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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BEN ORLANDO MARTIN,)	No. CV-16-8581 GW (AS)
)	
Plaintiff,)	ORDER DISMISSING FIRST AMENDED
v.)	COMPLAINT IN PART WITH LEAVE TO
M.D. STAINER et al.,)	AMEND
)	
Defendants.)	
)	

INTRODUCTION

On November 17, 2016, Plaintiff Ben Orlando Martin, an inmate at the California State Prison, Los Angeles County ("CSP-LAC"), proceeding *pro se*, filed a complaint pursuant to 42 U.S.C. § 1983. (Docket Entry No. 1). On January 18, 2017, the Court screened and dismissed the Complaint with leave to amend as prescribed by 28 U.S.C. § 1915A(b).¹ (Docket Entry No. 7). On March 24, 2017, Plaintiff filed his First Amended Complaint ("FAC") (Docket Entry No. 11).

¹ Magistrate judges may dismiss a complaint with leave to amend without approval from the district judge. McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991).

1 The Court has screened the FAC as prescribed by 28 U.S.C.
2 § 1915A. For the reasons discussed below, the Court DISMISSES the
3 FAC-IN-PART WITH LEAVE TO AMEND.
4

5 **ALLEGATIONS OF THE COMPLAINT**
6

7 The FAC alleges claims for unlawful retaliation and deliberate
8 indifference to serious medical needs as well as potential claims for
9 failure to protect and violation of state prison procedures. (FAC at
10 8-9).² The FAC names three defendants in their individual capacity:
11 "medical health care official D.O." Kang Hak Lee, "medical health
12 care official registered nurse" K. Johnson, and CSP-LAC Warden Debbie
13 Asuncion. (Id. at 3). The FAC seeks \$250,000 in compensatory
14 damages, \$250,000 in punitive damages, (id. at 33), and an injunction
15 against Asuncion, the California Department of Corrections and
16 Rehabilitation, and CSP-LAC's health care officials prohibiting
17 further retaliation and mandating Plaintiff's medical treatment at no
18 cost, placing Plaintiff in a single-inmate cell, and transferring
19 Plaintiff to an alternative correctional facility, (id. at 31-32).
20

21 **A. Lee And Johnson**
22

23 **1. January 14, 2016**
24

25 On January 14, 2016, Plaintiff, a former prisoner at High Desert
26 State Prison, was assisted to the pill call counter by an "(ADA)
27

28 ² All page references correspond with the pagination provided
by the Court's electronic docket.

1 assistant." (Id. at 14). Plaintiff asked the nurse when he would
2 receive a wheelchair and explained that extreme pain and swelling
3 prevented him from using a walker to ambulate. (Id.). Defendant Lee
4 approached the counter "in a fit of rage" and started "screaming out
5 Plaintiff[']s medical condition, including the treatment Plaintiff is
6 under and medications currently being administered." (Id.). Lee
7 stated that he was aware that Plaintiff, a former inmate at High
8 Desert State Prison, had been a part of the investigation into High
9 Desert's medical practices. (Id. at 15). Lee accused Plaintiff of
10 not requiring a wheelchair, stated that he did not want to see
11 Plaintiff in another wheelchair, and threatened to fire any prison
12 assistant who transported Plaintiff in a wheelchair. (Id.). Lee
13 also told Plaintiff to "forget about" his pain management medication
14 because Plaintiff was a whistleblower and that his future medical
15 requests would "get lost in the trash." (Id. at 16).

16
17 One day prior to this incident, Lee also "scream[ed]" out
18 Plaintiff's privileged medical information. (Id. at 18). Johnson
19 stood behind Lee "laughing and making light of a situation that[']s
20 clearly in violation of Plaintiff['s] (HIPAA) rights." (Id.).

21
22 **2. January 29, 2016**

23
24 On January 29, 2016, Plaintiff's foot and leg were swollen to
25 one-third larger than their normal size. (Id.). The swelling was
26 due to Plaintiff's use of his walker "which was causing the swelling
27 in Plaintiff[']s entire right side because of the excess walking."
28 (Id. at 22). Plaintiff showed the swelling to Lee and expressed
concern that using a walker was making the swelling worse. (Id. at

1 18). Lee informed Plaintiff that he would treat Plaintiff after he
2 saw two other patients. (Id.).

3
4 After Lee had finished with the two patients and other patients
5 began appearing, Plaintiff asked Johnson when Lee would see him.
6 (Id. at 19). Plaintiff informed Johnson that he was in tremendous
7 pain and the swelling was getting worse. (Id.). Johnson informed
8 Plaintiff that it was not his turn and made a joke about Plaintiff's
9 pain. (Id.). After waiting two hours and twenty minutes, Plaintiff
10 again asked Johnson if Lee would treat him because Plaintiff was in
11 tremendous pain. (Id.). Johnson informed Plaintiff that Lee was
12 going home and Plaintiff should "suck it up and act like a man."
13 (Id.). Johnson laughed and gave Lee and other nurses "high five[s]."
14 (Id.).

15
16 Before Plaintiff left the medical yard, Johnson again denied
17 Plaintiff's request to see Lee and for pain medication. (Id.).
18 Johnson, like Lee, observed the swelling in Plaintiff's foot and leg,
19 but nonetheless denied him treatment. (Id. at 20, 18).

20
21 Plaintiff alleges that Lee's and Johnson's failure to treat him
22 "resulted in further significant injury." (Id. at 21). Lee's and
23 Johnson's actions "emphasized physical harm, or the risk of it."
24 (Id. (emphasis added)). The "unsafe conditions" have "'pose[d] an
25 unreasonable risk of serious damage to Plaintiff[']s future health'
26 and violates [the] Eighth Amendment *even if the damages ha[ve] not*
27 *yet occurred.*" (Id. (emphasis added)). Plaintiff also alleges that
28 Lee's and Johnson's actions resulted in "unnecessary and wanton
infliction of pain." (Id.).

1 After Lee and Johnson denied him treatment, Plaintiff went on a
2 five-day hunger strike. (Id. at 23). The hunger strike ended after
3 five days when a prison lieutenant provided Plaintiff with a
4 temporary wheelchair. (Id.). Plaintiff used this temporary
5 wheelchair until he was permanently assigned a wheelchair on February
6 25, 2016. (Id.). Lee altered medical documentation to indicate that
7 it was he who had provided Plaintiff with the wheelchair when it
8 actually was the lieutenant who had provided Plaintiff with the
9 wheelchair. (Id.).
10

11 3. April 15, 2016 12

13 On April 15, 2016, Lee called Plaintiff into his office to
14 discuss Plaintiff's chronic obstructive pulmonary disorder. (Id.).
15 Plaintiff asked Lee when Plaintiff would receive surgery for his hip.
16 (Id.). Lee indicated that he would not recommend surgery "because it
17 cost[s] to[o] much," and Plaintiff was "not worth it." (Id.). Lee
18 explained that Plaintiff was an informant and Lee would teach
19 Plaintiff a "hard lesson" by ensuring that Plaintiff did not receive
20 his surgery. (Id.). Plaintiff nonetheless received his corrective
21 surgery, a right hip arthroscopy with labral repair, on August 17,
22 2016. (Id. at 23-24).
23

24 Since his surgery, Plaintiff has not received one session of
25 physical therapy. (Id. at 24). For at least 78 days, Plaintiff has
26 remained confined to a wheelchair with no medical treatment or
27 efforts to restore Plaintiff's ability to walk. (Id.).
28

1 **B. Asuncion**

2
3 Asuncion failed to get medical care for Plaintiff despite
4 knowing that Plaintiff had filed requests for medical care that were
5 directed to Asuncion. (Id. at 30). Asuncion also knew that
6 Plaintiff had gone on a hunger strike. (Id.).

7
8 Further, Plaintiff has been "physically assaulted and threatened
9 with violence more times than whats outlined in the Plaintiff[']s
10 complaint." (Id.). Plaintiff "feels his life is in imminent danger
11 of serious physical injury, because Warden Debbie Asuncion[']s
12 continuous actions of retaliation, and putting Plaintiff in
13 situations where the alternative to violence is more violence
14 committed against the Plaintiff." (Id.).

15
16 Plaintiff is confined to a wheelchair and cannot defend himself
17 against attacks by the administration or its inmates. (Id.).
18 Plaintiff is "completely vulnerable against the retaliation of Warden
19 Asuncion and her administration." (Id.).

20
21 **STANDARD OF REVIEW**

22
23 Congress mandates that district courts initially screen civil
24 complaints filed by prisoners seeking redress from governmental
25 entities or employees. 28 U.S.C. § 1915A(b). A court may dismiss
26 such a complaint, or any portion thereof, before service of process,
27 if that court concludes that the complaint (1) is frivolous or
28 malicious; (2) fails to state a claim upon which relief can be
granted; or (3) seeks monetary relief from a defendant who is immune

1 from such relief. 28 U.S.C. § 1915A(b)(1)-(2); see also Lopez v.
2 Smith, 203 F.3d 1122, 1126-27 & n.7 (9th Cir. 2000) (en banc).

3
4 Dismissal for failure to state a claim is appropriate if a
5 complaint fails to proffer "enough facts to state a claim for relief
6 that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
7 544, 570 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 678
8 (2009). "A claim has facial plausibility when the plaintiff pleads
9 factual content that allows the court to draw the reasonable
10 inference that the defendant is liable for the misconduct alleged."
11 Iqbal, 556 U.S. at 678; see also Hartmann v. Cal. Dep't of Corr. &
12 Rehab., 707 F.3d 1114, 1122 (9th Cir. 2013). A plaintiff must
13 provide "more than labels and conclusions" or a "formulaic recitation
14 of the elements" of his claim. Twombly, 550 U.S. at 555; see also
15 Iqbal, 556 U.S. at 678. However, "[s]pecific facts are not
16 necessary; the [complaint] need only 'give the defendant fair notice
17 of what the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (quoting
18 Twombly, 550 U.S. at 555).
19

20
21 In considering whether to dismiss a complaint, a court is
22 generally limited to the pleadings and must construe all "factual
23 allegations set forth in the complaint . . . as true and . . . in the
24 light most favorable" to the plaintiff. Lee v. City of Los Angeles,
25 250 F.3d 668, 688 (9th Cir. 2001). Moreover, *pro se* pleadings are
26 "to be liberally construed" and held to a less stringent standard
27 than those drafted by a lawyer. Erickson, 551 U.S. at 94; see also
28 Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) ("Iqbal
incorporated the Twombly pleading standard and Twombly did not alter

1 courts' treatment of pro se filings; accordingly, we continue to
2 construe pro se filings liberally when evaluating them under
3 Iqbal."). Nevertheless, dismissal for failure to state a claim can
4 be warranted based on either the lack of a cognizable legal theory or
5 the absence of factual support for a cognizable legal theory.
6 Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir.
7 2008). A complaint may also be dismissed for failure to state a
8 claim if it discloses some fact or complete defense that will
9 necessarily defeat the claim. Franklin v. Murphy, 745 F.2d 1221,
10 1228-29 (9th Cir. 1984).

11 12 DISCUSSION

13 14 **A. The FAC's Failure To Protect and State Law Claims Violate Rule 8**

15
16 A "pro se litigant is not excused from knowing the most basic
17 pleading requirements." American Ass'n of Naturopathic Physicians v.
18 Hayhurst, 227 F.3d 1104, 1107-08 (9th Cir. 2000). Rule 8 of the
19 Federal Rules of Civil Procedure requires that a complaint contain "a
20 short and plain statement of the claim showing that the pleader is
21 entitled to relief[,]" Fed. R. Civ. P. 8(a)(2), and that "[e]ach
22 allegation must be simple, concise, and direct." Fed. R. Civ. P.
23 8(d)(1). "The 'short and plain statement' must provide the defendant
24 with 'fair notice of what the plaintiff's claim is and the grounds
25 upon which it rests.'" Dura Pharm., Inc. v. Broudo, 544 U.S. 336,
26 346 (2005) (citation omitted); see also Jones v. Cmty. Redevelopment
27 Agency, 733 F.2d 646, 649 (9th Cir. 1984).
28

1 To do so, "Rule 8(a)(2) . . . requires a 'showing,' rather than
2 a blanket assertion, of entitlement to relief." Twombly, 550 U.S. at
3 555 n.3. "Factual allegations must be enough to raise a right to
4 relief above the speculative level, on the assumption that all the
5 allegations in the complaint are true (even if doubtful in fact)."
6 Id. at 555 (citation omitted); see also Cook v. Brewer, 637 F.3d
7 1002, 1004 (9th Cir. 2011). Thus, if a plaintiff fails clearly to
8 set forth allegations sufficient to provide defendants with notice of
9 which defendant is being sued on what theory and what relief is being
10 sought against which defendant, the complaint fails to comply with
11 Rule 8. See, e.g., McHenry v. Renne, 84 F.3d 1172, 1177-79 (9th Cir.
12 1996); Nevijel v. Northcoast Life Ins. Co., 651 F.2d 671, 674 (9th
13 Cir. 1981); see also Bautista v. Los Angeles Cnty., 216 F.3d 837, 841
14 (9th Cir. 2000) (citations omitted). Failure to comply with Rule 8
15 constitutes an independent basis for dismissal of a complaint that
16 applies even if a court determines that the claims in the complaint
17 are not wholly without merit. McHenry, 84 F.3d at 1179; Nevijel, 651
18 F.2d at 673.

19
20 Here, Plaintiff's FAC does not contain allegations that provide
21 defendants with notice of the nature of the failure to protect or
22 violation of state prison procedures claim. While the FAC refers to
23 these claims in the "Introduction" as two of four claims alleged,
24 (FAC at 8), the body of the FAC identifies only two causes of action:
25 a First Amendment retaliation claim ("First Cause of Action") and an
26 Eighth Amendment inadequate medical care claim ("Second Cause of
27 Action"), (id. at 26, 29). Similarly, the FAC provides only a
28 "Statement of Facts To Claim I" and a "Statement of Facts to Claim

1 II," but no designated statements of facts for a failure to protect
2 or state law claim. (Id. at 14-24). For example, the FAC contains
3 no indication whether Plaintiff asserts a failure to protect claim
4 against Lee and/or Johnson, and if so, what facts support this claim.
5 Accordingly, Lee and Johnson have no fair notice of a failure to
6 protect claim or the grounds upon which it rests. While Plaintiff
7 alleges that Asuncion failed to protect him in the FAC's factual
8 allegations supporting Plaintiff's inadequate medical care claim,
9 this allegation is not sufficient to place Asuncion on notice of the
10 facts that form the basis of any failure to protect claim.
11

12
13 To state a failure to protect claim, a plaintiff first must
14 "objectively show that he was deprived of something "sufficiently
15 serious"." Lemire v. Cal. Dep't of Corrections & Rehabilitation,
16 726 F.3d 1062, 1074 (9th Cir. 2013) (quoting Foster v. Runnels, 554
17 F.3d 807, 812 (9th Cir. 2009); see also Farmer v. Brennan, 511 U.S.
18 825, 834 (1994). Second, the plaintiff must allege that the prison
19 official acted with deliberate indifference to the plaintiff's
20 safety. Farmer, 511 U.S. at 834; Lemire, 726 F.3d at 1074. The
21 official must know of, and disregard, an excessive risk to inmate
22 health or safety - i.e., must both be aware of facts from which the
23 inference could be drawn that a substantial risk of serious harm
24 exists and also draw the inference. Farmer, 511 U.S. at 837. Third,
25 the plaintiff must plausibly allege that the official's actions were
26 an actual and proximate cause of the plaintiff's injuries. Id.
27 (citation omitted).
28

1 Here, Plaintiff alleges only that he has been "physically
2 assaulted and threatened with violence" on multiple occasions and
3 that his life is in "imminent danger of serious physical injury,
4 because Warden Debbie Asuncion[']s continuous actions of retaliation,
5 and putting Plaintiff in situations where the alternative to violence
6 is more violence committed against the Plaintiff." (FAC at 24).
7 These allegations fail to inform Asuncion of what alleged retaliatory
8 "continuous actions" she committed or how she allegedly "put[]"
9 Plaintiff in dangerous situations. Plaintiff also fails to allege
10 any fact establishing whether Plaintiff suffered a "sufficiently
11 serious" deprivation, whether Asuncion's acts or omissions were the
12 proximate cause of that harm, and whether Asuncion was aware that her
13 acts or omissions created a substantial risk of harm. Accordingly,
14 Plaintiff's allegations do not provide Asuncion with fair notice of a
15 failure to protect claim and the grounds upon which it rests.
16

17
18 In his first cause of action, Plaintiff recites the language of
19 California Code of Regulations title 15, sections 3084.1(d), (id. at
20 26 ("`No reprisal shall be taken against an inmate . . . for filing an
21 appeal.'") (emphasis added)), and 3160(a) ("Staff shall not in any
22 way retaliate against or discipline any inmate for initiating or
23 maintaining a lawsuit.'")). However, Plaintiff does not allege
24 whether these procedures support his First Amendment claim or assert
25 a separate state law claim for violation of these prison procedures.
26 Plaintiff also fails to allege which defendants he brings a state law
27 claim and the supporting facts for any such claim. Accordingly, the
28 FAC does not provide defendants with fair notice of a state law

1 claim.

2
3 Plaintiff's vague and conclusory allegations are insufficient to
4 state a section 1983 or state law claim. See Blantz v. Cal. Dep't of
5 Corr. & Rehab., 727 F.3d 917, 925 (9th Cir. 2013) ("A complaint will
6 not survive a motion to dismiss if it 'tenders naked assertions
7 devoid of further factual enhancement.'") (citation omitted); Hydrick
8 v. Hunter, 669 F.3d 937, 942 (9th Cir. 2012) ("Plaintiffs' 'bald' and
9 'conclusory' allegations are insufficient to establish individual
10 liability under 42 U.S.C. § 1983."); Cook, 637 F.3d at 1004 ("[T]he
11 pleading standard Rule 8 announces does not require detailed factual
12 allegations, but it demands more than an unadorned, the-defendant-
13 unlawfully-harmed-me accusation.") (citations and internal quotation
14 marks omitted). Accordingly, the FAC's failure to protect and state
15 law claims must be DISMISSED with leave to amend for failure to
16 comply with Rule 8.
17

18
19 **B. The FAC Fails To Show Personal Participation By Asuncion**
20

21 Plaintiff sues Asuncion for unlawful retaliation and inadequate
22 medical care. Plaintiff alleges that Asuncion retaliated against him
23 "for engaging in his constitutionally protected conduct for utilizing
24 the prison grievance process by filing 602 staff complaints, and for
25 taking part in the 2015 special review of High Desert State Prison."
26 (FAC at 26). Plaintiff further alleges that Asuncion, with Lee and
27 Johnson, "all collectively[] denied Plaintiff his Eighth Amendment
28

1 right . . . in the form of deliberate indifference to a serious
2 medical need." (Id. at 29).
3

4 Other than these conclusory allegations, the FAC does not
5 contain any contentions regarding conduct by Asuncion that gives rise
6 to a retaliation or inadequate medical care claim against her. To
7 demonstrate a Section 1983 civil rights violation against a
8 government official, a plaintiff must show either direct, personal
9 participation or some other sufficient causal connection between the
10 official's conduct and the alleged constitutional violation. See
11 Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011). A supervising
12 officer personally has to have taken some action against the
13 plaintiff or have "set in motion a series of acts by others . . .
14 which he knew or reasonably should have known, would cause others to
15 inflict the constitutional injury" on the plaintiff. Larez v. City
16 of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991) (internal
17 quotations omitted), overruled on other grounds by Ashcroft v. al
18 Kidd, 563 U.S. 731 (2011). A government official may not be held
19 liable for the unconstitutional conduct of a subordinate under a
20 theory of *respondeat superior*. See Iqbal, 129 S. Ct. at 1948.
21 Rather, "[s]upervisory liability [may be] imposed against a
22 supervisory official in his individual capacity [only] for his own
23 culpable action or inaction in the training, supervision, or control
24 of his subordinates, for his acquiescence in the constitutional
25 deprivations of which the complaint is made, or for conduct that
26 showed a reckless or callous indifference to the rights of others."
27 Preschooler II v. Clark County Bd. of Trustees, 479 F.3d 1175, 1183
28 (9th Cir. 2007).

1 In order to state a retaliation or inadequate medical claim care
2 against Asuncion, Plaintiff must allege either direct personal
3 participation by Asuncion in the violation of his constitutional
4 rights or some sufficient causal connection between Asuncion's
5 conduct and the alleged constitutional violation. Cf. Starr, 652
6 F.3d at 1207. However, the FAC alleges neither. Instead, it alleges
7 only that, with knowledge of Lee's and Johnson's "continued pattern
8 of culpable failure[s]" and Plaintiff's hunger strike, Asuncion
9 failed to "ma[k]e . . . reasonable attempt to remedy the problem."
10 (FAC at 30).

11
12 Plaintiff has not established that Asuncion's failure to "remedy
13 the problem" "set in motion a series of acts by others . . . which
14 [s]he knew or reasonably should have known, would cause others to
15 inflict the constitutional injury" on Plaintiff. Cf. Larez, 946 F.2d
16 at 646 (internal quotations omitted). Moreover, the FAC alleges that
17 Asuncion's failure "to remedy the problem" of either Plaintiff's
18 inadequate medical care or Lee's and Johnson's retaliation occurred
19 *after* Lee and Johnson allegedly engaged in a "continued pattern of
20 culpable failure[s]." (FAC at 30). Thus, by Plaintiff's own
21 allegations, Asuncion failed to remedy a *pre-existing* violation of
22 Plaintiff's rights. (Id.). Consequently, Asuncion's omission could
23 not have *caused* the constitutional injury in the first instance.³

24
25 ³ Plaintiff's inadequate medical care claim against Asuncion
26 also fails because, as discussed below, Plaintiff has not stated a
27 deliberate indifference to serious medical needs claim against Lee or
28 Johnson. See infra § IV.E. Therefore, Plaintiff's derivative claim
against Asuncion for failure to remedy the problem of Lee's and
Johnson's inadequate medical care necessarily fails.

1 For these reasons, Plaintiff fails to allege facts that
2 establish either Asuncion's personal involvement in the deprivation
3 of Plaintiff's rights or some other sufficient causal connection.
4 Accordingly, Plaintiff's retaliation and inadequate medical care
5 claims against Asuncion must be DISMISSED with leave to amend.
6

7 **C. The FAC Fails To State A Section 1983 Claim For Injunctive**
8 **Relief Against Asuncion**
9

10 Plaintiff prays for the relief of "an injunction . . .
11 warranting an exception to the Eleventh Amendment bar . . . allowing
12 Plaintiff to proceed with claim against Warden Asuncion." (Id. at
13 31). Pursuant to the Eleventh Amendment, a state and its official
14 arms are immune from suit under section 1983. Howlett v. Rose, 496
15 U.S. 356, 365 (1990); see also Brown v. Cal. Dept. of Corrections,
16 554 F.3d 747, 752 (9th Cir. 2009) ("California has not waived its
17 Eleventh Amendment immunity with respect to claims brought under §
18 1983 in federal court"). "[A] suit against a state official in his
19 or her official capacity . . . is no different from a suit against
20 the State itself," and state officials sued in their official
21 capacity are generally entitled to immunity. Flint v. Dennison, 488
22 F.3d 816, 824-25 (9th Cir. 2007) (citation omitted). However, State
23 officials sued in their *official* capacity, however, are considered
24 "person[s]" when they are sued for prospective injunctive relief
25 under section 1983, and the Eleventh Amendment does not bar such
26 claims. Flint, 488 F.3d at 824-25 (citing Kentucky v. Graham, 473
27 U.S. 159, 167 n.14 (1985)).
28

1 Here, Plaintiff seeks an injunction against Asuncion, the
2 California Department of Corrections and Rehabilitation, and CSP-
3 LAC's health care officials prohibiting further retaliation and
4 mandating Plaintiff's medical treatment at no cost, placement in a
5 single-inmate cell, and transfer to an alternative correctional
6 facility. (FAC at 31-32). However, Plaintiff does not allege an
7 official capacity claim against Asuncion and therefore, Plaintiff is
8 not entitled to pursue a claim for prospective injunctive relief.
9 Moreover, Plaintiff's individual capacity claim for injunctive relief
10 against Asuncion also fails. Claims for injunctive relief against
11 the state may not be brought against a state official in her
12 individual capacity. An individual capacity suit "seek[s] to impose
13 *personal* liability upon a government official for actions [s]he takes
14 under color of state law," Kentucky, 473 U.S. at 165 (emphasis
15 added), and it is money damages that are available from a defendant
16 sued in her individual capacity. Plaintiff's claim for injunctive
17 relief, however, seeks system-wide changes at the California
18 Department of Corrections and CSP-LAC and is not directed at Asuncion
19 in her individual capacity. Accordingly, Plaintiff's section 1983
20 claim for injunctive relief against Asuncion in her individual
21 capacity must be DISMISSED with leave to amend.
22

23 //

24 //

25 //

1 **D. The FAC Fails To State A Retaliation Claim Against Johnson**⁴
2

3 Plaintiff alleges that Johnson "deliberately and intentionally
4 'retaliated' against Plaintiff for engaging in his constitutionally
5 protected conduct for utilizing the prison grievance process by
6 filing 602 staff complaints, and for taking part in the 2015 special
7 review of High Desert State Prison." (FAC at 26). Plaintiff further
8 alleges that Johnson laughed when Lee revealed Plaintiff's
9 confidential medical information, (id. at 18), and that she laughed
10 at and denied Plaintiff treatment for his swelling and pain in his
11 foot and leg, (id. at 19). These allegations do not satisfy the
12 third element of a retaliation claim against Johnson.

13
14 To state a First Amendment retaliation claim, a plaintiff
15 "[f]irst, . . . must allege that the retaliated-against conduct is
16 protected." Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012)
17 (citing Rhodes v. Robinson, 408 F.3d 559, 568 (9th Cir. 2005)).
18 "Second, the plaintiff must claim the defendant took adverse action
19 against the plaintiff. The adverse action need not be an independent
20 constitutional violation." Id. (citation omitted) (citing Rhodes,
21 408 F.3d at 568; Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995)).
22 "Third, the plaintiff must allege a causal connection between the
23 adverse action and the protected conduct." Id. "Fourth, the
24 plaintiff must allege that the 'official's acts would chill or

25
26 ⁴ The Court did not dismiss Plaintiff's retaliation claim
27 against Lee in its initial order of dismissal. (Docket Entry No. 7
28 at 13). Plaintiff re-pleads that claim in the FAC with allegations
substantially similar to those in his original Complaint. The FAC's
retaliation claim against Lee survives dismissal for the same reasons
that the Court previously held that the Complaint's retaliation claim
against Lee may proceed. (Id.).

1 silence a person of ordinary firmness from future First Amendment
2 activities.'" Id. (quoting Rhodes, 408 F.3d at 568); see also
3 Rhodes, 408 F.3d at 562 (A plaintiff does not have to show that his
4 speech was actually suppressed. A plaintiff's showing that his First
5 Amendment rights were chilled, even if not "necessarily silenced," is
6 enough to state a claim.); Watison, 668 F.3d at 1114 (if this
7 "chilling effect" is not alleged, "[a plaintiff] may still state a
8 claim if [the complaint] alleges he [or she] suffered some other
9 harm,' that is 'more than minimal'") (quoting Brodheim v. Cry, 584
10 F.3d 1262, 1269 (9th Cir. 2009); Rhodes, 408 F.3d at 568 n.11).
11 "Fifth, the plaintiff must allege 'that the prison authorities'
12 retaliatory action did not advance [the] legitimate goals of the
13 correctional institution.'" Watison, 668 F.3d at 1114 (quoting Rizzo
14 v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985)).

15
16 The FAC alleges the protected conduct of filing staff complaints
17 and participating in a federal investigation and adverse action by
18 Johnson of denying Plaintiff medical care. The Court assumes that
19 denying medical care for pain and swelling sufficiently severe to
20 prevent an inmate from walking would be sufficient to silence a
21 person of ordinary firmness. The Court also assumes that the denial
22 of medical care did not advance legitimate correctional goals. The
23 FAC, however, does not allege facts that, if true, establish a causal
24 connection between Johnson's denial of medical care and Plaintiff's
25 protected conduct.

26
27 Direct evidence of retaliatory intent rarely can be pleaded in a
28 complaint. See id. at 1114. Allegations of a chronology of events

1 from which retaliation can be inferred, however, is sufficient to
2 survive dismissal. Id.

3
4 Here, Plaintiff provides neither direct evidence nor a
5 chronology of events indicative of retaliatory motive. Instead, the
6 FAC only alleges the conclusion that Johnson "deliberately and
7 intentionally 'retaliated' against Plaintiff for engaging in his
8 constitutionally protected conduct." This conclusion alone -
9 unaccompanied by any chronology of events or other facts giving rise
10 to an inference that Johnson acted with a retaliatory motive - is
11 not sufficient to state the necessary causal connection.

12
13 The FAC's allegations do not state a First Amendment claim
14 against Johnson. Accordingly, Plaintiff's retaliation claim against
15 Johnson must be DISMISSED with leave to amend.

16
17 **E. The FAC Fails To State A Claim For Deliberate Indifference To**
18 **Serious Medical Needs Against Lee And Johnson**

19
20 A defendant is liable for the delay or denial of a prisoner's
21 medical care in violation of the Eighth Amendment only when
22 deliberately indifferent to the prisoner's known serious medical
23 needs. Farmer, 511 U.S. at 834; see also Estelle v. Gamble, 429 U.S.
24 97, 104 (1976). A prisoner must show that the deprivation suffered
25 was "objectively, sufficiently serious" and that prison officials
26 were deliberately indifferent to his safety in allowing the
27 deprivation to take place. Morgan v. Morgensen, 465 F.3d 1041, 1045
28 (9th Cir. 2006).

1 A plaintiff can satisfy the objective component of the
2 deliberate indifference standard by demonstrating that a failure to
3 treat the plaintiff's condition could result in further significant
4 injury or the unnecessary and wanton infliction of pain. Colwell v.
5 Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014) (citation omitted);
6 accord McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992),
7 overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d
8 1133 (9th Cir. 1997). A plaintiff can satisfy the subjective
9 component of the deliberate indifference standard by showing that a
10 prison official "knows of and disregards an excessive risk to inmate
11 health and safety." Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir.
12 2004). A jail official must "both be aware of facts from which the
13 inference could be drawn that a substantial risk of serious harm
14 exists, and he must also draw the inference." Farmer, 511 U.S. at
15 837.
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18 Here, Plaintiff alleges that he suffered from swelling and pain
19 in his leg and foot that prohibited him from walking. He further
20 alleges that he required corrective hip surgery. These conditions
21 appear to satisfy the objective requirement that Plaintiff had a
22 serious medical need.
23

24 Plaintiff, however, does not allege facts that, if true, satisfy
25 the subjective component of the deliberate indifference standard.
26 The FAC's Eighth Amendment claim against Lee and Johnson is
27 substantially the same as the original Complaint's claim, which the
28 Court dismissed for failure to state a claim. The Court expressly

1 ordered Plaintiff, in any amended complaint, to comply with the
2 authorities discussed in the Court's order of dismissal. (Docket
3 Entry No. 7 at 32). The Court further informed Plaintiff of the
4 requirements necessary to satisfy the subjective component of the
5 deliberate indifference standard. (Id. at 16-19). Plaintiff
6 nonetheless filed an Eighth Amendment claim against Lee and Johnson
7 that suffers from the same infirmities as his original claim.
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9
10 Plaintiff alleges that, on January 14, 2016, Lee revealed
11 Plaintiff's confidential medical information, refused to provide
12 Plaintiff with a wheelchair, told Plaintiff to forget about his pain
13 management medication, and threatened that Plaintiff's future medical
14 requests would get "lost in the trash." Johnson laughed when Lee
15 revealed Plaintiff's confidential medical information. In addition,
16 Lee and Johnson refused to treat Plaintiff on January 29, 2016,
17 despite swelling and pain in Plaintiff's foot and leg that prevented
18 Plaintiff from walking. When Plaintiff complained about the lack of
19 treatment, Johnson told Plaintiff that he should "suck it up and act
20 like a man." She also laughed and gave Lee and other nurses "high
21 fives. Then, on April 15, 2016, Lee informed Plaintiff that he would
22 not recommend surgery because Plaintiff was a whistleblower and
23 needed to be taught a "hard lesson." After Plaintiff received hip
24 surgery, he did not receive post-operative physical therapy for at
25 least 78 days, and he remains confined in a wheelchair.
26

27 These allegations do not establish that Lee and Johnson acted
28 with deliberate indifference. First, while Plaintiff alleges that

1 Lee and Johnson refused to treat Plaintiff's swelling and pain on
2 January 29, 2016, Plaintiff received a wheelchair five days later.
3 Thus, the cause of Plaintiff's complaints - i.e., using a walker
4 instead of a wheelchair to ambulate - was promptly eliminated. (FAC
5 at 12, 13, 14, 29, 41). Plaintiff has not established that
6 defendants were aware that the minimal delay of five days in
7 receiving a wheelchair would result in excessive and serious risk to
8 Plaintiff's health and safety. Moreover, the FAC itself alleges a
9 risk of future harm, which further suggests that the short delay of
10 five days posed no excessive or serious risk to Plaintiff's present
11 health and safety. (Id. at 21 (alleging that the failure to treat
12 "'pose[d] an unreasonable risk of serious damage to Plaintiff[']s
13 future health,'" and that "the damages *ha[ve] not yet occurred*")
14 (emphasis added)).

15
16 Second, while Plaintiff alleges that Lee threatened not to
17 recommend surgery, Plaintiff does not allege that Lee acted on this
18 threat. Unfulfilled threats do not constitute an excessive and
19 serious threat to an inmate's health and safety. In addition,
20 Plaintiff received surgery four months after Lee allegedly threatened
21 not to recommend it. On the facts alleged, a delay of four months
22 alone is not indicative of an awareness of an excessive and serious
23 risk to Plaintiff's health and safety.

24
25 Third, while Plaintiff alleges that Lee and Johnson failed to
26 treat Plaintiff or provide him with pain medication on January 29,
27 2016, harm that arises from an isolated instance of neglect
28 "militates against a finding of deliberate indifference." Jett v.

1 Penner, 439 F.3d 1091, 1096 (9th Cir. 2006); see also McGuckin, 974
2 F.2d at 1060. Plaintiff does not allege that Lee and Johnson failed
3 repeatedly, or even on a second occasion, to treat Plaintiff.
4 Compare McGuckin, 974 F.2d at 1060 (repeated failures to treat an
5 inmate properly or a single egregious instance "strongly suggests"
6 that the defendant acted with deliberate indifference). Moreover,
7 "mere malpractice, or even gross negligence," in the provision of
8 medical care does not establish a constitutional violation. Wood v.
9 Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990); see also Estelle,
10 429 U.S. at 105-06 ("[A] complaint that a physician has been
11 negligent in diagnosing or treating a medical condition does not
12 state a valid claim of medical mistreatment under the Eighth
13 Amendment.").

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15
16 Fourth, while Plaintiff alleges that he received no physical
17 therapy for 78 days after his hip surgery and remains unable to walk,
18 Plaintiff does not allege that Lee and Johnson were responsible for
19 his lack of physical therapy. Further, Plaintiff does not allege
20 that they were aware that withholding or delaying physical therapy
21 for 78 days posed a serious and excessive risk of harm to Plaintiff
22 or that their conduct amounted to anything more than medical
23 negligence. Cf. Wood, 900 F.3d at 1334.

24
25 Finally, while Plaintiff alleges that Johnson made jokes at
26 Plaintiff's expense and told him to "act like a man," unprofessional
27 comments do not give rise to a claim of deliberate indifference.
28 Johnson's unprofessionalism does not establish that she was aware

1 that denying treatment to Plaintiff on one occasion posed a
2 substantial risk of serious harm.

3
4 For these reasons, Plaintiff has failed to allege that
5 defendants acted with deliberate indifference to his medical needs.
6 Accordingly, Plaintiff's Eighth Amendment claims against Lee and
7 Johnson must be DISMISSED with leave to amend. If Plaintiff wishes
8 to pursue an Eighth Amendment claim against Lee or Johnson in any
9 amended complaint, he must allege facts that establish that
10 defendants acted with the requisite deliberate indifference.

11
12 **ORDER**

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14 For the reasons stated above, Plaintiff's FAC is DISMISSED-IN-
15 PART with leave to amend.

16
17 If Plaintiff wishes to further pursue the claims dismissed in
18 this action, he must file a Second Amended Complaint no later than **30**
19 **days from the date of this Order. The Second Amended Complaint must**
20 **cure the pleading defects discussed above and shall be complete in**
21 **itself without reference to the original Complaint or FAC. See L.R.**
22 **15-2 ("Every amended pleading filed as a matter of right or allowed**
23 **by order of the Court shall be complete including exhibits. The**
24 **amended pleading shall not refer to the prior, superseding**
25 **pleading."). This means that Plaintiff must allege and plead any**
26 **viable claims in the FAC again.**

27
28 In any amended complaint, Plaintiff should identify the nature
of each separate legal claim, identify the defendant(s) against whom

1 he brings the claim, and confine his allegations to those operative
2 facts supporting each of his claims. Pursuant to Federal Rule of
3 Civil Procedure 8(a), all that is required is a "short and plain
4 statement of the claim showing that the pleader is entitled to
5 relief." However, Plaintiff is advised that the allegations in the
6 Second Amended Complaint should be consistent with the authorities
7 discussed above. In addition, the Second Amended Complaint may not
8 include new defendants or claims not reasonably related to the
9 allegations in the previously-filed complaints. Furthermore,
10 Plaintiff shall indicate in what capacity he sues any defendant(s).
11 **Plaintiff is strongly encouraged to utilize the standard civil rights**
12 **complaint form when filing any amended complaint, a copy of which is**
13 **attached.**

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15 **Plaintiff is explicitly cautioned that failure to timely file a**
16 **Second Amended Complaint, or failure to correct the deficiencies**
17 **described above, may result in a recommendation that this action, or**
18 **portions thereof, be dismissed with prejudice for failure to**
19 **prosecute and/or failure to comply with court orders. See Fed. R.**
20 **Civ. P. 41(b).**

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1 Plaintiff is further advised that if he no longer wishes to
2 pursue this action in its entirety or with respect to particular
3 defendants or claims, he may voluntarily dismiss all or any part of
4 this action by filing a Notice of Dismissal in accordance with
5 Federal Rule of Civil Procedure 41(a)(1). A form Notice of Dismissal
6 is attached for Plaintiff's convenience.

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8 IT IS SO ORDERED.

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10 Dated: June 27, 2017

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12 _____/s/_____
13 ALKA SAGAR
14 United States Magistrate Judge
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