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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ISIDRO ROMAN,

Plaintiff,

v.

M. KNOWLES, et al.,

Defendant.

Civil No. 07cv1343-JLS (POR)

**REPORT AND RECOMMENDATION
THAT DEFENDANTS' MOTION TO
DISMISS BE GRANTED**

[Document No. 41]

I. INTRODUCTION

On December 11, 2007, Plaintiff Isidro Roman, a state prisoner proceeding *pro se*, filed a second amended civil rights complaint pursuant to 42 U.S.C. § 1983 against the following Defendants: Mike Knowles, warden of the Kern Valley State Prison (“KVSP”); G. Giurbino, warden of the California State Prison at Calipatria (“CSP-CAL”); S. Zamora, healthcare manager of KVSP; M.E. Bourland, chief deputy warden at CSP-CAL; D. Paramo, associate warden at CSP-CAL; C.G. Butler, correctional captain at CSP-CAL; D. Bell, correctional counselor/appeals coordinator at CSP-CAL; R. Din, Newman, and M.D. Greenwood, correctional lieutenants at CSP-CAL; F.L. Martinez, correctional sergeant at CSP-CAL; A. Hernandez, K. Teeters, J. Nutt, C. Rodiles, Rush, Barajas, Ibarra, Alderete, Lopez, Gonzales, and P. Rodriguez-Toledo, correctional officers at CSP-CAL; and L. Terrones, medical technical assistant at KVSP. (Doc. No. 13.¹) Plaintiff sues Defendants in their individual capacities. (Compl. at 3-6.) On March 28, 2008, Defendants filed a

¹ Hereafter referred to as “Complaint.”

1 Motion to Dismiss Plaintiff’s Complaint. (Doc. No. 41.²) After thorough review of the parties’
2 papers and all supporting documents, this Court RECOMMENDS that Defendant’s Motion to
3 Dismiss be **GRANTED**.

4 **II. BACKGROUND**

5 **A. Plaintiff’s Specific Factual Allegations**

6 Plaintiff is an inmate at the California Substance Abuse Treatment Facility and State Prison
7 at Corcoran, California. Plaintiff files this suit, complaining of events which he claims occurred
8 while he was an inmate at Calipatria State Prison (“CSP-CAL”) and Kern Valley State Prison
9 (“KSVP”).

10 Plaintiff alleges that on September 15, 2005, he was housed in the Sensitive Needs Yard of
11 the CSP-CAL. (Compl. at ¶ 18). On that date, he informed prison authorities of his belief that his
12 personal safety was in jeopardy. (Compl. at ¶ 18). Accordingly, he was removed from the Sensitive
13 Needs population pending further investigation. (Compl. at ¶ 18). Plaintiff was medically
14 evaluated, cleared for placement in Administrative Segregation, and escorted to the Administrative
15 Segregation Unit, where he was relinquished to the custody of Defendants Martinez, Hernandez,
16 Teeters, Nutt, Rodiles, Rush, Barajas, Ibarra, Alderete, Lopez, Gonzales, and Rodriguez-Toledo.
17 (Compl. at ¶ 20, 22). Plaintiff alleges Defendants were well aware that in light of Plaintiff’s
18 Sensitive Needs status, he required special attention and consideration and was not to be made
19 accessible to any inmate from the general population. (Compl. at ¶ 19). Also, Plaintiff alleges these
20 Defendants had earned notoriety for staging inmate-on-inmate flights. (Compl. at ¶ 21). Moreover,
21 Plaintiff alleges these Defendants’ supervisors, Defendants Giurbino, Bourland, and Paramo, were
22 aware of this practice and had failed to stop it. (Compl. at ¶ 21). Plaintiff further alleges that upon
23 his arrival in Administrative Segregation, one or more of the Defendants tampered with and altered
24 the transferring documents so that Plaintiff would be placed in a cell with an inmate from the general
25 population. (Compl. at ¶ 23). Plaintiff claims Defendants did this, knowing Plaintiff would be
26 assaulted or killed. (Compl. at ¶ 23). Plaintiff alleges Defendants Martinez and Hernandez placed
27 him in a cell with a general population inmate, knowing he would be placed in danger. (Compl. at ¶

28 ² Hereafter referred to as “MTD.”

1 24). Immediately upon entrance into the cell, Plaintiff was attacked. (Compl. at ¶ 26).

2 Plaintiff alleges Defendants Martinez, Hernandez, Teeters, Nutt, Rodiles, and Barajas were
3 aware that Plaintiff was being attacked, but did not take measures to stop the attack and permitted it
4 to continue. (Compl. at ¶ 26). After “some time,” Plaintiff alleges these Defendants removed
5 Plaintiff’s attacker from the cell and ordered Plaintiff to the floor. Plaintiff alleges despite his
6 compliance with this order, Defendants applied force to him and removed him from the cell, at
7 which time he was medically examined. (Compl. at ¶ 27-28).

8 Following this incident, Plaintiff alleges Defendants Bourland, Paramo, Butler, Bell, Din,
9 Newman, Greenwood, Martinez, Hernandez, Teeters, Nutt, Rodiles, and Rodriguez-Toledo created
10 false reports charging Plaintiff with battering his attacker, rather than the reverse. (Compl. at ¶ 29).
11 Plaintiff claims he challenged these allegedly false charges and was exonerated from them. (Compl.
12 at ¶ 30-31). Plaintiff filed a grievance alleging Defendants Greenwood, Hernandez, Martinez, Bell,
13 Butler, and Bourland introduced false evidence against Plaintiff. (Compl. at ¶ 31). Plaintiff alleges
14 Defendants retaliated against him and harassed him as a result of filing the grievance. (Compl. at ¶
15 31-32). Specifically, Plaintiff alleges Defendants Rush, Barajas, Ibarra, Gonzales, Alderete, Lopez,
16 and Rodriguez-Toledo began referring to him as “Child Molester,” “Rat,” and “Snitch,” in the
17 presence of other inmates, knowing it would cause other inmates to attack Plaintiff. (Compl. at ¶
18 33). On November 15, 2005, Plaintiff claims he was attacked by another inmate as a result of
19 Defendants actions. (Compl. at ¶ 34). Plaintiff alleges Defendants, particularly Rodriguez-Toledo,
20 again falsely charged Plaintiff with instigating the attack. (Compl. at ¶ 34).

21 Plaintiff contends when Defendant Greenwood convened the hearing on this charge,
22 Defendant Greenwood attempted to bargain with him, offering to dismiss the charge in exchange for
23 Plaintiff withdrawing his grievance related to the initial attack. (Compl. at ¶ 36). When Plaintiff
24 refused to do so, Plaintiff alleges Defendant Greenwood summarily found Plaintiff guilty of the
25 charge, without allowing the introduction of any evidence Plaintiff had requested. (Compl. at ¶ 36).
26 Moreover, Plaintiff claims Defendant Greenwood manipulated the hearing transcript to justify his
27 failure to allow the introduction of Plaintiff’s requested evidence. (Compl. at ¶ 37). Plaintiff also
28 alleges Defendants Butler, Paramo, Bell, and Bourland were aware of Defendant Greenwood’s

1 actions and ignored them. (Compl. at ¶ 37).

2 Plaintiff claims to have suffered various physical injuries as a result of the two attacks and
3 the force applied to him by Defendants. (Compl. at ¶ 38). He alleges Defendants Butler, Din,
4 Newman, Greenwood, Martinez, Hernandez, Teeters, Nutt, Rodiles, Rush, Barajas, Ibarra, Alderete,
5 Lopez, and Rodriguez-Toledo were aware of his physical injuries, but declined to provide him with
6 medical care. (Compl. at ¶ 39).

7 On May 10, 2006, Plaintiff was transferred to Kern Valley State Prison. (Compl. at ¶ 39).
8 On August 4, 2006, Plaintiff reported to the medical clinic seeking medical attention. (Compl. at ¶
9 39). Plaintiff claims Defendant Terrones, a medical technical assistant, obtained his vital signs in
10 preparation for his seeing the treating physician. When he refused to remove a blood pressure band
11 himself at her request, she became belligerent toward him and ejected him from the clinic without
12 permitting him to see the treating physician. (Compl. at ¶ 39-40). Plaintiff alleges he reported these
13 events to a Doe Defendant who was a sergeant, but Doe Defendant also refused to provide him with
14 medical care. (Compl. at ¶ 41).

15 Plaintiff claims he filed grievances concerning these events. (Compl. at ¶ 42). In an attempt
16 to thwart his efforts and retaliate against him for filing the grievances, Plaintiff claims Defendants
17 Bourland, Paramo, Butler, Bell, Din, Newman, Greenwood, Martinez, Hernandez, Teeters, Nutt,
18 Rodiles, Rush, Barajas, Ibarra, Alderete, Lopez, Gonzales, Rodriguez-Toledo, Zamora, and Terrones
19 “rejected, destroyed, intercepted, and falsified” responses. (Compl. at ¶ 42). As retaliation and in
20 order to humiliate him, Plaintiff contends Defendants Greenwood, Martinez, Hernandez, Teeters,
21 Nutt, Rodiles, Rush, Barajas, Ibarra, Alderete, Lopez, Gonzales, and Rodriguez-Toledo also
22 permitted other inmates to throw human excrement and other bodily fluids and substances on
23 Plaintiff. (Compl. at ¶ 42).

24 Plaintiff contends all Defendants at the administrative level knew of and approved of the
25 conduct of all Defendants and did nothing to stop it. (Compl. at ¶ 44). Plaintiff alleges Defendants
26 acted against him because he was an inmate who frequently pursued grievances charging staff of
27 misconduct. (Compl. at ¶ 47).

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1 **B. Procedural Background**

2 On July 23, 2007, Plaintiff filed a complaint against Defendants Adams, Crones, Giurbino,
3 and Zamora. (Doc. No. 1). On August 6, 2007, the Court dismissed the case without prejudice for
4 failure to pay filing fees and/or move to proceed in forma pauperis. (Doc. No. 2). On August 8,
5 2007, Plaintiff filed a first amended complaint against Defendants Knowles, Bourland, Cobbs,
6 Paramo, Moncayo, Butler, Arline, Bell, Carrillo, Din, Newman, Greenwood, Hinshaw, Cake,
7 Martinez, Lane, Hernandez, Teeters, Nutt, Rodiles, Rush, Barajas, Ibarra, Alderete, Lopez,
8 Gonzales, Rodriguez-Toledo, Terrones, DOES 1-100, Adams, Giurbino, and Zamora. (Doc. No. 4).
9 On October 18, 2007, the Court sua sponte dismissed Plaintiff's first amended complaint without
10 prejudice for failure to state a claim. (Doc. No. 8).

11 On December 11, 2007, Plaintiff filed a second amended complaint. (Doc. No. 13). In his
12 Complaint, Plaintiff alleges Defendants violated his Eighth and Fourteenth Amendment rights by
13 being deliberately indifferent to his safety, which resulted in attacks by other inmates, and by using
14 excessive force against him. Further, Plaintiff alleges Defendants violated his Eighth and Fourteenth
15 Amendment rights by being deliberately indifferent to his medical needs after the attacks. Also,
16 Plaintiff alleges Defendants violated his First and Fourteenth Amendment rights by conspiring and
17 retaliating against him and by interfering with certain grievance proceedings. Moreover, Plaintiff
18 alleges Defendants' conduct violated state tort laws.

19 On March 28, 2008, Defendants filed a Motion to Dismiss Plaintiff's Complaint. (Doc. No.
20 41). Defendants seek dismissal on the grounds that: (1) Plaintiff cannot base his constitutional
21 claims on a theory of respondeat superior; (2) Plaintiff's Fourteenth Amendment claims for
22 deliberate indifference and excessive force should be dismissed because they are more appropriately
23 analyzed under the Eighth Amendment; (3) Plaintiff's Fourteenth Amendment claims for retaliation
24 and interference should be dismissed because they are more appropriately analyzed under the First
25 Amendment; (4) Plaintiff fails to state a claim against certain Defendants under the Eighth
26 Amendment; (5) Plaintiff failed to comply with the California Torts Claims Act; and (6) Certain
27 Defendants are immune from liability under state law. (MTD at 2-3).

28 //

III. DISCUSSION

A. Standard of Review

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) tests the legal sufficiency of the claims in the complaint. A claim can only be dismissed if it “appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Hishon v. King & Spaulding, 467 U.S. 69, 73 (1974). The court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them, and must construe the complaint in the light most favorable to the plaintiff. N.L. Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995); Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004) (“[U]nder Fed.R.Civ.P. 12(b)(6), [the Court must] accept[] all facts alleged in the complaint as true and construing them in the light most favorable to the plaintiff,”) (*citing* Karam v. City of Burbank, 352 F.3d 1188, 1192 (9th Cir. 2003)).

The court looks not at whether the plaintiff will “ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Dismissal is not warranted unless it “appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” Conley, 355 U.S. at 45-46.

Where a plaintiff appears in propria persona in a civil rights case, the court must construe the pleadings liberally and afford the plaintiff any benefit of the doubt. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is “particularly important in civil rights cases.” Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the court may not “supply essential elements of claims that were not initially pled.” Ivey v. Board of Regents of the University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.” Id.; see also Jones v. Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984) (conclusory allegations unsupported by facts are insufficient to state a claim under section 1983). “The plaintiff must allege with at least some degree of particularity overt acts which defendants engaged in that

1 support the plaintiff's claim." Jones, 733 F.2d at 649 (internal quotation omitted).

2 Nevertheless, the court must give a pro se litigant leave to amend his complaint unless it is
3 "absolutely clear that the deficiencies of the complaint could not be cured by amendment." Noll v.
4 Carlson, 809 F.2d 1446, 1447 (9th Cir. 1987). Thus, before a pro se civil rights complaint may be
5 dismissed, the court must provide the plaintiff with a statement of the complaint's deficiencies.
6 Karim-Panahi, 839 F.2d at 623-24.

7 **B. Respondeat Superior**

8 Plaintiff alleges Defendants Knowles, Giurbino, Bourland, Paramo, Butler, Bell, Newman,
9 Greenwood, and Zamora committed constitutional violations. Defendants allege the aforementioned
10 Defendants all act in supervisory capacities. To the extent Plaintiff alleges these Defendants
11 committed constitutional violations on the basis of their supervisory roles alone, Defendants contend
12 the claims against them must be dismissed. (MTD at 6).

13 Liability for a civil rights violation under Section 1983 may not be based on a theory of
14 respondeat superior. Monell v. Dep't of Social Services of City of New York, 436 U.S. 658, 693
15 (1978). "Liability under [§] 1983 arises only upon a showing of personal participation by the
16 defendant." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Therefore, "a supervisory official,
17 such as a warden, may be liable under Section 1983 only if he was personally involved in the
18 constitutional deprivation, or if there was a sufficient causal connection between the supervisor's
19 wrongful conduct and the constitutional violation." Henry v. Sanchez, 923 F. Supp. 1266, 1272
20 (C.D. Cal. 1996). For there to be a sufficient causal connection, the official must have known of a
21 constitutional violation; it is not enough to claim that an official should have known of a
22 constitutional deprivation because of a complaint brought through the prison appeals system. Barry
23 v. Ratelle, 985 F. Supp. 1235, 1239 (S.D. Cal. 1997).

24 **1. Defendants Knowles, Giurbino, and Zamora**

25 Defendant Knowles is the warden of the KSVP facility, Defendant Giurbino is the warden of
26 the CSP-CAL facility, and Defendant Zamora is the healthcare manager of the KVSP facility.
27 Plaintiff sues each of these three Defendants in their individual capacity. (Compl. at ¶ 4-5).
28 Plaintiff, however, has failed to allege Defendants Knowles, Giurbino, or Zamora were personally

1 involved in the events Plaintiff alleges constitute constitutional violations. Further, Plaintiff fails to
2 allege any causal connection between these three Defendants and the alleged constitutional
3 violations. Conversely, Plaintiff alleges Knowles, Giurbino, and Zamora acted in supervisory and
4 management roles. (Compl. at ¶ 4-5). Therefore, Plaintiffs constitutional claims against Knowles,
5 Giurbino, and Zamora are based on a theory of respondeat superior, which does not create liability
6 under section 1983. Monell v. Dep't of Social Services of City of New York, 436 U.S. 658, 693
7 (1978)(Compl. at ¶ 4-5). Based thereon, the Court recommends Defendants' Motion to Dismiss all
8 of Plaintiff's constitutional claims against Defendants Knowles, Giurbino, and Zamora be
9 **GRANTED** with leave to amend.

10 **2. Defendants Bourland, Paramo, and Bell**

11 Defendant Bourland is the chief deputy warden at CSP-CAL, Defendant Paramo is an
12 associate warden at CSP-CAL, and Defendant Bell is a correctional counselor/appeals coordinator at
13 CSP-CAL. Plaintiff sues each of these three Defendants in their individual capacity. (Compl. at ¶ 6,
14 8). Plaintiff, however, has failed to allege Defendants Bourland, Paramo, or Bell were personally
15 involved in the events related to Plaintiff's allegations of (1) deliberate indifference to safety and
16 excessive force, or (2) deliberate indifference to medical needs. Further, Plaintiff fails to allege any
17 causal connection between these three Defendants and the alleged deliberate indifference to safety or
18 medical needs. Conversely, Plaintiff alleges Bourland, Paramo, and Bell acted in supervisory and
19 management roles. (Compl. at ¶ 6, 8). Therefore, Plaintiffs claims of deliberate indifference to
20 safety and medical needs against Bourland, Paramo, and Bell are based on a theory of respondeat
21 superior, which does not create liability under section 1983. Monell v. Dep't of Social Services of
22 City of New York, 436 U.S. 658, 693 (1978). Based thereon, the Court recommends Defendants'
23 Motion to Dismiss Plaintiff's claims of (1) deliberate indifference to safety and use of excessive
24 force, and (2) deliberate indifference to medical needs, against Defendants Bourland, Paramo, and
25 Bell be **GRANTED** with leave to amend.

26 **3. Defendants Butler, Newman, and Greenwood**

27 Defendant Butler is a captain at CSP-CAL, and Defendants Newman and Greenwood are
28 correctional lieutenants at CSP-CAL. (Compl. at ¶ 7, 9). Plaintiff sues each of these three

1 Defendants in their individual capacity. (Compl. at ¶ 7, 9). Plaintiff, however, has failed to allege
2 Defendants Butler, Newman, or Greenwood were personally involved in the events related to
3 Plaintiff's allegations of deliberate indifference to safety and excessive force.³ Further, Plaintiff
4 fails to allege any causal connection between these three Defendants and the alleged deliberate
5 indifference to safety and excessive force. Conversely, Plaintiff alleges Butler, Newman, and
6 Greenwood acted in supervisory and management roles. (Compl. at ¶ 7, 9). Therefore, Plaintiffs
7 claim of deliberate indifference to safety and excessive force against Butler, Newman, and
8 Greenwood is based on a theory of respondeat superior, which does not create liability under section
9 1983. Monell v. Dep't of Social Services of City of New York, 436 U.S. 658, 693 (1978). Based
10 thereon, the Court recommends Defendants' Motion to Dismiss Plaintiff's claim of deliberate
11 indifference to safety and use of excessive force against Defendants Butler, Newman, and
12 Greenwood be **GRANTED** with leave to amend.

13 **C. Fourteenth Amendment Claim of Deliberate Indifference and Use of Excessive Force**

14 Plaintiff alleges Defendants were deliberately indifferent to his safety and medical needs, and
15 used excessive force, all in violation of the Fourteenth Amendment. (Compl. at ¶ 50-68).
16 Defendants' contend these claims under the Fourteenth Amendment should be dismissed because
17 they are more appropriately analyzed under the Eighth Amendment. (MTD at 7-8).

18 The Due Process Clause of the Fourteenth Amendment guarantees that no person may be
19 deprived "of life, liberty, or property, without due process of law." U.S. Const. XIV, § 1. A person
20 asserting a violation of the right to due process must allege facts showing that he was deprived of an
21 interest cognizable under the Due Process Clause. See Kentucky Dep't of Corrections v. Thompson,
22 490 U.S. 454, 459-60 (1989); Board of Regents v. Roth, 408 U.S. 564, 571 (1972). Liberty interests
23 in the prison context are generally limited to freedom from restraints that "impose atypical and
24 significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v.
25 Conner, 515 U.S. 472, 484 (1995). Even severe hardship does not rise to the level of a constitutional
26 violation unless it is both atypical and significant. Id.

27
28 ³ Plaintiff's claim for deliberate indifference to medical needs against Defendants Butler, Newman, and Greenwood is not dismissed because Plaintiff alleges facts in his second amended complaint indicating these Defendants had knowledge of Plaintiff's medical needs and chose not to treat him. (Compl. ¶ 38).

1 Where an explicit textual source of constitutional protection exists, a claim should be
2 analyzed under the source as opposed to a more generalized Fourteenth Amendment substantive due
3 process analysis. See Graham v. Connor, 490 U.S. 386, 395 (1989) (explicit Fourth Amendment
4 constitutional protection trumps more generalized substantive due process analysis); County of
5 Sacramento v. Lewis, 523 U.S. 833, 843 (1998) (quoting United States v. Lanier, 520 U.S. 259, 272
6 n.7 (1997)) (finding that substantive due process analysis is inappropriate when the claim is already
7 " 'covered by a specific constitutional provision, such as the Fourth or Eighth Amendment ...' ");
8 Albright v. Oliver, 510 U.S. 266, 273 (1994) (holding that when a broad substantive due process
9 violation is alleged, the court should look to constitutional amendment that most closely provides an
10 explicit source of constitutional protection). Thus, the Eighth Amendment's cruel and unusual
11 punishment clause is the appropriate standard for analyzing a challenge to a condition of
12 confinement or deliberate indifference to the inmate's safety or medical needs. See Helling v.
13 McKinney, 509 U.S. 25, 32 (1993) (an inmate's challenge to conditions of confinement are subject
14 to scrutiny under the Eighth Amendment); Osolinski v. Kane, 92 F.3d 934, 936-37 (9th Cir. 1996)
15 (Eighth Amendment imposes a duty on prison officials to guarantee the safety of inmates).

16 Plaintiff has asserted Defendants were deliberately indifferent to his safety and medical
17 needs, and used excessive force, all in violation of the Fourteenth Amendment. Plaintiff's claims,
18 however, are squarely covered under the Eighth Amendment prohibition on cruel and unusual
19 punishment and are properly evaluated by the pertinent law set forth above. Graham v. Connor, 490
20 U.S. 386, 395 (1989); County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998); Albright v. Oliver,
21 510 U.S. 266, 273 (1994). Based thereon, the Court recommends Defendants' Motion to Dismiss
22 Plaintiff's Fourteenth Amendment claim of deliberate indifference to his safety and medical needs
23 and use of excessive force against Defendants be **GRANTED** without leave to amend.

24 **D. Fourteenth Amendment Claim of Retaliation and Interference**

25 Plaintiff alleges Defendants retaliated against him for filing grievances against several
26 Defendants and interfered with his filing of grievances, thereby violating the First and Fourteenth
27 Amendment. (Compl. at ¶ 69-73). Defendants contend these claims should be dismissed to the
28 extent they are presented under the Fourteenth Amendment because they are more appropriately

1 analyzed under the First Amendment. (MTD at 8).

2 Where an explicit textual source of constitutional protection exists, a claim should be
3 analyzed under the source as opposed to a more generalized Fourteenth Amendment substantive due
4 process analysis. See Graham v. Connor, 490 U.S. 386, 395 (1989) (explicit Fourth Amendment
5 constitutional protection trumps more generalized substantive due process analysis). Thus, the First
6 Amendment right to petition government through a prison grievance procedure is the appropriate
7 standard for analyzing a claim of retaliation and interference with the grievance process. See
8 Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995) (“The ‘government’ to which the First
9 Amendment guarantees a right of redress of grievances includes the prison authorities, as it includes
10 other administrative arms and units of government).

11 Plaintiff alleges Defendants retaliated against him for filing grievances against several
12 Defendants and interfered with his filing of grievances, thereby violating the First and Fourteenth
13 Amendment. (Compl. at ¶ 69-73). Plaintiff’s claims, however, are squarely covered under the First
14 Amendment right to petition government through prison grievance procedures and are properly
15 evaluated by the pertinent law set forth above. Graham v. Connor, 490 U.S. 386, 395 (1989);
16 County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998); Albright v. Oliver, 510 U.S. 266, 273
17 (1994). Based thereon, the Court recommends Defendants’ Motion to Dismiss Plaintiff’s Fourteenth
18 Amendment claim of retaliation for filing grievances against several Defendants and interference
19 with his filing of grievances against Defendants be **GRANTED** without leave to amend.

20 **E. Eighth Amendment Claims**

21 Plaintiff contends Defendants Knowles, Giurbino, Zamora, Bourland, Paramo, Butler, Bell,
22 Newman, Greenwood, and Terrones violated his Eighth Amendment rights because they were (1)
23 deliberately indifferent to his safety, (2) used excessive force, and were (3) deliberately indifferent
24 to his medical needs. (Compl. at ¶ 50-68). Defendants contend Plaintiff’s Eighth Amendment
25 claims against these Defendants should be dismissed for failure to state a claim under Federal Rule
26 of Civil Procedure 12(b)(6). (MTD at 8).

27 **1. Standard of Review per Fed. R. Civ. P. 12(b)(6)**

28 A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P 12(b)(6) tests the

1 legal sufficiency of the claims in the complaint. A claim cannot be dismissed unless it “appears
2 beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle
3 him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see Daniel v. County of Santa
4 Barbara, 288 F.3d 375, 380 (9th Cir. 2002); Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979,
5 984 (9th Cir. 2000). In order to survive a motion to dismiss, a plaintiff must “allege overt acts with
6 some degree of particularity such that his claim is set forth clearly enough to give defendants fair
7 notice of the type of claim being pursued.” Ortez v. Washington County, 88 F.3d 804, 810 (9th Cir.
8 1996).

9 The court must accept as true all material allegations in the complaint, as well as reasoned
10 inferences to be drawn from them, and must construe the complaint in the light most favorable to the
11 plaintiff. N.L. Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Parks School of
12 Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). The court looks not at whether the
13 plaintiff will “ultimately prevail but whether the claimant is entitled to offer evidence to support the
14 claims.” Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Display Research Laboratories, Inc. v.
15 Telegen Corp., 133 F. Supp. 2d 1170, 1173 (N.D. Cal. 2001).

16 Where a plaintiff appears in *propria persona* in a civil rights case, the court must construe
17 the pleadings liberally and afford the plaintiff any benefit of the doubt. Karim-Panahi v. Los
18 Angeles Police Dep’t, 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is
19 “particularly important in civil rights cases.” Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir.
20 1992). In giving liberal interpretation to a *pro se* civil rights complaint, however, the court may not
21 “supply essential elements of claims that were not initially pled.” Ivey v. Board of Regents of the
22 University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). Vague or conclusory allegations are not
23 sufficient to withstand a motion to dismiss in civil rights violations. Id.; see also Jones v.
24 Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984) (conclusory allegations
25 unsupported by facts are insufficient to state a claim under section 1983). “The plaintiff must allege
26 with at least some degree of particularity overt acts which defendants engaged in that support the
27 plaintiff’s claim.” Jones, 733 F.2d at 649 (internal quotation omitted).

28 In addition, when resolving a motion to dismiss for failure to state a claim, the court may not

1 generally consider materials outside the pleadings. Schneider v. California Dep't of Corrections,
2 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). “The focus of any Rule 12(b)(6) dismissal . . . is the
3 complaint.” Id. at 1197 n.1. However, the court may consider documents or exhibits “whose
4 contents are alleged in a complaint and whose authenticity no party questions.” Branch v. Tunnell,
5 14 F.3d 449, 454 (9th Cir. 1994); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1555
6 (9th Cir. 1990); Stone v. Writer's Guild of Am. W. Inc., 101 F.3d 1312, 1313-14 (9th Cir. 1996).

7 Where a *pro se* litigant's claim is dismissed for failure to state a claim, leave to amend
8 should be granted unless “it is absolutely clear that the deficiencies of the complaint could not be
9 cured by amendment.” Weilburg v. Shapiro, 488 F.3d 1202, 1205 (9th Cir. 2007)(quoting Schucker
10 v. Rockwood, 846 F.2d 1202, 1203-04 (9th Cir. 1988)). Prior to a final dismissal of a claim, “a *pro*
11 *se* litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend.” Lucas
12 v. Dep't of Corrections, 66 F.3d 245, 248 (9th Cir. 1995).

13 2. Eight Amendment Claims

14 “The treatment a prisoner receives in prison and the conditions under which the he is
15 confined are subject to scrutiny under the Eighth Amendment.” Farmer v. Brennan, 511 U.S. 825,
16 832 (1994)(internal quotation omitted); see also Morgan v. Morgansen, 465 F.3d 1041 (9th Cir.
17 2006)(“The Eighth Amendment's prohibition against cruel and unusual punishment protects
18 prisoners not only from inhumane methods of punishment but also from inhumane conditions of
19 confinement.”). However, due to the “harsh and restrictive” nature of a prison setting, a prisoner's
20 injury does not automatically constitute a constitutional violation. Morgan, 465 F.3d at 1045.

21 A prisoner alleging a violation of his Eighth Amendment must satisfy both an objective and a
22 subjective component. Clement v. Gomez, 298 F.3d 898, 904 (9th Cir. 2002). Under the objective
23 requirement, an inmate must show “the deprivation he suffered was objectively, sufficiently
24 serious.” Morgan, 465 F.3d at 1045. The deprivation must be such that the prisoner is denied “the
25 minimal civilized measure of life's necessities.” Farmer, 511 U.S. at 834 (internal quotation
26 omitted). As long as the institution provides inmates “with adequate food, clothing, shelter,
27 sanitation, medical care, and personal safety,” no Eighth Amendment violation has occurred.
28 Hoptowitt v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982).

1 //

2 The subjective requirement, relating to the defendants' state of mind, requires a prison
3 official to have a "sufficiently culpable state of mind." Farmer, 511 U.S. at 834; see also Allen v.
4 Sakai, 48 F.3d 1082, 1087 (9th Cir. 1994). The Court must analyze each claimed violation in light
5 of these requirements, for Eighth Amendment violations may not be based on the "totality of
6 conditions" at a prison. Hoptowit, 682 F.2d at 246-47.

7 **a. Deliberate Indifference to Safety**

8 Plaintiff alleges Defendants were deliberately indifferent to his safety in violation of his
9 Eighth Amendment right to be free from cruel and unusual punishment. (Compl. at ¶ 50-60).
10 Defendants Knowles, Giurbino, Zamora, Bourland, Paramo, Butler, Bell, Newman, Greenwood and
11 Terrones contend Plaintiff fails to plead sufficient facts to show they had knowledge of the conduct
12 he describes as constituting deliberate indifference to his safety. (MTD at 9-10).

13 "Prison officials have a duty to take reasonable steps to protect inmates from physical
14 abuse." Hoptowit, 682 F.2d at 1250-51. To establish a violation of this duty, a prisoner must
15 establish prison officials were "deliberately indifferent" to serious threats to the inmate's safety.
16 Farmer, 511 U.S. at 834. Deliberate indifference is present when a prison official "knows of and
17 disregards an excessive risk to inmate health or safety." Farmer, 511 U.S. at 837.

18 Plaintiff's claim satisfies the objective requirement. The two assaults alleged in the
19 complaint are contrary to a prison's duty to provide prisoners with personal safety. Hoptowit, 682
20 F.2d at 1246. However, Plaintiff's claim fails to satisfy the subjective requirement. Plaintiff fails to
21 plead sufficient facts to show "deliberate indifference" to his safety on the part of Defendants
22 Knowles, Giurbino, Bourland, Paramo, Butler, Bell, Newman, Greenwood, and Terrones.
23 Specifically, Plaintiff fails to plead facts demonstrating any of these Defendants had actual
24 knowledge he faced a substantial risk of serious harm and disregarded that risk by failing to take
25 reasonable steps to abate it. Farmer, 511 U.S. at 837.

26 In paragraph 57 of the Complaint, Plaintiff alleges Defendants Knowles, Giurbino, Zamora,
27 Bourland, Paramo, Butler, Bell, Newman, and Greenwood "had the authority and responsibility" to
28 ensure his protection and they failed to carry out this responsibility. (Compl. at ¶ 57). In paragraph

1 55, Plaintiff alleges Defendants Butler, Newman, Greenwood, and Terrones “had the duty” to
2 provide his safety and humane treatment. (Compl. at ¶ 55). In paragraph 21, Plaintiff alleges
3 Defendants Bell, Newman, and Bourland were aware other Defendants staged inmate-on-inmate
4 fights and knew they were “prone to continue arbitrarily, maliciously and sadistically subject[]
5 prisoners such as plaintiff to unnecessary dangers, physical assaults, instances of abuse and other
6 instances in which his safety was leveraged.” (Compl. at ¶ 21). In paragraph 43, Plaintiff claims all
7 Defendants condoned and permitted the two assaults he suffered. (Compl. at ¶ 43).

8 Nevertheless, Plaintiff does not allege any facts to show any of these Defendants had actual
9 knowledge of the possibility Plaintiff was going to be assaulted, that any of these Defendants
10 witnessed Plaintiff being assaulted, or that any of these Defendants failed to stop Plaintiff from
11 being assaulted. Plaintiff has not alleged, with at least some degree of particularity, overt acts
12 demonstrating Defendants knew Plaintiff faced a substantial risk of serious harm or that Defendants
13 had the necessary information to enable them to take reasonable steps to abate that risk. Broad,
14 conclusory allegations that Defendants should have known of specific incidents because of their
15 authority, responsibilities, and duties are not enough to prove deliberate indifference. Barry v.
16 Ratelle, 985 F. Supp. 1235, 1239 (S.D. Cal. 1997). Based thereon, the Court recommends
17 Defendants’ Motion to Dismiss Plaintiff’s Eighth Amendment Claim of deliberate indifference to
18 safety against Defendants Knowles, Giurbino, Zamora, Bourland, Paramo, Butler, Bell, Newman,
19 Greenwood, and Terrones be **GRANTED** with leave to amend.

20 **b. Excessive Force**

21 Plaintiff alleges all Defendants used excessive force against him in violation of his Eighth
22 Amendment right to be free from cruel and unusual punishment. (Compl. at ¶ 50-60). Defendants
23 Knowles, Giurbino, Zamora, Bourland, Paramo, Butler, Bell, Newman, Greenwood and Terrones
24 contend Plaintiff fails to plead sufficient facts to show these Defendants engaged in the conduct
25 Plaintiff describes as constituting excessive force. (MTD at 12).

26 “[W]henever prison officials stand accused of using excessive physical force in violation of
27 the [Eighth Amendment], the core judicial inquiry is...whether force was applied in a good-faith
28 effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Hudson v.

1 McMillian, 503 U.S. 1, 6-7 (1992); Schwenk v. Anderson, 204 F.3d 1187, 1196 (9th Cir. 2000);
2 Berg v. Kincheloe, 794 F.2d 457, 460 (9th Cir. 1986). Courts examine (1) the need for application
3 of force; (2) the relationship between the need and the amount of force used; (3) the extent of injury
4 inflicted; (4) the extent of threat to the safety of staff and inmates, as reasonably perceived by
5 responsible officials on the basis of facts known to them; and (5) any efforts made to temper the
6 severity of a forceful response. Hudson, 503 U.S. at 7. Supervisors can only be held liable for
7 excessive force of their subordinates if they “participated in or directed the violations, or knew of
8 the violations and failed to act to prevent them.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.
9 1989).

10 Here, Plaintiff does not allege Defendants Knowles, Giurbino, Zamora, Bourland, Paramo,
11 Butler, Bell, Newman, Greenwood or Terrones used excessive force against him. In paragraph 55 of
12 the Complaint, Plaintiff merely states these Defendants had a “duty” and “authority and
13 responsibility” to prevent the use of excessive force against him. (Compl. at ¶ 55). This allegation
14 is insufficient to establish an excessive force claim under the Eighth Amendment. Based thereon,
15 the Court recommends Defendants’ Motion to Dismiss Plaintiff’s Eighth Amendment Claim of
16 excessive force against Defendants Knowles, Giurbino, Zamora, Bourland, Paramo, Butler, Bell,
17 Newman, Greenwood, and Terrones be **GRANTED** with leave to amend.

18 **c. Deliberate Indifference to Medical Needs**

19 Plaintiff alleges certain Defendants were deliberately indifferent to his medical needs in
20 violation of his Eighth Amendment right to be free from cruel and unusual punishment. (Compl. at
21 ¶ 61-68). Defendants Knowles, Giurbino, Zamora, Paramo, Bourland, and Terrones contend
22 Plaintiff fails to allege sufficient facts to show these Defendants were deliberately indifferent to his
23 medical needs. (MTD at 13).

24 “[D]eliberate indifference to a prisoner’s serious illness or injury states a cause of action
25 under § 1983.” Estelle v. Gamble, 429 U.S. 97, 105 (1976). “A determination of ‘deliberate
26 indifference’ involves an examination of two elements: the seriousness of the prisoner’s medical
27 need and the nature of the defendant’s response to that need.” McGuckin v. Smith, 974 F.2d 1050,
28 1059 (9th Cir. 1992). First, “[a] ‘serious’ medical need exists if the failure to treat a prisoner’s

1 condition could result in further significant injury or the ‘unnecessary and wanton infliction of
2 pain.’” McGuckin, 974 F.2d at 1059 (quoting Estelle, 429 U.S. at 104). Second, to establish
3 deliberate indifference, a defendant must purposefully ignore or fail to respond to a prisoner’s pain
4 or possible medical need. McGuckin, 974 F.2d at 1060. Deliberate indifference to medical needs
5 occurs when prison officials “‘deny, delay, or intentionally interfere with medical treatment.’” Hunt
6 v. Dental Dep’t, 865 F.2d 198, 201 (9th Cir. 1989) (quoting Hutchinson v. US, 838 F.2d 390, 394
7 (9th Cir. 1984)).

8 “The requirement of deliberate indifference is less stringent in cases involving a prisoner’s
9 medical need than in other cases involving harm to incarcerated individuals because ‘[t]he State’s
10 responsibility to provide inmates with medical care ordinarily does not conflict with competing
11 administrative concerns.’” McGuckin, 974 F.2d at 1060. Nonetheless, the indifference to medical
12 needs must be substantial; inadequate treatment due to malpractice, or even negligence, does not
13 amount to a constitutional violation. Estelle, 429 U.S. at 106.

14 As to Defendant Terrones, Plaintiff fails to plead sufficient facts showing his medical
15 condition was serious. In paragraph 39, Plaintiff does not mention the medical condition for which
16 he went to the Kern Valley State Prison medical clinic. (Compl. at ¶ 39). Although Plaintiff
17 describes the extensive physical injuries he suffered due to two attacks in September and November
18 of 2005, he claims to have seen Defendant Terrones on August 4, 2006, nearly nine months later, for
19 an undisclosed medical condition. (Compl. at ¶ 38, 39). Due to Plaintiff’s failure to describe his
20 medical need at the time he saw Defendant Terrones, he has not plead facts sufficient to show he had
21 a “serious” medical need.

22 As to Defendants Knowles, Giurbino, Zamora, Paramo, and Bourland, Plaintiff fails to plead
23 sufficient facts demonstrating these Defendants had culpable states of mind. In paragraph 63 of the
24 Complaint, Plaintiff merely states these Defendants “had the duty to provide appropriate medical
25 services and treatment in accordance with sound principles of practice.” (Compl. at ¶ 63). In
26 paragraph 64, Plaintiff alleges all Defendants “acted in conscious disregard of [his] serious medical
27 needs and constitutional rights.” (Compl. at ¶ 64). In paragraph 65, Plaintiff alleges Defendants
28 “had the authority to ensure that [he] received adequate health care.” (Compl. at ¶ 65). Nonetheless,

1 Plaintiff fails to plead specific facts showing these Defendants had actual knowledge of his alleged
2 medical condition or that Defendants failed to provide him with necessary medical attention. Based
3 thereon, the Court recommends Defendants' Motion to Dismiss Plaintiff's Eighth Amendment
4 Claim of deliberate indifference to his medical needs against Defendants Knowles, Giurbino,
5 Zamora, Paramo, Bourland and Terrones be **GRANTED** with leave to amend.

6 **F. California Tort Claims Act**

7 Plaintiff asserts state tort causes of action against Defendants for (1) intentional infliction of
8 emotional distress, (2) negligent infliction of emotional distress, (3) negligent custodianship of a
9 prisoner, and (4) negligent conduct of a public employee. (Compl. at ¶ 74-88). Defendants contend
10 Plaintiff's state tort causes of action should be dismissed because Plaintiff failed to comply with the
11 requirements of the California Tort Claims Act (CTCA). (MTD at 15).

12 The CTCA requires that state tort law claims against a public entity, including those asserted
13 by inmates, be presented to the Victim Compensation Board before they can be litigated in state or
14 federal court. Cal. Gov't Code §§ 911.2, 945.4; State of California v. Superior Court, 32 Cal. 4th
15 1234, 1239 (Cal. 2004); Hernandez v. McClanahan, 996 F. Supp. 975, 977 (N.D. Cal. 1998).
16 California Government Code § 945.4 provides that "no suit for money or damages may be brought
17 against a public entity on a cause of action for which a claim is required to be presented ... until a
18 written claim therefor has been presented to the public entity and has been acted upon by the board,
19 or has been deemed to have been rejected by the board." Cal.Gov.Code § 945.4 (West 2008). In
20 addition, section 945.6 provides that, "any suit brought against a public entity on a cause of action
21 for which a claim is required to be presented ... must be commenced, if written notice is given in
22 accordance with section 913, not later than six months after the date such notice is personally
23 delivered or deposited in the mail." Cal. Gov. Code § 945.6. (West 2008). The failure to comply
24 with these requirements bars the plaintiff from bringing suit against that public entity. State of
25 California, 32 Cal. 4th at 1239.

26 The Ninth Circuit has expressly held that a tort claim against a public entity must be
27 presented to the Board before a plaintiff may pursue the claim in federal court. Mangold v.
28 California Public Utilities Com'n, 67 F.3d 1470, 1477 (9th Cir. 1995). A plaintiff pursuing such a

1 claim has the burden of affirmatively alleging compliance with the CTCA. Karim-Panahi v. Los
2 Angeles Police Dept., 839 F.2d 621, 627 (9th Cir.1988); Hendon v. Ramsey, 528 F.Supp.2d 1058,
3 1069 (S.D. Cal. 2007). An inmate’s utilization of the prison’s grievance system does not satisfy the
4 CTCA’s requirements. Hendon, 528 F.Supp.2d at 1069.

5 Here, there is no indication Plaintiff has complied with CTCA. First, Plaintiff fails to allege
6 facts which show he has complied with California’s Tort Claims Act. Karim-Panahi, 839 F.2d at
7 627. Second, Defendants represent they have searched the Victim Compensation Board’s records
8 and discovered Plaintiff presented a claim to the Board, but he presented it late. (Doc. 41-3). The
9 Board denied Plaintiff’s request to present a late claim. (Doc. 41-3, Ex. A). Based on these reasons,
10 the Court RECOMMENDS Defendants’ Motion to Dismiss as relates to Plaintiff’s state tort law
11 claims be **GRANTED** without leave to amend.

12 **G. State Law Immunity**

13 **1. Government Code Section 845.6**

14 Plaintiff asserts he has suffered injury under state law because of the deliberate and negligent
15 acts of unspecified Defendants. (Compl. at ¶ 74-88). Defendants Knowles, Giurbino, Zamora,
16 Bourland, and Paramo contend Plaintiff’s allegation these Defendants failed to provide Plaintiff with
17 medical care should be dismissed because they are immunized from liability under California
18 Government Code § 845.6. California Code Section 845.6 states:

19 Neither a public entity nor a public employee is liable for injury proximately caused
20 by the failure of the employee to furnish or obtain medical care for a prisoner in his custody;
21 but, except as otherwise provided by sections 855.8 and 856, a public employee, and the
22 public entity where the employee is acting within the scope of his employment, is liable if
the employee knows or has reason to know that the prisoner is in need of immediate medical
care and he fails to take reasonable action to summon such medical care.

23 In order to state a claim under this exception to the immunity provision of § 845.6, a prisoner
24 must establish three elements: (1) the public employee knew or had reason to know of the need (2)
25 for immediate medical care, and (3) failed to reasonably summon such care. Jett v. Penner, 439 F.3d
26 1091, 1099 (9th Cir. 2006).

27 Here, Plaintiff alleges Defendants Knowles, Giurbino, Zamora, Bourland and Paramo “had a
28 duty” to provide him with medical care and they “had the authority to ensure that he received

1 adequate medical care.” (Compl. at ¶ 63, 65). However, Plaintiff fails to plead facts showing
2 Defendants Knowles, Giurbino, Zamora, Bourland and Paramo had actual knowledge of Plaintiff’s
3 alleged need for medical care. Plaintiff also fails to plead facts showing these Defendants had
4 reason to know of the alleged need for medical care. Therefore, Plaintiff fails to plead the requisite
5 facts to destroy the immunity granted to Defendants Knowles, Giurbino, Zamora, Bourland, and
6 Paramo by California Government Code § 845.6. Based thereon, the Court recommends
7 Defendants’ Motion to Dismiss Plaintiff’s state tort claims that Defendants Knowles, Giurbino,
8 Zamora, Bourland, and Paramo failed to provide him medical care be **GRANTED** with leave to
9 amend.

10 **2. Government Code Section 820.8**

11 Plaintiff asserts the state law claim of negligent conduct of a public employee against
12 Defendants Knowles, Giurbino, Zamora, Bourland, Paramo, Butler, Bell, Newman, Greenwood, and
13 Martinez. (Compl. at ¶ 86). Defendants allege this claim is based on a theory of respondeat
14 superior. (MTD at 17). To the extent Plaintiff’s state law claims against Defendants are based on
15 their supervisory roles, Defendants contend they should be dismissed because they are immune from
16 liability. *Id.*

17 “Supervisory personnel whose personal involvement is not alleged many not be held
18 responsible for the acts of their subordinates under California law.” *Milton v. Nelson*, 527 F.2d
19 1158, 1159 (9th Cir. 1975). Government Code § 820.8 states:

20 Except as otherwise provided by statute, a public employee is not liable for an injury
21 caused by the act or omission of another person. Nothing in this section exonerates a public
22 employee from liability for injury proximately caused by his own negligent or wrongful act
or omission.

23 Here, Plaintiff alleges Defendants Knowles, Giurbino, Zamora, Bourland, Paramo, Butler,
24 Bell, Newman, Greenwood, and Martinez had the authority, responsibility, and duty to prevent the
25 conduct he alleges. (Compl. at ¶ 57, 55, 63). Plaintiff also alleges these Defendants had the
26 responsibility to implement policies and procedures, and to supervise, train, and discipline staff.
27 (Compl. at ¶ 4,5,6,7,9,10). However, Plaintiff fails to plead facts showing these Defendants were
28 personally involved in the acts or omissions giving rise to the state law claim of negligent conduct of

1 a public employee. Therefore, Plaintiff fails to plead the requisite facts to destroy the immunity
2 granted to Defendants Knowles, Giurbino, Zamora, Bourland, Paramo, Butler, Bell, Newman,
3 Greenwood, and Martinez by California Government Code § 820.8. Based thereon, the Court
4 recommends Defendants' Motion to Dismiss Plaintiff's state tort claims, which intend to hold
5 Defendants Knowles, Giurbino, Zamora, Bourland, Paramo, Butler, Bell, Newman, Greenwood, and
6 Martinez vicariously liable for the act of others, be **GRANTED** with leave to amend.

7 **H. Dismissal For Failure to Serve**

8 A review of the Court's docket indicates no proof of service has been filed as to Defendants
9 R. Din, Ibarra, Lopez, and Gonzales. See Walker v. Sumner, 14 F.3d 1415, 1421-22 (9th Cir. 1994)
10 (where a pro se plaintiff fails to provide the Marshal with sufficient information to effect service, the
11 court's sua sponte dismissal of those unserved defendants is appropriate under Fed.R.Civ.P. 4(m)).

12 Accordingly, this Court RECOMMENDS Plaintiff to show cause no later than **February 6,**
13 **2009**, why the claims against these Defendants should not be dismissed for want of prosecution
14 pursuant to Fed.R.Civ.P. 4(m). If Plaintiff wishes to proceed with his claims against these
15 Defendants he must provide the Court with proof of proper service by **February 13, 2009**.
16 Otherwise, the Court recommends all the remaining Defendants be dismissed from this action
17 without prejudice.

18 **IV. CONCLUSION**

19 For the reasons set forth herein, it is recommended that Defendants' motion to dismiss be
20 **GRANTED**. The Court recommends that:

21 (1) Defendants' Motion to Dismiss all of Plaintiff's constitutional claims against
22 Defendants Knowles, Giurbino, and Zamora be **GRANTED** with leave to amend.

23 (2) Defendants' Motion to Dismiss Plaintiff's claims of (1) deliberate indifference to
24 safety and use of excessive force, and (2) deliberate indifference to medical needs, against
25 Defendants Bourland, Paramo, and Bell be **GRANTED** with leave to amend.

26 (3) Defendants' Motion to Dismiss Plaintiff's claim of deliberate indifference to safety
27 and use of excessive force against Defendants Butler, Newman, and Greenwood be **GRANTED**
28 with leave to amend.

1 (4) Defendants' Motion to Dismiss Plaintiff's Fourteenth Amendment claim of deliberate
2 indifference to his safety and medical needs and use of excessive force against Defendants be
3 **GRANTED** without leave to amend.

4 (5) Defendants' Motion to Dismiss Plaintiff's Fourteenth Amendment claim of retaliation
5 for filing grievances against several Defendants and interference with his filing of grievances against
6 Defendants be **GRANTED** without leave to amend.

7 (6) Defendants' Motion to Dismiss Plaintiff's Eighth Amendment Claim of deliberate
8 indifference to safety against Defendants Knowles, Giurbino, Zamora, Bourland, Paramo, Butler,
9 Bell, Newman, Greenwood, and Terrones be **GRANTED** with leave to amend.

10 (7) Defendants' Motion to Dismiss Plaintiff's Eighth Amendment Claim of excessive
11 force against Defendants Knowles, Giurbino, Zamora, Bourland, Paramo, Butler, Bell, Newman,
12 Greenwood, and Terrones be **GRANTED** with leave to amend.

13 (8) Defendants' Motion to Dismiss Plaintiff's Eighth Amendment Claim of deliberate
14 indifference to his medical needs against Defendants Knowles, Giurbino, Zamora, Paramo, Bourland
15 and Terrones be **GRANTED** with leave to amend.

16 (9) Defendants' Motion to Dismiss as relates to Plaintiff's state tort law claims be
17 **GRANTED** without leave to amend.

18 (10) Defendants' Motion to Dismiss Plaintiff's state tort claims that Defendants Knowles,
19 Giurbino, Zamora, Bourland, and Paramo failed to provide him medical care be **GRANTED** with
20 leave to amend.

21 (11) Defendants' Motion to Dismiss Plaintiff's state tort claims, which intend to hold
22 Defendants Knowles, Giurbino, Zamora, Bourland, Paramo, Butler, Bell, Newman, Greenwood, and
23 Martinez vicariously liable for the act of others, be **GRANTED** with leave to amend.

24 (12) Plaintiff shall show cause why the claims against Defendants R. Din, Ibarra, Lopez,
25 and Gonzales should not be dismissed. If Plaintiff wishes to proceed with his claims against these
26 Defendants, he must provide the Court with proof of proper service.

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1 This Report and Recommendation of the undersigned Magistrate Judge is submitted to the
2 United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)
3 (1994).

4 This Report and Recommendation will be submitted to the United States District Court judge
5 assigned to this case pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file written
6 objections with the Court and serve a copy on all parties on or before **February 27, 2009**. This
7 document should be captioned "Objections to Report and Recommendation." Any reply to the
8 objections shall be served and filed **no later than 10 days** after being served with the objections.

9 *The parties are advised that no extensions of time will be granted for purposes of filing objections.*
10 The parties are further advised that failure to file objections within the specified time may waive the
11 right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

12 **IT IS SO ORDERED.**

13 DATED: January 26, 2009

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15 _____
16 LOUISA S PORTER
United States Magistrate Judge

17 cc: The Honorable Janis L. Sammartino
18 all parties

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