

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

LA VANCE McNAIR,  
Plaintiff,

No. 2:14-CV-1043-CMK-P

vs.

ORDER

L. LIVELY, et al.,  
Defendants.

\_\_\_\_\_ /

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s complaint (Doc. 1).

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if it: (1) is frivolous or malicious; (2) fails to state a claim upon which relief can be granted; or (3) seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1), (2). Moreover, the Federal Rules of Civil Procedure require that complaints contain a “. . . short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This means that claims must be stated simply, concisely, and directly. See McHenry v. Renne,

1 84 F.3d 1172, 1177 (9th Cir. 1996) (referring to Fed. R. Civ. P. 8(e)(1)). These rules are satisfied  
2 if the complaint gives the defendant fair notice of the plaintiff's claim and the grounds upon  
3 which it rests. See Kimes v. Stone, 84 F.3d 1121, 1129 (9th Cir. 1996). Because plaintiff must  
4 allege with at least some degree of particularity overt acts by specific defendants which support  
5 the claims, vague and conclusory allegations fail to satisfy this standard. Additionally, it is  
6 impossible for the court to conduct the screening required by law when the allegations are vague  
7 and conclusory.

8           Plaintiff names the following as defendants: Lively, McCoy, Zahniser,  
9 Agbemaflle, and Windsor. Plaintiff states that, on April 8, 2013, the wall fire extinguisher near  
10 his cell "erupted" and that he cut his hand when he put his hand on it attempting to protect his  
11 belongings. According to plaintiff, defendants Lively, Zahniser, and McCoy were correctional  
12 officers on duty at the time. Plaintiff states that, due to the "large amount of water that come  
13 from the extinguisher it caused several inmates to mop the water up and took over two hours."  
14 Plaintiff adds that this caused defendants to "catch an attitude with the plaintiff by denying him  
15 medical attention." Plaintiff also claims that defendant Agbemaflle, a prison nurse, also denied  
16 him medical attention "by saying in order to be treating my hand I would have to have my  
17 building officer to call medical."

18           Next, plaintiff claims that he informed defendants Lively, Zahniser, and McCoy of  
19 "the circumstances on getting medical treatment." According to plaintiff, they refused to call  
20 medical. Plaintiff states that he then filed a formal request for an appointment with the medical  
21 clinic. Plaintiff adds that he was eventually seen by defendant Windsor, a prison doctor, on May  
22 15, 2013, and that he was prescribed medication to treat infection.

23           The treatment a prisoner receives in prison and the conditions under which the  
24 prisoner is confined are subject to scrutiny under the Eighth Amendment, which prohibits cruel  
25 and unusual punishment. See Helling v. McKinney, 509 U.S. 25, 31 (1993); Farmer v. Brennan,  
26 511 U.S. 825, 832 (1994). The Eighth Amendment ". . . embodies broad and idealistic concepts

1 of dignity, civilized standards, humanity, and decency.” Estelle v. Gamble, 429 U.S. 97, 102  
2 (1976). Conditions of confinement may, however, be harsh and restrictive. See Rhodes v.  
3 Chapman, 452 U.S. 337, 347 (1981). Nonetheless, prison officials must provide prisoners with  
4 “food, clothing, shelter, sanitation, medical care, and personal safety.” Toussaint v. McCarthy,  
5 801 F.2d 1080, 1107 (9th Cir. 1986). A prison official violates the Eighth Amendment only  
6 when two requirements are met: (1) objectively, the official’s act or omission must be so serious  
7 such that it results in the denial of the minimal civilized measure of life’s necessities; and (2)  
8 subjectively, the prison official must have acted unnecessarily and wantonly for the purpose of  
9 inflicting harm. See Farmer, 511 U.S. at 834. Thus, to violate the Eighth Amendment, a prison  
10 official must have a “sufficiently culpable mind.” See id.

11 Deliberate indifference to a prisoner’s serious illness or injury, or risks of serious  
12 injury or illness, gives rise to a claim under the Eighth Amendment. See Estelle, 429 U.S. at  
13 105; see also Farmer, 511 U.S. at 837. This applies to physical as well as dental and mental  
14 health needs. See Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982). An injury or illness is  
15 sufficiently serious if the failure to treat a prisoner’s condition could result in further significant  
16 injury or the “. . . unnecessary and wanton infliction of pain.” McGuckin v. Smith, 974 F.2d  
17 1050, 1059 (9th Cir. 1992); see also Doty v. County of Lassen, 37 F.3d 540, 546 (9th Cir. 1994).  
18 Factors indicating seriousness are: (1) whether a reasonable doctor would think that the condition  
19 is worthy of comment; (2) whether the condition significantly impacts the prisoner’s daily  
20 activities; and (3) whether the condition is chronic and accompanied by substantial pain. See  
21 Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000) (en banc).

22 In this case, plaintiff has not alleged sufficient facts to show that he presented with  
23 a serious injury. Plaintiff describes his injury as follows: “a nice cut to my left palm.” He does  
24 not, however, allege an injury which is accompanied by substantial pain or which impacts his  
25 daily activities. And while plaintiff alleges that he developed an infection, he has not alleged that  
26 the infection was significant. In fact, it appears that it was treated with nothing more serious than

1 medication.

2           Because it is possible that the deficiencies identified in this order may be cured by  
3 amending the complaint, plaintiff is entitled to leave to amend prior to dismissal of the entire  
4 action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc). Plaintiff is  
5 informed that, as a general rule, an amended complaint supersedes the original complaint. See  
6 Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). Thus, following dismissal with leave to  
7 amend, all claims alleged in the original complaint which are not alleged in the amended  
8 complaint are waived. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987). Therefore, if  
9 plaintiff amends the complaint, the court cannot refer to the prior pleading in order to make  
10 plaintiff's amended complaint complete. See Local Rule 220. An amended complaint must be  
11 complete in itself without reference to any prior pleading. See id.

12           If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the  
13 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See  
14 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The complaint must allege in specific terms how  
15 each named defendant is involved, and must set forth some affirmative link or connection  
16 between each defendant's actions and the claimed deprivation. See May v. Enomoto, 633 F.2d  
17 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

18           Finally, plaintiff is warned that failure to file an amended complaint within the  
19 time provided in this order may be grounds for dismissal of this action. See Ferdik, 963 F.2d at  
20 1260-61; see also Local Rule 110. Plaintiff is also warned that a complaint which fails to comply  
21 with Rule 8 may, in the court's discretion, be dismissed with prejudice pursuant to Rule 41(b).  
22 See Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 673 (9th Cir. 1981).

23 ///

24 ///

25 ///

26 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's complaint is dismissed with leave to amend; and
2. Plaintiff shall file a first amended complaint within 30 days of the date of service of this order.

DATED: October 30, 2014

  
\_\_\_\_\_  
**CRAIG M. KELLISON**  
UNITED STATES MAGISTRATE JUDGE