

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

NASARIO RODRIGUEZ,

Plaintiff, No. CIV S-06-0321 FCD GGH H

VS.

SERGEANT DIXON, 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). This case was originally filed in the Northern District on February 2, 2006, then transferred and filed in this court, on February 15, 2006. This complaint remained unscreened for nearly three years because it was never properly processed by this court's Clerk's Office. When this case was finally and very belatedly brought to the attention of this court, the undersigned acted immediately to screen it.

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.

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1           *Although the current statutory filing fee is \$350.00, plaintiff will only be required*  
2           *to pay the applicable filing fee at the time that this action was filed, which is \$250.00. 28 U.S.C.*  
3           *§§ 1914(a), 1915(b)(1). Plaintiff has been without funds for six months and is currently without*  
4           *funds. Accordingly, the court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1).*  
5           *Plaintiff is obligated to make monthly payments of twenty percent of the preceding month's*  
6           *income credited to plaintiff's prison trust account. These payments shall be collected and*  
7           *forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's*  
8           *account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).*

9           The court is required to screen complaints brought by prisoners seeking relief  
10          against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
11          § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised  
12          claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be  
13          granted, or that seek monetary relief from a defendant who is immune from such relief. 28  
14          U.S.C. § 1915A(b)(1),(2).

15          A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
16          Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
17          (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
18          indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
19          490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
20          pledged, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
21          Cir. 1989); Franklin, 745 F.2d at 1227.

22          A complaint must contain more than a "formulaic recitation of the elements of a  
23          cause of action;" it must contain factual allegations sufficient to "raise a right to relief above the  
24          speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).  
25          "The pleading must contain something more...than...a statement of facts that merely creates a  
26          suspicion [of] a legally cognizable right of action." Id., quoting 5 C. Wright & A. Miller, Federal

1 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). In reviewing a complaint under this  
2 standard, the court must accept as true the allegations of the complaint in question, Hospital  
3 Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light  
4 most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. Jenkins v.  
5 McKeithen, 395 U.S. 411, 421 (1969).

6 Plaintiff states that on 12/23/04, plaintiff was permitted access to the  
7 administrative segregation (Ad Seg) yard "with extreme ice on the yard." Complaint, p. 9. No  
8 precautionary measures were taken to prevent slipping or falls, resulting in plaintiff's injuring his  
9 back and left knee when he slipped on the ice. Id.

10 Defendant Dr. Wong informed plaintiff that his back and knee were not injured,  
11 but numerous subsequent medical procedures/actions have "proved Dr. Wong wrong." Id.  
12 Plaintiff states, at least at the time of his writing the complaint, that he was scheduled for knee  
13 surgery and awaiting radiology reports concerning his back to find out if he needed back surgery.  
14 Id.

15 Plaintiff asserts that "the Lassen CDC medical staff" have repeatedly denied him  
16 pain killers when they have been asked and that the Solano Medical Staff has attempted to  
17 discourage plaintiff from filing accident reports "stating that it would be useless."

18 Plaintiff lists the following as defendants: Sergeant (Sgt. Dixon) of the Lassen  
19 Yard Ad Seg Unit; Dr. Wong in Lassen Yard; Lassen Yard CDC Medical Staff; Solano State  
20 Prison Medical Staff.

21 As to plaintiff's claims regarding the ice on the Ad Seg yard, creating dangerous  
22 conditions, plaintiff fails to ascribe the failure to warn of the icy conditions to any individual  
23 within his allegations. It is not enough to simply separately set down the name of a correctional  
24 sergeant associated with an Ad. Seg. Unit. There can be no liability under 42 U.S.C. § 1983  
25 unless there is some affirmative link or connection between a defendant's actions and the  
26 claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167

1 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). This claim will be  
2 dismissed but plaintiff will be granted leave to amend.

3 As to plaintiff's claims against defendant Dr. Wong, plaintiff must be more  
4 specific in alleging an Eighth Amendment violation for inadequate medical care based on this  
5 defendant's apparent diagnosis and/or inaction. In order to state a § 1983 claim for violation of  
6 the Eighth Amendment based on inadequate medical care, plaintiff must allege "acts or  
7 omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."  
8 Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976). To prevail, plaintiff must show  
9 both that his medical needs were objectively serious, and that defendants possessed a sufficiently  
10 culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 299, 111 S. Ct. 2321, 2324 (1991);  
11 McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992) (on remand). The requisite state of mind  
12 for a medical claim is "deliberate indifference." Hudson v. McMillian, 503 U.S. 1, 4, 112 S. Ct.  
13 995, 998 (1992).

14 A serious medical need exists if the failure to treat a prisoner's condition could  
15 result in further significant injury or the unnecessary and wanton infliction of pain. Indications  
16 that a prisoner has a serious need for medical treatment are the following: the existence of an  
17 injury that a reasonable doctor or patient would find important and worthy of comment or  
18 treatment; the presence of a medical condition that significantly affects an individual's daily  
19 activities; or the existence of chronic and substantial pain. See, e.g., Wood v. Housewright, 900  
20 F. 2d 1332, 1337-41 (9th Cir. 1990) (citing cases); Hunt v. Dental Dept., 865 F.2d 198, 200-01  
21 (9th Cir. 1989). McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on other  
22 grounds, WMX Technologies v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

23 In Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970 (1994) the Supreme Court  
24 defined a very strict standard which a plaintiff must meet in order to establish "deliberate  
25 indifference." Of course, negligence is insufficient. Farmer, 511 U.S. at 835, 114 S. Ct. at 1978.  
26 However, even civil recklessness (failure to act in the face of an unjustifiably high risk of harm

1 which is so obvious that it should be known) is insufficient. Id. at 836-37, 114 S. Ct. at 1979.  
2 Neither is it sufficient that a reasonable person would have known of the risk or that a defendant  
3 should have known of the risk. Id. at 842, 114 S. Ct. at 1981.

4 It is nothing less than recklessness in the criminal sense – subjective standard –  
5 disregard of a risk of harm of which the actor is actually aware. Id. at 838-842, 114 S. Ct. at  
6 1979-1981. “[T]he official must both be aware of facts from which the inference could be drawn  
7 that a substantial risk of serious harm exists, and he must also draw the inference.” Id. at 837,  
8 114 S. Ct. at 1979. Thus, a defendant is liable if he knows that plaintiff faces “a substantial risk  
9 of serious harm and disregards that risk by failing to take reasonable measures to abate it.” Id. at  
10 847, 114 S. Ct. at 1984. “[I]t is enough that the official acted or failed to act despite his  
11 knowledge of a substantial risk of serious harm.” Id. at 842, 114 S. Ct. at 1981. If the risk was  
12 obvious, the trier of fact may infer that a defendant knew of the risk. Id. at 840-42, 114 S. Ct. at  
13 1981. However, obviousness per se will not impart knowledge as a matter of law.

14 Also significant to the analysis is the well established principle that mere  
15 differences of opinion concerning the appropriate treatment cannot be the basis of an Eighth  
16 Amendment violation. Jackson v. McIntosh, 90 F.3d 330 (9th Cir. 1996); Franklin v. Oregon,  
17 662 F.2d 1337, 1344 (9th Cir. 1981). Plaintiff’s claims as to this defendant are too vague and  
18 generalized to be colorable. The claims against defendant Wong will be dismissed but plaintiff  
19 will be granted leave to amend.

20 As to the remaining defendants, Lassen CDC Medical Staff and Solano Medical  
21 Staff, they will be dismissed because plaintiff must name individual defendants for the court to  
22 be able to direct service of a complaint. Plaintiff will be granted leave to amend.

23 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the  
24 conditions complained of have resulted in a deprivation of plaintiff’s constitutional rights. See  
25 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms  
26 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless

1 there is some affirmative link or connection between a defendant's actions and the claimed  
2 deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir.  
3 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory  
4 allegations of official participation in civil rights violations are not sufficient. See Ivey v. Board  
5 of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

14 In accordance with the above, IT IS HEREBY ORDERED that:

15 1. Plaintiff's request for leave to proceed in forma pauperis is granted.  
16 2. Plaintiff is obligated to pay the statutory filing fee of \$250.00 for this action.

17 The fee shall be collected and paid in accordance with this court's order to the Director of the  
18 California Department of Corrections and Rehabilitation filed concurrently herewith.

19 3. The complaint is dismissed for the reasons discussed above, with leave to file  
20 an amended complaint within thirty days from the date of service of this order. Failure to file an  
21 amended complaint will result in a recommendation that the action be dismissed.

22 DATED: January 22, 2009

23 /s/ Gregory G. Hollows

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25 UNITED STATES MAGISTRATE JUDGE  
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