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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD ANTHONY EVANS,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Defendant.

No. 2:17-cv-1891 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 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 payments of twenty percent of the preceding month's income credited to plaintiff's trust account.

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

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

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15 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.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

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

1 In reviewing a complaint under this standard, the court must accept as true the allegations of the
2 complaint in question, Erickson, 551 U.S. at 93, and construe the pleading in the light most
3 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other
4 grounds, Davis v. Scherer, 468 U.S. 183 (1984).

5 Plaintiff arrived at Deuel Vocational Institution on June 5, 2017, but alleges that it took
6 three weeks to be seen by mental health providers; he was only seen by medical and Sgt.
7 Harrison. He claims an “attack left [him] mentally and physically unstable,” and he put in
8 “requests and 602s to see mental health.” (ECF No. 1 at 3.) Plaintiff names the California
9 Department of Corrections and Rehabilitation (“CDCR”) as the sole defendant, and seeks money
10 damages.

11 Here, plaintiff has named an improper defendant. Plaintiff may not bring a section 1983
12 action against defendant CDCR. See Brown v. California Dep’t. of Corr., 554 F.3d 747, 752 (9th
13 Cir. 2009) (“The district court correctly held that the California Department of Corrections and
14 the California Board of Prison Terms were entitled to Eleventh Amendment immunity.”);
15 Maldonado v. Harris, 370 F.3d 945, 951 (9th Cir. 2004) (“State agencies . . . are not ‘persons’
16 within the meaning of § 1983, and are therefore not amenable to suit under that statute.”). Rather,
17 plaintiff must name individuals who allegedly violated his constitutional or federal rights.

18 In addition, plaintiff’s allegations fail to state a cognizable Eighth Amendment violation.
19 “In the Ninth Circuit, the test for deliberate indifference consists of two parts. First, the plaintiff
20 must show a serious medical need by demonstrating that failure to treat a prisoner’s condition
21 could result in further significant injury or the unnecessary and wanton infliction of pain. Second,
22 the plaintiff must show the defendant’s response to the need was deliberately indifferent. This
23 second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner’s
24 pain or possible medical need and (b) harm caused by the indifference.” Jett v. Penner, 439 F.3d
25 1091, 1096 (9th Cir. 2006) (internal citations, punctuation and quotation marks omitted); accord,
26 Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Lemire v. CDCR, 726 F.3d 1062, 1081
27 (9th Cir. 2013). A prisoner must allege facts supporting a reasonable inference that the prison
28 official “kn[ew] of and disregard[ed] an excessive risk to inmate health or safety; the official must

1 both be aware of the facts from which the inference could be drawn that a substantial risk of
2 serious harm exists, and he must also draw the inference.” Farmer v. Brennan, 511 U.S. 825, 837
3 (1994). Moreover, mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support
4 this cause of action.” Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing
5 Estelle v. Gamble, 429 U.S. at 97, 105-06 (1976)). A difference of medical opinion does not
6 demonstrate deliberate indifference to a prisoner's serious medical needs. See Sanchez v. Vild,
7 891 F.2d 240, 242 (9th Cir. 1989).

8 Plaintiff’s allegations fail to allege facts demonstrating that plaintiff had a serious mental
9 health need, or that he was at risk of a substantial serious harm due to the three week delay in
10 seeing a mental health professional. He fails to allege facts that any particular individual was
11 aware of such substantial risk or that such individual drew an inference that plaintiff was at
12 substantial risk of harm from the delay.

13 Finally, it is apparent from the face of plaintiff’s complaint that he has not yet exhausted
14 his administrative remedies. Exhaustion in prisoner cases covered by 42 U.S.C. § 1997e(a) is
15 mandatory. Porter v. Nussle, 534 U.S. 516, 524 (2002). Exhaustion is a prerequisite for all
16 prisoner suits regarding conditions of confinement, whether they involve general circumstances
17 or particular episodes, and whether they allege excessive force or some other wrong. Porter, 534
18 U.S. at 532. In other words, plaintiff must exhaust his administrative remedies before he files suit
19 in federal court. If plaintiff did not exhaust his administrative remedies as to his claims raised
20 here before filing the instant action, plaintiff risks further delay by pursuing this action. Plaintiff
21 may choose instead to voluntarily dismiss this action and then re-file his complaint once he
22 exhausts his administrative remedies.

23 In light of the above, plaintiff’s complaint must be dismissed. The court, however, grants
24 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 In accordance with the above, IT IS HEREBY ORDERED that:

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

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

20 3. Plaintiff's complaint is dismissed.

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

23 a. The completed Notice of Amendment; and

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

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

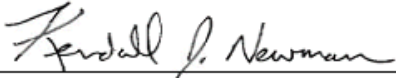
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Failure to file an amended complaint in accordance with this order may result in the dismissal of this action.

Dated: October 30, 2017

evan1891.14


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD ANTHONY EVANS,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
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Defendant.

No. 2:17-cv-1891 KJN P

ORDER

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

Amended Complaint

DATED: _____

Plaintiff