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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY TATE,

Plaintiff,

vs.

MATTHEW CATE, et al.,

Defendants.

Case No. 1:09-cv-00770 JLT (PC)

ORDER DENYING REQUEST TO FILE A
SECOND AMENDED COMPLAINT

(Doc. 20)

_____ /

Plaintiff is a state prisoner proceeding pro se and *in forma pauperis* with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the Court is Plaintiff’s December 6, 2010, request to file a second amended complaint. (Doc. 20.)

I. Background

Plaintiff is proceeding in this action on his first amended complaint filed February 2, 2010. By order filed November 23, 2010, the Court screened the amended complaint and found that it states a cognizable inadequate medical care claim against Defendant Villasayne and a cognizable retaliation claim against Defendant O’Brien. However, as to the remaining claims and identified defendants, the Court found that Plaintiff’s allegations failed to state a cognizable claim. In addition, because Plaintiff had previously been granted leave to amend and was instructed at that time of the deficiencies in his original complaint, the Court dismissed Plaintiff’s remaining claims without further leave to amend.

1 **II. Motion for Reconsideration**

2 In his pending motion, Plaintiff requests that he be permitted to file a second amended
3 complaint to further clarify his dismissed claims. Plaintiff argues that certain facts in the amended
4 complaint were either unclear or misunderstood. In particular, Plaintiff contends that the Court
5 failed to consider the inmate grievances and appeals Plaintiff filed against Defendant O'Brien. (See
6 Doc. 20 at 1-2.)

7 Because Plaintiff effectively requests the Court to reconsider its screening order wherein the
8 Court denied Plaintiff further leave to amend, the Court construes the instant motion as one for
9 reconsideration. While the Court has the power to reconsider its own orders at any time prior to
10 entry of judgment, United States v. Smith, 389 F.3d 944, 949 (9th Cir. 2004) (citing City of Los
11 Angeles v. Santa Monica Baykeeper, 254 F.3d 882, 888-89 (9th Cir. 2001)), Federal Rule of Civil
12 Procedure 60(b)(6), which allows the Court to relieve a party from an order for any reason that
13 justifies relief, "is to be used sparingly as an equitable remedy to prevent manifest injustice and is
14 to be utilized only where extraordinary circumstances . . ." exist. Harvest v. Castro, 531 F.3d 737,
15 749 (9th Cir. 2008) (internal quotations marks and citation omitted). "[R]econsideration should not
16 be granted, absent highly unusual circumstances, unless the district court is presented with newly
17 discovered evidence, committed clear error, or if there is an intervening change in the controlling
18 law." Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009)
19 (internal quotations marks and citations omitted). It "may *not* be used to raise arguments or present
20 evidence for the first time when they could reasonably have been raised earlier in the litigation." Id.
21 (emphasis in the original).

22 In this case, Plaintiff has failed to demonstrate extraordinary circumstances warranting
23 reconsideration of the Court's screening order. As an initial matter, Plaintiff has failed to comply
24 with Local Rule 230(j), which requires a party seeking reconsideration to clearly specify what
25 grounds exist for the motion. In his motion, Plaintiff argues vaguely that the Court failed to consider
26 his inmate grievances against Defendant O'Brien. However, Plaintiff fails to specify which inmate
27 grievance he is referring to or which set of facts the Court allegedly failed to consider. For this
28 reason alone, Plaintiff's motion should be denied.

1 In any event, the Court fully considered all the inmate grievances filed by Plaintiff against
2 Defendant O'Brien. Plaintiff attached two sets of inmate grievances to his amended complaint
3 pertaining to Defendant O'Brien. The first set of inmate grievances was filed against Defendant
4 O'Brien on October 8, 2007. (See Doc. 16 at 45-59.) Plaintiff complains therein that on October
5 1, 2007, Defendant O'Brien: (1) failed to calculate his breathing measurements correctly; (2) told
6 other prison officials that Plaintiff was faking his illness, which caused an eight minute delay in
7 Plaintiff receiving medical treatment; and (3) asked Plaintiff to assume painful positions during a
8 subsequent medical examination. (Id. at 45-47.) The Court found these allegations insufficient in
9 demonstrating that Defendant O'Brien acted with deliberate indifference to Plaintiff's serious
10 medical needs. (See Doc. 19 at 7-8.) The Court explicitly explained that there were no facts
11 indicating that Defendant O'Brien intentionally miscalculated Plaintiff's breathing measurements;
12 no facts suggesting that the eight minute delay caused by Defendant O'Brien's comments led to a
13 worsening of Plaintiff's medical condition; and no facts indicating that Defendant O'Brien was
14 actually aware that Plaintiff suffered from a serious medical need. (Id.) As such, the Court found that
15 Plaintiff's allegations failed to state a cognizable inadequate medical care claim against Defendant
16 O'Brien.

17 Plaintiff's second set of inmate grievances against Defendant O'Brien was filed on March
18 7, 2008. (See Doc. 16 at 60-69.) Therein, Plaintiff accuses Defendant O'Brien of retaliating against
19 him for filing the first set of inmate grievances discussed above. (Id. at 60.) Plaintiff alleges that
20 as retaliation, Defendant O'Brien tampered with Plaintiff's medical files and hindered his ability to
21 see a doctor on one occasion. (Id. at 62.) The Court found that these allegations, when construed
22 liberally, stated a cognizable retaliation claim against Defendant O'Brien. (Doc. 19 at 10.) The
23 Court therefore authorized service of Plaintiff's amended complaint on Defendant O'Brien as to this
24 claim. (Doc. 18.)

25 Because the Court fully examined all of the allegations in the amended complaint, including
26 those contained in Plaintiff's inmate grievances and appeals filed against Defendant O'Brien,
27 Plaintiff's pending motion for reconsideration plainly lacks merit. Accordingly, the motion should
28 be denied for this reason as well.

1 **III. Conclusion**

2 For all the reasons set forth above, it is HEREBY ORDERED that Plaintiff's request to file
3 a second amended complaint, construed as a motion for reconsideration, (Doc. 20) is DENIED.

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5 IT IS SO ORDERED.

6 Dated: December 9, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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