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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMAL ALBERT JENKINS,

1:11-cv-00805-LJO-GSA-PC

Plaintiff,

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS ACTION BE
DISMISSED, WITH PREJUDICE, FOR
FAILURE TO STATE A CLAIM
(Doc. 20.)

v.

JAMES A. YATES, et al.,

OBJECTIONS, IF ANY, DUE IN THIRTY
DAYS

Defendants.

I. RELEVANT PROCEDURAL HISTORY

Jamal Albert Jenkins (“Plaintiff”) is a state prisoner in the custody of the California Department of Corrections and Rehabilitation, proceeding pro se and in forma pauperis with this civil rights action pursuant to the Civil Rights Act, 42 U.S.C. § 1983 and the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132. This action was initiated by civil Complaint filed by Plaintiff on April 28, 2011, at the United States District Court for the Northern District of California. (Doc. 1.) On May 16, 2011, the case was transferred to the Eastern District of California. (Doc. 7.) The Court screened the Complaint pursuant to 28 U.S.C. § 1915 and entered an order on July 13, 2012, dismissing the Complaint for failure to state a claim, with leave to amend. (Doc. 18.) On August 9, 2012, Plaintiff filed the First Amended Complaint, which is now before the Court for screening. (Doc. 20.)

1 **II. SCREENING REQUIREMENT**

2 The court is required to screen complaints brought by prisoners seeking relief against a
3 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
4 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
5 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
6 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
7 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
8 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a
9 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

10 A complaint is required to contain “a short and plain statement of the claim showing that the
11 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
12 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
13 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell
14 Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)). While a plaintiff’s
15 allegations are taken as true, courts “are not required to indulge unwarranted inferences,” Doe I v.
16 Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation
17 omitted). Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim that
18 is plausible on its face.’” Iqbal 129 S.Ct. at 1949. While factual allegations are accepted as true,
19 legal conclusions are not. Id.

20 To state a viable claim for relief, Plaintiff must set forth sufficient factual allegations to state
21 a plausible claim for relief. Iqbal, 129 S.Ct. at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962,
22 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this plausibility
23 standard. Id.

24 **III. SUMMARY OF FIRST AMENDED COMPLAINT**

25 Plaintiff is presently incarcerated at Pleasant Valley State Prison (“PVSP”) in Coalinga,
26 California, where the events at issue allegedly occurred. Plaintiff names as defendants James A.
27 Yates (Warden of PVSP), Anthony S. Lonigro (Chief Executive Officer of PVSP Health Services),
28 J. Clark Kelso (Health Care Services Receiver), and Captain C. Herrera.

1 Plaintiff alleges as follows in the First Amended Complaint. Plaintiff suffers from a rare but
2 serious medical condition known as Paruresis or Shybladder Syndrome, which makes it difficult for
3 those afflicted to urinate in front of other people. Some courts have recognized this condition as a
4 mental disability which is covered under the Americans With Disabilities Act. Plaintiff alleges that
5 since 2008, CDCR Primary Care Providers have failed to provide him appropriate treatment, which
6 caused Plaintiff to suffer unnecessary and degenerative injury.

7 Plaintiff alleges that defendant J. Clark Kelso, Health Care Services Receiver, decided a
8 policy in response to Plaintiff's condition: "...your condition has no medical solution because the
9 situation was unrelated to a physical condition." First Amd Cmp at 4 ¶11. Plaintiff also alleges that
10 the Receiver's Office has not provided him with medically acceptable treatment. Plaintiff alleges
11 that defendant Anthony S. Lonigro followed defendant Kelso's policy and therefore failed to provide
12 him with appropriate medical treatment. Plaintiff also alleges that the Primary Care Providers under
13 defendant Lonigro's supervision have expressed that they are unable to treat Plaintiff's Paruresis.

14 Plaintiff alleges that unnamed Appeals Coordinators have arbitrarily screened out Plaintiff's
15 inmate appeals, thus denying Plaintiff appropriate medical treatment under defendant Lonigro's
16 policy and practice. Plaintiff claims that the Appeals Coordinators' arbitrary screening has caused
17 a "chilling effect on the assertion of legitimate claims." First Amd Cmp. at 6 ¶19.

18 Plaintiff requests monetary damages, preliminary and permanent injunctive relief, declaratory
19 relief, and costs and fees.

20 **IV. PLAINTIFF'S CLAIMS**

21 The Civil Rights Act under which this action was filed provides:

22 Every person who, under color of [state law] . . . subjects, or causes to be subjected,
23 any citizen of the United States . . . to the deprivation of any rights, privileges, or
24 immunities secured by the Constitution . . . shall be liable to the party injured in an
action at law, suit in equity, or other proper proceeding for redress.

25 42 U.S.C. § 1983. "Section 1983 . . . creates a cause of action for violations of the federal
26 Constitution and laws." Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997)
27 (internal quotations omitted).

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1 **A. Supervisory Liability**

2 Plaintiff names as defendants persons employed in supervisory positions and seeks to hold
3 them liable in their supervisory capacity. Under section 1983, Plaintiff must demonstrate that each
4 defendant *personally* participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930,
5 934 (9th Cir. 2002) (emphasis added). Plaintiff must demonstrate that each defendant, through his
6 or her own individual actions, violated Plaintiff’s constitutional rights. Iqbal, 129 S.Ct. at 1948-49.
7 Liability may not be imposed on supervisory personnel under section 1983 on the theory of
8 respondeat superior, as each defendant is only liable for his or her own misconduct. Iqbal, 129 S.Ct.
9 at 1948-49; Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009). A supervisor may be
10 held liable only if he or she “participated in or directed the violations, or knew of the violations and
11 failed to act to prevent them.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); accord Starr v.
12 Baca, 652 F.3d 1202, 1205-06 (9th Cir. 2011); Corales v. Bennett, 567 F.3d 554, 570 (9th Cir.
13 2009); Preschooler II v. Clark County School Board of Trustees, 479 F.3d 1175, 1182 (9th Cir.
14 2007); Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir. 1997). Therefore, to the extent that
15 Plaintiff seeks to impose liability upon any of the other Defendants in their supervisory capacity, the
16 Court finds that Plaintiff fails to state a cognizable claim.

17 **B. ADA Claim**

18 “Title II of the ADA prohibits discrimination on the basis of disability.” Lovell v. Chandler,
19 303 F.3d 1039, 1052 (9th Cir. 2002). Title II of the ADA provides that “no qualified individual with
20 a disability shall, by reason of such disability, be excluded from participation in or be denied the
21 benefits of the services, programs, or activities of a public entity, or be subject to discrimination by
22 such entity.” 42 U.S.C. § 12132. Title II of the ADA applies to inmates within state prisons.
23 Pennsylvania Dept. of Corrections v. Yeskey, 118 S.Ct. 1952, 1955 (1998); see also Armstrong v.
24 Wilson, 124 F.3d 1019, 1023 (9th Cir. 1997); Duffy v. Riveland, 98 F.3d 447, 453-56 (9th Cir.
25 1996).

26 The treatment, or lack of treatment, concerning Plaintiff’s medical condition does not provide
27 a basis upon which to impose liability under the RA or ADA. Burger v. Bloomberg, 418 F.3d 882,
28 882 (8th Cir. 2005) (medical treatment decisions not a basis for RA or ADA claims); Schiavo ex

1 rel. Schindler v. Schiavo, 403 F.3d 1289, 1294 (11th Cir. 2005) (RA not intended to apply to medical
2 treatment decisions); Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005)
3 (medical decisions not ordinarily within scope of ADA or RA); Bryant v. Madigan, 84 F.3d 246, 249
4 (7th Cir. 1996) (“The ADA does not create a remedy for medical malpractice.”).

5 Plaintiff seeks to bring an ADA claim because he was not provided adequate medical
6 treatment for a condition known as Paruresis or Shybladder Syndrome. Plaintiff has not alleged facts
7 demonstrating that he was “improperly excluded from participation in, and denied the benefits of,
8 a prison service, program, or activity on the basis of his physical handicap.” Armstrong, 124 F.3d
9 at 1023. Thus, the Court finds that Plaintiff fails to state a cognizable claim under the ADA.

10 **C. Eighth Amendment Medical Claim**

11 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate
12 must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091, 1096
13 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 291 (1976)). The two-
14 part test for deliberate indifference requires the plaintiff to show (1) “‘a serious medical need’ by
15 demonstrating that ‘failure to treat a prisoner’s condition could result in further significant injury or
16 the unnecessary and wanton infliction of pain,’” and (2) “the defendant’s response to the need was
17 deliberately indifferent.” Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059
18 (9th Cir. 1992), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136
19 (9th Cir. 1997) (en banc) (internal quotations omitted)). Deliberate indifference is shown by “a
20 purposeful act or failure to respond to a prisoner’s pain or possible medical need, and harm caused
21 by the indifference.” Id. (citing McGuckin, 974 F.2d at 1060). Deliberate indifference may be
22 manifested “when prison officials deny, delay or intentionally interfere with medical treatment, or
23 it may be shown by the way in which prison physicians provide medical care.” Id. Where a prisoner
24 is alleging a delay in receiving medical treatment, the delay must have led to further harm in order
25 for the prisoner to make a claim of deliberate indifference to serious medical needs. McGuckin at
26 1060 (citing Shapely v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985)).

27 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051, 1060
28 (9th Cir. 2004). “Under this standard, the prison official must not only ‘be aware of the facts from

1 which the inference could be drawn that a substantial risk of serious harm exists,’ but that person
2 ‘must also draw the inference.’” Id. at 1057 (quoting Farmer v. Brennan, 511 U.S. 825, 837, 114
3 S.Ct. 1970, 1979 (1994)). “‘If a prison official should have been aware of the risk, but was not, then
4 the official has not violated the Eighth Amendment, no matter how severe the risk.’” Id. (quoting
5 Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)). “A showing of
6 medical malpractice or negligence is insufficient to establish a constitutional deprivation under the
7 Eighth Amendment. Id. at 1060. “[E]ven gross negligence is insufficient to establish a
8 constitutional violation.” Id. (citing Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990)).

9 “A difference of opinion between a prisoner-patient and prison medical authorities regarding
10 treatment does not give rise to a § 1983 claim.” Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir.
11 1981) (internal citation omitted). To prevail, plaintiff “must show that the course of treatment the
12 doctors chose was medically unacceptable under the circumstances . . . and . . . that they chose this
13 course in conscious disregard of an excessive risk to plaintiff’s health.” Jackson v. McIntosh, 90
14 F.3d 330, 332 (9th Cir. 1996) (internal citations omitted).

15 Plaintiff alleges that he suffers from a serious medical condition which causes him
16 continuous excruciating abdominal pain. However, Plaintiff fails to make factual allegations
17 demonstrating that any of the Defendants consciously disregarded an excessive risk to his health or
18 safety. At most, Plaintiff alleges a difference of opinion about medical treatment, which is not
19 actionable under § 1983. Therefore, the Court finds that Plaintiff fails to state a cognizable Eighth
20 Amendment medical claim against any of the defendants.

21 **D. Inmate Appeals Process**

22 Defendants’ actions in responding to Plaintiff’s appeals, alone, cannot give rise to any claims
23 for relief under section 1983 for violation of due process. “[A prison] grievance procedure is a
24 procedural right only, it does not confer any substantive right upon the inmates.” Buckley v. Barlow,
25 997 F.2d 494, 495 (8th Cir. 1993) (citing Azeez v. DeRobertis, 568 F. Supp. 8, 10 (N.D. Ill. 1982));
26 see also Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (no liberty interest in processing of
27 appeals because no entitlement to a specific grievance procedure); Massey v. Helman, 259 F.3d 641,
28 647 (7th Cir. 2001) (existence of grievance procedure confers no liberty interest on prisoner); Mann

1 v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). “Hence, it does not give rise to a protected liberty
2 interest requiring the procedural protections envisioned by the Fourteenth Amendment.” Azeez, 568
3 F. Supp. at 10; Spencer v. Moore, 638 F. Supp. 315, 316 (E.D. Mo. 1986). Actions in reviewing a
4 prisoner’s administrative appeal, without more, are not actionable under section 1983. Buckley, 997
5 F.2d at 495.

6 Plaintiff alleges that unnamed Appeals Coordinators arbitrarily screened out Plaintiff’s
7 inmate appeals. Because actions in reviewing a prisoner’s administrative appeal, without more, are
8 not actionable under section 1983, the Court finds that Plaintiff fails to state a cognizable claim for
9 the processing and/or reviewing of his 602 inmate appeals.

10 **E. Retaliation**

11 To state a claim for retaliation under the First Amendment, Plaintiff must satisfy five
12 elements. Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009). First, the plaintiff must allege
13 that the retaliated-against conduct is protected. The filing of an inmate grievance is protected
14 conduct. Rhodes v. Robinson, 408 F.3d 559, 568 (9th Cir. 2005). Second, the plaintiff must claim
15 the defendant took adverse action against the plaintiff. Id. at 567. The adverse action need not be
16 an independent constitutional violation. Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995). “[T]he
17 mere threat of harm can be an adverse action . . .” Brodheim, 584 F.3d at 1270. Third, the plaintiff
18 must allege a causal connection between the adverse action and the protected conduct. Because
19 direct evidence of retaliatory intent rarely can be pleaded in a complaint, allegation of a chronology
20 of events from which retaliation can be inferred is sufficient to survive dismissal. Pratt, 65 F.3d at
21 808 (“timing can properly be considered as circumstantial evidence of retaliatory intent”); Murphy
22 v. Lane, 833 F.3d 106, 108-09 (7th Cir. 1987). Fourth, the plaintiff must allege that the “official’s
23 acts would chill or silence a person of ordinary firmness from future First Amendment activities.”
24 Robinson, 408 F.3d at 568 (internal quotation marks and emphasis omitted). “[A] plaintiff who fails
25 to allege a chilling effect may still state a claim if he alleges he suffered some other harm,”
26 Brodheim, 584 F.3d at 1269, that is “more than minimal,” Robinson, 408 F.3d at 568 n. 11. Fifth,
27 the plaintiff must allege “that the prison authorities’ retaliatory action did not advance legitimate
28 goals of the correctional institution . . .” Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985). A

1 plaintiff successfully pleads this element by alleging, in addition to a retaliatory motive, that the
2 defendant's actions were arbitrary and capricious, id., or that they were "unnecessary to the
3 maintenance of order in the institution," Franklin v. Murphy, 745 F.2d 1221, 1230 (9th Cir. 1984).

4 Here, Plaintiff alleges that unnamed Appeals Coordinators arbitrarily screened out Plaintiff's
5 inmate appeals, causing a "chilling effect on the assertion of legitimate claims." First Amd Cmp.
6 at 6 ¶19. To the extent that Plaintiff alleges that Appeals Coordinators retaliated against him by
7 screening out his inmate appeals, the court finds that Plaintiff fails to state a cognizable claim.
8 Plaintiff has not alleged a causal connection between the adverse action and the protected conduct,
9 or alleged that screening out Plaintiff's complaints did not advance legitimate goals of the
10 correctional institution.

11 **F. Policy Decision**

12 To state a claim against a defendant under § 1983, the plaintiff must allege some facts
13 indicating that the defendant either personally participated in the alleged deprivation of constitutional
14 rights; knew of the violations and failed to act to prevent them; or promulgated or "implemented a
15 policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving
16 force of the constitutional violation.'" Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989) (internal
17 citations omitted); Taylor, 880 F.2d at 1045. In this instance, Plaintiff claims that defendant J. Clark
18 Kelso, Health Care Services Receiver, made policy when he decided that Plaintiff's condition,
19 Paruresis or Shybladder Syndrome, has no medical solution because the situation is unrelated to a
20 physical condition. However, Plaintiff has not alleged facts indicating that a policy was promulgated
21 or implemented, or that any such policy is a repudiation of constitutional rights and is the moving
22 force of one or more constitutional violations against Plaintiff. Therefore, the Court finds that
23 Plaintiff fails to state a cognizable claim against defendant Kelso for making a policy decision.

24 **VI. CONCLUSION AND RECOMMENDATIONS**

25 The Court finds that Plaintiff's First Amended Complaint fails to state any cognizable claims
26 upon which relief may be granted under § 1983. Therefore, the First Amended Complaint should
27 be dismissed for failure to state a claim. In this action, the Court previously granted Plaintiff an
28 opportunity to amend the complaint, with ample guidance by the Court. Plaintiff has now filed two

1 complaints without alleging facts against any of the defendants which state a claim under § 1983.
2 The Court finds that the deficiencies outlined above are not capable of being cured by amendment,
3 and therefore further leave to amend should not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Lopez
4 v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

5 Therefore, **IT IS HEREBY RECOMMENDED** that pursuant to 28 U.S.C. § 1915A and
6 28 U.S.C. § 1915(e), this action be dismissed with prejudice for failure to state a claim upon which
7 relief may be granted under § 1983, and that this dismissal be subject to the “three-strikes” provision
8 set forth in 28 U.S.C. § 1915(g). Silva v. Vittorio, 658 F.3d 1090, 1098 (9th Cir. 2011).

9 These Findings and Recommendations will be submitted to the United States District Judge
10 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30)**
11 **days** after being served with these Findings and Recommendations, Plaintiff may file written
12 objections with the court. The document should be captioned “Objections to Magistrate Judge’s
13 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the
14 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d
15 1153 (9th Cir. 1991).

16
17 IT IS SO ORDERED.

18 **Dated: December 6, 2012**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE