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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRIAN JENNINGS,)	1:10cv0928 AWI DLB
)	
)	
Plaintiff,)	ORDER REQUIRING PLAINTIFF TO EITHER
)	FILE AMENDED COMPLAINT OR NOTIFY
v.)	COURT OF WILLINGNESS TO PROCEED
)	ONLY ON CLAIMS FOUND TO BE
COUNTY OF FRESNO, et al.,)	COGNIZABLE
)	(Doc. 1)
)	
Defendants.)	RESPONSE DUE WITHIN THIRTY DAYS
)	

Plaintiff Brian Jennings (“Plaintiff”), proceeding pro se and inform a pauperis, filed this civil rights action on May 24, 2010. He names the County of Fresno, Fresno County Sheriff Margaret Mims, Officer Livingston and Officer Harrow as Defendants.

DISCUSSION

A. Screening Standard

Pursuant to [28 U.S.C. § 1915\(e\)\(2\)](#), the court must conduct an initial review of the complaint for sufficiency to state a claim. The court must dismiss a complaint or portion thereof if the court determines that the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. [28 U.S.C. § 1915\(e\)\(2\)](#). If the court determines that the complaint fails to state a claim, leave to amend may be granted to the extent that the deficiencies of the complaint can be cured by amendment.

1 In reviewing a complaint under this standard, the Court must accept as true the allegations
2 of the complaint in question, [Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740](#)
3 [\(1976\)](#), construe the pro se pleadings liberally in the light most favorable to the Plaintiff, [Resnick](#)
4 [v. Hayes, 213 F.3d 443, 447 \(9th Cir. 2000\)](#), and resolve all doubts in the Plaintiff's favor,
5 [Jenkins v. McKeithen, 395 U.S. 411, 421 \(1969\)](#).

6 B. Plaintiff's Allegations

7 Plaintiff alleges that he was sentenced to serve time in the Fresno County Jail for a
8 probation violation on April 28, 2008. On or about May 24, 2008, while serving his sentence, he
9 was assaulted by Officer Livingston. Officer Livingston reportedly threw Plaintiff into a steel
10 door, causing a severe facial laceration and semi-loss of consciousness. Officer Harrow then
11 jumped on Plaintiff's neck and arm.

12 Plaintiff also alleges that Defendants County of Fresno and Sheriff Mims are liable for
13 the acts of the defendant officers. Plaintiff claims that defendants were carrying out an official
14 policy or de facto custom that the occasional use of excessive force upon jail inmates is
15 acceptable.

16 Plaintiff asserts violations of the Fourth, Eighth and Fourteenth Amendments for use of
17 excessive force. He seeks general and punitive damages.

18 C. Analysis

19 1. Excessive Force Claims

20 Plaintiff appears to assert an excessive force claim in violation of both the Fourth and
21 Eighth Amendments. However, the Ninth Circuit has stated that the "Fourth Amendment sets
22 the applicable constitutional limitations on the treatment of an arrestee detained without a
23 warrant up until the time such arrestee is released or found to be legally in custody based upon
24 probable cause for arrest." [Pierce v. Multnomah County, Or., 76 F.3d 1032, 1043 \(9th Cir.](#)
25 [1996\)](#). Here, Plaintiff alleges that he was sentenced and serving time when the incident occurred.
26 Thus, the Fourth Amendment is inapplicable to his excessive force claim.

27 Rather, Plaintiff properly asserts a violation of the Eighth Amendment prohibition on
28 excessive force. The Eighth Amendment's prohibition against cruel and unusual punishment

1 protects convicted prisoners. [Bell v. Wolfish, 441 U.S. 520, 535 \(1979\)](#); [Graham v. Connor, 490](#)
2 [U.S. 386, 395 n.10 \(1989\)](#). “When prison officials use excessive force against prisoners, they
3 violate the inmates’ Eighth Amendment right to be free from cruel and unusual punishment.”
4 [Clement v. Gomez, 298 F.3d 898, 903 \(9th Cir. 2002\)](#). Plaintiff’s complaint appears to state a
5 cognizable claim pursuant to [42 U.S.C. § 1983](#) as to Defendants Livingston and Harrow for
6 alleged use of excessive force in violation of the Eighth Amendment.

7 2. Fourteenth Amendment Due Process Claim

8 Plaintiff alleges a claim for relief for violation of due process under the Fourteenth
9 Amendment. However, after conviction, the Eighth Amendment is the primary source of
10 protection where the deliberate use of force is challenged as excessive. [Graham](#), 490 U.S. at 395
11 n.10. Any protection that substantive due process provides against excessive force is “at best
12 redundant of that provided by the Eighth Amendment.” *Id.* Accordingly, Plaintiff’s due process
13 claims are appropriately addressed under the Eighth Amendment.

14 3. Defendant Fresno County

15 Plaintiff also seeks to impose liability on Defendant County of Fresno. A local
16 government unit may not be held responsible for the acts of its employees under a respondeat
17 superior theory of liability. [Monell v. Department of Social Services, 436 U.S. 658, 691 \(1978\)](#);
18 [Webb v. Sloan, 330 F.3d 1158, 1163-64 \(9th Cir. 2003\)](#); [Gibson v. County of Washoe, 290 F.3d](#)
19 [1175, 1185 \(9th Cir. 2002\)](#). Rather, a local government unit may only be held liable if it inflicts
20 the injury complained of. [Gibson, 290 F.3d at 1185](#).

21 Generally, a claim against a local government unit for municipal or county liability
22 requires an allegation that “a deliberate policy, custom, or practice . . . was the ‘moving force’
23 behind the constitutional violation . . . suffered.” [Galen v. County of Los Angeles, 477 F.3d 652,](#)
24 [667 \(9th Cir. 2007\)](#); [City of Canton, Ohio, v. Harris, 489 U.S. 378, 385 \(1989\)](#). Alternatively,
25 and more difficult to prove, municipal liability may be imposed where the local government
26 unit’s omission led to the constitutional violation by its employee. [Gibson at 1186](#). Under this
27 route to municipal liability, the “plaintiff must show that the municipality’s deliberate
28 indifference led to its omission and that the omission caused the employee to commit the

1 constitutional violation.” [Id.](#) Deliberate indifference requires a showing “that the municipality
2 was on actual or constructive notice that its omission would likely result in a constitutional
3 violation.” [Id.](#)

4 Here, Plaintiff alleges that the County acted with deliberate indifference and that the
5 County carried out an official policy or de facto custom that the occasional use of excessive force
6 upon jail inmates is acceptable. Plaintiff appears to state a cognizable claim against the County
7 of Fresno.

8 4. Defendant Mims

9 Plaintiff also seeks to impose liability on Sheriff Mims. Supervisory personnel are
10 generally not liable under [section 1983](#) for the actions of their employees under a theory of
11 *respondeat superior* and, therefore, when a named defendant holds a supervisory position, the
12 causal link between him and the claimed constitutional violation must be specifically alleged.
13 See [Fayle v. Stapley, 607 F.2d 858, 862 \(9th Cir. 1979\)](#); [Mosher v. Saalfeld, 589 F.2d 438, 441](#)
14 [\(9th Cir. 1978\), cert. denied, 442 U.S. 941 \(1979\)](#). To state a claim for relief under [section 1983](#)
15 based on a theory of supervisory liability, Plaintiff must allege some facts that would support a
16 claim that supervisory defendants either: personally participated in the alleged deprivation of
17 constitutional rights; knew of the violations and failed to act to prevent them; or promulgated or
18 “implement[ed] a policy so deficient that the policy ‘itself is a repudiation of constitutional
19 rights’ and is ‘the moving force of the constitutional violation.’” [Hansen v. Black, 885 F.2d 642,](#)
20 [646 \(9th Cir. 1989\)](#) (internal citations omitted); [Taylor v. List, 880 F.2d 1040, 1045 \(9th Cir.](#)
21 [1989\)](#).

22 Plaintiff alleges that Defendant Mims was aware of the violations and implemented an
23 official policy or de facto custom that the occasional use of excessive force upon jail inmates is
24 acceptable. Thus, he appears to state a cognizable claim against Defendant Mims.

25 5. Defendant Chapman

26 In his allegations, Plaintiff references a person named “Chapman.” However, Plaintiff
27 did not name Chapman as a Defendant and has failed to link him or her with an alleged
28 deprivation of his rights. The Ninth Circuit has held that “[a] person ‘subjects’ another to the

1 deprivation of a constitutional right, within the meaning of [section 1983](#), if he does an
2 affirmative act, participates in another's affirmative acts or omits to perform an act which he is
3 legally required to do that causes the deprivation of which the complaint is made." [Johnson v.](#)
4 [Duffy, 588 F.2d 740, 743 \(9th Cir. 1978\)](#). Thus, the requisite causal connection can be
5 established not only by some kind of direct personal participation, but also by setting in motion a
6 series of acts by another which the actor knows or reasonably should know would cause others to
7 inflict the constitutional injury. [Id.](#) This standard of causation "...closely resembles the standard
8 'foreseeability' formulation of proximate cause." [Arnold v. International Bus. Mach. Corp., 637](#)
9 [F.2d 1350, 1355 \(9th Cir. 1981\)](#). Plaintiff has not linked Defendant Chapman with any alleged
10 deprivation. The Court will provide Plaintiff with the opportunity to file an amended complaint
11 curing this deficiency

12 6. Doe Defendants

13 Plaintiff names as defendants Does 1-50. "As a general rule, the use of 'John Doe' to
14 identify a defendant is not favored." [Gillespie v. Civiletti, 629 F.2d 637, 642 \(9th Cir. 1980\)](#).
15 Plaintiff is advised that Doe defendants cannot be served by the United States Marshal until
16 Plaintiff has identified them as actual individuals and amended his complaint to substitute names
17 for Doe defendants. For service to be successful, the Marshal must be able to identify and locate
18 defendants.

19 **CONCLUSION AND ORDER**

20 The Court finds that Plaintiff's complaint state a cognizable claim for excessive force
21 under the Eighth Amendment against defendants Livingston and Harrow. The complaint also
22 states cognizable claims against the County and Sheriff Mims. However, Plaintiff fails to state
23 any other claims upon which relief can be granted under [section 1983](#) against any of the
24 defendants.

25 Plaintiff shall be required to either file an amended complaint, or notify the court of his
26 willingness to proceed only on the claims found cognizable. Should Plaintiff choose to proceed
27 only on the cognizable claims, the court will begin the process to initiate service upon defendants
28 by the United States Marshal.

1 Under [Rule 15\(a\) of the Federal Rules of Civil Procedure](#), courts “should freely give
2 leave [to amend] when justice so requires.” The court will provide Plaintiff with time to file an
3 amended complaint curing the deficiencies identified above should he wish to do so. Plaintiff is
4 granted leave to file an amended complaint within thirty days.

5 Plaintiff is advised that Local Rule 220 requires that an amended complaint be complete
6 in itself without reference to any prior pleading. As a general rule, an amended complaint
7 supersedes the original complaint. See [Loux v. Rhay, 375 F.2d 55, 57 \(9th Cir. 1967\)](#). Once an
8 amended complaint is filed, the original complaint no longer serves any function in the case.
9 Therefore, in an amended complaint, as in an original complaint, each claim and the involvement
10 of each defendant must be sufficiently alleged. The amended complaint should be clearly and
11 boldly titled “First Amended Complaint,” refer to the appropriate case number, and be an original
12 signed under penalty of perjury.

13 Based on the foregoing, it is HEREBY ORDERED that:

- 14 1. Within **thirty (30) days** from the date of service of this order, Plaintiff shall
15 either:
- 16 (1) File an amended complaint, or
 - 17 (2) Notify the court in writing that he does not wish to file an amended
18 complaint and is instead willing to proceed only on the cognizable claims;
- 19 2. Should Plaintiff choose to amend the complaint, Plaintiff shall caption the
20 amended complaint “First Amended Complaint” and refer to the case number
21 1:10-cv-0928-AWI-DLB; and
- 22 3. If Plaintiff fails to comply with this order, this action will be dismissed for failure
23 to state a claim upon which relief may be granted.

24 IT IS SO ORDERED.

25 Dated: December 7, 2010

26 /s/ Dennis L. Beck
27 UNITED STATES MAGISTRATE JUDGE
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