UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PEDRO REYES,

Plaintiff,

v.

EDMUND G. BROWN, JR., DR. ROGELIO ORTEGA, RAY MADDEN, JOHN DOE CORRECTIONAL OFFICERS 1 THROUGH 5, JOHN DOE CORRECTIONAL SERGEANT, AND NURSE BELTRAN,

Defendants.

Case No.: 16cv84-JLS (BLM)

REPORT AND RECOMMENDATION FOR ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED

[ECF Nos. 39, 53]

This Report and Recommendation is submitted to United States District Judge Janis L. Sammartino pursuant to 28 U.S.C. § 636(b) and Civil Local Rules 72.1(c) and 72.3(f) of the United States District Court for the Southern District of California. For the following reasons, the Court **RECOMMENDS** that Defendants' motions to dismiss be **GRANTED**.

PROCEDURAL BACKGROUND

On January 5, 2016, Plaintiff Pedro Reyes, a state prisoner proceeding *pro se* and *in forma pauperis*, filed a complaint under the Civil Rights Act, 42 U.S.C. § 1983, against Defendants Brown, Ortega, and Madden. ECF No. 1 ("Comp."). Plaintiff alleged claims under the Eighth and Fourteenth Amendments. Id. at 3-18. On April 25, 2016, Defendants filed a

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Motion to Dismiss the Complaint for Failure to State a Claim for which Relief May be Granted. ECF No. 19-1. After granting two requests from Plaintiff to continue his deadline for opposing Defendants' motion [see ECF Nos. 22-26], Plaintiff timely filed his opposition [ECF No. 28].

On July 25, 2016, Plaintiff filed a "REQUEST FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT" and "PLAINTIFF'S SECOND MOTION FOR THE APPOINTMENT OF COUNSEL BASED ON PRIOR ARGUMENT AND A RECENT THREAT TO AN INMATE ASSISTANT" that were accepted by the Court on discrepancy on August 2, 2016. ECF Nos. 29-32. On August 15, 2016, Defendants filed a response indicating that they did not oppose the motion to file a first amended complaint [see ECF No. 35] and the Court took the matter under submission. On August 26, 2016, District Judge Sammartino granted Plaintiff's motion to file a first amended complaint and denied as moot Defendants' motion to dismiss. ECF No. 36.

On July 25, 2016, Plaintiff filed the operative First Amended Complaint under the Civil Rights Act, 42 U.S.C. § 1983, alleging violations of the Eighth Amendment against Defendants Madden, Ortega, Beltran, and John Does 1 through 6. ECF No. 37 ("FAC"). On October 5, 2016, Defendants Madden and Ortega filed a Motion to Dismiss for Failure to State a Claim for Which Relief May be Granted. ECF No. 39-1 ("MTD 1").

On October 25, 2016, Plaintiff filed a letter requesting the appointment of counsel, or in the alternative, more time to file his opposition. ECF No. 44; see also ECF No. 45. On November 4, 2016, the Court issued an order denying Plaintiff's motion for the appointment of counsel and granted Plaintiff's motion to extend the deadline to file an opposition to Defendants' motion to dismiss. ECF No. 45. On November 15, 2016, Plaintiff filed a motion to appoint counsel and requested the case be stayed until the Court rules on the motion to appoint counsel. ECF No. 48. On November 30, 2016, the Court denied Plaintiff's motion to appoint counsel and denied as moot Plaintiff's motion to stay. ECF No. 49.

On December 12, 2016, Plaintiff filed a second motion for an extension of time to file an opposition to Defendants' motion to dismiss. ECF No. 51. The Court granted Plaintiff's motion and ordered Plaintiff to file his opposition on or before January 12, 2017, and Defendants to file their reply on or before February 6, 2017. ECF No. 52. On January 3, 2017, Plaintiff timely filed

his opposition. ECF No. 55 ("Oppo. 1"). Defendants did not file a reply. See Docket.

On December 21, 2016, Defendant Beltran filed a motion to dismiss Plaintiff's First Amended Complaint for failure to state a claim for which relief may be granted. ECF No. 53-1 ("MTD 2"). On January 24, 2017, Plaintiff filed his opposition [ECF No 56 ("Oppo. 2")]. Defendants did not file a reply. See Docket.

COMPLAINT ALLEGATIONS

Because this case comes before the Court on a motion to dismiss, the Court must accept as true all material allegations in the complaint, and must construe the complaint and all reasonable inferences drawn therefrom in the light most favorable to Plaintiff. See Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002).

According to the First Amended Complaint, Plaintiff (1) was forced to endure unsafe prison conditions, (2) was denied adequate medical care, and (3) suffered cruel and unusual punishment. FAC. Plaintiff alleges that in order to move around the D-Yard prison facility where he is housed to get breakfast and dinner or to exercise (jog, walk, run etc.), he is required to walk on a specific track. FAC at 3. The track, however, is in a severely dangerous condition and is comprised of sharp, jagged rocks that protrude from various angles, wide cracks, and random indentations. Id. Due to the state of the path, it is difficult for people using the path to maintain their balance and it is likely that anyone who falls on the path will "turn an ankle in." Id. Plaintiff alleges that the poor condition of the track caused him to trip and fall while jogging around the path on March 11, 2015. Id. The fall caused Plaintiff to strike his head and neck on the asphalt, lose consciousness for approximately two to three minutes, injure his shoulder and neck, and suffer several scrapes and bruises. Id. Plaintiff alleges that Defendant Madden, acting in his individual and official capacity as Warden, was aware of the unsafe condition of the path, failed to repair the path, and implemented a policy permitting the track to be fixed only with requested funds from Sacramento when he knew those requests were being ignored. Id. at 3, 35. Plaintiff further alleges that Defendant Madden could have used inmate labor or funds intended to be used for less serious issues to fix the track. Id. at 3. Plaintiff alleges that the handling of the dangerous path violated his Eighth Amendment rights

and that he was subjected to "dangerous prison conditions." Id.

With respect to his cruel and unusual punishment claims, Plaintiff alleges that when he initially fell and lost consciousness on March 11, 2015, none of the correction officers supervising the yard offered Plaintiff assistance.[1] Id. at 4. Plaintiff also alleges that the correctional Sergeant supervising the correction officers failed to ensure Plaintiff's safety.[2] Id. Instead, other inmates carried him to the medical clinic. Id. Plaintiff alleges that the officers' failure to assist Plaintiff constitutes cruel and unusual punishment. Id.

Plaintiff also alleges that he failed to receive adequate medical care from March 11, 2015 to June 22, 2015. See Id. at 5-7. After the inmates carried Plaintiff to the medical clinic, Nurses Pacheco and Johnson cleaned Plaintiff's superficial wounds. Id. at 5. Plaintiff told them that he was in severe pain. Id. Nurses Pacheco and Johnson sent Plaintiff to see Defendant Nurse Beltran.[3] Id. Nurse Beltran prescribed Plaintiff 600mg of Ibuprofen for pain, and told Plaintiff to put in a medical request if he wanted to see the doctor. Id.

Plaintiff's pain continued to increase and he was seen by Defendant Doctor Ortega "[a] few days after Plaintiff[']s fall." Id. at 6. Defendant Ortega allegedly "continuously down played Plaintiff's pain" and "ignored Plaintiff when [he] said that 600mg of []Ibuprofen did nothing for the pain." Id. Plaintiff alleges that Defendant Ortega accused Plaintiff of faking his injuries. Id. Defendant Ortega told Plaintiff he would have x-rays taken of Plaintiff's shoulder and spine. Id. However, Plaintiff alleges that he "does not know if these x-rays took place." Id. Plaintiff alleges

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[1] The Correction Officers are named as John Does 1-5 in Plaintiff's First Amended Complaint. These Doe Defendants have not been served in this action. See ECF No. 41 (Summons returned unexecuted as to John Does 1 through 5). Because the Doe correctional officers have not been served, this Report and Recommendation will not address Plaintiff's claims against them.

[2] The Correctional Sergeant is named as John Doe 6 in Plaintiff's First Amended Complaint. This Doe Defendant also has not been served in this action. See ECF No. 42 (Summons returned unexecuted as to John Doe 6). Accordingly, this Report and Recommendation will not address Plaintiff's claim against the Doe correctional sergeant.

[3] The claims against Defendant Beltran are addressed in Defendants' MTD 2. See MTD 2. Defendants' MTD 1 does not address Defendant Beltran who waived service on November 17, 2016, after the MTD 1 was filed. See ECF No. 46.

his medical records indicate that three x-rays were taken of his shoulder and spine on April 6, 2015 and April 20, 2015, but that the x-ray technicians did not replace the x-ray film after taking the first x-rays. Id. at 6, 18, 20. Plaintiff alleges that had Defendant Ortega actually taken x-rays, he would have seen Plaintiff's injury. Id. at 6. After the x-rays and Plaintiff's continued complaints of pain, Defendant Ortega sent Plaintiff to get a cervical spine MRI on May 29, 2015. Id. at 7, 22. The MRI indicated that Plaintiff needed emergency surgery to place a steel rod in his neck.[4] Id. at 7. On June 22, 2015, Plaintiff underwent a non-complicated C4-C5 ACDF surgery with Dr. Berman for a traumatic C4-C5 herniated disk with myelopathy. Id. at 58. Plaintiff alleges that Defendant Ortega was deliberately indifferent when he deprived Plaintiff of adequate medical care for over three months between the date of Plaintiff's fall and the date of the surgery. Id. at 2, 6.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 8(a), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the plaintiff's claims. See Fed. R. Civ. P. 12(b)(6). The issue is not whether the plaintiff ultimately will prevail, but whether he has properly stated a claim upon which relief could be granted. Jackson v. Carey, 353 F.3d 750, 755 (9th Cir. 2003). In order to survive a motion to dismiss, the plaintiff must set forth "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). If the facts alleged in the complaint are "merely consistent with" the defendant's liability, the plaintiff has not satisfied

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[4] Plaintiff's MRI revealed the presence of cervical cord compression and C4-5 disk extrusion with central canal stenosis, cord compression, and associated myelomalacia. FAC at 22.

the plausibility standard. Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557). Rather, "[a] claim has facial plausibility when the [plaintiff] plead[s] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556).

When a plaintiff appears *pro se*, the court must be careful to construe the pleadings liberally and to afford the plaintiff any benefit of the doubt. See Erickson v. Pardus, 551 U.S. 89, 94 (2007); Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002). This rule of liberal construction is "particularly important" in civil rights cases. Hendon v. Ramsey, 528 F. Supp. 2d 1058, 1063 (S.D. Cal. 2007) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992)); see also Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (stating that because "Iqbal incorporated the Twombly pleading standard and Twombly did not alter the courts' treatment of pro se filings; accordingly we continue to construe pro se filings liberally . . . ." This is particularly important where the petitioner is a *pro se* prisoner litigant in a civil matter). When giving liberal construction to a *pro se* civil rights complaint, however, the court is not permitted to "supply essential elements of the claim[] that were not initially pled." Easter v. CDC, 694 F. Supp. 2d 1177, 1183 (S.D. Cal. 2010) (quoting Ivey v. Bd. of Regents of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982)). "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." Id. (quoting Ivey, 673 F.2d at 268).

The court should allow a *pro se* plaintiff leave to amend his or her complaint, "unless the pleading could not possibly be cured by the allegation of other facts." Ramirez v. Galaza, 334 F.3d 850, 861 (9th Cir. 2003) (internal quotation marks and citations omitted). Moreover, "before dismissing a pro se complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively." Ferdik, 963 F.2d at 1261.

To state a claim under § 1983, a plaintiff must allege facts sufficient to show that (1) a person acting under color of state law committed the conduct at issue, and (2) the conduct deprived the plaintiff of some "rights, privileges, or immunities" protected by the Constitution of

the laws of the United States. 42 U.S.C. § 1983. To prevail on a § 1983 claim, "a plaintiff must demonstrate that he suffered a specific injury as a result of specific conduct of a defendant and show an affirmative link between the injury and the conduct of the defendant." Harris v. Schriro, 652 F. Supp. 2d 1024, 1034 (D. Ariz. 2009) (citation omitted). A particular defendant is liable under § 1983 only when the plaintiff proves he participated in the alleged violation. Id.

I. MOTION TO DISMISS – DEFENDANTS MADDEN AND ORTEGA

Plaintiff alleges that he was forced to endure unsafe prison conditions, denied adequate medical care, and suffered cruel and unusual punishment in violation of his Eighth Amendment rights. FAC. Plaintiff seeks (1) an injunction preventing Defendant Ortega from acting as his care provider, (2) damages to be determined by the court or a jury, (3) punitive damages in a sum to be determined by the court or a jury, and (4) special damages for any lost future wages and pre-judgment interest on all monetary awards. Id. at 9.

Defendants move to dismiss Plaintiff's claims against Defendants Madden and Ortega on the ground that Plaintiff's First Amended Complaint fails to state a claim for relief under the Eighth Amendment. MTD 1.

A. Eighth Amendment Deliberate Indifference to Safety Claim Against Defendant Madden

Plaintiff alleges that Defendant Madden violated his Eighth Amendment right to be free from dangerous prison conditions by knowingly failing to fix the dangerous condition of the track which caused Plaintiff to trip and fall while running. FAC at 3. In response, Defendants state that "Plaintiff's conclusory allegations fail to state an Eighth Amendment deliberate-indifference-to-safety claim against Warden Madden." MTD 1 at 12.

A prisoner may state a section 1983 claim under the Eighth Amendment against prison officials where the officials acted with "deliberate indifference" to the threat of serious harm. Leach v. Drew, 385 F. App'x. 699-701 (9th Cir. 2010) (citing Berg v. Kincheloe, 794 F.2d 457, 459, 460-61 (9th Cir. 1986); Robins v. Prunty, 249 F.3d 862, 866 (9th Cir. 2001)). To assert an Eighth Amendment claim based on conditions of confinement, a prisoner must satisfy two requirements: one objective and one subjective. See Farmer v. Brennan, 511 U.S. 825, 834

(1994). Under the objective requirement, "the prison official's acts or omissions must deprive an inmate of the minimal civilized measure of life's necessities." Id.; see also Matthews v. Holland, 2016 WL 3167568, at *2 (E.D. Cal. June 6, 2016). Under the subjective requirement, the prisoner must allege facts which demonstrate that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837. To prove knowledge of the risk, the prisoner may rely on circumstantial evidence; in fact, the very obviousness of the risk may be sufficient to establish knowledge. Id. at 842.

1. Objective Prong

Plaintiff alleges that the "poor condition of the track" poses a danger of injury whether "running or walking." FAC at 3. Plaintiff explains that "[t]he state of the track is so severe that walking on it in the state provided shoes hurt your feet, [t]here are sharp jagged rocks that p[ro]trude [making] it is easy for one to catch their foot on [it], and there are many cracks that are wide enough to turn an ankle in." Id. Plaintiff alleges that it was the dangerous condition of the track that caused him to trip and fall, which severely injured his neck. Id.

Defendants contend that federal courts generally reject constitutional claims brought by inmates injured as a result of a "slip-and-fall" caused by a hazardous condition and that Plaintiff's "trip-and-fall" scenario should be treated identically. MTD 1 at 13-14. Additionally, Defendants assert that the "dangerous condition" of the track does not pose a substantial risk of harm and that Defendant Madden's conduct "would be nothing more than negligence, at best, and is insufficient to elevate Plaintiff's claim to an Eighth Amendment violation." Id. at 14.

Plaintiff opposes Defendants' contention and argues that his case is distinguishable from "slip-and-fall" cases because those cases concern qualified immunity in the summary judgment context and involve minor safety hazards whereas this case involves an on-going hazardous condition that prisoners must face and deal with multiple times each day. Oppo. 1 at 10. Plaintiff further argues that he has pled sufficient facts to demonstrate a "danger plus" situation where there was a threat to his safety that was exacerbated by Defendant Madden's policy requiring

prisoners to use the track despite his failure to repair the track. Id. at 11-12.

"Generally, courts have conclude[d] that plaintiffs have failed to state claims when they have fallen in prison." Ramage v. United States, 2014 WL 4702288, at *5 (D. Ariz. Sept. 22, 2014). In reaching this decision, a number of courts have concluded, at both the motion to dismiss and summary judgment stages, that poorly maintained surfaces or leaky roofs do not pose a substantial risk of serious harm supporting a constitutional violation and are merely negligence claims. See Hall v. Frauenheim, 2016 WL 2898712, at *1-*5 and fn. 1 (E.D. Cal. May 18, 2016) (dismissing plaintiff's claim with leave to amend where plaintiff alleged that defendant knew about the leaky roof for years and the wet floor from the roof caused plaintiff to fall and recognizing that "Warden acknowledged that leaky roofs are an issue, but stated that everything that could be done by the institution had been done. The matter was forwarded to Sacramento, and funding was an issue."); see also Seymore v. Dep't of Corr Servs., 2014 WL 641428, *4 (S.D.N.Y. Feb. 18, 2014) (considering defendants' motion to dismiss and finding that the plaintiff (a pre-trial detainee) who alleged exposure to unsafe living conditions where the bathroom had improper tile flooring with potholes, cracks and leaks that cause him to slip and fall, failed to meet the standard for an Eighth Amendment violation as plaintiff's allegations were ordinary torts that did not rise to the level of constitutional violation and failed to satisfy the objective prong of the deliberate indifference inquiry); Shannon v. Vannoy, 2016 WL 1559583, *1 (M.D. La. Apr. 18, 2016) (granting defendants' motion to dismiss where plaintiff claimed that defendants were deliberately indifferent to a known safety risk where they knew of but failed to repair a hole in the ceiling of his cell that leaked water every time it rained and finding that plaintiff's claim was nothing more than a negligence claim and not cognizable under 42 U.S.C. § 1983); and Sylla v. City of N.Y., 2005 WL 3336460, *1-4 (E.D. N.Y. Dec. 8, 2005) (dismissing plaintiff's deliberate indifference claim where correctional officer ordered plaintiff to use a bathroom that the officer knew was flooded and plaintiff slipped and fell injuring his spine, neck, back, and cervical collar because plaintiff "alleged nothing more than a slip-and-fall accident on a wet bathroom floor" which does not meet the objective or subjective prongs of an Eighth Amendment claim). The courts have reached this conclusion, even where the hazard has

existed, and been known to prison officials, for years and where the prisoner was required to use the dangerous location, such as a bathroom. See Hall, 2016 WL 2898712 at *1-*5 and n.1; see also Seymore, 2014 WL 641428 at *4; Shannon, 2016 WL 1559583 at *1; and Sylla, 2005 WL 3336460 at *1-*4.

The Ninth Circuit Court of Appeals has held that "[s]lippery floors without protective measures could create a sufficient danger to warrant relief" where the plaintiff has some known exacerbating condition. Frost v. Agnos, 152 F.3d 1124, 1129 (9th Cir. 1998) (denying defendants' summary judgment motion with respect to Plaintiff's claim that prison officials failed to take reasonable measures to guarantee his safety where prisoner had a broken leg that was repeatedly reinjured when he slipped and fell in the slippery shower that was not handicap-accessible). While the Ninth Circuit has not provided further guidance on this additional requirement, a district court has concluded that "the risk of harm turns into a substantial risk of serious harm somewhere between a bare claim of a slippery floor and a claim of a hazard plus some known exacerbating condition." Washington v. Sandoval, 2012 WL 987291, at * 8 (N.D. Cal. Aug. 6, 2012).

Plaintiff argues that he has alleged the required danger plus exacerbating condition by explaining the dangerous condition of the track and the fact that Defendant Madden enforces a policy requiring inmates to use the track for exercise and to walk to meals and a policy preventing the repair of the track without the requested funds from Sacramento. See Oppo. 1 at 12. In making this argument, Plaintiff relies on Gill v. Mooney, 824 F.2d 192, 195 (2d Cir. 1987), in which the Second Circuit reversed the district court's dismissal of plaintiff's complaint alleging violations of his Eighth and Fourteenth Amendment rights and found that plaintiff stated a colorable claim when he alleged that he was ordered to continue working on a ladder after he informed the correctional officer that the ladder was unsafe which lead to him falling off of the ladder and injuring himself. Gill is distinguishable from the instant matter. First, in most instances, the level of likely injury from falling off a ladder is more serious than that likely to be incurred falling on a track. While there is a risk of harm in falling on a track, it is not a substantial risk of serious harm. Second, Plaintiff "has not pled any conditions which rendered him unable

to 'provide for [his] own safety'" as he was not precluded from walking around any cracks or avoiding the damaged portions of the track and he was not required to jog. Osolinski v. Kane, 92 F.3d 934, 938–39 (9th Cir. 1996); see also Frost, 152 F.3d at 1129 (plaintiff had broken leg which made it very dangerous to use the non-handicap accessible bathroom). In contrast, an inmate forced to use a defective ladder to complete his work is unable to avoid the danger of the ladder and provide for his or her own safety. The Court therefore finds that Plaintiff has not alleged facts establishing the danger plus exacerbation contemplated by the Ninth Circuit.

Plaintiff's allegations regarding the condition of the track do not state a constitutional violation. At most, Plaintiff has alleged negligence on the grounds that the track was not properly maintained and "was in a severe state of disrepair." FAC at 3. However, having to walk or exercise on a poorly maintained track does not deprive Plaintiff "of the minimal civilized measure of life's necessities."[5] Farmer, 511 U.S. at 834. Plaintiff also has not adequately alleged that there was an exacerbating condition that elevated the condition of the track from risk of harm to substantial risk of serious harm. See Washington, 2012 WL 987291, at *8 (stating that a condition posing a substantial risk of serious harm requires a claim of hazard plus "some known exacerbating condition"). Because Plaintiff has not shown that the D-Yard track is in a condition posing a substantial risk of serious harm or depriving him of a life necessity, the objective requirement of an Eighth Amendment deliberate indifference to safety claim is not met.

2. Subjective Prong

Even if Plaintiff had satisfied the objective prong of his failure to prevent harm claim, the claim fails as he has not satisfied the subjective prong. Plaintiff states that Warden Madden knew of the dangerous condition of the track and "allowed a custom or policy of ignoring it." FAC at 2. Specifically, Plaintiff alleges that Defendant Madden "is responsible for the custody, treatment, training and discipline of all inmates under his charge" and "is tasked with developing

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[5] Some Eighth Amendment deprivation claims that have been found to survive the initial pleading stages concern a complete lack of outdoor exercise, excessive noise, inadequate lighting, inadequate ventilation, lack of personal hygiene supplies, and adequate food and water. See Keenan v. Hall, 83 F.3d 1083, 1089-1091 (9th Cir. 1996).

a process to ensure that the living conditions for the inmate population are sufficient." Id. at 3. Plaintiff further alleges that Defendant Madden erred in waiting for requested funds to become available to repair the track instead of utilizing inmate labor for the needed repairs or using other funds intended for less serious issues. Id.

Defendants contend that Plaintiff's allegation that "Warden Madden would by virtue of his position 'know' that the condition of an asphalt track posed a danger to Plaintiff is not plausible or entitled to the presumption of truth." MTD 1 at 15. Thus, Defendants assert that Plaintiff failed to state a claim for deliberate indifference on the part of Warden Madden. Id. at 16. Plaintiff opposes Defendants' position and argues that Defendant Madden was aware of the hazardous condition of the track as evidenced by his requests for funds to repair the track and that despite this knowledge, Defendant Madden enforced a policy that required inmates to walk on the track if they wanted to walk, jog, or obtain a meal in the dining hall. Oppo. 1 at 6-7. Plaintiff reiterates that Defendant Madden could have repaired the track with inmate labor or other funds, but failed to do so. Id. at 7.

To state a claim for a constitutional violation under Section 1983, a plaintiff "must plead facts sufficient to show that [his] claim has substantive plausibility." Johnson v. City of Shelby, 135 S.Ct. 346, 347 (2014) (citing Bell Atlantic Corp., 550 U.S. at 544; Ashcroft, 556 U.S. at 662). Government officials are not liable under § 1983 for their subordinates' unconstitutional conduct based on *respondeat superior* or another theory of vicarious liability, and plaintiff is required to plead that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." See Iqbal, 556 U.S. at 676; see also Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) (finding no vicarious liability for a municipal "person" under 42 U.S.C. § 1983)).

A supervisor may be individually liable under § 1983 "if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989)). To be held liable, a supervisor need not be physically present when the alleged constitutional

injury occurs nor be "directly and personally involved in the same way as are the individual officers who are on the scene inflicting constitutional injury." Starr, 652 F.3d at 1205 (citation omitted). Rather, the requisite causal connection is established when a supervisor "set[s] in motion a series of acts by others," or "knowingly refus[es] to terminate a series of acts by others which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury." Id. at 1207-08 (citation omitted). A supervisor may also be held liable for his "own culpable action or inaction in the training, supervision, or control of his subordinates, for his acquiescence in the constitutional deprivation," or "conduct that showed a reckless or callous indifference to the rights of others." Id. at 1208 (citation omitted). Additionally, a supervisor may be held liable if he implements a "policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." Hansen, 885 F.2d at 646 (internal quotation marks and citation omitted).

Here, Plaintiff's FAC names Warden Madden in his individual and official capacities. FAC at 2. Plaintiff alleges that Defendant Madden is liable because of his duty as the Warden of Centinela State Prison. See id. As such, this is a *respondeat superior* claim and Defendant Madden can only be liable if he was either personally involved in the alleged constitutional deprivation, or there is a causal connection between Defendant Madden and the alleged violation. See Starr, 652 F.3d at 1207. Plaintiff does not allege that Defendant Madden was personally involved, but does allege that he implemented policies that exacerbated the dangerous condition of the track and hampered the repair of the track. FAC at 3. The first policy, that the track could only be repaired with specifically requested funds, is insufficient to establish a causal connection to Plaintiff's alleged constitutional deprivation. Plaintiff did not offer any allegations or facts showing how a policy of requesting funds to fix the track caused Plaintiff's deprivation of constitutional rights. See Neely v. Romero, 2016 WL 5235049, at *3-4 (E.D. Cal. Sept. 21, 2016) (plaintiff failed to state a claim against the defendant because he did not show that defendant was personally involved or that his deprivation was the result of a deficient policy). Plaintiff also fails to provide any support for his assertion that Defendant Madden did not have to rely on the requested funds and could have used inmate labor or other

monies to repair the track. FAC; see also Easter, 694 F. Supp. 2d at 1183 ("[v]ague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss") (quoting Ivey, 673 F.2d at 268).

The second policy that inmates must walk on the track to and from the dining hall, is also not causally connected to Plaintiff's deliberate indifference to safety claim. Plaintiff was not walking to or from breakfast or dinner when he tripped and fell on the track. FAC at 3. Therefore, this policy did not cause Plaintiff's alleged constitutional deprivation and his accident could have occurred regardless of this policy. See Neely, 2016 WL 523049, at * 3-4. Additionally, neither the first nor the second policy is in and of itself a "repudiation of constitutional rights." Hansen, 885 F.2d at 646 (internal quotation marks and citation omitted).

The third policy, that inmates must only walk or jog on the track counterclockwise, is the most causally related to Plaintiff's alleged constitutional deprivation because he was running on the track when he tripped and fell. FAC at 3. However, this policy is still insufficient to establish Defendant Madden's liability under § 1983 because Plaintiff has not alleged that Defendant Madden implemented "a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." Hansen, 885 F.2d at 646 (internal quotation marks and citation omitted). Requiring inmates to run on a track, even if that track is deteriorated, does not constitute a deficient policy supporting a constitutional violation. As a result, Plaintiff has not alleged facts supporting a finding that Defendant Madden implemented the policy with deliberate indifference to a substantial risk of harm.

Plaintiff's vague and conclusory allegations have not shown a causal link between Defendant Madden and the constitutional violation. See Henry v. Sanchez, 923 F. Supp. 1266, 1272 (C.D. Cal. 1996) ("A supervisory official, such as a warden, may be liable under Section 1983 only if he was personally involved in the constitutional deprivation, or if there was a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation."). Accordingly, Plaintiff cannot meet the subjective requirement of an Eighth Amendment deliberate indifference to safety claim. Because Plaintiff satisfies neither the objective nor subjective requirements, the Court **RECOMMENDS** that Defendants' motion to

dismiss Plaintiff's Eighth Amendment claim of deliberate indifference to his safety against Defendant Warden be **GRANTED WITH LEAVE TO AMEND**. See Ramirez, 334 F.3d at 861 (court must grant a *pro se* plaintiff leave to amend his complaint "unless the pleading could not possibly be cured by the allegation of other facts") (citing Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc)).

B. Eighth Amendment Deliberate Indifference to Medical Care Claim Against Defendant Ortega

Plaintiff alleges that Defendant Ortega violated his constitutional rights because he was deliberately indifferent to his serious medical need. FAC at 6. Plaintiff asserts that Defendant Ortega provided constitutionally inadequate medical care for three months after Plaintiff's fall by failing to believe Plaintiff's claims and failing to order appropriate tests, which resulted in Plaintiff enduring ongoing pain and then an emergency surgery once the correct diagnostic tests were performed. Id. at 6-7. Defendants contend that Plaintiff's attachments to his First Amended Complaint establish that Defendant Ortega "provided necessary, adequate, and timely medical care to Plaintiff." MTD 1 at 16. Plaintiff opposes Defendants' position arguing that in addition to providing inadequate medical care for several months, Defendant Ortega interfered with Plaintiff's treatment and recovery once the injury was properly diagnosed and Plaintiff underwent surgery. Oppo. 1 at 20-23.

A prison official's "deliberate indifference to a prisoner's serious illness or injury" violates the Eighth Amendment's proscription against cruel and unusual punishment. See Clement v. Gomez, 298 F.3d 898, 904 (9th Cir. 2002). A prisoner must satisfy an objective and a subjective requirement to assert an Eighth Amendment violation. Id. The objective requirement is satisfied so long as the prisoner alleges facts to show that his medical need is sufficiently "serious" such that the "failure to treat [the] condition could result in further significant injury or the unnecessary and wanton infliction of pain." Id. (internal quotation marks and citation omitted); Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000) (en banc). The subjective component requires the prisoner to allege facts showing a culpable mental state, specifically, "deliberate indifference to a substantial risk of serious harm." Farmer, 511 U.S. at 836. The indifference

must be substantial, and inadequate treatment due to malpractice, or even gross negligence does not rise to the level of a constitutional violation. Estelle v. Gamble, 429 U.S. 97, 106 (1976). Indifference "may appear when prison officials deny, delay, or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." Tracey v. Sacramento Cnty. Sheriff, 2008 WL 154607, at *2 (E.D. Cal. Jan. 15, 2008) (quoting Hutchinson v. U.S., 838 F.2d 390, 392 (9th Cir. 1988)).

"Mere delay of medical treatment, without more, is insufficient to state a claim of deliberate medical indifference." Robinson v. Catlett, 725 F. Supp. 2d 1203, 1208 (S.D. Cal. July 19, 2012) (quoting Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985)). To state a claim for deliberate indifference arising from a delay in treatment, a prisoner must allege that the delay was harmful, although an allegation of substantial harm is not required. McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir. 1991), overruled on other grounds by, WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997). Factual allegations indicating that the official "sat idly by as [the prisoner] was seriously injured despite the defendant's ability to prevent the injury" or that the official "repeatedly failed to treat an inmate properly . . . strongly suggests that the defendant's actions were motivated by 'deliberate indifference' to the prisoner's medical needs." Id. at 1060-61. "In sum, the more serious the medical needs of the prisoner, and the more unwarranted the defendant's actions in light of those needs, the more likely it is that a plaintiff has established 'deliberate indifference' on the part of the defendant." Id. at 1061. Isolated incidents relative to a plaintiff's overall treatment suggests no deliberate indifference. Id. at 1060.

1. Objective Prong

Plaintiff satisfies the objective prong of the test for an Eighth Amendment violation. A "serious" medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." Nawabi v. Wyatt, 2009 WL 3514849, at *7 (C.D. Cal., Oct. 26, 2009) (citing Estelle, 429 U.S. 97 at 104). In considering the seriousness of an alleged medical need, courts should consider whether (1) a reasonable doctor would think that the condition is worthy of comment or treatment; (2) the condition

significantly affects the prisoner's daily activities; and (3) the condition is chronic and accompanied by substantial pain. Id. (citing Doty v. County of Lassen, 37 F.3d 540 at 546 n.3) (9th Cir. 1994).

Here, the Court must accept as true that Plaintiff fell down and seriously injured his neck which resulted in the need for surgery. FAC at 6-7. In addition, Plaintiff had to endure substantial pain for several months until his injury was properly diagnosed and the surgery was performed. Id. at 6-7, 47. A reasonable doctor is likely to think that an injury that requires surgery for a traumatic herniated disk with mylopathy is worthy of comment or treatment. While Plaintiff does not allege that his injury affects his daily activities, he does allege that the injury has been life changing for him as he now has a permanent metal rod implanted in his spine and that he will be "impaired for the rest of [his] life." Id. at 42. Under these facts, Plaintiff states a plausible allegation of a "serious illness or injury." McGuckin, 974 F.2d at 1061-62 (finding that a prisoner's herniated nucleus pulposus, which required surgery, is sufficiently serious for Eighth Amendment purposes).

2. Subjective Prong

Plaintiff has failed to allege facts supporting his claim that Defendant Ortega was deliberately indifferent to a substantial risk of serious harm to Plaintiff resulting from his medical care after his fall on the track. Plaintiff's First Amended Complaint states that he was examined by Defendant Ortega a few days after his fall on the track and that Defendant Ortega "continuously down played Plaintiff's pain," ignored Plaintiff's complaints that Ibuprofen was insufficient to treat his pain, and accused Plaintiff of "faking his injuries." FAC at 6. Plaintiff alleges that Defendant Ortega treated Plaintiff multiple times "in much the same manner as the first time." Id. Plaintiff claims that "although Defendant Ortega was making the appearance of treating Plaintiff, in actuality he was not." Id.

The medical records provided by Plaintiff undercut Plaintiff's claim that Defendant Ortega was deliberately indifferent to Plaintiff's medical needs.[6] The records demonstrate that

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[6] Plaintiff's First Amended Complaint does not provide the specific dates of his medical treatment.

Defendant Ortega first examined Plaintiff in April 2015[7] and reported a head contusion with loss of consciousness, an unsteady sensation while walking, and lower extremity weakness. Id. at 47. Despite Defendant Ortega's examination "show[ing] no focal neurological deficits," he ordered an urgent head CT scan and a right shoulder x-ray. Id. On April 6, 2015, an x-ray was taken of Plaintiff's right shoulder. Id. at 18. Plaintiff's CT scan also was taken in April 2015. Id. at 47.[8] Plaintiff's x-ray was normal and the head CT scan "was negative for intracranial pathology." Id. Plaintiff continued to report an unsteadiness while walking and mild neck pain and Defendant Ortega ordered a cervical spine x-ray.[9] Id. Plaintiff's cervical spine x-ray was taken on April 20, 2015, and showed "[n]o fracture or subluxation," that "[d]isc spacing and alignment is normal," and there is "[n]o prevertebral soft tissue swelling." Id. at 20. Plaintiff continued to complain of an unsteady gait and a sensation of generalized weakness. Id. at 47. Defendant Ortega again examined Plaintiff in May 2015 and determined that his muscle strength and gait were normal, but showed "abnormal lower extremity reflexes." Id. In response to Plaintiff's abnormal lower extremity reflexes, Defendant Ortega ordered an MRI of the cervical spine, which was taken in May 2015 and showed "cervical spine disc bulge with cord compression."[10] Id. Upon review of the MRI, the facility clinic doctor referred Plaintiff to an outside hospital for surgery.[11] Id. Plaintiff underwent "cervical spine surgery of C4-C5

See FAC. The Court will refer to the medical treatment dates generally based on the operative complaint. However, Plaintiff's original Complaint provides specific treatment dates. See Comp. The Court will identify the specific dates of treatment set forth in the original Complaint in footnotes.

[7] On April 2, 2015. Comp. at 7, 65-68.

[8] Plaintiff was seen for the CT scan on April 15, 2015. Comp. at 81-85.

[9] Plaintiff saw Defendant Ortega for a follow-up exam after his x-ray on April 16, 2015. Comp. at 84-85.

[10] Defendant Ortega ordered an MRI of Plaintiff's cervical spine on May 21, 2015. Comp. at 106-110, 107. The MRI results were received on May 29, 2015. Id.

[11] On June 20, 2015, the MRI results were explained to Plaintiff and he was transferred to a

diskectomy and fusion" on June 22, 2015.[12] Id.

The record shows that Plaintiff was repeatedly treated by Defendant Ortega from April 2015 to June 2015. Id. Defendant Ortega did not deny, delay, or intentionally interfere with Plaintiff's medical treatment. On the contrary, Defendant Ortega prescribed mild pain medications, ordered a CT scan [id. at 47], a right shoulder x-ray [id. at 18], a cervical spine x-ray [id. at 20], and an MRI [id. at 47] to determine the cause of Plaintiff's complaints. Id. at 6. Defendant Ortega exhibited an interest in accurately diagnosing Plaintiff's pain through his numerous examinations and continued to investigate Plaintiff's symptoms even after receiving normal x-rays and a normal CT Scan. See id. While a three-month delay between the injury and Plaintiff's surgery is not ideal, there is no evidence that Defendant Ortega deliberately failed to provide adequate medical care to Plaintiff. See McGuckin, 974 F.2d at 1061-62 (finding that the defendants were not deliberately indifferent where they began treating the plaintiff in April 1989 with mild painkillers for one month, then in May ordered a CT scan and MRI which were taken in August, and finally referring the plaintiff for surgery in late August 1989 which took place in December 1989); see also Robinson, 725 F. Supp. 2d at 1208 (finding that a mere delay in receiving treatment is insufficient to show deliberate indifference). Rather, the medical records establish that Defendant Ortega provided ongoing diagnostic testing and medical care to Plaintiff in an effort to determine the exact extent and cause of his pain and other symptoms. Even accepting as true Plaintiff's allegations that Defendant Ortega discounted his claims and symptoms, at most, the evidence could establish negligence or malpractice, neither of which

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higher level of care. Comp. at 110-116. On the same day, Plaintiff saw Dr. Blake Berman, at Desert Regional Medical Center, who reviewed Plaintiff's MRI and found some abnormalities. Id. at 135. That day, Plaintiff saw Dr. Gregory Lepkowski at El Centro Regional Medical Center, who transferred Plaintiff to a medical facility with a neurosurgeon. Id. at 119-125. On June 21, 2015, Plaintiff was admitted to the hospital. Id. at 148.

[12] Plaintiff had several follow-up appointments with various doctors after his surgery. Comp. at 149-169. On July 29, 2015, Plaintiff had a follow-up appointment with Defendant Ortega and reported that the he was improving gradually. Id. at 156-157. Plaintiff again saw Defendant Ortega for a post-surgery follow-up appointment on August 18, 2015. Id. at 166-167.

constitutes a constitutional violation. Estelle, 429 U.S. at 106. Additionally, another doctor, Dr. Seely, examined Plaintiff in April 2015 and also concluded that Plaintiff had a normal neurological exam with improving symptoms, and normal gait and ambulation. FAC at 47.

As such, Plaintiff has not alleged facts establishing the subjective prong of an Eighth Amendment deliberate indifference to medical care claim. Because the relevant medical records dramatically undercut Plaintiff's argument and establish that Defendant Ortega was not deliberately indifferent to Plaintiff's medical issues, the Court **RECOMMENDS** that Defendants' motion to dismiss Plaintiff's Eighth Amendment claim of deliberate indifference to his medical needs against Defendant Ortega be **GRANTED WITHOUT LEAVE TO AMEND**. See Ramirez, 334 F.3d at 861 (court may dismiss without leave to amend if the pleading cannot be cured by the addition of other facts).

C. Injunctive Relief - Defendant Ortega

Plaintiff is seeking injunctive relief to prevent Defendant "Ortega from acting as Plaintiff's care provider." FAC at 9. The Eleventh Amendment permits "suits for prospective injunctive relief against state officials acting in violation of federal law." Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 437 (2004). Thus, injunctive relief is available if there is a "real or immediate threat that the plaintiff will be wronged again." City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983). Injunctive relief is appropriate only when "irreparable injury" is threatened. Id. To establish irreparable injury, a plaintiff must demonstrate a "real or immediate threat that [he] will be wronged again-a 'likelihood of substantial and immediate irreparable injury." Id. "A state law enforcement agency may be enjoined from committing constitutional violations where there is proof that officers within the agency have engaged in a persistent pattern of misconduct." Gomez v. Vernon, 255 F.3d 1118, 1129 (9th Cir. 2001) (quoting Thomas v. County of Los Angeles, 978 F.2d 504, 508 (9th Cir. 1992)); and Walters v. Reno, 145 F.3d 1032, 1048 (9th Cir. 1998) ("Injunctive relief is appropriate in cases involving challenges to government policies resulting in a pattern of constitutional violations").[13]

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[13] The standard for injunctive relief must be considered in conjunction with the Prison

Here, Plaintiff has not alleged any facts demonstrating that Defendant Ortega violated federal law. Plaintiff also has failed to allege or demonstrate that there is a "real or immediate threat" that he will be wronged again or that there is a "likelihood of substantial and immediate irreparable injury." Lyons, 461 U.S. at 111. Additionally, Plaintiff has not alleged a persistent pattern of misconduct by officials that would support any type of injunction.

Accordingly, the Court **RECOMMENDS** that Plaintiff's request for injunctive relief be **DENIED**.

II. DEFENDANT BELTRAN'S MOTION TO DISMISS

Plaintiff alleges that Defendant Beltran violated his Eighth Amendment right to adequate medical care when Defendant Beltran told Plaintiff "he would have to put in a medical request slip if he wanted to be seen by a doctor." FAC at 5. Plaintiff explained that, "[a]t this time this was a difference in medical opinion[,] so Defendant Beltran is only sued in his official capacity." Id. Plaintiff requests monetary damages for Defendant Beltran's conduct. Id. at 9. Defendant Beltran contends that he is immune from suit under the Eleventh Amendment because Plaintiff only sues him in his official capacity and only seeks compensatory, special, and punitive

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Litigation Reform Act ("PLRA"). The PLRA provides, in relevant part:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief

18 U.S.C. § 3626(a)(1)(A). Under the PLRA, the court must find that the prospective relief is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right," before granting injunctive relief. 18 U.S.C. § 3626(a)(1); see also Gomez, 255 F.3d at 1128-9. Additionally, the court must give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." Id. at 1129 (citing Oluwa v. Gomez, 133 F.3d 1237, 1239 (9th Cir. 1998) (quoting 18 U.S.C. § 3626(a)(1)) (holding that Congress explicitly prescribed section 3626's reach to include pending cases).

damages. Id.; see also MTD 2 at 4. Plaintiff responds that Defendant Beltran should not be dismissed because Plaintiff has pled facts that support suing Defendant Beltran in both his individual and official capacity, despite his error in only suing him in his official capacity. Oppo. 2. at 4. Plaintiff further argues that "it could be inferred that [he] was attempting to seek declaratory and/or injunctive relief" from the policy under which Defendant Beltran required Plaintiff to submit a request to see a doctor. Id. at 6. Plaintiff also argues that Defendant Beltran had a duty to provide Plaintiff with medically necessary services the same day as his injury and that the Motrin Defendant Beltran gave to Plaintiff was not sufficient to meet that standard. Id. at 8. Plaintiff requests that Defendant Beltran not be dismissed and that he be given leave to amend his FAC so that he may "clarify all inartfully [sic] pled theories alleged against Beltran." Id. at 9.

"The Eleventh Amendment bars actions for damages against state officials who are sued in their official capacities in federal court." Dittman v. California, 191 F.3d 1020, 1026 (9th Cir. 1999); see also Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) (a suit for damages against a state official in his or her official capacity is really a suit against the state itself, which is prohibited by the Eleventh Amendment). As discussed herein, Plaintiff sues Defendant Beltran only in his official capacity and requests monetary damages - specifically, compensatory and punitive damages in a sum "to be determined by the court or a jury," and "special damages for any lost future wages and pre-judgment interest on all monitary [sic] awards." FAC at 9. The district court has no jurisdiction over this claim and **RECOMMENDS** that Defendants' motion to dismiss Plaintiff's claims for monetary damages against Defendant Beltran in his official capacity be **GRANTED WITHOUT LEAVE TO AMEND**. Dittman, 191 F.3d at 1026 ("The Eleventh Amendment bars actions for damages against officials who are sued in their official capacities in federal court"); see also Ramirez, 334 F.3d at 861 (court may dismiss without leave to amend if the pleading cannot be cured by the addition of other facts).

Plaintiff indicates that if permitted to amend his complaint, he would seek declaratory and injunctive relief from the policy that Defendant "Beltran might have been complying with." Oppo. 2 at 6. Plaintiff describes the policy as requiring "that someone such as Plaintiff who

sustained a spinal/neck fracture, lost consciousness [a]nd had to be carried to the prison's clinic would then 'have to put in a medical request slip if he wanted to be seen by a doctor' after complaining of severe pain" and "a policy, custom, or rule that won[']t allow an inmate to be treated by anyone more qualified then [sic] a nurse unless he first submitts [sic] a request for treatment regardless of how serious or complicated the issue." Oppo. 2 at 5 (quoting FAC at 5); see also FAC at 2. Even if the Court permitted Plaintiff to amend the FAC, Plaintiff could not state a claim for injunctive relief. Plaintiff has not and cannot allege that there is a "real or immediate threat that [he] will be wronged again." Lyons, 461 U.S. at 111; see also Jones v. Dovery, 2008 WL 733468, at *10 (S.D. Cal. Mar. 18, 2008) (adopting the magistrate judge's report and recommendation recommending dismissal of Plaintiff's claims for injunctive relief after finding that "Plaintiff has not alleged that an irreparable injury is threatened, or provided any proof that Defendants have engaged in a persistent pattern of misconduct."). Plaintiff no longer has a spinal/neck fracture, no longer requires surgery, and is not at all likely to again find himself at the mercy of an alleged policy requiring "that someone [] who sustained a spinal/neck fracture, lost consciousness [a]nd had to be carried to the prison's clinic would then 'have to put in a medical request slip if he wanted to be seen by a doctor' after complaining of severe pain." Oppo. 2 at 5 (quoting FAC at 5). In addition, Plaintiff must establish standing for his claim for relief which includes showing that "he is under threat of suffering an injury in fact that is concrete and particularized [and that] the threat [is] actual and imminent, not conjectural or hypothetical [and] fairly traceable to challenged conduct of the defendant. Lopez v. Cate, 2013 WL 239097, *13 (E.D. Cal. Jan. 22, 2013) (citing Summers v. Earth Island Institute, 555 U.S. 488, 493 (2009) and Mayfield v. United States, 599 F.3d 964, 969 (9th Cir. 2010)). While it is true that Plaintiff may again one day find himself needing to see a doctor and having to submit a formal request before he can do so, that is conjectural or hypothetical and not a concrete or particularized injury. Id. Here, the alleged wrong - that Plaintiff had to submit a formal request to see a doctor for his neck pain - has already taken place and was remedied when Plaintiff began seeing Doctors Ortega, Seely, Quazi, and others to treat his injury. Plaintiff does not allege that has had any problems as a result of the policy at issue since he was first injured. Accordingly, the

1 Court **RECOMMENDS** that Plaintiff's request to amend his FAC to seek declaratory and/or
2 injunctive relief from the "policy, custom, or rule that won['ʼ]t allow an inmate to be treated by
3 anyone more qualified then [sic] a nurse unless he first submitts [sic] a request for treatment
4 regardless of how serious or complicated the issue" [see FAC at 2] be **DENIED**.

5 Finally, even if as Plaintiff requests, he was permitted to amend his complaint and sue
6 Defendant Beltran in his individual capacity, Plaintiff's allegations would fail. In his FAC and
7 Oppo. 2, Plaintiff alleges that Defendant Beltran violated his Eighth Amendment right to
8 adequate medical care by denying him an immediate doctor visit and, instead, requiring him to
9 submit a formal request in accordance with prison policy. FAC at 5; see also Oppo. 2 at 2-3, 5.
10 Plaintiff himself characterized this as a "difference in medical opinion." FAC at 5. It is clearly
11 established law that "a difference of opinion between a prisoner-patient and prison medical
12 authorities regarding treatment does not give rise to a [§] 1983 claim." Johnson v. Fortune,
13 2016 WL 1461516, at *2 (E.D. Cal. Apr. 14, 2016) (quoting Franklin v. Oregon, 662 F.2d 1337,
14 1344 (9th Cir. 1981)). If it did give rise to a claim, Plaintiff would be unable to satisfy both the
15 objective and subjective requirements to assert an Eighth Amendment violation. As stated
16 above, Plaintiff has satisfied the objective prong of the test for an Eighth Amendment violation,
17 as a reasonable doctor is likely to think that pain and injury sustained after falling and injuring
18 yourself such that you later require surgery is worthy of comment or treatment, and Plaintiff
19 now has a permanent metal rod implanted in his spine. See above Section IB(1). However,
20 Plaintiff has not and cannot satisfy the second prong and show that Defendant Beltran was
21 deliberately indifferent to a substantial risk of serious harm. In his FAC, Plaintiff states that
22 Defendant Beltran prescribed him 600 mg of Motrin/Ibuprofen for his pain after he was first
23 seen by triage nurses Pacheco and Johnson who treated Plaintiff's "superficial wounds." FAC at
24 5. Plaintiff does not say that Defendant Beltran could have done anything else for his injuries.[14]
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[14] See Corwin v. City of Indep., MO., 829 F.3d 695, 698–99 (8th Cir. 2016) ((1) affirming district court's finding that nurse was not deliberately indifferent to detainee's serious medical needs and granting summary judgment where nurse examined plaintiff's hand, prescribed over the over-the-counter pain medication, applied an ACE bandage wrap, and placed plaintiff on the list

FAC. Plaintiff does not allege that there were any doctors around and available who could have treated him immediately even if Defendant Beltran had not required Plaintiff to submit a formal request. Id. Defendant Beltran provided medical care, informed Plaintiff of how to obtain an appointment with a doctor, and did not deny, delay, or intentionally interfere with medical treatment. See Hartsfield v. Colburn, 491 F.3d 394, 398 (8th Cir. 2007) (affirming District Court's finding in favor of defendants where plaintiff alleged deliberate indifference due to a prison policy requiring him to submit a second sick call request to receive medical treatment that resulted in a very painful delay before having three teeth extracted, and noting that the District Court found that "[s]ick call requests were Jail policy, and it was not unreasonable for medical staff to tell Hartsfield how to request more medical attention and expect him to comply"); see also Jenkins v. Cty. of Hennepin, Minn., 557 F.3d 628, 633–34 (8th Cir. 2009) (stating that "a policy that results in delayed treatment is not unconstitutional unless it evinces deliberate indifference to serious medical needs. The Constitution does not require jailers to handle every medical complaint as quickly as each inmate might wish") (citing Johnson v. Hamilton, 452 F.3d 967, 972–73 (8th Cir. 2006) (concluding that a one-month delay in treating a fractured finger did not rise to a constitutional violation)). Moreover as discussed above, Plaintiff was examined by Dr. Ortega within a few days of his fall. See FAC at 6. Again, even if Defendant Beltran's treatment of Plaintiff was found to be negligent or consisted of malpractice, neither of those rise to the level of a constitutional violation.

The Court thus **RECOMMENDS** that Defendants' motion to dismiss Plaintiff's claims against Defendant Beltran be **GRANTED WITHOUT LEAVE TO AMEND**.

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of prisoners to be transported to the doctor, (2) rejecting plaintiff's claims that the nurse should have provided more aggressive treatment and obtained more timely medical care for plaintiff from a doctor, and (3) noting that plaintiff failed to provide any medical evidence supporting a claim that the delay cause plaintiff to suffer a detrimental effect).

CONCLUSION

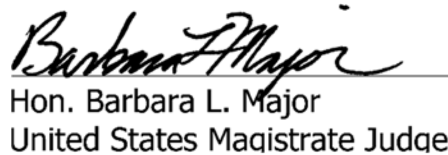
For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Court issue an order: (1) approving and adopting this Report and Recommendation, (2) granting Defendants' Motions to Dismiss, and (3) denying Plaintiff's request for injunctive relief.

IT IS HEREBY ORDERED that any written objections to this Report must be filed with the Court and served on all parties **no later than May 2, 2017**. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with this Court and served on all parties **no later than May 23, 2017**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

IT IS SO ORDERED.

Dated: 4/4/2017



Hon. Barbara L. Major
United States Magistrate Judge