

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

HERB L. GADBURY,

No. 2:15-cv-2015 DB P

Plaintiff,

## ORDER

STATE OF CALIFORNIA, et al.,

## Defendants.

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, seeks relief pursuant to 42 U.S.C. § 1983. Plaintiff has consented to the jurisdiction of a magistrate judge.

After plaintiff's complaint was dismissed on July 5, 2016, with leave to amend for failure to state a claim, plaintiff filed a letter responding to certain deficiencies identified in the screening order. This letter was construed as a first amended complaint and also dismissed with leave to amend for failure to state a claim. Plaintiff has now resubmitted his original complaint.

## I. Screening Requirement

The court is required to screen complaints brought by individuals proceeding in forma pauperis seeking relief against a governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the complaint contains 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

1 such relief. 28 U.S.C. § 1915A(b)(1), (2). “Notwithstanding any filing fee, or any portion  
2 thereof, that may have been paid, the court shall dismiss the case at any time if the court  
3 determines that . . . the action or appeal . . . fails to state a claim upon which relief may be  
4 granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

5 **II. Pleading Standard**

6 A complaint must contain “a short and plain statement of the claim showing that the  
7 pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
8 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
9 conclusory statements, do not suffice,” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell  
10 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)), and courts “are not required to indulge  
11 unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009)  
12 (internal quotation marks and citation omitted). While factual allegations are accepted as true,  
13 legal conclusions are not. Iqbal, 556 U.S. at 678.

14 Under section 1983, plaintiff must demonstrate that each defendant personally participated  
15 in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). This  
16 requires the presentation of factual allegations sufficient to state a plausible claim for relief.  
17 Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).  
18 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings liberally  
19 construed and to have any doubt resolved in their favor, Hebbe v. Pliler, 627 F.3d 338, 342 (9th  
20 Cir. 2010) (citations omitted), but nevertheless, the mere possibility of misconduct falls short of  
21 meeting the plausibility standard, Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

22 **III. Plaintiff’s Allegations**

23 At all times relevant to this action, plaintiff was housed at California Health Care Facility  
24 (“CHCF”) in Stockton, California. Plaintiff names as defendants the State of California, Appeals  
25 Examiner K.J. Allen, and CHCF Warden Brian Duffy.

26 Plaintiff’s specific allegations are minimal. He contends only that he has been unable to  
27 consume any milk or cheese since the age of 6 due to health reasons, and he has been a vegetarian  
28 since the age of 10 for religious beliefs. When plaintiff entered the California prison system at the

1 age of 40, he received a doctor's order for a dairy-free vegetarian diet. Recently, he was given  
2 only a standard vegetarian diet with milk, cheese and fish when it appeared on the menu. This  
3 causes him health issues and violates his religious rights.

4 The following details are gleaned from the grievances attached to the complaint:

5 Following CHCF's refusal to provide plaintiff with a modified vegetarian diet<sup>1</sup>, plaintiff  
6 filed an appeal with Health Care Services. On March 5, 2014, his appeal was granted at the  
7 second level of review, and he received a doctor's order for a lacto-ovo vegetarian diet excluding  
8 dairy products and substituting peanut butter for cheese.

9 Despite this doctor's order, plaintiff was again not provided a modified vegetarian diet.  
10 On July 18, 2014, plaintiff filed a grievance concerning this issue, and on December 11, 2014,  
11 defendant Warden Duffy denied the grievance at the second level of review. Warden Duffy  
12 explained that diets can be modified for medical and religious reasons. While plaintiff was  
13 receiving a vegetarian diet per his religious beliefs, he was directed to speak to his physician to  
14 discuss his medical diet concerns.

15 Plaintiff appealed this denial with a copy of the March 5, 2014, doctor's order. In light of  
16 this evidence, the Office of Appeals remanded the matter to the CHCF Appeals Coordinator on  
17 March 27, 2015, with a directive "to gather current information from both Medical staff and Food  
18 Services staff regarding [plaintiff's] special diet relative to this appeal issue."

19 On July 31, 2015, defendant Appeals Examiner K.J. Allen denied plaintiff's appeal at the  
20 third level of review after concluding that, "[a]ccording to the medical records, the appellant is  
21 not currently approved for a medical diet." CHCF informed the Appeals Examiner that when  
22 plaintiff was moved from Facility D, with a higher level of care (where his special diet was  
23 approved), to Facility C, a lower level of care, all of his dietary accommodations were  
24 discontinued. Plaintiff was thus again "advised to consult his current healthcare provider for any  
25 new requests in relation to his diet."

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<sup>1</sup> A grievance attached to the complaint suggests that plaintiff is Hindu. See Compl. (ECF No. 14  
28 at 15).

1 Plaintiff initiated this action on September 21, 2015, and seeks an order directing  
2 defendants at CHCF to (1) substitute smart milk (soy) for regular milk, (2) to substitute peanut  
3 butter for cheese, and (3) to exclude all meat, including fish, from his food trays. He also seeks  
4 nominal damages in the amount of \$1.00.

5 **IV. Discussion**

6 Plaintiff's complaint, of course, suffers from the same infirmaries previously identified in  
7 the July 15, 2016, screening order. Even if plaintiff had properly asserted his claims against a  
8 defendant, the court again notes that there is no constitutional violation on the facts alleged.

9 Insofar as plaintiff alleges an Eighth Amendment medical indifference claim, he has failed  
10 to properly allege deliberate indifference to his serious medical needs. Snow v. McDaniel, 681  
11 F.3d 978, 985 (9th Cir. 2012), overruled in part on other grounds, Peralta v. Dillard, 744 F.3d  
12 1076, 1082-83 (9th Cir. 2014); Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v.  
13 Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). To establish an Eighth Amendment medical  
14 indifference claim, plaintiff "must show (1) a serious medical need by demonstrating that failure  
15 to treat [his] condition could result in further significant injury or the unnecessary and wanton  
16 infliction of pain," and (2) that "the defendant's response to the need was deliberately  
17 indifferent." Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096). Deliberate indifference is  
18 shown by "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need,  
19 and (b) harm caused by the indifference." Id., 680 F.3d at 1122. The requisite state of mind is one  
20 of subjective recklessness, which entails more than ordinary lack of due care. Snow, 681 F.3d at  
21 985 (citation and quotation marks omitted); Wilhelm, 680 F.3d at 1122.

22 Construing plaintiff's lactose intolerance as a serious medical need, the allegations  
23 establish that the decision to decline plaintiff's request for a dairy-free diet was because plaintiff  
24 did not have a current medical directive for such a dietary modification. There is no claim that  
25 plaintiff was denied an updated dietary modification from a medical care provider or that he  
26 received an updated dietary modification that is not being followed by institutional staff. There is  
27 thus no deliberate indifference on the facts alleged.

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1           Additionally, plaintiff was previously informed of the requirements for asserting a First  
2 Amendment Free Exercise claim. To implicate the Free Exercise Clause, plaintiff must  
3 demonstrate that prison officials substantially burdened the free exercise of his religion by  
4 preventing him from engaging in conduct which he sincerely believes is consistent with his faith.  
5 Shakur v. Schriro, 514 F.3d 878, 884-85 (9th Cir. 2008). The underlying religious belief must be  
6 “sincerely held.” Malik v. Brown, 16 F.3d 330, 333 (9th Cir. 1994); see also Shakur, 514 F.3d at  
7 884-85 (noting that the “sincerity test,” not the “centrality test,” applies to a free exercise  
8 analysis). Plaintiff must also demonstrate that the burden on the free exercise of his sincerely held  
9 religious beliefs is substantial. “In order to reach the level of a constitutional violation, the  
10 interference with one’s practice of religion must be more than an inconvenience; the burden must  
11 be substantial[.]” Freeman v. Arpaio, 125 F.3d 732, 736 (9th Cir. 1997) (citation and internal  
12 quotation marks omitted), overruled in part on other grounds by Shakur, 514 F.3d at 884-85. A  
13 substantial burden exists where the state “put [s] substantial pressure on an adherent to modify his  
14 behavior and to violate his beliefs[.]” Thomas v. Review Board, 450 U.S. 707, 718 (1981).

15           Here, plaintiff does not allege that he is being denied a vegetarian diet. Instead, his claim  
16 seems to be premised on the fact that his meals continue to include certain meat products. This  
17 appears to follow from California Code of Regulations, title 15, § 54080.14, which provides, in  
18 relevant part:

19           Institution vegetarian meals shall be lacto-ovo vegetarian (includes  
20 dairy products and eggs), and may contain fish when it appears on  
21 the menu. Inmates with determined religious, personal, or ethical  
22 dietary needs and showing a Religious Diet Card shall be provided  
23 with an approved vegetarian protein alternate, often from that same  
24 days’ scheduled meal. Inmates may participate in the program, by  
25 submitting to any appropriate Chaplain a CDCR Form 3030  
26 Religious Diet Request.

27           Plaintiff free exercise claim fails because he does not allege how the occasional inclusion  
28 of eggs or fish (see Institutional Weekly Vegetarian Menus (ECF No. 11 at 10-16)) substantially  
burdens his sincerely held religious beliefs. There is also no suggestion that he is being forced to  
eat these products to avoid the risk of a nutritionally inadequate diet since the July 31, 2015, third  
level response to plaintiff’s grievance notes, and plaintiff does not dispute, that plaintiff is

1 provided with a daily protein of peanut butter and crackers in order to meet the daily caloric  
2 requirement for inmates. Thus, plaintiff's free exercise claim must be dismissed.

3 **IV. Conclusion**

4 Plaintiff's complaint will once again be dismissed for failure to state a claim. The court  
5 must now determine whether to allow plaintiff leave to further amend.

6 Federal Rule of Civil Procedure 15(a)(2) provides that "a party may amend its pleading  
7 only with the opposing party's written consent or the court's leave. The court should freely grant  
8 leave when justice so requires." Fed. R. Civ. P. 15(a)(2). When determining whether to grant  
9 leave to amend, courts weigh certain factors: "undue delay, bad faith or dilatory motive on the  
10 part of [the party who wishes to amend a pleading], repeated failure to cure deficiencies by  
11 amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of  
12 the amendment, [and] futility of amendment [.]" See Foman v. Davis, 371 U.S. 178, 182 (1962).  
13 Although prejudice to the opposing party "carries the greatest weight[,]"...a strong showing of any  
14 of the remaining Foman factors" can justify the denial of leave to amend. See Eminence Capital,  
15 LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam). Furthermore, analysis of  
16 these factors can overlap. For instance, a party's "repeated failure to cure deficiencies" constitutes  
17 "a strong indication that the [party] has no additional facts to plead" and "that any attempt to  
18 amend would be futile[.]" See Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 988, 1007  
19 (9th Cir. 2009) (internal quotation marks omitted) (upholding dismissal of complaint with  
20 prejudice when there were "three iterations of [the] allegations — none of which, according to  
21 [the district] court, was sufficient to survive a motion to dismiss"); see also Simon v. Value  
22 Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir. 2000) (affirming dismissal without leave  
23 to amend where plaintiff failed to correct deficiencies in complaint, where court had afforded  
24 plaintiff opportunities to do so, and had discussed with plaintiff the substantive problems with his  
25 claims), amended by 234 F.3d 428, overruled on other grounds by Odom v. Microsoft Corp., 486  
26 F.3d 541, 551 (9th Cir. 2007); Plumeau v. Sch. Dist. # 40 Cnty. of Yamhill, 130 F.3d 432, 439  
27 (9th Cir. 1997) (denial of leave to amend appropriate where further amendment would be futile).

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1 Plaintiff has now had three opportunities to state a claim. Following review of the  
2 documents filed in this case, including plaintiff's administrative grievances and the weekly  
3 institutional vegetarian menus, the undersigned finds that leave to amend would be futile.

4 Accordingly, it is HEREBY ORDERED that plaintiff's complaint (ECF No. 14) is  
5 dismissed without leave to amend.

6 Dated: June 7, 2017



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8 DEBORAH BARNES  
9 UNITED STATES MAGISTRATE JUDGE  
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