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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JASON S. HARPER,
Plaintiff,
vs.
ARNOLD SCHWARZENEGGER, et al.,
Defendants.

1:10-cv-00926-LJO-GSA-PC
FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS ACTION
BE DISMISSED WITH PREJUDICE FOR
FAILURE TO STATE A CLAIM UPON
WHICH RELIEF MAY BE GRANTED
UNDER § 1983
OBJECTIONS, IF ANY, DUE WITHIN
THIRTY DAYS

I. BACKGROUND

Jason S. Harper (“Plaintiff”) is a state prisoner proceeding pro se with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on May 24, 2010. (Doc. 1.) On December 13, 2010, Plaintiff filed the First Amended Complaint. (Doc. 9.) On April 12, 2012, the Court dismissed the First Amended Complaint for failure to state a claim, with leave to amend. (Doc. 11.) On July 12, 2012, Plaintiff filed the Second Amended Complaint. (Doc. 16.) On March 1, 2013, the court issued an order striking the Second Amended Complaint for lack of Plaintiff’s signature, with leave to amend. (Doc. 19.) On March 28, 2013, Plaintiff filed the Third Amended Complaint. (Doc. 23.) On April 15, 2013, Plaintiff filed a motion for leave to amend the complaint, which was granted. (Docs. 26,

1 27.) On May 20, 2013, Plaintiff filed the Fourth Amended Complaint, which is now before the
2 court for screening. (Doc. 33.)

3 **II. SCREENING REQUIREMENT**

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

12 A complaint is required to contain “a short and plain statement of the claim showing
13 that the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
14 are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
15 mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct.
16 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955
17 (2007)). While a plaintiff’s allegations are taken as true, courts “are not required to indulge
18 unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009)
19 (internal quotation marks and citation omitted). Plaintiff must set forth “sufficient factual
20 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal 556 U.S.
21 at 678. While factual allegations are accepted as true, legal conclusions are not. Id. The mere
22 possibility of misconduct falls short of meeting this plausibility standard. Id. at 678-79; Moss
23 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).

24 **III. SUMMARY OF FOURTH AMENDED COMPLAINT**

25 Plaintiff is presently incarcerated at the California Substance Abuse Treatment Facility
26 (SATF) in Corcoran, California. The events at issue occurred at Pleasant Valley State Prison
27 (PVSP) in Coalinga, California, Kern Valley State Prison (KVSP) in Delano, California, and
28 SATF. Plaintiff names 22 defendants, including former Governor Arnold Schwarzenegger,

1 CDCR Secretary Matthew Cates, CDCR Under Secretary Scott Kernan, PVSP Warden James
2 A. Yates, PVSP Chief Deputy Warden M.E. Spearman, PVSP Associate Warden J Ahlin,
3 KVSP Warden M. Biter, SATF Warden Ralph Diaz, SATF Associate Warden C. Etchebehere,
4 and 13 correctional officers of various ranks from PVSP, KVSP, and SATF. Plaintiff's factual
5 allegations follow.

6 **PVSP**

7 On June 22, 2009, at PVSP, Plaintiff was asleep with his hearing aids out of his ears.
8 Without warning, Plaintiff's cell mate snatched him from the top bunk, forcefully slammed him
9 face down onto the bottom bunk, tied him up, removed his underwear, and sexually assaulted
10 him from behind. Plaintiff tried to scream, but his head was held down in the mattress. The
11 perpetrator then turned Plaintiff over and forced him to perform oral sex. The cell mate
12 threatened Plaintiff with serious injury or death if he ever told anyone. The cell mate also told
13 Plaintiff to swallow the evidence, but Plaintiff managed to spit the contents of his mouth into a
14 ziplock bag and save it. After the perpetrator was transferred and Plaintiff felt safe, he reported
15 the incident to a correctional officer. Plaintiff was interviewed, gave officials the ziplock bag,
16 and was given new clothes and taken to the hospital for a sexual assault kit.

17 In January 2010, Plaintiff had a mental breakdown and was admitted to a crisis bed,
18 diagnosed with PTSD, and given medication. Plaintiff continues to have occasional flashbacks.
19 Plaintiff also had fights with other cell mates because they found out about the sexual assault.

20 Plaintiff alleges that defendants at PVSP knew that the perpetrator had other victims
21 before they placed Plaintiff in the cell with him. Defendants did not take proper measures to
22 ensure Plaintiff's safety before placing him with the perpetrator.

23 **KVSP and SATF**

24 Plaintiff alleges that prison officials at KVSP and SATF continued to place him at risk
25 of harm by failing to follow the rules and regulations to properly screen out cell mates who
26 may be a threat to ADA inmates.

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1 **Relief Requested**

2 Plaintiff requests monetary damages, declaratory relief, and injunctive relief including
3 permanent single-cell status.

4 **IV. PLAINTIFF’S CLAIMS**

5 The Civil Rights Act under which this action was filed provides:

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

10 42 U.S.C. § 1983. “Section 1983 . . . creates a cause of action for violations of the federal
11 Constitution and laws.” Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997)
12 (internal quotations omitted). “To the extent that the violation of a state law amounts to the
13 deprivation of a state-created interest that reaches beyond that guaranteed by the federal
14 Constitution, Section 1983 offers no redress.” Id.

15 **A. Personal Participation**

16 To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted
17 under color of state law and (2) the defendant deprived him of rights secured by the
18 Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.
19 2006). “A person ‘subjects’ another to the deprivation of a constitutional right, within the
20 meaning of section 1983, if he does an affirmative act, participates in another’s affirmative acts,
21 or omits to perform an act which he is legally required to do that causes the deprivation of
22 which complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). “The
23 requisite causal connection can be established not only by some kind of direct, personal
24 participation in the deprivation, but also by setting in motion a series of acts by others which
25 the actor knows or reasonably should know would cause others to inflict the constitutional
26 injury.” Id. at 743-44).

27 In the Fourth Amended Complaint, Plaintiff fails to demonstrate that any of the
28 defendants *personally* participated in the deprivation of his rights. Jones v. Williams, 297 F.3d

1 930, 934 (9th Cir. 2002) (emphasis added). Plaintiff fails to allege any action by a defendant
2 demonstrating that the defendant, through his or her own individual actions, violated Plaintiff's
3 constitutional rights. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1948-49 (2009). Therefore, Plaintiff
4 fails to state a claim under § 1983 against any of the defendants.

5 **B. Failure to Protect**

6 The Eighth Amendment protects prisoners from inhumane methods of punishment and
7 from inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th
8 Cir. 2006). Although prison conditions may be restrictive and harsh, prison officials must
9 provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety.
10 Farmer v. Brennan, 511 U.S. 825, 832-33, 114 S.Ct. 1970 (1994) (internal citations and
11 quotations omitted). Prison officials have a duty to take reasonable steps to protect inmates
12 from physical abuse. Farmer, 511 U.S. at 833; Hearn v. Terhune, 413 F.3d 1036, 1040 (9th
13 Cir. 2005).

14 To establish a violation of this duty, the prisoner must establish that prison officials
15 were "deliberately indifferent to a serious threat to the inmates's safety." Farmer, at 834. The
16 question under the Eighth Amendment is whether prison officials, acting with deliberate
17 indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his
18 future health . . .'" Id. at 843 (*citing* Helling v. McKinney, 509 U.S. 25, 35 (1993)). The
19 Supreme Court has explained that "deliberate indifference entails something more than mere
20 negligence ... [but] something less than acts or omissions for the very purpose of causing harm
21 or with the knowledge that harm will result." Farmer at 835. The Court defined this "deliberate
22 indifference" standard as equal to "recklessness," in which "a person disregards a risk of harm
23 of which he is aware." Id. at 836-37.

24 The deliberate indifference standard involves both an objective and a subjective prong.
25 First, the alleged deprivation must be, in objective terms, "sufficiently serious." Id. at 834.
26 Second, subjectively, the prison official must "know of and disregard an excessive risk to
27 inmate health or safety." Id. at 837; Anderson v. County of Kern, 45 F.3d 1310, 1313 (9th Cir.
28 1995). To prove knowledge of the risk, however, the prisoner may rely on circumstantial

1 evidence; in fact, the very obviousness of the risk may be sufficient to establish knowledge.
2 Farmer, 511 U.S. at 842; Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th Cir. 1995).

3 In the Fourth Amended Complaint, Plaintiff fails to allege facts showing that any
4 individual defendant deliberately acted, or failed to act, while disregarding a known excessive
5 risk of harm to Plaintiff. Therefore, the court finds that Plaintiff fails to state a failure to protect
6 claim against any of the defendants. Moreover, the court finds Plaintiff's allegations to be
7 vague and conclusory, which are insufficient to state a claim. See Iqbal, 556 U.S. at 569-72.

8 **V. CONCLUSION AND RECOMMENDATIONS**

9 The Court finds that Plaintiff's Fourth Amended Complaint fails to state any claims
10 upon which relief can be granted under § 1983 against any of the defendants. In this action, the
11 Court previously granted Plaintiff leave to amend the complaint, with ample guidance by the
12 Court. Plaintiff has now filed five complaints without alleging facts against any of the
13 defendants which state a claim under § 1983. The Court finds that the deficiencies outlined
14 above are not capable of being cured by amendment, and therefore further leave to amend
15 should not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Lopez v. Smith, 203 F.3d 1122, 1127
16 (9th Cir. 2000).

17 Therefore, **IT IS HEREBY RECOMMENDED** that pursuant to 28 U.S.C. § 1915A
18 and 28 U.S.C. § 1915(e), this action be dismissed with prejudice for failure to state a claim
19 upon which relief may be granted under § 1983, and that this dismissal be subject to the "three-
20 strikes" provision set forth in 28 U.S.C. § 1915(g). Silva v. Vittorio, 658 F.3d 1090, 1098 (9th
21 Cir. 2011).

22 These Findings and Recommendations will be submitted to the United States District
23 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
24 **thirty (30) days** after being served with these Findings and Recommendations, Plaintiff may
25 file written objections with the court. The document should be captioned "Objections to
26 Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file

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1 objections within the specified time may waive the right to appeal the District Court's order.
2 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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5 IT IS SO ORDERED.

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7 Dated: November 18, 2013

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE