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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SAIYEZ AHMED,
Plaintiff,
v.
M. MARTEL, et al.,
Defendants.

Case No. 1:13-cv-00941-DAD-MJS

**FINDINGS AND RECOMMENDATION
TO DISMISS ACTION FOR FAILURE TO
STATE A CLAIM**

(ECF No. 42)

**FOURTEEN (14) DAY OBJECTION
DEADLINE**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983. (ECF Nos. 1, 4.)

On August 7, 2014, the Court screened Plaintiff's first amended complaint and concluded that Plaintiff stated a cognizable First Amendment retaliation claim against Defendants Martel, Davis, Shannon, Cano, and Combs for transferring him to a more dangerous institution in retaliation for pursuing an administrative grievance. (ECF No. 13.) Plaintiff's remaining claims were dismissed with prejudice. (Id.)

Defendants Martel, Davis, Shannon, Cano, and Combs waived service and filed a motion to dismiss. (ECF Nos. 16, 17.) The motion to dismiss was granted on the grounds that documents attached to Plaintiff's complaint reflected that Defendants were

1 not responsible for the transfer decision and no other facts suggested that they
2 participated in the adverse transfer. (ECF Nos. 29, 33, 38.) Plaintiff was given leave to
3 amend.

4 His second amended complaint is before the Court for screening. (ECF No. 42.)

5 **I. Screening Requirement**

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

15 **II. Pleading Standard**

16 Section 1983 “provides a cause of action for the deprivation of any rights,
17 privileges, or immunities secured by the Constitution and laws of the United States.”
18 Wilder v. Virginia Hosp. Ass’n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).
19 Section 1983 is not itself a source of substantive rights, but merely provides a method
20 for vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386,
21 393-94 (1989).

22 To state a claim under § 1983, a plaintiff must allege two essential elements:
23 (1) that a right secured by the Constitution or laws of the United States was violated and
24 (2) that the alleged violation was committed by a person acting under the color of state
25 law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d
26 1243, 1245 (9th Cir. 1987).

27 A complaint must contain “a short and plain statement of the claim showing that
28 the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations

1 are not required, but “[t]hreadbare recitals of the elements of a cause of action,
2 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.
3 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
4 Plaintiff must set forth “sufficient factual matter, accepted as true, to state a claim to
5 relief that is plausible on its face.” Id. Facial plausibility demands more than the mere
6 possibility that a defendant committed misconduct and, while factual allegations are
7 accepted as true, legal conclusions are not. Id. at 677-78.

8 **III. Plaintiff’s Allegations**

9 Plaintiff currently is housed at California State Prison, Los Angeles County, but
10 complains of acts that occurred at Pleasant Valley State Prison (“PVSP”) in Coalinga,
11 California. Although the complaint refers to various “Defendants” and identifies some
12 individuals by name, only Defendant M. Martel is listed in the caption.

13 Plaintiff’s second amended complaint contains various allegations that have been
14 dismissed with prejudice for failure to state a claim. (ECF No. 13.) These allegations will
15 not be repeated here, except as background to the allegations at issue. His remaining
16 allegations may be summarized essentially as follows.

17 Plaintiff was placed in solitary confinement in December 2010. The reasons for
18 placing and retaining Plaintiff in solitary confinement were false. On January 19, 2012,
19 Plaintiff was removed from solitary for a hospital admission. Plaintiff returned to PVSP
20 on January 26, 2012 and was returned to solitary confinement. That same day, Plaintiff
21 attended an Institutional Classification Committee (“ICC”) with Defendants M. Martel,
22 M.C. Davis, R. Shannon, C.P. Cano, and D. Combs. Defendants told Plaintiff that he
23 would be transferred to CMF-III or CMC-E-III due to safety concerns. Plaintiff claims this
24 was another in a series of “excuses” proffered by the ICC during the course of his time
25 in solitary confinement relating to enemy or safety concerns.

26 On January 30, 2012, Plaintiff began a hunger strike to protest his transfer.

27 On February 8, 2012, Plaintiff filed a “formal complaint.”

28

1 Thereafter, Defendants began asking Plaintiff what they could do to end his
2 protest. Plaintiff replied that they would have to stop fabricating reasons for keeping him
3 in solitary confinement and for transferring him.

4 On February 14, 2012, Defendant Cano interviewed Plaintiff in the infirmary.
5 Plaintiff was told to stop his hunger strike and withdraw his complaint because a new
6 ICC would be held on February 16, 2012. Cano told Plaintiff that he would be released
7 from solitary confinement and would not be transferred.

8 On February 16, 2012, Plaintiff attended an ICC with Defendants. Martel “et al.”
9 advised Plaintiff that he would be released to C-Facility and there was no reason to
10 transfer him. Plaintiff was told to stop or withdraw his formal complaint.

11 Plaintiff thereafter was released to C-Facility but continued to pursue his
12 grievance.

13 On February 28, 2016, Plaintiff was transferred to CSP-Solano, where he has
14 substantial safety concerns.

15 Plaintiff’s alleges that Defendants’ conduct violated the Due Process clause of
16 the Fourteenth Amendment and the Eighth Amendment’s prohibition against cruel and
17 unusual punishment. These claims have been dismissed with prejudice and will not be
18 discussed further. The action proceeds, if at all, on a claim of First Amendment
19 retaliation. Plaintiff seeks declaratory and injunctive relief.

20 **IV. Analysis**

21 “Within the prison context, a viable claim of First Amendment retaliation entails
22 five basic elements: (1) An assertion that a state actor took some adverse action
23 against an inmate (2) because of (3) that prisoner’s protected conduct, and that such
24 action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action
25 did not reasonably advance a legitimate correctional goal.” Rhodes v. Robinson, 408
26 F.3d 559, 567-68 (9th Cir. 2005).

27 The second element focuses on causation and motive. See Brodheim v. Cry, 584
28 F.3d 1262, 1271 (9th Cir. 2009). A plaintiff must show that his protected conduct was a

1 “substantial’ or ‘motivating’ factor behind the defendant’s conduct.” Id. (quoting
2 Sorrano’s Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989). Although it can
3 be difficult to establish the motive or intent of the defendant, a plaintiff may rely on
4 circumstantial evidence. Bruce v. Ylst, 351 F.3d 1283, 1289 (9th Cir. 2003) (finding that
5 a prisoner established a triable issue of fact regarding prison officials’ retaliatory motives
6 by raising issues of suspect timing, evidence, and statements); Hines v. Gomez, 108
7 F.3d 265, 267-68 (9th Cir. 1997); Pratt v. Rowland, 65 F.3d 802, 808 (9th Cir. 1995)
8 (“timing can properly be considered as circumstantial evidence of retaliatory intent”).

9 In terms of the third prerequisite, filing a grievance is a protected action under the
10 First Amendment. Valandingham v. Bojorquez, 866 F.2d 1135, 1138 (9th Cir. 1989).

11 With respect to the fourth prong, “[it] would be unjust to allow a defendant to
12 escape liability for a First Amendment violation merely because an unusually
13 determined plaintiff persists in his protected activity” Mendocino Envtl. Ctr. v.
14 Mendocino Cnty., 192 F.3d 1283, 1300 (9th Cir. 1999). The correct inquiry is to
15 determine whether an official’s acts would chill or silence a person of ordinary firmness
16 from future First Amendment activities. Rhodes, 408 F.3d at 568-69 (citing Mendocino
17 Envtl. Ctr., 192 F.3d at 1300).

18 With respect to the fifth prong, a prisoner must affirmatively allege that “the
19 prison authorities’ retaliatory action did not advance legitimate goals of the correctional
20 institution or was not tailored narrowly enough to achieve such goals.” Rizzo v. Dawson,
21 778 F.2d 527, 532 (9th Cir. 1985).

22 The Court already has concluded that Plaintiff engaged in protected conduct by
23 filing a grievance. Additionally, a transfer to a more dangerous institution is sufficient to
24 allege adverse action, even though Plaintiff has no constitutional right to be housed in
25 any particular institution. Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995) (holding that
26 prison official may not “transfer an inmate to another prison in retaliation for the inmate’s
27 exercise of his First Amendment right”); Meachum v. Fano, 427 U.S. 215 ,224-25 (1976)

1 (no right to be housed in a particular institution). Finally, Plaintiff's allegations are
2 sufficient to suggest that the transfer was not motivated by any penological necessity.

3 Thus, the issue before the Court is whether Plaintiff has alleged sufficient facts to
4 suggest that Defendants transferred Plaintiff because of his protected First Amendment
5 activity. Indeed, the Court previously dismissed Plaintiff's complaint on the ground that
6 the first amended complaint failed in this regard. (ECF Nos. 29 & 33.) More specifically,
7 the Court held as follows:

8 The exhibits attached to the First Amended Complaint reveal
9 two critical contradictions. First, they reveal that the decision
10 to transfer Plaintiff to CSP-Solano was made on February
11 14, 2012, two days before the second ICC hearing and thus
12 before Defendants allegedly told Plaintiff to stop pursuing his
13 appeal. (See ECF No. 11 at 40.) Second, they reveal that
14 the decision to transfer Plaintiff to CSP-Solano was made by
15 a Classification Staff Representative ("CSR") (id.). Plaintiff
16 did not allege that any of the Defendants are CSRs (see
17 ECF No. 11 at 2-3).

18 In short, while Plaintiff alleges in his First Amended
19 Complaint that Defendants decided to transfer him to CSP-
20 Solano after the February 16, 2012, ICC hearing, his exhibits
21 reveal the transfer decision was actually made before the
22 February 16, 2012 ICC hearing and by someone other than
23 the named Defendants. Plaintiff's conclusory statement that
24 the Defendants "are who authorized the illegal transfer" is
25 without support in the factual allegations.

26 Plaintiff has failed to cure these defects in his second amended complaint. He
27 now alleges that Cano told him to stop pursuing his grievance on February 14, 2016.
28 However, the allegations do not suggest this was a threat, but rather an indication that
the grievance would essentially be mooted by the subsequent ICC decision. More
significantly, however, Plaintiff does not allege any facts to suggest that the ICC
members are CSRs or otherwise authorized the transfer to CSP-Solano. He therefore
fails to allege that any of the ICC members took adverse action against him because of
his protected activity. Nor does he allege facts to suggest that the CSR responsible for
the transfer was aware of his grievance or acted because of it. He therefore fails to state
a claim.

1 Plaintiff has been advised at some length of the legal standards applicable to his
2 claims and had been afforded the opportunity to cure noted defects. He has failed to do
3 so. Further leave to amend appears futile and should be denied.

4 **V. Conclusion and Recommendation**

5 Based on the foregoing, Plaintiff's second amended complaint fails to state a
6 cognizable claim. He previously was advised of pleading deficiencies and afforded the
7 opportunity to correct them. He failed to do so. Any further leave to amend reasonably
8 appears futile and should be denied.

9 Accordingly, it is HEREBY RECOMMENDED that the action be DISMISSED with
10 prejudice for failure to state a claim.

11 The findings and recommendation will be submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).
13 Within fourteen (14) days after being served with the findings and recommendation, the
14 parties may file written objections with the Court. The document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendation." A party may
16 respond to another party's objections by filing a response within fourteen (14) days after
17 being served with a copy of that party's objections. The parties are advised that failure
18 to file objections within the specified time may result in the waiver of rights on appeal.
19 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
20 F.2d 1391, 1394 (9th Cir. 1991)).

21 IT IS SO ORDERED.
22

23 Dated: December 23, 2016

24 /s/ Michael J. Seng
25 UNITED STATES MAGISTRATE JUDGE
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