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

BRADFORD McATHUR,

Plaintiff,

vs.

CASE NO. CV F 06-0184 AWILJO

**ORDER TO DISMISS COMPLAINT AND TO
VACATE FINDINGS AND
RECOMMENDATIONS**

CITY OF TAFT POLICE DEPARTMENT,
et al.,

Defendants.

BACKGROUND

Plaintiff Bradford McAthur (“plaintiff”) was a state prisoner and proceeds pro se and in forma pauperis in this civil rights action under 42 U.S.C. § 1983 (“section 1983”). Plaintiff proceeds with a form complaint (“complaint”) to name as defendants the Taft City Police Department, Taft City police officer Williams (Badge No. 27) (“Officer Williams”), and Taft City police officer Kinney (“Officer Kinney”). The complaint’s caption includes “Officers Academy” as a defendant but the complaint lacks specific allegations as to such defendant. The complaint alleges that during a December 28, 2004 traffic stop, Officers Williams and Kinney used physical force to arrest plaintiff, who was injured. The complaint seeks monetary damages for personal injury and punitive damages.

1 This Court issued its March 13, 2006 order (“March 13 order”) to require plaintiff, no later than
2 April 3, 2006, to pay the \$250 filing fee for this action or to submit a fully completed in forma pauperis
3 application to demonstrate that he is entitled to proceed without prepayment of fees. After plaintiff
4 failed to comply with the March 13 order, this Court issued its April 10, 2006 findings and
5 recommendations to dismiss this action on grounds that plaintiff failed to: (1) submit the \$250 filing fee
6 or an application to proceed without prepayment of fees; (2) comply with the March 13 order; and (3)
7 diligently prosecute this action. On April 20, 2006, plaintiff belatedly filed his application to proceed
8 without prepayment of fees. By a separate order, this Court granted plaintiff’s application to permit
9 plaintiff to proceed without prepayment of fees. As such, this Court VACATES its April 10, 2006
10 findings and recommendations and will address plaintiff’s complaint.

11 **DISCUSSION**

12 **Standards For Screening**

13 This Court is required to screen complaints brought by prisoners seeking relief against a
14 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). This Court
15 must dismiss a complaint, or portion thereof, which “is frivolous, malicious or fails to state a claim upon
16 which relief may be granted” or “seeks monetary relief from a defendant who is immune from such
17 relief.” 28 U.S.C. § 1915A(b)(1) and (2). Moreover, “[a] trial court may dismiss a claim sua sponte
18 under Fed.R.Civ.P. 12(b)(6). . . . Such dismissal may be made without notice where the claimant cannot
19 possibly win relief.” *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987); *see Wong v.*
20 *Bell*, 642 F.2d 359, 361-362 (9th Cir. 1981). Sua sponte dismissal may be made before process is served
21 on defendants. *Neitzke v. Williams*, 490 U.S. 319, 324 (1989) (dismissals under 28 U.S.C. § 1915(d)
22 are often made sua sponte); *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984) (court may dismiss
23 frivolous in forma pauperis action sua sponte prior to service of process on defendants).

24 Since plaintiff proceeds in forma pauperis, this Court, notwithstanding any filing fee that may
25 have been paid, shall dismiss a case at any time if the Court determines the action is frivolous, malicious,
26 fails to state a claim on which relief may be granted, or seeks monetary relief against an immune
27 defendant. *See* 28 U.S.C. § 1915(e); 2 Schwarzer, Tashima & Wagstaffe, California Practice Guide:
28 Federal Civil Procedure Before Trial (2006) Attacking the Pleadings, para. 9:226.1, pp. 9-69. A court

1 need not accept as true factual allegations in in forma pauperis complaints and may reject “completely
2 baseless” allegations, including those which are “fanciful,” “fantastic” or “delusional.” *Denton v.*
3 *Hernandez*, 504 U.S. 25, 32, 112 S.Ct. 1728, 1733 (1992).

4 A claim is legally frivolous when it lacks an arguable basis either in law or fact. *Neitzke*, 490
5 U.S. at 325; *Franklin*, 745 F.2d at 1227-1228. A federal court may dismiss a claim as frivolous where
6 it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless.
7 *Neitzke*, 490 U.S. at 327.

8 The test for maliciousness is a subjective one and requires the court to “determine the . . . good
9 faith of the applicant.” *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43, 46 (1915); *see Wright v.*
10 *Newsome*, 795 F.2d 964, 968 n. 1 (11th Cir. 1986). A lack of good faith is found most commonly in
11 repetitive suits filed by plaintiffs who have used the advantage of cost-free filing to file a multiplicity
12 of suits. A complaint is malicious if it suggests an intent to vex defendants or abuse the judicial process
13 by relitigating claims decided in prior cases. *Crisafi v. Holland*, 655 F.2d 1305, 1309 (D.C. Cir. 1981);
14 *Phillips v. Carey*, 638 F.2d 207, 209 (10th Cir. 1981); *Ballentine v. Crawford*, 563 F.Supp. 627, 628-629
15 (N.D. Ind. 1983); *cf. Glick v. Gutbrod*, 782 F.2d 754, 757 (7th Cir. 1986) (court has inherent power to
16 dismiss a case demonstrating “clear pattern of abuse of judicial process”). A lack of good faith or malice
17 also can be inferred from a complaint containing untrue material allegations of fact or false statements
18 made with intent to deceive the court. *See Horsey v. Asher*, 741 F.2d 209, 212 (8th Cir. 1984).

19 A complaint, or portion thereof, may be dismissed for failure to state a claim if it appears beyond
20 doubt that plaintiff can prove no set of facts in support of the claim or claims that would entitle him to
21 relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41,
22 45-46, 78 S.Ct. 99 (1957)); *see also Palmer v. Roosevelt Lake Log Owners Ass’n*, 651 F.2d 1289, 1294
23 (9th Cir. 1981). “[W]hen a federal court reviews the sufficiency of a complaint, before the reception of
24 any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not
25 whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to
26 support claims.” *Scheurer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1688 (1974); *Gilligan v. Jamco*
27 *Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

28 As further explained below, the complaint demonstrates that plaintiff is entitled to offer no

1 evidence for its vague, insufficient claims.

2 **The Complaint's General Deficiencies**

3 F.R.Civ.P. 8 establishes general pleading rules and provides in pertinent part:

4 (a) Claims for Relief. A pleading which sets forth a claim for relief . . . shall
5 contain (1) a short and plain statement of the grounds upon which the court's jurisdiction
6 depends, unless the court already has jurisdiction and the claim needs no new grounds
7 of jurisdiction to support it, (2) a short plain statement of the claim showing that the
8 pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader
9 seeks.

10 . . .

11 (e) Pleading to be Concise and Direct; Consistency.

12 (1) Each averment of a pleading shall be simple, concise and direct.

13 A pleading may not simply allege a wrong has been committed and demand relief. The
14 underlying requirement is that a pleading give "fair notice" of the claim being asserted and the "grounds
15 upon which it rests." *Conley*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 103 (1957); *Yamaguchi v. United States*
16 *Dept. of Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). Although a complaint need not outline all
17 elements of a claim, "[i]t must be possible . . . for an inference to be drawn that these elements exist."
18 *Walker v. South Cent. Bell Telephone Co.*, 904 F.2d 275, 277 (5th Cir. 1990); *Lewis v. ACB Business*
19 *Service, Inc.*, 135 F.3d 389, 405-406 (6th Cir. 1998).

20 Despite the flexible pleading policy of the Federal Rules of Civil Procedure, a complaint must
21 give fair notice and state the elements of the claim plainly and succinctly. *Jones v. Community Redev.*
22 *Agency*, 733 F.2d 646, 649 (9th Cir. 1984). A plaintiff must allege with at least some degree of
23 particularity overt facts which defendant engaged in to support plaintiff's claim. *Jones*, 733 F.2d at 649.
24 Here, the complaint fails to comply with F.R.Civ.P. 8(a)(2), to provide fair notice of claims against each
25 defendant, and to demonstrate plaintiff is entitled to relief as to each defendant. At best, the complaint
26 makes overbroad, sweeping allegations as to Officers Williams and Kinney and fails to set forth
27 sufficient specific acts, omissions or wrongs by each defendant. The complaint's caption lists Officers
28 Academy as a defendant, but the complaint fails to identify it as a defendant and to make sufficient
allegations as to it. The complaint fails to allege with sufficient particularity specific overt acts of each
defendant and in turn, resulting damages from each defendant's overt acts. The complaint makes vague

1 references to acts surrounding plaintiff's arrest. Because the complaint fails to satisfy F.R.Civ.P. 8(a)(2)
2 requirements, it must be dismissed.

3 **The Complaint's Section 1983 Deficiencies**

4 The Civil Rights Act, under which this action was filed, provides:

5 Every person who, under the color of [state law] . . . subjects, or causes to be subjected,
6 any citizen of the United States . . . to the deprivation of any rights, privileges, or
7 immunities secured by the Constitution . . . shall be liable to the party injured in an action
at law, suit in equity, or other proper proceedings for redress.

8 42 U.S.C. § 1983.

9 To state a section 1983 claim, a plaintiff must plead that: (1) defendants acted under color of state
10 law at the time the complained of act was committed; and (2) defendants deprived plaintiff of rights,
11 privileges or immunities secured by the Constitution or laws of the United States. *Gibson v. United*
12 *States*, 781 F.2d 1334, 1338 (9th Cir. 1986). The complaint fails to state colorable claims (or any claims
13 for that matter) against each defendant in that it makes vague, insufficient allegations regarding
14 plaintiff's encounter with Officers Williams and Kinney. The complaint fails to adequately articulate
15 deprivation of a right, privilege or immunity secured by the Constitution or laws of the United States.

16 Section 1983 requires that there be an actual connection or link between the actions of defendant
17 and deprivation allegedly suffered. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978);
18 *Rizzo v. Goode*, 423 U.S. 362 (1976). The Ninth Circuit Court of Appeals has held that "[a] person
19 'subjects' another to deprivation of a constitutional right, within the meaning of section 1983, if he does
20 an affirmative act, participates in another's affirmative acts or omits to perform an act which he is legally
21 required to do that causes the deprivation of which complaint is made." *Johnson v. Duffy*, 588 F.2d 740,
22 743 (9th Cir. 1978). The complaint fails to satisfy the linking requirement as to each defendant and to
23 articulate how each defendant deprived plaintiff of constitutional rights and resulting harm. This Court
24 advises plaintiff of the specific need to satisfy the linking requirement.

25 **Deficiencies In Claims Against Taft Police Department**

26 The complaint names the Taft Police Department as a defendant but asserts no claims against
27 it. This Court advises plaintiff that a local government unit may not be held liable for the acts of its
28 employees under a respondeat superior theory. *Monell*, 436 U.S. at 691, 98 S.Ct. 2018; *Davis v. Mason*

1 County, 927 F.2d 1473, 1480 (9th Cir.), cert. denied, 502 U.S. 899, 112 S.Ct. 275 (1991); *Thompson v.*
2 *City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989). The local government unit “itself must cause
3 the constitutional deprivation.” *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992). Because
4 liability of a local governmental unit must rest on its actions, not the actions of its employees, a plaintiff
5 must go beyond the respondeat superior theory and demonstrate the alleged constitutional violation was
6 the product of a policy or custom of the local governmental unit. *City of Canton, Ohio v. Harris*, 489
7 U.S. 378, 385, 109 S.Ct. 1197 (1989); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-480, 106 S.Ct.
8 1292 (1986). To maintain a section 1983 claim against a local government, a plaintiff must establish
9 the requisite culpability (a “policy or custom” attributable to municipal policymakers) and the requisite
10 causation (the policy or custom as the “moving force” behind the constitutional deprivation). *Monell*,
11 436 U.S. at 691-694, 98 S.Ct. 2018; *Gable v. City of Chicago*, 296 F.3d 531, 537 (7th Cir. 2002).

12 A plaintiff can establish a “policy or custom” by showing: (1) an express policy that, when
13 enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by
14 written law or express municipal policy, is so permanent and well settled as to constitute a custom or
15 usage with force of law; or (3) an allegation that the constitutional injury was caused by a person with
16 final policymaking authority. *Gable*, 296 F.3d at 537; *Baxter v. Vigo County School Corp.*, 26 F.3d 728,
17 735 (7th Cir. 1994). “[O]fficial policy must be ‘the moving force of the constitutional violation’ in order
18 to establish the liability of a government body under § 1983.” *Polk County v. Dodson*, 454 U.S. 312,
19 326, 102 S.Ct. 445 (1981) (quoting *Monell*, 436 U.S. at 694, 98 S.Ct. 2018)); see *Rizzo v. Goode*, 423
20 U.S. 362, 370-377, 96 S.Ct. 598 (1976) (general allegation of administrative negligence fails to state a
21 constitutional claim cognizable under section 1983). A “plaintiff must show that the municipal action
22 was taken with the requisite degree of culpability and must demonstrate a direct causal link between the
23 municipal action and the deprivation of federal rights.” *Bryan County Commissioners v. Brown*, 520
24 U.S. 397, 404, 117 S.Ct. 1382 (1997). A plaintiff must demonstrate that a defendant’s policy was
25 “closely related to the ultimate injury.” *Harris*, 489 U.S. at 391, 109 S.Ct. at 1206. “At the very least
26 there must be an affirmative link between the policy and particular constitutional violation.” *Oklahoma*
27 *City v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427 (1985).

28 The complaint lacks allegations of a policy or custom and resulting constitutional violation to

1 set forth a *Monell* claim. In such absence, a claim against the Taft Police Department is dismissed.

2 **Malice**

3 This Court is concerned that plaintiff has brought this action in absence of good faith and
4 attempts to take advantage of cost-free filing to vex defendants. Such attempt provides further grounds
5 to dismiss plaintiff's complaint.

6 **Attempt At Amendment**

7 Plaintiff is granted an opportunity to attempt to amend his complaint to cure deficiencies.
8 Plaintiff is further admonished that this Court's Local Rule 15-220 requires an amended complaint to
9 be complete in itself without reference to any prior pleading. As a general rule, an amended complaint
10 supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). After the filing
11 of an amended complaint, the original pleadings serves no further function. Thus, in an amended
12 complaint, each claim and involvement of each defendant must be sufficiently alleged.

13 **CONCLUSION AND ORDER**

14 For the reasons discussed above, this Court:

- 15 1. DISMISSES plaintiff's complaint and GRANTS plaintiff leave to amend;
- 16 2. ORDERS plaintiff, no later than May 17, 2006, to file an amended complaint; and
- 17 3. **Admonishes plaintiff that failure to file an amended complaint in compliance with**
18 **this order will result in a recommendation to dismiss this action for failure to obey**
19 **a court order;** and
- 20 4. VACATES its April 10, 2006 findings and recommendations.

21 IT IS SO ORDERED.

22 **Dated: April 25, 2006**
66h44d

/s/ Lawrence J. O'Neill
UNITED STATES MAGISTRATE JUDGE