IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN FRYMAN,

Plaintiff, No. CIV S-07-2636 JAM DAD P

vs.

A. TRAQUINA, et al., ORDER AND

Defendants. FINDINGS AND RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding through counsel with a civil rights action seeking relief under 42 U.S.C. § 1983. The matter is before the court on defendants' amended motion for summary judgment brought pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff has filed an opposition to the motion, and defendants have filed a reply.

BACKGROUND

Plaintiff is proceeding on his original complaint against defendants Traquina and Noriega. Therein, he alleges that he suffers from a growth on the inner part of the left side of his chest. At the time he informed defendants of the growth, it was enlarging in size each day and was causing him increasing discomfort. On October 11, 2006, plaintiff saw a specialist, Dr. Eisenberg, who told him that he had a gynecomastic cyst and that surgery was an acceptable

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treatment for the condition. On April 16, 2007, plaintiff saw another specialist, Dr. Young, and he too recommended surgery to treat the condition. (Compl. Attach. at 1.)

Plaintiff alleges that defendant Traquina, Chief Medical Officer at CSP-Solano, determined that surgery would be simply cosmetic and was therefore unnecessary. Plaintiff also alleges that defendant Noriega, the Acting Chief Physician and Surgeon at CSP-Solano, agreed with defendant Traquina. Plaintiff maintains that the defendants failed to address or consider his concerns about the pain he experienced when he touched the affected area, laid on it, brushed against it, or wore a t-shirt over it. Plaintiff also alleges that he received nothing from defendants by way of pain management medication. Plaintiff concludes that defendants Traquina and Noriega have violated his rights under the Eighth Amendment by failing to treat his serious medical condition and the pain he suffers as a result thereof. (Compl. Attach. at 1-2.)

PROCEDURAL HISTORY

At screening the court determined that plaintiff's complaint appeared to state cognizable claims for relief against defendants Traquina and Noriega, and in due course, the United States Marshal served plaintiff's complaint on them. On March 13, 2008, defendants filed an answer. On March 24, 2008, this court issued a discovery order. The parties subsequently filed cross-motions for summary judgment. On October 24, 2008, the undersigned issued findings and recommendations, recommending that both parties' motions be denied without prejudice. On January 15, 2009, the assigned district judge adopted the findings and recommendations and denied the summary judgment motions without prejudice.

On June 10, 2009, defendants filed the pending amended motion for summary judgment, arguing that the evidence presented in support of their motion establishes that they were not deliberately indifferent to plaintiff's serious medical needs. On August 27, 2009, plaintiff filed an opposition to the motion, arguing that the medical care he received from the defendants in connection with the growth in his chest and the increasing pain caused by it fell below constitutional standards. On September 4, 2009, defendants filed a reply.

SUMMARY JUDGMENT STANDARDS UNDER RULE 56

Summary judgment is appropriate when it is demonstrated that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

> Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. See id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party

must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

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OTHER APPLICABLE LEGAL STANDARDS

I. Civil Rights Act Pursuant to 42 U.S.C. § 1983

The Civil Rights Act under which this action was filed provides as follows:

> Every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). "A person 'subjects' another to the deprivation of a constitutional right, within the meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

Moreover, supervisory personnel are generally not liable under § 1983 for the actions of their employees under a theory of respondeat superior and, therefore, when a named defendant holds a supervisorial position, the causal link between him and the claimed constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory allegations concerning the involvement of official personnel in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

II. Eighth Amendment and Adequate Medical Care

The unnecessary and wanton infliction of pain constitutes cruel and unusual punishment prohibited by the Eighth Amendment. Whitley v. Albers, 475 U.S. 312, 319 (1986); Ingraham v. Wright, 430 U.S. 651, 670 (1977); Estelle v. Gamble, 429 U.S. 97, 105-06 (1976). In order to prevail on a claim of cruel and unusual punishment, a prisoner must allege and prove that objectively he suffered a sufficiently serious deprivation and that subjectively prison officials

acted with deliberate indifference in allowing or causing the deprivation to occur. Wilson v. Seiter, 501 U.S. 294, 298-99 (1991).

Where a prisoner's Eighth Amendment claims arise in the context of medical care, the prisoner must allege and prove "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. An Eighth Amendment medical claim has two elements: "the seriousness of the prisoner's medical need and the nature of the defendant's response to that need." McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1991), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

A medical need is serious "if the failure to treat the prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" McGuckin, 974 F.2d at 1059 (quoting Estelle v. Gamble, 429 U.S. at 104). Indications of a serious medical need include "the presence of a medical condition that significantly affects an individual's daily activities." Id. at 1059-60. By establishing the existence of a serious medical need, a prisoner satisfies the objective requirement for proving an Eighth Amendment violation. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

If a prisoner establishes the existence of a serious medical need, he must then show that prison officials responded to the serious medical need with deliberate indifference. Farmer, 511 U.S. at 834. In general, deliberate indifference may be shown when prison officials deny, delay, or intentionally interfere with medical treatment, or may be shown by the way in which prison officials provide medical care. Hutchinson v. United States, 838 F.2d 390, 393-94 (9th Cir. 1988). Before it can be said that a prisoner's civil rights have been abridged with regard to medical care, however, "the indifference to his medical needs must be substantial. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action." Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105-06). See also Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) ("Mere negligence in

diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights."); McGuckin, 974 F.2d at 1059 (same). Deliberate indifference is "a state of mind more blameworthy than negligence" and "requires 'more than ordinary lack of due care for the prisoner's interests or safety.'" Farmer, 511 U.S. at 835 (quoting Whitley, 475 U.S. at 319).

Delays in providing medical care may manifest deliberate indifference. Estelle, 429 U.S. at 104-05. To establish a claim of deliberate indifference arising from a delay in providing care, a plaintiff must show that the delay was harmful. See Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); McGuckin, 974 F.2d at 1059; Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990); Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1989); Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). In this regard, "[a] prisoner need not show his harm was substantial; however, such would provide additional support for the inmate's claim that the defendant was deliberately indifferent to his needs." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). See also McGuckin, 974 F.2d at 1060.

Finally, mere differences of opinion between a prisoner and prison medical staff as to the proper course of treatment for a medical condition do not give rise to a § 1983 claim. Toguchi, 391 F.3d at 1058; Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981).

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. Defendants' Statement of Undisputed Facts and Evidence

The defendants' statement of undisputed facts is supported by citations to a declaration signed under penalty of perjury by defendant Traquina. It is also supported by citations to plaintiff's complaint and copies of his medical records.

The evidence submitted by the defendants establishes the following. On August 25, 2005, plaintiff saw Dr. William Chen for evaluation of a lump in his left breast. Dr. Chen found a tender mass measuring 3.0 cm by 2.0 cm and requested a mammogram and a surgical

consultation. He also prescribed Motrin for plaintiff's discomfort. On December 21, 2005, defendant Noriega, the surgical consultant, diagnosed plaintiff with left breast gynecomastia. He also found multiple pigmented moles on plaintiff's chest and abdomen and recommended excisional biopsy of two of the lesions to rule out melanoma in light of plaintiff's family history of melanoma. On December 28, 2005, defendant Noriega removed two of the pigmented moles and prescribed Motrin for plaintiff's postoperative discomfort. The results of the biopsies were benign, thereby ruling out melanoma. (Defs.' SUDF 4, Traquina Decl. ¶¶ 6-7 & Ex. A.)

On November 7, 2005, plaintiff underwent a mammogram, which suggested that he had left breast gynecomastia. On August 2, 2006, plaintiff saw Dr. Eisenberg, an endocrinologist at Queen of the Valley Hospital. Dr. Eisenberg ordered another mammogram, which also indicated plaintiff had left breast gynecomastia. On October 11, 2006, plaintiff saw Dr. Eisenberg a second time. Dr. Eisenberg found that the mass on plaintiff's left breast had doubled in size and ordered additional tests and studies. In an October 16, 2006 addendum, Dr. Eisenberg noted that plaintiff's gynecomastia was idiopathic or of unknown cause based on the negative results of plaintiff's work-up, which included clinical, hormonal, and imaging studies. Dr. Eisenberg also noted that "we have ruled out other causes such as testicular tumor, deficiency or excessive testosterone, chronic renal disease, chronic liver disease and drug therapy. . . ." Finally, Dr. Eisenberg recommended surgical removal of the left breast mass by a plastic surgeon. (Defs.' SUDF 5, Traquina Decl. ¶¶ 8-9 & Ex. A.)

On January 30, 2007, the Medical Authorization Review ("MAR") Committee denied plaintiff's request for surgery but referred him to Dr. Young, a plastic surgeon at UCSF for further review. Both defendants Noriega and Traquina were members of the MAR Committee. (Defs.' SUDF 7, Traquina Decl. ¶ 10 & Ex. A.)

On April 16, 2007, plaintiff saw Dr. Young. Dr. Young diagnosed plaintiff with idiopathic left-sided gynecomastia and recommended surgery for the condition. On July 12, 2007, the MAR Committee denied plaintiff's request for surgery again because it considered the

procedure cosmetic. The California Code of Regulations and California Department of Corrections and Rehabilitation policy prohibit cosmetic surgery. Based on plaintiff's diagnoses and evaluations, the MAR Committee decided to continue with a conservative course of treatment, including observation and symptomatic treatment with anti-inflammatory medication. (Defs.' SUDF 5, 7, Traquina Decl. ¶¶ 10-11, 16 & Ex. A.)

On December 2, 2008, Dr. Nguyen, a contract physician, referred plaintiff to the CSP-Solano Surgical Clinic for evaluation of moles and reevaluation of his left breast gynecomastia. On May 13, 2009, defendant Traquina examined plaintiff and reviewed his medical record. Plaintiff's left breast was slightly larger than the right breast and had multiple small tender nodules measuring about 3.0 mm in diameter, consistent with small gynecomastia with fibrocystic changes. On October 11, 2006, Dr. Eisenberg measured plaintiff's left breast gynecomastia at 8.0 cm to 9.0 cm in diameter. Plaintiff's breast enlargement had decreased significantly in size during the last three years. According to defendant Traquina, it was half of the size as described in 2006. (Defs.' SUDF 8, Traquina Decl. ¶¶ 12-13 & Ex. A.)

In general, gynecomastia is a benign condition that does not cause pain. On occasion, it may cause discomfort, which Motrin can control. Gynecomastia is a fibrocystic condition, which causes the development of abnormally large mammary glands. Although it is not physically harmful, in some cases, it can be an indicator of other more serious underlying conditions, such as a testicular tumor, high or low testosterone levels, renal disease, and liver disease. If those conditions are present, treating the underlying condition may lead to improvement of the condition. Medication may also cause gynecomastia. In such cases an alternative medication may be available to avoid the gynecomastia side-effects while still treating the primary condition for which the original medication was prescribed. Although surgery may be an option, American insurance companies generally deny coverage for surgery on the grounds that it is a cosmetic procedure. (Traquina Decl. ¶ 14.)

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Test results revealed no underlying cause of plaintiff's gynecomastia. Medication was also ruled out as a possible cause. In addition, according to defendant Traquina, plaintiff's gynecomastia had reduced in size without surgery. In defendant Traquina's board certified surgical opinion, surgery was not and is not now advisable in plaintiff's case. Defendant Traquina believes that Motrin can relieve any discomfort and that plaintiff should be treated with annual examinations and mammograms as indicated. (Traquina Decl. ¶ 15 & Ex. A.)

Plaintiff has been prescribed Motrin on the following dates: August 25, 2005 (800 mg) for sixty days; October 13, 2005 (800 mg) for ninety days; December 5, 2005 (400 mg) twenty tablets; December 28, 2005 (400 mg) for three days; February 26, 2007 (800 mg) for three days; October 15, 2007 (800 mg) for six months. In addition, defendant Traquina has provided plaintiff with detailed instruction on self breast examination. (Traquina Decl. ¶ 15 & Ex. A.)

In defendant Traquina's opinion, plaintiff has received all reasonable and necessary care consistent with community standards and consistent with the degree of knowledge and skill ordinarily possessed and exercised by members of his profession under similar circumstances. According to defendant Traquina, plaintiff has a benign condition and possible serious causes for his condition have been ruled out. In defendant Traquina's opinion, monitoring plaintiff's condition and treating it with anti-inflammatories such as Motrin as needed is medically acceptable and preferable to surgical treatment. Defendant Traquina states that at all times he tried to treat plaintiff with dignity and respect, and at no time did he refuse to provide him with necessary care or treatment. (Defs.' SUDF 9-12, Traquina Decl. ¶¶ 5, 17-18.)

II. Defendants' Arguments

Defense counsel argues that under the undisputed facts of this case neither defendant Traquina nor defendant Noriega was deliberately indifferent to plaintiff's medical needs. Specifically, counsel argues that plaintiff has a benign condition that is most appropriately treated conservatively. In defendant Traquina's professional opinion, a conservative approach is preferable in light of the inherent risks of surgery, such as bleeding,

infection, and scarring. Additionally, surgery for gynecomastia is generally regarded as cosmetic by American insurance companies. Here, the MAR Committee denied plaintiff's request for surgery because it too determined that it was cosmetic and not medically necessary. (Defs.' Mot. for Summ. J. at 7-8.)

Defense counsel also argues that in cases involving complex medical issues, expert medical testimony is necessary to establish deliberate indifference as well as to show that the alleged failure to provide plaintiff care or treatment caused him actual harm. In this case, counsel argues that the defendants provided plaintiff with an appropriate course of treatment for his condition. According to defense counsel, although plaintiff seems to believe that he needs surgery and two outside physicians recommended it, those are mere differences of opinion and do not support plaintiff's Eighth Amendment claim. (Defs.' Mot. for Summ. J. at 10.)

Finally, defense counsel argues that plaintiff cannot establish that the defendants had actual knowledge of a "substantial risk of serious harm." The MAR Committee, including defendants Traquina and Noriega, determined that the requested surgery was not medically necessary and was cosmetic. The California Code of Regulations excludes cosmetic procedures for inmates. Moreover, plaintiff's laboratory tests produced normal results, which ruled out other causes of the growth, including testicular tumor, deficiency or excessive testosterone, chronic renal disease, chronic liver disease, and drug therapy. Defense counsel concludes, based upon these alleged facts, that plaintiff received all reasonable and necessary care and is receiving treatment which is less risky and preferable to the surgery he requests. (Defs.' Mot. for Summ. J. at 10-11.)

III. Plaintiff's Opposition

In opposition to defendants' motion for summary judgment, plaintiff's counsel argues that the record shows that defendants Traquina and Noriega were deliberately indifferent to plaintiff's serious medical needs. According to plaintiff's counsel, since 2005 plaintiff has complained about chronic and excruciating pain as a result of the growth in his left chest.

Plaintiff has also repeatedly sought medical care from medical personnel at CSP-Solano as well as from outside specialists. Moreover, contrary to defendants' claim, plaintiff's growth remains as large as it was when Dr. Eisenberg measured it in 2006. In this regard, plaintiff's counsel contends that there is a legitimate factual dispute as to whether plaintiff has been suffering from a serious medical condition. (Pl.'s Opp'n to Defs.' Mot. for Summ. J. at 10-12 & Pl.'s Decl. ¶ 24.)

Counsel for plaintiff also argues that the record shows that Dr. Eisenberg and Dr. Young recommended surgery for plaintiff because the growth in his chest caused him pain. Defendants Traquina and Noriega, on the other hand, failed to consider plaintiff's pain when they denied his requests for surgery. In fact, the only reason the defendants denied plaintiff's requests for surgery was because they considered the recommended procedure cosmetic. Counsel contends that, unlike Drs. Eisenberg and Young, the defendants based their decision on legal considerations (i.e., whether the California Code of Regulations permitted the procedure) and not on plaintiff's well-documented medical condition and symptoms. In this regard, plaintiff's counsel contends that this case does not revolve around a mere difference of medical opinion but rather involves a legitimate factual question as to whether the defendants Traquina and Noriega acted with deliberate indifference to plaintiff's serious medical needs. (Pl.'s Opp'n to Defs.' Mot. for Summ. J. at 11-15.)

Finally, plaintiff's counsel argues that he is not required to provide expert testimony to demonstrate the defendants' deliberate indifference. Defendants have not established that this case involves a complex medical issue. On the contrary, according to plaintiff's counsel, it involves a simple claim that the defendants refused to provide plaintiff with adequate medical care. In addition, defendant Traquina's declaration cannot be offered as expert testimony because the defendants never identified him as an expert witness. Moreover, even assuming the court considers defendant Traquina an expert, plaintiff has submitted reports from two medical specialists who examined plaintiff and opined that he needed surgery. Finally, plaintiff's counsel argues that plaintiff does not need expert testimony to establish actual harm

caused by the defendants deliberate indifference because he may establish the infliction of pain by producing evidence of an existing medical condition which is reasonably likely to be the cause of his alleged pain. (Pl.'s Opp'n to Defs.' Mot. for Summ. J. at 15-17.)

IV. Defendants' Reply

In reply, defense counsel argues that defendant Traquina's understanding is that gynecomastia is not a condition that causes pain and that Traquina's examination of plaintiff indicated that he had tenderness, not pain, as would be expected with gynecomastia. In addition, defense counsel contends, plaintiff's gynecomastia shrunk on its own without surgery. To the extent that plaintiff claims to suffer pain or discomfort, defense counsel argues that there is no evidence of any instance in which plaintiff requested but was refused pain medication. Defense counsel asserts that the evidence indicates plaintiff was prescribed Motrin on numerous occasions. Although plaintiff states in his declaration that he began experiencing pain in March 2006, defense counsel argues that Dr. Eisenberg's August 2006 report indicates that plaintiff told him that "there has never been any pain." (Defs.' Reply at 1-2.)

Defense counsel also argues that defendant Traquina believes that subjecting plaintiff to surgery is not in plaintiff's best interests. Defense counsel contends that although plaintiff attempts to support his argument that surgery is medically necessary based on Dr. Eisenberg and Dr. Young's recommendations, these doctors' unsworn statements make clear that they only recommended surgery, not that surgery was medically necessary or that defendant Traquina's contrary opinion fell below the standard of care or amounted to deliberate indifference. Counsel argues that defendant Traquina's recommendation is consistent with what would be authorized by a private health insurance company. In this regard, defense counsel contends that this case involves a mere difference of medical opinion, which cannot support a § 1983 claim. (Defs.' Reply at 2-3.)

Finally, defense counsel argues that the defendants provided plaintiff with an acceptable level of medical care. They gave him a thorough work-up, including several

examinations at the prison, a referral to two outside specialists, two mammograms, and clinical, hormonal, and imaging studies, which confirmed the diagnosis of benign idiopathic gynecomastia and they ruled out other serious underlying conditions or causes. Defense counsel contends that plaintiff has failed to rebut defendant Traquina's expert opinion and the conservative course of treatment the defendants chose to administer. Accordingly, defense counsel concludes that the defendants are entitled to summary judgment in their favor. (Defs.' Reply at 2-3.)

ANALYSIS

I. Plaintiff's Serious Medical Needs

Based on the evidence presented by the parties in connection with the pending motion, the undersigned finds that a reasonable juror could conclude that plaintiff's left breast gynecomastia and related pain constituted an objective, serious need for medical treatment. See McGuckin, 974 F.2d at 1059-60 ("The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain are examples of indications that a prisoner has a 'serious' need for medical treatment."); see also Canell v. Bradshaw, 840 F. Supp. 1382, 1393 (D. Or. 1993) (the Eighth Amendment duty to provide medical care applies "to medical conditions that may result in pain and suffering which serve no legitimate penological purpose."). Specifically, the record in this case demonstrates that plaintiff repeatedly sought and received medical care for his condition from medical personnel at CSP-Solano, including both of the defendants, and from two outside specialists. In light of plaintiff's medical history as well as the observations and treatment recommendations by several doctors, a reasonable juror could conclude that failure to treat plaintiff's gynecomastia and related pain could result in "further significant injury" and the "unnecessary and wanton infliction of pain." See, e.g., McGuckin, 974 F.2d at 1059. Accordingly, defendants' motion for summary judgment hinges on whether, based upon the

evidence before the court, a rationale jury could conclude that the defendants responded to plaintiff's serious medical needs with deliberate indifference. Farmer, 511 U.S. at 834; Estelle, 429 U.S. at 106. Based on the evidence presented by the parties in connection with the pending motion, the undersigned finds that a reasonable juror could conclude that defendants Traquina and Noriega responded to plaintiff's serious medical needs with deliberate indifference. See Farmer, 511 U.S. at 834; Estelle, 429 U.S. at 106.

II. Defendants' Response to Plaintiff's Serious Medical Needs

As a preliminary matter, the court finds that the defendants have borne their initial responsibility of demonstrating that there is no genuine issue of material fact with respect to the adequacy of the medical care provided to plaintiff. For example, defendants evidence demonstrates that gynecomastia is a fibrocystic condition, which causes the development of abnormally large mammary glands. In general, it is a benign condition that does not cause pain but may cause discomfort, which can be controlled by Motrin. In some cases, gynecomastia is caused by an underlying medical condition or medication. However, here, plaintiff's negative test results based on clinical, hormonal, and imaging studies indicate that his gynecomastia is idiopathic. (Traquina Decl. ¶¶ 8, 14-15 & Ex. A.)

