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

MICHAEL BAKER,

Plaintiff,

No. 2:09-cv-2757 MCE KJN P

vs.

PEREZ, et al.,

Defendants.

ORDER

_____/

Plaintiff is a state prisoner proceeding without counsel. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302. On October 21, 2009, plaintiff also filed a motion to appoint counsel.

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's prison trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated to

1 make monthly payments of twenty percent of the preceding month's income credited to
2 plaintiff's prison trust account. These payments will be forwarded by the appropriate agency to
3 the Clerk of the Court each time the amount in plaintiff's account exceeds \$10.00, until the filing
4 fee is paid in full. 28 U.S.C. § 1915(b)(2).

5 The court has reviewed plaintiff's complaint and, for the limited purposes of
6 § 1915A screening, finds that it states a cognizable claim against defendants Bowers, St. Laurant,
7 Nurse Miller and Dr. Medina. See 28 U.S.C. § 1915A.

8 For the reasons stated below, the court finds that the complaint does not state a
9 cognizable claim against defendants Perez, Swingle, Agyeman, Nepomuceno, Baker, Bryant,
10 Shaw, Withers and May. The claims against those defendants are hereby dismissed with leave to
11 amend.

12 Plaintiff may proceed forthwith to serve defendants Bowers, St. Laurant, Nurse
13 Miller and Dr. Medina and pursue his claims against only those defendants, or he may delay
14 serving any defendant and attempt to state a cognizable claim against defendants Perez, Swingle,
15 Agyeman, Nepomuceno, Baker, Bryant, Shaw, Withers and May.

16 If plaintiff elects to attempt to amend his complaint to state a cognizable claim
17 against any or all of the defendants Perez, Swingle, Agyeman, Nepomuceno, Baker, Bryant,
18 Shaw, Withers and May, he has thirty days so to do. He is not obligated to amend his complaint.

19 Plaintiff states that he suffers from nerve damage and has undergone disc
20 replacement surgery both of which result in severe pain. He states that he has been prescribed
21 gabapitin and tramadol for treatment. Plaintiff's claims involve failure to receive medication in a
22 timely manner from prison medical staff at High Desert State Prison (HDSP). Plaintiff states that
23 he did not receive medication at the appropriate times during several intervals from 2007 to
24 2009. From August 2007 to December 2007, plaintiff contends that he did not receive his
25 medication several times from nurses. Though it is not entirely clear from the complaint, it
26 appears that plaintiff received his medication two to four times a day. Plaintiff does not identify

1 the nurses who failed to bring the medication during this time period

2 Between January 1, 2008, and July 10, 2008, plaintiff alleges that unnamed
3 nurses did not bring him medication on 10 occasions, sometimes in the morning and sometimes
4 at night. Plaintiff also provides a day by day account of a few months in January and February
5 2009, where he did not receive his prescription for Ensure and other medications, from unnamed
6 defendants. Plaintiff also attempts to attach liability to supervising medical staff at HDSP
7 without properly describing how they were involved.

8 With respect to these alleged incidents of not receiving his medication, plaintiff
9 provides general statements that just missing one prescription causes him pain, but provides no
10 further details. These allegations do not rise to the level of deliberate indifference required to
11 bring a claim under the Eighth Amendment and plaintiff has failed to identify the appropriate
12 defendants for these claims.

13 In order to state a § 1983 claim for violation of the Eighth Amendment based on
14 inadequate medical care, plaintiff must allege “acts or omissions sufficiently harmful to evidence
15 deliberate indifference to serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106 (1976).
16 To prevail, plaintiff must show both that his medical needs were objectively serious, and that
17 defendants possessed a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 299
18 (1991); McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992) (on remand). The requisite state of
19 mind for a medical claim is “deliberate indifference.” Hudson v. McMillian, 503 U.S. 1, 4
20 (1992).

21 A serious medical need exists if the failure to treat a prisoner’s condition could
22 result in further significant injury or the unnecessary and wanton infliction of pain. Indications
23 that a prisoner has a serious need for medical treatment are the following: the existence of an
24 injury that a reasonable doctor or patient would find important and worthy of comment or
25 treatment; the presence of a medical condition that significantly affects an individual’s daily
26 activities; or the existence of chronic and substantial pain. See, e.g., Wood v. Housewright, 900

1 F. 2d 1332, 1337-41 (9th Cir. 1990) (citing cases); Hunt v. Dental Dept., 865 F.2d 198, 200-01
2 (9th Cir. 1989). McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on other
3 grounds, WMX Technologies v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

4 In Farmer v. Brennan, 511 U.S. 825 (1994) the Supreme Court defined a very
5 strict standard which a plaintiff must meet in order to establish “deliberate indifference.” Of
6 course, negligence is insufficient. Farmer, 511 U.S. at 835. However, even civil recklessness
7 (failure to act in the face of an unjustifiably high risk of harm which is so obvious that it should
8 be known) is insufficient. Id. at 836-37. Neither is it sufficient that a reasonable person would
9 have known of the risk or that a defendant should have known of the risk. Id. at 842.

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

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

16 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
17 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
18 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
19 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the
20 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
21 omits to perform an act which he is legally required to do that causes the deprivation of which
22 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

23 Moreover, supervisory personnel are generally not liable under § 1983 for the
24 actions of their employees under a theory of *respondeat superior* and, therefore, when a named
25 defendant holds a supervisory position, the causal link between him and the claimed
26 constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862
(9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S.

1 941 (1979). Vague and conclusory allegations concerning the involvement of official personnel
2 in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th
3 Cir. 1982).

4 If plaintiff elects to proceed forthwith against defendants Bowers, St. Laurant,
5 Nurse Miller and Dr. Medina, against whom he has stated a cognizable claim for relief, then
6 within thirty days he must return materials for service of process enclosed herewith. In this event
7 the court will construe plaintiff's election as consent to dismissal of all claims against defendants
8 Perez, Swingle, Agyeman, Nepomuceno, Baker, Bryant, Shaw, Withers and May without
9 prejudice.

10 Any amended complaint must show the federal court has jurisdiction, the action is
11 brought in the right place, and plaintiff is entitled to relief if plaintiff's allegations are true. It
12 must contain a request for particular relief. Plaintiff must identify as a defendant only persons
13 who personally participated in a substantial way in depriving plaintiff of a federal constitutional
14 right. Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the
15 deprivation of a constitutional right if he does an act, participates in another's act or omits to
16 perform an act he is legally required to do that causes the alleged deprivation).

17 In an amended complaint, the allegations must be set forth in numbered
18 paragraphs. Fed. R. Civ. P. 10(b). Plaintiff may join multiple claims if they are all against a
19 single defendant. Fed. R. Civ. P. 18(a). If plaintiff has more than one claim based upon separate
20 transactions or occurrences, the claims must be set forth in separate paragraphs. Fed. R. Civ. P.
21 10(b).

22 The federal rules contemplate brevity. See Galbraith v. County of Santa Clara,
23 307 F.3d 1119, 1125 (9th Cir. 2002) (noting that "nearly all of the circuits have now disapproved
24 any heightened pleading standard in cases other than those governed by Rule 9(b)"); Fed. R. Civ.
25 P. 84; cf. Rule 9(b) (setting forth rare exceptions to simplified pleading). Plaintiff's claims must
26 be set forth in short and plain terms, simply, concisely and directly. See Swierkiewicz v. Sorema

1 N.A., 534 U.S. 506, 514 (2002) (“Rule 8(a) is the starting point of a simplified pleading system,
2 which was adopted to focus litigation on the merits of a claim.”); Fed. R. Civ. P. 8. Plaintiff
3 must not include any preambles, introductions, argument, speeches, explanations, stories,
4 griping, vouching, evidence, attempts to negate possible defenses, summaries, and the like.
5 McHenry v. Renne, 84 F.3d 1172, 1177-78 (9th Cir. 1996) (affirming dismissal of § 1983
6 complaint for violation of Rule 8 after warning); see Crawford-El v. Britton, 523 U.S. 574, 597
7 (1998) (reiterating that “firm application of the Federal Rules of Civil Procedure is fully
8 warranted” in prisoner cases). The court (and defendant) should be able to read and understand
9 plaintiff’s pleading within minutes. McHenry, 84 F.3d at 1179-80. A long, rambling pleading
10 including many defendants with unexplained, tenuous or implausible connection to the alleged
11 constitutional injury, or joining a series of unrelated claims against many defendants, very likely
12 will result in delaying the review required by 28 U.S.C. § 1915 and an order dismissing
13 plaintiff’s action pursuant to Fed. R. Civ. P. 41 for violation of these instructions.

14 A district court must construe a pro se pleading “liberally” to determine if it states
15 a claim and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff
16 an opportunity to cure them. See Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000).
17 While detailed factual allegations are not required, “[t]hreadbare recitals of the elements of a
18 cause of action, supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 129
19 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
20 Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim to relief that
21 is plausible on its face.’” Id. (quoting Twombly, 550 U.S. at 570).

22 A claim has facial plausibility when the plaintiff pleads factual
23 content that allows the court to draw the reasonable inference that
24 the defendant is liable for the misconduct alleged. The plausibility
25 standard is not akin to a “probability requirement,” but it asks for
26 more than a sheer possibility that a defendant has acted unlawfully.
Where a complaint pleads facts that are merely consistent with a
defendant’s liability, it stops short of the line between possibility
and plausibility of entitlement to relief.

1 Id. (citations and quotation marks omitted). Although legal conclusions can provide the
2 framework of a complaint, they must be supported by factual allegations, and are not entitled to
3 the assumption of truth. Id. at 1950.

4 An amended complaint must be complete in itself without reference to any prior
5 pleading. Local Rule 15-220; see Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff
6 files an amended complaint, the original pleading is superseded.

7 By signing an amended complaint, plaintiff certifies he has made reasonable
8 inquiry and has evidentiary support for his allegations, and for violation of this rule the court may
9 impose sanctions sufficient to deter repetition by plaintiff or others. Fed. R. Civ. P. 11.

10 A prisoner may bring no § 1983 action until he has exhausted such administrative
11 remedies as are available to him. 42 U.S.C. § 1997e(a). The requirement is mandatory. Booth
12 v. Churner, 532 U.S. 731, 741 (2001). California prisoners or parolees may appeal “any
13 departmental decision, action, condition, or policy which they can demonstrate as having an
14 adverse effect upon their welfare.” Cal. Code Regs. tit. 15, §§ 3084.1, et seq. An appeal must be
15 presented on a CDC form 602 that asks simply that the prisoner “describe the problem” and
16 “action requested.” Therefore, this court ordinarily will review only claims against prison
17 officials within the scope of the problem reported in a CDC form 602 or an interview or claims
18 that were or should have been uncovered in the review promised by the department. Plaintiff is
19 further admonished that by signing an amended complaint he certifies his claims are warranted
20 by existing law, including the law that he exhaust administrative remedies, and that for violation
21 of this rule plaintiff risks dismissal of his entire action, including his claims against defendants
22 Bowers, St. Laurant, Nurse Miller and Dr. Medina.

23 Plaintiff has also requested the appointment of counsel. The United States
24 Supreme Court has ruled that district courts lack authority to require counsel to represent
25 indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298
26 (1989). In certain exceptional circumstances, the court may request the voluntary assistance of

1 counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir.
2 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). In the present case, the
3 court does not find the required exceptional circumstances. Plaintiff's request for the
4 appointment of counsel will therefore be denied at this time.

5 Accordingly, IT IS HEREBY ORDERED that:

6 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

7 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.

8 Plaintiff is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
9 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
10 Director of the California Department of Corrections and Rehabilitation filed concurrently
11 herewith.

12 3. Plaintiff's motion to appoint counsel (Doc. 4) is denied, without prejudice.

13 4. Claims against defendants Perez, Swingle, Agyeman, Nepomuceno, Baker,
14 Bryant, Shaw, Withers and May are dismissed with leave to amend. Within thirty days of service
15 of this order, plaintiff may amend his complaint to attempt to state cognizable claims against
16 these defendants. Plaintiff is not obliged to amend his complaint.


17 5. The allegations in the pleading are sufficient at least to state cognizable claims
18 against defendants Bowers, St. Laurant, Nurse Miller and Dr. Medina. See 28 U.S.C. § 1915A.
19 With this order the Clerk of the Court shall provide to plaintiff a blank summons, a copy of the
20 pleading filed October 5, 2009, 4 USM-285 forms and instructions for service of process on
21 defendants Bowers, St. Laurant, Nurse Miller and Dr. Medina. Within thirty days of service of
22 this order plaintiff may return the attached Notice of Submission of Documents with the
23 completed summons, the completed USM-285 forms, and 5 copies of the endorsed October 5,
24 2009, complaint. The court will transmit them to the United States Marshal for service of
25 process pursuant to Fed. R. Civ. P. 4. Defendants Bowers, St. Laurant, Nurse Miller and Dr.
26 Medina will be required to respond to plaintiff's allegations within the deadlines stated in Fed. R.

1 Civ. P. 12(a)(1). In this event, the court will construe plaintiff's election to proceed forthwith as
2 consent to an order dismissing his defective claims against defendants Perez, Swingle, Agyeman,
3 Nepomuceno, Baker, Bryant, Shaw, Withers and May without prejudice.

4 6. Failure to comply with this order will result in a recommendation that this
5 action be dismissed.

6 DATED: February 23, 2010

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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

MICHAEL BAKER,

Plaintiff,

No. 2:09-cv-2757 MCE KJN P

vs.

PEREZ, et al.,

Defendant[s].

NOTICE OF SUBMISSION OF DOCUMENTS

_____ /

Plaintiff hereby submits the following documents in compliance with the court's order
filed _____:

1 completed summons form

4 completed forms USM-285

5 copies of the 10/5/09
Complaint

Plaintiff consents to the dismissal of defendants [insert names] without prejudice.

OR

_____ Plaintiff opts to file a [#] amended complaint and delay service of process.

Dated:

Plaintiff