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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

Case No.: 3:17-cv-00068-MMD-WGC

CLIFFORD W. MILLER,

Plaintiff

v.

ROMEO ARANAS, et. al.,

Defendants

**Order**

Re: ECF No. 60

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Before the court is Plaintiff's Motion for Leave to File Third Amended Complaint (TAC) (ECF No. 60), declaration of counsel in support of the motion (ECF No. 60-1), and proposed TAC (ECF No. 60-2). Defendants filed a response (ECF No. 61, 61-1 to 61-9) and errata to the response (ECF No. 62, 62-1). Plaintiff filed a reply. (ECF No. 65.)

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For the reasons set forth below, Plaintiff's motion is granted and the TAC will be filed as the operative complaint.

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**I. BACKGROUND**

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Plaintiff filed his original complaint and application for leave to proceed in forma pauperis (IFP) on February 2, 2017. (ECF Nos. 1, 1-1.) The court screened the complaint, and dismissed it with leave to amend. (ECF No. 3.) Plaintiff filed a first amended complaint (FAC) on February 27, 2018. (ECF No. 5.) The court screened the FAC and determined Plaintiff could proceed with an Eighth Amendment deliberate indifference to serious medical needs claim based on allegations that he was blind in one eye, he was seen by doctors who told him his condition was treatable but he was not provided the required surgery. (ECF No. 6.)

1 Plaintiff was proceeding pro se when he filed the complaint and FAC. On August 27,  
2 2019, Terri Keyser-Cooper, Esq., appeared on behalf of Plaintiff (ECF No. 26), and filed a  
3 motion for leave to file a second amended complaint (SAC) (ECF No. 27) and proposed SAC  
4 (ECF No. 27-2). The court granted the motion, and allowed Plaintiff to proceed with the SAC  
5 which asserted an Eighth amendment deliberate indifference to serious medical needs claim  
6 against Dr. Romeo Aranas, as well as a claim under Title II of the Americans with Disabilities  
7 Act (ADA) against the Nevada Department of Corrections (NDOC). (ECF No. 34, SAC filed at  
8 ECF No. 35.)

9 On November 19, 2019, Plaintiff filed a motion for preliminary injunction seeking the  
10 following relief: (1) modification of NDOC's alleged policy of rejecting one-eyed prisoners for  
11 corrective surgery; and (2) that his disciplinary conviction for filing a grievance for his ADA  
12 claim be expunged. (ECF Nos. 38, 38-1 to 38-5.) Defendants filed a response. (ECF Nos. 45, 45-  
13 1 to 45-9.) Plaintiff filed a reply. (ECF Nos. 48, 48-1.)

14 Plaintiff subsequently filed a motion for partial summary judgment. (ECF Nos. 51, 51-1  
15 to 51-4.) Defendants filed a response. (ECF Nos. 55, 55-1 to 55-8, errata at ECF Nos. 56, 56-1.)

16 The court held a hearing on the motion for preliminary injunction on March 2, 2020. The  
17 court first discussed the motion's request for an order expunging Plaintiff's disciplinary record.  
18 Plaintiff asserted that he was improperly disciplined for filing a grievance to exhaust his  
19 administrative remedies as to the ADA claim. Plaintiff's counsel explained that this was part of a  
20 claim for retaliation under the ADA, but acknowledged that the retaliation claim was not part of  
21 the FAC. Deputy Attorney General (DAG) Rands represented that he would discuss with his  
22 clients whether they would agree to expunge the disciplinary conviction, which would render  
23 that aspect of the motion for preliminary injunction moot.

1 The court also addressed Defendants' request to postpone resolution of Plaintiff's motion  
2 for partial summary judgment because Defendants sought to conduct discovery, including  
3 deposing some of Plaintiff's treating doctors. DAG Rands advised the court that NDOC was in  
4 the process of having Plaintiff referred to a general ophthalmologist for a consultation regarding  
5 cataract surgery. DAG Rands further represented that Plaintiff was already authorized for  
6 surgery if it was recommended by the ophthalmologist.

7 The court ordered that the motion for preliminary injunction and motion for partial  
8 summary judgment would be held in abeyance for 90 days so that DAG Rands could confer with  
9 his client on the disciplinary issue, and so Plaintiff could be seen by a general ophthalmologist  
10 for the surgery consultation and so additional discovery could be conducted. The court allowed  
11 Defendants to file a supplement to their response to the motion for partial summary judgment by  
12 June 12, 2020, and Plaintiff to file a reply by June 26, 2020. (ECF No. 59.) An extension was  
13 granted, and the supplement was filed on June 18, 2020. (ECF Nos. 68, 68-1 to 68-10.) Plaintiff  
14 filed his reply on June 30, 2020. (ECF Nos. 69, 69-1 to 69-5.)

15 On March 15, 2020, Plaintiff filed this motion seeking leave to file the TAC. (ECF No.  
16 60.) Plaintiff's counsel represents that she spoke to Mr. Rands on March 13, 2020, and he  
17 informed her that NDOC refused to expunge Plaintiff's disciplinary conviction from his record,  
18 which resulted in the filing of this motion to amend to add a claim for retaliation under the ADA.  
19 The court will now address the propriety of the amendment.

## 20 **II. DISCUSSION**

### 21 **A. Legal Standard**

22 "A party may amend its pleading once as a matter of course within: (A) 21 days after  
23 serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after

1 service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f),  
2 whichever is earlier.” Fed. R. Civ. P. 15(a)(1)(A), (B). Otherwise, a party must seek the opposing  
3 party’s written consent or leave of court to amend a pleading. Fed. R. Civ. P. 15(a)(2).

4 “The court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2).  
5 Leave to amend need not be given where amendment: “(1) prejudices the opposing party; (2) is  
6 sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile.” *Amerisource Bergen*  
7 *Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006) (citation omitted).

8 In addition, “[t]he court shall review, before docketing, if feasible or, in any event, as  
9 soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress  
10 from a governmental entity or office or employee of a governmental entity.” 28 U.S.C. §  
11 1915A(a). “On review, the court shall identify cognizable claims or dismiss the complaint, or  
12 any portion of the complaint, if the complaint-- (1) is frivolous, malicious, or fails to state a  
13 claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is  
14 immune from such relief.” 28 U.S.C. § 1915A(b)(1)-(2).

15 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
16 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and  
17 28 U.S.C. § 1915A(b)(1) track that language. Thus, when reviewing the adequacy of a complaint  
18 under 28 U.S.C. § 1915(e)(2)(B)(ii) or 28 U.S.C. § 1915A(b)(1), the court applies the same  
19 standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th  
20 Cir. 2012). Review under 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*  
21 *Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

22 In reviewing the complaint under this standard, the court must accept as true the  
23 allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all

1 doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations  
2 omitted). Allegations in pro se complaints are "held to less stringent standards than formal  
3 pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotation marks  
4 and citation omitted).

5 A complaint must contain more than a "formulaic recitation of the elements of a cause of  
6 action," it must contain factual allegations sufficient to "raise a right to relief above the  
7 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading  
8 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]  
9 a legally cognizable right of action." *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice &*  
10 *Procedure* § 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state "enough facts  
11 to state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556  
12 U.S. 662, 678 (2009).

### 13 **B. Analysis**

14 Defendants do not argue, and the court does not find, that amendment will prejudice  
15 Defendants, is sought in bad faith, or will result in an undue delay in the litigation. The claim  
16 simply alleges that Plaintiff was required to exhaust his administrative remedies as to all claims he  
17 intended to pursue in a lawsuit under the Prison Litigation Reform act (PLRA); he initially filed a  
18 grievance regarding his Eighth Amendment Claim, and filed a lawsuit alleging the Eighth  
19 Amendment claim; he subsequently retained counsel and determined that he needed to amend his  
20 lawsuit to assert an ADA claim; therefore, he filed a second grievance asserting violation of the  
21 ADA. He contends he was then improperly disciplined for filing the ADA grievance.

22 The court will now address Defendants' argument that amendment would be futile and the  
23 related issue of whether he states a colorable claim for retaliation under Title II of the ADA.

1 The Ninth Circuit applies the "Title VII burden-shifting framework, as established in  
2 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), to  
3 retaliation claims under the ADA." *T.B. v. San Diego Unified School Dist.*, 806 F.3d 451, 472-73  
4 (9th Cir. 2015) (citations omitted), *as amended Nov. 19, 2015*. Under this standard, to make out a  
5 prima facie case for retaliation, the Plaintiff must establish that: "(a) that he or she was engaged  
6 in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal  
7 link between the two." *Id.* at 473 (internal quotation marks and citation omitted). The "standard  
8 for the 'causal link' is but-for-causation, a more stringent test." *Id.*

9 In the TAC, Plaintiff alleges he is an inmate who has no prior disciplinary history. He  
10 engaged in a protected activity, filing a grievance under the ADA, and suffered an adverse  
11 action: discipline for filing a grievance under the ADA. He goes on to aver that there is a causal  
12 connection between the discipline and his exercise of his protected rights. He alleges that the  
13 adverse action was intentional and made with reckless indifference to his federally protected  
14 rights under the ADA. He contends that his only hope for eventual freedom is from the Pardon  
15 Board, and to gain any such relief he must have a perfect discipline record. Therefore, he  
16 contends he was harmed by the retaliatory discipline. He seeks damages and injunctive relief,  
17 including removal and expungement of the discipline from his record. (ECF No. 60-2 at 16-17.)

18 Plaintiff has alleged facts sufficient to state a claim for retaliation under Title II of the  
19 ADA in the TAC. Nevertheless, Defendants argue that amendment to assert a retaliation claim  
20 under Title II of the ADA would be futile because: (1) there is no requirement for administrative  
21 exhaustion under the ADA, and there was no retaliation because Plaintiff was properly  
22 disciplined for filing two grievances arising out of the same claim; (2) the discipline will not  
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1 affect Plaintiff's chance at a pardon; (3) he cannot proceed with an ADA claim because he did  
2 not comply with NDOC's requirements.

3 First, Defendants assert that under Administrative Regulation 740.04, it is an abuse of the  
4 grievance procedure to file a grievance that contains specific claims or incidents previously filed  
5 by the same inmate. They contend that Plaintiff's second grievance arose out of the same claim  
6 and requested the same remedy; therefore, disciplining him for filing the second grievance was  
7 proper. They assert that Plaintiff filed a grievance requesting surgery for his eye, and several  
8 months later filed a second grievance requesting surgery on his eye; therefore, these are  
9 essentially the same grievance. Plaintiff was charged and convicted of abuse of the grievance  
10 process because the first and second grievances arose out of the same claim and requested the  
11 same remedy. They maintain that the discipline was proper and was not retaliatory. Defendants  
12 argue that there is no requirement under Title II of the ADA for administrative exhaustion before  
13 filing suit, implying there was no need to file a second grievance.

14 To the extent Defendants are arguing there was no retaliation because Plaintiff was not  
15 required to file a grievance under the ADA and therefore he was properly charged with filing two  
16 grievances arising from the same claim, this issue was squarely addressed in *O'Guinn v.*  
17 *Lovelock Correctional Center*, 502 F.3d 1056 (9th Cir. 2007). There, the Ninth Circuit held that  
18 "[t]he plain language of the PLRA, as well as Supreme Court and Ninth Circuit precedent, lead  
19 us to conclude that exhaustion is required for ADA [ ] claims." *Id.* at 1061. The Ninth Circuit  
20 pointed out that the PLRA clearly states: "No action shall be brought with respect to prison  
21 conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in  
22 any jail, prison, or other correctional facility until such administrative remedies as are available  
23 are exhausted." *Id.* (emphasis original, citing 42 U.S.C. § 1997e(a).) The ADA is a federal law;

1 therefore, a prisoner must exhaust available administrative remedies before bringing an action  
2 under the ADA. *Id.* "[E]xhaustion of available administrative remedies is required for *any* suit  
3 challenging prison conditions, not just for suits under § 1983." *Id.* (citation and internal quotation  
4 marks omitted).

5         The Ninth Circuit specifically addressed the case Defendants rely on, *Zimmerman v.*  
6 *Oregon Dep't of Justice*, 170 F.3d 1169 (9th Cir. 1999), which was decided prior to *O'Guinn*.  
7 The court recognized that Title II of the ADA does not require exhaustion of administrative  
8 remedies before filing suit. *Id.* The court noted that, on the other hand, nothing in the ADA  
9 exempts an inmate from the PLRA's exhaustion requirement. *Id.* Congress intended the PLRA to  
10 "apply to *all* federal laws with respect to prisoner suits, with the intent that prison officials would  
11 have the first opportunity to address prison conditions[.]" *Id.* (emphasis added). "This  
12 congressional intent would be defeated if prisoners were able to bring federal suits directly in  
13 district court wherever a federal statute lacked an exhaustion provision." *Id.* Thus, the PLRA  
14 requires that inmates exhaust administrative remedies before filing a claim under Title II of the  
15 ADA, even though the ADA itself does not require exhaustion. *Id.* at 1061-62.

16         Therefore, the court does not find Plaintiff's Title II ADA retaliation claim is futile on  
17 this basis. Plaintiff has adequately alleged a claim of retaliation under Title II of the ADA.  
18 Defendants may attempt to raise a genuine dispute of material fact as to whether the adverse  
19 action was taken because of Plaintiff's disability or because there was a violation of NDOC's  
20 grievance procedure in a *motion for summary judgment*; however, for purposes of pleading a  
21 claim in the TAC, his allegations are sufficient.

22         Second, Defendants contend that the "blemish" on his record will have no effect on his  
23 chances for an eventual pardon. They assert that he is serving four terms of life without the



1 possibility of parole, and even if he were to appear before the Parole Board, this discipline would  
2 not likely be considered. They refer to a Parole Risk Assessment form at ECF No. 61-7.

3 This form appears to list questions relevant to *parole* risk assessment. One of the areas of  
4 inquiry is offenses in custody in the 12 months preceding the hearing date. Preliminarily,  
5 Plaintiff's argument is that this could have an impact on a future *pardon* hearing. It is not clear  
6 that the *Pardon* Board considers the same criteria as is considered by the *Parole* Board, or  
7 whether the *Pardon* Board would consider Plaintiff's entire disciplinary history. Regardless,  
8 Plaintiff has sufficiently alleged he was harmed as a result of the adverse conduct because he  
9 received a disciplinary sanction. Therefore, the court does not find amendment would be futile  
10 on this basis.

11 Finally, Defendants state that under AR 658 an inmate seeking an accommodation must  
12 submit a DOC 2668 Inmate Disability Accommodation Request Form to initiate review of his  
13 request, and Plaintiff did not submit the request. AR 658 states that an inmate with a disability  
14 that believes he is not being reasonably accommodated will submit a grievance with a written  
15 request for accommodation in compliance with AR 740. (ECF No 61-8 at 7.) There is no doubt  
16 Plaintiff complied with this requirement. AR 658 later states that an inmate seeking an  
17 accommodation shall submit an Inmate Disability Accommodation Request Form (DOC 2668)  
18 (*id.* at 8); however, the court is not aware of any federal authority concluding that NDOC's  
19 internal requirements for submitting a form requesting an accommodation have any impact on an  
20 ADA claim filed in federal court. The PLRA requires an inmate to exhaust administrative  
21 remedies before filing suit. NDOC's grievance procedure set forth in AR 740 governs  
22 administrative remedies, and therefore, exhaustion, within NDOC. AR 658 contains an internal  
23 requirement to submit a form when an inmate seeks an accommodation, but AR 658 does *not*

1 state that this must be done in order for an inmate to file a federal ADA claim, or otherwise  
2 indicate that this is part of the exhaustion of administrative remedies in order to file a lawsuit in  
3 federal court. Therefore, the court also finds that the proposed amendment is not futile on this  
4 basis.

5 In sum, the court finds that amendment would not be futile; that Plaintiff states a  
6 colorable retaliation claim under Title II of the ADA; and, Plaintiff's motion for leave to file the  
7 TAC is granted. The court will separately address the pending motion for preliminary injunction  
8 and motion for partial summary judgment.

9 **III. CONCLUSION**

10 Plaintiff's motion for leave to file the TAC (ECF No. 60) is **GRANTED**. The Clerk shall  
11 **FILE** the TAC (ECF No. 60-2). Within **21 days** of the date of this Order, Defendants shall file  
12 an answer or otherwise respond to the TAC.

13 **IT IS SO ORDERED.**

14 Dated: July 22, 2020

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William G. Cobb  
17 United States Magistrate Judge  
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