

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEVIN RUSSELL MEYER,

Plaintiff,

No. CIV S-06-2584 LKK GGH P

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

ORDER &

FINDINGS AND RECOMMENDATIONS

On May 27, 2008, the court issued findings and recommendations granting in part, and denying in part, defendants' motion to dismiss. The findings and recommendations were adopted by order filed July 25, 2008. The court dismissed plaintiff's claim regarding denial of a request for a lower bunk as to defendant Todd for failure to exhaust administrative procedures. Plaintiff's claims for prospective injunctive relief were dismissed, as was defendant Schwarzenegger. The court granted the motion to dismiss as to defendant Grannis and Sullivan but the court provided plaintiff with leave to amended within twenty days. The court denied the motion to dismiss for plaintiff's claims of inadequate medical care against defendant Brimhall and Akintola. Plaintiff filed a second amended complaint on August 19, 2008, and defendants' requested a screening of the second amended complaint on August 29, 2008.

\\\\\\

1 Plaintiff's second amended complaint has failed to cure the defects described in the
2 court's May 27, 2008, order, essentially repeating the allegations of the first amended complaint.
3 Plaintiff alleges the same facts that defendant Grannis and Sullivan, both non-medical prison
4 officials, arbitrarily denied his medical request. However, plaintiff has not provided new
5 information or alleged sufficient facts to demonstrate that these non-medical officials erred in
6 relying on the doctors' opinions. Plaintiff's allegations are conclusory at best and the claims
7 against defendant Grannis and Sullivan should be dismissed.

8 Plaintiff has also added other defendants and claims that occurred after filing of the
9 complaint and plaintiff has repeated allegations against previous defendant Todd, who was
10 dismissed by court order on July 25, 2008. To the extent that the second amended complaint
11 contains additional allegations and newly named defendants against whom his claims could not
12 have been timely administratively exhausted, his amendments would appear to be futile.
13 McKinney v. Carey, 311 F.3d 1198, 1200 (9th Cir. 2002) (requiring administrative exhaustion
14 prior to filing suit).

15 The court recommends that the second amended complaint be stricken and the case
16 proceed on the first amended complaint with plaintiff's claims of inadequate medical care in
17 violation of the Eighth Amendment as to defendants Brimhall and Akintola in their individual
18 capacities.

19 Accordingly, IT IS HEREBY ORDERED that:

20 1. Plaintiff's second amended complaint be stricken and the case proceed on the
21 first amended complaint with plaintiff's claims of inadequate medical care in violation of the
22 Eighth Amendment as to defendants Brimhall and Akintola in their individual capacities.

23 2. Defendants' Motion for Protective Order, (Docket #49) November 21, 2008, is
24 dismissed as moot.

25 3. Defendants' are ordered to reply to Plaintiff's, January 6, 2009, motion to
26 compel.

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

IT IS RECOMMENDED that:

1. Plaintiff's claims against defendant Grannis and Sullivan are dismissed from this action, for the reasons stated above.

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

DATED: January 29, 2009

/s/ Gregory G. Hollows

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH: AB
meyer2584.scm