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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

MAURICE SCOTT,
Plaintiff,
v.
MTA KELLER, *et al.*,
Defendants.

Case No. 2:07-CV-00184-KJD-PAL

ORDER

Presently before the Court is Defendant Arvindra Brar’s Motion for Summary Judgment (#78). Plaintiff filed a response in opposition (#84) to which Defendant Brar replied (#79). Also before the Court is Defendant Anitra Aytman’s Motion for Summary Judgment (#80). Plaintiff filed a response in opposition (#83) to which Defendant Aytman¹ replied (#85). Finally before the Court is Plaintiff’s Motion for Forty-Five (45) Day Extension of Time to Obtain Oral Deposition (#82).²

¹At the time the factual allegations of the complaint occurred, Defendant Aytman was known as Anitra Gage.

²It is unclear from the record whether Plaintiff has ever received a copy of his deposition testimony. However, having conducted an exhaustive review of Plaintiff’s deposition, the Court finds that no facts contained in the deposition would have raised genuine issues requiring the Court to deny Defendants’ motions for summary judgment. Therefore, the Court denies Plaintiff’s motion for an extension.

1 I. Background

2 Avrindra Brar, M.D., is a licensed physician and surgeon in the State of California. He has
3 been employed as a physician and surgeon with the California Department of Corrections and
4 Rehabilitation (“CDCR”) at California State Prison, Corcoran (“Corcoran”) since 2001. He works
5 as a yard doctor and emergency room doctor and his responsibilities include treating inmates at
6 various clinics in the prison and in the emergency room.

7 Defendant Anitra Aytman (“Aytman”) is a nurse family practitioner in the State of California.
8 She was employed at Corcoran in 2005. Aytman treated and provided nursing services to inmates,
9 including Plaintiff.

10 Plaintiff Maurice Scott suffered a hand injury on January 4, 2005, while incarcerated at the
11 California State Prison, Solano (“Solano”). On January 6, 2005, Dr. Rohrer diagnosed Scott with
12 recurrent swelling of the right hand and Scott received a prescription for Motrin, a pain reliever and
13 anti-inflammatory medication. An x-ray showed a fracture at the proximal end (closest to the
14 knuckle) of the fourth metacarpal. The fourth metacarpal refers to the metacarpal bone connected to
15 the ring finger. Scott’s x-ray also showed that the proximal end of the damaged metacarpal was
16 displaced dorsally, meaning that it was out of alignment and toward the palm of the hand.

17 On April 6, 2005, Scott was transferred to Corcoran. On May 5, 2005, Scott was seen by the
18 first time by Defendant Aytman. She obtained a history from Scott who complained of pain with
19 periodic numbness and tingling in his hand. Scott was assessed with a fracture and referred for an
20 orthopedic consultation and was prescribed Motrin. On May 6, 2005, Aytman issued a notification
21 of diagnostic test results and also issued a request for a referral to an orthopedist for follow up.

22 On June 8, 2005, Scott had another x-ray of his right wrist and hand. The x-ray of the wrist
23 showed healed fractures at the base of the fourth and fifth metacarpal bones. It also showed slight
24 posterior subluxation (dislocation) of the base of the fourth and fifth metacarpal bones. Dr. Neubarth
25 prescribed Neurotonin for relief of pain.

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1 On August 2, 2005, Defendant Aytman saw Scott for the second time. Scott was referred to
2 physical therapy and prescribed medication for acid reflux.

3 Scott was seen for an orthopedic consultation on August 17, 2005, by Dr. Smith, an
4 orthopedic surgeon at Corcoran. Dr. Smith noted the results of the June 8th x-ray and noted that Scott
5 complained of numbness and tingling in his hand. Dr. Smith referred Scott for an Electromyogram
6 (“EMG”) and nerve conduction studies (“NCS”). An EMG tests the electrical activity of muscles
7 and is used to detect many diseases and conditions including peripheral nerve damage. An NCS tests
8 the motor and sensory nerves electrical conduction ability primarily evaluating numbness, tingling,
9 burning or weakness in arms and legs. Dr. Smith noted that he needed to see Scott again, and until
10 the tests were conducted nothing could be done for Scott, other than prescribe anti-inflammatory
11 medication.

12 Scott was also seen in the clinic by Aytman on September 12, 2005. Aytman noted that the
13 EMG had been deferred. She noted the EMG had been scheduled by Dr. Sanchez with follow up
14 after the EMG was completed. Aytman also saw Scott on November 1, 2005, but Plaintiff only
15 complained on that date of chest pain caused by reflux.

16 Dr. Brar examined Scott for the first time on October 24, 2005. Scott complained that the
17 EMG and NCS had not been conducted yet. Scott was wearing a wrist splint and receiving
18 Neurotonin and Motrin for pain. Brar diagnosed Scott with a history of metacarpal fracture and wrist
19 trauma. Brar contacted staff in the Utilization Management Office (“UMO”), responsible for
20 approving and scheduling tests. The UMO informed Brar that it had not received any order for an
21 EMG and NCS. Brar then ordered the test for Scott. Brar also ordered follow up with Dr. Smith
22 within thirty (30) days of the tests being completed.

23 Dr. Pineda performed the tests on November 14, 2005. As a result of the tests, Pineda
24 diagnosed Scott with mild carpal tunnel syndrome and mild Guyon’s canal syndrome, and
25 recommended a wrist splint for Scott. Carpal tunnel syndrome has symptoms including numbness,
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1 tingling and is commonly treated with wrist splints. Guyon's canal syndrome, entrapment of the
2 ulnar nerve as it passes through the wrist, is also treated with the use of a splint.

3 Dr. Brar then examined Scott again on December 6, 2005 in response to two inmate
4 grievances that Scott submitted regarding the medical treatment of his right wrist. One grievance
5 requested that Scott be sent to an outside orthopedic surgeon. Brar denied this request, because Scott
6 was receiving care from Dr. Smith. Brar ordered the nursing staff to contact Dr. Pineda to determine
7 what type of splint should be ordered for Scott. The second grievance complained that Scott had not
8 been seen by a doctor for treatment of his right hand. Brar granted the grievance and told Scott that
9 he would be treated by the specialist.

10 II. Standard for Summary Judgment

11 Summary judgment may be granted if the pleadings, depositions, answers to interrogatories,
12 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any
13 material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ.
14 P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the
15 initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at
16 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a
17 genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
18 587 (1986); Fed. R. Civ. P. 56(e).

19 All justifiable inferences must be viewed in the light most favorable to the nonmoving party.
20 See Matsushita, 475 U.S. at 587. However, the nonmoving party may not rest upon the mere
21 allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit
22 or other evidentiary materials as provided by Rule 56(e), showing there is a genuine issue for trial.
23 See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court need only resolve factual
24 issues of controversy in favor of the non-moving party where the facts specifically averred by that
25 party contradict facts specifically averred by the movant. See Lujan v. Nat'l Wildlife Fed'n., 497
26 U.S. 871, 888 (1990); see also Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 345

1 (9th Cir. 1995) (stating that conclusory or speculative testimony is insufficient to raise a genuine
2 issue of fact to defeat summary judgment). Evidence must be concrete and cannot rely on “mere
3 speculation, conjecture, or fantasy. O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th
4 Cir. 1986). “[U]ncorroborated and self-serving testimony,” without more, will not create a “genuine
5 issue” of material fact precluding summary judgment. Villiarimo v. Aloha Island Air Inc., 281 F.3d
6 1054, 1061 (9th Cir. 2002).

7 Summary judgment shall be entered “against a party who fails to make a showing sufficient
8 to establish the existence of an element essential to that party’s case, and on which that party will
9 bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Summary judgment shall not be granted
10 if a reasonable jury could return a verdict for the nonmoving party. See Anderson, 477 U.S. at 248.

11 III. Analysis

12 Both Defendants have moved for summary judgment asserting that no genuine issue of
13 material fact prevents the court from granting summary judgment for them and against Plaintiff
14 because the undisputed facts show that each Defendant did not take actions that violated Plaintiff’s
15 Eighth Amendment rights, and even if such facts were found, Defendants are entitled to qualified
16 immunity.

17 Under 42 U.S.C. § 1983, to maintain an Eighth Amendment claim based on prison medical
18 treatment, an inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner,
19 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104(1976)). The
20 Ninth Circuit employs a two-part test of deliberate indifference requiring a plaintiff to (1) first show
21 a “serious medical need” by demonstrating that “failure to treat a prisoner’s condition could result in
22 further significant injury or the unnecessary and wanton infliction of pain,” and (2) the defendant’s
23 response to the need was deliberately indifferent. McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th
24 Cir. 1991), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir.
25 1997) (en banc) (citing Estelle 429 U.S. at 104) (internal quotations removed). A plaintiff may
26 satisfy the second prong by demonstrating (1) the prison official engaged in a purposeful act or

1 failure to respond to a prisoner’s pain or possible medical need, and (2) harm caused by the
2 indifference. Jett, 439 F.3d at 1096 (citing McGuckin, 974 F.2d at 1060.) Indifference “may appear
3 when prison officials deny, delay or intentionally interfere with medical treatment, or it may be
4 shown by the way in which prison physicians provide medical care.” McGuckin, 974 F.2d at 1060.
5 “A prisoner need not show harm was substantial; however, such would provide additional support
6 for the inmate’s claim that the defendant was deliberately indifferent to his needs.” Jett, 439 F.3d at
7 1096.

8 Although Scott makes claims for deliberate indifference resulting from both denial and delay
9 of medical treatment, as he was eventually treated, all of his claims are really for delay of treatment.
10 In the Ninth Circuit, “mere delay of surgery, without more, is insufficient to state a claim of
11 deliberate medical indifference . . . unless the denial was harmful.” Shapley v. Nevada Bd. of State
12 Prison Com’rs, 766 F.2d 404, 407 (9th Cir. 1985).

13 [A] finding that the defendant's activities resulted in “substantial” harm
14 to the prisoner is not necessary, although a finding that the inmate was
15 seriously harmed by the defendant's action or inaction tends to provide
16 additional support to a claim that the defendant was “deliberately
17 indifferent” to the prisoner's medical needs; the fact that an individual
18 sat idly by as another human being was seriously injured despite the
19 defendant's ability to prevent the injury is a strong indicium of
20 callousness and deliberate indifference to the prisoner's suffering

21 McGuckin, 974 F.2d at 1060 (internal citations removed). Once Plaintiff has established the
22 harmfulness of the delay, “it is up to the fact finder to determine whether or not the defendant was
23 ‘deliberately indifferent’ to the prisoner's medical needs.” Id. A finding that the delay in treatment
24 was an “isolated occurrence” or “isolated exception” to the inmate’s overall medical treatment tends
25 to weigh against a finding of deliberate indifference. See e.g. Wood v. Housewright, 900 F.2d 1332,
26 1334 (9th Cir. 1990); Toussaint v. McCarthy, 801 F.2d 1080, 1111 (9th Cir.1986). “On the other
hand, a finding that the defendant repeatedly failed to treat an inmate properly or that a single failure
was egregious strongly suggests that the defendant's actions were motivated by ‘deliberate
indifference’ to the prisoner's medical needs.” McGuckin, 974 F.2d at 1060-61. “In sum, the more

1 serious the medical needs of the prisoner, and the more unwarranted the defendant's actions in light
2 of those needs, the more likely it is that a plaintiff has established 'deliberate indifference' on the part
3 of the defendant." Id. at 1061.

4 A. Dr. Arvindra Brar

5 Plaintiff asserts that genuine issues of fact are raised regarding Defendant Brar's deliberate
6 indifference because Brar did not grant Plaintiff's request to see an "outside" orthopedic surgeon.
7 However, this denial of Plaintiff's grievance on our about December 6, 2005, does not evidence a
8 purposeful act or failure to respond to Plaintiff's serious medical need for several reasons. First, Dr.
9 Brar first examined Plaintiff on October 24, 2005, more than nine months after Plaintiff's hand and
10 wrist injury occurred. Dr. Brar discovered that the orthopedist's order, on August 17, 2005, that
11 Scott undergo an EMG and NCS had not been conducted or scheduled. In direct response to that
12 situation, Brar ordered the tests "URGENT" and as a direct result of his efforts the tests were
13 conducted three weeks later on November 14, 2005.

14 Then, in response to Plaintiff's grievances initially filed on September 20, 2005³ and October
15 20, 2005, Dr. Brar met with Plaintiff on December 6, 2005. Since Plaintiff had undergone the tests
16 as ordered by Dr. Brar, he denied the request to see an outside orthopedic surgeon and told Scott that
17 he would be seen by Dr. Smith and made a request that a follow-up be scheduled. The failure to
18 allow Scott to see an outside surgeon did not intentionally delay Scott's treatment. Instead, the
19 record showed that Dr. Brar expedited the treatment when delay was brought to his attention. There
20 is no evidence in the record that Dr. Brar was aware that Scott's treatment would be delayed after all
21 tests had been completed because Plaintiff merely needed a consultation with the in-house orthopedic
22 surgeon.

23 Plaintiff now alleges for the first time, on August 13, 2009, two years after his amended
24 complaint (#14) was filed, that Dr. Brar violated California Government Code § 845.6 which makes
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26 ³This grievance directly led to the October 24, 2005 meeting with Dr. Brar.

1 a public employee liable if he knew that a prisoner was in need of immediate medical care and failed
2 to take reasonable action. However, Plaintiff has failed to demonstrate good cause under Federal
3 Rule of Civil Procedure 16(b) for failure to amend within the time specified in the scheduling order.

4 Accordingly, the court will not construe Plaintiff's opposition to the motion for summary
5 judgment as a motion to amend his pleadings. Even if the Court would do so, such an amendment
6 would be futile, because Dr. Brar did summon medical care when presented with evidence of delay
7 in Scott's treatment. Thus, Plaintiff has failed to demonstrate that Dr. Brar was deliberately
8 indifferent to his serious medical needs. Therefore, the Court grants Dr. Brar's motion for summary
9 judgment.

10 B. Anitra Aytman

11 Similarly, Plaintiff asserts Defendant Aytman delayed his treatment, disputing that she
12 ordered an orthopedic evaluation after initially seeing him after the transfer to Corcoran on May 5,
13 2005. However, the documentary evidence demonstrates that Aytman did order the orthopedic
14 evaluation on May 5, 2005. The evaluation was approved on May 9, 2005, though the record is
15 unclear as to who signed the approval. The orthopedic evaluation did not occur until August 17,
16 2005, but Plaintiff has not demonstrated that Aytman was responsible for the delay. There is no
17 indication that Aytman had any knowledge of the delay, until possibly August 2, 2005.

18 These facts, without more, do not establish that Plaintiff's Eighth Amendment rights were
19 violated. Similar to Dr. Brar, in opposition, Plaintiff has alleged that Aytman violated California
20 Government Code § 845.6. The Court denies any motion to amend the complaint in opposition to
21 the motion for summary judgment. Plaintiff has not shown good cause for failing to amend the
22 complaint earlier. Thus, the Court grants summary judgment to Defendant Aytman, because Plaintiff
23 has failed to raise genuine issues of material fact that would establish that Aytman violated his
24 constitutional rights.

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1 IV. Conclusion

2 Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion for Forty-Five (45) Day
3 Extension of Time to Obtain Oral Deposition (#82) is **DENIED**;


4 IT IS FURTHER ORDERED that Defendant Arvindra Brar's Motion for Summary Judgment
5 (#78) is **GRANTED**;

6 IT IS FURTHER ORDERED that Defendant Anitra Aytman's Motion for Summary
7 Judgment (#80) is **GRANTED**;

8 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Defendants
9 Arvindra Brar and Anitra Aytman and against Plaintiff.

10 DATED this 29th day of March 2010.

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Kent J. Dawson
United States District Judge