

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MINH CONG DO,  
Plaintiff,

v.

CA CORRECTIONS HEALTH CARE  
SERVICES, et al.,  
Defendants.

Case No. 23-cv-05906 BLF (PR)

**ORDER OF DISMISSAL WITH  
LEAVE TO AMEND**

Plaintiff, a state inmate, filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against medical staff at Pelican Bay State Prison (“PBSP”) where he was formerly housed. Dkt. No. 8 at 1.<sup>1</sup> Plaintiff has filed a motion for leave to proceed *in forma pauperis* which will be addressed in a separate order. Dkt. No. 9.

**DISCUSSION**

**A. Standard of Review**

A federal court must conduct a preliminary screening in any case in which a

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<sup>1</sup> The Court granted Plaintiff relief from PBSP’s email filing procedures after his transfer to another institution. Dkt. No. 7. Accordingly, the complaint filed under Docket No. 8 is the operative complaint in this matter.

1 prisoner seeks redress from a governmental entity or officer or employee of a  
 2 governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any  
 3 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim  
 4 upon which relief may be granted or seek monetary relief from a defendant who is immune  
 5 from such relief. *See id.* § 1915A(b)(1), (2). Pro se pleadings must, however, be liberally  
 6 construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

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

11 **B. Plaintiff's Claims**

12 Plaintiff alleges “medical malpractice, medical negligence, and [i]nadequate  
 13 medical care” by PBSP and contracted employees with the California Corrections Health  
 14 Care Services (“CCHCS”). Dkt. No. 8 at 2. He names various medical staff of PBSP and  
 15 CCHCS. *Id.* at 2-4. Specifically, Plaintiff alleges the “careless” administration of a  
 16 shingles vaccine on March 29, 2023, by Nurse Hakaki which caused nerve damage in his  
 17 left arm resulting in the loss of partial mobility, according to staff at Curry Medical Center  
 18 (“CMC”). *Id.* at 5. He was referred for further care to CMC on June 26, 2023, where an  
 19 examination noted weakness, loss of sensation, and pain in Plaintiff’s left arm. *Id.* at 5-7.  
 20 Plaintiff alleges that PBSP later made its own evaluation of his test results and concluded  
 21 that they were “within normal limits” and that no follow-up was required. *Id.* at 8.  
 22 Plaintiff assert that he has an ongoing medical issue with his left arm and that PBSP’s  
 23 conclusion “completely contradicts every note, statement and admission” of all relevant  
 24 parties. *Id.* He asserts that Defendants acted with deliberate indifference to his serious  
 25 medical needs, in violation of his Eighth Amendment rights. *Id.* at 9. He seeks declaratory  
 26 and injunctive relief, as well as damages. *Id.* at 10.

27 Deliberate indifference to serious medical needs violates the Eighth Amendment’s  
 28

1 proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104  
2 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other*  
3 *grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (*en*  
4 *banc*). A determination of a “deliberate indifference” claim involves an examination of  
5 two elements: the seriousness of the prisoner’s medical need and the nature of the  
6 defendant’s response to that need. *Id.* at 1059.

7       Regarding the first element, a serious medical need exists if the failure to treat a  
8 prisoner’s condition could result in further significant injury or the “unnecessary and  
9 wanton infliction of pain.” *Id.* The existence of an injury that a reasonable doctor or  
10 patient would find important and worthy of comment or treatment, the presence of a  
11 medical condition that significantly affects an individual’s daily activities, or the existence  
12 of chronic and substantial pain are examples of indications that a prisoner has a serious  
13 need for medical treatment. *Id.* at 1059-60. With regard to the second element, a prison  
14 official is deliberately indifferent if he or she knows that a prisoner faces a substantial risk  
15 of serious harm and disregards that risk by failing to take reasonable steps to abate it.  
16 *Farmer* at 837. The prison official must not only “be aware of facts from which the  
17 inference could be drawn that a substantial risk of serious harm exists,” but “must also  
18 draw the inference.” *Id.* If a prison official should have been aware of the risk, but did not  
19 actually know, the official has not violated the Eighth Amendment, no matter how severe  
20 the risk. *Gibson v. County of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002).

21       Plaintiff’s allegations are insufficient to state a cognizable Eighth Amendment  
22 claim. His allegations essentially indicate nothing more than a difference of opinion  
23 regarding the course of treatment. “A difference of opinion between a prisoner-patient and  
24 prison medical authorities regarding treatment does not give rise to a § 1983 claim.”  
25 *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). Similarly, a showing of nothing  
26 more than a difference of medical opinion as to the need to pursue one course of treatment  
27 over another is insufficient, as a matter of law, to establish deliberate indifference.

1 *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004); *Sanchez v. Vild*, 891 F.2d 240,  
2 242 (9th Cir. 1989). “But this is true only if both dueling medical opinions are medically  
3 acceptable under the circumstances.” *Porretti v. Dzurenda*, 11 F.4th 1037, 1048 (9th Cir.  
4 2021) (internal quotation marks and citation omitted) (finding that “[w]ith only one  
5 credible and medically acceptable recommendation, [plaintiff’s] case did not involve a  
6 mere disagreement of medical opinion between experts over different acceptable  
7 treatments”). In order to prevail on a claim involving choices between alternative courses  
8 of treatment, a plaintiff must show that the course of treatment the doctors chose was  
9 medically unacceptable under the circumstances and that he or she chose this course in  
10 conscious disregard of an excessive risk to plaintiff’s health. *Toguchi*, 391 F.3d at 1058;  
11 *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996). Plaintiff’s allegations are  
12 insufficient to indicate that PBSP and CCHCS medical staff acted with deliberate  
13 indifference in their alternative course of treatment to satisfy the subjective element for an  
14 Eighth Amendment claim. Specifically, there is no allegation that PBSP/CCHCS’s  
15 conclusion was medically acceptable under the circumstances and that their chosen course  
16 was in conscious disregard of an excessive risk to Plaintiff’s health. *Id.* Plaintiff shall be  
17 granted leave to amend, to attempt to state sufficient facts to indicate that each named  
18 Defendant knew that Plaintiff faced a substantial risk of serious harm with regard to the  
19 condition of his left arm and disregarded that risk by failing to take reasonable steps to  
20 abate it. *Farmer* at 837.

21 Furthermore, Plaintiff’s claims for malpractice and negligence are not cognizable  
22 under § 1983, for such claims are insufficient to make out a violation of the Eighth  
23 Amendment. *See Toguchi*, 391 F.3d at 1060; *Hallett v. Morgan*, 296 F.3d 732, 744 (9th  
24 Cir. 2002); *Franklin*, 662 F.2d at 1344. Accordingly, these state law claims must be  
25 dismissed for failure to state a claim unless there is a basis to assert supplemental  
26 jurisdiction under 28 U.S.C. § 1367 (1993).

27 In preparing an amended complaint, Plaintiff should keep the following in mind.

1 Liability may be imposed on an individual defendant under § 1983 only if Plaintiff can  
2 show that the defendant proximately caused the deprivation of a federally protected right.  
3 *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988). A person deprives another of a  
4 constitutional right within the meaning of section 1983 if he does an affirmative act,  
5 participates in another’s affirmative act or omits to perform an act which he is legally  
6 required to do, that causes the deprivation of which the plaintiff complains. *See Leer*, 844  
7 F.2d at 633.

8  
9 **CONCLUSION**

10 For the foregoing reasons, the Court orders as follows:

11 1. The complaint is **DISMISSED with leave to amend**. Within **twenty-eight**  
12 **(28) days** of the date this order is filed, Plaintiff shall file an amended complaint to correct  
13 the deficiencies described above. The amended complaint must include the caption and  
14 civil case number used in this order, Case No. 23-cv-05906 BLF (PR), and the words  
15 “AMENDED COMPLAINT” on the first page. If using the court form complaint, Plaintiff  
16 must answer all the questions on the form in order for the action to proceed. The amended  
17 complaint supersedes the original, the latter being treated thereafter as non-existent.  
18 *Ramirez v. Cty. Of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015). Consequently,  
19 claims not included in an amended complaint are no longer claims and defendants not  
20 named in an amended complaint are no longer defendants. *See Ferdik v. Bonzelet*, 963  
21 F.2d 1258, 1262 (9th Cir.1992).

22 2. **Failure to respond in accordance with this order in the time provided**  
23 **will result in the dismissal with prejudice of this action for failure to state a claim,**  
24 **without further notice to Plaintiff.**

25 3. The Clerk shall include two copies of the court’s complaint with a copy of  
26 this order to Plaintiff.

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**IT IS SO ORDERED.**

**Dated: \_\_April 2, 2024\_\_**

  
BETH LABSON FREEMAN  
United States District Judge

Order of Dism. With Leave to Amend  
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