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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

HERBERT JOHNSON,  
Plaintiff,  
v.  
UNNAMED DEFENDANTS,  
Defendants.

1:16-cv-00708-DAD-MJS (PC)

**ORDER REQUIRING PLAINTIFF TO  
EITHER FILE A FOURTH AMENDED  
COMPLAINT OR NOTIFY COURT OF  
WILLINGNESS TO PROCEED ONLY ON  
COGNIZABLE EIGHTH AMENDMENT  
CLAIM AGAINST DR. LE**

**(ECF NO. 31)**

**THIRTY-DAY DEADLINE**

Plaintiff is a state prisoner proceeding pro se in a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff’s Second Amended Complaint was dismissed with leave to amend on December 8, 2016, for misjoinder pursuant to Federal Rule of Civil Procedure 20. (ECF No. 32.) Plaintiff’s has now filed a Third Amended Complaint, which is before the Court for screening.

**I. Screening Requirement**

The in forma pauperis statute provides, “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       **II. Pleading Standard**

2           Section 1983 “provides a cause of action for the deprivation of any rights,  
3 privileges, or immunities secured by the Constitution and laws of the United States.”  
4 Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).  
5 Section 1983 is not itself a source of substantive rights, but merely provides a method for  
6 vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94  
7 (1989).

8           To state a claim under § 1983, a plaintiff must allege two essential elements:  
9 (1) that a right secured by the Constitution or laws of the United States was violated and  
10 (2) that the alleged violation was committed by a person acting under the color of state  
11 law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d  
12 1243, 1245 (9th Cir. 1987).

13           A complaint must contain “a short and plain statement of the claim showing that  
14 the pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations  
15 are not required, but “[t]hreadbare recitals of the elements of a cause of action,  
16 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.  
17 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).  
18 Plaintiff must set forth “sufficient factual matter, accepted as true, to state a claim to relief  
19 that is plausible on its face.” Id. Facial plausibility demands more than the mere  
20 possibility that a defendant committed misconduct and, while factual allegations are  
21 accepted as true, legal conclusions are not. Id. at 677-78.

22       **III. Plaintiff’s Allegations**

23           Plaintiff names Dr. Le and “ADA Warden” Jackie Jeter as Defendants for conduct  
24 that occurred while he was housed at Kern Valley State Prison (“KVSP”) in Delano,  
25 California.

26           Plaintiff’s allegations may be fairly summarized as follows:  
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1 Plaintiff suffers from an unspecified illness. He alleges, although it is not entirely  
2 clear, that he was provided with a medical chrono relating to diet while housed at  
3 Ironwood State Prison (“ISP”) in Blythe, California.

4 Following Plaintiff’s transfer to KVSP, he began to lose weight, presumably  
5 because the medical chrono issued at ISP was not being followed. When Plaintiff raised  
6 this issue with Dr. Le, she would not look at the chrono because she said her computer  
7 only goes back three years. Dr. Le also denied Plaintiff an extra tray for meals after he  
8 complained of pain and weight loss on the grounds he did not meet weight requirements.  
9 From October 2015 to March 2016, Plaintiff suffered pain and significant weight loss.

10 Plaintiff next alleges that ADA Warden Jeter denied Plaintiff a package needed to  
11 help with weight loss because Plaintiff is blacklisted.

12 Plaintiff seeks \$35,000 against each Defendant. He may also be seeking  
13 unspecified injunctive relief.

#### 14 **IV. Analysis**

##### 15 **A. Eighth Amendment**

16 The treatment a prisoner receives in prison and the conditions under which the  
17 prisoner is confined are subject to scrutiny under the Eighth Amendment, which prohibits  
18 cruel and unusual punishment. See Helling v. McKinney, 509 U.S. 25, 31 (1993); Farmer  
19 v. Brennan, 511 U.S. 825, 832 (1994). The Eighth Amendment “...embodies broad and  
20 idealistic concepts of dignity, civilized standards, humanity, and decency.” Estelle v.  
21 Gamble, 429 U.S. 97, 102 (1976). Conditions of confinement may, however, be harsh  
22 and restrictive. See Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Nonetheless, prison  
23 officials must provide prisoners with “food, clothing, shelter, sanitation, medical care, and  
24 personal safety.” Toussaint v. McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986).

25 A prison official violates the Eighth Amendment only when two requirements are  
26 met: (1) objectively, the official's act or omission must be so serious such that it results in  
27 the denial of the minimal civilized measure of life's necessities; and (2) subjectively, the  
28 prison official must have acted unnecessarily and wantonly for the purpose of inflicting

1 harm. See Farmer, 511 U.S. at 834. Thus, to violate the Eighth Amendment, a prison  
2 official must have a “sufficiently culpable mind.” See id.

3 Deliberate indifference to a prisoner’s serious illness or injury, or risks of serious  
4 injury or illness, gives rise to a claim under the Eighth Amendment. See Estelle, 429 U.S.  
5 at 105; see also Farmer, 511 U.S. at 837. This applies to physical as well as dental and  
6 mental health needs. See Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982). An  
7 injury or illness is sufficiently serious if the failure to treat a prisoner's condition could  
8 result in further significant injury or the “...unnecessary and wanton infliction of pain.”  
9 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992); see also Doty v. County of  
10 Lassen, 37 F.3d 540, 546 (9th Cir. 1994). Factors indicating seriousness are: (1)  
11 whether a reasonable doctor would think that the condition is worthy of comment; (2)  
12 whether the condition significantly impacts the prisoner's daily activities; and (3) whether  
13 the condition is chronic and accompanied by substantial pain. See Lopez v. Smith, 203  
14 F.3d 1122, 1131-32 (9th Cir. 2000) (en banc).

15 The requirement of deliberate indifference is less stringent in medical needs  
16 cases than in other Eighth Amendment contexts because the responsibility to provide  
17 inmates with medical care does not generally conflict with competing penological  
18 concerns. See McGuckin, 974 F.2d at 1060. Thus, deference need not be given to the  
19 judgment of prison officials as to decisions concerning medical needs. See Hunt v.  
20 Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1989). The complete denial of medical  
21 attention may constitute deliberate indifference. See Toussaint v. McCarthy, 801 F.2d  
22 1080, 1111 (9th Cir. 1986).

23 Delay in providing medical treatment, or interference with medical treatment, may  
24 also constitute deliberate indifference. See Lopez, 203 F.3d at 1131. Where delay is  
25 alleged, however, the prisoner must also demonstrate that the delay led to further injury.  
26 See McGuckin, 974 F.2d at 1060.

27 In applying the deliberate indifference standard, the Ninth Circuit has held that  
28 before it can be said that a prisoner's civil rights have been abridged, “the indifference to

1 his medical needs must be substantial. Mere 'indifference,' 'negligence,' or 'medical  
2 malpractice' will not support this cause of action." Broughton v. Cutter Lab., 622 F.2d  
3 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105-06).

4 Plaintiff's allegations as to Dr. Le are not entirely clear. He appears to allege that  
5 Dr. Le denied him medical care when she declined to abide by a medical chrono issued  
6 at a previous institution. He indicates thought that Dr. Le attempted to locate the chrono  
7 but could not because her computer could not pull up information that old. Such facts  
8 reveal a frustrated attempt to help, not deliberate indifference.

9 Plaintiff next alleges that Dr. Le refused to provide him with extra food trays  
10 despite his complaints of pain and significant weight loss. These allegations are  
11 sufficient to state a medical indifference claim.

#### 12 **B. The Americans with Disabilities Act**

13 Title II of the Americans with Disabilities Act ("ADA"), prohibits a public entity from  
14 discriminating against a qualified individual with a disability on the basis of disability. 42  
15 U.S.C. § 12132. In order to state a claim that a public program or service violated Title II  
16 of the ADA, a plaintiff must show: (1) he is a "qualified individual with a disability"; (2) he  
17 was either excluded from participation in or denied the benefits of a public entity's  
18 services, programs, or activities, or was otherwise discriminated against by the public  
19 entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his  
20 disability. McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir.2004); see also Lee  
21 v. City of Los Angeles, 250 F.3d 668, 691 (9th Cir. 2001) ("If a public entity denies an  
22 otherwise 'qualified individual' 'meaningful access' to its 'services, programs, or activities'  
23 'solely by reason of' his or her disability, that individual may have an ADA claim against  
24 the public entity.").

25 The ADA authorizes suits by private citizens for money damages against public  
26 entities, United States v. Georgia, 546 U.S. 151, 153 (2006), and state prisons "fall  
27 squarely within the statutory definition of 'public entity.'" Pennsylvania Dep't. of Corrs. v.  
28 Yeskey, 524 U.S. 206, 210 (1998). "To recover monetary damages under Title II of the

1 ADA ..., a plaintiff must prove intentional discrimination on the part of the defendant.”  
2 Duvall v. County of Kitsap, 260 F.3d 1124, 1138 (9th Cir.2001). The standard for  
3 intentional discrimination is deliberate indifference, which “requires both knowledge that  
4 a harm to a federally protected right is substantially likely, and a failure to act upon that  
5 likelihood.” Id. at 1139.

6 Plaintiff’s allegations as to Jackie Jeter are too vague and conclusory to state a  
7 claim and certainly fall short of the requirements for bringing an ADA claim. Because  
8 there are simply no allegations to suggest intentional discrimination, this claim will be  
9 dismissed.

### 10 **C. First Amendment Mail Tampering**

11 Prisoners have a First Amendment right to send and receive mail. See Witherow  
12 v. Paff, 52 F.3d 264, 265 (9th Cir. 1995) (per curiam). However, an isolated incident of  
13 mail interference or tampering is usually insufficient to establish a constitutional violation.  
14 Davis v. Goord, 320 F.3d 346, 351 (2d. Cir. 2003); see also Crofton v. Roe, 170 F.3d  
15 957, 961 (9th Cir. 1999) (temporary delay or isolated incident of delay of mail does not  
16 violate a prisoner's First Amendment rights); Witherow, 52 F.3d at 266 (First Amendment  
17 not violated where prison's mail regulation related to a legitimate penological interest).  
18 Moreover, the right to receive mail is subject to “substantial limitations and restrictions in  
19 order to allow prison officials to achieve legitimate correctional goals and maintain  
20 institutional security.” Walker v. Sumner, 917 F.2d 382, 385 (9th Cir.1990) (citations  
21 omitted). To be constitutional, an action or regulation restricting an inmate's ability to  
22 send or receive mail must be “reasonably related to legitimate penological interests.”  
23 Turner v. Safley, 482 U.S. 78, 89 (1987).

24 To the extent Plaintiff is accusing Jackie Jeter of tampering with his mail, his  
25 allegations suggest only an isolated incident, which is not actionable as alleged. This  
26 claim must therefore be dismissed.

### 27 **V. Conclusion**

28 Plaintiff’s Third Amended Complaint states only a cognizable Eighth Amendment

1 medical indifference claim against Dr. Le for denying Plaintiff extra trays of food. His  
2 complaint states no other cognizable claims.

3 The Court will grant Plaintiff **one final opportunity** to file an amended complaint  
4 to cure noted defects, to the extent he believes in good faith he can do so. Noll v.  
5 Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). If Plaintiff chooses to amend, he must  
6 demonstrate that the alleged acts resulted in a deprivation of his constitutional rights.  
7 Iqbal, 556 U.S. at 677-78. Plaintiff must set forth “sufficient factual matter . . . to ‘state a  
8 claim that is plausible on its face.’” Id. at 678 (quoting Twombly, 550 U.S. at 555).  
9 Plaintiff should note that although he has been given the opportunity to amend, it is not  
10 for the purposes of adding new claims. George v. Smith, 507 F.3d 605, 607 (7th Cir.  
11 2007) (no “buckshot” complaints). Plaintiff should carefully read this screening order and  
12 focus his efforts on curing the deficiencies set forth above.

13 If Plaintiff does not wish to file an amended complaint, and he is agreeable to  
14 proceeding only on the claim found to be cognizable, he may file a notice informing the  
15 Court that he does not intend to amend, and he is willing to proceed only on his  
16 cognizable claim. The undersigned will then recommend to the district judge assigned to  
17 this case to dismiss the other claims and Defendant.

18 If Plaintiff files an amended complaint, it should be brief, Fed. R. Civ. P. 8(a), but it  
19 must state what each named defendant did that led to the deprivation of Plaintiff’s  
20 constitutional rights, Iqbal, 556 U.S. at 676-677. Although accepted as true, the “[f]actual  
21 allegations must be [sufficient] to raise a right to relief above the speculative level. . . .”  
22 Twombly, 550 U.S. at 555 (citations omitted).

23 Finally, an amended complaint supersedes the prior complaint, see Loux v. Rhay,  
24 375 F.2d 55, 57 (9th Cir. 1967), and it must be “complete in itself without reference to the  
25 prior or superseded pleading,” Local Rule 220.

26 Based on the foregoing, it is HEREBY ORDERED that:

- 27 1. The Clerk’s Office shall send Plaintiff a blank civil rights complaint form;  
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2. Within thirty (30) days from the date of service of this order, Plaintiff must either:
- a. File a Fourth Amended Complaint curing the deficiencies identified by the Court in this order, or
  - b. Notify the Court in writing that he does not wish to file an amended complaint and he is willing to proceed only on the claim found to be cognizable in this Order; and
3. If Plaintiff fails to comply with this order, the undersigned will recommend dismissal of this action for failure to obey a court order and failure to prosecute.

IT IS SO ORDERED.

Dated: January 23, 2017

*/s/ Michael J. Seng*  
UNITED STATES MAGISTRATE JUDGE