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

STEWART MANAGO,

Plaintiff,

No. CIV S-07-2290 LKK KJM P

vs.

BRAD WILLIAMS, et al.,

Defendants.

ORDER

_____ /

Plaintiff, a state prisoner proceeding pro se, brings this action under 42 U.S.C. section 1983. Plaintiff has filed a motion for a preliminary injunction (1) requiring defendant California Department of Corrections and Rehabilitation to transfer plaintiff to a prison where he will receive “proper mental health treatment,” and (2) prohibiting CDCR “from transferring plaintiff to” a prison “[w]here plaintiff . . . may be placed in unlawful danger.” Pl.’s Mot at 1 (Dkt. No. 23).

This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262. On January 15, 2010, the magistrate judge filed findings and recommendations which recommended denying the motion for a preliminary injunction as moot. Plaintiff has filed timely objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this

1 court has conducted a de novo review of this case. Having carefully reviewed the entire file, the
2 court agrees that the motion for a preliminary injunction should be denied. Because the court's
3 analysis differs in several regards from the magistrate judge's, the court writes separately here.

4 **I. Standard**

5 The Ninth Circuit formerly used a "sliding scale" approach to determining whether a
6 preliminary injunction should issue. Under this approach, a moving party could show either a
7 likelihood of success on the merits and the possibility of irreparable injury, or that serious
8 questions are raised and that the balance of hardships tips sharply in the movant's favor. See
9 Coalition for Economic Equity v. Wilson, 122 F.3d 692, 700 (9th Cir. 1997). The approach was
10 a "sliding scale" because a strong showing on the merits lessened the burden of showing
11 irreparable injury, and vice versa. The Supreme Court has since overruled at least one
12 application of this sliding scale approach, holding that preliminary relief may never issue absent a
13 showing of *likely* irreparable injury, regardless of the showing on the merits. Winter v. Natural
14 Res. Def. Council, ___ U.S. ___, ___, 129 S.Ct. 365, 375-76 (2008). However, as this case
15 demonstrates, Winter only differs from the prior approach in a narrow class of cases, not
16 including the instant matter. Here, the magistrate judge found no likelihood of irreparable injury.
17 This court agrees, and in this situation, no injunction may issue under either formulation of the
18 test.

19 **II. Discussion**

20 Plaintiff's motion is motivated by two primary concerns. First, plaintiff contends that
21 prison guards put him in danger in retaliation for plaintiff's prior testimony against another
22 prison official. Second, plaintiff contends that he was not receiving adequate mental health care
23 while incarcerated at California State Prison - Sacramento (CSP-Sac).

24 As to the first concern, plaintiff's appears to have requested both that CDCR be ordered
25 to be transfer plaintiff *from* CSP-Sac and that CDCR be enjoined from retaliatorily transferring
26 him *to* another institution where his safety would be at an even greater risk. Since his motion

1 was filed, plaintiff filed a supplemental brief stating that he has been transferred from CSP-Sac to
2 the California Correctional Institution (CCI) in Tehachapi, California. (Dkt. No. 34). The
3 magistrate judge interpreted plaintiff as stating that he was not in danger at CCI, and the
4 magistrate concluded that the motion for a preliminary injunction was therefore moot insofar as it
5 was motivated by plaintiffs' safety. In plaintiff's objections to the findings and recommendations,
6 plaintiff asserts that he is still in danger. (Dkt. No. 58, at 3). Moreover, even if plaintiff was not
7 presently in danger, his explicit request for a prohibition on future retaliatory transfers was not
8 mooted by the transfer from CSP-Sac.

9 Plaintiff nonetheless has failed to meet his burden of showing that his safety warrants a
10 preliminary injunction, because plaintiff has not shown a likelihood of irreparable injury.
11 Despite plaintiff's statement that he "believe[s] that he is still in danger of assault" at CCI, he
12 provides no allegations or evidence indicating that such an assault is likely. Instead, his
13 allegations pertaining to treatment since his transfer to CCI pertain solely to the provision of
14 medical care. Nor has plaintiff provided any argument as to why a retaliatory transfer is likely, or
15 that such a transfer would result in irreparable injury.

16 Turning to plaintiff's second concern, plaintiff argues that he has continued to receive
17 inadequate mental health care at CCI.¹ This concern was therefore not mooted by the transfer to
18 CCI. The magistrate judge recognized, however, that plaintiff does not "specify what additional
19 treatment he believes he should receive," and that "[t]here is no evidence before the court that the
20 only remedy for undefined deficiencies in his mental health care treatment would be yet another
21 transfer to another prison facility." Findings and Recommendations at 3. Thus, plaintiff has not
22 shown that he is likely to suffer an irreparable injury in this regard.

23 **III. Conclusion**

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¹ Insofar as plaintiff's objections to the findings and recommendations complain of
26 inadequate medical care, these arguments were not raised in the initial motion, and the court
declines to address them here.

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For the reasons stated above, IT IS HEREBY ORDERED THAT:

1. The court declines to adopt the findings and recommendations filed January 15, 2010 (Dkt. No. 55).
2. Plaintiff's motion for a preliminary injunction (Dkt. No. 23) is denied.

DATED: February 24, 2010.


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT