

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

ANTHONY MACK,

Plaintiff,

v.

SUSAN HUBBARD, et al.,

Defendants.

CASE NO. 1:09-cv-02078 AWI GSA PC

ORDER DISMISSING COMPLAINT, WITH
LEAVE TO FILE AMENDED COMPLAINT
WITHIN THIRTY DAYS

(ECF No. 1)

Screening Order

I. Screening Requirement

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil action pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132.. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

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

1 ///

2 Pursuant to Federal Rule of Civil Procedure 8(a), a complaint must contain “a short and plain
3 statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. P. 8(a). “Such
4 a statement must simply give the defendant fair notice of what the plaintiff’s claim is and the
5 grounds upon which it rests.” Swierkiewicz, 534 U.S. at 512. However, “the liberal pleading
6 standard . . . applies only to a plaintiff’s factual allegations.” Neitze v. Williams, 490 U.S. 319, 330
7 n.9 (1989). “[A] liberal interpretation of a civil rights complaint may not supply essential elements
8 of the claim that were not initially pled.” Bruns v. Nat’l Credit Union Admin., 122 F.3d 1251, 1257
9 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982)).

10 **II. Plaintiff’s Claims**

11 Plaintiff, an inmate in the custody of the California Department of Corrections and
12 Rehabilitation nat Corcoran State Prison, brings this ADA action against officials employed by the
13 CDCR at Corcoran State Prison. Plaintiff names 27 individual defendants.

14 Plaintiff alleges that he suffers from a “chronic and serious foot disability” and is required
15 to wear orthopedic footwear. Plaintiff alleges that “prison officials” confiscated and disposed of
16 his footwear. (Compl. ¶ 23.) Plaintiff was forced to wear shoes with no supports for over 28
17 months. (Compl. ¶ 24.) Plaintiff alleges that after filing inmate grievances, and multiple medical
18 visits, a podiatrist recommended soft shoes. The podiatrist failed to recommend any particular
19 specifications. Plaintiff was not issued the soft soled shoes. (Compl. ¶ 31.)

20 On February 7, 2008, Plaintiff was summoned to the medical clinic, and offered strap-on soft
21 soled shoes “sent from the laundry.” Plaintiff alleges that they were not properly designed for his
22 foot condition, and that “no further accommodations or treatment or preventive measures have
23 followed since.” (Compl. ¶ 33.)

24 In April of 2008, the podiatrist recommended foot surgery. Plaintiff had “several re-
25 consults,” and was approved for foot surgery by an outside orthopedic surgeon on January 12, 2009.
26 On January 23, 2009, the Acting Chief Medical Officer rejected the recommendation and cancelled
27 the surgery. (Compl. ¶¶ 34-37.) Plaintiff contacted a private organization, the Prison Law Office.
28 The Prison Law Office “contacted the Attorney General’s Office under the procedures set forth under

1 the Plata stipulation.” (Compl. ¶ 39.)

2 On March 10, 2009, Plaintiff was seen at the prison hospital. It was determined that surgery
3 was warranted, and another request for surgery was issued. It was also determined that the soft shoes
4 issued earlier were “medically inappropriate.” Another chrono for personal footwear was issued.
5 On March 17, 2009, Plaintiff’s shoes, ordered on March 12th, were received at the prison. Plaintiff
6 alleges that he was given the run around, and eventually told that the shoes were lost. The shoes
7 were re-ordered, and Plaintiff eventually received them on October 5, 2009. Plaintiff alleges that
8 the shoes did not fit. (Compl. ¶ 66.)

9 Plaintiff underwent foot surgery on March 30, 2009. Plaintiff alleged that the surgery was
10 performed negligently, as the procedure was only performed on one toe, and not the other toes that
11 were affected. (Compl. ¶ 45.)

12 **A. ADA**

13 Plaintiff seeks to impose liability for violation of Title II of the Americans with Disabilities
14 Act, which “prohibit[s] discrimination on the basis of disability.” Lovell v. Chandler, 303 F.3d
15 1039, 1052 (9th Cir. 2002). “To establish a violation of Title II of the ADA, a plaintiff must show
16 that (1) [he] is a qualified individual with a disability; (2) [he] was excluded from participation in
17 or otherwise discriminated against with regard to a public entity’s services, programs, or activities;
18 and (3) such exclusion or discrimination was by reason of [his] disability.” Lovell, 303 F.3d at 1052.

19 Plaintiff has not alleged any facts with support a claim for violation of the ADA. The
20 treatment, or lack of treatment, concerning Plaintiff’s medical condition does not provide a basis
21 upon which to impose liability under the ADA. Burger v. Bloomberg, 418 F.3d 882, 882 (8th Cir.
22 2005) (medical treatment decisions not a basis for RA or ADA claims); Fitzgerald v. Corr. Corp. of
23 Am., 403 F.3d 1134, 1144 (10th Cir. 2005) (medical decisions not ordinarily within scope of ADA
24 or RA); Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) (“The ADA does not create a remedy
25 for medical malpractice.”). Aside from Defendants’ medical treatment decisions of which Plaintiff
26 complains, and which are not an appropriate basis upon which to predicate an ADA claim, Plaintiff
27 alleges no facts to show that any named Defendant participated in, or was otherwise responsible for,
28 excluding him from activities, programs or benefits otherwise available to him. Therefore, Plaintiff

1 fails to state a cognizable claim for violation of his rights under Title II of the ADA.

2 **B. Eighth Amendment**

3 Although Plaintiff fails to identify 42 U.S.C. § 1983 as a separate cause of action, he does
4 specifically set forth a claim that Defendants were deliberately indifferent to his medical needs.

5 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate
6 must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091, 1096
7 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 295 (1976)). The two part
8 test for deliberate indifference requires the plaintiff to show (1) “‘a serious medical need’ by
9 demonstrating that ‘failure to treat a prisoner’s condition could result in further significant injury or
10 the unnecessary and wanton infliction of pain,’” and (2) “‘the defendant’s response to the need was
11 deliberately indifferent.” Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059
12 (9th Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th
13 Cir. 1997) (en banc) (internal quotations omitted)). Deliberate indifference is shown by “a
14 purposeful act or failure to respond to a prisoner’s pain or possible medical need, and harm caused
15 by the indifference.” Id. (citing McGuckin, 974 F.2d at 1060). Where a prisoner is alleging a delay
16 in receiving medical treatment, the delay must have led to further harm in order for the prisoner to
17 make a claim of deliberate indifference to serious medical needs. McGuckin at 1060 (citing Shapely
18 v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985)).

19 To state a claim under section 1983, Plaintiff must allege that (1) the defendant acted under
20 color of state law and (2) the defendant deprived him of rights secured by the Constitution or federal
21 law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). “A person deprives
22 another of a constitutional right, where that person ‘does an affirmative act, participates in another’s
23 affirmative acts, or omits to perform an act which [that person] is legally required to do that causes
24 the deprivation of which complaint is made.’” Hydrick v. Hunter, 500 F.3d 978, 988 (9th Cir. 2007)
25 (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “[T]he ‘requisite causal connection
26 can be established not only by some kind of direct, personal participation in the deprivation, but also
27 by setting in motion a series of acts by others which the actor knows or reasonably should know
28 would cause others to inflict the constitutional injury.’” Id. (quoting Johnson at 743-44).

1 Here, Plaintiff alleges conduct as to correctional staff in general. In order to hold Defendants
2 liable, Plaintiff must allege facts as to each Defendant indicating that they knew of and disregarded
3 Plaintiff's serious medical condition. In order to hold an individual defendant liable, Plaintiff must
4 name the individual defendant, describe where that defendant is employed and in what capacity, and
5 explain how that defendant acted under color of state law. Plaintiff should state clearly, in his or
6 her own words, what happened. Plaintiff must describe what each defendant, *by name*, did to violate
7 the particular right described by Plaintiff. Plaintiff is advised the deliberate indifference is a higher
8 legal standard than negligence. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not
9 support this cause of action." Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir.1980)
10 (citing Estelle, 429 U.S. at 105-06). See also Toguchi v. Chung, 391 F.3d 1051, 1060 (9th
11 Cir.2004).

12 **III. Conclusion and Order**

13 The Court has screened Plaintiff's complaint and finds that it does not state any claims upon
14 which relief may be granted under section 1983 or the ADA. The Court will provide Plaintiff with
15 the opportunity to file an amended complaint curing the deficiencies identified by the Court in this
16 order. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff is cautioned that he may
17 not change the nature of this suit by adding new, unrelated claims in his amended complaint.
18 George, 507 F.3d at 607 (no "buckshot" complaints).

19 Plaintiff's amended complaint should be brief, Fed. R. Civ. P. 8(a), but must state what each
20 named defendant did that led to the deprivation of Plaintiff's constitutional or other federal rights,
21 Hydrick, 500 F.3d at 987-88. Although accepted as true, the "[f]actual allegations must be
22 [sufficient] to raise a right to relief above the speculative level" Bell Atlantic Corp. v.
23 Twombly, 127 S.Ct. 1955, 1965 (2007) (citations omitted).

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

1 to London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth, 114 F.3d at
2 1474.

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

- 4 1. Plaintiff's complaint is dismissed, with leave to amend, for failure to state a claim;
- 5 2. The Clerk's Office shall send Plaintiff a complaint form;
- 6 3. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file an
7 amended complaint;
- 8 4. Plaintiff may not add any new, unrelated claims to this action via his amended
9 complaint and any attempt to do so will result in an order striking the amended
10 complaint; and
- 11 5. If Plaintiff fails to file an amended complaint, the Court will recommend that this
12 action be dismissed, with prejudice, for failure to state a claim.

13
14
15 IT IS SO ORDERED.

16 **Dated: November 1, 2011**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE