UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CARLOS ROMERO ROJO,

Plaintiff,

v.

FBOP, et al.,

Defendants.

/

CASE NO. 1:09-cv-01152-AWI-SMS PC

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

(Doc. 20)

OBJECTIONS DUE WITHIN THIRTY DAYS

Findings and Recommendations Following Screening of Amended Complaint

I. Screening Requirement

Plaintiff Carlos Romero Rojo, a federal prisoner proceeding pro se and in forma pauperis, filed this civil action on June 16, 2009, pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which provides a remedy for violation of civil rights by federal actors. On December 15, 2009, the Court dismissed Plaintiff's complaint, with leave to amend, for failure to state any claims. Plaintiff filed an amended complaint on December 28, 2009.

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

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). "[P]laintiffs [now] face a higher burden of pleadings facts . . ," Al-Kidd v. Ashcroft, 580 F.3d 949, 977 (9th Cir. 2009), and while a plaintiff's allegations are taken as true, courts "are not required to indulge unwarranted inferences," Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

To state a viable claim for relief, Plaintiff must set forth sufficient factual allegations sufficient to state a plausible claim for relief. Iqbal, 129 S.Ct. at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this plausibility standard. Id.

II. Plaintiff's Eighth Amendment Medical Care Claim

A. Allegations

Plaintiff is currently housed at the Federal Correctional Institution in Adelanto, California. The events at issue in this action occurred at the United States Penitentiary in Atwater, California. In his amended complaint, Plaintiff names Warden Hector A. Rios, Assistant Health Care Administrator L. Mettreay, and Doctor Jon Franco as defendants, and is seeking money damages and medical treatment as relief for the alleged violation of his rights.

Plaintiff alleges that he has a life threatening liver problem, and suffers from Hepatitis C, cirrhosis, and syphilis. On June 4, 2009, Defendant Franco informed Plaintiff that he was not eligible for interferon treatment for his liver because he was "too far gone," and prescribed a medication for Plaintiff's liver disease which caused Plaintiff to break out in a sore and a body rash.

///

(Doc. 20, court record p. 3.) Plaintiff was in the hole at the time and when he showed his condition to Defendants Mettreay and Rios, both of them smirked and walked away from him.

Plaintiff also alleges that on June 4, 2009, he informed Defendant Franco that his band-aid implant needed replaced, and should have been replaced in 2008. Plaintiff alleges that Defendant Franco informed him he was going to die but refused to allow him to be taken to an outside doctor. Plaintiff alleges that since Franco concluded he did not want to help Plaintiff, he should have appointed another doctor for a second opinion and for further medical treatment. Plaintiff alleges his was in pain from his liver issue, but Franco took his "well being for granted" and told him he was too far gone. (Id., p. 4.)

B. Discussion

"[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate must show 'deliberate indifference to serious medical needs.'" Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 295 (1976)). The two part test for deliberate indifference requires the plaintiff to show (1) "'a serious medical need' by demonstrating that 'failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain,'" and (2) "the defendant's response to the need was deliberately indifferent." Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal quotations omitted)). Where a prisoner is alleging a delay in receiving medical treatment, the delay must have led to further harm in order for the prisoner to make a claim of deliberate indifference to serious medical needs. McGuckin, 974 F.2d at 1060 (citing Shapely v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985)).

"A difference of opinion between a prisoner-patient and prison medical authorities regarding treatment does not give rise to a [constitutional] claim." Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981) (internal citation omitted). Therefore, Plaintiff's disagreement with Defendant Franco's conclusion that Plaintiff was not eligible for interferon treatment does not give rise to a cognizable claim. Further, Plaintiff does not have an entitlement under the Constitution to a second opinion or to treatment by an outside doctor. Defendant Franco's medical opinion that Plaintiff's

condition is terminal and there is nothing further that can be done for him provides no basis for the imposition of liability against Franco.

With respect to Defendants Mettreay and Rios, Plaintiff's allegations do not support a claim that he was suffering from a serious medical need and that in ignoring him, Defendants knowingly disregarded a substantial risk of harm to his health. Farmer v. Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970 (1994). Further, Plaintiff has not alleged facts demonstrating that the failure to provide him immediate treatment for his sore and rash caused further harm. McGuckin, 974 F.2d at 1060.

IV. Conclusion and Recommendation

Plaintiff's amended complaint fails to state a claim upon which relief may be granted under federal law. Plaintiff was previously given leave to amend but was unable to cure the deficiencies in his claim. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Given the legal claim at issue and the nature of Plaintiff's allegations, that Court does not find that further leave to amend is warranted. While the Court does not minimize the distress that Plaintiff must be under in light of being told his condition is terminal, the events complained of do not rise to the level of constitutional violations. Accordingly, the Court HEREBY RECOMMENDS that this action be dismissed, with prejudice, for failure to state a federal claim.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within **thirty (30) days** after being served with these Findings and Recommendations, Plaintiff may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is 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 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: January 5, 2010 **/s/ Sandra M. Snyder**
UNITED STATES MAGISTRATE JUDGE