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PORTLAND DIVISION

LAURA WICKIZER,

Plaintiff, v. DR. CATHERINE E. CRIM, Personally, DR. S. SHELTON, Personally, D. BROWN, Personally,

Defendants.

Case No. 3:18-cv-01816-AC FINDINGS AND RECOMMENDATION

_____ ACOSTA, Magistrate Judge:

Introduction Plaintiff Laura Wickizer ("Plaintiff")

1 brought this lawsuit against current and former Oregon Department of Corrections ("ODOC") officials: Dr. Catherine Crim, Dr. Steve Shelton,

1 This action was originally brought by Rachel Haney Smallwood, Chandra Loveland, and Laura Wickizer as a putative class action. Former plaintiffs Smallwood and Loveland have since been dismissed. (ECF Nos. 102, 71). On May 10, 2021, the title of this action was changed to reflect

Page 2 – FINDINGS AND RECOMMENDATION and Mr. Dan Brown (collectively, "Defendants"). She alleges Eighth Amendment violations under 42 U.S.C. § 1983 and supplemental tort claims under Oregon law. Before the court is Defendants' motion for summary judgment. ("De f. Mot. for Summary Judgment," ECF No. 104). Plaintiff opposes this motion but has not formally filed a response. (Declaration of Jessica Spooner in Support of Defendant's Mot. for Summary Judgment ("S pooner Decl.") ¶ 3). For the reasons that follow, the court recommends Defendants' motion be GRANTED and the case DISMISSED.

Preliminary Procedural Matter The instant motion was filed on May 17, 2021. Plaintiff's counsel w ithdrew on June 28, 2021. (Order, ECF No. 113.) On June 29, 2021, the court issued the following

notice to Plaintiff:

The defendants have made a motion for summary judgment (Motion for Summary Judgment [104]) by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine dispute of material fact that is, if there is no real dispute about any fact that would affect the result of your case and the party who asked for summary judgment is entitled to judgment as a matter of law. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials, as provided in Rule 56(c), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine dispute of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial. Wickizer as the only remaining plaintiff. (ECF No. 103).

Page 3 – FINDINGS AND RECOMMENDATION (Summ. J. Advice Notice, ECF No. 115.) The court mailed the notice to Plaintiff and directed her to respond to the motion by August 6, 2021. (Clerk's Notice of Mailing to Laura Wickizer, ECF No. 116.) Plaintiff did not respond, and the unopposed motion was taken under advisement on October 28, 2021. (Order, ECF No. 113.) The only material Plaintiff offers in support of her claims is the content of her May 17, 2021 complaint ("Complaint"). The court may not consider the Complaint when ruling on Defendant's summary judgment mo tion, however, because the Complaint is unverified: it does not contain a sworn statement declaring, under penalty of perjury, the allegations are true and correct in accordance with 28 U.S.C. § 1746. Because of this omission, the court cannot treat the Complaint as an affidavit opposing Defendant's summary judgment motion. See Lew v. Kona Hosp., 754 F.2d 1420, 1423 (9th Cir. 1985) (a verified complaint may be used as an opposing affidavit under Rule 56 to the extent it expresses personal knowledge of admissible facts, but an unverified complaint is insufficient to counter a summary judgment motion supported by affidavits). Accordingly, the following facts are based primarily on Defendant's evidence and the court considers them undisputed.

Background I. Medical Examination and Grievance Plaintiff, a former adult-in-custody ("AIC"), was in the custody of ODOC from July 28, 2016 to July 5, 2019. (Declaration of Lisa Arrington ("Arrington D ecl.") ¶ 3, Ex. 1). During that period, she was in the custody and care of Coffee Creek Correctional facility (CCCF) in Washington County. (Compl. ¶ I). \ \ \ \ \

Page 4 – FINDINGS AND RECOMMENDATION On August 25, 2017, Plaintiff had a medical appointment with Dr. Catherine Crim, an obstetrician and gynecologist formerly employed by

ODOC. (Declaration of Teresa Hannon in support of Defs.' Mot. for Summ ary Judgment ("Hannon Decl.") ¶ 4, Ex. 1). At the appointment, Plaintiff consented to a pelvic exam. (Hannon Decl. ¶ 4, Ex. 1). A chaperone was present in the examination room. (Id.; Spooner Decl. ¶ 4, Ex. 1, Wickizer depo. at p. 33:4-7). Dr. Crim used a speculum to conduct the exam. (Spooner Decl. ¶ 4, Ex. 1, Wickizer depo. at p. 32:9-16). Plaintiff alleges "Dr. Crim used an oversized sp eculum very roughly" causing her "intense pain and discomfort" that led to intermittent bleeding for three days after the exam. (Id.). Plaintiff "jumped off" the speculum and quickly ended the exam. (Id.). On December 23, 2017, Plaintiff submitted a grievance related to Dr. Crim and the August pelvic exam. (Arrington Decl. ¶ 14, Ex. 4). The grievance alleged that, during the pelvic exam, Dr. Crim "entered the large speculum aggressively and abrupt causing severe discomfort and pain." (Id. ¶ 14, Ex. 4 at 1). This grievance was denied on December 26, 2017 as untimely. (Id. ¶ 14). Plaintiff attempted to appeal her denied grievance, but the Grievance Coordinator responded that she could not appeal her denied grievance under ODOC procedures. (Id.). Plaintiff did not file any grievance regarding an alleged medically compelled exam or alleged sexual abuse by Dr. Crim. (Id. ¶ 15). She has not submitted other grievances regarding Dr. Crim. (Id. ¶ 14). II. Complaint and Deposition In October 2018, Plaintiff filed this lawsuit against Defendants, three ODOC employees and professionals, asserting three claims for relief: (1) an Eight Amendment violation under 42 U.S.C. § 1983 ("Section 1983"); (2) a medical ne gligence claim under state common law; and (3)

Page 5 – FINDINGS AND RECOMMENDATION a sexual battery claim under state common law. (See generally Compl., ECF No. 1). She identified as defendants Dr. Catherine Crim; Dr. Steve Shelton, a former ODOC Clinical Director; and Dave Brown, a Medical Services Manager. (Id.; Answer ¶¶ 4-6, ECF No. 12). Plaintiff appeared for her deposition on November 18, 2020, and she was questioned about her experience with Dr. Crim during the pelvic exam. (Spooner Decl. ¶ 4, Ex. 1). When asked if she felt Dr. Crim had behaved toward her in a sexual manner, she answered "[n]o, not – not really sexual, just – I—actually, I can't really answer that . . . . But anything I've ever experienced, no." (Id. at p. 41:2-8). Plaintiff later stated that she felt Dr. Crim was being "dominant" during the exam but "didn' t know if it was sexual for her." (Id. at p. 71:14-16). Plaintiff indicated she had a prior experience with a male doctor that felt sexual in nature, and that her experience Dr. Crim later reminded her of that incident. (Id. at p. 71:18-22). Responding to questions about her pain following the pelvic exam, Plaintiff stated that she experienced discomfort and intermittent bleeding for three days after the exam, but no pain since. (Id. at p. 56:22-25). She had not discussed the exam with a mental health professional. (Id. at p. 53:1-14). When Plaintiff was asked what trauma she had experienced in her life, she did not mention the medical exam by Dr. Crim. (Id. at p. 47:5-19). Upon questioning, Plaintiff was also unable to quantify what monetary compensation she believed she should receive. (Id. at p. 61:8- 11). Plaintiff was also questioned about her intentions in naming Dr. Shelton and Mr. Brown as additional defendants. When asked why she was suing Dr. Shelton, Plaintiff responded "if he was the head of medical at the time that this occurred and at the time of the first – whenever any first – whoever put in the first grievanc e, I think that they should have been looked at a little more

Page 6 – FINDINGS AND RECOMMENDATION seriously." (Spooner Decl. ¶ 4, Ex. 1, Wickizer depo. at p. 28:3-6. Plainti ff stated that if Dr. Shelton was not the head of medical at the time of her pelvic exam, then "whoever was the head of medical at that time" failed to adequately a ddress her allegation. (Id. at p. 28:8-10). She further stated that if Dr. Shelton oversaw grievances, then she had also named him because "I think whoever denied those grievances did -- did wrong – did that also wrong." (Id. at p. 29:20-21). Lisa Arrington, not Dr. Shelton, is the Diversity Coordinator at CCCF who processes grievances. (Arrington Decl. ¶ 1). When asked why she was suing Mr. Brown, Plaintiff responded "What was Mr. Brown's position? Is he the nurse?" (Spooner Dec. ¶ 4, E x. 1, Wickizer depo at p. 30:1-3. Plaintiff then stated that what Mr. Brown had done wrong was the "ex act same thing as I said about Mr. Shelton." (Id. at p. 30:6-7).

Legal Standard Summary judgment is appropriate where the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." F ED. R. CIV. P. 56(a). Summary judgment is not proper if material factual issues exist for trial. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995).

The moving party bears the initial burden of establishing the absence of a genuine dispute of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine dispute for trial. Id. at 324. A nonmoving party cannot defeat summary judgment by relying on the allegations in an unverified complaint. Hernandez v. Spacelabs Medical, Inc., 343 F.3d 1107, 1112 (9th Cir. 2003). Thus, summary judgment should

Page 7 – FINDINGS AND RECOMMENDATION be entered "against a party who fails to make a sh owing sufficient to establish the existence of an element essential to that party's case, and on which th at party will bear the burden of proof at trial. Celotex, 477 U.S. at 322.

The court must view all evidence in the light most favorable to the nonmoving party. Bell v. Cameron Meadows Land Co., 669 F.2d 1278, 1284 (9th Cir. 1982). All reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1982). Where different ultimate inferences may be drawn, summary judgment is inappropriate. Sankovich v. Life Ins. Co. of North America, 638 F.2d 136, 140 (9th Cir. 1981).

However, deference to the nonmoving party has limits. A party asserting that a fact is genuinely disputed must support the assertion with admissible evidence. FED. R. CIV. P. 56(c). The "mere existence of a scintilla of evidence in support of the [party's] po sition [is] insufficient." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Therefore, where "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (internal quotation marks omitted).

Discussion I. Plaintiff failed to exhaust her administrative remedies for all claims

A. Standard Under the Prison Litigation Reform Act (" PLRA"), adults-in-custody ("AICs") must exhaust all available administrative remedies before filing a court action to redress prison conditions or incidents, including Section 1983 claims. 42 U.S.C. § 1997(e)(a). The exhaustion

Page 8 – FINDINGS AND RECOMMENDATION requirement is mandatory and requires compliance with both procedural and substantive elements of the prison grievance processes. Woodford v. Ngo, 548 U.S. 81, 84, 90 (2006). To meet this requirement, inmates must complete the administrative review process and comply with all applicable procedural rules by appealing a grievance to the highest level before filing suit. Lira v. Herrera, 427 F.3d 1164, 1170 (9th Cir. 2005). The exhaustion requirement applies to "all inmate suits about prison life" that do not involve the duration of a prisoner's sentence. Nettles v. Grounds, 830 F.3d 922, 932 (9th Cir. 2016) (citing Porter v. Nussle, 534 U.S. 516, 532 (2002)). Exhaustion of administrative remedies is an affirmative defense properly raised in a motion for summary judgment. Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir. 2014). Accordingly, Defendants bears the burden to establish that Plaintiff had an available administrative remedy and failed to exhaust that remedy. Williams v. Paramo, 775 F.3d 1182 (9th Cir. 2015). If Defendants make that showing, Plaintiff can only overcome it with evidence showing the available administrative remedies were effectively unavailable to her. Albino, 747 F.3d at 1172). Nevertheless, the ultimate burden remains with Defendants. Id.

B. ODOC's Grievance System Defendants have submitted evidence detailing that inmate grievances at CCCF are processed in accordance with the ODOC Administrative rules governing AIC Communication and Grievance Review System found in Chapter 291, Division 109 of the Oregon Administrative Rules ("OAR"). (Arrington Decl. ¶ 5). Under that sy stem, AICs are encouraged to communicate with line staff verbally or in writing as their primary means of resolving disputes. (Arrington Decl. ¶ 6; OAR 291-109-0100(3)(a)). If a dispute cannot be resolved informally, AICs may seek resolution of the dispute using the internal grievance review and appeal system. (Arrington Decl.

Page 9 – FINDINGS AND RECOMMENDATION ¶ 6; OAR 291-109-0100(3)(b)). AICs are informed of the grievance process during Orientation and are given an Orientation Information Packet when they first arrive at the facility. (Arrington Decl. ¶ 6). Additionally, the AIC handbook contains information regarding the grievance process and grievance forms and accompanying instructions are available on all housing units. (Id.) Amongst other things, an AIC may grieve the misapplication of any departmental rules, policies, or other directives; sexual abuse or harassment; and unprofessional actions of employees. (Arrington decl. ¶ 8; OAR 291-109-0210(3)(a)-(b)). However, there are also some things an AIC cannot grieve. (Arrington Decl. ¶ 9). Examples of non-grievable items include: (1) the processing of and responses to grievances and grievance appeals, and (2) claims or issues the AIC has pursued in pending litigation in state or federal courts. (Id.; OAR 291-109-0210(4)(h), (j)).

To obtain a grievance review, the grievance must be submitted within 14 calendar days of the date of

the incident giving rise to the grievance, unless the AIC can satisfactorily demonstrate why the grievance could not be timely filed. (Arrington Decl. ¶ 8; OAR 291-109-0205(1)). This timeliness requirement does not apply to sexual abuse grievances. (Id.; OAR 291-109-0245(3)). When a grievance is accepted, staff provide an initial response to the AIC within 35 days, unless further investigation is needed. (Arrington Decl. ¶ 10; OAR 291-109-0205(2)). For a sexual abuse grievance, the department has 90 days to respond, and may request a 70-day extension. (Id.; OAR 291- 109-0245(6)(a)). When a grievance is denied for not complying with ODOC's grievance rules, it is returned to the AIC with an explanation. (Arrington Decl. ¶ 10).

If an AIC is dissatisfied with the initial response to an accepted grievance, the AIC may appeal the denial by completing a Grievance Appeal form. (Arrington Decl. ¶ 11). Initial appeals must be generally received by the institution grievance coordinator within 14 calendar

Page 10 – FINDINGS AND RECOMMENDATION days from the date the initial grievance response was sent to the AIC. (Id.; OAR 291-109-205(3)). A response to the initial appeal is then sent to the AIC within 35 calendar days unless further review is necessary. (Id.; OAR 291-109-205(4)). If an AIC is dissatisfied with the response to their first-level grievance appeal, they may submit a second appeal within 14 calendar days from the date the initial appeal response was sent to the AIC. (Arrington Decl. ¶ 12; OAR 291-109- 205(5)). The response to an AIC's second- level grievance appeal is final. (Id.).

C. Plaintiff's grievance ag ainst Dr. Crim was untimely Defendants argue that Plaintiff failed to exhaust the grievance procedure concerning all her claims against Dr. Crim because she untimely submitted her original grievance. (Defs.' Mot. for Summary Judgment at 7). This court agrees. As Defendants note, Plaintiff did not submit a grievance against Dr. Crim until December 23, 2017, approximately three months after her August 2017 pelvic exam. This delay is will beyond the requisite 14-day period for submitting a grievance. Moreover, Plaintiff presents no evidence satisfactorily demonstrating why her grievance could not be timely filed. Additionally, Plaintiff's attempt to appeal her denied grievance was properly denied because "the processing of and responses to grievances and grievance appeals" is not a permissible grie vance issue. OAR 291-109-0210(4)(j). Because Plaintiff's grievance was untimely, she failed to exhaust her administrative remedies regarding her second claim for relief, medical negligence and her second claim for relief should be dismissed with prejudice. Furthermore, Plaintiff did not file any grievance alleging her exam was medically compelled exam or alleging sexual abuse by Dr. Crim. As such, Plaintiff also failed to exhaust her administrative remedies regarding her first and third claims for relief, violation of the Eighth

Page 11 – FINDINGS AND RECOMMENDATION Amendment and sexual battery. Accordingly, all of her claims should be dismissed with prejudice. II. Dr. Shelton and Mr. Brown lack personal involvement in the alleged deprivation of rights

Plaintiff brings her first claim for relief pursuant to 42 U.S.C. § 1983. "Section 1983 creates a private right of action against individuals who, acting under color of state law, violate federal constitutional or statutory rights." Devereaux v. Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001). Generally, "liability under [Section] 1983 must be based on the personal involvement of the defendant." Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). "A plaintiff must allege facts, not simply conclusions, that show an individual was personally involved in the deprivation of his civil rights." Id. at 1194. Section 1983 does permit liability under the doctrine of respondeat superior. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). As such, "[a] supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." Id. Here, Plaintiff has not presented evidence to establish that Mr. Shelton, a former ODOC Clinical Director, and Mr. Brown, a Medical Service Manager, were personally involved in the deprivation of her civil rights. Plaintiff alleges only broad conclusions as to how these supervisors were responsible; she does not explain how they participated in, directed, knew of, or condoned any deprivations of her rights. Given this absence of evidence, Defendants have met their burden to show no genuine dispute exists as to the lack of personal involvement of Mr. Brown and Dr. Shelton as it related to Plaintiff's Section 1983 clai m. Dismissal with prejudice of this claim as to these two defendants is appropriate for this additional reason.

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Conclusion For the foregoing reasons, the court recommends Defendants' motion for summary judgment (ECF No. 104) be GRANTED and this case DISMISSED with prejudice. Because Defendants' first and second arguments are dispositiv e, the court declines to address Defendants' alternative arguments 2

for dismissal.

Scheduling Order The Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 14 days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 2nd day of February, 2022.

_____ JOHN V. ACOSTA United States Magistrate Judge

2 Defendants alternatively argued (1) they are entitled to qualified immunity; (2) they are immune from damages in their official capacities; (3) Plaintiff cannot prove the elements of her state claims

for medical negligence and sexual battery; (4) the supplemental claims should be dismissed for lack of subject matter jurisdiction; and (5) the State of Oregon should be substituted for the named defendants and dismissed.