IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

JAMES M. UPTHEGROVE,

Petitioner,

ORDER

05-C-153-C

v.

SGT. KUKA and
C.O. MUHE,

Respondents.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Plaintiff is proceeding pro se and in forma pauperis in this action in which he alleges that on one occasion in November 2004, defendants Kuka and Muhe deliberately denied him one dose of medication, causing him to suffer great pain. Defendants have answered plaintiff's complaint and a preliminary pretrial conference has been held to schedule a trial date and deadlines for completing discovery and filing dispositive motions. Now plaintiff has filed a motion for appointment of counsel. The motion will be denied.

Federal district courts are authorized by statute to appoint counsel for an indigent litigant when "exceptional circumstances" justify such an appointment. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir.1993)(quoting with approval Terrell v. Brewer, 935 F.2d

1015, 1017 (9th Cir.1991)). The Seventh Circuit will find such an appointment reasonable where plaintiff's likely success on the merits would be substantially impaired by an inability to articulate his claims in light of the complexity of the legal issues involved. Id. In other words, the test is, "given the difficulty of the case, [does] the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel [make] a difference in the outcome?" Id. The test is not, however, whether a good lawyer would do a better job than the pro se litigant. Id. at 323; see also Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997).

In Hudson v. McHugh, 148 F.3d 859, 862 (7th Cir. 1998), the court of appeals declined to find that it was an abuse of the court's discretion to deny the prisoner plaintiff's request for a lawyer to represent him on his claim that he had been denied epilepsy mediation for 11 days, precipitating a seizure. The court of appeals acknowledged that although prisoner cases raising Eighth Amendment claims of denial of medical care almost always present "tricky issues of state of mind and medical causation," it was reasonable for the court to evaluate the plaintiff to be as competent as any other average pro se litigant to present his case. Id. at n.1.

The challenges that plaintiff faces in proving the facts of his case are the same challenges faced by every other pro se litigant claiming deliberate indifference to a serious medical need. Like the plaintiff in Hudson, plaintiff will have to prove defendants' state of

mind and the medical causation for his pain. Such proof may well be difficult to come by. But the fact that matters of state of mind and medical causation are tricky to prove is not sufficient reason by itself to find that plaintiff's case presents exceptional circumstances warranting appointment of counsel. If it were, it would be established law that district courts are not free to decline to appoint counsel for pro se litigants raising claims of denial of medical care.

Plaintiff argues that he needs a lawyer to help him with his case because the issues are complex and he does not have adequate access to a law library. However, plaintiff's claim is not legally complex. It is a straightforward Eighth Amendment claim of denial of medical care. The law governing this type of claim has been settled since Estelle v. Gamble, 429 U.S. 97, 103 (1976), and was explained to plaintiff in the order granting him leave to proceed. He does not need to scour law books and cite additional legal precedent in order to succeed on his claim.

Although plaintiff suggests that his ability to investigate the facts of his case is "greatly limited" because of his incarceration, I see no reason why this would be true. He does not allege any impairments, such as an inability to read or write. Indeed, in his recent motion, which he has presumably filed without the assistance of another inmate, he reveals that he is at least as capable as the average pro se litigant to present his claims. His written submissions are clear and reflect his ability to understand what this court has said in its

previous orders and to respond appropriately.

Plaintiff has available to him all of the discovery tools described in the Federal Rules of Civil Procedure. In addition, he has personal knowledge of the incident giving rise to his claim and he should be able to obtain access to his own medical records to corroborate this information. If plaintiff's injury was such that his symptoms are not beyond a layperson's grasp, he will not need an expert witness. Gil v. Reed, 381 F.3d 649, 659 (7th Cir. 2004) (citing Ledford v. Sullivan, 105 F.3d 354, 360 (7th Cir. 1997)).

Plaintiff suggests that if he had a lawyer, the lawyer could amend his complaint to add claims of retaliation that have occurred since the time he filed his complaint. However, I would not allow such an amendment in this lawsuit, even if the motion to amend was filed by a lawyer. It is this court's practice to prohibit litigants from raising retaliation claims in the context of the lawsuit that allegedly provoked the retaliation so as to avoid the complication of issues which can result from an accumulation of claims in one action.

In summary, I believe that plaintiff is capable of prosecuting this lawsuit and that having appointed counsel will not make a difference in the case's outcome.

ORDER

IT IS ORDERED that plaintiff's motion for appointment of counsel is DENIED.

Entered this 21st day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge