

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Wade v. Burkhart

Wade · No. 2:24-cv-2936 AC P · Decided August 27, 2025

SUMMARY

The United States District Court for the Eastern District of California grants Damaris J. Wade leave to proceed in forma pauperis in a 42 U.S.C. § 1983 action. Following screening under 28 U.S.C. § 1915A, the court finds a viable Eighth Amendment excessive-force claim against defendants Humphers, Lindquist, Tuyen, and McNamara, but finds the other asserted claims and defendants insufficiently pleaded. The court gives plaintiff the choice to proceed on the screened excessive-force claim or file an amended complaint.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
WRITING FOR THE COURT	Allison Claire
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	August 27, 2025
DOCKET	2:24-cv-2936 AC P
DISPOSITION	other
PROCEDURAL POSTURE	Prisoner civil-rights action under 42 U.S.C. § 1983 screened under 28 U.S.C. § 1915A. The court granted plaintiff leave to proceed in forma pauperis, found an Eighth Amendment excessive-force claim adequately stated against four defendants, found the remaining claims and defendants insufficiently pleaded, and gave plaintiff the choice to proceed on the surviving claim or amend.
STANDARD OF REVIEW	Under 28 U.S.C. § 1915A, the court screens prisoner complaints seeking relief from governmental entities or officers and may dismiss claims that are frivolous or fail to state a claim. The court accepts well-pleaded allegations as true and construes them in the light most favorable to the plaintiff, but requires more than conclusory allegations and applies the facial-plausibility standard.
PRECEDENTIAL VALUE	unpublished district-court order; precedential status unknown

PARTIES

Damaris J. Wade v. M. Burkhardt, et al.

TOPICS

prisoners rights

section 1983

civil rights

pleadings

first amendment

PRACTICE AREAS

prisoner civil rights

constitutional law

federal civil procedure

QUESTIONS PRESENTED

1. Whether the complaint adequately stated an Eighth Amendment excessive-force claim against Humphers, Lindquist, Tuyen, and McNamara.
2. Whether the complaint adequately stated First Amendment retaliation, Eighth Amendment deliberate-indifference, or failure-to-protect claims.
3. Whether the complaint sufficiently alleged personal involvement by the remaining named defendants to support § 1983 liability.
4. Whether plaintiff should be permitted to proceed on the surviving claim or amend the complaint to cure pleading deficiencies.
5. Whether plaintiff qualified to proceed in forma pauperis under 28 U.S.C. § 1915.

HOLDINGS

1. Plaintiff's request to proceed in forma pauperis was granted because his declaration showed that he could not afford to pay the entire filing fee.
2. The complaint adequately stated an Eighth Amendment excessive-force claim against defendants Humphers, Lindquist, Tuyen, and McNamara.
3. The complaint failed to state viable First Amendment retaliation, Eighth Amendment deliberate-indifference, or failure-to-protect claims, and failed to state claims against Burkhardt, Struve, Odam, D'Angelo, Judd, Maner, Barrios, Chavez, Spaulding, and Reese.

KEY QUOTATIONS

“the court finds that plaintiff has adequately stated a valid Eighth Amendment excessive force claim against defendants Humphers, Lindquist, Tuyen, and McNamara.” (at 4)

“Plaintiff has the option to proceed immediately on his excessive force claim pursuant to the Eighth Amendment against defendants Humphers, Lindquist, Tuyen, and McNamara as set forth in Section III above, or to file an amended complaint.” (at 10)

FACTUAL BACKGROUND

During a prison-yard recall, staff allegedly prevented Wade from passing through a closing gate, ordered him to cuff up, and then roughly grabbed, pushed, slammed, and punched him despite his disclosure of a preexisting

shoulder separation. Wade alleged loss of consciousness, facial and bodily injuries, and subsequent surgery for the shoulder injury. He also alleged retaliation, denial of medical treatment and law-library access, interference with mail, and denial of an opportunity to file a grievance, but did not identify specific defendants responsible for those acts.

PROCEDURAL HISTORY

Plaintiff, a state inmate proceeding without counsel, filed a § 1983 complaint and an application to proceed in forma pauperis. The court granted in forma pauperis status and conducted statutory screening. The court ordered that plaintiff elect within 21 days between proceeding on the screened Eighth Amendment excessive-force claim against Humphers, Lindquist, Tuyen, and McNamara or filing an amended complaint; absent an election, the court would recommend dismissal without prejudice of the deficient claims and defendants.

