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6 **UNITED STATES DISTRICT COURT**  
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8 EASTERN DISTRICT OF CALIFORNIA  
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10 LAMONT SHEPARD, CASE NO. 1:10-CV-00023-DLB PC  
11 Plaintiff, ORDER DISMISSING CERTAIN CLAIMS  
12 v. (DOC. 1)  
13 J. TILTON, et al., Defendants.  
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15

16 **Screening Order**

17 **I. Background**

18 Plaintiff Lamont Shepard (“Plaintiff”) is a prisoner in the custody of the California  
19 Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in  
20 forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff initiated this  
21 action by filing his complaint on January 6, 2010. Doc. 1. On October 12, 2010, the Court  
22 screened Plaintiff’s complaint pursuant to 28 U.S.C. § 1915A and found that it stated cognizable  
23 claims against Defendants L. A. Martinez, R. Perez, P. Garcia, J. Soto, E. De la Cruz, J. Campos,  
24 and Trevino for violation of the Eighth Amendment, but failed to state any other claims. Doc. 7.  
25 Plaintiff was provided the opportunity to either file an amended complaint curing the deficiencies  
26 identified, or to notify the Court of his willingness to proceed only on claims found to be  
27 cognizable. On February 22, 2011, Plaintiff indicated his willingness to proceed only on the  
28 cognizable claims. Doc. 10. The Court issues the following order.

1       The Court is required to screen complaints brought by prisoners seeking relief against a  
2 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
3 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
4 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or  
5 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.  
6 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been  
7 paid, the court shall dismiss the case at any time if the court determines that . . . the action or  
8 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §  
9 1915(e)(2)(B)(ii).

10       A complaint must contain “a short and plain statement of the claim showing that the  
11 pleader is entitled to relief . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
12 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
13 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing  
14 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual  
15 matter, accepted as true, to ‘state a claim that is plausible on its face.’” *Id.* (quoting *Twombly*,  
16 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions are not. *Id.*

17 **II.      Summary Of Complaint**

18       Plaintiff is incarcerated at Corcoran State Prison (“CSP”), where the events giving rise to  
19 this action occurred. Plaintiff names as Defendants former director of CDCR James Tilton,  
20 former warden Derral Adams, correctional sergeant L. A. Martinez, and correctional officers R.  
21 Perez, P. Garcia, J. Soto, E. De la Cruz, J. Campos, R. Castro, L. Nelson, and T. Cano. Plaintiff  
22 also names Defendant Trevino in the body of his complaint.

23       Plaintiff alleges the following. On August 4, 2009, Plaintiff was conversing with another  
24 inmate through a fence that separated west yard from east yard. Defendant Perez informed  
25 Plaintiff that he was not allowed to do so. Plaintiff asked whether this rule was for only black  
26 inmates. Defendant Trevino then made a statement to Plaintiff and pepper-sprayed him with OC  
27 pepper spray. Plaintiff dropped to the ground. A defendant then jumped onto Plaintiff’s back.  
28 Plaintiff was then escorted to the program office, rather than decontamination. Plaintiff noticed

1 that Defendants Martinez and Soto were escorting him. Once at the program office, Defendant  
2 Martinez instructed Defendant De La Cruz to clear out the office, and the secure the door.  
3 Officer Miranda was told to go outside and close the door, and not permit anyone to come in.  
4 Defendants Soto, De La Cruz, Perez, Trevino, Garcia, and Campos entered before the door was  
5 closed. Plaintiff was handcuffed behind his back at this point. Defendants then proceeded to  
6 beat Plaintiff in the head, while Defendant Garcia was the lookout. Defendants used racial slurs  
7 as they beat Plaintiff. Plaintiff was knocked unconscious twice during the assault. Upon  
8 awakening a third time, Plaintiff overheard Captain Seifert and Lieutenant Gamboa yell at the  
9 Defendants.

10 Captain Seifert informed Plaintiff that Investigative Services Unit had been contacted.  
11 Plaintiff was taken to ACH (Acute Care Hospital) in CSP. The examining doctor found that  
12 Plaintiff should be sent to an outside hospital for medical care. On the ride to the hospital,  
13 Defendant Castro rode in the cab and informed Plaintiff that they should beat Plaintiff or kill  
14 him.

15 Plaintiff filed several inmate grievances regarding this matter. Some were directed to the  
16 warden, others to the secretary, and others to the Office of Internal Affairs. None were  
17 processed.

18 Plaintiff alleges violation of the Eighth Amendment, the Due Process Clause of the  
19 Fourteenth Amendment, and state law claims of assault and battery. Plaintiff requests as relief  
20 the firing of the Defendant officers involved, a vacating of a false report regarding the incident on  
21 Plaintiff, and compensatory and punitive damages.

22 **III. Analysis**

23 **A. Eighth Amendment**

24 “What is necessary to show sufficient harm for purposes of the Cruel and Unusual  
25 Punishments Clause [of the Eighth Amendment] depends upon the claim at issue . . . .” *Hudson*  
26 v. *McMillian*, 503 U.S. 1, 8 (1992). “The objective component of an Eighth Amendment claim is  
27 . . . contextual and responsive to contemporary standards of decency.” *Id.* (internal quotation  
28 marks and citations omitted). The malicious and sadistic use of force to cause harm always

1 violates contemporary standards of decency, regardless of whether or not significant injury is  
2 evident. *Id.* at 9; *see also Oliver v. Keller*, 289 F.3d 623, 628 (9th Cir. 2002) (Eighth  
3 Amendment excessive force standard examines *de minimis* uses of force, not *de minimis*  
4 injuries)). However, not “every malevolent touch by a prison guard gives rise to a federal cause  
5 of action.” *Hudson*, 503 U.S. at 9. “The Eighth Amendment’s prohibition of cruel and unusual  
6 punishments necessarily excludes from constitutional recognition *de minimis* uses of physical  
7 force, provided that the use of force is not of a sort ‘repugnant to the conscience of mankind.’”  
8 *Id.* at 9-10 (internal quotations marks and citations omitted).

9       Here, Plaintiff has sufficiently alleged a cognizable Eighth Amendment claim against  
10 Defendants L. A. Martinez, R. Perez, P. Garcia, J. Soto, E. De la Cruz, J. Campos, and Trevino.

11       Plaintiff fails to state a cognizable Eighth Amendment claim against Defendant Castro.  
12 Verbal harassment or abuse alone is not sufficient to state a constitutional deprivation under 42  
13 U.S.C. § 1983. *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (citation and internal  
14 quotation omitted). Mere threats are insufficient to state a claim an Eighth Amendment claim.  
15 *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (per curiam).

16       **B.       Due Process**

17       Plaintiff alleges a due process violation for the beating he suffered. “[W]here a particular  
18 amendment provides an explicit textual source of constitutional protection against a particular  
19 sort of government behavior, that Amendment, not the more generalized notion of substantive  
20 due process, must be guide for analyzing a plaintiff’s claims.” *Patel v. Penman*, 103 F.3d 868,  
21 874 (9th Cir. 1996). Here, the Eighth Amendment, and not the more generalized notion of  
22 substantive due process, is the explicit textual source of constitutional protection. Thus, there is  
23 no substantive due process claim.

24       Plaintiff also has no federal due process right to a specific procedure regarding inmate  
25 grievances. *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (no liberty interest in  
26 processing of appeals because no entitlement to specific grievance procedure). Thus, Plaintiff

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1 does not state a claim against Defendants Tilton, Adams, or Nelson.<sup>1</sup>

2       **C. Supervisory Liability**

3       If Plaintiff is alleging liability against Defendants Tilton and Adams on the basis of their  
4 role as supervisory officials, Plaintiff fails to state a claim. The Supreme Court recently  
5 emphasized that the term “supervisory liability,” loosely and commonly used by both courts and  
6 litigants alike, is a misnomer. *Iqbal*, 129 S. Ct. at 1949. “Government officials may not be held  
7 liable for the unconstitutional conduct of their subordinates under a theory of *respondeat*  
8 *superior.*” *Id.* at 1948. Rather, each government official, regardless of his or her title, is only  
9 liable for his or her own misconduct.

10       When the named defendant holds a supervisory position, the causal link between the  
11 defendant and the claimed constitutional violation must be specifically alleged. *See Fayle v.*  
12 *Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir.  
13 1978). To state a claim for relief under § 1983 for supervisory liability, plaintiff must allege  
14 some facts indicating that the defendant either: personally participated in the alleged deprivation  
15 of constitutional rights; knew of the violations and failed to act to prevent them; or promulgated  
16 or “implemented a policy so deficient that the policy ‘itself is a repudiation of constitutional  
17 rights’ and is ‘the moving force of the constitutional violation.’” *Hansen v. Black*, 885 F.2d 642,  
18 646 (9th Cir. 1989) (internal citations omitted); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.  
19 1989). Plaintiff alleges no facts that indicate Defendants Tilton or Adams knew of the violations  
20 and failed to act to prevent them, personally participated in the alleged deprivation, or  
21 promulgated or implemented a policy so deficient that the policy itself is a repudiation of  
22 constitutional rights and the moving force of a constitutional violation.

23       **D. State Law Claims**

24       California’s Tort Claims Act requires that a tort claim against a public entity or its  
25 employees be presented to the California Victim Compensation and Government Claims Board,

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27       <sup>1</sup> Plaintiff also names T. Cano as a Defendant. However, Plaintiff fails to link Defendant Cano to any action  
28 that would indicate a violation of Plaintiff’s federally protected rights. *Long v. County of Los Angeles*, 442 F.3d  
1178, 1185 (9th Cir. 2006).

1 formerly known as the State Board of Control, no more than six months after the cause of action  
2 accrues. Cal. Gov't Code §§ 905.2, 910, 911.2, 945.4, 950-950.2. Presentation of a written  
3 claim, and action on or rejection of the claim are conditions precedent to suit. *State v. Superior*  
4 *Court of Kings County (Bodde)*, 32 Cal. 4th 1234, 1245 (2004); *Mangold v. California Pub.*  
5 *Utils. Comm'n*, 67 F.3d 1470, 1477 (9th Cir. 1995). To state a tort claim against a public  
6 employee, a plaintiff must allege compliance with the Tort Claims Act. *State v. Superior Court*,  
7 32 Cal.4th at 1245; *Mangold*, 67 F.3d at 1477; *Karim-Panahi v. Los Angeles Police Dept.*, 839  
8 F.2d 621, 627 (9th Cir. 1988). As there is no such pleading in this complaint, Plaintiff's state  
9 law claims are dismissed.

10 **IV. Conclusion And Order**

11 Plaintiff states a cognizable Eighth Amendment claim against Defendants L. A. Martinez,  
12 R. Perez, P. Garcia, J. Soto, E. De la Cruz, J. Campos, and A. Trevino. Plaintiff was provided  
13 the opportunity to either file an amended complaint or notify the Court of his willingness to  
14 proceed only on the cognizable claims. Plaintiff indicated that he wished to proceed only on the  
15 cognizable claims.

16 Accordingly, based on the foregoing, it is HEREBY ORDERED that:

17 1. This action proceed against Defendants L. A. Martinez, R. Perez, P. Garcia, J.  
18 Soto, E. De la Cruz, J. Campos, and A. Trevino for violation of the Eighth  
19 Amendment;

20 2. All other claims are dismissed from this action for failure to state a claim; and

21 3. Defendants Tilton, Adams, Cano, Nelson, and Castro are dismissed from this  
22 action.

23 IT IS SO ORDERED.

24 Dated: February 24, 2011

25 \_\_\_\_\_ /s/ **Dennis L. Beck**  
26 UNITED STATES MAGISTRATE JUDGE  
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