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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CURTIS HIGHTOWER,)	No. 2:08-cv-00228-SPK
)	
Plaintiff,)	
)	
v.)	
W. PATTON,)	
)	
Defendant.)	

ORDER DISMISSING AMENDED COMPLAINT IN PART,
DENYING PENDING IFP APPLICATION [DOC. 31] AS MOOT,
AND AUTHORIZING SERVICE OF PROCESS

On July 2, 2009, this Court dismissed Plaintiff’s original complaint in part. The order indicated that a claim could proceed as against Defendant W. Patton, but that the complaint failed to state a claim as against other named Defendants. The order indicated that Plaintiff could still attempt to file an amended complaint as against the dismissed Defendants, or could proceed against Patton only.

In response, Plaintiff filed a statement indicating among other things that he intended to file an amended complaint in an attempt to state claims as to the other Defendants. On September 22, 2009, this Court granted Plaintiff an additional 30

1 days to file that amended complaint. The Court indicated that the amended
2 complaint would then be screened pursuant to 28 U.S.C. § 1915A(a). The Court
3 also granted Plaintiff’s Motion to Proceed In Forma Pauperis (IFP) on September
4 22, 2009.

5 On October 1, 2009, Plaintiff filed a motion for extension of time to file the
6 amended complaint, which the Court granted. The Court allowed until December
7 22, 2009 to file the amended complaint.

8 On December 14, 2009, Plaintiff filed the amended complaint, which this
9 Court now screens as required by Section 1915A(a). Plaintiff also filed another
10 Application to Proceed In Forma Pauperis [doc. 31].

11 I.

12 The Court granted Plaintiff IFP status on September 22, 2009. The new
13 Application to Proceed IFP of December 14, 2009 is not necessary and is
14 superfluous. Accordingly, the new Application to Proceed IFP [doc. 31] is
15 DENIED as MOOT. The prior grant of IFP status remains in effect.

16 II.

17 The Court is required to screen a prisoner’s civil rights complaint seeking
18 redress from a governmental entity or employee of a governmental entity. 28
19 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the
20 prisoner has raised claims that are legally “frivolous or malicious,” that fail to state
21 a claim upon which relief may be granted, or that seek monetary relief from a
22 defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
23 “Notwithstanding any filing fee, or any portion thereof, that may have been paid,
24 the court shall dismiss the case at any time if the court determines that . . . the
25 action . . . fails to state a claim upon which relief may be granted[.]” 28 U.S.C. §
26 1915(e)(2)(B)(ii).

1 A complaint must contain “a short and plain statement of the claim showing
2 that the pleader is entitled to relief[.]” Fed. R. Civ. P. 8(a). Although a complaint
3 “does not need detailed factual allegations” to survive dismissal, a plaintiff must
4 provide “more than mere labels and conclusions, and a formulaic recitation of the
5 elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550
6 U.S. 544, 555 (2007). The complaint must contain factual allegations sufficient to
7 rise above the “speculative level,” *id.*, or the merely possible or conceivable. *Id.* at
8 557, 570. That is, the complaint must contain “enough facts to state a claim to
9 relief that is plausible on its face.” *Id.* at 570. A claim has “facial plausibility”
10 when the complaint presents enough facts “to draw the reasonable inference that
11 the defendant is liable.” *Ashcroft v. Iqbal*, 556 U.S. ___, ___, 129 S. Ct. 1937,
12 1949 (2009). In a pro se civil rights case, the complaint must be construed
13 liberally to afford plaintiff the benefit of any doubt. *See, e.g., Karim-Panahi v. Los*
14 *Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988).

15 Applying these principles, the Court has screened the Amended Complaint
16 of December 14, 2009. In the amended complaint, similarly to the original
17 complaint, Plaintiff alleges constitutional violations (excessive force in violation of
18 the Eighth Amendment) under 42 U.S.C. § 1983 against various named Defendants
19 regarding an incident wherein Plaintiff’s eye was injured allegedly by being
20 punched and knee-ed by Defendant W. Patton (a sergeant at the High Desert State
21 Prison in Susanville, California).

22 Without reiterating all the details of the amended complaint (which the
23 Court must assume as true for present purposes), the Court concludes that a prima
24 facie claim under the Eighth Amendment is stated against Defendant Patton,
25 sufficient to withstand screening. “[T]he unnecessary and wanton infliction of pain
26 ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”
27

1 *Hudson v. McMillian*, 503 U.S. 1, 5 (1992) (citing *Whitley v. Albers*, 475 U.S. 312,
2 319 (1986)). The question is whether harm inflicted was “unnecessary and wanton
3 pain and suffering” and depends upon “whether force was applied in a good faith
4 effort to maintain or restore discipline or maliciously and sadistically for the very
5 purpose of causing harm.” *Hudson*, 503 U.S. at 6; *see also Wilkins v. Gaddy*, 559
6 U.S. ___, 2010 WL 596513 (Feb. 22, 2010) (reiterating the *Hudson* standards).

7 The *Hudson* court laid out five factors to be considering in making this
8 determination: (1) the extent of injury suffered by an inmate; (2) the need for
9 application of force; (3) the relationship between that need and the amount of force
10 used; (4) the threat reasonably perceived by the responsible officials; and (5) any
11 efforts made to temper the severity of a forceful response. *Id.* at 7.

12 Applying *Hudson* here, to withstand scrutiny Plaintiff would have to show,
13 or allege facts indicating, that each Defendants’ actions were “malicious and
14 sadistic” and for the very purpose of causing harm. The Amended Complaint, like
15 the original complaint, alleges that Patton punched or knee-ed Plaintiff in the left
16 eye, causing some loss of vision during an altercation where Patton was
17 transferring Plaintiff to administrative segregation. Plaintiff alleges that he was
18 being held on the ground, and was in handcuffs, when Patton told Plaintiff to stop
19 spitting. Plaintiff denies spitting. Patton allegedly punched Plaintiff in the left eye
20 six or seven times and knee-ed him there twice while he was in handcuffs.
21 Plaintiff was injured and was taken to a hospital. He alleges surgery was required
22 to repair a chipped orbit bone on his left eye and that his vision is now affected.
23 Such allegations, again which the Court must assume as true for present purposes,
24 state a claim that injury could have been inflicted “maliciously and sadistically.”

25 However, as with the original complaint, a claim is stated against Patton
26 only. Plaintiff has named several other individual Defendants, including The High
27

1 Desert Prison itself. Reviewing the details of the allegations of the amended
2 complaint, the Court again concludes that there is no claim stated against any other
3 named Defendant. A prison itself such as the High Desert Prison cannot be a
4 Defendant (a claim against the prison would be construed as a claim against the
5 State of California and would be barred by the Eleventh Amendment.) Although
6 Gullion is mentioned as “taking down” Plaintiff upon Patton’s direction, there are
7 no facts pled against Gullion indicating that Gullion inflicted force against
8 Plaintiff. Additionally, there are no factual allegations against any other
9 individuals aside from a general allegation that no one stopped Patton from
10 assaulting Plaintiff. Such general allegations fail to satisfy the pleading
11 requirements of *Twombly* and *Iqbal*.

12 Accordingly, the Amended Complaint is DISMISSED in part. It states a
13 claim only against Defendant Patton. All other Defendants are DISMISSED.
14 Plaintiff has already been given leave to amend to attempt to state claims against
15 the other individuals, and further leave at this stage would be futile. The Amended
16 Complaint may proceed only as against Patton.

17 III.

18 Because the Amended Complaint passes the necessary screening as against
19 Patton, the Court authorizes Plaintiff to proceed with the attempting of service of
20 process. Accordingly,

21 (1) The Clerk of the Court shall send Plaintiff a copy of this order, a USM-
22 285 form, a summons, an instruction sheet, and a copy of the Amended Complaint
23 filed on December 14, 2009.

24 (2) Within 30 days from the date of this order, Plaintiff shall complete the
25 following requirements for service of the current complaint:

26 (a) properly complete and sign the attached Notice of Submission of
27

1 Documents form,
2 (b) properly complete the summons form;
3 (c) properly complete a USM-285 form for Defendant Patton;
4 (d) submit four copies of the complaint filed on December 14, 2009;
5 and
6 (e) provide the completed forms and copies of the Amended
7 Complaint to the Clerk of Court.

8 (4) Plaintiff need not attempt service on Defendant and need not request
9 waiver of service. Upon receipt of all the documents listed above in section (3),
10 the Court will issue an order directing the Clerk to forward the completed forms to
11 the United States Marshal to serve the named Defendant pursuant to Fed. R. Civ. P.
12 4, without payment of costs.

13 (5) Plaintiff's failure to comply with this order within 30 days may result in
14 dismissal of the action.

15 IT IS SO ORDERED.

16 DATED: February 24, 2010.



Samuel P. King

Samuel P. King
Senior United States District Judge

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE EASTERN DISTRICT OF CALIFORNIA
4

5 CURTIS HIGHTOWER,) No. 2:08-cv-00228-SPK
6)
7 Plaintiff,)
8)
9 v.)
10 W. PATTON,)
11 Defendant.)
_____)

12 NOTICE OF SUBMISSION OF DOCUMENTS
13

14 Plaintiff hereby submits the following documents in compliance with
15 the court's order filed February 24, 2010:

16 _____ completed summons form
17 _____ completed USM-285 forms
18 _____
19 _____ copies of the complaint
20

21 DATED: _____
22

23 _____
24 Plaintiff
25
26
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