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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHARLES A. NEELY,
Plaintiff,
v.
J. ROMERO, et al.,
Defendants.

CASE No. 1:16-cv-00601-MJS (PC)
**ORDER DISMISSING ACTION WITH
PREJUDICE FOR FAILURE TO STATE A
CLAIM**
(ECF No. 11)
**DISMISSAL COUNTS AS A STRIKE
PURSUANT TO 28 U.S.C. § 1915(g)**
**CLERK TO TERMINATE ALL PENDING
MOTIONS AND CLOSE CASE**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983. (ECF Nos. 1 & 4.) He has consented to Magistrate Judge jurisdiction. (ECF No. 5.) No other parties have appeared in the action.

Plaintiff's complaint was dismissed for failure to state a claim and he was given leave to amend. (ECF No. 7.) His first amended complaint is before the Court for screening.

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, malicious,” or 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 **II. Pleading Standard**

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

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

23 A complaint must contain “a short and plain statement of the claim showing that
24 the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
25 are not required, but “[t]hreadbare recitals of the elements of a cause of action,
26 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.
27 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
28 Plaintiff must set forth “sufficient factual matter, accepted as true, to state a claim to relief

1 that is plausible on its face.” Id. Facial plausibility demands more than the mere
2 possibility that a defendant committed misconduct and, while factual allegations are
3 accepted as true, legal conclusions are not. Id. at 677-78.

4 **III. Plaintiff’s Allegations**

5 Plaintiff is incarcerated at Golden State Modified Community Correctional
6 Institution, a privately owned prison under contract with the California Department of
7 Corrections and Rehabilitation and the location where the acts giving rise to the
8 complaint occurred. He names the following individuals as defendants: Correctional
9 Officer J. Romero, and Warden W. Wilson.

10 Plaintiff’s allegations may be summarized essentially as follows.

11 On January 27, 2015, Defendant Romero slammed his right arm into Plaintiff’s
12 chest while Plaintiff was exiting the dorm for chow. Plaintiff contends that Romero
13 singled him out because of Plaintiff’s slight stature and calm demeanor and to
14 demonstrate and establish his authority.

15 Warden Wilson failed to provide his subordinates with proper training on the use
16 of force and releasing inmates to chow. There is no policy for releasing inmates to chow.

17 Plaintiff contends that this conduct constituted cruel and unusual punishment,
18 excessive force, and a violation of his due process rights. He seeks training for officers
19 at his institution on the use of force and release for chow, suspension or termination of
20 Romero, termination or demotion of Wilson, and a requirement that all officers at the
21 institution wear body cameras.

22 **IV. Analysis**

23 **A. State Action**

24 To state a claim under § 1983, a plaintiff must allege two essential elements:
25 (1) that a right secured by the Constitution or laws of the United States was violated and
26 (2) that the alleged violation was committed by a person acting under the color of state
27 law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d
28 1243, 1245 (9th Cir. 1987).

1 Here, Plaintiff is incarcerated in a privately operated prison, and Defendants
2 presumably are privately employed. There is a presumption that “conduct by private
3 actors is not state action.” Florer v. Congregation Pidyon Shevuyim, N.A., 639 F.3d 916,
4 922 (9th Cir. 2011). However, “state action may be found if . . . there is such a close
5 nexus between the State and the challenged action that seemingly private behavior may
6 be fairly treated as that of the State itself.” Id. at 924 (internal quotation marks omitted)
7 (quoting Brentwood Academy v. Tennessee Secondary School Athletic Assoc., 531 U.S.
8 288, 295 (2001). It is beyond dispute that “state prisoners . . . enjoy a right of action
9 against private correctional providers under 42 U.S.C. § 1983.” Corr. Servs. Corp. v.
10 Malesko, 534 U.S. 61, 72 n.5 (2001).

11 Accordingly, Plaintiff’s status as a state prisoner in a privately operated prison
12 under contract with the State is sufficient to allege state action.

13 **B. Excessive Force**

14 “In its prohibition of ‘cruel and unusual punishments,’ the Eighth Amendment
15 places restraints on prison officials, who may not . . . use excessive physical force
16 against prisoners.” Farmer, 511 U.S. at 832 (citing Hudson v. McMillian, 503 U.S. 1
17 (1992)). “[W]henver prison officials stand accused of using excessive physical force in
18 violation of the [Eighth Amendment], the core judicial inquiry is . . . whether force was
19 applied in a good-faith effort to maintain or restore discipline, or maliciously and
20 sadistically to cause harm.” Hudson, 503 U.S. at 6-7 (citing Whitley v. Albers, 475 U.S.
21 312 (1986)).

22 When determining whether the force was excessive, the court looks to the “extent
23 of the injury suffered by an inmate . . . , the need for application of force, the relationship
24 between that need and the amount of force used, the threat ‘reasonably perceived by
25 the responsible officials,’ and ‘any efforts made to temper the severity of a forceful
26 response.’” Hudson, 503 U.S. at 7 (citing Whitley, 475 U.S. at 321). While de minimis
27 uses of physical force generally do not implicate the Eighth Amendment, significant
28 injury need not be evident in the context of an excessive force claim, because “[w]hen

1 prison officials maliciously and sadistically use force to cause harm, contemporary
2 standards of decency always are violated.” Hudson, 503 U.S. at 9 (citing Whitley, 475
3 U.S. at 327).

4 The extent of injury suffered by the plaintiff may indicate the amount of force
5 applied. Wilkins v. Gaddy, 559 U.S. 34, 37 (2010). “[N]ot ‘every malevolent touch by a
6 prison guard gives rise to a federal cause of action.’” Id. (quoting Hudson, 503 U.S. at 9).

7 The Eighth Amendment’s prohibition of ‘cruel and unusual’
8 punishments necessarily excludes from constitutional
9 recognition de minimis uses of physical force, provided that
10 the use of force is not of a sort repugnant to the conscience
11 of mankind. An inmate who complains of a ‘push or shove’
12 that causes no discernible injury almost certainly fails to state
13 a valid excessive force claim. Injury and force, however, are
14 only imperfectly correlated, and it is the latter that ultimately
15 counts.”

16 Wilkins, 559 U.S. at 37-38 (internal citations and some internal quotation marks omitted).

17 Plaintiff’s allegations do not rise to the level of excessive force for the reasons
18 stated in the prior screening order. Defendant Romero’s act of slamming his arm into
19 Plaintiff’s chest in an apparent effort to slow down the chow line was at most
20 unnecessary. It cannot be characterized as malicious or sadistic. As alleged, it amounts
21 to a mere “push or shove” resulting in no discernible injury. Such conduct does not
22 violate the Eighth Amendment. Wilkins, 559 U.S. at 37-38.

23 **C. Due Process**

24 The Fourteenth Amendment protects individuals from the deprivation of liberty or
25 property without due process of law. The Court can discern no basis for a due process
26 claim within Plaintiff’s complaint. Plaintiff’s allegations are more properly analyzed under
27 the Eight Amendment.

28 **D. Defendant Wilson**

As Plaintiff already was advised, supervisory personnel may not be held liable
under section 1983 for the actions of subordinate employees based on respondeat
superior, or vicarious liability. Crowley v. Bannister, 734 F.3d 967, 977 (9th Cir. 2013);

1 accord Lemire v. California Dep't of Corr. and Rehab., 726 F.3d 1062, 1074-75 (9th Cir.
2 2013); Lacey v. Maricopa County, 693 F.3d 896, 915-16 (9th Cir. 2012) (en banc).

3 Rather, “[a] supervisor may be liable only if (1) he or she is personally involved in
4 the constitutional deprivation, or (2) there is a sufficient causal connection between the
5 supervisor’s wrongful conduct and the constitutional violation.” Crowley, 734 F.3d at 977
6 (citation and internal quotation marks omitted); accord Lemire, 726 F.3d at 1074-75;
7 Lacey, 693 F.3d at 915-16. “Under the latter theory, supervisory liability exists even
8 without overt personal participation in the offensive act if supervisory officials implement
9 a policy so deficient that the policy itself is a repudiation of constitutional rights and is the
10 moving force of a constitutional violation.” Crowley, 734 F.3d at 977 (internal quotation
11 marks omitted) (citing Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989)).

12 Plaintiff alleges that Defendant Wilson failed to train her subordinates in the use of
13 force and releasing inmates for chow, and failed to implement a chow-release policy.
14 These allegations fail to state a claim. As the Court noted above, Plaintiff’s allegations
15 against Defendant Romero fail to state a constitutional claim. Thus, Wilson’s alleged
16 failure to train or supervise Romero did not result in a constitutional violation. Plaintiff
17 fails to offer any allegations to demonstrate that Defendant Wilson was personally
18 involved in a deprivation of his rights, or that a deprivation was the result of a deficient
19 policy.

20 Plaintiff therefore fails to state a claim against Defendant Wilson based on
21 supervisory liability.

22 **V. Conclusion and Order**

23 Plaintiff’s first amended complaint fails to state a cognizable claim. He previously
24 was advised of pleading deficiencies and afforded the opportunity to correct them. He
25 failed to do so. Any further leave to amend reasonably appears futile and will be denied.

26 Accordingly, it is HEREBY ORDERED that:

- 27 1. The action is DISMISSED with prejudice for failure to state a claim;
- 28 2. Dismissal counts as a strike pursuant to the “three strikes” provision set

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forth in 28 U.S.C. § 1915(g); and

3. The Clerk of the Court shall terminate all pending motions and close the case.

IT IS SO ORDERED.

Dated: September 21, 2016

1st Michael J. Seng
UNITED STATES MAGISTRATE JUDGE