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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RELAUN V. DEADMON,

Plaintiff,

v.

JEFFERY WANG, et al.,

Defendants.

Case No. 1:14-cv-00316-LJO-MJS (PC)
**FINDINGS AND RECOMMENDATIONS
TO DISMISS ACTION WITH PREJUDICE
FOR FAILURE TO STATE A CLAIM
(ECF No. 10)
OBJECTIONS DUE WITHIN FOURTEEN
(14) DAYS**

Plaintiff is a state prisoner proceeding pro se and *in forma pauperis* in this civil rights action filed on March 6, 2014 pursuant to 42 U.S.C. § 1983.

The Court screened Plaintiff's complaint (ECF No. 1) and dismissed it for failure to state a claim, but gave leave to amend (ECF No. 9). Plaintiff's First Amended Complaint (ECF No. 10) is now before the Court for screening.

I. 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, malicious," or that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is

1 immune from such relief. 28 U.S.C. § 1915A(b)(1), (2). “Notwithstanding any filing fee,
2 or any portion thereof, that may have been paid, the court shall dismiss the case at any
3 time if the court determines that . . . the action or appeal . . . fails to state a claim upon
4 which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

5 **II. PLEADING STANDARD**

6 Section 1983 “provides a cause of action for the deprivation of any rights,
7 privileges, or immunities secured by the Constitution and laws of the United States.”
8 Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990), quoting 42 U.S.C. § 1983.

9 Section 1983 is not itself a source of substantive rights, but merely provides a method
10 for vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386,
11 393-94 (1989).

12 To state a claim under § 1983, a plaintiff must allege two essential elements: (1)
13 that a right secured by the Constitution or laws of the United States was violated and (2)
14 that the alleged violation was committed by a person acting under the color of state law.
15 See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cty., 811 F.2d 1243,
16 1245 (9th Cir. 1987).

17 A complaint must contain “a short and plain statement of the claim showing that
18 the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
19 are not required, but “[t]hreadbare recitals of the elements of a cause of action,
20 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.
21 662, 678 (2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

22 Plaintiff must set forth “sufficient factual matter, accepted as true, to state a claim that is
23 plausible on its face.” *Id.* Facial plausibility demands more than the mere possibility that
24 a defendant committed misconduct and, while factual allegations are accepted as true,
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1 legal conclusions are not. *Id.* at 667-68.

2 **III. PLAINTIFF'S ALLEGATIONS**

3 Plaintiff names as Defendants (1) Wang, M.D., Corcoran State Prison ("CSP")
4 Chief Medical Executive, (2) Macias, former CSP Chief Executive Officer, (3) Obaiza,
5 CSP Chief Executive Officer, (4) McCabe, CSP Physician, (5) Yu, CSP Physician, (6)
6 Aye, CSP Physician, (7) Beregovskaya, CSP Physician, (8) Rouch, CSP Nurse
7 Practitioner, (9) Lopez, CSP Registered Nurse, (10) Epstein, CSP Correctional Officer,
8 and (11) Gil, CSP Correctional Officer.

9
10 Plaintiff's allegations can be summarized essentially as follows:

11 Plaintiff requested treatment at the CSP clinic for chronic hiccups for which he
12 induced vomiting when breathing became difficult. He was given antacid and told by
13 Defendant Nurse Lopez that there was nothing she could do for hiccups.

14
15 He had a follow-up visit with Defendant Dr. Yu, who found no symptoms of
16 distress and told him to put in a medical service request if his hiccups persisted.

17 Plaintiff returned to the clinic and presented the same complaints many times
18 over the ensuing months. Dr. Yu requested referral to a GI specialist, but the request
19 was denied by the Chief Medical Officer as not meeting InterQual criteria. Plaintiff was
20 given different hiccup medications and a chest x-ray by Defendant Dr. Beregovskaya.
21 Defendant Dr. Aye told him the hiccups were benign. Dr. Yu told him there were no
22 acute findings relating to the hiccups.

23
24 Plaintiff's self-induced vomiting eventually caused him to vomit blood. He was
25 hospitalized and underwent a GI consultation, gastric endoscopy and a CT scan of his
26 neck. All were interpreted as normal.

27
28 Plaintiff suffered two incidents of respiratory distress or failure in the presence of

1 Defendant Correctional Officers Epstein and Gil. Defendant Gil had to Heimlich Plaintiff
2 to restore normal breathing. Neither Epstein nor Gil filed incident reports.

3 Plaintiff filed a prison medical appeal seeking appropriate treatment for his
4 hiccups, vomiting and breathing difficulties. The appeal was partially granted (for
5 medication) at the first level by Defendant McCabe, partially granted (for GI test) at the
6 second level by Defendants Obaiza, Wang and Macias, and denied by nonparty CDCR
7 Appeals Chief Zamora at the third level.
8

9 In this action Plaintiff seeks (1) monetary damages, (2) a declaration his rights
10 have been violated, and (3) an affirmative injunction directing that he receive
11 appropriate care.

12 **IV. DISCUSSION**

13 **A. Medical Indifference**

14
15 “[T]o maintain an Eighth Amendment claim based on prison medical treatment,
16 an inmate must show deliberate indifference to serious medical needs.” Jett v. Penner,
17 439 F.3d 1091, 1096 (9th Cir. 2006)(quoting Estelle v. Gamble, 429 U.S. 97, 104
18 (1976)). This requires the plaintiff to show (1) “a serious medical need by
19 demonstrating that failure to treat a prisoner's condition could result in further significant
20 injury or the unnecessary and wanton infliction of pain,” and (2) “the defendant's
21 response to the need was deliberately indifferent.” Jett, 439 F.3d at 1096, quoting
22 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds by*
23 WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997).
24

25 “A medical need is serious if failure to treat it will result in significant injury or the
26 unnecessary and wanton infliction of pain.” Peralta v. Dillard, 744 F.3d 1076, 1081 (9th
27 Cir. 2014)(citing Jett, 439 F.3d at 1096). Examples of a serious medical need include
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1 “the existence of an injury that a reasonable doctor or patient would find important and
2 worthy of comment or treatment; the presence of a medical condition that significantly
3 affects an individual’s daily activities; or the existence of chronic and substantial pain.”
4 Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014).

5
6 A prison official shows deliberate indifference to such a need if he “knows of and
7 disregards an excessive risk to inmate health.” Peralta, 744 F.3d at 1082(citing Farmer
8 v. Brennan, 511 U.S. 825, 837 (1994)). This “requires more than ordinary lack of due
9 care.” Colwell, 763 F.3d at 1066 (citing Farmer, 511 U.S. at 835). Instead, the prison
10 official must “be aware of facts from which the inference could be drawn that a
11 substantial risk of serious harm exists, and he must also draw the inference.” Colwell,
12 763 F.3d at 1066. Prison officials may demonstrate deliberate indifference when they
13 “deny, delay, or intentionally interfere with medical treatment,” and prison doctors may
14 be deliberately indifferent in their provision of care. Id.

15
16 Negligence, inadvertence, or differences of medical opinion between the prisoner
17 and medical providers, however, do not amount to a constitutional violation. See
18 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996); Sanchez v. Vild, 891 F.2d 240,
19 242 (9th Cir. 1989); Lyons v. Busi, 566 F.Supp.2d 1172, 1191-1192 (E.D. Cal. 2008); cf.
20 Colwell v. Bannister, 763 F.3d at 1068 (distinguishing plaintiff’s uncorrected cataracts
21 from “a case of ordinary medical mistake or negligence” and finding defendants
22 deliberately indifferent). Even a showing of medical malpractice or gross negligence is
23 insufficient to establish a constitutional violation. Simmons v. Navajo Cty., 609 F.3d
24 1011, 1019 (9th Cir. 2010); Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004).
25 Rather, “the plaintiff ‘must show that the course of treatment the doctors chose was
26 medically unacceptable under the circumstances’ and that the defendants ‘chose this
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1 course in conscious disregard of an excessive risk to plaintiff's health.” Snow v.
2 McDaniel, 681 F.3d 978, 988 (9th Cir. 2012)(*overruled on other grounds by Peralta*, 744
3 F.3d at 1083)(citations omitted).

4
5 **1. Serious Medical Need**

6 As the Court stated in its first screening order (ECF No. 9), Plaintiff's chronic
7 hiccups, difficulty breathing, and chronic vomiting demonstrate a serious need for
8 medical treatment. See Jett, 439 F.3d at 1096 (a “serious medical need” may be shown
9 by demonstrating that failure to treat a prisoner's condition could result in further
10 significant injury or the unnecessary and wanton infliction of pain).

11 **2. Deliberate Indifference**

12 However, Plaintiff's Amended Complaint does not include facts suggesting
13 Defendants “kn[ew] of and disregard[ed] an excessive risk to inmate health.” This Court
14 dismissed Plaintiff's original complaint because it found that Plaintiff had been seen by
15 medical staff at least 19 times, undergone X-rays and other diagnostic testing, and had
16 spent time in an outside facility in the four months following his initial medical request.
17 Such attention and treatment is inconsistent with Plaintiff's claims that Defendants
18 ignored his health concerns.

19
20 Plaintiff now claims that notwithstanding that he ultimately received care, his
21 symptoms were ignored for more than 25 days, and that when he went to the clinic on
22 January 26, January 30, February 3, and February 7, 2012 he “was returned to his cell
23 without help.” (ECF No. 10, at 9).

