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**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

BRENT H. GAFFNEY,
Plaintiff,
vs.
DR. HENRY LUBAN et al.,
Defendants.

3:11-cv-00216 JWS
ORDER AND OPINION
[Re: Motion at docket 23]

I. MOTION PRESENTED

At docket 23, defendants Henry Luban (“Luban”), Bruce Busby (“Busby”), and Iris Beach (“Beach”) move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint for failure to state a claim. Because the motion is supported by affidavits and other materials outside the pleadings, the court must treat the motion “as one for summary judgment under Rule 56.”¹ Plaintiff Brent H. Gaffney, who was incarcerated, was granted approximately three additional months to respond.² At

¹Fed. R. Civ. P. 12(d).

²Doc. 35.

1 docket 48, plaintiff filed a motion to allow the case to proceed which the court construes
2 as a response to defendants' motion for summary judgment. Defendants filed a
3 response to plaintiff's motion, which the court construes as a reply in support of their
4 motion for summary judgment, at docket 51. Oral argument was not requested and
5 would not assist the court.

6 7 **II. BACKGROUND**

8 Plaintiff was incarcerated at the Lemon Creek Correctional Center from May 7,
9 2011 through May 13, 2011. During that time, plaintiff alleges that he was denied
10 medical treatment and medication. Plaintiff also alleges the Lemon Creek Correctional
11 Center does not make accommodations for disabled persons.

12 Plaintiff was incarcerated at the Anchorage Correctional Complex from May 13,
13 2011 through September 21, 2011. Plaintiff maintains that during that period he was
14 denied medication for a back injury, post-traumatic stress disorder, traumatic brain
15 injuries, disassociation disorder, depression, and insomnia.

16 Plaintiff filed suit against Luban, a doctor at the Anchorage Correctional
17 Complex, Busby, the assistant superintendent at the Lemon Creek Correctional Center,
18 and Beach, a nurse at the Lemon Creek Correctional Center. Plaintiff has asserted four
19 claims. Two are asserted pursuant to 42 U.S.C. § 1983, based on alleged violations of
20 the Eighth Amendment stemming from the denial of medical care discussed above.

21 22 **III. STANDARD OF REVIEW**

23 Summary judgment is appropriate where "there is no genuine dispute as to any
24 material fact and the movant is entitled to judgment as a matter of law."³ The
25 materiality requirement ensures that "only disputes over facts that might affect the
26 outcome of the suit under the governing law will properly preclude the entry of summary
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28 ³Fed. R. Civ. P. 56(a).

1 judgment.”⁴ Ultimately, “summary judgment will not lie if the . . . evidence is such that a
2 reasonable jury could return a verdict for the nonmoving party.”⁵ In resolving a motion
3 for summary judgment, a court must view the evidence in the light most favorable to the
4 non-moving party.⁶ The reviewing court may not weigh evidence or assess the
5 credibility of witnesses.⁷ The burden of persuasion is on the moving party.⁸

7 IV. DISCUSSION

8 The Prison Litigation Reform Act of 1995 (“PLRA”) contains an exhaustion
9 provision which states that “[n]o action shall be brought with respect to prison conditions
10 under section 1983 . . . or any other Federal law, by a prisoner . . . until such
11 administrative remedies as are available are exhausted.”⁹ Under that provision, a
12 prisoner must “exhaust any available [administrative remedies] . . . even where the
13 relief sought—monetary damages—cannot be granted by the administrative process.”¹⁰

14 Defendants argue that plaintiff has failed to exhaust his administrative remedies.
15 Defendants note that plaintiff did not file any grievances while incarcerated at Lemon
16 Creek Correctional Center and only one grievance while incarcerated at the Anchorage
17 Correctional Complex. Although plaintiff’s grievance was based on a refusal to
18 prescribe him Clonazepam and Ambien to treat his traumatic brain injuries and
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21 ⁴*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

22 ⁵*Id.*

23 ⁶*Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000).

24 ⁷*Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1036 (9th Cir. 2005).

25 ⁸*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

26 ⁹42 U.S.C. § 1997e(a).

27 ¹⁰*Woodford v. Ngo*, 548 U.S. 81, 85 (2006) (internal quotation omitted).

1 insomnia,¹¹ the grievance did not involve treatment by Luban, but rather by a
2 psychiatrist, Dwight Stallman (“Stallman”).

3 Plaintiff responds that he did adequately exhaust available administrative
4 remedies, but that he is unable to produce documentation. Plaintiff maintains that there
5 are several witnesses who would testify that they helped him with his grievances, but he
6 is unable to identify or contact them. Plaintiff produced what purports to be an affidavit
7 from another prisoner at the Anchorage Correctional Complex, Michael Everett. In it,
8 Everett states that he helped plaintiff with four grievances. The affidavit, though signed,
9 was not notarized and is composed in the same typeface and with all capital letters
10 similar to most of plaintiff’s filings. Plaintiff also maintains that he requested that his
11 grievances be logged.

12 Defendants have presented the affidavit of Debbie Miller, superintendent of the
13 Anchorage Correctional Complex, who states that there is no record of plaintiff
14 requesting that his grievances be logged.¹² Defendants have also produced the
15 affidavit of Sergeant Suluia Augafa (“Augafa”), a compliance sergeant at the Anchorage
16 Correctional Complex. Augafa states that plaintiff submitted numerous medical
17 grievances during his most recent period of incarceration, which was from March 2012
18 until July 2012.¹³ He states that none of them pertained to Luban, Busby, or Beach.
19 Most importantly, Augafa states that the only medical grievance that plaintiff filed in
20 2011 was the grievance pertaining to Stallman.¹⁴ Defendants have produced the

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25 ¹¹See doc. 23-1 at 1.

26 ¹²Doc. 51-1 at 2.

27 ¹³Doc. 51-2 at 1–2.

28 ¹⁴Doc. 24 at 2.

1 affidavit of Robert Corcoran which states that plaintiff did not file any grievances while
2 at the Lemon Creek Correctional Center.¹⁵

3 Based on the evidence before the court, no reasonable jury could conclude that
4 plaintiff filed a grievance pertaining to the defendants to this action. As defendants
5 point out, even if the grievance regarding Stallman’s treatment of plaintiff were
6 sufficient, Stallman and Luban’s difference in medical opinion is insufficient to establish
7 deliberate indifference.¹⁶ Because plaintiff failed to exhaust the administrative remedies
8 available to him, defendants are entitled to summary judgment on the claims against
9 them.

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11 **V. CONCLUSION**

12 For the reasons above, defendants motion at docket 23, construed as a motion
13 for summary judgment pursuant to Federal Rule of Civil Procedure 56 is **GRANTED**.
14 The Clerk shall please enter judgment for defendants on the claims against them.
15 Because plaintiff has not identified a defendant as to his remaining claims, those claims
16 are **DISMISSED**.

17 DATED this 22nd day of August 2012.

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19 /s/
20 _____
 JOHN W. SEDWICK
 UNITED STATES DISTRICT JUDGE

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 ¹⁵Doc. 25 at 1–2.

27 ¹⁶*Toguchi v. Chung*, 391 F.3d 1051, 1059–60 (9th Cir. 2004) (citing *Jackson v.*
28 *McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996).