Both defendants Noriega and Traquina have treated plaintiff for his gynecomastia. On December 21, 2005, defendant Noriega diagnosed plaintiff with left breast gynecomastia. He also subsequently removed two of plaintiff's pigmented moles to rule out melanoma as a cause and prescribed him Motrin for any postoperative discomfort for three days. Plaintiff then saw Dr. Eisenberg and Dr. Young in connection with his gynecomastia. Both of them recommended surgery. The MAR Committee, which both defendants Noriega and Traquina were members of, denied plaintiff's requests for surgery on two separate occasions because it too determined that surgery would be cosmetic only and was not medically necessary. According to defendant Traquina, a board certified general surgeon, plaintiff has received all reasonable and necessary care for his condition and surgery was not and is not now advisable in plaintiff's case. Instead,

according to defendant Traquina, plaintiff should be treated with annual examinations, mammograms as indicated, and Motrin for any discomfort. In fact, during defendant Traquina's recent examination of plaintiff on May 13, 2009, he observed that plaintiff's gynecomastia had reduced in size without surgery. (Traquina Decl. ¶¶ 7, 10-11, 13, 17 & Ex. A.) Given this evidence, the burden shifts to plaintiff to establish the existence of a genuine issue of material fact with respect to his deliberate indifference claims.

As indicated above, the court finds that plaintiff has submitted sufficient evidence to create a genuine issue of material fact precluding summary judgment in defendants' favor. Defense counsel is obviously correct in stating that a mere difference of opinion between a prisoner and prison medical staff does not give rise to a cognizable § 1983 claim. See Toguchi, 391 F.3d at 1058; Jackson, 90 F.3d at 332; see also Fleming v. Lefevere, 423 F. Supp. 2d 1064, 1070 (C.D. Cal. 2006) ("Plaintiff's own opinion as to the appropriate course of care does not create a triable issue of fact because he has not shown that he has any medical training or expertise upon which to base such an opinion."). Likewise, a difference of medical opinion between doctors does not give rise to a constitutional violation. See Toguchi, 391 F.3d at 1059-60 ("Dr. Tackett's contrary view was a difference of medical opinion, which cannot support a claim of deliberate indifference."); Sanchez, 891 F.2d at 242 (difference of opinion between medical personnel regarding the need for surgery does not amount to deliberate indifference to a prisoner's serious medical needs).

However, in the undersigned's view, the evidence in the instant case is akin to those cases where prison officials and doctors deliberately ignore the express orders of a prisoner's treating physician. See Jett, 439 F.3d at 1097-98 (finding a triable issue of fact as to whether a prison doctor was deliberately indifferent to a prisoner's medical needs when he decided not to request an orthopedic consultation as the prisoner's emergency room doctor had previously ordered); Hamilton v. Endell, 981 F.2d 1062, 1067 (9th Cir. 1992) (finding a triable issue of fact as to whether prison officials were deliberately indifferent to prisoner's serious

medical needs when they relied on the opinion of a prison doctor instead of the opinion of the prisoner's treating physician and surgeon), abrogated in part on other grounds by Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1045 (9th Cir. 2002).

According to the evidence submitted by plaintiff, on August 25, 2005, he saw Dr. Chen who observed that plaintiff was suffering from a tender mass measuring 3.0 cm by 2.0 cm in his left chest. Dr. Chen requested a mammogram of the lump in plaintiff's left breast and prescribed Motrin for plaintiff's discomfort. However, no action was taken after nearly two months, so plaintiff submitted a health care services request form to prison officials. Only then did plaintiff receive an order for a mammogram. On November 7, 2005, plaintiff underwent the mammogram, which suggested that he had left breast gynecomastia. Plaintiff, unaware of the mammogram results, submitted two additional health care services request forms to prison officials on December 16, 2005, and March 6, 2006, inquiring about the test and expressing concerns about his growth. Over the next several months, plaintiff submitted two more health care services request forms on May 2, 2006, and July 29, 2006, reiterating his concern about the growth and noting that it was growing in size and causing him increasing pain. (Pl.'s Decl. ¶¶ 4-5, 7-8 & Exs. B-F.)

On August 2, 2006, plaintiff finally was allowed to see Dr. Eisenberg of Queen of the Valley Hospital. Plaintiff also underwent a second mammogram at that time which indicated that his left breast gynecomastia was "more prominent" than on his previous mammogram. Dr. Eisenberg's impression was that plaintiff had "[l]eft-sided gynecomastia with some lymphadenopathy." In the following two months, the lump in plaintiff's chest continued to grow in size and his pain increased in intensity, so plaintiff submitted another health care services request form to prison officials on October 5, 2006, explaining that he had been scheduled to see a specialist but had not seen one yet. (Pl.'s Decl. ¶¶ 9-10 & Exs. G-H.)

On October 11, 2006, plaintiff saw Dr. Eisenberg a second time. Dr. Eisenberg noted that plaintiff's gynecomastia was "considerable in degree and quite tender" and had

increased to 8.0 cm to 9.0 cm in diameter, whereas before it was 4.0 cm to 5.0 cm diameter. Dr. Eisenberg recommended surgery to treat plaintiff's condition because he believed it was "likely to be progressive and [the] cause of considerable distress." In an addendum to his report dated October 16, 2006, Dr. Eisenberg recommended that a plastic surgeon perform the procedure because general surgeons tend to produce considerable deformity in performing the necessary procedure. (Pl.'s Decl. ¶¶ 11-13 & Exs. I-J.)

On November 21, 2006, and again on January 12, 2007, plaintiff submitted additional health care services request forms to prison officials, inquiring when his surgery would take place because the growth in his chest was causing him constant pain. Having not received a response from prison officials, plaintiff filed an administrative appeal on November 26, 2006. Therein, he wrote that the growth on his chest was growing larger and more painful. On February 9, 2007, defendant Traquina, on behalf of defendant Noriega, responded to plaintiff's grievance at the first formal level of review and explained that the MAR Committee denied plaintiff's request for surgery because the procedure was considered cosmetic under the California Code of Regulations, Title 15, Section 3350. At the time, defendants Traquina and Noriega were members of the MAR Committee. The MAR Committee's denial fails to indicate whether the committee took the pain being suffered by plaintiff into consideration before rendering its decision. (Pl.'s Decl. ¶¶ 14-17 & Exs. K-P.)

On April 16, 2007, plaintiff saw Dr. Young at UCSF Medical Center, Division of Plastic and Reconstructive Surgery in connection with his left breast gynecomastia. Plaintiff informed Dr. Young that he had developed swelling on the left side of his chest over the previous two years. He also complained to Dr. Young that he was suffering pain and tenderness and that his chest hurt whenever he attempted to move his arms. Dr. Young's impression was that plaintiff had idiopathic left-sided gynecomastia with significant deformity. Similar to Dr. Eisenberg, Dr. Young recommended that plaintiff "undergo excision of the excess breast tissue." He also recommended that a plastic surgeon perform the procedure to prevent deformity of the

chest. (Pl.'s Decl. ¶¶ 18-19 & Ex. Q.)

Notwithstanding Dr. Young's recommendation for surgery as well as Dr. Eisenberg's previous recommendation for surgery, on April 16, 2007, defendant Traquina responded to plaintiff's administrative appeal at the second formal level of review and explained that the MAR Committee denied his request for surgery again, noting that "there is no medical need to excise the excessive breast tissue, hence, such procedure is considered cosmetic in nature." At the time, defendants Traquina and Noriega were members of the MAR Committee. Once again, the MAR Committee's denial fails to indicate whether the committee took plaintiff's pain into consideration before rendering its decision. (Pl.'s Decl. ¶¶ 20-21 & Ex. R.)

In considering defendants' motion for summary judgment, the court is required to believe plaintiff's evidence and draw all reasonable inferences from the facts before the court in plaintiff's favor. See Anderson, 477 U.S. at 255; Matsushita, 475 U.S. at 587. Drawing all reasonable inferences from the evidence in plaintiff's favor, the court finds that the evidence before it on summary judgment indicates that this case involves more than a mere difference of opinion over the appropriate course of treatment. See, e.g., Estelle, 429 U.S. at 104-05 (holding that deliberate indifference may manifest "by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed"); Lopez v. Smith, 203 F.3d 1122, 1132 (9th Cir. 2000) (holding that a prisoner may establish deliberate indifference by showing that a prison official intentionally interfered with his medical treatment); Wakefield v. Thompson, 177 F.3d 1160, 1165 & n.6 (9th Cir. 1999) (holding that "a prison official acts with deliberate indifference when he ignores the instructions of the prisoner's treating physician or surgeon.").

Specifically, plaintiff's case came before defendants Noriega and Traquina on at least two occasions. They were aware that plaintiff had left breast gynecomastia and that it was growing in size and causing him increased pain. They were also aware that two outside

specialists that prison officials referred plaintiff to had recommended surgery as the course of treatment. It is undisputed that the defendants had the authority to authorize surgery for plaintiff, but they denied the procedure as "cosmetic" even though it appeared to be medically necessary under at least one view of the evidence. Under these circumstances, a reasonable juror could find that, based on the evidence before the court, the defendants ignored plaintiff's serious medical needs as well as the recommendations of two medical specialists thereby violating plaintiff's right to adequate medical care under the Eighth Amendment. Cf. Hamilton, 981 F.2d at 1067 ("By choosing to rely upon a medical opinion which a reasonable person would likely determine to be inferior, the prison officials took actions which may have amounted to the denial of medical treatment, and the 'unnecessary and wanton infliction of pain.'").

Finally, insofar as defense counsel argues that plaintiff cannot establish that the defendants had actual knowledge of a "substantial risk of serious harm," the court finds the argument unpersuasive. It is well established that this court cannot grant defendants' motion for summary judgment simply based on their assertion as to their own state of mind. As the Ninth Circuit recently has explained:

> Proof of "subjective awareness" is not limited to the purported recollections of the individuals involved. "Whether an official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." Indeed, in certain circumstances, "a factfinder may conclude that [an] official knew of a substantial risk from the very fact that the risk was obvious. . . ."
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> * * *
>
> "[Q]uestions involving a person's state of mind are generally factual issues inappropriate for resolution by summary judgment." We, of course, "may not make credibility determinations or weigh conflicting evidence." (internal citations omitted)

Conn v. City of Reno, 572 F.3d 1047, 1057-58 (9th Cir. 2009).

As noted above, the evidence before the court establishes that plaintiff has a long medical history of suffering from gynecomastia. As early as August 2005, he began submitting

health care services request forms at CSP-Solano for medical care related to the gynecomastia. In the ensuing years, plaintiff sought and ultimately received medical attention for his condition from CSP-Solano doctors, including Dr. Chen, Dr. Noriega, and Dr. Nguyen. Both Dr. Chen and Dr. Nguyen requested surgical consultations for plaintiff. Plaintiff also sought and ultimately received medical attention from two outside specialists, Dr. Eisenberg and Dr. Young. Both Dr. Eisenberg and Dr. Young recommended surgery for plaintiff's condition. During his visits with these various doctors and in multiple health care services request forms and administrative grievances to prison officials, plaintiff complained about the worsening of his condition and the pain he suffers as a result thereof. As of August 27, 2009, plaintiff still suffers from left breast gynecomastia, which measures around 9.0 cm, is tender, painful, and affects his daily activities. Although plaintiff has received Motrin for pain on occasion, it does not alleviate the physical suffering he experiences every day as a result of the gynecomastia. (Pl.'s Decl. & Exs.)

Defendants Traquina and Noriega acknowledge that they were members of the MAR Committee when the committee reviewed plaintiff's case on two separate occasions. They also acknowledge that they have previously treated him for his ongoing medical condition and/or reviewed his administrative grievances regarding his medical care. Finally, defendants Traquina and Noriega acknowledge that, notwithstanding plaintiff's long medical history with gynecomastia and Dr. Eisenberg and Dr. Young's recommendations for surgery, they denied his requests as "cosmetic" even though, as noted above, surgery appears to be medically necessary under at least one view of the evidence. Under these circumstances, a reasonable juror could find that, based on the evidence before the court, plaintiff's medical needs were so obvious that defendants Noriega and Traquina should have been aware of any substantial risk of injury or harm to plaintiff.

Accordingly, for all of the foregoing reasons, the court concludes that defendants Noriega and Traquina are not entitled to summary judgment on plaintiff's Eighth Amendment inadequate medical care claims.

OTHER MATTERS

Counsel for plaintiff has filed a request for judicial notice of this court's October 24, 2008 findings and recommendations, recommending that the parties' cross-motions for summary judgment be denied. Judicial notice of adjudicative facts is appropriate with respect to matters that are beyond reasonable dispute in that they are either generally known or capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned. See Fed. R. Evid. 201 and advisory committee notes. Here, the court's previous findings and recommendations are part of the record in this case. Accordingly, the court will deny plaintiff's request for judicial notice as unnecessary.

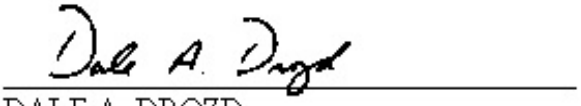
CONCLUSION

IT IS HEREBY ORDERED that plaintiff's August 27, 2009 request for judicial notice (Doc. No. 41) is denied as unnecessary.

IT IS HEREBY RECOMMENDED that defendants' June 10, 2009 amended motion for summary judgment (Doc. No. 35) be denied.

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)(l). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within seven days after service of the objections. The parties are 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: December 23, 2009.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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