

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICHARD ERNEST ANAYA,

Plaintiff,

v.

HERRINGTON, et al.,

Defendants.

CASE NO. 1:09-CV-01653-AWI-DLB PC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL OF THIRD
AMENDED COMPLAINT FOR FAILURE
TO STATE A CLAIM WITH LEAVE TO
AMEND

(DOC. 54)

OBJECTIONS, IF ANY, DUE WITHIN
TWENTY-ONE DAYS

_____ /

Findings And Recommendations

I. Background

Plaintiff Richard Ernest Anaya (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983 and Title II of the Americans with Disabilities Act. This action is proceeding against Defendants Chen and Lopez for deliberate indifference to a serious medical need in violation of the Eighth Amendment and against Defendants Lopez, Chen, R. Keldgore, Lopez, Herrington, and J. White for violation of Title II of the ADA. Pending before the Court is Plaintiff’s third amended complaint, filed August 26, 2011, which Plaintiff labels as a “Motion to Amend.” Doc. 54. The Court screens the third amended complaint pursuant to 28 U.S.C. § 1915A.

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

1 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
2 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
3 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
4 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been
5 paid, the court shall dismiss the case at any time if the court determines that . . . the action or
6 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §
7 1915(e)(2)(B)(ii).

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

15 **II. Summary of Third Amended Complaint**

16 Plaintiff is currently incarcerated at Kern Valley State Prison (“KVSP”) in Delano,
17 California, where the events giving rise to this action occurred. Plaintiff names as Defendants: S.
18 Lopez, chief medical officer; Chen, medical doctor; L. DiLeo, medical doctor; J. White, CC II
19 (correctional counselor II); R. Kelgore, associate warden; and Herrington, warden.

20 Plaintiff alleges the following. Defendant Lopez knew of and disregarded an excessive
21 risk to Plaintiff’s health by denying Plaintiff a medical chrono for a single cell on July 13, 2009.
22 Third Am. Compl. (“TAC”) 2:23-3:10. A previous chief medical officer had found that Plaintiff
23 should be single celled because he has Hepatitis C, which can be transmitted to other inmates.
24 *Id.* Plaintiff has bleeding because of a rectal prolapse which makes him more susceptible to
25 catching a disease. *Id.* A surgeon on July 11, 2006 found that Plaintiff is permanently disabled
26 and should be single-celled. *Id.* at 3:11-26. Defendant Lopez is also denying follow-up care for
27 Plaintiff’s lower back which is causing Plaintiff acute pain when Plaintiff has a prolapse. *Id.*
28 Plaintiff’s right knee is in pain and requires surgery. *Id.*

1 Plaintiff has lower extremity problems which require the use of grab bars around the
2 toilet. *Id.* at 4:1-20. Plaintiff qualifies for ADA disability but has not been given grab bars for
3 his cell. *Id.* Plaintiff has a hernia that pushes into Plaintiff's lung, which causes breathing
4 problems. *Id.* Defendant does not provide adequate pain medication. *Id.* Plaintiff contends
5 intentional discrimination. *Id.*

6 On February 9, 2009, Defendant Chen was aware and on notice that Plaintiff was infected
7 with Hepatitis C, which can infect other inmates. *Id.* at 4:23-6:2. Plaintiff was also more
8 susceptible to catching other diseases, such as HIV-AIDS, or Heptatis A and B. *Id.* Plaintiff was
9 intentionally discriminated against regarding ADA accommodations. *Id.* Doctors have found
10 that Plaintiff was permanently disabled. *Id.* Plaintiff has a bulging disc and vertebrae. *Id.*

11 On April 6, 2009, Defendant J. White and R. Kelgore were responsible for denying
12 Plaintiff single cell status and housing Plaintiff in a cell without grab bars. *Id.* at 7:16-8:12.
13 Plaintiff contends that both Defendants knew Plaintiff had a chrono that should be honored at all
14 institutions. *Id.* Plaintiff contends that housing him with another inmate was done with the
15 intent to "rooster fight" Plaintiff with other inmates who get aggressive after finding out Plaintiff
16 has Hepatitis C. *Id.*

17 On July 13, 2009, Defendant Herrington denied Plaintiff's appeal. *Id.* at 8:15-9:5.
18 Plaintiff contends that Defendant Herrington knew of the risk of serious harm to Plaintiff and
19 failed to respond. *Id.* Plaintiff contends Defendant Herrington intentionally discriminated
20 against Plaintiff by denying him a grab bar cell, as well as a single cell. *Id.* Defendant Herrington
21 denied Plaintiff's request for follow-up care by a back specialist. *Id.*

22 On February 20, 2010, Defendant DiLeo removed Plaintiff from his MS moraphene
23 medication, which Plaintiff had been taken for the past two and a half years. *Id.* at 6:5-7:13.
24 Plaintiff's lower back and right knee went into acute pain. *Id.* On February 26, 2010, Defendant
25 DiLeo examined Plaintiff for a medical emergency and apologized for removing Plaintiff. *Id.*
26 Defendant DiLeo signed orders to wean Plaintiff off of the pain medication. *Id.* Defendant
27 DiLeo failed to provide a back specialist to examine Plaintiff's lower back, and prolonged urgent
28 follow up care for Plaintiff's knee and back. *Id.* High Desert State Prison had given orders for

1 Plaintiff to have urgent surgery. *Id.* Plaintiff also complained of high blood pressure, which
2 Defendant DiLeo thought might have to do with Plaintiff's pain. *Id.* Defendant DiLeo would
3 not prescribe a high dose of pain medication. *Id.* Defendant DiLeo had overdosed another
4 patient who had a heart condition. *Id.*

5 Plaintiff requests as relief monetary damages, injunctive relief for surgery, and attorney's
6 fees.¹

7 **III. Analysis**

8 **A. Eighth Amendment**

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

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

27 ¹ Plaintiff's request for attorney's fees is denied. Pro se litigants are not entitled to
28 recover attorneys's fees pursuant to 42 U.S.C. § 1988. *Friedman v. Arizona*, 912 F.2d 328, 333
n.2 (9th Cir. 1990).

1 1188 (9th Cir. 2002)).

2 Plaintiff fails to state an Eighth Amendment claim against Defendant Lopez. Plaintiff
3 alleges that Defendant Lopez denied Plaintiff's medical chrono for single cell status. Plaintiff
4 fails to allege how not receiving single cell status rises to the level of a substantial risk of serious
5 harm to Plaintiff. Plaintiff's allegations that he is more susceptible to diseases because he has
6 rectal prolapses is speculative. *Iqbal*, 129 S. Ct. at 1949. Plaintiff alleges that Defendant Lopez
7 denied Plaintiff follow-up care for his back. Plaintiff fails to allege facts which demonstrate that
8 denial of follow-up care is a substantial risk of serious harm to Plaintiff.

9 Plaintiff fails to state an Eighth Amendment claim against Defendant Chen. Plaintiff
10 alleges that Defendant Chen denied Plaintiff's chrono for single cell status. Again, Plaintiff fails
11 to allege how not receiving single cell status rises to the level of a substantial risk of serious harm
12 to Plaintiff. Allegations that he is more susceptible to disease are speculative. Plaintiff also
13 alleges Defendant Chen is denying Plaintiff follow-up care for his back. Plaintiff fails to allege
14 facts which demonstrate that denial of follow-up care is a substantial risk of serious harm to
15 Plaintiff.²

16 Plaintiff fails to state an Eighth Amendment claim against Defendants White and
17 Kelgore. Plaintiff's allegations that they denied Plaintiff's single cell status fails to demonstrate
18 that being denied single cell status rises to the level of a substantial risk of serious harm to
19 Plaintiff. Plaintiff's allegation that cell mates will attack Plaintiff once they discover Plaintiff's
20 communicable diseases is speculative.

21 Plaintiff fails to state an Eighth Amendment claim against Defendant DiLeo. Plaintiff
22 alleges that Defendant DiLeo removed Plaintiff from his pain medication for six days, then put
23 Plaintiff back on the medication. Defendant DiLeo did this allegedly to wean Plaintiff off of the
24 pain medication. This amounts to an isolated incident of neglect, which fails to rise to the level
25 of deliberate indifference. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). Plaintiff alleges

27 ² Based on inmate grievance No. KVSP-09-240, submitted with the TAC and
28 incorporated by reference, Plaintiff was referred to see a back specialist, which would indicate
that follow-up care with a back specialist was provided.

1 that Defendant DiLeo failed to prescribe more pain medication for Plaintiff's high blood
2 pressure. Plaintiff fails to allege how not overdosing Plaintiff is deliberate indifference to a
3 serious medical need.

4 Plaintiff fails to state an Eighth Amendment claim against Defendant Herrington.
5 Plaintiff alleges that Defendant Herrington denied Plaintiff's inmate appeal requesting single cell
6 status. Plaintiff fails to allege facts which demonstrate that the denial of single cell status is a
7 substantial risk of serious harm to Plaintiff's health. Plaintiff's allegations of harm from other
8 cell mates is speculative. Plaintiff's allegations regarding denial of follow-up care for his back
9 fails to state a claim, as the allegations do not demonstrate a substantial risk of serious harm to
10 Plaintiff.

11 To the extent that Plaintiff is alleging supervisory liability against any Defendants,
12 Plaintiff fails to state a claim. The term "supervisory liability," loosely and commonly used by
13 both courts and litigants alike, is a misnomer. *Iqbal*, 129 S. Ct. at 1949. "Government officials
14 may not be held liable for the unconstitutional conduct of their subordinates under a theory of
15 *respondeat superior*." *Id.* at 1948. Rather, each government official, regardless of his or her
16 title, is only liable for his or her own misconduct.

17 When the named defendant holds a supervisory position, the causal link between the
18 defendant and the claimed constitutional violation must be specifically alleged. *See Fayle v.*
19 *Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir.
20 1978). To state a claim for relief under § 1983 for supervisory liability, plaintiff must allege
21 some facts indicating that the defendant either: personally participated in the alleged deprivation
22 of constitutional rights; knew of the violations and failed to act to prevent them; or promulgated
23 or "implemented a policy so deficient that the policy 'itself is a repudiation of constitutional
24 rights' and is 'the moving force of the constitutional violation.'" *Hansen v. Black*, 885 F.2d 642,
25 646 (9th Cir. 1989) (internal citations omitted); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
26 1989). Plaintiff fails to allege facts which demonstrate that any supervisory Defendants
27 personally participated in the violation of Plaintiff's constitutional rights, knew of constitutional
28 violations and failed to act, or implemented a policy that is so deficient it is the moving force of a

1 constitutional violation. *Hansen*, 885 F.2d at 646; *Taylor*, 880 F.2d at 1045.

2 **B. ADA**

3 Title II of the Americans with Disabilities Act (“ADA”) prohibits discrimination on the
4 basis of disability. *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). Title II of the ADA
5 provides that “no qualified individual with a disability shall, by reason of such disability, be
6 excluded from participation in or be denied the benefits of the services, programs, or activities of
7 a public entity, or be subject to discrimination by such entity.” 42 U.S.C. § 12132. Title II of the
8 ADA applies to inmates within state prisons. *Pennsylvania Dept. of Corrections v. Yeskey*, 524
9 U.S. 206, 210 (1998).

10 “To establish a violation of Title II of the ADA, a plaintiff must show that (1) [he] is a
11 qualified individual with a disability; (2) [he] was excluded from participation in or otherwise
12 discriminated against with regard to a public entity’s services, programs, or activities; and (3)
13 such exclusion or discrimination was by reason of [his] disability.” *Lovell*, 303 F.3d at 1052.

14 “To recover monetary damages under Title II of the ADA . . . a plaintiff must prove intentional
15 discrimination on the part of the defendant,” and the standard for intentional discrimination is
16 deliberate indifference. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001).

17 “Deliberate indifference requires both knowledge that a harm to a federally protected right is
18 substantially likely, and a failure to act upon that likelihood.” *Id.* at 1139 (citing *City of Canton*
19 *v. Harris*, 489 U.S. 378, 389 (1988)).

20 Plaintiff fails to allege an ADA claim. Plaintiff fails to allege facts which demonstrate
21 Defendants excluded or discriminated against Plaintiff with regards to the prison’s services
22 because of Plaintiff’s disability. Plaintiff is alleging that because he is disabled, he should have
23 accommodations. Even assuming Plaintiff is a qualified individual with a disability, Plaintiff has
24 failed to allege facts which demonstrate that Defendants excluded Plaintiff *because of his*
25 *disability*.³

26
27 ³ Based on Plaintiff’s inmate grievance submitted with his third amended complaint and
28 incorporated by reference, it appears that prison officials at KVSP had provided Plaintiff with
accommodations for his alleged disability, such as authorization for a wheelchair, crutches,

1 **C. Supplemental Jurisdiction**

2 Plaintiff alleges medical malpractice against Defendant Chen. Pursuant to 28 U.S.C. §
3 1367(a), in any civil action in which the district court has original jurisdiction, the district court
4 “shall have supplemental jurisdiction over all other claims in the action within such original
5 jurisdiction that they form part of the same case or controversy under Article III,” except as
6 provided in subsections (b) and (c). “[O]nce judicial power exists under § 1367(a), retention of
7 supplemental jurisdiction over state law claims under 1367(c) is discretionary.” *Acri v. Varian*
8 *Assoc., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997). “The district court may decline to exercise
9 supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed
10 all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). The Supreme Court
11 has cautioned that “if the federal claims are dismissed before trial, . . . the state claims should be
12 dismissed as well.” *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).
13 Because Plaintiff fails to state a cognizable § 1983 claim, the Court will not exercise
14 supplemental jurisdiction over his state law claims.

15 **IV. Conclusion And Recommendation**

16 Plaintiff fails to state a claim against any Defendants. The Court has provided Plaintiff
17 with several opportunities to amend. *See* First Am. Compl., Doc. 14; Second Am. Compl., Doc.
18 25. Plaintiff has amended his pleadings such that he no longer states a claim. The Court finds
19 that Plaintiff may be able to cure the deficiencies identified regarding his claims, and thus
20 Plaintiff should be provided one final opportunity to amend. *Lopez v. Smith*, 203 F.3d 1122,
21 1127 (9th Cir. 2000) (en banc).

22 Based on the foregoing, it is HEREBY RECOMMENDED that

- 23 1. The third amended complaint be dismissed for failure to state a claim upon which
24 relief may be granted;
- 25 2. Plaintiff be granted leave to file a fourth amended complaint within thirty days
26 from the date of service of the order resolving these Findings and

27 _____
28 bottom bunk, and lower tier cell. Doc. 54, Director’s Level Review of KVSP-09-00240.

1 Recommendations; and

2 3. Failure to timely comply should result in dismissal of the action with prejudice
3 for failure to obey a court order and failure to state a claim.

4 These Findings and Recommendations will be submitted to the United States District
5 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **twenty-**
6 **one (21) days** after being served with these Findings and Recommendations, the parties may file
7 written objections with the Court. The document should be captioned “Objections to Magistrate
8 Judge’s Findings and Recommendations.” The parties are advised that failure to file objections
9 within the specified time may waive the right to appeal the District Court’s order. *Martinez v.*
10 *Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

11 IT IS SO ORDERED.

12 **Dated: October 18, 2011**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28