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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

AUBREY GAYLE PADGETT,)
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 Plaintiff,)
)
 v.)
)
 ARIZONA DEPARTMENT OF)
 CORRECTIONS, DEPUTY WARDEN)
 FREELAND, DORA SCHRIRO,)
 SGT. WALKER, OFFICER KIRKLAND,)
 CO KRUMPELMAN,)
)
 Defendants.)
 _____)

CIV 08-00617 PHX MHM MEA
REPORT AND RECOMMENDATION

TO THE HONORABLE MARY H. MURGUIA:

This matter is before the Magistrate Judge on referral from the District Judge, and the determination of the Magistrate Judge is dispositive of some of Plaintiff's claims. Accordingly, the following proposed findings of fact, report, and recommendation are made pursuant to Rule 72(b), Federal Rules of Civil Procedure, and 28 U.S.C. § 636(b)(1)(B) and (C). Before the Court is Plaintiff's motion to amend/correct the complaint, which motion was filed August 27, 2008. See Docket No. 39.

Background

Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983 on March 31, 2008, alleging Defendants were liable to him for violation of his constitutional rights while incarcerated.

1 Plaintiff's initial complaint sought compensatory and punitive
2 damages and injunctive relief. Plaintiff alleged he was
3 retaliated against and threatened by corrections officers for
4 exercising his right to grieve the conditions of his confinement
5 and for stating he intended to exercise this right (Count I).
6 Plaintiff further alleged that Director Schriro and Warden
7 Freedlund subjected him to unconstitutional conditions of
8 confinement because he had been confined to a "tent" facility
9 where he was subjected to extremes of heat and cold and exposed
10 to vermin (Count II). Plaintiff also alleged the unit's dining
11 facilities were unsanitary and posed a threat to inmate health
12 (Count III).

13 On May 9, 2008, the Court dismissed Count II and Count
14 III of Plaintiff's original complaint. The Court concluded
15 Plaintiff's allegations regarding the living conditions and
16 eating facilities at the North Unit of the Florence prison did
17 not rise to the level of a constitutional violation, i.e., that
18 the risks posed to his health as described by Plaintiff were not
19 "sufficiently serious" to satisfy the standard for violation of
20 the Eighth Amendment. The Court also concluded Plaintiff had
21 not adequately stated a claim against Director Schriro or Deputy
22 Warden Freedlund for violation of Plaintiff's Eighth Amendment
23 rights.

24 Accordingly, at that time the Court dismissed the
25 Arizona Department of Corrections, Dora Schriro, and Deputy
26 Warden Freeland as defendants in this matter. The Court ordered
27 that Defendants Walker, Kirkland, and Krumpelman answer the
28 count of the complaint asserting these defendants retaliated

1 against Plaintiff for asking to file a grievance. Service of
2 the original complaint was returned executed on Defendant
3 Kirkland and on Defendant Krumpelman on or about June 3, 2008.
4 Service was returned unexecuted with regard to Defendant Walker.

5 Plaintiff filed an amended complaint on May 27, 2008,
6 prior to the date Defendants were served with the original
7 complaint. The amended complaint named Defendants Walker,
8 Kirkland and Krumpelman as defendants, and also named additional
9 defendants. The served Defendants filed a motion asking the
10 Court to screen the amended complaint, which motion was granted.
11 On August 19, 2008, the undersigned filed a Report and
12 Recommendation recommending that Defendants Kirkland, Walker,
13 and Krumpelman be required to answer Count I of the amended
14 complaint, and that the other counts and defendants of the
15 amended complaint be dismissed. See Docket No. 38.

16 Plaintiff filed the pending motion to amend the
17 complaint on August 27, 2008. See Docket No. 39. Attached to
18 the motion is a "First Amended Complaint with Leave of the
19 Court", although if allowed the pleading would be Plaintiff's
20 second amended complaint. Plaintiff filed a memorandum and
21 affidavits in support of his motion to amend. Defendants filed
22 a response in opposition to the motion to amend. See Docket No.
23 46. Plaintiff filed a motion for a screening order on September
24 25, 2008. See Docket No. 49.

25 On November 26, 2008, the Court adopted the Report and
26 Recommendation with regard to the first amended complaint, filed
27 before Defendants were served, and dismissed Count II and Count
28 III of the amended complaint and all defendants except Defendant

1 Walker, Defendant Kirkland, and Defendant Krumpelman. See
2 Docket No. 52. Defendants Kirkland and Krumpelman filed an
3 answer to the amended complaint on December 22, 2009. See
4 Docket No. 54. The undersigned issued a scheduling order
5 governing litigation of Count I of the amended complaint. See
6 Docket No. 56. Plaintiff filed a motion to strike the answer to
7 the complaint, which motion was denied on January 21, 2009. See
8 Docket No. 61.

9 **Analysis**

10 Plaintiff's first amended complaint was filed as of
11 right because Plaintiff was allowed to amend his complaint once
12 prior to the filing of an answer or other responsive pleading to
13 the original complaint. Plaintiff is not entitled to the
14 current proposed amendment of his complaint as of right.

15 Rule 15(a), Federal Rules of Civil Procedure, provides
16 that a plaintiff should be given leave to amend his complaint
17 when justice so requires. See, e.g., United States v. Hougham,
18 364 U.S. 310, 316, 81 S. Ct. 13, 17 (1960); Howey v. United
19 States, 481 F.2d 1187, 1190 (9th Cir. 1973). However, the
20 policy of allowing the amendments of pleadings must be tempered
21 by the plaintiff's undue delay or bad faith, and any repeated
22 failure to cure deficiencies by previously allowed amendments.
23 Schlachter-Jones v. General Tele., 936 F.2d 435, 443 (9th Cir.
24 1991) (internal quotations omitted). Leave to amend is also
25 properly denied where amendment would be futile. See, e.g., id.

26 Plaintiff's proposed amended complaint at Docket No. 39
27 seeks to add the same Counts II and III as his original
28 complaint and his first amended complaint, filed as of right,

1 and to add defendants with regard to these proposed counts. The
2 Court has now adopted the Report and Recommendation denying and
3 dismissing claims in the first amended complaint which were
4 substantially similar to those stated in Count II and Count III
5 of the proposed amended complaint. Plaintiff further seeks to
6 add defendants with regard to Count II and Count III of the
7 proposed amended complaint. The defendants should not be added
8 because the Court determined, in adopting the Report and
9 Recommendation, that no constitutional rights were violated by
10 the alleged facts stated in Count II and Count III of the
11 proposed amended complaint.

12 **Conclusion**

13 Plaintiff's proposed amended complaint does not state
14 claims for relief with regard to Count II and Count III, which
15 are substantially similar to the claims previously denied by the
16 Court upon screening of an amended complaint filed as of right.

17 Accordingly,

18 **IT IS RECOMMENDED that** Plaintiff's motion at Docket No.
19 39 for leave to file an amended complaint be **denied**.

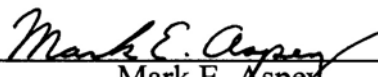
20 This recommendation is not an order that is immediately
21 appealable to the Ninth Circuit Court of Appeals. Any notice of
22 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
23 Procedure, should not be filed until entry of the district
24 court's judgment.

25 Pursuant to Rule 72(b), Federal Rules of Civil
26 Procedure, the parties shall have ten (10) days from the date of
27 service of a copy of this recommendation within which to file
28 specific written objections with the Court. Thereafter, the

1 parties have ten (10) days within which to file a response to
2 the objections. Pursuant to Rule 7.2, Local Rules of Civil
3 Procedure for the United States District Court for the District
4 of Arizona, objections to the Report and Recommendation may not
5 exceed seventeen (17) pages in length.

6 Failure to timely file objections to any factual or
7 legal determinations of the Magistrate Judge will be considered
8 a waiver of a party's right to de novo appellate consideration
9 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
10 1121 (9th Cir. 2003) (en banc). Failure to timely file
11 objections to any factual or legal determinations of the
12 Magistrate Judge will constitute a waiver of a party's right to
13 appellate review of the findings of fact and conclusions of law
14 in an order or judgment entered pursuant to the recommendation
15 of the Magistrate Judge.

16 DATED this 23rd day of January, 2009.

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Mark E. Aspey
United States Magistrate Judge
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