IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JERRY EUGENE SMITH,

Plaintiff,

v.

L. FRAIRE, et. al.,

Defendants.

No. C 14-04297 EJD (PR)

ORDER OF DISMISSAL

Plaintiff, a state prisoner at San Quentin State Prison ("SQSP"), filed the instant civil rights action in pro se pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis will be granted in a separate written order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that 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. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

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

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. See 28 U.S.C. § 1915A(b). A claim is frivolous if it is premised on an indisputably meritless legal theory or is clearly lacking any factual basis. See Neitzke v. Williams, 490 U.S. 319, 327 (1989). Although a complaint is not "frivolous" within the meaning of sections 1915A and 1915(e)(2) because it fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), see id. at 331, failure to state a claim is a separate basis for dismissal under sections 1915A and 1915(e)(2). A dismissal as legally frivolous is proper only if the legal theory lacks an arguable basis, while under Rule 12(b)(6) a court may dismiss a claim on a dispositive issue of law without regard to whether it is based on an outlandish theory or on a close but ultimately unavailing one. See id. at 324-28.

Sections 1915A and 1915(e)(2) accord judges the unusual power to pierce the veil of the complaint's factual allegations and dismiss as frivolous those claims whose factual contentions are clearly baseless. See Denton v. Hernandez, 504 U.S. 25, 32 (1992). Examples are claims describing fantastic or delusional scenarios with which federal district judges are all too familiar. See Neitzke, 490 U.S. at 328. To pierce the veil of the complaint's factual allegations means that a court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations. See Denton, 504 U.S. at 32. But, this initial assessment of the plaintiff's factual allegations must be weighted in favor of the plaintiff. See id. A

frivolousness determination cannot serve as a factfinding process for the resolution of disputed facts. See id. A finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them. See id. at 32-33. But the complaint may not be dismissed simply because the court finds the plaintiff's allegations unlikely or improbable. See id. at 33.

B. Plaintiff's Claims

Plaintiff claims that on May 16, 2013, Defendant Correctional Officer L. Fraire pushed him and grabbed his chest, causing injury to his back. (Compl. at 3.) Plaintiff claims that Defendant Fraire and Defendant K. Ancheta then filed false reports which had him sent to segregation. (Id.)

The treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment. Helling v. McKinney, 509 U.S. 25, 31 (1993). "After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Whitley v. Albers, 475 U.S. 312, 319 (1986) (ellipsis in original) (internal quotation and citation omitted). Whenever prison officials stand accused of using excessive force in violation of the Eighth Amendment, the core judicial inquiry is whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Hudson v. McMillian, 503 U.S. 1, 6-7 (1992); Whitley, 475 U.S. at 320-21.

According to the attached documents relating to the incident, which includes Plaintiff's staff complaint and the allegedly false rules violations report, Plaintiff approached Defendant Fraire in an irate manner and with a raised voice. Defendant Fraire gave Plaintiff several orders to stay away, which Plaintiff ignored. Instead, Plaintiff took a step towards Defendant Fraire, which made it necessary for him to push Plaintiff in the chest with both hands in order to control him. Defendant Fraire then sounded the alarm, to which responding staff arrived. (Docket No. 1-2 at 5, 11.) According to the medical report of injury immediately following the incident, the only

injury indicated was a reddened area on Plaintiff's chest. (Id. at 25.)

The extent of injury suffered by an inmate is one factor that may suggest whether the use of force could possibly have been thought necessary in a particular situation. Hudson, 503 U.S. at 7. The extent of injury may also provide some indication of the amount of force applied. Wilkins v. Gaddy, 130 S. Ct. 1175, 1178 (2010). But not every malevolent touch by a prison guard gives rise to a federal cause of action. Hudson, 503 U.S. at 9. The Eighth Amendment's prohibition of cruel and unusual punishment necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind. Id. An inmate who complains of a push or shove that causes no discernable injury almost certainly fails to state a valid excessive force claim. Id.

Based on the complaint and the attached papers, the extent of force used by Defendant Fraire was a "grab" and "push" which is not of a sort "repugnant to the conscience." Id. Furthermore, the facts indicate that the force was applied not to "maliciously and sadistically" for the purpose of causing harm, but rather in a good-faith effort to maintain or restore discipline. See Hudson, 503 U.S. at 6-7. Accordingly, Plaintiff's excessive force claim must be dismissed as frivolous because his factual contentions are clearly baseless. See Denton, 504 U.S. at 32.

The attached documents also dispute Plaintiff's claim that he was confined in segregation based on a false report. Plaintiff admits that he pursued Defendant Fraire when he gave him an unsatisfactory answer in response to Plaintiff's question. (Compl. at 3.) Furthermore, when Plaintiff's inmate appeal lead to an inquiry into possible staff misconduct, the result revealed no evidence of any violation of departmental policy. (Docket No. 1-2 at 4-5.) Accordingly this claims is DISMISSED as frivolous because it clearly lacks any factual basis. See Neitzke, 490 U.S. at 327.

Based on the foregoing discussion, the claims of excessive force and false report filing are DISMISSED as frivolous. See 28 U.S.C. § 1915A(b).

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CONCLUSION

For the reasons stated above, this action is DISMISSED as the claims alleged are frivolous. See 28 U.S.C. § 1915A(b).

The Clerk shall terminate any pending motions and close the file.

DATED: 1/26/15

EDWARD J. DAVILA
United States District Judge

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Plaintiff,

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_____/

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CERTIFICATE OF SERVICE

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

That on 1/27/15, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jerry Eugene Smith H-44485
San Quentin State Prison
San Quentin, CA 94964

Dated: 1/27/15

Richard W. Wieking, Clerk
By: Elizabeth Garcia, Deputy Clerk