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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

DIANE REIMERS,

Plaintiff,

v.

CDCR, et al.,

Defendants.

CASE NO. 1:10-cv-00763-SKO PC

ORDER DISMISSING AMENDED  
COMPLAINT, WITH LEAVE TO AMEND,  
FOR FAILURE TO STATE A CLAIM

(Doc. 11)

THIRTY-DAY DEADLINE

**Screening Order**

**I. Screening Requirement and Standard**

Plaintiff Diane Reimers, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on April 22, 2010. On May 20, 2010, the Court dismissed Plaintiff’s complaint, with leave to amend. The case was dismissed after Plaintiff failed to comply with the order to amend, but Plaintiff’s subsequent motion for reconsideration was granted and the case was reopened on December 8, 2010. Now pending before the Court is Plaintiff’s amended complaint, filed August 27, 2010.

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an 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).

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

4 A complaint must contain “a short and plain statement of the claim showing that the pleader  
5 is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but  
6 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,  
7 do not suffice,” Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1937, 1949 (2009) (citing Bell  
8 Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)), and courts “are not required  
9 to indulge unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir.  
10 2009) (internal quotation marks and citation omitted). While factual allegations are accepted as true,  
11 legal conclusions are not. Iqbal, 129 S.Ct. at 1949.

12 Under section 1983, Plaintiff must demonstrate that each defendant personally participated  
13 in the deprivation of her rights. Iqbal, 129 S.Ct. at 1949; Jones v. Williams, 297 F.3d 930, 934 (9th  
14 Cir. 2002). This requires the presentation of factual allegations sufficient to state a plausible claim  
15 for relief. Iqbal, 129 S.Ct. at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir.  
16 2009). The mere possibility of misconduct falls short of meeting this plausibility standard. Iqbal,  
17 129 S.Ct. at 1949-50; Moss, 572 F.3d at 969.

## 18 **II. Plaintiff’s Claim**

### 19 **A. Summary of Allegations**

20 Plaintiff, who is incarcerated at Valley State Prison for Women in Chowchilla, brings this  
21 action against the California Department of Corrections and Rehabilitation (CDCR) for medical  
22 injuries. Plaintiff alleges that she underwent emergency surgery on December 15, 2009, following  
23 an MRI. Plaintiff had seven vertebrae removed and she was paralyzed on her right side for fourteen  
24 months. Plaintiff alleges that for fourteen months, she complained of neck pain and high blood  
25 pressure.<sup>1</sup> Plaintiff thinks she was injured during a throat biopsy in which doctors had trouble

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28 <sup>1</sup> It appears Plaintiff complained of neck pain for fourteen months before being injured and she was then  
partially paralyzed for fourteen months after surgery, but the allegations are not entirely clear.

1 positioning her head and questioned her regarding whether she had arthritis. Plaintiff alleges that  
2 she was severely compromised due to the doctors' negligence.

3 **B. Discussion**

4 Negligence does not support a medical care claim under section 1983, Estelle v. Gamble, 429  
5 U.S. 97, 106, 97 S.Ct. 285 (1977); McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992),  
6 overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en  
7 banc), and CDCR is immune from suit, Aholelei v. Dept. of Public Safety, 488 F.3d 1144, 1147 (9th  
8 Cir. 2007). Because Plaintiff has not alleged facts sufficient to support a claim that her constitutional  
9 rights were violated and she has not named a proper party, she fails to state a claim upon which relief  
10 may be granted under section 1983. The Court will provide Plaintiff with the opportunity to file a  
11 second amended complaint naming the individual(s) responsible for the alleged violation of her  
12 constitutional rights and setting forth sufficient facts to support a constitutional claim. The  
13 applicable legal standard is as follows.

14 To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison  
15 conditions must involve "the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452  
16 U.S. 337, 347, 101 S.Ct. 2392 (1981). A prisoner's claim of inadequate medical care does not rise  
17 to the level of an Eighth Amendment violation unless (1) "the prison official deprived the prisoner  
18 of the 'minimal civilized measure of life's necessities,'" and (2) "the prison official 'acted with  
19 deliberate indifference in doing so.'" Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004)  
20 (quoting Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002) (citation omitted)). A prison official  
21 does not act in a deliberately indifferent manner unless the official "knows of and disregards an  
22 excessive risk to inmate health or safety." Farmer v. Brennan, 511 U.S. 825, 834, 114 S.Ct. 1970  
23 (1994).

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

1 risk.” Id. (quoting Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)).  
2 Further, neither a difference of opinion between Plaintiff and medical personnel nor a difference of  
3 opinion between medical personnel regarding treatment will support a claim under section 1983.  
4 Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th  
5 Cir. 1981) (quotation marks and citation omitted).

6 **III. Conclusion and Order**

7 Plaintiff’s amended complaint fails to state a claim upon which relief may be granted under  
8 section 1983. The Court will provide Plaintiff with one final opportunity to amend to cure the  
9 deficiencies identified by the Court in this order.<sup>2</sup> Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir.  
10 2000); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff may not change the nature  
11 of this suit by adding new, unrelated claims in her second amended complaint. George v. Smith, 507  
12 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints).

13 Plaintiff’s second amended complaint should be brief, Fed. R. Civ. P. 8(a), but it must state  
14 what each named defendant did that led to the deprivation of Plaintiff’s constitutional rights, Iqbal,  
15 129 S.Ct. at 1948-49. Although accepted as true, the “[f]actual allegations must be [sufficient] to  
16 raise a right to relief above the speculative level. . . .” Twombly, 550 U.S. at 555 (citations omitted).

17 Finally, an amended complaint supercedes the prior complaint, Forsyth v. Humana, Inc., 114  
18 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987), and it must be  
19 “complete in itself without reference to the prior or superceded pleading,” Local Rule 220.  
20 Therefore, “[a]ll causes of action alleged in an original complaint which are not alleged in an  
21 amended complaint are waived.” King, 814 F.2d at 567 (citing to London v. Coopers & Lybrand,  
22 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth, 114 F.3d at 1474.

23 Based on the foregoing, it is HEREBY ORDERED that:

- 24 1. The Clerk’s Office shall send Plaintiff a complaint form;

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<sup>2</sup> Plaintiff’s original complaint was unsigned and it did not set forth a statement of claim. Because this is the first screening order which addresses Plaintiff’s factual allegations, the Court deems it in the interest of justice to permit Plaintiff another opportunity to amend.

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- 2. Plaintiff's amended complaint, filed August 27, 2010, is dismissed for failure to state a claim upon which relief may be granted under section 1983;
- 3. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file a second amended complaint; and
- 4. If Plaintiff fails to file a second amended complaint in compliance with this order, this action will be dismissed, with prejudice, for failure to state a claim.

IT IS SO ORDERED.

**Dated: June 8, 2011**

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE