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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WAYNE CHICK,

Plaintiff,

vs.

B. A. LACEY, et al.,

Defendants.

) 1:11cv01447 LJO DLB PC
)
) FINDINGS AND RECOMMENDATIONS
) REGARDING DEFENDANTS'
) MOTION TO DISMISS
) (Document 45)
)
) THIRTY-DAY DEADLINE
)
)

Plaintiff Wayne Chick (“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. Plaintiff filed this action on August 29, 2011.

A. PROCEDURAL HISTORY

On April 22, 2013, the Court screened Plaintiff’s First Amended Complaint (“FAC”) and found the following cognizable claims: (1) an Eighth Amendment conditions of confinement claim against Defendants Lacey and Wattle; (2) an Eighth Amendment failure to protect claim against Defendant Lacey; and (3) an intentional infliction of emotional distress claim against Defendants Lacey and Wattle. The Court dismissed all other claims and Defendants.

1 Defendant Lacey filed a motion to dismiss on October 14, 2013.¹

2 The Court granted the motion and dismissed the FAC with leave to amend on May 27,
3 2014. Specifically, the Court found that (1) Plaintiff failed to allege physical harm in
4 conjunction with his Eighth Amendment claims; (2) Plaintiff failed to establish a causal
5 relationship between Defendant Lacey and the alleged attack by his cellmate; and (3) Plaintiff
6 failed to allege compliance with the California Tort Claims Act.

7 On August 7, 2014, after receiving an extension of time, Plaintiff filed his Second
8 Amended Complaint (“SAC”).

9 Defendants filed the instant motion to dismiss pursuant to Federal Rule of Civil
10 Procedure 12(b)(6) on August 18, 2014, prior to the Court’s screening of the SAC. Plaintiff did
11 not file an opposition and the Court therefore deems the motion ready for decision pursuant to
12 Local Rule 230(1).

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14 **B. ALLEGATIONS IN SAC**

15 At the times of the events at issue, Plaintiff was incarcerated at Sierra Conservation
16 Center (“SCC”) in Jamestown, California. Defendants Lacey and Wattle were correctional
17 officers at SCC.

18 On September 6, 2010, while Plaintiff was at the evening meal, Defendant Lacey
19 conducted a cell search and left a “complete mess,” with his personal belongings thrown to the
20 floor and mixed with those of his cellmate. ECF No. 44, at 5.

21 After, Defendants had Plaintiff bring all of his personal property to the officer’s podium,
22 where they “rampaged” through his property and randomly removed and threw away items.
23 ECF No. 44, at 5. The removed items included court transcripts, direct appeal briefs and notes
24 related to his criminal appeal.
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¹ Defendant Wattle had not been served at the time the motion was filed.

1 Defendant Lacey began to yell loudly, calling Plaintiff's name in front of the other
2 inmates and using words and phrases "clearly intended to imply those inmates were free to
3 physically attack" him. ECF No. 44, at 5-6. Plaintiff believes this was done with the intent to
4 instill psychological trauma and physical fear.

5 On September 7, 2010, Defendant Lacey was working the pedestrian gate at the plaza.
6 Plaintiff walked past the area and overheard Defendant Lacey telling a group of other inmates
7 that he was "going to trash Chick's cell, and take his stuff." ECF No. 44, at 6. During the day,
8 Plaintiff was warned by about twelve inmates of Defendant Lacey's intent to trash his cell. That
9 day, Defendant Lacey had Plaintiff bring his property back to the podium. The officers
10 "rampaged" through Plaintiff's property and randomly removed and threw away items. ECF No.
11 44, at 6. The removed items included court transcripts, direct appeal briefs and notes related to
12 his criminal appeal.

13 On September 9, 2010, during the morning pill call, Plaintiff spoke with Correctional
14 Sergeant Mutty about Defendants' harassment and threats. Mutty told Plaintiff that he would
15 speak to them. After third watch began, Defendants had Plaintiff bring his personal property to
16 the podium, where they again "rampaged" through his property and randomly removed and
17 threw away items. ECF No. 44, at 6. The removed items included court transcripts, direct
18 appeal briefs and notes related to his criminal appeal. After, Defendants, in a loud and
19 demeaning manner, told Plaintiff that he was a mentally ill, dirty individual, and that tomorrow,
20 he'd be going through the same procedure. That evening, Plaintiff was physically and
21 psychologically humiliated. He was trembling and unable to sleep as a result of the prior
22 harassment and psychological torture.

23 On September 10, 2010, Defendant Lacey sent a note to Katherine Robertson, Ph.D.,
24 stating that Plaintiff was a dirty, hoarding inmate. Plaintiff spoke with Dr. Robertson, who made
25 a written record of their session.
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1 Later that day, Defendant Lacey had Plaintiff bring all of his property to the podium. The
2 officers again “rampaged” through his property and randomly removed and threw away items.
3 ECF No. 44, at 7. The removed items included court transcripts, direct appeal briefs and notes
4 related to his criminal appeal. Defendant Lacey then permitted other inmates to rifle through his
5 property and take whatever items they wanted. Defendant Lacey eventually told Plaintiff to
6 place the remainder of his property into a small storage room within the building. Defendant
7 Lacey did not permit Plaintiff to shower and sent him back to his cell without a toothbrush or
8 toothpaste. Plaintiff was unable to sleep due to fear.

9
10 On September 11, 2010, Defendants Lacey and Wattle instructed Plaintiff to remove his
11 property from the storage room and bring it to the podium. While Plaintiff was doing this,
12 Defendants Lacey and Wattle were making fun of Plaintiff, stereotyping him and yelling
13 derogatory names in the presence of other inmates. During this search, Defendants disposed of
14 Plaintiff’s top and bottom dentures and religious artifacts. Plaintiff states that the confiscation of
15 these items caused Plaintiff to experience a “debilitating emotional state” over a prolonged
16 period of time. ECF No. 44, at 8.

17 On September 13, 2010, Defendant Lacey yelled at Plaintiff while he was in his cell and
18 told him to bring his property down to the podium. Defendant Lacey again “rampaged” through
19 his property and randomly removed and threw away items. ECF No. 44, at 8. The removed
20 items included court transcripts, direct appeal briefs and notes related to his criminal appeal.
21 That evening, Defendant Lacey prohibited Plaintiff from showering. This made him
22 apprehensive because he was “becoming very ‘rip’ [sic] with body odor offensive to his
23 cellmate.” ECF No. 44, at 9.

24
25 On September 16, 2010, Defendant Lacey called Plaintiff in from the yard and told him
26 to pack his property up and bring it to the podium. Defendant Lacey left Plaintiff’s property
27 exposed at the podium for several hours. Later in the day, Defendant Lacey approached
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1 Plaintiff's door and yelled that had been waiting for him for 30 minutes so that he could search
2 his property. That evening, Plaintiff was not allowed to pick up his psychiatric medication "as a
3 direct result of Defendant Lacey's actions." ECF No. 44, at 9.

4 On September 20, 2010, Defendant Lacey called Plaintiff from his cell to the podium and
5 proceeded to ridicule and belittle him in the presence of other inmates. Plaintiff believes that this
6 was done for the sole apparent purpose of demoralizing him.

7 On September 23, 2010, Defendant Lacey did the same thing, but this time, he was
8 yelling loudly to other inmates, including his cellmate, to encourage them to physically attack
9 Plaintiff.

10 On or about October 7, 2014, Plaintiff was attacked by his cellmate as a direct result of
11 the actions of Defendants Lacey and Wattle. This caused physical injury to Plaintiff. Plaintiff
12 asserts that the denial of showers and personal hygiene items caused his body odor to deteriorate,
13 which caused his cellmate to assault him.

14 On October 14, 2010, Plaintiff told his mental health provider that he was physically
15 attacked by his cell-mate. Plaintiff cites to a mental health progress note dated October 14, 2010,
16 that states that Plaintiff was assaulted the prior week by his former cellie, and that he continues
17 to complain of what he perceives to be unrelenting harassment by a correctional officer.

