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7 **UNITED STATES DISTRICT COURT**

8 EASTERN DISTRICT OF CALIFORNIA

9
10 ANTWOINE BEALER,

11 Plaintiff,

12 v.

13 WARDEN OF KERN VALLEY STATE
PRISON,

14 Defendant.

Case No. 1:17-cv-01277-LJO-SAB (PC)

Appeal No. 18-17306

ORDER REVOKING *IN FORMA*
PAUPERIS STATUS ON APPEAL

(Doc. No. 40)

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17 **I. Introduction**

18 Plaintiff Antwoine Bealer, a state prisoner, appeared *pro se* and *in forma pauperis* in this
19 civil rights action pursuant to 42 U.S.C. § 1983. This matter was referred to a United States
20 Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

21 Plaintiff initiated this action on March 3, 2017. (Doc. No. 1.) Plaintiff was ordered to
22 apply to proceed *in forma pauperis* in this action pursuant to 28 U.S.C. § 1915, or pay the filing
23 fee, and his deadline to do so was extended on a few occasions. (Doc. Nos. 4, 7, 12.) Finally, on
24 February 20, 2018, Plaintiff filed a motion to proceed *in forma pauperis*. (Doc. No. 14.) On
25 February 26, 2018, that motion was granted. (Doc. No. 15.)

26 On March 14, 2018, the assigned Magistrate Judge screened Plaintiff's complaint, and
27 found that Plaintiff alleged that officers at Kern Valley State Prison sexually assaulted him by
28 shining a flashlight into his groin area while he was lying in his bunk during security checks, and

1 further harassed him by shining their lights into his eyes. (Doc. No. 19.) Plaintiff contended that
2 he believed this was due to a prejudice against inmates who have a record of having assaulted
3 staff in their files, or who have filed administrative appeals or lawsuits against staff. The
4 magistrate judge found no cognizable claim for relief, but explained the relevant legal standards
5 to Plaintiff, and granted him leave to amend his allegations to attempt to cure the identified
6 deficiencies in his complaint, within thirty days. (*Id.*)

7 Following rulings on other motions and extensions of time, on August 29, 2018, Plaintiff
8 filed a first amended complaint. (Doc. No. 26.) On August 31, 2018, the assigned magistrate
9 judge screened Plaintiff's first amended complaint, and issued findings and recommendations.
10 (Doc. No. 27.) The magistrate judge found that Plaintiff failed to state any cognizable claim for
11 a violation of his federal rights, as his allegations were largely identical to his original
12 allegations. As Plaintiff had not cured or attempted to cure the deficiencies in his allegations, the
13 magistrate judge found that further leave to amend would be futile, and recommended dismissal.
14 (*Id.*) The findings and recommendations were served on Plaintiff and contained notice that any
15 objections thereto were to be filed within thirty days. (*Id.* at 6-7.) No timely objections were
16 filed.

17 On October 25, 2018, the Court adopted the findings and recommendations in full, and
18 dismissed this action, with prejudice, for Plaintiff's failure to state a cognizable claim upon
19 which relief may be granted. (Doc. No. 33.) Judgment was entered accordingly the same day.
20 (Doc. No. 34.)

21 On November 9, 2018, Plaintiff filed a motion for relief from judgment pursuant to
22 Federal Rule of Civil Procedure 60. (Doc. No. 35.) Plaintiff argued in the motion that he
23 submitted objections to prison officials for mailing on October 26, 2018, which it appeared the
24 Court did not receive, and which entitled him to relief from the order dismissing his case. (*Id.*)
25 On November 14, 2018, the Court denied Plaintiff's motion, finding that the date that Plaintiff
26 asserted that he submitted his objections was beyond the extended deadline, making any
27 objections that he sent late. (Doc. No. 36). Further, he had not otherwise explained the
28 objections, and had not shown any grounds for relief from the final judgment. (*Id.*)

1 On November 30, 2018, Plaintiff filed a timely notice of appeal. (Doc No. 37.) Fed. R.
2 App. P. 4(a)(1), (4). The appeal was processed on December 3, 2018. (Doc. No. 38.)

3 **II. In Forma Pauperis Status**

4 On December 6, 2018, the Ninth Circuit Court of Appeals referred the matter back to this
5 Court for the limited purpose of determining whether *in forma pauperis* status should continue
6 for the appeal. (Doc. No. 36). *See* 28 U.S.C. § 1915(a)(3); *see also* *Hooker v. Amer. Airlines*,
7 302 F.3d 1091 1092 (9th Cir. 2002) (revocation of *in forma pauperis* status is appropriate where
8 district court finds the appeal to be frivolous).

9 In this case, Plaintiff brings a claim for sexual assault and harassment based on
10 allegations that, in May 2014 and March 2015, he was placed into an Administrative Segregation
11 Unit, where male officers shined lights from their flashlights onto his groin area and into his eyes
12 while conducting cell counts. (First Am. Compl., Doc. No. 26, at 6.) This Court found a failure
13 to state a claim upon which relief could be granted, and dismissed the case.

14 Plaintiff's notice of appeal does not give the grounds for his appeal. (Doc. No. 37.)
15 However, Plaintiff's first amended complaint was accompanied by a brief arguing that the Court
16 erred in finding that he failed to state a cognizable claim. In sum, Plaintiff asserts that the
17 officers shining their flashlights onto his groin area and into his eyes constituted cruel and
18 unusual punishment in violation of the Eighth Amendment, because it is not acceptable for an
19 officer to harass a person for any reason, and that any measure of sexual assault or harassment is
20 a constitutional violation. (*Id.* at 10-11.) Plaintiff further argues that the Court erred by
21 requiring him to litigate his claim at the screening stage, as he does not know the state of mind of
22 the officers, and cannot determine their state of mind without conducting discovery. (*Id.* at 11.)
23 As he is a United States citizen, Plaintiff asserts that he also stated a claim for violation of his
24 equal protection rights.

25 "After incarceration, only the unnecessary and wanton infliction of pain constitutes cruel
26 and unusual punishment forbidden by the Eighth Amendment." *Watison v. Carter*, 668 F.3d
27 1108, 1112 (9th Cir. 2012) (citations omitted). Although the pain may be physical or
28 psychological, it must be objectively sufficient serious. *Id.*

1 Here, Plaintiff argues that the shining of a flashlight onto his groin area and into his eyes
2 was done with the specific intent to harass him, is an abuse of power, and is not acceptable
3 behavior. Even considering Plaintiff's allegations in the light most favorable to him, he has not
4 shown conduct that rises to the level of severity required to state an Eighth Amendment claim for
5 cruel and unusual punishment. The Ninth Circuit has found that the Eighth Amendment does not
6 prohibit guards from performing visual searches, even if the guards also pointed, joked, or
7 gawked at the prisoners, causing them to suffer feelings of discomfort or humiliation. *Id.* at 1113
8 (citing *Somers v. Thurman*, 109 F.3d 614, 622 (9th Cir. 1997)); *see also Grummett v. Rushen*,
9 779 F.2d 491, 494 n. 1 (9th Cir. 1985) (prison's policy allowing female guards to observe male
10 inmates disrobing, showering, using the toilet, and being strip-searched, and allowing them to
11 conduct pat-down searches including the groin area, did not amount to "the type of shocking and
12 barbarous treatment protected against by the [E]ighth [A]mendment").

13 Plaintiff in this case is a male inmate alleging that he had a flashlight shined on his groin
14 area and into his eyes by male officers. He has not alleged any physical contact, or any other
15 conduct likely to cause severe psychological distress or other significant harm. Further, Plaintiff
16 was given leave to amend to clarify or add allegations sufficient to state a cognizable claim, but
17 instead stood upon largely the same allegations in his amended pleading.

18 Plaintiff asserts that the officers' conduct was done to annoy, bother, and harass him. He
19 argues that any conduct of a harassing nature is sufficient to state a claim for a constitutional
20 violation. Even accepting as true that the officers' conduct was done for the purposes of
21 harassment, such conduct is not objectively serious to rise to the level of a constitutional
22 violation under long-established legal standards, as not every harm or annoyance violates the
23 Constitution. Plaintiff's opinion to the contrary is not sufficient to show a colorable argument
24 that the Court erred here.

25 Plaintiff further argues that he has shown a violation of his right to equal protection of the
26 laws because he believes these actions were done based on him having a history of assaulting
27 staff or filing an administrative appeal or lawsuit against staff. Plaintiff pleaded no facts in
28 support of this argument, despite being given the relevant legal standards. Plaintiff also failed to

1 allege facts sufficient to show that he was treated differently from similarly situated individuals
2 without a rational basis. Therefore, his claim was properly dismissed. *See, e.g., K'napp v.*
3 *Arlitz*, 661 F. App'x 468, 470 (9th Cir. 2016). He makes no argument against this other than
4 stating that as a United States citizen, he is entitled to equal protection of the laws. This also
5 does not present any colorable argument that the Court erred in finding that Plaintiff failed to
6 state any equal protection claim.

7 Based on the foregoing, the Court finds that Plaintiff's appeal is frivolous in nature, and
8 his *in forma pauperis* status should be revoked on appeal.

9 **III. Conclusion**

10 Accordingly, IT IS HEREBY ORDERED that:

- 11 1. Plaintiff's appeal is declared frivolous and not taken in good faith;
- 12 2. Pursuant to 28 U.S.C. § 1915(a)(3), Plaintiff is not entitled to proceed *in forma*
13 *pauperis* in Appeal No. 18-17306, filed on November 30, 2018;
- 14 3. Pursuant to Federal Rule of Appellate Procedure 24(a)(4), this order serves as
15 notice to the parties and the United States Court of Appeals for the Ninth Circuit
16 of the finding that Plaintiff is not entitled to proceed *in forma pauperis* for this
17 appeal; and
- 18 4. The Clerk of the Court is directed to serve a copy of this order on the parties and
19 the United States Court of Appeals for the Ninth Circuit.

20
21 IT IS SO ORDERED.

22 Dated: December 10, 2018

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE