

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

4 **II. Screening Requirement**

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 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 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon
18 which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in
19 support of the claim or claims that would entitle him to relief. Hishon v. King & Spalding, 467
20 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Palmer v. Roosevelt
21 Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under
22 this standard, the court must accept as true the allegations of the complaint in question, Hosp.
23 Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light
24 most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor, Jenkins v.
25 McKeithen, 395 U.S. 411, 421 (1969).

26 **III. Plaintiff's Allegations**

27 Plaintiff is a transgendered inmate who was housed at Mule Creek State Prison in Ione,
28 California, during all times relevant to this action. On January 8, 2015, plaintiff had a "one-on-

1 one” with defendant psychiatrist, Dr. P. Nathu, in a holding cage. During this meeting, Dr. Nathu
2 “started massaging his penis ... while asking me to perform for him, and he would provided [sic]
3 any medications for me.” When plaintiff became angry because he got propositioned, Dr. Nathu
4 left. Plaintiff seeks damages for the psychological and emotional distress that he suffered as a
5 result of Dr. Nathu’s improper conduct.

6 **IV. Discussion**

7 The Eighth Amendment prohibits cruel and unusual punishment in penal institutions.
8 Whether a specific act constitutes cruel and unusual punishment is measured by “the evolving
9 standards of decency that mark the progress of a maturing society.” Hudson v. McMillian, 503
10 U.S. 1, 8 (1992). “Sexual harassment or abuse of an inmate by a corrections officer is a violation
11 of the Eighth Amendment.” Wood v. Beauclair, 692 F.3d 1041, 1045-46 (9th Cir. 2012) (citing
12 Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000) (“In the simplest and most absolute of
13 terms...prisoners [have a clearly established Eighth Amendment right] to be free from sexual
14 abuse....”). This is so even without evidence of physical injury because “at its core, the Eighth
15 Amendment protects ‘the basic concept of human dignity’ and forbids conduct that is ‘so totally
16 without penological justification that it results in the gratuitous infliction of suffering.’ ... We
17 have previously held that a sexual assault on a prisoner by a prison guard is always ‘deeply
18 offensive to human dignity’ and is completely void of penological justification.” Id. at 1050-51.

19 In his complaint, plaintiff alleges that Dr. Nathu propositioned him during a one-on-one
20 meeting, but there is no allegation that Dr. Nathu actually touched plaintiff. Indeed, plaintiff’s
21 administrative grievance filed after this incident provides that Dr. Nathu acted only “through
22 gestures, statements and bribery, also mental manipulation.” Compl. Ex. A (ECF No. 1 at 19).
23 “[V]erbal harassment generally does not violate the Eighth Amendment.” Keenan v. Hall, 83
24 F.3d 1083, 1092 (9th Cir. 1996) (implying that harassment “calculated to ... cause [the prisoner]
25 psychological damage” might state an Eighth Amendment claim) (citing Oltarzewski v. Ruggiero,
26 830 F.2d 136, 139 (9th Cir. 1987)), amended by 135 F.3d 1318 (9th Cir. 1998); see also Austin v.
27 Terhune, 367 F.3d 1167, 1171 (9th Cir. 2004) (explaining that “the Eighth Amendment’s
28 protections do not necessarily extend to mere verbal sexual harassment.”). Because there is no

1 allegation that Dr. Nathu touched plaintiff and also no allegation that the defendant acted in an
2 effort to cause plaintiff psychological damage, the court finds that plaintiff fails to state an Eighth
3 Amendment claim. Whether plaintiff has additional facts to state a claim is unclear to the court at
4 this time. The undersigned notes that, on review of the pleading and attachments submitted in
5 support, plaintiff had continued medical contact with Dr. Nathu after the incident underlying this
6 action. It is unclear, however, if Dr. Nathu ever made any further sexually harassing comments
7 towards plaintiff. If plaintiff chooses to file an amended complaint, he must allege facts that
8 would raise Dr. Nathu's conduct beyond the isolated incident of verbal harassment identified in
9 the complaint.

10 **V. Conclusion**

11 As discussed supra, plaintiff's complaint fails to state a claim. If plaintiff chooses to
12 amend the complaint, plaintiff must demonstrate how the conduct complained of has resulted in a
13 deprivation of plaintiff's constitutional rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980).
14 Also, the complaint must allege in specific terms how each named defendant is involved. There
15 can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection
16 between a defendant's actions and the claimed deprivation. Rizzo v. Goode, 423 U.S. 362
17 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743
18 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil
19 rights violations are not sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

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


1. Plaintiff’s request for leave to proceed in forma pauperis is granted.

2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). All fees shall be collected and paid in accordance with this court’s order to the Director of the California Department of Corrections and Rehabilitation filed concurrently herewith.

3. Plaintiff’s complaint is dismissed.

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 Procedure, and the Local Rules of Practice; the amended complaint must bear the docket number assigned this case and must be labeled “Amended Complaint”; plaintiff must file an original and two copies of the amended complaint; failure to file an amended complaint in accordance with this order will result in a recommendation that this action be dismissed.

Dated: April 21, 2016


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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