FILED: May 13, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6880
(9:19-cv-02062-JD)

FRED FREEMAN

Plaintiff - Appellant

v.

DIRECTOR STIRLING; DEPUTY DIRECTOR MCCALL; WARDEN DAVIS; ASSOCIATE WARDEN ANDREA THOMPSON; OPERATION COORDINATOR JOHN OR JANE DOE; EMETTU LILLIAN, P.R.N.; WANDA SERMONS; MEDICAL DIRECTOR JOHN OR JANE DOE; SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Defendants - Appellees

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Rushing, and Senior Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

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FRED FREEMAN,

Plaintiff - Appellant,

v.

DIRECTOR STIRLING; DEPUTY DIRECTOR MCCALL; WARDEN DAVIS; ASSOCIATE WARDEN ANDREA THOMPSON; OPERATION COORDINATOR JOHN OR JANE DOE; EMETTU LILLIAN, P.R.N.; WANDA SERMONS; MEDICAL DIRECTOR JOHN OR JANE DOE; SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Beaufort. Joseph Dawson, III, District Judge. (9:19-cv-02062-JD)

Submitted: January 21, 2022 Decided: February 1, 2022

Before NIEMEYER and RUSHING, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Fred Freeman, Appellant Pro Se. Elloree Ann Ganes, HOOD LAW FIRM, Charleston, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Fred Freeman appeals the district court's orders accepting the recommendation of the magistrate judge, denying relief on Freeman's complaint asserting claims under 42 U.S.C. § 1983 and the Americans with Disabilities Act, and denying Freeman's Fed. R. Civ. P. 59(e) motion for reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's orders. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Fred Freeman, # 235180, Plaintiff, v. Director Stirling; Deputy Director McCall; Warden Davis; Associate Warden Andrea Thompson; Operation Coord. John or Jane Doe; Emettu Lilian, P.R.N.; Wanda Sermons; Medical Director John or Jane Doe; and South Carolina Department of Corrections, Defendants.	CIVIL ACTION NO. 9:19-2062-SAL-MHC **REPORT AND RECOMMENDATION**

This action was filed by Plaintiff, proceeding pro se, pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA). ECF No. 1. This matter is before the Court on the Motion to Dismiss or, in the alternative, for Summary Judgment (the Motion), filed by Defendants Director Stirling, Deputy Director McCall, Warden Davis, Associate Warden Andrew Thompson, Emettu Lilian, P.R.N., Wanda Sermons and the South Carolina Department of Corrections.[1] ECF No. 72.

Because Plaintiff is proceeding pro se, he was advised pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), that a failure to respond to the Motion could result in the Motion being granted and his case being dismissed. ECF No. 74. Plaintiff filed his Response in Opposition

[1] Plaintiff did not serve Defendants Operation Coord. Doe and Medical Directors Doe with his Complaint. ECF No. 17 at 1–2.

on July 28. ECF No. 87.

All pretrial proceedings in this case were referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Local Civil Rule 73.02(B)(2)(d)(DSC). Because the Motion to Dismiss is a dispositive motion, this Report and Recommendation is entered for review by the District Judge.

FACTS

Plaintiff is incarcerated in the South Carolina Department of Corrections (SCDC) and is currently housed at Lieber Correctional Institute (LCI). ECF No. 1 at 3. Plaintiff's claims pertain to his time at Kirkland Correctional Institution (KCI) during September and October of 2017. ECF No. 1 at 10–12. Plaintiff alleges he is disabled and was placed in a dorm located in an old courtyard unit, which required him to climb stairs and maneuver around uneven surfaces, causing him injury and pain and suffering. *Id.* at 10–11. He further asserts that Defendant Emettu Lilian saw him for a physical examination on September 19, 2017, at which time he was supposed to receive a walker. Plaintiff contends that the medical assessment should have occurred within three business days of his arrival, pursuant to SCDC policy. ECF No. 87 at 10. He further contends that he did not receive the walker until almost a month later, on October 16, 2017, after it was issued by Defendant Wanda Sermons and she called to move Plaintiff to a different dorm. ECF No. 1 at 12; ECF No. 87 at 10.

Plaintiff claims that Defendants were deliberately indifferent to his medical needs and operated KCI under unconstitutional policies. He asserts claims against all Defendants for violation of 42 U.S.C. § 1983 and the ADA.

LEGAL STANDARD

Defendants have moved to dismiss Plaintiff's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In the alternative, Defendants have moved for summary

judgment on all of the claims pursuant to Rule 56 of the Federal Rules of Civil Procedure.

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (quoting *Bell Alt. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[T]he facts alleged 'must be enough to raise a right to relief above the speculative level' and must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Robinson v. Am. Honda Motor Co.*, 551 F.3d 218, 222 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555, 570). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

When considering a Rule 12(b)(6) motion, the court is required to evaluate the complaint in its entirety, accept the factual allegations in the pleading as true, and draw all reasonable factual inferences in favor of the non-moving party. *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440, 448 (4th Cir. 2011). This Court is "not required to accept as true the legal conclusions set forth in a plaintiff's complaint." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). Indeed, the "presence . . . of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint cannot support [the legal conclusion]." *Young v. City of Mount Ranier*, 238 F.3d 567, 577 (4th Cir. 2001).

If matters outside the pleadings, such as affidavits, are considered by the court in connection with a Rule 12(b)(6) motion, then the motion to dismiss converts to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Wilson-Cook Med., Inc. v. Wilson*, 942 F.2d. 247, 251 (4th Cir. 1991). In considering a motion for summary judgment, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248. Factual disputes that are irrelevant or unnecessary will not be counted. *Id.*

Further, while the federal court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case, *see, e.g., Boag v. MacDougall*, 454 U.S. 364, 365 (1982), the requirement of liberal construction does not mean that the court can assume the existence of a genuine issue of material fact when none exists, *see United States v. Wilson*, 699 F.3d 789, 797 (4th Cir. 2012); *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990) ("The 'special judicial solicitude' with which a district court should view such pro se complaints does not transform the court into an advocate."). Ultimately, a motion for summary judgment shall be granted "if there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

LAW AND ANALYSIS

A. There is a Material Question of Fact as to Whether Plaintiff Exhausted Administrative Remedies.

Section 1997e(a) of the Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

Consequently, the PLRA's exhaustion requirement is mandatory and "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 524, 532 (2002). The exhaustion requirement also applies to claims under the ADA. *Thomas v. S.C. Dep't. of Corr.*, No. 0:14-CV-3244, 2014 WL 4700219, at *4 (D.S.C. Sept. 19, 2014).

Exhaustion is defined by each prison's grievance procedure, not the PLRA; an inmate must comply with his prison's grievance procedure to exhaust his administrative remedies. *Jones v. Bock*, 549 U.S. 199, 218 (2007). An inmate's failure to "properly take each step within the administrative process . . . bars, and does not just postpone, suit under § 1983." *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002); *see also White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997) (upholding dismissal of an inmate's complaint because the inmate failed to proceed beyond the first step in the administrative grievance process).

Exhaustion is an affirmative defense; an inmate is not required to plead exhaustion in his complaint. *Jones*, 549 U.S. at 216. However, to survive a motion for summary judgment asserting failure to exhaust, the inmate is required to produce evidence in response to the motion that refutes the claim that he failed to exhaust. *See Hill v. Haynes*, 380 F. App'x 268, 270 (4th Cir. 2010) (explaining, in the context of prison's motion arguing that inmate failed to exhaust the grievance process, that "to withstand a motion for summary judgment, the nonmoving party must produce competent evidence sufficient to reveal the existence of a genuine issue of material fact for trial" (citing Fed. R. Civ. P. 56(e)(2))).

SCDC provides inmates with a procedure through which they may file grievances on issues related to their confinement, including actions of staff members toward an inmate. The grievance process is set forth in SCDC Policies/Procedures, "Inmate Grievance System." ECF No. 72-3. Generally, an inmate must first submit a Request to Staff Member Form or Automated Request to Staff Member . *Id.* at 7–10, § 13. Thereafter, the inmate must file a Step 1 Grievance Form, setting forth the issue grieved. Inmates may then appeal an SCDC decision as to the Step 1 Grievance by filing a Step 2 Grievance Form, which is provided to the inmate when the Step 1 Grievance Form is served on him. *Id.*; ECF No. 72-4 at 3–4, ¶ 14. SCDC's response to a Step 2 Grievance is

considered the final agency decision on an issue. ECF No. 72-4 at 4, ¶ 15.

Here, Defendants cite to Grievance No. KCI-1249-17, providing a detailed argument as to why Plaintiff failed to exhaust his administrative remedies. ECF Nos. 72-1 at 7–8; 72-4 at 4, ¶¶ 16–19 and Exhibit B. However, as Plaintiff explains in his Response, the Grievances giving rise to his Complaint are Grievance Nos. LCI-0166-18 and LCI-0189-18. ECF Nos. 87 at 29–30; 87-1 at 1–4. With regard to these Grievances, Plaintiff admits that he did not file a Step 2 Grievance. However, he contends that he was denied the form required for doing so. ECF No. 1 at 4, ¶ 4; ECF No. 87 at 29.

Under the PLRA, inmates "must exhaust available remedies, but need not exhaust unavailable ones." *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016). There are three circumstances, which "will not often arise," where "an administrative remedy, although officially on the books, is not capable of use to obtain relief." *Id.* at 1859. Specifically, an administrative procedure is considered unavailable to an inmate when: (1) the procedure "operates as a dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) the procedure is "so opaque that it becomes, practically speaking, incapable of use"; and (3) "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 1589–60.

Plaintiff has set forth evidence, via his verified Complaint,[2] indicating his effort to exhaust his administrative remedies was thwarted by Defendants. Defendants dispute Plaintiff's contention, arguing that the forms needed were available to Plaintiff and that the forms even describe the process for appealing a Step 1 decision by completing a Step 2 Appeal Form. ECF

[2] In this Circuit, verified complaints by pro se prisoners are to be considered as affidavits and may, standing alone, defeat a motion for summary judgment. *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991).

No. 72-1 at 8. Notably, however, and as set forth in the Affidavit of the Chief of the Inmate Grievance Branch of the Office of General Counsel for the SCDC, the Step 2 Grievance Form is "provided to [the inmate] by the Inmate Grievance Coordinator (IGC) when the Step 1 Grievance Form is served on him." ECF No. 72-4 at 3–4, ¶ 14. Thus, the record evidence shows that the Step 2 Grievance form has to be provided to Plaintiff by the IGC and is not a form otherwise available to him.

In Plaintiff's Complaint and his Response, he alleges he was denied access to a Step 2 Grievance Form. Moreover, although Defendants' records indicate that Grievance Nos. LCI-0166-18 and LCI-0189-18 were resolved informally and that Plaintiff accepted the resolutions, ECF No. 72-6 at 22–23, the face of each Grievance contains a checked box indicating Plaintiff does "not accept the Warden's decision" and wishes to appeal. ECF No. 87-1 at 2 and 4. Given that Plaintiff's evidence is to be believed and all justifiable inferences must be drawn in favor of Plaintiff for purposes of Defendants' Motion, *see Liberty Lobby, Inc.*, 477 U.S. at 255, there is a genuine issue of material fact as to whether Plaintiff's efforts to pursue the requisite steps in the grievance process may have been thwarted by Defendants, such that Defendants' Motion on the basis of failure to exhaust administrative remedies should be denied.

Defendants also argue that, even if Plaintiff submitted a Step 2 Grievance, his administrative remedies would not have been exhausted because he failed to seek an informal resolution through a Request to Staff Member (RTSM). The RTSM is, however, preliminary to filing a Step 1 Grievance. As noted above, the grievance to which Defendants refer is not the correct grievance in this case. Nowhere in either of the two Grievances at issue in this case, Nos. LCI-0166-18 and LCI-0189-18LCI, is there any reference or indication that Plaintiff had not submitted the RTSM form.

Under the circumstances, viewing the evidence in the light most favorable to Plaintiff and drawing all justifiable inferences therefrom, there is a material question of fact as to whether Plaintiff exhausted his administrative remedies in this instance. Accordingly, the undersigned recommends denying Defendants' Motion for Summary Judgment on this basis.

B. Plaintiff Has Failed to State a Claim Upon which Relief May be Granted as to Defendants Stirling, McCall and Thompson.

Defendants Stirling, McCall, and Thompson all are in supervisory positions with SCDC. Defendant Stirling is the SCDC Director. ECF No. 1 at 3. Defendant Thompson was the Associate Warden of Operations during the time period in Plaintiff's Complaint. *Id.* at 4. Defendant McCall, now retired, was the Deputy Director of Operations for SCDC at the time of the allegations in Plaintiff's Complaint. *Id.* at 3–4. All of these roles are supervisory in nature, and these Defendants have no personal interaction with inmates going through the intake process, including medical assessments. ECF No. 72-1 at 11.

In § 1983 actions, "liability will only lie where it is affirmatively shown that the official charged acted personally in the deprivation of the plaintiff's rights." *Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir. 1977). Here, there are no allegations in the Complaint showing any of these three Defendants had any direct involvement in Plaintiff's dorm selection, medical assessment, and prescription and fulfillment of medical devices. Thus, Plaintiff fails to state a claim upon which relief may be granted, as there are no allegations against these Defendants regarding their direct conduct in Plaintiff's medical care and classification.

To the extent Plaintiff's Complaint attempts to plead liability against these Defendants as a result of their supervisory roles, the claim still must be dismissed because there is no vicarious liability under § 1983. As a general rule, the doctrine of vicarious liability or respondeat superior is not available to a § 1983 plaintiff as a means to create liability of a supervisor for the acts of his

or her subordinate. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691–94 (1978). There is a limited exception for supervisory liability under § 1983 where the facts establish the following:

> (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices"; and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994) (citations omitted). In this instance, there are no allegations in the Complaint or evidence in the record that would suggest that this limited exception is applicable.

Plaintiff also alleges that these three Defendants did not follow SCDC policies or procedures. ECF No. 1 at 11, 14 ¶ E2. However, these allegations, standing alone, do not amount to a constitutional violation. *See Riccio v. Cnty of Fairfax, Va.*, 907 F.2d 1459, 1469 (4th Cir. 1990) (if state law grants more procedural rights than the Constitution requires, a state's failure to abide by the law is not a federal due process issue); *Keeler v. Pea*, 782 F. Supp. 42, 44 (D.S.C. 1992) (violations of prison policies that fail to reach the level of a constitutional violation are not actionable under § 1983). Thus, Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief may be granted as to Defendants Stirling, McCall, and Thompson.

C. Plaintiff Has Not Established That Any Defendant Was Deliberately Indifferent to His Serious Medical Needs.

It is well established that deliberate indifference by prison personnel to an inmate's serious illness or injury is actionable under 42 U.S.C. § 1983 as constituting cruel and unusual punishment contravening the Eighth Amendment.[3] *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976). To prove

[3] Defendants contend that Plaintiff's need for a walker is likely not enough to qualify as a serious medical need, as it is stated in his medical records that Plaintiff only needs it for long-distance walking, and not all movements. ECF Nos. 72-1 at 14; 103. The Court makes no finding as to

a deliberate indifference claim under the Eighth Amendment, a plaintiff must show (1) that, objectively, the deprivation of a basic human need was "sufficiently serious" and (2) that, subjectively, the defendant acted with a "sufficiently culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

The subjective component can be demonstrated by showing that the defendant acted with deliberate indifference. Deliberate indifference requires a showing that the defendants actually knew of and ignored a plaintiff's serious need for medical care. *See Young v. City of Mount Rainer*, 238 F.3d 567, 575–76 (4th Cir. 2001). This requires more than a showing of medical negligence. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). The mere fact that a prisoner may believe he had a more serious injury or that he required better treatment does not establish a constitutional violation. *See, e.g., King v. United States*, 536 F. App'x 358, 362–63 (4th Cir. 2013). The Constitution requires only that the prisoner receive adequate medical care; it does not guarantee the prisoner treatment of his choice. *Id.* (citing *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013); *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004)).

Plaintiff generally alleges that, upon intake at Kirkland Correctional Institution in early September 2017, he was placed in a dorm that required him to maneuver stairs and uneven surfaces, which caused injuries to what Plaintiff describes as his surgical portable femur, hip-left, and lumbar-right. *See* ECF No. 1 at 10–12. According to Plaintiff, Defendant Lilian saw him for a physical exam on September 19, 2017, and he was supposed to receive a walker that day. However, he did not obtain a walker until October 16, 2017, during a sick call visit with Defendant Sermons,

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whether the need for a walker was a "serious medical need." For purposes of this Motion, the Court assumes, as Plaintiff has alleged, that he is disabled and needed a walker. ECF No. 1 at 10–12.

wherein she also had Plaintiff moved to a different dorm. ECF No. 1 at 12; ECF No. 87 at 10. In general, the gravamen of Plaintiff's claim is over the delay in getting a medical assessment (which he contends should have occurred within three days of arrival, per SCDC policy), the approximately one month delay in getting a walker, and the approximately 46-day delay in being moved to a different dorm. ECF No. 87 at 5–12, 16, 24–25.

Plaintiff was evaluated and his concerns acknowledged by Defendants Lilian and Sermons. ECF No. 72-7. While Plaintiff complains about the delay in fulfilling the orders for a walker and moving his dorm placement, there is no allegation or evidence that any Defendant intentionally delayed in getting Plaintiff a walker or moving him to a different dorm room. Delay alone does not automatically trigger deliberate indifference. *Teran v. Cruz*, No. 5:14-CV-4728-RMG, 2016 WL 155051, at *2 (D.S.C. Jan. 13, 2016) (citing *King*, 536 F. App'x at 362–63). A prisoner's constitutional "right to treatment is limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable." *Bowring v. Godwin*, 551 F.2d 44, 47–48 (4th Cir. 1977).

As the evidence shows, Plaintiff received medical attention and treatment. ECF No. 103-1. Defendant Lilian listened to Plaintiff's medical concerns on September 19, 2017, physically examined him and properly ordered equipment and treatment based on this examination. ECF Nos. 72-7; 103-1 at 10. As to Defendant Sermons, she was, in fact, the individual who issued Plaintiff a walker, on the day she saw him for medical treatment, and had him moved to a different dorm. ECF Nos. 72-7; 103-1 at 7–8. Neither Defendant was deliberately indifferent to any serious medical need of Plaintiff, as they treated and attended to his needs.[4]

[4] There are no factual allegations against the other Defendants supporting an allegation of deliberate indifference against them.

Plaintiff also alleges that after he received the walker, no further medical treatment was given to him, though he does not indicate what medical treatment may have been needed after the walker was provided and his dorm changed. ECF No. 1 at 12, ¶ V. According to his medical records, Plaintiff was to be seen again on October 19, 2017, but he did not show. ECF No. 103. Plaintiff denies having or knowing about any medical appointment on October 19, 2017. ECF No. 87 at 27. Regardless, however, the remaining medical records show that Plaintiff was seen and treated by SCDC Health Services on numerous occasions in October 2017 and beyond. Ultimately, the "type and amount of medical care is left to the discretion of prison officials as long as medical care is provided." *Lee v. Loranth*, No. 4:12-CV-02547-DCN, 2013 WL 2635843, at *7 (D.S.C. June 12, 2013), *aff'd*, 544 F. App'x 220 (4th Cir. 2013). Here, the evidence shows that Plaintiff received treatment, specifically a walker and new dorm, and there is no evidence that Plaintiff was denied further treatment for any serious medical need after that point.

Viewing the evidence in the light most favorable to Plaintiff, he has not shown that Defendants were deliberately indifferent to his serious medical needs. To the contrary, Plaintiff received care for his complaints. Although Plaintiff may have desired an earlier initial assessment, quicker provision of a walker, and a quicker move to a different dorm, his desires alone do not transform a non-emergency that is actually addressed into deliberate indifference in violation of the Eight Amendment's proscription against cruel and unusual punishment. Overall, the actions taken by these Defendants were in furtherance of addressing Plaintiff's medical concerns, and there was no deliberate indifference to a known serious medical need.

D. Plaintiff Has Failed to Establish a Viable ADA Claim Against Any Defendant.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services,

programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Under Title II of the ADA, state correctional institutions are considered public entities. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998); *see* 42 U.S.C. § 12131(1) (defining a "public entity" as any state or local government, instrumentality thereof, or the National Railroad Passenger Corporation and any commuter authority). Accordingly, the Court addresses Plaintiff's ADA claim under the provisions of Title II.

Individuals are not liable under Title II of the ADA for discrimination claims. *See Blackburn v. South Carolina*, No. CA 006-2011-PMD-BM, 2009 WL 632542, at *20 (D.S.C. Mar. 10, 2009), *aff'd*, 404 F. App'x 810 (4th Cir. 2010) (citing *Garcia v. SUNY Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 107 (2d Cir. 2001)); *Pathways Psychosocial v. Town of Leonardtown*, 133 F. Supp. 2d 772, 780 (D. Md. 2001) (citing *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n.8 (8th Cir. 1999). Accordingly, Plaintiff's claim for alleged disability discrimination may be brought against individual Defendants only in their official capacities, and any disability discrimination claim brought against any individual Defendant in his or her individual capacity must be dismissed. *See Blackburn*, 2009 WL 632542, at *20.

"[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Id.* (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)). Therefore, just as actions against a state or state agencies generally are barred by the doctrine of sovereign immunity, any action against individual Defendants in their official capacities are also barred by sovereign immunity, unless Congress has explicitly created an exception. *See id.*

The ADA does, however, create a limited exception to state sovereign immunity. A disabled inmate may sue a state institution for ADA violations that also violate the Eighth

Amendment. *See id.* (citing *United States v. Georgia,* 546 U.S. 151, 159 (2006)); *see also Spencer v. Earley*, 278 F. App'x 254, 257–59 (4th Cir. 2008). As noted by the court in *Blackburn*, it is not sufficient for Plaintiff to show that Defendants did not comply with the requirements of the ADA. Rather, to withstand sovereign immunity, Plaintiff must show that the actions of Defendants "so deprived him of the essential needs . . . that it violated his Eighth Amendment rights as applied to the states under the Fourteenth Amendment." *Blackburn*, 2009 WL 632542, at * 21.

Here, Plaintiff's claims that his ADA rights were violated are identical to his claims that Defendants were deliberately indifferent to his serious medical needs. Because this Court has already determined that Plaintiff has not established an issue of material fact on his Eighth Amendment deliberate indifference claims, the Court similarly concludes that his ADA claims regarding his medical treatment fail as a matter of law.

E. The Doctrine of Qualified Immunity Bars Plaintiff's Claims Against Defendants.

Defendants also argue that they are immune from Plaintiff's claims. The doctrine of qualified immunity offers some protection to a government employee being sued in his or her individual capacity, as is the case with Defendants here. The Supreme Court has held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Renn by and Through Renn v. Garrison*, 100 F.3d 344, 349 (4th Cir. 1996).

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether a plaintiff's allegations, if true, establish a clear constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736 (2002). If a violation of a constitutional right in fact exists, qualified immunity nonetheless shields a prison official from liability, unless the violation was of a "clearly established

right of which a reasonable person would have known." *Wilson v. Kittoe*, 337 F.3d 392, 397 (4th Cir. 2003) (internal quotations omitted).

As set forth in detail above, Plaintiff has failed to establish an issue of material fact on any of his allegations of constitutional violations. Because none of Defendants violated Plaintiff's constitutional rights, they are also shielded from liability by qualified immunity.

F. To the Extent Plaintiff Asserts a Claim for Medical Malpractice, He Has Failed to Comply with Pre-Suit Statutory Filing.

To the extent Plaintiff is attempting to assert a cause of action for medical malpractice,[5] Plaintiff's Complaint fails as a matter of law. In South Carolina, a civil action alleging medical malpractice cannot commence without first satisfying certain statutory requirements. *See* S.C. Code Ann. § 15-36-100 and § 15-79-110, *et. seq.*; *Millmine v. Harris*, No. CA 3:10-1595-CMC, 2011 WL 317643, at *1–2 (D.S.C. Jan. 31, 2011); *Rotureau v. Chaplin*, No. CIV.2:09-CV-1388-DCN, 2009 WL 5195968, at *6 (D.S.C. Dec. 21, 2009). Pursuant to those provisions, Plaintiff must file a "Notice of Intent to File Suit" accompanied by an expert affidavit supporting Plaintiff's allegations before he can bring a medical malpractice complaint. S.C. Code Ann. § 15-79-125.

Here, Plaintiff has not filed any expert affidavit or Notice of Intent to File Suit. Accordingly, to the extent Plaintiff alleges a medical malpractice claim against these Defendants, it must be dismissed.

G. Defendants are Immune from Liability under the South Carolina Tort Claims Act.

To the extent Plaintiff intends some other form of negligence claim, it, too, should be dismissed. SCDC is an agency of the State of South Carolina. As employees of a state agency, Defendants are protected by the South Carolina Tort Claims Act (the Act). S.C. Code Ann. § 15-

[5] Plaintiff's Complaint includes a claim for negligence pertaining to the medical care he received. ECF No. 1 at 7, ¶ B; *id.* at 13, ¶ C.

78-30(a), (c), (d), and (h) (defining "agency," "employee," "governmental entity," and "political subdivision" for purposes of the South Carolina Tort Claims Act).

The remedy provided by the Act is the exclusive civil remedy available for any tort committed by a governmental entity or its employees except where the employee's conduct was not within the scope of her official duties or constituted actual fraud, actual malice, intent to harm or a crime of moral turpitude. S.C. Code Ann. § 15-78-20(b); *id.* § 15-78-70(b). When a plaintiff alleges a state governmental employee has committed a tort while acting within the scope of her official duty, S.C. Code Ann. § 15-78-70(c) provides that the plaintiff can name as a defendant only the governmental entity for which the employee was acting. Furthermore, § 15-78-60 provides in relevant part:

> The governmental entity is not liable for a loss resulting from: . . . (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee; . . . (25) responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity except when the responsibility or duty is exercised in a grossly negligent manner.

S.C. Code Ann. §§ 15-78-60(5), (25).

Here, Plaintiff has not identified, and there is no evidence establishing, any action on the part of Defendants that would tend to show that their conduct falls outside the provisions of the Act. *See* S.C. Code Ann. § 15-78-70(b). Moreover, the evidence before the Court shows that Defendants acted within their discretion and judgment. *See* S.C. Code Ann. § 15-78-60(5). Plaintiff has not alleged, nor is there any evidence establishing, that any Defendant was grossly negligent. *See* S.C. Code Ann. § 15-78-60(25). Under the circumstances, SCDC is not liable to Plaintiff, pursuant to the terms of the Act.[6]

[6] In light of the foregoing analysis and grant of summary judgment, the undersigned declines to

RECOMMENDATION

For the reasons set forth in detail above, the undersigned recommends that Defendant's Motion for Summary Judgment (ECF No. 72) be **GRANTED.**

IT IS SO RECOMMENDED.

The parties are also referred to the Notice Page attached hereto.

Molly H. Cherry
United States Magistrate Judge

October 15, 2020
Charleston, South Carolina

address Defendants' argument for dismissal of the case on the grounds of frivolousness.