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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GAVIN RUSSELL SWANSON,
Plaintiff,
v.
D. BODENHAMER, et al.,
Defendants.

No. 2:13-cv-1809 GEB AC P

ORDER

Plaintiff, a state prisoner proceeding pro se, 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). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 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 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

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

3 The court is required to screen complaints brought by prisoners seeking relief against a
4 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
5 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
6 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
7 monetary relief from a defendant who is immune from such relief. 28 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 (9th
10 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 cause of
16 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, 555 (2007). "The pleading
18 must contain something more. . . than . . . a statement of facts that merely creates a suspicion [of]
19 a legally cognizable right of action." Id., quoting 5 C. Wright & A. Miller, Federal Practice and
20 Procedure § 1216, pp. 235-35 (3d ed. 2004). "[A] complaint must contain sufficient factual
21 matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal,
22 566 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570). "A claim has
23 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
24 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 allegations
26 of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740
27 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in
28 the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421(1969).

1 Plaintiff has named eight individuals employed at California State Prison-Sacramento
2 (CSP-Sac) as defendants. Plaintiff alleges that after being severely stabbed on January 20, 2013,
3 he was hospitalized for five days at the U.C. Davis Trauma Center. He claims that on his return
4 he was seen by defendant Bodenhamer, who made no effort to examine him thoroughly, writing
5 him off as “fine.” Thereafter, plaintiff made numerous attempts to get help in light of his
6 “immense pain and loss of sensation, tingling and burning” around the site of his wound. His
7 requests to see a doctor/specialist were denied. He claims that he remains, eight months later,
8 without adequate treatment. Complaint, p. 8.

9 Eighth Amendment Inadequate Medical Care Claim

10 In order to state a §1983 claim for violation of the Eighth Amendment based on
11 inadequate medical care, plaintiff must allege “acts or omissions sufficiently harmful to evidence
12 deliberate indifference to serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106 (1976).
13 To prevail, plaintiff must show both that his medical needs were objectively serious, and that
14 defendants possessed a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 299
15 (1991); McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992) (on remand). The requisite state of
16 mind for a medical claim is “deliberate indifference.” Hudson v. McMillian, 503 U.S. 1, 5
17 (1992).

18 A serious medical need exists if the failure to treat a prisoner’s condition could result in
19 further significant injury or the unnecessary and wanton infliction of pain. Indications that a
20 prisoner has a serious need for medical treatment are the following: the existence of an injury
21 that a reasonable doctor or patient would find important and worthy of comment or treatment; the
22 presence of a medical condition that significantly affects an individual’s daily activities; or the
23 existence of chronic and substantial pain. See, e.g., Wood v. Housewright, 900 F. 2d 1332, 1337-
24 41 (9th Cir. 1990) (citing cases); Hunt v. Dental Dept., 865 F.2d 198, 200-01 (9th Cir. 1989).
25 McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on other grounds, WMX
26 Technologies v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

27 In Farmer v. Brennan, 511 U.S. 825 (1994), the Supreme Court established a very
28 demanding standard for “deliberate indifference.” Negligence is insufficient. Farmer, 511 U.S.

1 at 835. Even civil recklessness (failure to act in the face of an unjustifiably high risk of harm
2 which is so obvious that it should be known) is insufficient to establish an Eighth Amendment
3 violation. Id. at 836-37. It not enough that a reasonable person would have known of the risk or
4 that a defendant should have known of the risk. Id. at 842. Rather, deliberate indifference is
5 established only where the defendant *subjectively* “knows of and disregards an *excessive risk* to
6 inmate health and safety.” Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (internal
7 citation omitted) (emphasis added).

8 A physician need not fail to treat an inmate altogether in order to violate that inmate’s
9 Eighth Amendment rights. Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir. 1989). A
10 failure to *competently* treat a serious medical condition, even if some treatment is prescribed, may
11 constitute deliberate indifference in a particular case. Id. However, mere differences of opinion
12 concerning the appropriate treatment cannot form the basis of an Eighth Amendment violation.
13 Jackson v. McIntosh, 90 F.3d 330 (9th Cir. 1996); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th
14 Cir. 1981). In cases involving complex medical issues where plaintiff contests the type of
15 treatment he received, expert opinion will almost always be necessary to establish the necessary
16 level of deliberate indifference. Hutchinson v. United States, 838 F.2d 390 (9th Cir. 1988).

17 A finding that an inmate was seriously harmed by the defendant’s action or inaction tends
18 to provide additional support for a claim of deliberate indifference; however, it does not end the
19 inquiry. McGuckin, 974 F.2d 1050, 1060 (9th Cir. 1992). In summary, “the more serious the
20 medical needs of the prisoner, and the more unwarranted the defendant’s actions in light of those
21 needs, the more likely it is that a plaintiff has established deliberate indifference on the part of the
22 defendant.” McGuckin, 974 F.2d at 1061.

23 Plaintiff’s allegations are insufficient to frame an Eighth Amendment claim because he
24 fails to provide an adequate factual predicate for his claims against the one defendant, D.
25 Bodenhamer, he names within his allegations. Plaintiff’s claim against her is vague and broad-
26 sweeping. He simply asserts that she failed, in his estimation, to examine him thoroughly upon
27 his return from a five-day hospital stay. Plaintiff must set forth what specific medical care he was
28 in need of to which she was deliberately indifferent. As to the remaining defendants, Warden

1 Virga; E.C. Daye; Drs. Bal, Sahota, Dhillion, Wedell; and Reg. Nurse Russell, plaintiff does not
2 link any of these individuals by name to specific acts that violated his constitutional rights. The
3 individual defendants will be dismissed but plaintiff is granted leave to amend.

4 Eleventh Amendment

5 To the extent he may have intended to sue CSP-Sac, plaintiff is informed that the Eleventh
6 Amendment serves as a jurisdictional bar to suits brought by private parties against a state or state
7 agency unless the state or the agency consents to such suit. See Quern v. Jordan, 440 U.S. 332
8 (1979); Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam); Jackson v. Hayakawa, 682 F.2d
9 1344, 1349-50 (9th Cir. 1982). In the instant case, the State of California has not consented to
10 suit. Accordingly, plaintiff's claims against CSP-Sac are frivolous and must be dismissed.

11 Conclusion

12 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions
13 complained of have resulted in a deprivation of his constitutional rights. See Ellis v. Cassidy, 625
14 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms how each named
15 defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless there is some
16 affirmative link or connection between a defendant's actions and the claimed deprivation. Rizzo
17 v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v.
18 Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory allegations of
19 official participation in civil rights violations are not sufficient. See Ivey v. Board of Regents,
20 673 F.2d 266, 268 (9th Cir. 1982).

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

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

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

2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the Director of the California Department of Corrections and Rehabilitation filed concurrently herewith.

3. The complaint is dismissed for the reasons discussed above, with leave to file an amended complaint within twenty-eight days from the date of service of this order. Failure to file an amended complaint will result in a recommendation that the action be dismissed.

DATED: September 13, 2013


ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

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