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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL MALDONADO,

Plaintiff,

v.

PADILLA, et. al.,

Defendants.

Case No. 1:15-cv-00836-DAD-MJS-(PC)
**FINDINGS AND RECOMMENDATION
TO GRANT DEFENDANTS JIMINEZ
AND CHAVEZ’S MOTION TO DISMISS
(ECF No. 18)**
**FOURTEEN (14) DAY OBJECTION
DEADLINE**

I. INTRODUCTION

Plaintiff is a prisoner proceeding pro se and in forma pauperis in a civil rights action pursuant to 42 U.S.C. § 1983. This matter proceeds on Plaintiff’s Second Amended Complaint, which was found to state Eighth Amendment excessive force claims against Defendants Padilla, Jiminez, and Chavez. (ECF Nos. 11-12.)

On December 8, 2015, Defendants Jiminez and Chavez filed a motion to dismiss for failure to state a claim and failure to exhaust administrative remedies. (ECF No. 18.) Plaintiff filed an opposition, and Defendants have filed a reply. This matter is fully briefed and ready for disposition.

1 **II. RELEVANT ALLEGATIONS**

2 Plaintiff's allegations may be fairly summarized as follows:

3 On May 15, 2014, Plaintiff briefly chatted with another inmate while waiting to be
4 escorted to medical. Defendant Jimenez and another correctional officer, Castillo,
5 approached Plaintiff in a threatening manner and told him to, "Shut the f*** up!" They
6 then stood menacingly near Plaintiff, allegedly to "entice" Plaintiff to approach them.
7 Plaintiff did not approach, and supervising officer Sgt. Mendoza gestured to Jimenez and
8 Castillo to leave. As Jimenez and Castillo walked away, they both told Plaintiff, "I'll get
9 you while you're asleep!" Correctional Officer Jane Doe overheard this comment and told
10 Plaintiff to go back to his cell because she "[didn't] want nothing to happen to you."

11 Later in the day, Defendant Padilla summoned Plaintiff to the podium in the
12 dayroom where Plaintiff had been playing cards with friends. Padilla said that Plaintiff
13 had messed up by arguing in front of the warden, and that unidentified Third Watch
14 superior officers were plotting to "set [Plaintiff] up." Padilla added that Defendant Officer
15 Chavez had said Plaintiff called her a bitch. At this time, Plaintiff turned to return to his
16 friends, but Padilla called him back to the podium.

17 As Plaintiff approached "in a non-threatening manner," Padilla withdrew his pepper
18 spray canister from its holster. When Plaintiff was 3-5 feet away, Padilla began spraying
19 Plaintiff directly in the face. Plaintiff fell to the ground in a prone position, but Padilla kept
20 spraying. Plaintiff then felt a kick in the ribs, and Plaintiff heard Padilla say, "Who's the
21 bitch now?" Plaintiff begged Padilla to stop but he continued spraying. Padilla then
22 handcuffed Plaintiff, and other officers arrived on the scene, including Chavez and
23 Jimenez. Plaintiff heard Chavez and Jimenez (both of whom Plaintiff can recognize by
24 voice) say, "Who's the bitch now?" Plaintiff was then lifted and dragged to the fire escape
25 door. An unidentified officer told Plaintiff, "You got what you deserve," and "We're going
26 to make sure you get a third strike." Plaintiff was then taken to a decontamination area.

1 **III. DEFENDANTS’ MOTION TO DISMISS**

2 **A. Failure to State a Claim**

3 Defendants first move for dismissal on the ground that Plaintiff has failed to state a
4 claim. In order to survive dismissal for failure to state a claim pursuant to Rule 12(b)(6),
5 “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
6 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting
7 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In considering a motion to
8 dismiss, the court must accept as true the allegations of the complaint in question,
9 Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), construe the
10 pleading in the light most favorable to the party opposing the motion, and resolve all
11 doubts in the pleader’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421, reh’g denied,
12 396 U.S. 869 (1969). The court may consider facts established by exhibits attached to
13 the complaint. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). The
14 court may also consider facts which may be judicially noticed, Mullis v. United States
15 Bankruptcy Ct., 828 F.2d 1385, 1388 (9th Cir. 1987); and matters of public record,
16 including pleadings, orders, and other papers filed with the court, Mack v. South Bay
17 Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986).

18 On review, the Court agrees with Defendants Jiminez and Chavez that Plaintiff’s
19 pleading fails to state a claim against them. Plaintiff alleges that after Padilla pepper
20 sprayed and kicked him in the ribs, the moving Defendants arrived on the scene and
21 said “Who’s the bitch now?” There is no allegation that either of these Defendants
22 assaulted Plaintiff. Their only involvement, then, is their verbal abuse and harassment,
23 which, standing alone, do not state a claim. Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir.
24 1996) (verbal threats); Oltarzewski v. Ruggiero, 830 F.2d 136, 138 (9th Cir. 1987)
25 (verbal threats); Gaut v. Sunn, 810 F.2d 923, 925 (9th 1987) (verbal harassment).
26 Defendants’ motion to dismiss should therefore be granted on this ground, and for the
27 reasons discussed infra, leave to amend should be denied.

1 **B. Failure to Exhaust Administrative Remedies**

2 Defendants also move for dismissal on the ground that Plaintiff has not exhausted
3 his administrative remedies as to them. Examination of Plaintiff’s inmate grievance
4 regarding this incident, which is attached to his Second Amended Complaint¹, convinces
5 the undersigned that Plaintiff has not exhausted his administrative remedies and,
6 therefore, leave to amend the Second Amended Complaint to state a claim against the
7 moving Defendants should be denied. Cano v. Taylor, 739 F.3d 1214, 1220-21 (9th Cir.
8 2014) (new claims added to a lawsuit via amendment that are exhausted prior to the
9 amendment comply with the exhaustion requirement); Rhodes v. Robinson, 621 F.3d
10 1002, 1007 (9th Cir. 2010) (new claims asserted in an amended complaint are to be
11 considered by the court so long as administrative remedies with respect to those new
12 claims are exhausted before the amended complaint is tendered to the court for filing).

13 The Prison Litigation Reform Act (“PLRA”) stipulates, “No action shall be brought
14 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by
15 a prisoner confined in any jail, prison, or other correctional facility until such
16 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).
17 Therefore, prisoners are required to exhaust all available administrative remedies prior to
18 filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007).

19 “The primary purpose of a [prisoner’s administrative] grievance is to alert the
20 prison to a problem and facilitate its resolution, not to lay groundwork for litigation.”
21 Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). “A grievance need not include
22 legal terminology or legal theories unless they are in some way needed to provide notice
23 of the harm being grieved. A grievance also need not contain every fact necessary to
24 prove each element of an eventual legal claim.” Id. Instead, the grievance must alert
25 “the prison to the nature of the wrong for which redress is sought,” id. at 1120 (quoting

26 _____
27 ¹ Coppola v. Smith, 982 F. Supp. 2d 1133, 1136 (E.D. Cal. 2013) (“In assessing a motion to dismiss,
28 courts may consider documents attached to the complaint, documents incorporated by reference in the
complaint, or matters of judicial notice.”)

1 Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)), and must give the prison an
2 opportunity “to reach the merits of the issue.” Id. at 1119.

3 On June 2, 2014, Plaintiff filed a 602 inmate grievance regarding the incident at
4 issue in this case. See ECF No. 11 at 47-48. There, Plaintiff clearly set forth Defendant
5 Padilla’s role in the attack, but there was no mention of the involvement of any other
6 correctional staff in the attack, either generally or by name. See id. at 47-59. Plaintiff’s
7 grievance was considered at all levels of review and ultimately denied at the Third Level.
8 Id. at 58-59.

9 Pursuant to CDCR regulations, Plaintiff was required to include sufficient facts to
10 give notice of his claims and identify the individuals involved. See Cal. Code Regs. tit.
11 15, § 3084.2(a)(3) (2015) (inmate must “list all staff member(s) involved and ... describe
12 their involvement in the issue.”). Plaintiff’s grievance did not comply with this procedural
13 directive since he did not name Defendants Jiminez and Chavez. Arguably, he failed to
14 exhaust his administrative remedies on this ground. However, under recent Ninth Circuit
15 authority, this is not necessarily fatal to Plaintiff’s claim since the “prison officials
16 ignore[d] the procedural problem and render[ed] a decision on the merits of the
17 grievance at each available step of the administrative process.” Reyes v. Smith, 810
18 F.3d 654, 657 (9th Cir. Jan. 12, 2016).

19 Nonetheless, what is problematic for Plaintiff is that he failed to include sufficient
20 information to put prison officials on notice of the breadth of the problem in order to allow
21 them to take corrective action. In this case, neither Plaintiff’s grievance nor the prison
22 officials’ investigation of that grievance revealed that anyone besides Defendant Padilla
23 was involved in the pepper spraying incident. Since “[t]he primary purpose of a
24 [prisoner’s administrative] grievance is to alert the prison to a problem and facilitate its
25 resolution,” Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009), Plaintiff was required
26 to at least allege that more than one individual was involved – or, stated another way,
27 not affirmatively limit the involvement to only Defendant Padilla. Plaintiff’s decision to
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1 identify only one correctional officer, and make no mention of the involvement of any
2 others, leads the Court to conclude that he did not exhaust his administrative remedies
3 because he failed to put prison officials on notice of the breadth of the problem so that
4 they could attempt to satisfactorily resolve his complaints.

5 **IV. CONCLUSION**

6 Based on the foregoing, the Court HEREBY RECOMMENDS that Defendants
7 Jiminez and Chavez's motion to dismiss be GRANTED (ECF No. 18), and they be
8 dismissed from this action without prejudice.

9 These Findings and Recommendations are submitted to the United States District
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
11 **fourteen** (14) days after being served with these Findings and Recommendations, any
12 party may file written objections with the Court and serve a copy on all parties. Such a
13 document should be captioned "Objections to Magistrate Judge's Findings and
14 Recommendations." Any reply to the objections shall be served and filed within **fourteen**
15 (14) days after service of the objections. The parties are advised that failure to file
16 objections within the specified time may result in the waiver of rights on appeal.
17 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
18 F.2d 1391, 1394 (9th Cir. 1991)).

19
20 IT IS SO ORDERED.

21
22 Dated: March 4, 2016

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE