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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY ASBERRY,
Plaintiff,
v.
MATTHEW CATE, et al.,
Defendants.

No. 2: 11-cv-2462 KJM KJN P

ORDER

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. On March 31, 2014, the undersigned directed defendants to file further briefing regarding two requests contained in plaintiff's motion to compel. (ECF No. 151.) On April 17, 2014, defendants filed a response to the March 31, 2014 order. (ECF No. 152.) For the following reasons, defendants are directed to supplement their April 17, 2014 response.

Plaintiff's Claims

Plaintiff's claims relevant to the pending motion arise from a cell move on January 25, 2010. Plaintiff alleges that he was assaulted by his new cellmate, inmate Wilson, the following day, during which plaintiff suffered injuries to his back and neck. Plaintiff alleges that defendants failed to protect plaintiff from inmate Wilson. Plaintiff alleges that inmate Wilson had mental problems and was improperly classified. Plaintiff alleges that he received inadequate medical care for the injuries he suffered as a result of the attack by inmate Wilson.

1 Plaintiff alleges failure to protect claims against defendants Elson, Phelps, Virga and
2 Chen. In particular, plaintiff alleges that defendant Elson brought inmate Wilson to plaintiff's
3 cell. (ECF No. 49 at 7.) Plaintiff alleges that after the incident involving inmate Wilson,
4 defendant Phelps told plaintiff that he (Phelps) made the cell move knowing that inmate Wilson
5 had serious mental problems. (Id. at 9.) Plaintiff also alleges that just prior to becoming
6 plaintiff's cellmate, inmate Wilson was housed in administrative segregation ("ad seg"). (Id. at
7 11.) Plaintiff alleges that while housed in ad seg, inmate Wilson behaved in a way consistent
8 with someone with mental health problems. (Id.) Plaintiff alleges that B-4 and ad seg staff knew
9 that inmate Wilson suffered from serious mental health problems. (Id. at 12.)

10 Plaintiff alleges that defendant Chen was inmate Wilson's treating psychiatrist prior to
11 inmate Wilson being housed with plaintiff. (Id.) Plaintiff alleges that defendant Virga, as a
12 member of the weekly classification committee, was responsible for classifying all ad seg
13 inmates, including inmate Wilson. (Id.) Plaintiff is alleging that defendants Chen and Virga were
14 responsible for inmate Wilson's wrongful change in classification which resulted in inmate
15 Wilson being housed with plaintiff.

16 Discussion

17 *Defendant Ali's Response to Interrogatory No. 14*

18 In the March 31, 2014 order, the undersigned directed defendant Ali to file a supplemental
19 response to plaintiff's interrogatory 14. (ECF No. 151 at 6-7.) This interrogatory asked
20 defendant Ali to describe the difference between the x-rays and MRI's taken of plaintiff's lower
21 back prior to January 26, 2010, and those taken after that date. Defendant Ali responded that he
22 did not have possession, custody or control of any x-rays or MRIs taken of plaintiff prior to
23 January 26, 2010, and therefore, could not respond to interrogatory no. 14. (Id.)

24 In the March 31, 2014 order, the court found that it was unclear from defendant Ali's
25 response to interrogatory no. 14 whether he was claiming that he did not have access to any x-
26 rays or MRIs prior to January 26, 2010, because neither of these tests were performed. (Id.) The
27 court directed defendant Ali to clarify his response.

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1 In his supplemental response, defendant Ali states that he is not in possession, control or
2 custody of any x-rays or MRIs taken of plaintiff prior to January 26, 2010. (ECF No. 152-1 at
3 16.) Defendant Ali states that he has been informed that his attorney requested plaintiff's medical
4 records from January 1, 2009, to the present, but that no x-ray or MRI reports have been located
5 that predate January 26, 2010. (Id.) Defendant states that he will supplement his response to the
6 interrogatory in the event that an x-ray or MRI report is located. (Id.)

7 In a pleading filed May 27, 2014, plaintiff states that after having an Olsen review of his
8 medical records, he obtained x-rays of his lower back from April 1, 2008, and February 18, 2010.
9 (ECF No. 159.) Attached to plaintiff's pleading are what appear to be reports from these x-rays.
10 (Id.)

11 Plaintiff's interrogatory no. 14 did not limit the date of any x-ray or MRI taken of his back
12 prior to January 2010. Defendant did not make any objection to plaintiff's open-ended request
13 for x-ray and MRI comparisons. In any event, plaintiff's request for defendant Ali to compare x-
14 rays from April 2008 and February 2010 is not unreasonable. Accordingly, defendant Ali is
15 directed to file a supplemental response to plaintiff's interrogatory no. 14 based on the alleged x-
16 ray reports attached to plaintiff's May 27, 2014 pleading.

17 *Inmate Wilson's Mental Health Records*

18 In the motion to compel, addressed in the March 31, 2014, order, plaintiff alleged that
19 defendants denied his request to review inmate Wilson's mental health records. In the March 31,
20 2014 order, the undersigned directed defendants to supplement their objection that they did not
21 have custody or control over inmate Wilson's mental health records for the years prior to the
22 alleged incident. (ECF No. 151 at 5.) Defendants were directed to address the location of these
23 records and why they could not be obtained with reasonable efforts. (Id.) If, upon further
24 inquiry, defendants determined that they did have access to these records, defendants were
25 directed to file them under seal. (Id.)

26 Defendants' response to the March 31, 2014 order sets forth four reasons why inmate
27 Wilson's mental health records cannot be produced. First, defendants state that because inmate
28 Wilson is on parole, his records are not kept in the electronic Unit Health Record, which would be

1 accessible to medical defendants. Instead, inmate Wilson's records are located at the Health
2 Records Center, and are presumably archived. Defendants argue that because the records are
3 presumably archived, the individual defendants do not have possession, custody or control of the
4 records. Defense counsel also represents that she has requested that the Health Records Center
5 look for inmate Wilson's medical file and inform defense counsel if the records contain inmate
6 Wilson's mental health records from January 2009 through January 2010.

7 As discussed in the March 31, 2014 order, Federal Rule of Civil Procedure 34 empowers a
8 party to serve on any other party a request to produce "any designated documents ... which are in
9 the possession, custody or control of the party upon whom the request is served." Fed. R. Civ. P.
10 34(a). Documents are in the "possession, custody, or control" of the served party if the party has
11 actual possession, custody, or control, or has "the legal right to obtain the documents on demand."
12 U.S. v. Int'l Union of Petroleum & Indus. Workers, 870 F.2d 1450, 1452 (9th Cir. 1989).

13 The court agrees that defendants do not have actual possession, custody or control over
14 the at-issue records if they are archived. However, for the reasons stated herein, the undersigned
15 finds that defendants have now shown that they do not have a legal right to obtain these records.

16 In their second point, defendants argue that the Office of the Attorney General is
17 permitted to obtain an inmate's medical records for purposes of defending employees of the
18 California Department of Corrections and Rehabilitation ("CDCR"). In a declaration submitted
19 in support of the further briefing, defense counsel states that she contacted senior staff counsel
20 with the California Receiver's Office who informed her that the Attorney General's office is able
21 to obtain an inmate's medical records for purposes of defending litigation. (ECF No. 152-1 at 2.)

22 Plaintiff's primary contention concerns Wilson's mental health history and
23 appropriateness of being celled with plaintiff. Nevertheless, in her declaration, defense counsel
24 states that she has not requested or reviewed inmate Wilson's mental health records in the course
25 of defending this action. (Id.) Defendants' objection that they cannot provide the records
26 because they are not sought for purposes of defending litigation is without merit.

27 Defendants also argue that plaintiff's Eighth Amendment claim against them turns on
28 what they knew at the time they double celled plaintiff with inmate Wilson, and not what they

1 should have known based on inmate Wilson's medical file. This argument is untimely as it
2 should have been raised in defendants' opposition to plaintiff's motion to compel. This argument
3 is not relevant to the issue of whether defendants have access to inmate Wilson's records.
4 Nevertheless, for the reasons stated herein, this argument is also without merit.

5 The Eighth Amendment requires that prison officials take reasonable measures to
6 guarantee the safety of prisoners. Farmer v. Brennan, 511 U.S. 825, 832 (1994). In particular,
7 prison officials have a duty to protect prisoners from violence at the hands of other prisoners. Id.
8 at 833; Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005). The failure of prison officials to
9 protect inmates from attacks by other inmates or from dangerous conditions at the prison violates
10 the Eighth Amendment only when two requirements are met: (1) the deprivation alleged is,
11 objectively, sufficiently serious; and (2) the prison official is, subjectively, deliberately indifferent
12 to inmate safety. Farmer, 511 U.S. at 834; Hearns, 413 F.3d at 1040–41.

13 Plaintiff is alleging that defendants knew that inmate Wilson had serious mental health
14 problems. Inmate Wilson's mental health records are relevant to this claim and may also lead to
15 relevant evidence. Defendants' suggestion that inmate Wilson's mental health records are not
16 relevant is without merit.

17 In their third point, defendants argue that without an expert report, inmate Wilson's
18 mental health records will offer little guidance to the court. If the undersigned or trial judge
19 determines that an expert is required in order to evaluate inmate Wilson's records, an expert may
20 be appointed.

21 Defendants also argue that even if the court felt that certain portions of the records should
22 be reviewed by plaintiff, safety and security concerns would be at issue. Defendants argue that
23 because plaintiff should not be permitted to review or have access to inmate Wilson's mental
24 health records for safety and security reasons, they cannot be entered at trial or relied on in a
25 dispositive motion.

26 The undersigned acknowledges the serious safety and security issues that would arise
27 were plaintiff to have access to inmate Wilson's mental health records. Assuming that the court
28 determines that no portion of the records should be disclosed to plaintiff, there are various

1 procedures by which the records may be considered by the court in the context of a dispositive
2 motion and at trial which take into account the relevant safety and security concerns.

3 In their fourth point, defendants argue that plaintiff had the ability to request a subpoena
4 for inmate Wilson's records from the court while discovery was still open. Defendants argue that
5 a subpoena was the appropriate manner in which to seek the records. This argument is not
6 relevant to the issue of whether defendants have access to inmate Wilson's records. This
7 argument is untimely as it should have been raised in defendants' opposition to plaintiff's motion
8 to compel. Nevertheless, the undersigned finds that plaintiff's request for inmate Wilson's
9 records, through the discovery process, rather than by way of a subpoena, was not improper.

10 For the reasons discussed above, the undersigned finds that defendant's arguments
11 regarding why they do not have access to inmate Wilson's relevant mental health records are
12 unpersuasive. Within fourteen days of the date of this order, defense counsel shall determine
13 whether inmate Wilson's mental health records from January 2009 through January 2010 have
14 been located in the archives. If the records have been located, within fourteen days, defense
15 counsel shall file a request to file these records under seal, pursuant to Local Rule 141, and a
16 request for a protective order pursuant to the Health Insurance and Portability and Accountability
17 Act ("HIPAA").¹ If the records cannot be located at the Health Records Center, defendants shall
18 inform the court within that time with a declaration from the person who conducted the search.

19 Accordingly, IT IS HEREBY ORDERED that within fourteen days defendant Ali shall
20 file a supplemental response to interrogatory no. 14; within fourteen days, defendants shall file a
21 request to file under seal inmate Wilson's mental health records from January 2009 through
22 January 2010, and a request for a protective order; if these records cannot be located at the Health

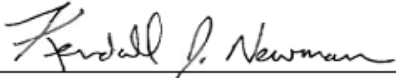
23 ¹ HIPAA's privacy provisions allow for disclosure of medical information in the course of
24 administrative or judicial proceedings; however, the Act places certain requirements on both the
25 medical professional providing the information and the party seeking it. See 45 C.F.R. §
26 164.512(e) (2004). Under HIPAA, disclosure is permitted, inter alia, pursuant to a court order,
27 subpoena, or discovery request when the healthcare provider "receives satisfactory assurance
28 from the party seeking the information that reasonable efforts have been made by such party to
secure a qualified protective order...." 45 C.F.R. § 164.512(1)(e)(ii)(b). The protective order must
prohibit "using or disclosing the protected health information for any purpose other than the
litigation ..." and "[r]equire [] the return to the [physician] or destruction of the protected health
information ... at the end of the litigation or proceeding." 45 C.F.R. § 164.512(1)(e)(v).

1 Records Center, defendants shall inform the court within that time with a declaration by the
2 person who conducted the search.

3 Dated: June 4, 2014

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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