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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JEFF J. HANCOCK,

No. C 09-06082 CW (PR)

Plaintiff,

ORDER DISMISSING COMPLAINT WITH
LEAVE TO AMEND

v.

CHIEF OF CORRECTION EDWARD C.
FLORES, et al.,

Defendants.

INTRODUCTION

Plaintiff, a state prisoner currently incarcerated at the California Training Facility (CTF), has filed a pro se civil rights action pursuant to 42 U.S.C. § 1983 alleging that Defendants were deliberately indifferent to his serious medical needs. He seeks monetary damages.

His motion for leave to proceed in forma pauperis has been granted.

Venue is proper because the events giving rise to the claim are alleged to have occurred at the Santa Clara County Jail, which is located in this judicial district. See 28 U.S.C. § 1391(b).

DISCUSSION

I. 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 cognizable claims and dismiss any claims that are frivolous, malicious, fail

1 to state a claim upon which relief may be granted or seek monetary
2 relief from a defendant who is immune from such relief. See id.
3 § 1915A(b)(1), (2). Pro se pleadings must, however, be liberally
4 construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
5 699 (9th Cir. 1988).

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

12 II. Deliberate Indifference Claim

13 Deliberate indifference to serious medical needs violates the
14 Eighth Amendment's proscription against cruel and unusual
15 punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976);
16 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled
17 on other grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133,
18 1136 (9th Cir. 1997) (en banc); Jones v. Johnson, 781 F.2d 769, 771
19 (9th Cir. 1986). A determination of "deliberate indifference"
20 involves an examination of two elements: the seriousness of the
21 prisoner's medical need and the nature of the defendant's response
22 to that need. See McGuckin, 974 F.2d at 1059. A "serious" medical
23 need exists if the failure to treat a prisoner's condition could
24 result in further significant injury or the "unnecessary and wanton
25 infliction of pain." Id. (citing Estelle, 429 U.S. at 104). A
26 prison official is deliberately indifferent if he or she knows that
27 a prisoner faces a substantial risk of serious harm and disregards
28

1 that risk by failing to take reasonable steps to abate it. Farmer
2 v. Brennan, 511 U.S. 825, 837 (1994).

3 Plaintiff's allegation that he suffers from "Post-Traumatic
4 Epilepsy with associated Grand Mal seizures," supports an inference
5 that he has serious medical needs. (Compl., Attach. at 2.)
6 Liberally construed, Plaintiff's allegations that the medical staff
7 at Santa Clara County Jail failed to provide adequate medical
8 treatment for his illness -- while he was housed there from August
9 8, 2003 through September 10, 2003 -- would state a cognizable
10 deliberate indifference claim.

11 Specifically, Plaintiff claims that on August 8, 2003,
12 "Correctional Officer Doe #1," the intake booking officer, "failed
13 to note the anti-seizure medication necessary to maintain the
14 plaintiff's health" (Id.) Plaintiff also claims that
15 "Nurse Doe #2 conducted a nursing assessment at approximately the
16 same time correctional staff was booking Plaintiff." (Id.) He
17 claims, "Defendants Doe #1 and Doe #2 knew Plaintiff had seizures
18 through verbal inquiry during intake/booking." (Id. at 10.) He
19 also claims, "Defendants knew through Plaintiff's previous
20 incarceration of 2/9/2000 that his condition stemmed from a
21 fractured skull in 1999, and that he suffered from Grand Mal
22 seizures which were controlled by the injection [sic] of the anti-
23 seizure medication Dilantin." (Id.) However, Plaintiff claims
24 Defendants did not provide him with his anti-seizure medication.
25 (Id. at 9.)

26 Plaintiff claims that, on August 9, 2003 at 11:00 AM, "the
27 failure of correctional staff to provide Plaintiff's anti-seizure
28 medication for his serious medical need caused Plaintiff to suffer

1 a Grand Mal seizure, fall off of his bunk [bed] striking his head
2 abruptly on the concrete cell floor, causing nerve damage which
3 permanently impaired his hearing and mobility (balance)"
4 (Id. at 4, 9.) He was found unconscious on the cell floor, and
5 taken to the "jail hospital," and then released on August 10, 2003
6 after he was "prescribed an unfamiliar medication and his balance
7 was irregular." (Id. at 4.)

8 On August 14, 2003, Plaintiff "complained of a bitten toungue
9 [sic] he'd suffered during a seizure on 8/9/03." (Id.) He also
10 informed his physician that he had not yet received his "prescribed
11 anti-seizure medication since [his] incarceration." (Id.)

12 On September 10, 2003, Plaintiff was transferred to Elmwood
13 Men's Facility in Milpitas, California. (Id.) Thereafter,
14 Plaintiff was transferred to several other prisons before he was
15 finally transferred to Salinas Valley State Prison in 2008 and then
16 eventually to CTF. (Id.)

17 Liberally construed, Plaintiff's allegations present a
18 cognizable Eighth Amendment claim for deliberate indifference to
19 his serious medical needs. However, Plaintiff identifies
20 "Correctional Officer Doe #1" and "Nurse Doe #2" as those who were
21 present and participated in the deliberate indifference to his
22 serious medical needs, and whose names he intends to learn through
23 discovery. The use of Doe defendants is not favored in the Ninth
24 Circuit. See Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir.
25 1980). However, where the identity of the defendants cannot be
26 known prior to the filing of a complaint the plaintiff should be
27 given an opportunity through discovery to identify them. Id.

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1 Failure to afford the plaintiff such an opportunity is error. See
2 Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999).

3 Accordingly, the Eighth Amendment claim for deliberate
4 indifference against the Doe defendants is DISMISSED without
5 prejudice. Should Plaintiff learn their identities, he may move to
6 file an amended complaint to add them as named defendants. See
7 Brass v. County of Los Angeles, 328 F.3d 1192, 1195-98 (9th Cir.
8 2003).

9 III. Supervisory Liability Claim

10 In addition to naming "Correctional Officer Doe #1" and "Nurse
11 Doe #2," Plaintiff also names "Santa Clara County Chief of
12 Correction Edward C. Flores" in his supervisory capacity. A
13 supervisor may be liable under § 1983 upon a showing of
14 (1) personal involvement in the constitutional deprivation or (2) a
15 sufficient causal connection between the supervisor's wrongful
16 conduct and the constitutional violation. Redman v. County of San
17 Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc) (citation
18 omitted). Here, Plaintiff has alleged neither.

19 Accordingly, Plaintiff's supervisory liability claim against
20 Defendant Flores is DISMISSED with leave to amend. Plaintiff may
21 file an amended supervisory liability claim if he can truthfully
22 allege facts meeting the standards explained above.

23 IV. Exhaustion

24 Another question which must be answered before Plaintiff can
25 proceed with any claims for monetary damages is whether he has
26 exhausted available administrative remedies with respect to his
27 claims.

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1 The Prison Litigation Reform Act of 1995 (PLRA) amended 42
2 U.S.C. § 1997e to provide that "[n]o action shall be brought with
3 respect to prison conditions under [42 U.S.C. § 1983], or any other
4 Federal law, by a prisoner confined in any jail, prison, or other
5 correctional facility until such administrative remedies as are
6 available are exhausted." 42 U.S.C. § 1997e(a). Under this
7 section, an action must be dismissed unless the prisoner exhausted
8 his available administrative remedies before he filed suit, even if
9 the prisoner fully exhausts while the suit is pending. See
10 McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). "[T]he
11 PLRA's exhaustion requirement applies to all inmate suits about
12 prison life, whether they involve general circumstances or
13 particular episodes, and whether they allege excessive force or
14 some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002).
15 Exhaustion of all "available" remedies is mandatory; those remedies
16 need not meet federal standards, nor must they be "plain, speedy
17 and effective." Id. at 524; Booth v. Churner, 532 U.S. 731, 739-40
18 & n.5 (2001). Even when the prisoner seeks relief not available in
19 grievance proceedings, notably money damages, exhaustion is a
20 prerequisite to suit. Id. at 741. The purposes of the exhaustion
21 requirement include allowing the prison to take responsive action,
22 filtering out frivolous cases and creating an administrative
23 record. See Porter, 534 U.S. at 525.

24 A prisoner's concession to non-exhaustion is a valid ground
25 for dismissal, so long as no exception to exhaustion applies.
26 Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir.), cert. denied, 124
27 S. Ct. 50 (2003). Accordingly, a claim may be dismissed without
28 prejudice if it is clear from the record that the prisoner has

1 conceded that he did not exhaust administrative remedies. Id.

2 Plaintiff states that administrative remedies were
3 "unavailable due to [his] transfer to state prison." (Compl. at
4 2.) He also claims that he "didn't know [he] suffered a permanent
5 injury while [he] was incarcerated in county jail." (Id.) He
6 "requested a grievance from the county while in prison, [but] they
7 said you have to be currently in custody in the Santa Clara County
8 Jail." (Id.) It thus appears from the face of the complaint that
9 he has not exhausted his administrative remedies as required by 42
10 U.S.C. § 1997e(a). Therefore, his claims are subject to dismissal.
11 If Plaintiff did exhaust his administrative remedies with respect
12 to his claims before filing this action, he may amend his complaint
13 to so allege, as set forth below. Otherwise, the action will be
14 dismissed without prejudice to refile after exhausting his
15 administrative remedies. See McKinney, 311 F.3d at 1199-1201.

16 CONCLUSION

17 For the foregoing reasons, the Court orders as follows:

- 18 1. Plaintiff's Eighth Amendment claim for deliberate
19 indifference against the Doe Defendants is DISMISSED without
20 prejudice. Plaintiff may move to file an amended complaint to add
21 them as named defendants once he has learned their identities.
- 22 2. Plaintiff's supervisory liability claim against Defendant
23 Flores is DISMISSED with leave to amend if he can truthfully allege
24 facts meeting the standards explained above.
- 25 3. If Plaintiff did exhaust his administrative remedies with
26 respect to his claims before filing this action, he may amend his
27 complaint to so allege. Otherwise, the action will be dismissed
28 without prejudice to refile after exhausting his administrative

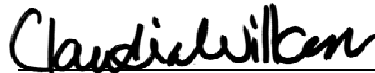
1 remedies.

2 4. Within thirty (30) days from the date of this Order
3 Plaintiff may file an amended complaint as set forth above.
4 Plaintiff must use the attached civil rights form, write the case
5 number for this action -- C 09-06082 CW (PR) -- on the form,
6 clearly label the complaint "Amended Complaint," and complete all
7 sections of the form. Because an amended complaint completely
8 replaces the original complaint, Plaintiff must include in it all
9 the claims he wishes to present. See Ferdik v. Bonzelet, 963 F.2d
10 1258, 1262 (9th Cir. 1992). He may not incorporate material from
11 the original complaint by reference. The failure to file an
12 amended complaint will result in the dismissal of this action
13 without prejudice.

14 5. The Clerk of the Court shall send Plaintiff a blank civil
15 rights form along with a copy of this Order.

16 IT IS SO ORDERED.

17 DATED: 11/30/2010



CLAUDIA WILKEN
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 JEFF J HANCOCK,

5 Plaintiff,

6 v.

7 SANTA CLARA COUNTY et al,

8 Defendant.

Case Number: CV09-06082 CW

CERTIFICATE OF SERVICE

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

11 That on November 30, 2010, I SERVED a true and correct copy(ies) of the attached and **blank civil**
12 **rights form**, by placing said copy(ies) and **blank civil rights form** in a postage paid envelope
13 addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by
14 placing said copy(ies) and **blank civil rights form** into an inter-office delivery receptacle located in
15 the Clerk's office.

16 Jeff J. Hancock
17 V-49474
18 CTF North - LB - 111L
19 P.O. Box 705
20 Soledad, CA 93960

21 Dated: November 30, 2010

22 Richard W. Wieking, Clerk
23 By: Nikki Riley, Deputy Clerk
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