IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFFREY STEVEN AKRIGHT,

ORDER

Plaintiff,

05-C-27-C

v.

SHERIFF DAVID GRAVES;
STEPHEN A. CULLINAN, Doctor;
E. PETERS, Head Nurse; L. BAKER, Nurse;

Defendants.

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On January 31, 2005, I screened plaintiff's complaint under 28 U.S.C. § 1915A and allowed plaintiff to proceed on his claim that defendants Graves, Cullinan, Peters and Baker violated his rights under the Eighth Amendment by failing to respond to his need for medical treatment of an ankle injury. In addition, I told plaintiff that because he is not proceeding in forma pauperis, he is responsible for serving his complaint on the defendants and that he must submit proof of service when service is complete. Plaintiff has not yet filed proof that he has served the defendants with his complaint. However, he has filed a motion for appointment of counsel, together with an affidavit in support. This 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)). Plaintiff has not made a showing of indigency in this case.

Second, even if plaintiff were to make a showing that he is financially eligible for court-appointed counsel, I would deny his motion. The Court of Appeals for the Seventh Circuit has found appointment of counsel reasonable where the 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 injury, if he has one. (At this early stage of the proceedings, there is no evidence in the record that plaintiff suffered any injury as a result of defendants' alleged failure to treat his ankle injury.) 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 "may require expert testimony." In addition, plaintiff states that he has "only a high school education and no legal education."

Plaintiff's claim is not 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. Moreover, plaintiff does not allege any impairments, such as an inability to read or write. Indeed, his complaint and recent motion reveals that he is at least as capable as the average pro se litigant to present his claims.

Plaintiff has available to him all of the discovery tools described in the Federal Rules of Civil Procedure. If he has questions about how to use those tools, he is free to ask the magistrate judge for guidance at the preliminary pretrial conference that will be scheduled in his case after the defendants answer his complaint. In addition, plaintiff has personal knowledge of the lack of treatment he has alleged and he should be able to obtain access to his own medical records to corroborate his need for treatment, how long he was deprived of it and what injury resulted, if any. 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)). Even if plaintiff were to require a medical expert, he suggests no reason why he could not seek out such a professional witness on his own. If plaintiff is requesting counsel with the idea that he will be able to shift to the lawyer the cost of hiring an expert, he should understand that regardless whether he is represented by counsel, his indigent status does not do away with his obligation to pay the costs of deposing witnesses or hiring experts to testify on his behalf.

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 16th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge