

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOSEPH VAN PATTEN,

Plaintiff,

v.

ORDER

06-C-374-C

D.O.C., MATTHEW FRANK,
WARDEN DEPPISCH,
JOSEPH LADWIG and DR. LUY,

Defendants.

In an order dated October 18, 2006, I granted plaintiff Joseph Van Patten leave to proceed in forma pauperis on his claim that defendants Luy, Deppisch and Frank exhibited deliberate indifference to his serious medical needs by failing for nine months to provide him with appropriate care for a broken leg he sustained in December 2004, and that defendant Ladwig exhibited deliberate indifference to his serious medical needs by forcing him to walk a half mile on his broken leg in order to obtain treatment. Defendants have answered plaintiff's complaint and the case has been set for a preliminary pretrial conference to take place before Magistrate Judge Stephen Crocker on December 19, 2006. Now before the court is plaintiff's motion for appointment of counsel, which will be denied.

In deciding whether to appoint counsel, I must first find that plaintiff has made

reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he asked to represent him in this case and who turned him down. Plaintiff asserts in his motion that he sent the court a “list of attorneys written to requesting counsel and a list of responses refusing to represent plaintiff in this case.” However, the court is unable to locate this submission if, in fact, it was received. Nevertheless, plaintiff does attach to his present motion a copy of a letter he received from David Winter, in which Winter declines to travel to the Shawano County jail to visit with plaintiff. If plaintiff simply wrote to lawyers asking whether they would be willing to come to the Shawano County jail to talk with him, I would be unable to find that he made a reasonable effort to find a lawyer on his own. At the least, plaintiff would have to provide counsel with a written description of his claim (perhaps by including with his letter to counsel a copy of this court’s order granting him leave to proceed on his claims) and a request whether counsel might be willing to represent him on a contingent fee basis. For the purpose of this order, I will assume that plaintiff’s earlier letters seeking the assistance of various lawyers met these requirements. This is because even if I were to find that plaintiff made reasonable efforts to find a lawyer on his own, his request for appointed counsel must 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 Court of Appeals for the Seventh Circuit will find such an appointment 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 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).

Plaintiff asserts that he has no access to "resources in which [he] could research or study any aspects of both state and federal law or statutes," no money to hire a lawyer and limited knowledge of the law. In addition, he believes his case is "complex" and that an investigation will be required that he will be unable to conduct while he is in jail.

The vast majority of pro se litigants requesting appointed counsel have no money to hire a lawyer and are limited in their understanding of the law. Plaintiff's submissions filed to date reveal that he is at least of ordinary intelligence. At the upcoming preliminary pretrial conference, plaintiff will be instructed in the use of discovery techniques available to him under the Federal Rules of Civil Procedure and informed of procedures he will be expected to follow in moving his case to resolution. Neither his lack of assets nor his lack

of familiarity with court procedures is an exceptional circumstance warranting appointment of counsel.

Plaintiff's lack of legal resources also should not prove to be an insurmountable obstacle in this case. The law governing claims of deliberate indifference is thoroughly settled and was explained to plaintiff in the order granting him leave to proceed on his claims. Moreover, plaintiff should be able to prove through his medical records that his leg was broken, that he made repeated requests for medical attention and that his requests were ignored. He will not need an expert to testify that he faced a serious risk of harm from the failure to treat his break. Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997) (expert testimony on risk of harm not necessary if seriousness of risk would be obvious to lay person).

In Gil v. Reed, 381 F.3d 649, 659 (7th Cir. 2004), the court of appeals reiterated a view it has held for at least 15 years that denying a request for appointment of counsel will constitute an abuse of discretion if it would result in fundamental unfairness infringing on the plaintiff's due process rights. It found such a fundamental unfairness to exist in Gil, because Gil's status as a Colombia national created serious language barrier problems for him that rendered him incapable of litigating his case in light of the complexities of applying state law and rules of evidence to his claims under the Federal Tort Claims Act and federal law and rules of evidence to his Eighth Amendment claim.

Plaintiff Van Patten is not similarly situated to Mr. Gil. Federal case law and evidentiary rules govern both of his claims. Plaintiff speaks, writes and understands English. The obstacles he faces in gathering the evidence he needs to prove his case may be difficult, but the inherent difficulty in proving cases raising claims of deliberate indifference to serious medical needs by prison officials is not sufficient by itself to require appointed counsel. If this were the case, there would be legal precedent mandating the appointment of counsel in such cases. There is no such precedent, nor is there likely to be.

As helpful as it would be to plaintiff and to the court to have the assistance of counsel, I solicit such help only in rare instances in which the plaintiff is unusually handicapped in presenting his case or the issue raised is one of significance. Only a limited number of lawyers are capable of representing indigent plaintiffs in civil cases and willing to do so without any compensation and without reimbursement for expenses. Federal courts and federal plaintiffs are not the only supplicants for help from this limited group.

Approximately 220,000 Wisconsin residents living below 100% of the federal poverty threshold need civil legal services each year. Wisconsin State Bar, available at <http://www.wisbar.org/AM/Template.cfm?Section=ProBono> (last visited July 7, 2006). Approximately 63,800 of these individuals actually seek access to the legal system. Id. Wisconsin's three largest civil legal services programs only had the resources to handle approximately 16,000 cases using a combination of staff lawyers, volunteer lawyers, and partially compensated private lawyers. The areas of need are legion.

Wisconsin's lawyers assume the costs of pro bono representation in civil cases raising claims of violations of the Americans with Disability Act (especially employment discrimination, accessibility, specialized transportation, and right to community service) the Fair Housing Act, Medicaid and Medicare regulations, Social Security, Homestead Credit, and Title VII discrimination. They assist persons with claims of deinstitutionalization from mental health facilities; abuse and neglect in institutions, schools, and community settings; the right to free and appropriate education, access to Assistive Technology (communication devices, education aids); and insurance discrimination. They assist numerous others with claims relating to family law, child support, family preservation, subsidized housing, welfare, consumer complaints, unemployment compensation and driver's license reinstatement. They litigate cases for persons living with HIV or AIDS on a variety of matters including, estate planning, guardianships, discrimination, bankruptcy and insurance disputes. They take on cases raising claims of unconstitutional conditions of confinement in Wisconsin's prisons and represent churches and other non-profit entities with their legal needs. Nevertheless, approximately 42,300 of the individuals seeking relief in Wisconsin's courts had to represent themselves. The Legal Services Corporation, which was created in 1974 to provide legal assistance to low-income Americans, estimates that four out of every five income-eligible people who apply for assistance are turned away because of the lack of resources to help them all. Legal Services Corporation, "Serving the Civil Legal Needs of Low-Income Americans: A Special Report to Congress" (2000). Simply put, there are not

enough lawyers to meet the needs of all of the persons who want or need their help.

Plaintiff's case is not exceptional and neither are his circumstances. As noted above, he will be provided with this court's procedural rules to assist him in bringing or defending against a motion for summary judgment, and his motions and other papers will be construed generously by the court to determine whether they fit within the Federal Rules of Civil Procedure. If this case goes to trial, plaintiff will receive written instruction about the manner in which the trial will be conducted and what he will be expected to prove. In sum, 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. Therefore, his motion for appointment of counsel will be denied.

ORDER

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

Entered this 28th day of November, 2006.

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