UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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U.S. COURT OF APPEALS

JAMES ARTHUR ROSS, Plaintiff-Appellant, v. STEVEN SHELTON; et al., Defendants-Appellees.	No. 19-35247 D.C. No. 2:18-cv-00045-YY District of Oregon, Pendleton ORDER

Before: SCHROEDER, HAWKINS, and LEE, Circuit Judges.

We treat Ross's petition for panel rehearing and petition for rehearing en banc as a motion for reconsideration and motion for reconsideration en banc. The mandate is recalled for the limited purpose of considering Ross's combined motion for reconsideration and reconsideration en banc (Docket Entry No. 13).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

The mandate shall reissue forthwith.

No further filings will be entertained in this closed case.

Appendix A.

Unfortunately, due to an extremely chaotic and misfortunate ~~event~~ series of events, I have been unable to locate the 9th Circuits original dismissal order. I believe I may have sent it in attached to my Petition for Rehearing. Also, since the events described above are all related to COVID-19 issues, lockdowns and my own infection that devasted me, I have had no time or resources to be able to obtain the document. I cannot even pull it up on the computer. Hopefully, this court is understanding and will not hold it against me. If nothing else, allow me the time to write the court (9th Cir.) to obtain a copy which may take several months to achieve. Thank You!

Appendix B

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PENDLETON DIVISION

JAMES ARTHUR ROSS,

Plaintiff,

v.

STEVEN SHELTON, M.D., et al,

Defendants.

Case No. 2:18-cv-00045-YY

ORDER

YOU, Magistrate Judge:

On February 21, 2019, this court issued an Opinion and Order (ECF #42) granting defendants' Motion for Summary Judgment. Plaintiff has filed a Motion for Reconsideration (ECF #45), which is denied for the reasons set forth below.

"Reconsideration is an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 540 F. Supp. 2d 1176, 1179 (D. Or. 2008) (quoting *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). "[A] motion for reconsideration should not be granted, absent highly unusual circumstances." *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999); *see also Shalit v. Coppe*, 182 F.3d 1124, 1132 (9th Cir. 1999) ("[R]econsideration is appropriate only in very limited circumstances . . . . "). "Motions for reconsideration are generally disfavored, and may not be used to present new arguments or

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evidence that could have been raised earlier." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991); *see also Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) ("A motion for reconsideration may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised in earlier litigation.").

A motion for reconsideration is "appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J v. AC & S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

This court has reviewed plaintiff's motion for reconsideration. To the extent plaintiff raises the same arguments he made in response to defendants' motion for summary judgment, the court carefully considered those arguments and rejected them for the reasons extensively discussed in its Opinion and Order. After reviewing plaintiff's motion for reconsideration, the court is not persuaded there is clear error in its decision. To the extent plaintiff makes new arguments, he could have asserted those in his earlier response but did not. As such, they cannot be considered on reconsideration. For these reasons, plaintiff's motion for reconsideration (ECF #45) is denied.

CONCLUSION

Plaintiff's Motion for Reconsideration (ECF # 45) is DENIED.

DATED March 29, 2019.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge

JAMES ARTHUR ROSS
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMES ARTHUR ROSS,	) **Case No. 2:18-cv-00045-YY**
Plaintiff,	)
v.	) **PLAINTIFF'S MOTION FOR RECONSIDERATION**
STEVEN SHELTON, et al.,	)
Defendant(s).	)

COMES NOW, James Arthur Ross, the Plaintiff, pro se, and hereby respectfully moves this Court for reconsideration of it's OPINION AND ORDER dismissing this case dated February 21st, 2019. The plaintiff submits the following, but not limited to, as the basis for reconsideration:

First, the plaintiff wishes for this Honorable Court to acknowledge that he is pro se and a person not trained in the law. That he is doing his very best to understand these proceedings, respond appropriately and articulately.

Therefore, the plaintiff is going to attempt to lay out how he believes this Court erred, misconstrued the facts and/or abused it's discretion in the summary judgment process and in this case over all:

First, this court denied the plaintiff assistance of counsel citing that it did not have to appoint counsel in civil cases nor did it have the authority to do so. This court also reasoned that it believed the

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plaintiff able to litigate his own case sufficiently.

However, this court went even further to deny the plaintiff any discovery, failed to rule on the Plaintiff's request for expert testimony, which the plaintiff asserts would have proved that for an initial screening during the course of treatment for a knee injury, yes, a brief examination and an X ray may have been proper, initially, however, further treatment would demand an M.R.I. (Magnetic Resonance Imaging) – A noninvasive diagnostic technique that produces computerized images of internal body tissues based on electromagnetically induced activity of atoms within the body, in order to determine if any real damage had occurred to the tendons and ligaments, more specifically, the A.C.L. and M.C.L., which the plaintiff believes that he is suffering from a damaged or torn M.C.L., which left untreated will result in irreparable and permanent damage.

Furthermore, the expert witness, to wit an orthopedic surgeon, not a physician whom is not trained in such fields, could have given his expert and specialized opinion on at least the proper course of treatment and the necessary tests to be performed. This is important, because the limits, usages and intents of the capabilities of such tests when compared to each other such as an X ray, M.R.I. or an athropetic procedure, is not a question of debatable treatment, rather, scientific fact of what each test is capable of or, rather, limited to.

If, as the plaintiff contests, that an X ray is unable to determine such injuries and is instead, limited to bony abnormalities and soft tissue damage (such as a bruise), then, there is an issue of why has not the defendants taken this next step to ensure that the plaintiff does not have a more serious injury or damage, which left untreated, would lead to serious irreparable and permanent damage.

This is especially so, after the Plaintiff's repeated attempts over the years, literally, to be properly treated, which this court repeatedly cites, yet, appears to fail or refuses to acknowledge or to recognize these facts as evidence supporting the Plaintiff's position in this case.

Instead, this court appears to be in the position as if the plaintiff never followed up, when the

fact of the matter is, as the plaintiff has previously laid out, uncontested, that plaintiff had repeatedly, almost in a timely graphed timeline over a period of years, sought medical treatment for his knee injuries only to receive the exact same response each time, which led to him being placed on sports restrictions with X rays and false promises of follow up treatment that never came about[1].

Furthermore, the plaintiff would be left waiting for an extreme period of time until he had no choice, but to sign up again seeking medical treatment for the same exact issues, only to repeat the same exact process and lies as to follow up treatment. The only thing changing was the length of the amount of time in which he was placed on "sports restrictions" status, which the plaintiff has consistently asserted, was nothing more than a form of punishment and retaliation.

For example, "sports restrictions" means that the person whom is placed on such status cannot do nothing more than walk. The person cannot do any exercise no matter what. Even if it does not involve the use of the area of medical concern. The person cannot be caught participating in any way, shape or form of any activity.

For example, if a soccer ball or basketball rolls your way and you pick it up and toss it back to the inmates whom are using it, you are now in violation of your restrictions and can and will be subject to disciplinary punishment. The plaintiff has seen this happen. It is a way to retaliate under the false premises of providing "proper" medical treatment to bypass the laws against such retaliation, while actually providing no treatment at all. (More genuine issues suitable for trial)

For example, ask yourself, would it be ok if you went to your doctors office for the flu and he told you to stay in bed and take some cold and flu medicine. However, while at home, you go outside to check your mail. The next thing you know, you are being taken to jail, because your doctor found out that you were out of your bed. Now, you are subject to losing your job and interfering with countless other reparations in your life as a result. Is this court saying that that would be ok? That that is a proper

1 This is very important as the defendants do not contest these facts. Instead, they argue in favor of these facts as a proper course of medical treatment.

course of medical treatment and not unreasonable in order for you to obtain medical treatment? If not, then, how can this court determine that it would be proper for an inmate to obtain medical treatment?

Also, this court acknowledges that since 2016, the plaintiff has not signed up again for treatment, as if that is of some factual importance in support of the defendants. When in fact, it is nothing more than clear and reasonably convincing evidence to the contrary. The reality is that plaintiff did not want to be punished anymore for seeking medical treatment and was in fear of it[2]. Nothing in the record would suggest otherwise and this court has failed the plaintiff in recognizing it as such.

Furthermore, each time the plaintiff was placed on such restrictions, he gained great amounts of weight and was very depressed affecting his daily activities, duties and responsibilities. His only option was to seek litigation in hopes the court would intervene and that he would finally receive the help that he needs. The mere fact that he has stopped seeking medical treatment from the defendants for his knee injuries is nothing more than absolute proof that the defendants successfully interfered in the Plaintiff's attempts to seek his constitutional rights to medical care and, thus, violating his constitutional rights.

The only way that would make any of it reasonable giving the defendants any shroud of evidence to the contrary, would have been if they had actually followed up with continued care. This did not happen and this court fails to or refuses to acknowledge that the Plaintiff's injuries did not stop hurting. The only thing that happened was the passage of time[3] while the plaintiff was waiting to be followed up with until eventually he got tired of waiting and suffering and, as stated above, started the whole process over again.

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2 As stated previously in this case, which was again, barely noted by this court, the plaintiff has a heart condition, which he was told by the same defendants, that he needs to exercise and be more healthy. The Plaintiff's condition could end in cardiac arrest. This is a serious issue. In fact, the plaintiff has been battling these issues along with an enlarged liver and other unknown medical issues that he is being currently treated for, which all require better exercise and healthier living, not restrictions subject to disciplinary sanctions. This is further reasonable evidence in support of the plaintiff's case.

3 If it truly is nothing more than a bruise, then, how long would this court suggest that plaintiff should have to wait for the pain to resolve, weeks, months, years, because as this court so laid out in it's order, that is exactly what the plaintiff went through. Years of suffering with no extended treatment. If an X ray did not show you the first time, it is not going to show you the second or third or fourth time either. All you are doing is subjecting the plaintiff to extreme amounts of radiation for no reason, especially when their are other tests that have absolute and undeniable results.

Not once, did the defendants say or come to the medical conclusion that the Plaintiff's injuries were an ongoing issue and that their may be something more serious entailed. Nor did they take any further follow up steps to ensure such. Especially so after the plaintiff specifically stated such to the defendants. That "this is not a new injury"; "Please do not retaliate against me by placing me on sports restrictions again"; all of which is stated in the Plaintiff's grievances, pleadings, exhibits and all uncontested by the defendants making them facts of the case.

Yet, the plaintiff was given no further treatment beyond which he had been receiving for years, which did not resolve the issues nor relieve the plaintiff from his continued suffering. This is the epitome of deliberate indifference, medical negligence and this court has failed and/or refused to acknowledge such[4], let alone, any fact in support of the Plaintiff's case. They have all been misconstrued or twisted in favor of the defendants, which in this stage of the proceedings, especially with all the limitations that this court has placed on the Plaintiff, such is supposed to be construed in the favor of the non-moving party, to wit, the plaintiff.

Furthermore, this court states that "Ross has not reported any knee pain since, although he has complained on different occasions about the flu, a rash, and a sore on his third right toe". This is confounding to the plaintiff, because not only has this court looked into the records to make such a statement, it appears to be insinuating that since the plaintiff went to medical for other, minor issues as listed, that that is somehow evidence against the plaintiff.

First, even if it was, that would have been another genuine issue of fact suitable for trial.

However, for arguments sake, one is not placed on such restrictions as the plaintiff has raised

4 This court even even cites the Defendants' statement from J. DaFoe "I see that your knee pain is something that you have been dealing with for quite some time...." *Id.*, Ex. 10. Instead of this court applying such as evidence to the Defendants' deliberate indifference and medical negligence, this court cites it as evidence in favor of the defendants. As stated above, how long does the plaintiff have to suffer before the medical treatment and concern is elevated? This at least should be genuine issues of fact suitable for trial. Not for this court to determine at this stage. This is not a mere scintilla of evidence and the plaintiff need not show more than one genuine issue suitable for trial. Especially, when it is the Defendants' responsibility and burden to begin with to prove that no triable issues exist.

and suffered from in this case for seeking such minuscule treatment as listed.

Therefore, unless this court is insinuating that when a litigant is seeking litigation in such a case, that said litigant should not seek any other treatment, no matter how serious or not, while litigating on another issue that has nothing to do with one or the other, even as a course of treatment, then, the plaintiff cannot understand any relevancy for this court to make such a statement[5]

It should also be noted that Under section II (A) of this Courts' opinion and order, this court states that the plaintiff "complained of right knee pain, which he has been experiencing since childhood". This statement is false. The plaintiff was, as stated above, following up on his right knee pain from the injury he suffered the previous year, which this court cited in the sentences just above this statement. This Courts' failure to acknowledge such and misconstrue the facts extremely prejudiced the plaintiff in these proceedings and is nothing more than evidence that this court has abused it's discretion in not, in the very least, requesting counsel to represent the plaintiff.

This court also fails to recognize that the defendants do not, and, never have, contradicted or argued against these statements or assertions made by the plaintiff. Instead, they argue that they have given the proper course of treatment. They do not argue the limits of an X ray or the importance of an M.R.I. as the plaintiff asserts, instead, they argue that a brief examination of the injury and an X ray followed by "sports restrictions", as the proper "initial" course of treatment.

The problem is that their is nothing "initial" about the Plaintiff's repeated requests for medical treatment over the course of years, which this court fails to take into account as evidence. The reality is that the plaintiff has been suffering and experiencing extreme pain from these injuries for years and the defendants have been negligent and indifferent to his serious medical needs, see ***McAdoo v. Martin***, 899 F.3d 521 (8th Cir. 2018) pain from an injury is sufficient to establish deliberate indifference; "A serious medical need exists if failure to treat the condition could result in further significant injury or

5 In fact, their are other statements made in this Courts' Opinion and Order that, with all due respect to this court, make the plaintiff feel that this court has some what biasedly tilted this case in favor of the defendants.

the unnecessary and wanton infliction of pain." ***Brown v. Perez***, No. EDCV 14-2421-CJC JEM, 2015 WL 2153451, at *3 (C.D. Cal. May 7, 2015) (citing ***McGuckin v. Smith***, 974 F.2d 1050, 1059 (9th Cir. 1992).

Furthermore, this court states that a "difference of medical opinion...[is] insufficient, as a matter of law, to establish deliberate indifference." *Id.* (citation and quotations omitted). "[N}or does a dispute between a prisoner and prison official over the necessity for or extent of medical treatment amount to a constitutional violation." ***Toguchi v. Chung***, 391 F.3d 1051, 1058 (9th Cir. 2004).

Again, the plaintiff is troubled by this citation. Is this court stating that no matter the prison official, whether medically trained or not, makes any determination that any treatment provided or not, is sufficient treatment, would be beyond contestation?

Because, the plaintiff specifically pointed out that he was never examined by a doctor, orthopedic surgeon or even a physician. That it was a nurse who had "treated" the plaintiff with promises of seeing his care provider, which never happened.

This court repeatedly misconstrues the Plaintiff's pleadings and the facts of the case and unbelievably in favor of the defendants every time. Such as the retaliation issue. Their is no legitimate correctional goal in telling the plaintiff whom was previously directed by the same defendants to exercise and be healthy due to his heart condition, to not do so under pressure of the threat of extreme punishment.

Another statement is this Courts' statement that "even assuming that other inmates with similar injuries are receiving unnecessary MRIs", is prejudicial and bias to the plaintiff. Unless this court is diverse in the medical field or an orthopedic surgeon, how can this court come to the conclusion that MRIs are unnecessary? Let alone that other inmates seeking and receiving such treatment, is unnecessary? It seems extremely biased. And, again, this court takes the Defendants' statements that the plaintiff "received appropriate treatment for his condition" as facts of the case, which this court has not

allowed the plaintiff to contest. The defendants may be trained in some parts of the medical fields, however, that does not mean that they are trained in the fields of the Plaintiff's injuries, nor to the extent of such and the defendants have not provided any evidence as to such. Thus, the Plaintiff's statements should carry even more weight as the facts are supposed to be taken in light most favorable to the non-moving party.

Then, this court continuously states that the plaintiff has failed to show this or prove that or submit evidence to the contrary, while providing him none, nor allowing him any assistance of any kind to present his case to this court. If this court was going to put the plaintiff through such extreme conditions in trying to bring his case to a trial, then, this court should have allowed the plaintiff discovery, expert witness and in the very least requested the assistance of counsel to aide him. It is for all of these reasons that the plaintiff feels that this court has wrongfully tilted these proceedings in favor of the defendants from the start and maybe even in some what of a biased manner as this court appears to lean so heavily on the Defendants' statements as true and absolute while technically barring the Plaintiff to contest them.

CONCLUSION

Plaintiff believes that he has presented this Honorable Court with sufficient triable issues of fact suitable for trial. Plaintiff does not believe that the defendants have met the threshold for summary judgment to begin with, which is mandated by law in the first place before the burden can even be shifted to the plaintiff. Plaintiff argues that in the very least he has proven that contradicted genuine and factual issues exist that should be suitable for trial and not this stage, which is only meant to determine that such exist. Not to actually decide them as if it were trial already and without jury.

Furthermore, this court has repeatedly denied the plaintiff counsel, discovery, expert witness[6]

6 Some of these issues the court has not even ruled on before deciding summary judgment.

and he is not some professional trained in the law with tons of resources at his disposal. In fact, this court has technically stripped any and all resources from the plaintiff, extremely limiting his abilities to even have a fair opportunity to respond to the Defendants' motion for summary judgment. The only real hope that plaintiff had was to be able to show the Defendants' mind sets, actions and the truth through cross examination and other capacities afforded to him through a trial proceeding. Especially since the defendants would have to answer questions on the spot and under oath. Something this court has denied the plaintiff the ability or opportunity to do in this case.

The plaintiff believes that this court has misconstrued the facts of this case, abused it's discretion in denying counsel and any other resource, such as discovery, while taking the Defendants' statements as true, uncontested facts in some what of an almost biased manner. This court has literally handicapped this case from the beginning to such an extent that it truly left no other outcome available to the plaintiff except what this court has unconstitutionally opinioned.

Finally, the plaintiff is not limiting his preservations or arguments through this motion as listed above. He is only attempting to raise some serious concerns that he ha with this Courts' opinion and order that he feels this court could and should address before moving forward. The plaintiff is hoping that this court will reconsider it's decision, request appointment of counsel and allow this case to proceed to trail finding that the defendants did not meet their burden for summary judgment and that there does exist genuine issues of fact suitable for trial.

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Therefore, I, James Arthur Ross, the Plaintiff, pro se, do swear under penalty of perjury that the above is true and correct to the best of my knowledge and belief and for the reason(s) stated above, I humbly pray this Honorable Court to reconsider it's prior decision, find that their does exist triable issues of fact suitable for trial, request the appointment of counsel and allow this case to proceed to trial.

DATED this 07th day of March, 2019.

Respectfully Submitted By:

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cc: Shannon M. Vincent,
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File.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PENDLETON DIVISION

JAMES ARTHUR ROSS,

Plaintiff,

v.

STEVEN SHELTON, M.D., et al,

Defendants.

Case No. 2:18-cv-00045-YY

JUDGMENT

Based on the Record,

IT IS ORDERED AND ADJUDGED that this Action is dismissed, with prejudice. The Court certifies that an appeal would not be taken in good faith. See 28 U.S.C. § 1915(a)(3).

IT IS SO ORDERED.

Dated this 21st day of February, 2019.

/s/Youlee Yim You
Youlee Yim You
United States Magistrate Judge

Appendix E

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PENDLETON DIVISION

JAMES ARTHUR ROSS,

Plaintiff,

v.

STEVEN SHELTON, M.D., et al,

Defendants.

Case No. 2:18-cv-00045-YY

OPINION AND ORDER

YOU, Magistrate Judge:

Pro se plaintiff James Arthur Ross ("Ross") is an inmate housed at Two Rivers Correctional Institution ("TRCI") in Umatilla, Oregon. He brings a civil rights action pursuant to 42 U.S.C. § 1983 against defendants Dr. Steven Shelton, M.D., medical director at the Oregon Department of Corrections ("ODOC"), J. Dafoe, health services administrator at ODOC, and three TRCI nurses, B. Whelan, Shannon Johnston, and M. Whelan. Ross' allegations stem from medical care he has received for a knee injury. He alleges that defendants violated his rights "to be free from retaliation, to medical treatment, to be free from cruel and unusual punishment, equal protection and due process and the [Americans with Disabilities Act] ADA, as guaranteed . . . through the Oregon Constitution, Article I, . . . and the United States Constitution[,] Amendments 1st, 8th, and 14th[.]" Compl. 2, ECF #2. Ross seeks 1) an MRI of his knees, ankles, and shoulder; 2) discontinuation of the policy of placing inmates on sports restrictions

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and subjecting them to disciplinary sanctions for noncompliance; 3) discontinuation of the practice of administering x-rays for injuries that should be detected through other means, such as MRIs; and 4) monetary relief in the amount of $127,569.23. *Id.* at 6.

Defendants collectively seek summary judgment (ECF # 31) on all of Ross' claims. For the reasons discussed below, defendants' motion for summary judgment is GRANTED.[1]

I. Summary Judgment Standard

FRCP 56(c) authorizes summary judgment if "no genuine issue" exists regarding any material fact and "the moving party is entitled to judgment as a matter of law." The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party does so, the nonmoving party must "go beyond the pleadings" and designate specific facts showing a "genuine issue for trial." *Id.* at 324 (citing FRCP 56(e)).

The court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-movant's favor. *Newmaker v. City of Fortuna*, 842 F.3d 1108, 1111 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2217 (2017). Although "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment," the "mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 255 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine

[1] All parties have consented to allow a magistrate judge to enter final orders and judgment in this case in accordance with FRCP 73 and 28 USC § 636(c).

issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation and quotation marks omitted).

Pro se complaints are "to be liberally construed." *Estelle v. Gamble,* 429 U.S. 97, 106 (1976). "This rule protects the rights of pro se litigants to self-representation and meaningful access to the courts, . . . and is particularly important in civil rights cases." *Pouncil v. Tilton*, 704 F.3d 568, 574–75 (9th Cir. 2012) (citations and quotation marks omitted).

II. Eighth Amendment

A. Background Facts

On July 6, 2012, Ross saw a medical provider for right knee pain after being involved in an altercation. Decl. Digiulio, ¶ 7. This was Ross' first complaint of knee pain since his admission to ODOC in 2004. *Id.* Three days later, on July 9, 2012, Ross received two x-rays of his right knee. *Id.* The findings were "negative" and showed "no [b]ony, articular or soft tissue abnormality." *Id.* ¶ 8.

On July 8, 2013, Ross complained of right knee pain, which he has been experiencing since childhood. ECF #32, at 20. He reported that his knee went in and out of socket, and that it was out of socket again. *Id.* He described constant pain, rated at a score of six on a scale of one to ten, and asked for the knee to be popped back into place. *Id.* After reviewing the July 9, 2012 x-ray, which showed no significance, medical staff instructed Ross to rest and take ibuprofen for pain, and he was given a sports restriction[2] for two weeks. *Id.*

On July 17, 2014, Ross was playing basketball when he was struck below the left knee. *Id.* at 24-25. He complained of pain radiating to his toes, a swollen knee, and "popping." *Id.*

[2] Ross describes a sports restriction as a limitation on every physical activity except for walking. Resp. 5.

Ross reported that he landed on the side of his ankle and heard a "pop." ECF #32, at 11. Ross was x-rayed the same day, and the results were again normal. Digiulio Decl. ¶ 9. He was told to rest, ice, elevate, and take ibuprofen, and he was given crutches with an Ace bandage wrap. ECF #32, at 12.

Approximately one month later, on August 20, 2014, Ross complained about ongoing knee pain and was told to return to sick call if the problem persisted. *Id.* He returned on August 30, 2014, complaining again of knee pain. *Id.*

On January 8, 2016, Ross reported to sick call with complaints of pain in the left knee in the patella region (left kneecap). *Id.* ¶ 11. He reported a history of left knee trauma from playing basketball, and was experiencing pain and stiffness that woke him during the night and had worsened over the past six to eight months. Ross reported that ibuprofen was no longer effective. Ross was placed on a sports restriction for three months. *Id.*

Three days later, Ross received an x-ray of his left knee. *Id.* The findings were "normal." *Id.* The articular surfaces were smooth and joint spaces appeared normal. *Id.* No acute or chronic feature was seen, and the patella was aligned and intact. *Id.*

On January 29, 2016, Ross sent an inmate communications form to the medical department complaining about lack of treatment for his knee. Compl., Ex. 3. Three days later, on February 3, 2016, he was advised that his "x-ray was normal so most likely it is soft tissue injury and it takes time for soft tissue injuries to resolve[.] [R]esting your leg and taking anti-inflammatories as directed is the right treatment." *Id.*

On February 4, 2016, Ross filed a grievance, complaining that the sports restriction was punitive. He stated that he had heart problems and needed exercise on a regular basis, and that there were plenty of exercises he could perform without hurting his knee. *Id.*, Ex. 5. On March

14, 2016, defendant Shannon Johnston, an RN Nurse Manager, responded to the grievance, noting that x-ray results showed a normal left knee and that a "sports restriction would assist in the healing of [his] chronic knee injury." *Id.*, Ex. 6. Ross appealed his grievance on March 21, 2016. *Id.*, Ex. 7. In his appeal, he expressed concern that "medical would retaliate against me by putting [the] same restriction on me." *Id.*

On May 3, 2016, Dr. Shelton wrote Ross a letter addressing his grievance form. *Id.*, Ex. 8. Dr. Shelton told Ross explained that "[t]he type of knee pain [he] experienced is appropriately treated with rest and nonsteroidal anti-inflammatory drugs (NSAIDs) which includes ibuprofen, Naxproxen, and aspirin" and that "[t]he restriction from sports was intended to avoid further injury to [his] knee and allow it time to heal." *Id.* Dr. Shelton invited Ross to "send an Inmate Communication or visit sick call to discuss the treatment plan based on the progression of [his] knee symptoms" and that "Health Services is committed to providing care that is respectful, compassionate, objective and non-judgmental." *Id.*

On May 11, 2016, Ross filed another grievance appeal form. *Id.*, Ex. 9. Ross stated that "nothing in Dr. Shelton's response justifies the actions taken by 'medical' on me, which did not provide me (in my opinion) proper medical treatment, but only punished me for seeking it." *Id.* On June 27, 2016, defendant J. DaFoe, an ODOC Health Services Administrator, wrote Ross and stated, "I see that your knee pain is something that you have been dealing with for quite some time . . . ." *Id.*, Ex. 10. DaFoe reiterated that a "sports restriction is intended to avoid further injury to your knee and allow it to heal" and "ensures . . . that you are avoiding the activities that can worsen your symptoms." *Id.* DaFoe explained that "[t]his is a standard treatment/protocol for patients complaining of joint/extremity pain/discomfort" and "not intended to be a 'punishment' by any means." *Id.*

Ross has not reported any knee pain since, although he has complained on different occasions about the flu, a rash, and a sore on his third right toe. Digiulio Decl. ¶ 14; ECF #32, at 46, 47. According to Dr. Christopher Digiulio, a physician and deputy medical director with ODOC, the medical care that Ross has received for knee pain was appropriate and well within the community standards. Digiulio Decl. ¶¶ 5, 14.

B. Relevant Law

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.'" *Suchodolski v. Peters*, No. 1:17-cv-01113-AC, 2018 WL 4926300, at *9 (D. Or. Oct. 10, 2018) (citing *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). Punishment must comport with "the evolving standards of decency that mark the progress of a maturing society." *Id.* (quoting *Estelle*, 429 U.S. at 102).

"[T]o state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle,* 429 U.S. at 106. "It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Id.*

A prison official is deliberately indifferent if the official knows that a prisoner faces substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. *Farmer*, 511 U.S. at 847. To succeed on a deliberate indifference claim based on inadequate medical care, a plaintiff must show (1) he suffered an objectively serious illness or

injury while incarcerated, and (2) prison officials were subjectively aware of the plaintiff's serious condition, but nonetheless delayed or denied access to adequate medical care. *Suchodolski*, 2018 WL 4926300, at *10 (internal citations omitted). "Thus, to violate the Eighth Amendment, a prison official must have a 'sufficiently culpable mind.'" *Guy v. Kimbrell*, No. CIVS03-1208-JAM-CMKP, 2008 WL 2774184, at *3 (E.D. Cal. June 27, 2008), report and recommendation adopted, 2008 WL 3200855 (E.D. Cal. Aug. 7, 2008) (quoting *Farmer*, 511 U.S. at 834).

"A serious medical need exists if failure to treat the condition could result in further significant injury or the unnecessary and wanton infliction of pain." *Brown v. Perez*, No. EDCV 14-2421-CJC JEM, 2015 WL 2153451, at *3 (C.D. Cal. May 7, 2015) (citing *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992)). Examples of serious medical needs include "[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *McGuckin*, 974 F.2d at 1059–60.

"However, an inadvertent or negligent failure to provide medical care does not constitute deliberate indifference." *Brown*, 2015 WL 2153451, at *4 (citing *Estelle*, 429 U.S. at 105–06). "When medical treatment is delayed rather than denied, the delay generally amounts to deliberate indifference only if it caused further harm." *Id.* (citing *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990); *Hunt v. Dental Dept.*, 865 F.2d 198, 200 (9th Cir. 1989); *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985); *Hallett v. Morgan*, 296 F.3d 732, 746 (9th Cir. 2002) (delayed dental care did not violate Eighth Amendment because

plaintiffs did not show that "delays occurred to patients with problems so severe that delays would cause significant harm")).

A "difference of medical opinion . . . [is] insufficient, as a matter of law, to establish deliberate indifference." *Id.* (citation and quotations omitted). "[N]or does a dispute between a prisoner and prison official over the necessity for or extent of medical treatment amount to a constitutional violation." *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004).

C. Analysis

There is no evidence that Ross' knee injury is objectively serious under the Eighth Amendment. Multiple x-rays produced negative and normal results, and showed no bony, articular, or soft tissue abnormality. The articular surfaces were smooth and joint spaces appeared normal, there were no acute or chronic features, and the knee cap was aligned and intact. The objective medical evidence does not show this was a condition that "significantly affect[ed] [Ross'] daily activities" and does not corroborate Ross' accounts of "substantial pain." *McGuckin*, 974 F.2d at 1059-60. Instead, Ross has been diagnosed with a soft tissue injury and repeatedly told to rest. This was not an injury "that a reasonable doctor or patient would find important and worthy of comment or treatment" or refer to a specialist, as Ross contends. *Id.*

Moreover, there is no evidence that defendants were subjectively aware of Ross' serious condition, yet nonetheless delayed or denied access to adequate medical care. Each time, after reporting his injuries, Ross has been immediately x-rayed and given prompt medical advice. One time he received crutches and an Ace bandage. Similarly, his grievances have been responded to in a timely manner, and he has been invited to send further inmate communications or visit sick call to discuss his treatment plan and progression of his symptoms. According to Dr.

Digiulio, who is a physician, the medical care that Ross received was appropriate and well within the community standards.

At most, Ross has an argument that defendants were negligent in treating his injury. Ross maintains that he needs to be seen by a specialist and receive an MRI. Resp. 2, ECF #38. However, negligence or a difference of opinion is not enough to establish deliberate indifference. Nor has Ross shown that any delay in treating him has caused further harm. Medical records show that Ross has not been seen for his knee injury since early 2016, although he has complained of other injuries. Ross claims that he has not returned to sick call about his knee because he experiences "no difference," so "why . . . go back . . . to be punished again and still receive no treatment?" Resp. 6. Again, however, his difference of opinion regarding what medical treatment is appropriate for his injury does not establish a claim of deliberate indifference. Because defendants are entitled to prevail on plaintiff's Eighth Amendment claim as a matter of law, their motion for summary judgment on this claim is granted.

III. Retaliation—First Amendment

Ross contends that his "right to be free" from retaliation under the First Amendment has been violated. Compl. 4. Prisoners have a First Amendment right to file prison grievances. *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009) (internal citations omitted). Retaliation against prisoners for exercising this right violates the First Amendment and is a matter of clearly established law. *Id.*

To prevail on this claim, a prisoner must establish that he was retaliated against for exercising his constitutional rights and that the retaliatory action does not advance legitimate penological goals, such as preserving institutional order and discipline. *Barnett v. Centoni,* 31 F.3d 813, 815-16 (9th Cir. 1994) (per curiam). The prisoner must establish: "(1) [a]n assertion

that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Brodheim*, 584 F.3d at 1269 (citing *Rhodes v. Robinson*, 408 F.3d 559, 566 (9th Cir. 2005)).

The prisoner bears the burden of establishing that the actions he complains of have no legitimate penological purpose. *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Generally, courts avoid "excessive judicial involvement in day-to-day prison management, which 'often squander[s] judicial resources with little offsetting benefit to anyone.'" *Id.* at 807 (citation omitted). Courts should "'afford appropriate deference and flexibility to state officials trying to manage a volatile environment,' especially with regard to 'the fine-tuning of the ordinary incidents of prison life, a common subject of prisoner claims[.]'" *Id.* Furthermore "the nature of a retaliation claim requires that it be 'regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions.'" *Banks v. Oregon,* No. 2:12-cv-01651-MC, 2014 WL 1946552, *3 (D. Or. May 12, 2014) (quoting *Adams v. Rice,* 40 F.3d 72, 74 (4th Cir. 1994)).

Ross alleges that prison officials took adverse action against him by imposing a temporary sports restriction when he sought treatment for his knee injury. However, Ross has failed to establish that any adverse action has taken place. Rather, Ross received the standard treatment and protocol for patients complaining of joint/extremity pain and discomfort, which is to rest and take anti-inflammatories. Moreover, even if Ross was able to show that an adverse action took place, he is unable to demonstrate that the action did not reasonably serve a legitimate correctional goal, such as minimizing inmate injury. Because defendants have

established that they are entitled to judgment as a matter of law, summary judgment is granted as to this claim.

IV. Equal Protection

Ross claims that other inmates with similar injuries "receive the very treatment [he] ha[s] been requesting for years." Resp. 7. He contends that this "unequal treatment" is unconstitutional under the Fourteenth Amendment. *Id.*; Compl. 4.

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall deny to any person the equal protection of the laws, "which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). "When an equal protection claim is premised on unique treatment rather than a classification, the Supreme Court has described it as a 'class of one' claim." *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008) (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). To establish a violation of equal protection in a "class of one" case, a plaintiff must establish that the defendants "intentionally, and without rational basis, treated the plaintiff differently from others similarly situated." *Id.* (internal citations omitted). However, a person cannot state an equal protection claim merely by dividing all persons not injured into one class and alleging that they received better treatment than the plaintiff did. *See Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). Instead, to state a "class of one" claim, the plaintiff must identify the group of individuals with whom he is similarly situated, identify the allegedly intentional and disparate treatment, and allege that there was no rational basis for the different treatment. *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011).

Ross has failed to allege a colorable equal protection claim. As Dr. Digiulio explained, the treatment that Ross has been receiving is appropriate for his injury and within community standards. Thus, even assuming that other inmates with similar injuries are receiving unnecessary MRIs, Ross cannot show there is no rational basis for the different treatment he has received, as it is the appropriate treatment for his condition.

V. Due Process

It appears that Ross claims a loss of liberty interest as a result of being placed on a sports restriction. Due process protection attaches only to instances that are an atypical and significant hardship on the inmate compared to the ordinary incidents of prison life. *Brown v. Oregon Department of Corrections*, 751 F.3d 983, 987 (9th Cir. 2014) (quoting *Sandin v. Connor*, 515 U.S. 472, 484 (1995)). Moreover, the Fourteenth Amendment requires only "some evidence" to support a decision by prison officials that results in the loss of a liberty interest. *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455 (1985). The "some evidence" standard "does not require examination of the entire record, independent assessment of the credibility of witnesses, or the weighing of evidence." *Id.* "[T]he relevant question is whether there is any evidence in the record that could support the conclusion." *Id.* at 455-56.

Here, the record does not point to any evidence that the sports restriction placed on Ross was an atypical and significant hardship. Rather, it was "intended to avoid further injury" to Ross' knee and to allow it to heal. The diagnosis and treatment that Ross received, which was appropriate and within community standards, constitutes "some evidence" to support the purported loss of liberty interest, i.e., the sports restriction. Thus, Ross' due process claim fails.

VI. ADA Claim

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity." 42 U.S.C. § 12132. To prove a Title II claim, plaintiff must demonstrate that (1) he is an individual with a disability; (2) he is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) he was either excluded from participation in or denied benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of his disability. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002). A disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A).

Title II of the ADA "unmistakably includes State prisons and prisoners within its coverage." *Pennsylvania Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 210 (1998). "Further, medical care is one of the 'services, programs, or activities' covered by the ADA." *Payne v. Arizona*, No. CV 09-01195-PHX-NVW, 2012 WL 1151957, at *3 (D. Ariz. Apr. 5, 2012) (citing *Kiman v. N.H. Dept. of Corrs.*, 451 F.3d 274, 284 (1st Cir. 2006)). The "alleged deliberate refusal of prison officials to accommodate [a prisoner's] disability-related needs in such fundamentals as . . . medical care . . . constitutes exclusion from participation in or . . . denial of the benefits of the prison's services, programs, or activities." *United States v. Georgia*, 546 U.S. 151, 157 (2006).

However, "[w]hile evidence of discriminatory medical care can constitute a claim under the ADA, claims based solely on provision of inadequate or negligent medical care are not cognizable under the ADA." *Payne*, 2012 WL 1151957, at *4 (citing *Simmons v. Navajo Cnty.*,

Ariz., 609 F.3d 1011, 1021–22 (9th Cir. 2010) ("The ADA prohibits discrimination because of disability, not inadequate treatment for disability."); *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1997) ("The ADA does not create a remedy for medical malpractice."); *Marlor v. Madison Cty., Idaho*, 50 F. App'x 872, 873 (9th Cir.2002) ("Inadequate medical care does not provide a basis for an ADA claim unless medical services are withheld by reason of a disability.")).

Additionally, "[t]o recover monetary damages under Title II of the ADA . . . a plaintiff must prove intentional discrimination on the part of the defendant." *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001). Intentional discrimination is established by showing the defendant acted with "deliberate indifference." *Id.* "Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood." *Id.* at 1139. A plaintiff must "identify 'specific reasonable' and 'necessary' accommodations that the [defendant] failed to provide" and show the defendant's failure to act was "a result of conduct that is more than negligent, and involves an element of deliberateness." *Id.* at 1140.

Here, Ross makes only fleeting reference to the ADA in his Complaint and provides no further explanation of his claim in his response to the motion for summary judgment. Compl. 5, ECF #2. Even assuming Ross has a disability under the ADA, he has failed to establish that defendants acted with the requisite discriminatory intent, or deliberate indifference. As discussed above, there is no evidence that defendants' actions were anything more than negligent, if that.

VII. State Constitutional Claims—Eleventh Amendment

Ross asserts that his rights under the Oregon Constitution, Article 1, have been violated but fails to refer to a specific section. Nevertheless, Ross' claims are barred by the Eleventh Amendment.

Defendants contend that the State of Oregon must be substituted for the individual defendants and thereafter dismissed under the Eleventh Amendment. Mot. Summ. J. 7, ECF #22. In support of their argument, defendants cite to ORS 30.265(1), which they contend provides that the "sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or duties . . . shall be an action against the public body only." *Id.*

Defendants incorrectly cite to an old version of ORS 30.265(1).[3] The current, relevant statutory scheme is codified in ORS 30.265(2) through (4).

In any event, even though "[t]he Oregon Tort Claims Act is a waiver of sovereign immunity[,]" it "does not waive Eleventh Amendment immunity." *Estate of Pond v. Oregon*, 322 F. Supp. 2d 1161, 1165 (D. Or. 2004); *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 n. 9 (1984) ("a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts"). The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

[3] In 1991, the Oregon legislature added the following language to *former* ORS 30.265(1): "The sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or duties and eligible for representation and indemnification under ORS 30.285 or 30.287 shall be an action against the public body only." *Berry v. State, Dep't of Gen. Servs.*, 141 Or. App. 225, 227 (1996). However, the statute has since been amended.

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI. Under the Eleventh Amendment, federal courts may not entertain lawsuits brought by citizens against a state without the state's express consent. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). "The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). The court "will find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction"). *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). The OTCA contains no such express consent to file suit against the state in federal court. *Estate of Pond*, 322 F. Supp. 2d at 1165.

Moreover, it is apparent from the evidence that the individual defendants in this case were acting in their official capacities. "When a plaintiff brings a lawsuit against a government officer in his official capacity, a court treats the suit 'as a suit against the entity' that employs the officer." *Updike v. Clackamas Cty.*, No. 3:15-CV-00723-SI, 2015 WL 7722410, at *3 (D. Or. Nov. 30, 2015) (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). The individual defendants in this case are employees of ODOC and TRCI. TRCI is part of the Oregon Department of Corrections, which is an arm of the State of Oregon. *See Gauthier v. E. Oregon Corr. Inst.*, No. CV 04-290-HA, 2004 WL 2260670, at *4 (D. Or. Oct. 7, 2004) (finding Eastern Oregon Correctional Institution is a part of the ODOC, which is an "arm of the State or Oregon"). Thus, the suit must be treated as one against the State of Oregon, and the state constitutional claims must be dismissed under the Eleventh Amendment.

VIII. Qualified Immunity

Defendants contend that they are entitled to qualified immunity from damages. Mot. Summ. J. 11, ECF #31. It is unnecessary to decide that issue, as the motion for summary judgment is otherwise denied on the merits.

IX. Injunctive Relief

Ross seeks an end to the "policy of placing inmates on restrictions, which subject them to disciplinary punishment or outright denial of treatment" and an end to "giving x-rays for things that obviously need MRIs." Compl. 6. Defendants argue that, even if Ross is entitled to prevail on his claims, this form of relief is unavailable because the Prison Litigation Reform Act ("PLRA") contains a restriction on prospective injunctive relief. Mot. Summ. J. 12, ECF #31 (citing 18 U.S.C. § 3626(a)(1)(A)).

Indeed, under the PLRA, courts "shall not grant or approve any prospective relief unless the court finds such relief is narrowly drawn . . . ." 18 U.S.C. § 3626(a)(1)(A). The PLRA "operates simultaneously to restrict the equity jurisdiction of federal courts and to protect the bargaining power of prison administrators—no longer may courts grant or approve relief that binds prison administrators to do more than the constitutional minimum." *Gilmore v. People of the State of Cal.*, 220 F.3d 987, 999 (9th Cir. 2000).

Demanding an end to "giving x-rays for things that obviously need MRIs" and an end to punitive "inmate restrictions" does not constitute injunctive relief that is narrowly drawn. Furthermore, the relief sought by Ross is not the least "intrusive" means necessary to correct the alleged violations, which pertain to Ross' knee injury. Thus, even if Ross was entitled to relief on his claims, his request for prospective injunction fails for these reasons.

CONCLUSION

Defendants' Motion for Summary Judgment (ECF #31) is GRANTED in its entirety and this action is dismissed with prejudice. The court further certifies that any appeal from the order or judgment dismissing this case would be frivolous and not taken in good faith. *See* 28 U.S.C. § 1915(a)(3).

IT IS SO ORDERED.

DATED February 21, 2019.

/s/ Youlee Yim You

Youlee Yim You
United States Magistrate Judge