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

KEVIN BARTHOLOMEW,

Plaintiff,

No. CIV S-08-3058 MCE KJM P

vs.

TERRY MOORE, et al.,

Defendants.

ORDER

_____/

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(b)(1).

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.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). An initial partial filing fee of \$15.92 will be assessed by this order. 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff’s trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the

1 preceding month's income credited to plaintiff's prison trust account. These payments will be
2 forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's
3 account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

4 The court is required to screen complaints brought by prisoners seeking relief
5 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
6 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
7 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may
8 be granted, or that seek monetary relief from a defendant who is immune from such relief. 28
9 U.S.C. § 1915A(b)(1),(2).

10 A claim is legally frivolous when it lacks an arguable basis either in law or in
11 fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-
12 28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
13 indisputably meritless legal theory or where the factual contentions are clearly baseless.
14 Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however
15 inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d
16 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227. A complaint, or portion thereof, should
17 only be dismissed for failure to state a claim upon which relief may be granted if it appears
18 beyond doubt that plaintiff can prove no set of facts in support of the claim or claims that would
19 entitle him to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (1969).

20 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and
21 plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
22 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell
23 Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65 (2007). A complaint must
24 contain more than "a formulaic recitation of the elements of a cause of action;" it must contain
25 factual allegations sufficient "to raise a right to relief above the speculative level." Id. However,
26 "[s]pecific facts are not necessary; the statement [of facts] need only "give the defendant fair

1 notice of what the . . . claim is and the grounds upon which it rests.””” Erickson v. Pardus, 551
2 U.S. 89, 127 S.Ct. 2197 (2007). In reviewing a complaint under this standard, the court must
3 accept as true the allegations of the complaint, id., and construe the pleading in the light most
4 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

5 Plaintiff has filed the complaint form itself supplemented by an argument, his
6 declaration, and a number of exhibits. In some instances, the argument and/or declaration
7 change the focus of the claims in the complaint, so that the court has some difficulty in
8 determining the exact contours of plaintiff’s claims.

9 In the complaint itself, plaintiff lists three claims, each alleged to be
10 “infringement of liberty under the U.S. Constitution 14th Amendment To Procedural Due
11 Process.” However, in the body of the claims, plaintiff alleges that the defendants each violated
12 his “right to due process and equal protection under law.” Compl. at Claims 1-3.

13 In claim one, plaintiff alleges that defendant Vierra told an inmate clerk not to
14 prepare a form to allow plaintiff to return to work. He also alleges that Vierra said to plaintiff,
15 “you don’t expect me to help you after writing me up.” Claim two is comprised of related
16 allegations against defendant Chesser who, according to plaintiff, refused to rehire plaintiff for
17 his job because he was “not hiring any more lifers, . . . and I need workers that are loyal, not
18 people who write 602's on me. . . .” Finally, in claim three, plaintiff alleges that defendant Lane
19 was aware that Vierra and Chesser violated plaintiff’s right. He also claims that Chesser and
20 Vierra rehired an inmate named Estep, but did not rehire plaintiff, and that Chesser and Vierra
21 “punished plaintiff. . . for filing a CDC 602 inmate appeal”

22 To the extent that plaintiff complains generally about the defendants’ refusal to
23 rehire him, the complaint does not state a claim, because there is no right to a prison job.
24 Vignolo v. Miller, 120 F.3d 1075, 1077 (9th Cir. 2001). He fares slightly better with his claimed
25 violation of the Equal Protection Clause, though it is not clear whether he claims the
26 discriminatory treatment is based on his status as a lifer or as a Muslim, something mentioned in

1 one of the attachments, or simply based on the fact that he and inmate Estep were treated
2 differently. It is possible he is claiming all three reasons as the basis for the claim, but it is
3 simply not clear from the complaint as it is currently constituted.

4 Plaintiff may be attempting to allege a retaliation claim. Retaliatory actions taken
5 against a prisoner for exercising his First Amendment rights violate the constitution whether or
6 not the underlying misconduct would establish a constitutional violation.

7 Within the prison context, a viable claim of First Amendment
8 retaliation entails five basic elements: (1) An assertion that a state
9 actor took some adverse action against an inmate (2) because of (3)
10 that prisoner's protected conduct, and that such action (4) chilled
the inmate's exercise of his First Amendment rights, and (5) the
action did not reasonably advance a legitimate correctional goal.

11 See Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted). While
12 plaintiff suggests that the defendants refused to rehire him because of his resort to the prison
13 grievance system, his claims themselves are based only on due process and equal protection, not
14 on the First Amendment.

15 Taking into account all of the above, the court has determined that the complaint
16 does not contain a short and plain statement as required by Fed. R. Civ. P. 8(a)(2). Although the
17 Federal Rules adopt a flexible pleading policy, a complaint must give fair notice and state the
18 elements of the claim plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d
19 646, 649 (9th Cir. 1984). Plaintiff must allege with at least some degree of particularity overt
20 acts which defendants engaged in that support plaintiff's claim. Id. Because plaintiff has failed
21 to comply with the requirements of Fed. R. Civ. P. 8(a)(2), the complaint must be dismissed.
22 The court will, however, grant leave to file an amended complaint.

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. Ivey v. Board of
5 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 Finally, plaintiff is advised to consider the rules for clear pleading outlined in
15 McHenry v. Renne, 84 F.3d 1172 (9th Cir. 1996). In McHenry, the court quoted the standard
16 form negligence complaint from the Appendix to the Federal Rules of Civil Procedure as a
17 model for clear pleading:

18 1. Allegation of jurisdiction.

19 2. On June 1, 1936, in a public highway, called Boylston Street, in
20 Boston Massachusetts, defendant negligently drove a motor
vehicle against plaintiff, who was then crossing said highway.

21 3. As a result plaintiff was thrown down and had his leg broken,
22 and was otherwise injured, was prevented from transacting his
23 business, suffered great pain of body and mind, and incurred
expenses for medical attention and hospitalization in the sum of
one thousand dollars.

24 Wherefore plaintiff demands judgment against defendant in the
25 sum of one thousand dollars.

26 Id. at 1377.

1 Plaintiff's complaint suffers from many of the same problems as the pleading
2 dismissed in McHenry: there is much "narrative rambling[]," but the factual and legal basis of
3 the claims remains ill-defined. Id. at 1176. Amendment may cure some of these deficiencies.

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

5 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

6 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.

7 Plaintiff is assessed an initial partial filing fee of \$15.92. Fees shall be collected and paid in
8 accordance with this court's order to the Director of the California Department of Corrections
9 and Rehabilitation filed concurrently herewith.

10 3. Plaintiff's complaint is dismissed.

11 4. Plaintiff is granted thirty days from the date of service of this order to file an
12 amended complaint that complies with the requirements of the Civil Rights Act, the Federal
13 Rules of Civil Procedure, and the Local Rules of Practice; the amended complaint must bear the
14 docket number assigned this case and must be labeled "Amended Complaint"; failure to file an
15 amended complaint in accordance with this order will result in a recommendation that this action
16 be dismissed.

17 5. The Clerk of the Court is directed to send plaintiff the form for a civil rights
18 action by a prisoner.

19 DATED: April 16, 2009.

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21 _____
22 U.S. MAGISTRATE JUDGE

23 2/bart3058.14