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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOSE A. VEGA,

Plaintiff,

v.

JAMES A. YATES, et al.,

Defendants.

CASE NO. 1:07-cv-01193-OWW-MJS (PC)

FINDINGS AND RECOMMENDATION
RECOMMENDING DISMISSAL OF ACTION
WITH PREJUDICE FOR FAILURE TO
STATE A CLAIM

(ECF No. 30)

OBJECTIONS DUE WITHIN THIRTY DAYS

I. PROCEDURAL HISTORY

Plaintiff Jose A. Vega (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on August 16, 2007. (ECF No. 1.) Plaintiff’s original complaint was dismissed on January 13, 2009 for failure to state a claim. (ECF No. 15.) He filed a First Amended Complaint on May 8, 2010. (ECF No. 19.) On February 10, 2010, Plaintiff was given leave to file a Second Amended Complaint (ECF No. 25); the Second Amended Complaint was filed February 24, 2010. (ECF No. 26.) The Second Amended Complaint was dismissed with leave to amend on August 27, 2010. (ECF No. 29.) Plaintiff filed a Third Amended Complaint on October 5, 2010. (ECF No. 30.) It is this Third Amended Complaint which is now before the Court.

II. SCREENING REQUIREMENTS

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

1 raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which
2 relief may be granted, or that seek monetary relief from a defendant who is immune from
3 such relief. 28 U.S.C. § 1915A(b)(1), (2). “Notwithstanding any filing fee, or any portion
4 thereof, that may have been paid, the court shall dismiss the case at any time if the court
5 determines that . . . the action or appeal . . . fails to state a claim upon which relief may be
6 granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

7 A complaint must contain “a short and plain statement of the claim showing that the
8 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
9 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
10 mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949
11 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set
12 forth “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its
13 face.’” Iqbal, 129 S.Ct. at 1949 (quoting Twombly, 550 U.S. at 555). While factual
14 allegations are accepted as true, legal conclusions are not. Iqbal, 129 S.Ct. at 1949.

15 **III. PLAINTIFF’S ALLEGATIONS**

16 Plaintiff is a state prisoner confined in Pleasant Valley State Prison (“PVSP”) where
17 the events at issue occurred. Plaintiff alleges that at about 5:50 a.m. on January 4, 2007,
18 he fell into hot oil on a grill in the prison kitchen and burned his left hand and fingers.
19 Defendant Danielson, the Supervising Cook, escorted Plaintiff into a walk-in freezer and
20 instructed him to place his hand in a bucket of mustard. Plaintiff followed these instructions
21 and remained standing in the walk-in freezer with his hand in a bucket of mustard for about
22 thirty minutes until Defendant Danielson escorted him to the medical clinic. Two days later,
23 on January 6, 2007, Plaintiff was transported to Fresno Community Hospital Burn Center
24 where he was treated and told to return in two weeks.

25 On January 8, Plaintiff informed prison staff that he was in pain and that he was
26 supposed to have a follow up appointment at the burn center. Defendant Castillo, a prison
27 doctor, gave Plaintiff pain medication but failed to set up the follow-up appointment at the
28 burn center. He also did not do any testing to determine why Plaintiff could not move his

1 hand properly. Between January 8 and January 17, Plaintiff was in pain and lost function
2 in his hand. On January 17, Plaintiff returned to the medical clinic seeking aid. He was
3 again seen by Defendant Castillo, who, again, did not test Plaintiff's hand to determine the
4 reason for the loss of functionality and informed Plaintiff that he did not see any record for
5 a follow-up appointment to the burn center.

6 Although not specified by Plaintiff, he appears to be claiming a violation of his Eighth
7 Amendment rights. Plaintiff asserts that Defendant John Doe in medical records failed to
8 schedule Plaintiff's appointment with the burn center, Defendant Danielson failed to seek
9 immediate medical treatment for Plaintiff's injuries, and Defendant Costillo failed to order
10 tests to determine a reason for the dysfunction of Plaintiff's hand and failed to find out
11 about the follow-up appointment.

12 **IV. ANALYSIS**

13 The Civil Rights Act under which this action was filed provides:

14 Every person who, under color of [state law] . . . subjects, or
15 causes to be subjected, any citizen of the United States . . . to
16 the deprivation of any rights, privileges, or immunities secured
17 by the Constitution . . . shall be liable to the party injured in an
18 action at law, suit in equity, or other proper proceeding for
19 redress.

20 42 U.S.C. § 1983. "Section 1983 . . . creates a cause of action for violations of the federal
21 Constitution and laws." Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir.
22 1997) (internal quotations omitted).

23 Plaintiff alleges violations of his Eighth Amendment right to adequate medical care.

24 "[T]o maintain an Eighth Amendment claim based on prison medical treatment, an
25 inmate must show 'deliberate indifference to serious medical needs.'" Jett v. Penner, 439
26 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)). The
27 two part test for deliberate indifference requires the plaintiff to show (1) "a serious medical
28 need' by demonstrating that 'failure to treat a prisoner's condition could result in further
significant injury or the unnecessary and wanton infliction of pain,'" and (2) "the defendant's
response to the need was deliberately indifferent." Jett, 439 F.3d at 1096 (quoting

1 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds,
2 WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc) (internal quotations
3 omitted)). Deliberate indifference is shown by “a purposeful act or failure to respond to a
4 prisoner’s pain or possible medical need, and harm caused by the indifference.” Jett, 439
5 F.3d at 1096 (citing McGuckin, 974 F.2d at 1060). In order to state a claim for violation of
6 the Eighth Amendment, a plaintiff must allege sufficient facts to support a claim that the
7 named defendants “[knew] of and disregard[ed] an excessive risk to [Plaintiff’s] health . .
8 . . .” Farmer v. Brennan, 511 U.S. 825, 837 (1994).

9 In applying this standard, the Ninth Circuit has held that before it can be said that
10 a prisoner’s civil rights have been abridged, “the indifference to his medical needs must be
11 substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this
12 cause of action.” Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980)
13 (citing Estelle, 429 U.S. at 105-06). “[A] complaint that a physician has been negligent in
14 diagnosing or treating a medical condition does not state a valid claim of medical
15 mistreatment under the Eighth Amendment. Medical malpractice does not become a
16 constitutional violation merely because the victim is a prisoner.” Estelle, 429 U.S. at 106;
17 see also Anderson v. County of Kern, 45 F.3d 1310, 1316 (9th Cir. 1995); McGuckin, 974
18 F.2d at 1050, overruled on other grounds, WMX, 104 F.3d at 1136. Even gross negligence
19 is insufficient to establish deliberate indifference to serious medical needs. See Wood v.
20 Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990).

21 Also, “a difference of opinion between a prisoner-patient and prison medical
22 authorities regarding treatment does not give rise to a § 1983 claim.” Franklin v. Oregon,
23 662 F.2d 1337, 1344 (9th Cir. 1981) (internal citation omitted). To prevail, Plaintiff “must
24 show that the course of treatment the doctors chose was medically unacceptable under
25 the circumstances . . . and . . . that they chose this course in conscious disregard of an
26 excessive risk to plaintiff’s health.” Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1986)
27 (internal citations omitted). A prisoner’s mere disagreement with diagnosis or treatment
28 does not support a claim of deliberate indifference. Sanchez v. Vild, 891 F.2d 240, 242

1 (9th Cir. 1989).

2 Plaintiff asserts that Defendants Danielson, Defendant Costillo, and John Doe
3 violated his Eighth Amendment rights by denying him adequate medical care. Plaintiff's
4 claims against each of these Defendants will be addressed in turn below.

5 **A. Defendant Danielson**

6 Plaintiff alleges that Defendant Danielson violated his constitutional rights when she
7 instructed him to place his burned hand into a tub of mustard and left him there for thirty-
8 five minutes before allowing him to seek medical treatment. Plaintiff's Third Amended
9 Complaint again fails to state that Danielson acted with deliberate indifference to Plaintiff's
10 serious medical needs. As noted in the Court's August 27, 2010 Screening Order, one
11 could certainly question the wisdom of Danielson's initial response to Plaintiff's injury and
12 the approximate thirty-five minute delay in getting him medical treatment. However, as
13 pleaded, Danielson's response did not show indifference, let alone, deliberate indifference.
14 Also, there is no suggestion that her instructions increased Plaintiff's suffering or otherwise
15 worsened his condition. Additionally, Plaintiff fails to allege that the thirty-five minute delay
16 in obtaining medical treatment for his burned hand led to further harm.

