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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL EUGENE HOLLIS,

Plaintiff,

v.

RUSSELL YORK, et al.,

Defendants.

CASE NO. 1:09-cv-00463-AWI-SMS

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSING CERTAIN
CLAIMS AND DEFENDANTS

(ECF No. 50)

OBJECTIONS DUE WITHIN THIRTY DAYS

I. Screening Requirement

Plaintiff Michael Eugene Hollis (“Plaintiff”) is a federal prisoner proceeding pro se and in forma pauperis in this civil action pursuant to 42 U.S.C. § 1983 and 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 violation of civil rights by federal actors.¹ Currently pending before the Court is the third amended complaint, filed September 26, 2011. (ECF No. 50.)

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 “fails to state a claim on which relief may be granted,” or that “seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B).

¹Initially, the Court notes that although Plaintiff brings this action under Bivens, the allegations involve both federal and state actors. Accordingly, the Court shall construe this as an action brought under both Bivens and 42 U.S.C. § 1983.

1 In determining whether a complaint states a claim, the Court looks to the pleading standard
2 under Federal Rule of Civil Procedure 8(a). Under Rule 8(a), a complaint must contain “a short and
3 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
4 “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it
5 demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Ashcroft v.
6 Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 555
7 (2007)).

8 Under section 1983, Plaintiff must demonstrate that each defendant personally participated
9 in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). This requires
10 the presentation of factual allegations sufficient to state a plausible claim for relief. Iqbal, 129 S. Ct.
11 at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). “[A] complaint [that]
12 pleads facts that are ‘merely consistent with’ a defendant’s liability . . . ‘stops short of the line
13 between possibility and plausibility of entitlement to relief.’” Iqbal, 129 S. Ct. at 1949 (quoting
14 Twombly, 550 U.S. at 557). Further, although a court must accept as true all factual allegations
15 contained in a complaint, a court need not accept a plaintiff’s legal conclusions as true. Iqbal, 129
16 S. Ct. at 1949. “Threadbare recitals of the elements of a cause of action, supported by mere
17 conclusory statements, do not suffice.” Id. (quoting Twombly, 550 U.S. at 555).

18 **II. Complaint Allegations**

19 Plaintiff is incarcerated at the Federal Correctional Institution in Big Spring, Texas.
20 Plaintiff’s third amended complaint alleges that while he was housed at the Fresno County Jail from
21 August 18, 2008 until June 16, 2009, he was denied access to the law library or any system of
22 receiving legal materials. (Third Amended Compl. 6, ECF No. 50.) Plaintiff alleges that he wrote
23 to Defendant York and filed complaints that were ignored by Defendant Mims. (Id. at 6.)

24 Plaintiff was told that he would be moved to Madera County Jail, but Defendant York failed
25 to have Plaintiff transferred to Madera County Jail. (Id. at 9-10.) Plaintiff alleges that had he had
26 access to legal materials, Judge Wanger would have granted all if not some of his motions for
27 injunctive relief. (Id. at 10.) Plaintiff brings this action against Defendants Mims and York for
28 obstructing Plaintiff from pursuing his civil rights complaints against jail conditions. (Id. at 11.)

1 Plaintiff was harmed by being denied research into injunctive relief while housed at Fresno County
2 Jail. (Id. at 11-12.)

3 Additionally, Plaintiff alleges that he was subjected to pain and misery due to cold
4 temperatures in the “40's and 50's” while housed at the Fresno County Jail. (Id. at 12.) Plaintiff
5 alleges that he was kept in a cold holding cell at the Fresno County Jail because of an unwritten
6 policy since it makes inmates easier to manage. (Id. at 12-13.) Plaintiff alleges that Defendants Mims
7 and York were aware of the jail temperatures through letters, grievances, face to face talks,² attorney
8 interventions, and sit down talks with both York and Mims representatives. (Id. at 12.)

9 On October 13, 2008, Plaintiff asked his defense attorney to talk to the United States
10 Marshall Service about the cold, medical care, and library denials. On October 27, 2008, Plaintiff
11 complained about the cold, medical care, forced housing with gang members, and denial of library
12 access. Plaintiff also learned that federal prisoners were housed in Madera.³ (Id. at 13.) Plaintiff
13 was exposed to cold temperatures from October 2008 through March 2009 causing him to suffer
14 from post surgical osteo-arthritis and foot numbness. Plaintiff complained to medical personnel
15 about the cold. (Id. at 14.)

16 Plaintiff filed two grievances regarding the jail temperature in November 2008 and Defendant
17 Mims and an unidentified individual sent Defendant Dawson and Calvert to “falsify a temperature
18 reading by ‘shooting’ a lazer temperature reading at a sky light on the sunny side of the building.”
19 (Id. at 15.) Plaintiff asked Defendant Dawson to take a reading in Plaintiff’s cell and Defendant
20 Dawson refused. On December 12, 2008, Plaintiff’s grievance was denied by an unidentified jail
21 commander (“Defendant Doe”). Nothing was done to address Plaintiff’s suffering. (Id.)

22 Plaintiff was placed in “the hole” and subjected to even colder temperatures which caused
23 him to catch a cold. Plaintiff was given cold medication for two and one half days when his
24

25 ²Although Plaintiff alleges that Defendants Mims and York were aware due to face to face talks he stated in
26 his complaint that he never spoke face to face with Defendants Mims or York. (Third Amended Compl. 6.)

27 ³Plaintiff references a prior order of the Court finding that cognizable claims had been stated in his prior
28 complaint. However, Plaintiff has been advised that an amended complaint supercedes the original complaint,
Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987),
and must be “complete in itself without reference to the prior or superceded pleading,” Local Rule 220.

1 symptoms of a runny nose, sneezing, sore throat and coughing up phlegm lasted over three weeks.
2 He suffered from severe pain due to the cold and was not given pain medication while in the hole.
3 (Id. at 17.)

4 On October 27, 2008, Plaintiff was told that the United States Marshall Service was planning
5 to move him to another facility in Madera. Plaintiff spoke with a United States Marshall on
6 December 1, 2008, and was led to believe the move would occur soon. Plaintiff filed a motion for
7 a change of venue, which was denied by Judge Wanger. Plaintiff ended up taking a psychiatric
8 medication until he was transferred from Fresno County Jail in June 2009. (Id. at 18.)

9 Plaintiff brings this action against Defendants Holder, Mims, York, Dawson, Calvert, and
10 Doe, in their individual and official capacities, alleging denial of access to the court in violation of
11 the First Amendment and cruel and unusual conditions of confinement in violation of the Eighth and
12 Fourteenth Amendments. He is seeking compensatory and punitive damages, and injunctive relief.

13 **III. Discussion**

14 **A. Access to Court**

15 Inmates have a fundamental constitutional right of access to the courts. Lewis v. Casey, 518
16 U.S. 343, 346 (1996); Hebbe v. Pliler, 611 F.3d 1202, 1206 (9th Cir. 2010). The right is merely the
17 right to bring to court a grievance the inmate wishes to present, and is limited to direct criminal
18 appeals, habeas petitions, and civil rights actions. Lewis, 518 U.S. at 354. To bring a claim, the
19 plaintiff must have suffered an actual injury by being shut out of court. Christopher v. Harbury, 536
20 U.S. 403, 415 (2002); Lewis, 518 U.S. at 351.

21 Prisoners do not have the right to access a law library and “an inmate cannot establish
22 relevant actual injury simply by establishing that his prison's law library or legal assistance program
23 is subpar in some theoretical sense.” Lewis, 518 U.S. at 351. Thus an inmate cannot state a
24 cognizable claim by alleging that he was denied access to the law library or a legal assistance
25 program. Plaintiff appears to be attempting to allege denial of access to the courts for the claims that
26 he originally brought in this action. The incidents alleged in Plaintiff’s third amended complaint
27 occurred from October 2008 through March 2009. Plaintiff’s original complaint was filed March
28 11, 2009, approximately six months after the alleged violations began. During his criminal case, in

1 January 2009, Plaintiff was advised by Judge Wanger that he needed to file a civil action to address
2 his concerns. (Third Amended Compl. 23.) Although Plaintiff’s request for legal materials was
3 denied on January 15, 2009, he filed this action approximately two months later. (Id. at 24.)

4 Additionally, Plaintiff alleges that motions he has filed in this action would have been
5 granted if he had adequate access to legal materials. (See Third Amended Complaint 35.) Plaintiff
6 has filed a motion for a change of venue, motion for recusal, and multiple motions for injunctive
7 relief requesting the Court order the Bureau of Prisons to transfer him out of Fresno County Jail, and
8 then after he was transferred, back to California that have been denied. Upon review of the motions
9 filed in this action, the Court finds that even with additional legal research Plaintiff would not have
10 prevailed on his motions.

11 While Plaintiff claims that he was unable to bring actions due to denial of access to legal
12 assistance, he has not alleged any facts demonstrating that he suffered an actual injury to qualifying
13 litigation, and his claim fails as a matter of law. Christopher, 536 U.S. at 415; Lewis, 518 U.S. at
14 351.

15 **B. Deliberate Indifference**

16 The incidents alleged in the complaint begin when Plaintiff was a pretrial detainee and
17 continue after he was convicted. As a pretrial detainee, Plaintiff would be protected from conditions
18 of confinement which amount to punishment. Bell v. Wolfish, 441 U.S. 520, 535-36 (1979);
19 Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1017-18 (9th Cir. 2010); Clouthier v. County of
20 Contra Costa, 591 F.3d 1232, 1244 (9th Cir. 2010). While pretrial detainees’ rights are protected
21 under the Due Process Clause of the Fourteenth Amendment, the standard for claims brought under
22 the Eighth Amendment has long been used to analyze pretrial detainees’ conditions of confinement
23 claims. Simmons, 609 F.3d at 1017-18; Clouthier, 591 F.3d at 1242; Frost v. Agnos, 152 F.3d 1124,
24 1128 (9th Cir. 1998). Accordingly, Plaintiff’s claims for conditions of confinement and, to the
25 extent Plaintiff is attempting to allege a denial of medical treatment, would be analyzed under the
26 deliberate indifference standard applicable to the Eighth Amendment.

27 To constitute cruel and unusual punishment, prison conditions must involve “the wanton and
28 unnecessary infliction of pain.” Rhodes v. Chapman, 452 U.S. 337, 347 (1981). The plaintiff must

1 “objectively show that he was deprived of something ‘sufficiently serious,’ and make a subjective
2 showing that the deprivation occurred with deliberate indifference to the inmate’s health or safety.”
3 Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010) (citations omitted). Deliberate indifference
4 requires a showing that “prison officials were aware of a “substantial risk of serious harm” to an
5 inmates health or safety and that there was no “reasonable justification for the deprivation, in spite
6 of that risk.” Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837, 844 (1994)). The circumstances,
7 nature, and duration of the deprivations are critical in determining whether the conditions
8 complained of are grave enough to form the basis of a viable claim.” Johnson v. Lewis, 217 F.3d
9 726, 731 (9th Cir. 2006).

10 **1. Conditions of Confinement**

11 Plaintiff’s allegations are sufficient to state a cognizable claim against Defendants Dawson
12 and Calvert for subjecting Plaintiff to cold temperatures in the jail in violation of the Eighth
13 Amendment.

14 Plaintiff’s conclusory statements that Defendant Doe sent Defendants Dawson and Calvert
15 to collect fraudulent temperature readings is insufficient to state a cognizable claim. Iqbal, 129 S.
16 Ct. at 1949. The facts as alleged in the complaint show that Defendant Doe responded to Plaintiff’s
17 grievance by sending employees out to investigate the temperature in the jail. Plaintiff’s grievance
18 was denied based upon the temperature readings provided by the investigating officials. The prison
19 grievance procedure does not confer any substantive rights upon inmates and actions in reviewing
20 appeals cannot serve as a basis for liability under section 1983. Buckley v. Barlow, 997 F.2d 494,
21 495 (8th Cir. 1993). At the time Plaintiff’s appeal was denied Defendant Doe would be relying upon
22 the temperature readings provided during the investigation and Plaintiff has failed to allege facts to
23 indicate that Defendant Doe was aware that the temperature readings were inaccurate.

24 Additionally, government officials may not be held liable for the actions of their subordinates
25 under a theory of *respondeat superior*. Iqbal, 129 S. Ct. at 1948. Since a government official cannot
26 be held liable under a theory of vicarious liability for section 1983 actions, Plaintiff must plead that
27 the official has violated the Constitution through his own individual actions. Id. at 1948. Plaintiff’s
28 allegation that he sent a letter or that he informed the subordinates of Defendants Mims and York

1 about the temperatures in the jail is insufficient to demonstrate that Defendants Mims or York
2 “participated in or directed the violations, or knew of the violations and failed to act to prevent
3 them.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). While Plaintiff has alleged that he
4 submitted grievances he has failed to set forth factual allegations to demonstrate that Defendants
5 Mims or York were aware of a serious risk of harm to Plaintiff and failed to respond. Thomas, 611
6 F.3d at 1150.

7 **2. Medical Treatment**

8 To the extent that Plaintiff attempts to bring this action for denial of medication, the
9 complaint fails to state a cognizable claim. Plaintiff’s allegation that he was not given pain
10 medication and only given cold medication for two and one half days, when he continued to suffer
11 a runny nose, sneezing, sore throat and was coughing up phlegm for three weeks is insufficient to
12 establish that Plaintiff was at a risk of serious harm from the denial of medication. Farmer, 511 U.S.
13 at 837. Additionally, Plaintiff has failed to show that any named defendant was aware that any need
14 for medication existed and the allegations do not link any named defendant to the decision to deny
15 him medication. Jones, 297 F.3d at 934.

16 **3. Transfer to Another Facility**

17 While Plaintiff alleges cruel and unusual punishment because he was not transferred after
18 being informed he would be, the factual allegations fail to establish that Defendant York was aware
19 of any risk of harm to Plaintiff or that Plaintiff suffered an objectively serious deprivation of life’s
20 basic necessities due to the failure to transfer him. Farmer, 511 U.S. 834. Plaintiff has failed to
21 state a cognizable claim based upon not being transferred to a different facility.

22 **C. Due Process**

23 Additionally, there is no substantive liberty interest in being housed in a particular prison.
24 Olim v. Wakinekona, 461 U.S. 238, 245 (1983); White v. Lambert, 370 F.3d 1002, 1013 (9th Cir.
25 2004) (overruled on other grounds by Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010). Neither
26 the initial decision assigning the inmate to a particular prison nor a subsequent transfer to a different
27 prison implicate the Due Process Clause. Olim, 461 U.S. 244-45; see Moody v. Daggett, 429 U.S.
28 78, 88 f. 9 (1976); Montanye v. Haymes, 427 U.S. 236, 242 (1976). Plaintiff does not have a liberty

1 interest in being moved from Fresno County Jail to another facility.

2 **D. Federal Torts Claim Act**

3 To the extent that Plaintiff seeks to hold the United States Department of Justice liable for
4 the temperatures at the Fresno County Jail or in the federal holding cells, the United States and its
5 agencies are immune from suit absent a waiver of sovereign immunity. FDIC v. Meyer, 510 U.S.
6 471, 476 (1994). The Federal Tort Claims Act (“FTCA”) provides a limited waiver of sovereign
7 immunity for certain torts committed by government employees. Delta Savings Bank v. United
8 States, 265 F.3d 1017, 1024 (9th Cir. 2001). This waiver includes “tort claims arising out of
9 negligent conduct of government employees acting within the scope of their employment,” Terbush
10 v. United States, 516 F.3d 1125, 1128-29 (9th Cir. 2008), if the United States, *as a private person*,
11 would be liable to the plaintiff under California tort law, United States v. Olson, 126 S. Ct. 510, 511
12 (2005); Delta Savings Bank, 265 F.3d at 1025. Any duty owed to the plaintiff by the United States
13 “must be found in California state tort law.” Delta Saving Banks, 265 F.3d at 1025.

14 In addition, a suit may not be instituted against the United States under the FTCA unless the
15 claim is first presented to the appropriate federal agency and the claim is finally denied, or six
16 months have passed without a final resolution having been made. 28 U.S.C. § 2675(a). Where the
17 claim requirement is not met the Court must dismiss the claim for lack of subject matter jurisdiction.
18 Goodman v. United States, 298 F.3d 1048, 1054, 1055 (2002). Plaintiff fails to allege that he met
19 the requirement to file a claim with the appropriate federal agency within the applicable time period.

20 **E. Official Capacity**

21 Plaintiff is a prisoner in federal custody and is seeking relief pursuant to Bivens which
22 recognized a private action where federal officers are alleged to have violated the constitutional
23 rights of citizens. Correctional Services Corporation v. Malesko, 534 U.S. 61, 66 (2001). A Bivens
24 action will not lie against the United States, agencies of the United States, or federal agents in their
25 official capacity. See FDIC v. Meyer, 510 U.S. 471, 486 (1994). Plaintiff’s only remedy for an
26 alleged constitutional violation is against the individual official. Malesko, 534 U.S. at 72.

27 A local government unit may only be held liable for a constitutional injury if it inflicts the
28 injury complained of through a policy or custom. Waggy v. Spokane County Washington, 594 F.3d

1 707, 713 (9th Cir. 2010). While Plaintiff alleges that Defendant Mims implemented a library policy
2 that denied him access to the courts, his claim fails as he did not demonstrate that the policy violated
3 his constitutional rights. Burke v. County of Alameda, 586 F.3d 725, 734 (9th Cir. 2009) (citation
4 omitted); see also Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1185-86 (9th Cir. 2002).

5 Plaintiff's conclusory statements that the unwritten policy of keeping the holding cells cold
6 so inmates are easier to manage are insufficient to state a plausible claim. Iqbal, 129 S. Ct. at 1949.
7 Plaintiff also alleges that there is a policy outlawing long johns, beanies, socks, or gloves in the
8 commissary. However, according to the exhibits attached to Plaintiff's complaint, he was directing
9 his requests for warm clothing and blankets to medical personnel and was informed that he needed
10 to seek such items through custody personnel. (Third Amended Compl. 30, 33, 34.) According to
11 the response to Plaintiff's grievance on December 2, 2008, this was the fifth inappropriate grievance
12 Plaintiff submitted to medical personnel. Plaintiff's complaint fails to show that the "customs or
13 policies were the moving force behind" the violation of plaintiff's constitutional rights. Long v.
14 County of Los Angeles, 442 F.3d 1178, 1186 (9th Cir. 2006). Nor does the complaint sufficiently
15 link any named defendant to the alleged policy to deny inmate of warm clothing or heat. Iqbal, 129
16 S. Ct. at 1949.

17 Additionally, the complaint is devoid of any mention of Defendant Holder, other than
18 Plaintiff's request for relief. Since Plaintiff has failed to set forth factual allegations against
19 Defendant Holder he should be dismissed from this action for failure to state a claim.

20 **F. Injunctive Relief**

21 Finally Plaintiff requests an order that no financial settlement will be taken from him for
22 costs of incarceration. For each form of relief sought in federal court, Plaintiff must establish
23 standing. Mayfield v. United States, 599 F.3d 964, 969 (9th Cir. 2010), *cert.denied*, 131 S. Ct. 503
24 (2010). This requires Plaintiff to "show that he is under threat of suffering 'injury in fact' that is
25 concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical;
26 it must be fairly traceable to challenged conduct of the defendant; and it must be likely that a
27 favorable judicial decision will prevent or redress the injury." Summers v. Earth Island Institute, 129
28 S. Ct. 1142, 1149 (2009) (citation omitted); Mayfield, 599 F.3d at 969 (citation omitted). The

1 allegations found cognizable in the complaint do not establish standing for Plaintiff to request the
2 relief requested.

3 Additionally, the Prison Litigation Reform Act places limitations on injunctive relief.
4 Section 3626(a)(1)(A) provides in relevant part, “Prospective relief in any civil action with respect
5 to prison conditions shall extend no further than necessary to correct the violation of the Federal right
6 of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief
7 unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct
8 the violation of the Federal right, and is the least intrusive means necessary to correct the violation
9 of the Federal right.” 18 U.S.C. § 3626(a)(1)(A). The relief that Plaintiff requests is not narrowly
10 drawn to correct the violation of the federal right at issue in this action. 18 U.S.C. § 3626(a)(1)(A);
11 Summers v. Earth Island Institute, 129 S. Ct. 1142, 1149-50 (2009) (citation omitted) Price v. City
12 of Stockton, 390 F.3d 1105, 1112 (9th Cir. 2004). Accordingly, Plaintiff’s claim for injunctive relief
13 is not cognizable.

14 **IV. Conclusion and Order**

15 Plaintiff’s third amended complaint sets forth a cognizable claim against Defendants Dawson
16 and Calvert for deliberate indifference to conditions of confinement in violation of the Eighth
17 Amendment, but does not state any other federal claims for relief. Because Plaintiff has previously
18 been notified of the deficiencies and given leave to amend, the Court recommends that the non-
19 cognizable claims be dismissed, with prejudice. Noll, 809 F.2d at 1448-49. Based on the foregoing,
20 it is HEREBY RECOMMENDED that:

- 21 1. This action proceed pursuant to 42 U.S.C. § 1983 on Plaintiff’s third amended
22 complaint, filed September 26, 2011, against Defendants Dawson and Calvert
23 deliberate indifference to conditions of confinement in violation of the Eighth
24 Amendment;
- 25 2. Plaintiff’s First Amendment access to the court claim, remaining Eighth and
26 Fourteenth Amendment claims, official capacity claims, and claim for injunctive
27 relief be dismissed, with prejudice, for failure to state a claim under section 1983;
28 and

1 3. Defendants Holder, Mims, York, and Doe be dismissed, with prejudice, based upon
2 Plaintiff's failure to state a cognizable claim against them.

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

10
11
12 IT IS SO ORDERED.

13 **Dated:** October 3, 2011

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE