

capacity; B. Trowbridge, in her/his *
official and individual capacity; Crystal *
Van Vooren, in her official and *
individual capacity; Douglas L. Weber, *
in his official and individual capacity; *
Greg Zike, in his official and individual *
capacity; *
*
Appellees. *

Submitted: May 15, 2007
Filed: August 15, 2007

Before COLLOTON, BEAM, and BENTON, Circuit Judges.

PER CURIAM.

South Dakota State Penitentiary (SDSP) inmate William R. Cody appeals following the preservice dismissal of certain defendants and the adverse grant of summary judgment to the remaining defendants, in his 42 U.S.C. § 1983 lawsuit. Cody's lawsuit was based on alleged failures to provide him a special diet for his hypertension, diabetes, and high cholesterol, and related failures to act on his complaints and grievances. We affirm.

First, we grant Cody's motion to add defendants Greg Zike, C. Crowell, B. Trowbridge, Crystal Van Vooren, and Douglas L. Weber as appellees, because we believe Cody properly evinced an intent to appeal from the order dismissing these defendants. *See Berdella v. Delo*, 972 F.2d 204, 208 n.6 (8th Cir. 1992) (if proper notice is given, appeal of final order permits review of issues resolved in earlier

orders). We further conclude that the district court's¹ dismissal of the claims against these defendants, pursuant to 28 U.S.C. § 1915A, was correct, *see Cooper v. Schriro*, 189 F.3d 781, 783 (8th Cir. 1999) (per curiam) (de novo review of § 1915A dismissals), as the allegations against them did not describe conduct that violated Cody's constitutional rights, *see Stone v. Harry*, 364 F.3d 912, 914-15 (8th Cir. 2004) (pro se complaints are to be liberally construed, but court is not required to assume facts not alleged or to construct legal theory that assumes facts not pleaded).

Next, we conclude that summary judgment was proper as to all the remaining defendants. *See Alberson v. Norris*, 458 F.3d 762, 765 (8th Cir. 2006) (standard of review). The conduct Cody attributed to the defendants did not result in a deprivation of Cody's constitutional rights.

The issue closest to being trialworthy is Cody's claim that Preyer failed to provide him with a special diet, as ordered by Dr. Eugene Regier, in accordance with menus prepared by CBM dietician Lenora Moeckel. This issue is controlled by *Wishon v. Gammon*, 978 F.2d 446 (8th Cir. 1992). In *Wishon*, a prisoner accused prison officials of being deliberately indifferent to his dietary needs. *Id.* at 449. This court recognized that prisoners have a right to adequate nutrition and the failure to provide adequate nutrition may qualify as a deliberate indifference that violates the Eighth Amendment. *Id.* However, a prisoner must show ". . .the food he was served was nutritionally inadequate or prepared in a manner presenting an immediate danger to his health, or that his health suffered as a result of the food." *Id.*

In this case, Cody presented no evidence of an immediate danger to his health or that his health suffered due to Preyer's failure to provide the prescribed diet. The district court found that "[Cody] offers no 'verifying medical evidence that the

¹The Honorable Richard H. Battey, United States District Judge for the District of South Dakota

defendants ignored an acute or escalating situation or that delays adversely affected the prognosis given the kind of injury in this case.'" The district court correctly granted summary judgment for Preyer.

Finally, we find no abuse of discretion in the district court's denial of Cody's motion for recusal, *see* 28 U.S.C. § 144 (requiring reassignment if party files timely and sufficient affidavit stating judge has personal bias or prejudice against him or in favor of adverse party); *Bannister v. Delo*, 100 F.3d 610, 614 (8th Cir. 1996) (district judge's impartiality is presumed and movant bears substantial burden of proving otherwise), or in the court's discovery rulings, *see Sheets v. Butera*, 389 F.3d 772, 780 (8th Cir. 2004) (reversal of discovery rulings is unwarranted absent gross abuse of discretion resulting in fundamental unfairness).

Accordingly, we affirm the district court's decisions.
