

1 amended complaint states the following cognizable claims: (1) Eighth Amendment medical
2 indifference claims against defendants Toor and Mudunuri in their individual capacities; and (2)
3 First Amendment retaliation claim against defendant Mudunuri in her individual capacity. The
4 court will authorize service of the first amended complaint as to these defendants by separate
5 order.

6 However, plaintiff again fails to state cognizable claims against defendant Toor for First
7 Amendment retaliation and against defendant Pagan for Eighth Amendment deliberate
8 indifference. We will recommend that these claims be dismissed.

9 **A. First Amendment Retaliation – Defendant Toor**

10 Plaintiff has attempted to reassert a First Amendment retaliation claim against defendant
11 Toor, a medical practitioner, in his first amended complaint. As in the original complaint,
12 plaintiff alleges that, on November 12, 2016, Toor refused to authorize pain medication after
13 plaintiff returned from hospitalization following urethra surgery and septic shock.¹ *See* ECF No.
14 13 at 9. Plaintiff then filed a grievance against defendant Toor. *See id.* Subsequently, on
15 February 18, 2017, plaintiff was seen at the prison infirmary for an issue regarding his catheter,
16 and Toor was the on-call doctor. *See id.* at 10. Plaintiff asked the attending R.N. to change the
17 catheter, and the R.N. called Toor to get authorization. *See id.* Toor refused to give authorization
18 to change the catheter and instructed the R.N. to send plaintiff back to his yard with a five-day
19 follow-up with the yard doctor. *See id.* Plaintiff alleges that he suffered severe pain due to the
20 delay. *See id.* at 10-11.

21 These allegations do not state a First Amendment retaliation claim because plaintiff has
22 failed to plausibly allege facts that would support an inference that Toor refused provide
23 authorization for the catheter change on February 18, 2017 in retaliation for the filing of the
24 grievance against him. *See Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (holding
25 that in a First Amendment retaliation claim, a plaintiff must allege facts indicating that a prison
26 official took adverse action against a prisoner “because of” the prisoner’s protected conduct).

27 ¹ The medical treatment allegations form the basis for the cognizable Eighth Amendment
28 deliberate indifference claim against defendant Toor.

1 Nothing in the first amended complaint supports an inference that Toor even had knowledge of
2 plaintiff's grievance on February 18, 2017. Therefore, we recommend that this claim be
3 dismissed without prejudice.²

4 **B. Eighth Amendment Deliberate Indifference – Defendant Pagan**

5 Plaintiff also has attempted to reassert an Eighth Amendment deliberate indifference claim
6 against defendant Pagan, a registered nurse. As in the original complaint, plaintiff alleges that
7 Pagan attempted to insert a catheter into his urethra on November 7, 2016 and caused severe pain
8 to plaintiff after several failed insertion attempts. *See* ECF No. 13 at 6. Plaintiff describes the
9 treatment provided by Pagan as “torture” and describes the pain as “excruciating.” *Id.* While
10 plaintiff undoubtedly had a serious medical condition, nothing in the first amended complaint
11 indicates that Pagan was deliberately indifferent to plaintiff's serious medical need. *See Jett v.*
12 *Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (holding that a deliberate indifference to serious
13 medical needs claim consists of two parts: (1) a “serious medical need” demonstrated by a failure
14 to treat a prisoner's medical condition that could result in further significant injury or the
15 unnecessary and wanton infliction of pain; and (2) “deliberate indifference”—demonstrated by (a)
16 a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm
17 caused by the indifference).

18 Pagan was attempting to treat plaintiff's serious medical need. Even if the treatment fell
19 below professional medical standards,³ this does not amount to deliberate indifference to serious
20 medical needs. *See Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002) (holding that
21 allegations of medical negligence are insufficient to state a claim for deliberate indifference to
22 serious medical needs). Because it appears that plaintiff will be unable to state an Eighth

23 ² If, after some discovery, plaintiff can—in good faith—allege facts to cure the deficiencies, he
24 may file a motion for leave to amend the complaint before the deadline for amended pleadings,
25 which will be set in a subsequent scheduling and discovery order after the defendants file an
answer.

26 ³ To the extent that plaintiff is intending to bring a state law medical malpractice claim, we do not
27 find a cognizable claim because plaintiff has not alleged compliance with the California Tort
28 Claims Act. *See Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 627 (9th Cir. 1988)
(holding that failure to allege compliance with California tort claim procedures warrants dismissal
of state law tort claims against public employees).

1 Amendment claim against Pagan, the court recommends dismissal with prejudice. *See Cato v.*
2 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995) (holding that *pro se* litigant must be given
3 leave to amend his or her complaint, and some notice of its deficiencies, unless it is absolutely
4 clear that deficiencies of complaint could not be cured by amendment).

5 **C. Order**

6 Under 28 U.S.C. § 636(c)(1), all parties named in a civil action must consent to a
7 magistrate judge’s jurisdiction before that jurisdiction vests for “dispositive decisions.” *Williams*
8 *v. King*, 875 F.3d 500, 504 (9th Cir. 2017). No defendant has appeared or consented to a
9 magistrate judge’s jurisdiction, so any dismissal of a claim requires an order from a district judge.
10 Thus, we submit these findings and recommendations to a district judge under 28 U.S.C.
11 § 636(b)(1).

12 The clerk of the court is directed to assign a district judge to this case.

13 The first amended complaint states the following cognizable claims:

- 14 1. Eighth Amendment medical indifference claims against defendants Toor and
15 Mudunuri in their individual capacities; and
- 16 2. A First Amendment retaliation claim against defendant Mudunuri in her individual
17 capacity.

18 The court will authorize service of the first amended complaint as to these defendants by
19 separate order.

20 **D. Recommendation**

21 We recommend that:

- 22 3. the First Amendment retaliation claim in the first amended complaint against
23 defendant Toor be dismissed without prejudice; and
- 24 4. the Eighth Amendment deliberate indifference claim in the first amended complaint
25 against defendant Pagan be dismissed with prejudice.

26 These findings and recommendations will be submitted to the district judge assigned to
27 the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14) days of service
28 of these findings and recommendations, plaintiff may file written objections with the court. If

1 plaintiff files such objections, he should do so in a document captioned “Objections to Magistrate
2 Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections within
3 the specified time may result in the waiver of rights on appeal. *See Wilkerson v. Wheeler*, 772
4 F.3d 834, 838-39 (9th Cir. 2014).

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6 IT IS SO ORDERED.

7 Dated: December 5, 2018


UNITED STATES MAGISTRATE JUDGE

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