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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DERRICK COOPER,  
Plaintiff,  
v.  
CORRECTIONAL OFFICER LEATHEM,  
Defendants.

No. 2:15-cv-0074 DAD P

ORDER

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 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 **SCREENING REQUIREMENT**

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

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

17 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain  
18 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the  
19 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic  
20 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
21 However, in order to survive dismissal for failure to state a claim a complaint must contain more  
22 than "a formulaic recitation of the elements of a cause of action;" it must contain factual  
23 allegations sufficient "to raise a right to relief above the speculative level." Bell Atlantic, 550  
24 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the  
25 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.  
26 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all  
27 doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

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1 The Civil Rights Act under which this action was filed provides as follows:

2 Every person who, under color of [state law] . . . subjects, or causes  
3 to be subjected, any citizen of the United States . . . to the  
4 deprivation of any rights, privileges, or immunities secured by the  
5 Constitution . . . shall be liable to the party injured in an action at  
6 law, suit in equity, or other proper proceeding for redress.

7 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the  
8 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See  
9 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362  
10 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the  
11 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or  
12 omits to perform an act which he is legally required to do that causes the deprivation of which  
13 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

14 Moreover, supervisory personnel are generally not liable under § 1983 for the actions of  
15 their employees under a theory of respondeat superior and, therefore, when a named defendant  
16 holds a supervisory position, the causal link between him and the claimed constitutional  
17 violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979);  
18 Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory allegations  
19 concerning the involvement of official personnel in civil rights violations are not sufficient. See  
20 Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

21 **PLAINTIFF’S COMPLAINT**

22 In the present case, plaintiff has identified Correctional Officer Leathem as the sole  
23 defendant in this action. Plaintiff alleges that he suffers from a serious lung disease and, on  
24 January 7, 2014, called the Building 8 Control Officer and asked to be sent to the medical unit for  
25 a breathing treatment. According to plaintiff, defendant Leathem began to mock him by flicking  
26 the light in the control booth and making disrespectful statements over the public address system.  
27 Plaintiff claims that defendant Leathem violated his right to adequate medical care. (Compl. at 5  
28 & Attachs.)

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1 **DISCUSSION**

2 The allegations in plaintiff's complaint are so vague and conclusory that the court is  
3 unable to determine whether the current action is frivolous or fails to state a claim for relief. The  
4 complaint does not contain a short and plain statement as required by Fed. R. Civ. P. 8(a)(2).  
5 Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair notice to  
6 the defendants and must allege facts that support the elements of the claim plainly and succinctly.  
7 Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege  
8 with at least some degree of particularity overt acts which defendants engaged in that support his  
9 claims. Id. Because plaintiff has failed to comply with the requirements of Fed. R. Civ. P.  
10 8(a)(2), the complaint must be dismissed. The court will, however, grant leave to file an amended  
11 complaint.

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

21 Plaintiff's complaint suffers from a number of additional defects. As an initial matter,  
22 plaintiff has not signed his complaint. Under Rule 11 of the Federal Rules of Civil Procedure,  
23 plaintiff must sign "[e]very pleading, written motion, and other paper" submitted to the court.  
24 Fed. R. Civ. P. 11. In addition, it is clear from the allegations of plaintiff's complaint that he is  
25 dissatisfied defendant Leathem's response to his medical needs. However, the Supreme Court  
26 has held that inadequate medical care does not constitute cruel and unusual punishment  
27 cognizable under § 1983 unless the mistreatment rises to the level of "deliberate indifference to  
28 serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). In general, deliberate

1 indifference may be shown when prison officials deny, delay, or intentionally interfere with  
2 medical treatment, or may be shown by the way in which prison officials provide medical care.  
3 Hutchinson v. United States, 838 F.2d 390, 393-94 (9th Cir. 1988).

4 In any amended complaint plaintiff may elect to file, he will need to allege facts  
5 demonstrating how defendant Leathem's actions rose to the level of "deliberate indifference."  
6 Plaintiff is advised that mere differences of opinion between a prisoner and prison medical staff  
7 or between medical professionals as to the proper course of treatment for a medical condition do  
8 not give rise to a § 1983 claim. See Toguchi v. Soon Hwang Chung, 391 F.3d 1051, 1058 (9th  
9 Cir. 2004); Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996); Sanchez v. Vild, 891 F.2d  
10 240, 242 (9th Cir. 1989); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981).

11 In addition, before it can be said that a prisoner's civil rights have been abridged, "the  
12 indifference to his medical needs must be substantial. Mere 'indifference,' 'negligence,' or  
13 'medical malpractice' will not support this cause of action." Broughton v. Cutter Lab., 622 F.2d  
14 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105-06). See also Wood v. Housewright, 900  
15 F.2d 1332, 1334 (9th Cir. 1990) ("In determining deliberate indifference, we scrutinize the  
16 particular facts and look for substantial indifference in the individual case, indicating more than  
17 mere negligence or isolated occurrences of neglect.").

18 Finally, delays in providing medical care may manifest deliberate indifference. Estelle,  
19 429 U.S. at 104-05. To establish a claim of deliberate indifference arising from delay in  
20 providing care, however, a plaintiff must allege facts showing that the delay was harmful. See  
21 Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); McGuckin, 974 F.2d at 1059; Wood, 900  
22 F.2d at 1335; Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1989); Shapley v. Nevada Bd. of  
23 State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). In this regard, "[a] prisoner need not  
24 show his harm was substantial; however, such would provide additional support for the inmate's  
25 claim that the defendant was deliberately indifferent to his needs." Jett v. Penner, 439 F.3d 1091,  
26 1096 (9th Cir. 2006). See also McGuckin, 974 F.2d at 1060.

27 Finally, plaintiff is informed that the court cannot refer to a prior pleading in order to  
28 make plaintiff's amended complaint complete. Local Rule 220 requires that an amended

1 complaint be complete in itself without reference to any prior pleading. This is because, as a  
2 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375  
3 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no  
4 longer serves any function in the case. Therefore, in an amended complaint, as in an original  
5 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

6 **CONCLUSION**

7 Accordingly, IT IS HEREBY ORDERED that:

8 1. Plaintiff's motion to proceed in forma pauperis (Doc. No. 2) is granted.

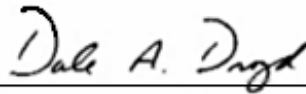
9 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. The fee  
10 shall be collected and paid in accordance with this court's order to the Director of the California  
11 Department of Corrections and Rehabilitation filed concurrently herewith.

12 3. Plaintiff's complaint is dismissed.

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

19 5. The Clerk of the Court is directed to send plaintiff the court's form for filing a civil  
20 rights action.

21 Dated: January 20, 2015

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23 \_\_\_\_\_  
24 DALE A. DROZD  
25 UNITED STATES MAGISTRATE JUDGE

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