

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

3 THOMAS EUGENE MOORE,

No. C 06-02150 SBA (PR)

4 Plaintiff,

**ORDER DISMISSING DELIBERATE  
 INDIFFERENCE, SUPERVISORY  
 LIABILITY AND EQUAL PROTECTION  
 CLAIMS**

5 v.

6 BROWN & WILLIAMSON TOBACCO,  
 7 CORPORATION, et al.,

8 Defendants.

9 \_\_\_\_\_/

10  
 11 On November 10, 2008, the Court issued an Order of Service and directed Plaintiff to amend  
 12 his deliberate indifference, supervisory liability and equal protection claims. After granting Plaintiff  
 13 an extension, the Court gave him until December 10, 2008 to file an amendment to the complaint.  
 14 He was warned the failure to do so would result in dismissal of his deliberate indifference,  
 15 supervisory liability and equal protection claims without prejudice.

16 In an Order dated December 12, 2008, the Court granted Plaintiff's request for an extension  
 17 of time to file his amendment to the complaint.

18 On January 2, 2009, Plaintiff filed his amendment to the complaint. The Court now reviews  
 19 Plaintiff's amended deliberate indifference, supervisory liability and equal protection claims.

20 **I. Deliberate Indifference Claims**

21 In its November 10, 2008 Order, the Court determined that, liberally construed, Plaintiff  
 22 alleged that Defendants Grillo and Gibbs were deliberately indifferent to his serious medical needs  
 23 by failing to provide medical therapy and treatment for Plaintiff's tobacco smoking addiction from  
 24 June 19, 2001 to January 1, 2005. (Nov. 10, 2008 Order at 9.) Plaintiff claimed that Defendants  
 25 Grillo and Gibbs failed to provide him the medical treatment necessary for his smoking addiction  
 26 and caused him to suffer "headaches, pain, dizziness, nervousness, depression, insomnia, weight  
 27 loss, emotional distress and other physical and mental damages." (Id.) The Court also determined  
 28 that Plaintiff alleged Defendants Beza and Schneider were deliberately indifferent to his serious

1 medical needs by failing to inform Plaintiff that tobacco is addictive and by selling tobacco to  
2 Plaintiff "up to July 1, 2005." (Id.) The Court further stated that Plaintiff did not allege that he  
3 informed Defendants Beza, Schneider, Grillo and Gibbs of his need for medical treatment due to his  
4 tobacco smoking addiction or that they were aware of facts from which the inference could be drawn  
5 that a substantial risk of serious harm exists from selling him tobacco products. (Id.) Therefore, the  
6 Court concluded that Plaintiff's allegations failed to show that Defendants Beza, Schneider, Grillo  
7 and Gibbs acted with deliberate indifference, an essential element to a deliberate indifference claim.  
8 This claim was dismissed with leave to amend to cure this pleading deficiency.

9 Deliberate indifference to serious medical needs violates the Eighth Amendment's  
10 proscription against cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976);  
11 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX  
12 Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A determination of  
13 "deliberate indifference" involves an examination of two elements: the seriousness of the prisoner's  
14 medical need and the nature of the defendant's response to that need. Id. at 1059. A serious medical  
15 need exists if the failure to treat a prisoner's condition could result in further significant injury or the  
16 "unnecessary and wanton infliction of pain." Id. (citing Estelle, 429 U.S. at 104). A prison  
17 employee is deliberately indifferent if he or she knows that a prisoner faces a substantial risk of  
18 serious harm and disregards that risk by failing to take reasonable steps to abate it. Farmer v.  
19 Brennan, 511 U.S. 825, 837 (1994).

20 Neither negligence nor gross negligence will constitute deliberate indifference. See Farmer,  
21 511 U.S. at 835-36 (1994); see also Estelle, 429 U.S. at 106 (establishing that deliberate indifference  
22 requires more than negligence). A prison official cannot be held liable under the Eighth Amendment  
23 for denying an inmate humane conditions of confinement unless the standard for criminal  
24 recklessness is met, i.e., the official knows of and disregards an excessive risk to inmate health or  
25 safety. See Farmer, 511 U.S. at 837. The official must both be aware of facts from which the  
26 inference could be drawn that a substantial risk of serious harm exists, and he must also draw the  
27 inference. See id. An Eighth Amendment claimant need not show, however, that a prison official  
28 acted or failed to act believing that harm actually would befall an inmate; it is enough that the

1 official acted or failed to act despite his knowledge of a substantial risk of serious harm. See id. at  
2 842. This is a question of fact. See Farmer, 511 U.S. at 842. A heightened pleading standard  
3 applies to the subjective prong of Eighth Amendment claims: the plaintiff must make  
4 nonconclusory allegations supporting an inference of unlawful intent. Alfrey v. United States, 276  
5 F.3d 557, 567-68 (9th Cir. 2002).

6 In Plaintiff's amendment to the complaint, he explains the Defendants Beza, Schneider,  
7 Grillo and Gibbs were

8 informed by the State of California, [the] California Legislature, and by Assembly  
9 Member Tim Leslie, as well as by Assembly Bill No. 384, and also California  
10 Penal Code section 5030.1(a) and (b) which prohibits and stops the provisions  
11 and the selling of smoking tobacco to the plaintiff, and also Assembly Bill No.  
384 states that the [CDCR] and defendant Woodford would provide anti-smoking  
and smoking cessation programs for the plaintiff's smoking tobacco addiction  
after January 1, 2005.

12 (Am. to Compl. at 1.) He adds: "Assembly Bill No. 384 states that smoking cessation programs will  
13 be provided to inmates." (Id. at 2.) Plaintiff therefore argues:

14 [D]efendants Beza and Schneider were deliberately indifferent to the plaintiff's  
15 serious medical needs by failing to inform the plaintiff that tobacco is addictive  
16 and by selling this tobacco to the plaintiff when defendants Beza and Schneider  
17 were aware of facts by Assembly Bill No. 384 from which the inference could be  
18 drawn that a substantial risk of serious harm of tobacco smoking addiction exists  
19 from selling the plaintiff the tobacco products for smoking, and defendants Grillo  
20 and Gibbs were deliberately indifferent to the plaintiff's serious medical needs by  
21 failing to provide the plaintiff with a tobacco smoking cessation program to help  
22 the plaintiff medically when defendants Grillo and Gibbs were aware of facts by  
23 Assembly Bill No. 384 from which the inference could be drawn that a substantial  
24 risk of serious harm of tobacco smoking addiction exists from failing to medically  
25 treat the plaintiff's tobacco smoking addiction.

26 (Id.) Finally, he claims that he "went for medical treatment and care on December 27, 2004, and  
27 was seen by Defendants Grillo and Gibbs" and that he informed them that he

28 was having problems by being addicted to smoking tobacco and that the plaintiff  
was having pain in his throat, mouth, nose, lungs, and chest, and that he was  
coughing and having headaches and could not sleep, and when Defendants Grillo  
and Gibbs checked the plaintiff, [they] wrote a medical report listing the physical  
damages to the plaintiff that the plaintiff's tobacco smoking ha[d] caused to the  
plaintiff and listed that the plaintiff suffered from 1) focal mucoperistoeal  
thickening over the nasal turbinates, and 2) chronic sinusitis along the inferior  
aspect of the lateral wall.

(Id.)

1 Plaintiff's allegations in his amendment to the complaint relating to the Eighth Amendment  
2 violation fails to cure the pleading deficiencies of his original deliberate indifference claim. He  
3 argues that the aforementioned Defendants "were informed of and aware of the facts of Assembly  
4 Bill No. 384 from which the inference could be drawn that a substantial risk of tobacco smoking  
5 addiction by Plaintiff existed and that a smoking addition cessation program was needed by the  
6 plaintiff . . . ." (Am. to Compl. at 2.) Even if such an inference could be made and Assembly Bill  
7 No. 384 were violated, a violation of state law is not a cognizable claim for relief under § 1983.

8 Moreover, contrary to Plaintiff's claim, Assembly Bill No. 384 does not require smoking  
9 cessation programs. Assembly Bill No. 384 states:

10 This bill would prohibit the possession or use of tobacco products by inmates and  
11 wards under the jurisdiction of the Department of Corrections and the Department  
12 of the Youth Authority. It would require the directors of these departments to  
13 adopt regulations to implement this prohibition, and would require that these  
14 regulations include an exemption for departmentally approved religious  
15 ceremonies.

16 2004 Cal. Stat. c. 798 (A.B. 384). Thus, it requires prison officials to "adopt regulations to  
17 implement" the prohibition of the possession and use of tobacco products by inmates. Id.  
18 Therefore, the Court finds unavailing Plaintiff's argument that Assembly Bill No. 384 requires a  
19 smoking cessation program.

20 Equally unavailing is Plaintiff's argument that Defendant Grillo's and Gibb's "medical  
21 diagnosis of Plaintiff on December 27, 2004" amounted to deliberate indifference. Plaintiff alleges  
22 that Defendant Grillo and Gibbs "wrote a medical report listing the physical damages . . . that  
23 plaintiff's tobacco smoking has caused," but that they "continued to allow the plaintiff to smoke  
24 tobacco and to be addicted to smoking tobacco." (Am. to Compl. at 3.) Plaintiff claims Defendants  
25 Grillo and Gibbs treated him and after they made their "medical diagnosis," they "continued to allow  
26 [him] to smoke tobacco and to be addicted to smoking tobacco . . . ." (Id.) Plaintiff argues that  
27 Defendants Grillo and Gibbs should have offered him a smoking cessation program. However, the  
28 Court finds that Plaintiff does not have a constitutional right to a smoking cessation program.  
Furthermore, "[a] difference of opinion between a prisoner-patient and prison medical authorities  
regarding treatment does not give rise to a § 1983 claim." Id. Here, Plaintiff allegations amount to a

1 difference of medical opinion as to the need to pursue one course of treatment over another, which is  
2 insufficient, as a matter of law, to establish deliberate indifference. See Sanchez v. Vild, 891 F.2d  
3 240, 242 (9th Cir. 1989).

4 In sum, Plaintiff has failed to show that he had a serious medical need and that Defendants  
5 Beza, Schneider, Grillo and Gibbs knew of and disregarded an excessive risk to inmate health or  
6 safety. See Farmer, 511 U.S. at 837. Therefore, the Court finds that Plaintiff's allegations in his  
7 amendment to the complaint do not amount to deliberate indifference to his serious medical needs  
8 against the aforementioned defendants. At most, they amount to negligence, which is not  
9 constitutionally cognizable. Accordingly, the Court finds that Plaintiff fails to state a  
10 constitutionally cognizable deliberate indifference claim as a matter of law and that leave to amend  
11 would be futile.

12 Accordingly, IT IS HEREBY ORDERED that the deliberate indifference claim against  
13 Defendants Beza, Schneider, Grillo and Gibbs is dismissed without further leave to amend.

14 **II. Supervisory Liability Claims**

15 In the amendment, Plaintiff states that Defendants Woodford and Evans:

16 were deliberately indifferent to the plaintiff's serious medical needs by failing to  
17 supervise or create a smoking cessation program for the plaintiff pursuant to  
18 Assembly Bill No. 384, when defendants Woodford and Evans were aware of facts  
19 by Assembly Bill No. 384 from which the inference could be drawn that a  
20 substantial risk of serious harm of tobacco smoking addiction exists from the selling  
21 of smoking tobacco to the plaintiff.

22 (Am. to Compl. at 5.)

23 Plaintiff claims that because Defendant Woodford is the Director of the California  
24 Department of Corrections and Rehabilitation and because Defendant Evans was a former SVSP  
25 Warden, they should be liable for the alleged "fail[ure] to provide and supervise the creation and  
26 supervision of a tobacco smoking cessation program for the plaintiff" at SVSP.<sup>1</sup> (Id.) This is a  
27 respondeat superior claim, that is, Plaintiff seeks to hold Defendants Woodford and Evans liable

---

28 <sup>1</sup> Plaintiff does not provide any facts to support his allegation that Defendants Woodford and  
Evans were aware of his medical problems from his tobacco addiction or his need for a tobacco  
smoking cessation program. Therefore, the Court construes his amendment to the complaint to  
allege that prison officials were not properly supervised by Defendants Woodford and Evans.

1 because they are the supervisors of the persons Plaintiff contends violated his rights. This is,  
2 however, not a proper basis for liability under 42 U.S.C. § 1983. See Taylor v. List, 880 F.2d 1040,  
3 1045 (9th Cir. 1989). Therefore, nothing in the amendment is sufficient to overcome the deficiency  
4 of his supervisory liability claim against Defendants Woodford and Evans, which gave rise to the  
5 dismissal with leave to amend.

6 Accordingly, IT IS HEREBY ORDERED that the supervisory liability claim against  
7 Defendants Woodford and Evans is dismissed without further leave to amend.

8 **III. Equal Protection Claim**

9 The Court found that Plaintiff alleged in his original complaint that the inadequate care by  
10 Defendants was the result of a conspiracy based on racial animus. In its November 10, 2008 Order,  
11 the Court liberally construed this as a claim under the Equal Protection Clause of the Fourteenth  
12 Amendment. (Nov. 10, 2008 Order at 10-11 [citing Wolff v. McDonnell, 418 U.S. 539, 556  
13 (1974) ("Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment  
14 from invidious discrimination based on race.")].) The Court determined that Plaintiff made  
15 conclusory allegations that the named Defendants acted because of a conspiracy based on racial  
16 animus, but that he did not present facts from which such a conclusion might be drawn. Therefore,  
17 Plaintiff's equal protection claim was dismissed with leave to amend for failure to present a  
18 cognizable claim for relief. Plaintiff was directed to assert facts which support an equal protection  
19 claim against the named Defendants in order to cure this pleading deficiency.

20 The Court notes that nowhere in his amendment to the complaint does Plaintiff amend his  
21 equal protection claim. The time to file his amended equal protection claim has passed, and Plaintiff  
22 has failed to do so. Accordingly, IT IS HEREBY ORDERED that the equal protection claim is  
23 DISMISSED without prejudice.

24 The only remaining Defendants in this case, Lane Limited and Brown & Williamson  
25 Tobacco Corporation, have filed a motion to dismiss pursuant to Federal Rules of Civil Procedure  
26 41(b), 12(b)(4) and 12(b)(5). Plaintiff's opposition to the dispositive motion is due to be filed with  
27 the Court and served on Defendants no later than **February 6, 2009**, thirty days after the motion was  
28 filed. If Defendants wish to file a reply brief, they shall do so no later than **fifteen (15) days** after

1 the date Plaintiff's opposition is filed. The motion shall be deemed submitted as of the date the reply  
2 brief is due. No hearing will be held on the motion unless the Court so orders at a later date. The  
3 Court will resolve the motion to dismiss in a separate written Order.

4 IT IS SO ORDERED.

5 DATED: 1/22/09

*Saundra B. Armstrong*  
SAUNDRA BROWN ARMSTRONG  
United States District Judge

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4  
5  
6 MOORE et al,

Case Number: CV06-02150 SBA

7 Plaintiff,

**CERTIFICATE OF SERVICE**

8 v.

9 BROWN & WILLIAMSON TOBACCO,  
10 CORPORATION et al,

11 Defendant.

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

14 That on January 23, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said  
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
16 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
17 located in the Clerk's office.

18 Thomas Eugene Moore D-62389  
19 Pelican Bay State Prison  
20 P.O. Box 7500  
21 Crescent City, CA 95532

22 Dated: January 23, 2009

23 Richard W. Wiekling, Clerk  
24 By: LISA R CLARK, Deputy Clerk  
25  
26  
27  
28