

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Edward Androshchuk v. Polayo, et al.

Androshchuk v. Polayo · No. 2:24-cv-01914-EFB (PC) · Decided October 29, 2025

SUMMARY

The United States District Court for the Eastern District of California screened a state prisoner’s 42 U.S.C. § 1983 complaint alleging failure to protect and retaliation. The court found a potentially cognizable First Amendment retaliation claim against defendant Mendoza, dismissed the remaining claims with leave to amend, and permitted the plaintiff to proceed only against Mendoza or file an amended complaint.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
WRITING FOR THE COURT	Edmund F. Brennan
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	October 29, 2025
DOCKET	2:24-cv-01914-EFB (PC)
DISPOSITION	other
PROCEDURAL POSTURE	Screening of a state prisoner's pro se complaint under 28 U.S.C. §§ 1915A and 1915(e)(2) in a 42 U.S.C. § 1983 action.
STANDARD OF REVIEW	The court screened the complaint under 28 U.S.C. §§ 1915A and 1915(e)(2), accepting well-pleaded allegations as true and construing them in the light most favorable to plaintiff, while applying the Rule 8(a) and plausibility standards under Twombly and Iqbal.
PRECEDENTIAL VALUE	nonprecedential
PARTIES	Edward Androshchuk v. Polayo, Ortiz, Merced, Mendoza, John Doe 1

TOPICS

- section 1983
- prisoners rights
- first amendment
- pleadings
- civil procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the complaint stated an Eighth Amendment failure-to-protect claim against the correctional officers and sergeants.
2. Whether the complaint stated a First Amendment retaliation claim based on Sergeant Mendoza's alleged threat to withhold assistance because plaintiff had filed grievances and complaints.
3. Whether the complaint stated a separate First Amendment retaliation claim based on plaintiff's report of an attacker's comment and his subsequent five-hour stay in a holding cage.
4. Whether plaintiff should be granted leave to amend the dismissed claims.

HOLDINGS

1. The complaint failed to state an Eighth Amendment failure-to-protect claim. The allegations did not plausibly show that Polayo, Ortiz, or Merced acted with deliberate indifference, and they did not adequately allege a sufficiently serious risk, a defendant's deliberate indifference, or more-than-de-minimis injury attributable to the housing assignment against Mendoza or the Doe sergeant.
2. The complaint plausibly stated a First Amendment retaliation claim against Mendoza.
3. The complaint failed to state the second retaliation claim because it did not allege that a named defendant took the adverse action because of protected conduct, and the reported statement was not alleged to be a grievance or litigation-related communication.
4. All claims other than the cognizable First Amendment retaliation claim against Mendoza were dismissed with leave to amend within 30 days.

KEY QUOTATIONS

“The complaint fails to allege any failure to protect claim against correctional officers Polayo, Ortiz, or Merced because each of them is alleged to have summoned their respective sergeants (Mendoza and Doe) to address plaintiff’s safety concerns.” (at 6)

“The complaint thus plausibly states a claim against Mendoza for retaliation.” (at 8)

“All other claims are dismissed with leave to amend within 30 days of service of this order.” (at 10)

FACTUAL BACKGROUND

Plaintiff, a state prisoner, alleged that upon arrival at Kern Valley State Prison he warned correctional officers and sergeants that placement in a particular housing facility exposed him to danger based on a prior incarceration and security concerns. He was placed in that facility and later attacked by several inmates, but the complaint did not describe the attack or resulting physical injuries with sufficient specificity. Plaintiff also alleged that he spent five hours in a holding cage and experienced overheating, dehydration, nausea, vomiting, headaches, blurred vision, and lightheadedness, without alleging that any named defendant caused or controlled that confinement. Sergeant Mendoza allegedly told plaintiff that because he had filed grievances and complaints against staff, he

should not expect their assistance; the court found that allegation sufficient to state a First Amendment retaliation claim.

PROCEDURAL HISTORY

Plaintiff filed a § 1983 complaint alleging that correctional officers and sergeants failed to protect him from an inmate attack and retaliated against him. The court screened the complaint and found a potentially cognizable First Amendment retaliation claim against Sergeant Mendoza, while dismissing all other claims with leave to amend within 30 days. Plaintiff was given the option either to proceed only on the retaliation claim against Mendoza or to file an amended complaint before service.

DISPOSITION

other

CASES CITED

- *Neitzke v. Williams*, 490 U.S. 319, 325, 327-28 (1989)
- *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554, 555-57, 570 (2007)
- *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)
- *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)
- *Erickson v. Pardus*, 551 U.S. 89 (2007)
- *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)
- *Johnson v. Ryan*, 55 F.4th 1167, 1172 (9th Cir. 2022)
- *Williams v. Paramo*, 775 F.3d 1182, 1190 (9th Cir. 2015)
- *Helling v. McKinney*, 509 U.S. 25, 31 (1993)
- *Farmer v. Brennan*, 511 U.S. 825, 832, 834-35, 842, 847 (1994)
- *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)
- *Frost v. Agnos*, 152 F.3d 1124 (9th Cir. 1998)
- *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000)
- *Whitley v. Albers*, 475 U.S. 312, 319 (1986)
- *Labatad v. Corr. Corp. of Am.*, 714 F.3d 1155, 1160 (9th Cir. 2013)
- *Hernandez v. Denton*, 861 F.2d 1421, 1424 (9th Cir. 1988), vacated on other grounds sub nom. *Denton v. Hernandez*, 112 S. Ct. 1728 (1992)
- *Rhodes v. Robinson*, 408 F.3d 559, 567-69 (9th Cir. 2005)
- *Brodheim v. Cry*, 584 F.3d 1262, 1271 n.4 (9th Cir. 2009)
- *West v. Livesay*, 2:19-cv-7190-VBF-KES, 2022 WL 17185985, at *4 (C.D. Cal. Aug. 10, 2022)
- *Bobadilla v. Knight*, 2:18-cv-1778-JAM-KJN, 2020 WL 4059183, at *7 (E.D. Cal. July 20, 2020)
- *Olin v. Wakinekona*, 461 U.S. 238, 245 (1983)
- *Meachum v. Fano*, 427 U.S. 215, 225-27 (1976)

- Oliver v. Perez-Pantoja, No. 5:19-cv-7957 EJD, 2023 WL 12033407, at *5 (N.D. Cal. Mar. 24, 2023)
- Vignolo v. Miller, 120 F.3d 1075, 1078 (9th Cir. 1997)
- Shepard v. Quillen, 840 F.3d 686, 691 (9th Cir. 2016)
- Rizzo v. Dawson, 778 F.2d 527, 531 (9th Cir. 1985)
- Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)
- Brass v. County of Los Angeles, 328 F.3d 1192, 1197-98 (9th Cir. 2003)
- Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)
- Forsyth v. Humana, 114 F.3d 1467, 1474 (9th Cir. 1997)
- Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967)

OPINION

1 2 3 4 5 UNITED STATES DISTRICT COURT 6 FOR THE EASTERN DISTRICT OF
CALIFORNIA 7 8 EDWARD ANDROSHCHUK, No. 2:24-cv-01914-EFB (PC) 9 Plaintiff, 10 v.
ORDER 11 POLAYO, et al., 12 Defendants. 13 14 Plaintiff is a state prisoner proceeding without
counsel in an action brought under 42 15 U.S.C. § 1983. This proceeding was referred to this court
by Local Rule 302 pursuant to 28 16 U.S.C. § 636(b)(1).

The court screens plaintiff’s complaint.¹ ECF No. 1. 17 Screening Standards 18 Federal courts
must engage in a preliminary screening of cases in which prisoners seek 19 redress from a
governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 20 1915A(a).

The court must identify cognizable claims or dismiss the complaint, or any portion of 21 the
complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which relief 22
may be granted,” or “seeks monetary relief from a defendant who is immune from such relief.” 23
Id. § 1915A(b). 24 This standard is echoed in 28 U.S.C. § 1915(e)(2), which requires that courts
dismiss a 25 case in which a plaintiff proceeds in forma pauperis at any time if it determines,
among other 26 things, that the action “is frivolous or malicious,” “fails to state a claim on which
relief may be 27 granted,” or “seeks monetary relief against a defendant who is immune from such
relief.” “[The] 28 1 Plaintiff has paid the statutory filing fee.

ECF Nos. 12, 13. 1 term ‘frivolous,’ when applied to a complaint, embraces not only the
inarguable legal conclusion, 2 but also the fanciful factual allegation.” *Neitzke v. Williams*, 490
U.S. 319, 325 (1989) (discussing 3 the predecessor to modern § 1915(e)(2), former § 1915(d)).

Thus, § 1915(e)(2) allows judges to 4 dismiss a claim based on factual allegations that are clearly
baseless, such as facts describing 5 “fantastic or delusional scenarios.” Id. at 327-38. 6 A pro se
plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a) 7 of the Federal
Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and 8 plain
statement of the claim showing that the pleader is entitled to relief, in order to give the 9 defendant
fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl.*

Corp. v. 10 Twombly, 550 U.S. 544, 554, 562-563 (2007) (citing Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 11 2 L.Ed.2d 80 (1957)). While the complaint must comply with the “short and plain statement” 12 requirements of Rule 8, its allegations must also include the specificity required by Twombly and 13 Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). 14 To avoid dismissal for failure to state a claim a complaint must contain more than “naked 15 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of 16 action.” Twombly, 550 U.S. at 555-557.

In other words, “[t]hreadbare recitals of the elements of a 17 cause of action, supported by mere conclusory statements do not suffice.” Iqbal, 556 U.S. at 678. 18 Furthermore, a claim upon which the court can grant relief must have facial plausibility. 19 Twombly, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual 20 content that allows the court to draw the reasonable inference that the defendant is liable for the 21 misconduct alleged.” Iqbal, 556 U.S. at 678.

When considering whether a complaint states a 22 claim upon which relief can be granted, the court must accept the allegations as true, Erickson v. 23 Pardus, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the 24 plaintiff, see Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). 25 Screening Order 26 Plaintiff sues 1) correctional officers Polayo, Ortiz, and Merced, and 2) correctional 27 sergeants Mendoza and John Doe 1.

All defendants are employed at Kern Valley State Prison 28 (KVSP). Plaintiff alleges that he arrived at KVSP on April 19, 2023. He was placed in an intake 1 holding cell at KVSP’s receiving and release (R/R) entry point. He immediately informed nearby 2 officers (Polayo and Ortiz) of his concern for his safety at KVSP, based on experiences during a 3 previous incarceration at KVSP, “years ago.” ECF No. 1 at 7.

He alleges that during his 4 previous stay at KVSP he was an “STG2 target” at risk from other prisoners because of his 5 crimes, and that this was documented in his file. 6 Polayo and Ortiz told plaintiff that his safety concerns were not yet proven or “endorsed,” 7 “because plaintiff had not experienced any new threats or physical attacks.” Id. at 7 ¶ 17. 8 Plaintiff asked to speak with the shift sergeant (Mendoza).

While they waited for Mendoza, 9 Polayo advised plaintiff he “needed to man up, and stop acting like my life is so in danger,” while 10 Ortiz “chimed in” that plaintiff “didn’t give my victim a chance so I needed to man up as 11 suggested.” Id. at 7 ¶ 18. Both Polayo and Ortiz told plaintiff to “cuff up and go to my endorsed 12 facility, and stop crying like a snitch.” Id. at 7-8 ¶ 18.

13 Mendoza arrived and plaintiff reiterated that he could not go to the “D facility”³ because 14 of the nature of his crime, that he has an “R-suffix”⁴ and is a vulnerable victim who needs 15 protection, and that sending plaintiff to D facility was a callous response deliberately indifferent 16 to plaintiff’s safety. Id. at 8 ¶ 19. Mendoza told plaintiff he needed to “be a man” and allow

staff 17 to escort him to D facility, and also “[y]ou file grievances and complaints against staff, and now 18 you want our f***king assistance it doesn’t work like that.

We’re all together you should know 19 that Androshchuk, you were here before.” Id. at ¶¶ 19-21. 20 Polayo and Ortiz escorted plaintiff to the D facility and to the custody of Merced, who 21 was the D facility’s “S.N.E.”⁵ Id. at ¶ 25. Plaintiff began to cry and his “mental health 22 conditions beg[a]n to exacerbate from mental distress.” Id. at ¶ 24. Plaintiff relayed his safety 23 2 “STG” is understood to be an abbreviation for the term “security threat group.” See *Johnson v. Ryan*, 55 F.4th 1167, 1172 (9th Cir.

2022). 24 3 This is apparently a housing unit within KVSP. 25 4 The complaint does not explain the “R-suffix” designation. See *Williams v. Paramo*, 26 775 F.3d 1182, 1190 (9th Cir. 2015) (an R-suffix may indicate a sex offense). 27 5 The complaint does not explain the “S.N.E.” designation, but it appears to be irrelevant to plaintiff’s claims against Merced.

28 1 concerns to Merced, including his history of being attacked during his previous stay in the D 2 facility. Merced stated ““Look how it works here is when something happens in respect[] to your 3 safety concerns at that time you’ll be given an option [whether] you want to stay on the yard or 4 leave by either signing off or not. That is the only way I can help you.” Id. at ¶ 26.

At 5 plaintiff’s request, Merced called the staff sergeant (John Doe 1). The Doe sergeant told plaintiff 6 “Now you[’re] going to D4 whatever happened was in the past don’t worry.” Id. at 10 ¶ 27. 7 The complaint alleges plaintiff was “brutally attacked” by “several inmates” on May 24, 8 2023 while he walked to receive his morning medications. Id. at ¶¶ 28, 29.

The inmates used 9 “unlawful force accompanied by the apparent ability to injure plaintiff.” Id. at ¶ 29. One of the 10 inmates is alleged to have stated “you think we forgot about you.” Id. at ¶ 31. The complaint 11 does not provide any further information about the attack.

The complaint alleges the inmates 12 “inflict[ed] bodily injury” and that plaintiff “sustain[ed] physical injuries,” but there is no 13 description of any physical injury from the attack. Id. at ¶¶ 28, 29. 14 The complaint alleges plaintiff was placed in a holding cage where medical personnel 15 documented his unspecified injuries. Id. at ¶ 28. Plaintiff was kept in the holding cage for five 16 hours while he alleges he “went into shock” and was “light headed, faint, vomiting” and “left in 17 the heat ... [r]esultin[g] in my symptoms exacerbating such as nausea, headaches, blurred vision, 18 dehydrat[ion], [and] overhear[ing].” Id. The complaint alleges plaintiff’s lengthy stay in the 19 holding cage was retaliation for his having told unidentified custody staff about the attacker’s 20 alleged comment.

Id. at ¶¶ 28, 31. 21 Plaintiff was removed from the holding cage and taken to “C facility” and thereafter he 22 was transported to an outside hospital emergency room. Id. at 11 ¶ 31. The complaint does not 23 allege the reason for the off-site transport or the treatment plaintiff received

at the hospital. 24 Plaintiff claims defendants failed to protect him from serious harm, and that he thereby suffered 25 unspecified injuries from the attack.

Id. at 12 ¶ 36. 26 Deliberate Indifference – Failure to Protect 27 “[T]he treatment a prisoner receives in prison and the conditions under which he is 28 confined are subject to scrutiny under the Eighth Amendment,” which prohibits “cruel and 1 unusual punishment.” *Helling v. McKinney*, 509 U.S. 25, 31 (1993). A violation of the Eighth 2 Amendment requires a showing of both an “objective component” – the objective seriousness of 3 the challenged condition, and a “subjective component” – the responsible official’s subjective 4 state of mind.

Farmer v. Brennan, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294, 298 5 (1991). The Eighth Amendment imposes a duty on prison officials to “provide humane 6 conditions of confinement; prison officials must ensure that inmates receive adequate food, 7 clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of 8 the inmates.’” *Farmer*, 511 U.S. at 832.

Where a prisoner alleges injuries stemming from an 9 objectively unsafe condition of confinement, prison officials may be held liable only if they acted 10 with “deliberate indifference to a substantial risk of serious harm.” *Frost v. Agnos*, 152 F.3d 11 1124 (9th Cir. 1998) (citing *Farmer*, 511 U.S. at 835). A condition is sufficiently serious if it 12 poses “a substantial risk of serious harm” to the inmate.

Farmer, 511 U.S. at 832. Because the 13 sufficiency of a conditions-of-confinement claim depends upon the particular facts of each 14 situation, the “circumstances, nature, and duration” of the challenged conditions must be carefully 15 considered. *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). “Whether a prison official had 16 the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the 17 usual ways, including inference from circumstantial evidence,... and a factfinder may conclude 18 that a prison official knew of a substantial risk from the very fact that the risk was obvious.” 19 *Farmer*, 511 U.S. at 842.

Thus, a showing of deliberate indifference rests on facts clearly 20 evincing “obduracy and wantonness, not inadvertence or error in good faith.” *Whitley v. Albers*, 21 475 U.S. 312, 319 (1986). “Liability may follow only if a prison official ‘knows that inmates 22 face a substantial risk of serious harm and disregards that risk by failing to take reasonable 23 measures to abate it.’” *Labatad v. Corr.*

Corp. of Am., 714 F.3d 1155, 1160 (9th Cir. 2013) 24 (quoting *Farmer*, 511 U.S. at 847). The Eighth Amendment does not give rise to a federal cause 25 of action whenever prisoners are inconvenienced or suffer de minimis injuries. *Hernandez v. 26 Denton*, 861 F.2d 1421, 1424 (9th Cir. 1988), vacated on other grounds sub nom. *Denton v. 27 Hernandez*, 112 S. Ct. 1728 (1992).

28 //// 1 Analysis of Deliberate Indifference Claims 2 The complaint fails to allege any failure to protect claim against correctional officers 3 Polayo, Ortiz, or Merced because each of them is alleged to have summoned their respective 4 sergeants (Mendoza and Doe) to address plaintiff's safety concerns. Any statements they may 5 have made to plaintiff are irrelevant to show deliberate indifference because the complaint does 6 not allege any of these officers had authority to make or to change plaintiff's housing assignment.

7 The complaint instead alleges that Polayo, Ortiz, and Merced referred plaintiff's safety concerns 8 to their sergeants which indicates they took the measures reasonably available to them regarding 9 those concerns. 10 According to plaintiff's allegations, the sergeants (Mendoza and/or Doe) may have had 11 authority to reassign plaintiff away from the D facility, but they each independently declined to 12 do so on the grounds that plaintiff had not shown a present threat to his safety based on events 13 that occurred "years ago." However, the complaint fails to show that sergeants Mendoza and/or 14 Doe exposed plaintiff to a specific and substantial risk of serious harm by assigning plaintiff to 15 the D facility, or that they were deliberately indifferent to that risk, or that plaintiff suffered any 16 specific injury – anything more than de minimis harm or pain – as a result of the housing 17 assignment, for the following reasons.

18 Regarding the attack of May 24, 2023, the complaint fails to allege the circumstances of 19 the event that would show a serious and substantial risk of serious harm that should have been 20 apparent to Mendoza and/or Doe as of plaintiff's arrival on April 19.

The complaint alleges an 21 attack by other inmates that was "brutal" and demonstrated an "apparent ability to injure 22 plaintiff" and caused unspecified physical injury, but it does not describe the attack, the physical 23 injury, or the severity of physical injury. See ECF No. 1 at 10 ¶ 29 (emphasis added). A medical 24 evaluation was conducted while plaintiff was in the holding cage after the attack, but the 25 complaint does not describe the results of the evaluation.

Plaintiff was transported to the hospital 26 at some point after he was transferred from the D facility to the C facility, but the complaint does 27 not allege the reason for the transport, nor does it describe what care plaintiff received at the 28 hospital.

In summary, the complaint does not allege any specific physical injury from the attack 1 that was more than de minimis. 2 The complaint instead alleges specific conditions apparently related to the extended time 3 that plaintiff spent in the holding cage after the attack and before being transferred to C facility, 4 such as over-heating, dehydration, nausea, headaches, blurred vision, vomiting, and 5 lightheadedness.

Because these are the only specific conditions alleged in the complaint, it 6 therefore appears that the off-site transport may have been to address these issues. The complaint 7 thus fails to plausibly allege a greater-than-de minimis injury as a result of the attack itself.

For 8 these reasons the complaint fails to state an Eighth Amendment failure to protect claim based on 9 the attack. 10 Regarding the five-hour stay in the holding cage, which appears to have led to the 11 overheating and other conditions described in the complaint, there is no allegation that any of the 12 defendants had any role in placing or keeping plaintiff in the holding cage.⁶ Decisions that may 13 have been made by the sergeant defendants (Mendoza and/or Doe) to house plaintiff in the D 14 facility upon his arrival at KVSP on April 19 are too far removed from plaintiff's time in the 15 holding cage on May 24 to state a claim of deliberate indifference.

16 Retaliation 17 To state a claim for retaliation in violation of the First Amendment, a prisoner must allege 18 facts showing five elements: (1) that a state actor took some adverse action against him (2) 19 because of (3) his protected conduct, (4) that such action chilled his exercise of his First 20 Amendment rights, and (5) the action did not advance a legitimate correctional goal.

Rhodes v. 21 Robinson, 408 F.3d 559, 567-568 (9th Cir. 2005). The plaintiff need not allege that his speech 22 was actually inhibited or suppressed, but merely that the defendant's conduct was such as would 23 chill or silence a person of ordinary firmness from future First Amendment activities. *Id.* at 568- 24 569. Conduct protected by the First Amendment includes communications that are "part of the 25 grievance process." *Brodheim v. Cry*, 584 F.3d 1262, 1271 n.4 (9th Cir.

2009). 26 6 In particular, the complaint does not allege that the defendants who worked in the R/R 27 entry point (Polayo, Ortiz, and Mendoza) were responsible for the confinement in the holding cage in the D facility. 28 1 Analysis of Retaliation Claims 2 The complaint alleges two separate instances of potential retaliation.

The first adequately 3 states a claim, the second does not. The first retaliation claim in the complaint is based on 4 Mendoza's comment to plaintiff that "filing grievances and complaints against staff" would 5 impede his receiving assistance. ECF No. 1 at 8 ¶¶ 19-21. Plaintiff had objected to his placement 6 in D facility as being "deliberately indifferent" and Mendoza's comment apparently also 7 referenced grievances and/or complaints plaintiff had made "before" – i.e., during plaintiff's 8 previous stay at KVSP.

This sufficiently alleges protected conduct. The threat to withhold 9 assistance in changing plaintiff's housing assignment away from the D facility is sufficient under 10 these allegations to constitute an adverse action.⁷ The complaint thus plausibly states a claim 11 against Mendoza for retaliation. 12 The second potential retaliation claim relates to the allegation that plaintiff's five-hour 13 stay in the holding cage was retaliation for telling unidentified custody staff that an inmate who 14 attacked plaintiff had commented "you think we forgot about you." ECF No. 1 at 10 ¶¶ 28, 31.

15 The inference is that plaintiff's reporting of this comment was somehow an implicit criticism of 16 prison officials for assessing that plaintiff would not face an undue threat in D facility because

of 17 events during his previous incarceration there. See *id.* at 10 ¶ 27 (the Doe sergeant had assured 18 plaintiff that “whatever happened was in the past don’t worry”).

However, “an inmate’s mere 19 verbal criticism of a government official, without indicating an intent to sue or pursue an 20 administrative grievance, is not protected conduct.” *West v. Livesay*, 2:19-cv-7190-VBF-KES, 21 2022 WL 17185985, at *4 (C.D. Cal. Aug. 10, 2022); see also *Bobadilla v. Knight*, 2:18-cv-1778- 22 JAM-KJN, 2020 WL 4059183, at *7 (E.D. Cal. July 20, 2020) (“there is no clearly established 23 7 A prisoner has no constitutional right to have the housing assignment of his choice.

See *Olin v. Wakinekona*, 461 U.S. 238, 245 (1983); *Meachum v. Fano*, 427 U.S. 215, 225-27 (1976). 24 However, an adverse action “need not independently deprive the plaintiff (prisoner or not) of a constitutional right.” *Oliver v. Perez-Pantoja*, No. 5:19-cv-7957 EJD, 2023 WL 12033407, at *5 25 (N.D. Cal. March 24, 2023) (citing *inter alia* *Vignolo v. Miller*, 120 F.3d 1075, 1078 (9th Cir.

1997)). Adverse actions may include a harm or a threat of harm that would chill a person of 26 ordinary firmness from complaining. *Shepard v. Quillen*, 840 F.3d 686, 691 (9th Cir. 2016) (placement in administrative segregation or threat to do so); *Vignolo*, 120 F.3d at 1078 (discharge 27 from prison job); *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985) (transfer to a different prison).

28 1 Supreme Court or Ninth Circuit authority finding that a prisoner’s verbal complaints concerning 2 matters not related to inmate grievances or litigation constitute protected conduct”). The 3 complaint also fails to allege that plaintiff reported his attacker’s comment to any of the 4 defendants, or that any of the defendants was responsible for the time plaintiff spent in the 5 holding cage.

The holding cage allegations therefore fail to state the first three elements of a 6 retaliation claim – i.e., that any of the defendants kept plaintiff in the holding cage for an 7 excessive time because of plaintiff’s protected speech. 8 Summary 9 The complaint does not state any cognizable claim against Polayo, Ortiz, Merced, or the 10 Doe sergeant. It does state a cognizable First Amendment retaliation claim against Mendoza, but 11 does not state an Eighth Amendment failure to protect claim against Mendoza.

12 Doe Defendant 13 Should plaintiff choose to file an amended complaint, then regarding any claim against the 14 Doe sergeant in an amended complaint, the court notes that the use of Doe defendants in federal 15 court is problematic, see *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980), and ultimately 16 unnecessary. Should plaintiff learn the identity of the “Doe,” he may move pursuant to Rule 15 17 of the Federal Rules of Civil Procedure to file an amended complaint to add him as a defendant.

18 See *Brass v. County of Los Angeles*, 328 F.3d 1192, 1197-98 (9th Cir. 2003). Unknown persons
19 cannot be served with process until they are identified by their real names and the court will not
20 investigate the names and identities of unknown defendants. 21 Amended Complaint 22
Plaintiff will be provided an opportunity to file an amended complaint to attempt to 23 correct the
deficiencies identified in this screening order.

Plaintiff is not obligated to amend the 24 complaint; he may instead choose to proceed only on his
First Amendment retaliation claim 25 against Mendoza. 26 If plaintiff chooses to file an amended
complaint, he should note that any amended 27 complaint must identify as a defendant only
persons who personally participated in a substantial 28 way in depriving him of a federal
constitutional right.

Johnson v. Duffy, 588 F.2d 740, 743 (9th 1 || Cir. 1978) (a person subjects another to the
deprivation of a constitutional right if he does an act, 2 || participates in another's act or omits to
perform an act he is legally required to do that causes the 3 || alleged deprivation). 4 Further, any
amended complaint must be written or typed so that it so that it is complete in 5 || itself without
reference to any earlier filed complaint.

E.D. Cal. L.R. 220. This is because an 6 || amended complaint supersedes any earlier filed
complaint, and once an amended complaint is 7 || filed, the earlier filed complaint no longer serves
any function in the case. See *Forsyth v. 8 | Humana*, 114 F.3d 1467, 1474 (9th Cir. 1997) (the
“amended complaint supersedes the original, 9 || the latter being treated thereafter as non-
existent.”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th 10 | Cir.

1967)). 11 The court cautions plaintiff that failure to comply with the Federal Rules of Civil 12 ||
Procedure, this court's Local Rules, or any court order may result in this action being 13 ||
dismissed. See Local Rule 110. 14 Order 15 Accordingly, it is hereby ORDERED that: 16 1.
Plaintiff's complaint (ECF No. 1) alleges, for screening purposes, a potentially 17 || cognizable
claim for violation of the First Amendment against defendant Mendoza.

18 2. All other claims are dismissed with leave to amend within 30 days of service of this 19 |
order. Plaintiff ☐ not obligated to amend his complaint. 20 3. Within thirty days plaintiff shall
return the notice below advising the court whether he 21 || elects to proceed with the cognizable
claims or file an amended complaint. If the former option is 22 || selected and returned, the court
will enter an order directing service at that time.

23 4. Failure to comply with any part of this this order may result in dismissal of this action. 24 |
Dated: October 28, 2025 26 EDMUND F. BRENNAN UNITED STATES MAGISTRATE JUDGE
27 28 10 1 Attachment 2 UNITED STATES DISTRICT COURT 3 FOR THE EASTERN
DISTRICT OF CALIFORNIA 4 EDWARD ANDROSHCHUK, Plaintiff, 5 v. 6 POLAYO, et al.,
Defendants. 7 No. 2:24-cv-1914-EFB (P) 8 NOTICE OF ELECTION 9 In accordance with the

court's Screening Order, plaintiff hereby elects to: 10 (1) _____ proceed only with the First Amendment claims against Mendoza.

11 OR 12 (2) _____ delay serving any defendant and file an amended complaint. 13 14
_____ 15 Plaintiff 16 Dated: 17 18 19 20 21 22 23 24 25 26 27 28