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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANKIE LICON, JR.,  
Plaintiff,  
v.  
W. DAVID SMILEY, et al.,  
Defendants.

No. 2: 17-cv-1063 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).

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. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time

1 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.  
2 § 1915(b)(2).

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 when 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), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.  
15 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
16 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at  
17 1227.

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

1 complaint in question, Erickson, 551 U.S. at 93, and construe the pleading in the light most  
2 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other  
3 grounds, Davis v. Scherer, 468 U.S. 183 (1984).

4 Plaintiff alleges that in September 2016, defendant Wong denied his request to renew his  
5 morphine prescription. Plaintiff alleges that defendant Wong “weaned me off for an alleged  
6 ‘intoxication’ that [supposedly] occurred on April 12, 2016.” Plaintiff alleges that defendants  
7 Rudas, Smith and Smiley denied his grievances challenging defendant Wong’s decision to wean  
8 him off morphine.

9 Plaintiff has attached defendant Smith’s response to his grievance. This response states,  
10 in relevant part,

11 Dr. Rudas stated that due to this major ankle surgery with  
12 indwelling hardware you have legitimate chronic pain and the  
13 MCSP PMC approved chronic pain treatment with Morphine ER 15  
14 mg twice daily on September 29, 2015. Dr. Rudas stated you were  
15 found in a state of acute ethanol intoxication on April 16, 2016. Dr.  
16 Wong weaned you off of Morphine on September 26, 2016 because  
of the ethanol incident. Dr. Rudas reviewed your case with Dr. C.  
Smith, Chief Physician & Surgeon (CP & S), and it was determined  
that Dr. Wong’s use of non-narcotic chronic pain management is  
appropriate; therefore, Morphine is denied at this time as it is not  
medically appropriate.

17 (ECF No. 1 at 15.)

18 Deliberate indifference to an inmate’s serious medical needs violates the Eighth  
19 Amendment’s proscription against cruel and unusual punishment. See Estelle v. Gamble, 429  
20 U.S. 97, 104 (1976); Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004). To establish an  
21 Eighth Amendment claim on a condition of confinement, such as medical care, a prisoner-  
22 plaintiff must show: (1) an objectively, sufficiently serious, deprivation, and (2) the official was,  
23 subjectively, deliberately indifferent to the inmate’s health or safety. See Farmer v. Brennan, 511  
24 U.S. 825, 834 (1994).

25 If plaintiff was found in a state of acute ethanol intoxication, it is unclear how plaintiff is  
26 claiming that defendant Wong’s decision to discontinue morphine constituted deliberate  
27 indifference. If plaintiff is claiming that his intoxication did not justify discontinuation of  
28 morphine, he shall explain this in an amended complaint. It is possible that plaintiff may be

1 claiming that he was not found in a state of acute ethanol intoxication, and that the reason for  
2 discontinuing morphine was false. If this is plaintiff's claim, he shall clarify this is in an amended  
3 complaint. Because the undersigned cannot determine whether plaintiff has stated a potentially  
4 colorable claim for relief, the complaint is dismissed with leave to amend.

5 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions  
6 about which he complains resulted in a deprivation of plaintiff's constitutional rights. Rizzo v.  
7 Goode, 423 U.S. 362, 371 (1976). Also, the complaint must allege in specific terms how each  
8 named defendant is involved. Id. There can be no liability under 42 U.S.C. § 1983 unless there is  
9 some affirmative link or connection between a defendant's actions and the claimed deprivation.  
10 Id.; May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743  
11 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil  
12 rights violations are not sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

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

- 22 1. Plaintiff's request for leave to proceed in forma pauperis is granted.
- 23 2. 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.

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3. Plaintiff's complaint is dismissed.


4. Within thirty days from the date of this order, plaintiff shall complete the attached Notice of Amendment and submit the following documents to the court:

- a. The completed Notice of Amendment; and
- b. An original and one copy of the Amended Complaint.

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

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

Dated: July 7, 2017

  
KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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No. 2: 17-cv-1063 KJN P

NOTICE OF AMENDMENT

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

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

\_\_\_\_\_  
Plaintiff