18 Based on these factual allegations, Plaintiff asserts (1) an Eighth Amendment conditions
19 of confinement claim because his dentures were confiscated, he was not permitted to shower for
20 an extended period of time, and he was not given personal hygiene items; (2) an Eighth
21 Amendment failure to protect claim based on Defendant Lacey's instigation of violence and
22 resulting assault; and (3) intentional infliction of emotional distress.

23 For relief, he seeks compensatory damages.
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1 **C. Legal Standard**

2 To survive a motion to dismiss, a complaint must contain sufficient factual matter,
3 accepted as true, to state a claim that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662,
4 678, 129 S.Ct. 1937 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct.
5 1955 (2007)) (quotation marks omitted); Conservation Force v. Salazar, 646 F.3d 1240, 1241-42
6 (9th Cir. 2011); Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The Court must
7 accept the well-pleaded factual allegations as true and draw all reasonable inferences in favor of
8 the non-moving party. Daniels-Hall v. National Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010);
9 Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007); Huynh v. Chase Manhattan Bank, 465
10 F.3d 992, 996-97 (9th Cir. 2006); Morales v. City of Los Angeles, 214 F.3d 1151, 1153 (9th Cir.
11 2000). Further, although the pleading standard is now higher, the Ninth Circuit has continued to
12 emphasize that prisoners proceeding pro se in civil rights actions are still entitled to have their
13 pleadings liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman,
14 680 F.3d 1113, 1121 (9th Cir. May 25, 2012); Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir.
15 2012); Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (citations omitted).

17 **D. Analysis**

18 1. Cognizable Injury

19 For each of Plaintiff's Eighth Amendment claims, he seeks damages for "severe
20 emotional suffering and distress." ECF No. 44, at 10-11. In fact, the allegations in his SAC
21 revolve almost entirely on Plaintiff's alleged emotional distress and mental health treatment.
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23 However, absent physical injury, a prisoner is barred from pursuing claims for mental
24 and emotional injury. 42 U.S.C. § 1997e(e); Oliver v. Keller, 289 F.3d 623, 625-628 (9th Cir.
25 2002). The requisite physical injury need not be significant, but must be more than *de minimus*
26 for purposes of 42 U.S.C. § 1997e(e). Pierce v. County of Orange, 526 F.3d 1190, 1124 (9th Cir.
27 2008); Oliver, 289 F.3d at 628.

1 The Court previously dismissed Plaintiff’s FAC because he did not allege *any* physical
2 injury. Defendants now argue that the amendments in his SAC are not sufficient.

3 a. *Eighth Amendment- Failure to Protect*

4 This claim is asserted against Defendant Lacey based on Plaintiff’s allegation that he
5 instigated and/or encouraged violence, resulting in the October 7, 2010, assault. In amending his
6 complaint, Plaintiff added an allegation that the assault caused “physical injury,” and he makes
7 numerous references to this “physical injury.” ECF No. 44, at 10-12.

8 Defendants argue, and the Court agrees, that these bare assertions of physical injury are
9 not sufficient to demonstrate more than *de minimus* physical harm. Despite the Court’s prior
10 analysis and instruction, Plaintiff does not describe his “physical injury” in any way, nor does he
11 describe the alleged assault. Moreover, while Plaintiff reported being assaulted to his mental
12 health provider, there is no explanation of the nature of any injuries. ECF No. 44, at 21. He also
13 fails to include any medical records, or *any* records that describe any injuries. He submits an
14 inmate grievance that was submitted after the alleged assault, but the grievance does not include
15 any discussion of an assault or any resulting physical injury. ECF No. 49- 51.

16 To the extent that Plaintiff cites an inability to sleep, fear and “debilitating emotional
17 state,” these impacts are not physical in nature and cannot satisfy the physical injury requirement
18 of section 1997e(e). See Chappell v. Fleming, 2014 WL 793986, *5 (E.D. Cal. 2014) (emotional
19 harm, or fear of harm, is insufficient to state an Eighth Amendment claim).

20 Plaintiff’s allegations are not sufficient to demonstrate that he suffered more than a *de*
21 *minimus* injury, and he is therefore barred from recovering for emotional injuries under 42
22 U.S.C. § 1997e(e). Iqbal, 556 U.S. at 678 (a complaint does not suffice if it tenders “naked
23 assertion[s]” devoid of “further factual enhancement.”) (internal citations omitted).

1 b. *Eighth Amendment- Conditions of Confinement*

2 Plaintiff’s conditions of confinement claim against Defendants Lacey and Wattle is based
3 on his contentions that they prohibited him from showering “for an extended period of time,”
4 confiscated his dentures and denied “all personal hygiene items.” ECF No. 10.

5 Extreme deprivations are required to make out a conditions of confinement claim, and
6 only those deprivations denying the minimal civilized measure of life’s necessities are
7 sufficiently grave to form the basis of an Eighth Amendment violation. Hudson v. McMillian,
8 503 U.S. 1, 9 (1992) (citations and quotations omitted). In order to state a claim for violation of
9 the Eighth Amendment, the plaintiff must allege facts sufficient to support a claim that prison
10 officials knew of and disregarded a substantial risk of serious harm to the plaintiff. Farmer v.
11 Brennan, 511 U.S. 825, 847 (1994); Foster, 554 F.3d at 812.

12 Plaintiff fails to state a conditions of confinement claim for two reasons. First, as
13 discussed above, although Plaintiff alleges that he was not permitted to shower, that his dentures
14 were taken and that he was not given personal hygiene items, he does not point to any resulting
15 physical harm. Moreover, his claims of an inability to sleep, fear and “debilitating emotional
16 state,” are not physical in nature and cannot satisfy the physical injury requirement of section
17 1997e(e). See Chappell, 2014 WL * 5.

18 Second, the deprivations underlying his claim are not “sufficiently grave,” nor do they
19 support a finding that Defendants “knew of and disregarded a substantial risk of serious harm.”
20 While the Eighth Amendment guarantees personal hygiene supplies, Keenan v. Hall, 83 F.3d
21 1083, 1091 (9th Cir. 1996), the circumstances, nature, and duration of the deprivations are
22 critical in determining whether the conditions complained of are grave enough to form the basis
23 of a viable Eighth Amendment claim, Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000).

24 Here, although Plaintiff alleges the denial of showers for an extended period of time, his
25 factual allegations show that he was denied a shower on two occasions. Similarly, although he
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1 alleges that he was denied all personal hygiene items, his facts show that he was denied a
2 toothbrush and toothpaste once, and that his dentures were confiscated once. These allegations
3 do not rise to the level of an Eighth Amendment violation.

4 2. Causal Link Between Defendants’ Conduct and Alleged Violations

5 Defendants next argue that Plaintiff has failed to allege a sufficient causal link between
6 their actions and the alleged constitutional violations.

7 In the context of a deliberate indifference claim, a plaintiff must prove that the
8 defendant’s deliberate indifference was the actual and proximate cause of the deprivation. Leer
9 v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988). While direct, personal participation is not
10 required, “the critical question is whether it was reasonably foreseeable that the actions of the
11 particular . . . defendants would lead to the rights violations alleged to have occurred”
12 Wong v. U.S., 373 F.3d 952, 966 (9th Cir. 2004).

13 As to Plaintiff’s failure to protect claim, the Court previously explained that he failed to
14 allege a sufficient causal link between Defendant Lacey’s statement on September 23, 2014, and
15 an attack at least two weeks later by his cellmate. The Court also noted that there was no
16 allegation that the cellmate heard Defendant Lacey’s alleged statement.

17 Plaintiff’s amendments fail to cure this deficiency. Although he now states that his
18 cellmate was present during Defendant Lacey’s statements, he again fails to establish that his
19 statements were the actual and proximate cause of the assault. Plaintiff adds an allegation
20 implying that the denial of showers led to body odor, which led to the assault. However,
21 Plaintiff alleges that he was denied a shower on September 10, 2010, and September 13, 2010.
22 The alleged assault occurred on October 7, 2010, almost one month later. Plaintiff does not
23 allege that he was not permitted to shower during this time.
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1 3. Intentional Infliction of Emotional Distress

2 In the prior Findings and Recommendations, the Court held that Plaintiff failed to allege
3 compliance with the Government Claims Act (“Act”). Plaintiff has now allegedly submitted a
4 claim pursuant to the Act, but Defendants contend that the submission does not correct the
5 deficiency.

6 The Act requires that a tort claim against a public entity or its employees be presented to
7 the California Victim Compensation and Government Claims Board generally no more than six
8 months after the cause of action accrues. Cal. Gov’t Code §§ 905.2, 910, 911.2, 945.4, 950-
9 950.2. Presentation of a written claim, and action on or rejection of the claim are conditions
10 precedent to suit. Shirk v. Vista Unified Sch. Dist., 42 Cal.4th 201, 208-09 (Cal. 2007); State v.
11 Superior Court of Kings Cnty. (Bodde), 32 Cal.4th 1234, 1239 (Cal. 2004); Mabe v. San
12 Bernardino Cnty. Dep’t of Pub. Soc. Servs., 237 F.3d 1101, 1111 (9th Cir. 2001); Mangold v.
13 California Pub. Utils. Comm’n, 67 F.3d 1470, 1477 (9th Cir. 1995). To state a tort claim against
14 a public employee, a plaintiff must allege compliance with the Act. Shirk, 42 Cal.4th at 209;
15 Bodde, 32 Cal.4th at 1239; Mangold, 67 F.3d at 1477; Karim-Panahi v. Los Angeles Police
16 Dep’t, 839 F.2d 621, 627 (9th Cir. 1988).

17 In attempting to cure the deficiency, Plaintiff attaches an August 1, 2014, letter to the
18 California Victim Compensation and Government Claims Board. He states that he was not
19 aware of the presentation requirement until Defendant Lacey raised the issue in the prior motion
20 to dismiss. ECF No. 44, at 61. In his SAC, Plaintiff states that he is “in the process of
21 exhausting” the claim by filing a late claim. ECF No. 44, at 12. However, as noted above,
22 action on the claim, or rejection of the claim, is an element of the cause of action. Plaintiff’s late
23 attempt at presenting a claim is not sufficient.

24 Additionally, the Court notes that it would not exercise supplemental jurisdiction over his
25 state law claim where he fails to state a federal claim, even if the state law claim deficiencies are
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1 curable. 28 U.S.C. § 1367(c)(3); Parra v. PacifiCare of Az., Inc., 715 F.3d 1146, 1156 (9th Cir.
2 2013); Herman Family Revocable Trust v. Teddy Bear, 254 F.3d 802, 805 (9th Cir. 2001).

3 **E. Conclusion and Recommendation**

4 Based on the foregoing, it is HEREBY RECOMMENDED that Defendants' motion to
5 dismiss be GRANTED and Plaintiff's SAC be DISMISSED WITHOUT leave to amend. The
6 Court has previously explained these deficiencies to Plaintiff, but he has failed to correct them.
7 Further leave to amend is not warranted given the scare nature of his amendments. Akhtar v.
8 Mesa, 698 F.3d 1202, 1212-13 (9th Cir. 2012); Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.
9 2000); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

10 These Findings and Recommendations will be submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty
12 (30) days after being served with these Findings and Recommendations, the parties may file
13 written objections with the Court. The document should be captioned "Objections to Magistrate
14 Judge's Findings and Recommendations." A party may respond to another party's objections by
15 filing a response within fourteen (14) days after being served with a copy of that party's
16 objections. The parties are advised that failure to file objections within the specified time may
17 waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th
18 Cir. 1991).

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21 IT IS SO ORDERED.

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23 Dated: December 2, 2014

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE