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

ERIC BIGONE,

Plaintiff,

No. CIV S-10-1947 GGH P

vs.

A. POMAZAL, et. al.,

Defendants.

ORDER

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Plaintiff is a state prisoner proceeding pro se. He seeks relief pursuant to 42 U.S.C. § 1983 and Title II of the American’s with Disabilities Act (ADA) and has requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis. This proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(b)(1).

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). An initial filing fee of \$3.33 will be assessed at this time. 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 trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the preceding

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

4 The court is required to screen complaints brought by prisoners seeking relief  
5 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
6 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised  
7 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be  
8 granted, or that seek monetary relief from a defendant who is immune from such relief. 28  
9 U.S.C. § 1915A(b)(1),(2).

10 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
11 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
12 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
13 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
14 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
15 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
16 Cir. 1989); Franklin, 745 F.2d at 1227.

17 A complaint must contain more than a "formulaic recitation of the elements of a  
18 cause of action;" it must contain factual allegations sufficient to "raise a right to relief above the  
19 speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).  
20 "The pleading must contain something more...than...a statement of facts that merely creates a  
21 suspicion [of] a legally cognizable right of action." Id., quoting 5 C. Wright & A. Miller, Federal  
22 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). "[A] complaint must contain sufficient  
23 factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft  
24 v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127 S.Ct. 1955). "A  
25 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
26 the reasonable inference that the defendant is liable for the misconduct alleged." Id.

1           In reviewing a complaint under this standard, the court must accept as true the  
2 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.  
3 738, 740, 96 S.Ct. 1848 (1976), construe the pleading in the light most favorable to the plaintiff,  
4 and resolve all doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct.  
5 1843 (1969).

6           The complaint states a colorable claim for relief against defendant Pomazal,  
7 pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b), solely for the claim that Pomazal  
8 denied the proper pain medication to plaintiff.

9           Plaintiff's remaining allegations against Pomazal and all other defendants are  
10 dismissed with leave to amend. Plaintiff's complaint sets forth many allegations that defendants  
11 have violated the Eighth Amendment and the ADA and plaintiff seeks injunctive relief. It is  
12 difficult to identify viable claims in the complaint as plaintiff intertwines his claims under the  
13 Eighth Amendment and the ADA. Also, interspersed throughout the complaint are paragraphs  
14 containing information that are not relevant to the underlying claims. Plaintiff also states that  
15 certain defendants are liable for denying his inmate appeals.

16           Plaintiff describes many instances where his medical requests were denied and he  
17 concludes this is a violation of the ADA and the Eighth Amendment. Plaintiff states that his  
18 permanent cane chrono was denied, thus he has difficulty moving around and this demonstrates  
19 deliberate indifference to serious medical needs. This is insufficient to demonstrate a viable  
20 Eighth Amendment claim.

21           Plaintiff also contends that he has been denied ADA classification, however, this  
22 does not state a claim under the ADA. Plaintiff must describe how he was excluded from certain  
23 activities due to a disability. If plaintiff files an amended complaint he must separately list and  
24 describe his allegations arising under the Eighth Amendment and then his allegations arising  
25 under the ADA.

26           In order to state a claim for violation of the Eighth Amendment based on

1 inadequate medical care, plaintiff must allege “acts or omissions sufficiently harmful to evidence  
2 deliberate indifference to serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106 (1976).  
3 To prevail, plaintiff must show both that his medical needs were objectively serious, and that  
4 defendants possessed a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 299,  
5 (1991); McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992) (on remand). The requisite state of  
6 mind for a medical claim is “deliberate indifference.” Hudson v. McMillian, 503 U.S. 1, 4  
7 (1992).

8           A serious medical need exists if the failure to treat a prisoner’s condition could  
9 result in further significant injury or the unnecessary and wanton infliction of pain. Indications  
10 that a prisoner has a serious need for medical treatment are the following: the existence of an  
11 injury that a reasonable doctor or patient would find important and worthy of comment or  
12 treatment; the presence of a medical condition that significantly affects an individual’s daily  
13 activities; or the existence of chronic and substantial pain. See, e.g., Wood v. Housewright, 900  
14 F. 2d 1332, 1337-41 (9th Cir. 1990) (citing cases); Hunt v. Dental Dept., 865 F.2d 198, 200-01  
15 (9th Cir. 1989). McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on other  
16 grounds, WMX Technologies v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

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

23           It is nothing less than recklessness in the criminal sense-subjective  
24 standard-disregard of a risk of harm of which the actor is actually aware. Id. at 838-842. “[T]he  
25 official must both be aware of facts from which the inference could be drawn that a substantial  
26 risk of serious harm exists, and he must also draw the inference.” Id. at 837. Thus, a defendant

1 is liable if he knows that plaintiff faces “a substantial risk of serious harm and disregards that risk  
2 by failing to take reasonable measures to abate it.” Id. at 847. “[I]t is enough that the official  
3 acted or failed to act despite his knowledge of a substantial risk of serious harm.” Id. at 842. If  
4 the risk was obvious, the trier of fact may infer that a defendant knew of the risk. Id. at 840-42.  
5 However, obviousness per se will not impart knowledge as a matter of law.

6 Title II of the ADA “prohibit[s] discrimination on the basis of disability.” Lovell  
7 v. Chandler, 303 F.3d 1039, 1052 (9th Cir.2002). Title II provides that “no qualified individual  
8 with a disability shall, by reason of such disability, be excluded from participation in or be denied  
9 the benefits of the services, programs, or activities of a public entity, or be subject to  
10 discrimination by such entity.” 42 U.S.C. § 12132. Title II of the ADA applies to inmates within  
11 state prisons. Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 118 S.Ct. 1952, 1955,  
12 141 L.Ed.2d 215 (1998); see also Armstrong v. Wilson, 124 F.3d 1019, 1023 (9th Cir.1997);  
13 Duffy v. Riveland, 98 F.3d 447, 453-56 (9th Cir.1996).

14 In order to state a claim that a public program or service violated Title II of the  
15 ADA, a plaintiff must show: (1) he is a “qualified individual with a disability”; (2) he was either  
16 excluded from participation in or denied the benefits of a public entity's services, programs, or  
17 activities, or was otherwise discriminated against by the public entity; and (3) such exclusion,  
18 denial of benefits, or discrimination was by reason of his disability. McGary v. City of Portland,  
19 386 F.3d 1259, 1265 (9th Cir. 2004).

20 Furthermore, prisoners do not have a “separate constitutional entitlement to a  
21 specific prison grievance procedure.” Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003),  
22 citing Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). Even the nonexistence of, or the  
23 failure of prison officials to properly implement, an administrative appeals process within the  
24 prison system does not raise constitutional concerns. Mann v. Adams, 855 F.2d at 640. See also,  
25 Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993); Flick v. Alba, 932 F.2d 728 (8th Cir.  
26 1991); Azeez v. DeRobertis, 568 F.Supp. 8, 10 (N.D. Ill.1982) (“[A prison] grievance procedure

1 is a procedural right only, it does not confer any substantive right upon the inmates. Hence, it  
2 does not give rise to a protected liberty interest requiring the procedural protections envisioned  
3 by the fourteenth amendment”). Specifically, a failure to process a grievance does not state a  
4 constitutional violation. Buckley, supra.

5 Plaintiff is informed that the court cannot refer to a prior pleading in order to  
6 make plaintiff’s amended complaint complete. Local Rule 15-220 requires that an amended  
7 complaint be complete in itself without reference to any prior pleading. This is because, as a  
8 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375  
9 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no  
10 longer serves any function in the case. Therefore, in an amended complaint, as in an original  
11 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

12 Accordingly, IT IS HEREBY ORDERED that:

13 1. Plaintiff’s request to proceed in forma pauperis is granted;

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

15 An initial filing fee of \$3.33 will be assessed at this time. The fee shall be collected and paid in  
16 accordance with this court’s order to the Director of the California Department of Corrections  
17 and Rehabilitation filed concurrently herewith.

18 3. Plaintiff’s claims against all defendants except Pomazal are dismissed for the  
19 reasons discussed above, with leave to file an amended complaint within twenty-eight days from  
20 the date of service of this order. Failure to file an amended complaint will result in a  
21 recommendation that these defendants be dismissed from this action.

22 4. Upon filing an amended complaint or expiration of the time allowed therefor,  
23 the court will make further orders for service of process upon some or all of the defendants.

24 DATED: August 17, 2010

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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