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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ESTER BURNETT,
Plaintiff,
v.
R. MIRANDA, et al.,
Defendants.

No. 2:13-cv-1239 MCE CKD P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a California prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. He is proceeding with claims arising under the Eighth Amendment against defendants Sisson,¹ Hitt,² Lewis, Miranda, Lee, Lankford, Simmerman, Swingle and French (defendants); all current or former employees of the California Department of Corrections and Rehabilitation (CDCR) at High Desert State Prison (High Desert).³

¹ The person identified as Lt. “Sessions” in plaintiff’s complaint answered plaintiff’s complaint as Lt. Sisson.

² The person identified as Lt. “Hits” in plaintiff’s complaint answered plaintiff’s complaint as Lt. Hitt.

³ On August 13, 2013, the court screened plaintiff’s complaint pursuant to 28 U.S.C. § 1915A. In the screening order, the court found that the complaint asserts cognizable claims against these defendants arising under the Eighth Amendment. All other claims and defendants were dismissed.

1 Defendants have filed a motion for summary judgment. In the motion, defendants argue: 1)
2 plaintiff has failed to exhaust his administrative remedies with respect to his claims against
3 defendants Sisson, Hitt, Lewis and Simmerson; 2) that all defendants are entitled to judgment as a
4 matter of law on all of plaintiff's claims because of a failure of proof as to certain essential
5 elements of plaintiff's claims; and 3) that all defendants are immune from plaintiff's claims under
6 the "qualified immunity" doctrine.⁴

7 I. Plaintiff's Claims

8 All of plaintiff's claims are related in some way to the denial of a "single-cell, single bed"
9 cell assignment (assignment to a cell with no cellmate and no bunk beds) while at High Desert
10 which plaintiff asserts he needed due to back pain. Plaintiff's complaint is confusing, vague and,
11 at times, misleading. Nevertheless, the court has, as directed by the Ninth Circuit, liberally
12 construed plaintiff's complaint, Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010) while
13 keeping in mind that defendants are entitled to "fair notice" of the claims against them. Jones v.
14 Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984).

15 The court omits allegations in plaintiff's complaint which are not relevant to a viable
16 Eighth Amendment claim for either inadequate medical care or inadequate cell conditions.
17 Denial or delay of medical care for a prisoner's serious medical needs may constitute a violation
18 of a prisoner's Eighth Amendment rights. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). An
19 individual is liable for such a violation only when the individual is deliberately indifferent to a
20 prisoner's serious medical needs. Id. With respect to cell conditions, the Eighth Amendment's
21 prohibition of cruel and unusual punishment imposes on prison officials, among other things, a
22 duty to "take reasonable measures to guarantee the safety of the inmates." Farmer v. Brennan,
23 511 U.S. 825, 832 (1991) (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)). An
24 inmate's Eighth Amendment rights can only be violated by a prison official if that official

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27 ⁴ Defendants assert objections to certain evidence submitted by plaintiff. ECF Nos. 67-68. The
28 objections are discussed below only to the extent the evidence to which an objection made is
material to the outcome of defendants' motion for summary judgment.

1 exposes an inmate to a “substantial risk of serious harm,” while displaying “deliberate
2 indifference” to that risk. Id. at 834.

3 A. Sisson, Hitt, Lewis and Simmerson

4 Plaintiff asserts that on June 9, 2010, when he arrived at High Desert, he was met by
5 Correctional Lieutenants Hitt, Lewis, Sisson and Simmerson. Eventually, those defendants
6 escorted plaintiff to a room with a computer. The computer indicated that plaintiff needed
7 “single-cell, single bed housing.” Each defendant asked plaintiff “what the hell is that?” Plaintiff
8 responded “that is the housing I need.” Defendants Hitt, Lewis, Sisson and Simmerson all said
9 ““you got to be fucking kidding’ while laughing hysterically.” They then taunted plaintiff by
10 saying “do you think we are going to give you that housing here, you [are] out of your fucking
11 mind.” “We are not going to give you that housing.” “We will have medical staff say you don’t
12 need it.” After that, plaintiff was placed into a holding cell. As each defendant left, they told
13 plaintiff “good luck with trying to get that housing here because it’s not going to happen.”

14 B. French

15 Plaintiff alleges that he was seen by defendant French on June 11, 2010. On that day,
16 French told plaintiff “we are not cutting out the top bunk of a cell for you. . .” French told
17 plaintiff she was aware of recommendations made by an outside doctor named doctor Rahimifar,
18 but plaintiff “would not [receive] such housing at [High Desert].” Plaintiff also alleges French
19 did not send plaintiff to be evaluated by a specialist to determine if plaintiff needed “single-cell,
20 single bed” housing.

21 C. Miranda

22 Plaintiff alleges that he saw defendant Miranda, a physician’s assistant, on June 10 and
23 June 14, 2010. On those occasions, plaintiff claims Miranda ignored the express orders of Dr.
24 Rahimifar” because “correctional staff ask[ed] him to and it would be a[n] inconvenience to order
25 correctional staff to remove the top bunk in a cell.”

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1 In the body of his complaint, plaintiff also references two medical records authored by
2 defendant Miranda on July 16, 2010. Both appear to have been generated after plaintiff visited
3 Miranda that day. ECF No. 2 at 41-42.⁵ According to Miranda, plaintiff complained about
4 chronic neck and back pain. Among other things, plaintiff told Miranda that he cannot sit up
5 straight while sitting on the lower bunk in his cell without hitting his head on the upper bunk. He
6 also indicated that he had already hit his head on the upper bunk five times. Plaintiff requested to
7 be placed in a cell by himself without bunk beds.

8 Miranda denied plaintiff's request for a cell with only one bed and revoked authorization
9 to be placed in a cell by himself based upon: 1) his own observations of plaintiff; and 2) the
10 written opinion of neurosurgeon Dr. Calvin found in plaintiff's medical file in which Dr. Calvin
11 indicates that plaintiff could share a cell with another inmate and be housed in a cell that has a
12 "chair."

13 D. Lankford

14 Plaintiff alleges defendant Lankford denied plaintiff "single-bed, single cell" housing on
15 July 16, 2010.

16 E. Lee

17 Plaintiff alleges on March 17, 2011, defendant Dr. Lee removed plaintiff from the
18 Disability Placement Program. Plaintiff alleges this denied plaintiff "single bed, single cell"
19 housing.

20 F. Swingle

21 Plaintiff alleges that on July 22, 2010, he mailed a letter to defendant Dr. Swingle, the
22 Chief Medical Officer at High Desert. In the letter (ECF No. 57-2 at 127-28) plaintiff asserts that
23 around July 15, 2010 he was informed by a correctional officer that he would not be assigned to
24 "single-cell, single-bed" housing as was ordered by a "doctor or neurosurgeon." Plaintiff asserts
25 he was told somebody in "custody" was of the opinion that plaintiff's medical records indicated

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28 ⁵ The page numbers referenced are generally those assigned by the court's electronic docketing system.

1 plaintiff simply needed somewhere to sit in his cell, and the stool provided in every cell in the
2 rear of the cell, and attached to a desk, would meet plaintiff's needs.

3 Plaintiff informed defendant Swingle that the stool did not meet his needs because he
4 could not comfortably watch television while sitting on the stool, he had to share the stool with a
5 cellmate, and he could only face the wall while sitting on the stool, not the cell door.

6 Finally, plaintiff informed Swingle that he had a bed sore at that moment because he had
7 been lying down too much. He would not have been lying down so much if he had a reasonable
8 place to sit where he would not be in "extreme pain."

9 Defendant Swingle responded to plaintiff's letter as follows (ECF No. 57-2 at 94):

10 Our institution was unaware of this inmates [sic] history or medical
11 needs at the time of his arrival. We have extensively researched
12 this issue and discussed it as possible with his specialty providers.
13 The neurosurgeon has a noted in the UHR clarifying his position
14 that a chair in the cell is adequate and that a lower bunk should be
15 adequate to accommodate his needs.

14 Plaintiff asserts defendant Swingle ignored the recommendations made by Dr. Rahimifar
15 that plaintiff be assigned to "single-cell, single bed" housing. Plaintiff also takes issue with the
16 fact that Dr. Swingle never discussed plaintiff's condition with Dr. Rahimifar or Dr. Calvin.
17 Finally, plaintiff asserts Dr. Swingle should have sent plaintiff to a specialist before denying him
18 "single-cell, single bed" housing.

19 II. Failure To Exhaust

20 Defendants argue that plaintiff has failed to exhaust administrative remedies with respect
21 to his claims against defendants Lewis, Hitt, Sisson and Simmerson. Title 42 U.S.C. § 1997e(a)
22 provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of
23 this title, or any other federal law . . . until such administrative remedies as are available are
24 exhausted." Administrative procedures generally are exhausted once a prisoner has received a
25 "Director's Level Decision," or third level review, with respect to his issues or claims. Cal. Code
26 Regs. tit. 15, § 3084.7. Administrative remedies must be "properly" exhausted, which means use
27 of all steps put forward by the agency. Woodford v. Ngo, 548 U.S. 81, 90 (2006). Also, "proper
28 exhaustion demands compliance with an agency's deadlines and other critical procedural rules

1 because no adjudicative system can function effectively without imposing some orderly structure
2 on the course of its proceedings.” Id. at 90-91. In deciding whether administrative remedies have
3 been exhausted on a motion for summary judgment, the court may decide disputed issues of fact.
4 See Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003).

5 In his complaint, plaintiff points to a grievance he filed on June 10, 2010 in which
6 plaintiff essentially makes the allegations he makes in his complaint. ECF No. 57-2 at 101.
7 Plaintiff points to evidence indicating the grievance was screened out at the first level of review.
8 ECF No. 57-2 at 100. The response to the grievance reads as follows:

9 [Inmate] Burnett, you submitted a green 602, a pink 602-hc and an
10 ADA 1824 all with the same issues. This appeal 602 (Green) is
11 being screened back as a duplicate. Your original 1824 was
referred for a first level review.

12 Plaintiff also points to the ADA 1824 form referenced above where he indeed makes
13 essentially the same allegations made against defendants Lewis, Hitt, Sisson and Simmerson in
14 this action and made in his grievance. ECF No. 57-2 at 83. On October 6, 2010, plaintiff
15 received a “Director’s Level Decision” as to his ADA 1824. ECF No. 57-2 at 77.

16 In light of the foregoing, the court finds that plaintiff exhausted all administrative
17 remedies available to him. Plaintiff attempted to utilize the prisoner grievance process with
18 respect to his allegations against Lewis, Hitt, Sisson and Simmerson, but was told the grievance
19 would not be considered because it was duplicative of another administrative remedy sought by
20 plaintiff. Either the actions taken by plaintiff through the ADA 1824 process served to exhaust
21 plaintiff’s administrative remedies or he was barred from exhausting administrative remedies by
22 prison staff. In any case, plaintiff did all he could do and his claims against Lewis, Hitt, Sisson
23 and Simmerson should not be dismissed for failure to exhaust administrative remedies.

24 III. Failure of Proof

25 Summary judgment is appropriate when it is demonstrated that there “is no genuine
26 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
27 Civ. P. 56(a). A party asserting that a fact cannot be disputed must support the assertion by
28 “citing to particular parts of materials in the record, including depositions, documents,

1 electronically stored information, affidavits or declarations, stipulations (including those made for
2 purposes of the motion only), admissions, interrogatory answers, or other materials. . .” Fed. R.
3 Civ. P. 56(c)(1)(A).

4 Summary judgment should be entered, after adequate time for discovery and upon motion,
5 against a party who fails to make a showing sufficient to establish the existence of an element
6 essential to that party’s case, and on which that party will bear the burden of proof at trial. See
7 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). “[A] complete failure of proof concerning an
8 essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”
9 Id.

10 If the moving party meets its initial responsibility, the burden then shifts to the opposing
11 party to establish that a genuine issue as to any material fact actually does exist. See Matsushita
12 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the
13 existence of this factual dispute, the opposing party may not rely upon the allegations or denials
14 of their pleadings but is required to tender evidence of specific facts in the form of affidavits,
15 and/or admissible discovery material, in support of its contention that the dispute exists or show
16 that the materials cited by the movant do not establish the absence of a genuine dispute. See Fed.
17 R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the
18 fact in contention is material, i.e., a fact that might affect the outcome of the suit under the
19 governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv.,
20 Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is
21 genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving
22 party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

23 In the endeavor to establish the existence of a factual dispute, the opposing party need not
24 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
25 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
26 trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce
27 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”

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1 Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee’s note on 1963
2 amendments).

3 In resolving the summary judgment motion, the evidence of the opposing party is to be
4 believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the
5 facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475
6 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s
7 obligation to produce a factual predicate from which the inference may be drawn. See Richards
8 v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902
9 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than
10 simply show that there is some metaphysical doubt as to the material facts Where the record
11 taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
12 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

13 A. Sisson, Hitt, Lewis and Simmerson

14 Defendants assert Sisson, Hitt, Lewis and Simmerson should be granted summary
15 judgment because, under California law, it was not up to them to decide whether plaintiff should
16 have been given a particular housing accommodation for medical reasons when he arrived at
17 High Desert. Rather, it was up to medical staff to recommend housing accommodations which
18 could then be provided by correctional staff. Defendants argue that because there is no evidence
19 before the court that Sisson, Hitt or Lewis actually caused plaintiff to be denied a “single-cell,
20 single bed” housing assignment, they should all be granted summary judgment.

21 First, the court notes that, in his declaration, defendant Simmerson indicates it was he who
22 conducted the “intake, screening and processing” of plaintiff when he arrived at High Desert on
23 June 9, 2010. ¶ 17. Simmerson indicates that when it comes to deciding at screening whether
24 any housing accommodations should be made with respect to an inmate’s medical condition, the
25 officer conducting the screening refers to the inmate’s most recent CDCR Form 1845
26 “Comprehensive Accommodation Chrono.” ¶¶ 11-12. Plaintiff’s then-most-recent CDCR Form
27 1845, dated December 7, 2009, indicates that plaintiff was restricted to being housed in a lower
28 bunk and on a ground floor row of cells. Ds’ Ex. G at 12-13. There is nothing indicating plaintiff

1 had to be placed in a cell with only one bunk or by himself.⁶ Simmerson also indicates that if a
2 housing accommodation is to be made other than one required on the most recent CDCR Form
3 1845, it must be ordered by medical staff as part of medical screening conducted at intake. ¶ 14.
4 Defendants present documents which appear to constitute a report drafted after plaintiff's medical
5 screening occurring on June 9, 2010. Ds' Ex. F. The report indicates that plaintiff's most recent
6 CDCR 1845 is the one dated December 7, 2009 and nothing in the documents suggests that
7 plaintiff should be housed in a cell with only one bunk, and nothing over the bunk.⁷

8 Defendants provide a report drafted by defendant Simmerson pursuant to his intake
9 screening of plaintiff conducted on June 9, 2010. Ds' Ex. E. In the report, Simmerson indicates
10 that based upon his screening, plaintiff was authorized to be in a cell by himself, on a lower tier
11 and in a lower bunk. Ds' Ex. E at 2.

12 There are two problems with defendants' argument concerning defendant Simmerson.
13 First, plaintiff alleges that the computer indicated to Simmerson that plaintiff required "single-
14 bed, single cell" housing, which creates a genuine issue of material fact as to whether there was
15 medical necessity to house plaintiff on a single bed, or on a lower bunk of a bunk bed in a cell, by
16 himself.⁸ Second, according to the very regulations provided by defendants, Simmerson was
17 obligated to review plaintiff's most recent CDCR-128G form at screening to determine if plaintiff
18 was entitled to single cell housing. ECF No. 31-1 at 11. While defendants do not provide
19 plaintiff's then-most-recent CDCR-128G, plaintiff does, and it is dated April 15, 2010. ECF No.
20 57-2 at 183. In that document, it is indicated as follows:

21 The [Pleasant Valley State Prison] Chief Physician and Surgeon
22 (CPS) was consulted regarding the temporary single cell status of
23 BURNETT. [Institutional Classification Committee] was advised
that BURNETT was seen by a Neuro Surgeon who recommended

24 ⁶ On previous CDCR 1845 forms which were completed on February 5, 2009 and May 11, 2009,
25 it is indicated that plaintiff requires a single bed in his cell with nothing over the bed. Id. at 9-11.

26 ⁷ It appears this report was drafted by medical professionals not identified in plaintiff's complaint
27 as defendants or otherwise.

28 ⁸ Again, as indicated above, the evidence presented by the party opposing summary judgment
must generally be believed.

1 that BURNETT continue with single cell housing with no over head
2 bunk due to a complication with his neck and lower back. . . The
3 single cell with no overhead bunk is temporary as BURNETT heals
4 from a prior surgery and shall be evaluated in the future by a neuro
5 surgeon.

6 Furthermore a follow-up CDCR 128G was drafted on July 15, 2010, after plaintiff arrived
7 at High Desert. It was noted in that document that:

8 [P]er CDCR 128G dated 4/15/10, [the committee] recommended
9 BURNETT continue with Single Cell housing with no over head
10 bunk due to complications with his neck an[d] lower back (due to a
11 prior surgery).

12 ECF No.57-2 at 191.

13 In light of the foregoing, the court finds there is at least a genuine issue of material fact as
14 to whether the appropriate medical personnel had either authorized or recommended that plaintiff
15 be assigned “single-cell, single-bed” housing when plaintiff arrived at High Desert on June 9,
16 2010, and whether defendant Simmerson was aware that medical personnel had either authorized
17 or recommended that plaintiff be assigned “single-cell, single-bed” housing. For these reasons,
18 defendants’ motion for summary judgment should be denied with respect to plaintiff’s claim
19 against defendant Simmerson.

20 B. French

21 As indicated above, plaintiff claims defendant French failed to follow a housing
22 recommendation made by an outside physician, Dr. Rahimifar. A progress report based upon
23 dictation by Dr. Rahimifar indicates that he met with plaintiff on April 1, 2010 for neck and lower
24 back pain:

25 The patient comes in complaining of continued neck pain radiating
26 down both arms and low back pain radiating down both legs. He
27 states that [it] has increased over the course of the last couple of
28 weeks. He complains of inability to sleep due to both neck and
back pain.

ECF No. 57-2 at 7-8.

After the examination, Dr. Rahimifar, with respect to housing, recommended that plaintiff
be housed in a cell by himself and in a lower bunk.

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1 When Nurse Practitioner French met with plaintiff, however, plaintiff was already
2 assigned to a lower bunk, and cell where he was housed alone, having been so assigned the prior
3 day by defendant Simmerson. Therefore, plaintiff has no claim concerning defendant French’s
4 failure to follow a recommendation by Dr. Rahimifar. To the extent plaintiff asserts other
5 defendants failed to follow Dr. Rahimifar’s recommendation prior to the time plaintiff’s single
6 cell status was revoked by defendant Miranda on July 16, 2010 (see below), those assertions will
7 not be addressed further.

8 With respect to plaintiff’s assertion that French should have sent plaintiff to a specialist to
9 determine if plaintiff should have been housed in “single-cell, single bed” housing, plaintiff fails
10 to point to evidence suggesting this amounted to a violation of plaintiff’s Eighth Amendment
11 rights concerning medical care. Nothing suggests Nurse Practitioner French’s failure to refer
12 plaintiff to a specialist amounts to deliberate indifference as plaintiff fails to show that French
13 was not capable of evaluating plaintiff’s need for “single-cell, single bed” housing on her own,
14 that referral to plaintiff’s primary care physician was insufficient, or that plaintiff’s use of normal
15 prison procedure for requesting a medical accommodation would be insufficient.

16 For all of these reasons, defendants’ motion for summary judgment as to plaintiff’s
17 remaining claim against defendant French should be granted.

18 C. Miranda

19 With respect to the allegations regarding Miranda’s actions on July 16, 2010, the court
20 finds there is at least a genuine issue of material fact as to whether Miranda was deliberately
21 indifferent to a substantial risk of serious harm by denying plaintiff housing in a cell with no bunk
22 beds. As indicated above, evidence before the court (ECF No. 53-2 at 12) indicates that plaintiff
23 told Miranda of his difficulties with sitting on a bunk with another bunk on top of it including the
24 fact that he had already hit his head on the upper bunk five times. While there is evidence from
25 plaintiff’s medical file and other evidence submitted by defendants that plaintiff did not really
26 need to be housed in a cell with only one bunk, plaintiff’s clear explanation of his problem to
27 defendant Miranda and her failing to order that plaintiff be housed in a cell without bunk beds
28 despite her apparent authority to make such an order at least creates an issue of fact to be decided

1 by a finder of fact.

2 As indicated above, Miranda appears to rely on the opinion of Dr. Calvin that plaintiff did
3 not need to be housed in a cell without bunk beds, he simply needed a chair. From all the
4 evidence before the court, however, an appropriate inference could be made that defendant
5 Miranda was aware that plaintiff's trouble with being assigned to a lower bunk bed was not only
6 the fact that he could not sit in the bed comfortably, but it was difficult for him to get in and out
7 of the lower bunk. Furthermore, there is no evidence that plaintiff had a chair in his cell on July
8 17, 2010, or that Miranda ever caused plaintiff to have a chair.⁹

9 For the reasons stated above, the court will recommend that defendant Miranda be granted
10 summary judgment with respect to any claim against him except the claim that he violated
11 plaintiff's Eighth Amendment rights on July 16, 2010 when he denied plaintiff housing in a cell
12 without bunk beds.

13 D. Lankford

14 As for plaintiff's allegation that defendant Dr. Lankford denied plaintiff "single-bed,
15 single cell" housing on July 16, 2010, plaintiff fails to point to any evidence supporting this.¹⁰ In
16 his declaration, ECF No. 38, Lankford indicates he provided treatment to plaintiff after he had
17 been involved in an altercation with another inmate; nothing in the declaration concerns a
18 determination regarding housing made on July 16, 2010. Accordingly, the court will recommend
19 that defendant Lankford be granted summary judgment.

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22 ⁹ In her affidavit, defendant Dr. Swingle indicated plaintiff was given a chair. ECF No. 45 at 4,
23 ¶ 8. However, Dr. Swingle fails to point to any evidence in support of this or indicate how she
24 knows that plaintiff was given a chair. It does appear that there was a small, built-in metal desk
25 and connected metal stool in the back of plaintiff's cell as there is in all or most cells at High
26 Desert. See e.g. ECF No. 57-2 at 152. Absent further clarification from Dr. Calvin, a small metal
27 stool permanently located in the rear of a cell and attached to a desk is not the same as a chair
28 especially for someone with back problems.

¹⁰ Defendant Lankford is not identified anywhere in the report authored by defendant Miranda on
July 16, 2010 where Miranda terminated plaintiff's "single cell" status.

1 E. Lee

2 Plaintiff alleges defendant Lee removed plaintiff from the Disability Placement Program
3 on March 17, 2011 which removed plaintiff from “single-cell, single bed” housing. However, as
4 already discussed, plaintiff had been removed from single cell housing on July 16, 2010 by
5 defendant Miranda and plaintiff had never been authorized for “single bed” housing while at High
6 Desert. Thus, it is not clear what effect, if any, any action taken by defendant Lee on March 17,
7 2011 had on plaintiff’s housing assignment. To the extent plaintiff alleges Lee should have given
8 plaintiff a “single-cell, single bed” assignment on March 17, 2011, plaintiff fails to point to
9 anything reviewed by Lee demonstrating as much. Most importantly, plaintiff fails to indicate
10 that he spoke with defendant Lee about his condition on or around March 17, 2011 or that Lee
11 conducted an examination of plaintiff. Furthermore, the document signed by Lee on March 17,
12 2011 appears to have been signed by Lee in her capacity as a “Health Care Manager” and not a
13 treating physician. See ECF No. 57-2 at 23; ECF No. 39.¹¹

14 For these reasons, defendants’ motion for summary judgment should be granted with
15 respect to plaintiff’s remaining claim against defendant Lee.

16 F. Swingle

17 Finally, with respect to plaintiff’s claim against defendant Swingle arising out of the letter
18 he wrote to her, as Chief Medical Officer, Swingle is not obligated to research, address or even
19 review every issue raised by an inmate in correspondence given that inmates have primary care
20 providers and more than one grievance procedure. In any case, the response Swingle gave to
21 plaintiff did not amount to deliberate indifference to plaintiff’s medical condition or his
22 conditions of confinement. First, the court reiterates there is no evidence Dr. Rahimifar ever
23 recommended that plaintiff be housed in a cell without bunk beds. Rather, he recommended that
24 plaintiff be given a bottom bunk which, at all times relevant in this case, he was. Furthermore,
25 plaintiff complained that the stool provided in his cell was inadequate for him to watch television

26 ¹¹ In her declaration, defendant Lee indicates that the recommendations made in the March 17,
27 2011 Disability Placement Program Verification form were made by defendant Miranda whom
28 Lee indicates was plaintiff’s “primary care provider.” However, Miranda’s signature does not
appear to be on the form.

1 or to just leisurely sit and watch the comings and goings outside his cell. But, plaintiff has no
2 right to watch television while in prison and conditions of confinement which amount to
3 “[r]outine discomfort inherent in the prison setting” are not an adequate basis for an Eighth
4 Amendment violation. Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000).¹²

5 For these reasons, the court will recommend that defendants’ motion for summary
6 judgment be granted with respect to plaintiff’s remaining claims against defendant Swingle.

7 IV. Qualified Immunity

8 Defendants assert they are immune from plaintiff’s remaining claims under the “qualified
9 immunity” doctrine. Government officials performing discretionary functions generally are
10 shielded from liability for civil damages insofar as their conduct does not violate clearly
11 established statutory or constitutional rights of which a reasonable person would have known.
12 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

13 As indicated above, there is a failure of proof with respect to most of plaintiff’s claims. In
14 those instances, defendants are entitled to qualified immunity because there are not facts which
15 can show a violation of Constitutional rights.

16 With respect to plaintiff’s remaining claim against defendant Simmerson, defendants
17 assert Simmerson acted appropriately: “[u]pon Burnett’s arrival, he was referred for medical
18 clearance, which was conducted, and he was housed according to the requirements for his safety
19 and security.” However, defendants’ ignore plaintiff’s assertion that Simmerson was made
20 aware via computer that plaintiff required “single-bed, single-cell” housing and that plaintiff’s

21
22 ¹² To be clear, plaintiff’s claim against defendant Miranda is distinguished from plaintiff’s claim
23 against defendant Swingle in the following respects. First, Miranda was directly responsible for
24 plaintiff’s medical care as one of plaintiff’s primary care providers during the relevant period of
25 time, ECF No. 42 at ¶ 3, while Swingle was essentially an administrator. Furthermore, the report
26 drafted by Miranda on July 16, 2010, (ECF No. 53-2 at 12) makes clear that he was aware of
27 plaintiff’s specific complaints about the pain from which he was suffering, the ways in which his
28 cell was causing him discomfort, including that he did not have anywhere he could sit in his cell
where he would not be in pain, and that he injured himself getting in and out of his bunk. In his
letter to defendant Swingle, plaintiff essentially complains that his stool is not ideal for watching
television or for sitting and monitoring the outside of his cell. Finally, in his letter to Swingle
plaintiff does not claim that sitting on the stool causes him pain or that getting in and out of his
bunk does.

1 then-most-recent 128G form, which, under California law, Simmerson was required to review at
2 screening, also recommended that housing assignment. Therefore, defendants have not met their
3 burden of demonstrating that defendant Simmerson is entitled to immunity under the “qualified
4 immunity” doctrine.

5 With respect to plaintiff’s claim against defendant Miranda arising out of the report
6 drafted by him on July 16, 2010, plaintiff has a clearly established right to have correctional staff
7 not be deliberately indifferent to plaintiff’s exposure to substantial risk of serious harm. Farmer,
8 511 U.S. 834. There are genuine issues of material fact as to whether Miranda violated the aspect
9 of the Eighth Amendment specifically addressed in Farmer.

10 For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that defendants’
11 motion for Summary Judgment (ECF No. 48) be:

- 12 1. Denied with respect to plaintiff’s claim that defendant Miranda violated plaintiff’s
13 Eighth Amendment rights on July 16, 2010 when he denied plaintiff housing in cell
14 without bunk beds.
- 15 2. Denied with respect to plaintiff’s claim that defendant Simmerson violated plaintiff’s
16 Eighth Amendment rights on June 9, 2010 when Simmerson failed to house plaintiff in a
17 cell without bunk beds.
- 18 3. Granted in all other respects.

19 These findings and recommendations are submitted to the United States District Judge
20 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
21 after being served with these findings and recommendations, any party may file written
22 objections, no longer than 15 pages, with the court and serve a copy on all parties. Such a
23 document should be captioned “Objections to Magistrate Judge’s Findings and
24 Recommendations.” Any response to the objections shall be served and filed within fourteen
25 days after service of the objections. The parties are advised that failure to file objections within

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1 the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
2 F.2d 1153 (9th Cir. 1991).

3 Dated: March 5, 2015



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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