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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOHN I. MCALLISTER,

Plaintiff,

v.

J E GUNJA, et al.,

Defendants.

CASE NO. 1:06-cv-00082-OWW-WMW PC

ORDER REQUIRING PLAINTIFF TO EITHER
FILE AMENDED COMPLAINT OR NOTIFY
COURT OF WILLINGNESS TO PROCEED
ONLY ON CLAIMS FOUND TO BE
COGNIZABLE

(Doc. 1)

RESPONSE DUE WITHIN THIRTY DAYS

Plaintiff John I. McAllister (“Plaintiff”) is a federal prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971), which provides a remedy for violations of civil rights by federal actors.

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 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

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1 “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited
2 exceptions,” none of which applies to section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S.
3 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain “a short and
4 plain statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. P. 8(a).
5 “Such a statement must simply give the defendant fair notice of what the plaintiff’s claim is and the
6 grounds upon which it rests.” Swierkiewicz, 534 U.S. at 512. However, “the liberal pleading
7 standard . . . applies only to a plaintiff’s factual allegations.” Neitze v. Williams, 490 U.S. 319, 330
8 n.9 (1989). “[A] liberal interpretation of a civil rights complaint may not supply essential elements
9 of the claim that were not initially pled.” Bruns v. Nat’l Credit Union Admin., 122 F.3d 1251, 1257
10 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982)).

11 **II. Plaintiff’s Claims**

12 **A. Summary of Complaint**

13 Plaintiff was incarcerated at the United States Penitentiary in Atwater, California (“Atwater”)
14 at the time the events in his complaint occurred. Plaintiff names the following parties as defendants:

15 J. E. Gunja - Western Regional Director of the division of the Federal Bureau of Prisons

16 Paul M. Schultz - Warden

17 A. Booth - Associate Warden of Operations

18 C. Gant - Associate Warden of Industries, Education and Recreation

19 J. Jusino - Director of Recreation

20 L. Smith - Safety Officer

21 L. Martin - manager of CMS

22 McCarty - Shop-Foreman of CMS

23 Gordon - Work Crew Correctional Officer

24 R. Boister - Work Crew Correctional Officer

25 R. Brown - Case Manager

26 Federal Bureau of Prisons

27 The incident described in the complaint took place on February 14, 2004. Plaintiff was
28 walking down a walkway near the prison’s softball field. Plaintiff was struck by a softball that flew

1 over the fence and into the walkway. The impact of the softball caused Plaintiff's sunglasses to
2 shatter causing serious injuries to Plaintiff's eye. Plaintiff was knocked down on impact and was
3 unconscious for a few minutes.

4 Officer Scott (not named as a defendant) was the first officer on the scene and arrived after
5 about five minutes. Another five minutes later, a prisoner brought a wheel chair to the scene and
6 Plaintiff was taken to the prison hospital by Officer Scott. It took approximately 15 minutes for staff
7 to get Plaintiff to the prison hospital. After arriving at the hospital, it took several hours to close the
8 laceration in Plaintiff's eye. Plaintiff was also seen by a doctor outside the prison to receive more
9 stitches.

10 Plaintiff was prescribed pain medication and eye drops from the outside ophthalmologist,
11 Doctor Kenneth R. Grossman (not named as a defendant). Plaintiff did not receive the prescribed
12 medication that day. The next day, February 13, 2004, Plaintiff attempted to pick up his prescribed
13 medication but was told that they did not have it that day. Plaintiff returned with Lt. Spencer (not
14 named as a defendant) but was still unable to pick up his prescribed medication. On February 20,
15 2004, Plaintiff returned to the medical pill line with Lt. Spencer but only received one day's worth
16 of pain medication because the prescription had run out.

17 On February 27, 2004, Plaintiff had an appointment with an unnamed doctor. The doctor
18 informed Plaintiff that the impact from the softball had caused permanent blindness in his eye.

19 Plaintiff spoke to Defendant Warden Schultz about his injury and about the hazardous
20 condition around the softball field but alleges Defendant Schultz "didn't care about that nor did he
21 want to hear about it."

22 Plaintiff filed a tort claim through the prison's administrative remedy procedures which
23 Plaintiff deemed inadequate. Plaintiff alleges that he had worked for two years as a repairman on
24 washers and dryers and other equipment. At an unspecified later date, Plaintiff was transferred to
25 the electric shop as an electrician. In April 2005, Plaintiff alleges he was fired from that job in
26 retaliation for filing the tort claim for his injury through the prison administrative remedy procedures.

27 In June 2005, Plaintiff was transferred to the Federal Correctional Institution in Terre Haute,
28 Indiana. Plaintiff alleges "Defendants were without just cause to transfer [Plaintiff] out of the

1 Western Region. Defendants knew that [Plaintiff] would not receive proper medical care/treatment
2 for his medical problems.” Plaintiff alleges the transfer was to prevent Plaintiff from filing this
3 action.

4 Plaintiff seeks monetary damages for the following causes of action: 1) Conditions of
5 confinement in violation of the Eighth Amendment against J. E. Gunja, Paul M. Schultz, A. Booth,
6 C. Gant, J. Jusino, L Smith, L. Martin and the Federal Bureau of Prisons.¹ 2) Denial of Due Process
7 and Equal Protection against all named defendants. 3) Retaliation for exercising rights under the
8 First Amendment by filing a complaint through the administrative remedy procedures against
9 Defendants Martin, McCarty, Gordon, Boister and Brown. 4) Civil and Criminal Conspiracy in
10 violation of 42 U.S.C. § 1985(A)(3)(4) and 18 U.S.C. §§ 241-242 against Defendants J. E. Gunja,
11 Paul M. Schultz, A Booth, C. Gant, J. Jusino, L. Smith, L. Martin, McCarty, Gordon, R. Boister and
12 R. Brown. 5) Violation of 42 U.S.C. § 1986 against all named defendants

13 **B. Plaintiff’s Substantive Claims**

14 **1. Conditions of Confinement Claim**

15 Plaintiff’s complaint alleges that the arrangement of the softball field and the walkway posed
16 a threat to Plaintiff’s safety, resulting in an unconstitutionally unsafe condition of confinement in
17 violation of the Eighth Amendment. Two requirements must be met to establish a violation of the
18 Eighth Amendment by a prison official: First, the deprivation must be sufficiently serious - one that
19 “result[s] in the denial of ‘the minimal civilized measure of life’s necessities’”. Farmer v. Brennan,
20 511 U.S. 825, 834 (1994). Second, “[t]o violate the Cruel and Unusual Punishments Clause, a prison
21 official must have a ‘sufficiently culpable state of mind.’” Id. “In prison-conditions cases that state
22 of mind is one of ‘deliberate indifference’ to inmate health or safety.” Id. (citing Wilson v. Seiter,
23 501 U.S. 294, 302-303 (1991)).

24 Plaintiff’s complaint states a cognizable claim for violation of the Eighth Amendment.
25 “Persons involuntarily confined by the state have a constitutional right to safe conditions of
26 confinement.” Hoptowit v. Spellman, 753 F.3d 779, 784 (9th Cir. 1985) (citing Youngberg v.

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28 ¹Plaintiff’s “First Claim for Relief” and “Second Claim for Relief” appear to allege the same cause of action
for deliberate indifference to threats to his safety in violation of the Eighth Amendment.

1 Romeo, 457 U.S. 307, 315-16 (1982); Santana v. Collazo, 714 F.2d 1172 (1st Cir. 1983)). “[T]he
2 Eighth Amendment entitles inmates in a penal institution to an adequate level of personal safety.”
3 Id. (citing Santana, 714 F.2d at 1183; Estelle v. Gamble, 429 U.S. 97, 103-104 (1976)). Plaintiff
4 alleges that the arrangement of the softball field and the walkway at the prison creates and unsafe
5 environment that resulted in a serious injury to Plaintiff’s eye. As for the subjective requirement for
6 establishing Eighth Amendment violations, Plaintiff has alleged he specifically made complaints
7 regarding the safety conditions of the prison softball field/walkway and was ignored, thereby
8 demonstrating that defendants were deliberately indifferent to the prison conditions.

9 **2. Fifth Amendment Due Process/Equal Protection Claims**

10 Plaintiff’s complaint alleges a violation of the Equal Protection Clause. The Fifth
11 Amendment of the United States Constitution forbids the federal government from carrying out
12 discrimination that is so unjustifiable as to be violative of due process. Weinberger v Wiesenfeld,
13 420 U.S. 636, 637 n.2 (1975). Although the Fifth Amendment contains no equal protection clause,
14 the approach to Fifth Amendment discrimination claims is “precisely the same as the approach to
15 equal protection claims under the Fourteenth Amendment.” Id. (citing Schlesinger v. Ballard, 419
16 U.S. 498 (1975)); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974); Frontiero v. Richardson, 411
17 U.S. 677 (1973); but see Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (“there may be
18 overriding national interests which justify selective federal legislation that would be unacceptable
19 for an individual State”).

20 Equal protection claims arise when a charge is made that similarly situated individuals are
21 treated differently without a rational relationship to a legitimate state purpose. See San Antonio
22 School District v. Rodriguez, 411 U.S. 1 (1972). In order to state a § 1983 claim based on a
23 violation of the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must show that
24 defendants acted with intentional discrimination against plaintiff or against a class of inmates which
25 included plaintiff. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (equal protection
26 claims may be brought by a “class of one”); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740
27 (9th Cir. 2000); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998); Federal Deposit Ins.
28 Corp. v. Henderson, 940 F.2d 465, 471 (9th Cir. 1991); Lowe v. City of Monrovia, 775 F.2d 998,

1 1010 (9th Cir. 1985). “A plaintiff must allege facts, not simply conclusions, that show that an
2 individual was personally involved in the deprivation of his civil rights.” Barren, 152 F.3d at 1194.
3 Since Plaintiff’s complaint fails to allege that he was treated differently than anyone else, he fails to
4 allege a cognizable claim for a violation of equal protection.

5 Plaintiff also alleges that the unsafe conditions at the prison violate the Due Process Clause
6 of the Fifth Amendment of the U.S. Constitution. Plaintiff’s alleged claim is an Eighth Amendment
7 claim, not a Due Process claim. “Where a particular amendment provides an explicit textual source
8 of constitutional protection against a particular sort of government behavior, that Amendment, not
9 the more generalized notion of substantive due process, must be the guide for analyzing a plaintiff’s
10 claims.” Patel v. Penman, 103 F.3d 868, 874 (9th Cir. 1996) (citations, internal quotations, and
11 brackets omitted); see also County of Sacramento v. Lewis, 523 U.S. 833, 841-42 (1998).

12 **3. Retaliation Claim**

13 Plaintiff alleges that he was fired from his job and transferred from Atwater in retaliation for
14 filing claims for his injury through the prison’s administrative appeals process. Allegations of
15 retaliation against a prisoner’s First Amendment rights to speech or to petition the government may
16 support a section 1983 claim. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985); see also
17 Valandingham v. Bojorquez, 866 F.2d 1135 (9th Cir. 1989); Pratt v. Rowland, 65 F.3d 802, 807 (9th
18 Cir. 1995). “Within the prison context, a viable claim of First Amendment retaliation entails five
19 basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2)
20 because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise
21 of his First Amendment rights, and (5) the action did not reasonably advance a legitimate
22 correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

23 Plaintiff alleges that defendants fired Plaintiff from his job as an electrician and transferred
24 him from Atwater because of Plaintiff’s administrative appeals. Therefore, Plaintiff’s complaint
25 states a cognizable claim for retaliation for Plaintiff’s exercise of his First Amendment rights.

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1 **4. 42 U.S.C. § 1985(A)(3)(4)² and 18 U.S.C. §§ 241-242 Claims**

2 Plaintiff alleges that defendants conspired to deprive Plaintiff of his constitutional rights in
3 violation of 42 U.S.C. § 1985(3) and 18 U.S.C. §§ 241-242. 42 U.S.C. §1985(3) provides a cause
4 of action against persons who enter a conspiracy to deprive any person of the equal protection of the
5 laws. “The language requiring intent to deprive of *equal* protection . . . means that there must be
6 some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the
7 conspirators’ action.” Griffen v. Breckenridge, 403 U.S. 88, 102 (emphasis added). As discussed
8 above regarding Plaintiff’s Equal Protection claims, Plaintiff’s complaint fails to allege any facts
9 suggesting any class-based motive on the part of defendants. Therefore, his complaint fails to state
10 a claim under 42 U.S.C. § 1985(3).

11 Plaintiff also alleges violations of 18 U.S.C. §§ 241 (Conspiracy against rights) and 242
12 (Deprivation of rights under color of law). Both are criminal statutes. A private right of action under
13 a criminal statute has rarely been implied. Chrysler Corp. v. Brown, 441 U.S. 281, 316 (1979).
14 Where a private right of action has been implied, ““there was at least a statutory basis for inferring
15 that a civil cause of action of some sort lay in favor of someone.” Chrysler Corp., 441 U.S. at 316
16 (quoting Cort v. Ash, 422 U.S. 66, 79 (1975)). Upon review of these penal statutes, there is no
17 indication that civil enforcement is available. Therefore, Plaintiff fails to state a claim for violations
18 of 18 U.S.C. §§ 241-242.

19 **5. 42 U.S.C. § 1986 Claim**

20 Plaintiff’s complaint alleges a cause of action under 42 U.S.C. § 1986. “Section 1986
21 provides a remedy against state actors who have negligently failed to prevent a conspiracy that would
22 be actionable under § 1985.” Cerrato v. San Francisco Cmty. Coll. Dist., 26 F.3d 968, 971 n.7 (9th
23 Cir. 1994). “A claim can be stated under [§] 1986 only if the complaint contains a valid claim under
24 [§] 1985.” Karim-Panahi v. Los Angeles Police Dep’t, 839 F.2d 621, 626 (9th Cir. 1988). Since
25 Plaintiff’s claim fails to allege a claim under § 1985, his claim under § 1986 must fail as well.

27 ²Plaintiff’s complaint alleges a violation of 42 U.S.C. § 1985(A)(3)(4), which does not exist. The Court
28 will assume that Plaintiff is attempting to state a claim under 42 U.S.C. § 1985(3) (Conspiracy to interfere with civil
rights).

1 **C. Plaintiff's Claims Against Specific Defendants**

2 Plaintiff names defendants Gunja, Schultz, Booth, Gant, Jusino, Smith and Martin in
3 connection with his Eighth Amendment claim regarding the conditions of his confinement.
4 However, Plaintiff's complaint only alleges sufficient facts to support a cause of action against
5 Warden Schultz. Warden Schultz is the only defendant whom Plaintiff specifically alleges facts
6 suggesting that Defendant Schultz was aware and deliberately indifferent to the conditions created
7 by the softball field.

8 Plaintiff may not establish claims against defendants by simply alleging conclusory
9 statements linking defendants to the constitutional violations. Although accepted as true, the
10 "[f]actual allegations must be [sufficient] to raise a right to relief above the speculative level"
11 Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007) (citations omitted). Plaintiff must
12 provide specific factual allegations regarding each individual defendant linking their actions or
13 omissions to the constitutional violations in order to support a cause of action against them. Plaintiff
14 cannot simply make conclusory allegations that there was a conspiracy among the defendants or that
15 defendants instituted a policy that deprived plaintiff of his constitutional rights, or defendants failed
16 to train their subordinates - he must allege specific facts that support the existence of the conspiracy,
17 or state what the policy was and how the policy deprived the Plaintiff of his constitutional rights, or
18 how the defendants' failure to train resulted in the deprivation of his constitutional rights.

19 Finally, supervisory personnel are generally not liable under section 1983 for the actions of
20 their employees under a theory of respondeat superior and, therefore, when a named defendant holds
21 a supervisory position, the causal link between him and the claimed constitutional violation must
22 be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld,
23 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979). To state a claim for relief
24 under section 1983 based on a theory of supervisory liability, plaintiff must allege some facts that
25 would support a claim that supervisory defendants either: personally participated in the alleged
26 deprivation of constitutional rights; knew of the violations and failed to act to prevent them; or
27 promulgated or "implemented a policy so deficient that the policy 'itself is a repudiation of
28 constitutional rights' and is 'the moving force of the constitutional violation.'" Hansen v. Black, 885