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25 As an initial matter, the records do not reflect any 25-day period in which Plaintiff
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1 went untreated.¹ However, even if there had been such a delay, the facts Plaintiff has
2 presented do not demonstrate a constitutional violation.

3 For delay in delivery of care to be actionable under § 1983, a medical provider
4 must be “aware of the plaintiff’s need for treatment” but fail “to ensure administration of
5 the prescribed treatment.” Wilhelm v. Rotman, 680 F.3d 1113, 1122-1123 (9th Cir.
6 2012)(unconstitutional delay existed where physician concluded surgery was necessary
7 but failed to request the referral properly and inexplicably cancelled a second referral
8 request). The delay must also cause the inmate harm, though the harm need not be
9 substantial. See id., at 1122 (citing Jett, 439 F.3d at 1096); accord McGuckin, 974 F.3d
10 at 1060. “[T]he fact that an individual sat idly by as another human being was seriously
11 injured despite the defendant’s ability to prevent the injury is a strong indicium of
12 callousness and deliberate indifference to the prisoner.” McGuckin, 974 F.3d at 1060.

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15 Here, Plaintiff has not shown that any providers “failed to ensure administration
16 of a prescribed treatment” or that they “sat idly by” despite being able to help during the
17 four appointments between January 26 and February 7. In fact, despite the Court’s
18 request for additional facts demonstrating Defendants’ alleged deliberate indifference
19 (ECF No. 9, at 7), Plaintiff has not provided any details of these appointments at all. All
20 Plaintiff has alleged is that he sought some kind of affirmative treatment for his
21 symptoms and did not receive it; however, he has not set forth facts indicating that
22 defendants consciously disregarded an excessive risk to his health.

23
24 The mere fact that defendants returned plaintiff to his cell “without help” is not, by
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26 ¹ On January 10, Plaintiff was prescribed an anti-nausea medication and on January 17, he was given an
27 antacid. At two subsequent appointments, on January 20 and 23rd, Plaintiff’s breathing was evaluated
28 and determined not to show irregularity. Plaintiff apparently received no additional treatment from
January 26 through February 7. On February 10, he was prescribed baclofen, which helped somewhat.
The period from January 26 through February 10 is only 15 days.

1 itself, sufficient to establish deliberate indifference. Unless a medical provider *knows*
2 that failing to act poses a substantial risk of serious harm, his decision to “wait and see”
3 is not unconstitutional, even where it proves ineffective. See Fryman v. Traquina, No.
4 CIV S-07-2636 2011 WL 475872, at *11 (E.D. Cal. Feb. 4, 2011)(decision to treat
5 gynocomastia by observation and regular mammograms, rather than surgery, did not
6 demonstrate deliberate indifference); Cole v. Carey, No. CIV S-06-0336 2009 WL
7 2611946, at *5-*6 (E.D. Cal. Aug. 24, 2009)(conservative treatment for Achilles tendon
8 injury did not amount to deliberate indifference). Here, as described above, Plaintiff has
9 not pleaded any facts indicating knowingly risky or reckless conduct on the part of
10 Defendants such as to make a delay in treatment unconstitutional.

11
12 Even if it were assumed for the sake of discussion that Defendants
13 misapprehended the health risks facing Plaintiff, and that returning him to his cell
14 without additional treatment reflected poor medical judgment or negligence, Defendants’
15 conduct would still not be actionable. “Negligence in diagnosing or treating a medical
16 condition does not state a valid claim of medical mistreatment under the Eighth
17 Amendment.” Wilhelm, 680 F.3d at 1122(citing Estelle, 429 U.S. at 106).

18
19 Plaintiff fails to state a claim of medical indifference. Leave to amend this claim
20 would be futile and should be denied.

21 **V. CONCLUSION AND RECOMMENDATION**

22
23 Plaintiff’s first amended complaint fails to state any cognizable claim. He was
24 previously advised of pleading deficiencies and afforded the opportunity to correct them.
25 He failed to do so. No useful purpose would be served by once again pointing out the
26 deficiencies and giving another opportunity to correct them. Further leave to amend
27 appears futile and should be denied.
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1 The undersigned recommends that the action be dismissed with prejudice, that
2 dismissal count as a strike pursuant to 28 U.S.C. § 1915(g), and that the Clerk of the
3 Court terminate any and all pending motions and close the case.

4 These Findings and Recommendations are submitted to the United States
5 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).
6 Within **fourteen** (14) days after being served with these Findings and
7 Recommendations, any party may file written objections with the Court and serve a
8 copy on all parties. Such a document should be captioned “Objections to Magistrate
9 Judge’s Findings and Recommendations.” Any reply to the objections shall be served
10 and filed within fourteen (14) days after service of the objections. The parties are
11 advised that failure to file objections within the specified time may result in the waiver of
12 rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter
13 v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).
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17 IT IS SO ORDERED.

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19 Dated: February 24, 2015

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE