

2011 WL 3607461

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United States District Court,
C.D. California.

Maurice P. OLIVIER, Plaintiff,

v.

Gloria MOLINA, et al., Defendants.

No. CV 08–7169–JFW (AGR).

|
July 14, 2011.

Attorneys and Law Firms

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REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

ALICIA G. ROSENBERG, United States Magistrate Judge.

*1 The Court submits this Report and Recommendation to the Honorable John F. Walter, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 05–07 of the United States District Court for the Central District of California. For the reasons set forth below, the Magistrate Judge recommends that Defendant's motion to dismiss the Second Amended Complaint be granted in part and denied in part.

I.

SUMMARY OF PROCEEDINGS

On August 12, 2009, Plaintiff filed a first amended complaint (“FAC”) pursuant to 42 U.S.C. § 1983. On November 9, 2009, Defendants filed a motion to dismiss. On July 6, 2010, the District Court adopted the Report and Recommendation

(“R & R” (Dkt. No. 78)), dismissing Claim Three without prejudice for failure to exhaust administrative remedies; dismissing Defendants Molina, Burke, Yaroslavsky, Knabe, and Antonovich; and dismissing Claim Two with leave to amend “solely to allege a claim against Defendant Baca in his individual and/or official capacity.” (“Order Adopting” (Dkt. No. 81) at 3.)

On September 14, 2010, Plaintiff filed a Corrected Second Amended Complaint (“SAC”). On September 24, 2010, Defendant Baca filed a motion to dismiss based on failure to exhaust and failure to state a claim. On September 27, 2010, the Court notified Plaintiff of the requirements of opposing an unenumerated Rule 12(b) motion based on failure to exhaust. (Dkt. No. 96.) On October 8, 2010, Plaintiff filed an opposition. On November 24, 2010, Defendant filed a reply. The matter was taken under submission and is ready for decision.

II.

ALLEGATIONS IN SAC

Plaintiff names Leroy Baca, Sheriff of the Los Angeles County Sheriff's Department, in his individual and official capacities. (SAC at 3.)

A. Claim One

Between July 12 and July 17, 2006, Plaintiff, a pretrial detainee at the time of the incidents alleged in the complaint, was forced to sleep on the concrete floor at the Los Angeles County Jail (“LACJ”). (SAC at 5.) He didn't have a bed, blanket, pillow, toothbrush, toothpaste, soap, towel, or razors, and he could not shower. (*Id.* at 5A.)

Plaintiff claims that Defendant violated his due process rights under the Fifth and Fourteenth Amendments and pursuant to a treaty related to the minimum standards of treatment of prisoners. (*Id.* at 5.)

B. Claim Two

On September 1, 2006, Plaintiff was put in a LACJ cell that was infested with rats, mice, roaches, gnats, and red ants. (*Id.*

at 5B.) He also contracted lice from the mattress in his cell. (*Id.*)

Plaintiff claims that Defendant violated his due process rights under the Fifth and Fourteenth Amendments and pursuant to a treaty related to the minimum standards of treatment of prisoners. (*Id.*) Plaintiff also alleges that Defendant failed to train or implement a policy to address these conditions. (*Id.* at 5C.)

C. Relief

Plaintiff seeks damages.

III.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

A. Legal Standard

*2 Pursuant to the Prison Litigation Reform Act of 1995 ("PLRA"), "[n]o action shall be brought with respect to prison conditions ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

"[F]ailure to exhaust is an affirmative defense under the PLRA." *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct. 910, 921, 166 L.Ed.2d 798 (2007). The defense of failure to exhaust remedies may be raised by an unenumerated Rule 12(b) motion rather than a motion for summary judgment. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir.2003). Defendants "have the burden of raising and proving the absence of exhaustion." *Id.* at 1119. In ruling on a dismissal motion based on a prisoner's failure to exhaust, "a court 'may look beyond the pleadings and decide disputed issues of fact.'" *Morton v. Hall*, 599 F.3d 942, 945 (9th Cir.2010) (quoting *Wyatt*, 315 F.3d at 1120). Any unexhausted claim should be dismissed without prejudice. *Id.*

To exhaust remedies, a prisoner must comply with the prison's procedural rules " 'so that the agency addresses the issues on the merits.' " *Woodford v. Ngo*, 548 U.S. 81, 90, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006) (citation omitted). "Proper exhaustion demands compliance with an agency's deadlines

and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Id.* at 90–91.

In the first step of the LACJ's administrative process, the inmate submits an Inmate Complaint Form ("or a written complaint of any kind"). (MTD, Kennedy Decl. ("Kennedy Decl." ¹) ¶ 3.) The inmate may deposit the complaint in a special box or give it to any LACJ employee. (*Id.* ¶ 4.) If the inmate gives the complaint to an employee, that employee must route it to the appropriate supervisor. (*Id.*) All complaints are logged into a computer and given a reference number. (*Id.* ¶ 5.) The investigator assigned to handle the complaint contacts the inmate to attempt to resolve it. (*Id.* ¶ 6.) If the inmate is not satisfied or if the complaint is denied, the inmate may appeal to the Watch Commander. (*Id.* ¶ 7.) There is also one more level of appeal after the Watch Commander, but Kennedy does not describe it. (*Id.*) Exhaustion is not complete until the inmate "has exhausted each level of appeal." (*Id.*)

B. Analysis

1. Claim One (Floor Sleeping)

Defendant contends that Plaintiff never filed any grievance regarding Claim One. (MTD at 3.) Defendant's argument was rejected in this court's previous R & R, which was adopted by the District Court. (R & R at 7–9, Dkt. No. 78; Order Adopting Magistrate Judge's Report and Recommendation, Dkt. No. 81.) ² The Court's conclusion was based, in part, on Defendant's failure "to submit persuasive evidence rebutting Plaintiff's claim." (R & R at 8.) Specifically, in his declaration ("Caldwell Decl. One"), Charles Caldwell stated he did "not specifically recall Plaintiff" and stated only that he "would have" deposited Plaintiff's complaint in the box and that policy "requires" him to do so. (*Id.*) In this latest motion to dismiss, Caldwell submitted a new declaration ("Caldwell Decl. Two") in conjunction with Defendants' reply. Caldwell states that he "**never** refused to forward an inmate complaint form given to me by an inmate" in his "entire career." (Caldwell Decl. Two ¶ 4 (emphasis in original).) However, Caldwell also stated that his duties require him "to interact with many hundreds, if not thousands, of inmates at MCJ" and that he "would have forwarded any inmate complaint form given to me and deposited ... in a

complaint box.” (Caldwell Decl. One ¶ 3.) Caldwell's second declaration does not alter the disposition of Claim One.

*3 Claim One has been exhausted.

C. Claim Two (Cell Infestation)

Defendant argues that Plaintiff did not completely exhaust Claim Two. (MTD at 4.) The previous R & R, which was adopted by the District Court, noted that Plaintiff received a remedy for the lice, but with respect to the complaints about other cell infestation in Claim Two, Defendants did not meet their burden of proving the absence of exhaustion. (R & R at 9.) The Court's conclusion was based, in part, on the fact that although Defendants stated that on September 11, 2006, Plaintiff submitted a grievance regarding lice in his cell, Defendants did not attach a copy of the grievance, which would have rebutted Plaintiff's claim that he submitted one regarding the other infestation in his cell. (R & R at 9.) In this latest motion to dismiss, Defendants have submitted a new declaration from Dawn Abaca, a registered nurse who responds to inmate complaints regarding medical issues. (Reply, Dkt. No. 99 (“Abaca Decl.”) ¶ 3.) Abaca attaches an ACLU Medical Complaint Fax form dated September 11, 2006, in which the ACLU stated: “Inmate reports lice in his cell and may require medical attention as a result. Please see inmate. Thank you.” (Abaca Decl., Ex. A.) The ACLU form supports Defendants' original claim that Plaintiff did not submit a complaint regarding cell infestation other than lice.

Accordingly, Claim Two has been exhausted with respect to lice but not with respect to complaints about other cell infestation.

IV.

FAILURE TO STATE A CLAIM

A. Legal Standards

1. Dismissal Standard

To survive dismissal, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, — U.S. —, —, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citation omitted). “A claim has facial plausibility when the

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant's liability, it ‘stops short of the line between possibility and plausibility of “entitlement to relief.”’ “ *Id.* (citations omitted).

2. Prison Conditions Standard for Pretrial Detainees

A pretrial detainee is “protected by the Fourteenth Amendment's [substantive] Due Process Clause..... Under the Due Process Clause, detainees have a right against jail conditions or restrictions that amount to punishment. This standard differs significantly from the standard relevant to convicted prisoners, who may be subject to punishment so long as it does not violate the Eighth Amendment's bar against cruel and unusual punishment.” *Pierce v. County of Orange*, 526 F.3d 1190, 1205 (9th Cir.2008) (citations and quotation marks omitted). Punitive intent may be inferred from the nature of the condition, which will “generally turn on whether an alternate purpose is reasonably assignable.” *Id.* “[I]f a ... condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment.” *Bell v. Wolfish*, 441 U.S. 520, 539, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

B. Claim One (Floor Sleeping)

*4 Defendant argues that forcing Plaintiff to sleep on the floor does not violate his constitutional rights. (MTD at 5.) The cases Defendant cites are inapposite. In *Hernandez v. Denton*, 861 F.2d 1421, 1422 (9th Cir.1988), *vacated on other grounds*, 493 U.S. 801, 110 S.Ct. 37, 107 L.Ed.2d 7 (1989), Hernandez, a prisoner, claimed his Eighth Amendment rights were violated when “he had to sleep without a mattress for one night.” Without any additional description of the facts, the Ninth Circuit held that sleeping without a mattress “for only one night is insufficient to state an eighth amendment violation.” *Id.* at 1424. First, unlike Plaintiff, Hernandez was a prisoner, not a pretrial detainee. As outlined above, the legal standard for the two categories of inmates are significantly different. Plaintiff does not allege an Eighth Amendment claim, but a claim under the Fourteenth Amendment. Second,

even applying the Eighth Amendment standard, Hernandez was deprived of a mattress for only one night; he was not forced to sleep on a concrete floor for six.

In the second case Defendant cites, *Allen v. City and County of Honolulu*, 816 F.Supp. 1501, 1504 (D.Ha, 1993), the district court found that in Hawaii sleeping on a mattress on a concrete slab and sleeping on a mattress on a concrete floor are the same.³ Here, Plaintiff appears to allege that he slept directly on the floor. (SAC at 5–5A; Opposition, Ex. 1 (“I was forced to ... sleep on the floor ... with no mattress ... for six days”).⁴

In *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir.1989), criticized on other grounds in *Bull v. City and County of San Francisco*, 595 F.3d 964, 977–78 (9th Cir.2010) (en banc), Thompson, a pretrial detainee, alleged “he was forced to spend two nights on the floor of a prison cell without a mattress.” *Id.* at 1442. The Ninth Circuit found that “Thompson’s uncontroverted allegation that he was provided with neither a bed nor even a mattress unquestionably constitutes a cognizable Fourteenth Amendment claim.” *Id.* at 1448 (collecting cases). The court noted that *Rutherford v. Pitchess*, 457 F.Supp. 104, 109 (C.D.Cal.1978) also “involved a constitutional attack on the conditions of Los Angeles County Men’s Jail, the facility at issue in this case.” *Id.* In *Rutherford*, “the district court found such a situation inconsistent with due process and ordered the County to maintain the capability of providing each inmate with a bed.” *Id.* at 1448–49.

Defendant’s contention that forcing a pretrial detainee to sleep on the floor does not state a claim is rejected. See *Thomas v. Baca*, 514 F.Supp.2d 1201, 1215 (C.D.Cal.2007) (holding that “the practice of requiring inmates to sleep on the floor of LASD jails violates the Eighth Amendment”).

C. Individual Capacity

Defendant argues he should be dismissed in his individual capacity for both claims. (MTD at 7–8.)

“To state a claim for relief under section 1983, [a plaintiff] must plead two essential elements: 1) that the Defendants acted under color of state law; and 2) that the Defendants caused [the plaintiff] to be deprived of a right secured by

the Constitution and laws of the United States.” *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir.1997).

*5 “Liability under § 1983 must be based on the personal involvement of the defendant.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir.1998). “A defendant may be held liable as a supervisor under § 1983 if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.” *Starr v. Baca*, 633 F.3d 1191, 1196 (9th Cir.2011) (citation and quotation marks omitted). A plaintiff must show that “the supervisor breached a duty to plaintiff which was the proximate cause of the injury.” *Id.* “The requisite causal connection can be established ... by setting in motion a series of acts by others,’ or by ‘knowingly refus[ing] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury.’ “ *Id.* at 1197 (citations omitted). “A supervisor can be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others.” *Id.* (citation omitted).

In *Starr*, the Ninth Circuit held that plaintiff sufficiently alleged a claim of supervisory liability for deliberate indifference under § 1983 by alleging that Sheriff Baca knew of the unconstitutional conditions in the jail, knew of the culpable actions of his subordinates and failed to act despite his ability to take action that would have protected the prisoners. *Id.* at 1197–98. The court reasoned that the sheriff is required by statute to take charge of the county jail and the prisoners in it, and is answerable for “the prisoner’s safekeeping.” *Id.* at 1197 (citation omitted).

1. Claim One (Floor Sleeping)

In the previous R & R, the Court found that Plaintiff may state a claim against Defendant in his individual capacity with respect to the floor sleeping claim. (R & R at 11.) Defendant has not provided any reason for the court to alter its conclusion.

Plaintiff alleges Sheriff Baca is in charge of the county jail. (SAC at 5.) Since 2004, Sheriff Baca was aware of

overcrowding and the custom of inmates sleeping on the floor by virtue of *Thomas v. Baca*, CV 04-8448 DDP (SHx) and the court orders issued in that litigation. Plaintiff alleges that despite that notice, Sheriff Baca failed to terminate the practice with deliberate indifference. (*Id.*) As a result, Plaintiff alleges he was forced to “sleep on a concrete floor for six days without access to basic human needs such as a bed, blanket, pillow, shower, toothbrush, toothpaste, soap, towel, and razors.” (*Id.* at 5-5A.) Plaintiff has suffered chronic neck, back and shoulder pain. (*Id.* at 5A.)

Plaintiff's allegations in the SAC are sufficient to state a claim against Defendant in his individual capacity in Claim One. *See Starr*, 633 F.3d at 1198-1201.

2. Claim Two (Cell Infestation)

*6 In the previous R & R, the Court found there were no allegations in the first amended complaint that Defendant was responsible for the infestation in Plaintiff's cell or the lice in Plaintiff's mattress. (R & R at 13.) Plaintiff alleged only that Defendant was responsible for the LACJ, and the Court found that a “bare allegation of supervisor liability” was insufficient.

Plaintiff's allegations in Claim Two in the SAC fare no better. Plaintiff alleges Defendant “and unnamed deputies had a custom of forcing pretrial detainees into unsanitary cell living environments. Furthermore, Sheriff Baca was aware of this widespread custom” based on a June 14, 2006 stipulation. (SAC at 5B-5C.) The SAC attaches the stipulation from *Rutherford v. Block*, Case No. 75-4111-DDP (C. D.Cal.) signed by counsel for the parties and approved by Judge Pregerson on June 15, 2006. (SAC, Ex. A.) The conditions addressed in the stipulation included reduction in cell and dormitory populations, indoor and outdoor recreation, visitation, and “implementation of staff and inmate accountability measures and operational changes relating to inmate supervision and safety.” (*Id.* at 2-3 ¶ 1.) Plaintiff cites page 7 of the “Outline Of An Illustrative Plan For Remedial Measures For The Los Angeles County Men's Central Jail,” prepared by an outside consulting firm for the ACLU of Southern California and attached as Exhibit 1 to the stipulation. (SAC at 5C.) The consultants recommended an Enhanced Inmate Supervision Model that would include making deputies “responsible for all aspects of inmate management during their shift for their particular rows, including ... ensuring cleanliness and adherence to sanitation

rules.” Such a recommendation is entirely too general and conclusory, and does not satisfy the pleading standards in *Starr*. 633 F.3d at 1204 (“allegations in a complaint ... must be sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it” and “must be sufficiently plausible that it is not unfair to require the opposing party to be subjected to the expense of discovery”). Nothing in the stipulation or the attached recommendations would put Sheriff Baca on notice of the existence of cell infestation.

Therefore, Plaintiff's allegation that Sheriff Baca “through deliberate indifference failed to adequately train, or implement an effective LASD policy to his deputies addressing these unconstitutional conditions” fails to state a claim. (SAC at 5C.) “[T]o prevail on such a claim, [Plaintiff] must show that [the defendant's] failure to train amounted to deliberate indifference.” *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir.1998) (citing *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (“the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact”)). A conclusory allegation of deliberate indifference is insufficient. *See Iqbal*, 129 S.Ct. at 1949 (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”).

*7 Accordingly, Plaintiff has still failed to allege sufficient facts to state a claim against Defendant in his individual capacity with respect to Claim Two. Because Plaintiff has already been given an opportunity to amend, it is recommended that Claim Two against Defendant in his individual capacity be dismissed with prejudice. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir.1992).

D. Fifth Amendment

Defendant argues that Plaintiff's Fifth Amendment claims are not legally cognizable. (MTD at 8.) As previously noted, in both claims Plaintiff alleges a violation of the due process clause in the Fifth Amendment. The due process component of the Fifth Amendment applies only to the federal government. *See Bingue v. Prunchak*, 512 F.3d 1169,

1174 (9th Cir.2008). Defendant is not a federal actor, and amendment would be futile. It is therefore recommended that Plaintiff's claims based on a violation of the Fifth Amendment be dismissed with prejudice.

E. Treaty

Defendant argues that Plaintiff's "treaty" claims are not clear and not cognizable. (MTD at 8.) In both claims, Plaintiff refers to "the treaty establishing the standard minimum rules for the treatment of prisoners pursuant to Article II Section 2." (SAC at 5, 5B.) Plaintiff argues that in *Thomas v. Baca*, Judge Pregerson "cited the treaty as authority in his November 2007 decision granting judgment for the Plaintiff's [sic]." (Opposition at 9.) *Thomas* was filed on September 21, 2007 and does refer to the Standard Minimum Rules for the Treatment of Prisoners, but not as a legal basis for stating a claim under § 1983. 514 F.Supp.2d at 1217–18. Judge Pregerson notes only that "[i]nternational guidelines support [the] basic right" of a bed in a jail and that "international opinion" may be considered in a constitutional analysis of prison conditions). *Id.*

The Standard Minimum Rules for the Treatment of Prisoners is not "a source of justiciable rights." *Serra v. Lappin*, 600 F.3d 1191, 1197 (9th Cir.2010). The document was adopted in 1995 by the United Nations. *Id.* "It is not a treaty, and it is not binding on the United States." *Id.* Although "a treaty having the force of federal law ... may support a cause of action under § 1983," "it must both confer individual rights and be self-executing." *Cornejo v. County of San Diego*, 504 F.3d 853, 856, 858 (9th Cir.2007).

Accordingly, Plaintiff's claims based on the Standard Minimum Rules for the Treatment of Prisoners cannot state a claim, and amendment would be futile. The claim should be dismissed with prejudice.

V.

RECOMMENDATION

For the reasons discussed above, it is recommended that the District Court issue an Order (1) adopting this Report and Recommendation; (2) granting in part and denying in part Defendant's unenumerated Rule 12(b) motion based on failure to exhaust remedies; (3) granting in part and denying in part Defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim; (4) dismissing without prejudice Claim Two with respect to cell infestation other than lice; (5) dismissing with prejudice Defendant Baca in his individual capacity in Claim Two; (6) dismissing with prejudice both claims based on the Fifth Amendment; (7) dismissing with prejudice both claims based on the Standard Minimum Rules for the Treatment of Prisoners; and (8) dismissing with prejudice the failure to train claim with respect to Claim Two.

All Citations

Not Reported in F.Supp.2d, 2011 WL 3607461

Footnotes

- 1 Deputy Kennedy is the Custodian of Records for the Men's Central Jail Legal Unit. (Kennedy Decl. ¶ 2.)
- 2 Defendants filed objections to the previous R & R, which the District Court overruled. (Order Adopting at 1.) Defendants did not file a motion for reconsideration of the District Court's ruling.
- 3 It is not clear from the court's decision what legal standard it is applying to the floor sleeping claim.
- 4 Defendant contends Plaintiff alleges he slept on a mattress. (MTD at 6.) Under Claim One, Plaintiff alleges he "was forced ... to live, and sleep on a concrete floor for six days without ... access to ... a bed" from July 1p2–

17, 2006. (SAC at 3, 5–5A.) Under Claim Two, Plaintiff alleges he contacted lice from his mattress during the period September 1–October 15, 2006. (*Id.* at 3, 5B.)

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