(PC) Brodheim v. Cry, et al Doc. 233

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL J. BRODHEIM,

Plaintiff, No. 2:02-cv-0573 FCD KJN P

vs.

MICHAEL CRY, et al.,

Defendants. FINDINGS AND RECOMMENDATIONS

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Plaintiff Michael Brodheim is a state prisoner at the California Medical Facility ("CMF") in Vacaville, California, proceeding with counsel in this civil rights action filed pursuant to 42 U.S.C. § 1983. Presently pending is defendants' motion to dismiss the operative Fourth Amended Complaint and this action in its entirety. For the following reasons, the court recommends that defendants' motion be granted.[1]

I. Introduction

This action proceeds on plaintiff's Fourth Amended Complaint ("FAC"), filed February 28, 2011 (Dkt. No. 227), and is before this court on remand from the Ninth Circuit Court of Appeals, for further proceedings consistent with that court's decision in Brodheim v.

[1] This matter is before the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B), Local General Order No. 262, and Local Rule 302(c).

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Cry, 584 F.3d 1262 (9th Cir. 2009). Defendants are Michael Cry (former CMF Inmate Appeals Coordinator), K. Dickinson (current CMF Warden), and V. Singh (current CMF Chief Deputy Warden).[2] Defendants are sued in their official capacities only. Plaintiff seeks only declaratory and injunctive relief based on his claim of retaliation in the processing of his administrative grievances, in alleged violation of the First Amendment to the United States Constitution, and Article I, section 2, of the California Constitution, and based on his pendent state law claim that defendants violated plaintiff's rights under the Bane Civil Rights Act, California Civil Code § 52.1. Plaintiff does not seek damages.

Defendants move to dismiss this action on the following grounds: (1) plaintiff's retaliation claim against defendant Cry and his successors are moot; (2) plaintiff fails to state a claim against defendants Dickinson and Singh; and (3) plaintiff fails to state a claim under the Bane Civil Rights Act . (Dkt. No. 227.) Plaintiff timely filed an opposition to defendants' motion (Dkt. No. 230), and defendants filed a reply (Dkt. No. 231). A hearing on defendants' motion was held before the undersigned on May 19, 2011. Plaintiff was represented by attorney Joseph Elford; defendants were represented by Assistant Attorney General Kelli Hammond.

II. Background

Plaintiff alleges that on June 18, 2001, defendant Cry, then CMF Inmate Appeals Coordinator, rejected an administrative grievance submitted by plaintiff on a CDCR Form 602. On June 20, 2001, plaintiff returned the grievance and rejection notice to Cry, together with an "Inmate Request for Interview," in which plaintiff set forth his objections to Cry's response. On June 21, 2001, Cry rejected plaintiff's request for an interview with a note stating that the rejection would stand and the admonition, "I'd also like to warn you to be careful what you write, request on this form." (FAC, ¶¶ 10-12.)

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[2] On October 7, 2010, this court substituted defendant Dickinson for former CMF Warden Ramirez-Palmer, and defendant Singh for former CMF Chief Deputy Warden Valadez, pursuant to Federal Rule of Civil Procedure 25(d)(1). (Dkt. No. 218.)

Upon receiving Cry's "warning" on June 25, 2001, plaintiff filed a staff complaint against Cry, in which he inquired why Cry had "warned" plaintiff, and requested that Cry stop infringing on plaintiff's First Amendment right to seek redress of grievances. (FAC, ¶ 13.)

The informal and first formal levels of review were bypassed. (Dkt. No. 130-1 at 15.) On July 23, 2001, the grievance was denied at the second level of review by former CMF Chief Deputy Warden Valadez, on behalf of former CMF Warden Ramirez-Palmer. (Id. at 16, 21-22.) The Warden concluded that plaintiff had filed his complaint against Cry "as a form of retaliation against CC II Cry," who had acted "within the scope of his duties as the Appeals Coordinator." (Id.; FAC, ¶ 14.)

On August 25, 2001, plaintiff submitted his staff complaint against Cry for third (Director) level review, alleging that Cry's "warning" could only be construed as an attempt to chill plaintiff's First Amendment right to file grievances. (Dkt. No. 130-1 at 23-25.) The Director's Level Appeal Decision was rendered on November 20, 2011, and concluded that plaintiff's complaint was "unsubstantiated." (Id. at 28; FAC, ¶¶ 15, 16.)

Thereafter, "[o]n February 15, 2002, Brodheim was informed that defendant Cry had inquired of another inmate whether Brodheim had written an administrative grievance on behalf of one of CMF's disabled inmates. Cry informed this other inmate that the handwriting on the 602 looked like Brodheim's. Brodheim wanted to file an administrative appeal alleging that there was no legitimate reason for Cry's inquiry or comment, because inmates are expressly permitted by regulation to assist other inmates in the preparation of an appeal. Brodheim, however, was deterred from [] filing another complaint against Cry by his earlier 'warning,' as well as the warden's subsequent determination that Brodheim submitted his staff complaint against Cry 'as a form of retaliation.'" (FAC, ¶ 17.)

The initial complaint filed in 2002 was dismissed with leave to amend (Dkt. No. 5), and plaintiff thereafter filed an amended complaint (Dkt. No. 6). The court found that plaintiff stated potentially cognizable claims against, inter alia, defendants Cry, Valadez, and

Ramirez-Palmer, and authorized the filing of a Second Amended Complaint on May 19, 2003 (Dkt. No. 19); then authorized the filing of a Third Amended Complaint and Supplemental Pleading on September 22, 2004 (Dkt. No. 54). Since September 9, 2005, this action has proceeded only against defendants Cry, Valadez, and Ramirez-Palmer. All other named defendants were dismissed from this action. (Dkt. Nos. 17, 20, 25, 42, 87, 90.)

On September 25, 2007, this court granted defendants' motion for summary judgment on plaintiff's Third Amended Complaint and Supplemental Pleading. (Dkt. Nos. 184, 189.) By formal mandate issued December 17, 2009, the Ninth Circuit Court of Appeals reversed the district court's decision, and remanded this case for further proceedings. Brodheim v. Cry, supra, 584 F.3d at 1274. The Appeals Court reinstated plaintiff's First Amendment retaliation claim under 42U.S.C. § 1983, finding that plaintiff had produced sufficient evidence to create a genuine issue of material fact whether Cry's warning constituted an adverse action. Id., 584 F.3d at 1269-73. The Ninth Circuit rejected the district court's alternative basis for summary judgment, that plaintiff's claims were barred by the doctrine of res judicata based on a separate state court action plaintiff had filed. The decision reinstated plaintiff's state law claim because not previously reached by the district court.

On remand, this court held a status conference and granted plaintiff leave to file a motion to permit further amendment of his complaint. (Dkt. No. 213.) After considering plaintiff's motion, and defendants' opposition thereto, the court concluded that it would be "prudent to proceed conservatively on the operative pleadings, permitting only limited supplemental pleading, and thereby maintaining the existing separation between plaintiff's primary alleged facts and the alleged events occurring subsequent thereto." (Dkt. No. 218 at 6-7.) This court reasoned that "[a]uthorizing the filing of only a supplemental pleading will cause limited delay . . . and minimal costs, and cannot reasonably be construed as prejudicial to defendants. Fed. R. Civ. P. 15(d)." (Id. at 7.) Pursuant to Federal Rule of Civil Procedure 25(d)(1), the court substituted the following supervisory defendants: current CMF Warden K.

Dickinson was substituted for former CMF Warden Ana Ramirez-Palmer, and current CMF Chief Deputy Warden V. Singh was substituted for former CMF Chief Deputy Warden J. Valadez. (Id. at 8.) Plaintiff was granted leave to file "a Second Supplemental Pleading limited to allegations of any additional events, relevant to plaintiff's presently existing claims, which occurred subsequent to the filing of plaintiff's Third Amended and Supplemental Complaint." (Id.) Significant to the court was plaintiff's representation that he "intended to add 'no new claims,' or 'change the scope of the trial,' but only 'provide evidence of a continuation of [retaliatory] conduct by policy-making prison authorities,' that is, 'additional evidence of a custom or policy' allegedly demonstrating 'retaliation by prison officials occurring since the last complaint was filed.'" (Id. at 5 (fn. omitted), quoting plaintiff's brief set forth in Dkt. No. 216 at 1-2) (emphasis added.)

After plaintiff filed his Second Supplemental Pleading, defendants filed a motion to dismiss (Dkt. No. 221), heard by this court on December 23, 2010. At the hearing, plaintiff's counsel conceded that plaintiff's contentions against defendant Cry "himself" were now moot, but argued that this action should proceed against Cry's successors, as well as the current Warden, who had allegedly "turned a blind eye" to continuing incidents of retaliation. (Audio Recording of Dec. 23, 2010 Hearing.) Plaintiff's counsel stated that he didn't yet "have all the facts" to challenge the conduct of Cry's successors, but believed that "there is at least one other inmate who will state that he believes he was retaliated against for filing his grievances." (Id.) Noting the length and history of this case, and the patchwork of operative pleadings, the court granted plaintiff leave to file a single comprehensive pleading specifying all instances of alleged retaliatory conduct that would warrant the requested injunctive relief in this action despite the departure of each of the original defendants. (Id.) The court instructed plaintiff's counsel that the allegations of the amended complaint must be specific in identifying the alleged ongoing retaliatory conduct and its chilling effect on the exercise of plaintiff's First Amendment rights, and any allegations of related conduct against other inmates, thus demonstrating that plaintiff's

retaliation claims are not now moot. (Id.) (emphasis added.)

Accordingly, the court denied without prejudice the pending motion to dismiss, and directed plaintiff to "file and serve a Fourth Amended Complaint, consistent with the parameters set forth by the court on the record at the hearing." (Dkt. No. 225 at 1.) Defendants were directed to file an answer or a motion to dismiss. (Id. at 2.) In support of plaintiff's stated need to obtain additional relevant facts, the court vacated the expired discovery deadline and directed that "the parties may continue to conduct discovery until further order of this court." (Id.)

Plaintiff filed the operative Fourth Amended Complaint on February 1, 2011. (Dkt. No. 226.) Significantly, the Fourth Amended Complaint is identical to plaintiff's Second Supplemental Pleading, with one exception, the addition of Paragraph 22, which merely provides in full: "At least two other inmates at CMF have been retaliated against by the appeals coordinator for filing administrative grievances since 2008." (FAC, ¶ 22.) Thus, as now framed by the Fourth Amended Complaint:

> On or about January 20, 2004, Ramirez-Palmer's successor, [former] Warden Teresa Schwartz, prepared a memorandum to Brodheim responding to letters Brodheim had written to public officials, seeking redress for Cry's inappropriate rejection of Brodheim's grievances and staff complaints. The memorandum criticized Brodheim for his protected activity as follows: "[Y]our attempts to write numerous individuals, both inside and outside the Department, to garner support for your allegations, has led to unnecessary staff time to respond to your multiple, duplicate complaints. . . . It is unfortunate that valuable staff time and energy are directed towards the allegations you have made." (FAC, ¶ 18.)
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> Brodheim wanted to file an administrative grievance and tort claim against Cry, and amend the instant complaint, when he learned that Cry sought to effectuate his transfer because of Brodheim's "focus on litigation," but he was deterred from doing so by Cry's previous conduct.[3] (FAC, ¶ 19.)

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[3] The Ninth Circuit more fully noted these allegations as follows:

On June 8, 2004, Cry sent a memorandum to his supervisor, Associate Warden Veal, "formally document[ing] a continued concern of harassment and fixation

On several occasions subsequent to the original filing of this complaint, defendant Cry rejected administrative grievances filed by Brodheim without a legitimate basis for doing so, thereby further chilling the exercise of Brodheim's First Amendment rights. (FAC, ¶ 20.)

On November 19, 2008, another inmate at CMF, Gerald Simmons, submitted a declaration stating that he had been informed by Correctional Officer L. Sanchez that the CMF administration wanted Brodheim removed from his position in the prison library because Brodheim was engaged in litigation against a prison official.[4] (FAC, ¶ 21.)

At least two other inmates at CMF have been retaliated against by the appeals coordinator for filing administrative grievances since 2008. (FAC, ¶ 22.)

To date, no official at CMF, including Warden Dickinson, has admitted that Cry's conduct violated Brodheim's First Amendment right to seek redress of grievances, thereby ratifying his conduct as a policy at CMF. (FAC, ¶ 23.)

If not enjoined by this Court, defendants will continue to violate the right of Brodheim and similarly situated inmates to seek redress of grievances. (FAC, ¶ 24.)

Defendants move to dismiss the Fourth Amended Complaint. (Dkt. No. 227.) Plaintiff has filed an opposition (Dkt. No. 230), and defendants filed a reply (Dkt. No. 231). The

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exhibited by Inmate Brodheim." In the memorandum, Cry . . . noted that two inmates had informed him that Brodheim was "systematically inciting other inmates and assisting them to file 602 complaints utilizing these same disruptive tactics." [¶] Cry's memorandum concluded with a recommendation that Brodheim be considered for a possible transfer out of CMF, noting a lack of restraining orders against Brodheim and generally questioning Brodheim's "psychiatric override" designation, which is what led to his placement in CMF. Cry noted that Brodheim's "major problem" was "his attitude of superiority above everyone else in levels of authority in CDC," and that he was "starting to make it difficult [for Cry] to perform [his] duties as the Appeals Coordinator." [¶] In response to this memorandum, plaintiff was not transferred or disciplined. However, all appeals by Cry were subsequently assigned to the other Appeals Coordinator at CMF, R. Piazza.

Brodheim v. Cry, 584 F.3d at 1266.

[4] In a separate state court action, plaintiff sought reinstatement to his work assignment at the prison law library. (See Dkt. No. 215, Exh. A, First Amended Complaint in Brodheim v. Sanchez et al., Solano County Superior Court, Case No. FCS034441.)

court heard the parties' arguments on May 19, 2011.

III. Discussion

A. Legal Standards for Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedures provides for motions to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept as true the allegations of the complaint in question, Erickson v. Pardus, 551 U.S. 89 (2007), and construe the pleading in the light most favorable to the plaintiff, Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Meek v. County of Riverside, 183 F.3d 962, 965 (9th Cir. 1999). Still, to survive dismissal for failure to state a claim, even a pro se complaint must contain more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a claim upon which the court can grant relief must have facial plausibility. Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949. Attachments to a complaint are considered to be part of the complaint for purposes of a motion to dismiss for failure to state a claim. Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

B. Plaintiff Fails to State a Retaliation Claim Against Defendant Cry or His Successors

Plaintiff sues former CMF Inmate Appeals Coordinator Michael Cry "in his official capacity only, so this suit is against the offices he previously occupied." (FAC, ¶ 5.)

While conceding at the hearing that his specific claims and request for injunctive relief against Cry are now moot,[5] plaintiff asserts that his claims against Cry's successor(s) should survive the motion to dismiss because "First Amendment retaliation by the prison appeals coordinator at CMF continues." (Dkt. No. 230 at 3.) Plaintiff directs the court's attention to the new allegation of his Fourth Amended Complaint that "[a]t least two other inmates at CMF have been retaliated against by the appeals coordinator for filing administrative grievances since 2008." (FAC, ¶ 22.)

Defendants contend that plaintiff's retaliation claims against Cry and his successors are entirely moot because Cry is no longer employed at CMF, and plaintiff's new allegation fails to assert that the alleged retaliatory conduct of Cry's successors has been directed against plaintiff. Given the absence of any allegation that there exists a "live controversy between Brodheim and the current Appeals Coordinator at CMF" (Dkt. No. 231 at 1), defendants contend that plaintiff no longer asserts a viable retaliation claim.[6]

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[5] The Fourth Amended Complaint identifies the following allegations against defendant Cry: (1) On June 18, 2001, Cry rejected plaintiff's administrative grievance (FAC, ¶ 10); (2) On June 21, 2001, Cry responded to plaintiff's request for an interview with a handwritten "warning" (id. at ¶ 12); (3) On February 15, 2002, another inmate informed plaintiff that Cry had inquired whether plaintiff had written an administrative grievance on behalf of a third inmate, which is a permissible activity; plaintiff alleges that he was "deterred from filing another complaint against Cry by his earlier 'warning,' as well as the warden's subsequent determination that Brodheim submitted his staff complaint against Cry 'as a form of retaliation'" (id. at ¶ 17); (4) On an unidentified date, when plaintiff learned that Cry "sought to effectuate his transfer," plaintiff was deterred from "fil[ing] an administrative grievance and tort claim against Cry, and amend[ing] the instant complaint" (id. at ¶ 19); and (5) "On several occasions subsequent to the original filing of this complaint, defendant Cry rejected administrative grievances filed by [plaintiff] without a legitimate basis for doing so, thereby further chilling the exercise of [plaintiff's] First Amendment rights" (id. at ¶ 20). Plaintiff seeks an injunction proscribing future interference with, or retaliation for, the exercise of his First Amendment right to seek redress of grievances.

[6] Defendants also contend, and plaintiff concedes, that plaintiff lacks standing to pursue the constitutional rights of other inmates. Plaintiff asserts that his allegations concerning the rights of other inmates (see FAC, ¶¶ 1, 22, 24, and requested relief) reflect only that they may incidentally benefit should plaintiff prevail in this action. It is clear that, absent class certification, plaintiff may challenge only the alleged violations of his own constitutional rights. See e.g. Hamm v. Groose, 15 F.3d 110, 112 (8th Cir.1994) ("an inmate cannot bring a denial-of-access claim on behalf of another inmate who is able to bring such a claim in his or her own name"); Reynoldson v. Shillinger, 907 F.2d 124, 125 (10th Cir. 1990) ("to the extent a complaint concerns 'inmates' rather than the plaintiff himself, it is dismissable for failure to allege the

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

A prisoner's First Amendment retaliation claim seeking injunctive relief from a defendant in his official capacity may continue against the defendant's successor in office. "[T]he Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law." Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 437 (2004), citing Ex parte Young, 209 U.S. 123 (1908). "[U]nder the landmark decision in Ex parte Young, a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury." Quern v. Jordan, 440 U.S. 332, 337 (1979) (citations omitted). An action against a public officer in his or her official capacity "does not abate" when the officer ceases to hold office while the action is pending; rather, "[t]he officer's successor is automatically substituted as a party." Fed. R. Civ. P. 25(d); Hoptowit v. Spellman, 753 F.2d 779, 781-82 (9th Cir. 1985) (authorizing the continuation of a suit for injunctive relief against an official's successor).

In Spomer v. Littleton, 414 U.S. 514 (1974), and Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974), the United States Supreme Court identified the factors to be considered in assessing whether an action is moot against an official's successor.

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plaintiff's standing to proceed" (citation omitted)); Newsom v. Norris, 888 F.2d 371, 381 (6th Cir. 1989) ("a prisoner who initiates a civil action challenging certain conditions at a prison facility in his individual capacity is limited to asserting alleged violations of his own constitutional rights and, absent a request for class certification, lacks standing to assert the constitutional rights of other prisoners"); Weaver v. Wilcox, 650 F2d 22, 27 (3rd Cir. 1981) ("[A]n inmate does not have standing to sue on behalf of his fellow prisoners. Rather, the prisoner must allege a personal loss and seek to vindicate a deprivation of his own constitutional rights." (Citations omitted.)).

Spomer was a civil rights class action for injunctive relief, alleging purposeful racial discrimination by a former Alexander County State's Attorney (Berbling). Pending the Court's review of the Court of Appeals' decision relative to quasi-judicial immunity, Berbling's elected successor (Spomer) was substituted in the action. The Court vacated the judgment below and remanded the case to the Court of Appeals to determine, in the first instance, whether the original dispute was now moot and whether leave should be granted to amend the complaint to include claims against the new State's Attorney. The Court reasoned:

> [T]here is nothing in the record upon which we may firmly base a conclusion that a concrete controversy between W. C. Spomer and the respondents is presented to this Court for resolution. No allegations in the complaint cited any conduct of W. C. Spomer as the basis for equitable or any other relief. . . .The wrongful conduct charged in the complaint is personal to Berbling, despite the fact that he was also sued in his then capacity as State's Attorney. No charge is made in the complaint that the policy of the office of State's Attorney is to follow the intentional practices alleged, apart from the allegation that Berbling, as the incumbent at the time, was then continuing the practices he had previously followed. . . .The plain fact is that, on the record before us, respondents have never charged Spomer with anything and do not presently seek to enjoin him from doing anything. Under these circumstances, recognizing that there may no longer be a controversy between respondents and any Alexander County State's Attorney concerning injunctive relief to be applied in futuro, we remand to the Court of Appeals for a determination, in the first instance, of whether the former dispute regarding the availability of injunctive relief against the State's Attorney is now moot and whether respondents will want to, and should be permitted to, amend their complaint to include claims for relief against the petitioner.

Spomer v. Littleton, 414 U.S. at 521-22.

Similarly, the plaintiffs in Mayor of Philadelphia v. Educational Equality League, supra, 415 U.S. 605, also a class action, challenged, on racial discrimination grounds, the personal appointment policies of Philadelphia Mayor James Tate; however, Frank Rizzo became Mayor while the case was pending before the Court of Appeals. The Court of Appeals nonetheless issued "extensive injunctive relief" and ordered the District Court to undertake supervision of the new mayor's appointments. The Supreme Court reversed the judgment of the

Court of Appeals, finding error in the "ordering [of] prospective injunctive relief against the new Mayor in a case devoted exclusively to the personal appointment policies of his predecessor." Mayor, 415 U.S. at 613. Relying on Spomer, the Mayor court found:

> Where there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor.

Mayor, 415 U.S. at 613 (emphasis added).

In contrast to Spomer and Mayor, plaintiff herein alleges that the conduct which he challenges is ongoing. (FAC, ¶ 22.) However, plaintiff has nonetheless failed to allege a cognizable First Amendment retaliation claim, either generally or against any successor to Cry. The new allegation of the Fourth Amended Complaint that "the appeals coordinator" retaliated against two inmates for filing administrative grievances (id.), fails to allege facts in support of each element of a retaliation claim. See Rhodes v. Robinson, supra, 408 F.3d at 567-68. Specifically, the new allegation: fails to identify the involved individuals; fails to identify the alleged retaliatory ("adverse") actions; fails to explain how the alleged actions chilled the inmates' further exercise of their First Amendment rights while failing to advance legitimate correctional goals; fails to allege how the alleged incidents were similar to what occurred to plaintiff; and fails to allege how what occurred to those individuals perpetuates a chilling of plaintiff's First Amendment rights. Id. Nor does the new allegation identify the Appeals Coordinator—the successor to Cry—who allegedly retaliated against these inmates.

Plaintiff was accorded ample opportunity to obtain this information. When asked by the court, at the May 19, 2011 hearing, to identify the challenged conduct referenced in Paragraph 22 of the Fourth Amended Complaint, plaintiff's counsel responded: "It's difficult for me to explain . . . because of the difficulty I have communicating with my client, since he is incarcerated. . . . My understanding is basically what it says here, that since 2008, we could come

forward with the names of two other inmates who have been retaliated against for filing grievances by the current, or at least the Appeals Coordinator from 2008, who I believe is the current Appeals Coordinator." (Audio Recording of May 19, 2011 Hearing.) Counsel offered to obtain the names of these inmates, adding that one of the inmates had been transferred but "we would have a hard time proving that another inmate was transferred because of his focus on litigation; that would require more facts than we currently have. . . ." (Id.) The court explained that obtaining such information had been the clear purpose of providing plaintiff, in December 2010, the opportunity to pursue additional discovery and to file a further amended and comprehensive complaint.

As in Spomer, plaintiff herein has failed to allege a live controversy between himself and Cry's current successor, and thus asserts no basis for awarding prospective injunctive relief, the only remedy sought by plaintiff. However, in contrast to Spomer, plaintiff has already been accorded the opportunity—with specific instructions by the court—to file an amended complaint that contains a supported allegation that Cry's challenged conduct toward plaintiff has been perpetuated by Cry's successors. As now framed, plaintiff's allegation of ongoing retaliatory conduct by the "appeals coordinator" may or may not refer to CMF's current Appeals Coordinator, fails to set forth the essential elements of a retaliation claim, fails to allege retaliation against plaintiff, and fails to assert that the alleged retaliation against other inmates bears any connection to plaintiff's original challenge against Cry. This court may not supply missing elements in a deficiently-alleged claim. Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983) (it is improper for a court to assume that "the [plaintiff] can prove facts which [he] has not alleged"). Rather, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences [drawn] from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009), quoting Ashcroft v. Iqbal, supra, 129 S. Ct. at 1949. Moreover, a complaint must allege

1 sufficient facts to give defendants fair notice of the claim against them and the grounds upon
2 which such claim rests. Bell Atlantic Corporation v. Twombly, supra, 550 U.S. at 555.
3 Plaintiff asserts nonetheless that his newly-alleged Paragraph 22 is sufficient to
4 demonstrate that "the continuation of the dispute" originating between plaintiff and Cry "is a
5 reasonable inference," quoting Hoptowit v. Spellman, supra, 753 F.2d at 782 (citation and
6 internal quotation marks omitted). (Dkt. No. 230 at 4.) Hoptowit is distinguishable. Hoptowit
7 was a class action of present and future inmates at Washington State Penitentiary, seeking
8 constitutionally adequate conditions of confinement related to the physical structure of the prison
9 and the risks it posed to inmate health and safety. On appeal after remand, the Ninth Circuit
10 Court of Appeals rejected defendants' contention that the district court had erred in issuing a
11 remand/injunctive order without first conducting a hearing to determine, inter alia, whether the
12 new administrators had continued the unconstitutional practices of their predecessors. The Court
13 of Appeals noted that the successors of the named defendants were necessarily parties to the
14 action by reason of Federal Rule of Civil Procedure 25(d)(1). However, distinguishing Spomer
15 and Mayor, the court noted that "most of the evidence does not relate to the personal conduct of
16 the principal named defendants," but rather to established "findings of fact concerning
17 institutional practices and physical conditions at the penitentiary . . . from which the continuation
18 of the dispute is a reasonable inference . . . and not merely idiosyncratic abuses of the particular
19 members of the outgoing administration." Hoptowit, 753 F.2d at 782 (citations and internal
20 quotation marks omitted).
21 Unlike Hoptowit, a class action challenging the physical structure of a correctional
22 institution and related conditions of confinement impacting all of its prisoners, matters subject to
23 injunctive relief regardless of personnel changes, the instant case is premised on the personal
24 interactions between plaintiff and Cry, and therefore between plaintiff and Cry's successors.
25 This conclusion is underscored by the Ninth Circuit's narrow construction of plaintiff's original
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retaliation claim as premised on Cry's personal "warning" to plaintiff,[7] Brodheim, 584 F.3d at 1269-73, and by that court's finding that the "primary right" plaintiff pursued in this action was "the actual alleged harm . . . inflicted by Cry himself when he placed the handwritten warning on Brodheim's interview request form in 2001," id. at 1269. The Ninth Circuit's focus on plaintiff's specific allegations against Cry to assess the sufficiency of plaintiff's retaliation claim underscores the personal nature of that claim, and supports this court's finding that, given Cry's departure from CMF and the absence of a cognizable claim that plaintiff has suffered continuing and ongoing retaliation by Cry's successors, plaintiff's retaliation claim is no longer viable.

"[W]here there is no reasonable expectation that the alleged violation will recur, and where interim relief or events have completely and irrevocably eradicated the effects of the alleged violation, the case is moot." America Cargo Transport, Inc. v. U.S., 625 F.3d 1176, 1179 (9th Cir. 2010), citing County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (internal quotation and punctuation marks omitted).

C. Plaintiff Fails to State a Claim against Defendants Dickinson and Singh

Defendants seek to dismiss plaintiff's claims against current CMF Warden Dickinson, and current CMF Chief Deputy Warden Singh, for failure to state a claim. To state a claim for relief under Section 1983 based on a theory of supervisory liability, a plaintiff must

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[7] Assessing the five basic elements of a retaliation claim, as set forth in Rhodes v. Robinson, supra, 408 F.3d at 567-68, the Court of Appeals found that a genuine issue of material fact existed whether Cry's written warning constituted an "adverse action." The court concluded that it was the province of the trier of fact to determine "whether Cry's statement intimated that some form of punishment or adverse action would follow a failure to comply," noting that "[t]here were a number of things that Cry, as a corrections officer, could have done;" and that Cry's "transfer memo" sent to the Warden in 2004 "is circumstantial evidence that a jury could view as supporting [plaintiff's] contention the warning was a threat of transfer or disciplinary action." Brodheim, 584 F.3d at 1270-71. The Court of Appeals concluded, however, that: (1) it is "undisputed that [Cry's] warning was motivated by [plaintiff's] protected conduct," because filing an administrative grievance and using disrespectful language therein are both protected activities, id. at 1271; (2) applying an objective standard, "[a] reasonable person may have been chilled by Cry's warning," id.; and (3) Cry's warning advanced no legitimate penological interest, concluding that "Cry's warning of [plaintiff] cannot escape constitutional scrutiny by citing a legitimate penological interest," id. at 1273. Thus, the Ninth Circuit's analysis of each element of plaintiff's retaliation claim focused on Cry's specific written warning to plaintiff.

allege facts that the supervisory defendants (1) personally participated in the alleged deprivation of constitutional rights, (2) knew of the violations and failed to prevent them, or (3) promulgated or "implement[ed] a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989) (citations and internal quotations omitted); see also Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Facts consistent with at least one of these scenarios must be specifically alleged in order to state a potentially cognizable claim against a supervisory defendant.

The Fourth Amended Complaint sets forth the following allegations against the former and current CMF Wardens and Chief Deputy Wardens:

> On July 23, 2001, prior defendant Ramirez-Palmer, then CMF's Warden, denied Brodheim's appeal at the second level of review. In her response, which was signed by defendant Valadez, the Warden concluded that Brodheim had submitted his 602 appeal "as a form of retaliation against CC II Cry" and that Cry had acted "within the scope of his duties as the Appeals Coordinator." (FAC, ¶ 14.)
>
> The Director's Level Appeal Decision was rendered on November 20, 2001. This decision concluded that Brodheim's complaint was "unsubstantiated". . . . (FAC, ¶ 16.)
>
> . . . [Plaintiff] . . . was deterred from filing another complaint against Cry by his earlier "warning," as well as the warden's subsequent determination that Brodheim submitted his staff complaint against Cry "as a form of retaliation." (FAC, ¶ 17.)
>
> On or about January 20, 2004, Ramirez-Palmer's successor, Warden Teresa Schwartz, prepared a memorandum to Brodheim responding to letters Brodheim had written to public officials, seeking redress for Cry's inappropriate rejection of Brodheim's grievances and staff complaints. The memorandum criticized Brodheim for his protected activity as follows: "[Y]our attempts to write numerous individuals, both inside and outside the Department, to garner support for your allegations, has led to unnecessary staff time to respond to your multiple, duplicate complaints. . . . It is unfortunate that valuable staff time and energy are directed towards the allegations you have made." (FAC, ¶ 18.)
>
> On November 19, 2008, another inmate at CMF, Gerald Simmons, submitted a declaration stating that he had been informed by

> Correctional Officer L. Sanchez that the CMF administration wanted Brodheim removed from his position in the prison library because Brodheim was engaged in litigation against a prison official. (FAC, ¶ 21.)
>
> To date, no official at CMF, including Warden Dickinson, has admitted that Cry's conduct violated Brodheim's First Amendment right to seek redress of grievances, thereby ratifying his conduct as a policy at CMF. (FAC, ¶ 23.)
>
> This conduct, as well as the ratification of this conduct by the other prison official defendants, have chilled, and continue to chill Brodheim's exercise of First Amendment rights and rights secured to him under the laws of the State of California. (FAC, ¶ 27.)

Plaintiff contends that his "failure to admit" allegation against current Warden Dickinson (FAC, ¶ 23), is sufficient to overcome defendants' motion to dismiss because it alleges a causal connection between Dickinson's alleged ratification of Cry's challenged conduct and a continuing policy of First Amendment retaliation at CMF. Plaintiff relies on the Ninth Circuit's decision in Gomez v. Vernon, 255 F.3d 1118 (9th Cir. 2001), to assert that "[a] policy or custom may be found . . . in the failure of an official to take any remedial steps after the violations," and "[w]here the retaliatory acts are traceable to a custom or policy, . . . it is unnecessary to demonstrate that the decision-making official directly ordered each act carried out under his edict." Id. at 1127 (citations and internal quotation marks omitted). (Dkt. No. 230 at 5-6.) Plaintiff asserts that this court should assume that Warden Dickinson is fully aware of plaintiff's claims against Cry (because this litigation has proceeded during Dickinson's tenure as CMF Warden, and resulted in a published Ninth Circuit decision), and that Dickinson has failed to acknowledge that Cry violated plaintiff's First Amendment rights due to a policy at CMF of ratifying First Amendment retaliatory conduct by Cry's successors. (Id. at 6).

Defendants respond that "[p]laintiff's sole claim against Defendant Dickinson is that she has failed to admit that Cry's conduct violated Plaintiff's First Amendment right to seek redress of grievances. (FAC, ¶ 23.) But the alleged retaliatory acts of Cry took place between 2001 and Cry's retirement in 2006, before Defendant Dickinson was the Warden at CMF. There

are no allegations that Warden Dickinson knew Cry, or was aware of Cry's alleged misconduct. The alleged conduct relates to the personal conduct of the previous Warden and Chief Deputy Warden at CMF, and there are no allegations contained in the FAC that Defendants Dickinson and Singh have condoned retaliatory conduct against Plaintiff, that the current Litigation Coordinator ever retaliated against Plaintiff, or that the current Appeals Coordinator has a policy of retaliating against Plaintiff for engaging in protected First Amendment activity. [¶] The wrongful conduct charged in the complaint is personal to Cry, Ramirez-Palmer, and Valadez, despite the fact that they were sued in their official capacities as Appeals Coordinator, Warden, and Chief Deputy Warden respectively. See Spomer, supra, 414 U.S. at 521. There is nothing in the record upon which to conclude that a controversy still exists between the Plaintiff and the current prison officials. Accordingly, the claims against Dickinson and Singh, as successors in office to Ramirez-Palmer and Valadez, should be dismissed." (Dkt. No. 227-1 at 8-9.)

The court finds defendants' argument persuasive, particularly in light of the court's finding that plaintiff has failed to allege a cognizable claim of ongoing retaliation against plaintiff by any of Cry's successors. Plaintiff's "failure to admit" allegation against current Warden Dickinson (FAC, ¶ 23) is entirely speculative; even assuming its truth, such an isolated allegation would fail to demonstrate an actionable policy or practice. "Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996) (citations omitted); see also Thompson v. City of Los Angeles, 885 F.2d 1439, 1443-44 (9th Cir. 1989) ("Consistent with the commonly understood meaning of custom, proof of random acts or isolated events are insufficient to establish custom.") (Citations omitted.)[8] Additionally, plaintiff

[8] Moreover, the Ninth Circuit declined to grant plaintiff summary judgment and remanded this matter for further proceedings because there were factual disputes concerning the interactions between Cry and plaintiff. Brodheim v. Cry, 584 F.3d at 1274. Thus, plaintiff's argument against the current Warden is particularly weak based solely upon the assertion that the

makes no allegation against current Chief Deputy Warden Singh. In addition, the several allegations of plaintiff's Fourth Amended Complaint challenging the conduct of former supervisory personnel—e.g., that former Warden Ramirez-Palmer's interim successor, former Warden Schwartz, cautioned plaintiff in 2004 that it was "unfortunate" that his complaints were requiring "valuable staff time and energy" (FAC, ¶ 18); that former Associate Warden Veal received (but did not act upon) Cry's 2004 memorandum recommending plaintiff's transfer to another prison (FAC, ¶ 19); and that, in 2008, "the CMF administration" sought to remove plaintiff from his prison library job (FAC, ¶ 21) (the subject of a separate state court action by plaintiff (see n. 5, supra))—also fail to allege an ongoing pattern or policy of retaliation against plaintiff or any other inmate at CMF.

The court finds, therefore, that plaintiff has failed to a state a cognizable claim against CMF Warden Dickinson or CMF Chief Deputy Warden Singh. This finding requires the dismissal of plaintiff's remaining federal claims.

D. Court Declines to Exercise Supplemental Jurisdiction

Plaintiff alleges against all defendants a violation of California's Bane Civil Rights Act, California Civil Code § 52.1. (See FAC, ¶ 31 ("In doing the aforesaid acts, defendants interfered with Brodheim's right to seek redress of grievances under the First Amendment and article I, section 2 of the California Constitution through the use of threats, intimidation, and/or coercion, in violation of California Civil Code § 52.1.").)[9]

Pursuant to this court's findings that plaintiff has failed to assert a viable federal claim, the court invokes its discretion under 28 U.S.C. §1367(c)(3), to decline the exercise of

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Warden failed to essentially admit liability.

[9] The Bane Civil Rights Act provides a private right of action to individuals for conduct that "interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by [such] individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of [California]." Cal. Civ. Code § 52.1(a), (b) (emphasis added).

supplemental jurisdiction over this pendent state law claim. Accord, Ove v. Gwinn, 264 F.3d 817, 826 (9th Cir. 2001) ("[a] court may decline to exercise supplemental jurisdiction over related state-law claims once it has 'dismissed all claims over which it has original jurisdiction,'" quoting 28 U.S.C. § 1367(c)(3) (citation omitted)).

IV. Conclusion

For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

1. Defendants' motion to dismiss plaintiff's Fourth Amended Complaint (Dkt. No. 227), be granted; and

2. This action be dismissed and judgment entered for defendants.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within 21 days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within 14 days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: June 7, 2011

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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