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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 FIRST AMENDED
COMPLAINT WITH LEAVE TO AMEND

I.

INTRODUCTION

On November 6, 2016, Plaintiff Hoy Chan ("Plaintiff"), a state prisoner proceeding pro se, filed a complaint pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq. ("Complaint," Dkt. No. 1). Due to defects in pleading, the Court dismissed the Complaint with leave to amend. (Dkt. No. 5). Plaintiff subsequently filed the instant First Amended Complaint on May 12, 2017. ("FAC," Dkt. No. 6).

1 Congress mandates that district courts perform an initial
2 screening of complaints in civil actions where a prisoner seeks
3 redress from a governmental entity or employee. 28 U.S.C.
4 § 1915A(a). This court may dismiss such a complaint, or any portion
5 of it, before service of process if the court concludes that the
6 complaint (1) is frivolous or malicious, (2) fails to state a claim
7 upon which relief can be granted, or (3) seeks monetary relief from
8 a defendant who is immune from such relief. 28 U.S.C. § 1915A(b).
9 For the reasons stated below, the First Amended Complaint is
10 DISMISSED with leave to amend.¹

11 12 II.

13 ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

14

15 Plaintiff names the following Chuckawalla Valley State Prison
16 ("CVSP") employees as defendants in their official and individual
17 capacities:² (1) physician's assistant and "Primary Care Doctor"
18 Orry Marciano; (2) Nurse Beatres; (3) Warden Kimberly Sibel;

20 ¹ Magistrate Judges may dismiss a complaint with leave to amend
21 without approval of the District Judge. See McKeever v. Block,
22 932 F.2d 795, 798 (9th Cir. 1991).

23 ² Under section 1983, state officials sued in their official
24 capacity for prospective injunctive relief are considered
25 "individuals" not immune from suit. Flint v. Dennison, 488 F.3d
26 816, 825 (9th Cir. 2007). Plaintiff seeks injunctive relief on
27 his section 1983 claims. Furthermore, the ADA allows suits for
28 monetary damages against public entities. United States v.
Georgia, 546 U.S. 151, 154 (2006). Under Title II, individuals
may be sued in their official capacity because claims against them
are claims against the governmental agency. Miranda B. v.
Kitzhaber, 328 F.3d 1181, 1187-88 (9th Cir. 2003). Thus,
Plaintiff's official capacity claims are proper here.

1 (4) Correctional Officer Anderson; and (5) Correctional Officer
2 Calvillo (collectively "Defendants"). (FAC at 3-4).

3
4 Plaintiff, a diabetic with breathing problems, alleges that
5 Marciano discriminated against him because of his alleged
6 disabilities. (Id. at 3, 5). Plaintiff contends that "more than
7 a year" ago, Marciano promised Plaintiff access to an orthopedic
8 doctor, whom Plaintiff alleges he has not yet seen. (Id. at 5).
9 Marciano also prescribed medicine to Plaintiff that has allegedly
10 "deteriorated [his] body." (Id. at 3).

11
12 Plaintiff alleges that Nurse Beatres "always denied [his]
13 disability," and yelled at him to stop complaining and "take
14 Tylenol." (Id. at 3, 5). Plaintiff believes that, after Marciano
15 and Beatres told the officers that Plaintiff is not disabled,
16 Anderson and Cavillo "forced [him] to work using chemicals." (Id.
17 at 4). Because Plaintiff's disability was allegedly not "in the
18 system," he was not excused from work and could be written up if
19 he refused. (Id.).

20
21 Plaintiff claims that the "severe pain" from his bunion is
22 exacerbated by the heavy work boots he must wear. (Id. at 6).
23 Plaintiff has attached records indicating that therapeutic shoes
24 were prescribed to him after two infirmary visits on February 15
25 and 23, 2017. (Id. at 7, 14).³ As of the filing of the First
26 Amended Complaint, he has not received the shoes. (Id. at 6).

27 _____
28 ³ The Court refers to the documents attached to the First Amended
Complaint as if they were consecutively paginated.

1 During the February 23 visit, a cane was prescribed and a follow-
2 up "Orthotics Referral Request" was scheduled for May 23, 2017,
3 citing a "moderate right Bunion." (Id. at 8). Records do not
4 indicate which physician treated him during either visit, but
5 Plaintiff claims that an unnamed "D Yard" doctor recommended the
6 cane. (Id. at 5, 7, 14).

7
8 Plaintiff alleges that Warden Sibel "knows what's going on,"
9 i.e., that inmates are provided with doctors and nursing staff who
10 do not "[know] their jobs and responsibilities." (Id. at 3).
11 Plaintiff alleges that Sibel is also failing in her
12 "responsibilities to inform or educate her staff" on the importance
13 of operational procedures. (Id. at 5).

14
15 The First Amended Complaint claims that Defendants "abused
16 [Plaintiff's] constitutional rights" by discriminating against him
17 in violation of the Americans with Disabilities Act. (Id. at 5-
18 6). Defendants also allegedly inflicted cruel and unusual
19 punishment upon Plaintiff, by forcing him to work and showing
20 deliberate indifference to his medical needs. (Id. at 3-5). The
21 First Amended Complaint also alleges violations of "Title 45" of
22 the California Code of Regulations, which does not appear to exist,
23 and claims that Sibel failed to train and supervise the Defendants.
24 (Id. at 3, 5). Plaintiff's prayer for relief is unclear. (Id. at
25 6). While Plaintiff vaguely calls for "justice," he also appears
26 to be seeking an injunction, demanding his prescribed therapeutic
27 shoes and a visit to an orthopedic specialist. (Id.). Plaintiff
28 does not request monetary damages. (Id.).

1 activities; (3) he was either excluded from
2 participation in or denied the benefits of the public
3 entity's services, programs, or activities, or was
4 otherwise discriminated against by the public entity;
5 and (4) such exclusion, denial of benefits, or
6 discrimination was by reason of [his] disability."

7
8 Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1021 (9th Cir.
9 2010) (quoting McGary v. City of Portland, 386 F.3d 1259, 1265 (9th
10 Cir. 2004)). In order to allege that Plaintiff is disabled under
11 the ADA, he must demonstrate that he has been diagnosed with a
12 condition that substantially limits his life activities. Bragdon
13 v. Abbott, 524 U.S. 624, 631 (1998); see also Weaving v. City of
14 Hillsboro, 763 F.3d 1106, 1111 (9th Cir. 2014) ("A 2008 Amendment
15 to the ADA provides, 'The definition of disability in this chapter
16 shall be construed in favor of broad coverage . . .' 'The term
17 'substantially limits' shall be interpreted consistently with the
18 [amendment].'" (citing 42 U.S.C. § 12102(4)(A-B)).

19
20 "The ADA prohibits discrimination because of disability, not
21 inadequate treatment for disability." Simmons, 609 F.3d at 1022
22 (emphasis added). Insufficient medical care does not state a claim
23 under the ADA. Id.; see also Bryant v. Madigan, 84 F.3d 246, 249
24 (7th Cir. 1996) ("[T]he Act would not be violated by a prison's
25 simply failing to attend to the medical needs of its disabled
26 prisoners . . . The ADA does not create a remedy for medical
27 malpractice.").

28 \\

1 Here, Plaintiff's ADA claim fails because the First Amended
2 Complaint does not allege that Plaintiff was denied access to a
3 governmental benefit because of his disability. Instead, Plaintiff
4 claims that Marciano and Beatres provided substandard care.
5 Plaintiff must allege facts showing that the prison's purported
6 refusal to accommodate his disability prevented him from enjoying
7 the benefits of services, programs or activities provided to non-
8 disabled prisoners, and that he was discriminated against because
9 of his disability.

10
11 Additionally, "Title II authorizes suits by private citizens,"
12 including prisoners, only "for money damages against public
13 entities that violate § 12132." United States v. Georgia, 546 U.S.
14 151, 154 (2006) (sovereign immunity does not protect states from
15 ADA claims by state prisoners). Plaintiff does not seek monetary
16 relief. Accordingly, Plaintiff's ADA claim is dismissed, with
17 leave to amend.

18
19 **B. Plaintiff Fails To State A Cruel And Unusual Punishment Claim**

20
21 Plaintiff broadly claims that he was subjected to "cruel and
22 unusual punishment." (FAC at 3, 5). This punishment appears to
23 have included forced labor and a violation of some unidentified
24 provision of the California Code of Regulations. (Id. at 5). It
25 is unclear whether Plaintiff is raising this claim against only
26 Anderson and Cavillo, or all of the Defendants.

1 Infliction of suffering on prisoners that is “totally without
2 penological justification” violates the Eighth Amendment. Rhodes
3 v. Chapman, 452 U.S. 337, 346 (1981) (citation omitted). Only “the
4 unnecessary and wanton infliction of pain . . . constitutes cruel
5 and unusual punishment forbidden by the Eighth Amendment.” Whitley
6 v. Albers, 475 U.S. 312, 319 (1986) (internal quotation marks and
7 citation omitted). The pain must amount to “the type of shocking
8 and barbarous treatment protected against by the [E]ighth
9 [A]mendment.” Grummett v. Rushen, 779 F.2d 491, 494 n.1 (9th Cir.
10 1985). To state an Eighth Amendment claim, a prisoner must allege
11 that prison officials acted with deliberate indifference to a
12 substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825,
13 828 (1994). Prison officials manifest deliberate indifference if
14 they know of and disregard an excessive risk to an inmate’s safety
15 or health. Id. at 837.

16
17 Here, Plaintiff alleges that Anderson and Cavillo “forced
18 [him] to work using chemicals.” (FAC at 5). The First Amended
19 Complaint fails to show whether the chemicals or the work itself
20 posed any risk to Plaintiff’s health, which the Defendants knew
21 and deliberately ignored. Also, to the extent that Plaintiff is
22 attempting to assert that Defendants violated a safety regulation,
23 the First Amended Complaint does not specify which regulation was
24 allegedly violated. See California Code of Regulations, Titles 1-
25 28. However, Plaintiff is advised that the failure to follow a
26 state regulation is not itself a constitutional violation. See
27 Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1052 (9th Cir.
28 2002). Because Plaintiff does not allege “shocking and barbarous”

1 conduct by any Defendant that would rise to the level of a
2 constitutional violation, the First Amended Complaint fails to
3 state a cruel and unusual punishment claim. See Watison v. Carter,
4 668 F.3d 1108, 1113 (9th Cir. 2012) (citation omitted). Therefore,
5 the First Amended Complaint must be dismissed, with leave to amend.
6

7 **C. Plaintiff Fails To State An Eighth Amendment Claim For**
8 **Deliberate Indifference To Serious Medical Needs**
9

10 Plaintiff further alleges that Defendants were deliberately
11 indifferent to his serious medical needs in violation of the Eighth
12 Amendment. Defendants allegedly failed to provide adequate medical
13 care for Plaintiff's bunion, which led, in part, to his
14 deteriorating health. (FAC at 3-6). However, Plaintiff's
15 deliberate indifference claim is defective.
16

17 To state a claim for unconstitutional health care services, a
18 prisoner must demonstrate that the defendants were "deliberately
19 indifferent" to his "serious medical needs." Jett v. Penner, 439
20 F.3d 1091, 1096 (9th Cir. 2006). To establish a "serious medical
21 need," the prisoner must show that "failure to treat [the]
22 prisoner's condition could result in further significant injury or
23 the 'unnecessary and wanton infliction of pain.'" Jett, 439 F.3d
24 at 1096 (citation omitted); see also Morgan v. Morgensen, 465 F.3d
25 1041, 1045 (9th Cir. 2006) (the existence of a serious medical need
26 is determined by an objective standard).
27
28

1 To establish "deliberate indifference" to such a need, the
2 prisoner must demonstrate: "(a) a purposeful act or failure to
3 respond to a prisoner's pain or possible medical need, and (b) harm
4 caused by the indifference." Jett, 439 F.3d at 1096. Deliberate
5 indifference "may appear when prison officials deny, delay or
6 intentionally interfere with medical treatment, or it may be shown
7 by the way in which prison physicians provide medical care." Id.
8 (citation omitted). Yet, an "inadvertent [or negligent] failure
9 to provide adequate medical care" alone does not state a claim.
10 Id. (citation omitted). The defendant must have been subjectively
11 aware of a serious risk of harm and must have consciously
12 disregarded that risk. See Farmer, 511 U.S. at 839 (1994). An
13 "isolated exception" to the defendant's "overall treatment" of the
14 prisoner also does not state a deliberate indifference claim.
15 Jett, 439 F.3d at 1096.

16
17 Here, even if Plaintiff's impairments gave rise to "serious
18 medical needs," the First Amended Complaint does not allege that
19 Marciano and Beatres were subjectively aware of, and deliberately
20 chose to ignore, these needs. On the contrary, the First Amended
21 Complaint indicates Plaintiff's symptoms were treated with medicine
22 and a cane. (FAC at 7, 14-15). Plaintiff's vague allegations that
23 the medicine "deteriorated his health" fail to demonstrate
24 deliberate indifference. (Id. at 3-4); Farmer, 511 U.S. at 835.
25 While the Defendants allegedly also failed to care for Plaintiff's
26 bunion by denying him therapeutic shoes and access to an orthopedic
27 surgeon, a difference of opinion regarding treatment does not give
28 rise to a deliberate indifference claim. Fleming v. LeFevere, 423

1 F. Supp. 2d. 1064, 1070 (C.D. Cal 2006); see also Sanchez v. Vild,
2 891 F.2d 240, 242 (9th Cir. 1989). Additionally, Nurse Beatres'
3 conduct does not rise to the level of a constitutional violation
4 because the First Amended Complaint merely alleges that she lacked
5 compassion by yelling at Plaintiff. (Id. at 3).

6
7 Plaintiff does not appear to allege deliberate indifference
8 claims against any of the other three Defendants. Therefore,
9 because the First Amended Complaint acknowledges that Marciano and
10 Beatres took affirmative steps to investigate and treat Plaintiff's
11 complaints, Plaintiff's deliberate indifference claims are
12 dismissed with leave to amend.

13
14 **D. Plaintiff Fails To State A Claim For Failure To Train And**
15 **Supervise**

16
17 Plaintiff alleges that Sibel knows of inmates who have died
18 as the result of medical staff "delaying [and] denying [their]
19 medical needs." (FAC at 3). Plaintiff further alleges that Sibel
20 has failed to "inform or educate her staff on Operational
21 Procedure." (Id. at 5).

22
23 To demonstrate a civil rights action against a government
24 official, a plaintiff must show either the official's direct,
25 personal participation in the harm, or some sufficiently direct
26 connection between the official's conduct and the alleged
27 constitutional violation. See Starr v. Baca, 652 F.3d 1202, 1205-
28 06 (9th Cir. 2011). A supervising officer such as Sibel must

1 personally take some action against the plaintiff or "set in motion
2 a series of acts by others . . . which [s]he knew or reasonably
3 should have known, would cause others to inflict the constitutional
4 injury" on the plaintiff. Larez v. City of Los Angeles, 946 F.2d
5 630, 646 (9th Cir. 1991) (internal quotations omitted). Government
6 officials may not be held liable for the unconstitutional conduct
7 of their subordinates. See Ashcroft v. Iqbal, 556 U.S. 662, 676
8 (2009). Rather, a supervisor may only be held accountable "for
9 his own culpable action or inaction in the training, supervision,
10 or control of his subordinates, for his acquiescence in the
11 constitutional deprivations of which the complaint is made, or for
12 conduct that showed a reckless or callous indifference to the
13 rights of others." Preschooler II v. Clark County Bd. of Trustees,
14 479 F.3d 1175, 1183 (9th Cir. 2007).

15
16 The First Amended Complaint does not allege facts that
17 establish that Sibel's failure to train or supervise the Defendants
18 led to violations of Plaintiff's constitutional rights. Plaintiff
19 claims that Sibel failed to educate her staff about "Operational
20 Procedure." Plaintiff fails to explain which procedure he is
21 referring to, why that procedure is relevant to his alleged
22 injuries, or how Sibel failed to train her staff. Plaintiff must
23 allege specific facts showing what Sibel personally did or did not
24 do, and explain how her action or inaction caused a violation of
25 Plaintiff's civil rights. Accordingly, the First Amended Complaint
26 must be dismissed with leave to amend.

27 \\

28 \\

1 **E. The First Amended Complaint Violates Rule 8**

2
3 Federal Rule of Civil Procedure 8(a)(2) requires that a
4 complaint contain “‘a short and plain statement of the claim
5 showing that the pleader is entitled to relief,’ in order to ‘give
6 the defendant fair notice of what the . . . claim is and the
7 grounds upon which it rests.’” Bell Atlantic v. Twombly, 550 U.S.
8 544, 555 (2007) (citations omitted). Rule 8 may be violated when
9 a pleading “says too little” and “when a pleading says too much.”
10 Knapp v. Hogan, 738 F.3d 1106, 1109 (9th Cir. 2013) (emphasis in
11 original); see also Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys.,
12 Inc., 637 F.3d 1047, 1058-59 (9th Cir. 2011) (a complaint violates
13 Rule 8 if a defendant would have difficulty understanding and
14 responding to the complaint).

15
16 The First Amended Complaint violates Rule 8 because Plaintiff
17 does not clearly identify the nature of each of his legal claims,
18 the specific facts giving rise to each claim, or the specific
19 Defendant or Defendants against whom each claim is brought.
20 Plaintiff also makes a passing reference to a mental health program
21 (“HOPE”) alleging that it is mere “propaganda,” intended to show
22 the “People of California” that the prison cares about inmates,
23 even though many are sick and “the elderly inmates [are] abused by
24 medical staff.” (FAC at 5). Plaintiff does not explain the
25 program’s relevance to his claims. Without more specific
26 information, Defendants cannot respond to the First Amended
27 Complaint. See Cafasso, 637 F.3d at 1058-59. Accordingly, the
28 First Amended Complaint is dismissed, with leave to amend.

1 IV.

2 CONCLUSION

3
4 For the reasons stated above, the First Amended Complaint is
5 dismissed with leave to amend. If Plaintiff still wishes to pursue
6 this action, he is granted **thirty (30) days** from the date of this
7 memorandum and Order within which to file a Second Amended
8 Complaint. In any amended complaint, Plaintiff shall cure the
9 defects described above.

10
11 **Furthermore, Plaintiff shall omit any claims or allegations**
12 **that are not reasonably related to the claims asserted in the First**
13 **Amended Complaint but shall instead attempt to cure the**
14 **deficiencies addressed in this Order.** The Second Amended
15 Complaint, if any, shall be complete in itself and shall bear both
16 the designation "Second Amended Complaint" and the case number
17 assigned to this action. It shall not refer in any manner to the
18 original Complaint.

19
20 In any amended complaint, Plaintiff should confine his
21 allegations to the operative facts supporting each of his claims.
22 Plaintiff is advised that pursuant to Federal Rule of Civil
23 Procedure 8(a), all that is required is a "short and plain statement
24 of the claim showing that the pleader is entitled to relief."
25 **Plaintiff is strongly encouraged to utilize the standard civil**
26 **rights complaint form when filing any amended complaint, a copy of**
27 **which is attached.** In any amended complaint, Plaintiff should
28 identify the nature of each separate legal claim and make clear

1 what specific factual allegations support his claims. Plaintiff
2 is strongly encouraged to keep his statements concise and to omit
3 irrelevant details. It is not necessary for Plaintiff to cite case
4 law or include legal argument.

5
6 **Plaintiff is explicitly cautioned that failure to timely file**
7 **a Second Amended Complaint, or failure to correct the deficiencies**
8 **described above, will result in a recommendation that this action**
9 **be dismissed with prejudice for failure to prosecute and obey Court**
10 **orders pursuant to Federal Rule of Civil Procedure 41(b).**
11 **Plaintiff is further advised that if he no longer wishes to pursue**
12 **this action he may voluntarily dismiss it by filing a Notice of**
13 **Dismissal in accordance with Federal Rule of Civil Procedure**
14 **41(a)(1). A form Notice of Dismissal is attached for Plaintiff's**
15 **convenience.**

16
17 DATED: June 28, 2017

18
19
20 /s/

SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

21
22 **THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS, WESTLAW OR**
23 **ANY OTHER LEGAL DATABASE.**