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

AMOS RYLES,)	No. 2:08-cv-00074-SPK
)	
Plaintiff,)	
)	
v.)	
)	
T. FELKER, ET AL.,)	
)	
Defendants.)	

ORDER DISMISSING AMENDED COMPLAINT

Plaintiff Amos Ryles is a state prisoner proceeding pro se. Plaintiff seeks relief for alleged civil rights violations pursuant to 42 U.S.C. § 1983. His request for leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 has been granted in a previous order. His original complaint was dismissed earlier by a previous judge for failure to state a claim, but dismissal was with leave to amend. An amended complaint was filed and the matter was eventually re-assigned to this court. The record reflects that Plaintiff was subsequently paroled from the High Desert State Prison in Susanville, California, where the alleged incident occurred. A court filing was returned stamped with “mail returned as undeliverable.” Although Plaintiff did not file a change of address in this case, the record was since

1 updated with an address for Plaintiff of the Donovan Correctional Facility in San
2 Diego, California.

3 The Court now proceeds with necessary screening of the amended
4 complaint. For the reasons set forth, the amended complaint is dismissed. The
5 dismissal is again without prejudice, and Plaintiff is given another opportunity to
6 state a claim. A second amended complaint is to be filed **within 30 days**. If a
7 second amended complaint is not filed, the action will be closed with judgment to
8 issue in favor of Defendants.

9 I.

10 The court is required to screen complaints brought by prisoners seeking
11 relief against a government entity or officer or employee of a government entity.
12 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if
13 the prisoner has raised claims that are legally “frivolous or malicious,” that fail to
14 state a claim upon which relief may be granted, or that seek monetary relief from a
15 defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
16 “Notwithstanding any filing fee, or any portion thereof, that may have been paid,
17 the court shall dismiss the case at any time if the court determines that . . . the
18 action . . . fails to state a claim upon which relief may be granted[.]” 28 U.S.C. §
19 1915(e)(2)(B)(ii).

20 A complaint must contain “a short and plain statement of the claim showing
21 that the pleader is entitled to relief[.]” Fed. R. Civ. P. 8(a). Although a complaint
22 “does not need detailed factual allegations” to survive dismissal, a plaintiff must
23 provide “more than mere labels and conclusions, and a formulaic recitation of the
24 elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550
25 U.S. 544, 555 (2007). The complaint must contain factual allegations sufficient to
26 rise above the “speculative level,” *id.*, or the merely possible or conceivable. *Id.* at
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1 complaining that Plainer was “threatening my life and approaching me with
2 homosexuality.” He alleges that Speers, Noyes, and Hitchcock then retaliated
3 against him by “sexually assaulting me when each one of these officers escorted
4 me seperately [sic] by rubbing their hands on my arm and saying I love you.” He
5 further alleges that when he asked Speers “not to touch me like that” he and
6 another officer Probst (who is not a named defendant) “slammed me to the
7 ground[.]”

8 Plaintiff appears to be claiming he was retaliated against in violation of the
9 First Amendment for engaging in protected speech – filing prison grievances or
10 complaints. In the prison context, “a viable claim of First Amendment retaliation
11 entails five basic elements: (1) [a]n assertion that a state actor took some adverse
12 action against an inmate (2) because of (3) that prisoner’s protected conduct, and
13 that such action (4) chilled the inmate’s exercise of his First Amendment rights,
14 and (5) the action did not reasonably advance a legitimate correctional goal.”
15 *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (internal footnote
16 omitted). The plaintiff has the burden of demonstrating that his exercise of his
17 First Amendment rights was the substantial or motivating factor behind
18 defendants’ conduct. *See, e.g., Hartman v. Moore*, 547 U.S. 250, 259 (2006) (a
19 Section 1983 plaintiff “must show a causal connection between a defendant's
20 retaliatory animus and subsequent injury in any sort of retaliation action[.]”). The
21 plaintiff also bears the burden of pleading and proving the absence of legitimate
22 correctional goals for the conduct of which he complains. *Pratt v. Rowland*, 65
23 F.3d 802, 806 (9th Cir. 1995). Verbal harassment is generally insufficient to state
24 a claim. *E.g., Oltarzewski v. Ruggiero*, 830 F.2d 136, 39 (9th Cir. 1987); *Gaut v.*
25 *Sunn*, 810 F.2d 923, 925 (9th Cir. 1987).

26 As with the original complaint, the Court concludes that the amended
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1 complaint fails to state a claim for retaliation. Plaintiff’s allegations that
2 Defendants Speers, Noyes, and Hitchcock “sexually assault[ed] me when each one
3 of these officers escorted me seperately [sic] by rubbing their hands on my arm and
4 [said] I love you” does not state a plausible claim for retaliation against Plaintiff
5 for participating in protected speech. Even if true that the officers “rubbed their
6 hands on [plaintiff’s] arm and said I love you,” when transporting him from a “602
7 hearing” while in handcuffs, such behavior cannot plausibly be considered an
8 “adverse action” caused by Plaintiff’s exercising protected First Amendment rights
9 such as participation in a prison grievance or action. Even assuming the conduct
10 was “adverse,” such behavior would not “chill or silence a person of ordinary
11 firmness from future First Amendment activities.” *Brodheim v. Cry*, 584 F.3d
12 1262, 1271 (9th Cir. 2009) (“a plaintiff [has to show] . . . that the adverse action at
13 issue ‘would chill or silence a person of ordinary firmness from future First
14 Amendment activities.’”) (citing *Rhodes*, 408 F.3d at 568-69). Although the
15 complaint does allege being “slammed to the ground,” such use of force by Probst
16 was alleged to be in response to Plaintiff’s complaining about being touched by
17 officers and in conjunction with being transported, not for exercising First
18 Amendment rights.

19 The allegations of the amended complaint are insufficient “to draw the
20 reasonable inference that the defendant[s] [are] liable.” *Ashcroft v. Iqbal*, ___ U.S.
21 ___, 129 S. Ct. 1937, 1949 (2009). This standard “asks for more than a sheer
22 possibility that a defendant has acted unlawfully.” *Id.* A complaint that pleads
23 facts that are merely consistent with liability stops short of the line between
24 possibility and plausibility. *Id.*

25 III.

26 Accordingly, the amended complaint is DISMISSED. The Court, however,
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1 will allow Plaintiff another opportunity attempt to state a claim. Plaintiff is granted
2 **30 days** leave to amend to state a claim with factual allegations as required under
3 *Twombly* and *Iqbal*. Plaintiff, however, may not change the nature of the suit by
4 adding new, unrelated claims in a new amended complaint. Further, Plaintiff is
5 notified that any amended complaint supercedes the prior complaint and must be
6 complete in itself without reference to prior or superceded pleadings. *E.g., King v.*
7 *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (citation omitted). If no further amended
8 complaint is filed within 30 days, the action will be closed and judgment entered
9 against Plaintiff.

10 IT IS SO ORDERED.

11 DATED: December 18, 2009.



Samuel P. King

Samuel P. King
Senior United States District Judge