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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION**

ANTHONY DAVIS,  
CDCR #T-48683,

Plaintiff,

Civil No. 1:08-1245 BTM (BLM)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT  
PURSUANT TO FED.R.CIV.P.  
12(b)(6)**

**[Doc. No. 16]**

vs.

A. LYNN, Correctional Officer;  
D. GONSALEZ, Correctional Officer;  
F. FREGOSA, Correctional Officer,

Defendants.

**I. PROCEDURAL BACKGROUND**

Anthony Davis ("Plaintiff"), a prisoner currently incarcerated at Mule Creek State Prison located in Ione, California, proceeding pro se and *in forma pauperis*, has filed a civil rights action pursuant to 42 U.S.C. § 1983.

1 Defendants Lynn, Gonzales<sup>1</sup> and Fregosa (“Defendants”) have filed a Motion to Dismiss  
2 Plaintiff’s Complaint pursuant to FED.R.CIV.P. 12(b)(6) [Doc. No. 16]. Although Plaintiff was  
3 granted an extension of time to respond to Defendants’ Motion, to date he has failed to file an  
4 Opposition.

## 5 **II. PLAINTIFF’S FACTUAL ALLEGATIONS**

6 Plaintiff alleges that he was falsely accused of a “lewd act” on Defendant Lynn on  
7 September 15, 2007. *See* Compl. at 3. Defendant Lynn called for assistance from Defendants  
8 Gonzales and Fregosa who came and escorted Plaintiff out of the building. *Id.* After they left  
9 the building, Plaintiff claims Defendants Gonzales and Fregosa “pushed my face, head and body  
10 up against a [wall] hard several times until I was dazed.” *Id.* He further alleges that Defendants  
11 Gonzales and “slammed me down to the ground (face first) while twisting my arms which I was  
12 still cuffed up.” *Id.* Plaintiff claims that during this incident, Defendant Lynn “was laughing  
13 and pointing at me.” *Id.* Finally, Plaintiff alleges that “not only was I hurt physically but their  
14 abuse caused me mental and emotional injury as well.” *Id.*

## 15 **III. DEFENDANTS’ MOTION TO DISMISS**

### 16 **A. Defendants’ Arguments**

17 Defendants seek dismissal of Plaintiff’s Complaint pursuant to Rule 12(b)(6) on three  
18 grounds: (1) Plaintiff has failed to state a claim against Defendant Lynn; (2) Plaintiff has failed  
19 to state a claim against Fregosa and Gonzales; and (3) Defendant Lynn is entitled to qualified  
20 immunity. *See* Defs.’ Mot. at 1-7.

### 21 **B. FED.R.CIV.P. 12(b)(6) Standard of Review**

22 A Rule 12(b)(6) dismissal may be based on either a “‘lack of a cognizable legal theory’  
23 or ‘the absence of sufficient facts alleged under a cognizable legal theory.’” *Johnson v.*  
24 *Riverside Healthcare System, LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting *Balistreri*  
25 *v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)). In other words, the plaintiff’s  
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28 <sup>1</sup> Plaintiff names Defendant “Gonzalez” but according to the Motion filed by Defendants’  
counsel, the correct spelling of this Defendant’s name appears to be “Gonzales.”

1 complaint must provide a “short and plain statement of the claim showing that [he] is entitled  
2 to relief.” *Id.* (citing FED.R.CIV.P. 8(a)(2)). “Specific facts are not necessary; the statement need  
3 only give the defendant[s] fair notice of what ... the claim is and the grounds upon which it  
4 rests.” *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007) (internal quotation marks  
5 omitted).

6 In order to “avoid dismissal under Rule 12(b)(6) motions, a plaintiff must aver in his  
7 complaint ‘sufficient factual matter, accepted as true, to state a claim to relief that is plausible  
8 on its face.’” *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009) (citing *Ashcroft v. Iqbal*, 556 U.S.  
9 —, 129 S.Ct. 1937, 1949 (2009). “A claim has facial plausibility when the plaintiff pleads  
10 factual content that allows the court to draw the reasonable inference that the defendant is liable  
11 for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949 (2009) .

12 In addition, factual allegations asserted by pro se petitioners, “however inartfully  
13 pleaded,” are held “to less stringent standards than formal pleadings drafted by lawyers.” *Haines*  
14 *v. Kerner*, 404 U.S. 519-20 (1972). Thus, where a plaintiff appears in propria persona in a civil  
15 rights case, the Court must construe the pleadings liberally and afford plaintiff any benefit of the  
16 doubt. *See Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988).

17 Nevertheless, and in spite of the deference the court is bound to pay to any factual  
18 allegations made, it is not proper for the court to assume that “the [plaintiff] can prove facts  
19 which [he or she] has not alleged.” *Associated General Contractors of California, Inc. v.*  
20 *California State Council of Carpenters*, 459 U.S. 519, 526 (1983). Nor must the court “accept  
21 as true allegations that contradict matters properly subject to judicial notice or by exhibit” or  
22 those which are “merely conclusory,” require “unwarranted deductions” or “unreasonable  
23 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.) (citation omitted),  
24 *amended on other grounds*, 275 F.3d 1187 (9th Cir. 2001).

### 25 **C. Eighth Amendment Claims**

26 Defendants argue that Plaintiff has failed to state an Eighth Amendment claim against any  
27 of the named Defendants. Plaintiff alleges that Defendants Gonzales and Fregosa pushed his  
28 “face, head and body” up against a wall several times until he was “dazed.” Compl. at 3. Then

1 Plaintiff alleges Gonzales and Fregosa “slammed” him down to the ground face first while  
2 “twisting [Plaintiff’s] arms” even while he was handcuffed *Id.*

3 When an inmate claims that prison officials violated his Eighth Amendment rights by  
4 using excessive physical force, the relevant inquiry is “whether force was applied in a good-faith  
5 effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson*  
6 *v. McMillian*, 503 U.S. 1, 7 (1992). An Eighth Amendment violation occurs only when an  
7 inmate is subjected to the “unnecessary and wanton infliction of pain.” *Whitley v. Albers*, 475  
8 U.S. 312, 319 (1986). To determine whether Plaintiff has satisfied the malicious and sadistic  
9 standard, the Court examines the following five factors: (1) the extent of the injury suffered; (2)  
10 the need for the application of force; (3) the relationship between that need and the amount of  
11 force used; (4) the threat reasonably perceived by Defendants; and (5) any efforts made to  
12 temper the severity of a forceful response. *Hudson*, 503 U.S. at 7; *Whitley*, 475 U.S. at 321.

13 Here, Plaintiff’s factual allegations that he was pushed against a wall multiple times and  
14 “slammed” down to the ground even though he was handcuffed, are sufficient to state an Eighth  
15 Amendment excessive force claim. Thus, the Court DENIES Defendants’ Motion to Dismiss  
16 Plaintiff’s Eighth Amendment excessive force claims.

17 Defendants fail to argue that Plaintiff has not sufficiently alleged an Eighth Amendment  
18 failure to protect claim against Defendant Lynn. In addition, they do not argue that Defendant  
19 Lynn is entitled to qualified immunity with respect to Plaintiff’s Eighth Amendment failure to  
20 protect claims. Thus, those claims remain in this action.

#### 21 **D. Verbal Harassment**

22 Defendants also seek dismissal of Plaintiff’s claims that Defendant Lynn was “laughing  
23 and pointing” at him on the grounds that these claims, standing alone, cannot constitute a  
24 constitutional violation. *See* Defs.’ Mot. at 5-6. To the extent that Plaintiff is seeking to hold  
25 Defendant Lynn liable for harassing him, the Court agrees with Defendants that he has failed to  
26 state a claim. Verbal harassment or verbal abuse by prison officials generally does not constitute  
27 a violation of the Eighth Amendment. *See Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996)  
28 (harassment does not constitute an Eighth Amendment violation); *Oltarzewski v. Ruggiero*, 830

1 F.2d 136, 139 (9th Cir. 1987) (harassment in the form of vulgar language directed at an inmate  
2 is not cognizable under § 1983); *McDowell v. Jones*, 990 F.2d 433, 434 (8th Cir. 1993) (verbal  
3 threats and name calling are not actionable under § 1983).

4 Thus, the Court GRANTS Defendants' Motion to Dismiss Plaintiff's verbal harassment  
5 claims pursuant to FED.R.CIV.P. 12(b)(6).

6 **E. Qualified Immunity**

7 Defendant Lynn also seeks dismissal of Plaintiff's allegations of verbal harassment on  
8 qualified immunity grounds. However, because the Court has dismissed these claims, the Court  
9 need not reach any issues regarding qualified immunity with respect to a claim which the Court  
10 has found that Plaintiff failed to allege a constitutional violation. *See County of Sacramento v.*  
11 *Lewis*, 523 U.S. 833, 841 n.5 (1998) (“[The better approach to resolving cases in which the  
12 defense of qualified immunity is raised is to determine first whether the plaintiff has alleged the  
13 deprivation of a constitutional right at all.”); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001)  
14 (“If no constitutional right would have been violated were the allegations established, there is  
15 no necessity for further inquiries concerning qualified immunity.”).

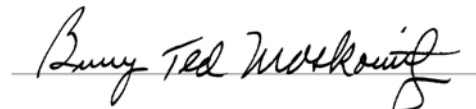
16 **IV. CONCLUSION**

17 For all the reasons set forth above, the Court hereby:

18 GRANTS Defendants' Motion to Dismiss Plaintiff's verbal harassment claims and  
19 DENIES Defendants' Motion to Dismiss Plaintiff's Eighth Amendment claims pursuant to  
20 FED.R.CIV.P. 12(b)(6). Defendants shall file an Answer to Plaintiff's Complaint, and serve it  
21 upon Plaintiff, no later than twenty (20) days after the date upon which this Order is filed.

22 **IT IS SO ORDERED.**

23 DATED: October 26, 2009

24 

25 Honorable Barry Ted Moskowitz  
26 United States District Judge