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5 **UNITED STATES DISTRICT COURT**
67 EASTERN DISTRICT OF CALIFORNIA
89 RICHARD ERNEST ANAYA, CASE NO. 1:09-cv-01653-DLB PC
10 v. Plaintiff, ORDER DISMISSING FIRST AMENDED
11 HERRINGTON, et al., COMPLAINT WITH LEAVE TO FILE
Defendants. SECOND AMENDED COMPLAINT WITHIN
THIRTY DAYS
(Doc. 14)
RESPONSE DUE WITHIN 30 DAYS
13 /14
15 **Order Following Screening Of First Amended Complaint**16 **I. Background**17 Plaintiff Richard Ernest Anaya (“Plaintiff”) is a prisoner in the custody of the California
18 Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in
19 forma pauperis in a civil rights action pursuant to 42 U.S.C. § 1983. On September 17, 2009,
20 Plaintiff initiated this action by filing his complaint. On October 29, 2009, the Court dismissed
21 the complaint, with leave to file an amended complaint within thirty days. On November 16,
22 2009, Plaintiff filed his first amended complaint.23 The Court is required to screen complaints brought by prisoners seeking relief against a
24 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
25 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
26 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
27 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
28 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been

1 paid, the court shall dismiss the case at any time if the court determines that . . . the action or
2 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §
3 1915(e)(2)(B)(ii).

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

12 **II. Summary of Amended Complaint**

13 Plaintiff is incarcerated at Kern Valley State Prison (“KVSP”) in Delano, California,
14 where the events giving rise to this action occurred. Plaintiff names as defendants warden
15 Herrington, chief medical officer Lopez, medical doctor Chen, associate warden Keldgore, and
16 correctional counselor J. White.

17 Plaintiff alleges that he was denied inmate appeals regarding medical treatment, ADA
18 accommodations, single cell status, grab bars, and crutches by Defendant Herrington. (Pl’s First
19 Am. Compl.) Plaintiff alleges that defendant Chen, as Plaintiff’s primary physician, denied his
20 single cell status and request for follow-up care with a back specialist. (FAC 1C.) Plaintiff
21 alleges that he has a permanent accommodation chrono which states that he has an infectious
22 disease which makes him a medical risk of infection to any inmate who may be housed with him.
23 (*Id.*) Plaintiff’s exhibits submitted and incorporated by reference indicate that he suffers from a
24 prolapsed rectum and thus suffers from incontinence.

25 Plaintiff alleges that Defendants Keldgore and White took away Plaintiff’s single cell
26 status and placed him in administrative segregation for disobeying an order to accept a cell mate.
27 (*Id.*) Plaintiff alleges that he never said he would assault any inmate that was put in his cell, but
28 rather tried to explain enemy concerns and how other inmates become hostile when they find out

1 about Plaintiff's medical condition. (*Id.*) Plaintiff alleges that Defendant White assessed a rules
2 violation against Plaintiff for failing to take a cell mate, even if he should not be double celled.
3 (FAC 2D.)

4 Plaintiff alleges that Defendant Lopez as chief medical officer denied Plaintiff's appeal
5 and is not providing a knee surgery which is causing Plaintiff acute wanton pain. (*Id.*) Plaintiff
6 also alleges that Defendant Lopez is not providing follow-up care for Plaintiff's lower back. (*Id.*)
7 Plaintiff seeks money damages.

8 **III. Discussion**

9 **A. Eighth Amendment - Deliberate Indifference To A Serious Medical Need**

10 The Eighth Amendment prohibits cruel and unusual punishment. "The Constitution does
11 not mandate comfortable prisons." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quotation and
12 citation omitted). A prisoner's claim of inadequate medical care does not rise to the level of an
13 Eighth Amendment violation unless (1) "the prison official deprived the prisoner of the 'minimal
14 civilized measure of life's necessities,'" and (2) "the prison official 'acted with deliberate
15 indifference in doing so.'" *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting
16 *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (citation omitted)). The deliberate
17 indifference standard involves an objective and a subjective prong. First, the alleged deprivation
18 must be, in objective terms, "sufficiently serious . . ." *Farmer*, 511 U.S. at 834 (citing *Wilson v.*
19 *Seiter*, 501 U.S. 294, 298 (1991)). Second, the prison official must "know[] of and disregard[]
20 an excessive risk to inmate health or safety . . ." *Id.* at 837.

21 "Deliberate indifference is a high legal standard." *Toguchi*, 391 F.3d at 1060. "Under
22 this standard, the prison official must not only 'be aware of the facts from which the inference
23 could be drawn that a substantial risk of serious harm exists,' but that person 'must also draw the
24 inference.'" *Id.* at 1057 (quoting *Farmer*, 511 U.S. at 837). "'If a prison official should have
25 been aware of the risk, but was not, then the official has not violated the Eighth Amendment, no
26 matter how severe the risk.'" *Id.* (quoting *Gibson v. County of Washoe, Nevada*, 290 F.3d 1175,
27 1188 (9th Cir. 2002)).

28 Plaintiff's allegations against Defendants Keldgore and White fails to state a cognizable

1 Eighth Amendment claim. Plaintiff alleges only that Defendants denied him his single cell
2 status, and that Defendant White assessed Plaintiff a rules violation for refusing to accept a cell
3 mate. This is not sufficient to indicate that Defendants knew of and disregarded an excessive
4 risk to inmate health or safety. The risk must be sufficiently serious, and must be a risk to
5 Plaintiff's health or safety. Furthermore, Defendants must know of this risk and disregard it.
6 The Court reminds Plaintiff that he must set forth "sufficient factual matter, accepted as true, to
7 'state a claim that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550
8 U.S. at 555). Facts, not legal conclusions, are acceptable. *Id.*

9 Plaintiff's allegations against Defendant Chen fail to state a cognizable Eighth
10 Amendment claim. Plaintiff alleges that Defendant Chen denied his single cell status and request
11 for follow-up care with a back specialist. Plaintiff contends that he is an infectious inmate
12 because of his incontinence and digestive issues. Here, Plaintiff has not sufficiently alleged that
13 Defendant Chen knew of and disregarded an excessive risk to Plaintiff's health or safety.
14 *Farmer*, 511 U.S. at 837. Furthermore, a difference of opinion between the physician and
15 prisoner concerning appropriate course of treatment does not amount to deliberate indifference to
16 a serious medical need. *Toguchi*, 391 F.3d at 1058. In order to establish a difference of opinion
17 amounts to deliberate indifference, Plaintiff "must show that the course of treatment the doctors
18 chose was medically unacceptable under the circumstances" and "that the chose this course in
19 conscious disregard pf an excessive risk to [the prisoner's] health." *Jackson v. McIntosh*, 90
20 F.3d 330, 332 (9th Cir. 1996). Plaintiff does not sufficiently demonstrate that Defendant Chen's
21 treatment was medically unacceptable or chosen in conscious disregard of an excessive risk to
22 Plaintiff's health. *Id.*

23 Plaintiff's allegations against Defendant Herrington and Lopez in their roles as
24 supervisory personnel also fails to state a cognizable Eighth Amendment claim. Under § 1983,
25 there is no respondeat superior liability, and each defendant is liable only for his or her own
26 misconduct. *Iqbal*, 129 S. Ct. at 1948-49. Plaintiff's allegations that Defendants Herrington and
27 Lopez are responsible for the conduct of the individuals under their supervision, without more, is
28 insufficient to state a cognizable claim under § 1983.

1 Plaintiff's allegation that Defendant Lopez denied him a knee surgery is also insufficient
2 to state a cognizable Eighth Amendment claim. Plaintiff fails to demonstrate that Defendant
3 Lopez's conduct was medically unacceptable or chosen in conscious disregard of an excessive
4 risk to Plaintiff's health. *Jackson*, 90 F.3d at 332.

5 **B. ADA Claim**

6 Title II of the Americans with Disabilities Act (ADA) "prohibit[s] discrimination on the
7 basis of disability." *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). Title II of the
8 ADA provides that "no qualified individual with a disability shall, by reason of such disability,
9 be excluded from participation in or be denied the benefits of the services, programs, or activities
10 of a public entity, or be subject to discrimination by such entity." 42 U.S.C. § 12132. Title II of
11 the ADA applies to inmates within state prisons. *Pennsylvania Dept. of Corrections v. Yeskey*,
12 118 S. Ct. 1952, 1955 (1998).

13 "To establish a violation of Title II of the ADA, a plaintiff must show that (1) [he] is a
14 qualified individual with a disability; (2) [he] was excluded from participation in or otherwise
15 discriminated against with regard to a public entity's services, programs, or activities; and (3)
16 such exclusion or discrimination was by reason of [his] disability." *Lovell*, 303 F.3d at 1052. To
17 recover monetary damages under Title II of the ADA or the Rehabilitation Act, a plaintiff must
18 prove intentional discrimination on the part of the defendant," and the standard for intentional
19 discrimination is deliberate indifference. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th
20 Cir. 2001).

21 Plaintiff's allegations fail to state a cognizable ADA claim. Plaintiff's exhibits indicate
22 that he had an accommodation chrono which indicated that Plaintiff be single-cell status. Prison
23 officials ruling on Plaintiff's inmate appeals found that Plaintiff received a lower bunk, elevated
24 commode, grip bars, and wheelchair access. Plaintiff fails to demonstrate that he was denied
25 access to any of the prison's services, programs, or activities. Plaintiff thus fails to state an ADA
26 claim.

27 **C. Rules Violation**

28 Plaintiff contends that he was assessed a rules violation for refusing a cell mate, even

1 though he was not supposed to have one. Plaintiff contends he was placed in administrative
2 segregation (“ad seg”) for refusing a cell mate. Plaintiff fails to demonstrate that his placement
3 in ad seg violated any federal or constitutional rights. Plaintiff was provided with notice and
4 reason for his placement in ad seg, and had an opportunity to respond. *Hewitt v. Helms*, 459 U.S.
5 460, 476 (1983), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).
6 Plaintiff thus appeared to receive adequate due process for his ad seg placement. Accordingly,
7 Plaintiff fails to state a cognizable § 1983 claim regarding the rules violation.

8 **IV. Conclusion and Order**

9 Plaintiff’s complaint fails to state any claims against any defendants under § 1983. The
10 Court will provide Plaintiff with an opportunity to file a second amended complaint curing the
11 deficiencies identified by the Court in this order. *Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th
12 Cir. 1987). Plaintiff may not change the nature of this suit by adding new, unrelated claims in his
13 amended complaint. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot”
14 complaints). If Plaintiff does not wish to pursue this action, Plaintiff may file a notice with the
15 Court that he wishes to voluntarily dismiss this action pursuant to Federal Rule of Civil
16 Procedure 41(a).

17 Plaintiff’s second amended complaint should be brief, Fed. R. Civ. P. 8(a), but must state
18 what each named defendant did that led to the deprivation of Plaintiff’s constitutional or other
19 federal rights. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Although accepted as true, the
20 “[f]actual allegations must be [sufficient] to raise a right to relief above the speculative level . . .
21 .” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

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

1 Accordingly, based on the foregoing, it is HEREBY ORDERED that:

2 1. Plaintiff's first amended complaint is dismissed, with leave to amend, for failure
3 to state any claims under§ 1983;

4 2. The Clerk's Office shall send Plaintiff a complaint form;

5 3. Within **thirty (30) days** from the date of service of this order, Plaintiff shall either
6 file a second amended complaint or notify the Court of his intent to voluntarily
7 dismiss this action; and

8 4. If Plaintiff fails to respond within thirty (30) days, the Court will dismiss this
9 action for failure to obey a court order and failure to state a claim.

10 IT IS SO ORDERED.

11 Dated: April 12, 2010

12 /s/ Dennis L. Beck
13 UNITED STATES MAGISTRATE JUDGE