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

ULYSSES DAVIS, Jr.,

Plaintiff,

Civ. No. S-09-832 FCD KJM P

vs.

JAMES WALKER, et al.,

Defendants.

ORDER

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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). By this order, plaintiff will be assessed an initial partial filing fee of \$10.00 in accordance with the provisions of 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

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

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

11           A claim is legally frivolous when it lacks an arguable basis either in law or in  
12 fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-  
13 28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
14 indisputably meritless legal theory or where the factual contentions are clearly baseless.  
15 Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however  
16 inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d  
17 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

18           In order to avoid dismissal for failure to state a claim a complaint must contain  
19 more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements  
20 of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other  
21 words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
22 statements do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a  
23 claim upon which the court can grant relief must have facial plausibility. Twombly, 550 U.S. at  
24 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the  
25 court to draw the reasonable inference that the defendant is liable for the misconduct alleged."  
26 Iqbal, 129 S. Ct. at 1949. When considering whether a complaint states a claim upon which

1 relief can be granted, the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct.  
2 2197, 2200 (2007), and construe the complaint in the light most favorable to the plaintiff, see  
3 Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

4           Plaintiff alleges that Friday evening prayer services are not provided to Muslim  
5 inmates in administrative segregation even though inmates in general population may attend  
6 such services. He also suggests that he is not provided access to religious counseling services.  
7 He does not explicitly characterize this claim as either a denial of his First Amendment rights or  
8 as a denial of equal protection, though he does ask for “whatever relief is required by  
9 discrimination of prison officials. . . .”

10           In order to maintain a claim based on an abridgment of the First Amendment right  
11 to the free exercise of religion, plaintiff must allege, if he can, that defendants burdened the  
12 practice of his religion by preventing him from engaging in conduct mandated by his faith,  
13 without any justification reasonably related to legitimate penological interests. Freeman v.  
14 Arpaio, 125 F.3d 732, 736 (9th Cir. 1997). Plaintiff’s conclusory allegations do not establish a  
15 First Amendment claim.

16           To the extent that plaintiff brings an equal protection claim, it is again not clear  
17 whether plaintiff compares his treatment to that of Muslim inmates in general population or to  
18 some other groups of inmates. He will be given an opportunity to amend this portion of the  
19 complaint.

20           Plaintiff also alleges he was not allowed to make telephone calls to ill family  
21 members and that it was the chaplain’s responsibility to assure he was allowed to make such  
22 calls. A prisoner has a First Amendment right to telephone access, subject to reasonable security  
23 limitations. Keenan v. Hall, 83 F.3d 1083, 1093 (9th Cir. 1996), but once again it is not clear  
24 whether petitioner is raising an equal protection claim or a First Amendment claim.

25           Finally, plaintiff names Warden James Walker, Associate Warden Joe Lizarraga,  
26 Correctional Captain Fred Schroeder and Community Partnership Manager Mark Elia as

1 defendants but does not describe what role these defendants play in the alleged denial of rights.  
2 He will be given an opportunity to amend the complaint.

3           In sum, the court finds the allegations in plaintiff's complaint too vague and  
4 conclusory to determine whether the current action is frivolous or fails to state a claim for relief.  
5 The court has determined that the complaint does not contain a short and plain statement as  
6 required by Federal Rule of Civil Procedure 8(a)(2). Although the Federal Rules adopt a flexible  
7 pleading policy, a complaint must give fair notice and state the elements of the claim plainly and  
8 succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff  
9 must allege with at least some degree of particularity overt acts which defendants engaged in that  
10 support plaintiff's claim. Id. Because plaintiff has failed to comply with the requirements of  
11 Federal Rule of Civil Procedure 8(a)(2), the complaint must be dismissed. The court will,  
12 however, grant leave to file an amended complaint.

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

22           In addition, plaintiff is informed that the court cannot refer to a prior pleading in  
23 order to make plaintiff's amended complaint complete. Local Rule 15-220 requires that an  
24 amended complaint be complete in itself without reference to any prior pleading. This is  
25 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.  
26 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original

1 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an  
2 original complaint, each claim and the involvement of each defendant must be sufficiently  
3 alleged.

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 \$10.00 in accordance with the provisions of 28  
8 U.S.C. § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to  
9 the Director of the California Department of Corrections and Rehabilitation filed concurrently  
10 herewith.

11 3. Plaintiff's complaint is dismissed.

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

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

20 DATED: August 25, 2009.

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23 U.S. MAGISTRATE JUDGE

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