

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS EDWARD PERRY  
Plaintiff,  
v.  
M. NELSON, et al.,  
Defendants.

No. 2:22-cv-2140 WBS AC P

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 declarations that makes the showing required by 28 U.S.C. § 1915(a). ECF Nos. 2, 7, 10. Accordingly, the requests 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.

1 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time  
2 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.  
3 § 1915(b)(2).

#### 4 II. Statutory Screening of Prisoner Complaints

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

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14 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as  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

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

1 cognizable right of action.” Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur  
2 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

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

### 12 III. Complaint

13 The complaint alleges that defendants Nelson, Banke, Villegas, Huston, Hill, and Johnson  
14 violated plaintiff’s Sixth, Eighth, and Fourteenth Amendment rights. ECF No. 1. Specifically,  
15 plaintiff alleges that he was falsely identified by a confidential source as having assaulted another  
16 inmate, resulting in plaintiff’s transfer to administrative segregation (Ad-Seg). Id. at 15. Plaintiff  
17 claims that Nelson coerced the confidential source to falsely testify against him and that  
18 following the accusation, Banke signed off on plaintiff’s transfer to Ad-Seg without any further  
19 investigation. Id. at 6, 15, 20. The day after being transferred to Ad-Seg, plaintiff was  
20 interviewed by Villegas, who concluded, without further investigation, that the allegations on  
21 paper were sufficient to keep plaintiff in Ad-Seg. Id. at 15-16, 20.

22 A few days after being placed in Ad-Seg, Bailey—who has not been named as a  
23 defendant—served plaintiff with the disciplinary write up. Id. at 16. Plaintiff then asked Bailey  
24 to act as a witness on his behalf during his disciplinary hearing and Bailey agreed. Id. Plaintiff  
25 later told the assigned investigative employee that he wanted Bailey as a witness and requested  
26 that he ask the confidential source several questions. Id. However, Nelson did not allow the  
27 confidential source to answer the questions, stating that they were irrelevant, and at plaintiff’s  
28 disciplinary hearing Huston denied plaintiff’s request to have Bailey present at the hearing. Id. at

1 17-21. Huston ultimately found plaintiff guilty and issued a punishment that included the loss of  
2 good time credits. Id. 17, 20-21. After the disciplinary hearing, plaintiff met with a committee  
3 headed by Hill. Id. at 17, 21. During this meeting, Hill decided to release plaintiff back into the  
4 general population without dropping the charges. Id. at 18, 22.

5 IV. Failure to State a Claim

6 A. Eight Amendment

7 “After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes  
8 cruel and unusual punishment forbidden by the Eighth Amendment.” Whitley v. Albers, 475 U.S.  
9 312, 319 (1986) (alteration in original) (citations and internal quotations omitted). “[E]xtreme  
10 deprivations are required to make out a conditions-of-confinement claim. Because routine  
11 discomfort is part of the penalty that criminal offenders pay for their offenses against society,  
12 only those deprivations denying the minimal civilized measure of life’s necessities are  
13 sufficiently grave to form the basis of an Eighth Amendment violation.” Hudson v. McMillian,  
14 503 U.S. 1, 8-9 (1992) (internal citations and quotation marks omitted).

15 Here, plaintiff alleges that he suffered cruel and unusual punishment when Banke signed  
16 off on his placement in Ad-Seg and Villegas kept him in Ad-Seg without first conducting a  
17 proper investigation. ECF No. 1 at 6-7, 20. However, the Ninth Circuit has held that placement  
18 in Ad-Seg, by itself, does not rise to the level of an Eighth Amendment violation, see Anderson v.  
19 County of Kern, 45 F.3d 1310, 1316 (9th Cir. 1995) (“administrative segregation, even in a single  
20 cell for twenty-three hours a day, is within the terms of confinement ordinarily contemplated by a  
21 sentence”), and plaintiff has not alleged any facts that show the conditions of his confinement in  
22 Ad-Seg rose to the level of cruel and unusual punishment. Similarly, “[t]he issuance of Rules  
23 Violation Reports, even if false, does not rise to the level of cruel and unusual punishment.”  
24 Cauthen v. Rivera, 2013 WL 1820260, at \*10, 2013 U.S. Dist. LEXIS 62472, at \*24 (E.D. Cal.  
25 Apr. 30, 2013) (citations omitted); Jones v. Prater, 2012 WL 1979225, at \*2, 2012 U.S. Dist.  
26 LEXIS 76486, at \*5-6 (E.D. Cal. June 1, 2012) (“[P]laintiff cannot state a cognizable Eighth  
27 Amendment violation based on an allegation that defendants issued a false rules violation against  
28 plaintiff.” (citation omitted)). For these reasons, plaintiff has not stated any cognizable claims

1 under the Eighth Amendment for cruel and unusual punishment.

2 B. Due Process

3 i. False Allegations

4 Plaintiff alleges that the disciplinary charge was based on falsified allegations which were  
5 coerced by Nelson. ECF No. 1 at 15. To the extent plaintiff is alleging that this violated his right  
6 to due process, prisoners do not have a liberty interest in being free from false accusations of  
7 misconduct, see Hines v. Gomez, 108 F.3d 265, 268 (9th Cir. 1997) (“there are no procedural  
8 safeguards protecting a prisoner from false retaliatory accusations”), and his allegations do not  
9 give rise to a claim under § 1983. To the extent plaintiff is also attempting the claim the failure to  
10 investigate violated due process, his claim is not cognizable. See Gomez v. Whitney, 757 F.2d  
11 1005, 1006 (9th Cir. 1985) (“[W]e can find no instance where the courts have recognized  
12 inadequate investigation as sufficient to state a civil rights claim unless there was another  
13 recognized constitutional right involved.” (citation omitted)).

14 ii. Administrative Segregation

15 To the extent plaintiff is attempting to allege a due process claim in relation to his  
16 placement in Ad-Seg, he fails. When an inmate is placed in Ad-Seg the only procedural  
17 requirements are that he be given “an informal, nonadversary review of the information  
18 supporting [his] administrative confinement, including whatever statement [he] wishe[s] to  
19 submit, within a reasonable time after confining him to administrative segregation.” Hewitt v.  
20 Helms, 459 U.S. 460, 472 (1983), overruled on other grounds by Sandin v. Conner, 515 U.S. 472  
21 (1995). Plaintiff’s allegations that Villegas met with him the day after his confinement began,  
22 reviewed why plaintiff had been placed in Ad-Seg, and allowed plaintiff to make a statement,  
23 demonstrate that the procedural requirements were met.

24 iii. Disciplinary Hearing

25 “The Sixth Amendment provides that ‘[i]n all criminal prosecutions, the accused shall  
26 enjoy the right . . . to have Assistance of Counsel for his defence.’” Nordstrom v. Ryan, 762 F.3d  
27 903, 909 (9th Cir. 2014) (quoting U.S. Const. amend. VI). However, “[p]rison disciplinary  
28 proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant

1 in such proceedings does not apply.” Wolff v. McDonnell, 418 U.S. 539, 556 (1974). Plaintiff is  
2 therefore not entitled to the protections of the Sixth Amendment in relation to his disciplinary  
3 proceedings and his claims fall under the Fourteenth Amendment.

4 When a prisoner faces disciplinary charges that include the loss of good-time credits, they  
5 are entitled to the following procedural protections: (1) twenty-four-hour advanced written notice  
6 of the charges against him, id. at 563-64; (2) “a written statement by the factfinders as to the  
7 evidence relied on and reasons for the disciplinary action,” id. at 564 (internal quotation marks  
8 and citation omitted); (3) an opportunity to call witnesses and present documentary evidence  
9 where doing so “will not be unduly hazardous to institutional safety or correctional goals,” id. at  
10 566; (4) assistance at the hearing if he is illiterate or if the matter is complex, id. at 570; and (5) a  
11 sufficiently impartial fact finder, id. at 570-71. A finding of guilt must also be “supported by  
12 some evidence in the record.” Superintendent v. Hill, 472 U.S. 445, 454 (1985). In this case,  
13 plaintiff has alleged the loss of good time credits, and therefore the procedural protections  
14 outlined in Wolff apply.

15 Plaintiff claims that Huston violated his due process rights when he denied plaintiff the  
16 opportunity to have Bailey present as a witness during the hearing. ECF No. 1 at 8, 17, 20.  
17 However, the attachments to the complaint show that plaintiff was able to question Bailey about  
18 the incident through written questions submitted to the investigative employee, and beyond  
19 stating that he wanted Bailey as a character witness, plaintiff does not indicate what other  
20 questions he would have asked Bailey had he been present during the disciplinary hearing. Id. at  
21 8, 16-17, 20-21, 26. A hearing officer may decline an inmate’s request to call witnesses, “for  
22 irrelevance, lack of necessity, or the hazards presented in individual cases,” Wolff, 418 U.S. at  
23 566, and plaintiff has not demonstrated that Huston’s refusal to allow Bailey to be questioned in  
24 person denied him the right to have Bailey as a witness.

25 Plaintiff also claims that his rights were denied when Nelson denied him the opportunity  
26 to confront the confidential source and stated that the questions were not relevant. ECF No. 1 at  
27 19. However, while prisoners have a right to call witnesses, there is no right to cross-  
28 examination, Wolff, 418 U.S. at 567-68, and Nelson therefore did not violate plaintiff’s rights.

1                   iv.    Disciplinary Appeal

2           Plaintiff claims that Hill violated his rights because he did not overturn the disciplinary  
3 finding. ECF No. 1 at 9, 21-22. However, plaintiff has no claim for the “loss of a liberty interest  
4 in the processing of his appeals . . . because inmates lack a separate constitutional entitlement to a  
5 specific prison grievance procedure.” Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003).  
6 Furthermore, an individual defendant is not liable under § 1983 unless the facts establish the  
7 defendant’s personal involvement in the constitutional deprivation or a causal connection between  
8 the defendant’s acts and the constitutional deprivation. Hansen v. Black, 885 F.2d 642, 646 (9th  
9 Cir. 1989).

10           In Ramirez, the Ninth Circuit affirmed the district court’s dismissal for failure to state a  
11 claim where the plaintiff alleged that the disciplinary and appeals boards violated his due process  
12 rights when they denied his request to examine adverse witnesses and allegedly masked  
13 procedural errors committed at the disciplinary hearing. 334 F.3d at 860. As in Ramirez,  
14 plaintiff has alleged, at most, that he notified Hill of the completed violation of his due process  
15 rights. Hill’s refusal to overturn plaintiff’s disciplinary conviction did not violate his rights or  
16 contribute to the violation.

17                   C.    Personal Involvement

18           “Liability under § 1983 must be based on the personal involvement of the defendant.”  
19 Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (citation omitted). Plaintiff does not  
20 make any allegations against Johnson other than to state that she is currently the warden, and he  
21 explicitly alleges that during the times at issue Hill was the warden and the one who denied  
22 plaintiff’s appeal. ECF No. 1 at 9, 21-22. Since, Johnson was not the warden during the relevant  
23 times and plaintiff makes no other allegations against her, he fails to state a claim against her in  
24 her individual capacity. It appears that Johnson may have been named solely based on her  
25 position as the current warden in order to provide injunctive relief.

26                   D.    Official Capacity Claims

27           Plaintiff states he is suing the defendants in their individual and official capacities. ECF  
28 No. 1 at 14. However, claims for damages against state officials acting in their official capacity

1 are barred by sovereign immunity because “a suit against a state official in his or her official  
2 capacity is not a suit against the official but rather is a suit against the official’s office” and  
3 therefore “no different from a suit against the State itself.” Will v. Mich. Dep’t of State Police,  
4 491 U.S. 58, 71 (1989) (citations omitted). Accordingly, any claim for damages against  
5 defendants in their official capacities is barred. To the extent plaintiff seeks injunctive relief in  
6 the form of a ban on officers having private offices (ECF No. 1 at 10), plaintiff does not identify  
7 who he is seeking injunctive relief from and the requested relief is not linked to the alleged  
8 violations. Plaintiff therefore fails to any state claims for injunctive relief against any defendant  
9 in their official capacity. See Colwell v. Bannister, 763 F.3d 1060, 1070 (9th Cir. 2014) (to state  
10 a claim for injunctive relief plaintiff must “identify the law or policy challenged as a  
11 constitutional violation and name the official within the entity who can appropriately respond to  
12 injunctive relief” (citation omitted)).

13 V. Leave to Amend

14 The complaint does not state any cognizable claims for relief and plaintiff will be given an  
15 opportunity to file an amended complaint. If plaintiff chooses to file a first amended complaint,  
16 he must demonstrate how the conditions about which he complains resulted in a deprivation of his  
17 constitutional rights. Rizzo v. Goode, 423 U.S. 362, 370-71 (1976). Also, the complaint must  
18 allege in specific terms how each named defendant is involved. Arnold v. Int’l Bus. Machs.  
19 Corp., 637 F.2d 1350, 1355 (9th Cir. 1981). There can be no liability under 42 U.S.C. § 1983  
20 unless there is some affirmative link or connection between a defendant’s actions and the claimed  
21 deprivation. Id.; Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, “[v]ague and  
22 conclusory allegations of official participation in civil rights violations are not sufficient.” Ivey v.  
23 Bd. of Regents, 673 F.2d 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 first 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 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. That means you do not have to pay  
8 the entire filing fee now. You will pay it over time, out of your trust account.

9 Your complaint will not be served because the facts you alleged are not enough to state a  
10 claim. Defendants have not violated your Sixth Amendment rights because a disciplinary  
11 proceeding is not a criminal prosecution. To state a claim for a violation of your due process  
12 rights in relation to your disciplinary proceeding you must allege facts that show which  
13 procedural protections were violated by the prison officials.

14 You may amend your complaint to try to fix these problems. Be sure to provide facts that  
15 show exactly what each defendant did to violate your rights or to cause a violation of your rights.  
16 If you choose to file a first amended complaint, it must include all claims you want to bring.  
17 Once an amended complaint is filed, the court will not look at any information in the original  
18 complaint. **Any claims and information not in the first amended complaint will not be**  
19 **considered.**

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

21 1. Plaintiff's requests for leave to proceed in forma pauperis (ECF Nos. 2, 10) are  
22 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 appropriate agency filed concurrently herewith.

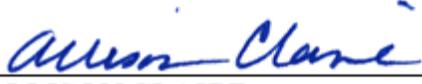
27 3. Plaintiff's complaint fails to state a claim upon which relief may be granted, see 28  
28 U.S.C. § 1915A, and will not be served.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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." Failure to file an amended complaint in accordance with this order will result in a recommendation that this action be dismissed.

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

DATED: November 15, 2023

  
\_\_\_\_\_  
ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE