

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

FRANCISCO COLON,)	CASE NO. 1:10-cv-01642 GSA PC
)	
Plaintiff,)	ORDER DISMISSING COMPLAINT, WITH
)	LEAVE TO FILE AMENDED COMPLAINT
v.)	WITHIN THIRTY DAYS
)	
DR. ZIA, et al.,)	(Doc. 1)
)	
Defendants.)	
	/	

Screening Order

I. Screening Requirement

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff has consented to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c)(1).

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 Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions,"
2 none of which applies to § 1983 actions. Swierkewicz v. Sorema, N.A., 534 U.S. 506 (512) (2002).
3 Pursuant to Rule 8(a), a complaint must contain "a short and plain statement of the claim showing
4 that the pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a). "Such a statement must simply give
5 defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."
6 Swierkewicz, 534 U.S. at 512. Detailed factual allegations are not required, but "[t]hreadbare
7 recitals of the elements of the cause of action, supported by mere conclusory statements, do not
8 suffice." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009), citing Bell Atlantic Corp. v. Twombly, 550
9 U.S. 544, 555 (2007). "Plaintiff must set forth sufficient factual matter accepted as true, to 'state a
10 claim that is plausible on its face.'" Iqbal, 129 S.Ct. at 1949, quoting Twombly, 550 U.S. at 555.
11 While factual allegations are accepted as true, legal conclusions are not. Iqbal, 129 S.Ct. at 1949.

12 Although accepted as true, "[f]actual allegations must be [sufficient] to raise a right to relief
13 above the speculative level." Twombly, 550 U.S. at 555 (citations omitted). A plaintiff must set
14 forth "the grounds of his entitlement to relief," which "requires more than labels and conclusions,
15 and a formulaic recitation of the elements of a cause of action." Id. at 555-56 (internal quotation
16 marks and citations omitted). To adequately state a claim against a defendant, a plaintiff must set
17 forth the legal and factual basis for his claim.

18 **II. Plaintiff's Claims**

19 Plaintiff, an inmate in the custody of the California Department of Corrections and
20 Rehabilitation (CDCR) at Avenal State Prison, brings this civil rights action against the following
21 individual defendants employed by the CDCR at Avenal State Prison: Dr. Zia, D.D.S; Dr. Malan,
22 D.D.S.; Dr. Lindquist, D.D.S. Plaintiff's statement of claim, in its entirety, follows:

23 Dr. Zia knowingly or negligently failed to provide necessary and
24 adequate medical care by incorrectly performing an oral surgery (i.e.,
25 a wisdom tooth extraction) prior to any treatment of the underlying
26 anaerobic infection, directly leading to a tremendous and unnecessary
27 amount of subsequent pain and suffering and, a permanently
debilitating nerve damage to my right side jaw and facial area and, my
palatal sensory glands as well. Dr. Malan and Lindquist are equally
responsible for Plaintiff's injuries through the doctrine of vicarious
liability.

28 (Compl. ¶ IV.)

1 **A. Eighth Amendment Medical Care Claim**

2 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate
3 must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091, 1096
4 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 295 (1976)). The two part
5 test for deliberate indifference requires the plaintiff to show (1) “‘a serious medical need’ by
6 demonstrating that ‘failure to treat a prisoner’s condition could result in further significant injury or
7 the unnecessary and wanton infliction of pain,’” and (2) “‘the defendant’s response to the need was
8 deliberately indifferent.” Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059
9 (9th Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th
10 Cir. 1997) (en banc) (internal quotations omitted)). Deliberate indifference is shown by “a
11 purposeful act or failure to respond to a prisoner’s pain or possible medical need, and harm caused
12 by the indifference.” Id. (citing McGuckin, 974 F.2d at 1060).

13 Although Plaintiff alleges that he suffered from an objectively serious medical condition, he
14 has not alleged any facts indicating that the response to the condition was deliberately indifferent.
15 Specifically, the facts alleged in the complaint indicate that Dr. Zia performed a wisdom tooth
16 extraction prior to treating an underlying infection. Plaintiff appears to be challenging the quality
17 of care, rather than the fact of medical care. Before it can be said that a prisoner’s civil rights have
18 been abridged with regard to medical care, “the indifference to his medical needs must be substantial.
19 Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.”
20 Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir.1980) (citing Estelle v. Gamble, 429
21 U.S., 97, 105-06 (1976)). See also Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir.2004).

22 Plaintiff’s conclusion that the Dr. Zia “incorrectly” removed the wisdom tooth prior to
23 treating the infection does not, of itself, state a claim for relief. Mere difference of opinion between
24 a prisoner and prison medical staff as to appropriate medical care does not give rise to a section 1983
25 claim. Hatton v. Arpaio, 217 F.3d 845 (9th Cir. 2000); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th
26 Cir. 1981). The facts of the complaint do not indicate whether, or when the infection was treated.
27 There are no facts alleged indicating a failure to treat the infection, or a delay in treating the
28 infection. Plaintiff alleges that Dr. Zia chose to remove Plaintiff’s wisdom tooth before treating the

1 infection. Such an allegation, of itself, fails to state a claim for relief.

2 **B. Supervisory Liability**

3 Plaintiff alleges that Dr. Malan, the Chief Dentist, and Dr. Lindquist, the Supervising Dentist,
4 are liable on the ground of vicarious liability. Under section 1983, Plaintiff must prove that the
5 Defendants holding supervisory positions personally participated in the deprivation of his rights.
6 Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). There is no respondeat superior liability, and
7 each defendant is only liable for his or her own misconduct. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1948-
8 49 (2009). A supervisor may be held liable for the constitutional violations of his or her
9 subordinates only if he or she “participated in or directed the violations, or knew of the violations
10 and failed to act to prevent them.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Plaintiff has
11 failed to allege any facts indicating that either Dr. Malan or Dr. Lindquist “participated in or directed
12 the violations, or knew of the violations and failed to act to prevent them.” They should therefore
13 be dismissed.

14 **III. Conclusion and Order**

15 The Court has screened Plaintiff’s complaint and finds that it does not state any claims upon
16 which relief may be granted under section 1983. The Court will provide Plaintiff with the
17 opportunity to file an amended complaint curing the deficiencies identified by the Court in this order.
18 Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff is cautioned that he may not
19 change the nature of this suit by adding new, unrelated claims in his amended complaint. George,
20 507 F.3d at 607 (no “buckshot” complaints).

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

26 Finally, Plaintiff is advised that an amended complaint supercedes the original complaint,
27 Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567
28 (9th Cir. 1987), and must be “complete in itself without reference to the prior or superceded

1 pleading,” Local Rule 220. Plaintiff is warned that “[a]ll causes of action alleged in an original
2 complaint which are not alleged in an amended complaint are waived.” King, 814 F.2d at 567 (citing
3 to London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth, 114 F.3d at
4 1474.

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

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

15
16
17 IT IS SO ORDERED.

18 **Dated: December 12, 2010**

19 /s/ Gary S. Austin
20 UNITED STATES MAGISTRATE JUDGE
21
22
23
24
25
26
27
28