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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KELLY DAVIS,

Plaintiff,

v.

R. WILSON and J. LEWIS,

Defendants.

1:16-cv-00605-EPG (PC)

ORDER DISMISSING COMPLAINT WITH
LEAVE TO AMEND
(ECF NO. 1)

THIRTY DAY DEADLINE TO FILE
AMENDED COMPLAINT

Kelly Davis (“Plaintiff”) is proceeding *pro se* with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on April 29, 2016. (ECF No. 1). In Plaintiff’s Complaint, Plaintiff claims that he did not receive an MRI or sufficient pain medication for back problems.

On May 12, 2016, Plaintiff consented to Magistrate Judge jurisdiction in this action pursuant to 28 U.S.C. § 636(c) (ECF No. 6), and no other parties have made an appearance. Therefore, pursuant to Appendix A(k)(4) of the Local Rules of the Eastern District of California, the undersigned shall conduct any and all proceedings in the case until such time as reassignment to a District Judge is required. Local Rule Appendix A(k)(3).

This Court has screened Plaintiff’s Complaint and finds that it fails to state a claim as to any defendant. This order provides an explanation of the relevant law to inform Plaintiff should he desire to file an amended complaint. Plaintiff may file an amended complaint

1 attempting to state a claim within thirty days, if he so chooses. If Plaintiff chooses not to file
2 an amended complaint, this Court will dismiss Plaintiff’s case for failure to state a cognizable
3 claim.

4 **I. SCREENING REQUIREMENT**

5 The Court is required to screen complaints brought by prisoners seeking relief against a
6 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
7 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
8 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
9 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
10 § 1915A(b)(1), (2). “Notwithstanding any filing fee, or any portion thereof, that may have
11 been paid, the court shall dismiss the case at any time if the court determines that the action or
12 appeal fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

13 A complaint is required to contain “a short and plain statement of the claim showing
14 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
15 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
16 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
17 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are
18 taken as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart
19 Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).
20 Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim to relief that
21 is plausible on its face.’” Iqbal, 556 U.S. at 678. While factual allegations are accepted as true,
22 legal conclusions are not. Id.

23 To state a viable claim for relief, Plaintiff must set forth sufficient factual allegations to
24 state a plausible claim for relief. Id. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969
25 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this plausibility
26 standard. Id.

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1 **II. SUMMARY OF COMPLAINT**

2 Plaintiff claims that Defendants R. Wilson, a physician at California Correctional
3 Institution, Tehachapi (CCI), and J. Lewis, Deputy Director of Policy and Risk Management
4 Health Care Services at CCI, were deliberately indifferent to Plaintiff’s serious medical needs
5 by denying him effective pain relief medication and delaying a proper diagnosis via an MRI.
6 Plaintiff also alleges that Defendants denied appropriate specialist consultation and prescribed
7 large doses of temporary pain relief such as ibuprofen known to be unsafe for liver/kidney
8 functions. Plaintiff alleges that there is “factual evidence of lumbar disc’s bulging per MRI
9 dated 12-1-2008, and multiple prescriptions for effective pain reliever medication present in my
10 medical file.” Plaintiff requests consultation with a specialist and prescription for tramadol and
11 gabapentin.

12 Plaintiff’s factual allegations are very brief. They do not include any description of the
13 defendants or what they did or failed to do. However, Plaintiff attaches 16 pages of exhibits
14 from his medical and appeal records. One record reflects an MRI of the lumbar spine done on
15 October 14, 2015. That MRI found “[m]ild degenerative changes of the lumbar spine results in
16 mild central canal and mild bilateral neural foraminal narrowing at L3-4, L4-5, and L5-S1.” It
17 appears to have been ordered by Defendant R. Wilson. Another record reflects a neurological
18 consult from an unknown date. In the notes it states “MRI L-spine reviewed nominal findings
19 re disc . . . continue conservative approach . . . actual MRI reviewed . . . muscle relaxers for
20 acute exacerbations. . . . update chrono & add backbrace, wedge pillow.” The exhibits also
21 include correspondence with prison appeals staff predating the MRI, who appear to have
22 initially denied a request for such an MRI.

23 **III. ANALYSIS OF PLAINTIFF’S CLAIMS**

24 **A. Legal Standards**

25 The Civil Rights Act under which this action was filed provides:

26 Every person who, under color of any statute, ordinance,
27 regulation, custom, or usage, of any State or Territory or the
28 District of Columbia, subjects, or causes to be subjected, any
citizen of the United States or other person within the jurisdiction
thereof to the deprivation of any rights, privileges, or immunities

1 secured by the Constitution and laws, shall be liable to the party
2 injured in an action at law, suit in equity, or other proper
proceeding for redress....

3 42 U.S.C. § 1983. “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely
4 provides ‘a method for vindicating federal rights elsewhere conferred.’” Graham v. Connor,
5 490 U.S. 386, 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see
6 also Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los
7 Angeles, 697 F.3d 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir.
8 2012); Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006).

9 To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted
10 under color of state law, and (2) the defendant deprived him of rights secured by the
11 Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.
12 2006); see also Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing
13 “under color of state law”). A person deprives another of a constitutional right, “within the
14 meaning of § 1983, ‘if he does an affirmative act, participates in another's affirmative act, or
15 omits to perform an act which he is legally required to do that causes the deprivation of which
16 complaint is made.’” Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th
17 Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite
18 causal connection may be established when an official sets in motion a ‘series of acts by others
19 which the actor knows or reasonably should know would cause others to inflict’ constitutional
20 harms.” Preschooler II, 479 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of
21 causation “closely resembles the standard ‘foreseeability’ formulation of proximate cause.”
22 Arnold v. Int'l Bus. Mach. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City
23 of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008).

24 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an
25 inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d
26 1091, 1096 (9th Cir. 2006), (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). This
27 requires a plaintiff to show (1) “a ‘serious medical need’ by demonstrating that ‘failure to treat
28 a prisoner’s condition could result in further significant injury or the unnecessary and wanton

1 infliction of pain,” and (2) “the defendant's response to the need was deliberately indifferent.”
2 Id. (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992) (citation and internal
3 quotations marks omitted), overruled on other grounds WMX Technologies v. Miller, 104 F.3d
4 1133 (9th Cir. 1997) (en banc)).

5 Deliberate indifference is established only where the defendant *subjectively* “knows of
6 and disregards an *excessive risk* to inmate health and safety.” Toguchi v. Chung, 391 F.3d
7 1051, 1057 (9th Cir. 2004) (emphasis added) (citation and internal quotation marks omitted).

8 Deliberate indifference can be established “by showing (a) a purposeful act or failure to
9 respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference.”
10 Jett, 439 F.3d at 1096 (citation omitted). Civil recklessness (failure “to act in the face of an
11 unjustifiably high risk of harm that is either known or so obvious that it should be known”) is
12 insufficient to establish an Eighth Amendment violation. Farmer v. Brennan, 511 U.S. 825,
13 836-37 & n.5 (1994) (citations omitted).

14 A difference of opinion between an inmate and prison medical personnel—or between
15 medical professionals—regarding appropriate medical diagnosis and treatment is not enough to
16 establish a deliberate indifference claim. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989);
17 Toguchi, 391 F.3d at 1058. Additionally, “a complaint that a physician has been negligent in
18 diagnosing or treating a medical condition does not state a valid claim of medical mistreatment
19 under the Eighth Amendment. Medical malpractice does not become a constitutional violation
20 merely because the victim is a prisoner.” Estelle, 429 U.S. at 106.

21 **B. Application to Plaintiff’s Complaint**

22 Plaintiff’s allegations do not state a claim for deliberate indifference to serious medical
23 needs under these legal standards. Plaintiff alleges that he should have received an MRI earlier
24 as well as consultation with specialists and certain pain relievers. As an initial matter, Plaintiff
25 does not provide any facts regarding the named defendants to assess what they did or failed to
26 do, not to mention that they acted with deliberate indifference to Plaintiff’s serious medical
27 needs. On the contrary, Defendant Wilson appears to be the person who ultimately ordered an
28 MRI for Plaintiff.

1 Plaintiff also does not allege sufficient facts that show the delay in receiving an MRI or
2 certain pain medications is a result of deliberate indifference rather than a difference of
3 medication opinion. Based on the records of the MRI he did receive, it does not appear that the
4 medication he requested was prescribed by that doctor. Indeed, he does not allege that any
5 medical professional believed that he required an MRI, specialist, or specific medication and
6 that Defendants denied that care based on deliberate indifference. Instead, based on the facts
7 alleged it appears that Plaintiff disagrees with the medical approach of his prison doctors.
8 While this may be true, these facts are not sufficient to establish a claim that defendants
9 violated Plaintiff's constitutional rights.

10 IV. CONCLUSION

11 The Court finds that Plaintiff's Complaint fails to state any cognizable claim upon
12 which relief may be granted under section 1983. The Court will dismiss this complaint and
13 give Plaintiff leave to amend to file an amended complaint addressing the issues described
14 above.

15 Under Rule 15(a) of the Federal Rules of Civil Procedure, "leave to amend shall be
16 freely given when justice so requires." Accordingly, the Court will provide Plaintiff with time
17 to file an amended complaint curing the deficiencies identified above. Lopez v. Smith, 203
18 F.3d 1122, 1126-30 (9th Cir. 2000). Plaintiff is granted leave to file an amended complaint
19 within thirty days if he chooses to do so.

20 The amended complaint must allege constitutional violations under the law as discussed
21 above. Specifically, Plaintiff must state what each named defendant did that led to the
22 deprivation of Plaintiff's constitutional or other federal rights. Fed. R. Civ. P. 8(a); Iqbal, 556
23 U.S. at 678; Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). There is no *respondeat*
24 *superior* liability, and each defendant is only liable for his or her own misconduct. Iqbal, 556
25 U.S. at 676. Plaintiff must also demonstrate that each defendant *personally* participated in the
26 deprivation of his rights by acting with deliberate indifference to Plaintiff's health or safety,
27 which is sufficiently serious. Jones, 297 F.3d at 934 (emphasis added).

28 Plaintiff should note that although he has been given the opportunity to amend, it is not

1 for the purpose of changing the nature of this suit or adding unrelated claims. George v. Smith,
2 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints).

3 Plaintiff is advised that an amended complaint supersedes the original complaint, Lacey
4 v. Maricopa County, 693 F 3d. 896, 907 n.1 (9th Cir. 2012) (*en banc*), and it must be complete
5 in itself without reference to the prior or superseded pleading, Local Rule 220. Therefore, in an
6 amended complaint, as in an original complaint, each claim and the involvement of each
7 defendant must be sufficiently alleged. The amended complaint should be clearly and boldly
8 titled “First Amended Complaint,” refer to the appropriate case number, and be an original
9 signed under penalty of perjury.

10 Based on the foregoing, it is **HEREBY ORDERED** that:

- 11 1. The Clerk’s Office is directed to send Plaintiff a civil rights complaint form;
- 12 2. Plaintiff may file a First Amended Complaint curing the deficiencies identified
13 by the Court in this order if he believes additional true factual allegations would
14 state a claim, within **thirty (30) days** from the date of service of this order;
- 15 3. If Plaintiff chooses to file an amended complaint, Plaintiff shall caption the
16 amended complaint “First Amended Complaint” and refer to the case number
17 1:16-cv-00605-EPG; and
- 18 4. If Plaintiff fails to file an amended complaint within 30 days the Court will
19 dismiss Plaintiff’s case for failure to state a claim and failure to comply with a
20 Court order.

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22 IT IS SO ORDERED.

23 Dated: December 16, 2016

24 /s/ Eric P. Gray
25 UNITED STATES MAGISTRATE JUDGE
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