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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

LAMONT SHEPARD,

Plaintiff,

v.

JAMES E. TILTON, et al.,

Defendants.

CASE NO. 1:10-CV-00023-DLB PC

ORDER GRANTING PLAINTIFF’S MOTION  
AND DISMISSING DEFENDANT J.  
CAMPOS FROM ACTION

(DOC. 27)

ORDER DENYING PLAINTIFF’S MOTION  
TO AMEND HIS COMPLAINT

/ (DOC. 28)

Plaintiff Lamont Shepard (“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. This action is proceeding on Plaintiff’s complaint, filed January 6, 2010, against Defendants L. A. Martinez, R. Perez, P. Garcia, J. Soto, E. De la Cruz, J. Campos, and A. Trevino for violation of the Eighth Amendment. Pending before the Court is: 1) Plaintiff’s motion to dismiss Defendant Trevino from this action filed August 26, 2011, and 2) Plaintiff’s motion to amend his complaint, filed August 30, 2011. Docs. 27, 28.

**I. Motion To Dismiss Defendant Campos**

Plaintiff moves for dismissal of Defendant J. Campos from the action. Doc. 27. Plaintiff states that Defendant J. Campos resembled Defendant Soto, and thus included in this action. Plaintiff has discovered that Defendant J. Campos was not the correct officer, but rather Defendant Soto. Defendants do not oppose the motion. Defs.’ Opp’n 1:25-26, Doc. 30.

1 Pursuant to Rule 41(a)(2), the Court finds dismissal of Defendant Campos proper.  
2 Accordingly, it is HEREBY ORDERED that Plaintiff's motion to dismiss Defendant Campos  
3 from the action, filed August 26, 2011, is GRANTED. Defendant Campos is dismissed from the  
4 action. This dismissal is with prejudice.

5 **II. Motion To Amend Complaint**

6 Plaintiff moves for leave to amend his complaint to include claims against officer  
7 Miranda, captain Seifert, and lieutenant Brodie. Pl.'s Mot., Doc. 28. Defendants oppose the  
8 motion as unreasonable, prejudicial, and futile. Defs.' Opp'n 2:19-4:24, Doc. 30.

9 "Rule 15(a) is very liberal and leave to amend 'shall be freely given when justice so  
10 requires.'" *AmerisourceBergen Corp. v. Dialysis West, Inc.*, 445 F.3d 1132, 1136 (9th Cir. 2006)  
11 (quoting Fed. R. Civ. P. 15(a)). However, courts "need not grant leave to amend where the  
12 amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue  
13 delay in the litigation; or (4) is futile." *Id.* The factor of "[u]ndue delay by itself . . . is  
14 insufficient to justify denying a motion to amend." *Owens v. Kaiser Foundation Health Plan,*  
15 *Inc.*, 244 F.3d 708, 712-13 (9th Cir. 2001) (quoting *Bowles v. Reade*, 198 F.3d 752, 757-58 (9th  
16 Cir. 1999)). However, "[w]here the party seeking amendment knows or should know of the  
17 facts upon which the proposed amendment is based but fails to include them in the original  
18 complaint, the motion to amend may be denied," *E.E.O.C. v. Boeing, Co.*, 843 F.2d 1213, 1222  
19 (9th Cir. 1988) (quoting *Jordan v. County of L.A.*, 669 F.2d 1311, 1324 (9th Cir. 1982),  
20 *vacated on other grounds*, 459 U.S. 810 (1982)), and the "court's discretion to  
21 deny leave to amend is particularly broad where the court has already given the plaintiff an  
22 opportunity to amend his complaint," *Fidelity Financial Corp. v. Federal Home Loan Bank of*  
23 *San Francisco*, 792 F.2d 1432, 1438 (9th Cir. 1986).

24 Plaintiff had named Miranda, Seifert, and Brodie in his complaint, but did not list them as  
25 Defendants. Plaintiff provides no explanation as to why amendment should be granted, other  
26 than citing to his pleadings. However, the pleadings do not state a claim against these three  
27 individuals and would thus be futile. Against Miranda, Plaintiff alleges only that Miranda stood  
28 in front of the door and was ordered to not let anyone in. Compl. ¶ 23, Doc. 1. Against Seifert,

1 Plaintiff alleges only that he awoke to the sounds of Seifert yelling at Defendants, Seifert told  
2 Plaintiff to calm down that he saw what happened, Seifert ordered Plaintiff to another building  
3 for decontamination, and that Seifert called Internal Affairs. Compl. ¶¶ 30-33. Against Brodie,  
4 Plaintiff alleges only that Brodie told Plaintiff that he did not condone what the officers did.  
5 Compl. ¶ 33.

6 The above alleged facts do not demonstrate a violation of any of Plaintiff's federal or  
7 constitutional rights. Plaintiff's claims against the Defendants are for excessive force in violation  
8 of the Eighth Amendment. Plaintiff's claims against Miranda, Seifert, and Brodie appear  
9 premised on a theory of failing to intervene. *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir.  
10 1995). However, Plaintiff makes no allegations that the three proposed Defendants actually  
11 caused a constitutional violation. *See Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) ("A  
12 person subjects another to the deprivation of a constitutional right, within the meaning of section  
13 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform  
14 an act which he is legally required to do that causes the deprivation of which complaint is  
15 made.") (internal quotations omitted). There are no facts that demonstrate any of three knew of  
16 and disregarded an excessive risk of serious harm to Plaintiff's safety. *Farmer v. Brennan*, 511  
17 U.S. 825, 834 (1994). Allowing amendment of the pleadings would appear futile.

18 The Court provided Plaintiff with an opportunity to amend his complaint. Doc. 7.  
19 Plaintiff opted to proceed only on the cognizable claims. Doc. 10. Plaintiff was aware of the  
20 facts alleged in his complaint at the time he filed it, and indicates no new or recently discovered  
21 facts that would merit amendment of his pleadings.

22 Accordingly, it is HEREBY ORDERED that Plaintiff's motion to amend his complaint,  
23 filed August 30, 2011, is DENIED.

24 IT IS SO ORDERED.

25 Dated: November 9, 2011

/s/ Dennis L. Beck  
UNITED STATES MAGISTRATE JUDGE