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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LIONELL THOLMER,

Plaintiff,

v.

JAMES A. YATES, et al.,

Defendants.

CASE NO. 1:06-cv-01403-LJO-GSA-PC

ORDER REQUIRING PLAINTIFF TO EITHER
FILE AMENDED COMPLAINT OR NOTIFY
COURT OF WILLINGNESS TO PROCEED
ONLY ON CLAIMS FOUND TO BE
COGNIZABLE

(Doc. 11)

RESPONSE DUE WITHIN THIRTY DAYS

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I. Screening Requirement

Plaintiff Lionell Tholmer (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on October 12, 2006. On December 5, 2006, Plaintiff filed a first amended complaint.

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

“Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions,” none of which applies to section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain “a short and

1 plain statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. P. 8(a).
2 “Such a statement must simply give the defendant fair notice of what the plaintiff’s claim is and the
3 grounds upon which it rests.” Swierkiewicz, 534 U.S. at 512. However, “the liberal pleading
4 standard . . . applies only to a plaintiff’s factual allegations.” Neitze v. Williams, 490 U.S. 319, 330
5 n.9 (1989). “[A] liberal interpretation of a civil rights complaint may not supply essential elements
6 of the claim that were not initially pled.” Bruns v. Nat’l Credit Union Admin., 122 F.3d 1251, 1257
7 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982)).

8 **II. Plaintiff’s Claims**

9 **A. Summary of the Complaint**

10 **1. Medical Treatment**

11 Plaintiff is a state prisoner currently housed at Pelican Bay State Prison in California. The
12 events giving rise to the complaint occurred at Pleasant Valley State Prison (PVSP) in 2006.

13 Plaintiff was transferred to PVSP on January 11, 2006. The complaint alleges that sometime
14 after January 11, 2006, Plaintiff began to suffer from severe back ache and fever. Plaintiff alleges
15 that despite filling out multiple medical request forms and giving them to Medical Technical
16 Assistants in the prison, he did not receive medical attention until March 6, 2006. On March 6,
17 Plaintiff was examined in the PVSP infirmary and diagnosed with a disease commonly known as
18 valley fever. Plaintiff alleges that despite the medication he was prescribed to treat valley fever, he
19 continued to suffer from chills, fever, inability to keep food down, body ache, and swelling.

20 The complaint states that on August 27, 2006, after complaining to a prison physician about
21 shortness of breath, chest pain, and fever, the physician ordered that x-rays be taken of Plaintiff’s
22 chest the following day. On August 28, Plaintiff advised two unnamed prison nurses that he was
23 having breathing problems and that a physician had ordered that x-rays be taken of his chest. The
24 two nurses disregarded Plaintiff’s request. From August 28 to September 13, Plaintiff repeatedly
25 notified prison personnel that Plaintiff was having trouble breathing, among other symptoms, and
26 that he needed chest x-rays. On September 13, Plaintiff was hospitalized at the Coalinga Regional
27 Medical Center (CRMC) due to high fever and irregular heart rate. X-rays performed at CRMC
28 revealed that Plaintiff was suffering from severe pneumonia.

1 their official capacity. See Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 839 (9th Cir.
2 1997). However, the Eleventh Amendment does not bar suits seeking damages against state officials
3 in their personal capacity. See Hafer v. Melo, 502 U.S. 21, 30 (1991); Ashker v. California Dep't
4 of Corrections, 112 F.3d 392, 394 (9th Cir.), cert. denied, 118 S. Ct. 168 (1997); Pena v. Gardner,
5 976 F.2d 469, 472 (9th Cir. 1992).

6 (ii) Declaratory Relief

7 "A declaratory judgment, like other forms of equitable relief, should be granted only as a
8 matter of judicial discretion, exercised in the public interest." Eccles v. Peoples Bank of Lakewood
9 Village, 333 U.S. 426, 431 (1948). "Declaratory relief should be denied when it will neither serve
10 a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings
11 and afford relief from the uncertainty and controversy faced by the parties." United States v.
12 Washington, 759 F.2d 1353, 1357 (9th Cir. 1985). In the event that this action reaches trial and the
13 jury returns a verdict in favor of Plaintiff, that verdict will be a finding that Plaintiff's constitutional
14 rights were violated. Accordingly, a declaration that Defendants violated Plaintiff's rights is
15 unnecessary.

16 (iii) Injunctive Relief

17 In general, injunctive relief is "to be used sparingly, and only in a clear and plain case." See
18 Rizzo v. Goode, 423 U.S. 362, 378 (1976) (internal quotation omitted). When a government agency
19 is involved, the government should be granted the "widest latitude in the dispatch of its own internal
20 affairs;" when a state agency is involved, these considerations are strengthened because of federalism
21 concerns. Gomez v. Vernon, 255 F.3d 1118, 1128 (9th Cir. 2001) (citing O'Shea v. Littleton, 414
22 U.S. 488, 499 (1974)). Under the Prison Litigation Reform Act (PLRA), the Court must find that
23 the prospective relief is "narrowly drawn, extends no further than necessary to correct the violation
24 of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal
25 right," before granting injunctive relief. Id. at 1129.

26 Plaintiff asks for an injunction ordering Defendants to 1) cease and desist obstructing
27 Plaintiff's right to appeal or redress of wrongs, 2) carry out, without delay, follow up x-rays of
28 Plaintiff's lungs and evaluate and treat Plaintiff's pneumonia, and 3) examine Plaintiff to determine

1 whether Plaintiff's chronic illnesses expose Plaintiff to greater danger from valley fever and if so,
2 to remove Plaintiff from the vicinity of valley fever. Plaintiff's requests are moot, as Plaintiff is no
3 longer housed at PVSP and has not demonstrated a reasonable expectation of returning to PVSP. See
4 ACLU v. Lomax, 471 F.3d 1010, 1017 (9th Cir. 2006) (request for relief is moot if there is no
5 reasonable expectation that plaintiff will again be subject to same injury).

6 **B. Plaintiff's Eighth Amendment Claim**

7 "[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate
8 must show 'deliberate indifference to serious medical needs.'" Jett v. Penner, 439 F.3d 1091, 1096
9 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 295 (1976)). The two part
10 test for deliberate indifference requires the plaintiff to show (1) "'a serious medical need' by
11 demonstrating that 'failure to treat a prisoner's condition could result in further significant injury or
12 the unnecessary and wanton infliction of pain,'" and (2) "the defendant's response to the need was
13 deliberately indifferent." Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059
14 (9th Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th
15 Cir. 1997) (en banc) (internal quotations omitted)). Deliberate indifference is shown by "a
16 purposeful act or failure to respond to a prisoner's pain or possible medical need, and harm caused
17 by the indifference." Id. (citing McGuckin, 974 F.2d at 1060). Deliberate indifference may be
18 manifested "when prison officials deny, delay or intentionally interfere with medical treatment, or
19 it may be shown by the way in which prison physicians provide medical care." Id.³

20 **1. Defendant John Doe (Chief Medical Officer)**

21 The complaint names Pleasant Valley State Prison's Chief Medical Officer, John Doe, as a
22 Defendant. The complaint alleges that Defendant Doe's failure to order timely chest x-rays and
23 refusal to overturn the Plaintiff's medical appeal denial constituted deliberate indifference to
24 Plaintiff's serious medical needs. Under minimal federal notice pleading standards, the Court finds
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26 ³ Plaintiff's allegations appear to primarily address the adequacy of medical care provided to him at PVSP.
27 To the extent Plaintiff seeks to raise an Eighth Amendment challenge to the general conditions of confinement at
28 PVSP, Plaintiff fails to allege facts that indicate Defendants are responsible for the conditions of which Plaintiff
complains. For example, Plaintiff does not allege that the acts or omissions of Defendants have caused an
excessively high risk of contracting valley fever at PVSP.

1 Plaintiff's allegations are sufficient to allow him to proceed against Defendant Doe for violation of
2 the Plaintiff's Eighth Amendment right to adequate medical care. Fed. R. Civ. P. 8(a); Erickson v.
3 Pardus, 127 S.Ct. 2197, 2200 (2007); Alvarez v. Hill, 518 F.3d 1152, 1157-58 (9th Cir. 2008).

4 **2. Defendants Yates, Allison, and Mattingly**

5 The complaint names PVSP's Warden, James Yates, Correctional Officer Allison, and
6 Correctional Officer Mattingly as Defendants. The complaint alleges that Defendants Yates,
7 Mattingly, and Allison had knowledge of the Plaintiff's medical condition and that Defendants'
8 failure to overturn the denial of Plaintiff's medical appeal requesting transfer constituted deliberate
9 indifference to Plaintiff's serious medical needs. Documents denying Plaintiff's various medical
10 appeals, which are attached to the complaint as exhibits and incorporated by reference, contain the
11 signatures of Defendants Yates, Allison, and Mattingly. Under minimal federal notice pleading
12 standards, the Court finds Plaintiff's allegations are sufficient to allow him to proceed against
13 Defendants Yates, Mattingly, and Allison for violation of the Plaintiff's Eighth Amendment right
14 to adequate medical care. Fed. R. Civ. P. 8(a); Erickson, 127 S.Ct. at 2200; Alvarez, 518 F.3d at
15 1157-58.

16 **3. Defendant Hudson**

17 The complaint alleges that Defendant Hudson had knowledge of Plaintiff's condition and
18 refused to file Plaintiff's complaint for inadequate medical treatment. The complaint also alleges
19 that Defendant Hudson refused to overturn Plaintiff's medical appeal denial despite knowledge of
20 Plaintiff's condition. Under minimal federal notice pleading standards, the Court finds Plaintiff's
21 allegations are sufficient to allow him to proceed against Defendant Hudson for violation of the
22 Plaintiff's Eighth Amendment right to adequate medical care. Fed. R. Civ. P. 8(a); Erickson, 127
23 S.Ct. at 2200; Alvarez, 518 F.3d at 1157-58.

24 **4. Defendants Spralding and Maddox**

25 The complaint fails to allege facts sufficient to state a claim against Defendants Maddox and
26 Spralding for violation of Plaintiff's constitutional rights.⁴ Defendant Maddox is the director of the
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28 ⁴ Allegations against all other named Defendants pertain only to Plaintiff's Due Process claims.

1 California Department of Corrections and Rehabilitation. Supervisory personnel are generally not
2 liable under section 1983 for the actions of their employees under a theory of respondeat superior,
3 and therefore, when a named defendant holds a supervisory position, the causal link between her and
4 the claimed constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858,
5 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S.
6 941 (1979). The complaint fails to allege any acts or omissions by Defendant Maddox that deprived
7 Plaintiff of any constitutional right.

8 Defendant Spralding is a Correctional Officer at PVSP. Although the complaint alleges that
9 Defendant Spralding had knowledge of Plaintiff's condition, the complaint fails to allege that any
10 acts or omissions of Defendant Spralding led to the deprivation of Plaintiff's constitutional rights.

11 **C. Plaintiff's Due Process Claims**

12 **1. Access to Courts**

13 Inmates have a fundamental constitutional right of access to the courts. Lewis v. Casey, 518
14 U.S. 343, 346 (1996). The right is limited to direct criminal appeals, habeas petitions, and civil
15 rights actions. Id. at 354. Claims for denial of access to the courts may arise from the frustration
16 or hindrance of "a litigating opportunity yet to be gained" (forward-looking access claim) or from
17 the loss of a meritorious suit that cannot now be tried (backward-looking claim). Christopher v.
18 Harbury, 536 U.S. 403, 412-15 (2002). To prevail on a claim, a plaintiff must show that he suffered
19 an actual injury by being shut out of court. Id. at 415; Lewis, 518 U.S. at 351.

20 The complaint fails to state a claim for violation of Plaintiff's due process rights with respect
21 to Plaintiff's access to the courts.⁵ Although the complaint alleges that certain Defendants obstructed
22 Plaintiff's access to the prison's administrative process, Plaintiff fails to allege that he suffered actual
23 injury and thus the complaint fails to state a claim. Id.

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26 ⁵Plaintiff also alleges a violation of his First Amendment rights, although the complaint is not clear as to the
27 basis for such claim. To the extent Plaintiff seeks to raise a First Amendment challenge regarding his access to the
28 courts, the Fourteenth Amendment's Due Process Clause provides a more appropriate legal framework in which to
evaluate Plaintiff's claim. See Cochran v. Kansas, 316 U.S. 255, 257 (1942) (prisoner's claim regarding prison's
obstruction of appeals process and access to courts evaluated under Fourteenth Amendment standard).

1 **2. Adequacy of Pleasant Valley State Prison’s Appeals Process**

2 The Due Process Clause of the Fourteenth Amendment protects against the deprivation of
3 liberty without due process of law.⁶ Wilkinson v. Austin, 545 U.S. 209, 221 (2005). In order to
4 invoke the protection of the Due Process Clause, a plaintiff must first establish the existence of a
5 liberty interest for which the protection is sought. Id. “[A prison] grievance procedure is a
6 procedural right only, it does not confer any substantive right upon the inmates.” Buckley v. Barlow,
7 997 F.2d 494, 495 (8th Cir. 1993) (citing Azeez v. DeRobertis, 568 F. Supp. 8, 10 (N.D. Ill. 1982));
8 see also Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (no liberty interest in processing of
9 appeals because no entitlement to a specific grievance procedure). “Hence, it does not give rise to
10 a protected liberty interest requiring the procedural protections envisioned by the Fourteenth
11 Amendment.” Azeez v. DeRobertis, 568 F. Supp. at 10; Spencer v. Moore, 638 F. Supp. 315, 316
12 (E.D. Mo. 1986). Defendants’ actions in responding to Plaintiff’s administrative appeals, standing
13 alone, cannot give rise to any claims for relief under section 1983.

14 **3. Deprivation of Property**

15 A complaint alleging intentional deprivation of a prisoner’s property fails to state a claim
16 under section 1983 if the state provides an adequate post deprivation remedy. Barnett v. Centoni,
17 31 F.3d 813, 816 (9th Cir. 1994) (citing Hudson v. Palmer, 468 U.S. 517, 533 (1984)). California
18 law provides an adequate post-deprivation remedy for property deprivations caused by prison
19 officials. Barnett, 31 F.3d at 816; CAL. GOV’T CODE § 810-895 (2008). Where a government
20 official’s act causing loss of property is merely negligent, no procedure for compensation is
21 constitutionally required. Daniels v. Williams, 474 U.S. 327, 333 (1986). “The actions of prison
22 custodians in...mislaying an inmate’s property...suggest no more than a failure to measure up to the
23 conduct of a reasonable person,” and do not amount to a deprivation of property within the meaning
24 of the Fourteenth Amendment. Id. at 332.

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27 ⁶The complaint alleges violations of the Plaintiff’s Fifth Amendment rights, however, “the Fifth
28 Amendment’s due process clause applies only to the federal government.” Bingue v. Prunchak, 512 F.3d 1169, 1174
(9th Cir. 2008).

1 Plaintiff alleges that certain Defendants intentionally caused the deprivation of Plaintiff's
2 property. However, California provides adequate post deprivation remedies and thus the complaint
3 fails to state a claim under the Fourteenth Amendment. Barnett, 31 F.3d at 816. The complaint also
4 asserts that certain Defendants negligently permitted the deprivation of Plaintiff's property, however,
5 negligence is not actionable under section 1983 in the context of deprivation of property.⁷ Daniels,
6 474 U.S. at 333.

7 **III. Conclusion and Order**

8 Plaintiff's complaint states a claim under the Eighth Amendment against Defendants Yates,
9 Allison, Mattingly, Hudson, and John Doe (Chief Medical Officer) for violations of Plaintiff's right
10 to adequate medical treatment.⁸ The complaint does not state any other claims. The Court will
11 provide Plaintiff with the opportunity to file an amended complaint curing the deficiencies identified
12 by the Court in this order. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

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14 If Plaintiff does not wish to file an amended complaint and is agreeable to proceeding only
15 on the claims identified in this order as cognizable, Plaintiff may so notify the Court in writing, and
16 the Court will issue a recommendation for dismissal of the other claims and Defendants, and will
17 forward Plaintiff four summons and four USM-285 forms for completion and return. Upon receipt
18 of the forms, the Court will direct the United States Marshal to initiate service of process.

19 If Plaintiff opts to amend, his amended complaint should be brief, Fed. R. Civ. P. 8(a), but
20 must state what each named defendant did that led to the deprivation of Plaintiff's constitutional or
21 other federal rights, Hydrick v. Hunter, 500 F.3d 978, 987-88 (9th Cir. 2007). Although accepted

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23 ⁷The complaint asks the Court to exercise supplemental jurisdiction over state law tort claims, although the
24 complaint is unclear as to the precise state law claims asserted. Non-federal claims are part of the same case as
25 federal claims when they "derive from a common nucleus of operative fact and are such that a plaintiff would
26 ordinarily be expected to try them in one judicial proceeding." Finley v. United States, 490 U.S. 545, 549 (1989)
27 (quoting United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966)). Because the complaint fails to state a
28 federal claim for deprivation of property, and because any state law property-based claims are unrelated to the only
cognizable claims plead by the complaint (the Eighth Amendment claims), the Court declines to exercise
supplemental jurisdiction over the Plaintiff's state law tort claims. Supplemental jurisdiction is a doctrine of
discretion, not of right. City of Chicago v. Intern. College of Surgeons, 522 U.S. 156, 172 (1997).

⁸ Although the Court finds service on Defendant Doe to be appropriate, Plaintiff must identify Defendant
Doe before service can be effected.

1 as true, the “[f]actual allegations must be [sufficient] to raise a right to relief above the speculative
2 level” Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007) (citations omitted).
3 Plaintiff may not change the nature of this suit by adding new, unrelated claims in his amended
4 complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints). Finally,
5 Plaintiff is advised that an amended complaint supercedes the original complaint, Forsyth v.
6 Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir.
7 1987), and must be “complete in itself without reference to the prior or superceded pleading,” Local
8 Rule 15-220. Plaintiff is warned that “[a]ll causes of action alleged in an original complaint which
9 are not alleged in an amended complaint are waived.” King, 814 F.2d at 567 (citing to London v.
10 Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth, 114 F.3d at 1474.

11 Based on the foregoing, it is HEREBY ORDERED that:

- 12 1. The Clerk’s Office shall send Plaintiff a civil rights complaint form;
- 13 2. Within **thirty (30) days** from the date of service of this order, Plaintiff must either:
 - 14 a. File an amended complaint curing the deficiencies identified by the Court in
 - 15 this order, or
 - 16 b. Notify the Court in writing that he does not wish to file an amended
 - 17 complaint and wishes to proceed only against Defendants Yates, Allison,
 - 18 Mattingly, Hudson, and John Doe for deliberate indifference to Plaintiff’s
 - 19 serious medical needs; and
 - 20
- 21 3. If Plaintiff fails to comply with this order, this action will be dismissed for failure to
- 22 obey a court order.
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26 IT IS SO ORDERED.

27 **Dated: January 26, 2009**

28 /s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE