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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MACK A. WEST, Jr., Plaintiff-Appellant, v. F. ULLOA, Correctional Officer, individual and official capacity; et al., Defendants-Appellees.	No. 20-56167 D.C. No. 2:17-cv-04892-VBF-KES MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Valerie Baker Fairbank, District Judge, Presiding

Submitted December 5, 2022**
San Francisco, California

Before: BADE, LEE, and KOH, Circuit Judges.

Mack A. West, Jr., a California state prisoner proceeding pro se, appeals the district court's judgment dismissing his 42 U.S.C. § 1983 action against twenty-eight defendants alleging violations of his rights under the First and Eighth

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Amendments. We have jurisdiction under 28 U.S.C. § 1291. We review the district court's dismissal for failure to state a claim de novo and its denial of leave to amend for abuse of discretion. *Chappel v. Lab'y Corp. of Am.*, 232 F.3d 719, 723, 725–26 (9th Cir. 2000). We affirm.

The district court properly dismissed West's First Amendment retaliation claims against Correctional Officers Ulloa and Torres because he failed to plausibly allege that they took adverse actions or retaliated against him, or that their actions chilled the exercise of his First Amendment rights. *See Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005) (setting forth the elements of a First Amendment retaliation claim in "the prison context"); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (a plaintiff must allege facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

The district court properly dismissed West's First Amendment retaliation claims against Warden Asuncion and Grievance Appeals Coordinators Barnes, Curiel, and Estrada, premised on their responses to his grievances, because West made only speculative allegations that they retaliated against him. *See Wood v. Yordy*, 753 F.3d 899, 905 (9th Cir. 2014) ("We have repeatedly held that mere speculation that defendants acted out of retaliation is insufficient.").

The district court properly dismissed West's First Amendment retaliation

claims alleging that Chief Deputy Warden Cano, Correctional Counselor Rhodes, and Captain Freeman created a document that included false information about West and interfered with West's grievance responses because West failed to plausibly allege that they took adverse actions or retaliated against him, or that their actions chilled the exercise of his First Amendment rights. *See Rhodes*, 408 F.3d at 567–68.

The district court properly dismissed West's First Amendment retaliation claims against Lieutenant Reaume, which alleged that Reaume placed West in administrative segregation as retaliation and obstructed an inquiry into one of West's grievances. However, West conceded that he was transferred to administrative segregation because a weapon was found in his cell. Moreover, West did not plausibly allege an adverse action, that Reaume retaliated against him, or that Reaume's actions lacked a legitimate correctional goal. *See id.*; *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995) ("Legitimate goals of a correctional institution include the preservation of internal order and discipline and the maintenance of institutional security.").

Because West failed to plausibly allege that Correctional Officers Gray and Hogan took adverse actions or retaliated against him, the district court properly dismissed West's claims alleging that Gray and Hogan fabricated inmate communications as excuses for retaliatory cell searches. *See Rhodes*, 408 F.3d at

567–68.

The district court properly dismissed West's Eighth Amendment claim alleging that other defendants failed to protect him from Ulloa and Torres because West failed to plausibly allege that any defendant knew that Ulloa and Torres posed a substantial risk of serious harm to him. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (setting forth the elements of an Eighth Amendment claim of deliberate indifference).

The district court properly dismissed West's Eighth Amendment claim alleging that Ulloa, Torres, Cano, and Rhodes failed to protect him from other inmates by creating a document that included false information about West because West did not plausibly allege that they knew of any substantial risk of serious harm. *See id.*

The district court properly dismissed West's Eighth Amendment claim alleging that Ulloa and Torres failed to protect him from himself when they allegedly planted weapons in his cell, slid him a small piece of metal, and taunted him because he did not allege facts showing that they had any reason to know that he was at serious risk of suicide. *See id.*; *Conn v. City of Reno*, 591 F.3d 1081, 1102 (9th Cir. 2010), *vacated*, 563 U.S. 915 (2011), *opinion reinstated in relevant part*, 658 F.3d 897 (9th Cir. 2011) (discussing deliberate indifference in the context of a risk of suicide). Moreover, a verbal taunt, without more, would not rise to the

level of an Eighth Amendment violation. *See Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (per curiam).

The district court properly dismissed West's Eighth Amendment claims for deliberate indifference to his mental health needs because he failed to allege that medical providers Leduc, Garret, Paz, and Ghassemi provided care that was medically unacceptable under the circumstances or chosen in conscious disregard of an excessive risk to his health. *See Toguchi v. Chung*, 391 F.3d 1051, 1058–60 (9th Cir. 2004) (explaining that a prisoner's difference of opinion concerning the appropriate course of treatment does not state a claim for medical deliberate indifference unless the prisoner can show "that the chosen course of treatment 'was medically unacceptable under the circumstances,' and was chosen 'in conscious disregard of an excessive risk to the prisoner's health'" (citation omitted)).

The district court did not abuse its discretion in dismissing without leave to amend because amendment would be futile. *See Chappel*, 232 F.3d at 725–26 (explaining that a district court properly denies leave to amend when it would be futile); *Fid. Fin. Corp. v. Fed. Home Loan Bank of San Francisco*, 792 F.2d 1432, 1438 (9th Cir. 1986) ("The district court's discretion to deny leave to amend is particularly broad where the court has already given the plaintiff an opportunity to amend his complaint.").

The district court did not abuse its discretion in referencing documents

outside the record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001) (explaining that on a Rule 12(b) motion to dismiss, a court may "take judicial notice of *undisputed* matters of public record"). To the extent that the district court erred by referencing testimony in West's prior criminal trial, we find no reversible error because the district court based its decision not on information outside the record, but on deficiencies in the amended complaint. *See La. Mun. Police Emps.' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1063–64 (9th Cir. 2016) (finding no reversible error when "even if the district court's reference to extrinsic materials were excised, its analysis would still be sufficient to uphold its conclusions.").

West's requests for appointment of counsel on appeal (Docket Entry Nos. 55 and 62) and request for judicial notice (Docket Entry No. 58) are DENIED.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 03/03/2023 at 10:46:21 AM Pacific Standard Time and filed on 03/03/2023

Case Name: Mack West, Jr. v. F. Ulloa, et al
Case Number: 20-56167

Docket Text:
Filed text clerk order (Deputy Clerk: OC): The petition for panel rehearing [69], is DENIED. [12666669] (Cubillos, Omar)

Notice will be electronically mailed to:

Oliver Wu: oliver.wu@doj.ca.gov

Case participants listed below will not receive this electronic notice:

Mack A. West, Jr.
F-60029
#F-60029
SVSP - SALINAS VALLEY STATE PRISON
P.O. Box 1050
Soledad, CA 93960-1050

The following information is for the use of court personnel:

DOCKET ENTRY ID: 12666669
RELIEF(S) DOCKETED:
for rehearing by panel only
DOCKET PART(S) ADDED: 16185025, 16159724, 16159725, 16127848, 16185026

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MACK WEST, JR.,

Plaintiff,

v.

F. ULLOA, ET AL.,

Defendants.

Case No. 2:17-cv-04892-VBF-KES

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the pleadings and all the records and files herein, along with the Report and Recommendation ("R&R") of the United States Magistrate Judge. The Court has engaged in de novo review of those portions of the R&R to which objections were made.

IT IS ORDERED THAT:

The Court accepts the findings, conclusions, and recommendations of the United States Magistrate Judge.

The Fourth Amended Complaint is **DISMISSED WITH PREJUDICE** and without leave to amend.

Final judgment consistent with this Order shall be entered as a separate document.

This action is **TERMINATED** and the case SHALL BE CLOSED.

IT IS SO ORDERED.

Date: September 30, 2020

Valerie Baker Fairbank

Honorable Valerie Baker Fairbank
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MACK WEST Jr.,

Plaintiff,

v.

F. ULLOA, et al.,

Defendants.

Case No. 2:17-cv-04892-VBF-KES

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

In July 2017, pro se inmate Plaintiff Mack West, Jr. ("Plaintiff") initiated this lawsuit alleging civil rights violations under 42 U.S.C. § 1983 by multiple employees of the California Department of Corrections and Rehabilitation ("CDCR") at California State Prison-Los Angeles County ("CSP-LAC"). (Dkt. 1.) After various motions and grants of leave to amend, Plaintiff filed the operative

Fourth Amended Complaint ("4AC") in February 2019. (Dkt. 172.)

The 4AC names as Defendants the following twenty-seven CSP-LAC staff members:

1. Correctional Officers Ulloa, Torres, Gray, Hogan, Martin, and Williams;
2. Captain Freeman;
3. Lieutenants Reaume and Graves;
4. Psychologists Garrett, Paz, and Ghassemi;
5. Warden Asuncion;
6. Associate Warden Wood;
7. Chief Deputy Warden Cano;
8. Sergeants Schmaucher, Davis, Perez, and Gonzales;
9. Correctional Counselors Burns, Rhodes, Castro II, Rodriguez, and Walters; and
10. Appeals Coordinator and Staff Curiel, Barnes, and Estrada.

(Dkt. 172 at 3-15.[1]) The 4AC also refers to psychologist Leduc as a "defendant," although she is not listed in the section that names the other Defendants. (Id. at 29.) Leduc appeared in this action in October 2018 represented by the same lawyers as the other Defendants. (Dkt. 153.) The Court liberally construes the 4AC as attempting to state a claim against Leduc.

Generally, Plaintiff alleges that Defendants Ulloa and Torres planted contraband (i.e., "weapons" and a metal detector) in Plaintiff's cell on two occasions. Plaintiff alleges that when he told the other Defendants what Ulloa and Torres did, they did not believe him; instead, they punished him by re-housing him in Administrative Segregation ("Ad-Seg") and refused to grant him relief via the grievance process. Based on these facts, Plaintiff alleges that Defendants (1) violated his Eight Amendment rights by acting deliberately indifferent to his

[1] Page citations refer to pagination imposed by the Court's e-filing system.

mental health needs, (2) violated his Eight Amendment rights by failing to protect him, and (3) violated his First Amendment rights by retaliating against him after he filed grievances. (Dkt. 172 at 17, 23, 28.)

Because the Court concludes that Plaintiff fails to allege facts which, if accepted as true, would establish every element of his claims and granting Plaintiff further leave to amend would be futile, the Court recommends that this action be dismissed with prejudice.

II.

PROCEDURAL HISTORY

A. Prior Litigation.[2]

Plaintiff was arrested in 1999 and charged with murdering acquaintance K.O. with a sharpened screwdriver and attempting to murder T.A. with the same weapon in the course of robbing a gas station convenience store. West v. Gastelo, No. 2:09-cv-03147-JKS, 2016 U.S. Dist. LEXIS 133896 (E.D. Cal. Sep. 28, 2016) (habeas proceedings summarizing state court prosecution). In August 1999, he was deemed incompetent to stand trial and treated at Atascadero State Hospital until he became competent in December 1999. See People v. West, No. A117123, 2008 WL 3414687, at *1 (Cal. Ct. App. Aug. 12, 2008). He was found incompetent again in 2001, but in August 2002, the hospital staff deemed him competent to stand trial. See id. After that point, the court and medical professionals agreed repeatedly that Plaintiff was exaggerating his symptoms to avoid going to trial.[3] See id. at *1-*3.

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[2] The Court takes judicial notice of the cited records that establish the dates of Plaintiffs' prior filings and the nature of his allegations.

[3] As one doctor stated, "During the four times I have seen him, he has described his symptoms in a very different way and has acted in a very different manner each time. From the beginning there have also been questions about the degree to which he may have been exaggerating his symptoms. [¶] Throughout the time I spent with Mr. West in the latest interview, he never appropriately answered a single one of my direct question[s], which I take to be significant. I have

In November 2006, he pleaded no contest to second degree murder. He was sentenced to sixteen years to life in prison. Id.

In 2008, he filed a lawsuit challenging his treatment as a pre-trial detainee in the custody of the Solano County Sheriff's Department between periods spent at Atascadero. See West v. Washibyashi, E.D. Cal. case no. 08-cv-0290. He sued many correctional staff members, alleging that they stole his property, beat him up, lied to frame him for rules violation, retaliated against him for filing grievances, and repeatedly sent him to Ad-Seg. Most relevant to the instant allegations, he alleged that while on suicide watch, Officer Washibyashi slid him a weapon (a razor blade). (Id., Dkt. 1 at 13-14.) This lawsuit was dismissed for failure to state a claim and misjoinder. (Id., Dkt. 27, 41.)

By 2010, Plaintiff had moved to the California Medical Facility in Vacaville ("CMF"). (Id., Dkt. 46.) He joined a lawsuit against correctional staff there, but his claims were dismissed as improperly joined. See Heilman v. Cate, E.D. Cal. case no. 10-cv-0828.

In 2011, while housed at CSP-Corcoran, he filed another civil rights lawsuit against CMF staff members. See West v. Pettigrew, E.D. Cal. case no. 11-cv-1692. He alleged that his medical chrono indicated "that he must be housed on a lower

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interviewed several thousand people suffering from psychosis during the years of my psychiatric practice. In each case—no matter how severe the mental illness—all but a tiny minority of these people have been able to answer some questions appropriately. Only in cases where I have strongly suspected malingering have the people being interviewed seemed unable to give even one appropriate answer." People v. West, No. A117123, 2008 WL 3414687, at *2 (Cal. Ct. App. Aug. 12, 2008). Another doctor similarly testified that, while Plaintiff did suffer from a mental illness, he was "quite resourceful and is able to describe symptoms that would be consistent with an illness and exaggerates those and amplifies those ... in a way to affect a certain outcome. . . . [D]uring the interview, 'his presentation was one in which he was spontaneously offering material that was designed to convince me of a very serious mental illness and specifically that he wasn't competent to proceed.'" Id.

bunk." (Id., Dkt. 1 at 3.) He later admitted his chrono recommended, but did not require, a lower bunk, and the lawsuit was dismissed for his failure to comply with orders intended to limit his frivolous filings. (Id., Dkt. 179, 207.)

In 2012, he filed a civil rights lawsuit against CMF staff member Officer Dizon alleging a "campaign of harassment" including retaliatory cell searches and confiscation of property. See West v. Dizon, E.D. Cal. case no. 12-cv-1293. In the same year, April 2016, he moved to Kern Valley State Prison (id., Dkt. 167) and in October 2016, he moved to CSP-LAC (id., Dkt. 177).

In January 2016, while still at Kern Valley, he filed a lawsuit against multiple staff members at CSP-Corcoran. See West v. Hulbert, E.D. Cal. case no. 16-cv-0046. Plaintiff alleged that Officer Hulbert gave him a weapon (i.e., he failed to remove a piece of metal from Plaintiff's legal mail), despite knowing he was a suicide risk. (Id., Dkt. 12 at 6.)

B. The Instant Litigation.

In July 2017, Plaintiff initiated this action by moving ex parte for a temporary restraining order ("TRO") seeking transfer to another prison. (Dkt. 1.) Plaintiff alleged that he had been in Ad-Seg at CSP-LAC since May 2017 and was receiving inadequate mental health care. (Dkt. 2 at 8-9.) The Court denied the TRO, noting that the "alleged actions have been occurring over the past 60 days," such that "Plaintiff has not demonstrated how, absent immediate injunctive relief, his circumstances will be imminently impacted ...." (Dkt. 6 at 5.) The Court also granted Plaintiff leave to file an amended complaint. (Dkt. 7.)

On August 9, 2017, Plaintiff constructively filed an amended TRO application. (Dkt. 18, 19.) It was denied for the same reasons. (Dkt. 23.)

On August 24, 2017, Plaintiff constructively filed a notice of change of address alerting the Court that he had been transferred to High Desert State Prison in Susanville. (Dkt. 11.) In early September 2017, however, he was transferred back to CSP-LAC. (Dkt. 17.) He alleges that he was released from Ad-Seg on

about September 30, 2017. (Dkt. 172 at 43.)

In October 2017, Plaintiff filed a First Amended Complaint. (Dkt. 28.) Shortly thereafter, he filed a Second Amended Complaint ("SAC"). (Dkt. 33.) After the Court authorized service (Dkt. 34), Plaintiff moved for leave to file a supplemental complaint adding twenty-two new defendants not named in the SAC (Dkt. 41). The Court denied that motion. (Dkt. 49, 65, 121.)

In March 2018, Defendants moved to dismiss the SAC. (Dkt. 119, 126, 153.) After Plaintiff opposed the motion (Dkt. 150), the Court granted the motion as to all but four Defendants and gave Plaintiff leave to amend. (Dkt. 154.) Plaintiff chose to file a Third Amended Complaint (Dkt. 167) followed by the 4AC (Dkt. 172). The 4AC's initial allegations are mostly a verbatim copy of the SAC. (Compare Dkt. 33 at 15-30 and Dkt. 172 at 17-30.) The 4AC omits a grievance-related due process claim alleged in the SAC (Dkt. 33 at 31) and adds 18 pages of allegations that re-tell the events described in the earlier pages. (Dkt. 172 at 31-49.)

Again, twenty-seven Defendants (all but Leduc) moved to dismiss. (Dkt. 181.) Generally, Defendants argue that (1) Plaintiff's factual allegations, even if accepted as true, are speculative and insufficient to establish each element of his claims, (2) Plaintiff fails to allege personal participation in wrongdoing by most Defendants, (3) Defendants are entitled to qualified immunity, and (4) Eleventh Amendment immunity bars Plaintiff's official capacity claims for monetary damages.

Plaintiff filed an opposition (Dkt. 194) and Defendants replied (Dkt. 197).

III.

SUMMARY OF PLAINTIFF'S ALLEGATIONS

A. The April 27, 2017 Cell Search.

Plaintiff arrived at CSP-LAC in October 2016. He immediately began filing grievances, including a 2016 complaint against Defendants Ulloa and Torres for battering another prisoner. (Dkt. 172 at 31.) He filed a grievance against Ulloa in

March 2017 alleging that Ulloa "interfered" with the psychological evaluations of another prisoner, Wagner, who later hung himself. (Id.) In April and early May 2017, Plaintiff complained that many staff members (including Ulloa, Torres, and the warden) were "orchestrating prisoners attack on other prisoners during meal time." (Id.) At some point before April 2017, Ulloa threatened to start searching cells of inmates who had filed complaints against him and other staff. (Id. at 33.) In April 2017, Plaintiff learned that another inmate, Morris, claimed that Ulloa and Torres had searched Morris's cell and planted a weapon. (Id.) Plaintiff alleges that at least four other inmates had weapons planted in their cells. (Id. at 32.)

Later in April 2017, Plaintiff contends that as a pretext to justify cell searches, Defendants Ulloa and Gray "falsified a kite" that was supposedly "dropped" and found; it said that medical staff was not checking inmates' mouths after dispensing medication, suggesting that inmates were keeping pills in their cells. (Id.) On April 27, 2017, Ulloa and Gray searched Plaintiff's cell and confiscated his CD-player and headphones. (Id. at 17.)

Plaintiff submitted a grievance about this cell search on May 2, 2017. (Id. at 44.) A few days later, on May 5, 2017, when Warden Asuncion entered Plaintiff's housing unit with Torres to make an announcement, Plaintiff called out to her, asking what was "the use of writing to her" when Plaintiff's mail was being "obstructed by other staff." (Id. at 34.) A day or so later, Torres allegedly told inmate Bagner that Plaintiff had "fronted him off to the warden." (Id.) Torres told Plaintiff that he disliked him, and Torres would "do what he has to do." (Id.)

B. The May 11, 2017 Cell Search.

Ulloa and Torres searched Plaintiff's cell again on May 11, 2017. (Id. at 17.) During the search of his cell, Plaintiff was escorted to the shower where he was strip-searched using a metal detector. (Id. at 34.) When Plaintiff returned to his cell, he immediately began looking for planted contraband. (Id. at 34-35.) He found a metal detector in a box of his legal papers. (Id. at 35.) He told inmate

Bagner to tell Ulloa and Torres to "come get this metal detector they planted in his cell." (Id.) Ulloa came back and denied planting the metal detector but blamed Torres for leaving it there. (Id.) Ulloa purported agreed that if Plaintiff did not report the metal detector, then Ulloa and Torres would return some of his confiscated property and stop searching his cell. (Id.)

C. The May 23, 2017 Cell Search.

About two weeks later, Plaintiff contends that Ulloa and Hogan forged another kite that claimed "weapons were hidden in the building." (Id. at 18.) Discovery of the kite prompted a "massive search," including of Plaintiff's cell, on the morning of May 23, 2017. (Id. at 37.) During this search, Defendant Hogan found a "weapon"[4] in Plaintiff's cell in a legal envelope under the mattress. (Id. at 36-38.) When asked about it, Plaintiff claimed that Ulloa and Torres planted it during the May 11 search, but no one believed this explanation. Plaintiff was issued a rules violation and sent to Ad-Seg. (Id. at 17-19, 37.)

D. Events in Ad-Seg.

Upon arriving at Ad-Seg, medical staff screened Plaintiff to determine whether confinement in administrative segregation would exacerbate his mental health impairments. (Id. at 39.) Plaintiff informed staff that he felt suicidal and "was stressed due to officer planting a weapon in his cell ...." (Id.) In response, Defendant Garrett evaluated Plaintiff's suicide risk. (Id.) Plaintiff told her that he "had a plan of cutting his wrist with a razor or something sharp ...." (Id.) Defendant Garrett then "falsely claimed" that due to overcrowding, none of CSP-LAC's suicide watch cells were available, so Plaintiff would need to stay in Ad-Seg. (Id.)

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[4] Plaintiff does not describe the "weapon." According to the Ad-Seg Unit Placement Notice, the weapon was "made from round metal stock sharpened to a point," and the other end was "wrapped in cloth to form a handle." (Dkt. 3 at 42.)

The next day, Defendant Freeman spoke with Plaintiff in Ad-Seg to investigate the alleged rule violation. (Id. at 39-40.) Plaintiff told him that he needed protection from Ulloa and Torres because they had planted the weapon, but Freeman "smiled" and failed to take Plaintiff's concerns seriously. (Id. at 40.)

On May 30, 2017, Defendants Burns, Rhodes, Freeman, Cano, Davis, and Ghassemi conducted Plaintiff's first committee hearing. (Id.) Again, he told them that he wanted protection from Ulloa and Torres because they had planted a weapon in his cell, but "everyone failed to do anything" in response to this concern. (Id.)

E. Plaintiff Gets a "Weapon" in Ad-Seg.

On June 7, 2017, Defendant Ulloa allegedly "left his assigned post and came into Ad-Seg" where he walked up to Plaintiff's cell door, slid an unidentified "weapon" under the door, and identified himself by speaking to Plaintiff. (Id. at 41.) He told Plaintiff to "f*ck his self" with the "weapon." (Id.)

No one discovered that Plaintiff had a "weapon" until the next day, June 8, when Plaintiff told Defendant Gonzalez that he had a "weapon" because Ulloa had slid it under the door. (Id. at 42.) Gonzalez instructed Plaintiff to give the "weapon" to Officer Resendiz, which Plaintiff did. (Id.) Gonzalez asked Plaintiff why he had not thrown the "weapon" away if he was afraid of getting caught with it; Plaintiff told Gonzalez that he did not want to destroy evidence of Ulloa's wrongdoing. (Id.) When Gonzalez wrote up the incident report, he said that "someone" slid a "weapon" under Plaintiff's door (without identifying Ulloa as the perpetrator) which Plaintiff alleges is evidence that Gonzalez "fostered the code of silence." (Id.) According to the incident report signed by Gonzalez and submitted to the Court by Plaintiff, "the 'weapon' was a 4 inch by ½ inch flat piece of black metal stock"—i.e., a piece of metal about as long as a deck of cards and as wide as a shoelace. (Dkt. 21 at 107.)

On June 12 and 18, Plaintiff filed more grievances concerning the threat he perceived from Ulloa and Torres. (Dkt. 172 at 44.) Plaintiff filed this action in

July 2017. (Dkt. 1.)

F. Plaintiff's Transfers.

At his second committee hearing on August 10, 2017, Plaintiff again told Defendants Wood, Freeman, Walters, Castro II, and Ghassemi that Ulloa and Torres had planted weapons in his cell. (Dkt. 172 at 47.) Plaintiff alleges that Defendants should have acted on his accusations immediately either by transferring Ulloa and Torres to another prison or by transferring Plaintiff. (Id. at 36.) Instead, the committee approved a plan to retain Plaintiff in Ad-Seg at CSP-LAC until he could be transferred to another prison. (Id. at 47.) Two days later, on August 12, 2017, Plaintiff was transferred to High Desert State Prison in Susanville. (Dkt. 22 at 1.)

In early September 2017, however, he was transferred back to CSP-LAC. (Dkt. 17.) He had a third classification committee meeting on September 13, 2017. (Dkt. 33 at 50.) He alleges that he was released from Ad-Seg on about September 30, 2017, and housed in D-yard. (Dkt. 172 at 43.)

At some later point, he was transferred to CSP-Corcoran. (Dkt. 130 [motion to obtain legal files from CSP-Corcoran].) By April 2018, he was at Kern Valley State Prison in Delano, his current address of record. (Dkt. 122.)

G. Remedies Requested.

Plaintiff requests a variety of remedies, including: declaratory judgment reflecting success of his legal claims; injunctive relief ordering Defendants to transfer Plaintiff to a different prison and to remove the "lock-up" order, rule violation reports, and "committee hearing chrono" from Plaintiff's "C-File"; the return of Plaintiff's "legal and personal" property; attorney's fees; and compensatory damages of $10,000 and punitive damages of $20,000 from each Defendant. (Dkt. 172 at 51-53.)

IV.

LEGAL STANDARDS

A. Motions to Dismiss.

A Rule 12(b)(6) motion to dismiss tests the sufficiency of a statement of claim for relief. A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990) (as amended).

In determining whether a complaint states a claim on which relief may be granted, its allegations of material fact must be taken as true and construed in the light most favorable to plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989). Where, as here, the plaintiff is appearing pro se, courts must construe the allegations of the complaint liberally and must afford the plaintiff the benefit of any doubt. Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988). However, "the liberal pleading standard ... applies only to a plaintiff's factual allegations." Neitze v. Williams, 490 U.S. 319, 330 n.9 (1989). "[A] liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled." Bruns v. Nat'l Credit Union Admin., 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982)).

With respect to a plaintiff's pleading burden, the Supreme Court has held that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. ... Factual allegations must be enough to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted). While there is no "probability requirement" at the pleading stage, plaintiffs must allege "enough

fact to raise a reasonable expectation that discovery will reveal evidence" to support the allegations. Id. at 556. This is a context-specific inquiry, requiring the reviewing court to draw on its experience and common sense. Id. Applying these principles, Twombly held that allegations of an anti-trust conspiracy were implausible, and thus not entitled to a presumption of truth, where the "obvious alternative explanation" was that each defendant had acted in its own interest independently. Id. at 567.

In Ashcroft v. Iqbal, 556 U.S. 662 (2009), Plaintiff Iqbal, a Pakistani Muslim, alleged that he was investigated as a "person of interest" after the September 11 attacks because of animus against his race and religion. The United States Supreme Court found his allegations of discrimination implausible, because the "obvious alternative explanation" was that the government's legitimate investigation "would produce a disparate, incidental impact on Arab Muslims, even though the policy's purpose was to target neither Arabs nor Muslims." Id. at 664, 682. Expounding on Twombly, Iqbal explained that to avoid dismissal for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' ... 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." Id. at 678 (citation omitted).

> The Ninth Circuit has summarized the Twombly/Iqbal holdings as follows:
>
> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of

discovery and continued litigation.

Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

In deciding a motion to dismiss pursuant to Rule 12(b)(6), courts may consider material that is properly subject to judicial notice. Mullis v. U. S. Bankr. Court, 828 F.2d 1385, 1388 (9th Cir. 1987); Mack v. S. Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986) ("[O]n a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment."), abrogated on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991)).

Even if a named defendant—i.e., Leduc—has not moved to dismiss a complaint under Rule 12(b)(6), because Plaintiff is proceeding pro se, the Court may screen the complaint under essentially the same standard. See 28 U.S.C. § 1915A(b) ("The court shall review . . . a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. . . . if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted.").

V.

DISCUSSION

A. Plaintiff's Official Capacity Claims.

Plaintiff sues all Defendants in their official capacity. (See Dkt. 172 at 2-15.) Plaintiff's claims for damages and retroactive relief are barred by the Eleventh Amendment. See Pena v. Gardner, 976 F.2d 469, 472 (9th Cir. 1992) ("The eleventh amendment bars both a federal court action for damages (or other retroactive relief) brought by a citizen against a state and such a federal court action brought by a citizen against a state official acting in his official capacity."). Additionally, at least some of Plaintiff's requested injunctive relief is moot. Plaintiff has been transferred from CSP-LAC, and he has not demonstrated that

there is a reasonable expectation that he will be transferred back. See Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991) (per curiam); see also Andrews v. Cervantes, 493 F.3d 1047, 1053 n.5 (9th Cir. 2007). To the extent Plaintiff requests other injunctive relief, his claims fail because, as explained below, he has not alleged anything rising to a constitutional deprivation.

B. Plaintiff Fails to Allege Facts Supporting "Retaliation" Claims.

1. Elements.

Prisoners have a First Amendment right to file grievances against prison officials and to be free from retaliation for doing so. Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009). In the prison context, a viable claim of First Amendment retaliation includes five elements: "(1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." Id. (quoting Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005)).

To plead a causal connection between the adverse action and the protected conduct, a plaintiff must show that his protected conduct was "the 'substantial' or 'motivating' factor behind the defendant's conduct." Id. at 1271 (citation omitted). Mere "speculation that defendants acted out of retaliation is not sufficient." Wood v. Yordy, 753 F.3d 899, 905 (9th Cir. 2014). Under Twombly/Iqbal, the facts alleged must show more than that retaliation could conceivably have occurred; they must support a reasonable inference that it did occur. A retaliatory motive may be shown by circumstantial facts such as "(1) proximity in time between protected speech and the alleged retaliation; (2) [that] the [defendant] expressed opposition to the speech; [or] (3) other evidence that the reasons proffered by the [defendant] for the adverse ... action were false and pretextual." McCollum v. Cal. Dep't of Corr. & Rehab., 647 F.3d 870, 882 (9th Cir. 2011) (citation omitted).

To plead a chilling effect, inmate plaintiffs must allege facts showing that the defendant's acts "would chill or silence a person of ordinary firmness from future First Amendment activities." Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (citation omitted). If the defendant's acts did not actually chill the plaintiff's protected expression, then the plaintiff may still state a claim if he alleges he suffered some harm that is more than minimal, because "harm that is more than minimal will almost always have a chilling effect." Rhodes, 408 F.3d at 568 n.11.

2. Claims against All Defendants Except Ulloa and Torres.

The Court previously dismissed Plaintiff's retaliation claims against all Defendants except Ulloa and Torres, explaining at length why those claims failed as to each Defendant. (See Dkt. 154 at 11-12.) In the 4AC, Plaintiff has not alleged additional facts in support of these claims, and they fail for the same reasons. Plaintiff fails to allege facts showing that the allegedly retaliatory actions (such as searching his cell, sending him to Ad-Seg after finding a weapon under his mattress, denying his grievances, and failing to immediately transfer him to a different prison) did not advance legitimate correctional goals. Plaintiff also fails to allege facts suggesting that any of these Defendants were motivated by a desire to retaliate against him because he had filed grievances against them or others. The fact that these Defendants took adverse actions against Plaintiff (well explained by other circumstances) after he filed grievances against assorted staff members is not enough to support an inference that Defendants acted with the intent to chill his protected activity.

3. Claims against Defendants Ulloa and Torres.

First, Plaintiff alleges that Ulloa and Torres wrote and dropped fake "kites" to create an excuse to conduct retaliatory cell searches. (Dkt. 172 at 18, 32.) These allegations fail to state a retaliation claim. Plaintiff alleges no facts that would support an inference that the kites were faked, let alone faked by Ulloa, Torres, or

any other named Defendant.[5] Thus, Plaintiff fails to allege facts showing that the searches were not prompted by the kites (rather than a retaliatory motive) or that they lacked a legitimate penological justification.

Second, Plaintiff alleges that Ulloa and Torres left a metal detector in a box of legal papers during a cell search on May 11, 2017.[6] (Dkt. 172 at 34-35.) He alleges that they did this deliberately to get him in trouble. (Id.) Plaintiff admits, however, that he found the metal detector before anyone else did, and when he confronted Ulloa about it, Ulloa acknowledged that Torres had left it behind. (Id. at 35.) Plaintiff returned the metal detector, and no one punished him for having it. Instead, Plaintiff used the incident as a bargaining opportunity. (Id.) Thus, with regard to leaving the metal detector in his cell, Plaintiff has not pled facts showing that this was an adverse action (versus a mistake), that it was motivated by a desire to retaliate, or that it caused him any harm, so as to have a chilling effect on his grievance filings.

Third, Plaintiff alleges that Ulloa and Torres left a weapon in an envelope under his mattress during the May 11 search that was not discovered until Defendant Hogan found it on May 23. (Id. at 36-38.) Plaintiff was not present during the May 11 cell search and his allegations that Ulloa and Torres are responsible for putting the weapon under his mattress are entirely speculative. Plaintiff alleges that he heard from another inmate that Torres felt Plaintiff had "fronted off"[7] during this incident, and that Torres disliked Plaintiff and made the

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[5] In one of his filings, for example, Plaintiff speculated that Ulloa "or his inmate informant who acted in concert with Defendant dropped a kite." (Dkt. 18 at 3.)

[6] The correctional officers may have searched Plaintiff's legal papers for metal because they knew that Plaintiff had filed an earlier lawsuit against an officer who failed to remove a piece of metal from his legal papers. See West v. Hulbert, E.D. Cal. case no. 16-cv-0046.

[7] To "front off" about something means to express resentment brashly. See

vague statement that he would "do what he has to do." These facts do not support a reasonable inference that Torres was the individual—rather than another inmate or any of the numerous other staff members about whom Plaintiff had complained—who supposedly planted a weapon in Plaintiff's cell.

Fourth, Plaintiff alleges that Ulloa slid a "weapon" into his Ad-Seg cell and announced himself to Plaintiff by telling him to f*ck himself with it. (Id. at 41.) While Ulloa allegedly did this to retaliate against Plaintiff, Plaintiff was never "caught" with the "weapon" or punished for having it. Instead, Plaintiff reported the incident and gave the "weapon" to a guard, insisting that Ulloa was to blame. (Id.) Within days, Plaintiff filed more grievances against Ulloa. (Id. at 44.)

Plaintiff does not explain what "weapon" Ulloa slid under the door, but based on attachments to his filings, it was a small piece of flat metal. It is a stretch to describe such an item as a "weapon," but Plaintiff has made such exaggerations before: In a previous suit, Plaintiff described a piece of metal left in his legal papers as a "weapon." See West v. Hulbert, E.D. Cal. case no. 16-cv-0046 (Dkt. 12 at 6). Plaintiff also describes the metal detector left in his cell as "dangerous" contraband. (Dkt. 2 at 2.) Plaintiff fails to allege either a chilling effect on his speech or any harm arising out of this incident where Ulloa allegedly gave Plaintiff a small piece of metal. Indeed, Plaintiff filed more complaints after this incident against Ulloa. These bizarre allegations, so similar to Plaintiff's previous complaints against other officers, do not state a claim for relief that is plausible on its face under the Twombly/Iqbal standard, such that it is would be "[fair] to require [Defendant Ulloa] to be subjected to the expense of discovery and continued litigation." Starr, 652 F.3d at 1216.

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https://idioms.thefreedictionary.com/front+off

C. Plaintiff Fails to Allege Facts Supporting "Failure to Protect" Claims.

1. Elements.

The Eighth Amendment requires prison officials to "take reasonable measures to guarantee the safety of the inmates." Hudson v. Palmer, 468 U.S. 517, 526-27 (1984). "[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he **[1]** knows that inmates face a **[2]** substantial risk of serious harm and disregards that risk by **[3]** failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. 825, 847 (1970).

To show that a prison official "knew" of a substantial risk, 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." Id. at 837. Knowledge may be established through an "inference from circumstantial evidence" or "from the very fact that the risk was obvious." Id. at 842. That an official "should have been aware" of a particular risk to an inmate, but was not, does not establish an Eighth Amendment violation "no matter how severe the risk." Peralta v. Dillard, 744 F.3d 1076, 1086 (9th Cir. 2014) (citation omitted), cert. denied, 135 S. Ct. 946 (2015).

2. Failure to Protect Plaintiff from Ulloa and Torres.

Plaintiff alleges that the other Defendants knew that Ulloa and Torres posed a substantial risk of harm to Plaintiff, because Plaintiff told them that Ulloa and Torres had planted a weapon in his cell. (Dkt. 172 at 24-27.) The Court previously discussed in detail why these claims failed. (See Dkt. 154 at 19-21.) Plaintiff has not rectified those identified deficiencies.

Essentially, Plaintiff contends that Defendants had a legal duty to believe his accusations against Ulloa and Torres, such that their failure to act in response to those accusations amounted to deliberate indifference. Plaintiff's accusations, however, were not "facts from which the inference could be drawn that a

substantial risk of serious harm exists." Farmer, 511 U.S. at 837. Plaintiff's accusations were implausible and uncorroborated. Even if Plaintiff told the other Defendants about his conversations with Torres and Ulloa, they were entitled to be skeptical that their colleagues had conspired to plant weapons in such a peculiar manner. Under these circumstances, Plaintiff's accusations were insufficient to put Defendants on notice that Ulloa or Torres posed a serious risk of harm.

3. Failure to Protect Plaintiff from Other Inmates.

Plaintiff alleges that Ulloa and Torres defamed him by putting false information in his "committee hearing chrono," i.e., that Plaintiff sodomized his cell mate in 1996. (Id. at 20.) Later in the 4AC, Plaintiff accuses Defendants Cano and Rhodes of including this false information in his chrono, knowing that Plaintiff is more likely to be assaulted if other prisoners believe he is gay. (Id. at 43.)

The Court has already dismissed these claims (see Dkt. 154 at 11), and Plaintiff has not changed his allegations. He still does not allege facts showing that any Defendants who knew about the "false" chrono were deliberately indifferent to a substantial risk of harm to Plaintiff. Plaintiff does not allege that any general population inmates were aware of the false entry or threatened him, so his allegations fail to establish a substantial risk of harm.

4. Failure to Protect Plaintiff from Himself.

Against Ulloa and Torres, Plaintiff alleges that they knew he had a serious mental health condition that made him a danger to himself if he had access to a weapon, but they disregarded that risk by planting "weapons" in his cell. (Dkt. 172 at 23.) Again, as to the first "weapon" supposedly planted or supplied to Plaintiff by Ulloa and Torres, Plaintiff's allegations are speculative, such that they cannot support his claim. As to the small piece of metal that Ulloa supposedly slid to Plaintiff in Ad-Seg, while "the Eighth Amendment protects against deliberate indifference to a detainee's serious risk of suicide," (Conn v. City of Reno, 591 F.3d 1081, 1102 (9th Cir. 2010), judgment vacated, 563 U.S. 915 (2011), and

opinion reinstated, 658 F.3d 897 (9th Cir. 2011)), Plaintiff does not allege in the 4AC that Ulloa knew Plaintiff was at a serious risk of suicide, other than conclusory statements about Ulloa's knowledge. Instead, Plaintiff interprets Ulloa's actions as "sexual harassment." (See Dkt. 172 at 25.) Furthermore, Plaintiff has not shown that he was at serious risk of suicide; indeed, there is no indication that Plaintiff did anything with the small piece of metal except wait for an opportunity to hand it to a different guard. As for Ulloa's taunt that Plaintiff should "f*ck himself" with the small piece of metal, verbal threats, without more, are generally insufficient to state a § 1983 claim for violation of the Eighth Amendment. See Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987) (per curiam).

D. Plaintiff Fails to Allege Facts Supporting Medical "Deliberate Indifference" Claims.

1. Elements.

To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, "[f]irst, the plaintiff must show a 'serious medical need' by demonstrating that 'failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain.'" Second, the plaintiff must show the defendant's response to the need was deliberately indifferent." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal citations omitted).

Under the first prong, "[e]xamples of serious medical needs include '[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.'" Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992)). "A heightened suicide risk or an attempted suicide is a serious medical need." Conn v. City of Reno, 591 F.3d 1081, 1095 (9th Cir. 2009), judgment vacated on other grounds,

563 U.S. 915 (2011), and opinion reinstated in relevant part, 658 F.3d 897 (9th Cir. 2011).

The second prong, "deliberate indifference," requires both "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." Jett, 439 F.3d at 1096. "Indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.'" Id. (citation omitted). Negligence does not suffice to state a claim under § 1983. Id.; Estelle, 429 U.S. at 106. Also, difference of opinion between the prisoner and medical providers concerning the appropriate course of treatment does not give rise to an Eighth Amendment claim. See Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

2. The Psychologist Defendants.

Plaintiff alleges the following four psychologist Defendants violated his Eighth Amendment right to adequate medical care: (1) Ghassemi, (2) Leduc, (3) Garrett, and (4) Paz.

Defendant Ghassemi: Plaintiff alleges that Ghassemi attended his first two classification committee hearings. (Dkt. 172 at 40, 47.) Plaintiff told Ghassemi (and everyone else there) that Ulloa and Torres had planted a weapon in his cell, but they did not believe him and, as a result, they did not immediately transfer him to another prison or discipline Ulloa and Torres. (Id.) Plaintiff does not allege that Ghassemi had any responsibility for treating his mental health other than serving on the classification committee. Plaintiff's allegations against Ghassemi in the SAC were previously dismissed (Dkt. 154) and remain unchanged in the 4AC. They should be dismissed again for the same reasons.

Defendant Leduc: Plaintiff alleges that Leduc (identified in the SAC as Jane Doe 2) "sat on the committee panel, in a chair, said nothing, ignoring Plaintiff ...." (Dkt. 172 at 48.) Plaintiff is apparently referring to the third classification

committee meeting on September 13, 2017. (Dkt. 33 at 59-60.) She "failed to act [on] Plaintiff's request for protection" from Ulloa and Torres (i.e., to be transferred or have them transferred) or recognize that "his serious mental health conditions [would] worsen being placed back on D-yard" instead of remaining in Ad-Seg. (Dkt. 172 at 48.) She "failed to have Plaintiff evaluated to be admitted to [a] mental health crisis bed – suicide watch and failed to take any action." (Id.)

Again, the members of the classification committee were entitled to be skeptical of Plaintiff's outlandish and speculative accusations, such that their failure to act on them did not violate Plaintiff's civil rights. Plaintiff does not allege that he ever told Leduc he was suicidal or that she played any role in his healthcare beyond serving on the classification committee. Plaintiff fails to state an Eighth Amendment claim against Leduc.

Defendant Garrett: Upon being sent to Ad-Seg, Plaintiff informed medical staff he "was stressed due to officers planning a weapon inside his cell during their retaliatory search and he was suicidal." (Dkt. 172 at 39.) The medical staff duly contact Garrett who evaluated Plaintiff. (Id.) Plaintiff alleges that the evaluation was "unlawful," because after he told her that "he had a plan to cut his wrist with a razor or something sharp," she "falsely claimed" that CSP-LAC had no available suicide watch cells due to overcrowding, such that Plaintiff "would be kept in Ad-Seg and not transferred to another prison with a vacant suicide watch cell, which was a new policy, knowing that she was fabricating information to Plaintiff and further falsely claimed that they no longer have to admit prisoners to mental health crisis beds if [they] cut themselves." (Id.) Lastly, he contends that Garrett never notified the sergeant that Ulloa and Torres posed a threat to him. (Id.)

Thus, the gravamen of Plaintiff's allegations against Garrett is that he thought he knew the "magic words" that would require an immediate prison transfer (i.e., a threat to cut himself), but when he said them to Garrett, she did not

immediately order him transferred.[8] He contends that she lied about the availability of a suicide watch cell without alleging any facts suggesting that one was available (something he would hardly have been in a position to know). He fails to allege facts showing that her refusal to place him in a suicide watch cell at CSP-LAC was motivated by deliberate indifference to his mental health. Even if Garrett could have transferred him to a suicide watch cell at CSP-LAC, there is no reason to think that transfer would have improved his mental health. Plaintiff claimed that housing him in Ad-Seg would worsen his mental health (id.), but later claimed that releasing him on D-yard would worsen his mental health (id. at 48). Plaintiff does not allege that he was denied mental health medication or counselling while in Ad-Seg.

Garrett, like the other Defendants, was entitled to disbelieve Plaintiff's allegations against Ulloa and Torres without violating Plaintiff's civil rights. While she may not have notified the sergeant, the next day, Plaintiff spoke with Captain Freeman and told him about Ulloa and Torres planting the weapon, so supervisory staff were aware of his concerns. (Id. at 40.) Captain Freeman had some context to evaluate these accusations, since Plaintiff had previously accused Freeman of failing to stop staff from orchestrating inmate attacks. (Id.) A few days later, Plaintiff told the entire classification committee that Ulloa and Torres were trying to harm him. (Id.) Plaintiff's allegations against Garrett fail to demonstrate that her decision not to tell the sergeant caused or increased any mental distress that Plaintiff was suffering.

Defendant Paz: On May 26 (i.e., just a few days after his May 23 arrival at Ad-Seg), Plaintiff received mental health services from "clinician Defendant Paz."

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[8] This is consistent with the findings of one of the doctors who examined Plaintiff before his criminal trial—that Plaintiff was "quite resourceful and is able to describe symptoms that would be consistent with an illness and exaggerates those and amplifies those ... in a way to affect a certain outcome." West, 2008 WL 3414687, at *2.

(Id. at 41.) Plaintiff told Paz that his safety was "threated" by Ulloa and Torres because they had "planted a metal detector and a deadly weapon in his cell" and requested protection from them. (Id.) Defendant Paz notified Sgt. Schumacher of Plaintiff's concerns. (Id.) In response, Sgt. Schumacher discussed the situation with Plaintiff but advised he "could not do anything," presumably because the decision whether to transfer Plaintiff would be made by the classification committee. (Id.)

These allegations do not state a claim for deliberate indifference against Paz. They show that Plaintiff was receiving mental health treatment in Ad-Seg, and when Paz was asked to do something beyond a psychologist's authority (i.e., transfer Ulloa and Torres or transfer Plaintiff), Paz raised the matter to a sergeant, and he addressed the situation.[9]

E. The Court Need Not Address Defendants' Qualified Immunity Arguments.

Given that the Court is recommending that all of Plaintiff's claims be dismissed with prejudice, the Court need not address Defendants' arguments that they are entitled to qualified immunity.

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[9] In November 2018, on evaluating Plaintiff's Second Amended Complaint, the Court initially concluded that Plaintiff might state retaliation and Eighth Amendment claims against Ulloa and Torres, and that he might also state an Eighth Amendment claim against Paz. (See Dkt. 154 at 12-14, 16-17.) On further review, it is apparent that he does not.

VI.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) dismissing Plaintiff's 4AC with prejudice.

DATED: December 5, 2019

Karen E. Scott

KAREN E. SCOTT
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals but are subject to the right of any party to timely file objections as provided in the Federal Rules of Civil Procedure and the instructions attached to this Report. This Report and any objections will be reviewed by the District Judge whose initials appear in the case docket number.

Additional material from this filing is available in the Clerk's Office.