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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ISMAEL LOPEZ-RANGEL,
Plaintiff,
v.
COPENHAVER, et al.,
Defendants.

No. 1:14-cv-01175 DLB PC
ORDER DISMISSING SECOND
AMENDED COMPLAINT WITHOUT
LEAVE TO AMEND

Plaintiff Ismael Lopez-Rangel (“Plaintiff”), a former federal prisoner proceeding pro se and in forma pauperis, filed this civil action on July 28, 2014, pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which provides a remedy for violation of civil rights by federal actors.¹

On January 22, 2015, the Court screened Plaintiff’s complaint and dismissed it with leave to amend. Plaintiff filed a First Amended Complaint on March 2, 2015.

This action was dismissed without prejudice on December 9, 2015, after Plaintiff was released and deported, but failed to keep the Court apprised of his current address. Plaintiff, who now resides in Mexico, filed a notice of change of address on January 21, 2016. The Court reopened this action on January 26, 2016.

¹ Plaintiff consented to the jurisdiction of the United States Magistrate Judge on August 13, 2014.

1 On January 29, 2016, the Court screened the First Amended Complaint and dismissed it
2 with leave to amend.

3 On April 26, 2016, after Plaintiff failed to file an amended complaint or otherwise contact
4 the Court, the Court again dismissed the action without prejudice.

5 On May 6, 2016, Plaintiff filed the instant Second Amended Complaint. Because Plaintiff
6 was attempting to comply with Court orders and the possibility of mail delays given that he
7 resides in Mexico, the Court again vacated the judgment.

8 In his Second Amended Complaint, Plaintiff names USP-Atwater Warden Copenhaver,
9 Health Service Administrator Ms. Mettry, Nurse Franco, Doctors Franco, Grossman and Grimm,
10 Physician's Assistant Wong and Counselor Gardea as Defendants.

11 **A. SCREENING REQUIREMENT**

12 The Court is required to screen complaints brought by prisoners seeking relief against a
13 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
14 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
15 “frivolous, malicious,” or that fail to state a claim upon which relief may be granted, or that seek
16 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
17 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
18 dismiss the case at any time if the court determines that ... the action or appeal ... fails to state a
19 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

20 Under Bivens, a plaintiff may sue a federal officer in his or her individual capacity for
21 damages for violating the plaintiff's constitutional rights. See Bivens, 403 U.S. at 397. “Actions
22 under [42 U.S.C.] § 1983 and those under Bivens are identical save for the replacement of a state
23 actor under § 1983 by a federal actor under Bivens.” Van Strum v. Lawn, 940 F.2d 406, 409 (9th
24 Cir.1991). To state a claim under Bivens, a plaintiff must allege: (1) that a right secured by the
25 Constitution of the United States was violated, and (2) that the alleged violation was committed
26 by a federal actor. See Van Strum, 940 F.2d at 409.

27 A complaint must contain “a short and plain statement of the claim showing that the
28 pleader is entitled to relief” Fed.R.Civ.P. 8(a)(2). Detailed factual allegations are not

1 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
2 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
3 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual
4 matter, accepted as true, to state a claim to relief that is plausible on its face.” Id. Facial
5 plausibility demands more than the mere possibility that a defendant committed misconduct and,
6 while factual allegations are accepted as true, legal conclusions are not. Id. at 677-78.

7 **B. PLAINTIFF’S ALLEGATIONS**

8 Plaintiff has been released from federal custody and is currently residing in Mexico.

9 The events at issue occurred while he was incarcerated at USP-Atwater.

10 Plaintiff alleges that upon arrival at USP-Atwater, he contacted Health Services and
11 requested medical assistance for an eye problem. Plaintiff told Health Services that he needed
12 surgery for an eye infection. Medical “responded that infection that required surgery.” ECF No.
13 20, at 9. Medical told him to submit a cop-out. Plaintiff submitted a cop-out, but was then told
14 by Medical to submit a sick-call form. Plaintiff didn’t understand because Defendant Dr. Franco
15 told him to submit a cop-out, but Defendant Mettry of Health Services told him to submit a sick-
16 call.

17 Plaintiff told Defendant Gardea, his counselor, about his medical problems, but he never
18 did anything to help.

19 Plaintiff then went to Defendant Copenhaver, the Warden. He told Plaintiff that
20 Defendant Mettry was going to look into Plaintiff’s eye problem, but she never did.

21 Plaintiff submitted another cop-out and Defendant Wong received it. However, seven or
22 eight months passed before Plaintiff received his first eye surgery.

23 Plaintiff contends that the surgery was the result of his notification that he was going to
24 initiate a complaint against Medical.

25 After his surgery, Plaintiff experienced intense pain, loss of sight, headaches, nausea and
26 other painful symptoms. He requested medication and eye drops from Health Services, and
27 Medical indicated that Plaintiff would be seen.

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1 Plaintiff followed Medical's orders and submitted a cop-out. He did not get a response
2 and submitted another one.

3 After fifteen to twenty days of waiting in pain for medical assistance, the pain forced
4 Plaintiff to remove his bandages. He was not able to see properly and discovered that he was
5 losing sight.

6 Plaintiff submitted another cop-out to Medical, but his cop-outs were not answered.

7 Plaintiff submitted three more cop-outs. Eight months later, Medical or Health services
8 informed him of a second surgery.

9 Plaintiff underwent a second eye surgery. When he returned, he experienced vomiting,
10 nausea and respiratory problems. Plaintiff was unable to stop vomiting, and Medical gave him a
11 shot to help reduce the vomiting. After the shot, Plaintiff was not given any other medication and
12 was immediately sent to his unit.

13 After arriving at his unit, Plaintiff was in pain all night. He notified BOP officials of his
14 pain and eye problem, but the officials ignored his requests for medical attention.

15 Plaintiff was in pain all night. He notified Bureau of Prisons ("BOP") officials of his pain
16 and eye problem, but they ignored his requests for medical attention. Plaintiff was told by the
17 6A-Unit BOP officials to submit another cop-out to Medical so that he could get medical
18 attention.

19 After three or four days, Medical called Plaintiff to examine his eye. Plaintiff had pain in
20 his eye, but he believed that the pain was going away and that he was going to be able to see
21 clearly in a couple of days. That did not happen.

22 About twenty days later, Plaintiff spoke with Defendant Mettry and informed her that he
23 had a blister and what looked like a water bubble in his eye. Defendant Mettry only told Plaintiff
24 that he should submit a cop-out.

25 Plaintiff submitted a cop-out and waited for a month with no answer. He submitted
26 another cop-out, but again received no answer. Plaintiff then went to Defendant Copenhaver,
27 Defendant Gardea, the Doctor and Physician's Assistant, as well as other medical personnel, to
28 inform them of the blisters, red spots, water bubbles and pain in his eye.

1 Defendant Mettry told Plaintiff to look at the call-out for scheduling. Plaintiff was called
2 to Medical three times, but each time, the eye specialist was not there to see him. He was
3 rescheduled each time.

4 On the fourth appointment, Plaintiff was seen by an eye doctor. The doctor told Plaintiff
5 that he was going to perform a third surgery. Plaintiff told the doctor that he did not trust him
6 because it was going to be the third surgery. The doctor did not know that Plaintiff had been
7 subjected to two previous surgeries. The doctor told Plaintiff that he would not force Plaintiff to
8 have the surgery.

9 Plaintiff explains that he does not speak, write or understand English, and the eye doctor
10 did not speak Spanish. Plaintiff believes that his communication was hindered by the language
11 barrier, though he declined further surgeries because of distrust. Plaintiff told the doctor that he
12 would resort to the courts for assistance.

13 Plaintiff alleges that Defendant Grossman performed the first two surgeries. Plaintiff
14 contends that Defendant Grossman failed to inform him of any additional surgeries, and failed to
15 provide adequate medical care.

16 Plaintiff contends that prior to the second surgery, Defendant Grim administered
17 anesthesia. However, he overmedicated Plaintiff, resulting in vomiting, headaches and dizziness.

18 Plaintiff also alleges that at some point, Defendant Wong performed a physical
19 examination, but not an eye examination. He states that he did not request a physical, but rather
20 asked for assistance with his eye problem.

21 Plaintiff contends that Defendants' negligent acts contributed to the loss of sight and pain
22 in his left eye. Based on these allegations, Plaintiff alleges violation of his due process rights
23 under the Fifth Amendment, and cruel and unusual punishment in violation of the Eighth
24 Amendment.

25 **C. DISCUSSION**

26 The Court notes that as with Plaintiff's prior amendments, the Second Amended
27 Complaint offers little, if any, additional factual information. While Plaintiff has added, changed

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1 and/or deleted certain legal language, the allegations in his Second Amended Complaint remain
2 largely the same as those in his original complaint.

3 1. Linkage

4 To state a claim, Plaintiff must link each named defendant to a violation of his
5 constitutional rights; there is no *respondeat superior* liability under Bivens. Starr v. Baca, 652
6 F.3d 1202, 1205-08 (9th Cir. 2011), cert. denied, 132 S.Ct. 2101 (2012); Serra v. Lappin, 600
7 F.3d 1191, 1200 (9th Cir. 2010).

8 Although Plaintiff names Defendant Nurse Franco as a Defendant, he fails to allege any
9 specific facts against her. In his causes of action, he simply states that she was negligent in
10 failing to provide adequate medical care. He also alleges that she failed to take action and
11 delayed medical assistance. Legal conclusions, without factual support, are insufficient to state a
12 claim.

13 Accordingly, Plaintiff fails to state a claim against Defendant Nurse Franco. Plaintiff was
14 informed of this deficiency in the prior screening orders, but failed to correct it.

15 2. Fifth Amendment

16 Plaintiff alleges that Defendants violated his due process rights under the Fifth
17 Amendment. This claim is based on his belief that Defendants provided negligent medical care
18 and/or ignored his requests for medical assistance.

19 When a constitutional amendment provides an explicit textual source of constitutional
20 protection against a particular sort of government behavior, that amendment, not the more
21 generalized notion of substantive due process, must govern. See County of Sacramento v. Lewis,
22 523 U.S. 833, 842 (1998).

23 Here, Plaintiff's medical claims are governed by the Eighth Amendment and are therefore
24 not cognizable under the Fifth Amendment.

25 4. Eighth Amendment

26 While the Eighth Amendment of the United States Constitution entitles Plaintiff to
27 medical care, the Eighth Amendment is violated only when a prison official acts with deliberate
28 indifference to an inmate's serious medical needs. Snow v. McDaniel, 681 F.3d 978, 985 (9th

1 Cir. 2012), overruled in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th
2 Cir. 2014); Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v. Penner, 439 F.3d
3 1091, 1096 (9th Cir. 2006). Plaintiff “must show (1) a serious medical need by demonstrating
4 that failure to treat [his] condition could result in further significant injury or the unnecessary and
5 wanton infliction of pain,” and (2) that “the defendant’s response to the need was deliberately
6 indifferent.” Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096). Deliberate indifference is
7 shown by “(a) a purposeful act or failure to respond to a prisoner’s pain or possible medical need,
8 and (b) harm caused by the indifference.” Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at
9 1096). The requisite state of mind is one of subjective recklessness, which entails more than
10 ordinary lack of due care. Snow, 681 F.3d at 985 (citation and quotation marks omitted);
11 Wilhelm, 680 F.3d at 1122.

12 a. *Defendants Dr. Franco, Mettry, Gardea and Copenhaver*

13 Insofar as Plaintiff alleges that Defendants Dr. Franco and Mettry ignored his medical
14 needs, his facts show that he asked them for medical treatment and they instructed him to submit
15 medical requests. In one instance, Defendant Mettry instructed Plaintiff to “look at the call-out
16 for scheduling.” Although Plaintiff may not have liked their instructions on how to obtain
17 medical care, there is no indication that they acted with the requisite state of mind. Mere
18 negligence or inadvertence, or a difference in medical judgment or opinion does not amount to
19 deliberate indifference. See Estelle, 429 U.S. at 105-06; see also McGuckin, 974 F.2d at 1060 (“A
20 defendant must *purposefully ignore or fail to respond* to a prisoner’s pain or possible medical
21 need in order for deliberate indifference to be established.”) (emphasis added).

22 Similarly, Plaintiff alleges that he asked Defendant Copenhaver for help with his eye
23 problem, and that Defendant Copenhaver told him that Defendant Mettry would look into the
24 issue. Again, Defendant Copenhaver responded to Plaintiff’s inquiry and there is no indication
25 that he acted with deliberate indifference. While Plaintiff alleges that Defendant Mettry did not
26 follow-up, he does not link this failure to Defendant Copenhaver, nor does he provide sufficient
27 facts about Defendant Mettry’s failure to establish that she acted with deliberate indifference.
28 Estelle, 429 U.S. at 105-106.

1 As to Defendant Gardea, Plaintiff contends that he informed Counselor Gardea about
2 Plaintiff's medical problems, but he never did anything to help Plaintiff. Again, these allegations
3 are too vague to demonstrate that Defendant Gardea's failure was deliberately indifferent. There
4 is no indication that Defendant Gardea's actions were purposeful.

5 Plaintiff also alleges that he informed Defendants Copenhaver, Mettry and Gardea about
6 blisters and red spots in his eye. However, Plaintiff's allegations show that he was then called for
7 medical appointments. He states that he was rescheduled three times because the eye specialist
8 never appeared, but there is no indication that any Defendants were responsible for this. Plaintiff
9 eventually saw the eye specialist at his fourth appointment.

10 Moreover, Plaintiff cites various delays of weeks or months, but he does not link any
11 named Defendant to the actual delay. Iqbal, 556 U.S. at 676-77; Lemire v. California Dep't of
12 Corr. and Rehab., 726 F.3d 1062, 1074-75 (9th Cir.2013).

13 Finally, insofar as Plaintiff alleges that Defendants Dr. Franco, Mettry and Copenhaver
14 failed to train and supervise USP-Atwater medical staff, he fails to state a claim. Supervisory
15 personnel may not be held liable under section 1983 for the actions of subordinate employees
16 based on *respondeat superior*, or vicarious liability. Crowley v. Bannister, 734 F.3d 967, 977
17 (9th Cir. 2013); accord Lemire v. California Dep't of Corr. and Rehab., 726 F.3d 1062, 1074-75
18 (9th Cir. 2013); Lacey v. Maricopa County, 693 F.3d 896, 915-16 (9th Cir. 2012) (en banc). "A
19 supervisor may be liable only if (1) he or she is personally involved in the constitutional
20 deprivation, or (2) there is a sufficient causal connection between the supervisor's wrongful
21 conduct and the constitutional violation." Crowley, 734 F.3d at 977 (citing Snow, 681 F.3d at
22 989) (internal quotation marks omitted); accord Lemire, 726 F.3d at 1074-75; Lacey, 693 F.3d at
23 915-16.

24 Although Plaintiff alleges that Defendants Dr. Franco, Copenhaver and Mettry failed to
25 train and supervise medical staff, he does not provide any factual support to either (1) directly
26 link them to this failure; or (2) suggest a causal connection between their alleged failures and a
27 constitutional violation. A conclusory assertion that Defendants failed to properly train and

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1 supervise staff will not support a cognizable claim for relief under section 1983. Crowley, 734
2 F.3d at 977; Lemire, 726 F.3d at 1074-75.

3 For these reasons, Plaintiff fails to state a claim against Defendants Mettry, Copenhaver,
4 Gardea and Dr. Franco. Plaintiff was informed of these deficiencies in the prior screening order,
5 but has not corrected them.

6 b. *Defendant Wong*

7 Plaintiff alleges that Defendant Wong received a cop-out slip, but that seven or eight
8 months then passed before Plaintiff received surgery. Plaintiff does not connect Defendant Wong
9 to this delay, however.

10 Plaintiff further contends that Defendant Wong performed a physical even though Plaintiff
11 specifically requested an eye exam. He does not provide facts to show that Defendant Wong
12 acted with deliberate indifference, however. Even assuming that Defendant Wong erred, a
13 finding which is not necessarily supported by the record, an Eighth Amendment claim may not be
14 premised on even gross negligence by a physician. Wood v. Housewright, 900 F.2d 1332, 1334
15 (9th Cir. 1990).

16 Plaintiff therefore fails to state a claim against Defendant Wong. Plaintiff was informed
17 of these deficiencies in the prior screening order, but has failed to correct them.

18 c. *Defendants Grossman and Grim*

19 Plaintiff argues that Defendant Grossman's negligence during an unsuccessful eye surgery
20 and Defendant Grim's negligent actions in overmedicating Plaintiff with anesthesia violated the
21 Eighth Amendment. Again, however, Plaintiff does not provide sufficient facts to show that they
22 acted with the requisite state of mind. As explained above, even if Defendants Grossman and
23 Grim erred in their treatment, an Eighth Amendment claim may not be premised on even gross
24 negligence by a physician. Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990).

25 Plaintiff therefore fails to state a claim against Defendants Grossman and Grim. Plaintiff
26 was informed of these deficiencies in the prior screening order but has failed to correct them.

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1 **D. CONCLUSION AND ORDER**

2 Plaintiff's Second Amended Complaint fails to state any cognizable claims against any
3 Defendant. Plaintiff has been provided numerous opportunities to correct the deficiencies, but he
4 has failed to do so. In the prior screening order, the Court notified Plaintiff that this would be his
5 final opportunity to amend. Accordingly, the Court finds that further leave to amend is not
6 warranted. Akhtar v. Mesa, 698 F.3d 1202, 1212-13 (9th Cir. 2012); Lopez v. Smith, 203 F.3d
7 1122, 1130 (9th Cir. 2000).

8 Therefore, this action is DISMISSED WITHOUT LEAVE TO AMEND for failure to
9 state a claim for which relief can be granted.

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11 IT IS SO ORDERED.

12 Dated: July 13, 2016

/s/ Dennis L. Beck
13 UNITED STATES MAGISTRATE JUDGE

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8th: All violated 8th. After two weeks, Plaintiff's eye problems worsened. Defendants knowing
and willful lack of disregard for his health violated the Eighth and exposed him to unnecessary
pain and suffering, resulting in permanent eye injury