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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVE WILHELM,  
Plaintiff,  
v.  
SCOTT KERNAN, et al.,  
Defendants.

No. 2:16-cv-2204 KJN P

ORDER

Plaintiff is a state prisoner, proceeding pro se. Plaintiff 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). He consented to proceed before the undersigned for all purposes. See 28 U.S.C. § 636(c).

Plaintiff submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). 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 to make monthly payments of twenty percent of the preceding month's income credited to plaintiff's 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 The court is required to screen complaints brought by prisoners seeking relief against a  
5 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
6 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally  
7 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek  
8 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

9 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
10 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
11 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an  
12 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
13 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
14 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
15 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.  
16 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
17 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at  
18 1227.

19 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain  
20 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the  
21 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic  
22 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
23 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a  
24 formulaic recitation of the elements of a cause of action;" it must contain factual allegations  
25 sufficient "to raise a right to relief above the speculative level." Id. at 555. However, "[s]pecific  
26 facts are not necessary; the statement [of facts] need only 'give the defendant fair notice of what  
27 the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93  
28 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal quotations marks omitted).

1 In reviewing a complaint under this standard, the court must accept as true the allegations of the  
2 complaint in question, Erickson, 551 U.S. at 93, and construe the pleading in the light most  
3 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other  
4 grounds, Davis v. Scherer, 468 U.S. 183 (1984).

5 Plaintiff contends that he is denied equal protection and subjected to age discrimination in  
6 violation of the Eighth and Fourteenth Amendments by prison regulations requiring that inmates  
7 65 and older be deemed “high risk medical” regardless of their medical issues.

8 However, “age is not a suspect classification.” Gregory v. Ashcroft, 501 U.S. 452, 470  
9 (1991). Therefore, plaintiff cannot state an equal protection claim for discrimination. See Barren  
10 v. Harrington, 152 F.3d 1193, 1194-95 (9th Cir. 1998) (failure to demonstrate membership in a  
11 protected class means plaintiff has not stated an equal protection clause claim).<sup>1</sup>

12 Moreover, inmates do not have a constitutional right to be housed at a particular facility or  
13 institution or to be transferred, or not transferred, from one facility or institution to another. Olim  
14 v. Wakinekona, 461 U.S. 238, 244-48 (1983); Meachum v. Fano, 427 U.S. 215, 224-25 (1976);  
15 Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991) (per curiam). Nor does an inmate have a  
16 constitutional right to any particular classification. Moody v. Daggett, 429 U.S. 78, 88 n.9  
17 (1976); Hernandez v. Johnston, 833 F.2d 1316, 1318 (9th Cir. 1987). Alleged deprivations of  
18 rights arising from prison officials’ housing and classification decisions do not give rise to a  
19 federal constitutional claim encompassed by the Fourteenth Amendment. Board of Regents v.  
20 Roth, 408 U.S. 564, 569 (1972).

21 Plaintiff sets forth no factual allegations that suggest an Eighth Amendment violation.

22 Therefore, plaintiff’s complaint must be dismissed. Although it does not appear that  
23 plaintiff can amend his complaint to state a cognizable claim, in an abundance of caution, the  
24 court will grant leave to file an amended complaint.

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27 <sup>1</sup> The Age Discrimination in Employment Act (“ADEA”) makes it unlawful for an “employer”  
28 “to discharge any individual” who is at least 40 years old “because of such individual’s age.” 29  
U.S.C. §§ 623(a), 631(a). The term “employer” is defined to include “a State or political  
subdivision of a State.” § 630(b)(2). Thus, plaintiff also could not state a claim under the ADEA.

1 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions  
2 about which he complains resulted in a deprivation of plaintiff's constitutional rights. Rizzo v.  
3 Goode, 423 U.S. 362, 371 (1976). Also, the complaint must allege in specific terms how each  
4 named defendant is involved. Id. There can be no liability under 42 U.S.C. § 1983 unless there is  
5 some affirmative link or connection between a defendant's actions and the claimed deprivation.  
6 Id.; May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743  
7 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil  
8 rights violations are not sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

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

- 18 1. Plaintiff's request for leave to proceed in forma pauperis is granted.
- 19 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff  
20 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.  
21 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the  
22 Director of the California Department of Corrections and Rehabilitation filed concurrently  
23 herewith.
- 24 3. Plaintiff's complaint is dismissed.
- 25 4. Within thirty days from the date of this order, plaintiff shall complete the attached  
26 Notice of Amendment and submit the following documents to the court:
  - 27 a. The completed Notice of Amendment; and
  - 28 b. An original and one copy of the Amended Complaint.

1 Plaintiff's amended complaint shall comply with the requirements of the Civil Rights Act, the  
2 Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must  
3 also bear the docket number assigned to this case and must be labeled "Amended Complaint."

4 Failure to file an amended complaint in accordance with this order may result in the  
5 dismissal of this action.

6 5. The Clerk of the Court shall send plaintiff the form for filing a civil rights action by a  
7 prisoner.

8 Dated: September 6, 2017

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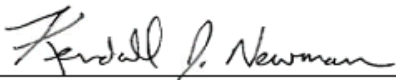
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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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NOTICE OF AMENDMENT

Plaintiff hereby submits the following document in compliance with the court's order  
filed \_\_\_\_\_.

DATED: \_\_\_\_\_ Amended Complaint

\_\_\_\_\_  
Plaintiff