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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

COLIN M. RANDOLPH,
Plaintiff,
v.
R. LOZOVOY, et al.,
Defendants.

1:16-cv-01528-DAD-EPG (PC)
ORDER FINDING COGNIZABLE CLAIMS
ORDER FOR PLAINTIFF TO EITHER:
(1) NOTIFY THE COURT THAT HE IS WILLING TO PROCEED ONLY ON THE CLAIM FOR DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS AGAINST DEFENDANT LOZOVOY;
(2) FILE A FIRST AMENDED COMPLAINT;
OR
(3) NOTIFY THE COURT THAT HE WISHES TO STAND ON HIS COMPLAINT, SUBJECT TO THE COURT ISSUING FINDINGS AND RECOMMENDATIONS TO THE DISTRICT JUDGE CONSISTENT WITH THIS ORDER
(ECF NO. 1)
THIRTY DAY DEADLINE

I. BACKGROUND

Colin M. Randolph (“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 filed a complaint on October 11, 2016 (ECF No. 1), which is before this Court for screening. Plaintiff alleges that he did not immediately receive a lower bunk and other medical treatment after injuring his knee.

II. SCREENING REQUIREMENT

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).

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

7 A complaint is required to contain “a short and plain statement of the claim showing
8 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
9 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
10 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
11 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are
12 taken as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart
13 Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).
14 Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim to relief that
15 is plausible on its face.’” Iqbal, 556 U.S. at 678; Moss v. U.S. Secret Service, 572 F.3d 962,
16 969 (9th Cir. 2009). While factual allegations are accepted as true, legal conclusions are not.
17 Id. The mere possibility of misconduct falls short of meeting this plausibility standard. Id.

18 **III. SUMMARY OF PLAINTIFF’S COMPLAINT**

19 On or about March 1, 2015, Plaintiff injured his left knee coming down from his
20 assigned upper bunk. Plaintiff submitted a medical sick call slip requesting medical attention

21 On or about March 3, 2015, Defendant correctional officer (C/O) Buyard arrived with a
22 wheelchair and pushed Plaintiff to the doctor’s office. While at the doctor’s office, Plaintiff
23 met with Defendant nurse practitioner Lozovoy. Plaintiff described his symptoms and their
24 effect on his every day activities. Defendant Lozovoy did not evaluate Plaintiff’s injury.
25 Plaintiff asked him for a temporary lower bunk accommodation and wheelchair access for
26 showers as well as adequate pain medication and an X-ray. Defendant Lozovoy denied all the
27 requests, and stated that he had removed Plaintiff’s lower bunk accommodation for exercising
28 and since Plaintiff has gout, Plaintiff’s joints are prone to flare ups from any trauma. Plaintiff

1 was already receiving medication for gout and pain. Defendant Lozovoy told Plaintiff he had
2 to figure out how to get off his bunk without stressing his joints. When Plaintiff protested there
3 was no way to get out the upper bunk without trauma to the joints, Defendant Lozovoy told
4 Plaintiff that other inmates are not complaining and that Plaintiff needed to figure it out.

5 On or about March 4, 2015, Plaintiff went “man down” and was taken to
6 triage/emergency in a wheelchair, where he was seen by a nurse who evaluated Plaintiff’s knee
7 and scheduled an immediate X-ray. The X-ray came back negative, showing no signs of breaks
8 or fractures. The person who conducted the X-ray suggested that Plaintiff request an MRI due
9 to the severe swelling. The nurse who evaluated Plaintiff’s knee told Plaintiff that he would be
10 seen later by Doctor Chen.

11 Plaintiff was taken back to his cell and given 400 mg of ibuprofen, which did not reduce
12 the swelling or pain. Because Plaintiff could not get on or off the assigned bunk without
13 assistance, he urinated and defecated on himself.

14 During daily pill rounds, Plaintiff told Defendant Rodriguez that the medication was not
15 working, that the pain and swelling had increased, that Plaintiff needed help getting on and off
16 his bunk, and that Plaintiff was in desperate need for a shower. Defendant Rodriguez refused
17 to give Plaintiff any medical assistance.

18 Plaintiff submitted several emergency sick call slips.

19 On or about March 5, 2015, Plaintiff was seen by Defendant Grewal, a registered nurse.
20 Plaintiff described his symptoms. Defendant Grewal told Plaintiff that he had a history of gout
21 and was receiving treatment for it, and that the swelling would subside as well as the pain.
22 Plaintiff asked for help getting around in the meantime, but Defendant Grewal insisted that
23 Plaintiff deal with it until the swelling and pain subsides.

24 On March 8, 2015, Plaintiff was seen again by Dr. Grewal who changed Plaintiff’s
25 medication from 400 mg ibuprofen to 500 mg of naproxen. Plaintiff complained that the
26 medication was insufficient. Defendant Grewal also gave Plaintiff an ACE bandage and an ice
27 pack and said Plaintiff would be issued a walker to get around the cell and to showers. Plaintiff
28 again asked for a temporary lower bunk, but Dr. Grewal refused the request.

1 On March 10, 2015, Plaintiff saw Defendant Chen at the medical clinic. Plaintiff
2 described his symptoms and his frustration with his treatment. Dr. Chen told Plaintiff that he
3 had gout and was receiving treatment, and that Plaintiff needed to be patient. Dr. Chen told
4 Plaintiff to figure out a way to live with the upper bunk. Dr. Chen also failed to respond to
5 Plaintiff's request for an MRI.

6 On March 18, 2015, Defendant Rodriguez came to Plaintiff's cell with his gout
7 medication and told Plaintiff that his uric acid level was going to be checked for gout. Plaintiff
8 asked for assistance in getting down from his bunk and assistance in getting to the clinic for the
9 blood draw. When Defendant Rodriguez refused to give Plaintiff assistance in getting down
10 from the bunk, Plaintiff refused to take his pill for gout until he spoke with a sergeant. Plaintiff
11 did not speak with a sergeant but did take his medication within the hour and at every
12 scheduled time thereafter.

13 Plaintiff filed prison grievances. As a result of the grievances, on March 19, 2015, Dr.
14 Chen ordered that Plaintiff be given a temporary lower bunk. Plaintiff received a lower bunk
15 on March 20, 2015. On March 27, 2015, Plaintiff was provided a wheelchair to be used to get
16 to showers, yard and visiting.

17 Plaintiff alleges a violation of the Eighth Amendment for cruel and unusual punishment
18 against five defendants who worked at Kern Valley State Prison during this time.

19 **IV. EVALUATION OF PLAINTIFF'S EIGHTH AMENDMENT CLAIM**

20 "[T]o maintain an Eighth Amendment claim based on prison medical treatment, an
21 inmate must show 'deliberate indifference to serious medical needs.'" Jett v. Penner, 439 F.3d
22 1091, 1096 (9th Cir. 2006), (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). This
23 requires Plaintiff to show (1) "a 'serious medical need' by demonstrating that 'failure to treat a
24 prisoner's condition could result in further significant injury or the unnecessary and wanton
25 infliction of pain,' " and (2) "the defendant's response to the need was deliberately indifferent."
26 Id. (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992) (citation and internal
27 quotations marks omitted), overruled on other grounds by WMX Technologies v. Miller, 104
28 F.3d 1133 (9th Cir. 1997) (en banc)).

1 Deliberate indifference is established only where the defendant *subjectively* “knows of
2 and disregards an *excessive risk* to inmate health and safety.” Toguchi v. Chung, 391 F.3d
3 1051, 1057 (9th Cir. 2004) (emphasis added) (citation and internal quotation marks omitted).
4 Deliberate indifference can be established “by showing (a) a purposeful act or failure to
5 respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference.”
6 Jett, 439 F.3d at 1096 (citation omitted). Civil recklessness (failure “to act in the face of an
7 unjustifiably high risk of harm that is either known or so obvious that it should be known”) is
8 insufficient to establish an Eighth Amendment violation. Farmer v. Brennan, 511 U.S. 825,
9 836-37 & n.5 (1994) (citations omitted).

10 A difference of opinion between an inmate and prison medical personnel—or between
11 medical professionals—regarding appropriate medical diagnosis and treatment is not enough to
12 establish a deliberate indifference claim. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989);
13 Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004). Additionally, “a complaint that a
14 physician has been negligent in diagnosing or treating a medical condition does not state a valid
15 claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not
16 become a constitutional violation merely because the victim is a prisoner.” Estelle, 429 U.S. at
17 106. To establish a difference of opinion rising to the level of deliberate indifference, “plaintiff
18 must show that the course of treatment the doctors chose was medically unacceptable under the
19 circumstances.” Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

20 Plaintiff alleges that he failed to receive proper treatment for a knee injury, and in
21 particular a lower bunk accommodation and pain medication, from March 1, 2015 through
22 March 18, 2015. It appears that numerous medical professionals did not believe that he
23 required a lower bunk. Repeatedly, the medical professionals assert that the issue is related to
24 Plaintiff’s gout, which is already getting treated. With one exception noted below, the medical
25 professionals attempted to diagnose and treat Plaintiff. While Plaintiff disagrees with their
26 medical conclusion, there are no factual allegations that show that they were being deliberately
27 indifferent to a serious medical need.

28 However, the Court finds that Plaintiff’s allegations against Defendant Lozovoy state a

1 claim for deliberate indifference to serious medical needs. Unlike the other medical
2 professionals, Plaintiff alleges that Defendant Lozovoy, who is a nurse practitioner, refused to
3 evaluate Plaintiff's injury. Instead, Defendant Lozovoy stated that he had already removed
4 Plaintiff's lower bed accommodation. Defendant Lozovoy told Plaintiff that other inmates are
5 not complaining and that Plaintiff needed to figure it out. Moreover, it was after this visit that
6 Plaintiff alleges that he urinated and defected on his bed because he could not get up and down
7 from the upper bunk.

8 Although further facts may reveal that Defendant Lozovoy had a different assessment of
9 Plaintiff's medical needs and was not in fact deliberately indifferent, or that the damages
10 associated with Defendant Lozovoy's inaction were insubstantial, the Court finds that these
11 allegations against Defendant Lozovoy are sufficient to state a claim under the Eighth
12 Amendment.

13 **V. CONCLUSION AND ORDER**

14 The Court has screened Plaintiff's complaint and finds that it states a cognizable claim
15 against Defendant Lozovoy for deliberate indifference to serious medical needs in violation of
16 the Eighth Amendment. However, the complaint states no other cognizable claims against any
17 of the other defendants.

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

23 The amended complaint must allege constitutional violations under the law as discussed
24 above. Specifically, Plaintiff must state what each named defendant did that led to the
25 deprivation of Plaintiff's constitutional or other federal rights. Fed. R. Civ. P. 8(a); Iqbal, 556
26 U.S. at 676; Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

27 Plaintiff should note that although he has been given the opportunity to amend, it is not
28 for the purpose of changing the nature of this suit or adding unrelated claims. George v. Smith,

1 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints).

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

9 Plaintiff has a choice as to how to proceed. Plaintiff can file an amended complaint if
10 he believes that additional facts would state additional claims under the legal standards
11 described above. If Plaintiff files an amended complaint, the Court will screen that amended
12 complaint in due course. Plaintiff can also notify the Court that he is willing to proceed only
13 against Defendant Lozovoy as described above, in which case the Court will begin the process
14 of service of the complaint on Defendant Lozovoy and dismiss the remaining claims.
15 Alternatively, because District Judge Dale A. Drozd is the presiding judge on this case,
16 Plaintiff can notify this Court that he wishes to stand on his complaint, in which case this Court
17 will issue findings and recommendations to Judge Drozd consistent with this order.

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

- 19 1. The Clerk’s Office shall send Plaintiff a civil rights complaint form;
- 20 2. Within **thirty (30) days** from the date of service of this order, Plaintiff shall
21 either:
 - 22 a. File a First Amended Complaint curing the deficiencies identified by the
23 Court in this order if he believes additional true factual allegations would
24 state any additional claims or claims against any additional defendants;
 - 25 b. Notify the Court in writing that he does not wish to file an amended
26 complaint and is instead willing to proceed only on the claim against
27 Defendant Lozovoy for deliberate indifference to serious medical needs in
28 violation of the Eighth Amendment; or

1 c. Notify the Court in writing that he wishes to stand on this complaint, in
2 which case the Court will issue findings and recommendations to the Judge
3 Drozd consistent with this order.

4 3. If Plaintiff chooses to file an amended complaint, Plaintiff shall caption the
5 amended complaint "First Amended Complaint" and refer to the case number
6 1:16-cv-01528-DAD-EPG; and

7 4. Failure to comply with this order may result in the dismissal of this action for
8 failure to comply with a court order.

9
10 IT IS SO ORDERED.

11 Dated: January 11, 2017

12 /s/ Eric P. Drozd
13 UNITED STATES MAGISTRATE JUDGE
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