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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CLIFFORD BRENT THOMAS,
Plaintiff,
v.
K. KAUL, et al.,
Defendants.

No. 2:16-cv-2784-JAM-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, a request for appointment of counsel, and a motion to amend.

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 The court has reviewed plaintiff’s amended complaint pursuant to § 1915A and finds that
26 the allegations are too vague and conclusory to state a cognizable claim for relief.¹ According to

27 ¹ Plaintiff has filed two complaints in this action. ECF Nos. 1 & 6. In screening for
28 purposes of 28 U.S.C. § 1915A, the court looks exclusively to the most recent amended

1 the complaint, plaintiff experienced a seizure on the E-yard on December 1, 2015, causing him to
2 fall and “bust” his head, requiring four staples. Plaintiff alleges that defendant Dr. Kauer
3 responded by moving plaintiff to D-yard, which is a medical yard, but failed to order protective
4 pads for plaintiff so that he would not hurt himself if he fell again. ECF No. 6 at 4. Plaintiff also
5 alleges that defendant nurse practitioner Hashemi did not provide him with a protective helmet
6 and neck collar until March 9, 2016, and the when test results revealed that plaintiff was not
7 epileptic, defendant Hashemi moved plaintiff to another medical yard, “not wanting to figure out
8 what [was] wrong with [plaintiff].” *Id.* at 5. Lastly, plaintiff claims that defendant nurse Galang
9 told plaintiff’s mental health provider that plaintiff was “exaggerating his symptoms” and
10 “engaging in this behavior . . . to avoid issues in [the] E-yard.” ECF No. 6 at 3. Plaintiff purports
11 to assert claims for medical malpractice, defamation, and deliberate indifference to medical
12 needs. Under the applicable legal standards however, the complaint must be dismissed for failure
13 to state a claim upon which relief may be granted. To proceed, plaintiff must file an amended
14 complaint.

15 To state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal
16 constitutional or statutory right; and (2) that the violation was committed by a person acting under
17 the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d
18 930, 934 (9th Cir. 2002). An individual defendant is not liable on a civil rights claim unless the
19 facts establish the defendant’s personal involvement in the constitutional deprivation or a causal
20 connection between the defendant’s wrongful conduct and the alleged constitutional deprivation.
21 *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44
22 (9th Cir. 1978).

23 To succeed on an Eighth Amendment claim predicated on the denial of medical care, a
24 plaintiff must establish that he had a serious medical need and that the defendant’s response to
25 that need was deliberately indifferent. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *see*
26 *also Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A serious medical need exists if the failure to

27 complaint. *See Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir.
28 1989) (holding that an amended pleading supersedes the original).

1 treat the condition could result in further significant injury or the unnecessary and wanton
2 infliction of pain. *Jett*, 439 F.3d at 1096. Deliberate indifference may be shown by the denial,
3 delay or intentional interference with medical treatment or by the way in which medical care is
4 provided. *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988).

5 To act with deliberate indifference, a prison official must both be aware of facts from
6 which the inference could be drawn that a substantial risk of serious harm exists, and he must also
7 draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, a defendant is liable if
8 he knows that plaintiff faces “a substantial risk of serious harm and disregards that risk by failing
9 to take reasonable measures to abate it.” *Id.* at 847. A physician need not fail to treat an inmate
10 altogether in order to violate that inmate’s Eighth Amendment rights. *Ortiz v. City of Imperial*,
11 884 F.2d 1312, 1314 (9th Cir. 1989). A failure to competently treat a serious medical condition,
12 even if some treatment is prescribed, may constitute deliberate indifference in a particular case.
13 *Id.*

14 Plaintiff’s allegations are not sufficient to state a claim for deliberate indifference to
15 medical needs in violation of the Eighth Amendment. Plaintiff’s complaint alleges a failure
16 and/or a delay in providing him with protective pads and gear. The complaint does not allege that
17 any defendant intended to deprive plaintiff of the protective gear or if even if it had, that any
18 defendant did so knowing it would expose plaintiff to a substantial risk of serious harm. In
19 addition, the complaint fails to allege that any failure and/or a delay in providing plaintiff with
20 protective gear caused him any harm. It is important to differentiate common law negligence
21 claims of malpractice from claims predicated on violations of the Eight Amendment’s prohibition
22 of cruel and unusual punishment. In asserting the latter, “[m]ere ‘indifference,’ ‘negligence,’ or
23 ‘medical malpractice’ will not support this cause of action.” *Broughton v. Cutter Laboratories*,
24 622 F.2d 458, 460 (9th Cir. 1980) (citing *Estelle v. Gamble*, 429 U.S. 97, 105-106 (1976); *see*
25 *also Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004).

26 To the extent plaintiff intends to allege a defamation claim based on the defendant
27 Galang’s statements to plaintiff’s mental health provider, he is informed that defamation is a
28 state-law cause of action rather than a claim under the federal Constitution, and a “claim for

1 violation of state law is not cognizable under § 1983.” *Cornejo v. County of San Diego*, 504 F.3d
2 853, 855 n.3 (9th Cir. 2007). Moreover, the California Government Claims Act (“Act”) requires
3 that a plaintiff who seeks to prosecute a state tort claim for damages against a state employee first
4 present that claim to the California Victim Compensation and Government Board. Cal. Gov’t
5 Code §§ 905, 905.2, 910, 911.2, 911.4, 911.6, 945.4, 950-950.2; *California v. Super. Ct. (Bodde)*,
6 32 Cal.4th 1234, 1245 (2004). To state a tort claim against a state employee, the plaintiff must
7 allege compliance with the Act’s presentation requirement. *Bodde*, 32 Cal.4th at 1245; *Karim-*
8 *Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 627 (9th Cir. 1988). Plaintiff has not pled compliance
9 with the Act’s claim presentation requirement

10 Plaintiff will be granted leave to file an amended complaint, if he can allege a cognizable
11 legal theory against a proper defendant and sufficient facts in support of that cognizable legal
12 theory.² *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (*en banc*) (district courts must
13 afford pro se litigants an opportunity to amend to correct any deficiency in their complaints).
14 Should plaintiff choose to file an amended complaint, the amended complaint shall clearly set
15 forth the claims and allegations against each defendant. Any amended complaint must cure the
16 deficiencies identified above and also adhere to the following requirements:

17 Any amended complaint must identify as a defendant only persons who personally
18 participated in a substantial way in depriving him 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 It must also contain a caption including the names of all defendants. Fed. R. Civ. P. 10(a).

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

25 Any amended complaint must be written or typed so that it so that it is complete in itself
26 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
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28 ² Accordingly, plaintiff’s motion to amend the complaint is denied as moot.

1 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
2 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
3 F.3d 1467, 1474 (9th Cir. 1997) (the “‘amended complaint supersedes the original, the latter
4 being treated thereafter as non-existent.’”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
5 1967)).

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

9 **IV. Request for Appointment of Counsel**

10 Plaintiff requests that the court appoint counsel. District courts lack authority to require
11 counsel to represent indigent prisoners in section 1983 cases. *Mallard v. United States Dist.*
12 *Court*, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an attorney
13 to voluntarily to represent such a plaintiff. *See* 28 U.S.C. § 1915(e)(1); *Terrell v. Brewer*, 935
14 F.2d 1015, 1017 (9th Cir. 1991); *Wood v. Housewright*, 900 F.2d 1332, 1335-36 (9th Cir. 1990).
15 When determining whether “exceptional circumstances” exist, the court must consider the
16 likelihood of success on the merits as well as the ability of the plaintiff to articulate his claims pro
17 se in light of the complexity of the legal issues involved. *Palmer v. Valdez*, 560 F.3d 965, 970
18 (9th Cir. 2009). Having considered those factors, the court finds there are no exceptional
19 circumstances in this case.

20 **V. Summary of Order**

21 Accordingly, IT IS HEREBY ORDERED that:

- 22 1. Plaintiff’s request to proceed in forma pauperis (ECF No. 2) is granted.
- 23 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected
24 in accordance with the notice to the California Department of Corrections and
25 Rehabilitation filed concurrently herewith.
- 26 3. Plaintiff’s motion to amend the complaint (ECF No. 9) is denied as moot.
- 27 4. Plaintiff’s request for appointment of counsel (ECF No. 3) is denied without
28 prejudice.

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5. 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 "Second Amended Complaint." Failure to comply with this order will result in dismissal of this action for failure to prosecute. If plaintiff files an amended complaint stating a cognizable claim the court will proceed with service of process by the United States Marshal.

Dated: April 27, 2017.



EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE