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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

IMMANUEL PRICE,

 Plaintiff,

 v.

EBLER, et al,

 Defendants.

No. 2:17-cv-2020 AC

ORDER

Plaintiff, a state prisoner proceeding pro se, 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.

I. Application to Proceed In Forma Pauperis

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). ECF No. 2. 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 for monthly payments of twenty percent of the preceding month’s income credited to plaintiff’s prison 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 II. Statutory Screening of Prisoner Complaints

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

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13 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as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

17 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the
18 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of
19 what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550
20 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
21 “Failure to state a claim under § 1915A incorporates the familiar standard applied in the context
22 of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).” Wilhelm v. Rotman,
23 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal for failure
24 to state a claim, a complaint must contain more than “a formulaic recitation of the elements of a
25 cause of action;” it must contain factual allegations sufficient “to raise a right to relief above the
26 speculative level.” Twombly, 550 U.S. at 555 (citations omitted). “[T]he pleading must contain
27 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally
28 cognizable right of action.” Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur

1 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

2 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
3 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting
4 Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
5 content that allows the court to draw the reasonable inference that the defendant is liable for the
6 misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). In reviewing a complaint under this
7 standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg.
8 Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 740 (1976) (citation omitted), as well as construe the
9 pleading in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor,
10 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

11 III. Complaint

12 Plaintiff contends that four CDCR employees are responsible for failing to protect
13 plaintiff from an assault by his former cellmate at Mule Creek State Prison (MCSP). Plaintiff
14 names Lt. Ebler of MCSP and three Doe defendants: the designated custody supervisor at MCSP,
15 and a nurse and psychiatrist at CSP-Corcoran. The complaint alleges as follows.

16 On November 11, 2016, inmate Sessions was transferred to MCSP from Corcoran. On
17 arrival, Sessions was assigned as plaintiff’s cellmate although plaintiff was a general population
18 inmate and Sessions was a participant in CDCR’s Enhanced Outpatient Program for inmates with
19 serious mental illness. Pursuant to CDCR policy, EOP inmates are not supposed to be housed in
20 general population. Within hours, Sessions assaulted plaintiff and threatened him with sexual
21 assault. Sessions told plaintiff that he was not taking his medications and that he had a violent
22 past. The nurse and psychiatrist Does had been part of Sessions’ EOP treatment team at Corcoran
23 and therefore must have been aware of his medication non-compliance; they could have taken
24 preventative action including seeking involuntary medication.

25 IV. Failure to State a Claim

26 Prison officials have an obligation to protect prisoners from injury by other prisoners.
27 Farmer v. Brennan, 511 U.S. 825, 833-34 (1994). The Eighth Amendment is only violated,
28 however, when a defendant acts with a sufficiently culpable state of mind. See Wilson v. Seiter,

1 501 U.S. 294, 297 (1991). Accordingly, to state a claim for failure to protect in violation of the
2 Eighth Amendment, a plaintiff must plead facts demonstrating that the defendants knew of and
3 disregarded an excessive risk to inmate health or safety. Farmer, 511 U.S. at 837. “[T]he official
4 must both be aware of facts from which the inference could be drawn that a substantial risk of
5 serious harm exists, and he must also draw the inference.” Id. This is the standard for deliberate
6 indifference.

7 The allegations of the complaint do not satisfy this standard. First, it is unclear who made
8 the decision to house Sessions in general population. The complaint implies that that Lt. Ebler
9 and the Doe custody supervisor were responsible generally for Sessions’ placement, but there are
10 no allegations specifying the actions of either putative defendant. To state any claim against any
11 defendant, plaintiff must explain what that person did to violate his rights. Johnson v. Duffy, 588
12 F.2d 740, 743 (9th Cir. 1978). There can be no liability under § 1983 without personal
13 involvement. Id. Moreover, whoever made the decision cannot be liable under § 1983 for
14 violating CDCR policy; liability is limited to those who violate federal rights. See Blessing v.
15 Freestone, 520 U.S. 329, 340 (1997). Plaintiff cannot state a claim against either Ebler or the
16 designated custody supervisor without facts demonstrating that he or she was subjectively aware
17 that Sessions posed an excessive risk of violence to plaintiff, and made the placement anyway.
18 See Farmer, 511 U.S. at 837. The fact that Sessions was classified as EOP is not enough to
19 demonstrate that he posed an excessive risk of harm to plaintiff. It is not enough that MCSP
20 officials should have known that Sessions was dangerous. See Farmer, 511 U.S. at 842. Failure
21 to take reasonably necessary precautions, without facts reflecting actual knowledge of a threat to
22 plaintiff, does not rise to the level of an Eighth Amendment violation.

23 The same principles apply with even greater force to the Corcoran mental health
24 professionals. The court cannot imagine any set of facts on which the Doe nurse and Doe
25 psychiatrist could have known of a threat to plaintiff, because they treated Sessions before he was
26 transferred to MCSP and they were not involved in the housing decision. The conduct of theirs
27 that plaintiff identifies is the failure to ensure Sessions’ medication compliance. Even if the nurse
28 and psychiatrist had provided inadequate care to Sessions, that would not make them liable to

1 plaintiff for several reasons. First, negligence and medical malpractice do not rise to the level of
2 an Eighth Amendment violation. Estelle v. Gamble, 429 U.S. 97, 105-106 (1976). Second, the
3 harm to plaintiff was not a reasonably foreseeable consequence of their actions. See Martinez v.
4 California, 444 U.S. 277 (1980) (parole board members not liable under § 1983 for releasing
5 dangerous inmate who then committed a murder). Third, their actions cannot be construed as the
6 cause of the assault. Id. The only people who can be liable are those who themselves knowingly
7 subjected plaintiff to an excessive risk of harm.¹

8 For these reasons, the complaint fails to state a claim upon which relief may be granted. It
9 is therefore not suitable for service. Rather than recommend dismissal, the undersigned will give
10 plaintiff the opportunity to amend.

11 V. Leave to Amend

12 If plaintiff chooses to file a first amended complaint, he must demonstrate how the
13 conditions about which he complains resulted in a deprivation of his constitutional rights. Rizzo
14 v. Goode, 423 U.S. 362, 370-71 (1976). Also, the complaint must allege in specific terms how
15 each named defendant is involved. Arnold v. Int'l Bus. Machs. Corp., 637 F.2d 1350, 1355 (9th
16 Cir. 1981). There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link
17 or connection between a defendant's actions and the claimed deprivation. Id.; Johnson v. Duffy,
18 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, "[v]ague and conclusory allegations of official
19 participation in civil rights violations are not sufficient." Ivey v. Bd. of Regents, 673 F.2d 266,
20 268 (9th Cir. 1982) (citations omitted).

21 Plaintiff is also informed that the court cannot refer to a prior pleading in order to make
22 his first amended complaint complete. Local Rule 220 requires that an amended complaint be
23 complete in itself without reference to any prior pleading. This is because, as a general rule, an
24 amended complaint supersedes the original complaint. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.
25 1967) (citations omitted), overruled in part by Lacey v. Maricopa County, 693 F.3d 896, 928 (9th

26 ¹ The complaint also makes a passing reference to equal protection, ECF No. 1 at 3. The right to
27 protection that plaintiff asserts is an Eighth Amendment right to safety. The equal protection
28 clause applies only to discrimination based on membership in a protected class. See Serrano v.
Francis, 345 F.3d 1071, 1082 (9th Cir. 2003).

1 Cir. 2012) (claims dismissed with prejudice and without leave to amend do not have to be re-pled
2 in subsequent amended complaint to preserve appeal). Once plaintiff files a first amended
3 complaint, the original complaint no longer serves any function in the case. Therefore, in an
4 amended complaint, as in an original complaint, each claim and the involvement of each
5 defendant must be sufficiently alleged.

6 VI. Plain Language Summary of this Order for a Pro Se Litigant

7 Your request to proceed in forma pauperis is granted and you are not required to pay the
8 entire filing fee immediately.

9 The complaint has been screened and found not to state a claim. If you want to proceed,
10 you must file an amended complaint that includes additional facts. You must tell the court who
11 made the decision to house Sessions with you, and facts showing that each responsible person
12 knew that Sessions was dangerous and posed an excessive risk to you when they made that
13 decision. It is not enough to say that Sessions was in EOP, or that MCSP staff violated CDCR
14 policy by putting him in general population. Failure to be careful enough is called negligence,
15 and that does not violate the Eighth Amendment. To state a claim for deliberate indifference in
16 violation of the Eighth Amendment, you must present facts showing that each defendant was
17 aware that Sessions posed an excessive risk to your safety when they put you together.

18 If you choose to amend your complaint, the first amended complaint must include all of
19 the claims you want to make because the court will not look at the claims or information in the
20 original complaint. **Any claims not in the first amended complaint will not be considered.**

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

22 1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 2) 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.

28 3. Plaintiff's complaint is dismissed with leave to amend.

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4. Within thirty days from the date of service of this order, plaintiff may file an amended complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must bear the docket number assigned this case and must be labeled "First Amended Complaint." Plaintiff must file an original and two copies of the amended complaint. Failure to file an amended complaint in accordance with this order will result in dismissal of this action.

5. The Clerk of the Court is directed to send plaintiff a copy of the prisoner complaint form used in this district.

DATED: April 21, 2020



ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE