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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RAUL CERVANTES,
Plaintiff,
v.
SERGEANT WILLIAMSON et al.,
Defendants.

No. 2:15-cv-2138 CKD P (TEMP)

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s second amended complaint.

SCREENING REQUIREMENT

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

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an

1 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
2 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
3 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
4 Cir. 1989); Franklin, 745 F.2d at 1227.

5 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and plain
6 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
7 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic
8 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
9 However, in order to survive dismissal for failure to state a claim a complaint must contain more
10 than “a formulaic recitation of the elements of a cause of action;” it must contain factual
11 allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic, 550
12 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the
13 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
14 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all
15 doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

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

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

22 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
23 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
24 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
25 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the
26 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
27 omits to perform an act which he is legally required to do that causes the deprivation of which
28 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

Moreover, supervisory personnel are generally not liable under § 1983 for the actions of
their employees under a theory of respondeat superior and, therefore, when a named defendant

1 holds a supervisory position, the causal link between him and the claimed constitutional
2 violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979);
3 Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory allegations
4 concerning the involvement of official personnel in civil rights violations are not sufficient. See
5 Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

6 **PLAINTIFF’S SECOND AMENDED COMPLAINT¹**

7 In his second amended complaint, plaintiff identifies Officer Burciaga as the sole
8 defendant in this action. Plaintiff’s allegations are difficult to decipher, but he appears to take
9 issue with defendant Burciaga’s conduct during an escort that took place on April 28, 2015.
10 Specifically, plaintiff alleges that he had been on a hunger strike for eighteen (18) days and had
11 been experiencing hallucinations. He told officers he wanted to speak to a mental health doctor
12 before he came out of his cell. Defendant Burciaga told plaintiff he could see the doctor after his
13 morning medical check. After seeing a nurse, plaintiff alleges that he proceeded back to his
14 building and felt a hit on the top of his head. Plaintiff alleges that he fell to the floor and was
15 bleeding. According to plaintiff, he has lost some vision and hearing since the incident. In terms
16 of relief, plaintiff requests monetary damages and further medical care. (Sec. Am. Compl. at 3 &
17 Attachs.)

18 **DISCUSSION**

19 The allegations of plaintiff’s second amended complaint are so vague and conclusory that
20 the court is unable to determine whether the current action is frivolous or fails to state a claim for
21 relief. The complaint does not contain a short and plain statement as required by Fed. R. Civ. P.
22 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair
23 notice to the defendants and must allege facts that support the elements of the claim plainly and
24 succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff
25 must allege with at least some degree of particularity overt acts which the defendant engaged in

26 ¹ On November 24, 2015, plaintiff filed a first amended complaint. On November 30, 2015,
27 before the court had an opportunity to screen plaintiff’s first amended complaint, he filed a
28 second amended complaint. The court will proceed on plaintiff’s second amended complaint as
the operative pleading in this action.

1 that support his claims. Id. Because plaintiff has failed to comply with the requirements of
2 Federal Rule of Civil Procedure 8(a)(2), the court must dismiss plaintiff's second amended
3 complaint. In the interest of justice, the court will grant plaintiff leave to file a final, third
4 amended complaint.

5 If plaintiff chooses to pursue this action by filing a third amended complaint, he must
6 allege facts therein demonstrating how the conditions complained of resulted in a deprivation of
7 plaintiff's federal constitutional or statutory rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir.
8 1980). In addition, plaintiff must allege in specific terms how the defendant was involved in the
9 deprivation of plaintiff's rights. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633
10 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Vague and
11 conclusory allegations of official participation in civil rights violations are not sufficient. Ivey v.
12 Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

13 As this court previously advised plaintiff, to maintain an Eighth Amendment claim based
14 on excessive use of force, he must allege facts showing that defendant Burciaga used force
15 against him maliciously and sadistically for the "very purpose of causing harm." Whitley v.
16 Albers, 475 U.S. 312, 320-21 (1986). See also Hudson v. McMillian, 503 U.S. 1, 5 6-7 (1992)
17 ("whenever prison officials stand accused of using excessive physical force in violation of the
18 Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in Whitley, i.e.,
19 whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously
20 and sadistically to cause harm."). In any third amended complaint plaintiff elects to file, he
21 should clarify how and under what circumstances defendant Burciaga used force against him. If,
22 for example, plaintiff believes that defendant Burciaga unnecessarily hit him on top of his head
23 and caused him to fall and suffer his alleged injuries, he needs to allege these facts in his amended
24 complaint.

25 Plaintiff is advised that the court will consider several factors to determine whether a use
26 of force violates the Eighth Amendment, including the need for force, the relationship between
27 the need for force and the amount of force used, and the extent of the threat the officers
28 reasonably perceived the plaintiff posed. See Whitley, 475 U.S. at 321. A prisoner is not

1 required to allege and show a “significant injury,” see Hudson, 503 U.S. at 9-10, but “an inmate
2 who complains of a ‘push or shove’ that causes no discernible injury almost certainly fails to state
3 a valid excessive force claim.” Wilkins v. Gaddy, 559 U.S. 34, 38 (2010).

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

11 CONCLUSION

12 Accordingly, IT IS HEREBY ORDERED that:

- 13 1. Plaintiff’s second amended complaint (Doc. No. 17) is dismissed;
- 14 2. Plaintiff is granted thirty days from the date of service of this order to file a third
15 amended complaint that complies with the requirements of the Civil Rights Act, the Federal Rules
16 of Civil Procedure, and the Local Rules of Practice; the third amended complaint must bear the
17 docket number assigned to this case and must be labeled “Third Amended Complaint”; failure to
18 file a third amended complaint in accordance with this order will result in a recommendation that
19 this action be dismissed without prejudice; and
- 20 3. The Clerk of the Court is directed to send plaintiff the court’s form for filing a civil
21 rights action.

22 Dated: March 11, 2016

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24 _____
25 CAROLYN K. DELANEY
26 UNITED STATES MAGISTRATE JUDGE

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