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

NAKIA PETTUS,
Plaintiff,

v.

UNITED STATES BUREAU OF PRISONS,
et al.,
Defendants.

No. C 08-00741 CRB

**ORDER GRANTING DEFENDANT
SMITH'S MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

Plaintiff, a prisoner presently incarcerated in Lewisburg, Pennsylvania, filed a pro se complaint under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Following this Court's preliminary screening of the Complaint pursuant to 28 U.S.C. § 1915A(a) two claims remain: (1) that Defendant Smith, warden at Atwater United States Penitentiary ("USP- Atwater") where Plaintiff was an inmate from March 13, 2008 through August 17, 2008, was deliberately indifferent to Plaintiff's personal safety by allowing him to be threatened by three inmates and forced into a Special Housing Unit ("SHU"); and (2) that Defendant Smith was deliberately indifferent to Plaintiff's mental health by failing to provide him with psychiatric care despite his attempts to seek treatment. June 9, 2009 Order (Dkt. 38).

1 The parties have filed cross motions for summary judgment.¹ For the reasons that
2 follow, Defendant's Motion for Summary Judgment (Dkt. 59) is GRANTED and Plaintiff's
3 Motion for Summary Judgment (Dkt. 67) is DENIED.

4 **I. BACKGROUND**

5 **A. Procedural History**

6 Plaintiff filed this action on May 5, 2008, and he filed a Second Amended Complaint
7 ("SAC") on May 26, 2009. This Court screened the claims in the SAC pursuant to 28 U.S.C.
8 § 1915A(a) and concluded that the two causes of action set forth above were viable.

9 Defendant moved to dismiss on July 29, 2009 on the ground that Plaintiff failed to
10 exhaust his administrative remedies as required under the Prison Litigation Reform Act. Dkt.
11 46. This Court denied that Motion on February 16, 2010 after concluding "that Plaintiff has
12 sufficiently alleged that he availed himself of the Bureau of Prisons grievance process." Dkt.
13 58 at 1.

14 Defendant then filed his Motion for Summary Judgment on April 16, 2010, and
15 Plaintiff filed his cross Motion for Summary Judgment on June 18, 2010. Those Motions are
16 presently before the Court.

17 **B. Relevant Undisputed Facts**

18 In April 2007, Plaintiff was housed at the United States Penitentiary-Coleman in
19 Florida. SAC ¶ 8; Devere Decl. Ex. 3 to Def.'s Mot. for S.J. (Dkt. 59). On or about April
20 12, 2007, several inmates who were angry with Plaintiff "escorted" him to a Lieutenant's
21 office, and Plaintiff feared for his safety. SAC ¶¶ 15, 22-24. Prison staff at USP-Coleman
22 ultimately determined that it was necessary for security reasons to transfer Plaintiff to
23 another institution, and he was sent to USP-Atwater on March 13, 2008. See, e.g., Howard
24 Decl. Ex. 6 to Def.'s Mot. for S.J. (Dkt. 59); SAC ¶ 26.

25
26 ¹ Plaintiff suggests that he had insufficient access to the law library at his current prison and,
27 accordingly, insufficient time in which to prepare an adequate Opposition to Defendant's Motion for
28 Summary Judgment. Pl.'s Opp'n to Def.'s Mot. for S.J. (Dkt. 63) at 62-66. The Court finds this
argument to be without merit in light of the fact that Plaintiff was able to prepare a 72-page, single-
spaced handwritten Opposition that contained numerous case citations and a 50-page handwritten
Declaration (a substantial portion of which concerned factual allegations irrelevant to this case). See
Dkt. 63, 66.

1 Plaintiff requested protective custody upon his arrival at USP-Atwater because he
2 believed that inmates in his designated housing unit were aware of the issues that led to his
3 transfer. Pl.’s Decl. in Opp’n to Defs.’ Mot. for S.J. or Dispositive Mot. (Dkt. 48) ¶ 23
4 (“Requested to be place in segregation until they classify me properly into another housing
5 unit.”); SAC ¶¶ 31-34. He was then placed into a secondary SHU. Devere Decl. Ex. 3-4 to
6 Def.’s Mot. for S.J. (Dkt. 59). He remained in protective custody during his 5-month stay at
7 USP-Atwater. Id. He received a psychological screening interview upon his arrival at USP-
8 Atwater and at least one other visit from a psychologist during his 5-month stay. Pettus
9 Decl. ¶ 37-41; Pl.’s Opp’n to Mot. for S.J. (Dkt. 63) at 53 (citing, on the second page “53” of
10 his Opposition, Defendant’s evidence reflecting a 15-minute meeting with a staff
11 psychologist).²

12 **II. STANDARD OF REVIEW**

13 Summary judgment is properly entered “if the pleadings, the discovery and disclosure
14 materials on file, and any affidavits show that there is no genuine issue as to any material fact
15 and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); see
16 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477
17 U.S. 242, 256 (1986). The movant bears the “burden of showing the absence of a genuine
18 issue as to any material fact, and for these purposes the material it lodged must be viewed in
19 the light most favorable to the opposing party.” Adickes v. S.H. Kress & Co., 398 U.S. 144,

22 ² Defendant sets forth compelling evidence that Plaintiff was actually visited by psychological
23 staff five times during his five months at USP-Atwater. See Ellis Decl. Ex. 5 to Def.’s Mot. for S.J.
24 (Dkt. 59). Notwithstanding that evidence, Plaintiff maintains in his Declaration that he “did not receive
25 any psychological evaluation at Atwater U.S.P. during his stay.” Pettus Decl. (Dkt. 66) at ¶ 66. The
26 Court cannot resolve a factual dispute on a Motion for Summary Judgment. However, notwithstanding
27 paragraph 66 of his Declaration, Plaintiff admits elsewhere in his Declaration and in his Opposition to
28 Defendant’s Motion for Summary Judgment that he met with a mental health professional when he
arrived at USP-Atwater and at least one additional time. Pettus Decl. ¶ 37-41; Pl.’s Opp’n to Mot. for
S.J. (Dkt. 63) at 53 (citing, on the second page “53” of his Opposition, Defendant’s evidence reflecting
a 15-minute meeting with a staff psychologist). Because a party cannot create an issue of fact by
contradicting his own admissions, the Court accepts as undisputed the facts that (1) Plaintiff met with
a mental health professional when he arrived at USP-Atwater and (2) he met with a mental health
professional at least one other time during his 5-month stay. See Cleveland v. Policy Mgmt. Sys. Corp.,
526 U.S. 795, 806 (1999).

1 157 (1970). The movant is not required to produce evidence negating the non-movant's
2 claims. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990) (“[T]he purpose of Rule 56
3 is to enable a party who believes there is no genuine dispute as to a specific fact essential to
4 the other side's case to demand at least one sworn averment of that fact before the lengthy
5 process of litigation continues”). If the movant carries its burden, the burden shifts to the
6 nonmoving party to establish facts beyond the pleadings showing there remains a triable
7 issue of disputed material fact so that summary judgment is not appropriate. Celotex, 477
8 U.S. at 324; Adickes, 398 U.S. at 157.

9 To successfully rebut a properly supported summary judgment motion, the
10 non-moving party “must point to some facts in the record that demonstrate a genuine issue of
11 material fact and, with all reasonable inferences made in the [nonmoving party's] favor,
12 could convince a reasonable jury to find for [that party].” Reese v. Jefferson School Dist. No.
13 14J, 208 F.3d 736, 738 (9th Cir. 2000). The non-moving party must “go beyond the
14 pleadings and by her own affidavits, or by ‘the depositions, answers to interrogatories, and
15 admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’”
16 Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). The opposing party may not rest on
17 conclusory allegations or mere assertions. Rather, it must present significant probative
18 evidence of specific facts raising a material issue that “can be resolved only by a finder of
19 fact because [the issue] may reasonably be resolved in favor of either party.” Anderson, 477
20 U.S. at 249-50, 256.

21 **III. DISCUSSION**

22 **A. DEFENDANT IS ENTITLED TO QUALIFIED IMMUNITY**

23 Government officials “are shielded from liability for civil damages insofar as their
24 conduct does not violate clearly established statutory or constitutional rights of which a
25 reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
26 The Court should conduct a two-part test when resolving a qualified immunity defense.
27 First, decide whether the facts that a plaintiff has alleged or shown make out a violation of a
28 constitutional right. Second, decide whether the right at issue was “clearly established” at

1 the time of the defendant’s alleged misconduct. Saucier v. Katz, 533 U.S. 194 (2001). A
2 right is clearly established if a reasonable officer would necessarily have known that his
3 actions were unlawful. Dunn v. Castro, – F.3d —, 2010 WL 3547637, at *3 (9th Cir. Sept.
4 14, 2010) (quoting Saucier, 533 U.S. at 202). Whether an officer would necessarily have
5 known that his actions were unlawful turns on “whether the preexisting law provided the
6 defendant with ‘fair warning’ that [his] conduct was unlawful.” Flores v. Morgan Hill
7 Unified Sch. Dist., 324 F.3d 1130, 1137 (9th Cir. 2003) (quoting Hope v. Pelzer, 536 U.S.
8 730, 740 (2002)). Courts are permitted to address either prong of the qualified immunity test
9 in light of the circumstances of the case. Pearson v. Callahan, __ U.S. ___, 129 S. Ct. 808,
10 818 (2009).

11 **1. Claim of Deliberate Indifference to Personal Safety**

12 With respect to Plaintiff’s claim that Defendant was deliberately indifferent to his
13 personal safety, it is undisputed that Plaintiff *requested* to be placed in protective custody
14 when he arrived at USP-Atwater from USP-Coleman. Indeed, Plaintiff admits that “the
15 security threat to Plaintiff was initiated at U.S.P. Coleman and did not involve U.S.P.
16 Atwater or Defendant Warden D. Smith.” Pl.’s Opp’n to Def.’s Mot. for S.J. (Dkt. 63) at 32.
17 Thus, by Plaintiff’s own admission, there was no constitutional violation by Defendant in this
18 case. To the extent Plaintiff is claiming that he should have been reclassified out of
19 protective custody at USP-Atwater, Defendant is entitled to qualified immunity because (1)
20 classification and housing decisions do not support a claim for violation of the Eighth
21 Amendment; and (2) there is no evidence that Defendant was involved in or acquiesced in an
22 *illegitimate* decision to keep Plaintiff in the SHU for reasons other than his own safety. See,
23 e.g., Peyton v. Vasquez, 2007 WL 1456149, *5 (E.D. Cal. May 16, 2007) (“Classification
24 and housing placement decisions . . . do not support a claim for violation of the Eighth
25 Amendment.”); Hewitt v. Helms, 459 U.S. 460, 468 (1983); See Hutchinson v. United States,
26 838 F.2d 390 (9th Cir. 1988); see also Ashcroft v. Iqbal, – U.S. —, 129 S. Ct. 1937, 1948
27 (2009) (“Government officials may not be held liable for the unconstitutional conduct of
28 their subordinate under a theory of *respondeat superior*.”).

1 Plaintiff also asserts that Defendant “is liable for depriving Plaintiff verification of
2 his specific status while in special housing unit when requested for administrative detention
3 documents.” Pl.’s Opp’n to Def.’s Mot. for S.J. (Dkt. 63) at 32. Defendant is entitled to
4 qualified immunity with respect to this specific assertion for two reasons. First, the facts
5 Plaintiff has set forth do not establish the violation of a constitutional right. Plaintiff had no
6 right to “a written decision describing the reasons for placing the prisoner in administrative
7 segregation.” Toussaint v. McCarthy, 801 F.2d 1080, 1000-1101 (9th Cir. 1986).³ Moreover,
8 even if Plaintiff did have the right to a verification of status, there is no evidence that
9 Defendant acquiesced in denying him one. See Hutchinson, 838 F.2d at 390; Iqbal, 129 S.
10 Ct. at 1948. Second, even if the facts did set forth the violation of a constitutional right, the
11 right to a “verification of status” was not clearly established at the time of the alleged
12 constitutional violation.

13 **2. Claim of Deliberate Indifference to Mental Health**

14 With respect to Plaintiff’s claim that Defendant was deliberately indifferent to his
15 mental health by failing to provide him with psychiatric care, the undisputed evidence again
16 shows that Defendant is entitled to qualified immunity. Plaintiff admits that he received a
17 psychological evaluation when he arrived at USP-Atwater and that he was seen at least one
18 additional time by a psychologist during his 5-month stay at the prison. Pettus Decl. ¶ 37-41;
19 Pl.’s Opp’n to Mot. for S.J. (Dkt. 63) at 53 (citing, on the second page “53” of his
20 Opposition, Defendant’s evidence reflecting a 15-minute meeting with a staff psychologist).
21 Thus, Defendant was not deliberately indifferent to Plaintiff’s mental health needs. In
22 addition, Plaintiff has not set forth evidence from which a rational jury could conclude that
23 he was in serious medical need of antidepressants⁴ or that, even if he was in serious medical
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25 ³ The only causes of action at issue in this case concern alleged violations of the Eighth
26 Amendment. See June 9, 2009 Order (Dkt. 38). To the extent Plaintiff is attempting to set out a claim
27 that his due process rights were violated, that claim is not before the Court.

28 ⁴ Neither his disagreement with the psychologists he saw at USP-Atwater regarding his need
for antidepressants or the fact that he was eventually prescribed antidepressants at another institution
constitutes sufficient evidence to create a jury question as to whether, *while at USP-Atwater*, he was in
a serious medical need of antidepressants. See Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989).

1 need of antidepressants, Defendant was aware of that need or acquiesced in depriving him of
2 the antidepressants. See Hutchinson, 838 F.2d at 390; Iqbal, 129 S. Ct. at 1948.⁵

3 **V. CONCLUSION**

4 For the foregoing reasons, Defendant's Motion for Summary Judgment is
5 GRANTED.⁶ The Clerk is directed to enter Judgment in favor of Defendant and against
6 Plaintiff and close this case.

7 **IT IS SO ORDERED.**

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10 Dated: September 23, 2010



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CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

⁵ Plaintiff also appears to take issue with the facts that (1) USP-Atwater did not have a staff *psychiatrist* but rather just staff *psychologists*; and (2) USP-Atwater, because of staffing needs, had to bring in psychologists from outside the institution. Neither of these facts, if true, amount to an Eighth Amendment violation.

⁶ Plaintiff filed a Motion for Summary Judgment on June 18, 2010. Dkt. 67. That Motion is denied because it (1) is untimely and (2) is baseless in light of this Court's conclusion that Defendant is entitled to summary judgment on the basis of qualified immunity.