IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Benjamin Hendricks,	:	
Plaintiff,	:	
v.	:	Case No. 2:11-cv-40
Ohio Department of Rehabilitation and Correction, et al.,	:	JUDGE MICHAEL H. WATSON Magistrate Judge Kemp
Defendants.	:	

ORDER

This case is before the Court to consider a number of pending motions. All of these motions have been filed by plaintiff, Benjamin Hendricks, with the exception of a motion for summary judgment filed by Defendant Michelle Miller (#12). Mr. Hendricks has filed a declaration in support of a request for a temporary restraining order and preliminary injunction (#24), a "motion for a reduced number of copies" (#27), a "motion for leave to file an amended complaint with supplemental pleadings and parties" (#28), a motion to compel discovery (#30), and a motion for sanctions (#37). The Court will dispose of these motions as set forth below.

I. Background

Mr. Hendricks filed his original complaint asserting claims of deliberate indifference by various ODRC officials and staff at the Belmont Correctional Institution to his serious medical needs under 42 U.S.C. §1983. The original complaint, construed broadly, alleged failure to follow specialists' orders relating to his gastrointestinal conditions and corresponding dietary restrictions. He also asserted state law claims of malpractice, negligence, and the intentional infliction of emotional distress.

He requested declaratory relief finding that the defendants' actions are illegal and violate his constitutional rights. Additionally, Mr. Hendricks requested preliminary and permanent injunctive relief relating to the implementation of policies and procedures addressed to the nutritional needs of inmates with inflammatory bowel disease. He named eight defendants including the Ohio Department of Rehabilitation and Correction, the Belmont Correctional Institution, Dr. John DesMarais, Mona Parks, Theresa Bell, Michelle Miller, Susan Nesbitt, and Kelly Riehle. He also included 25 Jane or John Doe defendants.

On March 23, 2011, defendants Belmont Correctional Institution and the Ohio Department of Rehabilitation and Corrections filed a motion to dismiss asserting Eleventh Amendment immunity. On March 24, 2011, defendants Michelle Miller and Kelly Riehle filed motion for summary judgment asserting that, with respect to his §1983 claim, Mr. Hendricks had failed to exhaust his remedies and further asserting that his state law and declaratory judgment claims were without merit. On April 18, 2011, Mr. Hendricks filed a response to these motions in which he stated that he was dismissing his claims against ODRC, the Belmont Correctional Institution, and Kelly Riehle without prejudice. In anticipation of Mr. Hendrick's filing, the defendants filed a signed notice of stipulation of dismissal indicating their agreement with Mr. Hendricks' voluntary dismissal of these defendants. As a result, the ODRC, Belmont Correctional Institution, and Kelly Riehle have been dismissed as defendants in this case.

On June 6, 2011, Mr. Hendricks filed a motion for leave to file an amended complaint. In his proposed amended complaint, he names as defendants John DesMarais, Mona Parks, Theresa Bell, Michelle Miller, and Susan Nesbitt. He proposes to add as defendants Tobbi Valentine, Martin Akasubo, Nneka Ezeneke, Robert

Loeloff, Mary Lawrence and 50 John or Jane Does. Through this proposed amended complaint, he seeks to include further allegations relating to his gastrointestinal issues demonstrating deliberate indifference to his serious medical needs in violation of the Eighth Amendment. Several of the proposed allegations relate to events occurring outside of the Belmont Correctional Institution and several of the proposed defendants are not employed at the Belmont Correctional Institution. Further, Mr. Hendricks seeks to add a claim against Dr. DesMarais relating to a change in his seizure medication for an epilepsy condition. He also seeks to assert two First Amendment claims - a claim of retaliation against Ms. Miller arising from the alleged destruction of his legal materials relating to his medical conditions and a denial of access to the courts claim against Ms. Lawrence.

Mr. Hendricks also proposes to include state law claims of negligence, malpractice, and assault in addition to the intentional infliction of emotional distress which he now seeks to assert against Mr. Akasubo. The proposed amended complaint seeks declaratory relief as well as money damages. Further, the proposed amended complaint no longer asserts an Eighth Amendment claim against Ms. Miller, making her motion for summary judgment moot.

Mr. Hendricks also has made several other filings. With respect to his claims for injunctive relief asserted in his original complaint, Mr. Hendricks filed a declaration in support of his request for a temporary restraining order and a preliminary injunction. Defendants have construed this declaration as an independent motion and have opposed it. Additionally, Mr. Hendricks has filed a motion for a reduced number of copies through which he seeks to be excused from serving a copy of each filing on each defendant or an order from

the Court directing the defendants to provide him with “free copies of all papers.” The defendants have responded to this motion stating that they have no objection to Mr. Hendricks’ request. Further, Mr. Hendricks has filed a motion to compel relating to discovery requests seeking access to his institutional medical file and his medical files from East Ohio Regional Hospital and The Ohio State University Medical Center. The defendants have responded stating that they will make Mr. Hendricks’ institutional medical file available to him thereby making the motion to compel moot. Finally, in his reply in support of his motion for leave to amend, Mr. Hendricks requests an award of sanctions against the defendants contending that the defendants have misrepresented the reasons for his incarceration have provided false information in their discovery requests, and have interfered with the discovery process. As a result, he seeks the appointment of a special master to oversee discovery in this case. The Court will address each of Mr. Hendricks’ motions in turn.

II. Motion for Leave to File an Amended Complaint

The Court will turn first to the issues raised by Mr. Hendrick’s motion for leave to file an amended complaint. Fed.R.Civ.P. 15(a)(2) states that when a party is required to seek leave of court in order to file an amended pleading, “[t]he court should freely give leave when justice so requires." The United States Court of Appeals for the Sixth Circuit has spoken extensively on this standard, relying upon the decisions of the United States Supreme Court in Foman v. Davis, 371 U.S. 178 (1962) and Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971), decisions which give substantial meaning to the "when justice so requires." In Foman, the Court indicated that the rule is to be interpreted liberally, and that in the absence of undue delay, bad faith, or dilatory motive on the part of the

party proposing an amendment, leave should be granted. In Zenith Radio Corp., the Court indicated that mere delay, of itself, is not a reason to deny leave to amend, but delay coupled with demonstrable prejudice either to the interests of the opposing party or of the Court can justify such denial.

Expanding upon these decisions, the Court of Appeals has noted that:

> [i]n determining what constitutes prejudice, the court considers whether the assertion of the new claim or defense would: require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction.

Phelps v. McClellan, 30 F.3d 658, 662-63 (6th Cir. 1994) (citing Tokio Marine & Fire Insurance Co. v. Employers Insurance of Wausau, 786 F.2d 101, 103 (2d Cir. 1986)). See also Moore v. City of Paducah, 790 F.2d 557 (6th Cir. 1986); Tefft v. Seward, 689 F.2d 637 (6th Cir. 1982). Stated differently, deciding if any prejudice to the opposing party is "undue" requires the Court to focus on, among other things, whether an amendment at any stage of the litigation would make the case unduly complex and confusing, see Duchon v. Cajon Co., 791 F.2d 43 (6th Cir. 1986) (per curiam), and to ask if the defending party would have conducted the defense in a substantially different manner had the amendment been tendered previously. General Electric Co. v. Sargent and Lundy, 916 F.2d 1119, 1130 (6th Cir. 1990); see also Davis v. Therm-O-Disc, Inc., 791 F. Supp. 693 (N.D. Ohio 1992).

The Court of Appeals has also identified a number of additional factors which the District Court must take into account in determining whether to grant a motion for leave to file an amended pleading. They include whether there has been a repeated failure to cure deficiencies in the pleading, and

whether the amendment itself would be an exercise in futility. Robinson v. Michigan Consolidated Gas Co., 918 F.2d 579 (6th Cir.1990); Head v. Jellico Housing Authority, 870 F.2d 1117 (6th Cir.1989). The Court may also consider whether the matters contained in the amended complaint could have been advanced previously so that the disposition of the case would not have been disrupted by a later, untimely amendment. Id. It is with these standards in mind that the instant motion to amend will be decided.

Defendants Miller, Nesbitt, DesMarais, Parks and Bell oppose the motion for leave to amend on grounds of futility and prejudice. First, with respect to futility, they argue that "respondeat superior does not apply to 1983 claims. ... And negligence, medical malpractice, and intentional infliction of emotional distress are not actionable here." See Response (#34), p. 2 (citations omitted). Additionally, they contend that Mr. Hendricks "has not given the defendants reasonable guidance on whether his proposed amended claims have been properly exhausted.... Therefore, because the defendants cannot tell whether the proposed amended claims would be futile, [Mr.] Hendricks should not be allowed to file an amended complaint without evidence (i.e., claim numbers) indicating that the proposed amended claims have been exhaustively grieved." Id. at p. 3.

In reply, Mr. Hendricks contends that he is not asserting a *respondeat superior* claim and that the state law claims are proper here because this Court can exercise supplemental jurisdiction over them. Additionally, Mr. Hendricks asserts that, under Jones v. Bock, 549 U.S. 199 (2007), he is not required to "specially plead or demonstrate exhaustion." Despite this argument, Mr. Hendricks provides a list of grievance numbers relating to the claims in his proposed amended complaint.

Defendants' first argument with respect to futility is that supervisory personnel cannot be liable under the doctrine of *respondeat superior*. There is no question that allegations of direct involvement in constitutional deprivations, rather than attempts to impose liability by virtue of the doctrine of *respondeat superior*, are necessary in order to hold an individual defendant liable under §1983. Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Although there are other legal claims that can properly be asserted against a supervisor simply because someone under his or her supervision may have committed a legal wrong, liability for constitutional deprivations under 42 U.S.C. §1983 cannot rest on such a claim. Consequently, unless the plaintiff's complaint affirmatively pleads the personal involvement of a defendant in the allegedly unconstitutional action about which the plaintiff is complaining, the complaint fails to state a claim against that defendant and dismissal is warranted. See also Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir. 1984). This rule holds true even if the supervisor has actual knowledge of the constitutional violation as long as the supervisor did not actually participate in or encourage the wrongful behavior. See Shehee v. Luttrell, 199 F.3d 295, 300 (6th Cir. 1999) (prison officials cannot be held liable under §1983 for failing to respond to grievances which alert them of unconstitutional actions); see also Stewart v. Taft, 235 F.Supp.2d 763, 767 (N.D. Ohio 2002) ("supervisory liability under §1983 cannot attach where the allegation of liability is based upon a mere failure to act").

Although the defendants did not identify with specificity any proposed defendants on which Mr. Hendricks seeks to impose liability under the doctrine of *respondeat superior*, the Court's review of the proposed amended complaint indicates that Mr. Hendricks has not alleged any active participation in alleged

constitutional violations by Mr. Croft or Ms. Bell. Instead, these defendants appear to be named solely as a result of their supervisory positions. According to the proposed amended complaint, Mr. Croft is the Chief Inspector for the ODRC and Ms. Bell is the Dietary Operations Manager for the ODRC.

Aside from his various factual allegations relating only to Mr. Croft's role in the grievance process, with respect to a cause of action against Mr. Croft, Mr. Hendricks states

> ¶87. The tacit authorization demonstrated by defendant Croft to defendants Miller and Lawrence actions violated plaintiff's rights under the First Amendment to the U.S. Constitution.

With respect to Ms. Bell, Mr. Hendricks briefly mentions her in the body of his proposed amended complaint at paragraphs 80-81 in connection with the return of his grievance appeals. Because Mr. Hendricks has failed to allege that Mr. Croft or Ms. Bell actively engaged in unconstitutional behavior, the proposed amended complaint fails to state a claim against them. Consequently, the motion for leave to amend will be denied to the extent that it seeks to name Mr. Croft and Ms. Bell as defendants.

Additionally, the defendants contend that the state law claims Mr. Hendricks proposes to assert are not actionable here. The Court agrees. To the extent that Mr. Hendricks seeks to assert state law claims against certain defendants, under O.R.C. §9.86 no such claims may be maintained against state officials unless and until it has been determined that those officials acted manifestly outside the scope of their employment. That determination cannot be made by a federal court, but is reserved to the Ohio Court of Claims under O.R.C. §2743.02(F). Griffin v. Kyle, Case No. 2:10-cv-664, 2011 WL 2885007 (S.D. Ohio July 15, 2011). As this Court explained in Nuovo v. The Ohio State University, 726 F.Supp. 2d 829, 848 (S.D. Ohio 2010)(Frost, J.),

> as another judicial officer has recognized, "[t]he Sixth Circuit has read §§ 9.86 and 2743.02(F) together to hold that a state employee is immune from state law claims until the Court of Claims has held that § 9.86 immunity is unavailable." Prior v. Mukasey, No. 3:08CV994, 2008 WL 5076821, at *2 (N.D.Ohio Nov. 21, 2008). This means that, "'[u]ntil the Ohio Court of Claims determines that [defendant] are not immune, there is no cause of action cognizable under Ohio law over which the district court can assert jurisdiction.' " Id. (quoting Haynes v. Marshall, 887 F.2d 700, 705 (6th Cir.1989)).

Consequently, the motion for leave to amend will be denied to the extent that it seeks to assert state law claims of assault, malpractice, negligence, and the intentional infliction of emotional distress.

Defendants also contend that Mr. Hendricks has not provided sufficient information to demonstrate exhaustion. Under 42 U.S.C. §1997e, as amended by the Prison Litigation Reform Act (PLRA), a prisoner confined in any jail, prison or other correctional facility may not bring an action challenging "prison conditions" under 42 U.S.C. §1983 or any other federal law "until such administrative remedies as are available are exhausted." 42 U .S.C. § 1997e(a). It is undisputed that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court. Jones v. Bock, 549 U.S. 199, 204-205 (2007) citing Porter v. Nussle, 534 U.S. 516, 524 (2002). However, as Mr. Hendricks points out, the Supreme Court, in Jones, concluded that failure to exhaust is an affirmative defense under the PLRA, and inmates are not required specially to plead or demonstrate exhaustion in their complaints. Jones, 549 U.S. at 216. In light of Mr. Hendricks' argument, the motion for leave to amend will not be denied with respect to the remaining claims on grounds relating to exhaustion. However, the Court finds that allowing an amendment to include some of Mr. Hendricks' remaining claims would be futile.

Mr. Hendricks alleges at paragraphs 78-82 of his proposed amended complaint that his access to the courts was denied or obstructed by the actions of Ms. Lawrence in failing to follow the grievance procedures and policies. In order to state a claim for denial of access to the courts, Mr. Hendricks must allege some adverse consequence in a court proceeding. Harbin-Bey v. Rutter, 420 F.3d 571, 578 (6th Cir. 2005) ("In order to state a claim for interference with access to the courts, ... a plaintiff must show actual injury."); see also Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999)(en banc). Adverse consequences "include having a case dismissed, being unable to file a complaint, and missing a court-imposed deadline." Id. Mr. Hendricks does not allege that Ms. Lawrence's alleged failure to follow the grievance process caused him injury or precluded his meaningful access to the Court. Consequently, Mr. Hendricks has failed to state a claim upon which relief can be granted for the denial of access to the courts and the motion for leave to amend will be denied as to this proposed claim.

Similarly, Mr. Hendricks has failed to state a claim of a civil conspiracy involving various defendants. As recently explained in Anderson v. County of Hamilton, –- F.Supp.2d –-, 2011 WL 900913, *11 (S.D. Ohio March 14, 2011),

> To state a claim for conspiracy to violate a right protected by §1983, plaintiff must allege facts showing a single plan existed, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to him." [Collyer v. Darling, 98 F.3d 211, 229 (6th Cir.1996), cert. denied, 520 U.S. 1267, 117 S.Ct. 2439, 138 L.Ed.2d 199 (1997)]. Moreover, plaintiff must allege facts showing not only an agreement by defendants to violate plaintiff's constitutional rights, but also an actual deprivation of a constitutional right. Stone v. Holzberger, 807 F.Supp. 1325, 1340 (S.D. Ohio 1992) (Spiegel, J.) ("plaintiff must allege and prove both a conspiracy and

> an actual deprivation of rights; mere proof of conspiracy is insufficient to establish a section 1983 claim"). In addition, "conspiracy claims must be pled with some degree of specificity" and "vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under §1983. Accordingly, pleading requirements governing civil conspiracies are relatively strict." Fieger v. Cox, 524 F.3d 770, 776 (6th Cir. 2008) (internal citations and quotations omitted). Plaintiff must provide factual support respecting the material elements of his conspiracy claim. See Moldowan v. City of Warren, 578 F.3d 351, 395 (6th Cir. 2009).

Mr. Hendricks has made no such allegations here. His entire claim consists of one sentence stating that "[t]he actions of defendants Croft, Miller, and Lawrence demonstrate a civil conspiracy." Consequently, the motion for leave to amend will be denied to the extent Mr. Hendricks seeks to assert a civil conspiracy claim.

Beyond their arguments relating to futility, defendants also raise the issue of prejudice in support of their position that the motion for leave to amend should be denied. The primary focus of their prejudice argument appears to be their belief that the allegations of the proposed amended complaint do not relate to the allegations of the original complaint. In his reply, Mr. Hendricks explains that the allegations of the amended complaint arise from the failure to follow specialists' recommendations just as the allegations of the original complaint. A liberal reading of the proposed amended complaint demonstrates that some of Mr. Hendricks' proposed allegations do relate to issues raised in his original complaint. However, the Court agrees with defendants that several of the proposed allegations are beyond the scope of the original complaint such that a grant of leave to amend would result in prejudice to them.

As discussed above, the focus of Mr. Hendricks' original

complaint was the failure to accommodate his dietary needs by various ODRC personnel and the staff of the Belmont Correctional Institution. In his proposed amended complaint, Mr. Hendricks alleges the delay or denial of his seizure medication by Dr. DesMarais and a John Doe defendant and the disregard of his dietary restrictions and gastrointestinal conditions by various employees of the Pickaway Correctional Institution or the Corrections Medical Center including Ms. Valentine, Mr. Loeloff, Mr. Akasubo, and Ms. Ezeneke. The addition of a claim relating to a different medical condition and the addition of several defendants unconnected to the Belmont Correctional Institution will undoubtedly delay the resolution of this matter. This constitutes sufficient prejudice to the defendants that the Court, in its discretion, will deny the motion for leave to amend to the extent that Mr. Hendricks seeks to assert claims against Ms. Valentine, Mr. Loeloff, Mr. Akasubo, and Ms. Ezeneke. Further, the motion for leave to amend will be denied to the extent he seeks to add a claim against Dr. DesMarais and a John Doe defendant relating to a medical condition separate from that alleged in the original complaint.

To summarize, the motion for leave to amend will be granted in part and denied in part as follows. The motion for leave to amend will be denied with respect to any claims against Mr. Croft or Ms. Bell because Mr. Hendricks has not alleged their personal involvement in any unconstitutional activity. Further, the motion will be denied as to the proposed denial of access to the courts claim and any claims against Ms. Valentine, Mr. Loeloff, Mr. Akasubo, Ms. Ezeneke, and Ms. Lawrence. The motion for leave also will be denied with respect to the proposed civil conspiracy claim asserted in paragraph 88 and the various state law claims set forth in paragraphs 89-91. Additionally, the motion for leave to amend will be denied as to the proposed claims against

Dr. DesMarais and a John Doe defendant set forth in paragraphs 48-57, and paragraph 85 relating to Mr. Hendricks' epilepsy condition. On the other hand, the motion for leave to amend will be granted to the extent that Mr. Hendricks seeks to assert a First Amendment retaliation claim against Ms. Miller and an Eighth Amendment claim against Ms. Nesbitt, Dr. DesMarais and Ms. Parks relating to the alleged disregard of his nutritional therapy.

III. Remaining Motions

A. Mr. Hendricks' Declaration in Support of his Request for a TRO and Preliminary Injunction

The Court notes that the prayer for relief in Mr. Hendricks' original complaint included a request for preliminary and permanent injunctions directed to policies and practices of the ODRC and the Belmont Correctional Institution with respect to inmates with inflammatory bowel disease. Both of these original defendants have been dismissed from this case and the proposed amended complaint does not contain any request for injunctive relief. Consequently, the Court views Mr. Hendricks as having abandoned his request for injunctive relief.

Moreover, the Court does not construe the declaration filed by Mr. Hendricks as a motion for a TRO and a preliminary injunction. The Court is required to weigh four factors in determining whether a party is entitled to a TRO or a preliminary injunction under Fed. R. Civ. P. 65(a). Those factors are: (1) the likelihood that the party seeking the injunction will succeed on the merits of the claim; (2) the extent to which the party seeking the injunction will be injured unless relief is granted, focusing particularly on the possibility of irreparable injury; (3) whether the injunction, if issued, will cause substantial harm to others; and (4) whether issuance of the injunction is in the public interest. See Jones v. Caruso, 569 F.3d 258, 270 (6th

Cir. 2009). No one factor is dispositive. Rather, these four factors must be balanced in determining whether preliminary injunctive relief should issue. Certified Restoration Dry Cleaning Network, L.L.C., v. Tenke Corp., 511 F.3d 535, 542 (6th Cir. 2007). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that circumstances clearly demand it." Overstreet v. Lexington-Fayette Urban County Government, 305 F.3d 566, 573 (6th Cir. 2002). Mr. Hendricks has not addressed any of these factors in his declaration. As a result, the Court simply cannot treat Mr. Hendricks' declaration as a request for a TRO or preliminary injunction.

B. Motion for Reduced Number of Copies

Mr. Hendricks contends that, given his indigent status, he should not be required to bear the expense of serving copies on each defendant. Accordingly, he requests that he be excused from serving each defendant or that defendants allow him to make free copies. It is unclear from Mr. Hendricks' filing whether his request was to be excused from providing service copies of the amended complaint for each newly added defendant in the event leave was granted or whether he simply seeks to be excused from providing individual copies of his various filings to each defendant.

Defendants, construing his motion as requesting only the latter, have responded that they have no objection to this request. Moreover, under the Federal Rules of Civil Procedure, he need only file a copy with the Court and serve a copy on defense counsel. See Fed.R.Civ.P. 5(b). Consequently, to the extent that Mr. Hendricks simply seeks to be excused from serving copies of all his filings on individual defendants, his motion is granted.

To the extent that Mr. Hendricks seeks free copies,

however, his motion will be denied. Although in his brief motion Mr. Hendricks did not raise this issue in terms of a right of access to the courts argument, "the Sixth Circuit repeatedly has held that the constitutional right of access to the courts does not entitle prisoners to free access to photocopying machinery." Nali v. Michigan Dept of Corrections, 2009 WL 3052227, *11 (W.D. Mich. Sept. 21, 2009) citing Bell-Bey, v. Toombs, No. 93-2405, 1994 WL 105900 (6th Cir. March 28, 1994) ("the law is settled that an inmate does not enjoy a federal constitutional right to unlimited free photocopying services"); Hawk v. Vidor, No. 92-2349, 1993 WL 94007, *1 (6th Cir. March 31, 1993) ("the right to have access to the courts is not interpreted as requiring unlimited access to photocopiers"); Al-Jabbar v. Dutton, No. 92-5004, 1992 WL 107016, at *1 ("a prisoner's right of access to the courts does not guarantee him unlimited photocopying at the state's expense") (6th Cir. May 19, 1992); Bond v. Dunn, No. 89-6181, 1989 WL 149988, at *1 (6th Cir. Dec.12, 1989) ("The constitutional right of access to the courts does not require that prison officials provide inmates free access to photocopying machinery"); Fazzini v. Gluch, No. 88-2147, 1989 WL 54125, *2 (6th Cir. May 23, 1989) ("The right of access to the courts does not require that prison officials provide free, unlimited access to photocopy machines").

C. Motion to Compel

In his motion to compel, Mr. Hendricks argues that he has been unable to make copies of the information contained in his medical file and that defendants have objected to all of his discovery requests. He has attached to his motion a copy of defendants' response to his first request for production of documents which indicates that the defendants provided some of the requested information to Mr. Hendricks over objection. Consequently, the focus of Mr. Hendricks' motion to compel

appears to be defendants' failure to provide the requested medical records. In response to the motion to compel, defendants assert that defense counsel arranged for Mr. Hendricks to review his institutional medical records on July 6, 2011, and that copies would be made, at Mr. Hendricks' expense, of any documents he requested. In reply, Mr. Hendricks contends that he needs additional information beyond that contained in his institutional medical file including his medical records from East Ohio Regional Hospital and Ohio State University Medical Center. He argues further that he may require additional access to his medical records as the need arises including access to the CMC MOSS database. Mr. Hendricks again raises the issue of his inability to bear the copying costs and also requests the appointment of counsel to assist him in this action.

In light of Mr. Hendricks' reply, the Court views the focus of the motion to compel to be his request for access to his medical records beyond those contained in his institutional medical file - including access to records held by non-parties East Ohio Regional Hospital and Ohio State University Medical Center. Defendants have stated in response to this discovery request that these documents are not within their custody and control. Mr. Hendricks has provided no evidence to the contrary.

Under Fed.R.Civ.P. 34(c), a nonparty may be compelled to produce documents as provided in Fed.R.Civ.P. 45. Rule 45 sets forth the procedure for issuance of subpoenas including those commanding the production of documents. As a pro se prisoner proceeding *in forma pauperis*, Mr. Hendricks is not relieved from the obligations of Rule 45 to the extent that he is seeking information in the control of third-parties. See, e.g., Smith v. Yarrow, 78 Fed.Appx. 529, 544 (6th Cir. 2003). Mr. Hendricks does not argue that he has sought discovery from the Ohio State University Medical Center or the East Ohio Regional Hospital as

provided in Rule 45. Consequently, the motion to compel will be denied with regard to these discovery requests and will be denied as moot with respect to his request for access to his institutional medical file.

To the extent that Mr. Hendricks may need additional time to review his institutional medical file, he is free to pursue such access with the defendants, either through a second request for production or otherwise, through the close of discovery. Further, under Fed.R.Civ.P. 26(e), the defendants have an obligation to supplement their response to his requests for production under certain circumstances. As a result, the Court does not view Mr. Hendricks' motion to compel as currently framed as relating to the potential need for additional access to his medical records including access to the CMC MOSS database.

Additionally, with respect to Mr. Hendricks' statements that he is unable to bear the costs for copying his medical file, again the motion to compel will be denied. There is no constitutional or statutory requirement that the defendants pay for Mr. Hendricks' discovery efforts. Smith, supra. Although as a pro se prisoner in a §1983 suit Mr. Hendricks may pursue any discovery method allowed under the Federal Rules of Civil Procedure, he must do so on the same terms as any other civil litigant. This includes paying for his own discovery costs. See Rittner v. Thrower, Case No. 2:06-cv-471, 2007 WL 756704 (S.D. Ohio March 8, 2007).

Finally, with respect to Mr. Hendricks' request for appointment of counsel,

> [a]ppointment of counsel in a civil case is not a constitutional right. It is a privilege that is justified only by exceptional circumstances. In determining whether exceptional circumsntances exist, courts have examined the type of case and the abilities of the plaintiff to represent himself. This generally involves a determination of the complexity of the

factual and legal issues involved.

Id. quoting Lavado v. Keohane, 992 F.2d 60-1, 605-06 (6th Cir. 1993)(internal citations and quotations omitted). As this Court has previously stated, this action has not yet progressed to the point that the Court is able to make such an evaluation of plaintiff's claims. Consequently, the motion for appointment of counsel will be denied. Mars v. Hanberry, 752 F.2d 254 (6th Cir. l985).

D. Request for Sanctions

Mr. Hendricks asserts that the defendants are interfering with the discovery process to the point where the conduct is sanctionable. This conduct, according to Mr. Hendricks, includes providing false information in response to his discovery requests. There is no question that "'[c]omplete and accurate responses to discovery are required for the proper functioning of our system of justice.'" JPMorgan Chase Bank, N.A. v. Neovi, Inc., 2006 WL 3803152, *5 (S.D. Ohio November 14, 2005) quoting Wagner v. Dryvit Systems, Inc., 208 F.R.D. 606, 609 (D. Neb. 2001). Mr. Hendricks, however, has provided no evidentiary support for his claim that defendants have failed to provide accurate responses to his discovery requests. Consequently, his request for sanctions, as well as his related request for appointment of a special master to oversee discovery, will be denied.

IV. DISPOSITION

For the reasons stated above, the motion for leave to amend (#28) is granted in part and denied in part as set forth above. The Clerk is directed to detach and file the amended complaint attached to the motion. The only claims at issue in the amended complaint are a First Amendment claim for retaliation against defendant Miller and an Eighth Amendment claim against Ms. Parks,

Ms. Nesbitt, and Dr. DesMarais relating to the alleged disregard of plaintiff's nutritional therapy.

Further, the motion to compel (#30) and the motion for sanctions (#37) are denied. The motion for reduced number of copies (#27) is granted in part and denied in part. Further, the declaration in support of a TRO and preliminary injunction (#24) is not construed as a motion and shall be removed from the Court's pending motions list. The motion for summary judgment (#12) is denied as moot. The motion for extension of time (#31) also is denied as moot.

V. APPEAL PROCEDURE

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge