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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL XAVIER BELL,
Plaintiff,
v.
MICHAEL MARTEL, et al.,
Defendants.

No. 2:17-cv-0063 CKD P

ORDER

I. Introduction

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

1 II. Screening Standard

2 The court is required to screen complaints brought by prisoners seeking relief against a
3 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
4 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
5 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
6 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

7 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
8 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
9 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
10 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
11 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
12 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
13 Cir. 1989); Franklin, 745 F.2d at 1227.

14 In order to avoid dismissal for failure to state a claim a complaint must contain more than
15 “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause
16 of action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words,
17 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
18 statements do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a claim
19 upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. “A
20 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
21 the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S. Ct.
22 at 1949. When considering whether a complaint states a claim upon which relief can be granted,
23 the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007),
24 and construe the complaint in the light most favorable to the plaintiff, see Scheuer v. Rhodes, 416
25 U.S. 232, 236 (1974).

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1 III. Discussion

2 Plaintiff names multiple defendants at the Department of State Hospitals, located on the
3 campus of the California Health Care Facility in Stockton, California. In May 2016, plaintiff was
4 housed there to receive treatment for mental illness. Plaintiff alleges that, during a May 5, 2016
5 cell extraction when he was suicidal, several defendants used excessive force in violation of the
6 Eighth Amendment. Plaintiff alleges that he received injuries including a bloody nose, two black
7 eyes, ruptured veins in both eyes, bruises, back pain, and a skull fracture.

8 The Eighth Amendment prohibits cruel and unusual punishment. “[T]he unnecessary and
9 wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth
10 Amendment.” Whitely v. Albers, 475 U.S. 312, 319 (1986). “The Eighth Amendment’s
11 prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition
12 de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the
13 conscience of mankind.” Wilkins v. Gaddy, 559 U.S. 34, 37-38 (2010) (quoting Hudson v.
14 McMillian, 503 U.S. 1, 9 (1992)) (internal quotations omitted).

15 Not every malevolent touch by a prison guard gives rise to a federal cause of action.
16 Wilkins, 559 U.S. at 37 (quoting Hudson, 503 U.S. at 9) (quotation marks omitted). In
17 determining whether the use of force was wanton and unnecessary, courts may evaluate the extent
18 of the prisoner’s injury, the need for application of force, the relationship between that need and
19 the amount of force used, the threat reasonably perceived by the responsible officials, and any
20 efforts made to temper the severity of a forceful response. Hudson, 503 U.S. at 7 (quotation
21 marks and citations omitted). While the absence of a serious injury is relevant to the Eighth
22 Amendment inquiry, it does not end it. Hudson, 503 U.S. at 7. The malicious and sadistic use of
23 force to cause harm always violates contemporary standards of decency. Wilkins, 559 U.S. at 37
24 (quoting Hudson, 503 U.S. at 9) (quotation marks omitted). Thus, it is the use of force rather than
25 the resulting injury which ultimately counts. Id. at 1178. Mere negligence is not actionable under
26 §1983 in the prison context. Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004).

27 Having carefully reviewed the complaint and attachments, the undersigned concludes that
28 the complaint states cognizable Eighth Amendment claims against defendants Richardson and

1 Wagner, both of whom allegedly punched plaintiff in the face during the cell extraction.

2 Plaintiff's allegations that some defendants falsified reports about this incident do not
3 suffice to state a claim. See Daniels-Hall v. National Educ. Ass'n, 629 F.3d 992, 998 (9th Cir.
4 2010) (while the court must assume plaintiff's factual allegations are true, it is not required to
5 accept allegations that are "merely conclusory, unwarranted deductions of fact, or unreasonable
6 inferences.").

7 As to the supervisory defendants, supervisory personnel are generally not liable under
8 §1983 for the actions of their employees under a theory of respondeat superior and, therefore,
9 when a named defendant holds a supervisory position, the causal link between him and the
10 claimed constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858,
11 862 (9th Cir. 1979). A defendant may be held liable as a supervisor under § 1983 if there exists
12 "either (1) his or her personal involvement in the constitutional deprivation; or (2) a sufficient
13 causal connection between the supervisor's wrongful conduct and the constitutional violation."
14 Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011), citing Hansen v. Black, 885 F.2d 642, 646
15 (9th Cir. 1989). A supervisor's own culpable action or inaction in the training, supervision, or
16 control of his subordinates may establish supervisory liability. Starr, 652 F.3d at 1208. However,
17 allegations do not state a cause of action against a supervisory defendant where "there is no
18 allegation of a *specific* policy implemented by the Defendant[] or a *specific* event or events
19 instigated by the Defendant[] that led to" the purportedly unconstitutional conduct. Hydrick v.
20 Hunter, 669 F.3d 937, 942 (9th Cir. 2012) (emphasis in original).

21 Under these standards, plaintiff's claims against all defendants except Wagner and
22 Richardson must be dismissed. However, plaintiff will have one opportunity to amend the
23 complaint.

24 IV. Leave to Amend

25 Plaintiff will be given 30 days from the date of service of this order to amend his
26 complaint to cure the deficiencies set forth above. Plaintiff is not required to file an amended
27 complaint, but failure to do so will be construed as plaintiff's consent to dismiss all defendants
28 except Richardson and Wagner.

1 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to
2 make plaintiff's amended complaint complete. Local Rule 220 requires that an amended
3 complaint be complete in itself without reference to any prior pleading. This is because, as a
4 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375
5 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no
6 longer serves any function in the case. Therefore, in an amended complaint, as in an original
7 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

8 V. Motion for Counsel

9 Plaintiff has requested the appointment of counsel. The United States Supreme Court has
10 ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983
11 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In certain exceptional
12 circumstances, the court may request the voluntary assistance of counsel pursuant to 28 U.S.C. §
13 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900
14 F.2d 1332, 1335-36 (9th Cir. 1990). In the present case, the court does not find the required
15 exceptional circumstances at this time. Plaintiff's request for the appointment of counsel will
16 therefore be denied without prejudice to renewal at a later stage of the litigation.

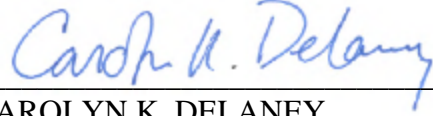
17 In accordance with the above, IT IS HEREBY ORDERED that:

- 18 1. Plaintiff's request for leave to proceed in forma pauperis is granted;
- 19 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. All fees
20 shall be collected and paid in accordance with this court's order to the Director of the California
21 Department of Corrections and Rehabilitation filed concurrently herewith;
- 22 3. Plaintiff's claims against all defendants except Richardson and Wagner are dismissed
23 with leave to amend;
- 24 4. If plaintiff elects to amend, any amended complaint must bear the docket number
25 assigned this case and must be labeled "Amended Complaint";
- 26 5. If plaintiff elects to amend, the Amended Complaint shall be filed no more than thirty
27 days from the date of this order;
- 28 6. Upon the filing of an amended complaint or expiration of the time allowed therefor, the

1 court will make further orders for service of process upon some or all of the defendants; and

2 7. Plaintiff's motion to appoint counsel (ECF No. 6) is denied without prejudice to
3 renewal at a later stage of this litigation.

4 Dated: April 12, 2017



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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