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

MARIO THOMPSON,

Plaintiff,

No. 2:12-cv-0776 KJM DAD P

vs.

D. ROSARIO et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding pro se. Plaintiff 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 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 trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly

1 payments of twenty percent of the preceding month's income credited to plaintiff's prison trust
2 account. These payments will be forwarded by the appropriate agency to the Clerk of the Court
3 each time the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28
4 U.S.C. § 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 the present case, plaintiff has identified Officer Rosario, Sergeant Primm, and
26 Lieutenant Sanchez as the defendants. Plaintiff alleges that, on or about November 29, 2009,
defendant Rosario used unnecessary force against him when he pushed plaintiff into his cell after
removing plaintiff's mechanical restraints. According to plaintiff, both defendants Primm and

1 Sanchez subsequently became aware of defendant Rosario's alleged use of force against plaintiff,
2 and defendant Primm threatened to send plaintiff to "ad-seg" if he pursued an excessive force
3 complaint about the incident. According to plaintiff, defendant Rosario's use of force resulted in
4 plaintiff injuring his back. Plaintiff claims that the defendants have violated his rights under the
5 Eighth Amendment. In terms of relief, plaintiff requests monetary damages. (Compl. Attach. at
6 1-7.)

7 DISCUSSION

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

18 If plaintiff chooses to file an amended complaint, he must allege facts
19 demonstrating how the conditions complained of resulted in a deprivation of his federal
20 constitutional or statutory rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The
21 amended complaint must allege in specific terms how each named defendant was involved in the
22 deprivation of plaintiff's rights. There can be no liability under 42 U.S.C. § 1983 unless there is
23 some affirmative link or connection between a defendant's actions and the claimed deprivation.
24 Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980);
25 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Vague and conclusory allegations of
26 official participation in civil rights violations are not sufficient. Ivey v. Board of Regents, 673

1 F.2d 266, 268 (9th Cir. 1982).

2 If plaintiff wishes to proceed on an excessive use force claim against defendant
3 Rosario, he is advised that the Eighth Amendment prohibits the infliction of “cruel and unusual
4 punishments.” U.S. Const. amend. VIII. The “unnecessary and wanton infliction of pain”
5 constitutes cruel and unusual punishment prohibited by the United States Constitution. Whitley
6 v. Albers, 475 U.S. 312, 319 (1986). See also Ingraham v. Wright, 430 U.S. 651, 670 (1977);
7 Estelle v. Gamble, 429 U.S. 97, 105-06 (1976). Neither accident nor negligence constitutes cruel
8 and unusual punishment, as “[i]t is obduracy and wantonness, not inadvertence or error in good
9 faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.”
10 Whitley, 475 U.S. at 319.

11 What is needed to show unnecessary and wanton infliction of pain “varies
12 according to the nature of the alleged constitutional violation.” Hudson v. McMillian, 503 U.S.
13 1, 5 (1992) (citing Whitley, 475 U.S. at 320). To prevail on an Eighth Amendment claim the
14 plaintiff must allege and show that objectively he suffered a “sufficiently serious” deprivation.
15 Farmer, 511 U.S. at 834; Wilson v. Seiter, 501 U.S. 294, 298-99 (1991). The plaintiff must also
16 show that subjectively each defendant had a culpable state of mind in allowing or causing the
17 plaintiff’s deprivation to occur. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

18 It is well established that “whenever prison officials stand accused of using
19 excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core
20 judicial inquiry is that set out in Whitley, i.e., whether force was applied in a good-faith effort to
21 maintain or restore discipline, or maliciously and sadistically to cause harm.” Hudson, 503 U.S.
22 at 6-7. However, a prisoner is not required to allege and show a “significant injury” to establish
23 that he suffered a sufficiently serious constitutional deprivation. Hudson, 503 U.S. at 9-10.

24 In any amended complaint plaintiff elects to file, he will need to elaborate on the
25 circumstances surrounding his confrontation with defendant Rosario and explain why and in
26 what manner he believes the defendant used force maliciously and sadistically to cause harm and

1 be dismissed without prejudice.

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

4 DATED: July 5, 2012.

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DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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