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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

LEE A. VINCENT,  
#94633 )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
HOWARD SKOLNIK, *et al.*, )  
 )  
Defendants. )  
\_\_\_\_\_ /

3:10-cv-00291-LRH-RAM

**ORDER**

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. The court now reviews the complaint.

**I. Screening Standard**

Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner’s claims, “if the allegation of poverty is untrue,” or if the action “is frivolous or malicious,” “fails to state a claim on which relief may be granted,” or “seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona*, 885 F.2d 639, 640 (9<sup>th</sup> Cir. 1989).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under Section

1 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under Rule  
2 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232  
3 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a “formulaic recitation of the  
4 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief  
5 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965  
6 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a  
7 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard, the  
8 court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital*  
9 *Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to plaintiff and  
10 resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

11 Allegations in a *pro se* complaint are held to less stringent standards than formal pleadings  
12 drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21  
13 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). All  
14 or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the prisoner’s claims  
15 lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that are  
16 untenable (*e.g.* claims against defendants who are immune from suit or claims of infringement of a legal  
17 interest which clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.*  
18 fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever v. Block*, 932  
19 F.2d 795, 798 (9th Cir. 1991).

20 To sustain an action under section 1983, a plaintiff must show (1) that the conduct complained  
21 of was committed by a person acting under color of state law; and (2) that the conduct deprived the  
22 plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676, 689 (9<sup>th</sup> Cir.  
23 2006).

## 24 **II. Instant Complaint**

25 Plaintiff, who is incarcerated at Ely State Prison (“ESP”), has sued Nevada Department of  
26 Corrections (“NDOC”) Director Howard Skolnik, and ESP Warden Eldon McDaniel. Plaintiff alleges  
27 that Administrative Regulation (“A.R.”) 733 prohibits inmates in disciplinary segregation from  
28 purchasing food and beverage from the canteen and that the food provided by culinary does not “meet

1 the nutritional and caloric requirements for an adult male.” Plaintiff alleges that Director Skolnik  
2 created the canteen restrictions, Warden McDaniel enforces the restrictions, and that defendants use lack  
3 of food as a punishment in violation of his Eighth and Fourteenth Amendment rights.

4 At the outset the court notes that, “[w]here a particular amendment ‘provides an explicit textual  
5 source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment,  
6 not the more generalized notion of “substantive due process,” must be the guide for analyzing [a  
7 plaintiff’s] claims.’” *Albright v. Oliver*, 510 U.S. 266, 273-74 (1994) (Rehnquist, C.J., for plurality)  
8 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Therefore, plaintiff’s claims will be analyzed  
9 under the Eighth Amendment right to be free from cruel and unusual punishment rather any generalized  
10 notions of substantive due process under the Fourteenth Amendment, and his Fourteenth Amendment  
11 claim must be dismissed with prejudice.

12 The Eighth Amendment prohibits the imposition of cruel and unusual punishments and  
13 “embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency.” *Estelle*  
14 *v. Gamble*, 429 U.S. 97, 102 (1976). “The Constitution ‘does not mandate comfortable prisons.’”  
15 *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)).  
16 An alleged deprivation must first be, in objective terms, “sufficiently serious.” *Farmer v. Brennan*, 511  
17 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). “The second requirement  
18 flows from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth  
19 Amendment.’ To violate the Cruel and Unusual Punishments Clause, a prison official must have a  
20 ‘sufficiently culpable state of mind.’” *Id.*

21 The Eighth Amendment requires only that prisoners receive food that is adequate to maintain  
22 health; it need not be tasty or aesthetically pleasing.” *LeMaire v. Maass*, 12 F.3d 1444, 1456 (9<sup>th</sup> Cir.  
23 1993); *see also Johnson v. Lewis*, 217 F.3d 726, 732 (9<sup>th</sup> Cir. 2000); *Keenan v. Hall*, 83 F.3d 1083, 1091  
24 (9<sup>th</sup> Cir. 1996), *amended by* 135 F.3d 1318 (9<sup>th</sup> Cir. 1998). By way of example, “[t]he fact that the food  
25 occasionally contains foreign objects or sometimes is served cold, while unpleasant, does not amount  
26 to a constitutional deprivation.” *LeMaire*, 12 F.3d at 1456 (citation and internal quotations omitted).

27 This court finds that plaintiff’s Eighth Amendment claim is vague that it is unable to determine  
28 whether the current action is frivolous or fails to state a claim for relief. Plaintiff sets forth no

1 facts—such as a medical need or any other reason—to explain why he requires more food than the amount  
2 issued by culinary, and thus to show how he suffers an unconstitutional deprivation. The court has  
3 determined that the complaint does not contain a short and plain statement as required by Fed. R. Civ.  
4 P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair  
5 notice and state the elements of the claim plainly and succinctly. *Jones v. Community Redev. Agency*,  
6 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege a specific deprivation of a constitutional right  
7 and allege with at least some degree of particularity overt acts engaged in by defendants that support  
8 plaintiff’s claim. *Id.* Because plaintiff has failed to comply with the requirements of Fed. R. Civ. P.  
9 8(a)(2), the complaint must be dismissed.

10 However, plaintiff’s allegations that he does not receive sufficient food while in disciplinary  
11 segregation may implicate his Eighth Amendment rights. Therefore, plaintiff has leave to file an  
12 amended complaint if he is able to set forth specific facts regarding the alleged violation of his Eighth  
13 Amendment rights. If plaintiff elects to proceed in this action by filing an amended complaint, he is  
14 advised that he should specifically identify each defendant to the best of his ability, clarify what  
15 constitutional right he believes each defendant has violated and support each claim with factual  
16 allegations about each defendant’s actions. There can be no liability under 42 U.S.C. § 1983 unless  
17 there is some affirmative link or connection between a defendant’s actions and the claimed deprivation.  
18 *Rizzo v. Good*, 423 U.S. 362 (1976); *May v. Enomoto*, 633 F.2d 164, 167 (9<sup>th</sup> Cir. 1980); *Johnson v.*  
19 *Duffy*, 588 F.2d 740, 743 (9<sup>th</sup> Cir. 1978). Plaintiff’s claims must be set forth in short and plain terms,  
20 simply, concisely and directly. *See Swierkeiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); Fed. R.  
21 Civ. P. 8.

22 Plaintiff is informed that the court cannot refer to a prior pleading in order to make plaintiff’s  
23 amended complaint complete. Local Rule 15-220 requires that an amended complaint be complete in  
24 itself without reference to any prior pleading. This is because, as a general rule, an amended complaint  
25 supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files  
26 an amended complaint, the original pleading no longer serves any function in the case. Therefore, in an  
27 amended complaint, as in an original complaint, each claim and the involvement of each defendant must  
28 be sufficiently alleged.

1 **III. Conclusion**

2 **IT IS THEREFORE ORDERED** that the Clerk shall **FILE** the complaint. (Docket #1-2).

3 **IT IS FURTHER ORDERED** that plaintiff's Fourteenth Amendment claim is **DISMISSED**  
4 **with prejudice** and without leave to amend.

5 **IT IS FURTHER ORDERED** that plaintiff's complaint is **DISMISSED WITH LEAVE TO**  
6 **AMEND**. Plaintiff may choose to file an amended complaint if he is able to set forth an Eighth  
7 Amendment claim.

8 **IT IS FURTHER ORDERED** that plaintiff will have **thirty (30) days** from the date that this  
9 Order is entered to file his amended complaint, if he believes he can correct the noted deficiencies. The  
10 amended complaint must be a complete document in and of itself, and will supersede the original  
11 complaint in its entirety. Any allegations, parties, or requests for relief from prior papers that are not  
12 carried forward in the amended complaint will no longer be before the court.

13 **IT IS FURTHER ORDERED** that plaintiff shall clearly title the amended complaint as such  
14 by placing the words "FIRST AMENDED" immediately above "Civil Rights Complaint Pursuant to 42  
15 U.S.C. § 1983" on page 1 in the caption, and plaintiff shall place the case number, **3:10-CV-00291-**  
16 **LRH-RAM**, above the words "FIRST AMENDED" in the space for "Case No."

17 **IT IS FURTHER ORDERED** that plaintiff is expressly cautioned that if he does not timely file  
18 an amended complaint in compliance with this order, this entire action may be immediately dismissed.

19 **IT IS FURTHER ORDERED** that the Clerk shall send to plaintiff a blank section 1983 civil  
20 rights complaint form with instructions along with one copy of the original complaint.

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22 DATED this 11th day of August, 2010.

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LARRY R. HICKS  
27 UNITED STATES DISTRICT JUDGE  
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