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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SHANNON L. AVERY, SR.,

1:07-cv-01175-OWW-GSA-PC

Plaintiff,

v.

CDCR DIRECTOR, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS ACTION PROCEED
ON THE SECOND AMENDED COMPLAINT
AGAINST DEFENDANT AMAYA FOR
RETALIATION, DEFENDANT GONZALES FOR
INADEQUATE MEDICAL CARE AND FAILURE TO
PROTECT, DEFENDANT BASCOM FOR
EXCESSIVE FORCE, AND ON PLAINTIFF’S
RELATED STATE TORT CLAIMS, AND THAT ALL
OTHER CLAIMS AND DEFENDANTS BE
DISMISSED FOR FAILURE TO STATE A CLAIM
(Doc. 69.)

OBJECTIONS, IF ANY, DUE IN 30 DAYS

I. BACKGROUND

Shannon L. Avery, Sr. (“Plaintiff”) is a former state prisoner proceeding pro se and in forma pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on May 16, 2007 in the Northern District of California, and the case was transferred to the Eastern District of California on August 13, 2007. (Docs. 1, 2.) The Court screened Plaintiff’s Complaint pursuant to 28 U.S.C. § 1915A and entered an order on May 1, 2009 requiring Plaintiff to either file an amended complaint or notify the Court that he wished to proceed only on the claims found to be cognizable by the Court. (Doc. 46.) On October 27, 2009, Plaintiff submitted the First Amended Complaint. (Doc. 60.) On April 20, 2010, the Court dismissed the First Amended Complaint for Plaintiff’s failure to comply with the Court’s May 1, 2009 order, with

1 leave to file a Second Amended Complaint. (Doc. 63.) On July 20, 2010, Plaintiff filed the Second
2 Amended Complaint, which is now before the Court for screening. (Doc. 69.)

3 **II. SCREENING REQUIREMENT**

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

12 A complaint must contain “a short and plain statement of the claim showing that the pleader
13 is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
14 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
15 do not suffice.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v.
16 Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). While a plaintiff’s allegations are
17 taken as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores,
18 Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

19 To state a viable claim for relief, Plaintiff must set forth sufficient factual allegations
20 sufficient to state a plausible claim for relief. Iqbal, 129 S.Ct. at 1949-50; Moss v. U.S. Secret
21 Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of
22 meeting this plausibility standard. Id.

23 **III. SUMMARY OF SECOND AMENDED COMPLAINT**

24 Plaintiff is presently out of custody and resides in Oakland, California. At the time of the
25 events at issue in the Second Amended Complaint, Plaintiff was incarcerated at Avenal State Prison
26 ("ASP") in Avenal, California. In the Second Amended Complaint, Plaintiff names as defendants
27 Suzan L. Hubbard (Director, CDCR), Kathy Mendoza-Powers (Warden, ASP), R. Ndoh (Associate
28 Warden, ASP), Captain S. K. Pennywell, E. Lu (Nurse), Correctional Officer (“C/O”) Bascom, P.

1 Kaur (Nurse), Dr. Suryadevara (CMO), C/O J. Amaya, C/O G. Gonzales, Sergeant E. Alfaro, A.
2 McGraw (RN), Sergeant J. Ramos, E. Weinstein, and H. Hill (“Defendants”). Plaintiff requests
3 monetary damages, declaratory relief, and injunctive relief. Plaintiff recounts several events
4 beginning in May 2006, as follows.

5 ***(1) Repercussions for Bringing ADA Issues***

6 Plaintiff was the ADA (Americans with Disabilities Act) representative for the Mens
7 Advisory Council at ASP. On May 9, 2006, Plaintiff complained to Sgt. E. Alfaro about ADA issues
8 concerning the hot water only running for five minutes. Sgt. Alfaro told Plaintiff, “You don’t want
9 to bring those issues up.” Plaintiff said he would continue to bring up such issues. Approximately
10 thirty minutes later, a representative of the Black Mens Advisory Council approached Plaintiff and
11 said that Sgt. Alfaro wanted him to talk to Plaintiff about the hot water issue.

12 On May 10, 2006, a group of inmates approached Plaintiff about his ADA-1824 form request
13 concerning issues about television closed-captioning and sports being shown on both televisions.
14 C/O J. Amaya and C/O G. Gonzales watched as the inmates threatened Plaintiff by saying that if
15 closed-captioning appeared on the televisions, Plaintiff would be hurt. C/O Amaya sent Plaintiff to
16 talk to Sgt. Alfaro in the support office about the ADA requests. Plaintiff told Sgt. Alfaro he wanted
17 to withdraw his ADA requests, explaining that C/O Amaya had told the inmates in Unit 640 about
18 Plaintiff’s ADA-1824 form, which is supposed to be a confidential document, causing Plaintiff’s life
19 to be threatened. Sgt. Alfaro told Plaintiff he wouldn’t have granted the ADA requests anyway, and
20 that if Plaintiff wanted to submit an ADA form again, he should consult with the inmate population
21 first. Sgt. Alfaro said he would withdraw Plaintiff’s ADA requests, and Plaintiff left the support
22 office. When Plaintiff entered Unit 640, C/O Amaya told Plaintiff, “If you bring any more ADA
23 issues, I’ll take it out on the general population.” Plaintiff continued to bring up ADA issues
24 anyway.

25 Defendants Captain Pennywell, Sgt. Alfaro, C/O Amaya and C/O Gonzales manipulated
26 inmates against Plaintiff, just as Amaya stated he would. Captain Pennywell was in charge of
27 Facility VI when the events occurred. Pennywell permitted and encouraged inmates to attack
28 Plaintiff when Pennywell turned on both televisions in Units 640 and 650.

1 **(2) Move from Unit 640 to Unit 650**

2 On May 11, 2006, C/O G. Gonzales told Plaintiff to pack his property and move from Unit
3 640 to Unit 650. The prisoners who wanted to harm Plaintiff were in Unit 650, which is called the
4 Gladiator Dorm. Plaintiff asked C/O Gonzales more than once why he was being moved, and
5 Gonzales responded, "Hurry and pack your stuff before count." Plaintiff told C/O Gonzales he was
6 taking heat medication, and that there was a heat alert because the temperature was over 100 degrees.
7 C/O Gonzales opened the door, said "Let's go," and locked the door behind Plaintiff. Plaintiff
8 became dizzy from the heat and started yelling for help. No one came to the Unit 650 door until
9 forty minutes later. Plaintiff was taken to the emergency room with heat stroke and high blood
10 pressure.

11 **(3) Staring at Plaintiff**

12 On August 18, 2009, as Plaintiff exited the chow hall, Sgt. J. Ramos began staring at Plaintiff
13 and continued to stare, turning in Plaintiff's direction, until Plaintiff arrived at Unit 640. This
14 bothered Plaintiff.

15 **(4) Medical Chrono, Fall on Pavement, and Drop from Gurney**

16 Plaintiff had a medical chrono which allowed him to pick up his medication at 6:30 a.m. On
17 August 19, 2006, C/O G. Gonzales refused to honor Plaintiff's chrono. When Plaintiff told C/O
18 Gonzales he needed to get his medication, Gonzales said, "It doesn't matter, this is the Captain's
19 order." Thirty minutes later, Plaintiff was released and barely made it in time to get the medication.
20 Again on August 20, 2006, C/O Gonzales refused to honor Plaintiff's chrono. Plaintiff begged, but
21 Gonzales said "No, you are not going anywhere!" C/O Gonzales had released all the other
22 medication prisoners but had stopped Plaintiff and locked the Unit 640 doors. Forty minutes later,
23 C/O Gonzales released Plaintiff. Plaintiff walked through the doors and became dizzy, fell in a hole
24 in the pavement, and hit his head, injuring his neck and back. Plaintiff was in severe pain. Medical
25 staff and an ambulance were called, and Plaintiff was taken to the emergency room at Unit 390. As
26 Plaintiff was being pulled out of the ambulance, strapped on the gurney and in severe pain, someone
27 lifted up the bottom end of the gurney and dropped it to the ground. Plaintiff yelled very loudly due
28 to the impact. A loud voice said, "Get up, you're not hurt." Plaintiff was on the gurney, halfway out

1 of the ambulance, with the bottom end of the gurney on the ground. C/O Bascom bent down, picked
2 up the end of the gurney, lifted it up in the air, and dropped Plaintiff again, yelling, "Get up, you're
3 not hurt!" Plaintiff yelled over and over for him to stop and called for help. Plaintiff could see
4 prison staff standing around and watching, but no one intervened. C/O Bascom picked up the end
5 of the gurney again and dropped Plaintiff again, yelling, "Get up, you're not hurt!" C/O Bascom
6 dropped Plaintiff five times before Plaintiff lost consciousness.

7 In the emergency room, Plaintiff recognized an African-American nurse as one of the persons
8 who stood and watched as Bascom dropped Plaintiff. Plaintiff asked the nurse her name and she
9 replied, "McGraw, RN McGraw." Plaintiff asked RN McGraw for water, but she rudely refused,
10 telling Plaintiff he had to sit up first.

11 Plaintiff also alleges that on several days, Sgt. J. Ramos and C/O J. Amaya refused to honor
12 Plaintiff's medical chrono to pick up medication at 6:30 a.m.

13 **(5) Denial of Medication**

14 Plaintiff alleges that Associate Warden Ndoh, Captain Pennywell, C/O Bascom, Sgt. Alfaro,
15 Sgt. Ramos, H. Hill, C/O Gonzales, and C/O Amaya denied him medication, causing Plaintiff to
16 have a seizure and causing his blood pressure to rise to 200/111.

17 **(6) Abrupt Discontinuation of Medication**

18 Plaintiff alleges that Dr. Suryadevara conspired to intentionally stop Plaintiff's medication,
19 Elavil (amitriptyline), for twenty-one days, despite warnings clearly stating Do not stop abruptly.
20 Each time Physician's Assistant R. Gonzales would re-order the Elavil, Dr. Suryadevara would have
21 it stopped. This caused Plaintiff severe pain, disorientation, stress, humiliation, terror, and the
22 possibility of a stroke.

23 **IV. PLAINTIFF'S CLAIMS**

24 The Civil Rights Act under which this action was filed provides:

25 Every person who, under color of [state law] . . . subjects, or causes
26 to be subjected, any citizen of the United States . . . to the deprivation
27 of any rights, privileges, or immunities secured by the Constitution .
28 . . shall be liable to the party injured in an action at law, suit in equity,
or other proper proceeding for redress.

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1 42 U.S.C. § 1983. “Section 1983 . . . creates a cause of action for violations of the federal
2 Constitution and laws.” Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997)
3 (internal quotations omitted). “To the extent that the violation of a state law amounts to the
4 deprivation of a state-created interest that reaches beyond that guaranteed by the federal Constitution,
5 Section 1983 offers no redress.” Id.

6 **A. Supervisory Liability/Personal Participation**

7 Defendants Suzan L. Hubbard, Kathy Mendoza-Powers, and R. Ndoh hold supervisory
8 positions in the CDCR and/or at ASP. To the extent that Plaintiff seeks to hold any of the
9 Defendants liable in their supervisory capacity on the theory of respondeat superior, Plaintiff is
10 unable to do so. Under section 1983, Plaintiff must demonstrate that each defendant *personally*
11 participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002)
12 (emphasis added). Plaintiff must demonstrate that each defendant, through his or her own individual
13 actions, violated Plaintiff’s constitutional rights. Iqbal, 129 S.Ct. at 1948-49. Liability may not be
14 imposed on supervisory personnel under section 1983 on the theory of respondeat superior, as each
15 defendant is only liable for his or her own misconduct. Id.; Ewing v. City of Stockton, 588 F.3d
16 1218, 1235 (9th Cir. 2009). A supervisor may be held liable only if he or she “participated in or
17 directed the violations, or knew of the violations and failed to act to prevent them.” Taylor v. List,
18 880 F.2d 1040, 1045 (9th Cir. 1989); accord Starr v. Baca, No. 09-55233, 2011 WL 477094, at *4-5
19 (9th Cir. Feb. 11, 2011); Corales v. Bennett, 567 F.3d 554, 570 (9th Cir. 2009); Preschooler II v.
20 Clark County School Board of Trustees, 479 F.3d 1175, 1182 (9th Cir. 2007); Harris v. Roderick,
21 126 F.3d 1189, 1204 (9th Cir. 1997). Therefore, to the extent that Plaintiff seeks to impose liability
22 upon any of the Defendants in their supervisory capacity, Plaintiff fails to state a claim.

23 **B. Conspiracy**

24 In the context of conspiracy claims brought pursuant to section 1983, a complaint must
25 “allege [some] facts to support the existence of a conspiracy among the defendants.” Buckey v.
26 County of Los Angeles, 968 F.2d 791, 794 (9th Cir. 1992); Karim-Panahi v. Los Angeles Police
27 Department, 839 F.2d 621, 626 (9th Cir. 1988). Plaintiff must allege that defendants conspired or

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1 acted jointly in concert and that some overt act was done in furtherance of the conspiracy. Sykes v.
2 State of California, 497 F.2d 197, 200 (9th Cir. 1974).

3 A conspiracy claim brought under section 1983 requires proof of “an agreement or meeting
4 of the minds to violate constitutional rights,” Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2001)
5 (quoting United Steel Workers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1540-41 (9th Cir.
6 1989) (citation omitted)), and an actual deprivation of constitutional rights, Hart v. Parks, 450 F.3d
7 1059, 1071 (9th Cir. 2006) (quoting Woodrum v. Woodward County, Oklahoma, 866 F.2d 1121,
8 1126 (9th Cir. 1989)). “To be liable, each participant in the conspiracy need not know the exact
9 details of the plan, but each participant must at least share the common objective of the conspiracy.”
10 Franklin, 312 F.3d at 441 (quoting United Steel Workers, 865 F.2d at 1541).

11 Plaintiff alleges that Defendants conspired to violate his rights. However, Plaintiff has not
12 alleged any facts supporting the allegation that Defendants entered into an agreement or had a
13 meeting of the minds to violate Plaintiff's constitutional rights. Therefore, Plaintiff fails to state a
14 claim for conspiracy.

15 **C. Retaliation**

16 Plaintiff alleges he was retaliated against by some of the Defendants for bringing up ADA
17 issues and filing ADA-1984 forms complaining about possible ADA violations. “Within the prison
18 context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion
19 that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's
20 protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment
21 rights, and (5) the action did not reasonably advance a legitimate correctional goal.” Rhodes v.
22 Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

23 Plaintiff alleges that defendant C/O J. Amaya informed a group of inmates that Plaintiff had
24 filed an ADA-1984 form requesting closed-captioning on the televisions, resulting in inmates
25 approaching Plaintiff and telling him that he would be hurt if closed-captioning appeared on the
26 televisions. Plaintiff also alleges that C/O Amaya told Plaintiff, “If you bring any more ADA issues,
27 I'll take it out on the general population,” which was a threat to manipulate other inmates against
28 Plaintiff. Under these facts, Plaintiff states a cognizable claim for retaliation against C/O Amaya.

1 However, Plaintiff does not allege facts demonstrating that any other defendant took an adverse
2 action against him because of protected conduct.

3 **D. Verbal Harassment**

4 Plaintiff alleges that some of the defendants harassed or threatened him. Mere verbal
5 harassment or abuse, including the use of racial epithets, does not violate the Constitution and, thus,
6 does not give rise to a claim for relief under 42 U.S.C. § 1983. Oltarzewski v. Ruggiero, 830 F.2d
7 136, 139 (9th Cir. 1987). Also, threats do not rise to the level of a constitutional violation. Gaut v.
8 Sunn, 810 F.2d 923, 925 (9th Cir. 1987). Therefore, Plaintiff fails to state a cognizable claim against
9 any of the defendants for verbal harassment or threats.

10 **E. Eighth Amendment - Failure to Protect**

11 Plaintiff claims that defendant C/O J. Amaya endangered Plaintiff's life when he told other
12 inmates that Plaintiff had filed an ADA-1984 form requesting closed-captioning on the televisions.
13 Plaintiff also claims that defendant C/O G. Gonzales intentionally placed Plaintiff's life in danger
14 when he transferred him from Unit 640 to Unit 650, which is called the Gladiator Dorm, where
15 prisoners who wanted to harm Plaintiff were housed. Plaintiff also alleges that defendant Captain
16 Pennywell actively permitted and encouraged the inmate general population to attack Plaintiff, when
17 Pennywell turned on both televisions in Unit 640 and Unit 650.

18 Although prison conditions may be restrictive and harsh, prison officials must provide
19 prisoners with food, clothing, shelter, sanitation, medical care, and personal safety. Farmer v.
20 Brennan, 511 U.S. 825, 832 (1994); Toussaint v. McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986);
21 Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982). Where a prisoner alleges injuries stemming
22 from unsafe conditions of confinement, prison officials may be held liable only if they acted with
23 "deliberate indifference to a substantial risk of serious harm." Frost v. Agnos, 152 F.3d 1124, 1128
24 (9th Cir. 1998). Thus, a prison official may be held liable under the Eighth Amendment for denying
25 humane conditions of confinement only if he knows that inmates face a substantial risk of harm and
26 disregards that risk by failing to take reasonable measures to abate it. Id. at 837-45.

27 Plaintiff states a cognizable claim against defendant C/O Gonzales for placing him in danger
28 by sending him outside alone in 100-degree heat, knowing that there was a heat alert and that

1 Plaintiff was taking heat medication, causing Plaintiff to end up at the emergency room with heat
2 stroke. With respect to defendant Amaya, Plaintiff fails to allege facts that Amaya acted with
3 deliberate indifference, while knowing that Plaintiff faced a substantial risk of serious harm. With
4 respect to defendant Pennywell, Plaintiff fails to allege facts demonstrating that Pennywell knew she
5 was placing Plaintiff in danger by turning on the televisions. Plaintiff also alleges that some of the
6 other defendants failed to protect him. However, for those allegations he uses vague and conclusory
7 language which does not suffice to state a claim. While a plaintiff's allegations are taken as true,
8 courts "are not required to indulge unwarranted inferences," Wal-Mart Stores, Inc., 572 F.3d at 681.

9 **F. Eighth Amendment – Failure to Intercede**

10 Plaintiff alleges that defendant RN McGraw stood by and watched defendant C/O Bascom
11 intentionally drop Plaintiff to the ground multiple times and did nothing to stop it or prevent
12 Plaintiff's injuries.

13 Although prison conditions may be restrictive and harsh, prison officials must provide
14 prisoners with food, clothing, shelter, sanitation, medical care, and personal safety. Id.; Toussaint,
15 801 F.2d at 1107; Hoptowit, 682 F.2d at 1246. Where a prisoner alleges injuries stemming from
16 unsafe conditions of confinement, prison officials may be held liable only if they acted with
17 "deliberate indifference to a substantial risk of serious harm." Frost, 152 F.3d at 1128. Thus, a
18 prison official may be held liable under the Eighth Amendment for denying humane conditions of
19 confinement only if he knows that inmates face a substantial risk of harm and disregards that risk
20 by failing to take reasonable measures to abate it. Id. at 837-45. An officer can be held liable for
21 failing to intercede only if he had a "realistic opportunity" to intercede. Cunningham v. Gates, 229
22 F.3d 1271, 1289 (9th Cir. 2000); Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995).

23 Based on the Court's review, the Ninth Circuit has never extended the duty to intervene in
24 an altercation between a prisoner and law enforcement or correctional officers or other inmates to
25 those who are not law enforcement or correctional officers. Therefore, RN McGraw had no duty to
26 intervene in the alleged altercation between Plaintiff and defendant C/O Bascom. Thus, Plaintiff
27 fails to state a cognizable claim against defendant RN McGraw for failure to intercede and protect
28 him.

1 **G. Eighth Amendment - Medical Care**

2 Plaintiff alleges that defendant C/O G. Gonzales refused to honor Plaintiff’s medical chrono
3 which allowed Plaintiff to pick up his medication at 6:30 a.m., causing him to become dizzy and fall
4 on the pavement, injuring his neck and back. Plaintiff also alleges that on several days, defendants
5 Sgt. Ramos and C/O Amaya refused to honor his chrono to pick up medication at 6:30 a.m. Plaintiff
6 also alleges that defendants Ndoh, Pennywell, Bascom, Alfaro, Ramos, Hill, Gonzales, and Amaya
7 denied him medication, causing Plaintiff to have a seizure and causing his blood pressure to rise to
8 200/111. Further, Plaintiff alleges that Dr. Suryadevara abruptly stopped Plaintiff’s medication,
9 Elavil (amitriptyline), for twenty-one days, despite warnings clearly stating Do not stop abruptly,
10 causing Plaintiff severe pain, disorientation, stress, humiliation, terror, and the possibility of a stroke.

11 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate
12 must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091, 1096
13 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 295 (1976)). The two part
14 test for deliberate indifference requires the plaintiff to show (1) “‘a serious medical need’ by
15 demonstrating that ‘failure to treat a prisoner’s condition could result in further significant injury or
16 the unnecessary and wanton infliction of pain,’” and (2) “the defendant’s response to the need was
17 deliberately indifferent.” Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059
18 (9th Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th
19 Cir. 1997) (en banc) (internal quotations omitted)). Deliberate indifference is shown by “a
20 purposeful act or failure to respond to a prisoner’s pain or possible medical need, and harm caused
21 by the indifference.” Id. (citing McGuckin, 974 F.2d at 1060). Deliberate indifference may be
22 manifested “when prison officials deny, delay or intentionally interfere with medical treatment, or
23 it may be shown by the way in which prison physicians provide medical care.” Id. (citing McGuckin
24 at 1060 (internal quotations omitted)). Where a prisoner is alleging a delay in receiving medical
25 treatment, the delay must have led to further harm in order for the prisoner to make a claim of
26 deliberate indifference to serious medical needs. McGuckin at 1060 (citing Shapley v. Nevada Bd.
27 of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985)).

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1 Plaintiff states a cognizable Eighth Amendment medical claim against defendant G. Gonzales
2 for refusing to honor Plaintiff's medical chrono, causing him to become dizzy, fall, and injure
3 himself. However, Plaintiff has not stated a cognizable Eighth Amendment medical claim against
4 any other defendant. Plaintiff fails to make allegations against any other defendant demonstrating
5 a purposeful act or failure to respond to Plaintiff's pain or possible medical need, with harm caused
6 by the indifference.

7 **H. Eighth Amendment - Excessive Force**

8 "What is necessary to show sufficient harm for purposes of the Cruel and Unusual
9 Punishments Clause [of the Eighth Amendment] depends upon the claim at issue . . ." Hudson v.
10 McMillan, 503 U.S. 1, 8 (1992). "The objective component of an Eighth Amendment claim is . .
11 . contextual and responsive to contemporary standards of decency." Id. (internal quotation marks
12 and citations omitted). The malicious and sadistic use of force to cause harm always violates
13 contemporary standards of decency, regardless of whether or not significant injury is evident. Id.
14 at 9; see also Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002) (Eighth Amendment excessive force
15 standard examines de minimis uses of force, not de minimis injuries)). However, not "every
16 malevolent touch by a prison guard gives rise to a federal cause of action." Id. at 9. "The Eighth
17 Amendment's prohibition of cruel and unusual punishments necessarily excludes from constitutional
18 recognition de minimis uses of physical force, provided that the use of force is not of a sort
19 'repugnant to the conscience of mankind.'" Id. at 9-10 (internal quotations marks and citations
20 omitted).

21 "[W]henver prison officials stand accused of using excessive physical force in violation of
22 the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied
23 in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."
24 Id. at 7. "In determining whether the use of force was wanton and unnecessary, it may also be proper
25 to evaluate the need for application of force, the relationship between that need and the amount of
26 force used, the threat reasonably perceived by the responsible officials, and any efforts made to
27 temper the severity of a forceful response." Id. (internal quotation marks and citations omitted).

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1 “The absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end
2 it.” Id.

3 Plaintiff states a cognizable claim for excessive force against defendant C/O Bascom for
4 intentionally dropping him to the ground five times when Plaintiff was on the gurney. However,
5 Plaintiff fails to state a cognizable claim for excessive force against any of the other defendants.

6 **I. Staring at Plaintiff and Withholding Water**

7 Plaintiff alleges that defendant C/O J. Ramos began staring at Plaintiff as Plaintiff exited the
8 chow hall, and continued to stare, turning in Plaintiff’s direction, until Plaintiff arrived at Unit 640,
9 which bothered Plaintiff. Plaintiff also alleges that defendant RN McGraw rudely refused his request
10 for water when Plaintiff was in the emergency room, telling him that he had to sit up first.

11 These allegations do not rise to the level of a Constitutional violation. Therefore, Plaintiff
12 fails to state a claim against defendant Ramos for staring at Plaintiff, or against defendant McGraw
13 for refusing Plaintiff’s request for water.

14 **J. State Law Claims**

15 **Tort Claims**

16 Plaintiff brings state tort claims against Defendants for negligence, intentional infliction of
17 emotional distress, assault, battery, and failure to train and supervise employees. Plaintiff is
18 informed that violation of state tort law, state regulations, rules and policies of the CDCR, or other
19 state law is not sufficient to state a claim for relief under § 1983. To state a claim under § 1983,
20 there must be a deprivation of federal constitutional or statutory rights. See Paul v. Davis, 424 U.S.
21 693 (1976). Although the court may exercise supplemental jurisdiction over state law claims,
22 Plaintiff must first have a cognizable claim for relief under federal law. See 28 U.S.C. § 1367.

23 Pursuant to 28 U.S.C. § 1367(a), in any civil action in which the district court has original
24 jurisdiction, the district court “shall have supplemental jurisdiction over all other claims in the action
25 within such original jurisdiction that they form part of the same case or controversy under Article
26 III [of the Constitution],” with specific exceptions. "Pendent jurisdiction over state claims exists
27 when the federal claim is sufficiently substantial to confer federal jurisdiction, and there is a
28 'common nucleus of operative fact between the state and federal claims.'" Brady v. Brown, 51 F.3d

1 810, 816 (9th Cir. 1995) (quoting Gilder v. PGA Tour, Inc., 936 F.2d 417, 421 (9th Cir.1991)).
2 “[O]nce judicial power exists under § 1367(a), retention of supplemental jurisdiction over state law
3 claims under 1367(c) is discretionary.” Acri v. Varian Assoc., Inc., 114 F.3d 999, 1000 (9th Cir.
4 1997). The Supreme Court has cautioned that “if the federal claims are dismissed before trial, . . .
5 the state claims should be dismissed as well.” United Mine Workers of America v. Gibbs, 383 U.S.
6 715, 726 (1966).

7 In this instance, the Court has found cognizable § 1983 claims in the Second Amended
8 Complaint against defendants Amaya, Gonzales, and Bascom. Therefore, at this juncture, the Court
9 shall exercise supplemental jurisdiction over Plaintiff’s state tort law claims that form part of the
10 same case or controversy as Plaintiff’s cognizable federal claims.¹

11 Criminal Action

12 Plaintiff also brings a claim for mayhem against Defendants. This suggests that Plaintiff
13 seeks to bring a criminal action. “Section 1983 . . . creates a cause of action for violations of the
14 federal Constitution and laws.” Sweaney, 119 F.3d at 1391 (internal quotations omitted). As a rule,
15 civil actions may be started by individuals, but criminal actions may only be started by the state and
16 not by individuals. Indeed, with limited exceptions, none which apply to §1983 actions, state and
17 federal law do not allow a private citizen to bring a criminal prosecution against another citizen.
18 Therefore, Plaintiff is unable to bring a criminal action for mayhem against any of the defendants.

19 **K. Emotional Distress**

20 Plaintiff claims he suffered emotional distress as a result of the constitutional violations
21 against him. The Prison Litigation Reform Act provides that “[n]o Federal civil action may be
22 brought by a prisoner confined in jail, prison, or other correctional facility, for mental and emotional
23 injury suffered while in custody without a prior showing of physical injury.” 42 U.S.C. § 1997e(e).
24 The physical injury “need not be significant but must be more than *de minimis*.” Oliver, 289 F.3d
25 at 627. The physical injury requirement applies only to claims for mental or emotional injuries and
26 does not bar claims for compensatory, nominal, or punitive damages. Id. at 630. Therefore, Plaintiff

27
28 ¹At this stage of the proceedings, the Court makes no determination about the viability of Plaintiff’s state tort claims.

1 may not pursue a federal cause of action for mental or emotional damages without a showing of
2 physical injury.

3 **L. Declaratory and Injunctive Relief**

4 Plaintiff requests monetary, declaratory, and injunctive relief. With regard to declaratory
5 relief, “[a] declaratory judgment, like other forms of equitable relief, should be granted only as a
6 matter of judicial discretion, exercised in the public interest.” Eccles v. Peoples Bank of Lakewood
7 Village, 333 U.S. 426, 431 (1948). “Declaratory relief should be denied when it will neither serve
8 a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings
9 and afford relief from the uncertainty and controversy faced by the parties.” United States v.
10 Washington, 759 F.2d 1353, 1357 (9th Cir. 1985). In the event that this action reaches trial and the
11 jury returns a verdict in favor of Plaintiff, that verdict will be a finding that Plaintiff’s constitutional
12 rights were violated. A declaration that defendant violated Plaintiff’s rights is unnecessary.

13 Plaintiff requests injunctive relief via medical treatment, a polygraph examination, and the
14 suspension of CDCR staff for retaliation. The court cannot award this form of relief. Any award
15 of equitable relief is governed by the Prison Litigation Reform Act, which provides in relevant part:

16
17 Prospective relief in any civil action with respect to prison conditions
18 shall extend no further than necessary to correct the violation of the
19 Federal right of a particular plaintiff or plaintiffs. The court shall not
20 grant or approve any prospective relief unless the court finds that such
relief is narrowly drawn, extends no further than necessary to correct
the violation of the Federal right, and is the least intrusive means
necessary to correct the violation of the Federal right. 18 U.S.C.
§3626(a)(1)(A).

21 The injunctions requested by Plaintiff would not remedy the past violation of Plaintiff’s
22 constitutional rights and therefore are not narrowly drawn to correct the alleged past violations.

23 Also, when a prisoner seeks injunctive relief concerning the prison where he is incarcerated,
24 his claims for such relief become moot when he is no longer subjected to those conditions. See
25 Weinstein v. Bradford, 423 U.S. 147, 148-49 (1975) (finding prisoner’s due process claim to be
26 moot once he obtained a full release from prison supervision); Dilley v. Gunn, 64 F.3d 1365, 1368-
27 69 (9th Cir. 1995) (finding prisoner’s suit for library access to be moot upon his transfer to another
28 prison). Once Plaintiff was transferred or released from Avenal State Prison where the alleged

1 violations occurred, any claims for injunctive relief regarding conditions at those institutions became
2 moot.

3 For the foregoing reasons, the Court finds that this action is a damages action only.

4 **V. CONCLUSION AND RECOMMENDATIONS**

5 For the reasons set forth above, the Court finds that Plaintiff states cognizable claims in the
6 Second Amended Complaint against defendant C/O J. Amaya for retaliation under the First
7 Amendment; against defendant C/O G. Gonzales for inadequate medical care and for failure to
8 protect Plaintiff in violation of the Eighth Amendment; and against defendant C/O Bascom for use
9 of excessive force in violation of the Eighth Amendment. However, the Court finds that Plaintiff
10 fails to state any other claims upon which relief may be granted under § 1983. The Court also finds
11 that this action is a damages only action, and that supplemental jurisdiction should be exercised for
12 Plaintiff's related state tort claims at this juncture. The Court previously granted Plaintiff two
13 opportunities to amend the complaint, with guidance by the Court.

14 Plaintiff has now filed three complaints. Based on this record and the facts set forth in the
15 Second Amended Complaint, the Court finds that further leave to amend is not warranted. 28 U.S.C.
16 § 1915(e)(2)(B)(ii); Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

17 Accordingly, **IT IS HEREBY RECOMMENDED** that:

- 18 1. This action proceed with the Second Amended Complaint filed on July 20, 2010, on
19 the claims found cognizable by the Court against defendant C/O J. Amaya for
20 retaliation under the First Amendment; against defendant C/O G. Gonzales for
21 inadequate medical care and for failure to protect Plaintiff, in violation of the Eighth
22 Amendment; against defendant C/O Bascom for use of excessive force in violation
23 of the Eighth Amendment, assault, and battery; and on Plaintiff's related state tort
24 claims;
- 25 2. This action proceed for money damages only as relief;
- 26 3. All remaining claims and defendants be dismissed based on Plaintiff's failure to state
27 a claim upon which relief may be granted under § 1983;

28 ///

1 4. Plaintiff's claims for supervisory liability, conspiracy, verbal harassment, failure to
2 intercede, due process, mayhem, for staring at Plaintiff, and for withholding water
3 from Plaintiff, be dismissed from this action based on Plaintiff's failure to state a
4 claim upon which relief may be granted under § 1983;

5 5. Defendants Hubbard, Mendoza-Powers, Ndoh, Pennywell, Lu, Kaur, Suryadevara,
6 Alfaro, McGraw, Ramos, Weinstein, and Hill be dismissed from this action based on
7 Plaintiff's failure to state any claims upon which relief may be granted against them
8 under § 1983; and

9 6. This action be referred back to the Magistrate Judge for further proceedings,
10 including initiation of service.

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

18
19 IT IS SO ORDERED.

20 **Dated: April 14, 2011**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE