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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TIMOTHY BERTRAM,

Plaintiff,

v.

C. SIZELOVE, et al.,

Defendants.

CASE NO: 1:10-cv-00583-AWI-GBC (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS, DENYING
PLAINTIFF’S MOTION TO AMEND
COMPLAINT, AND DISMISSING DOE
DEFENDANTS

/ Docs. 56, 58, 67

On April 5, 2010, Plaintiff, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983. On November 22, 2010, the Court dismissed certain claims and found a cognizable claims against Defendants C. Sizelove and J. Heinzler and two Doe Defendants (“Defendants”) for Eighth Amendment deliberate indifference to medical needs. Doc. 13. The Court dismissed, with prejudice, Plaintiff’s claims of receiving a cold shower; First Amendment retaliation; and return of personal property. *Id.* On August 2, 2011, the Court issued a discovery and scheduling order, establishing a deadline of February 2, 2012 to amend pleadings, a discovery deadline of April 2, 2012, and a dispositive motion deadline of June 11, 2012. Doc. 36.

On February 6, 2012, Plaintiff filed a [Motion for Extension of Time to Amend Pleadings](#). Doc. 56. On February 15, 2012, Plaintiff filed a [Proposed First Amended Complaint](#). Doc. 58. On March 19, 2012, Defendants filed an [Opposition](#) to Plaintiff’s motion to amend pleadings. Doc. 62. On March 30, 2012, Plaintiff filed a [Reply](#) to Defendants’ opposition. Doc. 65. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

1 On April 11, 2012, the Magistrate Judge issued [Findings and Recommendations](#),
2 recommending to deny Plaintiff's motion to amend complaint and to dismiss Doe Defendants. Doc.
3 67. On May 7, 2012, Plaintiff filed [Objections](#). Doc. 69.

4 In Plaintiff's objections, he agrees with the dismissal of various claims and defendants, but
5 he seeks to add retaliation claims against J. Wood and J. Heinzler. *Id.* at 2. "Within the prison
6 context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion
7 that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's
8 protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment
9 rights, and (5) the action did not reasonably advance a legitimate correctional goal. *Rhodes v.*
10 *Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *accord Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th
11 Cir. 2009). The Court already dismissed Plaintiff's claims of retaliation, with prejudice. Doc. 13.
12 The court finds the law of the case doctrine requires the court to not give leave to amend a claim for
13 which the court has already given leave to amend and then dismissed with prejudice. [Delta Savings](#)
14 [Bank v. United States](#), 265 F.3d 1017, 1027 (9th Cir. 2001).

15 Plaintiff seeks to add a claim regarding failure to deliver his legal mail. *Id.* First, it appears
16 that this claim is not against the current Defendants. Second, Plaintiff states he is currently
17 exhausting this claim, which would preclude filing this claim prior to exhaustion. Pursuant to the
18 Prison Litigation Reform Act of 1995 ("PLRA"), "[n]o action shall be brought with respect to prison
19 conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,
20 prison, or other correctional facility until such administrative remedies as are available are
21 exhausted." 42 U.S.C. § 1997e(a). The PLRA's exhaustion requirement is therefore mandatory, and
22 no longer left to the discretion of the district court. *Woodford v. Ngo*, 548 U.S. 81, 85 (2006) (citing
23 *Booth v. Churner*, 532 U.S. 731, 739 (2001)).

24 Plaintiff seeks to add H. Sherwood as a defendant for deliberate indifference to medical need.
25 Pl. Obj. at 4, Doc. 69. Plaintiff states that while Plaintiff was in the holding cage, Plaintiff asked
26 Sherwood for a lower bunk due to his medical issues (seizures) and Sherwood told him, "we'll see,
27 after what you just did, you ain't got [expletive] coming." *Id.* The two part test for deliberate
28 indifference requires the plaintiff to show (1) "a serious medical need" by demonstrating that

1 ‘failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and
2 wanton infliction of pain,’” and (2) “the defendant’s response to the need was deliberately
3 indifferent.” *Jett*, 439 F.3d at 1096 (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.
4 1992), *overruled on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997)
5 (en banc)). Plaintiff’s allegation of Sherwood’s threat against him is insufficient to demonstrate
6 deliberate indifference to medical need. Mere verbal harassment or abuse alone is not sufficient to
7 state a claim under § 1983, *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987), and threats
8 do not rise to the level of a constitutional violation, *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987).

9 It is well-established that the Court may deny leave to amend if amendment would be futile.
10 *Nordyke v. King*, 644 F.3d 776, 788 n.12 (9th Cir. 2011); *Serra v. Lapin*, 600 F.3d 1191, 1200 (9th
11 Cir. 2010); *Gardner v. Martino*, 563 F.3d 981, 990-92 (9th Cir. 2009); *Deveraturda v. Globe*
12 *Aviation Security Services*, 454 F.3d 1043, 1046 (9th Cir. 2006); *Thinket Ink Information Resources,*
13 *Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004); *Saul v. U.S.*, 928 F.2d 829, 843
14 (9th Cir. 1991). Evaluating whether a proposed amendment is futile requires the Court to determine
15 whether the amendment would withstand a motion to dismiss under Federal Rule of Civil Procedure
16 12(b)(6), and in making this evaluation, the Court is confined to review of the proposed amended
17 pleading. *Nordyke*, 644 F.3d at 788 n.12 (*citing Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th
18 Cir. 1988) and *Ashcroft v. Iqbal*, 556 U.S. 662, ___, 129 S. Ct. 1937, 1949 (2009)).

19 The Court finds that it would be futile to grant Plaintiff’s motion to amend and add additional
20 defendants, as his proposed amended complaint fails to state a claim against the new defendants.

21 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de*
22 *novo* review of this case. Having carefully reviewed the entire file, the Court finds the Findings and
23 Recommendations to be supported by the record and by proper analysis.

24 Accordingly, IT IS HEREBY ORDERED that:

- 25 1. The Court adopts the Findings and Recommendations, filed on April 11, 2012, in
26 full;
- 27 2. Plaintiff’s motion to amend his complaint is DENIED, as futile, for failure to state
28 a claim against Doe Defendants and proposed new additional Defendants; and

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3. Doe Defendants are DISMISSED from this action, with prejudice, for failure to state a claim.

IT IS SO ORDERED.

Dated: August 3, 2012



CHIEF UNITED STATES DISTRICT JUDGE