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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHNNY HEARNE,
Plaintiff,
v.
CCI D. MONDOZA,
Defendant.

No. 2:16-cv-2887 KJN P

ORDER

Plaintiff is a state prisoner, proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983, and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis is granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated to make monthly payments of twenty percent of the preceding month's income credited to plaintiff's trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time

1 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.
2 § 1915(b)(2).

3 The court is required to screen complaints brought by prisoners seeking relief against a
4 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
5 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
6 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
7 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

8 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
9 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
10 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an
11 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
12 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
13 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
14 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.
15 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably
16 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at
17 1227.

18 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain
19 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
20 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
21 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
22 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a
23 formulaic recitation of the elements of a cause of action;" it must contain factual allegations
24 sufficient "to raise a right to relief above the speculative level." Id. at 555. However, "[s]pecific
25 facts are not necessary; the statement [of facts] need only 'give the defendant fair notice of what
26 the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93
27 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal quotations marks omitted).
28 In reviewing a complaint under this standard, the court must accept as true the allegations of the

1 complaint in question, Erickson, 551 U.S. at 93, and construe the pleading in the light most
2 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other
3 grounds, Davis v. Scherer, 468 U.S. 183 (1984).

4 Plaintiff claims that he has written and spoken with defendant about a medical transfer to
5 California Medical Facility (“CMF”) in Vacaville, claiming that “custody” at California State
6 Prison, Sacramento, is “unhealthy” for plaintiff and makes him feel unsafe. (ECF No. 1 at 2.)
7 Plaintiff alleges that CMF is open to all custody levels, and he seeks a transfer to CMF so he can
8 stay close to home, Richmond, in the Bay Area. Plaintiff claims he has a “medical situation,” but
9 provides no further details.

10 First, inmates do not have a constitutional right to be housed at a particular facility or
11 institution or to be transferred, or not transferred, from one facility or institution to another. Olim
12 v. Wakinekona, 461 U.S. 238, 244-48 (1983); Johnson v. Moore, 948 F.2d 517, 519 (9th Cir.
13 1991) (per curiam). Here, plaintiff does not have a constitutional right to be housed at CMF, even
14 if CMF is closer to his home, and he fails to show that he will be irreparably harmed if he is not
15 transferred. See Olim, 461 U.S. at 244-48; Moore, 948 F.2d at 519.

16 Second, plaintiff may not dictate where he is housed for medical care. While the Eighth
17 Amendment of the United States Constitution entitles plaintiff to medical care, the Eighth
18 Amendment is violated only when a prison official acts with deliberate indifference to an
19 inmate’s serious medical needs. Snow v. McDaniel, 681 F.3d 978, 985 (9th Cir. 2012), overruled
20 in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th Cir. 2014); Wilhelm v.
21 Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir.
22 2006). Plaintiff “must show (1) a serious medical need by demonstrating that failure to treat [his]
23 condition could result in further significant injury or the unnecessary and wanton infliction of
24 pain,” and (2) that “the defendant’s response to the need was deliberately indifferent.” Wilhelm,
25 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096). Deliberate indifference is shown by “(a) a
26 purposeful act or failure to respond to a prisoner’s pain or possible medical need, and (b) harm
27 caused by the indifference.” Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096). The
28 requisite state of mind is one of subjective recklessness, which entails more than ordinary lack of

1 due care. Snow, 681 F.3d at 985 (citation and quotation marks omitted); Wilhelm, 680 F.3d at
2 1122. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of
3 action.” Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle v.
4 Gamble, 429 U.S. at 97, 105-06 (1976)).

5 Third, plaintiff must name a proper defendant. In the instant complaint, it does not appear
6 that defendant Mondoza was responsible for plaintiff’s housing.

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

8 Every person who, under color of [state law] . . . subjects, or causes
9 to be subjected, any citizen of the United States . . . to the
10 deprivation of any rights, privileges, or immunities secured by the
11 Constitution . . . shall be liable to the party injured in an action at
12 law, suit in equity, or other proper proceeding for redress.

13 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
14 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
15 Monell v. Department of Social Servs., 436 U.S. 658 (1978) (“Congress did not intend § 1983
16 liability to attach where . . . causation [is] absent.”); Rizzo v. Goode, 423 U.S. 362 (1976) (no
17 affirmative link between the incidents of police misconduct and the adoption of any plan or policy
18 demonstrating their authorization or approval of such misconduct). “A person ‘subjects’ another
19 to the deprivation of a constitutional right, within the meaning of § 1983, if he does an
20 affirmative act, participates in another’s affirmative acts or omits to perform an act which he is
21 legally required to do that causes the deprivation of which complaint is made.” Johnson v. Duffy,
22 588 F.2d 740, 743 (9th Cir. 1978).

23 Moreover, supervisory personnel are generally not liable under § 1983 for the actions of
24 their employees under a theory of respondeat superior and, therefore, when a named defendant
25 holds a supervisory position, the causal link between him and the claimed constitutional
26 violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979)
27 (no liability where there is no allegation of personal participation); Mosher v. Saalfeld, 589 F.2d
28 438, 441 (9th Cir. 1978) (no liability where there is no evidence of personal participation), cert.
denied, 442 U.S. 941 (1979). Vague and conclusory allegations concerning the involvement of
official personnel in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673

1 F.2d 266, 268 (9th Cir. 1982) (complaint devoid of specific factual allegations of personal
2 participation is insufficient).

3 Fourth, plaintiff's speculative or generalized fears of unsafety are insufficient to state an
4 Eighth Amendment claim. See, e.g., Berg v. Kincheloe, 794 F.2d 457, 459 (9th Cir. 1986) ("a
5 mere suspicion that an attack will occur" is not enough to support a cognizable Eighth
6 Amendment claim); Williams v. Wood, 223 Fed. Appx. 670, 671 (9th Cir. Mar. 1, 2007)
7 ("speculative and generalized fears of harm at the hands of other prisoners do not rise to a
8 sufficiently substantial risk of serious harm to [plaintiff's] future health").

9 The court finds the allegations in plaintiff's complaint so vague and conclusory that it is
10 unable to determine whether the current action is frivolous or fails to state a claim for relief. The
11 court has determined that the complaint does not contain a short and plain statement as required
12 by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a
13 complaint must give fair notice and state the elements of the claim plainly and succinctly. Jones
14 v. Cmty. Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least
15 some degree of particularity overt acts which defendants engaged in that support plaintiff's claim.
16 Id. Because plaintiff has failed to comply with the requirements of Fed. R. Civ. P. 8(a)(2), the
17 complaint must be dismissed. While it is unclear whether plaintiff can allege facts supporting a
18 cognizable civil rights claim, the court will grant leave to file an amended complaint.

19 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions
20 about which he complains resulted in a deprivation of plaintiff's constitutional rights. Rizzo v.
21 Goode, 423 U.S. 362, 371 (1976). Also, the complaint must allege in specific terms how each
22 named defendant is involved. Id. There can be no liability under 42 U.S.C. § 1983 unless there is
23 some affirmative link or connection between a defendant's actions and the claimed deprivation.
24 Id.; May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743
25 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil
26 rights violations are not sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

27 A prisoner may bring no § 1983 action until he has exhausted such administrative
28 remedies as are available to him. 42 U.S.C. § 1997e(a). The requirement is mandatory. Booth v.

1 Churner, 532 U.S. 731, 741 (2001). California prisoners may appeal “departmental policies,
2 decisions, actions, conditions, or omissions that have a material adverse effect on the[ir] welfare.
3 . . .” Cal. Code Regs. tit. 15, §§ 3084.1, et seq. An appeal must be presented on a CDC form 602
4 that asks that the prisoner “describe the problem” and “action requested.”¹

5 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to
6 make plaintiff’s amended complaint complete. Local Rule 220 requires that an amended
7 complaint be complete in itself without reference to any prior pleading. This requirement exists
8 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.
9 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original
10 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an
11 original complaint, each claim and the involvement of each defendant must be sufficiently
12 alleged.

13 Finally, plaintiff must file his amended complaint on the current form used by this district,
14 completing all sections therein.

15 In accordance with the above, IT IS HEREBY ORDERED that:

- 16 1. Plaintiff’s request for leave to proceed in forma pauperis is granted.

17 ¹ On January 28, 2011, California prison regulations governing inmate grievances were revised.
18 Cal. Code Regs. tit. 15, § 3084.7. Now, inmates in California proceed through three levels of
19 appeal to exhaust the appeal process: (1) formal written appeal on a CDC 602 inmate appeal
20 form, (2) second level appeal to the institution head or designee, and (3) third level appeal to the
21 Director of the California Department of Corrections and Rehabilitation (“CDCR”). Cal. Code
22 Regs. tit. 15, § 3084.7. Under specific circumstances, the first level review may be bypassed. Id.
23 The third level of review constitutes the decision of the Secretary of the CDCR and exhausts a
24 prisoner’s administrative remedies. See id. § 3084.7(d)(3). Since 2008, medical appeals have
25 been processed at the third level by the Office of Third Level Appeals for the California
26 Correctional Health Care Services. A California prisoner is required to submit an inmate appeal
27 at the appropriate level and proceed to the highest level of review available to him. Butler v.
28 Adams, 397 F.3d 1181, 1183 (9th Cir. 2005); Bennett v. King, 293 F.3d 1096, 1098 (9th Cir.
2002). Since the 2011 revision, in submitting a grievance, an inmate is required to “list all staff
members involved and shall describe their involvement in the issue.” Cal. Code Regs. tit. 15,
§ 3084.2(3). Further, the inmate must “state all facts known and available to him/her regarding
the issue being appealed at the time,” and he or she must “describe the specific issue under appeal
and the relief requested.” Cal. Code Regs. tit. 15, §§ 3084.2(a)(4). An inmate now has thirty
calendar days to submit his or her appeal from the occurrence of the event or decision being
appealed, or “upon first having knowledge of the action or decision being appealed.” Cal. Code
Regs. tit. 15, § 3084.8(b).

1 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
2 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
3 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
4 Director of the California Department of Corrections and Rehabilitation filed concurrently
5 herewith.

6 3. Plaintiff's complaint is dismissed.

7 4. Within thirty days from the date of this order, plaintiff shall complete the attached
8 Notice of Amendment and submit the following documents to the court:

9 a. The completed Notice of Amendment; and


10 b. An original and one copy of the Amended Complaint.

11 Plaintiff's amended complaint shall comply with the requirements of the Civil Rights Act, the
12 Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must
13 also bear the docket number assigned to this case and must be labeled "Amended Complaint."

14 Failure to file an amended complaint in accordance with this order may result in the
15 dismissal of this action.

16 5. The Clerk of the Court is directed to send plaintiff the form for filing a civil rights
17 complaint by a prisoner.

18 Dated: December 23, 2016

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHNNY HEARNE,
Plaintiff,
v.
D. MONDOZA,
Defendant.

No. 2:16-cv-2887 KJN P

NOTICE OF AMENDMENT

Plaintiff hereby submits the following document in compliance with the court's order
filed _____.

DATED: _____ Amended Complaint

Plaintiff