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

JAMMIE YERKS,

Plaintiff,

v.

SANDRA MCARDLE,
MAXIM PHYSICIAN RESOURCES,
JOLINDA WATERMAN, LORI ALSUM,
MR. GREER, MR. KALLAS, MS. DAANE,
JOHN AND JANE DOE(S), DR. GAVIN,
and WISCONSIN DEPT. OF CORRECTIONS,

Defendants.

OPINION AND ORDER

19-cv-595-wmc

Pro se plaintiff Jammie Yerks, a Wisconsin state prisoner, seeks leave to proceed under 42 U.S.C. § 1983 on Eighth Amendment and Wisconsin negligence claims arising out of defendants delaying pain medication for his chronic, painful shoulder injury. Yerks has also filed a motion for expedited screening and for assistance in recruiting counsel. (Dkt. #19.) For the reasons that follow, the court will grant Yerks leave to proceed on his claims against certain of the named defendants as required by 28 U.S.C. § 1915A. However, at this time, the court must deny without prejudice Yerks's request for assistance in recruiting counsel. Finally, by virtue of this order, his motion for expedited screening has been rendered moot.

ALLEGATIONS OF FACT[1]

A. Background

Yerks was incarcerated at the Wisconsin Secure Program Facility ("WSPF") during the time period relevant to this lawsuit and seeks leave to proceed against the Wisconsin Department of Corrections ("DOC"), as well as certain of its WSPF employees, including Health Services Unit ("HSU") Manager Jolinda Waterman, Dr. Gavin, John and Jane Doe "Medical Staff," and the John and Jane Doe "Class III Committee Members."[2] Yerks also seeks to proceed against Sandra McArdle, a nurse practitioner at WSPF, who operates as an independent contractor through her employer Maxim Physician Resources. Finally, Yerks names various Bureau of Health Services ("BHS") employees, including Health Services Nursing Coordinator Lori Alsum, Director Mr. Greer, Medical Director Mr. Kallas, and Director of Pharmacy Ms. Daane.

In September 2014, while Yerks was incarcerated at Dodge Correctional Institution ("DCI"), he injured his shoulder. A March 2016 MRI further showed that Yerks had a massive rotator cuff tear "involving the entire supraspinatus and infraspinatus tendons with medical retraction to glenohumeral joint level." (Dkt. #1 at 5.) As a result, an

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[1] For screening purposes, the court assumes the following facts based on the allegations in plaintiff's complaint (dkt. #1), including all reasonable inferences, and the exhibits submitted with it (dkt. ##5, 6, 7), which are deemed part of that pleading. *See* Fed. R. Civ. P. 10(c); *see also Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004) (explaining that documents attached to the complaint become part of the pleading, meaning that a court may consider those documents to determine whether plaintiff has stated a valid claim). At this stage, the court resolves all ambiguities and draws all reasonable inferences in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

[2] The WSPF Medical Staff and Class III Committee Members are not formally named in the caption of Yerks's complaint, except as generic "John and Jane Doe(s)," but they are listed by specific description in the "parties" section and an Eighth Amendment violation is alleged against them in the "legal claims" section.

orthopedic specialist advised Yerks that there were options available to improve his shoulder pain, although he would not regain normal shoulder function. Apparently in the meantime, a follow-up visit to the HSU at DCI on July 19, 2016, resulted in a doctor prescribing Yerks indomethacin and Tramadol for his shoulder pain. Yerks was later prescribed continued use of Tramadol on August 31, 2016, and that prescription was renewed continuously throughout 2017 and 2018.[3]

B. Treatment After WSPF Transfer

On October 7, 2018, after being transferred to WSPF, Yerks informed the HSU there that he was in severe pain after aggravating his shoulder injury. Yerks was seen in HSU the next day, October 8, 2018, and Nurse Practitioner Sandra McArdle renewed his prescription for Tramadol on November 19, 2018. Yerks also underwent another MRI on December 5, 2018, which "revealed the extent of the severity of the previous findings with regard to [his] shoulder, but in further detail." (Dkt. #1 at 8.)

On December 16, 2018, Yerks submitted a medication refill request for Tramadol, and defendant McArdle again completed a prescribers' order for the medication on December 19, 2018. (Dkt. #6-1 at 36-37.) Instead, however, Yerks allegedly stopped receiving Tramadol all together on that date. To resolve the issue, Yerks spoke directly with HSU staff, asked various guards to tell HSU about his need for pain medication, and he filed health service requests ("HSRs") and inmate complaints about this need as well. Accordingly, on December 19, Officer Bromeland allegedly gave Nurse West an empty

[3] Tramadol is an opioid analgesic that is "used to relieve moderate to moderately severe pain." *See* "Tramadol," Mayo Clinic, https://www.mayoclinic.org/drugs-supplements/tramadol-oral-route/description/drg-20068050 (last updated May 1, 2020).

blister packet and informed her that Yerks was out of Tramadol and experiencing severe shoulder pain, but was unable to obtain any medication for Yerks. Next, Sergeant Furrer allegedly called HSU on December 21, 2018, stating that Yerks was in agonizing pain and needed his pain medication.

When those requests went unanswered, Yerks himself raised the same concern during blood pressure checks at HSU on December 26 and December 28, 2018, but the attending nurse allegedly responded each time that Yerks should "put in a blue slip" or HSR, even after Yerks explained that he had already done so. Also on December 28, Officer Parish allegedly informed Nurse West that Yerks was still out of his pain medication, apparently once again without result. Then, on January 6, 2019, Yerks also told Sergeant Kussmaul that he had still not received his Tramadol. However, when the sergeant in turn informed Nurse Kemberling, she allegedly explained that Yerks's prescription had expired on December 19, and that Yerks was scheduled to see a health care provider soon. Similarly, when Yerks approached defendant McArdle after his medical file review on January 9, 2019, and asked her if there was anything that he could get for his pain, McArdle allegedly told Yerks once more that (1) there was nothing she could do and (2) he should submit "an HSU slip."

Although claiming to have already been submitting HSRs and inmate complaints, in his December 30, 2018, HSR, Yerks specifically complained of neck and shoulder pain and asked for his pain medication. Attached to Yerks's complaint are similar HSRs dated January 2, January 8 and January 20, 2019, as well as a January 2 patient letter from defendant McArdle acknowledging that Yerks had been out of Tramadol "since the 19th,"

and explaining that she had not ordered more because the nurses had not heard from Yerks, and now that Yerks had been off Tramadol for a "prolonged period of time," it may be difficult to again get permission for his ongoing use of the medication. (Dkt. #6-1 at 39-42.) Nevertheless, Yerks again submitted an inmate complaint on January 14, 2019, stating that he was in pain and needed his medication. On January 18, 2019, Health Services Nursing Coordinator Lori Alsum, a reviewing authority for inmate complaints involving medical issues, affirmed Yerks's first, December 30th complaint.[4]

Yerks then saw Dr. Gavin on January 17, 2019. Yerks alleges that she prescribed him the muscle relaxant cyclobenzaprine that day, but only as a stop-gap until she could review his MRI results and confirm the extent of Yerks's injury for herself.[5] Dr. Gavin also allegedly acknowledged in her January 17 progress notes that Yerks had timely requested his Tramadol refill back in December, but remarked that Yerks "may actually benefit more from [cyclobenzaprine]." (Dkt. #7-1 at 1.)

When Yerks did not receive that medication either, he filed an appeal from the affirmance of his inmate complaint on January 25, 2019. Yerks also sent Director of Pharmacy Daane and Medical Directors Greer and Kallas each a letter dated January 20, 2019, informing them that although he had written to HSU about the issue, he had not received any medication to relieve his chronic shoulder pain since December 2018. These

[4] Yerks's second, January 14, 2019, complaint was apparently rejected that same day, but only because the issue raised was duplicative.

[5] Cyclobenzaprine "helps relieve pain, stiffness, and discomfort caused by strains, sprains, or injuries to [the] muscles." *See* "Cyclobenzaprine," Mayo Clinic, https://www.mayoclinic.org/drugs-supplements/cyclobenzaprine-oral-route/description/drg-20063236 (last updated June 1, 2020).

three letters were apparently referred to Nursing Coordinator Alsum, who responded on February 4, 2019, explaining that Yerks's health care concerns had to be routed through the inmate complaint system and noting that Yerks had recently seen Dr. Gavin. (Dkt. #5-1 at 16.) Yerks wrote back on February 11, clarifying both that he *had* used the inmate complaint system to no avail and had not even received cyclobenzaprine newly prescribed by Dr. Gavin. (Dkt. #5-1 at 17.) However, defendant Alsum did not reply.

Yerks next filed HSRs on February 11 and 17, reiterating that he had not received any medication. (Dkt. #6-1 at 47-48.) In addition, Yerks informed Sergeant Furrer on February 8 that he had still not received any pain medications, yet, again, apparently nothing was done.

On February 18, Yerks saw defendant Dr. Gavin a second time, who by then had reviewed the MRI results. Gavin's progress notes from this visit appear to confirm Yerks's assertion that he never received the cyclobenzaprine prescribed at his previous appointment, and she re-ordered the drug. (Dkt. #7-1 at 2.) The doctor also ordered Tramadol in a new, higher dosage given Yerks's size, and the fact that he had by then been taking the drug for two years. When Yerks asked Dr. Gavin why it had taken so long for him to receive this pain medication, the doctor allegedly explained that the prison's "Class III Committee" had to review and approve prescriptions for drugs like Tramadol. However, Dr. Gavin did not give Yerks an estimate of how long that process should or would take.

Yerks's first inmate complaint appeal was apparently affirmed on February 27, 2019, but he does not allege whether or when he began receiving any pain medication. Still, he does alleges that "[b]etween December 19, 2018 and March 7, 2019 and beyond,"

he "continued to suffer while the defendants failed to treat and persisted with clearly ineffective (due to delay) orders for treatment of his serious medical need."[6] (Dkt. #1 at 14.) Moreover, Yerks maintains that he was never provided any alternative to Tramadol for pain management, nor was he informed of any risks or consequences of stopping it after his long-term use, although he does not specifically allege suffering any ill effects.

OPINION

Plaintiff seeks leave to proceed on Eighth Amendment deliberate indifference claims against defendants Waterman, McArdle, Gavin, Alsum, Greer, Kallas, Daane, and Class III John and Jane Doe Committee Members. Plaintiff also seeks to proceed on Wisconsin state law negligence or medical malpractice claims against defendants Waterman, McArdle (and her employer Maxim Physician Resources), Gavin, Alsum, Greer, Kallas, Daane, John and Jane Doe medical staff, and DOC. The court will address these claims separately, and then turn to plaintiff's renewed motion for assistance in the recruitment of counsel.

I. Eighth Amendment Deliberate Indifference Claims

To prevail on his Eighth Amendment claim, plaintiff must demonstrate a defendant's "deliberate indifference" to his "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *see also Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997) (same).

[6] In an HSR filed on February 27, 2019, Yerks claims that he is receiving cyclobenzaprine but still needs Tramadol. (Dkt. #6-1 at 50.) A prescribers' order dated March 13, 2019, and an excerpt of Yerks's medical administration record further indicates that Yerks *was* receiving Tramadol as of mid-March 2019. (Dkt. #7-1 at 10, 12, 15.) In his declaration in support of his complaint, however, Yerks asserts that he continued to experience extreme pain in his shoulder between December 19, 2018, and March 14, 2019. (Dkt. #2 at 1.)

"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). Proof of a defendant's "deliberate indifference" requires two elements: (1) awareness of plaintiff's need for medical treatment and (2) disregard of this risk by conscious failure to take reasonable measures. Finally, in a prison context, even a delay of a just a few days may constitute deliberate indifference to a known, serious medical condition in violation of the Eighth Amendment if the alleged delay caused the inmate's condition to worsen or unnecessarily prolonged his pain. *Estelle*, 429 U.S. at 104–05, (1976); *see* also *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010); *Petties v. Carter* 836 F.3d 722, 730-31 (7th Cir. 2016) (holding that inexplicable delay in medical treatment for a prisoner, which serves no penological interest, can support an inference of deliberate indifference for purposes of a prisoner's Eighth Amendment claim); *Grieveson v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008) (guards could be liable under the Eighth Amendment for delaying treatment of broken nose for a day and half); *Edwards v. Snyder*, 478 F.3d 827, 830–31 (7th Cir. 2007) (a plaintiff who painfully dislocated his finger and was needlessly denied treatment for two days stated a claim for deliberate indifference).

Thus, a plaintiff's Eighth Amendment claim for deliberate indifference raises three, threshold questions for screening purposes under § 1915A:

1. Did plaintiff allege an objective need for medical treatment?
2. Did plaintiff allege a defendant knew that he needed treatment?

3. Despite awareness of that need, did plaintiff allege that a defendant consciously failed to take reasonable measures to provide necessary treatment?

For the purposes of screening, plaintiff's allegations that he suffered from debilitating and excruciating pain in his shoulder support a reasonable inference that he had an objectively serious medical need. The remaining questions for screening, therefore, are whether plaintiff has alleged sufficient facts to find (or reasonably infer) that each of the individual defendants *knew* about his alleged pain *and* acted with indifference despite being in a position to take steps to relieve it.

A. HSU Manager Jolinda Waterman

Plaintiff alleges that defendant Waterman caused "undue delay in [plaintiff] receiving the prescribed pain management treatment" and failed to ensure that plaintiff timely received "at least a temporary supplement for pain management." (Dkt. #1 at 7, 17.) A prison official, however, cannot be held liable solely by virtue of his or her supervisory role. *Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000) (rejecting § 1983 actions against individuals merely for their supervisory role over others). While this is admittedly a close call, the court will allow plaintiff to proceed on a deliberate indifference claim against Waterman at this stage.

In particular, while plaintiff does not specifically allege when or how defendant Waterman learned of his ongoing, untreated pain, he does detail his repeated, varied efforts to seek relief from HSU over two months. Taken with certain exhibits submitted with the complaint, those allegations support a reasonable inference that Waterman was aware of and deliberately disregarded plaintiff's ongoing grievances. To begin, an inmate complaint

examiner reviewed plaintiff's first inmate complaint with Waterman, including allegations that Yerks was in pain and without his pain medication or any other relief. (Dkt. #5-1 at 1, 6.) While plaintiff's pleading is silent as to what, if anything, Waterman did in response to this information, it is reasonable to infer that Waterman would have received notification of the decision affirming plaintiff's complaint on January 18, 2019, including the examiner's and reviewer's notation that Yerks had recently seen a doctor who prescribed plaintiff cyclobenzaprine. (Dkt. #5-1 at 7-8.) Although this notation might suggest that Yerks's complaint was addressed and resolved, he subsequently noted in three follow-up letters, all dated January 20, as well as in a February 11 HSR, that he had notified HSU and Waterman without response *and* still had not received any pain medication. (Dkt. ##5-1 at 12-14, 6-1 at 47.)

Certainly, ambiguities remain regarding the extent of defendant Waterman's personal knowledge of and involvement in plaintiff's ongoing medical treatment, as well as how Waterman responded to plaintiff's inmate complaint and any follow-up requests for intervention. Indeed, fact-finding may reveal that Waterman reasonably deferred to the medical judgments of Dr. Gavin or Nurse Practitioner McArdle, or that Waterman did take reasonable measures in response to plaintiff's complaints to try to get him pain medication. At this stage, however, each of those factual issues is for another day, since the court must construe all ambiguities and draws all inferences in plaintiff's favor. Accordingly, because a reasonably jury could infer that Waterman knew plaintiff's pain medication issue remained unresolved even after seeing Dr. Gavin yet failed to act despite being in a position to do so as manager, plaintiff may proceed past the screening stage

against this defendant on his Eighth Amendment claim.

B. Nurse Practitioner Sandra McArdle

As for defendant McArdle, plaintiff also sufficiently alleges that she failed to respond adequately to his complaints about his pain and the ongoing delays in his receipt of pain medication. Specifically, N.P. McArdle knew plaintiff had been taking Tramadol and apparently could prescribe it, having twice renewed his prescription. Moreover, this defendant acknowledges in her January 2, 2019, patient letter to plaintiff -- presumably written in response to an inquiry from plaintiff about his medication -- that he "had been out since the 19th." (Dkt. #6-1 at 39.) There is no evidence at this point to conclude that McArdle took any action to remedy the situation; to the contrary, in that same letter, McArdle indicates only that it might prove difficult to obtain permission for ongoing use of Tramadol. (Dkt. #6-1 at 39.) Moreover, McArdle allegedly again failed to act on January 9, 2019, in response to plaintiff's in-person plea for pain relief, saying that she could do nothing and instructing him to file an HSR. Whether that was in fact true, these factual allegations are sufficient for the court to infer that McArdle knew plaintiff was in ongoing pain and suffering without medication, yet declined to take any reasonable measures to provide relief. Accordingly, plaintiff may proceed against defendant McArdle on this claim.

C. Dr. Gavin

While a closer call, plaintiff will also be allowed to proceed against Dr. Gavin on the facts currently alleged. While plaintiff generally alleges that Dr. Gavin failed to treat his

pain (or persisted in a course of ineffective treatment) and caused a delay in plaintiff receiving his prescribed pain medications, the court has a far harder time reasonably making such inferences on the specific facts alleged. At most, Dr. Gavin was made aware of plaintiff's shoulder injury at a January 17, 2019, consultation. Although the doctor apparently did not order Tramadol that day, she did prescribe cyclobenzaprine because, as plaintiff alleges, she had not yet been able to locate and review plaintiff's MRI results to confirm the severity of his injury. Moreover, at a follow-up consultation on February 18, 2019, and after reviewing the MRI, Dr. Gavin not only re-ordered cyclobenzaprine but also ordered a new, higher dosage of Tramadol, while explaining that the Class III Committee would have to approve the latter prescription. Given the month delay in getting Yerks's existing MRI results, the apparent undisputed history of Yerks's need for Tramadol as a pain reliever, and the unexplained further delay in his receiving the actual medication, these allegations permit an inference at the screening stage that Dr. Gavin was deliberately indifferent to plaintiff's urgent pain needs, or at least, failed to take reasonable steps ensure adequate treatment in a timely manner.

Certainly, prisoners are not entitled to receive the particular medical treatment of their choice, *Forbes*, 112 F.3d at 267, and this court may ultimately conclude that there is insufficient evidence that Dr. Gavin consciously disregarded plaintiff's pain and suffering by ordering him a different medication and allowing a month delay awaiting receipt of test results that apparently had justified stronger pain medication, and even then deferring to a committee for final approval, a reasonable jury could find that Dr. Gavin acted with deliberate indifference as to this delay in light of plaintiff's condition. The fact that

plaintiff allegedly did not even receive the cyclobenzaprine Dr. Gavin ordered only adds to questions about delay in diagnosing plaintiff's condition *and* whether she failed to take reasonable measures to respond to it once confirmed.

In fairness, there are also mitigating considerations in the facts as pleaded and the doctor's progress notes, including that once the doctor had reviewed plaintiff's MRI results and confirmed plaintiff had not yet been dispensed cyclobenzaprine, she re-ordered that medication as well as a new, higher dosage of Tramadol. (Dkt. ##1 at 13, 7-1 at 2.) Plaintiff does not allege that Dr. Gavin then delayed submitting her Tramadol request to the Class III Committee, only that she could not predict how long the approval process would take. Nor does plaintiff allege that he ever complained to Dr. Gavin that either pain medication was ineffective or that he was suffering any ill effects, other than in a HSR on February 27, 2019, noting that cyclobenzaprine was not relieving his pain and asking for Tramadol, and another HSR dated March 17, 2019, complaining that his pain was worse and requesting "something" for the pain until "his pain medication is available," of which Dr. Gavin may or may not have been aware. (Dkt. ##6-1 at 50, 7-1 at 6.) *See Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005) (deliberate indifference can include persisting in treatment "known to be ineffective"). However, the court is unable to conclude that plaintiff has completely pleaded himself out of court as to his claim against defendant Gavin based on these admittedly contrary facts. Accordingly, the court will allow plaintiff to proceed past screening against Dr. Gavin on the claim of deliberate indifference to his pain after her initial January 17, 2019, consultation based on repeated delays, acknowledging that her role as to each of those delays may prove to be reasonable or, at

least, outside her control.

D. Health Services Nursing Coordinator Lori Alsum

Plaintiff further alleges that defendant Lori Alsum -- the Health Services Nursing Coordinator *and* a reviewing authority for inmate complaints involving medical matters -- failed to take any measures to end plaintiff's pain and suffering after learning that he was still without medication despite having successfully raised the matter through the inmate complaint review process and being seen by a doctor. In support, plaintiff alleges that as Nurse Coordinator, Alsum was made aware that plaintiff had not been receiving *any* pain medication when she reviewed and affirmed his inmate complaint on January 18, 2019. At that point, however, Alsum also knew plaintiff had just seen a doctor and been prescribed cyclobenzaprine, so she could reasonably have concluded the issue had been resolved. Indeed, Alsum reached a similar conclusion in her response to plaintiff's January 20, 2019, letters.

Much more concerning, however, is the allegation that Alsum did nothing after plaintiff wrote her back on February 11, 2019, explaining that he remained in extreme pain, was still without any pain medication, including cyclobenzaprine nearly two months after its being prescribed, and had not gotten relief through the inmate complaint system or by writing to HSU. (Dkt. #5-1 at 17.) Certainly, this letter offered substantial reason to believe that plaintiff was not in fact receiving adequate medical care. Viewing these factual allegations in the light most favorable to plaintiff, they support an inference that Alsum, both in her role as Nurse Coordinator and a reviewing authority for medical grievances, ultimately turned a blind eye to plaintiff's ongoing pain remaining untreated.

Greeno, 414 F.3d at 656 (suggesting that even non-medical prison officials could be held liable if they ignore a prisoner's medical care complaints).

Again, additional fact-finding may well reveal that Alsum *did* reasonably respond to plaintiff's follow-up letter, was reasonably deferring to the medical judgments of HSU staff or the inmate grievance process or at most negligently mishandled his informal complaint. *See Jackson v. Ill. Medi–Car, Inc.*, 300 F.3d 760, 765 (7th Cir. 2002) ("Evidence that the official acted negligently is insufficient to prove deliberate indifference."). Given the generous pleading standard applicable at this stage, however, the court will also allow plaintiff to proceed on his deliberate indifference claim against defendant Alsum.

E. Mr. Greer, Mr. Kallas and Ms. Daane

Regarding these three BHS officials, plaintiff's *sole* allegation against them is that they "failed to notify the proper officials or staff" of his pain medication issue after receiving his informal complaint, thus prolonging his severe pain. (Dkt. #1 at 18.) As noted, plaintiff sent each of these defendants a letter after his inmate complaint had been affirmed, stating that he had gone without his pain medication for approximately a month and had repeatedly written to HSU and defendant Waterman to no avail. (Dkt. #5-1 at 12-14.) However, defendant Alsum's response to these letters indicates that all three putative defendants took the affirmative step of referring the letters to her for review. (Dkt. #5-1 at 16.) Since each of these defendants apparently *did* notify an official with the expertise to respond to plaintiff's concerns *and*, importantly, *did not* receive any follow-up requests for intervention (unlike Alsum herself) that would have put them on notice of plaintiff's continued plight, there is no basis to infer that Greer, Kallas, and Daane

consciously disregarded plaintiff's ongoing pain and suffering, even if plaintiff was dissatisfied with *Alsum's* follow up. Accordingly, these defendants will be dismissed from this lawsuit.

F. The John and Jane Doe Class III Committee Members

Plaintiff would also collectively hold accountable the John and Jane Doe Class III Committee Members for allegedly causing the delayed administration of his Tramadol and for failing to ensure that HSU staff provided him pain relief while his request for Tramadol was pending. (Dkt. #1 at 17-18.) However, a plaintiff may not rely on "[v]ague references to a group of 'defendants,' without specific allegations tying the individual defendants to the alleged unconstitutional conduct." *Anderson*, 538 F.3d at 778. Indeed, to demonstrate liability under § 1983, a plaintiff must allege sufficient facts showing that an individual personally caused or participated in 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). Here, neither the complaint nor the exhibits indicate when any of the committee members became aware of plaintiff's need for Tramadol, nor indicate how any one of them responded. If plaintiff has inadvertently omitted such allegations, he may move to amend. For now, however, he may not proceed because the court has no reasonable basis to infer that any of these individual committee members was deliberately indifferent to plaintiff's ongoing pain and suffering.

II. Wisconsin State Law Negligence Claims

Plaintiff also seeks to proceed on Wisconsin state law negligence or medical

malpractice claims based on various theories against defendants Waterman, John and Jane Doe medical staff, McArdle and her employer Maxim Physician Resources, Gavin, Alsum, Greer, Kallas, Daane, and the DOC. Jurisdiction is proper over these claims under 28 U.S.C. §1367(a) ("district 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 specific 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).

As an initial matter, the court will not allow plaintiff to proceed on a negligence claim against the DOC, which is an arm of the State of Wisconsin. The Wisconsin Supreme Court has held that the DOC is protected from suit under the doctrine of sovereign immunity, at least as to negligence types of claims.[7] *Mayhugh v. State*, 364 Wis. 2d 208, 224, 228-29, 867 N.W.2d 754, 764-65 (Wis. 2015). Nor can plaintiff proceed

[7] That plaintiff proposes to sue the DOC "pursuant to Chapter 655 Wis. Stat." does not alter this result. (Dkt. #1 at 21.) Wisconsin Statute Chapter 655 governs medical malpractice claims against "health care providers" as defined by that statute and their employees. *See Phelps v. Physicians Ins. Co. of Wisconsin*, 319 Wis. 2d 1, 41, 768 N.W.2d 615, 635 (Wis. 2009). Wisconsin's correctional institutions are specifically exempt under Chapter 655, as are providers employed by the state. *See* Wis. Stat. § 655.003. Plaintiff, however, may still pursue "common law medical malpractice claims against individuals not subject to Chapter 655." *Killian v. Nicholson*, No. 17-C-895, 2018 WL 1902587, at *3 (E.D. Wis. Apr. 20, 2018); *see also Carter v. Griggs*, No. 16-cv-252-wmc, 2018 WL 1902885 at *6 (W.D. Wis. Apr. 20, 2018).

on negligence claims at this point against an unspecified number of John and Jane Doe defendants based on vague, conclusory allegations that they were collectively responsible for unspecified actions "resulting in [plaintiff] not receiving his prescribed pain" medication or for failing to ensure plaintiff either timely received Tramadol or other pain relief. (Dkt. #1 at 20-21.) Without specific allegations tying any of these Doe defendants individually to the alleged unlawful conduct, the court cannot reasonably infer that they breached an assumed or owed duty of care; plus, those defendants lack reasonable notice of the factual bases for the negligence claims against them. *See Marshall v. Knight*, 445 F.3d 965, 968 (7th Cir. 2006) (noting that Federal Rule of Civil Procedure 8(a) requires that a complaint contain a "'short and plain statement of the claim' sufficient to notify the defendants of the allegations against them and enable them to file an answer."). In addition, because the Eighth Amendment claims against Greer, Kallas, and Daane are dismissed, the court also declines to exercise jurisdiction over state law negligence or medical malpractice claims against these defendants. *See, e.g.*, *Williams v. Rodriguez*, 509 F.3d 392, 404 (7th Cir. 2007) (affirming district court's dismissal of plaintiff's state law claims for lack of jurisdiction after parallel federal claims had been dismissed).

Consistent with the above, plaintiff *may* proceed on a negligence claim against defendants Waterman, McArdle, Gavin and Alsum, all of whom at least arguably owed plaintiff a duty of care arising from his status as an inmate at WSPF and their relationship with him as manager of the HSU, a nurse practitioner, a doctor and the Health Services Nurse Coordinator and reviewing authority, respectively. For reasons already discussed, it is also plausible that each of these defendants breached this duty by failing to undertake

reasonable measures to ensure plaintiff promptly received pain medication or alternative pain relief when confronted with his complaints of ongoing, untreated pain, whether proximately caused or prolonged by these breaches. Accordingly, the negligence claims against these four defendants will be allowed to proceed.

Plaintiff may also proceed on a negligence claim against defendant McArdle's employer Maxim Physician Resources. While it is not clear why McArdle's employer needs to be joined as an actual defendant, it is not uncommon for an employer to be named in negligence suits against employees for acts within the scope of employment. *See Shannon v. City of Milwaukee*, 94 Wis. 2d 364, 370, 289 N.W.2d 564, 568 (1980) ("Under the doctrine of *respondeat superior* an employer can be held vicariously liable for the negligent acts of his employees while they are acting within the scope of their employment."). The court will, therefore, grant plaintiff leave to proceed on a negligence claim against Maxim Physician Resources as well.

III. Motion for Assistance in Recruiting Counsel

Finally, the court will deny without prejudice plaintiff's renewed motion for assistance in recruiting counsel. Civil litigants have no constitutional or statutory right to the appointment of counsel. *E.g.*, *Ray v. Wexford Health Sources, Inc.,* 706 F.3d 864, 866-67 (7th Cir. 2013); *Luttrell v. Nickel,* 129 F.3d 933, 936 (7th Cir. 1997). However, the court in its discretion determine whether to help recruit counsel to assist an eligible plaintiff. *See* 28 U.S.C. § 1915(e)(1) ("The court may request an attorney to represent any person unable to afford counsel.")

Before deciding whether to help a plaintiff recruit counsel, a court must find that

the plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful. *Jackson v. County of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992). With his previous motion, plaintiff submitted copies of three letters from law firms declining to represent him. Accordingly, the central question remains "whether the difficulty of the case—factually and legally—exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself." *Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007). To that end, plaintiff claims that: (1) he has difficulty understanding "concepts involving civil litigation, medical malpractice, and the Federal Rules of Civil Procedure"; and (2) he relies on another prisoner to help him prepare his filings and exhibits. Plaintiff also asks the court to consider the reasons given in his first motion for the recruitment of counsel, which the court denied via a text-only order on March 6, 2020. (Dkt. #20.) In his previous motion, plaintiff claimed that he: has limited use of his right arm and hand; takes pain medications, which leave him feeling "mentally clouded," and struggles to understand the medical issues in his case, leaving him reliant on the assistance of other inmates. (Dkt. #9 at 3-6.)

The court denied plaintiff's initial motion because this matter was under advisement for screening with the court, meaning that plaintiff did not have any tasks before him. As for his renewed motion, only screening has been completed in this case, meaning plaintiff's near term obligations will only include deciding whether to amend his complaint, participating in the preliminary pretrial conference, and preparing and responding to discovery requests. Although plaintiff emphasizes that he lacks legal expertise and struggles with medical terminology, this is true of many, if not most, *pro se* litigants. Moreover,

plaintiff's filings indicate he *can* complete the immediate tasks at hand. To date, he has articulated the factual bases for his claims in a thorough manner and submitted an understandable, well-organized pleading. Plaintiff may have had help from others in preparing his filings, but he acknowledges that he was able to gather and compile the medical documents filed in support of his complaint and "log most of the relevant dates and times as they pertain to the matters at issue" in this case. (Dkt. #9 at 5.) Indeed, plaintiff has personal knowledge of the circumstances surrounding the lawsuit and is in the best position to explain not only what he did but what defendants did (or did not do) in response to his complaints of ongoing, severe pain. To the extent plaintiff is concerned about the discovery process, the court notes that after the preliminary pretrial conference takes place in this case, he will receive further guidance from the court regarding how to gather evidence to prove his claims.

Accordingly, the court is not persuaded that plaintiff needs an attorney to litigate his claims at this early stage and will again deny his motion without prejudice to its renewal at a later date, should future tasks prove to be beyond plaintiff's capabilities. Plaintiff should be aware, however, that the court receives many more requests for counsel than the small pool of available volunteers can accommodate. Only those cases presenting exceptional circumstances can be considered for court assistance in recruiting a volunteer. If plaintiff renews his motion, he should include specific details explaining the tasks he is unable to perform on his own, as well as any extraordinary circumstances that make this particular case unique.

ORDER

IT IS ORDERED that:

1) Plaintiff Jammie Yerks is GRANTED leave to proceed on Eighth Amendment deliberate indifference and Wisconsin state law negligence or medical malpractice claims against defendants Jolinda Waterman, Sandra McArdle, Dr. Gavin and Lori Alsum, and on a negligence or medical malpractice claim against defendant Maxim Physician Resources.

2) Plaintiff is DENIED leave to proceed against defendants Greer, Kallas, Daane, John or Jane Doe Class III Committee Members, John and Jane Doe medical staff, and the Wisconsin Department of Corrections, who are all DISMISSED from this lawsuit.

3) Plaintiff's motion for expedited screening (dkt. #19) is DENIED as moot.

4) Plaintiff's motion for assistance in recruiting counsel (dkt. #19) is DENIED without prejudice.

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 state 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 plaintiff's complaint if it accepts service for the defendants.

6) 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 the defendants' attorney.

7) 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.

8) If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court is unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 21st day of July, 2020.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge