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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ANTONIO FAHIE,

Plaintiff,

v.

MERCY HOSPITAL, et al.,

Defendants.

CASE NO. 1:09-CV-01024-LJO-DLB PC

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND DISMISSING
ACTION FOR FAILURE TO STATE A
CLAIM (DOC. 26)

DISMISSAL COUNTS AS STRIKE
PURSUANT TO 28 U.S.C. § 1915(G)

_____ /

Plaintiff Antonio Fahie (“Plaintiff”) is a California state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On December 3, 2010, the Magistrate Judge filed a [Findings and Recommendations](#) herein which was served on Plaintiff and which contained notice to Plaintiff that any objection to the Findings and Recommendations was to be filed within thirty days. Doc. 26. Plaintiff filed an [Objection](#) to the Findings and Recommendations on December 16, 2010. Doc. 27.

In accordance with the provisions of 28 U.S.C. § 636(b)(1), this Court has conducted a de novo review of this case. Having carefully reviewed the entire file, the Court finds the Findings and Recommendations to be supported by the record and by proper analysis.

Plaintiff contends that Defendants Rashidi and Shuie violated Plaintiff’s Eighth Amendment rights. [Objection](#), Doc. 27. First, these claims were dismissed by a previous order. *See* Doc. [18](#). Second, Plaintiff still fails to state a claim. Plaintiff alleges only that Defendants Rashidi and Shuie performed an incorrect surgery, and Defendant Rashidi did not perform corrective surgery until two

1 weeks later. These allegations continue to fail to state a cognizable Eighth Amendment claim.
2 Plaintiff alleges insufficient facts to demonstrate that Defendants Rashidi or Shuie knew of and
3 disregarded an excessive risk to Plaintiff's health. *Farmer v. Brennan*, 511 U.S. 825, 834, 837
4 (1994). Plaintiff's allegations amount at most to negligence, which is not a cognizable Eighth
5 Amendment claim. *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2006). Plaintiff failed to state
6 a cognizable claim against any Defendants.

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. The [Findings and Recommendations](#), filed December 3, 2010, is adopted in full;
- 9 2. This action is dismissed for failure to state a claim upon which relief can be granted;
10 and
- 11 3. This dismissal counts as a strike pursuant to 28 U.S.C. § 1915(g).

12
13 IT IS SO ORDERED.

14 Dated: February 1, 2011

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE