IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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

ROBERT E. ADSIT,

Plaintiff,

ORDER

v.

05-C-579-C

GLEN HEINZL and JUDY SMITH,

Defendants.

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

In an order entered in this case on April 14, 2006, I denied plaintiff Robert Adsit's third motion for appointment of counsel on the ground that he had failed to make a showing that he made reasonable efforts to find a lawyer on his own. Now plaintiff has moved for reconsideration of the order, pointing out that when he filed his complaint in this case, he submitted copies of letters from two lawyers who had declined to represent him.

Plaintiff is correct that I overlooked the letters attached to his complaint from lawyers who told him they would be unable to represent him. Although plaintiff did not submit proof that *three* lawyers turned him down, I will accept his representation that he made a third request that was denied. Therefore, I will address plaintiff's motion on its merits.

As I noted in earlier orders, plaintiff is proceeding on two claims in this lawsuit. The

first claim is that defendant Judy Smith failed to respond to a letter plaintiff wrote to her at some point during the 13 months plaintiff was incarcerated at the Oshkosh Correctional Institution, telling her about penile pain he was experiencing and a doctor's refusal to give him medication for the pain "or even check what was wrong." The second claim is that defendant Glen Heinzl refused to prescribe plaintiff pain medication for four months while plaintiff waited for an appointment with a specialist and prescribed plaintiff post-surgical medication with the intent of making plaintiff sick. Both of these claims concern past events for which plaintiff is seeking more than three million dollars in money damages.

In support of his motion, plaintiff states that he cannot understand the magistrate judge's preliminary pretrial conference order and "the package information" that was sent to him. He claims he has a third grade education only and does not read well. Finally, plaintiff states that inmates who had been helping him in the past are no longer able to assist him.

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 injury, if he has one. 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's assertion that he cannot read well and that he has achieved a third grade education would be problematic in most circumstances. However, plaintiff's own submissions to the court reveal that he has read this court's orders and that he is capable of expressing himself beyond the third grade level. Moreover, even if I believe that plaintiff's reading and writing skills are limited, I am not convinced that a lawyer will make a difference in the outcome of plaintiff's case.

In the first place, I will remind plaintiff that his original complaint was written for him by another inmate who appeared to be exaggerating the allegations of wrongdoing. For this reason, I directed plaintiff to answer specific questions posed by the court to clarify his assertions. Plaintiff's response was equally suspect. It appeared to have been written by the same inmate who wrote plaintiff's complaint and did not respond directly the questions plaintiff had been asked to answer. This necessitated a second order directing plaintiff to answer the questions himself and declare in the presence of a notary that his answers were true under penalty of perjury. Plaintiff responded to this order, claiming he had written the first response to the questions himself (despite the fact that the earlier response included unique grammatical marks present in the other inmate's writings), but further clarifying the

precise nature of his claims against the various defendants named in his complaint. From this response, I granted plaintiff leave to proceed in forma pauperis on the above-described claims against defendants Smith and Heinzl and denied plaintiff leave to proceed against additional defendants and other claims.

The chance that plaintiff will be able to prove that defendant Smith deliberately refused to respond to his letter to her is minuscule. In response to the question, "When did [defendant] Smith learn of your complaints of pain," plaintiff stated, "I don't know the exact date, but it was between the 13 months while I was at [the Oshkosh Correctional Institution]. Although I allowed plaintiff to proceed on this claim, I told him that in order to prevail on the claim, he would have to prove that in his letter he described his condition in sufficient detail to put defendant Smith on notice that he had a serious medical condition and that he made it clear to Smith in his letter that prison medical staff knew about his medical problem but completely disregarded it. The fact that plaintiff is unable to say when over a thirteen-month period he sent a letter to Smith suggests that he does not have a copy of the letter in his possession and will be unable to prove that he wrote to Smith at all. Without the letter, plaintiff has little chance of succeeding on the merits of his claim against Smith whether he has a lawyer or not.

Plaintiff was allowed to proceed on two allegations of wrongdoing against defendant Heinzl: 1) that Heinzl deliberately ignored plaintiff's complaints of penile pain during the

four-month period that he was waiting to see a urologist; and 2) that Heinzl prescribed him medication for the very purpose of causing plaintiff to have an allergic reaction to it. In order to succeed on his first claim against Heinzl, plaintiff will have to obtain documentation of his reports of pain to defendant Heinzl and Heinzl's refusal to respond to those reports. He does not need a lawyer to do this. If documentation exists, it will exist in plaintiff's medical records. With respect to plaintiff's second claim against Heinzl, although I was required under liberal pleading standards to allow plaintiff to proceed on the claim, plaintiff's ability to succeed on the claim is unlikely at best, even if he were to have a lawyer. As I advised plaintiff in the order granting him leave to proceed on this claim, it is commonplace for doctors to prescribe patients medication that have possible negative side effects. If Heinzl asserts under oath that he made a mistake in prescribing plaintiff's medication or that he believed that the benefits of treating plaintiff's condition with the medication he prescribed outweighed the likelihood that plaintiff would have a serious negative reaction to it, plaintiff will not be able to prove that Heinzl violated his Eighth Amendment rights.

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 reconsideration of this court's order of April 14, 2006, is GRANTED; plaintiff's third motion for appointment of counsel is DENIED.

Entered this 24th day of April, 2006.

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