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United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD G. GARVER,  
Plaintiff,

No. C 08-1834 WHA (PR)

**DISMISSAL WITH LEAVE TO  
AMEND**

v.

Correctional Officer MAYES,  
Defendant.

Plaintiff, an inmate of Pelican Bay State Prison, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. Plaintiff also requests leave to proceed in forma pauperis.

**DISCUSSION**

**A. STANDARD OF REVIEW**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the

1 statement need only "give the defendant fair notice of what the . . . claim is and the grounds  
2 upon which it rests." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam) (citations  
3 omitted). Although in order to state a claim a complaint "does not need detailed factual  
4 allegations, . . . a plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief'  
5 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause  
6 of action will not do. . . . Factual allegations must be enough to raise a right to relief above the  
7 speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations  
8 omitted). A complaint must proffer "enough facts to state a claim for relief that is plausible on  
9 its face." *Id.* at 1974.

10 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
11 (1) that a right secured by the Constitution or laws of the United States was violated, and (2)  
12 that the violation was committed by a person acting under the color of state law. *West v. Atkins*,  
13 487 U.S. 42, 48 (1988).

#### 14 **B. LEGAL CLAIMS**

15 Plaintiff contends that when he leaned down on a cart to have shackles removed from  
16 his ankles "he was not there and I lost my balance and went to[] left side and broke bones in left  
17 hand." Plaintiff does not say who "he" refers to in the quoted sentence, and while the  
18 implication may be that it was defendant Mayes, the only named defendant, he does not say so.  
19 The only name in the "Statement of Claim" is "Dr. Duncan," and he is only alleged to have told  
20 plaintiff that he might never recover full use of the hand, so it seems clear that plaintiff is not  
21 trying to allege that Dr. Duncan was responsible for the actual injury to his hand. The  
22 complaint will be dismissed with leave to amend for that reason, failure to say who "was not  
23 there."

24 In addition, the factual allegations which plaintiff does make are insufficient to state a  
25 claim for deliberate indifference to his safety. A defendant is deliberately indifferent to the  
26 safety of an inmate only if he or she knew of and disregarded an excessive risk to inmate health  
27 or safety. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Plaintiff has alleged only that an  
28 unnamed person "was not there," which is insufficient to allege deliberate indifference. If there

1 was some sort of regular procedure that was not followed, or if plaintiff was particularly  
2 unsteady, or if plaintiff could allege in good faith that the escort did not provide assistance in a  
3 situation where it clearly was needed, that might or might not suffice, but as it is the allegation  
4 amounts to no more than negligence.

5 Finally, it is not clear whether plaintiff intends to allege deliberate indifference to a  
6 serious medical need in not providing care for his broken hand. If he does, he must allege facts  
7 showing that a specific named defendant did, or omitted to do, something that amounted to  
8 deliberate indifference.

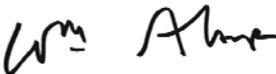
9 **CONCLUSION**

10 1. The complaint is **DISMISSED** with leave to amend, as indicated above, within thirty  
11 days from the date of this order. The amended complaint must include the caption and civil  
12 case number used in this order and the words AMENDED COMPLAINT on the first page.  
13 Because an amended complaint completely replaces the original complaint, plaintiff must  
14 include in it all the claims he wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262  
15 (9th Cir. 1992). He may not incorporate material from the original complaint by reference.  
16 Failure to amend within the designated time will result in the dismissal of these claims.

17 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the court  
18 informed of any change of address by filing with the clerk a separate paper headed "Notice of  
19 Change of Address." Papers intended to be filed in this case should be addressed to the clerk  
20 and not to the undersigned. Petitioner also must comply with the Court's orders in a timely  
21 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
22 pursuant to Federal Rule of Civil Procedure 41(b).

23 **IT IS SO ORDERED.**

24 Dated: November 12, 2008.

  
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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE