

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

HERSHEL C. MITCHELL,)	1:12-cv-01259-BAM (PC)
)	
Plaintiff,)	ORDER DISMISSING ACTION FOR
)	FAILURE TO STATE A CLAIM
v.)	(ECF No. 7)
)	
MATTHEW CATES, et al.,)	
)	
Defendants.)	
)	
)	

I. Screening Requirement and Standard

Plaintiff Hershel C. Mitchell (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. On October 10, 2013, the Court dismissed Plaintiff’s complaint with leave to amend. Plaintiff’s first amended complaint, filed on October 31, 2013, is currently before the Court for screening.

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2); 28 U.S.C. § 1915(e)(2)(B)(ii).

A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not

1 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
2 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937,
3 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65
4 (2007)). While a plaintiff’s allegations are taken as true, courts “are not required to indulge
5 unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009)
6 (internal quotation marks and citation omitted).

7 To survive screening, Plaintiff’s claims must be facially plausible, which requires
8 sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable
9 for the misconduct alleged. Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949 (quotation marks omitted);
10 Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility
11 that a defendant acted unlawfully is not sufficient, and mere consistency with liability falls short
12 of satisfying the plausibility standard. Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949 (quotation marks
13 omitted); Moss, 572 F.3d at 969.

14 **II. Plaintiff’s Allegations**

15 Plaintiff is currently housed at the California Correctional Institution located in
16 Tehachapi, California. The events complained about allegedly occurred while Plaintiff was
17 housed at Avenal State Prison. Plaintiff names (1) Matthew Cates, Secretary of the California
18 Department of Corrections and Rehabilitation; (2) J. D. Hartley, Warden at Avenal State Prison;
19 (3) R. Boccella, Correctional Captain at Avenal State Prison; and (3) Duval, Correctional
20 Lieutenant at Avenal State Prison as defendants.

21 Plaintiff alleges as follows: On March 14, 2012, while incarcerated on Facility-A yard,
22 Building 120, Dorm #1-3L, Plaintiff and Inmate McDowell were involved in a verbal
23 confrontation because Inmate McDowell was using a cigarette lighter to burn incense in the
24 dorm. Plaintiff asked Inmate McDowell not to burn the incense in the dorm area because
25 Plaintiff was a life-long non-smoker and was allergic to second-hand smoke. Plaintiff
26 experienced respiratory problems, difficulty breathing and became physically ill. When Plaintiff
27 asked Inmate McDowell not to burn the incense, Inmate McDowell became hostile and stated,
28 “You’re not going to tell me how to do my program.” As Plaintiff had only recently moved into

1 the dorm, Inmate McDowell further stated, “You just moved into the dorm and you’re not going
2 to move in here and change the way that I do things.” (ECF No. 7, p. 3.) Plaintiff then left the
3 dorm and went outside so that his breathing could return to normal.

4 When Plaintiff returned to the dorm about an hour and a half later, Inmate McDowell was
5 still burning incense, which resulted in another verbal confrontation between Plaintiff and Inmate
6 McDowell. Inmate McDowell then used a contraband cell phone to call other CRIPP gang
7 inmates and inform them Plaintiff was going to tell correctional officers that Inmate McDowell
8 was burning incense in the dorm area.

9 Approximately ten to twelve hours later, Plaintiff received injuries from an assault by two
10 CRIPP gang inmates named Verdon and Howell. During the course of the assault, Inmate
11 Howell stated that they had received information from Inmate McDowell that Plaintiff was going
12 to inform correctional officers that Inmate McDowell was using a contraband cigarette lighter to
13 burn incense in Building 120, Dorm 1, on the Facility A Yard.

14 Plaintiff claims that defendants violated his Eighth Amendment rights against cruel and
15 unusual punishment by exposing him to second hand smoke. Plaintiff further claims that
16 defendants knew of the existence of illegal contraband, such as cigarette lighters, cell phones,
17 and tobacco products in the possession of the other inmates prior to Plaintiff’s incarceration at
18 Avenal State Prison. Plaintiff asserts that he was the victim of assault by other prisoners who
19 had these contraband items in their possession. Plaintiff believes that defendants disregarded the
20 threats and risk of safety posed by the contraband despite disciplinary reports and referrals for
21 prosecution of other inmates in the possession of contraband at Avenal State Prison.

22 Plaintiff further claims that defendants violated his Equal Protection rights because he
23 was not protected from the assault. Plaintiff also claims that his Equal Protection rights were
24 violated because defendants did not take any legal actions against the inmates who committed
25 battery in his case.

26 Plaintiff seeks compensatory and punitive damages, along with declaratory relief.

27 ///

28 ///

1 **III. Discussion**

2 **A. Equal Protection – Fourteenth Amendment**

3 The Equal Protection Clause requires that all persons who are similarly situated should be
4 treated alike. Lee v. City of Los Angeles, 250 F.3d 668, 686 (2001); City of Cleburne v.
5 Cleburne Living Center, 473 U.S. 432, 439 (1985). An equal protection claim may be
6 established by showing that the defendant intentionally discriminated against the plaintiff based
7 on the plaintiff’s membership in a protected class, Lee, 250 F.3d at 686; Barren v. Harrington,
8 152 F.3d 1193, 1194 (1998), or that plaintiff has been intentionally treated differently from
9 similarly situated individuals without a rational basis for the difference in treatment, Thornton v.
10 City of St. Helens, 425 F.3d 1158, 1167 (2005); Village of Willowbrook v. Olech, 528 U.S. 562,
11 564 (2000).

12 Plaintiff has failed to state a cognizable equal protection claim. Plaintiff has not alleged
13 that he was discriminated against based on his membership in a protected class or that he was
14 intentionally treated differently than similarly situated individuals. Rather, Plaintiff’s equal
15 protection claim derives from his allegations that the inmates involved in his assault were not
16 properly punished or referred for criminal prosecution. Such allegations are not sufficient to
17 support a violation of *Plaintiff’s* equal protection rights. This deficiency cannot be cured by
18 amendment.

19 As the Court previously informed Plaintiff, to the extent that his equal protection claim is
20 based on allegations that defendants failed to protect him from assault, such allegations are better
21 suited to an Eighth Amendment claim. Such a claim is discussed below in greater detail.

22 **B. Eighth Amendment**

23 1. Failure to Protect

24 Prison officials are required “to take reasonable steps to protect inmates from physical
25 abuse.” Hoptowit v. Ray, 682 F.2d 1237, 1250 (9th Cir. 1982) (abrogated on other grounds by
26 Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293 (1995)). Prison officials also have a duty to
27 “protect prisoners from violence at the hands of other prisoners.” Farmer v. Brennan, 511 U.S.
28 825, 833, 114 S.Ct. 1970, 1976 (1994). However, “not . . . every injury suffered by one prisoner

1 at the hands of another [] translates into constitutional liability for prison officials responsible
2 for the victim’s safety.” Id. at 834. A prison official cannot be found liable under the Eighth
3 Amendment unless the official “knows of and disregards and excessive risk to inmate health or
4 safety.” Id. at 837. The prison official must “both be aware of facts from which the inference
5 could be drawn that a substantial risk of serious harm exists, and he must also draw the
6 inference.” Id.

7 As with the allegations in his original complaint, the allegations in Plaintiff’s amended
8 complaint fail to show that any named defendant knew that Plaintiff was at a substantial risk of
9 an assault by Inmates Verdon, Howell or McDowell. Plaintiff fails to state a cognizable claim
10 for failure to protect him from assault. Despite being informed of the relevant legal standard,
11 Plaintiff has not been able to cure the deficiencies in his Eighth Amendment failure to protect
12 claim.

13 2. Conditions of Confinement

14 Plaintiff alleges that the incense smoke and contraband items violated his constitutional
15 right against cruel and unusual punishment. The Eighth Amendment’s prohibition against cruel
16 and unusual punishment protects prisoners from inhumane conditions of confinement. Morgan
17 v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006). Prison officials therefore have a “duty to
18 ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and
19 personal safety.” Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000) (citations omitted).

20 In order to establish a violation of this duty, a prisoner must show that he was subjected
21 to an objectively serious deprivation that amounts to a denial of “the minimal civilized measure
22 of life’s necessities.” Farmer, 511 U.S. at 834 (quoting Rhodes v. Chapman, 452 U.S. 337, 346,
23 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)). A prisoner must also show that prison officials acted
24 with sufficiently culpable states of mind in failing to satisfy their duties. Farmer, 511 U.S. at 834.
25 Prison officials must have acted with deliberate indifference. Id. As discussed above, a prison
26 official is liable under the Eighth Amendment only if he “knows of and disregards an excessive
27 risk to inmate health and safety; the official must both be aware of facts from which the
28

1 inference could be drawn that a substantial risk of serious harm exists, and he must also draw the
2 inference.” Id. at 837.

3 As with his original complaint, Plaintiff has failed to allege sufficient facts to
4 demonstrate that defendants knew of Inmate McDowell’s possession and burning of incense (or
5 possession of contraband) and disregarded an excessive risk to Plaintiff’s health. Plaintiff’s
6 generalized allegations regarding the known possession of contraband by other inmates is not
7 sufficient. Despite being informed of the relevant legal standard, Plaintiff has been unable to
8 cure this deficiency.

9 **IV. Conclusion and Order**

10 Plaintiff’s first amended complaint fails to state a cognizable claim upon which relief
11 may be granted under section 1983. Despite being provided the relevant legal standards and an
12 opportunity to amend, Plaintiff has been unable to state a cognizable claim and further leave to
13 amend will not be granted. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). Accordingly,
14 it is HEREBY ORDERED that this action is DISMISSED, with prejudice, for failure to state a
15 claim. This dismissal is subject to the “three-strikes” provision set forth in 28 U.S.C. § 1915(g).

16
17 IT IS SO ORDERED.

18 Dated: November 4, 2013

19 /s/ Barbara A. McAuliffe
20 UNITED STATES MAGISTRATE JUDGE
21
22
23
24
25
26
27
28