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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL J. PAYAN,)	1:13cv00807 LJO DLB PC
)	
Plaintiff,)	FINDINGS AND RECOMMENDATIONS
)	REGARDING DEFENDANTS' MOTION
vs.)	TO DISMISS
)	(Document 17)
H. TATE, et al.,)	THIRTY-DAY OBJECTION DEADLINE
)	
Defendants.)	

Plaintiff Michael J. Payan (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action on May 28, 2013. This action is proceeding on the following cognizable claims: (1) retaliation in violation of the First Amendment by Defendants Bingamon, Tate and Vu; and (2) deliberate indifference to a serious medical need in violation of the Eighth Amendment against Defendants Bingamon, Tate, Vu, Sheisha and Joaquin.

On April 16, 2014, Defendants filed a motion to dismiss the Eighth Amendment claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff filed his opposition on June 2, 2014, and Defendants filed their reply on June 5, 2014. The motion is deemed submitted pursuant to Local Rule 230(1).

1 **A. ALLEGATIONS IN COMPLAINT**

2 Plaintiff is currently incarcerated at Pelican Bay State Prison. The events complained of
3 occurred at California Correctional Institution, where the events at issue occurred.

4 Plaintiff alleges that he lost balance and fell in the shower on July 21, 2010.

5 Plaintiff was seen by Defendant Bingamon on August 11, 2010. Plaintiff told Defendant
6 Bingamon that he felt a painful tear in his left shoulder when he fell, and that he could not use
7 his left arm or sleep because of pain. Defendant Bingamon told Plaintiff that he had a torn
8 tendon in his rotator cuff and that he would order an x-ray. Plaintiff told him that prior doctors
9 have said that x-rays were not sufficient to detect tendon or muscle injuries, and he asked for an
10 MRI. Defendant Bingamon got upset and told Plaintiff that he was careless, and he was lucky he
11 was getting an x-ray.
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13 Plaintiff saw Defendant Bingamon again on September 29, 2010. He told Plaintiff that
14 the x-ray did not pick up any tears in the tendon. Defendant Bingamon indicated that he would
15 order a steroid injection and prescribe Gabapentin, to which Plaintiff objected. Defendant
16 Bingamon told Plaintiff that if he did not consent to the injection and Gabapentin, he would
17 terminate the appointment and Plaintiff would forfeit all medical attention. Plaintiff said that he
18 did not want to forfeit medical care and Defendant Bingamon told him that he should not make a
19 habit of complaining about medical care.
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21 Plaintiff took Gabapentin, which made him feel sick and did not relieve the pain.

22 Plaintiff returned to Defendant Bingamon on October 20, 2010. Defendant Bingamon
23 told Plaintiff that because of his complaints, his supervisor, Defendant Tate, got upset and
24 discontinued Gabapentin because it was not for torn tendons. Defendant Bingamon told Plaintiff
25 that he would be scheduled for an injection and physical therapy, and if there was no
26 improvement, an MRI. Defendant Tate confirmed this plan and gave Plaintiff an injection.
27 Defendant Tate told Plaintiff that he was scheduled for an MRI to get a proper diagnosis.
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1 Plaintiff asked how Defendant Tate knew where to locate the injection, but he refused to answer
2 and sent Plaintiff back to his cell.

3 On November 2, 2010, Plaintiff returned to Defendant Bingamon and reported that he
4 could not use his left arm and that he was in extreme pain. Plaintiff said that the injection did not
5 work and requested an MRI. Defendant Bingamon became angry and told Plaintiff that he
6 wasn't going to treat Plaintiff because of his complaints.

7 On or around December 2, 2010, Plaintiff saw Defendant Tate. Defendant Tate told
8 Plaintiff that he hated whiners and inmates who told doctors what to do, and that an MRI wasn't
9 worth the five dollars that it would cost Plaintiff. Defendant Tate told Plaintiff that if he
10 continued to complain, he would cancel the MRI.

11 On December 15, 2010, Plaintiff filed a medical care grievance regarding Defendant
12 Tate's medical treatment and threats. On January 4, 2011, Defendant Sheisha, the Chief
13 Physician, interviewed Plaintiff at the Second Level. Plaintiff reiterated his complaints about
14 Defendant Tate and told Defendant Sheisha that he believed he had a torn tendon. Defendant
15 Sheisha told Plaintiff that he wasn't the first one to complaint about Defendant Tate, but that the
16 medical staff doesn't get paid enough to look into petty matters. Defendant Sheisha turned the
17 grievance into a staff complaint and ended the interview. In the Second Level response,
18 Defendant Joaquin, the Chief Medical Officer, only reiterated part of the interview and implied
19 that because an inquiry was done, the inquiry partially granted the complaint. Plaintiff believes
20 that Defendants Sheisha and Joaquin deliberately turned Plaintiff's grievance into a staff
21 complaint to make the complaint confidential and to allow for the continuation of improper
22 treatment.

23 After Plaintiff filed his grievance against Defendant Tate, Defendant Tate recommended
24 that the MRI be disapproved.
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1 On January 5, 2011, Defendant Sheisha gave Plaintiff a second steroid injection. Plaintiff
2 told Defendant Sheisha that the previous injection did not work and that the pain was worsening.
3 Plaintiff said that he did not consent to the injection because it was being performed without an
4 MRI. Defendant Sheisha told Plaintiff that if he did not consent, he would be charged with
5 interfering with medical staff orders and would not receive any treatment at all. Plaintiff
6 consented to the injection out of fear.

7 Plaintiff did not experience any relief after the second injection.

8 On March 9, 2011, Plaintiff saw Defendant Bingamon and reported that his shoulder was
9 in constant pain. Defendant Bingamon told Plaintiff that he had upset his supervisor, Defendant
10 Tate, because of the grievance, and that he wasn't going to "go against his supervisor." Compl.
11 10. He sent Plaintiff home.

12 On April 11, 2011, Plaintiff filed out a Health Care Request Form and indicated that he
13 was still experiencing pain.

14 On May 4, 2011, Plaintiff saw Defendant Vu and told him of his dissatisfaction with his
15 prior care. Defendant Vu looked at Plaintiff's prior grievances and told Plaintiff that he should
16 not complain about the people that have "the keys to his life." Compl. 11. He told Plaintiff that
17 he needed an MRI, but that because of the problems that Plaintiff had caused, he'd have to go
18 through shots and physical therapy first. Plaintiff told Defendant Vu that he had already had two
19 shots and that they did not work, but Defendant Vu said that this was the only way that Plaintiff
20 would be given an MRI.

21 Plaintiff was not seen again until December 1, 2011. During that time, he continued to
22 complain in medical requests of severe pain and limited use of his shoulder.

23 When Plaintiff saw Defendant Vu on December 1, 2011, he continued to complain of
24 pain and asked for an MRI. Defendant Vu said that CDCR policy prevents him from ordering an
25 MRI without prior x-rays, shots, physical therapy and another shot. Plaintiff told Defendant Vu
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1 that the prior injections did not work and asked for a copy of the cited policy. Defendant Vu
2 became angry and told Plaintiff that he would take the injections or nothing at all.

3 On December 16, 2011, Plaintiff saw Defendant Sheisha and received an injection even
4 though he pleaded for an MRI. Defendant Sheisha told him that if he did not consent to the
5 injections, then he would receive no treatment at all.

6 On January 10, 2012, Plaintiff submitted a Health Care Request Form because he
7 experienced a painful tear in his shoulder.

8 He was seen by Defendant Vu on January 24, 2012. Plaintiff's neck and shoulder were
9 swollen and he had no mobility without pain. He requested stronger pain medication and an
10 MRI because the injections were making his shoulder worse. Defendant Vu told Plaintiff that he
11 was not a doctor, and that he would continue to treat him pursuant to policy even if the injections
12 were not working.

13 On February 16, 2012, Plaintiff submitted a Health Care Request Form due to extreme
14 pain and clicking noises in his shoulder. He submitted additional requests on March 26 and
15 April 26, 2012, after he was not seen. Plaintiff filed another grievance on April 5, 2012.

16 Plaintiff was seen by Defendant Vu on April 27, 2012, and complained of worsening
17 shoulder pain. Defendant Vu told Plaintiff that he should never have filed a grievance on him,
18 and that although he did need an MRI, he was going to note that Plaintiff did not need one.
19 Defendant Vu told Plaintiff that he was going to order another injection and physical therapy
20 because policy dictates his treatment. Plaintiff pleaded for other treatment, but Defendant Vu
21 refused to listen and sent him back to his cell.

22 Plaintiff continued to experience pain over the next several months and went without
23 further treatment despite requests.

1 Defendant Vu interviewed Plaintiff on July 2, 2012, in connection with the prior
2 grievance. He again told Plaintiff that he should not have filed a grievance against him and that
3 he would only get injections pursuant to policy.

4 Plaintiff feared that if he did not get the injections, then he would not get any treatment.
5 On July 13, 2012, he received another steroid injection from Defendant Sheisha. Plaintiff asked
6 for an MRI, but Defendant Sheisha told him that he was not going to tend to his “stupid
7 complaints” and that he was tired of Plaintiff’s grievances. Compl. 15.

8 On July 20, 2012, Plaintiff saw Defendant Bingamon, who diagnosed inflammation of
9 the left shoulder and deterioration of his shoulder tendon. He told Plaintiff that he needed an
10 MRI, but that he was not going to get involved in Plaintiff’s problems with other doctors.

11 On August 11, 2012, Plaintiff submitted a Health Care Request Form complaining of
12 extreme pain. He had been on the list for physical therapy for one month, but had not been seen.
13 Plaintiff submitted another form on August 24, 2012, complaining of extreme pain and limited
14 mobility. Plaintiff submitted a third request on August 29, 2012, explaining that earlier in the
15 day, his shoulder gave out and he felt a shock of pain.

16 On October 5, 2012, Plaintiff told Defendant Vu that he had gone through the physical
17 therapy evaluation but was not better. Defendant Vu told Plaintiff that it did not matter how he
18 felt, because he would still need to have another injection before he would consider
19 recommending an MRI.
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21 Plaintiff went for two months without treatment and eventually requested help from a
22 correctional officer after his shoulder tore when he was getting out of bed.
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24 On November 27, 2012, Plaintiff submitted a Health Care Request Form complaining of
25 extreme pain and asking for an MRI.
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1 Plaintiff saw Defendant Vu on November 29, 2012, and explained that he had reinjured
2 his shoulder. Defendant Vu told Plaintiff that he would order the last injection when he wanted,
3 and that because he was in a “good mood,” he would order an MRI. Compl. 17.

4 On December 5, 2012, Defendant Sheisha gave Plaintiff another injection.

5 Plaintiff received an MRI on December 12, 2012. The test revealed a large full-thickness
6 tear of the tendon and atrophy, a partial tear of another tendon and other shoulder problems.

7 On January 10, 2013, Plaintiff was seen by Defendant Vu, who told Plaintiff that he had
8 several tears in the muscles surrounding the rotator cuff and that he was sending Plaintiff to the
9 prison orthopedist.

10 On January 22, 2013, Plaintiff saw the orthopedic surgeon. Dr. Lewis told Plaintiff that
11 he had torn three of the four major muscles that make up the rotator cuff and that the atrophy
12 rendered it inoperable. He expressed concern as to how long Plaintiff had been in pain and told
13 Plaintiff that the steroid injections may have caused, or contributed to, the atrophy.

14 On February 8, 2013, Plaintiff saw specialist Dr. Heiser for a second opinion. He told
15 Plaintiff that the injury was inoperable, and that he could alter the mechanics of the shoulder by
16 fusing the bicep muscle to the supraspinatus muscle. Dr. Heiser did not recommend this,
17 however, because of Plaintiff’s age. Dr. Heiser told Plaintiff that these types of injuries need to
18 be diagnosed as early as possible and properly treated.

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20 **B. LEGAL STANDARD**

21 To survive a motion to dismiss, a complaint must contain sufficient factual matter,
22 accepted as true, to state a claim that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662,
23 678, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555,
24 127 S.Ct. 1955, 1964-65 (2007)) (quotation marks omitted); Conservation Force, 646 F.3d at
25 1242; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The Court must accept
26 the factual allegations as true and draw all reasonable inferences in favor of the non-moving
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1 party, Daniels-Hall, 629 F.3d at 998; Sanders, 504 F.3d at 910; Morales v. City of Los Angeles,
2 214 F.3d 1151, 1153 (9th Cir. 2000), and in this Circuit, pro se litigants are entitled to have their
3 pleadings liberally construed and to have any doubt resolved in their favor, Wilhelm v. Rotman,
4 680 F.3d 1113, 1121 (9th Cir. 2012); Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012);
5 Silva v. Di Vittorio, 658 F.3d 1090, 1101 (9th Cir. 2011); Hebbe v. Pliler, 627 F.3d 338, 342 (9th
6 Cir. 2010).

7 **C. DISCUSSION**

8 1. Eighth Amendment Deliberate Indifference

9 Plaintiff's complaint was screened and the Court determined that it stated a claim upon
10 which relief may be granted. 28 U.S.C. § 1915A; Watison, 668 F.3d at 1112. Defendants
11 present no arguments which persuade the Court that it committed clear error in determining that
12 Plaintiff's Eighth Amendment claim was cognizable, or that any other grounds justifying relief
13 from the screening order exist. See Ingle v. Circuit City, 408 F.3d 592, 594 (9th Cir. 2005) ("A
14 district court abuses its discretion in applying the law of the case doctrine only if (1) the first
15 decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence
16 on remand was substantially different; (4) other changed circumstances exist; or (5) a manifest
17 injustice would otherwise result.").

18 To maintain an Eighth Amendment claim, a prisoner must show that prison officials were
19 deliberately indifferent to a substantial risk of harm to his health or safety. E.g., Farmer v.
20 Brennan, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994); Thomas v. Ponder, 611 F.3d 1144, 1150-51
21 (9th Cir. 2010); Foster v. Runnels, 554 F.3d 807, 812-14 (9th Cir. 2009); Morgan v. Morgensen,
22 465 F.3d 1041, 1045 (9th Cir. 2006); Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000); Frost
23 v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998). This requires the prisoner to demonstrate (1) the
24 existence of an objectively serious risk of harm and (2) that, subjectively, prison officials knew
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1 of and disregarded that risk. E.g., Farmer, 511 U.S. at 834, 847; Thomas, 611 F.3d at 1150-51;
2 Foster, 554 F.3d at 812.

3 Defendants' motion is based on their contention that Plaintiff's allegations amount to
4 nothing more than a difference of opinion regarding treatment. Defendants argue that Plaintiff
5 was treated numerous times during the time period at issue, and that in exercise of their
6 professional judgment, Defendants conservatively managed Plaintiff's condition with
7 examination, x-rays, medication and steroid injections.
8

9 The Court disagrees. At the screening stage, Plaintiff's allegations are sufficient to state
10 an Eighth Amendment deliberate indifference claim. While Plaintiff may have received
11 treatment throughout the time period at issue, it was the *way* in which treatment was rendered
12 that distinguishes this case from a mere difference of opinion. Plaintiff alleges that Defendants
13 essentially made him withstand ineffective treatment longer than necessary because of their
14 feelings towards him. He alleges that for a period of two years, Defendants refused an MRI,
15 continued with ineffective treatment and/or threatened to withhold all medical care for reasons
16 unrelated to Plaintiff's medical condition.

17 Accordingly, Defendants' motion to dismiss based on failure to state a claim should be
18 denied.

19
20 **2. Qualified Immunity**

21 Finally, Defendants argue that they are entitled to qualified immunity. Government
22 officials enjoy qualified immunity from civil damages unless their conduct violates clearly
23 established statutory or constitutional rights. Jeffers v. Gomez, 267 F.3d 895, 910 (9th
24 Cir.2001). When a court is presented with a qualified immunity defense, the central questions
25 for the court are: (1) whether the facts alleged, taken in the light most favorable to the plaintiff,
26 demonstrate that the defendant's conduct violated a statutory or constitutional right; and (2)
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1 whether the right at issue was “clearly established.” Saucier v. Katz, 533 U.S. 194, 201, 121
2 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

3 “A government official’s conduct violates clearly established law when, at the time of the
4 challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable
5 official would have understood that what he is doing violates that right.’ ” Ashcroft v. al-Kidd, –
6 — U.S. —, —, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011) (quoting Anderson v.
7 Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). In this regard, “existing
8 precedent must have placed the statutory or constitutional question beyond debate.” Id. The
9 inquiry must be undertaken in light of the specific context of the particular case. Saucier, 533
10 U.S. at 201.

11
12 While Plaintiff may ultimately be unable to prove his claims, at the pleading stage, his
13 allegations are accepted as true. If proven, Plaintiff’s allegations are sufficient to establish that
14 Defendants were deliberately indifferent to his serious medical needs, in violation of the Eighth
15 Amendment.

16 By 2010, the time that the alleged constitutional violations began, “the general law
17 regarding the medical treatment of prisoners was clearly established,” and “it was also clearly
18 established that [prison staff] could not intentionally deny or delay access to medical care.”
19 Clement v. Gomez, 298 F.3d 898, 906 (9th Cir.2002). Any reasonable prison official should
20 have known that continuing to provide ineffective treatment for reasons unrelated to Plaintiff’s
21 medical condition violates the Eighth Amendment.

22
23 Accordingly, Defendants’ motion to dismiss based on qualified immunity should be
24 denied.

1 **D. RECOMMENDATION**

2 For these reasons, the Court RECOMMENDS that Defendants' motion to dismiss be
3 DENIED, and that Defendants be ORDERED to FILE a responsive pleading within thirty (30)
4 days of adoption of these Findings and Recommendations.

5 These Findings and Recommendations are submitted to the United States District Judge
6 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30)
7 days after being served with these Findings and Recommendations, any party may file written
8 objections with the Court and serve a copy on all parties. Such a document should be captioned
9 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
10 shall be served and filed within ten (10) days after service of the objections. The parties are
11 advised that failure to file objections within the specified time may waive the right to appeal the
12 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.1991).

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15 IT IS SO ORDERED.

16 Dated: October 15, 2014

/s/ Dennis L. Beck
17 UNITED STATES MAGISTRATE JUDGE