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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN HICKS,
Plaintiff,
v.
STATE MEDICAL, et al.,
Defendants.

No. 2:15-cv-0747 DB P

AMENDED ORDER¹

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action under 42 U.S.C. § 1983. Plaintiff alleges that the water at “Tracy Medical” was contaminated, which posed a dangerous risk to his immune system as an AIDS patient. (ECF No. 1 at 3.) Furthermore, plaintiff alleges that defendant Lopez, a correctional officer on the third watch, was responsible for plaintiff being assigned to the third tier of the prison, which posed a dangerous risk to him because he had pins and screws in his left knee and took psychiatric medication. (Id. at 2) Before the court are plaintiff’s application to proceed in forma pauperis (ECF Nos. 2; 5) and the screening of plaintiff’s complaint. Plaintiff has consented to the jurisdiction of a magistrate
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¹ This amended order is identical to the order issued on September 22, 2017. However, that prior order did not include the referenced attachment – the “Notice of Amendment.” This amended order includes that attachment.

1 judge. (ECF No. 4.) For the reasons set forth below, the court grants plaintiff's motion to
2 proceed in forma pauperis and dismisses plaintiff's complaint with leave to amend.

3 **I. Motion to Proceed In Forma Pauperis**

4 Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a).
5 (ECF Nos. 2; 5.) Accordingly, the request to proceed in forma pauperis will be granted.

6 Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§
7 1914(a), 1915(b)(1). Plaintiff is currently without funds. Accordingly, the court will not assess
8 an initial partial filing fee. 28 U.S.C. § 1915(b)(1). Plaintiff is obligated for monthly payments
9 of twenty percent of the preceding month's income credited to plaintiff's prison trust account.
10 These payments shall be collected and forwarded by the appropriate agency to the Clerk of the
11 Court each time the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in
12 full. 28 U.S.C. § 1915(b)(2).

13 **II. Screening**

14 The court is required to screen complaints brought by prisoners seeking relief against a
15 governmental entity or an officer or employee of a governmental entity. See 28 U.S.C. §
16 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims
17 that are legally "frivolous or malicious," that fail to state a claim upon which relief may be
18 granted, or that seek monetary relief from a defendant who is immune from such relief. See 28
19 U.S.C. § 1915A(b)(1) & (2).

20 **A. Legal Standard**

21 A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke
22 v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir.
23 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably
24 meritless legal theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at
25 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an
26 arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989);
27 Franklin, 745 F.2d at 1227.

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1 In considering whether a complaint states a claim upon which relief can be granted, the court
2 must accept the allegations as true, Erickson v. Pardus, 551 U.S. 89, 94 (2007), and construe the
3 complaint in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236
4 (1974).

5 Pro se pleadings are held to a less stringent standard than those drafted by lawyers. See
6 Haines v. Kerner, 404 U.S. 519, 520 (1972). Still, to survive dismissal for failure to state a claim,
7 a pro se complaint must contain more than “naked assertions,” “labels and conclusions” or “a
8 formulaic recitation of the elements of a cause of action.” Bell Atlantic Corp. v. Twombly, 550
9 U.S. 544, 555-57 (2007). In other words, “[t]hreadbare recitals of the elements of a cause of
10 action, supported by mere conclusory statements do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662,
11 678 (2009).

12 Furthermore, a claim upon which the court can grant relief must have facial plausibility.
13 Twombly, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual
14 content that allows the court to draw the reasonable inference that the defendant is liable for the
15 misconduct alleged.” Iqbal, 556 U.S. at 678. Attachments to a complaint are considered to be
16 part of the complaint for purposes of a motion to dismiss for failure to state a claim. Hal Roach
17 Studios v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

18 **B. Discussion**

19 Plaintiff’s complaint appears to make two claims against two defendants. A claim for
20 inadequate medical care by the “doctor” at DVI, as well as a deliberate indifference claims
21 against correctional officer Lopez at DVI. (ECF No. 1 at 2-3.) For the reasons outlined below,
22 the court dismisses the complaint for failure to state a cognizable claim.

23 **1. Improper Defendant**

24 The first named defendant in this action appears to be the prison institution itself, which
25 plaintiff identifies as merely “Tracy Medical.” Plaintiff’s complaint is deficient, first, in that it
26 fails to identify a proper party for relief. The Eleventh Amendment prohibits federal courts from
27 hearing a Section 1983 lawsuit in which damages or injunctive relief is sought against state
28 agencies (such as the California Department of Corrections and Rehabilitation) and individual

1 prisons (such as “Tracy Medical”), absent “a waiver by the state or a valid congressional override
2” Dittman v. California, 191 F.3d 1020, 1025 (9th Cir. 1999). “The Eleventh Amendment
3 bars suits which seek either damages or injunctive relief against a state, ‘an arm of the state,’ its
4 instrumentalities, or its agencies.” See Fireman’s Fund Ins. Co. v. City of Lodi, Cal., 302 F.3d
5 928, 957 n. 28 (9th Cir. 2002) (internal quotation and citations omitted), cert. denied, 538 U.S.
6 961 (2003). “The State of California has not waived its Eleventh Amendment immunity with
7 respect to claims brought under § 1983 in federal court” Dittman, 191 F.3d at 1025–26
8 (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985)); see also Brown v. Cal.
9 Dep’t. of Corr., 554 F.3d 747, 752 (9th Cir. 2009). “However, under Ex Parte Young, 209 U.S.
10 123 (1908), the Eleventh Amendment does not bar actions seeking only prospective declaratory
11 or injunctive relief against state officers in their official capacities[.]” Fireman’s Fund, 302 F.3d
12 at 957 n. 28 (internal quotation and citation omitted), or, in appropriate instances, in their
13 individual capacities, Idaho v. Coeur d’Alene Tribe of Idaho, 521 U.S. 261, (1997) (citing Ex
14 Parte Young, 209 U.S. at 123). In any amended complaint that he may file, plaintiff should
15 carefully consider whom he may properly name as a defendant in this action.

16 **2. Failure to State a Claim for Inadequate Medical Care**

17 Plaintiff’s claim against “Tracy Medical” is also deficient in that it fails to adequately state a
18 claim under Section 1983. The court will briefly set forth the standards that govern a claim under
19 the Eighth Amendment based on inadequate medical care.

20 To state such a claim, plaintiff must allege “acts or omissions sufficiently harmful to
21 evidence deliberate indifference to serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106
22 (1976). To prevail, plaintiff must show both that his medical needs were objectively serious, and
23 that defendant possessed a sufficiently culpable state of mind. Snow v. McDaniel, 681 F.3d 978,
24 982 (9th Cir. 2012), overruled on other grounds by Peralta v. Dillard, 744 F.3d 1076, 1083 (9th
25 Cir. 2014) (en banc); Wilson v. Seiter, 501 U.S. 294, 297-99 (1991). To meet the objective
26 element, plaintiff must demonstrate the existence of a serious medical need. Estelle, 429 U.S. at
27 104. Such a need exists if the failure to treat the injury or condition “could result in further
28 significant injury” or cause “the unnecessary and wanton infliction of pain.” Jett v. Penner, 439

1 F.3d 1091, 1096 (9th Cir. 2006) (internal quotes and citations omitted). Serious medical needs
2 include “[t]he existence of an injury that a reasonable doctor or patient would find important and
3 worthy of comment or treatment; the presence of a medical condition that significantly affects an
4 individual’s daily activities; [and] the existence of chronic and substantial pain.” McGuckin v.
5 Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled in part on other grounds by WMX
6 Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997).

7 Under the subjective element, a prison official is deliberately indifferent only if the official
8 “knows of and disregards an excessive risk to inmate health and safety.” Toguchi v. Chung, 391
9 F.3d 1051, 1057 (9th Cir. 2004) (internal quotes and citation omitted). To prevail on a claim for
10 deliberate indifference, a prisoner must demonstrate that the prison official “kn[ew] of and
11 disregard[ed] an excessive risk to inmate health or safety; the official must both be aware of the
12 facts from which the inference could be drawn that a substantial risk of serious harm exists, and
13 he must also draw the inference.” Farmer v. Brennan, 511 U.S. 825, 837 (1994). Deliberate
14 indifference “may appear when prison officials deny, delay or intentionally interfere with medical
15 treatment, or it may be shown by the way in which prison physicians provide medical care.”
16 Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir. 1988). The court “need not defer to the
17 judgment of prison doctors or administrators” when deciding the deliberate indifference element.
18 Hunt v. Dental Dept., 865 F.2d 198, 200 (9th Cir. 1989) (where prison officials were aware loss
19 of his dentures was causing him severe pain and permanent physical damage, three month delay
20 in providing pain relief and soft food diet constituted Eighth Amendment violation).

21 Delays in providing medical care may manifest deliberate indifference. Estelle, 429 U.S. at
22 104-05. To establish a claim of deliberate indifference arising from delay in providing care, a
23 plaintiff must show that the delay was harmful. See Hallett v. Morgan, 296 F.3d 732, 745-46 (9th
24 Cir. 2002); Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); McGuckin, 974 F.2d at 1059.
25 In this regard, “[a] prisoner need not show his harm was substantial; however, such would
26 provide additional support for the inmate’s claim that the defendant was deliberately indifferent to
27 his needs.” Jett, 439 F.3d at 1096; see also McGuckin, 974 F.2d at 1060.

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1 In applying the deliberate indifference standard, the Ninth Circuit has held that before it can
2 be said that a prisoner's civil rights have been abridged, "the indifference to his medical needs
3 must be substantial. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support
4 this cause of action." Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing
5 Estelle, 429 U.S. at 105-06). A complaint that a physician has been negligent in diagnosing or
6 treating a medical condition does not state a valid claim of medical mistreatment under the Eighth
7 Amendment. Even gross negligence is insufficient to establish deliberate indifference to serious
8 medical needs. See Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990).

9 A difference of opinion between medical professionals concerning the appropriate course
10 of treatment generally does not amount to deliberate indifference to serious medical needs.
11 Toguchi, 391 F.3d at 1058; Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Also, "a
12 difference of opinion between a prisoner-patient and prison medical authorities regarding
13 treatment does not give rise to a [§]1983 claim." Franklin, 662 F.2d at 1344. To establish that
14 such a difference of opinion amounted to deliberate indifference, the prisoner "must show that the
15 course of treatment the doctors chose was medically unacceptable under the circumstances" and
16 "that they chose this course in conscious disregard of an excessive risk to [the prisoner's] health."
17 See Jackson, 90 F.3d at 332; see also Wilhelm v. Rotman, 680 F.3d 1113, 1123 (9th Cir. 2012)
18 (awareness of need for treatment followed by unnecessary delay in implementing the prescribed
19 treatment sufficient to plead deliberate indifference); see also Snow, 681 F.3d at 988 (decision of
20 non-treating, non-specialist physicians to repeatedly deny recommended surgical treatment may
21 be medically unacceptable under all the circumstances).

22 The statement of claim in plaintiff's complaint provides as follows:

23 I am being a gennie pig. I have full blown AIDS. The water in
24 Tracy CA reception center is contaminated. Its dangerous to my
25 immune system. And I'm being given dirty unclean water. There's
a sign for the visitors that says do not drink water.

26 (sic) (ECF No. 1 at 3.) Plaintiff's prayer for relief merely states "to be compensated for the stress
27 and malpractice." (Id.)

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

10 **3. Failure to State a Claim Against Defendant Lopez**

11 As to defendant Lopez, plaintiff's full claim states that:

12 I've got pins and screws in my left knee and there making me cell
13 on the third tier. I also take psychiatric medication. I should not be
14 on the third tier.

14 (ECF No. 1 at 2.)

15 As with the claim against "Tracy Medical," it appears that plaintiff is trying to make a claim
16 for deliberate indifference to a medical need. However, also like the claim against "Tracy
17 Medical," the court finds the allegations in the complaint so vague and conclusory that it is unable
18 to determine whether the current action is frivolous or fails to state a claim for relief. The court
19 has provided plaintiff with the elements for pursuing a deliberate indifference claim above.
20 Plaintiff must allege with at least some degree of particularity overt acts which this defendant
21 engaged in that support the claim for deliberate indifference. As currently stated plaintiff merely
22 names Lopez as a defendant and then alleges generally that plaintiff should not be placed on the
23 third tier of the prison. In order to make a claim on this basis, it is necessary to identify a specific
24 defendant who took a specific action that harmed plaintiff. The complaint, as currently drafted,
25 does not do this.

26 **4. Leave to File an Amended Complaint**

27 As stated above, the court ultimately finds the allegations in plaintiff's complaint so vague
28 and conclusory that it is unable to determine whether the current action is frivolous or fails to

1 state a claim for relief. The court has determined that the complaint does not contain a short and
2 plain statement as required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a
3 flexible pleading policy, a complaint must give fair notice and state the elements of the claim
4 plainly and succinctly. Jones v. Cmty. Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984).
5 Plaintiff must allege with at least some degree of particularity overt acts which defendants
6 engaged in that support plaintiff's claim. Id. Because plaintiff has failed to comply with the
7 requirements of Fed. R. Civ. P. 8(a)(2), the complaint must be dismissed. The court will,
8 however, grant leave to file an amended complaint.

9 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions
10 about which he complains resulted in a deprivation of plaintiff's constitutional rights. Rizzo v.
11 Goode, 423 U.S. 362, 371 (1976). Also, the complaint must allege in specific terms how each
12 named defendant is involved. Id. There can be no liability under 42 U.S.C. § 1983 unless there is
13 some affirmative link or connection between a defendant's actions and the claimed deprivation.
14 Id.; May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743
15 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil
16 rights violations are not sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

24 **III. Conclusion**

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

- 26 1. Plaintiff's request for leave to proceed in forma pauperis (ECF Nos. 2; 5) is granted.
- 27 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff is
28 assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1).

1 All fees shall be collected and paid in accordance with this court's order to the Director of the
2 California Department of Corrections and Rehabilitation filed concurrently herewith.

3 3. Plaintiff's complaint is dismissed.


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

6 a. The completed Notice of Amendment; and

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

8 Plaintiff's amended complaint shall comply with the requirements of the Civil Rights Act, the
9 Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must
10 also bear the docket number assigned to this case and must be labeled "Amended Complaint."
11 Failure to file an amended complaint in accordance with this order may result in the dismissal of
12 this action.

13 Dated: November 6, 2017

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16 DEBORAH BARNES
17 UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN HICKS,
Plaintiff,
v.
STATE MEDICAL, et al.,
Defendants.

No. 2:15-cv-0747 DB P

NOTICE OF AMENDMENT

Plaintiff submits the following document in compliance with the court's order filed

_____.

_____ Amended Complaint

DATED:

Plaintiff