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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RONNIE R. GOVEA,
Plaintiff,
v.
ROBERT W. FOX, et al.,
Defendants.

No. 2:15-cv-2545 DB P

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action under 42 U.S.C. § 1983. Plaintiff’s claims arise from his medical treatment at California Medical Facility. Presently before the court is plaintiff’s amended complaint for screening. For the reasons set forth below, the court will give plaintiff the option of proceeding with the complaint as screened or filing an amended complaint.

SCREENING

I. Legal Standards

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. See 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,” that fail to state a claim upon which relief may be

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1 granted, or that seek monetary relief from a defendant who is immune from such relief. See 28
2 U.S.C. § 1915A(b)(1) & (2).

3 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
4 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
5 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
6 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
7 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
8 pleaded, has an arguable legal and factual basis. See Franklin, 745 F.2d at 1227.
9 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and plain
10 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
11 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic
12 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

13 To survive dismissal for failure to state a claim a complaint must contain more than “a
14 formulaic recitation of the elements of a cause of action;” it must contain factual allegations
15 sufficient “to raise a right to relief above the speculative level.” Bell Atlantic, 550 U.S. at 555.
16 In reviewing a complaint under this standard, the court must accept as true the
17 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
18 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all
19 doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

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

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

24 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
25 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
26 Monell v. Dept. of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
27 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the
28 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or

1 omits to perform an act which he is legally required to do that causes the deprivation of which
2 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

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

10 **II. Allegations in the Complaint**

11 Plaintiff alleges he was sent to California Medical Facility (“CMF”) in February 2013 due to
12 his serious medical needs. (ECF No. 13 at 5.) He further claims his left knee was temporarily
13 replaced with an antibiotic spacer due to several knee replacement failures. (Id.) Plaintiff
14 submitted health care requests asking to have the spacer removed and have knee replacement
15 surgery performed. He states he was not provided medical treatment for over one year and when
16 he was provided treatment it was not adequate or effective. He claims the delay in treatment
17 caused him pain and irreversible damage. He further alleges that when he received a knee
18 replacement, medical officials used a cheaper knee replacement device that is defective and must
19 be removed.

20 **III. Does Plaintiff State a Claim under § 1983?**

21 **A. Legal Standards under the Eighth Amendment**

22 The Eighth Amendment prohibits the infliction of “cruel and unusual punishments.” U.S.
23 Const. amend. VIII. The unnecessary and wanton infliction of pain constitutes cruel and unusual
24 punishment prohibited by the Eighth Amendment. Whitley v. Albers, 475 U.S. 312, 319 (1986);
25 Ingraham v. Wright, 430 U.S. 651, 670 (1977); Estelle v. Gamble, 429 U.S. 97, 105-06 (1976).
26 Neither accident nor negligence constitutes cruel and unusual punishment, as “[i]t is obduracy
27 and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited
28 by the Cruel and Unusual Punishments Clause.” Whitley, 475 U.S. at 319. Dated:

1 If a prisoner’s Eighth Amendment claim arises in the context of medical care, the prisoner
2 must allege and prove “acts or omissions sufficiently harmful to evidence deliberate indifference
3 to serious medical needs.” Estelle, 429 U.S. at 106. An Eighth Amendment medical claim has
4 two elements: “the seriousness of the prisoner’s medical need and the nature of the defendant’s
5 response to that need.” McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on
6 other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

7 A medical need is serious “if the failure to treat the prisoner’s condition could result in
8 further significant injury or the ‘unnecessary and wanton infliction of pain.’” McGuckin, 974
9 F.2d at 1059 (quoting Estelle, 429 U.S. at 104). Indications of a serious medical need include
10 “the presence of a medical condition that significantly affects an individual’s daily activities.” Id.
11 at 1059-60. By establishing the existence of a serious medical need, a prisoner satisfies the
12 objective requirement for proving an Eighth Amendment violation. Farmer v. Brennan, 511 U.S.
13 825, 834 (1994).

14 If a prisoner establishes the existence of a serious medical need, he must then show that
15 prisoner officials responded to the serious medical need with deliberate indifference. See Farmer,
16 511 U.S. at 834. In general, deliberate indifference may be shown when prison officials deny,
17 delay, or intentionally interfere with medical treatment, or may be shown by the way in which
18 prison officials provide medical care. Hutchinson v. United States, 838 F.2d 390, 393-94 (9th
19 Cir. 1988).

20 Before it can be said that a prisoner’s civil rights have been abridged with regard to medical
21 care, “the indifference to his medical needs must be substantial. Mere ‘indifference,’
22 ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.” Broughton v. Cutter
23 Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105-06); see also
24 Toguchi v. Soon Hwang Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (“Mere negligence in
25 diagnosing or treating a medical condition, without more, does not violate a prisoner’s Eighth
26 Amendment rights.”); McGuckin, 974 F.2d at 1059 (same). Deliberate indifference is “a state of
27 mind more blameworthy than negligence” and “requires ‘more than ordinary lack of due care for
28 the prisoner’s interests or safety.’” Farmer, 511 U.S. at 835.

1 Delays in providing medical care may manifest deliberate indifference. Estelle, 429 U.S. at
2 104-05. To establish a claim of deliberate indifference arising from delay in providing care, a
3 plaintiff must show that the delay was harmful. See Hallett v. Morgan, 296 F.3d 732, 745-46 (9th
4 Cir. 2002); Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); McGuckin, 974 F.2d at 1059;
5 Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990); Hunt v. Dental Dep't, 865 F.2d 198,
6 200 (9th Cir. 1989); Shapley v. Nevada Bd. Of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir.
7 1985). In this regard, “[a] prisoner need not show his harm was substantial; however, such would
8 provide additional support for the inmate’s claim that the defendant was deliberately indifferent to
9 his needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).

10 Finally, mere differences of opinion between a prisoner and prison medical staff or between
11 medical professionals as to the proper course of treatment for a medical condition do not give rise
12 to a § 1983 claim. See Toguchi, 391 F.3d at 1058; Jackson v. McIntosh, 90 F.3d 330, 332 (9th
13 Cir. 1996); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Franklin v. Oregon, 662 F.2d
14 1337, 1344 (9th Cir. 1981).

15 **B. Analysis**

16 **1. Delay in Providing Treatment**

17 **a. Defendants Fox, Rading, Bick and Lewis**

18 Plaintiff has alleged that defendants Fox, Rading, Bick, and Lewis failed to provide timely
19 medical treatment even though they were aware he was in pain and that delay could result in
20 further damage. Plaintiff specifically these defendants knew his knee was replaced with a
21 temporary antibiotic spacer due to an infection and they intentionally delayed his medical
22 treatment, leaving him in pain and causing irreversible damage to his leg. Accordingly, plaintiff
23 has alleged sufficient facts to state a claim for deliberate indifference to his serious medical needs
24 in violation of the Eighth Amendment.

25 **b. Doe Defendants**

26 Additionally, plaintiff has stated a claim against the ten Doe defendants who are members of
27 the Institutional Utilization Management Committee based on the delay in providing medical
28 treatment even though they were aware plaintiff was in pain and that delay could result in further

1 damage. Plaintiff has alleged the committee members were aware plaintiff required treatment
2 and was in chronic pain and failed to timely approve adequate medical care causing irreversible
3 damage to plaintiff's leg.

4 The use of Does in pleading practice is generally disfavored—but it is not prohibited. See
5 Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980); Wakefield v. Thompson, 177 F.3d 1160,
6 1163 (9th Cir. 1999); Lopes v. Viera, 543 F. Supp.2d 1149, 1152 (E.D. Cal. 2008). However,
7 plaintiff is hereby advised that the court cannot order service of a Doe defendant because the
8 United States Marshal cannot serve a Doe defendant.

9 Therefore, plaintiff will be required to identify him or her with enough information to locate
10 the defendant for service of process. The United States Marshal cannot initiate service of process
11 on unknown defendants. Plaintiff will be given an opportunity through discovery to identify the
12 unknown (Doe) defendants. Crowley v. Bannister, 734 F.3d 967, 978 (9th Cir. 2013) (quoting
13 Gillespie, 629 F.2d at 642). Once the identity of a Doe defendant is ascertained, plaintiff must
14 file a motion to amend his complaint only to identify the identified Doe defendant so that service
15 by the United States Marshal can be attempted. However, the court will recommend that any Doe
16 defendant plaintiff fails to identify during the course of discovery be dismissed from this action.

17 **2. Difference of Medical Opinion**

18 A difference of opinion between a prison-patient and prison medical authorities regarding
19 treatment does not give rise to an Eighth Amendment claim under § 1983. Franklin v. Oregon,
20 662 F.2d 1337, 1344 (9th Cir. 1981). Similarly, a showing of nothing more than a difference of
21 opinion as to the need to pursue one course of treatment over another is generally insufficient to
22 establish deliberate indifference. Toguchi v. Chung, 391 F.3d 1051, 1058, 1059-60 (9th Cir.
23 2004).

24 In order to prevail on an Eighth Amendment claim involving choices between alternative
25 courses of treatment, a prisoner-plaintiff must show that the course of treatment the doctors chose
26 was medically unacceptable under the circumstances and that they chose this course in conscious
27 disregard of an excessive risk to plaintiff's health. Toguchi, 391 F.3d at 1058; Jackson v.
28 McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

1 Plaintiff's allegations against defendant Wolfson are not sufficient to state a claim. Plaintiff
2 alleges the knee replacement device was a cheaper model than the one recommended by a
3 previous physician and that the knee replacement device is unstable requiring a revision surgery.

4 However, this shows at most a difference of opinion between medical professionals or
5 between Dr. Wolfson and plaintiff. Plaintiff has not stated any facts showing that the use of a
6 cheaper device was medically unacceptable under the circumstances. Plaintiff, who is not a
7 doctor, has merely alleged that the cheaper device was defective. However, plaintiff cannot state
8 a claim for violation of his rights under the Eighth Amendment simply because the surgery was
9 unsuccessful. Estelle, 429 U.S. at 106 ("Medical malpractice does not become a constitutional
10 violation merely because the victim is a prisoner."). Accordingly, plaintiff's Eighth Amendment
11 claim against defendant Wolfson will be dismissed with leave to amend.

12 **IV. California Negligence Claim**

13 Plaintiff's second claim alleges defendants were negligent in violation of California law.
14 However, plaintiff has not pled compliance with the California Government Claims Act
15 ("GCA"), which requires filing a claim with the California Victim's Compensation Government
16 Claim Board prior to filing a lawsuit against a state employee or entity. Cal. Gov't Code §§
17 905.2, 911.2, 945.2, 950.2; Munoz v. California, 33 Cal.App.4th 1767, 1776 (1995). Presentation
18 of a written claim, and action on or rejection of the claim are conditions precedent to suit. State
19 v. Superior Court of Kings Cnty. (Bodde), 32 Cal.4th 1234, 1239 (Cal. 2004); Mabe v. San
20 Bernardino Cnty. Dep't of Pub. Soc. Servs., 237 F.3d 1101, 1111 (9th Cir. 2001); Mangold v.
21 California Pub. Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995).

22 Thus, in order to state a tort claims against a public employee, plaintiff must allege
23 compliance with the GCA and if he failed to comply, he may not bring any state law tort claims
24 in this action, regardless of the merits of those claims. Bodde, 32 Cal.4th at 1239; Mangold, 67
25 F.3d at 1477; Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 627 (9th Cir. 1988). The
26 requirement that a plaintiff asserting claims subject to the GCA must affirmatively allege
27 compliance with the claims filing requirement applies in federal court as well. Karim-Panahi,

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1 839 F.2d at 627. Plaintiff's purported state law negligence claim must be dismissed with leave to
2 amend for failure to allege compliance with the GCA.

3 **AMENDING THE COMPLAINT**

4 As set out above, plaintiff fails to state a claim against defendant Wolfson and his state law
5 claim must be dismissed for failure to comply with the GCA. However, plaintiff will be given the
6 opportunity to amend the complaint.

7 Plaintiff is advised that in an amended complaint he must clearly identify each defendant and
8 the action that defendant took that violated his constitutional rights. The court is not required to
9 review exhibits to determine what plaintiff's charging allegations are as to each named defendant.
10 If plaintiff wishes to add a claim, he must include it in the body of the complaint. The charging
11 allegations must be set forth in the amended complaint so defendants have fair notice of the
12 claims plaintiff is presenting. That said, plaintiff need not provide every detailed fact in support
13 of his claims. Rather, plaintiff should provide a short, plain statement of each claim. See Fed. R.
14 Civ. P. 8(a).

15 Any amended complaint must show the federal court has jurisdiction, the action is brought in
16 the right place, and plaintiff is entitled to relief if plaintiff's allegations are true. It must contain a
17 request for particular relief. Plaintiff must identify as a defendant only persons who personally
18 participated in a substantial way in depriving plaintiff of a federal constitutional right. Johnson v.
19 Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a
20 constitutional right if he does an act, participates in another's act or omits to perform an act he is
21 legally required to do that causes the alleged deprivation).

22 In an amended complaint, the allegations must be set forth in numbered paragraphs. Fed. R.
23 Civ. P. 10(b). Plaintiff may join multiple claims if they are all against a single defendant. Fed. R.
24 Civ. P. 18(a). If plaintiff has more than one claim based upon separate transactions or
25 occurrences, the claims must be set forth in separate paragraphs. Fed. R. Civ. P. 10(b).

26 The federal rules contemplate brevity. See Galbraith v. County of Santa Clara, 307 F.3d
27 1119, 1125 (9th Cir. 2002) (noting that "nearly all of the circuits have now disapproved any
28 heightened pleading standard in cases other than those governed by Rule 9(b)"); Fed. R. Civ. P.

1 84; cf. Rule 9(b) (setting forth rare exceptions to simplified pleading). Plaintiff's claims must be
2 set forth in short and plain terms, simply, concisely and directly. See Swierkiewicz v. Sorema
3 N.A., 534 U.S. 506, 514 (2002) ("Rule 8(a) is the starting point of a simplified pleading system,
4 which was adopted to focus litigation on the merits of a claim."); Fed. R. Civ. P. 8.

5 An amended complaint must be complete in itself without reference to any prior pleading.
6 E.D. Cal. R. 220. Once plaintiff files an amended complaint, all prior pleadings are superseded.


7 By signing an amended complaint, plaintiff certifies he has made reasonable inquiry and has
8 evidentiary support for his allegations, and for violation of this rule the court may impose
9 sanctions sufficient to deter repetition by plaintiff or others. Fed. R. Civ. P. 11.

10 CONCLUSION

11 Accordingly, IT IS HEREBY ORDERED that:

- 12 1. Plaintiff's state law negligence claim is dismissed with leave to amend for failure to
13 comply with the CGA. Plaintiff's allegations against defendant Wolfson fail to state an
14 Eighth Amendment claim.
- 15 2. Plaintiff has the option to proceed immediately on his Eighth Amendment claim for delay
16 of medical treatment against defendants Fox, Clark, Bick, Lewis, and the ten Doe
17 defendant members of the Institutional Utilization Management Committee as set forth in
18 Section III above, or to amend the complaint.
- 19 3. Within fourteen days of service of this order plaintiff shall complete and return the
20 attached form notifying the court whether he wants to proceed on the screened complaint
21 or whether he wants to file a second amended complaint.
- 22 4. Failure to comply with this order will result in a recommendation that this action be
23 dismissed.

24 Dated: December 3, 2018

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27 DEBORAH BARNES
28 UNITED STATES MAGISTRATE JUDGE

DLB:12
DLB1/prisoner-civil rights/gove2545.Scm2

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UNITED STATES DISTRICT COURT
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Defendants.

No. 2:15-cv-2545 DB P

PLAINTIFF'S NOTICE ON HOW TO
PROCEED

Check one:

_____ Plaintiff wants to proceed immediately on his Eighth Amendment claims against defendants Fox, Clark, Bick, Lewis, and the ten Doe defendant members of the Institutional Utilization Management Committee without amending the complaint. Plaintiff understands that by going forward without amending the complaint he is voluntarily dismissing his state law negligence claim and his Eighth Amendment claim against defendant Wolfson without prejudice.

_____ Plaintiff wants to amend the complaint.

DATED: _____

Ronnie R. Govea
Plaintiff pro se