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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICKEY WILLIAMS,	)	
	)	
Plaintiff(s),	)	No. 1:08-cv-0705 CRB
	)	
v.	)	ORDER OF DISMISSAL
	)	
S. KUNTZMAN, et al.,	)	
	)	
Defendant(s).	)	
_____	)	

I.

Plaintiff, a prisoner at California State Prison, Solano, filed a First Amended Complaint ("FAC") (docket # 15) under 42 U.S.C. § 1983 alleging that, while at Wasco State Prison, defendants failed to provide him adequate dental care for a tooth abscess. He sought damages and injunctive relief.

Per order filed on May 4, 2009, the court found that, when liberally construed, plaintiff's allegations appeared to state a cognizable claim for deliberate indifference to serious medical needs under § 1983 and ordered the U.S. Marshal to serve the named defendants – Chief Dental Officer S. Kuntzman and dentists Merkel and R. Seitz.

1 Defendants moved to dismiss under Federal Rule of Civil Procedure  
2 12(b)(6) on the ground that plaintiff does not state a claim for damages for  
3 deliberate indifference under § 1983 against any defendant and that defendants  
4 are entitled to qualified immunity. Defendants also argued that plaintiff's claim  
5 for injunctive relief under § 1983 should be dismissed as barred by the remedial  
6 plan in the class-action of Perez v. Cate, No. C 05-5241 JSW (N.D. Cal.).

7 Per order filed on December 15, 2009, the court granted defendants'  
8 motion to dismiss, but afforded plaintiff an opportunity to amend to allege, if  
9 possible, a § 1983 claim for damages against Seintz and/or Kutzman based on  
10 deliberate indifference to serious medical needs. The court found that plaintiff's  
11 allegations against Merkel did not amount to more than a claim for medical  
12 malpractice not cognizable under § 1983 and that his claim for injunctive relief  
13 was barred by the remedial plan of Perez v. Cate.

## 14 II.

15 Deliberate indifference to serious medical needs violates the Eighth  
16 Amendment's proscription against cruel and unusual punishment. Estelle v.  
17 Gamble, 429 U.S. 97, 104 (1976). A "serious medical need" exists if the failure  
18 to treat a prisoner's condition could result in further significant injury or the  
19 "unnecessary and wanton infliction of pain." McGuckin v. Smith, 974 F.2d 1050,  
20 1059 (9th Cir. 1992) (citing Estelle, 429 U.S. at 104), overruled in part on other  
21 grounds by WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir.  
22 1997) (en banc). A prison official is "deliberately indifferent" if he knows that a  
23 prisoner faces a substantial risk of serious harm and disregards that risk by failing  
24 to take reasonable steps to abate it. Farmer v. Brennan, 511 U.S. 825, 837  
25 (1994).

1 Negligence alone does not warrant liability under the Eighth Amendment.  
2 Id. at 835-36 & n4. An "official's failure to alleviate a significant risk that he  
3 should have perceived but did not, . . . cannot under our cases be condemned as  
4 the infliction of punishment." Id. at 838. Instead, "the official's conduct must  
5 have been 'wanton,' which turns not upon its effect on the prisoner, but rather,  
6 upon the constraints facing the official." Frost v. Agnos, 152 F.3d 1124, 1128  
7 (9th Cir. 1998) (citing Wilson v. Seiter, 501 U.S. 294, 302-03 (1991)). Prison  
8 officials violate their constitutional obligation only by "intentionally denying or  
9 delaying access to medical care." Estelle, 429 U.S. at 104-05.

10 A difference of opinion between a prisoner-patient and prison medical  
11 authorities regarding treatment does not give rise to a § 1983 claim. Franklin v.  
12 Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). Similarly, a showing of nothing  
13 more than a difference of medical opinion as to the need to pursue one course of  
14 treatment over another is generally insufficient to establish deliberate  
15 indifference. Toguchi v. Chung, 391 F.3d 1051, 1058, 1059-60 (9th Cir. 2004).

### 17 III.

18 Currently before the court for screening under 28 U.S.C. § 1915A is  
19 plaintiff's Second Amended Complaint ("SAC") (docket # 29) and a request for  
20 leave to file and screen a proposed Third Amended Complaint ("TAC") (docket  
21 # 36). Good cause appearing, plaintiff's request for leave to file his proposed  
22 TAC is GRANTED.

#### 24 A. Merkel

25 In his FAC, plaintiff alleged that he was provided dental care by Merkel  
26 after he bit down on a hard object and exposed a hole in his tooth. Merkel filled  
27

1 the hole but, according to plaintiff, did not do "a good job" and plaintiff later  
2 developed a "tooth abscess." Docket #15 at 2.

3 The court dismissed plaintiff's allegations against Merkel for failure to  
4 state a claim upon which relief may be granted. It explained:

5 Plaintiff's allegations may state a claim for medical malpractice  
6 against Merkle, but they are insufficient to make out a violation of  
7 the Eighth Amendment. See Toguchi, 391 F.3d at 1060-61;  
8 Franklin, 662 F.2d at 1344. There is no indication whatsoever that  
9 Merkel knew that plaintiff faced a substantial risk of serious harm  
10 and disregarded that risk by failing to take reasonable steps to abate  
11 it. Farmer, 511 U.S. at 837.

