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RICHARD W. WIEKING
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NORTHERN DISTRICT OF CALIFORNIA

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

QUILLIE L. HARVEY, JR.,)	
)	
Plaintiff(s),)	No. C 07-1244 CRB (PR)
)	
vs.)	ORDER GRANTING
)	DEFENDANTS' MOTION FOR
ARNOLD SCHWARZENEGGER, et al.,)	DISMISSAL/SUMMARY
)	JUDGMENT
Defendant(s).)	
_____)	(Docket # 65)

Plaintiff, a prisoner at Salinas Valley State Prison ("SVSP") and frequent litigant in federal court, filed a pro se complaint under 42 U.S.C. § 1983 alleging various violations of his constitutional rights while incarcerated at SVSP. The court screened the complain pursuant to 28 U.S.C. § 1915A and recognized four claims under § 1983: (1) improper classification, (2) deprivation of outdoor exercise, (3) mail tampering and (4) deliberate indifference to serious medical needs. Aug. 29, 2007 Order at 2. The court dismissed plaintiff's allegations regarding an inadequate administrative appeals system and dismissed Governor Schwarzenegger and Secretary James Tilton. *Id.* All other named defendants were ordered served. *Id.* at 3.

Defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state claim upon which relief can be granted. The court granted the motion with respect to the claims regarding improper

1 classification, deprivation of outdoor exercise and deliberate indifference to
2 serious medical needs, and denied the motion with respect to the mail-tampering
3 claim. July 21, 2008 Order at 5. The improper-classification claim was
4 dismissed without leave to amend, but the claims regarding deprivation of
5 outdoor exercise and deliberate indifference to serious medical needs were
6 dismissed with leave to amend. Id. The court also dismissed defendants Sotelo,
7 Hedgpeth, Vera and Medina. Id.¹

8 Plaintiff filed a First Amended Complaint ("FAC"), which defendants
9 requested the court screen pursuant to 28 U.S.C. § 1915A. The court screened
10 the FAC and found that it stated a cognizable § 1983 claim for mail tampering
11 against defendant L. Lafferty and a cognizable § 1983 claim for deliberate
12 indifference to serious medical needs against defendants Nguyen, M. S. Evans,
13 Charles Lee, S. M. Rodriguez, M. Mendez and J. Ippolito. Oct. 31, 2008 Order at
14 2. All other claims and defendants were dismissed. Id.

15 Defendants now move for dismissal of plaintiff's claims against
16 defendants Rodriguez, Mendez and Ippolito under Federal Rule of Civil
17 Procedure 12(b) on the ground that plaintiff failed to exhaust available
18 administrative remedies as to said claims before filing suit as required by 42
19 U.S.C. § 1997e(a). Additionally, defendants move for summary judgment on
20 plaintiff's claims against defendants Lafferty, Nguyen, Evans and Lee under
21 Federal Rule of Civil Procedure 56 on the ground that there are no material facts
22 in dispute and that they are entitled to judgment as a matter of law. Defendants
23 Lafferty, Nguyen, Evans and Lee also claim that they are entitled to qualified
24 immunity. Plaintiff has filed an opposition and defendants have filed a reply.

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26 ¹Defendant Younce was dismissed after the court was informed of his
27 death. See Sept. 30, 2008 Order at 1.

DISCUSSION

A. Standard of Review

Nonexhaustion under 42 U.S.C. § 1997e(a) is an affirmative defense that should be treated as a matter of abatement and brought in an "unenumerated Rule 12(b) motion rather than [in] a motion for summary judgment." Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) (citations omitted). In deciding a motion to dismiss for failure to exhaust administrative remedies under § 1997e(a), the court may look beyond the pleadings and decide disputed issues of fact. Id. at 1119-20. If the court concludes that the prisoner has not exhausted California's prison administrative process, the proper remedy is dismissal without prejudice. Id. at 1120.

Summary judgment is proper where the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

The moving party for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrete, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. But on an issue for which the opposing party will have the burden of proof at trial, as is the case here, the moving party need only point out "that there is an absence of evidence to support

1 the nonmoving party's case." Id.

2 Once the moving party meets its initial burden, the nonmoving party must
3 go beyond the pleadings and, by its own affidavits or discovery, "set forth
4 specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P.
5 56(e). If the nonmoving party fails to make this showing, "the moving party is
6 entitled to judgment as a matter of law." Celotex Corp., 477 U.S. at 323.

7 B. Analysis

8 1. Motion for dismissal for nonexhaustion

9 The Prison Litigation Reform Act of 1995("PLRA") amended 42
10 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to
11 prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a
12 prisoner confined in any jail, prison, or other correctional facility until such
13 administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).
14 Although once within the discretion of the district court, exhaustion in prisoner
15 cases covered by § 1997e(a) is now mandatory. Porter v. Nussle, 534 U.S. 516,
16 524 (2002). All available remedies must now be exhausted; those remedies
17 "need not meet federal standards, nor must they be 'plain, speedy, and effective.'"
18 Id. (citation omitted). Even when the prisoner seeks relief not available in
19 grievance proceedings, notably money damages, exhaustion is a prerequisite to
20 suit. Id.; Booth v. Churner, 532 U.S. 731, 741 (2001). Similarly, exhaustion is a
21 prerequisite to all prisoner suits about prison life, whether they involve general
22 circumstances or particular episodes, and whether they allege excessive force or
23 some other wrong. Porter, 534 U.S. at 532. PLRA's exhaustion requirement
24 requires "proper exhaustion" of available administrative remedies. Woodford v.
25 Ngo, 548 U.S. 81, 93 (2006).

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1 CDCR's records show that plaintiff did not exhaust his claims against
2 Rodriguez, Mendez and Ippolito via any other administrative appeals. But in his
3 opposition papers, plaintiff alleges that he attempted to do so when, on April 5,
4 2006, he handed an appeal concerning the defendant property officers to
5 correctional officer Reyes for filing with the appeals coordinator.² In support, he
6 attaches exhibits C and E to his declaration in support of his opposition. Exhibit
7 C contains a 602 on which plaintiff appears to have written allegations against
8 Rodriguez and Mendez. But, unlike the appeals he attached to his FAC, this
9 purported appeal does not bear any stamps or other evidence of receipt by the
10 appeals coordinator or any other prison official.

11 Exhibit E contains a letter dated July 30, 2006 from plaintiff to appeals
12 coordinator Medina asking about the status of "a staff complaint on three officers
13 for withholding medical" that he allegedly "sent" Medina on April 5, 2006. Pl.'s
14 Decl. Ex. E. Medina responded by reminding plaintiff that he must follow
15 procedure and submit an Inmate Request for Interview (Form GA 22) describing
16 the information sought. There is no evidence that plaintiff submitted a Form GA
17 22 and/or made any attempts to resubmit to Medina the staff complaint against
18 the defendant property officers. On this record, it cannot be said that plaintiff
19 properly exhausted available administrative remedies, or gave CDCR a fair
20 opportunity to correct its own mistakes, before haling Rodriguez, Mendez and
21 Ippolito into federal court. See Woodford, 548 U.S. at 89, 90-91. The claims
22 against Rodriguez, Mendez and Ippolito must be dismissed without prejudice.
23 See Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003).

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26 ²The informal level of review is waived for grievances concerning
27 "alleged misconduct by a departmental peace officer." Cal. Code Regs. tit. 15, §
28 3084.5(a)(3)(G).

1 2. Motion for summary judgment

2 Defendants move for summary judgment on plaintiff's claims
3 against defendants Lafferty, Nguyen, Evans and Lee, and argue that they are
4 entitled to qualified immunity from damages. Under Saucier v. Katz, 533 U.S.
5 194 (2001), the court must undertake a two-step analysis when a defendant
6 asserts qualified immunity in a motion for summary judgment. The court first
7 faces "this threshold question: Taken in the light most favorable to the party
8 asserting the injury, do the facts alleged show the officer's conduct violated a
9 constitutional right?" 533 U.S. at 201. If the court determines that the conduct
10 did not violate a constitutional right, the inquiry is over and the officer is entitled
11 to qualified immunity.

12 If the court determines that the conduct did violate a constitutional right, it
13 then moves to the second step and asks "whether the right was clearly
14 established" such that "it would be clear to a reasonable officer that his conduct
15 was unlawful in the situation he confronted." Id. at 201-02. Even if the violated
16 right was clearly established, qualified immunity shields an officer from suit
17 when he makes a decision that, even if constitutionally deficient, reasonably
18 misapprehends the law governing the circumstances he confronted. Brosseau v.
19 Haugen, 543 U.S. 194, 198 (2004); Saucier, 533 U.S. at 205-06. If "the officer's
20 mistake as to what the law requires is reasonable . . . the officer is entitled to the
21 immunity defense." Id. at 205.³

22 a. Mail Tampering

23 Plaintiff alleges that on January 24, 2006 he submitted an
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25 ³Although the Saucier sequence is often appropriate and beneficial, it is not
26 mandatory. A court may exercise its discretion in deciding which prong to
27 address first, in light of the particular circumstances of each case See Pearson v.
28 Callahan, 129 S. Ct. 808, 818 (2009).

1 administrative appeal in which he alleged that defendant Lafferty and the mail
2 room staff had "tampered" with his mail. FAC ¶ 14. Plaintiff namely noted in
3 the 602 that his "legal mail" had been opened outside of his presence and that
4 holiday cards postmarked December 21 and 22, 2005 were not delivered to him
5 until January 17, 2006. Id. Ex. A. Plaintiff further alleges that Lafferty
6 responded to the 602 by sending plaintiff's mail to the wrong cell and, along with
7 "other unidentified mail room staff," opening his legal mail outside of his
8 presence. Id. ¶ 15.

9 Prison officials may institute procedures for inspecting "legal mail," i.e.,
10 mail sent between attorneys and prisoners. See Wolff v. McDonnell, 418 U.S.
11 539, 576-77 (1974) (incoming mail from attorneys); see also Royse v. Superior
12 Court, 779 F.2d 573, 574-75 (9th Cir. 1986) (prison officials may inspect mail
13 sent by prisoner to the courts). But the opening and inspecting of "legal mail"
14 outside the presence of a prisoner may have an impermissible "chilling" effect on
15 a prisoner's First Amendment right to petition the government. See O'Keefe v.
16 Van Boening, 82 F.3d 322, 325 (9th Cir. 1996) (citing Laird v. Tatum, 408 U.S.
17 1, 11 (1972)).⁴ If the prisoner demonstrates a chilling effect, prison officials must
18 establish that legitimate penological interests justify the policy or practice. See
19 id. at 327 (mail policy that allows prison mail room employees to open and read
20 grievances sent by prisoners to state agencies outside prisoners' presence
21 reasonable means to further legitimate penological interests).

22 Lafferty claims she is entitled to summary judgment because she did not
23 work in SVSP's mail room during the relevant time period. Lafferty sets forth
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25 ⁴But cf. Keenan v. Hall, 83 F.3d 1083, 1094 (9th Cir. 1996), amended,
26 135 F.3d 1318 (9th Cir. 1998) (prison officials may open and inspect mail to
27 prisoner from courts outside prisoner's presence because mail from courts, as
28 opposed to mail from a prisoner's lawyer, is not "legal mail").

1 evidence showing that she was on medical leave from SVSP August 30, 2005
2 through September 8, 2005 and November 18, 2005 through June 8, 2006.
3 According to Lafferty, plaintiff has set forth no evidence showing that she
4 actually and proximately caused the deprivation of plaintiff's First Amendment
5 rights of which he complains. See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir.
6 1988). The court agrees.

7 In support of his mail tampering claim, plaintiff submits a note Lafferty
8 allegedly wrote to him on September 9, 2005. The note reassures plaintiff that
9 the mail room sends him his magazines "the same day they arrive from the post
10 office." Pl.'s Decl. Ex. G at 2. The note does not contradict Lafferty's evidence
11 that she was on medical leave from August 30, 2005 through September 9, 2005
12 or show a genuine issue for trial on plaintiff's claim that Lafferty violated his
13 First Amendment right to petition the government and/or to receive mail. See
14 Fed. R. Civ. P. 56(e); Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986).

15 Plaintiff also submits a second note Lafferty allegedly wrote to him on
16 November 18, 2005. That note reassures plaintiff that the mail room sends him
17 his newspapers "on the same day we get them." Pl.'s Decl. Ex. G at 3. The note
18 does not contradict Lafferty's evidence that she was on medical leave from
19 November 18, 2005 through June 8, 2006 – Lafferty worked approximately one
20 hour on November 18, 2005 before she saw her doctor and he put her on
21 immediate medical leave until she returned to SVSP in June 2006. Nor does the
22 note show a genuine issue for trial on plaintiff's claim that Lafferty violated his
23 First Amendment right to petition the government and/or to receive mail. See
24 Fed. R. Civ. P. 56(e); Celotex Corp., 477 U.S. at 323.

25 Specifically in support of his claim that Lafferty violated his First
26 Amendment rights by opening his legal mail outside of his presence, plaintiff
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1 points to page 29 of exhibit A of his FAC. The page numbered 29 in exhibit A to
2 the FAC is a photocopy of an envelope postmarked January 17, 2006, which has
3 an attorney's name in the return address and is stamped "Opened in Error." FAC
4 Ex. A at 29. But there is no genuine issue for trial on plaintiff's claim that
5 Lafferty opened the envelope. See Fed. R. Civ. P. 56(e); Celotex Corp., 477 U.S.
6 at 323. The uncontroverted evidence shows that Lafferty was on medical leave at
7 the time the envelope was received and opened.

8 Plaintiff also submits a photocopy of an envelope from the American Bar
9 Association postmarked September 12, 2005, with a handwritten note saying,
10 "Opened in error, not read," and signed "L. Lafferty." Pl.'s Decl. Ex. A at 20.
11 Lafferty concedes that the note appears to be in her handwriting, but suggests that
12 the piece of mail at issue was opened in error and promptly resealed and initialed
13 without reading, pursuant to protocol. Plaintiff's conclusory allegations that it
14 was intentionally opened and presumably read are insufficient to create a triable
15 issue of fact. See Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (conclusory
16 allegations insufficient to defeat summary judgment). The court is satisfied that
17 the instant incident of mail mishandling without any evidence of improper motive
18 or resulting interference with the right to counsel or access to the courts does not
19 give rise to a constitutional violation. See Smith v. Maschner, 899 F.2d 940, 944
20 (10th Cir. 1990); see also Bach v. Illinois, 504 F.2d 1100, 1102 (7th Cir. 1974)
21 (isolated incident of mail mishandling insufficient to state claim under § 1983).
22 Lafferty is entitled to summary judgment (and qualified immunity) on plaintiff's
23 mail tampering claim.

24 b. Medical Needs

25 Plaintiff alleges that defendant Nguyen was deliberately
26 indifferent to his foot pain because Nguyen unnecessarily delayed for nearly
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1 seven months (from August 25, 2005 to March 22, 2006) writing an
2 accommodation chrono authorizing plaintiff to wear soft shoes in the
3 Administrative Segregation Unit ("ASU").

4 Deliberate indifference to serious medical needs violates the Eighth
5 Amendment's proscription against cruel and unusual punishment. Estelle v.
6 Gamble, 429 U.S. 97, 104 (1976). A "serious medical need" exists if the failure
7 to treat a prisoner's condition could result in further significant injury or the
8 "unnecessary and wanton infliction of pain." McGuckin v. Smith, 974 F.2d 1050,
9 1059 (9th Cir. 1992) (citing Estelle, 429 U.S. at 104), overruled in part on other
10 grounds by WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir.
11 1997) (en banc). A prison official is "deliberately indifferent" if he knows that a
12 prisoner faces a substantial risk of serious harm and disregards that risk by failing
13 to take reasonable steps to abate it. Farmer v. Brennan, 511 U.S. 825, 837
14 (1994).

15 Negligence is not enough for liability under the Eighth Amendment. Id. at
16 835-36 & n.4. An "official's failure to alleviate a significant risk that he should
17 have perceived but did not, . . . cannot under our cases be condemned as the
18 infliction of punishment." Id. at 838. Instead, "the official's conduct must have
19 been 'wanton,' which turns not upon its effect on the prisoner, but rather, upon the
20 constraints facing the official." Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir.
21 1998) (citing Wilson v. Seiter, 501 U.S. 294, 302-03 (1991)). Prison officials
22 violate their constitutional obligation only by "intentionally denying or delaying
23 access to medical care." Estelle, 429 U.S. at 104-05.

24 A difference of opinion between a prisoner-patient and prison medical
25 authorities regarding treatment does not give rise to a § 1983 claim. Franklin v.
26 Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). Similarly, a showing of nothing
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1 more than a difference of medical opinion as to the need to pursue one course of
2 treatment over another is generally insufficient to establish deliberate
3 indifference. Toguchi v. Chung, 391 F.3d 1051, 1058, 1059-60 (9th Cir. 2004);
4 Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). In order to prevail on a
5 claim involving choices between alternative courses of treatment, a prisoner-
6 plaintiff must show that the course of treatment the doctors chose was medically
7 unacceptable under the circumstances and that they chose this course in
8 conscious disregard of an excessive risk to plaintiff's health. Toguchi, 391 F.3d
9 at 1058; Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

10 Nguyen claims he is entitled to summary judgment because the undisputed
11 facts show that he consistently and adequately responded to plaintiff's foot pain
12 and wrote him a soft-shoe chrono immediately after receiving the expert opinion
13 of a podiatrist that a soft-shoe chrono was recommended for plaintiff. Nguyen
14 argues that no reasonable juror could find that he was deliberately indifferent to
15 plaintiff's serious medical needs under the circumstances. In support, Nguyen
16 submits declarations and documentary evidence showing the following:

17 During the relevant time period of August 2005 to March 2006, Nguyen
18 worked at SVSP as a contract physician and saw plaintiff several times for
19 chronic shoulder pain and foot pain. Plaintiff's medical records specifically show
20 that Nguyen saw plaintiff on approximately six occasions in these seven months,
21 and that Nguyen recommended or prescribed pain medication, x-rays, an MRI
22 (magnetic resonance imaging) and physical therapy – all of which plaintiff
23 received. Nguyen Decl. ¶ 4, Ex. A. Nguyen did not write an accommodation
24 chrono for plaintiff to wear soft shoes in the ASU until such a chrono was
25 recommended by a podiatrist in March 2006, however.

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1 While working at SVSP, Nguyen was aware of a memo from defendant
2 Chief Medical Officer Dr. C. Lee concerning the issuance of comprehensive
3 accommodation chronos to allow inmates to have personal soft shoes. Id. ¶ 5.
4 This memo went into effect before Nguyen started working at SVSP. Id. While
5 at SVSP, Nguyen understood the soft-shoe memo to mean that inmates did not
6 need medical authorization to wear soft shoes. Id. It was his understanding that
7 inmates had previously not been allowed to wear soft shoes, but that this rule had
8 been changed and so they no longer needed medical authorization for soft shoes.
9 Id. It was also his understanding that inmates in the ASU were generally not
10 allowed to have soft shoes, however. Id. During the period Nguyen saw
11 plaintiff, Nguyen believed plaintiff to be housed in the ASU. Id.

12 Lee issued the soft-shoe memo in his capacity as Health Care Manager to
13 all staff concerning the policy for issuing soft-shoe chronos for inmates on June
14 23, 2004. Joaquin Decl. ¶ 5, Ex. B. Doctors typically complete a comprehensive
15 accommodation chrono (CDCR Form 7410) to authorize access to medical
16 devices or other medically- necessary accommodations. Id. Chronos for medical
17 accommodations must be approved by the chief medical officer or the health care
18 manager before they become valid. Id.

19 Lee's 2004 memo concerning soft-shoe chronos states: "Effective
20 immediately, all personal soft shoe chronos are hereby cancelled and no longer in
21 effect. This does not apply to orthopedic shoes which are specially fitted to meet
22 the inmate's medical podiatric needs. In instances in which soft soled shoes had
23 been utilized to provide ankle support, those inmates should be referred to the
24 medical clinic for an evaluation to determine if ankle braces, sleeves or straps are
25 appropriate." Id. Ex. B. This memo has continuously been in effect since it was
26 issued in 2004 and there have not been any other memos concerning soft-shoe
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1 chronos to clarify or supersede it. Id. ¶ 6.

2 The memo making soft-shoe chronos no longer necessary has not been
3 applied to inmates in the ASU. Id. ¶ 7. Inmates in the ASU with medical
4 conditions requiring special shoes (including soft shoes) must be evaluated by a
5 foot specialist before they will be issued a comprehensive accommodation chrono
6 for special shoes. Id. The reason for this exception to the 2004 soft-shoe memo
7 is that prison policies prohibit inmates in the ASU from having personal soft
8 shoes because they may use the laces to hang themselves or make weapons. Id.

9 As Nguyen recalls, comprehensive accommodation chronos (such as a
10 soft-shoe chrono) were issued after a two-step process when he worked at SVSP.
11 Nguyen Decl. ¶ 5. First, he would write the comprehensive accommodation
12 chrono based on his recommendations after examining an inmate-patient. Id.
13 Second, the health case manager or chief medical officer would review the
14 comprehensive accommodation chrono and approve or reject it. Id. At the time
15 plaintiff requested a soft-shoe chrono, Nguyen believed that because plaintiff was
16 in the ASU any soft-shoe chrono he wrote for him would be rejected unless it
17 was supported by a foot specialist. Id.

18 Plaintiff's medical records show that plaintiff first complained to Nguyen
19 of foot pain and requested a soft-shoe chrono when Nguyen saw Plaintiff on
20 August 25, 2005, two weeks after Nguyen started working at SVSP. Nguyen
21 Decl. ¶ 6. At the time, it was Nguyen's understanding that only a podiatrist could
22 authorize special shoes. Id. That same day, Nguyen responded to plaintiff's
23 complaint about foot pain by completing a Health Care Services Physician
24 Request for Services (CDCR Form 7243), in which he referred plaintiff for a
25 podiatry consultation. Id. Nguyen noted in the request that the inmate stated that
26 his foot hurt with his current shoe, but that an examination of his feet was
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1 unremarkable and he did not believe a soft-shoe chrono was medically necessary.
2 Id. ¶ 6, Ex. R.

3 Plaintiff saw the podiatrist on October 24, 2005, who noted that plaintiff
4 had heel and arch pain and excessive pronation. Id. ¶ 7. Although Nguyen is not
5 a podiatrist, he understands pronation to refer to the position of the sole of the
6 foot. Id. The podiatrist ordered x-rays of both plaintiff's feet, which were
7 performed two days later on October 26, 2005. The x-rays showed that both feet
8 were normal and did not show any evidence of disease or injury. Id. The
9 podiatrist recommended a follow-up appointment in two months. Id., Ex. C-1.

10 Plaintiff had a follow-up appointment with the podiatrist two months later,
11 on December 12, 2005. Id. ¶ 8. At that time, the podiatrist noted that the x-rays
12 of both feet were within normal limits, and that plaintiff had excessive pronation
13 of both feet. Id. The podiatrist also requested that plaintiff be rescheduled to the
14 podiatry clinic after his SHU (security housing unit) term to receive functional
15 orthotics. Id. Upon reviewing plaintiff's medical records, Nguyen understood
16 this to mean that the podiatrist did not recommend that plaintiff should have
17 orthotics until he was housed in the general population. Id. ¶ 8, Ex. C-2.

18 Plaintiff had another follow-up appointment with the podiatrist on March
19 6, 2006. Id. ¶ 9. At that time, the podiatrist again noted that the x-rays of both
20 feet were within normal limits and that plaintiff had excessive pronation of both
21 feet. Id. The podiatrist also recommended that plaintiff be allowed to wear his
22 personal soft shoes with orthotics to control pronation in both feet. Id. ¶ 9, Ex.
23 C-2. Nguyen saw plaintiff again on March 21, 2006 for shoulder pain and noted
24 in plaintiff's chart that plaintiff needed a soft-shoe chrono. Id. ¶ 10, Ex. D. It
25 was Nguyen's understanding that because he now had the expert opinion of the
26 podiatrist recommending soft shoes, Nguyen could now write a soft-shoe chrono
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1 for plaintiff that would likely be approved by the health care manager or chief
2 medical officer. Id. ¶ 10.

3 On March 22,2006, the day after Nguyen saw plaintiff and noted that he
4 needed a soft-shoe chrono, Nguyen wrote plaintiff a soft-shoe chrono on a CDCR
5 Form 7410. Id. ¶ 11. In this chrono, Nguyen noted that plaintiff saw the
6 podiatrist on March 6, 2006 and that the podiatrist recommended personal soft
7 shoes with orthotics to control pronation of the feet. Id. The following day, on
8 March 23,2006, the soft-shoe chrono was approved. Id. Nguyen believes it was
9 approved because the expert opinion of the podiatrist justified the request for soft
10 shoes in the ASU. Id. ¶ 11, Ex. E.

11 Plaintiff's medical records show that during most of the period from
12 August 2005 through March 2006, he was prescribed pain medication by
13 Nguyen. Id. ¶ 12. Specifically, Nguyen alternately prescribed Naproxen or
14 Indomethacin, depending on which medication plaintiff said provided better pain
15 relief. Id. These are both non-steroidal anti-inflammatory drugs (NSAIDs),
16 which is a class of generalized pain relievers that includes medications like Advil
17 and Motrin that are sold over the counter. Id. Nguyen prescribed these pain
18 medications primarily to treat Plaintiff s frequent complaints of shoulder pain, but
19 this same type of medication would also be used to treat the kind of foot pain of
20 which plaintiff complained. Id. ¶ 12, Ex. F.

21 Under Nguyen's version of the facts, Nguyen was not deliberately
22 indifferent to plaintiff's foot pain. Nguyen referred plaintiff to a podiatrist on the
23 same day on which plaintiff first requested medical attention and a soft-show
24 chrono for foot pain; Nguyen prescribed plaintiff appropriate pain medication;
25 and Nguyen wrote plaintiff a soft-shoe chrono upon obtaining the expert opinion
26 of the podiatrist that plaintiff should be allowed to wear soft shoes to control
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1 pronation of the feet. Nguyen did not disregard a known risk of serious harm to
2 plaintiff's health by failing to take reasonable steps to abate it. See Farmer, 511
3 U.S. at 837.

4 Plaintiff's contentions that Nguyen should have written the soft-shoe
5 chrono immediately upon plaintiff's request, or that Nguyen should have called
6 the podiatrist to influence his medical recommendation, do not compel a different
7 conclusion. At best, plaintiff's contentions suggest that Nguyen was negligent
8 because he should have done more; but that is not enough to establish deliberate
9 indifference under § 1983. See id. at 835-36 & n.4. Plaintiff has set forth no
10 evidence showing that Nguyen "intentionally den[ied] or delay[ed him] access to
11 medical care." Estelle, 429 U.S. at 104-05. Nguyen is entitled to summary
12 judgment as a matter of law. See Celotex Corp. v. Cattrett, 477 U.S. 317, 323
13 (1986)

14 Nguyen is also entitled to qualified immunity from damages because the
15 record shows that he acted under the reasonable belief that the opinion of a
16 podiatrist was needed before plaintiff could be issued a soft-show chrono for the
17 ASU. Even if Nguyen was mistaken, as plaintiff claims, Nguyen would be
18 entitled to qualified immunity. See Saucier v. Katz, 533 U.S. 194, 202 (2001)
19 (rule of qualified immunity protects all but the plainly incompetent or those who
20 knowingly violate the law; defendants can have a reasonable, but mistaken, belief
21 about the facts or about what the law requires in any given situation).

22 Plaintiff alleges that defendants Evans and Lee, SVSP's warden and health
23 care manager, also were deliberately indifferent to his serious medical needs.
24 Plaintiff specifically alleges that although he informed Evans and Lee that he was
25 not getting a soft-shoe chrono because the doctors were relying on an outdated
26 policy memo, Evans and Lee "failed to cure the situation." FAC ¶¶ 22, 32-33.

1 But plaintiff sets forth no evidence showing that the policy memo was outdated
2 or not in effect during the pertinent time period. Put simply, plaintiff sets forth
3 no evidence showing that there was a "situation" for Evans and/or Lee to "cure."
4 Cf. Farmer, 511 U.S. at 837 (deliberate indifference requires that prison official
5 know that prisoner faces a substantial risk of serious harm and that prison official
6 disregard that risk by failing to take reasonable steps to abate it). Evans and Lee
7 are entitled to summary judgment because there is no genuine issue for trial on
8 plaintiff's claim that Evans and/or Lee were deliberately indifferent to plaintiff's
9 serious medical needs. See Celotex Corp., 477 U.S. at 323.

10 At minimum, Evans and Lee are entitled to qualified immunity from
11 damages because reasonable prison officials could have believed that their
12 conduct was lawful under the circumstances. See Saucier, 533 U.S. at 205-06.
13 After all, plaintiff's medical record made clear that plaintiff received medical care
14 for his feet (including the medical care of a specialist) as soon as he complained
15 of feet pain in August 2005 and that the care was ongoing.

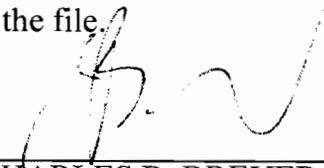
16 CONCLUSION

17 For the foregoing reasons, defendants' motion for dismissal/summary
18 judgment (docket # 65) is GRANTED.

19 The clerk shall enter judgment in favor of defendants, terminate all
20 pending motions as moot, and close the file.

21 SO ORDERED.

22 DATED: ~~DEC 29~~ 2008


23 CHARLES R. BREYER
24 United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

QUILLIE L. HARVEY,
Plaintiff,

Case Number: CV07-01244 CRB

CERTIFICATE OF SERVICE

v.

ARNOLD SCHWARZENEGGER et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on December 29, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Quillie L. Harvey H-28106
Salinas Valley State Prison
C-1-108
P.O. Box 1050
Soledad, CA 93960

Dated: December 29, 2009

Richard W. Wieking, Clerk



By: Tracy Lucero, Deputy Clerk