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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BENITO MORALES,

Plaintiff,

No. C 15-3973 NC (PR)

v.

**ORDER OF DISMISSAL WITH
LEAVE TO AMEND**

CALIFORNIA CORRECTIONAL HEALTH
CARE SERVICES, et al.,

Defendants.

Plaintiff Benito Morales, a California state prisoner proceeding *pro se*, filed a civil rights action under 42 U.S.C. § 1983.¹ Plaintiff is granted leave to proceed *in forma pauperis* in a separate order. For the reasons stated below, the complaint is dismissed with leave to amend.

DISCUSSION

I. Standard of Review

A federal court must engage in a preliminary screening of any case in which a prisoner seeks 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.

¹ Plaintiff has consented to magistrate judge jurisdiction. (Docket No. 5.)

1 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v.*
2 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

3 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of
4 the claim showing that the pleader is entitled to relief.” “Specific facts are not necessary; the
5 statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds
6 upon which it rests.’” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted).

7 Although in order to state a claim a complaint “does not need detailed factual allegations, . . .
8 a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more
9 than labels and conclusions, and a formulaic recitation of the elements of a cause of action
10 will not do. . . . Factual allegations must be enough to raise a right to relief above the
11 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations
12 omitted). A complaint must proffer “enough facts to state a claim to relief that is plausible
13 on its face.” *Id.* at 570.

14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that
15 a right secured by the Constitution or laws of the United States was violated and (2) that the
16 violation was committed by a person acting under the color of state law. *West v. Atkins*, 487
17 U.S. 42, 48 (1988). Liability may be imposed on an individual defendant under § 1983 if the
18 plaintiff can show that the defendant proximately caused the deprivation of a federally
19 protected right. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988).

20 **II. Legal Claim**

21 Plaintiff alleges that on December 27, 2014, plaintiff suffered from excruciating back
22 pain and spasms. Plaintiff was unable to get out of bed, and his cellmate notified the nurse
23 on staff. Defendant Nurse Kim Widger approached plaintiff’s cell and asked if plaintiff
24 could come speak with her. Plaintiff responded that he was in pain and hadn’t been able to
25 get up all morning. Defendant smiled and rolled her eyes, and did not believe that anything
26 was wrong with plaintiff because she could see plaintiff’s legs moving, and plaintiff had
27 received x-rays showing no irregularities. Plaintiff alleges that defendant’s response was
28 deliberately indifferent to his serious medical needs because she was negligent and acted in

1 an unprofessional manner.

2 The Eighth Amendment requires that prison officials take reasonable measures to
3 guarantee the safety of prisoners. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994). To
4 state an Eighth Amendment violation, two requirements are met: (1) the deprivation alleged
5 is, objectively, sufficiently serious; and (2) the prison official is, subjectively, deliberately
6 indifferent to inmate health or safety. *Id.* at 834. Neither negligence nor gross negligence
7 will constitute deliberate indifference. *See id.* at 835-36 & n.4. A prison official cannot be
8 held liable under the Eighth Amendment for denying an inmate humane conditions of
9 confinement unless the standard for criminal recklessness is met, i.e., the official knows of
10 and disregards an excessive risk to inmate health or safety by failing to take reasonable steps
11 to abate it. *See id.* at 837. The official must both be aware of facts from which the inference
12 could be drawn that a substantial risk of serious harm exists, and he must also draw the
13 inference. *See id.*

14 Here, even liberally construed, plaintiff has not stated a claim that defendant was
15 deliberately indifferent to his serious medical needs. From the allegations, no reasonable
16 inference can be made that defendant was criminally reckless, or that she knew that she was
17 subjecting plaintiff to an excessive risk to his health. “A difference of opinion between a
18 prisoner-patient and prison medical authorities regarding treatment does not give rise to a
19 § 1983 claim.” *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). And, a claim of
20 medical malpractice or negligence is insufficient to make out a violation of the Eighth
21 Amendment. *See Toguchi v. Chung*, 391 F.3d 1051, 1060-61 (9th Cir. 2004); *McGuckin v.*
22 *Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992) (mere negligence in diagnosing or treating a
23 medical condition, without more, does not violate a prisoner’s Eighth Amendment rights),
24 *overruled on other grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th
25 Cir. 1997) (en banc).

26 Although plaintiff names additional defendants, he does not link any of those
27 defendants with any action or inaction demonstrating that any of them violated plaintiff’s
28 rights. Liability may only be imposed on an individual defendant under 42 U.S.C. § 1983 if

1 the plaintiff can show that the defendant's actions both actually and proximately caused the
2 deprivation of a federally protected right. *See Lemire v. Cal. Dept. of Corrections &*
3 *Rehabilitation*, 726 F.3d 1062, 1085 (9th Cir. 2013).

4 As the complaint currently reads, plaintiff has not stated a cognizable claim against
5 any defendant. However, if plaintiff believes that he can cure the deficiencies addressed
6 above, he may amend his complaint to do so.

7 **CONCLUSION**

8 1. The complaint is DISMISSED with leave to amend. If Plaintiff believes he can
9 cure the above-mentioned deficiencies in good faith, he must file an amended complaint
10 within **twenty-eight days** from the date this order is filed. The amended complaint must
11 include the caption and civil case number used in this order (C 15-3973 NC (PR)) and the
12 words AMENDED COMPLAINT on the first page. **Failure to file an amended complaint**
13 **within twenty-eight days and in accordance with this order may result in the dismissal**
14 **of this case. The Clerk of the Court is directed to send plaintiff a blank civil rights form**
15 **along with his copy of this order.**

16 2. Plaintiff is advised that an amended complaint supersedes the original
17 complaint. "[A] plaintiff waives all causes of action alleged in the original complaint which
18 are not alleged in the amended complaint." *London v. Coopers & Lybrand*, 644 F.2d 811,
19 814 (9th Cir. 1981).

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

25 IT IS SO ORDERED.

26
27 DATED: January 4, 2016

28 
NATHANAEL M. COUSINS
United States Magistrate Judge