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

JOSEPH WHITAKER,

Plaintiff,

No. 2:13-cv-00505 DAD P

vs.

CRANE, et al.,

Defendants.

ORDER

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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).

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. See 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. See 28 U.S.C. § 1915A(b)(1) & (2).

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1 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
2 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
3 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
5 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
6 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
7 Cir. 1989); Franklin, 745 F.2d at 1227.

8 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and  
9 plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the  
10 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell Atlantic  
11 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47  
12 (1957)). However, in order to survive dismissal for failure to state a claim a complaint must  
13 contain more than “a formulaic recitation of the elements of a cause of action;” it must contain  
14 factual allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic,  
15 550 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the  
16 allegations of the complaint. See Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740  
17 (1976). The court must also construe the pleading in the light most favorable to the plaintiff and  
18 resolve all doubts in the plaintiff’s favor. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

19 Here, the allegations in plaintiff’s complaint are so vague and conclusory that the  
20 court is unable to determine whether the current action is frivolous or fails to state a claim for  
21 relief. The allegations of plaintiff’s hand-written complaint are difficult to decipher. It appears  
22 that in part plaintiff is attempting to allege that a correctional officer threatened him with  
23 physical harm. Beyond that, the court cannot determine the nature of plaintiff’s complaint. It is  
24 clear that plaintiff’s complaint does not contain a short and plain statement as required by Fed. R.  
25 Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a complaint must  
26 give fair notice to the defendants and must allege facts that support the elements of the claim

1 plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984).  
2 Plaintiff must allege with at least some degree of particularity overt acts which the defendants  
3 engaged in that support his claims. Id. Because plaintiff has failed to comply with the  
4 requirements of Fed. R. Civ. P. 8(a)(2), the complaint must be dismissed. The court will,  
5 however, grant leave to file an amended complaint.

6           If plaintiff chooses to file an amended complaint, plaintiff must demonstrate how  
7 the conditions complained of resulted in a deprivation of plaintiff's federal constitutional or  
8 statutory rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The amended complaint  
9 must allege in specific terms how each named defendant was involved in the deprivation of  
10 plaintiff's rights. There can be no liability under 42 U.S.C. § 1983 unless there is some  
11 affirmative link or connection between a defendant's actions and the claimed deprivation. Rizzo  
12 v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v.  
13 Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Vague and conclusory allegations of official  
14 participation in civil rights violations are not sufficient. Ivey v. Board of Regents, 673 F.2d 266,  
15 268 (9th Cir. 1982).

16           In any amended complaint he elects to file, plaintiff must complete all portions of  
17 the form complaint, including identifying each named defendant and the correctional facility  
18 where each defendant is employed. Plaintiff is also advised that an allegation of mere threats  
19 alone fails to state a claim of cruel and unusual punishment under the Eighth Amendment. Gaut  
20 v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987) (Upholding the district court's dismissal of plaintiff's  
21 claim that defendants threatened him with bodily harm to deter plaintiff from pursuing legal  
22 redress for grievances and observing that "it trivializes the eighth amendment to believe a threat  
23 constitutes a constitutional wrong.") Additionally, neither verbal abuse nor the use of profanity  
24 violate the Eighth Amendment proscription against cruel and unusual punishment. Oltarzewski  
25 v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (holding that allegations of the use of vulgar

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1 language; profanity, verbal abuse and verbal harassment do not state a constitutional claim under  
2 42 U.S.C. § 1983).

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

10           Accordingly, IT IS HEREBY ORDERED that:

11           1. Plaintiff's complaint is dismissed.

12           2. Plaintiff is granted thirty days from the date of service of this order to file an  
13 amended complaint that complies with the requirements of the Civil Rights Act, the Federal  
14 Rules of Civil Procedure, and the Local Rules of Practice; the amended complaint must bear the  
15 docket number assigned to this case and must be labeled "Amended Complaint"; plaintiff must  
16 use the form complaint provided by the court and answer each question in the form complaint;  
17 failure to file an amended complaint in accordance with this order will result in the dismissal of  
18 this action without prejudice.

19           3. The Clerk of the Court is directed to provide plaintiff with the court's form  
20 complaint for a § 1983 action.

21 DATED: March 25, 2013.

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25 DALE A. DROZD  
26 UNITED STATES MAGISTRATE JUDGE

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