

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
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JACKIE M. JOHNSON,
Plaintiff,
v.
S. CHANAN, et al.,
Defendants.

No. 2:15-cv-1606 AC P

ORDER

Plaintiff, a former state prisoner¹ proceeding pro se, 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. Plaintiff has consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c) and Local Rule 305(a). ECF No. 4.

I. Application to Proceed In Forma Pauperis

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). ECF No. 6. Accordingly, the request to proceed in forma pauperis will be granted.

II. Statutory Screening of Prisoner Complaints

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The

¹ Plaintiff was released from prison sometime after filing the complaint. ECF No. 5.

1 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
2 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
3 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).
4 This standard also applies to complaints brought by non-prisoners that are proceeding pro se. 28
5 U.S.C. § 1915(e)(2).

6 A claim “is [legally] frivolous where it lacks an arguable basis either in law or in fact.”
7 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
8 Cir. 1984). “[A] judge may dismiss [in forma pauperis] claims which are based on indisputably
9 meritless legal theories or whose factual contentions are clearly baseless.” Jackson v. Arizona,
10 885 F.2d 639, 640 (9th Cir. 1989) (citation and internal quotations omitted), superseded by statute
11 on other grounds as stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Neitzke, 490
12 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded,
13 has an arguable legal and factual basis. Id.

14 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the
15 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of
16 what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550
17 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
18 However, in order to survive dismissal for failure to state a claim, a complaint must contain more
19 than “a formulaic recitation of the elements of a cause of action;” it must contain factual
20 allegations sufficient “to raise a right to relief above the speculative level.” Id. (citations
21 omitted). “[T]he pleading must contain something more . . . than . . . a statement of facts that
22 merely creates a suspicion [of] a legally cognizable right of action.” Id. (alteration in original)
23 (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d
24 ed. 2004)).

25 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
26 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell
27 Atl. Corp., 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
28 content that allows the court to draw the reasonable inference that the defendant is liable for the

1 misconduct alleged.” Id. (citing Bell Atl. Corp., 550 U.S. at 556). In reviewing a complaint
2 under this standard, the court must accept as true the allegations of the complaint in question,
3 Hospital Bldg. Co. v. Rex Hosp. Trs., 425 U.S. 738, 740 (1976), as well as construe the pleading
4 in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor, Jenkins v.
5 McKeithen, 395 U.S. 411, 421 (1969).

6 III. Complaint

7 In the complaint, plaintiff alleges that defendant Chanan has subjected him to sexual
8 harassment in the form of sexual comments and gesturing and exposing himself to plaintiff. ECF
9 No. 1 at 4. Defendant Ortega was allegedly aware of Chanan’s behavior, but told investigators
10 that he does not know anything and had not seen anything. Id. Plaintiff identifies Warden Fox as
11 a defendant (id. at 2), but does not make any allegations against him (id. at 3-4).

12 IV. Failure to State a Claim

13 A. Eighth Amendment

14 1. Verbal Sexual Harassment

15 The Eighth Amendment proscribes the infliction of cruel and unusual punishment on
16 prisoners. “After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes
17 cruel and unusual punishment forbidden by the Eighth Amendment.” Whitley v. Albers, 475 U.S.
18 312, 319 (1986) (alteration in original) (internal quotation marks omitted) (quoting Ingraham v.
19 Wright, 430 U.S. 651, 670 (1977)). “The alleged pain may be physical or psychological.”
20 Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012) (citing Jordan v. Gardner, 986 F.2d 1521
21 (9th Cir. 1993)). However, “[v]erbal harassment or abuse . . . is not sufficient to state a
22 constitutional deprivation under 42 U.S.C. § 1983.” Oltarzewski v. Ruggiero, 830 F.2d 136, 139
23 (9th Cir. 1987) (alteration in original) (quoting Collins v. Cundy, 603 F.2d 825, 827 (10th Cir.
24 1979)); see also Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996) (stating that “verbal
25 harassment generally does not violate the Eighth Amendment”), amended on other grounds by
26 135 F.3d 1318 (9th Cir. 1998). This includes verbal harassment of a sexual nature, and exposure.
27 Austin v. Terhune, 367 F.3d 1167, 1171-72 (9th Cir. 2004) (officer’s conduct was not sufficiently
28 serious to violate the Eighth Amendment where officer exposed himself to prisoner but never

1 physically touched him); Patrick v. Martin, 402 F. App'x 284, 285 (9th Cir. 2010) (sexual
2 harassment claim based on verbal harassment insufficient to state a claim under § 1983) (citing
3 Oltarzewski, 830 F.2d at 139).

4 Plaintiff's allegations against defendant Chanan are limited to verbal harassment,
5 exposure, and gesturing. ECF No. 1 at 3-4. While the alleged actions are certainly inappropriate,
6 they do not rise to the level of a constitutional violation and the claims must be dismissed.
7 However, since there may be additional facts that plaintiff can assert that would state a claim, he
8 will be given an opportunity to amend.

9 2. Failure to Protect

10 An officer is not liable under the Eighth Amendment unless he "knows of and disregards
11 an excessive risk to inmate health or safety; the official must both be aware of facts from which
12 the inference could be drawn that a substantial risk of serious harm exists, and he must also draw
13 the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Therefore, before plaintiff can
14 state a claim for relief against defendant Ortega, he must first allege facts that demonstrate that
15 defendant Chanan's actions caused or put him at risk for serious harm. Additionally, failing to
16 report an incident that has already taken place, without more, does not constitute a disregard for
17 an excessive risk to inmate health or safety. Plaintiff alleges that defendant Ortega lied to
18 investigators about whether he had witnessed the alleged sexual harassment by defendant Chanan.
19 ECF No. 1 at 4. Failing to report the incident is insufficient to state a claim under the Eighth
20 Amendment absent facts showing that by failing to report the incident, defendant knowingly
21 disregarded an excessive risk to plaintiff's health or safety. Plaintiff's claims regarding defendant
22 Ortega's failure to report will therefore be dismissed with leave to amend.

23 B. Supervisory Liability

24 There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or
25 connection between a defendant's actions and the claimed deprivation. Rizzo v. Goode, 423 U.S.
26 362, 371, 376 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980). "Vague and
27 conclusory allegations of official participation in civil rights violations are not sufficient." Ivey v.
28 Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982) (citations omitted).

1 Additionally, “[t]here is no respondeat superior liability under section 1983.” Taylor v
2 List, 880 F.2d 1040, 1045 (9th Cir. 1989). “A defendant may be held liable as a supervisor under
3 § 1983 ‘if there exists either (1) his or her personal involvement in the constitutional deprivation,
4 or (2) a sufficient causal connection between the supervisor’s wrongful conduct and the
5 constitutional violation.’” Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting Hansen v.
6 Black, 885 F.2d 642, 646 (9th Cir. 1989)). A supervisor may be liable for the constitutional
7 violations of his subordinates if he “knew of the violations and failed to act to prevent them.”
8 Taylor, 880 F.2d at 1045. Finally, supervisory liability may also exist without any personal
9 participation if the official implemented “a policy so deficient that the policy itself is a
10 repudiation of the constitutional rights and is the moving force of the constitutional violation.”
11 Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (citations and quotations
12 marks omitted), abrogated on other grounds by Farmer v. Brennan, 511 U.S. 825 (1970). Plaintiff
13 has failed to allege sufficient personal involvement by defendant Fox.

14 Since the complaint contains no allegations against defendant Fox, the court can only
15 assume that he was named because of his position as warden, which is insufficient to state a claim
16 for relief. Because plaintiff does not make any allegations against defendant Fox, he must be
17 dismissed. However, since plaintiff may be able to amend the complaint to state a cognizable
18 claim, he will be given an opportunity to amend.

19 V. Leave to Amend

20 If plaintiff chooses to file a first amended complaint, he must demonstrate how the
21 conditions about which he complains resulted in a deprivation of his constitutional rights. Rizzo,
22 423 U.S. at 370-71. Also, the complaint must allege in specific terms how each named defendant
23 is involved. Arnold v. Int’l Bus. Machs. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981). There can
24 be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection
25 between a defendant’s actions and the claimed deprivation. Id.; Johnson v. Duffy, 588 F.2d 740,
26 743 (9th Cir. 1978). Furthermore, “[v]ague and conclusory allegations of official participation in
27 civil rights violations are not sufficient.” Ivey, 673 F.2d at 268 (citations omitted).

28 ////

1 Plaintiff is also informed that the court cannot refer to a prior pleading in order to make
2 his first amended complaint complete. Local Rule 220 requires that an amended complaint be
3 complete in itself without reference to any prior pleading. This is because, as a general rule, an
4 amended complaint supersedes the original complaint. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.
5 1967), overruled in part by Lacey v. Maricopa County, 693 F.3d 896, 929 (9th Cir. 2012) (claims
6 dismissed with prejudice and without leave to amend do not have to be re-pled in subsequent
7 amended complaint to preserve appeal). Once plaintiff files a first amended complaint, the
8 original complaint no longer serves any function in the case. Therefore, in an amended
9 complaint, as in an original complaint, each claim and the involvement of each defendant must be
10 sufficiently alleged.

11 VI. Summary

12 Plaintiff's request to proceed in forma pauperis is granted.

13 The complaint is dismissed with leave to amend because the facts plaintiff has alleged are
14 not enough to state a claim for relief. In order to state a claim against defendant Chanan, plaintiff
15 must allege facts that show defendant Chanan did more than verbally harass him or make
16 suggestive gestures at him. In order to state a claim against defendant Ortega, plaintiff must show
17 that Ortega's failure to report Chanan put plaintiff at risk of serious harm. Finally, to state a
18 claim against defendant Fox, plaintiff must explain what Fox did and how it violated his rights.
19 The fact that Fox was the warden, without more, is not enough to state a claim.

20 If plaintiff chooses to amend his complaint, the first amended complaint must include all
21 of the claims plaintiff wants to make because the court will not look at the claims or information
22 in the original complaint. In other words, any claims not in the first amended complaint will not
23 be considered.

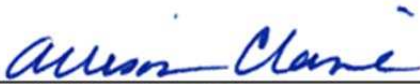
24 In accordance with the above, IT IS HEREBY ORDERED that:

- 25 1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 6) is granted.
- 26 2. Plaintiff's complaint is dismissed with leave to amend.
- 27 3. Within thirty days from the date of service of this order, plaintiff may file an amended
28 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil

1 Procedure, and the Local Rules of Practice. The amended complaint must bear the docket
2 number assigned this case and must be labeled "First Amended Complaint." Plaintiff must file an
3 original and two copies of the amended complaint. Failure to file an amended complaint in
4 accordance with this order will result in dismissal of this action.

5 4. The Clerk of the Court is directed to send plaintiff a copy of the prisoner complaint
6 form used in this district.

7 DATED: September 12, 2016

8 
9

ALLISON CLAIRE
10 UNITED STATES MAGISTRATE JUDGE
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28