

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA**

Kern v. Ho

Kern v. Ho · No. 2:24-cv-1931 TLN CSK P · Decided April 10, 2025

OPINION

(PC) Kern v. Ho

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10

11 JAMES CURTIS KERN, No. 2:24-cv-1931 TLN CSK P

12 Plaintiff, ORDER 13 v.

14 DR. HO,

15 Defendant. 16

17 Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. 18 §
1983 and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This 19
proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1). 20
Plaintiff submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). 21
Accordingly, the request to proceed in forma pauperis is granted. 22 Plaintiff is required to pay the
statutory filing fee of \$350.00 for this action. 28 U.S.C. 23 §§ 1914(a), 1915(b)(1). By this order,
plaintiff is assessed an initial partial filing fee in 24 accordance with the provisions of 28 U.S.C. §
1915(b)(1). By separate order, the Court will 25 direct the appropriate agency to collect the initial
partial filing fee from plaintiff's trust account 26 and forward it to the Clerk of the Court.
Thereafter, plaintiff is obligated to make monthly 27 payments of twenty percent of the preceding
month's income credited to plaintiff's trust account. 28 These payments will be forwarded by the
appropriate agency to the Clerk of the Court each time 1 the amount in plaintiff's account exceeds
\$10.00, until the filing fee is paid in full. 28 U.S.C. 2 § 1915(b)(2). 3 As set forth below, plaintiff's
complaint is dismissed with leave to amend.

4 I. SCREENING STANDARDS

5 The court is required to screen complaints brought by prisoners seeking relief against a 6
governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The 7
court must dismiss a complaint or portion thereof if the prisoner raised claims that are legally 8
“frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek 9
monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

10 A claim is legally frivolous when it lacks an arguable basis either in law or in fact. 11 *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an 12 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 14 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully 15 pleaded, has an arguable legal and factual basis. See *Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989), superseded by statute as stated in *Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 17 2000) (“[A] judge may dismiss [in forma pauperis] claims which are based on indisputably 18 meritless legal theories or whose factual contentions are clearly baseless.”); *Franklin*, 745 F.2d at 19 1227.

20 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and plain 21 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the 22 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). 24 In order to survive dismissal for failure to state a claim, a complaint must contain more than “a 25 formulaic recitation of the elements of a cause of action;” it must contain factual allegations 26 sufficient “to raise a right to relief above the speculative level.” *Bell Atlantic*, 550 U.S. at 555. 27 However, “[s]pecific facts are not necessary; the statement [of facts] need only ‘give the 28 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Erickson v. 1 Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic*, 550 U.S. at 555, citations and internal 2 quotations marks omitted). In reviewing a complaint under this standard, the court must accept as 3 true the allegations of the complaint in question, *Erickson*, 551 U.S. at 93, and construe the 4 pleading in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 5 (1974), overruled on other grounds, *Davis v. Scherer*, 468 U.S. 183 (1984).

6 II. PLAINTIFF’S COMPLAINT

7 Plaintiff alleges that orthopedic specialist Dr. Ho consulted with plaintiff prior to an MRI 8 being taken on March 30, 2023. (ECF No. 1 at 4.) Plaintiff claims Dr. Ho lied to plaintiff and 9 “showed great neglect regarding the lipoma on [plaintiff’s] left forearm,” which is sitting on a 10 nerve, causing plaintiff extreme pain. (Id.) Plaintiff also alleges that the lipoma is pinching the 11 main artery to his heart, causing fluttering in plaintiff’s arm and heartbeat. Despite plaintiff 12 informing Dr. Ho about this, plaintiff alleges that Dr. Ho waited until March 19, 2024 to call 13 plaintiff to medical, when Dr. Ho knew plaintiff was leaving to prison. (Id.) Plaintiff alleges that 14 Dr. Ho said plaintiff had refused surgery to have the lipoma removed a year ago, but plaintiff 15 claims that Dr. Ho previously informed plaintiff he would have to wait until he was released and 16 find someone on his own to perform the surgery, which he alleges shows Dr. Ho’s “dishonesty.” 17 (Id.) Plaintiff claims that Dr. Ho then told plaintiff that Dr. Ho found other nerve problems on 18 plaintiff’s left side and Dr. Ho now thinks plaintiff should see a group of outside

specialists and 19 get a fusion and a surgery before plaintiff transferred to state prison. (Id.) However, on March 20 21, 2024, plaintiff was “suddenly transferred to North Kern State Prison” with serious medical 21 issues, no medical procedures done, and no medical records supporting his need for surgery. (Id.) 22 Plaintiff claims he feels a “great sense of medical neglect,” and that “very careless actions 23 were made by moving [plaintiff] and not even informing Pelican Bay State Prison of plaintiff’s 24 medical issues.” (Id.) Plaintiff contends he remains in a great deal of pain, which is untreated. 25 Plaintiff also contends the lipoma has gotten much harder, his nerves constantly flutter trying to 26 circulate, and his heartbeat is very irregular. Plaintiff contends he is at risk of stroke or heart 27 attack. Plaintiff seeks unidentified injunctive relief, declaratory relief, and monetary damages. 28 (ECF No. 1 at 9.) Plaintiff names Dr. Ho as the sole defendant.

1 III. DISCUSSION

2 A. Standards Governing Medical Care 3 A claim that prison officials are deliberately indifferent to an inmate’s serious medical 4 needs violates either the Eighth Amendment or Fourteenth Amendment, depending on whether 5 plaintiff is a pre-trial detainee or incarcerated pursuant to a conviction.¹ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (Eighth Amendment requires prison official to ensure that inmates receive 7 adequate food, clothing, shelter, and medical care, and to take reasonable measures to guarantee 8 inmates’ safety); *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (pretrial detainee challenge to 9 conditions of confinement is brought under Due Process Clause of Fourteenth Amendment). 10 1. Fourteenth Amendment 11 “Pretrial detainees have a constitutional right to adequate medical care while in the 12 custody of the government and awaiting trial.” *Est. of Nelson v. Chelan Cnty.*, 2024 WL 13 1705923, at *9 (E.D. Wash. Apr. 19, 2024) (citing *Russell v. Lumitap*, 31 F.4th 729, 738 (9th Cir. 14 2022)). The claim is evaluated under an objective deliberate indifference standard. *Gordon v. 15 Cty. of Orange*, 888 F.3d 1118, 1120, 1124-25 (9th Cir. 2018). To state a Fourteenth Amendment 16 claim that a jail official was deliberately indifferent to a pretrial detainee’s safety or health, the 17 detainee must show that (1) the prison official made an intentional decision with respect to the 18 conditions under which the pretrial detainee was confined; (2) those conditions put the pretrial 19 detainee at substantial risk of suffering serious harm; (3) the prison official did not take 20 reasonable available measures to abate that risk, even though a reasonable official in the 21 1 Plaintiff was a state prisoner at the time he filed the instant complaint. According to plaintiff’s 22 petition for writ of habeas corpus, plaintiff was convicted on February 6, 2024. *Kern v. Superior Court*, No. 2:24-cv-2432 DAD JDP P (E.D. Cal.). A court may take judicial notice of court 23 records. See, e.g., *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002) (“[W]e may take notice of proceedings in other courts, both within and without the federal judicial system, if 24 those proceedings have a direct relation to matters at issue”) (internal quotation omitted). 25 Plaintiff was admitted to state custody on March 20, 2024. This information was obtained from the California Department of Corrections and Rehabilitation (“CDCR”) Inmate Locator 26 website, <https://ciris.mt.cdcr.ca.gov/> (accessed Apr. 8, 2025). The Court may take judicial notice of public records available on online inmate

locators. See *United States v. Basher*, 629 F.3d 27 1161, 1165 (9th Cir. 2011) (taking judicial notice of Bureau of Prisons’ inmate locator available to the public); see also *Foley v. Martz*, 2018 WL 5111998, at *1 (S.D. Cal. Oct. 19, 2018) (taking 28 judicial notice of CDCR’s inmate locator). 1 circumstances would have appreciated the high degree of risk involved—making the 2 consequences of the prison official’s conduct obvious; and (4) by not taking such measures, the 3 prison official caused the pretrial detainee’s injuries. *Id.* at 1125. 4 For the third element, the defendant’s conduct must be objectively unreasonable, “a test 5 that will necessarily turn[] on the facts and circumstances of each particular case.” *Id.* (citations 6 and internal quotation marks omitted). The four-part test articulated in *Gordon* requires the 7 plaintiff to prove more than negligence, but less than subjective intent—something akin to 8 reckless disregard. See *id.* Mere negligence and a simple lack of due care do not violate the 9 Fourteenth Amendment. See *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 10 2016); *Gordon*, 888 F.3d at 1125. 11 2. Eighth Amendment 12 To state an Eighth Amendment claim that a prison official is deliberately indifferent to an 13 inmate’s serious medical needs in violation of the Eighth Amendment, the plaintiff must show 14 that the prison official knew that a prisoner faced a substantial risk of serious harm and 15 disregarded that risk by failing to take reasonable steps to abate it. *Farmer*, 511 U.S. at 837; *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). The two-part test for deliberate indifference 17 requires plaintiff to show (1) “a ‘serious medical need’ by demonstrating that failure to treat a 18 prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton 19 infliction of pain,’” and (2) “the defendant’s response to the need was deliberately indifferent.” 20 *Id.* Under the relevant Eighth Amendment standard, “prison officials who actually knew of a 21 substantial risk to inmate health or safety may be found free from liability if they responded 22 reasonably to the risk, even if the harm ultimately was not averted.” *Farmer*, 511 U.S. at 844 (“A 23 prison official’s duty under the Eighth Amendment is to ensure reasonable safety”) (internal 24 quotation marks and citation omitted). To be deliberately indifferent in violation of the Eighth 25 Amendment, a prison official must have a subjective “state of mind more blameworthy than 26 negligence,” akin to criminal recklessness. *Id.* at 835, 839-40. 27 Negligence allegations are insufficient. Deliberate indifference “requires more than 28 ordinary lack of due care.” *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (quoting 1 *Farmer*, 511 U.S. at 835). The indifference to the prisoner’s medical needs must be substantial -- 2 negligence, inadvertence, or differences in medical judgment or opinion do not rise to the level of 3 a constitutional violation. *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004) (negligence 4 constituting medical malpractice is not sufficient to establish an Eighth Amendment violation). 5 B. Analysis 6 Here, plaintiff’s allegations are too vague and conclusory to determine whether plaintiff 7 can state a cognizable claim against Dr. Ho, an orthopedic specialist. Plaintiff refers to neglect, 8 but negligence is insufficient to rise to the level of an Eighth Amendment or Fourteenth 9 Amendment violation. *Toguchi*, 391 F.3d at 1058; *Castro*, 833 F.3d at 1071. Plaintiff disagrees 10 with what Dr. Ho allegedly told plaintiff prior to March 30,

2023, and which consult took place 11 before plaintiff's MRI was taken on March 30, 2023. However, it is well established that "a mere 12 difference of medical opinion . . . [is] insufficient, as a matter of law, to establish deliberate 13 indifference." *Toguchi*, 391 F.3d at 1058 (alterations in original) (citation omitted). This rule 14 applies whether the difference is between the medical professional and a prisoner, or two or more 15 medical professionals. *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016) (citation 16 omitted). Plaintiff must show that the treatment "was medically unacceptable under the 17 circumstances" and was chosen "in conscious disregard of an excessive risk" to plaintiff's health. 18 *Id.* 19 Plaintiff identifies Dr. Ho as an orthopedic specialist, but it is unclear whether Dr. Ho was 20 employed at the jail, or whether he was an outside specialist contracted by the jail. This 21 distinction makes a difference because referrals to outside specialists require referral orders from 22 medical professionals at the jail. If Dr. Ho was an outside specialist, he would have no control 23 over whether or when plaintiff was scheduled to be seen by Dr. Ho. 24 Plaintiff's complaint provides no facts demonstrating he sought medical care after his 25 2023 MRI to seek treatment for his lipoma, or to seek further treatment by Dr. Ho, or to challenge 26 Dr. Ho's alleged failure to provide surgery, or to complain of the extreme pain he was suffering. 27 Further, plaintiff provides no facts explaining how plaintiff was called to see Dr. Ho on March 19, 28 2024. If plaintiff contends that the delay in receiving treatment for his lipoma was based on some 1 act or omission on the part of Dr. Ho, plaintiff must set forth specific facts showing that Dr. Ho's 2 initial decision to defer surgery was medically unacceptable under the circumstances. See 3 *Hamby*, 821 F.3d at 1092. Plaintiff provides no facts demonstrating that plaintiff saw Dr. Ho 4 again until March 19, 2024, or that Dr. Ho was somehow made aware that plaintiff continued to 5 suffer extreme pain after March 2023 as a result of the lipoma not being removed. In addition, 6 while plaintiff questions Dr. Ho's March 19, 2024 findings that Dr. Ho had found other nerve 7 problems on plaintiff's left side, should be seen by a group of outside specialists and get a fusion 8 and a surgery, it is unclear whether those findings were based on Dr. Ho's review of the 2023 9 MRI, or his physical evaluation of plaintiff almost a year after the MRI. 10 Further, as an orthopedic specialist, Dr. Ho would have no control over plaintiff's transfer 11 to state prison. Plaintiff's allegations demonstrate that Dr. Ho did not see plaintiff until March 12 19, 2024, and plaintiff was "suddenly moved to North Kern State Prison" on March 21, 2024. 13 (ECF No. 1 at 4.) Subsequently, plaintiff was transferred to Pelican Bay State Prison, where he 14 was housed when he filed the instant action. Plaintiff includes no factual allegations 15 demonstrating that Dr. Ho was responsible for ensuring plaintiff received medical care after 16 plaintiff was transferred away from the county jail, or that plaintiff's medical records be 17 forwarded to the CDCR. 18 Finally, plaintiff's request for unspecified injunctive relief against defendant Dr. Ho is 19 now moot because plaintiff is no longer housed at the Sacramento County Jail, but has been 20 transferred to state custody, and plaintiff does not allege he has a reasonable expectation of 21 returning to the county jail. See *Stine v. Von Blankensee*, 2024 WL 1406428, at *1 (9th Cir. Apr. 22 2, 2024) ("Stine's deliberate indifference claim seeking injunctive and

declaratory relief has become moot because Stine was transferred to another prison”); *Andrews v. Cervantes*, 493 F.3d 24 1047, 1053 n.5 (9th Cir. 2007) (prisoner’s claims for injunctive relief generally become moot upon transfer) (citing *Johnson v. Moore*, 948 F.2d 517, 519 (9th Cir. 1991) (per curiam) (holding claims for injunctive relief “relating to [a prison’s] policies are moot” when the prisoner has been moved and “he has demonstrated no reasonable expectation of returning to [the prison]”)); *Greer v. KCSO Administration*, 2021 WL 3857677, at *1 (E.D. Cal. Aug. 30, 2021), recommendation 1 adopted, 2021 WL 4502818 (Oct. 1, 2021) (finding Greer’s claim for injunctive relief against county jail moot where he is incarcerated in state prison and there is no reasonable expectation he will return to the county jail), findings and recommendations adopted, 2021 WL 4502818 (Oct. 1, 4 2021). 5 C. Leave to Amend 6 In light of the above deficiencies, plaintiff’s complaint must be dismissed. Fed. R. Civ. P. 7 8(a)(2). The Court will, however, grant leave to file an amended complaint. 8 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions 9 about which he complains resulted in a deprivation of plaintiff’s constitutional rights. See e.g., *West v. Atkins*, 487 U.S. 42, 48 (1988). Also, the complaint must allege in specific terms how 11 each named defendant is involved. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). There can be no 12 liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a 13 defendant’s actions and the claimed deprivation. *Rizzo*, 423 U.S. at 371; *May v. Enomoto*, 633 F.2d 164, 167 (9th Cir. 1980). Furthermore, vague and conclusory allegations of official 15 participation in civil rights violations are not sufficient. *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982). 17 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to 18 make plaintiff’s amended complaint complete. Local Rule 220 requires that an amended 19 complaint be complete in itself without reference to any prior pleading. This requirement exists 20 because, as a general rule, an amended complaint supersedes the original complaint. See *Ramirez v. Cnty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015) (“an ‘amended complaint 22 supersedes the original, the latter being treated thereafter as non-existent.’” (internal citation 23 omitted)). Once plaintiff files an amended complaint, the original pleading no longer serves any 24 function in the case. Therefore, in an amended complaint, as in an original complaint, each claim 25 and the involvement of each defendant must be sufficiently alleged.

26 IV. CONCLUSION

27 In accordance with the above, IT IS HEREBY ORDERED that: 28 1. Plaintiff’s request for leave to proceed in forma pauperis (ECF No. 2) is granted.] 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff 2 || is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. 3 || § 1915(b)(1). All fees shall be collected and paid in accordance with this court’s order to the 4 | Director of the California Department of Corrections and Rehabilitation filed concurrently 5 || herewith. 6 3. Plaintiff’s complaint is dismissed. 7 4. Within thirty days from the date of this order, plaintiff shall complete the attached 8 | Notice of Amendment and submit the following documents to the court: 9 a. The completed

Notice of Amendment; and 10 b. An original of the Amended Complaint. 11 | Plaintiffs amended complaint shall comply with the requirements of the Civil Rights Act, the 12 || Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must 13 || also bear the docket number assigned to this case and must be labeled “Amended Complaint.” 14 | Failure to file an amended complaint in accordance with this order may result in the dismissal of 15 || this action. 16 17 || Dated: April 9, 2025 A aA i Aan Spe |

CHI SOO KIM

19 UNITED STATES MAGISTRATE JUDGE

20 |} /cerm1931.14n.csk 21 22 23 24 25 26 27 28 1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10

JAMES CURTIS KERN, No. 2:24-cv-1931 TLN CSK P

11 Plaintiff, 12

v. NOTICE OF AMENDMENT

13

DR. HO,

14 Defendant. 15

16 17 Plaintiff submits the following document in compliance with the court’s order 18 filed on _____ (date). 19 20 Amended Complaint 21 (Check this box if submitting an Amended Complaint) 22 DATED: _____ 23 Plaintiff 24 25 26 27 28