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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT E. COLEMAN,

 Plaintiff,

 v.

CDCR, et al.,

 Defendants.

Case No. 1:09-cv-00224-DLB PC

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS AND DISMISSING
ACTION FOR FAILURE TO STATE A
CLAIM UPON WHICH RELIEF MAY BE
GRANTED**

ECF No. 94

I. Background

Plaintiff Robert E. Coleman (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in forma pauperis in this civil action pursuant to 42 U.S.C. § 1983. On July 11, 2012, Plaintiff filed his Fifth Amended Complaint (“5AC”). On December 5, 2012, the Court screened the complaint and found that it stated cognizable claims for relief against Defendants A. Diaz, M. Lopez, and P. Maldonado for retaliation in violation of the First Amendment. ECF No. 93. On January 4, 2013, Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted. ECF No. 94. On January 22, 2013, Plaintiff filed his opposition. ECF No. 95. On January 29, 2013, Defendants filed their reply. ECF No. 96. The matter is submitted pursuant to Local Rule 230(l).

II. Legal Standard

The focus of any Rule 12(b)(6) dismissal . . . is the complaint.” *Schneider v. California*

1 *Dept. of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). In considering a motion to dismiss for
2 failure to state a claim, the court must accept as true the allegations of the complaint in question,
3 *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the
4 light most favorable to the party opposing the motion, and resolve all doubts in the pleader's favor.
5 *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). The federal system is one of notice pleading.
6 *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126 (9th Cir. 2002).

7 Pursuant to Rule 8(a), a complaint must contain “a short and plain statement of the claim
8 showing that the pleader is entitled to relief . . .” Fed. R. Civ. P. 8(a). Detailed factual allegations
9 are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
10 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl.*
11 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual matter,
12 accepted as true, to ‘state a claim that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at
13 555). While factual allegations are accepted as true, legal conclusions are not. *Id.*

14 **III. Summary of Fifth Amended Complaint¹**

15 Plaintiff was confined at California State Prison – Corcoran (“CSP-Cor”) in Corcoran,
16 California, during the events alleged in this action. Plaintiff names as Defendants: A. Diaz,
17 correctional lieutenant at CSP-Cor, and M. Lopez and P. Maldonado, correctional sergeants at CSP-
18 Cor.

19 Plaintiff alleges the following. While incarcerated in Administrative Segregation 3A03 (“ad
20 seg”) at CSP-Cor in January of 2008, Defendants Diaz, M. Lopez, and Maldonado failed to provide
21 Plaintiff with his personal or legal property, even after he showed them a February 19, 2008 court
22 deadline. Fifth Am. Compl. (“5AC”) ¶ 15. Plaintiff filed an inmate grievance regarding this. 5AC ¶
23 15. After submitting this grievance, on February 27, 2008, Plaintiff was issued a Rules Violation
24 Report (“RVR”) for refusing a direct order by Officer S. Vela regarding accepting a cell mate. 5AC
25 ¶ 16. On March 3, 2008, Defendants Lopez and Diaz put Plaintiff on property restriction for thirty
26 days. 5AC ¶ 17. Plaintiff had access only to one sheet, one shirt, one pair of boxers, and one pair of
27 socks, with no access to his other personal property or hygiene items. 5AC ¶ 17.

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¹ Only Plaintiff’s allegations which are relevant to this motion are included.

1 On March 10, 2008, Plaintiff attended his RVR 115 hearing, and Defendant Diaz was the
2 senior hearing officer. 5AC ¶ 18. Plaintiff protested, contending that Defendant Diaz was the ad seg
3 lieutenant and had ordered his officers to confiscate Plaintiff's property. 5AC ¶ 18. Plaintiff was
4 ignored, and was found guilty by Defendant Diaz. 5AC ¶ 18.

5 On May 6, 2008, Plaintiff filed an inmate grievance challenging the guilty finding because
6 Defendant Diaz was not an impartial decision maker. 5AC ¶ 19. Plaintiff remained on property
7 restriction for six months rather than the three months found in the RVR. 5AC ¶ 19. In May of
8 2008, Defendants Diaz, Lopez, and Maldonado wrote a memo admonishing ad seg inmates about
9 specific punishments that they would receive if Defendants' rules were violated. 5AC ¶ 20. Plaintiff
10 compiled a group inmate grievance contesting the memo, but his grievance was never processed.
11 5AC ¶ 20.

12 After the submission of the group grievance, Defendant Maldonado approached Plaintiff at
13 his cell and told him that he would be moving. 5AC ¶ 21. Plaintiff requested to speak with a
14 captain. 5AC ¶ 21. Defendant Maldonado threatened Plaintiff with a cell extraction if Plaintiff
15 refused to move. 5AC ¶ 21. Plaintiff again pleaded to speak to the captain, at which point
16 Defendant Maldonado retreated from the cell. 5AC ¶ 21. A few days later, Defendants Diaz and
17 Lopez threatened Plaintiff with a cell extraction if he refused to move and ordered subordinates to
18 prepare to extract Plaintiff. 5AC ¶ 22. Plaintiff complied, and was housed in cell 150. 5AC ¶ 22.

19 Cell 150's lights were not properly working. 5AC ¶ 23. Plaintiff alerted Defendants Diaz,
20 Lopez, and Maldonado of the problem, but was ignored. 5AC ¶ 23. Plaintiff then filed another
21 inmate grievance. 5AC ¶ 23. Plaintiff remained in these conditions for two months. 5AC ¶ 23. Ad
22 seg windows are covered in a white substance that prevents much light from passing through. 5AC ¶
23 24. Plaintiff's eyes became strained because of his pterygium/dry eye syndrome. 5AC ¶ 24.
24 Plaintiff's eyeglasses had been confiscated, making it difficult for him to conduct many legal
25 endeavors. 5AC ¶ 24. Plaintiff had surgery on his right eye in February of 2009. 5AC ¶ 24.

26 **IV. Analysis**

27 Allegations of retaliation against a prisoner's First Amendment rights to speech or to petition
28 the government may support a § 1983 claim. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985);

1 *see also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989); *Pratt v. Rowland*, 65 F.3d 802,
2 807 (9th Cir. 1995). Within the prison context, a viable claim of First Amendment retaliation entails
3 five basic elements: (1) An assertion that a state actor took some adverse action against an inmate
4 (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
5 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate
6 correctional goal." *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009) (quoting *Rhodes v.*
7 *Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)).

8 Defendants contend that Plaintiff's claims of retaliation are composed of three issues: alleged
9 retaliation for 1) the filing of his grievance concerning Defendant Diaz's impartiality, 2) his
10 grievance regarding complaining of his property restriction, and 3) his grievance concerning
11 Defendants' issuance of a memo. Defs. Mem. P. & A. 6-7.

12 **A. Property Grievance**

13 As to Plaintiff's property grievance, Defendants contend that they did not take any action
14 against Plaintiff to place him on property restriction. Defs. Mem. P. & A. 5:5-8. Rather, it was
15 officer Vela who issued a Rules Violation Report that led to Plaintiff's property restriction. Defs.
16 Mem. P. & A. 5:5-8. Plaintiff had also been placed on property restriction for refusing a direct order
17 to accept a cellmate, which Plaintiff does not deny that he did.

18 Plaintiff contends that he was placed on property restriction because he was charged with
19 refusing to submit to handcuffs, not because he refused to accept a cellmate. Pl. Opp'n 6:17-7:19.
20 However, Plaintiff does not allege that in the 5AC, and thus, the Court reviews only Plaintiff's
21 pleadings. Plaintiff further contends that property restrictions cannot be imposed as punishment on
22 administrative segregation inmates.

23 The Court finds that Plaintiff fails to state a claim regarding retaliation for his property
24 grievance. Plaintiff fails to allege facts which demonstrate that Defendants took the adverse action
25 against Plaintiff, or that the adverse action was not in furtherance of a legitimate penological goal. .
26 Defendants cite to the CDCR's Departmental Operations Manual ("D.O.M.") section 54046.11.²
27 Restrictions for up to 180 days are applicable to inmates who refuse appropriate housing more than
28

² The Court takes judicial notice of the D.O.M. pursuant to Rule 201 of the Federal Rules of Evidence.

1 once.

2 **B. Grievance Concerning Impartiality**

3 Defendants contend that Plaintiff did not sufficiently allege a claim concerning retaliation for
4 the filing of his grievance concerning Defendant Diaz's impartiality. Defs. Mem. P. & A. 7:22-28.
5 Plaintiff contends that he remained on property restriction for six months rather than the three
6 months that was initially ordered. Defendants contend that Plaintiff does not identify who caused
7 him to remain on six month property restriction. For inmates who refuse to accept appropriate
8 housing more than once, such inmates may be subject to property restrictions for up to 180 days.

9 Plaintiff contends that Defendant Diaz responded to Plaintiff's grievance and stated that he
10 would be removed from property restriction, and was thus responsible. Pl.'s Opp'n 9:23-10:9.
11 However, Plaintiff does not attach this grievance in support. Plaintiff also contends that the
12 provisions of D.O.M. section 54046.11 do not apply to inmates in administrative segregation. That
13 is an unsupported argument. Section 54046.1, which describes housing assignment policy and
14 includes section 54046.11, applies to all inmates, including those in administrative segregation.

15 The Court finds that Plaintiff fails to state a claim for retaliation as to Plaintiff's grievance
16 regarding impartiality. Plaintiff fails to link Defendants regarding the imposition of additional
17 property restriction. Additionally, the punishment imposed would legitimately advance penological
18 goals.

19 **C. Grievance Concerning Memo**

20 Defendants contend that Plaintiff has not alleged sufficient facts to demonstrate that he was
21 retaliated against for filing the grievance concerning the memo by placing him in a new cell with
22 deficient lighting. Defs. Mem. P. & A. 6:20-7:19. Defendants contend that Plaintiff has not linked
23 any Defendant to the choice of the new cell. Defendants contend that Plaintiff fails to allege facts
24 which demonstrate that he was moved to a new cell because of the grievance. Defendants further
25 contend that the faulty light in the new cell is not an adverse action that would deter a person of
26 ordinary firmness from engaging in protected activity. Defendants finally contend that there were
27 legitimate reasons for Plaintiff to move to a new cell, since Plaintiff admits that he repeatedly
28 refused a cell mate and exposed himself to female officers.

1 Plaintiff contends that the timing of the move is indicative of a retaliatory motive. Pl. Opp'n
2 8:21-28. Plaintiff also contends that he was threatened with a cell extraction if he did not move.

3 The Court again finds that Plaintiff fails to state a claim concerning alleged retaliation for the
4 filing of this grievance concerning the memo. Based on the pleadings, Plaintiff did not sufficiently
5 allege facts to demonstrate that the new cell constituted an adverse action for purposes of retaliation.
6 The faulty light described is not such an adverse action that it would chill a person of ordinary
7 firmness from exercising his First Amendment activities. The alleged threat to Plaintiff of a cell
8 extraction if he did not move appears to be a threat concerning Plaintiff refusing to comply with an
9 order to move, and not because of an inmate appeal.³

10 **D. Dismissal of Action**

11 This is the Fifth Amended Complaint filed by Plaintiff in this action. Plaintiff has not been
12 able to cure the deficiencies in this action after being provided several opportunities. Accordingly,
13 further leave to amend will not be granted. *Lopez v. Smith*, 203 F.3d 1122, 1130 (2000) (en banc).

14 **V. Conclusion and Order**

15 Based on the foregoing, it is HEREBY ORDERED that:

- 16 1. Defendants' Motion to Dismiss, filed January 4, 2013, is granted;
17 2. This action is dismissed with prejudice for failure to state a claim upon which relief may
18 be granted;
19 3. All other pending motions are denied as moot; and
20 4. The Clerk of the Court is directed to close this action.

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23 IT IS SO ORDERED.

24 Dated: February 26, 2013

/s/ Dennis L. Beck
25 UNITED STATES MAGISTRATE JUDGE

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³ Having found that Plaintiff fails to state a claim, the Court declines to address Defendants' qualified immunity arguments.