

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM LEE BROOKS, II,
Plaintiff,
v.
DANIEL CASSIE,
Defendant.

Case No. 2:23-cv-00294-JDP (PC)

ORDER

DIRECTING THE CLERK OF COURT TO
RANDOMLY ASSIGN A DISTRICT JUDGE
TO THIS MATTER

FINDINGS AND RECOMMENDATIONS

THAT PLAINTIFF’S MOTION TO STRIKE
BE GRANTED IN PART AND DENIED IN
PART

ECF No. 25

OBJECTIONS DUE WITHIN FOURTEEN
DAYS

Plaintiff is a state inmate proceeding without counsel in this civil rights action brought under 42 U.S.C. § 1983. Plaintiff moves to strike all eight affirmative defenses in defendant’s answer. ECF No. 25. Defendant has filed an opposition, ECF No. 29, and plaintiff has filed a reply, ECF No. 32. I recommend that plaintiff’s motion to strike be granted in part and denied in part. Should these recommendations be adopted, defendant may file an amended answer within twenty-one days.

1 **Legal Standards**

2 Federal Rule of Civil Procedure 12(f) provides that courts “may strike from a pleading an
3 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” *Petrie v.*
4 *Elec. Game Card, Inc.*, 761 F.3d 959, 966-67 (9th Cir. 2014) (internal quotations omitted). An
5 affirmative defense can be deficient either in pleading or as a matter of law. *Kohler v. Islands*
6 *Rests., LP*, 280 F.R.D. 560, 564 (S.D. Cal. 2012). In terms of pleading, “[t]he key to determining
7 the sufficiency of pleading an affirmative defense is whether it gives the plaintiff fair notice of the
8 defense.” *Wyshak v. City Nat’l Bank*, 607 F.2d 824, 827 (9th Cir. 1979). An affirmative defense
9 is deficient as a matter of law only if it can be shown “that there are no questions of fact, that any
10 questions of law are clear and not in dispute, and that under no set of circumstances could the
11 defense succeed.” *Secs. & Exch. Comm’n v. Sands*, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995).
12 Motions to strike affirmative defenses are disfavored challenges, because they often amount to
13 little more than a dilatory tactic. *See Cal. Dep’t of Toxic Substances Control v. Alco Pac., Inc.*,
14 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002).

15 **Analysis**

16 Plaintiff’s motion challenges eight affirmative defenses. Defendant generally argues that
17 each defense provided plaintiff with fair notice, that questions of fact and law are in dispute, and
18 that plaintiff has not demonstrated that he will be prejudiced. ECF No. 29 at 2-3. Defendant fails
19 to address any of plaintiff’s individual arguments with respect to each affirmative defense. I will
20 address each affirmative defense in turn.

21 **A. First Affirmative Defense**

22 Defendant’s first affirmative defense reads “Defendant is entitled to immunity or qualified
23 immunity because no reasonable person in his respective position would believe that his conduct
24 was unlawful and the law was not clearly established that Defendant could be held liable for such
25 conduct.” ECF No. 23 at 3. Plaintiff argues that since defendant is being sued in his individual
26 capacity, qualified immunity does not apply. ECF No. 25 at 2. Plaintiff also argues that even if
27 the defense were to apply defendant is not entitled to qualified immunity because no reasonable
28 state official could have believed that his or her conduct was lawful. *Id.*

1 Qualified immunity is a proper affirmative defense. *See Norwood v. Vance*, 591 F.3d
2 1062, 1075 (9th Cir. 2010) (“Qualified immunity is an affirmative defense that must be pleaded in
3 the answer.”). And contrary to plaintiff’s argument, qualified immunity is a defense available to
4 governmental officials sued in their individual capacities. *Cnty. House, Inc. v. City of Boise,*
5 *Idaho*, 623 F.3d 945, 965 (9th Cir. 2010) (citing *Eng v. Cooley*, 552 F.3d 1062, 1064 n.1 (9th Cir.
6 2009); *Kentucky v. Graham*, 473 U.S. 159, 165-68 (1985)). Finally, a motion to strike will be
7 granted if the affirmative defense fails to provide notice—it will not necessarily be granted based
8 on the likelihood of success on the merits. *Smith v. Cobb*, No. 15-cv-00176-GPC, 2017 WL
9 3887420, at *5 (S.D. Cal. Sept. 5, 2017) (“Courts do not strike affirmative defenses simply
10 because they will fail. The decision to strike is a question of notice to Plaintiff, not the likelihood
11 of success on the merits.”). Because qualified immunity is a well-known defense, pleading the
12 defense alone puts plaintiff on notice, and thus I will not recommend striking it. *See Vogel v.*
13 *Linden Optometry APC*, No. CV 13-00295 GAF (SHx), 2013 WL 1831686, at *5 (C.D. Cal. Apr.
14 30, 2013).

15 **B. Second Affirmative Defense**

16 Defendant’s second affirmative defense reads, “[t]o the extent Plaintiff suffered any
17 damages, he failed to mitigate his damages.” ECF No. 23 at 3. Plaintiff argues that mitigation is
18 not required in sexual assault cases. ECF No. 25 at 2. I recommend that this defense be stricken
19 because it lays no factual foundation and does not describe how plaintiff failed to mitigate his
20 damages. *See Park v. Kitt*, No. 1:19-cv-01551-AWI-HBK (PC), 2021 WL 1210364, *4 (E.D.
21 Cal. Mar. 31, 2021) (“[T]here are myriad ways in which a plaintiff can fail to mitigate damages. .
22 . . A brief description of that factual basis should be included so that this defense is not ‘fact
23 barren.’”).

24 **C. Third Affirmative Defense**

25 Defendant’s third affirmative defense reads, “[t]o the extent Plaintiff suffered damages,
26 his own conduct contributed to those damages.” ECF No. 23 at 3. Plaintiff again argues that he
27 is a victim of sexual assault and thus this defense cannot apply to him. ECF No. 25 at 3. For the
28 same reason as I recommend striking the second affirmative defense, I also recommend striking

1 this affirmative defense.

2 **D. Fourth Affirmative Defense**

3 Defendant's fourth affirmative defense reads, "[t]he damages sustained by Plaintiff, if
4 any, were fully or partly the fault of others, who are not parties to this lawsuit. The identities of
5 any such individuals may be determined in the course of discovery." ECF No. 23 at 3. Plaintiff
6 argues that defendant admits in his answer that no other medical personnel were present during
7 plaintiff's examination, thus negating this defense. ECF No. 25 at 3. Defendant, meanwhile,
8 does not identify any relevant non-parties or otherwise provide a factual basis for the defense. I
9 recommend that this defense be stricken.

10 **E. Fifth Affirmative Defense**

11 Defendant's fifth affirmative defense reads, "[t]o the extent that Plaintiff is seeking
12 damages against Defendant in his official capacity, Plaintiff's claim is barred by the Eleventh
13 Amendment." ECF No. 23 at 3. Plaintiff clarifies that he intends to only sue defendant in his
14 individual capacity. ECF No. 25 at 3. With this understanding, this defense is stricken.

15 **F. Sixth Affirmative Defense**

16 Defendant's sixth affirmative defense reads, "[t]o the extent that Plaintiff's damages
17 claims are based on mental or emotional injury, they must be dismissed because Plaintiff cannot
18 show that Defendant's conduct caused him any physical injury, as required by 42 U.S.C.
19 § 1997e(e)." ECF No. 23 at 3. Plaintiff's claim of sexual assault is excluded from the physical
20 injury requirement. 42 U.S.C. § 1997e(e) ("No Federal civil action may be brought by a prisoner
21 confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered
22 while in custody without a prior showing of physical injury or *the commission of a sexual act.*")
23 (emphasis added); see *Bearchild v. Cobban*, 947 F.3d 1130, 1144 (9th Cir. 2020). I recommend
24 that this defense be stricken.

25 **G. Seventh Affirmative Defense**

26 Defendant's seventh affirmative defense reads, "[t]o the extent that Plaintiff has
27 previously litigated the issues raised in the Complaint, and those claims were finally determined,
28 Plaintiff's claims are barred by the doctrine of res judicata or collateral estoppel." ECF No. 23 at

1 4. This case was initiated when plaintiff filed a statement in another case explaining that
2 defendant sexually assaulted him, just as defendant sexually assaulted the plaintiff in the other
3 case. That, however, is not grounds for either res judicata or collateral estoppel. Further,
4 defendant's conclusory legal assertions involving the defense of res judicata or collateral estoppel
5 does not suffice to afford plaintiff fair notice of how it applies to this case. *See McCune v.*
6 *Munirs Co.*, No. 2:12-cv-02733-GEB, 2013 WL 5467212 at *1 (E.D. Cal. Sept. 30, 2013) ("An
7 affirmative defense which simply states a legal conclusion or theory . . . is insufficient to provide
8 fair notice."). I recommend that this defense be stricken.

9 **H. Eighth Affirmative Defense**

10 Defendant's eighth affirmative defense reads, "[p]laintiff failed to timely and properly
11 exhaust his available administrative remedies before filing the operative Complaint." ECF No. 23
12 at 4. Plaintiff argues that he has exhausted his administrative remedies. ECF No. 25 at 3-4.
13 Failure to exhaust administrative remedies is a proper affirmative defense to a claim brought by
14 an inmate plaintiff. *Albino v. Baca*, 747 F.2d 1162, 1166 (9th Cir. 2014) (en banc). This defense
15 has provided plaintiff with sufficient notice that defendant may argue that he failed to exhaust
16 available administrative remedies before initiating this action, as required by 42 U.S.C.
17 § 1997e(a). Consequently, this defense should not be stricken. *See Smith*, 2017 WL 3887420, at
18 *5.

19 Accordingly, it is hereby ORDERED that the Clerk of Court randomly assign a district
20 judge to this matter.

21 Further, it is hereby RECOMMENDED that:

22 1. Plaintiff's motion to strike, ECF No. 25, be granted as to defendant's Second,
23 Third, Fourth, Fifth, Sixth, and Seventh Affirmative Defenses, which are stricken with leave to
24 amend and is denied as to defendant's First and Eighth Affirmative Defenses.

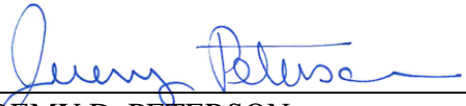
25 2. Defendant be granted twenty-one days from the date of any order addressing these
26 findings and recommendations to amend his answer.

27 These findings and recommendations are submitted to the United States District Judge
28 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

1 after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
4 objections shall be served and filed within fourteen days after service of the objections. The
5 parties are advised that failure to file objections within the specified time may waive the right to
6 appeal the District Court’s order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez*
7 *v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

8
9 IT IS SO ORDERED.

10 Dated: May 20, 2024


11 _____
12 JEREMY D. PETERSON
13 UNITED STATES MAGISTRATE JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28