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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERTO M. GARCIA, JR.,

Plaintiff,

vs.

MATTHEW M. JUAREZ, JR.,

Defendant.

1:12-cv-00750-AWI-GSA-PC

ORDER FINDING COGNIZABLE CLAIM

ORDER FOR PLAINTIFF TO EITHER:

- (1) FILE A SECOND AMENDED COMPLAINT, OR
- (2) NOTIFY THE COURT OF HIS WILLINGNESS TO PROCEED AGAINST DEFENDANT JUAREZ ON THE EXCESSIVE FORCE CLAIM FOUND COGNIZABLE BY THE COURT

THIRTY DAY DEADLINE TO FILE SECOND AMENDED COMPLAINT OR NOTIFY COURT OF WILLINGNESS TO PROCEED

I. BACKGROUND

Roberto M. Garcia, Jr. ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on May 8, 2012. (Doc. 1.)

1 The court screened the Complaint pursuant to 28 U.S.C. 1915A and entered an order on
2 May 10, 2013, dismissing the Complaint for failure to state a claim, with leave to amend.
3 (Doc. 9.) On June 14, 2013, Plaintiff filed the First Amended Complaint, which is now before
4 the Court for screening. (Doc. 11.)

5 **II. SCREENING REQUIREMENT**

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

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

26 **III. SUMMARY OF FIRST AMENDED COMPLAINT**

27 Plaintiff is in the custody of the California Department of Corrections and
28 Rehabilitation (CDCR), presently incarcerated at Kern Valley State Prison (KVSP) in Delano,

1 California, where the events at issue in the First Amended Complaint allegedly occurred.
2 Plaintiff brings this civil rights complaint against defendant Sergeant Matthew M. Juarez, Jr.,
3 who is a prison official employed by the CDCR at KVSP. Plaintiff's factual allegations follow.

4 On May 23, 2011, while Plaintiff was on the recreation yard exercising, another
5 prisoner attacked him and forced him to defend himself. The control officer ordered "yard
6 down" at which time Plaintiff complied by lying down on the ground in a prone position,
7 posing no threat to anyone. (First Amd Cmp, Doc. 11 at 4 ¶IV.) While Plaintiff was on the
8 ground, defendant Sergeant Matthew M. Juarez, Jr., kicked him in his left shoulder with
9 extreme force, causing Plaintiff severe pain. Defendant Juarez also placed his knee into
10 Plaintiff's back and pulled Plaintiff's right arm behind his back with extreme force, twisting
11 and extending the arm higher, injuring Plaintiff's right shoulder. While he was assaulting
12 Plaintiff, defendant Juarez called Plaintiff discriminatory and profane names and threatened
13 him with hostile statements such as "You fu—in pu—y I'm tired of you pieces of sh-t, you
14 fu—in PC's" (which referred to Plaintiff's Protective Custody status on a Sensitive Needs
15 Yard). (First Amd Cmp at 6 ¶12.) Defendant Juarez then instructed an unknown correctional
16 officer to escort Plaintiff to the facility program office, where he was placed in a holding cage.
17 Plaintiff immediately complained about the severe pain, discomfort, and injury to his right
18 shoulder. Plaintiff was seen by a nurse but was not provided with pain medication and did not
19 receive any treatment such as x-rays until the next day. Plaintiff was provided with an arm
20 sleeve and given six weeks to heal before starting physical therapy. Plaintiff was receiving
21 pain medication as of the date of the First Amended Complaint.

22 Plaintiff requests monetary damages, declaratory and injunctive relief, and costs of suit.

23 **IV. PLAINTIFF'S CLAIMS**

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

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

1 42 U.S.C. § 1983. “Section 1983 . . . creates a cause of action for violations of the federal
2 Constitution and laws.” Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997)
3 (internal quotations omitted). “To the extent that the violation of a state law amounts to the
4 deprivation of a state-created interest that reaches beyond that guaranteed by the federal
5 Constitution, Section 1983 offers no redress.” Id.

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

17 **A. Excessive Force – Eighth Amendment Claim**

18 “What is necessary to show sufficient harm for purposes of the Cruel and Unusual
19 Punishments Clause [of the Eighth Amendment] depends upon the claim at issue” Hudson
20 v. McMillian, 503 U.S. 1, 8 (1992). “The objective component of an Eighth Amendment claim
21 is . . . contextual and responsive to contemporary standards of decency.” Id. (internal quotation
22 marks and citations omitted). The malicious and sadistic use of force to cause harm always
23 violates contemporary standards of decency, regardless of whether or not significant injury is
24 evident. Id. at 9; see also Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002) (Eighth
25 Amendment excessive force standard examines *de minimis* uses of force, not *de minimis*
26 injuries)). However, not “every malevolent touch by a prison guard gives rise to a federal cause
27 of action.” Id. at 9. “The Eighth Amendment’s prohibition of cruel and unusual punishments
28 necessarily excludes from constitutional recognition *de minimis* uses of physical force,

1 provided that the use of force is not of a sort ‘repugnant to the conscience of mankind.’ Id. at
2 9-10 (internal quotations marks and citations omitted).

3 “[W]henver prison officials stand accused of using excessive physical force in
4 violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether
5 force was applied in a good-faith effort to maintain or restore discipline, or maliciously and
6 sadistically to cause harm.” Id. at 7. “In determining whether the use of force was wanton and
7 unnecessary, it may also be proper to evaluate the need for application of force, the relationship
8 between that need and the amount of force used, the threat reasonably perceived by the
9 responsible officials, and any efforts made to temper the severity of a forceful response.” Id.
10 (internal quotation marks and citations omitted). “The absence of serious injury is . . . relevant
11 to the Eighth Amendment inquiry, but does not end it.” Id.

12 The court finds that Plaintiff states a cognizable claim for use of excessive force in
13 violation of the Eighth Amendment against defendant Sergeant Matthew M. Juarez, Jr., for
14 assaulting Plaintiff when he was prone on the ground posing no threat to anyone.

15 **B. Equal Protection**

16 The Equal Protection Clause requires that persons who are similarly situated be treated
17 alike. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249
18 (1985); Shakur v. Schriro, 514 F.3d 878, 891 (9th Cir. 2008). An equal protection claim may
19 be established by showing that Defendants intentionally discriminated against Plaintiff based
20 on his membership in a protected class, Comm. Concerning Cmty. Improvement v. City of
21 Modesto, 583 F.3d 690, 702-03 (9th Cir. 2009); Serrano v. Francis, 345 F.3d 1071,1082 (9th
22 Cir. 2003), Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001), or that similarly
23 situated individuals were intentionally treated differently without a rational relationship to a
24 legitimate state purpose, Engquist v. Oregon Department of Agr., 553 U.S. 591, 601-02, 128
25 S.Ct. 2146 (2008); Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073
26 (2000); Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 592 (9th Cir. 2008); North Pacifica LLC
27 v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008).

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1 Plaintiff has not alleged any facts demonstrating that he was intentionally discriminated
2 against on the basis of his membership in a protected class, or that he was intentionally treated
3 differently than other similarly situated inmates without a rational relationship to a legitimate
4 state purpose. Moreover, verbal harassment or abuse alone is not sufficient to state a claim
5 under section 1983, Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987), and threats do
6 not rise to the level of a constitutional violation, Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir.
7 1987). Without more, Plaintiff's allegations of verbal abuse fail to state a claim against
8 defendant Juarez.

9 **V. CONCLUSION AND ORDER**

10 For the reasons set forth above, the court finds that Plaintiff states a cognizable claim in
11 the First Amended Complaint against defendant Sergeant Matthew M. Juarez, Jr., for use of
12 excessive force in violation of the Eighth Amendment. However, Plaintiff fails to state any
13 other claims against defendant upon which relief may be granted under § 1983. Plaintiff shall
14 be required to either file a Second Amended Complaint, or notify the Court of his willingness
15 to proceed only on the cognizable claim for excessive force against defendant Juarez. Should
16 Plaintiff choose to proceed only on the cognizable claim for excessive force, the Court will
17 begin the process to initiate service upon defendant Juarez by the United States Marshal.

18 Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend 'shall be
19 freely given when justice so requires.'" The Court will provide Plaintiff with time to file an
20 amended complaint curing the deficiencies identified above should he wish to do so. Plaintiff
21 is granted leave to file a Second Amended Complaint within thirty days. Noll v. Carlson, 809
22 F.2d 1446, 1448-49 (9th Cir. 1987).

23 Should Plaintiff choose to amend the complaint, the Second Amended Complaint
24 should be brief, Fed. R. Civ. P. 8(a), but must state what each named defendant did that led to
25 the deprivation of Plaintiff's constitutional or other federal rights, Iqbal, 556 U.S. at 678; Jones
26 v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Plaintiff must set forth "sufficient factual
27 matter . . . to 'state a claim that is plausible on its face.'" Id. at 678 (quoting Twombly, 550
28 U.S. at 555). There is no *respondeat superior* liability, and each defendant is only liable for his

1 or her own misconduct. Iqbal, 556 U.S. at 677. Plaintiff must demonstrate that each defendant
2 *personally* participated in the deprivation of his rights. Jones, 297 F.3d at 934 (emphasis
3 added).

4 Plaintiff should note that although he has been given the opportunity to amend, it is not
5 for the purposes of adding new defendants for unrelated issues. In addition, Plaintiff should
6 take care to include only those claims that have been administratively exhausted.

7 If Plaintiff decides to file an amended complaint, he is reminded that an amended
8 complaint supercedes the original complaint, Lacey v. Maricopa County, 693 F. 3d 896, 907
9 n.1 (9th Cir. Aug., 29, 2012) (en banc), and it must be complete in itself without reference to
10 the prior or superceded pleading. Local Rule 220. Once an amended complaint is filed, the
11 original complaint no longer serves any function in the case. Therefore, in an amended
12 complaint, as in an original complaint, each claim and the involvement of each defendant must
13 be sufficiently alleged. The amended complaint should be clearly and boldly titled "Second
14 Amended Complaint," refer to the appropriate case number, and be an original signed under
15 penalty of perjury.

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

- 17 1. The Clerk's Office shall send Plaintiff a civil rights complaint form;
- 18 2. Within **thirty (30) days** from the date of service of this order, Plaintiff shall
19 either:
 - 20 (1) File a Second Amended Complaint curing the deficiencies identified in
21 this order, or
 - 22 (2) Notify the Court in writing that he does not wish to file an amended
23 complaint and is instead willing to proceed only on the excessive force
24 claim against defendant Sergeant Matthew M. Juarez, Jr.;
- 25 3. Should Plaintiff choose to amend the complaint, Plaintiff shall caption the
26 amended complaint "Second Amended Complaint" and refer to the case number
27 1:12-cv-00750-AWI-GSA-PC; and

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4. If Plaintiff fails to comply with this order, this action will be dismissed for failure to comply with a court order.

IT IS SO ORDERED.

Dated: February 24, 2014

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE