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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LANCE WILLIAMS,

Plaintiff,

v.

O. ORTEGA, ET AL.,

Defendants.

Case No.: 18-cv-00547-LAB-MDD

**REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE
RE: DEFENDANTS’ MOTION TO
DISMISS**

[ECF No. 26]

This Report and Recommendation is submitted to United States Judge Larry Alan Burns pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the Southern District of California.

For the reasons set forth herein, it is **RECOMMENDED** that Defendants’ Motions to Dismiss be **GRANTED**.

I. PROCEDURAL HISTORY

Plaintiff Lance Williams (“Plaintiff”) is a state prisoner at Richard J. Donovan Correctional Facility (“Donovan”) proceeding *pro se* and *in forma*

1 *pauperis*. (ECF No. 26 at 1).¹ On March 15, 2018, Plaintiff filed a complaint
2 pursuant to 42 U.S.C. § 1983 (“Complaint”). (ECF No. 1). The Complaint
3 sets forth various claims against officer J. Melgoza (“Defendant Melgoza”),
4 psychiatric technician/nurse M. Kimani (“Defendant Kimani”), and others.
5 Plaintiff alleges that Defendants Melgoza and Kimani violated his Eighth
6 Amendment rights by acting with deliberate indifference to his serious
7 medical needs. (ECF No. 1 at 8, 11-12). Plaintiff further alleges that
8 Defendant Kimani falsified medical records in violation of California Penal
9 Code sections 132 and 134. (*Id.* at 2).

10 On June 28, 2019, Defendants Melgoza and Kimani filed a Motion to
11 Dismiss the claims against them. (ECF No. 26). Defendants contend that
12 Plaintiff failed to allege that Defendants Melgoza and Kimani were
13 deliberately indifferent to Plaintiff’s medical needs. (ECF No. 26-1 at 3-4).
14 Defendants further contend that California Penal Code sections 132 and 134
15 do not offer redress under 42 U.S.C. § 1983. (*Id.* at 5-6).

16 On July 14, 2019, Plaintiff filed an Opposition to Defendants’ Motion to
17 Dismiss (“Opposition”). (ECF No. 28). In the Opposition, Plaintiff alleges
18 additional facts that were not alleged in the Complaint. In ruling on a
19 motion to dismiss, the court may not consider facts alleged for the first time
20 in opposition to a motion to dismiss. *See Cervantes v. City of San Diego*, 5
21 F.3d 1273, 1274 (9th Cir. 1993). As such, the Court’s analysis is limited to
22 the facts alleged in the Complaint.

23 **II. BACKGROUND FACTS**

24 The facts as presented are taken from Plaintiff’s Complaint and are not
25

26 ¹ All pincite page references refer to the automatically generated ECF page
27 number, not the page number in the original document.

1 to be construed as findings of fact by the Court. This discussion is limited to
2 the allegations regarding Defendants Melgoza and Kimani.

3 Plaintiff's claims arise from a series of events on March 1, 2018. (ECF
4 No. 1 at 4). On March 1, 2018, Plaintiff walked to the sergeant's office and
5 crossed paths with officer Ortega ("Defendant Ortega"). (*Id.*). Defendant
6 Ortega told Plaintiff it was "yard recall" and Plaintiff must return to his cell.
7 (*Id.*). Plaintiff told Defendant Ortega that Plaintiff was going to see the
8 sergeant about "his court call," and continued walking. (*Id.*). The
9 conversation led to an altercation where Defendant Ortega pushed Plaintiff
10 into the wall. (*Id.* at 5). The altercation escalated and ended with Defendant
11 Ortega handcuffing Plaintiff. (*Id.*). Plaintiff alleges that Defendant Ortega
12 pulled the handcuffs "extremely tight." (*Id.*). Defendant Ortega took
13 Plaintiff to the P.S.U. mental health building and placed Plaintiff in the
14 "cage," where Plaintiff remained for one hour. (*Id.*). Plaintiff requested
15 medical throughout the hour he spent in the cage. (*Id.* at 6).

16 After Plaintiff was released from the cage, Plaintiff returned to his
17 building. (*Id.* at 8). Plaintiff asked Defendant Melgoza to call medical to
18 treat his injuries sustained during the altercation with Defendant Ortega.
19 (*Id.*). Defendant Melgoza said, "I'm not calling anybody go tell the Seargent."
20 [sic] (*Id.*). Plaintiff requested Defendant Melgoza allow Plaintiff out of the
21 building to speak with the sergeant. (*Id.*). Defendant Melgoza allowed
22 Plaintiff out of the building. (*Id.*). Before this conversation with Defendant
23 Melgoza, Plaintiff "went to numerous inmates cells" [sic] to show them his
24 injuries. (*Id.*).

25 In his examination following this incident, Plaintiff showed Defendant
26 Kimani "fresh dried blood" on his wrist, a cut in his nose [sic], and fresh blood
27 on his shirt. (*Id.* at 11). Plaintiff informed Defendant Kimani of "throbbing

1 pain” in his body and that he could not move his ring finger. (*Id.*). Defendant
2 Kimani did not perform a mental health assessment or check Plaintiff’s body
3 for injuries or bruising. (*Id.* at 12). Plaintiff attached to the Complaint a
4 copy of the medical report Defendant Kimani prepared following the
5 examination. (*Id.* at 30). The report indicates that Plaintiff had scabs on his
6 wrists. (*Id.*). The report indicates that Defendant Kimani examined Plaintiff
7 at 12:40 and that a registered nurse was notified at 13:00. (*Id.*). Plaintiff
8 alleges Defendant Kimani falsified this report. (*Id.* at 12).

9 III. LEGAL STANDARD

10 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency
11 of a claim. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “Under
12 Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and
13 plain statement of the claim showing that the pleader is entitled to relief.”
14 *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (internal quotations omitted).
15 The pleader must provide the Court with “more than an unadorned, the-
16 defendant-unlawfully-harmed-me accusation.” *Id.* at 678 (citing *Bell Atlantic*
17 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Threadbare recitals of the
18 elements of a cause of action, supported by mere conclusory statements, do
19 not suffice.” *Id.* The court must assume the truth of the facts which are
20 presented and construe all inferences from them in the light most favorable
21 to the non-moving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.
22 2002).

23 A *pro se* pleading is construed liberally on a defendant’s motion to
24 dismiss for failure to state a claim. *Thompson v. Davis*, 295 F.3d 890, 895
25 (9th Cir. 2002) (citing *Ortez v. Washington Cty.*, 88 F.3d 804, 807 (9th Cir.
26 1996)). The *pro se* pleader must still set out facts in his complaint that bring
27 his claims “across the line from conceivable to plausible.” *Twombly*, 550 U.S.

1 at 570.

2 A *pro se* litigant is entitled to notice of deficiencies in the complaint and
3 an opportunity to amend, unless the complaint's deficiencies cannot be cured
4 by amendment. See *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).
5 Thus, the court is not required to accept as true allegations that are
6 "supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678.
7 Furthermore, the court "may not supply essential elements of the claim that
8 were not initially pled." *Ivey v. Bd. of Regents of the University of Alaska*, 673
9 F.2d 266, 268 (9th Cir. 1982).

10 IV. DISCUSSION

11 A. Deliberate Indifference

12 Plaintiff alleges that Defendants Melgoza and Kimani violated his
13 Eighth Amendment right to be free from cruel and unusual punishment
14 when the defendants delayed treatment and denied Plaintiff access to
15 treatment. (ECF No. 1 at 8, 11-12). Defendants contend that Plaintiff's
16 claim fails as a matter of law because he has not pled facts sufficient to show
17 that either Defendant acted with deliberate indifference to Plaintiff's serious
18 medical needs. (ECF No. 26-1 at 4-5).

19 The Eighth Amendment is violated when prison officials demonstrate
20 "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429
21 U.S. 97, 104 (1976); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996). In
22 order to state a claim for deliberate indifference under the Eighth
23 Amendment, an inmate must plead facts sufficient to show both an objective
24 and a subjective requirement. *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th
25 Cir. 2014).

26 First, to satisfy the objective prong, the inmate must show that he
27 suffered a deprivation or injury that was "objectively, sufficiently serious."

1 *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotations omitted). A
2 serious medical need is shown if a failure to provide adequate treatment
3 results in wanton and unnecessary infliction of pain. *McGuckin v. Smith*, 974
4 F.2d 1050, 1059 (9th Cir. 1992).

5 Next, to satisfy the subjective prong, the inmate must demonstrate that
6 “the official [knew] of and disregard[ed] an excessive risk to inmate health or
7 safety...” *Farmer*, 511 U.S. at 837. The official must have been aware of
8 facts or factual circumstances that would allow him to draw the inference
9 that a substantial risk of serious harm to the inmate’s health and safety
10 exists, and he must *also* draw that inference. *Id.*

11 It is not enough that the plaintiff merely disagree with the course of
12 treatment provided. *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004).
13 A difference in medical opinion is “insufficient, as a matter of law, to
14 establish deliberate indifference.” *Id.* (citing *Jackson v. McIntosh*, 90 F.3d
15 330, 332 (9th Cir. 1996)).

16 **1. Defendant Melgoza**

17 Plaintiff alleges that Defendant Melgoza was deliberately indifferent to
18 Plaintiff’s serious medical needs. (ECF No. 1 at 3).

19 Plaintiff asked Defendant Melgoza to call medical. (ECF 1 at 8).
20 Defendant Melgoza said, “I’m not calling anybody go tell the Seargent.” [sic]
21 (*Id.*). Plaintiff requested Defendant Melgoza allow Plaintiff out of the
22 building to speak with the sergeant. (*Id.*). Defendant Melgoza allowed
23 Plaintiff out of the building. (*Id.*). Before this conversation with Defendant
24 Melgoza, Plaintiff “went to numerous inmates cells” [sic] to show them his
25 injuries. (*Id.*).

