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

CLIFTON JEROME MCDANIEL,

Plaintiff,

No. CIV S-07-1189 JAM JFM (PC)

vs.

S. HUBBARD, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on three claims: an excessive force claim against defendant Cobbs; a deliberate indifference to conditions of confinement claim against defendant Carson; and a cover-up claim against defendants Cueva, Hall and Swan. This matter is before the court on defendants Cueva, Hall and Swans’ motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c).

**STANDARDS FOR A MOTION FOR JUDGMENT ON THE PLEADINGS  
PURSUANT TO FED. R. CIV. P. 12(c)**

Federal Rule of Civil Procedure 12(c) provides:

After the pleadings are closed--but early enough not to delay trial--  
a party may move for judgment on the pleadings.

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1 Fed. R. Civ. P. 12(c). In considering a motion for judgment on the pleadings the court accepts  
2 “all factual allegations in the complaint as true” and construes the allegations “in the light most  
3 favorable to the non-moving party.” Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009)  
4 (citing Turner v. Cook, 362 F.3d 1219, 1225 (9th Cir. 2004)). Judgment on the pleadings is  
5 appropriate “when there is no issue of material fact in dispute, and the moving party is entitled to  
6 judgment as a matter of law.” Fleming v. Pickard, *id.* (citing Heliotrope Gen., Inc. v. Ford  
7 Motor Co., 189 F.3d 971, 979 (9th Cir. 1999)).

### 8 **ALLEGATIONS OF THE COMPLAINT**

9 Plaintiff’s complaint contains the following allegations. At all times relevant to  
10 this action, plaintiff was a state prisoner housed at California Medical Facility in Vacaville. On  
11 July 25, 2006, plaintiff, who was on psychotropic medication, became ill due to high  
12 temperatures in his cell. He asserts his medication required extra precautions to be taken during  
13 periods of extreme heat. Not feeling well, plaintiff notified medical staff, who sent a nurse to  
14 examine plaintiff. Upon the nurse’s arrival, defendant Carson informed her that plaintiff was  
15 “allright” [*sic*] and that she could leave. Defendant Carson, however, was aware that plaintiff  
16 was not feeling well, having asked plaintiff earlier, “What’s wrong you can’t stand a little heat?”  
17 (Compl. at 6.) Plaintiff, who was unconscious at the time, became aware of defendant Carson’s  
18 statements through various inmates and the visiting nurse. Plaintiff claims he suffered  
19 irreparable brain damage as a result of defendant Carson’s actions.

20 Also, on October 21, 2006, defendant Cobbs allegedly slammed a cell door onto  
21 plaintiff’s arthritic shoulder. Plaintiff claims he has been prescribed more medication due to the  
22 injury caused by defendant Cobbs. Upon investigation of the incident, defendants Swan and  
23 Cueva threatened plaintiff by telling him that if he did not clear defendant Cobbs of the charges  
24 during his video-recorded examination, then he “would be locked up and all of [his] property  
25 would be destroyed and no one will ever see [him] or hear from [him] again.” (Compl. at 6.)  
26 Defendant Hall processed plaintiff’s inmate appeal regarding the Cobbs incident at the second

1 level of review. When plaintiff informed him of the threats, defendant Hall attempted to cover  
2 up the incident by claiming he did not know who defendants Swan and Cueva were and by  
3 failing to question plaintiff's witnesses.

#### 4 **DEFENDANTS' MOTION**

5 Defendants Swan, Cueva and Hall bring the present motion on four grounds: (1)  
6 plaintiff's claim of a cover-up is premature and must be dismissed; (2) plaintiff's factual  
7 allegations are insufficient to support a failure to protect claim; (3) plaintiff's factual allegations  
8 are insufficient to support a due process violation; and (4) defendant Hall is entitled to dismissal  
9 because plaintiff's complaint fails to state a claim against him or, alternatively, defendant Hall is  
10 entitled to qualified immunity.

##### 11 **1. Cover-Up Claim**

12 Defendants seek dismissal of plaintiff's cover-up claim against them on the  
13 ground that the claim is not ripe.

14 Allegations that officials engaged in a cover-up state a constitutional claim only if  
15 the cover-up deprived plaintiff of his right of access to courts by causing him to fail to obtain  
16 redress for the constitutional violation that was the subject of the cover-up. See Karim-Panahi v.  
17 Los Angeles Police Dept., 839 F.2d 621, 625 (9th Cir. 1988); Rose v. City of Los Angeles, 814  
18 F.Supp. 878, 881 (C.D. Cal. 1993). A cover-up claim is premature when, as here, plaintiff's  
19 action seeking redress for the underlying constitutional violations remains pending. See  
20 Karim-Panahi, 839 F.2d at 625 (claim alleging police cover-up of misconduct was premature  
21 when action challenging misconduct was pending); Rose, 814 F.Supp. at 881 (same).

22 Here, plaintiff brings a claim against defendant Cobbs for excessive force and a  
23 claim against defendants Swan, Cueva and Hall for covering up the incident. If plaintiff  
24 succeeds on his claim against defendant Cobbs, then he will have suffered no injury caused by  
25 defendants Swan, Cueva and Hall. If, however, plaintiff does not succeed on his claim against  
26 defendant Cobbs, then defendants Swan, Cueva and Hall might have successfully impeded

1 plaintiff's right of access to the courts. Accordingly, the court finds plaintiff's cover-up claim is  
2 not ripe until he can show that his underlying suit – his pending claim of excessive force against  
3 defendant Cobbs – fails.

4           Because plaintiff has not yet suffered harm as a result of the defendants' alleged  
5 cover-up, this court recommends that plaintiff's cover-up claim against defendants Swan, Cueva  
6 and Hall be dismissed without prejudice.

7 **2.           Failure to Protect Claim**

8           Defendants next seek dismissal of plaintiff's claim against them to the extent it is  
9 construed as a failure to protect claim.

10           The Eighth Amendment's prohibition on cruel and unusual punishment imposes  
11 on prison officials, among other things, a duty to "take reasonable measures to guarantee the  
12 safety of the inmates." Farmer v. Brennan, 511 U.S. 825, 832 (1991) (quoting Hudson v.  
13 Palmer, 468 U.S. 517, 526-27 (1984)). To properly allege an Eighth Amendment claim for  
14 failure to protect an inmate from violence, the inmate must assert that he was incarcerated under  
15 conditions posing a "substantial risk of serious harm," and that a prison official displayed  
16 "deliberate indifference" to that risk. Id. at 834. A prison official displays deliberate  
17 indifference to inmate-on-inmate violence when he is "both aware of facts from which the  
18 inference could be drawn that a substantial risk of serious harm exists, and he must also draw the  
19 inference." Id. at 837.

20           Examination of the first amended complaint reveals no facts to support a claim for  
21 failure to protect. Instead, plaintiff's claim against these defendants is predicated on their  
22 alleged attempts to "cover up [the defendant Cobbs] incident" and defendant Hall's "covering up  
23 the incident at the second level of review." Unsurprisingly, then, plaintiff fails to assert that he  
24 was incarcerated under conditions posing a "substantial risk of serious harm," and that these  
25 defendants displayed "deliberate indifference" to that risk. See Farmer, 468 U.S. at 834.

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2           Because plaintiff has not pleaded a failure to protect claim in his first amended  
3 complaint, this action is not subject to dismissal for his failure to state facts supporting such a  
4 claim. This aspect of defendants' motion for judgment on the pleadings should be denied.

5 **3.           Due Process Violation**

6           As a third ground for dismissal, defendants assert that to the extent plaintiff is  
7 claiming his due process rights were violated by them, his claim fails because he has not alleged  
8 any facts showing that his due process rights were implicated.

9           The Due Process Clause of the Fourteenth Amendment provides that the state  
10 shall not "deprive any person of life, liberty, or property, without due process of law." U.S.  
11 Const., amend. XIV, § 1. "Historically, this guarantee of due process has been applied to  
12 deliberate decisions of government officials to deprive a person of life, liberty, or property."  
13 Daniels v. Williams, 474 U.S. 327, 331 (1986). The purpose of the clause is to protect  
14 individuals from a government's arbitrary exercise of its powers. Id. Thus, the clause  
15 traditionally has protected against deliberately chosen, but arbitrary government actions.

16           Examination of the first amended complaint reveals that plaintiff's cover-up claim  
17 may allege a due process violation. Covering up the use of excessive force or using threats to  
18 thwart plaintiff's grievances may hinder plaintiff's access to the courts to redress a constitutional  
19 violation, a right protected by several constitutional provisions, including due process. See  
20 Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982); Hadley v. Gutierrez, 526 F.3d 1324, 1332  
21 (11th Cir. 2008) (right of access to the courts secured by Article IV's Privileges and Immunities  
22 Clause, First Amendment, Fifth Amendment, and Fourteenth Amendment). However, for the  
23 reasons set forth above, that claim is not ripe.

24           Accordingly, the court recommends that plaintiff's cover-up allegation, to the  
25 extent it is construed as a due process violation, be dismissed without prejudice.

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2 **4. Failure to Investigate**

3 Finally, defendants assert that defendant Hall is entitled to dismissal because the  
4 allegations against him arise solely through the inmate grievance process. While not specifically  
5 stated in his first amended complaint, plaintiff generally appears to grieve the review of his  
6 inmate appeal by defendant Hall.

7 The Due Process Clause protects prisoners from being deprived of liberty without  
8 due process of law. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). In order to state a cause of  
9 action for deprivation of due process, a plaintiff must first establish the existence of a liberty  
10 interest for which the protection is sought. “States may under certain circumstances create  
11 liberty interests which are protected by the Due Process Clause.” Sandin v. Conner, 515 U.S.  
12 472, 483-84 (1995). Liberty interests created by state law are generally limited to freedom from  
13 restraint which “imposes atypical and significant hardship on the inmate in relation to the  
14 ordinary incidents of prison life.” Id.

15 “[A prison] grievance procedure is a procedural right only, it does not confer any  
16 substantive right upon the inmates.” Azeez v. DeRobertis, 568 F. Supp. 8, 10 (N.D. Ill. 1982),  
17 accord Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993); see also Ramirez v. Galaza, 334  
18 F.3d 850, 860 (9th Cir. 2003) (no liberty interest in processing of appeals because no entitlement  
19 to a specific grievance procedure); Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001)  
20 (existence of grievance procedure confers no liberty interest on prisoner); Mann v. Adams, 855  
21 F.2d 639, 640 (9th Cir. 1988). “Hence, it does not give rise to a protected liberty interest  
22 requiring the procedural protections envisioned by the Fourteenth Amendment.” Azeez v.  
23 DeRobertis, 568 F.Supp. at 10; Spencer v. Moore, 638 F. Supp. 315, 316 (E.D. Mo. 1986).  
24 Actions in reviewing prisoner’s administrative appeal cannot serve as the basis for liability under  
25 a section 1983 action. Buckley, 997 F.2d at 495.

26 The substance of plaintiff’s claim against defendant Hall is that defendant Hall

1 failed to adequately investigate plaintiff's claim against defendant Cobbs and lied about knowing  
2 defendants Swan and Cuevo. Because this claim arises from defendant Hall's review of  
3 plaintiff's administrative appeal, it cannot serve as the basis for liability in this action. See  
4 Buckley, 997 F.2d at 495.

5 Accordingly, the court recommends that defendants' motion for judgment on the  
6 pleadings be granted with prejudice on this ground as to defendant Hall.

7 IT IS HEREBY RECOMMENDED that:

8 Defendants' November 9, 2009 motion for judgment on the pleadings be granted  
9 in part and denied in part:

10 1. Plaintiff's cover-up claim against defendants Swan, Cueva and Hall be  
11 dismissed without prejudice; and

12 2. Plaintiff's failure to investigate claim against defendant Hall be dismissed with  
13 prejudice.

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

22 DATED: August 12, 2010.

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25 UNITED STATES MAGISTRATE JUDGE  
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