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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**

Plaintiff, a detainee, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. The original complaint was dismissed with leave to amend and plaintiff has filed an amended complaint.

DISCUSSION

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

1 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above
2 the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations
3 omitted). A complaint must proffer “enough facts to state a claim to relief that is plausible on its
4 face.” *Id.* at 570. The United States Supreme Court has explained the “plausible on its face”
5 standard of *Twombly*: “While legal conclusions can provide the framework of a complaint, they
6 must be supported by factual allegations. When there are well-pleaded factual allegations, a court
7 should assume their veracity and then determine whether they plausibly give rise to an entitlement
8 to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

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

12 **LEGAL CLAIMS**

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

27 A prisoner may state an Eighth Amendment claim under § 1983 for sexual harassment if
28 the alleged sexual harassment was sufficiently harmful, i.e., a departure from “the evolving

1 standards of decency that mark the progress of a maturing society,” and the defendant acted with
2 intent to harm the prisoner. *See Thomas v. District of Columbia*, 887 F. Supp. 1, 3-4 (D.D.C.
3 1995) (citing *Hudson v. McMillian*, 503 U.S. 1, 6, 8 (1992)) (internal quotations and citation
4 omitted). Sexual assault, coercion and harassment certainly may violate contemporary standards
5 of decency and cause physical and psychological harm, *see Jordan v. Gardner*, 986 F.2d 1521,
6 1525-31 (9th Cir. 1993) (en banc); *Women Prisoners of the District of Columbia Dep’t of*
7 *Corrections v. District of Columbia*, 877 F. Supp. 634, 664-67 (D.D.C. 1994); however, not every
8 malevolent touch by a prison guard or official gives rise to an Eighth Amendment violation--the
9 Eighth Amendment’s prohibition against cruel and unusual punishment necessarily excludes from
10 constitutional recognition de minimis uses of force. *See Hudson*, 503 U.S. at 9-10; *Watison v.*
11 *Carter*, 668 F.3d 1108, 1112-14 (9th Cir. 2012) (no Eighth Amendment violation against officer
12 who was alleged to have rubbed his thigh against plaintiff’s thigh while plaintiff was on toilet and
13 to have begun smiling before leaving cell laughing).

14 “Within the prison context, a viable claim of First Amendment retaliation entails five basic
15 elements: (1) An assertion that a state actor took some adverse action against an inmate (2)
16 because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s
17 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate
18 correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted).
19 *Accord Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (prisoner suing prison officials under §
20 1983 for retaliation must allege that he was retaliated against for exercising his constitutional
21 rights and that the retaliatory action did not advance legitimate penological goals, such as
22 preserving institutional order and discipline); *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994)
23 (per curiam) (same).

24 Deliberate indifference to serious medical needs violates the Eighth Amendment’s
25 proscription against cruel and unusual punishment.¹ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976);

26 _____
27 ¹ Even though pretrial detainees’ claims arise under the Due Process Clause, the Eighth
28 Amendment serves as a benchmark for evaluating those claims. *See Carnell v. Grimm*, 74 F.3d
977, 979 (9th Cir. 1996) (8th Amendment guarantees provide minimum standard of care for
pretrial detainees). The Ninth Circuit has determined that the appropriate standard for evaluating

1 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, WMX
2 Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A determination of
3 “deliberate indifference” involves an examination of two elements: the seriousness of the
4 prisoner's medical need and the nature of the defendant's response to that need. *Id.* at 1059.

5 A “serious” medical need exists if the failure to treat a prisoner’s condition could result in
6 further significant injury or the “unnecessary and wanton infliction of pain.” *Id.* The existence of
7 an injury that a reasonable doctor or patient would find important and worthy of comment or
8 treatment; the presence of a medical condition that significantly affects an individual's daily
9 activities; or the existence of chronic and substantial pain are examples of indications that a
10 prisoner has a “serious” need for medical treatment. *Id.* at 1059-60.

11 A prison official is deliberately indifferent if he or she knows that a prisoner faces a
12 substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate
13 it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must not only “be aware of
14 facts from which the inference could be drawn that a substantial risk of serious harm exists,” but
15 he “must also draw the inference.” *Id.* If a prison official should have been aware of the risk, but
16 was not, then the official has not violated the Eighth Amendment, no matter how severe the risk.
17 *Gibson v. County of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002). “A difference of opinion
18 between a prisoner-patient and prison medical authorities regarding treatment does not give rise to
19 a § 1983 claim.” *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).

20 Plaintiff alleges that Deputies Padilla, Martin, and Prado used excessive force against him
21 on June 11, 2015. Plaintiff states that Deputy Jones and Gray used excessive force against him in
22 late June or early July 2015. Plaintiff also states that that Deputy Jones denied him medical care
23 and this was in retaliation. On July 10, 2015, plaintiff was taken to the medical unit to have X-
24 Rays taken. Plaintiff states that the X-Ray technician carelessly handled him while he took the X-

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26 constitutional claims brought by pretrial detainees is the same one used to evaluate convicted
27 prisoners’ claims under the Eighth Amendment. “The requirement of conduct that amounts to
28 ‘deliberate indifference’ provides an appropriate balance of the pretrial detainees’ right to not be
punished with the deference given to prison officials to manage the prisons.” *Redman v. County
of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc) (citation omitted).

1 Rays and inappropriately touched plaintiff's thigh, leg, and buttock.


2 Plaintiff has presented sufficient allegations to proceed against the defendants on the
3 excessive force and sexual harassment claims. However, plaintiff's allegations regarding
4 retaliation and failure to provide medical care fail to state a claim. These claims are dismissed
5 with leave to amend. Plaintiff must provide more information as described in the legal standards
6 above. He should also identify the X-ray technician. If plaintiff wishes to proceed on this
7 complaint with only the excessive force and sexual harassment claims he may indicate this to the
8 Court. If plaintiff files a second amended complaint with additional information regarding the
9 retaliation and medical care claims he must also present the excessive force and sexual harassment
10 claims.

11 **CONCLUSION**

12 The amended complaint is **DISMISSED** with leave to amend. The second amended
13 complaint must be filed within **twenty-eight (28) days** of the date this order is filed and must
14 include the caption and civil case number used in this order and the words **SECOND AMENDED**
15 **COMPLAINT** on the first page. Because an amended complaint completely replaces the original
16 complaint, plaintiff must include in it all the claims he wishes to present. *See Ferdik v. Bonzelet*,
17 963 F.2d 1258, 1262 (9th Cir. 1992). He may not incorporate material from the original complaint
18 by reference.

19 **IT IS SO ORDERED.**

20 Dated: May 23, 2016

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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

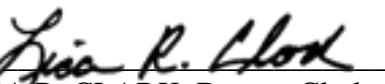
9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.
10 District Court, Northern District of California.

11
12 That on May 23, 2016, I SERVED a true and correct copy(ies) of the attached, by placing
13 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: May 23, 2016

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