26 Plaintiff fails to provide any documentation or information which
27 objectively shows that a serious injury was present. Plaintiff requested and

1 received medical care. By allowing Plaintiff out of the building to speak with
2 the sergeant regarding Plaintiff's injuries, Defendant Melgoza did not
3 disregard Plaintiff's health, as Plaintiff so claims. Further, prior to
4 requesting medical care, Plaintiff went to "numerous inmates" to show them
5 his injuries. The time Plaintiff spent showing his injuries to other inmates
6 before seeking medical care suggests Plaintiff's injuries were not serious
7 medical needs. Plaintiff's unsupported claim of deliberate indifference to a
8 serious medical need is not sufficient to constitute a constitutional violation.
9 *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004).

10 **2. Defendant Kimani**

11 Plaintiff alleges that Defendant Kimani was deliberately indifferent to
12 Plaintiff's serious medical needs because Defendant Kimani failed to call
13 medical or take Plaintiff to medical. (ECF No. 1 at 11). Plaintiff further
14 alleges that Defendant Kimani falsified the March 1, 2018 medical report, in
15 violation of California Penal Code sections 132 and 134. (*Id.* at 2).

16 Plaintiff asserts that during the examination, he showed Defendant
17 Kimani "fresh dried blood" on his wrist, a cut in his nose [sic], and fresh blood
18 on his shirt. (*Id.* at 11). Plaintiff attached to the Complaint the medical
19 report Defendant Kimani prepared following the examination. (*Id.* at 30).
20 The report indicates that Plaintiff had scabs on his wrists. (*Id.*). The report
21 also indicates that Defendant Kimani examined Plaintiff at 12:20 and that a
22 registered nurse was notified at 13:00. (*Id.*).

23 There is no objective showing of a serious medical need and no showing
24 of a deprivation of treatment. Plaintiff asked for and received medical care.
25 Defendant Kimani documented the examination in a medical report. The
26 medical report indicates that Plaintiff had scabs on his wrist and that a
27 registered nurse was notified. Plaintiff has failed to demonstrate that

1 Defendant Kimani knew of and disregarded an excessive risk to Plaintiff's
2 health. No inference can be drawn in favor of a substantial risk of serious
3 harm. Plaintiff's disagreement with Defendant Kimani's treatment is not
4 enough to demonstrate deliberate indifference to a serious medical need.
5 *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004). The facts as pled by
6 Plaintiff lack detail sufficient to overcome the high burden of demonstrating
7 deliberate indifference.

8 Accordingly, the Court **RECOMMENDS** that Defendants' Motion to
9 Dismiss Plaintiff's Eighth Amendment claims for Deliberate Indifference be
10 **GRANTED** as to Defendants Melgoza and Kimani.

11 **B. False Report**

12 Plaintiff alleges that Defendant Kimani falsified the March 1, 2018
13 medical report in violation of California Penal Code sections 132 and 134.
14 (ECF 1 at 2). Defendants argue that because these sections do not give rise
15 to civil liability, these claims should be dismissed. (ECF 26-1 at 6).

16 California Penal Code section 132 ("Section 132") makes it a felony to
17 offer in evidence a record that the person knows has been forged. Cal. Penal
18 Code § 132 (West 2019). California Penal Code section 134 ("Section 134")
19 makes it a felony to prepare a false record with the intent to produce it for
20 any fraudulent purpose in a trial or other proceeding. Cal. Penal Code § 132
21 (West 2019). Criminal statutes do not create civil liability. *See Allen v. Gold*
22 *Country Casino*, 464 F.3d 1044, 1048 (2006). As criminal statutes, neither
23 Section 132 nor Section 134 create civil liability.

24 Accordingly, the Court **RECOMMENDS** that Defendants' Motion to
25 Dismiss Plaintiff's claim for falsifying medical records be **GRANTED** as to
26 Defendant Kimani.

27 ///

1 **V. CONCLUSION**

2 Based on the foregoing, it is **RECOMMENDED** that:

3 Defendants' Motion to Dismiss Plaintiff's Eighth Amendment claims for
4 Deliberate Indifference be **GRANTED** as to Defendants Melgoza and Kimani
5 and **DISMISSED WITHOUT PREJUDICE**.

6 Defendants' Motion to Dismiss Plaintiff's claim for falsifying medical
7 records be **GRANTED** as to Defendant Kimani and **DISMISSED WITH**
8 **PREJUDICE** to the extent Plaintiff's falsifying medical records claim
9 against Defendant Kimani is based upon California Penal Code Section 132
10 and Section 134.

11 This Report and Recommendation will be submitted to the United
12 States District Judge assigned to this case, pursuant to the provisions of 28
13 U.S.C. § 636(b)(1). Any party may file written objections with the court and
14 serve a copy on all parties by **September 23, 2019**. The document shall be
15 captioned "Objections to Report and Recommendation." Any reply to the
16 objections shall be served and filed by **September 30, 2019**.

17 The parties are advised that failure to file objections within the
18 specified time may waive the right to raise those objections on appeal of the
19 court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

20 **IT IS SO ORDERED.**

21 Dated: September 6, 2019

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23 Hon. Mitchell D. Dembin
24 United States Magistrate Judge
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