17 The Court finds that Plaintiff fails to state a claim against Defendant Danielson. The
18 Court notes that the original screening order in this case indicated that Plaintiff had stated
19 a cognizable claim against Defendant Danielson in his original complaint. (ECF No. 15,
20 p. 8.) However, instead of proceeding with that cognizable claim, Plaintiff chose to amend
21 his complaint. In his amended complaints, including the one currently before the Court,
22 Plaintiff failed to allege the facts he had pled in the original complaint with respect to
23 Defendant Danielson, despite having been advised of the option to plead such facts and
24 proceed against Defendant Danielson. The Court can only conclude that Plaintiff made
25 a knowing decision not to so proceed.

26 As Plaintiff was previously informed, each complaint is complete in itself without
27 reference to any prior pleading. As a general rule, an amended complaint supersedes the
28 original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once an amended

1 complaint is filed, the original complaint no longer serves any function in the case.
2 Therefore, in an amended complaint, as in an original complaint, each claim and the
3 involvement of each defendant must be sufficiently alleged. At the present time, the Court
4 is confined to reviewing the allegations in the Third Amended Complaint and finds that the
5 allegations contained therein fail to state a claim against Defendant Danielson.

6 **B. Defendant Costillo**

7 Plaintiff alleges that Defendant Costillo violated Plaintiff's constitutional rights by
8 failing to order tests to determine why Plaintiff's hand was not functioning correctly and by
9 not determining whether Plaintiff was supposed to have a follow-up appointment at the
10 burn center. Plaintiff does not allege that the medical treatment was medically
11 unacceptable under the circumstances.

12 Plaintiff's Third Amended Complaint fails to allege facts sufficient to show that
13 Defendant Costillo acted with deliberate indifference to Plaintiff's serious medical injury.
14 The pleadings reflect that Defendant Costillo treated Plaintiff every time he saw him and
15 prescribed pain medication. It appears that Plaintiff simply disagrees with the course of
16 treatment taken by Defendant Costillo; that is insufficient to sustain a claim for a
17 constitutional violation. For these reasons, Plaintiff has failed to state a claim upon which
18 relief maybe granted against Defendant Costillo.

19 **C. Defendant John Doe**

20 Plaintiff alleges that Defendant John Doe failed to schedule a follow-up appointment
21 at the burn center in violation of his right to receive adequate medical treatment. Plaintiff's
22 Third Amended Complaint fails to state a claim against Defendant John Doe. Plaintiff fails
23 to allege that Doe was aware of Plaintiff's serious medical need and was deliberately
24 indifferent to it. Thus, Plaintiff fails to state a claim upon which relief may be granted
25 against Defendant John Doe._____

26 **V. CONCLUSION**

27 The Court finds that Plaintiff's Complaint fails to state any Section 1983 claims upon
28 which relief may be granted against the named Defendants. Under Rule 15(a) of the

1 Federal Rules of Civil Procedure, leave to amend “shall be freely given when justice so
2 requires.” In addition, “[l]eave to amend should be granted if it appears at all possible that
3 the plaintiff can correct the defect.” Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)
4 (internal citations omitted). However, in this action Plaintiff has filed three amended
5 complaints and received substantial guidance from the Court twice. (ECF Nos. 15, 19, 26,
6 29, & 30.) Plaintiff has now filed four Complaints, at least two of which that do not allege
7 sufficient facts to state Section 1983 claim against the named Defendants. The Court finds
8 that the deficiencies outlined above are not capable of being cured by amendment, and
9 therefore recommends that further leave to amend not be granted. 28 U.S.C. §
10 1915(e)(2)(B)(ii); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

11 Accordingly, based on the foregoing, the Court HEREBY RECOMMENDS that this
12 action be dismissed in its entirety, with prejudice, for failure to state a claim upon which
13 relief may be granted.

14 These Findings and Recommendation will be submitted to the United State District
15 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).
16 Within thirty (30) days after being served with these Findings and Recommendation,
17 Plaintiff may file written objections with the Court. The document should be captioned
18 “Objections to Magistrate Judge’s Findings and Recommendation.” Plaintiff is advised that
19 failure to file objections within the specified time may waive the right to appeal the District
20 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21
22 IT IS SO ORDERED.

23 Dated: January 13, 2011

/s/ Michael J. Song
UNITED STATES MAGISTRATE JUDGE