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

ERNEST MILLER,

Plaintiff,

No. CIV S-08-3101 GGH P

vs.

T. PEREZ, et al.,

Defendants.

ORDER

_____/

Plaintiff is a state prisoner proceeding pro se. He seeks relief pursuant to 42 U.S.C. § 1983 and has requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis. 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). Plaintiff has been without funds for six months and is currently without funds. Accordingly, the court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). Plaintiff is obligated to make monthly payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account. These payments shall be collected

1 and forwarded by the appropriate agency to the Clerk of the Court each time the amount in
2 plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

3 The court is required to screen complaints brought by prisoners seeking relief
4 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
5 § 1915A(a). 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. 28
8 U.S.C. § 1915A(b)(1),(2).

9 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
10 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
11 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
12 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
13 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
14 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
15 Cir. 1989); Franklin, 745 F.2d at 1227.

16 A complaint must contain more than a "formulaic recitation of the elements of a
17 cause of action;" it must contain factual allegations sufficient to "raise a right to relief above the
18 speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).
19 "The pleading must contain something more...than...a statement of facts that merely creates a
20 suspicion [of] a legally cognizable right of action." Id., quoting 5 C. Wright & A. Miller, Federal
21 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). In reviewing a complaint under this
22 standard, the court must accept as true the allegations of the complaint in question, Hospital
23 Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light
24 most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. Jenkins v.
25 McKeithen, 395 U.S. 411, 421 (1969).

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1 Plaintiff names the following as defendants: High Desert State Prison (HDSP)
2 Warden Perez; Sergeant C. Lockard; Lieutenant J. Lawry; Correctional Officer (C/O) Robinson,
3 aka, Mr. Carpe; C/O Noriega. Complaint, pp. 1-3. Among plaintiff claims, he makes several
4 that do not implicate his constitutional rights, i.e, 180-day loss of telephone privileges, canteen-
5 shopping, access to television and radio, or receipt from friends or family of vendor packages.
6 Complaint, p. 4. However, he raises the specter of racial discrimination as the basis for his loss
7 of such amenities. "Prisoners are protected under the Equal Protection Clause of the Fourteenth
8 Amendment from invidious discrimination based on race." Wolff v. McDonnell, 418 U.S. 539,
9 556, 94 S. Ct. 2963, 2974 (1974), citing Lee v. Washington, 390 U.S. 333, 88 S. Ct. 994 (1968).
10 Plaintiff has failed, however, other than making this conclusory assertion to posit any factual
11 predicate for such an allegation. Moore v. Brown & Williamson Tobacco, Corp., 2009 WL
12 192448 *4-5 (N.D. Ca. 2009)(dismissing plaintiff's equal protection claim where plaintiff's
13 conclusory allegations that defendants' conduct was based on racial animus had been dismissed
14 with leave to amend to assert facts supporting the claim but plaintiff to do so timely). This claim
15 will be dismissed but plaintiff will be granted leave to amend.

16 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
17 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See
18 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms
19 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless
20 there is some affirmative link or connection between a defendant's actions and the claimed
21 deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir.
22 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory
23 allegations of official participation in civil rights violations are not sufficient. See Ivey v. Board
24 of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

25 In addition, plaintiff is informed that the court cannot refer to a prior pleading in
26 order to make plaintiff's amended complaint complete. Local Rule 15-220 requires that an

1 amended complaint be complete in itself without reference to any prior pleading. This is
2 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.
3 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original
4 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an
5 original complaint, each claim and the involvement of each defendant must be sufficiently
6 alleged.

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

- 8 1. Plaintiff's request for leave to proceed in forma pauperis is granted.
- 9 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.

10 The fee shall be collected and paid in accordance with this court's order to the Director of the
11 California Department of Corrections and Rehabilitation filed concurrently herewith.

12 3. Plaintiff's equal protection claim as to all defendants is dismissed for the
13 reasons discussed above, with leave to file an amended complaint within thirty days from the
14 date of service of this order. Failure to file an amended complaint will result in a
15 recommendation that this claim be dismissed from this action.

16 4. Upon filing an amended complaint or expiration of the time allowed therefor,
17 the court will make further orders for service of process upon some or all of the defendants.

18 DATED: April 8, 2009

/s/ Gregory G. Hollows

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20 UNITED STATES MAGISTRATE JUDGE

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