

OCT 12 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK J. FERNANDEZ,

Plaintiff - Appellant,

v.

SUSAN RISENHOOVER; et al.,

Defendants - Appellees.

No. 09-16279

D.C. No. 3:08-cv-01266-CRB

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Submitted September 13, 2010**

Before: SILVERMAN, CALLAHAN, and N.R. SMITH, Circuit Judges.

Frank J. Fernandez, a California state prisoner, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging deliberate indifference to his serious medical needs. We have jurisdiction under 28 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 1291. We review de novo. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 770 (9th Cir. 2006). We affirm.

The district court properly dismissed Fernandez’s deliberate indifference claim because, in light of the extensive medical care that the complaint acknowledges Fernandez received, the defendants’ refusal to give him a double mattress states, at most, a claim of negligence. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990) (“While poor medical treatment will at a certain point rise to the level of constitutional violation, mere malpractice, or even gross negligence, does not suffice.”).

Contrary to Fernandez’s contention, the district court did not abuse its discretion by ruling on the motion to dismiss before considering Fernandez’s request for further discovery because discovery could not have affected a ruling on the pleadings. *Cf. Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988) (the district court did not abuse its discretion by staying discovery when the discovery could not have affected summary judgment).

Fernandez’s remaining contentions are unpersuasive.

AFFIRMED.