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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
DISMISSING COMPLAINT WITH
LEAVE TO AMEND**

I.

INTRODUCTION

On February 1, 2017, Gregory Gene Lewis ("Plaintiff"), a California state prisoner proceeding pro se, filed a civil complaint pursuant to the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"); the Civil Rights Act, 42 U.S.C. § 1983; and the California Government Claims Act, Cal. Gov't Code §§ 905 et seq. ("CGCA").¹ (Dkt. No. 1).

¹ The short title "Government Claims Act" has been used interchangeably in California cases with the title "Tort Claims Act" to refer to the statutory scheme for presenting claims for money damages against state and local governmental entities.

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 thereof, before service of process if the complaint (1) is
6 frivolous or malicious, (2) fails to state a claim upon which
7 relief can be granted, or (3) seeks monetary relief from a defendant
8 who is immune from such relief. 28 U.S.C. § 1915A(b)(1-2); see
9 also Lopez v. Smith, 203 F.3d 1122, 1126-27 & n.7 (9th Cir. 2000)
10 (en banc). For the reasons stated below, the Complaint is DISMISSED
11 with leave to amend.²

12
13 **II.**

14 **ALLEGATIONS OF THE COMPLAINT**

15
16 Plaintiff sues three Chuckawalla State Prison ("CSP")
17 employees: (1) Orry Marciano, a "physician assistant/primary care
18 physician" ("Marciano"); (2) Ms. Beatres, a nurse ("Beatres"); and
19 (3) Kimberly Seibel, the warden ("Seibel"). All Defendants are
20 sued in both their individual and official capacities. (Complaint
21 ("Compl.") at 3).

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24 _____
25 However, because the California Supreme Court has expressed a
26 preference for the title "Government Claims Act," the Court will
adopt that usage. See City of Stockton v. Superior Court, 42 Cal.
4th 730, 741-42 (2007).

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

1 Plaintiff alleges that he has been disabled for the past
2 twelve years following a gunshot wound to the leg. (Id. at 6).
3 As a result of his injury, Plaintiff walks with a limp and needs
4 to use a cane. (Id.). However, prison staff took Plaintiff's cane
5 away from him and nurse Beatres "denied [Plaintiff's] disability"
6 by refusing to return it. (Id. at 5).

7
8 In 2016, CSP staff assigned Plaintiff to work as a kitchen
9 "lineback," which requires him to carry heavy pans and trays and
10 push heavy carts. (Id.). In light of his disability and age (he
11 is sixty-three years old), this job is difficult for Plaintiff to
12 perform. Clinic staff, correctional officers, and the cook
13 supervisory staff "ignored the operational procedures" in assigning
14 him this job. (Id.).

15
16 At some unidentified time, Marciano, Plaintiff's primary
17 health care provider, increased Plaintiff's dosage of Simvastatin
18 from 20 to 40 milligrams, which Plaintiff believes caused him to
19 suffer a mild stroke and heart failure.³ (Id. at 5-6). Plaintiff
20 collapsed and was taken to the hospital to receive treatment for
21 the stroke. (Id. at 6). Following this incident, Plaintiff has
22 been physically and mentally traumatized. His body has
23 deteriorated because his medical needs have been "denied and
24 delayed." (Id.).

25 ³ According to an attachment to the Complaint, Simvastatin "reduces
26 levels of 'bad' cholesterol . . . and triglycerides in the blood,
27 while increasing levels of 'good' cholesterol. . . . Simvastatin
28 is also used to lower the risk of stroke, heart attack, and other
heart complications" (Compl. at 18) (continuous
pagination).

1 The only allegation against Warden Seibel is that "she is not
2 doing her responsibility to instruct or educate her staff to
3 acknowledge inmates that are under the [ADA]." (Id. at 5).

4
5 Plaintiff claims that Defendants' actions constituted
6 "discrimination of [his] disability" under the ADA, citing
7 Armstrong v. Davis.⁴ (Id. at 5). Plaintiff also contends that
8 Defendants violated his constitutional rights by subjecting him to
9 "cruel and unusual punishment" and by "delaying" his "medical needs
10 [sic]." (Id. at 5-6). In addition, Plaintiff asserts that Marciano
11 is liable for "negligence [in] prescribing medicine that cause[d]
12 mild stroke [sic] and heart failure" (Id.). Finally,
13 Plaintiff alleges, without further explanation or citation, that
14 Defendants violated Title 15 of the California Code of Regulations.
15 (Id.). The Complaint does not specifically request monetary or
16 injunctive relief. (See id. at 5-6).

17
18 **III.**

19 **DISCUSSION**

20
21 Under 28 U.S.C. § 1915A(b), the Court must dismiss the
22 Complaint due to pleading defects. However, the Court must grant
23 a pro se litigant leave to amend his defective complaint unless

24 ⁴ Plaintiff does not provide a case citation, but is presumably
25 referring to Armstrong v. Davis, 275 F.3d 849, 879 (9th Cir. 2001),
26 abrogated on other grounds by Johnson v. California, 543 U.S. 499,
27 504-05 (2005); see also Nordstrom v. Ryan, 762 F.3d 903, 911 (9th
28 Cir. 2014) (recognizing partial abrogation). Armstrong affirmed,
in part, an injunction requiring the California Department of
Corrections to provide ADA training to its staff and to track
inmates with disabilities. Armstrong, 275 F.3d at 875-76.

1 "it is absolutely clear that the deficiencies of the complaint
2 could not be cured by amendment." Akhtar v. Mesa, 698 F.3d 1202,
3 1212 (9th Cir. 2012) (citation and internal quotation marks
4 omitted). For the reasons discussed below, it is not "absolutely
5 clear" that at least some of the defects of Plaintiff's Complaint
6 could not be cured by amendment. The Complaint is therefore
7 DISMISSED with leave to amend.

8
9 **A. The Complaint Violates Federal Rule of Civil Procedure 8**

10
11 Federal Rule of Civil Procedure 8(a)(2) requires that a
12 complaint contain "'a short and plain statement of the claim
13 showing that the pleader is entitled to relief,' in order to 'give
14 the defendant fair notice of what the . . . claim is and the
15 grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly,
16 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)). Rule 8
17 may be violated when a pleading "says too little," and "when a
18 pleading says too much." Knapp v. Hogan, 738 F.3d 1106, 1108 (9th
19 Cir. 2013) (emphasis in original).

20
21 Here, the Complaint violates Rule 8 because Plaintiff does
22 not clearly identify the nature of each of the legal claims he is
23 bringing, the specific facts giving rise to each claim, or the
24 specific Defendant or Defendants against whom each claim is
25 brought. Without more specific information, Defendants cannot
26 respond to the Complaint. See Cafasso, U.S. ex rel. v. Gen.
27 Dynamics C4 Sys., Inc., 637 F.3d 1047, 1058 (9th Cir. 2011) (a
28 complaint violates Rule 8 if a defendant would have difficulty

1 understanding and responding to the complaint). Moreover, because
2 Plaintiff is not required to provide evidence supporting his claims
3 at this stage of the litigation, the exhibits attached to the
4 Complaint appear unnecessary. Additionally, the Complaint must
5 state what relief Plaintiff is seeking by this action.
6 Accordingly, the Complaint is dismissed, with leave to amend.

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

9
10 Plaintiff fails to state a claim under the ADA, which broadly
11 prohibits "public entities" from discriminating against disabled
12 individuals in the provision of public services. Fortyune v. City
13 of Lomita, 766 F.3d 1098, 1101 (9th Cir. 2014); see also Castle v.
14 Eurofresh, Inc., 731 F.3d 901, 910 (9th Cir. 2013) ("Title II [of
15 the ADA] applies to the operation of state prisons."). To achieve
16 compliance with the Act, "Title II authorizes suits by private
17 citizens for money damages against public entities that violate
18 § 12132." United States v. Georgia, 546 U.S. 151, 154 (2006).

19
20 To state a claim under § 12132, a plaintiff must allege that:

21
22 "(1) he is an individual with a disability; (2) he is
23 otherwise qualified to participate in or receive the
24 benefit of some public entity's services, programs, or
25 activities; (3) he was either excluded from
26 participation in or denied the benefits of the public
27 entity's services, programs, or activities, or was
28 otherwise discriminated against by the public entity;

1 and (4) such exclusion, denial of benefits, or
2 discrimination was by reason of [his] disability.”
3

4 Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1021 (9th Cir. 2010)
5 (quoting McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir.
6 2004)). To demonstrate a disability under the ADA, a plaintiff
7 must show that he has been diagnosed with a condition that
8 substantially limits his life activities. Bragdon v. Abbott, 524
9 U.S. 624, 631 (1998); see also Weaving v. City of Hillsboro, 763
10 F.3d 1106, 1111 (9th Cir. 2014) (definition of disability under
11 the ADA “shall be construed in favor of broad coverage”) (quoting
12 42 U.S.C. § 12102(4)(A)).
13

14 “The ADA prohibits discrimination because of disability, not
15 inadequate treatment for disability.” Simmons, 609 F.3d at 1022
16 (emphasis added). Insufficient medical care does not state a claim
17 under the ADA. Id.; see also Bryant v. Madigan, 84 F.3d 246, 249
18 (7th Cir. 1996) (“[T]he Act would not be violated by a prison’s
19 simply failing to attend to the medical needs of its disabled
20 prisoners . . . The ADA does not create a remedy for medical
21 malpractice.”); Elbert v. N.Y. State Dept. of Corr. Servs., 751 F.
22 Supp. 2d 590, 595 (S.D. N.Y. 2010) (“Courts routinely dismiss ADA
23 suits by disabled inmates that allege inadequate medical treatment,
24 but do not allege that the inmate was treated differently because
25 of his or her disability.”) (citing cases); Carrion v. Wilkinson,
26 309 F. Supp. 2d 1007, 1016 (N.D. Ohio 2004) (complaint alleging
27 that prison failed to provide inmate with diabetic diet did not
28 state ADA claim in the absence of allegations that prison officials

1 denied the inmate "the benefits of any services, programs, or
2 activities provided for other non-disabled inmates, or that they
3 subjected him to discrimination because of his diabetes").

4
5 Plaintiff's vague and conclusory accusations of
6 "discrimination" do not state a claim under the ADA. Plaintiff
7 states that Marciano "discriminat[ed]" against "his disability" by
8 "prescribing [the] wrong medicine," thereby causing him to suffer
9 a mild stroke. (Compl. at 5). This is a claim for inadequate
10 medical care, not discrimination, and does not identify the "public
11 services" to which Plaintiff was denied access because of his
12 disability.

13
14 Plaintiff further claims that Beatres "denied [his]
15 disability" by failing to "accomodat[e] [his] request" for the
16 return of his cane. (Id.). The "denial of mobility-assistance
17 devices to persons unable to physically function without them" may
18 violate Title II where the deprivations force disabled prisoners
19 "into the vulnerable position of being dependent on other inmates
20 to enable them to obtain basic services, such as meals, mail,
21 showers, and toilets." Armstrong v. Brown, 732 F.3d 955, 960 (9th
22 Cir. 2013). Here, however, Plaintiff does not allege any facts
23 showing that the denial of a cane forced him to rely on the
24 assistance of other inmates to get to food, showers, toilets, or
25 other prison services. Indeed, the allegations that Plaintiff
26 works in the kitchen strongly suggest that he is not dependent on
27 a cane to move around the prison.

1 Finally, Plaintiff's summary claim that Seibel failed to train
2 her staff to "acknowledge" prisoners protected under the ADA
3 similarly does not state an ADA claim. "The Ninth Circuit has not
4 set out a standard for failure-to-train claims under the ADA."
5 Green v. Tri-Cty. Metro. Transp. Dist. of Oregon, 909 F. Supp. 2d
6 1211, 1220 (D. Or. 2012). Even assuming, without deciding, that
7 failure to train claims are cognizable under the ADA, Plaintiff
8 has not shown how Seibel's alleged failure to train resulted in
9 discrimination depriving him of the ability to participate in a
10 program or service offered to non-disabled prisoners. Accordingly,
11 Plaintiff's ADA claims are dismissed, with leave to amend.

12
13 **C. Plaintiff Fails To State A Cruel And Unusual Punishment Claim**

14
15 Plaintiff broadly claims that he was subjected to "cruel and
16 unusual punishment" causing damage to his body in violation of his
17 constitutional rights. (Compl. at 6). It is not clear exactly
18 which acts form the basis of Plaintiff's constitutional claim,
19 which Defendant or Defendants committed them, or what specific harm
20 they caused.

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).

3
4 It is possible that Plaintiff may believe that his work
5 assignment as a kitchen lineman constitutes “cruel and unusual
6 punishment” because it requires him to lift heavy trays and pans
7 and push heavy carts. However, the Complaint simply does not
8 provide any facts about this work detail, or Plaintiff’s alleged
9 inability to perform the tasks required of him, that would
10 establish “shocking and barbarous treatment” without any
11 penological justification. Additionally, the Complaint does not
12 explain how any of the named Defendants might be liable for any
13 pain Plaintiff suffered as a consequence of his job. Accordingly,
14 Plaintiff’s “cruel and unusual” punishment claims are dismissed,
15 with leave to amend.

16
17 **D. Plaintiff Fails To Allege A Deliberate Indifference Claim**

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

1 To establish "deliberate indifference" to a serious medical
2 need, a plaintiff must demonstrate: "(a) a purposeful act or
3 failure to respond to a prisoner's pain or possible medical need,
4 and (b) harm caused by the indifference." (Id.). 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 (citations omitted). The defendant must have been subjectively
9 aware of a serious risk of harm to Plaintiff and must have
10 consciously disregarded that risk. See Farmer v. Brennan, 511 U.S.
11 825, 828 (1994).

12
13 The Complaint fails to state a deliberate indifference claim.
14 First, the Complaint's vague language fails to establish that
15 Plaintiff had a serious medical need. With respect to Marciano,
16 while Plaintiff may have presented with high cholesterol, a not
17 uncommon condition which Marciano attempted to address with
18 Simvastatin, Plaintiff does not allege any facts showing that he
19 had symptoms of any other serious medical condition requiring
20 immediate attention. With respect to Beatres, Plaintiff does not
21 allege any facts showing why his limp from a twelve-year old injury
22 was so serious that the failure to treat it would likely result in
23 significant additional injury or the unnecessary and wanton
24 infliction of pain.

25
26 Second, the Complaint does not adequately allege that Marciano
27 or Beatres were subjectively aware of Plaintiff's serious medical
28 need and refused to give him medical attention, putting him at risk

1 of injury. Marciano attempted to treat Plaintiff's high
2 cholesterol and risk of stroke with Simvastatin, and when Plaintiff
3 collapsed in the kitchen due to a "mild stroke" and heart failure,
4 he was immediately sent by ambulance to the hospital. Similarly,
5 there are no facts showing that Plaintiff's limp was so serious
6 that Beatres must have known it constituted a serious medical
7 condition requiring immediate attention. Indeed, although
8 Plaintiff claims that Beatres did not return his cane, he does not
9 explain how Beatres even knew that he had a limp.

10
11 Third, the Complaint does not show that Plaintiff suffered
12 any harm from Defendants' alleged acts or failures to act.
13 Plaintiff's claims that the increased dosage of Simvastatin that
14 Marciano prescribed "caused" his stroke and heart failure are
15 contradicted by the exhibits Plaintiff attached to the Complaint
16 that explain that Simvastatin is used to prevent strokes and heart
17 failure. (Compl. at 18). Plaintiff alleges that Beatres did not
18 give him a cane, but does not allege any specific harm that he
19 suffered as a result. Accordingly, to the extent that Plaintiff
20 is attempting to assert deliberate indifference claims, the claims
21 must be dismissed, with leave to amend.

22
23 **E. Plaintiff Fails To Allege Personal Participation By Warden**
24 **Seibel In The Alleged Civil Rights Violations**

25
26 To demonstrate a civil rights violation, a plaintiff must show
27 either direct, personal participation, or some sufficient causal
28 connection between the official's conduct and the alleged

1 constitutional violation. See Starr v. Baca, 652 F.3d 1202, 1205-
2 06 (9th Cir. 2011).

3
4 Plaintiff's allegations against Warden Seibel are conclusory
5 and vague. Plaintiff merely states that Warden Seibel did not
6 fulfill her responsibility to "instruct[] and educat[e]" CSP staff
7 about the ADA. (Compl. at 3). This allegation does not identify
8 any constitutional right that was violated by Seibel's actions,
9 much less show how Seibel personally and directly participated in
10 the violation. Plaintiff does not allege any facts establishing a
11 connection between Seibel's purported failure to train and the
12 actions taken by Marciano and Beatres. Furthermore, the Ninth
13 Circuit has ruled that due to the comprehensive remedial scheme
14 created by the ADA, a plaintiff cannot bring an action under 42
15 U.S.C. § 1983 against a state official in his individual capacity
16 to vindicate rights created by Title II of the ADA. Vinson v.
17 Thomas, 288 F.3d 1145, 1156 (9th Cir. 2002). Accordingly,
18 Plaintiff's claims against Seibel are dismissed, with leave to
19 amend. Plaintiff is expressly cautioned that he must not allege
20 claims without a legal and factual basis.

21
22 **F. Plaintiff Fails To State A Claim For Violation Of Prison**
23 **Protocols And Regulations**

24
25 Plaintiff appears to claim that Defendants violated his due
26 process rights when they failed to comply with certain unidentified
27 state prison policies, procedures, rules, or regulations. (Compl.
28 at 6). However, the mere violation of state prison regulations is

1 not actionable under § 1983. See Sandin v. Conner, 515 U.S. 472,
2 484 (1995). To state a claim under § 1983, "a plaintiff must
3 allege the violation of a right secured by the Constitution . . .
4 committed by a person acting under color of state law." West v.
5 Atkins, 487 U.S. 42, 48 (1988). Plaintiff fails to show how
6 Defendants violated a right secured under the Constitution simply
7 by violating administrative "operational procedures" or
8 regulations. (Compl. at 6). Accordingly, the Complaint must be
9 dismissed, with leave to amend.

10
11 **G. Plaintiff Fails To State A Claim For Negligence**

12
13 Plaintiff may be attempting to bring a state law tort claim
14 for medical negligence against Marciano for changing his
15 Simvastatin prescription. (See Compl. at 6). Negligence is a
16 state law cause of action in tort. However, the Complaint does
17 not satisfy the procedural requirements for alleging state law tort
18 claims against governmental actors.

19
20 Under the California Government Claims Act, a plaintiff may
21 not bring an action for damages against a public employee or entity
22 unless he first presents a written claim to the governmental entity
23 within six months of the incident. See Mabe v. San Bernadino
24 Cnty., Dept. of Public Social Servs., 237 F.3d 1101, 1111 (9th Cir.
25 2001) (CGCA requires the "timely presentation of a written claim
26 and the rejection of the claim in whole or in part" before a
27 plaintiff can file suit); see also Cal. Gov't Code § 945.4 (no suit
28 for money damages may be brought against a public entity until a

1 written claim is presented to the public entity, and is acted upon
2 or rejected by the board). To the extent that Plaintiff is
3 asserting a state law negligence claim, the Complaint must allege
4 that Plaintiff has complied with the CGCA's claims presentation
5 requirement, or explain why compliance should be excused.⁵ Mangold
6 v. Cal. Pub. Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995).
7 Plaintiff does not allege compliance with the claims presentation
8 requirement of the CGCA. Accordingly, the Complaint is dismissed,
9 with leave to amend.

10
11 **H. It Is Unclear Whether Plaintiff Has Exhausted His**
12 **Administrative Remedies**

13
14 Plaintiff affirmatively states in the Complaint that he did
15 not file a grievance relating to his current Complaint. (Compl.
16 at 2). Plaintiff explains that he "was not aware on [sic] how they
17 abused [his] rights until finally [he] discovered that they
18 violated [his] constitutional right [sic] by discriminating [his]
19 disability (ADA) [sic]." (Id.). However, Plaintiff also states
20 that the grievance procedure is "completed." (Id.).

21 \\

22 \\

23 _____
24 ⁵ The CGCA's claim presentation requirement is separate from, and
25 is not satisfied by, internal prison grievance processes. See
26 Hendon v. Ramsey, 528 F. Supp. 2d 1058, 1069-70 (S.D. Cal. 2007)
27 ("Although Plaintiff has demonstrated successfully that he utilized
28 the prison grievance process to exhaust his federal claims by
filing an inmate appeal, and has attached documentation in the form
of his CDC 602 form and administrative responses, these documents
do not satisfy the CTCA [California Tort Claims Act] with respect
to his state law negligence claims.").

1 The Prison Litigation Reform Act of 1995 (the "PLRA"), 42
2 U.S.C. § 1997e(a), requires a prisoner to exhaust all available
3 administrative remedies before suing over prison conditions in
4 federal court. Booth v. Churner, 532 U.S. 731, 733-34 (2001); see
5 also 42 U.S.C. § 1997e(a) ("No action shall be brought . . . until
6 such administrative remedies as are available are exhausted.").
7 "[F]ederal courts may not consider a prisoner's civil rights claim
8 when a remedy was not sought first in an available administrative
9 grievance procedure." Panaro v. City of North Las Vegas, 432 F.3d
10 949, 954 (9th Cir. 2005). The PLRA's exhaustion requirement also
11 applies to ADA claims brought by prisoners. O'Guinn v. Lovelock
12 Corr. Ctr., 502 F.3d 1056, 1061 (9th Cir. 2007) ("[N]othing in the
13 ADA . . . carves out an exception to the PLRA exhaustion
14 requirement."). A prisoner must pursue a remedy through all levels
15 of the prison's grievance process "as long as some action can be
16 ordered in response to the complaint," Brown v. Valoff, 422 F.3d
17 926, 934 (9th Cir. 2005), regardless of the ultimate relief offered
18 through such procedures. Booth, 532 U.S. at 741.

19
20 While exhaustion is normally a precondition to suit, the PLRA
21 does not require exhaustion "when circumstances render
22 administrative remedies 'effectively unavailable.'" Sapp v.
23 Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010). Courts in the Ninth
24 Circuit require "a good-faith effort on the part of inmates to
25 exhaust a prison's administrative remedies as a prerequisite to
26 finding remedies effectively unavailable." Albino v. Baca, 697
27 F.3d 1023, 1035 (9th Cir. 2012); see also Sapp, 623 F.3d at 823-24
28 (to fall within an exception to exhaustion requirement, "a prisoner

1 must show that he attempted to exhaust his administrative remedies
2 but was thwarted").

3
4 "[T]he PLRA does not require that a prisoner's federal court
5 complaint affirmatively plead exhaustion." Nunez v. Duncan, 591
6 F.3d 1217, 1223-24 (9th Cir. 2010) (citing Jones v. Bock, 549 U.S.
7 199, 212-17 (2007)). Generally, failure to exhaust is an
8 affirmative defense that requires the defendant, following service
9 of the complaint, to prove that a plaintiff failed to exhaust his
10 administrative remedies by showing that "administrative remedies
11 were available and unused." Albino, 697 F.3d at 1035. However,
12 "[a] prisoner's concession to nonexhaustion is a valid ground for
13 dismissal, so long as no exception to exhaustion applies." Wyatt
14 v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003). As a general
15 matter, a prisoner-plaintiff's "personal lack of knowledge of the
16 law is insufficient to excuse" a failure to exhaust. Castro v.
17 Unnamed Defendants, 2017 WL 1106024, at *7 (E.D. Cal. Mar. 23,
18 2017); see also Napier v. Laurel Cnty., Ky., 636 F.3d 218, 222 n.2
19 (6th Cir. 2011) ("A plaintiff's failure to exhaust [under the PLRA]
20 cannot be excused by his ignorance of the law or the grievance
21 policy.").

22
23 Plaintiff is cautioned that if he failed to present any of
24 the instant claims to the prison through the administrative
25 grievance process before filing this lawsuit, Defendants may raise
26 the failure to exhaust as an affirmative defense and may seek
27 dismissal of any unexhausted claims.

1 IV.

2 CONCLUSION

3
4 For the reasons stated above, the Complaint is dismissed with
5 leave to amend. If Plaintiff still wishes to pursue this action,
6 he is granted **thirty (30) days** from the date of this Memorandum
7 and Order within which to file a First Amended Complaint. In any
8 amended complaint, the Plaintiff shall cure the defects described
9 above. **Plaintiff shall not include new defendants or new**
10 **allegations that are not reasonably related to the claims asserted**
11 **in the original complaint.** The First Amended Complaint, if any,
12 shall be complete in itself and shall bear both the designation
13 "First Amended Complaint" and the case number assigned to this
14 action. It shall not refer in any manner to any previously filed
15 complaint in this matter.

16
17 In any amended complaint, Plaintiff should confine his
18 allegations to those operative facts supporting each of his claims.
19 Plaintiff is advised that pursuant to Federal Rule of Civil
20 Procedure 8(a), all that is required is a "short and plain statement
21 of the claim showing that the pleader is entitled to relief."
22 **Plaintiff is strongly encouraged to utilize the standard civil**
23 **rights complaint form when filing any amended complaint, a copy of**
24 **which is attached.** In any amended complaint, Plaintiff should
25 identify the nature of each separate legal claim and make clear
26 what specific factual allegations support each of his separate
27 claims. Plaintiff is strongly encouraged to keep his statements
28 concise and to omit irrelevant details. **It is not necessary for**

1 Plaintiff to cite case law, include legal argument, or attach
2 exhibits at this stage of the litigation. Plaintiff is also advised
3 to omit any claims for which he lacks a sufficient factual basis.
4

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

16 DATED: July 7, 2017
17

18 /s/

SUZANNE H. SEGAL
19 UNITED STATES MAGISTRATE JUDGE
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NOTICE

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3 Reports and Recommendations are not appealable to the Court
4 of Appeals, but may be subject to the right of any party to file
5 objections as provided in the Local Rules Governing the Duties of
6 Magistrate Judges and review by the District Judge whose initials
7 appear in the docket number. No notice of appeal pursuant to the
8 Federal Rules of Appellate Procedure should be filed until entry
9 of the judgment of the District Court.
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