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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES JAMIL GARRETT

Plaintiff,

v.

DR. NGOZI IGBINOSA,

Defendant.

CASE NO. 1:16-cv-00259-LJO-MJS (PC)

**FINDINGS AND RECOMMENDATIONS
TO DISMISS NON-COGNIZABLE
CLAIMS**

(ECF No. 20)

FOURTEEN (14) DAY DEADLINE

Plaintiff is a state prisoner proceeding pro se in this civil rights action filed pursuant to 42 U.S.C. § 1983. He has consented to Magistrate Judge jurisdiction. (ECF No. 5.) Defendant declined to consent to Magistrate judge jurisdiction. (ECF No. 45.)

On February 03, 2017, the Court screened Plaintiff's second amended complaint (ECF No. 20) and found it states cognizable First Amendment retaliation, and Eighth Amendment deliberate indifference claims against Defendant Igbinoso. (ECF No. 21.) The remaining claims were dismissed with prejudice for failure to state a claim.

I. Williams v. King

Federal courts are under a continuing duty to confirm their jurisdictional power and are "obliged to inquire sua sponte whenever a doubt arises as to [its] existence[.]" Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977) (citations omitted). On November 9, 2017, the Ninth Circuit Court of Appeals ruled that 28 U.S.C. § 636(c)(1) requires the consent of all named plaintiffs and defendants, even those not

1 served with process, before jurisdiction may vest in a Magistrate Judge to dispose of a
2 civil claim. Williams v. King, 875 F.3d 500 (9th Cir. 2017). Accordingly, the Court held
3 that a Magistrate Judge does not have jurisdiction to dismiss a claim with prejudice
4 during screening even if the plaintiff has consented to Magistrate Judge jurisdiction. Id.

5 Here, Defendant was not yet served at the time that the Court screened the
6 second amended complaint and therefore had not appeared or consented to Magistrate
7 Judge jurisdiction. Because Defendant had not consented, the undersigned's dismissal of
8 Plaintiff's claims is invalid under Williams. Because the undersigned nevertheless stands
9 by the analysis in his previous screening order, he will below recommend to the District
10 Judge that the non-cognizable claims be dismissed.

11 **II. Findings and Recommendations on Second Amended Complaint**

12 **A. Screening Requirement**

13 The Court is required to screen complaints brought by prisoners seeking relief
14 against a governmental entity or an officer or employee of a governmental entity. 28
15 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner
16 has raised claims that are legally "frivolous or malicious," that fail to state a claim upon
17 which relief may be granted, or that seek monetary relief from a defendant who is
18 immune from such relief. 28 U.S.C. § 1915A(b)(1), (2). "Notwithstanding any filing fee,
19 or any portion thereof, that may have been paid, the court shall dismiss the case at any
20 time if the court determines that . . . the action or appeal . . . fails to state a claim upon
21 which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

22 **B. Pleading Standard**

23 Section 1983 provides a cause of action against any person who deprives an
24 individual of federally guaranteed rights "under color" of state law. 42 U.S.C. § 1983. A
25 complaint must contain "a short and plain statement of the claim showing that the pleader
26 is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
27 required, but "[t]hreadbare recitals of the elements of a cause of action, supported by
28 mere conclusory statements, do not suffice," Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)

1 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)), and courts “are not
2 required to indulge unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d
3 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). While factual
4 allegations are accepted as true, legal conclusions are not. Iqbal, 556 U.S. at 678.

5 Under section 1983, Plaintiff must demonstrate that each defendant personally
6 participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir.
7 2002). This requires the presentation of factual allegations sufficient to state a plausible
8 claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962,
9 969 (9th Cir. 2009). Prisoners proceeding pro se in civil rights actions are entitled to
10 have their pleadings liberally construed and to have any doubt resolved in their favor,
11 Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (citations omitted), but nevertheless,
12 the mere possibility of misconduct falls short of meeting the plausibility standard, Iqbal,
13 556 U.S. at 678; Moss, 572 F.3d at 969.

14 **C. Plaintiff’s Allegations**

15 The acts giving rise to this action occurred while Plaintiff was detained at the
16 California Substance Abuse Treatment Facility (“CSATF”), in Corcoran, California. He
17 names a single defendant: Dr. Ngozi Igbinosa, his primary care provider (“PCP”) at
18 CSATF.

19 Plaintiff’s allegations are not entirely clear. As best the Court can determine,
20 Plaintiff alleges as follows:

21 In 2011, Plaintiff contracted Valley Fever while housed at Pleasant Valley State
22 Prison (“PVSP”) in Coalinga, California. While at PVSP, Plaintiff’s treating doctor
23 provided medical care, including a prescription for Diflukin.

24 Plaintiff was transferred to CSATF and was placed under the care of Defendant
25 Dr. Ngozi Igbinosa. Defendant Igbinosa is the wife of the Chief Medical Officer at PVSP,
26 Dr. Felix Igbinosa, a named defendant in a class action filed by Plaintiff and other
27 inmates regarding their contraction of Valley Fever.

28

1 On Plaintiff's first visit with Defendant Igbinosa asked about her relationship to Dr.
2 Felix Igbinosa. Defendant Igbinosa responded, "I know who you are. I want you to know,
3 I'm not afraid of you or your big time attorney!"

4 After Plaintiff learned of the Defendant's relationship to Dr. Felix Igbinosa, he then
5 immediately sought another primary care doctor on the ground that there was a conflict of
6 interest, but his request was denied.

7 Defendant Igbinosa, as Plaintiff's primary care doctor, discontinued Plaintiff's
8 prescription for Diflukin, opting instead for a generic substitute, Fluconazole. Plaintiff
9 experienced severe side effects.

10 Although Dr. Igbinosa was aware that this generic substitute caused Plaintiff to
11 suffer severe side-effects, she refused to change the medication. Plaintiff's side-effects
12 became so unbearable that he was scheduled for a tele-med appointment with another
13 doctor, Dr. Smith, who ordered Plaintiff to stop taking the generic medication.

14 On Saturday, October 3, 2015, Plaintiff injured himself during a fall. Dr. Igbinosa
15 was off of work that day, but she gave care instructions to a nurse who called the doctor
16 at home. The pleading suggests that Dr. Igbinosa prescribed 400 mg of Ibuprofen in
17 response to the fall, but this did not alleviate Plaintiff's pain.

18 On October 5, 2015, Plaintiff was taken by a non-party correctional officer to see
19 Dr. Igbinosa for a follow-up to his fall. Plaintiff waited for hours in pain to see Dr. Igbinosa.
20 He later learned that the Defendant asked her staff, "How we're gonna deal with Mr.
21 Garrett today?" Plaintiff claims this conduct demonstrates a purposeful indifference to
22 Plaintiff's medical needs.

23 He seeks damages.

24 **D. Analysis**

25 **1. Eighth Amendment**

26 The Eighth Amendment's Cruel and Unusual Punishments Clause prohibits
27 deliberate indifference to the serious medical needs of prisoners. McGuckin v. Smith, 974
28 F.2d 1050, 1059 (9th Cir. 1992). A claim of medical indifference requires (1) a serious

1 medical need, and (2) a deliberately indifferent response by defendant. Jett v. Penner,
2 439 F.3d 1091, 1096 (9th Cir. 2006). The deliberate indifference standard is met by
3 showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical
4 need and (b) harm caused by the indifference. Id. Where a prisoner alleges deliberate
5 indifference based on a delay in medical treatment, the prisoner must show that the delay
6 led to further injury. See Hallett v. Morgan, 296 F.3d 732, 745-46 (9th Cir. 2002);
7 McGuckin, 974 F.2d at 1060a; Shapley v. Nevada Bd. Of State Prison Comm'rs, 766
8 F.2d 404, 407 (9th Cir. 1985) (per curiam).

9 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d
10 1051, 1060 (9th Cir. 2004). “Under this standard, the prison official must not only ‘be
11 aware of the facts from which the inference could be drawn that a substantial risk of
12 serious harm exists,’ but that person ‘must also draw the inference.’” Id. at 1057 (quoting
13 Farmer v. Brennan, 511 U.S. 825, 837 (1994)). “If a prison official should have been
14 aware of the risk, but was not, then the official has not violated the Eighth Amendment,
15 no matter how severe the risk.” Id. (brackets omitted) (quoting Gibson, 290 F.3d at
16 1188). Mere indifference, negligence, or medical malpractice is not sufficient to support
17 the claim. Broughton v. Cutter Labs., 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle v.
18 Gamble, 429 U.S. 87, 105-06 (1976)). A prisoner can establish deliberate indifference by
19 showing that officials intentionally interfered with his medical treatment for reasons
20 unrelated to the prisoner’s medical needs. See Hamilton v. Endell, 981 F.2d 1062, 1066
21 (9th Cir. 1992); Estelle, 429 U.S. at 105.

22 An allegation that prison officials deliberately ignored a prisoner’s complaint about
23 the ineffective nature of prescribed pain medication and the pain being suffered as a
24 result can, in some circumstances, give rise to a constitutional claim. See Chess v.
25 Dovey, No. CIV S-07-1767 LKK DAD P, 2011 WL 567375, at *21 (E.D. Cal. Feb. 15,
26 2011) (denying summary judgment on Eighth Amendment claim where the doctor
27 “ignored plaintiff’s complaint about the ineffective nature of the Tylenol, aspirin and other
28 medications he was being given and the pain being suffered as a result”); Franklin v.

1 Dudley, No. 2:07-cv-2259 FCD KJN P, 2010 WL 5477693, at *6 (E.D. Cal. Dec. 29, 2010)
2 (existence of triable issue of fact as to whether defendant violated Eighth Amendment
3 precluded the granting of summary judgment where plaintiff was previously prescribed
4 narcotic pain medication but now was given only Motrin, Naprosyn, and Tylenol under
5 prison's no-narcotic policy). However, a prisoner does not have a constitutional right to
6 the medication of his choice, and a mere difference of opinion regarding appropriate
7 treatment and pain medication is insufficient to give rise to a constitutional claim.
8 Toguchi, 391 F.3d at 1058; Wilson v. Borg, No. 95-15720, 1995 WL 571481, at *2 (9th
9 Cir. Sept. 27, 1995); Smith v. Norrish, No. 94-16906, 1995 WL 267126, at *1 (9th Cir.
10 May 5, 1995); McMican v. Lewis, No. 94-16676, 1995 WL 247177, at *2 (9th Cir. Apr. 27,
11 1995).

12 Plaintiff's allegations of Valley Fever, pain and mobility challenges are sufficient to
13 allege a serious medical need. Jett, 439 F.3d at 1096 (a "serious medical need" may be
14 shown by demonstrating that "failure to treat a prisoner's condition could result in further
15 significant injury or the 'unnecessary and wanton infliction of pain'"); McGuckin, 974 F.2d
16 at 1059-60 ("The existence of an injury that a reasonable doctor or patient would find
17 important and worthy of comment or treatment; the presence of a medical condition that
18 significantly affects an individual's daily activities; or the existence of chronic and
19 substantial pain are examples of indications that a prisoner has a 'serious' need for
20 medical treatment.").

21 Plaintiff has adequately alleged facts to show that Defendant acted with deliberate
22 indifference when she continued the prescription for a generic medication despite being
23 informed that Plaintiff was suffering painful side effects from it. This is sufficient to state a
24 medical indifference claim.

25 Plaintiff's remaining allegations, however, are insufficient. Plaintiff asserts, for
26 example, that he waited in pain for hours on October 5, 2015, to see Dr. Igbinosa, but he
27 makes no allegation that this delay was purposeful. Dr. Igbinosa's asking her staff how to
28 deal with Plaintiff that day does not suggest that the delay to see Plaintiff was intentional.

1 Similarly, to the extent Plaintiff claims that Dr. Igbinosa prescribed an ineffective dose of
2 pain medication following his October 3, 2015, fall, nothing in the pleading suggests she
3 knowingly did so.

4 **B. First Amendment Retaliation**

5 Plaintiff also appears to allege that Defendant retaliated against him for filing a
6 lawsuit against Defendant's husband.

7 "Within the prison context, a viable claim of First Amendment retaliation entails five
8 basic elements: (1) An assertion that a state actor took some adverse action against an
9 inmate (2) because of (3) that prisoner's protected conduct, and that such action (4)
10 chilled the inmate's exercise of his First Amendment rights, and (5) the action did not
11 reasonably advance a legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559,
12 567-68 (9th Cir. 2005).

13 The second element focuses on causation and motive. See Brodheim v. Cry, 584
14 F.3d 1262, 1271 (9th Cir. 2009). A plaintiff must show that his protected conduct was a
15 "substantial' or 'motivating' factor behind the defendant's conduct." Id. (quoting Sorrano's
16 Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989). Although it can be difficult to
17 establish the motive or intent of the defendant, a plaintiff may rely on circumstantial
18 evidence. Bruce v. Ylst, 351 F.3d 1283, 1289 (9th Cir. 2003) (finding that a prisoner
19 established a triable issue of fact regarding prison officials' retaliatory motives by raising
20 issues of suspect timing, evidence, and statements); Hines v. Gomez, 108 F.3d 265, 267-
21 68 (9th Cir. 1997); Pratt v. Rowland, 65 F.3d 802, 808 (9th Cir. 1995) ("timing can
22 properly be considered as circumstantial evidence of retaliatory intent").

23 In terms of the third prerequisite, pursuing a civil rights legal action is protected
24 activity under the First Amendment. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985).
25 With respect to the fourth prong, "[it] would be unjust to allow a defendant to escape
26 liability for a First Amendment violation merely because an unusually determined plaintiff
27 persists in his protected activity" Mendocino Env'tl. Ctr. v. Mendocino Cnty., 192 F.3d
28 1283, 1300 (9th Cir. 1999). The correct inquiry is to determine whether an official's acts

1 would chill or silence a person of ordinary firmness from future First Amendment
2 activities. Rhodes, 408 F.3d at 568-69 (citing Mendocino Env'tl. Ctr., 192 F.3d at 1300).

3 With respect to the fifth prong, a prisoner must affirmatively allege that “the prison
4 authorities’ retaliatory action did not advance legitimate goals of the correctional
5 institution or was not tailored narrowly enough to achieve such goals.” Rizzo v. Dawson,
6 778 F.2d 527, 532 (9th Cir. 1985).

7 Plaintiff claims that, because of the civil rights action filed against Defendant’s
8 husband, Defendant retaliated against Plaintiff by refusing to properly treat him. To
9 demonstrate motive and knowledge of the lawsuit, Plaintiff alleges that he asked
10 Defendant if she was Dr. Felix Igbinosa’s spouse following his transfer from PVSP, and
11 that Defendant indicated that she knew about the lawsuit and Plaintiff’s involvement in it.
12 When he learned of the relationship between the two, he asked for another doctor.
13 Plaintiff also alleges that Defendant Dr. Igbinosa, without any legitimate correctional goal,
14 failed to treat him properly because he was a Plaintiff in the lawsuit. Plaintiff’s pleading
15 satisfies the criteria for a retaliation claim. The Court therefore finds that Plaintiff has
16 asserted a cognizable First Amendment retaliation claim.

17 **III. Conclusion**

18 Plaintiff’s complaint states a First Amendment claim against Defendant as well as
19 an Eighth Amendment claim based on the fact that she continued to prescribe Plaintiff a
20 generic medication even though he experienced side effects. However, his remaining
21 Eighth Amendment claims are not cognizable as pled.

22 Accordingly, IT IS HEREBY RECOMMENDED that this action continue to proceed
23 only on Plaintiff’s Eighth Amendment and First Amendment claims against Defendant
24 Igbinosa as described herein; and that the remaining Eighth Amendment claims be
25 DISMISSED with prejudice.

26 These findings and recommendation will be submitted to the United States District
27 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).
28 Within fourteen (14) days after being served with the findings and recommendations, the

1 parties may file written objections with the Court. The document should be captioned
2 "Objections to Magistrate Judge's Findings and Recommendation." A party may respond
3 to another party's objections by filing a response within fourteen (14) days after being
4 served with a copy of that party's objections. The parties are advised that failure to file
5 objections within the specified time may result in the waiver of rights on appeal.
6 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
7 F.2d 1391, 1394 (9th Cir. 1991)).

8
9 IT IS SO ORDERED.

10 Dated: April 3, 2018

/s/ Michael J. Seng
11 UNITED STATES MAGISTRATE JUDGE

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