

2022 WL 1210694
Only the Westlaw citation is currently available.
United States Court of Appeals, **Ninth Circuit**.

Marciano **PLATA**; et al., Plaintiffs-Appellees,

v.

Gavin **NEWSOM**, Governor of the State of California; Kathleen Allison, Secretary of the
California Department of Corrections and Rehabilitation, Defendants-Appellants,

J. Clark Kelso, Receiver-Appellee.

Marciano **Plata**; et al., Plaintiffs-Appellees,

v.

California Correctional Peace Officers Association, Intervenor-Appellant,
and

Gavin **Newsom**, Governor of the State of California; Kathleen Allison, Secretary of the
California Department of Corrections and Rehabilitation, Defendants,

J. Clark Kelso, Receiver-Appellee.

No.

21

-

16696

, No.

21

-

16816

Argued and Submitted March 15, **2022** San Francisco, California

FILED APRIL **25**, **2022**

Appeal from the United States District Court for the Northern District of California, Jon S. Tigar,
District Judge, Presiding, D.C. No. 4:01-cv-01351-JST

Attorneys and Law Firms

Laura Bixby, Steven Fama, Alison Hardy, Rita Katherine Lomio, Sara Norman, Donald Specter, Esquire,
Prison Law Office, Berkeley, CA, Neil Sawhney, Gupta Wessler, San Francisco, CA, for Plaintiffs-
Appellees in **21-16696**.

Steven Fama, Alison Hardy, Rita Katherine Lomio, Sara Norman, Donald Specter, Esquire, Laura Bixby,
Prison Law Office, Berkeley, CA, for Plaintiffs-Appellees in **21-16816**.

Gregg McLean Adam, Esquire, Messing Adam & Jasmine, LLP, San Francisco, CA, for Intervenor-
Appellant in **21-16816**.

David Carrillo Casarrubias, Esquire, Samantha Derin Wolff, Hanson Bridgett, LLP, Iram Hasan, Deputy Attorney General, AGCA - Office of the California Attorney General, San Francisco, CA, Martha P. Ehlenbach, Esquire, Deputy Attorney General, AGCA-Office of the California Attorney General, Sacramento, CA, Paul B. Mello, Esquire, Hanson Bridgett, LLP, Walnut Creek, CA, for Defendants-Appellants in **21-16696**.

Robert Emmett Bowen, Brad D. Brian, Esquire, Katherine M. Forster, Esquire, Jacob Kreilkamp, Munger, Tolles & Olson, LLP, Los Angeles, CA, Martin H. Dodd, Jamie L. DuPree, Futterman DuPree Dodd Croley Maier LLP, San Francisco, CA, Xiaonan April Hu, Munger, Tolles & Olson LLP, Washington, DC, for Receiver-Appellee in **21-16696**.

Robert Emmett Bowen, Brad D. Brian, Esquire, Katherine M. Forster, Esquire, Jacob Kreilkamp, Munger, Tolles & Olson, LLP, Los Angeles, CA, Martin H. Dodd, Jamie L. DuPree, Futterman DuPree Dodd Croley Maier LLP, San Francisco, CA, Xiaonan April Hu, Jonathan Meltzer, Munger, Tolles & Olson LLP, Washington, DC, for Receiver-Appellee in **21-16816**.

Before: CHRISTEN and BRESS, Circuit Judges, and FEINERMAN,* District Judge.

MEMORANDUM**

***1** Defendants and Intervenor appeal the district court's orders adopting, and setting a deadline to implement, the court-appointed Receiver's recommendation that California prison officials enact a mandatory COVID-19 vaccination policy requiring workers who regularly access California Department of Corrections and Rehabilitation (CDCR) facilities be vaccinated (except in cases of medical or religious exemptions). Defendants and Intervenor argue the district court erred by ruling that CDCR acted with deliberate indifference by failing to require all staff members to vaccinate, and that the district court failed to narrowly tailor its remedy pursuant to the Prison Litigation Reform Act (PLRA). We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), and we vacate the district court's orders. Because the parties are familiar with the facts, we recite only those necessary to decide this appeal.

Defendants and Intervenor argue that CDCR did not act with deliberate indifference by requiring only workers in healthcare settings, and not all prison workers (subject to exemptions), to be vaccinated statewide. The parties dispute whether we review the district court's determination of deliberate indifference de novo or for abuse of discretion, but we conclude Plaintiffs failed to show deliberate indifference under either standard.

To establish an Eighth Amendment violation based on a failure to prevent harm, the inmate must make both an objective showing that he is incarcerated under conditions posing a substantial risk of serious harm, *Lemire v. Cal. Dep't of Corrs. & Rehab.*, 726 F.3d 1062, 1074 (**9th Cir.** 2013), and a subjective showing that the defendants demonstrated “ ‘deliberate indifference’ to inmate health or safety,” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). “Deliberate indifference is a high legal standard.” *Toguchi v. Chung*, 391 F.3d 1051, 1060 (**9th Cir.** 2004). For a successful showing of deliberate indifference, the defendant must provide medically unacceptable care in conscious disregard of an excessive risk to the plaintiff's health. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 786 (**9th Cir.** 2019) (quoting *Hamby v. Hammond*, 821 F.3d 1085, 1092 (**9th Cir.** 2016)). Disagreements about the best medical course of action do not meet the deliberate indifference standard, nor does negligence or malpractice. *Toguchi*, 391 F.3d at 1057–58, 1060; *see also Hamby*, 821 F.3d at 1092 (**9th Cir.** 2016).

We conclude that CDCR's COVID-19 vaccination policy was not deliberately indifferent because the agency took significant action to address the health risks posed by COVID-19, including making vaccines and booster doses available to prisoners and correctional staff, enacting policies to encourage and facilitate staff and prisoner vaccination, requiring staff to wear personal protective equipment, and ensuring unvaccinated staff members regularly test for COVID-19. Defendants also employed other widely accepted mitigation measures to reduce the risk of prisoners contracting COVID-19, including symptom screening for all individuals entering the prisons; enhanced cleaning in the facilities; adopting an outbreak action plan; upgrading ventilation; establishing quarantine protocols for medically vulnerable patients; and testing, masking, and physical distancing among inmates. In light of these uncontested facts, Defendants did not ignore or fail to respond to the risk of COVID-19 generally, nor did they disregard the importance of vaccination as a key mitigation measure specifically.

***2** Plaintiffs and the Receiver argue Defendants' approach was deliberately indifferent because: (1) CDCR disregarded the Receiver's conclusion that, "given the rapid and ongoing spread of the Delta variant in California, *mandatory COVID-19 vaccination for institutional staff is necessary to provide adequate health protection for incarcerated persons*"; and (2) "[o]nce COVID-19 infection has been introduced into a prison, it is virtually impossible to contain"; and (3) staff are the primary vector for introducing the virus to correctional facilities. Plaintiffs further argue that a staff vaccination mandate is necessary to protect inmates from the risks of COVID-19 because CDCR's other mitigation measures are insufficient—masking and physical distancing are inconsistently enforced in prison, and testing offers only limited protection. In support of this position, the Receiver points to a study showing that full vaccination consistently reduces household viral spread of the alpha and delta variants of COVID-19. The Receiver also notes that, in the absence a full staff vaccination mandate, CDCR experienced approximately 2.5 times the infection rate of the California general population during the peak of the Omicron variant.

A decision to adopt an approach that is not the most medically efficacious does not itself establish deliberate indifference, *see Toguchi*, 391 F.3d at 1057–58, and the record does not include evidence demonstrating how much more effective a vaccine mandate would be compared to Defendants' existing measures to mitigate the introduction and spread of COVID-19 in a custodial environment, nor is it clear from the record that this is an unquantifiable figure. Moreover, the Receiver's authority extends to the prison's health care system, not overall prison administration. Defendants are tasked with meeting non-medical imperatives such as maintaining sufficient staffing to operate the state's correctional institutions safely. Defendants and Intervenor stress that over 700 correctional officers are currently eligible to retire, and suggest some correctional staff may do so rather than continue to work in the face of a vaccine mandate. The district court's orders denying Defendants' and Intervenor's motions for stay deemed Defendants' staffing concerns "speculative," but the district court did not make specific findings regarding the total number of correctional personnel, the impact the loss of up to 700 correctional officers would have on CDCR's ability to safely operate the prisons and provide programming, the likelihood that staff eligible to retire might do so rather than receive vaccinations, nor CDCR's ability to hire replacement staff. In the absence of such findings, we must defer to the prison's balancing of administrative concerns. *See Farmer*, 511 U.S. at 845 (concluding courts must give "due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions,'") (quoting *Spain v. Proconier*, 600 F.2d 189, 193 (9th Cir. 1979)); *Helling v. McKinney*, 509 U.S. 25, 37 (1993). On this record, Plaintiffs did not meet their burden of establishing Defendants' vaccination policy was deliberately indifferent, and we vacate the district court's orders on appeal concluding

otherwise. *See Helling*, 509 U.S. at 306 (holding that deliberate indifference “should be determined in light of the prison authorities’ current attitudes and conduct”). We need not address Defendants’ and Intervenor’s argument that the district court’s remedy was overbroad. *See* 18 U.S.C. § 3626(a)(1)(A).¹

VACATED.

Footnotes

- * The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.
- ** This disposition is not appropriate for publication and is not precedent except as provided by **Ninth Circuit** Rule 36-3.
- ¹ The American College of Correctional Physicians’ motion for leave to file an amicus brief (No. 21-16996, Dkt. #50) is granted. *See* Fed. R. App. P. 29(a).