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

10 EDGAR LEE WARREN,

11 Plaintiff,

No. CIV S-08-1743 KJM P

12 vs.

13 ARNOLD SCHWARZENEGGER, et al.,

14 Defendants.

ORDER

15 _____/
16 Plaintiff is a California detainee currently being housed at Napa State Hospital.
17 He has filed an action for violation of civil rights under 42 U.S.C. § 1983 and a request to
18 proceed in forma pauperis.

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

21 The federal in forma pauperis statute authorizes federal courts to dismiss a case if
22 the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be
23 granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C.
24 § 1915(e)(2).

25 A claim is legally frivolous when it lacks an arguable basis either in law or in
26 fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-

28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at 327.

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

The court finds that the allegations in plaintiff's "amended complaint,"¹ are so vague and conclusory that it fails to state a claim upon which relief can be granted. Although the Federal Rules of Civil Procedure adopt a flexible pleading policy, a complaint must give fair notice and state the elements of the claim plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least some degree of particularity overt acts which defendants engaged in that support plaintiff's claim. Id. Plaintiff's "amended complaint" must be dismissed. The court will, however, grant leave to file a "second amended complaint."

If plaintiff chooses to amend his current complaint, plaintiff must set forth the jurisdictional grounds upon which the court's jurisdiction depends. Federal Rule of Civil Procedure 8(a). Further, plaintiff must demonstrate how the conduct complained of has resulted

¹ Plaintiff has actually filed three documents identified as "complaints" in this action. The most recent is an amended complaint filed on September 9, 2008 and that is the complaint to which the court refers.

1 in a deprivation of plaintiff's federal rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980).
2 There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or
3 connection between a defendant's actions and the claimed deprivation. Rizzo v. Goode, 423
4 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588
5 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official
6 participation in civil rights violations are not sufficient. Ivey v. Board of Regents, 673 F.2d 266,
7 268 (9th Cir. 1982).

8 To the extent plaintiff is attempting to plead a cause of action for denial of access
9 to courts, plaintiff should consider Lewis v. Casey, 518 U.S. 343 (1996). Most importantly in
10 Lewis, the court held that for a prisoner to be successful on a denial of access to courts claim, he
11 must show not only denial of access, but also injury resulting from the denial of access; "the
12 inmate . . . must . . . demonstrate that the alleged shortcomings in the [prison's law] library or
13 legal assistance program hindered his efforts to pursue a legal claim." Id. at 351. "He might
14 show, for example, that a complaint he prepared was dismissed for failure to satisfy some
15 technical requirement which, because of deficiencies in the prison's legal assistance facilities, he
16 could not have known. Or that he had suffered arguably actionable harm that he wished to bring
17 before the courts, but was so stymied by inadequacies of the law library that he was unable even
18 to file a complaint." Id.

19 If plaintiff is attempting to establish an Eighth Amendment right based upon
20 inadequate conditions of confinement, plaintiff is informed that in order to prevail on such a
21 claim he must show that prison officials were deliberately indifferent to a substantial risk of
22 serious harm. Farmer v. Brennan, 511 U.S. 825, 834 (1991).

23 In addition, plaintiff is informed that the court cannot refer to a prior pleading in
24 order to make plaintiff's "second amended complaint" complete. Local Rule 15-220 requires
25 that an amended complaint be complete in itself without reference to any prior pleading. This is
26 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.

1 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original
2 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an
3 original complaint, each claim and the involvement of each defendant must be sufficiently
4 alleged.

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

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

14 1. Plaintiff's request to proceed in forma pauperis is granted.

15 2. The complaints filed by plaintiff on July 18, 2008, August 20, 2008 and
16 September 9 2008 are dismissed.

17 3. Plaintiff is granted thirty days from the date of service of this order to file a
18 second amended complaint that complies with the requirements of the Federal Rules of Civil
19 Procedure, and the Local Rules of Practice; the amended complaint must bear the docket number
20 assigned this case and must be labeled "Second Amended Complaint"; plaintiff must file an
21 original and two copies of the "second amended complaint;" failure to file an amended
22 complaint in accordance with this order will result in a recommendation that this action be
23 dismissed.

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1 4. Plaintiff's motions for the appointment of counsel (#2, #7, #11 and #14) are
2 denied.

3 DATED: February 6, 2009.

4 1/mp/warr1743.14(9.08.08)



U.S. MAGISTRATE JUDGE