



1 which relief may be granted, or that seek monetary relief from a defendant who is  
2 immune from such relief. 28 U.S.C. § 1915A(b)(1), (2). “Notwithstanding any filing fee,  
3 or any portion thereof, that may have been paid, the court shall dismiss the case at any  
4 time if the court determines that . . . the action or appeal . . . fails to state a claim upon  
5 which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

## 6 **II. Pleading Standard**

7 A complaint must contain “a short and plain statement of the claim showing that  
8 the pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations  
9 are not required, but “[t]hreadbare recitals of the elements of a cause of action,  
10 supported by mere conclusory statements, do not suffice,” Ashcroft v. Iqbal, 556 U.S.  
11 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)), and  
12 courts “are not required to indulge unwarranted inferences,” Doe I v. Wal-Mart Stores,  
13 Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).  
14 While factual allegations are accepted as true, legal conclusions are not. Iqbal, 556 U.S.  
15 at 678.

16 Under section 1983, Plaintiff must demonstrate that each defendant personally  
17 participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th  
18 Cir. 2002). This requires the presentation of factual allegations sufficient to state a  
19 plausible claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572  
20 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting  
21 the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

## 22 **III. Plaintiff’s Allegations**

23 At all times relevant to this suit, Plaintiff was incarcerated at the Central California  
24 Women’s Facility (“CCWF”) in Chowchilla, California. Plaintiff sues a single Defendant,  
25 Correctional Officer M. Baron. Her allegations may be summarized as follows:

26 Plaintiff is wheelchair bound and suffers from diabetes. On February 12, 2016,  
27 Plaintiff went to the officer’s station so that Correctional Officer Frutoz could inspect a  
28 problem with her wheelchair seat. While Plaintiff was seated in her wheelchair,

1 Defendant began hitting Plaintiff's wheelchair with the door of the officer's station. When  
2 Plaintiff asked him to stop, he continued hitting Plaintiff's wheelchair and did not say  
3 anything. Plaintiff's wheelchair was damaged.

4 Since the incident, Defendant has become verbally abusive, harassing, and  
5 disrespectful towards Plaintiff. He calls her racial slurs, makes fun of her disability, locks  
6 her outside when it is hot, and knocks on her window to wake her when she is asleep.

7 Plaintiff accuses Defendant of excessive force, property damage, retaliation, and  
8 denial of medical care. She states she is constantly anxious and afraid and her diabetes  
9 is "out of control" due to the stress. She seeks compensatory damage and an injunction  
10 requiring Defendant to stay away from her and other female inmates.

#### 11 **IV. Discussion**

##### 12 **A. Scope of Relief**

13 Plaintiff asks that Defendant be prevented from working with her or any other  
14 women.

15 In any civil action involving prison or jail conditions seeking prospective relief, the  
16 Court will grant only the relief necessary to correct the violations of the rights particular to  
17 the case. 18 U.S.C § 3626(a)(1)(A). "The court shall not grant or approve any  
18 prospective relief unless the court finds that such relief is narrowly drawn, extends no  
19 further than necessary to correct the violation of the Federal right, and is the least  
20 intrusive means necessary to correct the violation of the Federal right." *Id.* Plaintiff's  
21 desired prospective relief extends beyond the scope of this litigation.

##### 22 **B. Excessive Force**

23 To state an Eighth Amendment excessive force claim, a plaintiff must allege facts  
24 to show that the use of force involved an "unnecessary and wanton infliction of pain."  
25 Jeffers v. Gomez, 267 F.3d 895, 910 (9th Cir. 2001) (quoting Whitley v. Albers, 475 U.S.  
26 312, 319 (1986)). Whether the force inflicted unnecessary and wanton pain turns on  
27 whether the "force was applied in a good-faith effort to maintain or restore discipline, or  
28 maliciously and sadistically to cause harm." Wilkins v. Gaddy, 559 U.S. 34, 37 (2010)

1 (per curiam) (citing Hudson v. McMillian, 503 U.S. 1, 9 (1992)) (internal quotation marks  
2 omitted); Furnace v. Sullivan, 705 F.3d 1021, 1028 (9th Cir. 2013). The Court must look  
3 at the need for application of force; the relationship between that need and the amount  
4 of force applied; the extent of the injury inflicted; the extent of the threat to the safety of  
5 staff and inmates as reasonably perceived by prison officials; and any efforts made to  
6 temper the severity of the response. See Whitley, 475 U.S. at 321.

7 Not “every malevolent touch by a prison guard gives rise to a federal cause of  
8 action.” Hudson, 503 U.S. at 9. The objective component of an Eighth Amendment claim  
9 is contextual and responsive to contemporary standards of decency, Hudson, 503 U.S.  
10 at 8 (quotation marks and citation omitted), and although *de minimis* uses of force do not  
11 violate the Constitution, the malicious and sadistic use of force to cause harm always  
12 violates contemporary standards of decency, regardless of whether or not significant  
13 injury is evident. Wilkins, 559 U.S. at 37-8 (citing Hudson, 503 U.S. at 9-10) (quotation  
14 marks omitted); Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002).

15 Here, Plaintiff alleges Defendant hit her wheelchair with the door while she was  
16 sitting in it. She does not allege that he made any contact with her person, that she  
17 suffered pain or any other harm as a result of Defendant’s actions, or that Defendant’s  
18 actions were intended to cause Plaintiff harm. These facts are insufficient to state a  
19 claim. Plaintiff will be granted leave to amend.

### 20 **C. Conditions of Confinement**

21 Extreme deprivations are required to make out an Eighth Amendment conditions  
22 of confinement claim, and only those deprivations denying the minimal civilized measure  
23 of life’s necessities are sufficiently grave to form the basis of an Eighth Amendment  
24 violation. Hudson v. McMillian, 503 U.S. 1, 9 (1992) (citations and quotations omitted).  
25 To maintain an Eighth Amendment claim, a prisoner must show that prison officials were  
26 deliberately indifferent to a substantial risk of harm to his health or safety. See, e.g.,  
27 Farmer v. Brennan, 511 U.S. 825, 847 (1994); Thomas v. Ponder, 611 F.3d 1144, 1150-  
28 51 (9th Cir. 2010); Foster v. Runnels, 554 F.3d 807, 812-14 (9th Cir. 2009); Morgan, 465

1 F.3d at 1045; Johnson, 217 F.3d at 731; Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir.  
2 1998). “Deliberate indifference describes a state of mind more blameworthy than  
3 negligence” but is satisfied by something “less than acts or omissions for the very  
4 purpose of causing harm or with knowledge that harm will result.” Farmer, 511 at 835.

5 For Eighth Amendment claims arising out of medical care in prison, Plaintiff “must  
6 show (1) a serious medical need by demonstrating that failure to treat [her] condition  
7 could result in further significant injury or the unnecessary and wanton infliction of pain,”  
8 and (2) that “the defendant’s response to the need was deliberately indifferent.” Wilhelm  
9 v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012) (citing Jett v. Penner, 439 F.3d 1091,  
10 1096 (9th Cir. 2006)). Deliberate indifference is shown by “(a) a purposeful act or failure  
11 to respond to a prisoner’s pain or possible medical need, and (b) harm caused by the  
12 indifference.” Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096). The requisite  
13 state of mind is one of subjective recklessness, which entails more than ordinary lack of  
14 due care. Snow v. McDaniel, 681 F.3d 978, 985 (9th Cir. 2012), *overruled in part on*  
15 *other grounds*, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th Cir. 2014) (citation and  
16 quotation marks omitted); Wilhelm, 680 F.3d at 1122.

17 First, Plaintiff’s allegations that Defendant was verbally abusive and harassing do  
18 not state a cognizable claim under 42 U.S.C. § 1983. Oltarzewski v. Ruggiero, 830 F.2d  
19 136, 139 (9th Cir. 1987) (“[v]erbal harassment or abuse . . . is not sufficient to state a  
20 constitutional deprivation under 42 U.S.C. § 1983.”) (quoting Collins v. Cundy, 603 F.2d  
21 825, 827 (10th Cir. 1979)); see also Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996)  
22 (assaultive comments by prison guard not enough to implicate Eighth Amendment); Gaut  
23 v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987) (mere threat does not constitute constitutional  
24 wrong); see also 42 U.S.C. § 1997(e) (prisoners cannot bring civil suits in federal court  
25 for mental or emotional injuries suffered while incarcerated unless they first show that  
26 they suffered physical injury). Likewise, Plaintiff’s claims that Defendant knocked on her  
27 window to wake her up do not allege a constitutional violation.

28 Second, Plaintiff has not alleged a cognizable medical care claim against

1 Defendant, as there is no evidence Defendant was in any way responsible for the care  
2 and/or treatment of Plaintiff's medical conditions. At most, Defendant's actions had the  
3 ancillary, and unforeseeable, effect of exacerbating Plaintiff's condition due to the stress  
4 it caused her.

5 Finally, Plaintiff alleges Defendant locked her outside when it was hot. While such  
6 actions could, under extreme circumstances, constitute deliberate indifference to a  
7 serious risk of suffering substantial harm, Plaintiff's simple, but broad, statement alleges  
8 no such thing.

9 For the reasons stated above, Plaintiff's claims relating to her conditions of  
10 confinement will be dismissed with leave to amend.

#### 11 **D. Property Damage**

12 Plaintiff alleges Defendant damaged her wheelchair. It is not clear whether the  
13 damage was so extensive that her wheelchair was rendered unusable or that Plaintiff  
14 was otherwise deprived of her property.

15 Prisoners have a protected interest in their personal property. Hansen v. May,  
16 502 F.2d 728, 730 (9th Cir. 1974). However, the procedural component of the Due  
17 Process Clause is not violated by a random, unauthorized deprivation of property if the  
18 state provides an adequate post-deprivation remedy. Hudson v. Palmer, 468 U.S. 517,  
19 533 (1984); Barnett v. Centoni, 31 F.3d 813, 816-17 (9th Cir. 1994). California provides  
20 such a remedy. Barnett, 31 F.3d at 816-17 (citing Cal. Gov't Code §§810-895). It does  
21 not appear that Plaintiff pursued these remedies prior to filing her lawsuit. Her claims  
22 regarding the damage sustained to her wheelchair will therefore be dismissed with leave  
23 to amend.

#### 24 **E. Retaliation**

25 Section 1983 provides for a cause of action against prison officials who retaliate  
26 against inmates for exercising their constitutionally protected rights. Pratt v. Rowland, 65  
27 F.3d 802, 806 n. 4 (9th Cir. 1995) (“[R]etaliatory actions by prison officials are cognizable  
28 under § 1983.”) Within the prison context, a viable claim of retaliation entails five basic

1 elements: “(1) An assertion that a state actor took some adverse action against an  
2 inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4)  
3 chilled the inmate’s exercise of his constitutional rights, and (5) the action did not  
4 reasonably advance a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559,  
5 567-68 (9th Cir. 2005); accord Watison v. Carter, 668 F.3d at 1114-15; Silva v. Di  
6 Vittorio, 658 F.3d 1090, 1104 (9th Cir. 2011); Brodheim v. Cry, 584 F.3d at 1269.

7 The second element focuses on causation and motive. See Brodheim v. Cry, 584  
8 F.3d 1262, 1271 (9th Cir. 2009). A plaintiff must show that his protected conduct was a  
9 “substantial’ or ‘motivating’ factor behind the defendant’s conduct.” Id. (quoting  
10 Sorrano’s Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989). Although it can  
11 be difficult to establish the motive or intent of the defendant, a plaintiff may rely on  
12 circumstantial evidence. Bruce, 351 F.3d at 1289 (finding that a prisoner established a  
13 triable issue of fact regarding prison officials’ retaliatory motives by raising issues of  
14 suspect timing, evidence, and statements); Hines v. Gomez, 108 F.3d 265, 267-68 (9th  
15 Cir. 1997); Pratt, 65 F.3d at 808 (“timing can properly be considered as circumstantial  
16 evidence of retaliatory intent”).

17 In terms of the third prerequisite, filing a complaint or grievance is constitutionally  
18 protected. Valandingham v. Bojorquez, 866 F.2d 1135, 1138 (9th Cir. 1989).

19 With respect to the fourth prong, the correct inquiry is to determine whether an  
20 official’s acts “could chill a person of ordinary firmness from continuing to engage in the  
21 protected activity[.]” Pinard v. Clatskanie School Dist. 6J, 467 F.3d 755, 770 (9th Cir.  
22 2006); see also White v. Lee, 227 F.3d 1214, 1228 (9th Cir. 2000).

23 With respect to the fifth prong, a prisoner must affirmatively allege that “the prison  
24 authorities’ retaliatory action did not advance legitimate goals of the correctional  
25 institution or was not tailored narrowly enough to achieve such goals.” Rizzo v. Dawson,  
26 778 F.2d at 532.

27 Here, Plaintiff alleges that Defendant was abusive and harassing. However, she  
28 has alleged no protected conduct on her part, nor has she alleged that Defendant’s

1 behavior was in response to that protected conduct. Plaintiff's retaliation claim will be  
2 dismissed with leave to amend.

3 **V. Motion to Attend Court Proceedings**

4 Plaintiff seeks the Court's leave to attend all court proceedings in this case. She  
5 also seeks leave to have her witnesses attend.

6 First, Plaintiff is advised that pursuant to Local Rule 230(I), all motions shall be  
7 submitted upon the record without oral argument unless otherwise directed by the Court.  
8 There currently are no hearings or other open court procedures scheduled. If and when  
9 the Court schedules a hearing at which Plaintiff's presence is invited or required, the  
10 Court will arrange for her to appear in person or telephonically. Plaintiff's motion to  
11 secure her own attendance in court will therefore be denied as premature.

12 The same is true with regard to Plaintiff's witnesses. If this case proceeds to a trial  
13 or other proceeding justifying or necessitating witness testimony, Plaintiff will be directed  
14 as to procedures for securing witness testimony.

15 For these reasons, Plaintiff's motion for leave to attend court proceedings will be  
16 denied without prejudice.

17 **VI. Conclusion**

18 Plaintiff's civil rights complaint states no cognizable claims. Plaintiff has not  
19 previously been provided with notice of the deficiencies in her claims and the Court will  
20 provide Plaintiff with the opportunity to file an amended complaint, if she believes, in  
21 good faith, she can cure the identified deficiencies. If Plaintiff amends, she may not  
22 change the nature of this suit by adding new, unrelated claims in her amended  
23 complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007). If Plaintiff does not wish  
24 to file an amended complaint, she must file a notice of willingness to voluntarily withdraw  
25 her lawsuit.

26 If Plaintiff files an amended complaint, it should be brief, Fed. R. Civ. P. 8(a), but  
27 under section 1983, it must state what each named defendant did that led to the  
28 deprivation of Plaintiff's constitutional rights and liability may not be imposed on



1 supervisory personnel under the theory of *respondeat superior*. Iqbal, 556 U.S. at 676-  
2 77; Starr, 652 F.3d at 1205-07. Although accepted as true, the “[f]actual allegations  
3 must be [sufficient] to raise a right to relief above the speculative level. . . .” Twombly,  
4 550 U.S. at 555 (citations omitted).

5 Finally, an amended complaint supersedes the original complaint, Lacey v.  
6 Maricopa County, 693 F.3d 896, 907 n.1 (9th Cir. 2012) (en banc), and it must be  
7 “complete in itself without reference to the prior or superseded pleading.” Local Rule  
8 220.

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

- 10 1. Plaintiff’s motion for leave to attend court proceedings (ECF No. 8) is DENIED  
11 without prejudice;
- 12 2. The Clerk’s Office shall send Plaintiff a blank complaint form along with a copy  
13 of the complaint filed October 13, 2016;
- 14 3. Within **thirty (30) days** from the date of service of this order, Plaintiff must  
15 either:
  - 16 a. File an amended complaint curing the deficiencies identified by the  
17 Court in this order, or
  - 18 b. Notify the Court in writing that she wishes to voluntarily dismiss this  
19 case; and
- 20 4. If Plaintiff fails to comply with this order, the Court will recommend this action  
21 be dismissed for failure to state a claim and failure to obey a court order.

22 IT IS SO ORDERED.

23  
24 Dated: January 23, 2017

25 /s/ Michael J. Seng  
26 UNITED STATES MAGISTRATE JUDGE  
27  
28