

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 26 2017

FOR THE NINTH CIRCUIT

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

KEVIN DONAVON ATKINSON,

No. 16-55146

Plaintiff-Appellant,

D.C. No. 3:14-cv-00016-JLS-JMA

v.

MEMORANDUM*

UNITED STATES GOVERNMENT,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

Submitted May 24, 2017**

Before: THOMAS, Chief Judge, and LEAVY and SILVERMAN, Circuit
Judges.

Kevin Donavon Atkinson appeals pro se from the district court's judgment dismissing his Federal Tort Claims Act action alleging negligent infliction of emotional distress and intentional infliction of emotional distress arising out of treatment provided at a Veteran's Affairs health center. We have jurisdiction

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

under 28 U.S.C. § 1291. We review de novo a dismissal under Fed. R. Civ. P. 12(b)(6). *Hebbe v. Pliler*, 627 F.3d 338, 341 (9th Cir. 2010). We affirm.

The district court properly dismissed Atkinson's claim for negligent infliction of emotional distress because Atkinson failed to establish that defendant owed him a duty of care. *See Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.*, 770 P.2d 278, 281 (Cal. 1989) (setting forth elements of a negligent infliction of emotional distress claim under California law); *Burgess v. Superior Court*, 831 P.2d 1197, 1200-03 (Cal. 1992) (discussing duty of care).

The district court properly dismissed Atkinson's claim for intentional infliction of emotional distress because Atkinson failed to establish that defendant's conduct was extreme and outrageous conduct. *See Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795, 819 (Cal. 1993) (discussing elements of an intentional infliction of emotional distress claim under California law).

AFFIRMED.