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

EDWARD THOMAS,

Plaintiff,

No. CIV S-08-2188-SPG (PC)

vs.

T. FELKER, et al.,

Defendants.

ORDER GRANTING IN PART AND DENYING
IN PART DEFENDANTS' MOTIONS TO
DISMISS PLAINTIFF'S SECOND AMENDED
COMPLAINT

I. Background

A. Procedural History

On September 17, 2008, Plaintiff Edward Thomas, a state prisoner incarcerated at California's High Desert Prison, proceeding without counsel, filed this civil rights action under 42 U.S.C. § 1983. Clerk's Record, Docket No. 1 ("Doc." 1). Plaintiff was confined at the time of the events giving rise to the complaint. Plaintiff seeks monetary damages and injunctive relief. This court determined that the complaint stated four cognizable claims for relief: (1) denial of due process regarding a lack of opportunity to pursue administrative appeals and grievances; (2) excessive force; (3) denial of due process because of inadequate medical care; and (4) retaliation against him for filing administrative appeals. (Doc. 23.) The complaint named Defendants Tom

1 Felker, T. Perez, D. Vanderville, M. Runnels, A. Audette, R. Ingwerson, J. Ginder, N. Albonico,
2 G. Speers, M. Beutler, D. Neiman, L. Betti, J. Wright, A. Gorby, H. Cottrell, David Medina, J.
3 Clark, and R. Shaw. (Doc. 1.) On March 9, 2009, Plaintiff amended his complaint to add
4 Defendant R. Plainer. (Doc. 25; Doc. 27.)

5 On March 23, 2009, Plaintiff filed a "supplemental complaint," which the court construed
6 as a motion for leave to amend his complaint. (Doc. 29.) The court determined that Plaintiff had
7 stated cognizable claims and granted leave to amend the complaint to add allegations against
8 Defendant Plainer and against new Defendants P. Cochrane, J. Lawry, C. White, Chad Nelson, T.
9 Cobb, Kimberly Lowther, and A. Zinn. (Doc. 46.)

10 Four motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) are now pending
11 before the court.

12 On October 14, 2009, Defendants Ginder, Albonico, Speers, Beutler, Neimann, Gorby,
13 Clark, Cottrell, Cochrane, and White filed a motion to dismiss Plaintiff's state-law claims for
14 failure to plead compliance with California's Government Claims Act ("Motion I"). (Doc. 53.)

15 On November 4, 2009, Plaintiff filed an opposition to Motion I. (Doc. 56.) Defendants Ginder et
16 al. filed a reply to Plaintiff's opposition on November 9, 2009. (Doc. 57.)

17 On October 16, 2009, Defendant Medina filed a motion to dismiss Plaintiff's state-law
18 claims for failure to plead compliance with the California Government Claims Act ("Motion II").
19 (Doc. 54.) Under Eastern District of California Local Rule 230(l), Plaintiff had 21 days to
20 respond to the motion. Plaintiff did not respond to Motion II. "Failure of the responding party to
21 file opposition . . . may be deemed a waiver of any opposition to the granting of the motion . . ."
22 E.D. Cal. Local R. 230(l). This court could deem Plaintiff's silence to be a waiver of any
23 opposition to Motion II. However, Motion II raises the same legal issue already raised by Motion
24 I, and Plaintiff opposed Motion I. Because the legal issue is identical, this court will deem
25 Plaintiff's opposition of November 4, 2009, to be in opposition to Motion II also.

26 On November 23, 2009, Defendants Ginder, Albonico, Speers, Beutler, Neimann, Gorby,

1 Clark, Cottrell, Cochrane, White, Medina, Vanderville, Audette, Ingwerson, Betti, Wright, Cobb,
2 Lowther, Zinn, Felker, Perez, and Nelson filed a motion to dismiss certain of Plaintiff's claims
3 against certain Defendants for failure to state a claim upon which relief can be granted ("Motion
4 III"). (Doc. 60.) On December 14, 2009, Plaintiff filed "Plaintiff[']s Secondary (2nd
5 Objection/Opposition to Defendants['] Motion to Dismiss," which opposed the November 23,
6 2009, motion to dismiss. (Doc. 64.)

7 On December 22, 2009, Defendants Shaw and Lawry filed a motion to dismiss certain of
8 Plaintiff's claims for failure to state a claim upon which relief could be granted ("Motion IV").
9 (Doc. 65.) Plaintiff had 21 days to respond to the motion. E.D. Cal. Local R. 230(l). Plaintiff
10 failed to respond to Motion IV. The motion raised the same legal issue already raised by Motions
11 I and II. Motion IV also raised two issues previously raised by Motion III, which Plaintiff
12 opposed on December 14, 2009. Therefore, the court will deem Plaintiff's oppositions of
13 November 4, 2009, and December 14, 2009, to be in opposition to Motion IV also.

14 **B. Summary of Alleged Facts**

15 Plaintiff alleges that he was assaulted by Defendants Beutler, Betti, and Neimann on May
16 17, 2008, that they threatened to retaliate against him if he reported their actions, and that prison
17 staff delayed treatment for his injuries. (Doc. 1, at 7-10.) He alleges that when he reported the
18 assault, Defendants Ginder and Albonico threatened him and tried to bribe him into withdrawing
19 his report. (Doc. 1, at 11.) Plaintiff alleges that Defendants Audette and Ingwerson made false
20 reports to cover up the assault, instead of conducting an impartial investigation into it. (Doc. 1, at
21 19.)

22 Plaintiff alleges that prison officials filed a false disciplinary report against him after he
23 reported the assault. He alleges that Defendant Lawry conducted the disciplinary hearing without
24 allowing Plaintiff the assistance of staff, the right to call witnesses or question the reporting
25 employee, or the right to submit evidence. (Doc. 29, at 6.) Plaintiff alleges that prison officials,
26 including Defendant White, interfered with his efforts to exhaust administrative remedies

1 regarding this disciplinary hearing. (Doc. 29, at 10.)

2 Plaintiff alleges that on June 20, 2008, he was assaulted by Defendants Wright, Gorby, and
3 Cottrell, and that they threatened to retaliate against him if he reported this second assault. (Doc.
4 1, at 13-14.) Plaintiff alleges that Defendant Clark had substituted a cracked cane for Plaintiff's
5 cane, so that when Plaintiff attempted to stand after the assault, the cane broke, and he fell. (Doc.
6 1, at 15.) Plaintiff alleges that Defendants Wright, Gorby, and Clark accused him of faking his
7 injuries and refused to obtain medical treatment for him. (Doc. 1, at 15-16.) Plaintiff also alleges
8 that Defendant Speers laughed at him and did not get medical help. (Doc. 1, at 16.) Plaintiff
9 alleges that when he slid his broken cane out under his cell door at Defendant Wright's request,
10 Defendant Wright falsely accused Plaintiff of attacking Defendant Wright. (Doc. 1, at 16.)
11 Plaintiff alleges that Defendants Medina, Speers, Shaw, and Clark falsified medical reports to
12 cover up the incident. (Doc. 1, at 16-17, 20-22.) Plaintiff alleges that he received inadequate
13 medical care after the incident. (Doc. 1, at 21-22.) Plaintiff alleges that, after the incident,
14 Defendant Gorby confiscated Plaintiff's personal property. (Doc. 1, at 20.)

15 Plaintiff alleges that Defendant Plainer was responsible for a disciplinary hearing after the
16 second assault, at which Plaintiff was found to have assaulted Defendant Wright with the broken
17 cane. (Doc. 29, at 12.) Plaintiff alleges that this disciplinary hearing did not take place or
18 considered falsified reports prepared by or false testimony from Defendants Plainer, Nelson,
19 Cobb, and Zinn. (Doc. 29, at 13-18.)

20 Plaintiff alleges that he informed Defendants Felker, Perez, Vanderville, Runnels, and
21 Cochrane either of the assaults or that he was in fear for his safety, but they did not protect him.
22 (Doc. 1, at 17-19; Doc. 29, at 7-9) He also alleges that Defendants Runnels and Vanderville
23 knew that he was in danger after he reported the first assault, but did not protect him. (Doc. 1, at
24 20.)

25 Plaintiff alleges that Defendants interfered with or did not respond to his attempts to file
26 administrative grievances regarding the assaults. (Doc. 1, at 22-23.)

1 **II. Analysis**

2 **A. Legal Standard**

3 Federal Rule of Civil Procedure 12(b)(6) requires dismissal of a complaint "if it is clear
4 that no relief could be granted under any set of facts that could be proved consistent with the
5 allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984). In considering a Rule
6 12(b)(6) motion, the court must accept as true the factual allegations of the complaint. *Erickson*
7 *v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). In addition, the pleadings of a litigant proceeding
8 without counsel should be construed liberally. *Id.* However, "[t]hreadbare recitals of the
9 elements of a cause of action, supported by mere conclusory statements do not suffice." *Ashcroft*
10 *v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). A claim must have facial plausibility to survive a motion
11 to dismiss, and facial plausibility arises when "the plaintiff pleads factual content that allows the
12 court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

13 The court considers attachments to a complaint to be part of the complaint for purposes of
14 a motion to dismiss for failure to state a claim. *United States v. Ritchie*, 342 F.3d 903, 908 (9th
15 Cir. 2003). However, if the court considers evidence outside the pleadings in order to grant or
16 deny the motion, a motion to dismiss is converted into a motion for summary judgment. *Id.* at
17 907. Therefore, this court will not consider any evidence beyond the complaint and its
18 attachments, specifically disregarding Plaintiff's allegation in his opposition of November 4, 2009,
19 that he had complied with California's Government Claims Act, and the attachments to that
20 opposition.

21 **B. Motions to Dismiss**

22 **1. Due Process Violation in Administrative Grievance Process**

23 Plaintiff claims that he has been denied his right to file administrative appeals and
24 grievances in violation of the Due Process Clause of the Fourteenth Amendment. Motions III and
25 IV seek dismissal of this due process claim because Plaintiff does not have a due process right to
26 an administrative grievance process.

1 "[I]nmates lack a separate constitutional entitlement to a specific prison grievance
2 procedure." Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003); accord Mann v. Adams, 855
3 F.2d 639, 640 (9th Cir. 1988) (order) ("There is no legitimate claim of entitlement to a grievance
4 procedure."). Because Plaintiff has no due process right, Defendants' alleged actions could not
5 violate the Due Process Clause.

6 The court acknowledges that its order of February 24, 2009, recognized this due process
7 claim. However, the court may reconsider its interlocutory orders at any time. Fed. R. Civ. P.
8 54(b). In its discretion, the court now reconsiders and reverses its earlier conclusion that Plaintiff
9 has stated a due process claim for relief arising from Defendants' alleged interference with
10 Plaintiff's administrative grievances.

11 The court wishes to make clear that this reconsideration applies only to the due process
12 claim stemming from the grievance process, rather than to the due process claim--stated in
13 Plaintiff's second amended complaint--arising from Plaintiff's disciplinary hearings. An inmate
14 does have procedural due process rights in a disciplinary hearing. Wolff v. McDonnell, 418 U.S.
15 539, 566 (1974).

16 Accordingly, this court GRANTS Defendants' motions to dismiss Plaintiff's due process
17 claim arising from the administrative appeal and grievance process and orders that the claim be
18 dismissed as to all Defendants without leave to amend.

19 **2. Excessive Force**

20 Plaintiff claims that Defendants used excessive force against him in violation of the Eighth
21 Amendment. Motions III and IV seek dismissal of this claim against Defendants Albonico,
22 Audette, Clark, Cobb, Ginder, Ingwerson, Lowther, Medina, Nelson, Shaw, Speers, White, and
23 Zinn. These Defendants argue that Plaintiff has not alleged that they participated in the assaults
24 nor that they were informed of the threat to his safety and failed to prevent an assault.

25 A state official is liable under 42 U.S.C. § 1983 only if he or she proximately caused the
26 violation of a plaintiff's constitutional rights. Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988).

1 An official may be liable for personally participating in the violation. Taylor v. List, 880 F.2d
2 1040, 1045 (9th Cir. 1989). Use of excessive force against a prisoner violates the Eighth
3 Amendment. Clement v. Gomez, 298 F.3d 898, 903 (9th Cir. 2002). A prison official also
4 violates the Eighth Amendment if the official "knows of and disregards an excessive risk to inmate
5 health or safety." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Therefore, an official can be
6 liable for failing to intervene if he or she is present when another official uses excessive force
7 against a prisoner. Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995).

8 Plaintiff does not allege use of excessive force by any of these Defendants. Plaintiff
9 alleges that Defendants Albonico and Ginder placed him in the law library holding cage during the
10 investigation of the first assault, but he does not allege that they used force against him. Plaintiff
11 alleges that Defendant Clark switched his cane for a cracked cane and that he fell as a result.
12 However, Plaintiff does not allege that Defendant Clark knew that the cane was cracked and
13 unsafe, so the mere substitution of medical equipment does not constitute use of force. Finally,
14 Plaintiff alleges that Defendants Cobb, Ginder, Ingwerson, Lowther, Medina, Nelson, Shaw, and
15 Zinn falsified reports or otherwise assisted in covering up the assaults against him. However,
16 Plaintiff has not alleged that any of these Defendants knew ahead of time that Plaintiff was at risk
17 of further assault and failed to prevent it. Thus, the alleged coverup does not constitute disregard
18 of a known excessive risk to Plaintiff's safety. Plaintiff makes no allegations relating to use of
19 excessive force by Defendants Audette, Speers, and White. The court concludes that Plaintiff has
20 failed to state a claim for use of excessive force by Defendants Albonico, Audette, Clark, Cobb,
21 Ginder, Ingwerson, Lowther, Medina, Nelson, Shaw, Speers, White, and Zinn.

22 Accordingly, this court GRANTS the motions to dismiss Plaintiff's excessive force claim
23 against Defendants Albonico, Audette, Clark, Cobb, Ginder, Ingwerson, Lowther, Medina,
24 Nelson, Shaw, Speers, White, and Zinn, and orders that the claim be dismissed with leave to
25 amend within 60 days.

26 **3. Deliberate Indifference to Medical Needs**

1 Plaintiff claims that Defendants violated the Eighth Amendment by failing to provide him
2 medical care. Motion III seeks dismissal of this claim against Defendants Albonico, Audette,
3 Cobb, Cochrane, Felker, Ginder, Ingwerson, Lowther, Nelson, Perez, Speers, Vanderville, White,
4 and Zinn. These Defendants argue that Plaintiff has not alleged that they were aware of his
5 serious need for medical treatment.

6 A prison official violates the Eighth Amendment if the official "knows of and disregards an
7 excessive risk to inmate health or safety." Farmer, 511 U.S. at 837. Deliberate indifference to a
8 prisoner's serious medical needs constitutes a violation of the Eighth Amendment. Estelle v.
9 Gamble, 429 U.S. 97, 104 (1976). The indifference may be "manifested by prison doctors in their
10 response to the prisoner's needs or by prison guards in intentionally denying or delaying access to
11 medical care or intentionally interfering with the treatment once prescribed." Id. at 104-05
12 (footnotes omitted). An official does not act with deliberate indifference if the official disregards
13 a risk of which he or she is not aware. Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004).

14 Plaintiff does not allege that any of these Defendants, except for Defendant Speers, was
15 aware of his need for medical care. Plaintiff alleges that, after the second alleged assault, when he
16 had a large contusion over his left eye and suffered from vertigo, Defendant Speers "kept walking
17 by [Plaintiff's] cell door looking inside and laughing at [Plaintiff]," but did not "ever attempt[] to
18 make an effort to summon medical attention." (Doc. 1, at 16). Deliberate indifference to medical
19 needs may be shown by circumstantial evidence. Lolli v. County of Orange, 351 F.3d 410, 421
20 (9th Cir. 2003). Plaintiff has alleged that Defendant Speers was laughing at him, which would
21 demonstrate either (1) that Speers was either aware of the beating or the subsequent fall, or (2)
22 that Plaintiff's appearance or behavior were significantly abnormal and that Speers was aware of
23 this. Thus, Plaintiff has sufficiently alleged that Defendant Speers was aware of his need for
24 medical care. Plaintiff has stated a claim against Defendant Speers for deliberate indifference to
25 Plaintiff's serious medical needs.

26 Accordingly, this court GRANTS the motion to dismiss the deliberate indifference claim

1 against Defendants Albonico, Audette, Cobb, Cochrane, Felker, Ginder, Ingwerson, Lowther,
2 Nelson, Perez, Vanderville, White, and Zinn, and orders that the claim be dismissed with leave to
3 amend within 60 days. This court DENIES Defendants' motion to dismiss the deliberate
4 indifference claim against Defendant Speers.

5 **4. Government Claims Act**

6 Plaintiff's second amended complaint brings state-law claims. Motions I, II, III, and IV
7 seek dismissal of these claims because Plaintiff has not pleaded compliance with the California
8 Government Claims Act.

9 The California Government Claims Act requires that all claimants seeking monetary
10 damages from a state entity must submit an administrative claim before filing suit. Cal. Gov't
11 Code §§ 900.2, 905, 905.2, 910, 911.2, 945.4, 950-50.2. Timely presentation of the
12 administrative claim is a condition precedent to suit and is an element of the cause of action.
13 Shirk v. Vista Unified Sch. Dist., 164 P.3d 630, 634 (Cal. 2007). The claim must have been both
14 presented and rejected. Mangold v. Cal. Pub. Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995);
15 Sparks v. Kern County Bd. of Supervisors, 93 Cal. Rptr. 3d 173, 176 (Ct. App. 2009). A plaintiff
16 bringing suit on a claim subject to the Government Claims Act "must allege facts demonstrating
17 or excusing compliance with the claim presentation requirement. Otherwise, his complaint . . .
18 fail[s] to state facts sufficient to constitute a cause of action." State v. Superior Court (Bodde),
19 90 P.3d 116, 122 (Cal. 2004). The requirement of pleading compliance applies even in federal
20 court. Karim-Panahi v. L. A. Police Dep't, 839 F.2d 621 (9th Cir. 1988). However, the claim
21 presentation requirement of the Government Claims Act "is inoperative in an action brought under
22 section 1983." Williams v. Horvath, 548 P.2d 1125, 1130 (Cal. 1976).

23 Plaintiff's complaint seeks monetary damages from state officials. The state-law claims,
24 therefore, are subject to the Government Claims Act. His complaint does not allege facts
25 demonstrating compliance with the claims presentation requirement—namely, the date on which
26 he filed a claim, its subject, the date on which it was resolved, and the administrative board's

1 decision. Nor does his complaint plead an excuse. Plaintiff's opposition of November 9, 2009,
2 alleges that he filed three administrative claims. On a motion to dismiss, the court will not
3 consider evidence outside the pleadings. Ritchie, 342 F.3d at 908. Therefore, Plaintiff's state-law
4 claims must be dismissed.

5 However, "[f]acts raised for the first time in plaintiff's opposition papers should be
6 considered by the court in determining whether to grant leave to amend." Broam v. Bogan, 320
7 F.3d 1023, 1026 n.2 (9th Cir. 2003). Plaintiff argues in his opposition that he filed three
8 administrative claims. Exhibits attached to Plaintiff's opposition demonstrate the resolution of
9 two of the claims, but not the third. One exhibit shows that the administrative board rejected a
10 claim on October 23, 2008. This claim was rejected before March 23, 2009, when Plaintiff
11 amended his complaint to include state-law claims. Thus, as to the subject of the claim rejected in
12 October, Plaintiff may have complied with the requirement that a claim be presented and rejected
13 before bringing suit. He may be able to amend his complaint to allege compliance with the
14 Government Claims Act as to some of his state-law claims.

15 Accordingly, this court GRANTS Defendants' motions to dismiss the state-law claims and
16 orders that the claims be dismissed as to all Defendants with leave to amend within 60 days.

17 **III. Conclusion and Order**

18 For the foregoing reasons, the court hereby:

19 1. GRANTS the motions to dismiss Plaintiff's due process claim arising from the
20 administrative grievance process and dismisses the claim as to all Defendants with prejudice;

21 2. GRANTS, with leave to amend within 60 days, the motions to dismiss
22 Plaintiff's excessive force claim against Defendants Albonico, Audette, Clark, Cobb, Ginder,
23 Ingwerson, Lowther, Medina, Nelson, Shaw, Speers, White, and Zinn;

24 3. GRANTS, with leave to amend within 60 days, the motion to dismiss the
25 deliberate indifference claim against Defendants Albonico, Audette, Cobb, Cochrane, Felker,
26 Ginder, Ingwerson, Lowther, Nelson, Perez, Vanderville, White, and Zinn;

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4. DENIES the motion to dismiss the deliberate indifference claim against

Defendant Speers; and

5. GRANTS, with leave to amend within 60 days, the motions to dismiss the

state-law claims as to all Defendants.

IT IS SO ORDERED.

DATED: January 22, 2010

/s/ Susan P. Graber

UNITED STATES CIRCUIT JUDGE