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

STEVEN D. STEWART,

Plaintiff,

v.

TIMOTHY GILBERG, *et al.*,,

Defendants.

ORDER

10-cv-360-bbc

Plaintiff Steven D. Stewart has been allowed to proceed on his Eight Amendment deliberate indifference and excessive force claims. Now before the court are plaintiff's motions for issuance of a subpoena, dkt. 30, and for appointment of counsel, dkt. 29.

Plaintiff seeks a subpoena for the medical records of Sgt. Hassell regarding Sgt. Hassell's treatment at Boscobel Hospital following his entry of plaintiff's cell. Normally I would deny such a request as unnecessary because plaintiff can request the same documents under Fed. R. Civ. P. 34, but it is clear from defendants' response, dkt. 33, that they do not intend to produce these records. Defendants are correct that these records are presumed confidential, and that they are not necessarily relevant in *plaintiff's* case alleging excessive force against Sgt. Hassell and others. The court also must weigh policy and security concerns suggesting that inmates should have access to correctional officer medical records only in the narrowest circumstances. Plaintiff has not sufficiently explained why these records are relevant to his claim or Sgt. Hassell's defense, nor has he explained with any specificity why his need for this information outweighs both Sgt. Hassel's interest and the Department of Corrections' interest in maintaining its confidentiality. Therefore, the court is denying the motion for a subpoena and finding that, on the current record, this information is not discoverable.

Next, plaintiff moves for appointment of counsel. As an initial matter, he asserts that he cannot find defendant Cindy Sawinski to serve discovery on her. He appears to believe that she is not represented by the attorney general's office. Ms. Sawinski ***is*** represented by attorney general's office and plaintiff may serve that office with discovery requests directed to her.

As for appointing counsel, plaintiff has made the required reasonable effort to find a lawyer on his own, without success. *See Jackson v. County of McLean*, 953 F.2d 1070, 1073 (7th Cir. 1992). Even so, appointment of counsel is not warranted in this case, The legal threshold for appointing an attorney is whether, given the difficult of the case, does the plaintiff appear to be competent to litigate it himself? *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007).

As a starting point, this court would appoint a lawyer to almost every pro se plaintiff if lawyers were available to take these cases. But they are not. Most lawyers do not have the time, the background or the desire to represent pro se plaintiffs in a pro bono capacity, and this court cannot make them. Congress has appropriated finds for court-appointed counsel in criminal cases but it has not appropriated any funds for court-appointed counsel in civil cases like this one. Lawyers who accept appointments to represent pro se plaintiffs in civil cases can obtain compensation for their services only if they are successful and even then, the compensation may fall short of their time and effort. So the court only appoints counsel in cases where there is a demonstrated need, using the appropriate legal test.

In his motion, plaintiff says this case requires expert testimony and concerns security issues. Plaintiff believes that with the assistance of an attorney he would prevail in this case. The fact that a non-lawyer would have a better chance of winning a lawsuit if he was represented by competent lawyer instead of representing himself is not a basis to appoint an attorney. *Pruitt*,

503 F.3d at 655. Neither does this court appoint an attorney in a case to shift the burden of finding and paying an expert witness.

The key inquiry right now is whether plaintiff appears competent to take discovery, file and respond to motions, and prepare for trial. At this point in the case, plaintiff appears able to represent himself. At the preliminary pretrial conference on December 17, 2010, I instructed plaintiff on how to use discovery techniques available to all litigants so that he can gather the evidence he needs to prove his claim. Also, plaintiff was mailed the procedures discussed at the conference, which were written for the very purpose of helping pro se litigants understand how these matters work.

The law governing plaintiff's claim is straightforward and was explained to him in the order granting him leave to proceed. As for the proving his claim through research and investigation, plaintiff's case relies on facts. Plaintiff has personal knowledge of the facts and circumstances surrounding the lawsuit and he should already possess, or be able to obtain through discovery, the relevant documents that he needs to prove his claim.

In denying plaintiff's motion, I stress that the rulings reflect my assessment of plaintiff's ability to prosecute the case at its current stage only; if at some point plaintiff's circumstances change, and it keeps him from litigating the case, he is free to write to the court for additional clarification about procedures or to renew his motion for appointment of counsel.

ORDER

IT IS ORDERED that:

1. Plaintiff's motion for issuance of a discovery subpoena, dkt. 30, is DENIED.

2. Plaintiff's motion for appointment of counsel, dkt. 29, is DENIED without prejudice.

Entered this 19th day of January, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge