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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CONNOR A. DAVIS,
Plaintiff,
v.
CDCR, et al.,
Defendants.

No. 2:16-cv-2906 MCE KJN P

ORDER

Plaintiff is a state prisoner, proceeding without counsel. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983. This proceeding was referred to this court pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302. On February 22, 2017, the undersigned recommended that this action be dismissed based on plaintiff's failure to pay the filing fee or submit a completed application to proceed in forma pauperis. Plaintiff was granted an extension of time in which to provide such document, and on April 25, 2017, plaintiff submitted the motion to proceed in forma pauperis. The findings and recommendations are vacated.

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

1 the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and
2 forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments
3 of twenty percent of the preceding month's income credited to plaintiff's prison trust account.
4 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time
5 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.
6 § 1915(b)(2).

7 Plaintiff's second amended complaint is now before the court. (ECF No. 15.)

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

13 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
14 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
15 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
16 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
17 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
18 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
19 Cir. 1989); Franklin, 745 F.2d at 1227.

20 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon
21 which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in
22 support of the claim or claims that would entitle him to relief. Hishon v. King & Spalding, 467
23 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Palmer v. Roosevelt
24 Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under
25 this standard, the court must accept as true the allegations of the complaint in question, Hosp.
26 Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light
27 most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor, Jenkins v.
28 McKeithen, 395 U.S. 411, 421 (1969).

1 The court finds the allegations in plaintiff's second amended complaint so vague and
2 conclusory that it is unable to determine whether the current action is frivolous or fails to state a
3 claim for relief. The court has determined that the amended complaint does not contain a short
4 and plain statement as required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a
5 flexible pleading policy, a complaint must give fair notice and state the elements of the claim
6 plainly and succinctly. Jones v. Cmty. Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984).
7 Plaintiff must allege with at least some degree of particularity overt acts which defendants
8 engaged in that support plaintiff's claim. Id. Because plaintiff has failed to comply with the
9 requirements of Fed. R. Civ. P. 8(a)(2), the second amended complaint must be dismissed. The
10 court will, however, grant leave to file a third amended complaint.

11 If plaintiff chooses to file an amended pleading, any amended complaint must show the
12 federal court has jurisdiction, the action is brought in the right place, and plaintiff is entitled to
13 relief if plaintiff's allegations are true. It must contain a request for particular relief. Plaintiff
14 must identify as a defendant only persons who personally participated in a substantial way in
15 depriving plaintiff of a federal constitutional right. Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir.
16 1978) (a person subjects another to the deprivation of a constitutional right if he does an act,
17 participates in another's act or omits to perform an act he is legally required to do that causes the
18 alleged deprivation).

19 The federal rules contemplate brevity. See Galbraith v. County of Santa Clara, 307 F.3d
20 1119, 1125 (9th Cir. 2002) (noting that "nearly all of the circuits have now disapproved any
21 heightened pleading standard in cases other than those governed by Rule 9(b)"); Fed. R. Civ. P.
22 84; cf. Rule 9(b) (setting forth rare exceptions to simplified pleading). Plaintiff's claims must be
23 set forth in short and plain terms, simply, concisely and directly. See Swierkiewicz v. Sorema
24 N.A., 534 U.S. 506, 514 (2002) ("Rule 8(a) is the starting point of a simplified pleading system,
25 which was adopted to focus litigation on the merits of a claim."); Fed. R. Civ. P. 8. Plaintiff must
26 not include any preambles, introductions, argument, speeches, explanations, stories, griping,
27 vouching, evidence, attempts to negate possible defenses, summaries, and the like. McHenry v.
28 Renne, 84 F.3d 1172, 1177-78 (9th Cir. 1996) (affirming dismissal of § 1983 complaint for

1 violation of Rule 8 after warning); see Crawford-El v. Britton, 523 U.S. 574, 597 (1998)
2 (reiterating that “firm application of the Federal Rules of Civil Procedure is fully warranted” in
3 prisoner cases). The court (and defendant) should be able to read and understand plaintiff’s
4 pleading within minutes. McHenry, 84 F.3d at 1179-80. A long, rambling pleading including
5 many defendants with unexplained, tenuous or implausible connection to the alleged
6 constitutional injury, or joining a series of unrelated claims against many defendants, very likely
7 will result in delaying the review required by 28 U.S.C. § 1915 and an order dismissing plaintiff’s
8 action pursuant to Fed. R. Civ. P. 41 for violation of these instructions.

9 A district court must construe a pro se pleading “liberally” to determine if it states a claim
10 and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an
11 opportunity to cure them. See Lopez, 203 F.3d at 1130-31. While detailed factual allegations are
12 not required, “[t]hreadbare recitals of the elements of a cause of action, supported by mere
13 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
14 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual
15 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft, 556
16 U.S. at 678 (quoting Bell Atlantic Corp., 550 U.S. at 570).

17 A claim has facial plausibility when the plaintiff pleads factual
18 content that allows the court to draw the reasonable inference that
19 the defendant is liable for the misconduct alleged. The plausibility
20 standard is not akin to a “probability requirement,” but it asks for
21 more than a sheer possibility that a defendant has acted unlawfully.
Where a complaint pleads facts that are merely consistent with a
defendant’s liability, it stops short of the line between possibility
and plausibility of entitlement to relief.

22 Ashcroft, 556 U.S. at 678 (citations and quotation marks omitted). Although legal conclusions
23 can provide the framework of a complaint, they must be supported by factual allegations, and are
24 not entitled to the assumption of truth. Id. at 1950.

25 A prisoner may bring no § 1983 action until he has exhausted such administrative
26 remedies as are available to him. 42 U.S.C. § 1997e(a). The requirement is mandatory. Booth v.
27 Churner, 532 U.S. 731, 741 (2001). California prisoners or parolees may appeal “departmental
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1 policies, decisions, actions, conditions, or omissions that have a material adverse effect on the[ir]
2 welfare. . . .” Cal. Code Regs. tit. 15, §§ 3084.1, et seq. An appeal must be presented on a CDC
3 form 602 that asks simply that the prisoner “describe the problem” and “action requested.”
4 Therefore, this court ordinarily will review only claims against prison officials within the scope of
5 the problem reported in a CDC form 602 or an interview or claims that were or should have been
6 uncovered in the review promised by the department.

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

15 By signing a third amended complaint, plaintiff certifies he has made reasonable inquiry
16 and has evidentiary support for his allegations, and for violation of this rule the court may impose
17 sanctions sufficient to deter repetition by plaintiff or others. Fed. R. Civ. P. 11.

18 Plaintiff is provided the court’s form for filing a civil rights complaint. Plaintiff shall use
19 this form to file any third amended complaint.

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

- 21 1. The February 22, 2017 findings and recommendations (ECF No. 12) are vacated.
- 22 2. Plaintiff’s request for leave to proceed in forma pauperis is granted.
- 23 3. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
24 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
25 § 1915(b)(1). All fees shall be collected and paid in accordance with this court’s order to the
26 Director of the California Department of Corrections and Rehabilitation filed concurrently
27 herewith.
- 28 4. Plaintiff’s second amended complaint is dismissed;

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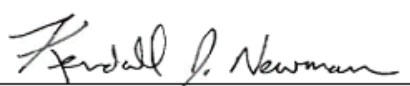
5. Plaintiff is granted thirty days from the date of service of this order to file a third amended complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil Procedure, and the Local Rules of Practice; the third amended complaint must be filed on the court's form and bear the docket number assigned this case and must be labeled "Third Amended Complaint"; plaintiff must file an original and two copies of the third amended complaint; and

6. The Clerk is directed to send plaintiff a copy of the court's form for filing a civil rights complaint.

Failure to file a third amended complaint in accordance with this order will result in a recommendation that this action be dismissed.

Dated: June 9, 2017

/davi2906.14amd


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE