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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANK RODRIGUEZ,
Plaintiff,
v.
DR. KROXTON, ET AL.,
Defendants.

Case No. CV 17-9231-DMG (KK)

ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND

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I.

INTRODUCTION

On December 18, 2017, Plaintiff Frank Rodriguez (“Plaintiff”), proceeding pro se and in forma pauperis, constructively filed¹ a civil rights Complaint pursuant to 42 U.S.C. § 1983 (“Section 1983”) alleging deliberate indifference against defendant Dr. Kroxton for refusing to prescribe medications, and against defendants Peake and Lewis for denying Plaintiff’s related administrative appeals. For the reasons discussed below, the Court dismisses the Complaint with leave to amend.

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¹ Under the “mailbox rule,” when a pro se prisoner gives prison authorities a pleading to mail to court, the court deems the pleading constructively “filed” on the date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010) (citation omitted); Douglas v. Noelle, 567 F.3d 1103, 1107 (9th Cir. 2009) (stating the “mailbox rule applies to § 1983 suits filed by pro se prisoners”).

1 **II.**

2 **BACKGROUND**

3 On December 18, 2017, Plaintiff constructively filed the Complaint pursuant
4 to Section 1983 against defendants Dr. Kroxton, Peake, and Lewis in both their
5 individual and official capacities. ECF Docket No. (“Dkt.”) 1, Compl. at 2-3.
6 Plaintiff alleges defendant Dr. Kroxton was deliberately indifferent to Plaintiff’s
7 medical needs and violated his “constitutional right to adequate medical treatment
8 for severe anxiety attacks” by “refusing to describe proper medication.” *Id.* at 3, 5.
9 Plaintiff also claims deliberate indifference against defendants Peake and Lewis, for
10 denying his appeals for “proper medications.” *Id.* at 3, 5.

11 Plaintiff seeks general relief and punitive damages. *Id.* at 6.

12 **III.**

13 **STANDARD OF REVIEW**

14 As Plaintiff is proceeding in forma pauperis, the Court must screen the
15 Complaint and is required to dismiss the case at any time if it concludes the action
16 is frivolous or malicious, fails to state a claim on which relief may be granted, or
17 seeks monetary relief against a defendant who is immune from such relief. 28
18 U.S.C. § 1915(e)(2)(B); see Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir.
19 1998).

20 In determining whether a complaint fails to state a claim for screening
21 purposes, the Court applies the same pleading standard from Rule 8 of the Federal
22 Rules of Civil Procedure (“Rule 8”) as it would when evaluating a motion to
23 dismiss under Federal Rule of Civil Procedure 12(b)(6). See Watison v. Carter,
24 668 F.3d 1108, 1112 (9th Cir. 2012). Under Rule 8(a), a complaint must contain a
25 “short and plain statement of the claim showing that the pleader is entitled to
26 relief.” Fed. R. Civ. P. 8(a)(2).

27 A complaint may be dismissed for failure to state a claim “where there is no
28 cognizable legal theory or an absence of sufficient facts alleged to support a

1 cognizable legal theory.” Zamani v. Carnes, 491 F.3d 990, 996 (9th Cir. 2007). In
2 considering whether a complaint states a claim, a court must accept as true all of
3 the material factual allegations in it. Hamilton v. Brown, 630 F.3d 889, 892-93 (9th
4 Cir. 2011). However, the court need not accept as true “allegations that are merely
5 conclusory, unwarranted deductions of fact, or unreasonable inferences.” In re
6 Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008).

7 Although a complaint need not include detailed factual allegations, it “must
8 contain sufficient factual matter, accepted as true, to state a claim to relief that is
9 plausible on its face.” Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011)
10 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868
11 (2009)). A claim is facially plausible when it “allows the court to draw the
12 reasonable inference that the defendant is liable for the misconduct alleged.” Id.
13 The complaint “must contain sufficient allegations of underlying facts to give fair
14 notice and to enable the opposing party to defend itself effectively.” Starr v. Baca,
15 652 F.3d 1202, 1216 (9th Cir. 2011).

