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

BRYON ANDERSON,
Plaintiff,

vs.

No. CIV. S-10-2833 LKK GGH PS

HERB BENEDICT,
Defendant.

ORDER

_____/

Plaintiff, proceeding in this action pro se, 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(21), pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted an affidavit making the showing required by 28 U.S.C. § 1915(a)(1). Accordingly, the request to proceed in forma pauperis will be granted.

The determination that plaintiff may proceed in forma pauperis does not complete the required inquiry. Pursuant to 28 U.S.C. § 1915(e)(2), the court is directed to dismiss the case at any time if it determines the allegation of poverty is untrue, or if the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant.

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
14 S.Ct. 1955). “A claim has facial plausibility when the plaintiff pleads factual content that allows
15 the court to draw the reasonable inference that the defendant is liable for the misconduct
16 alleged.” Id.

17 Pro se pleadings are liberally construed. See Haines v. Kerner, 404 U.S. 519,
18 520-21, 92 S. Ct. 594, 595-96 (1972); Balistreri v. Pacifica Police Dep’t., 901 F.2d 696, 699 (9th
19 Cir. 1988). Unless it is clear that no amendment can cure the defects of a complaint, a pro se
20 plaintiff proceeding in forma pauperis is entitled to notice and an opportunity to amend before
21 dismissal. See Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987); Franklin, 745 F.2d at 1230.

22 The court is unable to determine a jurisdictional basis for this action. A federal
23 court is a court of limited jurisdiction, and may adjudicate only those cases authorized by the
24 Constitution and by Congress. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377, 114
25 S. Ct. 1673, 1675 (1994). U.S. Const. Art. III, § 1 provides that the judicial power of the United
26 States is vested in the Supreme Court, “and in such inferior Courts as the Congress may from

1 time to time ordain and establish.” Congress therefore confers jurisdiction upon federal district
2 courts, as limited by U.S. Const. Art. III, § 2. See Ankenbrandt v. Richards, 504 U.S. 689, 697-
3 99, 112 S. Ct. 2206, 2212 (1992). Lack of subject matter jurisdiction may be raised at any time
4 by either party or by the court. See Attorneys Trust v. Videotape Computer Products, Inc., 93
5 F.3d 593, 594-95 (9th Cir. 1996).

6 The basic federal jurisdiction statutes, 28 U.S.C. §§ 1331 & 1332, confer “federal
7 question” and “diversity” jurisdiction, respectively. Statutes which regulate specific subject
8 matter may also confer federal jurisdiction. See generally, W.W. Schwarzer, A.W. Tashima & J.
9 Wagstaffe, Federal Civil Procedure Before Trial § 2:5. Unless a complaint presents a plausible
10 assertion of a substantial federal right, a federal court does not have jurisdiction. See Bell v.
11 Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 776 (1945). A federal claim which is so insubstantial as
12 to be patently without merit cannot serve as the basis for federal jurisdiction. See Hagans v.
13 Lavine, 415 U.S. 528, 537-38, 94 S. Ct. 1372, 1379-80 (1974).

14 For diversity jurisdiction pursuant to 28 U.S.C. § 1332, each plaintiff must be
15 diverse from each defendant, and the amount in controversy must exceed \$75,000. For federal
16 question jurisdiction pursuant to 28 U.S.C. § 1331, the complaint must either (1) arise under a
17 federal law or the United States Constitution, (2) allege a “case or controversy” within the
18 meaning of Article III, section 2, or (3) be authorized by a jurisdiction statute. Baker v. Carr,
19 369 U.S. 186, 198, 82 S. Ct. 691, 699-700, 7 L. Ed. 2d 663 (1962).

20 In this case, plaintiff alleges that defendant, apparently plaintiff’s employer, did
21 not pay him his correct wage, and did not pay him overtime. He also alleges that during the
22 worst heat wave in Sacramento, defendant retaliated against him by forcing him to dig by hand
23 when backhoes were used. He also claims he was unfairly laid off, but defendant hired two
24 carpenters the very next day. As a result of the stress, he developed herpes.

25 The complaint asserts no basis for jurisdiction. It does not raise a federal question
26 but is limited to an employment dispute which should be adjudicated in state court. Only if

1 plaintiff can allege a violation of his constitutional rights or federal law can he maintain an action
2 for which there is federal jurisdiction.¹ For diversity jurisdiction, plaintiff would need to allege
3 that he is diverse from the defendant, and provide the state of residence for all parties. His
4 alleged damages would also need to exceed \$75,000. If plaintiff thinks he can proceed with
5 diversity jurisdiction, he is permitted to file an amended complaint.

6 If plaintiff chooses to amend the complaint to state a federal claim, plaintiff must
7 demonstrate how the conditions complained of have resulted in a deprivation of plaintiff's
8 constitutional rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint
9 must allege in specific terms how each named defendant is involved. There can be no liability
10 under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant's
11 actions and the claimed deprivation. Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976); May v.
12 Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir.
13 1978). Furthermore, vague and conclusory allegations of official participation in civil rights
14 violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

23 Good cause appearing, IT IS ORDERED that:

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

26 ¹It is unclear whether plaintiff may state a claim under the Fair Labor Standards Act.

1 2. The complaint is dismissed for the reasons discussed above, with leave to file
2 an amended complaint within twenty-eight (28) days from the date of service of this Order.
3 Failure to file an amended complaint will result in a recommendation that this action be
4 dismissed.

5 DATED: December 13, 2010

/s/ Gregory G. Hollows

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7 GREGORY G. HOLLOWS,
8 UNITED STATES MAGISTRATE JUDGE

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