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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. MORROW,
Plaintiff,
v.
LAGGE, et al.,
Defendants.

No. 2:15-cv-2306-EFB P

ORDER

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He has filed an application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. Request to Proceed In Forma Pauperis

Plaintiff’s application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

II. Screening Requirement and Standards

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion

1 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which
2 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such
3 relief.” *Id.* § 1915A(b).

4 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)
5 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and
6 plain statement of the claim showing that the pleader is entitled to relief, in order to give the
7 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*
8 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).
9 While the complaint must comply with the “short and plain statement” requirements of Rule 8,
10 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556
11 U.S. 662, 679 (2009).

12 To avoid dismissal for failure to state a claim a complaint must contain more than “naked
13 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of
14 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of
15 a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at
16 678.

17 Furthermore, a claim upon which the court can grant relief must have facial plausibility.
18 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual
19 content that allows the court to draw the reasonable inference that the defendant is liable for the
20 misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a
21 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*
22 *Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the
23 plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

24 **III. Screening Order**

25 For the limited purposes of § 1915A screening and liberally construed, the complaint
26 (which references “7 witness statements”), states a potentially cognizable Eighth Amendment
27 excessive force claim against defendants Lagge, Abukalam, and Liemthongsamout.

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1 The complaint, which seeks one million dollars in damages against each defendant, also
2 names “RN Dader” and “D.A. Todd Riebe” as defendants. Plaintiff alleges that Dader applied
3 water to his wound, which later became infected. As for Riebe, plaintiff merely states “malicious
4 prosecution.” *See* ECF No. 1 at 1. Plaintiff does not adequately link these defendants to any
5 specific violation of his federal rights. Under the standards provided below, such vague and
6 conclusory allegations are not sufficient to support a proper claim for relief.

7 To state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal
8 constitutional or statutory right; and (2) that the violation was committed by a person acting under
9 the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d
10 930, 934 (9th Cir. 2002).

11 An individual defendant is not liable on a civil rights claim unless the facts establish the
12 defendant’s personal involvement in the constitutional deprivation or a causal connection between
13 the defendant’s wrongful conduct and the alleged constitutional deprivation. *See Hansen v.*
14 *Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).

15 Plaintiff may not sue any official on the theory that the official is liable for the
16 unconstitutional conduct of his or her subordinates. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948
17 (2009). Because respondeat superior liability is inapplicable to § 1983 suits, “a plaintiff must
18 plead that each Government-official defendant, through the official’s own individual actions, has
19 violated the Constitution.” *Id.*

20 To succeed on an Eighth Amendment claim predicated on the denial of medical care, a
21 plaintiff must establish that he had a serious medical need and that the defendant’s response to
22 that need was deliberately indifferent. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *see*
23 *also Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A serious medical need exists if the failure to
24 treat the condition could result in further significant injury or the unnecessary and wanton
25 infliction of pain. *Jett*, 439 F.3d at 1096. Deliberate indifference may be shown by the denial,
26 delay or intentional interference with medical treatment or by the way in which medical care is
27 provided. *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988).

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1 To act with deliberate indifference, a prison official must both be aware of facts from
2 which the inference could be drawn that a substantial risk of serious harm exists, and he must also
3 draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, a defendant is liable if
4 he knows that plaintiff faces “a substantial risk of serious harm and disregards that risk by failing
5 to take reasonable measures to abate it.” *Id.* at 847. A physician need not fail to treat an inmate
6 altogether in order to violate that inmate’s Eighth Amendment rights. *Ortiz v. City of Imperial*,
7 884 F.2d 1312, 1314 (9th Cir. 1989). A failure to competently treat a serious medical condition,
8 even if some treatment is prescribed, may constitute deliberate indifference in a particular case.
9 *Id.*

10 It is important to differentiate common law negligence claims of malpractice from claims
11 predicated on violations of the Eight Amendment’s prohibition of cruel and unusual punishment.
12 In asserting the latter, “[m]ere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not
13 support this cause of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir.
14 1980) (citing *Estelle v. Gamble*, 429 U.S. 97, 105-106 (1976); see also *Toguchi v. Chung*, 391
15 F.3d 1051, 1057 (9th Cir. 2004).

16 In general, “a claim of malicious prosecution is not cognizable under 42 U.S.C. § 1983 if
17 process is available within the state judicial system to provide a remedy. However, an exception
18 exists to the general rule when a malicious prosecution is conducted with the intent to deprive a
19 person of equal protection of the laws or is otherwise intended to subject a person to a denial of
20 constitutional rights. In California, the elements of malicious prosecution are (1) the initiation of
21 criminal prosecution, (2) malicious motivation, and (3) lack of probable cause.” *Usher v. Los*
22 *Angeles*, 828 F.2d 556 (9th Cir. Cal. 1987) (internal citations and quotations omitted).

23 In addition, state prosecutors are entitled to absolute prosecutorial immunity for acts taken
24 in their official capacity. See *Kalina v. Fletcher*, 522 U.S. 118, 123–24 (1997); *Buckley v.*
25 *Fitzsimmons*, 509 U.S. 259, 269–70 (1993); *Imbler v. Pachtman*, 424 U.S. 409, 427, 430–31
26 (1976) (holding that prosecutors are immune from civil suits for damages under § 1983 for
27 initiating prosecutions and presenting cases).

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1 Thus, plaintiff may either proceed only on the Eighth Amendment excessive force claims
2 against defendants Lagge, Abukalam, and Liemthongsamout, identified above, or he may amend
3 his complaint to attempt to cure the deficiencies identified herein. Plaintiff is not obligated to
4 amend his complaint.

5 Any amended complaint must cure the deficiencies identified above and also adhere to the
6 following requirements:

7 Any amended complaint must identify as a defendant only persons who personally
8 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*
9 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a
10 constitutional right if he does an act, participates in another's act or omits to perform an act he is
11 legally required to do that causes the alleged deprivation).

12 It must also contain a caption including the names of all defendants. Fed. R. Civ. P. 10(a).

13 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. *George*
14 *v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

15 Any amended complaint must be written or typed so that it so that it is complete in itself
16 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
17 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
18 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
19 F.3d 1467, 1474 (9th Cir. 1997) (the ““amended complaint supersedes the original, the latter
20 being treated thereafter as non-existent.””) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
21 1967)).

22 The court cautions plaintiff that failure to comply with the Federal Rules of Civil
23 Procedure, this court's Local Rules, or any court order may result in this action being dismissed.
24 *See* E.D. Cal. Local Rule 110.

25 **IV. Summary of Order**

26 Accordingly, IT IS HEREBY ORDERED that:

- 27 1. Plaintiff's request to proceed in forma pauperis (ECF No. 2) is granted.

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- 1 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected
2 in accordance with the notice to the California Department of Corrections and
3 Rehabilitation filed concurrently herewith.
- 4 3. The allegations in the pleading are sufficient to state potentially cognizable Eighth
5 Amendment excessive force claims against defendants Lagge, Abukalam, and
6 Liemthongsamout. All other claims and defendants are dismissed with leave to
7 amend within 30 days of service of this order. Plaintiff is not obligated to amend
8 his complaint.
- 9 4. With this order the Clerk of the Court shall provide to plaintiff a blank summons, a
10 copy of the November 6, 2015 complaint (ECF No. 1), three USM-285 forms and
11 instructions for service of process on defendants. Within 30 days of service of this
12 order plaintiff may return the attached Notice of Submission of Documents with
13 the completed summons, the completed USM-285 forms, and four copies of the
14 endorsed complaint. The court will transmit them to the United States Marshal for
15 service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure.
16 Defendants Lagge, Abukalam, and Liemthongsamout will be required to respond
17 to plaintiff's allegations within the deadlines stated in Rule 12(a)(1) of the Federal
18 Rules of Civil Procedure.
- 19 5. Failure to comply with this order may result in dismissal of this action.

20 DATED: March 22, 2017.

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22 EDMUND F. BRENNAN
23 UNITED STATES MAGISTRATE JUDGE
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UNITED STATES DISTRICT COURT
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v.

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Defendants.

No. 2:15-cv-2306-EFB P

NOTICE OF SUBMISSION OF
DOCUMENTS

In accordance with the court’s Screening Order, plaintiff hereby elects to:

(1) _____ proceed only with the Eighth Amendment excessive force claims against defendants Lagge, Abukalam, and Liemthongsamout, and submits the following documents:

- 1 completed summons form
- 3 completed forms USM-285
- 4 copies of the November 6, 2015 complaint

OR

(2) _____ delay serving any defendant and files an amended complaint in accordance with the court’s Screening Order.

Plaintiff

Dated: