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8 **UNITED STATES DISTRICT COURT**

9 EASTERN DISTRICT OF CALIFORNIA

10
11 JEROME MARKIEL DAVIS,

12 Plaintiff,

13 v.

14 STATE OF CALIFORNIA, et al.,

15 Defendants.

Case No. 1:18-cv-00832-BAM (PC)

ORDER DIRECTING CLERK OF COURT TO
RANDOMLY ASSIGN DISTRICT JUDGE TO
ACTION

FINDINGS AND RECOMMENDATIONS
REGARDING DISMISSAL OF CERTAIN
CLAIMS AND DEFENDANTS

(ECF Nos. 15, 16)

FOURTEEN (14) DAY DEADLINE

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19 **I. Background**

20 Plaintiff Jerome Markiel Davis ("Plaintiff") is a state prisoner proceeding *pro se* and *in*
21 *forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983.

22 On January 9, 2019, the Court screened Plaintiff's complaint and found that Plaintiff
23 stated a cognizable claim for deliberate indifference in violation of the Eighth Amendment
24 against Defendant Roberts in her individual capacity arising from the alleged incident of food
25 tampering, but failed to state any other cognizable claims against any other defendants. The
26 Court ordered Plaintiff to either file a first amended complaint or notify the Court of his
27 willingness to proceed only on the cognizable claim. (ECF No. 15.) On January 17, 2019,
28 Plaintiff notified the Court of his willingness to proceed on the cognizable claim identified by the

1 Court. (ECF No. 16.)

2 **II. Screening Requirement and Standard**

3 The Court is required to screen complaints brought by prisoners seeking relief against a
4 governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C.
5 § 1915A(a). Plaintiff's complaint, or any portion thereof, is subject to dismissal if it is frivolous
6 or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary
7 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

8 A complaint must contain "a short and plain statement of the claim showing that the
9 pleader is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
10 required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere
11 conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
12 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff's allegations are taken as
13 true, courts "are not required to indulge unwarranted inferences." Doe I v. Wal-Mart Stores, Inc.,
14 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

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

21 **III. Allegations in Complaint**

22 Plaintiff is currently housed at the Maguire Correctional Facility in Redwood City,
23 California. The events in the complaint are alleged to have occurred while Plaintiff was housed at
24 the California Substance Abuse Treatment Facility in Corcoran, California. Plaintiff names the
25 following defendants in their individual and official capacities: (1) State of California;
26 (2) Warden Stuart Sherman; (3) Supervising Registered Nurse L. Koeppe; and (4) Registered
27 Nurse D. Roberts.

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1 In Claim I, Plaintiff alleges cruel and unusual punishment, claiming that Defendant
2 Roberts handed him a meal that he was unauthorized to receive. The meal made his mouth bleed
3 and go numb with a medicine taste. Defendant Koeppe, the supervisor, did not train Defendant
4 Roberts in the correct manner, which led to the cruelty against Plaintiff. Defendant Sherman is
5 responsible because his prison did not protect Plaintiff from cruelty after he explained that
6 someone poisoned his food at the previous prison. Plaintiff asked for a special accommodation so
7 that his food would not be tampered with. Plaintiff alleges that the State of California (CDCR)
8 failed to protect him from cruelty because the rules and regulations for feeding inmates in
9 administrative segregation are ineffective and allow for staff to retaliate in the inmates' food.
10 Plaintiff claims that the act was intentional because it happened at a previous institution.

11 In Claim II, Plaintiff alleges a violation of his Equal Protection rights, claiming that he
12 was discriminated against by Defendant Roberts. She allegedly victimized Plaintiff by tampering
13 with a meal that she was not authorized to give. Plaintiff contends that he was the sole victim of
14 extreme symptoms while his peers enjoyed a safe meal. Plaintiff asserts that Defendants Sherman
15 and CDCR are responsible because the rules governing how inmates are fed are ineffective.
16 Plaintiff further asserts that the rules do not provide equal protection because he was singled out
17 and because, unlike inmates in general population, inmates in administrative segregation cannot
18 see their food being placed on food trays by staff. Plaintiff alleges that Defendant Koeppe is
19 responsible because he failed to train Defendant Roberts in the correct manner and to not retaliate
20 or discriminate against inmates.

21 In Claim III, Plaintiff alleges "bad living conditions," claiming that CDCR did not create
22 rules for staff to follow when feeding inmates in segregated housing to ensure that no one is
23 tampering with meals. Plaintiff explains that inmates cannot see their trays, which creates a
24 possibility for staff to discriminate or retaliate against an inmate by tampering with the food.
25 Plaintiff asserts that this possibility creates a bad living condition. He alleges that Defendant
26 Roberts is responsible for these inhumane conditions because she tampered with his food. She
27 reportedly intentionally gave Plaintiff a Kosher meal, when he was supposed to receive a regular
28 inmate tray. She also allegedly coerced Plaintiff into believing that he was approved for the tray.

1 The Kosher meal reportedly was opened and tampered with, causing Plaintiff to suffer severe
2 symptoms. Plaintiff contends that Defendant Sherman is responsible because he did not make
3 sure these conditions did not exist at his prison.

4 In Claim IV, Plaintiff alleges a violation of his right to be free from
5 excessive/unreasonable force and retaliation. Plaintiff contends that CDCR has rules on how to
6 feed inmates in segregated housing, but those rules did not make sure that he was safe or free
7 from excessive force and retaliation. Plaintiff further contends that the rules opened a blind sport
8 for staff to tamper with Plaintiff's food. Plaintiff avers that Defendant Roberts tampered with his
9 food, which was excessive, unusual and unreasonable. He also avers that it was discrimination
10 and retaliation. Plaintiff claims that Defendant Koeppe did not ensure that his staff underwent
11 proper training. Plaintiff also claims that Defendant Sherman did not ensure the implementation
12 of rules and regulations to prevent the deprivation of Plaintiff's rights.

13 In Claim V, Plaintiff alleges a violation of his "right to life." Plaintiff asserts that CDCR
14 has rules on serving food to inmates in segregated housing. However, CDCR's failure to
15 implement cameras or safety measure to ensure that staff are not conspiring against inmates by
16 attacking their meals is a deprivation of the right to life and makes the rules ineffective. Plaintiff
17 again asserts that his food was tampered with in disregard to his life due to CDCR negligent rules
18 for feeding inmates in segregated housing. Plaintiff repeats his assertion that Defendant Roberts
19 tampered with his food, causing him severe symptoms. Plaintiff claims that the act of giving him
20 an unauthorized meal that was tampered with was a disregard for his life, and Defendant Roberts
21 did not want him to live a safe and healthy life. Plaintiff further claims that neither Defendant
22 Koeppe or Defendant Sherman properly train their staff and are negligent.

23 In Claim VI, Plaintiff alleges defamation of character. Plaintiff claims that Defendants
24 Sherman, Koeppe and Roberts denied his claims of misconduct and when the matter was
25 investigated through the appeals process, they said Plaintiff was lying and staff did nothing
26 wrong. Plaintiff asserts that this derailed the process of a further investigation and jeopardized a
27 blood test and urinalysis ordered by the doctor. Plaintiff alleges that on the day that the tests were
28 to be done by the lab technicians, they refused.

1 As relief, Plaintiff seeks compensatory and punitive damages, along with injunctive relief.

2 **IV. Discussion**

3 **A. Federal Rule of Civil Procedure 8**

4 Plaintiff's complaint fails to comply with Federal Rule of Civil Procedure 8. Pursuant to
5 Rule 8, a complaint must contain "a short and plain statement of the claim showing that the
6 pleader is entitled to relief." Fed. R. Civ. P. 8(a). Detailed factual allegations are not required,
7 but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
8 statements, do not suffice." Iqbal, 556 U.S. at 678 (citation omitted). Plaintiff must set forth
9 "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"
10 Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555). While factual allegations are
11 accepted as true, legal conclusions are not. Id.; see also Twombly, 550 U.S. at 556–57; Moss,
12 572 F.3d at 969.

13 Plaintiff's complaint is short, but it is not a plain statement of his claims. Plaintiff's
14 complaint lacks clear factual allegations regarding the incident at issue and the involvement of
15 various defendants.

16 **B. State of California – Eleventh Amendment Immunity**

17 Plaintiff attempts to bring suit against the State of California and its agency, the California
18 Department of Corrections and Rehabilitation. The Eleventh Amendment prohibits federal courts
19 from hearing a Section 1983 lawsuit in which damages or injunctive relief is sought against state
20 agencies (such as CDCR), absent "a waiver by the state or a valid congressional override . . ."
21 Dittman v. California, 191 F.3d 1020, 1025 (9th Cir. 1999). "The Eleventh Amendment bars
22 suits which seek either damages or injunctive relief against a state, 'an arm of the state,' its
23 instrumentalities, or its agencies." See Fireman's Fund Ins. Co. v. City of Lodi, Cal., 302 F.3d
24 928, 957 n.28 (9th Cir. 2002) (internal quotation and citations omitted), cert. denied, 538 U.S. 961
25 (2003). "The State of California has not waived its Eleventh Amendment immunity with respect
26 to claims brought under § 1983 in federal court" Dittman, 191 F.3d at 1025–26 (citing
27 Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985)); see also Brown v. Cal. Dep't. of
28 Corr., 554 F.3d 747, 752 (9th Cir. 2009). However, "the Eleventh Amendment does not bar

1 actions seeking only prospective declaratory or injunctive relief against state officers in their
2 official capacities[,]” Fireman’s Fund, 302 F.3d at 957 n.28 (internal quotation and citation
3 omitted), or, in appropriate instances, in their individual capacities, Idaho v. Coeur d’Alene Tribe
4 of Idaho, 521 U.S. 261, 269 (1997) (citing Ex Parte Young, 209 U.S. 123 (1908)).

5 Plaintiff therefore fails to state a cognizable claim against the State of California or the
6 California Department of Corrections and Rehabilitation.

7 **C. Official Capacity**

8 Plaintiff is attempting to bring suit for monetary damages against defendants in their
9 individual and official capacities. As noted above, “[t]he Eleventh Amendment bars suits for
10 money damages in federal court against a state, its agencies, and state officials in their official
11 capacities.” Aholelei v. Dep’t. of Pub. Safety, 488 F.3d 1144, 1147 (9th Cir. 2007) (citations
12 omitted). However, the Eleventh Amendment does not bar suits seeking damages against state
13 officials in their personal capacities. Hafer v. Melo, 502 U.S. 21, 30 (1991); Porter v. Jones, 319
14 F.3d 483, 491 (9th Cir. 2003). Thus, Plaintiff may only proceed against the defendants in their
15 individual capacities for monetary damages and in their official capacities for injunctive relief.
16 Nonetheless, as discussed more fully below, Plaintiff’s request for injunctive relief is now moot.

17 **D. Supervisory Liability**

18 Insofar as Plaintiff is attempting to hold Defendants Sherman and Koeppe liable based
19 solely on their supervisory roles, he may not do so. Liability may not be imposed on supervisory
20 personnel for the actions or omissions of their subordinates under the theory of respondeat
21 superior. Iqbal, 556 U.S. at 676–77; Simmons v. Navajo Cty., Ariz., 609 F.3d 1011, 1020–21
22 (9th Cir. 2010); Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009); Jones v.
23 Williams, 297 F.3d 930, 934 (9th Cir. 2002). Supervisors may be held liable only if they
24 “participated in or directed the violations, or knew of the violations and failed to act to prevent
25 them.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); accord Starr v. Baca, 652 F.3d 1202,
26 1205–06 (9th Cir. 2011); Corales v. Bennett, 567 F.3d 554, 570 (9th Cir. 2009). Plaintiff may
27 also allege the supervisor “implemented a policy so deficient that the policy ‘itself is a
28 repudiation of constitutional rights’ and is ‘the moving force of the constitutional violation.’ ”

1 Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989) (internal citations omitted).

2 Here, Plaintiff's complaint fails to allege that Defendants Sherman and Koeppel
3 participated in, directed or knew of any intended violation of Plaintiff's rights. Plaintiff's
4 complaint also fails to adequately allege that any of these supervisory defendants implemented a
5 policy so deficient that it was a repudiation of Plaintiff's rights and the moving force of any
6 constitutional violation. Although Plaintiff makes conclusory allegations concerning the policy
7 for feeding inmates in segregation, he provides no factual allegations identifying the relevant
8 policy and its deficiencies.

9 **E. Failure to Train/Supervise**

10 Plaintiff also complains that Defendants Sherman and Koeppel failed to properly train or
11 supervise their staff. A "failure to train" or "failure to supervise" theory can be the basis for a
12 supervisor's liability under § 1983 in only limited circumstances, such as where the failure
13 amounts to deliberate indifference. See City of Canton, Ohio v. Harris, 489 U.S. 378, 387–90
14 (1989). To establish a failure-to-train/supervise claim, a plaintiff must show that "'in light of the
15 duties assigned to specific officers or employees, the need for more or different training [or
16 supervision] [was] obvious, and the inadequacy so likely to result in violations of constitutional
17 rights, that the policy-makers . . . can reasonably be said to have been deliberately indifferent to
18 the need.'" Clement v. Gomez, 298 F.3d 898, 905 (9th Cir. 2002) (quoting Canton, 489 U.S. at
19 390).

20 Ordinarily, a single constitutional violation by an untrained employee is insufficient to
21 demonstrate deliberate indifference for purposes of failure to train. Connick v. Thompson, 563
22 U.S. 51, 62 (2011). Instead, a plaintiff must usually demonstrate "[a] pattern of similar
23 constitutional violations by untrained employees," Id., unless the need for training is "so obvious"
24 and "so likely to result in the violation of constitutional rights," that "the failure to provide proper
25 training may fairly be said to represent a policy for which the city is responsible, and for which
26 the city may be held liable if it actually causes injury," Canton, 489 U.S. at 390.

27 Here, Plaintiff's complaint fails to state a cognizable claim based upon a theory of failure
28 to train or supervise. Plaintiff's factual allegations identify an isolated incident at the California

1 Substance Abuse Treatment Facility, not a pattern of constitutional violations at that facility
2 related to alleged food tampering in segregated housing.

3 **F. Food Tampering – Eighth Amendment**

4 Adequate food is a basic human need protected by the Eighth Amendment. Hoptowit v.
5 Ray, 682 F.2d 1237, 1246 (9th Cir. 1982), abrogated on other grounds by Sandin v. O’Connor,
6 515 U.S. 472 (1995). While prison food need not be “tasty or aesthetically pleasing,” it must be
7 “adequate to maintain health.” LeMaire v. Maass, 12 F.3d 1444, 1456 (9th Cir. 1993). “The fact
8 that the food occasionally contains foreign objects or sometimes is served cold, while unpleasant,
9 does not amount to a constitutional deprivation.” Id. (citation omitted). However, extreme
10 deprivations are required to make out a conditions of confinement claim, and only those
11 deprivations denying the minimal civilized measure of life’s necessities are sufficiently grave to
12 form the basis of an Eighth Amendment violation. Hudson v. McMillian, 503 U.S. 1, 9 (1992)
13 (citations and quotations omitted). To state a claim for violation of the Eighth Amendment, the
14 plaintiff must allege facts sufficient to support a claim that prison officials knew of and
15 disregarded a substantial risk of serious harm to the plaintiff. Farmer v. Brennan, 511 U.S. 825,
16 847 (1994).

17 At the pleading stage, the Court finds that Plaintiff’s complaint states a cognizable Eighth
18 Amendment deliberate indifference claim against Defendant Roberts in her individual capacity.

19 **G. Equal Protection – Fourteenth Amendment**

20 Plaintiff alleges denial of equal protection in violation of the Fourteenth Amendment. The
21 Equal Protection Clause requires that all persons who are similarly situated should be treated
22 alike. Lee v. City of Los Angeles, 250 F.3d 668, 686 (2001); City of Cleburne v. Cleburne
23 Living Center, 473 U.S. 432, 439 (1985). To state an Equal Protection claim, Plaintiff must show
24 that the defendants acted with an intent or purpose to discriminate against him based on
25 membership in a protected class, Lee, 250 F.3d at 686; Barren v. Harrington, 152 F.3d 1193, 1194
26 (1998), or that similarly situated individuals were intentionally treated differently without a
27 rational relationship to a legitimate state purpose, Thornton v. City of St. Helens, 425 F.3d 1158,
28 1167 (2005); Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

1 Here, Plaintiff has failed to allege sufficient facts to demonstrate that he is in a protected
2 class or that similarly situations individuals were treated differently.

