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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CURTIS RENEE JACKSON,
Plaintiff,
v.
D. GIBBS, et al.,
Defendants.

No. 2:16-cv-0685-KJM-EFB P

ORDER DISMISSING COMPLAINT WITH
LEAVE TO AMEND PURSUANT TO 28
U.S.C. § 1915A

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He seeks leave to proceed in forma pauperis.

I. Request to Proceed In Forma Pauperis

Plaintiff’s application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

II. Screening Requirement and Standards

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which

1 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such
2 relief.” *Id.* § 1915A(b).

3 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)
4 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and
5 plain statement of the claim showing that the pleader is entitled to relief, in order to give the
6 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*
7 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

8 While the complaint must comply with the “short and plain statement” requirements of Rule 8,
9 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556
10 U.S. 662, 679 (2009).

11 To avoid dismissal for failure to state a claim a complaint must contain more than “naked
12 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of
13 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of
14 a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at
15 678.

16 Furthermore, a claim upon which the court can grant relief must have facial plausibility.
17 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual
18 content that allows the court to draw the reasonable inference that the defendant is liable for the
19 misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a
20 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*
21 *Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the
22 plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

23 **III. Screening Order**

24 The court has reviewed plaintiff’s complaint (ECF No. 1) pursuant to § 1915A and finds it
25 must be dismissed for failure to state a claim. According to the complaint, defendant Gibbs
26 stopped and searched plaintiff when plaintiff was leaving the exercise yard, which was shared by
27 “high risk” inmates. Gibbs allegedly told plaintiff, who is confined to a wheelchair, to lean
28 forward so he could search the bottom back side of the wheelchair. Gibbs placed his hand down

1 the back side of plaintiff's wheelchair and discovered a small plastic bottle, which plaintiff
2 claimed contained soap. Gibbs continued his search by inserting his hand "down the back side of
3 plaintiff's underwear, placing his fingers deeply down the center of plaintiff's buttocks, nearly
4 touching the anal area" ECF No. 1 ¶ 11. This sent plaintiff into a "verbal rage," and
5 plaintiff asked "what the fuck are you doing?" *Id.* Gibbs allegedly responded, "I needed to go
6 deep," and then said "I need some of that soap to wash my hands." *Id.* Defendant Reece, who
7 was also present during the search, then said, "You never had a man on your ass." *Id.* ¶ 12.
8 Plaintiff claims that defendants Gibbs and Reece, through their "sexual" abuse and comments,
9 violated plaintiff's Eighth and Fourteenth Amendment rights. As set forth below, the allegations
10 fail to state a cognizable claim under the applicable standards.

11 A prison official violates the Eighth Amendment's proscription of cruel and unusual
12 punishment where he or she deprives a prisoner of the minimal civilized measure of life's
13 necessities with a "sufficiently culpable state of mind." *Farmer v. Brennan*, 511 U.S. 825, 834
14 (1994). To state such an Eighth Amendment claim, a prisoner must allege facts showing that (1)
15 the defendant prison official's conduct deprived him or her of the minimal civilized measure of
16 life's necessities and (2) that the defendant acted with deliberate indifference to the prisoner's
17 health or safety. *Id.* at 834.

18 Although prisoners have a right to be free from sexual abuse, the Eighth Amendment's
19 protections do not necessarily extend to mere verbal sexual harassment. *Austin v. Terhune*, 367
20 F.3d 1167, 1171 (9th Cir. 2004); *Watison v. Carter*, 668 F.3d 1108, 1113 (9th Cir. 2012) ("the
21 exchange of verbal insults between inmates and guards is a constant, daily ritual observed in this
22 nation's prisons of which we do not approve, but which do not violate the Eighth Amendment."
23 (internal quotation marks omitted)). A guard's physical sexual assault of an inmate, however, is
24 "offensive to human dignity" and may violate the Eighth Amendment. *Schwenk v. Hartford*, 204
25 F.3d 1187, 1196-97 (9th Cir. 1987). For an allegedly inappropriate body search to violate the
26 Eighth Amendment, the plaintiff must demonstrate that the search amounted to the unnecessary
27 and wanton infliction of pain. *Jordan v. Gardner*, 986 F.2d 1521, 1525-26 (9th Cir. 1993)
28 (concluding that "momentary discomfort" is not enough). In the absence of a preexisting mental

1 condition or a particularly invasive search, the humiliation allegedly suffered because of
2 unwanted physical contact from a correctional officer “does not rise to the level of severe
3 psychological pain required to state an Eighth Amendment claim.” *Watison*, 668 F.3d at 1112-14
4 (affirming dismissal of Eighth Amendment claim against correctional officer who allegedly
5 entered inmate’s cell while on the toilet, and rubbed his thigh against the inmate’s thigh, while
6 smiling and laughing).

7 For purposes of the Fourth Amendment, searches of prisoners must be reasonable to be
8 constitutional. *Nunez v. Duncan*, 591 F.3d 1217, 1227 (9th Cir. 2010). “The test of
9 reasonableness under the Fourth Amendment is not capable of precise definition or mechanical
10 application. In each case it requires a balancing of the need for the particular search against the
11 invasion of personal rights that the search entails. Courts must consider the scope of the
12 particular intrusion, the manner in which it is conducted, the justification for initiating it, and the
13 place in which it is conducted.” *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 559, (1979)).

14 Here, plaintiff alleges that Gibbs’s initial search consisted of searching behind plaintiff’s
15 back when plaintiff was leaving the yard, which was shared by high risk inmates. When this
16 initial search produced a small bottle, Gibbs searched further, reaching into plaintiff’s underwear
17 and “down the center of plaintiff’s buttocks,” which sent plaintiff into a “verbal rage.” Gibbs and
18 Reece then made several “sexual” comments to plaintiff. These allegations fail to demonstrate
19 that the conduct of either defendant amounted to the unnecessary and wanton infliction of pain or
20 that either had the requisite mental state for an Eighth Amendment violation. In addition, the
21 allegations do not suggest that the search was otherwise unreasonable under the circumstances.

22 Plaintiff will be granted leave to file an amended complaint, if he can allege a cognizable
23 legal theory against a proper defendant and sufficient facts in support of that cognizable legal
24 theory. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (*en banc*) (district courts must
25 afford pro se litigants an opportunity to amend to correct any deficiency in their complaints).
26 Should plaintiff choose to file an amended complaint, the amended complaint shall clearly set
27 forth the claims and allegations against each defendant. Any amended complaint must cure the
28 deficiencies identified above and also adhere to the following requirements:

1 Any amended complaint must identify as a defendant only persons who personally
2 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*
3 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a
4 constitutional right if he does an act, participates in another's act or omits to perform an act he is
5 legally required to do that causes the alleged deprivation).

6 It must also contain a caption including the names of all defendants. Fed. R. Civ. P. 10(a).

7 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. *George*
8 *v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

9 Any amended complaint must be written or typed so that it so that it is complete in itself
10 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
11 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
12 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
13 F.3d 1467, 1474 (9th Cir. 1997) (the ““amended complaint supersedes the original, the latter
14 being treated thereafter as non-existent.””) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
15 1967)).

16 The court cautions plaintiff that failure to comply with the Federal Rules of Civil
17 Procedure, this court's Local Rules, or any court order may result in this action being dismissed.
18 *See* E.D. Cal. L.R. 110.

19 **IV. Summary of Order**

20 Accordingly, IT IS HEREBY ORDERED that:

- 21 1. Plaintiff's request to proceed in forma pauperis (ECF No. 2) is granted.
- 22 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected
23 in accordance with the notice to the California Department of Corrections and
24 Rehabilitation filed concurrently herewith.
- 25 3. The complaint is dismissed with leave to amend within 30 days. The complaint
26 must bear the docket number assigned to this case and be titled “Amended
27 Complaint.” Failure to comply with this order will result in dismissal of this
28 action for failure to prosecute. If plaintiff files an amended complaint stating a

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cognizable claim the court will proceed with service of process by the United States Marshal.

Dated: October 4, 2017.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE