

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANNY TABB,

Plaintiff,

v.

NAPHCARE, HSA, PIERCE COUNTY
JAIL, OLSON, WENDY, BALDERAMA,
PERO, WATKINS, GENGA,

Defendants.

Case No. C21-5541 LK-TLF

ORDER DECLINING SERVICE
AND GRANTING LEAVE TO
AMEND COMPLAINT

This matter comes before the Court on plaintiff's filing of a civil rights complaint. Dkt. 9. Plaintiff has been granted *in forma pauperis* status in this matter and is proceeding *pro se*. Dkt. 8. Considering deficiencies in the complaint discussed below, however, the undersigned will not direct service of the complaint at this time. On or before **February 28, 2022**, plaintiff must either show cause why this cause of action should not be dismissed or file an amended complaint.

DISCUSSION

The Court must dismiss the complaint of a prisoner proceeding *in forma pauperis* "at any time if the [C]ourt determines" that the action: (a) "is frivolous or malicious"; (b) "fails to state a claim on which relief may be granted" or (c) "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2); 28 U.S.C.

§ 1915A(a), (b). A complaint is frivolous when it has no arguable basis in law or fact. *Franklin v. Murphy*, 745 F.3d 1221, 1228 (9th Cir. 1984).

Before the Court may dismiss the complaint as frivolous or for failure to state a claim, though, it “must provide the [prisoner] with notice of the deficiencies of his or her complaint and an opportunity to amend the complaint prior to dismissal.” *McGucken v. Smith*, 974 F.2d 1050, 1055 (9th Cir. 1992); *see also Sparling v. Hoffman Constr., Co., Inc.*, 864 F.2d 635, 638 (9th Cir. 1988); *Noll v. Carlson*, 809 F.2d 1446, 1449 (9th Cir. 1987). On the other hand, leave to amend need not be granted “where the amendment would be futile or where the amended complaint would be subject to dismissal.” *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991).

To state a claim under 42 U.S.C. § 1983, a complaint must allege: (1) the conduct complained of was committed by a person acting under color of state law, and (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985).

Plaintiff’s complaint appears to relate to the defendants failing to replace his hearing aids after they were damaged by the arresting officer. Dkt. 9 at 3. Plaintiff did not identify the arresting officer by name; thus, it is unclear if the arresting officer is one of the named defendants. Plaintiff also claims that his grievances relating to his hearing aids and alleged disability have gone unanswered. *Id.* Plaintiff alleges that defendants acted with deliberate indifference to a serious medical need for hearing aids. *Id.* at 6-7.

1 He also alleges that his rights under the Americans with Disabilities Act (ADA) were
2 violated. *Id.*

3 While Plaintiff names several individual defendants, he fails to allege sufficient
4 facts from which it may be inferred whether any of the named defendants personally
5 acted, or omitted to act, in a manner that caused a violation of plaintiff's constitutional or
6 federal statutory rights. The complaint puts together all "defendants" and claims they
7 have violated plaintiff's rights but fails to connect specific defendants to specific acts or
8 omissions, and fails to allege facts concerning how any such acts or omissions may
9 have been causally connected to violations of plaintiff's constitutional or federal
10 statutory rights.

11 The Court cannot properly screen the complaint until plaintiff complies with the
12 pleading requirements set forth in Rule 8 with respect to their claims. In this regard,
13 plaintiff should list his factual allegations according to the claims that plaintiff is asserting
14 as to each individual defendant -- rather than describing all of their factual allegations
15 together against the defendants as a group. In addition, in order to state a claim, plaintiff
16 must include more than "naked assertions," "labels and conclusions" or "a formulaic
17 recitation of the elements of a cause of action." *Bell Atlantic Corp. v Twombly*, 550 U.S.
18 544, 555-557 (2007). A claim upon which the court can grant relief has facial plausibility;
19 in other words, a claim has "facial plausibility when the plaintiff pleads factual content
20 that allows the court to draw the reasonable inference that the defendant is liable for the
21 misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

22 Plaintiff is advised that in order to state a claim under 42 U.S.C. § 1983, a
23 complaint must establish "the violation of a right secured by the Constitution and the
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1 laws of the United States, and must show that the alleged deprivation was committed by
2 a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (1988). In the
3 amended complaint, plaintiff must write out short, plain statements telling the Court: (1)
4 the constitutional or federal statutory right plaintiffs believe was violated; (2) the name of
5 the person who violated the right; (3) exactly what that person did or failed to do; (4)
6 how the action or inaction of that person is connected to the violation of plaintiff’s
7 constitutional or federal statutory rights; and (5) what specific injury plaintiff suffered
8 because of that person’s conduct. *See Rizzo v. Goode*, 423 U.S. 362, 371–72 (1976).

9 If the person named as a defendant was a supervisory official, plaintiff must (if he
10 can do so in good faith) state facts to show: either -- that the defendant personally
11 participated in the constitutional deprivation (and tell the Court the five things listed
12 above); or -- that the defendant was aware of the similar widespread abuses, but with
13 deliberate indifference to plaintiff’s constitutional rights, failed to take action to prevent
14 further harm to plaintiff. *See Monell v. New York City Department of Social Services*,
15 436 U.S. 658, 691 (1978).

16 Plaintiff must repeat this process regarding each non-supervisory, or supervisory,
17 person he names as a defendant, including any “John Doe” and “Jane Doe” defendants.
18 If plaintiff fails to affirmatively link the conduct of each named defendant with the specific
19 injury suffered by plaintiff, the claim against that defendant will be dismissed for failure
20 to state a claim. Conclusory allegations that a defendant or a group of defendants have
21 violated a constitutional right are not acceptable and will be dismissed. *Ashcroft v. Iqbal*,
22 129 S.Ct. 1937, 1949 (2009).

1 The plaintiff should state all of his allegations relating to each claim under
2 separate headings and within those headings should describe exactly what happened,
3 who was involved – with descriptions of specific acts or omissions of any individual
4 defendant who allegedly was involved, and also set forth any facts that would show how
5 their individual involvement caused the alleged violation of federal law. If plaintiff fails to
6 do so, the Court may recommend dismissal of insufficient claims.

7 In the following paragraphs, some of the legal standards that may apply to
8 plaintiff's claims are set forth. Plaintiff should carefully review the standards and amend
9 only those claims that he believes, in good faith, are supported by facts and law.

10 *Deliberate Indifference*

11 Based on plaintiff's asserted status as a pretrial detainee, the Court construes
12 the complaint as purporting to state a claim under 42 U.S.C. § 1983 for a violation of
13 plaintiff's Fourteenth Amendment rights to medical care. Yet plaintiff's complaint fails to
14 provide sufficient factual allegations regarding defendants' conduct, and thus as
15 currently written, it fails to state a claim for deliberate indifference to plaintiff's medical
16 needs.

17 Under Section 1983, Plaintiff must show that each of the defendants was
18 involved in violating the Constitution with individually culpable action or inaction. *Hines*
19 *v. Youseff*, 914 F.3d 1218 1228 (9th Cir. 2019). Section 1983 actions may be not
20 brought against a supervisor on a theory that the supervisor is liable for the acts of his
21 or her subordinates. See *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658,
22 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *Polk County v. Dodson*, 454 U.S. 312,
23 325, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981). Likewise, a supervising official may not be
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1 held liable for violations made in accordance with a municipality's policy in lieu of the
2 municipality. See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) (quoting
3 *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 690 (1978)). Instead, only the individual
4 actions of the defendants – whether participation or direction of the alleged violation, or
5 knowing of the violation and failing to act to prevent it – can make a defendant liable for
6 violations under his or her supervision. See *Barren v. Harrington*, 152 F.3d 1193, 1194
7 (9th Cir. 1998), cert. denied, 525 U.S. 1154, 119 S. Ct. 1058, 143 L. Ed. 2d 63 (1999).

8 To state a Fourteenth Amendment claim relating to medical care of a pre-trial
9 detainee, a plaintiff must include factual allegations that a state actor acted, or failed to
10 act, in a manner that shows deliberate indifference to his serious medical needs.

11 *Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018). The deliberate
12 indifference standard under the Fourteenth Amendment (in contrast with the Eighth
13 Amendment standard, that has a subjective component) is objective. *Id.*

14 The elements are: “(i) the defendant made an intentional decision with respect to
15 the conditions under which the plaintiff was confined; (ii) those conditions put the
16 plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take
17 reasonable available measures to abate that risk, even though a reasonable official in
18 the circumstances would have appreciated the high degree of risk involved – making
19 the consequences of the defendant's conduct obvious; and (iv) by not taking such
20 measures, the defendant caused the plaintiff's injuries.” *Id.*, at 1125. The defendant's
21 conduct must be objectively unreasonable; concerning element (iii), plaintiff is required
22 to show more than negligence, but less than subjective intent – “something akin to
23 reckless disregard.” *Id.* (citations and internal quotations omitted).

1 Here, plaintiff's complaint contains conclusory allegations that the
2 "jail/state/county" and "medical staff" failed to take action when plaintiff requested new
3 hearing aids. Dkt. 9 at 3. Plaintiff has not alleged what risks he faced or what harm he
4 suffered during the time alleged in the complaint. This is insufficient to demonstrate that
5 the defendants put plaintiff at substantial risk of serious harm, or that the defendants'
6 inactions had injured plaintiff. Further, if the allegations are purely that the defendants
7 denied grievances, and there are no allegations that they "directly participated,
8 encouraged, authorized or acquiesced" in the claimed harm, the necessary showing of
9 personal participation has not been made. *Hayes v. Dovey*, 2011 WL 1157532, at *6
10 (S.D. Cal. Mar. 28, 2011) (quoting *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir.
11 1999)); see *Johnson v. Hayden*, 2012 WL 652586, at *3 (D. Or. Feb. 10, 2012) (citing
12 *Shehee*, 199 F.3d at 300) (it is not unconstitutional to merely deny a grievance).

13 Without further details of the defendants' conduct and affirmative link to a
14 resulting injury, the complaint is insufficient to bring claims against the defendants. See
15 *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976). If plaintiff intends to pursue this
16 claim, he should include all of his factual allegations against *specifically* named
17 defendants relating to this claim in one section of the amended complaint. Their factual
18 allegations must support every element of the claim as described above.

19 *Americans with Disabilities Act (ADA)*

20 Plaintiff generally alleges violations of the ADA. However, it is unclear whether
21 plaintiff is alleging any specific defendants committed particular ADA violations, or
22 whether plaintiff is attempting to bring his ADA claims against defendants in their
23 individual or official capacities. To the extent plaintiff is attempting to bring these claims
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1 against defendants in their individual capacities, plaintiff fails to state a claim because
2 individual liability is precluded under the ADA. *Stewart v. Unknown Parties*, 483 F. App'x
3 374, 374 (9th Cir. 2012) (citing *Lovell v. Chander*, 303 F.3d 1039, 1052 (9th Cir. 2002));
4 *see also Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 107 (2d Cir.
5 2001) (Title II of the ADA does not provide for individual capacity suits against state
6 officials.).

7 To the extent plaintiff is attempting to bring ADA claims against defendants in
8 their official capacities, the ADA provides a “qualified individual with a disability” cannot,
9 “by reason of such disability, be excluded from participation in or be denied the benefits
10 of the services, programs, or activities of a public entity, or be subjected to
11 discrimination by any such entity.” 42 U.S.C. § 12132.

12 “To state a claim of disability¹ discrimination under Title II [of the ADA], the
13 plaintiff must allege four elements: (1) the plaintiff is an individual with a disability; (2)
14 the plaintiff is otherwise qualified to participate in or receive the benefit of some public
15 entity's services, programs, or activities; (3) the plaintiff was either excluded from
16 participation in or denied the benefits of the public entity's services, programs, or
17 activities, or was otherwise discriminated against by the public entity; and (4) such
18 exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.”
19 *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002). In order to recover money
20 damages under Title II, a plaintiff must prove that he was discriminated against

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22 ¹ The term “disability” under the ADA means, “(A) a physical or mental impairment that substantially limits
23 one or more major life activities of such individual; (B) a record of such an impairment; or (C) being
24 regarded as having such an impairment (as described in paragraph (3)).” 42 U.S.C. § 12102(1). Major life
activities include, but are not limited to, “caring for oneself, performing manual tasks, seeing, hearing,
eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating,
thinking, communicating, and working.” 42 U.S.C. § 12102(2).

1 intentionally and the Ninth Circuit uses the “deliberate indifference standard.” *Duvall v.*
2 *County of Kitsap*, 260 F.3d 1124, 1138–39 (9th Cir. 2001). To prove intentional
3 discrimination, Plaintiff must show: 1) that a public entity had knowledge that a violation
4 of his rights under the ADA was substantially likely to occur; and 2) at a minimum, the
5 public entity failed to act. *Lovell v. Chandler*, 303 F.3d 1039, 1056 (9th Cir. 2002).

6 Plaintiff has failed to allege facts showing defendants discriminated against him
7 on the basis of his alleged disability. “The ADA prohibits discrimination because of
8 disability, not inadequate treatment for disability.” *Simmons v. Navajo Cty*, 609 F.3d
9 1011, 1022 (9th Cir. 2010) (citing *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996)
10 (“[T]he Act would not be violated by a prison's simply failing to attend to the medical
11 needs of its disabled prisoners.... The ADA does not create a remedy for medical
12 malpractice.”)).

13 If plaintiff intends to pursue this claim, he should include all of his factual
14 allegations against *specifically* named defendants relating to this claim in one section of
15 the amended complaint. Their factual allegations must support every element of the
16 claim as described above.

17 CONCLUSION

18 The Court DECLINES to serve the complaint which, as discussed above, is
19 deficient. Thus, the Court grants plaintiff the opportunity to file an amended complaint to
20 cure the above-mentioned deficiencies by **February 28, 2022**. The amended complaint
21 must carry the same case number as this one. Plaintiff should list his claims in
22 separately numbered paragraphs containing all relevant factual allegations relating to
23 each separately numbered claim. The amended complaint will act as a complete
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1 substitute for the prior operative complaint. Any cause of action alleged in the original
2 complaint that is not alleged in the second amended complaint is waived. *Forsyth v.*
3 *Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), overruled in part on other grounds,
4 *Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012).

5 The Court will screen the amended complaint to determine whether it contains
6 factual allegations linking each defendant to the alleged violations of plaintiff's rights. If
7 the amended complaint is not timely filed, or fails to adequately address the issues
8 raised herein, the Court may recommend dismissal of the action. The Clerk is directed
9 to send plaintiffs the appropriate forms for filing a 42 U.S.C. § 1983 civil rights complaint
10 and for service, a copy of this Order and the Pro Se Information Sheet.

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12 Dated this 10th day of January, 2022.

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Theresa L. Fricke
16 United States Magistrate Judge
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