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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

WESLEY WILLIAM KESSLER,  
Plaintiff,  
v.  
J. BORESZ,  
Defendant.

No. 2:16-cv-1552-EFB P

ORDER

Plaintiff is a county inmate proceeding without counsel in an action brought under 42 U.S.C. § 1983. He has filed an application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

**I. Request to Proceed In Forma Pauperis**

Plaintiff’s application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

**II. Screening Requirement and Standards**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion

1 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which  
2 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such  
3 relief.” *Id.* § 1915A(b).

4 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)  
5 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and  
6 plain 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 Atl. Corp. v.*  
8 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).  
9 While the complaint must comply with the “short and plain statement” requirements of Rule 8,  
10 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556  
11 U.S. 662, 679 (2009).

12 To avoid dismissal for failure to state a claim a complaint must contain more than “naked  
13 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of  
14 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of  
15 a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at  
16 678.

17 Furthermore, a claim upon which the court can grant relief must have facial plausibility.  
18 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual  
19 content that allows the court to draw the reasonable inference that the defendant is liable for the  
20 misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a  
21 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*  
22 *Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the  
23 plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

### 24 **III. Screening Order**

25 The court has reviewed plaintiff’s complaint (ECF No. 1) pursuant to § 1915A and finds  
26 that it must be dismissed with leave to amend. Plaintiff names Officer J. Borez as the defendant.  
27 According to the complaint, plaintiff was “asked to prone out a certain way” while he was being  
28 arrested. ECF No. 1 at 3. Plaintiff informed the defendant that he could not prone out as

1 requested due to a recent operation on his shoulder. *Id.* Defendant then “demanded” that plaintiff  
2 prone out, and plaintiff maintained that he could not. The defendant then grabbed plaintiff’s right  
3 hand and twisted it behind plaintiff’s back, causing injury to plaintiff’s right rotator cuff. *Id.*  
4 Plaintiff seeks compensatory and punitive damages as relief. *Id.* Although plaintiff does not  
5 identify any claims for relief, it appears that he wishes to pursue a claim of excessive force.  
6 However, as explained below, plaintiff’s scant allegations are not sufficient to state a claim upon  
7 which relief could be granted. To proceed, plaintiff must file an amended complaint.

8 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1)  
9 that a right secured by the Constitution or laws of the United States was violated, and (2) that the  
10 alleged violation was committed by a person acting under the color of state law. *West v. Atkins*,  
11 487 U.S. 42, 48 (1988). An individual defendant is not liable on a civil rights claim unless the  
12 facts establish the defendant’s personal involvement in the constitutional deprivation or a causal  
13 connection between the defendant’s wrongful conduct and the alleged constitutional deprivation.  
14 *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44  
15 (9th Cir. 1978).

16 In order to state a claim for the use of excessive force by a pretrial detainee, a plaintiff  
17 “must show only that the force purposely or knowingly used against him was objectively  
18 unreasonable.” *Kingsley v. Hendrickson*, \_\_\_ S. Ct. \_\_\_, 2015 U.S. LEXIS 4073, at \*12 (June 22,  
19 2015). Plaintiff does not allege that defendant forced him to prone out in the position to which  
20 plaintiff objected. Plaintiff merely alleges that, despite informing defendant of a “recent”  
21 shoulder operation (without specifying right or left), defendant twisted plaintiff’s right hand  
22 during the course of arrest. Plaintiff alleges no other facts regarding the circumstances at the time  
23 of his arrest. These allegations fail to show that defendant’s use of force was objectively  
24 unreasonable. Plaintiff may be able to state a cognizable excessive force claim if he can allege  
25 facts demonstrating that the force used was objectively unreasonable under the circumstances.

26 Plaintiff will be granted leave to file an amended complaint, if plaintiff can allege a  
27 cognizable legal theory against a proper defendant and sufficient facts in support of that  
28 cognizable legal theory. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)

1 (district courts must afford pro se litigants an opportunity to amend to correct any deficiency in  
2 their complaints). Should plaintiff choose to file an amended complaint, the amended complaint  
3 shall clearly set forth the claims and allegations against each defendant.

4 Any amended complaint must not exceed the scope of this order and may not add new,  
5 unrelated claims. Further, any amended complaint must cure the deficiencies identified above  
6 and also adhere to the following requirements:

7 Any amended complaint must identify as a defendant only persons who personally  
8 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*  
9 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a  
10 constitutional right if he does an act, participates in another's act or omits to perform an act he is  
11 legally required to do that causes the alleged deprivation). It must also contain a caption  
12 including the names of all defendants. Fed. R. Civ. P. 10(a).

13 Any amended complaint must be written or typed so that it so that it is complete in itself  
14 without reference to any earlier filed complaint. L.R. 220. This is because an amended  
15 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the  
16 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114  
17 F.3d 1467, 1474 (9th Cir. 1997) (the “‘amended complaint supersedes the original, the latter  
18 being treated thereafter as non-existent.’”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.  
19 1967)).

20 Finally, the court cautions plaintiff that failure to comply with the Federal Rules of Civil  
21 Procedure, this court's Local Rules, or any court order may result in this action being dismissed.  
22 *See E.D. Cal. L.R. 110.*

#### 23 **IV. Summary of Order**

24 Accordingly, IT IS HEREBY ORDERED that:

- 25 1. Plaintiff's request to proceed in forma pauperis (ECF No. 2) is granted.
- 26 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in  
27 accordance with the notice to the Sheriff of Sacramento County filed concurrently  
28 herewith.

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3. The complaint is dismissed with leave to amend within 30 days. The amended complaint must bear the docket number assigned to this case and be titled "First Amended Complaint." Failure to comply with this order will result in this action being dismissed for failure to state a claim. If plaintiff files an amended complaint stating a cognizable claim the court will proceed with service of process by the United States Marshal.

Dated: October 3, 2017.

  
EDMUND F. BRENNAN  
UNITED STATES MAGISTRATE JUDGE