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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

GEORGE FETTER,  
  
Plaintiff,  
  
v.  
  
PLACER COUNTY SHERIFF, EDWARD  
N. BONNER, individually and  
in his Official Capacity,  
COUNTY OF PLACER, CALIFORNIA  
FORENSICS MEDICAL GROUP  
(CFMG), PLACER COUNTY SHERIFF  
DEPARTMENT, and DOES 1  
through 20,  
  
Defendants.

No. 2:12-cv-2235-GEB-EFB

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DIMISS THE THIRD  
AMENDED COMPLAINT**

Each of the following movants, the County of Placer ("Placer County"), the Placer County Sheriff's Office ("PCSO")<sup>1</sup> and Placer County Sheriff Bonner in his individual and official capacities (collectively "Defendants"), seek dismissal of Plaintiff's Third Amended Complaint ("TAC") under Federal Rule of Civil Procedure ("Rule") 12(b)(6). Plaintiff alleges in the TAC

<sup>1</sup> Since the PCSO argues in the dismissal motion that Plaintiff erroneously sued it as the "Placer County Sheriff Department," this Order refers to this Defendant as the PCSO.

1 violations of the Fourteenth Amendment, Title II of the Americans  
2 with Disabilities Act ("ADA"), § 504 of the Rehabilitation Act  
3 ("RA"), and California law.

4 Each movant argues the dismissal motion should be  
5 granted without leave to amend because "Plaintiff has tried  
6 unsuccessfully to plead and re-plead his allegations four times"  
7 and this demonstrates that "[f]urther leave to amend would be  
8 futile." (Mem. P.& A. ISO Mot. Dismiss TAC ("Mot.") 1:6-7, ECF  
9 No. 51-1.)

#### 10 I. LEGAL STANDARD

11 To survive a motion to dismiss, a complaint  
12 must contain sufficient factual matter,  
13 accepted as true, to "state a claim to relief  
14 that is plausible on its face." A claim has  
15 facial plausibility when the plaintiff pleads  
16 factual content that allows the court to draw  
17 the reasonable inference that the defendant  
18 is liable for the misconduct alleged. The  
19 plausibility standard is not akin to a  
"probability requirement," but it asks for  
more than a sheer possibility that a  
defendant has acted unlawfully. Where a  
complaint pleads facts that are "merely  
consistent with" a defendant's liability, it  
"stops short of the line between possibility  
and plausibility of entitlement to relief."

20 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation  
21 omitted).

22 "For purposes of a motion to dismiss, we accept all  
23 well-pleaded allegations of material fact as true and construe  
24 them in the light most favorable to the nonmoving party."  
25 Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777, 783 (9th  
26 Cir. 2012). However, "we do not accept legal conclusions in the  
27 complaint as true, even if cast in the form of factual  
28 allegations." Lacano Investments, LLC v. Balash, 765 F.3d 1068,

1 1071 (9th Cir. 2011) (internal quotation marks omitted).

2 **II. FACTUAL ALLEGATIONS**

3 The factual background, based on the allegations in  
4 Plaintiff's TAC, follows. Plaintiff alleges his "right leg was  
5 amputated due to the neglect of the defendants." (TAC ¶ 10, ECF  
6 No. 49.)

7 Plaintiff was arrested for driving under the influence.  
8 (Id. ¶¶ 11-12.) Prior to his arrest, Plaintiff fell off a roof,  
9 injuring "both of his legs, heels and ankles." (Id. ¶ 11.) While  
10 incarcerated, he "began to have extreme pain in his leg and his  
11 leg began to turn black." (Id. ¶ 15.) "[T]he deputies were  
12 informed of the pain and observed the fact that [Plaintiff's] leg  
13 was turning [b]lack," yet "refused to allow [Plaintiff] to see a  
14 doctor or transport him to the hospital." (Id. ¶¶ 15-16.)

15 Plaintiff was "placed on the upper tier for housing,  
16 forcing him to . . . climb a full flight of stairs to get to his  
17 cell, [and] although the officers were aware that Plaintiff had  
18 injuries to both ankles" and "feet and could barely walk . . .  
19 [Plaintiff] was not provided a wheelchair." (Id. ¶ 41.)

20 When Plaintiff "was ultimately released" he  
21 "immediately went to see a doctor" who informed him "the  
22 condition of his leg was so severe since it had not been attended  
23 to for so long that it would have to be amputated." (Id. ¶¶ 13,  
24 17.) A "second opinion" confirmed the diagnosis and Plaintiff's  
25 leg was amputated. (Id. ¶¶ 18-19.)

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1 **III. DISCUSSION**

2 **A. Claims Against PCSO**

3 PCSO argues all claims alleged against it in the FAC  
4 should be dismissed since although "California Government Code  
5 section 811.2 defines 'public entity' to include 'every kind of  
6 political or governmental entity in the state,' . . . [c]ourts  
7 have found that definition to exclude departments of public  
8 entities," like the PCSO. (Mot. 5:18-20.) PCSO also argues  
9 Plaintiff's 42 U.S.C. § 1983 claim against it should be dismissed  
10 since PCSO is not a "person" as the term is used in the statute  
11 concerning liability for a federal claim. (Mot. 5:26-6:2.)

12 The Ninth Circuit has held a sheriff's department is a  
13 "public entity" under Cal. Gov. Code § 811.2. Streit v. Cnty. of  
14 Los Angeles, 236 F.3d 552, 565 (9th Cir. 2001). Further, it has  
15 held that when a sheriff's department acts to "overs[ee] and  
16 manage[] . . . [a] local jail," it is considered a "person" as  
17 the term is used in 42 U.S.C. § 1983. Id. at 561.

18 Therefore, PCSO's motion to dismiss the claims against  
19 it on this ground is denied.

20 **B. 42 U.S.C. § 1983 Claims**

21 **1. Sheriff Bonner in His Individual Capacity**

22 Sheriff Bonner seeks dismissal of Plaintiff's  
23 individual capacity claim that is alleged against him under 42  
24 U.S.C. § 1983, arguing it is devoid of factual allegations  
25 concerning "what [he] personally did, or did not do, to cause the  
26 harm complained of by Plaintiff." (Mot. 11:1-2.)

27 "A supervisor may be held liable under § 1983 [in his  
28 individual capacity] if he or she was personally involved in the

1 constitutional deprivation or a sufficient causal connection  
2 exists between the supervisor's unlawful conduct and the  
3 constitutional violation." Jackson v. City of Bremerton, 263 F.3d  
4 646, 653 (9th Cir. 2001). Specifically, "[a] supervisor can be  
5 liable in his individual capacity for his own culpable action or  
6 inaction in the training, supervision, or control of his  
7 subordinates; for his acquiescence in the constitutional  
8 deprivation; or for conduct that showed a reckless or callous  
9 indifference to the rights of others." Watkins v. City of  
10 Oakland, 145 F.3d 1087, 1093 (9th Cir. 1998).

11 Plaintiff alleges in the TAC that Sheriff Bonner  
12 "condoned the [unconstitutional] activities . . . in that he  
13 knew or should have known that his staff was inadequately trained  
14 or was deliberately ignoring the health and well being of the  
15 inmates that were in their care and custody." (TAC ¶ 35.)

16 The allegation that Sheriff Bonner "condoned the  
17 [officer's] activities" "tenders naked assertions devoid of  
18 further factual enhancement" and does not plausibly allege that  
19 Sheriff Bonner violated Plaintiff's constitutional rights. Iqbal,  
20 556 U.S. at 678. Therefore, this portion of the dismissal motion  
21 is granted. Since this claim is unchanged from the claim in  
22 Plaintiff's prior complaint, which was dismissed for the same  
23 reason, the motion for dismissal without leave to amend is  
24 granted.

## 25 2. Conspiracy

26 The County, PCSO and Sheriff Bonner (in his official  
27 capacity) seek dismissal of Plaintiff's conspiracy claim against  
28 them that is alleged under § 1983, arguing the pled allegations

1 "are mere conclusions with no factual allegations to support  
2 them." (Mot. 11:15-17.)

3 Plaintiff alleges in this claim that "Defendant[s]...in  
4 conspiracy with each other [acted] to deprive Plaintiff of his  
5 federal . . . rights . . . by failing and refusing to provide  
6 Plaintiff with access to medical care" and "Defendants . . . in  
7 conspiracy with each other [acted] to deprive Plaintiff under  
8 color of state law of his rights, as guaranteed to him. . . ."  
9 (TAC ¶¶ 46, 48.)

10 These "conclusory allegations. . . [of] conspir[acy]"  
11 are devoid of sufficient facts alleging a viable conspiracy  
12 claim." Woodrum v. Woodward Cnty., 866 F.2d 1121, 1126 (9th Cir.  
13 1989). Therefore, the dismissal motion is granted. Since  
14 Plaintiff has unsuccessfully pled this claim four times, the  
15 motion for dismissal without leave to amend is granted.

16 **3. Unconstitutional Policies, Practices or Customs**  
17 **and a Failure to Adequately Hire and Train**

18 The County, PCSO and Sheriff Bonner (in his official  
19 capacity) seek dismissal of Plaintiff's section 1983 claim  
20 against them, in which Plaintiff alleges that each movant's  
21 unconstitutional policies, practices or customs or a failure to  
22 adequately hire and train employees caused his injuries.  
23 Defendants argue Plaintiff's vague and conclusory allegations  
24 cannot support this claim.

25 Plaintiff counters he adequately supports this claim in  
26 paragraphs 30 through 33 of the TAC, which state:

27 30. Plaintiff incorporates and restates each  
28 of the above paragraphs as if fully set forth  
herein.

1 31. Defendants maintained policies, customs  
2 or practices in the Main Jail that were the  
3 moving force behind the violation of  
4 Plaintiff, Fetter's constitutional rights.

5 32. Such policies, customs or practices  
6 include, but are not limited to, failing to  
7 promulgate sufficient policies and procedures  
8 to ensure that inmates' medical needs are  
9 taken into account when housing them.

10 a. Plaintiff FETTER was housed in an  
11 upper tier cell despite the fact that  
12 officers knew. . . that such housing would be  
13 detrimental to the Plaintiff because of his  
14 medical needs.

15 b. Plaintiff FETTER, was initially  
16 booked in at a medical facility because of  
17 his injuries and it is documented that the  
18 Plaintiff had calcaneous (Heel) injuries to  
19 both his right and left feet.

20 c. Plaintiff was then placed on the  
21 upper tier for housing, forcing him to have  
22 to climb a full flight of stairs to get to  
23 his cell, although the officers were aware  
24 that Plaintiff had injuries to both ankles.

25 Failing to promulgate sufficient policies and  
26 procedures to ensure that staff provide for  
27 all inmates' medical needs.

28 d. Plaintiff FETTER, although he had  
injuries to both feet and could barely walk  
and could not walk without pain was not  
provided a wheel chair.

e. Instead of a wheel chair the  
Plaintiff was provided a chair in which he  
would have to use his injured feet to make it  
mobile and had to scoot around causing much  
pain to both of his injured feet.

f. Plaintiff FETTER is informed and  
believes and on that basis alleges that the  
Defendants policies and procedures are  
inadequate to ensure that inmates will have  
access to the necessary medical devices.

f. Plaintiff FETTER is informed and  
believes and on that basis alleges that the  
Defendants had a practice of denying inmates  
the necessary medical devices as a way of  
punishing the inmates.

1 33. These Defendants knew or should have  
2 known that the policies, customs or practices  
3 in the Main Jail would cause grievous injury  
to Plaintiff, FETTER in violation of his  
constitutional rights.

4 (Opp'n 6:3-7:12.)

5 The challenged claim is a municipal liability claim.  
6 "A section 1983 plaintiff may establish municipal liability . . .  
7 [by] prov[ing] that a [municipal] employee committed [an] alleged  
8 constitutional violation pursuant to a formal government policy  
9 or a 'longstanding practice or custom which constitutes the  
10 standard operating procedure of the local government entity."  
11 Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992.) The  
12 municipality's policy, practice or custom must be the "moving  
13 force" behind the constitutional violation. City of Oklahoma v.  
14 Tuttle, 471 U.S. 808, 819 (1985). However, "[i]t is insufficient  
15 for a plaintiff to allege generally that supervisors knew about  
16 the constitutional violation or that they generally created  
17 policies and procedures that led to the violation, without  
18 alleging 'a specific policy' or 'a specific event' instigated by  
19 the supervisors that led to the constitutional violation." Peyton  
20 v. Grounds, No. 13-4232-VC(PR), 2014 WL 1866516 at \*1 (N.D. Cal.  
21 May 8, 2014) (quoting Hydrick v. Hunder, 559 F.3d 937, 942 (9th  
22 Cir. 2012) (dismissing the Complaint since "there [was] no  
23 allegation of a specific policy or custom, nor . . . specific  
24 allegations regarding each Defendant's purported knowledge of the  
25 [section 1983 violation]") (emphasis omitted).

26 Nowhere in Plaintiff's TAC does he allege "a specific  
27 policy or a specific event instigated by the [Defendants] that  
28 led to [his alleged] constitutional violation." Peyton, 2014 WL



1 1866516 at \*1. Therefore, each movant's dismissal motion is  
2 granted. Further, since Plaintiff has unsuccessfully pled this  
3 claim in three prior complaints, the motion to dismiss without  
4 leave to amend is granted.

5 **C. ADA and RA**

6 Defendants also seek dismissal of Plaintiff's ADA and  
7 RA claims, arguing that Plaintiff has not alleged "discrimination  
8 because of [a] disability", which is an element of each claim.  
9 (Mot. 12:10-14.)

10 To plead a Title II ADA claim, a plaintiff must allege  
11 he "was . . . discriminated against by the public entity. . . by  
12 reason of [his] disability." Simmons v. Navajo Cnty., 609 F.3d  
13 1011, 1021 (9th Cir. 2010) (quotation omitted) (emphasis added).  
14 To plead a § 504 RA claim, a plaintiff must allege he was  
15 "qualified to receive the benefit [of a program] . . . [but] was  
16 denied the benefits of the program solely by reason of his  
17 disability." O'Guinn v. Lovelock Correctional Ctr., 502 F.3d  
18 1056, 1060 (9th Cir. 2001) (quotation omitted) (emphasis added).

19 Plaintiff alleges in his ADA and RA claims that he was  
20 denied access to outside medical care, excluded from  
21 participating in counseling and therapy programs and assigned to  
22 an upper tier cell. (TAC ¶¶ 68, 76, 102.) However, Plaintiff does  
23 not allege he was denied access to these programs because of a  
24 disability.

25 Therefore, Plaintiff's ADA and RA claims are dismissed.  
26 Since these claims are unchanged from the claims in Plaintiff's  
27 prior complaint, which were dismissed for the same reason, the  
28 motion for dismissal without leave to amend is granted.

1           **D. California Government Code §§ 11135-11139**

2           Defendants also seek dismissal of Plaintiff's claim  
3 alleged under California Government Code § 11135, arguing  
4 Plaintiff fails to state a viable claim since he has not alleged  
5 he was "denied access to any specific program due to his  
6 disability." (Mot. 14:18-20.) Section 11135 states, in pertinent  
7 part: "No person in the State of California shall, on the basis  
8 of . . . disability, be unlawfully denied full and equal access  
9 to the benefits of, or be unlawfully subjected to discrimination  
10 under, any program or activity. . . ."

11           A "program or activity" as the phrase is used in §  
12 11135 means "any project, action or procedure. . . [;including]  
13 the provision of. . . health, welfare, rehabilitation, housing,  
14 or other services. . . ." 22 CCR § 98010.

15           Defendants assert "[w]hile Plaintiff alleges that the  
16 denial of a wheel chair and being placed on the second tier  
17 caused injury to his leg, he does not allege that these . . .  
18 acts denied him access to any programs at the Placer County  
19 Jail." (Mot. 15:15-17.)

20           Plaintiff alleges in the TAC that Defendants violated  
21 Cal. Gov. Code § 11135 "by failing to accommodate Plaintiff  
22 FETTER'S need for a wheel chair and by placing him on an upper  
23 tier." (TAC ¶ 55.)

24           Defendants have not shown that this claim should be  
25 dismissed. Therefore, this portion of the motion is denied.

26           **E. California Disabled Persons Act**

27           Defendants seek dismissal of Plaintiff's claim alleged  
28 under the California Disabled Persons Act ("CDPA"), arguing it

1 alleges a denial of access to a service, which the CDPA "does not  
2 address." (Mot. 16:13-14.) Plaintiff alleges that Defendants'  
3 failed provide him "access to the appropriate medical care and  
4 attention" necessary to treat his condition. (TAC ¶ 60.) This  
5 allegation essentially alleges the denial of a service.

6 The CDPA prescribes in part that: "[i]ndividuals with  
7 disabilities or medical conditions have the same right as the  
8 general public to the full and free use of . . . public  
9 buildings, medical facilities. . . public facilities, and other  
10 public places." Cal. Civ. Code § 54. "The CDPA is concerned  
11 solely with physical access to public spaces. Thus, Plaintiff  
12 cannot maintain a claim based on the denial of services."  
13 Wilkins-Jones v. Cnty. of Alameda, 859 F. Supp. 2d 1039, 1054  
14 (N.D. Cal. 2012).

15 Therefore, Defendants dismissal motion is granted with  
16 leave to amend.

17 **F. California Government Code § 845.6**

18 Placer County and Sheriff Bonner (in his official  
19 capacity) seek dismissal of Plaintiff's claim alleging that their  
20 conduct violates California Government Code § 845.6, arguing this  
21 statute requires an inmate to be in need of immediate medical  
22 care and "Plaintiff...has not claimed any exigent circumstances"  
23 showing he was in need of immediate medical care. (Mot. 15:26-  
24 27.)

25 Plaintiff argues the allegation "that [his] leg had  
26 turned [b]lack" demonstrates he was in need of immediate medical  
27 care. (Opp'n 12:1-5.)

28 California Government Code § 845.6 prescribes:

1 Neither a public entity nor a public employee  
2 is liable for injury proximately caused by  
3 the failure of the employee to furnish or  
4 obtain medical care for a prisoner in his  
5 custody. . . [unless the] public employee and  
6 the public entity where the employee is  
7 acting . . . knows or has reason to know that  
8 the prisoner is in need of immediate medical  
9 care and he fails to take reasonable action  
10 to summon such medical care.

11 Plaintiff alleges he is a "white/Caucasian male" whose  
12 leg "began to turn black." (TAC ¶ 15.) The movants have not shown  
13 this allegation is insufficient to allege that Plaintiff was in  
14 need of immediate medical care. Therefore, this portion of the  
15 motion is denied.

16 **G. Negligence, Negligent Hiring and Supervision, and**  
17 **Negligent Infliction of Emotional Distress**

18 **1. Sheriff Bonner in His Individual and Official**  
19 **Capacities**

20 Sheriff Bonner seeks dismissal of Plaintiff's  
21 negligence, negligent hiring and supervision, and negligent  
22 infliction of emotional distress claims alleged against him in  
23 his individual and official capacities, arguing each is based on  
24 the alleged conduct of his subordinates for which he "cannot be  
25 liable under Gov. Code § 820.8(a)(2)." (Mot. 16:3-4.)

26 Cal. Gov. Code § 820.8 states in part: "Except as  
27 otherwise provided by statute, a public employee is not liable  
28 for an injury caused by the act or omission of another person."

Concerning Plaintiff's negligence and negligent  
infliction of emotional distress claims, Plaintiff does not  
allege that Sheriff Bonner was personally involved with his  
injuries alleged in these claims. Therefore, these claims are

1 dismissed. However, Plaintiff does allege in his negligent  
2 supervision, training, hiring and retention claim alleges that  
3 Sheriff Bonner is "direct[ly] liability for [his own]  
4 negligence." Delfino v. Agilent Technologies, Inc., 145 Cal. App.  
5 4th 790, 815 (2006).

6 Specifically, Plaintiff alleges Sheriff Bonner had "a  
7 duty to hire, supervise, train and retain employee[s]. . . so  
8 that these employees. . . refrain[ed] from the conduct alleged,"  
9 that Sheriff Bonner "breached this duty causing the conduct  
10 alleged," and that this "breach proximately caused the [alleged]  
11 damages and injur[y] to Plaintiff . . . ." (TAC ¶¶ 91-93.)

12 However, these conclusory allegations do not support  
13 drawing a reasonable inference that Sheriff Bonner is liable for  
14 this claim, and it is therefore dismissed. Fayer, 649 F.3d at  
15 1064 ("[C]onclusory allegations of law and unwarranted inferences  
16 are insufficient to defeat a motion to dismiss.").

17 Since these claims are unchanged from the claims in  
18 Plaintiff's prior complaint, which were dismissed for the same  
19 reason, the motion for dismissal without leave to amend is  
20 granted.

## 21 **2. Placer County and PCSO**

22 Placer County and PCSO seek dismissal of Plaintiff's  
23 negligence and negligent infliction of emotional distress claims  
24 alleged against them; and Placer County also seeks dismissal of  
25 Plaintiff's negligent hiring, training and retention claim  
26 alleged against it. These movants argue California "Government  
27 Code section 844.6(a)(2) immunizes . . . [them from claims  
28 alleging] injur[y] to [a] prisoner[]." (Mot. 17:4-6.)

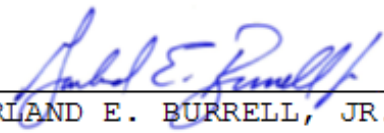
1 Cal. Gov. Code § 844.6(a)(2) prescribes in part:  
2 "[p]ublic entities" are "not liable for an injury to any  
3 prisoner." Counties and local law enforcement agencies are  
4 considered "public entities." Cal. Gov. Code § 811.2 (holding  
5 counties to be public entities); Streit, 236 F.3d at 565 (finding  
6 a county sheriff's department was a public entity); Shaw v. State  
7 of California Dep't of Alcoholic Beverage Control, 788 F.2d 600,  
8 605 (9th Cir. 1986) ("[W]e conclude that the courts of California  
9 would hold that the Police Department is a public entity under  
10 section 811.2.").

11 Therefore, Placer County and PCSO are immune from suit  
12 for Plaintiff's negligence-based claims and the claims are  
13 dismissed. Since these claims are unchanged from the claims in  
14 Plaintiff's prior complaint, which were dismissed for the same  
15 reason, the motion for dismissal without leave to amend is  
16 granted.

#### 17 IV. CONCLUSION

18 For the reasons stated above, the dismissal motion is  
19 GRANTED IN PART and DENIED IN PART. Plaintiff is granted ten days  
20 (10) from the date on which this order is filed to amend any  
21 claim dismissed with leave to amend.

22 Dated: January 12, 2015

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25 \_\_\_\_\_  
26 GARIAND E. BURRELL, JR.  
27 Senior United States District Judge  
28