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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PAUL MITCHELL,  
Plaintiff,  
v.  
BRIAN DUFFY, et al.,  
Defendants.

No. 2:16-cv-0703 JAM AC P

ORDER

Plaintiff, a state prisoner 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. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

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. 9. 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.

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. Statutory Screening of Prisoner Complaints

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 where 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). "[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
13 meritless legal theories or whose factual contentions are clearly baseless." Jackson v. Arizona,  
14 885 F.2d 639, 640 (9th Cir. 1989) (citation and internal quotations omitted), superseded by statute  
15 on other grounds as stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Neitzke, 490  
16 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded,  
17 has an arguable legal and factual basis. Id.

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

1            “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
2 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell  
3 Atl. Corp., 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
4 content that allows the court to draw the reasonable inference that the defendant is liable for the  
5 misconduct alleged.” Id. (citing Bell Atl. Corp., 550 U.S. at 556). In reviewing a complaint  
6 under this standard, the court must accept as true the allegations of the complaint in question,  
7 Hospital Bldg. Co. v. Rex Hosp. Trs., 425 U.S. 738, 740 (1976), as well as construe the pleading  
8 in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor, Jenkins v.  
9 McKeithen, 395 U.S. 411, 421 (1969).

10            III.    Complaint

11            The complaint names as defendants Warden Duffy, Lt. Avalos, Sgt. Pongyang, and Capt.  
12 Ladson and alleges the following:

13                    Prison officials, headed by a warden, are responsible for  
14 maintaining order and imposing discipline in the prison. They must  
15 protect the inmates and prison employees against violence & injury.  
16 Petitioner while imprisoned at CHCF was the victim of two  
17 separate unprovoked attacks in two months. Plaintiff is a level 3  
18 G.P. disabled senior who uses a wheelchair and has cardiac disease.  
19 Defendant did not provide for my not being in harms way when the  
propensity or likelihood of violence was known. 2nd attack  
captured on CHCF/CCTV. Being that the housing unit ‘C2B’  
CHCF housed plaintiff in was a designated max custody/AD. Seg.  
Unit building it is evident that its inhabitants included many violent  
and dangerous prisoners.

20 ECF No. 1 at 3.

21            IV.    Failure to State a Claim

22            “The Constitution does not mandate comfortable prisons, but neither does it permit  
23 inhumane ones.” Farmer v. Brennan, 511 U.S. 825, 832 (1994) (internal quotation marks and  
24 citation omitted). “[A] prison official violates the Eighth Amendment only when two  
25 requirements are met. First, the deprivation alleged must be, objectively, sufficiently serious, a  
26 prison official’s act or omission must result in the denial of the minimal civilized measure of  
27 life’s necessities.” Id. at 834 (internal quotation marks and citations omitted). Second, the prison  
28 official must subjectively have a “sufficiently culpable state of mind . . . one of deliberate

1 indifference to inmate health or safety.” Id. (internal quotation marks and citations omitted). The  
2 official is not liable under the Eighth Amendment unless he “knows of and disregards an  
3 excessive risk to inmate health or safety; the official must both be aware of facts from which the  
4 inference could be drawn that a substantial risk of serious harm exists, and he must also draw the  
5 inference.” Id. at 837. Then he must fail to take reasonable measures to abate the substantial risk  
6 of serious harm. Id. at 847.

7           The question under the Eighth Amendment is whether prison  
8 officials, acting with deliberate indifference, exposed a prisoner to a  
9 sufficiently substantial “risk of serious damage to his future health,”  
10 Helling [v. McKinney], 509 U.S. 25, 35 (1993)], and it does not  
11 matter whether the risk comes from a single source or multiple  
sources, any more than it matters whether a prisoner faces an  
excessive risk of attack for reasons personal to him or because all  
prisoners in his situation face such a risk.

12 Id. at 843. However, mere negligent failure to protect an inmate from harm is not actionable  
13 under § 1983. Id. at 835.

14           It is clear from the complaint that plaintiff is attempting to state a claim for failure to  
15 protect based upon being improperly housed, which led to his being assaulted on two separate  
16 occasions. However, plaintiff has failed to explain what involvement the defendants had in his  
17 placement. Moreover, each of the defendants appears to hold a supervisory position and it is not  
18 clear whether they were named because they were supervisors or because they had some  
19 involvement in plaintiff’s placement.

20           There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or  
21 connection between a defendant’s actions and the claimed deprivation. Rizzo v. Goode, 423 U.S.  
22 362, 371, 376 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980). “Vague and  
23 conclusory allegations of official participation in civil rights violations are not sufficient.” Ivey v.  
24 Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982) (citations omitted).

25           Additionally, “[t]here is no respondeat superior liability under section 1983.” Taylor v  
26 List, 880 F.2d 1040, 1045 (9th Cir. 1989) (citation omitted). “A defendant may be held liable as a  
27 supervisor under § 1983 ‘if there exists either (1) his or her personal involvement in the  
28 constitutional deprivation, or (2) a sufficient causal connection between the supervisor’s wrongful

1 conduct and the constitutional violation.” Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011)  
2 (quoting Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989)). A supervisor may be liable for the  
3 constitutional violations of his subordinates if he “knew of the violations and failed to act to  
4 prevent them.” Taylor, 880 F.2d at 1045. Finally, supervisory liability may also exist without  
5 any personal participation if the official implemented “a policy so deficient that the policy itself is  
6 a repudiation of the constitutional rights and is the moving force of the constitutional violation.”  
7 Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (citations and quotation  
8 marks omitted), abrogated on other grounds by Farmer, 511 U.S. 825.

9 Accordingly, the allegations of the complaint fail to show that the defendants violated  
10 plaintiff’s rights and the complaint will be dismissed with leave to amend.

11 V. Leave to Amend

12 If plaintiff chooses to file a first amended complaint, he must demonstrate how the  
13 conditions about which he complains resulted in a deprivation of his constitutional rights. Rizzo,  
14 423 U.S. at 370-71. Also, the complaint must allege in specific terms how each named defendant  
15 is involved. Arnold v. Int’l Bus. Machs. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981). There can  
16 be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection  
17 between a defendant’s actions and the claimed deprivation. Id.; Johnson v. Duffy, 588 F.2d 740,  
18 743 (9th Cir. 1978). Furthermore, “[v]ague and conclusory allegations of official participation in  
19 civil rights violations are not sufficient.” Ivey, 673 F.2d at 268 (citations omitted).

20 Plaintiff is also informed that the court cannot refer to a prior pleading in order to make  
21 his first amended complaint complete. Local Rule 220 requires that an amended complaint be  
22 complete in itself without reference to any prior pleading. This is because, as a general rule, an  
23 amended complaint supersedes the original complaint. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.  
24 1967), overruled in part by Lacey v. Maricopa County, 693 F.3d 896, 929 (9th Cir. 2012) (claims  
25 dismissed with prejudice and without leave to amend do not have to be re-pled in subsequent  
26 amended complaint to preserve appeal). Once plaintiff files a first amended complaint, the  
27 original complaint no longer serves any function in the case. Therefore, in an amended

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1 complaint, as in an original complaint, each claim and the involvement of each defendant must be  
2 sufficiently alleged.

3 VI. Plain Language Summary of this Order for a Pro Se Litigant

4 Your request to proceed in forma pauperis is granted and you are not required to pay the  
5 entire filing fee immediately.

6 The complaint is dismissed with leave to amend because the facts you have alleged are not  
7 enough to state a claim for relief. You need to explain what each defendant did to violate your  
8 rights. Just saying that the defendants were in charge is not enough.

9 If you choose to amend your complaint, the first amended complaint must include all of  
10 the claims you want to make because the court will not look at the claims or information in the  
11 original complaint. **Any claims or information not in the first amended complaint will not be**  
12 **considered.**

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

14 1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 9) is granted.

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

20 3. Plaintiff's complaint is dismissed with leave to amend.

21 4. Within thirty days from the date of service of this order, plaintiff may file an amended  
22 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil  
23 Procedure, and the Local Rules of Practice. The amended complaint must bear the docket  
24 number assigned this case and must be labeled "First Amended Complaint." Plaintiff must file an  
25 original and two copies of the amended complaint. Failure to file an amended complaint in  
26 accordance with this order will result in dismissal of this action.

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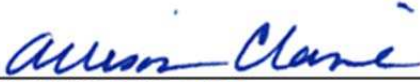
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5. The Clerk of the Court is directed to send plaintiff a copy of the prisoner complaint form used in this district.

IT IS SO ORDERED.

DATED: January 11, 2018

  
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ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE