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

ALBERTO WINFFEL,

Plaintiff,

No. CIV S-10-1002 EFB P

vs.

POMAZAL, et. al.,

Defendants.

ORDER

Alberto Winffel, an inmate confined at High Desert State Prison, filed this pro se civil rights action under 42 U.S.C. § 1983. In addition to filing a complaint, plaintiff has filed an application to proceed in forma pauperis. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1) and is before the undersigned pursuant to plaintiff's consent. See E.D. Cal. Local Rules, Appx. A, at (k)(4).

I. Request to Proceed In Forma Pauperis

Plaintiff has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Dckt. No. 2. Plaintiff's application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

1 **II. Screening Order**

2 Pursuant to 28 U.S.C. § 1915A, the court shall review “a complaint in a civil action in
3 which a prisoner seeks redress from a governmental entity or officer or employee of a
4 governmental entity.” 28 U.S.C. § 1915A(a). “On review, the court shall identify cognizable
5 claims or dismiss the complaint, or any portion of the complaint, if the complaint (1) is frivolous,
6 malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief
7 from a defendant who is immune from such relief.” *Id.* § 1915A(b).

8 The court has reviewed plaintiff’s complaint and, for the limited purposes of § 1915A
9 screening, finds that it states a cognizable claim against defendant Ling.

10 For the reasons stated below, the complaint does not state a cognizable claim against
11 defendant Pomazal. These claims will therefore be dismissed with leave to amend.

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

20 A claim has facial plausibility when the plaintiff pleads factual content that allows
21 the court to draw the reasonable inference that the defendant is liable for the
22 misconduct alleged. The plausibility standard is not akin to a “probability
23 requirement,” but it asks for 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.

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

1 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
2 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that
3 the alleged violation was committed by a person acting under the color of state law. *West v.*
4 *Atkins*, 487 U.S. 42, 48 (1988). An individual defendant is not liable on a civil rights claim
5 unless the facts establish the defendant's personal involvement in the constitutional deprivation
6 or a causal connection between the defendant's wrongful conduct and the alleged constitutional
7 deprivation. *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d
8 740, 743-44 (9th Cir. 1978).

9 Plaintiff alleges that defendant Pomazal is the chief medical officer of his prison and that
10 he is "legally responsible for the operations of the medical staff." He alleges that defendant Ling
11 experimentally injected him with a steroid, knowing that he should have used an xray to guide
12 him. Consequently, the injection damaged plaintiff's nerve and caused his leg to atrophy.
13 Plaintiff does not allege that Pomazal was personally involved in his medical care. Plaintiff may
14 not sue any supervisor, such as defendant Pomazal, on a theory that the supervisor is liable for
15 the acts of his or her subordinates. *See Polk County v. Dodson*, 454 U.S. 312, 325 (1981). A
16 supervisor may be held liable in his or her individual capacity "for his own culpable action or
17 inaction in the training, supervision or control of his subordinates." *Watkins v. City of Oakland,*
18 *Cal.*, 145 F.3d 1087, 1093 (9th Cir. 1998) (quoting *Larez v. City of Los Angeles*, 946 F.2d 630,
19 646 (9th Cir. 1991)). "A supervisor is only liable for constitutional violations of his subordinates
20 if the supervisor participated in or directed the violations, or knew of the violations and failed to
21 act to prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Plaintiff's claim
22 against Pomazal must therefore be dismissed.

23 Plaintiff may proceed forthwith to serve defendant Ling and pursue his claims against
24 only those defendants or he may delay serving any defendant and attempt to state a cognizable
25 claim against defendant Pomazal.

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1 If plaintiff elects to attempt to amend his complaint to state a cognizable claim against
2 defendant Pomazal, he has 30 days so to do. He is not obligated to amend his complaint.
3 However, if plaintiff elects to proceed forthwith against defendant Ling, against whom he has
4 stated a cognizable claim for relief, then within 30 days he must return materials for service of
5 process enclosed herewith. In this event the court will construe plaintiff's election as consent to
6 dismissal of all claims against defendant Pomazal, without prejudice.

7 Any amended complaint must adhere to the following requirements:

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

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

18 It must contain a caption including the name of the court and the names of all parties.
19 Fed. R. Civ. P. 10(a).

20 Plaintiff may join multiple claims if they are all against a single defendant. Fed. R. Civ.
21 P. 18(a). If plaintiff has more than one claim based upon separate transactions or occurrences,
22 the claims must be set forth in separate paragraphs. Fed. R. Civ. P. 10(b). Plaintiff may join
23 multiple claims if they are all against a single defendant. Fed. R. Civ. P. 18(a). Unrelated claims
24 against different defendants must be pursued in multiple lawsuits. "The controlling principle
25 appears in Fed. R. Civ. P. 18(a): 'A party asserting a claim . . . may join, [] as independent or as
26 alternate claims, as many claims . . . as the party has against an opposing party.' Thus multiple

1 claims against a single party are fine, but Claim A against Defendant 1 should not be joined with
2 unrelated Claim B against Defendant 2. Unrelated claims against different defendants belong in
3 different suits, not only to prevent the sort of morass [a multiple claim, multiple defendant] suit
4 produce[s], but also to ensure that prisoners pay the required filing fees-for the Prison Litigation
5 Reform Act limits to 3 the number of frivolous suits or appeals that any prisoner may file
6 without prepayment of the required fees. 28 U.S.C. § 1915(g).” *George v. Smith*, 507 F.3d 605,
7 607 (7th Cir. 2007); *see also* Fed. R. Civ. P. 20(a)(2) (joinder of defendants not permitted unless
8 both commonality and same transaction requirements are satisfied). Plaintiff may not change the
9 nature of this suit by alleging new, unrelated claims in an amended complaint. *George*, 507 F.3d
10 at 607 (no “buckshot” complaints).

11 The allegations must be short and plain, simple and direct and describe the relief plaintiff
12 seeks. Fed. R. Civ. P. 8(a); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); *Galbraith v.*
13 *County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002). A long, rambling pleading,
14 including many defendants with unexplained, tenuous or implausible connection to the alleged
15 constitutional injury or joining a series of unrelated claims against many defendants very likely
16 will result in delaying the review required by 28 U.S.C. § 1915 and an order dismissing
17 plaintiff’s action pursuant to Rule 41 of the Federal Rules of Civil Procedure for violation of
18 these instructions.

19 Plaintiff must sign the complaint. Fed. R. Civ. P. 11(a). By signing an amended
20 complaint, plaintiff certifies he has made reasonable inquiry and has evidentiary support for his
21 allegations and that for violation of this rule the court may impose sanctions sufficient to deter
22 repetition by plaintiff or others. Fed. R. Civ. P. 11.

23 A prisoner may bring no § 1983 action until he has exhausted such administrative
24 remedies as are available to him. 42 U.S.C. § 1997e(a). The requirement is mandatory. *Booth*
25 *v. Churner*, 532 U.S. 731, 741 (2001). By signing an amended complaint plaintiff certifies his
26 claims are warranted by existing law, including the law that he exhaust administrative remedies,

1 and that for violation of this rule plaintiff risks dismissal of his entire action, including his claims
2 against defendant Ling.

3 Accordingly, the court hereby orders that:

4 1. Plaintiff's request to proceed in forma pauperis is granted.

5 2. Plaintiff must pay the statutory filing fee of \$350 for this action. All payments shall
6 be collected and paid in accordance with the notice to the Director of the California Department
7 of Corrections and Rehabilitation filed concurrently herewith.

8 3. Claims against defendant Pomazal are dismissed with leave to amend. Within 30 days
9 of service of this order, plaintiff may amend his complaint to attempt to state cognizable claims
10 against these defendants. Plaintiff is not obligated to amend his complaint.

11 4. The allegations in the pleading are sufficient at least to state cognizable claims against
12 defendant Ling. *See* 28 U.S.C. § 1915A. With this order the Clerk of the Court shall provide to
13 plaintiff a blank summons, a copy of the complaint filed April 26, 2010, one USM-285 form and
14 instructions for service of process on defendant Ling. Within 30 days of service of this order
15 plaintiff may return the attached Notice of Submission of Documents with the completed
16 summons, the completed USM-285 forms, and two copies of the April 26, 2010 complaint. The
17 court will transmit them to the United States Marshal for service of process pursuant to Rule 4 of
18 the Federal Rules of Civil Procedure. Defendant Ling will be required to respond to plaintiff's
19 allegations within the deadlines stated in Rule 12(a)(1) of the Federal Rules of Civil Procedure.
20 In this event, the court will construe plaintiff's election to proceed forthwith as consent to an
21 order dismissing his defective claims against defendant Pomazal without prejudice.

22 5. Failure to comply with this order will result in this action being dismissed.

23 Dated: October 18, 2010.

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25 EDMUND F. BRENNAN
26 UNITED STATES MAGISTRATE JUDGE

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Plaintiff,

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vs.

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Defendants.

NOTICE OF SUBMISSION OF DOCUMENTS

_____ /

In accordance with the court's order filed _____, plaintiff hereby elects to:

(1) _____ consent to the dismissal of defendant Pomazal without prejudice, and submits the following documents:

- 1 completed summons form
- 1 completed forms USM-285
- 2 copies of the April 26, 2010 Complaint

OR

(2) _____ delay serving any defendant and files a first amended complaint in an attempt to state cognizable claims against defendant Pomazal.

Dated:

Plaintiff