IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DANIEL WRIGHT,

Plaintiff, No. 2:09-cv-2349 MCE JFM (PC)

vs.

DOROTHY E. SWINGLE, et al.,

Defendants. FINDINGS & RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. In the operative complaint filed August 24, 2009, plaintiff alleges that defendants routinely run out of his prescription medication, causing him pain and sleep loss, and defendants' medical directive to "crush and float" certain medication taken by plaintiff causes swelling in his throat and numbness in his mouth. Compl. at 3. This matter is before the court on defendants' motion for summary judgment. Plaintiff opposes the motion.

FACTS

The following facts are undisputed unless noted otherwise. At all times relevant to this action, plaintiff was a prisoner at High Desert State Prison ("HDSP"), Dorothy Swingle was the Chief Medical Officer at HDSP, and J. Nepomuceno was the Chief Physician and Surgeon at HDSP. See Mot. for Summ. J., Ex. A at 1-5; Swingle Decl., ¶ 1; Compl. at 2-3.

1. Delayed Receipt of Medication

Plaintiff has a chronic condition causing him pain in his lower back and neck. See Mot. for Summ. J., Ex. C at 1-38, 62; Opp'n, Ex. C at 1. While at HDSP, plaintiff has been prescribed multiple medications for the treatment of his pain, including Naproxen, Acetaminophen, and Amitryptiline. See Mot. for Summ. J., Ex. C at 178-82.

The Pharmacist in Chief, not named in this action, and his staff are responsible for ordering and stocking the prescription medications for inmates at HDSP. Swingle Decl., ¶ 3. Neither defendant supervises the pharmacist and neither is not involved in ordering medications for the prison. Id.

Since 2008, plaintiff filed numerous Health Care Services Request Forms in which he complained that he has not been receiving his prescribed medication in a timely manner. E.g., "I have not been [getting] my medication that I been [prescribed]," filed April 29, 2008, Opp'n, Ex. C at 7; "This is my second health care request form that I sent to get my medication. I would like to know what is the holdup on my medication. . . . ," filed June 21, 2008, id. at 9, ". . . I am still not [getting] my prescribed medication. This is a continuous [situation.] I get my medication sometimes and sometimes I don't get it. I would like to know why. . . . ," filed August 3, 2008, id. at 20; and "I have been waiting for two weeks for my medication. I would like to know what happ[ened] to it . . . ," filed August 22, 2008, id. at 21.

On April 30, 2009, plaintiff filed a 602 inmate appeal form[1] in which he complained that on April 15, 2009 the medical staff had run out of his pain medication and that "they keep letting my pain medication run out."[2] Mot. for Summ. J., Ex. A at 8. At the informal

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[1] California prison regulations provide administrative procedures in the form of one informal and three formal levels of review to address an inmate's claims. See Cal. Code Regs. tit. 15, §§ 3084.1-3084.7. Administrative procedures generally are exhausted once a plaintiff has received a "Director's Level Decision," or third level review, with respect to his issues or claims. Cal. Code Regs. tit. 15, § 3084.5.

[2] Since filing the grievance, plaintiff continued to complain about his delayed receipt of prescription medication. See Opp'n, Ex. C at 1-59 (Health Request Services Forms filed on June

level of review, plaintiff was informed that his prescription for Amitriptyline had run out and had to be renewed by a nurse. Id. Dissatisfied, plaintiff appealed this response on the ground that it did not "address [plaintiff's] request to have this stop happening to [him] consistently." Id.

On June 22, 2009 at the first formal level of review, plaintiff's appeal was partially granted by Nepomuceno, who stated that medication refills need to be approved by the provider and filled by the pharmacy staff. Mot. for Summ. J., Ex. A at 8. Nepomuceno further stated that, despite plaintiff's allegation that this was an ongoing problem, there was no indication that plaintiff had missed any more than one dose of medication. Id. at 10.

