

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 23 2019

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

CHRISTOPHER ISAAC SIMMONS,

Plaintiff-Appellant,

v.

GRISOM; et al.,

Defendants-Appellees.

No. 18-16357

D.C. No. 1:07-cv-01058-DAD-SAB
Eastern District of California,
Fresno

ORDER

Before: GOULD and PAEZ, Circuit Judges.

Appellees' request for judicial notice of appellant's litigation history (Docket Entry No. 4) is granted.

Appellees' motion to revoke appellant's in forma pauperis status (Docket Entry No. 3) is granted. Appellant's in forma pauperis status is revoked for this appeal because appellant has had three or more prior actions or appeals dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted, and appellant has not alleged imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g).

Within 21 days after the date of this order, appellant shall pay \$505.00 to the district court as the docketing and filing fees for this appeal and file proof of payment with this court. Failure to pay the fees will result in the automatic dismissal of the

appeal by the Clerk for failure to prosecute, regardless of further filings. *See* 9th Cir. R. 42-1.

No motions for reconsideration, clarification, or modification of the denial of appellant's in forma pauperis status shall be entertained.

If the appeal is dismissed for failure to comply with this order, the court will not entertain any motion to reinstate the appeal that is not accompanied by proof of payment of the docketing and filing fees.

Briefing is suspended pending further order of this court.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER I. SIMMONS,

No. 1:07-cv-01058-DAD-SAB

Plaintiff,

v.

GRISOM, et al.,

Defendants.

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND GRANTING
DEFENDANT AKANNO'S MOTION FOR
SUMMARY JUDGMENT

(Doc. No. 228)

Plaintiff Christopher I. Simmons is appearing pro se and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983.

The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. On June 16, 2017, the assigned magistrate judge issued findings and recommendations recommending that the Doe defendants 1 through 10 be dismissed from the action without prejudice. (Doc. No. 228.) After receiving extensions of time in which to do so, plaintiff finally filed objections to the June 16, 2017 findings and recommendations on September 22, 2017. (Doc. No. 237.) Defendants Grissom, Keiley, Rients, and St. Lucia then filed a response to those objections on September 29, 2017, to which plaintiff filed an unauthorized reply, which the court has nonetheless considered, on October 26, 2017. (Doc. Nos. 238, 241.)

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On November 22, 2017, the magistrate judge issued findings and recommendations recommending that the motion for summary judgment filed on behalf of defendants Grissom, Keiley, Rents and St. Lucia be granted. (Doc. No. 242.) The findings and recommendations were served on the parties and contained notice that objections were to be filed within thirty days. Plaintiff filed objections to those findings and recommendations on February 26, 2018, to which these defendants filed a response on March 12, 2018. (Doc. Nos. 249, 251.)

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the undersigned has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court concludes the findings and recommendations issued on June 16, 2017 are supported by the record and by proper analysis. To the extent that plaintiff objects to the dismissal of the Doe defendants based upon his contention that he has had inadequate time to file a motion to compel and complete discovery in this case, the court observes that the discovery deadline set by the scheduling order were extended on several occasions. (See Doc. Nos. 123, 131.) While the court notes that plaintiff states he suffers from major depressive disorder and has trouble concentrating, it is clear from the large number of documents he has filed in this action that plaintiff is capable of articulating his position, responding in a timely manner and litigating this action.

Similarly, the findings and recommendations dated November 22, 2017 are supported by the record and by proper analysis. In his objections plaintiff fails to point to any evidence before the court on summary judgment that defendant Rients acted with a retaliatory motive. *See Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). Instead, according to the objections, plaintiff merely contends defendant Rients treated him brusquely on the evening in question because he “wanted to ‘go home’ and was being held up,” not because he was retaliating against plaintiff’s threatened prison grievances against a nurse. (Doc. No. 249 at 6.) In sum, plaintiff’s objections provide no basis upon which to reject the magistrate judge’s findings and recommendations.

For these reasons:

1. The findings and recommendations issued on June 16, 2017 (Doc. No. 228) and November 22, 2017 (Doc. No. 242) are adopted in full;

2. The motion for summary judgment filed on behalf of defendants Grissom, Keiley, Rients, and St. Lucia is granted;
3. Doe Defendants 1 through 10 are dismissed without prejudice; and
4. The Clerk of the Court is directed to enter judgment in favor of defendants Grissom, Keiley, Rients, and St. Lucia, and close this case.

IT IS SO ORDERED.

Dated: **June 20, 2018**

Dale A. Doyd
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

11 CHRISTOPHER I. SIMMONS,) Case No.: 1:07-cv-01058-DAD-SAB (PC)
12 Plaintiff,)
13 v.) FINDINGS AND RECOMMENDATIONS
14 GRIS SOM, et al.,) REGARDING DEFENDANTS GRIS SOM,
15 Defendants.) KEILEY, RIENTS, AND ST. LUCIA'S MOTION
16) FOR SUMMARY JUDGMENT
17) [ECF No. 172]
18)
19 Plaintiff Christopher I. Simmons is appearing pro se and in forma pauperis in this civil rights
20 action pursuant to 42 U.S.C. § 1983.
21 Currently before the Court is Defendants Grissom, Keiley, Rients, and St. Lucia's motion for
22 summary judgment, filed April 18, 2016.
23 I.
24 RELEVANT HISTORY
25 This action is proceeding against Defendants Grissom, Keiley and St. Lucia for deliberate
26 indifference to a serious medical need in violation of the Eighth Amendment, and against Defendant
27 Rients for retaliation in violation of the First Amendment.
28

II.

LEGAL STANDARD

3 Any party may move for summary judgment, and the Court shall grant summary judgment if
4 the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
5 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Washington Mut. Inc. v.
6 U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether it be that a fact is disputed
7 or undisputed, must be supported by (1) citing to particular parts of materials in the record, including
8 but not limited to depositions, documents, declarations, or discovery; or (2) showing that the materials
9 cited do not establish the presence or absence of a genuine dispute or that the opposing party cannot
10 produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted).
11 The Court may consider other materials in the record not cited to by the parties, but it is not required
12 to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031
13 (9th Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

14 In resolving cross-motions for summary judgment, the Court must consider each party's
15 evidence. Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 960 (9th Cir. 2011). Plaintiff bears the
16 burden of proof at trial, and to prevail on summary judgment, he must affirmatively demonstrate that
17 no reasonable trier of fact could find other than for him. Soremekun v. Thrifty Payless, Inc., 509 F.3d
18 978, 984 (9th Cir. 2007). Defendants do not bear the burden of proof at trial and in moving for
19 summary judgment, they need only prove an absence of evidence to support Plaintiff's case. In re
20 Oracle Corp. Sec. Litig.

21 In judging the evidence at the summary judgment stage, the Court does not make credibility
22 determinations or weigh conflicting evidence, Soremekun, 509 F.3d at 984 (quotation marks and
23 citation omitted), and it must draw all inferences in the light most favorable to the nonmoving party
24 and determine whether a genuine issue of material fact precludes entry of judgment, Comite de
25 Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011) (quotation
26 marks and citation omitted).

27 In arriving at this recommendation, the Court has carefully reviewed and considered all
28 arguments, points and authorities, declarations, exhibits, statements of undisputed facts and responses

1 thereto, if any, objections, and other papers filed by the parties. Omission of reference to an argument,
2 document, paper, or objection is not to be construed to the effect that this Court did not consider the
3 argument, document, paper, or objection. This Court thoroughly reviewed and considered the
4 evidence it deemed admissible, material, and appropriate.

5 **III.**

6 **DISCUSSION**

7 **A. Summary of Plaintiff's Complaint¹**

8 **"Heat Risk" Allegations**

9 On June 24, 2006, Plaintiff filed a request "to provide adequate air circulation to prevent
10 suffering a heat stroke." (Compl. ¶ 29.) Plaintiff contends that he was identified as a "heat risk"
11 patient and required monitoring. (Compl. ¶ 29.) Plaintiff alleges that Defendants R. Grissom, P.
12 Keiley, A. St. Lucia, and Doe Nurses 1-10 denied Plaintiff's requests for adequate air circulation, ice,
13 cold showers and access to cold water which were necessary for Plaintiff's "heat risk." (Compl. ¶ 46.)
14 Plaintiff also contends that Defendants Does #1-10 and Defendant St. Lucia failed to monitor the
15 temperature for Plaintiff on July 20, 2006. (Compl. ¶ 29.) Plaintiff also contends that he was denied
16 access to cold water or ice and was locked in his cell without air during a heat wave. (Compl. ¶ 29.)

17 **Pain Medication Allegations**

18 On July 28, 2006, Defendant Akanno violated Plaintiff's Eighth Amendment rights when he
19 "denied the benefits of hot packs for PLAINTIFF's serious medical needs, and based that decision on
20 PLAINTIFF not being granted an "extra privilege." (First Am. Compl. ¶ 20.)

21 On October 25, 2006, Defendant M. Rients "interfered with PLAINTIFF's prescribed
22 medications for his severe debilitating pain, causing PLAINTIFF to unnecessarily suffer severe
23 debilitating pain the entire night without pain medications. (Compl. 23.)

24 On August 22, 2007, Defendant Akanno "conspired to cover-up the illegal actions of Sauceda
25 when Defendant Akanno changed the medical order from every eight hours to BID or every 12 hours
26 ... despite PLAINTIFF's specific requested action not to change the medical order as a reprisal,

27

28 ¹ This action is proceeding on Plaintiff's first amended complaint, filed February 17, 2012. (ECF No. 45.)

1 violating PLAINTIFF's 1st Amendment right." (Compl. ¶ 32.) Plaintiff filed a grievance regarding
2 his medication. (Compl. ¶ 33.)

3 **Retaliation Allegations**

4 Plaintiff alleges that Defendant M. Rients violated Plaintiff's First Amendment rights by
5 retaliating against Plaintiff by issuing Plaintiff a rule violation report ("RVR") after Plaintiff indicated
6 that he was going to file a staff misconduct complaint. (Compl. ¶ 24.) Plaintiff also contends that
7 Rients "rushed in PLAINTIFF's cell to forcibly take a paper envelop[e] PLAINTIFF had waiting for
8 T. Ellstrom to return and PLAINTIFF could obtain her name not displayed as required by policy."
9 (Compl. ¶ 24.)

10 **B. Statement of Undisputed Facts²**

11 1. Plaintiff is prescribed medications that make him susceptible to heat. This
12 susceptibility to heat has caused him to be identified as a "heat risk" inmate. (First Am. Compl.,
13 February 17, 2012, ECF No. 24, p. 9-10, ¶¶ 45-46; Samson Decl., ¶ 3 [Simmons Dep. 23:24-25; 24:1-
14 15].)

15 2. At all times relevant to the claims in his complaint, Plaintiff was housed in A Facility,
16 Building 1, Section B, in Cell 113, at Kern Valley State Prison (KVSP). (Samson Decl., ¶ 3
17 [Simmons Dep. 20:19-25; 21:1-20]; Grissom Decl., ¶ 4; Keiley Decl., ¶ 4; Hancock Decl., ¶ 6.)

18 3. On June 24, 2006, Plaintiff filed an emergency CDCR 602 administrative grievance,
19 alleging that his cell was 105 degrees and that he was not receiving adequate air circulation, exposing
20 him to the risk of heat stroke due to his "Heat Risk" status. Plaintiff requested that the ventilation
21 problem be corrected and to be provided with ice.³ (ECF No. 24, p. 6, ¶ 29; Samson Decl., ¶ 3
22 [Simmons Dep. 35:9-12]; Defs.' Ex. 1.)

23 4. By Plaintiff's own admission, he did not have a thermometer in his cell. (Samson
24 Decl., ¶ 3 [Simmons Dep. 43:17-25; 44:1-6].)

25
26 ² Plaintiff filed his own statement of undisputed facts, and Defendants filed a response thereto. Defendants object to all
27 sixteen of Plaintiff's proposed undisputed facts on the grounds that it is not relevant or material to the present motion, or
not supported by the evidence cited by Plaintiff. The Court has reviewed Plaintiff's proposed statement of undisputed facts
and agrees with Defendants.

28 ³ Plaintiff's objection to the title of the grievance form is immaterial and is overruled.

1 5. Because Plaintiff's administrative grievance concerned a request for maintenance
2 repairs, the appeals office referred the appeal to Defendant Keiley, the KVSP Correctional Plant
3 Manager II, and Defendant Grissom, the Associate of Business Services, to provide a response at the
4 first level of review. (Keiley Decl., ¶¶ 3, 5; Grissom Decl., ¶¶ 2-3, 5; Defs.' Ex. 1.)

5 6. In response to Plaintiff's administrative grievance, Defendant Keiley, requested that the
6 KVSP Chief Engineer, Defendant St. Lucia, investigate Plaintiff's allegations. (Keiley Decl., ¶ 6; St.
7 Lucia Decl., ¶¶ 1, 4.)

8 7. Defendant St. Lucia interviewed Plaintiff on July 20, 2006, and measured the
9 temperature in Plaintiff's cell. (St. Lucia Decl., ¶ 5.)

10 8. Defendant St. Lucia was not authorized to supply Plaintiff with ice or cold showers, but
11 Defendant St. Lucia informed Plaintiff that he could make a request for ice or cold showers through
12 custody staff. (St. Lucia Decl., ¶¶ 8, 10; Defs.' Ex. 1.)

13 9. Based on the investigation conducted by Defendant St. Lucia, Defendant Keiley denied
14 Plaintiff's administrative grievance at the first level and Defendant Grissom approved the denial.
15 (Keiley Decl., ¶ 9; Grissom, Decl., ¶ 10.)

16 10. In addition, KVSP has a Heat Plan that is required to be implemented when
17 temperatures exceed a threshold that is safe for heat risk inmates. (Hancock Decl., ¶¶ 4-5; Keiley
18 Decl., ¶ 15; Defs.' Ex. 3.)

19 11. Under the Heat Plan, Defendant Keiley, who was responsible for managing
20 maintenance and plant operations, would not have been notified of any problems with ventilation or
21 the cooling system unless the internal temperature of a housing unit reached 90 degrees to conduct
22 priority work repairs. (Keiley Decl., ¶ 14.)

23 12. On October 26, 2006, a nurse came to Plaintiff's cell to pass out medications.
24 (Samson Decl., ¶ 3 [Simmons Dep. 104:7-8].)

25 13. During that nurse's first medication pass at Plaintiff's cell, Plaintiff advised the nurse
26 that he was missing one of his medications and, in response, she informed him that she would bring
27 the medication back at the last medication pass. (Samson Decl., ¶ 3 [Simmons Dep. 104:1-17].)

1 14. However, during the last medication pass, Plaintiff advised the nurse that he did not
2 receive his pain medication. (Samson Decl., ¶ 3 [Simmons Dep. 104:18-21].)

3 15. Officer Rients overheard the nurse respond to Plaintiff and inform him that he had
4 received all required medications and asked for her medication envelope to be returned. (Rients Decl.,
5 ¶ 4.)

6 16. Plaintiff, however, refused to return the medication envelope and stated that he wanted
7 his medication. (Rients Decl., ¶ 5; Samson Decl., ¶ 3 [Simmons Dep. 106:15-21].)

8 17. Officer Rients issued Plaintiff a rules violation report for delaying a peace officer.
9 (Rients Decl., ¶ 11; Defs.' Ex. 4.)

10 18. Nursing licensure laws require nurses who fill the medication envelope to also
11 dispense the medication to the patient. (Ranson Decl., ¶ 11.)

12 19. Therefore, the nurse who conducted the medication pass in the housing unit would have
13 known what medications were present in the envelope provided to the Plaintiff. (Ranson Decl., ¶ 12.)

14 20. Also, the nurse who administered Plaintiff's medications at 1800 hours would have
15 been working the same shift as the nurse who administered medications at 2000 hours. (Ranson Decl.,
16 ¶ 10.)

17 21. Thus, that same nurse would have been aware of which medications Plaintiff still
18 required at 2000 hours, and which medications had already been dispensed. (Ranson Decl., ¶ 10.)

19 **C. Defendants' Objections to Plaintiff's Evidence Attached to Opposition**

20 Defendants raise several objections to Plaintiff's declaration and certain exhibits attached to his
21 opposition. It is not the practice of the Court to rule on evidentiary matters individually in the context
22 of summary judgment, unless otherwise noted. Only the objections to exhibits that are relevant and
23 need to be considered in resolving the instant motions will be addressed below.

24 **D. Findings on Defendants' Motion**

25 Plaintiff raises claims under Section 1983 for violation of the Eighth Amendment's prohibition
26 against cruel and unusual punishments. To constitute cruel and unusual punishment in violation of the
27 Eighth Amendment, prison conditions must involve "the wanton and unnecessary infliction of pain."
28 Rhodes v. Chapman, 452 U.S. 337, 347 (1981). A prisoner's claim does not rise to the level of an

1 Eighth Amendment violation unless (1) “the prison official deprived the prisoner of the ‘minimal
2 civilized measure of life’s necessities,’” and (2) “the prison official ‘acted with deliberate indifference
3 in doing so.’” Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting Hallett v. Morgan, 296
4 F.3d 732, 744 (9th Cir. 2002) (citation omitted)). In order to find a prison official liable under the
5 Eighth Amendment for denying humane conditions of confinement within a prison, the official must
6 know “that inmates face a substantial risk of serious harm and disregard[] that risk by failing to take
7 reasonable measures to abate it.” Farmer v. Brennan, 511 U.S. 825, 847 (1994).

8 To maintain an Eighth Amendment claim based on prison medical treatment, an inmate must
9 show (1) a serious medical need by demonstrating that failure to treat a prisoner’s condition could
10 result in further significant injury or the unnecessary and wanton infliction of pain, and (2) a
11 deliberately indifferent response by defendant. Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).
12 The deliberate indifference standard is met by showing (a) a purposeful act or failure to respond to a
13 prisoner’s pain or possible medical need and (b) harm caused by the indifference. Id.

14 It is axiomatic that a prison official’s failure to provide inmates relief from extreme
15 temperatures may constitute an Eighth Amendment violation. Wilson v. Seiter, 501 U.S. 294, 304
16 (1991) (“low cell temperature at night combined with a failure to issue blankets” could constitute an
17 Eighth Amendment violation); Graves v. Arpaio, 623 F.3d 1043, 1049 (9th Cir. 2010) (“The district
18 court did not err … in concluding that dangerously high temperatures that pose a significant risk to
19 detainee health violate the Eighth Amendment.”); Chandler v. Crosby, 379 F.3d 1278, 1294 (11th Cir.
20 2004) (“[T]he Eighth Amendment applies to prisoner claims of inadequate cooling and ventilation.”).
21 The Ninth Circuit has recognized that the “Eighth Amendment guarantees adequate heating” but not
22 necessarily a “comfortable” temperature. Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996). One
23 measure of an inadequate, as opposed to merely uncomfortable, temperature is that it poses “a
24 substantial risk of serious harm.” Farmer, 511 U.S. at 834.

25 1. Heat Temperatures Within KVSP Between June and July

26 As previously stated, Plaintiff contends that the temperature in his cell was 105 degrees
27 Fahrenheit during June and July 2016. As a result, Plaintiff contends that he was exposed to the risk
28 of heat stroke due to his heat risk status. It is undisputed that Plaintiff is prescribed medications that

1 make him susceptible to heat. This susceptibility to heat has caused him to be identified as a “heat
2 risk” inmate. (First Am. Compl., February 17, 2012, ECF No. 24, p. 9-10, ¶¶ 45-46; Samson Decl., ¶
3 3 [Simmons Dep. 23:24-25; 24:1-15].)

4 Defendants submit evidence that KVSP has a Heat Plan that is implemented when
5 temperatures exceed a threshold that is safe for high risk inmates. (Hancock Decl., ¶¶ 4-5; Keiley
6 Decl., ¶ 15; Defs.’ Ex. 3.) The KVSP Heat Plan program requires staff to document the temperatures
7 within the housing units at the highest tier an inmate on the heat-risk list is housed, every three hours,
8 seven days a week. (Defs.’ Ex. 3.) Defendants submit the records from the months of June and July
9 2006 which demonstrate that the temperature did not reach or exceed 90 degrees Fahrenheit in
10 Plaintiff’s housing unit. (Hancock Decl., ¶ 7; Keiley Decl. ¶ 16, Defs.’ Ex. 2.) In opposition, Plaintiff
11 contends that Defendants have provided inaccurate temperature measures and provided “doctored”
12 results which failed to take any temperature measurements at the peak of the day’s heat. (Pl. Opp’n at
13 5, 12.) However, there is no evidence, beyond Plaintiff’s mere speculation, that the records are not
14 authenticate. Indeed, Defendants submit the declaration of B. Hancock, Litigation Coordinator, at
15 KVSP, who is also the Heat Plan Coordinator and maintains the Heat Plan documents in the
16 Institutional Heat Plan files in the ordinary course of business. (Hancock Decl., ¶¶ 1-2.) Hancock
17 declares the following:

18 The purpose of the KVSP Heat Plan is to identify and protect inmates who are, or who may be,
19 susceptible to heat related illness by providing measures of identification and prevention.

20 The KVSP Heat Plan was implemented to meet the requirements ordered by the Court in
21 *Coleman v. Wilson*, Court No. CIV-S-90-0520-LKK-JFM, United States District Court,
Eastern District of California.

22 The Heat Plan provides specific procedures to monitor and record temperature (inside and
23 outside) annually, May 1 through October 31, and it establishes a system to alert staff and
inmates of alternatives necessary, in the event the Institutional Heat Plan is implemented, to
24 prevent the onset of heat related pathologies. Attached as Defendants’ Exhibit 3 is a copy of
the 2006 KVSP Heat Plan.

25 Attached as Defendants’ Exhibit 2 are the Internal Temperature Record Logs for Facility A,
26 Building 1, Section B, the housing unit where Plaintiff Christopher Simmons (P-25328) was
27 housed, for June and July 2006.

1 During June and July 2006, the Inside Temperature did not reach or exceed 90 degrees
2 Fahrenheit in Plaintiff's housing unit. As a result, Stage II of the Heat Plan was not activated.
3 Stage II of the Heat Plan would have required that cooling measures be implemented by
housing staff, including iced liquids, access to showers or spray bottles for misting, and fans.

4 Stage I of the Heat Plan only concerns outside temperatures readings, and is implemented
5 when outside temperatures reach 90 degrees Fahrenheit. However, Stage I requires staff to
alert and move heat risk inmates indoors, but it does not require implementation of cooling
measures, such as iced liquids, access to showers or spray bottles, and fans.

7 (Hancock Decl., ¶¶ 3-9.) There is insufficient evidence to support Plaintiff's bare contention that the
8 internal temperature record logs for the facility where Plaintiff was housed in June and July 2006,
9 were falsified.

10 Plaintiff contends that he notified prison officials of the evaporative cooling system failure on
11 June 24, 2006; however, despite the emergency nature of the appeal, prison officials did not respond
12 until a month later on July 20, 2006. However, the internal temperature record logs for June and July
13 2006 demonstrate that the internal temperature in Plaintiff's housing unit did not exceed 90 degrees
14 Fahrenheit. (Hancock Decl., ¶ 7; Keiley Decl., ¶ 16; Defs.' Ex. 2.) Furthermore, Defendant St. Lucia,
15 Chief Engineer at KVSP, declares, in pertinent part:

16 Under the direction of the Correctional Plant Manager II, I was responsible for supervising the
17 daily operation of the KVSP engineering section.

18 In that capacity, I plan, assign, and supervise the work on staff in performing, maintenance,
19 and repairs for institution equipment and systems, including ventilation and air conditioning.

20 I do not recall any complaints regarding alleged inadequacies in air flow delivered to Plaintiff's
cell before I received Plaintiff's appeal, log no. KVSP-0-06-01537, and conducted an
21 investigation.

22 (St. Lucia Decl., ¶¶2-4.) In addition, Defendant R. Grissom, Associate Warden of Business Services
23 at KVSP, declares that the plant operations staff, including the engineers, routinely monitor the
24 efficiency and output of the prison's cooling and ventilation systems and make adjustments as
25 appropriate. (Grissom Decl., ¶ 13.) Plaintiff submits no evidence to contradict the declarations of St.
26 Lucia and Grissom with regard to the adequacy of the ventilation air flow in June 2006.

1 Furthermore, after Defendants Grissom and Keiley received Plaintiff's administrative appeal
2 alleging that his cell was 105 degrees Fahrenheit and did not have adequate air circulation, Defendant
3 Keiley assigned Defendant St. Lucia to investigate. (Keiley Decl., ¶ 6; St. Lucia Decl., ¶¶ 1, 4.)
4 Defendant St. Lucia declares that on July 20, 2006, he went to Plaintiff's cell, recorded Plaintiff's cell
5 temperature to be at 74 degrees Fahrenheit, measured the air supply temperature at 67 degrees
6 Fahrenheit, and ensured that the cooling systems were functioning normally. (St. Lucia Decl., ¶¶ 6-7.)
7 St. Lucia further declares that had Plaintiff's cell required ventilation or cooling system repairs, he
8 would have performed the repairs himself or instructed other KVSP maintenance staff to perform the
9 repairs without delay. (*Id.* at ¶ 12.) To the extent Plaintiff requested ice or a cold shower from
10 Defendant St. Lucia, he informed Plaintiff that he was not authorized to provide such items to Plaintiff
11 and such request must be directed to custodial staff. (St. Lucia Decl. ¶¶ 8, 10; Defs.' Ex. 1.)

12 Plaintiff admits that he did not have a thermometer in his cell, but he now claims that he was
13 able to read the temperature in the day room of his housing unit and that temperatures ranged between
14 82-84 degrees. (Pl.'s Decl., ¶ 20.) First, Plaintiff's argument lacks evidentiary foundation and
15 support, as the allegation is based purely on Plaintiff's declaration. Second, even assuming the
16 validity of Plaintiff's argument, temperatures ranging from 82-84 degrees would still not necessitate
17 the implementation of the KVSP Heat Plan.

18 Plaintiff contends that on July 26, 2006, the temperature on day room thermometer read 95
19 degrees Fahrenheit. (Pl.'s Decl., ¶ 16.) However, such is based on a reading of a thermometer in
20 control booth that Plaintiff admitted at his deposition was not working at the time relevant to this
21 action. (Simmons Dep. at 44.) Thus, this factual contention lacks support and contradicts Plaintiff's
22 deposition testimony. While the Court sympathizes with Plaintiff's claim that his housing unit felt hot
23 during the summer months of June and July 2006, and Defendants acknowledge that the ventilation
24 was repaired during the third week of July 2006, there is no evidence to support the contention that the
25 temperatures exceeded 90 degrees Fahrenheit. Plaintiff's repeated arguments and evidence relating to
26 the external temperature at KVSP in June and July 2006, is not relevant to the analysis here, of the
27 internal temperatures within the KVSP facility. Accordingly, this evidence to the extent it may be
28 considered is not relevant and does not create a genuine issue of material fact to defeat summary

1 judgment. While Defendants have acknowledged that the ventilation system was repaired in the third
2 week of July 2006, there is no competent evidence that the temperatures in Plaintiff's cell reached or
3 exceeded 90 degrees, notwithstanding the cooling and ventilation system, such that KVSP's Heat Plan
4 program would have been implicated and appropriate measure taken.

5 Furthermore, Plaintiff may not attempt to defeat Defendants' motion for summary judgment by
6 arguing that the Defendants acted improperly during discovery because there have been no meritorious
7 motions to compel the alleged discovery and there has been no sanctions ruling in the course of
8 discovery. See, e.g., Bank of America Nat'l Trust & Savings Ass'n v. Envases Venezolanos, S.A.,
9 740 F.Supp. 260, 269 (S.D.N.Y.) ("Simple allegations of improper discovery tactics are not sufficient
10 to defeat a summary judgment motion, particularly where the party making those allegations has failed
11 to take advantage of the appropriate avenues of relief available under the Federal Rules of Civil
12 Procedure."); citations.) Arguments or contentions set forth in a responding brief do not constitute
13 evidence. See Coverdell v. Dep't of Soc. & Health Servs., 834 F.2d 758, 762 (9th Cir. 1987)
14 (recitation of unsworn facts not evidence). Plaintiff must do more than attack the credibility of
15 Defendants' evidence. See National Union Fire. Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th
16 Cir. 1983) ("[N]either a desire to cross-examine an affiant nor an unspecified hope of undermining his
17 or her credibility suffices to avert . . . judgment."). Accordingly, Defendants' motion for summary
18 judgment should be denied.

19 2. Deliberate Indifference to Serious Medical Need-Defendant Rients

20 Plaintiff contends that on October 26, 2006, Defendant Rients interfered with his prescribed
21 medications, causing him to suffer the entire night without pain medications.

22 While the Eighth Amendment of the United States Constitution entitles Plaintiff to medical
23 care, the Eighth Amendment is violated only when a prison official acts with deliberate indifference to
24 an inmate's serious medical needs. Snow v. McDaniel, 681 F.3d 978, 985 (9th Cir. 2012), overruled
25 in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th Cir. 2014); Wilhelm v.
26 Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).
27 Plaintiff "must show (1) a serious medical need by demonstrating that failure to treat [his] condition
28 could result in further significant injury or the unnecessary and wanton infliction of pain," and (2) that

1 "the defendant's response to the need was deliberately indifferent." Wilhelm, 680 F.3d at 1122 (citing
2 Jett, 439 F.3d at 1096). Deliberate indifference is shown by "(a) a purposeful act or failure to respond
3 to a prisoner's pain or possible medical need, and (b) harm caused by the indifference." Wilhelm, 680
4 F.3d at 1122 (citing Jett, 439 F.3d at 1096). The requisite state of mind is one of subjective
5 recklessness, which entails more than ordinary lack of due care. Snow, 681 F.3d at 985 (citation and
6 quotation marks omitted); Wilhelm, 680 F.3d at 1122.

7 It is undisputed that on October 26, 2006, a nurse went to Plaintiff's cell to pass out
8 medications. (Simmons Dep. at 104:7-8.) During the nurse's first medication pass at Plaintiff's cell,
9 Plaintiff advised the nurse that he was missing one of his medication and, in response, she informed
10 him that she would bring the medication back at the last medication pass. (Id. at 104:1-17.) However,
11 during the last medication pass, Plaintiff advised the nurse that he did not receive his medication. (Id.
12 at 104:18-21.) Officer Rients overheard the nurse respond to Plaintiff and inform him that he had
13 received all required medications and asked for her medication envelope to be returned. (Rients Decl.,
14 ¶ 4.) Plaintiff, however, refused to return the medication envelope and stated that he wanted his
15 medication. (Rients Decl., ¶ 5; Simmons Dep. at 106:15-21.) Officer Rients issued Plaintiff a rules
16 violation report for delaying a peace officer. (Rients Decl., ¶ 11; Defs.' Ex. 4.) Nursing licensure
17 laws require nurses who fill the medication envelope to also dispense the medication to the patient.
18 (Ranson Decl., ¶ 11.) Therefore, the nurse who conducted the medication pass in the housing unit
19 would have known what medications were present in the envelope provided to the Plaintiff. (Ranson
20 Decl., ¶ 12.) Also, the nurse who administered Plaintiff's medications at 1800 hours would have been
21 working the same shift as the nurse who administered medications at 2000 hours. (Ranson Decl., ¶
22 10.)

23 There is no evidence to support Plaintiff's claim that Defendant officer Rients interfered with
24 the administration of Plaintiff's pain medication on October 26, 2006. The mere failure of preventing
25 Plaintiff from ascertaining the name of the nurse who dispensed the medications on October 26, 2006,
26 is insufficient to demonstrate deliberate indifference on the part of Defendant officer Rients because at
27 the time of the alleged interference by Rients, Plaintiff had already received any and all medication
28 treatment he was going to receive that day. Defendant Rients declares that when the nurse indicated

1 that Plaintiff had received all medications he was supposed to receive, he believed that Plaintiff had
2 been provided with all prescribed medications. (Rents Decl., ¶ 16.) P.K. Ranson declares, “[o]fficer
3 Rents would not have had any knowledge of what medications Plaintiff had been dispensed or
4 required, and it would have been reasonable to rely on the statements of the nurse conducting the
5 medication pass when she indicated, as noted in the rules violation report, that the Plaintiff had already
6 received all required medications.” (Rents Decl., ¶ 13.) Here, the evidence in the record
7 demonstrates that Defendant officer Rents reasonably relied on the nurse’s medical determination that
8 Plaintiff had received all the medication he was due that day.

9 Plaintiff acknowledges that he did not return the medical envelope in an attempt to have the
10 nurse return for purposes of obtaining his/her name to file a complaint. The fact that Defendant officer
11 Rents directed and obtained the medical envelope from Plaintiff does not demonstrate deliberate
12 indifference to a serious medical need. There is no evidence that Defendant officer Rents made any
13 decision, whatsoever, as to the administration of Plaintiff’s pain medication on October 26, 2006, and
14 the medical notes from that day demonstrate that nursing staff was to administer Atenolol, Oxycodone
15 and Pregabalin on October 24, 2006. (Defs.’ Ex. 5, at 14; see also Defs’ Ex. 5 at 7-13.) The medical
16 records indicate that on October 26, 2006, Plaintiff received all the prescribed medications, but even if
17 he did not receive the pain medication on October 26, 2006, such action cannot be attributed to
18 Defendant officer Rents. In his opposition, Plaintiff contends that officer Rents used excessive force
19 in retrieving the medical envelope from him, such allegations exceed the scope of the operative
20 complaint and Plaintiff is not proceeding on a claim of excessive force. Thus, nothing in the record
21 suggests that Defendant officer Rents did anything other than his job in retrieving the medical
22 envelope, after disbursement of all medication, to return to the nursing staff. Accordingly, Defendant
23 Rents is entitled to summary judgment.

24 3. Retaliation Claim-Defendant Rents

25 Plaintiff contends that Defendant Rents gave Plaintiff a rules violation report after Plaintiff
26 stated that he would file a staff misconduct complaint.

27 “Prisoners have a First Amendment right to file grievances against prison officials and to be
28 free from retaliation for doing so.” Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (citing

1 Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009)). A retaliation claim in the prison context has
2 five elements: (1) the plaintiff engaged in protected conduct, (2) the defendant took adverse action
3 against the plaintiff, (3) there was a causal connection between the adverse action and the protected
4 conduct, (4) the official's acts would chill or silence a person of ordinary firmness from future First
5 Amendment activities, and (5) the retaliatory action did not advance legitimate goals of the
6 correctional institution. Id.

7 In this case, there is no question that a reduction in pay constitutes an adverse action, see
8 Brodheim, 584 F.3d at 1270 (the mere threat of harm can be sufficiently adverse to support a
9 retaliation claim), or that engagement in filing prison grievances is protected conduct, Watison, 668
10 F.3d at 1114-15; Brodheim, 584 F.3d at 1269. The critical inquires in this case relate to 1)
11 Defendant's motive in issuing Plaintiff a rules violation report, and 2) the existence of a legitimate
12 correctional goal underlying the issuance of the rules violation report.

13 Plaintiff must show that his expression that he would file a staff complaint stemming from
14 officer Rient's alleged interference with his medications was the substantial or motivating factor in
15 Defendant's decision to issue Plaintiff a rules violation report for delaying a police officer in the
16 performance of duty, Title 15 of the California Code of Regulations Section 3005. Brodheim, 584
17 F.3d 1262, 1271 (9th Cir. 2009) (citing Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th
18 Cir. 1989)). In this Circuit, Plaintiff need "only put forth evidence of retaliatory motive that, taken in
19 the light most favorable to him, presents a genuine issue of material fact as to" Defendant's
20 motivation. Brodheim, 584 F.3d at 1271 (citing Bruce v. Ylst, 351 F.3d 1283, 1289 (9th Cir. 2003))
21 (internal quotation marks omitted). This requires Plaintiff to offer either direct evidence of retaliatory
22 motive or at least one of three general types of circumstantial evidence: (1) proximity in time between
23 the protected conduct and the alleged retaliation, (2) expressed opposition to the conduct, or (3) other
24 evidence that the reasons proffered by Defendant for the adverse action were false and pretextual.
25 McCollum v. California Department of Corrections and Rehabilitation, 647 F.3d 870, 882 (9th Cir.
26 2011) (citing Allen v. Iranon, 283 F.3d 1070, 1077 (9th Cir. 2002)) (quotation marks omitted).

27 As just stated, Plaintiff contends that Defendant officer Rents issued him a rules violation
28 report on October 26, 2006, because Plaintiff indicated that he would file a staff complaint stemming

1 from the alleged interference with his medications. Defendant Rients does not recall hearing Plaintiff
2 indicate that he was going to "write him up," and declares that he had a legitimate correctional goal for
3 issuing Plaintiff a rules violation report. (Rients Decl., ¶ 13.)

4 In issuing Plaintiff the rules violation report, Defendant officer Rients stated the following:

5 On 10-26-06, at approximately 2110 hours, while I was assigned as A1-Floor#1, L.V.N.
6 Alstrum was doing her medication pass. Inmate SIMMONS (P-25328,FAB1-113L) started to
7 complain about not getting one of his medications. L.V.N Alstrum told inmate SIMMONS
8 that he got the medications he was supposed to get and asked for her medication envelope
9 back. Inmate SIMMONS said he wanted his medication and wouldn't give back the envelope.
10 I told inmate SIMMONS I'm giving you a direct order to give the envelope back you are
11 delaying the L.V.N.'s medication pass. Inmate SIMMONS said he wanted to talk to a Sgt. I
12 told inmate SIMMONS he was going to program to see the Sgt. The L.V.N. continued her
13 medication pass. When myself and C/O Robles went to take inmate SIMMONS to program he
14 didn't want to go. I told inmate SIMMONS the only way you are not going to program is if
you give the envelope back. Inmate SIMMONS gave the envelope back. I told inmate
SIMMONS you will be receiving a CDCR-115 for delaying the medication pass and refusing a
direct order. Inmate SIMMONS started to complain about getting the write up, I told him you
slowed down her medication pass and delayed program for about (10) minutes while you
argued with us. I still have to pick up mail and count and you delayed that. Inmate
SIMMONS is aware of this report.

15 (Defs.' Ex. 4, at 1.) Plaintiff was found guilty of willfully delaying a peace officer. (Id. at 2.)

16 Plaintiff's explanations for his conduct and argument that the evidence does not support the
17 rules violation report are not relevant to his claim of retaliation. In addition, Plaintiff's claim that
18 Defendant Rients issued the rules violation report to cover up his alleged use of excessive force, and
19 not because of the exercise of his First Amendment rights is beyond the scope of this action. The
20 Court did not find that Plaintiff's first amended complaint stated a cognizable retaliation based on
21 alleged excessive force by Defendant Rients. (ECF No. 47.) The Court's screening decision controls
22 and a party may not amend claims by way of an opposition to a motion for summary judgment. See,
23 e.g., Fossen v. Blue Cross and Blue Shield of Montana, Inc., 660 F.3d 1102, 1115 (9th Cir. 2011);
24 Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1079-80 (9th Cir. 2008). In any event, Plaintiff's
25 retaliation claim based on the exercise of his First Amendment rights fails on the merits. Plaintiff
26 admittedly withheld the medical envelope, and Plaintiff's conduct provided justification for the
27 issuance of the rules violation report for delaying a peace officer in performance of duty. The
28 connection between the disciplinary measure taken against Plaintiff and his failure to comply with the

1 applicable rules is neither arbitrary nor irrational. Brodheim, 584 F.3d at 1272-73 (citing Shaw, 532
2 U.S. at 228) (quotation marks omitted). To the contrary, there was a valid, rational connection
3 between actions taken against Plaintiff and the preservation of institutional safety and security
4 allowing peace officers to perform their official duties. Id. Plaintiff has failed to submit any evidence
5 to demonstrate that Defendant Rients acted with a retaliatory motive in issuing the rules violation
6 report or that disciplinary action did not serve a legitimate penological interest. Accordingly,
7 summary judgment should be granted as to Plaintiff's retaliation claim based on the issuance of the
8 rules violation report.

9 **IV.**

10 **RECOMMENDATIONS**

11 Based on the foregoing, it is HEREBY RECOMMENDED that:

12 1. Defendants' motion for summary judgment be granted; and
13 2. Judgment be entered in favor of Defendants

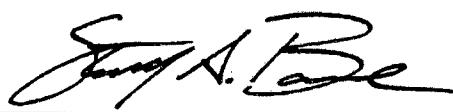
14 These Findings and Recommendations will be submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after
16 being served with these Findings and Recommendations, the parties may file written objections with
17 the Court. The document should be captioned "Objections to Magistrate Judge's Findings and
18 Recommendations." The parties are advised that failure to file objections within the specified time
19 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.
20 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

21

22 IT IS SO ORDERED.

23

Dated: November 21, 2017



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UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 13 2019

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

CHRISTOPHER ISAAC SIMMONS,

Plaintiff - Appellant,

v.

GRISSEOM; et al.,

Defendants - Appellees.

No. 18-16357

D.C. No. 1:07-cv-01058-DAD-SAB
U.S. District Court for Eastern
California, Fresno

ORDER

A review of the docket demonstrates that appellant has failed to respond to the January 23, 2019 order of this court.

Pursuant to Ninth Circuit Rule 42-1, this appeal is dismissed for failure to prosecute.

This order served on the district court shall, 21 days after the date of the order, act as the mandate of this court.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Tina S. Price
Deputy Clerk
Ninth Circuit Rule 27-7