UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WARREN C. GREEN,

Plaintiff,

v.

CDCR, et al.,

Defendants.

No. 2:14-cv-2854 TLN AC P

ORDER AND FINDINGS AND RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner incarcerated at the California Health Care Facility (CHCF), under the authority of the California Department of Corrections and Rehabilitation (CDCR). Plaintiff seeks in this civil rights action to obtain monetary damages as recompense for the alleged deliberate indifference of medical providers in failing to timely diagnose and treat his epididymitis (inflammation of the epididymis, the coiled tube at the back of the testicle that stores and carries sperm).[1] Plaintiff alleges that a lump appeared in his right testicle in 2011 and became chronically painful; that the lump was misdiagnosed and improperly treated, including as a urinary tract infection (UTI); and that ultimately plaintiff's testicle was removed in January

[1] See Mayo Clinic Diseases and Conditions, at http://www.mayoclinic.org/diseases-conditions/epididymitis/basics/definition/con-20032876. This court may take judicial notice of facts that are capable of accurate determination by sources whose accuracy cannot reasonably be questioned. See Fed. R. Evid. 201.

2015. Plaintiff avers that he is distressed by the loss of his testicle and experiences ongoing pain.

Currently pending for this court's review is plaintiff's proposed Second Amended Complaint, ECF No. 17, and request for appointment of counsel, ECF No. 18. For the reasons set forth below, this court recommends that the instant action be dismissed without prejudice for failure to state a cognizable claim, and that plaintiff's request for appointment of counsel be denied.

II. Second Amended Complaint

A. Legal Standards for Screening a Prisoner Civil Rights Complaint

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," fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

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

A district court must construe a pro se pleading liberally to determine if it states a potentially cognizable claim. The court must explain to the plaintiff any deficiencies in his complaint and accord plaintiff an opportunity to cure them. See Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000). While detailed factual allegations are not required, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). "While legal conclusions can provide the framework of a complaint, they must

be supported by factual allegations." Id. at 679. Rule 8 of the Federal Rules of Civil Procedure "requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." Twombly, 550 U.S. at 555 (citation and internal quotation and punctuation marks omitted).

A pro se litigant is entitled to notice of the deficiencies in the complaint and an opportunity to amend, unless the complaint's deficiencies cannot be cured by amendment. See Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

B. Plaintiff's Second Amended Complaint

Plaintiff has filed numerous documents in this court in his attempt to craft a cognizable complaint alleging deliberate indifference to his serious medical needs by specific defendants. The court has attempted to provide adequate guidance. Most recently, by orders filed September 29, 2015, and October 14, 2015, see ECF Nos. 11, 15, the court directed plaintiff to file one comprehensive document, combining the claims and exhibits set forth in prior documents, particularly his original complaint, ECF No. 1, and First Amended Complaint (FAC), ECF No. 9; and to identify specific defendants and their allegedly unconstitutional conduct based on the legal standards for stating a cognizable deliberate indifference claim. This court stated that "[p]laintiff's allegations, taken together, appear to state a cognizable claim of deliberate indifference to plaintiff's serious medical needs." ECF No. 11 at 5. However, the court noted that plaintiff's filings have consistently failed to "link" any challenged conduct (misdiagnoses, belated referrals to specialists, inappropriate treatments) to specific defendants. A complaint that fails to identify specific acts by each defendant who allegedly violated the plaintiff's rights fails to meet the notice requirements of Rule 8(a). See Hutchinson v. United States, 677 F.2d 1322, 1328 n.5 (9th Cir.1982).

However, the abbreviated Second Amended Complaint (SAC), ECF No. 17, fails to include these critical details. The SAC alleges, for example, that plaintiff's "epididymitis was 'processed as a routine matter,' stated by: J. Lewis" (sic), citing "his report." ECF No. 17 at 4. The SAC also alleges that "my medical condition wasn't taken seriously as it should have been,

statements by: J. Lewis and Dr. Liu, who at first just 'treated' me with antibiotics." Id. There are no pertinent exhibits attached to the SAC. Exhibits attached to the original complaint and FAC reference J. Lewis only twice: (1) an October 10, 2014 notice on behalf of J. Lewis (Deputy Director, Policy and Risk Management Services, California Correctional Health Care Services (CCHC)), informing plaintiff that his submission of Health Care Appeal Log No. CHCF HC 14000797 lacked plaintiff's signature and date, see ECF No. 9 at 31; and (2) the October 13, 2014 Director's Level Decision on the same appeal, written on behalf of J. Lewis, finding that plaintiff had received medically appropriate treatment from unnamed clinical staff, viz., two different antibiotics that apparently resolved his putative UTI, and five medical evaluations within two weeks, see ECF No. 9 at 23-4. Neither of these exhibits supports a claim against J. Lewis. Supervisors may be held liable under Section 1983 only if they "participated in or directed the violations, or knew of the violations and failed to act to prevent them." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).[2]

Nor does the Second Level Decision in plaintiff's Health Care Appeal Log No. CHCF HC 14000797 support a cognizable claim against the Physician's Assistant who interviewed plaintiff (O. Akintola), or Dr. T. Bzoskie, CHCF Chief Medical Executive (CME), who rendered the decision. See ECF No. 1 at 33-4. Although this decision also assumed, apparently incorrectly, that plaintiff was suffering from UTIs, it notes that plaintiff's symptoms, including complaints of testicular pain, "resolved after the antibiotics were discontinued." Id. at 34. There are no facts from which to reasonably infer that either individual was deliberately indifferent to plaintiff's serious medical needs, that is, that he "kn[ew] of and disregard[ed] an excessive risk to [plaintiff's] health or safety; the official must both be aware of the 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).

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[2] While this court previously noted that plaintiff may be able to name a supervisory official, such as a Chief Medical Officer, for the purpose of obtaining prospective relief, see ECF No. 11 at 6-7, plaintiff now seeks only damages.

Similarly, the general allegations against Drs. Liu and Quresh in the SAC, see ECF No. 17 at 4, 5, are supported neither by the SAC nor any previously filed exhibits. Finally, although plaintiff was previously informed that he is unable to sue a state agency, as he has again named in the SAC "HCS [Health Care Services] & Associates," "HCS and Medical Associates in CHCF et al.," etc. See ECF No. 17 at 1, 2.

In sum, the court's review of plaintiff's numerous filings has failed to identify a potentially cognizable deliberate indifference claim against any specific medical provider. Because plaintiff has been accorded adequate opportunity to correct the deficiencies of his pleading, and asserts that he does not intend to attempt further amendment, the court finds that further amendment would be futile. See Noll, 809 F.2d at 1448; accord Hartmann v.CDCR, 707 F.3d 1114, 1130 (9th Cir. 2013).

For these reasons, this court finds that the SAC fails to state a cognizable claim, and recommends that this action be dismissed without prejudice.

III. Request for Appointment of Counsel

Plaintiff has submitted a "form" motion requesting appointment of counsel. See ECF No. 18. The motion states that plaintiff is incarcerated, indigent, and unlearned in the law. The undersigned acknowledges that any prisoner civil rights case would benefit from the appointment of counsel. However, the standards supporting appointment of counsel in prisoner civil rights actions require "exceptional circumstances" uncommon to that confronted by most prisoners, and the court finds that plaintiff has not demonstrated such circumstances.

District courts have no authority to require an attorney to voluntarily represent an indigent prisoner in a civil rights action. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). Only in certain exceptional circumstances may a district court request the voluntary assistance of a willing attorney. See 28 U.S.C. § 1915(e)(1); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). The test for exceptional circumstances requires the court to evaluate the plaintiff's likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986); Weygandt v.

Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances common to most prisoners, such as lack of legal education and limited law library access, do not establish exceptional circumstances that would warrant a request for voluntary assistance of counsel. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009).

In addition to these standards, this court is required to consider each plaintiff's request for appointment of counsel in light of the reality that only a limited number of volunteer attorneys are available for appointment. In the present case, plaintiff has been provided guidance by the court and repeated opportunities to identify at least one defendant against whom he can allege a viable claim for deliberate indifference to his serious medical needs. Despite plaintiff's numerous filings, and the court's careful review of his exhibits, neither plaintiff nor this court has been able to formulate such a claim. Thus, it is not clear that appointed counsel would be able to identify such a claim. As plaintiff was informed early on in this case, "Negligence is insufficient. Even civil recklessness (failure to act in the face of an unjustifiably high risk of harm which is so obvious that it should be known) is insufficient to establish an Eighth Amendment violation. It is not enough that a reasonable person would have known of the risk or that a defendant should have known of the risk." ECF No. 7 at 4 (citing Farmer, 511 U.S. at 835-42).

Additionally, incarceration, indigence and limited legal training are circumstances common to nearly all prisoners. In the absence of potentially cognizable claims, this court is unable to assess their complexity or find that plaintiff is likely to succeed on the merits.

For these reasons, the undersigned recommends that plaintiff's request for appointment of counsel be denied.

IV. Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that plaintiff's request for appointment of counsel, ECF No. 18, is DENIED.

IT IS HEREBY RECOMMENDED that:

1. This action be dismissed without prejudice; and

2. The Clerk of Court be directed to close this case.

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These findings and recommendations are submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty one days after being served with these findings and recommendations, plaintiff may file written objections with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: October 19, 2016

ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE