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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID EARL PARMER,

Plaintiff,

No. CIV S-09-3310 GGH P

vs.

J. WALKER, et al.,

ORDER

Defendants.

_____ /

Plaintiff is a state prisoner proceeding pro se. He seeks relief pursuant to 42 U.S.C. § 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

This case was transferred from the Southern District of California by a filing dated November 30, 2009. On December 16, 2009, this court ordered plaintiff to file a completed application for leave to proceed in forma pauperis on the form used by this district within thirty days. Plaintiff filed a request for leave to proceed in forma pauperis, but failed to file a certified copy of his prison trust account for the six-month period immediately preceding the filing of the complaint or to obtain the certification required on the form. 28 U.S.C. § 1915(a)(2). Therefore, by an order filed February 16, 2010, plaintiff was directed, within thirty days, to file a certified copy of his prison trust account statement for the six-month period immediately preceding the

1 filing of the complaint and the certification required on the in forma pauperis application form.
2 Plaintiff was cautioned, in both the order filed on December 16, 2009, and the one filed on
3 February 16, 2010, that his failure to comply with the order would result in a recommendation
4 that this action be dismissed without prejudice.

5 As plaintiff failed to file a timely response to the February 16, 2010, order, the
6 court on, April 5, 2010, recommended dismissal of this case without prejudice. Within the
7 objection period, plaintiff filed a certified copy of his trust account, although he did not submit
8 the certification required on the in forma pauperis application form. Despite his tardiness and
9 lack of full compliance, the court will vacate the findings and recommendations and liberally find
10 that plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. §
11 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

12 Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28
13 U.S.C. §§ 1914(a), 1915(b)(1). Plaintiff has been without funds for six months and is currently
14 without funds. Accordingly, the court will not assess an initial partial filing fee. 28 U.S.C.
15 § 1915(b)(1). Plaintiff is obligated to make monthly payments of twenty percent of the preceding
16 month's income credited to plaintiff's prison trust account. These payments shall be collected
17 and forwarded by the appropriate agency to the Clerk of the Court each time the amount in
18 plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

19 The court is required to screen complaints brought by prisoners seeking relief
20 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
21 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
22 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be
23 granted, or that seek monetary relief from a defendant who is immune from such relief. 28
24 U.S.C. § 1915A(b)(1),(2).

25 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
26 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28

1 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
2 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
3 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
4 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
5 Cir. 1989); Franklin, 745 F.2d at 1227.

6 A complaint must contain more than a “formulaic recitation of the elements of a
7 cause of action;” it must contain factual allegations sufficient to “raise a right to relief above the
8 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).
9 “The pleading must contain something more...than...a statement of facts that merely creates a
10 suspicion [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal
11 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). “[A] complaint must contain sufficient
12 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft
13 v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127 S.Ct.
14 1955). “A claim has facial plausibility when the plaintiff pleads factual content that allows the
15 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
16 Id.

17 In reviewing a complaint under this standard, the court must accept as true the
18 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
19 738, 740, 96 S.Ct. 1848 (1976), construe the pleading in the light most favorable to the plaintiff,
20 and resolve all doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct.
21 1843 (1969).

22 To the extent plaintiff seeks to name the California Department of Corrections
23 and Rehabilitation (CDCR), plaintiff is informed that the Eleventh Amendment serves as a
24 jurisdictional bar to suits brought by private parties against a state or state agency unless the state
25 or the agency consents to such suit. See Quern v. Jordan, 440 U.S. 332 (1979); Alabama v.
26 Pugh, 438 U.S. 781 (1978)(per curiam); Jackson v. Hayakawa, 682 F.2d 1344, 1349-50 (9th Cir.

1 1982). In the instant case, the State of California has not consented to suit. Accordingly,
2 plaintiff's claims against CDCR are frivolous and must be dismissed.

3 As to any claims against "medical" at California State Prison-Sacramento (CSP-
4 Sac), these claims will be dismissed because plaintiff fails to identify an individual appropriate
5 for service of process.

6 Plaintiff claims that defendant Warden Walker, on August 18, 2009, told everyone
7 "in the committee," apparently the classification committee, that plaintiff was convicted of rape,
8 and kept plaintiff in "PSU" for another month because he said people like plaintiff make him
9 sick; defendant Walker also said he was out to get plaintiff because of a lawsuit plaintiff had
10 pending against CDCR. Complaint, pp. 2-3. Defendant Daly has "call[ed] [plaintiff] out of [his]
11 race," and has said "he is playing with [plaintiff's] release date," messing with plaintiff's paper
12 work and is telling other inmates that plaintiff has an "R" suffix when he does not. Id.
13 Defendant C. Rasmussen has called plaintiff a "black asshole" and has messed with plaintiff's
14 case records and said that plaintiff raped someone when this is not true. Id. Defendant M.
15 Bobbala (and apparently unnamed others) has not seen him for his medical needs and plaintiff
16 states that he has been in severe pain. Id. Confusingly, he also complains that "they" are in fact
17 trying to give him epidural steroid injections, which he apparently objects to because CSP-Sac
18 does not have the appropriate program. Id., at 9.

19 Plaintiff claims to be in fear for his life and states that if he did not have a cell he
20 "would be dead." Complaint, p. 5. He complains that as an ADA and DPO inmate he has a
21 wheelchair and walker due to his illness, has difficulty negotiating hills at the prison, and claims
22 that unnamed medical staff are with defendant Walker in not transferring plaintiff to a prison that
23 has a disability placement program. Id., at 4. The court notes, however, that plaintiff has
24 recently filed a notice of his change of address to California Medical Facility.

25 Retaliation by prison officials for the exercise of a prisoner's constitutional right
26 of access to the courts violates the federal constitution. Pratt v. Rowland, 65 F.3d 802, 807 (9th

1 Cir. 1995); Schroeder v. McDonald, 55 F.3d 454, 461 (9th Cir. 1995); Black v. Lane, 22 F.3d
2 1395, 1402 (7th Cir. 1994); Woods v. Smith, 60 F.3d 1161, 1164 (5th Cir. 1995); Rizzo v.
3 Dawson, 778 F.2d 527, 532 (9th Cir. 1985).

4 In order to state a retaliation claim, a plaintiff must plead facts which suggest that
5 retaliation for the exercise of protected conduct was the “substantial” or “motivating” factor
6 behind the defendant’s conduct. Soranno’s Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir.
7 1989); Rizzo 778 F.2d at 532. The plaintiff must also plead facts which suggest an absence of
8 legitimate correctional goals for the conduct he contends was retaliatory. Pratt at 806 (citing
9 Rizzo at 532). Verbal harassment alone is insufficient to state a claim. See Oltarzewski v.
10 Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987). However, even threats of bodily injury are
11 insufficient to state a claim, because a mere naked threat is not the equivalent of doing the act
12 itself. See Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987). Mere conclusions of hypothetical
13 retaliation will not suffice, a prisoner must “allege specific facts showing retaliation because of
14 the exercise of the prisoner’s constitutional rights.” Frazier v. Dubois, 922 F.2d 560, 562 (n.1)
15 (10th Cir. 1990).

16 In Pratt, the Ninth Circuit concluded that in evaluating retaliation claims, courts
17 should defer “to prison officials in the evaluation of proffered legitimate penological reasons for
18 conduct alleged to be retaliatory.” Pratt, 65 F.3d at 807 (citing Sandin v. Conner, 515 U.S. 472,
19 115 S. Ct. 2293 (1995)). Plaintiff does not frame a claim rising to the level of a constitutional
20 deprivation when he states that defendants have called him hurtful or inappropriate names, said
21 things that were untrue or even threatened him, particularly where plaintiff has not alleged, for
22 example, how his case or paperwork has actually been “messed with” or if somehow untrue
23 charges or convictions have been wrongly placed in his record. In order to provide an adequate
24 factual predicate for a claim of retaliation for plaintiff’s having filed a lawsuit against CDCR, it
25 would be helpful for plaintiff to be more specific in characterizing the lawsuit at issue and to
26 demonstrate the link between the lawsuit and any constitutional deprivation plaintiff has suffered

1 at the hands of defendant Walker or any other defendant. The retaliation claims will be
2 dismissed but plaintiff will be granted leave to amend.

3 As for plaintiff's claims of inadequate medical care, in order to state a § 1983
4 claim for violation of the Eighth Amendment based on inadequate medical care, plaintiff must
5 allege "acts or omissions sufficiently harmful to evidence deliberate indifference to serious
6 medical needs." Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976). To prevail,
7 plaintiff must show both that his medical needs were objectively serious, and that defendants
8 possessed a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 299, 111 S. Ct.
9 2321, 2324 (1991); McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992) (on remand). The
10 requisite state of mind for a medical claim is "deliberate indifference." Hudson v. McMillian,
11 503 U.S. 1, 4, 112 S. Ct. 995, 998 (1992).

12 A serious medical need exists if the failure to treat a prisoner's condition could
13 result in further significant injury or the unnecessary and wanton infliction of pain. Indications
14 that a prisoner has a serious need for medical treatment are the following: the existence of an
15 injury that a reasonable doctor or patient would find important and worthy of comment or
16 treatment; the presence of a medical condition that significantly affects an individual's daily
17 activities; or the existence of chronic and substantial pain. See, e.g., Wood v. Housewright, 900
18 F. 2d 1332, 1337-41 (9th Cir. 1990) (citing cases); Hunt v. Dental Dept., 865 F.2d 198, 200-01
19 (9th Cir. 1989). McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on other
20 grounds, WMX Technologies v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

21 In Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970 (1994) the Supreme Court
22 defined a very strict standard which a plaintiff must meet in order to establish "deliberate
23 indifference." Of course, negligence is insufficient. Farmer, 511 U.S. at 835, 114 S. Ct. at 1978.
24 However, even civil recklessness (failure to act in the face of an unjustifiably high risk of harm
25 which is so obvious that it should be known) is insufficient. Id. at 836-37, 114 S. Ct. at 1979.
26 Neither is it sufficient that a reasonable person would have known of the risk or that a defendant

1 should have known of the risk. Id. at 842, 114 S. Ct. at 1981.

2 It is nothing less than recklessness in the criminal sense – subjective standard –
3 disregard of a risk of harm of which the actor is actually aware. Id. at 838-842, 114 S. Ct. at
4 1979-1981. “[T]he official must both be aware of facts from which the inference could be drawn
5 that a substantial risk of serious harm exists, and he must also draw the inference.” Id. at 837,
6 114 S. Ct. at 1979. Thus, a defendant is liable if he knows that plaintiff faces “a substantial risk
7 of serious harm and disregards that risk by failing to take reasonable measures to abate it.” Id. at
8 847, 114 S. Ct. at 1984. “[I]t is enough that the official acted or failed to act despite his
9 knowledge of a substantial risk of serious harm.” Id. at 842, 114 S. Ct. at 1981. If the risk was
10 obvious, the trier of fact may infer that a defendant knew of the risk. Id. at 840-42, 114 S. Ct. at
11 1981. However, obviousness per se will not impart knowledge as a matter of law.

12 Also significant to the analysis is the well established principle that mere
13 differences of opinion concerning the appropriate treatment cannot be the basis of an Eighth
14 Amendment violation. Jackson v. McIntosh, 90 F.3d 330 (9th Cir. 1996); Franklin v. Oregon,
15 662 F.2d 1337, 1344 (9th Cir. 1981).

16 Moreover, a physician need not fail to treat an inmate altogether in order to violate
17 that inmate’s Eighth Amendment rights. Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir.
18 1989). A failure to competently treat a serious medical condition, even if some treatment is
19 prescribed, may constitute deliberate indifference in a particular case. Id.

20 Additionally, mere delay in medical treatment without more is insufficient to state
21 a claim of deliberate medical indifference. Shapley v. Nevada Bd. of State Prison Com’rs, 766
22 F.2d 404, 408 (9th Cir. 1985). Although the delay in medical treatment must be harmful, there is
23 no requirement that the delay cause “substantial” harm. McGuckin, 974 F.2d at 1060, citing
24 Wood v. Housewright, 900 F.2d 1332, 1339-1340 (9th Cir. 1990) and Hudson, 112 S. Ct. at 998-
25 1000. A finding that an inmate was seriously harmed by the defendant’s action or inaction tends
26 to provide additional support for a claim of deliberate indifference; however, it does not end the

1 inquiry. McGuckin, 974 F.2d 1050, 1060 (9th Cir. 1992). In summary, “the more serious the
2 medical needs of the prisoner, and the more unwarranted the defendant’s actions in light of those
3 needs, the more likely it is that a plaintiff has established deliberate indifference on the part of
4 the defendant.” McGuckin, 974 F.2d at 1061. Plaintiff’s allegations against defendant Bobbala
5 regarding his or her failing to alleviate his pain are too vague. Plaintiff must set forth what
6 conditions or condition he sought treatment for, when he sought such treatment and how
7 Bobbala, or any other specifically named defendant, subjected him to unconstitutionally
8 inadequate medical care. Plaintiff’s inconsistency in complaining of a lack of medical treatment
9 while simultaneously decrying injections that unnamed staff apparently have tried to give him
10 presumably to treat his pain undermines the framing of a colorable claim. Defendant Bobala will
11 be dismissed but plaintiff will be granted leave to amend.

12 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
13 conditions complained of have resulted in a deprivation of plaintiff’s constitutional rights. See
14 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms
15 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless
16 there is some affirmative link or connection between a defendant’s actions and the claimed
17 deprivation. Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976); May v. Enomoto, 633 F.2d
18 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore,
19 vague and conclusory allegations of official participation in civil rights violations are not
20 sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

21 In addition, plaintiff is informed that the court cannot refer to a prior pleading in
22 order to make plaintiff’s amended complaint complete. Local Rule 220 requires that an amended
23 complaint be complete in itself without reference to any prior pleading. This is because, as a
24 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375
25 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no
26 longer serves any function in the case. Therefore, in an amended complaint, as in an original

1 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

2 In accordance with the above, IT IS HEREBY ORDERED that:

3 1. The Findings and Recommendations, filed on April 5, 2010 (docket # 10), are
4 hereby VACATED;

5 2. Plaintiff's request for leave to proceed in forma pauperis is granted.

6 3. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.
7 The fee shall be collected and paid in accordance with this court's order to the Director of the
8 California Department of Corrections and Rehabilitation filed concurrently herewith.

9 4. The complaint is dismissed for the reasons discussed above, with leave to file
10 an amended complaint within twenty-eight days from the date of service of this order. Failure to
11 file an amended complaint will result in a recommendation that the action be dismissed.

12 DATED: May 10, 2010

13 /s/ Gregory G. Hollows

14 _____
15 UNITED STATES MAGISTRATE JUDGE

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