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\*E-FILED - 3/8/12\*

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

PAUL D. O’HAIRE,	)	No. C 09-2508 RMW (PR)
	)	
Plaintiff,	)	ORDER GRANTING
v.	)	DEFENDANTS’ MOTION FOR
	)	SUMMARY JUDGMENT
	)	
	)	(Docket No. 87)
NAPA STATE HOSPITAL, et al.,	)	
	)	
Defendants.	)	

Plaintiff filed a pro se civil rights action pursuant to 42 U.S.C. § 1983 against employees of Napa State Hospital (“NSH”). NSH defendants have moved for summary judgment. Plaintiff has filed an opposition, and defendants have filed a reply. Having carefully considered the papers submitted, the court hereby GRANTS defendants’ motion for summary judgment for the reasons set forth below.

**BACKGROUND<sup>1</sup>**

Plaintiff is a civilly committed patient at NSH after being adjudicated not guilty by reason of insanity. (Compl. at ¶ 2.) Defendant Linda Howard (“Howard”) is the Program Director at NSH. (Decl. Howard at ¶ 1.) She was the Acting Program Director from February

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<sup>1</sup> The following facts are undisputed unless otherwise indicated.

1 2008 through November 2008, and then Program Director from November 2008 through June  
2 2009. (Id.) Defendant Debbie Weakley (“Weakley”) is the Nursing Coordinator at NSH. (Decl.  
3 Weakley at ¶ 1.) She was employed at NSH as the Unit Supervisor, Nursing Coordinator, and  
4 Program Assistant from January 2008 through June 2009. (Id.)

5 I. Medical History and Treatment

6 Plaintiff’s complaint alleges that from January 2008 through June 2009, defendants failed  
7 to properly address and treat his pain in his lower back/hip and right calf; nausea and weight  
8 loss; complications with his colonoscopy; a boil on his left buttock; sleep deprivation; Hepatitis  
9 C+, and need for pain management. (Decl. Ritsick at ¶ 7.)

10 A. Lower back/hip and right calf pain

11 In January 2008, plaintiff suffered lower back pain. (Compl. at ¶ 6.) It stopped after a  
12 period of time, and then plaintiff experienced increasing severe pain on the right side of his  
13 body. (Id.) On January 30, 2008, Dr. Chow opined that plaintiff had a pulled muscle, and  
14 prescribed a pain reliever. (Id. at ¶ 7.) The following day, due to a mix-up, the pharmacy  
15 discontinued the prescription. (Id.) On February 10, 2008, after plaintiff spoke with several  
16 people about his pain, they told plaintiff they had experienced similar pain, and it was  
17 determined to be sciatic nerve pain. (Id. at ¶ 11.) Dr. Chow continued to say he did not know  
18 why plaintiff was experiencing pain. (Id.) On February 13, 2008, plaintiff had an x-ray, and the  
19 technician told him that plaintiff’s condition was very similar to the sciatic nerve pain the  
20 technician was currently experiencing. (Id.) Plaintiff continued to experience pain and  
21 requested a medical neglect investigation on Dr. Chow. (Id. at ¶ 14.) On February 28, 2008, a  
22 neurologist diagnosed plaintiff with a pinched nerve which was causing the sciatic pain, and  
23 asked if plaintiff would consider surgery. (Id. at ¶ 16.) On May 27, 2008, plaintiff was taken to  
24 get orthopedic stockings for his swollen right calf. (Id. at ¶ 50.) Plaintiff was told he could not  
25 get more than one pair because budget issues only permitted one pair per patient. Plaintiff met  
26 with Weakley, Unit Supervisor, who told him that Susan Kessler wanted pictures of plaintiff’s  
27 right calf and ankle, but then Weakley told him that the Unit nor Howard had any cameras. (Id.  
28 at ¶ 42.) Plaintiff told Weakley again that neither the Unit nor Program Management have done

1 anything about the infirm medical and treatment conditions even though they were aware of it.  
2 (Id.) From February 2008 through June 2009, plaintiff received pain relievers for several  
3 different types of medications designed to alleviate his pain (Decl. Ritsick at ¶¶ 13-14, 19, 22,  
4 25, 27-29, 32, 35, 36); x-rays and physical therapy (id. at ¶¶ 15-20, 24, 25, 28-29, 32-33, 36); an  
5 MRI (id. at ¶ 23); and was referred to, and seen by specialists (id. at ¶¶ 24, 26, 27, 30-31, 33,  
6 35).

7 B. Nausea and weight loss

8 Plaintiff also complained about nausea and weight loss, however, he had been working  
9 with NSH staff to lose weight because he was considered obese. (Decl. Ritsick at ¶ 37.)  
10 Plaintiff was advised to follow a diet, and exercise to control his weight. (Id. at ¶¶ 38-43.)  
11 Plaintiff complained of nausea due to one of his pain medications, and NSH staff decreased the  
12 prescription. (Id. at ¶ 40.)

13 C. Colonoscopy

14 On February 7, 2008, plaintiff was scheduled to undergo a colonoscopy for removal of an  
15 inflammation in plaintiff's colon. (Compl. at ¶ 10.) That appointment was cancelled. (Id.) On  
16 March 21, 2008, plaintiff asked Nurse Cowart to contact Howard again about initiating a medical  
17 neglect investigation regarding Dr. Chow's handling of plaintiff's conditions and delays in  
18 receiving second colonoscopy. (Compl. at ¶ 27.) Cowart said that he emailed Howard, but  
19 plaintiff never heard from Howard. (Id.) On August 21, 2008, plaintiff was told that at 4:00  
20 p.m., he was to no longer have solid foods to prep for his colonoscopy the following morning.  
21 (Id. at ¶ 80.) Plaintiff was also given a prescription laxative solution to finish that was supposed  
22 to clear the bowels for surgery. (Decl. Ritsick at ¶ 51.) Plaintiff did not finish the solution. The  
23 following day, the surgeon told him that his bowel preparation was poor, and that he needed to  
24 schedule another colonoscopy. (Id. at ¶ 52; Compl. at ¶ 80.) This meant another discontinuation  
25 of pain medications to account for the procedure. (Id.) On August 26, 2008, plaintiff met with  
26 his treatment team with Weakley in attendance, where plaintiff was blamed for the poor bowel  
27 preparation. (Id. at ¶ 82.) The next day, plaintiff asked Patients Rights Advocate Susan Kessler  
28 to proceed with filing a complaint against Weakley for her improper statements. (Id. at ¶ 83.)

1 Plaintiff was rescheduled for a colonoscopy on October 10, 2008, which was successfully  
2 completed. (Decl. Ritsick at ¶¶ 52, 54.)

3 D. Boil

4 On February 28, 2008, a neurologist examined a boil on plaintiff's left buttock, and  
5 remarked that if it did not go down, it might need antibiotics. (Compl. at ¶ 16.) Between March  
6 and July 2008, NSH doctors assessed and prescribed two rounds of antibiotic treatment for the  
7 boil. (Decl. Ritsick at ¶¶ 60, 62, 66-67, 69.) On May 1, 2008, Dr. Chow examined plaintiff's  
8 boil. (Compl. at ¶ 38.) Dr. Chow said it looked like a chronic problem and said he would write  
9 a referral to the surgeon to have it removed. (Id.) On May 5 and May 6, 2008, plaintiff was seen  
10 by a neurologist, and his boil was discharging blood again. (Id. at ¶ 42.) On May 9, 2008,  
11 Weakley told plaintiff that his appointment to remove the boil had been cancelled, and plaintiff  
12 would be taken at a later date to a surgeon at the Queen of the Valley hospital, and also gave him  
13 several other appointment dates. (Id. at ¶ 43.) On May 20, 2008, plaintiff's boil was bleeding  
14 again. (Id. at ¶ 47.) On July 17, 2008, NSH staff took plaintiff to the surgical clinic to assess his  
15 boil, and the doctor determined that the boil had healed and surgery was unnecessary. (Decl.  
16 Ritsick at ¶ 70.) Plaintiff suffered no recurrences. (Id.)

17 E. Sleep deprivation

18 From January 2008 through June 2008, NSH staff gave plaintiff two different  
19 medications to help him sleep because he was complaining of sleep deprivation. (Decl. Ritsick  
20 at ¶ 72.) In June 2008, plaintiff's prescription for an antidepressant that aided sleep was  
21 increased, and plaintiff's sleeping patterns improved. (Id. at ¶¶ 73-74.) From June 2008 through  
22 June 2009, NSH staff continued to treat plaintiff's sleep issues with Restoril. (Id. at ¶ 74.)

23 F. Hepatitis C+

24 In 2006, plaintiff tested positive for Hapatitis C+ antibodies. (Decl. Ritsick at ¶ 75.) An  
25 RNA test determines the amount of viral RNA in a person's blood in order to determine whether  
26 the virus is still present. (Id.) A low "viral load" number indicates that the virus has been  
27 cleared from the body. (Id.) In 2006 - 2008, plaintiff's viral load was low, indicating that the  
28 virus was undetectable and cleared from his body. (Id. at ¶ 76.) From February 2008 through

1 July 2008, plaintiff was asymptomatic for Hepatitis C+, and he needed no treatment or care for  
2 it. (Id. at ¶ 78.)

3 G. Pain management

4 On May 22, 2008, plaintiff asked for a pain management program from his inter-  
5 disciplinary treatment planning team – Drs. Bleman, Bowyer, and Nurse Delma. (Compl. at ¶  
6 49.) Dr. Blement referred plaintiff to a pain specialist, Dr. Poh. (Id.) On June 2, 2008, plaintiff  
7 spoke with Weakley and told her that pain specialist, Dr. Poh, said NSH was unable to provide a  
8 pain management group. (Id. at ¶ 55.) Plaintiff asked her to contact Howard to request a  
9 medical neglect investigation and asked for a written response. (Id.) Weakley said she would  
10 email Howard, but Howard did not contact plaintiff. (Id.) On June 4 and June 19, plaintiff  
11 complained to Weakley again regarding infirm medical treatment. (Id. at ¶¶ 56, 62.) She again  
12 stated that she would email Howard. (Id.) Plaintiff was scheduled for a variety of group  
13 therapies each week. (Id. at ¶¶ 61, 67.)

14 II. Our Café History

15 On February 7, 2008, plaintiff requested a vacation from defendant Ken Wright  
16 (“Wright”), Director of Our Café, based upon the severity of plaintiff’s pain. (Compl. at ¶ 9.)  
17 Wright told plaintiff that NSH was experiencing a budget shortfall, which precluded disabled  
18 employees from receiving paid vacations for the foreseeable future. (Id.) In March 2008,  
19 plaintiff requested a two week vacation, but was told by Wright and Gardner Carlson, On the Job  
20 Training Program, that they needed time to consider the request because NSH had an insufficient  
21 budget which precluded paid vacations at that time. (Id. at ¶¶ 24, 26.) Wright told plaintiff that  
22 he could take a 2-day vacation, but that was it. (Id. at ¶ 26.)

23 On April 9, 2008, plaintiff spoke with Wright about the cessation of having paid vacation  
24 time. (Id. at ¶ 36.) Wright said he would have to talk to the Acting Chief. (Id.) On May 1,  
25 2008, Senior Manager Zapata started criticizing plaintiff’s work and attitude. (Id. at ¶ 38.)  
26 Plaintiff asked her what the procedure was for filing a complaint against her, and she directed  
27 him back to his Unit. Plaintiff complained to the Acting Chief, and Wright. (Id.) Wright told  
28 plaintiff to get a free soda and come back for a meeting the following day. (Id.) At the meeting

1 with Wright, Zapata, and Copple, plaintiff relayed that many employees had disputes with  
2 Zapata, and that despite plaintiff's painful medical condition, he worked to the best of his ability.  
3 (Id. at ¶ 39.)

4 In May and July 2008, plaintiff experienced work-related problems with Zapata and  
5 Copple, and noticed that Zapata started using a more derogatory tone toward males. (Id. at ¶¶  
6 42, 71.) On September 10, 2008, plaintiff told Zapata and Wright that he wasn't going to get any  
7 better, and that his new PT schedule was in the middle of work hours so he would have to adjust  
8 his work schedule. (Id. at ¶ 90.) Zapata told him that he would just lose hours. (Id.) Plaintiff  
9 complained that he needed accommodations due to his medical condition, and Zapata told him  
10 that he needed to either use sick hours or go on disability. (Id.)

11 In October 2008, plaintiff complained to Wright again that Zapata sent him home saying  
12 "you're having a bad day; you should go home." (Id. at ¶ 104.) Plaintiff complained that he was  
13 tired of being discriminated against by Zapata, referencing them as "them," or "make them do  
14 it." (Id.) On October 29, 2008, Wright told plaintiff he and plaintiff should meet with the  
15 treatment team. (Id. at ¶ 105.) The next day, plaintiff requested a lateral job transfer. (Id. at ¶  
16 106.) That night, plaintiff had a team meeting in which he was informed that three managers  
17 told them plaintiff had been aggressive. (Id.) On October 31, 2008, Wright told plaintiff he was  
18 on immediate suspension with full pay until further notice. (Id. at 108.) On November 4, 2008,  
19 during a team meeting, Wright said that for 6.5 years, plaintiff's work performance was  
20 exemplary, but throughout 2008, he had been aggressive and that all three managers were afraid  
21 of him. (Id. at ¶ 112.) In February 2009, plaintiff was told that Our Café was closing on March  
22 31, 2009 because of financial problems. (Id. at ¶ 141.)

### 23 ANALYSIS

24 Plaintiff claims that: (1) defendants Howard and Weakley failed to provide him adequate  
25 medical care and were deliberately indifferent to his serious medical needs, in violation of his  
26 Fourteenth and Eighth Amendment rights; (2) defendants Wright and NSH failed to provide  
27 reasonable accommodations at Our Café for plaintiff's physical disability, in violation of the  
28 Americans with Disabilities Act; and (3) defendant Wright retaliated against him for his

1 opposition to unlawful employment practices in violation of Title VII of Civil Rights Act.  
2 Defendants move for summary judgment, arguing that they are entitled to judgment as a matter  
3 of law because there are no genuine issue of material facts in dispute.

4 I. Standard of Review

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

11 The party moving for summary judgment bears the initial burden of identifying those  
12 portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine  
13 issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). Where the moving  
14 party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no  
15 reasonable trier of fact could find other than for the moving party. But on an issue for which the  
16 opposing party will have the burden of proof at trial, the moving party need only point out “that  
17 there is an absence of evidence to support the nonmoving party’s case.” Id. at 325.

18 Once the moving party meets its initial burden, the nonmoving party must go beyond the  
19 pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is a  
20 genuine issue for trial.” Fed. R. Civ. P. 56(e). The court is only concerned with disputes over  
21 material facts and “factual disputes that are irrelevant or unnecessary will not be counted.”  
22 Anderson, 477 U.S. at 248. It is not the task of the court to scour the record in search of a  
23 genuine issue of triable fact. Keenan v. Allen, 91 F.3d 1275, 1279 (9th Cir. 1996). The  
24 nonmoving party has the burden of identifying, with reasonable particularity, the evidence that  
25 precludes summary judgment. Id. If the nonmoving party fails to make this showing, “the  
26 moving party is entitled to judgment as a matter of law.” Celotex Corp., 477 U.S. at 323.

1 II. Plaintiff's Claims

2 A. Medical needs

3 Plaintiff asserts that he was not provided adequate medical care, and NSH staff was  
4 deliberately indifferent to his medical needs. Plaintiff believes that Howard and Weakley are  
5 liable for these violations.

6 “Persons who have been involuntarily committed are entitled to more considerate  
7 treatment and conditions of confinement than criminals whose conditions of confinement are  
8 designed to punish.” Youngberg v. Romeo, 457 U.S. 307, 321-22 (1982). Under the Due  
9 Process Clause of the Fourteenth Amendment, civilly-committed persons retain substantive  
10 liberty interests, which include at least the right to basic necessities such as adequate food,  
11 shelter, clothing and medical care; safe conditions of confinement; and freedom from  
12 unnecessary bodily restraint. Id. at 315-16. The court must only make certain that professional  
13 judgment in fact was exercised in making the pertinent decision. Id. at 321-22. “[T]he decision,  
14 if made by a professional, is presumptively valid; liability may be imposed only when the  
15 decision by the professional is such a substantial departure from accepted professional judgment,  
16 practice, or standards as to demonstrate that the person responsible actually did not base the  
17 decision on such judgment.” Id. at 323. Courts undertaking this inquiry are restricted to two  
18 questions: “(1) whether the decisionmaker is a qualified professional entitled to deference, and  
19 (2) whether the decision reflects a conscious indifference amounting to gross negligence, so as to  
20 demonstrate that the decision was not based upon professional judgment.” Houghton v. South,  
21 965 F.2d 1532, 1536 (9th Cir. 1992).

22 Viewing the evidence in the light most favorable to the plaintiff, there is an absence of  
23 evidence that the treatment decisions regarding plaintiff's care from January 2008 through June  
24 2009 was a substantial departure from accepted professional judgment. Plaintiff does not dispute  
25 the accuracy of the extensive records submitted by defendants. Nor does plaintiff assert that  
26 NSH staff are not “qualified professionals.” Based on the evidence submitted by defendants,  
27 there is an absence of evidence that the decisions made regarding plaintiff's medical treatment  
28 was a “conscious indifference amounting to gross negligence.” Defendants set forth evidence



1 that the treatment decisions made by NSH staff were within the normal standard of care for  
2 people with plaintiff's medical conditions. (Decl. Ritsick at ¶¶ 84-85.) Further, plaintiff submits  
3 no evidence in support of his claim that the treatment decisions of NSH staff were outside the  
4 scope of professional judgment or that the decisions that were made were not presumptively  
5 valid. Plaintiff's general accusations against individual non-defendant doctors are not enough in  
6 themselves to show that professional judgment was no

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1 drawn that a substantial risk of serious harm exists, and he must also draw the inference.”  
2 Farmer, 511 U.S. at 837. Thus, an inadvertent failure to provide adequate medical care, mere  
3 negligence or medical malpractice, a mere delay in medical care (without more), or a difference  
4 of opinion over proper medical treatment, are all insufficient to constitute an Eighth Amendment  
5 violation. See Estelle, 429 U.S. at 105-07.

6 Viewing the evidence in the light most favorable to the plaintiff, plaintiff has tendered no  
7 competent evidence demonstrating that the course of treatment chosen for him was medically  
8 unacceptable under the circumstances, see Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir.  
9 2004). See, e.g., Estelle, 429 U.S. at 107 (“A medical decision not to order an X-ray, or like  
10 measures, does not constitute cruel and unusual punishment.”); Fleming v. Lefevere, 423 F.  
11 Supp. 2d 1064, 1070 (C.D. Cal. 2006) (“Plaintiff’s own opinion as to the appropriate course of  
12 care does not create a triable issue of fact because he has not shown that he has any medical  
13 training or expertise upon which to base such an opinion.”). In this regard, plaintiff’s  
14 disagreement with NSH staff as to the appropriate course of diagnosis and treatment, without  
15 more, is insufficient to survive defendants’ motion for summary judgment. At most, plaintiff’s  
16 allegations amount to negligence. However, a claim of medical malpractice or negligence is  
17 insufficient to make out a violation of the Eighth Amendment. See Toguchi, 391 F.3d at  
18 1060-61. Moreover, in light of the extensive medical records and undisputed evidence set forth  
19 by defendants, plaintiff has failed to demonstrate that there was an

1 do, that causes the deprivation of which the plaintiff complains. See id. at 633. The inquiry into  
2 causation must be individualized and focus on the duties and responsibilities of each individual  
3 defendant whose acts or omissions are alleged to have caused a constitutional deprivation. Id. at  
4 633. To defeat summary judgment, sweeping conclusory allegations will not suffice; the  
5 plaintiff must instead “set forth specific facts as to each individual defendant’s” actions which  
6 violated his or her rights. Id. at 634.

7         Howard and Weakley are the only properly served and named defendants subject to  
8 liability for this claim.

9         As the Program Director, Howard’s duties did not allow her to make medical decisions  
10 regarding patients. (Decl. Howard at ¶ 2.) If there were problems in any of the units in  
11 Howard’s program, Howard or her Program Assistant investigated the problem and attempted to  
12 find a solution. (Id. at ¶ 4.) After investigation, Howard or the Program Assistant would refer  
13 complaints to the appropriate party for action, such as the supervising doctors, supervising  
14 psychiatrists, unit supervisors, or Executive Director if Howard believed she could not resolve  
15 the complaint. (Id.) Regarding complaints about medical care, if Howard or her Program  
16 Assistant was unable to resolve it, her normal course of action would be to refer the complaints  
17 to the Nursing Coordinator, Nursing Administrator, and/or the Medical Director. (Id. at ¶ 5.)  
18 Plaintiff’s only allegations linking Howard to his claim were that he asked NSH staff to contact  
19 Howard to begin a “medical neglect investigation” and never heard from Howard (Compl. at ¶¶  
20 14, 27, 55, 56, 81), and that he sent an “Indexed Packet” to Howard and was told that she would  
21 meet with him regarding his claims of infirm conditions (Id. at ¶ 5). Here, all that plaintiff has  
22 shown is that NSH staff informed him that they would alert Howard as to plaintiff’s claims, and  
23 Howard has not personally responded to him.<sup>2</sup> Even assuming that plaintiff’s medical care was  
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25         <sup>2</sup> Plaintiff’s unverified, bald, and conclusory statement disputing Howard’s assertion that  
26 she or her program assistant investigated plaintiff’s claims is not sufficient to establish a genuine  
27 issue of material fact. (Opp. at ¶ 24.) See Rodriguez v. Airborne Express, 265 F.3d 890, 902  
28 (9th Cir. 2001); see also Thornton v. City of St. Helens, 425 F.3d 1158, 1167 (9th Cir. 2005) (in  
equal protection case, conclusory statement of bias not sufficient to carry nonmoving party’s  
burden). Once the moving party meets its initial burden, the nonmoving party must go beyond  
the pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there

1 deficient in some manner, plaintiff has not provided evidence that Howard participated in,  
2 directed, or knew about alleged wrongful conduct and failed to stop it. See, e.g., Leer, 844 F.2d  
3 at 634 (concluding that summary judgment was proper because the prisoners failed to allege  
4 facts that demonstrated that the defendant was the actual and proximate cause of any  
5 constitutional violation).

6 To the extent plaintiff means to sue Howard based her supervisory role, that claim also  
7 fails. A supervisor may be liable under section 1983 upon a showing of (1) personal  
8 involvement in the constitutional deprivation or (2) a sufficient causal connection between the  
9 supervisor's wrongful conduct and the constitutional violation. Starr v. Baca, 652 F.3d 1202,  
10 1207 (9th Cir. 2011); Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en  
11 banc). A supervisor therefore generally "is only liable for constitutional violations of his  
12 subordinates if the supervisor participated in or directed the violations, or knew of the violations  
13 and failed to act to prevent them." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). "It has  
14 long been clearly established that '[s]upervisory liability is imposed against a supervisory  
15 official in his individual capacity for his own culpable action or inaction in the training,  
16 supervision, or control of his subordinates, for his acquiescence in the constitutional deprivations  
17 of which the complaint is made, or for conduct that showed a reckless or callous indifference to  
18 the rights of others.'" Preschooler II v. Davis, 479 F.3d 1175, 1183 (9th Cir. 2007) (citations  
19 omitted).

20 Here, there was not a sufficient causal connection between Howard's conduct and any  
21 constitutional violation. Moreover, the complaints plaintiff had were against medical staff, and  
22 there was no evidence that Howard was their supervisor, or that they were her subordinates.  
23 Finally, there was no evidence that Howard was responsible for the NSH medical staff's training  
24 or supervision, or that she acquiesced in any allegation of deprivation.

25 Thus, Howard is entitled to summary judgment on the ground that plaintiff has not

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27 is a genuine issue for trial." Fed. R. Civ. P. 56(e). "The non-moving party must show more than  
28 the mere existence of a scintilla of evidence." In re Oracle Corporation Securities Litigation,  
627 F.3d 376, 387 (9th Cir. 2010) (citing Liberty Lobby, 477 U.S. at 252). Plaintiff has not  
satisfied his burden.

1 provided evidence from which a reasonable jury could find that she proximately caused the  
2 purported deprivation of his Eighth or Fourteenth Amendment rights.

3 Similarly, Weakley was a Unit Supervisor, Nursing Coordinator, and Program Assistant  
4 from January 2008 through June 2009. (Decl. Weakley at ¶ 1.) As Unit Supervisor, she oversaw  
5 the function of the unit, and if there were any issues arising involving unit staff or patients,  
6 Weakley’s job was to investigate and attempt to resolve the issues. (Id. at ¶ 4.) As Nursing  
7 Coordinator, she administratively managed and supervised the nurses, and if there were issues  
8 involving the nursing staff, Weakley’s job was to investigate and attempt to resolve the issues.  
9 (Id. at ¶ 5.) As the Program Assistant, Weakley was responsible for administrative tasks, as well  
10 as investigating patient complaints and attempting to resolve them or refer them to the Program  
11 Director or Office of Patient’s Rights. (Id. at ¶ 6.) Plaintiff’s only allegations regarding  
12 Weakley were: (1) she told him there were no cameras in the unit available to take pictures of  
13 his leg (Compl. at ¶ 42); (2) she told him that an appointment had been canceled but would be  
14 rescheduled (id.); (3) she blamed him for poor bowel preparation prior to his colonoscopy (id. at  
15 ¶ 82); (4) she recommended his transfer to a different unit (id. at ¶¶ 156-57); and (5) she emailed  
16 Howard regarding pain management groups and “infirm medical conditions” (id. at ¶¶ 55, 56).  
17 Again, plaintiff has not provided evidence that Weakley participated in, directed, or knew of any  
18 alleged wrongful conduct and failed to stop it.<sup>3</sup> See, e.g., Leer, 844 F.2d at 634.

19 Again, to the extent plaintiff means to sue Weakley based her supervisory role, that claim  
20 also fails. The complaints plaintiff had were against medical staff, and there was no evidence  
21 that Weakley was their supervisor, or that they were her subordinates. Finally, there was no  
22 evidence that Weakley was responsible for the NSH medical staff’s training or supervision, or  
23 that she acquiesced in any allegation of deprivation.

24 Thus, Weakley is entitled to summary judgment on the ground that plaintiff has not  
25 provided evidence from which a reasonable jury could find that she proximately caused the

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27 <sup>3</sup> In his unverified opposition, plaintiff discusses in more detail, Weakley’s involvement  
28 in plaintiff’s transfer to a different unit. (Opp. at ¶¶ 25-29.) However, it appears that plaintiff is  
alleging facts to support a claim of retaliation, which is not properly before this court.

1 purported deprivation of his Eighth or Fourteenth Amendment rights.

2           Alternatively, defendants contend that even if they violated plaintiff’s constitutional  
3 rights, they are entitled to qualified immunity. The defense of qualified immunity protects  
4 “government officials . . . from liability for civil damages insofar as their conduct does not  
5 violate clearly established statutory or constitutional rights of which a reasonable person would  
6 have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In Saucier v. Katz, 533 U.S. 194  
7 (2001), the Supreme Court set forth a two-pronged test to determine whether qualified immunity  
8 exists. First, the court asks: “[t]aken in the light most favorable to the party asserting the injury,  
9 do the facts alleged show the officer's conduct violated a constitutional right?” Id. at 201. If no  
10 constitutional right was violated if the facts were as alleged, the inquiry ends and defendants  
11 prevail. Id. If, however, “a violation could be made out on a favorable view of the parties’  
12 submissions, the next, sequential step is to ask whether the right was clearly established . . . The  
13 contours of the right must be sufficiently clear that a reasonable official would understand that  
14 what he is doing violates that right. . . . The relevant, dispositive inquiry in determining whether  
15 a right is clearly established is whether it would be clear to a reasonable officer that his conduct  
16 was unlawful in the situation he confronted.” Id. at 201-02 (quoting Anderson v. Creighton, 483  
17 U.S. 635, 640 (1987)). Although Saucier required courts to address the questions in the  
18 particular sequence set out above, courts now have the discretion to decide which prong to  
19 address first, in light of the particular circumstances of each case. See Pearson v. Callahan, 553  
20 U.S. 223, 236 (2009).

21           First, civilly committed persons have a clearly established liberty interest in “reasonably  
22 nonrestrictive confinement conditions.” Youngberg, 457 U.S. at 324 (holding that civilly  
23 committed persons have a substantive due process right to “reasonable care and safety,  
24 reasonably nonrestrictive confinement conditions, and such training as may be required by these  
25 interests”). Second, the right against deliberate indifference to a serious medical need has been  
26 clearly established. See Clement v. Gomez, 298 F.3d 898, 906 (9th Cir. 2002).

27           As discussed, the record does not show a violation of plaintiff’s Fourteenth or Eighth  
28 Amendment rights. Even if a constitutional violation had been shown, defendants would prevail

1 on the second Saucier prong. For the purposes of qualified immunity the official’s conduct must  
2 be viewed not as a broad general proposition, but in the context of the specific facts of the case.  
3 Saucier, 522 U.S. at 202.

4 The specific facts of this case show that defendants knew that plaintiff had numerous  
5 complaints about the way NSH was handling his medical conditions. It is possible for a  
6 reasonable prison official in defendants’ positions to mistakenly, though reasonably, perceive  
7 that the exposure of risk of harm to plaintiff was not so high, and that acting within the confines  
8 of their job duties by investigating and referring the complaints to the appropriate officials, but  
9 not doing more, was constitutionally permissible. See, e.g., Estate of Ford v. Ramirez-Palmer,  
10 301 F.3d 1043, 1050-52 (9th Cir. 2002). Thus, defendants are entitled to qualified immunity.

11 B. ADA

12 Plaintiff claims that NSH and Wright failed to provide reasonable accommodations for  
13 his physical disabilities while he was employed at Our Café, in violation of the ADA.  
14 Specifically, plaintiff alleges that NSH and Wright refused to allow him to take short breaks  
15 because of his sciatic pain, and when he mentioned that he would file a complaint against them,  
16 he was suspended from work. Defendants assert that NSH is immune from money damages, and  
17 also that plaintiff fails to state a claim under Titles I, II, and III of the ADA. Plaintiff concedes  
18 that NSH is immune from money damages, but claims that NSH should be liable for declaratory  
19 relief. (Opp. at ¶ 32.)

20 “Title I of the ADA enables individuals who have suffered employment discrimination  
21 because of their disabilities to sue employers for damages and injunctive relief in federal court.”  
22 Walsh v. Nevada Dept. of Human Resources, 471 F.3d 1033, 1036 (9th Cir. 2006) (citing 42  
23 U.S.C. § 12117(a)). No party disputes that NSH is immune from money damages under Title I.  
24 Walsh, 471 F.3d 1036 (“State governments can invoke the Eleventh Amendment’s guarantee of  
25 sovereign immunity against Title I suits seeking money damages.”) (citing Board of Trustees of  
26 the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001)). Thus, the claim against NSH for  
27 damages is dismissed.

28 Defendants’ assertion that plaintiff has no standing to sue NSH for prospective equitable

1 relief is correct. See Walsh, 471 F.3d at 1037. In Walsh, a former employee sued a state agency  
2 and requested injunctive relief to force the Department to adopt and enforce lawful policies  
3 regarding discrimination based on disability. The Ninth Circuit held that because the employee  
4 no longer worked for the State or the Department, nor was she seeking re-employment, it was  
5 unlikely that she would benefit from an injunction requiring the anti-discriminatory policies she  
6 requested. Thus, concluded the Ninth Circuit, she had no standing to bring such a claim for  
7 relief. Id. Similarly, here, plaintiff was not employed at Our Café at the time he filed suit, nor  
8 was he seeking to be re-employed. This court agrees that plaintiff has no standing to bring a  
9 claim for prospective equitable relief.

10 Moreover, declaratory relief is unavailable. The Declaratory Judgment Act, 28 U.S.C. §  
11 2201 (1993), “permits a federal court to declare the rights of a party whether or not further relief  
12 is or could be sought, and . . . declaratory relief may be available even though an injunction is  
13 not.” Green v. Mansour, 474 U.S. 64, 72 (1985). “The district court, however, may grant  
14 declaratory relief only when there is an actual case or controversy; a declaratory judgment may  
15 not be used to secure judicial determination of moot questions.” Native Village of Noatak v.  
16 Blatchford, 38 F.3d 1505, 1514 (9th Cir. 1994). “Mootness is the doctrine of standing set in a  
17 time frame: The requisite personal interest that must exist at the commencement of the litigation  
18 (standing) must continue throughout its existence (mootness).” Id. at 1509 (quoting United  
19 States Parole Comm’n v. Geraghty, 445 U.S. 388, 397 (1980)). The constitutional “case or  
20 controversy” requirement allows the district court to grant relief in an action filed only if there is  
21 a “real and substantial controversy admitting of specific relief through a decree of a conclusive  
22 character, as distinguished from an opinion advising what the law would be upon a hypothetical  
23 state of facts.” See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937). A declaratory  
24 judgment thus may not be used to secure judicial determination of moot questions. See  
25 Blatchford, 38 F.3d at 1509. Here, Our Café terminated its operations on March 31, 2009, prior  
26 to the commencement of this action due to financial issues. Thus, any declaratory judgment  
27 against NSH for its alleged discrimination against plaintiff’s disability as an employee of Our  
28 Café is no longer a real or substantial controversy. Nor does plaintiff’s claim satisfy the two



1 exceptions to the mootness doctrine of being “capable of repetition yet evading review,” or  
2 voluntary cessation. Cf. Blatchford, 38 F.3d at 1509-11. Thus, plaintiff’s claim for declaratory  
3 relief is against NSH is also denied.

4         Regarding Wright’s liability under Title I, the Ninth Circuit has concluded that  
5 “individual defendants cannot be held personally liable for violations of the ADA.” Walsh, 471  
6 F.3d at 1038. Thus, defendants are entitled to summary judgment as to plaintiff’s Title I claim.

7         Title II of the ADA, 42 U.S.C. § 12101 et seq., provides that “no qualified individual with  
8 a disability shall, by reason of such disability, be excluded from participation in or be denied the  
9 benefits of the services, programs, or activities of a public entity, or be subjected to  
10 discrimination by any such entity.” 42 U.S.C. § 12132. However, plaintiff’s claim against NSH  
11 and Wright must be dismissed under Title II because Title II does not apply to employment. See  
12 Zimmerman v. Oregon Dept. of Justice, 170 F.3d 1169, 1173 (9th Cir. 1999).

13         Under Title III of the ADA, “[n]o individual shall be discriminated against on the basis of  
14 disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages,  
15 or accommodations of any place of public accommodation by any person who owns, leases (or  
16 leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a). However, Title  
17 III is also inapplicable to employment discrimination. See Parker v. Metropolitan Life Ins. Co.,  
18 121 F.3d 1006, 1115 (6th Cir. 1997) (holding “the statutory framework of the ADA expressly  
19 limits discrimination in employment practices to Title I of the ADA”); Gardner v. Pediatrix  
20 Medical Group, No. 09-1325 MMC, 2009 WL 2394368 (N.D. Cal. 2009); Motzkin v. Trs. of  
21 Boston Univ., 938 F. Supp. 983, 996 (D. Mass. 1996) (holding “Title III does not apply to  
22 employment discrimination”); see also Weyer v. Twentieth Century Fox Film Corp., 198 F.3d  
23 1104, 1114 (9th Cir. 2000) (noting “[w]e see no reason why the rationale of Zimmerman,” in  
24 which Ninth Circuit held Title II of ADA inapplicable to “employment,” would not “apply  
25 equally to Title III [of the ADA]”).

26         Thus, defendants are entitled to summary judgment on plaintiff’s ADA claim.

27         C.     Title VII of the Civil Rights Act

28         Finally, plaintiff claims that Wright retaliated against him for his opposition to the

1 unlawful employment practices at Our Café, in violation of Title VII of Civil Rights Act.<sup>4</sup>  
2 Defendants argue that plaintiff fails to state a claim under Title VII because it prohibits  
3 employment discrimination only on the basis of race, color, religion, sex, or national origin, and  
4 plaintiff does not allege as such. See 42 U.S.C. 2000e-2(a). Because plaintiff only alleges that  
5 Wright engaged in unlawful employment practices by discriminating against plaintiff because of  
6 his disability, plaintiff's Title VII claim fails to state a cognizable claim. Defendants are entitled  
7 to summary judgment on this claim.

8 **CONCLUSION**

9 The court concludes that plaintiff has failed to raise a genuine issue of material fact as to  
10 his allegations of violations of the Eighth and Fourteenth Amendments, the ADA, and Title VII  
11 of the Civil Rights Act, and that defendants are entitled to judgment as a matter of law.  
12 Accordingly, defendants' motion for summary judgment is GRANTED. The clerk shall  
13 terminate all pending motions, enter judgment for the defendants, and close the file.

14 IT IS SO ORDERED.

15 DATED: \_\_\_\_\_

  
RONALD M. WHYTE  
United States District Judge

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<sup>4</sup> Plaintiff appears to have abandoned this claim in his opposition by failing to address it.

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

PAUL D. O'HAIRE,  
Plaintiff,

Case Number: CV09-02508 RMW

**CERTIFICATE OF SERVICE**

v.

NAPA STATE HOSPITAL, ET AL. et al,  
Defendant.

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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 March 8, 2012, 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.

Paul D. O'Haire  
Unit T-6  
Napa State Hospital  
2100 Napa-Vallejo Highway  
Napa, CA 94558-6293

Dated: March 8, 2012

Richard W. Wieking, Clerk  
By: Jackie Lynn Garcia, Deputy Clerk