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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ANTHONY KEEL,

Plaintiff,

v.

A. HEDGPETH, et al.,

Defendants.

CASE NO. 1:08-cv-00242-OWW-WMW PC

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

(Doc. 21)

RESPONSE DUE WITHIN 30 DAYS

Plaintiff Anthony Keel (“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 is in the custody of the California Department of Corrections and Rehabilitation. The events in Plaintiff’s complaint took place while he was incarcerated at Kern Valley State Prison. Plaintiff brings suit under section 1983 for violations of his rights under the Fifth, Eighth and Fourteenth Amendments.

I. Screening Requirement

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). “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a

1 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

2 “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited
3 exceptions,” none of which applies to section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S.
4 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain “a short and
5 plain statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. P. 8(a).
6 “Such a statement must simply give the defendant fair notice of what the plaintiff’s claim is and the
7 grounds upon which it rests.” Swierkiewicz, 534 U.S. at 512. However, “the liberal pleading
8 standard . . . applies only to a plaintiff’s factual allegations.” Neitze v. Williams, 490 U.S. 319, 330
9 n.9 (1989). “[A] liberal interpretation of a civil rights complaint may not supply essential elements
10 of the claim that were not initially pled.” Bruns v. Nat’l Credit Union Admin., 122 F.3d 1251, 1257
11 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982)).

12 **II. Background**

13 **A. Procedural Background**

14 Plaintiff’s original complaint was filed in the U.S. District Court for the Northern District
15 of California on December 3, 2007 and was transferred to this court on February 19, 2008. Plaintiff
16 subsequently filed three additional motions, (Doc. #10, #11, and #15), which this court construed
17 as a motion to file an amended complaint and granted, (Doc. #16). Plaintiff filed a first amended
18 complaint on February 2, 2009. (Doc. #18). On February 3, 2009, Plaintiff filed a motion seeking
19 to correct his complaint. (Doc. #21). The court will treat Plaintiff’s February 3 motion as the
20 operative amended complaint as it is the most recent and complete pleading.

21 **B. Factual Background**

22 On August 22, 2007, Defendant S. Wash found an incomplete 602 form, used to file inmate
23 administrative grievances, in Plaintiff’s cell. The 602 alleged that Defendant Wash discriminated
24 against Plaintiff because she allowed Hispanic inmates out to work while leaving Plaintiff in his cell.
25 Plaintiff was summoned to Defendant Wash’s office and they had a talk.

26 After the talk with Defendant Wash, Plaintiff was approached by a black inmate who asked
27 Plaintiff why he was writing up Defendant Wash. Plaintiff was then attacked from behind by other
28 inmates and lost consciousness. Plaintiff alleges that Defendant Wash instigated this attack by

1 giving the 602 form to a “Mexican Shot Caller”. (Compl. 3.) When Plaintiff regained
2 consciousness, he saw Defendant Burrows in the gun tower. Plaintiff alleges that Defendant
3 Burrows allowed the inmates who attacked Plaintiff to leave the scene of the attack without stopping
4 them. Plaintiff alleges that Defendant Burrows watched the entire attack take place and did nothing.
5 Further, Defendant Burrows directed medical staff elsewhere to cover-up the attack on Plaintiff.

6 Plaintiff was interviewed about the attack on August 23, 2007 by Defendant C. Blackstone.
7 Plaintiff asked to see a doctor and was taken to the cage area. A doctor arrived but ignored Plaintiff.

8 A week after the incident, Plaintiff appeared before a committee chaired by Defendant Chris
9 Chrono regarding a transfer to a different yard. Plaintiff requested a transfer or placement in
10 protective custody because of the incident with Defendants Wash and Burrows. However, Plaintiff
11 was placed in the D-Facility Yard where he was stabbed again by Mexican inmates.

12 **III. Discussion**

13 **A. Retaliation Claim**

14 Plaintiff alleges that Defendant S. Wash retaliated against Plaintiff for writing an inmate
15 grievance against her. In the prison context, allegations of retaliation against a prisoner’s First
16 Amendment rights to speech or to petition the government may support a section 1983 claim. Rizzo
17 v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985); see also Valandingham v. Bojorquez, 866 F.2d 1135
18 (9th Cir. 1989); Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995). “[A] viable claim of First
19 Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some
20 adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that such
21 action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not
22 reasonably advance a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th
23 Cir. 2005). An allegation of retaliation against a prisoner’s First Amendment right to file a prison
24 grievance is sufficient to support a claim under section 1983. Bruce v. Ylst, 351 F.3d 1283, 1288
25 (9th Cir. 2003).

26 Plaintiff alleges that Defendant Wash retaliated against Plaintiff’s exercise of protected
27 conduct by instigating the attack against Plaintiff by other inmates. Therefore, Plaintiff states a
28 cognizable claim for retaliation against Defendant Wash.

1 **B. Eighth Amendment Claims**

2 Plaintiff alleges that defendants violated his rights under the Eighth Amendment. The Eighth
3 Amendment prohibits the imposition of cruel and unusual punishments and “embodies ‘broad and
4 idealistic concepts of dignity, civilized standards, humanity and decency.’” Estelle v. Gamble, 429
5 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)). A prison
6 official violates the Eighth Amendment only when two requirements are met: (1) the objective
7 requirement that the deprivation is “sufficiently serious”, Farmer v. Brennan, 511 U.S. 825, 834
8 (1994) (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991), and (2) the subjective requirement that
9 the prison official has a “sufficiently culpable state of mind”, Id. (quoting Wilson, 501 U.S. at 298).
10 The objective requirement that the deprivation be “sufficiently serious” is met where the prison
11 official’s act or omission results in the denial of “the minimal civilized measure of life’s necessities”.
12 Id. (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). The subjective requirement that the
13 prison official has a “sufficiently culpable state of mind” is met where the prison official acts with
14 “deliberate indifference” to inmate health or safety. Id. (quoting Wilson, 501 U.S. at 302-303). A
15 prison official acts with deliberate indifference when he/she “knows of and disregards an excessive
16 risk to inmate health or safety”. Id. at 837. “[T]he official must both be aware of facts from which
17 the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the
18 inference.” Id.

19 **1. Threats to Safety**

20 Plaintiff alleges that Defendant Burrows violated his Eighth Amendment rights by being
21 deliberately indifferent to threats to Plaintiff’s safety. “Prison officials have a duty to take reasonable
22 steps to protect inmates from physical abuse.” Hoptowit v. Ray, 682 F.2d 1237, 1250-51 (9th Cir.
23 1982). To establish a violation of this duty, the prisoner must establish that prison officials were
24 “deliberately indifferent” to serious threats to the inmate’s safety. See Farmer v. Brennan, 511 U.S.
25 825, 834 (1994). To demonstrate that a prison official was deliberately indifferent to a serious threat
26 to the inmate’s safety, the prisoner must show that “the official [knew] of and disregard[ed] an
27 excessive risk to inmate . . . safety; the official must both be aware of facts from which the inference
28 could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the

1 inference.” Farmer, 511 U.S. at 837.

2 Plaintiff alleges that Defendant Wash exhibited deliberate indifference toward Plaintiff’s
3 safety by setting up an attack against Plaintiff by other inmates. Therefore, Plaintiff states a
4 cognizable claim against Defendant Wash.

5 Plaintiff alleges that Defendant Burrows was in the gun tower while Plaintiff was attacked
6 by other inmates. Plaintiff alleges that Defendant Burrows witnessed the attack, but did nothing to
7 protect Plaintiff and stop the attack. Therefore, Plaintiff states a cognizable claim against Defendant
8 Burrows for deliberate indifference to threats to his safety.

9 Plaintiff alleges that he raised his safety concerns to Defendant Chrono during a committee
10 meeting regarding a possible transfer. However, Defendant Chrono did not place Plaintiff in
11 protective custody and Plaintiff was attacked and stabbed after being placed in the D-Facility Yard.
12 Therefore, Plaintiff states a cognizable claim against Defendant Chrono for deliberate indifference
13 to threats to his safety.

14 **2. Medical Needs**

15 Plaintiff alleges that Defendant Blackstone and Burrows violated his Eighth Amendment
16 rights by being deliberately indifferent to his medical needs. “[D]eliberate indifference to a
17 prisoner’s serious illness or injury states a cause of action under § 1983.” Estelle v. Gamble, 429
18 U.S. 97, 105 (1976). “A ‘serious’ medical need exists if the failure to treat a prisoner’s condition
19 could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’”
20 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX
21 Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (quoting Estelle, 429 U.S. at 104). Delay of
22 medical treatment can amount to deliberate indifference. See Jett v. Penner, 439 F.3d 1091, 1096
23 (9th Cir. 2006); Clement v. Gomez, 298 F.3d 898, 905 (9th Cir. 2002); Hallett v. Morgan, 296 F.3d
24 732, 744 (9th Cir. 2002); Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc); Jackson
25 v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996); McGuckin, 974 F.2d at 1059; Hutchinson v. United
26 States, 838 F.2d 390, 394 (9th Cir. 1988).

27 Plaintiff’s claims against Defendants Blackstone and Burrows fails for two reasons. First,
28 as to Defendant Blackstone, Plaintiff alleges that he asked Defendant Blackstone to see a doctor and

1 Defendant Blackstone ordered Plaintiff to be taken to the cage area to be seen by a doctor. Plaintiff
2 was taken to the cage area and a doctor arrived, but the doctor did not examine Plaintiff. Therefore,
3 it appears that Defendant Blackstone did take steps to get Plaintiff to be seen by a doctor. Plaintiff
4 does not allege that Defendant Blackstone ordered the doctor to ignore Plaintiff, or took any other
5 action to prevent Plaintiff from being seen by the doctor. Secondly, as to both defendants, Plaintiff
6 does not allege that he suffered from a “serious” medical need and that the delay in treatment could
7 have lead to further significant injury or the “unnecessary and wanton infliction of pain”. Plaintiff
8 provides no allegations regarding the nature or extent of his injuries. Therefore, Plaintiff has failed
9 to state a cognizable claim against Defendant Blackstone and Burrows for deliberate indifference
10 to his medical needs.

11 **C. Fourteenth Amendment Claims**

12 Plaintiff alleges that appeals coordinators violated his rights under the Fourteenth
13 Amendment by denying his appeals. The Due Process Clause protects prisoners from being deprived
14 of liberty without due process of law. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). In order to
15 state a cause of action for deprivation of due process, a plaintiff must first establish the existence of
16 a liberty interest for which the protection is sought. Liberty interests may arise from the Due Process
17 Clause itself or from state law. Hewitt v. Helms, 459 U.S. 460, 466-68 (1983). Liberty interests
18 created by state law are generally limited to freedom from restraint which “imposes atypical and
19 significant hardship on the inmate in relation to the ordinary incidents of prison life.” Sandin v.
20 Conner, 515 U.S. 472, 484 (1995).

21 “[A prison] grievance procedure is a procedural right only, it does not confer any substantive
22 right upon the inmates.” Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993) (citing Azeez v.
23 DeRobertis, 568 F. Supp. 8, 10 (N.D. Ill. 1982)); see also Ramirez v. Galaza, 334 F.3d 850, 860 (9th
24 Cir. 2003) (no liberty interest in processing of appeals because no entitlement to a specific grievance
25 procedure); Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001) (existence of grievance procedure
26 confers no liberty interest on prisoner); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). “Hence,
27 it does not give rise to a protected liberty interest requiring the procedural protections envisioned by
28 the Fourteenth Amendment.” Azeez v. DeRobertis, 568 F. Supp. at 10; Spencer v. Moore, 638 F.

1 Supp. 315, 316 (E.D. Mo. 1986).

2 The actions of defendant appeals coordinators took place after the constitutional violations
3 occurred. At that point, denying Plaintiff's grievances regarding the attack by other inmates did not
4 cause or contribute to the violations. Therefore, Plaintiff fails to state any claims against Defendants
5 Gricewich, Pfeiffer, and Adams.

6 **D. Claims Against Defendant Warden Hedgpeth**

7 Plaintiff alleges that Defendant Warden Hedgpeth contributed to the violations of Plaintiff's
8 rights. Supervisory personnel are generally not liable under section 1983 for the actions of their
9 employees under a theory of respondeat superior and, therefore, when a named defendant holds a
10 supervisory position, the causal link between him and the claimed constitutional violation must be
11 specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld,
12 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979). To state a claim for relief
13 under section 1983 based on a theory of supervisory liability, plaintiff must allege some facts that
14 would support a claim that supervisory defendants either: personally participated in the alleged
15 deprivation of constitutional rights; knew of the violations and failed to act to prevent them; or
16 promulgated or "implemented a policy so deficient that the policy 'itself is a repudiation of
17 constitutional rights' and is 'the moving force of the constitutional violation.'" Hansen v. Black, 885
18 F.2d 642, 646 (9th Cir. 1989) (internal citations omitted); Taylor v. List, 880 F.2d 1040, 1045 (9th
19 Cir. 1989).

20 Plaintiff has not alleged that Defendant Hedgpeth personally participated in the alleged
21 constitutional violations, knew of the violations and failed to prevent them, or promulgated or
22 implemented a policy that itself is the moving force of the constitutional violations. Plaintiff makes
23 allegations related to a race riot in the prison but provides no allegations on how Defendant Hedgpeth
24 was personally involved. Therefore, Plaintiff has failed to allege sufficient facts to hold Defendant
25 Hedgpeth liable under § 1983 for any constitutional violations.

26 **IV. Conclusion and Order**

27 Plaintiff's complaint states cognizable claims against Defendants Wash, Burrows, and
28 Chrono for deliberate indifference toward threats to Plaintiff's safety and against Defendant Wash

1 for retaliation. Plaintiff's complaint fails to state claims against any other defendants. The Court
2 will provide Plaintiff with the opportunity to file an amended complaint curing the deficiencies
3 identified by the Court in this order. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).
4 Plaintiff may not change the nature of this suit by adding new, unrelated claims in his amended
5 complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no "buckshot" complaints).

6 If Plaintiff does not wish to file an amended complaint and is agreeable to proceeding only
7 on the claims identified in this order as cognizable, Plaintiff may so notify the Court in writing, and
8 the Court will issue a recommendation for dismissal of the other claims and defendants, and will
9 forward Plaintiff three (3) summonses and three (3) USM-285 forms for completion and return.
10 Upon receipt of the forms, the Court will direct the United States Marshal to initiate service of
11 process.

12 If Plaintiff opts to amend, his amended complaint should be brief, Fed. R. Civ. P. 8(a), but
13 must state what each named defendant did that led to the deprivation of Plaintiff's constitutional or
14 other federal rights, Hydrick v. Hunter, 500 F.3d 978, 987-88 (9th Cir. 2007). With respect to
15 exhibits, while they are permissible if incorporated by reference, Fed. R. Civ. P. 10(c), they are not
16 necessary in the federal system of notice pleading, Fed. R. Civ. P. 8(a). In other words, it is not
17 necessary at this stage to submit evidence to prove the allegations in Plaintiff's complaint because
18 at this stage Plaintiff's factual allegations will be accepted as true. Although accepted as true, the
19 "[f]actual allegations must be [sufficient] to raise a right to relief above the speculative level . . .",
20 Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007) (citations omitted), meaning Plaintiff
21 must provide enough allegations in his complaint to demonstrate why he is entitled to the relief that
22 he seeks.

23 Finally, Plaintiff is advised that an amended complaint supercedes the original complaint.
24 Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567
25 (9th Cir. 1987). The amended complaint must be "complete in itself without reference to the prior
26 or superceded pleading." Local Rule 15-220. Plaintiff is warned that "[a]ll causes of action alleged
27 in an original complaint which are not alleged in an amended complaint are waived." King, 814 F.2d
28 at 567 (citing London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth,

1 114 F.3d at 1474. In other words, even the claims that were properly stated in the original complaint
2 must be completely stated again in the amended complaint.

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

- 4 1. The Clerk’s Office shall send Plaintiff a civil rights complaint form;
- 5 2. Within **thirty (30) days** from the date of service of this order, Plaintiff must either:
 - 6 a. File an amended complaint curing the deficiencies identified by the Court in
7 this order, or
 - 8 b. Notify the Court in writing that he does not wish to file an amended
9 complaint and wishes to proceed only against Defendants Wash, Burrows,
10 and Chrono for deliberate indifference toward threats to Plaintiff’s safety and
11 against Defendant Wash for retaliation; and
- 12 3. If Plaintiff fails to comply with this order, this action will be dismissed for failure to
13 obey a court order.

14
15 IT IS SO ORDERED.

16 **Dated:** February 9, 2009

17 /s/ William M. Wunderlich
18 UNITED STATES MAGISTRATE JUDGE
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