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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RICHARD ERNEST ANAYA,

1:09-CV-01653-AWI-DLB PC

Plaintiff,

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL OF
ACTION FOR FAILURE TO STATE A
CLAIM UPON WHICH RELIEF MAY BE
GRANTED (DOC. 64)

v.

HERRINGTON, et al.,

Defendants.

OBJECTIONS DUE WITHIN FOURTEEN
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. Plaintiff initiated this action by filing his complaint on September 17, 2009. On October 29, 2009, the Court screened Plaintiff’s complaint and dismissed with leave to amend. On November 16, 2009, Plaintiff filed his first amended complaint. On April 13, 2010, the Court screened Plaintiff’s first amended complaint and dismissed with leave to amend. On April 29, 2010, Plaintiff filed his second amended complaint. On November 30, 2010, the Court dismissed certain claims, and ordered service of process on Defendants Chen, Herrington, Keldgore, Lopez, and White for violation of the Eighth Amendment and Title II of the Americans with Disabilities Act. On August 10, 2011, Plaintiff was granted leave to file a third amended complaint. On August 26, 2011, Plaintiff filed his third amended complaint. Doc. 54. On October 19, 2011, the Court issued a Findings and

1 Recommendations, recommending dismissal of Plaintiff’s third amended complaint for failure to
2 state a claim, with leave to amend.¹ On November 3, 2011, Plaintiff filed his fourth amended
3 complaint. Doc. 64.²

4 The Court is required to screen complaints brought by prisoners seeking relief against a
5 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
6 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
7 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
8 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
9 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been
10 paid, the court shall dismiss the case at any time if the court determines that . . . the action or
11 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §
12 1915(e)(2)(B)(ii).

13 A complaint must contain “a short and plain statement of the claim showing that the
14 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
15 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
16 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing
17 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual
18 matter, accepted as true, to ‘state a claim that is plausible on its face.’” *Id.* (quoting *Twombly*,
19 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions are not. *Id.*

20 **II. Summary of Fourth Amended Complaint**

21 Plaintiff is incarcerated at Kern Valley State Prison (“KVSP”) in Delano, California,
22 where the events giving rise to this action occurred. Plaintiff names as Defendants warden
23 Herrington, chief medical officer S. Lopez, medical doctor Chen, medical doctor DiLeo,
24 associate warden Keldgore, and CC II J. White. Plaintiff alleges the following against each
25

26 ¹The district judge assigned to this action adopted the Findings and Recommendations on
27 March 27, 2012. Doc. 70.

28 ² Plaintiff’s fourth amended complaint is labeled “motion to amend.”

1 Defendant.

2 **A. Defendant Lopez**

3 On July 13, 2009, Plaintiff was denied single cell status by Defendant Lopez, causing
4 Plaintiff to contract Hepatitis B by using an unsanitary toilet. Pl.'s 4th Am. Compl. ("4AC")
5 2:23-28. Plaintiff contends that Defendant Lopez knew of the risk to Plaintiff because Plaintiff
6 bleeds when he has a rectal prolapse. *Id.* at 2:27-1:1. Plaintiff has irritable bowel syndrome,
7 goes into wanton pain when he prolapses, and his lower back goes out, requiring Plaintiff to lay
8 down until the pain passes. *Id.* at 3:1-4. Plaintiff has incontinence problems, and is required to
9 clean the bathroom area of the cell. *Id.* at 3:4-11. Plaintiff had received a single cell status
10 chrono from another medical doctor. *Id.* at 3:11-21. A medical doctor at UC Davis
11 recommended that Plaintiff be placed on single cell status on March 20, 2006. *Id.*, Ex. A at 29-
12 31. On December 18, 2006, another doctor at UC Davis recommended that a grab bar, a rail near
13 the toilet, would remove pressure off of Plaintiff's abdominal area, making it less likely to
14 exacerbate a prolapse. *Id.* at 6:1-6. Plaintiff arrived at KVSP on January 27, 2009. Plaintiff had
15 received accommodations from medical staff at High Desert State Prison, but was denied such
16 here. *Id.* at 6:11-20.

17 Defendant Lopez was responsible for Plaintiff's medical care. *Id.* at 4:6-8. Defendant
18 Lopez is depriving Plaintiff of strong enough pain medication, such that he is in wanton pain in
19 his right knee, and lower back, and rectal prolapse. *Id.* Defendant Lopez is disregarding
20 Plaintiff's lower back follow-up care, as recommended by medical personnel at High Desert
21 State Prison, where Plaintiff was previously incarcerated. *Id.* at 4:16-27. Plaintiff had been
22 previously referred for knee construction surgery on February 2, 2009. *Id.* at 5:1-6. On July 18,
23 2011, Plaintiff learned from a knee surgeon at UC Davis that Plaintiff now needs knee
24 replacement surgery. *Id.* at 5:7-23.

25 **B. Defendant Chen**

26 On February 9, 2009, Defendant Chen denied Plaintiff's medical chrono for single cell
27 status, which caused Plaintiff to contract hepatitis B by using an unsanitary toilet. *Id.* at 7:1-6.
28 Plaintiff's rectal prolapses make him more susceptible to contracting diseases such as Hepatitis

1 B. *Id.* at 7-11. Defendant Chen disregarded Plaintiff's lower back follow-up care, as
2 recommended by High Desert State Prison medical personnel. *Id.* at 7:10-21. Defendant Chen
3 did not provide knee surgery for Plaintiff. *Id.* at 9:15-16.

4 **C. Defendant DiLeo**

5 On February 20, 2010, Defendant DiLeo abruptly had Plaintiff taken off of his pain
6 medication, morphine sulfate, which Plaintiff had been taking for the past two and a half years.
7 *Id.* at 10:20-28. On February 26, 2010, Plaintiff had a medical emergency because of his extreme
8 pain. *Id.* Defendant DiLeo examined Plaintiff and discovered that Plaintiff had been taking the
9 medication for a long period of time and should have weaned Plaintiff off the drug rather than
10 abruptly doing so. *Id.* at 11:1-13. Defendant DiLeo failed to provide knee surgery for Plaintiff.
11 *Id.* at 12:9-10.

12 **D. Defendants J. White and R. Keldgore**

13 On April 6, 2009, Defendants White and Keldgore were aware of Plaintiff's chrono that
14 Plaintiff should be housed in a single cell. *Id.* at 12:17-28. Their actions in not complying with
15 the medical chrono caused Plaintiff to contract Hepatitis B by using an unsanitary toilet. *Id.*

16 **E. Defendant Herrington**

17 On July 13, 2009, Defendant Herrington denied Plaintiff's grievances, Nos. KVSP 09-
18 240 and 34-10-10782, which denied Plaintiff a single cell, knee surgery, follow-up care for his
19 back, adequate pain medication, and grab bar accommodations in his cell. *Id.* at 14:1-10.
20 Plaintiff contracted Hepatitis B, was inflicted with wanton pain, and the deterioration of his knee.
21 *Id.* at 14:11-14.³

22 Plaintiff contends a violation of due process against Defendant Herrington, and a
23 violation of the Eighth Amendment, Title II of the Americans with Disabilities Act, and medical
24 malpractice against all Defendants. Plaintiff does not specify what relief he seeks.

25 ///

27
28 ³ A review of Plaintiff's exhibits contradicts Plaintiff's allegation. Defendant S. Lopez responded to the grievances, not Defendant Herrington. 4th Am. Compl., Ex. A, p. 54.

1 **III. Analysis**

2 **A. Eighth Amendment**

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

14 “Deliberate indifference is a high legal standard.” *Toguchi*, 391 F.3d at 1060. “Under
15 this standard, the prison official must not only ‘be aware of the facts from which the inference
16 could be drawn that a substantial risk of serious harm exists,’ but that person ‘must also draw the
17 inference.’” *Id.* at 1057 (quoting *Farmer*, 511 U.S. at 837). “‘If a prison official should have
18 been aware of the risk, but was not, then the official has not violated the Eighth Amendment, no
19 matter how severe the risk.’” *Id.* (quoting *Gibson v. County of Washoe, Nevada*, 290 F.3d 1175,
20 1188 (9th Cir. 2002)).

