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

VERNON TOWNER,

Plaintiff,

No. CIV S-08-2823 LKK EFB P

vs.

MICHAEL KNOWLES, et al.,

Defendants.

ORDER AND  
FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_ /

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He seeks leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a). This proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff’s declaration makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). However, he must pay the \$350 filing fee, *see* 28 U.S.C. §§ 1914(a), 1915(b)(1), and must make monthly payments of 20 percent of the preceding month’s income credited to his trust account. *See* 28 U.S.C. § 1915(b)(2). The agency having custody of plaintiff shall forward payments from plaintiff’s account to the Clerk of the Court each time the amount in the account exceeds \$10 until the filing fee is paid.

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1 Plaintiff also requests that the court appoint counsel. District courts lack authority to  
2 require counsel to represent indigent prisoners in section 1983 cases. *Mallard v. United States*  
3 *Dist. Court*, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request  
4 counsel voluntarily to represent such a plaintiff. 28 U.S.C. § 1915(e)(1); *Terrell v. Brewer*, 935  
5 F.2d 1015, 1017 (9th Cir. 1991); *Wood v. Housewright*, 900 F.2d 1332, 1335-36 (9th Cir. 1990).  
6 There are no such exceptional circumstances in this case.

7 The court has reviewed plaintiff's complaint and, for the limited purposes of § 1915A  
8 screening, finds that it states a cognizable Eighth Amendment claim against defendant Lesane.  
9 *See* 28 U.S.C. § 1915A.

10 The complaint does not state a cognizable claim against defendants California  
11 Department of Corrections and Rehabilitation (CDCR), Knowles, Hubbard, or Lewis. Plaintiff  
12 alleges that he has had five operations on his hip and that he will eventually need a total hip  
13 replacement. He further alleges that defendant Lesane was aware of his serious medical needs.  
14 Plaintiff alleges that sometime before October 29, 2007, defendant Lesane approached plaintiff  
15 in the dining hall, grabbed plaintiff by his collar and ran him across a hallway. Plaintiff  
16 continues, stating that Lesane then slammed plaintiff against the wall several times, and threw  
17 plaintiff's property, including plaintiff's walker. In addition to Lesane, plaintiff names as  
18 defendants CDCR, Knowles, Hubbard and Lewis on the ground that they "condone such age old  
19 practices as cronyism, and nepotism, so rampant within the system, which allows officers like  
20 Sgt. Lesane to go about assaulting poor and helpless inmates." Compl. at 7.

21 The Civil Rights Act under which this action was filed provides:

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

25 42 U.S.C. § 1983. Plaintiff's claim against CDCR must be dismissed because a state agency is  
26 not a "person" for purposes of § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71

1 (1989). Furthermore, under the Eleventh Amendment to the Constitution of the United States, a  
2 state or state agency may not be sued in federal court without its consent. *Pennhurst State Sch.*  
3 *& Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.  
4 1989). The defects in plaintiff’s claim against CDCR cannot be cured by amendment, thus,  
5 plaintiff is not entitled to leave to amend to state a claim against defendant CDCR.

6 An individual defendant is not liable on a civil rights claim unless the facts establish the  
7 defendant’s personal involvement in the constitutional deprivation or a causal connection  
8 between the defendant’s wrongful conduct and the alleged constitutional deprivation. *See*  
9 *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th  
10 Cir. 1978). Plaintiff may not sue any supervisor on a theory that the supervisor is liable for the  
11 acts of his or her subordinates. *See Polk County v. Dodson*, 454 U.S. 312, 325 (1981). A  
12 supervisor may be held liable in his or her individual capacity ““for his own culpable action or  
13 inaction in the training, supervision or control of his subordinates.”” *Watkins v. City of Oakland,*  
14 *Cal.*, 145 F.3d 1087, 1093 (9th Cir. 1998) (quoting *Larez v. City of Los Angeles*, 946 F.2d 630,  
15 646 (9th Cir. 1991)). To state a claim against any individual defendant, the plaintiff must allege  
16 facts showing that the individual defendant participated in or directed the alleged violation, or  
17 knew of the violation and failed to act to prevent it. *See Barren v. Harrington*, 152 F.3d 1193,  
18 1194 (9th Cir. 1998), *cert. denied*, 525 U.S. 1154 (1999) (“A plaintiff must allege facts, not  
19 simply conclusions, that show that an individual was personally involved in the deprivation of  
20 his civil rights.”); *Taylor*, 880 F.2d at 1045.

21 Plaintiff fails to link defendants Knowles, Hubbard, or Lewis to any act or omission that  
22 would indicate a deprivation of plaintiff’s federal rights. While plaintiff alleges that defendant  
23 Lewis screened out several of plaintiff’s inmate appeals without any basis, and thus, has  
24 discouraged plaintiff from pursuing his civil rights, “inmates lack a separate constitutional  
25 entitlement to a specific prison grievance procedure.” *Ramirez v. Galaza*, 334 F.3d 850, 860  
26 (9th Cir. 2003) (no liberty interest in processing of appeals because no entitlement to a specific

1 grievance procedure); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988). The Due Process  
2 Clause protects prisoners from being deprived of liberty without due process of law. *Wolff v.*  
3 *McDonnell*, 418 U.S. 539, 556 (1974). In order to state a cause of action for deprivation of due  
4 process, a plaintiff must first establish the existence of a liberty interest for which the protection  
5 is sought. “States may under certain circumstances create liberty interests which are protected  
6 by the Due Process Clause.” *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995). Liberty interests  
7 created by state law are generally limited to freedom from restraint which “imposes atypical and  
8 significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin*,  
9 515 U.S. at 484. Plaintiff fails to state a liberty interest for defendant Lewis’s alleged  
10 interference with plaintiff’s inmate appeals.

11 Thus, plaintiff fails to state a section 1983 claim against these defendants. To proceed  
12 against defendants Knowles, Hubbard or Lewis, plaintiff must file an amended complaint.

13 Plaintiff may proceed forthwith to serve defendant Lesane and pursue his claim against  
14 only that defendant or he may delay serving this defendant and attempt to state a cognizable  
15 claim against defendants Knowles, Lewis, or Hubbard.

16 If plaintiff elects to attempt to amend his complaint to state a cognizable claim against  
17 defendants Knowles, Lewis, or Hubbard, he has 30 days so to do. He is not obligated to amend  
18 his complaint. However, if plaintiff elects to proceed forthwith against defendant Lesane,  
19 against whom he has stated a cognizable claim for relief, then within 20 days he must return  
20 materials for service of process enclosed herewith. In this event the court will construe  
21 plaintiff’s election as consent to dismissal of all claims against defendants CDCR, Knowles,  
22 Hubbard and Lewis without prejudice.

23 Any amended complaint must show that the federal court has jurisdiction and that  
24 plaintiff’s action is brought in the right place, that plaintiff is entitled to relief if plaintiff’s  
25 allegations are true, and must contain a request for particular relief. Plaintiff must identify as a  
26 defendant only persons who personally participated in a substantial way in depriving plaintiff of

1 a federal constitutional right. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person  
2 subjects another to the deprivation of a constitutional right if he does an act, participates in  
3 another’s act or omits to perform an act he is legally required to do that causes the alleged  
4 deprivation). If plaintiff contends he was the victim of a conspiracy, he must identify the  
5 participants and allege their agreement to deprive him of a specific federal constitutional right.

6 In an amended complaint, the allegations must be set forth in numbered paragraphs. Fed.  
7 R. Civ. P. 10(b). Plaintiff may join multiple claims if they are all against a single defendant.  
8 Fed. R. Civ. P. 18(a). If plaintiff has more than one claim based upon separate transactions or  
9 occurrences, the claims must be set forth in separate paragraphs. Fed. R. Civ. P. 10(b).

10 The federal rules contemplate brevity. *See Galbraith v. County of Santa Clara*, 307 F.3d  
11 1119, 1125 (9th Cir. 2002) (noting that “nearly all of the circuits have now disapproved any  
12 heightened pleading standard in cases other than those governed by Rule 9(b).”); Fed. R. Civ. P.  
13 84; cf. Rule 9(b) (setting forth rare exceptions to simplified pleading). Plaintiff’s claims must be  
14 set forth in short and plain terms, simply, concisely and directly. *See Swierkiewicz v. Sorema*  
15 *N.A.*, 534 U.S. 506, 514 (2002) (“Rule 8(a) is the starting point of a simplified pleading system,  
16 which was adopted to focus litigation on the merits of a claim.”); Fed. R. Civ. P. 8. Plaintiff  
17 must eliminate from plaintiff’s pleading all preambles, introductions, argument, speeches,  
18 explanations, stories, griping, vouching, evidence, attempts to negate possible defenses,  
19 summaries, and the like. *McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir. 1996) (affirming  
20 dismissal of § 1983 complaint for violation of Rule 8 after warning); *see Crawford-El v. Britton*,  
21 523 U.S. 574, 597 (1998) (reiterating that “firm application of the Federal Rules of Civil  
22 Procedure is fully warranted” in prisoner cases). The court (and defendant) should be able to  
23 read and understand plaintiff’s pleading within minutes. *McHenry*, 84 F.3d at 1177. A long,  
24 rambling pleading, including many defendants with unexplained, tenuous or implausible  
25 connection to the alleged constitutional injury or joining a series of unrelated claims against  
26 many defendants very likely will result in delaying the review required by 28 U.S.C. § 1915 and

1 an order dismissing plaintiff's action pursuant to Fed. R. Civ. P. 41 for violation of these  
2 instructions.

3 A district court must construe a pro se pleading "liberally" to determine if it states a  
4 claim and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an  
5 opportunity to cure them. *See Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000). However,  
6 the "[f]actual allegations must be enough to raise a right to relief above the speculative level on  
7 the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell*  
8 *Atlantic Corporation v. Twombly*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1955, 1965 (2007) (citations omitted).

9 An amended complaint must be complete in itself without reference to any prior  
10 pleading. Local Rule 15-220; *see Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff  
11 files an amended complaint, the original pleading is superseded.

12 By signing an amended complaint plaintiff certifies he has made reasonable inquiry and  
13 has evidentiary support for his allegations and that for violation of this rule the court may impose  
14 sanctions sufficient to deter repetition by plaintiff or others. Fed. R. Civ. P. 11.

15 A prisoner may bring no § 1983 action until he has exhausted such administrative  
16 remedies as are available to him. 42 U.S.C. § 1997e(a). The requirement is mandatory. *Booth*  
17 *v. Churner*, 532 U.S. 731, 741 (2001). A California prisoner or parolee may appeal "any  
18 departmental decision, action, condition, or policy which they can demonstrate as having an  
19 adverse effect upon their welfare." *Cal. Code Regs. Tit. 15, § 3084.1, et seq.* An appeal must  
20 be presented on a CDC form 602 that asks simply that the prisoner "describe the problem" and  
21 "action requested." Therefore, this court ordinarily will review only claims against prison  
22 officials within the scope of the problem reported in a CDC form 602 or an interview or claims  
23 that were or should have been uncovered in the review promised by the department. Plaintiff is  
24 further admonished that by signing an amended complaint he certifies his claims are warranted  
25 by existing law, including the law that he exhaust administrative remedies, and that for violation  
26 of this rule plaintiff risks dismissal of his entire action, including his claims against defendant

1 Lesane.

2 Accordingly, the court hereby orders that:

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

4 2. Plaintiff is must pay the statutory filing fee of \$350 for this action. All payments shall  
5 be collected and paid in accordance with the notice to the Director of the California Department  
6 of Corrections and Rehabilitation filed concurrently herewith.

7 3. Claims against defendants Lewis, Knowles and Hubbard are dismissed with leave to  
8 amend. Within 30 days of service of this order, plaintiff may amend his complaint to attempt to  
9 state cognizable claims against Lewis, Knowles or Hubbard. Plaintiff is not obliged to amend  
10 his complaint.

11 4. The allegations in the pleading are sufficient at least to state cognizable claims against  
12 defendant Lesane. *See* 28 U.S.C. § 1915A. With this order the Clerk of the Court shall provide  
13 to plaintiff a blank summons, a copy of the pleading filed November 21, 2008, one USM-285  
14 form and instructions for service of process on defendant Lesane. Within 20 days of service of  
15 this order plaintiff may return the attached Notice of Submission of Documents with the  
16 completed summons, the completed USM-285 forms, and two copies of the November 21, 2008  
17 complaint. The court will transmit them to the United States Marshal for service of process  
18 pursuant to Fed. R. Civ. P. 4. Defendant Lesane will be required to respond to plaintiff's  
19 allegations within the deadlines stated in Fed. R. Civ. P. 12(a)(1). In this event, the court will  
20 construe plaintiff's election to proceed forthwith as consent to an order dismissing his defective  
21 claims against defendants Lewis, Knowles and Hubbard without prejudice.

22 5. Plaintiff's November 21, 2008 request for appointment of counsel is denied without  
23 prejudice.

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1 Further, it is hereby RECOMMENDED that, for the reasons stated above, plaintiff's  
2 claims against defendant CDCR be dismissed without leave to amend.

3 These findings and recommendations are submitted to the United States District Judge  
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days  
5 after being served with these findings and recommendations, any party may file written  
6 objections with the court and serve a copy on all parties. Such a document should be captioned  
7 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
8 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
9 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

10 Dated: November 19, 2009.

11   
12 EDMUND F. BRENNAN  
13 UNITED STATES MAGISTRATE JUDGE  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

VERNON TOWNER,

Plaintiff,

No. CIV S-08-2823 LKK EFB P

vs.

MICHAEL KNOWLES, et al.,

Defendants.

NOTICE OF SUBMISSION OF DOCUMENTS

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Plaintiff hereby submits the following documents in compliance with the court's order  
filed \_\_\_\_\_:

- 1 completed summons form
- 1 completed forms USM-285
- 2 copies of the November 21, 2008 Complaint

Dated:

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Plaintiff