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

DAVID A. SCHLEMM,

Plaintiff,

v.

KEVIN CARR, LARRY FUCHS, W. OLSON, E. BLOUNT, L. DOEHLING, LUCINDA BUCHANAN, M. BLOCK, JUSTIN S. RIBAULT, JEANIE M. KRAMER, STEPHEN MURPHY, K. ZENK, E. DAVIDSON and JANE AND/OR JOHN DOES,

Defendants.

OPINION AND ORDER

21-cv-331-wmc

Pro se plaintiff David Schlemm, who is currently incarcerated at Columbia Correctional Institution ("Columbia"), filed this lawsuit under 42 U.S.C. § 1983, against over a dozen Wisconsin Department of Corrections ("DOC") employees, challenging Columbia prison officials' refusal to provide him a soy allergy diet and failure to treat his painful scar tissue on his right foot. Schlemm claims in particular that defendants violated his constitutional and state law rights, as well as the Americans with Disabilities Act and the Rehabilitation Act. Schlemm has further filed motions seeking a temporary restraining order and preliminary injunction, appointment of counsel and for a finding of contempt. (Dkt. ##3, 11, 15, 16, 18). Schlemm's complaint is ready for screening under 28 U.S.C. §§ 1915(e)(2), 1915A, and for the reasons that follow, the court will grant Schlemm leave to proceed against four of the 12 proposed defendants, on Eighth Amendment deliberate indifference claims. However, the court is denying Schlemm's motions at this time.

ALLEGATIONS OF FACT[1]

Plaintiff David Schlemm seeks to proceed against 12 individual defendants. Nine of those defendants are the following Columbia employees: Warden Larry Fuchs, Deputy Warden W. Olson, Security Director E. Blount, Medical Administrator Lucinda Buchanan, Assistant Medical Administrator M. Block, Dr. Justin Ribault, Nurse Practitioner Jeanie M. Kramer, Dr. Stephen Murphy, and Institution Complaint Examiner ("ICE") K. Zenk. The remaining three defendants are DOC administrators: Secretary Kevin Carr, BHS Nursing Coordinator L. Doehling, and Corrections Complaint Examiner ("CCE") E. Davidson. Schlemm also lists "Jane and/or John Does" as defendants but does not specify any titles or how many Doe defendants he intends to sue.

As noted, Schlemm's claims relate to how Columbia prison officials handled his soy allergy and foot injury. Starting with his soy allergy, in October of 2015, before Schlemm was incarcerated at Columbia, a doctor placed Schlemm on a low soy diet after testing suggested a soy allergy. Schlemm was on and off that diet between 2016 and 2017. However, when he was transferred to Columbia in the fall of 2017, his soy free diet was reinstated after Dr. Syed and Schueler ordered a soy allergy test that again confirmed his allergy.

Despite the modified diet, Schlemm continued to receive soy on his meal trays. On October 31, 2017, Schlemm complained, which eventually led Schueler to cancel Schlemm's soy free diet on November 6, 2017, apparently for no legitimate reason.

[1] In addressing any *pro se* litigant's complaint, the court must read the allegations generously, drawing all reasonable inferences and resolving ambiguities in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

Schlemm alleges that when he consumes soy, he suffers numerous adverse consequences, including vomiting, stomach pain, cramps, constipation, gas and fatigue.

Between 2019 and 2020, although Schlemm repeatedly complained to defendant Dr. Ribault, he refused to reinstate the soy free diet restriction. In November of 2020, defendant NP Kramer started working with Schlemm, and for the next year Schlemm asked Kramer to reinstate his soy free diet restriction, also to no avail. Finally, plaintiff claims that he has complained to defendants Carr, Doehling, Block, Zenk, Davidson, and the Doe defendants to reissue the soy allergy diet, and those complaint were not successful.

As for Schlemm's foot injury, Schlemm deals with scar tissue on his foot from a 1998 gunshot wound. In 2015, he started having problems with the scar tissue and received mediplast pads from the HSU, which he alleges were insufficient to treat his scar tissue, resulting in severe pain. The problem continued when Schlemm arrived at Columbia in 2017. Between 2017 and 2018, Dr. Syed surgically trimmed the scar tissue, but according to Schlemm the tissue grew back. Schlemm also maintains that defendants Ribault and Buchanan refused to treat the scar tissue from 2018 to 2020.

On July 21, 2020, Schlemm had an off-site appointment with defendant Dr. Murphy, who surgically trimmed the scar tissue. Again, the scar tissue grew back within less than a month. In November of 2020, Schlemm had a second appointment with Dr. Murphy, who again trimmed the scar tissue, and again the tissue regrew within a month. In December Schlemm had a third appointment with Dr. Murphy for another trimming, and the scar tissue regrew yet again.

Schlemm alleges that this scar tissue causes him such extreme pain that he can barely walk. On April 8, 2021, he fell and subsequently had to undergo shots of

Ketorlac/Tordol 60 mg for three days to relieve the pain. However, Schlemm did not receive a cane or other assistive device for walking. Schlemm fell again on April 25, 2021, but "defendants" refused to see him. (Compl. (dkt. #1) ¶ 40.) Schlemm claims that he has not been seen by a doctor about his scar tissue for five months, and that he has not received personal shoes he ordered.

On April 6, 2021, Schlemm wrote to defendant Warden Fuchs about his medical issues and that he did not have a cane or crutch for walking. Schlemm further wrote that a sergeant commented that his foot looked infected. Schlemm asked Fuchs to come to his cell to look at his foot. Fuchs did not respond to his letter or visited his cell.

Finally, plaintiff claims that he has been waiting for two years to see a neurologist.

OPINION

Plaintiff seeks to proceed against defendants on claims for violation of the Eighth Amendment, state law and the Americans with Disabilities/Rehabilitation Act.[2]

I. Improper Defendants

As an initial matter, however, plaintiff may not proceed against defendants Carr, Olson, Blount, Doehling, Zenk, E. Davidson or the Doe defendants, on any of these claims, for lack of personal involvement. Indeed, to demonstrate liability under § 1983, a plaintiff must allege sufficient facts showing that an individual personally caused or participated in

[2] Plaintiff further claims that defendants' actions (or inactions) in this lawsuit are in retaliation for pursuing a lawsuit before this court, *Schlemm v. Wall*, No. 11-cv-272-wmc, but he had not listed a First Amendment retaliation claim in his claims for relief. The court will not read such a claim into his complaint since plaintiff has not alleged that any of the defendants knew about his lawsuit before this court in making decisions about his health care. *Morgin v. City of E. Chi.*, 349 F.3d 989, 1005 (7th Cir. 2003) (successful retaliation claim requires that a plaintiff's protected First Amendment act was known to and motivated the defendant).

a constitutional deprivation. *See Minix v. Canarecci*, 597 F.3d 824, 833-34 (7th Cir. 2010) ("individual liability under § 1983 requires personal involvement in the alleged constitutional violation") (citation omitted). Plaintiff claims only in general terms that he complained to these defendants about his unsuccessful efforts to reinstate that soy free diet, but he has not alleged when or how he communicated with them, or how these defendants responded to his communications. These types of conclusory allegations are insufficient to implicate them personally. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995) (plaintiff must assert a specific act of wrongdoing by a specific individual to meet the personal involvement requirement necessary for § 1983 liability). Although the court infers that plaintiff may have included them in this lawsuit because of their supervisory positions at Columbia or within the DOC, supervisors cannot be held liable under § 1983 solely by virtue of their position. *See Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000) (rejecting § 1983 actions against individuals merely for their supervisory role of others).

Nor may plaintiff proceed against any of these defendants for their involvement in resolving one or more inmate complaints plaintiff pursued about his soy allergy or foot condition. Ruling against a prisoner on an inmate complaint does not qualify as personal involvement in a constitutional violation, and it is not sufficient to state a claim. *McGee v. Adams*, 721 F.3d 474, 485 (7th Cir. 2013); *George v. Smith*, 507 F.3d 605, 609-10 (7th Cir. 2007) ("Ruling against a prisoner on an administrative complaint does not cause or contribute to the violation."); *see also Owens v. Hinsley*, 635 F.3d 950, 953 (7th Cir. 2011) ("Prison grievances procedures are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged

mishandling of Owen's grievances by persons who otherwise did not cause or participate in the underlying conduct states no claim."). Therefore, plaintiff may not proceed on any federal claim against Carr, Olson, Blount, Doehling, Zenk, E. Davidson and the Doe defendants, and the court further declines to exercise supplemental jurisdiction over any claim plaintiff may or may not have against him under state law. *See Williams v. Rodriguez*, 509 F.3d 392, 404 (7th Cir. 2007) (affirming dismissal of plaintiff's state law claims for lack of jurisdiction after parallel federal claims had been dismissed). Accordingly, Carr, Olson, Blount, Doehling, Zenk, E. Davidson and the Doe defendants will be dismissed, and the court will turn to plaintiff's Eighth Amendment, state law and ADA claims.

II. Eighth Amendment Claim

A prison official who violates the Eighth Amendment in the context of a prisoner's medical treatment demonstrates "deliberate indifference" to a "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). "Serious medical needs" include (1) life-threatening conditions or those carrying a risk of permanent serious impairment if left untreated, (2) withholding of medical care that results in needless pain and suffering, or (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez v. Peters*, 111 F.3d 1364, 1371 (7th Cir. 1997). "Deliberate indifference" encompasses two elements: (1) awareness on the part of officials that the prisoner needs medical treatment and (2) disregard of this risk by conscious failure to take reasonable measures. *Forbes,* 112 F.3d at 266.

As an initial matter, the court accepts for screening purposes that plaintiff's soy allergy and scar tissue on his foot presented serious medical needs, since plaintiff suffered

severe pain and digestive issues and required medical intervention for both conditions. Plaintiff's allegations as to Dr. Ribault, NP Kramer and Buchanan are short and undetailed, but sufficient to support a claim for deliberate indifference. It appears that Dr. Ribault and Kramer each refused to put plaintiff back on a soy-free diet for multiple years, for no legitimate or medically-appropriate reason. Moreover, plaintiff alleges that Ribault and Buchanan outright refused to treat plaintiff's painful scar tissue from 2019 to 2020, which also supports an inference of deliberate indifference.

Plaintiff's claim against Dr. Murphy requires more discussion, since Dr. Murphy repeatedly attempted to treat plaintiff for his troublesome and painful scar tissue. Although Dr. Murphy did not deny plaintiff any medical treatment, it may be reasonable to infer that in repeatedly trimming the scar tissue, he persisted in a course of treatment known to be ineffective, which may support an inference of deliberate indifference. *See Greeno v. Daley*, 414 F.3d 645, 654 (7th Cir. 2005) (physician who "doggedly persisted in a course of treatment known to be ineffective" could support an Eighth Amendment violation). Moreover, plaintiff's allegations suggest that his pain has actually *increased* significantly because of Dr. Murphy's interventions *and* that Dr. Murphy then failed to schedule him for follow-ups and, worse, most recently ignored plaintiff's complaint about his falls. Considering these allegations together, they support an inference that Dr. Murphy has failed to exercise professional judgment in his handling of plaintiff's foot condition, and then outright ignored plaintiff's need for follow-up, which suggests deliberate indifference.

Finally, with some skepticism, the court also will grant plaintiff leave to proceed against Warden Fuchs. As pled, Warden Fuchs learned through plaintiff's communications

that plaintiff's medical concerns related to his problems with his scar issue were being ignored. It is unclear whether Fuchs received and responded to plaintiff's communications, or if Fuchs simply ignored them. If Fuchs responded and deferred to the professional judgment of the HSU staff, then his handling of plaintiff's complaint would not support an inference of deliberate indifference, since he, as the warden and a non-medical professional, was entitled to delegate medical issues to HSU staff, and to defer to that staff. *Askew v. Davis*, 613 F. App'x 544, 548 (7th Cir. 2015); *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2006) ("Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job. The division of labor is important not only to bureaucratic organization but also to efficient performance of tasks; people who stay in their roles can get more work done, more effectively, and cannot be hit with damages under § 1983 for not being ombudsmen."). If, on the other hand, Fuchs received and outright *ignored* plaintiff's complaint that his medical needs were being ignored, it may be reasonable to infer deliberate indifference. Since at this stage the court must resolve ambiguities in plaintiff's favor, the court will grant him leave to proceed against Fuchs, advising plaintiff that this claim faces a significant uphill battle.

However, the court will not grant plaintiff leave to proceed against any defendant for his allegation that he has not seen a neurologist in two years or that his personal shoes were withheld. Plaintiff has not alleged which defendants were responsible for these issues or when these events occurred, and since § 1983 liability requires personal involvement, the court will not grant plaintiff leave to proceed against any defendant with respect to these allegations. *Grieveson v. Anderson*, 538 F.3d 763, 778 (7th Cir. 2008) ("Vague references to a group of 'defendants,' without specific allegations tying the individual

defendants to the alleged unconstitutional conduct" insufficient to support a claim under § 1983). Plaintiff is free to seek leave to amend his complaint if he can provide details about these issues sufficient to implicate any of the defendants in this lawsuit. Should he choose to amend his complaint, the court must screen it under §§ 1915(e)(2), 1915A.

III. State Law Claims

Plaintiff also seeks to proceed against defendants on state law claims of negligence under this court's supplemental jurisdiction. *See* 28 U.S.C. § 1367(a); *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 936 (7th Cir. 2008). Because the court is only allowing plaintiff to proceed on federal claims against Dr. Ribault, NP Kramer, Buchanan, Dr. Murphy and Warden Fuchs, the court declines to exercise supplemental jurisdiction over plaintiff's proposed state claims against any other defendant. *See Williams*, 509 F.3d at 404.

As for Dr. Ribault, NP Kramer, Buchanan, Dr. Murphy and Warden Fuchs, the same facts supporting plaintiff's Eighth Amendment claim underpin his medical negligence claim, so the court will exercise supplemental jurisdiction over these claims. 28 U.S.C. § 1367(a) ("[D]istrict courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."). Under Wisconsin law, the elements of a cause of action in negligence are: (1) a duty of care or a voluntary assumption of a duty on the part of the defendant; (2) a breach of the duty, which involves a failure to exercise ordinary care in making a representation or in ascertaining the facts; (3) a causal connection between the conduct and the injury; and (4)

an actual loss or damage as a result of the injury. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 307 (1987). At least for screening purposes, for the same reasons as outlined above, plaintiff's allegations support a reasonable inference that these defendants owed plaintiff a duty of care, breached that duty and as a result, plaintiff was injured. Accordingly, the court will grant plaintiff leave to proceed on a state law claims against defendants Dr. Ribault, NP Kramer, Buchanan, Dr. Murphy and Warden Fuchs.

IV. **ADA and Rehabilitation Act** Claim

Finally, to establish a violation of Title II of the ADA, a plaintiff "must prove that he is a 'qualified individual with a disability,' that he was denied 'the benefits of the services, programs, or activities of a public entity' or otherwise subjected to discrimination by such an entity, and that the denial or discrimination was 'by reason of' his disability." *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) (*citing Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996) (citing 42 U.S.C. § 12132)). The Rehabilitation Act is substantially identical, except that a claim under § 504 of that Act has four elements: (1) an individual with a disability; (2) who was otherwise qualified to participate; (3) but who was denied access solely by reason of disability; (4) in a program or activity receiving federal financial assistance. *See Jaros v. Ill. Dep't of Corr.*, 684 F.3d 667, 671-72 (7th Cir. 2012).

Even accepting that plaintiff's soy allergy and foot condition rendered him disabled as defined under the ADA/Rehabilitation Act, his allegations do not support a claim. While Columbia is considered a "public entity," plaintiff does not claim to be excluded from any service, program, or activity offered to other prisoners *because* of how staff have treated his foot condition or soy allergy. Instead, he simply claims that defendants denied him

appropriate medical treatment. Since plaintiff has not alleged that he has been denied services, programs or activities because of his claimed disability, plaintiff may not proceed on a claim under either the ADA or Rehabilitation Act. *See Resel v. Fox*, 26 F. App'x 572, 576-77 (7th Cir. 2001) ("A claim for inadequate medical treatment is improper under the ADA.") (citing *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996)).

V. Plaintiff's Motions (dkt. ##3, 9, 11, 15, 16)

In addition to screening plaintiff's claim, the court must also take up several motions filed by plaintiff. Plaintiff seeks a temporary restraining order, recruitment of counsel and a finding that prison officials have been preventing him from accessing this court. The court addresses them in turn.

A. Motion for temporary restraining order and preliminary injunction (dkt. #3)

Plaintiff asks that the court grant him a temporary restraining order and preliminary injunction in the form of (1) reissuing his soy free diet and (2) taking him to a doctor to remove his scar tissue from his foot. Plaintiff claims that without access to a soy free diet he is unable to maintain adequate nutrition, and that he needs to see a specialist for his foot because he walks with a permanent limp because of the way the scar tissue grows back in a painful manner.

To prevail on a motion for a preliminary injunction, plaintiff must show: (1) a likelihood of success on the merits of his case; (2) a lack of an adequate remedy at law; and (3) an irreparable harm that will result if the injunction is not granted. *Lambert v. Buss*, 498 F.3d 446, 451 (7th Cir. 2007). Furthermore, the Prison Litigation Reform Act

("PLRA"), which governs this lawsuit, narrows the available relief to an even greater extent in cases involving prison conditions. Specifically, the PLRA states that any injunctive relief to remedy prison conditions must be "narrowly drawn to extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2); *see also Westefer v. Neal*, 682 F.3d 679, 681 (7th Cir. 2012) (vacating overbroad injunction related to the procedures for transferring prisoners to a supermax prison).

As an initial matter, although plaintiff's allegations are sufficient to pass muster under the court's generous pleading standard, he has not shown a likelihood of success on the merits of his claims related to his need for a soy-free diet and for treatment for his foot. Plaintiff has not submitted evidence of his current ongoing efforts to obtain a nutritionally sound diet, so the court has no reason to infer that defendants are currently denying him adequate nutrition by refusing to put him on a soy free diet. Similarly, plaintiff claims that he is having difficulties walking and believes his foot to be infected, but he has not submitted details about his interactions with HSU that might suggest that his medical needs currently are being ignored or that he has an unaddressed need to see a specialist. More specifically, although plaintiff claims that his complaints about his foot have been ignored, he also attests that on May 12, 2021, he filed an inmate complaint about how staff have been responding to his concerns about the scar tissue on his foot. (Schlemm Decl. (dkt. #4) ¶ 12.) Plaintiff filed this motion just a few days later, on May 17, 2021, and he has not supplemented his motion with any evidence suggesting that his inmate complaint has been ignored. Therefore, plaintiff has neither shown a likelihood of success on the merits, nor that he lacks an adequate remedy. Accordingly, the court is denying

plaintiff's motion for a temporary restraining order or preliminary injunction. Plaintiff may renew this motion provided that he can submit up to date and detailed proposed findings of fact and supporting evidence related to his current efforts to obtain needed medical care related to his nutritional needs and foot condition. If plaintiff renews his motion for a preliminary injunction, he should use this court's procedures for motions for obtaining injunctive relief, a copy of which will be sent to plaintiff along with this order.

B. Motion for appointment of counsel (dkt. #9)

Next plaintiff seeks appointment of counsel, alleging that this case is complex and he has limited access to the law library due to his incarceration. Although the court will accept that plaintiff has made reasonable efforts to recruit an attorney on his own (*see* attachments to dkt. #10), recruitment of counsel at this stage in this lawsuit is not necessary because the court is not persuaded that the legal and factual demands of this lawsuit exceed his abilities to represent himself further. *See Pruitt v. Mote,* 503 F.3d 647, 654-55 (7th Cir. 2007). This lawsuit was only just screened to proceed, and it will be scheduled for a telephonic preliminary pretrial conference shortly, during which Magistrate Judge Crocker will explain how this case will proceed, set the schedule, and follow up with a detailed order that memorializes the schedule and attaches this court's procedures. Plaintiff's filings suggest that he is more than capable of litigating this case without an attorney. In any event, it is too early in this lawsuit, and volunteer counsel are too scarce a resource, for this court to conclude that plaintiff needs the assistance of counsel at this stage. Therefore, the motion should be denied. Plaintiff should use the resources available to him at Columbia and the materials he will receive from the court to help him litigate

this case. Then, only if plaintiff finds he is still unable to meet the demands of this lawsuit without the help of an attorney, he may renew this motion, provided that he can detail exactly how the demands of this lawsuit exceed his abilities.

C. Motion for interference with court access and for contempt (dkt. ##11, 15, 16, 18)

Finally, plaintiff filed multiple motions taking issue with how Columbia officials processed his requests related to his need to pay the initial partial filing fee owed in this case. Since the court received plaintiff's initial partial filing fee payment on June 25, 2021, the court will deny these motions as moot.

ORDER

IT IS ORDERED that:

1. Plaintiff David Schlemm is GRANTED leave to proceed against defendants Larry Fuchs, Lucinda Buchanan, Dr. Justin Ribault and NP Jeanie Kramer on Eighth Amendment medical care deliberate indifference and Wisconsin negligence claims.

2. Plaintiff is DENIED leave to proceed on any other claim, and defendants Kevin Carr, W. Olson, E. Blount, L. Doehling, M. Block, K. Zenk, E. Davidson and the Doe defendants are DISMISSED.

3. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to the plaintiff's complaint if it accepts service for the defendants.

4. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the defendants. The court will disregard any documents submitted by plaintiff

unless plaintiff shows on the court's copy that he has sent a copy to the defendants or to the defendants' attorney.

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

6. If plaintiff is transferred or released while this case is pending, 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.

7. Plaintiff's motions (dkt. #3, 9, 11, 15, 16, 18) are DENIED. Plaintiff's motions for appointment of counsel and for a preliminary injunction are denied without prejudice, as explained above.

8. The clerk of court is directed to forward plaintiff a copy of this court's procedures for obtaining injunctive relief.

Entered this 9th day of March, 2022.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge