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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CURTIS L. KIMBROUGH,

Plaintiff,

v.

DR. ERICA WEINSTEIN, et al.,

Defendants.

CASE NO. 1:08-cv-00101-OWW-SMS PC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL OF ACTION,
WITH PREJUDICE, FOR FAILURE TO
STATE A CLAIM UNDER SECTION 1983

(Doc. 23)

THIRTY-DAY OBJECTION PERIOD

Findings and Recommendations Recommending Dismissal of Action

I. Procedural History

Plaintiff Curtis L. Kimbrough, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on January 22, 2008. On September 10, 2009, the Court screened Plaintiff’s complaint and dismissed it with leave to amend for failure to state any claims. Plaintiff filed an amended complaint on October 30, 2009.

II. Screening Requirement

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall

1 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a
2 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

3 A complaint must contain “a short and plain statement of the claim showing that the pleader
4 is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
5 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
6 do not suffice.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v.
7 Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). Plaintiff must set forth “sufficient
8 factual matter, accepted as true, to ‘state a claim that is plausible on its face.’” Iqbal, 129 S.Ct. at
9 1949 (quoting Twombly, 550 U.S. at 555). Facial plausibility demands more than the mere
10 possibility that a defendant committed misconduct, Iqbal, 129 S.Ct. at 1950, and while factual
11 allegations are accepted as true, legal conclusions are not, id. at 1949.

12 **III. Plaintiff’s Eighth Amendment Medical Care Claim**

13 **A. Allegations**

14 Plaintiff is an inmate in the custody of the California Department of Corrections and
15 Rehabilitation and at the time of the events at issue in this action, he was incarcerated at Avenal State
16 Prison. Plaintiff alleges that he was denied appropriate follow-up medical care after having shoulder
17 surgery, in violation of his rights under the Eighth Amendment of the United States Constitution.
18 Plaintiff names Mercy Hospital surgeon Young Paik, M.D.; Avenal State Prison Chief Medical
19 Officers Erica Weinstein, M.D., and Nanveet Adaya, M.D.; and Avenal State Prison physical
20 therapist Steve Chabak, M.D., as defendants. Plaintiff seeks damages, declaratory relief, and an
21 injunction.

22 On June 20, 2007, Plaintiff had arthroplasty on his left shoulder at Mercy Hospital in
23 Bakersfield and he remained hospitalized until June 25, 2007, at which time he was sent back to
24 Avenal State Prison. Defendant Paik, who performed the surgery, issued an order recommending
25 that Plaintiff be provided with physical and occupational therapy on an urgent basis. Physical
26 therapy had been ordered while Plaintiff was in the hospital, but he did not receive any.

27 On June 27, 2007, Plaintiff requested to see to a doctor and was seen by Dr. Castillo, a
28 primary care physician. Plaintiff asked about receipt of physical and occupational therapy and was

1 told by Dr. Castillo that the Chief Medical Officer had not renewed a contract with a physical therapy
2 provider. Dr. Castillo issued a request for Plaintiff to be sent to an outside facility for physical and
3 occupational therapy on an urgent basis.

4 Plaintiff was finally seen for physical therapy on September 6, 2007, at which time he was
5 told by Defendant Chabak that he would receive therapy two to three times a week beginning the
6 next week.

7 On September 7, 2007, Plaintiff received a letter from Pui Yee Yu with the Prison Law
8 Office stating that Defendants Weinstein and Adaya informed him that the delay in receiving
9 physical therapy was attributable to ongoing contract negotiations with physical therapy providers.

10 Plaintiff next received therapy on November 20, 2007, and he was told by Defendant Chabak
11 that he would receive five more sessions. Plaintiff was seen three more times, on December 4, 5,
12 and 11, 2007.

13 Plaintiff contends that he continues to suffer further injury to his left shoulder, including pain.

14 **B. Discussion**

15 **1. Standard**

16 To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison
17 conditions must involve “the wanton and unnecessary infliction of pain.” Rhodes v. Chapman, 452
18 U.S. 337, 347 (1981). A prisoner’s claim of inadequate medical care does not rise to the level of an
19 Eighth Amendment violation unless (1) “the prison official deprived the prisoner of the ‘minimal
20 civilized measure of life’s necessities,’” and (2) “the prison official ‘acted with deliberate
21 indifference in doing so.’” Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting Hallett
22 v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002) (citation omitted)). A prison official does not act in
23 a deliberately indifferent manner unless the official “knows of and disregards an excessive risk to
24 inmate health or safety.” Farmer v. Brennan, 511 U.S. 825, 834 (1994). Deliberate indifference may
25 be manifested “when prison officials deny, delay or intentionally interfere with medical treatment,”
26 or in the manner “in which prison physicians provide medical care.” McGuckin v. Smith, 974 F.2d
27 1050, 1059 (9th Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133,
28 1136 (9th Cir. 1997) (en banc). Where a prisoner is alleging a delay in receiving medical treatment,

1 the delay must have led to further harm in order for the prisoner to make a claim of deliberate
2 indifference to serious medical needs. McGuckin, 974 F.2d at 1060 (citing Shapely v. Nevada Bd.
3 of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985)).

4 “Deliberate indifference is a high legal standard.” Toguchi, 391 F.3d at 1060. “Under this
5 standard, the prison official must not only ‘be aware of the facts from which the inference could be
6 drawn that a substantial risk of serious harm exists,’ but that person ‘must also draw the inference.’”
7 Id. at 1057 (quoting Farmer, 511 U.S. at 837). “‘If a prison official should have been aware of the
8 risk, but was not, then the official has not violated the Eighth Amendment, no matter how severe the
9 risk.’” Id. (quoting Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)).

10 **2. Defendant Paik**

11 Defendant Paik is a private physician who performed Plaintiff’s shoulder surgery at Mercy
12 Hospital. Assuming without deciding that Defendant Paik acted under color of law by as a state
13 contract provider, see e.g., Brentwood Academy, 531 U.S. at 295, 121 S.Ct. 924; Pollard v. GEO
14 Group, Inc., No. 07-16112, 2010 WL 5028447, at *8-13 (9th Cir. Dec. 10, 2010); Villegas v. Gilroy
15 Garlic Festival Ass’n, 541 F.3d 950, 954-55 (9th Cir. 2008), there are no factual allegations
16 supporting a claim that he knowing disregarded an excessive risk of harm to Plaintiff’s health while
17 Plaintiff was in the hospital. The conclusory allegation that Plaintiff did not receive therapy while
18 in the hospital for five days falls well short of supporting an Eighth Amendment claim against
19 Defendant Paik. The Court recommends dismissal of the claim against Defendant Paik, with
20 prejudice.

21 **3. Defendant Chabak**

22 Defendant Chabak provided physical therapy to Plaintiff on a number of occasions.
23 Plaintiff’s amended complaint is devoid of any allegations linking Defendant Chabak to the
24 approximately two month delay in receiving an initial physical therapy evaluation, to the non-receipt
25 of any physical therapy between the initial evaluation on September 6, 2007, and the next session
26 on November 20, 2007, or to the failure to provide the remaining two of five therapy sessions in
27 December 2007. There are simply no facts suggesting that there were any acts or omissions
28 constituting deliberate indifference that were attributable to Defendant Chabak, or that Defendant

1 Chabak, through some action or inaction, caused Plaintiff to suffer further injury to his shoulder.
2 The Court recommends dismissal of the claim against Defendant Chabak, with prejudice.

3 **4. Defendants Weinstein and Adaya**

4 Under section 1983, Plaintiff must show that the defendants holding supervisory positions
5 personally participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th
6 Cir. 2002). There is no respondeat superior liability, and each defendant is only liable for his or her
7 own misconduct. Iqbal, 129 S.Ct. at 1948-49. A supervisor may be held liable for the constitutional
8 violations of his or her subordinates only if he or she “participated in or directed the violations, or
9 knew of the violations and failed to act to prevent them.” Taylor v. List, 880 F.2d 1040, 1045 (9th
10 Cir. 1989); also Corales v. Bennett, 567 F.3d 554, 570 (9th Cir. 2009); Preschooler II v. Clark
11 County School Board of Trustees, 479 F.3d 1175, 1182 (9th Cir. 2007); Harris v. Roderick, 126 F.3d
12 1189, 1204 (9th Cir. 1997).

13 As Chief Medical Officers, Plaintiff contends that Defendants Weinstein and Adaya were
14 responsible for the alleged violation of his constitutional rights because they failed to ensure that he
15 received appropriate post-surgical therapy and they were responsible for the policies or practices in
16 place which led to Plaintiff’s inability to obtain timely and/or adequate physical therapy.

17 Plaintiff’s factual allegations fall short of supporting a plausible Eighth Amendment claim
18 for deliberate indifference arising out of the failure to provide adequate physical therapy. Construing
19 Plaintiff’s allegations liberally and in the light most favorable to Plaintiff, Hebbe v. Pliler, No. 07-
20 17265, 2010 WL 4673711, at *3 (9th Cir. Nov. 19, 2010) (citations omitted), there is insufficient
21 factual support for Plaintiff’s claim that the failure to provide more physical therapy than was
22 provided rose to a level of deliberate indifference, that Plaintiff suffered further harm as a result of
23 insufficient physical therapy, or that Defendants Weinstein and Adaya were responsible for that
24 failure, Farmer, 511 U.S. at 837; Toguchi, 391 F.3d 1057. The Court recommends dismissal of the
25 claim against Defendants Weinstein and Adaya, with prejudice.

26 **IV. Conclusion and Recommendation**

27 Plaintiff’s amended complaint fails to state a claim upon which relief may be granted under
28 section 1983. Plaintiff was previously provided with notice of the deficiencies in his claims and

1 granted leave to amend. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff was
2 unable to cure the deficiencies and further leave to amend is not warranted. Id. Accordingly, it is
3 HEREBY RECOMMENDED that this action be dismissed, with prejudice, for failure to state a
4 claim under section 1983.

5 These Findings and Recommendations will be submitted to the United States District Judge
6 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30)**
7 **days** after being served with these Findings and Recommendations, Plaintiff may file written
8 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
9 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the
10 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d
11 1153 (9th Cir. 1991).

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15 IT IS SO ORDERED.

16 **Dated:** January 6, 2011

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE