



1 (ECF No. 14.) However, the District Judge assigned to the case declined to adopt the  
2 findings and recommendations as to the First Amendment retaliation claim, concluding  
3 that the chrono at issue was insufficiently adverse to support a retaliation claim. (ECF  
4 No. 21.) Specifically, the District Judge concluded that Plaintiff's claim that the chrono  
5 could be used to deny him parole was too speculative under the facts alleged. (Id.)  
6 Plaintiff was again given leave to amend his First Amendment retaliation claim. His  
7 remaining claims were dismissed with prejudice.

8 His second amended complaint is before the Court for screening. (ECF No. 22.)

9 **I. Screening Requirement**

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

19 **II. Pleading Standard**

20 Section 1983 "provides a cause of action for the deprivation of any rights,  
21 privileges, or immunities secured by the Constitution and laws of the United States."  
22 Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).  
23 Section 1983 is not itself a source of substantive rights, but merely provides a method for  
24 vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94  
25 (1989).

26 To state a claim under § 1983, a plaintiff must allege two essential elements:  
27 (1) that a right secured by the Constitution or laws of the United States was violated and  
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1 (2) that the alleged violation was committed by a person acting under the color of state  
2 law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d  
3 1243, 1245 (9th Cir. 1987).

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

### 13 **III. Plaintiff’s Allegations**

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

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

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

21 In late October 2015, Plaintiff submitted a grievance regarding issues with  
22 Defendant. Plaintiff complained that Defendant threatened that he would lose his job if  
23 he did not move into her building. He complained that Defendant did not timely submit  
24 for Plaintiff’s quarterly pay increase. He complained that Defendant told his roommates  
25 that he was an informant.

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

6 Defendant also explained that she had attempted on several occasions in early  
7 2015 to provide Plaintiff pay increases, but that the increases did not go through for  
8 technological reasons. Plaintiff was unhappy with this result, and his unhappiness began  
9 to affect his attitude and relationship with others in the Unit. On October 20, 2015,  
10 Plaintiff was involved in a physical altercation with another inmate, and Defendant noted  
11 the altercation on Plaintiff's bed card.

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

17 Plaintiff did not learn of this chrono until December 15, 2015. That same day, he  
18 filed a complaint regarding the chrono, and therein also complained of comments made  
19 by Defendant on several occasions that non-party Officer Herrada had a small penis that  
20 caused him to urinate on the restroom floor that Plaintiff was required to mop.

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

24 On December 29, 2015, Plaintiff was transferred to the California Institution for  
25 Men. Plaintiff alleges that he was the only inmate in his facility with a CPAT machine  
26 who was transferred on December 29, 2015. He believes his transfer was caused by  
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1 Defendant and/or Defendant's chrono. Alternatively, he contends that he was transferred  
2 in retaliation for his December 15, 2015 complaint against Defendant.

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

#### 5 **IV. Analysis**

6 With the exception of Plaintiff's First Amendment retaliation claim against  
7 Defendant in her individual capacity, all other claims were dismissed with prejudice by  
8 the District Judge. (ECF No. 21.) Accordingly, only the First Amendment retaliation claim  
9 is addressed herein.

10 "Within the prison context, a viable claim of First Amendment retaliation entails  
11 five basic elements: (1) An assertion that a state actor took some adverse action against  
12 an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4)  
13 chilled the inmate's exercise of his First Amendment rights, and (5) the action did not  
14 reasonably advance a legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559,  
15 567-68 (9th Cir. 2005).

16 The second element of a prisoner retaliation claim focuses on causation and  
17 motive. See Brodheim v. Cry, 584 F.3d 1262, 1271 (9th Cir. 2009). A plaintiff must show  
18 that his protected conduct was a "'substantial' or 'motivating' factor behind the  
19 defendant's conduct." Id. (quoting Sorrano's Gasco. Inc. v. Morgan, 874 F.2d 1310, 1314  
20 (9th Cir. 1989). Although it can be difficult to establish the motive or intent of the  
21 defendant, a plaintiff may rely on circumstantial evidence. Bruce v. Ylst, 351 F.3d 1283,  
22 1288-89 (9th Cir. 2003) (finding that a prisoner establishes a triable issue of fact  
23 regarding prison officials' retaliatory motives by raising issues of suspect timing,  
24 evidence, and statements); Hines v. Gomez, 108 F.3d 265, 267-68 (9th Cir. 1997); Pratt  
25 v. Rowland, 65 F.3d 802, 808 (9th Cir. 1995) ("timing can properly be considered as  
26 circumstantial evidence of retaliatory intent").

1           The third prong can be satisfied by various activities. Filing a grievance is a  
2 protected action under the First Amendment. Valandingham v. Bojorquez, 866 F.2d  
3 1135, 1138 (9th Cir. 1989). Pursuing a civil rights litigation similarly is protected under  
4 the First Amendment. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985).

5           With respect to the fourth prong, “[it] would be unjust to allow a defendant to  
6 escape liability for a First Amendment violation merely because an unusually determined  
7 plaintiff persists in his protected activity . . . .” Mendocino Envtl. Ctr. v. Mendocino Cnty.,  
8 192 F.3d 1283, 1300 (9th Cir. 1999). The correct inquiry is to determine whether an  
9 official’s acts would chill or silence a person of ordinary firmness from future First  
10 Amendment activities. Rhodes, 408 F.3d at 568-69 (citing Mendocino Envtl. Ctr., 192  
11 F.3d at 1300).

12           With respect to the fifth prong, a prisoner must affirmatively show that “the prison  
13 authorities’ retaliatory action did not advance legitimate goals of the correctional  
14 institution or was not tailored narrowly enough to achieve such goals.” Rizzo, 778 F.2d at  
15 532.

16           Plaintiff alleges that he was transferred to another institution in retaliation for his  
17 December 15, 2015 complaint against Defendant. Prison inmates do not have a  
18 constitutional right to be incarcerated at a particular correctional facility or to be  
19 transferred from one facility to another. Meachum v. Fano, 427 U.S. 215, 224-25 (1976);  
20 see also Olim v. Wakinekona, 461 U.S. 238, 244-45 (1983). However, it is well settled  
21 that prison officials may not “transfer an inmate to another prison in retaliation for the  
22 inmate’s exercise of his First Amendment right[s.]” Pratt, 65 F.3d at 806. In the instant  
23 case, however, Plaintiff has not alleged facts to suggest that any adverse transfer  
24 occurred because of his protected conduct. He does not allege facts to suggest that  
25 Defendant had authority to transfer him to another institution. Indeed, according to  
26 Plaintiff, Defendant had been suspended by the time Plaintiff was transferred. Nor does  
27 he allege that the person or persons responsible for his transfer were motivated by  
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1 Plaintiff's complaint against Defendant or even were aware of the complaint at the time  
2 the transfer decision was made. Accordingly, this allegation fails to state a claim.

3 Plaintiff also appears to contend that he may have been transferred as a result of  
4 the negative information contained in Defendant's November 17, 2016 chrono and thus,  
5 the chrono constitutes adverse action sufficient to chill an ordinary person's exercise of  
6 their First Amendment rights. As noted by the District Judge with respect to Plaintiff's first  
7 amended complaint:

8 [T]he 128B Chrono in this case is not so extraordinary that it  
9 falls outside the general rule. The 128B Chrono contains  
10 some obvious hyperbole. The 128B Chrono reads as if  
11 Desha is upset because Plaintiff filed formal complaints or  
12 grievances against her, and that Desha is trying to explain  
13 ahead of time why an additional grievance could be  
14 forthcoming. There are no allegations that Plaintiff was  
15 disciplined as result of the 128B Chrono, or that any kind of  
16 negative result has occurred because of the 128B Chrono.

17 (ECF No. 21 at 3.)

18 Plaintiff's suspicion that he was transferred based on the contents of the chrono  
19 appears to be based purely on speculation. He provides no details regarding the  
20 individual or individuals responsible for the transfer decision and how or why the chrono  
21 might have motivated their decision. Nor does he provide facts to suggest that the  
22 transfer did not further a legitimate penological goal.

23 Accordingly, Plaintiff fails to state a cognizable retaliation claim.

## 24 **V. Conclusion and Recommendation**

25 Plaintiff's complaint does not state a cognizable First Amendment retaliation claim  
26 against Defendant Desha. Plaintiff previously was advised of pleading defects and  
27 afforded the opportunity to cure them. He failed to do so. Further leave to amend  
28 appears futile and should be denied.

Accordingly, it is HEREBY RECOMMENDED that the second amended complaint  
be DISMISSED with prejudice and without leave to amend for failure to state a claim.

1 The findings and recommendation 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 recommendation, the  
4 parties may file written objections with the Court. The document should be captioned  
5 "Objections to Magistrate Judge's Findings and Recommendation." A party may respond  
6 to another party's objections by filing a response within fourteen (14) days after being  
7 served with a copy of that party's objections. The parties are advised that failure to file  
8 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)).

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12 IT IS SO ORDERED.

13 Dated: May 15, 2017

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