

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Wiley Y. Daniel

Civil Action No. 07-cv-00872-WYD-KMT

ELI ANDRADE,

Plaintiff,

v.

DAVID OBA, Doctor;
LOUIS CAIBILIN, Doctor;
KIM COLLEYMORE, N.P.;
JUDY BRIZENDINE, H.S.A; and
SUTTON, Doctor;

Defendants.

**ORDER AFFIRMING AND ADOPTING RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

THIS MATTER is before the Court in connection with “Defendants Oba, Cabiling, Colleymore and Brizendine’s Motion for Summary Judgment” filed November 11, 2008, and “Defendant Jere G. Sutton, M.D.’s Motion to Dismiss Plaintiff’s Amended Prison Complaint under Fed. R. Civ. P. 12(b)(6)” filed March 13, 2009. Sutton’s motion to dismiss was converted to a motion for summary judgment by Order of May 20, 2009. These motions were referred to Magistrate Judge Tafoya for a recommendation. She issued a “Recommendation of United States Magistrate Judge” on June 30, 2009, which is incorporated herein by reference. See 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

Magistrate Judge Tafoya recommends therein that summary judgment be granted in this case. As to Claim One, an Eighth Amendment claim for deliberate indifference, she finds in light of the medical records, Defendants’ affidavits/declarations, and the absence

of specific factual allegations to support Plaintiff's case that no genuine issue of material fact exists as to whether Defendants knew of and disregarded an excessive risk to Plaintiff's health posed by his abdominal condition. (Recommendation at 9-16.) Magistrate Judge Tafoya finds that it is clear that they did not. Accordingly, she recommends that summary judgment be granted as to the Eighth Amendment claim as to all Defendants. (*Id.*)

As to Claim Two, Magistrate Judge Tafoya finds that Plaintiff's claim for a violation of his right to "staff information" under the "Inmate Bill of Rights/Core Values" does not implicate any right, privilege or immunity secured by the Constitution. (Recommendation at 17.) Therefore, she finds that this allegation fails to state a claim under section 1983. (*Id.*) As to the claim that on November 22, 2006, Dr. Sutton terminated Plaintiff's prescription for Nubain, she finds that Plaintiff fails to allege this caused the violation of any right. (*Id.*) "Even construing it as a claim for violation of Plaintiff's "Right to the Care that is Ordered" under the "Inmate Bill of Rights/Core Values," it fails to sufficiently allege the violation of the Eighth Amendment" as Plaintiff's allegations show that he merely disagreed with the decision. (*Id.*) (citing *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803, 811 (10th Cir. 1999) ("a prisoner who merely disagrees with a diagnosis or a prescribed course of treatment does not state a constitutional violation"). Accordingly, Magistrate Judge Tafoya recommends that summary judgment be granted in favor of all Defendants on Claim Two. She also recommends that the claims of "negligence" and "medical malpractice" be dismissed. (Recommendation at 17-18.)

Finally, Magistrate Judge Tafoya recommends that summary judgment be granted as to the due process claim, Claim Three. (Recommendation at 19.) She finds that Plaintiff makes allegations against his case manager, Georganne Howe, who is not a party

to this case. (*Id.* at 18-19.) Further, she finds that Plaintiff has not alleged the involvement of Defendants Oba, Cabiling, Colleymore, Sutton and Brizendine with any “misplaced” grievance paperwork at issue in the claim, and the “complaint is devoid of any discussion whatsoever of either element of a properly stated procedural due process claim.” (*Id.* at 19.) Accordingly, the Recommendation finds that Plaintiff failed to state a Fourteenth Amendment procedural due process claim against the Defendants and that summary judgment should also be granted on this claim. (*Id.*)

In conclusion from the foregoing, Magistrate Judge Tafoya recommends that “Defendants Oba, Cabiling, Colleymore and Brizendine’s Motion for Summary Judgment” (Doc. No. 83) and “Defendant Jere G. Sutton, M.D.’s Motion to Dismiss Plaintiff’s Amended Prisoner Complaint under Fed. R. Civ. P. 12(b)(6)” (Doc. No. 108), as converted to a motion for summary judgment, be granted. (*Id.* at 19.) She further recommends that the case be dismissed in its entirety, with prejudice. (*Id.*)

Magistrate Judge Tafoya advised the parties that written objections were due within ten (10) days after service of a copy of the Recommendation. (*Id.* at 20.) Despite this advisement, no objections were filed to the Recommendation. No objections having been filed, I am vested with discretion to review the Recommendation “under any standard [I] deem[] appropriate.” *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); see also *Thomas v. Arn*, 474 U.S. 140, 150 (1985) (stating that “[i]t does not appear that Congress intended to require district court review of a magistrate’s factual or legal conclusions, under a de novo or any other standard, when neither party objects to those findings”). Nonetheless, though not required to do so, I review the Recommendation to

"satisfy [my]self that there is no clear error on the face of the record."¹ See Fed. R. Civ. P. 72(b) Advisory Committee Notes.

Having reviewed the Recommendation, I am satisfied that there is no clear error on the face of the record. I find Magistrate Judge Tafoya's Recommendation to be thorough and well reasoned and agree with her Recommendation that Plaintiff has not stated a claim upon which relief can be granted or shown that there are genuine issues of material fact that preclude the entry of summary judgment. Accordingly, I agree with Magistrate Judge Tafoya that Defendants' motions are properly granted and that the case should be dismissed. It is therefore

ORDERED that the Recommendation of United States Magistrate Judge dated June 30, 2009, is **AFFIRMED and ADOPTED**. In accordance therewith, it is

ORDERED that Defendants Oba, Cabiling, Colleymore and Brizendine's Motion for Summary Judgment (Doc. No. 83) is **GRANTED**. It is

FURTHER ORDERED that Defendant Jere G. Sutton, M.D.'s Motion to Dismiss Plaintiff's Amended Prisoner Complaint under Fed. R. Civ. P. 12(b)(6) (Doc. No. 108), as converted to a summary judgment motion, is **GRANTED**. Finally, it is

ORDERED that this case is **DISMISSED WITH PREJUDICE**.

Dated: September 2, 2009

BY THE COURT:

s/ Wiley Y. Daniel
Wiley Y. Daniel
Chief United States District Judge

¹ Note, this standard of review is something less than a "clearly erroneous or contrary to law" standard of review, Fed. R. Civ. P. 72(a), which in turn is less than a de novo review, Fed. R. Civ. P. 72(b).