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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID S. PERRYMAN,)	No. C 08-4973 JSW (PR)
Plaintiff,)	ORDER OF DISMISSAL WITH LEAVE TO AMEND AND INSTRUCTIONS TO THE CLERK (Docket No. 2)
vs.)	
SAN FRANCISCO SHERIFF'S DEPARTMENT,)	
Defendant.)	

INTRODUCTION

Plaintiff, a prisoner incarcerated at the San Francisco County Jail filed this civil rights action pursuant to 42 U.S.C. § 1983, complaining about the use of excessive force and inadequate medical care and diet he received at the jail. Plaintiff also seeks leave to proceed *in forma pauperis* (docket no. 2). In this order, the Court dismisses the complaint with leave to amend and orders Plaintiff to file an amended complaint within thirty days from the date of this order.

STATEMENT OF FACTS

Plaintiff alleges that the San Francisco Sheriff's Department used excessive force in moving him to a psychological housing unit on September 5, 2008, despite his informing jail officials that he had suffered a heart attack and needed medication. Plaintiff also contends that the cell move aggravated his heart condition and that he was moved to housing inappropriate for someone in his condition, and has been served a diet

1 inappropriate for his medical needs. Plaintiff seeks injunctive relief.

2 STANDARD OF REVIEW

3 Federal courts must engage in a preliminary screening of cases in which prisoners
4 seek redress from a governmental entity or officer or employee of a governmental entity.
5 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the
6 complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or
7 fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a
8 defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be
9 liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
10 1990).

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

15 ANALYSIS

16 Plaintiff appears to state a cognizable claim regarding the use of excessive force
17 and deliberate indifference to serious medical needs. However, Plaintiff has failed in the
18 complaint to identify the responsible parties with regard to each of his claims. Instead,
19 he provides a list of parties, but does not identify what each did in order to establish his
20 liability for the claimed violations of his constitutional rights.

21 Deliberate indifference to serious medical needs violates the Eighth Amendment's
22 proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97,
23 104 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other*
24 *grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en
25 banc); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986). A determination of
26 "deliberate indifference" involves an examination of two elements: the seriousness of the
27 prisoner's medical need and the nature of the defendant's response to that need. *See*

1 *McGuckin*, 974 F.2d at 1059.

2 A "serious" medical need exists if the failure to treat a prisoner's condition could
3 result in further significant injury or the "unnecessary and wanton infliction of pain." *Id.*
4 (citing *Estelle v. Gamble*, 429 U.S. at 104). The existence of an injury that a reasonable
5 doctor or patient would find important and worthy of comment or treatment; the
6 presence of a medical condition that significantly affects an individual's daily activities;
7 or the existence of chronic and substantial pain are examples of indications that a
8 prisoner has a "serious" need for medical treatment. *See id.* at 1059-60 (citing *Wood v.*
9 *Housewright*, 900 F.2d 1332, 1337-41 (9th Cir. 1990)).

10 A prison official is deliberately indifferent if he knows that a prisoner faces a
11 substantial risk of serious harm and disregards that risk by failing to take reasonable
12 steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). In order for deliberate
13 indifference to be established, there must be a purposeful act or failure to act on the part
14 of the defendant and resulting harm. *See McGuckin*, 974 F.2d at 1060; *Shapley v.*
15 *Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985). However, in
16 his complaint, Plaintiff has failed to state a claim of municipal liability on the part of the
17 County.

18 The treatment a prisoner receives in prison and the conditions under which he is
19 confined are subject to scrutiny under the Eighth Amendment. *Helling v. McKinney*, 509
20 U.S. 25, 31 (1993). "After incarceration, only the unnecessary and wanton infliction of
21 pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment
22 ." *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (ellipsis in original) (internal quotation
23 and citation omitted). A prison official violates the Eighth Amendment when two
24 requirements are met: (1) the deprivation alleged must be, objectively, sufficiently
25 serious, *Farmer v. Brennan*, 511 U.S. 824, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S.
26 294, 298 (1991)), and (2) the prison official possesses a sufficiently culpable state of
27 mind, i.e., the offending conduct was wanton, *id.* (citing *Wilson*, 501 U.S. at 297);
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1 *LeMaire v. Maass*, 12 F.3d 1444, 1451 (9th Cir. 1993).

2 To state a claim arising under federal law, it must be clear from the face of
3 Plaintiff's well-pleaded complaint that there is a federal question. *Easton v. Crossland*
4 *Mortgage Corp.*, 114 F.3d 979, 982 (9th Cir. 1997). While a plaintiff is not required to
5 plead his evidence "or specific factual details not ascertainable in advance of discovery,"
6 *Gibson v. United States*, 781 F.2d 1334, 1340 (9th Cir. 1986), *cert. denied*, 479 U.S.
7 1054 (1987), a pleading will not be sufficient to state a claim under § 1983 if the
8 allegations are mere conclusions, *Kennedy v. H & M Landing, Inc.*, 529 F.2d 987, 989
9 (9th Cir. 1976). And a complaint that fails to state the specific acts of the defendant
10 which violated the plaintiff's rights fails to meet the requirements of Rule 8(a)(2) of the
11 Federal Rules of Civil Procedure. *Hutchinson v. United States*, 677 F.2d 1322, 1328 n.5
12 (9th Cir. 1982). District courts must afford pro se prisoner litigants an opportunity to
13 amend to correct any deficiency in their complaints. *Lopez v. Smith*, 203 F.3d 1122,
14 1126-27 (9th Cir. 2000) (en banc).

15 In this case, Plaintiff has failed to state the specifics regarding the mistreatment he
16 suffered from any particular defendant, how his constitutional rights were violated, and
17 the conduct of each Defendant that he asserts is responsible for a constitutional violation.
18 As such, Plaintiff will be granted leave to amend to allege specifics regarding any claims
19 he has against any individually named or municipal defendant.

20 In his amended complaint, Plaintiff must establish legal liability of each person or
21 entity for the claimed violation of his rights. Liability may be imposed on an individual
22 defendant under section 1983 if the plaintiff can show that the defendant proximately
23 caused the deprivation of a federally protected right. *See Leer v. Murphy*, 844 F.2d 628,
24 634 (9th Cir. 1988); *Harris v. City of Roseburg*, 664 F.2d 1121, 1125 (9th Cir. 1981). A
25 person deprives another of a constitutional right within the meaning of section 1983 if he
26 does an affirmative act, participates in another's affirmative act or omits to perform an
27 act which he is legally required to do, that causes the deprivation of which the plaintiff
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1 complains. *See Leer*, 844 F.2d at 633; *see, e.g., Robins v. Meecham*, 60 F.3d 1436, 1442
2 (9th Cir. 1995) (prison official's failure to intervene to prevent 8th Amendment violation
3 may be basis for liability). Sweeping conclusory allegations will not suffice; the plaintiff
4 must instead "set forth specific facts as to each individual defendant's" deprivation of
5 protected rights. *Leer*, 844 F.2d at 634.

6 With regard to the supervisory employees named, Plaintiff should be mindful that
7 a supervisor may be liable under § 1983 only upon a showing of (1) personal
8 involvement in the constitutional deprivation or (2) a sufficient causal connection
9 between the supervisor's wrongful conduct and the constitutional violation. *Redman v.*
10 *County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc). A supervisor
11 therefore generally "is only liable for constitutional violations of his subordinates if the
12 supervisor participated in or directed the violations, or knew of the violations and failed
13 to act to prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

14 Plaintiff has not properly alleged liability on the part of any properly named
15 Defendants. Plaintiff will be provided with thirty days in which to amend to correct the
16 deficiencies in his complaint. Accordingly, the complaint is DISMISSED. However,
17 Plaintiff is provided with LEAVE TO AMEND his complaint within thirty days, as set
18 forth below.

19 MOTION FOR COUNSEL

20 Plaintiff has requested appointment of counsel to represent him. However, there
21 is no constitutional right to counsel in a civil case unless an indigent litigant may lose his
22 physical liberty if he loses the litigation. *See Lassiter v. Dep't of Social Services*, 452
23 U.S. 18, 25 (1981); *Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997) (no
24 constitutional right to counsel in § 1983 action), *withdrawn in part on other grounds on*
25 *reh'g en banc*, 154 F.3d 952 (9th Cir. 1998) (en banc). A court "may request an attorney
26 to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1).

27 The decision to request counsel to represent an indigent litigant under § 1915 is
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1 within “the sound discretion of the trial court and is granted only in exceptional
2 circumstances.” *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). A finding of
3 the “exceptional circumstances” of the plaintiff seeking assistance requires an evaluation
4 of the likelihood of the plaintiff’s success on the merits and an evaluation of the
5 plaintiff’s ability to articulate his claims pro se in light of the complexity of the legal
6 issues involved. *See Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1103
7 (9th Cir. 2004); *Rand*, 113 F.3d at 1525; *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th
8 Cir. 1991); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Both of these
9 factors must be viewed together before reaching a decision on a request for counsel
10 under § 1915. *See id.* Plaintiff’s motion is DENIED without prejudice.

11 CONCLUSION

12 For the foregoing reasons and for good cause shown,

13 1. Plaintiff’s complaint is DISMISSED WITH LEAVE TO AMEND, as
14 indicated above. Plaintiff shall file an amended complaint within *thirty days from the*
15 *date of this order*. The amendment must include the caption and civil case number used
16 in this order and the words “COURT ORDERED AMENDED COMPLAINT” on the
17 first page. Failure to amend within the designated time will result in the dismissal of the
18 complaint without prejudice.

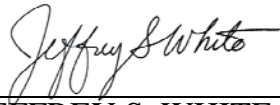
19 2. Plaintiff is advised that an amended complaint supersedes the original
20 complaint. “[A] plaintiff waives all causes of action alleged in the original complaint
21 which are not alleged in the amended complaint.” *London v. Coopers & Lybrand*, 644
22 F.2d 811, 814 (9th Cir. 1981). Defendants not named in an amended complaint are no
23 longer defendants. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.), *cert. denied*,
24 506 U.S. 915 (1992).

25 3. It is Plaintiff’s responsibility to prosecute this case. Plaintiff must keep the
26 Court informed of any change of address and must comply with the Court’s orders in a
27 timely fashion. Failure to do so may result in the dismissal of this action under Federal
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1 Rule of Civil Procedure 41(b).

2 IT IS SO ORDERED.

3 DATED: April 8, 2009



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5 JEFFREY S. WHITE
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
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5 DAVID S. PERRYMAN,
6 Plaintiff,
7

Case Number: CV08-04973 JSW

CERTIFICATE OF SERVICE

8 v.

9 SAN FRANCISCO SHERIFF DEPARTMENT
et al,


10 Defendant.
11 _____/

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
13 Court, Northern District of California.

14 That on April 8, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing
16 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery
17 receptacle located in the Clerk's office.

18 David S. Perryman Prisoner Id 2214792
19 San Francisco County Jail # 2
850 Bryant Street
San Francisco, CA 94103

20 Dated: April 8, 2009

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Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk
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