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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT FRED CRAIG,
Plaintiff,

v.

RON DAVIS, et al.,
Defendants.

Case No. [15-cv-03664-PJH](#)

**ORDER OF DISMISSAL WITH LEAVE
TO AMEND**

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.

DISCUSSION

I. 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

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

17 Plaintiff states that he received inadequate medical care.

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
22 banc). A determination of "deliberate indifference" involves an examination of two
23 elements: the seriousness of the prisoner's medical need and the nature of the
24 defendant's response to 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.*
27 The existence of an injury that a reasonable doctor or patient would find important and
28 worthy of comment or treatment; the presence of a medical condition that significantly

1 affects an individual's daily activities; or the existence of chronic and substantial pain are
2 examples of indications that a prisoner has a "serious" need for medical treatment. *Id.* at
3 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
6 steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must
7 not only "be aware of facts from which the inference could be drawn that a substantial
8 risk of serious harm exists," but he "must also draw the inference." *Id.* If a prison official
9 should have been aware of the risk, but was not, then the official has not violated the
10 Eighth Amendment, no matter how severe the risk. *Gibson v. County of Washoe*, 290
11 F.3d 1175, 1188 (9th Cir. 2002). "A difference of opinion between a prisoner-patient and
12 prison medical authorities regarding treatment does not give rise to a § 1983 claim."
13 *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).

14 Plaintiff appears to be diabetic and on March 3, 2015, was supposed to receive
15 100 units of Lantus, a long acting insulin. Instead, he states that a nurse gave him 100
16 units of regular insulin, which would have killed a normal person, but because plaintiff is
17 440 pounds, the extra fat saved his life. Plaintiff was taken to Marin General Hospital for
18 treatment that same day. A medical progress report from the prison noted that he was
19 treated immediately and responded to the treatment without any serious adverse effects
20 other than hypoglycemic symptoms. Plaintiff names as defendants the nurse who gave
21 the shot, the chief medical officer of the prison, and the warden. He seeks money
22 damages.

23 To state an Eighth Amendment claim, plaintiff must show that the defendants
24 acted with deliberate indifference. If a prison official should have been aware of the risk,
25 but was not, then the official has not violated the Eighth Amendment, no matter how
26 severe the risk. *Gibson*, 290 F.3d at 1188. A claim of medical malpractice or negligence
27 is insufficient to make out a violation of the Eighth Amendment. *See Toguchi v. Chung*,
28 391 F.3d 1051, 1060-61 (9th Cir. 2004).

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While this was a serious incident, based on plaintiff's allegations it appears that the nurse made a mistake but plaintiff has not shown deliberate indifference. Plaintiff's claim more resembles medical malpractice or negligence which should be brought in state court. However, plaintiff will be provided one opportunity to amend to present a cognizable Eighth Amendment claim.

CONCLUSION

1. The complaint is **DISMISSED** with leave to amend in accordance with the standards set forth above. The amended complaint must be filed no later than **October 12, 2015**, and must include the caption and civil case number used in this order and the words AMENDED COMPLAINT on the first page. Because an amended complaint completely replaces the original complaint, plaintiff must include in it all the claims he wishes to present. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He may not incorporate material from the original complaint by reference.

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

IT IS SO ORDERED.

Dated: September 3, 2015



PHYLLIS J. HAMILTON
United States District Judge

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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 September 3, 2015, 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.

Robert Fred Craig ID: AS6563
San Quentin State Prison
San Quentin, CA 94974

Dated: September 3, 2015

Susan Y. Soong
Clerk, United States District Court

By: 
Nichole Peric, Deputy Clerk to the
Honorable PHYLLIS J. HAMILTON