

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

---

CHRISTIAN R. AGUIRRE-HODGE,

Plaintiff,

v.

OPINION and ORDER

CHARLES LARSON, RANDALL HEPP,  
CATHY JESS, MARK SCHOMISCH,  
and CANDACE WHITMAN,

18-cv-995-jdp

Defendants.

---

Pro se plaintiff Christian Aguirre-Hodge, a Wisconsin prisoner incarcerated at New Lisbon Correctional Institution (NLCI), alleges that staff at his previous prison, Fox Lake Correctional Institution (FLCI), ignored his medical needs. He asserts claims under the Eighth Amendment and Wisconsin negligence law. Aguirre-Hodge has filed a complaint, Dkt. 1, and two motions to amend his complaint, Dkt. 7 and Dkt. 12, which I construe as supplements to his original complaint.

The next step is for me to screen his complaint and its supplements and dismiss any portion that 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. 28 U.S.C. §§ 1915 and 1915A. In screening any pro se litigant's complaint, I must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (per curiam). For the reasons explained below, I will allow Aguirre-Hodge to proceed on Eighth Amendment deliberate indifference claims and state-law negligence claims against all of the defendants.

Also before me is Aguirre-Hodge's motion for appointment of counsel. Dkt. 10. I will deny the motion because Aguirre-Hodge has not shown that this case is so complex that he will be unable to litigate it himself.

### ALLEGATIONS OF FACT

The following facts are drawn from Aguirre-Hodge's complaint and its supplements, Dkts. 1, 7, 12, and I accept these facts as true at the screening stage.

Until September 2018, Aguirre-Hodge was incarcerated at FLCI. Aguirre-Hodge has a history of knee problems, so defendant Charles Larson, a doctor at FLCI, referred him to an orthopedic specialist, Eric Nelson. Nelson recommended that Aguirre-Hodge receive a "total knee replacement" in his left knee. Dkt. 1, ¶ 5.

On February 27, 2018, Larson met with Aguirre-Hodge to discuss the knee replacement and explain the process of approving the surgery. During the meeting, Larson grabbed "personal property" that "was in [Aguirre-Hodge's] possession" and verbally abused Aguirre-Hodge. *Id.*, ¶¶ 8–10. Larson then canceled the knee surgery in retaliation for the incident.

The next day, Aguirre-Hodge filed a grievance, complaining about Larson's conduct and the denial of his surgery. The complaint was reviewed by the warden and "all relevant defendant prison employees or prison officials." *Id.*, ¶ 19. Defendants Randal Hepp, Cathy Jess, Mark Schomisch, and Candace Whitman all had the power to intervene but did not.

In September, Aguirre-Hodge was transferred to NLCI, and on January 7, 2019, Nelson reexamined Aguirre-Hodge and sent a report to the prison that stated, "[f]or some reason, the DOC never moved forward with scheduling the patient for a joint replacement . . . I once again recommend total knee replacement. The operation would be expected to significantly improve

his quality of life.” Dkt. 3, ¶¶ 2–3. The doctor at NLCI scheduled the surgery, and Nelson performed a knee replacement on February 20, 2019.

## ANALYSIS

### A. Screening of the complaint

Aguirre-Hodge asserts claims under 42 U.S.C. § 1983 for violations of the Eighth Amendment and under Wisconsin law for negligence.

#### 1. Eighth Amendment claims

Aguirre-Hodge contends that all defendants were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976). To state a deliberate indifference claim, Aguirre-Hodge must allege that each defendant was aware of a serious medical need and consciously failed to take reasonable measures to help him. *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008). A serious medical need is a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. *Johnson v. Snyder*, 444 F.3d 579, 584–85 (7th Cir. 2006). Delay in treatment constitutes deliberate indifference if the delay unnecessarily prolongs the prisoner’s pain. *Smith v. Knox Cty. Jail*, 666 F.3d 1037, 1040 (7th Cir. 2012).

Aguirre-Hodge states a deliberate indifference claim against defendant Charles Larson. He alleges that Larson received a recommendation from an outside specialist that said he needed knee surgery. He also alleges that Larson met with him to prepare for the surgery, but that after some sort of altercation, Larson canceled the surgery. Although Aguirre-Hodge does not provide the details of his altercation with Larson, I can infer at the screening stage that

Larson canceled the surgery because he was angry at Aguirre-Hodge, and not because he determined it was medically unnecessary. As a result, Aguirre-Hodge had to wait until he was transferred to a different prison, with a different doctor on staff, before he was approved for the surgery.

Aguirre-Hodge also states a claim against defendants Cathy Jess, Randall Hepp, Mark Schomisch, and Candace Whitman. I take Aguirre-Hodge to be saying that these defendants all reviewed his complaint that Larson withheld the surgery, and that all of these defendants had the power to intervene and ensure that Aguirre-Hodge received the surgery, but they failed to fully investigate his complaint. Grievance examiners are not immune from liability. *Tyler v. Wick*, No. 14-cv-68-jdp, 2016 WL 5496631, at \*2 (W.D. Wis. Sept. 29, 2016), *aff'd*, 680 F. App'x 484 (7th Cir. 2017). But Aguirre-Hodge should be aware that it may be difficult for him to succeed on his claims against these defendants. He will need to prove not only that they dismissed his grievance, but also that they failed to investigate it or refer the issue to the proper medical personnel. *See Greeno v. Daley*, 414 F.3d 645, 655–56 (7th Cir. 2005).

## **2. Negligence claims**

Aguirre-Hodge also asserts claims for negligence against all defendants. Under Wisconsin law, a claim for negligence “requires the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) an injury or injuries, or damages.” *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860.

For the reasons I allowed Aguirre-Hodge to proceed on Eighth Amendment claims against defendants, I will also allow him to proceed on negligence claims against them. His allegations that they were deliberately indifferent to his medical needs are sufficient to state a claim that they breached their duty of care.

## B. Recruitment of counsel

Aguirre-Hodge has asked the court to appoint counsel for him. But litigants in civil cases do not have a constitutional right to counsel, and I do not have the authority to appoint counsel to represent a pro se plaintiff in a civil matter. Rather, I can only assist in recruiting counsel who may be willing to serve voluntarily. *See* 28 U.S.C. § 1915(e)(1); *Pruitt v. Mote*, 503 F.3d 647, 654, 656 (7th Cir. 2007) (en banc). Almost all of this court’s pro se litigants would benefit from the assistance of counsel, but there are not enough lawyers willing to take these types of cases to give each plaintiff one. I must decide for each case “whether this particular prisoner-plaintiff, among many deserving and not-so-deserving others, should be the beneficiary of the limited resources of lawyers willing to respond to courts’ requests.” *McCaa v. Hamilton*, 893 F.3d 1027, 1036 (7th Cir. 2018) (Hamilton, J., concurring).

To prove that assistance in recruiting counsel is necessary, this court generally requires that pro se plaintiffs: (1) provide the names and addresses of at least three lawyers who decline to represent them in the case; and (2) demonstrate that theirs is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds their demonstrated ability to prosecute it. *Pruitt*, 503 F.3d at 655; *see also Young v. Cramer*, No. 13-cv-77, 2013 WL 5504480, at \*2 (W.D. Wis. Oct. 3, 2013). Aguirre-Hodge has satisfied the first requirement because he submitted letters from five lawyers that declined to represent him. But he has not satisfied the second requirement.

I am not convinced that this case will be too complex for Aguirre-Hodge to litigate. He says that his imprisonment will limit his ability to litigate the case and that he lacks legal knowledge. But these barriers are unfortunately common among pro se prisoner litigants. They are not in themselves reasons to recruit counsel. Aguirre-Hodge also says that this case will be

especially complex because it will involve conflicting testimony. But almost all lawsuits involve conflicting accounts. And although his case involves medical issues, it is far too early to tell whether it will actually boil down to complex issues that exceed Aguirre-Hodge's capabilities.

So I will deny his motion for now. As the case progresses, if he continues to believe that he is unable to litigate the lawsuit himself, then he may renew his motion. But he will have to explain what specific litigation tasks he cannot perform. If Aguirre-Hodge finds it difficult to meet a specific court deadline, then he should write the court about that and seek an extension of that deadline.

## ORDER

IT IS ORDERED that:

1. Plaintiff Christian Aguirre-Hodge is GRANTED leave to proceed on the following claims:
  - Eighth Amendment deliberate indifference claims against defendants Charles Larson, Randall Hepp, Cathy Jess, Mark Schomisch, and Candace Whitman.
  - Wisconsin-law negligence claims against defendants Larson, Hepp, Jess, Schomisch, and Whitman.
2. Plaintiff's motion for appointment of counsel, Dkt. 10, is DENIED.
3. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint, Dkt. 1, its supplements, Dkt. 7 and Dkt. 12, and this order are being sent today to the Attorney General for service on defendants. Plaintiff should not attempt to serve defendants on his own at this time. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.
4. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer or lawyers who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that

do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

5. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.
6. If plaintiff moves to a new address, it is plaintiff's obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his claims may be dismissed for his failure to prosecute them.

Entered March 12, 2019.

BY THE COURT:

/s/

---

JAMES D. PETERSON  
District Judge