

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

VICTOR M. CORREA,
Plaintiff,

No. CIV S-10-0603 GGH P

vs.

R.L. GOWER, 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 2, 2010 (docket # 6), plaintiff's complaint was dismissed with leave to file an amended complaint. Plaintiff has filed an amended complaint. Plaintiff has consented to the jurisdiction of the undersigned. Docket # 4.

As plaintiff has been previously informed, 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 be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28

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

6 A complaint must contain more than a “formulaic recitation of the elements of a
7 cause of action;” it must contain factual allegations sufficient to “raise a right to relief above the
8 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).
9 “The pleading must contain something more...than...a statement of facts that merely creates a
10 suspicion [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal
11 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). “[A] complaint must contain sufficient
12 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft
13 v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127 S.Ct.
14 1955). “A claim has facial plausibility when the plaintiff pleads factual content that allows the
15 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
16 Id.

17 In reviewing a complaint under this standard, the court must accept as true the
18 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
19 738, 740, 96 S.Ct. 1848 (1976), construe the pleading in the light most favorable to the plaintiff,
20 and resolve all doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct.
21 1843 (1969).

22 Plaintiff has failed to cure the defects of the original complaint. Plaintiff first
23 focuses, inexplicably and inaccurately, on a finding the court did not make when he states that
24 the undersigned wrongly “accuse[d]” him of not completing the third level grievance process.
25 Amended Complaint, p. 1. On the contrary, the court did not challenge plaintiff’s representation
26 that the third level grievance process had been completed. See Dkt # 6, p. 5. The court,

1 however, did set forth in some detail (incorporated by reference herein), how plaintiff had failed
2 to show how recording his arrest record involving his having been charged with sex offenses
3 with children, even though those charges were ultimately dismissed, on his classification chrono
4 constituted a failure to protect, rising to the level of an Eighth Amendment violation, noting that
5 plaintiff had made no allegation that, as a result, he has suffered or been subjected to any assault
6 or attack or even a threat of attack. *Id.*, p. 6.

7 In his amended complaint, plaintiff asserts that he *has* been a rape victim at High
8 Desert State Prison and that he has alerted HDSP staff, the Board of [Parole Hearings] and other
9 unidentified agencies with no response. AC, p. 1. Other than the broad claim, plaintiff provides
10 no factual predicate in support of the claim—he does not even provide an approximation of when
11 it occurred or in any way characterize the circumstances of the alleged sexual assault. Although
12 he conclusorily alleges that his life is in danger at HDSP, he does not link his allegation that it is
13 a falsification of his records for defendants to classify and categorize his convictions and arrests
14 together (a claim dismissed from the original complaint, albeit with leave to amend), i.e., that his
15 records have been falsified by showing that he had been arrested for sex offenses with children,
16 with the attack of which he avers he was a victim. Moreover, he does not name even one
17 individual defendant within his amended complaint, much less link anyone to any conduct
18 alleged to have deprived plaintiff of his constitutional rights. The Civil Rights Act under which
19 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 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
2 omits to perform an act which he is legally required to do that causes the deprivation of which
3 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

4 Moreover, supervisory personnel are generally not liable under § 1983 for the
5 actions of their employees under a theory of respondeat superior and, therefore, when a named
6 defendant holds a supervisory position, the causal link between him and the claimed
7 constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862
8 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S.
9 941 (1979). Vague and conclusory allegations concerning the involvement of official personnel
10 in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th
11 Cir. 1982).

12 Plaintiff also seems not to have taken note of the court’s admonition that under
13 Local Rule 220, an amended complaint must be complete in itself without reference to any prior
14 pleading. The court finds the allegations in plaintiff’s amended complaint so vague and
15 conclusory that it is unable to determine whether the current action is frivolous or fails to state a
16 claim for relief. The court has determined that the amended complaint does not contain a short
17 and plain statement as required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a
18 flexible pleading policy, a complaint must give fair notice and state the elements of the claim
19 plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984).
20 Rule 8 requires “sufficient allegations to put defendants fairly on notice of the claims against
21 them.” McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991)). Accord Richmond v.
22 Nationwide Cassel L.P., 52 F.3d 640, 645 (7th Cir. 1995) (amended complaint with vague and
23 scanty allegations fails to satisfy the notice requirement of Rule 8.) Plaintiff must allege with at
24 least some degree of particularity overt acts which defendants engaged in that support plaintiff’s
25 claim. Id. Because plaintiff has failed to comply with the requirements of Fed. R. Civ. P.
26 8(a)(2), the amended complaint must be dismissed. The court will, however, grant leave to file a

1 second amended complaint.

2 If plaintiff chooses to file a second amended complaint, plaintiff must demonstrate
3 how the conditions complained of have resulted in a deprivation of plaintiff's constitutional
4 rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the second amended complaint
5 must allege in specific terms how each named defendant is involved. There can be no liability
6 under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant's
7 actions and the claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto,
8 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).
9 Furthermore, vague and conclusory allegations of official participation in civil rights violations
10 are not sufficient. Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

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

- 20 1. Plaintiff's amended complaint is dismissed; and
21 2. The amended complaint is dismissed for the reasons discussed above, with
22 leave to file a second amended complaint within twenty-eight days from the date of service of
23 this order. Failure to file a second amended complaint will result in dismissal of this action.

24 DATED: August 23, 2010

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

26 GGH:009 - corr0603.ord