UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

EARNEST S. HARRIS,

Plaintiff,

v.

D. NEVE,

Defendant.

Case No. 1:19-cv-01338-AWI-JLT (PC)

ORDER GRANTING DEFENDANT'S REQUEST FOR SCREENING

(Doc. 52)

FINDINGS AND RECOMMENDATIONS TO DISMISS CERTAIN CLAIMS

(Doc. 51)

21-DAY DEADLINE

On July 13, 2021, the Court granted Plaintiff leave to file a third amended complaint. (Doc. 47.) Plaintiff filed a third amended complaint on August 10, 2021. (Doc. 51.) Defendant requests that the Court screen the complaint. (Doc. 52.) Because screening is mandatory under 28 U.S.C. § 1915A(a), the Court grants Defendant's request.

Upon screening, the Court finds that Plaintiff's third amended complaint states cognizable claims of retaliation and excessive force, but its remaining claims are not cognizable. Because Plaintiff has received three opportunities to amend, the Court finds that further amendment would be futile. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212-13 (9th Cir. 2012). Therefore, the Court recommends that the non-cognizable claims be dismissed.

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I. SCREENING REQUIREMENT

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the complaint is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b). The Court should dismiss a complaint if it lacks a cognizable legal theory or fails to allege sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

II. PLEADING REQUIREMENTS

A. Federal Rule of Civil Procedure 8(a)

"Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513 (2002). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Pro. 8(a)(2). "Such a statement must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz*, 534 U.S. at 512 (internal quotation marks and citation omitted).

Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Factual allegations are accepted as true, but legal conclusions are not. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

The Court construes pleadings of *pro se* prisoners liberally and affords them the benefit of any doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (citation omitted). However, "the liberal pleading standard . . . applies only to a plaintiff's factual allegations," not his legal theories. *Neitze v. Williams*, 490 U.S. 319, 330 n.9 (1989). Furthermore, "a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled," *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) (internal

quotation marks and citation omitted), and courts "are not required to indulge unwarranted inferences," *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). The "sheer possibility that a defendant has acted unlawfully" is not sufficient to state a cognizable claim, and "facts that are merely consistent with a defendant's liability" fall short. *Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted).

B. Linkage and Causation

Section 1983 provides a cause of action for the violation of constitutional or other federal rights by persons acting under color of state law. *See* 42 U.S.C. § 1983. To state a claim under section 1983, a plaintiff must show a causal connection or link between the actions of the defendants and the deprivation alleged to have been suffered by the plaintiff. *See Rizzo v. Goode*, 423 U.S. 362, 373-75 (1976). The Ninth Circuit has held that "[a] person 'subjects' another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (citation omitted).

III. PLAINTIFF'S FACTUAL ALLEGATIONS

Plaintiff was incarcerated at California State Prison, Corcoran. (*See* Doc. 51.) He alleges Defendant-Correctional Officer Neve refused to provide him meals on two occasions and "st[ole] the snacks out of [his] lunches" over the span of a month in retaliation for his filing lawsuits and "numerous . . . grievances." (*Id.* at 4, 6-7.) Plaintiff alleges that, "on several occasions," Defendant made such comments as, "this one (the Plaintiff) likes to file 602's against me, we'll see how that['s] going to work out for him." (*Id.* at 4.)

Plaintiff alleges that on August 24, 2018, Defendant walked past his door and refused to provide him a meal tray while serving meals to other inmates. (*Id.* at 4-5.) Plaintiff states that when he alerted him, Defendant replied that he would not feed Plaintiff because Plaintiff was going to court. (*Id.* at 5.) When Plaintiff told Defendant that he did not have court that day, Defendant ignored him. (*Id.*) Plaintiff states that he "suffered se[vere] stomach pain and dizz[iness] from not being" fed. (*Id.*) Plaintiff filed a grievance regarding the incident. (*Id.*)

Plaintiff did not see Defendant again until June of 2019. (*Id.*) Plaintiff alleges that on June 30, 2019, Defendant walked up to Plaintiff's cell, showed Plaintiff his meal tray, then threw the food into the garbage. (*Id.*) Plaintiff states that he again suffered stomach pain and dizziness for missing the meal, and he visited a nurse regarding these symptoms. (*Id.* at 6.) Plaintiff says he "lived in fear" if he continued to file grievances against Defendant, but he nevertheless filed another grievance for the incident. (*Id.*)

Between May and June of 2018, Plaintiff alleges Defendant applied handcuffs on him excessively tight on three occasions. (*Id.* at 8-9.) On the third occasion, Plaintiff alleges he told Defendant that the handcuffs were "stopping the blood flow from [his] wrist and [that he] felt faint," but that Defendant replied, "'that's what happens to inmates who file lawsuits.'" (*Id.* at 9.) Plaintiff states that the resulting pain, redness, and swelling lasted two to three days. (*Id.*)

IV. DISCUSSION

A. Conditions of Confinement

"It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney*, 509 U.S. 25, 31 (1993). "[P]rison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of . . . inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal quotation marks and citations omitted).

"In order to establish . . . [an Eighth Amendment] violation, [p]laintiffs must satisfy both the objective and subjective components of a two-part test." *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (citation omitted). First, plaintiffs must show that their alleged deprivation is "sufficiently serious." *Farmer*, 511 U.S. at 834 (internal quotation marks and citation omitted). To be sufficiently serious, the "prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.'" *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). Second, plaintiffs must show that the prison official was deliberately indifferent to their health or safety. *Farmer*, 511 U.S. at 834.

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Plaintiff's allegations regarding his meals do not satisfy the first, objective prong. Plaintiff alleges Defendant refused to provide him meals on two occasions and took snacks out of his lunches. (Doc. 51 at 4-7.) These deprivations are not sufficiently serious to implicate the Eighth Amendment. The Ninth Circuit has held, for example, that "food occasionally contain[ing] foreign objects or sometimes [being] served cold, while unpleasant, does not amount to a constitutional deprivation." *LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993) (internal quotation marks and citation omitted). Likewise, Defendant's alleged refusal to provide Plaintiff two meals over the span of ten months, or his alleged removal of snacks from Plaintiff's lunches, is not sufficiently serious to violate the Eighth Amendment. *See Foster v. Runnels*, 554 F.3d 807, 812 n.1 (9th Cir. 2009) (denial of two meals over the span of two months did "not appear to rise to the level of a constitutional violation"); *See Hearns v. Terhune*, 413 F.3d 1036, 1042 (9th Cir. 2005) ("circumstances, nature, and duration of a deprivation of [ ] necessities must be considered in determining whether a constitutional violation has occurred") (internal quotation marks and citation omitted). Plaintiff's allegations regarding his meals fail to rise to the level of cruel and unusual punishment.

B. Excessive Force

The "unnecessary and wanton infliction of pain" on prisoners "constitutes cruel and unusual punishment." *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (internal quotation marks and citation omitted). As courts have observed, "[p]ersons are sent to prison as punishment, not *for* punishment." *Gordon v. Faber*, 800 F. Supp. 797, 800 (N.D. Iowa) (quoting *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977)) (citation omitted). "Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks and citation omitted).

A correctional officer engages in excessive force in violation of the Cruel and Unusual Punishments Clause if he (1) uses excessive and unnecessary force under all the circumstances, and (2) "harms an inmate for the very purpose of causing harm," and not "as part of a good-faith effort to maintain security." *Hoard v. Hartman*, 904 F.3d 780, 788 (9th Cir. 2018). In other words, "whenever prison officials stand accused of using excessive physical force . . ., the core

judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). In making this determination, courts may consider "the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response." *Id.* at 7. Courts may also consider the extent of the injury suffered by the prisoner. *Id.* However, the absence of serious injury is not determinative. *Id.*

Plaintiff states cognizable claims of excessive force. He alleges Defendant applied handcuffs on him excessively tight and that when he informed Defendant that he felt faint, Defendant replied, "that's what happens to inmates who file lawsuits . . ." (Doc. 51 at 8-9). These allegations are sufficient to show that the amount of force used was excessive and unnecessary and intended to cause harm, not to maintain security.

C. Retaliation

A claim of First Amendment retaliation has five elements. *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012). First, a plaintiff must allege that he engaged in protected activity. *Id.* For example, filing an inmate grievance is protected, *Rhodes v. Robinson*, 408 F.3d 559, 568 (9th Cir. 2005), as is the right to access the courts, *Bounds v. Smith*, 430 U.S. 817, 821 (1977); *see also Rizzo v. Dawson*, 778 F.2d 527, 531-32 (9th Cir. 1985). Second, the plaintiff must show that the defendant took adverse action against him. *Watison*, 668 F.3d at 1114 (citation omitted). "Third, the plaintiff must allege a causal connection between the adverse action and the protected conduct." *Id.* In other words, the plaintiff must claim the defendant subjected him to an adverse action *because of* his engagement in protected activity. *Rhodes*, 408 F.3d at 567. "Fourth, the plaintiff must allege that the official's acts would chill or silence a person of ordinary firmness from future [protected] activities." *Watison*, 668 F.3d at 1114 (internal quotation marks and citation omitted). "Fifth, the plaintiff must allege 'that the prison authorities' retaliatory action did not advance legitimate goals of the correctional institution. . .'" *Id.* (quoting *Rizzo*, 778 F.2d at 532).

Plaintiff's allegations establish cognizable retaliation claims. Plaintiff alleges that he

engaged in protected conduct, i.e., filing inmate grievances and lawsuits, and that Defendant took adverse action against him because he engaged in such conduct, i.e., applying handcuffs on him excessively tight on three occasions, refusing to provide him meals on two occasions, and taking snacks or "food items out of . . . lunches" over the span of a month. (Doc. 51 at 4-9.) Plaintiff does not allege that Defendant's actions chilled his speech, since he continued to filed grievances. (*See id.* at 6.) However, Plaintiff alleges that he was harmed, and "harm that is more than minimal will almost always have a chilling effect." *Rhodes*, 408 F.3d at 562.

V. CONCLUSION, ORDER, AND RECOMMENDATION

For the reasons set forth above, the Court **GRANTS** Defendant's request for screening (Doc. 52). The Court finds that Plaintiff's third amended complaint (Doc. 51) states cognizable claims of retaliation and excessive force, but that its remaining claims are not cognizable. Given Plaintiff's three opportunities to amend, further amendment would be futile. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212-13 (9th Cir. 2012). Accordingly, the Court **RECOMMENDS** that the claims in Plaintiff's complaint be **DISMISSED**, except for the claims of retaliation and excessive force, pursuant to 42 U.S.C. § 1983.

These Findings and Recommendations will be submitted to the United States District Judge assigned to this case, pursuant to 28 U.S.C. § 636(b)(l). **Within 21 days** of the date of service of 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's failure to file objections within the specified time may result in waiver of his rights 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: **September 7, 2021** **/s/ Jennifer L. Thurston**
CHIEF UNITED STATES MAGISTRATE JUDGE