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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL D. HARRISON,

Plaintiff,

v.

T. MOORE, et al.,

Defendants.

Case No. 1:08-cv-1065-AWI-MJS (PC)

**ORDER ADOPTING IN PART FINDINGS
AND RECOMMENDATIONS TO GRANT
IN PART AND DENY IN PART
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

(Doc. 247)

Plaintiff is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action brought pursuant to 28 U.S.C. § 1983. The action proceeds against Defendants Moore, Davis-Jones, Rabaino-Burns, Dava, Kim, Galvan, C. Gonzalez, M. Gonzalez, O'Neal, Parsons, Roth, Tumayo, Urbano, Vicente, Casio, Cisneros, and Coronado on Plaintiff's medical indifference claims. Doc. 160.¹ The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 of the United States District Court for the Eastern District of California.

On June 18, 2015, the Magistrate Judge issued Findings and Recommendations to grant in part and deny in part Defendants' motion for summary judgment. Doc. 247.

¹ Service was recently reattempted on Defendant Johnson. Doc. 256. Defendants Bastianon, Zakari, Edmonds and Raygoza have not been served in this action and have not otherwise appeared in it. Docs. 238 and 245.

1 Defendants filed objections to the Findings and Recommendations on July 2, 2015.
2 Doc. 254. Plaintiff filed objections to the Findings and Recommendations on July 28,
3 2015. Doc. 260. Defendants object to the recommendation to deny summary judgment
4 to Defendants Davis Jones and the mental health defendants, and to the
5 recommendation to deny qualified immunity to these defendants. Plaintiff objects to the
6 recommendation to grant summary judgment to Defendants Moore, Kim, and Dava, as
7 well as to the mental health defendants after the period of April 20-May 3, 2007.

9 In accordance with the provisions of 28 U.S.C. § 636(b)(1), the Court has
10 conducted a *de novo* review of this case. Having carefully reviewed the entire file, the
11 Court finds that the June 18, 2015 Findings and Recommendations are supported by the
12 record and by proper analysis. The Court accordingly adopts all parts of the Findings
13 and Recommendations except for the recommendation regarding Defendant Moore as
14 Plaintiff sufficiently clarified his allegations against Defendant Moore in his objections
15 (submitted in the form of a declaration signed under penalty of perjury). The Court
16 addresses the parties' objections below.

18 I. DEFENDANTS' OBJECTIONS

19 A. Nurse Davis Jones

20 The Court rejects Defendants' contention that there is no issue of disputed fact
21 regarding whether Nurse Davis Jones violated the Eighth Amendment. To the contrary,
22 Davis Jones' alleged refusal to examine or refer Plaintiff for further treatment despite his
23 complaints of severe pain and the visible swelling and bruising of his arm; and her
24 peremptory statement that if he could move his arm, "it ain't broke," if true, indicate that
25 she consciously disregarded obvious signs of serious injury, and failed to provide a
26 minimally competent level of care. See McGuckin v. Smith, 974 F.2d 1050, 1060 (9th
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1 Cir. 1992), *overruled on other grounds by* WMX Tech., Inc. v. Miller, 104 F.3d 1133,
2 1136 (9th Cir. 1997); Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir. 1989);
3 Moore v. Thomas, 653 F.Supp.2d 984, 1000 (N.D. Cal. 2009).

4 **B. Mental Health Staff: Psychologist Roth, Correctional Counselor Cisneros,**
5 **LPTs Parsons, M. Gonzalez, C. Gonzalez, Galvan, Casio, O'Neal, Coronado,**
6 **and Tamayo²**
7

8 The Court also rejects Defendants' objections that there is no issue of disputed
9 fact regarding whether the mental health defendants violated the Eighth Amendment.
10 Taken as true, Plaintiff's allegations that he complained of arm pain to every single
11 mental health staff member with whom he interacted, that the bruising and swelling in his
12 arm was plainly visible, that none of the mental health defendants responded to his
13 complaints, and that they falsified their records, state a claim of medical indifference.
14 See McGuckin, 974 F.2d at 1060; M.H. v. Cnty. of Alameda, 62 F.Supp.3d 1049,
15 1077-1078 (N.D. Cal. 2014) (intake nurse potentially liable for deliberate indifference
16 where she knew of decedent's risk factors for alcohol withdrawal, but failed to ensure he
17 received follow up care, and may have falsified records).
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19 Although some of the above Defendants may not have interacted with Plaintiff
20 between April 20 and May 3, Defendants have not at this stage shown an absence of
21 disputed fact as to any Defendant in particular. Therefore the Court finds there remain
22 issues of disputed fact regarding which Defendants allegedly ignored Plaintiff's claims of
23 severe pain and visible signs of injury between April 20 and May 3, 2007. The fact that
24 Plaintiff received an ice pack and some ibuprofen on the day of his injury does not
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27 ² As noted, Psychiatrist Zakari and LPTs Edmonds, Raygoza, Johnson, and Bastianon have not been
28 served or appeared in this action. The claims against them are not addressed in the Findings and
Recommendations.

1 absolve mental health defendants of potential liability under the Eighth Amendment for
2 the two-week period that followed. An ice pack would be of limited use after a few hours,
3 and Defendants do not indicate they were aware Plaintiff was taking ibuprofen.

4 Defendants provide no authority for their contention that non-treating prison staff are
5 entitled to assume that inmates are already receiving adequate care, and the Court has
6 found none. See Estate of Prasad ex rel. Prasad v. Cnty. of Sutter, 958 F.Supp.2d
7 1101, 1113 (E.D. Cal. 2013) (sheriff's deputies who ignored medical instructions were
8 not justified in believing decedent "was in capable hands" even though he was receiving
9 some treatment from medical staff).

11 **C. Qualified Immunity**

12 The Court rejects Defendants' argument that they are entitled to qualified
13 immunity. It is clearly established that both medical and non-medical staff may be held
14 liable for failing to respond to an inmate's complaints of pain and requests for medical
15 assistance. See Erickson v. Pardus, 551 U.S. 89, 90 (2007); Estate of Prasad ex rel.
16 Prasad v. Cnty. of Sutter, 958 F.Supp.2d 1101, 1112 (E.D. Cal. 2013). It is also clearly
17 established that prison staff may violate the Eighth Amendment not only by failing to
18 provide care altogether but by providing care that is medically unacceptable. See Snow
19 v. McDaniel, 681 F.3d 978, 988 (9th Cir. 2012), *overruled on other grounds by Peralta v.*
20 Dillard, 744 F.3d 1076, 1083 (9th Cir. 2014); Ortiz, 884 F.3d at 1314. Accepting
21 Plaintiff's allegations as true, reasonable prison staff in Davis Jones' and the mental
22 health Defendants' positions would have known that ignoring an inmate's visible injury
23 and complaints of pain was unlawful.

26 **II. PLAINTIFF'S OBJECTIONS**

27 **A. Defendant Moore**

1 Plaintiff clarifies for the first time in his objections (submitted in the form of a
2 declaration made under penalty of perjury) that Moore was present at his cell-front when
3 Defendant Davis-Jones told Plaintiff that if he could move his arm, it was not broken.
4 Plaintiff states that “they both left me to suffer. So Sgt. Moore is just as guilty as T.
5 Davis Jones.” Doc. 260, at 2. Plaintiff also states that “when I showed [Moore] my
6 broken arm and asked for help, he refused, knowing I was hurt.” Id. It is unclear when
7 this subsequent refusal took place. Taking as true Plaintiff’s allegations that his arm was
8 visibly swollen and bruised, that he complained of severe pain, and that Moore knew
9 Plaintiff had been in a fight, there is an issue of disputed fact regarding whether
10 Defendant Moore acted with deliberate indifference to Plaintiff’s serious medical needs
11 when Moore refused to seek medical care. See Jett v. Penner, 439 F.3d 1091, 1098
12 (9th Cir. 2006); Clement v. Gomez, 298 F.3d 898, 904-905 (9th Cir. 2002). Accordingly,
13 the Court does not adopt the Findings and Recommendations with regards to Defendant
14 Moore and will deny summary judgment on this defendant.
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17 **B. Dr. Kim & Nurse Dava**

18 The Court rejects Plaintiff’s argument there are issues of disputed fact regarding
19 whether Defendants Kim and Dava violated his Eighth Amendment rights. As the
20 Magistrate Judge stated in the Findings and Recommendations, medical staff have
21 broad discretion in prescribing medication and determining what care is appropriate.
22 See Doc. 247, at 20-21; see also, e.g., Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir.
23 2004). Viewing the facts in the light most favorable to Plaintiff, Defendants have
24 established an absence of evidence to support the claim that Defendant Kim or
25 Defendant Dava knowingly provided care that was medically unacceptable when they
26 failed to prescribe antibiotics and deferred further treatment decisions until follow-up
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1 appointments. See Toguchi, 391 F.3d at 1058; Jackson v. McIntosh, 90 F.3d 330, 332
2 (9th Cir. 1996).

3 **C. Mental Health Defendants**

4 The Court rejects Plaintiff's argument that the mental health defendants caused
5 an unconstitutional delay in medical care for the period from June 6, 2007 through
6 September 1, 2007. As the Findings and Recommendations noted, Defendant saw
7 medical staff no fewer than 12 times during this three-month period, and his level of care
8 was found to be constitutionally adequate. Plaintiff's contention that the mental health
9 defendants could have simply called the chief medical officer to have Plaintiff sent to
10 Mercy Hospital is not supported by the facts.
11

12 Accordingly, it is HEREBY ORDERED that:

- 13
- 14 1. The Court adopts all parts of the June 18, 2015 Findings and Recommendations
15 (Doc. 247) except for the recommendation regarding Defendant Moore;
 - 16 2. Defendants' motion for summary judgment (Doc. 202) is GRANTED
17 as to Defendants Rabaino-Burns, Kim, and Dava; and
 - 18 3. Defendants' motion for summary judgment (Doc. 202) is DENIED as to
19 Defendants Moore, Davis-Jones, Urbano, Roth, C. Gonzalez, M. Gonzalez,
20 Casio, Coronado, Cisneros, Galvan, O'Neal, Parsons, and Tamayo.
21
 - 22 4. The case is to remain open.

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24 IT IS SO ORDERED.

25 Dated: August 25, 2015

26 
27 SENIOR DISTRICT JUDGE
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