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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VICTOR M. ACUNA,
Plaintiff,

v.

NNENNA IKEGBU, et al.,
Defendants.

Case No. [14-cv-03651-JCS](#) (PR)

**ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND**

INTRODUCTION

This is a federal civil rights action filed under 42 U.S.C. § 1983 by a pro se state prisoner. After review of the complaint pursuant to 28 U.S.C. § 1915(e), the Court DISMISSES the complaint with leave to file an amended complaint on or before January 25, 2015.¹

DISCUSSION

A. Standard of Review

In its initial review of this pro se complaint, this Court must dismiss any claim that is frivolous or malicious, or fails to state a claim on which relief may be granted, or seeks

¹ Plaintiff consented to magistrate judge jurisdiction. The magistrate judge, then, has jurisdiction to issue this order, even though defendants have not been served or consented to magistrate judge jurisdiction. *See Neals v. Norwood*, 59 F.3d 530, 532 (5th Cir. 1995) (holding that magistrate judge had jurisdiction to dismiss prisoners action under 42 U.S.C. § 1983 as frivolous without consent of defendants because they had not been served and therefore were not parties).

1 monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C.
2 § 1915(e). Pro se pleadings must be liberally construed. *See Balistreri v. Pacifica Police*
3 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

4 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a
5 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949
6 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has
7 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
8 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
9 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal
10 conclusions cast in the form of factual allegations if those conclusions cannot reasonably
11 be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55
12 (9th Cir. 1994).

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

17 **B. Legal Claims**

18 Plaintiff alleges that several persons at CSP-Sacramento and Pelican Bay State
19 Prison provided constitutionally inadequate health care when he sought treatment for his
20 injured foot.

21 **1. CSP-Sacramento Defendants**

22 The events giving rise to the CSP-Sacramento claims occurred in the Eastern
23 District of California and therefore must be heard in that district. Accordingly, plaintiff’s
24 claims against the warden of CSP-Sacramento; Andrew Nangalam, a doctor at CSP-
25 Sacramento; and the Doe defendants at CSP-Sacramento are DISMISSED without
26 prejudice and these persons are TERMINATED as defendants in this action. If plaintiff
27 wishes to pursue his claims against these defendants, he must file a civil rights action in
28 that district.

1 **2. Pelican Bay Defendants**

2 The complaint will be dismissed with leave to amend, for the reasons stated below.
3 Plaintiff lists the following Pelican Bay defendants: (a.) Nnenna Ikegbu, a doctor;
4 (b.) Donna Jacobsen, a doctor; (c.) Michael Sayre, Chief Medical Officer; (d.) Maureen
5 McLean, another medical officer; (e.) Rickie Lee Strawn, a nurse; (f.) S. Smedley, a nurse;
6 (g.) C. Tinoshenko, a nurse; (8) H. Williams, a nurse; and (h.) H. McAlexander, a nurse.

7 **(a.) Nnenna Ikegbu**

8 Liberally construed, his claim against Ikegbu is cognizable under § 1983. Plaintiff
9 must, however, reallege this claim with specific facts in his amended complaint. If he fails
10 to do so, the Court will deem the claim waived.

11 **(b.) Donna Jacobsen**

12 A prison official is deliberately indifferent if he knows that a prisoner faces a
13 substantial risk of serious harm and disregards that risk by failing to take reasonable steps
14 to abate it. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must
15 not only “be aware of facts from which the inference could be drawn that a substantial risk
16 of serious harm exists,” but “must also draw the inference.” *Id.* Consequently, in order
17 for deliberate indifference to be established, there must exist both a purposeful act or
18 failure to act on the part of the defendant and harm resulting therefrom. *See McGuckin v.*
19 *Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992).

20 His allegations against Donna Jacobsen do not state a claim under this standard.
21 His alleges that Jacobsen provided him with a pillow to elevate his injured leg, a bottom
22 bunk assignment, a brace, and a ground floor housing chrono. (Compl. at 12.) Not only
23 do these allegations fail to state a claim for deliberate indifference, they actually show that
24 he received appropriate and constitutionally adequate care. Accordingly, his claims
25 against Jacobsen are DISMISSED with leave to amend.

26 **(c.) Michael Sayre**

27 “A person deprives another ‘of a constitutional right, within the meaning of section
28 1983, if he does an affirmative act, participates in another’s affirmative acts, or omits to

1 perform an act which he is legally required to do that causes the deprivation of which [the
2 plaintiff complains].” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (quoting *Johnson*
3 *v. Duffy*, 588 F.2d 740, 743 (9th Cir.1978)). The inquiry into causation must be
4 individualized and focus on the duties and responsibilities of each individual defendant
5 whose acts or omissions are alleged to have caused a constitutional deprivation. *Id.*

6 Plaintiff fails to state why Sayre is liable for deliberate indifference. In the
7 complaint, he alleges only that Sayre ruled on one of plaintiff’s prison grievances.
8 (Compl. at 15.) This is not sufficient to state a claim that Sayre knew plaintiff faced a risk
9 of serious harm and failed to act. Accordingly, this claim is DISMISSED with leave to
10 amend. In his amended complaint, plaintiff must set for specific facts tying Sayre to a
11 constitutional violation, or his claim will not survive screening.

12 The Court assumes that plaintiff names Sayre also because he may be liable as
13 supervisor. However, there is no respondeat superior liability under § 1983. *Taylor v.*
14 *List*, 880 F.2d 1040, 1045 (9th Cir. 1989). It is not enough that a supervisor merely has a
15 supervisory relationship over the defendants; the plaintiff must show that the supervisor
16 “participated in or directed the violations, or knew of the violations and failed to act to
17 prevent them.” *Id.* Furthermore, supervisor defendants are entitled to qualified immunity
18 where the allegations against them are simply “bald” or “conclusory” because such
19 allegations do not “plausibly” establish the supervisors’ personal involvement in their
20 subordinates’ constitutional wrong. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948–52 (2009).
21 In order for any claim against Sayre to survive review, plaintiff must allege specific facts
22 linking the supervisory defendant to the actions of the other defendants.

23 **(d.) Maureen McLean and (e.) Rickie Lee Strawn**

24 Plaintiff’s undetailed allegations fail to meet the specificity requirements of *Leer* as
25 to these defendants. Specifically, plaintiff’s complaint lacks any specific factual
26 allegations tying Maureen Mclean or Rickie Lee Strawn to any constitutional violation.
27 Accordingly, his claims against Mclean and Strawn are DISMISSED with leave to amend.
28 In his amended complaint, plaintiff’s allegations must meet the requirements of *Leer* in

1 order to survive review.

2 **(f.) S. Smedley**

3 Plaintiff alleges that Smedley partially granted his prison grievance, which means
4 that Smedley approved whatever treatment plaintiff sought. (Compl. at 17-18.) This does
5 not state a claim for deliberate indifference. He alleges that “no treatment was
6 forthcoming,” but does not provide any specific facts tying Smedley to this lack of
7 treatment. This claim is DISMISSED with leave to amend.

8 **(g.) C. Tinoshenko**

9 Plaintiff alleges that Tinoshenko said that she would speak to the doctors about
10 getting stronger pain medication for him, and that she provided him with ibuprofen and
11 Tylenol-3. (Compl. at 11-12.) This does not state a claim for deliberate indifference.
12 Rather, these allegations show that Tinoshenko provided reasonable and timely treatment.
13 This claim is DISMISSED with leave to amend.

14 **(h.) H. Williams**

15 Plaintiff alleges that Williams examined him and on another occasion yelled at him
16 that he had an appointment with a doctor. (Compl. 11 & 15.) While Williams may have
17 been rude, these allegations do not show deliberate indifference. This claim is
18 DISMISSED with leave to amend.

19 **(i.) H. McAlexander**

20 Plaintiff alleges that McAlexander told him that his x-rays showed that his foot had
21 not healed. (Compl. at 16.) This does not state a claim for deliberate indifference. This
22 claim is DISMISSED with leave to amend.

23 **CONCLUSION**

24 The complaint is DISMISSED with leave to amend. Plaintiff shall file an amended
25 complaint on or before January 25, 2015. The first amended complaint must include the
26 caption and civil case number used in this order (14-3651 JCS (PR)) and the words FIRST
27 AMENDED COMPLAINT on the first page. It must address all deficiencies discussed
28 above. Because an amended complaint completely replaces the previous complaints,

1 plaintiff must include in his first amended complaint all the claims he wishes to present
2 and all of the defendants he wishes to sue — this includes that claim against Ikegbu found
3 cognizable above. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Plaintiff
4 may not incorporate material from the prior complaint by reference. Failure to file an
5 amended complaint in accordance with this order will result in dismissal of this action
6 without further notice to plaintiff.

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

12 Plaintiff’s motion for the appointment of counsel (Docket No. 4) is DENIED
13 without prejudice. He may refile this motion along with his amended complaint. The
14 Clerk shall terminate Docket No. 4.

15 **IT IS SO ORDERED.**

16 **Dated:** December 15, 2014

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19 JOSEPH C. SPERO
20 United States Magistrate Judge
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Case No. [14-cv-03651-JCS](#)

CERTIFICATE OF SERVICE

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

That on 12/15/2014, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Victor M. Acuna ID: #:D-33299
Pelican Bay State Prison
P.O. Box 7500, Housing: D2-216
Crescent City, CA 95532

Dated: 12/15/2014

Richard W. Wieking
Clerk, United States District Court

By: Karen L. Hom
Karen Hom, Deputy Clerk to the
Honorable JOSEPH C. SPERO