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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

11 || ANTHONY ANDERSON, Case No. 1:09-cv-01029 JLT (PC)

12 Plaintiff,

Case No. 1:09-cv-01029 JLT (PC)

ORDER DISMISSING THE COMPLAINT  
WITH LEAVE TO AMEND

13 || vs.

(Doc. 1)

14 || A. HEDGPETH, et al.,

## Defendants.

17 Plaintiff is a state prisoner proceeding pro se and *in forma pauperis* with a civil rights action  
18 pursuant to 42 U.S.C. § 1983. This proceeding was referred to the undersigned magistrate judge in  
19 accordance with 28 U.S.C. § 636(b)(1) and Local Rule 302. Pending before the court is Plaintiff's  
20 complaint filed June 12, 2009.

21 | I. SCREENING

## 22 A. **Screening Requirement**

23 The Court is required to review a case filed *in forma pauperis*. 28 U.S.C. § 1915(A)(a). The  
24 Court must review the complaint and dismiss the action if it is frivolous or malicious, fails to state a  
25 claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from  
26 such relief. 28 U.S.C. § 1915 (e)(2). If the Court determines the complaint fails to state a claim, leave  
27 to amend may be granted to the extent that the deficiencies of the complaint can be cured by amendment.

<sup>28</sup> Lopez v. Smith, 203 F.3d 1122, 1127-28 (9th Cir. 2000) (en banc).

1           **B.       Section 1983**

2           The Civil Rights Act under which this action was filed provides as follows:

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

8           42 U.S.C. § 1983.

9           To plead a § 1983 violation, the plaintiff must allege facts from which it may be inferred that (1)  
10          plaintiff was deprived of a federal right, and (2) the person who deprived plaintiff of that right acted  
11          under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988); Collins v. Womancare, 878 F.2d 1145,  
12          1147 (9th Cir. 1989). To warrant relief under § 1983, the plaintiff must allege and show that the  
13          defendants' acts or omissions caused the deprivation of the plaintiff's constitutionally protected rights.  
14          Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1993). "A person deprives another of a constitutional right,  
15          within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative  
16          acts, or omits to perform an act which he is legally required to do that causes the deprivation of which  
17          [the plaintiff complains]." Id. There must be an actual causal connection or link between the actions  
18          of each defendant and the deprivation alleged to have been suffered by the plaintiff. See Monell v. Dept.  
19          of Social Services, 436 U.S. 658, 691-92 (1978) (citing Rizzo v. Goode, 423 U.S. 362, 370-71(1976)).

20           **C.       Rule 8(a)**

21           Section 1983 complaints are governed by the notice pleading standard in Federal Rule of Civil  
22          Procedure 8(a), which provides in relevant part that:

23           A pleading that states a claim for relief must contain:

24           (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court  
25          already has jurisdiction and the claim needs no new jurisdictional support;

26           (2) a short and plain statement of the claim showing that the pleader is entitled to relief;  
27          and

28           (3) a demand for the relief sought, which may include relief in the alternative or different  
29          types of relief.

30           The Federal Rules of Civil Procedure adopt a flexible pleading policy. Nevertheless, a complaint  
31          must give fair notice and state the elements of the plaintiff's claim plainly and succinctly. See Bell

1      Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In other words, the plaintiff is required to give  
2      the defendants fair notice of what constitutes the plaintiff's claim and the grounds upon which it rests.  
3      Jones v. Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984). Although a complaint  
4      need not outline all the elements of a claim, there "must contain sufficient factual matter, accepted as  
5      true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L.  
6      Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 570). Vague and conclusory allegations are  
7      insufficient to state a claim under § 1983. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir.  
8      1982).

9      **II.      THE COMPLAINT**

10      In his complaint, Plaintiff identifies the following as defendants to this action: (1) the Director  
11      of the California Department of Corrections and Rehabilitation ("CDCR"); (2) Warden Hedgpeth; (3)  
12      Correctional Officer Sweeney; (4) Correctional Officer Ohanneson; and (5) Correctional Sergeant Ward.  
13      Plaintiff alleges as follows. On June 12, 2008, Defendant Sweeney electronically released Plaintiff from  
14      his cell. As Plaintiff stood in front of his cell door, pursuant to prison protocol, inmate Jefferson stepped  
15      out of his cell and attempted to throw a punch at Plaintiff. Plaintiff evaded the initial assault and  
16      retreated backwards in a defensive position. Nevertheless, inmate Jefferson continued to pursue  
17      Plaintiff. (Compl. at 1, 5-6.)

18      A few moments later, Plaintiff heard a gunshot and saw a large projectile fly by. Plaintiff  
19      contends that the gunshot was fired by Defendant Ohanneson using a 40 mm Multiple Baton Launcher  
20      ("MBL"). Inmate Jefferson momentarily halted his attack but soon recommenced. Seconds later,  
21      Plaintiff heard a second gunshot. This time the projectile struck Plaintiff on the left side of his face,  
22      causing Plaintiff to temporarily lose consciousness. Plaintiff contends that the second gunshot was fired  
23      by Defendant Sweeney, also with a 40 mm MBL. (Compl. at 6-7.)

24      Plaintiff was immediately taken to Kern Medical Center. There, Plaintiff was treated for his  
25      injuries, which included swelling and lacerations on the left side of his face. Plaintiff also suffered a  
26      rupture in his left eye. According to a memorandum by Chief Medical Officer Lopez, it is uncertain as  
27      to whether Plaintiff will ever regain sight out of his left eye. (Compl. at 8-10, Appx. A1 & A3.)

28      In Plaintiff's view, inmate Jefferson's attack was premeditated and orchestrated, at least in part,

1 by prison officials. According to Plaintiff, he and inmate Jefferson were once cellmates, but due to an  
2 incompatible living arrangement the two were moved into separate housing units by Defendant Ward.  
3 However, the day prior to the attack, Plaintiff was abruptly moved to a housing unit adjacent to that of  
4 inmate Jefferson. Moreover, on the day of the attack, the correctional officer typically stationed to  
5 ensure prisoner safety during cell release was conspicuously absent. (Compl. at 10-12.)

6 Based on the above allegations, Plaintiff appears to claim that: (1) Defendant Sweeney used  
7 excessive force against him in violation of the Eighth Amendment; (2) prison officials failed to protect  
8 him in violation of the Eighth Amendment; (3) and the Director of the CDCR and Warden Hedgpeth  
9 failed to properly train Defendants Sweeney and Ohanneson in the use of the 40 mm MBL. Plaintiff also  
10 presents several state law claims. In terms of relief, Plaintiff seeks monetary damages and injunctive  
11 relief. (Compl. at 13-17.)

12 **III. DISCUSSION**

13 **A. Eighth Amendment - Excessive Force**

14 Plaintiff claims that Defendant Sweeney used excessive force against him in violation of the  
15 Eighth Amendment. "When prison officials use excessive force against prisoners, they violate the  
16 inmates' Eighth Amendment right to be free from cruel and unusual punishment." Clement v. Gomez,  
17 298 F.3d 898, 903 (9th Cir. 2002). In determining whether a prison official has used excessive force,  
18 "the core judicial inquiry . . . is whether force was applied in a good-faith effort to maintain or restore  
19 discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 7 (1992).  
20 Factors the Court may consider in making this determination include: (1) the extent of the injury; (2) the  
21 need for force; (3) the relationship between the need and the amount of force used; (4) the threat as  
22 reasonably perceived by prison officials; and (5) any efforts made by prison officials to temper the  
23 severity of a forceful response. Id. (quoting Whitley v. Albers, 475 U.S. 312, 321 (1986)).

24 Here, Plaintiff's allegations fail to demonstrate that Defendant Sweeney's use of force was  
25 applied "maliciously and sadistically to cause harm" (Hudson, 503 U.S. at 7) and are similar to those  
26 raised in Jeffers v. Gomez, 267 F.3d 895 (9<sup>th</sup> Cir. 2001). In Jeffers, the plaintiff was shot by a errant  
27 bullet when prison officials were attempting to quell a prison disturbance. Id. at 901. Inmates were  
28 involved in the prison yard, race riot and many were armed with makeshift stabbing weapons. Id. at 901-

1 902. When the defendants fired their weapons at the inmates, it was done to prevent serious injury or  
2 death of others and was done while the fray was ongoing. Id. Jeffers was shot mistakenly when one of  
3 the defendants fired at the inmate who was attempting to stab Jeffers with a five-to-six inch nail that had  
4 been fashioned onto a plastic handle. Id. at 902.

5 Similarly, here Plaintiff alleges that he and inmate Jefferson became embroiled in a physical  
6 altercation which Defendants Ohanneson and Sweeney attempted to quell. In firing her 40 mm MBL,  
7 Defendant Sweeney appears to have sought to restore and, in fact restored, prison order. Although  
8 Plaintiff appears to disagree with the degree of force used by Defendant Sweeney, the Court is not in a  
9 position to simply second-guess whether Defendant should have deployed less forceful measures.  
10 Rather, as discussed above, the core judiciary inquiry “is whether force was applied in a good-faith effort  
11 to maintain or restore discipline, or maliciously and sadistically to cause harm.” Id. Because there is  
12 no indication that Defendant Sweeney applied force for the very purpose of causing harm, Plaintiff has  
13 failed to state a cognizable excessive force claim.

14 **B. Eighth Amendment - Failure to Protect**

15 Plaintiff claims that prison officials were complicit in inmate Jefferson’s assault and failed to  
16 protect him. Under the Eighth Amendment, “prison officials have a duty . . . to protect prisoners from  
17 violence at the hands of other prisoners.” Farmer v. Brennan, 511 U.S. 825, 833 (1994) (quoting Cortes-  
18 Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988)). To establish a violation of this  
19 duty, a prisoner must demonstrate that prison officials were “deliberately indifferent to a serious threat  
20 to the inmate’s safety.” Farmer, 511 U.S. at 834. This requires the prisoner to satisfy both an objective  
21 and a subjective component. First, the prisoner must demonstrate that the alleged deprivation was, in  
22 objective terms, “sufficiently serious.” Id. at 834 (quoting Wilson v. Seitner, 501 U.S. 294, 298 (1991)).  
23 Second, the prisoner must demonstrate that prison officials acted with a sufficiently culpable state of  
24 mind. Prison officials must have known of and disregarded an excessive risk to the prisoner’s safety.  
25 Id. at 837.

26 Plaintiff’s allegations are too vague to state a cognizable claim. In his complaint, Plaintiff  
27 suggests that prison officials knew that inmate Jefferson was hostile to him. Plaintiff also alleges that  
28 prison officials deliberately moved him to a housing cell adjacent to that of inmate Jefferson.

1 Nevertheless, to warrant relief under § 1983, Plaintiff must affirmatively link these actions to specific  
2 defendants. See Rizzo, 423 U.S. at 370-71. It is insufficient for Plaintiff to simply allege that prison  
3 officials, in general, were somehow complicit in the assault. Accordingly, Plaintiff vague allegations  
4 fail to state a cognizable failure to protect claim.

5 **C. Supervisory Liability**

6 Plaintiff claims that the Director of the CDCR and Warden Hedgpeth failed to properly train  
7 Defendants Sweeney and Ohanneson in the use of the 40 mm MBL. Supervisory personnel are generally  
8 not liable under § 1983 for the actions of their employees under a theory of *respondeat superior*. Monell  
9 v. Dep’t. of Soc. Servs., 436 U.S. 658, 691 (1978). Therefore, when a named defendant holds a  
10 supervisory position, the causal link between him and the claimed constitutional violation must be  
11 specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979). In other words, “[u]nder  
12 § 1983 a supervisor is only liable for his own acts. Where the constitutional violations were largely  
13 committed by subordinates the supervisor is liable only if he participated in or directed the violations.”  
14 Humphries v. County of Los Angeles, 554 F.3d 1170, 1202 (9th Cir. 2009).

15 A supervisor’s failure to train subordinates may give rise to individual liability under § 1983  
16 where the failure amounts to deliberate indifference to the rights of persons whom the subordinates are  
17 likely to come into contact. See Canell v. Lightner, 143, F.3d 1210, 1213-14 (9th Cir. 1998). To impose  
18 liability under this theory, a plaintiff must demonstrate that the subordinate’s training was inadequate,  
19 that the inadequate training was a deliberate choice on the part of the supervisor, and that the inadequate  
20 training caused a constitutional violation. Id. at 1214. See also City of Canton v. Harris, 489 U.S. 378,  
21 391 (1989); Lee v. City of Los Angeles, 250 F.3d 668, 681 (9th Cir. 2001).

22 Here, Plaintiff’s claim that the Director of the CDCR and Warden Hedgpeth failed to adequately  
23 train their subordinates rests solely on the allegation that Defendants Sweeney and Ohanneson missed  
24 their intended targets when they fired their weapons. However, missing a target does not alone  
25 demonstrate that Defendants were inadequately trained. A prison official might fire a weapon and miss  
26 the intended target for a myriad of reasons, all unrelated to training. Plaintiff must therefore allege facts  
27 to support his otherwise conclusory claim. In particular, Plaintiff must specify which aspects of  
28 Defendants’ training were deficient and how those deficiencies caused Defendants to use excessive

1 force.

2       **D.     State Law Claims - Negligence**

3       Lastly, Plaintiff presents several state law claims for negligence against Defendants Sweeney and  
4       Ohanneson for the use of force and against the Director of the CDCR and Warden Hedgpeth for failing  
5       to adequately train subordinates in the use of force.

6       Under the California Tort Claims Act (“CTCA”), a plaintiff may not maintain an action for  
7       damages against a public employee unless he has presented a written claim to the state Victim  
8       Compensation and Government Claims Board within six months of accrual of the action. See Cal. Gov’t  
9       Code §§ 905, 911.2(a), 945.4 & 950.2; Mangold v. California Pub. Utils. Comm’n, 67 F.3d 1470, 1477  
10      (9th Cir. 1995). The purpose of CTCA’s presentation requirement is “to provide the public entity  
11      sufficient information to enable it to adequately investigate claims and to settle them, if appropriate,  
12      without the expense of litigation.” City of San Jose v. Superior Court, 12 Cal.3d 447, 455 (1974). Thus,  
13      in pleading a state tort claim, plaintiff must allege facts demonstrating that he has complied with  
14      CTCA’s presentation requirement. State of California v. Superior Court (Bodde), 32 Cal.4th 1234,  
15      1243-44 (2004). Failure to allege compliance constitutes a failure to state a cause of action and will  
16      result in the dismissal of plaintiff’s state law claims. Karim-Panahi v. Los Angeles Police Dep’t, 839  
17      F.2d 621, 627 (1988).

18      Plaintiff fails to demonstrate in his complaint that he has complied with CTCA’s presentation  
19      requirement. Unless Plaintiff is able to do so, he may not proceed with his state law claims in this  
20      action. See id.

21       **E.     Leave to Amend**

22      The Court will provide Plaintiff with the opportunity to file an amended complaint curing the  
23      deficiencies identified by the Court in this order. See Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir.  
24      1987) (“A pro se litigant must be given leave to amend his or her complaint unless it is absolutely clear  
25      that the deficiencies of the complaint could not be cured by amendment.”) (internal quotations omitted).  
26      However, if Plaintiff elects to file an amended complaint, he is cautioned that he may not change the  
27      nature of this suit by adding new, unrelated claims in his amended complaint. See George v. Smith, 507  
28      F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints). Plaintiff is also advised that once he files an

1 amended complaint, his original pleadings are superceded and no longer serve any function in the case.  
2 See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Thus, the amended complaint must be “complete  
3 in itself without reference to the prior or superceded pleading.” Local Rule 220.

4 **IV. CONCLUSION**

5 Accordingly, for the reasons set forth above, it is HEREBY ORDERED that:

6 1. Plaintiff's complaint is dismissed;

7 2. Plaintiff is granted thirty (30) days from the date of this order to file an amended  
8 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules  
9 of Civil Procedure, and the Local Rules; the amended complaint must bear the docket  
10 number assigned to this case and must be labeled “Amended Complaint”;

11 3. The Clerk of the Court is directed to send Plaintiff the form complaint for use in a civil  
12 rights action; and

13 4. Plaintiff is cautioned that failure to comply with this order will result in a  
14 recommendation that this action be dismissed without prejudice.

15  
16 IT IS SO ORDERED.

17 Dated: November 6, 2010

18 /s/ Jennifer L. Thurston  
19 UNITED STATES MAGISTRATE JUDGE  
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