

DANNY JAMES COHEA,

Plaintiff,

v.

J. COLVIN, D. McCARGAR, S.L.
BAUGHMAN, M.A. MICHEELS, R
YAMAMOTO, SD AKIN, D. ADAMS,
and A GOLD.

Defendants.

No. 2:00-cv-02799-GEB-EFB

SECOND SUPPLEMENT TO PRETRIAL
ORDER

Defendants' Supplemental Pretrial Statements filed June 5, 2015, (ECF Nos. 277, 279), indicate the following second supplement to the February 20, 2015 Pretrial Order ("PO") should issue.

AFFIRMATIVE DEFENSES

The following affirmative defenses are preserved for trial:

1) Statute of limitations concerning Plaintiff's claims against Defendants McCargar, Baughman, and Micheels concerning the September 27, 1997 Rules Violation Report ("RVR"), and

2) Qualified immunity alleged by each Defendant.

1 As the Ninth Circuit states in Act Up! /Portland v.
2 Bagley, 988 F.2d 868, 873 (9th Cir. 1993):

[T]he determination of what conduct underlies the alleged violation-what the officer and claimant did or failed to do-is a determination of fact [to be decided by a jury;] however, . . . the determination whether those facts support an objective belief that [the officer reasonably believed he was not violating Plaintiff's right to be free from excessive force] is ordinarily a question for the court.

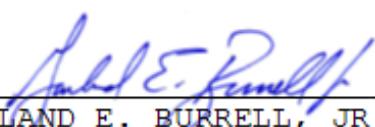
9 Since the jury will not decide the question of law
10 involved in determining whether any Defendant is entitled to
11 qualified immunity, the proposed jury instructions need not
12 include instruction on this affirmative defense. The jury will
13 resolve the discrete issues of fact, if any, and all assertions
14 made by the parties regarding the defense of qualified immunity
15 shall be confined to those issues of fact.

16 Accordingly, a special verdict or interrogatories shall
17 be filed by each party for all factual disputes to be resolved by
18 the jury concerning the qualified immunity affirmative defense no
19 later than July 21, 2015. Further, no later than July 21, 2015,
20 each party shall file proposed prevailing party findings of fact
21 and conclusions of law concerning this affirmative defense.

22 Defendants also assert their position that "[t]he
23 Federal Civil Rights Act provides liability only against those
24 who, through their personal involvement or failure to perform
25 legally required duties, caused the deprivation of another's
26 constitutionally protected rights[,] and they did not
27 "personally cause Plaintiff any harm." (Defs. Adams, Akins,
28 Baughman, Colvin, Gold, McCargar, Micheels, and Yamamoto's Supp.

1 Pretrial Stmt. 2:2-4, 2:12, ECF No. 277; Def. Scarsella's Supp.
2 Pretrial Stmt. 1:26-28, 2:8-9, ECF No. 279.) However, argument
3 that "merely negates . . . element[s]" of a claim is not an
4 affirmative defense. Zivkovic v. S. Cal. Edison Co., 302 F.3d
5 1080, 1088 (9th Cir. 2002) ("A defense which demonstrates that
6 plaintiff has not met its burden of proof is not an affirmative
7 defense.").

8 Dated: June 8, 2015

9
10 
11 GARLAND E. BURRELL, JR.
12 Senior United States District Judge

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28