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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

LAKEITH L. MCCOY,)	Case No.: 1:13-cv-01495-BAM (PC)
)	
Plaintiff,)	ORDER DISMISSING ACTION FOR FAILURE
)	TO STATE A CLAIM
v.)	
)	
M. GARIKAPARTHI, et al.,)	
)	
Defendants.)	
)	
)	

I. Screening Requirement and Standard

Plaintiff LaKeith L. McCoy (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. On October 15, 2014, the Court dismissed Plaintiff’s complaint with leave to amend. (ECF No. 9.) Plaintiff’s first amended complaint, filed on November 17, 2014, is currently before the Court for screening.

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2); 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 is
2 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, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) (citing Bell
5 Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). While a plaintiff’s
6 allegations are taken as true, courts “are not required to indulge unwarranted inferences.” Doe I v.
7 Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation
8 omitted).

9 To survive screening, Plaintiff’s claims must be facially plausible, which requires sufficient
10 factual detail to allow the Court to reasonably infer that each named defendant is liable for the
11 misconduct alleged. Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949 (quotation marks omitted); Moss v.
12 United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility that a defendant
13 acted unlawfully is not sufficient, and mere consistency with liability falls short of satisfying the
14 plausibility standard. Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949 (quotation marks omitted); Moss, 572
15 F.3d at 969.

16 **II. Plaintiff’s Allegations**

17 Plaintiff is currently housed at the California Correctional Institution in Tehachapi, California,
18 where the events in the complaint are alleged to have occurred. Plaintiff names the following
19 defendants: (1) Dr. M. Garikaparathi; (2) A. Steiber; (3) J. Keeler; and (4) T. Chavez.

20 Plaintiff alleges: Plaintiff, who has been incarcerated at CCI since November 21, 2012, has a
21 severe allergy to eggs. Plaintiff was instructed by the prison’s medical department to avoid foods that
22 contain egg protein, such as eggs, French toast, cookies, coffee cake, coleslaw, macaroni salad,
23 mayonnaise, noodles, potato salad, some salad dressing, breakfast pockets, éclairs, pancakes,
24 cornbread, cakes, and carrot salad. Each week, Plaintiff is restricted from eating the majority of
25 breakfasts because they contain eggs or are prepared with eggs. The food that is prepared each week
26 has been the same from week to week with a few rare exceptions. Each week, Plaintiff is served a
27 breakfast that contains stewed prunes, oatmeal, scrambled eggs, pinto beans, two flour tortillas, salsa,
28 non-fat milk and coffee. When Plaintiff receives his tray, the scrambled eggs are spilled over into the

1 oatmeal and pinto beans, leaving Plaintiff with only stewed prunes and two flour tortillas to eat. At
2 least once a week, there is a breakfast served with fresh fruit, cornmeal mush, beef hash, boiled egg,
3 wheat bread, non-fat milk and coffee. Plaintiff is restricted from the egg in this meal. Once a week, a
4 meal is being served containing fresh fruit, farina cereal, boiled eggs, hash brown potatoes, wheat
5 bread, margarine readies, non-fat milk and coffee. When this meal is given to Plaintiff, the eggs are
6 cracked open, exposing the egg. The egg is or has been placed on the hash browns or wheat bread.
7 On any given day, Plaintiff is served fresh fruit, hominy grits, coffee cake, peanut butter, wheat bread,
8 non-fat milk and coffee. The coffee cake is always spilled over into the hominy grits. Each and every
9 Saturday, the prison serves fresh fruit, cooked rice cereal, pancakes, syrup, peanut butter, margarine
10 readies, non-fat milk and coffee. Plaintiff is restricted from eating the pancakes. Every Sunday, there
11 is a breakfast served containing fresh fruit, cold cereal, scrambled eggs, turkey ham or sausage, hash
12 brown potatoes, wheat bread, margarine readies, non-fat milk and coffee. The eggs are either
13 deliberately placed on top of the ham or spilled onto the sausage and hash brown. Due to Plaintiff's
14 allergy, he is denied a complete breakfast and is only able to eat the bread, fruit and cold cereal.

15 At least three to four times a week for dinner, Plaintiff is served cake. During the week, some
16 other portions may contain coleslaw, noodles or other food items that Plaintiff must avoid. When
17 cookies are given to Plaintiff in his lunch, he has to discard them. Although the cookies are
18 individually packaged, they are given a total of four times per week. When cake is given for dinner, it
19 is deliberately placed in the portion with either the bread or cornbread.

20 Plaintiff alleges that he is being denied an adequate and complete breakfast at least six times
21 per week and denied adequate portions for both lunch and dinner. Plaintiff is restricted from
22 exercising five times a week despite doctor's orders to do so. Plaintiff goes to sleep with stomach
23 aches and hunger pains. Plaintiff alleges that he suffers from malnourishment and weight loss. Due to
24 other inmates' generosity, Plaintiff has been able to maintain some form of health. Plaintiff does not
25 have a means of buying food.

26 On January 31, 2013, Defendant T. Chavez told Plaintiff that no special food substitutions
27 would be provided.
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1 On March 11, 2013, Defendant J. Keeler explained to Plaintiff that if the prison had to provide
2 him with any special diet, they would have to do it for everyone with an allergy.

3 On April 24, 2013, Defendant A. Steiber told Plaintiff that the prison would not substitute or
4 provide a special diet because they would have to do so for everyone else.

5 Defendant Garikaparathi explained to Plaintiff that if his weight dropped to 144 pounds, then he
6 would be forced to provide Plaintiff with a food supplement. When Plaintiff's weight dropped to 144
7 pounds, Defendant Garikaparathi refused to give Plaintiff any type of food supplement. Plaintiff
8 alleges that he weighed less than 144 pounds because he was weighed with waist chains and
9 handcuffs, a heavy prison jumpsuit, underclothes and prison shoes. Plaintiff is 29 years old and is
10 5'10" tall.

11 Plaintiff asserts that Defendants are depriving him of adequate food in violation of his right to
12 be free from cruel and unusual punishment as guaranteed by the Eighth Amendment to the United
13 States Constitution.

14 **III. Discussion**

15 **A. Eighth Amendment - Deliberate Indifference to Serious Medical Needs**

16 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate
17 must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091, 1096
18 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251
19 (1976)). The two part test for deliberate indifference requires the plaintiff to show (1) “a ‘serious
20 medical need’ by demonstrating that failure to treat a prisoner's condition could result in further
21 significant injury or the ‘unnecessary and wanton infliction of pain,’” and (2) “the defendant's
22 response to the need was deliberately indifferent.” Jett, 439 F.3d at 1096; Wilhelm v. Rotman, 680
23 F.3d 1113, 1122 (9th Cir. 2012).

24 Deliberate indifference is shown where the official is aware of a serious medical need and fails
25 to adequately respond. Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1018 (9th Cir. 2010).
26 Deliberate indifference is a high legal standard. Simmons, 609 F.3d at 1019; Toguchi v. Chung, 391
27 F.3d 1051, 1060 (9th Cir. 2004). The prison official must be aware of facts from which he could make
28

1 an inference that “a substantial risk of serious harm exists” and he must make the inference. Farmer v.
2 Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811 (1994).

3 A difference of opinion between a prisoner and prison medical authorities as to proper
4 treatment does not give rise to a claim. Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981);
5 Mayfield v. Craven, 433 F.2d 873, 874 (9th Cir. 1970). Additionally, a difference of opinion between
6 medical providers regarding treatment does not amount to deliberate indifference. Sanchez v. Vild,
7 891 F.2d 240, 242 (9th Cir. 1989). To state a claim under these conditions requires the plaintiff to
8 “show that the course of treatment the doctors chose was medically unacceptable under the
9 circumstances, . . . and . . . they chose this course in conscious disregard of an excessive risk to
10 plaintiff’s health.” Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

11 Plaintiff has failed to state a cognizable Eighth Amendment claim against Defendant Dr.
12 Garikaparathi arising from the failure to provide a food supplement. At best, Plaintiff has established a
13 difference of opinion regarding the necessity for such a supplement.

14 **B. Eighth Amendment - Failure to Provide Adequate Food**

15 The Eighth Amendment’s prohibition against cruel and unusual punishment protects prisoners
16 not only from inhumane methods of punishment but also from inhumane conditions of confinement.
17 Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006) (citing Farmer, 511 U.S. at 847, and
18 Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392 (1981)) (quotation marks omitted). Prison
19 officials must ensure that inmates receive adequate food, clothing, shelter, medical care and personal
20 safety. Farmer, 511 U.S. at 832.

21 “Adequate food is a basic human need protected by the Eighth Amendment.” Keenan v. Hall,
22 83 F.3d 1083, 1091 (9th Cir. 1996). The Eighth Amendment requires only that prisoners receive food
23 that is adequate to maintain health. LeMaire v. Maass, 12 F.3d 1444, 1456 (9th Cir. 1993). However,
24 the Ninth Circuit has found that “[t]he sustained deprivation of food can be cruel and unusual
25 punishment when it results in pain without any penological purpose.” Foster v. Runnels, 554 F.3d 807,
26 812–13 (9th Cir. 2009) (finding the denial of sixteen meals in twenty-three days a sufficiently serious
27 deprivation for Eighth Amendment purposes).

1 Plaintiff has not adequately alleged a sufficiently serious deprivation to state a cognizable
2 claim. Plaintiff has not alleged a sustained deprivation of food. By Plaintiff's own admission, he is
3 able to eat a variety of foods served during breakfast meals and is not wholly deprived of edible food
4 at each breakfast meal. Further, by Plaintiff's own admission, he is only prevented from eating
5 cookies during lunch and various food items during dinner meals, such as cake, coleslaw or noodles.
6 Plaintiff has not identified any lunch or dinner meals that he has been unable to eat nor has he
7 adequately alleged that he is being denied adequate food during lunch or dinner.

8 **IV. Conclusion and Order**

9 Plaintiff's complaint fails to state a cognizable claim for relief. The Court finds that the
10 identified deficiencies cannot be cured by amendment and further leave to amend is not warranted.
11 Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). Accordingly, Plaintiff's complaint is HEREBY
12 DISMISSED for failure to state a cognizable section 1983 claim. All pending motions, if any, are
13 terminated.

14
15 IT IS SO ORDERED.

16 Dated: November 19, 2014

/s/ Barbara A. McAuliffe
17 UNITED STATES MAGISTRATE JUDGE