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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALEXANDRA FERREIRA DA SILVA,
Plaintiff,
v.
JONATHAN KEVIN ROSS, et al.,
Defendants.

No. 2:21-cv-1208-KJM-CKD PS

FINDINGS AND RECOMMENDATIONS
(ECF No. 32)

Plaintiff proceeds pro se with a civil rights action under 42 U.S.C. § 1983. Defendant’s motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is before the court. This matter is appropriate for decision without oral argument. See Local Rule 230(g). For the reasons that follow, the undersigned recommends the motion be denied.

I. PROCEDURAL BACKGROUND

Plaintiff initiated this action on July 9, 2021. (ECF No. 1.) On October 28, 2021, service of plaintiff’s first amended complaint (“FAC”) was found appropriate for defendant, Officer Heidi Morgan, for an alleged unconstitutionally excessive use of force in violation of the Fourteenth Amendment. (ECF No. 13.) On June 17, 2022, defendant moved to dismiss the complaint. (ECF No. 32.) Plaintiff filed an opposition and defendant filed a reply. (ECF Nos. 43, 44.)

1 **II. LEGAL STANDARDS FOR A MOTION TO DISMISS**

2 Dismissal under Rule 12(b)(6) may be warranted for “the lack of a cognizable legal theory
3 or the absence of sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica
4 Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990). In evaluating whether a complaint states a claim
5 on which relief may be granted, the court accepts as true the allegations in the complaint and
6 construes the allegations in the light most favorable to the plaintiff. Hishon v. King & Spalding,
7 467 U.S. 69, 73 (1984); Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989).

8 “[R]ecitals of the elements of a cause of action, supported by mere conclusory statements,
9 do not suffice” to state a valid claim for relief. Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009). A
10 complaint must do more than allege mere “labels and conclusions” or “a formulaic recitation of
11 the elements of a cause of action.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
12 order to state a valid claim for relief, a plaintiff must allege “enough facts to state a claim to relief
13 that is plausible on its face.” Twombly, 550 U.S. at 570. A claim that is plausible on its face has
14 sufficient factual content to allow a reasonable inference that the defendant is liable for the
15 misconduct alleged. Iqbal, 556 U.S. at 678.

16 Courts of this circuit recognize their duty “to ensure that pro se litigants do not lose their
17 right to a hearing on the merits of their claim due to ignorance of technical procedural
18 requirements.” Balistreri, 901 F.2d at 699. As such, the pleadings of pro se litigants “are liberally
19 construed, particularly where civil rights claims are involved.” Id. However, a court’s “liberal
20 interpretation of a civil rights complaint may not supply essential elements of [a] claim that were
21 not initially pled.” Ivey v. Bd. of Regents of Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

22 **III. DISCUSSION**

23 **A. RELEVANT ALLEGATIONS IN THE COMPLAINT**

24 Plaintiff was an ICE detainee at Yuba County jail in March of 2020. (ECF No. 12 at 25.)
25 On March 17, 2020, while escorting plaintiff to the dorm, Officer Morgan struck plaintiff “several
26 times on middle back with her two hands and shoved [plaintiff] through the hallway (from the
27 elevator close to booking until close to the kitchen area).” (Id.) Plaintiff alleges this use of force
28 occurred “without any provocation.” (Id. at 27.) Plaintiff further alleges she sustained an injury:

1 “Today I have an injury on my back[.]” (Id. at 25.)

2 **B. DEFENDANT’S MOTION TO DISMISS**

3 In the motion to dismiss, defendant asserts (1) the FAC fails to state a claim for relief; (2)
4 C/O Morgan is entitled to qualified immunity for the alleged use of force; (3) the FAC fails to
5 state a short and plain statement under Rule 8 of the Federal Rules of Civil Procedure; and (4)
6 plaintiff fails to allege that she complied with the Prison Litigation Reform Act (“PLRA”) by
7 filing/appealing her grievances through the Yuba County Jail system. (ECF No. 32 at 2.)

8 **1. Legal Standards for the Excessive Force Claim**

9 Constitutional questions regarding the conditions and circumstances of plaintiff’s
10 confinement are properly raised under the Due Process Clause of the Fourteenth Amendment. See
11 City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); Bell v. Wolfish, 441 U.S. 520,
12 535 (1979). The due process rights of detainees who are not convicted prisoners are “at least as
13 great as the Eighth Amendment protections available to a convicted prisoner.” Revere, 463 U.S.
14 at 244. Thus, while the Eighth Amendment provides a minimum standard of care for detainees,
15 plaintiff’s rights while she was detained are determined under the Due Process Clause of the
16 Fourteenth Amendment rather than the Eighth Amendment’s protection against cruel and unusual
17 punishment. Gibson v. County of Washoe, 290 F.3d 1175, 1197 (2001) (overruled on other
18 grounds by Castro v. County of Los Angeles, 833 F.3d 1060 (2016)).

19 The constitution does not prohibit the use of objectively reasonable force by officers. See
20 Tatum v. City & County of San Francisco, 441 F.3d 1090, 1095 (9th Cir. 2006). Whether force
21 used was excessive depends on “whether the officers’ actions [were] ‘objectively reasonable’ in
22 light of the facts and circumstances confronting them, without regard to their underlying intent or
23 motivation.” Graham v. Connor, 490 U.S. 386, 397 (1989); Tatum, 441 F.3d at 1095; Lolli v.
24 County of Orange, 351 F.3d 410, 415 (9th Cir. 2003). The proper inquiry balances the nature and
25 quality of the intrusion against the countervailing governmental interests at stake. Graham, 490
26 U.S. at 396; Lolli, 351 F.3d at 415. The “reasonableness” of a particular use of force must be
27 judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision
28 of hindsight. Graham, 490 U.S. at 396. “Not every push or shove, even if it may later seem

1 unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment.” Id. (internal
2 quotation marks omitted).

3 **2. Adequacy of the Claim Pleaded**

4 Citing Parker v. City of Los Angeles, 726 Fed. Appx. 546 (9th Cir. 2018), Saucier v. Katz,
5 533 U.S. 194 (2001), and Palacios v. City of Oakland, 970 F. Supp. 732, 740 (N.D. Cal. 1997),
6 defendant argues prior courts have found an officer’s use of a push/shove to be not excessive
7 under 42 U.S.C. § 1983 if the officer used a reasonable amount of force and had a legitimate
8 interest in using the amount of force used. (ECF No. 32-1 at 7-8.)

9 Defendant argues plaintiff’s allegations that defendant used excessive force must be taken
10 along with defendant’s description of the incident in the incident report attached to the FAC. (See
11 ECF No. 32-1 at 1.) Based on plaintiff’s allegations and defendant’s description of the incident,
12 defendant argues, there were two possible uses of force on March 17, 2020:

13 First, CO Morgan touched Plaintiff’s shoulder to redirect her away
14 from booking and towards the housing unit. Secondly, CO Morgan
15 used an open palm to shove Plaintiff when she stopped in order to
keep Plaintiff walking towards the housing unit and away from the
male inmates in the holding cell.

16 (Id. at 7.) Defendant argues these can only be described as both minimal and reasonable uses of
17 force under the circumstances. (Id.)

18 Here, though, plaintiff’s allegations need not be taken along with defendant’s version of
19 the incident set forth in the incident report. Although exhibits attached to a complaint are part of
20 the complaint “for all purposes,” Fed. R. Civ. P. 10(c), that does not mean all facts set forth in
21 attachments to a complaint must be treated as true. See Guzell v. Hiller, 223 F.3d 518, 519 (7th
22 Cir. 2000). “A plaintiff in a libel suit who attached the allegedly libelous article to his complaint
23 would obviously not be vouching for the truth of the libelous assertions in the article.” Id. (citing
24 Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 674 (2nd Cir. 1995)). The plaintiff’s purpose in
25 attaching an exhibit to the complaint determines what assertions, if any, in the exhibit are facts
26 the plaintiff has incorporated into the complaint. Guzell, 223 F.3d at 519.

27 In this instance, plaintiff attached defendant’s incident narrative to the FAC as an
28 “[o]verview about [defendant’s] accusation.” (See ECF No. 12 at 2, Table of Contents to the

1 FAC.) Plaintiff alleged the accusations therein were false. (See id. at 25 (“she falsely accused to
2 disobey order and threaten [plaintiff]; [which] is untrue”).) Therefore, plaintiff “did not vouch for
3 the truth of the statements..., and they cannot be assumed to be true for purposes of ruling on this
4 motion.” Wilson v. Grannis, No. C07-2018 PJH(PR), 2008 WL 4415268, at *3 (N.D. Cal. Sept.
5 26, 2008).

6 3. Qualified Immunity

7 Qualified immunity shields government officials from monetary damages unless their
8 conduct violated “clearly established statutory or constitutional rights of which a reasonable
9 person would have known.” Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018). “In evaluating a
10 grant of qualified immunity, a court considers whether (1) the state actor’s conduct violated a
11 constitutional right and (2) the right was clearly established at the time of the alleged
12 misconduct.” Gordon v. County of Orange, 6 F.4th 961, 967-68 (9th Cir. 2021) (citing Saucier v.
13 Katz, 533 U.S. 194, 200-01 (2001), overruled in part by Pearson v. Callahan, 555 U.S. 223
14 (2009)). “[I]f the answer to either [question] is ‘no,’ then the state actor cannot be held liable for
15 damages.” Id. at 968 (citation omitted).

16 Defendant argues the doctrine of qualified immunity shields her from liability because the
17 force used was de minimis. (ECF No. 32-1 at 10.) Defendant argues the force used of grabbing
18 plaintiff’s shoulder or shoving her away from the booking area and away from male inmates, as
19 plaintiff walked to her housing unit, was not clearly established as unlawful at the time of the
20 challenged conduct. (Id.)

21 Liberally construing the FAC, plaintiff alleges defendant struck her several times on the
22 back, without provocation, causing an injury that plaintiff still had when she filed the complaint.
23 (ECF No. 12 at 25, 27.) The court is unable to conclude at this stage, under the first prong, that
24 defendant did not violate plaintiff’s rights under the Fourteenth Amendment. Under the second
25 prong, similarly, unresolved issues of fact prevent a determination of qualified immunity. See
26 Wilkins v. City of Oakland, 350 F.3d 949, 956 (9th Cir. 2003) (“Where the officers’ entitlement
27 to qualified immunity depends on the resolution of disputed issues of fact in their favor, and
28 against the non-moving party, [a grant of qualified immunity] is not appropriate.”).

1 **4. Exhaustion of Remedies under the PLRA**

2 Defendant argues plaintiff failed to comply with the PLRA because the FAC does not
3 plead that she filed a grievance at Yuba County Jail and appealed it to the highest level of
4 authority. (ECF No. 32-1 at 11.) Under the Prison Litigation Reform Act of 1995 (“PLRA”),
5 “[n]o action shall be brought with respect to prison conditions under section 1983 of this title...
6 *by a prisoner confined in any jail...* until such administrative remedies as are available are
7 exhausted.” 42 U.S.C.A. § 1997e (emphasis added). A prisoner or jail inmate must exhaust
8 administrative remedies before bringing suit. McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th
9 Cir. 2002). “[A]n action is ‘brought’ for purposes of § 1997e(a) when the complaint is tendered to
10 the district clerk[.]” Vaden v. Summerhill, 449 F.3d 1047, 1050 (9th Cir. 2006). Failure to
11 comply with the PLRA’s exhaustion requirement is an affirmative defense that must be raised and
12 proved by the defendant. Jones v. Bock, 549 U.S. 199, 216 (2007).

13 Here, defendant does not assert, and the record does not reflect, that plaintiff was confined
14 in jail or otherwise confined or detained at the time she brought this action. (See generally, ECF
15 No. 1.) Defendant further makes no argument that the exhaustion requirement of the PLRA
16 should be applied to plaintiffs who were no longer confined or detained when they brought the
17 suit. Defendant fails to show the amended complaint should be dismissed due to a failure to
18 comply with the PLRA. See, e.g., Valdivia v. Cnty. of Santa Cruz, No. 08-00916 JF, 2008 WL
19 4065873, at *4 (N.D. Cal. Aug. 27, 2008) (“Because Valdivia had been released from the Santa
20 Cruz County jail prior to bringing the instant suit, he is not subject to 42 U.S.C. § 1997e(a).”)

21 **5. Rule 8**

22 Defendant next requests that in the event the court is not persuaded by defendant’s other
23 arguments, “that Plaintiff’s complaint contain a short and plain statement pursuant to FRCP Rule
24 8.” (ECF No. 32-1 at 11.) Under Rule 8 of the Federal Rules of Civil Procedure, a complaint must
25 contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”
26 Fed. R. Civ. P. 8(a)(2). “Each allegation must be simple, concise, and direct.” Fed. R. Civ. P.
27 8(d)(1). The policy behind Rule 8’s pleading requirement is to give the defendant fair notice of
28 the claim and the grounds upon which it rests. Leatherman v Tarrant County Narcotics

1 Intelligence and Coord Unit, 507 US 163, 168 (1993).

2 Here, the entirety of the FAC totals 203 pages, including a number of exhibits, which
3 appear both before and after the body of the civil rights complaint. (See ECF No. 12, generally.)
4 The body of the civil rights complaint consists of 13 pages, including a blank page. (ECF No. 12
5 at 21-33; see also id. at 1, Table of Contents.) This statement is not so rambling or disorganized
6 that it obscures the nature of the excessive force claim. In addition, requiring defendant to answer
7 a 13-page statement does not place an unjustified burden on defendant or the court. See
8 Salahuddin v Cuomo, 861 F 2d 40, 41 (2nd Cir. 1988) (“unnecessary prolixity... places an
9 unjustified burden on the court and the party who must respond to [the complaint]” (internal
10 quotation marks omitted)); compare, e.g., Grimes v. Fremont Gen. Corp., 933 F. Supp. 2d 584,
11 595 (S.D.N.Y. 2013) (dismissing amended complaint with more than 1000 specifically numbered
12 paragraphs and hundreds of additional un-numbered paragraphs).

13 As to the claim against defendant Morgan, the first amended “complaint fully sets forth
14 who is being sued, for what relief, and on what theory, with enough detail to guide discovery.”
15 McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996). Therefore, the motion to dismiss for
16 failure to comply with Rule 8 of the Federal Rules of Civil Procedure should be denied.

17 **IV. CONCLUSION AND ORDER**

18 In accordance with the above, IT IS RECOMMENDED:

- 19 1. Defendant’s motion to dismiss (ECF No. 32) be DENIED.
- 20 2. Defendant be ordered to file and serve a responsive pleading within 14 days after any
21 order adopting these findings and recommendations.

22 These findings and recommendations are submitted to the United States District Judge
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after
24 being served with these findings and recommendations, any party may file written objections with
25 the court and serve a copy on all parties. Such a document should be captioned “Objections to
26 Magistrate Judge's Findings and Recommendations.” Any response to the objections shall be
27 served and filed within fourteen days after service of the objections. The parties are advised that
28 failure to file objections within the specified time may waive the right to appeal the District

1 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

2 Dated: November 17, 2022



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4 CAROLYN K. DELANEY
5 UNITED STATES MAGISTRATE JUDGE

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