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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARCUS JAMES BREWER,
Plaintiff,
v.
FLOREZ, et al.,
Defendants.

No. 2:17-cv-2003-EFB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff, who is incarcerated in the Yuba County Jail, is proceeding without counsel in an action brought under 42 U.S.C. § 1983. He has filed four motions to proceed in forma pauperis (ECF Nos. 6, 10, 11 & 12), and a motion for a temporary restraining order (ECF No. 14). As discussed below, plaintiff’s request for leave to proceed in forma pauperis is granted, but his complaint fails to state a cognizable claim and must be dismissed with leave to amend. In light of that deficiency, the motion for a temporary restraining order must be denied.

Application to Proceed In Forma Pauperis

Plaintiff’s application (ECF No. 12) 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). Plaintiff’s other in forma pauperis applications (ECF No. 6, 10, & 11) are denied as moot.

1 Screening Requirements

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

7 A claim “is [legally] frivolous where it lacks an arguable basis either in law or in fact.”
8 *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th
9 Cir. 1984). “[A] judge may dismiss [in forma pauperis] claims which are based on indisputably
10 meritless legal theories or whose factual contentions are clearly baseless.” *Jackson v. Arizona*,
11 885 F.2d 639, 640 (9th Cir. 1989) (citation and internal quotations omitted), *superseded by statute*
12 *on other grounds as stated in Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000); *Neitzke*, 490
13 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded,
14 has an arguable legal and factual basis. *Id.*

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

26 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
27 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
28 *Corp.*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content

1 that allows the court to draw the reasonable inference that the defendant is liable for the
2 misconduct alleged.” *Id.* (citing *Bell Atl. Corp.*, 550 U.S. at 556). In reviewing a complaint
3 under this standard, the court must accept as true the allegations of the complaint in question,
4 *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), as well as construe the pleading
5 in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor, *Jenkins v.*
6 *McKeithen*, 395 U.S. 411, 421 (1969).

7 Screening Order

8 Plaintiff alleges generally that defendant Florez has subjected him to excessive force,
9 denial of medical care, and retaliation. However, his claims are too vague to proceed.

10 Plaintiff claims that, on an unspecified date, Florez used excessive force against him “out
11 of anger.” ECF No. 1 at 3. He does not offer any meaningful description of the excessive force
12 Florez allegedly used against him or the circumstances under which force was used. Instead, he
13 simply states that he had bruises and marks on his arms from being handcuffed. *Id.* Plaintiff also
14 alleges that Florez cut himself and began to bleed, though it is unclear how this occurred or how it
15 is relevant to the excessive force claims. *Id.* After this incident, plaintiff claims that he was
16 removed to a medical cell without privileges and without a disciplinary hearing. *Id.*

17 At some later point, plaintiff alleges that Florez issued a “write-up” that “did not go
18 through.” *Id.* at 5. Angered by this, Florez allegedly began to retaliate against plaintiff. *Id.*
19 Plaintiff demanded to speak to mental health staff, though it is not clear what psychiatric issues he
20 suffered from. *Id.* He intimates that Florez prevented him from securing psychiatric treatment,
21 though he does not explain how. *Id.*

22 Plaintiff’s complaint will be dismissed with leave to amend. First, plaintiff should
23 describe, in precise terms, how Florez subjected him to excessive force. Second, and to the extent
24 he seeks to raise a claim for medical deliberate indifference, plaintiff must describe what health
25 issues he suffered from and how Florez (or any other defendant) interfered with his treatment.
26 Third, the court concludes that plaintiff’s retaliation claim fails. Plaintiff does not allege that
27 Florez retaliated against him based on the exercise of any protected conduct. *See, e.g., Rhodes v.*
28 *Robinson*, 408 F.3d 559, 567-568 (9th Cir. 2005)(“Within the prison context, a viable claim of

1 First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took
2 some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and
3 that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action
4 did not reasonably advance a legitimate correctional goal.”). Finally, plaintiff is advised that any
5 claims against Yuba County Jail itself are non-cognizable. *See Bd. of County Comm'rs v. Brown*,
6 520 U.S. 397, 403 (1997).

7 Leave to Amend

8 Plaintiff may choose to amend his complaint. He is cautioned that any amended
9 complaint must identify as a defendant only persons who personally participated in a substantial
10 way in depriving him of his constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.
11 1978) (a person subjects another to the deprivation of a constitutional right if he does an act,
12 participates in another's act or omits to perform an act he is legally required to do that causes the
13 alleged deprivation). Plaintiff may also include any allegations based on state law that are so
14 closely related to his federal allegations that “they form the same case or controversy.” *See* 28
15 U.S.C. § 1367(a).

16 The amended complaint must also contain a caption including the names of all defendants.
17 Fed. R. Civ. P. 10(a).

18 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. *See*
19 *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007). Nor may he bring unrelated claims against
20 multiple defendants. *Id.*

21 Any amended complaint must be written or typed so that it so that it is complete in itself
22 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
23 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
24 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
25 F.3d 1467, 1474 (9th Cir. 1997) (the “amended complaint supersedes the original, the latter
26 being treated thereafter as non-existent.”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
27 1967)).

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1 Any amended complaint should be as concise as possible in fulfilling the above
2 requirements. Fed. R. Civ. P. 8(a). Plaintiff should avoid the inclusion of procedural or factual
3 background which has no bearing on his legal claims. He should also take pains to ensure that his
4 amended complaint is as legible as possible. This refers not only to penmanship, but also spacing
5 and organization. Plaintiff should carefully consider whether each of the defendants he names
6 actually had involvement in the constitutional violations he alleges. A “scattershot” approach in
7 which plaintiff names dozens of defendants will not be looked upon favorably by the court.

8 Motion for a Temporary Restraining Order

9 Plaintiff also requests a restraining order to keep an “officer,” presumably Florez, 500 feet
10 away from him. ECF No. 14. However, plaintiff fails to meet the minimum threshold for merit
11 to satisfy the standard for a temporary restraining order or preliminary injunction.¹ At an
12 irreducible minimum, he must demonstrate that there is at least a fair chance of success on the
13 merits. *Johnson v. California State Board of Accountancy*, 72 F.3d 1427, 1430, 1433 (9th Cir.
14 1995); *Sports Form, Inc. v. United Press International*, 686 F.2d 750, 753 (9th Cir. 1982). As
15 discussed above, his complaint must be dismissed for failure to state a claim and at present he has
16 shown no likelihood of success on the merits of any claim. Accordingly, plaintiff’s motion must
17 be denied.

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21 ¹ A temporary restraining order may be issued upon a showing “that immediate and
22 irreparable injury, loss, or damage will result to the movant before the adverse party can be heard
23 in opposition.” Fed. R. Civ. P. 65(b)(1)(A). “The standards for granting a temporary restraining
24 order and a preliminary injunction are identical.” *Haw. County Green Party v. Clinton*, 980 F.
25 Supp. 1160, 1164 (D. Haw. 1997); *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d
26 832, 839 n.7 (9th Cir. 2001) (observing that an analysis of a preliminary injunction is
27 “substantially identical” to an analysis of a temporary restraining order).

28 A preliminary injunction represents the exercise of a far reaching power not to be
indulged except in a case clearly warranting it. *Dymo Indus. v. Tapeprinter, Inc.*, 326 F.2d 141,
143 (9th Cir.1964). The moving party must prove that he is likely to succeed on the merits, that
he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
equities tips in his favor, and that an injunction is in the public interest. *Stormans, Inc. v. Selecky*,
586 F.3d 1109, 1127 (9th Cir.2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, — U.S. —
—, 129 S.Ct. 365, 375–76, 172 L.Ed.2d 249 (2008)).

1 Conclusion

2 Accordingly, it is ORDERED that:

3 1. Plaintiff's application to proceed in forma pauperis (ECF No. 12) is GRANTED;

4 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in
5 accordance with the notice filed concurrently herewith;

6 3. Plaintiff's other applications to proceed in forma pauperis (ECF Nos. 6, 10, & 11) are
7 DENIED as MOOT;

8 4. Plaintiff's complaint (ECF No. 1) is dismissed with leave to amend within 30 days of
9 service of this order;

10 5. Failure to comply with this order may result in dismissal of this action; and

11 6. The Clerk of the Court shall randomly assign a United States District Judge to this
12 action.

13 Further, it is RECOMMENDED that plaintiff's motion for a temporary restraining order
14 (ECF No. 14) be DENIED.

15 These findings and recommendations will be submitted to the United States District Judge
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
17 after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. The document should be captioned
19 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
20 objections shall be filed and served within seven days after service of the objections. Failure to
21 file objections within the specified time may waive the right to appeal the District Court's order.
22 *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th
23 Cir. 1991).

24 DATED: July 17, 2018.

25 
26 EDMUND F. BRENNAN
27 UNITED STATES MAGISTRATE JUDGE
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