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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY C. BONTEMPS,
Plaintiff,
v.
HARPER,
Defendant.

No. 2:13-cv-00506 DAD P

ORDER

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1). Plaintiff has consented to Magistrate Judge jurisdiction over this action pursuant to 28 U.S.C. § 636(c). (See ECF No. 4.)

I. In Forma Pauperis Application

Plaintiff has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and 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 separate order, the court will direct the appropriate agency to collect twenty percent of the preceding month’s income credited to plaintiff’s prison trust account and

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1 forward it to the Clerk of the Court each time the amount in plaintiff's account exceeds \$10.00,
2 until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

3 **II. Plaintiff's Complaint**

4 Plaintiff names in his complaint only one defendant, correctional Sergeant Harper who is
5 employed at High Desert State Prison. In its entirety, plaintiff's complaint alleges as follows¹:

6 On June 2, 2012 I was placed in administrative segregation due to
7 staff use of force on 6-25-12. I was given a chrono stating
8 comprehensive accommodation chrono for my AirCast walker
9 400-1-P-large walking boot and sock and air pump to pump up the
10 airbags in the AirCast. Sergeant Harper took my sock and my air
11 pump until I left administrative segregation Oct. 17-2012[.] While
12 I was in administrative segregation I fell several times because I
13 couldn't [illegible] my AirCast. Since I've been in H.D.S.P. I've
14 had two AirCast[.] Sergeant was not aware that I had another pump
15 when I left administrative segregation.

16 (ECF No. 1 at 3.) Plaintiff seeks \$400,000 as compensatory and punitive damages. (Id.)

17 **III. Screening Requirement**

18 The court is required to screen complaints brought by prisoners seeking relief against a
19 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
20 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
21 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
22 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

23 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
24 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
25 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
26 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
27 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
28 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
Cir. 1989); Franklin, 745 F.2d at 1227.

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¹ Plaintiff's complaint is handwritten and portions are illegible.

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

12 The allegations of plaintiff’s complaint are so vague and conclusory that the court is
13 unable to determine whether the current action is frivolous or fails to state a claim for relief. The
14 complaint does not contain a short and plain statement as required by Fed. R. Civ. P. 8(a)(2).
15 Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair notice to
16 the defendants and must allege facts that support the elements of the claim plainly and succinctly.
17 Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege
18 with at least some degree of particularity overt acts which defendants engaged in that support his
19 claims. Id. Because plaintiff has failed to comply with the requirements of Fed. R. Civ. P.
20 8(a)(2), the complaint must be dismissed. The court will, however, grant plaintiff leave to file an
21 amended complaint and will provide plaintiff with the following legal standards governing the
22 claims that plaintiff appears to be attempting to allege.

23 **IV. Eighth Amendment Claim**

24 To the extent that plaintiff is proceeding with an Eighth Amendment claim challenging the
25 conditions of his confinement, he is advised of the following legal requirements governing such a
26 claim.

27 It is well established that a prison official’s deliberate indifference to a substantial risk of
28 serious harm to an inmate violates the cruel and unusual punishment clause of the Eighth

1 Amendment. Farmer v. Brennan, 511 U.S. 825, 828-29 (1994); Helling v. McKinney, 509 U.S.
2 25, 31-32 (1993); Wilson v. Seiter, 501 U.S. 294, 302 (1991); Estelle v. Gamble, 429 U.S. 97,
3 104 (1976). “It is not, however, every injury suffered by one prisoner at the hands of another that
4 translates into constitutional liability for prison officials responsible for the victim’s safety.”
5 Farmer, 511 U.S. at 834. There are both objective and a subjective requirements in attempting to
6 state a cognizable claim under the Eighth Amendment. First, for the objective requirement, “the
7 inmate must show that he is incarcerated under conditions posing a substantial risk of serious
8 harm.” Id. Second, as to the subjective requirement, the prison official must have a sufficiently
9 culpable state of mind. See id. Here the required state of mind is one of deliberate indifference.
10 See id. A prison official who knows of and disregards an excessive risk to the inmate’s health or
11 safety demonstrates deliberate indifference. See id. at 837. Thus, “the official must both be
12 aware of facts from which the inference could be drawn that a substantial risk of serious harm
13 exists, and he must also draw that inference.” Id. However, an official that knows of a
14 substantial risk to an inmate’s health or safety but acts reasonably under the circumstances will
15 not be held liable under the cruel and unusual punishment clause, even if the threatened harm
16 results. See id. at 843.

17 Therefore, in any amended complaint he elects to file plaintiff must allege facts
18 demonstrating that he faced a substantial risk of serious harm, that the named defendant knew of
19 and disregarded the risk of harm to plaintiff, and that the actions of the named defendant in
20 response to that risk of harm were not reasonable.

21 **V. Americans with Disabilities Act (ADA) Claim**

22 Insofar as plaintiff is attempting to present a claim pursuant to the ADA, he is advised that
23 Title II of the ADA provides that:

24 no qualified individual with a disability shall, by reason of such
25 disability, be excluded from participation in or be denied the
26 benefits of the services, programs, or activities of a public entity, or
be subject to discrimination by such entity.

27 To establish a violation of the ADA, a plaintiff must allege and show that: (1) he or she is a
28 qualified individual with a disability; (2) he or she was excluded from participation in or

1 otherwise discriminated against with regard to a public entity's services, programs, or activities;
2 and (3) such exclusion or discrimination was by reason of his or her disability. See Simmons v.
3 Navajo County, 609 F.3d 1011, 1021 (9th Cir. 2010); Lovell v. Chandler, 303 F.3d 1039, 1052
4 (9th Cir. 2002). The proper defendant with respect to an alleged violation of the ADA is the
5 public entity or correctional facility. See Armstrong v. Wilson, 124 F.3d 1019, 1022-23 (9th Cir.
6 1997).

7 Here, plaintiff has not named a proper defendant with respect to an ADA claim nor has he
8 sought a proper remedy with respect to such a claim. In addition, plaintiff has not alleged that he
9 has been excluded from participation in, or otherwise discriminated against with regard to, a
10 public entity's services, programs, or activities due to a disability.

11 **VI. Amended Complaint**

12 In any amended complaint he elects to file, plaintiff must allege facts demonstrating how
13 the conditions complained of resulted in a deprivation of plaintiff's federal constitutional or
14 statutory rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The amended complaint
15 must allege in specific terms how each named defendant was involved in the deprivation of
16 plaintiff's rights. There can be no liability under 42 U.S.C. § 1983 unless there is some
17 affirmative link or connection between a defendant's actions and the claimed deprivation. Rizzo
18 v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v.
19 Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Vague and conclusory allegations of official
20 participation in civil rights violations are not sufficient. Ivey v. Board of Regents, 673 F.2d 266,
21 268 (9th Cir. 1982).

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

1 **VII. Conclusion**

2 In accordance with the above, IT IS HEREBY ORDERED that:

3 1. Plaintiff's April 18, 2013 request for leave to proceed in forma pauperis (ECF No. 5) is
4 granted.

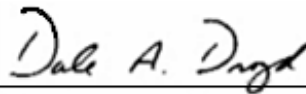
5 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
6 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
7 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
8 Director of the California Department of Corrections and Rehabilitation filed concurrently
9 herewith.

10 3. Plaintiff's complaint is dismissed.

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

17 5. The Clerk of the Court is directed to provide plaintiff with the court's form complaint
18 for a § 1983 action.

19 Dated: March 24, 2014

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22 DALE A. DROZD
23 UNITED STATES MAGISTRATE JUDGE

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