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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

David Torrez,)	No. CV 09-0957-PHX-MHM (MHB)
Plaintiff,)	ORDER
vs.)	
Corrections Corp. of America, et al.,)	
Defendants.)	

Plaintiff David Torrez, a California inmate who is confined in the La Palma Correctional Center, a Corrections Corporation of America (CCA) facility in Eloy, Arizona, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983, which the Court dismissed with leave to amend. (Doc.# 1, 4.)¹ Plaintiff filed a First Amended Complaint, which the Court dismissed for failure to state a claim with leave to amend. (Doc.# 8, 10.) Plaintiff has filed a Second Amended Complaint. (Doc.# 11.) Because Plaintiff has failed to cure previously cited deficiencies and otherwise fails to state a claim, the Second Amended Complaint and this action will be dismissed.

I. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may

¹ “Doc.#” refers to the docket number of filings in this case.

1 be granted, or that seek monetary relief from a defendant who is immune from such relief.
2 28 U.S.C. § 1915A(b)(1), (2).

3 A pleading must contain a “short and plain statement of the claim *showing* that the
4 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not
5 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
6 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
7 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
8 statements, do not suffice.” Id. Further, “a complaint must contain sufficient factual matter,
9 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id. (quoting Bell
10 Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible “when the
11 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
12 defendant is liable for the misconduct alleged.” Id. “Determining whether a complaint states
13 a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court
14 to draw on its judicial experience and common sense.” Id. at 1950. Thus, although a
15 plaintiff’s specific factual allegations may be consistent with a constitutional claim, a court
16 must assess whether there are other “more likely explanations” for a defendant’s conduct.
17 Id. at 1951.

18 If the Court determines that a pleading could be cured by the allegation of other facts,
19 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the
20 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). Leave to
21 amend, however, need not be given if a complaint as amended is subject to dismissal. Moore
22 v. Kayport Package Exp., Inc., 885 F.2d 531, 538 (9th Cir. 1989). The Court’s discretion to
23 deny or grant leave to amend is particularly broad where a plaintiff has previously been
24 permitted to amend his complaint. See Sisseton-Wahpeton Sioux Tribe v. United States, 90
25 F.3d 351, 355 (9th Cir. 1996). Failure to cure deficiencies by previous amendments is one
26 of the factors to be considered in deciding whether justice requires granting leave to amend.
27 Moore, 885 F.2d at 538. Plaintiff’s Second Amended Complaint fails to cure cited
28 deficiencies and otherwise fails to state a claim.

1 **II. Second Amended Complaint**

2 Plaintiff alleges one count for violation of privacy. He sues CCA and the following
3 La Palma Correctional Center (LPCC) employees: Unit Manager Meier; Security Lieutenant
4 Johnson; an Unknown Male Staff member; and an Unknown Nurse Practitioner.² He seeks
5 injunctive, compensatory, and punitive relief.

6 Plaintiff's claims are based on the following allegations: Plaintiff was tested for
7 tuberculosis by the California Department of Corrections and Rehabilitation (CDCR) in April
8 2008. In July 2008, Plaintiff was transferred to the Florence Correctional Center, a CCA
9 facility, in Florence, Arizona.

10 On September 13, 2008, Plaintiff was transferred to LPCC. On arrival at LPCC,
11 Plaintiff and about 30 other inmates were taken to the medical department, where clinic staff
12 gave them an Intake Teaching Packet (ITP), which they were to read and acknowledge with
13 their signature. A few seconds after receiving the ITP, Defendants Meier, Johnson, and the
14 Unknown Male Staff-member entered the clinic and took a "security stance" at the door: legs
15 apart and arms crossed. Meier announced that any inmate who refused a tuberculosis test
16 would be strapped down and forced to be tested because that was the "CCA way." (Doc.#
17 8 at 3A.) She also said that it was CCA policy to test an inmate for tuberculosis every time
18 an inmate was relocated to a new facility. (Id.) Several inmates objected on the basis that
19 they had already recently been tested by CDCR or that they took medications that caused a
20 false positive, which were reflected in their medical files. The discussion between inmates
21 and staff became more acrimonious. One inmate asserted that the ITP provided that they had
22 the right to refuse medical treatment, which he construed to include tuberculosis testing.
23 Meier told the inmates that anyone who refused the test would be strapped down, tested, and
24 then sent to the "hole." (Id. at 3B.) Johnson told the inmates that the test posed no risk to
25 the inmates and that there would be no exceptions to the test. The Unknown Male Staff-
26 member added that additional security would be called if necessary to complete testing but

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28 ² Plaintiff does not allege any claim against the male staff-member. (Doc.# 11 at 3C-3D.)

1 that the inmates would regret it if additional security was called. At this juncture, the inmates
2 were angry and Plaintiff feared they would riot and that he would be unable to protect
3 himself due to a bladder infection. Meier reiterated that everyone had to be tested and
4 threatened to call in the Special Operation Response Team (SORT), if necessary. Meier and
5 the other officers retreated into the clinic and an inmate kicked a chair towards the door.

6 A few minutes later, an officer came out of the clinic and told Plaintiff that he was to
7 go first. Plaintiff objected on the grounds that he had been unable to read the ITP because
8 he did not have his eyeglasses. The officer required Plaintiff to go in. After taking his
9 temperature and blood pressure, Plaintiff submitted to the PPD test despite his objections,
10 while Meier and Johnson observed.

11 **III. Failure to State a Claim**

12 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
13 conduct about which he complains was committed by a person acting under the color of state
14 law and (2) the conduct deprived him of a federal constitutional or statutory right. Wood v.
15 Ostrander, 879 F.2d 583, 587 (9th Cir. 1989). In addition, to state a valid constitutional
16 claim, a plaintiff must allege that he suffered a specific injury as a result of the conduct of
17 a particular defendant and he must allege an affirmative link between the injury and the
18 conduct of that defendant. Rizzo v. Goode, 423 U.S. 362, 371-72, 377 (1976).

19 As in his previous complaints, Plaintiff again alleges that his Fourth Amendment
20 privacy rights were violated. The Court previously stated:

21 Plaintiff alleges that CCA maintained a policy subjecting inmates to
22 tuberculosis testing whenever they are transferred to a new facility and that
23 Plaintiff was subjected to such testing, when unnecessary, over his objections.
As a result, Plaintiff suffered a needle prick and contends that he suffered from
emotional distress and body aches.

24 Plaintiff alleges that Meier and Johnson remained present over
25 Plaintiff's objection as Plaintiff disclosed confidential medical information
with medical staff, which he contends violated his privacy rights. Plaintiff
26 alleges that Unknown Medical Staff administered the tuberculosis test without
27 Plaintiff's consent and despite his express objections that the test violated
CCA, CDCR, and ITP policies. Plaintiff alleges that the administration of the
test caused him pain when the needle was inserted and stress causing neck and
back pain and insomnia.

28 "The applicability of the Fourth Amendment turns on whether the
person invoking its protection can claim a "justifiable," a "reasonable," or a

1 “legitimate expectation of privacy” that has been “invaded by government
2 action.” Hudson v. Palmer, 468 U.S. 517, 525 (1984) (quotation omitted); see
3 also Bell v. Wolfish, 441 U.S. 520, 557 (1979). “A right of privacy in
4 traditional Fourth Amendment terms is fundamentally incompatible with the
5 close and continual surveillance of inmates and their cells required to ensure
6 institutional security and internal order.” Hudson, 468 U.S. at 527-28.
7 Furthermore, any restriction on an inmate’s privacy interests is justified to the
8 extent that it is “reasonably related to legitimate penological interests.” See
9 Turner v. Safley, 482 U.S. 78, 89 (1987). Nevertheless, inmates have a “right
10 to bodily privacy.” Sepulveda v. Ramirez, 967 F.2d 1413, 1415 (9th Cir.
11 1992); see Hydrick v. Hunter, 500 F.3d 978, 1000 (9th Cir. 2007). The state,
12 however, may restrict this right “to the extent necessary to further the
13 correctional system’s legitimate goals and policies.” Grummett v. Rushen, 779
14 F.2d 491, 493 (9th Cir. 1985). Preventing disease and protecting the health of
15 inmates are legitimate penological goals. See, e.g., Thompson v. City of Los
16 Angeles, 885 F.2d 1439, 1447 (9th Cir.1989). Further, tuberculosis is
17 recognized as a highly contagious disease in prison populations. Lee v.
18 Armontrout, 991 F.2d 487, 489 (8th Cir. 1993). The plaintiff “bears the
19 burden of pleading and proving the absence of legitimate correctional goals for
20 the conduct of which he complains.” Bruce v. Ylst, 351 F.3d 1283, 1289 (9th
21 Cir. 2003) (citations omitted).

22 Plaintiff fails to allege any facts to support that CCA maintained a
23 policy that resulted in a violation of Plaintiff’s privacy rights. Indeed, he states
24 that Meier and Johnson remained present during his interview by medical staff
25 in contravention of CCA policy and contracts with the CDCR. Plaintiff also
26 fails to state a claim against Meier or Johnson based on their presence while
27 he discussed medical information prior to administration of the tuberculosis
28 test. Plaintiff fails to allege facts to support that Meier and Johnson were
present for any reasons that were not reasonably related to legitimate
penological interests: to ensure that Plaintiff complied with testing. Plaintiff
otherwise fails to allege facts to support that he had an expectation of privacy
in the administration of a tuberculosis test. Plaintiff also fails to allege facts
to support that the Unknown Medical Staff who administered the tuberculosis
test in any way violated Plaintiff’s reasonable expectations of privacy in
connection with the tuberculosis test. For these reasons, Plaintiff fails to state
a claim for violation of his privacy rights in Count I.

20 (Doc.# 10 at 5-6.)

21 In the Second Amended Complaint, Plaintiff alleges that CCA implemented a policy
22 that required “unwarranted medical testing,” which contradicted the terms of CCA’s contract
23 with the California Department of Corrections and Rehabilitation. He contends that as a
24 result, he was given a tuberculosis skin test over his objections after he was transferred to
25 LPCC and under duress. Plaintiff alleges that Meier and Johnson “intruded” into the clinic
26 area and he was “forced to reveal private medical information” in their presence. (Doc.# 11
27 at 3C.) He alleges that the unknown male medical staff-member administered the
28 tuberculosis test despite Plaintiff’s objection. Plaintiff asserts that administration of the skin

1 test violated “state law.”³ As in his previous complaints, Plaintiff fails to set forth facts to
2 support that he had a reasonable expectation of privacy under the circumstances or that any
3 Defendant violated his Fourth Amendment rights. Accordingly, Plaintiff fails to state a
4 claim.

5 **Conclusion**

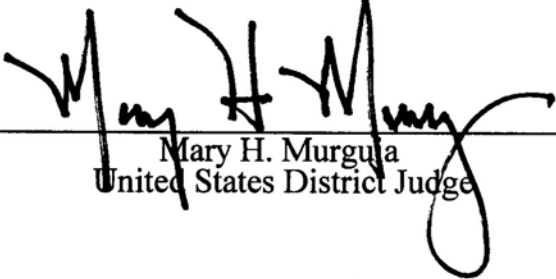
6 Plaintiff was previously warned about the deficiencies in his complaints and was
7 afforded opportunities to cure those shortcomings. (Doc.# 6, 10.) Plaintiff has not cured the
8 cited deficiencies in his Second Amended Complaint or otherwise stated a claim for relief.
9 Accordingly, the Second Amended Complaint and this action will be dismissed.

10 **IT IS ORDERED:**

11 (1) The Second Amended Complaint (doc.# 11) is **dismissed** for failure to state
12 a claim.

13 (2) The Clerk of Court must enter a judgment of dismissal of this action with
14 prejudice that states that the dismissal counts as a “strike” under 28 U.S.C. § 1915(g).

15 DATED this 16th day of December, 2009.

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19 Mary H. Murgula
20 United States District Judge
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27 ³ Plaintiff does not indicate whether he is referring to Arizona, California, or other
28 state law. Plaintiff expressly filed this case under 42 U.S.C. § 1983, i.e., based on federal
question subject matter jurisdiction.