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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Ernie Pete Ortega,
Plaintiff,

vs.

Dora Schriro, et. al.,
Defendants.

CV 07-2451-PHX-MHM (JCG)
REPORT & RECOMMENDATION

Pending before the Court is a Motion for Leave to Amend the Complaint filed by Plaintiff on March 11, 2009. (Doc. No. 48.) Defendants did not file a response to the Motion. The Magistrate recommends that the Motion for Leave to Amend be granted; the Magistrate has also screened the Proposed Second Amended Complaint pursuant to 28 U.S.C. § 1915A(a) and recommends that portions of the Proposed Second Amended Complaint be dismissed.

PROCEDURAL HISTORY

On December 3, 2007, Plaintiff Ernie Pete Ortega, who is confined in the Arizona State Prison Complex-Eyman in Florence, Arizona, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983. (Doc. No. 1.) The Court granted Plaintiff's second Application to Proceed *in Forma Pauperis* on April 15, 2008. (Doc. No. 13.) On that same date, the Court screened Plaintiff's Complaint pursuant to 28 U.S.C. § 1915A(a), ordered Defendant Hewitt to answer Count Two of the Plaintiff's original Complaint, and dismissed

1 the remaining claims and Defendants without prejudice. (*Id.*)

2 On May 13, 2008, Plaintiff filed his First Amended Complaint.¹ (Doc. No. 14.)
3 Pursuant to Rule 15(1)(A), Plaintiff was entitled to amend his Complaint as of right because
4 Defendant Hewitt had not yet filed a responsive pleading. Defendant Hewitt was served on
5 July 14, 2008. (Doc. No. 15.)

6 On July 17, 2008, Defendant Hewitt filed a Motion for Screening Order, requesting
7 that Plaintiff's First Amended Complaint be screened pursuant to 28 U.S.C. § 1915A(a) and
8 that Defendant Hewitt be relieved of any requirement to file a responsive pleading to the First
9 Amended Complaint until a new screening order is issued. (Doc. No. 16.) On August 22,
10 2008, the Magistrate issued a Report & Recommendation, recommending that: (1) Counts
11 1, 2 and 4 of the First Amended Complaint be dismissed without prejudice; (2) requiring
12 Defendant Hewitt to answer Counts 3 and 5; (3) requiring Defendants Kraicinski, Sambora
13 and Owens to answer Count 5; and (4) requiring Defendant Durrenburg to answer Counts 7
14 and 8. (Doc. No. 26.) The Report & Recommendation was adopted by the district court on
15 October 1, 2008. (Doc. No. 30.)

16 Defendant Hewitt filed a Motion to Dismiss Counts 3 and 5 on October 7, 2008.
17 (Doc. No. 31.) That Motion has been fully briefed and is pending in the district court.
18 Plaintiff has completed and returned service packets for Defendants Kraicinski, Sambora,
19 Owens and Durrenburg; those service packets have been processed by the U.S. Marshal's
20 Office and the Marshals are in the process of serving Defendants Kraicinski, Sambora,
21 Owens and Durrenburg. (Doc. No. 47.)

22 On March 11, 2009, Plaintiff filed a Motion for Leave to Amend his complaint and
23 lodged with the Court a Proposed Second Amended Complaint ("Second Amended
24 Complaint"). (Doc. Nos. 48 & 49.)
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27 ¹ The First Amended Complaint was filed without Plaintiff's signature. On July 29,
28 2008, the Court issued an Order requiring Plaintiff to complete and return a certificate form
certifying that Plaintiff's signature on the form shall serve as an original signature on the First
Amended Complaint. Plaintiff returned the certificate form on August 19, 2008.

1 ANALYSIS

2 **1. Motion for Leave to Amend**

3 The Federal Rules of Civil Procedure provide: “A party may amend the party's
4 pleading once as a matter of course at any time before a responsive pleading is served
5 Otherwise a party may amend the party's pleading only by leave of court or by written
6 consent of the adverse party.” Rule 15(a), Fed.R.Civ.P. Pursuant to Rule 15(a) of the
7 Federal Rules of Civil Procedure, the court may grant leave to amend “freely” “when justice
8 so requires.” However, the policy toward permitting liberal amendment of pleadings must
9 be tempered with considerations of undue delay, bad faith, dilatory motive on the part of the
10 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
11 prejudice to the opposing party by virtue of allowance of the amendment, or futility of
12 amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962)). The Court’s discretion to
13 deny or grant leave to amend is particularly broad where Plaintiff has previously been
14 permitted to amend his complaint. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90
15 F.3d 351, 355 (9th Cir. 1996).

16 Upon review of the Proposed Second Amended Complaint, the Magistrate
17 recommends that Plaintiff be permitted to amend. As stated in Section 2, below, some of the
18 counts of Plaintiff’s Proposed Second Amended Complaint properly allege claims for relief.
19 Given the procedural posture of the case, the Court finds that amendment will not cause
20 undue delay. There is no evidence before the Court to suggest that Plaintiff has acted in bad
21 faith or with dilatory motive. Plaintiff has not repeatedly failed to cure deficiencies identified
22 in previous amendments. Defendants will not suffer undue prejudice if amendment is
23 permitted. Although some of the proposed amendments are futile because they are without
24 legal merit, the Magistrate recommends that the amendment be permitted and that the futile
25 claims be dismissed during screening pursuant to 28 U.S.C. § 1915A(a).

26 Finally, because Plaintiff has had two opportunities to amend his complaint, the
27 Magistrate recommends that the district court exercise its discretion and order that no further
28 amendments be permitted.

1 **2. Screening of the Proposed Amended Complaint**

2 In his six-count Proposed Second Amended Complaint, Plaintiff sues Defendants
3 already named in his Amended Complaint, as well as numerous additional defendants (Dora
4 B. Schriro and various corrections officers).

5 In Count One, Plaintiff alleges that Defendant Hewitt violated Plaintiff's First
6 Amendment rights when he purposely denied a grievance and then refused to provide Risk
7 Management forms to Plaintiff even after the deputy warden (1) found in Plaintiff's favor on
8 appeal of the denial of the grievance and (2) informed Plaintiff that Defendant Hewitt would
9 provide Plaintiff with the Risk Management forms.² Liberally construed, Plaintiff has stated
10 a viable claim of First Amendment retaliation. The Magistrate recommends that Defendant
11 Hewitt be required to answer Count One of the Proposed Second Amended Complaint.

12 In Count Two, Plaintiff alleges that Defendants Hewitt, Kraicinski, Sambora, Owens,
13 and additional defendants Property Officer II Sikori, Chaplain Childs, Corrections Officer
14 III Provencio and Chaplain Henderson violated his First Amendment rights when: (1)
15 Defendant Hewitt arranged for Plaintiff to be transferred to another unit; (2) Property Officer
16 Sikori refused to issue Plaintiff needed clothing, repair his sink or issue him personal and
17 legal property; (3) Defendants Kraicinski and Owens held Plaintiff's legal documents and
18 refused to copy them; (4) Chaplain Childs refused to issue Plaintiff his Native American
19 Religious Church items; (5) Defendant Sambora refused to process Plaintiff's grievances;
20 (6) Corrections Officer Provencio delayed Plaintiff's grievances; (7) Chaplain Henderson
21 refused Plaintiff's request for a special religious diet. Liberally construed, Plaintiff has stated
22 a viable claims of First Amendment retaliation. Thus, the Magistrate recommends that
23 Defendants Hewitt, Kraicinski, Sambora, Owens, Property Officer II Sikori, Chaplain Childs,
24 Corrections Officer III Provencio and Chaplain Henderson be required to answer Count Two

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² Count One of the Proposed Second Amended Complaint is the same as Count Three of Plaintiff's First Amended Complaint, which the Court ordered Defendant Hewitt to answer.

1 of the Complaint.³

2 In Count Three of his Proposed Second Amended Complaint, Plaintiff alleges that
3 Defendant Durrenburg violated his Eighth Amendment rights by sending him to the Health
4 Unit via the West Yard, causing Plaintiff to be attacked.⁴ Plaintiff has properly alleged a
5 claim against Defendant Durrenburg for deliberate indifference/failure to protect in violation
6 of the Eighth Amendment.

7 In Count Four of his Proposed Second Amended Complaint, Plaintiff makes two
8 allegations. First, Plaintiff alleges that Defendant Durrenburg falsified disciplinary reports
9 following the attack on Plaintiff, in violation of Plaintiff's Fourteenth Amendment rights,
10 because Plaintiff is Native American. This allegation is identical to Count Seven of
11 Plaintiff's First Amended Complaint, which the Court required Defendant Durrenburg to
12 answer. Second, Plaintiff alleges that additional defendants Corrections Officer III
13 Provencio, Corrections Officer III Weerts and D.W. Kimble all denied Plaintiff's grievance
14 regarding Defendant Durrenburg's actions in further violation of Plaintiff's Fourteenth
15 Amendment rights. This second allegation fails to state a claim. A prisoner does not have
16 a protected liberty interest in prison grievance procedures. *See Mann v. Adams*, 855 F.2d
17 639, 640 (9th Cir. 1988), *cert. denied*, 488 U.S. 898 (1988). The mere denial of a grievance
18 does not give rise to the inference of active unconstitutional behavior. Where a defendant's
19 only involvement in the allegedly unconstitutional conduct is the denial of administrative
20 grievances, the failure to intervene on a prisoner's behalf to remedy alleged unconstitutional
21 behavior does not amount to active unconstitutional behavior for purposes of § 1983. *Shehee*
22 *v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999), *cert. denied*, 530 U.S. 1264 (2000).
23 Accordingly, Plaintiff has failed to state a Fourteenth Amendment claim against Corrections

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25 ³ Count Two of Plaintiff's Proposed Second Amended Complaint is essentially a
26 restatement of Count Five of Plaintiff's First Amended Complaint, except that Plaintiff has now
27 specifically named defendants Property Officer II Sikori, Chaplain Childs, Corrections Officer
28 III Provencio and Chaplain Henderson. The Court previously ordered Defendants Hewitt,
Kraicinski, Sambora and Owens to answer Count Five of the First Amended Complaint.

⁴ Count Three of the Proposed Second Amended Complaint is identical to Count Six of
Plaintiff's First Amended Complaint, which the Court ordered Defendant Durrenberg to answer.

1 Officer III Provencio, Corrections Officer III Weerts and D.W. Kimble.


2 In Count Five of his Proposed Second Amended Complaint, Plaintiff alleges a claim
3 not previously alleged in his First Amended Complaint: Plaintiff claims that Defendants
4 Special Security Officer Sgt. Antonelli and D.W. Carrillo violated Plaintiff's Fourteenth
5 Amendment rights when they moved Plaintiff to the East Yard, where he was assaulted due
6 to his race. Liberally construed, Count Five properly alleges a claim against Defendants
7 Antonelli and Carrillo for deliberate indifference/failure to protect in violation of the Eighth
8 Amendment.

9 In Count Six of his Proposed Second Amended Complaint, Plaintiff alleges that
10 additional defendants Corrections Officer III Gordon, D.W. Carrillo, Sgt. Grabowski,
11 Corrections Officers III Matthews, Corrections Officer III Camacho, Corrections Officer II
12 Haggie, S.S.U. Sgt. Antonelli, C.D.U. Property Officer Russell, Property Officer Dankek,
13 Sgt. O'Connor, Corrections Officer Sheridan, Corrections Officer III Woods, Librarian
14 Cooper and unidentified John Doe officers violated his First Amendment rights. In support
15 of this claim, Plaintiff provides a lengthy list of events – ranging from interference with
16 grievance procedures to mishandling property to placement decisions to issuing tickets to
17 Plaintiff for his hairstyle – which he claims occurred in retaliation against him. To state a
18 valid claim under § 1983, plaintiffs must allege that they suffered a specific injury as a result
19 of specific conduct of a defendant and show an affirmative link between the injury and the
20 conduct of that defendant. *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976). Plaintiff does
21 not allege specifically how any of the defendants identified in Count Six personally
22 participated in the deprivation of Plaintiff's constitutional rights. Because Plaintiff has failed
23 to demonstrate the link between Defendants' conduct and his alleged injuries, Plaintiff has
24 failed to state a claim in Count Six.

25 **RECOMMENDATION**

26 Based on the foregoing and pursuant to 28 U.S.C. § 636(b) and Local Rule 1.17(d)(2),
27 Rules of Practice of the United States District Court, District of Arizona, the Magistrate
28 Judge recommends that the District Court issue an Order:

- 1 1. GRANTING Plaintiff's Motion for Leave to Amend (Doc. No. 48);
- 2 2. ORDERING that the Proposed Second Amended Complaint currently lodged at Doc.
- 3 No. 49 be filed by the Clerk of the Court;
- 4 3. DISMISSING Count Six of Plaintiff's Proposed Second Amended Complaint;
- 5 4. DISMISSING Defendants Dora B. Schriro, Zaborski, Kimble, Weerts, Marrow,
- 6 Littleton, Gordon, Grabowski, Matthews, Camacho, Haar, Haggie, Russell, Dankek,
- 7 O'Connor, Sheridan, Woods, Scott, Cooper, #2818 and unidentified John Doe
- 8 officers;
- 9 5. DIRECTING the Clerk of the Court to send Plaintiff a service packet, summons and
- 10 request for waiver forms for Defendants Sikori, Childs, Provencio, Henderson,
- 11 Antonelli and Carrillo;
- 12 6. ORDERING Defendants Kraicinski, Sambora, Owens, Sikori, Childs, Provencio and
- 13 Henderson to answer or otherwise respond to Count 2;
- 14 7. ORDERING Defendant Durrenberg to answer or otherwise respond to Counts 3 and
- 15 4;
- 16 8. ORDERING Defendants Antonelli and Carrillo to answer or otherwise respond to
- 17 Count 5;
- 18 9. Construing Defendant Hewitt's Motion to Dismiss Counts 3 and 5 of the First
- 19 Amended Complaint as a Motion to Dismiss Counts 1 and 2 of the Second Amended
- 20 Complaint, as the allegations against Defendant Hewitt remain essentially the same
- 21 (Doc. No. 31);
- 22 10. ORDERING that Plaintiff is not permitted any further amendment of his complaint.
- 23 DATED this 3rd day of April, 2009.



Jennifer C. Guerin
United States Magistrate Judge