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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MACK A. WEST, Jr., Plaintiff-Appellant, v. F. ULLOA, Correctional Officer, individual and official capacity; et al., Defendants-Appellees.	No. 20-56167 D.C. No. 2:17-cv-04892-VBF-KES MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Valerie Baker Fairbank, District Judge, Presiding

Submitted December 5, 2022**
San Francisco, California

Before: BADE, LEE, and KOH, Circuit Judges.

Mack A. West, Jr., a California state prisoner proceeding pro se, appeals the district court's judgment dismissing his 42 U.S.C. § 1983 action against twenty-eight defendants alleging violations of his rights under the First and Eighth

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Amendments. We have jurisdiction under 28 U.S.C. § 1291. We review the district court's dismissal for failure to state a claim de novo and its denial of leave to amend for abuse of discretion. *Chappel v. Lab'y Corp. of Am.*, 232 F.3d 719, 723, 725–26 (9th Cir. 2000). We affirm.

The district court properly dismissed West's First Amendment retaliation claims against Correctional Officers Ulloa and Torres because he failed to plausibly allege that they took adverse actions or retaliated against him, or that their actions chilled the exercise of his First Amendment rights. *See Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005) (setting forth the elements of a First Amendment retaliation claim in "the prison context"); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (a plaintiff must allege facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

The district court properly dismissed West's First Amendment retaliation claims against Warden Asuncion and Grievance Appeals Coordinators Barnes, Curiel, and Estrada, premised on their responses to his grievances, because West made only speculative allegations that they retaliated against him. *See Wood v. Yordy*, 753 F.3d 899, 905 (9th Cir. 2014) ("We have repeatedly held that mere speculation that defendants acted out of retaliation is insufficient.").

The district court properly dismissed West's First Amendment retaliation

claims alleging that Chief Deputy Warden Cano, Correctional Counselor Rhodes, and Captain Freeman created a document that included false information about West and interfered with West's grievance responses because West failed to plausibly allege that they took adverse actions or retaliated against him, or that their actions chilled the exercise of his First Amendment rights. *See Rhodes*, 408 F.3d at 567–68.

The district court properly dismissed West's First Amendment retaliation claims against Lieutenant Reaume, which alleged that Reaume placed West in administrative segregation as retaliation and obstructed an inquiry into one of West's grievances. However, West conceded that he was transferred to administrative segregation because a weapon was found in his cell. Moreover, West did not plausibly allege an adverse action, that Reaume retaliated against him, or that Reaume's actions lacked a legitimate correctional goal. *See id.*; *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995) ("Legitimate goals of a correctional institution include the preservation of internal order and discipline and the maintenance of institutional security.").

Because West failed to plausibly allege that Correctional Officers Gray and Hogan took adverse actions or retaliated against him, the district court properly dismissed West's claims alleging that Gray and Hogan fabricated inmate communications as excuses for retaliatory cell searches. *See Rhodes*, 408 F.3d at

567–68.

The district court properly dismissed West's Eighth Amendment claim alleging that other defendants failed to protect him from Ulloa and Torres because West failed to plausibly allege that any defendant knew that Ulloa and Torres posed a substantial risk of serious harm to him. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (setting forth the elements of an Eighth Amendment claim of deliberate indifference).

The district court properly dismissed West's Eighth Amendment claim alleging that Ulloa, Torres, Cano, and Rhodes failed to protect him from other inmates by creating a document that included false information about West because West did not plausibly allege that they knew of any substantial risk of serious harm. *See id.*

The district court properly dismissed West's Eighth Amendment claim alleging that Ulloa and Torres failed to protect him from himself when they allegedly planted weapons in his cell, slid him a small piece of metal, and taunted him because he did not allege facts showing that they had any reason to know that he was at serious risk of suicide. *See id.*; *Conn v. City of Reno*, 591 F.3d 1081, 1102 (9th Cir. 2010), *vacated*, 563 U.S. 915 (2011), *opinion reinstated in relevant part*, 658 F.3d 897 (9th Cir. 2011) (discussing deliberate indifference in the context of a risk of suicide). Moreover, a verbal taunt, without more, would not rise to the

level of an Eighth Amendment violation. *See Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (per curiam).

The district court properly dismissed West's Eighth Amendment claims for deliberate indifference to his mental health needs because he failed to allege that medical providers Leduc, Garret, Paz, and Ghassemi provided care that was medically unacceptable under the circumstances or chosen in conscious disregard of an excessive risk to his health. *See Toguchi v. Chung*, 391 F.3d 1051, 1058–60 (9th Cir. 2004) (explaining that a prisoner's difference of opinion concerning the appropriate course of treatment does not state a claim for medical deliberate indifference unless the prisoner can show "that the chosen course of treatment 'was medically unacceptable under the circumstances,' and was chosen 'in conscious disregard of an excessive risk to the prisoner's health'" (citation omitted)).

The district court did not abuse its discretion in dismissing without leave to amend because amendment would be futile. *See Chappel*, 232 F.3d at 725–26 (explaining that a district court properly denies leave to amend when it would be futile); *Fid. Fin. Corp. v. Fed. Home Loan Bank of San Francisco*, 792 F.2d 1432, 1438 (9th Cir. 1986) ("The district court's discretion to deny leave to amend is particularly broad where the court has already given the plaintiff an opportunity to amend his complaint.").

The district court did not abuse its discretion in referencing documents

outside the record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001) (explaining that on a Rule 12(b) motion to dismiss, a court may "take judicial notice of *undisputed* matters of public record"). To the extent that the district court erred by referencing testimony in West's prior criminal trial, we find no reversible error because the district court based its decision not on information outside the record, but on deficiencies in the amended complaint. *See La. Mun. Police Emps.' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1063–64 (9th Cir. 2016) (finding no reversible error when "even if the district court's reference to extrinsic materials were excised, its analysis would still be sufficient to uphold its conclusions.").

West's requests for appointment of counsel on appeal (Docket Entry Nos. 55 and 62) and request for judicial notice (Docket Entry No. 58) are DENIED.

AFFIRMED.