

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL DICKMAN.

No. 2:14-cv-2150 DAD P

Plaintiff.

ORDER

RICHARD M. TAN et al.,

Defendants.

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. 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 **SCREENING REQUIREMENT**

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

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

17 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain
18 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
19 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
20 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
21 However, in order to survive dismissal for failure to state a claim a complaint must contain more
22 than "a formulaic recitation of the elements of a cause of action;" it must contain factual
23 allegations sufficient "to raise a right to relief above the speculative level." Bell Atlantic, 550
24 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the
25 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
26 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all
27 doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

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

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

5 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
6 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
7 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
8 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the
9 meaning of § 1983, if he does an affirmative act, participates in another’s affirmative acts or
10 omits to perform an act which he is legally required to do that causes the deprivation of which
11 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

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

PLAINTIFF'S COMPLAINT

20 In the present case, plaintiff has identified Dr. Tan, Nurse Blake, Chief Medical Executive
21 Kuerstan, Chief Pfile, Warden Swarthout, Receiver Kelso, and the California Department of
22 Corrections and Rehabilitation as the defendants in this action. In his complaint plaintiff alleges
23 that he has been diagnosed with Diffuse Idiopathic Skeletal Hyperostosis (“DISH”) also known as
24 Forestier’s Disease. According to plaintiff, DISH is a form of degenerative arthritis. Plaintiff
25 complains that the defendants have failed to provide him with adequate medical care for his
26 condition. For example, he alleges that defendant Dr. Tan has refused to provide him with proper
27 pain management. He also alleges that defendant Nurse Blake wrongfully accused him of
28 possibly hoarding his medication by now swallowing it. Plaintiff claims that defendants have

1 violated his rights under the Eighth Amendment, the Americans with Disabilities Act, and certain
2 state laws and requests declaratory and injunctive relief and damages. (Compl. at 3-23.)

3 **DISCUSSION**

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

14 If plaintiff chooses to file an amended complaint, he must allege facts demonstrating how
15 the conditions complained of resulted in a deprivation of his federal constitutional or statutory
16 rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The amended complaint must allege in
17 specific terms how each named defendant was involved in the deprivation of plaintiff's rights.
18 There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or
19 connection between a defendant's actions and the claimed deprivation. Rizzo v. Goode, 423 U.S.
20 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740,
21 743 (9th Cir. 1978). Vague and conclusory allegations of official participation in civil rights
22 violations are not sufficient. Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

23 It is clear from the allegations of plaintiff's complaint that he is dissatisfied with the
24 medical care he has received for his degenerative arthritis condition while incarcerated.
25 However, inadequate medical care does not constitute cruel and unusual punishment cognizable
26 under § 1983 unless the mistreatment rises to the level of "deliberate indifference to serious
27 medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). In general, deliberate indifference
28 may be shown when prison officials deny, delay, or intentionally interfere with medical

1 treatment, or may be shown by the way in which prison officials provide medical care.

2 Hutchinson v. United States, 838 F.2d 390, 393-94 (9th Cir. 1988).

3 In any amended complaint plaintiff elects to file, he must allege facts demonstrating how
4 each named defendant's actions rose to the level of "deliberate indifference." Plaintiff is advised
5 that mere differences of opinion between a prisoner and prison medical staff as to the proper
6 course of treatment for a medical condition do not give rise to a § 1983 claim. See Toguchi v.
7 Soon Hwang Chung, 391 F.3d 1051, 1058 (9th Cir. 2004); Jackson v. McIntosh, 90 F.3d 330, 332
8 (9th Cir. 1996); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Franklin v. Oregon, 662 F.2d
9 1337, 1344 (9th Cir. 1981).

10 In addition, before it can be said that a prisoner's civil rights have been abridged, "the
11 indifference to his medical needs must be substantial. Mere 'indifference,' 'negligence,' or
12 'medical malpractice' will not support this cause of action." Broughton v. Cutter Lab., 622 F.2d
13 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105-06). See also Wood v. Housewright, 900
14 F.2d 1332, 1334 (9th Cir. 1990) ("In determining deliberate indifference, we scrutinize the
15 particular facts and look for substantial indifference in the individual case, indicating more than
16 mere negligence or isolated occurrences of neglect.").

17 Delays in providing medical care may manifest deliberate indifference. Estelle, 429 U.S.
18 at 104-05. To establish a claim of deliberate indifference arising from delay in providing medical
19 care, however, a plaintiff must allege facts showing that the delay in treatment was harmful. See
20 Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); Hunt v. Dental Dep't, 865 F.2d 198, 200
21 (9th Cir. 1989); Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir.
22 1985). In this regard, "[a] prisoner need not show his harm was substantial; however, such would
23 provide additional support for the inmate's claim that the defendant was deliberately indifferent to
24 his needs." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).

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1 The court observes that plaintiff has also included a claim under the Americans with
2 Disabilities Act (“ADA”). Title II of the ADA provides that:

3 no qualified individual with a disability shall, by reason of such
4 disability, be excluded from participation in or be denied the
5 benefits of the services, programs, or activities of a public entity, or
be subject to discrimination by such entity.

6 To establish a violation of the ADA, a plaintiff must allege facts showing that: (1) he or she is a
7 qualified individual with a disability; (2) he or she was excluded from participation in or
8 otherwise discriminated against with regard to a public entity’s services, programs, or activities;
9 and (3) such exclusion or discrimination was by reason of his or her disability. See Simmons v.
10 Navajo County, 609 F.3d 1011, 1021 (9th Cir. 2010); Lovell v. Chandler, 303 F.3d 1039, 1052
11 (9th Cir. 2002).

12 Plaintiff has not alleged any facts suggestive of a cognizable ADA claim in his complaint.
13 Specifically, plaintiff has not alleged that any defendant discriminated against him or denied him
14 benefits because of his alleged disability. Rather, plaintiff alleges that defendants failed to
15 provide him proper medical treatment when they refused to refer him to a physical therapist and
16 an orthopedist and failed to provide him with the appropriate diet for his condition and so on.
17 These allegations are part of an inadequate medical care claim raised under the Eighth
18 Amendment, not the ADA. See Simmons, 609 F.3d at 1022 (“The ADA prohibits discrimination
19 because of disability, not inadequate treatment for disability”). In any amended complaint
20 plaintiff elects to file, he should either omit his ADA claim or must allege facts demonstrating
21 how a defendant entity discriminated against him based on a disability.

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

CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

- 3 1. Plaintiff's motion to proceed in forma pauperis (Doc No. 3) is granted.
- 4 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. The fee
5 shall be collected and paid in accordance with this court's order to the Director of the California
6 Department of Corrections and Rehabilitation filed concurrently herewith.
- 7 3. Plaintiff's complaint (Doc. No. 1) is dismissed.
- 8 4. Plaintiff is granted thirty days from the date of service of this order to file an amended
9 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil
10 Procedure, and the Local Rules of Practice; the amended complaint must bear the docket number
11 assigned to this case and must be labeled "Amended Complaint"; failure to file an amended
12 complaint in accordance with this order will result in a recommendation that this action be
13 dismissed without prejudice; and
- 14 5. The Clerk of the Court is directed to send plaintiff the court's form for filing a civil
15 rights action.

16 Dated: March 30, 2015

DAD:9
dick2150.14a

Dale A. Drozd
DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE