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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREGORY GENE LEWIS,
Plaintiff,
v.
ORRY MARCIANO, et al.,
Defendants.

Case No. EDCV 17-0181 SVW (SS)

MEMORANDUM DECISION AND ORDER:

- (1) CONSTRUING "MOTION TO AMEND COMPLAINT" AS SECOND AMENDED COMPLAINT (Dkt. No. 7); AND
(2) DISMISSING SECOND AMENDED COMPLAINT WITH LEAVE TO AMEND¹

I.

INTRODUCTION

On August 21, 2017, Plaintiff, a California state prisoner proceeding pro se, filed a document titled "Motion to Amend Complaint with Leave to Clarify" in the above-captioned civil rights action. ("August 21 Motion," Dkt. No. 7). For the reasons stated below, the Court construes the August 21 Motion as a Second

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

1 Amended Complaint, and, so construed, DISMISSES the Second Amended
2 Complaint with leave to amend.

3
4 Congress mandates that district courts perform an initial
5 screening of complaints in civil actions where a prisoner seeks
6 redress from a governmental entity or employee. 28 U.S.C.
7 § 1915A(a). This Court may dismiss such a complaint, or any
8 portion, before service of process if it concludes that the
9 complaint (1) is frivolous or malicious, (2) fails to state a claim
10 upon which relief can be granted, or (3) seeks monetary relief from
11 a defendant who is immune from such relief. 28 U.S.C. § 1915A(b) (1-
12 2); see also Lopez v. Smith, 203 F.3d 1122, 1126-27 & n.7 (9th Cir.
13 2000) (en banc).

14
15 **II.**

16 **PRIOR PROCEEDINGS**

17
18 On February 1, 2017, Plaintiff filed a civil complaint under
19 the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq.;
20 the Civil Rights Act, 42 U.S.C. § 1983; and the California
21 Government Claims Act, Cal. Gov't Code §§ 905 et seq.
22 ("Complaint," Dkt. No. 1). The Complaint sued three Chuckawalla
23 Valley State Prison ("CVSP") employees: Orry Marciano, a
24 "physician assistant/primary care physician"; Ms. Beatres, a
25 nurse; and Kimberly Seibel, the warden. (Id. at 3). The Complaint
26 vaguely alleged that Marciano, Beatres, and Seibel violated
27 Plaintiff's rights by, among other things, refusing to return his
28 cane; failing to intervene in his work assignment as a kitchen

1 lineback, which required him to carry heavy pans and trays and push
2 heavy carts; and failing to provide medical care both before and
3 after he suffered a mild stroke and heart failure. (Id. at 5-6).
4

5 On July 7, 2017, the Court dismissed the Complaint with leave
6 to amend due to pleading defects. ("ODLA," Dkt. No. 5). The
7 Court's Order required Plaintiff to file a First Amended Complaint
8 correcting the deficiencies in the original Complaint within thirty
9 days if he wished to pursue this action. (Id. at 18).
10

11 On July 27, 2017, Plaintiff submitted two documents to the
12 Court: (1) a Notice of Dismissal stating that "only Defendants"
13 are dismissed from the Complaint (the "July 27 Dismissal Notice,"
14 Dkt. No. 9),² and (2) a civil complaint bearing the caption and
15 case number of the instant case. ("July 27 Complaint," Dkt. No.
16 11). This pleading once again purported to raise claims under the
17

18 ² The July 27 Dismissal Notice did not identify the Defendants to
19 be dismissed by name and appeared incomplete. While Plaintiff's
20 intent in filing the Notice is somewhat unclear, to the extent that
21 Plaintiff was attempting to "dismiss" Defendants named in the
22 original Complaint who were not named in subsequent pleadings, the
23 Notice was unnecessary and confusing.

24 The filing of an amended complaint supersedes, i.e., entirely
25 supplants or replaces, the original or any prior complaint, which
26 is "treated thereafter as nonexistent." Ramirez v. County of San
27 Bernardino, 806 F.2d 1002, 1008 (9th Cir. 2015) (internal quotation
28 marks and citation omitted); see also Charles Alan Wright, et al.,
6 Fed. Prac. & Proc. Civ. § 1476 (3d ed. 2016 update) ("Once an
amended pleading is interposed, the original pleading no longer
performs any function in the case and any subsequent motion made
by an opposing party should be directed at the amended pleading.")
(footnotes omitted). Therefore, defendants named in an original
complaint who are not named in a first amended or subsequent
complaint are deemed "dismissed" from the case without further
action.

1 ADA and section 1983, but against an entirely different set of CVSP
2 employees. The July 27 Complaint sued five CVSP employees, none
3 of whom were sued in the original Complaint: Mr. Verduzco and
4 Mr. Vengocher, both "chief cooks"; Mr. Perez and Ms. Prieta, both
5 supervisors; and Dr. Lee, the chief medical doctor. Plaintiff
6 claimed that Verduzco and Vengocher improperly required him to
7 leave his cane and disability vest in their office when he worked
8 in the kitchen; that Perez and Prieta knew that he was required to
9 give up his cane and vest while working; and that Lee denied his
10 request for seizure medication. (Id. at 3-4).

11
12 However, the July 27 Complaint also included references to
13 the original Complaint and its Defendants. In light of the
14 ambiguities on the face of the July 27 Complaint, the Court issued
15 an "Order Requiring Clarification" in which it ordered Plaintiff
16 to inform the Court whether he intended the July 27 Complaint to
17 (1) supplement the original Complaint, (2) supersede the original
18 Complaint, or (3) open an entirely new action. ("Clarification
19 Order," Dkt. No. 7).

20
21 In response to the Clarification Order, though not directly
22 addressing it, on August 21, 2017, Plaintiff filed the instant
23 August 21 Motion. Although captioned as a "motion," the filing
24 contains no argument or requests. Instead, it appears to be another
25 attempt to amend the pleading, as it includes a statement of
26 jurisdiction, a list of Defendants, a statement of facts, a
27 recitation of "legal claims," and a prayer for damages. The
28 allegations in the August 21 Motion purport to sue six CVSP

1 employees, some of whom, but not all, were sued in one or the other
2 of the prior versions of Plaintiff's claims, i.e., staff cooks
3 Viengochia and Verdusco³ and supervisors Perez and Prieta (all of
4 whom were named in the July 27 Complaint, but not the original
5 Complaint); Marciano (who was named in the original Complaint, but
6 not the July 27 Complaint); and correctional officer Moreno, named
7 for the first time, whom Plaintiff alleges is in charge of the
8 safety and security of the C facility kitchen. (August 21 Motion
9 at 1-2). The August 21 Motion abandons the claims against Lee in
10 the July 27 Complaint and the claims against Beatres and Seibel in
11 the original Complaint.

12
13 Based upon the evolution of Plaintiff's claims, and the fact
14 that some, but not all, of the Defendants in the original Complaint
15 and the July 27 Complaint have been named in the most recent
16 iteration of the claims, it appears that Plaintiff intended for
17 the July 27 Complaint to be the First Amended Complaint in this
18 matter, and for the August 21 Motion to be the Second Amended
19 Complaint. The Court has separately ordered that the July 27
20 Complaint be filed as the First Amended Complaint. (See Dkt. No.
21 10). The Court now construes the "August 21 Motion" (Dkt. No. 7)
22 as the Second Amended Complaint and DIRECTS the Court Clerk to re-
23 file that document in a separate docket entry as the Second Amended
24 Complaint.⁴ Accordingly, the Second Amended Complaint supersedes

25 _____
26 ³ The Court presumes that Defendants "Viengochia" and "Verdusco"
27 in the August 21 Motion are Defendants "Vengocher" and "Verduzco"
28 in the July 27 Complaint.

⁴ For the remainder of this Order, the Court will refer to the
"August 21 Motion" as the "Second Amended Complaint" or "SAC."

1 both the original Complaint and the First Amended Complaint, and
2 is the current operative pleading.

3
4 **III.**

5 **ALLEGATIONS OF THE SECOND AMENDED COMPLAINT**

6
7 As noted above, the Second Amended Complaint sues six CVSP
8 employees: "staff supervisor cooks" Viengochia and Verduco;
9 "supervisor II cooks" Perez and Prieta, who supervise Viengochia
10 and Verduco; health care provider Marciano; and correctional
11 officer Moreno. (SAC at 1-2). All Defendants are sued in both
12 their individual and official capacities. (Id. at 3).

13
14 Plaintiff alleges that he is "mobility impaired" because his
15 right leg is shorter than his left leg, and his left leg "sometimes
16 gives out on [him]," (id.), which leaves him with a "severe
17 a[b]normal limp." (Id. at 5). Plaintiff states that when he
18 reported to work on December 10, 2015 with his "mobility impaired
19 lime green vest and cane," Viengochia asked him what was "wrong"
20 with him. (Id. at 3). Viengochia told Plaintiff that if he refused
21 to work, he would issue a Rules Violation Report for failure to
22 work at his assigned duties. (Id.). Plaintiff told Viengochia
23 that he "wanted no problems and could not afford any disciplinary
24 infractions." (Id.). Viengochia assigned Plaintiff to "pots and
25 pans," which required him to stand for six or seven hours. (Id.).
26 Viengochia allowed Plaintiff to sit on a "chair" made out of milk
27 crates, but nonetheless confiscated his cane, as he did on a daily
28

1 basis for four months. (Id.). However, Viengochia allowed
2 Plaintiff to pick up his cane at the end of the shift. (Id.).
3

4 When Verdusco filled in for Viengochia, he, too, would take
5 away Plaintiff's cane every day, and return it to him at the end
6 of the shift. (Id. at 4-5). Verdusco made verbal threats that he
7 would write Plaintiff up in a disciplinary report if Plaintiff
8 missed work or failed to comply with a "direct order." (Id. at
9 4). Verdusco, like Viengochia, knew that Plaintiff was mobility
10 impaired because he had seen Plaintiff in his vest. (Id.).
11

12 Perez and Prieta are in "charge of the overall functions of
13 the culinary kitchens" at CVSP. (Id. at 5). They check in daily
14 on the "functions and operations" managed by their "cook
15 supervisors," and have daily meetings with them. (Id.). Both
16 Perez and Prieta saw Plaintiff and inquired about him. (Id.).
17

18 Moreno is in charge of the security of the C facility kitchen.
19 (Id. at 6). He was aware of Plaintiff's "mobility impairment" vest
20 and cane, but nonetheless condoned Viengochia's and Verdusco's
21 actions "by allowing them to do as they please[d]" with Plaintiff.
22 (Id.).
23

24 From the date of Plaintiff's initial medical consultation at
25 CVSP, Marciano knew of Plaintiff's medical history, including his
26 limp, his medical vest and cane, and his "chronos for lower
27 bed/lower tier." (Id. at 6-7). Marciano also knew that Plaintiff
28 "used to take sei[z]ure medication." (Id. at 6). Plaintiff asked

1 for Marciano's help in getting him out of his kitchen assignment,
2 but Marciano "did nothing for [him] even after . . . [he] had a
3 mild stroke while at work in the kitchen." (Id. at 7). Plaintiff
4 was sent to the hospital by ambulance on January 10, 2016 because
5 he was suffering from chest pains. (Id. at n.4).

6
7 Plaintiff alleges that "he was denied equal protection of the
8 law" because of his race and mobility disability. (Id. at 8).
9 Plaintiff further claims that he suffered physical pain and "mental
10 anguish" for "well over four months" by being "forced to work
11 beyond [his] means" in violation of Eighth and Fourteenth Amendment
12 rights. (Id. at 8-9). Plaintiff seeks punitive damages of \$20,000
13 from each Defendant, and "compensatory damages from each defendant
14 for the sum of \$1,000,000 each." (Id. at 8). Plaintiff "further
15 seeks nominal damages for mental anguish from each defendant for
16 the sum of \$20,000 each." (Id. at 9).

17 18 **IV.**

19 **DISCUSSION**

20
21 Under 28 U.S.C. section 1915A(b), the Court must dismiss
22 Plaintiff's Second Amended Complaint due to multiple pleading
23 defects. However, the Court must grant a pro se litigant leave to
24 amend his defective complaint unless "it is absolutely clear that
25 the deficiencies of the complaint could not be cured by amendment."
26 Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012) (citation and
27 internal quotation marks omitted). Accordingly, for the reasons
28

1 stated below, the Second Amended Complaint is DISMISSED with leave
2 to amend.

3
4 **A. The Second Amended Complaint Violates Federal Rule Of Civil**
5 **Procedure 8**

6
7 Federal Rule of Civil Procedure 8 requires that a complaint
8 contain “‘a short and plain statement of the claim showing that
9 the pleader is entitled to relief’ in order to ‘give the defendant
10 fair notice of what the . . . claim is and the grounds upon which
11 it rests.’” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).
12 Each claim must be simple, concise, and direct. Fed. R. Civ. P.
13 8(d)(1). Rule 8 can be violated when “too much” or “too little”
14 is said. Knapp v. Hogan, 738 F.3d 1106, 1109 (9th Cir. 2013).

15
16 Here, the Second Amended Complaint does not comply with Rule
17 8. Although the “factual allegations” in the Second Amended
18 Complaint against each of the six Defendants are concise and
19 clearly organized, they are extremely vague and conclusory. The
20 allegations do not explain which acts by which Defendants violated
21 which particular federal constitutional rights. For example,
22 although Plaintiff summarily claims that his due process rights
23 were violated, he does not state whether he is bringing a due
24 process claim against each of the six Defendants, or just one or
25 some of them. Nor does he explain what process he believes he was
26 due, or identify what each of the Defendants separately did to
27 violate his due process rights. The complaint fails to provide
28 Defendants with fair notice of the claims in a short, clear and

1 concise statement. See Twombly, 550 U.S. at 555. Accordingly,
2 the Second Amended Complaint is dismissed, with leave to amend.

3
4 Dismissal is appropriate based solely on Plaintiff's failure
5 to comply with Rule 8. However, to the extent that the Court is
6 able to discern claims that Plaintiff may be attempting to raise,
7 the Court reviews these claims and the relevant law below.

8
9 **B. Plaintiff's Official Capacity Claims Are Defective**

10
11 Plaintiff sues Defendants for damages in both their official
12 and individual capacities. (SAC at 3). However, Plaintiff's
13 official capacity claims are barred by the Eleventh Amendment and
14 cannot proceed.

15
16 Pursuant to the Eleventh Amendment, states are immune from
17 suits for damages under section 1983. See Howlett v. Rose, 496
18 U.S. 356, 365 (1990); Brown v. Cal. Dep't of Corr., 554 F.3d 747,
19 752 (9th Cir. 2009) ("California has not waived its Eleventh
20 Amendment immunity with respect to claims brought under § 1983 in
21 federal court."). "[A] suit against a state official in his or
22 her official capacity . . . is no different from a suit against
23 the State itself." Flint v. Dennison, 488 F.3d 816, 824-25 (9th
24 Cir. 2007) (citation omitted). Therefore, state employees sued
25 for damages in their official capacity are generally entitled to
26 immunity. Id. at 825. However, a plaintiff may seek monetary
27 damages under section 1983 from state employees in their individual
28 capacity. See Adler v. Lewis, 675 F.2d 1085, 1098 (9th Cir. 1982)

1 ("State officials must be sued in their individual capacity in an
2 action for monetary damages.").

3
4 Here, the Second Amended Complaint prays for monetary damages
5 only, a remedy Plaintiff cannot obtain from state employees in
6 their official capacity. (SAC at 8-9). Thus, to the extent that
7 Plaintiff is seeking only monetary damages in this action, the
8 official capacity claims are defective and must be dismissed.

9
10 **C. Plaintiff Fails To State An Equal Protection Claim**

11
12 The Equal Protection Clause broadly requires the government
13 to treat similarly situated people equally. Hartman v. California
14 Dep't of Corr. and Rehabilitation, 707 F.3d 1114, 1123 (9th Cir.
15 2013). To state an equal protection claim, typically a plaintiff
16 must allege that "'defendants acted with an intent or purpose to
17 discriminate against [him] based upon membership in a protected
18 class,'" such as a particular race or religion. Furnace v.
19 Sullivan, 705 F.3d 1021, 1030 (9th Cir. 2013) (quoting Barren v.
20 Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998)). "Intentional
21 discrimination means that a defendant acted at least in part
22 because of a plaintiff's protected status." Serrano v. Francis,
23 345 F.3d 1071, 1082 (9th Cir. 2003) (internal quotation marks and
24 citation omitted) (emphasis in original); see also Byrd v. Maricopa
25 Cnty. Sheriff's Dep't, 565 F.3d 1205, 1212 (9th Cir. 2009) (to
26 state an equal protection claim, plaintiff "must plead intentional
27 unlawful discrimination or allege facts that are at least
28 susceptible of an inference of discriminatory intent").

1 Where the governmental classification does not involve a
2 suspect or protected class, or impinge upon a fundamental right,
3 the classification will not “run afoul of the Equal Protection
4 Clause if there is a rational relationship between disparity of
5 treatment and some legitimate governmental purpose.” Nurre v.
6 Whitehead, 580 F.3d 1067, 1098 (9th Cir. 2009) (quoting Cent. State
7 Univ. v. Am. Ass’n of Univ. Professors, 526 U.S. 124, 127-28
8 (1999)). “Although disabled people do not constitute a suspect
9 class, the Equal Protection Clause [nonetheless] prohibits
10 irrational and invidious discrimination against them.” Dare v.
11 California, 191 F.3d 1167, 1174 (9th Cir. 1999). However, “a
12 governmental policy that purposefully treats the disabled
13 differently from the non-disabled need only be rationally related
14 to legitimate legislative goals to pass constitutional muster.”
15 Martin v. California Dep’t of Veterans Affairs, 560 F.3d 1042,
16 1049-50 (9th Cir. 2009) (internal quotation marks and citation
17 omitted).

18
19 Courts have also recognized equal protection claims brought
20 by a “class of one” where the plaintiff alleges that he or she has
21 been intentionally treated differently from others similarly
22 situated and that there is no rational basis for the difference in
23 treatment. See Village of Willowbrook v. Olech, 528 U.S. 562, 564
24 (2000). A “class-of-one” equal protection claim must generally
25 show that the difference in treatment resulted from non-
26 discretionary state action. See Engquist v. Oregon Dep’t of
27 Agriculture, 553 U.S. 591 (2008). As the Supreme Court explained,
28

1 There are some forms of state action . . . which by their
2 nature involve discretionary decisionmaking based on a
3 vast array of subjective, individualized assessments.
4 In such cases the rule that people should be "treated
5 alike, under like circumstances and conditions" is not
6 violated when one person is treated differently from
7 others, because treating like individuals differently is
8 an accepted consequence of the discretion granted. In
9 such situations, allowing a challenge based on the
10 arbitrary singling out of a particular person would
11 undermine the very discretion that such state officials
12 are entrusted to exercise.

13
14 Id. at 603 (explaining that the equal protection clause would not
15 prohibit an officer from issuing a speeding ticket to one person
16 and not others even for no discernable reason unless the decision
17 to cite was based on the speeder's membership in a protected class);
18 see also Towery v. Brewer, 672 F.3d 650, 660 (9th Cir. 2012) (the
19 "class-of-one doctrine" does not apply to "forms of state action
20 that involve discretionary decisionmaking"); Kansas Penn Gaming,
21 LLC v. Collins, 656 F.3d 1210, 1216 (10th Cir. 2011) (observing
22 that successful "class of one" equal protection claims typically
23 "have arisen from unfavorable zoning decisions, withholding of
24 permits, and selective regulatory enforcement") (internal citation
25 omitted).

26
27 Liberally construed, the Second Amended Complaint identifies
28 two bases for Plaintiff's equal protection claims: his race and

1 his disability. (Id. at 8). However, the Second Amended Complaint
2 contains absolutely no facts showing that Plaintiff was
3 discriminated against because of his race -- in fact, it does not
4 even identify Plaintiff's race. While Plaintiff does allege some
5 facts relating to his disability, it is unclear whether he is
6 contending that he was discriminated against because he is
7 disabled, and disabled prisoners as a class are treated differently
8 than able-bodied prisoners with no rational justification for the
9 difference, or that Plaintiff, as a "class of one," was
10 irrationally treated differently than other disabled or able-bodied
11 prisoners in some non-discretionary state action. If Plaintiff
12 wishes to pursue an equal protection claim, he must allege facts
13 showing his membership in an identifiable group and clearly
14 identify which acts he contends constitute discrimination, and who
15 committed them. Accordingly, the Second Amended Complaint is
16 dismissed, with leave to amend.

17
18 **D. Plaintiff Fails To State A Due Process Claim**

19
20 The Fourteenth Amendment provides that the State shall not
21 "deprive any person of life, liberty or property, without due
22 process of the law." U.S. Const. amend. XIV, § 1. To state a
23 substantive due process claim, a plaintiff must allege that a state
24 actor deprived him "of life, liberty, or property in such a way
25 that 'shocks the conscience' or 'interferes with rights implicit
26 in the concept of ordered liberty.'" Corales v. Bennett, 567 F.3d
27 554, 568 (9th Cir. 2009) (quoting United States v. Salerno, 481
28 U.S. 739, 746 (1987)); Resnick v. Hayes, 213 F.3d 443, 447 (9th

1 Cir. 2000) (same). To state a procedural due process claim, a
2 plaintiff must demonstrate that he was denied substantive due
3 process, then show that the procedures attendant upon the
4 deprivation were constitutionally insufficient. Ky. Dep't of Corr.
5 v. Thompson, 490 U.S. 454, 459-60 (1989).

6
7 Similar to the deficiencies in Plaintiff's equal protection
8 claim, it is unclear whether Plaintiff is asserting a due process
9 claim against all, or just one or some, of the Defendants; what
10 liberty or property interest Plaintiff claims to have been
11 violated; whether Plaintiff is attempting to allege a substantive
12 or procedural due process violation, or both; and what,
13 specifically, Plaintiff believes each Defendant did to violate his
14 due process rights. Accordingly, the Second Amended Complaint is
15 dismissed, with leave to amend.

16
17 **E. Plaintiff Fails To State A Deliberate Indifference Claim**

18
19 To state an Eighth Amendment claim based on a prisoner's
20 medical treatment, the prisoner must demonstrate that the defendant
21 was "deliberately indifferent" to his "serious medical needs."
22 Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006); see also West
23 v. Atkins, 487 U.S. 42, 49 (1988). To establish a "serious medical
24 need," the prisoner must demonstrate that "failure to treat a
25 prisoner's condition could result in further significant injury or
26 the 'unnecessary and wanton infliction of pain.'" Jett, 439 F.3d
27 at 1096 (citation omitted); see also Morgan v. Morgensen, 465 F.3d
28

1 1041, 1045 (9th Cir. 2006) (the existence of a serious medical need
2 is determined by an objective standard).

3
4 To establish "deliberate indifference" to such a need, the
5 prisoner must demonstrate: "(a) a purposeful act or failure to
6 respond to a prisoner's pain or possible medical need, and (b) harm
7 caused by the indifference." Id. Deliberate indifference "may
8 appear when prison officials deny, delay or intentionally interfere
9 with medical treatment, or it may be shown by the way in which
10 prison physicians provide medical care." Id. (citations
11 omitted). The defendant must have been subjectively aware of a
12 serious risk of harm and must have consciously disregarded that
13 risk. See Farmer v. Brennan, 511 U.S. 825, 845 (1994).

14
15 "[A] plaintiff's showing of nothing more than a difference
16 of medical opinion as to the need to pursue one course of treatment
17 over another [is] insufficient, as a matter of law, to establish
18 deliberate indifference.'" Wilhelm v. Rotman, 680 F.3d 1113, 1122
19 (9th Cir. 2012) (quoting Jackson v. McIntosh, 90 F.3d 330, 332 (9th
20 Cir. 1996)); see also Hamby v. Hammond, 821 F.3d 1085, 1092 (9th
21 Cir. 2016) ("[A] difference of opinion between a physician and the
22 prisoner -- or between medical professionals -- concerning what
23 medical care is appropriate does not amount to deliberate
24 indifference.") (quoting Snow v. McDaniel, 681 F.3d 978, 987 (9th
25 Cir. 2012), overruled in part on other grounds by Peralta v.
26 Dillard, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc)). Where a
27 physician defendant opts for one course of treatment over another,
28 or for no affirmative treatment at all, the plaintiff must show

1 that the option the physician chose was medically unacceptable
2 under the circumstances, and that the physician chose it in
3 conscious disregard of an excessive risk to the plaintiff's health.
4 Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004).

5
6 Although the SAC does not identify the specific Defendants
7 against whom Plaintiff may be attempting to assert a deliberate
8 indifference claim, the Court presumes that the list includes, at
9 a minimum, Marciano. Plaintiff alleges that Marciano was aware of
10 his medical history and condition, but nonetheless failed to
11 intervene when Plaintiff asked him for "medical help to get out of
12 [his] assignment" in the C facility kitchen. These spare
13 allegations fail to state a deliberate indifference claim. First,
14 it is not clear from the SAC that Plaintiff has or had a serious
15 medical condition. Plaintiff does not allege any facts showing
16 why his limp was so serious that the failure to exempt him from
17 kitchen detail would likely result in significant additional injury
18 or the unnecessary and wanton infliction of pain. Second,
19 Plaintiff does not allege facts showing that Marciano's failure to
20 exempt Plaintiff from his kitchen assignment was "medically
21 unacceptable" and was "chosen in conscious disregard of an
22 excessive risk" to Plaintiff's health. Hamby, 821 F.3d at 1092
23 (internal quotation marks and citation omitted).

24
25 Third, even though Plaintiff alleges that he suffered mental
26 anxiety from being required to work in the kitchen, this allegation
27 fails to show the "harm" necessary for a deliberate indifference
28 claim because "an inmate may not pursue an emotional distress

1 injury unless accompanied by a physical injury" that is more than
2 "de minimus." Wood v. Idaho Dep't of Corr., 391 F. Supp. 2d 852,
3 867 (D. Idaho 2005); 42 U.S.C. § 1997e(e); Oliver v. Keller, 289
4 F.3d 623, 629 (9th Cir. 2002) (pretrial detainee failed to state
5 deliberate indifference claim for "mental and emotional injury"
6 where the only physical injuries alleged were a canker sore and
7 back and leg pain). Plaintiff does not sufficiently describe any
8 plausible physical pain he may have endured as a consequence of
9 his job. Indeed, Plaintiff admits that he was allowed to sit on a
10 makeshift chair while working, and that his cane was returned to
11 him at the end of every shift. Accordingly, the Second Amended
12 Complaint is dismissed, with leave to amend.

13
14 **F. Plaintiff Fails To State A Cruel And Unusual Punishment Claim**

15
16 Alternatively, it is possible that Plaintiff's Eighth
17 Amendment claim is based on the contention that his work assignment
18 as a kitchen lineman constitutes "cruel and unusual punishment"
19 because it requires him to lift heavy trays and pans and push heavy
20 carts. This ground for an Eighth Amendment claim also fails.

21
22 Infliction of suffering on prisoners that is "totally without
23 penological justification" violates the Eighth Amendment. Rhodes
24 v. Chapman, 452 U.S. 337, 346 (1981). Only "the unnecessary and
25 wanton infliction of pain . . . constitutes cruel and unusual
26 punishment forbidden by the Eighth Amendment." Whitley v. Albers,
27 475 U.S. 312, 319 (1986) (internal quotation marks and citation
28 omitted). The punishment must constitute "shocking and barbarous

1 treatment." Grummett v. Rushen, 779 F.2d 491, 494 n.1 (9th Cir.
2 1985). "To be cruel and unusual punishment, conduct that does not
3 purport to be punishment at all must involve more than ordinary
4 lack of due care for the prisoner's interests or safety." Whitley,
5 475 U.S. at 319. "It is obduracy and wantonness, not inadvertence
6 or error in good faith, that characterize the conduct prohibited
7 by the Cruel and Unusual Punishments Clause" Wilson v.
8 Seiter, 501 U.S. 294, 299 (1991) (internal quotation marks and
9 citation omitted). Accordingly, "courts considering a prisoner's
10 [cruel and unusual punishment] claim must ask: 1) if the officials
11 acted with a sufficiently culpable state of mind; and 2) if the
12 alleged wrongdoing was objectively harmful enough to establish a
13 constitutional violation." Somers v. Thurman, 109 F.3d 614, 622
14 (9th Cir. 1997) (citing Hudson v. McMillian, 503 U.S. 1, 8 (1992)).
15

16 The Second Amended Complaint simply does not provide any facts
17 about Plaintiff's work detail, or his alleged inability to perform
18 the tasks required of him, to establish that requiring him to work
19 as a kitchen lineman was "shocking and barbarous treatment" with
20 no penological justification. Additionally, as with the SAC's
21 other claims, the SAC does not identify which Defendants allegedly
22 violated Plaintiff's Eighth Amendment rights, or explain why each
23 one is individually liable for any pain Plaintiff suffered as a
24 consequence of his job. Accordingly, the Second Amended Complaint
25 is dismissed, with leave to amend.

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27 \\

28 \\

1 **G. Plaintiff Fails To State A Claim Against The Supervisory**
2 **Defendants**

3
4 To demonstrate a civil rights action against a government
5 official, a plaintiff must show either the official's direct,
6 personal participation in the harm, or some sufficiently direct
7 connection between the official's conduct and the alleged
8 constitutional violation. See Starr v. Baca, 652 F.3d 1202, 1205-
9 06 (9th Cir. 2011). A supervising officer must personally take
10 some action against the plaintiff or "set in motion a series of
11 acts by others . . . which [s]he knew or reasonably should have
12 known, would cause others to inflict the constitutional injury" on
13 the plaintiff. Larez v. City of Los Angeles, 946 F.2d 630, 646
14 (9th Cir. 1991) (internal quotations omitted). Government
15 officials may not be held liable for the unconstitutional conduct
16 of their subordinates. See Ashcroft v. Iqbal, 556 U.S. 662, 676
17 (2009). Rather, a supervisor may be held accountable only "for
18 his own culpable action or inaction in the training, supervision,
19 or control of his subordinates, for his acquiescence in the
20 constitutional deprivations of which the complaint is made, or for
21 conduct that showed a reckless or callous indifference to the
22 rights of others." Preschooler II v. Clark County Bd. of Trustees,
23 479 F.3d 1175, 1183 (9th Cir. 2007).

24
25 The SAC fails to state a supervisory claim against Perez,
26 Prieta or Moreno. Plaintiff merely alleges that Perez and Prieta,
27 who supervised Viengochia and Verdusco, "saw" Plaintiff with his
28 vest and cane and "inquired" about him. (Id. at 5). Making an

1 inquiry about a prisoner does not, by itself, show a violation of
2 the prisoner's constitutional rights. Plaintiff appears to imply
3 that because Perez and Prieta supervise Viengochia and Verduco,
4 they should be responsible for their subordinates' actions.
5 However, liability under section 1983 arises only for acts
6 committed by each Defendant personally. A supervisor is not liable
7 merely because a subordinate violated a plaintiff's constitutional
8 rights.

9
10 Plaintiff further alleges that Moreno, who was "in charge of
11 the safety and security of the 'C' facility kitchen" where
12 Plaintiff worked, "condoned" Viengochia's and Verduco's actions
13 toward Plaintiff because he knew what they were doing but still
14 allowed them to "do what they pleased." (Id. at 6). However, the
15 only facts alleged against Viengochia and Verduco are that they
16 confiscated Plaintiff's cane, which they returned to him at the
17 end of his shift. Even if Moreno's responsibilities for the "safety
18 and security" of the C facility kitchen authorized him to intervene
19 in individual work assignments, which Plaintiff does not allege
20 and which seems questionable, Plaintiff has not explained why
21 confiscating his cane presented a security threat. Accordingly,
22 the Second Amended Complaint is dismissed, with leave to amend.

23
24 **IV.**

25 **CONCLUSION**

26
27 For the reasons stated above, the Second Amended Complaint is
28 dismissed with leave to amend. If Plaintiff still wishes to pursue

1 this action, he is granted **thirty (30) days** from the date of this
2 Memorandum and Order within which to file a Third Amended
3 Complaint. In any amended complaint, Plaintiff shall **cure the**
4 **defects** described above. **Plaintiff shall not include new**
5 **defendants or new allegations that are not reasonably related to**
6 **the claims asserted in the SAC.** The Third Amended Complaint, if
7 any, shall be complete in itself and shall not refer in any manner
8 to the original complaint, the First Amended Complaint, or the
9 Second Amended Complaint. Its caption page shall bear the
10 designation "Third Amended Complaint" and the case number assigned
11 to this action. **If Plaintiff chooses to pursue this action, he**
12 **shall not file the Third Amended Complaint as a "motion," but shall**
13 **simply caption the document as the "Third Amended Complaint."**

14
15 The Third Amended Complaint should be short and concise. In
16 any amended complaint, Plaintiff should confine his allegations to
17 those operative facts supporting each of his claims. Plaintiff is
18 advised that pursuant to Federal Rule of Civil Procedure 8(a), all
19 that is required is a "short and plain statement of the claim
20 showing that the pleader is entitled to relief." **Plaintiff is**
21 **strongly encouraged to utilize the standard civil rights complaint**
22 **form when filing any amended complaint, a copy of which is attached.**
23 In any amended complaint, Plaintiff should identify the nature of
24 each separate legal claim and the Defendant (by name) against whom
25 the claim is asserted, and make clear what specific factual
26 allegations support each separate claim. Plaintiff is strongly
27 encouraged to keep his statements concise and to omit irrelevant
28

