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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JONATHAN DAVIS,
Plaintiff,
v.
K. KELLY, et al.,
Defendants.

No. 2:22-cv-0773 DB P

ORDER

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims that he has received inadequate medical care in violation of his rights. Presently before the court is plaintiff’s motion to proceed in forma pauperis (ECF No. 2) and his complaint for screening (ECF No. 1). For the reasons set forth below, the court will grant the motion to proceed in forma pauperis and dismiss the complaint with leave to amend.

IN FORMA PAUPERIS

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). (ECF No. 2.) 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

1 forward it to the Clerk of the court. Thereafter, plaintiff will be obligated for monthly payments
2 of twenty percent of the preceding month's income credited to plaintiff's prison trust account.
3 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time
4 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. §
5 1915(b)(2).

6 SCREENING

7 I. Legal Standards

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

14 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
15 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
16 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
17 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
18 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
19 pleaded, has an arguable legal and factual basis. See Franklin, 745 F.2d at 1227.
20 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain
21 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
22 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell
23 AtlanticCorp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47
24 (1957)).

25 However, in order to survive dismissal for failure to state a claim a complaint must
26 contain more than "a formulaic recitation of the elements of a cause of action;" it must contain
27 factual allegations sufficient "to raise a right to relief above the speculative level." Bell Atlantic,
28 550 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the

1 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
2 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all
3 doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

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

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

10 42 U.S.C. § 1983. Here, the defendants must act under color of federal law. Bivens, 403 U.S. at
11 389. The statute requires that there be an actual connection or link between the
12 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
13 Monell v. Dept. of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
14 (1976). "A person 'subjects' another to the deprivation of a constitutional right, within the
15 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
16 omits to perform an act which he is legally required to do that causes the deprivation of which
17 complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

18 Moreover, supervisory personnel are generally not liable under § 1983 for the actions of
19 their employees under a theory of respondeat superior and, therefore, when a named defendant
20 holds a supervisory position, the causal link between him and the claimed constitutional
21 violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979);
22 Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory allegations
23 concerning the involvement of official personnel in civil rights violations are not sufficient. See
24 Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

25 **I. Allegations in the Complaint**

26 Plaintiff claims the events giving rise to the claim occurred while he was incarcerated at
27 Mule Creek State Prison ("MCSP"). He has identified the following defendants: (1) Dr. Kanwar
28 Kelley, surgeon at MCSP; (2) Dr. Marianna Ashe, chief physician at MCSP; and (3) San Joaquin
Medical Hospital. (ECF No. 1 at 1.)

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1 Plaintiff states that he had a medical procedure performed by Dr. Kelley on August 17,
2 2020. (Id. at 3.) On October 22, 2020, he was told by Dr. Taylor that he was scheduled to have a
3 second procedure with Dr. Kelley to repair a hole in his septum. He alleges that the torn septum
4 was caused by the August 17, 2020, procedure performed by Dr. Kelley.

5 He further alleges that on January 1, 2021, Dr. Ashe made the problem worse by failing to
6 hold Dr. Kelley liable for creating the hole and not fixing it in a timely manner. (Id. at 4.) He
7 claims that Dr. Ashe denied the appeal and his condition remains the same.

8 **II. Does Plaintiff State a Claim under § 1983?**

9 **A. Legal Standards – Eighth Amendment**

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

17 The deliberate indifference standard involves an objective and subjective prong. First, the
18 alleged deprivation must be, in objective terms, “sufficiently serious” Farmer v. Brennan,
19 511 U.S. 825, 834 (1994) (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)). Second, the prison
20 official must “know[] of and disregard[] an excessive risk to inmate health or safety”
21 Farmer, 511 U.S. at 837. Thus, a prison official may be held liable under the Eighth Amendment
22 for denying humane conditions of confinement only if he knows that inmates face a substantial
23 risk of harm and disregards that risk by failing to take reasonable measures to abate it. Id. at 837-
24 45.

25 Where a prisoner’s Eighth Amendment claim arises in the context of medical care, the
26 prisoner must allege and prove “acts or omissions sufficiently harmful to evidence deliberate
27 indifference to serious medical needs.” Estelle, 429 U.S. at 106. An Eighth Amendment medical
28 claim has two elements: “the seriousness of the prisoner’s medical need and the nature of the

1 defendant's response to that need." McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992),
2 overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en
3 banc).

4 A medical need is serious "if the failure to treat the prisoner's condition could result in
5 further significant injury or the 'unnecessary and wanton infliction of pain.'" McGuckin, 974
6 F.2d at 1059 (quoting Estelle, 429 U.S. at 104). Indications of a serious medical need include
7 "the presence of a medical condition that significantly affects an individual's daily activities." *Id.*
8 at 1059-60. By establishing the existence of a serious medical need, a prisoner satisfies the
9 objective requirement for proving an Eighth Amendment violation. Farmer v. Brennan, 511 U.S.
10 825, 834 (1994).

11 If a prisoner establishes the existence of a serious medical need, he must then show that
12 prisoner officials responded to the serious medical need with deliberate indifference. See Farmer,
13 511 U.S. at 834. In general, deliberate indifference may be shown when prison officials deny,
14 delay, or intentionally interfere with medical treatment, or may be shown by the way in which
15 prison officials provide medical care. Hutchinson v. United States, 838 F.2d 390, 393-94 (9th
16 Cir. 1988).

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

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

1 332 (9th Cir. 1996) overruled in part on other grounds by Peralta v. Dillard, 744 F.3d 1076, 1083
2 (9th Cir. 2014) (en banc); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Franklin v. Oregon,
3 662 F.2d 1337, 1344 (9th Cir. 1981).

4 **B. Analysis**

5 There is a distinction between common law negligence claims of improper medical care
6 from claims predicated on violations of the Eighth Amendment’s prohibition of cruel and unusual
7 punishment. “Medical malpractice does not become a constitutional violation merely because the
8 victim is a prisoner.” Estelle, 429 U.S. at 106.

9 Plaintiff has alleged that he had a negative outcome following a procedure performed by
10 defendant Dr. Kelley. (ECF No. 1 at 3.) However, in order to state a deliberate indifference
11 claim, plaintiff must show that the procedure was “medically unacceptable under the
12 circumstances” and that Dr. Kelley chose it ‘in conscious disregard of an excessive risk to
13 plaintiff’s health.” Jackson, 90 F.3d at 332; Toguchi, 391 F.3d at 1058. That plaintiff had a bad
14 outcome following the procedure is not sufficient to show that defendant was deliberately
15 indifferent. See Cunningham v. UCSF Spine Center, No. C-13-1978 EMC (pr), 2013 WL
16 5539311, at *3 (N.D. Cal. Oct. 8, 2013) (“That a surgery has potential complications or cannot be
17 performed with guaranteed perfect results does not mean that a doctor who performs the surgery
18 does so with deliberate indifference, or even negligence.”); Torrey v. Lovett, No. 2:12-cv-1457
19 JAM CKD P, 2013 WL 269043, at *2 (E.D. Cal. Jan. 23, 2013) (plaintiff’s allegation that his
20 knee surgery was “botched” was “exactly the kind of negligence claim that is not cognizable
21 under § 1983”).

22 Plaintiff claims that Dr. Ashe violated his rights by denying an appeal. (ECF No. 1 at 4.)
23 Plaintiff’s disagreement with that decision is insufficient to state a claim. Franklin v. State of
24 Oregon State Welfare Div., 662 F.2d 1337, 1344 (9th Cir. 1981) (“A difference of opinion
25 between a prisoner-patient and prison medical authorities does not give rise to a § 1983 claim.”).
26 In any amended complaint, plaintiff should state facts showing that Dr. Ashe’s actions deprived
27 him of medical treatment or were medically unacceptable under the circumstances.

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1 The sole allegation against San Joaquin General Hospital is that the hospital was “reckless
2 in their surgical procedures.” (ECF No. 1 at 4.) Such a conclusory allegation is insufficient to
3 state a claim. See Felix v. Casey, 2021 WL 2209828 at *2 (E.D. Cal. June 1, 2021) (finding
4 conclusory allegations against San Joaquin General Hospital was insufficient to state a claim
5 under § 1983). In order to state a claim under § 1983 plaintiff must allege the violation was
6 committed by a person or entity acting on behalf of the state. West v. Atkins, 487 U.S. 42, 58
7 (1988). In any amended complaint plaintiff should state facts showing how the hospital violated
8 his rights and that San Joaquin General Hospital was acted on behalf of the state.

9 **III. Amending the Complaint**

10 As set forth above, the complaint fails to state a claim. However, plaintiff will be given
11 the opportunity to file an amended complaint. Plaintiff is advised that in an amended complaint
12 he must clearly identify each defendant and the action that defendant took that violated his
13 constitutional rights. The court is not required to review exhibits to determine what plaintiff’s
14 charging allegations are as to each named defendant. The charging allegations must be set forth
15 in the amended complaint, so defendants have fair notice of the claims plaintiff is presenting.
16 That said, plaintiff need not provide every detailed fact in support of his claims. Rather, plaintiff
17 should provide a short, plain statement of each claim. See Fed. R. Civ. P. 8(a).

18 Any amended complaint must show the federal court has jurisdiction, the action is brought
19 in the right place, and plaintiff is entitled to relief if plaintiff’s allegations are true. It must
20 contain a request for particular relief. Plaintiff must identify as a defendant only persons who
21 personally participated in a substantial way in depriving plaintiff of a federal constitutional right.
22 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation
23 of a constitutional right if he does an act, participates in another’s act or omits to perform an act
24 he is legally required to do that causes the alleged deprivation).

25 In an amended complaint, the allegations must be set forth in numbered paragraphs. Fed.
26 R. Civ. P. 10(b). Plaintiff may join multiple claims if they are all against a single defendant. Fed.
27 R. Civ. P. 18(a). If plaintiff has more than one claim based upon separate transactions or
28 occurrences, the claims must be set forth in separate paragraphs. Fed. R. Civ. P. 10(b).

1 The federal rules contemplate brevity. See Galbraith v. County of Santa Clara, 307 F.3d
2 1119, 1125 (9th Cir. 2002) (noting that “nearly all of the circuits have now disapproved any
3 heightened pleading standard in cases other than those governed by Rule 9(b)”; Fed. R. Civ. P.
4 84; cf. Rule 9(b) (setting forth rare exceptions to simplified pleading). Plaintiff’s claims must be
5 set forth in short and plain terms, simply, concisely and directly. See Swierkiewicz v. Sorema
6 N.A., 534 U.S. 506, 514 (2002) (“Rule 8(a) is the starting point of a simplified pleading system,
7 which was adopted to focus litigation on the merits of a claim.”); Fed. R. Civ. P. 8.

8 An amended complaint must be complete in itself without reference to any prior pleading.
9 E.D. Cal. R. 220. Once plaintiff files an amended complaint, all prior pleadings are superseded.
10 Any amended complaint should contain all of the allegations related to his claim in this action. If
11 plaintiff wishes to pursue his claims against the defendant, they must be set forth in the amended
12 complaint.

13 By signing an amended complaint, plaintiff certifies he has made reasonable inquiry and
14 has evidentiary support for his allegations, and for violation of this rule the court may impose
15 sanctions sufficient to deter repetition by plaintiff or others. Fed. R. Civ. P. 11.

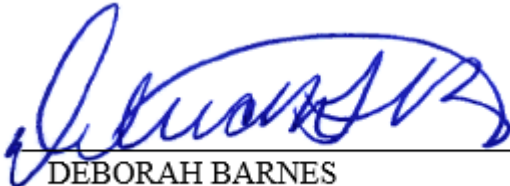
16 CONCLUSION

- 17 1. Plaintiff’s motion to proceed in forma pauperis (ECF No. 2) is granted.
- 18 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
19 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. §
20 1915(b)(1). All fees shall be collected and paid in accordance with this court’s order
21 to the Director of the California Department of Corrections and Rehabilitation filed
22 concurrently herewith.
- 23 3. Plaintiff’s complaint (ECF No. 1) is dismissed with leave to amend.
- 24 4. Plaintiff is granted thirty days from the date of service of this order to file an amended
25 complaint that complies with the requirements of the Civil Rights Act, the Federal
26 Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint
27 must bear the docket number assigned to this case and must be labeled “First
28 Amended Complaint.”

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5. Failure to comply with this order will result in a recommendation that this action be dismissed.

Dated: August 1, 2022



DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

DB:12
DB/DB Prisoner Inbox/Civil Rights/S/davi0773.scm