

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3

4 LEO B. TURNER,

No. C 10-04046 CW (PR)

5 Plaintiff,

ORDER GRANTING RECONSIDERATION,
VACATING ORDER OF DISMISSAL
WITH PREJUDICE AND TRANSFERRING
ACTION TO THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF CALIFORNIA

6 v.

7 SGT. R. COLON, et al.,

8 Defendants.

(Docket nos. 8 & 9)

9 _____/
10
11 Plaintiff Leo B. Turner, a state prisoner incarcerated at
12 Salinas Valley State Prison, filed a civil rights complaint
13 pursuant to 42 U.S.C. § 1983 seeking damages for a respiratory
14 infection he acquired after correctional officers directed
15 Plaintiff and other inmates to stand outside in a rainstorm without
16 the benefit of coats or jackets while their cell doors were being
17 repaired.

18 On October 12, 2010 the Court dismissed the complaint for
19 failure to state a claim upon which relief could be granted. Based
20 on the facts alleged in the complaint, the Court determined that
21 amendment to state a claim for relief would be futile and dismissed
22 the complaint with prejudice and without leave to amend. Judgment
23 was entered that same date.

24 Now pending before the Court is Plaintiff's motion for
25 reconsideration of the Court's Order of dismissal. Additionally,
26 Plaintiff has submitted a first amended complaint for the Court's
27 review.

28 //

DISCUSSION

1
2 A motion which challenges the Court's final judgment may be
3 properly brought under either Rule 59(e) or Rule 60(b) of the
4 Federal Rules of Civil Procedure. See Fuller v. M.G. Jewelry, 950
5 F.2d 1437, 1441-42 (9th Cir. 1991). Because Plaintiff's motion was
6 filed within ten days of the entry of judgment it will be treated
7 as a motion to alter or amend judgment under Rule 59(e). See
8 United States v. Nutri-Cology, Inc., 982 F.2d 394, 396-97 (9th Cir.
9 1992) (a motion to reconsider served within ten days of the entry
10 of order or judgment should be construed as a Rule 59(e) motion).

11 "A motion for reconsideration under Rule 59(e) 'should not be
12 granted, absent highly unusual circumstances, unless the district
13 court is presented with newly discovered evidence, committed clear
14 error, or if there is an intervening change in the controlling
15 law.'" McDowell v. Calderon, 197 F.3d 1253, 1254 (9th Cir. 1999)
16 (internal citation omitted).

17 In his original complaint, Plaintiff alleged that he caught a
18 respiratory infection after Sgt. R. Colon, an unnamed Correctional
19 Lieutenant and three unnamed floor officers ordered Plaintiff and
20 other inmates to go to "mandatory yard" and stand outside in the
21 rain without coats or jackets while the inmates' cell doors were
22 being fixed. The Court dismissed Plaintiff's complaint, finding as
23 follows:

24 Neither negligence nor gross negligence is
25 actionable under § 1983 in the prison context. See Farmer
26 v. Brennan, 511 U.S. 825, 835-36 & n.4 (1994); Wood v.
27 Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990). The
28 applicable standard is one of deliberate indifference to
inmate health or safety under the Eighth Amendment, see
Farmer, 511 U.S. at 834; Wilson v. Seiter, 501 U.S. 294,

1 302 (1991), which requires more than a showing of
2 negligence, see Estelle v. Gamble, 429 U.S. 97, 106
3 (1976). A prison official cannot be held liable under the
4 Eighth Amendment unless the standard for criminal
5 recklessness is met, that is, the official knows of and
6 disregards an excessive risk to inmate health or safety.
7 See Farmer, 511 U.S. at 837. And under no circumstances
8 is there respondeat superior liability under § 1983. See
9 Monell v. Dep't of Social Servs., 436 U.S. 658, 691
10 (1978); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.
11 1989).

12 Plaintiff's allegations amount to negligence at
13 most, and do not state a claim for relief under the Eighth
14 Amendment. Accordingly, Plaintiff has failed to state a
15 claim upon which relief may be granted. Because amendment
16 would be futile, this action is DISMISSED with prejudice.

17 Order of Dismissal at 2:19-3:11.

18 In the present motion for reconsideration, Plaintiff argues
19 that he should be allowed to amend his complaint to allege facts
20 that show Defendants intentionally acted to cause harm to Plaintiff
21 by acting with deliberate indifference to his safety in violation of
22 the Eighth Amendment. Plaintiff has submitted for the Court's
23 review a first amended complaint in which he restates the claim from
24 his original complaint in greater detail, alleging that even though
25 the usual practice when cell doors are being fixed is to put inmates
26 in the dining hall, Defendants, knowing it was storming outside,
27 intentionally made the inmates stand in the yard without allowing
28 them to retrieve coats or jackets for protection. In addition,
29 Plaintiff states for the first time in the first amended complaint
30 that the actions complained of took place at Deuel Vocational
31 Institution, in Tracy, California.

32 The Court finds that when the new factual allegations in
33 Plaintiff's first amended complaint are liberally construed they
34 state an Eighth Amendment claim for deliberate indifference to

1 Plaintiff's safety. Accordingly, the Court hereby GRANTS
2 Plaintiff's motion for reconsideration, VACATES the Order
3 dismissing the complaint with prejudice and directs the Clerk of
4 the Court to REOPEN this action.

5 In view of the fact that Plaintiff's claims did not occur at
6 Salinas Valley State Prison, however, but took place at Deuel
7 Vocational Institution, which is located in San Joaquin County
8 within the Eastern District of California, the action is hereby
9 TRANSFERRED to the United States District Court for the Eastern
10 District of California. See 28 U.S.C. § 84(b); 28 U.S.C.
11 § 1406(a).

12 CONCLUSION

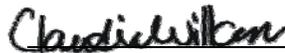
13 For the foregoing reasons, the Court orders as follows:

- 14 1. Plaintiff's motion for reconsideration is GRANTED.
- 15 2. The Court's October 12, 2010 Order of Dismissal With
16 Prejudice is VACATED.
- 17 3. The Clerk shall REOPEN this action.
- 18 4. The Clerk shall TRANSFER the case to the United States
19 District Court for the Eastern District of California forthwith.

20 This Order terminates Docket nos. 8 and 9.

21 IT IS SO ORDERED.

22 DATED: 8/31/2011



23 CLAUDIA WILKEN
24 United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 TURNER et al,

5 Plaintiff,

6 v.

7 COLON et al,

8 Defendant.

Case Number: CV10-04046 CW

CERTIFICATE OF SERVICE

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

11 That on August 31, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

14 Leo B. Turner K99152
15 Salinas Valley State Prison
16 P.O. Box 1020
17 Soledad, CA 93960

18 Dated: August 31, 2011

19 Richard W. Wieking, Clerk
20 By: Nikki Riley, Deputy Clerk