

EXHIBIT - L

PART B - RESPONSE

CUMMINGS, DARREL INMATE	088532 NUMBER	1211-405-047 GRIEVANCE LOG NUMBER	SOUTH BAY C.F. CURRENT INMATE LOCATION	B2103L HOUSING LOCATION
----------------------------	------------------	--------------------------------------	---	----------------------------

YOUR REQUEST FOR ADMINISTRATIVE REMEDY OR APPEAL HAS BEEN RECEIVED AND EVALUATED.

YOUR COMPLAINT IS THAT NURSE TRIMBLE IS RETALIATING AGAINST YOU FOR FILING A COMPLAINT AGAINST HER AND IS REFUSING YOU ADEQUATE MEDICAL CARE.

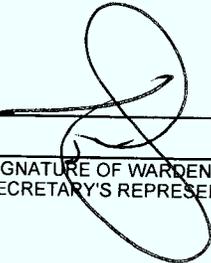
RECORDS INDICATE YOU WERE ASSIGNED AN IMPAIRED ASSISTANT AND YOU REPORTED THAT YOUR ASSISTANT WAS NOT COMPLETING HIS TASK. ON 11/26/2012, YOU WERE SEEN BY THE CLINICIAN AND WERE INSTRUCTED TO AWAIT A CALL-OUT TO BE TRAINED WITH A NEW IMPAIRED ASSISTANT. THERE IS NO EVIDENCE TO SUPPORT YOUR CLAIM THAT NURSE TRIMBLE IS RETALIATING AGAINST YOU.

BASED ON THE ABOVE INFORMATION, YOUR GRIEVANCE IS DENIED.

YOU MAY OBTAIN FURTHER ADMINISTRATIVE REVIEW OF YOUR COMPLAINT BY OBTAINING FORM DC1-303, REQUEST FOR ADMINISTRATIVE REMEDY OR APPEAL, COMPLETING THE FORM, PROVIDING ATTACHMENTS AS REQUIRED BY 33-103.007(3)(A) AND (B), F.A.C., AND FORWARDING YOUR COMPLAINT TO THE BUREAU OF POLICY MANAGEMENT AND INMATE APPEALS, 501 SOUTH CALHOUN STREET, TALLAHASSEE, FLORIDA 32399-2500.

Dr. J. Heller, Medical Director

J. Heller
 J. Heller, M.D.
 S.B.C.F.



11/29/2012
DATE

SIGNATURE AND TYPED OR PRINTED NAME OF EMPLOYEE RESPONDING

SIGNATURE OF WARDEN, ASST. WARDEN, OR SECRETARY'S REPRESENTATIVE

COPY DISTRIBUTION - INSTITUTION / FACILITY

- (2 Copies) Inmate
- (1 Copy) Inmate's File
- (1 Copy) Retained by Official Responding

COPY DISTRIBUTION - CENTRAL OFFICE

- (1 Copy) Inmate
- (1 Copy) Inmate's File - Inst./Facility
- (1 Copy) C.O. Inmate File
- (1 Copy) Retained by Official Responding

1211-405-047
N. Finisse

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

RECEIVED

NOV 21 2012

REQUEST FOR ADMINISTRATIVE REMEDY OR APPEAL

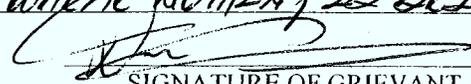
GRIEVANCE CLERK

TO: Warden Assistant Warden Secretary, Florida Department of Corrections
From: CUMMINGS, DANIEL # 068532 3BCE
Last First Middle Initial Number Institution

Part A - Inmate Grievance

ON OR ABOUT 11-19-12 AT APPROXIMATELY 10:45 AM., MYSELF AND NURSE TRIMBLE, BECAME ENGAGED IN A VERY DELIBERATE DISAGREEMENT IN REGARDS TO MY MEDICAL TREATMENT, AND HER BLATANT DISREGARD OF MY SITUATIONS OF CONSTANT PAIN, UNABLE TO STAND OR WALK WITHOUT EVEN MORE EXCRUCIATING PAIN OR EVEN ACCOMPLISH MY DAILY ROUTINES WITHOUT EXTREME DIFFICULTY. THESE PROBLEMS ARE BEING CAUSED BY A SPINAL PROBLEM THAT HAS BEEN DIAGNOSED BY THIS FACILITY APPROXIMATELY 2 1/2 YEARS AGO. HOWEVER, THIS INJURY WAS LEFT UNTREATED AND UNREPAIRED WHICH HAS DETEORATED TO THE POINT OF BECOMING SUBSTANTIALLY WORSE. AND AS A RESULT OF THIS DELIBERATE INDIFFERENCE TO MY SERIOUS MEDICAL NEED FOR PROPER TREATMENT AND SURGERY I AM NOW COMMITTED IT SEEMS PERMANENTLY TO A WHEEL CHAIR AND ASSIGNED AN INMATE HELPER WHO CAN'T EVEN HELP HIS SELF. AND FOR THE RECORD I'VE NEVER AGREED TO BEING PERMANENTLY PLACED IN A WHEEL CHAIR OR TO RECEIVING A DYSFUNCTIONAL INMATE TO ASSIST ME WHEN HE CAN'T ASSIST HIMSELF, THE TOPIC OF ME AND MS. TRIMBLE'S DISAGREEMENT. FURTHERMORE, THIS ALTERNATIVE TO EXCRUCIATING PAIN AND DIAGNOSED INJURY IN NO WAY SUFFICE ADEQUATELY FOR MEDICAL CARE. AS A MATTER OF FACT IT AMOUNTS TO "NO" CARE AT ALL, THE FURTHER PROLONGING OF EXCRUCIATING PAIN, AND EVEN FURTHER DAMAGE TO DETERIORATING INJURY, AMOUNTS TO HUMAN TORTURE, ESPECIALLY WHERE NOTHING IS BEING DONE.

11/20/12
DATE


SIGNATURE OF GRIEVANT AND D.C. #

CONTINUATION OF GRIEVANCE

NAME: Cummings Jacob
Last Name, First & Middle Initial

[] INFORMAL [x] FORMAL

D.C. # 088532

DATE: 11/1/2012

AS IF THAT WASN'T ENOUGH I GAVE MY CLASSIFICATION OFFICER MS. BROWN, AND MY DORMATORY SUPERVISOR COLEMAN THE NAME OF AN INMATE WHO HAS BEEN ASSISTING ME AND IS WILLING TO PROVIDE ME FURTHER ASSISTANCE WITH MY IN HOUSE ACTIVITIES, TO WHICH THEY TOTALLY AGREED. HOWEVER, WHEN THIS MATTER WAS REFERRED TO MS. N. FINNISSE HSA, SHE TO APPROVED THAT I SHOULD BE ASSIGNED SOMEONE ELSE. ITS BEEN TWO WEEKS MS. TRIMBLE HAS BEEN ASSIGNED TO CONDUCT THIS MATTER, AND WHEN I QUESTIONED HER AS TO WHY THIS PROCESS OF RECEIVING SOMEONE TO HELP ME HASN'T TAKEN PLACE? SHE TOLD ME THAT, "SHE WAS BUSY AND HAD OTHER THINGS TO DO."

AND AS A RESULT OF ME QUESTIONING HER FURTHER ABOUT NOW SHE WAS DELIBERATELY IGNORING ME AND PUTTING OTHER PEOPLE IN FRONT OF ME FOR THE LAST TWO WEEKS I WAS TOLD TO GET OUT OF MEDICAL AND DON'T COME BACK UNTIL I'M CALLED.

FURTHER, IN RETALIATION FOR FILING A COMPLAINT ON HER WITH THE PALM BEACH COUNTY HEALTH DEPT. SHE HAS RETALIATED AGAIN ME BY DENYING MY REQUESTED HELPERS. I'VE NEVER AGREED TO INMATE RONALD MANN ASSISTING ME AND ALL THE EVENT THAT I AM HURT ANY FURTHER, THEN THE NORMAL BUMPS AND BRUISES I'VE BEEN EXPERIENCING WITH NO HELP.

I WANTED TO MAKE SURE THAT IT IS DOCUMENTED THAT I SPECIFICALLY INFORMED YOU OF THIS MATTER.

I NEED THIS INJURY FIX, I NEED SOMETHING FOR PAIN AND I NEED HELP NOW IF POSSIBLE. AS AP

Inmate's Signature:

Date:

11/20/12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-81413-CIV-DIMITROULEAS
MAGISTRATE JUDGE P.A. WHITE

DARREL E. CUMMINGS, :
 :
 Plaintiff, :
 :
 v. :
 :
 NEW ENGLAND COMPOUNDING :
 CENTER, ET AL., :
 :
 Defendants. :

REPORT OF
MAGISTRATE JUDGE

I. Introduction

The pro-se plaintiff, Darrel E. Cummings, filed a civil rights complaint pursuant to 42 U.S.C. §1983, seeking monetary and injunctive relief for denial of adequate medical treatment.(De#1) The plaintiff is proceeding in forma pauperis.

This civil action is before the Court for an initial screening pursuant to 28 U.S.C. §1915.

II. Analysis

A. Applicable Law for Screening

As amended, 28 U.S.C. §1915 reads in pertinent part as follows:

Sec. 1915 Proceedings in Forma Pauperis

* * *

(e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that -

* * *

(B) the action or appeal -

* * *

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief from a defendant who is immune from such relief.

The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997) ("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). When reviewing complaints pursuant to 28 U.S.C. §1915(e)(2)(B), the Court must apply the standard of review set forth in Fed.R.Civ.P. 12(b)(6), and the Court must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom. In order to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the Constitution or laws of the United States. Whitehorn v. Harrelson, 758 F.2d 1416, 1419 (11 Cir. 1985). Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of

facts in support of his claim which would entitle him to relief." Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The Eleventh Circuit recently confirmed that there is a heightened pleading standard in §1983 actions against entities that can raise qualified immunity as a defense. Swann v. Southern Health Partners, Inc., 388 F.3d 834, 837 (11 Cir. 2004). While Fed.R.Civ.P. 8 allows a plaintiff considerable leeway in framing a complaint, the Eleventh Circuit has tightened the application of Rule 8 with respect to §1983 cases in an effort to weed out nonmeritorious claims, requiring that a §1983 plaintiff allege with some specificity the facts which make out its claim. GJR Investments, Inc. v. County of Escambia, Fla., 132 F.3d 1359, 1367 (11 Cir. 1998); Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11 Cir. 1992), cert. denied sub nom. Deutchsh v. Oladeinde, 507 U.S. 987 (1993). Nevertheless, the threshold is "exceedingly low" for a complaint to survive a motion to dismiss for failure to state a claim. Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11 Cir. 1985).

B. Factual Allegations

The plaintiff has ignored the Federal Rules of Civil Procedure requiring a short plain statement as to each defendant, and has submitted thirty-five (35) typewritten pages. The plaintiff names defendants Barry Caden, CEO of the New England Compounding Center, Warden Tom Levins, Ms. Finnisse, Health Administrator, Drs. J. Dauphin and Jules Heller, employed at South Bay, and Robert Lins, an Orthopedic Specialist in West Palm Beach, along with Officer McIntire. He essentially alleges that all the named defendants were indifferent to his serious medical needs.

He arrived in South Bay Correctional Facility in March of

2010. Dr. Dauphin was deliberately indifferent to his medical needs. He examined his back and side and found abnormalities. He reviewed the plaintiff's medical file and X-rays taken in 2007, indicating mild degenerative disc disease, and prescribed no treatment. The plaintiff received no treatment until August of 2011, when he complained of pain radiating down his left leg. He contends the pain medication prescribed did not work. X-rays taken in 2011 indicated significant changes in his spine. Dauphin was aware the plaintiff was in pain, but intentionally delayed or prolonged care for years. In September of 2011, Dauphin discontinued a medication which did not work and prescribed 600 mg of Ibuprofen. In that same month he received an MRI demonstrating his various spinal problems had escalated. Although surgery was recommended by another physician, he contends Dauphin refused surgery, claiming it would not work. He delayed and prolonged surgery, causing him extreme pain over a long period of time.

He alleges that Health Administrator Finnisse ignored his medical problems in her responses to his grievances. She denied his request for surgery, stating that it was recommended he try other means before surgery. He contends she prolonged surgery based upon budget concerns.

He alleges the Warden, along with Dauphin and Finnisse, prolonged and delayed treatment, causing him unnecessary pain.

He claims that Dauphin recommended a consultation with Dr. Lins, an Orthopedist, who recommended epidural injections, but informed him it would provide only temporary release. Lins also told him he could not do anything without authorization from the facility.

He claims the Medical Director Dr. Heller, ignored his condition in 2012, and provided various inadequate pain medications. He contends Heller denied a plan for a prescribed course of treatment, and was indifferent to his needs for physical therapy. He claims Heller retaliated against him by discontinuing previously established treatment, when he initiated complaints. He further contends that Dr. Heller was made aware that injections from the New England Compounding Center were infected and that patients receiving such injections should be carefully watched, as there had been resulting illnesses and deaths. He claims that Heller stated there was no emergency, and denied him treatment for his symptoms after being injected.

He names the CEO of the New England Compounding Center in Massachusetts for contaminated injections used at his place of incarceration, causing him injury.

Officer McIntire was also indifferent to his pain when he collapsed in his dorm and McIntire forced him out of a chair.

C. Analysis of Sufficiency of Complaint

The Eighth Amendment prohibits any punishment which violates civilized standards of decency or "involve[s] the unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173(1976)); see also Campbell v. Sikes, 169 F.3d 1353, 1363 (11 Cir. 1999). "However, not 'every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment.'" McElligott v. Foley, 182 F.3d 1248, 1254 (11 Cir. 1999) (citation omitted). An Eighth Amendment claim contains both an objective and a subjective component. Taylor v. Adams, 221 F.3d

1254, 1257 (11 Cir. 2000); Adams v. Poag, 61 F.3d 1537, 1543 (11 Cir. 1995). First, a plaintiff must set forth evidence of an objectively serious medical need. Taylor, 221 F.3d at 1258; Adams, 61 F.3d at 1543. Second, a plaintiff must prove that the prison official acted with an attitude of "deliberate indifference" to that serious medical need. Farmer, 511 U.S. at 834; McElligott, 182 F.3d at 1254; Campbell, 169 F.3d at 1363. The objective component requires the plaintiff to demonstrate that he has been subjected to specific deprivations that are so serious that they deny him "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981); see also Hudson v. McMillian, 503 U.S. 1, 8-9 (1992).

A serious medical need is considered "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Hill v. DeKalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1187 (11 Cir. 1994) (quotation marks and citation omitted). The subjective component requires the plaintiff to demonstrate that the prison officials acted wantonly, with deliberate indifference to the plaintiff's serious needs. See Farmer v. Brennan, 511 U.S. 825, 834 (1994); Wilson v. Seiter, 501 U.S. 294, 298-99 (1991). Deliberate indifference is the reckless disregard of a substantial risk of serious harm; mere negligence will not suffice. Id. at 835-36. Consequently, allegations of medical malpractice or negligent diagnosis and treatment fail to state an Eighth Amendment claim of cruel and unusual punishment. See Estelle, 429 U.S. at 106. The inadvertent or negligent failure to provide adequate medical care "cannot be said to constitute 'an unnecessary and wanton infliction of pain.'" Estelle, 429 U.S. at 105-06; Wilson, 501 U.S. at 298.

The Eleventh Circuit has provided guidance concerning the distinction between "deliberate indifference" and "mere negligence." For instance, "an official acts with deliberate indifference when he knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate." Lancaster v. Monroe County, 116 F.3d 1419, 1425 (11 Cir. 1997). The "deliberate indifference" standard may be met in instances where a prisoner is subjected to repeated examples of delayed, denied, or grossly incompetent or inadequate medical care; prison personnel fail to respond to a known medical problem; or prison doctors take the easier and less efficacious route in treating an inmate. See, e.g., Waldrop v. Evans, 871 F.2d 1030, 1033 (11 Cir. 1989).

Allegations that raise only claims of mere negligence, neglect, or medical malpractice are insufficient to recover on a §1983 claim. Estelle v. Gamble, supra. In fact, once an inmate has received medical care, courts are hesitant to find that an Eighth Amendment violation has occurred. Hamm, supra. Treatment violates the Eighth Amendment only if it involves "something more than a medical judgment call, an accident, or an inadvertent failure," Murrell v. Bennett, 615 F.2d 306, 310 n. 4 (5 Cir. 1980). It must be "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." Rogers v. Evans, supra at 1058.

Moreover, the Courts have long recognized that a difference of opinion between an inmate and the prison medical staff regarding medical matters, including the diagnosis or treatment which the inmate receives, cannot in itself rise to the level of a cause of action for cruel and unusual punishment, and have consistently held that the propriety of a certain course of medical treatment is not

a proper subject for review in a civil rights action. Estelle v. Gamble, supra, at 107 ("matter[s] of medical judgment" do not give rise to a §1983 claim). See Ledoux v. Davies, 961 F.2d 1536 (10 Cir. 1992) (inmate's claim he was denied medication was contradicted by his own statement, and inmate's belief that he needed additional medication other than that prescribed by treating physician was insufficient to establish constitutional violation); Ramos v. Lamm, 639 F.2d 559, 575 (10 Cir. 1980) (difference of opinion between inmate and prison medical staff regarding treatment or diagnosis does not itself state a constitutional violation), cert. denied, 450 U.S. 1041 (1981); Smart v. Villar, 547 F.2d 112, 114 (10 Cir. 1976) (same); Burns v. Head Jailor of LaSalle County Jail, 576 F.Supp. 618, 620 (N.D. Ill., E.D. 1984) (exercise of prison doctor's professional judgment to discontinue prescription for certain drugs not actionable under §1983).

1. Serious Medical Need

The plaintiff has sufficiently alleged that he had serious medical needs. The plaintiff has spinal issues, resulting in severe pain.

2. Deliberate Indifference

The plaintiff's allegations against Drs. Dauphin and Heller may state a claim of deliberate indifference. At this preliminary stage, it is difficult to discern whether allegations that they provided pain medication that did not work or that they delayed surgery actually states a claim of deliberate indifference. However, this claim will require further factual development to determine whether the defendants were deliberately indifferent to his medical needs or attempted to take a more conservative approach

to his treatment.

Courts have held that pain, if experienced over sufficient time, may qualify as a serious medical need. See; McElligott v Foley, 182 F.3d 1248 (11 Cir. 1999). The plaintiff contends he was in extreme pain over a period of years, and that these doctors did not properly treat him. Therefore the complaint should continue against Dr. Dauphin and Dr. Heller.

The plaintiff further alleges that Dr. Heller retaliated against him for filing grievances by stopping his medication. In certain circumstances, retaliation may violate the inmate's First Amendment rights. Wright v. Newsome, 795 F.2d 964, 968 (11 Cir. 1986). In the "free world" context, an act taken in retaliation for exercise of a constitutionally protected right is actionable under §1983 even if the act, when taken for different reasons, would have been proper. Mount Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 283 (1977)).

The analysis applied in this Circuit to a prisoner retaliation claim requires a "mutual accommodation" between the penal institution's legitimate needs and goals and the prisoner's retained constitutional rights, under the "reasonableness" test set forth in Turner v. Safley, 482 U.S. 78 (1987). Adams v. James, supra, at 948. At this preliminary stage, the plaintiff has stated a claim for retaliation.

Dr. Lins is an orthopedic specialist, referred for consultation by the prison. He diagnosed the plaintiff's condition, but stated that he could only treat the patient based upon approval by the prison facility. It does not appear that he deliberately ignored the plaintiff's condition. He should be dismissed.

He claims the Warden and Finnisse, the Health Administrator delayed his treatment. The Warden appears to have been named in his supervisory capacity. His liability is predicated solely on his position as supervisor. Such liability, however, may not be predicated on the theory of respondeat superior. If a plaintiff sues a supervisor, there must be proof that the alleged injuries resulted from an official custom, policy, or practice. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978); Mandel v. Doe, 888 F.2d 782 (11 Cir. 1989). The plaintiff bears the burden of establishing a causal link between a government policy or custom and the injury which is alleged. Byrd v. Clark, 783 F.3d 1002, 1008 (11 Cir. 1986)(citing Monell, supra). See also; Ashcroft v Iqbal, supra. (Heightened pleading standard for supervisory liability) The plaintiff has failed to demonstrate a Monell claim against this defendant and he should be dismissed.

The plaintiff was dissatisfied with the grievance responses by Finnisse. To the extent that the plaintiff contends that the defendant in this case failed to properly respond to, or denied his grievances, such failures, in and of themselves, do not rise to a constitutional level so as to constitute a denial of due process. This is because the Constitution does not entitle prisoners and pretrial detainees in state or federal facilities to grievance procedures, Adams v. Rice, 40 F.3d 72, 75 (4 Cir. 1994), cert. denied 514 U.S. 1022 (1995); Buckley v. Barlow, 997 F.2d 494, 495 (8 Cir. 1993); Flick v. Alba, 932 F.2d 728, 729 (8 Cir. 1991); Stewart v. Block, 938 F.Supp. 582, 588 (C.D. Cal. 1996); Brown v. Dodson, 863 F.Supp. 284, 285 (W.D. Va. 1994); and since even if a grievance mechanism has been created for the use of state inmates, the mechanism involves a procedural right, not a substantive one, and it does not give rise to a liberty interest protected by the Due Process Clause, Antonelli v. Sheahan, 81 F.3d 1422, 1430 (7

Cir. 1996); Hoover v. Watson, 886 F.Supp. 410, 418 (D.Del. 1995); Brown v. Dodson, supra at 285. Thus, if the state elects to provide a grievance mechanism, violations of its procedures, or even a failure to respond to the prison grievance, do not give rise to a §1983 claim, Buckley v. Barlow, supra, 997 F.2d at 495; Hoover v. Watson, supra, 886 F.Supp. at 418-19. When the claim underlying the administrative grievance involves a constitutional right, the prisoner's right to petition the government for redress is the right of access to the courts, which is not compromised by an administrative refusal to entertain his grievance. Flick v. Alba, supra, 932 F.2d at 729. Here, the plaintiff has had access to the courts.

Finnisse, a Health Service Administrator, responded to the plaintiff's grievances, stating his records indicated he had been seen by a specialist and that less drastic methods, such as epidural injections and physical therapy were to be tried prior to surgery. (DE#1p18). Finnisse was not a treating physician, but merely responded to grievances based upon his record. This defendant should be dismissed.

The claims against Officer McIntire are unclear and fail to state a constitutional claim. This defendant should be dismissed.

The CEO of the New England Compounding Center is sued because allegedly the syringes were infected. This is not a constitutional claim, but a state tort for negligence and relief is to be found in the state courts. Further, the company has filed a notice of bankruptcy, stating that all actions against them are stayed.

III. Conclusion

It is therefore recommended as follows:

1. Claims for denial of adequate medical treatment continue against Drs. Dauphin and Heller, and against Dr. Heller for retaliation.

2. Claims against Warden Levins, Finnisse, Dr. Lins and Officer McIntire, and the CEO of New England Compounding Center be dismissed pursuant to 28 U.S.C. §1915(e)(2)(B)(ii) for failure to state a claim upon which relief may be granted.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Dated this 15th day of February, 2013.



UNITED STATES MAGISTRATE JUDGE

cc: Darrel E. Cummings, Pro Se
#088532
South Bay Correctional Facility
Address of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-81413-CIV-DIMITROULEAS/SNOW

DARREL CUMMINGS,

Plaintiff,

vs.

NEW ENGLAND COMPOUNDING CENTER

et al.,

Defendants.

**ORDER ADOPTING IN PART REPORT AND RECOMMENDATION AND
SUSTAINING IN PART OBJECTIONS**

THIS CAUSE is before the Court upon the February 15, 2013 Report and Recommendation of Magistrate Judge Patrick A. White [DE 11]. The Court has conducted a de novo review of the Report and Recommendation, carefully considered Plaintiff's Objections [DE 14], the supplement to those objections [DE 15], the motion to correct a clerical error in the objections, [DE 16], and the record herein, and is otherwise fully advised in the premises.

For context, the Court will begin by setting forth Plaintiff's allegations in his Complaint.¹ Plaintiff arrived at the South Bay Correctional Facility in March 2010. He complained to the interviewing nurse about back and side pains. Defendant Dr. Jean Dauphin examined him on April 10, 2010. Plaintiff had a history in his medical file with x-rays taken on August 10, 2007

¹ The Court assumes that these facts are true for the purposes of this Order, *Aschroft v. Iqbal*, 556 U.S. 662, 678-79 (2009), but makes no findings of fact.

that indicated mild degenerative disc change at L5 S1. Nevertheless, Dr. Dauphin did not provide treatment, so Plaintiff claims Dauphin demonstrated deliberate indifference.

Plaintiff continued to repeatedly complain about back pains radiating to his left leg. He apparently had been given medication for his pain, but that medicine was not working. He was evaluated on August 5, 2011 and again on August 11, 2011. On August 11, Dr. Robert Smalley observed significant back problems due to spondylolisthesis and a degenerative disc. Compared to his medical record from 2007, Plaintiff's condition had worsened over the intervening four years. Plaintiff asserts that Dr. Dauphin's lack of treatment caused the deterioration. Furthermore, Dr. Dauphin was aware of the deterioration because he reviewed Dr. Smalley's report on August 15, 2011.

Dr. Bradford A. Slutsky, an orthopedic specialist, examined Plaintiff on August 26, 2011. Dr. Slutsky's notes record that Plaintiff has been suffering from back pain for four years and that anti-inflammatory and muscle relaxation medicine had not alleviated Plaintiff's pain. He found Grade 2 spondylolisthesis. He recommended an MRI because conservative treatment had not yielded any improvement and there were signs of nerve impingement. He showed Plaintiff's x-rays and explained that there was no way therapy or a shot could cure the damage. [DE 1 ¶ 29].² Dr. Dauphin received this recommendation on August 29, 2011.

On September 1, 2011, Plaintiff made a medical request because of back pain. Dr. Dapuhin changed the pain medication to ibuprofen. On September 16, 2011, Plaintiff had an MRI. The MRI revealed grade 2 spondylolisthesis, lumerization of S1, 25 percent subluxation of

² This allegation is contradicted because he also alleges that on October 10, 2011, Dr. Slutsky recommended physical therapy and epidural injections. [DE 1 ¶ 20].

L5 on S1, degenerative marrow signal changes with disc bulge, severe bilateral facet hypertrophy, and severe foraminal narrowing. Dr. Dauphin read the report on September 25, 2011.

Plaintiff returned to Dr. Slutsky's office on October 10, 2011. He recommended a course of physical therapy and epidural injections. These would be prior to a "large fusion" surgery. [DE 1 ¶ 20]. He noted that surgery was "definitely up to [Plaintiff]." *Id.*

Dr. Dauphin never gave Plaintiff the option of surgery. He told Plaintiff that "surgery was out of the question because the budget was not going to allow it." Plaintiff claims that Dr. Dauphin never viewed the x-rays which showed the disc totally out of line and the nerve being pinched, which was a significant medical condition Plaintiff believes any layman could recognize. Nevertheless, Dr. Dauphin "question[ed] the validity of the recommendation given by the orthopedic surgeon" because "it will not work." *Id.* ¶ 23. Instead, Dr. Dauphin increased pain medication and wrote a consultation for epidural injections.

Defendant Finisse, the health service administrator, informed Plaintiff in response to one of Plaintiff's grievances that it was recommended to try physical therapy and epidural injections before surgery. Plaintiff claims that Finisse was deliberately indifferent by not allowing Plaintiff the option of surgery that Dr. Slutsky had noted could be up to Plaintiff.

Plaintiff claims that the Warden also was aware of his ongoing grievances and referred them to Finisse. Because the Warden chose to ignore Plaintiff's significant pain and request for surgery, Plaintiff claims that the Warden was deliberately indifferent to his medical needs.

Plaintiff saw Defendant Dr. Lins, another orthopedic specialist, on November 22, 2011. Dr. Lins said that epidural injections would not cure the pinched nerves but could provide

temporary relief. Plaintiff claims that Dr. Lins was deliberately indifferent because it took nearly year from this first meeting before epidural injections were given. He also faults him for never recommending surgery.

Plaintiff's pain continued to February 7, 2012, six months after his spondylolisthesis went from Grade 1 to Grade 2. He claims that his pain was progressing and his condition deteriorating. Epidural injections were not conducted until July-August 2012. That was almost a year after such shots had been recommended.

A new doctor then began seeing Plaintiff at the prison, Defendant Dr. Heller. Dr. Heller saw Plaintiff on September 5, 2012. He provided no treatment, even though Plaintiff was complaining of deep pain all over. He did refer him back to Dr. Lins for a lumbar injection, but then cancelled that injection. Plaintiff claims that Dr. Heller was indifferent to Plaintiff's medical needs and purposefully avoided treating him.

Dr. Lins sent Plaintiff a letter dated October 5, 2012 about the possibility his epidural shots had been contaminated by fungal meningitis. Plaintiff displayed symptoms of such an infection. Plaintiff complained to the Warden via a grievance on October 7, 2012 asking him to contact the Centers for Disease Control due to the possible infection, but the Warden did nothing. He also contacted Dr. Lins on October 16, 2012, but Dr. Lins did not respond. No one tested Plaintiff for infection though he was exhibiting infection symptoms. Plaintiff had filed a grievance against Dr. Heller on October 4, 2012, so Plaintiff claims that the lack of action after the infection was due to retaliation.

Toward the end of his complaint, Plaintiff introduces one final defendant. Defendant Officer McIntire was allegedly deliberately indifferent to Plaintiff's medical needs. Plaintiff

claims that due to extreme pain in his back, he fell and grabbed a chair to avoid hitting the ground. He pulled himself in to the chair, and then Officer McIntire threatened him and forced him to move out of the chair. Plaintiff then fell.

JUDGE WHITE'S REPORT AND RECOMMENDATION

Judge White screened Plaintiff's *pro se* complaint under 28 U.S.C. § 1915. Judge White properly set forth the standard for evaluating 42 U.S.C. § 1983 claims for violations of the Eighth Amendment. As he noted,

The Eighth Amendment prohibits any punishment which violates civilized standards of decency or "involve[s] the unnecessary and wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173(1976)); *see also Campbell v. Sikes*, 169 F.3d 1353, 1363 (11 Cir. 1999). "However, not 'every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment.'" *McElligott v. Foley*, 182 F.3d 1248, 1254 (11 Cir. 1999) (citation omitted).

[DE 11 at 5]. Judge White observed, and this Court agrees, that Plaintiff has alleged that he suffered from an objectively serious medical need.

Plaintiff must also show, however, that the prison officials acted wantonly, with deliberate indifference to Plaintiff's serious needs. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991). Mere negligence is not enough. *Farmer*, 511 U.S. at 835. Therefore, claims of medical malpractice or negligent diagnosis and treatment are insufficient. *Estelle*, 429 U.S. at 106. There must be "something more than a medical judgment call, an accident, or an inadvertent failure." *Murrell v. Bennett*, 615 F.2d 306, 310 n.4 (5th Cir. 1980).³ As a result, a prisoner's disagreement with a prescribed course of treatment,

³ The Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th

standing alone, is not enough to state a claim. *See* [DE 11 at 7 (citing cases)]; *Adams v. Poag*, 61 F.3d 1537, 1545 (11th Cir.1995) (holding that whether prison officials should have employed additional diagnostic techniques or care is an example of medical judgment and not an appropriate basis for § 1983 liability.).

However, deliberate indifference is shown if an official “acts with deliberate indifference when he knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate.” *Lancaster v. Monroe County*, 116 F.3d 1419, 1425 (11th Cir. 1997). Alternately, the deliberate indifference standard can be met if the prisoner has treatment repeatedly delayed, denied, or provided with gross incompetence, or if doctors take the easier and less efficacious route in treating the inmate. *Waldrop v. Evans*, 871 F.2d 1030, 1033 (11th Cir. 1989).

The Court agrees with Judge White that Plaintiff has stated a claim for deliberate indifference against Defendants Dauphin and Heller for grossly delaying treatment for a serious medical need. The Court also agrees the Plaintiff has stated a claim for retaliation against Heller.

Judge White recommended that the suit against Dr. Lins be dismissed, because Lins was simply an orthopedic specialist that the prison referred Plaintiff to and could only treat Plaintiff with the prison’s approval. Plaintiff objected, arguing that Dr. Lins should have known that his recommendation of epidural shots without surgery would not be efficacious. The Court agrees with Judge White that Plaintiff has not provided sufficient allegations for the Court to conclude that Dr. Lins was deliberately indifferent to Plaintiff’s medical needs; instead, all Plaintiff has alleged is that Dr. Lins’ prescription was insufficient and he disagrees with it. That is not enough

Cir. 1981).

to state a claim. *Cf. Murrell*, 615 F.2d at 310 n. 4. The Court also agrees that Plaintiff's allegations do not show that Dr. Lins was dragging his feet in providing sufficient care. Dr. Lins could only act with the approval of the prison. Finally, the Court notes that there is insufficient allegation that Dr. Lins knew he was injecting Plaintiff with epidural shots infected with fungal meningitis, so there is no claim for deliberate indifference on the basis of those shots, either.

Judge White also recommended that the Warden and Finisse, the health administrator, be dismissed. Judge White believed that Plaintiff was suing these two in their supervisory capacity. Because Plaintiff had not alleged facts supporting liability under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), Judge White dismissed these Defendants.

Plaintiff objects, arguing that he was suing these defendants in their individual capacity. He claims that he addressed grievances to them and that they were personally aware of the grievances and were doing nothing to help Plaintiff. He therefore attempts to sidestep Judge White's conclusion that a Plaintiff has no cause of action for a dysfunctional grievance system. As Plaintiff tries to clarify, he is not suing about the denials of grievances per se, but rather the fact that the Warden and Finisse knew that Plaintiff was suffering with insufficient medical attention, had it within their power to correct his problems, and chose to do nothing.

Even under Plaintiff's clarifications, the warden's only involvement was in the denial of grievances. As the Tenth Circuit has held, "Whatever knowledge [the warden] may have had when he denied the appeal, his only involvement was to deny the grievance appeal, which is insufficient for § 1983 liability." *Weldon v. Ramstad-Hvass*, 2013 WL 791619, at *10 (10th Cir. Mar. 5, 2013) (citing *Stewart v. Beach*, 701 F.3d 1322, 1328 (10th Cir. 2012)); *see also* *Washington v. Showalter*, 2012 WL 3641930, at *2 (3d Cir. Aug. 27, 2012) (finding review of

grievance insufficient participation absent a reason to believe or actual knowledge that prison doctors were mistreating prisoner); *Gevas v. Mitchell*, 492 F. App'x 654, *6 (7th Cir. 2012) (finding warden not liable because "ruling against a prisoner on an administrative complaint does not cause or contribute to the violation" (citation omitted)).

The situation for Finisse is different. The allegations of the complaint are unclear, but it appears that as health administrator she is more than just a grievance officer. As such, she could be liable for not coordinating medical care for Plaintiff. *See Gevas*, 492 F. App'x at *6. The Court will reexamine Finisse's position and involvement if she desires to make a motion for summary judgment. The Court sustains Plaintiff's objections as to Finisse and overrules Judge White's report on this point.

Moving on to Officer McIntire, Judge White found that Plaintiff's claim against her was ambiguous and recommended dismissal. In his objections, Plaintiff claims that Officer McIntire was aware of Plaintiff's severe back problems and nevertheless threatened him until he abandoned the chair he was sitting in. He also states that she was aware of Plaintiff's condition when he told he had to get out of her chair and did not notify the medical department of Plaintiff's emergency collapse. According to Plaintiff's objections, "McIntire contrary to declared emergency re-ordered me to get the hell out of her chair' when [I] informed [her] . . . I couldn't walk or stand maybe do to previous surgery. She nefariously stated, 'she didn't give a damn and get your ass out of my chair.'" She then did not report that Plaintiff was having a medical emergency and had collapsed. Plaintiff believes Officer McIntire's actions were deliberately indifferent to his medical needs and constitute cruel and unusual punishment.

“[A]n official acts with deliberate indifference when he knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate.” *Lancaster*, 116 F.3d at 1425. In addition, when a plaintiff alleges that a prison official used excessive force in violation of the Eighth Amendment, the Court’s inquiry is whether the “force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). The Court finds that Plaintiff’s additional facts asserted in his objection possibly could make out a claim for deliberate indifference or cruel or unusual punishment, but they were not alleged. The Court will therefore grant leave to amend Plaintiff’s complaint to clarify and full set forth the facts and legal theories under which he is suing Officer McIntire.

Finally, Judge White dismissed the claim against the New England Compounding Center, the company potentially liable for contaminating the epidural shots with fungal meningitis. Judge White said that the claim was a state law claim. That is true, but this Court can have jurisdiction over state law claims under 28 U.S.C. §1332 for diversity or 28 U.S.C. §1367 for supplemental claims. The Court therefore finds that the claim should not be dismissed for lack of jurisdiction, but does continue to stay the action as to New England Compounding Center due to its bankruptcy. *See* [DE 6].

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The February 15, 2013 Report and Recommendation of Magistrate Judge Patrick A. White [DE 11] is **ADOPTED** and **APPROVED IN PART**.
2. This action may proceed against Defendants Dauphin and Heller for deliberate indifference and against Defendant Heller for retaliation. If Plaintiff desires to

state retaliation claims against other defendants, Plaintiff must file an amended complaint;

3. As Plaintiff's complaint currently stands, the Court approves Judge White's recommendation that Officer McIntire be dismissed. If Plaintiff desires to make a claim against Officer McIntire, then Plaintiff may file an amended complaint on or before April 5, 2013 with all necessary allegations.
4. The Court approves Judge White's recommendation the Defendant Lins be dismissed;
5. The Court approves Judge White's recommendation that the Warden be dismissed;
6. The Report and Recommendation is **OVERRULED IN PART** inasmuch as it recommended dismissing Defendants Finisse and New England Compounding Center. Plaintiff's claims against Defendant Finisse and the New England Compounding Center remain pending, though this action is stayed as to New England Compounding Center;
7. The Court **GRANTS** Plaintiff's motion to correct clerical errors [DE 16];
8. The Court refers this matter to Judge White for further proceedings as appropriate, including the pending request for an injunction [DE-17].

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida,
this 12th day of March, 2013.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies Furnished to:
Counsel of Record

Darrel Cummings, pro se