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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CLEO WESTERFIELD,

Plaintiff,

No. 2:08-CV-1970-RCF

vs.

M.T.A. SPINKS, et al.,

Defendants.

ORDER DENYING IN FORMA PAUPERIS

PETITION WITHOUT PREJUDICE

Plaintiff, a prisoner proceeding pro se, seeks to bring this civil action in forma pauperis, asserting claims under 42 U.S.C. § 1983. As explained below, the court must deny plaintiff's petition because the inmate account statement that he submitted does not include information for the six-month period *immediately* preceding August 21, 2008, the date that he filed his complaint. If plaintiff wishes to proceed with this case, he must, within 30 days from the date of this order, file a new application to proceed in forma pauperis that includes this information.

A federal statute, 28 U.S.C. § 1915(a), sets forth certain financial requirements for prisoners who are attempting to bring a civil action in forma pauperis. Under 28 U.S.C. § 1915, a prisoner who brings a civil action in forma pauperis must, over time, pay a \$350 filing fee. In

1 order for the court to determine how the prisoner must pay this fee, the prisoner must submit a
2 certified copy of his inmate account statement for the six-month period *immediately* preceding
3 the date that the prisoner filed his complaint. *See* § 1915(a)(2). If the court grants the prisoner’s
4 petition, the court must, based on the information in the inmate account statement, “assess [the
5 prisoner’s financial status] and, when funds exist, collect, as a partial payment of any court fees
6 required by law, an initial partial filing fee of 20 percent of the greater of (A) the average
7 monthly deposits to the prisoner’s account; or (B) the average monthly balance in the prisoner’s
8 account for the 6-month period immediately preceding the filing of the complaint or notice of
9 appeal.” § 1915(b)(1).

10 In this case, plaintiff has submitted an inmate account statement only for the period of
11 December 1, 2007 through June 20, 2008. The court will therefore deny plaintiff’s petition to
12 proceed in forma pauperis without prejudice to resubmission. If, within 30 days from the date of
13 this order, plaintiff submits a new, completed application to proceed in forma pauperis, including
14 a certified copy of his inmate account statement showing his funds for the period of February 21,
15 2008 through August 21, 2008, the court will grant his petition, and thereby obligate plaintiff to
16 pay a \$350 filing fee. If, by that time, plaintiff decides not to proceed with the case, he need not
17 pay the \$350 filing fee.

18 In order for the petitioner to decide whether to submit a new petition and proceed with
19 the case, the court will address what an inmate must show in a complaint in order to state a
20 proper claim. First, a complaint must contain a “short and plain statement of the claim showing
21 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). The complaint must give the
22 defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. *See*
23 *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002). Plaintiff must show that each
24 defendant named in the complaint committed conduct which deprived plaintiff of a federal right.
25 *See Hydrick v. Hunter*, 500 F.3d 978, 987 (9th Cir. 2007).

26 In order to show a violation of the Fourteenth Amendment, a prisoner must show that

1 prison officials treated him “in a fashion so brutal and offensive to human dignity as to shock the
2 conscience.” *Thompson v. Souza*, 111 F.3d 694, 701 (9th Cir. 1997) (internal quotation marks
3 omitted). Plaintiff does not describe specific events giving rise to his Fourteenth Amendment
4 claims, and only states generally that prison employees falsified evidence and records and
5 destroyed or gave away his personal property. In order to violate a prison inmate’s liberty
6 interest under the Fourteenth Amendment, an action by prison officials must be an “atypical,
7 significant deprivation.” *Sandin v. Conner*, 515 U.S. 472, 486 (1995) (holding that placing a
8 prisoner in solitary confinement did not violate his Fourteenth Amendment rights); *see also*
9 *Myron v. Terhune*, 476 F.3d 716, 718 (9th Cir. 2007) (holding that classification of a prisoner
10 assigning him to a higher security institution did not violate his Fourteenth Amendment rights).

11 In order to show a violation of the Eighth Amendment based on medical treatment
12 provided in prison, a plaintiff must prove two things. “First, the plaintiff must show a serious
13 medical need by demonstrating that failure to treat a prisoner’s condition could result in further
14 significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must
15 show the defendant’s response to the need was *deliberately indifferent*.” *Jett v. Penner*, 439 F.3d
16 1091, 1096 (9th Cir. 2006). “A prison official acts with deliberate indifference . . . only if the
17 prison official knows of and disregards an excessive risk to inmate health and safety.” *Toguchi*
18 *v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004). A plaintiff may prove that a defendant acted
19 with “deliberate indifference” by demonstrating “(a) a purposeful act or failure to respond to a
20 prisoner’s pain or possible medical need and (b) harm caused by the indifference.” *Jett*, 439
21 F.3d at 1096. A plaintiff may show “indifference” by the way in which “prison officials deny,
22 delay or intentionally interfere with medical treatment, or . . . by the way in which prison
23 physicians provide medical care.” *Id.*

24 A prison physician does *not* violate the Eighth Amendment, however, merely through “an
25 inadvertent or negligent failure to provide adequate medical care.” *Id.* (internal quotation marks
26 omitted). *See also Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976). Moreover, supervising

1 personnel are not generally liable under 42 U.S.C. § 1983 for the violations of those who work
2 for them. “A supervisor is only liable for constitutional violations of his subordinates if the
3 supervisor participated in or directed the violations, or knew of the violations and failed to act to
4 prevent them.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

5 In order to show a violation of a First Amendment right through retaliation, five elements
6 must be shown: “(1) An assertion that a state actor took some adverse action against an inmate
7 (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
8 exercise of his First Amendment rights, and (5) the action did not reasonably advance a
9 legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

10 Under these principles, plaintiff's complaint does not state a claim against any of the
11 named defendants except possibly Correctional Officer McGill. Plaintiff states that Correctional
12 Officer McGill conducted a retaliatory search of plaintiff's cell in response to plaintiff's
13 successful defense against a disciplinary charge entered by defendant McGill. This allegation, if
14 construed in the light most favorable to plaintiff, may be sufficient to state a First Amendment
15 claim against defendant McGill. (This is not to say, however, that plaintiff would prevail on this
16 claim.) But the allegation does not support all the claims listed in the complaint against
17 defendant McGill. For example, the complaint alleges that defendant McGill also violated
18 plaintiff's Eighth Amendment rights. The claim that defendant McGill conducted a retaliatory
19 search of plaintiff's cell does not establish any link between that search and an Eighth
20 Amendment violation. *See id.* at 988.

21 The complaint fails to state claims against the other named defendants. Plaintiff states
22 that defendant Pazos violated plaintiff's First Amendment rights by falsifying an appeals process
23 document. Plaintiff has not shown a link between defendant Pazos' conduct and the injury to
24 plaintiff's First Amendment rights. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 966-67
25 (9th Cir. 2004). Plaintiff's complaint does not contain anything beyond bare allegations of
26 constitutional violations with regard to the other named defendants. The complaint “fails to

1 identify what role, if any, each individual defendant had” in the constitutional violations alleged.
2 *Id.* at 966. It therefore appears that if plaintiff decides to proceed with his case, the court would
3 have to dismiss his claims against all defendants other than perhaps McGill. Plaintiff would be
4 entitled, however, to ask the court for leave to amend his complaint to include both the original
5 allegations and additional allegations against the other named defendants. These allegations
6 would have to describe (a) how each defendant violated plaintiff’s constitutional rights and (b)
7 the connection or link between each defendant’s action and the plaintiff’s injuries. *See id.* at 966-
8 67.

9 If plaintiff wishes to amend his complaint, plaintiff is advised Local Rule 15-220 requires
10 that an amended complaint be complete in itself without reference to any prior pleading.
11 Because an amended complaint supersedes the original complaint, the amended complaint must
12 sufficiently state each claim and the involvement of each defendant. *See Loux v. Rhay*, 375 F.2d
13 55, 57 (9th Cir. 1967).

14 Accordingly, it is ORDERED as follows:

15 1. Plaintiff’s petition to proceed in forma pauperis is DENIED WITHOUT
16 PREJUDICE to its being refiled within 30 days from the date of this order.

17 2. If plaintiff, within 30 days from the date of this order, submits a new, properly
18 completed application to proceed in forma pauperis, including a certified inmate account
19 statement showing his funds for the period of February 21, 2008, through August 21, 2008 this
20 action will be reinstated, and the plaintiff’s petition will be granted.

21 3. The Clerk of the Court is directed to send plaintiff an Application to Proceed in
22 Forma Pauperis By a Prisoner for use in a civil rights action.

23
24 DATED: April 3, 2009

25
26 /s/ Raymond C. Fisher
Raymond C. Fisher,

UNITED STATES CIRCUIT JUDGE
Sitting by Designation

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