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

HON LAU,

Plaintiff,

No. CIV S-09-3146 DAD P

vs.

BILL LOCKYER,

Defendant.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has filed an application to proceed in forma pauperis under 28 U.S.C. § 1915. This proceeding was referred to the undersigned magistrate judge in accordance with Local Rule 302 and 28 U.S.C. § 636(b)(1).

SCREENING REQUIREMENT

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

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

8 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and
9 plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
10 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell Atlantic
11 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47
12 (1957)). However, in order to survive dismissal for failure to state a claim a complaint must
13 contain more than “a formulaic recitation of the elements of a cause of action;” it must contain
14 factual allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic,
15 550 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the
16 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
17 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all
18 doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

19 The Civil Rights Act under which this action was filed provides as follows:

20 Every person who, under color of [state law] . . . subjects, or causes
21 to be subjected, any citizen of the United States . . . to the
22 deprivation of any rights, privileges, or immunities secured by the
23 Constitution . . . shall be liable to the party injured in an action at
24 law, suit in equity, or other proper proceeding for redress.

25 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
26 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
(1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the

1 action is barred (absent prior invalidation) - no matter the relief sought (damages or equitable
2 relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal
3 prison proceedings) - *if* success in that action would necessarily demonstrate the invalidity of
4 confinement or its duration.”) (emphasis in original); Heck v. Humphrey, 512 U.S. 477 (1994) (a
5 state prisoner may not recover damages under § 1983 for allegedly unconstitutional
6 imprisonment, or for any other harm caused by “actions whose unlawfulness would render the
7 imprisonment invalid,” unless he can prove that the conviction or other basis for confinement has
8 been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal
9 authorized to make such a determination, or called into question by a federal court's issuance of a
10 writ of habeas corpus). A writ of habeas corpus is plaintiff's sole remedy by which to attack in
11 federal court his state court criminal conviction and sentence and that remedy may be pursued
12 only after he has properly exhausted all of his constitutional claims in state court.

13 CONCLUSION

14 IT IS HEREBY ORDERED that the Clerk of the Court is directed to randomly
15 assign a United States District Judge to this action.

16 IT IS HEREBY RECOMMENDED that:

- 17 1. Plaintiff's motion to proceed in forma pauperis (Doc. No. 21) be denied; and
- 18 2. This action be dismissed without prejudice.

19 These findings and recommendations are submitted to the United States District
20 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
21 days after being served with these findings and recommendations, plaintiff may file written
22 objections with the court. The document should be captioned “Objections to Magistrate Judge's
23 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the

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1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
2 F.2d 1153 (9th Cir. 1991).

3 DATED: July 14, 2011.

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6 _____
7 DALE A. DROZD
8 UNITED STATES MAGISTRATE JUDGE

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8 lau3146.56

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