DISPOSITION

other

CASES CITED

- *Neitzke v. Williams*, 490 U.S. 319, 325, 327 (1989)
- *Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989)
- *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)
- *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557, 570 (2007)
- *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
- *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)
- *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)
- *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976)
- *Arnold v. Int'l Bus. Machs. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981)
- *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)
- *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982)
- *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967)
- *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012)
- *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992)
- *Whitley v. Albers*, 475 U.S. 312, 321 (1986)
- *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010)
- *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)
- *Brodheim v. Cry*, 584 F.3d 1262, 1269-70 (9th Cir. 2009)
- *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998)
- *Shepard v. Quillen*, 840 F.3d 686, 688 (9th Cir. 2016)
- *Jones v. Williams*, 791 F.3d 1023, 1036 (9th Cir. 2015)
- *Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017)

- Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)
- Estelle v. Gamble, 429 U.S. 97, 104, 106 (1976)
- McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992)
- Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir. 1988)
- Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004)
- Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989)
- Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996)
- Farmer v. Brennan, 511 U.S. 825, 832, 834-37, 847 (1994)
- Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998)
- May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980)
- Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)

OPINION

(PC) Wade v. Burkhart

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 11 DAMARIS J. WADE, No. 2:24-cv-2936 AC P 12 Plaintiff, 13 v. ORDER 14 M.
BURKHART, et al., 15 Defendants. 16 17 Plaintiff is a state inmate who filed this civil rights
action pursuant to 42 U.S.C. § 1983 18 without a lawyer. He has requested leave to proceed
without paying the full filing fee for this 19 action, under 28 U.S.C. § 1915. Plaintiff has submitted
a declaration showing that he cannot 20 afford to pay the entire filing fee. See 28 U.S.C. § 1915(a)
(2). Accordingly, plaintiff’s motion to 21 proceed in forma pauperis is granted.1 22 I. Statutory
Screening of Prisoner Complaints 23 The court is required to screen complaints brought by
prisoners seeking relief against “a 24 1 This means that plaintiff is allowed to pay the \$350.00
filing fee in monthly installments that 25 are taken from the inmate’s trust account rather than in
one lump sum. 28 U.S.C. §§ 1914(a). As 26 part of this order, the prison is required to remove an
initial partial filing fee from plaintiff’s trust account. See 28 U.S.C. § 1915(b)(1). A separate order
directed to the appropriate agency 27 requires monthly payments of twenty percent of the prior
month’s income to be taken from plaintiff’s trust account. These payments will be taken until the
\$350 filing fee is paid in full.

28 See 28 U.S.C. § 1915(b)(2).

1 governmental entity or officer or employee of a governmental entity.” 28 U.S.C. § 1915A(a). A 2
claim “is [legally] frivolous where it lacks an arguable basis either in law or in fact.” Neitzke v. 3
Williams, 490 U.S. 319, 325 (1989). The court may dismiss a claim as frivolous if it is based on 4
an indisputably meritless legal theory or factual contentions that are baseless. Id., 490 U.S. at 5
327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an 6

arguable legal and factual basis. *Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989), 7 superseded by statute on other grounds as stated in *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 8 2000). 9 In order to avoid dismissal for failure to state a claim a complaint must contain more than 10 “naked assertion[s],” “labels and conclusions,” or “a formulaic recitation of the elements of a 11 cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007). In other words, 12 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory 13 statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim upon which the 14 court can grant relief has facial plausibility. *Twombly*, 550 U.S. at 570. “A claim has facial 15 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable 16 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citation 17 omitted). When considering whether a complaint states a claim, the court must accept the 18 allegations as true, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam), and construe the 19 complaint in the light most favorable to the plaintiff, *Jenkins v. McKeithen*, 395 U.S. 411, 421 20 (1969) (citations omitted). 21 II. Factual Allegations of the Complaint 22 The complaint alleges violations of plaintiff’s First and Eight Amendment rights by prison 23 staff at California State Prison, Sacramento, specifically by defendants Burkhart, Struve, 24 Lindquist, Humphers, Odam, Tuyen, McNamara, D’Angelo, Judd, Maner, Barrios, Chavez, 25 Spaulding, and Reese. EFC No. 1. During yard recall on August 25, 2024, prison staff began 26 closing the gate and did not let plaintiff through. *Id.* at 6. Humphers told plaintiff to cuff up, and 27 plaintiff followed his instructions but informed Humphers of his acromioclavicular (AC) 28 separation on his left shoulder. *Id.* Humphers proceeded to roughly grab plaintiff’s arm after 1 which Lindquist, McNamara, and Tuyen arrived at the scene and pushed plaintiff while shouting 2 at him to stop resisting. *Id.* Plaintiff was slammed to the ground on his left side and punched in 3 the face twice by Humphers, which rendered plaintiff unconscious. *Id.* He regained 4 consciousness when Humphers punched him in the face a third time, after which he was hit in the 5 face by Lindquist and in the upper and middle torso by Tuyen and McNamara. *Id.* Unspecified 6 defendants put their knees in plaintiff’s neck and back. *Id.* at 6-7. 7 At some point, D’Angelo lifted plaintiff off the ground and escorted him to the pedestrian 8 sally port with Tuyen, where he was stripped naked while Reese, a nurse, looked over his injuries 9 but did not document anything. *Id.* at 7. Plaintiff was allowed to put his clothes back on and was 10 then placed in a cage for several hours where he experienced major pain from being slammed on 11 his left side. *Id.* He sustained injuries including cuts to both eyebrows, active bleeding, and 12 swollen areas on his face and left side of his body, and underwent surgery for his AC separation 13 on October 16, 2024. *Id.* at 6-7. 14 Plaintiff also alleges that he has been targeted by unspecified officers because he has 15 searched for legal representation to assist with his claims. *Id.* at 9. He asserts that his injuries 16 were not documented, he was denied access to the law library, he was initially denied the 17 opportunity to file a grievance, and his mail is being tampered with. *Id.* 18 III. Claims for Which a Response Will Be Required 19 After conducting the screening required by 28 U.S.C. § 1915A(a), the court finds

that 20 plaintiff has adequately stated a valid Eighth Amendment excessive force claim against 21 defendants Humphers, Lindquist, Tuyen, and McNamara.2 22 IV. Failure to State a Claim 23 However, the allegations in the complaint are not sufficient to state any claim for relief 24 against Burkhart, Struve, Odam, D'Angelo, Judd, Maner, Barrios, Chavez, Spaulding, and Reese. 25 The complaint does not allege any conduct by defendants Burkhart, Struve, Odam, Judd, Maner, 26 27 2 Plaintiff also invokes the Ninth and Fourteenth Amendments. ECF No. 1 at 8-9. However, the facts alleged do not implicate either amendment and are instead consistent with claims for Eighth 28 Amendment excessive force and First Amendment retaliation. 1 Barrios, Chavez, and Spaulding, and therefore does not state any claims against these defendants. 2 Further, plaintiff fails to allege facts showing that defendant D'Angelo either used excessive force 3 against him or was present at a time when he could have intervened in the use of force by 4 Humphers, Lindquist, Tuyen, and McNamara. Plaintiff's allegations that Reese failed to 5 document his injuries are insufficient to demonstrate that Reese either used excessive force or 6 was deliberately indifferent to his serious medical need. 7 Plaintiff has also failed to state a valid retaliation claim against any defendants because he 8 has not specified any defendant who has taken adverse action against him. Similarly, plaintiff's 9 claim that his injuries were not treated does not support a deliberate indifference claim against 10 any defendant because he does not identify who denied him treatment, and he has not stated any 11 claims for failure to protect because he has not identified any defendant who had the opportunity 12 to intervene in the use of force but did not. It appears to the court that plaintiff may be able to 13 allege facts to fix these problems. Therefore, plaintiff has the option of filing an amended 14 complaint. 15 V. Options from Which Plaintiff Must Choose 16 Based on the court's screening, plaintiff has a choice to make. After selecting an option 17 from the two options listed below, plaintiff must return the attached Notice of Election form to 18 the court within 21 days from the date of this order. 19 The first option available to plaintiff is to proceed immediately against defendants 20 Humphers, Lindquist, Tuyen, and McNamara on the Eighth Amendment excessive force 21 claim. By choosing this option, plaintiff will be agreeing to voluntarily dismiss his First 22 Amendment retaliation claim, Eighth Amendment deliberate indifference and failure to 23 protect claims, and all claims against defendants Burkhart, Struve, Odam, D'Angelo, Judd, 24 Maner, Barrios, Chavez, Spaulding, and Reese. The court will proceed to immediately 25 serve the complaint and order a response from defendants Humphers, Lindquist, Tuyen, 26 and McNamara. 27 The second option available to plaintiff is to file an amended complaint to fix the 28 problems described in Section IV. If plaintiff chooses this option, the court will set a 1 deadline in a subsequent order to give plaintiff time to file an amended complaint. 2 VI. Plain Language Summary of this Order for Party Proceeding Without a Lawyer 3 Some of the allegations in the complaint state claims against the defendants and some do 4 not. You have stated an Eighth Amendment excessive force claim against defendants Humphers, 5 Lindquist, Tuyen, and McNamara. However, you have not stated a retaliation, deliberate 6 indifference, or failure to protect claim against any defendant, nor have you stated any claims 7

against defendants Burkhart, Struve, Odam, D'Angelo, Judd, Maner, Barrios, Chavez, Spaulding, 8 and Reese. 9 You have a choice to make. You may either (1) proceed immediately on your Eighth 10 Amendment excessive force claim against defendants Humphers, Lindquist, Tuyen, and 11 McNamara and voluntarily dismiss the other claims and defendants; or (2) try to amend the 12 complaint. To decide whether to amend your complaint, the court has attached the relevant legal 13 standards that may govern your claims for relief. See Attachment A. Pay particular attention to 14 these standards if you choose to file an amended complaint.

15 CONCLUSION

16 In accordance with the above, IT IS HEREBY ORDERED that: 17 1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 2) is GRANTED. 18 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff 19 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. 20 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the 21 appropriate agency filed concurrently herewith. 22 3. Plaintiff has not stated any viable First Amendment retaliation claims or Eighth 23 Amendment deliberate indifference or failure to protect claims. Plaintiff also has not stated any 24 viable claims against defendants Burkhart, Struve, Odam, D'Angelo, Judd, Maner, Barrios, 25 Chavez, Spaulding, and Reese for which relief can be granted. 26 4. Plaintiff has the option to proceed immediately on his excessive force claim pursuant 27 to the Eighth Amendment against defendants Humphers, Lindquist, Tuyen, and McNamara as set 28 forth in Section III above, or to file an amended complaint. 1 5. Within 21 days from the date of this order, plaintiff shall complete and return the 2 || attached Notice of Election form notifying the court whether he wants to proceed on the screened 3 || complaint or whether he wants to file an amended complaint. 4 6. If plaintiff does not return the form, the court will assume that he is choosing to 5 || proceed on the complaint as screened and will recommend dismissal without prejudice of his 6 || retaliation, deliberate indifference, and failure to protect claims and all claims against defendants 7 | Burkhart, Struve, Odam, D' Angelo, Judd, Maner, Barrios, Chavez, Spaulding, and Reese. 8 | DATED: August 27, 2025 " 9 AMhon—Chnne

ALLISON CLAIRE

10 UNITED STATES MAGISTRATE JUDGE

1] 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 1 2 3 4 5 6

7 UNITED STATES DISTRICT COURT

8 FOR THE EASTERN DISTRICT OF CALIFORNIA

9 10 DAMARIS J. WADE, No. 2:24-cv-2936 AC P 11 Plaintiff,

12 v. NOTICE OF ELECTION

13 M. BURKHART, et al., 14 Defendants. 15 16 Check one: 17 _____ Plaintiff wants to proceed immediately on his Eight Amendment excessive force claims 18 against defendants Humphers, Lindquist, Tuyen, and McNamara without amending the 19 complaint. Plaintiff understands that by choosing this option, his retaliation, deliberate 20 indifference, and failure to protect claims, as

well as all claims against defendants 21 Burkhart, Struve, Odam, D'Angelo, Judd, Maner, Barrios, Chavez, Spaulding, and Reese 22 will be voluntarily dismissed without prejudice pursuant to Federal Rule of Civil

23 Procedure 41(a).

24 _____ Plaintiff wants time to file an amended complaint. 25

26 DATED:_____

27 Damaris J. Wade Plaintiff pro se 28 1 Attachment A 2 This Attachment provides, for informational purposes only, the legal standards that may 3 apply to your claims for relief. Pay particular attention to these standards if you choose to file an 4 amended complaint. 5 I. Legal Standards Governing Amended Complaints 6 If plaintiff chooses to file an amended complaint, he must demonstrate how the conditions 7 about which he complains resulted in a deprivation of his constitutional rights. *Rizzo v. Goode*, 8 423 U.S. 362, 370-71 (1976). Also, the complaint must specifically identify how each named 9 defendant is involved. *Arnold v. Int'l Bus. Machs. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). 10 There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or 11 connection between a defendant's actions and the claimed deprivation. *Id.*; *Johnson v. Duffy*, 12 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, "[v]ague and conclusory allegations of official 13 participation in civil rights violations are not sufficient." *Ivey v. Bd. of Regents*, 673 F.2d 266, 14 268 (9th Cir. 1982) (citations omitted). 15 Plaintiff is also informed that the court cannot refer to a prior pleading in order to make 16 his amended complaint complete. See Local Rule 220. This is because, as a general rule, an 17 amended complaint replaces the prior complaint. *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967) 18 (citations omitted), overruled in part by *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 19 2012). Therefore, in an amended complaint, every claim and every defendant must be included. 20 II. Legal Standards Governing Substantive Claims for Relief 21 A. Excessive Force 22 "[T]he Eighth Amendment places restraints on prison officials, who may not . . . use 23 excessive physical force against prisoners." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citing 24 *Hudson v. McMillian*, 503 U.S. 1 (1992)). "[W]henever prison officials stand accused of using 25 excessive physical force in violation of the [Eighth Amendment], the core judicial inquiry is . . . 26 whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously 27 and sadistically to cause harm." *Hudson*, 503 U.S. at 6-7 (citing *Whitley v. Albers*, 475 U.S. 312 28 (1986)). When determining whether the force was excessive, the court looks to "[1] the extent of 1 injury suffered by an inmate," as well as "[2] the need for application of force, [3] the relationship 2 between that need and the amount of force used, [4] the threat 'reasonably perceived by the 3 responsible officials,' and [5] 'any efforts made to temper the severity of a forceful response.'"

4 *Id.* at 7 (quoting *Whitley*, 475 U.S. at 321). While a de minimis use of force does not violate the 5 Eighth Amendment, a plaintiff does not have to suffer a serious injury to state a claim for relief. 6 *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010) ("An inmate who is gratuitously beaten by guards does 7 not lose his ability to pursue an excessive force claim merely because he has the good fortune to

8 escape without serious injury.”). 9 B. Retaliation 10 To state a claim for retaliation, a plaintiff must allege defendants (1) took adverse action 11 against plaintiff (2) because of (3) plaintiff’s protected conduct, and that the action (4) would chill 12 an inmate of reasonable firmness from future protected conduct and (5) lacked a legitimate 13 correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). 14 An adverse action is an act (or failure to act) by prison officials which causes harm, and 15 “the mere threat of harm can be an adverse action, regardless of whether it is carried out.” 16 *Brodheim v. Cry*, 584 F.3d 1262, 1269-70 (9th Cir. 2009) (emphasis in original). To show 17 defendants retaliated “because of” the plaintiff’s actions, the plaintiff must show the defendants 18 were motivated by his protected conduct. See *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) 19 (proof of defendant’s general animosity toward plaintiff would not necessarily show her conduct 20 was motivated by plaintiff’s protected conduct). Protected conduct refers to acts taken by the 21 plaintiff that are protected by the First Amendment and may include lawsuits and grievances, as 22 well as verbal complaints or threats to sue. See *Rhodes*, 408 F.3d at 567 (prisoners have a First 23 Amendment right to file prison grievances and pursue civil litigation); *Shepard v. Quillen*, 840 24 F.3d 686, 688 (9th Cir. 2016) (prisoners have “First Amendment right to report staff 25 misconduct”); *Jones v. Williams*, 791 F.3d 1023, 1036 (9th Cir. 2015) (threats to sue constitute 26 protected conduct); *Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017) (form of complaint, 27 including verbal, “is of no constitutional significance”). 28 //// 1 C. Deliberate Indifference 2 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate 3 must show ‘deliberate indifference to serious medical needs.’” *Jett v. Penner*, 439 F.3d 1091, 4 1096 (9th Cir. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). This requires plaintiff 5 to show (1) “a ‘serious medical need’ by demonstrating that ‘failure to treat a prisoner’s condition 6 could result in further significant injury or the unnecessary and wanton infliction of pain,’” and 7 (2) “the defendant’s response to the need was deliberately indifferent.” *Id.* (some internal 8 quotation marks omitted) (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992)). 9 A plaintiff can establish deliberate indifference “by showing (a) a purposeful act or failure 10 to respond to a prisoner’s pain or possible medical need and (b) harm caused by the 11 indifference.” *Id.* (citing *McGuckin*, 974 F.2d at 1060). Deliberate indifference “may appear 12 when prison officials deny, delay or intentionally interfere with medical treatment, or it may be 13 shown by the way in which prison physicians provide medical care.” *Hutchinson v. United 14 States*, 838 F.2d 390, 394 (9th Cir. 1988) (citation omitted). “[A] complaint that a physician has 15 been negligent in diagnosing or treating a medical condition does not state a valid claim of 16 medical mistreatment under the Eighth Amendment.” *Estelle*, 429 U.S. at 106. 17 A difference of opinion between an inmate and prison medical personnel—or between 18 medical professionals—regarding the appropriate course of treatment does not by itself amount to 19 deliberate indifference to serious medical needs. *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th 20 Cir. 2004); *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). A difference of opinion rises to

21 the level of deliberate indifference when “the chosen course of treatment ‘was medically 22 unacceptable under the circumstances,’ and was chosen ‘in conscious disregard of an excessive 23 risk to [the prisoner’s] health.’” *Toguchi*, 391 F.3d at 1058 (alteration in original) (quoting 24 *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)). 25 D. Failure to Protect 26 “[A] prison official violates the Eighth Amendment only when two requirements are met. 27 First, the deprivation alleged must be, objectively, sufficiently serious; a prison official’s act or 28 omission must result in the denial of the minimal civilized measure of life’s necessities.” *Farmer* 1 v. *Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks and citations omitted). Second, 2 the prison official must subjectively have a sufficiently culpable state of mind, “one of deliberate 3 indifference to inmate health or safety.” *Id.* (internal quotation marks and citations omitted). The 4 official is not liable under the Eighth Amendment unless he “knows of and disregards an 5 excessive risk to inmate health or safety.” *Id.* at 837. He must then fail to take reasonable 6 measures to lessen the substantial risk of serious harm. *Id.* at 847. Negligent failure to protect an 7 inmate from harm is not actionable under § 1983. *Id.* at 835. 8 E. Personal Involvement 9 “Liability under § 1983 must be based on the personal involvement of the defendant,” 10 *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (citing *May v. Enomoto*, 633 F.2d 11 164, 167 (9th Cir. 1980)), and “[v]ague and conclusory allegations of official participation in civil 12 rights violations are not sufficient,” *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982) 13 (citations omitted). “A person ‘subjects’ another to the deprivation of a constitutional right, 14 within the meaning of section 1983, if he does an affirmative act, participates in another’s 15 affirmative acts, or omits to perform an act which he is legally required to do that causes the 16 deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 17 1978) (citation omitted). In other words, to state a claim for relief under section 1983, plaintiff 18 must link each individual defendant with some affirmative act or omission that shows a violation 19 of plaintiff’s federal rights. 20 Furthermore, “[t]here is no respondeat superior liability under section 1983,” *Taylor v.* 21 *List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (citation omitted), which means that a supervisor 22 cannot be held responsible for the conduct of his subordinates just because he is their supervisor. 23 “A supervisor is only liable for constitutional violations of his subordinates if the supervisor 24 participated in or directed the violations, or knew of the violations and failed to act to prevent 25 them.” *Id.* 26 27 28