IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID WAYNE WILSON,

Plaintiff, No. CIV S-06-0537 FCD GGH P

vs.

BAKER, et al.,

Defendants, ORDER & FINDINGS AND RECOMMENDATIONS

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I. Introduction

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. Pending before the court are defendants' motion for summary judgment filed on October 5, 2009. Plaintiff filed an opposition on November 5, 2009 and defendants filed a reply on December 9, 2009.

II. Complaint

This case is proceeding on the third amended complaint (TAC), filed on July 12, 2007, with an Equal Protection claim against defendants Khoury, Mitchell, Schwartz, Grannis, Pearson, Tilton and Kernan; a retaliation claim against defendant Baker; and a due process claim as to defendants Arnold, Mitchell, St. Germaine and Cullen for plaintiff's placement and retention in administrative segregation.

Plaintiff suffers from a serious mental illness and is a participant in the Enhanced Outpatient Program (EOP). Plaintiff alleges an Equal Protection claim in that he was originally not given a porter job and no EOP inmates were given orientation pamphlets describing the porter job.

Plaintiff alleges that Baker retaliated against him by concocting allegations that plaintiff threatened to kill her which led to a placement in administrative segregation. Plaintiff alleges that this retaliation was motivated by plaintiff only calling Baker a loudmouth and saying he was going to call government officials about her and file civil lawsuits.

Baker filed a Rule Violation Report (RVR) charging plaintiff with threatening a peace officer. As a result, plaintiff was placed in Administrative Segregation (Ad. Seg.) and remained there for six months and the conditions caused a significant hardship due to his heat sensitive medication. During this time plaintiff was provided several hearings, yet plaintiff alleges that his due process rights were violated by the defendants.

III. Motion for Summary Judgment

Legal Standard for Summary Judgment

Summary judgment is appropriate when it is demonstrated that the standard set forth in Fed. R. Civ. P. 56(c) is met. "The judgment sought should be rendered if . . . there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Under summary judgment practice, the moving party

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on

file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. See id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 630. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a

genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586 (citation omitted).

IV. Undisputed Facts

Plaintiff did not respond to defendants' undisputed facts and merely repeats the factual allegations from the complaint. The court has attempted to sift through plaintiff's facts to set forth the undisputed facts. The following of defendants' undisputed facts (DUF) are either not disputed by plaintiff, or following the court's review of the evidence submitted, have been deemed undisputed:

From November 2004 to August 2007, plaintiff was incarcerated at California Medical Facility (CMF). DUF #22. Plaintiff suffers from serious mental health illnesses and is at the EOP level of care. DUF #2. As a result of plaintiff's mental illness he is a member of the class in the class action lawsuit Coleman v. Schwarzenegger. DUF #5.

Plaintiff filed this action on March 14, 2006. DUF #10. Tilton was appointed as Acting Secretary of CDCR in April 2006 and appointed Secretary in September 2006. DUF

#11,12. At all relevant times Kernan was CDCR's Director of Adult Institutions. DUF #13. At all relevant times Grannis was Chief of the Inmate Appeals Branch. DUF #14. At all relevant times Schwartz was Warden of CMF. DUF #15. At all relevant times Cullen was the Associate Warden of CMF. DUF #16. At all relevant times Arnold was a Facility Captain at CMF. DUF #17. At all relevant times Khoury was the Chief Deputy of Clinical Services at CMF. DUF #18. At all relevant times Pearson was a Facility Captain who served as an appeals examiner in the Inmate Appeals Branch. DUF #19. At all relevant times St. Germaine was a Facility Captain at CMF. DUF #20. At all relevant times Baker was a Correctional Officer at CMF. DUF #21.

Defendants Khoury, Mitchell, Schwartz, Grannis, Pearson, Tilton & Kernan

On May 24, 2005, plaintiff field a grievance claiming that certain EOP inmates were being favored and given work as porters. DUF #24. Plaintiff also requested that EOP inmates be given orientation pamphlets about the porter job. DUF #25. On June 16, 2005, plaintiff received a response to his grievance that provided a description of the porter job and stated that the work schedules would be monitored to ensure even distribution. DUF #26. Plaintiff appealed this response stating that correctional officers still only used certain EOP inmates, and these inmates worked more extra hours than were allowed. DUF #27, Motion for Summary Judgment (MSJ), Plaintiff's Depo. at 240.

In response to plaintiff's appeal, non-defendant Dr. Tyler stated that EOP Orientation pamphlets would be pursued and every effort would be made to provide equal access to all EOP inmates. DUF #28. Defendant Khoury's name is the supervisor's name on the bottom of the appeal. TAC at 14. Defendant Khoury's name is also typed at the bottom of the second level response to the appeal, which was a denial, however the appeal was denied by defendant Mitchell on behalf of Khoury. TAC at 22. Plaintiff appealed to the third level of review which was reviewed by defendant Pearson and denied by defendant Grannis. TAC at 24.

Plaintiff was eventually given a job as a porter for four hours, one day a week, for two to three months, until he was placed in Ad. Seg. MSJ, Plaintiff's Depo. at 241-42. No EOP

inmates at CMF received orientation pamphlets because the pamphlets were still being developed. DUF #48.

Defendant Baker

On January 31, 2006, defendant Baker was responding to inmates yelling "man down" when plaintiff made a statement to Baker. MSJ at 157-58. On January 31, 2006, defendant Baker, filed a RVR against plaintiff alleging that plaintiff threatened to kill her. DUF #58. Plaintiff filed an inmate appeal on February 2, 2006, alleging that defendant Baker concocted the RVR regarding the threat, and filed the RVR to retaliate against plaintiff. MSJ at 7.

Defendants Arnold, Mitchell, St. Germaine & Cullen

Plaintiff was placed in Ad. Seg. on January 31, 2006, due to the incident with defendant Baker. DUF #63. On February 1, 2006, plaintiff was provided with an Ad. Seg. Placement Notice (CDC-114-D) form. DUF #64, MSJ at 348. This form described the reasons for plaintiff's placement in Ad. Seg. DUF #66. On February 1, 2006, plaintiff met with defendant Arnold for an initial hearing regarding the Ad. Seg. placement. DUF #67. Plaintiff provided defendant Arnold a list of questions that plaintiff wanted an investigative employee to ask witnesses in relation to defendant Baker's report. DUF #68. The Institutional Classification Committee (ICC) met on February 8, 2006, to review plaintiff's retention in Ad. Seg. DUF #71. At the meeting defendant Arnold, defendant Mitchell and a non-defendant were present along with plaintiff. DUF #72, 73. Plaintiff participated in the hearing. DUF #73. The hearing reflected that plaintiff's investigative employee interviewed the inmates plaintiff requested and the inmates stated that they did not hear plaintiff threaten defendant Baker. MSJ at 111. Nevertheless, the ICC ruled against plaintiff and retained him in Ad. Seg. Id. On February 12, 2006, plaintiff filed a grievance against defendant Arnold for allegedly violating his due process rights regarding the placement in Ad. Seg. and the hearing. DUF #77.

On March 15, 2006, the ICC, including defendant Arnold met to review whether

plaintiff should remain in Ad. Seg. DUF #78, 79. The ICC noted that plaintiff had been found guilty of the lesser included offense of action leading to violence based on the incident with defendant Baker. DUF #80. Plaintiff attended this hearing and actively participated. DUF #81. The ICC decided to retain plaintiff in Ad. Seg. pending referral for a transfer to another institution due to defendant Baker's safety concerns. DUF #82.

On March 17, 2006, plaintiff was issued an RVR for destruction of property after yelling he needed to go the law library and then broke the lock to his cell door. MSJ at 117. On April 12, 2006, plaintiff attended another ICC hearing, that included defendant Cullen. DUF #85, 86. Plaintiff actively participated in the hearing. DUF #88. The ICC reiterated that plaintiff would be kept in Ad. Seg. pending transfer to another institution. DUF #89. While not pleased with the ICC recommendation, plaintiff was content with a transfer to CMC or LAC. MSJ at 149.

On April 27, 2006, the RVR related to defendant Baker was ordered reissued and reheard because defendant Baker did not personally attend the first hearing. DUF #93.

On June 23, 2006, plaintiff filed a suit CIV S-06-1391 FCD EFB, alleging atypical and significant hardships as a result of his placement in Ad. Seg. Plaintiff alleged that he was on heat medication but as opposed to general population inmates, plaintiff was not provided with cooling measures such as a window, ice, ice drinks, or air vents. This case was dismissed for failure to state a claim and plaintiff's appeal to the Ninth Circuit was dismissed for failure to prosecute.[1]

On June 26, 2006, plaintiff filed a suit CIV S-06-1629 BEG KJM, alleging that he was not being allowed certain medical appliances. This case was dismissed for failing to exhaust administrative remedies. On appeal, the Ninth Circuit affirmed the dismissal.

On July 20, 2006, the reissued RVR related to defendant Baker was dismissed and

[1] A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

plaintiff was referred to placement on a reintegrated mixed exercise yard. DUF #94. All time credit losses were restored to plaintiff. DUF #95.

On July 21, 2006, plaintiff was issued a new Ad. Seg. Placement Notice indicating that plaintiff was being retained in Ad. Seg. Due to defendant Baker's safety concerns pending an ICC review. DUF #96. Defendant St. Germaine conducted an initial hearing and retained plaintiff in Ad. Seg. DUF #97. On July 26, 2006, an ICC hearing was held with defendant St. Germaine, defendant Cullen and two non-defendants. DUF #98. Plaintiff personally appeared at the hearing with his staff assistant. DUF #99. Due to defendant Baker's safety concerns, plaintiff was kept in Ad. Seg, pending his transfer to another prison. DUF #100.

Another ICC hearing was held on August 2, 2006, with defendant Cullen and defendant St. Germaine and several other non-defendants. DUF #102. Plaintiff personally appeared at this hearing. DUF #104. The ICC found that plaintiff no longer needed to be held in Ad. Seg. and should be released into EOP housing. DUF #105, 106. The ICC found that despite defendant Baker's safety concerns, she had not provided any documentation which supported any safety issues. MSJ at 156.

V. Disputed Facts

Defendant Baker contends that on January 31, 2006, she heard plaintiff say, "Man, these people don't know me. I'm going to kill that bitch." DUF #54. Defendant Baker perceived that she was the person that plaintiff was referring to and plaintiff's statement was a threat. DUF #55.

Plaintiff maintains that he did not threaten to kill Baker and instead called her a loudmouth and stated to her that he was going to contact government officials and file civil lawsuits against her. TAC at 5.

VI. Exhaustion of Prison Grievance Process

Defendants first argue that summary judgment should be granted as plaintiff failed to exhaust the prison grievance process. However, the court will not look to the merits of this

claim.

The court ordered service on August 8, 2007. Defendants filed their first motion to dismiss on December 6, 2007, that was denied. Defendants filed their answer on March 10, 2008 and March 12, 2008. A Scheduling Order was filed on August 6, 2008, setting the discovery cutoff date (February 1, 2009), and the deadline for the filing of pretrial dispositive motions (July 11, 2009). Defendants filed a second motion to dismiss on July 9, 2009, that was denied. Nevertheless, not until October 5, 2009, did these defendants bring this instant motion for summary judgment alleging plaintiff's failure to exhaust administrative remedies before filing this action. In their favor, defendants did raise and preserve the affirmative defense of non-exhaustion in their answers.

Defendants have brought this claim in a motion for summary judgment, as opposed to a motion to dismiss. Defendants have cited to Panero v. City of North Las Vegas, 432 F.3d 949, 952 (9th Cir. 2005), for the notion that a motion for failure to exhaust may be brought at the summary judgment stage. However, the court in Panero stated that it was appropriate at the summary judgment stage because at the time defendants brought the motion in that case, the affirmative defense of administrative exhaustion was unavailable. Id. However, now it is common practice for the affirmative defense of administrative exhaustion to be brought in a motion to dismiss.

Under Fed. R. Civ. P. 12(b), as to the specifically enumerated grounds 1 through 7, the rule announces that "[a] motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed." With respect to claims for failing to exhaust motions are generally brought under the nonenumerated grounds of Rule 12(b), that is timely when it, too, is brought prior to the filing of an answer. This is so because defendants have ready access to the CDCR records, or lack thereof, to support the motion and, if they do not, they have the means to seek an extension of time before filing an answer from the court to be permitted to gather the requisite information.

Even assuming arguendo that defendants properly raised this issue in a motion to dismiss at this time, the court would not look to the merits. This litigation had been proceeding for more than three and a half years before defendants brought the instant motion and this court has expended great time and resources with this case.

This court has not been able to uncover any binding and conclusive authority on the issuance of the timeliness, or lack thereof, of a nonenumerated 12(b) motion; however, the undersigned finds that the reasoning set forth in a federal court in the Central District of California, where the district judge found defendant's motion to dismiss for nonexhaustion of administrative remedies, filed some ten months after the filing of the answer, untimely, best encapsulates the position of the undersigned:

> Moving Defendant cites no case law which indicates that the issue of exhaustion of administrative remedies may only be raised through a motion for summary judgment. On the contrary, the Ninth Circuit has repeatedly found that "failure to exhaust nonjudicial remedies is a matter in abatement, not going to the merits of the claim, and as such is not properly raised in a motion for summary judgment." *Ritza v. International Longshoremen's And Warehousemen's Union, et al.*, 837 F.2d 365, 368 (9th Cir. 1988) (citation omitted); *Inlandboatmens Union of the Pacific v. Dutra Group*, 279 F.3d 1075, 1083 (9th Cir. 2002) ("We have held that a failure to exhaust non-judicial remedies must be raised in a motion to dismiss, and should be treated as such even if raised as part of a motion for summary judgment.")
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> Under previously existing Ninth Circuit case law, Moving Defendant should have brought his challenge to Plaintiff's claims based on failure to exhaust administrative remedies *through a timely motion to dismiss* rather than a motion for summary judgment.
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> The Ninth Circuit allows a Rule 12(b) motion *any time before the responsive pleading is filed*. See *Aetna Life Ins. Co. v. Alla Medical Services, Inc*., 855 F.2d 1470, 1474 (9th Cir. 1988) (citing *Bechtel v. Liberty Nat'l Bank*, 534 F.2d 1335, 1340-41 (9th Cir. 1976) (In *Bechtel*, the Ninth Circuit noted that "while some courts hold that Rule 12(b) motions must be made within 20 days of service of the complaint, the rule itself only requires that such motions 'be made before pleading if a further pleading is permitted." ')

Thomas v. Baca, 2003 WL 504755, *2 (C.D. Cal. 2003) [emphasis added].

The undersigned is aware of conflicting decisions at the district court level within this circuit, see, e.g., Rigsby v. Schriro, 2008 WL 2705376, *1 n. 2 (D. Ariz. 2008) (finding that, where defendant simultaneously filed an answer – asserting the failure to exhaust defense – and an unenumerated motion to dismiss for failure to exhaust administrative remedies, such a motion "need not be made before answering"); Tyner v. Schriro, 2008 WL 752612, *1 n. 1 (D. Ariz. 2008) (same); see also, Thrasher v. Garland, 2007 WL 3012615 *2 (W.D. Wash. 2007) (asserting that, although a motion to dismiss pursuant to the specifically enumerated grounds of Rule 12(b) should be brought before the answer is filed, a nonenumerated 12(b) motion "need not necessarily be brought prior to the filing of the answer.")[2]

However, this court finds the reasoning of Thomas v. Baca, supra, to better promote judicial efficiency and economy while at the same time limiting unfair prejudice to a pro se prisoner plaintiff. As noted, the state attorney general has virtually unlimited access to CDCR records. Defendants' counsel makes no effort whatsoever to explain why such a motion could not have been brought prior to the filing of the answer on behalf of these defendants or in the previous two motions to dismiss. This court had expended resources and time to screen the case, rule on two separate motions to dismiss and adjudicate a discovery dispute. Nor is the question of exhaustion, or lack thereof, of administrative remedies a jurisdictional one. Wyatt v. Terhune, 315 F.3d 1108, 1119 n. 13 (9th Cir. 2003) ("PLRA exhaustion is not a jurisdictional requirement.") Accordingly, the undersigned will not reach the merits of defendants' claim for failure to exhaust administrative remedies.

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[2] Moreover, some courts in this district specifically schedule the filing of nonenumerated 12(b) motions two or three months beyond the filing of the answer, which, of course, is certainly and entirely within a court's discretion. See, e.g., Hill v. Williams, 2008 WL 5212591, *7 (E.D. Cal. 2008); Johnson v. Shawnego, 2007 WL 509226 (E.D. Cal. 2007).

VII. Equal Protection

Defendants Khoury, Mitchell, Schwartz, Grannis, Pearson, Tilton and Kernan contend summary judgement should be granted as to plaintiff's Equal Protection claim as there is no genuine issue as to any material fact.

Legal Standard

The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985).

Analysis

Plaintiff alleges that these defendants violated the Equal Protection clause by not providing plaintiff with a porter job and by not providing orientation pamphlets to EOP inmates regarding prison jobs. Plaintiff's claims fail for several reasons.

It is undisputed that plaintiff eventually was given work as a porter for four hours a day, one day a week, for two to three months. Nevertheless, plaintiff has still failed to demonstrate facts that would show a violation of Equal Protection. It is undisputed that other EOP inmates were given work as porters, thus there is no claim that EOP inmates as a class were denied this job. Rather, plaintiff alleges that prison officials favored certain EOP inmates for this work, but plaintiff provides no allegations that the certain EOP inmates were of one specific class. Thus, plaintiff can demonstrate no disparate treatment. That plaintiff originally wanted a job and was not provided one will not support an Equal Protection claim or any other constitutional claim. See Coakley v. Murphy, 884 F.2d 1218, 1221 (9th Cir. 1989) (no constitutional right to continuation in work release program to implicate property interest under Fourteenth Amendment).

Plaintiff's claim that EOP inmates did not receive orientation pamphlets regarding porter jobs also fails to state a viable Equal Protection claim. It is undisputed that orientation

pamphlets were being created, and in their absence plaintiff was verbally informed about the porter job. More importantly, it is undisputed that no EOP inmates received pamphlets, thus plaintiff has failed to demonstrate that he was treated any differently than the other similarly situated inmates.

Moreover, none of the defendants that plaintiff has named with respect to these claims were responsible for providing porter jobs or creating pamphlets. Plaintiff argues that all of these defendants are liable as they were supervisors at CMF.[3] Supervisory personnel are generally not liable under § 1983 for the actions of their employees under a theory of respondeat superior and, therefore, when a named defendant holds a supervisorial position, the causal link between him and the claimed constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory allegations concerning the involvement of official personnel in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

In his opposition to the motion for summary judgment, plaintiff argues that these defendants as supervisors failed to properly supervise their employees. However, other than these conclusory allegations, plaintiff sets forth no facts that the defendants were somehow responsible for deciding who received porter jobs.

Thus, there is no genuine issue as to any material facts regarding plaintiff's Equal Protection claims. Summary judgment should be granted for defendants Khoury, Mitchell, Schwartz, Grannis, Pearson, Tilton and Kernan.

VIII. Retaliation

Defendant Baker argues that summary judgment should be granted as plaintiff has failed to demonstrate the elements of his retaliation claim.

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[3] It is undisputed that defendant Tilton was not even working at CMF when plaintiff's claims arose.

Legal Standard

"Within the prison context, a viable claim of First Amendment retaliation entails five basic 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 ." Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

In order to state a colorable retaliation claim, an inmate must allege either that the alleged retaliation either chilled the inmate's exercise of his First Amendment rights or that he suffered more than minimal harm. Rhodes, 408 F.3d at 567 n. 11. An objective standard governs the chilling inquiry. Brodheim v. Cry, 549 F. 3d 1262, 1271 (9th Cir. 2009). "A plaintiff does not have to show that 'his speech was actually inhibited or suppressed,' but rather that the adverse action at issue 'would chill or silence a person of ordinary firmness from future First Amendment activities.' " Id., quoting Rhodes, 408 F.3d at 568-69.

Analysis

The exact nature of plaintiff's claims against defendant Baker are difficult to discern. Defendant Baker maintains that plaintiff threatened to kill her. Plaintiff states that he did not threaten to kill her but called her a loudmouth and stated to her that he was going to contact government officials and file civil lawsuits against her. It is undisputed that as a result of the RVR filed by defendant Baker, plaintiff spent approximately six months in Ad. Seg. The court finds that this time in Ad. Seg. is more than a minimal harm for purposes of a retaliation claim. The court also notes that all time credit losses were restored.

Plaintiff first claims that defendant Baker filed the RVR to cover up her bringing in contraband to the facility, such as tobacco and drugs and for engaging in sexual acts with another inmate. Other than these statements plaintiff provides no factual support to bolster these allegations. Plaintiff does not explain why filing an RVR against him and making up a story that plaintiff threatened to kill her would cover up any of defendant Baker's alleged activities. Nor

does plaintiff allege that he ever reported Baker for this alleged activity and that was the reason for the retaliation. Plaintiff also alleges that defendant Baker's behavior was also a result of her attempts to prevent plaintiff from obtaining a porter job. Again, it is not clear how defendant Baker is related to plaintiff's attempts to obtain a porter job and, of course, plaintiff was given a porter job for two to three months.

Plaintiff has failed to set forth sufficient facts to support a claim of retaliation. First, it is not clear from plaintiff's pleadings what was his protected conduct that led to defendant Baker filing the RVR. Plaintiff also states that defendant Baker was retaliating due to plaintiff's grievances regarding the porter job, but plaintiff has presented no evidence that Baker was involved with his claims regarding the porter jobs or that she was even named in a grievance related to the porter jobs. While filing grievances is protected, plaintiff has failed to show that defendant Baker was taking action against plaintiff for this protected activity.

To the extent that plaintiff could argue that defendant Baker filed the RVR because plaintiff called her a loudmouth and said he was going to contact government officials and file civil lawsuits against her, threats such as these or other insults against prison staff are not protected. See Mitchell v. Hernandez, 2008 WL 2489210 *3 (E.D. Cal. June 17, 2008). Plaintiff has not described any lawsuits that he filed against defendant Baker or could have filed against her that would constitute legitimate protected conduct.

In addition, while plaintiff does not have to actually show that his speech was actually inhibited or suppressed, see Rhodes, 408 F. 3d. 568-69, the court notes that while plaintiff was in Ad. Seg. between January 31, 2006 and August 2, 2006, he filed six new federal law suits in the Eastern District of California, including the instant case.[4]

Thus, even assuming that plaintiff's allegations are accurate, plaintiff has not demonstrated sufficient facts that defendant Baker's conduct was connected to any protected

[4] No. CIV S-06-0537, No. CIV S-06-1032, No. CIV S-06-1232, No. CIV S-06-1391, No. CIV S-06-1629 and No. CIV S-06-1577.

activity. Summary judgment should be granted for defendant Baker.[5]

IX. Due Process

Defendants Arnold, Mitchell, St. Germaine and Cullen argue that summary judgment should be granted regarding plaintiff's claims that his due process rights were violated with respect to his placement and retention in Ad. Seg. In the November 13, 2007 order (Doc. 22), the court found that plaintiff's allegations of atypical and significant hardships in Ad. Seg., regarding his heat medication, were at least sufficient to state a colorable due process claim. In the motion for summary judgment, defendants do not specifically address plaintiff's claims regarding the heat medication as an atypical and significant hardship. Thus, for purposes of the instant motion, plaintiff's heat medication allegations will be considered to have caused an atypical and significant hardship. However, the due process protections that plaintiff did receive will be analyzed.

Legal Standard

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701 (1972). State statutes and prison regulations may grant prisoners liberty interests sufficient to invoke due process protections. Meachum v. Fano, 427 U.S. 215, 223-27, 96 S.Ct. 2532 (1976). However, the Supreme Court has significantly limited the instances in which due process can be invoked. Pursuant to Sandin v. Conner, 515 U.S. 472, 483, 115 S.Ct. 2293 (1995), a prisoner can show a liberty interest under the Due Process Clause of the Fourteenth Amendment only if he alleges a change in confinement that imposes an "atypical and significant hardship ... in relation to the ordinary incidents of prison

[5] Pursuant to the May 18, 2010 Related Case Order, the instant case has been related to CIV S-06-1139 and CIV S-06-1232. Case CIV S-06-1232 contains identical claims against defendant Baker, where motions are also pending. As it is recommended that summary judgment be granted for Baker in the instant case, the undersigned will also recommend in separate findings and recommendations that Baker be dismissed from Case CIV S-06-1232.

life." Id. at 484. As stated above, the court will assume that plaintiff's placement in Administrative segregation implicated a liberty interest.

Moreover, "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." Wolff v. McDonnell, 418 U.S. 539, 556, 94 S.Ct. 2963 (1974). With respect to prison disciplinary proceedings, the minimum procedural requirements that must be met are: (1) written notice of the charges; (2) at least 24 hours between the time the prisoner receives written notice and the time of the hearing, so that the prisoner may prepare his defense; (3) a written statement by the fact finders of the evidence they rely on and reasons for taking disciplinary action; (4) the right of the prisoner to call witnesses and present documentary evidence in his defense, when permitting him to do so would not be unduly hazardous to institutional safety or correctional goals; and (5) legal assistance to the prisoner where the prisoner is illiterate or the issues presented are legally complex. Id. at 563-71. Confrontation and cross examination are not generally required. Id. at 567. The right to call witnesses may legitimately be limited by "the penological need to provide swift discipline in individual cases ... [or] by the very real dangers in prison life which may result from violence or intimidation directed at either other inmates or staff." Ponte v. Real, 471 U.S. 491, 495, 105 S.Ct. 2192 (1985). As long as the five minimum Wolff requirements are met, due process has been satisfied. Walker v. Sumner, 14 F.3d 1415, 1420 (9th Cir.1994).

Analysis

After thoroughly reviewing the record regarding plaintiff's many hearings, it is evident that plaintiff was provided a great deal of due process protections and the Wolff requirements were met. When violations were discovered, the findings were vacated and plaintiff was provided new hearings.

Plaintiff was placed in Ad. Seg. on January 31, 2006, and the following day was provided with an Ad. Seg. Placement Notice (CDC-114-D) that described the reasons for the

placement. On February 1, 2006, plaintiff met with defendant Arnold for an initial hearing regarding the placement. Plaintiff provided a list of questions that plaintiff wanted an investigative employee to ask witnesses in relation to the charges. The ICC held a hearing with plaintiff on February 8, 2006, to review his retention in Ad. Seg. Plaintiff participated in the hearing and his witness' statements were reflected, in that his witnesses stated that they did not hear plaintiff threaten defendant Baker. Nevertheless, the ICC ruled against plaintiff and retained him in Ad. Seg.

On March 15, 2006, the ICC met again to review whether plaintiff should remain in Ad. Seg. The ICC noted that plaintiff had been found guilty of the lesser included offense of action leading to violence based on the incident with defendant Baker.[6] Plaintiff attended this hearing and actively participated. The ICC decided to retain plaintiff in Ad. Seg. pending referral for a transfer to another institution.

On April 12, 2006, plaintiff attended another ICC hearing, where he actively participated. The ICC reiterated that plaintiff would be kept in Ad. Seg. pending transfer to another institution.

On April 27, 2006, the RVR related to defendant Baker was ordered reissued and reheard because defendant Baker did not personally attend the first hearing. On July 20, 2006, the reissued RVR was dismissed and plaintiff was referred to placement on a reintegrated mixed exercise yard and all time credit losses were restored .

On July 21, 2006, plaintiff was issued a new Ad. Seg. Placement Notice indicating that he was being retained in Ad. Seg. due to defendant Baker's safety concerns pending an ICC review. On the same day an initial hearing was conducted and plaintiff was

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[6] It is not clear what date plaintiff was found guilty of this offense. In plaintiff's opposition he states that from March 2, 2005 to March 5, 2005, the disciplinary hearing was held and he was denied the ability to present witnesses. Assuming this is true, it is moot as the finding from this hearing was dismissed on April 27, 2006 by defendants, and plaintiff was provided a new hearing where the entire offense was dismissed.

retained in Ad. Seg. On July 26, 2006, an ICC hearing was held and plaintiff was kept in Ad. Seg, pending his transfer to another prison. Another ICC hearing was held on August 2, 2006 and plaintiff personally appeared. The ICC found that plaintiff no longer needed to be held in Ad. Seg. and should be released into EOP housing.

Ultimately, the charges against plaintiff were dismissed and he was credited with all time credits lost. Plaintiff objects to the outcome of certain hearings. That plaintiff disagrees with the outcome of certain hearings is not sufficient to find a violation of due process. For example, plaintiff alleges that his due process rights were violated because he was found guilty of threatening defendant Baker, despite his witnesses stating he did not threaten her. However, the ICC hearing decision reflects that plaintiff's investigative employee interviewed the inmate witnesses that plaintiff requested and the inmate witnesses stated that plaintiff did not make any threats. MSJ at 350. That the ICC members chose not to credit this evidence is not a due process violation.[7]

While plaintiff's complaint includes many similar examples of alleged due process violations,[8] his opposition to summary judgment only discusses that he requested witnesses at the initial hearing but defendant Mitchell's report falsely states that plaintiff did not request witnesses. Even if plaintiff did request witnesses at the initial hearing and witnesses were not allowed, plaintiff has failed to show this was a due process violation. The right to call witnesses may be limited, and regardless, the witness testimony was considered in the decision. See Ponte v. Real, 471 U.S. at 495. In addition, the results from the hearing where plaintiff alleges he was denied the ability to present witnesses, was dismissed and plaintiff was later

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[7] Plaintiff also requested his investigative employee interview the Honorable Peter C. Lewis, a Magistrate Judge in the Southern District of California, who apparently was involved in a telephone settlement conference with plaintiff regarding an unrelated case. Opposition at 52. That Judge Lewis was not interviewed regarding plaintiff's RVR is also not a violation of due process.

[8] Plaintiff's demand for a polygraph examination was also denied.

provided a new hearing where all charges were dismissed.

Thus, plaintiff has failed to show any violation of due process and summary judgment should be granted to defendants Arnold, Mitchell, St. Germaine and Cullen.[9]

X. Qualified Immunity & Injunctive Relief

Because the court has found that the conduct alleged by plaintiff does not state a constitutional deprivation, the court need not address defendants' argument for qualified immunity.

To the extent that plaintiff has requested injunctive relief, any such claim is denied as plaintiff has failed to state a constitutional deprivation and plaintiff is no longer housed at CMF, so the claims are moot.

IT IS HEREBY ORDERED that defendants' August 27, 2009 motion for an extension to file a summary judgment motion (Doc. 80) is granted.

Accordingly, IT IS HEREBY RECOMMENDED that the October 5, 2009 motion for summary judgment (Doc. 82), be granted and this case closed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within fourteen days after service of the objections. The parties are

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[9]While extreme deprivations of basis necessities may implicate substantive due process, plaintiff's allegations in no way rise to the level of a substantive due process violation. Moreover, any such deprivation would be better analyzed under the Eighth Amendment.

advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: June 18, 2010

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

GGH: AB
wils0537.sj