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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

ERIC DARNELL COOK,
Plaintiff,

No. C 15-5570 NJV (PR)

v.

**ORDER OF DISMISSAL WITH
LEAVE TO AMEND**

P. KAMALNATH, et. al.,
Defendants.

Plaintiff, a state prisoner, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis. (Doc. 6.)

DISCUSSION

A. Standard of Review

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). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). Although in order to state a claim a complaint "does not need detailed factual

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1 allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'
2 requires more than labels and conclusions, and a formulaic recitation of the elements of a
3 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief
4 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
5 (citations omitted). A complaint must proffer "enough facts to state a claim to relief that is
6 plausible on its face." *Id.* at 570. The United States Supreme Court has recently explained
7 the "plausible on its face" standard of *Twombly*: "While legal conclusions can provide the
8 framework of a complaint, they must be supported by factual allegations. When there are
9 well-pleaded factual allegations, a court should assume their veracity and then determine
10 whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662,
11 679 (2009).

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
13 elements: (1) that a right secured by the Constitution or laws of the United States was
14 violated, and (2) that the alleged deprivation was committed by a person acting under the
15 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

16 **B. Legal Claims**

17 Plaintiff alleges that he was given recalled medication which caused side effects.

18 Deliberate indifference to serious medical needs violates the Eighth Amendment's
19 proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104
20 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other*
21 *grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).
22 A determination of "deliberate indifference" involves an examination of two elements: the
23 seriousness of the prisoner's medical need and the nature of the defendant's response to
24 that need. *Id.* at 1059.

25 A "serious" medical need exists if the failure to treat a prisoner's condition could
26 result in further significant injury or the "unnecessary and wanton infliction of pain." *Id.* The
27 existence of an injury that a reasonable doctor or patient would find important and worthy of
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1 comment or treatment; the presence of a medical condition that significantly affects an
2 individual's daily activities; or the existence of chronic and substantial pain are examples of
3 indications that a prisoner has a "serious" need for medical treatment. *Id.* at 1059-60.

4 A prison official is deliberately indifferent if he or she knows that a prisoner faces a
5 substantial risk of serious harm and disregards that risk by failing to take reasonable steps
6 to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must not only
7 "be aware of facts from which the inference could be drawn that a substantial risk of serious
8 harm exists," but he "must also draw the inference." *Id.* If a prison official should have
9 been aware of the risk, but was not, then the official has not violated the Eighth
10 Amendment, no matter how severe the risk. *Gibson v. County of Washoe*, 290 F.3d 1175,
11 1188 (9th Cir. 2002). "A difference of opinion between a prisoner-patient and prison
12 medical authorities regarding treatment does not give rise to a § 1983 claim." *Franklin v.*
13 *Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).

14 Plaintiff states that after he was prescribed the psychiatric drug Risperidone, he
15 began to experience side effects of soreness and tenderness in his chest area. Plaintiff
16 states he was suffering from gynecomastia, swelling of the breast tissue in boys and men.
17 Plaintiff was seen by medical staff on April 15, 2015, who began tapering plaintiff off the
18 medication. On April 30, 2015, plaintiff was seen by his doctor and there was no evidence
19 of gynecomastia. On May 21, 2015, plaintiff had a prolactin level check which was in the
20 normal reference range.

21 Plaintiff states that medical staff should have known that Risperidone had been
22 recalled and he includes an exhibit from the Food and Drug Administration concerning the
23 recall. Complaint at 37-38. The exhibit indicates that Risperidone was not recalled, rather
24 specific lots of 3mg and 2mg tablets were recalled in 2010 and 2011 due to an
25 uncharacteristic odor which reportedly could cause temporary gastrointestinal symptoms.
26 Plaintiff has not presented allegations that he could have taken pills from the recalled lots or
27 that even if he did and he is suffering from gynecomastia, it was due to the Risperidone.

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1 Moreover, plaintiff has not presented sufficient allegations that soreness and tenderness in
2 his chest area was a serious medical sufficient to state an Eighth Amendment claim under
3 the standards set forth above. The complaint will be dismissed with leave to amend to
4 address these deficiencies and state a cognizable claim for relief.

5 **CONCLUSION**

6 1. The complaint is **DISMISSED** with leave to amend in accordance with the
7 standards set forth above. The amended complaint must be filed within **twenty-eight (28)**
8 **days** of the date this order is filed and must include the caption and civil case number used
9 in this order and the words AMENDED COMPLAINT on the first page. Because an
10 amended complaint completely replaces the original complaint, plaintiff must include in it all
11 the claims he wishes to present. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.
12 1992). He may not incorporate material from the original complaint by reference. Failure to
13 amend within the designated time will result in the dismissal of this action.

14 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the
15 court informed of any change of address by filing a separate paper with the clerk headed
16 "Notice of Change of Address," and must comply with the court's orders in a timely fashion.
17 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to
18 Federal Rule of Civil Procedure 41(b).

19 **IT IS SO ORDERED.**

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21 Dated: February 19, 2016.



NANDOR J. VADAS
United States Magistrate Judge