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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 ANDRE RAMON CRAVER,

12 Plaintiff,

13 v.

14 A. MOORE,

15 Defendant.  
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No. 2:17-cv-0303 CKD P

ORDER

17 I. Introduction

18 Plaintiff is a state prisoner proceeding pro se and seeking relief pursuant to 42 U.S.C. §  
19 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. §  
20 636(b)(1).

21 Plaintiff requests leave to proceed in forma pauperis. Since plaintiff has submitted a  
22 declaration that makes the showing required by 28 U.S.C. § 1915(a), his request will be granted.  
23 Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§  
24 1914(a), 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the  
25 initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court.  
26 Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the preceding  
27 month's income credited to plaintiff's prison trust account. These payments will be forwarded by  
28 the appropriate agency to the Clerk of the Court each time the amount in plaintiff's account

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).

## 20 III. Analysis

21 Plaintiff alleges that after he cursed and yelled at officials at a classification hearing,  
22 telling them he would kill any inmate double-celled with him, defendant Moore slammed him  
23 against the door and then to the floor, giving him a bloody lip. Plaintiff claims Moore used  
24 excessive force in violation of the Eighth Amendment. (ECF No. 1.)

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

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

9 Here, plaintiff has not stated an excessive force claim, as he admits he was agitated and  
10 threatening violence when Moore acted. While the amount of force used may have been  
11 negligent, the circumstances do not suggest the use of force was malicious or sadistic.

12 As it fails to state a claim, plaintiff's complaint must be dismissed. However, the court  
13 will grant leave to file an amended complaint. While plaintiff will be given the opportunity to  
14 amend, it is not for the purpose of adding new claims. See George v. Smith, 507 F.3d 605, 607  
15 (7th Cir. 2007). If plaintiff chooses to amend the complaint, he should carefully read this  
16 screening order and focus his efforts on curing the deficiencies set forth above.

#### 17 IV. Leave to Amend

18 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions  
19 complained of have resulted in a deprivation of plaintiff's constitutional rights. See Ellis v.  
20 Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, plaintiff's amended complaint must allege in  
21 specific terms how each named defendant is involved. There can be no liability under 42 U.S.C.  
22 § 1983 unless there is some affirmative link or connection between a defendant's actions and the  
23 claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976). Furthermore, vague and conclusory  
24 allegations of official participation in civil rights violations are not sufficient. Ivey v. Board of  
25 Regents, 673 F.2d 266, 268 (9th Cir. 1982).

26 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to  
27 make plaintiff's amended complaint complete. Local Rule 220 requires that an amended  
28 complaint be complete in itself without reference to any prior pleading. This is because, as a

1 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375  
2 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no  
3 longer serves any function in the case. Therefore, in an amended complaint, as in an original  
4 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

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

6 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

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

10 3. Plaintiff's complaint is dismissed for failure to state a claim;

11 4. Plaintiff is granted thirty days from the date of service of this order to file an amended  
12 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil  
13 Procedure, and the Local Rules of Practice; the amended complaint must bear the docket number  
14 assigned this case and must be labeled "Amended Complaint"; failure to file an amended  
15 complaint in accordance with this order will result in a recommendation that this action be  
16 dismissed.

17 Dated: March 22, 2017

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19 CAROLYN K. DELANEY  
20 UNITED STATES MAGISTRATE JUDGE  
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