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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FLOYD DEWAINE SCOTT, Plaintiff-Appellant, v. I. JIMENEZ, Licensed Vocational Nurse, in individual capacity, Defendant-Appellee.	No. 18-55593 D.C. No. 2:16-cv-01152-JVS-KK MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Submitted January 15, 2019**

Before: TROTT, TALLMAN, and CALLAHAN, Circuit Judges.

California state prisoner Floyd Dewaine Scott appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging deliberate indifference to his serious medical needs. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's decision on cross-motions

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

for summary judgment. *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). We affirm.

The district court properly granted summary judgment for defendant because Scott failed to raise a genuine dispute of material fact as to whether defendant was deliberately indifferent to his serious medical needs. *See Toguchi v. Chung*, 391 F.3d 1051, 1057-60 (9th Cir. 2004) (a prison official acts with deliberate indifference only if he or she knows of and disregards an excessive risk to the prisoner's health; medical malpractice, negligence, or a difference of opinion concerning the course of treatment does not amount to deliberate indifference); *Hallett v. Morgan*, 296 F.3d 732, 746 (9th Cir. 2002) (a prisoner alleging deliberate indifference based on delay in treatment must show that the delay caused significant harm); *see also Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009) ("[S]tate departmental regulations do not establish a federal *constitutional* violation.").

We treat Scott's objections to the answering brief and supplemental excerpts of record (Docket Entry No. 26) as a motion to strike, and deny the motion.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FLOYD SCOTT, Plaintiff, v. I. JIMENEZ, Defendants.	Case No. CV 16-1152-JVS (KK) **ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Complaint, the relevant records on file, and the Report and Recommendation of the United States Magistrate Judge. The Court has engaged in de novo review of those portions of the Report to which Plaintiff has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered dismissing this action with prejudice and without leave to amend.

Dated: April 18, 2018

HONORABLE JAMES V. SELNA
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FLOYD SCOTT, Plaintiff, v. I. JIMENEZ, Defendant(s).	Case No. CV 16-1152-JVS (KK) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable James V. Selna, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

SUMMARY OF RECOMMENDATION

Plaintiff Floyd Scott ("Plaintiff"), a California state inmate, filed a pro se complaint ("Complaint") pursuant to 42 U.S.C. § 1983 ("Section 1983"). The Complaint alleges defendant I. Jimenez ("Defendant"), a licensed vocational nurse, was deliberately indifferent to Plaintiff's serious medical needs while Plaintiff was an inmate at California State Prison – Los Angeles County ("CSP-LAC"). Plaintiff and Defendant filed cross Motions for Summary Judgment. For

the reasons set forth below, the Court recommends (1) denying Plaintiff's Motion for Summary Judgment, (2) granting Defendant's Motion for Summary Judgment, and (3) dismissing the action with prejudice.

II.

PROCEDURAL HISTORY

On February 16, 2016, Plaintiff constructively filed[1] the Complaint against Defendant in her individual capacity. Dkt. 1. Plaintiff alleges Defendant was deliberately indifferent to Plaintiff's serious medical needs on June 7, 2015 by ignoring his complaints of rectal bleeding on three occasions throughout the day, thereby delaying his treatment and transfer to Palmdale Regional Medical Center ("PRMC"). See id. Plaintiff also alleges Defendant was deliberately indifferent in violation of the Eighth Amendment when she misdiagnosed him with hemorrhoids and exchanged his expired anti-diarrhea medication without proper authorization and in violation of California Department of Corrections and Rehabilitation ("CDCR") policies and regulations. Id. Plaintiff alleges he "was stressed out not knowing what was going on and not being able to get the medical help he needed immediately." Id. at 8.

On May 27, 2016, Defendant filed an Answer to the Complaint. Dkt. 20.

On October 17, 2016, Plaintiff filed a Motion for Summary Judgment. Dkt. 84. In support of Plaintiff's Motion, Plaintiff submits the following:

- Statement of Undisputed Material Facts, Dkt. 84 at 21-24;
- Plaintiff's declaration, Dkt. 84 at 26-29 ("Scott Decl.");
- Copy of the Complaint without exhibits, Dkt. 84 at 31-38;
- Affidavit of Kenneth Johnson, Dkt. 84 at 40 ("Johnson Decl.");
- Plaintiff's inmate grievance forms and responses, Dkt. 84 at 42-53;

[1] Under the "mailbox rule," when a pro se prisoner gives prison authorities a pleading to mail to court, the court deems the pleading constructively "filed" on the date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010) (citation omitted).

- Declaration of Tracy Smith, Dkt. 84 at 55-56 ("Smith Decl.");
- Copy of San Quentin News article, Dkt. 84 at 58;
- Plaintiff's medical records, Dkt. 84 at 60-92, 101-18;
- CDCR staff reports regarding Plaintiff's daily activities, Dkt. 84 at 94-99; and
- Defendant's "Employee Post Assignment Report," Dkt. 84 at 120.

On November 1, 2016, Defendant filed a Motion for Summary Judgment. Dkt. 90. In support of Defendant's Motion, Defendant submits the following:

- Statement of Uncontroverted Facts, Dkt. 90-3;
- Defendant's declaration, Dkt. 90-4 ("Jimenez Decl.");
- Declaration of Anna Chen, D.O., Dkt. 90-5 ("Chen Decl.");
- Declaration of C. Wilcher, Dkt. 90-6 ("Wilcher Decl."); and
- Declaration of Defendant's counsel, Deputy Attorney General Gary Ostrick, Dkt. 90-7 ("Ostrick Decl."). Mr. Ostrick attaches the following exhibits to his Declaration:
  - Plaintiff's medical records from PRMC;
  - Excerpts of Plaintiff's Deposition ("Scott Depo.");
  - Excerpts of the deposition of Chin Yu Jean Lo, M.D. ("Lo Depo.");
  - Excerpts of the deposition of Mehdi Shahpoury Arani, M.D. ("Arani Depo.");
  - Excerpts of the deposition of Canagaratnam Pathmarajah, M.D. ("Pathmarajah Depo."); and
  - Plaintiff's responses to Defendant's Interrogatories.

On November 9, 2016, the Court issued an Order notifying Plaintiff of the requirements for opposing a motion for summary judgment, pursuant to Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) (en banc). Dkt. 92.

On November 14, 2016, Defendant filed an Opposition to Plaintiff's Motion. Dkt. 94. In support of the Opposition, Defendant submits the following:

- Statement of Genuine Disputes, Dkt. 94-1;
- Evidentiary Objections, Dkt. 94-2;
- Declaration of Defendant's counsel, Deputy Attorney General Gary Ostrick, Dkt. 90-3 ("Ostrick Opp. Decl."). In addition to the documents attached to Mr. Ostrick's declaration in support of Defendant's Motion for Summary Judgment, Mr. Ostrick attaches as Exhibit K excerpts of the deposition of Kenneth Johnson ("Johnson Depo."); and
- Compendium of Declarations containing the following declarations:
  - Chen Decl.;
  - Declaration of Correctional Officer R. D. Davis, Jr. ("Davis Decl.");
  - Jimenez Decl.;
  - Declaration of Correctional Officer B. R. Marin ("Martin Decl.");
  - Declaration of Correctional Officer C. Ramirez ("Ramirez Decl.");
  - Declaration of L. Soliz, RN ("Soliz Decl."); and
  - Wilcher Decl.

On November 14, 2016, Plaintiff filed an Opposition to Defendant's Motion. Dkt. 95. In support of his Opposition, Plaintiff submits a Statement of Genuine Dispute. Dkt. 96.

On November 21, 2016, Defendant filed a Reply in support of her Motion and a Response to Plaintiff's Statement of Genuine Disputes. Dkt. 99, Reply; Dkt. 98, Response. On November 28, 2016, Plaintiff filed a Reply in support of his Motion. Dkt. 100.

On December 8, 2016, Plaintiff filed an "Addition to Plaintiff's Motion for Summary Judgment." Dkt. 105. Plaintiff attached a copy of the Confidential Supplement to Appeal setting forth CSP-LAC's findings on Plaintiff's grievance. Id. On December 16, 2016, Defendant filed Evidentiary Objections to the exhibit attached to Plaintiff's "Addition."[2] Dkt. 111, Evidentiary Objections. On January 3, 2017, Plaintiff filed a "Reply" to Defendant's Evidentiary Objections to the exhibit attached to Plaintiff's "Addition." Dkt. 115. On January 18, 2017, Defendant filed a "Response" to Plaintiff's "Reply." Dkt. 121. On January 30, 2017, Plaintiff filed a Response to Defendant's Response to Plaintiff's Reply.[3] Dkt. 126.

On August 29, 2017, the Court issued an Order finding the cross-motions for summary judgment were fully briefed and submitted for decision without further discovery or briefing. Dkt. 138. On January 10, 2018, the case was transferred to the undersigned United States Magistrate Judge. Dkt. 144.

The Motions thus stand submitted and ready for decision.

III.

LEGAL STANDARD

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure if the moving party demonstrates the absence of a genuine dispute of material fact and entitlement to judgment as a matter of law. Celotex Corp. v.

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[2] On December 16, 2016, Defendant also filed a Motion to Strike Plaintiff's Addition to his Motion. Dkt. 110. On January 3, 2017, Plaintiff filed an Opposition to Defendant's Motion to Strike. Dkt. 119. In light of the ruling on the parties' motions for summary judgment, the Court recommends DENYING Defendant's Motion to Strike as moot.

[3] On February 15, 2017, Defendant filed a second Motion to Strike Plaintiff's Response to Defendant's Response to Plaintiff's Reply as an unauthorized sur-reply. Dkt. 127. On February 27, 2017, Plaintiff filed an Opposition to Defendant's second Motion to Strike. Dkt. 129. On March 2, 2017, Defendant filed a Reply in support of her second Motion to Strike. Dkt. 130. On March 13, 2017, Plaintiff filed a "Corrected" Opposition to Defendant's second Motion to Strike. Dkt. 133. In light of the ruling on the parties' motions for summary judgment, the Court recommends DENYING Defendant's second Motion to Strike as moot.

Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

When ruling on a summary judgment motion, the district court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Summary judgment is therefore not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts." Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1335 (9th Cir. 1980). Furthermore, the Court must not make credibility determinations with respect to the evidence offered. See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987) (citing Matsushita, 475 U.S. at 587).

When parties file cross-motions for summary judgment, the Court must consider each motion separately on its merits to determine whether either party has met its burden, "giving the nonmoving party in each instance the benefit of all reasonable inferences." ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1097 (9th Cir. 2003). The Court, however, must consider all evidence properly submitted in support of both cross-motions to determine whether the evidence in the record demonstrates the existence of a genuine issue of material fact. See Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two, 249 F.3d 1132, 1136-37 (9th Cir. 2001).

An affidavit or declaration may be used to support or oppose a motion for summary judgment, provided it is "made on personal knowledge, set[s] out facts that would be admissible in evidence, and show[s] that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). In addition, pursuant to Central District Local Rule 56-3, the Court assumes the material facts

as claimed and adequately supported by the moving party are admitted to exist without controversy.[4]

IV.

RELEVANT FACTUAL BACKGROUND

The Court finds the following material facts are undisputed and are "admitted to exist without controversy" for the purposes of this Order, except as otherwise noted.[5] See L.R. 56-3.

Plaintiff has been an inmate in the custody of the CDCR at CSP-LAC since December 22, 2011. Scott Decl. ¶ 1. Defendant has been employed as a licensed vocational nurse by CDCR at CSP-LAC since 2007. Jimenez Decl. ¶ 2.

On Sunday, June 7, 2015, at approximately 1:30 p.m., Plaintiff first experienced bleeding when he sat on the toilet to take a bowel movement. Scott Decl. ¶ 2; Scott Depo. 63:4-12. Plaintiff experienced "a pain in [his] stomach," it felt like he had to use the restroom, and when he did "then blood just shot out." Scott Depo. 63:17-21.

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[4] Central District Local Rule 56-3 provides:

> In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the "Statement of Genuine Disputes" and (b) controverted by declaration or other written evidence filed in opposition to the motion.

[5] To the extent certain facts, or conclusions, are not mentioned in this Report, the Court has not relied on them in reaching its decision. In addition to considering the parties' evidentiary objections, the Court has independently considered the admissibility of the evidence underlying both parties' papers and has not considered facts that are irrelevant or based upon inadmissible evidence. In addition, "objections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion are all duplicative of the summary judgment standard itself" and are thus "redundant" and unnecessary to consider here. Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006); see also Anderson, 477 U.S. at 248 ("Factual disputes that are irrelevant or unnecessary will not be counted."). Except as otherwise set forth in the summary of facts, Defendant's evidentiary objections are overruled as moot.

At approximately 2:15 p.m., Plaintiff told Defendant he "had a colonoscopy about one month before and [he was] having bleeding." Scott Depo. 82:13-23, 84:8-11. There is a dispute about what Defendant said in response to Plaintiff. Plaintiff claims Defendant responded that it was "probably hemorrhoids." Scott Depo. 84:12. Defendant claims she told Plaintiff that if he was bleeding profusely, he should notify a correctional officer to bring him to the clinic. Jimenez Decl. ¶ 6. Plaintiff did not tell Defendant anything else at that time and Defendant walked away. Scott Depo. 84:14-24; Jimenez Decl. ¶ 6.

During or after the evening meal, Plaintiff says he "walked up to" Defendant and "told her [he] had internal bleeding still." Scott Depo. 85:2, 85:13-15; Scott Decl. ¶ 5. Plaintiff says Defendant responded that "she was going to call the RN," but he never saw her pick up the phone. Scott Depo. 85:9-17; Scott Decl. ¶ 5. Plaintiff does not recall saying anything else to Defendant at that time. Scott Depo. 86:14-22. There is a dispute about whether this second interaction occurred because Defendant does not recall this second interaction. Jimenez Decl. ¶ 10.

At approximately 7:30 p.m., Plaintiff went to the "Facility A yards Nurses Office Medication Pass out Window." Scott Depo. 87:5-19; Scott Decl. ¶6; Jimenez Decl. ¶ 10. Plaintiff says he told Defendant he was "still having internal bleeding." Scott Depo. 87:5-19; Scott Decl. ¶6. Plaintiff does not recall saying anything else to Defendant during this interaction. Scott Depo. 90:1-25. However, Defendant does not recall Plaintiff mentioning that he still had bleeding and only recalls Plaintiff complaining about diarrhea. Jimenez Decl. ¶¶ 8, 10. Plaintiff gave Defendant expired medication that he had been given previously for diarrhea and Defendant replaced the expired medication with unexpired medication of the same type. Scott Depo. 88:12-13, 89:7-14; Jimenez Decl. ¶ 10. There is a dispute over whether Defendant obtained authorization to dispense the medication.

Defendant did not observe any signs of acute physical distress during any of her interactions with Plaintiff on June 7, 2015, nor did Plaintiff ever tell her he was

experiencing any pain. Jimenez Decl. ¶¶ 6, 9; Scott Depo. 84:14-24, 86:14-22, 90:1-25.

On the morning of June 8, 2015, Plaintiff went to his work assignment, but soon thereafter informed his supervisor, Staff Sergeant Hughes, about the bleeding and Sergeant Hughes sent Plaintiff to Facility A Medical. Scott Decl. ¶ 7; Scott Depo. 72:14-73:16.

When he arrived at Facility A Medical, RN Wilcher assessed and triaged Plaintiff. Wilcher Decl. ¶ 2. Plaintiff was "ambulatory and walked into the clinic without any physical assistance." Id. Plaintiff told RN Wilcher, "Since yesterday I been having blood in my stool and now I'm having abdominal pain." Id. ¶ 4. RN Wilcher took Plaintiff's vitals, which were "fine," and observed that Plaintiff did not appear to be in "acute physical pain." Id.

Plaintiff was then examined by Dr. Chen. Scott Decl. ¶ 8. Plaintiff told Dr. Chen he had six bowel movements on June 7, 2015 and three bowel movements already during the morning of June 8, 2015. Chen Decl. ¶ 4. Plaintiff told Dr. Chen that initially the blood was bright red, but had changed to a purple dark red color. Id. Plaintiff told Dr. Chen he had some pain in the lower left quadrant of his abdomen. Id. Dr. Chen ordered Plaintiff transferred to PRMC. Id.

When Plaintiff arrived at PRMC emergency room in the morning of June 8, 2015, he was seen by Dr. Lo. Lo Depo. 33:4-24. Dr. Lo took Plaintiff's history, examined Plaintiff, including a rectal exam, and ordered and reviewed bloodwork and other lab tests. Id. Dr. Lo determined Plaintiff's condition was "not so urgent" it required emergency treatment. Id. 34:3-6. Dr. Lo observed Plaintiff's stool was maroon, which Dr. Lo opined meant there was more than minimal bleeding, but that the bleeding was "older." Id. 37:18-18:7. Plaintiff's hemoglobin level was 12.2, which was high enough that Dr. Lo "did not consider it urgent." Id. 49:21-50:1. Plaintiff appeared comfortable and his vital signs did not show any signs of distress. Id. 43:25-44:2, 44:8-11. Dr. Lo opined it would not have made a

difference to Plaintiff's treatment if Plaintiff had arrived at PRMC on June 7, 2015. Id. 55:12-20. At approximately 3:34 p.m., Dr. Lo transferred Plaintiff's care to Dr. Arani, the admitting physician. Id. 35:5-25.

Dr. Arani conducted a general physical exam of Plaintiff and found he had no fever, no chills, no headache, and was "in no acute distress, very pleasant." Arani Depo. 35:15-36:23. Plaintiff's blood pressure and heart rate were "well controlled" and there was nothing concerning to Dr. Arani about Plaintiff's bloodwork. Id. 38:6-12, 57:18-20. Dr. Arani requested that a gastroenterologist examine Plaintiff. Arani Depo. Ex. 6.

Dr. Pathmarajah, whose primary practice area is gastroenterology, examined Plaintiff on June 8, 2015 and determined he would perform a colonoscopy and endoscopy the next day. Pathmarajah Depo. 24:3-21. Dr. Pathmarajah found Plaintiff did not have an active bleed and his hemoglobin was stable. Id. 24:22-25:4. Plaintiff had no fever, no chills, no headache, no shortness of breath, no chest pain, and his blood pressure was "well established." Id. 27:12-28:7.

On June 9, 2015, Dr. Pathmarajah performed an endoscopy and colonoscopy on Plaintiff. Id. 34:24-35:1. The endoscopy did not show any evidence of bleeding from the upper GI tract. Id. 35:15-19. The colonoscopy showed evidence of diverticulosis and no evidence of an active bleed. Id. 38:4-9. Dr. Pathmarajah opined it would not have made a difference to Plaintiff's treatment if Plaintiff had been taken to the hospital on June 7, 2015 instead of June 8, 2015 because he was not "destabilizing with faster heart rate and having rapid bleed." Id. 44:25-45:12.

Following completion of the endoscopy and colonoscopy, on June 9, 2015 at 10:02 a.m., Plaintiff's hemoglobin was 11.1, which was satisfactory for release from the hospital and indicated Plaintiff did not have an active bleed. Arani Depo. 57:21-58:2, 58:8-18. Therefore, Dr. Arani discharged Plaintiff from PRMC. Id. 61:14-62:7. Dr. Arani opined that it would not have made any difference to Plaintiff's

treatment if Plaintiff had not been transferred to PRMC until one day later because Plaintiff did not have "significant life threatening bleeding." Id. 64:25-65:15.

On June 29, 2015, Plaintiff saw Dr. Chen for a follow-up appointment and Plaintiff confirmed he had not had any blood in his stool or other rectal bleeding since returning from PRMC. Chen Decl. ¶ 6.

V.

DISCUSSION

A. RELEVANT LAW

Prison officials or private physicians under contract to treat state inmates "violate the Eighth Amendment if they are 'deliberate[ly] indifferen[t] to [a prisoner's] serious medical needs.'" Peralta v. Dillard, 744 F.3d 1076, 1081 (9th Cir. 2014) (alterations in original); Farmer v. Brennan, 511 U.S. 825, 828, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); West v. Atkins, 487 U.S. 42, 54, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). To assert a deliberate indifference claim, a prisoner plaintiff must show the defendant (1) deprived him of an objectively serious medical need, and (2) acted with a subjectively culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 297, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991).

"A medical need is serious if failure to treat it will result in 'significant injury or the unnecessary and wanton infliction of pain.'" Peralta, 744 F.3d at 1081. "A prison official is deliberately indifferent to [a serious medical] need if he 'knows of and disregards an excessive risk to inmate health.'" Id. at 1082. This standard "requires more than ordinary lack of due care." Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014). The "official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id.

"Deliberate 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.'" Id. In either case, however, the

indifference to the inmate's medical needs must be purposeful and substantial; negligence, inadvertence, or differences in medical judgment or opinion do not rise to the level of a constitutional violation. See Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996), cert. denied, 519 U.S. 1029, 117 S. Ct. 584, 136 L. Ed. 2d 514 (1996); see also Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004) (negligence constituting medical malpractice is not sufficient to establish an Eighth Amendment violation); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). "A difference of opinion between a prisoner-patient and prison medical authorities regarding treatment does not give rise to a" Section 1983 claim. Franklin v. Or., State Welfare Div., 662 F.2d 1337, 1344 (9th Cir. 1981). A plaintiff "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances, and . . . that they chose this course in conscious disregard of an excessive risk to plaintiff's health." Jackson, 90 F.3d at 331. "Moreover, mere delay . . . , without more, is insufficient to state a claim of deliberate medical indifference." Shapley v. Nev. Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985).

B. ANALYSIS

As a preliminary matter, where disputes were identified in the Relevant Factual Background above, the Court has assumed the truth of Plaintiff's facts for purposes of this Order. Nevertheless, viewing the evidence in the light most favorable to Plaintiff and giving Plaintiff the benefit of all reasonable inferences, Defendant has satisfied her burden to show an absence of a genuine dispute of material fact. Therefore, Defendant is entitled to judgment as a matter of law because the evidence is such that a no reasonable jury could return a verdict for Plaintiff.

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1. Defendant Did Not Violate Plaintiff's Eighth Amendment Right by Delaying Plaintiff's Transfer to PRMC by One Day, and Defendant Is Entitled to Judgment as a Matter of Law

First, there is no evidence that Defendant deprived Plaintiff of an objectively serious medical need, because there is no evidence that a failure to treat Plaintiff would result in significant injury. Peralta, 744 F.3d at 1081. Even though Plaintiff was transported to PRMC where he was monitored and tested for an active gastrointestinal bleed, neither the endoscopy nor colonoscopy performed on June 9, 2015 showed any evidence of an active bleed. Pathmarajah Depo. 35:15-19, 38:4-9. Hence, Plaintiff did not receive any actual treatment. Id. 44:1-7 ("A. There's no immediate medical treatment because it's all resolved. Naturally he's [sic] preop diverticular bleed, hemorrhoidal bleed has stopped."). As Dr. Pathmarajah explained, "usually when someone has a [gastrointestinal] bleed, it clots on its own and stops." Id. 38:17-19, 45:13-19. Therefore, because Plaintiff's medical condition did not require treatment and healed on its own, Plaintiff was not deprived of an objectively serious medical need.

Additionally, Plaintiff has offered no evidence that he told Defendant he was in any pain on June 7, 2015. Rather, the undisputed evidence establishes Plaintiff never told Defendant he was in pain or exhibited any signs of acute physical distress. Jimenez Decl. ¶¶ 6, 9; Scot Depo. 84:14-24, 86:14-22, 90:1-25. Therefore, there was no indication Defendant subjected Plaintiff to "unnecessary and wanton infliction of pain." Peralta, 744 F.3d at 1081.

Second, even assuming Plaintiff was deprived of an objectively serious medical need, there is no evidence that Defendant acted with a subjectively culpable state of mind. Plaintiff was walking around and did not show any signs of, or complain of, severe bleeding, "such as bloody underpants or blood dripping down his clothes." Jimenez Decl. ¶ 8; see also Scott Depo. 85:2. In addition, Plaintiff did not inform Defendant that he was experiencing any pain. Jimenez

Decl. ¶ 8; Scott Depo. 85:2. Hence, based on Defendant's experience working as a licensed vocational nurse and having worked for gastroenterologists, Defendant "concluded that the information that [Plaintiff] had provided to [her] regarding the blood in his bowel movements, when [she] visited his cell, was not sufficiently serious to require the immediate summoning of any medical assistance from a RN or physician." Jimenez Decl. ¶ 8. At most, Defendant was negligent in misdiagnosing Plaintiff with hemorrhoids; however, even negligence constituting medical malpractice is insufficient to state a claim for deliberate indifference. Toguchi, 391 F.3d at 1060; Jackson, 90 F.3d at 331; Heilman v. Lyons, No. 2:09-CV-2721-JAM (KJN), 2013 WL 3772471, at *12 (E.D. Cal. July 16, 2013) (granting defendants' motion for summary judgment, finding "the fact that plaintiff was in the early stages of his illness, and his symptoms were flu-like in nature, correctional officers' alleged failure to summon [same-day] medical assistance . . . , absent evidence to the contrary, constituted a difference of opinion as to the need for medical care, not deliberate indifference").

Finally, even if Defendant delayed Plaintiff's transfer to PRMC in conscious disregard of a serious medical condition, a brief delay in providing medical treatment, without more, is insufficient to state a federal civil rights claim. See Shapley, 766 F.2d at 407; Legare v. Lee, No. EDCV 15-00833-JVS (AFM), 2017 WL 1856231, at *5 (C.D. Cal. Jan. 13, 2017), report and recommendation adopted, 2017 WL 1843682 (C.D. Cal. May 8, 2017) ("Plaintiff has failed to cite to any evidence showing that he suffered further harm from the brief delay in changing his surgical dressing."); Goldsmith v. Davis, No. 2:10-CV-1995-KJM (EFB), 2013 WL 3490659, at *6 (E.D. Cal. July 10, 2013) ("Plaintiff fails to demonstrate that he suffered harmful consequences as a result of this one-day delay."). Here, there is no evidence suggesting the one-day delay in transferring Plaintiff to PRMC caused Plaintiff any harm. In fact, the undisputed evidence affirmatively establishes Plaintiff did not suffer any harm as a result of the delay. Drs. Lo, Arani, and

Pathmarajah all opined the delay did not make any difference to Plaintiff's condition or treatment. Lo Depo. 55:12-20; Arani Depo. 64:25-65:15; Pathmarajah Depo. 44:25-45:12. Dr. Pathmarajah explained that given Plaintiff's hemoglobin level on June 8, 2015, even if Dr. Pathmarajah "knew for sure he had an active bleed at that time," he "would have still basically done the same thing," i.e. stabilizing Plaintiff's condition as needed and then waiting twenty-four hours so he could do an endoscopy and colonoscopy. Id. 46:11-25.

Lastly, to the extent Plaintiff alleges he suffered mental anguish from the delay because he thought he was going to die, see Compl. at 8; Dkt. 95 at 3, "[a]ny speculation on [P]laintiff's part as to possible future harm he might have suffered absent medical treatment is insufficient to create a genuine issue of material fact." Heilman, 2013 WL 3772471, at *15.

2. Defendant Did Not Violate Plaintiff's Eighth Amendment Right by Misdiagnosing Plaintiff's Condition, and Defendant Is Entitled to Judgment as a Matter of Law

Plaintiff also claims Defendant, a licensed vocational nurse, was deliberately indifferent when she misdiagnosed Plaintiff with hemorrhoids because CDCR policy prohibits licensed vocational nurses from diagnosing patients. Dkt. 84 at 14-15. First, as set forth above, negligence, even negligence constituting medical malpractice, is not sufficient to establish an Eighth Amendment violation. Toguchi, 391 F.3d at 1060; Jackson, 90 F.3d at 331. Second, a violation of CDCR policy or regulation does not establish a federal constitutional violation. Cousins v. Lockyer, 568 F.3d 1063, 1070 (9th Cir. 2009) ("[S]tate departmental regulations do not establish a federal *constitutional* violation." (emphasis in original) (first citing Case v. Kitsap Cty. Sheriff's Dep't, 249 F.3d 921, 930 (9th Cir. 2001) ("[T]here is no § 1983 liability for violating prison policy. [Plaintiff] must prove that [the official] violated his constitutional right . . . ."); and then citing Gagne v. City of Galveston, 805 F.2d 558, 560 (5th Cir. 1986) ("[A]llegations about the

breach of a . . . regulation are simply irrelevant . . . in a suit over the deprivation of a constitutional right."))). Moreover, the result of the alleged misdiagnosis was a delay in transferring Plaintiff to PRMC of less than one day, which, as discussed above, did not cause Plaintiff any harm.

3. Defendant Did Not Violate Plaintiff's Eighth Amendment Right by Exchanging Plaintiff's Expired Medication, and Defendant Is Entitled to Judgment as a Matter of Law

Finally, Plaintiff claims Defendant was deliberately indifferent when she violated prison policy by exchanging Plaintiff's expired anti-diarrhea medication for unexpired pills without authorization from a doctor or registered nurse. Dkt. 84 at 15. Again, neither negligence nor a violation of CDCR policy is sufficient to state a claim for violation of the Eighth Amendment. See Toguchi, 391 F.3d at 1060; Cousins, 568 F.3d at 1070. Moreover, Plaintiff does not allege, nor is there any evidence, that the exchange of medications caused Plaintiff any harm.

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Therefore, viewing the evidence in the light most favorable to Plaintiff, Plaintiff has failed to establish a genuine issue of material fact, and Defendant has satisfied her burden to show she is entitled to judgment as a matter of law. Hence, Defendant's Motion for Summary Judgment should be granted. In addition, because the evidence is such that a no reasonable jury could return a verdict for Plaintiff, Plaintiff's Motion for Summary Judgment should be denied.

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VI.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the Court issue an Order: (1) accepting this Report and Recommendation; (2) DENYING Plaintiff's Motion for Summary Judgment; (3) GRANTING Defendant's Motion for Summary Judgment; and (4) entering Judgment DISMISSING this action with prejudice and without leave to amend.[6]

Dated: February 22, 2018

HONORABLE KENLY KIYA KATO
United States Magistrate Judge

[6] On June 11, 2017, Plaintiff filed a "Motion for an Order of Protection and a Court Order" in which he appeared to seek leave to amend his Complaint to add a claim against Correctional Officer J. Lopez for retaliation against Plaintiff for filing a grievance. Dkt. 134. On August 23, 2017, the assigned United States Magistrate Judge denied Plaintiff "leave to amend the complaint to add claims or parties to this action based on the circumstances described." Dkt. 137. Federal Rule of Civil Procedure 18(a) allows a plaintiff to add multiple claims to the lawsuit when they are against the same defendant. Federal Rule of Civil Procedure 20(a)(2) allows a plaintiff to join multiple defendants to a lawsuit where the right to relief arises out of the same "transaction, occurrence, or series of transactions" and "any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). In contrast, here, Plaintiff's proposed unrelated claims against different defendants must be brought in separate lawsuits to avoid confusion. Hence, the August 23, 2017 Order denying leave to amend should be accepted.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 22 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FLOYD DEWAINE SCOTT, Plaintiff-Appellant, v. I. JIMENEZ, Licensed Vocational Nurse, in individual capacity, Defendant-Appellee.	No. 18-55593 D.C. No. 2:16-cv-01152-JVS-KK Central District of California, Los Angeles ORDER

Before: TROTT, TALLMAN, and CALLAHAN, Circuit Judges.

Scott's petition for panel rehearing (Docket Entry No. 36) is denied.

No further filings will be entertained in this closed case.