

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

FRED CABRERA, #A0114810,)	CIV. NO. 17-00367 DKW-KJM
)	
Plaintiff,)	ORDER DISMISSING COMPLAINT
)	IN PART AND DIRECTING
vs.)	SERVICE
)	
STATE OF HAWAII, <i>et al.</i> ,)	
)	
Defendants.)	
)	

Before the court is pro se Plaintiff Fred Cabrera's amended prisoner civil rights Complaint. Am. Compl., ECF No. 7. Cabrera complains that Defendants the State of Hawaii and Oahu Community Correctional Center ("OCCC") officers Sergeant Malia Anderson and Manny Tavares violated his rights under the Eighth Amendment during an incident that allegedly occurred at OCCC on or about June 22, 2017.

For the following reasons, the State of Hawaii and the claims against Anderson and Tavares in their official capacities are DISMISSED. Cabrera is DIRECTED to effect service on Defendants Malia Anderson and Manny Tavares by mailing a copy of the amended Complaint and completed service documents to the United States Marshal. After service is completed, Anderson and Tavares (in their individual capacities) are directed to respond to the amended Complaint.

I. SCREENING

Federal courts must screen all cases in which prisoners seek redress from a governmental entity, officer, or employee, or seek to proceed without prepayment of the civil filing fees. *See* 28 U.S.C. §§ 1915(b)(2) and 1915A(a). The court must identify cognizable claims and dismiss those claims that are frivolous, malicious, fail to state a claim on which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at §§ 1915(b)(2) and 1915A(b).

A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Moreover, a plaintiff must demonstrate that each defendant personally participated in the deprivation of his rights. *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002).

Pro se prisoners’ pleadings must be liberally construed and given the benefit of any doubt. *Blaisdell v. Frappiea*, 729 F.3d 1237, 1241 (9th Cir. 2013); *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Leave to amend should be granted if it

appears possible that the plaintiff can correct the complaint's defects. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

II. DISCUSSION¹

Cabrera alleges that Anderson and Tavares ordered him to help move an allegedly mentally ill inmate from one cell to another on June 22, 2017. He claims that this inmate struck him several times during this cell movement causing him pain, while Tavares and Anderson stood nearby but failed to intervene. Cabrera alleges that Defendants violated the Eighth Amendment when they failed to protect him from this alleged assault. He seeks \$100,000 in damages.

A. **Eleventh Amendment**

“The Eleventh Amendment bars suits for money damages in federal court against a state, its agencies, and state officials acting in their official capacities.” *Aholelei v. Dep’t of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007). Defendants named in their official capacities are subject to suit under § 1983 only “for prospective declaratory and injunctive relief . . . to enjoin an alleged ongoing violation of federal law.” *Oyama v. Univ. of Haw.*, 2013 WL 1767710, at *7 (D. Haw. Apr. 23, 2013) (quoting *Wilbur v. Locke*, 423 F.3d 1101, 1111 (9th Cir.

¹For purposes of screening, the court accepts Cabrera's allegations of material facts as true and construes them in the light most favorable to him. See *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014).

2005), *abrogated on other grounds by Levin v. Commerce Energy Inc.*, 560 U.S. 413 (2010)); *see also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70-71 (1989) (“[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office.”); *Ex parte Young*, 209 U.S. 123 (1908).

Cabrera’s damages claims against the State of Hawaii, and against Anderson and Tavares in their official capacities, are DISMISSED.

B. Eighth Amendment - Failure to Protect

“[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.” *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (citations and quotations omitted). “Being violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’” *Id.* at 834 (citation omitted). To establish a prison official’s violation of this duty, a prisoner must first establish that the deprivation alleged is ‘objectively, sufficiently serious.’ *Id.* at 834; *Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005). This is a question of fact that must be “decided by the jury if there is any room for doubt.” *Lemire v. Cal. Dep’t of Corr. and Rehab.*, 726 F.3d 1062, 1075-76 (9th Cir. 2013) (citation omitted).

Second, the prisoner must establish that prison officials “‘knew of and disregarded’ the substantial risk of harm,” even if such harm was not intended, because “‘it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.’” *Id.* at 1074 (quoting *Farmer*, 511 U.S. at 837).

Cabrera states plausible claims against Anderson and Tavares for deliberate indifference to his safety in violation of the Eighth Amendment, and these claims shall proceed. The Court orders the amended Complaint to be served and Defendants Anderson and Tavares are directed to file a response.

III. SERVICE ORDER

Service of the Complaint is appropriate for Defendants Malia Anderson and Manny Tavares.

(1) The Clerk shall send Cabrera one copy of the endorsed amended Complaint, two completed summons, two USM-285 forms, four Notice of Lawsuit and Request for Waiver of Service for Summons forms (AO 398), four Waiver of Service of Summons forms (AO 399), and an instruction sheet. The Clerk shall send a copy of this order to the U.S. Marshal.

(2) Plaintiff shall complete the forms and send them to the U.S. Marshal.

Because Anderson and Tavares are Department of Public Safety (“DPS”) employees, Plaintiff should name them on the forms, **but address the forms to Shelley Nobriga, DPS Litigation Coordinator, 919 Ala Moana Blvd., 4th Floor Honolulu, HI 96814, and send them to the U.S. Marshal.** Ms. Nobriga is authorized to accept one complaint and the waiver of service forms for DPS Defendants.

(3) The U.S. Marshal shall mail a copy of the Complaint, two completed Notice of Lawsuit and Request for Waiver of Service forms (AO 398), and **four** completed Waiver of Service of Summons forms (AO 399) (**two** for each defendant) to Ms. Nobriga.

(4) The U.S. Marshal shall retain the summons and a copy of the Complaint. Defendants Anderson and Tavares shall return the Waiver of Service forms to the U.S. Marshal within thirty days from the date the requests are mailed. If the Waiver of Service of Summons forms and requests for waiver of service are returned as undeliverable, the U.S. Marshal shall immediately file them with the court.

(5) If Anderson and Tavares fail to return the Waiver of Service of Summons forms within thirty days, the U.S. Marshal shall personally serve them and command all necessary assistance from DPS. Within ten days after personal

service is effected, the U.S. Marshal shall file the return of service for Anderson and Tavares with evidence of any attempts to secure a waiver of service of summons and the costs incurred in effecting service. These costs will be taxed against the personally-served Defendant.

(6) Anderson and Tavares shall file an answer or responsive motion within sixty days after the request for waiver of service was sent (if formal service is waived), or twenty days after personal service.

(7) Cabrera shall inform the court of any change of address in writing. The notice shall not include requests for other relief. Failure to file such notice may result in the dismissal of the action for failure to prosecute.

(8) After the amended Complaint is served, Cabrera's documents are deemed served on Defendants or their attorney(s) when they are electronically filed by the court.

IV. CONCLUSION

(1) Claims against the State of Hawaii and Defendants Malia Anderson and Manny Tavares in their official capacities are DISMISSED.

(2) Claims against Defendants Malia Anderson and Manny Tavares in their individual capacities state a plausible claim for relief and shall be served.

(3) Cabrera SHALL request the U.S. Marshal to effect service on Defendants Anderson and Tavares as directed above. The Clerk is DIRECTED to send Cabrera the service forms detailed above.

(4) Anderson and Tavares SHALL file a response to Cabrera's Complaint.

IT IS SO ORDERED.

DATED: September 22, 2017 at Honolulu, Hawai'i.



/s/ Derrick K. Watson
Derrick K. Watson
United States District Judge

***Fred Cabrera v. State of Hawaii, et al.*; Civil No. 17-00367 DKW-KJM; ORDER DISMISSING COMPLAINT IN PART AND DIRECTING SERVICE**

Cabrera v. State, 1:17-cv-00367 DKW-KJM; Scrng 2017 Cabrera 17-367 (fac dsm soh ORD SVC)