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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JESSE FRANK OGLESBY,  
Plaintiff,  
v.  
DEPARTMENT OF CORRECTIONS, et  
al.,  
Defendants.

No. 2:18-cv-0113 KJN P

ORDER

I. Introduction

Plaintiff is a state prisoner, proceeding without counsel. 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 is 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

1 forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated to make monthly  
2 payments of twenty percent of the preceding month's income credited to plaintiff's trust account.  
3 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time  
4 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.  
5 § 1915(b)(2).

## 6 II. Screening Standards

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

12 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
13 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
14 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an  
15 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
16 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
17 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
18 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.  
19 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
20 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at  
21 1227.

22 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain  
23 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the  
24 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic  
25 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
26 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a  
27 formulaic recitation of the elements of a cause of action;" it must contain factual allegations  
28 sufficient "to raise a right to relief above the speculative level." Id. at 555. However, "[s]pecific

1 facts are not necessary; the statement [of facts] need only ‘give the defendant fair notice of what  
2 the . . . claim is and the grounds upon which it rests.’” Erickson v. Pardus, 551 U.S. 89, 93  
3 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal quotations marks omitted).  
4 In reviewing a complaint under this standard, the court must accept as true the allegations of the  
5 complaint in question, Erickson, 551 U.S. at 93, and construe the pleading in the light most  
6 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other  
7 grounds, Davis v. Scherer, 468 U.S. 183 (1984).

### 8 III. Plaintiff’s Complaint

9 In the instant complaint, plaintiff names the Department of Corrections, Warden Eric  
10 Arnold, and an “unknown chair manufacturer” as defendants. He alleges that he was given a  
11 defective ADA shower chair on July 29, 2017, which caused him to fall while showering. He  
12 also contends the shower was not ADA compliant. Plaintiff alleges he suffered severe  
13 neurological injuries and pain which has exacerbated his underlying medical condition. Further,  
14 plaintiff alleges that correctional staff failed to respond to a fellow inmate’s call of “man down,”  
15 delaying medical care for his injuries, but then he was “only seen and sent back to [his] cell.”  
16 (ECF No. 1 at 4.) Plaintiff suffered a headache and threw up all night. Plaintiff argues that he  
17 was not “sent out” to make sure he had not injured his head, neck and lower back, but then states  
18 he was “sent back from the hospital with left side weakness.” (Id.)

### 19 IV. Discussion

20 Plaintiff’s complaint suffers from a number of deficiencies.

#### 21 A. Improper Defendants

22 First, plaintiff has named improper defendants. As to the Department of Corrections, the  
23 Eleventh Amendment bars suits brought by private parties against a state or state agency unless  
24 the state or the agency consents to such suit. See Quern v. Jordan, 440 U.S. 332 (1979); Alabama  
25 v. Pugh, 438 U.S. 781 (1978) (per curiam); Jackson v. Hayakawa, 682 F.2d 1344, 1349-50 (9th  
26 Cir. 1982). Although the Eleventh Amendment is not jurisdictional, the court may raise the  
27 defect on its own. Wisconsin Department of Corrections v. Schacht, 524 U.S. 381, 389 (1998);  
28 Edelman v. Jordan, 415 U.S. 651, 677-78 (1974). In the instant case, the State of California has

1 not consented to suit. Accordingly, plaintiff's claims against the California Department of  
2 Corrections and Rehabilitation are legally frivolous and must be dismissed.

3 As to the warden, plaintiff alleges no facts connecting the warden to plaintiff's allegations.  
4 The Civil Rights Act under which this action was filed provides as follows:

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

10 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the  
11 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See  
12 Monell v. Department of Social Servs., 436 U.S. 658 (1978) ("Congress did not intend § 1983  
13 liability to attach where . . . causation [is] absent."); Rizzo v. Goode, 423 U.S. 362 (1976) (no  
14 affirmative link between the incidents of police misconduct and the adoption of any plan or policy  
15 demonstrating their authorization or approval of such misconduct). "A person 'subjects' another  
16 to the deprivation of a constitutional right, within the meaning of § 1983, if he does an  
17 affirmative act, participates in another's affirmative acts or omits to perform an act which he is  
18 legally required to do that causes the deprivation of which complaint is made." Johnson v. Duffy,  
19 588 F.2d 740, 743 (9th Cir. 1978).

20 Moreover, supervisory personnel are generally not liable under § 1983 for the actions of  
21 their employees under a theory of respondeat superior and, therefore, when a named defendant  
22 holds a supervisory position, the causal link between him and the claimed constitutional  
23 violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979)  
24 (no liability where there is no allegation of personal participation); Mosher v. Saalfeld, 589 F.2d  
25 438, 441 (9th Cir. 1978) (no liability where there is no evidence of personal participation), cert.  
26 denied, 442 U.S. 941 (1979). Vague and conclusory allegations concerning the involvement of  
27 official personnel in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673  
28 F.2d 266, 268 (9th Cir. 1982) (complaint devoid of specific factual allegations of personal  
participation is insufficient).

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1 Finally, as to the “unknown chair manufacturer,” such a defendant does not act under  
2 color of state law. Rather, if plaintiff wishes to pursue a negligence action against the chair  
3 manufacturer, he must do so in state court, not federal court.

4 B. Deliberate Indifference

5 1. Failure to Protect

6 It is unclear plaintiff can allege facts demonstrating deliberate indifference; rather, it  
7 appears he fell in the shower. Although showers and shower chairs may be ADA compliant, such  
8 compliance does not prevent a person from falling. It assists the person in not falling. But given  
9 the nature of showers, falling is always a risk. Plaintiff alleges no facts showing how the shower  
10 chair “caused” him to fall, and alleges no facts demonstrating that a particular person was aware  
11 the chair posed an unreasonable risk of substantial harm. In order to state a valid claim under  
12 § 1983, plaintiff must allege that he suffered a specific injury as a result of specific conduct of a  
13 defendant and show an affirmative link between the injury and the conduct of that defendant.  
14 Rizzo, 423 U.S. at 371-72, 377.

15 Thus, it is unclear whether plaintiff can state a cognizable civil rights claim based on an  
16 allegation that defendants failed to protect plaintiff from the risk of falling in the shower,  
17 particularly where plaintiff was provided a shower chair to prevent such risk. However, in an  
18 abundance of caution, plaintiff is provided the following standards in the event he can allege facts  
19 demonstrating that a particular person was deliberately indifferent to a substantial risk of harm to  
20 plaintiff.

21 The Eighth Amendment requires prison officials to take reasonable measures to guarantee  
22 the safety of prisoners. See Farmer v. Brennan, 511 U.S. 825, 832 (1994). In particular, prison  
23 officials have an affirmative duty to protect inmates from violence at the hands of other inmates.  
24 See id. at 833. The failure of a prison official to protect inmates from attacks by other inmates or  
25 from dangerous conditions at the prison violates the Eighth Amendment only when two  
26 requirements are met: (1) the objective component -- the deprivation alleged must be sufficiently  
27 serious, see Farmer, 511 U.S. at 834 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)); and (2)  
28 the subjective component -- the prison official must possess a sufficiently culpable state of mind.

1 See id. (citing Wilson, 501 U.S. at 297).

2 In determining whether a deprivation is sufficiently serious to satisfy the objective  
3 component of an Eighth Amendment claim, a court must consider the circumstances, nature, and  
4 duration of the deprivation. Id. at 834 (citing Wilson, 501 U.S. at 298). With respect to the  
5 subjective component, the requisite state of mind depends on the nature of the claim. In prison  
6 conditions cases, the necessary state of mind is one of “deliberate indifference.” See, e.g., Allen  
7 v. Sakai, 48 F.3d 1082, 1087 (9th Cir. 1994) (outdoor exercise); Farmer, 511 U.S. at 834 (inmate  
8 safety); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (inmate health); Wilson, 501 U.S. at 302-03  
9 (general conditions of confinement).

10 “Deliberate indifference” has both subjective and objective components. A prison official  
11 must “be aware of facts from which the inference could be drawn that a substantial risk of serious  
12 harm exists and . . . must also draw the inference.” Farmer, 511 U.S. at 837. Liability may  
13 follow only if a prison official “knows that inmates face a substantial risk of serious harm and  
14 disregards that risk by failing to take reasonable measures to abate it.” Id. at 847. Deliberate  
15 indifference describes a more blameworthy state of mind than negligence. See Farmer, 511 U.S.  
16 at 835 (citing Estelle, 429 U.S. at 104). Negligence is not enough to amount to an Eighth  
17 Amendment violation. Farmer, 511 U.S. at 835. Deliberate indifference is not shown by merely  
18 stating that a defendant should have known of a risk, but requires an actual perception of a risk  
19 that does not exist merely because a reasonable person should have perceived a risk. Id. at 836.

## 20 2. Deliberate Indifference to Serious Medical Needs

21 In the Ninth Circuit, a deliberate indifference claim has two components:

22 First, the plaintiff must show a “serious medical need” by  
23 demonstrating that “failure to treat a prisoner’s condition could  
24 result in further significant injury or the ‘unnecessary and wanton  
25 infliction of pain.’” Second, the plaintiff must show the  
26 defendant’s response to the need was deliberately indifferent. This  
27 second prong -- defendant’s response to the need was deliberately  
28 indifferent -- is satisfied by showing (a) a purposeful act or failure  
to respond to a prisoner’s pain or possible medical need and (b)  
harm caused by the indifference. Indifference “may appear when  
prison officials deny, delay or intentionally interfere with medical  
treatment, or it may be shown by the way in which prison  
physicians provide medical care.”

1 Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal citations omitted).

2 Plaintiff is cautioned that, in applying the deliberate indifference standard, the Ninth  
3 Circuit has held that before it can be said that a prisoner's civil rights have been abridged, "the  
4 indifference to his medical needs must be substantial. Mere 'indifference,' 'negligence,' or  
5 'medical malpractice' will not support this cause of action." Broughton v. Cutter Lab., 622 F.2d  
6 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105-06). A difference of opinion between  
7 medical professionals concerning the appropriate course of treatment generally does not amount  
8 to deliberate indifference to serious medical needs. Toguchi v. Soon Hwang Chung, 391 F.3d  
9 1051, 1058 (9th Cir. 2004); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). In addition,  
10 mere differences of opinion between a prisoner and prison medical staff as to the proper course of  
11 treatment for a medical condition do not give rise to a § 1983 claim. See Snow v. McDaniel, 681  
12 F.3d 978, 988 (9th Cir. 2012); Toguchi, 391 F.3d at 1058.

13 Finally, delays in providing medical care may manifest deliberate indifference. See  
14 Estelle, 429 U.S. at 104-05. However, to establish a deliberate indifference claim arising from a  
15 delay in providing medical care, a plaintiff must allege facts showing that the delay was harmful.  
16 See Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); Hunt v. Dental Dep't, 865 F.2d 198,  
17 200 (9th Cir. 1989); Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir.  
18 1985). In this regard, "[a] prisoner need not show his harm was substantial; however, such would  
19 provide additional support for the inmate's claim that the defendant was deliberately indifferent to  
20 his needs." Jett, 439 F.3d at 1096.

21 Here, plaintiff was seen in medical following his fall; indeed, he was provided a neck  
22 brace. Moreover, at some point he went to the hospital, because he claims that when he was sent  
23 back from the hospital, he had left side weakness. Such allegations, without more, suggest  
24 plaintiff has a difference of opinion with prison medical staff as to the appropriate medical  
25 treatment he should have received. Such allegations fail to rise to the level of deliberate  
26 indifference.

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1 C. Exhaustion of Administrative Remedies

2 In his complaint, plaintiff affirmatively states that he exhausted his administrative  
3 remedies as to claim one (failure to protect), but not to the highest level as to his second claim  
4 (medical deliberate indifference). (ECF No. 1 at 3, 4.) Plaintiff is cautioned that a prisoner may  
5 bring no § 1983 action until he has exhausted such administrative remedies as are available to  
6 him. 42 U.S.C. § 1997e(a). The requirement is mandatory. Booth v. Churner, 532 U.S. 731, 741  
7 (2001). Thus, if plaintiff prematurely files a claim in federal court before the administrative  
8 process is completed, plaintiff risks further delay in having his claim heard in federal court  
9 because the claim must be exhausted prior to filing the federal action.

10 V. Leave to Amend

11 For all of the above reasons, the court has determined that the complaint must be  
12 dismissed. The court will, however, grant leave to file an amended complaint

13 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions  
14 about which he complains resulted in a deprivation of plaintiff's constitutional rights. Rizzo, 423  
15 U.S. at 371. Also, the complaint must allege in specific terms how each named defendant is  
16 involved. Id. There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative  
17 link or connection between a defendant's actions and the claimed deprivation. Id.; May v.  
18 Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Duffy, 588 F.2d at 743.

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

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

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

3 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff  
4 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.  
5 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the  
6 Director of the California Department of Corrections and Rehabilitation filed concurrently  
7 herewith.

8 3. Plaintiff's complaint is dismissed.

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

11 a. The completed Notice of Amendment; and


12 b. An original and one copy of the Amended Complaint.

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

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

18 5. The Clerk of the Court is directed to send plaintiff the forms necessary to file a  
19 prisoner civil rights complaint.

20 Dated: February 14, 2018

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22 \_\_\_\_\_  
23 KENDALL J. NEWMAN  
24 UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JESSE FRANK OGLESBY,  
Plaintiff,  
v.  
DEPARTMENT OF CORRECTIONS, et  
al.,  
Defendants.

No. 2:18-cv-0113 KJN P

NOTICE OF AMENDMENT

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

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

Amended Complaint

\_\_\_\_\_  
Plaintiff