

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Martinez v. De La Torre

Case No. 5:23-cv-05797 EJD (PR), Order (N.D. Cal. May 7, 2025) · No. 5:23-cv-05797 EJD (PR) · Decided
May 7, 2025

OPINION

Martinez v. De La Torre

PER CURIAM.

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4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6 PAUL MARTINEZ, Case No. 5:23-cv-05797 EJD (PR) 7 Plaintiff, ORDER GRANTING
DEFENDANTS’

MOTION TO DISMISS

8 v. 9 F. DE LA TORRE, et al., (Docket No. 21) 10 Defendants. 11 12 Plaintiff, a former state
inmate, filed the instant pro se civil rights action pursuant to 13 42 U.S.C. § 1983 against prison
staff at the Correctional Training Facility (“CTF”). Dkt.

14 No. 1. This action is proceeding solely on the Eighth Amendment claim for verbal and
15 sexual harassment and related state law claims against Defendants J. Patricio, J. Para, and 16
M. Beirman. Dkt. No. 11.1 17 Defendants filed a motion to dismiss the Eighth Amendment claim
against them 18 under Federal Rule of Civil Procedure 12(b)(6) because the alleged statements do
not, as a 19 matter of law, rise to the level of an Eighth Amendment violation, and they are entitled
to 20 qualified immunity. Dkt. No. 21. Plaintiff did not file an opposition although he was 21
given an opportunity to do so. Defendants assert that Plaintiff is no longer incarcerated 22 and that
their motion should be considered submitted. Dkt. No. 22. 23 For the reasons discussed below,
Defendants’ motion is GRANTED. 24 25 26 1 After initial screening, the Court granted Plaintiff
leave to amend to attempt to correct deficiencies with respect to several of the other claims in the
complaint. Dkt. No. 10. 27 When the deadline to file an amended complaint passed with no
response from Plaintiff,

1 DISCUSSION

2 I. Motion to Dismiss 3 Failure to state a claim is grounds for dismissal under Rule 12(b)(6). To
survive a

4 Rule 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to state a claim to

5 relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). 6 This
“facial plausibility” standard requires the plaintiff to allege facts that add up to “more 7 than a
sheer possibility that a defendant has acted unlawfully.” Ashcroft v. Iqbal, 556 U.S. 8 662, 678

(2009). Dismissal for failure to state a claim is a ruling on a question of law. See *9 Parks School of Business, Inc., v. Symington*, 51 F.3d 1480, 1483 (9th Cir. 1995). 10 Review is limited to the contents of the complaint, see *Clegg v. Cult Awareness 11 Network*, 18 F.3d 752, 754-55 (9th Cir. 1994), including documents physically attached to 12 the complaint or documents the complaint necessarily relies on and whose authenticity is 13 not contested. See *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001), 14 overruled on other grounds by *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 15 2002). In addition, the court may take judicial notice of facts that are not subject to 16 reasonable dispute. See *id.* at 689 (discussing Fed. R. Evid. 201(b)). Allegations of fact in 17 the complaint must be taken as true and construed in the light most favorable to the non- 18 moving party. See *Symington*, 51 F.3d at 1484. 19 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need 20 detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds of his 21 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic 22 recitation of the elements of a cause of action will not do.... Factual allegations must be 23 enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. 24 A motion to dismiss should be granted if the complaint does not proffer “enough facts to 25 state a claim for relief that is plausible on its face.” *Id.* at 570. “The issue is not whether 26 plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his 27 claim.” *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). 1 Qualified immunity may be raised in a Rule 12(b)(6) motion and granted where 2 defendants are entitled to the defense based on plaintiff’s allegations. *Cousins v. Lockyer*, 3 568 F.3d 1063, 1071 (9th Cir. 2009). 4 A. Plaintiff’s Allegations 5 Plaintiff was a state prisoner incarcerated at CTF during the time of the underlying 6 events. Dkt. No. 1 at 7. At some point, Plaintiff requested to be assigned to the California 7 Prison Industry Authority (“CALPIA”), working with textiles. *Id.* at 9. Defendants 8 Patricio, Para, and Bierman are CALPIA staff and work as CALPIA supervisors. *Id.* at 8. 9 Plaintiff claims that during January and February 2023, Defendant Patricio began 10 making sexual comments to him, such as, “Are you going to make love to that 11 honeybun...”; “I think I like you...”; and “I got my eye on you...” *Id.* at 9. Defendant 12 Patricio “commonly stared” at Plaintiff and other prisoner-workers in a “creepy and lustful 13 fashion.” *Id.* Plaintiff states that he notified Defendants Para and Bierman of Defendant 14 Patricio’s “constant inappropriate sexual puns, behavior, and innuendoes,” but that these 15 Defendants informed him that if attempted to transfer to another assignment, they would 16 give him a below average job performance rating and that Plaintiff had no rights in 17 CALPIA. *Id.* at 10. 18 Plaintiff also claims that on February 6, 2023, workers and Defendants were 19 discussing the California Legislature’s California Abolition Act, a proposed constitutional 20 amendment that would have removed language from the California Constitution permitting 21 slavery and involuntary servitude as punishment for crimes. *Id.* That day, Defendant 22 Patricio told Plaintiff, “You’ll be my little sex-slave.” *Id.* Plaintiff began to consider filing 23 a grievance in an attempt to secure a transfer to another assignment. *Id.* 24 The next day, Defendants confronted Plaintiff about his

intent to file a grievance 25 against them and threatened him with a “false RVR and a false CDCR 101 to adversely 26 impact his chances of being found suitable for parole by the BPH.” Id. at 11. Plaintiff 27 claims that he was so emotionally distressed that he had a severe panic attack and had to be 1 facility and demanded Plaintiff “sign these f**king papers” or “get a write-up.” Id. 2 Plaintiff claims his heart rate increased significantly, and Defendant Para was asked to 3 leave by the nurse. Id. 4 Plaintiff claims that Defendants’ statements caused him mental anguish and violated 5 his Eighth Amendment rights. Id. at 14-15. He seeks declaratory and injunctive relief as 6 well as damages. Id. at 18-19. 7 B. Harassment 8 Allegations of verbal harassment and abuse fail to state a claim cognizable under 42 9 U.S.C. § 1983. See *Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997) overruled in 10 part on other grounds by *Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008); 11 *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1353 (9th Cir. 1981), aff’d sub nom. 12 *Kush v. Rutledge*, 460 U.S. 719 (1983); see, e.g., *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th 13 Cir. 1996), amended 135 F.3d 1318 (9th Cir. 1998) (disrespectful and assaultive comments 14 by prison guard not enough to implicate Eighth Amendment); *Oltarzewski v. Ruggiero*, 15 830 F.2d 136, 139 (9th Cir. 1987) (directing vulgar language at prisoner does not state 16 constitutional claim); *Burton v. Livingston*, 791 F.2d 97, 99 (8th Cir. 1986) (“mere words, 17 without more, do not invade a federally protected right”); *Batton v. North Carolina*, 501 F. 18 Supp. 1173, 1180 (E.D.N.C. 1980) (mere verbal abuse by prison officials does not state 19 claim under § 1983). 20 Furthermore, the Eighth Amendment is not violated even where the verbal 21 harassment is of a sexual nature. See *Blacher v. Johnson*, 517 Fed.Appx 564 (9th Cir. 22 2013); *Austin v. Williams*, 367 F.3d 1167, 1171-72 (9th Cir. 2004) (holding that “the 23 Eighth Amendment’s protections do not necessarily extend to mere verbal sexual 24 harassment”). A prisoner may state an Eighth Amendment claim under § 1983 for sexual 25 harassment only if the alleged harassment was sufficiently harmful, that is, a departure 26 from “the evolving standards of decency that mark the progress of a maturing society,” and 27 the defendant acted with intent to harm the prisoner. *Thomas v. District of Columbia*, 887 1 117 L.Ed.2d 156 (1992)) (internal quotations and citation omitted). Such harassment must 2 be “gross even for a prison setting and were calculated to and did cause [plaintiff] 3 psychological damage.” *Keenan*, 83 F.3d at 1092. 4 On the other hand, harassment coupled with conduct implicating the Eighth 5 Amendment’s proscription against cruel and unusual punishment may indeed present a 6 claim cognizable under § 1983. See *Hudson*, 468 U.S. at 528-30 (malicious cell searches 7 and calculated harassment unrelated to prison needs may implicate Eighth Amendment’s 8 protection against cruel and unusual punishment). 9 1. Analysis 10 Defendants assert that Plaintiff’s Eighth Amendment claim relies entirely on alleged 11 verbal statements of a sexual nature by Defendant Patricio. Dkt. No. 21. Defendants 12 contend that while the alleged statements are crude, they pale in comparison to alleged 13 statements made by defendants in other cases that were found, as a matter of law, to not 14 violate the Eighth Amendment. Id. Defendants set forth the following cases in support of 15

this argument: *Minifield v. Butikofer*, 298 F.Supp.2d 900 (N.D. Cal. 2004) (defendant’s 16 motion to dismiss granted for conduct that included unzipping clothing and directing 17 plaintiff to grab his penis on two different occasions and another time holding a “candy bar 18 towards his genital area, flipping it up and down”); *Brewster v. Mills*, No. 20-cv-03254- 19 HSG, 2022 WL 976973 (N.D. Cal. Mar. 31, 2022) (defendant’s summary judgment 20 granted based on qualified immunity for conduct that included threats that he would make 21 plaintiff “suck [defendant’s] dick until his knees buckled,” watching plaintiff shower and 22 making comments about plaintiff’s penis); *Baker v. Battad*, No. 19-cv-1438-AJB, 2020 23 WL 487411 (S.D. Cal. Jan. 30, 2020), report and recommendation adopted by 2020 WL 24 3451329 (S.D. Cal. June 24, 2020) (defendant’s motion to dismiss granted for conduct that 25 included informing plaintiff that defendant “wanted to suck [plaintiff’s] penis” and “let me 26 see your hot dog” while grabbing his own zipper and saying, “I’m going to show you 27 mine”); *Horton v. Billingsley*, No. 5:18-cv-1951-RGK, 2019 WL 7630863 (C.D. Cal. Dec. 1 (defendant’s motion to dismiss granted for conduct that included telling plaintiff she was 2 beautiful, gliding his finger on the back of her neck, asking plaintiff “if he took [plaintiff] 3 home with him, could he get into [her] pants whenever he wants,” and telling plaintiff to 4 “stay beautiful” and “keep [her] skin soft”); *Reed v. Racklin*, No. 2:144-cv-0799-WBS, 5 2019 WL 4745266 (E.D. Cal. Sept. 30, 2019), report and recommendation adopted by WL 6 5566441 (E.D. Cal. Oct. 29, 2019) (defendant’s summary judgment granted for conduct 7 that included asking plaintiff, while they were alone, “Do you think you could jack me off 8 in the blink of an eye”); *Thompson v. Cagle*, No. 1:18-cv-01020-LJO-EPG, 2019 WL 9 4392411 (E.D. Cal. Sept. 13, 2019), report and recommendation adopted by WL 5308994 10 (E.D. Cal. Oct. 21, 2019) (Eighth Amendment claim dismissed at screening for conduct 11 that included subjecting plaintiff to unwanted sexual advances, making “cat calls” to him, 12 making several remarks regarding anal sex, comparing mal anatomy of different 13 ethnicities, and stating, “f**k me running”); and *Patrick v. Hernandez*, No. 2:17-cv-1206 14 MCE CKD, 2018 WL 5095130 (E.D. Cal. Oct. 17, 2018) (Eighth Amendment claim 15 dismissed at screening for conduct that included pressuring plaintiff to expose his penis, 16 telling him “Patrick suck my dick” and “you want it in the ass,” telling other inmates that 17 “Patrick likes to jack people off” and “Patrick likes it in the ass,” and placing defendant’s 18 hand on his own crotch and saying “lick [his] nuts”). 19 Defendants also assert that the Ninth Circuit did not detail what type of verbal 20 harassment could meet the high standard described in *Keenan*. Dkt. No. 21 at 6, citing 21 *Keenan*, 83 F.3d 1083; see also *Brewster v. Mills*, 2022 WL 976973, at *5. Defendants 22 contend that the alleged statements by Defendant Patricio, even if true, fall far below the 23 threshold of an Eighth Amendment violation based on a review of the relevant district 24 court case law above. *Id.* Defendants assert that because an amendment would be futile, 25 dismissal of this claim with prejudice is warranted. *Id.* Plaintiff has filed no opposition to 26 refute Defendants’ arguments. 27 Taking the allegations in the complaint as true and construing them in the light most 1 conduct violated his Eighth Amendment rights. While Defendant Patricio’s

comments 2 were crude and inappropriate, Plaintiff does not allege that they were unusually gross for a 3 prison setting nor would the Court agree if he did so. Rather, the numerous cases on this 4 issue show that conduct and comments similar to, and far worse than, those made by 5 Defendant Patricio have been found not extreme enough to violate the Eighth Amendment. 6 See supra at 5-6. Nor was the verbal harassment accompanied by other conduct that 7 implicates the Eighth Amendment's proscription against cruel and unusual punishment; 8 rather, the Court found that the complaint failed to state any other cognizable claim. Dkt.

9 No. 10 at 6-7.

10 Lastly, allegations of mere threats also are not cognizable under § 1983. See *Gaut 11 v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (mere threat does not constitute constitutional 12 wrong, nor do allegations that naked threat was for purpose of denying access to courts 13 compel contrary result). Accordingly, the threatening statements made by Defendants Para 14 and Bierman, even if true, do not state a cognizable claim. *Id.*; see also *Keenan*, 83 F.3d at 15 1092 ("disrespectful and assaultive comments" made by prison guards did not violate 16 Eighth Amendment). 17 Based on the foregoing, Defendants' motion to dismiss must be granted. 18 Because the Court finds no constitutional violation occurred, it is not necessary to 19 reach Defendants' qualified immunity argument. Dkt. No. 21 at 7. 20 2. Leave to Amend 21 Defendants assert that the dismissal should be without leave to amend because it 22 would be futile. Dkt. No. 21 at 6. Plaintiff has filed no opposition arguing that he could 23 correct the deficiency of his Eighth Amendment by offering facts in good faith that could 24 establish a cognizable claim. 25 A pro se complaint must be liberally construed and "may be dismissed for failure to 26 state a claim only where it appears beyond doubt that the plaintiff can prove no set of facts 27 in support of his claim which would entitle him to relief." *Weilburg v. Shapiro*, 488 F.3d 1 not be granted where the amendment of the complaint would cause the opposing party 2 undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue 3 delay. See *Janicki Logging Co. v. Mateer*, 42 F.3d 561, 566 (9th Cir. 1994); *Roberts v. 4 Arizona Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981). 5 Here, after careful consideration, it is clear that the complaint cannot be cured by 6 amendment. Plaintiff already stated specific factual allegations of Defendants' statements 7 and conduct which do not rise to the level of an Eighth Amendment violation. Nor has 8 Plaintiff filed an opposition to indicate that he could if given an opportunity to do so. 9 Accordingly, the Eighth Amendment claim against Defendants shall be dismissed without 10 leave to amend. 11 D. State Law Claims 12 The Court has dismissed the Eighth Amendment claim over which it had original 13 jurisdiction, leaving only the state law claims. Therefore, the Court, in its discretion, 14 declines to exercise supplemental jurisdiction over these remaining state law claims. 28 15 U.S.C. § 1367(c)(3); see *Ove v. Gwinn*, 264 F.3d 817, 826 (9th Cir. 2001) (court may 16 decline to exercise supplemental jurisdiction over related state-law claims under subsection 17 (c)(3) once it has dismissed all claims over which it has original jurisdiction). 18 Accordingly, the state law claims for intentional infliction of emotional distress and 19 violation of the Banes Act are dismissed

without prejudice to pursuing them in state court.

20 CONCLUSION

21 For the foregoing reasons, Defendants J. Patricio, J. Para, and M. Beirman's motion 22 to
dismiss the action is GRANTED. Dkt. No. 21. The Eighth Amendment claim against 23
Defendants are DISMISSED with prejudice for failure to state a claim under Rule 24 12(b)(6).
The state law claims for intentional infliction of emotional distress and violation 25 of the Banes
Act are DISMISSED without prejudice to pursuing them in state court. 26 This order terminates
Docket No. 21. 27 1 IT IS SO ORDERED. 2 3 || Dated: May 7, 2025

4 EDWARD J. DAVILA

United States District Judge 5 6 7 8 9 10 11 a 12 2B 14 15 16 17 © Zz 18 19 20 21 22 23 24 25 26
27 28