

OCT 07 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>JERALD TUCKER,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>FRESNO COMMUNITY MEDICAL CENTER and L. PETERSON, Nurse,</p> <p>Defendants - Appellees.</p>

No. 10-17639

D.C. No. 1:09-cv-00333-GSA

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Gary S. Austin, Magistrate Judge, Presiding**

Submitted September 27, 2011***

Before: HAWKINS, SILVERMAN, and W. FLETCHER, Circuit Judges.

Jerald Tucker, a California state prisoner, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging that defendants

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** Tucker consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c).

*** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

were deliberately indifferent to his medical needs in the treatment of his back injury. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under 28 U.S.C. §§ 1915A and 1915(e)(2). *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order). We affirm.

The district court properly dismissed the action because Tucker failed to allege facts suggesting that defendants knew of and disregarded an excessive risk of harm to his health. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004) (“Deliberate indifference is a high legal standard. Even a showing of medical malpractice or negligence is insufficient to establish a constitutional deprivation under the Eighth Amendment.”).

The district court did not abuse its discretion by denying leave to amend. *See Gordon v. City of Oakland*, 627 F.3d 1092, 1094 (9th Cir. 2010) (leave to amend may be denied if amendment would be futile).

AFFIRMED.