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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT BOWIE,

CASE NO. 1:10-cv-01033-SKO PC

Plaintiff,

ORDER DISMISSING ACTION, WITH
PREJUDICE, FOR FAILURE TO STATE A
CLAIM UNDER SECTION 1983 AND
COUNTING DISMISSAL AS A STRIKE
UNDER 28 U.S.C. § 1915(G)

v.

DR. M. VU,

Defendant.

(Doc. 14)

Screening Order

I. Screening Requirement and Standard

Plaintiff Robert Bowie, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on June 1, 2010. On May 19, 2011, the Court dismissed Plaintiff’s complaint, with leave to amend, for failure to state a claim. Plaintiff filed an amended complaint on June 13, 2011.

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

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

14 **II. Plaintiff’s Eighth Amendment Medical Care Claim**

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

18 To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison
19 conditions must involve “the wanton and unnecessary infliction of pain.” Rhodes v. Chapman, 452
20 U.S. 337, 347, 101 S.Ct. 2392 (1981). A prisoner’s claim of inadequate medical care does not rise
21 to the level of an Eighth Amendment violation unless (1) “the prison official deprived the prisoner
22 of the ‘minimal civilized measure of life’s necessities,’” and (2) “the prison official ‘acted with
23 deliberate indifference in doing so.’” Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004)
24 (quoting Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002) (citation omitted)). A prison official
25 does not act in a deliberately indifferent manner unless the official “knows of and disregards an
26 excessive risk to inmate health or safety.” Farmer v. Brennan, 511 U.S. 825, 834, 114 S.Ct. 1970
27 (1994).

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1 Plaintiff's conclusory allegation is insufficient to state a claim under section 1983. Lack of
2 professionalism and malpractice do not rise to the level of an Eighth Amendment violation, Estelle
3 v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285 (1977); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th
4 Cir. 1987), and Plaintiff's amended complaint is devoid of any facts suggesting that Defendant Vu
5 knowingly disregarded a substantial risk of harm to Plaintiff's health, Farmer, 511 U.S. at 837.
6 Accordingly, Plaintiff fails to state a cognizable claim against Defendant Vu. Plaintiff's previous
7 complaint suffered from the same deficiencies and therefore, further leave to amend will not be
8 granted.

9 **III. Conclusion and Order**

10 Plaintiff's amended complaint fails to state a claim upon which relief may be granted under
11 section 1983. Plaintiff was previously provided with notice of the deficiencies in his claim and an
12 opportunity to amend, but he was unable to cure the deficiencies and further leave to amend is not
13 warranted. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Noll v. Carlson, 809 F.2d 1446,
14 1448-49 (9th Cir. 1987).

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

- 16 1. This action is dismissed, with prejudice, for failure to state a claim under section
17 1983; and
- 18 2. The dismissal shall count as a strike under 28 U.S.C. § 1915(g).

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20 IT IS SO ORDERED.

21 **Dated: June 21, 2011**

22 /s/ Sheila K. Oberto
23 UNITED STATES MAGISTRATE JUDGE
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