21 **B. Defendant Lopez**

22 Plaintiff fails to state an Eighth Amendment claim against Defendant Lopez. Plaintiff
23 alleges that Defendant Lopez denied him single-cell status on July 13, 2009. A review of
24 Plaintiff’s inmate grievances, submitted as exhibits and incorporated by reference, indicates that
25 on July 13, 2009, the Director’s level response denied Plaintiff’s appeal regarding his cell. 4th
26 Am. Compl., Ex. A, pp. 18-25. Defendant Lopez provided a second level response dated April
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1 13, 2009. *Id.*, Ex. A, p. 25; 3rd Am. Compl., Ex. A, pp. 28-29.⁴ According to the exhibit,
2 Defendant Lopez agreed with Defendant Chen that Plaintiff did not need a single cell because it
3 was not medically required. Plaintiff alleges that he contracted Hepatitis B because he shared a
4 cell, and was subject to rectal prolapse. However, Plaintiff has failed to allege facts which
5 demonstrate that denial of single cell status is a serious harm, or that Defendant Lopez was aware
6 of a serious harm in denying Plaintiff single cell status.

7 Plaintiff contends that Defendant Lopez disregarded Plaintiff's pain. A review of
8 Plaintiff's exhibits, incorporated into the 4AC, indicate that Defendant Lopez responded to
9 Plaintiff's grievances at the second level of review on three occasions, April 13, 2009, November
10 9, 2009, and June 12, 2010. 4th Am. Compl., Ex. A, pp. 25, 5-6, and 53-54; 3rd Am. Compl.,
11 Ex. A, pp. 28-29. Based on the grievances, Defendant Lopez found that Plaintiff was receiving
12 appropriate medical care. In the April 13, 2009 second level response, Defendant Lopez found
13 that Defendant Chen prescribed morphine for Plaintiff's pain. In the November 9, 2009 second
14 level response, Defendant Lopez found that Plaintiff was in the process of being evaluated as to
15 the necessity of surgery. In the June 12, 2010 second level response, Defendant Lopez found that
16 Plaintiff was receiving naproxen and pamelor for his pain. Even though Plaintiff was not
17 receiving the pain medication that he desired, Plaintiff was receiving other pain medication as
18 prescribed by the pain management committee at KVSP. Thus, Plaintiff has failed to
19 demonstrate that Defendant Lopez disregarded an excessive risk of serious harm to Plaintiff's
20 health regarding Plaintiff's pain.

21 Regarding Plaintiff's back treatment, even assuming Plaintiff has alleged a sufficiently
22 serious harm, Plaintiff fails to state a claim. Plaintiff was referred to a back specialist as of the
23 April 13, 2009 second level response. Plaintiff has failed to demonstrate that Defendant Lopez
24 disregarded an excessive risk of serious harm to Plaintiff's health regarding Plaintiff's back
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26 ⁴ Plaintiff submitted an incomplete copy of Defendant Lopez's second level response
27 with his fourth amended complaint. Plaintiff included the complete response in his third
28 amended complaint. The Court takes judicial notice of Plaintiff's filings in this action. Page
numbering for the third amended complaint is taken from the court docket numbering.

1 treatment.

2 **C. Defendant Chen**

3 Plaintiff fails to state an Eighth Amendment claim against Defendant Chen. Plaintiff
4 contends that Defendant Chen denied Plaintiff's single cell status. A review of Plaintiff's
5 exhibits incorporated into the 4AC, indicate that Defendant Chen had denied Plaintiff single cell
6 status as of February 9, 2009, finding it was not medically required. Plaintiff alleges that he
7 contracted hepatitis because he shared a cell, and was subject to rectal prolapse. However,
8 Plaintiff has failed to allege facts which demonstrate that denial of single cell status is a serious
9 harm, or that Defendant Chen was aware of a serious harm in denying Plaintiff single cell status.

10 Plaintiff fails to state a claim regarding follow-up care with a back specialist. According
11 to the submitted exhibits, Defendant Chen interviewed Plaintiff and determined that he would be
12 referred to a back specialist as of the April 13, 2009 second level response to Plaintiff's
13 grievance. Plaintiff has failed to allege facts which demonstrate that Defendant Chen was aware
14 of a serious harm and disregarded it.

15 Plaintiff fails to state a claim regarding knee surgery. Plaintiff has failed to allege facts
16 which demonstrate that Defendant Chen knew of a serious harm regarding Plaintiff's knee and
17 disregarded it.

18 **D. Defendant DiLeo**

19 Plaintiff fails to state an Eighth Amendment claim against Defendant DiLeo. Plaintiff
20 alleges that Defendant DiLeo abruptly cut off Plaintiff from his morphine medication, resulting
21 in Plaintiff suffering extreme pain. Plaintiff alleges that Defendant DiLeo was unaware that
22 Plaintiff had been taking morphine for so long, and should have weaned Plaintiff off the
23 medication. Plaintiff fails to allege facts which demonstrate that Defendant DiLeo knew of a
24 serious harm and disregarded it. Plaintiff's allegations demonstrate that Defendant DiLeo was
25 ignorant of Plaintiff's prior medical history, thus demonstrating that Defendant DiLeo lacked
26 knowledge of a serious harm.

27 Plaintiff fails to state a claim regarding knee surgery. Plaintiff has failed to allege facts
28 which demonstrate that Defendant DiLeo knew of a serious harm regarding Plaintiff's knee and

1 disregarded it.

2 **E. Deendants Keldgore and White**

3 Plaintiff does not allege a cognizable Eighth Amendment claim against Defendants R.
4 Keldgore and J. White. Plaintiff alleges that Defendants removed him from single cell status.
5 However, Plaintiff has not sufficiently alleged that there is an excessive risk of serious harm in
6 not having single cell status. Plaintiff has not alleged facts which demonstrate that Defendants
7 Keldgore and White were aware of an excessive risk of serious harm in denying him single cell
8 status.

9 **F. Defendant Herrington**

10 Plaintiff does not allege a cognizable Eighth Amendment claim against Defendant
11 Herrington. Plaintiff alleges that Defendant Herrington denied Plaintiff's grievances, Nos.
12 KVSP 09-240 and 34-10-10782, and denied Plaintiff a single cell, knee surgery, follow-up care
13 for his back, adequate pain medication, and grab bar accommodations in his cell. Based on the
14 exhibits submitted in support, Defendant Herrington did not respond to any of the grievances.
15 4th Am. Compl., Ex. A, pp. 18-25, 49-54. Plaintiff has not linked Defendant Herrington to any
16 act or omission that demonstrates a violation of his constitutional rights. *Johnson v. Duffy*, 588
17 F.2d 740, 743 (9th Cir. 1978).

18 Plaintiff alleges at most *respondeat superior* liability against Defendant Herrington,
19 which fails to state a § 1983 claim. The term "supervisory liability," loosely and commonly used
20 by both courts and litigants alike, is a misnomer. *Iqbal*, 129 S. Ct. at 1949. "Government
21 officials may not be held liable for the unconstitutional conduct of their subordinates under a
22 theory of *respondeat superior*." *Id.* at 1948. Rather, each government official, regardless of his
23 or her title, is only liable for his or her own misconduct.

24 When the named defendant holds a supervisory position, the causal link between the
25 defendant and the claimed constitutional violation must be specifically alleged. *See Fayle v.*
26 *Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir.
27 1978). To state a claim for relief under § 1983 for supervisory liability, plaintiff must allege
28 some facts indicating that the defendant either: personally participated in the alleged deprivation

1 of constitutional rights or knew of the violations and failed to act to prevent them. *Taylor v. List*,
2 880 F.2d 1040, 1045 (9th Cir. 1989).

3 Plaintiff fails to allege any facts that indicate Defendant Herrington personally
4 participated in an alleged deprivation of constitutional rights or knew of constitutional violations
5 and failed to act.

6 H. Americans With Disabilities Act

7 Plaintiff contends that Defendants denied him a cell with grab bars in violation of Title II
8 of the Americans with Disabilities Act. Title II of the Americans with Disabilities Act (“ADA”)
9 prohibits discrimination on the basis of disability. *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th
10 Cir. 2002). Title II of the ADA provides that “no qualified individual with a disability shall, by
11 reason of such disability, be excluded from participation in or be denied the benefits of the
12 services, programs, or activities of a public entity, or be subject to discrimination by such entity.”
13 42 U.S.C. § 12132. Title II of the ADA applies to inmates within state prisons. *Pa. Dep’t. of*
14 *Corr. v. Yeskey*, 524 U.S. 206, 210 (1998).

15 To state a claim under Title II of the ADA, the plaintiff must allege:
16 (1) he is an individual with a disability; (2) he is otherwise qualified to participate
17 in or receive the benefit of some public entity's services, programs, or activities;
18 (3) he was either excluded from participation in or denied the benefits of the
public entity's services, programs, or activities, or was otherwise discriminated
against by the public entity; and (4) such exclusion, denial of benefits, or
discrimination was by reason of [his] disability.

19 *Simmons v. Navajo County*, 609 F.3d 1011, 1021 (9th Cir. 2010) (citing *McGary v. City of*
20 *Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004)). “The term ‘qualified individual with a
21 disability’ means an individual with a disability who, with or without reasonable modifications to
22 rules, policies, or practices, the removal of architectural, communication, or transportation
23 barriers, or the provision of auxiliary aids and services, meets the essential eligibility
24 requirements for the receipt of services or the participation in programs or activities provided by
25 a public entity.” 42 U.S.C. § 12131(2).

26 “To recover monetary damages under Title II of the ADA . . . a plaintiff must prove
27 intentional discrimination on the part of the defendant,” and the standard for intentional
28 discrimination is deliberate indifference. *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138 (9th

1 Cir. 2001). “Deliberate indifference requires both knowledge that a harm to a federally protected
2 right is substantially likely, and a failure to act upon that likelihood.” *Id.* at 1139 (citing *City of*
3 *Canton v. Harris*, 489 U.S. 378, 389 (1988)). The Court assumes without deciding that Plaintiff
4 is a qualified individual with a disability.

5 Plaintiff fails to state a claim for violation of Title II of the ADA. Based on the submitted
6 exhibits in support, Plaintiff was provided with a raised commode, and was later provided a cell
7 with grab bars around the toilet. 4th Am. Compl. 18-25. Plaintiff has not alleged facts which
8 demonstrate that he was denied a benefit of the prison’s services, programs, or activities. If
9 Plaintiff is seeking monetary damages, Plaintiff has also failed to demonstrate that he is entitled
10 to such relief under the ADA. Plaintiff fails to allege sufficient facts to demonstrate deliberate
11 indifference on the part of any Defendants.

12 **D. Supplemental Jurisdiction**

13 Plaintiff alleges a medical malpractice state law claim. Pursuant to 28 U.S.C. § 1367(a),
14 except as provided in subsections (b) and (c),

15 in any civil action of which the district courts have original jurisdiction, the
16 district courts shall have supplemental jurisdiction over all other claims that are so
17 related to claim in the action within such original jurisdiction that they form part
18 of the same case or controversy under Article III of the United States Constitution.

18 “[O]nce judicial power exists under § 1367(a), retention of supplemental jurisdiction over state
19 law claims under 1367(c) is discretionary.” *Acri v. Varian Assoc., Inc.*, 114 F.3d 999, 1000 (9th
20 Cir. 1997). “The district courts may decline to exercise supplemental jurisdiction over a claim
21 under subsection (a) if . . . the district court has dismissed all claims over which it has original
22 jurisdiction.” 28 U.S.C. § 1367(c)(3). The Supreme Court has cautioned that “if the federal
23 claims are dismissed before trial, . . . the state claims should be dismissed as well.” *United Mine*
24 *Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). Because Plaintiff fails to state a
25 cognizable § 1983 or ADA claim, the Court should decline to exercise supplemental jurisdiction
26 over his state law claims.

27 **IV. Conclusion And Recommendation**

28 Plaintiff fails to state a claim against any Defendants. The Court has provided Plaintiff

1 with several opportunities to amend. *See* First Am. Compl., Doc. 14; Second Am. Compl., Doc.
2 25; Third Am. Compl., Doc. 54. The Court finds that Plaintiff will be unable to cure the
3 deficiencies identified in these Findings and Recommendations. Thus, further leave to amend
4 should not be granted.

5 Based on the foregoing, it is HEREBY RECOMMENDED that

- 6 1. This action be dismissed for failure to state a claim upon which relief may be
7 granted;
- 8 2. Supplemental jurisdiction over Plaintiff's state law claims be declined;
- 9 3. All other pending motions be denied as moot; and
- 10 4. The Clerk of the Court be directed to close this action.

11 These Findings and Recommendations will be submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen**
13 **(14) days** after being served with these Findings and Recommendations, the parties may file
14 written objections with the Court. The document should be captioned "Objections to Magistrate
15 Judge's Findings and Recommendations." A party may respond to another party's objections by
16 filing a response within **fourteen (14) days** after being served with a copy of that party's
17 objections. The parties are advised that failure to file objections within the specified time may
18 waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th
19 Cir. 1991).

20 IT IS SO ORDERED.

21 **Dated: April 4, 2012**

/s/ Dennis L. Beck
22 UNITED STATES MAGISTRATE JUDGE