16 “A document filed pro se is to be liberally construed, and a pro se complaint,
17 however inartfully pleaded, must be held to less stringent standards than formal
18 pleadings drafted by lawyers.” Woods v. Carey, 525 F.3d 886, 889-90 (9th Cir.
19 2008). However, liberal construction should only be afforded to “a plaintiff’s
20 factual allegations,” Neitzke v. Williams, 490 U.S. 319, 330 n.9, 109 S. Ct. 1827,
21 104 L. Ed. 2d 339 (1989), and the Court need not accept as true “unreasonable
22 inferences or assume the truth of legal conclusions cast in the form of factual
23 allegations,” Ileto v. Glock Inc., 349 F.3d 1191, 1200 (9th Cir. 2003).

24 If the court finds the complaint should be dismissed for failure to state a
25 claim, the court has discretion to dismiss with or without leave to amend. Lopez v.
26 Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000). Leave to amend should be granted
27 if it appears possible the defects in the complaint could be corrected, especially if
28 the plaintiff is pro se. Id. at 1130-31; see also Cato v. United States, 70 F.3d 1103,

1 1106 (9th Cir. 1995). If, however, after careful consideration, it is clear a complaint
2 cannot be cured by amendment, the court may dismiss without leave to amend.
3 Cato, 70 F.3d at 1107-11; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 972 (9th
4 Cir. 2009).

5 IV.

6 DISCUSSION

7 **A. PLAINTIFF FAILS TO STATE AN OFFICIAL CAPACITY CLAIM** 8 **AGAINST DEFENDANTS DR. KROXTON, PEAKE, AND LEWIS**

9 **1. Applicable Law**

10 An “official-capacity suit is, in all respects other than name, to be treated as
11 a suit against the entity.” Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099,
12 87 L. Ed. 2d 114 (1985); see also Brandon v. Holt, 469 U.S. 464, 471-72, 105 S. Ct.
13 873, 83 L. Ed. 2d 878 (1985); Larez v. City of L.A., 946 F.2d 630, 646 (9th Cir.
14 1991). Such a suit “is not a suit against the official personally, for the real party in
15 interest is the entity.” Graham, 473 U.S. at 166.

16 To state a cognizable constitutional claim against a state officer in their
17 official capacity, the plaintiff must demonstrate that a “policy or custom” of the
18 governmental entity of which the official is an agent was the “moving force”
19 behind the constitutional violation. Id. A plaintiff must show “that a [state]
20 employee committed the alleged constitutional violation pursuant to a formal
21 governmental policy or a ‘longstanding practice or custom which constitutes the
22 “standard operating procedure” of the local governmental entity.’” Gillette v.
23 Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992). Proof of random acts or isolated
24 events is insufficient to establish a custom or practice. Thompson v. City of L.A.,
25 885 F.2d 1439, 1444 (9th Cir. 1989). Rather, a plaintiff must prove widespread,
26 systematic constitutional violations which have become the force of law. Board of
27 Cty. Comm’rs of Bryan Cty. v. Brown, 520 U.S. 397, 404, 117 S. Ct. 1382, 1388, 137
28 L. Ed. 2d 626 (1997). In addition, a plaintiff must show the policy was “(1) the

1 cause in fact and (2) the proximate cause of the constitutional deprivation.”
2 Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996).

3 **2. Analysis**

4 Plaintiff alleges a claim against defendants Dr. Kroxton, Peake, and Lewis in
5 their official capacity. Compl. at 2-3. However, Plaintiff fails to present any facts
6 indicating defendants Dr. Kroxton, Peake, and Lewis are acting pursuant to a
7 specific policy, custom, or practice that is the “moving force” behind Plaintiff’s
8 alleged constitutional violations. See Graham, 473 U.S. at 166 (“[I]n an official-
9 capacity suit the entity’s ‘policy or custom’ must have played a part in the violation
10 of federal law.”); see also Harris, 489 U.S. 378. In fact, Plaintiff fails to identify
11 any policy or custom that was “(1) the cause in fact and (2) the proximate cause of
12 the constitutional deprivation.” See Trevino, 99 F.3d at 918.

13 Accordingly, Plaintiff fails to allege an official capacity claim against
14 defendants Dr. Kroxton, Peake, and Lewis. Hence, Plaintiff’s claim against Dr.
15 Kroxton, Peake, and Lewis in their official capacity must be dismissed.

16 **B. PLAINTIFF FAILS TO ALLEGE AN EIGHTH AMENDMENT**
17 **DELIBERATE INDIFFERENCE CLAIM AGAINST DEFENDANTS**
18 **DR. KROXTON, PEAKE, AND LEWIS IN THEIR INDIVIDUAL**
19 **CAPACITY**

20 **1. Applicable Law**

21 Prison officials or private physicians under contract to treat inmates “violate
22 the Eighth Amendment if they are ‘deliberately indifferent to a prisoner’s serious
23 medical needs.’” Peralta v. Dillard, 744 F.3d 1076, 1081 (9th Cir. 2014)
24 (alterations omitted) (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 50
25 L. Ed. 2d 251 (1976)); see also Farmer v. Brennan, 511 U.S. 825, 828, 114 S. Ct.
26 1970, 128 L. Ed. 2d 811 (1994). To assert a deliberate indifference claim, a prisoner
27 plaintiff must show the defendant: (1) deprived him of an objectively serious
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1 medical need, and (2) acted with a subjectively culpable state of mind. Wilson v.
2 Seiter, 501 U.S. 294, 297, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991).

3 “A medical need is serious if failure to treat it will result in ‘significant injury
4 or the unnecessary and wanton infliction of pain.’” Peralta, 744 F.3d at 1081
5 (quoting Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)). “A prison official is
6 deliberately indifferent to [a serious medical] need if he ‘knows of and disregards
7 an excessive risk to inmate health.’” Id. at 1082. The “official must both be aware
8 of facts from which the inference could be drawn that a substantial risk of serious
9 harm exists, and he must also draw the inference.” Farmer, 511 U.S. at 837.

10 Deliberate indifference “requires more than ordinary lack of due care.”
11 Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014) (quoting Farmer, 511
12 U.S. at 835). “Deliberate indifference ‘may appear when prison officials deny,
13 delay, or intentionally interfere with medical treatment, or it may be shown by the
14 way in which prison physicians provide medical care.’” Id. (quoting Hutchinson v.
15 United States, 838 F.2d 390, 394 (9th Cir. 1988)). In either case, however, the
16 indifference to the inmate’s medical needs must be substantial – negligence,
17 inadvertence, or differences in medical judgment or opinion do not rise to the level
18 of a constitutional violation. Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir.
19 2004) (negligence constituting medical malpractice is not sufficient to establish an
20 Eighth Amendment violation).

21 A difference of opinion between prison-patient and prison medical
22 authorities regarding treatment does not rise to the level of deliberate indifference.
23 See Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Mayfield v. Craven, 433
24 F.2d 873, 84 (9th Cir. 1970). A prisoner’s preference for a stronger medication
25 allegedly denied on administrative appeal “represents precisely the type of
26 difference in medical opinion between a lay prisoner and medical personnel that is
27 insufficient to establish a constitutional violation.” Parlin v. Sodhi, No. 10-6120
28 VBF (MRW), 2012 WL 5411710, at *4-5 (C.D. Cal. Aug. 8, 2012). Additionally, a

1 difference of opinion between medical professionals concerning the appropriate
2 course of treatment does not generally amount to a deliberate indifference to
3 serious medical needs. See Toguchi, 391 F.3d at 1058; Sanchez, 891 F.2d at 242;
4 see also Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

5 **2. Analysis**

6 **a. Defendant Dr. Kroxton**

7 Plaintiff alleges defendant Dr. Kroxton was deliberately indifferent to
8 Plaintiff’s “medical needs by refusing to describe proper medication.” FAC at 3.
9 Plaintiff claims defendant Dr. Kroxton violated his “constitutional right to
10 adequate medical treatment for severe anxiety attacks” by proscribing “ineffective
11 medication, i.e. [R]em[er]on and [B]us[p]ar whereas [A]tivan or [V]alium [wa]s
12 proper” as indicated by his “acting physician[’s]” letter. Id. at 5.

13 However, a difference of opinion between Plaintiff and defendant Dr.
14 Kroxton, or a difference of medical opinion between Plaintiff’s “acting physician”
15 and defendant Dr. Kroxton regarding medication does not amount to a deliberate
16 indifference to serious medical needs. See Toguchi, 391 F.3d at 1058 (finding
17 defendant doctor’s change of prescription to an allegedly inferior drug failed to
18 show deliberate indifference as a matter of law). Hence, Plaintiff fails to state a
19 deliberate indifference claim against defendant Dr. Kroxton for proscribing
20 different medications than requested. See Lua v. LAC CSP Med. Officials, No. CV
21 10-3548 DOC (JCG), 2011 WL 1743260, at * 2–3 (C.D. Cal. March 23, 2011)
22 (finding prisoner who was placed on “lesser medications” instead of Tramadol or
23 other pain relief medications, alleged merely a difference of medical opinion as to
24 his preferred pain medication rather than an actionable Eight Amendment claim of
25 deliberate indifference); Briones v. Grannis, No. CV 09-08074-VAP (VBK), 2010
26 WL 3636139, at *6 (C.D. Cal. Sept. 14, 2010) (finding failure to provide plaintiff
27 with her requested medications is not sufficient to state a claim of deliberate
28 indifference).

1 If Plaintiff chooses to file a First Amended Complaint, Plaintiff must clearly
2 designate on the face of the document that it is the “First Amended Complaint,” it
3 must bear the docket number assigned to this case, and it must be retyped or
4 rewritten in its entirety, preferably on the court-approved form. Plaintiff shall not
5 include new defendants or new allegations that are not reasonably related to the
6 claims asserted in the Complaint. In addition, the First Amended Complaint must
7 be complete without reference to the Complaint or any other pleading, attachment,
8 or document.

9 An amended complaint supersedes the preceding complaint. Ferdik v.
10 Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). After amendment, the Court will
11 treat all preceding complaints as nonexistent. Id. Because the Court grants
12 Plaintiff leave to amend as to all his claims raised here, any claim raised in a
13 preceding complaint is waived if it is not raised again in the First Amended
14 Complaint. Lacey v. Maricopa Cty., 693 F.3d 896, 928 (9th Cir. 2012).

15 2. Alternatively, Plaintiff may voluntarily dismiss the action without
16 prejudice, pursuant to Federal Rule of Civil Procedure 41(a). **The Clerk of Court**
17 **is directed to mail Plaintiff a blank Notice of Dismissal Form, which the Court**
18 **encourages Plaintiff to use.**

19 The Court advises Plaintiff that it generally will not be well-disposed toward
20 another dismissal with leave to amend if Plaintiff files a First Amended Complaint
21 that continues to include claims on which relief cannot be granted. “[A] district
22 court’s discretion over amendments is especially broad ‘where the court has
23 already given a plaintiff one or more opportunities to amend his complaint.’”
24 Ismail v. Cty. of Orange, 917 F. Supp.2d 1060, 1066 (C.D. Cal. 2012); see also
25 Ferdik, 963 F.2d at 1261. Thus, **if Plaintiff files a First Amended Complaint**
26 **with claims on which relief cannot be granted, the First Amended Complaint**
27 **will be dismissed without leave to amend and with prejudice.**

1 **Plaintiff is explicitly cautioned that failure to timely file a First**
2 **Amended Complaint will result in this action being dismissed with prejudice**
3 **for failure to state a claim, prosecute and/or obey Court orders pursuant to**
4 **Federal Rule of Civil Procedure 41(b).**

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6 Dated: January 09, 2018



HONORABLE KENLY KIYA KATO
United States Magistrate Judge

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