



1 granted, or that seek monetary relief from a defendant who is immune from such relief. See 28  
2 U.S.C. § 1915A(b)(1) & (2).

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

9 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and plain  
10 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the  
11 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic  
12 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
13 However, in order to survive dismissal for failure to state a claim a complaint must contain more  
14 than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
15 allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic, 550  
16 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the  
17 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.  
18 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all  
19 doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

20 The Civil Rights Act under which this action was filed provides as follows:

21 Every person who, under color of [state law] . . . subjects, or causes  
22 to be subjected, any citizen of the United States . . . to the  
23 deprivation of any rights, privileges, or immunities secured by the  
24 Constitution . . . shall be liable to the party injured in an action at  
25 law, suit in equity, or other proper proceeding for redress.

24 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the  
25 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See  
26 Monell v. Dept. of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362  
27 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the  
28 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or

1 omits to perform an act which he is legally required to do that causes the deprivation of which  
2 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

3 Moreover, supervisory personnel are generally not liable under § 1983 for the actions of  
4 their employees under a theory of respondeat superior and, therefore, when a named defendant  
5 holds a supervisory position, the causal link between him and the claimed constitutional  
6 violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979);  
7 Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory allegations  
8 concerning the involvement of official personnel in civil rights violations are not sufficient. See  
9 Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

## 10 **II. Allegations of the Complaint**

11 The events complained of occurred during plaintiff’s incarceration at California State Prison-  
12 Sacramento (“CSP-Sac”). (ECF No. 1.) Plaintiff alleges defendants subjected him to excessive  
13 force in violation of the Eighth Amendment and retaliated against him. Plaintiff seeks relief  
14 against the following defendants in their individual capacities: Sergeant Gonzales, Officer Mills,  
15 and Officer Carothers. (Id. ¶¶ 3-7.)

16 Plaintiff alleges that at all relevant times he was participating in the Enhanced Outpatient  
17 Program for mentally ill inmates. On October 2, 2014, defendants Carothers and Mills escorted  
18 him from a suicide watch mental health crisis bed back to A3 building in the Psychiatric Services  
19 Unit. Plaintiff had been on suicide watch for one week. However, when he was returned to A3,  
20 he was placed in a different cell. Plaintiff was so upset about this cell placement that he told  
21 Carothers and Mills, “I am suicidal.” Carothers and Mills then escorted plaintiff back to a  
22 holding cage. (Id. ¶¶ 8-17.)

23 Plaintiff became more upset and argued with defendant Gonzales about why he had been  
24 moved. He then “lost his temper” and spit in Gonzales’ face. Carothers and Mills “immediately  
25 slammed plaintiff down onto the ground face first.” Gonzales, who was wearing boots, then  
26 kicked plaintiff in the face and body. Mills punched plaintiff in the face and head. After he been  
27 shackled and was “no longer a threat,” Carothers twisted plaintiff’s left knee and stomped on it in  
28 an attempt to break it. (Id. ¶¶ 18-28.)

1 As a result of the beatings, plaintiff's face was bruised, swollen, and scraped. Plaintiff's knee  
2 was swollen and bruised. Plaintiff had a black eye. (Id. ¶ 30.)

3 Plaintiff seeks compensatory and punitive damages for his physical injuries and emotional  
4 distress. (Id. ¶¶ 38, 39.)

### 5 **III. Does Plaintiff State Cognizable Claims?**

6 Plaintiff has stated cognizable § 1983 claims against all defendants for excessive force in  
7 violation of the Eighth Amendment. See Hudson v. McMillian, 503 U.S. 1, 5 (1992) (the  
8 unnecessary and wanton infliction of pain violates the Cruel and Unusual Punishments Clause of  
9 the Eighth Amendment); Wilkins v. Gaddy, 559 U.S. 34, 37 (2010) (per curiam) (In an excessive  
10 force case, the question is whether "force was applied in a good-faith effort to maintain or restore  
11 discipline, or maliciously and sadistically to cause harm."). Plaintiff has not, however, stated any  
12 claim for retaliation. To state a claim for retaliation, plaintiff must show that he suffered an  
13 adverse action as a result of a constitutionally protected activity. See Blair v. Bethel Sch. Dist.,  
14 608 F.3d 540, 543 (9th Cir. 2010); Skoog v. County of Clackamas, 469 F.3d 1221, 1232 (9th Cir.  
15 2006); Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2004). Spitting in an officer's face is  
16 not a constitutionally protected activity.

### 17 **IV. Conclusion**

18 Because plaintiff has stated cognizable claims, the Clerk of the Court will be directed to issue  
19 the appropriate number of summonses to plaintiff for purposes of service of process. See Federal  
20 Rule of Civil Procedure 4.

21 Plaintiff shall complete service of process in accordance with Federal Rule of Civil  
22 Procedure 4 within sixty days from the date of this order. Plaintiff shall serve a copy of this order  
23 on each defendant together with a summons and a copy of the complaint. Within 120 days from  
24 the date of this order, plaintiff and defendants shall each submit to the court and serve by mail on  
25 all other parties the following status report:

- 26 1. Whether this matter is ready for trial and, if not, why not;

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1           2. Whether additional discovery is deemed necessary. If further discovery is deemed  
2 necessary, the party desiring it shall state the nature and scope of the discovery and provide an  
3 estimate of the time needed in which to complete it;

4           3. Whether a pretrial motion is contemplated. If any such motion is contemplated, the  
5 party intending to file it shall describe the type of motion and shall state the time needed to file  
6 the motion and to complete the time schedule set forth in Local Rule 230(l);

7           4. A narrative statement of the facts that will be offered by oral or documentary evidence  
8 at trial;

9           5. A list of all exhibits to be offered into evidence at the trial of the case;

10          6. A list of the names and addresses of all witnesses the party intends to call;

11          7. A summary of the anticipated testimony of any witnesses who are presently  
12 incarcerated;

13          8. The time estimated for trial;

14          9. Whether either party still requests trial by jury; and

15          10. Any other matter, not covered above, which the party desires to call to the attention of  
16 the court.

17           In addition, plaintiff shall inform the court in his status report of the date and manner of  
18 service of process.

19           The parties are informed that they may, if all consent, have this case tried by a United  
20 States Magistrate Judge while preserving their right to appeal to the Circuit Court of Appeals. An  
21 appropriate form for consent to trial by a magistrate judge is attached. Any party choosing to  
22 consent may complete the form and return it to the clerk of this court. Neither the magistrate  
23 judge nor the district judge handling the case will be notified of the filing of a consent form  
24 unless all parties to the action have consented.

25           Accordingly, IT IS HEREBY ORDERED that:

26           1. Plaintiff's claims for retaliation are dismissed.

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1           2. The allegations in the pleading are sufficient to state cognizable claims under the  
2 Eighth Amendment against defendants Gonzales, Mills, and Carothers in their individual  
3 capacities. See 28 U.S.C. § 1915A.

4           3. The Clerk of the Court is directed to issue and send plaintiff three (3) summonses, for  
5 defendants Gonzales, Mills, and Carothers. The Clerk shall also send plaintiff four (4) copies of  
6 the form Consent to Proceed Before United States Magistrate Judge with this order.

7           4. Plaintiff shall complete service of process on the defendants within sixty days from the  
8 date of this order. Plaintiff shall serve a copy of this order and a copy of the form Consent to  
9 Proceed Before United States Magistrate Judge on each defendant at the time the summons and  
10 complaint are served.

11           5. Defendants shall reply to the complaint within the time provided in Fed. R. Civ. P.  
12 12(a).

13           6. Plaintiff's status report shall be filed within ninety days from the date of this order.  
14 Defendants' status report shall be filed within thirty days thereafter. The parties are advised that  
15 failure to file a status report in accordance with this order may result in the imposition of  
16 sanctions, including dismissal of the action and preclusion of issues or witnesses.

17           7. Unless otherwise ordered, all motions to dismiss, motions for summary judgment,  
18 motions concerning discovery, motions pursuant to Fed. R. Civ. P. 7, 11, 12, 15, 41, 55, 56, 59  
19 and 60, and E.D. Cal. R. 110, shall be briefed pursuant to L.R. 230(l). Failure to timely oppose  
20 such a motion may be deemed a waiver of opposition to the motion. See L.R. 230(l). Opposition  
21 to all other motions need be filed only as directed by the court.

22           8. If plaintiff is released from prison while this case is pending, any party may request  
23 application of the other provisions of L.R. 230 in lieu of L.R. 230(l). Until such a motion is  
24 granted, L.R. 230(l) will govern all motions described in #7 above regardless of plaintiff's  
25 custodial status. See L.R. 102(d).

26           9. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), and  
27 Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), the court hereby informs plaintiff of the  
28 following requirements for opposing a motion for summary judgment pursuant to Fed. R. Civ. P.

1 56. Such a motion is a request for an order for judgment in favor of the defendant without trial.  
2 A defendant's motion for summary judgment will set forth the facts that the defendant contends  
3 are not reasonably subject to dispute and that entitle the defendant to judgment. To oppose a  
4 motion for summary judgment, plaintiff must show proof of his or her claims. Plaintiff may do  
5 this in one or more of the following ways. Plaintiff may rely on plaintiff's statements made under  
6 penalty of perjury in the complaint if the complaint shows that plaintiff has personal knowledge  
7 of the matters stated and plaintiff specifies those parts of the complaint on which plaintiff relies.  
8 Plaintiff may serve and file one or more affidavits or declarations setting forth the facts that  
9 plaintiff believes prove plaintiff's claims; the person who signs an affidavit or declaration must  
10 have personal knowledge of the facts stated. Plaintiff may rely on written records, but plaintiff  
11 must prove that the records are what plaintiff asserts they are. Plaintiff may rely on all or any part  
12 of the transcript of one or more depositions, answers to interrogatories, or admissions obtained in  
13 this proceeding. If plaintiff fails to contradict the defendant's evidence with counteraffidavits or  
14 other admissible evidence, the court may accept defendant's evidence as true and grant the  
15 motion. If there is some good reason why such facts are not available to plaintiff when required  
16 to oppose a motion for summary judgment, the court will consider a request to postpone  
17 consideration of the defendant's motion. See Fed. R. Civ. P. 56(d). If plaintiff does not serve and  
18 file a written opposition to the motion, or a request to postpone consideration of the motion, the  
19 court may consider the failure to act as a waiver of opposition to the defendant's motion. See  
20 L.R. 230(1). If the court grants the motion for summary judgment, whether opposed or  
21 unopposed, judgment will be entered for the defendant without a trial and the case will be closed  
22 as to that defendant.

23 10. If defendant moves for summary judgment, defendant must contemporaneously serve  
24 with the motion, but in a separate document, a copy of the attached Rand Notice. See Woods v.  
25 Carey, 684 F.3d 934, 935 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998)  
26 **Failure to do so may constitute grounds for denial of the motion.**

27 11. On April 3, 2014, the United States Court of Appeals for the Ninth Circuit overruled  
28 Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003), with respect to the proper procedural

1 device for raising the issue of administrative exhaustion. Albino v. Baca, 747 F.3d 1162, 1166  
2 (9th Cir. 2014) (en banc). Following the decision in Albino, a defendant may raise the issue of  
3 exhaustion in either (1) a motion to dismiss pursuant to Rule 12(b)(6), in the rare event the failure  
4 to exhaust is clear on the face of the amended complaint, or (2) a motion for summary judgment.  
5 Albino, 747 F.3d at 1166, 1169-70 (quotation marks omitted). An unenumerated Rule 12(b)  
6 motion is no longer the proper procedural device for raising the issue of exhaustion. Albino, 747  
7 F.3d at 1168. The court encourages defendant to bring motions raising exhaustion issues early in  
8 the case. Id. at 1170-71.


9 12. Unsigned affidavits or declarations will be stricken, and affidavits or declarations not  
10 signed under penalty of perjury have no evidentiary value.

11 13. Each party proceeding without counsel shall keep the court informed of a current  
12 address at all times while the action is pending. Any change of address must be reported  
13 promptly to the court in a separate document captioned for this case and entitled “Notice of  
14 Change of Address.” A notice of change of address must be properly served on other parties.  
15 Service of documents at the address of record for a party is fully effective. See L.R. 182(f). A  
16 party’s failure to inform the court of a change of address may result in the imposition of sanctions  
17 including dismissal of the action.

18 14. The Clerk of the Court shall serve on plaintiff a copy of the Local Rules of Court.

19 15. The failure of any party to comply with this order, the Federal Rules of Civil  
20 Procedure, or the Local Rules of Court, may result in the imposition of sanctions including, but  
21 not limited to, dismissal of the action or entry of default. See Fed. R. Civ. P. 41(b).

22 Dated: July 24, 2017

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26 DEBORAH BARNES  
27 UNITED STATES MAGISTRATE JUDGE

28 DLB:9  
DLB1/prisoner-civil rights/frat0462.8fee



1 **Rand Notice to Plaintiff**

2 This notice is provided to ensure that you, a pro se prisoner plaintiff, “have fair, timely and adequate notice  
3 of what is required” to oppose a motion for summary judgment. See Woods v. Carey, 684 F.3d 934 (9th Cir. 2012);  
4 Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998). The court requires that you be provided with this notice  
5 regarding the requirements for opposing a motion for summary judgment under Rule 56 of the Federal Rules of Civil  
6 Procedure.

7 When a defendant moves for summary judgment, the defendant is requesting that the court grant judgment  
8 in defendant’s favor without a trial. If there is no real dispute about any fact that would affect the result of your case,  
9 the defendant who asked for summary judgment is entitled to judgment as a matter of law, which will end your case  
10 against that defendant. A motion for summary judgment will set forth the facts that the defendant asserts are not  
11 reasonably subject to dispute and that entitle the defendant to judgment.

12 To oppose a motion for summary judgment, you must show proof of your claims.<sup>1</sup> To do this, you may  
13 refer to specific statements made in your complaint if you signed your complaint under penalty of perjury and if your  
14 complaint shows that you have personal knowledge of the matters stated. You may also submit declarations setting  
15 forth the facts that you believe prove your claims, as long as the person who signs the declaration has personal  
16 knowledge of the facts stated. You may also submit all or part of deposition transcripts, answers to interrogatories,  
17 admissions, and other authenticated documents. For each of the facts listed in the defendant’s Statement of  
18 Undisputed Facts, you must admit the facts that are undisputed, and deny the facts that are disputed. If you deny a  
19 fact, you must cite to the proof that you rely on to support your denial. See L.R. 260(b). If you fail to contradict the  
20 defendant’s evidence with your own evidence, the court may accept the defendant’s evidence as the truth and grant  
21 the motion.

22 The court will consider a request to postpone consideration of the defendant’s motion if you submit a  
23 declaration showing that for a specific reason you cannot present such facts in your opposition. If you do not respond  
24 to the motion, the court may consider your failure to act as a waiver of your opposition. See L.R. 230(l).

25 If the court grants the defendant’s motion, whether opposed or unopposed, judgment will be entered for that  
26 defendant without a trial and the case will be closed as to that defendant.

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27 <sup>1</sup> If the motion for summary judgment concerns the exhaustion of administrative remedies, you must submit  
28 proof of specific facts regarding the exhaustion of administrative remedies. See Stratton v. Buck, 697 F.3d 1004,  
1008 (9th Cir. 2012); Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014).