1 F.2d 642, 646 (9th Cir. 1989) (internal citations omitted); Taylor v. List, 880 F.2d 1040, 1045 (9th
2 Cir. 1989).

3 In summary, Plaintiff alleges a cognizable claim for relief for unsafe conditions of
4 confinement in violation of the Eighth Amendment against defendant Schultz. Plaintiff also alleges
5 a cognizable claim for relief for retaliating against Plaintiff's exercise of his First Amendment rights
6 against defendants Martin, McCarty, Gordon, Boister and Brown. Plaintiff fails to allege any other
7 cognizable claims. Plaintiff fails to allege facts regarding the actions or omissions of defendants
8 Gunja, Booth, Gant, Jusino, Smith, Martin, and the Federal Bureau of Prisons linking them to the
9 allegedly unsafe conditions in violation of the Eighth Amendment.

10 **III. Conclusion and Order**

11 In summary, Plaintiff alleges a cognizable claim for relief for unsafe conditions of
12 confinement in violation of the Eighth Amendment against defendant Schultz. Plaintiff also alleges
13 a cognizable claim for relief for retaliating against Plaintiff's exercise of his First Amendment rights
14 against defendants Martin, McCarty, Gordon, Boister and Brown. However, the complaint does not
15 state any other cognizable claims. The Court will provide Plaintiff with the opportunity to file an
16 amended complaint curing the deficiencies identified by the Court in this order. Noll v. Carlson, 809
17 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff may not change the nature of this suit by adding new,
18 unrelated claims in his amended complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no
19 "buckshot" complaints).

20 If Plaintiff does not wish to file an amended complaint and is agreeable to proceeding only
21 on the claims identified in this order as cognizable, Plaintiff may so notify the Court in writing, and
22 the Court will issue a recommendation for dismissal of the other claims and defendants, and will
23 forward Plaintiff six (6) summonses and six(6) USM-285 forms for completion and return. Upon
24 receipt of the forms, the Court will direct the United States Marshal to initiate service of process.

25 If Plaintiff opts to amend, his amended complaint should be brief, Fed. R. Civ. P. 8(a), but
26 must state what each named defendant did that led to the deprivation of Plaintiff's constitutional or
27 other federal rights, Hydrick v. Hunter, 500 F.3d 978, 987-88 (9th Cir. 2007). With respect to
28 defendants in supervisory positions, "there is no pure respondeat superior liability under § 1983,

1 [and] a supervisor [may only be held] liable for the constitutional violations of subordinates ‘if the
2 supervisor participated in or directed the violations, or knew of the violations and failed to act to
3 prevent them.’ Id. at 988. (quoting Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)). Although
4 accepted as true, the “[f]actual allegations must be [sufficient] to raise a right to relief above the
5 speculative level” Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007) (citations
6 omitted).

7 Finally, Plaintiff is advised that an amended complaint supercedes the original complaint.
8 Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567
9 (9th Cir. 1987). The amended complaint must be “complete in itself without reference to the prior
10 or superceded pleading.” Local Rule 15-220. Plaintiff is warned that “[a]ll causes of action alleged
11 in an original complaint which are not alleged in an amended complaint are waived.” King, 814 F.2d
12 at 567 (citing London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth,
13 114 F.3d at 1474.

14 Based on the foregoing, it is HEREBY ORDERED that:

- 15 1. The Clerk’s Office shall send Plaintiff a civil rights complaint form;
- 16 2. Within **thirty (30) days** from the date of service of this order, Plaintiff must either:
 - 17 a. File an amended complaint curing the deficiencies identified by the Court in
18 this order, or
 - 19 b. Notify the Court in writing that he does not wish to file an amended
20 complaint and wishes to proceed only against Defendant Schultz for violation
21 of the Eighth Amendment and Defendants Martin, McCarty, Gordon, Boister
22 and Brown for violation of the First Amendment; and
- 23 3. If Plaintiff fails to comply with this order, this action will be dismissed for failure to
24 obey a court order.

25 IT IS SO ORDERED.

26 **Dated: January 12, 2009**

27 /s/ William M. Wunderlich
28 UNITED STATES MAGISTRATE JUDGE