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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANGEL ZEVALLOS,
Plaintiff,
v.
KATHLEEN ALLISON, et al.,
Defendants.

No. 2:18-cv-1111 AC P

ORDER

Plaintiff, a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983, has filed a first amended complaint. ECF No. 12.

I. Statutory Screening of Prisoner Complaints

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

A claim “is [legally] frivolous where it lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). “[A] judge may dismiss . . . claims which are ‘based on indisputably meritless legal theories’ or whose ‘factual contentions are clearly baseless.’” Jackson v. Arizona, 885 F.2d 639,

1 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as
2 stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). The critical inquiry is whether a
3 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis.
4 Franklin, 745 F.2d at 1227-28 (citations omitted).

5 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the
6 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of
7 what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly,
8 550 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47
9 (1957)). “Failure to state a claim under § 1915A incorporates the familiar standard applied in the
10 context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).” Wilhelm v.
11 Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal
12 for failure to state a claim, a complaint must contain more than “a formulaic recitation of the
13 elements of a cause of action;” it must contain factual allegations sufficient “to raise a right to
14 relief above the speculative level.” Twombly, 550 U.S. at 555 (citations omitted). “[T]he
15 pleading must contain something more . . . than . . . a statement of facts that merely creates a
16 suspicion [of] a legally cognizable right of action.” Id. (alteration in original) (quoting 5 Charles
17 Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

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

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1 II. Amended Complaint

2 The amended complaint alleges that defendants Allison, Lizarraga, Kentner, Giovacchini,
3 and six Doe defendants violated plaintiff’s rights under the First and Eighth Amendments. ECF
4 No. 12. Plaintiff alleges that on June 4, 2016, he was placed on suicide watch. Id. at 4. The
5 following day, plaintiff was seen by defendant Kentner, a psychiatrist, and then returned to his
6 cell. Id. Upon escorting plaintiff back to his cell, Doe II failed to search the cell for dangerous
7 items or contraband, and plaintiff found three bottles of poison¹ that had been left by his toilet and
8 drank them. Id. at 4-5. Plaintiff also alleges that other personnel failed to search his cell and that
9 Doe II or other unspecified individuals deliberately put the chemicals in his cell, while Doe I left
10 her watch position unattended. Id. at 4-5, 7. Finally, the complaint alleges that unspecified
11 defendants retaliated against plaintiff for exercising his right to access the courts by giving him
12 false rules violation reports and that defendants are liable for the actions of their subordinates. Id.
13 at 6.

14 III. Failure to State a Claim

15 A. Personal Involvement

16 The complaint fails to identify the actions by defendants Allison, Lizarraga, Giovacchini,
17 or Does III-VI. There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative
18 link or connection between a defendant’s actions and the claimed deprivation, Rizzo v. Goode,
19 423 U.S. 362, 371, 376 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980), and plaintiff
20 has not alleged any facts showing the necessary personal involvement by any individual
21 defendant. Furthermore, plaintiff’s conclusory assertion that unspecified defendants are liable for
22 the actions of their subordinates is insufficient to establish such liability. See Ivey v. Bd. of
23 Regents, 673 F.2d 266, 268 (9th Cir. 1982) (“Vague and conclusory allegations of official
24 participation in civil rights violations are not sufficient.” (citations omitted)); Starr v. Baca,
25 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting Hansen v. Black, 885 F.2d 642, 646 (9th Cir.
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28 ¹ Both the original complaint and attachments to the amended complaint identify the contents of
the bottles as cleaning chemicals. ECF No. 1 at 10; ECF No. 12 at 19.

1 1989)) (supervisor can be liable for his personal involvement or if there is a sufficient causal
2 connection between supervisor's conduct and violation).

3 B. Retaliation

4 Plaintiff's retaliation claim fails because he has not identified who retaliated against him.
5 Furthermore, while he states that he was retaliated against "for exercising [his] right of access to
6 the courts," he does not specify what protected action he was taking in exercising this right or
7 why he believes that the write-ups were motivated by his protected conduct. See Rhodes v.
8 Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote and citation omitted) (adverse action
9 must be because of plaintiff's protected conduct). The mere fact that plaintiff was written up,
10 without more, does not mean that he was being retaliated against.

11 C. Deliberate Indifference

12 i. Defendant Kentner

13 Plaintiff alleges only that he talked to defendant Kentner. There are no allegations that
14 would suggest that Kentner was deliberately indifferent to plaintiff's medical needs. See Jett v.
15 Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (citation omitted) (deliberate indifference shown by
16 a purposeful act or failure to respond to plaintiff's pain or medical need and harm cause by
17 indifference).

18 ii. Doe Defendant I

19 Plaintiff alleges that Doe I was negligent in leaving her post unattended when it was her
20 responsibility to watch plaintiff until he was no longer suicidal. However, negligent failure to
21 protect an inmate from harm is not actionable under § 1983. Farmer v. Brennan, 511 U.S. 825,
22 835 (1994). Furthermore, it is unclear whether Doe I left her post while plaintiff was seeing
23 Kentner and was therefore unaware that plaintiff had been returned to his cell, or whether she left
24 plaintiff unattended after he was returned to his cell. There are also no facts regarding how long
25 Doe I left her post or that would show that she knew that chemicals had been left in plaintiff's
26 cell. Plaintiff has therefore failed to state a claim for deliberate indifference against Doe I. See
27 Farmer v. Brennan, 511 U.S. 825, 834 (1994) (internal quotation marks and citations omitted)

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1 (Eighth Amendment violated where prison official is deliberately indifferent to serious risk of
2 harm).

3 iii. Doe Defendant II

4 Plaintiff's allegations that Doe II and other unspecified individuals failed to failed to
5 search his cell fail to state a claim for deliberate indifference because there are no facts showing
6 that Doe II or other personnel were aware of the actual presence of chemicals in plaintiff's cell or
7 the possibility that chemicals had been left in plaintiff's cell. See Farmer, 511 U.S. at 834. The
8 conclusory allegation that Doe II, or some other unidentified individual, deliberately left
9 chemicals in plaintiff's cell also fails to state a claim for relief against any defendant. There are
10 no facts that demonstrate the chemicals were deliberately left in the cell.

11 IV. Leave to Amend

12 For the reasons set forth above, the court finds that the first amended complaint does not
13 state any cognizable claims. However, it appears that plaintiff may be able to allege facts to
14 remedy this and he will be given one final opportunity to amend the complaint if he desires.

15 If plaintiff chooses to file a second amended complaint, he must demonstrate how the
16 conditions about which he complains resulted in a deprivation of his constitutional rights.
17 Rizzo v. Goode, 423 U.S. 362, 370-71 (1976). Also, the complaint must allege in specific terms
18 how each named defendant is involved. Arnold v. Int'l Bus. Machs. Corp., 637 F.2d 1350, 1355
19 (9th Cir. 1981). There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative
20 link or connection between a defendant's actions and the claimed deprivation. Id.; Johnson v.
21 Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, "[v]ague and conclusory allegations of
22 official participation in civil rights violations are not sufficient." Ivey v. Bd. of Regents, 673 F.2d
23 266, 268 (9th Cir. 1982) (citations omitted).

24 Plaintiff is also informed that the court cannot refer to a prior pleading in order to make
25 his second amended complaint complete. Local Rule 220 requires that an amended complaint be
26 complete in itself without reference to any prior pleading. This is because, as a general rule, an
27 amended complaint supersedes the original complaint. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.
28 1967) (citations omitted), overruled in part by Lacey v. Maricopa County, 693 F.3d 896, 928 (9th

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 second amended
3 complaint, the original complaint and any previous amended complaints no longer serve any
4 function in the case. Therefore, in an amended complaint, as in an original complaint, each claim
5 and the involvement of each defendant must be sufficiently alleged.

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

7 You are being given leave to amend because the facts you have alleged in the complaint
8 are not enough to state a claim for relief. To state a claim for deliberate indifference, you must
9 allege facts showing that each defendant was aware of a risk to your health and safety and ignored
10 that risk. To state a claim for retaliation you must allege facts showing that the defendants'
11 actions were taken because you took some protected action like filing a grievance or lawsuit. To
12 state a claim against any defendant you must explain what that defendant did. You cannot make
13 claims against "defendants" generally.

14 If you choose to amend your complaint, the second amended complaint must include all of
15 the claims you want to make because the court will not look at the claims or information in the
16 original or first amended complaint. **Any claims and information not in the second amended
17 complaint will not be considered.**

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

19 1. The first amended complaint fails to state a claim upon which relief may be granted,
20 see 28 U.S.C. § 1915A, and will not be served.

21 2. Within thirty days from the date of service of this order, plaintiff may file a second
22 amended complaint that complies with the requirements of the Civil Rights Act, the Federal Rules
23 of Civil Procedure, and the Local Rules of Practice. The second amended complaint must bear
24 the docket number assigned this case and must be labeled "Second Amended Complaint."
25 Plaintiff must file an original and two copies of the second amended complaint. Failure to file a
26 second amended complaint in accordance with this order will result in in a recommendation that
27 this action be dismissed.

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

DATED: May 19, 2021.



ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE