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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ALFRED J. ANDERSON,  
Plaintiff,  
v.  
SAN FRANCISCO SHERIFF  
DEPARTMENT, et al.,  
Defendants.

Case No. [15-cv-03737-JD](#)

**ORDER OF DISMISSAL WITH  
LEAVE TO AMEND**

Re: Dkt. No. 7

Plaintiff, a state prisoner, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

**DISCUSSION**

**I. STANDARD OF REVIEW**

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). In its review, the Court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Although a complaint “does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above

1 the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations  
2 omitted). A complaint must proffer “enough facts to state a claim to relief that is plausible on its  
3 face.” *Id.* at 570. The United States Supreme Court has explained the “plausible on its face”  
4 standard of *Twombly*: “While legal conclusions can provide the framework of a complaint, they  
5 must be supported by factual allegations. When there are well-pleaded factual allegations, a court  
6 should assume their veracity and then determine whether they plausibly give rise to an entitlement  
7 to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

8 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: (1) a right secured by  
9 the Constitution or laws of the United States was violated, and (2) the alleged deprivation was  
10 committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

11 **II. LEGAL CLAIMS**

12 Plaintiff alleges that a jail guards assaulted him and pepper sprayed him and an X-ray  
13 technician inappropriately touched his thigh, leg, and buttock. When a pretrial detainee challenges  
14 conditions of his confinement, the proper inquiry is whether the conditions amount to punishment  
15 in violation of the Due Process Clause of the Fourteenth Amendment. *See Bell v. Wolfish*, 441  
16 U.S. 520, 535 n.16 (1979). The Due Process Clause protects a post-arraignment pretrial detainee  
17 from the use of excessive force that amounts to punishment. *See Graham v. Conner*, 490 U.S.  
18 386, 395 n. 10 (1989) (citing *Bell v. Wolfish*, 441 U.S. 520, 535–39 (1979)); *see also Gibson v.*  
19 *County of Washoe, Nev.*, 290 F.3d 1175, 1197 (9th Cir. 2002). The Ninth Circuit has stated the  
20 factors a court should consider in resolving a due process claim alleging excessive force. *White v.*  
21 *Roper*, 901 F.2d 1501, 1507 (9th Cir. 1990). These factors are (1) the need for the application of  
22 force, (2) the relationship between the need and the amount of force that was used, (3) the extent  
23 of the injury inflicted, and (4) whether force was applied in a good faith effort to maintain and  
24 restore discipline. *Id.*

25 A prisoner may state an Eighth Amendment claim under § 1983 for sexual harassment if  
26 the alleged sexual harassment was sufficiently harmful, i.e., a departure from “the evolving  
27 standards of decency that mark the progress of a maturing society,” and the defendant acted with  
28 intent to harm the prisoner. *See Thomas v. District of Columbia*, 887 F. Supp. 1, 3-4 (D.D.C.

1 1995) (citing *Hudson v. McMillian*, 503 U.S. 1, 6, 8 (1992)) (internal quotations and citation  
2 omitted). Sexual assault, coercion and harassment certainly may violate contemporary standards  
3 of decency and cause physical and psychological harm, see *Jordan v. Gardner*, 986 F.2d 1521,  
4 1525-31 (9th Cir. 1993) (en banc); *Women Prisoners of the District of Columbia Dep't of*  
5 *Corrections v. District of Columbia*, 877 F. Supp. 634, 664-67 (D.D.C. 1994); however, not every  
6 malevolent touch by a prison guard or official gives rise to an Eighth Amendment violation--the  
7 Eighth Amendment's prohibition against cruel and unusual punishment necessarily excludes from  
8 constitutional recognition de minimis uses of force. See *Hudson*, 503 U.S. at 9-10; *Watison v.*  
9 *Carter*, 668 F.3d 1108, 1112-14 (9th Cir. 2012) (no Eighth Amendment violation against officer  
10 who was alleged to have rubbed his thigh against plaintiff's thigh while plaintiff was on toilet and  
11 to have begun smiling before leaving cell laughing).

12 In the complaint, plaintiff briefly describes various acts committed against him on June 11,  
13 2015, July 1, 2015, and July 10, 2015. This action was filed on July 31, 2015. Plaintiff has also  
14 filed a letter that describes other incidents in August 2015. While plaintiff describes informal  
15 appeals filed related to these incidents, it is not clear if the claims have been fully exhausted and if  
16 plaintiff seeks to amend the complaint with additional allegations. The complaint will be  
17 dismissed with leave to amend to address these issues. Plaintiff should provide a clearer statement  
18 of his allegations and describe the actions of each individual defendant and more information to  
19 support his claim of sexual harassment including the name of the defendant medical technician.  
20 He should present all of his claims in the amended complaint.

### 21 CONCLUSION

22 1. The complaint is **DISMISSED** with leave to amend. The amended complaint must  
23 be filed within **twenty-eight (28) days** of the date this order is filed and must include the caption  
24 and civil case number used in this order and the words AMENDED COMPLAINT on the first  
25 page. Because an amended complaint completely replaces the original complaint, plaintiff must  
26 include in it all the claims he wishes to present. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th  
27 Cir. 1992). He may not incorporate material from the original complaint by reference. Failure to  
28 amend within the designated time will result in the dismissal of this action.


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2. Plaintiff's motion for permission for electronic case filing (Docket No. 7) is **DENIED** because plaintiff is incarcerated.

3. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court informed of any change of address by filing a separate paper with the clerk headed "Notice of Change of Address," and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

**IT IS SO ORDERED.**

Dated: November 17, 2015

  
\_\_\_\_\_  
JAMES DONATO  
United States District Judge

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3 ALFRED J. ANDERSON,  
4 Plaintiff,

5 v.

6 SAN FRANCISCO SHERIFF  
7 DEPARTMENT, et al.,  
8 Defendants.

Case No. [15-cv-03737-JD](#)

**CERTIFICATE OF SERVICE**

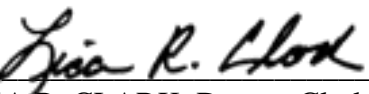
9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.  
10 District Court, Northern District of California.

11  
12 That on November 17, 2015, I SERVED a true and correct copy(ies) of the attached, by  
13 placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
14 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
15 receptacle located in the Clerk's office.

16  
17 Alfred J. Anderson ID: #15669262  
18 c/o PLS  
19 555 7th Street  
20 Suite 201  
21 San Francisco, CA 94103

22 Dated: November 17, 2015

23 Susan Y. Soong  
24 Clerk, United States District Court

25  
26 By:   
27 LISA R. CLARK, Deputy Clerk to the  
28 Honorable JAMES DONATO