

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

May 17, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

EDWARD J. STEINER,

Plaintiff,

v.

JON FISCHER, JILL HARPER, and
WASHINGTON STATE
DEPARTMENT OF CORRECTIONS,

Defendants.

No. 4:22-cv-05160-MKD

ORDER DISMISSING ACTION

1915(g)

BEFORE THE COURT is Plaintiff Edward J. Steiner's Second Amended Complaint (SAC), ECF No. 9. Plaintiff, a prisoner at the Washington State Penitentiary (WSP), is proceeding *pro se* and *in forma pauperis*; Defendants have not been served. Plaintiff seeks monetary damages and asks the Court to order that Defendant Jon Fischer stay away and stop threatening him. *Id.* at 9.

As a general rule, an amended complaint supersedes the original complaint and renders it without legal effect. *Lacey v. Maricopa County*, 693 F.3d 896, 927 (9th Cir. 2012). Therefore, "[a]ll causes of action alleged in an original complaint

1 which are not alleged in an amended complaint are waived.” *King v. Atiyeh*, 814
2 F.2d 565, 567 (9th Cir. 1987) (citing *London v. Coopers & Lybrand*, 644 F.2d
3 811, 814 (9th Cir. 1981)), *overruled in part by Lacey*, 693 F.3d at 928 (any claims
4 voluntarily dismissed are considered to be waived if not repud). Here, **IT IS**
5 **ORDERED** that Defendant Washington State Department of Corrections (DOC)
6 shall be added as a Defendant to this action.

7 However, liberally construing the SAC in the light most favorable to
8 Plaintiff, the Court finds that it fails to cure all the deficiencies of the First
9 Amended Complaint and does not state a claim upon which relief may be granted.

10 **WASHINGTON STATE DEPARTMENT OF CORRECTIONS**

11 Plaintiff names the Washington State DOC as a Defendant to this action. It
12 is well-settled that states and state agencies are not susceptible to suit under
13 Section 1983. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989). “*Will*
14 establishes that the State and arms of the State, which have traditionally enjoyed
15 Eleventh Amendment immunity, are not subject to suit under § 1983 in either
16 federal or state court.” *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 365
17 (1990). Thus, the Washington State DOC is an “arm[] of the State” entitled to
18 Eleventh Amendment immunity, and does not qualify as a “person” under Section
19 1983. *See id.* Accordingly, Plaintiff’s Section 1983 claims against the
20

1 Washington State DOC are subject to dismissal for failure to state a claim upon
2 which relief may be granted.

3 PLAINTIFF'S ALLEGATIONS

4 Plaintiff asserts that on March 21, 2022, Defendant Jon Fischer, a counselor
5 with Defendant Washington State DOC, threatened Plaintiff three times during a
6 five minute period while they were in Defendant Fischer's office. ECF No. 9 at 3-
7 4. He claims that Defendant Fischer commented that Plaintiff had traveled the
8 country causing problems. *Id.* at 5. Plaintiff states that he told Defendant Fischer
9 that was not true, and claims that Defendant Fischer "got very upset and told
10 [Plaintiff] he will make [Plaintiff's] time in here hard." *Id.* Plaintiff asserts that
11 Defendant Fischer then told him to leave his office. *Id.*

12 Plaintiff indicates that he filed an emergency grievance that same day. *Id.*
13 He claims that he did not feel safe and felt that his life was in danger because of
14 Defendant Fischer's "heinous threats." *Id.* Plaintiff states that he told a social
15 worker, who is not named as a Defendant to this action, about the threats. *Id.*

16 Plaintiff contends that things "started happening" right after he filed the
17 grievance against Defendant Fischer on March 21, 2022. *Id.* at 6. He claims that
18 he met with Defendant Jill Harper, a psychiatric Advanced Registered Nurse
19 Practitioner (ARNP) on March 29, 2022. *Id.* He asserts that "they" then
20 discontinued medication that Plaintiff had been taking for 25 years. *Id.* He claims

1 that the discontinuation of his medication “had a severe tortuous effect on
2 [Plaintiff].” *Id.* He argues that four days later, on April 2, 2022, “they” started
3 him on the medication again, but on April 23, 2022, “they cut the medication
4 again” after meeting with Defendant Harper. *Id.*

5 Plaintiff alleges that on March 31, 2022, his breathing medication was taken
6 away without any notice, and “they started up another medication that did not
7 work.” *Id.* at 6-7. He contends that Health Services subjected Plaintiff to
8 medications that were “adverse” to his well-being. *Id.* at 7.

9 Plaintiff alleges that between May 1, 2022 and July 15, 2022, he ordered
10 food and property in the amount of \$1,235.75, but six of his orders were never
11 received. *Id.* at 5. He also claims that he was denied work release on October 1,
12 2022, and E.H.M. on February 15, 2023. *Id.* Plaintiff alleges that several
13 individuals “of G.R.E. Administration[,]” none of whom are named as Defendants
14 to this action, have all conspired with Defendant Fischer. *Id.* He contends that he
15 was told by counselor Hutchenson, who is not named as a Defendant to this
16 action, that “they denied [Plaintiff] because [he] didn’t program and that is an
17 outright lie.” *Id.*

18 Plaintiff argues that Defendant Washington State DOC has cooperated with
19 Defendants Fischer and Harper by allowing them to cause Plaintiff’s severe
20 mental anguish and adverse health effects. *Id.* at 7. He claims that he has

1 exhausted all of the remedies available through Defendant Washington State
2 DOC. *Id.*

3 Plaintiff contends that “[a]ll this had a very bad effect” on him, his body,
4 and his well-being. *Id.* at 5. He argues that he does not feel safe because of
5 Defendant Fischer’s threats. *Id.* He claims that he has experienced retaliation for
6 filing grievances, high blood pressure, high anxiety, severe mental anguish,
7 agonizing physical pain, and trouble breathing. *Id.* at 5, 7-8. He asserts that he
8 had severe reactions to his medications being discontinued and restarted. *Id.* at 8.
9 He also claims that he has lost property in the amount of \$1,235.75. *Id.* at 5, 8.

10 **FIRST AMENDMENT RETALIATION**

11 Plaintiff asserts that he was retaliated against by Defendants Fischer,
12 Harper, and Washington State DOC for filing grievances and complaints. *Id.* at 5-
13 8. “Within the prison context, a viable claim of First Amendment retaliation
14 entails five basic elements: (1) An assertion that a state actor took some adverse
15 action against an inmate (2) because of (3) that prisoner’s protected conduct, and
16 that such action (4) chilled the inmate’s exercise of his First Amendment rights,
17 and (5) the action did not reasonably advance a legitimate correctional goal.”
18 *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *accord Watison v.*
19 *Carter*, 668 F.3d 1108, 1114-15 (9th Cir. 2012); *Brodheim v. Cry*, 584 F.3d 1262,
20 1269 (9th Cir. 2009).

1 Plaintiff's factual allegations fail to establish a retaliation claim against
2 Defendants because he has not alleged that any of the Defendants "took some
3 adverse action against [him]" that "chilled [his] exercise of his First Amendment
4 rights[.]" because he engaged in protected conduct. *Rhodes*, 408 F.3d at 567-68.
5 Plaintiff only alleges that Defendant Fischer threatened adverse action in the
6 future (Defendant Fischer told Plaintiff during their meeting on March 21, 2022,
7 that he can make Plaintiff's time in WSP "hard"). ECF No. 9 at 4-5. Further,
8 although Plaintiff claims that he is "still suffering from all the chilling effect that
9 they have created against [him]," Plaintiff has not alleged how Defendant
10 Fischer's threatened adverse action "would chill *or* silence a person of ordinary
11 firmness from future First Amendment activities" or that he suffered some other
12 non-minimal harm as a result of the threatened future action. *Id.* at 8; *see*
13 *Brodheim*, 584 F.3d at 1271; *Rhodes*, 408 F.3d at 568 n.11.

14 Plaintiff claims that he met with Defendant Harper on March 29, 2022, and
15 "they" discontinued his medication, "they" started him on the medication again,
16 and "they cut the medication again[.]" ECF No. 9 at 6. He appears to allege that
17 Health Services stopped his breathing medication and started him on another
18 medication that did not work. *Id.* at 6-7. Plaintiff has not named any individuals
19 associated with his allegations about undelivered property and although he
20 appears to name several individuals associated with his assertion that he was

1 denied work release, he does not name any of these individuals as Defendants to
2 this action. *Id.* at 5. Although Plaintiff asserts that “[t]he timing and motives for
3 all these heinous acts against [Plaintiff] are clearly visible[,]” he does not allege
4 that Defendants Fischer, Harper, or Washington State DOC failed to provide the
5 food or property that he ordered, nor does he make a specific assertion that these
6 Defendants were involved in the decision to stop his medication or to deny his
7 request for work release. *Id.* at 5, 8.

8 Conclusory allegations that Defendants took adverse action against
9 Plaintiff, along with conclusory allegations that he was denied work release
10 several months after meeting with Defendant Fischer, that his medication was
11 stopped after meeting with Defendant Harper, and that Defendant Washington
12 State DOC has cooperated with Defendants Fischer and Harper, do not state a
13 claim for retaliation. *Id.* at 5-7. Further, Plaintiff fails to state what adverse action
14 he experienced as a result of filing grievances. He does not allege sufficient facts
15 to show that Defendants retaliated against him for filing grievances. Thus,
16 Plaintiff has failed to state a plausible First Amendment retaliation claim against
17 Defendants Fischer, Harper, or Washington State DOC.

18 **EIGHTH AMENDMENT - THREATS**

19 Plaintiff claims that Defendant Fischer threatened him. *Id.* at 4-5. The
20 Eighth Amendment prohibits prison authorities from inflicting cruel and unusual

1 punishments on prison inmates. *Whitley v. Albers*, 475 U.S. 312, 318-19 (1986).
2 Conduct by prison authorities constitutes cruel and unusual punishment where it
3 causes an “unnecessary and wanton infliction of pain” and, thereby, offends “the
4 evolving standards of decency that mark the progress of a maturing society.”
5 *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976).

6 Allegations of verbal harassment and abuse, however, fail to state a
7 cognizable claim under Section 1983. *See Freeman v. Arpaio*, 125 F.3d 732, 738
8 (9th Cir. 1997), *overruled in part on other grounds by Shakur v. Schriro*, 514 F.3d
9 878, 884-85 (9th Cir. 2008). In the Eighth Amendment context, the Ninth Circuit
10 has held that mere threats of bodily injury by corrections officers against an
11 inmate fail to state a cause of action. *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir.
12 1987) (per curiam) (it “trivializes the [E]ighth [A]mendment to believe a threat
13 constitutes a constitutional wrong.”). To state an Eighth Amendment claim
14 involving a threat by a prison official, the plaintiff must allege circumstances that
15 demonstrate a verbal threat of deadly force accompanied by the intent to carry out
16 that threat or, in other words, an objective or subjective substantial risk
17 of harm. *See Oliver v. Noll*, 2012 WL 2055033, at *2-3 (N.D. Cal. 2012) (citing
18 cases); *Parker v. Asher*, 701 F. Supp 192, 195 (D. Nev. 1988) (concluding that an
19 allegation of verbal threats and aiming a loaded taser gun at an inmate states a
20 cognizable claim of cruel and unusual punishment); *Northington v. Jackson*, 973

1 F.2d 1518, 1522-24 (10th Cir. 1992) (reversing dismissal of Section 1983 action
2 where state actor “put a revolver to [plaintiff’s] head without identifying himself
3 as a corrections officer, [and] threatened to kill him”).

4 Here, Plaintiff has not alleged circumstances that demonstrate a verbal
5 threat of deadly force accompanied by the intent to carry out that threat. Rather,
6 Plaintiff claims that Defendant Fischer “threatened [Plaintiff] three times in a five
7 minute period” and told him that “he will make [Plaintiff’s] time in here hard.”
8 ECF No. 9 at 4-5. These allegations do not rise to the level of a viable Eighth
9 Amendment excessive force claim.

10 **EIGHTH AMENDMENT – MEDICAL/MENTAL HEALTH TREATMENT**

11 Plaintiff alleges that he experienced deliberate indifference by Defendants.
12 ECF No. 9 at 4, 6-7. The Eighth Amendment includes the right to adequate
13 medical and mental health treatment in prison. Prison officials or prison medical
14 providers can be held liable if their “acts or omissions [were] sufficiently harmful
15 to evidence deliberate indifference to serious medical needs.” *Estelle*, 429 U.S. at
16 106. As to the objective standard for prisoners’ medical care claims, “society
17 does not expect that prisoners will have unqualified access to health care.”
18 *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). Therefore, “deliberate indifference to
19 medical needs amounts to an Eighth Amendment violation only if those needs are
20 ‘serious.’” *Id.*

1 The Ninth Circuit has defined a “serious medical need” in the following
2 ways:

3 failure to treat a prisoner’s condition [that] could result in further
4 significant injury or the unnecessary and wanton infliction of pain[;] .
5 . . [t]he existence of an injury that a reasonable doctor or patient would
6 find important and worthy of comment or treatment; the presence of a
7 medical condition that significantly affects an individual’s daily
8 activities; or the existence of chronic and substantial pain

9 *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992) (internal citations
10 omitted), *overruled on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133
11 (9th Cir. 1997).

12 In the medical context, deliberate indifference can be “manifested by prison
13 doctors in their response to the prisoner’s needs or by prison guards in
14 intentionally denying or delaying access to medical care or intentionally
15 interfering with the treatment once prescribed.” *Estelle*, 429 U.S. at 104-05
16 (footnotes omitted). Medical malpractice or negligence, however, does not
17 support a cause of action under the Eighth Amendment, *Broughton v. Cutter*
18 *Labs.*, 622 F.2d 458, 460 (9th Cir. 1980) (per curiam), and a delay in medical
19 treatment does not violate the Eighth Amendment unless that delay causes further
20 harm, *McGuckin*, 974 F.2d at 1060. If medical personnel have been “consistently
responsive to [the inmate’s] medical needs,” and the plaintiff has not shown that
the medical personnel had “subjective knowledge and conscious disregard of a

1 substantial risk of serious injury,” there has been no Eighth Amendment violation.
2 *Toguchi v. Chung*, 391 F.3d 1051, 1061 (9th Cir. 2004).

3 Plaintiff contends that his medication was discontinued for four days after
4 he met with Defendant Jill Harper, and that the discontinuation of his medication
5 “had a severe tortuous effect on [Plaintiff].” ECF No. 9 at 6. He claims that on
6 April 23, 2022, “they cut the medication again” after meeting with Defendant
7 Harper. *Id.* He does not identify the individuals who stopped his medication on
8 either occasion, or present any facts from which the Court could infer that
9 Defendants Fischer or Harper had authority over these medical decisions. Further,
10 he appears to allege that Health Services stopped his breathing medication on
11 March 31, 2022, and “they started up another medication that did not work.” *Id.*
12 at 6-7. Plaintiff has not shown that Defendants Fischer or Harper consciously
13 disregarded a substantial risk of serious injury when unidentified individuals
14 discontinued his medication. Thus, Plaintiff has failed to state an
15 Eighth Amendment deliberate difference claim against Defendants Fischer or
16 Harper.

17 **FOURTEENTH AMENDMENT EQUAL PROTECTION**

18 Plaintiff also asserts that Defendant Fischer violated the Fourteenth
19 Amendment Equal Protection Clause. ECF No. 9 at 4. “The Equal Protection
20 Clause of the Fourteenth Amendment commands that no State shall ‘deny to any

1 person within its jurisdiction the equal protection of the laws,' which is essentially
2 a direction that all persons similarly situated should be treated alike." *City of*
3 *Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). An equal
4 protection claim may be demonstrated by showing that the defendant
5 intentionally discriminated against the plaintiff based on his or her membership in
6 a protected class, *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003), *Lee v.*
7 *City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001), or that similarly situated
8 individuals were intentionally treated differently without a rational relationship to
9 a legitimate state purpose, *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564
10 (2000); *N. Pacific LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008).
11 Conclusory allegations by themselves do not establish an equal protection
12 violation without proof of invidious discriminatory intent. *Vill. of Arlington*
13 *Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

14 Plaintiff does not assert any factual allegations that could be construed as an
15 equal protection violation. Thus, his allegations are not sufficient to state a
16 plausible Fourteenth Amendment equal protection claim against Defendant
17 Fischer.

18 NEGLIGENCE

19 Plaintiff appears to be attempting to assert a negligence claim against
20 Defendant Harper. ECF No. 9 at 6. However, any allegations of negligence do

1 not state a claim for relief that is plausible on its face even if Plaintiff had
2 provided factual content to support such a claim. Negligence is not actionable
3 under Section 1983. *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986); *see also*
4 *Daniels v. Williams*, 474 U.S. 327, 333 (1986) (“[I]njuries inflicted by
5 governmental negligence are not addressed by the United States Constitution . .
6 .”). Thus, Plaintiffs’ allegations of negligence do not state a viable Section 1983
7 claim against Defendant Harper.

8 CONCLUSION

9 On April 10, 2023, the Court advised Plaintiff of the deficiencies in his
10 FAC and granted him the opportunity to file a SAC or to voluntarily dismiss his
11 complaint. ECF No. 8. Plaintiff was instructed that in any SAC, he must allege
12 with specificity the names of the persons who caused or personally participated in
13 causing the alleged deprivation of his constitutional rights, the dates on which the
14 conduct of Defendant(s) allegedly took place, and the specific conduct or action
15 that Plaintiff alleges is unconstitutional. *Id.* at 10-11. Plaintiff was cautioned that
16 if he amended his complaint and the Court found that the SAC was frivolous,
17 malicious, or failed to state a claim, the SAC would be dismissed pursuant to 28
18 U.S.C. §§ 1915A(b)(1) and 1915(e)(2), and such a dismissal would count as one
19 of the dismissals under 28 U.S.C. § 1915(g). *Id.* at 12. Despite these orders,
20 Plaintiff has submitted a SAC that once again fails to state a claim for relief.

1 For the reasons set forth in the Court's Second Order to Amend or
2 Voluntarily Dismiss Complaint, ECF No. 8, the Second Amended Complaint,
3 ECF No. 9, is **DISMISSED** with prejudice for failure to state a claim against
4 Defendants upon which relief may be granted. 28 U.S.C. §§ 1915A(b)(1) and
5 1915(e)(2).

6 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who
7 brings three or more civil actions or appeals which are dismissed as frivolous or
8 for failure to state a claim will be precluded from bringing any other civil action
9 or appeal *in forma pauperis* "unless the prisoner is under imminent danger of
10 serious physical injury." 28 U.S.C. § 1915(g). **Plaintiff is advised to read the**
11 **statutory provisions under 28 U.S.C. § 1915. This dismissal of Plaintiff's**
12 **Second Amended Complaint may count as one of the three dismissals allowed**
13 **by 28 U.S.C. § 1915(g) and may adversely affect his ability to file future**
14 **claims in forma pauperis.**

15 **Accordingly, IT IS SO ORDERED:**

16 1. The Second Amended Complaint, ECF No. 9, is **DISMISSED with**
17 **prejudice** for failure to state a claim upon which relief may be granted under 28
18 U.S.C. §§ 1915A(b)(1) and 1915(e)(2).

19 2. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal of
20 this Order would not be taken in good faith.

1 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order,
2 enter judgment, forward copies to Plaintiff, and **CLOSE** the file. The Clerk of
3 Court is further directed to forward a copy of this Order to the Office of the
4 Attorney General of Washington, Corrections Division.

5 **DATED** May 17, 2023.

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7 s/Mary K. Dimke
8 MARY K. DIMKE
9 UNITED STATES DISTRICT JUDGE
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