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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 DAVID KING,

12 Plaintiff,

13 v.

14 WANG, et al.,

15 Defendants.
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No. 2:14-cv-1817 KJM CKD P (TEMP)

ORDER

18 Plaintiff, a state prisoner proceeding pro se and in forma pauperis, has filed this civil
19 rights action pursuant to 42 U.S.C. § 1983. This action proceeds on the original pleading (ECF
20 No. 1), which was found to state an Eighth Amendment medical indifference claim against
21 defendant Wang (ECF No. 8).

22 Before the court is defendant's July 27, 2015 motion to dismiss the complaint under Rule
23 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. (ECF No. 22.)
24 Plaintiff opposes the motion.

25 I. Legal Standards for Motion to Dismiss

26 In order to survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), "a
27 complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is
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1 plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S.
2 at 570). In considering a motion to dismiss, the court must accept as true the allegations of the
3 complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976),
4 construe the pleading in the light most favorable to the party opposing the motion, and resolve all
5 doubts in the pleader’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421, reh’g denied, 396 U.S.
6 869 (1969). The court may consider facts established by exhibits attached to the complaint.
7 Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also consider
8 facts which may be judicially noticed, Mullis v. United States Bankruptcy Ct., 828 F.2d 1385,
9 1388 (9th Cir. 1987); and matters of public record, including pleadings, orders, and other papers
10 filed with the court, Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986).

11 II. Plaintiff’s Allegations

12 Plaintiff alleges that on Saturday, August 17, 2013, he informed Licensed Vocational
13 Nurse (“LVN”) Wang that he had a toothache and was in terrible pain. LVN Wang told plaintiff
14 that there was nothing that she could do and directed him to submit a Medical Request Form.
15 Plaintiff submitted the form that day and was seen by a dentist on Tuesday, August 20, 2013.
16 Plaintiff seeks damages for the pain and suffering that he endured until his dental appointment.

17 III. Discussion

18 Defendant moves to dismiss the complaint on several grounds: (1) she was responsive to
19 plaintiff’s request for treatment, (2) her licensure precluded her from prescribing pain medication
20 or providing dental treatment for a toothache, (3) plaintiff was not harmed by the delay, and (4)
21 defendant is entitled to qualified immunity.

22 Where a prisoner’s Eighth Amendment claims arise in the context of medical care, the
23 prisoner must allege and prove “acts or omissions sufficiently harmful to evidence deliberate
24 indifference to serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106 (1976). An Eighth
25 Amendment medical claim has two elements: “the seriousness of the prisoner’s medical need and
26 the nature of the defendant’s response to that need.” McGuckin v. Smith, 974 F.2d 1050, 1059
27 (9th Cir. 1991), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th
28 Cir. 1997) (*en banc*).

1 A serious medical need exists if the failure to treat the condition could result in further
2 significant injury or the unnecessary and wanton infliction of pain. Jett v. Penner, 439 F.3d 1091,
3 1096 (9th Cir. 2006). To act with deliberate indifference, a prison official must both be aware of
4 facts from which the inference could be drawn that a substantial risk of serious harm exists, and
5 he must also draw the inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994). Thus, a
6 defendant is liable if he knows that plaintiff faces “a substantial risk of serious harm and
7 disregards that risk by failing to take reasonable measures to abate it.” Id. at 847. “It is enough
8 that the official acted or failed to act despite his knowledge of a substantial risk of harm.” Id. at
9 842.

10 Delays in providing medical care may manifest deliberate indifference. Estelle, 429 U.S.
11 at 104-05. To establish a claim of deliberate indifference arising from a delay in providing care, a
12 plaintiff must show that the delay was harmful. See Berry v. Bunnell, 39 F.3d 1056, 1057 (9th
13 Cir. 1994); McGuckin, 974 F.2d at 1059; Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir.
14 1990); Shapley v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985). In
15 this regard, “[a] prisoner need not show his harm was substantial; however, such would provide
16 additional support for the inmate’s claim that the defendant was deliberately indifferent to his
17 needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006); see also McGuckin, 974 F.2d at
18 1060. In addition, a physician need not fail to treat an inmate altogether in order to violate that
19 inmate’s Eighth Amendment rights. Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir.
20 1989) (per curiam). A failure to competently treat a serious medical condition, even if some
21 treatment is prescribed, may constitute deliberate indifference in a particular case. Id.

22 Defendant first argues that plaintiff’s allegations fail to state a claim because she did not
23 act with deliberate indifference. The court agrees that plaintiff’s allegations fall far short of the
24 showing necessary for a claim of deliberate indifference. Not only does plaintiff fail to assert any
25 facts to demonstrate the requisite state of mind, but he also fails to show that the minor 3-day
26 delay before his dental appointment resulted in further injury or the “unnecessary and wanton
27 infliction of pain.” By plaintiff’s own admission, LVN Wang did not outright refuse plaintiff’s
28 request for medical assistance. While plaintiff may have believed that LVN Wang should have

1 done more, there is no allegation that plaintiff's condition constituted a medical emergency. Even
2 assuming that LVN Wang was somehow negligent or even grossly negligent, this, without more,
3 does not establish a constitutional violation. Defendant's motion will therefore be granted.¹ Based
4 on the exhibit attached to his opposition, it may be unlikely that plaintiff can adduce sufficient
5 evidence to establish a viable deliberate indifference claim. Nonetheless, the court will grant him
6 leave to amend.

7 Accordingly, IT IS HEREBY ORDERED that:

8 1. Defendant's motion to dismiss (ECF No. 22) is granted;

9 2. The Complaint (ECF No. 1) is dismissed with leave to amend;

10 3. Plaintiff is granted thirty days from the date of service of this order to file an amended
11 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil
12 Procedure, and the Local Rules of Practice; the amended complaint must bear the docket number
13 assigned this case and must be labeled "Amended Complaint"; plaintiff must file an original and
14 two copies of the amended complaint; failure to file an amended complaint in accordance with
15 this order will result in a recommendation that this action be dismissed.

16 Dated: February 25, 2016



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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28 ¹ In light of this finding, the court declines to reach defendant's remaining grounds for dismissal.