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

SHAWN CURTIS DONGES,

Plaintiff,

No. CIV S-09-0360 DAD P

vs.

DON PERETT, et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s amended complaint.

SCREENING REQUIREMENT

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1) & (2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28

1 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
2 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
3 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
4 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
5 Cir. 1989); Franklin, 745 F.2d at 1227.

6 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and
7 plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
8 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic
9 Corp. v. Twombly, 550 U.S. 544, ___, 127 S. Ct. 1955, 1965 (2007) (quoting Conley v. Gibson,
10 355 U.S. 41, 47 (1957)). However, in order to survive dismissal for failure to state a claim a
11 complaint must contain more than “a formulaic recitation of the elements of a cause of action;” it
12 must contain factual allegations sufficient “to raise a right to relief above the speculative level.”
13 Bell Atlantic, 127 S. Ct. at 1965. In reviewing a complaint under this standard, the court must
14 accept as true the allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital
15 Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to the
16 plaintiff, and resolve all doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421
17 (1969).

18 The Civil Rights Act under which this action was filed provides as follows:

19 Every person who, under color of [state law] . . . subjects, or causes
20 to be subjected, any citizen of the United States . . . to the
21 deprivation of any rights, privileges, or immunities secured by the
22 Constitution . . . shall be liable to the party injured in an action at
23 law, suit in equity, or other proper proceeding for redress.

24 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
25 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
26 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
(1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the
meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or

1 omits to perform an act which he is legally required to do that causes the deprivation of which
2 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

3 Moreover, supervisory personnel are generally not liable under § 1983 for the
4 actions of their employees under a theory of respondeat superior and, therefore, when a named
5 defendant holds a supervisory position, the causal link between him and the claimed
6 constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862
7 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S.
8 941 (1979). Vague and conclusory allegations concerning the involvement of official personnel
9 in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th
10 Cir. 1982).

11 **PLAINTIFF’S AMENDED COMPLAINT**

12 In plaintiff’s amended complaint, he identifies as the defendants Don Perett, John
13 Baker, and Brian Flicker. All of the defendants appear to be employed at the Butte County Jail.
14 Plaintiff alleges that defendant Perett refuses to honor his family doctor’s diagnosis and
15 prescription. He also alleges that defendant Baker refuses to honor one Dr. Glaub’s mental
16 health diagnosis and prescription. Finally, plaintiff alleges that defendant Flicker exposed him to
17 extreme temperatures in the K-Pod from December 3, 2008, through January 1, 2009. Plaintiff
18 requests that the court order the defendants to honor his prescriptions and to award him monetary
19 compensation. (Am. Compl. at 8.)

20 The allegations in plaintiff’s amended complaint are so vague and conclusory that
21 the court is unable to determine whether the current action is frivolous or fails to state a claim for
22 relief. The amended complaint does not contain a short and plain statement as required by Fed.
23 R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a complaint must
24 give fair notice to the defendants and must allege facts that support the elements of the claim
25 plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984).
26 Plaintiff must allege with at least some degree of particularity overt acts which defendants

1 engaged in that support his claims. Id. Because plaintiff has failed to comply with the
2 requirements of Fed. R. Civ. P. 8(a)(2), the amended complaint must be dismissed. In the
3 interests of justice, the court will grant plaintiff leave to file a second amended complaint.

4 If plaintiff elects to pursue this action by filing a second amended complaint, the
5 court advises him again of the following legal standards. First, in Estelle v. Gamble, 429 U.S.
6 97, 106 (1976), the Supreme Court held that inadequate medical care did not constitute cruel and
7 unusual punishment cognizable under § 1983 unless the mistreatment rose to the level of
8 “deliberate indifference to serious medical needs.” In applying this standard, the Ninth Circuit
9 has held that before it can be said that a prisoner’s civil rights have been abridged, “the
10 indifference to his medical needs must be substantial. Mere ‘indifference,’ ‘negligence,’ or
11 ‘medical malpractice’ will not support this cause of action.” Broughton v. Cutter Lab., 622 F.2d
12 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105-06). In a second amended complaint,
13 plaintiff must allege facts demonstrating how each defendant’s actions rose to the level of
14 “deliberate indifference.”

15 Plaintiff is cautioned that mere differences of opinion between a prisoner and
16 prison medical staff as to the proper course of treatment for a medical condition do not give rise
17 to a § 1983 claim. See Toguchi v. Soon Hwang Chung, 391 F.3d 1051, 1058 (9th Cir. 2004);
18 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996); Sanchez v. Vild, 891 F.2d 240, 242 (9th
19 Cir. 1989); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). Likewise, a difference of
20 medical opinion between doctors does not give rise to a constitutional violation. See, e.g.,
21 Toguchi, 391 F.3d at 1059-60 (“Dr. Tackett’s contrary view was a difference of medical opinion,
22 which cannot support a claim of deliberate indifference.”); Sanchez, 891 F.2d at 242 (difference
23 of opinion between medical personnel regarding the need for surgery does not amount to
24 deliberate indifference to a prisoner’s serious medical needs).

25 In addition, the “unnecessary and wanton infliction of pain” constitutes cruel and
26 unusual punishment prohibited by the United States Constitution. Whitley v. Albers, 475 U.S.

1 312, 319 (1986). See also Ingraham v. Wright, 430 U.S. 651, 670 (1977); Estelle v. Gamble, 429
2 U.S. 97, 105-06 (1976). However, neither accident nor negligence constitutes cruel and unusual
3 punishment, because “[i]t is obduracy and wantonness, not inadvertence or error in good faith,
4 that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.”
5 Whitley, 475 U.S. at 319. What is needed to show unnecessary and wanton infliction of pain
6 “varies according to the nature of the alleged constitutional violation.” Hudson v. McMillian,
7 503 U.S. 1, 5 (1992) (citing Whitley, 475 U.S. at 320). In a second amended complaint, plaintiff
8 must allege facts showing that objectively he suffered a sufficiently serious deprivation and that
9 subjectively defendants had a culpable state of mind in allowing or causing the plaintiff’s
10 deprivation to occur. Wilson v. Seiter, 501 U.S. 294, 298-99 (1991).

11 Finally, to the extent that plaintiff asserts claims for injunctive relief against the
12 defendants in this action, his claims appear to have been rendered moot. Court records indicate
13 that plaintiff is no longer incarcerated at the Butte County Jail. When an inmate seeks injunctive
14 or declaratory relief concerning the facility where he is incarcerated, his claims for such relief
15 become moot when he is no longer subjected to those conditions. See Weinstein v. Bradford,
16 423 U.S. 147, 149 (1975); Dilley v. Gunn, 64 F.3d 1365, 1368-69 (9th Cir. 1995).

17 Plaintiff is reminded that the court cannot refer to prior pleadings in order to make
18 his second amended complaint complete. Local Rule 15-220 requires that an amended complaint
19 be complete in itself without reference to any prior pleading. This is because, as a general rule,
20 an amended complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55, 57
21 (9th Cir. 1967). Once plaintiff files a second amended complaint, the prior pleading no longer
22 serves any function in the case. Therefore, in a second amended complaint, as in an original
23 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

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1 **CONCLUSION**

2 Accordingly, IT IS HEREBY ORDERED that:

3 1. Plaintiff's April 10, 2009 amended complaint (Doc. No. 9) is dismissed;

4 2. Plaintiff is granted thirty days from the date of service of this order to file a
5 second amended complaint that complies with the requirements of the Civil Rights Act, the
6 Federal Rules of Civil Procedure, and the Local Rules of Practice; the second amended complaint
7 must bear the docket number assigned to this case and must be labeled "Second Amended
8 Complaint"; failure to file a second amended complaint in accordance with this order will result
9 in a recommendation that this action be dismissed without prejudice; and

10 3. The Clerk of the Court is directed to send plaintiff the court's form for filing a
11 civil rights action.

12 DATED: July 17, 2009.

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14 _____
15 DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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