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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 MARCUS L. HUDSON,

No. CIV S-08-3031-CMK-P

12 Plaintiff,

13 vs.

ORDER

14 A. AGYEMAN, et al.,

15 Defendants.
16 _____/

17 Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant
18 to 42 U.S.C. § 1983. Plaintiff has consented to Magistrate Judge jurisdiction pursuant to 28
19 U.S.C. § 636(c) and no other party has been served or appeared in the action. Pending before the
20 court is plaintiff's first amended complaint (Doc. 9).

21 On February 20, 2009, the court directed plaintiff to show cause within 30 days
22 why this action should not be dismissed, without leave to amend, for failure to state a claim.
23 Plaintiff's factual allegations were set forth in the court's prior order and will not be repeated
24 here. As to those allegations, the court stated:

25 Plaintiff's first amended complaint appears to be based on a
26 claim of deliberate indifference with respect to his medical needs. The
treatment a prisoner receives in prison and the conditions under which the

1 prisoner is confined are subject to scrutiny under the Eighth Amendment,
2 which prohibits cruel and unusual punishment. See Helling v. McKinney,
3 509 U.S. 25, 31 (1993); Farmer v. Brennan, 511 U.S. 825, 832 (1994).
4 The Eighth Amendment "... embodies broad and idealistic concepts of
5 dignity, civilized standards, humanity, and decency." Estelle v. Gamble,
6 429 U.S. 97, 102 (1976). Conditions of confinement may, however, be
7 harsh and restrictive. See Rhodes v. Chapman, 452 U.S. 337, 347 (1981).
8 Nonetheless, prison officials must provide prisoners with "food, clothing,
9 shelter, sanitation, medical care, and personal safety." Toussaint v.
10 McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986). A prison official violates
11 the Eighth Amendment only when two requirements are met: (1)
12 objectively, the official's act or omission must be so serious such that it
13 results in the denial of the minimal civilized measure of life's necessities;
14 and (2) subjectively, the prison official must have acted unnecessarily and
15 wantonly for the purpose of inflicting harm. See Farmer, 511 U.S. at 834.
16 Thus, to violate the Eighth Amendment, a prison official must have a
17 "sufficiently culpable mind." See id.

18 Deliberate indifference to a prisoner's serious illness or
19 injury, or risks of serious injury or illness, gives rise to a claim under the
20 Eighth Amendment. See Estelle, 429 U.S. at 105; see also Farmer, 511
21 U.S. at 837. This applies to physical as well as dental and mental health
22 needs. See Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982). An
23 injury or illness is sufficiently serious if the failure to treat a prisoner's
24 condition could result in further significant injury or the "... unnecessary
25 and wanton infliction of pain." McGuckin v. Smith, 974 F.2d 1050, 1059
26 (9th Cir. 1992); see also Doty v. County of Lassen, 37 F.3d 540, 546 (9th
Cir. 1994). Factors indicating seriousness are: (1) whether a reasonable
doctor would think that the condition is worthy of comment; (2) whether
the condition significantly impacts the prisoner's daily activities; and (3)
whether the condition is chronic and accompanied by substantial pain. See
Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000) (en banc).

The requirement of deliberate indifference is less stringent
in medical needs cases than in other Eighth Amendment contexts because
the responsibility to provide inmates with medical care does not generally
conflict with competing penological concerns. See McGuckin, 974 F.2d at
1060. Thus, deference need not be given to the judgment of prison
officials as to decisions concerning medical needs. See Hunt v. Dental
Dep't, 865 F.2d 198, 200 (9th Cir. 1989). The complete denial of medical
attention may constitute deliberate indifference. See Toussaint v.
McCarthy, 801 F.2d 1080, 1111 (9th Cir. 1986). Delay in providing
medical treatment, or interference with medical treatment, may also
constitute deliberate indifference. See Lopez, 203 F.3d at 1131. Where
delay is alleged, however, the prisoner must also demonstrate that the
delay led to further injury. See McGuckin, 974 F.2d at 1060.

Negligence in diagnosing or treating a medical condition
does not, however, give rise to a claim under the Eighth Amendment. See
Estelle, 429 U.S. at 106. Moreover, a difference of opinion between the
prisoner and medical providers concerning the appropriate course of
treatment does not give rise to an Eighth Amendment claim. See Jackson
v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

1 Here, while the court accepts that defendants performed a
2 colonoscopy on him when one should not have been performed, it is clear
3 from plaintiff's allegations that this was done mistakenly and not out of
4 defendants' deliberate desire to inflict pain or suffering. Therefore, at
5 best, plaintiff's complaint states a claim for medical negligence and not
6 deliberate indifference.

7 Plaintiff has not filed any response to the order to show cause. For the reasons outlined above,
8 the court finds that dismissal of this action for failure to state a claim is appropriate. The Clerk
9 of the Court is directed to enter judgment of dismissal and close this file.

10 IT IS SO ORDERED.

11 DATED: April 14, 2009

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13 **CRAIG M. KELLISON**
14 UNITED STATES MAGISTRATE JUDGE
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