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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER ALLEN VAN GESSEL,
Plaintiff,
v.
DR. THOMAS MOORE, *et al.*,
Defendants.

No. 1:18-cv-01478-DAD-GSA (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND DISMISSING
CERTAIN CLAIMS AND DEFENDANTS

(Doc. No. 16)

Plaintiff Christopher Allen Van Gessel is a federal prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action pursuant to *Bivens vs. Six Unknown Agents*, 403 U.S. 388 (1971) and the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On February 25, 2020, the assigned magistrate judge issued findings and recommendations, recommending that this action proceed only against defendants Dr. Moore, Physician’s Assistant (“PA”) Altuire, and PA Ballesil on plaintiff’s claims of medical

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1 indifference under the Eighth Amendment and medical malpractice under the FTCA.¹ (Doc. No.
2 16.) It was also recommended that all of plaintiff’s other claims and named defendants be
3 dismissed with prejudice due to plaintiff’s failure to state a cognizable claim. (*Id.*) The findings
4 and recommendations were served on plaintiff and contained notice that any objections thereto
5 were to be filed within fourteen (14) days of service. (*Id.*) On March 6, 2020, plaintiff filed
6 timely objections. (Doc. No. 17.)

7 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(B) and Local Rule 304, the
8 court has conducted a *de novo* review of this case. Having carefully reviewed the entire file,
9 including plaintiff’s objections, the court concludes that the findings and recommendations are
10 supported by the record and proper analysis.

11 In his objections, plaintiff reiterates his claim that the allegedly unsafe work conditions
12 present at his place of employment constitute a violation of the Fifth and Eighth Amendments and
13 the Occupational Safety and Health Act of 1970 (“OSHA”), 29 U.S.C. §§ 651 *et seq.* (Doc. No.
14 17.) However, plaintiff’s objections do not address the magistrate judge’s conclusion that his
15 claims relating to the conditions of his employment are not cognizable under OSHA or the
16 framework for *Bivens* claims as set forth by the Supreme Court in *Ziglar v. Abbasi*, ___U.S.___,
17 137 S. Ct. 1843 (2017). (Doc. No. 16 at 16–20, 23–25, 27.)

18 Accordingly:

- 19 1. The findings and recommendations issued on February 25, 2020, are adopted;
- 20 2. This action may proceed on the following claims by plaintiff:
 - 21 a. An Eighth Amendment medical indifference claim under *Bivens* against
22 defendants Dr. Thomas Moore, PA Altuire, and PA Ballestil;

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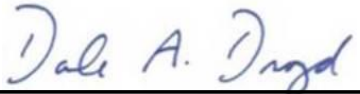
24 _____
25 ¹ The court notes that the magistrate judge also determined that “Plaintiff has stated cognizable
26 medical malpractice claims under the FTCA against the United States for failure to provide
27 Plaintiff with appropriate pain medication to treat Plaintiff’s excruciating pain.” (Doc. No. 16 at
28 26.) That determination, however, appears to be inadvertently omitted from the conclusion of the
pending findings and recommendations. Accordingly, the court clarifies that it construes the
findings and recommendations as also recommending that plaintiff’s FTCA claim against the
United States be allowed to proceed and will adopt that recommendation.

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- b. A medical malpractice claim under the FTCA against the United States;
- 3. All remaining claims and defendants are dismissed without leave to amend due to plaintiff's failure to state a claim upon which relief may be granted as to them; and
- 4. This case is referred back to the magistrate judge for further proceedings, including initiation of service of process.

IT IS SO ORDERED.

Dated: April 9, 2020



UNITED STATES DISTRICT JUDGE