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2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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5
6 FRED FULFORD,

7 Plaintiff,

8 v.

9 DOCTOR GRIFFEN, CALIFORNIA
10 DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

11 Defendants.

Case No.: C 13-2535 CW (PR)

ORDER OF DISMISSAL

12 INTRODUCTION

13 Plaintiff, a California prisoner incarcerated at San Quentin
14 State Prison (SQSP) and proceeding pro se, filed a civil rights
15 complaint pursuant to 42 U.S.C. § 1983. For the reasons discussed
16 below, this case is DISMISSED without prejudice for failure to
17 exhaust administrative remedies and failure to state a federal
18 claim for relief. Plaintiff's motion for leave to proceed in
19 forma pauperis is granted in a separate order.

20 DISCUSSION

21 I. Failure to Exhaust

22 The Prison Litigation Reform Act of 1995 (PLRA) provides: "No
23 action shall be brought with respect to prison conditions under
24 [42 U.S.C. § 1983], or any other Federal law, by a prisoner
25 confined in any jail, prison, or other correctional facility until
26 such administrative remedies as are available are exhausted." 42
27 U.S.C. § 1997e(a). Exhaustion is mandatory and not left to the
28 discretion of the district court. Woodford v. Ngo, 548 U.S. 81,

1 84 (2006). Exhaustion is a prerequisite to all prisoner lawsuits
2 concerning prison life, whether such actions involve general
3 conditions or particular episodes, whether they allege excessive
4 force or some other wrong, and even if they seek relief not
5 available in grievance proceedings, such as money damages. Porter
6 v. Nussle, 534 U.S. 516, 524 (2002). All available remedies must
7 be exhausted; those remedies "need not meet federal standards, nor
8 must they be 'plain, speedy, and effective.'" Id. (citation
9 omitted). Prisoners cannot avoid the administrative exhaustion
10 requirement by requesting relief not available in the appeals
11 system, such as monetary relief, or by simply declaring the
12 process futile. The exhaustion requirement requires "proper
13 exhaustion" of all available administrative remedies. Ngo, 548
14 U.S. at 93. Because exhaustion under § 1997e(a) is an affirmative
15 defense, a complaint may be dismissed for failure to exhaust only
16 if failure to exhaust is obvious from the face of the complaint
17 and/or any attached exhibits. Wyatt v. Terhune, 315 F.3d 1108,
18 1119-20 (9th Cir. 2003). The Court may dismiss a complaint for
19 failure to exhaust where the prisoner "conce[des] to
20 nonexhaustion" and "no exception to exhaustion applies." Id. at
21 1120.

22 Plaintiff indicates on the complaint that he has not
23 presented the facts in his complaint for review through the
24 administrative process. Compl. at 2. In the space for him to
25 indicate the reason for not pursuing an appeal, he writes next to
26 the informal appeal, "As there is no remedy that this prison or
27 its representative can take to remedy this case." Compl. at 2.
28

1 Plaintiff must comply with the PLRA's requirement of "proper
2 exhaustion" under Ngo: "Proper exhaustion demands compliance with
3 an agency's deadlines and other critical procedural rules because
4 no adjudicative system can function effectively without imposing
5 some orderly structure on the course of its proceedings." 548
6 U.S. at 90-91 (footnote omitted). Even if Plaintiff feels there
7 is nothing the prison can do to remedy the harm he alleges, he
8 must still take his claim through the entire SQSP administrative
9 appeals process before he may file a complaint in federal court.
10 Because it is clear that Plaintiff has not "properly exhausted"
11 his claims, and there is no applicable exception to the exhaustion
12 requirement, dismissal without prejudice is appropriate.

13 II. Failure to State a Federal Claim

14 A federal court must conduct a preliminary screening in any
15 case in which a prisoner seeks redress from a governmental entity
16 or officer or employee of a governmental entity. See 28 U.S.C.
17 § 1915A(a). In its review, the court must identify any cognizable
18 claims and dismiss any claims that are frivolous, malicious, fail
19 to state a claim upon which relief may be granted or seek monetary
20 relief from a defendant who is immune from such relief. See id.
21 § 1915A(b)(1), (2). Pro se pleadings must, however, be liberally
22 construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
23 699 (9th Cir. 1988).

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

1 (1988). Under § 1983, liability may be imposed on an individual
2 defendant only if the plaintiff can show that the defendant
3 proximately caused the deprivation of a federally protected right.
4 See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988).

5 Plaintiff alleges the following. Approximately eleven months
6 ago, he went to the hospital for surgery on his left foot. During
7 the surgery, Dr. Griffen removed half the bone in a toe that was
8 not injured. Plaintiff alleges that Dr. Griffen committed
9 malpractice and seeks money damages from him.

10 Deliberate indifference to serious medical needs violates the
11 Eighth Amendment's proscription against cruel and unusual
12 punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin
13 v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other
14 grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136
15 (9th Cir. 1997) (en banc). A determination of "deliberate
16 indifference" involves an examination of two elements: the
17 seriousness of the prisoner's medical need, and the nature of the
18 defendant's response to that need. Id. at 1059. A serious
19 medical need exists if the failure to treat a prisoner's condition
20 could result in further significant injury or the unnecessary and
21 wanton infliction of pain. Id. The existence of an injury that a
22 reasonable doctor or patient would find important and worthy of
23 comment or treatment, the presence of a medical condition that
24 significantly affects an individual's daily activities, or the
25 existence of chronic and substantial pain are examples of
26 indications that a prisoner has a serious need for medical
27 treatment. Id. at 1059-60.
28

1 A prison official is deliberately indifferent if he knows
2 that a prisoner faces a substantial risk of serious harm and
3 disregards that risk by failing to take reasonable steps to abate
4 it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). The prison
5 official must not only "be aware of facts from which the inference
6 could be drawn that a substantial risk of serious harm exists,"
7 but he "must also draw the inference." Id. In order for
8 deliberate indifference to be established, therefore, there must
9 be a purposeful act or failure to act on the part of the defendant
10 and resulting harm. McGuckin, 974 F.2d at 1060. Deliberate
11 indifference may be shown when prison officials deny, delay or
12 intentionally interfere with medical treatment, or it may be shown
13 in the way in which they provide medical care. Id. at 1062.
14 A claim of medical malpractice or negligence is insufficient to
15 make out a violation of the Eighth Amendment. Id. at 1059;
16 Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004).

17 Plaintiff's allegations fail to state a claim for deliberate
18 indifference to serious medical needs. First, Plaintiff does not
19 include allegations indicating what his condition is that meets
20 the requirements of a "serious medical need." Second, Plaintiff's
21 allegations do not show that Dr. Griffen's conduct amounted to
22 deliberate indifference. As stated above, a claim of negligence
23 or medical malpractice is insufficient to allege a violation of
24 the Eighth Amendment for deliberate indifference. The fact that
25 Plaintiff himself describes Dr. Griffen's conduct as malpractice
26 is an indication that Dr. Griffen's actions do not rise to the
27 level of deliberate indifference.

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CONCLUSION

For the foregoing reasons, this action is hereby DISMISSED without prejudice to Plaintiff's re-filing his claim after all available administrative remedies have been exhausted.

Plaintiff's action is also dismissed without prejudice to re-filing a medical malpractice claim in state court.

If Plaintiff exhausts administrative remedies and wishes to re-file this claim in a new case in federal court, he must remedy the deficiencies noted above in regard to alleging a claim for deliberate indifference to serious medical needs.

The Clerk shall terminate any pending motions and close the file.

IT IS SO ORDERED.

Dated: 9/24/2013


CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE