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

EDWARD R. WEBB,

Plaintiff,

No. 2:12-cv-0345 EFB P

vs.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION
et al.,

Defendants.

ORDER

Plaintiff is a state prisoner proceeding pro se with this 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. 7. 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 Federal courts must engage in a preliminary screening of cases in which prisoners seek
3 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion
5 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which
6 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such
7 relief.” *Id.* § 1915A(b).

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

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

20 A *pro se* plaintiff must satisfy the pleading requirements of Rule 8(a) of the Federal
21 Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and plain
22 statement of the claim showing that the pleader is entitled to relief, in order to give the defendant
23 fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*,
24 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

25 The court has reviewed plaintiff’s complaint pursuant to § 1915A and finds it does not
26 state a cognizable claim. Thus, to proceed plaintiff must file an amended complaint.

1 The complaint names as defendants the California Department of Corrections and
2 Rehabilitation (CDCR), Deuel Vocational Institute (DVI), and Michael Kim. The complaint's
3 factual allegations consist of the following:

4 Even after explaining to Inmate Webb that his families [sic] history of cancer, and
5 his borderline diabetes made it necessary for Hepatitis "C" treatment to be started
6 as soon as possible, they refused him due to time restraints. Moreover Doctors
7 knowingly kept this inmate on a drug which can and will aggravate his Hepatitis
8 "C" condition long term.

9 Dckt. No. 1, § IV. Plaintiff requests medical treatment and monetary damages. *Id.* § V.

10 The allegations in the complaint are too vague and conclusory to state a cognizable claim
11 for relief. Although the Federal Rules adopt a flexible pleading policy, a complaint must give
12 fair notice and state the elements of the claim plainly and succinctly. *Jones v. Community*
13 *Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least some
14 degree of particularity overt acts which defendants engaged in that support plaintiff's claim. *Id.*
15 Because plaintiff fails to plausibly state a claim for relief, the complaint must be dismissed. The
16 court will, however, grant leave to file an amended complaint.

17 To state a claim for violation of the Eighth Amendment based on inadequate medical
18 care, plaintiff must allege "acts or omissions sufficiently harmful to evidence deliberate
19 indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). To prevail,
20 plaintiff must show both that his medical needs were objectively serious, and that defendant
21 possessed a sufficiently culpable state of mind. *Wilson v. Seiter*, 501 U.S. 294, 297-99 (1991);
22 *McKinney v. Anderson*, 959 F.2d 853, 854 (9th Cir. 1992). A serious medical need is one that
23 significantly affects an individual's daily activities, an injury or condition a reasonable doctor or
24 patient would find worthy of comment or treatment, or the existence of chronic and substantial
25 pain. *See, e.g., McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other*
26 *grounds by WMX Techs. v. Miller*, 104 F.2d 1133, 1136 (9th Cir.1997) (*en banc*). It is important
to differentiate common law negligence claims of malpractice from claims predicated on
violations of the Eight Amendment's prohibition of cruel and unusual punishment. In asserting

1 the latter, “[m]ere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this
2 cause of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (citing
3 *Estelle v. Gamble*, 429 U.S. 97, 105-106 (1976); *see also Toguchi v. Chung*, 391 F.3d 1051,
4 1057 (9th Cir. 2004). Moreover, it is well established that mere differences of opinion
5 concerning the appropriate treatment cannot be the basis of an Eighth Amendment violation.
6 *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *Franklin v. Oregon*, 662 F.2d 1337, 1344
7 (9th Cir. 1981).

8 Plaintiff has not sufficiently alleged that any defendant acted with the requisite deliberate
9 indifference for an Eighth Amendment claim or that the acts or omissions of any defendant
10 caused him any injury.

11 Additionally, plaintiff is hereby informed that neither CDCR nor Deuel Vocational
12 Institute (DVI) are proper defendants. In order to state a claim under § 1983, a plaintiff must
13 allege: (1) the violation of a federal constitutional or statutory right; and (2) that the violation
14 was committed by *a person* acting under the color of state law. *See West v. Atkins*, 487 U.S. 42,
15 48 (1988); *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002).

16 Plaintiff may not sue any official on the theory that the official is liable for the
17 unconstitutional conduct of his or her subordinates. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948
18 (2009). Because respondeat superior liability is inapplicable to § 1983 suits, “a plaintiff must
19 plead that each Government-official defendant, through the official’s own individual actions, has
20 violated the Constitution.” *Id.*

21 Moreover, state agencies, such as CDCR and DVI, are immune from suit under the
22 Eleventh Amendment. *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 66 (1989);
23 *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam) (holding that prisoner’s
24 Eighth Amendment claims against CDCR for damages and injunctive relief were barred by
25 Eleventh Amendment immunity); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100
26 (1984) (Eleventh Amendment immunity extends to state agencies); *see also Hafer v. Melo*, 502

1 U.S. 21, 30 (1991) (clarifying that Eleventh Amendment does not bar suits against state officials
2 sued in their individual capacities, nor does it bar suits for prospective injunctive relief against
3 state officials sued in their official capacities).

4 Should plaintiff choose to file an amended complaint, the amended complaint shall
5 clearly set forth the claims and allegations against each defendant. It must also allege a
6 cognizable legal theory against a proper defendant and sufficient facts in support of that
7 cognizable legal theory. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
8 (district courts must afford pro se litigants an opportunity to amend to correct any deficiency in
9 their complaints). Plaintiff shall not include CDCR or DVI as a defendant in any amended
10 complaint.

11 Additionally, any amended complaint must be written or typed so that it is complete in
12 itself without reference to any earlier filed complaint. L.R. 220. This is because an amended
13 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
14 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
15 F.3d 1467, 1474 (9th Cir. 1997) (the “amended complaint supersedes the original, the latter
16 being treated thereafter as non-existent.”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
17 1967)). Plaintiff may not change the nature of this suit by alleging new, unrelated claims in an
18 amended complaint. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot”
19 complaints).

20 Accordingly, the court hereby orders that:

21 1. Plaintiff’s request to proceed *in forma pauperis* is granted.

22 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in
23 accordance with the notice to the Director of the California Department of Corrections and
24 Rehabilitation filed concurrently herewith.

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1 3. The complaint is dismissed with leave to amend within 30 days. The amended
2 complaint must bear the docket number assigned to this case and be titled "First Amended
3 Complaint." Failure to comply with this order will result in a recommendation that this action be
4 dismissed for failure to state a claim. If plaintiff files an amended complaint stating a cognizable
5 claim the court will proceed with service of process by the United States Marshal.

6 Dated: August 2, 2012.

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8 EDMUND F. BRENNAN
9 UNITED STATES MAGISTRATE JUDGE
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