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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

6 MAURICE JEROME PERRY,
7 Plaintiff,
8 v.
9 JOSEPH KELLY, et al.,
10 Defendants.
11

Case No. [16-cv-06099-KAW](#) (PR)

**ORDER SERVING COGNIZABLE
CLAIM; DISMISSING NON-
COGNIZABLE CLAIMS**

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13 Plaintiff Maurice Jerome Perry, a state prisoner incarcerated at the Elmwood Correctional
14 Facility in Milpitas, has filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983, alleging the
15 violation of his constitutional rights by Berkeley Police Officers Joseph Kelly (#1) and Lathrop
16 (#55), the City and County of Alameda and the Berkeley Police Department. Plaintiff has
17 consented to the jurisdiction of the undersigned United States Magistrate Judge over this action.
18 Plaintiff's motion for leave to proceed *in forma pauperis* is granted in a separate order. The Court
19 now reviews Plaintiff's complaint.

20 **DISCUSSION**

21 **I. Preliminary Review of Complaint**

22 A federal court must conduct a preliminary screening in any case in which a prisoner seeks
23 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
24 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims
25 that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek
26 monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b)(1), (2). *Pro se*
27 pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
28 Cir. 1988).

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

5 Liability may be imposed on an individual defendant under 42 U.S.C. § 1983 if the
6 plaintiff can show that the defendant's actions both actually and proximately caused the
7 deprivation of a federally protected right. *Lemire v. Cal. Dept. Corrections & Rehabilitation*, 756
8 F.3d 1062, 1074 (9th Cir. 2013); *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *Harris v. City*
9 *of Roseburg*, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives another of a constitutional
10 right within the meaning of section 1983 if he does an affirmative act, participates in another's
11 affirmative act or omits to perform an act which he is legally required to do, that causes the
12 deprivation of which the plaintiff complains. *Leer*, 844 F.2d at 633.

13 **II. Plaintiff's Claim**

14 In his complaint, Plaintiff alleges the following:

15 On February 6, 2015, Berkeley Police Officers Kelly and Lathrop were escorting Plaintiff
16 from the Santa Rita County Jail to the Valley Care Medical Center. In the parking lot of the Santa
17 Rita County Jail, Officers Kelly and Lathrop dragged Plaintiff by his thumb to the police car and
18 assaulted him. When they arrived at the Medical Center, the officers dragged Plaintiff to the
19 emergency room where he was diagnosed with a fractured left thumb, neck sprain and other
20 physical bruises. These officers were not trained properly by the Berkeley Police Department and
21 "they represent the City and County of Alameda."

22 Liberally construed, these allegations appear to give rise to a cognizable Fourth
23 Amendment claim for excessive force against Officers Kelly and Lathrop. However, even
24 liberally construed, the allegations do not give rise to an excessive force claim against the
25 Berkeley Police Department or the City and County of Alameda.

26 Local governments and police departments are "persons" subject to liability under 42
27 U.S.C. § 1983 where official policy or custom causes a constitutional tort. *Shaw v. Cal. Dep't of*
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1 *Alcoholic Beverage Control*, 788 F.2d 600, 604-05 & n.1 (9th Cir. 1986); *Brewster v. Shasta*
2 *County*, 275 F.3d 803, 812 (9th Cir. 2001). However, a municipality or police department may
3 not be held vicariously liable for the unconstitutional acts of its employees under the theory of
4 respondeat superior. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). To impose
5 municipal liability under Section 1983 for a violation of constitutional rights, a plaintiff must
6 show: (1) that the plaintiff possessed a constitutional right of which he or she was deprived; (2)
7 that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the
8 plaintiff's constitutional rights; and (4) that the policy is the moving force behind the
9 constitutional violation. *Plumeau v. School Dist. #40 County of Yamhill*, 130 F.3d 432, 438 (9th
10 Cir. 1997). Proof of random acts or isolated incidents of unconstitutional action by non-
11 policymaking employees are insufficient to establish the existence of a municipal policy or
12 custom. *Rivera v. County of Los Angeles*, 745 F.3d 384, 398 (9th Cir. 2014).

14 The conclusory allegation that the Berkeley Police Department did not properly train its
15 officers is insufficient to state a *Monell* claim. See *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009)
16 (conclusory allegations which are nothing more than a formulaic recitation of the elements of a
17 claim are not entitled to the assumption of truth and are insufficient to state a claim). Therefore,
18 Plaintiff has not alleged sufficient facts to state a municipal liability claim against the Berkeley
19 Police Department¹; the claim is dismissed with leave to amend to allege a cognizable *Monell*
20 claim.

22 Plaintiff incorrectly names the City and County of Alameda as a defendant. The City and
23 County of Alameda cannot be liable based on the acts of the individual defendants because they
24 work for the City of Berkeley, not for the City or County of Alameda. The City of Berkeley and
25 the County of Alameda are separate public entities. Therefore, all claims alleged against the City
26 and County of Alameda are dismissed with prejudice. Accordingly, any amendment of the *Monell*

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28 ¹ A claim against the Berkeley Police Department, a political subdivision of the City of Berkeley,
is more properly alleged as a claim against the City of Berkeley.

1 claim should be alleged against the City of Berkeley only.

2 CONCLUSION

3 Based on the foregoing, the Court orders as follows:

4 1. The claims alleged against the City and County of Alameda are dismissed with
5 prejudice. The clerk of the court shall terminate them as defendants on the docket.

6 2. The *Monell* claim against the Berkeley Police Department is dismissed with leave to
7 amend in accordance with the standards set forth above. The amended complaint must be filed
8 within twenty-eight (28) days of the date this Order is filed and must include the caption and civil
9 case number used in this Order and the words AMENDED COMPLAINT on the first page.
10 Because an amended complaint completely replaces the original complaint, Plaintiff must include
11 in it all the claims he wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.
12 1992). Plaintiff may not incorporate material from the original complaint by reference. Failure to
13 amend within the specified time period will result in this claim being dismissed with prejudice.

14 3. The allegations, liberally construed, appear to give rise to a Fourth Amendment
15 excessive force claim against Berkeley Police Officers Kelly and Lathrop. The Clerk of the Court
16 shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the
17 Waiver of Service of Summons, a copy of the complaint (docket no. 1), and all attachments
18 thereto, a copy of this Order and a copy of the form "Consent or Declination to Magistrate Judge
19 Jurisdiction" to Berkeley Police Officer Joseph Kelly (#1) and Berkeley Police Officer Lathrop
20 (#55). This form can also be found at www.cand.uscourts.gov/civilforms. The Clerk shall also
21 mail a copy of the complaint and a copy of this Order to the Berkeley City Attorney's Office in
22 Berkeley, and a copy of this Order to Plaintiff.

23 4. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure require
24 them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant
25 to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of
26 Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of
27 such service unless good cause be shown for their failure to sign and return the waiver forms. If
28 service is waived, this action will proceed as if Defendants had been served on the date that the

1 waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve
2 and file an answer before sixty days from the date on which the request for waiver was sent. (This
3 allows a longer time to respond than would be required if formal service of summons is
4 necessary.)

5 Defendants are advised to read the statement set forth at the foot of the waiver form that
6 more completely describes the duties of the parties with regard to waiver of service of the
7 summons. If service is waived after the date provided in the Notice but before Defendants have
8 been personally served, the answer shall be due sixty days from the date on which the request for
9 waiver was sent or twenty days from the date the waiver form is filed, whichever is later.

10 5. Defendants shall file their Consent or Declination to Magistrate Judge Jurisdiction on or
11 before the date their answer is due.

12 6. The following briefing schedule shall govern dispositive motions in this action:

13 a. No later than thirty days from the date their answer is due, Defendants shall file a
14 motion for summary judgment or other dispositive motion. If Defendants file a motion for
15 summary judgment, it shall be supported by adequate factual documentation and shall conform in
16 all respects to Federal Rule of Civil Procedure 56. If Defendants are of the opinion that this case
17 cannot be resolved by summary judgment, they shall so inform the Court prior to the date the
18 summary judgment motion is due. All papers filed with the Court shall be promptly served on
19 Plaintiff.

20 At the time of filing the motion for summary judgment or other dispositive motion,
21 Defendants shall comply with the Ninth Circuit's decision in *Woods v. Carey*, 684 F.3d 934 (9th
22 Cir. 2012), and provide Plaintiff with notice of what is required of him to oppose a summary
23 judgment motion. If the motion is based on non-exhaustion of administrative remedies,
24 Defendants must comply with the notice and procedural requirements in *Albino v. Baca*, 747 F.3d
25 1162 (9th Cir. 2014). *See Stratton v. Buck*, 697 F.3d 1004, 1008 (9th Cir. 2012).

26 b. Plaintiff's opposition to the motion for summary judgment or other dispositive
27 motion shall be filed with the Court and served on Defendants no later than twenty-eight days after
28 the date on which Defendants' motion is filed. The Ninth Circuit has held that the following notice

1 should be given to *pro se* plaintiffs facing a summary judgment motion:

2 The defendants have made a motion for summary judgment by which they seek to have
3 your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules
4 of Civil Procedure will, if granted, end your case.

5 Rule 56 tells you what you must do in order to oppose a motion for summary judgment.
6 Generally, summary judgment must be granted when there is no genuine issue of material
7 fact -- that is, if there is no real dispute about any fact that would affect the result of your
8 case, the party who asked for summary judgment is entitled to judgment as a matter of law,
9 which will end your case. When a party you are suing makes a motion for summary
10 judgment that is properly supported by declarations (or other sworn testimony), you cannot
11 simply rely on what your complaint says. Instead, you must set out specific facts in
12 declarations, depositions, answers to interrogatories, or authenticated documents, as
13 provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and
14 documents and show that there is a genuine issue of material fact for trial. If you do not
15 submit your own evidence in opposition, summary judgment, if appropriate, may be
16 entered against you. If summary judgment is granted [in favor of the defendants], your
17 case will be dismissed and there will be no trial.

18 *Rand v. Rowland*, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc).

19 Before filing his opposition, Plaintiff is advised to read the notice that will be provided to
20 him by Defendants when the motion is filed, and Rule 56 of the Federal Rules of Civil Procedure
21 and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (party opposing summary judgment must come
22 forward with evidence showing triable issues of material fact on every essential element of his
23 claim). Plaintiff is cautioned that because he bears the burden of proving his allegations in this
24 case, he must be prepared to produce evidence in support of those allegations when he files his
25 opposition to Defendants' summary judgment motion. Such evidence may include sworn
26 declarations from himself and other witnesses to the incident, and copies of documents
27 authenticated by sworn declaration. Plaintiff will not be able to avoid summary judgment simply
28 by repeating the allegations of his complaint.

The same evidentiary requirement applies if the defendants file a motion for summary
judgment for failure to exhaust administrative remedies. To oppose this motion, Plaintiff must
present any evidence he may have which tends to show that he did exhaust administrative
remedies or was excused from doing so. Again, the evidence may be in the form of declarations,
that is statements of fact from himself or other witnesses signed under penalty of perjury, copies of

1 documents accompanied by a declaration showing where they came from and why they are
2 authentic, or discovery documents such as answers to interrogatories or depositions. In
3 considering a summary judgment motion for failure to exhaust administrative remedies, the Court
4 can decide disputed issues of fact with regard to this portion of the case. *See generally Albino,*
5 *747 F.3d at 1172-73; Stratton, 697 F.3d at 1008.*

6 c. Defendants shall file a reply brief no later than fourteen days after the date
7 Plaintiff's opposition is filed.

8 d. The motion shall be deemed submitted as of the date the reply brief is due. No
9 hearing will be held on the motion unless the Court so orders at a later date.

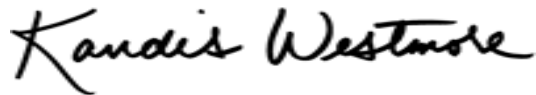
10 7. Discovery may be taken in this action in accordance with the Federal Rules of Civil
11 Procedure. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to Defendants to
12 depose Plaintiff and any other necessary witnesses confined in prison.

13 8. It is Plaintiff's responsibility to prosecute this case. He must keep the Court informed
14 of any change of address and must comply with the Court's orders in a timely fashion. Failure to
15 do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of
16 Civil Procedure 41(b).

17 9. Extensions of time are not favored, though reasonable extensions will be granted. Any
18 motion for an extension of time must be filed no later than three days prior to the deadline sought
19 to be extended.

20
21 **IT IS SO ORDERED.**

22 Dated: December 19, 2016

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24 KANDIS A. WESTMORE
25 United States Magistrate Judge
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