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3 **UNITED STATES DISTRICT COURT**

4 EASTERN DISTRICT OF CALIFORNIA

5 CHARLES WINDHAM,

6 Plaintiff,

7 v.

8 C. RODRIGUEZ, et al.,

9 Defendants.

Case No. 1:16-cv-00979-AWI-SAB-PC

ORDER REQUIRING PLAINTIFF TO
EITHER FILE AMENDED COMPLAINT
OR NOTIFY COURT OF WILLINGNESS
TO PROCEED ONLY ON COGNIZABLE
CLAIMS

THIRTY-DAY DEADLINE

11
12 Plaintiff is a state prisoner proceeding pro se and in forma pauperis pursuant to 42 U.S.C.
13 § 1983. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. §
14 636(b)(1)(B) and Local Rule 302. Currently before the Court is Plaintiff's complaint, filed July
15 8, 2016.16 **I.**17 **SCREENING REQUIREMENT**18 The Court is required to screen complaints brought by prisoners seeking relief against a
19 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
20 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
21 legally "frivolous or malicious," that "fail to state a claim on which relief may be granted," or
22 that "seek monetary relief against a defendant who is immune from such relief." 28 U.S.C. §
23 1915(e)(2)(B).24 A complaint must contain "a short and plain statement of the claim showing that the
25 pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
26 required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere
27 conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)(citing Bell
28 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate

1 that each defendant personally participated in the deprivation of Plaintiff's rights. Jones v.
2 Williams, 297 F.3d 930, 934 (9th Cir.2002).

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. Wilhelm v. Rotman, 680 F.3d
5 1113, 1121 (9th Cir. 2012)(citations omitted). To survive screening, Plaintiff's claims must be
6 facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer
7 that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss
8 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The "sheer possibility that a defendant
9 has acted unlawfully" is not sufficient, and "facts that are 'merely consistent with' a defendant's
10 liability" falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572
11 F.3d at 969.

12 **II.**

13 **COMPLAINT ALLEGATIONS**

14 Plaintiff, an inmate in the custody of the California Department of Corrections and
15 Rehabilitation (CDCR) at the California Health Care Facility at Stockton, brings this action
16 against Defendant officials employed by the CDCR at CSP Corcoran, where the events at issue
17 occurred. Plaintiff names as Defendants Correctional Officer (C/O) Rodriguez and Warden
18 Davey.

19 Plaintiff alleges that on August 1, 2015, Defendant Rodriguez came in to Plaintiff's
20 housing unit and began to taunt Plaintiff. Rodriguez referred to Plaintiff's Islamic faith, calling
21 him a "terrorist traitor," and informing Plaintiff that he destroyed Plaintiff's Qu'ran. Rodriguez
22 told Plaintiff that he also "ripped up and burned your legal beagle books." (ECF No. 1, p. 3.)
23 Plaintiff told Rodriguez that he would inform Warden Davey of his conduct at his Institutional
24 Classification Committee (ICC) hearing. On the same date, Plaintiff attended his ICC hearing,
25 where Defendant Davey was present. Plaintiff "apprised him of all that Rodriguez had said to
26 him an hour earlier." (Id., p. 4.) Warden Davey asked Plaintiff "what do you need all those law
27 books for anyway? You can't win against us." (Id.) Warden Davey advised Plaintiff that
28 Rodriguez does what he is told to do and that Plaintiff could file an inmate grievance if he liked.

1 Plaintiff alleges that as he departed the hearing room, Defendant Rodriguez was waiting for him.
2 Rodriguez told Plaintiff what he had said to Warden Davey. Rodriguez “then kicked plaintiff
3 hard in the genitals with his nazi black boots causing plaintiff to drop to the floor in excruciating
4 pain and agony. Then he kicked plaintiff some more and said’ ‘no medical for him, f***k him!”
5 (Id., p. 5.) Plaintiff alleges that he suffered swelling and contusion in his genitals, and blood in
6 his urine.

7 **III.**

8 **DISCUSSION**

9 **A. Excessive Force**

10 The unnecessary and wanton infliction of pain violates the Cruel and Unusual
11 Punishments Clause of the Eighth Amendment. Hudson v. McMillian, 503 U.S. 1, 5
12 (1992)(citations omitted). For claims arising out of the use of excessive physical force, the issue
13 is “whether force was applied in a good-faith effort to maintain or restore discipline, or
14 maliciously and sadistically to cause harm.” Wilkins v. Gaddy, 559 U.S. 34, 37 (2010)(per
15 curiam) (citing Hudson, 503 U.S. at 7)(internal quotation marks omitted); Furnace v. Sullivan,
16 705 F.3d 1021, 1028 (9th Cir. 2013). The objective component of an Eighth Amendment claim
17 is contextual and responsive to contemporary standards of decency, Hudson, 503 U.S. at 8
18 (quotation marks and citation omitted), and although de minimis uses of force do not violate the
19 Constitution, the malicious and sadistic us of force to cause harm always violates contemporary
20 standards of decency, regardless of whether or not significant injury is evident, Wilkins, 559
21 U.S. at 37-8 (citing Hudson, 503 U.S. at 9-10(quotation marks omitted); Oliver v. Keller, 289
22 F.3d 623, 628 (9th Cir. 2002).

23 Liberally construed, Plaintiff has alleged that Defendant Rodriguez kicked Plaintiff in the
24 genitals several times while Plaintiff was not offering any resistance, causing injury to Plaintiff.
25 Plaintiff has therefore stated a claim for relief against Defendant Rodriguez for excessive force.

26 **B. Denial of Medical Care**

27 A prisoner’s claim of inadequate medical care does not constitute cruel and unusual
28 punishment in violation of the Eighth Amendment unless the mistreatment rises to the level of

1 “deliberate indifference to serious medical needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir.
2 2006)(quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The two part test for deliberate
3 indifference requires Plaintiff to show (1) “a ‘serious medical need’ by demonstrating that failure
4 to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and
5 wanton infliction of pain,’” and (2) “the defendant’s response to the need was deliberately
6 indifferent.” Jett, 439 F.3d at 1096. A defendant does not act in a deliberately indifferent
7 manner unless the defendant “knows of and disregards an excessive risk to inmate health or
8 safety.” Farmer v. Brennan, 511 U.S. 825, 837 (1994). “Deliberate indifference is a high legal
9 standard,” Simmons v. Navajo County Ariz., 609 F.3d 1011, 1019 (9th Cir. 2010); Toguchi v.
10 Chung, 391 F.3d 1051, 1060 (9th Cir. 2004), and is shown where there was “a purposeful act or
11 failure to respond to a prisoner’s pain or possible medical need” and the indifference caused
12 harm. Jett, 439 F.3d at 10986.

13 In applying this standard, the Ninth Circuit has held that before it can be said that a
14 prisoner’s civil rights have been abridged, “the indifference to his medical needs must be
15 substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this
16 cause of action.” Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980)(citing
17 Estelle, 429 U.S. at 105-1C>06). “[A] complaint that a physician has been negligent in
18 diagnosing or treating a medical condition does not state a valid claim of medical mistreatment
19 under the Eighth Amendment. Medical malpractice does not become a constitutional violation
20 merely because the victim is a prisoner.” Estelle, 429 U.S. at 106; see also Anderson v. County
21 of Kern, 45 F.3d 1310, 1316 (9th Cir. 1995). Even gross negligence is insufficient to establish
22 deliberate indifference to serious medical needs. See Wood v. Housewright, 900 F.2d 1332,
23 1334 (9th Cir. 1990). Additionally, a prisoner’s mere disagreement with diagnosis or treatment
24 does not support a claim of deliberate indifference. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir.
25 1989).

26 Here, the Court finds Plaintiff’s allegations to be vague. Although Plaintiff alleges that
27 Defendant Rodriguez stated “no medical for him,” Plaintiff has not alleged that he was denied
28 medical care, or that Defendant Rodriguez in any way interfered with Plaintiff’s attempts to seek

1 medical treatment. To state a claim, Plaintiff must allege facts demonstrating the existence of a
2 link, or causal connection, between Defendant's actions or omissions and a violation of his
3 federal rights. Lemire v. California Dep't of Corr. and Rehab., 726 F.3d 1062, 1074-75 (9th Cir.
4 2013); Starr v. Baca, 652 F.3d 1202, 1205-08 (9th Cir. 2011). Plaintiff must allege some facts
5 indicating that Defendant was deliberately indifferent to Plaintiff's serious medical needs, as that
6 term is defined above. Plaintiff has failed to do so here. This claim should therefore be
7 dismissed.

8 **C. First Amendment**

9 To the extent that Plaintiff is claiming that Defendant Rodriguez violated his right to
10 freely exercise his religious belief, “[P]risoners retain the protections of the First Amendment”
11 but their “right to freely exercise [their] religion is limited by institutional objectives and by the
12 loss of freedom concomitant with incarceration.” Hartmann v. California Dep't of Corr. &
13 Rehab., 707 F.3d 1114, 1122 (9th Cir. 2013) (citing O'Lone v. Estate of Shabazz, 482 U.S. 342,
14 348 (1997). The protections of the Free Exercise Clause are triggered when prison officials
15 substantially burden the practice of an inmate's religion by preventing him from engaging in
16 conduct which he sincerely believes is consistent with his faith, but an impingement on an
17 inmate's constitutional rights will be upheld “if it is reasonably related to legitimate penological
18 interests.” Shakur v. Schriro, 514 F.3d 878, 884-85 (9th Cir. 2008) (quoting Turner v. Safley,
19 482 U.S. 78, 89 (1987)).

20 Plaintiff has failed to allege facts indicating a substantial burden of the practice of his
21 religious belief. The facts alleged indicate, at most, that Defendant destroyed Plaintiff's Qu'ran.
22 To the extent that Plaintiff claims that Defendant Rodriguez destroyed his property, the Court
23 will address such claim below. There are no facts alleged indicating that Defendant Rodriguez
24 prohibited Plaintiff from replacing his Qu'ran, or prevented Plaintiff from attending religious
25 services, or in any specific way interfering with Plaintiff's practice of his religious beliefs. A
26 single instance of depriving Plaintiff of his Qu'ran fails to state a claim for relief under the First
27 Amendment. This claim should therefore be dismissed.

28 Plaintiff seeks monetary damages. Plaintiff is advised that to the extent that he seeks

1 relief pursuant to the Religious Land Use and Institutionalize Persons Act of 2000 (RLUIPA),
2 money damages are not available under RLUIPA against the state or officials sued in their
3 official or individual capacities. Wood v. Yordy, 753 F.3d 899 (9th Cir. 2014); Sossamon v.
4 Texas, 563 U.S. 277, 281 (2011); Alvarez v. Hill, 667 F.3d 1061, 1063 (9th Cir. 2012).

5 **D. Deprivation of Property**

6 The Due Process Clause of the Fourteenth Amendment protects individuals from state
7 deprivations of life, liberty, or property without due process of law. With respect to prisoner's
8 property, the United States Supreme Court has held that "an unauthorized intentional deprivation
9 of property" by a prison official constitutes a violation of due process if a meaningful post-
10 deprivation remedy for the loss is unavailable. Hudson v. Palmer, 468 U.S. 517, 533 (1984).
11 The facts alleged in this case indicate that the deprivation of Plaintiff's books was unauthorized
12 intentional deprivation. Plaintiff has a meaningful post-deprivation remedy. Plaintiff may file a
13 grievance with prison officials and, if this fails to satisfy him, he may file a lawsuit in state court
14 pursuant to California Government Code §§ 900, et seq., which provides a remedy for torts
15 committed by public employees. See Paratt v. Taylor, 451 U.S. 527, 539 (1981) ("[P]ost-
16 deprivation remedies made available by the state can satisfy the Due Process Clause.") Arnold
17 v. Williams, No. CIV-S-08-28886 DAD P, 2009 WL 3710552, at *3 (E.D. Cal. Oct. 28, 2009)
18 (California Government Code §§ 900, et seq., provide a sufficient post-deprivation remedy for
19 the purposes of due process). Any due process claim regarding the deprivation of Plaintiff's
20 property should therefore be dismissed.

21 **E. Access to Courts**

22 To the extent that Plaintiff claims that the deprivation of his legal materials interfered
23 with his access to the courts. Inmates have a fundamental constitutional right of access to the
24 courts. Lewis v. Casey, 518 U.S. 343, 346 (1996); Silva v. Di Vittorio, 658 F.3d 1090, 1101 (9th
25 Cir. 2011); Phillips v. Hust, 588 F.3d 652, 655 (9th Cir. 2009). However, to state a viable claim
26 for relief, Plaintiff must show that he suffered an actual injury, which requires "actual prejudice
27 to contemplated or existing litigation." Nevada Dep't of Corr. v. Greene, 648 F.3d 1014, 1018
28 (9th Cir. 2011)(citing Lewis, 518 U.S. at 348)(internal quotation marks omitted); Christopher

1 v. Harbury, 536 U.S. 403, 415(2002). Plaintiff has not alleged any facts indicating that he
2 suffered actual injury as that term is defined here. This claim should therefore be dismissed.

3 **F. Warden Davey**

4 The only conduct charged to Defendant Warden Davey is that he participated in
5 Plaintiff's ICC hearing. In order to state a claim for relief under section 1983, Plaintiff must
6 allege facts linking Warden Davey with some affirmative act or omission that demonstrates a
7 violation of Plaintiff's rights. Ashcroft v. Iqbal, 556 U.S. 662, 673 (2009). Since a government
8 official cannot be held liable under a theory of vicarious liability for section 1983 actions,
9 Plaintiff must plead that the official has violated the Constitution through his own individual
10 actions. Id. at 673. Plaintiff has not alleged any facts indicating personal participation by
11 Warden Davey in an deprivation of a protected interest of Plaintiff's. Warden Davey should
12 therefore be dismissed from this action for Plaintiff's failure to state a claim for relief.

13 **IV.**

14 **CONCLUSION AND ORDER**

15 Plaintiff's complaint states a cognizable claim against Defendant Rodriguez for excessive
16 force in violation of the Eighth Amendment. Plaintiff fails to state any other claims for relief.
17 The Court will provide Plaintiff with the opportunity to file an amended complaint curing the
18 deficiencies identified by the Court in this order. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th
19 Cir. 1987).

20 If Plaintiff does not wish to file an amended complaint and is agreeable to proceeding
21 only against Defendant Rodriguez on his Eighth Amendment excessive force claim, Plaintiff may
22 so notify the Court in writing. The Court will recommend that Warden Davey and the other
23 claims be dismissed for failure to state a claim. Plaintiff will then be provided one summons and
24 one USM-285 form for completion and return. Upon receipt of the forms, the Court will direct
25 the United States Marshal to initiate service of process on Defendant Rodriguez.

26 If Plaintiff elects to amend, his amended complaint should be brief, Fed. R. Civ. P. 8(a),
27 but must state what each named defendant did that led to the deprivation of Plaintiff's
28 constitutional or other federal rights, Iqbal, 556 U.S. at 678-679; Jones, 297 F.3d at 934.

1 Although accepted as true, the “[f]actual allegations must be [sufficient] to raise a right to relief
2 above the speculative level . . . Twombly, 550 U.S. at 555 (citations omitted). The mere
3 possibility of misconduct is insufficient to state a claim. Iqbal, 556 U.S. at 678. Further,
4 Plaintiff may not change the nature of this suit by adding new, unrelated claims in his amended
5 complaint. George v. Smith, 507 F.3d 1467, 1474 (7th Cir. 2007)(no “buckshot” complaints).

6 Finally, an amended complaint supersedes the original complaint, Forsyth v.
7 Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir.
8 1987), and must be “complete in itself without reference to the prior or superseded pleading,”
9 Local Rule 220.

10 Based on the foregoing, IT IS HEREBY ORDERED that:

- 11 1. The Clerk’s Office shall send to Plaintiff a civil rights complaint form;
- 12 2. Within **thirty (30) days** from the date of service of this order, Plaintiff must
13 either:
 - 14 a. File an amended complaint curing the deficiencies identified by the Court in this
15 order, or
 - 16 b. Notify the Court in writing that he does not wish to file an amended complaint
17 and is willing to proceed only against Defendant Rodriguez for excessive force in
18 violation of the Eighth Amendment; and
- 19 3. If Plaintiff fails to comply with this order, the Court will recommend that this
20 action be dismissed for failure to obey a court order.

21 IT IS SO ORDERED.

22 Dated: September 19, 2016



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UNITED STATES MAGISTRATE JUDGE

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