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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KAREEM J. HOWELL,)	1:18-cv-00467-BAM (PC)
)	
Plaintiff,)	ORDER DIRECTING CLERK OF COURT
)	TO RANDOMLY ASSIGN DISTRICT
v.)	JUDGE
)	
S. BABB, et al.,)	FINDINGS AND RECOMMENDATIONS
)	TO DISMISS CERTAIN CLAIMS AND
Defendants.)	DEFENDANTS
)	
)	(ECF No. 10)
)	
)	FOURTEEN-DAY DEADLINE
)	

I. Screening Requirement and Standard

Plaintiff Kareem J. Howell (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. On July 2, 2018, the Court screened Plaintiff’s complaint and granted him leave to amend. (ECF No. 9.) Plaintiff’s first amended complaint, filed on July 30, 2018, is currently before the Court for screening. (ECF No. 10.)

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary relief

1 from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2); 28 U.S.C. §
2 1915(e)(2)(B)(ii).

3 A complaint must contain “a short and plain statement of the claim showing that the pleader
4 is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
5 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
6 statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009)
7 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65 (2007)).
8 While a plaintiff’s allegations are taken as true, courts “are not required to indulge unwarranted
9 inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation
10 marks and citation omitted).

11 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings
12 liberally construed and to have any doubt resolved in their favor. Hebbe v. Pliler, 627 F.3d 338,
13 342 (9th Cir. 2010) (citations omitted). To survive screening, Plaintiff’s claims must be facially
14 plausible, which requires sufficient factual detail to allow the Court to reasonably infer that each
15 named defendant is liable for the misconduct alleged, Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949
16 (quotation marks omitted); Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir.
17 2009). The sheer possibility that a defendant acted unlawfully is not sufficient, and mere
18 consistency with liability falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678,
19 129 S. Ct. at 1949 (quotation marks omitted); Moss, 572 F.3d at 969.

20 **II. Plaintiff’s Allegations**

21 Plaintiff is a state prisoner currently housed at California State Prison, Corcoran, where the
22 events in the complaint are alleged to have occurred. Plaintiff brings suit against the following
23 defendants: (1) Correctional Captain S. Babb; (2) Correctional Lieutenant S. Tumacder; and (3)
24 Correctional Captain Gallagher. Plaintiff alleges that he has been retaliated against in violation of
25 the First Amendment to the United States Constitution.

26 Plaintiff alleges that he filed an institutional staff complaint against Sergeant Burns, and
27 then filed a civil complaint in the Eastern District against Sergeant Burns on February 2, 2018,
28

1 Case No. 1:18-cv-00311. Since that time, Plaintiff alleges that he has been experiencing retaliation
2 by Defendants Babb, Tumacder and Gallagher.

3 On March 29, 2018, Defendants Babb and Tumacder came to Plaintiff's cell in the mental
4 health long term housing unit. Defendant Tumacder stated to Plaintiff, "You filed a complaint on
5 Sergeant J. Burns and another officer alleging some kind of misconduct. I think it's best if you
6 fixed that situation, or we are going to place you in the administrative segregation unit." (ECF
7 No. 10 at p. 6.) Plaintiff replied, "I'm not fixing anything. Sgt J. Burns violated my constitutional
8 rights, and I'm letting the courts deal with him." (Id.) Defendant Tumacder stated, "Look, that's
9 why we are here. To try and fix what happen, so this don't have to get messy." (Id.) Plaintiff
10 asked if Defendant Tumacder was threatening him and what would happen if he did not fix the
11 complaint. Defendant Babb then stated, "I'm going to order my officers to remove you from this
12 cell and take you over to ASU, and trust me, you're not tough enough for that unit." (Id. at p. 7.)

13 Plaintiff explained to the defendants that if they tried to move him to administrative
14 segregation, then he would file a complaint against them. Plaintiff also explained that he had a
15 serious mental disorder and the law prohibited them from placing him in the administrative
16 segregation unit. Defendant Babb then asked Plaintiff if he was going to fix the problem with J.
17 Burns. When Plaintiff said no, Defendant Babb told him to start packing his personal property
18 because he was moving. Plaintiff informed Defendant Babb that he needed to speak to mental
19 health staff and that he would kill himself before he allowed them to place him in administrative
20 segregation. Defendant Babb responded, "Kill yourself and we'll just move your dead body to the
21 A.S.U. unit. One way or another you're moving." (Id. at p. 5.) Plaintiff again asked Defendant
22 Babb to call someone from mental health for Plaintiff to speak with. Defendant Babb told Plaintiff
23 that he could speak to mental health on his own time and walked away from the cell.

24 About an hour later, approximately 10 to 12 correctional officers dressed in extraction gear
25 approached Plaintiff's cell and ordered him to submit to handcuffs. Plaintiff complied with the
26 order, submitted to handcuffs and was removed from his cell without incident. Plaintiff was
27 escorted to a holding cell inside the unit staff hallway while officers packed up his personal
28 property.

1 While speaking to a mental health care provider in the holding cell, Plaintiff was
2 approached by Defendant Babb, Defendant Tumacder and Morelock, a custody employee. Plaintiff
3 was asked if he had reconsidered not moving forward with his civil complaint against J. Burns.
4 Plaintiff assured them that he would be moving forward. At that time, Plaintiff was told that he
5 was being moved from the mental health long term housing unit due to several custody officers
6 stating that they did not feel safe working around Plaintiff. When Plaintiff demanded to know the
7 identities of the staff members, Defendant Babb told Plaintiff that it was not important and that the
8 only thing that mattered was Plaintiff dropping his civil complaint against J. Burns. Plaintiff
9 refused and was forcefully escorted to the administrative segregation unit. Plaintiff alleges that he
10 was moved without an opportunity to present his views to prison official and was denied a lock-
11 up order that stated the reason/cause for his placement in segregation.

12 Plaintiff asserts that he did not receive a mental health evaluation before, during or after
13 his placement in the administrative segregated housing unit. No mental health staff member
14 approved Plaintiff's removal from the mental health long term housing unit and placement in the
15 administrative segregation unit. The decision to move Plaintiff allegedly was a punitive decision
16 made by Defendants Babb, Tumacder, and J. Gallagher in retaliation for Plaintiff filed a staff
17 complaint and civil complaint against Officer J. Burns.

18 Prior to his move to administrative segregation, Plaintiff's mental health treatment plan
19 included attending 1½ hours in therapy groups working on his coping skills, his poor impulse
20 control/anger management and his processing. In addition, his treatment plan included attending
21 one-on-one sessions with his primary psychologist once a week, during which Plaintiff was
22 working through childhood issues. The long-term housing mental health program also provided
23 several privileges, including night dayroom two times a week, a yard exercise program for 3 hours
24 every other day, a window in the cell, a T.V., radio and typewriter in the cell, a food package once
25 a year, a cup and bowl and a library providing on-demand reading books and legal services.

26 Plaintiff asserts that his placement in the administrative segregation unit interfered with his
27 mental health treatment plan, and his adequate receipt of mental health services.

1 On March 30, 2018, Plaintiff asked Defendant Gallagher if he was going to Defendants
2 Babb, Tumacder, and other custody staff to place him in administrative segregation without a lock-
3 up order. Defendant Gallagher replied that Sergeant Burns had a lot of friends, and Plaintiff filing
4 a complaint against him could hurt his job. Defendant Gallagher also told Plaintiff that he was
5 placed in administrative segregation because they did not want him in the long-term mental health
6 housing unit. Plaintiff replied that he could not be removed from the mental health program
7 without the approval of mental health care providers and that it was illegal to interfere with him
8 receiving mental health services and his treatment plan. Plaintiff realized that Defendant Gallagher
9 refused to address Plaintiff's issues, so Plaintiff verbally requested that Defendant Gallagher bring
10 him an appeals complaint form so that he could file an emergency complaint for mistreatment and
11 his housing in the administrative segregation unit. Defendant Gallagher reportedly told Plaintiff
12 that he was not filing any complaints, and if he could not handle the unit, then he could kill himself.

13 Plaintiff seeks injunctive relief, along with compensatory and punitive damages.

14 **III. Discussion**

15 **A. Due Process – Administrative Segregation Placement**

16 Assignment of a prisoner to segregated housing meets federal procedural due process
17 standards if the prisoner has “‘an opportunity to present his views’ to the official ‘charged with
18 deciding whether to transfer him to administrative segregation.’” Toussaint v. McCarthy, 926 F.2d
19 800, 803 (9th Cir. 1990) (quoting Hewitt v. Helms, 459 U.S. 460, 476 (1983)). To satisfy due
20 process, the administrative segregation process must meet only minimal due process requirements:
21 an informal non-adversary hearing within a reasonable time after being segregated, notice of the
22 charges or the reasons segregation is being considered, and an opportunity for the inmate to present
23 his views. Toussaint v. McCarthy, 801 F.2d 1080, 1100 (9th Cir. 1986), overruled on other grounds
24 by Sandin v. Conner, 515 U.S. 472, 481 (1995).

25 At the pleading stage, Plaintiff appears to state a cognizable claim for denial of due process
26 related to his placement and retention in administrative segregation by Defendants Babb,
27 Tumacder and Gallagher. There is no indication that Plaintiff received an informal hearing, a
28 notice of the charges/reasons for segregation or an opportunity to present his views.

1 **B. Retaliation**

2 “Prisoners have a First Amendment right to file grievances against prison officials and to
3 be free from retaliation for doing so.” Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012)
4 (citing Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009)). Also protected by the First
5 Amendment is the right to pursue civil rights litigation in federal court without retaliation. Rhodes
6 v. Robinson, 408 F.3d 559, 567 (9th Cir. 2005). “Within the prison context, a viable claim of First
7 Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some
8 adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that such
9 action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not
10 reasonably advance a legitimate correctional goal.” Rhodes, 408 F.3d at 567–68.

11 At the pleading stage, Plaintiff has stated a cognizable retaliation claim against Defendants
12 Babb, Tumacder and Gallagher because they allegedly placed and/or retained Plaintiff in the
13 administrative segregation due to Plaintiff’s filing of a complaint against Sergeant Burns.

14 **C. Grievance Process**

15 Plaintiff also appears to complain about denial of inmate appeal/grievance forms by
16 Defendant Gallagher. However, Plaintiff cannot pursue any claims against staff relating to their
17 involvement in the administrative processing or review of his prisoner grievances. The existence
18 of an inmate grievance or appeals process does not create a protected liberty interest upon which
19 Plaintiff may base a claim that the process was deficient. Ramirez v. Galaza, 334 F.3d 850, 860
20 (9th Cir. 2003); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). Accordingly, Plaintiff cannot
21 state a cognizable claim against Defendant Gallagher based on the denial of appeal/grievance
22 forms.

23 **IV. Conclusion and Recommendations**

24 Based on the above, the Court finds that Plaintiff’s amended complaint states cognizable
25 claims against Defendants Babb, Tumacder and Gallagher for a violation of his Fourteenth
26 Amendment due process rights and for retaliation in violation of the First Amendment. However,
27 Plaintiff has not stated any other cognizable claims. Therefore, all other claims should be
28 dismissed.

1 Accordingly, the Clerk of the Court is HEREBY DIRECTED to randomly assign a district
2 judge to this action.

3 Further, it is HEREBY RECOMMENDED that:

- 4 1. This action proceed on Plaintiff's first amended complaint against Defendants Babb,
5 Tumacder and Gallagher for a violation of his Fourteenth Amendment due process
6 rights and for retaliation in violation of the First Amendment.
7 2. All other claims and defendants be dismissed from this action.

8 These Findings and Recommendation will be submitted to the United States District Judge
9 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**
10 **(14) days** after being served with these Findings and Recommendation, Plaintiff may file written
11 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
12 Findings and Recommendation." Plaintiff is advised that failure to file objections within the
13 specified time may result in the waiver of the "right to challenge the magistrate's factual findings"
14 on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan,
15 923 F.2d 1391, 1394 (9th Cir. 1991)).

16
17 IT IS SO ORDERED.

18 Dated: August 8, 2018

19 /s/ Barbara A. McAuliffe
20 UNITED STATES MAGISTRATE JUDGE
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