

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN ROSEBERRY, JR.,  
Plaintiff,  
v.  
BRANDI BROWN, et al.,  
Defendants.

No. 2:17-cv-0880 KJN P

ORDER

I. Introduction

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 consented to proceed before the undersigned for all purposes. See 28 U.S.C. § 636(c).

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

1 payments of twenty percent of the preceding month's income credited to plaintiff's trust account.  
2 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time  
3 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.  
4 § 1915(b)(2).

## 5 II. Screening Standards

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

11 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
12 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
13 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an  
14 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
15 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
16 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
17 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.  
18 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
19 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at  
20 1227.

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

1 the . . . claim is and the grounds upon which it rests.” Erickson v. Pardus, 551 U.S. 89, 93  
2 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal quotations marks omitted).  
3 In reviewing a complaint under this standard, the court must accept as true the allegations of the  
4 complaint in question, Erickson, 551 U.S. at 93, and construe the pleading in the light most  
5 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other  
6 grounds, Davis v. Scherer, 468 U.S. 183 (1984).

### 7 III. Plaintiff’s Complaint

8 Plaintiff claims that on several occasions, defendant Nurse Supervisor Brandi Brown  
9 shared plaintiff’s personal health care information with her husband, defendant Captain Brown,  
10 and the remaining named defendants, without first obtaining plaintiff’s authorization.<sup>1</sup> On  
11 September 1, 2016, defendant Brandi Brown had her husband, Captain Brown, take away  
12 plaintiff’s B1 clinic treatment card that allowed him to exchange his portable oxygen tank. On  
13 September 8, 2016, defendant Brandi Brown told Captain Brown to escort plaintiff and his  
14 oxygen tank to the B1 medical clinic. Captain Brown then told defendant Swan to escort plaintiff  
15 and his tank to B1 medical clinic where he turned plaintiff over to defendant Buckner, who told  
16 plaintiff to hand over the portable oxygen tank to inmate worker Jackson. Plaintiff asked  
17 Buckner to see the doctor’s order requiring plaintiff to turn over his oxygen tank. Buckner then  
18 ordered plaintiff to give the tank to Jackson and to leave, which plaintiff did. Plaintiff contends  
19 that at no time on either September 1 or 8, 2016, was there an order requiring plaintiff to turn over  
20 his portable oxygen tank. (ECF No. 1 at 8.) Plaintiff argues that the actions of defendants Brandi  
21 Brown, Captain Brown, Swan, Lesane, and Buckner demonstrate deliberate indifference to his  
22 serious medical needs.

23 ///

24 ///

---

25 <sup>1</sup> To the extent plaintiff attempts to raise a claim under “HIPAA,” the Health Insurance  
26 Portability and Accountability Act of 1996, “HIPAA itself does not provide for a private right of  
27 action.” Webb v. Smart Document Solutions, LLC, 499 F.3d 1078, 1082 (9th Cir. 2007) (citing  
28 Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462-01,  
82601 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160 and 164) (“Under HIPAA, individuals  
do not have a right to court action.”)).

1 IV. Medical Standards

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

9 What is needed to show unnecessary and wanton infliction of pain “varies according to  
10 the nature of the alleged constitutional violation.” Hudson v. McMillian, 503 U.S. 1, 5 (1992)  
11 (citing Whitley, 475 U.S. at 320). In order to prevail on a claim of cruel and unusual punishment,  
12 however, a prisoner must allege and prove that objectively he suffered a sufficiently serious  
13 deprivation and that subjectively prison officials acted with deliberate indifference in allowing or  
14 causing the deprivation to occur. Wilson v. Seiter, 501 U.S. 294, 298-99 (1991).

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

21 A medical need is serious “if the failure to treat the prisoner’s condition could result in  
22 further significant injury or the ‘unnecessary and wanton infliction of pain.’” McGuckin, 974  
23 F.2d at 1059 (quoting Estelle, 429 U.S. at 104). Indications of a serious medical need include  
24 “the presence of a medical condition that significantly affects an individual’s daily activities.” Id.  
25 at 1059-60. By establishing the existence of a serious medical need, a prisoner satisfies the  
26 objective requirement for proving an Eighth Amendment violation. Farmer v. Brennan, 511 U.S.  
27 825, 834 (1994).

28 ///

1           If a prisoner establishes the existence of a serious medical need, he must then show that  
2 prison officials responded to the serious medical need with deliberate indifference. See Farmer,  
3 511 U.S. at 834. In general, deliberate indifference may be shown when prison officials deny,  
4 delay, or intentionally interfere with medical treatment, or may be shown by the way in which  
5 prison officials provide medical care. Hutchinson v. United States, 838 F.2d 390, 393-94 (9th  
6 Cir. 1988).

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

16           Delays in providing medical care may manifest deliberate indifference. Estelle, 429 U.S.  
17 at 104-05. To establish a claim of deliberate indifference arising from delay in providing care, a  
18 plaintiff must show that the delay was harmful. See Hallett v. Morgan, 296 F.3d 732, 745-46 (9th  
19 Cir. 2002); Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); McGuckin, 974 F.2d at 1059;  
20 Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990); Hunt v. Dental Dep’t, 865 F.2d 198,  
21 200 (9th Cir. 1989); Shapley v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir.  
22 1985). In this regard, “[a] prisoner need not show his harm was substantial; however, such would  
23 provide additional support for the inmate’s claim that the defendant was deliberately indifferent to  
24 his needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).

25           Finally, mere differences of opinion between a prisoner and prison medical staff or  
26 between medical professionals as to the proper course of treatment for a medical condition do not  
27 give rise to a § 1983 claim. See Toguchi, 391 F.3d at 1058; Jackson v. McIntosh, 90 F.3d 330,

28 ////

1 332 (9th Cir. 1996); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Franklin v. Oregon, 662  
2 F.2d 1337, 1344 (9th Cir. 1981).

3 V. Discussion

4 Plaintiff included no factual allegations as to defendant Lesane. Defendant Captain  
5 Brown was not present at B1 clinic when plaintiff's oxygen tank was turned over, and there are  
6 no facts demonstrating he was aware there was no doctor's order requiring such action.  
7 Moreover, although defendant Swan escorted plaintiff to clinic, there are no facts suggesting  
8 Swan knew why plaintiff was being escorted to clinic. In addition, although defendant Buckner  
9 ordered plaintiff to turn over the tank, there are no facts suggesting that defendant Buckner was  
10 aware there was no doctor's order requiring plaintiff to return the tank. In addition, plaintiff fails  
11 to explain what harm, if any, he suffered as a result of having to turn over his portable oxygen  
12 tank.

13 Thus, it appears that plaintiff may be able to state a cognizable Eighth Amendment claim  
14 against defendant Brandi Brown, but it is unclear whether plaintiff can state a claim against  
15 defendant Buckner or any of the remaining defendants.

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

25 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions  
26 about which he complains resulted in a deprivation of plaintiff's constitutional rights. Rizzo v.  
27 Goode, 423 U.S. 362, 371 (1976). Also, the complaint must allege in specific terms how each  
28 named defendant is involved. Id. There can be no liability under 42 U.S.C. § 1983 unless there is

1 some affirmative link or connection between a defendant's actions and the claimed deprivation.  
2 Id.; May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743  
3 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil  
4 rights violations are not sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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 VI. Conclusion

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

15 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

16 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff  
17 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.  
18 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the  
19 Director of the California Department of Corrections and Rehabilitation filed concurrently  
20 herewith.

21 3. Plaintiff's complaint is dismissed.

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

24 a. The completed Notice of Amendment; and

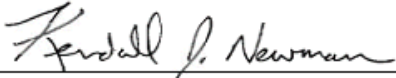
25 b. An original and one copy of the Amended Complaint.

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

Dated: September 1, 2017

  
KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

/rose0880.14n



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN ROSEBERRY, JR.,  
Plaintiff,  
v.  
BRANDI BROWN, et al.,  
Defendants.

No. 2:17-cv-0880 KJN P

NOTICE OF AMENDMENT

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

DATED: \_\_\_\_\_ Amended Complaint

\_\_\_\_\_  
Plaintiff