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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GEMMEL DIXON,

Plaintiff,

v.

F. GONZALES, et al.,

Defendants.

CASE NO. 1:09-CV-00172-LJO-DLB PC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL OF
ACTION FOR FAILURE TO STATE A
CLAIM

(DOC. 35)

OBJECTIONS DUE WITHIN TWENTY-ONE
DAYS

Findings And Recommendations

I. Background

Plaintiff Gemmel Dixon (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff initiated this action by filing his complaint on January 28, 2009. Doc. 1. The Court screened Plaintiff’s complaint on May 8, 2009, pursuant to 28 U.S.C. § 1915A, and found that it failed to state a claim. Doc. 9. Plaintiff was provided with the opportunity to file an amended complaint. On June 2, 2009, Plaintiff filed his first amended complaint. Doc. 13. On October 21, 2009, the Court issued Findings and Recommendations recommending dismissal of certain claims. Doc. 16. The Magistrate Judge had found that Plaintiff stated cognizable Eighth Amendment claims as to Defendants Gonzales, Carrasco, Zanchi, Peterson, and Gentry for failure to protect, but Plaintiff failed to state any other claims. On December 21, 2009, the District Judge assigned to this action adopted the findings and recommendation. Doc. 18.

1 On December 24, 2009, Plaintiff filed a motion to amend his civil rights complaint. Doc.
2 19. On June 22, 2010, the District Judge granted Plaintiff's motion. Doc. 22. Plaintiff filed his
3 second amended complaint on June 22, 2010, prior to receiving the District Judge's order.
4 Plaintiff omitted his cognizable claims. Plaintiff then filed a motion on August 16, 2010,
5 requesting clarification as to whether he had preserved his cognizable claims. On November 30,
6 2010, the Court issued an order requiring Plaintiff to file a third amended complaint if he wished
7 to preserve his cognizable claims. Plaintiff filed his third amended complaint on December 30,
8 2010. Doc. 27. On July 21, 2011, the Court screened Plaintiff's third amended complaint and
9 found that it failed to state a claim. Doc. 31. Plaintiff was provided one more opportunity to
10 amend. On September 7, 2011, Plaintiff filed his fourth amended complaint. Doc. 35.

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

20 A complaint must contain "a short and plain statement of the claim showing that the
21 pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
22 required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere
23 conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing
24 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual
25 matter, accepted as true, to 'state a claim that is plausible on its face.'" *Id.* (quoting *Twombly*,
26 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions are not. *Id.*

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1 **II. Summary Of Fourth Amended Complaint**

2 Plaintiff was incarcerated at California Correctional Institution (“CCI”) in Tehachapi,
3 California, where the events giving rise to this action occurred. Plaintiff names the following as
4 Defendants: F. Gonzales, warden of CCI; associate warden M. Carrasco; Facility 4A captain D.
5 Zanchi; Facility 4A lieutenant J. Peterson; correctional counselor II D. Cowee; director of CDCR
6 S. Hubbard; E. Arnold, chief of the CSU; Institutional Gang Investigator (“IGI”) lieutenant
7 Gentry; and correctional counselor S. Albritton.

8 Plaintiff alleges the following. A confidential memorandum was authored by IGI at CCI
9 on November 17, 2007 and placed in Plaintiff’s central file. Fourth Am. Compl. 4. Plaintiff was
10 recommended for transfer to another institution because of safety concerns. *Id.* Defendant F.
11 Gonzales is responsible for the safety of inmates under his charge. *Id.* Defendant Gonzales
12 failed to ensure that procedures were followed. *Id.* CDCR policy called for Plaintiff’s
13 immediate removal from the general population to administrative segregation. *Id.*

14 Defendant M. Carrasco failed to act within her authority to ensure that CCI staff executed
15 procedures to prevent assaults such as the one that occurred to Plaintiff. *Id.* at 5. Defendant
16 Zanchi was the active captain on November 17, 2007 when the information regarding an
17 imminent attack on Plaintiff was placed into Plaintiff’s central file. *Id.* The assault occurred on
18 November 20, 2007. *Id.* Defendant Zanchi took no reasonable steps to avert the attack. *Id.*
19 Defendant Peterson, the active lieutenant, failed to ensure that CDCR procedures involving
20 security were executed and enforced by staff under his authority. *Id.* Defendant Cowee
21 demonstrated his knowledge of the threat of assault, but made no effort to warn Plaintiff of the
22 threat or remove him. *Id.* at 5-6.

23 As a result of Plaintiff being assaulted, Plaintiff was recommend by the Institutional
24 Classification Committee (“ICC”) for an indeterminate Security Housing Unit (“SHU”) term for
25 safety reasons. *Id.* at 7. Plaintiff refused to accept placement in the Sensitive Needs Yard and
26 refused to become an informant. *Id.* Plaintiff’s classification status was referred to the
27 Departmental Review Board (“DRB”). *Id.* On June 27, 2008, the DRB, composed of
28 Defendants S. Hubbard, E. Arnold, and S. Albritton, reviewed Plaintiff’s case, and rejected the

1 ICC's rationale of placing Plaintiff in indeterminate SHU for safety reasons. *Id.* However, the
2 DRB still imposed an indeterminate SHU term based on Plaintiff's past violent and disruptive
3 behavior. *Id.* Plaintiff complains that DRB Defendants denied Plaintiff due process, including
4 notice of any impending disciplinary infractions, the right to call witnesses, and the right to be
5 present at the DRB hearing. *Id.* at 7-8.

6 Plaintiff requests declaratory relief, a permanent injunction ordering the restoration of all
7 lost credit and barring Plaintiff being housed in CCI, compensatory and punitive damages, and
8 legal fees, including attorney fees.

9 **III. Analysis**

10 **A. Failure To Protect**

11 Plaintiff alleges that Defendants violated Plaintiff's Eighth Amendment rights by failing
12 to protect him from harm. The Eighth Amendment protects prisoners from inhumane methods of
13 punishment and from inhumane conditions of confinement. *Morgan v. Morgensen*, 465 F.3d
14 1041, 1045 (9th Cir. 2006). Extreme deprivations are required to make out a conditions of
15 confinement claim, and only those deprivations denying the minimal civilized measure of life's
16 necessities are sufficiently grave to form the basis of an Eighth Amendment violation. *Hudson v.*
17 *McMillian*, 503 U.S. 1, 9 (1992) (citations and quotations omitted). Prison officials have a duty
18 to take reasonable steps to protect inmates from physical abuse. *Hoptowit v. Ray*, 682 F.2d 1237,
19 1250 (9th Cir. 1982). In order to state a claim for violation of the Eighth Amendment, Plaintiff
20 must allege facts sufficient to support a claim that officials knew of and disregarded a substantial
21 risk of serious harm to him. *E.g.*, *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Frost v. Agnos*,
22 152 F.3d 1124, 1128 (9th Cir. 1998). Mere negligence on the part of the official is not sufficient
23 to establish liability, but rather, the official's conduct must have been wanton. *Farmer*, 511 U.S.
24 at 835; *Frost*, 152 F.3d at 1128.

25 Plaintiff fails to state an Eighth Amendment claim against Defendants F. Gonzales, M.
26 Carrasco, D. Zanchi, and J. Peterson. Plaintiff alleges that these Defendants failed to ensure that
27 proper procedure was followed to prevent this attack. Plaintiff appears to be alleging liability
28 based on their supervisory roles. The term "supervisory liability," loosely and commonly used by

1 both courts and litigants alike, is a misnomer. *Iqbal*, 129 S. Ct. at 1949. “Government officials
2 may not be held liable for the unconstitutional conduct of their subordinates under a theory of
3 *respondeat superior*.” *Id.* at 1948. Rather, each government official, regardless of his or her
4 title, is only liable for his or her own misconduct.

5 When the named defendant holds a supervisory position, the causal link between the
6 defendant and the claimed constitutional violation must be specifically alleged. *See Fayle v.*
7 *Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir.
8 1978). To state a claim for relief under § 1983 for supervisory liability, plaintiff must allege
9 some facts indicating that the defendant either: personally participated in the alleged deprivation
10 of constitutional rights; knew of the violations and failed to act to prevent them; or promulgated
11 or “implemented a policy so deficient that the policy ‘itself is a repudiation of constitutional
12 rights’ and is ‘the moving force of the constitutional violation.’” *Hansen v. Black*, 885 F.2d 642,
13 646 (9th Cir. 1989) (internal citations omitted); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
14 1989).

15 Plaintiff alleges no facts that indicate Defendants Gonzales, Carrasco, Zanchi, and
16 Peterson personally participated in the alleged constitutional violation, knew of violations and
17 failed to act, or implemented a policy so deficient that the policy itself is the moving force of the
18 violation. *Hansen*, 885 F.2d at 646; *Taylor*, 880 F.2d at 1045. Plaintiff alleges no facts that
19 demonstrate Defendants Gonzales, Carrasco, Zanchi, and Peterson knew of an impending attack
20 against Plaintiff. Mere placement of a confidential memo in Plaintiff’s central file does not
21 demonstrate that these Defendants knew of a substantial risk of serious harm.

22 Plaintiff fails to state an Eighth Amendment claim against Defendant D. Cowee. Plaintiff
23 alleges that Defendant Cowee was aware of the potential risk of serious harm to Plaintiff based
24 on his signature on the confidential information disclosure form. Fourth Am. Compl., Ex. A.
25 However, the signature is dated December 21, 2007, a month after Plaintiff was allegedly attack.
26 This fails to demonstrate that Defendant Cowee knew of and disregarded a substantial risk of
27 serious harm to Plaintiff.

28 Plaintiff fails to state an Eighth Amendment claim against Defendant Gentry. Plaintiff

1 alleges no facts that demonstrate Defendant Gentry violated Plaintiff's constitutional rights. *See*
2 *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) ("A person subjects another to the
3 deprivation of a constitutional right, within the meaning of section 1983, if he does an
4 affirmative act, participates in another's affirmative acts, or omits to perform an act which he is
5 legally required to do that causes the deprivation of which complaint is made.") (internal
6 quotations omitted).

7 **B. Due Process**

8 Plaintiff alleges that Defendants Hubbard, Arnold, and Albritton violated Plaintiff's due
9 process rights. Based on the submitted exhibits, the DRB's actions were for purposes of
10 Plaintiff's classification status. Plaintiff fails to allege a liberty interest in his classification
11 status. *See Myron v. Terhune*, 476 F.3d 716, 718 (9th Cir. 2007). Plaintiff has failed to allege an
12 atypical and significant hardship for the DRB's imposition of an indeterminate SHU term, and
13 thus has failed to allege a liberty interest. The Due Process Clause protects prisoners from being
14 deprived of liberty without due process of law. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).
15 In order to state a cause of action for deprivation of procedural due process, a plaintiff must first
16 establish the existence of a liberty interest for which the protection is sought. *Id.* Liberty
17 interests may arise from the Due Process Clause itself or from state law. *Hewitt v. Helms*, 459
18 U.S. 460, 466-68 (1983). The Due Process Clause itself does not confer on inmates a liberty
19 interest in being confined in the general prison population instead of administrative segregation.
20 *See id.* With respect to liberty interests arising from state law, the existence of a liberty interest
21 created by prison regulations is determined by focusing on the nature of the deprivation. *Sandin*
22 *v. Conner*, 515 U.S. 472, 481-84 (1995). Liberty interests created by prison regulations are
23 limited to freedom from restraint which "imposes atypical and significant hardship on the inmate
24 in relation to the ordinary incidents of prison life." *Id.* at 484.

25 Even assuming Plaintiff alleged a liberty interest, Plaintiff would not state a claim.
26 Placement in indeterminate SHU for housing purposes, not disciplinary, is treated as similar to
27 placement in administrative segregation. *See Bruce v. Ylst*, 351 F.3d 1283, 1287 (9th Cir. 2003)
28 (in context of gang validation, finding of indeterminate SHU placement for housing purposes is

1 administrative discretion); *Toussaint v. McCarthy*, 801 F.2d 1080, 1100 (9th Cir. 1986) (due
2 process for administrative segregation placement requires only informal nonadversary hearing
3 within a reasonable time after prisoner is segregated, informing the prisoner of the reasons for
4 considering segregation, and allowing prisoner to present his views), *overruled in part on other*
5 *grounds, Sandin*, 515 U.S. 472. The prisoner is not entitled to “detailed written notice of
6 charges, representation of counsel or counsel-substitute, an opportunity to present witnesses, or a
7 written decision describing the reasons for placing the prisoner in administrative segregation.” *Id.*
8 at 1100-01 (citations omitted).

9 Here, based on the submitted exhibits, Plaintiff was provided an opportunity to present
10 his views regarding indeterminate SHU term. After the DRB Defendants approved an
11 indeterminate SHU term due to Plaintiff’s prior disruptive disciplinary history, Plaintiff’s
12 classification status was referred back to ICC for a decision. Ex. B, p.4, dated August 14, 2008.
13 The ICC then chose to adopt the DRB’s decision. Plaintiff was present at this initial SHU review
14 and expressed his disagreement with the DRB’s decision. The Court finds that Plaintiff was
15 provided a hearing, informed of the reasons for the indeterminate SHU term, and was allowed to
16 present his views, as required under *Toussaint*. Assuming that Plaintiff has a liberty interest
17 regarding an indeterminate SHU term, Plaintiff received the required due process. Plaintiff fails
18 to state a due process claim against Defendants Hubbard, Arnold, and Albritton.

19 **IV. Conclusion And Recommendation**

20 Plaintiff has failed to state a claim against any Defendants. Plaintiff has had several
21 opportunities to amend his complaint to state a claim, but is unable to do so. The Court does not
22 find that Plaintiff will be able to cure the deficiencies of his complaint. Further leave to amend will
23 not be granted. *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc).

24 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 25 1. This action be dismissed with prejudice for failure to state a claim upon which
26 relief may be granted;
- 27 2. This dismissal should subject Plaintiff to the “three strikes” provision of 28
28 U.S.C. § 1915(g).

