

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TIMOTHY HOWARD,

CASE NO. 1:10-cv-01783-AWI-GBC (PC)

Plaintiff,

FINDINGS AND RECOMMENDATION
RECOMMENDING DENIAL OF PLAINTIFF'S
MOTION FOR TEMPORARY RESTRAINING
ORDER

v.

J. WANG, et al.,

(ECF No. 13)

Defendants.

/ OBJECTIONS DUE WITHIN THIRTY DAYS

I. PROCEDURAL HISTORY

Plaintiff Timothy Howard ("Plaintiff") is a state prisoner and is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on September 28, 2010. (ECF No. 1.) Plaintiff then filed an Amended Complaint on January 13, 2011. (ECF No. 16.) No other parties have appeared.

Pending before the Court is Plaintiff's Motion requesting injunctive relief, filed January 13, 2011. (ECF No. 13.)

///

1 **II. ARGUMENT**

2 In the Motion, Plaintiff details the statement of facts from his Complaint, and
3 describes incidents that occurred in 2006, 2009, and 2010. Plaintiff states that he is still
4 being denied adequate medical treatment by Defendants.¹ Specifically, Plaintiff alleges
5 that he is being denied adequate medical treatment contrary to a neurologists
6 recommendations. Plaintiff states that he is still not being adequately treated for the
7 injuries suffered to his left foot.
8

9 **III. LEGAL STANDARDS**

10 A temporary restraining order (TRO) may be granted without written or oral notice
11 to the adverse party or that party's attorney only if: (1) it clearly appears from specific facts
12 shown by affidavit or by the verified complaint that immediate and irreparable injury, loss
13 or damage will result to the applicant before the adverse party or the party's attorney can
14 be heard in opposition, and (2) the applicant's attorney certifies in writing the efforts, if any,
15 which have been made to give notice and the reasons supporting the claim that notice
16 should not be required. See Fed. R. Civ. P. 65(b).
17

18 The standards for a TRO are essentially the same as that for a preliminary
19 injunction. To be entitled to preliminary injunctive relief, a party must demonstrate "that he
20 is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence
21 of preliminary relief, that the balance of equities tips in his favor, and that an injunction is
22 in the public interest." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009)
23
24

25
26 ¹ Plaintiff lists other individuals as Defendants including Beregovskaya, Enenmoh, Byers, and
27 Jean Pierre. These individuals are not named as defendants in the Complaint and will not be included here.

1 (citing Winter v. Natural Res. Def. Council, Inc., 129 S.Ct. 365, 374 (2008)). The Ninth
2 Circuit has also held that the “sliding scale” approach it applies to preliminary injunctions
3 as it relates to the showing a plaintiff must make regarding his chances of success on the
4 merits survives Winter and continues to be valid. Alliance for Wild Rockies v. Cottrell, 622
5 F.3d 1045, 1052-53 (9th Cir. 2010). Under this sliding scale, the elements of the
6 preliminary injunction test are balanced. As it relates to the merits analysis, a stronger
7 showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of
8 success on the merits. Id.

9
10 In cases brought by prisoners involving conditions of confinement, any preliminary
11 injunction “must be narrowly drawn, extend no further than necessary to correct the harm
12 the court finds requires preliminary relief, and be the least intrusive means necessary to
13 correct the harm.” 18 U.S.C. § 3626(a)(2).

14 **IV. ANALYSIS**

15
16 Plaintiff claims that he can meet all criteria necessary to be granted injunctive relief
17 in that: 1) Defendants are acting with deliberate indifference to Plaintiff’s needs contrary
18 to other doctor’s orders; 2) Plaintiff is likely to succeed on the merits; 3) without the Court’s
19 help, Plaintiff will suffer irreparable harm to his left foot without proper treatment; 4) the
20 equities tip in his favor; and 5) the relief sought serves the public interest.

21
22 Plaintiff claims that one doctor ordered pain medication, and another defendant
23 denied that order.

24
25 The Court finds that, at this stage in the proceedings, Plaintiff fails to meet the legal
26 standards required to be granted injunctive relief. To succeed on such motion, Plaintiff
27 must establish that he is likely to succeed on the merits, that he is likely to suffer

1 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his
2 favor, and that an injunction is in the public interest. Plaintiff's conclusory statements do
3 not meet any of these standards. First, Plaintiff has not demonstrated that he will succeed
4 on the merits of his case. He makes one statement that he will, but fails to demonstrate
5 how. Upon cursory review, Plaintiff's complaints seem to be more akin to a disagreement
6 with the course of treatment than deliberate indifference to Plaintiff's condition. Such
7 disagreement is insufficient to state a claim for an Eighth Amendment violation. Franklin
8 v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981) ("A difference of opinion between a
9 prisoner-patient and prison medical authorities regarding treatment does not give rise to
10 a § 1983 claim.") Thus, Plaintiff does not appear likely to succeed on the merits.
11

12
13 Second, Plaintiff states that he will suffer irreparable harm to his left foot if he
14 doesn't get treatment. However, Plaintiff's Complaint is not about his left foot injuries. It's
15 about the removal of medical appliances and not receiving pain medication.

16 Plaintiff's conclusory statements that injunctive relief will serve the public interest
17 and that the balance of equities tips in his favor are not persuasive.

18
19 The Court also notes that Plaintiff's Complaint alleges constitutional violations by
20 Defendants Wang and Clark. However, in this Motion, it appears that Plaintiff is asking
21 that different individuals, not subject to this action, be ordered to comply. Any ordered
22 action of the individuals in Plaintiff's Motion would not remedy the alleged wrongs by
23 Defendants Wang and Clark. Therefore, the Court lacks jurisdiction to issue the order
24 sought by Plaintiff.

25 **V. CONCLUSION**

26 Based on the foregoing, the Court HEREBY RECOMMENDS that Plaintiff's Motion
27

1 for a Temporary Restraining Order and Preliminary Injunction be DENIED.

2 These Findings and Recommendations will be submitted to the United States
3 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. §
4 636(b)(1). Within thirty (30) days after being served with these Findings and
5 Recommendations, plaintiff may file written objections with the court. The document
6 should be captioned "Objections to Magistrate Judge's Findings and Recommendations."
7 Plaintiff is advised that failure to file objections within the specified time may waive the right
8 to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.1991).

9
10 IT IS SO ORDERED.

11
12 Dated: July 14, 2011


13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
UNITED STATES MAGISTRATE JUDGE