

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DESHONE SMITH,

No. 2:14-cv-3002 CKD P

Plaintiff,

V.

ORDER

K. DICKSON, et al.,

Defendants.

I. Introduction

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. 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). 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 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 the amount in plaintiff's account

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

2 **II. Screening**

3 Since commencing this action on December 30, 2014, plaintiff has filed two amended
4 complaints. (ECF Nos. 13, 16.) For screening purposes, the court considers plaintiff's most
5 recent complaint. (ECF No. 16.)

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

11 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.

12 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
13 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
14 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
15 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
16 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
17 Cir. 1989); Franklin, 745 F.2d at 1227.

18 In order to avoid dismissal for failure to state a claim a complaint must contain more than
19 "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause
20 of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words,
21 "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
22 statements do not suffice." Ashcroft v. Iqbal, 556 U.S. at 678 (2009). Furthermore, a claim upon
23 which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. "A claim has
24 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
25 reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at
26 1949. When considering whether a complaint states a claim upon which relief can be granted, the
27 court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007), and
28 construe the complaint in the light most favorable to the plaintiff, see Scheuer v. Rhodes, 416

1 U.S. 232, 236 (1974).

2 Plaintiff alleges that on November 10, 2014, two correctional officers at Mule Creek State
3 Prison assaulted him by punching him in the back and ribs.¹ (ECF No. 16 at 3; see id. at 8.) He
4 told defendants, who were supervising officers, that he feared for his safety “based on lawsuits in
5 this prison . . . filed on other officers for unnecessary use of force,” and also based on the assault.
6 (Id. at 3-4.) However, they refused to investigate or report the issue. He has been unable to get
7 relief through the inmate appeals process.

8 Plaintiff seeks relief in the form of “health care on his back and ribs.” He requests that a
9 state judge hear this action (id. at 3), and appears to believe this action was commenced in state
10 court (id. at 1). He does not claim that any defendant violated his Constitutional or federal rights.

11 The court finds plaintiff’s complaint too vague and conclusory to state a claim. Although
12 the Federal Rules of Civil Procedure adopt a flexible pleading policy, a complaint must give fair
13 notice and state the elements of the claim plainly and succinctly. Jones v. Community Redev.
14 Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least some degree of
15 particularity overt acts which defendants engaged in that support a § 1983 claim. Id. Plaintiff’s
16 complaint must be dismissed. However, plaintiff will have one opportunity to file an amended
17 complaint.

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

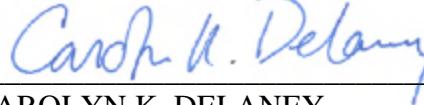
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28 ¹ These officers, Pogue and Jenkens, are not named as defendants.

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

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

- 9 1. Plaintiff's request for leave to proceed in forma pauperis is granted.
- 10 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. All fees
shall be collected and paid in accordance with this court's order to the Director of the California
12 Department of Corrections and Rehabilitation filed concurrently herewith.
- 13 3. Plaintiff's complaint is dismissed.
- 14 4. Plaintiff is granted thirty days from the date of service of this order to file an amended
complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil
16 Procedure, and the Local Rules of Practice; the amended complaint must bear the docket number
17 assigned this case and must be labeled "Amended Complaint"; plaintiff must file an original and
18 two copies of the amended complaint; failure to file an amended complaint in accordance with
19 this order will result in dismissal of this action.

20 Dated: March 18, 2015


21 CAROLYN K. DELANEY
22 UNITED STATES MAGISTRATE JUDGE

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