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

JAMES HENRY FLOURNOY,

Plaintiff,

No. 2:11-cv-2844 KJM EFB P

vs.

ERIC MANESS, et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding pro se with this civil rights action under 42 U.S.C. § 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1). See E.D. Cal. Local Rules, Appx. A, at (k)(4). Plaintiff has filed an amended complaint.

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a defendant who is immune from such relief.” *Id.* § 1915A(b).

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1 In order to avoid dismissal for failure to state a claim a complaint must contain more than
2 “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause
3 of action.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-557 (2007). In other words,
4 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
5 statements do not suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

6 Furthermore, a claim upon which the court can grant relief has facial plausibility.
7 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual
8 content that allows the court to draw the reasonable inference that the defendant is liable for the
9 misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949. When considering whether a complaint states a
10 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*
11 *Pardus*, 127 S. Ct. 2197, 2200 (2007), and construe the complaint in the light most favorable to
12 the plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

13 A *pro se* plaintiff must satisfy the pleading requirements of Rule 8(a) of the Federal
14 Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and plain
15 statement of the claim showing that the pleader is entitled to relief, in order to give the defendant
16 fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*,
17 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

18 The court has reviewed plaintiff’s amended complaint and for the limited purposes of
19 § 1915A screening, finds that the following claims are potentially cognizable: (1) an Eighth
20 Amendment excessive force claim against defendant Kinder; (2) an Eighth Amendment
21 deliberate indifference claim against defendants Bauer and Sahba based on plaintiff’s alleged
22 need for a wheelchair; and (3) a due process/privacy claim based on defendant Sotak’s alleged
23 access to plaintiff’s medical records. The remaining allegations fail to state a cognizable claim
24 for relief. Accordingly, plaintiff may either proceed only on the claims against defendants
25 Kinder, Bauer, Sahba and Sotak that are identified herein as cognizable, or he may amend his
26 complaint to attempt to cure the deficiencies in the complaint’s remaining allegations.

1 Plaintiff is not obligated to amend his complaint. If plaintiff chooses to proceed only on
2 the claims identified herein as cognizable, the court will construe plaintiff's election as his
3 voluntary dismissal of any remaining claims without prejudice.

4 Any amended complaint must be written or typed so that it so that it is complete in itself
5 without reference to any earlier filed complaint. L.R. 220. This is because an amended
6 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
7 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
8 F.3d 1467, 1474 (9th Cir. 1997) (the ““amended complaint supersedes the original, the latter
9 being treated thereafter as non-existent.””) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
10 1967)). Plaintiff may not change the nature of this suit by alleging new, unrelated claims in an
11 amended complaint. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot”
12 complaints).

13 Additionally, the court informs plaintiff of the following legal standards:

14 An individual defendant is not liable on a civil rights claim unless the facts establish the
15 defendant's personal involvement in the constitutional deprivation or a causal connection
16 between the defendant's wrongful conduct and the alleged constitutional deprivation. *See*
17 *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th
18 Cir. 1978). That is, plaintiff may not sue any official on the theory that the official is liable for
19 the unconstitutional conduct of his or her subordinates. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948
20 (2009). Because respondeat superior liability is inapplicable to § 1983 suits, “a plaintiff must
21 plead that each Government-official defendant, through the official's own individual actions, has
22 violated the Constitution.” *Id.* It is plaintiff's responsibility to allege facts to state a plausible
23 claim for relief. *Iqbal*, 129 S. Ct. at 1949; *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.
24 2009).

25 To state a claim for violation of the Eighth Amendment based on inadequate medical
26 care, plaintiff must allege “acts or omissions sufficiently harmful to evidence deliberate

1 indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). To prevail,
2 plaintiff must show both that his medical needs were objectively serious, and that defendant
3 possessed a sufficiently culpable state of mind. *Wilson v. Seiter*, 501 U.S. 294, 297-99 (1991);
4 *McKinney v. Anderson*, 959 F.2d 853, 854 (9th Cir. 1992). A serious medical need is one that
5 significantly affects an individual’s daily activities, an injury or condition a reasonable doctor or
6 patient would find worthy of comment or treatment, or the existence of chronic and substantial
7 pain. *See, e.g., McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other*
8 *grounds by WMX Techs. v. Miller*, 104 F.2d 1133, 1136 (9th Cir.1997) (*en banc*). It is important
9 to differentiate common law negligence claims of malpractice from claims predicated on
10 violations of the Eighth Amendment’s prohibition of cruel and unusual punishment. In asserting
11 the latter, “[m]ere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this
12 cause of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (citing
13 *Estelle v. Gamble*, 429 U.S. 97, 105-106 (1976); *see also Toguchi v. Chung*, 391 F.3d 1051,
14 1057 (9th Cir. 2004). Moreover, it is well established that mere differences of opinion
15 concerning the appropriate treatment cannot be the basis of an Eighth Amendment violation.
16 *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *Franklin v. Oregon*, 662 F.2d 1337, 1344
17 (9th Cir. 1981).

18 In order to state a claim that a public program or service violated Title II of the
19 Americans with Disabilities Act (“ADA”), a plaintiff must show: (1) he is a “qualified individual
20 with a disability”; (2) he was either excluded from participation in or denied the benefits of a
21 public entity’s services, programs, or activities, or was otherwise discriminated against by the
22 public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his
23 disability. *McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004); *see also Lee v. City*
24 *of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (“If a public entity denies an otherwise
25 ‘qualified individual’ ‘meaningful access’ to its ‘services, programs, or activities’ ‘solely by
26 reason of’ his or her disability, that individual may have an ADA claim against the public

1 entity.”); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1187-88 (9th Cir. 2003) (ADA plaintiff may
2 seek injunctive relief against state officials in their official capacities). Damages, however, are
3 only available under Title II of the ADA where a plaintiff proves the defendant acted with
4 deliberate indifference. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001).

5 Accordingly, the court hereby orders that:

6 1. The allegations in the pleading are sufficient at least to state the following potentially
7 cognizable claims: an Eighth Amendment excessive force claim against defendant Kinder, an
8 Eighth Amendment deliberate indifference claim against defendants Bauer and Sahba, and a due
9 process/privacy claim against defendant Sotak.

10 2. All remaining claims and defendants are dismissed with leave to amend within 30
11 days of service of this order. Plaintiff is not obligated to amend his complaint.

12 3. With this order the Clerk of the Court shall provide to plaintiff a blank summons, a
13 copy of the September 27, 2012 amended complaint, four USM-285 forms and instructions for
14 service of process on defendants Kinder, Bauer, Sahba, and Sotak. Within 30 days of service of
15 this order plaintiff may return the attached Notice of Submission of Documents with the
16 completed summons, the completed USM-285 form, and five copies of the complaint. The court
17 will transmit them to the United States Marshal for service of process pursuant to Rule 4 of the
18 Federal Rules of Civil Procedure. Defendants Kinder, Bauer, Sahba, and Sotak will be required
19 to respond to plaintiff’s allegations within the deadlines stated in Rule 12(a)(1) of the Federal
20 Rules of Civil Procedure. In this event, the court will construe plaintiff’s election to proceed
21 forthwith as his voluntary dismissal of all remaining claims and defendants, without prejudice.

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

24 Dated: January 14, 2013.

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EDMUND F. BRENNAN
26 UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
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JAMES HENRY FLOURNOY,

Plaintiff,
vs.

No. 2:11-cv-2844 KJM EFB P

ERIC MANESS,, et al.,

Defendants.

NOTICE OF SUBMISSION OF DOCUMENTS

_____ /

In accordance with the court’s Screening Order, plaintiff hereby elects to:

(1) _____ proceed only with the cognizable claims identified in the court’s Screening Order, consent to the dismissal of all remaining claims and defendants, and submits the following documents:

- 1 completed summons form
- 4 completed forms USM-285
- 5 copies of the September 27, 2012 complaint

OR

(2) _____ delay serving any defendant and files an amended complaint in accordance with the court’s Screening Order.

Dated:

Plaintiff