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

GREGORY C. BONTEMPS,

Plaintiff,

No. CIV S-09-2115 LKK EFB P

vs.

SOTAK, et al.,

Defendants.

ORDER

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Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. His case was referred to the undersigned under Local Rule 302(c)(17), pursuant to 28 U.S.C. § 636(b)(1). Currently pending before the court is plaintiff's third amended complaint, filed after two dismissals pursuant to 28 U.S.C. § 1915. The court will dismiss the third amended complaint and grant plaintiff a final opportunity to submit an amended complaint.

**I. Background**

The court granted plaintiff leave to proceed *in forma pauperis* on February 1, 2010, and dismissed the original complaint with leave to amend. Dckt. No. 9. That order explained that pursuant to 28 U.S.C. § 1915A(a), the court is directed to identify cognizable claims or dismiss the complaint, or any portion of the complaint, if it is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from an immune

1 defendant.

2           The court dismissed the original complaint for failure to state a claim. The court  
3 informed plaintiff that if he intended to pursue an Eighth Amendment claim based on  
4 defendants' deliberate indifference to his medical needs, he must allege acts or omissions  
5 showing that identified defendants knew of and disregarded plaintiff's serious medical needs.  
6 The court further informed plaintiff that he must include sufficient factual allegations linking  
7 each named defendant to an act or omission that would indicate a deprivation of plaintiff's  
8 federal rights.

9           Plaintiff filed an amended complaint, which was not at all responsive to the court's initial  
10 screening order. Plaintiff purported to bring a class action on behalf of "all unconvicted,  
11 pre-trial detainees" as well as "post-trial detainees, convicted and sentenced prisoners, who are  
12 or will in the future be incarcerated" at Rio Consumnes Correctional Center. Dckt. No. 14 at 9.  
13 The court dismissed the first amended complaint for failure to comply with the original  
14 screening order, failure to state a claim and for failure to comply with Rule 8 of the Federal  
15 Rules of Civil Procedure, which requires a complaint to include "a short and plain statement of  
16 the claim" showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); Dckt. No. 16.

17           The court granted plaintiff leave to file a second amended complaint, which plaintiff  
18 filed. The court dismissed the second amended complaint for failure to state a claim, as plaintiff  
19 had not alleged how any of the defendants' alleged actions affected any serious medical need, or  
20 if any serious medical need existed. Dckt. No. 19. The court also informed plaintiff that if he  
21 intended to pursue a First Amendment access to the courts claim, he must allege that the  
22 defendants' actions actually injured his litigation efforts. The court granted plaintiff one final  
23 opportunity file an amended complaint curing the deficiencies identified by the court in its  
24 multiple screening orders. In an abundance of caution, the court will give plaintiff one more  
25 opportunity to file an amended complaint. For the reasons stated below, the third amended  
26 complaint fails to state a claim.

1 **II. Third Amended Complaint**

2 Plaintiff alleges he was injured at Mule Creek State Prison in 2002. His alleged injuries  
3 included a fractured right foot and severe lower back pain. Defendant Smith was the attending  
4 doctor at Mule Creek. As a result of his injuries, doctors apparently gave plaintiff an air-cast for  
5 his right foot, a back brace, and medication.

6 Plaintiff claims that at some later time, he was re-arrested and placed in county jail.  
7 When he was arrested, he apparently had his air-cast and back brace and was housed on the  
8 medical floor of the jail.

9 Plaintiff alleges that defendants Sotak and Slayball witnessed plaintiff get into a fight  
10 with another inmate. Defendant Sotak, a doctor, allegedly took away plaintiff's cast, back brace,  
11 and medication without examining plaintiff, simply because of the fact that plaintiff had fought.  
12 At Sotak's direction, defendant Slayball allegedly moved plaintiff out of the medical floor.  
13 Plaintiff alleges defendants Sotak and Slayball were made aware of plaintiff's injuries by  
14 defendant Smith. Plaintiff claims he needed the air-cast to walk and the back brace for comfort.

15 Plaintiff also claims that defendants Cannon and Tidwell contacted defendant Slayball,  
16 who would move plaintiff around, in order to interfere with plaintiff's ability to speak with his  
17 attorney.

18 Plaintiff does not identify any theory of liability in his complaint. The court cannot  
19 determine any basis for imposing liability against defendant Smith. As for any potential claims  
20 against the remaining defendants, plaintiff is hereby informed as follows.

21 **A. Eighth Amendment Claim**

22 It is not clear from the complaint whether plaintiff was a pretrial detainee at the times  
23 alleged in his complaint, or a post-trial prisoner confined because of a criminal judgment and  
24 sentence. A pretrial detainee's claim for unconstitutional conditions of confinement arises from  
25 the Fourteenth Amendment Due Process Clause rather than from the Eighth Amendment  
26 prohibition against cruel and unusual punishment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

1 Nevertheless, the same standards are applied, requiring proof that the defendant acted with  
2 deliberate indifference. *See Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998).

3 To state a section 1983 claim for violation of the Eighth Amendment based on inadequate  
4 medical care, plaintiff must allege “acts or omissions sufficiently harmful to evidence deliberate  
5 indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). To prevail,  
6 plaintiff must show both that his medical needs were objectively serious, and that defendant  
7 possessed a sufficiently culpable state of mind. *Wilson v. Seiter*, 501 U.S. 294, 297-99 (1991);  
8 *McKinney v. Anderson*, 959 F.2d 853, 854 (9th Cir. 1992). A serious medical need is one that  
9 significantly affects an individual’s daily activities, an injury or condition a reasonable doctor or  
10 patient would find worthy of comment or treatment, or the existence of chronic and substantial  
11 pain. *See, e.g., McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other*  
12 *grounds by WMX Techs. v. Miller*, 104 F.2d 1133, 1136 (9th Cir.1997) (*en banc*).

13 Here, the complaint does not show that plaintiff’s medical needs, at the time the alleged  
14 violations occurred, were objectively serious.

15 Deliberate indifference may be shown by the denial, delay or intentional interference  
16 with medical treatment or by the way in which medical care is provided. *Hutchinson v. United*  
17 *States*, 838 F.2d 390, 394 (9th Cir. 1988). To act with deliberate indifference, a prison official  
18 must both be aware of facts from which the inference could be drawn that a substantial risk of  
19 serious harm exists, and he must also draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837  
20 (1994). Thus, a defendant is liable if he knows that plaintiff faces “a substantial risk of serious  
21 harm and disregards that risk by failing to take reasonable measures to abate it.” *Id.* at 847. “[I]t  
22 is enough that the official acted or failed to act despite his knowledge of a substantial risk of  
23 serious harm.” *Id.* at 842. A physician need not fail to treat an inmate altogether in order to  
24 violate that inmate’s Eighth Amendment rights. *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314  
25 (9th Cir. 1989). A failure to competently treat a serious medical condition, even if some  
26 treatment is prescribed, may constitute deliberate indifference in a particular case. *Id.* However,

1 it is important to differentiate common law negligence claims of malpractice from claims  
2 predicated on violations of the Eighth Amendment's prohibition of cruel and unusual punishment.  
3 In asserting the latter, "[m]ere 'indifference,' 'negligence,' or 'medical malpractice' will not  
4 support this cause of action." *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir.  
5 1980) (citing *Estelle*, 429 U.S. at 105-06); *see also Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th  
6 Cir. 2004). It is well established that mere differences of opinion concerning the appropriate  
7 treatment cannot be the basis of an Eighth Amendment violation. *Jackson v. McIntosh*, 90 F.3d  
8 330, 332 (9th Cir. 1996); *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).

9 Here, the complaint does not allege facts showing defendants were deliberately  
10 indifferent. Plaintiff claims defendant Sotak and/or Slayball took away plaintiff's air cast, back  
11 brace, and medication, and removed plaintiff from the medical floor. There are no facts  
12 suggesting that by taking away plaintiff's back brace and medication, and removing plaintiff  
13 from the medical floor, any defendant exposed plaintiff to a substantial risk of serious harm.  
14 Although plaintiff claims he could not walk without the air-cast, he does not allege facts showing  
15 that the confiscation of the air-cast exposed him to a substantial risk of serious harm.

#### 16 **B. Access to the Court Claim**

17 The complaint alleges defendants Tidwell, Cannon, and Slayball may have interfered  
18 with plaintiff's ability to communicate with his lawyers. As the court previously informed  
19 plaintiff, if he intends to pursue a claim based on the denial of his right of access to the courts,  
20 such claim fails. In *Lewis v. Casey*, 518 U.S. 343 (1996), the United States Supreme Court held  
21 that prison inmates have a constitutionally protected right to access the courts to bring civil  
22 rights actions to challenge their conditions of confinement and to bring challenges to their  
23 criminal convictions. 518 U.S. at 351, 354-55. The right is limited to direct criminal appeals,  
24 habeas petitions, and civil rights actions. *Id.* at 354-55. To state a claim he was denied access to  
25 the courts, plaintiff must allege that the deprivation actually injured his litigation efforts, in that  
26 defendants hindered his efforts to bring, or caused him to lose, an actionable claim of this type.

1 *See id.* at 351. Plaintiff has failed to provide factual allegations demonstrating such a  
2 deprivation. Accordingly, plaintiff has failed to state a cognizable access to the courts claim.

3 **III. Final Opportunity to Amend**

4 The court will grant plaintiff a final opportunity to file a fourth amended complaint  
5 curing the deficiencies identified in this order, as well as in the court's previous screening orders.  
6 Plaintiff is warned that he may not change the nature of this suit by alleging new, unrelated  
7 claims in an amended complaint. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (no  
8 "buckshot" complaints).

9 Should plaintiff choose to file a fourth amended complaint, he shall identify each  
10 defendant in both the caption and the body of the amended complaint, and clearly set forth the  
11 allegations against each such defendant. Pursuant to Rule 8 of the Federal Rules of Civil  
12 Procedure, any amended complaint must include "a short and plain statement of the claim"  
13 showing entitlement to relief. Fed. R. Civ. P. 8(a)(2).

14 Any amended complaint must be complete in itself without reference to any prior  
15 pleading. E.D. Cal. Local Rule 220; *see Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once  
16 plaintiff files an amended complaint, the original pleading is superseded.

17 Accordingly, the court hereby ORDERS that the third amended complaint is dismissed  
18 for failure to state a claim, with leave to amend within 30 days. The fourth amended complaint  
19 must bear the docket number assigned to this case and be titled "Fourth Amended Complaint."  
20 Failure to file an amended complaint will result in a recommendation that this action be  
21 dismissed for failure to state a claim. If plaintiff files an amended complaint stating a cognizable  
22 claim the court will proceed with service of process by the United States Marshal.

23 Dated: September 19, 2011.

24   
25 EDMUND F. BRENNAN  
26 UNITED STATES MAGISTRATE JUDGE