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UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF CALIFORNIA

| | | |
|-------------------------------------|---|--------------------------------------|
| NORMAN PIMENTEL, |) | Case No: 1:10-CV-01736-OWW-DLB |
| |) | |
| Plaintiff, |) | ORDER GRANTING DEFENDANTS' |
| |) | MOTION TO DISMISS PLAINTIFF'S |
| vs. |) | SECOND AMENDED COMPLAINT |
| |) | |
| |) | DATE: May 23, 2011 |
| THE COUNTY OF FRESNO, and DOES 1 TO |) | TIME: 10:00 a.m. |
| 50, |) | CTRM: 3 |
| |) | |
| Defendants. |) | (Honorable Oliver W. Wanger) |
| |) | |
| |) | |
| |) | |

On Monday, May 23, 2011, before the Honorable Oliver W. Wanger in Courtroom 3 of the United States District Court for the Eastern District of California, the Motion to Dismiss Plaintiff's Second Amended Complaint of Defendants the COUNTY OF FRESNO and CAPTAIN JOSE FLORES was heard. All parties appeared through counsel. After argument on the issues in open court and review and consideration of all of the pleadings submitted by counsel:

THE COURT FINDS that:

1) Plaintiff NORMAN L. PIMENTEL ("Plaintiff") is bringing an action for damages against the COUNTY OF FRESNO ("County"), CAPTAIN JOSE FLORES ("Flores"), and Does 2-20.

1 failed to provide training and supervision regarding appropriate practices and procedures to
2 provide adequate medical care.

3 9) Among other allegations, the SAC adds allegations that: Plaintiff had
4 previously been an inmate and the County knew he was suffering from psychiatric and seizure
5 disorders; Plaintiff was allegedly placed in a “rubber room” for the first few days of his
6 incarceration before being assigned to a top bunk without a ladder or other device to assist
7 climbing on and off; following his fall and on April 25, 2008, Plaintiff was taken to the jail clinic
8 where he was prescribed Vicodin and reassigned to a bed without an upper bunk; and Plaintiff
9 submitted a claim on June 4, 2008 alleging his slip and fall from a top bunk and the failure to
10 provide treatment requested by his physician.

11 10) Like the FAC, the SAC advances only conclusory allegations that the
12 named Defendants failed to provide training and supervision regarding the medical treatment of
13 inmates and pre-trial detainees and maintained a longstanding and official policy of classifying
14 and assigning those with psychological or psychiatric disorders to upper beds without ladders.
15 The deficiencies as to the Section 1983 claim in the FAC still exist in the SAC; in fact, the new
16 allegations make the claim of deliberate indifference less plausible as the SAC adds that Plaintiff
17 was taken to the jail clinic and given prescription pain medication on the day he reported his fall.
18 The new claim of placing “Elder Adults” in rubber rooms is unrelated to the deliberate
19 indifference claims previously advanced in the FAC and, without more, does not support a claim
20 of deliberate indifference. Once again the Section 1983 claim does not rise above mere
21 negligence. *See, Mortimer v. Baca*, 594 F.3d 714, 717-718 (9th Cir. 2010); *Clouthier v. County*
22 *of Contra Costa*, 591 F.3d 1232, 1242 (9th Cir. 2010). Section 1983 liability cannot be based
23 upon a respondeat superior theory. *E.g. Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992).

24 11) Plaintiff’s new ADA claim is not based upon facts sufficient to support
25 that he is disabled within the meaning of the ADA or had a mental or physical impairment that
26 substantially limited a major life activity. *See, e.g., Toyota Motor Manuf., Kentucky, Inc. v.*
27 *Williams*, 534 U.S. 184, 195 (2002). Further, no allegations demonstrate exclusion from or
28 denial of the benefit of a service, program, etc., by reason of a disability. *E.g., Simmons v.*
Navajo County, Arizona, 609 F.3d 1011, 1021-1022 (9th Cir. 2010). Because the claim does not

1 allege sufficient facts to state an ADA claim, Defendants' statute of limitations defense is not
2 addressed at this time.

3 12) Similar to the Section 1983 claim, Plaintiff's California Elder Abuse claim
4 in the SAC does not remedy any of the deficiencies contained in the FAC. In particular, the SAC
5 does not suggest that any Defendant acted outside of the scope of his/her employment in
6 interfering with Plaintiff's medical care. *See*, California Government Code § 950.2. The SAC
7 instead confirms that the acts of all Defendants were carried out in the course and scope of their
8 employment. Further, the Elder Abuse claim is not fairly reflected in Plaintiff's tort claim; as it
9 was not presented in accordance with California Government Code § 945.4, it is therefore
10 barred. Because the Elder Abuse claim is barred on these grounds, Defendants' other immunity
11 statutes, statute of limitations, and statutory application arguments do not need to be addressed.

12 13) Only the first negligence claim was alleged in the original Complaint; the
13 second and third negligence claims do not relate back to the original filing as they do not rest on
14 the same set of facts alleged in the original complaint or the same instrumentality as the claims
15 are based upon different acts and omissions, different injuries, and different duties. The second
16 negligence claim (the alleged failure to ensure treatment of Plaintiff's injury from April 25-April
17 30, 2008) was reasserted in the SAC although the claim had previously been dismissed with
18 prejudice; this claim is barred by the statute of limitations.

19 14) The third negligence claim (the alleged negligent failure to provide proper
20 follow up therapy, diet and treatment from May 2008 to Plaintiff's release on August 25, 2008)
21 was previously dismissed without prejudice as it was unclear when the claim accrued. The
22 allegations of the SAC make it clear that the statute of limitations on Plaintiff's third negligence
23 claim began to run no later than June 4, 2008 when he submitted a tort claim alleging that the Jail
24 was failing to follow the directives of his neurosurgeon. Plaintiff did not request leave to amend
25 his complaint until July 23, 2010, after the statute of limitations on the third negligence claim
26 expired. Therefore, the third negligence claim is also time-barred.

27 15) To the extent that Plaintiff is trying to state a fourth negligence claim
28 based on his alleged placement in a "rubber room" upon his arrival at the County Jail, this claim
was not alleged until 2011 and is time-barred.

