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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LONNIE WILLIAMS,

Plaintiff,

v.

J. LOPEZ, et al.,

Defendants.

CASE NO. 1:10-CV-00952-LJO-DLB PC

FINDINGS AND RECOMMENDATIONS
DISMISSING CERTAIN CLAIMS AND
DEFENDANTS

(DOC. 1)

OBJECTIONS, IF ANY, DUE WITHIN
THIRTY DAYS

Findings and Recommendations

I. Background

Plaintiff Lonnie Williams (“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 rights action pursuant to 42 U.S.C. § 1983. Plaintiff initiated this action by filing a complaint on May 27, 2010. On July 14, 2010, the undersigned screened Plaintiff’s complaint and found that it stated cognizable claims against Defendants J. Lopez, Brewer, and DaViega for unrelated claims. The undersigned issued an order requiring Plaintiff to either file an amended complaint curing the deficiencies herein, or notifying the Court of Plaintiff’s willingness to proceed only on claims found to be cognizable. On September 8, 2010, Plaintiff notified the Court that Plaintiff is willing to proceed only on the cognizable claims against Defendant Lopez. The Court issues the following Findings and Recommendations.

The Court is required to screen complaints brought by prisoners seeking relief against a

1 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
2 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
3 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
4 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
5 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been
6 paid, the court shall dismiss the case at any time if the court determines that . . . the action or
7 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §
8 1915(e)(2)(B)(ii).

9 A complaint must contain “a short and plain statement of the claim showing that the
10 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
11 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
12 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing
13 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual
14 matter, accepted as true, to ‘state a claim that is plausible on its face.’” *Id.* (quoting *Twombly*,
15 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions are not. *Id.*

16 **II. Summary Of Complaint and Analysis**

17 Plaintiff was previously incarcerated at North Kern State Prison (“NKSP”) in Delano,
18 California, where the events giving rise to this action occurred. Plaintiff names as Defendants
19 correctional officer J. Lopez, captain K. Da Viega, sergeant Taylor Swaim, sergeant F. Martinez,
20 Jr., correctional officer Sergio Castrejon, lieutenant George Becerra, acting warden Maurice
21 Junious, licensed psychiatric technician Elizabeth Brewer, and litigation coordinator Laura M.
22 Williams. Plaintiff also names CC I P. Horn, Dunlop, Longacre, Cunningham, Tindle, Kyle,
23 Vetterick, and D. Harban in the body of the complaint. Plaintiff alleges violations of the First,
24 Fourth, Eighth, and Fourteenth Amendments.¹

25 Plaintiff makes several disparate allegations which the Court will analyze separately.

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27
28 ¹ Plaintiff alleges a violation of the Fifth and Sixth Amendment. It is unclear what part of the Fifth or Sixth
Amendment was allegedly violated. Plaintiff thus fails to state a claim for violation of either.

1 **A. Prison Transfer**

2 Plaintiff alleges the following. Plaintiff is HIV-positive and a transsexual. (Compl. 3.)²
3 Plaintiff wrote inmate grievances regarding a potential transfer to California Correctional
4 Institution or Corcoran State Prison, because Plaintiff contends Plaintiff cannot be placed in
5 valley fever areas, or to Pelican Bay State Prison because Plaintiff cannot be isolated. (Compl.
6 3.) Plaintiff alleges that Defendant Williams conspired with P. Horn, Maurice Junious, George
7 Becerra, Castrejon, Taylor Swaim, and F. Martinez to retaliate against Plaintiff for filing prison
8 grievances. (Compl. 3.) Plaintiff also alleges deliberate indifference in violation of the Eighth
9 Amendment if transferred to any of the above locations.

10 Allegations of retaliation against a prisoner’s First Amendment rights to speech or to
11 petition the government may support a § 1983 claim. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th
12 Cir. 1985); *see also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989); *Pratt v.*
13 *Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). “Within the prison context, a viable claim of First
14 Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some
15 adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that
16 such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did
17 not reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-
18 68 (9th Cir. 2005).

19 As of the date of this Findings and Recommendations, Plaintiff is incarcerated at
20 California State Prison, Sacramento (“CSP-SAC”). (Notice of Change of Address, filed June 28,
21 2010, Doc. 9.) Plaintiff does not state a claim for retaliatory prison transfer. Plaintiff has not
22 sufficiently linked which Defendants threatened Plaintiff with transfer in retaliation for filing of
23 inmate grievances. To state a claim under § 1983, a plaintiff must allege that (1) the defendant
24 acted under color of state law and (2) the defendant deprived him of rights secured by the
25 Constitution or federal law. *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir.

