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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ernie Pete Ortega,
Plaintiff,
vs.
Dora Schriro, et al.,
Defendant.

No. CV-07-2451-PHX-MHM

ORDER

Currently pending before the Court is Defendants’ Motion to Dismiss Counts Three and Five of Plaintiff’s Amended Complaint, (Dkt.#31.), Plaintiff’s Motion for De Novo Review of Counts Six and Seven in the Amended Complaint, (Dkt.#33.), Motion for Leave to Amend Complaint, (Dkt.#48.), and Magistrate Judge Jennifer C. Guerin’s Report and Recommendation. (Dkt.#55.) After reviewing the record and determining oral argument unnecessary, the Court issues the following Order.

STANDARD OF REVIEW

The Court reviews the legal analysis in the Report and Recommendation de novo and the factual analysis de novo for those facts to which objections are filed, and for clear error for those facts to which no objections are filed. See 28 U.S.C. § 636(b)(1)(C); United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003)(en banc).

1 **FACTUAL BACKGROUND**

2 On May 13, 2008, Plaintiff Ernie Pete Ortega, *pro se*, filed a First Amended
3 Complaint against the instant Defendants asserting claims under 42 U.S.C. § 1983. On
4 October 1, 2008, this Court adopted Magistrate Judge Jennifer C. Guerin’s Report and
5 Recommendation (“R&R”) on Defendant Hewitt’s Motion for a Screening Order. In
6 adopting the Magistrate Judge’s recommendations, this Court ordered that Counts I, II and
7 IV in Plaintiff’s First Amended Complaint be dismissed without prejudice, that Defendant
8 Hewitt answer Counts III and V, that Defendants Kraicinski, Sambora and Owens answer
9 Count V, and that Defendant Durrenburg answer Counts VII and VIII. Defendants then
10 moved to Dismiss Plaintiff’s First Amended Complaint, to which Plaintiff responded by
11 filing a Motion for Leave to Amend his Complaint while simultaneously lodging a proposed
12 Second Amended Complaint.

13 On April 3, 2009, Magistrate Judge Guerin issued another R&R which recommended
14 granting Plaintiff’s Motion for Leave to Amend and the District Court not permit additional
15 amendments. The Magistrate Judge also screened Plaintiff’s Second Amended Complaint
16 and recommend (1) dismissing Count VI in its entirety, (2) dismissing from the case
17 Defendants Dora B. Schiro, Zaborski, Kimble, Weerts, Marrow, Littleton, Gordon,
18 Grabowski, Matthews, Camacho, Haar, Haggie, Russell, Dankek, O’Connor, Sheridan,
19 Woods, Scott, Cooper, #2818 and unidentified John Doe officers, (3) directing the Clerk
20 of the Court to send Plaintiff a service packet, summons and request for waiver forms for
21 Defendants Sikori, Childs, Provencio, Henderson, Antonelli and Carrillo, (4) ordering
22 Defendants Kraicinski, Sambora, Owens, Sikori, Childs, Provencio and Henderson to answer
23 or otherwise respond to Count II, (5) ordering Defendant Durrenberg to answer or otherwise
24 respond to Counts III and IV, (6) ordering Defendants Antonelli and Carrillo to answer or
25 otherwise respond to Count V, and (7) Construing Defendant Hewitt’s Motion to Dismiss
26 Counts III and V of the First Amended Complaint as a Motion to Dismiss Counts I and II of
27 the Second Amended Complaint, as the allegations against Defendant Hewitt remain
28 essentially the same.

1 On April 24, 2009, Plaintiff lodged objections to the Magistrate Judge’s Report and
2 Recommendation.

3 **ANALYSIS**

4 The Court first notes that it will adopt the portions of Magistrate Judge Guerin’s R&R
5 that were not objected to by the Parties. The only remaining issues therefore concern the
6 portions of the R&R for which there are objections. Plaintiff has objected to several aspects
7 of the R&R. First, Plaintiff objects to the recommendation that he not be permitted further
8 amendments. Next, Plaintiff objects to the dismissal of Count VI, as well as the dismissal of
9 Defendants Provencio, Weerts and Kimble from Count IV of the Second Amended
10 Complaint. Lastly, Plaintiff asks the Court to permit him to include Corrections Officers
11 Zaborski, Kimble and Kluff as Defendants under Count I of the Second Amended Complaint.

12 Turning to the substance of Plaintiff objections, the Court notes that it agrees with the
13 Magistrate Judge’s recommendation that Plaintiff should not be permitted to amend his
14 Complaint for a third time. This case was filed in December 2007 and it is rapidly
15 approaching the two year mark. In the interests of judicial economy and fairness to the
16 named Defendants, Plaintiffs case must begin to proceed forward without the potential delays
17 that might be caused by any future amendments.

18 With respect to the dismissal of Count VI of the Second Amended Complaint, the
19 Court agrees with the Magistrate Judge’s finding that Plaintiff has failed to state a valid claim
20 for retaliation under the First Amendment to the United States Constitution. As the
21 Magistrate Judge correctly noted, there is nothing in Count VI that specifically ties the
22 proposed Defendants to any alleged unconstitutional conduct. Instead of asserting concrete
23 allegations against specific Defendants, Count VI appears to contain nothing more than an
24 assortment of vague and generalized allegations that are raised against no individual
25 Defendant in particular. To survive a motion to dismiss for failure to state a claim under
26 Fed.R.Civ.P. 12(b)(6), the plaintiff must allege facts sufficient “to raise a right to relief above
27 the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule
28 8 of the Federal Rules of Civil Procedure does not demand detailed factual allegations, “it

1 demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”
2 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

3 The Court will next address the Magistrate Judge’s determination regarding Count IV
4 of the Second Amended Complaint. Specifically, Magistrate Judge Guerin recommended that
5 Plaintiff failed to state a Fourteenth Amendment against Defendants Provencio, Weerts and
6 Kimble claim for being allegedly denied a grievance form to complain about an incident
7 involving Defendant Durrenburg. The Court agrees with the Magistrate Judge on this point
8 of law. A prisoner does not have a protected liberty interest in prison grievance procedures,
9 and the mere denial of a grievance does not give rise to the inference of active
10 unconstitutional behavior. See Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988), cert.
11 denied, 488 U.S. 898 (1988).

12 Furthermore, the Court will not accept Plaintiff’s suggestion to permit him to add
13 Corrections Officers Zaborski, Kimble and Kluff as Defendants under Count I of the Second
14 Amended Complaint.

15 Lastly, it should be noted that under Ninth Circuit law, after amendment the original
16 pleading is treated as nonexistent. Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992).
17 Thus, the Court declines to construe Defendant Hewitt’s Motion to Dismiss Counts III and
18 V of the First Amended Complaint as a Motion to Dismiss Counts I and II of the Second
19 Amended Complaint. In other words, the original 12(b)(6) motion filed by Defendants will
20 be treated as moot and there will be another opportunity to file Rule 12 motions and a
21 responsive pleading.

22 **Accordingly,**

23 **IT IS HEREBY ORDERED** adopting as the Order of the Court the Magistrate
24 Judge's Report and Recommendation, to the extent it is consistent with the instant Court
25 Order. (Dkt. #55.)

26 **IT IS FURTHER ORDERED** denying as moot Defendants’ Motion to Dismiss
27 Counts Three and Five of Plaintiff’s Amended Complaint. (Dkt.#31.)

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