

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

SPENCER E. BERRY,

Plaintiff,

No. 2:12-cv-0363 KJN P

vs.

DOROTHY SWINGLE, et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding without counsel. The parties consented to proceed before the undersigned for all purposes. See 28 U.S.C. § 636(c). Multiple motions are pending, which this court will address seriatim.

Motions for Sanctions

On October 1, 2012, plaintiff filed a motion requesting sanctions against defendants' counsel. Plaintiff contends that defense counsel inappropriately contacted plaintiff by telephone. Plaintiff is advised that because he is pursuing litigation against defendants, it is not inappropriate for defense counsel to contact plaintiff. Plaintiff's motion for sanctions is without merit, and is denied.

On October 25, 2012, plaintiff renewed his motion for sanctions, and asked for a ruling. Plaintiff's second motion is denied as set forth above.

1 Motion to Compel Discovery

2 On October 25, 2012, plaintiff filed a motion to compel discovery. Defendants
3 filed an opposition; plaintiff did not file a reply. Plaintiff seeks to compel further production of
4 documents from defendants. Plaintiff claims that defendants provided medical records unrelated
5 to those requested by plaintiff, in addition to providing 85 blank and illegible pages, and copies
6 of other inmates' medical records. Plaintiff also maintains that additional production is required
7 because:

8 plaintiff alleges, for instance, the defendants subjected him to
9 harmful radiation via x-rays. Therefore his requests for radiology
10 reports/x-ray results is needed as proof defendants had plaintiff x-
11 rayed. Also plaintiff alleges medical malpractice related to the
12 testing, therefore, any and all medical records related to TB in the
13 plaintiff's records is relevant.

14 (Dkt. No. 43 at 96.)

15 Defendants contend that plaintiff does not claim that defendants failed to produce
16 all medical records from High Desert State Prison ("HDSP"); rather, plaintiff seeks medical
17 records from plaintiff's incarceration prior to plaintiff's incarceration at HDSP. However,
18 defendants argue, the court found that plaintiff is not likely to succeed on the merits of his claim
19 that he was exempt from tuberculosis testing because medical evidence conclusively established
20 that plaintiff never contracted tuberculosis. (Dkt. No. 36; 53.) Thus, defendants argue,
21 additional medical records prior to plaintiff's incarceration at HDSP are irrelevant to plaintiff's
22 instant claim. Defendants further contend that they did not produce irrelevant medical records
23 from HDSP to harass, delay, or prejudice plaintiff, and that some of the records produced
24 demonstrate that plaintiff did not falsely test negative for tuberculosis antibodies at HDSP due to
25 HIV, AIDS, chronic illness, or extremely poor health.

26 Plaintiff's amended complaint does not contain allegations that defendants
subjected him to harmful radiation by x-rays. (Dkt. No. 28, *passim*.) Moreover, plaintiff alleges
he was erroneously subjected to tuberculosis tested based on his belief that he contracted

1 tuberculosis in 1994, as allegedly diagnosed at the California Youth Authority. However, as set
2 forth in this court's August 29, 2012 findings and recommendations, defendants adduced medical
3 evidence demonstrating that plaintiff was administered two QuantiFERON Gold ("QFT-G")
4 blood tests, and that both the January 27, 2011, and April 18, 2011 results established that
5 plaintiff did not have tuberculosis, either active or latent. (Dkt. No. 36 at 6.) Dr. Swingle, the
6 Chief Medical Officer at HDSP, reviewed plaintiff's medical records and "conclusively
7 determined that [plaintiff] does not have tuberculosis." (Id.) Dr. Swingle stated that if plaintiff
8 had contracted active or latent tuberculosis at any time, including but not limited to 1994,
9 plaintiff would still have the antibodies in his system today, which would cause plaintiff to test
10 positive. (Id.) Thus, Dr. Swingle opined that plaintiff "has never been accurately diagnosed with
11 tuberculosis." (Id.)

12 Because the allegations in plaintiff's amended complaint do not include a claim
13 that plaintiff was subjected to harmful radiation by x-rays, plaintiff is not entitled to additional
14 medical records to support that claim. Moreover, because plaintiff's allegations are limited to his
15 treatment at HDSP, medical records prior to his incarceration at HDSP are not relevant.
16 Plaintiff's records from the California Youth Authority are not contained in plaintiff's records
17 with the California Department of Corrections and Rehabilitation ("CDCR"); thus, defendants
18 cannot produce documents not within their custody or control. Moreover, in light of the medical
19 evidence provided by Dr. Swingle confirming that plaintiff has not had tuberculosis and has not
20 been accurately diagnosed as having tuberculosis in the past, any test results from 1994
21 administered while plaintiff was held in the California Youth Authority are not relevant.
22 Similarly, any tuberculosis test results during plaintiff's incarceration at CDCR prior to his
23 incarceration at HDSP are not relevant.

24 The production of blank pages or documents from other inmates' records was
25 inadvertent and does not support a request for further production. Although plaintiff claims
26 certain pages were illegible (see dkt. no. 43 at 15, 19-20, 32, 54-58, 61-74, 78-80), no further

1 production of these pages are required because Dr. Swingle reviewed plaintiff's medical records
2 and confirmed the tuberculosis test results, as set forth in his declaration. (Dkt. No. 31-1.)
3 Moreover, as noted by defendants, plaintiff has access to his own medical records.


4 For all of the above reasons, plaintiff's motion to compel discovery is denied.

5 Accordingly, IT IS HEREBY ORDERED that:

- 6 1. Plaintiff's October 1, 2012 motion (dkt. no. 39) is denied;
- 7 2. Plaintiff's October 25, 2012 motion (dkt. no. 42) is denied; and
- 8 3. Plaintiff's October 25, 2012 motion to compel discovery (dkt. no. 43) is

9 denied.

10 DATED: January 9, 2013

11
12 
13 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

14 berr0363.mtc
15
16
17
18
19
20
21
22
23
24
25
26