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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DONNIE RAY O'NEAL, JR.,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

CASE No. 1:09-cv-01552-MJS (PC)

ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION OF ORDER
DISMISSING SECOND AMENDED
COMPLAINT WITH PREJUDICE AND
JUDGMENT ENTERED THEREON

(ECF No. 29)

I. PROCEDURAL HISTORY

Plaintiff Donnie Ray O'Neal, Jr. is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed on September 2, 2009 pursuant to 42 U.S.C. § 1983. (Compl., ECF No. 1.) Plaintiff consented to Magistrate Judge jurisdiction. (Consent, ECF No. 6.)

Plaintiff's Complaint and First Amended Complaint were screened and dismissed, with leave to amend, for failure to state a claim. (Orders Dismiss., ECF Nos. 17, 23.) On September 25, 2012, Plaintiff's Second Amended Complaint (Second Am. Compl., ECF No. 26) was screened and dismissed with prejudice for failure to state a claim (Order Dismiss., ECF No. 27), Judgment was entered thereon (J. on Order, ECF

1 No. 28), and the case was closed.

2 Plaintiff has filed a motion for reconsideration of the September 25, 2012 Order
3 and Judgment. (Mot. Recons., ECF No. 29.) That motion is now before the Court.¹

4 **II. SUMMARY OF SECOND AMENDED COMPLAINT**

5 Plaintiff is incarcerated at California Substance Abuse and Treatment Facility at
6 Corcoran, California (“CSATF”). (Second Am. Compl. at 1.) He has medical conditions
7 that require pain management, antibiotics, and a special diet. (Id. at 5.) He alleges that
8 on February 25, 2009, Defendant Physician’s Assistant Byers was deliberately
9 indifferent in falsifying Plaintiff’s medical records from “deaf”, to “hearing impaired.” (Id.
10 at 3.)

11 Plaintiff challenged Byers’ decision by filing a February 29, 2009 inmate
12 complaint with the CSATF Warden’s office. Defendants Warden Allison and Dr.
13 Enenmoh, who each had responsibility for reviewing the inmate complaint were
14 deliberately indifferent by failing to take action thereon to provide for his safety. (Id.)

15 On November 30, 2009, while Plaintiff’s complaint was still “sitting on [Defendant
16 Enenmoh’s] desk, awaiting his final review” (Id. at 4), Defendant Enenmoh
17 retaliated for the inmate complaint and the instant civil rights action filed September 2,
18 2009, by ordering that certain of Plaintiff’s medical treatments be discontinued. (Id. at
19 4.)

20 On August 12, 2012, Plaintiff awoke sweating, with chest pain, cramps, and
21 shortness of breath. He was transported to the medical clinic where preliminary
22 examinations found that Plaintiff’s blood pressure and heart rate were abnormally high.
23 An EKG discovered an irregular heart rhythm. The attending nurse related this
24 information to an unnamed doctor, who retaliated for filing of the instant action by not
25 providing immediate treatment. The nurse told a guard that a patient with these

27 ¹ On October 24, 2012, Plaintiff filed a Notice of Appeal of the Court’s dismissal of this action.
28 (Notice, ECF No. 30.) The appeal is being held in abeyance pending resolution of the instant Motion for
Reconsideration. (Order of U.S.C.A., ECF No. 33.)

1 symptoms outside of prison would have been admitted for observation. Plaintiff was
2 again denied medical treatment in retaliation for filing the instant action. (Id.)

3 Plaintiff's Second Amended Complaint names as Defendants: (1) Timothy Byers,
4 CSATF Physician's Assistant; (2) A. Enenmoh, CSATF Chief Medical Officer (CMO);
5 (3) K. Allison, CSATF Warden; and (4) Director, California Department of Corrections
6 and Rehabilitation (CDCR).

7 **III. LEGAL STANDARD**

8 Rule 60(b)(6) allows the Court to relieve a party from an order for any reason
9 that justifies relief. Rule 60(b)(6) "is to be used sparingly as an equitable remedy to
10 prevent manifest injustice and is to be utilized only where extraordinary
11 circumstances . . ." exist. Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008). The
12 moving party "must demonstrate both injury and circumstances beyond his control . . ."
13 Id. In seeking reconsideration of an order, Local Rule 230(j) requires a party to identify
14 the motion or order in issue and when it was made, and show "what new or different
15 facts or circumstances are claimed to exist which did not exist or were not shown upon
16 such prior motion, or what other grounds exist for the motion."

17 "A motion for reconsideration should not be granted, absent highly unusual
18 circumstances, unless the . . . court is presented with newly discovered evidence,
19 committed clear error, or if there is an intervening change in the controlling law," Marlyn
20 Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009),
21 and "[a] party seeking reconsideration must show more than a disagreement with the
22 [c]ourt's decision, and recapitulation . . ." of that which was already considered by the
23 court in rendering its decision. U.S. v. Westlands Water Dist., 134 F.Supp.2d 1111,
24 1131 (E.D. Cal. 2001).

25 **IV. ARGUMENT**

26 Plaintiff argues the Court wrongly dismissed his Second Amended Complaint for
27 failure to allege facts showing deliberate indifference and retaliation. (Mot. Recons. at
28 1:12-2:12.)

1 He argues the Second Amended Complaint contains facts sufficient to link
2 Defendants to a cognizable Eighth Amendment indifference claim because Defendants
3 delayed or failed to respond to his inmate complaint and prevented him from exhausting
4 administrative remedies. (Id.) The Court then wrongly dismissed his indifference claim
5 for failure to exhaust administrative remedies. (Id. at 3-12.) He “believes” that his
6 Second Amended Complaint alleges the Defendant CDCR Director’s refusal to respond
7 to his Director’s Level Appeal is sufficient to show exhaustion and denial of due process.
8 (Id.)

9 He also argues the Court erred in failing to attribute a February 9, 2010 internal
10 CDCR liability notification (“Liability Awareness Notice”) to Defendant Enenmoh. (Id.)²
11 This error, according to Plaintiff caused the Court incorrectly to conclude Defendant
12 Enenmoh was unaware of Plaintiff’s grievance and civil rights filings on November 30,
13 2009, when Dr. Enenmoh allegedly took the adverse action of discontinuing medical
14 treatment. The Court then wrongly concluded the causation necessary to support
15 Plaintiff’s retaliation claim was lacking and so it erroneously dismissed the retaliation
16 claim. Plaintiff argues that regardless of who filed the Liability Awareness Notice, its
17 mere existence shows Defendants were aware of his inmate complaint and this action
18 and supports his claim that they retaliated against him for these protected acts.

19 Furthermore he “believes” his Second Amended Complaint alleges that he
20 informed the Defendants of the instant action on several occasions (Id. at 1:24-27) so as
21 to show causation in support of his retaliation claim.

22 **V. ANALYSIS**

23 Plaintiff’s Motion for Reconsideration of the September 25, 2012 Order shall be
24 denied.

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27 ² He points out the Court, in its order dismissing the Second Amended Complaint attributed the
28 Liability Awareness Notice filing to Plaintiff when in fact Defendant(s) filed the Notice. (Mot. Recons. at
1:14-18.)

1 **A. Deliberate Indifference**

2 Plaintiff believes his Second Amended Complaint sufficiently alleges improper
3 handling of his related inmate complaint which prevented him from exhausting his
4 administrative remedies and denied him due process,³ leaving the Court’s dismissal of
5 his deliberate indifference claim in error.

6 This argument lacks merit. The Court dismissed Plaintiff’s deliberate indifference
7 claim not for failure to exhaust administrative remedies, but for failure to allege facts
8 suggesting named Defendants’ knowing indifference to a serious risk of harm. (Order
9 Dismiss. Second Am. Compl. at 6:4-9:18.)

10 Plaintiff’s motion merely re-hashes points already considered by the Court in its
11 September 25, 2012 Order. It does not controvert findings and determinations therein.
12 Plaintiff cites to no error, newly discovered evidence, or other grounds supporting
13 reconsideration

14 **B. Retaliation**

15 Plaintiff correctly notes the Court’s Order Dismissing the Second Amended
16 Complaint inadvertently attributed the Liability Awareness Notice to Plaintiff. In fact, the
17 Liability Awareness Notice was prepared by the CDCR Inmate Appeals Branch and filed
18 with the CDCR Legal Affairs Division. (Mot. Recons. at 3.)

19 Regardless, the misattribution is of no consequence; error in connection with it, if
20 any, is harmless. (Fed. R. Civ. P. 61). The Liability Awareness Notice was not from or to
21 any of the named Defendants in this action. The prison grievance and disability
22 accommodation documents appended with the Liability Awareness Notice cover-sheet
23 all post-date the alleged November 30, 2009 adverse action. As such the Liability
24 Awareness Notice and appended documents cannot be said to have been the cause of
25 something that predated them. Nothing in the Liability Awareness Notice and appended
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28 ³ Plaintiff’s Second Amended Complaint does not allege a Due Process Clause violation. Plaintiff has no independently enforceable Fourteenth Amendment right to the prison grievance process. Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988); Ramirez v. Galarza, 334 F.3d 850, 860 (9th Cir. 2003).

1 documents suggests Defendant Enenmoh was aware of or chargeable with notice of
2 Plaintiff's inmate complaint and the instant civil rights action when he allegedly took
3 adverse action on November 30, 2009.⁴

4 Plaintiff's further argument is no more availing. His stated belief as to the nature
5 of the contents of the Second Amended Complaint is inconsistent with its actual
6 contents. He describes no other error, newly discovered evidence, or other grounds for
7 reconsideration. He re-asserts points already considered by the Court in its September
8 25, 2012 Order, and fails to controvert the findings and determinations therein.

9 **VI. CONCLUSIONS AND ORDER**

10 Plaintiff has not met the burden imposed upon a party moving for reconsideration.
11 Marlyn Nutraceuticals, Inc., 571 F.3d at 880. He has not shown clear error or other
12 meritorious grounds for relief from the September 25, 2012 Order and Judgment thereon.

13 Accordingly, for the foregoing reasons, it is hereby ordered that Plaintiff's Motion for
14 Reconsideration of the September 25, 2012 Order Dismissing Second Amended Complaint
15 with Prejudice and Judgment entered thereon (ECF No. 29), is DENIED.

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20 IT IS SO ORDERED.

21 Dated: November 27, 2012

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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28 ⁴ Plaintiff's claim of retaliation occurring August 12, 2012, post-dating the Liability Awareness
Notice (Second Am. Compl. at 3-14), is not directed at any Defendants named in the Second Amended
Complaint. (See Order Dismiss. Second Am. Compl. at 12:12-15.)