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

JAVIER PEREZ-LOPEZ,

Plaintiff,

No. 2:10-cv-0353 KJN P

vs.

COX. et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding without counsel. 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 pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302.

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 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 prison trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated to

1 make monthly payments of twenty percent of the preceding month's income credited to
2 plaintiff's prison trust account. These payments will be forwarded by the appropriate agency to
3 the Clerk of the Court each time the amount in plaintiff's account exceeds \$10.00, until the filing
4 fee is 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 be
9 granted, or that seek monetary relief from a defendant who is immune from such relief.
10 28 U.S.C. § 1915A(b)(1),(2).

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

18 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and
19 plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
20 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
21 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47
22 (1957)). In order to survive dismissal for failure to state a claim, a complaint must contain more
23 than "a formulaic recitation of the elements of a cause of action;" it must contain factual
24 allegations sufficient "to raise a right to relief above the speculative level." Id. However,
25 "[s]pecific facts are not necessary; the statement [of facts] need only 'give the defendant fair
26 notice of what the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551

1 U.S. 89, 93 (2007) (quoting Bell Atlantic Corp., 550 U.S. at 555) (citations and internal
2 quotations marks omitted). In reviewing a complaint under this standard, the court must accept
3 as true the allegations of the complaint in question, id., and construe the pleading in the light
4 most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

5 Plaintiff alleges that he received a Rules Violation Report for possession of a cell
6 phone and was later found guilty which resulted in a loss of privileges and a 30 day loss of time
7 credits. Plaintiff challenges the hearing and seeks punitive and compensatory damages. Plaintiff
8 has not indicated that he seeks return of the 30 day loss of time, yet the complaint must still be
9 dismissed for the reasons that follow.

10 In Heck v. Humphrey, 512 U.S. 477 (1994), an Indiana state prisoner brought a
11 civil rights action under § 1983 for damages. Claiming that state and county officials violated his
12 constitutional rights, he sought damages for improprieties in the investigation leading to his
13 arrest, for the destruction of evidence, and for conduct during his trial (“illegal and unlawful
14 voice identification procedure”). Convicted on voluntary manslaughter charges, and serving a
15 fifteen year term, plaintiff did not seek injunctive relief or release from custody. The United
16 States Supreme Court affirmed the Court of Appeal’s dismissal of the complaint and held that:

17 in order to recover damages for allegedly unconstitutional
18 conviction or imprisonment, or for other harm caused by actions
19 whose unlawfulness would render a conviction or sentence invalid,
20 a § 1983 plaintiff must prove that the conviction or sentence has
21 been reversed on direct appeal, expunged by executive order,
22 declared invalid by a state tribunal authorized to make such
determination, or called into question by a federal court’s issuance
of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages
bearing that relationship to a conviction or sentence that has not
been so invalidated is not cognizable under 1983.

23 Heck, 512 U.S. at 486. The Court expressly held that a cause of action for damages under § 1983
24 concerning a criminal conviction or sentence cannot exist unless the conviction or sentence has
25 been invalidated, expunged or reversed. Id.

26 ///

1 The Supreme Court has extended the Heck bar to § 1983 suits that would negate
2 prison disciplinary proceedings that affect good-time credits. Edwards v. Balisok, 520 U.S. 641,
3 648 (1997). A prisoner's challenge to a disciplinary hearing procedure is barred if judgment in
4 his favor would necessarily imply the invalidity of the resulting loss of good-time credits. Id. at
5 646. So, a “prisoner's § 1983 action is barred (absent prior invalidation)-no matter the relief
6 sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct
7 leading to conviction or internal prison proceedings)-if success in that action would necessarily
8 demonstrate the invalidity of confinement or its duration.” Wilkinson v. Dotson, 544 U.S. 74,
9 81-82 (2005).

10 Plaintiff’s complaint will be dismissed and plaintiff will be given the opportunity
11 to file an amended complaint to provide more information to show if the prison disciplinary
12 charge has been expunged or overturned.

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

23 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
24 conditions about which he complains resulted in a deprivation of plaintiff’s constitutional rights.
25 Rizzo v. Goode, 423 U.S. 362, 371 (1976). Also, the complaint must allege in specific terms
26 how each named defendant is involved. Id. There can be no liability under 42 U.S.C. § 1983

1 unless there is some affirmative link or connection between a defendant's actions and the
2 claimed deprivation. Id.; May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy,
3 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official
4 participation in civil rights violations are not sufficient. Ivey v. Board of Regents, 673 F.2d 266,
5 268 (9th Cir. 1982).

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

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

15 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

16 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.

17 Plaintiff is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
18 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
19 Director of the California Department of Corrections and Rehabilitation filed concurrently
20 herewith.

21 3. Plaintiff's complaint is dismissed.

22 4. Within thirty days from the date of this order, plaintiff shall complete the
23 attached Notice of Amendment and submit the following documents to the court:

24 a. The completed Notice of Amendment; and


25 b. An original and one copy of the Amended Complaint.

26 Plaintiff's amended complaint shall comply with the requirements of the Civil Rights Act, the

1 Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must
2 also bear the docket number assigned to this case and must be labeled "Amended Complaint."
3 Failure to file an amended complaint in accordance with this order may result in the dismissal of
4 this action.

5 DATED: April 23, 2010

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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

JAVIER PEREZ-LOPEZ,

Plaintiff,
vs.

No. 2:10-cv-0353 KJN P

COX. et al.,

Defendant.

NOTICE OF AMENDMENT

_____ /

Plaintiff hereby submits the following document in compliance with the court's
order filed _____:

_____ Amended Complaint

DATED:

Plaintiff