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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ZANE HUBBARD,  
  
Plaintiff,  
  
v.  
  
SGT. GARCIA, et al.,  
  
Defendants.

Case No. 1:14-cv-00278-AWI-SAB PC  
  
ORDER DISMISSING COMPLAINT WITH  
LEAVE TO AMEND FOR FAILURE TO  
STATE A CLAIM  
  
(ECF No. 1)  
  
THIRTY-DAY DEADLINE

Plaintiff Zane Hubbard is a state prisoner, proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Currently before the Court is Plaintiff’s complaint, filed February 28, 2014. (ECF No. 1.)

**I.**

**SCREENING REQUIREMENT**

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that “fail[] to state a claim on which relief may be granted,” or that “seek[] monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B).

A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere

1 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell  
2 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate  
3 that each defendant personally participated in the deprivation of Plaintiff’s rights. Jones v.  
4 Williams, 297 F.3d 930, 934 (9th Cir. 2002).

5 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings  
6 liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d  
7 1113, 1121 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be  
8 facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer  
9 that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss  
10 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant  
11 has acted unlawfully” is not sufficient, and “facts that are ‘merely consistent with’ a defendant’s  
12 liability” falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572  
13 F.3d at 969.

## 14 II.

### 15 DISCUSSION

16 Plaintiff alleges that on February 5, 2014, the Warden, the Superintendent, Sergeant  
17 Garcia of IGI, CDW T. Perez, J.L Williams, Hirachetta, DeOchoa, Rodriguez, and Sergeant  
18 Tumacder threatened to kill him, homosexually harassed him, and deliberately slandered him if he  
19 did not “protective custody up.” (Compl. 3, ECF No. 1.) Plaintiff states that when he asked why  
20 law enforcement and protective custody inmates are his only enemy concerns, he was told it is  
21 because they say he looks black and is from the Mexican Mafia, specifically, the “ ‘actual’ Black  
22 Hand”. (Id.) Plaintiff contends this is part of the “negative criticism and discrimination, relative  
23 to cruel and unusual punishment” he is currently suffering from. (Id.)

24 While Rule 8 only requires “a short and plain statement of the claim”, the factual  
25 allegations in the complaint must contain sufficient factual detail for the Court to reasonably  
26 infer that the defendants are responsible for the conduct alleged. Iqbal, 556 U.S. at 678-79.  
27 Plaintiff’s conclusory statements are insufficient to state a plausible claim showing that he is  
28 entitled to relief. Plaintiff’s complaint shall be dismissed with leave to amend and he is advised

1 of the following legal standards that would appear to apply to his claims.

2 **A. Defendant Liability**

3 Government officials may not be held liable for the actions of their subordinates under a  
4 theory of respondeat superior. Iqbal, 129 S. Ct. at 1948. Since a government official cannot be  
5 held liable under a theory of vicarious liability for section 1983 actions, Plaintiff must plead that  
6 the official has violated the Constitution through his own individual actions. Iqbal, 129 S. Ct. at  
7 1948; OSU Student Alliance v. Ray, 699 F.3d 1053, 1069 (9th Cir. 2012). In other words, to  
8 state a claim for relief under section 1983, Plaintiff must link each named defendant with some  
9 affirmative act or omission that demonstrates a violation of Plaintiff’s federal rights.

10 Plaintiff’s complaint has little factual detail and names individual defendants with no  
11 factual allegations included against them. In his amended complaint, Plaintiff must include  
12 sufficient factual allegations as to the circumstances of this alleged incident, and the involvement  
13 of each individual defendant, for the Court to reasonably infer that the defendant was engaged in  
14 the misconduct alleged.

15 **B. Cruel and Unusual Punishment**

16 Liability under section 1983 exists where a defendant “acting under the color of law” has  
17 deprived the plaintiff “of a right secured by the Constitution or laws of the United States.”  
18 Jensen v. Lane County, 222 F.3d 570, 574 (9th Cir. 2000). The Eighth Amendment protects  
19 prisoners from inhumane methods of punishment and from inhumane conditions of confinement.  
20 Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006). Extreme deprivations are required  
21 to make out a conditions of confinement claim, and only those deprivations denying the minimal  
22 civilized measure of life’s necessities are sufficiently grave to form the basis of an Eighth  
23 Amendment violation. Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995 (1992) (citations and  
24 quotations omitted). In order to state a claim for violation of the Eighth Amendment, the  
25 plaintiff must allege facts sufficient to support a claim that prison officials knew of and  
26 disregarded a substantial risk of serious harm to the plaintiff. E.g., Farmer v. Brennan, 511 U.S.  
27 825, 847 (1994); Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).

28 Where an inmate is challenging the conditions of confinement he must show there was a

1 deprivation “sufficiently serious” to form the basis of a violation and “the prison official acted  
2 “with a sufficiently culpable state of mind.” Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir.  
3 2006) (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)). The circumstances, nature, and  
4 duration of the deprivations are critical in determining whether the conditions complained of are  
5 grave enough to form the basis of a viable Eighth Amendment claim. Johnson, 217 F.3d at 731.  
6 Since neither verbal harassment nor verbal threats constitute a violation of the Eighth  
7 Amendment, Plaintiff fails to state a cognizable claim. Keenan v. Hall, 83 F.3d 1083, 1092 (9th  
8 Cir. 1996); Oltarzewski v. Ruggiero, 830 F.2d 136, 138 (9th Cir. 1987); Gaut v. Sunn, 810 F.2d  
9 923, 925 (9th 1987).

### 10 **C. Equal Protection**

11 The Equal Protection Clause requires that all persons who are similarly situated should be  
12 treated alike. Lee v. City of Los Angeles, 250 F.3d 668, 686 (2001); City of Cleburne v.  
13 Cleburne Living Center, 473 U.S. 432, 439 (1985). An equal protection claim may be  
14 established by showing that the defendant intentionally discriminated against the plaintiff based  
15 on the plaintiff’s membership in a protected class, Lee, 250 F.3d at 686; Barren v. Harrington,  
16 152 F.3d 1193, 1194 (1998), or that similarly situated individuals were intentionally treated  
17 differently without a rational relationship to a legitimate state purpose, Thornton v. City of St.  
18 Helens, 425 F.3d 1158, 1167 (2005); Village of Willowbrook v. Olech, 528 U.S. 562, 564  
19 (2000). Plaintiff’s conclusory of discrimination is insufficient to state a cognizable claim.

### 20 **D. Sentencing**

21 Plaintiff also alleges that Defendant Banks-Graves is responsible for withholding and  
22 disobeying a court order of remand for resentencing. (ECF No. 1 at 3.) To the extent that  
23 Plaintiff seeks an order that he be resentenced, he needs to file such a motion with the  
24 resentencing court.

25 Further, Plaintiff alleges in the complaint that Defendant Banks-Graves is a correctional  
26 counselor. Correctional counselors in the prison system are not responsible for resentencing  
27 criminal defendants. It does not appear that Plaintiff can link Defendant Banks-Graves to any  
28 failure by the court to resentence him.



1 Cir. 1988). Although accepted as true, the “[f]actual allegations must be [sufficient] to raise a  
2 right to relief above the speculative level . . . .” Twombly, 550 U.S. at 555 (citations omitted).

3 Finally, an amended complaint supersedes the original complaint, Forsyth v. Humana,  
4 Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987),  
5 and must be “complete in itself without reference to the prior or superseded pleading,” Local  
6 Rule 220. “All causes of action alleged in an original complaint which are not alleged in an  
7 amended complaint are waived.” King, 814 F.2d at 567 (citing to London v. Coopers &  
8 Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth, 114 F.3d at 1474.

9 Based on the foregoing, it is HEREBY ORDERED that:

- 10 1. The Clerk’s Office shall send Plaintiff a civil rights complaint form;
- 11 2. Plaintiff’s complaint, filed February 28, 2014, is dismissed for failure to state a  
12 claim upon which relief may be granted under section 1983;
- 13 3. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file  
14 an amended complaint; and
- 15 4. If Plaintiff fails to file an amended complaint in compliance with this order, this  
16 action will be dismissed, with prejudice, for failure to state a claim.

17 IT IS SO ORDERED.

18 Dated: June 16, 2014

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21 UNITED STATES MAGISTRATE JUDGE