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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LEONE R. HARVEY,

Plaintiff,

v.

H. SHIRLEY, et al.,

Defendants.

No. 2:13-cv-01928 JAM AC P

ORDER

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983 and has requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). ECF Nos. 2, 9. Accordingly, the motions 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 payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time

1 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. §
2 1915(b)(2).

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

8 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
9 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
10 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
11 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
12 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
13 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
14 Cir. 1989); Franklin, 745 F.2d at 1227.

15 A complaint must contain more than a "formulaic recitation of the elements of a cause of
16 action;" it must contain factual allegations sufficient to "raise a right to relief above the
17 speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "The pleading
18 must contain something more. . . than . . . a statement of facts that merely creates a suspicion [of]
19 a legally cognizable right of action." Id. (quoting 5 C. Wright & A. Miller, Federal Practice and
20 Procedure § 1216, pp. 235-35 (3d ed. 2004)). "[A] complaint must contain sufficient factual
21 matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal,
22 566 U.S. 662 (2009) (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when
23 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
24 defendant is liable for the misconduct alleged." Id.

25 In reviewing a complaint under this standard, the court must accept as true the allegations
26 of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740
27 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in
28 the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421(1969).

1 In his first amended complaint, plaintiff challenges a prison disciplinary proceeding and
2 alleges that there were due process violations at his disciplinary hearing as well as at the
3 rehearing.¹ ECF No. 8 at 6-8. In Edwards v. Balisok, 520 U.S. 641, 644 (1997), the United
4 States Supreme Court applied the doctrine articulated in Heck v. Humphrey, 512 U.S. 477, 487
5 (1994), to prison disciplinary hearings. In Heck, the Court held that a state prisoner's claim for
6 damages for unconstitutional conviction or imprisonment is not cognizable under 42 U.S.C. §
7 1983 if a judgment in favor of plaintiff would necessarily imply the invalidity of his conviction or
8 sentence, unless the prisoner can demonstrate that the conviction or sentence has previously been
9 invalidated. 512 U.S. at 487. In applying the principle to the facts of Balisok, the Court held that
10 a claim challenging the procedures used in a prison disciplinary hearing, even if such a claim
11 seeks money damages and no injunctive relief, is not cognizable under § 1983 if the nature of the
12 inmate's allegations are such that, if proven, would necessarily imply the invalidity of the result
13 of the prison disciplinary hearing. 520 U.S. at 646. Because such a challenge, if successful,
14 would invalidate the duration of the inmate's confinement, it is properly brought as a habeas
15 corpus petition and not under § 1983. Heck, 512 U.S. at 487; Preiser v. Rodriguez, 411 U.S. 475,
16 500 (1973).

17 Here, plaintiff alleges that the hearing officer failed to consider evidence and witnesses
18 that would exonerate plaintiff. Such an allegation necessarily implies the invalidity of the
19 disputed disciplinary finding. There is no allegation that plaintiff's disciplinary conviction has
20 been reversed, expunged, or otherwise invalidated. If the loss of good time credits alleged in the
21 complaint would directly affect the duration of plaintiff's custody, his remedy lies in habeas and
22 the claim may not be maintained in this § 1983 action.

23 The court further finds the allegations in plaintiff's complaint vague and conclusory.
24 The court has determined that the complaint does not contain a short and plain statement as
25 required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy,

26 ¹ Before the court could screen the original complaint filed on September 17, 2013, plaintiff filed
27 a first amended complaint. Because the amended complaint supersedes the original, the court
28 will now screen the first amended complaint filed on October 24, 2013. See Loux v. Rhay, 375
F.2d 55, 57 (9th Cir. 1967).

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

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

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

- 24 1. Plaintiff's motions for leave to proceed in forma pauperis (ECF No. 2, 9) are granted.
- 25 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
26 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. §
27 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
28 Director of the California Department of Corrections and Rehabilitation filed concurrently

1 herewith.

2 3. The first amended complaint is dismissed for the reasons discussed above, with leave
3 to file an amended complaint.

4 4. Plaintiff is granted thirty days from the date of service of this order to file an amended
5 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil
6 Procedure, and the Local Rules of Practice; the amended complaint must bear the docket number
7 assigned this case and must be labeled "Second Amended Complaint"; plaintiff must file an
8 original and two copies of the amended complaint; failure to file an amended complaint in
9 accordance with this order will result in a recommendation that this action be dismissed.

10 DATE: May 7, 2014

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12 ALLISON CLAIRE
13 UNITED STATES MAGISTRATE JUDGE
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