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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNDREY TURNER,

Plaintiff,

v.

DURAN, et al.,

Defendants.

CASE NO. 1:12-cv-907-LJO-MJS (PC)

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DISMISSAL OF ACTION  
FOR FAILURE TO STATE ANY CLAIMS  
UNDER SECTION 1983

(ECF No. 16)

FOURTEEN-DAY OBJECTION DEADLINE

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Plaintiff Undrey Turner ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

Plaintiff initiated this action on June 4, 2012. (ECF No. 1.) No other parties have appeared in the action. The Court screened Plaintiff's Complaint and dismissed it with leave to amend for failure to state a claim. (ECF No. 15.) Plaintiff has since filed a First Amended Complaint. (Am. Compl., ECF No. 16.) Plaintiff's First Amended Complaint is now before the Court for screening.

For the reasons set forth below, the Court finds that Plaintiff's First Amended Complaint fails to state a claim and recommends that Plaintiff's action be dismissed with prejudice for failure to state a claim.

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1 **I. SCREENING REQUIREMENT**

2 The Court is required to screen complaints brought by prisoners seeking relief  
3 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
4 § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has  
5 raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which  
6 relief may be granted, or that seek monetary relief from a defendant who is immune from  
7 such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion  
8 thereof, that may have been paid, the court shall dismiss the case at any time if the court  
9 determines that . . . the action or appeal . . . fails to state a claim upon which relief may  
10 be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

11 A complaint must contain “a short and plain statement of the claim showing that the  
12 pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are  
13 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by  
14 mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, \_\_\_, 129  
15 S. Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).  
16 Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim that is  
17 plausible on its face.’” Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555).  
18 Facial plausibility demands more than the mere possibility that a defendant committed  
19 misconduct and, while factual allegations are accepted as true, legal conclusions are not.  
20 Id. at 1949-50.

21 **II. SUMMARY OF PLAINTIFF’S COMPLAINT**

22 Plaintiff is currently housed at California Substance Abuse Treatment Facility.  
23 Plaintiff previously was housed at California State Prison-Corcoran (“CSP-Corcoran”),  
24 where the events at issue in his First Amended Complaint occurred. Plaintiff alleges that  
25 the following individuals violated the Eighth Amendment by failing to protect him and  
26 California tort laws by acting with negligence: 1) Duran, correctional officer at CSP-  
27 Corcoran, 2) Smith, correctional officer at CSP-Corcoran, and 3) Maganya, correctional  
28 officer at CSP-Corcoran. All of the named Defendants work in the Secure Housing Unit

1 at CSP-Corcoran.

2 Plaintiff alleges as follows:

3 On September 13, 2011, Defendants Duran and Smith transferred a new cell-mate  
4 into Plaintiff's cell in the Secure Housing Unit without strip-searching the new cell-mate  
5 prior to the transfer. (Am. Compl. at 3.) Defendants Duran and Smith knew that  
6 California Code of Regulations and California Department of Corrections and  
7 Rehabilitation's Operational Procedures directed that they properly search Secure  
8 Housing Unit inmates before transferring them, but they failed to strip search Plaintiff's  
9 new cell-mate. (Id. at 3-4.) Plaintiff's new cell-mate stabbed Plaintiff after the transfer.  
10 (Id. at 3.) Defendant Maganya aided Defendants Duran and Smith in the transfer process  
11 by opening various cell doors from a control booth. (Id.)

12 Plaintiff asks for compensatory damages.

13 **III. ANALYSIS**

14 **A. 42 U.S.C. § 1983**

15 42 U.S.C. § 1983 "provides a cause of action for the 'deprivation of any rights,  
16 privileges, or immunities secured by the Constitution and laws' of the United States."  
17 Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). §  
18 1983 is not itself a source of substantive rights, but merely provides a method for  
19 vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94,  
20 109 S. Ct. 1865 (1989).

21 To state a claim under § 1983, a plaintiff must allege two essential elements: (1)  
22 that a right secured by the Constitution or laws of the United States was violated, and (2)  
23 that the alleged violation was committed by a person acting under the color of state law.  
24 See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243,  
25 1245 (9th Cir.1987).

26 **B. Eighth Amendment - Failure to Protect**

27 As the Court previously informed Plaintiff, the Eighth Amendment protects  
28 prisoners from inhumane methods of punishment and from inhumane conditions of

1 confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006). Although  
2 prison conditions may be restrictive and harsh, prison officials must provide prisoners with  
3 food, clothing, shelter, sanitation, medical care, and personal safety. See Toussaint v.  
4 McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986), abrogated in part on other grounds by  
5 Sandin v. Connor, 515 U.S. 472 (1995); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir.  
6 1982). Where a prisoner alleges injuries stemming from unsafe conditions of  
7 confinement, prison officials may be held liable only if they acted with “deliberate  
8 indifference to a substantial risk of serious harm.” Frost v. Agnos, 152 F.3d 1124, 1128  
9 (9th Cir. 1998).

10 The deliberate indifference standard involves an objective and a subjective prong.  
11 First, the alleged deprivation must be, in objective terms, “sufficiently serious ....” Farmer  
12 v. Brennan, 511 U.S. 825, 834 (1994) (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991));  
13 Johnson v. Lewis, 217 F.3d 726, 734 (9th Cir. 2000). A deprivation is sufficiently serious  
14 when the prison official's act or omission results “in the denial of the minimal civilized  
15 measure of life's necessities.” Farmer, 511 U.S. at 834 (quoting Rhodes v. Chapman,  
16 452 U.S. 337, 347 (1981)). Second, the plaintiff must make a subjective showing that the  
17 prison official knew of and disregarded an excessive risk to an inmate's health or safety.  
18 Id. at 837; Johnson, 217 F.3d at 734.

19 Plaintiff again fails to meet the requirements necessary to assert a cognizable  
20 Eighth Amendment failure to protect claim. Plaintiff has alleged that there was a  
21 substantial risk of harm because the new cell-mate possessed a weapon at the time of  
22 his transfer to Plaintiff's cell. However, Plaintiff does not allege that Defendants were  
23 actually aware of the danger that the inmate posed to Plaintiff. He alleges only that they  
24 **should** have been aware because a regulation directed them to search such Secure  
25 Housing Unit inmates prior to transfer. There are no facts plead which would support a  
26 claim that the failure to search reflected Defendants deliberate indifference to an obvious  
27 risk of harm to Plaintiff or anything more than perhaps simple negligence.

28 The existence of a regulation governing the conduct of prison employees does not

1 necessarily create a right for Plaintiff to sue civilly to enforce the regulations or for  
2 damages for their violation. Plaintiff has cited to no authority suggesting the existence of  
3 an implied private right of action under Title 15, and the Court finds no such authority or  
4 right. See Chappell v. Perrez, 2011 WL 2296816, \*2 (E.D. Cal. June 8, 2011); Lamon v.  
5 Cate, 2011 WL 773046, \*9 (E.D. Cal. Feb. 28, 2011). Plaintiff cannot base his Eighth  
6 Amendment claim on the violation of Title 15 regulations or on California Department of  
7 Corrections and Rehabilitation procedures. Plaintiff has failed to show that Defendants  
8 acted with deliberate indifference to an obvious risk to Plaintiff's safety.

9 Plaintiff has again failed to state a cognizable Eighth Amendment claim. Inasmuch  
10 as he preciously was advised of the deficiencies in his pleading, given a chance to amend  
11 to correct them, and shown a continuing inability to do so, no useful purpose would be  
12 served in once again advising him of the defects and inviting further amendment. Plaintiff  
13 will not be given further leave to amend this claim.

14 **C. Negligence**

15 Plaintiff alleges that all of the named Defendants are liable for negligence based  
16 on their failure to comply with Title 15 regulations and the Departmental Operations  
17 Manual.

18 "Under California law, '[t]he elements of negligence are: (1) defendant's obligation  
19 to conform to a certain standard of conduct for the protection of others against  
20 unreasonable risks (duty); (2) failure to conform to that standard (breach of duty); (3) a  
21 reasonably close connection between the defendant's conduct and resulting injuries  
22 (proximate cause); and (4) actual loss (damages).'" Corales v Bennett, 567 F.3d 554 572  
23 (9th Cir. 2009) (quoting McGarry v. Sax, 70 Cal. Rptr. 3d 519, 530 (2008) (internal  
24 quotations omitted)).

25 Based on Plaintiff's allegations regarding Defendants' failure to follow all  
26 regulations and procedures when transferring Plaintiff's new cell-mate, it is possible  
27 Plaintiff could state a negligence claim under California state law. However the Court  
28 need not address the viability of Plaintiff's state law claim because it will not exercise

1 supplemental jurisdiction over any state law claim given Plaintiff's inability to state a  
2 cognizable federal claim. 28 U.S.C. § 1367(a); Herman Family Revocable Trust v. Teddy  
3 Bear, 254 F.3d 802, 805 (9th Cir. 2001); see also Gini v. Las Vegas Metropolitan Police  
4 Dep't, 40 F.3d 1041, 1046 (9th Cir. 1994) ("When ... the court dismisses the federal claim  
5 leaving only state claims for resolution, the court should decline jurisdiction over the state  
6 claims and dismiss them without prejudice." Les Shockley Racing v. National Hod Rod  
7 Ass'n, 884 F.2d 504, 509 (9th Cir. 1989)).

8 Plaintiff fails to state a federal claim for failure to protect in violation of his Eighth  
9 Amendment rights. There being no foreseeable basis upon which Plaintiff could correct  
10 the defects in his claim and assert the alleged negligence as an independent federal civil  
11 rights cause of action, leave to amend would be wholly futile. Although he may not amend  
12 to try to assert such a claim in this Court, this claim will be dismissed without prejudice so  
13 that he may, if he wishes, attempt to pursue the claim in another appropriate forum.

#### 14 **IV. CONCLUSION AND RECOMMENDATION**

15 Plaintiff's First Amended Complaint fails to state any claims upon which relief may  
16 be granted under section 1983. Plaintiff was previously notified of the deficiencies in his  
17 claims and given leave to amend. Based on the nature of the deficiencies at issue, the  
18 Court finds that further leave to amend is not warranted. Lopez v. Smith, 203 F.3d 1122,  
19 1130 (9th Cir. 2000); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

20 Accordingly, the Court HEREBY RECOMMENDS the following:

- 21 1. Plaintiff's claim for failure to protect under the Eighth Amendment be  
22 dismissed with prejudice;
- 23 2. Plaintiff's state law negligence claim be dismissed without prejudice; and
- 24 3. Plaintiff's action be dismissed for failure to state any claims under 42 U.S.C.  
25 § 1983.

26 These Findings and Recommendations will be submitted to the United States  
27 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. §  
28 636(b)(l). Within **fourteen (14) days** after being served with these Findings and

1 Recommendations, Plaintiff may file written objections with the Court. The document  
2 should be captioned "Objections to Magistrate Judge's Findings and Recommendations."  
3 Plaintiff is advised that failure to file objections within the specified time may waive the  
4 right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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7 IT IS SO ORDERED.

8 Dated: November 29, 2012

*/s/ Michael J. Seng*  
UNITED STATES MAGISTRATE JUDGE

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