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

VINCENT BIAGAS,

Plaintiff,

No. CIV S-08-2646 DAD P

vs.

WALKER, et al.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding pro se and in forma pauperis. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983.

PROCEDURAL HISTORY

On December 22, 2008, the court screened plaintiff’s original complaint. See 28 U.S.C. § 1915A. The court noted that plaintiff’s allegations were unclear and difficult to decipher. It appeared that plaintiff was alleging that one Karen Gray discriminated against him by denying him access to the court by not providing him with his legal materials and refusing to send his legal mail. Plaintiff’s complaint, however, also listed a series of legal claims including excessive use of force, false imprisonment, violation of the First Amendment, and deliberate indifference. It was unclear who plaintiff was asserting these claims against or what plaintiff sought in terms of relief. Accordingly, the court granted him leave to file an amended complaint.

1 Nor does he allege how the defendants were deliberately indifferent to his serious medical needs.
2 Again, the remainder of plaintiff's amended complaint is unclear and simply too difficult to
3 decipher.

4 ANALYSIS

5 The court must dismiss a complaint or portion thereof if the prisoner has raised
6 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be
7 granted, or that seek monetary relief from a defendant who is immune from such relief. See 28
8 U.S.C. § 1915A(b)(1) & (2). A claim is legally frivolous when it lacks an arguable basis either in
9 law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d
10 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is
11 based on an indisputably meritless legal theory or where the factual contentions are clearly
12 baseless. Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim,
13 however inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885
14 F.2d 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

15 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and
16 plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
17 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
18 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47
19 (1957)). However, in order to survive dismissal for failure to state a claim a complaint must
20 contain more than "a formulaic recitation of the elements of a cause of action;" it must contain
21 factual allegations sufficient "to raise a right to relief above the speculative level." Bell Atlantic,
22 550 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the
23 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
24 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all
25 doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

26 ////

1 In this case, both of plaintiff's amended complaints fail to state a cognizable
2 claim. They also fail to comply with Rule 8(a)(2). In the court's previous order instructing
3 plaintiff how to proceed with an amended complaint, the court advised plaintiff of various legal
4 standards that may govern his claims. The court also advised plaintiff that he needed to allege
5 with at least some degree of particularity overt acts which defendants engaged in that support his
6 claims. Based on the court's review of plaintiff's amended complaints as well as plaintiff's other
7 filings throughout the course of this action, it is now clear that this action should be dismissed as
8 frivolous. See Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990) ("It is not an abuse
9 of discretion to deny leave to amend when any proposed amendment would be futile.").

10 CONCLUSION

11 IT IS HEREBY ORDERED that:

- 12 1. The court's April 22, 2009 findings and recommendations are vacated;
- 13 2. The Clerk of the Court is directed to randomly assign a United States District
14 Judge to this action.

15 IT IS HEREBY RECOMMENDED that this action be dismissed as frivolous.
16 See 28 U.S.C. § 1915A.

17 These findings and recommendations are submitted to the United States District
18 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
19 days after being served with these findings and recommendations, plaintiff may file written
20 objections with the court. The document should be captioned "Objections to Magistrate Judge's
21 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
22 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
23 F.2d 1153 (9th Cir. 1991).

24 DATED: September 4, 2009.

25 DAD:9
26 biag2646.56



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE