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

OSCAR GARNER,

Plaintiff,

v.

PAUL SUMNICHT, BELINDA SCHRUBBE, CYNTHIA THORPE and MARY GORSKE,

Defendants.

ORDER

11-cv-829-slc

Plaintiff Oscar Garner is proceeding in this case on his claims that defendants violated his Eighth Amendment and state medical negligence law by failing to provide him with adequate medical treatment and a special diet for lactose intolerance and irritable bowel syndrome. Before the court is Garner's motion for a preliminary injunction in which he seeks an injunction during the pendency of this case requiring defendants to provide him with a non-dairy food tray or snack bag containing sufficient calories to meet the required recommended nutritional intake. Dkt. 25.

Because Garner has not shown that he has a reasonable likelihood of success on the merits of his claim and that continuing the diet he has maintained for the past few years will cause him irreparable harm, I am denying his motion for a preliminary injunction.

OPINION

I. Legal Standard

"[T]he granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380, 389 (7th Cir. 1984). A plaintiff asking for emergency or preliminary injunctive relief is required to make a showing with admissible evidence that (1) he has no adequate remedy at law and will suffer irreparable harm if the injunction is not granted; (2) the

irreparable harm he would suffer outweighs the irreparable harm defendants would suffer from an injunction; (3) he has some likelihood of success on the merits; and (4) the injunction would not frustrate the public interest. *See Palmer v. City of Chicago*, 755 F.2d 560, 576 (7th Cir. 1985). For preliminary relief to be granted, the irreparable harm must be likely, that is, there must be more than a "mere possibility" that the harm will come to pass. *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21–23 (2008)). Although the alleged harm need not be occurring or be certain to occur before a court may grant relief, there still must be a "presently existing actual threat" of harm. *Id*. (citations omitted).

At the threshold, Garner must show some likelihood of success on the merits and that irreparable harm will result if the requested relief is denied. If Garner makes both showings, then the court balances the relative harms and the public interest, considering all four factors on a "sliding scale." *See In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997).

When dealing with prisoner cases, federal courts must accord wide-ranging deference to correctional professionals in the adoption and execution of policies for the operation of penal institutions. *Whitley v. Albers*, 475 U.S. 312, 321–22 (1986) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)). Federal courts do not interfere with matters of prison management, such as which facility a particular prisoner is housed, without a showing that a particular situation violates the Constitution. *Mendoza v. Miller*, 779 F.2d 1287, 1292 (7th Cir.), *cert. denied*, 476 U.S. 1142 (1986).

Garner's claims are based on the Eighth Amendment, which prohibits prison officials from showing deliberate indifference to a prisoner's serious medical need or suffering. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be 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). "Deliberate

indifference" means that prison officials know of and disregard an excessive risk to inmate health and safety. *Farmer*, 511 U.S. at 837. Inadvertent error, negligence, gross negligence and ordinary malpractice do not amount to cruel and unusual punishment within the meaning of the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996); *Snipes v. DeTella*, 95 F.3d 586, 590-91 (7th Cir. 1996). Thus, disagreement with a doctor's medical judgment, an incorrect diagnosis or improper treatment resulting from negligence is insufficient to state an Eighth Amendment claim. *Gutierrez v. Peters*, 111 F.3d 1364, 1374 (7th Cir. 1997); *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261 (7th Cir. 1996). Instead, "deliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." *Estate of Cole*, 94 F.3d at 261-62.

II. Analysis

Garner has averred that he is lactose intolerant and has irritable bowel syndrome. He alleges that because defendants have refused to place him on a lactose-free diet or treat him with lactose pills, he has suffered severe abdominal pain, diarrhea, vitamin D deficiency and weight loss over a three-year period. With respect to his weight, Garner avers that he weighed between 155 and 160 pounds when he arrived at WCI in 2008, but his weight has fluctuated between 122 and 140 pounds over the past three years because of the inadequate diet he is receiving at the institution. He currently weighs 137 pounds. Garner avers that he has lost so much weight that other inmates think he has AIDS and will not associate with him.

Garner also explains that because he is required to self-select foods from a regular food tray, he often unknowingly eats foods that contain dairy and suffers severe gas, diarrhea, blood in his stool and stomach cramps and bloating. In addition to causing him pain, these symptoms

also create significant tension with his cellmate with whom he shares a small cell for 18 to 22 hours a day. Although Garner can purchase non-dairy foods from the canteen when he is in general population, he cannot do so in segregation, where he has been housed for the past two years. Garner also submits a copy of a modified diet order form dated December 1, 2009, on which "Lactose Restricted Diet" is listed as a possible type of diet for inmates.

In response, defendant Dr. Paul Sumnicht avers that the Centers for Disease Control and Prevention has indicated that a normal weight range for a person who is 5 feet 10 inches tall would be between 129 and 174 pounds and a normal a body mass index (BMI) would be between 18.5 and 24.9. On February 25, 2008, Garner was 5'10" and 138 pounds with BMI of 19.8. On July 26, 2012, Garner weighed 145 pounds and had a BMI of 20.8. Sumnicht avers that Garner's Vitamin D level went from <7.0 L on August 7, 2008 to 35.0 (which is in the normal range) on September 2, 2010 after he was started on Vitamin D tablets on September 21, 2009.

According to Sumnicht, a regular diet that includes some dairy is sufficient for Garner because he is receiving Lactaid tablets to allow for consumption of dairy (Garner disputes this). Further, Garner is provided a high protein/high calorie diet, which provides him the proper nutrition. Defendants point out that Garner has a choice as to whether he will be housed in segregation or a regular housing unit (presumably by avoiding behaviors that will result in him being sent to segregation), and, therefore, is not completely dependent on the foods served by the prison. Sumnicht avers that Garner has food menus available to review and has consulted with Food Service regarding food choices. According to Sumnicht, the food menus rotate, so it is more than likely that he would be familiar with the choices on the menu, including which items may contain dairy. Finally, the lactose-free diet to which Garner refers no longer is offered at the institution; the form submitted by Garner was replaced by a new version that became effective in November of 2011.

Although there is some question as to whether lactose intolerance in itself constitutes a serious medical need (Sumnicht avers that it is not considered a "disease"), the parties seem to assume for purposes of this motion that the symptoms that Garner suffers from rise to this level; therefore, I will make this assumption as well. Even assuming Garner's version of the facts as true, he has not shown that he will suffer irreparable harm if he does not receive a lactose-free diet. Garner alleges that he has lost an unsafe amount of weight, has a Vitamin D deficiency and suffers from gastrointestinal problems when he has to self-select non-dairy items from his food tray. However, Garner's current weight of 137 pounds falls within the normal range of 129 to 174 pounds for someone of his height. Sumnicht's treatment notes confirm that Garner's weight has remained in the normal range throughout his incarceration at WCI.[1] Sumnicht also has successfully treated Garner's earlier-found Vitamin D deficiency.

Given these facts, it is unlikely that Garner will succeed on his deliberate indifference claim. Sumnicht has not ignored Garner's complaints and has taken reasonable measures to ensure that his treatment plan is effective. He regularly monitors Garner's weight and Vitamin D level. He also expresses the uncontroverted expert opinion that Garner can remain healthy and symptom-free if he remains on a high protein/high diet, avoids dairy products and supplements his diet with items from the canteen. Although Garner states that he often mistakenly eats dairy, he has been given the food menus and has consulted with Food Service in an attempt to help him make proper food choices. Garner has not produced any evidence, such as expert testimony, that suggest that Sumnicht's treatment decisions were substantial departures from accepted professional judgment, practice or standards. Without such a showing, Garner is not entitled to preliminary injunctive relief.

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[1] Garner avers that he has fluctuated between 122 and 140 pounds. Although 122 pounds is outside the normal range for a person of Garner's height, he has not indicated when he weighed 122 pounds or for how long. Further, his current weight of 137 pounds indicates that he is no immediate danger of being underweight.

ORDER

IT IS ORDERED that plaintiff Oscar Garner's motion for a preliminary injunction, dkt. 25, is DENIED.

Entered this 1st day of October, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge