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

11 DANNY F. ATTERBURY,)
12 Plaintiff,)
13 v.)
14 DAVE GRAZAINI, et al.,)
15 Defendants.)
16

No. C 10-0274 LHK (PR)
ORDER OF DISMISSAL
WITH LEAVE TO AMEND

(Docket No. 2)

17 Plaintiff, a former civil detainee at Napa State Hospital (“NSH”), proceeding *pro se*, filed
18 a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff’s motion for leave to proceed in
19 forma pauperis is GRANTED. For the reasons stated below, the Court dismisses the complaint
20 with leave to amend.

DISCUSSION

21 A. Standard of Review

22 A federal court must conduct a preliminary screening in any case in which a prisoner
23 seeks redress from a governmental entity or officer or employee of a governmental entity. *See*
24 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss
25 any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or
26 seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C.
27 § 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v.*
28

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

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

6 B. Legal Claims

7 Plaintiff alleges that Defendants individually and collectively prevented him from
8 obtaining proper medical treatment. (Complaint at 2.) Plaintiff further alleges that Defendants
9 abused him by preventing him from “obtaining adequate and proper exercise, fresh air,
10 medicines, and food.” (*Id.* at 2-3.) Finally, Plaintiff alleges that Dr. Raymond unnecessarily
11 removed Plaintiff’s gall bladder, which resulted in a potentially fatal medical condition. (*Id.* at
12 3.)

13 The Constitution does not mandate comfortable prisons, but neither does it permit
14 inhumane ones. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994). The conditions under which
15 a prisoner is confined are subject to scrutiny under the Eighth Amendment. *See Helling v.*
16 *McKinney*, 509 U.S. 25, 31 (1993). The Amendment also imposes duties on officials who must
17 provide all prisoners with the basic necessities of life such as food, clothing, shelter, sanitation,
18 medical care and personal safety. *See Farmer*, 511 U.S. at 832. In determining whether a
19 deprivation of a basic necessity is sufficiently serious to satisfy the objective component of an
20 Eighth Amendment claim, a court must consider the circumstances, nature, and duration of the
21 deprivation. The more basic the need, the shorter the time it can be withheld. *See Johnson v.*
22 *Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). Substantial deprivations of shelter, food, drinking
23 water or sanitation for four days, for example, are sufficiently serious to satisfy the objective
24 component of an Eighth Amendment claim. *See id.* at 732-733.

25 Also, deliberate indifference to serious medical needs violates the Eighth Amendment’s
26 proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104
27 (1976). A determination of “deliberate indifference” involves an examination of two elements:
28 the seriousness of the prisoner’s medical need and the nature of the defendant’s response to that

1 need. *See McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*,
2 *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

3 However, the action cannot proceed here because Plaintiff has not provided the Court
4 with the information necessary to determine whether a cognizable claim for relief has been stated
5 against any specifically named Defendant. A complaint that fails to state the specific acts of the
6 defendant which violated the plaintiff's rights fails to meet the requirements of Rule 8(a)(2) of
7 the Federal Rules of Civil Procedure. *Hutchinson v. United States*, 677 F.2d 1322, 1328 n.5 (9th
8 Cir. 1982). However, district courts must afford pro se prisoner litigants an opportunity to
9 amend to correct any deficiency in their complaints. *Lopez v. Smith*, 203 F.3d 1122, 1126-27
10 (9th Cir. 2000) (en banc).

11 In this case, Plaintiff's complaint fails to provide a short and plain statement regarding
12 each claim, including the conduct of each individual defendant that he asserts is responsible for a
13 constitutional violation. Plaintiff must specifically identify what each named defendant did or
14 did not do in order to state a claim with regard to each separate claim. As such, Plaintiff will be
15 granted leave to amend to allege specifics.

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

28 Also, Plaintiff names as defendants Dave Grazaiani, former NSH Executive Director,

1 Jeffrey Zwein, former NSH Medical Director, and Ed Foulk, current NSH Executive Director.
2 Plaintiff should be mindful that a supervisor may be liable under § 1983 only upon a showing of
3 (1) personal involvement in the constitutional deprivation or (2) a sufficient causal connection
4 between the supervisor's wrongful conduct and the constitutional violation. *Redman v. County of*
5 *San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc). A supervisor therefore generally “is
6 only liable for constitutional violations of his subordinates if the supervisor participated in or
7 directed the violations, or knew of the violations and failed to act to prevent them.” *Taylor v.*
8 *List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Plaintiff’s inclusion of these supervisory defendants
9 on the apparent basis that they are liable under a respondeat superior theory is insufficient. *See*
10 *id.*

11 In sum, Plaintiff’s allegations fail to specifically state what unlawful conduct is
12 attributable to any named defendant. Without this basic information, the complaint cannot
13 proceed. The complaint need not be long. In fact, a brief and clear statement with regard to each
14 claim listing each Defendant’s actions regarding that claim is preferable. Accordingly, the
15 complaint is DISMISSED WITH LEAVE TO AMEND. Plaintiff will be provided with thirty
16 days in which to amend to correct the deficiencies in his complaint.

17 CONCLUSION

- 18 1. Plaintiff’s complaint is DISMISSED without prejudice with leave to amend.
- 19 2. Plaintiff shall file an AMENDED COMPLAINT within **thirty days** from the date
20 this order is filed to cure the deficiencies described above. The amended complaint must include
21 the caption and civil case number used in this order (C 10-0274 LHK (PR)) and the words
22 AMENDED COMPLAINT on the first page. Plaintiff may not incorporate material from the
23 prior complaint by reference. **Failure to file an amended complaint within thirty days and in**
24 **accordance with this order will result in dismissal of this action.** The Clerk of the Court shall
25 send Petitioner a blank civil rights form along with his copy of this Order.
- 26 4. Plaintiff is advised that an amended complaint supersedes the original complaint.
27 “[A] plaintiff waives all causes of action alleged in the original complaint which are not alleged
28 in the amended complaint.” *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981).

1 Defendants not named in an amended complaint are no longer defendants. *See Ferdik v.*
2 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).

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

8 IT IS SO ORDERED.

9 DATED: 8/30/2010



LUCY H. KOH
United States District Judge