

successive petition clause is when the prisoner faces "imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

Plaintiff's claims against Dr. Garcia should be dismissed. Plaintiff does not allege that Dr. Garcia knew how serious the injury was; only that he should have known. This is nothing more than negligence. Plaintiff can ultimately succeed only if he can prove, by a preponderance of the evidence, a "deliberate indifference to a serious medical need." Estelle v. Gamble, 429 U.S. 97, 106 (1976). See also Farmer v. Brennan, 511 U.S. 825 (1994). Allegations of mere negligence in the treatment of his medical condition or claims based upon a difference of opinion over matters of medical judgment or expertise fail to state a federal constitutional question, absent exceptional circumstances. Id.; Massey v. Hutto, 545 F.2d 45 (8th Cir. 1976); Seward v. Hutto, 525 F.2d 1024 (8th Cir. 1975); Jones v. Lockhart, 484 F.2d 1192 (8th Cir. 1973); Cates v. Ciccone, 422 F.2d 926 (8th Cir. 1970). Although allegations of mere negligence in the treatment of an inmate will not suffice, factual statements which indicate a denial of necessary treatment for a serious medical condition, or deliberate indifference with such treatment, may form the basis of an actionable claim under the Eighth Amendment. And, in this respect, plaintiff's complaint is to be afforded a liberal construction, as required by Haines v. Kerner, 404 U.S. 519 (1972).

Plaintiff's claims against Superintendent Dana Meyer should also be dismissed. A supervisor cannot be held liable under section 1983 for an employee's unconstitutional actions. Boyd v. Knox, 47 F.3d 966, 968 (8th Cir. 1995); Choate v. Lockhart, 7 F.3d 1370, 1376 (8th Cir. 1993); Givens v. Jones, 900 F.2d 1229, 1233 (8th Cir. 1990). Instead, a supervisor can be held liable only for personal involvement in a constitutional violation, or when his or her corrective inaction amounts to deliberate indifference or tacit authorization of the violation. Boyd, 47 F.3d at 968; Fruit v. Norris, 905 F.2d 1147, 1151 (8th Cir. 1990).

Plaintiff's complaint should be dismissed because he has failed to state a claim under 42 U.S.C. § 1983. Plaintiff is warned that if this case is dismissed as recommended, it will count against him for purposes of the three-dismissal rule set forth in 28 U.S.C. § 1915(g).

IT IS, THEREFORE, RECOMMENDED that plaintiff's claims be dismissed, pursuant to 28 U.S.C. § 1915A, for failure to state a claim for which relief can be granted.

Under 28 U.S.C. § 636(b)(1), the parties may make specific written exceptions to this recommendation within twenty days. The District Judge will consider only exceptions to the specific proposed findings and recommendations of this report. Exceptions should not include matters outside of the report and recommendation. Other matters should be addressed in a separate pleading for consideration by the Magistrate Judge.

The statute provides for exceptions to be filed within ten days of the service of the report and recommendation. The court has extended that time to twenty days, and thus, additional time to file exceptions will not be granted unless there are exceptional circumstances. Failure to make specific written exceptions to this report and recommendation will result in a waiver of the right to appeal. See L.R. 74.1(a)(2).

Dated this 14th day of September, 2009, at Jefferson City, Missouri.

/s/ William A. Knox

WILLIAM A. KNOX
United States Magistrate Judge