

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

PATRICK J. FITZGERALD,

Plaintiff,

v.

ORDER

07-C-0061-C

JAMES GREER, Health Services Administration WDOC;
HELEN NELSON, Health Services Administrator WDOC;
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; and
JENNIFER DELVAUX, Inmate Complaint Examiner, WDOC/OSCI,

Defendants.

A hearing was held on plaintiff Patrick J. Fitzgerald's motion for a preliminary injunction on June 14, 2007. Plaintiff appeared in person, without counsel; defendants were represented by Francis X. Sullivan, Assistant Attorney General for the State of Wisconsin.

At the outset, Mr. Sullivan stated that he did not believe he had received copies of every document that plaintiff has submitted to the court. In checking the file after the hearing, I noticed that Mr. Sullivan has not filed a notice of appearance in this case. The

court's docket still shows Corey Finkelmeyer; presumably court documents are being sent directly to him and not to Mr. Sullivan.

Plaintiff's motion for a preliminary injunction (his third) rests on his belief that certain defendants are denying him pain medication that would ameliorate the serious pain he suffers on a daily basis. (Plaintiff was badly injured in an automobile accident before he was incarcerated.) Unfortunately, plaintiff was not able to adduce any medical evidence at the hearing that would enable the court to resolve the issue plaintiff raised: whether defendants had been deliberately indifferent to his complaints of pain when they denied him the medication he wishes to have to relieve his pain. He did produce evidence that in prior years, doctors had prescribed strong pain medication for him and that defendant Kaplan has not continued those prescriptions. However, he did not produce any evidence to show that Kaplan's decisions were not medically proper, so as to imply deliberate indifference to plaintiff's medical condition.

For their part, defendants did not illuminate the issue, as they called no witnesses. Thus, it remains a question whether plaintiff has been treated properly. In that situation, plaintiff cannot obtain an injunction; he is the one who must establish at least a likelihood that he will prevail ultimately on his claim of denial of constitutionally adequate medical care. However, I am left with concerns about the adequacy of the medical care that is being provided to plaintiff, who did suffer extensive injuries that could well be the cause of

lingering serious pain. Those concerns, as well as plaintiff's difficulties in litigating his claim, have convinced me that plaintiff could benefit from the assistance of counsel if a lawyer can be found to represent plaintiff with no guarantee of compensation for his or her services.

In the interim, I must deny plaintiff's motion for a preliminary injunction, as well as his motion for an independent medical examination pursuant to Fed. R. Civ. P. 35. Plaintiff appears to believe that this rule would provide a means for him to obtain the opinion of a medical expert at government expense. But that is not what Rule 35 does. Instead, it provides in part:

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner conditions, and scope of the examination and the person or persons by whom it is to be made.

Under this rule, the court could order the plaintiff to submit to an examination at the request of the *opposing party*. Under proper circumstances, this rule also would allow a party who has a person in his or her custody or under his or her legal control to be compelled to produce that person for a physical examination, if the proper motion was filed by the

opposite party. For example, a court could order a father to produce his son for a medical examination if the father was suing to recover for injuries to his infant son allegedly sustained as the result of a defendant's negligence and the defendant moved for the order of examination. The rule is not intended to cover a situation such as the one here, in which plaintiff wishes an examination of himself.

From my observation of plaintiff at the hearing and of the materials he has submitted in this case, I am persuaded that he needs the assistance of counsel to develop his claims. Therefore, I will attempt to locate counsel that will accept an appointment to represent him.

ORDER

IT IS ORDERED that plaintiff Patrick J. Fitzgerald's motion for a preliminary injunction to require defendants to provide him pain medication is DENIED, as is his motion for a medical examination brought pursuant to Fed. R. Civ. P. 35. The telephone pretrial conference scheduled for June 22, 2007, is rescheduled for 10:30 a.m., CDT, July 10, 2007, to allow the court to locate counsel who may be willing to assist plaintiff in this case.

Entered this 18th day of June, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

