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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN EDWARD MITCHELL,

 Plaintiff,

 v.

C. GONZALES, et al.,

 Defendants.

Case No. 1:23-cv-00062-SAB (PC)

ORDER DIRECTING CLERK OF COURT
TO RANDOMLY ASSIGN A DISTRICT
JUDGE TO THIS ACTION

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL OF
RETALIATION CLAIM

(ECF No. 11)

Plaintiff John Edward Mitchell is proceeding pro se in this civil rights action filed pursuant to 42 U.S.C. § 1983.

Currently before the Court is Plaintiff’s first amended complaint, filed April 14, 2023.

I.

SCREENING REQUIREMENT

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that “fail[] to state a claim on which relief may be granted,” or that “seek[] monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B); see also 28 U.S.C. § 1915A(b).

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1 A complaint must contain “a short and plain statement of the claim showing that the pleader
2 is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
3 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
4 statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic
5 Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate that each
6 defendant personally participated in the deprivation of Plaintiff’s rights. Jones v. Williams, 297
7 F.3d 930, 934 (9th Cir. 2002).

8 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings
9 liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d
10 1113, 1121 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be
11 facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer
12 that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss
13 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant
14 has acted unlawfully” is not sufficient, and “facts that are ‘merely consistent with’ a defendant’s
15 liability” falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d
16 at 969.

17 **II.**

18 **SUMMARY OF ALLEGATIONS**

19 The Court accepts Plaintiff’s allegations in his complaint as true only for the purpose of
20 the screening requirement under 28 U.S.C. § 1915.

21 Plaintiff brings the complaint against appeals coordinators Defendants C. Gonzales and A.
22 Leyva.

23 On November 3, 2019, Plaintiff sent a staff complaint, KVSP-0-19-04219 (KVSP 4219) to
24 the Kern Valley State Prison (KVSP) appeals office.

25 On November 5, 2019, Defendant C. Gonzales returned appeal KVSP 4219 instructing
26 Plaintiff to remove the allegation of retaliation for the appeal to be processed.

27 On November 7, 2019, Plaintiff returned KVSP 4219 after he removed the word
28 “retaliation.”

1 On November 14, 2019, Plaintiff sent a complaint against T. Rodriguez for retaliation. On
2 November 18, 2019, C. Gonzales cancelled the appeal by way of appeal KVSP-0-19-
3 4360 (KVSP 4360).

4 On November 27, 2019, Plaintiff resubmitted KVSP 4360 and it was cancelled
5 (erroneously) as duplicative of KVSP 4219.

6 On December 20, 2019, Plaintiff appealed the cancellation of KVSP 4360, which was
7 cancelled by C. Gonzalez on December 26, 2019 by way of appeal KVSP-0-19-04814.

8 On December 23, 2019, Plaintiff resubmitted KVSP 4219 for the second level review. A.
9 Leyva returned the appeal as cancelled instructing Plaintiff to remove the retaliation allegation
10 before the appeal could be processed.

11 On January 21, 2020, Plaintiff submitted an inmate request for interview.

12 On or about January 22, 2020, Plaintiff submitted a staff complaint against appeals
13 coordinators A. Leyva and C. Gonzalez.

14 On January 24, 2020, C. Gonzalez cancelled appeal KVSP-0-20-00277 (KVSP 0277)
15 instructing to remove the word retaliation.

16 On or about January 29, 2020, Plaintiff returned KVSP 0277 to Chief of Appeals R Diaz
17 giving notice that KVSP appeals coordinators were interfering with Plaintiff's attempt to file a
18 complaint for retaliation against them.

19 On February 10, 2020, the Office of Appeals acknowledged receipt of KVSP 0277.

20 On February 24, 2020, A. Leyva responded to KVSP 0277 against Leyva instructing
21 Plaintiff to follow instructions on CDC 695 form dated January 24, 2020 for further processing
22 wherein it instructed removal of the word retaliation.

23 On February 26, 2020, Plaintiff sent KVSP 00277 for third level review, and it was again
24 returned to Plaintiff to follow instructions. Plaintiff resubmitted the appeal on April 28, 2020,
25 but it was returned on May 13, 2020 by A. Leyva stating, "Be advised that these documents are
26 being returned to you as they are not an appeal."

27 On or about May 13, 2020, Plaintiff returned the staff complaint against the appeals
28 coordinators.

1 On or about May 25, 2020, Plaintiff sought intervention by sending KVSP 0277 to the
2 Chief Office of Inmate Appeals in Sacramento informing them that Plaintiff had “done everying
3 requested int eh CDC 695 ... and to no avail.” Upon information and believe, the appeal was sent
4 back to KVSP appeals who on June 5, 2020, responded by issuing KVSP 0277 a different log
5 number KVSP-0-20-01769 and titled it a “property” appeal on the CDC 695 form which again
6 instructed Plaintiff to remove the word “retaliation” in the previous submissions in order for it to
7 be processed.

8 Defendants C. Gonzalez and A. Leyva acting as appeals coordinators refused to process
9 grievances that did not conform to their personal belief of acceptable content, i.e. removal of the
10 word “retaliation.”

11 **III.**
12 **DISCUSSION**

13 **A. Retaliation**

14 Retaliation by a state actor for the exercise of a constitutional right is actionable under 42
15 U.S.C. § 1983 even if the act, when taken for different reasons, would have been proper. See Mt.
16 Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283–84 (1977). Retaliation, though
17 it is not expressly referred to in the Constitution, is actionable because retaliatory actions may
18 tend to chill individuals’ exercise of constitutional rights. See Perry v. Sindermann, 408 U.S. 593,
19 597 (1972). A viable claim of First Amendment retaliation entails five basic elements: (1) An
20 assertion that a state actor took some adverse action against an inmate (2) because of (3) that
21 prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First
22 Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.”
23 Rhodes v. Robinson, 408 F.3d 559, 567–68 (internal citation omitted).

24 “Neither our prior case law nor that of the Supreme Court has clearly established that
25 merely refusing to accept a grievance for processing is a retaliatory adverse action.” Richey v.
26 Dahne, 733 Fed.Appx. 881, 884 (9th Cir. 2018). Thus, “the denial of a grievance or appeal ‘neither
27 constitutes an adverse action that is more than de minimis nor is it sufficient to deter a prisoner
28 of ‘ordinary firmness’ from further First Amendment activities.” Chacon v. Diaz, No.

1 EDCV201898JWHKS, 2020 WL 7214292, at *5 (C.D. Cal. Sept. 28, 2020) (quoting Dicey v.
2 Hanks, No. 2:14-CV-2018 JAM AC, 2015 WL 4879627, at *5 (E.D. Cal. Aug. 14, 2015)
3 (collecting cases and denying leave to amend because “denial of a grievance does not constitute
4 an adverse action,” report and recommendation adopted, No. 214CV2018JAMACP, 2015 WL
5 6163444 (E.D. Cal. Oct. 15, 2015); see also Allen v. Kernan, No. 316CV01923CABJMA, 2018
6 WL 2018096, at *7 (S.D. Cal. Apr. 30, 2018) (same), aff’d, 771 F. Appx 407 (9th Cir. 2019);
7 Almy v. R. Bannister, No. 313CV00645MMDVPC, 2016 WL 11448946, at *6 (D. Nev. May 23,
8 2016) (“courts have generally concluded that the denial of a grievance or a disciplinary appeal
9 without more does not meet the requisite threshold of adversity”), report and recommendation
10 adopted sub nom. Almy v. Bannister, No. 313CV00645MMDVPC, 2016 WL 5419416 (D. Nev.
11 Sept. 27, 2016)).

12 Here, Plaintiff does not allege any Defendant took adverse action against him because he
13 filed these grievances and does not claim to have been chilled from exercising any constitutional
14 right. See Gunn v. Olmstead, No. 2:20-cv-2232 AC P, 2021 WL 3048359, at *3 (E.D. Cal. July
15 20, 2021) (“To the extent plaintiff may be attempting to allege that his grievances were denied in
16 retaliation for filing the grievances in the first place, the denial of a grievance does not constitute
17 an adverse action that is more than de minimis and is not sufficient to deter a prisoner of “ordinary
18 firmness” from further First Amendment activities.”) (citing Watison v. Carter, 668 F.3d 1108,
19 1114 (9th Cir. 2012)); see also Burciaga v. California Dep’t of Corr. & Rehab., No. 5:19-cv-
20 01436-ODW-JDE, 2019 WL 8634165, at *8 (C.D. Cal. Sept. 5, 2019) (“Plaintiff was not forced
21 to abandon his First Amendment right; rather, he pursued it individually ... [and] does not explain
22 how [Defendants’] instruction[s] to file his administrative grievance [differently]” resulted in the
23 loss of a potential claim for relief).).

24 **B. First Amendment-Expression of Speech and Right to Petition**

25 Speech is protected under the First Amendment, unless it falls under one of a few narrowly
26 defined categories of unprotected speech. R.A.V. v. City of St. Paul, 505 U.S. 377, 382– 84
27 (1992). The Ninth Circuit has held that “disrespectful language in a prisoner’s grievance is itself
28 protected activity under the First Amendment.” Brodheim v. Cry, 584 F.3d 1262, 1271 (9th Cir.

1 2009) (citing Bradley v. Hall, 64 F.3d 1276, 1281–82 (9th Cir. 1995)). In Turner v. Safley, the
2 United States Supreme Court held that a prison regulation that restricts inmates’ constitutional
3 rights could be constitutionally sound if it “is reasonably related to legitimate penological
4 interests.” 482 U.S. 78, 89 (1987). Turner requires that a valid regulation must (1) be content
5 neutral, (2) logically advance proper goals such as institutional security and safety, and (3) not
6 be an exaggerated response in relation to those goals. Id. at 93. The Supreme Court later clarified
7 that a prison regulation is considered to be content neutral if its purpose is “unrelated to the
8 suppression of expression.” Thornburgh v. Abbott, 490 U.S. 401, 415 (1989) (quoting Procunier
9 v. Martinez, 416 U.S. 396, 413 (1974)).

10 The Ninth Circuit recently established that a prison official's refusal to process a grievance
11 that failed to conform to the official's “personal conception of acceptable content” constituted
12 “content-based discrimination that runs contrary to the First Amendment protections.” Richey v.
13 Dahne, 733 Fed. Appx. At 883-84. The First Amendment prohibits State Defendants from
14 refusing to process grievances because the language in the grievances fails to conform to the
15 prison's conception of acceptable content. Id. at 883-84.

16 Here, based on Plaintiff’s allegations Defendants C. Gonzales and A. Leyva specifically
17 and repeatedly returned Plaintiff’s inmate grievances because they contained the word
18 “retaliation” within the grievance and refused to process the appeals unless the word “retaliation”
19 was removed, is sufficient to give rise to a claim for relief under the First Amendment. See, e.g.,
20 Richey v. Dahne, 733 Fed. Appx. At 883-84 (prison official’s refusal to process a grievance that
21 failed to conform to the official’s “personal conception of acceptable content” constituted
22 “content based discrimination that runs contrary to First Amendment protections.”); Williams v.
23 McKay, No. 1:20-cv-00008-REP, 2022 WL 973065, at *4 (D. Idaho Mar. 31, 2022) (prison
24 official violates inmate’s right to petition if fail to process grievance based on inmate’s refusal to
25 rewrite it to remove the offense remarks.).

26 **C. Further Leave to Amend**

27 Given that Plaintiff has not, despite previous amendment, stated a cognizable retaliation
28 claim based on the mere denial of his inmate grievance, the Court further leave to amend would

1 be futile. Hartmann v. Cal. Dep't of Corr. and Rehab., 707 F.3d 1114, 1130 (9th Cir. 2013) (“A
2 district court may deny leave to amend when amendment would be futile.”); accord Lopez v.
3 Smith, 203 F.3d 1122, 1129 (9th Cir. 2000) (“Courts are not required to grant leave to amend if
4 a complaint lacks merit entirely.”) Accordingly, the Court recommends dismissal of the
5 retaliation claim without leave to amend.

6 **IV.**

7 **ORDER AND RECOMMENDATIONS**

8 Based on the foregoing, it is HEREBY ORDERED that the Clerk of Court shall
9 randomly assign a District Judge to this action.

10 Further, it is HEREBY RECOMMENDED that:

- 11 1. This action proceed on Plaintiff’s First Amendment violation against Defendants
12 C. Gonzales and A. Leyva; and
13 2. Plaintiff’s retaliation claim be dismissed for failure to state a cognizable claim for
14 relief.

15 These Findings and Recommendation will be submitted to the United States District
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
17 **fourteen (14)** days after being served with these Findings and Recommendations, Plaintiff may
18 file written objections with the Court. The document should be captioned “Objections to
19 Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file
20 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.
21 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394
22 (9th Cir. 1991)).

23
24 IT IS SO ORDERED.

25 Dated: May 11, 2023

26 
27 _____
28 UNITED STATES MAGISTRATE JUDGE