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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANDREW LEAR,
Plaintiff,
vs.
DR. CONANAN, et al.,
Defendants.

1:12-cv-01170 GSA PC
ORDER DISMISSING COMPLAINT AND
GRANTING PLAINTIFF LEAVE TO FILE
AN AMENDED COMPLAINT

AMENDED COMPLAINT DUE
IN THIRTY DAYS

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

¹ Plaintiff filed a consent to proceed before a magistrate judge on Jly 12, 2012 (ECF No 4).

1 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §
2 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been
3 paid, the court shall dismiss the case at any time if the court determines that . . . the action or
4 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §
5 1915(e)(2)(B)(ii).

6 “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited
7 exceptions,” none of which applies to section 1983 actions. Swierkewicz v. Sorema N.A., 534
8 U.S. 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain “a
9 short and plain statement of the claim showing that the pleader is entitled to relief . . .” Fed.
10 R.Civ. P. 8(a). “Such a statement must simply give the defendant fair notice of what the
11 plaintiff’s claim is and the grounds upon which it rests.” Swierkewicz, 534 U.S. at 512.
12 However, “the liberal pleading standard . . . applies only to a plaintiff’s factual allegations.”
13 Nietze v. Williams, 490 U.S. 319, 330 n. 9 (1989). “[A] liberal interpretation of a civil rights
14 complaint may not supply essential elements of the claim that were not initially pled.” Bruns v.
15 Nat’l Credit Union Admin., 122 F.3d 1251, 1257 (9th Cir. 1997)(quoting Ivey v. Bd. of Regents,
16 673 F.2d 266, 268 (9th Cir. 1982)).

17 **II. Plaintiff’s Claims**

18 Plaintiff, an inmate in the custody of the California Department of Corrections and
19 Rehabilitation (CDCR) at Avenal State Prison, brings this action against defendant correctional
20 officials employed by the CDCR at Avenal. Plaintiff names as defendants Dr. Conan and
21 Physician’s Assistant (PA) Blackwell. Plaintiff’s claim stems from the denial of his request for
22 hernia surgery.

23 Plaintiff alleges that on May 19, 2011, he was seen by Dr. Conan regarding an
24 abdominal hernia. Plaintiff told Dr. Conan that the hernia was causing him severe pain and
25 his daily activities were “heavily impeded.” Dr. Conan refused Plaintiff’s request for hernia
26 surgery. Plaintiff alleges that “it is clearly obvious that Plaintiff is in pain, and that the hernia is
27 getting worse, as it can be observed from the bump which protrudes from the area of the
28 hernia.” Plaintiff alleges that, in his view, refusing an operation to close the hernia “will

1 obviously result in a more extensive surgery due to the delay in repairing the problem now in a
2 timely manner, and also to alleviate the pain and suffering of the Plaintiff.”

3 Plaintiff attaches as an exhibit to his complaint copies of an inmate grievance he filed
4 regarding this issue, along with the responses to his grievance. The response to Plaintiff’s
5 grievance at the second level, from California Correctional Health Care Services, indicates the
6 following.

7 Your appeal was assigned at the First Level Review on May 23,
8 2011. You were interviewed by M. Blackwell, PA-C, on June
9 17, 2011, in order to give you an opportunity to fully explain
10 your appeal. PA Blackwell documented that you had a small
11 reducible hernia and surgery is not medically indicated at this
12 time. PA Blackwell advised you to keep your follow up
13 appointment.

14 Your appeal was assigned at the Second Level on July 22, 2011.
15 A review of your Unit Health Record (UHR) and relevant
16 documents was conducted by the Chief Medical Executive’s
17 office on July 27, 2011, indicated that there are no changes in
18 your UHR since you last examination with PA Blackwell on June
19 17, 2011.

20 Your request for surgery to prevent the diagnosed hernia from
21 getting worse is denied as you were examined on June 17, 2011
22 by PA Blackwell and he documented that you had a small
23 reducible hernia and surgery is not medically indicated at this
24 time. Your appeal remains denied at the Second Level Review.

25 **C. Eighth Amendment**

26 Under the Eighth Amendment, the government has an obligation to provide medical
27 care to those who are incarcerated. See Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000).
28 “In order to violate the Eighth Amendment proscription against cruel and unusual punishment,
there must be a ‘deliberate indifference to serious medical needs of prisoners.’” Id. (quoting
Estelle v. Gamble, 429 U.S. 97, 104 (1976)). Lopez takes a two-prong approach to evaluating
whether medical care, or lack thereof, rises to the level of “deliberate indifference.” First, a
court must examine whether the plaintiff’s medical needs were serious. See Id. Second, a
court must determine whether “officials intentionally interfered with [the plaintiff’s] medical
treatment.” Id. at 1132.

Plaintiff is advised that he cannot prevail in a section 1983 action where only the quality
of treatment is subject to dispute. See Sanchez v. Vild, 891 F.2d 240 (9th Cir. 1989). Mere

1 difference of opinion between a prisoner and prison medical staff as to appropriate medical care
2 does not give rise to a section 1983 claim. Hatton v. Arpaio, 217 F.3d 845 (9th Cir. 2000);
3 Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). That is the case here. Plaintiff's
4 central allegation is that he disagrees with the diagnosis of medical officials.

5 Plaintiff has not alleged facts suggesting deliberate indifference. Plaintiff must allege
6 facts indicating that each defendant was aware of a specific harm to Plaintiff, and acted with
7 deliberate indifference to that harm. Plaintiff has failed to do so here. The complaint must
8 therefore be dismissed. Plaintiff will, however, be granted leave to file an amended complaint.

9 Plaintiff need not, however, set forth legal arguments in support of his claims. In order
10 to hold an individual defendant liable, Plaintiff must name the individual defendant, describe
11 where that defendant is employed and in what capacity, and explain how that defendant acted
12 under color of state law. Plaintiff should state clearly, in his own words, what happened.
13 Plaintiff must describe what each defendant, *by name*, did to violate the particular right
14 described by Plaintiff.

15 **III. Conclusion**

16 The Court has screened Plaintiff's complaint and finds that it does not state any claims
17 upon which relief may be granted under section 1983. The Court will provide Plaintiff with the
18 opportunity to file an amended complaint curing the deficiencies identified by the Court in this
19 order. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff is cautioned that he
20 may not change the nature of this suit by adding new, unrelated claims in his amended
21 complaint.

22 Plaintiff's amended complaint should be brief, Fed. R. Civ. P. 8(a), but must state what
23 each named defendant did that led to the deprivation of Plaintiff's constitutional or other
24 federal rights, Hydrick, 500 F.3d at 987-88. Although accepted as true, the "[f]actual
25 allegations must be [sufficient] to raise a right to relief above the speculative level" Bell
26 Atlantic v. Twombly, 550 U.S. 544, 554 (2007)(citations omitted).

27 Finally, Plaintiff is advised that an amended complaint supersedes the original
28 complaint, Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814

1 F.2d 565, 567 (9th Cir. 1987), and must be “complete and in and of itself without reference to
2 the prior or superseded pleading.” Local Rule 15-220. Plaintiff is warned that “[a]ll causes of
3 action alleged in an original complaint which are not alleged in an amended complaint are
4 waived.” King, 814 F.2d at 567 (citing to London v. Coopers & Lybrand, 644 F.2d 811, 814
5 (9th Cir. 1981)).

6 Accordingly, IT IS HEREBY ORDERED that:

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

16
17 IT IS SO ORDERED.

18 Dated: March 17, 2015

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE