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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LANELL MARTIN,
Plaintiff,
v.
D. DESHA,
Defendant.

CASE No. 1:16-cv-01353-AWI-MJS (PC)

**FINDINGS AND RECOMMENDATIONS
FOR PLAINTIFF TO PROCEED ON
COGNIZABLE FIRST AMENDMENT
RETALIATION CLAIM AGAINST
DEFENDANT DESHA AND TO DISMISS
ALL OTHER CLAIMS**

(ECF No. 13)

**FOURTEEN (14) DAY OBJECTION
DEADLINE**

Plaintiff is a state prisoner proceeding pro se in this civil rights action brought pursuant to 42 U.S.C. § 1983.

Plaintiff's complaint was screened and found to state a cognizable First Amendment retaliation claim against Defendant Desha, but no other claims. (ECF No. 11.) Plaintiff was ordered to file either an amended complaint or a notice that he was willing to proceed only on the cognizable claim. Plaintiff filed a first amended complaint (ECF No. 13), which is before the Court for screening.

1 **I. Screening Requirement**

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

11 **II. Pleading Standard**

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

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

23 A complaint must contain “a short and plain statement of the claim showing that
24 the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
25 are not required, but “[t]hreadbare recitals of the elements of a cause of action,
26 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.
27 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
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1 Plaintiff must set forth “sufficient factual matter, accepted as true, to state a claim to relief
2 that is plausible on its face.” Id. Facial plausibility demands more than the mere
3 possibility that a defendant committed misconduct and, while factual allegations are
4 accepted as true, legal conclusions are not. Id. at 677-78.

5 **III. Plaintiff’s Allegations**

6 Plaintiff is detained at the California Institution for Men and complains of acts that
7 occurred at Valley State Prison (“VSP”). He names Correctional Officer D. Desha as the
8 sole defendant.

9 Briefly stated, Plaintiff contends that Defendant retaliated against him for filing
10 grievances by writing a false chrono. His allegations may be summarized essentially as
11 follows:

12 Plaintiff worked under Defendant as an Assistance Helper in Building 4, D-Yard.

13 In late October 2015, Plaintiff submitted a grievance regarding issues with
14 Defendant. Plaintiff complained that Defendant threatened Plaintiff with loss of Plaintiff’s
15 job if Plaintiff did not move into her building; that Defendant did not timely submit for
16 Plaintiff’s quarterly pay increase, and that Defendant told Plaintiff’s his roommates that
17 Plaintiff was an informant.

18 On November 17, 2015, Defendant learned of Plaintiff’s grievance and wrote a
19 CDCR 128-B informational chrono regarding Plaintiff. Therein, Defendant stated that
20 Plaintiff had a poor attitude that affected his work crew. She stated Plaintiff had been
21 doing great, but more recently had had difficulty getting to work on time because he did
22 not live in the Housing Unit where he worked. Defendant wrote that she told Plaintiff he
23 would have to move into the Unit so that he could be at work in time to push wheelchairs
24 for the evening meal. According to Defendant, Plaintiff agreed to move.

25 Defendant also explained that she had attempted on several occasions in early
26 2015 to provide Plaintiff pay increases, but that the increases did not go through for
27 technological reasons. Plaintiff was unhappy with this result, and his unhappiness began
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1 to affect his attitude and relationship with others in the Unit. On October 20, 2015,
2 Plaintiff was involved in a physical altercation with another inmate, and Defendant noted
3 the altercation on Plaintiff's bed card.

4 Defendant also noted that, after she had denied Plaintiff a pay increase in
5 October 2015, Plaintiff's behavior deteriorated further. He lacked motivation in his work
6 and was having difficulties with his roommates. He also behaved antagonistically toward
7 Defendant. Defendant stated that she would not put in for a pay increase upon Plaintiff's
8 next review on December 29, 2016.

9 Plaintiff did not learn of this chrono until December 16, 2015. That same day, he
10 filed a complaint regarding the chrono, and therein also complained of comments made
11 by Defendant on several occasions that non-party Officer Herrada had a small penis that
12 caused him to urinate on the restroom floor that Plaintiff was required to mop.

13 On December 21, 2015, Defendant left the Unit with her belongings. She did not
14 return during Plaintiff's remaining time at VSP. Plaintiff believes she was suspended as a
15 result of his complaints.

16 On December 29, 2015, Plaintiff was transferred to the California Institution for
17 Men.

18 The appeals coordinator responded to Plaintiff's complaint against Defendant on
19 October 24, 2016, finding that a violation of CDCR policy had occurred.

20 Plaintiff claims retaliation and a variety of state law claims. He seeks money
21 damages and declaratory relief.

22 **IV. Analysis**

23 **A. Official Capacity Claims**

24 Plaintiff names Defendant in both her official and individual capacities.

25 Plaintiff's official capacity claim for damages against the Defendant is barred by
26 the Eleventh Amendment. See Kentucky v. Graham, 473 U.S. 159, 169-70 (1985)
27 (Eleventh Amendment immunity from damages in federal court action against state
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1 remains in effect when state officials are sued for damages in their official capacity).
2 Plaintiff's damages request against Defendant in her official capacity will be dismissed.

3 Although Eleventh Amendment immunity precludes an award of damages against
4 Defendant in her official capacities, it "does not bar actions for declaratory or injunctive
5 relief brought against state officials in their official capacity." Austin v. State Indus. Ins.
6 Sys., 939 F.2d 676, 680 (9th Cir. 1991). Here, Plaintiff also seeks declaratory relief.
7 However, his request for declaratory relief seeks only a declaration that his rights were
8 violated. Because his claim for damages necessarily entails a determination whether his
9 rights were violated, his separate request for declaratory relief is subsumed by those
10 claims, and should be dismissed. Rhodes v. Robinson, 408 F.3d 559, 566 n.8 (9th Cir.
11 2005).

12 Additionally, official capacity claims must allege that a policy or custom of the
13 governmental entity of which the official is an agent was the moving force behind the
14 violation. See Hafer v. Melo, 502 U.S. 21, 25 (1991); Kentucky v. Graham, 473 U.S. 159,
15 166 (1985). Plaintiff must establish an affirmative causal link between the policy at issue
16 and the alleged constitutional violation. See City of Canton, Ohio v. Harris, 489 U.S. 378,
17 385, 391-92 (1989); Van Ort v. Estate of Stanewich, 92 F.3d 831, 835 (9th Cir. 1996);
18 Oviatt v. Pearce, 954 F.2d 1470, 1473-74 (9th Cir. 1992). Here, Plaintiff identifies no
19 policy or custom associated with the violation.

20 Plaintiff already was advised of these legal standards but nonetheless fails to
21 state a cognizable claim. Plaintiff's official capacity claims should be dismissed. His
22 claim for declaratory relief likewise should be dismissed. Further leave to amend should
23 be denied.

24 **B. First Amendment Retaliation**

25 "Within the prison context, a viable claim of First Amendment retaliation entails
26 five basic elements: (1) An assertion that a state actor took some adverse action against
27 an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4)

1 chilled the inmate's exercise of his First Amendment rights, and (5) the action did not
2 reasonably advance a legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559,
3 567-68 (9th Cir. 2005).

4 The second element of a prisoner retaliation claim focuses on causation and
5 motive. See Brodheim v. Cry, 584 F.3d 1262, 1271 (9th Cir. 2009). A plaintiff must show
6 that his protected conduct was a "substantial' or 'motivating' factor behind the
7 defendant's conduct." Id. (quoting Sorrano's Gasco. Inc. v. Morgan, 874 F.2d 1310, 1314
8 (9th Cir. 1989). Although it can be difficult to establish the motive or intent of the
9 defendant, a plaintiff may rely on circumstantial evidence. Bruce v. Ylst, 351 F.3d 1283,
10 1288-89 (9th Cir. 2003) (finding that a prisoner establishes a triable issue of fact
11 regarding prison officials' retaliatory motives by raising issues of suspect timing,
12 evidence, and statements); Hines v. Gomez, 108 F.3d 265, 267-68 (9th Cir. 1997); Pratt
13 v. Rowland, 65 F.3d 802, 808 (9th Cir. 1995) ("timing can properly be considered as
14 circumstantial evidence of retaliatory intent").

15 The third prong can be satisfied by various activities. Filing a grievance is a
16 protected action under the First Amendment. Valandingham v. Bojorquez, 866 F.2d
17 1135, 1138 (9th Cir. 1989). Pursuing a civil rights litigation similarly is protected under
18 the First Amendment. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985).

19 With respect to the fourth prong, "[it] would be unjust to allow a defendant to
20 escape liability for a First Amendment violation merely because an unusually determined
21 plaintiff persists in his protected activity" Mendocino Env'tl. Ctr. v. Mendocino Cnty.,
22 192 F.3d 1283, 1300 (9th Cir. 1999). The correct inquiry is to determine whether an
23 official's acts would chill or silence a person of ordinary firmness from future First
24 Amendment activities. Rhodes, 408 F.3d at 568-69 (citing Mendocino Env'tl. Ctr., 192
25 F.3d at 1300).

26 With respect to the fifth prong, a prisoner must affirmatively show that "the prison
27 authorities' retaliatory action did not advance legitimate goals of the correctional
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1 institution or was not tailored narrowly enough to achieve such goals.” Rizzo, 778 F.2d at
2 532.

3 Plaintiff has alleged that Defendant wrote a negative chrono against Plaintiff in
4 retaliation for Plaintiff filing an administrative grievance. He alleges that the facts
5 contained in the chrono are untrue, sufficiently alleging a lack of legitimate penological
6 interest. The question, then, is whether the chrono constitutes adverse action sufficient
7 to chill a person of ordinary firmness.

8 Several courts have held that such chronos, in and of themselves, are insufficient
9 to constitute adverse action. See, e.g., Jenkins v. Caplan, No. C 02-5603 RMW PR,
10 2010 WL 3742659, at *2 (N.D. Cal. Sept. 16, 2010) (granting summary judgment for
11 defendant where plaintiff failed to present evidence that chrono constituted adverse
12 action); Williams v. Woodford, 2009 WL 3823916, *3 (E.D. Cal. 2009) (“the alleged filing
13 of the false administrative chrono fails to state a claim because it is not a sufficient
14 adverse action for a retaliation claim because the chrono was merely informational”);
15 Samano v. Copeland, 2008 WL 2168884, *2 (E.D. Cal.2008) (dismissing retaliation claim
16 for failure to state a claim because issuing a counseling chrono did not constitute an
17 adverse action). However, Plaintiff claims that the chrono is adverse because it could be
18 used to deny him parole. This is sufficient at the pleading stage to constitute adverse
19 action.

20 Accordingly, Plaintiff states a cognizable retaliation claim against Defendant.

21 **C. Fourteenth Amendment Defamation**

22 Plaintiff states his intent to bring a defamation claim.

23 Defamation can, under certain circumstances, constitute a claim for relief under
24 the Fourteenth Amendment. However, reputational harm alone does not state a § 1983
25 claim. Paul v. Davis, 424 U.S. 693, 701-710 (1976). Instead, a plaintiff must allege loss
26 of a constitutionally protected property or liberty interest in conjunction with the allegation
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1 of injury to reputation. Cooper v. Dupnik, 924 F.2d 1520, 1532 (9th Cir.1991), aff'd in
2 relevant part, 963 F.2d 1220, 1235 n.6 (9th Cir. 1992) (en banc).

3 Plaintiff does not describe any constitutionally protected interest he was deprived
4 of in connection with the injury to his reputation. He only speculates that the false chrono
5 may, at some point, be used to deny him parole. This allegation fails to state a claim.
6 Plaintiff previously was advised of this standard and afforded an opportunity to cure the
7 defect. He failed to do so. Further leave to amend appears futile and should be denied.

8 **D. State Law Claims**

9 The Court may exercise supplemental jurisdiction over state law claims in any civil
10 action in which it has original jurisdiction, if the state law claims form part of the same
11 case or controversy. 28 U.S.C. § 1367(a). “The district courts may decline to exercise
12 supplemental jurisdiction over a claim under subsection (a) if . . . the district court has
13 dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). The
14 Supreme Court has cautioned that “if the federal claims are dismissed before trial, . . .
15 the state claims should be dismissed as well.” United Mine Workers of Am. v. Gibbs, 383
16 U.S. 715, 726 (1966).

17 Furthermore, to bring a tort claim under California law, Plaintiff must allege
18 compliance with the California Tort Claims Act (“CTCA”). Under the CTCA, a plaintiff
19 may not maintain an action for damages against a public employee unless he has
20 presented a written claim to the state Victim Compensation and Government Claims
21 Board (“VCGCB”) within six months of accrual of the action. Cal. Gov't Code §§ 905,
22 911.2(a), 945.4 & 950.2; Mangold v. California Pub. Utils. Comm'n, 67 F.3d 1470, 1477
23 (9th Cir. 1995). Failure to demonstrate such compliance constitutes a failure to state a
24 cause of action and will result in the dismissal of state law claims. State of California v.
25 Superior Court (Bodde), 32 Cal.4th 1234, 1240 (2004).

26 Here, Plaintiff has alleged cognizable federal claims and has pled compliance with
27 the CTCA. Accordingly, the Court will address his state law claims.

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1. Defamation

“Defamation is an invasion of the interest in reputation.” Ringler Associates Inc. v. Maryland Cas. Co., 80 Cal. App. 4th 1165, 1179 (2000). To succeed on a claim for defamation, a plaintiff must establish the defendant made “the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.” Smith v. Maldonado, 72 Cal. App. 4th 637, 644 (1999) (citing Cal. Civ.C ode §§ 45, 46); see also Taus v. Loftus, 40 Cal. 4th 683, 720 (2007) (“defamation involves (a) a publication that is (b) false, (c) defamatory and (d) unprivileged, and that (e) has a natural tendency to injure or causes special damages”). Publication of the statement may either be written (libel) or spoken (slander). Cal Civ. Code §§ 45, 46.

Plaintiff’s defamation claim fails. The allegedly false statements appear to refer to differences of opinion, or differing interpretations of factual events, not to statements of fact. Plaintiff previously was advised of this defect but nonetheless fails to state a claim. This claim should be dismissed. Further leave to amend should be denied.

2. Negligence

A public employee is liable for injury to a prisoner “proximately caused by his negligent or wrongful act or omission.” Cal. Gov’t Code § 844.6(d). “Under California law, ‘[t]he elements of negligence are: (1) defendant’s obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks (duty); (2) failure to conform to that standard (breach of duty); (3) a reasonably close connection between the defendant’s conduct and resulting injuries (proximate cause); and (4) actual loss (damages).” Corales v. Bennett, 567 F.3d 554, 572 (9th Cir. 2009) (quoting McGarry v. Sax, 158 Cal. App. 4th 983, 994 (2008)). For claims based on medical malpractice, defendant has a duty “to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise.” Hanson v. Grode, 76 Cal. App. 4th 601, 606 (1999).

1 Plaintiff has not identified the duty he believes Defendant breached (other than a
2 duty to tell the truth) nor any damages resulting therefrom. His allegations do not state a
3 cognizable claim and this claim should be dismissed.

4 **3. Negligent Misrepresentation**

5 Plaintiff brings a new claim for negligent misrepresentation.

6 Under California law, negligent misrepresentation occurs where the defendant
7 makes false statements, honestly believing that they are true, but without reasonable
8 ground for such belief. See Bily v. Arthur Young & Co., 3 Cal.4th 370, 407-408 (1992).
9 This tort is not applicable on the facts presented here, primarily because Plaintiff alleges
10 that Defendant purposefully (rather than negligently) made false statements against him.
11 Furthermore, negligent misrepresentation requires Plaintiff's reliance on the allegedly
12 false statement of fact, not merely misrepresentations regarding Plaintiff. See 5 Witkin,
13 Summary 10th Torts § 818 (2005).

14 This claim should be dismissed.

15 **V. Conclusion and Recommendations**

16 Plaintiff's complaint states a cognizable First Amendment retaliation claim for
17 damages against Defendant Desha in her individual capacity, but no other cognizable
18 claims. Plaintiff previously was advised of pleading defects and afforded the opportunity
19 to cure them. He failed to do so. Further leave to amend appears futile and should be
20 denied.

21 Accordingly, it is HEREBY RECOMMENDED that:

- 22 1. Plaintiff proceed on his First Amendment retaliation claim for damages
23 against Defendant Desha in her individual capacity;
- 24 2. All other claims asserted in the second amended complaint be DISMISSED
25 with prejudice, and
- 26 3. Defendant Desha be required to file a responsive pleading or motion within
27 fourteen days of the order adopting these findings and recommendations.
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1 The findings and recommendations will be submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).
3 Within fourteen (14) days after being served with the findings and recommendations, the
4 parties may file written objections with the Court. The document should be captioned
5 “Objections to Magistrate Judge’s Findings and Recommendations.” A party may
6 respond to another party’s objections by filing a response within fourteen (14) days after
7 being served with a copy of that party’s objections. The parties are advised that failure to
8 file objections within the specified time may result in the waiver of rights on appeal.
9 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
10 F.2d 1391, 1394 (9th Cir. 1991)).

11
12 IT IS SO ORDERED.

13 Dated: January 23, 2017

/s/ Michael J. Seng
14 UNITED STATES MAGISTRATE JUDGE