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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MERRICK JOSE MOORE,
Plaintiff,
v.
CONNIE GIPSON, et al.,
Defendants.

Case No. 1:13-cv-01820-DAD-BAM (PC)
FINDINGS AND RECOMMENDATIONS TO
DISMISS CERTAIN CLAIMS AND
DEFENDANTS
FOURTEEN (14) DAY DEADLINE

Plaintiff Merrick Jose Moore (“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 has consented to Magistrate Judge jurisdiction. (ECF No. 7.)

On November 8, 2016, the Court screened Plaintiff’s second amended complaint and found that he stated a cognizable claim for excessive force against Defendants Meier, Casas, Childress, and Adams, and against Defendants Ford and Thornburg for failure to intervene. The Court dismissed all other claims and defendants from this action. (ECF No. 21.) This case has proceeded on Plaintiff’s excessive force claims against Defendants Meier, Casas, Childress, and Adams, and against failure to intervene claims against Defendants Ford and Thornburg.

I. Williams v. King

On November 9, 2017, the Ninth Circuit Court of Appeals ruled that 28 U.S.C. § 636(c)(1) requires the consent of all named plaintiffs and defendants, even those not served

1 with process, before jurisdiction may vest in a Magistrate Judge to dispose of a civil case.
2 Williams v. King, 875 F.3d 500 (9th Cir. 2017). Accordingly, the Ninth Circuit held that a
3 Magistrate Judge does not have jurisdiction to dismiss a case during screening even if the plaintiff
4 has consented to Magistrate Judge jurisdiction. Id.

5 Here, Defendants were not yet served at the time that the Court screened the second
6 amended complaint and therefore had not appeared or consented to Magistrate Judge jurisdiction.
7 Because all Defendants had not consented, the undersigned’s dismissal of Plaintiff’s claims is
8 invalid under Williams. Because the undersigned nevertheless stands by the analysis in the
9 previous screening order, she will below recommend to the District Judge that the non-cognizable
10 claims be dismissed.¹

11 **II. Findings and Recommendations on Second Amended Complaint**

12 **A. Screening Requirement and Standard**

13 The Court is required to screen complaints brought by prisoners seeking relief against a
14 governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C.
15 § 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous
16 or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary
17 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2); 28 U.S.C.
18 § 1915(e)(2)(B)(ii).

19 A complaint must contain “a short and plain statement of the claim showing that the
20 pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
21 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
22 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
23 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken

24
25 ¹ On August 8, 2017, Defendants filed a motion to compel responses to discovery requests. (ECF
26 No. 43.) Briefing on that motion is currently stayed pending a further joint status report from the
27 parties. (ECF Nos. 50, 54.) As discussed herein, these findings and recommendations are based
28 upon a screening of the allegations in Plaintiff’s first amended complaint pursuant to 28 U.S.C. §
1915A(a) and 28 U.S.C. § 1915(e)(2)(B), at the time that it was filed. The Court makes no
findings on the merits of the pending motion to compel. A separate order will issue on that
motion once the stay is lifted and briefing is complete.

1 as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores,
2 Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

3 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings
4 liberally construed and to have any doubt resolved in their favor. Hebbe v. Pliler, 627 F.3d 338,
5 342 (9th Cir. 2010) (citations omitted). To survive screening, Plaintiff’s claims must be facially
6 plausible, which requires sufficient factual detail to allow the Court to reasonably infer that each
7 named defendant is liable for the misconduct alleged, Iqbal, 556 U.S. at 678 (quotation marks
8 omitted); Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility that
9 a defendant acted unlawfully is not sufficient, and mere consistency with liability falls short of
10 satisfying the plausibility standard. Iqbal, 556 U.S. at 678 (quotation marks omitted); Moss, 572
11 F.3d at 969.

12 **B. Plaintiff’s Allegations**

13 Plaintiff is currently incarcerated at R. J. Donovan Correctional Facility. The events
14 alleged in the complaint occurred while Plaintiff was housed at Corcoran State Prison. Plaintiff
15 names the following defendants: (1) Alicia Casas, Correctional Officer; (2) G. Meier,
16 Correctional Officer; (3) L. Ford, Correctional Officer; (4) R. Childress, Correctional Officer;
17 (5) T. L. Adams, Correctional Officer; (6) D. Thornburg, Correctional Officer; (7) T. Marsh,
18 Correctional Officer; and (8) M. T. Cisneros, Correctional Captain.

19 Plaintiff alleges as follows: On February 15, 2013, Defendant Ford was working in the
20 tower (after being previously removed from her position as a result of Plaintiff’s grievance and
21 complaints to her supervisor, Defendant Weatherford). During the shower program, Plaintiff was
22 engaged in a conversation with one of the porters. At this time, Defendant Ford falsely claimed
23 that Plaintiff was in his cell, fully-clothed, masturbating. Defendant Ford also claimed that she
24 ordered Plaintiff to stop, opened the cell door, and instructed Plaintiff to put on some clothes and
25 report to the office. Plaintiff alleges that this is a fabrication because the shower door was open.

26 Plaintiff alleges that he was bewildered as to why Defendant Ford told him to report to the
27 office. Plaintiff exited the cell immediately and reported to the office. Once there, Plaintiff asked
28 Correctional Officer Campos why he was called to the office. Officer Campos said he did not

1 know, but Defendant Ford said to put Plaintiff in the C section lower shower because the porter
2 was cleaning the upper shower. Plaintiff requested to speak with her supervisor. Officer Campos
3 then told Plaintiff to return to his living quarters and retrieve his state blues. Once up the stairs,
4 Plaintiff entered his cell and proceeded to put on his state blues. Shortly thereafter, Defendants
5 Casas, Meier, Childress, Adams, and Thornburg entered the building. Defendants Casas, Meier,
6 Childress and Adams ran up to the cell. Once in front of the cell, Defendant Ford opened the
7 automated door. Upon hearing the door open, Plaintiff turned around and heard Defendant Ford
8 yelling “get that mother fucker.” (ECF No. 19, p. 3.) Defendant Meier snatched Plaintiff out of
9 the cell and slammed him into the top tier railing. Defendant Casas jumped on Plaintiff’s back,
10 causing Plaintiff’s chest to hit the second rail, while Defendants Childress and Adams bent
11 Plaintiff’s arms back, causing him to scream in pain. Defendant Ford yelled from the tower to
12 beat Plaintiff’s ass. Defendant Ford’s instigation caused Defendant Meier to repeatedly kick
13 Plaintiff’s feet out from underneath him.

14 As the alleged beating continued, Defendant Thornburg, the supervisor, stood at the
15 bottom of ‘B’ section stairs while the assault took place. Defendant Thornburg did not intervene
16 to stop the attack. Instead, Defendant Thornburg ordered Defendants Casas, Meier, Childress,
17 and Adams to take Plaintiff outside.

18 While the alleged assault continued, Defendant Casas reportedly began telling Defendants
19 Meier, Childress and Adams that she could not grab Plaintiff’s hands as she attempted to place
20 handcuffs on him. Defendants Childress and Adams then pushed Plaintiff’s arms upward toward
21 the sky, causing a burning sensation in Plaintiff’s shoulder. As Plaintiff screamed, other inmates
22 in the day room yelled to stop assaulting Plaintiff.

23 Defendants then held Plaintiff down on the railing while Defendant Casas placed
24 handcuffs on Plaintiff’s wrist so tight that his hands lost circulation. Plaintiff was dragged down
25 the tier and stairwell by Defendants Adams and Childress and taken into the rotunda area. Once
26 inside the rotunda, Defendants Adams and Childress slammed Plaintiff face first into the wall and
27 proceeded to punch Plaintiff in the ribs. After several punches, Plaintiff was taken to the program
28 office and placed in a holding cage. Plaintiff’s hands began to swell up. Defendants Cisneros

1 and Marsh entered the holding area and looked at Plaintiff's hands and face. Plaintiff informed
2 them that he was assaulted by their staff and he would like his injuries recorded. About two hours
3 later, Plaintiff was taken to the hospital, where x-rays were taken of his hand and a medical
4 evaluation was conducted.

5 On February 17, 2013, Plaintiff's psychologist decided it would be best to send Plaintiff
6 out of the institution for his own protection. Plaintiff was sent to San Quentin, where he remained
7 until March 1, 2013.

8 C. Discussion

9 1. Eighth Amendment

10 To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison
11 conditions must involve "the wanton and unnecessary infliction of pain." Rhodes v. Chapman,
12 452 U.S. 337, 347 (1981). The inquiry as to whether a prison official's use of force constitutes
13 cruel and unusual punishment is "whether force was applied in a good-faith effort to maintain or
14 restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S.
15 1, 6-7 (1992); Whitley v. Albers, 475 U.S. 312, 320 (1986).

16 "The objective component of an Eighth Amendment claim is . . . contextual and
17 responsive to contemporary standards of decency." Hudson, 503 U.S. at 8 (internal quotation
18 marks and citations omitted). A prison official's use of force to maliciously and sadistically
19 cause harm violates the contemporary standards of decency. Wilkins v. Gaddy, 559 U.S. 34, 37
20 (2010). However, "[n]ot 'every malevolent touch by a prison guard gives rise to a federal cause
21 of action.'" Wilkins, 559 U.S. at 37 (quoting Hudson, 503 U.S. at 9). Factors that can be
22 considered are "the need for the application of force, the relationship between the need and the
23 amount of force that was used, [and] the extent of injury inflicted." Whitley, 475 U.S. at 321;
24 Marquez v. Gutierrez, 322 F.3d 689, 692 (9th Cir. 2003).

25 The Court finds that Plaintiff has stated a cognizable excessive force claim against
26 Defendants Meier, Casas, Childress and Adams. Plaintiff also has stated a cognizable excessive
27 force claim arising from the same incident against Defendants Ford and Thornburg based on their
28 failure to intervene. See, e.g., Lolli v. Cty. of Orange, 351 F.3d 410, 418 (9th Cir. 2003); Briones

1 v. Fauenheim, No. 1:14cv01479 DLB PC, 2015 WL 966217 at *3 (E.D. Cal. Mar. 4, 2015)
2 (“failure to intervene can support an excessive force claim where the bystander-officers had a
3 realistic opportunity to intervene but failed to do so”).

4 The Court further finds that Plaintiff has failed to state a cognizable claim against
5 Defendants Marsh and Cisneros. Plaintiff appears to assert claims against Defendants Marsh and
6 Cisneros based on their supervisory roles. However, as Plaintiff was previously instructed,
7 liability may not be imposed on supervisory personnel for the actions or omissions of their
8 subordinates under the theory of respondeat superior. Iqbal, 556 U.S. at 676–77; Simmons v.
9 Navajo Cty., Ariz., 609 F.3d 1011, 1020–21 (9th Cir. 2010); Ewing v. City of Stockton, 588 F.3d
10 1218, 1235 (9th Cir. 2009); Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Supervisors
11 may be held liable only if they “participated in or directed the violations, or knew of the
12 violations and failed to act to prevent them.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989);
13 accord Starr v. Baca, 652 F.3d 1202, 1205–06 (9th Cir. 2011); Corales v. Bennett, 567 F.3d 554,
14 570 (9th Cir. 2009).

15 Plaintiff has alleged no facts indicating that Defendants Marsh or Cisneros participated in
16 or directed the violations or that they knew of the violations and failed to act to prevent them. At
17 best, Plaintiff alleges that Defendants Marsh and Cisneros learned of his injuries after the fact and
18 Plaintiff subsequently was sent to the hospital for evaluation of his injuries. As Plaintiff has been
19 given multiple opportunities to amend his complaint, it does not appear that the deficiencies in the
20 claims against Defendants Marsh and Cisneros can be cured by amendment.

21 **2. Injunctive Relief**

22 Plaintiff seeks injunctive relief from defendants. However, Plaintiff is no longer
23 incarcerated at Corcoran State Prison. Instead, he has been transferred to R. J. Donovan
24 Correctional Facility. As a result, his claim for injunctive relief is now moot. See Holt v.
25 Stockman, 2012 WL 259938, *6 (E.D. Cal. Jan. 25, 2012) (a prisoner’s claim for injunctive relief
26 is rendered moot when he is transferred from the institution whose employees he seeks to enjoin);
27 see also Andrews v. Cervantes, 493 F.3d 1047, 1053 n. 5 (9th Cir. 2007).

28 ///

1 **III. Conclusion and Order**

2 Accordingly, IT IS HEREBY RECOMMENDED that:

- 3 1. This action proceed on Plaintiff’s second amended complaint, filed on August 10, 2015,
4 for excessive force in violation of the Eighth Amendment against Defendants Meier,
5 Casas, Childress, and Adams, and against Defendants Ford and Thornburg arising from
6 their failure to intervene; and
7 2. All other claims and defendants be dismissed from this action, including Defendants
8 Marsh and Cisneros, and Plaintiff’s request for injunctive relief.

9
10 These Findings and Recommendations will be submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
12 **fourteen (14) days** after being served with these Findings and Recommendations, the parties may
13 file written objections with the Court. The document should be captioned “Objections to
14 Magistrate Judge’s Findings and Recommendation.” The parties are advised that failure to file
15 objections within the specified time may result in the waiver of the “right to challenge the
16 magistrate’s factual findings” on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir.
17 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

18 IT IS SO ORDERED.

19 Dated: December 6, 2017

20 /s/ Barbara A. McAuliffe
21 UNITED STATES MAGISTRATE JUDGE