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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LENNI WILKES,

Plaintiff,

No. CIV S-10-2706 DAD P

vs.

J. NEPOMUCENO, et al.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. Before the court is plaintiff's amended complaint.

I. Procedural History

Plaintiff's original complaint was filed with the court on October 6, 2010, and named defendant Nepomuceno as the sole defendant. On October 21, 2010, the court dismissed the original complaint because plaintiff had failed to allege any facts concerning the involvement of defendant Nepomuceno in a violation of plaintiff's constitutional rights. The court granted plaintiff leave to file an amended complaint curing this deficiency and provided plaintiff with the legal standards governing a claim of inadequate medical care in violation of the Eighth Amendment. Plaintiff filed his amended complaint on November 29, 2010.

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1 **II. Plaintiff's Amended Complaint**

2 In his amended complaint plaintiff names the following medical personnel at High
3 Desert State Prison (HDSP) as defendants: Chief Medical Officer Swingle, Physician's Assistant
4 Marciano, Dr. Lankford, and Chief Surgeon Dr. Nepomuceno. Therein, plaintiff alleges the
5 following. On July 26, 2009, plaintiff was taken to the medical treatment center at HDSP where
6 a visual diagnosis determined that he had suffered a bicep tendon tear while participating in a
7 handball tournament. (Doc. No. 9 at 4 & 8.) Plaintiff's case was referred to the Medical
8 Authorization Review (MAR) committee, then to the Health Care Review (HCR) committee.
9 (Id. at 4.) Plaintiff was told that an M.R.I. would be taken. (Id.) Eighteen days later, plaintiff
10 was transported to the Northern Nevada Medical Center (NNMC) where he was told by an
11 orthopedist that because of California's budgetary constraints he "should be taken to the E.R.
12 where adequate medical attention couldn't be denied." (Id. at 4 & 6.) Plaintiff asserts that
13 instead of being taken to Redding Medical Center for treatment, he was returned to HDSP. (Id.
14 at 4 & 6.) Two days later, plaintiff was taken to Banner Hospital in Susanville where an M.R.I.
15 confirmed that he had a torn bicep. (Id.) Plaintiff concedes in his amended complaint that
16 surgery was finally performed on his injury in mid-August 2009, but complains that donor tissue
17 was used to reconnect the bicep tendon to the muscle. (Id. at 9.)

18 Plaintiff contends that the prison policy of treating older patients conservatively
19 and the delay in his obtaining surgery has caused him uncertainty as to whether "the repair can
20 withstand the force I can produce to curl . . . [a 50 pound] dumbbell." (Id. at 8.) Plaintiff
21 believes that the conservative treatment he received has left him handicapped. (Id.)

22 Plaintiff has attached to his amended complaint a copy of the first level response
23 to his inmate appeal concerning the treatment of his injury. (Id. at 9-10.) In that response the
24 issue raised by plaintiff in his inmate grievance was described as follows:

25 Inmate Wilkes, on appeal you state on July 26, 2009 you suffered a
26 left bicep tendon tear. You say on August 14, 2009, eighteen days
later, you were taken to Reno and told there is a time limit on this

1 sort of injury to ensure proper healing. You state you were told
2 you were at that point then. You say surgery was performed in mid
3 August 2009. You state you had donor tissue used to reconnect the
4 tendon to the muscle and you are not comfortable with having
5 someone else's body part inside of you. You state you shouldn't
6 have to of had donor tissue as the only option to fix your arm when
7 FNP Miller, PA-C Marciano and a doctor in Reno said you needed
8 to be admitted to the hospital then, not weeks later. You are
9 specifically requesting that CDCR investigate and take immediate
10 disciplinary action against all those responsible in the delay of
11 finding a surgeon and ignoring the advice of HDSP staff. You say
12 you want an attempt to correct physical damage.

13 (Id. at 9.)

14 Plaintiff's inmate appeal was granted by defendant Dr. Nepomuceno, Chief
15 Physician and Surgeon at HDSP with respect to plaintiff's request for an investigation of whether
16 he was provided appropriate medical treatment. The response noted that plaintiff was
17 interviewed by defendant Dr. Lankford, who also investigated plaintiff's allegations. (Id.) The
18 response also addressed plaintiff's expressed concern about the type of treatment provided by
19 prison officials based on the patient's age and the alleged harm due to the alleged delay in
20 providing appropriate medical treatment in his case. In this regard, the response to plaintiff's
21 inmate appeal stated:

22 You were told that according to Emergency Medicine resources,
23 "Treatment is surgical repair of the tendon in the *young*, athletic
24 patient. The *older* patient can be treated conservatively with
25 immobilization." You fall into the latter category. Evidently Reno
26 Orthopedics refused to accept you as a patient. You[r] tendon tear
was repaired by orthopedics in Redding.

You stated you have some decreased strength in the left arm.
You most likely would have decreased strength in your left arm
regardless of whenever the surgery was completed. You were
given a full explanation of the surgery and plan for donor tissue use
at the time of your surgery and signed the surgery consent of [sic]
your own free will

(Id.)

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1 **III. Screening Requirement**

2 The court is required to screen complaints brought by prisoners seeking relief
3 against a governmental entity or an officer or employee of a governmental entity. See 28 U.S.C.
4 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
5 claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be
6 granted, or that seek monetary relief from a defendant who is immune from such relief. See 28
7 U.S.C. § 1915A(b)(1) & (2).

8 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
9 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
10 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
11 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
12 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
13 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
14 Cir. 1989); Franklin, 745 F.2d at 1227.

15 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and
16 plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
17 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic
18 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47
19 (1957)). However, in order to survive dismissal for failure to state a claim a complaint must
20 contain more than “a formulaic recitation of the elements of a cause of action;” it must contain
21 factual allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic,
22 550 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the
23 allegations of the complaint. See Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740
24 (1976). The court must also construe the pleading in the light most favorable to the plaintiff and
25 resolve all doubts in the plaintiff’s favor. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

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1 **IV. Analysis**

2 It is well established that a prison official’s deliberate indifference to a substantial
3 risk of serious harm to an inmate violates the cruel and unusual punishment clause of the Eighth
4 Amendment. Farmer v. Brennan, 511 U.S. 825, 828-29 (1994); Helling v. McKinney, 509 U.S.
5 25, 31-32 (1993); Wilson v. Seiter, 501 U.S. 294, 302 (1991); Estelle v. Gamble, 429 U.S. 97,
6 104 (1976). There are an objective and a subjective requirement which must be met for an
7 Eighth Amendment claim. Farmer, 511 U.S. at 834. First, with respect to the objective
8 requirement, “the inmate must show that he is incarcerated under conditions posing a substantial
9 risk of serious harm.” Id. Second, the prison official must have a sufficiently culpable state of
10 mind. Id. Here, the state of mind required is one of deliberate indifference. Id. A prison
11 official who knows of and disregards an excessive risk to an inmate’s health or safety
12 demonstrates deliberate indifference. Farmer, 511 U.S. at 837; see also Frost v. Agnos, 152 F.3d
13 1124, 1128 (9th Cir. 1998); Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir.
14 1991). Thus, “the official must both be aware of facts from which the inference could be drawn
15 that a substantial risk of serious harm exists, and he must also draw that inference.” Farmer, 511
16 U.S. at 837. However, a prison official who knows of a substantial risk to an inmate’s health or
17 safety but acts reasonably under the circumstances will not be held liable under the cruel and
18 unusual punishment clause, even if the threatened harm results. Id. at 843.

19 **A. Failure to Allege Facts Concerning Defendants’ Involvement**

20 Plaintiff was advised in the court’s October 21, 2010, order dismissing his
21 original complaint with leave to amend that in any amended complaint he elected to file, he was
22 required to allege in specific terms how each named defendant was involved in the alleged
23 deprivation of his rights. Plaintiff was also advised that there can be no liability under 42 U.S.C.
24 § 1983 unless there is some affirmative link or connection between a defendant’s actions and the
25 claimed deprivation. (Doc. No. 6 at 5) (citing Rizzo v. Goode, 423 U.S. 362 (1976); May v.
26 Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); and Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir.

1 1978)). Finally, plaintiff was cautioned that vague and conclusory allegations of official
2 participation in civil rights violations are not sufficient. (Id.) (citing Ivey v. Board of Regents,
3 673 F.2d 266, 268 (9th Cir. 1982)).

4 Nonetheless, in his amended complaint plaintiff has once again failed to set forth
5 any factual allegations concerning how defendants Lankford and Nepomuceno allegedly violated
6 his constitutional rights. The first level response by prison officials to the inmate grievance,
7 attached to plaintiff's amended complaint, indicates that defendant Lankford interviewed plaintiff
8 when plaintiff submitted his inmate grievance and that defendant Nepomuceno issued a favorable
9 decision in part on that grievance. (Doc. No. 9 at 9-10.) However, there are no allegations in
10 plaintiff's amended complaint as to how these defendants allegedly violated his Eighth
11 Amendment right to adequate medical care. Therefore, defendants Lankford and Nepomuceno
12 should be dismissed from this action. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)
13 (“Liability under section 1983 arises only upon a showing of personal participation by the
14 defendant.”).

15 As to defendant Dr. Marciano, in his amended complaint plaintiff merely alleges
16 that prior to the M.R.I. plaintiff received, defendant Marciano stated his belief that plaintiff had a
17 torn bicep and that this suspicion was later confirmed by the M.R.I. (Doc. No. 9 at 4.) Again,
18 there are no allegations suggesting that defendant Dr. Marciano was deliberately indifferent to
19 plaintiff's serious medical need. Rather, the allegations of the amended complaint suggest that
20 defendant Dr. Marciano attempted to take steps to have plaintiff's injury treated as plaintiff
21 contends it should have been treated. Therefore, defendant Marciano should also be dismissed
22 from this action.

23 Finally, as to defendant Chief Medical Officer Swingle, plaintiff merely alleges in
24 his amended complaint that all defendants “report to” defendant Swingle. However, plaintiff has
25 failed to set forth any allegations in his amended complaint suggesting that defendant Swingle
26 was personally involved in any of the medical decisions concerning treatment of plaintiff's torn

1 bicep. (Id. at 3.) Instead, based solely on defendant Swingle’s supervisory position, plaintiff
2 argues that defendant Swingle “knew of my injury, [and] knew it was a serious injury that
3 required prompt and adequate medical attention” but chose a conservative approach to treat
4 plaintiff’s injury. (Id. at 5.) However, supervisory personnel are generally not liable under
5 § 1983 for the actions of their employees under a theory of respondeat superior and, therefore,
6 when a named defendant holds a supervisory position, the causal link between him and the
7 claimed constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858,
8 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Here, the vague and
9 conclusory allegations of plaintiff’s amended complaint concerning defendant Swingle’s
10 involvement in the alleged violation of plaintiff’s rights under the Eighth Amendment are
11 insufficient to support a § 1983 action against that defendant. See Ivey v. Board of Regents, 673
12 F.2d 266, 268 (9th Cir. 1982).

13 **B. Difference of Opinion Regarding Appropriate Medical Treatment**

14 In his amended complaint plaintiff claims that after his injury, he should have
15 been taken to the emergency hospital so that surgery could be performed immediately rather than
16 approximately one month later.¹ Plaintiff disagrees with the early, conservative course of
17 treatment (immobilization) that was pursued following his injury, rather than an immediate
18 surgical repair of the tendon. Plaintiff’s contentions, however, demonstrate at most a mere
19 difference of opinion between himself and the prison medical staff as to proper course of medical
20 treatment for his bicep tear. Such differences in opinion do not rise to a level of an Eighth
21 Amendment claim. See Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989) (holding that a
22 difference of opinion does not amount to deliberate indifference to a prisoner’s serious medical
23 needs); Franklin v. Oregon, 662 F.2d 1337, 1334 (9th Cir. 1981) (“[W]here a defendant has
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25 ¹ According to the first level response provided by prison officials to plaintiff’s inmate
26 appeal, plaintiff’s injury occurred on July 26, 2009, and surgery on his torn bicep was performed
in mid-August of 2009. (Doc. No. 9 at 9.)

1 based his actions on a medical judgment that either of two alternative courses of treatment would
2 be medically acceptable under the circumstances, plaintiff has failed to show deliberate
3 indifference, as a matter of law.”). Therefore, the court finds that plaintiff has failed to state a
4 cognizable Eighth Amendment claim for the treatment of his torn bicep.

5 **C. Delay in Treatment**

6 In his amended complaint plaintiff also claims that because his surgery was
7 delayed, donor tissue had to be used and he is now “handicapped” because he may be unable to
8 curl a fifty-pound dumbbell. (Doc. No. 9 at 8.)

9 It is true that delay in providing medical care may manifest deliberate
10 indifference. Estelle, 429 U.S. at 104-05. However, to establish a claim of deliberate
11 indifference arising from delay in providing care, a plaintiff must allege and prove that the delay
12 was harmful. See Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); McGuckin, 974 F.2d at
13 1059; Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990); Hunt v. Dental Dep’t, 865
14 F.2d 198, 200 (9th Cir. 1989); Shapley v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404,
15 407 (9th Cir. 1985). “A prisoner need not show his harm was substantial; however, such would
16 provide additional support for the inmate’s claim that the defendant was deliberately indifferent
17 to his needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). See also McGuckin, 974 F.2d
18 at 1060.

19 Here, plaintiff’s allegations of harm are insufficient. In the first level response to
20 his inmate appeal, attached to plaintiff’s amended complaint, medical staff concluded that he
21 would have experienced decreased strength in his injured arm, regardless of when his surgery
22 was completed. (Doc. No. 9 at 9.) Moreover, in his amended complaint plaintiff has alleged
23 only that the delay in treatment has caused him personal uncertainty as to whether the repaired
24 bicep will withstand weight lifting activities. In addition, although plaintiff has alleged that he is
25 uncomfortable with the use of donor tissue in the repair of his torn bicep tendon, there is no
26 allegation that the use of donor tissue has been harmful to plaintiff’s health. Finally, plaintiff’s

1 amended complaint and attachments thereto reflect that he was informed of the intended use of
2 donor tissue by doctors prior to his surgery and that he nonetheless consented to the surgery.
3 Therefore, the court finds that plaintiff has failed to allege sufficient facts to state a cognizable
4 Eighth Amendment claim based on the claimed delay in providing him with medical treatment
5 for his torn bicep..

6 CONCLUSION

7 For the reasons set forth above, IT IS HEREBY ORDERED that this case be
8 randomly assigned to a District Judge.

9 Also, IT IS HEREBY RECOMMENDED that this action be dismissed for failure
10 to state a cognizable claim.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
13 one days after being served with these findings and recommendations, plaintiff may file written
14 objections with the court. The document should be captioned "Objections to Magistrate Judge's
15 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
16 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
17 F.2d 1153 (9th Cir. 1991).

18 DATED: November 9, 2011.

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21 _____
22 DALE A. DROZD
23 UNITED STATES MAGISTRATE JUDGE

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22 wilkes2706.fsc
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