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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
10

11 MARK FRANCIS KOCH,

No. 2:16-cv-1162-MCE-CMK-P

12 Plaintiff,

13 vs.

ORDER

14 BAHADUER, et al.

15 Defendants.  
16 \_\_\_\_\_/

17 Plaintiff, a former prisoner proceeding pro se, brings this civil rights action  
18 pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff's complaint (Doc. 5).

19 The court is required to screen complaints brought by prisoners seeking relief  
20 against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C.  
21 § 1915A(a). The court must dismiss a complaint or portion thereof if it: (1) is frivolous or  
22 malicious; (2) fails to state a claim upon which relief can be granted; or (3) seeks monetary relief  
23 from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1), (2). Moreover,  
24 the Federal Rules of Civil Procedure require that complaints contain a "short and plain statement  
25 of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This means  
26 that claims must be stated simply, concisely, and directly. See McHenry v. Renne, 84 F.3d 1172,

1 1177 (9th Cir. 1996) (referring to Fed. R. Civ. P. 8(e)(1)). These rules are satisfied if the  
2 complaint gives the defendant fair notice of the plaintiff's claim and the grounds upon which it  
3 rests. See Kimes v. Stone, 84 F.3d 1121, 1129 (9th Cir. 1996). Because plaintiff must allege  
4 with at least some degree of particularity overt acts by specific defendants which support the  
5 claims, vague and conclusory allegations fail to satisfy this standard. Additionally, it is  
6 impossible for the court to conduct the screening required by law when the allegations are vague  
7 and conclusory.

### 8 **I. PLAINTIFF'S ALLEGATIONS**

9 In his complaint, plaintiff alleges that he has been trying to get treatment for  
10 hernias since May 2015. In January 2016, he started wetting the bed due to his medical  
11 condition. He was then assaulted by an officer and sergeant. This attack began when he started  
12 wetting the bed at 1:00 a.m., then went to the bathroom/shower to clean up. Defendant Bahaduer  
13 pointed a light at plaintiff's genitals and would not move it. Plaintiff then went back to his dorm,  
14 until he was called to talk to the sergeant. He was told not to shower again. Plaintiff told the  
15 officers he would not have to if medical would treat his problem. Defendant Higgons then  
16 charged plaintiff, pushed him, and hit him in the side, and yelled at him. Defendant Higgons told  
17 plaintiff to return to his dorm, but then ran after plaintiff, yelling, pushing and hitting plaintiff  
18 with his fist.

### 19 **II. DISCUSSION**

20 There are several defects in plaintiff's complaint. First, to state a claim under 42  
21 U.S.C. § 1983, the plaintiff must allege an actual connection or link between the actions of the  
22 named defendants and the alleged deprivations. See Monell v. Dep't of Social Servs., 436 U.S.  
23 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). "A person 'subjects' another to the  
24 deprivation of a constitutional right, within the meaning of § 1983, if he does an affirmative act,  
25 participates in another's affirmative acts, or omits to perform an act which he is legally required  
26 to do that causes the deprivation of which complaint is made." Johnson v. Duffy, 588 F.2d 740,

1 743 (9th Cir. 1978). Vague and conclusory allegations concerning the involvement of official  
2 personnel in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d  
3 266, 268 (9th Cir. 1982). Rather, the plaintiff must set forth specific facts as to each individual  
4 defendant's causal role in the alleged constitutional deprivation. See Leer v. Murphy, 844 F.2d  
5 628, 634 (9th Cir. 1988).

6 Here, it appears plaintiff is upset that he has not received treatment for his medical  
7 condition. While the lack of medical treatment appears to be simply background information, if  
8 he is trying to state a claim for denial of medical treatment, he fails to allege sufficient facts and  
9 fails to identify any defendants responsible for his treatment, or lack thereof. Therefore, the court  
10 finds no viable claim for denial of medical treatment. In addition, as the lack of treatment is  
11 unrelated to the physical assault claim, if it is plaintiff's intention to raise such a claim, his  
12 medical treatment claim would be properly raised in a separate action, not this one.

13 In addition, plaintiff names both the California Health Care Facility and the  
14 California Department of Corrections and Rehabilitation as defendants to this action. However,  
15 the Eleventh Amendment prohibits federal courts from hearing suits brought against a state both  
16 by its own citizens, as well as by citizens of other states. See Brooks v. Sulphur Springs Valley  
17 Elec. Coop., 951 F.2d 1050, 1053 (9th Cir. 1991). This prohibition extends to suits against states  
18 themselves, and to suits against state agencies. See Lucas v. Dep't of Corr., 66 F.3d 245, 248  
19 (9th Cir. 1995) (per curiam); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A state's  
20 agency responsible for incarceration and correction of prisoners is a state agency for purposes of  
21 the Eleventh Amendment. See Alabama v. Pugh, 438 U.S. 781, 782 (1978) (per curiam); Hale v.  
22 Arizona, 993 F.2d 1387, 1398-99 (9th cir. 1993) (en banc). It does not appear that plaintiff  
23 actually intended to name either of these entities as defendants, but rather identified them as the  
24 location where the defendants work and he was housed. As these two defendants are protected  
25 by the Eleventh Amendment, plaintiff cannot maintain an action against them.

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1 As to the two individual defendants, it appears plaintiff's main claim is use of  
2 excessive force. However, to the extent plaintiff is attempting to state a claim for harassment or  
3 verbal abuse, no such claim exists. The treatment a prisoner receives in prison and the conditions  
4 under which the prisoner is confined are subject to scrutiny under the Eighth Amendment, which  
5 prohibits cruel and unusual punishment. See Helling v. McKinney, 509 U.S. 25, 31 (1993);  
6 Farmer v. Brennan, 511 U.S. 825, 832 (1994). The Eighth Amendment "embodies broad and  
7 idealistic concepts of dignity, civilized standards, humanity, and decency." Estelle v. Gamble,  
8 429 U.S. 97, 102 (1976). Conditions of confinement may, however, be harsh and restrictive. See  
9 Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Nonetheless, prison officials must provide  
10 prisoners with "food, clothing, shelter, sanitation, medical care, and personal safety." Toussaint  
11 v. McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986). A prison official violates the Eighth  
12 Amendment only when two requirements are met: (1) objectively, the official's act or omission  
13 must be so serious such that it results in the denial of the minimal civilized measure of life's  
14 necessities; and (2) subjectively, the prison official must have acted unnecessarily and wantonly  
15 for the purpose of inflicting harm. See Farmer, 511 U.S. at 834. Thus, to violate the Eighth  
16 Amendment, a prison official must have a "sufficiently culpable mind." See id.

17 Allegations of verbal harassment do not state a claim under the Eighth  
18 Amendment unless it is alleged that the harassment was "calculated to . . . cause [the prisoner]  
19 psychological damage." Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987); see also  
20 Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996), amended by 135 F.3d 1318 (9th Cir. 1998).  
21 In addition, the prisoner must show that the verbal comments were unusually gross, even for a  
22 prison setting, and that he was in fact psychologically damaged as a result of the comments.  
23 See Keenan, 83 F.3d at 1092. This includes verbal harassment of a sexual nature, and exposure.  
24 Austin v. Terhune, 367 F.3d 1167, 1171-72 (9th Cir. 2004).

25 Plaintiff alleges defendant Bahaduer harassed him, verbally and by use of her  
26 light. However, such harassment is insufficient to state a claim. Similarly, to the extent plaintiff

1 attempts to state a claim against defendant Higgons for yelling at him or for the obscenities used,  
2 plaintiff cannot state a claim. While the alleged actions may certainly be inappropriate, they do  
3 not rise to the level of a constitutional violation and any such claims must be dismissed.

4 Finally, as to the claim against defendant Higgons for use of force, plaintiff fails  
5 to provide sufficient facts to state a claim. This defect, however, may be curable and plaintiff  
6 will be provided an opportunity to file an amended complaint against defendant Higgons for use  
7 of excessive force. As stated above, a prison official violates the Eighth Amendment only when  
8 two requirements are met: (1) objectively, the official's act or omission must be so serious such  
9 that it results in the denial of the minimal civilized measure of life's necessities; and (2)  
10 subjectively, the prison official must have acted unnecessarily and wantonly for the purpose of  
11 inflicting harm. See Farmer, 511 U.S. at 834.

12 When prison officials stand accused of using excessive force, the core judicial  
13 inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or  
14 maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992);  
15 Whitley v. Albers, 475 U.S. 312, 320-21 (1986). The "malicious and sadistic" standard, as  
16 opposed to the "deliberate indifference" standard applicable to most Eighth Amendment claims,  
17 is applied to excessive force claims because prison officials generally do not have time to reflect  
18 on their actions in the face of risk of injury to inmates or prison employees. See Whitley, 475  
19 U.S. at 320-21. In determining whether force was excessive, the court considers the following  
20 factors: (1) the need for application of force; (2) the extent of injuries; (3) the relationship  
21 between the need for force and the amount of force used; (4) the nature of the threat reasonably  
22 perceived by prison officers; and (5) efforts made to temper the severity of a forceful response.  
23 See Hudson, 503 U.S. at 7. The absence of an emergency situation is probative of whether force  
24 was applied maliciously or sadistically. See Jordan v. Gardner, 986 F.2d 1521, 1528 (9th Cir.  
25 1993) (en banc). The lack of injuries is also probative. See Hudson, 503 U.S. at 7-9. Finally,  
26 because the use of force relates to the prison's legitimate penological interest in maintaining

security and order, the court must be deferential to the conduct of prison officials. See Whitley, 475 U.S. at 321-22.

Plaintiff's allegations as to the use of force appear to be limited to being pushed and struck once with a fist. At first blush, such actions, while again inappropriate, do not appear to be "so serious such that it results in the denial of the minimal civilized measure of life's necessities." As the standard for a violation of the Eighth Amendment is relatively high, the allegations in plaintiff's complaint do not reach the necessary severity. However, since there may be additional facts that plaintiff can assert that would state a claim, he will be given an opportunity to amend.

### III. CONCLUSION

Because it is possible that some of the deficiencies identified in this order may be cured by amending the complaint, plaintiff is entitled to leave to amend prior to dismissal of the entire action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc). Plaintiff is informed that, as a general rule, an amended complaint supersedes the original complaint. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). Thus, following dismissal with leave to amend, all claims alleged in the original complaint which are not alleged in the amended complaint are waived. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987). Therefore, if plaintiff amends the complaint, the court cannot refer to the prior pleading in order to make plaintiff's amended complaint complete. See Local Rule 220. An amended complaint must be complete in itself without reference to any prior pleading. See id.

If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The complaint must allege in specific terms how each named defendant is involved, and must set forth some affirmative link or connection between each defendant's actions and the claimed deprivation. See May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

1 Because some of the defects identified in this order cannot be cured by  
2 amendment, plaintiff is not entitled to leave to amend as to such claims. Plaintiff, therefore, now  
3 has the following choices: (1) plaintiff may file an amended complaint which does not allege the  
4 claims identified herein as incurable, in which case such claims will be deemed abandoned and  
5 the court will address the remaining claims; or (2) plaintiff may file an amended complaint which  
6 continues to allege claims identified as incurable, in which case the court will issue findings and  
7 recommendations that such claims be dismissed from this action, as well as such other orders  
8 and/or findings and recommendations as may be necessary to address the remaining claims.

9 Finally, plaintiff is warned that failure to file an amended complaint within the  
10 time provided in this order may be grounds for dismissal of this action. See Ferdik, 963 F.2d at  
11 1260-61; see also Local Rule 110. Plaintiff is also warned that a complaint which fails to comply  
12 with Rule 8 may, in the court's discretion, be dismissed with prejudice pursuant to Rule 41(b).  
13 See Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 673 (9th Cir. 1981).

14 Accordingly, IT IS HEREBY ORDERED that:

- 15 1. Plaintiff's complaint is dismissed with leave to amend; and
- 16 2. Plaintiff shall file an amended complaint within 30 days of the date of  
17 service of this order.

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20 DATED: May 12, 2017

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22 **CRAIG M. KELLISON**  
23 UNITED STATES MAGISTRATE JUDGE  
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