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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE GARCIA,  
Plaintiff,  
v.  
K. GREATHER, et al.,  
Defendants.

No. 2:16-cv-1915 CKD P

ORDER

Plaintiff is a state prisoner proceeding pro se and seeking relief pursuant to 42 U.S.C. § 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff requests leave to proceed in forma pauperis. Since plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a), his request 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 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. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

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

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

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

25           In his complaint, plaintiff asserts he informed defendants Grether, Aguilera and another  
26 unidentified officer that if he were to be housed in general population, plaintiff would be attacked.  
27 Plaintiff alleges these defendants ignored plaintiff’s warning and plaintiff was placed in general  
28 population anyway. However, plaintiff does not allege that he was attacked or injured in any

1 other way as a result of the actions of any these defendants. Plaintiff also alleges defendant Davis  
2 called plaintiff names while plaintiff was in a holding cell. Plaintiff seeks monetary damages.

3 Because verbal harassment generally does not rise to the level of a violation of the  
4 Constitution, Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) and plaintiff fails to  
5 otherwise allege any actionable injury, plaintiff's complaint must be dismissed. The court will,  
6 however, grant plaintiff leave to file an amended complaint in order to cure the deficiencies in his  
7 pleadings.

8 Plaintiff is informed that the Eighth Amendment forbids cruel and unusual punishment  
9 against prisoners. Cruel and unusual punishment is properly alleged when a plaintiff points to  
10 facts indicating he was injured as a result of at least deliberate indifference by a prison official to  
11 a substantial risk of serious physical harm. Farmer v. Brennan, 511 U.S. 825, 828 (1994).

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

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

- 20 1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. (9 & 10) is granted.
- 21 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. All fees  
22 shall be collected and paid in accordance with this court's order to the Director of the California  
23 Department of Corrections and Rehabilitation filed concurrently herewith.
- 24 3. Plaintiff's complaint is dismissed.
- 25 4. Plaintiff is granted thirty days from the date of service of this order to file an amended  
26 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil  
27 Procedure, and the Local Rules of Practice. The amended complaint must bear the docket  
28 number assigned this case and must be labeled "Amended Complaint." Failure to file an

1 amended complaint in accordance with this order will result in a recommendation that this action  
2 be dismissed.

3 Dated: October 18, 2016



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CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE

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