UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL A. SCHOLES,

Plaintiff,

v.

ROD HIGMAN, et al.,

Defendants.

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CASE NO. 1:08-CV-01489-AWI-DLB PC

FINDINGS AND RECOMMENDATION RECOMMENDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BE GRANTED

(DOC. 37)

OBJECTIONS DUE WITHIN TWENTY-ONE DAYS

Findings And Recommendations

I. Procedural History

Plaintiff Michael A. Scholes ("Plaintiff") is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff was formerly in the custody of the California Department of Corrections and Rehabilitation ("CDCR"). This action is proceeding on Plaintiff's complaint against Defendants Rod Hickman, Robin Dezember, Ken Clark, and Perlita McGuinness. On August 30, 2010, Defendants filed a motion for summary judgment. Defs.' Mot. Summ. J., Doc. 37. On September 26, 2010, Plaintiff filed his opposition. Pl.'s Opp'n, Docs. 40 to 43. On October 5, 2010, Defendants filed their reply. Defs.' Reply, Doc. 45. The Court does not find the matter necessary for a motions hearing pursuant to Local Rule 230(g), and the matter is deemed submitted.

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II. Summary Judgment Standard

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).[1] Under summary judgment practice, the moving party

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" *Id.* at 324. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Fed. R. Civ. P. 56(c); *Matsushita*, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the

[1] The Federal Rules of Civil Procedure were updated effective December 1, 2010.

suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2002); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006); *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (quoting former Rule 56(e) advisory committee's note on 1963 amendments).

In resolving a motion for summary judgment, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which an inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E. D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . .Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 586-87 (citations omitted).

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III. Undisputed Facts[2]

Plaintiff was a state prisoner housed at the California Substance Abuse Treatment Facility ("CSATF") at times material to the matters at issue. He paroled from CSATF on April 10, 2006. He has no medical training.[3] Defendants Hickman, Dezember, Clark, and McGuinness were employed by the CDCR and held the following positions at times material to the matters at issue: R. Hickman was the Secretary of the CDCR; R. Dezember was the Director of Healthcare Services for the CDCR; K. Clark was the Warden at CSATF; and P. McGuinness was the Chief Medical Officer ("CMO") at CSATF. Defendant Clark was responsible for the overall operation of the institution, but delegated responsibility for operating the various facilities to subordinates.[4] Defendant Clark rarely had any personal involvement in the operation of any particular facility, and rarely had personal knowledge concerning any individual inmate in the institution. Defendant Clark has no medical training or background, and was not personally informed about any specific medical conditions or medical treatment for any individual inmate. He did not make medical decisions, nor instruct any subordinate as to what medical decisions to make in any

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[2] All facts are taken from Defendants' statement of undisputed facts and are considered undisputed, unless otherwise noted. Pursuant to Local Rule 260(b) and Federal Rule of Civil Procedure 56(e), all disputes with the movant's statement of facts must be supported with citation to evidence. *See* L. R. 260(b) (parties opposing Statement of Undisputed Facts shall deny those that are disputed, "including with each denial a citation to the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission or other document relied upon in support of that denial"). Plaintiff filed a list of disputed and undisputed facts, with citations to submitted documents in support. Plaintiff's verified complaint and opposition may be treated as opposing affidavits to the extent that they are verified and set forth admissible facts (1) within Plaintiff's personal knowledge and not based merely on Plaintiff's belief and (2) to which Plaintiff is competent to testify. *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004); *Johnson v. Meltzer*, 134 F.3d 1393, 1399-1400 (9th Cir. 1998); *McElyea v. Babbitt*, 833 F.2d 196, 197-98 (9th Cir. 1987); *Lew v. Kona Hosp.*, 754 F.2d 1420, 1423 (9th Cir. 1985).

Plaintiff also submits his own statement of undisputed facts. To the extent that these facts dispute Defendants' statement of facts, they will be considered. The Court has reviewed all of the parties' arguments, even if the argument has not been mentioned herein. The Court will consider those facts and evidence that are relevant to resolving Defendants' motion for summary judgment.

[3] Plaintiff contends that he has "beyond a lay knowledge of medicine" because he has tertiary thyroidism, which requires self-monitoring. This does not dispute Defendants' statement that Plaintiff has no medical training. Plaintiff's objection is overruled.

[4] Plaintiff contends that the terms "facilities" and "institution" are too vague. The Court construes the terms to refer to CSATF and its facilities.

specific case.[5] Defendant Clark does not know the Plaintiff personally, has never met him, and has never received any specific knowledge concerning him, or any correspondence from or about him. Defendant Clark has no personal knowledge about any injury Plaintiff may have suffered while in the custody of CDCR, nor does he have any knowledge about any treatment Plaintiff may have received for any injury. Defendant Clark did not send anyone to speak with Plaintiff about communication between his father and state legislators, and has no recollection of ever taking any action concerning Plaintiff.[6]

On the evening of March 16, 2006, Plaintiff jumped off the top bunk and injured his knee. The next morning, March 17, 2006, Plaintiff submitted a sick call slip claiming that "I "hyper extended my right knee and I sustained some soft tissue damage. I cannot put any pressure on it, my lower leg and calf are causing my knee joint to pop from right to left. My knee is very unstable and I am in extreme pain." Plaintiff was seen by Nurse JauRegui at 11:15 a.m. The nurse noted that Plaintiff's blood pressure, pulse, respiration, and temperature were all within normal limits. Plaintiff's right knee was warm and tender with some swelling, and he was unable to completely extend his leg. Plaintiff was referred to Nurse Practitioner Mulvaney for an examination and evaluation. At approximately 12:45 p.m., Defendant McGuinness contends that she saw Plaintiff.[7] Plaintiff contends that he was treated by Nurse Practitioner Mulvaney only. Plaintiff again claimed that he heard his right knee "pop" after jumping off the

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[5] Plaintiff contends a conspiracy by all Defendants pursuant to case Nos. 3:01-CV-01351 in the Northern District of California, and Case No. 2:90-CV-00520 in the Eastern District of California. Plaintiff refers to *Plata v. Schwarzenegger, et al.*, and *Coleman v. Schwarzenegger, et al.*, which concerned the CDCR being placed on receivership regarding medical care for inmates. Those class action suits do not demonstrate any conspiracy by Defendants in this action. Plaintiff's allegations of conspiracy are far too vague. Plaintiff's objection is overruled.

[6] Plaintiff contends that Plaintiff was only informed that Defendant Clark was angry about the communication between Plaintiff's father and state legislators. The objection is overruled, as such knowledge relies upon inadmissible hearsay evidence. Fed. R. Evid. 801, 802.

[7] Plaintiff contends that he never saw Defendant McGuinness in any capacity until March 29, 2006. Plaintiff contends that on March 29, 2006, upon Plaintiff's return to CSATF following an x-ray, Plaintiff witnessed a guard give Defendant McGuinness an envelope containing Plaintiff's x-rays. Pl.'s Decl. ¶¶ 31-33, Doc. 42. Defendants contend that this not supported by any admissible evidence. Defendants cite to page 3 of Defendants' exhibit D. That citation is unclear as to who provided the treatment. However, Plaintiff's own declaration is sufficient to dispute Defendants' statement of facts. The statement of facts will thus be modified to reflect the parties' various contentions.

second level bunk. Plaintiff claimed that he had been "self-medicating" with Motrin and Tylenol since the previous night. Defendant McGuinness contends that she prescribed Naproxyn 250 mg.[8] Defendant McGuinness contends that she also ordered crutches and an x-ray of Plaintiff's right knee. On March 18, 2006, Plaintiff was designated as a "medical lay in."[9] Plaintiff was again seen on March 22, 2006. Plaintiff complained that he was unable to use the crutches because of a prior surgery on his right shoulder. Defendants contend that Plaintiff told the doctor that he wanted his knee fixed before he was released to parole on April 10, 2006.[10] Plaintiff contends that he was seen by a medical technical assistant, not a doctor. Defendants contend that the doctor noted that Plaintiff presented in a wheelchair with distressed affect. An oxygen saturation monitor was placed on Plaintiff to record any increase in his pulse rate. Plaintiff's pulse rate increased from 71 to 99 when he extended his right leg as far as he could. Defendants contend that the doctor ordered a continuation of the medications, but authorized the use of a wheelchair instead of crutches.

On March 25, 2006, Plaintiff was moved to cell 151, a lower tier cell, and assigned to a lower bunk. Defendants contend that an order was issued for an emergent x-ray of Plaintiff's right knee, to be completed at California State Prison – Corcoran ("CSP-Corcoran").[11] CSATF did not have the ability to complete the x-ray at that institution. Plaintiff was transported to CSP-Corcoran on March 29, 2006, and returned to CSATF the same day.

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[8] Plaintiff contends that Naproxyn is not a pain relief medication. Plaintiff is not qualified to make an opinion requiring expert training. Fed. R. Evid. 702. The Court notes that Defendants' submitted evidence indicates only that Naproxyn was prescribed, not what Naproxyn treats. Thus, Defendants' statement of facts is modified accordingly.

[9] Plaintiff contends that there is no evidentiary support to indicate that he received meals while on medical lay-in. After review of Defendants' supporting document, the Court cannot determine whether Plaintiff actually received his meals in his cell while on medical lay-in. Thus, the statement of facts is modified.

[10] Plaintiff contends that he was not seen by a doctor, but by a medical technical assistant. Defendants cite to page 5 of Defendants' exhibit D. Having reviewed exhibit D, the Court cannot find that Plaintiff was actually seen by a doctor on March 22, 2006. There is no signature to indicate who saw Plaintiff that day. Accordingly, the statement of facts has been modified accordingly to reflect that it is Defendants' contention only.

[11] Plaintiff contends that there was no such order issued. Defendants cite to page 6 of Defendants' exhibit D, which indicates a Request for Authorization of Temporary Removal for Medical Treatment. The document is unsigned. The Court will modify the statement of facts to reflect that it is Defendants' contention such an order was issued. Whether or not the order was authorized properly is not a material disputed fact in this action.

The x-ray was sent to Kern Radiology Medical Group, and interpreted by the radiologist, Dr. Jeffrey Child. Dr. Child's reading of the x-ray found "no evidence of fracture or other bony abnormality. No arthritic changes are seen. No evidence of joint effusion or radiopaque loose body is seen. Impression: Normal Examination."[12] The report was dictated on April 7, 2006, and transcribed on April 10, 2006.

Plaintiff was released on parole on April 10, 2006. On April 28, 2006, approximately two and a half weeks after being released from prison, Plaintiff sought medical attention for right knee pain. Plaintiff was seen in the U. C. Davis Orthopedic Clinic on April 28, 2006. He arrived on crutches. The doctor noted slight swelling of the right knee. Plaintiff had tenderness to palpation over the patella, as well as the medial and lateral aspects of the joint line. X-rays were taken, including an AP and lateral of Plaintiff's right knee. The x-rays revealed a Schatzker-1 tibial plateau fracture with no obvious split. The doctor believed that Plaintiff might also have a medial fracture of the patella, but no such fracture was evident from the x-ray.

The Plan set forth by the doctor was: "The patient is five to six weeks out from a depressed, lateral, plateau fracture, which has undoubtedly gone on to heal to some extent. We will admit him to the hospital for CT scanning of that plateau fracture as it is displaced enough to warrant surgery. He will require a buttress plate on the lateral side and likely bone graft. This has been described and explained to him. He has also been informed that the delay in his presentation may have some adverse affects on his outcome. Ideally, this is an injury treated in the first ten days post injury, and he is significantly late on that." Plaintiff had surgery on his right knee on April 29, 2006.[13] On May 15, 2006, Plaintiff returned to the clinic for a follow-up appointment. Plaintiff was doing well overall, but he needed Percocet for pain, and asked for something stronger. On examination of his knee, the incision was well-healed and the range of

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[12] Plaintiff contends that Dr. Ferguson reviewed separate x-rays of Plaintiff's right knee on April 28, 2006, and found a fracture. Plaintiff contends that there is an inference that Dr. Childs viewed different x-rays. Plaintiff's objection is overruled. It is undisputed that Dr. Ferguson and Dr. Childs viewed different x-rays. However, there is no evidence that Dr. Childs and Dr. Ferguson did not both view x-rays of Plaintiff's right knee.

[13] Plaintiff contends that he received a second surgery according to the plan of treatment on June 29, 2007. The Court notes this, but finds this fact is immaterial to the resolution of this motion.

motion of his knee was approximately 15 to 100 degrees. X-rays revealed that the hardware in Plaintiff's knee was in stable condition. The Assessment and Plan were: "Status post ORIF of lateral plateau fracture 2 weeks ago. Overall, patient doing well. Range of motion is good. We have encouraged him to work on obtaining full extension. He is in an unlocked Bledsoe knee brace which we will continue. Continue non-weightbearing for another 8 weeks for a total of 10 weeks non-weightbearing. The patient can stop his anticoagulation as he is spending more time out of bed then in bed at this point. I have given him a refill of pain medication, 90 Percocet and 90 ibuprofen. The patient should transition to ibuprofen if possible. At his next refill, I would consider Norco rather than Percocet. Also, have the patient visit with a today to see if there are any other resources available to him and his child to see whether he qualifies for any short-term disability. He will be unable to work for the next 2 to 3 months. I will see the patient back in one month for repeat AP lateral x-rays of his knee."

On his next follow-up visit to the clinic, Plaintiff was able to "touchdown weightbearing" with his leg, had full range of motion, and he had very little pain associated with the lateral part of the plateau. The Plan was to have Plaintiff go completely weightbearing, and a follow-up in four weeks. If necessary, x-rays and an MRI would be obtained to determine whether Plaintiff had a meniscal tear. Plaintiff was seen in the Orthopaedic Sports clinic in November 2006, and a CT anthrogram showed medial and lateral meniscal tears, but the doctor did not relate these tears to the initial knee injury.[14]

Plaintiff was seen for another follow-up appointment on January 9, 2007. According to the medical history, Plaintiff had last been seen in September 2006, scheduled for a follow-up appointment in November but had not been seen, and missed another appointment because he fell off a horse on December 6, 2006, causing a fracture of several thoracic vertebra. During this follow-up appointment Plaintiff had nearly full range of motion of the knee, just 5 degrees short of full extension. Plaintiff was able to flex his knee to about 130 degrees without pain. He had no knee effusion.

[14] Plaintiff contends that other reports do relate Plaintiff's meniscal tears to the initial knee injury. The Court notes this, but finds that it is immaterial for purposes of resolving this motion.

IV. Analysis

A. Deliberate Indifference To A Serious Medical Need

The Eighth Amendment prohibits cruel and unusual punishment. "The Constitution does not mandate comfortable prisons." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quotation and citation omitted). A prisoner's claim of inadequate medical care does not rise to the level of an Eighth Amendment violation unless (1) "the prison official deprived the prisoner of the 'minimal civilized measure of life's necessities,'" and (2) "the prison official 'acted with deliberate indifference in doing so.'" *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (citation omitted)). The deliberate indifference standard involves an objective and a subjective prong. First, the alleged deprivation must be, in objective terms, "sufficiently serious . . . ." *Farmer*, 511 U.S. at 834 (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Second, the prison official must "know[] of and disregard[] an excessive risk to inmate health or safety . . . ." *Id.* at 837.

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

B. Defendants Dizember and Hickman

Defendants contend that Plaintiff's claims against Defendants Dizember and Hickman are based solely on *respondeat superior* liability, and thus fails as a cognizable Eighth Amendment claim. Defs.' Mot. Summ. J. 6:16-7:2. Defendants also contend that there is no proof of conspiracy to violate Plaintiff's constitutional rights as Plaintiff makes only bare assertions without citation to any evidence. *Id.* at 10:11-25. Plaintiff contends that 1) he does not allege *respondeat superior* liability; 2) Defendants Dizember and Hickman conspired to violate his constitutional rights; and 3) it is Defendants' burden on summary judgment to demonstrate that

there is no viable conspiracy claim. Pl.'s Mem. P. & A. 5:25-6:5.

The Court has re-examined Plaintiff's amended complaint, and finds that Plaintiff makes only a bare allegation that Defendants conspired to violate his constitutional rights. Pl.'s Am. Compl., Doc. 6, filed May 20, 2008. Alleging that Defendants conspired to violate Plaintiff's constitutional rights is a legal conclusion, and insufficient to state a conspiracy claim. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (holding that while factual allegations are accepted as true in complaint, legal conclusions are not).[15]

Plaintiff appears to contend in his opposition that the conspiracy is based on the CDCR being in receivership regarding health care for inmates. Pl.'s Mem. P. & A., Doc. 43. Even if the Court granted Plaintiff leave to plead these additional allegations, such allegations do not remotely demonstrate any conspiracy by Defendants Dizember, Hickman, Clark, and McGuinness to deprive Plaintiff of his constitutional rights *in this action*. The Court cannot find that a viable conspiracy claim exists. Conspiracy is the only theory of liability by which Defendants Dizember and Hickman are in this action. Thus, summary judgment should be granted in favor of Defendants Dizember and Hickman.

C. Defendant Clark

Defendants contend that there is no evidence to indicate that Defendant Clark retaliated against Plaintiff for his requesting medical care.[16] Defs.' Mot. Summ. J. 11:3-12:7. Defendants contend that Plaintiff cannot show Defendant Clark took an adverse action against him. *Id.* Plaintiff contends that he was warned by two correctional counselors that Defendant Clark was angry that Plaintiff's family had contacted state legislators. Pl.'s Mem. P. & A. 9:12-10:13.

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[15] The Court may re-visit any orders prior to final adjudication. *See* Fed. R. Civ. P. 54(b).

The Court notes that Plaintiff is making new allegations in his opposition to Defendants' motion for summary judgment. Plaintiff is alleging a conspiracy to intimidate inmates by denying them medical care because of the pending class action in *Plata*. Plaintiff's new allegations will not be considered. Plaintiff had the opportunity to amend his pleadings pursuant to the Court's August 6, 2009 Discovery and Scheduling Order. Doc. 31. The deadline to amend pleadings was February 6, 2010. No new pleadings will be accepted.

[16] In the prison context, a viable claim for "First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

Defendants have sufficiently demonstrated that there is no triable issue of material fact as to Plaintiff's retaliation claim against Defendant Clark. Plaintiff's only support for his position is his declaration that two correctional counselors warned Plaintiff of Defendant Clark's anger, which is inadmissible hearsay evidence. *See* Fed. R. Evid. 801-803. Additionally, even if the Court considered Plaintiff's supporting evidence, it does not demonstrate that Defendant Clark took any adverse action against Plaintiff. As seen in the undisputed statement of facts, Defendant Clark was not involved in treating Plaintiff for his injury. Even construing all the facts in the light most favorable to the non-moving party, the Court cannot find that Defendant Clark took any adverse action against Plaintiff. Thus, summary judgment should be granted in favor of Defendant Clark and against Plaintiff.

D. Defendant McGuinness

Defendants contend that Plaintiff received adequate medical attention while he was incarcerated. Defs.' Mot. Summ. J. 7:5-11, 9:4-10:8. Defendants contend that he received pain medication, an x-ray of his right knee, meals in his cell, crutches, and a wheelchair to help him move around. *Id.* Defendants further contend that Plaintiff also received a lower tier/lower bunk assignment to accommodate his injury. *Id.* Though Plaintiff later received surgery regarding his knee injury, Defendants contend that Plaintiff did not suffer further injury as a result of any delay in receiving surgery. *Id.*

Plaintiff contends that Dr. Childs, who examined the March 29, 2006 x-ray of Plaintiff's right knee on April 7, 2006, failed to find a fracture. Plaintiff contends that Dr. Ferguson of the UC Davis Medical Department examined x-rays taken on April 28, 2006 and found a fracture. Plaintiff contends that the delay between Plaintiff's injury and subsequent surgery is deliberate indifference.

As previously stated, summary judgment should be granted in favor of Defendants Dizember, Hickman, and Clark. Thus, the only remaining claim is against Defendant McGuinness for violation of the Eighth Amendment. The Court will thus construe the facts in the light most favorable to Plaintiff as the non-moving party and believe Plaintiff's admissible evidence. *Anderson*, 477 U.S. at 255. Pursuant to Plaintiff's submitted evidence in opposition,

Defendant McGuinness received an envelope containing Plaintiff's x-rays on March 29, 2006. Pl.'s Decl. ¶¶ 31-33, Doc. 42. That is the extent of Defendant McGuinness's involvement in Plaintiff's medical care. *Id.*

Based on these facts, there is no triable issue of material fact as to Defendant McGuinness. There is no evidence to indicate that Defendant McGuinness knew of and disregarded an excessive risk to Plaintiff's health. *See Farmer*, 511 U.S. at 834, 837. Defendant McGuinness received an envelope containing Plaintiff's x-rays. Defendant McGuinness did not directly prescribe any treatment for Plaintiff. Defendant McGuinness did not issue a report regarding the results of Plaintiff's x-ray. Thus, there is an issue of whether Defendant McGuinness is liable under § 1983 for Plaintiff's treatment, as there appears to be no evidence that Defendant McGuinness caused any constitutional deprivation. *See Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).

Plaintiff contends that he should have received treatment sooner. However, there is no evidence to indicate that Defendant McGuinness knew that Plaintiff had suffered a fracture. The x-ray report submitted by Dr. Childs did not indicate any such injury. Even construing the facts in the light most favorable to Plaintiff, there is no evidence to support Plaintiff's Eighth Amendment claim against Defendant McGuinness. Summary judgment should be entered in favor of Defendant McGuinness and against Plaintiff.

E. Qualified Immunity

Defendants also contend that they are entitled to qualified immunity. As the Court recommends that summary judgment should be granted as to all Defendants, the Court does not reach Defendants' qualified immunity argument.

V. Conclusion and Recommendation

Based on the foregoing, it is HEREBY RECOMMENDED that:

1. Defendants' motion for summary judgment, filed August 30, 2010, should be GRANTED in full;
2. Judgment should be entered in favor of all Defendants and against Plaintiff; and
3. The Clerk of the Court be directed to close this action.

These Findings and Recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within **twenty-one (21) days** after being served with these Findings and Recommendations, the parties may file written objections with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: February 23, 2011 **/s/ Dennis L. Beck**
UNITED STATES MAGISTRATE JUDGE