12 Dec. 15, 2009 Order at 5.

13 Although plaintiff was not granted leave to amend as to Merkel, he  
14 nonetheless attempts to do so in his TAC. There, plaintiff alleges that Merkel  
15 (although now also referred to as MeKeel) provided him with emergency dental  
16 care after he bit down on a hard object and cracked a posterior molar. Merkel  
17 filled the hole, but two or three days later, plaintiff developed a "tooth abscess."  
18 TAC at 5. According to plaintiff, Merkel should have considered and performed  
19 root canal therapy ("RCT") rather than just filled the hole in his cracked molar.  
20 Plaintiff's allegations against Merkel/MeKeel are dismissed for the same reason  
21 his similar allegations against Merkel in the first amended complaint were  
22 dismissed – the allegations may state a claim for medical malpractice against  
23 Merkle/MeKeel, but they are insufficient to make out a violation of the Eighth  
24 Amendment. See Toguchi, 391 F.3d at 1060-61; Franklin, 662 F.2d at 1334.

25 B. Seitz and Kuntzman

26 In his FAC, plaintiff alleged that Seitz diagnosed tooth #19 as clinically  
27 abscessed and informed plaintiff that extraction of the tooth or RCT would be  
28 necessary. Docket # 15 at 2-3. Plaintiff did not want an extraction and wanted to

1 pursue RCT. Id. App. A at 1. Seitz explained that RCT on posterior teeth was  
2 not a covered procedure unless authorized by the Dental Authorization Request  
3 ("DAR") committee. Id. at 3 & App. A at 2. Plaintiff refused a recommended x-  
4 ray and "left saying he had to think about it." Id. App. A at 2. According to  
5 plaintiff, the DAR committee was "never convened to consider the option of  
6 endodontic therapy" (i.e., RCT) because the California Department of  
7 Corrections and Rehabilitation ("CDCR") "refuses to convene" the DAR  
8 committee. Id. at 3. Plaintiff alleged no facts as to Kuntzman.

9 The court dismissed plaintiff's allegations against Seitz and Kuntzman for  
10 failure to state a claim upon which relief may be granted. The court explained:

11 Plaintiff alleges that Seitz informed him that RTC required  
12 approval by the DAR committee, but the committee was never  
13 convened because CDCR refuses to convene it. There is no  
14 indication that Seitz had any role in preventing the committee from  
15 being convened. In order to state a claim for damages against Seitz  
16 or any of the named defendants, plaintiff must allege facts showing  
17 that the specific prison official's deliberate indifference was the  
18 "actual and proximate cause" of the deprivation of plaintiff's Eighth  
19 Amendment rights. See Leer v. Murphy, 844 F.2d 628, 634 (9th  
20 Cir. 1988). Plaintiff has not done so. He has not alleged a single  
21 fact showing how Seitz (or Kutzman) is responsible for his not  
22 getting RTC or, for that matter, why his not getting RTC amounts  
23 to deliberate indifference. See Toguchi, 391 F.3d at 1058 (to  
24 prevail on a claim involving choices between alternative courses of  
25 treatment, plaintiff must show that course of treatment doctors  
26 chose was medically unacceptable under the circumstances and that  
27 doctors chose this course in conscious disregard of an excessive  
28 risk to plaintiff's health).

Dec. 15, 2009 Order at 5-6.

21 In his TAC, plaintiff alleges that Seitz improperly advised him that RTC  
22 was not a covered procedure. TAC at 6. According to plaintiff, CDCR policy  
23 "stipulated in Chapter 2.9 Endodontics Dental Services Division of Correctional  
24 Health Care Services (Exhibit E)" provides that inmates "shall be eligible for  
25 limited Endodontic (root canal therapy) services at CDCR dental clinics." Id.  
26 But the exhibits plaintiff attaches to plaintiff's TAC in support of his claim make  
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1 clear that, under CDCR policy, "posterior root canal therapies on non-vital teeth  
2 are excluded procedures and, as such, require the prior approval of the Dental  
3 Authorization Review Committee," id. Ex. E at 1, and that Speir so advised  
4 plaintiff, id. Ex. D at 1. Plaintiff adds little more to this than his view that, under  
5 CDCR policy, he should have been offered RTC as an alternative to extraction.

6 Plaintiff's fails to state a § 1983 claim for damages against Seitz because  
7 he does not allege facts showing that Seitz's medical advice amounted to  
8 deliberate indifference or was the actual and proximate cause of the deprivation  
9 of plaintiff's Eighth Amendment rights. See Leer, 844 F.2d at 634. Plaintiff has  
10 not alleged any plausible facts showing that Seitz or Kutzman were personally  
11 responsible for his not getting RTC. His allegation that Kutzman should have  
12 provided a copy of the pertinent CDCR policy at the offices of the chief dentist  
13 does not compel a different conclusion.

14  
15 VI.

16 For the foregoing reasons, the TAC is dismissed under the authority of 28  
17 U.S.C. § 1915A(b) for failure to state a claim upon which relief may be granted.

18 The clerk shall enter judgment in accordance with this order, dismiss all  
19 pending motions as moot and/or without merit and close the file.

20 SO ORDERED.

21 DATED: March 2, 2010

22   
23 \_\_\_\_\_  
24 CHARLES R. BREYER  
25 United States District Judge