

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

JACKIE CARTER,

Plaintiff,

v.

OPINION AND ORDER

14-cv-512-wmc

ZIEGLER, PISCHKES, HASON, JAMES,
MELBY, LIESER, MEISNER, HAUTAMAKI,
MORGAN, GREER, ANDERSON, and DR.
CORRELL,

Defendants.

Pro se plaintiff Jackie Carter claims that the defendants violated his First Amendment rights by retaliating against him after he submitted a collective grievance about the limited access to the law library. He also claims that certain of defendants' retaliatory acts violated his rights under the Eighth Amendment. (Compl. (dkt. #1).) Because Carter is incarcerated at Columbia Correctional Institution ("CCI") and is seeking redress from a governmental employee, the Prison Litigation Reform Act ("PLRA") requires the court to screen his complaint and dismiss any portion that is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Because plaintiff has alleged a First Amendment claim against defendant Ziegler and an Eighth Amendment deliberate indifference claim against defendants Greer, Anderson, Morgan, Meisner and Hautamaki, he will be granted leave to proceed on those claims. In all other respects, the court will deny plaintiff leave to proceed and dismiss the other defendants from this action.

In addition to his complaint, plaintiff filed two motions for preliminary injunction with certain supporting materials. (Dkt. #2, 9.) The court will deny both motions because plaintiff has failed to demonstrate that: (1) he is likely to succeed on the merits of a deliberate indifference claim based on the denial of medical care concerning his feet; and (2) he will be irreparably harmed by the denial of a preliminary injunction.

ALLEGATIONS OF FACT¹

A. Discipline for Group Complaint about Law Library Access

Carter alleges that he and approximately 14 or 15 other prisoners filed a group complaint about “obstruction of law library.” (Compl. (dkt. #1) p.1.)² As the complaint examiner assigned to that complaint, defendant Mary Leiser instructed Carter to attempt to resolve the issue with unit manager Ziegler, who is also named as a defendant in this action. Ziegler and defendant correctional officer David Pischkes allegedly “rounded up all of the 14-15 prisoners that filed/signed the group complaint with [Carter] and told them in groups of 2-3 at a time that: If you don’t scratch your name off of the list or give them authorization to do it[,] each of them would be stuffed in solitary confinement with [Carter].” (*Id.*) Carter alleges that all of them then agreed to remove their names from the complaint, but that Carter was not given that option. On August 30, 2013, Carter

¹ In addressing any *pro se* litigant’s complaint, the court must read the allegations of the complaint generously, resolving ambiguities and making reasonable inferences in plaintiff’s favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, Carter alleges the following facts, which the court will assume are true for purposes of this screening order.

² Plaintiff later filed a copy of the grievance, which Carter indicates he mailed on August 18, 2013. (2nd Mot. for Prelim. Inj., Ex. (dkt. #9-1) p.2.)

alleges that he alone was sentenced to 120 days in solitary confinement based on this conduct report (303.20) and lying (303.27).

B. Solitary Confinement

While placed in solitary confinement, Carter alleges that correctional officers James and Hanson (both named as defendants) “held and destroyed wrongfully my personal property and legal documents.” (Compl. (dkt. #1) p.2.) Carter further alleges that the solitary unit manager defendant Melby was informed of the destruction of these materials and did nothing to stop it.

While held in solitary confinement, Carter also alleges that he was denied medically-prescribed shoes and blood pressure medication, causing him to “hobble around the concrete cell on his sore, swollen feet, ankles,” which resulted in him falling on October 24, 2013. (*Id.*) Carter contends that he filed complaints about the shoes with the director of health services for the Wisconsin Department of Corrections, James Greer, and with CCI’s health services manager, Karen Anderson, but that neither did anything. Carter further alleges that administrative captain Donald Morgan, warden Michael Meisner, and deputy warden Sandra Hautamaki were also aware of the problems with his shoes, but failed to take action.

In addition, Carter contends that he was denied showers from August 30, 2013, to October 6, 2013, while being held in solitary confinement because he could not “contort [his] body and squeeze injured arms out of steel food slot,” presumably to allow a

correctional officer to handcuff him prior to escorting him to the showers. (*Id.*; *see also id.* at p.3 (alleging length of time).)

At some time (perhaps, on or around September 24, 2013), Carter further alleges that Dr. Correll, who is also named as a defendant, “allowed the [other] defendants to get him . . . to alter my pain medication causing me pain and suffering.” (Compl. (dkt. #1) p.3.)

Plaintiff filed various documents to his complaint purportedly demonstrating that he exhausted his administrative remedies before filing suit. (Compl. (dkt. #1) p.4; *see also* Compl., Exs. (dkt. ##1-2, 1-3).)

OPINION

I. Screening Order

From these allegations, it appears that Carter is attempting to assert four claims: (1) a First Amendment retaliation claim; (2) a Fourteenth Amendment due process claim based on the destruction of property; (3) an Eighth Amendment deliberate indifference to his serious medical needs claim; and (4) an Eighth Amendment conditions of confinement claim. The court addresses each in turn.

A. First Amendment Retaliation Claim

“An act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution.” *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000). To state a claim for retaliation, a plaintiff must identify (1) the constitutionally protected

activity in which he was engaged; (2) one or more retaliatory actions taken by each defendant that would deter a person of “ordinary firmness” from engaging in the protected activity; and (3) sufficient facts to make it plausible to infer that the plaintiff’s protected activity was one of the reasons defendants took the action they did against him. *Bridges v. Gilbert*, 557 F.3d 541, 556 (7th Cir. 2009).

Here, plaintiff alleges that on or about August 18, 2013, he mailed a group grievance or complaint about law library access. Mary Leiser reviewed the grievance and asked him to discuss it with unit manager Ziegler. At some point after the filing of this grievance, Ziegler issued an adult conduct report for group resistance and petitions (303.20) and lying (303.27). The court infers from Carter’s allegations that a disciplinary committee adjudicated him guilty of those offenses, for which he was then sentenced to 120 days of solitary confinement.

From these allegations, the court finds that plaintiff has alleged the necessary elements of a First Amendment retaliation claim against Ziegler. Plaintiff alleges that he engaged in protected activity by filing a grievance. *Hoskins v. Lenear*, 395 F.3d 372, 375 (7th Cir. 2005) (recognizing that a prisoner’s right to use available grievance procedures constitutes protected activity under the First Amendment). Plaintiff further alleges an adverse action of being sentenced to 120 days of segregation, which is sufficient to support a finding that a reasonable person would be deterred from engaging in protected speech going forward. Finally, plaintiff adequately alleges that Ziegler was motivated by the filing of the collective grievance in issuing a conduct report. Accordingly, the court will grant Carter leave to proceed on a First Amendment retaliation claim against Ziegler.

B. Due Process Claim

Plaintiff next alleges that defendants James and Hanson destroyed personal property, including legal documents, under Melby's supervision. Presuming that Carter intends to allege a Fourteenth Amendment deprivation of property under official prison policy, the court must determine that he had a protected property interest, which was taken without due process of law. *See Caldwell v. Miller*, 790 F.2d 589, 608 (7th Cir. 1986).

As a threshold matter, Carter's amorphous reference to "personal property, including legal documents" fails to meet the pleading requirements of Federal Rule of Civil Procedure 8. Under Rule 8, Carter's complaint is required to contain "a short and plain statement" of each claim showing that he is entitled to relief. "The primary purpose of [Rule 8] is to give defendants fair notice of the claims against them and the grounds supporting the claims." *Stanard v. Nygren*, 658 F.3d 792, 797 (7th Cir. 2011) (citations omitted). Plaintiff's complaint fails to do that. Moreover, Carter fails to allege whether the destruction of his property is pursuant to an official prison policy, which is necessary to form the basis of his Fourteenth Amendment claim. *Caldwell*, 790 F.2d at 608. Otherwise, Carter already has been granted due process through his right to bring a state administrative proceeding. *See Kimmons v. Waupun Property Staff*, No. 00-3134, 1 Fed. Appx. 496, 498-99, 2001 WL 13085, at *2 (7th Cir. Jan. 3, 2001) (unpublished) (noting that the court has already found "Wisconsin's post-deprivation procedures are adequate") (citing *Hamlin v. Vaudenberg*, 95 F.3d 580, 585 (7th Cir. 1996); Wis. Admin. Code § DOC 303.10(4); Wis. Stat. §§ 893.35, 893.51, 893.52). As such, the court will

deny him leave at this time to proceed on such a claim, but allow Carter to amend his complaint to provide additional information.

Carter also alleges that defendants' destroyed his legal papers. From this allegation, the court will infer that Carter is attempting to bring an access to courts claim. To allege such a claim, however, plaintiff must plead an actual injury. *In re Maxy*, 674 F.3d 658, 660 (7th Cir. 2012) (“[T]o satisfactorily state a claim for an infringement of the right of access, prisoners must also allege an actual injury.”); *see also Marshall v. Knight*, 445 F.3d 965, 968 (7th Cir. 2006) (explaining that an access-to-courts claim “spell out . . . [a] connection between the alleged denial of access to legal materials and an inability to pursue a legitimate challenge to a conviction, sentence, or prison conditions”). Because Carter fails to allege that the destruction of these unidentified legal papers hampered his ability to litigate his claims, the court will similarly deny Carter leave to proceed on an access to courts claim, although he is also free to file an amended complaint containing good faith allegations of such an injury.

C. Deliberate Indifference to Serious Medical Needs Claim

The Eighth Amendment prohibits prison officials from showing deliberate indifference to prisoners' serious medical needs or suffering. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). To state a deliberate indifference claim, a plaintiff must allege facts from which it may be inferred that he had a serious medical need and that prison officials were deliberately indifferent to that need. *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997). Here, Carter contends that while he was held in segregation, he was denied

medically-prescribed footwear and blood pressure medication, and that the director of health services for the Wisconsin Department of Corrections, James Greer, and CCI's health services manager, Karen Anderson, knew about Carter being denied both, but failed to do anything about it. Carter also alleges that Morgan, Meisner, and Hautamaki were also aware of the problems with his shoes, but failed to take action. Finally, Carter alleges that Dr. Correll altered his pain medication.

“Serious medical needs” include (1) conditions that are life-threatening or that carry risk of permanent serious impairment if left untreated, (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering, or (3) conditions that have been “diagnosed by a physician as mandating treatment.” *Gutierrez*, 111 F.3d at 1371-73. A prison official has acted with deliberate indifference when the official “knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk.” *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (citing *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002)).

As currently alleged, plaintiff may proceed on an Eighth Amendment deliberate indifference claim against defendants Greer, Anderson Morgan, Meisner, and Hautamaki. Carter alleges that he was prescribed certain shoes -- a fact that has been established in other lawsuits -- and blood pressure medication. These allegations form a sufficient basis at the pleading stage to find that he had serious medical needs. Carter further alleges that he informed each of the five defendants about his lack of footwear while held in

solitary confinement, and they ignored his complaints.³ Carter further alleges that defendants Greer and Anderson were aware of his lack of blood pressure medication. The court finds these allegations at the pleading stage sufficient to establish the second prong of a deliberate indifference claim.

As for Dr. Correll, the court finds that Carter's allegations fail to meet the requirements of Rule 8. The complaint fails to allege that: (1) Carter was suffering from a serious medical need requiring pain medication; (2) the alteration in his pain medication somehow impact that serious medical need; and (3) Correll was aware of Carter's issues with pain. These failures are bolstered by Carter's allegation that he never met Correll. Accordingly, the court will deny Carter leave to proceed on a claim against Dr. Correll at this time, though, once again, he is free to amend his complaint to add this information.

While the allegations as to the other five defendants pass muster under the court's lower standard for screening, as Carter well knows, to be successful on this claim, he will have to prove defendants' deliberate indifference, which is a high standard. Inadvertent error, negligence or gross negligence are insufficient grounds for invoking the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). In particular, it will be Carter's burden to prove: (1) his medical conditions constituted serious medical needs,

³ To the extent Carter was provided Velcro footwear (as compared to his preferred tie boots) while in segregation, he has no basis for claiming deliberate indifference on the part of defendants. The court has already held (repeatedly) that the "boots with [V]elcro straps . . . fit the description discussed by UW Health podiatrist, Dr. Finnell, without creating security concerns." *Carter v. Radtke*, No. 09-cv-437, slip. op. at 14 (W.D. Wis. May 30, 2013) (dkt. #153); *see also Carter v. Meisner*, No. 12-cv-574, slip. op. at 15-16 (W.D. Wis. Oct. 31, 2014) (dkt. #98).

which may well require expert testimony rebutting medical evidence to the contrary; and (2) perhaps even more daunting, that the defendants knew his condition was serious and deliberately ignored his condition and related pain.

D. Conditions of Confinement Claim

Finally, plaintiff also alleges that he was denied a shower from August 30, 2014, to October 6, 2014. As for this particular claim, Carter fails to allege which of the defendants were responsible for this alleged denial. To demonstrate personal liability under § 1983, a plaintiff must allege sufficient facts showing that an individual personally caused or participated in the alleged constitutional deprivation. *See Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000); *Walker v. Taylorville Correctional Ctr.*, 129 F.3d 410, 413 (7th Cir. 1997) (noting that “personal involvement” is required to support a claim under § 1983).

II. Motions for Preliminary Injunction

Plaintiff also has filed two motions for preliminary injunction. In the first motion, plaintiff requests an order to be seen by a medical professional outside of this prison to assess his knees, “hips, elbows, back, and the bones, tendons, balls, heels, ankles in [his] feet.” (1st Mot. for Prelim. Inj. (dkt. #2).) Plaintiff also seeks an order stopping Dr. Correll from working in concert with the other defendants, mainly Morgan, to alter his medical prescriptions. (*Id.*) In the second motion, plaintiff seeks an order requiring

defendants to give him his medically-prescribed footwear shoes, ankle braces, orthodic, etc. etc.” (2nd Mot. for Prelim. Inj. (dkt. #9) p.1.)

While the subject of Carter’s motions concerns his ongoing complaints about foot pain, the claim of deliberate indifference here is limited to the alleged denial of medical treatment while he was held in segregation. Carter alleges that he was sentenced to 120 days of segregation, beginning August 30, 2013. Therefore, at least as alleged, Carter would have been released from segregation approximately seven months before he filed his first motion for preliminary injunction, and ten months before his second. As a result, Carter’s late-filed motions for preliminary injunction fall outside of the claims for which he has been granted leave to proceed in this case.

Even if the motions for preliminary injunction were properly advanced in this case, Carter’s motions and support would fall short of what is required to receive preliminary relief. To prevail on any 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). If he meets the first three requirements, then the court will balance the relative harms that could be caused to either party should the court act or not act as requested. *Id.*

The focus of Carter’s motions for preliminary injunction concern his prolonged concerns -- now covering several cases -- regarding a lack of proper footwear or treatment for his diabetes neuropathy. Carter again fails to make a showing that he is likely to succeed on the merits of such a deliberate indifference claim, particularly since the

standard for such a claim is very high. *See Snipes*, 95 F.3d at 590 (“Mere negligence or even gross negligence does not constitute deliberate indifference.”); *Oliver v. Deen*, 77 F.3d 156, 159 (7th Cir. 1996) (“Medical malpractice . . . is not a violation of the [Eighth] [A]mendment.”). Moreover, as explained above, Carter’s concerns occur outside of segregation (at least the disciplinary action which resulted in segregation which is the focus of the lawsuit). As such, Carter cannot demonstrate that he will suffer irreparable injury because of the likely *past* denial of footwear. As such, the court will deny both motions for preliminary injunction without prejudice.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Jackie Carter’s requests to proceed on (a) a First Amendment retaliation claim against defendant Ziegler, and (b) an Eighth Amendment deliberate indifference claim against defendants Greer, Anderson, Meisner, Morgan and Hautamaki are GRANTED. In all other respects Carter’s request is DENIED, and all other defendants are dismissed from this action.
- 2) Plaintiff’s motions for preliminary injunction (dkt. ##2, 9) are DENIED.
- 3) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than 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 defendants or to defendants’ attorney.
- 4) 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.
- 5) 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 40 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.

Entered this 18th day of June, 2015.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge