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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALLEN HAMMLER,

Plaintiff,

v.

J. HERNANDEZ, et al.,

Defendants.

Case No.: 18cv259-CAB-MDD

**REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE
RE: DEFENDANTS’ MOTION TO
DISMISS**

[ECF No. 15]

This Report and Recommendation is submitted to United States District Judge Cathy Ann Bencivengo pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 27.1(c) of the United States District Court for the Southern District of California.

For the reasons set forth herein, the Court **RECOMMENDS** Defendants Motion to Dismiss be **GRANTED**.

I. PROCEDURAL HISTORY

Plaintiff Allen Hammler (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis. (ECF Nos. 1, 5). On February 2, 2018, Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1). Plaintiff’s complaint sets forth claims against two individuals alleging that they

1 retaliated against him in violation of the First Amendment and failed to
2 protect him in violation of the Eighth Amendment. (*Id.* at 3-25).

3 On August 9, 2018, Defendants moved to dismiss the failure to protect
4 claim and all claims against both defendants filed in their official capacities.
5 (ECF No. 15-1 at 5-7). Defendants contend that Plaintiff may not proceed
6 with his failure to protect claim because he has not alleged a physical injury,
7 as required by 42 U.S.C. § 1997e(e), and that Eleventh Amendment
8 Immunity prohibits Plaintiff from suing Defendants in their official
9 capacities. (*Id.*). Defendants further argue that they are entitled to qualified
10 immunity as to Plaintiff's failure to protect claim. (*Id.* at 7).

11 Plaintiff opposes the motion to dismiss on the grounds that he was
12 subjected to intentional torture for no penological reason. (ECF No. 18 at 3).
13 In response to Defendants' Eleventh Amendment immunity argument,
14 Plaintiff "acquiesces and withdraws claims as it relates to Defendants'
15 liabilities in their official capacities." (*Id.* at 2).

16 Defendants reply that Plaintiff never specified the intentional torture
17 he suffered and concedes that he never suffered a "flesh wound." (ECF No. 19
18 at 3).

19 **II. BACKGROUND FACTS**

20 These facts, taken from the Complaint, should not to be construed as
21 findings of fact by the Court. Plaintiff has filed several 602 Complaints
22 against various Corrections Officers for assaults occurring on three separate
23 occasions. (ECF No. 1 at 3). Plaintiff first alleges that he was assaulted by
24 Corrections Officer Avilez on November 7, 2016. (*Id.*). After filing a
25 complaint following the Avilez incident, the named officers and their co-
26 workers began treating Plaintiff with "contempt." (*Id.*).

27 On November 15, 2016, Defendant Hernandez and Corrections Officer

1 Figueroa, while escorting Plaintiff from his cell to a group meeting, had
2 Plaintiff in both wrist and leg restraints. (*Id.* at 4). During this escort,
3 Defendant Hernandez began to violently shake Plaintiff by the arm,
4 commonly known as “rag dolling” him. Plaintiff believed that Defendant
5 Hernandez was attempting to provoke Plaintiff, whose reaction would give
6 Defendant Hernandez a reason to slam Plaintiff to the ground. (*Id.*).
7 Plaintiff told Hernandez that Plaintiff knew what the officer was attempting
8 to do and Hernandez responded “[S]hut the fuck up and walk. You turn
9 around and look at me again and you[re] going down.” (*Id.*). Once they
10 arrived at Plaintiff’s group meeting, Defendant Hernandez forced Plaintiff to
11 kneel on a slippery metal stool to remove Plaintiff’s leg restraints. (*Id.* at 4-
12 5). Plaintiff indicated he was about to fall off the stool and Defendant
13 Hernandez pushed Plaintiff, causing his knee to slide off the stool. (*Id.* at 5).
14 Plaintiff told Hernandez that he would be filing a complaint, to which
15 Hernandez responded “I’m gonna escort you to yard and we’ll see if you’ll be
16 talkin’ all that shit... just go to yard and don’t bitch out.” (*Id.*).

17 Plaintiff then spoke with Lieutenant Canedo and relayed his interaction
18 with Defendant Hernandez. (*Id.*). Plaintiff requested that Defendant
19 Hernandez be prohibited from escorting Plaintiff in the future. Canedo told
20 Plaintiff that he would look into it. (*Id.* at 6). However, both Hernandez and
21 Figueroa returned to escort Plaintiff back to his cell following his group
22 meeting. During the return walk, Defendant Hernandez told Plaintiff “You
23 went crying to the Lieutenant, I knew you were a bitch.” (*Id.*).

24 When the three men returned to Plaintiff’s cell, Plaintiff again knelt to
25 have his leg restraints removed, all the while receiving taunts from
26 Defendant Hernandez. (*Id.* at 7). Defendant Hernandez indicated that
27 Plaintiff better stay in the Administrative Segregation Unit (“ASU”) or

1 Hernandez would make sure Plaintiff was “...fucked up out there,” referring
2 to the yard. (*Id.*).

3 On the same day, Plaintiff met with clinical Psychologist Nance. (*Id.*).
4 Plaintiff discussed his interaction with and threats from Defendant
5 Hernandez. Defendant Hernandez overheard the conversation, during which
6 Defendant Hernandez made himself visible to Plaintiff, but not Nance, and
7 began making “crybaby” sounds and wiping away invisible tears. (*Id.*).
8 When Plaintiff pointed this out to Nance, Hernandez stepped out of sight
9 behind a wall, though Nance heard Defendant’s crybaby noises. (*Id.* at 9).

10 At the end of Plaintiff’s session with Nance, Defendant Hernandez
11 attempted to both confiscate Plaintiff’s shoes and escort Plaintiff back to his
12 cell. Plaintiff refused to allow Hernandez to escort him and made officers
13 Sears and Maldonado promise that Hernandez would not be his escort. (*Id.*).
14 On his way back to his cell Plaintiff was intercepted by his psychologist, Dr.
15 Loebenstein, who requested to speak with Plaintiff. (*Id.* at 10). Plaintiff
16 reported his experiences with Defendant Hernandez to Dr. Loebenstein. (*Id.*)

17 On November 17, 2016, Plaintiff was in his cell when Defendant
18 Hernandez kicked the cell door, startling Plaintiff. (*Id.*). Hernandez
19 indicated that he was escorting Plaintiff to his meeting with Dr. Loebenstein.
20 Plaintiff refused to go with Defendant Hernandez, who then called Plaintiff a
21 “bitch,” and left. Dr. Loebenstein then went to Plaintiff’s cell to see why
22 Plaintiff didn’t go to his appointment. Plaintiff again indicated that he would
23 not be escorted by Defendant Hernandez. (*Id.*).

24 On November 28, 2016, Plaintiff was escorted by Sergeant Alvarez and
25 Corrections Officer Dies to the Sergeant’s office, where Plaintiff was
26 interviewed on tape regarding Defendant Hernandez’s threats. (*Id.* at 11).
27 Upon returning to his cell following the interview, Plaintiff discovered officers

1 Hugh and Barrientos, “under the guise of searching for contraband...had
2 trashed [his] cell.” (*Id.*). The officers took a number of Plaintiff’s legal books
3 while others were torn in half. Plaintiff told the officers that what they had
4 done was retaliation and that he would report them, to which Officer Alvarez
5 responded, “with a sly grin,” that they were allowed to search Plaintiff’s cell.
6 (*Id.*). Plaintiff later discovered that the officers had gone through his legal
7 files and a file containing “documents, CDCR 602 Complaints, 22 Forms, etc.”
8 was missing. (*Id.* at 12).

9 On November 29, 2016, Plaintiff was escorted to his group meeting by
10 Officer Rogers. Following the meeting Rogers was about to escort Plaintiff
11 back to his cell when Defendant Hernandez joined the two and immediately
12 began berating Plaintiff. (*Id.* at 12-13). Defendant Hernandez told Plaintiff
13 that “snitching” on him would not change anything and reminded Plaintiff
14 that Hernandez could “still get close to you, you little bitch.” (*Id.* at 13).
15 Defendant Hernandez told Plaintiff that were it not for the security cameras,
16 Hernandez would “fuck [Plaintiff] up.” Plaintiff stayed face forward, fearing
17 that Hernandez would strike him from behind if he turned his head or
18 engaged with Hernandez. (*Id.*). Later, Plaintiff questioned Rogers about
19 what he overheard during the escort and Rogers indicated that he “hadn’t
20 been paying attention.” (*Id.*).

21 On December 6, 2016, Plaintiff was in his cell when Inmate Jennings,
22 escorted by Defendant Magallanes, stopped at Plaintiff’s cell and gave
23 Plaintiff a “kite” (letter) through the food port in Plaintiff’s door. (*Id.* at 14).
24 The kite was from Inmate Harris, who indicated that he was writing “on
25 behalf of and at the behest of Defendant Hernandez.” Harris wrote that
26 Plaintiff had better not go forward with his complaints against Hernandez or
27 Harris would have to get involved. (*Id.*). Harris indicated that Defendant

1 Hernandez “is the way he [Harris] feeds his kids.” (*Id.* at 15). Harris also
2 reminded Plaintiff that he was Plaintiff’s first cellmate and that Harris knew
3 where Plaintiff’s children live. (*Id.*)

4 Plaintiff then called for a staff member and gave the kite to the first one
5 to arrive, Dr. Saltzman. Plaintiff told Dr. Saltzman what occurred and Dr.
6 Saltzman read the kite. (*Id.*). Dr. Saltzman then flagged down Defendant
7 Magallanes and despite Plaintiff’s protests that Defendant Magallanes was
8 partially responsible for the kite, Dr. Saltzman gave the kite to Magallanes,
9 who took and read the kite and did not return it to Dr. Saltzman. (*Id.* at 15-
10 16). Plaintiff then had Dr. Saltzman sign a Form 22 as a receipt for the kite,
11 anticipating that the kite would “go missing” as a cover-up for Defendants
12 Magallanes and Hernandez’s activities. (*Id.* at 16).

13 Both Canedo and Dr. Loebenstein attempted to have Dr. Saltzman
14 indicate that Defendant Hernandez was named in the kite, however Dr.
15 Saltzman refused, saying that he “did not read the kite extensively.” (*Id.* at
16 16-17). Defendant Magallanes told Plaintiff on December 8, 2016, that he
17 had thrown the kite away. (*Id.* at 18). Plaintiff then gave Defendant
18 Magallanes a Form 22, requesting that Magallanes indicate in writing the
19 name of the staff member named in the kite. Magallanes reported that he
20 did not read the kite. (*Id.*).

21 On December 13, 2016, Plaintiff questioned Officer Juarez about the
22 kite as the officer was collecting food trays. (*Id.* at 19). Juarez, while taking
23 Plaintiff’s neighbor’s tray but looking at Plaintiff, said “[Y]ou know there was
24 this guy who [used] to live in in Cell #150. Very respectful, never bothered
25 nobody. One day I came to work and went by his cell. We talked and I left,
26 told him I’d see him later. Then I came to work the next day and found out
27 he’d cut his throat, killed his-self.” (*Id.* at 19-20). Plaintiff responded that

1 the officers had to be careful of who they gave razors to and Juarez responded
2 “... I guess he found out one of his daughters had died.” Plaintiff interprets
3 this interaction as a threat against his family. (*Id.* at 20).

4 On December 18, 2016, Plaintiff was transferred to the Department of
5 State Hospitals and then to the Psychiatric Services Unit at California State
6 Prison Sacramento. (*Id.*). Inmate Harris, author of the kite, had also been
7 transferred to Sacramento. (*Id.*). Harris, from a holding cell near Plaintiff’s
8 cell, yelled out “I’d better not catch you. You know we’re gonna end up on the
9 same yard, so when you see me you know what’s up.” (*Id.* at 21). Plaintiff
10 does not indicate whether a physical altercation with Harris occurred.

11 III. LEGAL STANDARD

12 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency
13 of a claim. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “Under
14 Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and
15 plain statement of the claim showing that the pleader is entitled to relief.”
16 *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (internal quotations omitted).
17 The pleader must provide the Court with “more than an un-adored, ‘the-
18 defendant-unlawfully-harmed-me’ accusation.) *Id.* at 678 (citing *Bell Atl.*
19 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Threadbare recitals of the
20 elements of a cause of action, supported by mere conclusory statements will
21 not suffice.” *Id.* “Although for the purposes of a motion to dismiss [a court]
22 must take all of the factual allegations in the complaint as true, [a court is]
23 not bound to accept as true a legal conclusion couched as a factual
24 allegation.” *Id.* (internal quotations omitted).

25 A pro se pleading is construed liberally on a defendant’s motion to
26 dismiss for failure to state a claim. *Thompson v. Davis*, 295 F.3d 890, 895
27 (9th Cir. 2002) (citing *Ortez v. Washington Cnty.*, 88 F.3d 804, 807 (9th Cir.

1 1996)). The pro se pleader must still set out facts in his complaint that bring
2 his claims “across the line from conceivable to plausible.” *Twombly*, 550 U.S.
3 at 570. A court “may not supply essential elements of the claim that were not
4 initially pled.” *Ivey v. Bd. Of Regents*, 673 F.2d 266, 268 (9th Cir. 1982).

5 A pro se litigant is entitled to notice of the deficiencies in the complaint
6 and an opportunity to amend, unless the complaint’s deficiencies cannot be
7 cured by amendment. See *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.
8 1987).

9 IV. DISCUSSION

10 **A. Eleventh Amendment Immunity**

11 Defendants are sued in both their individual and official capacities.
12 (ECF No. 1 at 2). Defendants argue that they are entitled to Eleventh
13 Amendment immunity as official-capacity claims for damages are barred.
14 (ECF No. 15-1 at 5). As a result, Defendants request that all claims against
15 them in their official capacities be dismissed. (*Id.*).

16 The general rule is that “[s]tate officers in their official capacities, like
17 States themselves, are not amenable to suit for damages under § 1983.”
18 *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n.24 (1997). “Suits
19 against state officials in their official capacity therefore should be treated as
20 suits against the State.” *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citing
21 *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)).

22 Here, in response to Defendants’ Motion to Dismiss, Plaintiff withdrew
23 the claims filed against Defendants in their official capacities. Accordingly,
24 the Court **RECOMMENDS** that Defendant’s Motion to Dismiss all
25 Defendants in their official capacity for a violation of section 1983 be
26 **GRANTED** and all claims against Defendants in their official capacities be
27 **DISMISSED** with prejudice.

1 **B. Failure-to-Protect Claim**

2 Defendants contend that Plaintiff's failure to protect claim cannot
3 survive because he failed to allege any physical injury as required by 42
4 U.S.C. § 1997e(e). (ECF No. 15-1 at 6).

5 The Prison Litigation Reform Act ("PLRA") states, in part, that "[n]o
6 Federal civil action may be brought by a prisoner confined in a jail, prison, or
7 other correctional facility, for mental or emotional injury suffered while in
8 custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).
9 This provision requires "a prior showing of physical injury that need not be
10 significant but must be more than de minimus." *Oliver v. Keller*, 289 F.3d
11 623, 627 (9th Cir.2002). Here, as set forth in Plaintiff's Complaint and
12 Opposition, the only injury that he claims with respect to the actions of
13 Defendants is a psychological injury.

14 Therefore, the Court **RECOMMENDS** that the Motion to Dismiss
15 Plaintiff's failure-to-protect claim be **GRANTED** and the failure-to-protect
16 claim be **DISMISSED** without prejudice as to all defendants. Because of this
17 recommendation, the Court will not discuss Defendants' qualified immunity
18 argument.

19 **V. CONCLUSION**

20 For the reasons set forth herein, it is **RECOMMENDED** that:

21 1) Defendants Motion be **GRANTED WITH PREJUDICE** as to
22 Plaintiff's claims against Defendants in their official capacities.

23 2) Defendants' Motion be **GRANTED WITHOUT PREJUDICE** as to
24 Plaintiff's failure-to-protect claim.

25 As a result, Plaintiff's only remaining claim is count one for First
26 Amendment Retaliation against both Defendants.

27 This Report and Recommendation will be submitted to the United

1 States District Judge assigned to this case, pursuant to the provisions of 28
2 U.S.C. § 636(b)(1). Any party may file written objections with the court and
3 serve a copy on all parties by **December 28, 2018**. The document shall be
4 captioned “Objections to Report and Recommendation.” Any reply to the
5 objections shall be served and filed by **January 4, 2019**.

6 The parties are advised that failure to file objections within the
7 specified time may waive the right to raise those objections on appeal of the
8 Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

9 **IT IS SO ORDERED.**

10 Dated: December 11, 2018



11
12 Hon. Mitchell D. Dembin
13 United States Magistrate Judge
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