

1
2
3
4
5
6 **UNITED STATES DISTRICT COURT**
78 EASTERN DISTRICT OF CALIFORNIA
910 ROBERT BOWIE, CASE NO. 1:10-cv-01033-SKO PC
11 v. Plaintiff, ORDER DISMISSING COMPLAINT, WITH
12 DR. M. VU, (Doc. 7) LEAVE TO AMEND, FOR FAILURE TO
13 Defendant. THIRTY-DAY DEADLINE14 /
15 **Screening Order**16 **I. Screening Requirement and Standard**17 Plaintiff Robert Bowie, a state prisoner proceeding pro se and in forma pauperis, filed this
18 civil rights action pursuant to 42 U.S.C. § 1983 on June 1, 2010. The Court is required to screen
19 complaints brought by prisoners seeking relief against a governmental entity or an officer or
20 employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or
21 portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to
22 state a claim upon which relief may be granted, or that seek monetary relief from a defendant who
23 is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2). “Notwithstanding any filing fee, or any
24 portion thereof, that may have been paid, the court shall dismiss the case at any time if the court
25 determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted.”
26 28 U.S.C. § 1915(e)(2)(B)(ii).27 A complaint must contain “a short and plain statement of the claim showing that the pleader
28 is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but

1 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
2 do not suffice,” Ashcroft v. Iqbal, ____ U.S. ___, ___, 129 S.Ct. 1937, 1949 (2009) (citing Bell
3 Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)), and courts “are not required
4 to indulge unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir.
5 2009) (internal quotation marks and citation omitted). While factual allegations are accepted as true,
6 legal conclusions are not. Iqbal, 129 S.Ct. at 1949.

7 To state a claim, Plaintiff must demonstrate that each defendant personally participated in
8 the deprivation of his rights. Id. at 1949. This requires the presentation of factual allegations
9 sufficient to state a plausible claim for relief. Iqbal, 129 S.Ct. at 1949-50; Moss v. U.S. Secret
10 Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of
11 meeting this plausibility standard. Iqbal, 129 S.Ct. at 1949-50; Moss, 572 F.3d at 969.

12 **II. Plaintiff's Eighth Amendment Medical Care Claim**

13 Plaintiff brings this action against Defendant M. Vu, a physician at the California
14 Correctional Institution in Tehachapi. Plaintiff alleges that Defendant Vu was disrespectful and
15 unprofessional, and that he committed malpractice in treating the gunshot wound to Plaintiff's right
16 foot.

17 To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison
18 conditions must involve “the wanton and unnecessary infliction of pain.” Rhodes v. Chapman, 452
19 U.S. 337, 347, 101 S.Ct. 2392 (1981). A prisoner's claim of inadequate medical care does not rise
20 to the level of an Eighth Amendment violation unless (1) “the prison official deprived the prisoner
21 of the ‘minimal civilized measure of life's necessities,’” and (2) “the prison official ‘acted with
22 deliberate indifference in doing so.’” Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004)
23 (quoting Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002) (citation omitted)). A prison official
24 does not act in a deliberately indifferent manner unless the official “knows of and disregards an
25 excessive risk to inmate health or safety.” Farmer v. Brennan, 511 U.S. 825, 834, 114 S.Ct. 1970
26 (1994).

27 Plaintiff's conclusory allegations are insufficient to state a claim under section 1983.
28 Disrespect, lack of professionalism, and malpractice will not support a claim for violation of the

1 Eighth Amendment, Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285 (1977); Oltarzewski v.
2 Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987), and Plaintiff's complaint is devoid of any facts
3 suggesting that Defendant Vu knowingly disregarded a substantial risk of harm to Plaintiff's health,
4 Farmer, 511 U.S. at 837. Accordingly, Plaintiff fails to state a cognizable claim against Defendant
5 Vu.

6 **III. Conclusion and Order**

7 Plaintiff's complaint fails to state a claim upon which relief may be granted under section
8 1983. The Court will provide Plaintiff with the opportunity to file an amended complaint curing the
9 deficiencies identified by the Court in this order. 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 his amended complaint. George v. Smith, 507 F.3d
12 605, 607 (7th Cir. 2007) (no "buckshot" complaints).

13 Plaintiff's amended complaint should be brief, Fed. R. Civ. P. 8(a), but it must state what
14 each named defendant did that led to the deprivation of Plaintiff's constitutional rights, Iqbal, 129
15 S.Ct. at 1948-49. Although accepted as true, the "[f]actual allegations must be [sufficient] to raise
16 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;
- 25 2. Plaintiff's complaint is dismissed for failure to state a claim upon which relief may
26 be granted under section 1983;
- 27 3. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file an
28 amended complaint; and

4. If Plaintiff fails to file an 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: May 18, 2011

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE