

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

17 In the FAC, plaintiff identifies former California State Prison-Sacramento Warden Tim
18 Virga and Correctional Officer A. Agnone as defendants in this action. (ECF No. 10 at 1, 2.)
19 However, plaintiff’s FAC contains no allegations describing any acts or omissions of defendant
20 Warden Virga.

21 Plaintiff alleges as follows in his FAC. At all pertinent times, plaintiff was incarcerated at
22 California State Prison-Sacramento (“CSP-SAC”). There, plaintiff “was known as a jailhouse
23 lawyer” (ECF No. 10 at 3.) Plaintiff suffers from a mobility impairment, a fact that is
24 known to defendant Agnone. (Id. at 4.) At an unspecified point in time, defendant Agnone wrote
25 a rules violation report, citing plaintiff for “not standing during count.” (Id.) It appears, though
26 plaintiff does not explicitly allege, that plaintiff was unable to stand on the occasion in question
27 due to his mobility impairment. (Id.) Plaintiff then filed an administrative grievance alleging
28 disability discrimination by defendant Agnone for writing the rules violation report. (Id.) At the

1 time a response to the grievance was returned, defendant Agnone removed property, including
2 legal materials, from plaintiff's cell "until due process was up."¹ (Id.) When challenged,
3 defendant Agnone returned a television to plaintiff's cell, but not the legal materials that had been
4 seized therefrom. (Id.)

5 At another, presumably later, point in time, when plaintiff's cell-block at CSP-SAC was
6 on lockdown, defendant Agnone deprived plaintiff of all of his law books. (ECF No. 10 at 4.)
7 Due to the lockdown, plaintiff was also unable to access the law library. (Id.) Plaintiff contends
8 that, by depriving him of necessary legal materials, defendant Agnone thereby ensured that he
9 (Agnone) would not be held liable for discriminating against plaintiff. (Id.)

10 According to plaintiff, defendant Agnone performed all of these actions in order to deny
11 plaintiff access to the courts. (ECF No. 10 at 4.)

12 As currently pled, plaintiff's FAC fails to state a claim for relief. It appears that plaintiff
13 may be attempting to allege that defendant Agnone retaliated against him for filing inmate
14 grievances. The following standards apply to such a claim. It is well-established that prison
15 inmates have a constitutional right to freedom from retaliation for engaging in activity protected
16 by the First Amendment. Rhodes v. Robinson, 408 F.3d 559 (9th Cir. 2005). A retaliation claim
17 brought by an inmate has five elements. First, the plaintiff must allege and demonstrate that he
18 was engaged in conduct protected by the First Amendment. See Watison v. Carter, 668 F.3d
19 1108, 1114 (9th Cir. 2012). Second, a "plaintiff must claim that the defendant took adverse
20 action against the plaintiff." Id. (citing Rhodes, 408 F.3d at 567). "The adverse action need not
21 be an independent constitutional violation." Id. (citing Pratt v. Rowland, 65 F.3d 802, 806 (9th
22 Cir. 1995)). Third, plaintiff must allege and prove a causal connection between the protected
23 conduct and the adverse action. Id. Fourth, the plaintiff must allege and prove either a chilling
24 effect on the exercise of First Amendment rights or some other harm. Id. Finally, plaintiff must
25 allege and show that the retaliatory action "did not advance legitimate goals of the correctional
26 institution" Id. (quoting Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985)).

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28 ¹ The court is uncertain what plaintiff means in using this phrase.

1 In his FAC, plaintiff has satisfactorily alleged four of these five elements. First, plaintiff
2 has alleged that, by filing an inmate grievance against defendant Agnone, plaintiff engaged in
3 conduct protected under the First Amendment. Plaintiff has also alleged that defendant Agnone
4 took adverse action against him, by removing legal materials and other property from his cell.
5 While plaintiff could have more explicitly pled a causal connection between these actions, the
6 allegation that defendant Agnone removed plaintiff's property after plaintiff received a response
7 to his inmate grievance against defendant Agnone is sufficient to satisfy this element for pleading
8 purposes. Finally, plaintiff has alleged that his legal materials were removed in order to deny him
9 access to the courts, i.e., an illegitimate correctional goal. However, plaintiff has failed to allege
10 in sufficient detail the harm that allegedly resulted from defendant Agnone's adverse action
11 against him. Statements such as "my property couldn't be found until due process was up" and
12 "C/O Agnone granted his self (sic) immunity" lack sufficient factual content to provide notice of
13 how the alleged removal of plaintiff's legal property impaired plaintiff's ability to proceed on his
14 inmate grievances. Nonetheless, plaintiff will be granted an opportunity to remedy this
15 deficiency in a second amended complaint if he wishes to pursue this action.

16 It also appears that plaintiff is attempting to bring a claim against defendant Agnone for
17 interference with plaintiff's right of access to the courts, based on the removal of plaintiff's legal
18 materials. The right of access to the courts "forbids states from 'erect[ing] barriers that impede
19 the right of access of incarcerated persons'" to file civil actions that have a "reasonable basis in
20 law or fact.'" Silva v. DeVittorio, 658 F.3d 1090, 1102 (9th Cir. 2011) (quoting Snyder v. Nolen,
21 380 F.3d 279, 290 (7th Cir. 2004) and John L. v. Adams, 969 F.2d 228, 235 (6th Cir. 1992)). A
22 prisoner asserting any denial of access to the courts claim must allege the anticipated or lost
23 underlying cause of action as well an "actual injury," – that is 'actual prejudice with respect to
24 contemplated or existing litigation, such as the inability to meet a filing deadline or to present a
25 claim.'" Lewis v. Casey, 518 U.S. 343, 348 (1996). See also Christopher v. Harbury, 536 U.S.
26 403, 415 (2002); Nevada Dept. of Corrs. v. Greene, 648 F.3d 1014, 1018 (9th Cir. 2011). If
27 plaintiff chooses to proceed with this claim in a second amended complaint, he must provide

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1 therein factual allegations that, if proven, would demonstrate that he suffered an actual injury
2 under the standard set forth above.

3 Although the Federal Rules adopt a flexible pleading policy, under Federal Rule of Civil
4 Procedure 8(a)(2), a complaint must give fair notice to the defendants and must allege facts that
5 support the elements of the claim plainly and succinctly. Jones v. Cmty. Redev. Agency, 733
6 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least some degree of particularity
7 overt acts which defendants engaged in that support his claims. Id. Because plaintiff has failed to
8 comply with the requirements of Rule 8(a)(2), his first amended complaint must be dismissed. In
9 the interests of justice, the court will grant plaintiff leave to file a second amended complaint.

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

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

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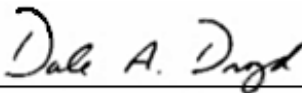
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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff’s first amended complaint (ECF No. 10) is dismissed.

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

Dated: September 25, 2015



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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