

1 § 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous or
2 malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary relief
3 from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b); 1915(e)(2)(B)(ii).

4 A complaint must contain “a short and plain statement of the claim showing that the pleader
5 is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
6 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
7 do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly,
8 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken as true, courts “are not required
9 to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir.
10 2009) (internal quotation marks and citation omitted).

11 To survive screening, Plaintiff’s claims must be facially plausible, which requires sufficient
12 factual detail to allow the Court to reasonably infer that each named defendant is liable for the
13 misconduct alleged. Iqbal, 556 U.S. at 678 (quotation marks omitted); Moss v. U.S. Secret Serv.,
14 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility that a defendant acted unlawfully is not
15 sufficient, and mere consistency with liability falls short of satisfying the plausibility standard.
16 Iqbal, 556 U.S. at 678 (quotation marks omitted); Moss, 572 F.3d at 969.

17 **II. Plaintiff’s Allegations**

18 Plaintiff is currently housed at the Golden State Modified Community Correctional Facility
19 (“GSMCCF”) located in McFarland, California, where the events in the complaint are alleged to
20 have occurred.¹ Plaintiff names the following defendants: (1) Y. Hernandez, GSMCCF
21 Correctional Officer; (2) George Zoley, CEO of GEO Corrections; (3) Scott Kernan, CDCR
22 Secretary; and (4) Inmate Bailey. Plaintiff sues Defendant Zoley in his official and individual
23 capacities.

24 Plaintiff alleges that on January 12, 2017, he was attacked and beaten into a state of
25 unconsciousness by Inmate Bailey. Plaintiff further alleges that Officer Hernandez failed in her

26 ¹ GSMCCF is a private prison operated by GEO Corrections and is under contract with the California
27 Department of Corrections and Rehabilitation (“CDCR”). The United States Supreme Court has acknowledged that
28 state prisoners might bring suit under § 1983 against privately owned correctional facilities. See Correctional Servs.
Corp. v. Malesko, 534 U.S. 61, 72 n. 5 (2001) (“[S]tate prisoners ... already enjoy a right of action against private
correctional providers under 42 U.S.C. § 1983.”) (emphasis omitted).

1 duties by calling code to the wrong dorm, which resulted in misdirection of support/security staff
2 to the wrong side of the prison. This failure caused a delay and allowed Inmate Bailey to batter
3 Plaintiff, causing loss of consciousness, brain trauma and loss of a tooth. Plaintiff further alleges
4 that Officer Hernandez was at an arm's length from the assault, but did nothing to intercede.
5 Plaintiff contends that she was trained to intercede in such situations, but she did not stop the fight.

6 Plaintiff further alleges that CEO Zoley is Officer Hernandez' commanding officer and
7 responsible for the training of officers under his control. Plaintiff contends that CEO Zoley
8 physically toured the prison in May/June 2017 and personally instructed staff, such as Officer
9 Hernandez, on policies and procedures, and oversaw operations, including security of housing units
10 where the assault occurred. Plaintiff contends that CEO Zoley failed to ensure that high custody
11 level inmates (Level III), such as Bailey, be physically separated from low level inmates (Level I),
12 such as Plaintiff. This asserted failure put Plaintiff in the way of an assault by failing to perform
13 required acts. Plaintiff contends that CEO Zoley was aware of prison conditions when he inspected
14 the institution and failed to amend the situation allowing Level III and Level I inmates to interact
15 unrestricted in housing units.

16 Plaintiff asserts that Defendant Kernan is liable for his failure to properly administer control
17 designation of the California Code of Regulations prohibiting housing of higher custody level
18 inmates and thus considered more dangerous with inmates of lower levels and thus considered low
19 risk and compliant inmates ready for or near release from prison. Plaintiff further contends that
20 Defendant Kernan's failure to properly administer the custody designation of Inmate Bailey, who
21 was a known physically violent convicted felon (and Level III inmate) and who subsequently
22 attached and beat Corrections Officer Orosco on July 3, 2017, over a small dispute. Plaintiff alleges
23 that Defendant Kernan's failure to separate Plaintiff from a higher security inmate subject Plaintiff
24 to an assault and battery causing great bodily injury.

25 Plaintiff also alleges that Defendants Hernandez, Zoley and Kernan negligently failed to
26 report the assault to the local district attorney for prosecution.

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1 **III. Discussion**

2 **A. Supervisory Liability**

3 Plaintiff is attempting to impose liability against Defendants Foley and Kernan based on
4 their roles as supervisors, which he may not do. Liability may not be imposed on supervisory
5 personnel for the actions or omissions of their subordinates under the theory of respondeat superior.
6 Iqbal, 556 U.S. at 676–77; Simmons v. Navajo Cty., Ariz., 609 F.3d 1011, 1020–21 (9th Cir. 2010);
7 Ewing v. Cty. of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009); Jones v. Williams, 297 F.3d 930,
8 934 (9th Cir. 2002). Supervisors may be held liable only if they “participated in or directed the
9 violations, or knew of the violations and failed to act to prevent them.” Taylor v. List, 880 F.2d
10 1040, 1045 (9th Cir. 1989); accord Starr v. Baca, 652 F.3d 1202, 1205–06 (9th Cir. 2011); Corales
11 v. Bennett, 567 F.3d 554, 570 (9th Cir. 2009). Supervisory liability may also exist without any
12 personal participation if the official implemented “a policy so deficient that the policy itself is a
13 repudiation of the constitutional rights and is the moving force of the constitutional violation.”
14 Redman v. Cty. of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (citations and quotations marks
15 omitted), abrogated on other grounds by Farmer v. Brennan, 511 U.S. 825 (1970).

16 Plaintiff fails to adequately allege that Defendants Foley and Kernan directed the alleged
17 violations of Plaintiff’s rights or knew of the violations and failed to act to prevent them. There is
18 no indication that Defendants Foley and Kernan knew of the security levels of either Inmate Bailey
19 or Plaintiff or knew that Plaintiff was at risk of any harm from Inmate Bailey. There also is no
20 indication that Defendants Foley and Kernan were responsible for assigning security levels to
21 inmates or for making individual housing assignments at the prison. Although Plaintiff generally
22 complains about inmates of differing security levels being housed together, Plaintiff has not
23 adequately alleged that either Defendant Zoley or Defendant Kernan knew of the particular housing
24 assignments at issue or knew that inmates with various security levels were being housed together
25 at the time of Plaintiff’s alleged assault. Additionally, Plaintiff fails to allege that Defendants Foley
26 and Kernan implemented any deficient policy that itself was a repudiation of Plaintiff’s rights and
27 the moving force of any constitutional violation. That Plaintiff and Inmate Foley may have been
28 assigned different security levels and housed together does not implicate any specific prison policy

1 implemented by defendants. Instead, Plaintiff's allegations suggest that CDCR policy may not
2 have been followed by persons responsible for housing decisions at the prison. Plaintiff has been
3 unable to cure the deficiencies in his claims against Defendants Foley and Kernan.

4 **B. Eighth Amendment – Failure to Protect**

5 Prison officials have a duty under the Eighth Amendment to protect prisoners from violence
6 at the hands of other prisoners because being violently assaulted in prison is simply not part of the
7 penalty that criminal offenders pay for their offenses against society. Farmer, 511 U.S. at 833–34
8 (quotation marks omitted); Clem v. Lomeli, 566 F.3d 1177, 1181 (9th Cir. 2009); Hearns v.
9 Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005). Prison officials are liable under the Eighth
10 Amendment only if they demonstrate deliberate indifference to conditions posing a substantial risk
11 of serious harm to an inmate; and it is well settled that deliberate indifference occurs when an
12 official acted or failed to act despite his knowledge of a substantial risk of serious harm. Farmer,
13 511 U.S. at 834, 841 (quotations omitted); Clem, 566 F.3d at 1181; Hearns, 413 F.3d at 1040. To
14 sufficiently state a failure to protect claim, a plaintiff must allege facts “to show that defendants
15 knew of any threats to his safety or deviated from professional standards by disregarding known
16 unsafe conditions.” Cranford v. Ahlin, 610 Fed.Appx. 714, 714 (9th Cir. 2015).

17 At the pleading stage, Plaintiff states a cognizable failure to protect claim against Defendant
18 Hernandez. Plaintiff not only alleges that Defendant Hernandez directed security to the wrong
19 dorm, but also failed to take any other available measures to stop the assault while it was ongoing.
20 However, Plaintiff does not state a cognizable Eighth Amendment claim against Defendants Foley
21 and Sherman. There is no indication that these defendants were aware of any substantial risk of
22 serious harm to Plaintiff at the hands of Inmate Bailey. At best, Plaintiff has suggested that Inmate
23 Bailey attacked a correctional officer on another occasion, but there is nothing to indicate that he
24 was a risk to Plaintiff or other prisoners prior to the alleged assault.

25 **C. Inmate Bailey**

26 Plaintiff attempts to assert a claim against Inmate Bailey. However, section 1983 only
27 provides a cause of action against persons acting under color of state law. West v. Atkins, 487 U.S.
28 42, 48 (1988). “[P]urely private conduct, no matter how wrongful, is not within the protective orbit

1 of section 1983.” Ouzts v. Maryland Nat’l Ins. Co., 505 F.2d 547, 550 (9th Cir. 1974). Further,
2 conduct by a private citizen ordinarily would not be attributable to the state. George v. Edholm,
3 752 F.3d 1206, 1215 (9th Cir. 2014). However, private action may be attributed to state if “there
4 is such a close nexus between the State and the challenged action that seemingly private behavior
5 may be fairly treated as that of the State itself.” Id. (citations and internal quotations omitted).
6 “Such a nexus may exist when, for instance, private action results from the State’s exercise of
7 coercive power or when the State provides significant encouragement, either overt or covert,” to
8 the private actor. Id. (citations and internal quotations omitted).

9 Plaintiff’s amended complaint does not adequately allege that Inmate Bailey’s conduct
10 could fairly be attributable to the state. There is no indication that prison officials coerced,
11 promoted or encouraged Inmate Bailey to assault Plaintiff.

12 **D. California Penal Code**

13 Plaintiff cannot bring a claim for battery in violation California Penal Code 243(d).
14 However, the penal code is a criminal statute and does not provide for a private right of action
15 against defendants. “With rare, limited exceptions, none of which applies to § 1983 actions, federal
16 law does not allow a private citizen to bring a criminal prosecution against another citizen. Criminal
17 actions are initiated by the state, not by private citizens.” Lipsey v. Reddy, No. 1:17-cv-00569-
18 LJO-BAM (PC), 2017 WL 4811723, at *4 (E.D. Cal. Oct. 24, 2017), report and recommendation
19 adopted, No. 1:17-cv-00569-LJO- BAM (PC), 2017 WL 5070338 (E.D. Cal. Nov. 3, 2017); see
20 also Chrysler Corp. v. Brown, 441 U.S. 281, 316 (1979) (noting that Supreme Court rarely implies
21 a private right of action under a criminal statute.) Therefore, Plaintiff is unable to bring a criminal
22 action under § 1983 against any of the defendants for violation of the California Penal Code, and
23 he fails to state a claim on that basis.

24 **E. State Law Claims**

25 Insofar as Plaintiff has alleged state law claims for various forms of negligence by
26 defendants, he has failed to allege compliance with the Government Torts Claims Act (“Act”). The
27 Act requires that a party seeking to recover money damages from a public entity or its employees
28 submit a claim to the entity before filing suit in court, generally no later than six months after the

1 cause of action accrues. Cal. Gov't Code §§ 905, 911.2, 945, 950.2 (emphasis added). When a
2 plaintiff asserts a claim subject to the Act, he must affirmatively allege compliance with the claim
3 presentation procedure, or circumstances excusing such compliance, in his complaint. Shirk v.
4 Vista Unified Sch. Dist., 42 Cal. 4th 201, 209 (2007). Plaintiff has not done so here.

5 **IV. Conclusion and Recommendation**

6 The Court finds that Plaintiff has stated a cognizable claim against Defendant Hernandez
7 for failure to protect in violation of the Eighth Amendment. However, Plaintiff has failed to state
8 any other cognizable claims. Despite being provided with the relevant pleading and legal standards,
9 Plaintiff has been unable to cure the deficiencies in his complaint and further leave will not be
10 granted. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

11 Accordingly, the Clerk of the Court is HEREBY DIRECTED to randomly assign a district
12 judge to this action. Further, it is HEREBY RECOMMENDED as follows:

13 1. This action proceed on Plaintiff's Eighth Amendment claim against Defendant
14 Hernandez for the failure to intervene while Inmate Bailey was attacking Plaintiff as set forth in
15 Plaintiff's first amended complaint filed on June 11, 2018; and

16 2. All other claims and defendants be dismissed from this action.

17 These Findings and Recommendations will be submitted to the United States District Judge
18 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**
19 **(14) days** after being served with these Findings and Recommendations, Plaintiff may file written
20 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
21 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
22 specified time may result in the waiver of the "right to challenge the magistrate's factual findings"
23 on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
24 F.2d 1391, 1394 (9th Cir. 1991)).
25 IT IS SO ORDERED.

26 Dated: July 30, 2018

27 /s/ Barbara A. McAuliffe
28 UNITED STATES MAGISTRATE JUDGE