

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

GARY FRANCIS O’LEARY,

Plaintiff,

No. CIV S-09-2601 KJM P

vs.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
et al.,

Defendants.

ORDER

_____/

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. By order filed June 4, 2010, plaintiff’s first amended complaint was dismissed with leave to file a second amended complaint. Plaintiff has now filed a second amended complaint.¹

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 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

¹ Because the court gave plaintiff leave to file a second amended complaint in its previous order, plaintiff’s motion for leave to file a second amended complaint is moot.

1 be granted, or that seek monetary relief from a defendant who is immune from such relief. 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
4 fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-
5 28 (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.
7 Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however
8 inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d
9 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

10 In order to avoid dismissal for failure to state a claim a complaint must contain
11 more than “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements
12 of a cause of action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other
13 words, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
14 statements do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a
15 claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570.
16 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
17 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129
18 S. Ct. at 1949. When considering whether a complaint states a claim upon which relief can be
19 granted, the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200
20 (2007), and construe the complaint in the light most favorable to the plaintiff, see Scheuer v.
21 Rhodes, 416 U.S. 232, 236 (1974).

22 The court again finds the allegations in plaintiff’s second amended complaint so
23 vague and conclusory that it fails to state a claim upon which relief can be granted, with one
24 exception. Plaintiff has stated a claim with adequate particularity against defendant Clark, a
25 nurse who, according to the complaint, took no action after reading plaintiff’s blood pressure as
26 190/112 in 2007, two days before plaintiff had a heart attack. See Second Am. Compl. at 3.

1 Plaintiff alleges that he “had a near fatal heart attack” and “dropped dead” shortly afterwards but
2 was revived by medical personnel on the scene. Id. He goes on to allege that he later was given
3 a pacemaker and, it appears, has been in a wheelchair following his collapse. Id. These
4 allegations, if true, could stand as the basis of a claim for deliberate indifference to a serious
5 medical need in violation of the Eighth Amendment.

6 As for all other defendants named in the complaint, plaintiff has included a few
7 facts not alleged in earlier pleadings, but the allegations still ascribe no specific acts of deliberate
8 indifference that, if proven in court, would subject a particular, individual defendant other than
9 Clark to liability. The court has noted in previous screening orders that a complaint must give
10 fair notice and state the elements of the claim plainly and succinctly. Jones v. Community
11 Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least some
12 degree of particularity overt acts which defendants engaged in that support plaintiff’s claim. Id.
13 Therefore the complaint must allege in specific terms how each named defendant is involved. A
14 sufficiently specific allegation includes a statement of a particular, serious medical need on a
15 particular occasion. There can be no liability under 42 U.S.C. § 1983 unless there is some
16 affirmative link or connection between an individual defendant’s actions and the claimed
17 deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir.
18 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Vague and conclusory allegations
19 of official participation in civil rights violations are not sufficient. Ivey v. Board of Regents, 673
20 F.2d 266, 268 (9th Cir. 1982).

21 Furthermore, supervisory officials such as a warden cannot be held vicariously
22 liable for the actions of their subordinates in a § 1983 action. Hansen v. Black, 885 F.2d 642,
23 646 (9th Cir. 1989). A supervisor can be held liable for a violation of constitutional rights even
24 if he or she was not personally involved in the actions which led to the violation if the supervisor
25 implemented a policy so deficient that the policy itself is a repudiation of constitutional rights
26 and is the moving force of the constitutional violation. Id. Participation sufficient to incur

1 liability may involve the setting in motion of acts that cause others to inflict constitutional injury.
2 Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978).

3 Therefore, when a named defendant holds a supervisory position, the causal link
4 between him and the claimed constitutional violation must be specifically alleged. See Fayle v.
5 Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir.
6 1978). A plaintiff must allege: (1) that the supervisory defendant's "own culpable action or
7 inaction in the training, supervision, or control of his subordinates" caused the constitutional
8 injury; (2) that he acquiesce[d] in the constitutional deprivations of which [the] complaint is
9 made;" or (3) that their conduct showed a "reckless or callous indifference to the rights of
10 others." Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991).

11 As noted above, plaintiff has included a few new facts about his medical
12 condition and treatment that did not appear in previous pleadings. Because some of these facts
13 evince, if true, a serious medical need and possible, deliberate indifference to those needs,
14 plaintiff will be afforded a final opportunity to amend his claims if he chooses. Plaintiff also has
15 the option of resting on the pleadings of the second amended complaint and proceeding solely
16 with a claim against defendant Clark. Therefore, plaintiff may (1) proceed forthwith to have the
17 court order defendant Clark served and pursue his claims against only that defendant or (2) he
18 may, after considering the pleading standards reviewed in this order, delay service on any
19 defendant and attempt again to state a cognizable claim against defendants Cate,
20 Schwarzenegger, Laoma, Machado, Madrid, Ortiz, Pashtoon, Barnett, Soltanian, Tseng or Todd.
21 Plaintiff is not obligated to amend his complaint and may simply proceed with the first option of
22 having defendant Clark served with the second amended complaint.

23 If plaintiff elects to file a third amended complaint and again attempt to state
24 cognizable claims against defendants Cate, Schwarzenegger, Laoma, Machado, Madrid, Ortiz,
25 Pashtoon, Barnett, Soltanian, Tseng or Todd, he has thirty days from the entry of this order in
26 which to do so.

1 If plaintiff chooses to file a third amended complaint, plaintiff is informed again
2 that the court cannot refer to a prior pleading in order to make plaintiff's second amended
3 complaint complete. Local Rule 220 requires that an amended complaint be complete in itself
4 without reference to any prior pleading. This is because, as a general rule, an amended
5 complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967).
6 Once plaintiff files a second amended complaint, the original pleading no longer serves any
7 function in the case. Therefore, in an amended complaint, as in a preceding complaint, each
8 claim and the involvement of each defendant must be sufficiently alleged.

9 If plaintiff elects to proceed forthwith against defendant Clark, against whom he
10 has stated a cognizable claim for relief, then within thirty days he must return the materials for
11 service of process enclosed herewith.

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

13 1. Within thirty days of service of this order, plaintiff may amend his complaint
14 to attempt to state cognizable claims against defendants Cate, Schwarzenegger, Laoma,
15 Machado, Madrid, Ortiz, Pashtoon, Barnett, Soltanian, Tseng and Todd. Plaintiff is not obliged
16 to amend his complaint.

17 2. The allegations in the pleading are sufficient to state cognizable claims against
18 defendant Clark. With this order the Clerk of the Court shall provide to plaintiff a blank
19 summons, a copy of the pleading filed June 15, 2010, one USM-285 form and instructions for
20 service of process on defendant Clark. Within thirty days of service of this order plaintiff may
21 return the attached Notice of Submission of Documents with the completed summons, the
22 completed USM-285 form, and two copies of the endorsed complaint of June 15, 2010. The
23 court will transmit them to the United States Marshal for service of process pursuant to Fed. R.
24 Civ. P. 4. Defendant Clark will be required to respond to plaintiff's allegations within the
25 deadlines stated in Fed. R. Civ. P. 12(a)(1).

26 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

3. Failure to comply with this order will result in a recommendation that this action be dismissed.

4. Plaintiff's motion for leave to file a second amended complaint (Docket No. 24) is denied as moot.

DATED: July 29, 2010.



U.S. MAGISTRATE JUDGE

⁴
olea2601.14option

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

GARY FRANCIS O'LEARY,

Plaintiff,

No. CIV S-09-2601 KJM P

vs.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
et al.,

Defendants.

NOTICE OF SUBMISSION OF DOCUMENTS

_____ /

Plaintiff hereby submits the following documents in compliance with the court's order

filed _____:

- 1 completed summons form
- _____ completed forms USM-285
- _____ copies of the _____
Amended Complaint

Dated:

Plaintiff