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

ROBERT FUENTES,

Plaintiff,

No. CIV S-05-0675 FCD GGH P

vs.

MIKE KNOWLES, et al.,

Defendants.

ORDER

_____/

Plaintiff is a state prisoner proceeding pro se. He seeks relief pursuant to 42 U.S.C. § 1983 and has requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis. This proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$150.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). An initial partial filing fee of \$9.98 will be assessed by this order. 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff’s trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the

1 preceding month's income credited to plaintiff's prison trust account. These payments will be
2 forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's
3 account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

4 The court is required to screen complaints brought by prisoners seeking relief
5 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
6 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
7 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be
8 granted, or that seek monetary relief from a defendant who is immune from such relief. 28
9 U.S.C. § 1915A(b)(1),(2).

10 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
11 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
12 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
13 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
14 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
15 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
16 Cir. 1989); Franklin, 745 F.2d at 1227.

17 A complaint, or portion thereof, should only be dismissed for failure to state a
18 claim upon which relief may be granted if it appears beyond doubt that plaintiff can prove no set
19 of facts in support of the claim or claims that would entitle him to relief. See Hishon v. King &
20 Spalding, 467 U.S. 69, 73 (1984), citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also
21 Palmer v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing
22 a complaint under this standard, the court must accept as true the allegations of the complaint in
23 question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), construe the
24 pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor.
25 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

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1 Named as defendants are Mike Knowles, J. Flint, B. Joseph, G. Coleman, C.
2 Campbell, C. Mitchell, J. Turella, T. Zink and J. Arong. Plaintiff first alleges that on February 3,
3 2004, he was assaulted by two other inmates in the “tank” at the Sacramento County Jail.
4 Plaintiff alleges that he should not have been placed in the tank with these inmates because of
5 their classification. Plaintiff alleges that defendant Joseph, the transportation sergeant, should
6 have made sure that plaintiff was not placed in the same tank with these inmates. The court finds
7 that the complaint states a colorable claim against defendant Joseph.

8 Plaintiff alleges that defendant Knowles is liable for this incident because, as the
9 Warden, he was responsible for plaintiff’s safety. The Civil Rights Act under which this action
10 was filed provides as follows:

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

16 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
17 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
18 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
19 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the
20 meaning of § 1983, if he does an affirmative act, participates in another’s affirmative acts or
21 omits to perform an act which he is legally required to do that causes the deprivation of which
22 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

23 Moreover, supervisory personnel are generally not liable under § 1983 for the
24 actions of their employees under a theory of respondeat superior and, therefore, when a named
25 defendant holds a supervisory position, the causal link between him and the claimed
26 constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862
(9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S.
941 (1979). Vague and conclusory allegations concerning the involvement of official personnel

1 in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th
2 Cir. 1982).

3 Plaintiff is basing defendant Knowles' liability on the theory of respondeat
4 superior. Plaintiff does not allege that defendant Knowles had any personal involvement in the
5 incident. Accordingly, this claim against defendant Knowles is dismissed with leave to amend.

6 Plaintiff alleges that defendant Flint is liable for the incident because, as
7 defendant Joseph's supervisor, he did not ensure that defendant Joseph segregated plaintiff from
8 the other inmates. Plaintiff does not allege that defendant Flint was present at the time that
9 defendant Joseph failed to segregate plaintiff. Without additional information regarding
10 defendant Flint's personal involvement in the incident, the court cannot determine whether
11 plaintiff has stated a colorable claim against him.

12 Plaintiff also alleges that defendant Flint failed to train defendant Joseph. To state
13 a "failure to train" claim, plaintiff must plead facts showing that, "in light of the duties assigned
14 to specific officers or employees, the need for more or different training is obvious, and the
15 inadequacy so likely to result in violations of constitutional rights, that the policy-makers...can
16 reasonably be said to have been deliberately indifferent to that need." City of Canton v. Harris,
17 489 U.S. 378, 390, 109 S.Ct. 1197 (1989). Plaintiff had plead no facts suggesting that defendant
18 Flint acted with deliberate indifference in failing to train defendant Joseph. Accordingly, this
19 claim is dismissed.

20 Plaintiff next alleges that defendants Joseph and Coleman used excessive force.
21 These allegations state a colorable claim for relief against these defendants.

22 Plaintiff alleges that following the assault by the two inmates, he was denied
23 adequate medical care. Plaintiff alleges that immediately following the incident defendant
24 Joseph summoned defendant Arong, a Medical Technical Assistant (MTA), who refused
25 plaintiff's request to be seen by a doctor. Plaintiff then submitted numerous administrative
26 appeals requesting to be seen by a doctor. On June 16, 2004, defendant Zink, a nurse, performed

1 a “medical triage” of plaintiff. She denied his request to be seen by a doctor.

2 On July 2, 2004, defendant Turella, a doctor, examined plaintiff. During the
3 exam, plaintiff was handcuffed with his hands behind his back. Plaintiff requested that he be
4 placed in a holding cage for the exam so that the handcuffs, which were causing him pain, could
5 be removed. Defendant Turella denied this request and claimed to know nothing about the attack
6 by the other inmates. At the conclusion of the exam, defendant Turella prescribed muscle
7 relaxers and ordered x-rays. On July 7, 2004, plaintiff’s head, neck, back and shoulders were x-
8 rayed. He does not know the results.

9 On July 24, 2004, plaintiff filed an appeal requesting an exam by a doctor other
10 than defendant Turella. On July 28, 2004, defendant Mitchell interviewed plaintiff regarding this
11 appeal. Defendant Mitchell told plaintiff that he would be examined by Dr. Borges within the
12 next week. Dr. Borges did not examine plaintiff during the next week. On August 26, 2004,
13 defendant Mitchell told plaintiff that Dr. Borges would examine him the following week.

14 Plaintiff alleges that as a result of defendants’ actions, he has suffered from
15 physical pain caused by the injuries he sustained following the attack by the two inmates in the
16 tank. Plaintiff alleges that he still suffers from pain to his back, shoulders, ankles, knees, wrists
17 and head. He alleges that he suffers from headaches, dizziness and has difficult walking or
18 moving about.

19 Plaintiff has stated colorable claims for inadequate medical care in violation of the
20 Eighth Amendment against defendants Joseph, Arong, Zink, Turella and Mitchell. Plaintiff also
21 alleges that defendants Knowles and Flint were responsible for the inadequate medical care
22 because they supervised the other defendants and were responsible for plaintiff’s safety. Plaintiff
23 is basing their liability on the theory of respondeat superior. Accordingly, the inadequate medical
24 care claims against these defendants are dismissed.

25 Plaintiff alleges that defendant Campbell is liable for plaintiff’s inadequate
26 medical care because he is defendant Arong’s supervisor. The inadequate medical care claim

1 against defendant Campbell is dismissed because it is based on the theory of respondeat superior.

2 In conclusion, the complaint states a colorable Eighth Amendment claim against
3 defendant Joseph based on his failure to protect plaintiff from the two inmates who attacked him.
4 The complaint states a colorable Eighth Amendment excessive force claim against defendants
5 Joseph and Coleman. The complaint states a colorable Eighth Amendment inadequate medical
6 care claim against defendants Joseph, Arong, Zink, Turella and Mitchell. All other claims are
7 dismissed with leave to amend.

8 Plaintiff is informed that the court cannot refer to a prior pleading in order to
9 make plaintiff's amended complaint complete. Local Rule 15-220 requires that an amended
10 complaint be complete in itself without reference to any prior pleading. This is because, as a
11 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375
12 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no
13 longer serves any function in the case. Therefore, in an amended complaint, as in an original
14 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

15 Plaintiff has requested the appointment of counsel. The United States Supreme
16 Court has ruled that district courts lack authority to require counsel to represent indigent
17 prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In
18 certain exceptional circumstances, the court may request the voluntary assistance of counsel
19 pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991);
20 Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). In the present case, the court
21 does not find the required exceptional circumstances. Plaintiff's request for the appointment of
22 counsel will therefore be denied.

23 Accordingly, IT IS HEREBY ORDERED that:

- 24 1. Plaintiff's request to proceed in forma pauperis is granted;
- 25 2. Plaintiff is obligated to pay the statutory filing fee of \$250.00 for this action.

26 Plaintiff is assessed an initial partial filing fee of \$9.98. All fees shall be collected and paid in

1 accordance with this court's order to the Director of the California Department of Corrections
2 filed concurrently herewith.

3 3. All claims but for the claims against discussed above against defendants
4 Joseph, Coleman, Joseph, Arong, Zink, Turella and Mitchell are dismissed for the reasons
5 discussed above, with leave to file an amended complaint within thirty days from the date of
6 service of this Order. Failure to file an amended complaint will result in a recommendation that
7 these defendants be dismissed from this action.

8 4. Upon filing an amended complaint or expiration of the time allowed therefor,
9 the court will make further orders for service of process upon some or all of the defendants.

10 5. Plaintiff's motion for the appointment of counsel is denied.

11 DATED: 4/22/05

12 /s/ Gregory G. Hollows

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14 GREGORY G. HOLLOWES
15 UNITED STATES MAGISTRATE JUDGE

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