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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 FRANKIE WASHINGTON,

12 Plaintiff,

13 vs.

14 D. OGLETREE, et al.,

15 Defendants.
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1:12-cv-01473-AWI-GSA-PC

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE BE
DISMISSED, WITH PREJUDICE, FOR
FAILURE TO STATE A CLAIM
(Doc. 14.)

OBJECTIONS, IF ANY, DUE WITHIN
THIRTY DAYS

19 **I. BACKGROUND**

20 Frankie Washington ("Plaintiff") is a state prisoner proceeding pro se and in forma
21 pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint
22 commencing this action on September 10, 2012. (Doc. 1.) The court screened the Complaint
23 pursuant to 28 U.S.C. 1915A and issued an order on May 17, 2013, dismissing the Complaint
24 for failure to state a claim, with leave to amend. (Doc. 12.) On July 15, 2013, Plaintiff filed
25 the First Amended Complaint, which is now before the court for screening. (Doc. 14.)

26 **II. SCREENING REQUIREMENT**

27 The court is required to screen complaints brought by prisoners seeking relief against a
28 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).

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

7 A complaint is required to contain “a short and plain statement of the claim showing
8 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
9 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
10 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937,
11 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955
12 (2007)). While a plaintiff’s allegations are taken as true, courts “are not required to indulge
13 unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009)
14 (internal quotation marks and citation omitted). Plaintiff must set forth “sufficient factual
15 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal 556 U.S.
16 at 678. While factual allegations are accepted as true, legal conclusions are not. Id.

17 To state a viable claim for relief, Plaintiff must set forth sufficient factual allegations to
18 state a plausible claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572
19 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this
20 plausibility standard. Id.

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

22 Plaintiff is presently incarcerated at the Central California Women’s Facility in
23 Chowchilla, California, where the events at issue in the First Amended Complaint allegedly
24 occurred. Plaintiff names as defendants Correctional Officer (C/O) D. Ogletree and the State of
25 California (“Defendants”). Plaintiff’s statement of claim consists of the following, in its
26 entirety:

27 “On 4/17/2011, I jumped on the telephone 5 minutes earlier than my time, at
28 8:55 a.m., but my name was on the list for 9:00 a.m. Officer Ogletree said he
was tired of me being a bully and moved me out of my cell, to where roommates

1 who are of a different caliber are at. I was attacked and bitten the following
2 Sunday on C/O Ogletree's shift. He had a discussion with the entire room
3 except me, I didn't attend. Inmate Franks came in, bit me 3 times, cut me, and
4 said she was going to set me up on a rape case. I ended up in SHU for two
5 years, for fighting back. I have to get tested for aids now every 6 months.
6 Franks was not punished, the inmate who bit and cut me. The state has rules,
7 policies and ordinances to prevent officers from segregating bulllys (*sic*), gays,
8 and ill inmates."

9 First Amended Complaint at 3 ¶IV. Plaintiff requests monetary damages and injunctive relief.

10 **IV. PLAINTIFF'S CLAIMS**

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

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

18 42 U.S.C. § 1983. "Section 1983 . . . creates a cause of action for violations of the federal
19 Constitution and laws." Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997)
20 (internal quotations omitted). "To the extent that the violation of a state law amounts to the
21 deprivation of a state-created interest that reaches beyond that guaranteed by the federal
22 Constitution, Section 1983 offers no redress." Id.

23 **A. Eleventh Amendment**

24 Plaintiff names the State of California as a defendant. Plaintiff is advised that she may
25 not sustain an action against a state. The Eleventh Amendment prohibits federal courts from
26 hearing suits brought against an unconsenting state. Brooks v. Sulphur Springs Valley Elec.
27 Co., 951 F.2d 1050, 1053 (9th Cir. 1991) (citation omitted); see also Seminole Tribe of Fla. v.
28 Florida, 116 S.Ct. 1114, 1122 (1996); Puerto Rico Aqueduct Sewer Auth. v. Metcalf & Eddy,
Inc., 506 U.S. 139, 144 (1993); Austin v. State Indus. Ins. Sys., 939 F.2d 676, 677 (9th Cir.
1991). Because California is a state, it is entitled to Eleventh Amendment immunity from suit.
Therefore, Plaintiff fails to state a claim against defendant State of California.

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1 **B. Failure to Protect - Eighth Amendment Claim**

2 Plaintiff alleges that defendant C/O Ogletree failed to protect her from attack by another
3 inmate.

4 The Eighth Amendment protects prisoners from inhumane methods of punishment and
5 from inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th
6 Cir. 2006). Although prison conditions may be restrictive and harsh, prison officials must
7 provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety.
8 Farmer v. Brennan, 511 U.S. 825, 832-33, 114 S.Ct. 1970 (1994) (internal citations and
9 quotations omitted). Prison officials have a duty to take reasonable steps to protect inmates
10 from physical abuse. Farmer, 511 U.S. at 833; Hearns v. Terhune, 413 F.3d 1036, 1040 (9th
11 Cir. 2005).

12 To establish a violation of this duty, the prisoner must establish that prison officials
13 were “deliberately indifferent to a serious threat to the inmates’s safety.” Farmer, at 834. The
14 question under the Eighth Amendment is whether prison officials, acting with deliberate
15 indifference, exposed a prisoner to a sufficiently substantial ‘risk of serious damage to his
16 future health’” Id. at 843 (*citing* Helling v. McKinney, 509 U.S. 25, 35 (1993)). The
17 Supreme Court has explained that “deliberate indifference entails something more than mere
18 negligence . . . [but] something less than acts or omissions for the very purpose of causing harm
19 or with the knowledge that harm will result.” Farmer at 835. The Court defined this “deliberate
20 indifference” standard as equal to “recklessness,” in which “a person disregards a risk of harm
21 of which he is aware.” Id. at 836-37.

22 The deliberate indifference standard involves both an objective and a subjective prong.
23 First, the alleged deprivation must be, in objective terms, “sufficiently serious.” Id. at 834.
24 Second, subjectively, the prison official must “know of and disregard an excessive risk to
25 inmate health or safety.” Id. at 837; Anderson v. County of Kern, 45 F.3d 1310, 1313 (9th Cir.
26 1995). To prove knowledge of the risk, however, the prisoner may rely on circumstantial
27 evidence; in fact, the very obviousness of the risk may be sufficient to establish knowledge.
28 Farmer, 511 U.S. at 842; Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th Cir. 1995).

1 Plaintiff fails to state a claim against defendant C/O Ogletree for failure to protect her.
2 While Plaintiff alleges that defendant C/O Ogletree housed her in a cell with roommates “of a
3 different caliber,” Plaintiff has not shown that C/O Ogletree knew of an excessive risk of harm
4 to Plaintiff’s safety and acted while consciously disregarding the risk. Plaintiff alleges no facts
5 showing that inmate Franks posed a particular, present danger to Plaintiff known to C/O
6 Ogletree when C/O Ogletree placed the two inmates together. Inmates of opposite gangs
7 placed in a cell with each other, without more, fails to satisfy the Eighth Amendment’s standard
8 that a prison official must be aware of a specific risk to an inmate. Labatad v. Corrections
9 Corp. of America, 714 F.3d 1155, 1161 (9th Cir. 2013). Therefore, Plaintiff fails to state a
10 claim against defendant C/O Ogletree for failure to protect her.

11 **V. CONCLUSION AND RECOMMENDATIONS**

12 The Court finds that Plaintiff’s First Amended Complaint fails to state any cognizable
13 claims upon which relief may be granted under § 1983. In this action, the Court previously
14 granted Plaintiff an opportunity to amend the complaint, with ample guidance by the Court.
15 Plaintiff has now filed two complaints without alleging facts against any of the Defendants
16 which state a claim under § 1983. The Court finds that the deficiencies outlined above are not
17 capable of being cured by amendment, and therefore further leave to amend should not be
18 granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

19 Therefore, **IT IS HEREBY RECOMMENDED** that pursuant to 28 U.S.C. § 1915A
20 and 28 U.S.C. § 1915(e), this action be dismissed with prejudice for failure to state a claim
21 upon which relief may be granted under § 1983, and that this dismissal be subject to the “three-
22 strikes” provision set forth in 28 U.S.C. § 1915(g). Silva v. Vittorio, 658 F.3d 1090, 1098 (9th
23 Cir. 2011).

24 These Findings and Recommendations will be submitted to the United States District
25 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
26 **thirty (30) days** after being served with these Findings and Recommendations, Plaintiff may
27 file written objections with the court. The document should be captioned “Objections to
28 Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file

1 objections within the specified time may waive the right to appeal the District Court's order.
2 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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4 IT IS SO ORDERED.

5 Dated: May 7, 2014

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE