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

GERALD WILSON,

Plaintiff,

No. 2:10-cv-0721 JAM JFM (PC)

vs.

M. McDONALD, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a complaint filed pursuant to 42 U.S.C. § 1983. Pending before the court is defendant Clark’s motion to dismiss plaintiff’s first amended complaint, filed June 10, 2010. Plaintiff opposes the motion.

PROCEDURAL BACKGROUND

On March 25, 2010, plaintiff filed a civil rights complaint alleging violations of his Eighth Amendment rights. On May 25, 2010, plaintiff’s complaint was screened pursuant to 28 U.S.C. § 1915A and dismissed for failure to state a claim. Plaintiff, who was granted leave to amend, filed a first amended complaint (“FAC”) on June 10, 2010.

1 By order dated September 15, 2010, the court determined that plaintiff's amended
2 complaint stated a cognizable claim for relief against defendants Clark, Diaz and Lopez.¹ On
3 December 17, 2010, defendants Diaz and Lopez filed an answer. Also on December 17, 2010,
4 defendant Clark filed the instant motion to dismiss for failure to state a claim. Plaintiff filed an
5 opposition on January 3, 2011.

6 FACTUAL ALLEGATIONS

7 Plaintiff's allegations as to Clark are reproduced here in their entirety:

8 On May 13, 2008, Plaintiff was assigned to be transfer [sic] to High Desert
9 State Prison [from Corcoran State Prison]. At this time about 8:00 p.m. on May
10 13, 2008, Plaintiff was seen by (LVN) Clark who ask [sic] Plaintiff do [sic] he
11 have any medical concerns. At that time I Plaintiff explain [sic] to (LVN) Clark
12 that I have a back injury from a fall out of a [sic] upper bed at Corcoran State
13 Prison, I have a bed order for a lower bed in my medical file and I have been order
14 [sic] some pain medication. (LVN) Clark said I would be seeing a doctor within
15 (10) day [sic] which never happen [sic], and I was not assigned a lower bed, and
16 did not receive any pain medication until September 25, 2008. [Citation omitted.]

17 (FAC at 7.)

18 STANDARDS FOR A MOTION TO DISMISS

19 Rule 12(b)(6) of the Federal Rules of Civil Procedures provides for motions to
20 dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).
21 In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must accept as
22 true the allegations of the complaint in question, Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197
23 (2007), and construe the pleading in the light most favorable to the plaintiff. Scheuer v. Rhodes,
24 416 U.S. 232, 236 (1974). In order to survive dismissal for failure to state a claim a complaint
25 must contain more than "a formulaic recitation of the elements of a cause of action;" it must
26 contain factual allegations sufficient "to raise a right to relief above the speculative level." Bell
Atlantic Corp. v. Twombly, 550 U.S. 544, 554 (2007). However, "[s]pecific facts are not
necessary; the statement [of facts] need only 'give the defendant fair notice of what the . . . claim

¹ Plaintiff did not identify Clark as a defendant in the "Parties" portion of the FAC, though he discussed him in the body of the FAC.

1 medical care at HDSP was attributable to Clark and did not detail any factual evidence to support
2 that theory. Plaintiff is informed that any theories of liability that he deems are implicit shall be
3 made explicit before a claim may proceed against Clark. Accordingly, defendant's motion to
4 dismiss should be granted.

5 "In dismissing for failure to state a claim under Rule 12(b)(6) a district court
6 should grant leave to amend even if no request to amend the pleading was made, unless it
7 determines that the pleading could not possibly be cured by the allegation of other facts." Lopez
8 v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). Here, the court finds that leave to
9 amend is warranted.

10 Accordingly, IT IS HEREBY RECOMMENDED that:

- 11 1. Defendant's motion to dismiss be granted; and
- 12 2. Plaintiff be granted leave to amend.

13 These findings and recommendations are submitted to the United States District
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
15 days after being served with these findings and recommendations, any party may file written
16 objections with the court and serve a copy on all parties. Such a document should be captioned
17 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
18 objections shall be filed and served within fourteen days after service of the objections. The
19 parties are advised that failure to file objections within the specified time may waive the right to
20 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: February 9, 2011.

22
23 
24 UNITED STATES MAGISTRATE JUDGE

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