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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL DAVID WILTSE,
Plaintiff,
v.
PATRICK COVELLO, et al.,
Defendants.

No. 2:21-cv-0901 CKD P

ORDER

Plaintiff is a state prisoner proceeding pro se with a civil action. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff requests leave to proceed in forma pauperis. As plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a), his request 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 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 the amount in plaintiff’s account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

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

6 Having conducted the required screening, the court finds that plaintiff may proceed on
7 claims 3-7 in his complaint, alleging violations of the Eighth Amendment. Plaintiff fails to state
8 actionable claims in claims 1 and 2. At this point, plaintiff has two options: 1) proceed on claims
9 3-7; or 2) attempt to cure the deficiencies in claims 1 and 2 in an amended complaint. In
10 considering whether to amend, the court advises plaintiff as follows:

11 1. With respect to claim 1, there can be no liability under 42 U.S.C. § 1983 unless there
12 is some affirmative link or connection between a defendant’s actions and the claimed deprivation.
13 Rizzo v. Goode, 423 U.S. 362 (1976). Vague and conclusory allegations of official participation
14 in civil rights violations, such as those against prison wardens simply because they are in charge
15 of their respective prisons, are not sufficient. Ivey v. Board of Regents, 673 F.2d 266, 268 (9th
16 Cir. 1982).

17 2. As for claim 2, plaintiff sues the California Department of Corrections and
18 Rehabilitation for damages based upon a violation of the Eighth Amendment. The Eleventh
19 Amendment serves as a jurisdictional bar to suits brought by private parties against a state or state
20 agency unless the state or the agency consents to such suit. See Quern v. Jordan, 440 U.S. 332
21 (1979); Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam); Jackson v. Hayakawa, 682 F.2d
22 1344, 1349-50 (9th Cir. 1982). The State of California has not consented to suit with respect to
23 claims arising under the Eighth Amendment for damages.

24 Finally, plaintiff is informed that the court cannot refer to a prior pleading in order to
25 make plaintiff’s amended complaint complete. Local Rule 220 requires that an amended
26 complaint be complete in itself without reference to any prior pleading. This is because, as a
27 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375
28 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no

1 longer serves any function in the case. Therefore, in an amended complaint, as in an original
2 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

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

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

5 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. All fees
6 shall be collected and paid in accordance with this court's order to the Director of the California
7 Department of Corrections and Rehabilitation filed concurrently herewith.

8 3. Plaintiff is granted 21 days within which to complete and return the attached form
9 notifying the court whether he wants to proceed on claims 3-7 in his complaint, or whether he
10 wishes to file an amended complaint in an attempt to cure the deficiencies in claims 1 and 2. If
11 plaintiff does not return the form, this action will proceed on claims 3-7.

12 Dated: September 8, 2021



13 _____
14 CAROLYN K. DELANEY
15 UNITED STATES MAGISTRATE JUDGE

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1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF CALIFORNIA

3
4 MICHAEL DAVID WILTSE,
5 Plaintiff,
6 v.
7 PATRICK COVELLO, et al.,
8 Defendants.

No. 2:21-cv-0901 CKD P

PLAINTIFF'S NOTICE OF
HOW TO PROCEED

9
10 Check **one**:

11 Plaintiff wants to proceed immediately on claims 3-7 in his complaint; or

12 Plaintiff wants time to file an amended complaint.

13 DATED:

14
15 _____
16 Plaintiff