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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DONALD WHITE, JR.,

Plaintiff,

v.

BRIAN EWERT,

Defendant.

NO: 4:16-cv-05122-MKD

ORDER TO AMEND OR
VOLUNTARILY DISMISS
COMPLAINT

Plaintiff, a prisoner at the Washington State Penitentiary, brings this *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983. By separate Order the Court granted Plaintiff leave to proceed *in forma pauperis*. Plaintiff seeks unspecified declaratory relief and monetary damages against Defendant Ewert.

PRISON LITIGATION REFORM ACT

Under the Prison Litigation Reform Act of 1995, 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

1 Court must dismiss a complaint or portion thereof if the prisoner has raised claims
2 that are legally “frivolous or malicious,” that fail to state a claim upon which relief
3 may be granted, or that seek monetary relief from a defendant who is immune from
4 such relief. 28 U.S.C. §§ 1915A(b)(1),(2) and 1915(e)(2); *see Barren v.*
5 *Harrington*, 152 F.3d 1193, 1194-1195 (9th Cir. 1998).

6 A claim is legally frivolous when it lacks an arguable basis either in law or
7 in fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), *superseded by statute on*
8 *other grounds as stated in Lopez v. Smith*, 203 F.3d 1122, 1126 (9th Cir. 2000) (en
9 banc); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The Court
10 may, therefore, dismiss a claim as frivolous where it is based on an indisputably
11 meritless legal theory or where the factual contentions are clearly baseless.
12 *Neitzke*, 490 U.S. at 327. The critical inquiry is whether a constitutional claim,
13 however inartfully pleaded, has an arguable legal and factual basis. *See Jackson v.*
14 *Arizona*, 885 F.2d 639, 640 (9th Cir. 1989), *superseded by statute on other*
15 *grounds as stated in Lopez*, 203 F.3d at 1130–31; *Franklin*, 745 F.2d at 1227.

16 The facts alleged in a complaint are to be taken as true and must “plausibly
17 give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950
18 (2009). Mere legal conclusions “are not entitled to the assumption of truth.” *Id.*
19 The complaint must contain more than “a formulaic recitation of the elements of a
20 cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It must

1 plead “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
2 570. On the basis of these standards, Plaintiff’s present allegations fail to state a
3 claim upon which relief may be granted.

4 SECTION 1983

5 Section 1983 requires a claimant to prove (1) a person acting under color of
6 state law (2) committed an act that deprived the claimant of some right, privilege,
7 or immunity protected by the Constitution or laws of the United States. *Leer v.*
8 *Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988). A person deprives another “of a
9 constitutional right, within the meaning of section 1983, if he does an affirmative
10 act, participates in another’s affirmative acts, or omits to perform an act which he
11 is legally required to do that “causes” the deprivation of which [the plaintiff
12 complains].” *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1439 (9th Cir. 1991)
13 (brackets in the original), *abrogated in part on other grounds*, *Farmer v.*
14 *Brennan*, 511 U.S. 825 (1994); *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.
15 1978).

16 A complaint must set forth the specific facts upon which the plaintiff relies
17 in claiming the liability of each defendant. *Ivey v. Board of Regents*, 673 F.2d 266,
18 268 (9th Cir. 1982). Even a liberal interpretation of a civil rights complaint may
19 not supply essential elements of a claim that the plaintiff failed to plead. *Id.* To
20 establish liability pursuant to § 1983, Plaintiff must set forth facts demonstrating

1 how each defendant caused or personally participated in causing a deprivation of
2 plaintiff's protected rights. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981);
3 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

4 **PLAINTIFF'S ALLEGATIONS**

5 Plaintiff states that he has been a paraplegic since 2006.

6 ***Bathroom:***

7 Plaintiff avers he had a "bladder emergency" on December 31, 2014. He
8 claims that when he asked Defendant Ewert to use his toilet, Defendant Ewert
9 responded, "Wait 10 minutes." Plaintiff does not state that he had informed
10 Defendant Ewert of the urgency of his need to urinate.

11 Plaintiff asserts that ten minutes later, Defendant Ewert and other officers
12 "stormed [the] dayroom" and Defendant Ewert allegedly yelled, "You can't use the
13 bathroom! I have no pity on you because you're in a wheelchair." These
14 allegations are unclear. Plaintiff does not state that he was entirely prevented from
15 using a toilet on December 31, 2014, or that he was unable to control his bladder
16 for an unspecified period of time.

17 It is certainly plausible that an emergency security situation might prevent an
18 officer from facilitating an inmate's use of the bathroom. A single incident when
19 Plaintiff was told he would need to wait ten minutes to use the restroom is
20 insufficient to state a constitutional violation. Defendant Ewert's subsequent

1 statements could plausibly mean any number of things, *i.e.*, no one would be using
2 the bathroom during an emergency situation, regardless of their disability.

3 To establish an Eighth Amendment violation in a conditions of confinement
4 case, the inmate must show that the prison official acted with deliberate
5 indifference to plaintiff's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 835
6 (1994). Deliberate indifference exists when the prison official "acted or failed to
7 act despite his knowledge of a substantial risk of serious harm." *Id.* at 842. A
8 single incident of denying an inmate access to a toilet, without any resulting harm,
9 is insufficient to state an Eighth Amendment claim. Plaintiff has failed to present
10 facts from which the Court could infer that Defendant Ewert was deliberately
11 indifferent to a substantial risk of serious harm on December 31, 2014.

12 ***Food:***

13 Plaintiff asserts that if he is on the toilet when his cell door is opened and
14 closed for dinner, then he is denied food for the night. He does not state when this
15 occurred, who denied him food, or what consequences he suffered from this
16 alleged deprivation. In any event, an occasional missed meal does not rise to the
17 level of a constitutional violation. *See e.g., Jaros v. Illinois Dept. of Correction*,
18 684 F.3d 667 (7th Cir. 2012) (occasional missed meal that did not endanger the
19 inmate did not state a claim); *see also Hutto v. Finney*, 437 U.S. 678, 683, 686-87

1 (1978) (diet consisting of fewer than 1,000 calories each day could violate Eighth
2 Amendment if maintained for substantial time period).

3 ***Incoming Legal Mail:***

4 Plaintiff claims that on October 20, 2015, Defendant Ewert opened
5 Plaintiff's incoming legal mail from the Washington State Attorney General,
6 inspected the envelope for contraband and read the five page document in
7 Plaintiff's presence. Plaintiff asserts that Defendant Ewert then "looked at
8 [Plaintiff] with an intimidating stare daring [Plaintiff] to complain." Plaintiff
9 contends that Defendant Ewert is currently under investigation and has been
10 removed from a particular unit for harassing inmates.

11 The Court is unable to infer a constitutional violation from these facts.
12 Prisoner officials, inspecting mail from attorneys in the presence of the inmate,
13 "have done all, and perhaps even more, than the Constitution requires." *Wolff v.*
14 *McDonnell*, 418 U.S. 539, 577 (1974). Plaintiff makes no allegation that the
15 Washington State Attorney General is his attorney. He has not alleged interference
16 with a confidential relationship.

17 The Supreme Court has not addressed the extent to which prison officials
18 may constitutionally examine or inspect an inmate's legal mail. Therefore, it
19 cannot be said, in the absence of an attorney-client privilege, that Defendant Ewert
20 acted in violation of Plaintiff's clearly established constitutional rights. "The

1 possibility that contraband will be enclosed in letters, even those from apparent
2 attorneys, surely warrants prison officials' opening the letters." *Wolff*, 418 U.S. at
3 577.

4 Plaintiff does not allege that Defendant Ewert's actions resulted in actual
5 injury to Plaintiff's access to the court. *See Lewis v. Casey*, 518 U.S. 343, 348–53
6 (1996) (access-to-courts claim requires plaintiff to show that defendant's conduct
7 caused actual injury to a non-frivolous legal claim). As presented, Plaintiff has
8 failed to state a claim upon which relief may be granted regarding his incoming
9 mail on October 20, 2015.

10 Finally, "[v]erbal harassment or abuse . . . is not sufficient to state a
11 constitutional deprivation under 42 U.S.C. § 1983." *Oltarzewski v. Ruggiero*, 830
12 F.2d 136, 139 (9th Cir. 1987). *See Martin v. Sargent*, 780 F.2d 1334, 1338 (8th
13 Cir. 1985) (name calling and verbal threats are not constitutional violations
14 cognizable under section 1983); *McFadden v. Lucas*, 713 F.2d 143, 146 (5th Cir.
15 1983) (mere threatening language and gestures of a custodial officer do not, even if
16 true, amount to constitutional violations); *Shelly v. Johnson*, 684 F. Supp. 941,
17 946-47 (W.D. Mich 1987), *affirmed*, 849 F.2d 228 (6th Cir.) (alleged harassment
18 and threats even with a guard pointing a loaded gun at an inmate did not rise to the
19 level of constitutional violation). The facts alleged by Plaintiff, an allegedly
20

1 intimidating stare, do not support a claim that he was subjected to cruel and
2 unusual punishment in violation of the Eighth Amendment.

3 **OPPORTUNITY TO AMEND OR VOLUNTARILY DISMISS** 4 **COMPLAINT**

5 Unless it is absolutely clear that amendment would be futile, a *pro se* litigant
6 must be given the opportunity to amend his complaint to correct any deficiencies.

7 *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987), *superseded by statute on*
8 *other grounds*, 28 U.S.C. § 1915(e)(2), *as stated in Aktar v. Mesa*, 698 F.3d 1202,
9 1212 (9th Cir. 2012). Plaintiff may submit an amended complaint within **sixty**
10 **(60) days** of the date of this Order which must include sufficient facts to establish
11 federal subject-matter jurisdiction. *See Broughton v. Cutter Laboratories*, 622
12 F.2d 458, 460 (9th Cir. 1980) (citations omitted). To do so, Plaintiff must show
13 persons acting under color of state law violated his constitutionally protected
14 rights.

15 Plaintiff's amended complaint shall consist of a **short** and **plain** statement
16 showing he is entitled to relief. Plaintiff shall allege with specificity the following:

- 17 (1) the names of the persons who caused or personally participated in
causing the alleged deprivation of his constitutional rights,
- 18 (2) the dates on which the conduct of each Defendant allegedly took place,
19 and
- 20 (3) the specific conduct or action Plaintiff alleges is unconstitutional.

1 Furthermore, Plaintiff shall set forth his factual allegations in separate numbered
2 paragraphs. THIS AMENDED COMPLAINT WILL OPERATE AS A
3 COMPLETE SUBSTITUTE FOR (RATHER THAN A MERE SUPPLEMENT
4 TO) THE PRESENT COMPLAINT. Plaintiff shall present his complaint on the
5 form provided by the Court as required by LR 10.1(i), Local Rules for the Eastern
6 District of Washington. The amended complaint must be legibly rewritten or
7 retyped in its entirety, it should be an original and not a copy, it may not
8 incorporate any part of the original complaint by reference, and **IT MUST BE**
9 **CLEARLY LABELED THE “FIRST AMENDED COMPLAINT”** and cause
10 **number 4:16-cv-05122-MKD must be written in the caption.**

11 **PLAINTIFF IS CAUTIONED IF HE FAILS TO AMEND WITHIN 60**
12 **DAYS AS DIRECTED, THE COURT WILL DISMISS THE COMPLAINT**
13 **FOR FAILURE TO STATE A CLAIM UNDER 28 U.S.C. §§ 1915(e)(2) and**
14 **1915A(b)(1).** Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner,
15 who brings three or more civil actions or appeals which are dismissed on grounds
16 they are legally frivolous, malicious, or fail to state a claim, will be precluded from
17 bringing any other civil action or appeal *in forma pauperis* “unless the prisoner is
18 under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

19 If Plaintiff chooses to amend his complaint and the Court finds the amended
20 complaint is frivolous, malicious, or fails to state a claim, the amended complaint

1 will be dismissed pursuant to 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2). Such a
2 dismissal would count as one of the dismissals under 28 U.S.C. § 1915(g).

3 Alternatively, the Court will permit Plaintiff to voluntarily dismiss his
4 Complaint pursuant to Rule 41(a), Federal Rules of Civil Procedure. Plaintiff may
5 submit the attached Motion to Voluntarily Dismiss the Complaint within **sixty (60)**
6 **days** of the date of this Order or risk dismissal under 28 U.S.C. §§ 1915A(b)(1)
7 and 1915(e)(2), and a “strike” under 28 U.S.C. § 1915(g). A voluntary dismissal
8 within this 60 day period will not count as a strike.

9 Plaintiff is still obligated to pay the full filing fee of \$350.00. However, if
10 Plaintiff elects to take a voluntary dismissal within the 60 day period, Plaintiff may
11 simultaneously file a separate Affidavit (or declaration under penalty of perjury)
12 and Motion to waive collection of the remaining balance of the filing fee in this
13 action. The Court will grant such a motion only for good cause shown. In no
14 event will prior partial payments be refunded to Plaintiff.

15 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
16 Order and forward a copy to Plaintiff, along with a form Motion to Voluntarily
17 Dismiss Complaint, **and a civil rights complaint form.**

18 DATED October 28, 2016.

19 s/ Mary K. Dimke
20 Mary K. Dimke
United States Magistrate Judge

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DONALD WHITE, JR.,

Plaintiff,

v.

BRIAN EWERT,

Defendant.

NO: 4:16-cv-05122-MKD

MOTION TO VOLUNTARILY DISMISS
COMPLAINT

Plaintiff DONALD WHITE, JR., requests the Court grant his Motion to Voluntarily Dismiss the Complaint pursuant to Rule 41(a), Federal Rules of Civil Procedure. Plaintiff is proceeding *pro se*; Defendants have not been served in this action.

DATED this ____ day of _____ 2016.

DONALD WHITE, JR