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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

MARTIN WARE,)	Case No.: 1:16-cv-01302-DAD-SAB (PC)
)	
Plaintiff,)	
)	ORDER DISMISSING COMPLAINT, WITH
v.)	LEAVE TO AMEND, FOR FAILURE TO STATE
)	A COGNIZABLE CLAIM FOR RELIEF
M. BITTER, et al.,)	
)	[ECF No. 1]
Defendants.)	
)	
)	

Plaintiff Martin Ware is appearing pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff declined United States Magistrate Judge jurisdiction; therefore, this action was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

Currently before the Court is Plaintiff’s complaint filed on August 25, 2016.

**I.
SCREENING REQUIREMENT**

The Court is required to screen complaints brought by persons proceeding in pro per. 28 U.S.C. § 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against 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).

1 A complaint must contain “a short and plain statement of the claim showing that the pleader is
2 entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
3 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
4 do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly,
5 550 U.S. 544, 555 (2007)). Plaintiff must demonstrate that each named defendant personally
6 participated in the deprivation of his rights. Iqbal, 556 U.S. at 676-677; Simmons v. Navajo County,
7 Ariz., 609 F.3d 1011, 1020-1021 (9th Cir. 2010).

8 While persons proceeding pro se are still entitled to have their pleadings liberally construed
9 and to have any doubt resolved in their favor, the pleading standard is now higher, Wilhelm v.
10 Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted), and to survive screening, Plaintiff’s
11 claims must be facially plausible, which requires sufficient factual detail to allow the Court to
12 reasonably infer that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at
13 678-79; Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a
14 defendant has acted unlawfully” is not sufficient, and “facts that are ‘merely consistent with’ a
15 defendant’s liability” falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss,
16 572 F.3d at 969.

17 II.

18 COMPLAINT ALLEGATIONS

19 Plaintiff names C. Pfeiffer, G. Jaimes, J. Usher, A. Garcia, E. Perez, D. Tarnoff, K. Kaufman,
20 M. Faulkner, M. Contreras, D. Davey, and V. Sica as Defendants.

21 On or about April 10, 2013, Plaintiff arrived at Kern Valley State Prison (KVSP), in Delano,
22 California.

23 On or about December 4, 2014, Plaintiff notified Defendant D. Davey and M. Bitter in a letter
24 report of being a victim of potential racial issues and on-going enemy concerns based on incidents
25 with other Afro-Americans security needs yard inmates. Plaintiff is a mixed origin Mexican national
26 who has past gang affiliation with a Southern Hispanic street gang known as Lynwood Varrio Young
27 Crowd Tiny Locos. Plaintiff is unable to continue to live safely or program with other Afro-American
28 security needs yard inmates at KVSP.

1 Plaintiff requested that Defendants Davey and Bitter update his initial housing review file,
2 specifically, two separate undocumented race-based incidents with Afro-American security needs yard
3 that initially occurred at High Desert State Prison. Plaintiff's request was denied.

4 On January 2, 2015, Defendant Jaime authorized a head administration decision to ensure
5 Plaintiff's welfare and safety while residing on facility "Charlie" security needs yard and provided that
6 Plaintiff's housing needs or custodial enemy separation concerns are more appropriately addressed by
7 the assigned counselor at that facility.

8 Over the next months, Plaintiff remained without proper staff supervision to his safety
9 concerns and suffered harm, anxiety, humiliation, and mental emotional pain.

10 On January 14, 2015, Plaintiff requested Defendant Garcia to deliver an anonymous note to
11 Defendant Usher that relayed his present safety concerns of a non-documented enemy situation with
12 inmate Stanley. Facility Program Office Supervisor Defendant V. Sica on two prior occasions
13 conducted a safety concern and housing needs review regarding Plaintiff's concerns. The issue was
14 reduced to "incompatible issues" with instructions to follow-up on the issues with the assigned
15 counselor at Plaintiff's building. The note was never delivered to Defendant Usher.

16 On or about February 2, 2015, Plaintiff notified Defendant Jaime and requested staff
17 intervention into incompatible issues regarding an intra facility cell move transfer that was not
18 recorded. Plaintiff's request was denied.

19 On or about February 6, 2015, Plaintiff informed Defendant Usher he received a memorandum
20 from Defendant Jaime, dated January 2, 2015, with instructions to follow-up on all his potential racial
21 issues and ongoing concerns before the upcoming annual reviewed scheduled for May 21, 2015.
22 Defendant Usher asked Plaintiff if it was all about inmate Stanley, and Plaintiff informed him that
23 Stanley was recently rehoused, and on January 31, 2015, he identified a non-documented enemy
24 separation on facility "Charlie" upper yard. Upon information and belief, counselors are obligated to
25 review custodial referrals and make a general threat assessment into Plaintiff's risk of danger or
26 serious harm.

1 On or about February 6, 2015, Plaintiff requested Defendant Usher to sign-off with inmate
2 Stanley on a compatible chrono agreeing to co-exist on the same facility. Usher denied the request
3 because Defendant Jaime provided written instruction regarding the proper procedures.

4 On or about February 6, 2015, Plaintiff was adversely removed from facility "Charlie"
5 building five to facility Delta six and shortly thereafter to building one and continued living with
6 inmate Roger Martin up until April 12, 2016.

7 On or about February 24, 2015, Plaintiff submitted an inmate appeal against Defendants V.
8 Sica and J. Usher for denial of procedural safeguards to receive a general threat assessment to identify
9 a non-documented enemy separation after program administration verified inmate Stanley was not on
10 the same facility or housed in the same housing unit.

11 On or about February 27, 2015, Defendant R. Perez, screened out Plaintiff's appeal (Log No.
12 KVSP-0-15-0312) and denied Plaintiff's request.

13 On or about February 26, 2015, Plaintiff made a request to Defendant Kaufman to help retrieve
14 inmate personal legal documentation in the possession of "Charlie."

15 On or about March 12, 2015, Plaintiff submitted an inmate appeal against Defendant Kaufman
16 for denial of adequate protection and for lack of assistance in retrieving inmate personal legal
17 documentation. Plaintiff's appeal was denied.

18 On or about March 29, 2015, Plaintiff requested that Defendant Jaime provide assistance in
19 retrieving Plaintiff's personal legal documentation retained at the facility Charlie program office
20 which was necessary to adjudicate his potential racial issue and ongoing enemy concerns with Afro-
21 American security needs yard inmates prior to the upcoming annual review. Plaintiff's request was
22 denied. Plaintiff made a second request to Defendant Jaime on May 27, 2015.

23 On or about June 9, 2015, Defendant Jaime informed Plaintiff that a future review of items
24 identified in his request would be provided a response by June 30, 2015.

25 On or about June 23, 2015, Defendant Jaime informed Plaintiff that another supervisor
26 completed an inquiry into Plaintiff enemy concerns.

1 Plaintiff's appeal Log No. KVSP-0-15-0312 was lost and/or delayed, and on July 16, 2015,
2 Plaintiff requested assistance from Defendant Perez in filing a new appeal. Plaintiff's request was
3 denied.

4 On or about August 16, 2015, Plaintiff again requested assistance from Defendant Perez in
5 processing a new appeal. Plaintiff's request was denied.

6 On or about August 18, 2015, Defendant Contreras asked Plaintiff during a prescheduled
7 annual review to sign an advisement of expectations and annunciation of a security threat group
8 affiliation. Plaintiff informed Defendant that his classification as an associate of the Black Street
9 Gang was in error and was used to testify in a murder trial. Defendant Contreras denied Plaintiff's
10 request for modification of his classification.

11 On or about August 19, 2015, Defendant Faulkner informed Plaintiff during annual reviewed
12 that he evaluated Plaintiff's safety concerns and all enemies were documented and noted. It was
13 determined that Plaintiff did not meet the criteria for restricted temporary housing. Plaintiff requested
14 reconsideration by Defendant Contreras, but Plaintiff's request was denied.

15 On or about October 18, 2015, Plaintiff submitted a second inmate appeal requesting
16 consideration to file a new appeal in connection with appeal Log No. KVSP-0-15-0312 which was
17 missing. On or about October 23, 2015, Defendant Perez informed Plaintiff that his second inmate
18 appeal was denied.

19 III.

20 DISCUSSION

21 A. Failure to Protect

22 The Eighth Amendment protects prisoners from inhumane methods of punishment and from
23 inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006).
24 Although prison conditions may be restrictive and harsh, prison officials must provide prisoners with
25 food, clothing, shelter, sanitation, medical care, and personal safety. Farmer v. Brennan, 511 U.S.
26 825, 832-33 (1994) (quotations omitted). Prison officials have a duty under the Eighth Amendment to
27 protect prisoners from violence at the hands of other prisoners because being violently assaulted in
28 prison is simply not part of the penalty that criminal offenders pay for their offenses against society.

1 Farmer, 511 U.S. at 833-34 (quotation marks omitted); Clem v. Lomeli, 566 F.3d 1177, 1181 (9th Cir.
2 2009); Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005). However, prison officials are liable
3 under the Eighth Amendment only if they demonstrate deliberate indifference to conditions posing a
4 substantial risk of serious harm to an inmate; and it is well settled that deliberate indifference occurs
5 when an official acted or failed to act despite his knowledge of a substantial risk of serious harm.

6 Farmer, 511 U.S. at 834, 841 (quotations omitted); Clem, 566 F.3d at 1181; Hearns, 413 F.3d at 1040.

7 Plaintiff's allegations fail to give rise to a cognizable claim for failure to protect. Plaintiff
8 makes reference to racial tension regarding an undocumented individual and that he was improperly
9 classified and could not be housed with other Afro-American sensitive needs yard inmates. However,
10 Plaintiff's fear injury is not sufficient to subject any Defendant to liability for failure to protect.
11 Rather, Plaintiff must identify with sufficient factual support a serious risk to Plaintiff's safety that
12 Defendants knew of and disregarded. Plaintiff's speculative and generalized fears of harm are not
13 enough to state an Eighth Amendment claim. See Berg v. Kincheloe, 794 F.2d 457, 459 (9th Cir.
14 1986) ("a mere suspicion that an attack will occur" is not enough to support a cognizable Eighth
15 Amendment claim). Accordingly, Plaintiff fails to state a cognizable failure to protect claim under the
16 Eighth Amendment and leave to amend will be granted.

17 **B. Equal Protection**

18 The Equal Protection Clause requires that persons who are similarly situated be treated alike.
19 City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985); Hartmann v. California
20 Dep't of Corr. & Rehab., 707 F.3d 1114, 1123 (9th Cir. 2013); Furnace v. Sullivan, 705 F.3d 1021,
21 1030 (9th Cir. 2013); Shakur v. Schriro, 514 F.3d 878, 891 (9th Cir. 2008). To state a claim, Plaintiff
22 must show that Defendants intentionally discriminated against him based on his membership in a
23 protected class. Hartmann, 707 F.3d at 1123; Furnace, 705 F.3d at 1030; Serrano v. Francis, 345 F.3d
24 1071, 1082 (9th Cir. 2003); Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001).

25 Although Plaintiff claims an equal protection violation occurred, Plaintiff fails to set forth any
26 facts to support an equal protection claim. Accordingly, Plaintiff fails to state a cognizable claim
27 under the Equal Protection Clause.

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Based on the foregoing, it is HEREBY ORDERED that:

1. The Clerk's Office shall send Plaintiff a civil rights complaint form;
2. Plaintiff's complaint, filed August 25, 2016, is dismissed for failure to state a claim;
3. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file an amended complaint; and
4. If Plaintiff fails to file an amended complaint in compliance with this order, this action will be dismissed for failure to state a claim.

IT IS SO ORDERED.

Dated: January 11, 2017


UNITED STATES MAGISTRATE JUDGE