

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ERNESTO G. MIRABAL,

No. C 12-3075 SI (pr)

Plaintiff,

**ORDER OF DISMISSAL WITH
LEAVE TO AMEND**

v.

LAURIE SMITH, et al.,

Defendants.

INTRODUCTION

Ernesto G. Mirabal, an inmate at the Santa Clara County Jail, filed a *pro se* civil rights action under 42 U.S.C. § 1983. His complaint is now before the court for review under 28 U.S.C. § 1915A.

BACKGROUND

Mirabal alleges in his complaint that, on an unstated date, he "was negligently or purposefully placed in the same cell as a documented 'keep away,'" who attacked him. Docket # 4, p. 3. Mirabal alleges that he suffered a dislocated finger, pain and disfiguration as a result of the attack.

1 by the defendants he has chosen to sue.

2 First, Mirabal has alleged that he "was negligently or purposefully placed" in a dangerous
3 situation. Purposeful placement would amount to an Eighth Amendment violation, while
4 negligent placement would not. If Mirabal wishes to pursue an Eighth Amendment claim in his
5 amended complaint, he needs to allege (if he truthfully can) that defendant(s) acted with the
6 requisite mental state in placing him in the cell with a known enemy.

7 Second, the complaint fails to "give the defendant fair notice of what the . . . claim is
8 and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations
9 omitted). Mirabal must provide enough information to provide notice of his claim so that
10 defendants can figure out what incident he is talking about to frame their response. In his
11 amended complaint, Mirabal must identify the date on which the event took place, the person
12 who attacked him, and the documentation that informed jailers that the attacking inmate was to
13 be kept away from plaintiff.

14 Third, Mirabal has failed to adequately allege facts showing the basis of liability for each
15 defendant. For example, he alleges that C/O Kind "failed to act reasonably when told of keep
16 away status," Docket # 4, p. 3, but doesn't say when he was told of the status, or what the
17 alleged unreasonableness was. His allegations against all of the individual defendants are too
18 vague to state a claim for an Eighth Amendment violation against any particular person. He
19 must allege facts showing that individual defendants knew of the "keep away" document or
20 otherwise knew that the two inmates were to be kept away from each other and disregarded it.
21 In his amended complaint, Mirabal must be careful to allege facts showing the basis for liability
22 for each defendant. He should not refer to them as a group (e.g., "the defendants"); rather, he
23 should identify each involved defendant by name and link each of them to his claim by
24 explaining what each involved defendant did or failed to do that caused a violation of his rights.
25 *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988). A supervisor may be liable under § 1983
26 upon a showing of (1) personal involvement in the constitutional deprivation or (2) a sufficient
27 causal connection between the supervisor's wrongful conduct and the constitutional violation.
28 *See Starr v. Baca*, 652 F.3d 1202, 1206-07 (9th Cir. 2011).

1 Fourth, Mirabal's allegations are insufficient to plead municipal liability. Mirabal has
2 sued the Sheriff and other defendants in their official and individual capacities. An official
3 capacity suit for damages against a county official is a suit for damages against the municipality
4 – here, Santa Clara County. *See Brandon v. Holt*, 469 U.S. 464, 469-73 (1985). Local
5 governments are "persons" subject to liability under § 1983 where official policy or custom
6 causes a constitutional tort, *see Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978);
7 however, a municipality may not be held vicariously liable for the unconstitutional acts of its
8 employees under the theory of respondeat superior, *see Board of County Comm'rs v. Brown*, 520
9 U.S. 397, 403 (1997); *Monell*, 436 U.S. at 691. To impose municipal liability under § 1983 for
10 a violation of constitutional rights, a plaintiff must establish: (1) that the plaintiff possessed a
11 constitutional right of which he was deprived; (2) that the municipality had a policy, custom or
12 practice; (3) that the policy, custom or practice amounted to deliberate indifference to the
13 plaintiff's constitutional rights; and (4) that the policy, custom or practice was the moving force
14 behind the constitutional violation. *See Plumeau v. School Dist. #40 County of Yamhill*, 130
15 F.3d 432, 438 (9th Cir. 1997); *see also AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631,
16 636 (9th Cir. 2012). It is not enough to allege simply that a policy, custom, or practice exists
17 that caused the constitutional violations. *AE ex rel. Hernandez*, 666 F.3d at 636-37. The
18 plaintiff must allege sufficient facts regarding the specific nature of the alleged policy, custom
19 or practice to allow the defendant to effectively defend itself, and these facts must plausibly
20 suggest that plaintiff is entitled to relief. *See id.* at 637.² In his amended complaint, he must
21 allege sufficient facts regarding the specific nature of the alleged policy, custom or practice to
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23 ²In “limited circumstances,” a municipal policy may be based upon the local
24 government’s decision not to train certain employees about their legal duty to avoid violating
25 citizens’ rights. *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011). In order to be a policy,
26 the local government’s failure to supervise, monitor or train must amount to deliberate
27 indifference to the rights of the people with whom the local government’s employees come into
28 contact. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989); *Long v. County of Los Angeles*, 442
F.3d 1178, 1188-89 (9th Cir. 2006). Only where a failure to supervise and train reflects a
“‘deliberate’ or ‘conscious’ choice” by a local government can the “shortcoming be properly
thought of as a city ‘policy or custom’ that is actionable under § 1983.” *Harris*, 489 U.S. at 389.
“A pattern of similar constitutional violations” by untrained employees is ordinarily necessary
to establish that the failure to train or supervise is a deliberate policy. *Connick*, 131 S. Ct. at
1360.

1 allow the defendant to effectively defend itself, and these facts must plausibly suggest that he
2 is entitled to relief.

3 Sixth, if Mirabal wants to allege a claim about his medical care, he must allege two
4 things: (1) a serious medical need and (2) deliberate indifference to that need by prison officials.
5 *See McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other grounds*,
6 *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997). As with his failure-to-
7 protect claim, he must link individual defendants to the claim, and must allege that the
8 defendants acted with the requisite mental state. Mere negligence in medical care is insufficient
9 to violate the Eighth or Fourteenth Amendment rights of an inmate. *See Toguchi v. Chung*, 391
10 F.3d 1051, 1060-61 (9th Cir. 2004).

11
12 **CONCLUSION**

13 For the foregoing reasons, the complaint is dismissed with leave to amend. The amended
14 complaint must be filed no later than **November 30, 2012**, and must include the caption and civil
15 case number used in this order and the words AMENDED COMPLAINT on the first page.
16 Plaintiff is cautioned that his amended complaint must be a complete statement of his claims.
17 *See Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) ("For claims dismissed with
18 prejudice and without leave to amend, we will not require that they be repled in a subsequent
19 amended complaint to preserve them for appeal. But for any claims voluntarily dismissed, we
20 will consider those claims to be waived if not repled.") Failure to file the amended complaint
21 by the deadline will result in the dismissal of the action.

22 IT IS SO ORDERED.

23 Dated: November 6, 2012

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26 SUSAN ILLSTON
27 United States District Judge
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