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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

HOY CHAN,

Plaintiff,

v.

ORRY MARCIANO, et al.,

Defendants.

Case No. EDCV 16-2513 R (SS)

**MEMORANDUM AND ORDER
DISMISSING COMPLAINT WITH
LEAVE TO AMEND**

**I.
INTRODUCTION**

On December 6, 2016, Plaintiff Hoy Chan ("Plaintiff"), a state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq. (the "Complaint"). (Dkt. No. 1).

Congress mandates that the court screen, as soon as practicable, "a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of

1 a governmental entity.” 28 U.S.C. § 1915A(a). The court may
2 dismiss such a complaint, or any portion of it, before service of
3 process if the court concludes that the complaint (1) is frivolous
4 or malicious, (2) fails to state a claim upon which relief can be
5 granted, or (3) seeks monetary relief from a defendant who is
6 immune from such relief. 28 U.S.C. § 1915A(b). For the reasons
7 stated below, the Complaint is DISMISSED with leave to amend.¹

8
9 **II.**

10 **ALLEGATIONS OF THE COMPLAINT**

11
12 Plaintiff names the following Chuckawalla Valley State Prison
13 (“CVSP”) employees as defendants in their official and individual
14 capacities: (1) physician’s assistant, Orry Marciano (“Marciano”);
15 (2) Nurse Beatres; (3) Correctional Officer Anderson (“Anderson”);
16 and (4) Correctional Officer Calvillo (“Calvillo”) (collectively
17 “Defendants”). (Compl. at 3-4).

18
19 Plaintiff alleges that Marciano engaged in the “unauthorized
20 practice of medicine” by prescribing medication to Plaintiff
21 without being a “real doctor” or making a diagnosis. (Id. at 3,
22 5). As a result of Marciano’s treatment, Plaintiff has become
23 “weak” and his “breathing problem” has deteriorated. Nurse
24 Anderson ignored Plaintiff’s medical “needs” and yelled at
25 Plaintiff. (Id. at 3).

26
27

1 Magistrate Judges may dismiss a complaint with leave to amend
28 without approval of the District Judge. See McKeever v. Block,
932 F.2d 795, 798 (9th Cir. 1991).

1 Plaintiff allegedly made a work accommodation request to
2 Anderson and Calvillo in order to avoid working with chemicals
3 because of Plaintiff's respiratory disability. (Id. at 4).
4 Plaintiff informed Calvillo that he uses "a breathing machine and
5 the chemicals are killing me." (Id. at 4). Anderson and Cavillo
6 did not follow the "operational procedure" or restrict Plaintiff's
7 exposure to chemicals. (Id. at 4-5).

8
9 Records attached to the Complaint indicate that a physician's
10 assistant² evaluated Plaintiff on October 18, 2016. (Id. at 7).³
11 The evaluation was conducted because Plaintiff filed a work
12 accommodation request. (Id. at 3-5, 7, 12). After the evaluation,
13 the physician's assistant allegedly informed Plaintiff that he was
14 not disabled because his "activities of daily living" were not
15 limited. (Id. at 7).

16
17 Plaintiff claims that Defendants were deliberately
18 indifferent to his serious medical needs and denied Plaintiff's
19 work accommodation request in disregard of his respiratory
20 disability. (Id. at 3-6). Plaintiff seeks an injunction requiring
21 Defendants to provide the "right medical care" and follow the
22 "operational procedure," and he requests that the Court
23 "investigate" the alleged "unconstitutional medical care" at CVSP.
24 (Id. at 6).

25
26 _____
27 ² The records do not identify the physician's assistant by name.

28 ³ The Court refers to the documents attached to the Complaint as if they were part of the Complaint and consecutively paginated.

1 III.

2 DISCUSSION

3
4 Pursuant to 28 U.S.C. § 1915A(b), the Court dismisses the
5 Complaint due to defects in pleading. A pro se litigant in a civil
6 rights case, however, must be given leave to amend his or her
7 complaint unless "it is absolutely clear that the deficiencies of
8 the complaint cannot be cured by amendment." See Akhtar v. Mesa,
9 698 F.3d 1202, 1212 (9th Cir. 2012) (citation and internal
10 quotation marks omitted). Accordingly, the Complaint is dismissed
11 with leave to amend.

12
13 **A. Plaintiff Fails To State An Eighth Amendment Claim For**
14 **Deliberate Indifference To Serious Medical Needs**

15
16 Plaintiff alleges that Defendants were deliberately
17 indifferent to his serious medical needs in violation of the Eighth
18 Amendment. Defendants allegedly failed to provide adequate medical
19 care for Plaintiff's respiratory disability, which caused
20 Plaintiff's health to deteriorate. (Compl. at 3-6). However,
21 Plaintiff's deliberate indifference claim is defective.

22
23 To maintain an Eighth Amendment claim based on a prisoner's
24 medical treatment, the prisoner must demonstrate that the defendant
25 was "deliberately indifferent" to his "serious medical needs."
26 Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006); see also West
27 v. Atkins, 487 U.S. 42, 49 (1988). To establish a "serious medical
28 need," the prisoner must demonstrate that "failure to treat a

1 prisoner's condition could result in further significant injury or
2 the 'unnecessary and wanton infliction of pain.'" Jett, 439 F.3d
3 at 1096 (citation omitted). A prisoner must show that the
4 deprivation that he suffered was "objectively, sufficiently
5 serious." Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir.
6 2006).

7
8 To establish "deliberate indifference," a prisoner must
9 demonstrate "(a) a purposeful act or failure to respond to a
10 prisoner's pain or possible medical need and (b) harm caused by
11 the indifference." Id. Deliberate indifference "may appear when
12 prison officials deny, delay or intentionally interfere with
13 medical treatment, or it may be shown by the way in which prison
14 physicians provide medical care." Id. (citations omitted). The
15 defendant must have been subjectively aware of a serious risk of
16 harm and must have consciously disregarded that risk. See Farmer
17 v. Brennan, 511 U.S. 825 (1994). Further, an "isolated exception"
18 to a defendant's "overall treatment" of a prisoner does not state
19 a deliberate indifference claim. Jett, 439 F.3d at 1096. Mere
20 malpractice or negligence in the provision of medical care does
21 not establish a constitutional violation. Simmons v. Navajo Cnty.
22 Ariz., 609 F.3d 1011, 1019 (9th Cir. 2010). Additionally, a mere
23 difference of opinion in the form or method of treatment does not
24 amount to a deliberate indifference of plaintiff's serious medical
25 needs. Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004).

26
27 Here, the Complaint does not adequately allege that Plaintiff
28 had a "serious medical need." Rather, Plaintiff refers to an

1 unspecified "disability;" claims that he is "weak;" and
2 alleges that his "breathing problem is getting worst [sic]."
3 (Compl. at 3-5). These vague allegations fail to demonstrate a
4 significant injury or unnecessary and wanton infliction of pain.
5 Jett, 439 F.3d at 1096.

6
7 Moreover, the Complaint does not sufficiently allege
8 "deliberate indifference," i.e., a purposeful act or failure to
9 respond to an objectively serious medical need and harm caused by
10 the indifference. The Complaint does not assert that any
11 particular Defendant was subjectively aware of a risk of harm to
12 Plaintiff and consciously disregarded that risk. On the contrary,
13 the Complaint indicates that Defendants treated Plaintiff's
14 symptoms with medicine and a "breathing machine. (Id. at 3-5).

15
16 The Complaint does not contain any dates explaining when the
17 alleged incidents occurred and which Defendants were involved on
18 what date. The Complaint also does not sufficiently explain
19 Plaintiff's condition (e.g., the specific diagnosis, severity of
20 the condition, and how it has progressed) and in what manner have
21 Defendants' actions affected Plaintiff's condition. Instead, the
22 Complaint vaguely alleges that Plaintiff had a disability and
23 Defendants' unspecified actions and inactions made his disability
24 "worse." (Compl. at 3-5). Additionally, Nurse Beatres' conduct
25 does not rise to the level of a constitutional violation because
26 the Complaint merely alleges that she lacked compassion and yelled
27 at Plaintiff. (Id. at 3).

1 In sum, the Complaint acknowledges that Defendants took
2 affirmative steps to investigate and treat Plaintiff's complaints.
3 The Complaint does not meet the high burden needed to sufficiently
4 allege a deliberate indifference to serious medical needs claim.
5 Accordingly, Plaintiff's deliberate indifference claims are
6 dismissed with leave to amend.

7
8 **B. Plaintiff Fails To State A Claim Under The ADA**

9
10 Plaintiff claims that Defendants declined to (1) medically
11 treat and (2) authorize a work accommodation for Plaintiff's
12 alleged respiratory disability. (Compl. at 3-6).

13
14 In order to be considered disabled under the ADA, a plaintiff
15 must either have: "(A) a physical or mental impairment that
16 substantially limits one or more of the major life activities of
17 such individual; (B) a record of such an impairment; or (C) [be]
18 regarded as having such an impairment." 42 U.S.C. § 12102(2).

19
20 Here, Plaintiff alleges that he is disabled under the ADA
21 because of an alleged respiratory condition. (Compl. at 3-6).
22 However, Plaintiff also provides documentation establishing that
23 CVSP medical staff examined Plaintiff and found "no restrictions
24 or limitations in [his] ability to perform [his] Activities of
25 Daily Living . . ." (Id. at 3-5, 9). In order to allege that
26 Plaintiff is disabled under the ADA, he must state facts
27 demonstrating that he has been diagnosed with a condition that
28 limits his life activities. Bragdon v. Abbott, 524 U.S. 624, 631

1 (1998); Gaines v. Diaz, No. 1:13-CV-01478-MJS, 2014 WL 4960794, at
2 *6 (E.D. Cal. Oct. 1, 2014) (Plaintiff's claim that he "suffered
3 from unspecified lower body mobility and pain conditions [did] not
4 alone demonstrate a disability."). Accordingly, Plaintiff has not
5 alleged facts to demonstrate that he is disabled under the ADA.

6
7 Assuming that Plaintiff is disabled, he still has not alleged
8 facts to establish a claim under the ADA. Title I of the ADA
9 prohibits discrimination "against a qualified individual on the
10 basis of disability in regard to . . . [the] privileges of
11 employment." 42 U.S.C. § 12112(a); Castle v. Eurofresh, Inc., 731
12 F.3d 901, 906 (9th Cir. 2013). Plaintiff has not alleged sufficient
13 facts to show whether he worked voluntarily or was employed by the
14 prison. In any amended complaint, Plaintiff must clarify his
15 allegations.

16
17 Moreover, claims under the ADA based solely on inadequate or
18 negligent medical treatment do not necessarily state a claim.
19 Simmons, 609 F.3d at 1021-22 ("The ADA prohibits discrimination
20 because of disability, not inadequate treatment for disability").
21 Here, Plaintiff does not allege that he was denied medical
22 treatment because of his respiratory disability. Instead,
23 Plaintiff claims that Defendants provided substandard care.
24 Prisons are subject to the ADA. See Armstrong v. Brown, 732 F.3d
25 955, 1072 (9th Cir. 2013). However, the Court cannot determine
26 from the current complaint the nature of Plaintiff's ADA claim.
27 Accordingly, Plaintiff's claims under the ADA are dismissed with
28 leave to amend.

1 **C. The Complaint Violates Rule 8**

2
3 Plaintiff's Complaint does not comply with the standards of
4 Federal Rule of Civil Procedure 8. See Fed. R. Civ. P. 8. Rule
5 8(a)(2) "'requires only a short and plain statement of the claim
6 showing that the pleader is entitled to relief,' in order to 'give
7 the defendant fair notice of what the . . . claim is and the grounds
8 upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544,
9 555 (2007). "Each allegation must be simple, concise, and direct."
10 Fed. R. Civ. P. 8(d)(1); see also Knapp v. Hogan, 738 F.3d 1106,
11 1109 (9th Cir. 2013) (pleading may violate Rule 8 in "multiple
12 ways," including by saying "too little" or "too much").

13
14 Here, the Complaint does not give Defendants fair notice of
15 what Plaintiff's claims are and the grounds upon which they rest.
16 The Complaint states far "too little" and does not provide enough
17 detail regarding Defendants' alleged actions or inactions. For
18 example, although the Complaint states that CO Anderson did not
19 follow "operational procedure," the Complaint does not explain what
20 this procedure is and what Defendants should have done differently.
21 (Compl. at 3-5). Moreover, the mere failure to follow a state
22 regulation, with nothing more, does not equate to a constitutional
23 violation. See Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043,
24 1051-53 (9th Cir. 2002) (finding defendant's negligent failure to
25 follow prison procedures did not itself constitute an Eighth
26 Amendment violation). Plaintiff must allege and explain how
27 Defendant's conduct violated his constitutional rights.

1 Accordingly, the Complaint is dismissed with leave to amend for
2 failure to meet the pleading standards of Rule 8.

3
4 **D. Plaintiff's Official Capacity Claims Are Defective**

5
6 Plaintiff sues Defendants under section 1983 in both their
7 official and individual capacities. (Compl. at 3-4). However,
8 the Eleventh Amendment bars Plaintiff's official capacity claims.

9
10 Pursuant to the Eleventh Amendment, a state and its official
11 arms are immune from suit under section 1983. See Howlett v. Rose,
12 496 U.S. 356, 365 (1990); Brown v. Cal. Dept. of Corrections, 554
13 F.3d 747, 752 (9th Cir. 2009) ("California has not waived its
14 Eleventh Amendment immunity with respect to claims brought under
15 § 1983 in federal court"). "A suit against a state official in
16 his or her official capacity . . . is no different
17 from a suit against the State itself." Flint v. Dennison, 488 F.3d
18 816, 824-25 (9th Cir. 2007) (citation omitted).⁴ Thus, state
19 officials sued for damages in their official capacity are generally
20 entitled to immunity. Id. at 825.

21
22 Notwithstanding, when state officials are sued in their
23 official capacity for prospective injunctive relief under section
24 1983, they are considered "individuals" not immune from suit. Id.

25 ⁴ Because official capacity claims are "in all respects other than
26 name" suits against the government entity, Plaintiff's claims here
27 against Defendants in their official capacity are claims against
28 the California Department of Corrections and Rehabilitation, i.e.,
the California state government. Kentucky v. Graham, 473 U.S. 159,
166 (1985).

1 (citing Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985)). The
2 Eleventh Amendment does not bar such claims. Id. However, as
3 noted above, Plaintiff does not appear to bring any claims for
4 prospective, i.e., future injunctive relief. Thus, this exception
5 is inapplicable. Accordingly, Plaintiff's official capacity claims
6 must be dismissed.

7 **IV.**

8 **CONCLUSION**

9
10 For the reasons stated above, the Complaint is dismissed with
11 leave to amend. If Plaintiff still wishes to pursue this action,
12 he is granted **thirty (30) days** from the date of this memorandum
13 and Order within which to file a First Amended Complaint. In any
14 amended complaint, Plaintiff shall cure the defects described
15 above.

16
17 **Furthermore, Plaintiff shall omit any claims or allegations**
18 **that are not reasonably related to the claims asserted in the**
19 **Complaint but shall instead attempt to cure the deficiencies**
20 **addressed in this Order.** The First Amended Complaint, if any,
21 shall be complete in itself and shall bear both the designation
22 "First Amended Complaint" and the case number assigned to this
23 action. It shall not refer in any manner to the original Complaint.

24
25 In any amended complaint, Plaintiff should confine his
26 allegations to the operative facts supporting each of his claims.
27 Plaintiff is advised that pursuant to Federal Rule of Civil
28 Procedure 8(a), all that is required is a "short and plain statement

1 of the claim showing that the pleader is entitled to relief.”
2 **Plaintiff is strongly encouraged to utilize the standard civil**
3 **rights complaint form when filing any amended complaint, a copy of**
4 **which is attached.** In any amended complaint, Plaintiff should
5 identify the nature of each separate legal claim and make clear
6 what specific factual allegations support his claims. Plaintiff
7 is strongly encouraged to keep his statements concise and to omit
8 irrelevant details. It is not necessary for Plaintiff to cite case
9 law or include legal argument.

10
11 **Plaintiff is explicitly cautioned that failure to timely file**
12 **a First Amended Complaint, or failure to correct the deficiencies**
13 **described above, will result in a recommendation that this action**
14 **be dismissed with prejudice for failure to prosecute and obey Court**
15 **orders pursuant to Federal Rule of Civil Procedure 41(b).**
16 **Plaintiff is further advised that if he no longer wishes to pursue**
17 **this action he may voluntarily dismiss it by filing a Notice of**
18 **Dismissal in accordance with Federal Rule of Civil Procedure**
19 **41(a)(1). A form Notice of Dismissal is attached for Plaintiff's**
20 **convenience.**

21
22 DATED: April 13, 2017

23
24
25 /s/
26 SUZANNE H. SEGAL
 UNITED STATES MAGISTRATE JUDGE

27 **THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS, WESTLAW OR**
28 **ANY OTHER LEGAL DATABASE.**