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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GEORGE ANDERSON,

Plaintiff,

v.

JOSE SOLIS,

Defendant.

No. C 12-3855 PJH

**ORDER DENYING MOTION  
TO DISMISS**

Defendant's motion for an order dismissing the complaint based on qualified immunity came on for hearing before this court on January 16, 2013. Plaintiff appeared by his counsel Michael D. Meadows, and defendant appeared by his counsel Karen K. Lowhurst. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby DENIES the motion as follows and for the reasons stated at the hearing.

**BACKGROUND**

This is a case brought under 42 U.S.C. § 1983, seeking damages for substantive due process violations, arising from an assault on a mental hospital employee by a patient at the hospital.

The following facts are as alleged in the complaint. From 1977 to 1985, and from 1991 to the present, plaintiff George Anderson ("Anderson") was employed as a rehabilitation therapist at Napa State Hospital ("the Hospital"), which is operated by the

1 State of California. Defendant Jose Solis (“Solis”) was a manager and senior unit  
2 supervisor employed at the Hospital, and had the authority to determine matters such as  
3 whether a patient would be restrained and whether an additional staff member would be  
4 assigned to a patient.

5 In 2010, Sean Michael Bouchie (“Bouchie”) was a patient at Napa State Hospital.  
6 The treatment plan prepared by the Psychiatric Treatment Team responsible for Bouchie’s  
7 care directed that when Bouchie exhibited signs of agitation, a staff member on the ward  
8 was required to calm Bouchie down by giving him food. If Bouchie remained agitated, the  
9 staff member was required to take him for a walk on the Hospital grounds. Anderson was  
10 the staff member assigned on his shift to care for Bouchie, and was therefore required to  
11 escort him on the Hospital grounds if he became agitated.

12 On Tuesday, December 7, 2010, Bouchie chased Anderson down a hall on the  
13 ward, threatening him with bodily harm. At the staff meeting held the following day,  
14 December 8, 2010, Anderson told Solis that Bouchie’s behavior had changed markedly,  
15 and that Bouchie was not the “good old Sean” who could be readily controlled, but had  
16 become dangerous and posed an increasing threat of physical harm to staff. Anderson  
17 pleaded for assistance from Solis.

18 During that December 8, 2010 staff meeting, Anderson asked Solis to take two  
19 actions which had previously been employed to address threats posed by other violent  
20 patients. He urged Solis to authorize placing Bouchie in a “walking restraint” – a restraint  
21 that limits the use of the patient’s arms, effectively preventing the patient from striking a  
22 staff member or another patient, but which permits the patient to eat. He also urged Solis  
23 to authorize the assignment of two staff members to take care of Bouchie on each shift,  
24 rather than a single staff member.

25 Anderson alleges that as the week progressed, Bouchie became more dangerous.  
26 At the staff meeting on December 9, 2010, Anderson again told Solis that Bouchie had  
27 become increasingly dangerous and posed a threat of physical harm to staff. Anderson  
28 again urged Solis to authorize placing Bouchie in a “walking restraint.” Anderson alleges

1 that notwithstanding this request, Solis again refused to authorize the use of the “walking  
2 restraint” or to assign an additional staff member to Bouchie. That same day, December 9,  
3 2010, Bouchie attacked a janitor.

4 At the staff meeting on December 10, 2010, Solis was informed of the attack on the  
5 janitor, and Anderson again told him that Bouchie posed a danger to staff and urged that  
6 Bouchie be placed in a “walking restraint.” Solis again refused, and also ordered that staff  
7 members assigned to Bouchie (including Anderson) respond to Bouchie’s agitation by  
8 taking him for a walk on the Hospital grounds alone and while Bouchie was unrestrained.

9 On December 11, 2010, Anderson noted that Bouchie was becoming increasingly  
10 agitated. He understood that under the treatment plan, Bouchie was to be first offered  
11 food, and if that did not calm him down, to be taken for a walk on the Hospital grounds. He  
12 also understood that he was forbidden by Solis to place a “walking restraint” on Bouchie,  
13 and that he was the lone staff member assigned to Bouchie during that shift.

14 Accordingly, Anderson offered food to Bouchie, and, after his agitation did not  
15 decrease, took him for a walk on the Hospital grounds. During this walk, Bouchie attacked  
16 and repeatedly pummeled Anderson. Anderson suffered a severe concussion, four  
17 fractures of the skull, brain injuries, and other injuries.

18 Anderson filed the present action on July 24, 2012, asserting a single cause of  
19 action under 42 U.S.C. § 1983, for violation of his Fourteenth Amendment substantive due  
20 process rights. Solis now seeks an order pursuant to Federal Rule of Civil Procedure  
21 12(b)(6), dismissing the complaint for failure to state a claim, based on qualified immunity.

## 22 DISCUSSION

### 23 A. Legal Standard

24 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal  
25 sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191,  
26 1199-1200 (9th Cir. 2003). Review is limited to the contents of the complaint. Allarcom  
27 Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). To survive  
28 a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the

1 minimal notice pleading requirements of Federal Rule of Civil Procedure 8, which requires  
2 that a complaint include a “short and plain statement of the claim showing that the pleader  
3 is entitled to relief.” Fed. R. Civ. P. 8(a)(2).

4 A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the  
5 plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support  
6 a cognizable legal theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir.  
7 1990). The court is to “accept all factual allegations in the complaint as true and construe  
8 the pleadings in the light most favorable to the nonmoving party.” Outdoor Media Group,  
9 Inc. v. City of Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007). However, legally  
10 conclusory statements, not supported by actual factual allegations, need not be accepted.  
11 Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). The allegations in the complaint “must be  
12 enough to raise a right to relief above the speculative level.” Bell Atlantic Corp. v.  
13 Twombly, 550 U.S. 544, 555 (2007) (citations and quotations omitted).

14 A motion to dismiss should be granted if the complaint does not proffer enough facts  
15 to state a claim for relief that is plausible on its face. See id. at 558-59. A claim has facial  
16 plausibility when the plaintiff pleads factual content that allows the court to draw the  
17 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 556  
18 U.S. at 678 (citation omitted). “[W]here the well-pleaded facts do not permit the court to  
19 infer more than the mere possibility of misconduct, the complaint has alleged – but it has  
20 not ‘show[n]’ – ‘that the pleader is entitled to relief.’” Id. at 679.

21 B. Defendant’s Motion

22 Solis argues that the complaint must be dismissed, based on qualified immunity.  
23 Qualified immunity protects government officials “from liability for civil damages insofar as  
24 their conduct does not violate clearly established statutory or constitutional rights of which a  
25 reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).  
26 The rule of qualified immunity protects “all but the plainly incompetent or those who  
27 knowingly violate the law;” defendants can have a reasonable, but mistaken, belief about  
28 the facts or about what the law requires in any given situation. Saucier v. Katz, 533 U.S.

1 194, 202 (2001) (citation and quotation omitted), overruled in part on other grounds by  
2 Pearson v. Callahan, 555 U.S. 223 (2009).

3 A public official's shield of qualified immunity is lost only if a plaintiff can establish  
4 both that (1) taken in the light most favorable to the party asserting injury, the facts alleged  
5 show that the officer's conduct violated a constitutional right, and (2) the right at issue was  
6 "clearly established" at the time of the defendant's alleged misconduct. Saucier, 533 U.S.  
7 at 201. The court may exercise its discretion in deciding which prong to address first, in  
8 light of the particular circumstances of each case. Pearson, 555 U.S. at 236.

9 Here, Solis argues that the complaint should be dismissed because Anderson has  
10 failed to plead a "clearly established" constitutional right. He asserts that Anderson does  
11 not allege that he (Solis) directly violated plaintiff's right to bodily integrity, but rather that it  
12 was a mentally ill patient at Napa State Hospital, for whom Anderson was responsible for  
13 caring, who caused the injury. He also contends that as a direct caregiver to persons with  
14 "mental disabilities" severe enough to warrant hospitalization, Anderson had no clearly  
15 established right to avoid a risk that is an inherent part of his job. Solis argues that at most,  
16 he himself might be considered to have been negligent in his role as supervisor, but asserts  
17 that such negligence does not give rise to a cause of action under § 1983.

18 In response, Anderson asserts that his claim is not a claim of negligence, but rather  
19 is one for violation of bodily integrity under the Fourteenth Amendment's Due Process  
20 Clause, as permitted by the "state-created danger" exception. Anderson argues that by  
21 assigning him to work alone with an unrestrained and violent mental patient, and by  
22 refusing his requests that some safety measures be put in place, Solis used his authority to  
23 affirmatively create an opportunity for Bouchie to assault Anderson, and also acted with  
24 deliberate indifference to the danger Anderson faced, particularly in light of his (Solis')  
25 knowledge of the danger.

26 The court finds that the motion must be DENIED. A qualified immunity defense is  
27 generally not amenable to dismissal under Rule 12(b)(6) because facts necessary to  
28 establish this affirmative defense generally must be shown by matters outside the

1 complaint. See Morley v. Walker, 175 F.3d 756, 761 (9th Cir. 1999). While a ruling on  
2 immunity “should be made early in the proceedings so that the costs and expenses of trial  
3 are avoided where the defense is dispositive[,]” the court is usually “not equipped at this  
4 stage to determine whether qualified immunity will ultimately protect [the defendant]. Those  
5 issues must be resolved at summary judgment or at trial.” Saucier, 533 U.S. at 199; see  
6 also Groten v. California, 251 F.3d 844, 851 (9th Cir. 2001).

7 It is true that qualified immunity can in some cases be determined in a motion under  
8 Rule 12(b)(6). See, e.g., Dunn v. Castro, 621 F.3d 1196, 1199 (9th Cir. 2010). When the  
9 record is clear that the official had a reasonable belief that his conduct was lawful, a court  
10 may properly dismiss a claim on the basis of qualified immunity. See Act Up!/Portland v.  
11 Bagley, 988 F.2d 868, 873 (9th Cir. 1993). Here, however, the court finds that the absence  
12 of a fully developed factual record makes it impossible to determine whether qualified  
13 immunity applies.

14 It is well-established that the Constitution protects a citizen's liberty interest in his  
15 own bodily security. See, e.g., Ingraham v. Wright, 430 U.S. 651, 673-74 (1977); Wood v.  
16 Ostrander, 879 F.2d 583, 589 (9th Cir. 1989). Nevertheless, “the Fourteenth Amendment's  
17 Due Process Clause generally does not confer any affirmative right to governmental aid”  
18 and “typically does not impose a duty on the state to protect individuals from third parties.”  
19 Patel v. Kent Sch. Dist., 648 F.3d 965, 971 (9th Cir. 2011) (citations and alterations  
20 omitted).

21 There are, however, two exceptions to this rule. First, there is the “special  
22 relationship” exception – when a custodial relationship exists between the plaintiff and the  
23 state such that the state assumes some responsibility for the plaintiff's safety and  
24 well-being. Henry A. v. Willden, 678 F.3d 991, 998 (9th Cir. 2012). Second, there is the  
25 “state-created danger exception” – when “the state affirmatively places the plaintiff in  
26 danger by acting with ‘deliberate indifference’ to a ‘known and obvious danger[.]’” Id.  
27 (citations omitted). If either of these exceptions applies, a state's omission or failure to  
28 protect may give rise to a § 1983 claim. Id.

1           The Ninth Circuit first recognized such “danger creation” liability in Wood. In that  
2 case, a state trooper determined that the driver of an automobile was intoxicated, arrested  
3 the driver and impounded the car. The officer's actions left Wood, a female passenger,  
4 stranded late at night in a known high-crime area. Subsequently, Wood accepted a ride  
5 from a passing car and was raped. The court held that Wood could claim § 1983 liability,  
6 since a jury presented with the above facts could find “that [the trooper] acted with  
7 deliberate indifference to Wood's interest in personal security under the fourteenth  
8 amendment.” Id. at 588.

9           After Wood, the Ninth Circuit found that state officials may be held liable in a variety  
10 of circumstances for their roles in creating or exposing individuals to danger they otherwise  
11 would not have faced. See, e.g., Munger v. City of Glasgow Police Dept., 227 F.3d 1082  
12 (9th Cir. 2000) (holding police officers could be held liable for the hypothermia death of a  
13 visibly drunk patron after ejecting him from a bar on night when the outside temperature  
14 was subfreezing); Penilla v. City of Huntington Park, 115 F.3d 707 (9th Cir. 1997) (holding  
15 as viable a state-created danger claim against police officers who, after finding a man in  
16 grave need of medical care, cancelled a request for paramedics and locked him inside his  
17 house); L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992) (“Grubbs”) (holding state employees  
18 could be liable for the rape of a registered nurse assigned to work alone in the medical  
19 clinic of a medium-security custodial institution with a known, violent sex-offender). These  
20 cases illustrate the principle that state actors may be held liable “where they affirmatively  
21 place an individual in danger,” Munger, 227 F.3d at 1086, by acting with “deliberate  
22 indifference to [a] known or obvious danger in subjecting the plaintiff to it,” Grubbs II, 92  
23 F.3d at 900.

24           In Kennedy v. City of Ridgefield, 439 F.3d 1055 (9th Cir. 2006), a 13-year-old shot  
25 two neighbors, killing the man and severely wounding his wife, eight hours after learning  
26 from the police that the wife had previously reported that the 13-year-old had molested her  
27 9-year-old daughter, and had also warned the police about the 13-year-old's prior violent  
28 actions. The wife later filed a § 1983 action against the city and the police officer who had

1 released the information to the 13-year-old and his mother. The district court denied  
2 summary judgment on qualified immunity, and the Ninth Circuit affirmed.

3 The Ninth Circuit delineated a two-part test, requiring (1) official (state) action that  
4 affirmatively placed an individual in danger; and (2) deliberate indifference to that danger.  
5 Id. at 1061-62. The court held that in examining whether an officer affirmatively places an  
6 individual in danger, the court should not look solely to the agency of the individual, nor  
7 should it rest its opinion on what options may or may not have been available to the  
8 individual. Instead, the court must examine whether the officer left the person in a situation  
9 that was more dangerous than the one in which they found him.” See id. at 1062.

10 Evaluating the officer's motion for summary judgment, the Ninth Circuit found that by  
11 informing the neighbor of the allegations without first warning plaintiff, the officer involved  
12 “affirmatively created an actual, particularized danger [plaintiff] would not otherwise have  
13 faced.” Id. at 1063.

14 As to the second prong, the court must decide whether the danger to which the  
15 defendant exposed plaintiff was known or obvious, and whether the defendant acted with  
16 deliberate indifference to it. Id. at 1064. “[D]eliberate indifference is a stringent standard of  
17 fault, requiring proof that a municipal actor disregarded a known or obvious consequence of  
18 his actions.” Bryan County v. Brown, 520 U.S. 397, 410 (1997). Because the evidence in  
19 Kennedy showed that the wife had warned the officer repeatedly about the neighbor's  
20 violent tendencies and specifically requested notice before the officer told the 13-year-old  
21 about the molestation charge, the court found that the officer's decision to proceed without  
22 such notice established deliberate indifference for purposes of summary judgment.  
23 Kennedy, 439 F.3d at 1064-65.

24 Solis contends, however, that the “state-created danger” exception has not been  
25 found by any court within the Ninth Circuit to apply to situations such as this one, where a  
26 manager's “failure to adopt a plaintiff's preferred form of patient care” causes an injury at  
27 the hands of the patient. Solis argues that the whole point of the exception is to allow for a  
28 cause of action where the state official's actions created a danger or exposed an individual

1 to a danger that he or she would not otherwise have faced, and that at a mental hospital,  
2 there is always a danger that a caregiver may be attacked by a mental patient. Solis  
3 asserts that the facts do not show that he took any affirmative steps that increased the  
4 danger normally experienced by a worker in Anderson's position – just that he exercised his  
5 discretion with regard to staffing decisions at the hospital.

6 With regard to Solis' argument that Anderson cannot establish a constitutional  
7 violation because Solis did nothing to place Anderson in danger, and the alleged danger  
8 was an inherent feature of Anderson's work with mentally ill patients, it appears that Solis  
9 may be attempting to read the exception out of the law. As noted above, the "state-created  
10 danger" doctrine provides an exception to the general rule that the Fourteenth Amendment  
11 does not impose a duty on the State to protect individuals from third parties. "Thus, by its  
12 very nature, the doctrine only applies in situations where the plaintiff was directly harmed  
13 by a third party – a danger that, in every case, could be said to have 'already existed.'" Henry A., 678 F.3d at 1002.

14  
15 The "dangers" examined by the Ninth Circuit in its prior cases (cited above) – such  
16 as the vengeful, unstable neighbor, see Kennedy, 439 F.3d 1055; the violent, predatory  
17 inmate, see Grubb II, 92 F.3d 894; or the rapist prowling a high-crime area late at night,  
18 see Wood, 879 F.2d 583 – already "existed" before the plaintiffs were harmed by them.  
19 The whole point of the state-created danger doctrine is that the affirmative actions of a  
20 state official created or exposed an individual to a danger which he or she would not have  
21 otherwise faced. Henry A., 678 F.3d at 1002-03 (quotations and citations omitted).

22 Here, Anderson has alleged that Solis knew of the danger posed by Bouchie, and  
23 that Solis was also aware that Anderson had repeatedly requested additional security in the  
24 form of use of restraints and/or an additional staff person, and that he nonetheless acted  
25 with deliberate indifference by exposing Anderson to that danger and refusing to take steps  
26 to mitigate the risk. At the very least, the court finds that there are factual issues that need  
27 to be developed before any determination can be made as to whether the "state-created  
28 danger" doctrine applies.

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**CONCLUSION**

In accordance with the foregoing, defendant's motion is DENIED, without prejudice to raising the qualified immunity defense in a later motion for summary judgment.

**IT IS SO ORDERED.**

Dated: January 22, 2013



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PHYLLIS J. HAMILTON  
United States District Judge