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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SHAUN DARNELL GARLAND,
Plaintiff,
vs.
ANTHONY HEDGPETH, J. BOLIN,
THOMPSON, BLACKSTONE,
J. VARGAS, J. OSTRANDER,
Defendants.

No. C 08-00635 WHA (PR)
**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION
TO DISMISS; DENYING
PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION;
DIRECTING PLAINTIFF TO
SERVE DEFENDANTS BOLIN
AND THOMPSON**
(Docket Nos. 13 & 23)

Plaintiff, a California prisoner proceeding *pro se*, has filed a civil rights complaint pursuant to 42 U.S.C. 1983, alleging *inter alia* that Defendants Hedgpeth, Bolin, Thompson, Blackstone, Vargas, and Ostrander, officers and employees of Kern Valley State Prison, retaliated against Plaintiff for his exercise of his First Amendment rights.¹ Defendants have moved to dismiss the action under the unenumerated portion of Federal Rule of Civil Procedure 12(b) and under Rule 12(b)(6). For the reasons stated herein, Defendants' motion to dismiss is GRANTED in part and DENIED in part.

Plaintiff's request for a preliminary injunction is DENIED. Plaintiff is DIRECTED to properly execute summons on Defendants Bolin and Thompson.

¹ Plaintiff is currently housed at Calipatria State Prison.

1 **BACKGROUND**

2 Plaintiff alleges that at Kern Valley State Prison (“KVSP”) on and around June 4th
3 and June 16th of 2007, Defendants retaliated against Plaintiff for exercising his First
4 Amendment rights. Plaintiff filed two prison grievances related to these claims. As to the
5 events of June 4th, the prison’s written decision on Plaintiff’s administrative grievance
6 provides a useful summary of Plaintiff’s allegations:

7 It is [Plaintiff]’s position that on June 4, 2007, Kern Valley State Prison
8 (KVSP) Third Watch Correctional Officer (CO) J. Bolin, who is assigned to
9 Building 4, served [Plaintiff] an evening meal tray that did not contain the
10 peanut butter protein supplement that is customarily given to [Plaintiff] to
11 replace the meat that [Plaintiff] does not eat. On June 5, 2007, CO Bolin
12 served [Plaintiff]’s evening meal tray with cheese as a protein replacement.
13 It is contended that [Plaintiff] alerted CO Bolin that [Plaintiff] does not eat
14 cheese due to dairy products causing allergic reactions to him. CO Bolin
15 informed [Plaintiff] that he would bring him a peanut butter packet later.
16 [Plaintiff] claims that later that evening, he asked CO Bolin about the
17 peanut butter that the officer did not bring him. CO Bolin stated that he was
18 not going to bring [Plaintiff] anything and also stated, “We have had
19 enough of you, nigger. You and your 602’s and lawsuits and we are going
20 to get you.” [Plaintiff] also claims this action took place at approximately
21 2110 hours, when CO Bolin came to collect the mail. On June 6, 2007,
22 Second Watch CO A. Thompson served [Plaintiff] a breakfast tray with
23 cheese on it. On April 9, 2007, [Plaintiff] wrote a complaint involving CO
24 Blackstone’s refusal to supplement [Plaintiff]’s meal with peanut butter and
25 her insistence on giving [Plaintiff] cheese or tuna, which she is aware that
26 [Plaintiff] does not eat. [Plaintiff] requests that Warden A. Hedgpeth halt
27 the racial threats and retaliatory acts of his subordinates against [Plaintiff].
28

(Def.’ Mot. to Dismiss (“MTD”), Decl. of Rachel Munoz, Ex. A at 6.)

21 With regard to the events of June 16th, the prison’s written decision on Plaintiff’s
22 administrative grievance provides a useful summary of Plaintiff’s allegations:

23 It is the [Plaintiff]’s position that on June 16, 2007, during the Third Watch,
24 a Kern Valley State Prison (KVSP) Correctional Officer appeared at
25 [Plaintiff]’s cell door and announced that boxer shorts and shower shoes are
26 to be worn outside of the cell for the purpose of a cell search. [Plaintiff]
27 states that he was still eating his dinner meal, when the two officers
28 approached his door for the search. [Plaintiff] claims he was complying
with one of the officer’s strip search instructions, when this particular
officer called [Plaintiff] an “Idiot[,]” as [Plaintiff] was trying to finish
chewing some food to allow the officer to look into [Plaintiff]’s mouth. It is
contended that [Plaintiff] asked the officer for his name but the officer
refused to identify himself but after several more times asking, the officer
said his name was Vargas. [Plaintiff] also claims that this officer also
elbowed [Plaintiff] as [Plaintiff] passed by the officer. Upon returning to

1 his cell, [Plaintiff] noted that the cell was in shambles and his property was
2 strewn about the cell, with several items taken or thrown away, including
3 [Plaintiff]’s prescribed medication of Metamucil. [Plaintiff] requests that
Warden A. Hedgpeth call off the verbal disrespect and retaliatory acts of his
subordinates against [Plaintiff].

4 (Id., Ex. B at 9.)

5 Based on these asserted facts, Plaintiff alleges that all Defendants violated his
6 (1) First Amendment rights by retaliating against him; (2) Eighth Amendment right to be
7 free from cruel and unusual punishment; and (3) Fourteenth Amendment right to be free
8 from racial discrimination.

9 DISCUSSION

10 I. Defendants Ostrander and Hedgpeth

11 Defendants contend that Plaintiff’s claims against Defendants Ostrander and
12 Hedgpeth should be dismissed because Plaintiff failed to exhaust his administrative
13 remedies for these claims. (MTD at 7.) Ostrander was in charge of the Institutional Gang
14 Investigations/Investigative Services Unit at the time of the alleged incidents. Hedgpeth
15 was the warden of KVSP at this same time.

16 As detailed above, Plaintiff filed two prison grievances related to the claims he
17 raises in the instant action. In these grievances, Plaintiff mentions only that Ostrander is
18 Vargas’s supervisor, and details no invidious actions Ostrander may have taken. Also,
19 Plaintiff does not detail in these grievances that or how Hedgpeth violated Plaintiff’s
20 rights or otherwise caused Plaintiff injury. Rather, in those grievances Plaintiff appeals to
21 Hedgpeth for relief, rather than accusing him of misdeeds.

22 “No action shall be brought with respect to prison conditions under [42 U.S.C.
23 § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other
24 correctional facility until such administrative remedies as are available are exhausted.”
25 42 U.S.C. § 1997e(a). Exhaustion is mandatory and no longer left to the discretion of the
26 district court. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (citing *Booth v. Churner*, 532
27 U.S. 731, 739 (2001)).

1 Compliance with prison grievance procedures is all that is required to “properly
2 exhaust.” *Jones v. Bock*, 127 S. Ct. 910, 922–23 (2007). The level of detail necessary in
3 a grievance to comply with the grievance procedures will vary from system to system and
4 claim to claim, but it is the prison’s requirements, and not the Prison Litigation Reform
5 Act [42 U.S.C. § 1997e], that define the boundaries of proper exhaustion. *Id.* at 923. The
6 inmate’s grievance must be sufficiently detailed to alert the prison as to “the nature of the
7 wrong for which redress is sought.” *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir.
8 2009) (citing *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002)). A grievant must use
9 all steps the prison holds out, enabling the prison to reach the merits of the issue.
10 *Woodford*, 548 U.S. at 90.

11 Plaintiff has not exhausted his administrative remedies as to his claims against
12 Defendants Ostrander and Hedgpeth. As to Ostrander, Plaintiff’s prison grievances do
13 not detail any invidious actions attributable to Defendant. Rather, Ostrander is mentioned
14 in the grievances only as Vargas’s supervisor, and is not alleged to have known of or
15 participated in the alleged violations. Because his grievance insufficiently detailed
16 Ostrander’s alleged invidious actions, Plaintiff’s grievance cannot have alerted the prison
17 as to “the nature of the wrong for which redress is sought.” *Griffin*, 557 F.3d at 1120.

18 As to Hedgpeth, Plaintiff’s prison grievances do not describe any wrong
19 committed by such Defendant. Indeed, Plaintiff appealed to Hedgpeth for relief, rather
20 than listing him as a wrongdoer. Because his prison grievance insufficiently detailed
21 Hedgpeth’s alleged invidious actions, Plaintiff’s grievance cannot have alerted the prison
22 as to the nature of the wrong for which redress is sought.

23 Plaintiff having failed to exhaust his administrative remedies, Defendants’ motion
24 to dismiss all claims against Defendants Ostrander and Hedgpeth is GRANTED. All
25 claims against Ostrander and Hedgpeth are hereby DISMISSED. Ostrander and
26 Hedgpeth are hereby TERMINATED from this action.

1 **II. Defendant Thompson**

2 Defendants have not moved for the dismissal of the claims against Defendant
3 Thompson.

4 **III. Defendants Bolin, Blackstone, and Vargas**

5 Defendants move to dismiss all claims against Defendants Bolin, Blackstone, and
6 Vargas, all of whom were correctional officers at the relevant time. (MTD at 9–18.)

7 **A. First Amendment Claims**

8 “Within the prison context, a viable claim of First Amendment retaliation entails
9 five basic elements: (1) An assertion that a state actor took some adverse action against
10 an inmate (2) because of (3) that prisoner’s protected conduct, and that such action
11 (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not
12 reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559,
13 567–68 (9th Cir. 2005) (footnote omitted).

14 Reading Plaintiff’s complaint broadly, it appears that Plaintiff has stated a claim
15 against Defendants Bolin and Vargas for a First Amendment violation. As to each,
16 Plaintiff alleges that each state actor took an adverse action (serving food allergic to
17 Plaintiff, searching his cell, elbowing him) because of Plaintiff’s protected activity of
18 filing grievances (“We have had enough of you, nigger. You and your 602’s and lawsuits
19 and we are going to get you”), and that such action did not reasonably advance a
20 legitimate correctional goal. On these facts, Defendants’ motion as to the First
21 Amendment claims against Defendants Bolin and Vargas is DENIED. In denying such
22 motion as to these claims, the Court makes no comment whether Plaintiff’s claims will
23 succeed on the merits.

24 Plaintiff has not, however, alleged facts sufficient to state a claim against
25 Defendant Blackstone for a First Amendment violation. Plaintiff has alleged only that he
26 sent her a grievance regarding his food. Plaintiff has not alleged any facts that Blackstone
27 took an actual adverse action that chilled his exercise of his First Amendment rights.

1 Accordingly, Defendants' motion as to the First Amendment claims against Blackstone is
2 GRANTED. All First Amendment claims against Blackstone are hereby DISMISSED.

3 **B. Fourteenth Amendment Claims**

4 A plaintiff alleging denial of equal protection under 42 U.S.C. § 1983 based on
5 race or other suspect classification must plead intentional unlawful discrimination or
6 allege facts that are at least susceptible of an inference of discriminatory intent. *Monteiro*
7 *v. Tempe Union High School Dist.*, 158 F.3d 1022, 1026 (9th Cir. 1998). To state a claim
8 for relief, the plaintiff must allege that the defendant state actor acted at least in part
9 because of plaintiff's membership in a protected class. *Serrano v. Francis*, 345 F.3d
10 1071, 1081–82 (9th Cir. 2003).

11 Plaintiff has stated a claim against Defendant Bolin for racial discrimination for his
12 levelling a threat, prefaced with a racially pejorative epithet, at Plaintiff, and other
13 allegedly retaliatory acts. Accordingly, Defendants' motion to dismiss all Fourteenth
14 Amendment claims against Bolin is DENIED. In denying such motion as to these claims,
15 the Court makes no comment whether Plaintiff's claims will succeed on the merits.

16 Plaintiff, however, has not alleged facts sufficient to state a claim for racial
17 discrimination against Defendants Vargas or Blackstone. Indeed, Plaintiff alleged in his
18 prison grievances that Vargas retaliated against him by searching his cell, but did not
19 allege that Vargas's actions were racially motivated. (MTD, Decl. of Rachel Munoz, Ex.
20 B at 9.) Accordingly, Defendants' motion to dismiss all Fourteenth Amendment claims
21 against Vargas and Blackstone is GRANTED. All Fourteenth Amendment claims against
22 Vargas and Blackstone are hereby DISMISSED.

23 **C. Eighth Amendment Claims**

24 Adequate food is a basic human need protected by the Eighth Amendment. *See*
25 *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996), amended, 135 F.3d 1318 (9th Cir.
26 1998). Denial of food service presents a sufficiently serious condition to meet the
27 objective prong of the Eighth Amendment deliberate indifference analysis. *Foster v.*
28

1 *Runnels*, 554 F.3d 807, 812–13 (9th Cir. 2009); *see, e.g., id.* at 812 (denial of 16 meals
2 over 23 days was “a sufficiently serious deprivation because food is one of life’s basic
3 necessities”); *id.* at 812 n.1 (denial of 2 meals over 9-week period was not sufficiently
4 serious to meet objective prong of Eighth Amendment deliberate indifference).

5 A prison official violates the Eighth Amendment when two requirements are met:
6 (1) the deprivation alleged must be, objectively, sufficiently serious, *Farmer v. Brennan*,
7 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)), and (2) the
8 prison official possesses a sufficiently culpable state of mind, *id.* (citing *Wilson*, 501 U.S.
9 at 297).

10 In determining whether a deprivation of a basic necessity is sufficiently serious to
11 satisfy the objective component of an Eighth Amendment claim, a court must consider the
12 circumstances, nature, and duration of the deprivation. The more basic the need, the
13 shorter the time it can be withheld. *See Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir.
14 2000). Substantial deprivations of shelter, food, drinking water or sanitation for four
15 days, for example, are sufficiently serious to satisfy the objective component of an Eighth
16 Amendment claim. *See id.* at 732–733; *see, e.g., Hearn v. Terhune*, 413 F.3d 1036,
17 1041–42 (9th Cir. 2005)

18 Plaintiff has failed to state Eighth Amendment claims against Defendants Bolin,
19 Blackstone, and Vargas. Considering the circumstances, nature, and duration of the
20 alleged acts, Defendants having brought or ordered to be brought to Plaintiff a tray of
21 food with one unacceptable item on it a handful of times does not amount to a sufficiently
22 serious deprivation under the Eighth Amendment. *See Foster*, 554 F.3d at 812 n.1.

23 Accordingly, Defendants’ motion to dismiss all Eighth Amendment claims against
24 Bolin, Blackstone, and Vargas is GRANTED. All Eighth Amendment claims against
25 Bolin, Blackstone, and Vargas are hereby DISMISSED.

26 Furthermore, Defendant Blackstone is hereby TERMINATED from this action, all
27 claims against her having been dismissed.

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1 which [he] has knowledge.” Rochon v. Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987).

2 Here, Plaintiff’s complaint has been pending for over 120 days, and, consequently,
3 absent a showing of “good cause,” is subject to dismissal without prejudice as to the
4 unserved defendants, Bolin and Thompson. *See* Fed. R. Civ. P. 4(m). Because Plaintiff
5 has not provided sufficient information to allow the Marshal to locate and serve Bolin and
6 Thompson, Plaintiff must remedy the situation or face dismissal of his claims against said
7 Defendants. *See Walker*, 14 F.3d at 1421–22 (holding prisoner failed to show cause why
8 prison official should not be dismissed under Rule 4(m) where prisoner failed to show he
9 had provided Marshal with sufficient information to effectuate service).

10 Accordingly, Plaintiff must either himself serve Bolin and Thompson with the
11 summons and complaint, or provide the Court with an accurate current location such that
12 the Marshal is able to serve Bolin and Thompson. If Plaintiff fails to effectuate service
13 on Bolin and Thompson, or provide the Court with an accurate current location for said
14 Defendants, within **thirty (30) days** of the date this order is filed, Plaintiff’s claims
15 against the unserved Defendants will be dismissed without prejudice pursuant to Rule
16 4(m) of the Federal Rules of Civil Procedure.

17 CONCLUSION

18 For the reasons set forth above, Defendants’ motion to dismiss is GRANTED in
19 part and DENIED in part. All claims against Defendants Ostrander, Hedgpeth, and
20 Blackstone are DISMISSED. Ostrander, Hedgpeth, and Blackstone are hereby
21 TERMINATED from this action. All Eighth Amendment claims against Bolin and
22 Vargas are DISMISSED. All Fourteenth Amendment claims against Vargas are
23 DISMISSED.

24 Plaintiff’s request for a preliminary injunction is DENIED.

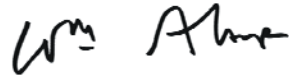
25 Plaintiff must comply with this order’s directions regarding the execution of
26 proper service on Defendants Bolin and Thompson within thirty (30) days from the date
27 of this order, or face dismissal of the claims against the unserved Defendants.

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1 This order terminates Docket Nos. 13 & 23.

2 **IT IS SO ORDERED.**

3 Dated: January 7, 2010



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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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