

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Charles Kinsey v. Susan Pasha, Nurse Practitioner

Kinsey v. Pasha · No. 3:25-cv-1225-JES-DDL · Decided February 5, 2026

SUMMARY

The United States District Court for the Southern District of California screened Charles Kinsey’s Second Amended Complaint under 28 U.S.C. §§ 1915(e)(2) and 1915A(b). The court found that Kinsey plausibly stated an Eighth Amendment failure-to-protect claim against Nurse Practitioner Susan Pasha, but dismissed his First Amendment retaliation and Eighth Amendment medical-care claims for failure to state a claim. Kinsey was given 45 days to proceed only on the surviving claim or file a Third Amended Complaint.

CASE DETAILS

COURT	United States District Court for the Southern District of California
WRITING FOR THE COURT	James E. Simmons Jr.
JURISDICTION	United States District Court for the Southern District of California
DECIDED	February 5, 2026
DOCKET	3:25-cv-1225-JES-DDL
DISPOSITION	other
PROCEDURAL POSTURE	Sua sponte screening of a prisoner proceeding in forma pauperis under 28 U.S.C. §§ 1915(e)(2) and 1915A(b).
STANDARD OF REVIEW	The court applied the Federal Rule of Civil Procedure 12(b)(6) plausibility standard in screening under 28 U.S.C. §§ 1915(e)(2) and 1915A(b), accepting well-pleaded factual allegations as true but disregarding legal conclusions and conclusory assertions.
PRECEDENTIAL VALUE	nonprecedential district court screening order
PARTIES	Charles Kinsey v. Susan Pasha, Nurse Practitioner

TOPICS

- prisoners rights
- section 1983
- civil procedure
- motions to dismiss
- cruel and unusual punishment

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the Second Amended Complaint plausibly alleged an Eighth Amendment failure-to-protect claim against Pasha.
2. Whether the Second Amended Complaint plausibly alleged a First Amendment retaliation claim based on Pasha's discontinuation of Kinsey's wheelchair accommodation after he requested privacy during medical questioning.
3. Whether the Second Amended Complaint plausibly alleged an Eighth Amendment deliberate-indifference claim based on Pasha's treatment of Kinsey's broken finger.
4. Whether Kinsey should be permitted to proceed on the surviving claim or amend the complaint again.

HOLDINGS

1. The Second Amended Complaint plausibly stated an Eighth Amendment failure-to-protect claim because it alleged that Pasha knew the path posed a substantial risk of serious harm, drew that inference from prior incidents and injuries, and disregarded the risk, resulting in Kinsey's broken finger.
2. The First Amendment retaliation claim was dismissed for failure to state a claim because Kinsey did not plausibly allege protected conduct, causation, chilling, or the absence of a legitimate correctional goal.
3. The Eighth Amendment medical-care claim was dismissed because the allegations that Pasha improperly set Kinsey's finger amounted at most to negligence or medical malpractice and did not plausibly establish deliberate indifference.
4. The court granted Kinsey 45 days either to proceed only on the surviving failure-to-protect claim or to file a complete Third Amended Complaint curing the deficiencies in the dismissed claims.

KEY QUOTATIONS

"[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (at 5)

"Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." (at 9)

FACTUAL BACKGROUND

Kinsey, a visually impaired prisoner, alleged that Nurse Practitioner Pasha knew a path at Richard J. Donovan Correctional Facility was dangerously uneven and had previously treated people injured in falls there. He alleged that Pasha discontinued his wheelchair accommodation after he requested privacy concerning COVID-19 symptoms and instead gave him a walker with small wheels. Kinsey alleged that he subsequently fell and broke a finger, which Pasha improperly set and which later required surgery. The court found the allegations sufficient

to plausibly show that Pasha knew of and disregarded a substantial risk of serious harm, but insufficient to establish retaliation or deliberate indifference in medical treatment.

PROCEDURAL HISTORY

Kinsey filed a § 1983 complaint concerning a fall and alleged denial of medical care while incarcerated. The court initially dismissed the action for failure to pay the filing fee or properly seek in forma pauperis status, later granted in forma pauperis status, dismissed the complaint for failure to state a claim, and granted leave to amend. After considering the Second Amended Complaint, the court found that the Eighth Amendment failure-to-protect claim plausibly stated a claim, dismissed the First Amendment retaliation and Eighth Amendment medical-care claims, and granted Kinsey 45 days either to proceed only on the surviving claim or file a Third Amended Complaint.

DISPOSITION

other

CASES CITED

- Hal Roach Studios, Inc. v. Richard Feiner and Co. Inc., 896 F.2d 1542, 1546 (9th Cir. 1990)
- Lopez v. Smith, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
- Rhodes v. Robinson, 621 F.3d 1002, 1004 (9th Cir. 2010)
- Nordstrom v. Ryan, 762 F.3d 903, 907 n.1 (9th Cir. 2014)
- Wheeler v. Wexford Health Sources, Inc., 689 F.3d 680, 681 (7th Cir. 2012)
- Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012)
- Wilhelm v. Rotman, 680 F.3d 1113, 1121, 1123 (9th Cir. 2012)
- Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009)
- Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)
- Hebbe v. Pliler, 627 F.3d 338, 342 & n.7 (9th Cir. 2010)
- Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)
- Ivey v. Board of Regents of the University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982)
- Devereaux v. Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001)
- Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1138 (9th Cir. 2012)
- Farmer v. Brennan, 511 U.S. 825, 834-37 (1994)
- Wilson v. Seiter, 501 U.S. 294, 298, 302-03 (1991)
- Whitley v. Albers, 475 U.S. 312, 319 (1986)
- Estelle v. Gamble, 429 U.S. 97, 104, 106 (1976)
- Oliver v. Keller, 289 F.3d 623, 627-28 (9th Cir. 2002)
- Goode v. Canedo, S.D. Cal. Case No. 21-cv-2054-GPC-KSC, 2022 WL 16753312, at *6 (S.D. Cal. Nov. 7, 2022)
- Glosson v. Morales, 469 F. Supp. 2d 827, 834 (S.D. Cal. 2007)

- Luong v. Hatt, 979 F. Supp. 481, 486 (N.D. Tex. 1997)
- Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005)
- Valdez v. Marquez, 2022 WL 184662, at *4 (S.D. Cal. Jan. 19, 2022)
- Hudson v. Palmer, 468 U.S. 517, 526 (1984)
- Watison v. Carter, 668 F.3d 1108, 1116-17 (9th Cir. 2012)
- Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989)
- Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977)
- Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014)
- Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir. 1988)
- Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004)
- Thompson v. Rodriguez, 2023 WL 4414579, at *4 (S.D. Cal. July 7, 2023)
- Atkins v. Brewer, 2009 WL 29873, at *4 (E.D. Cal. Jan. 5, 2009)
- Turner v. Barajas, 2015 WL 74194, at *4 (D. Ariz. Jan. 6, 2015)
- Duncan v. Wang, 2014 WL 109129, at *4 (E.D. Cal. Jan. 9, 2014)
- Rosati v. Igbinoso, 791 F.3d 1037, 1039 (9th Cir. 2015)
- Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012)
- Lacey v. Maricopa County, 693 F.3d 896, 928 (9th Cir. 2012) (en banc)

OPINION

Kinsey

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 11 CHARLES KINSEY, Case No.: 3:25-cv-1225-JES-DDL

CDCR# P-04738,

12

ORDER SCREENING SECOND

Plaintiff,

13 AMENDED COMPLAINT PURSUANT

vs. TO 28 U.S.C. § 1915(e)(2) AND 28 U.S.C. 14

§ 1915A(b) AND SETTING DEADLINE

15 TO CHOOSE OPTION

SUSAN PASHA, Nurse Practitioner, 16 Defendant. 17 18 I. Procedural Background 19 On May 12, 2025, Plaintiff Charles Kinsey, currently incarcerated at Richard J. 20 Donovan Correctional Facility (“RJD”) in San Diego, California, and proceeding pro se, 21 filed a civil rights Complaint pursuant to 42 U.S.C. § 1983 arising from events that 22 occurred during his confinement at RJD, specifically surrounding a fall and an alleged 23 subsequent lack of medical care. ECF No. 1. After

the Court dismissed the civil action on

24 May 16, 2025, for failure to pay the required filing fee and/or properly move to proceed in
25 forma pauperis (“IFP”), Plaintiff filed a motion for leave to proceed IFP. ECF Nos. 4–5. 26 On
September 23, 2025, the Court granted Plaintiff’s IFP motion, dismissed the Complaint 27
pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b) for failing to state a claim upon which 28 relief
may be granted, and granted Plaintiff 45 days leave to amend. ECF No. 7. 1 On October 20, 2025,
prior to filing any Amended Complaint, Plaintiff filed a 2 “Requested Order to Stop Retaliation.”
ECF No. 9 at 1–2. Upon review, the Court liberally 3 construed Plaintiff’s “Requested Order to
Stop Retaliation” as both: (1) a motion for 4 preliminary injunctive relief and (2) a motion to
extend time in which to amend and/or 5 supplement his complaint pursuant to Fed. R. Civ. P. 15(a)
and (d). On October 31, 2025, 6 the Court denied Plaintiff’s motion for preliminary injunctive
relief without prejudice as 7 moot, granted him leave to amend and/or supplement pursuant to Fed.
R. Civ. P. 15(a) and 8 (d) and further granted him a 45-day extension of time in which to file a
comprehensive 9 Amended Complaint. ECF No. 10. On or about the same time, however, Plaintiff
filed an 10 Amended Complaint. See ECF No. 12. Subsequently, on November 19, 2025, Plaintiff
filed 11 a Second Amended Complaint (“SAC”), see ECF No. 13, presumably in response to the
12 Court’s interim October 31, 2025, Order, which the Court now considers the operative 13
pleading in this action. See *Hal Roach Studios, Inc. v. Richard Feiner and Co. Inc.*, 896 14 F.2d
1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the original.”) 15 II. Sua Sponte
Screening Pursuant to 28 U.S.C. §§ 1915(e) and 1915A(b) 16 A. Standard of Review 17 Because
Plaintiff is a prisoner proceeding IFP, his SAC requires a pre-Answer 18 screening pursuant to 28
U.S.C. §§ 1915(e)(2) & 1915A(b). The Court must sua sponte 19 dismiss a prisoner’s IFP
complaint, or any portion of it, which is frivolous, malicious, fails 20 to state a claim, or seeks
damages from defendants who are immune. *Lopez v. Smith*, 203 21 F.3d 1122, 1126–27 (9th Cir.
2000) (en banc) (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes 22 v. Robinson*, 621 F.3d 1002, 1004
(9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)). “The 23 purpose of § 1915A is ‘to ensure that
the targets of frivolous or malicious suits need not 24 bear the expense of responding.’” *Nordstrom*
v. Ryan, 762 F.3d 903, 907 n.1 (9th Cir. 25 2014), quoting *Wheeler v. Wexford Health Sources,*
Inc., 689 F.3d 680, 681 (7th Cir. 2012). 26 “The standard for determining whether a plaintiff has
failed to state a claim upon 27 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as
the Federal Rule of 28 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v.*
Carter, 668 F.3d 1 1108, 1112 (9th Cir. 2012); see also *Wilhelm v. Rotman*, 680 F.3d 1113, 1121
(9th Cir. 2 2012) (“Failure to state a claim under § 1915A incorporates the familiar standard
applied 3 in the context of failure to state a claim under Federal Rule of Civil Procedure 12(b)
(6).”)

4 Rule 12(b)(6) requires a complaint to “contain sufficient factual matter, accepted as true,
5 to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 6
(2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Determining 7

whether a complaint states a plausible claim for relief [is] . . . a context-specific task that 8 requires the reviewing court to draw on its judicial experience and common sense.” Id. at 9 679. “[T]he tenet that a court must accept as true all of the allegations contained in a 10 complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a 11 cause of action, supported by mere conclusory statements, do not suffice.” Id. at 678. Also, 12 while the court “ha[s] an obligation where the petitioner is pro se, particularly in civil rights 13 cases, to construe the pleadings liberally and to afford the petitioner the benefit of any 14 doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010), citing *Bretz v. Kelman*, 15 773 F.2d 1026, 1027 n.1 (9th Cir. 1985), it may not “supply essential elements of claims 16 that were not initially pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 17 268 (9th Cir. 1982).

18 Title 42 U.S.C. § 1983 “creates a private right of action against individuals who, 19 acting under color of state law, violate federal constitutional or statutory rights.” 20 *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). “To establish § 1983 liability, a 21 plaintiff must show both (1) deprivation of a right secured by the Constitution and laws of 22 the United States, and (2) that the deprivation was committed by a person acting under 23 color of state law.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012). 24 B. Allegations in the SAC 25 Plaintiff claims he is visually impaired and was transferred to RJD when RJD was 26 undergoing renovations to become compliant with the Americans with Disabilities Act 27 (“ADA”). ECF No. 13 at 3. Plaintiff alleges Defendant Pasha knew a path to RJD’s 28 education facility was “on extreme unev[e]n terrain” because Pasha “commented to a 1 fellow nurse that the path was a fall waiting to happen.” Id. Plaintiff also alleges Pasha 2 previously responded to an incident where the injured person had used a walker and Pasha 3 treated two prior “victims of the path” who had suffered “serious injury from falling” on 4 that path. Id. 5 At some point Pasha asked Plaintiff whether he was experiencing Covid-19 6 symptoms in the presence of other inmates. Id. Plaintiff alleges that when he asked to move 7 to a more private location, Pasha “refused and treated the refusal to a[un]swer as a refusal 8 of care.” Id. Plaintiff claims that “in retaliation” for his request for privacy, Pasha 9 discontinued his wheelchair accommodation. Id. Instead, Pasha provided Plaintiff a walker 10 with “small wheels that could get caught in the cracks” and told Plaintiff that “the walker 11 was good enough.” Id. When Plaintiff objected and told Pasha she was “unqu[al]ified” to 12 take his wheelchair away, Pasha responded: “[S]ince you think I am unqualified to treat 13 you I will take the chair until the doctor can see you.” Id. When Plaintiff asked Pasha how 14 he could get to education without the wheelchair, Pasha responded: “If you fall you can 15 put in a sick call slip and maybe you will be[] seen.” Id. at 3–4. Plaintiff alleges he “did in 16 fact thereafter fall and broke [his] finger.” Id. at 4. He claims Pasha was subsequently 17 assigned to treat him, but she “i[m]properly set the finger” and as a result, Plaintiff “had to 18 go to s[ur]g[e]ry.” Id. Plaintiff contends his finger needed to be re-set, which caused him 19 pain, and he still does not have proper range of motion in his finger. Id. 20 Construing Plaintiff’s contentions against Defendant Pasha liberally, see, e.g., 21 *Hebbe*, 627 F.3d at 342 & n.7, Plaintiff

brings (1) an Eighth Amendment claim alleging a 22 failure to protect him from harm; (2) a First Amendment claim alleging retaliation for 23 exercising his right to private medical care; and (3) an Eighth Amendment claim alleging 24 denial of medical care. *Id.* at 3–4. Plaintiff seeks an injunction preventing Defendant Pasha 25 from interfering with the litigation of the instant case, an order “preclud[ing] [] 26 interdepartm[ent]al transfer” and monetary damages. *Id.* at 8. 27 /// 28 /// 1 C. Discussion 2 1. Eighth Amendment- failure to protect 3 As Plaintiff was instructed in the prior dismissal Order, see ECF No. 7 at 6–7, “a 4 prison official violates the Eighth Amendment when two requirements are met. First, the 5 deprivation alleged must be, objectively, ‘sufficiently serious.’” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). Second, “a prison 7 official must have a ‘sufficiently culpable state of mind,’” that is, “one of ‘deliberate 8 indifference’ to inmate health or safety.” *Id.*, quoting *Wilson*, 501 U.S. at 302–03. “[A] 9 prison official cannot be found liable under the Eighth Amendment for denying an inmate 10 humane conditions of confinement unless the official knows of and disregards an excessive 11 risk to inmate health or safety; the official must both be aware of facts from which the 12 inference could be drawn that a substantial risk of serious harm exists, and he must also 13 draw the inference.” *Id.* at 837. 14 In the SAC, Plaintiff again alleges, as he did in the prior Complaint, that Pasha was 15 aware of the condition of the walkway and knew it needed repair because she commented 16 to another nurse that the walkway was “a fall waiting to happen.” See ECF No. 13 at 3. 17 Plaintiff now also plausibly alleges Pasha actually drew an inference that the walkway 18 posed a substantial risk of serious harm to him, as he alleges that Pasha previously 19 responded to a fall incident on that path as well as treated two individuals who sustained 20 “serious injury” from falls on the path. *Id.* Plaintiff also claims Pasha was aware, given 21 Plaintiff’s inquiry, that he used that path to get to education and would be using a walker 22 to do so rather than a wheelchair, and further alleges Pasha told him: “If you fall you can 23 put in a sick call slip and maybe you will be[] seen.” See *id.* at 3–4; see *Farmer*, 511 U.S. 24 at 835 (“[D]eliberate indifference describes a state of mind more blameworthy than 25 negligence” and “more than ordinary lack of due care for the prisoner’s interests or 26 safety.”), quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986) and citing *Estelle v. 27 Gamble*, 429 U.S. 97, 104, 106 (1976). 28 /// 1 As the Court also instructed in the prior dismissal Order, see ECF No 7 at 8, in order 2 to state a claim, Plaintiff must set forth facts demonstrating that he suffered a sufficiently 3 grave physical injury due to a Defendant’s deliberate indifference to the substantial or 4 excessive risk of serious harm. See *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002) 5 (holding that the PLRA “requires a prior showing of physical injury that need not be 6 significant but must be more than de minimis.”); see also *Goode v. Canedo*, S.D. Cal. Case 7 No. 21-cv-2054-GPC-KSC, 2022 WL 16753312, at *6 (S.D. Cal. Nov. 7, 2022) (“The 8 threshold of physical injury necessary is not specified in the PLRA, but courts have 9 interpreted this to require physical injury more than de minimis.”), citing *Oliver*, 289 F.3d 10 at 628 (9th Cir. 2002). In the SAC, Plaintiff now plausibly alleges to have broken a finger 11 as a result of his fall.

See ECF No. 13 at 4; see *Glosson v. Morales*, 469 F.Supp.2d 827, 12 834 (S.D. Cal. 2007) (“‘A physical injury is an observable or diagnosable medical 13 condition requiring treatment by a medical care professional. It is not a sore muscle, an 14 aching back, a scratch, an abrasion, a bruise, etc., which lasts even up to two or three 15 weeks.’”), quoting *Luong v. Hatt*, 979 F.Supp.481, 486 (N.D. Tex. 1997). 16 Based on these amended allegations, the Court now finds Plaintiff plausibly states 17 an Eighth Amendment failure to protect claim against Defendant Pasha “sufficient to meet 18 the low threshold for proceeding past the screening stage.” *Wilhelm*, 680 F.3d at 1123. As 19 set forth below, Plaintiff will be given the option to amend his Complaint to cure the 20 pleading deficiencies of his dismissed claims or proceed only with the claim which survives 21 screening. See *Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (“A district court 22 should not dismiss a pro se complaint without leave to amend unless ‘it is absolutely clear 23 that the deficiencies of the complaint could not be cured by amendment.’”), quoting *Akhtar 24 v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012). 25 2. First Amendment- retaliation 26 Plaintiff also alleges Defendant Pasha, in response to Plaintiff’s exercise of his right 27 to private medical care, retaliated against him by discontinuing his wheelchair 28 accommodation. ECF No. 13 at 3. 1 “Within the prison context, a viable claim of First Amendment retaliation entails 2 five basic elements: (1) An assertion that a state actor took some adverse action against an 3 inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled 4 the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably 5 advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (2005) 6 (footnote omitted). 7 While Plaintiff alleges Defendant Pasha took some adverse action against him by 8 discontinuing his wheelchair accommodation, he does not plausibly allege any of the other 9 elements required to state a First Amendment retaliation claim. First, Plaintiff fails to claim 10 Pasha’s alleged retaliatory action was taken because he exercised a constitutional right. 11 While Plaintiff claims Pasha retaliated against him for requesting privacy, that right to 12 privacy is not “protected conduct.” See e.g. *Valdez v. Marquez*, 2022 WL 184662, at *4 13 (S.D. Cal. Jan. 19, 2022) (“Prisoners have no right to privacy in their cell, and thus privacy 14 while using the bathroom in one’s cell is not ‘protected conduct.’”), citing *Hudson v. 15 Palmer*, 468 U.S. 517, 526 (1984). Second, Plaintiff offers no facts to plausibly connect 16 the discontinuation of his wheelchair accommodation to his request for privacy as to his 17 Covid-19 symptoms and instead offers only a conclusory assertion that Pasha’s actions 18 were taken because of his own conduct. *Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the 19 elements of a cause of action, supported by mere conclusory statements, do not suffice.”); 20 see e.g. *Watson*, 668 F.3d at 116–17 (affirming dismissal of retaliation claim where 21 prisoner failed to allege defendant’s actions were “connected to [Plaintiff’s] filing of the 22 emergency grievance.”); see also *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 23 (9th Cir. 1989) (“[A] plaintiff alleging retaliation for the exercise of constitutionally 24 protected rights must initially show that the protected conduct was a ‘substantial’ or 25 ‘motivating’ factor in the defendant’s decision.”), quoting *Mt. Healthy City*

School Dist. 26 Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). Nor does Plaintiff claim Pasha's action 27 chilled his exercise of First Amendment rights or allege such action did not advance a 28 legitimate correctional goal. Rhodes, 408 F.3d at 567–68; see also Ivey, 673 F.2d at 268 1 (“[A] liberal interpretation of a civil rights complaint may not supply essential elements of 2 the claim that were not initially pled.”) If Plaintiff wishes to proceed with a 42 U.S.C. 3 § 1983 claim based on retaliation, he must set forth facts which plausibly allege a 4 Defendant took an adverse action because of his protected conduct which chilled his 5 exercise of his First Amendment rights and which did not reasonably advance a legitimate 6 correctional goal. Rhodes, 408 F.3d at 567–68. 7 Accordingly, Plaintiff's First Amendment retaliation claim against Defendant Pasha 8 is dismissed sua sponte pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b) for failure to state 9 a claim. As set forth below, Plaintiff will be given the option to amend his Complaint to 10 cure the pleading deficiencies of his dismissed claims or proceed only with the claim which 11 survives screening. See Rosati, 791 F.3d at 1039. 12 3. Eighth Amendment- denial of medical care 13 Plaintiff also alleges Pasha denied him his right to medical care when she “failed to 14 respond and i[m]properly set [his] finger.” ECF No. 13 at 4. 15 As Plaintiff was instructed in the prior dismissal Order, see ECF No. 7 at 9–10, “[i]n 16 order to prevail on an Eighth Amendment claim for inadequate medical care, a plaintiff 17 must show ‘deliberate indifference’ to his ‘serious medical needs.’” Colwell v. Bannister, 18 763 F.3d 1060, 1066 (9th Cir. 2014), quoting Gamble, 429 U.S. at 104. “Deliberate 19 indifference ‘may appear when prison officials deny, delay or intentionally interfere with 20 medical treatment, or it may be shown by the way in which prison physicians provide 21 medical care.’” Id., quoting Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir. 1988). 22 Plaintiff's allegations in the SAC are again insufficient to state an Eighth 23 Amendment claim because he fails to plausibly allege Pasha was deliberately indifferent 24 to his “‘serious medical needs.’” Id., quoting Gamble, 429 U.S. at 104. To show deliberate 25 indifference, a plaintiff must allege both “(a) a purposeful act or failure to respond to a 26 prisoner's pain or possible medical need and (b) harm caused by the indifference.” Jett v. 27 Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (citation omitted). 28 /// 1 Here, Plaintiff has plausibly alleged a “serious medical need” arising from his 2 broken finger. See e.g. Thompson v. Rodriguez, 2023 WL 4414579, at *4 (S.D. Cal. Jul. 7, 3 2023) (finding plaintiff's claim of a broken, swollen and bleeding finger with open fracture 4 “sufficient to plausibly show his injury constituted a serious medical need.”), citing Iqbal, 5 556 U.S. at 678 and Atkins v. Brewer, 2009 WL 29873, at *4 (E.D. Cal. Jan. 5, 2009) 6 (“Plaintiff's allegations that his finger was broken establishes that he had a serious medical 7 need.”) (additional citations omitted). However, Plaintiff does not plausibly allege 8 Defendant Pasha showed deliberate indifference to that need. Plaintiff instead 9 acknowledges Pasha “screen[ed] [him] for the broken finger” but claims she “i[m]properly 10 set the finger” which resulted in a subsequent need for surgery to have the finger reset. 11 ECF No. 13 at 4. Thus, Plaintiff alleges at most negligence or malpractice, neither of which 12 states a claim for relief under the Eighth Amendment. See e.g. Gamble, 429 U.S. at 106 13 (“[A] complaint that

a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”); see also *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004) (“Deliberate indifference is a high legal standard. A showing of medical malpractice or negligence is insufficient to establish a constitutional deprivation under the Eighth Amendment.”) (citations omitted). If Plaintiff wishes to proceed with this Eighth Amendment deliberate indifference claim against Pasha, he must set forth factual allegations which plausibly suggest “a purposeful act or failure to respond” by Pasha in the face of Plaintiff’s pain and must also allege “harm caused by the indifference.” *Jett*, 439 F.3d at 1096 (emphasis added); see also *Gamble*, 429 U.S. at 106 (“In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”); see e.g. *Turner v. Barajas*, 2015 WL 74194, at *4 (D. Ariz. Jan. 6, 2015) (“Although Plaintiff claims Defendant[]’s treatment resulted in a break of Plaintiff’s pinky finger, Plaintiff[]’s facts suggest Defendant[]’s treatment, at worst, constitutes medical malpractice.”); see also *Duncan v. Wang*, 2014 WL 109129, at *4 (E.D. Cal. Jan 9, 2014) (finding plaintiff failed to state cognizable deliberate indifference claim against a doctor who was “unable to reset the finger after three attempts” and “[t]here are no facts alleged to suggest the inability to re-set the finger was deliberate,” and where failure to schedule follow up appointment “demonstrates negligence at best,” noting two other doctors later followed up with Plaintiff). Accordingly, Plaintiff’s Eighth Amendment deliberate indifference claim against Pasha arising from an alleged denial of medical care is again dismissed sua sponte pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b) for failure to state a claim. As set forth below, Plaintiff will be given the option to amend his Complaint to cure the pleading deficiencies of his dismissed claims or proceed only with the claim which survives screening. See *Rosati*, 791 F.3d at 1039.

4. Plaintiff’s Options

Because the Court has determined that Plaintiff’s Eighth Amendment failure to protect claim against Defendant Pasha survives the sua sponte screening process but Plaintiff’s remaining claims against Defendant Pasha do not, the Court gives Plaintiff the option to either (1) notify the Court of his intent to proceed only with the Eighth Amendment failure to protect claim against Defendant Pasha or (2) file a Third Amended Complaint that corrects all the deficiencies of pleading identified in this Order. Plaintiff must choose one of those two options within forty-five (45) days from the date this Order is filed. If Plaintiff notifies the Court that he wishes to proceed only with the claim which survived screening, the Court will issue an Order directing the Clerk to issue the summons as to Defendant Pasha and will direct the U.S. Marshal to effect service of the summons and Complaint on that Defendant, and all remaining claims will remain dismissed from this action.

1 Conclusion and Order

Good cause appearing, the Court:

(1) DISMISSES all claims

against Defendant Pasha in the SAC sua sponte pursuant 4 ||to 28 U.S.C. §§ 1915(e)(2) & 1915A(b) for failing to state a claim upon which relief may 5 ||be granted with the exception of the Eighth Amendment failure to protect claim against 6 || Defendant Pasha. 7 (2) GRANTS Plaintiff forty-five (45) days leave from the date of this Order in which 8 || to either: (1) file a Notice of Intent to Proceed with his Eighth Amendment failure to protect 9 claim against Defendant Pasha only; or (2) file a Third Amended Complaint correcting the 10 || deficiencies of pleading identified in this Order. 11 If Plaintiff chooses to proceed only with the claim which survived screening, the 12 || Court will issue an Order directing the Clerk to issue the summons as to Defendant Pasha 13 ||and will direct the U.S. Marshal to effect service of the summons and Second Amended 14 || Complaint on that Defendant and all remaining claims against Defendant Pasha, the only 15 ||named Defendant in the SAC, will remain dismissed. If Plaintiff chooses to file an amended 16 || pleading, his Third Amended Complaint must be complete by itself without reference to 17 ||any prior version of his pleading, and any defendants not named and any claims not re- 18 alleged will be considered waived. See S.D. Cal. CivLR 15.1; see *Hal Roach Studios, Inc.*, 19 || 896 F.2d at 1546 (“[A]n amended pleading supersedes the original.”); *Lacey v. Maricopa* 20 || Cnty., 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend 21 ||which are not re-alleged in an amended pleading may be “considered waived if not 22 ||repled.”) 23 IT IS SO ORDERED. 24 || Dated: February 5, 2026 26 Honorable James E. Simmons Jr. 27 United States District Judge 28 11