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

PAUL ROBERTS,

Plaintiff,

No. CIV S-11-0474 FCD DAD P

vs.

JERRY BROWN et al.,

Defendant.

ORDER

\_\_\_\_\_ /

Plaintiff is a state prisoner proceeding pro se. He seeks relief pursuant to 42 U.S.C. § 1983 and has filed an application to proceed in forma pauperis under 28 U.S.C. § 1915. This proceeding was referred to the undersigned magistrate judge in accordance with Local Rule 302 and 28 U.S.C. § 636(b)(1).

Plaintiff has submitted an in forma pauperis application that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, plaintiff will be granted leave to proceed in forma pauperis.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. See 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. See 28 U.S.C. § 1915(b)(1). Plaintiff will be obligated to make monthly payments of twenty percent of

1 the preceding month's income credited to plaintiff's 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. See 28 U.S.C.  
4 § 1915(b)(2).

#### 5 **SCREENING REQUIREMENT**

6 The court is required to screen complaints brought by prisoners seeking relief  
7 against a governmental entity or an officer or employee of a governmental entity. See 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 be  
10 granted, or that seek monetary relief from a defendant who is immune from such relief. See 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 fact.  
13 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
14 (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. Neitzke,  
16 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
17 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
18 Cir. 1989); Franklin, 745 F.2d at 1227.

19 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and  
20 plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the  
21 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic  
22 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47  
23 (1957)). However, in order to survive dismissal for failure to state a claim a complaint must  
24 contain more than "a formulaic recitation of the elements of a cause of action;" it must contain  
25 factual allegations sufficient "to raise a right to relief above the speculative level." Bell Atlantic,  
26 550 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the

1 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.  
2 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all  
3 doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

4 The Civil Rights Act under which this action was filed provides as follows:

5 Every person who, under color of [state law] . . . subjects, or causes  
6 to be subjected, any citizen of the United States . . . to the  
7 deprivation of any rights, privileges, or immunities secured by the  
8 Constitution . . . shall be liable to the party injured in an action at  
9 law, suit in equity, or other proper proceeding for redress.

10 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the  
11 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See  
12 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362  
13 (1976). "A person 'subjects' another to the deprivation of a constitutional right, within the  
14 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or  
15 omits to perform an act which he is legally required to do that causes the deprivation of which  
16 complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

17 Moreover, supervisory personnel are generally not liable under § 1983 for the  
18 actions of their employees under a theory of respondeat superior and, therefore, when a named  
19 defendant holds a supervisory position, the causal link between him and the claimed  
20 constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862  
21 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory  
22 allegations concerning the involvement of official personnel in civil rights violations are not  
23 sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

### 24 **PLAINTIFF'S COMPLAINT**

25 In his complaint, plaintiff has identified Governor Brown, the Director of the  
26 California Department of Corrections and Rehabilitation, Warden McDonald, Associate Warden  
27 Beven, Dr. Swingle, Physician's Assistant Miranda, Nurse Clark, Nurse Reynolds, and Nurse  
28 Moore as the defendants in this action. Plaintiff alleges that the defendants have refused to

1 provide him with his prescription medication on a number of occasions because he was either not  
2 in his cell during pill distribution or was not in compliance with the applicable prison rules with  
3 respect to receiving medication, such as having his cell lights on during distribution of  
4 medication. Plaintiff also alleges that he has received his prescribed medication late during  
5 certain lock-downs at his institution of confinement. Finally, plaintiff alleges that part of his  
6 wheelchair had broken, causing it to become unstable and shake while in motion, but that  
7 defendants took more than seventeen months to replace it. In terms of relief, plaintiff requests  
8 declaratory judgment and monetary damages. (Compl. Attach. & Exs.)

### 9 DISCUSSION

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

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

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

4 To the extent that plaintiff wishes to pursue an inadequate medical care claim, he  
5 is advised that he must allege how each defendant's conduct rose to the level of "deliberate  
6 indifference" to his serious medical needs. Deliberate indifference is "a state of mind more  
7 blameworthy than negligence" and "requires 'more than ordinary lack of due care for the  
8 prisoner's interests or safety.'" Farmer, 511 U.S. at 835. Under the deliberate indifference  
9 standard, a person may be found liable for denying adequate medical care if he "knows of and  
10 disregards an excessive risk to inmate health and safety." Id. at 837. See also Estelle v. Gamble,  
11 429 U.S. 97, 106 (1976); Lolli v. County of Orange, 351 F.3d 410, 418-19 (9th Cir. 2003); Doty  
12 v. County of Lassen, 37 F.3d 540, 546 (9th Cir. 1994). A deliberate indifference claim  
13 predicated upon the failure to provide medical treatment has two elements:

14 First, the plaintiff must show a "serious medical need" by  
15 demonstrating that "failure to treat a prisoner's condition could  
16 result in further significant injury or the 'unnecessary and wanton  
17 infliction of pain.'" Second, the plaintiff must show the  
18 defendant's response to the need was deliberately indifferent.

17 Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006); McGuckin v. Smith, 974 F.2d 1050, 1059  
18 (9th Cir. 1991) (an Eighth Amendment medical claim has two elements: "the seriousness of the  
19 prisoner's medical need and the nature of the defendant's response to that need."), overruled on  
20 other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

21 In addition, to the extent that plaintiff has named prison staff members involved in  
22 processing of his inmate appeals as defendants in this action, he is advised that prison officials  
23 are not required under federal law to process inmate grievances and complaints in a specific way  
24 or to respond to them in a favorable manner. In this regard, even if named defendants delayed,  
25 denied, or ignored plaintiff's administrative grievances and complaints, they have not deprived  
26 him of a federal constitutional right. It is well established that "inmates lack a separate

1 constitutional entitlement to a specific prison grievance procedure.” Ramirez v. Galaza, 334  
2 F.3d 850, 860 (9th Cir. 2003) (citing Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988)).

3 Finally, the court notes that plaintiff’s allegations against California Governor  
4 Brown, Director of the California Department of Corrections and Rehabilitation, Warden  
5 McDonald, Associate Warden Beven, and Dr. Swingle do not appear to state a cognizable claim  
6 for relief. The Ninth Circuit has recently reaffirmed that a supervisory defendant may be held  
7 liable under § 1983 ““if there exists either (1) his or her personal involvement in the  
8 constitutional deprivation, or (2) a sufficient causal connection between the supervisor’s  
9 wrongful conduct and the constitutional violation.”” Starr v. Baca, \_\_ F.3d \_\_, 2011 WL  
10 2988827, at \*4 (9th Cir. July 25, 2011) (quoting Hansen v. Black, 885 F.2d 642, 646 (9th Cir.  
11 1989)). In his complaint, plaintiff has not alleged that the supervisory defendants were  
12 personally involved in his alleged constitutional deprivations. Nor has he alleged a sufficient  
13 causal connection between their conduct and any constitutional violation. If plaintiff still wishes  
14 to proceed against these defendants in this action, he will need to clarify in any amended  
15 complaint why these supervisory officials are named as defendants.

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

### 23 OTHER MATTERS

24 Also pending before the court is plaintiff’s motion for appointment of counsel and  
25 motion for a temporary restraining order. First, as to plaintiff’s motion for appointment of  
26 counsel, the United States Supreme Court has ruled that district courts lack authority to require

1 counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court,  
2 490 U.S. 296, 298 (1989). In certain exceptional circumstances, the district court may request  
3 the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935  
4 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

5 The test for exceptional circumstances requires the court to evaluate the plaintiff's  
6 likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in  
7 light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,  
8 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances  
9 common to most prisoners, such as lack of legal education and limited law library access, do not  
10 establish exceptional circumstances that would warrant a request for voluntary assistance of  
11 counsel. In the present case, the court does not find the required exceptional circumstances.

12 As to plaintiff's motion for a temporary restraining order, plaintiff is advised that  
13 his one-page motion is insufficient under Local Rule 231(c), so the court will construe it as a  
14 motion for a preliminary injunction. Plaintiff is advised that when an inmate seeks injunctive or  
15 declaratory relief concerning the prison where he is incarcerated, his claims for such relief  
16 become moot when he is no longer subjected to those conditions. See Weinstein v. Bradford,  
17 423 U.S. 147, 149 (1975); Dilley v. Gunn, 64 F.3d 1365, 1368-69 (9th Cir. 1995). Here, plaintiff  
18 requests preliminary injunctive relief against staff at High Desert State Prison. However, court  
19 records reveal that since filing his motion for injunctive relief, plaintiff was transferred to the  
20 Correctional Training Facility. Accordingly, the court will deny plaintiff's motion for a  
21 temporary restraining order as moot.

## 22 CONCLUSION

23 Accordingly, IT IS HEREBY ORDERED that:

- 24 1. Plaintiff's application to proceed in forma pauperis (Doc. No. 14) is granted.
- 25 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.

26 The fee shall be collected and paid in accordance with this court's order to the Director of the

1 California Department of Corrections and Rehabilitation filed concurrently herewith.

2 3. Plaintiff's complaint is dismissed.

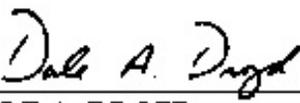
3 4. Plaintiff is granted thirty days from the date of service of this order to file an  
4 amended complaint that complies with the requirements of the Civil Rights Act, the Federal  
5 Rules of Civil Procedure, and the Local Rules of Practice; the amended complaint must bear the  
6 docket number assigned to this case and must be labeled "Amended Complaint"; failure to file an  
7 amended complaint in accordance with this order will result in a recommendation that this action  
8 be dismissed without prejudice.

9 5. The Clerk of the Court is directed to send plaintiff the court's form for filing a  
10 civil rights action.

11 6. Plaintiff's motion for appointment of counsel (Doc. No. 2) is denied.

12 7. Plaintiff's motion for a temporary restraining order (Doc. No. 3) is denied as  
13 moot.

14 DATED: August 11, 2011.

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17 \_\_\_\_\_  
18 DALE A. DROZD  
19 UNITED STATES MAGISTRATE JUDGE

17 DAD:9  
18 robe0474.14a