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

KENNETH EVANS,

Plaintiff,

No. CIV S-10-1969 GEB GGH P

vs.

CSP SACRAMENTO, et al.,

Defendants.

ORDER

Plaintiff is a state prisoner proceeding pro se. He seeks relief pursuant to 42 U.S.C. § 1983 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 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). Plaintiff will be assessed an initial filing fee of \$2.37. 28 U.S.C. § 1915(b)(1). Plaintiff will be obligated for monthly payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's account

1 exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

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

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

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

25 In reviewing a complaint under this standard, the court must accept as true the
26 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.

1 738, 740, 96 S.Ct. 1848 (1976), construe the pleading in the light most favorable to the plaintiff,
2 and resolve all doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct.
3 1843 (1969).

4 Plaintiff names as defendants Dr. Bakewell, Correctional Captain Vance, Appeals
5 Coordinator Briones and several unnamed individuals.

6 The only allegations against the named defendants involve plaintiff's knee
7 surgery. Plaintiff states that a few weeks after his surgery, some unnamed guard escorted
8 plaintiff to a different cell, even though he was not supposed to move for his knee to recover, and
9 in the process of moving he injured his knee and was then forced to wait for 5 hours in a holding
10 cell. Plaintiff states that defendant Vance was made aware of this situation and did not attempt to
11 alleviate plaintiff's pain and suffering. Plaintiff has not sufficiently linked Vance to the alleged
12 constitutional deprivation other than his position as a supervisor.

13 Plaintiff states that Briones denied his inmate appeals and failed to conduct full
14 investigations into plaintiff's appeals. However, plaintiff has no right to an appeals process.

15 Plaintiff also alleges that he was transferred to a different prison and defendant
16 Bakewell discontinued plaintiff's morphine and methadone that had been used to treat his pain.
17 Plaintiff states he was still in pain and needed the medication. While plaintiff may have a viable
18 claim against Bakewell, he must present more information concerning this claim and describe
19 how Bakewell was deliberately indifferent to his serious medical needs. Plaintiff's brief facts do
20 not contain sufficient factual matter that state a plausible claim. See Iqbal.

21 Plaintiff's complaint will be dismissed and he will be granted leave to file an
22 amended complaint within 28 days of service of this order.

23 In order to state a claim for violation of the Eighth Amendment based on
24 inadequate medical care, plaintiff must allege "acts or omissions sufficiently harmful to evidence
25 deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976).
26 To prevail, plaintiff must show both that his medical needs were objectively serious, and that

1 defendants possessed a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 299,
2 (1991); McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992) (on remand). The requisite state of
3 mind for a medical claim is “deliberate indifference.” Hudson v. McMillian, 503 U.S. 1, 4
4 (1992).

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

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

20 It is nothing less than recklessness in the criminal sense-subjective
21 standard-disregard of a risk of harm of which the actor is actually aware. Id. at 838-842. “[T]he
22 official must both be aware of facts from which the inference could be drawn that a substantial
23 risk of serious harm exists, and he must also draw the inference.” Id. at 837. Thus, a defendant
24 is liable if he knows that plaintiff faces “a substantial risk of serious harm and disregards that risk
25 by failing to take reasonable measures to abate it.” Id. at 847. “[I]t is enough that the official
26 acted or failed to act despite his knowledge of a substantial risk of serious harm.” Id. at 842. If

1 the risk was obvious, the trier of fact may infer that a defendant knew of the risk. Id. at 840-42.

2 However, obviousness per se will not impart knowledge as a matter of law.

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

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

9 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
10 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
11 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
12 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the
13 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
14 omits to perform an act which he is legally required to do that causes the deprivation of which
15 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

16 Moreover, supervisory personnel are generally not liable under § 1983 for the
17 actions of their employees under a theory of respondeat superior and, therefore, when a named
18 defendant holds a supervisory position, the causal link between him and the claimed
19 constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862
20 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S.
21 941 (1979). Vague and conclusory allegations concerning the involvement of official personnel
22 in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th
23 Cir. 1982).

24 Furthermore, prisoners do not have a “separate constitutional entitlement to a
25 specific prison grievance procedure.” Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003),
26 citing Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). Even the nonexistence of, or the
failure of prison officials to properly implement, an administrative appeals process within the
prison system does not raise constitutional concerns. Mann v. Adams, 855 F.2d at 640. See also,

1 Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993); Flick v. Alba, 932 F.2d 728 (8th Cir.
2 1991); Azeez v. DeRobertis, 568 F.Supp. 8, 10 (N.D.Ill.1982) (“[A prison] grievance procedure
3 is a procedural right only, it does not confer any substantive right upon the inmates. Hence, it
4 does not give rise to a protected liberty interest requiring the procedural protections envisioned
5 by the fourteenth amendment”). Specifically, a failure to process a grievance does not state a
6 constitutional violation. Buckley, *supra*.

7 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
8 conditions complained of have resulted in a deprivation of plaintiff’s constitutional rights. See
9 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms
10 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless
11 there is some affirmative link or connection between a defendant’s actions and the claimed
12 deprivation. Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976); May v. Enomoto, 633 F.2d
13 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore,
14 vague and conclusory allegations of official participation in civil rights violations are not
15 sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

24 In accordance with the above, IT IS HEREBY ORDERED that:

- 25 1. Plaintiff’s request for leave to proceed in forma pauperis is granted.
- 26 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.

1 Plaintiff is assessed an initial partial filing fee of \$2.37. All fees shall be collected and paid in
2 accordance with this court’s order to the Director of the California Department of Corrections
3 and Rehabilitation filed concurrently herewith.

4 3. Plaintiff’s complaint is dismissed for the reasons discussed above, with leave
5 to file an amended complaint within twenty-eight days from the date of service of this Order.
6 Failure to file an amended complaint will result in a recommendation that this action be
7 dismissed.

8 DATED: November 1, 2010

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/s/ Gregory G. Hollows

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

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