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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHNNY HEARNE,

Plaintiff,

v.

J. MA, et al.,

Defendants.

No. 2:16-cv-1775-EFB P

ORDER GRANTING IFP AND DISMISSING
COMPLAINT PURSUANT TO 28 U.S.C. §
1915A

Plaintiff, a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983, 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 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which

1 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such
2 relief.” *Id.* § 1915A(b).

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

8 While the complaint must comply with the “short and plain statement” requirements of Rule 8,
9 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556
10 U.S. 662, 679 (2009).

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

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

23 **III. Screening Order**

24 The court has reviewed plaintiff’s complaint (ECF No. 1) pursuant to § 1915A and finds
25 that the allegations are too vague and conclusory to state a cognizable claim for relief. The
26 named defendants include Warden David Baughman, Dr. Ma, LVN Child, LVN Pekke, and RN
27 Simes. The “Statement of Claim” alleged in the complaint consists of the following:
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1 On 7-20-16, 8pm, I had to go to C yard clinic to find my blood pressure was 204
2 over 123. Dr. Ma was called. He told LVN to send me back to my cell; He's not
3 sending me out "to the hospital"! His action is going to cause me to have a stroke-
4 seizure! LVN Pekke has told custody to search my cell – as if I'm not taking my
5 pills; and LVN's have to watch me take them. I refuse to have KOP meds, keep
6 on person's meds, so they watch me, and the blood test proof, I take my meds!

7 ECF No. 1, § IV.

8 The allegations suggest that plaintiff intends to assert claims based on defendant Ma's
9 response to his high blood pressure and defendant Pekke's instructions to custody staff to search
10 his cell. However, plaintiff has not identified his intended claims for relief or otherwise pleaded
11 sufficient facts to state a proper claim for relief. Although the Federal Rules adopt a flexible
12 pleading policy, a complaint must give fair notice and state the elements of the claim plainly and
13 succinctly. *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff does
14 not allege whether he needed and/or received any medical treatment while he was at the clinic.
15 Nor does he plead facts showing that defendant Ma's order for plaintiff to return to his cell
16 exposed him to a substantial risk of serious harm. The allegations regarding a cell search for
17 medication also fail to state a claim because "the Fourth Amendment proscription against
18 unreasonable searches does not apply within the confines of the prison cell." *Hudson v. Palmer*,
19 468 U.S. 517, 526 (1984). Indeed, "[p]rison officials must be free to seize from cells any articles
20 which, in their view, disserve legitimate institutional interests." *Id.* at 528 n. 8. Lastly, plaintiff
21 names several defendants but does not make any allegations against those defendants. He thus
22 fails to link them to any violation of his federal constitutional or statutory rights. Because
23 plaintiff fails to state a claim for relief, the complaint must be dismissed.

24 Plaintiff will be granted leave to file an amended complaint, if he can allege a cognizable
25 legal theory against a proper defendant and sufficient facts in support of that cognizable legal
26 theory. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (*en banc*) (district courts must
27 afford pro se litigants an opportunity to amend to correct any deficiency in their complaints).
28 Should plaintiff choose to file an amended complaint, the amended complaint shall clearly set
forth the claims and allegations against each defendant. Any amended complaint must cure the
deficiencies identified above and also adhere to the following requirements:

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

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

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

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

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

19 In addition, the court notes that the following legal standards may apply to plaintiff's
20 intended claims for relief.

21 To state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal
22 constitutional or statutory right; and (2) that the violation was committed by a person acting under
23 the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d
24 930, 934 (9th Cir. 2002). An individual defendant is not liable on a civil rights claim unless the
25 facts establish the defendant's personal involvement in the constitutional deprivation or a causal
26 connection between the defendant's wrongful conduct and the alleged constitutional deprivation.
27 *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44
28 (9th Cir. 1978). Plaintiff may not sue any official on the theory that the official is liable for the

1 unconstitutional conduct of his or her subordinates. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).
2 Plaintiff must identify the particular person or persons who violated his rights. He must also
3 plead facts showing how that particular person was involved in the alleged violation.

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

12 To act with deliberate indifference, a prison official must both be aware of facts from
13 which the inference could be drawn that a substantial risk of serious harm exists, and he must also
14 draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, a defendant is liable if
15 he knows that plaintiff faces "a substantial risk of serious harm and disregards that risk by failing
16 to take reasonable measures to abate it." *Id.* at 847. A physician need not fail to treat an inmate
17 altogether in order to violate that inmate's Eighth Amendment rights. *Ortiz v. City of Imperial*,
18 884 F.2d 1312, 1314 (9th Cir. 1989). A failure to competently treat a serious medical condition,
19 even if some treatment is prescribed, may constitute deliberate indifference in a particular case.
20 *Id.*

21 It is important to differentiate common law negligence claims of malpractice from claims
22 predicated on violations of the Eighth Amendment's prohibition of cruel and unusual punishment.
23 In asserting the latter, "[m]ere 'indifference,' 'negligence,' or 'medical malpractice' will not
24 support this cause of action." *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir.
25 1980) (citing *Estelle v. Gamble*, 429 U.S. 97, 105-106 (1976); *see also Toguchi v. Chung*, 391
26 F.3d 1051, 1057 (9th Cir. 2004).

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IV. Summary of Order

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff’s request to proceed in forma pauperis (ECF No. 9) is granted.
2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in accordance with the notice to the California Department of Corrections and Rehabilitation filed concurrently herewith.
3. The complaint is dismissed with leave to amend within 30 days. The complaint must bear the docket number assigned to this case and be titled “Amended Complaint.” Failure to comply with this order may result in dismissal of this action for failure to prosecute and failure to state a claim. If plaintiff files an amended complaint stating a cognizable claim the court will proceed with service of process by the United States Marshal.

Dated: November 14, 2017.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE