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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PETER J. REED,  
Plaintiff,  
v.  
E. RACKLIN, et. al.,  
Defendants.

No. 2:17-cv-00799 AC P

ORDER

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. In addition to filing a complaint (ECF No. 1), plaintiff has filed an application to proceed in forma pauperis under 28 U.S.C. § 1915. ECF No. 5.

**I. Application to Proceed In Forma Pauperis**

The court has reviewed plaintiff’s application and finds that it makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

**II. Screening Requirements**

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally

1 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek  
2 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

3 A claim “is [legally] frivolous where 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). “[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
6 meritless legal theories or whose factual contentions are clearly baseless.” Jackson v. Arizona,  
7 885 F.2d 639, 640 (9th Cir. 1989) (citation and internal quotations omitted), superseded by statute  
8 on other grounds as stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Neitzke, 490  
9 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded,  
10 has an arguable legal and factual basis. Id.

11 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the  
12 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of  
13 what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550  
14 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
15 However, in order to survive dismissal for failure to state a claim, a complaint must contain more  
16 than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
17 allegations sufficient “to raise a right to relief above the speculative level.” Id. (citations  
18 omitted). “[T]he pleading must contain something more . . . than . . . a statement of facts that  
19 merely creates a suspicion [of] a legally cognizable right of action.” Id. (alteration in original)  
20 (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d  
21 ed. 2004)).

22 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
23 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell  
24 Atl. Corp., 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
25 content that allows the court to draw the reasonable inference that the defendant is liable for the  
26 misconduct alleged.” Id. (citing Bell Atl. Corp., 550 U.S. at 556). In reviewing a complaint  
27 under this standard, the court must accept as true the allegations of the complaint in question,  
28 Hospital Bldg. Co. v. Rex Hosp. Trs., 425 U.S. 738, 740 (1976), as well as construe the pleading

1 in the light most favorable to the plaintiff and resolve all doubts in the plaintiff's favor, Jenkins v.  
2 McKeithen, 395 U.S. 411, 421 (1969).

### 3 **III. Screening Order**

#### 4 **A. Background**

5 Plaintiff alleges that on April 4, 2016, while incarcerated at California State Prison –  
6 Solano (Solano), he was summoned to defendant Racklin's office for a "pre-committee  
7 interview." ECF No. 1 at 6. Plaintiff alleges that upon his arrival, Racklin sexually harassed him  
8 by asking whether plaintiff could "jack him off in the blink of an eye." Id. Plaintiff informed  
9 Racklin that he would be filing a complaint, and Racklin stated that his comment was intended as  
10 a joke. Id.

11 After the meeting with Racklin, plaintiff approached defendant Easterling and told him  
12 about the incident. Id. Easterling brusquely told him to file a grievance form. Id. Eventually,  
13 plaintiff filed a complaint and an investigation into the incident was conducted. Plaintiff claims  
14 that defendant White acted improperly when he closed a Prison Rape Elimination Act (PREA)  
15 investigation into the incident without interviewing plaintiff or a mental health professional to  
16 whom plaintiff had spoken about the incident. Id. at 7.

17 On April 13, 2016, plaintiff was directed to attend a committee meeting. Id. He asked  
18 several staff members whether Racklin would be present at the meeting, and each told him that he  
19 would not be. Id. at 7-8. Plaintiff attended the meeting and spotted Racklin, which caused him to  
20 suffer an anxiety attack and nervous breakdown. Id. at 8. Plaintiff was subsequently excused  
21 from the meeting by defendant Popvich. Id. Plaintiff alleges that defendants Easterling, Arnold,  
22 White, and Popvich violated his rights under the PREA by forcing him to confront Racklin on  
23 that date. Id. at 10.

24 Plaintiff alleges that, since the incident with Racklin, he suffers from nightmares,  
25 troubling thoughts, and feelings of anger and helplessness. Id. at 9. He also claims that he now  
26 has difficulty adjusting to new environments and people. Id. Finally, he states that he has  
27 developed a deep homophobia and has homicidal feelings toward homosexual individuals. Id.

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1           **B.     Analysis**

2           After review of the complaint, the court finds that plaintiff has stated a potentially  
3 cognizable Eighth Amendment Claim against defendant Racklin. Generally, allegations of verbal  
4 harassment do not state a viable claim under section 1983. See Oltarzewski v. Ruggiero, 830  
5 F.2d 136, 139 (9th Cir. 1987). This is true even where the verbal harassment is of a sexual  
6 nature. Austin v. Terhune, 367 F.3d 1167, 1171 (9th Cir. 2004) (holding that “the Eighth  
7 Amendment's protections do not necessarily extend to mere verbal sexual harassment.”). A claim  
8 based on verbal harassment can succeed, however, if the offending comments were “gross even  
9 for a prison setting and were calculated to and did cause [plaintiff] psychological damage.”  
10 Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996). Here plaintiff alleges that Racklin’s  
11 comments caused him psychological damage. The court does not decide whether the comments  
12 were gross in the context of a prison setting or calculated to cause plaintiff psychological damage.  
13 It finds only that plaintiff could potentially be entitled to relief on this claim and that the claim  
14 should proceed past screening.

15           Plaintiff’s other claims based on violations of the PREA will be dismissed with leave to  
16 amend. The PREA does not give rise to a private cause of action. See Miller v. Brown, No. 1:12-  
17 CV-01589-LJO, 2014 U.S. Dist. LEXIS 15116, 2014 WL 496919, at \*8 (E.D. Cal. Feb. 6, 2014),  
18 report and recommendation adopted, No. 1:12-CV-01589-LJO, 2014 U.S. Dist. LEXIS 26171,  
19 2014 WL 806957 (E.D. Cal. Feb. 28, 2014); Porter v. Jennings, NO. 1:10-cv-01811-AWI-DLB  
20 PC, 2012 U.S. Dist. LEXIS 58021, 2012 WL 1434986, \*1 (E.D. Cal. Apr. 25, 2012).

21           **IV.    Leave to Amend**

22           Plaintiff may either continue only with his Eighth Amendment claim against defendant  
23 Racklin or he may choose to file an amended complaint which attempts to remedy the  
24 deficiencies with his other claims. If plaintiff chooses to file an amended complaint it should  
25 observe the following:

26           Any amended complaint must identify as a defendant only persons who personally  
27 participated in a substantial way in depriving him of a federal constitutional right. Johnson v.  
28 Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a

1 constitutional right if he does an act, participates in another’s act or omits to perform an act he is  
2 legally required to do that causes the alleged deprivation).

3 It must also contain a caption including the names of all defendants. Fed. R. Civ. P. 10(a).

4 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. See  
5 George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007).

6 Any amended complaint must be written or typed so that it so that it is complete in itself  
7 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended  
8 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the  
9 earlier filed complaint no longer serves any function in the case. See Forsyth v. Humana, 114  
10 F.3d 1467, 1474 (9th Cir. 1997) (the “‘amended complaint supersedes the original, the latter  
11 being treated thereafter as non-existent.’”) (quoting Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.  
12 1967)).

13 Finally, the court notes that any amended complaint should be as concise as possible in  
14 fulfilling the above requirements. Fed. R. Civ. P. 8(a). Plaintiff should avoid the inclusion of  
15 procedural or factual background which has no bearing on his legal claims. He should also take  
16 pains to ensure that his amended complaint is as legible as possible. This refers not only to  
17 penmanship, but also spacing and organization. Lengthy, unbroken paragraphs can be difficult to  
18 read when handwritten and plaintiff would do well to avoid them wherever possible.

#### 19 **IV. Plain Language Summary of the Order for a Pro Se Litigant**

20 You have been granted in forma pauperis status and will not have to pay the entire filing  
21 fee immediately.

22 The court has found that your complaint states an Eighth Amendment claim against  
23 defendant Racklin. Your claims against the other defendants are being dismissed because there is  
24 no private cause of action under the PREA.

25 You can either go forward with just your claim against Racklin or you can submit an  
26 amended complaint which fixes the problems with your other claims.

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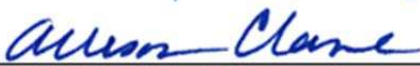
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1 **VI. Conclusion**

2 Accordingly, IT IS HEREBY ORDERED that:

- 3 1. Plaintiff's application to proceed in forma pauperis (ECF No. 5) is granted.
- 4 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected
- 5 in accordance with the notice to the California Department of Corrections and
- 6 Rehabilitation filed concurrently herewith.
- 7 3. The allegations in the pleading are sufficient to state a potentially cognizable
- 8 Eighth Amendment claim against defendant Racklin. All other claims are
- 9 dismissed with leave to amend within 30 days of service of this order. Plaintiff is
- 10 not obligated to amend his complaint.
- 11 4. With this order the Clerk of the Court shall provide to plaintiff a blank summons, a
- 12 copy of the April 17, 2017 complaint, and one USM-285 form and instructions for
- 13 service of process on defendant Racklin. Within 30 days of service of this order
- 14 plaintiff may return the attached Notice of Submission of Documents with the
- 15 completed summons, the completed USM-285 form, and two copies of the
- 16 endorsed complaint. The court will transmit them to the United States Marshal for
- 17 service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure.
- 18 Defendant Racklin will be required to respond to plaintiff's allegations within the
- 19 deadlines stated in Rule 12(a)(1) of the Federal Rules of Civil Procedure.
- 20 5. Failure to comply with this order may result in dismissal of this action.

21 DATED: June 9, 2017

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23 ALLISON CLAIRE  
24 UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT  
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PETER J. REED,

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v.

E. RACKLIN, et. al.,

Defendants.

No. 2:17-cv-00799 AC P

NOTICE OF SUBMISSION OF  
DOCUMENTS

In accordance with the court's Screening Order, plaintiff hereby elects to:

(1) \_\_\_\_\_ proceed only with the Eighth Amendment claims against defendant

Racklin, and submits the following documents:

- 1 completed summons form
- 1 completed forms USM-285
- 2 copies of the April 17, 2017 complaint

OR

(2) \_\_\_\_\_ delay serving any defendant and files an amended complaint in accordance

with the court's Screening Order.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Plaintiff