Plaintiff appealed this decision, arguing that he did not receive his medication from April 30, 2008 to May 9, 2008. See Opp'n, Ex. E at 1. On July 16, 2008 at the second formal level of review, plaintiff's appeal was partially granted by N. Acquaviva, Health Care Manager. See id. Therein, plaintiff was informed that the Medication Administration Record (MAR) was incomplete during the complained-of time frame because plaintiff was admitted to the Correctional Treatment Center for medical issues during that time. Id. Plaintiff was also informed that the California Department of Corrections ("CDCR") "implemented a new computerized pharmacy system which should alleviate this issue." Id. There is no evidence that plaintiff appealed to the Director's Level of Review.

2. DOT, Crush and Float Policy

In response to his back pain, plaintiff was prescribed 50 mg of Amitriptyline, which was scheduled to be taken in the evenings. See Swingle Decl., ¶¶ 8-9. In 2008, defendants Swingle and Nepomuceno issued a memorandum ordering that certain controlled

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15, 2009; July 18, 2009; August 24, 2009; September 8, 2009; September 15, 2009; October 5, 2009; October 10, 2009; December 1, 2009; December 3, 2009; December 6, 2009; January 7, 2010; March 7, 2010; March 22, 2010; April 19, 2010; May 6, 2010; May 18, 2010; July 17, 2010; and July 21, 2010).

substances, including Amitriptyline[3], be administered "DOT, Crush and Float with water"[4] in response to the increase in the diversion and misuse of controlled substances by inmates at HDSP. Swingle Decl., ¶¶ 4-5; Mot. for Summ. J., Ex. D. Every medication ordered to be crushed and floated was reviewed and approved by the pharmacist to ensure that the safety and efficacy are not significantly affected. Swingle Decl., ¶ 5. Amitriptyline used at HDSP is not a controlled release medication. Id. ¶ 10.

On November 23, 2008, plaintiff filed a 602 inmate appeal form complaining about the practice of crushing his medication and mixing them in water "causing the medication to stick to the bottom and sides of the cup," thereby preventing him from getting his full dose. Mot. for Summ. J., Ex. A at 11. On December 9, 2008 at the informal level of review, plaintiff was informed that "[p]er memorandum dated 9-3-08 it is policy and not optional to crush and float certain medications." Id. On December 12, 2008, plaintiff appealed this response on the ground that the policy effectively lowers his dosage and causes him pain. Id. On January 21, 2009 at the first formal level of review, plaintiff's appeal was denied by S. Martin, the Director of Nursing, who advised plaintiff that "HDSP policy states that any medication in the controlled substance category will be administered as, 'DOT, Crush and Float with water' until the order is changed by the provider." Id. at 13. Plaintiff was told that he could request more water from the nurse to swish in the cup to get the remainder of his medication or he could request to see the provider to inquire into the possibility of changing to another medication for the same treatment; there is no evidence plaintiff ever pursued that solution. Id. On February 11, 2009 at the second

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[3] Other medications subject to the crush and float policy included Acetaminophen with Codeine (Tylenol #3), Diphenhydramine (Benadryl), Gabepentin (Neurontin), Hydrocodone with APAP (Vicodin, Norso), Hydroxyzine (Atarax), Methadone (Dolophine), Methocarbamal (Robaxin), Morphine Sulfate Immediate Release (MS-IR), Oxycodone with APAP (Percocet) and Tramadol (Ultram). See Swingle Decl., ¶ 6.

[4] The process of crushing and floating medications involves grinding the medication into a powder and placing it in water. Swingle Decl., ¶ 11. A standardized instrument called a "pill-crusher" is used to prepare the medication. Id.

formal level of review, plaintiff's appeal was denied by Swingle on the ground that the HDSP policy of crushing controlled substance medication, including amitriptyline, is not optional. Id. at 14-15. There is no evidence that plaintiff appealed to the Director's Level of Review.

SUMMARY JUDGMENT STANDARDS UNDER RULE 56

Federal Rule of Civil Procedure 56(a) provides that "[t]he court shall grant summary judgment if the movant shows that 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).[5] A shifting burden of proof governs motions for summary judgment under Rule 56. Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376, 387 (9th Cir. 2010). Under summary judgment practice, the moving party

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P. 56(c)). "Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." In re Oracle Corp. Sec. Litig., 627 F.3d at 387 (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ. P. 56 advisory committee's notes to 2010 amendments (recognizing that "a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact").

If the moving party meets its initial responsibility, the opposing party must establish that a genuine dispute as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). To overcome summary

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[5] Federal Rule of Civil Procedure 56 was revised and rearranged effective December 10, 2010. However, as stated in the Advisory Committee Notes to the 2010 Amendments to Rule 56, "[t]he standard for granting summary judgment remains unchanged."

judgment, the opposing party must demonstrate the existence of a factual dispute that is both material, i.e., it affects the outcome of the claim under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc., 618 F.3d 1025, 1031 (9th Cir. 2010), and genuine, i.e., "'the evidence is such that a reasonable jury could return a verdict for the nonmoving party,'" FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010) (quoting Anderson, 477 U.S. at 248). A party opposing summary judgment must support the assertion that a genuine dispute of material fact exists by: "(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."[6] Fed. R. Civ. P. 56(c)(1)(A)-(B). However, the opposing party "must show more than the mere existence of a scintilla of evidence." In re Oracle Corp. Sec. Litig., 627 F.3d at 387 (citing Anderson, 477 U.S. at 252).

In resolving a summary judgment motion, the evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. Moreover, all reasonable inferences that may be drawn from the facts placed before the court must be viewed in a light most favorable to the opposing party. See Matsushita, 475 U.S. at 587; In re Oracle Corp. Sec. Litig., 627 F.3d at 387. However, to demonstrate a genuine factual dispute, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

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[6] "The court need consider only the cited materials, but may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). Moreover, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2).

On November 9, 2009, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999), and Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

DISCUSSION

Plaintiff brings two claims for relief. First, plaintiff argues that defendants violated his Eighth Amendment rights by failing to provide his medication in a timely manner. Next, plaintiff argues that defendants were deliberately indifferent to his medical needs when they initiated a policy of "crushing and floating" certain medications. Defendants seek summary judgment on both of these claims. Alternatively, defendants seek qualified immunity.

A. Standards

Generally, deliberate indifference to a serious medical need presents a cognizable claim for a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976); Toussaint v. McCarthy, 801 F.2d 1080, 1111 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987). According to Farmer v. Brennan, 511 U.S. 825, 847 (1994), "deliberate indifference" to a serious medical need exists "if [the prison official] knows that [the] inmate [ ] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." The deliberate indifference standard "is less stringent in cases involving a prisoner's medical needs than in other cases involving harm to incarcerated individuals because 'the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns.' " McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir. 1992) (quoting Hudson v. McMillian, 503 U.S. 1, 6 (1992)), overruled on other grounds by WMX Technologies, Inc. V. Miller, 104 F.3d 1133 (9th Cir. 1997). Specifically, a determination of "deliberate indifference" involves two elements: (1) the seriousness of the prisoner's medical needs; and (2) the nature of the defendant's responses to those needs. McGuckin, 974 F.2d at 1059.

First, a "serious" medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." Id. (citing Estelle, 429 U.S. at 104). Examples of instances where a prisoner has a "serious" need for medical attention include the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain. Id. at 1059-60 (citing Wood v. Housewright, 900 F.2d 1332, 1337-41 (9th Cir. 1990)); Hunt v. Dental Dep't., 865 F.2d 198, 200-01 (9th Cir. 1989).

Second, the nature of a defendant's responses must be such that the defendant purposefully ignores or fails to respond to a prisoner's pain or possible medical need in order for "deliberate indifference" to be established. McGuckin, 974 F.2d at 1060. Deliberate indifference may occur when prison officials deny, delay, or intentionally interfere with medical treatment, or may be shown by the way in which prison physicians provide medical care." Hutchinson v. United States, 838 F.2d 390, 392 (9th Cir. 1988). In order for deliberate indifference to be established, there must first be a purposeful act or failure to act on the part of the defendant and resulting harm. See McGuckin, 974 F.2d at 1060. "A defendant must purposefully ignore or fail to respond to a prisoner's pain or possible medical need in order for deliberate indifference to be established." Id. Second, there must be a resulting harm from the defendant's activities. Id.

B. Withholding Medication

In order to defeat defendants' motion for summary judgment, plaintiff must "produce at least some significant probative evidence tending to [show]," T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (internal quotations and citation omitted), that defendants withheld his medication "in conscious disregard of an excessive risk to plaintiff's health," Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir.) (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

Here, plaintiff asserts that defendants are responsible for the implementation and continuation of a policy of tardily ordering prescription medication. The evidence submitted by defendants, however, shows that the Pharmacist in Charge and not these defendants is responsible for ordering and stocking prescription medication. In his opposition, plaintiff argues that the 2008 memorandum authored by defendants implementing the crush and float policy demonstrates that they did, indeed, have the authority to order prescription medication. The court disagrees. The issuance of the memorandum establishes only that the defendants had the authority to implement a policy concerning the manner in which certain prescription medication would be distributed. It does not establish that defendants had the authority to order prescription medication. As such, the evidence does not reflect a genuine issue of fact that defendants participated in or implemented a policy concerning the alleged constitutional violation, that they directed it, or that they showed a "callous indifference" to plaintiff's right to medical care.

To the extent plaintiff's complaint can be construed to read that defendants are responsible for an ongoing violation of his rights (i.e., a continuing delay in the provision of prescription medication), the court notes, initially, that Swingle did not respond to plaintiff's appeal concerning this issue and there is no evidence to indicate that she was aware of it. A defendant cannot be deliberately indifferent to a medical need without first being aware of the need. See Farmer v. Brennan, 511 U.S. 825, 847 (1994).

As to Nepomuceno, who responded to plaintiff's inmate grievance at the First Level, plaintiff may show liability if he can demonstrate that Nepomuceno had the authority yet failed to prevent continuing delays in plaintiff's receipt of his prescription medication. See Herrera v. Hall, 2010 WL 2791586, slip op. at 4-5 (E.D. Cal. 2010). "[I]if there is an ongoing constitutional violation and the appeals coordinator had the authority and opportunity to prevent the ongoing violation, a plaintiff may be able to establish liability by alleging that the appeals coordinator knew about an impending violation and failed to prevent it." Id. (citing Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (supervisory official liable under Section 1983 if he or

she knew of a violation and failed to act to prevent it)). See also Ham v. Clark, 2009 WL 2355265, slip op. at 1-2 (E.D. Cal. 2009) (district court dismissed plaintiff's claims against prison officials who denied his administrative appeals on two grounds: (1) the plaintiff has no substantive right to a particular grievance procedure, and (2) the plaintiff failed to demonstrate that the appeals reviewers were personally involved with plaintiff's medical care or treatment).

Assuming *arguendo* that plaintiff's receipt of prescription medication continued to be delayed following the processing of his inmate appeal, plaintiff fails to respond to defendants' evidence showing that only the Pharmacist in Chief had the authority to order and stock prescription medication, not Nepomuceno or Swingle.

Accordingly, summary judgment should be granted for defendants on this claim.

C. Crush and Float Policy

Plaintiff's second claim is brought on the ground that defendants were deliberately indifferent to his medical needs when they ordered that Amitriptyline be crushed and floated.

Plaintiff takes issue with HDSP's policy of "crushing and floating" Amitriptyline, which he states causes swelling and numbness in his mouth. The evidence is undisputed that the Amitriptyline as used at HDSP is not a controlled-release medication and that the efficacy of Amitriptyline is not affected by crushing and floating it. Although plaintiff has suffered side effects of the policy of HDSP to crush and float controlled substances, on the evidence in the record, no reasonable jury could conclude that the defendants' policy of delivering Amitriptyline in crushed and floated form was medically unacceptable and that defendants chose this course in conscious disregard of an excessive risk to plaintiff's health.

Accordingly, summary judgment should be entered on this claim for defendants.

D. Qualified Immunity

Because the court has found that defendants are entitled to summary judgment, the court need not address defendants' argument for qualified immunity.

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For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that defendants' September 17, 2010 motion for summary judgment be granted.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: June 29, 2011.

UNITED STATES MAGISTRATE JUDGE

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