



1 exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

2 II. Screening Standard

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

8 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
9 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
10 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
11 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
12 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
13 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
14 Cir. 1989); Franklin, 745 F.2d at 1227.

15 In order to avoid dismissal for failure to state a claim a complaint must contain more than  
16 “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause  
17 of action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words,  
18 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
19 statements do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Furthermore, a claim  
20 upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. “A  
21 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
22 the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S.  
23 at 678. When considering whether a complaint states a claim upon which relief can be granted,  
24 the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007),  
25 and construe the complaint in the light most favorable to the plaintiff, see Scheuer v. Rhodes, 416  
26 U.S. 232, 236 (1974).

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1 III. Discussion

2 A. Allegations

3 Plaintiff names one defendant: a correctional officer, Rafferty, at California State Prison-  
4 Solano. Plaintiff alleges that on September 9, 2015, he was fighting with another inmate when  
5 Rafferty shot him in the head from 60 feet away with a 40 mm launcher, or block gun. (ECF No.  
6 1 at 10-11.) Rafferty fired several rounds, hitting both inmates in the head. (Id. at 18.) Other  
7 correctional officers tossed tear gas grenades near the two inmates, and they were placed in  
8 restraints and escorted to the medical facility. (Id.) Plaintiff was in extreme pain, passed out, and  
9 woke up in an ambulance. (Id.) He was admitted to a hospital the day of the incident and  
10 discharged two days later. (Id. at 19-20.) At the hospital, he underwent an M.R.I. and several  
11 CAT scans. (Id. at 20.)

12 Back in prison, plaintiff was placed in Administrative Segregation and denied a pillow,  
13 despite the recent injury to his head. (Id. at 20-21.) In the weeks that followed, plaintiff suffered  
14 from vertigo, pain, and sleep deprivation. (Id. at 21-22.) On November 3, 2015, he was placed  
15 on psychiatric medication for post-traumatic stress disorder. (Id. at 22.)

16 Plaintiff claims that defendant Rafferty used excessive force against him in violation of  
17 the Eighth Amendment.

18 B. Excessive Force

19 The Eighth Amendment prohibits cruel and unusual punishment. “[T]he unnecessary and  
20 wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth  
21 Amendment.” Whitely v. Albers, 475 U.S. 312, 319 (1986). “The Eighth Amendment’s  
22 prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition  
23 de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the  
24 conscience of mankind.” Wilkins v. Gaddy, 559 U.S. 34, 37-38 (2010) (quoting Hudson v.  
25 McMillian, 503 U.S. 1, 9 (1992)) (internal quotations omitted).

26 Not every malevolent touch by a prison guard gives rise to a federal cause of action.  
27 Wilkins, 559 U.S. at 37 (quoting Hudson, 503 U.S. at 9) (quotation marks omitted). In  
28 determining whether the use of force was wanton and unnecessary, courts may evaluate the extent

1 of the prisoner's injury, the need for application of force, the relationship between that need and  
2 the amount of force used, the threat reasonably perceived by the responsible officials, and any  
3 efforts made to temper the severity of a forceful response. Hudson, 503 U.S. at 7 (quotation  
4 marks and citations omitted). While the absence of a serious injury is relevant to the Eighth  
5 Amendment inquiry, it does not end it. Hudson, 503 U.S. at 7. The malicious and sadistic use of  
6 force to cause harm always violates contemporary standards of decency. Wilkins, 559 U.S. at 37  
7 (quoting Hudson, 503 U.S. at 9) (quotation marks omitted). Thus, it is the use of force rather than  
8 the resulting injury which ultimately counts. Id. at 1178. Mere negligence is not actionable under  
9 §1983 in the prison context. Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004).

10 Here, plaintiff has not stated an excessive force claim against defendant, as the complaint  
11 does not suggest the malicious or sadistic use of force. Rather, it appears defendant was using  
12 force to break up an inmate fight, such that the amount of force may have been reasonable under  
13 the circumstances. While plaintiff's description of the event is clear and specific, he does not  
14 explain why defendant's use of force was "wanton and unnecessary" in violation of the Eighth  
15 Amendment. Thus, the complaint will be dismissed for failure to state a claim. However,  
16 plaintiff will have the opportunity to amend the complaint.

### 17 C. Medical Indifference

18 Denial or delay of medical care for a prisoner's serious medical needs may constitute a  
19 violation of the prisoner's Eighth and Fourteenth Amendment rights. Estelle v. Gamble, 429 U.S.  
20 97, 104-05 (1976). An individual is liable for such a violation only when the individual is  
21 deliberately indifferent to a prisoner's serious medical needs. Id.; see Jett v. Penner, 439 F.3d  
22 1091, 1096 (9th Cir. 2006); Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002); Lopez v.  
23 Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000).

24 In the Ninth Circuit, the test for deliberate indifference consists of two parts. Jett, 439  
25 F.3d at 1096, citing McGuckin v. Smith, 974 F.2d 1050 (9th Cir. 1991), overruled on other  
26 grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc). First, the  
27 plaintiff must show a "serious medical need" by demonstrating that "failure to treat a prisoner's  
28 condition could result in further significant injury or the 'unnecessary and wanton infliction of

1 pain.” Id., citing Estelle, 429 U.S. at 104. “Examples of serious medical needs include “[t]he  
2 existence of an injury that a reasonable doctor or patient would find important and worthy of  
3 comment or treatment; the presence of a medical condition that significantly affects an  
4 individual’s daily activities; or the existence of chronic and substantial pain.” Lopez, 203 F. 3d  
5 at 1131-1132, citing McGuckin, 974 F.2d at 1059-60.

6 Second, the plaintiff must show the defendant’s response to the need was deliberately  
7 indifferent. Jett, 439 F.3d at 1096. This second prong is satisfied by showing (a) a purposeful act  
8 or failure to respond to a prisoner’s pain or possible medical need and (b) harm caused by the  
9 indifference. Id. Under this standard, the prison official must not only “be aware of facts from  
10 which the inference could be drawn that a substantial risk of serious harm exists,” but that person  
11 “must also draw the inference.” Farmer v. Brennan, 511 U.S. 825, 837 (1994). This “subjective  
12 approach” focuses only “on what a defendant’s mental attitude actually was.” Id. at 839. A  
13 showing of merely negligent medical care is not enough to establish a constitutional violation.  
14 Frost v. Agnos, 152 F.3d 1124, 1130 (9th Cir. 1998), citing Estelle, 429 U.S. at 105-106.

15 A difference of opinion about the proper course of treatment is not deliberate indifference,  
16 nor does a dispute between a prisoner and prison officials over the necessity for or extent of  
17 medical treatment amount to a constitutional violation. See, e.g., Toguchi v. Chung, 391 F.3d  
18 1051, 1058 (9th Cir. 2004); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989).

19 Plaintiff does not name any medical defendants or assert an Eighth Amendment medical  
20 claim. However, to the extent he alleges that his medical care after returning from the hospital  
21 was inadequate to treat his pain or other symptoms, plaintiff may amend the complaint in light of  
22 the above standard.

#### 23 IV. Leave to Amend

24 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions  
25 complained of have resulted in a deprivation of plaintiff’s constitutional rights. See Ellis v.  
26 Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, plaintiff’s amended complaint must allege in  
27 specific terms how each named defendant is involved. There can be no liability under 42 U.S.C.  
28 § 1983 unless there is some affirmative link or connection between a defendant’s actions and the

1 claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976). Furthermore, vague and conclusory  
2 allegations of official participation in civil rights violations are not sufficient. Ivey v. Board of  
3 Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

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

12 1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 2) is granted.

13 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. All fees  
14 shall be collected and paid in accordance with this court's order to the Director of the California  
15 Department of Corrections and Rehabilitation filed concurrently herewith.

16 3. Plaintiff's complaint is dismissed.

17 4. Plaintiff is granted thirty days from the date of service of this order to file an amended  
18 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil  
19 Procedure, and the Local Rules of Practice; the amended complaint must bear the docket number  
20 assigned this case and must be labeled "Amended Complaint"; plaintiff must file an original and  
21 two copies of the amended complaint; failure to file an amended complaint in accordance with  
22 this order will result in dismissal of this action.

23 Dated: September 22, 2016



24 CAROLYN K. DELANEY  
25 UNITED STATES MAGISTRATE JUDGE