

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DUANE DIXON,

Plaintiff,

v.

DEPARTMENT OF CORRECTION AND
REHABILITATION, et al.,

Defendants.

CASE NO. 1:10-CV-01225-LJO-DLB PC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL WITHOUT
LEAVE TO AMEND
(Doc. 8)

Plaintiff Duane Dixon (“Plaintiff”) is a California state prisoner proceeding pro se and in forma pauperis in this civil rights action. On July 8, 2010, Plaintiff filed his initial complaint. (Doc. 1). On August 5, 2010, Plaintiff filed a first amended complaint. (Doc. 8.) Plaintiff’s first amended complaint is presently before the court for screening.

A. Screening Requirement

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. [28 U.S.C. § 1915A\(a\)](#). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. [28 U.S.C. § 1915A\(b\)\(1\),\(2\)](#). "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 . . . the action or appeal . . . fails to state a claim upon which relief may be granted." [28 U.S.C. § 1915\(e\)\(2\)\(B\)\(ii\)](#).

1 "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited
2 exceptions," none of which applies to § 1983 actions. [Swierkiewicz v. Sorema N. A., 534 U.S.](#)
3 [506, 512 \(2002\)](#); [Fed. R. Civ. P. 8\(a\)](#). Pursuant to [Rule 8\(a\)](#), a complaint must contain "a short
4 and plain statement of the claim showing that the pleader is entitled to relief" [Fed. R. Civ.](#)
5 [P. 8\(a\)](#). "Such a statement must simply give the defendant fair notice of what the plaintiff's claim
6 is and the grounds upon which it rests." [Swierkiewicz, 534 U.S. at 512](#). However, "the liberal
7 pleading standard . . . applies only to a plaintiff's factual allegations." [Neitze v. Williams, 490](#)
8 [U.S. 319, 330 n.9 \(1989\)](#). "[A] liberal interpretation of a civil rights complaint may not supply
9 essential elements of the claim that were not initially pled." [Bruns v. Nat'l Credit Union Admin.,](#)
10 [122 F.3d 1251, 1257 \(9th Cir. 1997\)](#) (quoting [Ivey v. Bd. of Regents, 673 F.2d 266, 268 \(9th Cir.](#)
11 [1982\)](#)).

12 **B. Summary of Plaintiff's Amended Complaint**

13 Plaintiff is currently a state prisoner at R.J. Donovan Prison in San Diego, California.
14 The acts he complains of occurred while he was incarcerated at Kern Valley State Prison
15 ("KVSP") in Delano, California. Plaintiff names the following defendants: J. Akanno, M.D.,
16 medical doctor at KVSP; M. Spaeth, M.D., medical doctor at KVSP; R. Rodriguez, M.D.,
17 medical doctor at Mercy Hospital in Bakersfield, California; the California Department of
18 Corrections and Rehabilitation ("CDCR"); and Does 1 through 4, prison medical care providers.
19 Plaintiff alleges the following: On April 6, 2007, Plaintiff was attacked by another prisoner and
20 stabbed in the head. The object with which Plaintiff was stabbed broke off in his skull. Plaintiff
21 was examined by Dr. Akanno on the date of the incident. On June 4, 2007, Plaintiff went to the
22 medical staff at KVSP complaining of bleeding and dizziness. (Doc. 8, p. 3I and Exhibit D.).
23 Approximately two months after the assault, on June 12, 2007, Dr. Akanno again examined
24 Plaintiff and noted that the injury was healing poorly. On July 31, 2007, Dr. Akanno noted that
25 Plaintiff was afflicted with an "old scalp wound due to assault" and that Plaintiff was "awaiting
26 orthopedic surgery and scalp surgery." Plaintiff contends that Dr. Akanno "did not perceive
27 Plaintiff's injury" and was "nonchalant." (Doc. 8, p. 3D and Exhibits D and I.)

28 Approximately three months after the head injury, Plaintiff wrote to the warden about the

1 incessant pains in his head. On October 15, 2007, the associate warden advised Plaintiff to use
2 the appeal process. (Doc. 8, p. 3B and Exhibit B.)

3 On August 13, 2007, Plaintiff was transported to Mercy Hospital in Bakersfield,
4 California and examined by Dr. Rodriguez. His examination “was of the most cursory sort” and
5 Dr. Rodriguez “neither wanted to touch Plaintiff nor be in the same room with him.” Plaintiff
6 explained to Dr. Rodriguez that he believed there was something in the wound. Plaintiff felt that
7 Dr. Rodriguez was suspicious that Plaintiff might be irritating the injury. (Doc. 8, pp. 3B, 3G-H
8 and Exhibit C.)

9 On November 21, 2007, Dr. Spaeth excised skin from the wound area. Plaintiff contends
10 that Dr. Spaeth should have discovered the foreign body lodged in his head. On January 2, 2008,
11 Dr. Spaeth examined Plaintiff and noted that his scalp lesion was still draining. Plaintiff alleges
12 that Dr. Spaeth should have noticed that the wound was not healing. (Doc. 8, p. 3E.)

13 Plaintiff asserts that he repeatedly appealed to medical personnel regarding the pains in
14 his head and continuous bleeding. On numerous occasions, medical personnel documented that
15 the wound was not healing and Plaintiff was routinely given gauze and instructed to apply
16 pressure. (Doc. 8, pp. 3A-3B and Exhibit g.)

17 At some point, Plaintiff was transferred to Corcoran State Prison (“CSP-Corcoran”).
18 Following his transfer, Plaintiff’s wound was examined at CSP-Corcoran in May 2008. On July
19 3, 2008, a foreign body was excised from his skull. (Doc. 8, p. 3C.)

20 On July 31, 2008, Plaintiff filed an inmate appeal (“602”) form while at CSP-Corcoran.
21 The appeal was denied at the Director’s Level on February 11, 2010. (Attachments to Doc. 8.)

22 Plaintiff claims that he needlessly endured pain and suffering. Plaintiff seeks financial
23 damages to deter medical carelessness.

24 **C. Plaintiff’s Claims**

25 **1. Exhaustion of Administrative Remedies**

26 Before addressing the merits of Plaintiff’s claims, the court assesses whether Plaintiff has
27 exhausted his administrative remedies prior to filing this action.

28 The Prison Litigation Reform Act (“PLRA”) requires a prisoner to exhaust his

1 administrative remedies before filing a lawsuit concerning prison conditions:

2 No action shall be brought with respect to prison conditions under section 1983 of
3 this title, or any other Federal law, by a prisoner confined in any ... correctional
4 facility until such administrative remedies as are available are exhausted.

4 [42 U.S.C. § 1997e\(a\)](#). Prisoners are required to exhaust the available administrative remedies
5 prior to filing suit. [Jones v. Bock, 549 U.S. 199, 211, 127 S.Ct. 910, 918-19 \(2007\)](#); [McKinney](#)
6 [v. Carey, 311 F.3d 1198, 1199-1201 \(9th Cir. 2002\)](#). Exhaustion is required regardless of the
7 relief sought by the prisoner and regardless of the relief offered by the process, [Booth v. Churner,](#)
8 [532 U.S. 731, 741, 121 S.Ct. 1819 \(2001\)](#), and the exhaustion requirement applies to all prisoner
9 suits relating to prison life, [Porter v. Nussle, 534 U.S. 516, 532, 122 S.Ct. 983 \(2002\)](#). The
10 Supreme Court has held that this exhaustion requirement demands “proper” exhaustion.
11 [Woodford v. Ngo, 548 U.S. 90, 84, 126 S.Ct. 2378 \(2006\)](#). To “proper[ly]” exhaust, a prisoner
12 must comply “with an agency's deadlines and other critical procedural rules because no
13 adjudicative system can function effectively without imposing some orderly structure on the
14 course of its proceedings.” [Id. at 90-91, 126 S.Ct. 2378](#).

15 The California Department of Corrections and Rehabilitation has an administrative
16 grievance system for prisoner complaints. [Cal. Code Regs., tit. 15 § 3084.1](#). The process is
17 initiated by submitting a CDCR Form 602. [Id.](#) at § 3084.2(a). Four levels of appeal are
18 involved, including the informal level, first formal level, second formal level, and third formal
19 level, also known as the “Director’s Level.” [Id.](#) at § 3084.5. The process is initiated by
20 submission of the appeal to the informal level, or in some circumstances, the first formal level.
21 At the time of Plaintiff’s injury, appeals were to be submitted within fifteen working days of the
22 event being appealed. [Id.](#) at §§ 3084.5, 3084.6(c). In order to satisfy [section 1997e\(a\)](#), California
23 state prisoners are required to use this process to exhaust their claims prior to filing suit.
24 [Woodford, 548 U.S. at 85-86, 126 S.Ct. 2378](#); [McKinney, 311 F.3d at 1199-1201](#). Where it is
25 clear from the face of a prisoner’s complaint that he has not yet exhausted the administrative
26 grievance procedure, the action must be dismissed. 42 U.S.C. § 1997e(a); [Wyatt v. Terhune, 315](#)
27 [F.3d 1108, 1120 \(9th Cir.2003\)](#) (“A prisoner's concession to nonexhaustion is a valid grounds for
28 dismissal”); [see also Bennett v. King, 293 F.3d 1096, 1098 \(9th Cir.2002\)](#).

1 Plaintiff complains about an injury he sustained in April 2007, along with his subsequent
2 medical care while incarcerated at KVSP. According to the complaint and attachments, Plaintiff
3 “went directly to the prison warden by mail” to address the “incessant pains in his head.” In
4 October 2007, KVSP’s associate warden notified Plaintiff in writing of the availability of the 602
5 process to address his medical concerns. Plaintiff admits that the letter “advised [him] to use the
6 ‘appeal process.’” (Doc. 8, p. 3B and Exhibit B.) However, Plaintiff did not submit a 602 appeal
7 at any point during his incarceration at KVSP after his April 2007 injury. Instead, Plaintiff
8 waited until July 2008 to initiate the 602 process, which was after his transfer from KVSP to
9 CSP-Corcoran.

10 It is clear from the face of the complaint and attachments that Plaintiff did not afford
11 KVSP (and its medical staff) “an opportunity to correct its own [alleged] mistakes” before being
12 “haled into federal court.” [Woodford, 548 U.S. at 89, 126 S.Ct. 2378](#). In short, Plaintiff failed to
13 timely exhaust the administrative grievance process. Accordingly, as the PLRA precludes
14 prisoners from filing federal lawsuits concerning prison conditions unless they have first
15 exhausted available administrative remedies, Plaintiff’s complaint fails to state a claim upon
16 which relief can be granted.

17 **2. Medical Care**

18 The court construes Plaintiff’s complaint regarding his medical care as a claim that the
19 Defendant doctors were deliberately indifferent to his medical needs in violation of the Eighth
20 Amendment. Plaintiff contends that Defendants displayed medical carelessness in failing to
21 detect a foreign body lodged in his head, which resulted in his needless pain and suffering.
22 Plaintiff’s contentions do not reach the level of a constitutional violation.

23 Where a prisoner’s Eighth Amendment claim is one of inadequate medical care, the
24 prisoner must allege and prove “acts or omissions sufficiently harmful to evidence deliberate
25 indifference to serious medical needs.” [Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285](#)
26 [\(1976\)](#). Such a claim has two elements: “the seriousness of the prisoner’s medical need and the
27 nature of the defendant’s response to that need.” [McGuckin v. Smith, 974 F.2d 1050, 1059 \(9th](#)
28 [Cir.1991\)](#) (overruled on other grounds by [WMX Techs., Inc. V. Miller, 104 F.3d 1133, 1136 \(9th](#)

1 Cir. 1997). A medical need is serious "if the failure to treat a prisoner's condition could result in
2 further significant injury or the 'unnecessary and wanton infliction of pain.'" [McGuckin, 974](#)
3 [F.2d at 1059](#) (quoting [Estelle, 429 U.S. at 104](#)). Indications of a serious medical need include
4 "the presence of a medical condition that significantly affects an individual's daily activities." [Id.](#)
5 [at 1059-60](#). By establishing the existence of a serious medical need, a prisoner satisfies the
6 objective requirement for proving an Eighth Amendment violation. [Farmer v. Brennan, 511 U.S.](#)
7 [825, 834, 114 S.Ct. 1970 \(1994\)](#).

8 If a prisoner establishes the existence of a serious medical need, he or she must then show
9 that prison officials responded to the serious medical need with deliberate indifference. [Farmer,](#)
10 [511 U.S. at 834](#). In general, deliberate indifference may be shown when prison officials deny,
11 delay, or intentionally interfere with medical treatment, or it may be shown by the way in which
12 prison officials provide medical care. [Hutchinson v. United States, 838 F.2d 390, 394 \(9th](#)
13 [Cir.1988\)](#). Before it can be said that a prisoner's civil rights have been abridged with regard to
14 medical care, however, "the indifference to his medical needs must be substantial. Mere
15 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action."
16 [Broughton v. Cutter Laboratories, 622 F.2d 458, 460 \(9th Cir.1980\)](#) (citing [Estelle, 429 U.S. at](#)
17 [105-06](#)); see also [Toguchi v. Chung, 391 F.3d 1051, 1060 \(9th Cir.2004\)](#). Deliberate
18 indifference is "a state of mind more blameworthy than negligence" and "requires 'more than
19 ordinary lack of due care for the prisoner's interests or safety.'" [Farmer, 511 U.S. at 835](#) (quoting
20 [Whitley v. Albers, 475 U.S. 312, 319 \(1986\)](#)). "[A] complaint that a physician has been
21 negligent in diagnosing or treating a medical condition does not state a valid claim of medical
22 mistreatment under the Eighth Amendment." [Estelle, 429 U.S. at 106](#). Even gross negligence is
23 insufficient to establish deliberate indifference to serious medical needs. See [Wood v.](#)
24 [Housewright, 900 F.2d 1332, 1334 \(9th Cir.1990\)](#).

25 Also, "[a] difference of opinion between a prisoner-patient and prison medical authorities
26 regarding treatment does not give rise to a § 1983 claim." [Franklin v. Oregon, 662 F.2d 1337,](#)
27 [1344 \(9th Cir.1981\)](#) (internal citation omitted). To prevail, Plaintiff "must show that the course
28 of treatment the doctors chose was medically unacceptable under the circumstances ... and ... that

1 they chose this course in conscious disregard of an excessive risk to plaintiff's health.” [Jackson v.](#)
2 [McIntosh, 90 F.3d 330, 332 \(9th Cir.1986\)](#) (internal citations omitted). A prisoner's mere
3 disagreement with diagnosis or treatment does not support a claim of deliberate indifference.
4 [Sanchez v. Vild, 891 F.2d 240, 242 \(9th Cir.1989\)](#).

5 Here, Plaintiff does not contend that he was denied or refused medical treatment. While
6 at KVSP, Plaintiff saw prison doctors, prison medical staff and outside doctors on numerous
7 occasions. Rather, Plaintiff’s claim is that defendant doctors and medical staff failed to diagnose
8 him with a foreign body in his head. He asserts that medical personnel who initially examined
9 him should have performed said examination with “enough care and diligence” to discover the
10 foreign object. (Doc. 8, p. 31.) At most, Plaintiff is asserting negligence or a difference of
11 opinion regarding his diagnosis and treatment. As discussed above, mere negligence or a
12 disagreement about treatment are insufficient to support a deliberate indifference claim.

13 **II. Conclusion and Recommendations**

14 The court finds that plaintiff's complaint fails to state any claims upon which relief can be
15 granted under section 1983 against any of the defendants. Under [Rule 15\(a\) of the Federal Rules](#)
16 [of Civil Procedure](#), the court should “freely give leave [to amend] when justice so requires.” In
17 addition, “[l]eave to amend should be granted if it appears at all possible that the plaintiff can
18 correct the defect.” [Lopez v. Smith, 203 F.3d 1122, 1130 \(9th Cir. 2000\)](#) (internal citations
19 omitted). However, in this action, the court finds that the deficiencies outlined above are not
20 capable of being cured by amendment because Plaintiff did not timely exhaust his administrative
21 remedies, and therefore further leave to amend should not be granted. [28 U.S.C. §](#)
22 [1915\(e\)\(2\)\(B\)\(ii\)](#).

23 Accordingly, based on the foregoing, the court HEREBY RECOMMENDS that this
24 action be dismissed in its entirety for failure to state a claim upon which relief can be granted.

25 These Findings and Recommendations will be submitted to the United States District
26 Judge assigned to the case, pursuant to the provisions of [Title 28 U.S.C. § 636\(b\)\(1\)](#). Within
27 thirty (30) days after being served with these Findings and Recommendations, Plaintiff may file
28 written objections with the Court. The document should be captioned "Objections to Magistrate

1 Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections
2 within the specified time may waive the right to appeal the District Court's order. [Martinez v.](#)
3 [Ylst, 951 F.2d 1153 \(9th Cir. 1991\).](#)

4 IT IS SO ORDERED.

5 **Dated: March 2, 2011**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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