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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY DOWNS,
Plaintiff,
v.
LORI BALLS, et al.,
Defendants.

No. 2:15-cv-0507 KJN P

ORDER

Plaintiff is a state prisoner, proceeding without counsel. 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 consented to proceed before the undersigned for all purposes. See 28 U.S.C. § 636(c).

Plaintiff 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 to make monthly

1 payments of twenty percent of the preceding month's income credited to plaintiff's trust account.
2 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time
3 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.
4 § 1915(b)(2).

5 The court is required to screen complaints brought by prisoners seeking relief against a
6 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
7 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
8 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
9 monetary relief from a defendant who is immune from such relief. 28 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 when 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), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.
17 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably
18 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at
19 1227.

20 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain
21 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
22 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
23 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
24 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a
25 formulaic recitation of the elements of a cause of action;" it must contain factual allegations
26 sufficient "to raise a right to relief above the speculative level." Bell Atlantic, 550 U.S. at 555.
27 However, "[s]pecific facts are not necessary; the statement [of facts] need only 'give the
28 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Erickson v.

1 Pardus, 551 U.S. 89, 93 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal
2 quotations marks omitted). In reviewing a complaint under this standard, the court must accept as
3 true the allegations of the complaint in question, Erickson, 551 U.S. at 93, and construe the
4 pleading in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236
5 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984).

6 Plaintiff claims that Lori Balls/Bolls, the designated appeals coordinator at High Desert
7 State Prison refuses to process plaintiff's reasonable modification or accommodation request
8 form, CDC 1824, which allegedly deprives plaintiff of his ability to obtain the assistance of
9 counsel at his upcoming parole hearing. Further, plaintiff claims that defendant John Doe of the
10 Board of Prison Terms refuses to provide plaintiff with Board of Parole hearing forms known as
11 1073 and 1074,¹ which are used by disabled inmates in compliance with the Americans with
12 Disabilities Act ("ADA"). Plaintiff contends that the failure to process his request for
13 accommodation, as well as the failure to provide such parole forms, deprives him of a fair parole
14 hearing in violation of the ADA, and denies him access to the court, in violation of the First
15 Amendment, and violates his rights to due process and equal protection because his parole
16 hearing will have passed before relief can be granted.

17 Plaintiff fails to allege facts demonstrating that defendants violated plaintiff's equal
18 protection rights. The Equal Protection Clause requires that persons who are similarly situated be
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20 ¹ All of the forms referenced by plaintiff are available on the internet. The BPH 1073 form is a
21 "Notice and Request for Assistance at Parole Proceeding." The BPH 1073 form provides for a
22 pre-interview review of the inmate's central file, and has mental health concerns listed as one of
23 the identified disabilities, including the ability to circle the CCCMS level of care. However, this
24 portion of the form is to be completed by prison staff only. Id. The BPH 1073 form also allows
25 an inmate to self-identify when he needs help for the hearing. At the parole hearing, the Board
26 should address the ADA to make sure plaintiff has no disabilities that require accommodation, at
27 which time plaintiff may ask for assistance. Moreover, plaintiff's prison counselor may be of
28 assistance.

25 The BPH 1074 form is entitled "Request for Reasonable Accommodation -- Grievance
26 Process," which states that "you have been given a state attorney to help you in preparation for
27 and during your hearing. Fill out this form only if you did not get the other kinds of help for your
28 disability that you asked for on your BPH Form 1073 or if new problems came up. You can ask
your attorney or staff for help in filling out this form." Id. Thus, it appears plaintiff needs this
form only if he was not provided the assistance requested in BPH form 1073.

1 treated alike. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). A
2 plaintiff may establish an equal protection claim by showing that the plaintiff was intentionally
3 discriminated against on the basis of the plaintiff's membership in a protected class. See, e.g.,
4 Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001). Under this theory of equal
5 protection, the plaintiff must show that the defendants' actions were a result of the plaintiff's
6 membership in a suspect class, such as race. Thornton v. City of St. Helens, 425 F.3d 1158, 1167
7 (9th Cir. 2005).

8 If the action in question does not involve a suspect classification, a plaintiff may establish
9 an equal protection claim by showing that similarly situated individuals were intentionally treated
10 differently without a rational relationship to a legitimate state purpose. Village of Willowbrook
11 v. Olech, 528 U.S. 562, 564 (2000). To state an equal protection claim under this theory, a
12 plaintiff must allege that: (1) the plaintiff is a member of an identifiable class; (2) the plaintiff
13 was intentionally treated differently from others similarly situated; and (3) there is no rational
14 basis for the difference in treatment. Village of Willowbrook, 528 U.S. at 564. Plaintiff alleges
15 no facts to support an equal protection claim.

16 With regard to plaintiff's access to the court claim, plaintiff fails to state a cognizable civil
17 rights claim. Prisoners have a constitutional right of access to the courts. See Lewis v. Casey,
18 518 U.S. 343, 350 (1996). To establish a claim for any violation of the right of access to the
19 courts, the prisoner must prove that the actions of the prison official caused him an actual injury.
20 See id. at 350-55. Only if an actual injury is alleged does a plaintiff state a claim for which relief
21 can be granted. See, e.g., Jenkins v. McMickens, 618 F.Supp. 1472, 1474-75 (S.D. N.Y.1985)
22 (complaint alleging certain documents pertaining to pending trial confiscated and not returned
23 was too conclusory to support claim of denial of access to court). Here, plaintiff fails to allege
24 facts demonstrating an actual injury to his access to the court. The alleged failure of defendant
25 Balls to process plaintiff's form CDCR 1824 did not result in a denial of access to the courts
26 because plaintiff did not suffer any actual injury as a result of the alleged misconduct.

27 Moreover, plaintiff's claims are speculative and conclusory. Because plaintiff does not
28 state that he has actually been denied parole eligibility because of his inability to have assistance

1 at the hearing, or to have the forms sought, it is questionable whether he currently has standing to
2 raise this claim. Standing is present only when (1) a plaintiff suffers an “actual or imminent”
3 injury, (2) there is a “causal connection between the injury and the conduct complained of,” and
4 (3) that injury will likely be “redressed by a favorable decision.” Lujan v. Defenders of Wildlife,
5 504 U.S. 555, 560-61 (1992). Standing will not be found where speculative inferences are
6 necessary to establish either injury or the connection between the alleged injury and the act
7 challenged. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 45 (1976);
8 see also Johnson v. Weinberger, 851 F.2d 233 (9th Cir. 1988). Such is the case here.

9 Because the parole hearing has not yet taken place, plaintiff cannot demonstrate that the
10 Board failed to provide plaintiff the assistance he requires at the hearing. Plaintiff confirms that
11 he is currently being treated at the CCCMS level of care in the CDCR mental health program, and
12 such information should be available to the Board at the parole hearing. It is unclear from the
13 complaint that the Board requires form CDCR 1824 in order for plaintiff to obtain assistance at
14 the parole hearing, and the form CDCR 1824 does not reference its use at a parole hearing, as the
15 BPH form 1073 does. Moreover, it is unclear from plaintiff’s allegations or from BPH Forms
16 1073 and 1074 whether plaintiff’s request for assistance at the parole hearing would be denied
17 based on an alleged failure to complete such forms prior to the hearing.

18 The court finds the allegations in plaintiff’s complaint so vague and conclusory that it is
19 unable to determine whether the current action is frivolous or fails to state a claim for relief. The
20 court has determined that the complaint does not contain a short and plain statement as required
21 by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a
22 complaint must give fair notice and state the elements of the claim plainly and succinctly. Jones
23 v. Cmty. Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least
24 some degree of particularity overt acts which defendants engaged in that support plaintiff’s claim.
25 Id. Because plaintiff has failed to comply with the requirements of Fed. R. Civ. P. 8(a)(2), the
26 complaint must be dismissed. The court will, however, grant leave to file an amended complaint.

27 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions
28 about which he complains resulted in a deprivation of plaintiff’s constitutional rights. Rizzo v.

1 Goode, 423 U.S. 362, 371 (1976). Also, the complaint must allege in specific terms how each
2 named defendant is involved. Id. There can be no liability under 42 U.S.C. § 1983 unless there is
3 some affirmative link or connection between a defendant's actions and the claimed deprivation.
4 Id.; May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743
5 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil
6 rights violations are not sufficient. Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

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

16 1. Plaintiff's request for leave to proceed in forma pauperis is granted.
17 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
18 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
19 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
20 Director of the California Department of Corrections and Rehabilitation filed concurrently
21 herewith.

22 3. Plaintiff's complaint is dismissed.

23 4. Within thirty days from the date of this order, plaintiff shall complete the attached
24 Notice of Amendment and submit the following documents to the court:

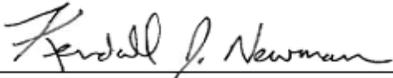
25 a. The completed Notice of Amendment; and

26 b. An original and one copy of the Amended Complaint.

27 Plaintiff's amended complaint shall comply with the requirements of the Civil Rights Act, the
28 Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must

1 also bear the docket number assigned to this case and must be labeled "Amended Complaint."
2 Failure to file an amended complaint in accordance with this order may result in the dismissal of
3 this action.

4 Dated: April 22, 2015

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6 KENDALL J. NEWMAN
7 UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
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GREGORY DOWNS,
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v.
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No. 2:15-cv-0507 KJN P

NOTICE OF AMENDMENT

Plaintiff hereby submits the following document in compliance with the court's order
filed _____.

DATED: _____ Amended Complaint

Plaintiff