IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARK RAHOI,

ORDER

Plaintiff,

06-C-691-C

v.

DOCTOR SIRIN, DOCTOR HUIBREGTSE, and DOCTOR BURTON COX, JR., all sued individually and in their official capacities,

Defendants.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Plaintiff, who is presently confined at the Prairie du Chien Correctional Institution in Prairie du Chien, Wisconsin, contends that defendants Sirin, Huibregste and Cox violated his Eighth Amendment rights when they were deliberately indifferent to his serious medical needs. He alleges that they failed to arrange for him to receive surgery for a rotator cuff tear he sustained before his probation was revoked in November 2005, and physical therapy for complications from his spinal cord injuries. Now before the court is plaintiff's motion for appointment of counsel.

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 medication 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 that he is suffering additional injury as a result of the lack of surgery and physical therapy. Such proof may well be difficult to come by. But the fact that matters of state of mind and 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 "[m]y imprisonment will greatly limit my ability to litigate [this case]" and because he cannot afford to hire a lawyer. In addition, plaintiff states that he has limited access to the law library, his education is limited and his "knowledge of the law leaves a lot to be desired." These conditions are present in most pro se cases. Plaintiff's claim is not unusually 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.

Although plaintiff suggests that a lawyer is necessary because of his limited education and knowledge of the law, I see no reason why this would be true. Plaintiff does not allege any impairments, such as an inability to read or write. Indeed, in his recent motions, 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. 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 to be held tomorrow, March 21, 2007. Because plaintiff will not receive this order before the conference, I will alert the magistrate judge to plaintiff's concerns about his lack of knowledge of court procedure so that the magistrate judge can address them. In addition, plaintiff has personal knowledge of the treatment he received (and did not receive) and he should be able to obtain access to his own medical records to corroborate this information. His medical records should show how long he was deprived of treatment 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 20th day of March, 2007.

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