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

KENNETH A. SMITH,
Plaintiff,

No. CIV S-10-2558-CMK-P

vs.

ORDER

D.V.I. STATE PRISON, et al.,
Defendants.

_____ /

Plaintiff is apparently a former state prisoner, currently on parole. Proceeding pro se, plaintiff brings this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. (Doc. 2). Plaintiff has consented to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c) and no other party has been served or appeared in the action.

Plaintiff has submitted the affidavit required by 28 U.S.C. § 1915(a) showing that plaintiff is unable to prepay fees and costs or give security therefor. Accordingly, the request to proceed in forma pauperis will be granted.

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1 The court is required to screen complaints brought by prisoners seeking relief
2 against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C.
3 § 1915A(a). The court is also required to screen complaints brought by litigants who have been
4 granted leave to proceed in forma pauperis. See 28 U.S.C. § 1915(e)(2). Under these screening
5 provisions, the court must dismiss a complaint or portion thereof if it: (1) is frivolous or
6 malicious; (2) fails to state a claim upon which relief can be granted; or (3) seeks monetary relief
7 from a defendant who is immune from such relief. See 28 U.S.C. §§ 1915(e)(2)(A), (B) and
8 1915A(b)(1), (2). Because plaintiff, who is no longer a prisoner, has been granted leave to
9 proceed in forma pauperis, the court will screen the complaint pursuant to § 1915(e)(2).

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

17 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and
18 plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
19 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic
20 Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964 (2007) (quoting Conley v. Gibson, 355
21 U.S. 41, 47 (1957)). In order to survive dismissal for failure to state a claim a complaint must
22 contain more than “a formulaic recitation of the elements of a cause of action;” it must contain
23 factual allegations sufficient “to raise a right to relief above the speculative level.” Id. However,
24 “[s]pecific facts are not necessary; the statement [of facts] need only give the defendant fair
25 notice of what the . . . claim is and the grounds upon which it rests.” Erickson v. Pardus, 551
26 U.S. 89, 127 S. Ct. 2197, 2200 (2007) (internal quotes omitted). In reviewing a complaint under

1 this standard, the court must accept as true the allegations of the complaint in question, see id.,
2 and construe the pleading in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416
3 U.S. 232, 236 (1974).

4 Here, plaintiff's statement of his claim is as follows:

5 In correct placement of facility level of care. Wrong placement
6 level two. Fact I am a level four inmate 9-6-2008. Correctional
D.V.I. RC Counselor.

7 This statement is so vague and conclusory that the court is unable to determine
8 whether this action is frivolous or fails to state a claim for relief. Either way, the court has
9 determined that the complaint does not contain a short and plain statement as required by Federal
10 Rule of Civil Procedures 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a
11 complaint must give fair notice and state the elements of the claim plainly and succinctly. See
12 Jones v. Comty. Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at
13 least some degree of particularity overt acts which defendants engaged in that support his claim.
14 See id. Because plaintiff has failed to comply with the requirements of Rule 8(a)(2), the
15 complaint must be dismissed. The court will, however, grant leave to file an amended complaint.

16 The court further notes that plaintiff fails to name any individual as a defendant in
17 his complaint. The only identifiable defendant named is "D.V.I." (Deuel Vocational Institution).
18 D.V.I. is a California State Prison. The Eleventh Amendment prohibits federal courts from
19 hearing suits brought against a state both by its own citizens, as well as by citizens of other states.
20 See Brooks v. Sulphur Springs Valley Elec. Coop., 951 F.2d 1050, 1053 (9th Cir. 1991). This
21 prohibition extends to suits against states themselves, and to suits against state agencies. See
22 Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per curiam); Taylor v. List, 880 F.2d
23 1040, 1045 (9th Cir. 1989). A state's agency responsible for incarceration and correction of
24 prisoners is a state agency for purposes of the Eleventh Amendment. See Alabama v. Pugh, 438
25 U.S. 781, 782 (1978) (per curiam); Hale v. Arizona, 993 F.2d 1387, 1398-99 (9th cir. 1993) (en
26 banc).

1 The Eleventh Amendment also bars actions seeking damages from state officials
2 acting in their official capacities. See Eaglesmith v. Ward, 73 F.3d 857, 859 (9th Cir. 1995);
3 Pena v. Gardner, 976 F.2d 469, 472 (9th Cir. 1992) (per curiam). The Eleventh Amendment
4 does not, however, bar suits against state officials acting in their personal capacities. See id.
5 Under the doctrine of Ex Parte Young, 209 U.S. 123 (1908), the Eleventh Amendment does not
6 bar suits for prospective declaratory or injunctive relief against state officials in their official
7 capacities. See Armstrong v. Wilson, 124 F.3d 1019, 1025 (9th Cir. 1997). The Eleventh
8 Amendment also does not bar suits against cities and counties. See Monell v. Dep't of Soc.
9 Servs., 436 U.S. 658, 690 n.54 (1978). As the only named defendant in plaintiff's complaint is
10 an immune defendant, this action, as currently written, is barred by state immunity. Unless
11 plaintiff can name an individual, acting in his personal capacity, plaintiff will be unable to
12 continue with this action.

13 Plaintiff is informed that to state a claim under 42 U.S.C. § 1983, the plaintiff
14 must allege an actual connection or link between the actions of the named defendants and the
15 alleged deprivations. See Monell v. Dep't of Social Servs., 436 U.S. 658 (1978); Rizzo v.
16 Goode, 423 U.S. 362 (1976). "A person 'subjects' another to the deprivation of a constitutional
17 right, within the meaning of § 1983, if he does an affirmative act, participates in another's
18 affirmative acts, or omits to perform an act which he is legally required to do that causes the
19 deprivation of which complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).
20 Vague and conclusory allegations concerning the involvement of official personnel in civil rights
21 violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).
22 Rather, the plaintiff must set forth specific facts as to each individual defendant's causal role in
23 the alleged constitutional deprivation. See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988).

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1 Because it is possible that the deficiencies identified in this order may be cured by
2 amending the complaint, plaintiff is entitled to leave to amend prior to dismissal of the entire
3 action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc). Plaintiff is
4 informed that, as a general rule, an amended complaint supersedes the original complaint. See
5 Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). Thus, following dismissal with leave to
6 amend, all claims alleged in the original complaint which are not alleged in the amended
7 complaint are waived. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987). Therefore, if
8 plaintiff amends the complaint, the court cannot refer to the prior pleading in order to make
9 plaintiff's amended complaint complete. See Local Rule 15-220. An amended complaint must
10 be complete in itself without reference to any prior pleading. See id.

11 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
12 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See
13 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The complaint must allege in specific terms how
14 each named defendant is involved, and must set forth some affirmative link or connection
15 between each defendant's actions and the claimed deprivation. See May v. Enomoto, 633 F.2d
16 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

17 Finally, plaintiff is warned that failure to file an amended complaint within the
18 time provided in this order may be grounds for dismissal of this action. See Ferdik, 963 F.2d at
19 1260-61; see also Local Rule 110. Plaintiff is also warned that a complaint which fails to comply
20 with Rule 8 may, in the court's discretion, be dismissed with prejudice pursuant to Rule 41(b).
21 See Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 673 (9th Cir. 1981).

22 Finally, plaintiff has filed a document which has been docketed as a "motion for
23 transfer." It appears that by this document plaintiff is seeking to have this action proceed in
24 United States District Court, Eastern District of California, Sacramento Division. The action was
25 filed here. Plaintiff's motion will therefore be denied as unnecessary.

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1 Accordingly, IT IS HEREBY ORDERED that:

- 2 1. Plaintiff's motion for leave to proceed in forma pauperis (Doc. 2) is
3 granted;
- 4 2. Plaintiff's complaint is dismissed with leave to amend;
- 5 3. Plaintiff shall file an amended complaint within 30 days of the date of
6 service of this order; and
- 7 4. Plaintiff's motion for transfer (Doc. 4) is denied as unnecessary.

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9 DATED: April 5, 2011

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11 **CRAIG M. KELLISON**
12 UNITED STATES MAGISTRATE JUDGE