

1 on Plaintiff by other inmates. The first occurred on July 5, 2000, and the second on July 10, 2000.

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3 In the order granting Plaintiff leave to file a first amended complaint, the Court noted that
4 the original complaint stated a claim for relief as to Defendant Johnson and Defendant Kellams for
5 a violation of the Eighth Amendment.¹ Plaintiff was specifically advised that he failed to state a
6 claim against the supervisory defendants, and that his claims for failure to train and retaliation also
7 failed.

8 In the order screening the first amended complaint, Plaintiff largely re-stated the allegations
9 of the original complaint. The Court specifically noted that “Plaintiff has stated a claim for relief
10 against Defendant Garcia for excessive force, and Abbati-Harlow for deliberate indifference.
11 Plaintiff failed to correct the identified deficiencies as to the remaining defendants. Plaintiff sought
12 leave to file a second amended complaint, which was granted on February 3, 2010.

13 **II. Screening Requirement**

14 The Court is required to screen complaints brought by prisoners seeking relief against a
15 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
16 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
17 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
18 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
19 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
20 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a
21 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

22 “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited
23 exceptions,” none of which applies to section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S.
24 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain “a short and
25 plain statement of the claim showing that the pleader is entitled to relief . . .” Fed. R. Civ. P. 8(a).
26 “Such a statement must simply give the defendant fair notice of what the plaintiff’s claim is and the

27
28 ¹Plaintiff does not name Kellams as a defendant in the March 23, 2010, second amended complaint now
before the Court.

1 grounds upon which it rests.” Swierkiewicz, 534 U.S. at 512. However, “the liberal pleading
2 standard . . . applies only to a plaintiff’s factual allegations.” Neitze v. Williams, 490 U.S. 319, 330
3 n.9 (1989). “[A] liberal interpretation of a civil rights complaint may not supply essential elements
4 of the claim that were not initially pled.” Bruns v. Nat’l Credit Union Admin., 122 F.3d 1251, 1257
5 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982)).

6 **III. Plaintiff’s Claims**

7 **A. Eighth Amendment**

8 The Eighth Amendment protects prisoners from inhumane methods of punishment and from
9 inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006).
10 Extreme deprivations are required to make out a conditions of confinement claim, and only those
11 deprivations denying the minimal civilized measure of life’s necessities are sufficiently grave to form
12 the basis of an Eighth Amendment violation. Hudson v. McMillian, 503 U.S. 1, 9, 112 S.Ct. 995
13 (1992) (citations and quotations omitted). In order to state a claim for violation of the Eighth
14 Amendment, the plaintiff must allege facts sufficient to support a claim that prison officials knew
15 of and disregarded a substantial risk of serious harm to the plaintiff. e.g., Farmer v. Brennan, 511
16 U.S. 825,847, 114 S.Ct. 1970 (1994); Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).

17 Plaintiff alleges that Defendants Hough, Garcia and White failed to protect Plaintiff, who was
18 in protective custody. As a result, Plaintiff claims he suffered physical injury by inmates Pates and
19 Fuller. Plaintiff has stated a claim for relief as to Defendants Hough, Garcia and White for failure
20 to protect Plaintiff in violation of the Eighth Amendment.

21 **B. Supervisory Defendants**

22 As to Defendants Alameida, Adams, Duncan, March, Johnson, Abbati-Harlow, Akin and
23 Ramirez, Plaintiff makes identical allegations. Plaintiff alleges that these defendants failed to ensure
24 that their “agents/officers/employees” were properly trained to protect a protective custody inmate.

25 Plaintiff has been advised that he may not hold supervisory defendants liable on a theory of
26 *respondeat superior*. Liability under section 1983 may not be based on *respondeat superior* but
27 only on the supervisor’s own wrongful acts or omissions. Monell v. Dept. of Soc. Servs., 436 U.S.
28 658, 694 n.58 (1979). Supervisors can be held liable for: 1) their own culpable action or inaction

1 in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional
2 deprivation of which a complaint is made; or 3) conduct that showed a reckless or callous
3 indifference to the rights of others. Cunningham v. Gates, 229 F.3d 1271, 1292 (9th Cir. 2000). The
4 supervisor’s action or inaction must be “affirmatively linked” to the deprivation of Plaintiff’s federal
5 rights. Rizzo v. Goode, 423 U.S. 362, 371 (1976).

6 Plaintiff may hold a supervisory defendant liable based on an unconstitutional policy if he
7 alleges facts indicating that the defendant “implemented a policy so deficient that the policy ‘itself
8 is a repudiation of constitutional rights’ and is ‘the moving force of the constitutional violation.’”
9 Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989)(internal citations omitted); Taylor v. List, 880
10 F.2d 1040, 1045 (9th Cir. 1989). In providing guidance to determine whether a particular course
11 of action was taken pursuant to official policy, the Supreme Court has held that

12 To be sure, ‘official policy’ often refers to formal rules or
13 understandings - often but not always committed to writing - that are
14 intended to, and do, establish fixed plans of action to be followed
15 under similar circumstances consistently over time. That was the
16 case in *Monell* itself, which involved a written rule requiring pregnant
17 employees to take unpaid leaves of absence before such leaves were
18 medically necessary. However . . . If the decision to adopt that
19 particular course of action is properly made by that government’s
20 authorized decision makers, it surely represents an act of official
21 government ‘policy’ as that term is commonly understood.

22 Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986).

23 The Court advised Plaintiff that in the original complaint and first amended complaint, he
24 failed to allege facts indicating that the supervisory defendants personally participated in the
25 deprivation at issue. In the second amended complaint, Plaintiff has alleged no new facts as to the
26 supervisory defendants. Plaintiff seeks to hold the supervisory defendants liable based on his
27 conclusory allegation that they acted pursuant to a policy. Plaintiff fails to identify any particular
28 policy. Plaintiff fails to allege any facts that affirmatively link the failure to protect Plaintiff to any
decision by a policymaker to adopt that course of action. Plaintiff has not alleged any facts
indicating that the failure to train employees in a particular respect may amount to a policy or
practice of failing to provide employees with adequate training. Plaintiff may not simply list
supervisory defendants and claim that he was injured because of policy or practice.

1 Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of the
2 cause of action, supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 129
3 S.Ct. 1937, 1949 (2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). “Plaintiff
4 must set forth sufficient factual matter accepted as true, to ‘state a claim that is plausible on its
5 face.’” Iqbal, 129 S.Ct. at 1949, quoting Twombly, 550 U.S. at 555. While factual allegations are
6 accepted as true, legal conclusions are not. Iqbal, 129 S.Ct. at 1949.

7 Although accepted as true, “[f]actual allegations must be [sufficient] to raise a right to relief
8 above the speculative level.” Twombly, 550 U.S. at 555 (citations omitted). A plaintiff must set
9 forth “the grounds of his entitlement to relief,” which “requires more than labels and conclusions,
10 and a formulaic recitation of the elements of a cause of action.” Id. at 555-56 (internal quotation
11 marks and citations omitted). To adequately state a claim against a defendant, a plaintiff must set
12 forth the legal and factual basis for his claim. Plaintiff has failed to do as to the supervisory
13 defendants. The supervisory defendants should therefore be dismissed.

14 **C. Failure to Train**

15 In the order granting Plaintiff leave to file a first amended complaint, he was advised that in
16 City of Canton v. Harris, 489 U.S. 378 (1989), the Supreme Court held that, under certain
17 circumstances, a municipality may be held liable based on the failure to train its employees. This
18 Court finds no authority for the extension of City of Canton and its progeny to state prison officials
19 being sued in their personal capacity. It appears to this Court, following a review of relevant case
20 law, that the cases involving failure to train are limited to suits against city and county entities.
21 This claim should therefore be dismissed.

22 **IV. Conclusion and Recommendation**

23 The Court finds that Plaintiff’s second amended complaint states a claim for relief as to
24 Defendants Hough, Garcia and White for failure to protect in violation of the Eighth Amendment.
25 Plaintiff fails to state a claim against the supervisory defendants and fails to state a claim for failure
26 to train. Plaintiff has amended twice, twice pursuant to orders of this Court, but has not cured the
27 deficiencies previously identified by the Court. Accordingly, the Court recommends that further
28 leave to amend not be granted, and that this action be ordered to proceed only on those claims

1 identified herein as cognizable. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). **Plaintiff**
2 **is specifically cautioned that he may not further amend the complaint without leave of court.**

3 Should Plaintiff file a third amended complaint, it will be stricken.

4 For the reasons set forth herein, the Court HEREBY RECOMMENDS that:

- 5 1. This action proceed against on the March 23, 2010, second amended complaint
6 against Defendants Hough, Garcia and White for failure to protect in violation of the
7 Eighth Amendment.
- 8 2. Plaintiff's supervisory claims and failure to protect claims be dismissed with
9 prejudice, for failure to state a claim upon which relief may be granted under section
10 1983;
- 11 3. Defendants Alamedia, Adams, Duncan, March, Johnson, Abbati-Harlow, Akin and
12 Ramirez be dismissed.

13 These Findings and Recommendations will be submitted to the United States District Judge
14 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30)**
15 **days** after being served with these Findings and Recommendations, Plaintiff may file written
16 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
17 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
18 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d
19 1153 (9th Cir. 1991).

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21 IT IS SO ORDERED.

22 **Dated: June 29, 2010**

/s/ Gary S. Austin
23 UNITED STATES MAGISTRATE JUDGE
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