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8	UNITED STATES DISTRICT COURT	
9	FOR THE EASTERN DISTRICT OF CALIFORNIA	
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11	CURTIS RENEE JACKSON,	No. 2:16-cv-685-KJM-EFB P
12	Plaintiff,	
13	V.	FINDINGS AND RECOMMENDATIONS
14	D. GIBBS, et al.	
15	Defendants.	
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17	Plaintiff is a state prisoner proceeding without counsel in an action brought under 42	
18	U.S.C. § 1983. On October 5, 2017, the court dismissed plaintiff's complaint with leave to	
19	amend after finding that it failed to state a vial	ble claim upon which relief could be granted. ECF
20	No. 6. Plaintiff has filed an amended complai	nt (ECF No. 11) which is before the court for
21	screening. 28 U.S.C. § 1915A(a).	
22	Screening	g Requirements
23	The court must dismiss a complaint or	portion thereof if the prisoner has raised claims that
24	are legally "frivolous or malicious," that fail to	o state a claim upon which relief may be granted, or
25	that seek monetary relief from a defendant wh	o is immune from such relief. 28 U.S.C.
26	§ 1915A(b)(1), (2).	
27	A claim "is [legally] frivolous where it lacks an arguable basis either in law or in fact."	
28	Neitzke v. Williams, 490 U.S. 319, 325 (1989)	; Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
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Cir. 1984). "[A] judge may dismiss [in forma pauperis] claims which are based on indisputably
 meritless legal theories or whose factual contentions are clearly baseless." *Jackson v. Arizona*,
 885 F.2d 639, 640 (9th Cir. 1989) (citation and internal quotations omitted), *superseded by statute on other grounds as stated in Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000); *Neitzke*, 490
 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded,
 has an arguable legal and factual basis. *Id*.

7 "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the 8 claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of 9 what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 10 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). 11 However, in order to survive dismissal for failure to state a claim, a complaint must contain more 12 than "a formulaic recitation of the elements of a cause of action;" it must contain factual 13 allegations sufficient "to raise a right to relief above the speculative level." Id. (citations 14 omitted). "[T]he pleading must contain something more . . . than . . . a statement of facts that 15 merely creates a suspicion [of] a legally cognizable right of action." Id. (alteration in original) 16 (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure 1216 (3d 17 ed. 2004)).

18 "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to 19 relief that is plausible on its face." Ashcroft v. Igbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. 20 Corp., 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content 21 that allows the court to draw the reasonable inference that the defendant is liable for the 22 misconduct alleged." Id. (citing Bell Atl. Corp., 550 U.S. at 556). In reviewing a complaint 23 under this standard, the court must accept as true the allegations of the complaint in question, 24 Hospital Bldg. Co. v. Rex Hosp. Trs., 425 U.S. 738, 740 (1976), as well as construe the pleading 25 in the light most favorable to the plaintiff and resolve all doubts in the plaintiff's favor, *Jenkins v*. 26 McKeithen, 395 U.S. 411, 421 (1969).

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1	Screening Order
2	Plaintiff alleges that, on February 9, 2015 and at the California Medical Facility, he was
3	stopped for a pat-down search by defendant Gibbs after exiting the general population exercise
4	yard. ECF No. 11 at 4. Plaintiff states that he is paraplegic and uses a wheelchair. Id. The pat
5	down search revealed a small plastic bottle labelled "deep sea nasal moisturizing spray" in the
6	back of the wheelchair, which plaintiff asserts contained liquid soap. Id. Defendant Gibbs then
7	directed plaintiff to lean forward in order to complete the search, and plaintiff complied. Id.
8	Plaintiff then alleges that, without warning, Gibbs put his hand inside plaintiff's
9	underwear and slid his fingers "down the center of plaintiff's buttocks." Id. at 6. Plaintiff
10	demanded to know what Gibbs was doing, and Gibbs stated that he "needed to go deeper." Id.
11	Defendant Reece stated that "you never had a man on your ass." Id. Plaintiff asserts that Gibbs'
12	search violated his Eighth Amendment right to be free from sexual abuse. Id. at 4. He claims
13	that Reece violated his Eighth Amendment rights by failing to stop Gibbs' sexual assault and by
14	failing to report the incident to the proper authorities. Id. at 8.
15	Prison officials may violate an inmate's Eighth Amendment rights by way of repetitive
16	and harassing searches, and from sexual abuse. Hudson v. Palmer, 468 U.S. 517, 530 (1984);
17	Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000). Not every malevolent touch by a
18	prison guard or official gives rise to an Eighth Amendment violation, however. De minimis uses
19	of force do not give rise to liability under section 1983. See Hudson v. McMillian, 503 U.S. 1, 9-
20	10 (1992); Berryhill v. Schriro, 137 F.3d 1073, 1076 (8th Cir. 1998) (no Eighth Amendment
21	violation where employees briefly touched inmate's buttocks with apparent intent to embarrass
22	him).
23	The court concludes that defendants' actions do not give rise to an Eighth Amendment
24	violation. For an allegedly inappropriate body search to violate the Eighth Amendment, the
25	plaintiff must demonstrate that the search amounted to the unnecessary and wanton infliction of
26	pain. Jordan v. Gardner, 986 F.2d 1521, 1525-26 (9th Cir. 1993) (concluding that "momentary
27	discomfort" is not enough). Here, Gibbs briefly touched plaintiff's buttocks during a search that

28 was occasioned by the discovery of a plastic bottle in his wheelchair. This action, standing alone,

does not rise to the level of unnecessary and wanton infliction of pain which the Eighth
Amendment prohibits. *Id.* at 1525. And the defendants' comments, while unprofessional, do not
themselves establish an Eighth Amendment violation. *See Watison v. Carter*, 668 F.3d 1108,
1113 (9th Cir. 2012) ("the exchange of verbal insults between inmates and guards is a constant,
daily ritual observed in this nation's prisons of which we do not approve, but which do not violate
the Eighth Amendment.") (internal quotation marks omitted).

7 Moreover, as the court stated in its previous order, Gibbs' search was reasonable for the 8 purposes of the Fourth Amendment. ECF No. 6 at 4. "The test of reasonableness under the 9 Fourth Amendment is not capable of precise definition or mechanical application. In each case it 10 requires a balancing of the need for the particular search against the invasion of personal rights 11 that the search entails. Courts must consider the scope of the particular intrusion, the manner in 12 which it is conducted, the justification for initiating it, and the place in which it is conducted." 13 Nunez v. Duncan, 591 F.3d 1217, 1227 (9th Cir. 2010) (quoting Bell v. Wolfish, 441 U.S. 520, 14 559, (1979)). The initial pat-down search in this case revealed a small, plastic bottle in the 15 "bottom of the seating area of plaintiff ['s] wheelchair." ECF No. 11 at 6. The item was found 16 after plaintiff had left a general population prison yard. Id. Thus, a further search of plaintiff's 17 person was not unreasonable under the circumstances. See, e.g., Thompson v. Souza, 111 F.3d 18 694, 700 (9th Cir. 1997) (holding that visual strip searches and urine tests to search for drugs 19 were reasonably related to the prison officials' legitimate penological interest in keeping drugs out 20 of prison).

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## Leave to Amend

The only remaining question is whether to grant plaintiff further leave to amend his complaint. The current complaint represents plaintiff's second attempt at stating a potentially cognizable claim and, given the similarity between his complaints, it does not appear that plaintiff has any additional, materially relevant allegations to add. Thus, plaintiff's failure to state a viable claim in either of his complaints counsels against a third attempt. *See, e.g., McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 809-810 (9th Cir. 1988) ("Repeated failure to cure deficiencies by /////

1	amendments previously allowed is another valid reason for a district court to deny a party leave		
2	to amend.").		
3	Conclusion		
4	Accordingly, it is RECOMMENDED that plaintiff's amended complaint (ECF No. 11) be		
5	DISMISSED without leave to amend for failure to state a cognizable claim and that the Clerk be		
6	directed to close the case.		
7	These findings and recommendations are submitted to the United States District Judge		
8	assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days		
9	after being served with these findings and recommendations, any party may file written		
10	objections with the court and serve a copy on all parties. Such a document should be captioned		
11	"Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections		
12	within the specified time may waive the right to appeal the District Court's order. <i>Turner v</i> .		
13	Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).		
14	DATED: October 11, 2018.		
15	Elming F. Biemm		
16	EDMUND F. BRENNAN UNITED STATES MAGISTRATE JUDGE		
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