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

RUSTY LUGO,

Plaintiff,

No. CIV S-09-0807 GEB DAD P

vs.

RAMIREZ,

Defendant.

ORDER

_____/

Plaintiff, a state prisoner proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983 together with a request for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. The in forma pauperis application is not on the form used by this district; therefore, plaintiff will be granted leave to submit a new application. In addition, the certificate portion of the request must be completed by the authorized officer at his institution and plaintiff must submit a certified copy of his prison trust account statement for the six month period immediately preceding the filing of the complaint. See 28 U.S.C. § 1915(a)(2).

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be

1 granted, or that seek monetary relief from a defendant who is immune from such relief. See 28
2 U.S.C. § 1915A(b)(1) & (2).

3 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
4 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
5 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
6 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
7 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
8 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
9 Cir. 1989); Franklin, 745 F.2d at 1227.

10 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and
11 plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
12 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic
13 Corp. v. Twombly, 550 U.S. 544, ___, 127 S. Ct. 1955, 1964 (2007) (quoting Conley v. Gibson,
14 355 U.S. 41, 47 (1957)). However, in order to survive dismissal for failure to state a claim a
15 complaint must contain more than “a formulaic recitation of the elements of a cause of action;” it
16 must contain factual allegations sufficient “to raise a right to relief above the speculative level.”
17 Bell Atlantic, 127 S. Ct. at 1965. In reviewing a complaint under this standard, the court must
18 accept as true the allegations of the complaint. See Hospital Bldg. Co. v. Rex Hosp. Trustees,
19 425 U.S. 738, 740 (1976). The court must also construe the pleading in the light most favorable
20 to the plaintiff and resolve all doubts in the plaintiff’s favor. See Jenkins v. McKeithen, 395 U.S.
21 411, 421 (1969).

22 Here, plaintiff alleges that defendant Ramirez put a “metal weapon” in his cell and
23 that this violated plaintiff’s constitutional rights. Plaintiff does not provide further facts or
24 allegations and the court is unable to determine whether the current action is frivolous or fails to
25 state a claim for relief. The complaint does not contain a short and plain statement as required by
26 Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a complaint

1 must give fair notice to the defendants and must allege facts that support the elements of the
2 claim plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir.
3 1984). Plaintiff must allege with at least some degree of particularity overt acts which
4 defendants engaged in that support his claims. Id. Because plaintiff has failed to comply with
5 the requirements of Fed. R. Civ. P. 8(a)(2), the complaint must be dismissed. The court will,
6 however, grant leave to file an amended complaint.

7 If plaintiff chooses to file an amended complaint, plaintiff must demonstrate how
8 the conditions complained of resulted in a deprivation of plaintiff's federal constitutional or
9 statutory rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The amended complaint
10 must allege in specific terms how each named defendant was involved in the deprivation of
11 plaintiff's rights. There can be no liability under 42 U.S.C. § 1983 unless there is some
12 affirmative link or connection between a defendant's actions and the claimed deprivation. Rizzo
13 v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v.
14 Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Vague and conclusory allegations of official
15 participation in civil rights violations are not sufficient. Ivey v. Board of Regents, 673 F.2d 266,
16 268 (9th Cir. 1982).

17 Plaintiff is informed that the court cannot refer to a prior pleading in order to
18 make plaintiff's amended complaint complete. Local Rule 15-220 requires that an amended
19 complaint be complete in itself without reference to any prior pleading. This is because, as a
20 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375
21 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no
22 longer serves any function in the case. Therefore, in an amended complaint, as in an original
23 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

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

2 1. Plaintiff shall submit, within thirty days from the service of this order, a
3 completed affidavit in support of his request to proceed in forma pauperis on the form provided
4 by the Clerk of Court;

5 2. Plaintiff shall submit, within thirty days from the service of this order, a
6 certified copy of his prison trust account statement for the six month period immediately
7 preceding the filing of the complaint;

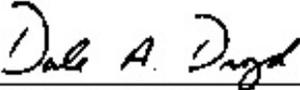
8 3. Plaintiff's complaint is dismissed;

9 4. Plaintiff is granted thirty days from the date of service of this order to file an
10 amended complaint that complies with the requirements of the Civil Rights Act, the Federal
11 Rules of Civil Procedure, and the Local Rules of Practice; the amended complaint must bear the
12 docket number assigned to this case and must be labeled "Amended Complaint;" plaintiff must
13 use the form complaint provided by the court and answer each question;

14 5. The Clerk of the Court is directed to send plaintiff a new Application to
15 Proceed In Forma Pauperis By a Prisoner and the court's form complaint for a § 1983 action; and

16 6. Plaintiff's failure to comply with this order will result in a recommendation
17 that this action be dismissed without prejudice.

18 DATED: April 14, 2009.

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21 _____
22 DALE A. DROZD
23 UNITED STATES MAGISTRATE JUDGE

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