

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Kakowski v. Macomber

Kakowski · No. 3:25-cv-0282-RBM-VET · Decided November 12, 2025

SUMMARY

The United States District Court for the Southern District of California dismissed Brian Kakowski’s Second Amended Complaint without prejudice for failure to state claims under 42 U.S.C. § 1983. The court rejected the alleged Eighth Amendment, due process, and First Amendment retaliation claims as insufficiently pleaded, but granted one final opportunity to amend. Plaintiff was ordered to file a complete Third Amended Complaint by December 30, 2025.

OPINION

Kakowski

PER CURIAM.

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8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 11 BRIAN KAKOWSKI, Case No.: 3:25-cv-0282-RBM-VET

CDCR #BF-3315,

12

ORDER DISMISSING SECOND

Plaintiff,

13 AMENDED COMPLAINT WITH

vs. LEAVE TO AMEND PURSUANT TO

14 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b) 15 JEFF MACOMBER, Secretary of the 16
California Department of Corrections and Rehabilitation, et al., 17 Defendants. 18 19 20 On
February 5, 2025, Plaintiff Brian Kakowski, a state prisoner incarcerated at the 21 Richard J.
Donovan Correctional Facility (“RJD”) in San Diego, California, proceeding 22 pro se, filed this
civil rights action pursuant to 42 U.S.C. § 1983. (Doc. 1.) Plaintiff 23 claimed that improper
training and supervision of RJD kitchen employees resulted in 24 unsanitary conditions presenting
a risk to his health in violation of the Eighth Amendment. 25 (Id. at 1–21.) On April 8, 2025, the
Court granted Plaintiff leave to proceed in forma 26 pauperis (“IFP”) and dismissed his Complaint
pursuant to 28 U.S.C. §§ 1915(e)(2) & 27 1915A(b), which require sua sponte dismissal of a
prisoner’s IFP complaint, or any portion 28 of it, which fails to state a claim. (Doc. 7.) The Court
found the Complaint failed to 1 plausibly allege any defendant was aware of a substantial risk to

inmate health and 2 deliberately disregarded the risk. (Id. at 6–7.) Plaintiff was notified of the deficiencies of 3 his pleading and granted leave to amend on or before May 23, 2025. (Id. at 7.) Plaintiff 4 filed a First Amended Complaint on April 21, 2025. (Doc. 8.) He filed a substantially 5 identical Second Amended Complaint (“SAC”) on May 5, 2025, which is the operative 6 pleading in this action. (Doc. 9.)

7 I. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

8 Because Plaintiff is a prisoner proceeding IFP, his SAC requires a pre-Answer 9 screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b). The Court must sua sponte 10 dismiss a prisoner’s IFP complaint, or any portion of it, which is frivolous, malicious, fails 11 to state a claim, or seeks damages from defendants who are immune. *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc) (28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (28 U.S.C. § 1915A(b)). 14 “The standard for determining whether a plaintiff has failed to state a claim upon 15 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of 16 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d 17 1108, 1112 (9th Cir. 2012); see also *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 18 2012) (noting that § 1915A screening “incorporates the familiar standard applied in the 19 context of failure to state a claim under Federal Rule of Civil Procedure 12(b) (6).”) Rule 20 12(b)(6) requires a complaint to “contain sufficient factual matter, accepted as true, to ‘state 21 a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) 22 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Determining whether a 23 complaint states a plausible claim for relief [is] . . . a context-specific task that requires the 24 reviewing court to draw on its judicial experience and common sense.” Id.

25 Section 1983 “creates a private right of action against individuals who, acting under 26 color of state law, violate federal constitutional or statutory rights.” *Devereaux v. Abbey*, 27 263 F.3d 1070, 1074 (9th Cir. 2001). “To establish § 1983 liability, a plaintiff must show 28 both (1) deprivation of a right secured by the Constitution and laws of the United States, 1 and (2) that the deprivation was committed by a person acting under color of state law.” 2 *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012). 3 B. Allegations in the SAC 4 Plaintiff once again alleges that he was assigned to a kitchen scullery job on May 5 24, 2024, where Defendant RJD Correctional Food/Kitchen Officer Goff said, “‘you are 6 not medically cleared to handle food’ but I need all the help I can get.” (Doc. 9 at 4.) That 7 same week Defendant RJD Correctional Supervising Cook Ward told Plaintiff he was a 8 hard worker and would give Plaintiff “a better pay # but I need to go to medical & make 9 the chrono go away so I’m allowed to handle food.” (Id.) 10 During the next month, Goff and Ward instructed Plaintiff to handle food daily, and 11 to wash pots, pans and trays with a floor detergent not intended to be used to clean food 12 items or touch skin. (Id.) When Plaintiff complained that the detergent burned his skin, 13 Ward told him to “use what I got.” (Id.) Since being exposed to that detergent, Plaintiff 14 has had “constant skin irritation and itching and flaking.” (Id.) Plaintiff spoke to their 15 supervisors who

acknowledged he should not be working in the kitchen, and he was 16 transferred to another job. (Id. at 5.) After he was removed from his kitchen assignment, 17 Defendant RJD Correctional Lieutenant G. Hernandez removed him from his “CGA 18 group” in retaliation for filing an inmate grievance regarding the conditions in the kitchens. 19 (Id. at 8.) 20 Plaintiff alleges that “as a matter of widespread practice and policy,” Defendants 21 continuously ignore California state regulations for food and safety standards regarding 22 food service at RJD, and as a result for years kitchen workers have faced a threat to their 23 health in violation of the prohibition against cruel and unusual punishment under the Eighth 24 Amendment. (Id. at 4–5.) He alleges Defendant California Department of Corrections and 25 Rehabilitation (“CDCR”) Secretary Macomber and RJD Warden Hill are responsible for 26 the failure of Defendants Goff, Ward and RJD Food Manager Acosta to train and supervise 27 kitchen workers to follow state food safety guidelines. (Id. at 5.) He claims his removal 28 from his CGA group was in retaliation for filing an inmate grievance and stopped him from 1 earning credits toward an earlier parole hearing in violation of due process. (Id. at 8.) 2 C. Analysis 3 1. Eighth Amendment Claim 4 “Prison officials have a duty to ensure that prisoners are provided adequate shelter, 5 food, clothing, sanitation, medical care and personal safety.” *Johnson v. Lewis*, 217 F.3d 6 726, 731 (9th Cir. 2000). Although subjecting “a prisoner to lack of sanitation that is severe 7 or prolonged can constitute an infliction of pain within the meaning of the Eighth 8 Amendment,” the temporary imposition of such conditions does not state a claim absent 9 allegations of a risk of harm. *Anderson v. County of Kern*, 45 F.3d 1310, 1314–15 (9th Cir. 10 1995); *Johnson*, 217 F.3d at 731 (“The circumstances, nature, and duration of a deprivation 11 of these necessities must be considered in determining whether a constitutional violation 12 has occurred.”) 13 “[A] prison official violates the Eighth Amendment when two requirements are met. 14 First, the deprivation alleged must be, objectively, ‘sufficiently serious.’” *Farmer v. 15 Brennan*, 511 U.S. 825, 834 (1994) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). 16 Second, Plaintiff must allege the prison official he seeks to hold liable had a “sufficiently 17 culpable state of mind,” that is, “one of ‘deliberate indifference’ to inmate health or safety.” 18 Id. (quoting *Wilson*, 501 U.S. at 302–03). 19 The allegations that Defendants Goff, Ward and Acosta failed to adequately hire, 20 train and supervise kitchen workers resulting in unsanitary conditions once again fail to 21 plausibly allege an Eighth Amendment violation. A prison official can be held liable only 22 if he is both “aware of facts from which the inference could be drawn that a substantial risk 23 of serious harm exists, and [draws] the inference.” *Farmer*, 511 U.S. at 837. The Eighth 24 Amendment is violated when a prison official, acting with deliberate indifference, exposed 25 Plaintiff to a sufficiently “substantial risk of serious harm” to his health. Id. at 843. The 26 Court previously informed Plaintiff in the prior dismissal order that he had alleged at most 27 negligence arising from budgetary concerns, but did not plausibly allege any Defendant 28 subjected him to inhumane conditions of confinement or actually drew an inference that a 1 substantial risk of serious harm existed. (See Doc. 7 at 6–7); see also *Farmer*, 511 U.S. at 2 835 (“deliberate indifference describes a state of mind more blameworthy than

negligence” 3 and “more than ordinary lack of due care for the prisoner’s interests or safety.”) Plaintiff 4 has not cured those pleading defects, as his allegations of unsanitary practices in the kitchen 5 resulting in irritated skin are once again insufficient to plausibly allege Defendants were 6 aware of facts from which an inference could be drawn that a substantial risk of serious 7 harm existed and subjected him to inhumane conditions of confinement. 8 Plaintiff has also once again failed to plausibly allege an Eighth Amendment claim 9 against CDCR Secretary Macomber or RJD Warden Hill based on their failure to supervise 10 the other Defendants. Supervisory liability is not an independent cause of action under 11 § 1983, and Plaintiff must allege both an underlying constitutional violation and a 12 connection between the supervisor’s actions and the violation. See *Starr v. Baca*, 652 F.3d 13 1202, 1207 (9th Cir. 2011) (“A defendant may be held liable as a supervisor under § 1983 14 ‘if there exists either (1) his or her personal involvement in the constitutional deprivation, 15 or (2) a sufficient causal connection between the supervisor’s wrongful conduct and the 16 constitutional violation.’”) (quoting *Hansen v. Black*, 855 F.2d 642, 646 (9th Cir. 1989)). 17 Plaintiff has once again failed to allege a constitutional violation and therefore has failed 18 to state a claim against Defendants Macomber and Hill. *Id.*; *Leer v. Murphy*, 844 F.2d 628, 19 633 (9th Cir. 1988) (“The inquiry into causation must be individualized and focus on the 20 duties and responsibilities of each individual defendant whose acts or omissions are alleged 21 to have caused a constitutional deprivation.”); *Starr*, 652 F.3d at 1207 (a plaintiff must 22 plausibly allege personal involvement or a causal connection between a defendant’s action 23 and a constitutional violation to state a § 1983 claim). 24 2. Due Process Claim 25 Plaintiff claims he has been subjected to atypical and significant hardship in 26 violation of due process because he has not been earning custody credits since he was 27 removed from his CGA group by Defendant Hernandez in retaliation for filing an inmate 28 grievance about the conditions in the kitchen. (Doc. 9 at 8.) The Due Process Clause of 1 the Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or 2 property, without due process of law.” U.S. Const. amend. XIV, § 1. In order to plausibly 3 allege a federal due process claim, Plaintiff must identify a protected liberty or property 4 interest. See *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Although there is no federal 5 right to early release, California law may create a liberty interest in custody credits. See 6 *id.* at 221. When a state enacts a statutory scheme which creates a liberty interest protected 7 by federal due process, “the Due Process Clause requires fair procedures for its 8 vindication.” *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011). The existence of a liberty 9 interest created by state law is determined by focusing on the nature of the deprivation. 10 *Sandin v. Connor*, 515 U.S. 472, 481–84 (1995). Such liberty interests are generally 11 limited to freedom from restraint which “imposes atypical and significant hardship on the 12 inmate in relation to the ordinary incidents of prison life.” *Id.* at 484. 13 Plaintiff has not plausibly alleged he was denied due process in being removed from 14 the group because the allegations he was removed in retaliation for complaining about the 15 conditions in the kitchen are entirely conclusory. There are no allegations that Plaintiff has 16 sought or been denied reinstatement to

the group or that he is otherwise entitled to attend 17 the group in his new job. *Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a 18 cause of action, supported by mere conclusory statements, do not suffice” to state a § 1983 19 claim, nor do the “mere possibility of misconduct” accusations). In any case, Plaintiff has 20 not plausibly alleged that shortening the time to a parole hearing would inevitably shorten 21 his sentence as necessary to state a due process claim. See *Sandin*, 515 U.S. at 485–87 (no 22 protected liberty interest where loss of custody credits would not inevitably shorten the 23 duration of the inmate’s sentence); *id.* at 487 (recognizing that the “myriad of 24 considerations” in the parole suitability evaluation does not permit a finding that 25 availability of a parole hearing will inevitably affect the duration of a prisoner’s sentence). 26 3. Retaliation Claim 27 Finally, Plaintiff alleges Defendant Hernandez removed him from his CGA group in 28 retaliation for filing an inmate grievance regarding the conditions in the kitchen. (Doc. 9 1 at 8.) “Prisoners have a First Amendment right to file grievances against prison officials 2 and to be free from retaliation for doing so.” *Watson v. Carter*, 668 F.3d 1108, 1114 (9th 3 Cir. 2021). However, a prisoner must allege a retaliatory motive, that is, a causal 4 connection between the adverse action and his protected conduct. *Id.* Plaintiff does not 5 include any factual allegations supporting his contention that Hernandez acted with a 6 retaliatory motive when removing Plaintiff from his group, or that his inmate grievance 7 was a substantial or motivating factor in that decision. *Id.*; see also *Wood v. Yordy*, 753 8 F.3d 899, 905 (9th Cir. 2014) (“We have repeatedly held that mere speculation that 9 defendants acted out of retaliation is not sufficient.”); *Iqbal*, 556 U.S. at 678 (“Threadbare 10 recitals of the elements of a cause of action, supported by mere conclusory statements, do 11 not suffice” to state a § 1983 claim). 12 D. Leave to Amend 13 Accordingly, the Court finds that Plaintiff’s SAC fails to state a plausible claim for 14 relief against any Defendant and is therefore subject to sua sponte dismissal in its entirety 15 pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b). *Watson*, 668 F.3d at 1112; *Wilhelm*, 16 680 F.3d at 1121. In light of Plaintiff’s pro se status, the Court grants him one last attempt 17 to amend his pleading to attempt to sufficiently allege a § 1983 claim if he can and if he 18 wishes to attempt to do so. See *Rosati v. Igbino*, 791 F.3d 1037, 1039 (9th Cir. 2015) 19 (“A district court should not dismiss a pro se complaint without leave to amend [pursuant 20 to 28 U.S.C. § 1915(e)(2)] unless ‘it is absolutely clear that the deficiencies of the 21 complaint could not be cured by amendment.’”) (quoting *Akhtar v. Mesa*, 698 F.3d 1202, 22 1212 (9th Cir. 2012)).

23 III. CONCLUSION

24 Good cause appearing, the Court DISMISSES all claims against all Defendants in 25 the Second Amended Complaint without prejudice and with leave to amend pursuant to 28 26 U.S.C. §§ 1915(e)(2) & 1915A(b) and GRANTS Plaintiff until December 30, 2025 to file 27 a Third Amended Complaint which cures the deficiencies of pleading noted in this Order 28 with respect to any or all Defendants. Plaintiff’s Third Amended Complaint must be 1 || complete by itself without reference to any prior version of his complaint. Defendants not 2 || named and any claims not re-alleged in the Third Amended Complaint will be considered 3 || waived. See S.D. Cal.

CivLR 15.1; Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 4 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the original.”); 5 || Lacey v. Maricopa County, 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed 6 || with leave to amend which are not re-alleged in an amended pleading may be “considered 7 || waived if not repled.”). If Plaintiff fails to timely amend, the Court will dismiss this action 8 || for failure to state a claim and failure to prosecute. See Lira v. Herrera, 427 F.3d 1164, 9 || 1169 (9th Cir. 2005) (“If a plaintiff does not take advantage of the opportunity to fix his 10 ||}complaint, a district court may convert the dismissal of the complaint into dismissal of the 11 || entire action.”). 12 IT IS SO ORDERED. 13 Dated: November 12, 2025 Fe Le ; ? L >

HON. RUTH BERMUDEZ MONTENEGRO

15 UNITED STATES DISTRICT JUDGE

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