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United States District Court
For the Northern District of California

E-Filed 2/22/11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JULIUS ROY BRAGG,

No. C 10-4695 RS (PR)

Plaintiff,

**ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND**

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

_____ /
This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. The Court now reviews the complaint pursuant to 28 U.S.C. § 1915A(a).

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that 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. *See id.* § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica*

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1 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

2 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim
3 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)
4 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
5 plausibility when the plaintiff pleads factual content that allows the court to draw the
6 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
7 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal
8 conclusions cast in the form of factual allegations if those conclusions cannot reasonably be
9 drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th
10 Cir. 1994). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
11 elements: (1) that a right secured by the Constitution or laws of the United States was
12 violated, and (2) that the alleged violation was committed by a person acting under the color
13 of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

14 **B. Legal Claims**

15 Plaintiff alleges that defendants, employees and officers of Pelican Bay State Prison,
16 provided constitutionally inadequate medical care in violation of his rights under the Eighth
17 Amendment. Specifically, plaintiff alleges that (1) Dr. C.L. Williams refused to give him
18 pain medication to treat chronic pain in plaintiff’s back, hands, and feet when plaintiff said
19 he would not pay for the medication, and otherwise failed to provide treatment for plaintiff’s
20 pain, mobility problems, and sleep disorder; (2) Dr. Nancy Adam refused to provide pain
21 medication or therapy to treat plaintiff’s various ailments; (3) Dr. Michael Sayre failed to
22 treat plaintiff’s chronic pain, discontinued medication plaintiff took for a skin condition, and
23 his fish oil supplements for his kidney ailment, and denied his request to be placed in a
24 medical facility; (4) Maureen McLean, chief of medical services, did not respond to
25 plaintiff’s written requests for help; (5) L. Phillips, a registered nurse, failed to report his
26 conditions to a doctor, and recommended that his claim be denied; (6) G. D. Lewis, warden
27 at Pelican Bay, failed to respond to plaintiff’s request for help; (7) Governor Schwarzenegger
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1 failed to respond to plaintiff's requests for help; and (8) J. Clark Kelso failed to respond to
2 plaintiff's request for help.

3 Deliberate indifference to a prisoner's serious medical needs violates the Eighth
4 Amendment's proscription against cruel and unusual punishment. *See Estelle v. Gamble*,
5 429 U.S. 97, 104 (1976). A determination of "deliberate indifference" involves an
6 examination of two elements: the seriousness of the prisoner's medical need and the nature
7 of the defendant's response to that need. *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.
8 1992) (overruled on other grounds, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136
9 (9th Cir. 1997) (en banc)).

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 steps to
12 abate it. *Farmer v. Brennan*, 511 U. S. 825, 837 (1994) (equating standard with that of
13 criminal recklessness). The prison official must not only "be aware of facts from which the
14 inference could be drawn that a substantial risk of serious harm exists," but "must also draw
15 the inference." *Id.* Consequently, in order for deliberate indifference to be established, there
16 must exist both a purposeful act or failure to act on the part of the defendant and harm
17 resulting therefrom. *See McGuckin*, 974 F.2d at 1060. In order to prevail on a claim of
18 deliberate indifference to medical needs, a plaintiff must establish that the course of
19 treatment the doctors chose was "medically unacceptable under the circumstances" and that
20 they embarked on this course in "conscious disregard of an excessive risk to plaintiff's
21 health." *See Toguchi v. Chung*, 391 F.3d 1051, 1058-60 (9th Cir. 2004). A claim of mere
22 negligence related to medical problems, or a difference of opinion between a prisoner patient
23 and a medical doctor, is not enough to make out a violation of the Eighth Amendment. *Id.*;
24 *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).

25 Plaintiff's complaint is deficient in that it does not contain sufficient factual matter to
26 support his claims. As to (1) it appears that Dr. Williams offered pain medication, but that
27 plaintiff refused to pay for it. Such facts do not indicate that Dr. Williams knew of and
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1 disregarded a serious risk to plaintiff’s health. Rather, plaintiff refused treatment that was
2 offered to him. As to his other claims against Williams, plaintiff has not alleged specific
3 facts that Williams failed to treat his mobility problems or his sleep disorder. Instead,
4 plaintiff alleges facts only as to the medication claim. As to (2), it appears that Adam
5 ordered a shower chair for plaintiff, though refused to order him other equipment to treat his
6 mobility problems. This is insufficient. Adam provided some treatment. That plaintiff, in
7 his opinion, did not receive all the treatment he wanted is not sufficient to state a claim for
8 relief. *See Toguchi*, 391 F.3d at 1058–60. Plaintiff must allege specific facts that Adam’s
9 refusal to order other equipment constituted a disregard of a serious risk to plaintiff’s health.
10 Also, his allegations regarding Adam’s refusal to prescribe medication are insufficient
11 because his factual allegations concern only medical equipment and physical therapy.

12 As to (3), it appears that Sayre promised to look into getting plaintiff a cane.
13 Plaintiff’s allegations do not go further, and therefore are insufficient. Promising to look into
14 a matter and not following up with plaintiff does not, without more, show that Sayre knew of
15 and disregarded a serious risk to plaintiff’s health. Similarly, plaintiff’s allegations that
16 Sayre’s discontinuation of cremes and medications, and his refusal to place plaintiff in a
17 medical facility, do not state claims for relief. Plaintiff himself says that Sayre discontinued
18 the medications and refused placement in a medical facility because his supervisors refused
19 to approve of further dispensation of such treatment. Plaintiff must allege specific facts that
20 Sayre could have, but refused to, provide proper treatment, and that his refusal to supply
21 medications or placement in a medical facility constituted deliberate indifference to his
22 serious medical needs. As to (5), plaintiff does not specify what medical complaints he
23 spoke of with L. Phillips, or what claim she allegedly recommended denying.

24 Plaintiff alleges in (4) and (6)–(8) claims against persons in authority over the other
25 defendants. Because there is no “pure” respondeat superior liability under section 1983, the
26 requisite causal connection for section 1983 purposes may be established when an official
27 sets in motion a “series of acts by others which the actor knows or reasonably should know
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1 would cause others to inflict” constitutional harms. *Preschooler II v. Clark Co. Sch. Bd. of*
2 *Trustees*, 479 F.3d 1175, 1183 (9th Cir. 2007) (citation removed). In order to hold
3 supervisors liable under § 1983, a plaintiff must show “(1) that he possessed a constitutional
4 right of which he was deprived; (2) that the [named defendants] had a policy; (3) that the
5 policy ‘amounts to deliberate indifference’ to [plaintiff’s] constitutional right; and (4) that the
6 policy is the “moving force behind the constitutional violation.” *Anderson v. Warner*, 451
7 F.3d 1063, 1070 (9th Cir. 2006) (citations removed). There also must be a “direct causal
8 link” between the policy or custom and the injury, and plaintiff must be able to demonstrate
9 that the injury resulted from a “permanent and well settled practice.” *Id.*, citing *McDade v.*
10 *West*, 223 F.3d 1135, 1141 (9th Cir. 2002). Plaintiff’s allegations do not meet these
11 requirements.

12 Accordingly, the complaint is DISMISSED with leave to amend. Plaintiff shall file an
13 amended complaint within 30 days from the date this order is filed. The first amended
14 complaint must include the caption and civil case number used in this order (10-4695 RS
15 (PR)) and the words FIRST AMENDED COMPLAINT on the first page. Because an
16 amended complaint completely replaces the previous complaints, plaintiff must include in his
17 first amended complaint all the claims he wishes to present and all of the defendants he
18 wishes to sue. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Plaintiff may
19 not incorporate material from the prior complaint by reference. Failure to file an amended
20 complaint in accordance with this order will result in dismissal of this action without further
21 notice to plaintiff.

22 It is plaintiff’s responsibility to prosecute this case. Plaintiff must keep the Court
23 informed of any change of address by filing a separate paper with the clerk headed “Notice
24 of Change of Address.” He must comply with the Court’s orders in a timely fashion or ask
25 for an extension of time to do so. Failure to comply may result in the dismissal of this action
26 pursuant to Federal Rule of Civil Procedure 41(b).

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Plaintiff's motions for the appointment of counsel (Docket No. 3), appointment of *amicus curiae* (Docket No. 4), and to file an unexhausted claim after exhaustion (Docket No. 5) are DENIED without prejudice. Plaintiff may refile such motions when he files his amended complaint. This order terminates Docket Nos. 3, 4 & 5.

IT IS SO ORDERED.

DATED: February 22, 2011


RICHARD SEEBORG
United States District Judge