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

JOSEPH A. JOHNSON,

Plaintiff,

No. CIV S-10-282 KJM P

vs.

CALIFORNIA DEPARTMENT
OF CORRECTIONS AND
REHABILITATION, et al.,

Defendants.

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 requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 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

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

5 I. The Complaint

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

12 A claim is legally frivolous when it lacks an arguable basis either in law or in
13 fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-
14 28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
15 indisputably meritless legal theory or where the factual contentions are clearly baseless.
16 Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however
17 inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d
18 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

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

1 S. Ct. at 1949. When considering whether a complaint states a claim upon which relief can be
2 granted, the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200
3 (2007), and construe the complaint in the light most favorable to the plaintiff, see Scheuer v.
4 Rhodes, 416 U.S. 232, 236 (1974).

5 Plaintiff alleges that he has been seriously injured because of the defendants'
6 deliberate indifference to his serious medical needs following an assault; that he is disabled as
7 defined by the ADA, but has been denied access to mental health services because of his race;
8 and that he has been denied equal protection because defendants ignored his safety concerns
9 even though he told defendants his life was in danger. Docket No. 1 at 3.¹ In his points and
10 authorities, there is some suggestion that he is raising a retaliation claim. Id. at 5. These points
11 and authorities, plus a separate declaration raise claims about events at Mule Creek State Prison.

12 In the body of the complaint, plaintiff does not repeat his ADA, retaliation or
13 medical needs claims, but focuses on his claim that he informed the defendants that he was in
14 danger from enemies at High Desert State Prison. He also alleges that because he felt suicidal,
15 he was sent to CTC. He alleges he was assaulted by another inmate, but it is not clear whether
16 this assault occurred on the yard or at CTC. Docket No. 1 at 15-16.² Finally, in connection
17 with his allegations against each defendant, plaintiff alleges that "there were other fabricated
18 policies, practices, actions, and omissions [sic], that discriminates against the Plaintiff." See,
19 e.g., Docket No. 1 at 11. He does not identify what these policies or omissions are.

20 Prison officials may violate the Eighth Amendment if they fail to protect an
21 inmate from harm at the hands of other inmates. Farmer v. Brennan, 511 U.S. 825, 833 (1994).

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23 ¹ The court refers to the page numbers assigned by its ECF system.

24 ² In another document, not part of the complaint, plaintiff suggests that the assault
25 occurred on B Facility of High Desert State Prison. Docket No.4 at 2. As this is a separate
26 document, the court will not consider it in determining whether the complaint states a cause of
action.

1 In addition, prison officials may violate the equal protection clause if they fail to protect an
2 inmate because of his race. Turner v. Safley, 482 U.S. 78, 84 (1987) (prisoners are protected
3 against invidious racial discrimination). In this case, however, it is not clear whether plaintiff is
4 making an Eighth Amendment claim, an equal protection claim, or both. Moreover, it is not
5 clear from the complaint whether the assault occurred on B Facility or in CTC.

6 In addition, plaintiff has mentioned retaliation claims and medical indifference
7 claims, but has failed to support them with any factual allegations, so the court cannot determine
8 whether he wishes to pursue these. Finally, he names the Department of Corrections and
9 Rehabilitation as a defendant, yet the agency is immune from suit under the Eleventh
10 Amendment. Brown v. California Dept. of Corrections, 554 F.3d 747, 752 (9th Cir. 2009).

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

21 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
22 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See
23 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms
24 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless
25 there is some affirmative link or connection between a defendant's actions and the claimed
26 deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir.

1 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory
2 allegations of official participation in civil rights violations are not sufficient. Ivey v. Board of
3 Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

11 Finally, the court refers plaintiff to McHenry v. Renne, 84 F.3d 1172, 1177 (9th
12 Cir. 1996), which relied on the standard form negligence complaint from the Appendix to the
13 Federal Rules of Civil Procedure as a model of precise pleading:

14 1. Allegation of jurisdiction.

15 2. On June 1, 1936, in a public highway, called Boylston Street,
16 in Boston Massachusetts, defendant negligently drove a motor
vehicle against plaintiff, who was then crossing said highway.

17 3. As a result plaintiff was thrown down and had his leg broken,
18 and was otherwise injured, was prevented from transacting his
19 business, suffered great pain of body and mind, and incurred
expenses for medical attention and hospitalization in the sum of
one thousand dollars.

20 Wherefore plaintiff demands judgment against defendant in the
21 sum of one thousand dollars.

22 Id. The court urges the plaintiff to rely on this model as well as a means of making his claims
23 understandable to the court and to any defendants.

24 II. Claims For Injunctive Relief

25 Plaintiff has filed two requests for injunctive relief, asking that he be transferred
26 to prevent further attempts on his life by correctional officers.

1 In Devose v. Herrington, 42 F.3d 470 (8th Cir. 1994), the inmate plaintiff sought
2 an injunction preventing the defendants from filing false disciplinary charges and taking other
3 actions in retaliation for the underlying lawsuit, in which plaintiff challenged his medical care.

4 The Court of Appeals observed:

5 [A] party moving for a preliminary injunction must necessarily
6 establish a relationship between the injury claimed in the party's
7 motion and the conduct asserted in the complaint. It is self-evident
8 that Devose's motion for temporary relief has nothing to do with
9 preserving the district court's decision making power. . . .
Although these new assertions might support additional claims
against the same prison officials, they cannot provide the basis for
a preliminary injunction in this lawsuit.

10 Id. (citations omitted); see also Omega World Travel v. Trans World Airways, 111 F.3d 14, 16
11 (4th Cir. 1997); Lebron v. Armstrong, 289 F.Supp.2d 56, 61 (D. Conn. 2003). If this showing of
12 relationship is not made, the court should not consider the factors for the issuance of preliminary
13 relief. In re Microsoft Antitrust Litigation, 333 F.3d 517, 526 (4th Cir. 2003).

14 So far as the court can understand the underlying complaint, it is based on
15 authorities' failure to protect plaintiff from violence at the hands of other inmates. The request
16 for injunctive relief is not related to this claim.

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

18 1. Plaintiff's request for leave to proceed in forma pauperis (docket no. 8) is
19 granted.

20 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.
21 The fee shall be collected and paid in accordance with this court's order to the Director of the
22 California Department of Corrections and Rehabilitation filed concurrently herewith.

23 3. Plaintiff's complaint is dismissed.

24 4. Plaintiff is granted thirty days from the date of service of this order to file an
25 amended complaint that complies with the requirements of the Civil Rights Act, the Federal
26 Rules of Civil Procedure, and the Local Rules of Practice; the amended complaint must bear the

1 docket number assigned this case and must be labeled "Amended Complaint"; plaintiff must file
2 an original and two copies of the amended complaint; failure to file an amended complaint in
3 accordance with this order will result in a recommendation that this action be dismissed.

4 5. The Clerk of the Court is directed to assign this case to a district judge.

5 IT IS HEREBY RECOMMENDED that plaintiff's requests for injunctive relief
6 (docket nos. 6 & 7) be denied.

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
9 one days after being served with these findings and recommendations, plaintiff may file written
10 objections with the court. The document should be captioned "Objections to Magistrate Judge's
11 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
12 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
13 F.2d 1153 (9th Cir. 1991).

14 DATED: May 6, 2010.

15 
16 U.S. MAGISTRATE JUDGE

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