3 **H. Excessive Force – Eighth Amendment**

4 Plaintiff's allegations of excessive force arise under the Eighth Amendment to the United
5 States Constitution. To constitute cruel and unusual punishment in violation of the Eighth
6 Amendment, prison conditions must involve "the wanton and unnecessary infliction of pain."
7 Rhodes v. Chapman, 452 U.S. 337, 347 (1981). The inquiry as to whether a prison official's use
8 of force constitutes cruel and unusual punishment is "whether force was applied in a good-faith
9 effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson,
10 503 U.S. at 6–7; Whitley v. Albers, 475 U.S. 312, 320 (1986).

11 "The objective component of an Eighth Amendment claim is . . . contextual and
12 responsive to contemporary standards of decency." Hudson, 503 U.S. at 8 (internal quotation
13 marks and citations omitted). A prison official's use of force to maliciously and sadistically
14 cause harm violates the contemporary standards of decency. Wilkins v. Gaddy, 559 U.S. 34, 37
15 (2010).

16 Plaintiff's complaint fails to state a cognizable claim for excessive force in violation of the
17 Eighth Amendment. There is no indication that any defendant used force, much less force
18 applied maliciously and sadistically to cause harm.

19 **I. Retaliation – First Amendment**

20 "Within the prison context, a viable claim of First Amendment retaliation entails five
21 basic elements: (1) An assertion that a state actor took some adverse action against an inmate
22 (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
23 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate
24 correctional goal." Rhodes v. Robinson, 408 F.3d 559, 567–68 (9th Cir. 2005).

25 Plaintiff's complaint fails to state a cognizable retaliation claim. At a minimum, Plaintiff
26 does not identify any protected conduct, nor does he identify any adverse action taken against him
27 *because of* that protected conduct.

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1 **J. Injunctive Relief**

2 Insofar as Plaintiff seeks injunctive relief against prison officials in their official
3 capacities, any such request is now moot. Plaintiff is no longer housed at the California
4 Substance Abuse Treatment Facility, where he alleges the incident at issue occurred, and where
5 the prison officials are employed. Therefore, any injunctive relief against the officials at the
6 California Substance Abuse Treatment Facility is moot. See Andrews v. Cervantes, 493 F.3d
7 1047, 1053 n.5 (9th Cir. 2007) (prisoner’s claims for injunctive relief generally become moot
8 upon transfer) (citing Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991) (per curiam) (holding
9 claims for injunctive relief “relating to [a prison’s] policies are moot” when the prisoner has been
10 moved and “he has demonstrated no reasonable expectation of returning to [the prison]”)).

11 **K. State Law Claims**

12 Insofar as Plaintiff has alleged state law claims for negligence and defamation by
13 defendants, he has failed to allege compliance with the Government Torts Claims Act (“Act”).
14 The Act requires that a party seeking to recover money damages from a public entity or its
15 employees submit a claim to the entity before filing suit in court, generally no later than six
16 months after the cause of action accrues. Cal. Gov’t Code §§ 905, 911.2, 945, 950.2 (emphasis
17 added). When a plaintiff asserts a claim subject to the Act, he must affirmatively allege
18 compliance with the claim presentation procedure, or circumstances excusing such compliance, in
19 his complaint. Shirk v. Vista Unified Sch. Dist., 42 Cal. 4th 201, 209 (2007). Plaintiff has not
20 done so here.

21 **V. Conclusion and Recommendation**

22 Plaintiff’s complaint states a cognizable claim for deliberate indifference in violation of
23 the Eighth Amendment against Defendant Roberts in her individual capacity arising from the
24 alleged incident of food tampering, but fails to state any other cognizable claims.

25 Accordingly, the Clerk of the Court is HEREBY DIRECTED to randomly assign a
26 District Judge to this action.

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Furthermore, it is HEREBY RECOMMENDED that:

1. This action proceeds on Plaintiff's complaint, filed June 20, 2018, (ECF No. 1), for deliberate indifference in violation of the Eighth Amendment against Defendant Roberts; and
2. All other claims and Defendants be dismissed based on Plaintiff's failure to state claims upon which relief may be granted.

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

IT IS SO ORDERED.

Dated: January 23, 2019

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE