UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WINSTON KEMPER, Plaintiff, v. CROSSON, et al., Defendants.	No. 2:14-cv-0305 KJN P ORDER

Plaintiff is a state prisoner proceeding without counsel. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983, and paid the filing fee. Plaintiff consented to proceed before the undersigned for all purposes. See 28 U.S.C. § 636(c).

By order filed August 15, 2014, plaintiff's complaint was dismissed, and plaintiff was granted thirty days in which to file an amended complaint. (ECF No. 20.) On September 3, 2014, plaintiff filed an amended complaint. As set forth in the August 15, 2014 order, the court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

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Plaintiff's amended complaint contains two allegations: (1) Dr. Pie, following differences in medical opinion, referred plaintiff to an ophthalmologist; and (2) Dr. Crosson gave plaintiff laser surgery which caused plaintiff to get glaucoma, "all of which was done with no prior tests." (ECF No. 22 at 3.) Plaintiff seeks monetary damages of one million dollars.

First, plaintiff's claim that the laser surgery caused plaintiff's glaucoma is belied by the exhibit appended to plaintiff's original complaint. (ECF No. 1 at 7.) Dr. Crosson recommended that plaintiff receive laser surgery "to prevent high eye pressure." (Id.) Laser surgery is used to decrease pressure in the eyes, and is a treatment for glaucoma. "Several large studies have shown that eye pressure is a major risk factor for optic nerve damage." Facts About Glaucoma, National Eye Institute <http://www.nei.nih.gov/health/glaucoma/glaucoma_facts.asp>, accessed September 9, 2014. "For reasons that doctors don't fully understand, increased pressure within the eye (intraocular pressure) is usually, but not always, associated with the optic nerve damage that characterizes glaucoma. This pressure is due to a buildup of a fluid (aqueous humor) that flows in and out of your eye." Glaucoma Causes, Mayo Clinic (Oct. 2, 2012) <http://www.mayoclinic.org/diseases-conditions/glaucoma/basics/causes/con-20024042>, accessed September 9, 2014. Thus, the exhibit provided by plaintiff demonstrates that the laser surgery was used to reduce pressure in plaintiff's eyes, not cause the symptoms exhibited by glaucoma.

Second, differences in medical opinion do not rise to the level of an Eighth Amendment violation. A difference of opinion between medical professionals concerning the appropriate course of treatment generally does not amount to deliberate indifference to serious medical needs. Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Also, "a difference of opinion between a prisoner-patient and prison medical authorities regarding treatment does not give rise to a[§]1983 claim." Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). To establish that such a difference of opinion amounted to deliberate indifference, the prisoner "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances" and "that they chose this course in conscious disregard of an excessive risk to [the prisoner's] health." See Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996); see also Wilhelm v. Rotman, 680 F.3d 1113, 1123 (9th Cir. 2012)

(doctor's awareness of need for treatment followed by his unnecessary delay in implementing the prescribed treatment sufficient to plead deliberate indifference); see also Snow v. McDaniel, 681 F.3d 978, 988 (9th Cir. 2012) (decision of non-treating, non-specialist physicians to repeatedly deny recommended surgical treatment may be medically unacceptable under all the circumstances.)

Thus, to the extent plaintiff contends that Dr. Pie should not have referred plaintiff to an ophthalmologist, such claim constitutes a mere difference of opinion and fails to state a cognizable civil rights claim.

Third, it is unclear whether plaintiff can allege facts demonstrating deliberate indifference based on his vague statement, "all of which was done with no prior tests." (ECF No. 22 at 3.)

Not every claim by a prisoner that he has received inadequate medical treatment states a violation of the Eighth Amendment. To maintain an Eighth Amendment claim based on prison medical treatment, plaintiff must show (1) a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain, and (2) a deliberately indifferent response by defendant. Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).

To act with deliberate indifference, a prison official must both know of and disregard an excessive risk to inmate health; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994). Deliberate indifference in the medical context may be shown by a purposeful act or failure to respond to a prisoner's pain or possible medical need, and harm caused by the indifference. Jett, 439 F.3d at 1096. Deliberate indifference may also be shown when a prison official intentionally denies, delays, or interferes with medical treatment or by the way prison doctors respond to the prisoner's medical needs. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); Jett, 439 F.3d at 1096.

In applying this standard, the Ninth Circuit has held that before it can be said that a prisoner's civil rights have been abridged, "the indifference to his medical needs must be substantial. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this

cause of action." Broughton v. Cutter Labs., 622 F.2d 458, 460 (9th Cir.1980), citing Estelle, 429 U.S. at 105-06. "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle, 429 U.S. at 106; see also Anderson v. Cnty. of Kern, 45 F.3d 1310, 1316 (9th Cir. 1995); McGuckin v. Smith, 974 F.2d 1050, 1050 (9th Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). Even gross negligence is insufficient to establish deliberate indifference to serious medical needs. See Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990).

Here, the consent form signed by plaintiff states that the laser surgery was "to prevent high eye pressure." (ECF No. 1 at 7.) The consent form suggests that the pressure in plaintiff's eyes was high, requiring laser surgery, and absent factual allegations to the contrary, appears medically necessary. Because it appears the laser surgery was done to prevent high pressure in plaintiff's eyes, it appears unlikely that plaintiff can state a cognizable Eighth Amendment claim based on his vague allegation that no prior tests were performed. Arguably, some form of eye test was performed that demonstrated plaintiff suffered with high pressure in his eyes prior to the signing of the consent form. But in an abundance of caution, plaintiff is granted one final opportunity to amend his claims should he be able to allege facts demonstrating deliberate indifference in performing the laser surgery.

The court finds the allegations in plaintiff's amended complaint so vague and conclusory that it is unable to determine whether the current action is frivolous or fails to state a claim for relief. The court has determined that the amended complaint does not contain a short and plain statement as required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair notice and state the elements of the claim plainly and succinctly. Jones v. Cmty. Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least some degree of particularity overt acts which defendants engaged in that support plaintiff's claim. Id. Because plaintiff has failed to comply with the requirements of Fed. R. Civ. P. 8(a)(2), the amended complaint must be dismissed. The court will, however, grant

leave to file a second amended complaint.

If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions about which he complains resulted in a deprivation of plaintiff's constitutional rights. Rizzo v. Goode, 423 U.S. 362, 371 (1976). Also, the second amended complaint must allege in specific terms how each named defendant is involved. Id. There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant's actions and the claimed deprivation. Id.; May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil rights violations are not sufficient. Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

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

1. Plaintiff's amended complaint is dismissed; and

2. Within thirty days from the date of this order, plaintiff shall complete the attached Notice of Amendment and submit the following documents to the court:

    a. The completed Notice of Amendment; and

    b. An original and one copy of the Second Amended Complaint.

Plaintiff's second amended complaint shall comply with the requirements of the Civil Rights Act, the Federal Rules of Civil Procedure, and the Local Rules of Practice. The second amended

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complaint must also bear the docket number assigned to this case and must be labeled "Second Amended Complaint."

Failure to file a second amended complaint in accordance with this order will result in the dismissal of this action.

Dated: September 10, 2014

kemp0305.14b

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WINSTON KEMPER,

Plaintiff,

v.

DR. CROSSON, et al.,

Defendants.

No. 2:14-cv-0305 KJN P

NOTICE OF AMENDMENT

Plaintiff hereby submits the following document in compliance with the court's order filed_____.

_____ Second Amended Complaint

DATED:

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Plaintiff