IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PATRICK J. FITZGERALD,

Petitioner, OPINION AND ORDER

v. 07-C-61-C

DEPARTMENT OF CORRECTIONS (WDOC);
MATHEW J. FRANK, Secretary of WDOC;
JAMES GREER, Health Services Administration WDOC;
HELEN NELSON, Health Services Administrator WDOC;
STEVE CASPERSON, Admin Div of Adult Institutions WDOC;
JUDY SMITH, Warden of Oshkosh Correctional Institution;
TOM EDWARDS, Oshkosh Correctional Health Services Administrator;
TIMOTHY CORRELL, MD, Dodge Correctional Institution;
DEB LEMKE, MD, Oshkosh Correctional Institution;
ROMAN Y KAPLAN, Health Services Unit, WDOC/OSCI;
NANCY BOWENS, Nurse Practitioner WDOC/OSCI;
JENNIFER DELVAUX, Inmate Complaint Examiner, WDOC/OSCI; and
DONNA LARSON, Registered Nurse, Oshkosh Correctional Institution,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I

conclude that petitioner is unable to prepay the full fee for filing this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Before I describe the allegations in petitioner's complaint, a word about the complaint is warranted. Petitioner has attached to the court's copy of his complaint 55 "exhibits" comprising 135 pages. He did not supply the court with copies for service on the respondents. In any event, the exhibits have not been considered in determining whether

petitioner may proceed on his claim. A number of the exhibits are copies of petitioner's inmate grievances and prison officials' responses to them, none of which are necessary to the complaint. As noted above, failure to exhaust is an affirmative defense. That means that proof of a litigant's efforts to exhaust is irrelevant unless the respondents move to dismiss for lack of exhaustion. At this stage, no such motion has been filed. Therefore, petitioner's exhaustion documents will be maintained in the court's file, but no consideration will be given to them unless petitioner wishes to use them at a later date in connection with a motion to dismiss and advises the court that he has served them on the respondents.

In addition to exhibits relating to his exhaustion efforts, petitioner includes with his complaint unauthenticated copies of certain of his medical records and health services requests he submitted over several months to various health services units. Ordinarily, attachments to a complaint are considered a part of the complaint. However, in this instance, petitioner appears to want the court and respondents to look to the content of those exhibits in an attempt to determine the nature of his claims against them. For example, nowhere in petitioner's complaint does petitioner allege precisely how health officials Tom Edwards and Donna Larson was personally involved in allegedly violating his constitutional right to medical care. Perhaps one or more of the exhibits would provide a clue, but it is contrary to the dictates of Fed. R. Civ. P. 8 to require respondents to guess at the nature of a petitioner's claims against them. Cf. Johnson v. Cambridge Industires, Inc.,

325 F.3d 892, 898 (7th Cir. 2003) (district court not required to "scour record" to find evidence supporting plaintiff's claims).

Rule 8 requires that a complaint 1) set forth a "short and plain statement of the grounds upon which the court's jurisdiction depends. . . ; 2) a short and plain statement of the claim showing that the pleader is entitled to relief; and 3) a demand for judgment for the relief the pleader seeks." Pursuant to Fed. R. Civ. P. 8(e), "each averment of a pleading shall be simple, concise and direct." In other words at this early stage, petitioner should have fied only his complaint, without the exhibits. If he wants the court to consider his medical records and health service requests later, such as in connection with a motion for summary judgment or for a preliminary injunction, he may submit authenticated versions at that time. "The primary purpose of [Rule 8] is rooted in fair notice: a complaint 'must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is." Vicom v. Harbtidge Merchant Services., Inc., 20 F.3d 771, 775 (7th Cir. 1994). Neither this court nor respondents are required to compare hundreds of documents with petitioner's complaint to determine what claims he may have. Jennings v. Emry, 910 F.2d 1434, 1436 (7th Cir. 1990) (complaint must be drafted "with clarity sufficient to avoid requiring a district court or opposing party to forever sift through its pages in search" of plaintiff's claims). Accordingly, I have not considered petitioner's many exhibits in determining whether he state a claim against any of the respondents.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

At all relevant times, petitioner was a prisoner of the state of Wisconsin incarcerated at various correctional institutions. Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections. Respondent James Greer is employed in administration at the department headquarters. Respondent Helen Nelson is Administrator of Health Services for the department. Respondent Steve Casperson is Administrator of the Division of Adult Institutions. Respondent Timothy Correll is a physician at the Dodge Correctional Institution. Respondent Judy Smith is the warden of the Oshkosh Correctional Institution, where respondent Deb Lemke is a doctor, respondent Nancy Bowens is a nurse practitioner, respondent Donna Larson is a nurse, respondent Tom Edwards is the Health Services Administrator, respondent Roman Kaplan is an employee in the health services unit and respondent Jennifer Delvaux is an inmate complaint examiner.

Before he was incarcerated, petitioner was in a serious motor vehicle accident. He suffered multiple cervical and rib fractures, a crushed upper torso, collapsed lungs, shattered teeth, a dislocated left shoulder, tearing of his rotator cuff and bicep muscles, a fractured right ankle and a snapped hamstring. He was in a coma and on life support for several months with traumatic brain injuries. After awakening, he required months of physical

therapy, occupational therapy and speech therapy. The numerous vertebrae and rib fractures caused his spine to compact, which is causing his disks to rupture. In addition, he has "ongoing injured muscles and tendons" and suffers horrible migraine headaches, insomnia, constant fatigue, chronic cervical and lower back pain and bouts of depression.

On April 4, 2005, petitioner entered the Wisconsin Department of Corrections at the Dodge Correctional Institution intake facility to begin serving a four-year sentence for operating a motor vehicle while intoxicated. Respondent Correll met with petitioner to assess and evaluate his medical problems, which include cardiac "Afib." After respondent Correll spoke with petitioner about his conditions and his chronic pain, Correll ordered and took x-rays, placed petitioner on a light duty restriction and ordered petitioner's medical records. The records showed that petitioner had in the past received prescriptions for pain medications such as Oxycontin, Hydrocodone and Percocet.

During the intake process, petitioner became suspicious of Correll's qualifications to arrange for his medical care. When he asked Correll about his credentials and schooling and why he worked for the Department of Corrections, respondent Correll became upset and promptly discontinued all of the orders for treatment he had placed. He told petitioner that he was restricting him to "Onsite HSU," where it would be impossible for petitioner to get into a rehabilitation program or receive treatment for his cardiac Afib and chronic pain. Correll commented to petitioner, "I could care less about your chronic pain and your

treatments" and "good luck getting treatment for your pain at your next facility." Petitioner begged Correll for "basic medical attention only to receive nothing." Correll's failure to treat petitioner's conditions caused him months of irregular heartbeat and severe stress and discomfort.

On June 20, 2005, petitioner entered the Kettle Moraine Correctional Institution, where he filed a health services request that was answered by an RN "Dan." Dan told petitioner that if he wanted therapy or medications he would have to file an inmate complaint because "we don't do that here." Petitioner filed an inmate complaint seeking relief for his pain and cardiac issues and the complaint was dismissed. In September 2005, petitioner saw Dr. E. Horn, who reviewed petitioner's medical record. Horn prescribed medication for petitioner's pain to be increased when they became ineffective, "Cardiac Afib Metroplolo" and Prilosec OTC for petitioner's ulcerated stomach. Horn also ordered petitioner to take 81mg aspirin as a blood thinner to enhance his heart medications.

On November 22, 2005, petitioner was transferred to the Oshkosh Correctional Institution. Respondent Bowens saw petitioner on November 29, 2005, at which time petitioner complained that he had had a black spot growing for months on his right ring finger. He advised Bowens that the spot itched and was tender, but Bowens dismissed the lesion as a tattoo.

On January 6, 2006, petitioner saw respondent Kaplan. Without opening petitioner's

chart, Kaplan discontinued petitioner's prescription pain medication stating, "I get a lot of people in here wanting drugs." According to Kaplan, petitioner's pain was caused by petitioner's cigarette smoking. Kaplan prescribed petitioner 800 mg of Ibuprofen to be taken twice daily. When petitioner explained that he could not take Ibuprofen because of his stomach ulcers, Kaplan said, "I do not care." Between January 11 and January 22, 2006, petitioner filed two inmate complaints and five health service requests challenging respondent Kaplan's discontinuation of his pain medication and seeking treatment for his agonizing pain. His inmate complaints were dismissed and the responses to his health service requests were to schedule him to see a doctor in early April.

On January 25, 2006, petitioner met with respondent Bowens regarding a cyst on his tail bone. Bowens lanced the cyst and wrote petitioner a prescription for 400 mg of Ibuprofen, which overwrote petitioner's earlier prescription for 800 mg. Bowens did not open petitioner's medical chart before making this change. Petitioner explained to Bowens that he had agonizing chronic pain throughout his body but Bowens told petitioner that he was incarcerated for a crime and being punished. For that reason, petitioner would not "see anything for pain." Approximately one month later, petitioner saw Bowens again and pleaded with her to give petitioner stronger pain medication. Bowens told petitioner he would have to be "on the floor screaming bloody murder before [he] gets any pain medications at Oshkosh."

On April 12, 2006, petitioner complained to the health services unit that he had not yet been called to see a doctor for his scheduled appointment on April 6. He was advised that the appointment had been rescheduled because no doctor had been at the facility since April 4, 2006. Throughout the remainder of 2006 petitioner filed numerous inmate complaints and health services requests seeking appropriate medical care for his pain and other medical problems. The inmate complaints were either dismissed or rejected by respondent Jennifer Delvaux.

In August 2006, petitioner wrote to respondents Steve Casperson, Helen Nelson and James Greer to advise them of his inability to obtain proper treatment for his conditions. They did not respond to his pleas for help.

On January 8, 2007, petitioner attended an appointment in the health service unit and discussed his chronic pain with nurse Jan Rzentharski. Rzentharski told petitioner that it is the policy at the Oshkosh Correctional Institution not to treat or even record inmate requests for help for chronic pain. She did not log petitioner's complaints of pain on the Health Services unit computer. At this time, petitioner noticed that his medical file was much thinner than it had been.

Earlier, on August 29, 2006, petitioner filed a petition for supervisory writ against respondents Tom Edwards and Deb Lemke, alleging that they were intentionally failing to fulfill their responsibilities as health care providers. Subsequently, on October 27, 2006,

respondent Lemke canceled a scheduled consultation about petitioner's pain. Instead, she quarantined petitioner with another patient who had MRSR, a "contagious and dreadful skin disease," after diagnosing a pimple on petitioner's shoulder as MRSR. Petitioner believes that Lemke's cancellation of the pain consultation and placement of petitioner in isolation with a contagious inmate were acts taken in retaliation for his having filed the petition for a supervisory writ. Fearing further retaliation, petitioner withdrew the writ on November 8, 2006.

"These ongoing reckless acts represent a pattern of events demonstrating intentional retaliation against petitioner by respondents Edwards, Smith and Lemke for filing grievances."

Respondents Edwards, Lemke, Bowen, Larson and Smith had access to petitioner's medical files. The shrinking of petitioner's files is the result of a conspiracy by these individuals to deprive petitioner of proper medical care.

OPINION

A. Wisconsin Department of Corrections and Respondent Frank

As an initial matter, I note that petitioner has sued the Wisconsin Department of Corrections for the alleged violations of his Eighth Amendment rights. Neither a state nor a state agency is a "person" within the meaning of 42 U.S.C. § 1983 and therefore may not

be sued under that statute. Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); Ryan v. Illinois Department of Children and Family Services, 185 F.3d 751, 758 (7th Cir. 1999). Because the Wisconsin Department of Corrections is a state agency, it is not subject to liability under § 1983. Therefore, respondent Wisconsin Department of Corrections will be dismissed from this action.

In addition, respondent Matthew Frank will be dismissed. In order for a supervisory official to be found liable under § 1983, there must be a "causal connection, or an affirmative link, between the misconduct complained of and the official sued." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). Petitioner has not alleged any facts suggesting that respondent Frank was personally involved in the incidents underlying his claim. Although respondent Frank is Secretary of the Wisconsin Department of Corrections, the doctrine of respondeat superior, under which a superior may be liable for a subordinate's tortious acts, does not apply to claims under 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981).

B. Denial of Medical Care

Petitioner alleges that he has been forced to endure unbearable pain because respondents Timothy Correll, Nancy Bowens, Roman Kaplan and Deb Lemke refused to provide him with adequate medication to alleviate it, that respondent Bowens was

deliberately indifferent to his medical needs when she dismissed petitioner's complaint of a small lesion on his finger as a tattoo, and that respondents Steve Casperson, Helen Nelson, James Greer and Jennifer Delvaux failed to intervene on petitioner's behalf after petitioner filed inmate complaints or wrote to tell them of his inadequate treatment.

The Eighth Amendment requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim under the Eighth Amendment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. Therefore, petitioner must allege facts from which it can be inferred that he had a serious medical need and that prison officials were deliberately indifferent to this need. Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Attempting to define "serious medical needs," the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez, 111 F.3d at 1371.

With the exception of his complaint that he had a small black spot on his finger, petitioner's allegations are sufficient to permit an inference that he has serious medical

needs. He suffers from ongoing physical difficulties and chronic pain that result from a serious automobile accident in which he sustained multiple injuries. In addition, petitioner alleges that respondents Correll, Kaplan and Bowens each told petitioner that they were unwilling to answer his pleas for medication to alleviate his pain because they did not care about his suffering and that respondent Lemke deliberately canceled an appointment petitioner had to discuss his pain. His allegations are sufficient to allege the deliberate indifference of these individuals.

In addition, petitioner's allegations that respondent Jennifer Delvaux dismissed his inmate grievances concerning the behavior of respondents Kaplan and Bowens and that respondents Casperson, Nelson and Greer turned a blind eye to petitioner's pleas for medical assistance are sufficient to state a claim against the respondents.

Petitioner's allegation that respondent Bowens declined to agree with petitioner that the spot on his finger was in need of treatment is not sufficient to state a claim of constitutional proportion. Petitioner does not allege any facts from which an inference may be drawn that the spot constitutes a serious medical need or that the failure to treat it results from anything other than Bowens's determination that the spot is not in need of treatment. This claim will be dismissed.

In addition, petitioner's claims of deliberate indifference to his serious medical needs against respondents Edwards, Larson and Smith will be dismissed. Nowhere in his

complaint does petitioner explain when he met with these respondents, what he told them or what they knew about his condition or how they responded to his requests. His only mention of Edwards, Larson and Smith with respect to petitioner's Eighth Amendment claim is on page 17 of the complaint, where he summarizes his allegations of mistreatment and contends that each of respondents "Smith, Kaplan, Edwards, Lemke, Correll, Larson, Bowen and Delvaux" are responsible. Because it is not clear from the allegations of the complaint what respondents Smith, Edwards and Larson did or did not do so as to violate petitioner's Eighth Amendment right to medical care, this claim will be dismissed against these three respondents.

C. Retaliation

A prison official who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not independently violate the Constitution. Id. To state a claim for retaliation, a prisoner is not required to allege a chronology of events from which retaliation may be inferred, Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002), but he must allege the retaliatory act and describe the protected act that prompted the retaliation. Id. These minimal facts are necessary to give prison officials adequate notice of the claim. Beanstalk Group, Inc. v. AM General Corp., 283 F.3d 856,

863 (7th Cir. 2002).

Petitioner alleges that because he filed a supervisory writ against respondents Edwards and Lemke, respondent Lemke canceled petitioner's scheduled pain consultation and placed him in isolation with a patient who had a contagious skin condition. These allegations are sufficient to give respondent Lemke notice of a retaliation claim. Petitioner also alleged, without explanation, that unspecified "ongoing reckless acts represent a pattern of events demonstrating intentional retaliation against petitioner by respondents Edwards, Smith and Lemke." As discussed above, it is not possible to learn from such a conclusory statement what constitutionally protected acts engaged in by petitioner prompted retaliatory acts from respondents Edwards or Smith, or what alleged retaliatory actions these respondents took. Therefore, petitioner will not be allowed to proceed against respondents Edwards and Smith on his retaliation claim.

C. Conspiracy

Claims of conspiracies to effect deprivations of civil or constitutional rights may be brought in federal court under § 1983. To state a claim of civil conspiracy, a petitioner must "indicate the parties, general purpose, and approximate date, so that the respondent has notice of what he is charged with." Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002). Here, however, petitioner's claim is that respondents Edwards, Lemke, Bowens,

Larson and Smith, all of whom have access to petitioner's medical chart, conspired to remove portions of his medical file. However, his own allegations suggest that prison officials are now logging medical information about prisoners on a health services unit computer, which would eliminate the need for paper files. In any event, it is too extreme a leap to conclude that the lack of medical care about which petitioner complains is the result of a dwindling paper record of his medical conditions. Because petitioner has no constitutional right to a medical record of a particular size, he fails to state a claim of conspiracy cognizable under § 1983. Thus, he will not be granted leave to proceed on this claim.

D. Motion for Preliminary Injunction

After he filed his complaint, petitioner filed a document titled "Order to Show Cause and Temporary Restraining Order," which I construe as a motion for a preliminary injunction. The motion is supported by a single affidavit in which petitioner avers that he has been diagnosed with severe chronic pain, that the Department of Corrections is doing nothing about it and that he will suffer "unconditionally" if he cannot receive immediate relief. In the motion, petitioner asks that

1) respondents be ordered to arrange promptly for him to be examined by a qualified orthopedic specialist who can evaluate his condition and "entertain all medical prescriptions";

2) respondents and their officers, agents, employees and all persons acting in concert or participation with them be restrained from retaliating against petitioner or harassing him;

3) his housing unit cell may be searched only while correctional officer supervisors are present;

4) his currently prescribed medical restrictions that include lower bunk, bed egg crate, extra pillow and cloth neck yarn "stay ordered and current until this legal action is final";

5) two copies of his medical chart and file be submitted to the clerk's office, including all information logged onto the Health Services Unit computer; and

6) petitioner remain at the Oshkosh Correctional Institution "until permanent and proper treatment and health care has been prescribed or until the court grants advanced permission to do so."

The standard applied to determine whether a petitioner is entitled to preliminary injunctive relief is well established.

> A district court must consider four factors in deciding whether a preliminary injunction should be granted. These factors are: 1) whether the plaintiff has a reasonable likelihood of success on the merits; 2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; 3) whether the threatened injury to the plaintiff outweighs the threatened harm an injunction may inflict on defendant; and 4) whether the granting of a preliminary injunction will disserve the public interest.

Pelfresne v. Village of Williams Bay, 865 F.2d 877, 883 (7th Cir. 1989). At the threshold, petitioner must show some likelihood of success on the merits and that irreparable harm will

result if the requested relief is denied. If petitioner makes both showings, the court then moves on to balance the relative harms and public interest, considering all four factors under a "sliding scale" approach. See In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997).

This court requires a party seeking emergency injunctive relief to follow specific procedures for obtaining such relief. Those procedures are described in a document titled Procedure To Be Followed On Motions For Injunctive Relief, a copy of which is included with this order. Petitioner should pay particular attention to those parts of the procedure that require him to submit proposed findings of fact in support of his motion and point to admissible evidence in the record to support each factual proposition.

Moreover, to obtain a preliminary injunction, a moving party must meet an exacting standard. See Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 11 (7th Cir. 1992). Petitioner has not met that standard. With respect to his request to order respondents to arrange promptly for him to be examined by a qualified orthopedic specialist who can evaluate his condition and "entertain all medical prescriptions," petitioner has submitted no evidence to show that respondents will not let him arrange for himself to be examined (at petitioner's expense) by such a specialist. Moreover, petitioner has put in no expert medical evidence to show that the pain medication he has been prescribed is so totally without medical or penological justification that it results in the gratuitous infliction of suffering.

Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

With respect to petitioner's request that respondents and their officers, agents, employees and all persons acting in concert or participation with them be restrained from retaliating against petitioner or harassing him, petitioner has put in no evidence (as opposed to mere allegations in his complaint) to prove that he has been retaliated against by respondent Lemke or any other respondent or that he is likely to be subjected to such retaliation or harassment in the future.

Finally, petitioner has not alleged any facts in his complaint to suggest that respondents are violating his constitutional rights in the course of searching his cell or that they have any intention of removing his medical restrictions or transferring him to another institution. Therefore, his requests for preliminary injunctive relief on these matters are not appropriate.

Finally, petitioner's request that this court order respondents to provide the clerk with two copies of his medical chart and file, including all information logged onto the Health Services Unit computer is not appropriately raised on a motion for preliminary injunction. It is petitioner's responsibility, not respondents', to supply the court with evidence pertaining to his claims. If certain evidence is in the hands of the respondents, he can obtain it through discovery at a later stage of these proceedings.

Because petitioner has neither followed the procedures for preliminary injunctive relief nor made the necessary showing of entitlement to such relief, his motion will be denied without prejudice.

E. Motion for Appointment of Counsel

Petitioner has moved the court for appointment of counsel and has supported the motion with an affidavit.

The Court of Appeals for the Seventh Circuit has held that before a district court can consider such motions, it must first find that the petitioner made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Petitioner has submitted letters from at least three lawyers who declined to represent him in this case. Therefore, he has made the required preliminary showing. However, the motion will be denied in any event.

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). The court of appeals 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 petitioner 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, petitioner will have to prove respondents' state of mind and that he is suffering a compensable injury caused by respondents' refusal to alter his pain medications or provide him speedier or more frequent medical consultations. (For example, at this early stage of the proceedings, there is no evidence in the record that

petitioner suffered any injury as a result of respondents' alleged delays in his medical treatment.) 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.

Petitioner argues that he needs a lawyer to help him with his case because the issues are complex and may require expert testimony, document discovery and possible depositions of witnesses. In addition, petitioner believes that the testimony will be "in sharp conflict." He states that he has a two-year college degree but no legal education, that he has limited access to legal materials and "no ability to investigate the facts of the case."

Contrary to petitioner's belief, the claims on which he has been allowed to proceed are not complex. The law governing Eighth Amendment claims of denial of medical care has been settled since Estelle v. Gamble, 429 U.S. 97, 103 (1976), and was explained to petitioner above. Similarly, the elements of proof for claims of retaliation for the exercise of a constitutional right have not changed in many years and also have been described in this order.

Although petitioner suggests that he cannot investigate the facts of his case while he is in prison, I see no reason why this would be true. He admits that he has a two-year college

degree, and his complaint and his many submissions reveal that his writing is clear and concise and that he is at least as capable as the average pro se litigant to present his claims. Moreover, petitioner 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 to be held by telephone in his case shortly after respondents file an answer to his complaint. In addition, petitioner has personal knowledge of the treatment, lack of treatment and medical appointments he has alleged were canceled and he will have access to his own medical records, as he has in the past. Even if petitioner needs a medical expert, he suggests no reason why he could not seek out such a professional witness on his own. If he 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 free him of the obligation to pay the costs of deposing witnesses or hiring experts to testify on his behalf.

In summary, I believe that petitioner 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 petitioner Patrick J. Fitzgerald's request for leave to proceed

in forma pauperis is

1. GRANTED on his claim that between April 4, 2005 and June 20, 2005, respondent Timothy Correll failed to treat petitioner's medical conditions, deliberately causing petitioner months of irregular heartbeat and severe pain, in violation of the Eighth Amendment;

2. GRANTED on his claim that beginning in January, 2006, to the present, respondents Roman Kaplan, Nancy Bowens disregarded petitioner's pleas for increased pain medication for the purpose of causing petitioner to suffer needlessly;

3. GRANTED on his claims that respondents Jennifer Delvaux, Casperson, Nelson and Greer turned a blind eye to petitioner's pleas for intervention to obtain proper medical assistance;

4. GRANTED on his claim that respondent Deb Lemke deliberately cancelled an appointment petitioner had to discuss his pain and isolated him with an inmate with a contagious skin disease in retaliation for petitioner's having filed a supervisory writ in state court;

5. DENIED on his claim that respondent Bowens's failure to treat the spot on petitioner's finger violates the Eighth Amendment;

6. DENIED on his claim that respondents Tom Edwards, Donna Larson and Judy Smith were deliberately indifferent to his serious medical needs in violation of the Eighth

Amendment;

7. DENIED on his claim that respondents Tom Edwards and Judy Smith retaliated against him for exercising a constitutional right; and

8. DENIED on his conspiracy claim against respondents Tom Edwards, Deb Lemke, Nancy Bowens, Donna Larson and Judy Smith;

FURTHER IT IS ORDERED that

1. Respondents Department of Corrections, Matthew Frank, Judy Smith, Tom Edwards and Donna Larson are DISMISSED from this action.

2. Petitioner's motion for a preliminary injunction is DENIED without prejudice.

3. Petitioner's motion for appointment of counsel is DENIED.

4. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

5. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. The unpaid balance of petitioner's filing fee is $346.64; petitioner is obligated to

pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

7. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on the state defendants.

8. Petitioner's exhibits are not considered to be a part of petitioner's complaint. However, they are being held in the file of this case in the event petitioner wishes to use them at some later stage in these proceedings.

Entered this 26th day of March, 2007.

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