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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BILLY PHELPS,)	1:09cv1925 AWI DLB
)	
)	
Plaintiff,)	ORDER DISMISSING AMENDED
)	COMPLAINT WITH LEAVE TO AMEND
v.)	
)	AMENDED COMPLAINT DUE WITHIN
CHRISTAIN RAMOS, et.al.,)	THIRTY (30) DAYS
)	
)	
Defendants.)	

Plaintiff Billy Phelps (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to [42 U.S.C. § 1983](#) on November 2, 2009. On February 18, 2010, the Court dismissed Plaintiff’s state law claims without leave to amend, but granted Plaintiff leave to amend his excessive force and malicious prosecution claims. On March 17, 2010, Plaintiff filed an amended civil rights complaint.

DISCUSSION

A. Screening Standard

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 fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. [28 U.S.C.](#)

1 [§ 1915A\(b\)\(1\),\(2\)](#); [28 U.S.C. § 1915\(e\)\(2\)](#). If the Court determines that the complaint fails to
2 state a claim, leave to amend may be granted to the extent that the deficiencies of the complaint
3 can be cured by amendment. [Lopez v. Smith, 203 F.3d 1122 \(9th Cir. 2000\) \(en banc\)](#).

4 B. Failure to State a Claim

5 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon
6 which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in
7 support of the claim or claims that would entitle him to relief. See [Hishon v. King & Spalding,](#)
8 [467 U.S. 69, 73 \(1984\)](#), citing [Conley v. Gibson, 355 U.S. 41, 45-46 \(1957\)](#); see also [Palmer v.](#)
9 [Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 \(9th Cir. 1981\)](#). In reviewing a
10 complaint under this standard, the court must accept as true the allegations of the complaint in
11 question, [Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 \(1976\)](#), construe the
12 pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor.
13 [Jenkins v. McKeithen, 395 U.S. 411, 421 \(1969\)](#).

14 C. Discussion

15 In his amended complaint, Plaintiff reasserts his claim for deliberate indifference and
16 cruel and unusual punishment in violation of the Eighth Amendment and his claim for malicious
17 prosecution. Plaintiff's factual allegations remain as stated in his original complaint.

18 1. Eighth Amendment Claim

19 The Court previously explained that because Plaintiff was not a convicted prisoner at the
20 time of the allegations in his complaint, the Fourth Amendment rather than the Eighth
21 Amendment protects Plaintiff from the use of excessive force. See [Graham v. Connor, 490 U.S.](#)
22 [386, 394 \(1989\)](#) (Fourth and Eighth Amendment “primary sources of constitutional protection
23 against physically abusive governmental conduct”; where excessive force claim arises in the
24 context of effecting arrest it is properly characterized as invoking the protections of the Fourth
25 Amendment). Although Plaintiff again has alleged “excessive force,” Plaintiff continues to
26 assert a violation of his Eighth Amendment, not the Fourth Amendment. The Court will provide
27 Plaintiff with a final opportunity to file an amended complaint curing this deficiency.
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