28 ² Page references are to the court docket numbering.

1 2006). Plaintiff bare allegations of conspiracy are insufficient to state a claim.³

2 Plaintiff fails to state a cognizable Eighth Amendment claim. The Eighth Amendment
3 protects prisoners from inhumane methods of punishment and from inhumane conditions of
4 confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir. 2006). Extreme deprivations
5 are required to make out a conditions of confinement claim, and only those deprivations denying
6 the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an
7 Eighth Amendment violation. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (citations and
8 quotations omitted). In order to state a claim for violation of the Eighth Amendment, Plaintiff
9 must allege facts sufficient to support a claim that officials knew of and disregarded a substantial
10 risk of serious harm to him. *E.g.*, *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Frost v. Agnos*,
11 152 F.3d 1124, 1128 (9th Cir. 1998). Mere negligence on the part of the official is not sufficient
12 to establish liability, but rather, the official's conduct must have been wanton. *Farmer*, 511 U.S.
13 at 835; *Frost*, 152 F.3d at 1128.

14 The pleadings fail to indicate that any Defendants knew of and disregarded an excessive
15 risk to Plaintiff's health. Considering a transfer and actual transfer are two separate acts.
16 Plaintiff's concerns of possible serious harm from the prison transfer are at best speculative.
17 Plaintiff thus fails to state a cognizable deliberate indifference claim here.

18 **B. April 18, 2010 Incident - False RVR**

19 Plaintiff alleges that on April 18, 2010, Defendant F. Martinez attempted to bribe
20

21 ³ A conspiracy claim brought under § 1983 requires proof of “an agreement or meeting of the minds to
22 violate constitutional rights,” *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2001) (quoting *United Steel Workers of*
23 *Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir. 1989) (citation omitted)), and an actual deprivation of
24 constitutional rights, *Hart v. Parks*, 450 F.3d 1059, 1071 (9th Cir. 2006) (quoting *Woodrum v. Woodward County,*
Oklahoma, 866 F.2d 1121, 1126 (9th Cir. 1989)). “To be liable, each participant in the conspiracy need not know
25 the exact details of the plan, but each participant must at least share the common objective of the conspiracy.”
Franklin, 312 F.3d at 441 (quoting *United Steel Workers*, 865 F.2d at 1541).

26 The federal system is one of notice pleading, and the court may not apply a heightened pleading standard to
27 plaintiff's allegations of conspiracy. *Empress LLC v. City and County of San Francisco*, 419 F.3d 1052, 1056 (9th
28 Cir. 2005); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126 (2002). However, although accepted as true,
the “[f]actual allegations must be [sufficient] to raise a right to relief above the speculative level . . .” *Bell Atl.*
Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations omitted). A plaintiff must set forth “the grounds of his
entitlement to relief[,]” which “requires more than labels and conclusions, and a formulaic recitation of the elements
of a cause of action . . .” *Id.* (internal quotations and citations omitted). As such, a bare allegation that Defendants
conspired to violate Plaintiff's constitutional rights will not suffice to give rise to a conspiracy claim under § 1983.

1 Plaintiff with extra food if Plaintiff assaulted fellow cell mate Gordon with a loose razor blade,
2 provided by Defendant Martinez. (Compl. 4.) Plaintiff refused, and notified Defendant Junious
3 of the incident. In retaliation, Defendants F. Martinez, Junious, Castrejon, Becerra, and Swaim
4 conspired against Plaintiff and aided in the filing of a false rules violation report against Plaintiff
5 for possession of a weapon. Defendants allegedly coached other staff to write false statements,
6 and deprived Plaintiff a fair and impartial hearing by denying the right to call witnesses or to
7 attend the hearing. Defendant J. Lopez also assaulted Plaintiff by slamming Plaintiff against a
8 metal box, bruising Plaintiff's left breast, and scratching Plaintiff's neck.

9 Plaintiff fails to state a cognizable retaliation claim against any Defendants regarding this
10 incident. First, Plaintiff fails to plead Defendants took adverse action against Plaintiff because of
11 Plaintiff's protected First Amendment activity. Furthermore, as stated previously, a bare
12 allegation that Defendants conspired to violate Plaintiff's constitutional rights will not suffice to
13 give rise to a conspiracy claim under § 1983.

14 The Due Process Clause protects prisoners from being deprived of liberty without due
15 process of law. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). In order to state a cause of
16 action for deprivation of procedural due process, a plaintiff must first establish the existence of a
17 liberty interest for which the protection is sought. *Id.* Liberty interests may arise from the Due
18 Process Clause itself or from state law. *Hewitt v. Helms*, 459 U.S. 460, 466-68 (1983). The Due
19 Process Clause itself does not confer on inmates a liberty interest in being confined in the general
20 prison population instead of administrative segregation. *See id.* With respect to liberty interests
21 arising from state law, the existence of a liberty interest created by prison regulations is
22 determined by focusing on the nature of the deprivation. *Sandin v. Conner*, 515 U.S. 472, 481-
23 84 (1995). Liberty interests created by prison regulations are limited to freedom from restraint
24 which "imposes atypical and significant hardship on the inmate in relation to the ordinary
25 incidents of prison life." *Id.* at 484. Here, Plaintiff fails to allege a liberty interest, and thus fails
26 to state a cognizable due process claim.

27 "What is necessary to show sufficient harm for purposes of the Cruel and Unusual
28 Punishments Clause [of the Eighth Amendment] depends upon the claim at issue" *Hudson*

1 v. *McMillian*, 503 U.S. 1, 8 (1992). “The objective component of an Eighth Amendment claim is
2 . . . contextual and responsive to contemporary standards of decency.” *Id.* (internal quotation
3 marks and citations omitted). The malicious and sadistic use of force to cause harm always
4 violates contemporary standards of decency, regardless of whether or not significant injury is
5 evident. *Id.* at 9; *see also Oliver v. Keller*, 289 F.3d 623, 628 (9th Cir. 2002) (Eighth
6 Amendment excessive force standard examines de minimis uses of force, not de minimis
7 injuries)). Plaintiff states a cognizable claim for use of excessive force against Defendant J.
8 Lopez.

9 **C. May 20, 2010 - Taunting**

10 Plaintiff alleges that Defendant Brewer taunted Plaintiff in retaliation for Plaintiff filing a
11 complaint against Defendant Brewer. (Compl. 5.) Plaintiff alleges that Defendant Brewer
12 conspired with Defendant Swaim, Castrajon, Dunlap, Becerra, Longacre and others to deprive
13 Plaintiff consultations with Plaintiff’s psychologist or to attend any medical appointments.
14 Verbal harassment is not enough to state an adverse action for purposes of retaliation.
15 *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (citation and internal quotation
16 omitted). Denial of access to medical or psychological treatment may be sufficient for a
17 retaliation claim. Plaintiff has sufficiently alleged a claim against Defendant Brewer for
18 retaliation. Again, Plaintiff’s bare allegations of conspiracy are insufficient to state a claim
19 against any other Defendants.

20 **D. May 10, 2010 Incident - Food Poisoning**

21 Plaintiff alleges Defendants F. Martinez, Taylor Swaim, Becerra, J. Lopez, Castrejon, and
22 Brewer conspired with officers Dunlop, Longacre, Cunningham, Tindle, Kyle, Vetterick, and D.
23 Harban to poison Plaintiff’s food with arsenic or some other unknown substance. (Compl. 6.)

24 Again, Plaintiff’s allegations of conspiracy, without more, are insufficient to state a claim
25 for conspiracy. Poisoning a prisoner’s food would violate the Eighth Amendment, and would be
26 sufficient to state a retaliation claim. However, Plaintiff has failed to sufficiently link which
27 Defendants committed the alleged violation. Bare allegations of conspiracy by Defendants are
28 not enough.

1 Plaintiff also alleges that Defendant Junious and Williams refused to file Plaintiff's
2 emergency staff complaints regarding this incident. (Compl. 6.) Adjudications in the inmate
3 grievance process, without more, fails to state a cognizable claim because Plaintiff is not entitled
4 under due process to a specific form of grievance procedure. *Ramirez v. Galaza*, 334 F.3d 850,
5 860 (9th Cir. 2003). Furthermore, supervisory personnel are only liable for their own
6 misconduct, not that of their subordinates. *Iqbal*, 129 S. Ct. at 1949. There is no respondeat
7 superior liability under § 1983. *Id.*

8 **E. April 29, 2010 to May 20, 2010 - Cell Search**

9 Plaintiff alleges that Plaintiff's cell was searched in retaliation, presumably for the filing
10 of prison grievances. (Compl. 7.) Plaintiff has not sufficiently identified which Defendants
11 searched Plaintiff's cell. Furthermore, prisoners have no Fourth Amendment right of privacy in
12 their cells. *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984). Plaintiff also fails to allege why the
13 searching of Plaintiff's cell did not advance any penological goals. *Rhodes*, 408 F.3d at 567-68.

14 **F. February 27, 2010 Incident**

15 Plaintiff alleges that Defendant K. DaViega conspired with D. Harban and S. Pineda to
16 break into Plaintiff's legal mail that Plaintiff sent to the courts. (Compl. 7.) Prisoners have "a
17 First Amendment right to send and receive mail." *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir.
18 1995). Prison regulations relating to the regulation of incoming mail are analyzed under the
19 reasonableness standard set forth in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). *Thornburgh v.*
20 *Abbott*, 490 U.S. 401, 413-14 (1989). The regulation is valid if it is reasonably related to
21 legitimate penological interests. *Turner*, 482 U.S. at 89. Destruction of mail because Plaintiff is
22 a transsexual would not serve any penological interest and gives rise to a cognizable First
23 Amendment claim against Defendant K. DaViega.

24 Plaintiff also alleges that Defendant K. DaViega threatened Plaintiff with management
25 cell status if Plaintiff continued to file complaints regarding food poisoning. (Compl. 7.)
26 Plaintiff alleges that Defendant K. DaViega conspired with C. Lugo, R. Perez, I. Quintero,
27 Criada, F. Martinez, George Becerra, and Taylor Swaim to deprive Plaintiff of a compatible cell
28 mate. Plaintiff was subsequently placed in the administrative segregation unit ("ASU").

1 Plaintiff does state a cognizable claim for retaliation against Defendant K. DaViega for
2 placing Plaintiff in ASU because Plaintiff filed grievances against prison officials. Plaintiff's
3 bare allegation of conspiracy fails to state a claim against any other Defendants.

4 **H. Unrelated Claims**

5 Plaintiff appears to be alleging different, unrelated claims in the same action. The Court
6 will require Plaintiff to pursue unrelated claims in a different action. The Court finds the
7 following claims unrelated to each other: (1) retaliatory prison transfer; (2) false RVR and
8 excessive force incident; (3) retaliatory denial of medical treatment; (4) food poisoning; (5)
9 retaliatory cell search; (6) and opening of legal mail and ASU cell placement. Plaintiff's
10 allegations of conspiracy are insufficient, and thus Plaintiff does not link these unrelated claims
11 together.

12 "The controlling principle appears in Fed. R. Civ. P. 18(a): 'A party asserting a claim to
13 relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as
14 independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has
15 against an opposing party.' Thus multiple claims against a single party are fine, but Claim A
16 against Defendant 1 should not be joined with unrelated Claim B against Defendant 2. Unrelated
17 claims against different defendants belong in different suits, not only to prevent the sort of
18 morass [a multiple claim, multiple defendant] suit produce[s], but also to ensure that prisoners
19 pay the required filing fees-for the Prison Litigation Reform Act limits to 3 the number of
20 frivolous suits or appeals that any prisoner may file without prepayment of the required fees. 28
21 U.S.C. § 1915(g)." *George v. Smith*, 507 F.3d, 605, 607 (7th Cir. 2007).

22 **III. Conclusion And Recommendation**

23 Plaintiff states a cognizable claim for excessive force against Defendant Lopez,
24 retaliation against Defendant Brewer, and violation of the First Amendment against Defendant
25 DaViega. Plaintiff fails to state any other cognizable claims. Plaintiff was provided with the
26 opportunity to file an amended complaint to cure the deficiencies identified, but declined, and
27 indicated willingness to proceed only against Defendant J. Lopez.

28 ///

1 Accordingly, based on the foregoing, it is HEREBY RECOMMENDED that:

- 2 1. This action proceed against Defendant J. Lopez for excessive force in violation of
3 the Eighth Amendment;
- 4 2. Plaintiff's claims for violation of the First Amendment against Defendants Brewer
5 and DaViega are dismissed without prejudice;
- 6 3. Plaintiff's other claims are dismissed with prejudice from this action for failure to
7 state a claim upon which relief may be granted; and
- 8 4. Defendants Taylor Swaim, F. Martinez, Jr., Sergio Castrejon, George Becerra,
9 Maurice Junious, Laura M. Williams, P. Horn, Dunlop, Longacre, Cunningham,
10 Tindle, Kyle, Vetterick, D. Harban, Brewer, and DaViega are dismissed from this
11 action.

12 These Findings and Recommendations are submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30)**
14 **days** after being served with these Findings and Recommendations, the parties may file written
15 objections with the court. Such a document should be captioned "Objections to Magistrate
16 Judge's Findings and Recommendations." The parties are advised that failure to file objections
17 within the specified time may waive the right to appeal the District Court's order. *Martinez v.*
18 *Ylst*, 951 F.2d 1153 (9th Cir. 1991).

19 IT IS SO ORDERED.

20 **Dated: September 13, 2010**

21 /s/ Dennis L. Beck
22 UNITED STATES MAGISTRATE JUDGE
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