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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

MUHAMMAD NURIDDIN,)	Case No.: 1:11-cv-01448-SAB (PC)
)	
Plaintiff,)	
)	
v.)	ORDER DISMISSING CERTAIN CLAIM AND
)	DEFENDANT FROM ACTION FOR FAILURE
)	TO STATE A COGNIZABLE CLAIM
ESTRELLA, et al.,)	
)	
Defendants.)	
)	
)	
)	

Plaintiff Muhammad Nuriddin is appearing pro se and in forma pauperis in this civil rights action pursuant to Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). Bivens actions and actions under 42 U.S.C. § 1983 “are identical save for the replacement of a state actor under § 1983 by a federal actor under Bivens.” Van Strum v. Lawn, 940 F.2d 406, 409 (9th Cir. 1991). Pursuant to 28 U.S.C. § 636(c), Plaintiff consented to the jurisdiction of the United States Magistrate Judge on September 7, 2011. Local Rule 302.

**I.
SCREENING REQUIREMENT**

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that “fail[] to state a claim on which relief may be granted,” or that “seek[]

1 monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B).

2 A complaint must contain “a short and plain statement of the claim showing that the pleader is
3 entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
4 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
5 do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly,
6 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate that each defendant personally
7 participated in the deprivation of Plaintiff’s rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir.
8 2002).

9 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings liberally
10 construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d 1113, 1121
11 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be facially plausible,
12 which requires sufficient factual detail to allow the Court to reasonably infer that each named
13 defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service,
14 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant has acted unlawfully” is not
15 sufficient, and “facts that are ‘merely consistent with’ a defendant’s liability” falls short of satisfying
16 the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

17 II.

18 COMPLAINT ALLEGATIONS

19 Plaintiff is currently in custody in Atwater United States Penitentiary (“AUSP”) in Atwater,
20 California. The incidents described in Plaintiff’s complaint took place while he was incarcerated in
21 this location. Plaintiff names Correctional Officer Estrella, Lieutenant Miller, Warden Rios, Assistant
22 Warden Bell, and Does 1-2 as defendants (collectively referred to as “Defendants”).

23 On September 29, 2010, Plaintiff walked through the institution’s metal detector, without any
24 detection. Defendant Estrella, who was standing guard outside the dining hall, ordered Plaintiff to
25 submit to a pat-down search. Plaintiff’s complied with Estrella’s order. Estrella ordered Plaintiff to
26 spread his legs, and he began the search on the upper body rubbing his chest and arms softly. He then
27 reached under Plaintiff’s crotch area with his forearm first. Plaintiff immediately turned around and
28 asked Estrella, “what are you doing.” Estrella ordered Plaintiff to turn around in an aggressive

1 manner. Estrella proceeded to pat search Plaintiff and gripped his “genitals first, then penis and
2 rubbed up along the anus.” Defendant Estrella performed this act of rubbing Plaintiff’s private area in
3 a sexual way. Plaintiff yanked away from Estrella and yelled “what the f... man what are you doing?”

4 Following this incident, Plaintiff exercised his right to file a grievance against Defendant
5 Estrella. Defendant Miller threatened Plaintiff to drop the complaint and not file further grievances or
6 he would be “buried” in the security housing unit (SHU) indefinitely. Plaintiff’s declined to obey
7 Defendant Miller’s request and was placed in the SHU for filing the grievance and received an
8 incident report. Several days later, Plaintiff was visited by Does 1-2 who threatened Plaintiff to
9 withdraw the grievance or he would remain in segregation for a long period of time. Defendants Rios
10 and Bell retaliated against Plaintiff for filing a grievance against Defendant Estrella, by stating that
11 could not release him unless he dropped the complaint. Plaintiff remained in the SHU for a month and
12 a half.

13 III.

14 DISCUSSION

15 A. Eighth Amendment Excessive Force Claims

16 The Cruel and Unusual Punishments Clause of the Eighth Amendment protects prisoners from
17 the use of excessive physical force. Wilkins v. Gaddy, 130 S.Ct. 1175, 1178 (2010) (per curiam);
18 Hudson v. McMillian, 503 U.S. 1, 8-9, 112 S.Ct. 995 (1992). What is necessary to show sufficient
19 harm under the Eighth Amendment depends upon the claim at issue, with the objective component
20 being contextual and responsive to contemporary standards of decency. Hudson, 503 U.S. at 8
21 (quotation marks and citations omitted). For excessive force claims, the core judicial inquiry is
22 whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously
23 and sadistically to cause harm. Wilkins, 130 S.Ct. at 1178 (quoting Hudson, 503 U.S. at 7) (quotation
24 marks omitted).

25 The Eighth Amendment protects inmates from repetitive and harassing searches, and from
26 sexual abuse. Schwenk v. Hartford, 204 F.3d 1187, 1196-1197 (9th Cir. 2000). Rape or other sexual
27 assault perpetrated by a guard against an inmate is offensive to human dignity and violates the Eighth
28 amendment regardless of lasting physical injury. Id. The Ninth Circuit has also held that, under

1 limited circumstances, a bodily search involving intimate touching may inflict psychological pain
2 sufficient to implicate the Eighth Amendment even in the absence of sexual assault. In Jordan v.
3 Gardner, 986 F.2d 1521, 1523-1531 (9th Cir. 1993) (en banc), the Ninth Circuit held that a prison
4 policy requiring male guards to conduct frequent random clothed body searches of female inmates
5 constituted cruel and unusual punishment when the policy was adopted despite the warnings of prison
6 psychologists that the intrusive searches would severely traumatize inmates, many of whom had pre-
7 incarceration histories of sexual abuse by men.

8 Plaintiff's allegations fail to give rise to a cognizable claim against Defendant Estrella.
9 Although Plaintiff contends that Defendant Estrella conducted the search in a "sexual way," the
10 complaint does not contain any facts to support such characterization. There is no allegation that
11 Defendant Estrella made any sexual comments or fondled or touched Plaintiff in a sexual manner.
12 Plaintiff merely alleges that during a presumably "clothed" body search, Defendant Estrella "gripped"
13 his genitals, then penis, and rubbed along his anus. Without more factual detail such as comments by
14 the defendant and/or further action, these facts are entirely consistent with a body search to maintain
15 and assure proper security within the prison facility. Such factual circumstances do not give to a
16 plausible claim that the search was conducted in a sexually abusive manner. Contrast Watson v.
17 Jones, 980 F.2d 1165, 116501166 (8th Cir. 1992) (triable issue as to sexual harassment when two
18 inmates alleged that female correctional officer fondled them during almost daily pat-down searches
19 of their genital area); Bromell v. Idaho Dep't of Corrections, No. CV 05-419-N-LMB, 2006 WL
20 3197157, * 1, *4 (D. Idaho Oct. 31, 2006) (allegations that officer pressed his penis against plaintiff's
21 buttocks and made sexual comments stated an Eighth Amendment claim); Rodriguez v. McClenning,
22 399 F.Supp.2d 228, 232, 237-238 (S.D.N.Y. 2005) (triable issue as to Eighth Amendment violation
23 when plaintiff contended that guard caressed his chest and groped his genitals and buttocks during a
24 pat-frisk search, saying "this way, it's more fun" when plaintiff objected); Houston v. Buck, No. CIV
25 S 03-1625 FCD JFM P, 2005 WL 1378964, *3 (E.D. Cal. 2005), adopted by 2005 WL 1561530 (E.D.
26 Cal. June 29, 2005) (triable issue as to Eighth Amendment violation when plaintiff alleged that guard
27 said "let me feel on you" before conducting a patdown search during which he squeezed parts of
28 plaintiff's body).

1 Even if Plaintiff believed there was a sexual aspect to the search, more is needed. See
2 Berryhill v. Schriro, 137 F.3d 1073, 1076 (8th Cir. 1998) (plaintiff’s belief that prison employee’s
3 brief touch to plaintiff’s buttocks, unaccompanied by sexual comments, was a sexual advance did not
4 create a triable issue as to Eighth Amendment violation when the evidence did not support
5 characterization); Smith v. Los Angeles County, No. CV 07-7028-VAP (MAN), 2005 WL 2569232,
6 *5 (C.D. Cal. 2010), adopted by 2010 WL 2572570 (C.D. Cal. 2010), aff’d, 452 Fed. Appx. 768 (9th
7 Cir. 2011) (pretrial detainee failed to state Fourteenth Amendment due process claim, or Fourth
8 Amendment unreasonable search claim, based on plaintiff’s allegations that defendant correctional
9 officer, pursuant to a search and without sexual comment, pulled plaintiff’s boxers to look at his
10 buttocks, inserted his hand “karate chop” style, into “the cavity of my buttocks . . . until it passed
11 between my legs and reached under and around until he cupped my genitals.” (citing Berryhill v.
12 Schriro, 137 F.3d 1073, 1076 (8th Cir. 1998) (affirming summary judgment for defendant on
13 plaintiff’s Eighth Amendment claim that prison employee’s brief touch (“mere seconds”) to plaintiff’s
14 buttocks during “horseplay,” unaccompanied by sexual comments, was an improper sexual advance
15 that “embarrassed” plaintiff); and Osterloth v. Hopwood, No. CV 06 152 M JCL, 2006 WL 3337505,
16 *6,*7 (D. Mont. 2006) (dismissing Eighth Amendment claim challenging as sexually abusive an
17 officer’s search of plaintiff that allegedly included the officer reaching between plaintiff’s legs,
18 grabbing his scrotum and penis, and sliding his hand between plaintiff’s buttocks, wherein plaintiff
19 stated to the officer, “that was pretty much sexual assault,” and officer responded, “yah pretty much.”).

20 **B. First Amendment—Retaliation Claims**

21 Allegations of retaliation against a prisoner’s First Amendment rights to speech or to petition
22 the government may support a section 1983 claim. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir.
23 1985); see also Valandingham v. Bojorquez, 866 F.2d 1135 (9th Cir. 1989); Pratt v. Rowland, 65 F.3d
24 802, 807 (9th Cir. 1995). “Within the prison context, a viable claim of First Amendment retaliation
25 entails five basic elements: (1) An assertion that a state actor took some adverse action against an
26 inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the
27 inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a
28 legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005); accord

1 Watison v. Carter, 668 F.3d 1108, 1114-15 (9th Cir. 2012); Brodheim v. Cry, 584 F.3d 1262, 1269
2 (9th Cir. 2009).

3 The Court finds that Plaintiff's allegations are sufficient to state a claim against Defendants
4 Miller, Rios, Bell, and Does 1-2 for retaliation, in violation of the First Amendment, and the Court has
5 forwarded Plaintiff the necessary service document by way of separate order issued January 24, 2014.

6 **IV.**

7 **CONCLUSION AND ORDER**

8 Plaintiff's complaint fails to state a cognizable Eighth Amendment violation against Defendant
9 Estrella, and this claim and defendant must be dismissed from the action with prejudice.

10 Accordingly,

11 IT IS HEREBY ORDERED that:

12 1. Plaintiff's claim for sexual assault in violation of the Eighth Amendment against
13 Defendant Estrella is DISMISSED.

14
15
16 IT IS SO ORDERED.

17 Dated: February 24, 2014

18 
19 _____
20 UNITED STATES MAGISTRATE JUDGE