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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JEMAL DAVID LEWIS,)	
)	
Plaintiff(s),)	No. C 06-0074 TEH (PR)
)	
vs.)	ORDER OF DISMISSAL
)	
DR. BABIENCO,)	(Doc # 2)
)	
Defendant(s).)	

Plaintiff, a prisoner at the Correctional Training Facility in Soledad, California, has filed a pro se complaint for damages under 42 U.S.C. § 1983 claiming that prison dentist Dr. Babienco was deliberately indifferent to his dental needs. Plaintiff specifically alleges that he saw Dr. Babienco on May 16, 2005 due to pain and slight swelling of his gumline. Babienco took x-rays and determined that plaintiff's gumline had become infected by two decaying teeth that had to be removed. Plaintiff was scheduled for oral surgery on May 18, 2005. But because plaintiff was not allowed to leave his housing unit until custody count was completed at 12:50 p.m., plaintiff arrived at his scheduled 12:30 p.m. appointment 45 minutes late and was told that surgery could not be performed that day.

Plaintiff returned to the dental clinic on May 20 and was seen by Dr. Repasky. Repasky prescribed ibuprofen and issued plaintiff a pass to return to the dental clinic on May 23, 2005 to have the decayed teeth removed.

1 Plaintiff returned to the dental clinic on the morning of May 23, but was
2 informed that Babienco would not perform the surgery that day. Plaintiff was
3 advised that because he had missed his first scheduled surgery appointment he
4 was required to initiate the inmate health care request procedure for a new dental
5 surgery appointment.

6 Plaintiff submitted a health care request for a new dental surgery
7 appointment on the morning of May 24 and oral surgery was scheduled for, and
8 performed on, the next day.

9 Plaintiff claims that Babienco unnecessarily delayed his oral surgery
10 "based upon the conflicting policies of custody staff and medical staff."

11 Plaintiff seeks to proceed in forma pauperis under 28 U.S.C. § 1915.

12 DISCUSSION

13 A. Standard of Review

14 Federal courts must engage in a preliminary screening of cases in which
15 prisoners seek redress from a governmental entity or officer or employee of a
16 governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable
17 claims or dismiss the complaint, or any portion of the complaint, if the complaint
18 "is frivolous, malicious, or fails to state a claim upon which relief may be
19 granted," or "seeks monetary relief from a defendant who is immune from such
20 relief." Id. § 1915A(b). Pro se pleadings must be liberally construed. Balistreri
21 v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

22 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two
23 elements: (1) that a right secured by the Constitution or laws of the United States
24 was violated, and (2) that the alleged violation was committed by a person acting
25 under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

26 /

B. Legal Claims

Deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A prison official is deliberately indifferent if he knows that a prisoner faces a substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). Neither negligence nor gross negligence is actionable under § 1983 in the prison context. See id. at 835-36 & n.4; Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990).

Although regrettable, plaintiff's allegations must be dismissed because they do not amount to more than a claim for negligence or gross negligence not cognizable under § 1983. See, e.g., Frost v. Agnos, 152 F.3d 1124, 1130 (9th Cir. 1998) (finding no merit in claims stemming from alleged delays in administering pain medication, treating broken nose and providing replacement crutch, because claims did not amount to more than negligence); O'Loughlin v. Doe, 920 F.2d 614, 617 (9th Cir. 1990) (finding that isolated occurrences of neglect may constitute grounds for medical malpractice but do not rise to level of unnecessary and wanton infliction of pain). Babienco's adherence to policy cannot be said to have amounted to deliberate indifference because the medical records made clear that plaintiff had been prescribed pain medication and therefore could reasonably wait a few more days to have his decayed teeth removed. Not surprisingly, plaintiff had oral surgery two days thereafter. Plaintiff's medical malpractice claim may be cognizable in state court, but not here. See Toguchi v. Chung, 391 F.3d 1051, 1060-61 (9th Cir. 2004)

CONCLUSION

For the foregoing reasons, plaintiff's request to proceed in forma pauperis (doc # 2) is DENIED and the complaint is DISMISSED under the authority of 28 U.S.C. § 1915A(b).

The clerk shall enter judgment in accordance with this order, terminate all pending motions as moot, and close the file. No fee is due.

SO ORDERED.

DATED: 01/17/06



THELTON E. HENDERSON
United States District Judge

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