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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID WAYNE WILSON,

Plaintiff,

No. CIV S-06-1232 FCD GGH P

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

FINDINGS AND RECOMMENDATIONS

I. Introduction

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s motion for summary judgment filed on January 11, 2010 (Doc. 52) to which defendants opposed on May 6, 2010 (Doc. 60) and defendants’ motion for judgment on the pleadings filed on May 5, 2010 (Doc. 56) to which plaintiff filed an opposition on May 28, 2010 (Doc. 63). For the reasons that follow, the undersigned recommends that this case be closed.

II. Background

This case is proceeding on the second amended complaint (SAC), filed on April 20, 2007. Plaintiff suffers from a serious mental illness and is a participant in the Enhanced Outpatient Program (EOP). Plaintiff alleges violations of his constitutional rights under the First,

1 Eighth and Fourteenth Amendments in this suit.¹ The remaining defendants are Correctional
2 Officers Nesbeth, Hislip and Baker.

3 On May 18, 2010, a Related Case Order was issued with respect to the instant
4 case and CIV S-06-1139 FCD GGH and CIV S-06-537 FCD GGH. Plaintiff's claims against
5 Baker in the instant case were addressed in CIV S-06-0537 FCD GGH, as the claims are
6 identical. The undersigned has issued concurrent findings and recommendations in that case and
7 recommended that summary judgment be granted and the case closed. Therefore, the claims
8 against Baker in this action should be dismissed as duplicative. Adams v. Cal. Dept. of Health
9 Services, 487 F.3d 684, 688 (9th Cir. 2007). In the alternative, Baker should be dismissed for the
10 same reasons set forth in the findings and recommendations in case CIV S-06-0537 FCD GGH.

11 Plaintiff alleges that Nesbeth placed plaintiff in Administrative Segregation (Ad.
12 Seg.) by fabricating stories and this was in retaliation for plaintiff requesting cell unlocks, filing
13 staff complaints, threatening to sue Nesbeth and for gathering signatures for a petition against
14 Nesbeth. Case CIV S-06-1139 FCD GGH contains the same claims against Nesbeth. In that
15 case, the prior magistrate judge assigned to the case dismissed plaintiff's third amended
16 complaint in its entirety without leave to amend. Plaintiff appealed and the Ninth Circuit
17 affirmed as to the dismissal of all claims and defendants except for Nesbeth and the claim of
18 retaliation. See Docs. 22, 30. Case CIV S-06-1139 FCD GGH now continues solely on the
19 retaliation claims against Nesbeth. There are no dispositive motions pending in that case as
20 discovery closed on June 7, 2010 and all dispositive motions shall be filed within 90 days after
21 the close of discovery. As case CIV S-06-1139 FCD GGH continues solely on the claims against
22 Nesbeth, the undersigned recommends that Nesbeth be dismissed from the instant action due the
23 duplicative nature of the claims. See Adams, 487 F.3d at 688.

24 With respect to the sole defendant left in the instant case, plaintiff states that
25

26 ¹ Other claims and defendants have previously been dismissed.

1 Hislip threatened to confine plaintiff to his cell for requesting cell unlocks, gathering signatures
2 against Hislip for a petition and for wanting to use the dayroom.

3 III. Judgment on the Pleadings

4 Legal Standard

5 Judgment on the pleadings is appropriate when, even if all material facts in the
6 pleading under attack are true, the moving party is entitled to judgment as a matter of law.
7 Honey v. Distelrath, 195 F.3d 531, 532-33 (9th Cir. 1999) (citing Nelson v. City of Irvine, 143
8 F.3d 1196, 1200 (9th Cir. 1998)). The court must assume the truthfulness of the material facts
9 alleged in the complaint. All inferences reasonably drawn from these facts must be construed in
10 favor of the responding party. Westlands Water Dist. v. Firebaugh Canal, 10 F.3d 667, 670 (9th
11 Cir. 1993); see also General Conference Corp. of Seventh-Day Adventists v. Seventh Day
12 Adventist Congregation Church, 887 F.2d 228, 230 (9th Cir. 1989). In addition, all allegations
13 of fact by the party opposing the motion are accepted as true, and are construed in the light most
14 favorable to that party. McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir.1988).
15 Allegations of the moving party which have been denied are assumed to be false. Hal Roach
16 Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir.1990).

17 Analysis

18 Plaintiff's SAC contains only one sentence describing the allegations against
19 Hislip. Plaintiff states, "On September 30, 2005, Plaintiff gathered signatures Affidavit for C/O
20 Hislip threatened Plaintiff to confined to cell for requesting cell unlocks, Exhibit's S.H.(3), S.H.
21 (4)." SAC at 3. The exhibits plaintiff references are a petition to remove Hislip from interacting
22 with EOP inmates due to the manner in which he conducts cell unlocks and an affidavit where
23 plaintiff states Hislip threatened to confine plaintiff to quarters when plaintiff disagreed with
24 Hislip's actions in that Hislip was taking inmates to the yard when plaintiff wanted to use the
25 dayroom. SAC at 15, 16. Plaintiff's motion for summary judgment and opposition to the
26 judgment on the pleadings contain no additional facts or allegations regarding Hislip.

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

6 Assuming that plaintiff’s allegation is true, he has failed to present a colorable
7 retaliation claim against Hislip. It is not clear if there was even any retaliation. There is no
8 evidence that Hislip took any adverse action against plaintiff, as it is not clear if plaintiff was
9 even confined to quarters. Even if Hislip confined plaintiff to quarters for wanting to use the
10 dayroom, this conduct does not support a retaliation claim as plaintiff has failed to describe any
11 protected conduct. Plaintiff has made no allegations that any grievances or suits were filed
12 against Hislip, prior to the alleged retaliation. Plaintiff requesting to use the dayroom when
13 Hislip was taking the inmates to the yard is not protected conduct.

14 Hislip’s threat to confine plaintiff to quarters will not support a retaliation claim
15 as verbal harassment alone is insufficient to state a claim. See Oltarzewski v. Ruggiero, 830 F.2d
16 136, 139 (9th Cir. 1987). Even threats of bodily injury are insufficient to state a claim, because a
17 mere naked threat is not the equivalent of doing the act itself. See Gaut v. Sunn, 810 F.2d 923,
18 925 (9th Cir. 1987). Mere conclusions of hypothetical retaliation will not suffice, a prisoner
19 must “allege specific facts showing retaliation because of the exercise of the prisoner's
20 constitutional rights.” Frazier v. Dubois, 922 F.2d 560, 562 (n.1) (10th Cir. 1990).

21 Plaintiff filed his original complaint in this case on June 6, 2006, which was
22 dismissed and plaintiff filed the operative second amended complaint on April 20, 2007.
23 Discovery ended on July 3, 2009, and plaintiff has already filed a motion for summary judgment.
24 Based on this procedural history and that plaintiff has repeatedly failed to allege more substantive
25 allegations against this defendant, Hislip should be dismissed from this action with prejudice.

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1 IV. Summary Judgment

2 The undersigned has reviewed plaintiff's motion for summary judgment and finds
3 that it is meritless. Moreover, as the court has recommended that the motion for judgment on the
4 pleadings be granted as to Hislip and claims against Nesbeth and Baker be dismissed as
5 duplicative, plaintiff's motion for summary judgment is denied.

6 Accordingly, IT IS HEREBY RECOMMENDED that:

- 7 1. Defendants' motion for judgment on the pleadings (Doc. 56) be granted and
8 defendant Hislip dismissed from this action with prejudice;
- 9 2. Defendant Baker be dismissed from this action due to the duplicative nature of
10 the claims against her and for the reasons set forth in CIV S-06-0537 FCD GGH;
- 11 3. Defendant Nesbeth be dismissed from this action due to the duplicative nature
12 of the claims against him but the claims will continue against him in CIV S-06-1139 FCD GGH;
- 13 4. Plaintiff's motion for summary judgment (Doc. 52) be denied;
- 14 5. This case be closed.

15 These findings and recommendations are submitted to the United States District
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
17 days after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be captioned
19 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
20 shall be served and filed within fourteen days after service of the objections. The parties are
21 advised that failure to file objections within the specified time may waive the right to appeal the
22 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23 DATED: June 18, 2010

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

25 GGH: AB
26 wils1232.sj