

1 (#15). However, the Court noted that Plaintiff “stated a claim for retaliation in his initial complaint,¹
2 and it is not clear that plaintiff intended to withdraw that claim” and granted Plaintiff one more
3 opportunity to correct the deficiencies. (*Id.*)

4 On June 16, 2008, Plaintiff filed his Third Amended Complaint (#16), which the Court screened
5 pursuant to 28 U.S.C. §1915A (#19). According to Plaintiff’s Third Amended Complaint, on June 4,
6 2007, Correctional Officer Campbell destroyed his personal property without cause and failed to give
7 Plaintiff a receipt for the property. (#16 at 7). On June 16, 2007, Plaintiff filed an administrative “602
8 complaint” against Campbell related to the June 4 incident. (*Id.*) When Plaintiff received no response
9 to his 602 complaint from prison administrators, he filed another 602 complaint against Campbell on
10 June 22, 2007. (*Id.*) Plaintiff alleges that the next day, June 23, he wrote out another 602 complaint
11 form and gave it directly to Campbell. (*Id.* at 8).

12 According to the Third Amended Complaint, Defendant Campbell had a different account of
13 what occurred on June 23. Campbell reported informed Sergeant Heise that Plaintiff had thrown the
14 folded 602 complaint form at Campbell, rather than handing it to him, and that the folded papers struck
15 Campbell in the chest. (*Id.* at 3). Campbell gave the 602 complaint to Heise and filed a complaint for
16 battery against Plaintiff based on the incident. (*Id.* at 7-8). Plaintiff alleges that the 602 complaint form
17 was never filed. (*Id.* at 8). Instead, Defendant Heise allegedly informed Plaintiff that the 602 complaint
18 would not be filed as Heise had destroyed it. (*Id.* at 8). A month later, the prison held a disciplinary
19 hearing on the charge that Plaintiff had committed battery. Plaintiff was found guilty. (*Id.* at 7-9). As
20 a consequence, Plaintiff had 150 days of time credit revoked and was placed in the Security Housing
21 Unit (SHU) for one year. (*Id.* at 9). Plaintiff successfully appealed this adjudication, arguing there was
22 not sufficient evidence to prove a charge of battery, and his time credits were restored. (*Id.*)

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24 ¹ As a general rule, an amended complaint supersedes the prior pleading, the latter being treated
25 as non-existent. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Additionally, Local Rule 15-220
26 requires that an amended complaint must be complete in itself without reference to any prior pleading.
27 Once the amended complaint is filed, the original complaint no longer serves any function in this case.
28 Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each
defendant must be sufficiently alleged. However, as Plaintiff was proceeding *pro se*, the Court liberally
interpreted his Amended Complaint to include the previously pleaded claim for retaliation. (#15).

1 Based on these allegations, Plaintiff claimed that 1) Campbell violated his First Amendment and
2 Fourteenth Amendment rights by destroying his property, failing to respond to Plaintiff's numerous 602
3 complaints, failing to file Plaintiff's 602 complaint and charging Plaintiff with battery in retaliation for
4 Plaintiff's filing of complaints, 2) Heise violated his First Amendment and Fourteenth Amendment
5 rights by destroying Plaintiff's July 23, 2007 602 complaint and assisting Campbell in filing a battery
6 charge against Plaintiff in retribution for Plaintiff's filing of 602 complaint forms, 3) R. Williams
7 denied Plaintiff his Fourteenth Amendment due process rights by finding him guilty of battery based on
8 insufficient evidence. (#16).

9 In screening Plaintiff's Third Amended Complaint, the Court dismissed² several of Plaintiff's
10 causes of action for failure to state a cognizable claim that a constitutional right had been violated.
11 (#19; #22). The Court dismissed Plaintiff's Fourteenth Amendment due process claims against
12 Defendant Williams because Plaintiff failed to sufficiently demonstrate the deprivation of a specific
13 liberty interest as placement in disciplinary segregation did not constitute "a major disruption" in
14 Plaintiff's environment. (#19 at 3 (citing *Sandin v. Conner*, 515 U.S. 472, 486-87 (1995); #15 at 3). In
15 addition, the Court found that Plaintiff's allegations that Defendant Campbell destroyed his personal
16 property and refused to respond to Plaintiff's grievances regarding the matter were insufficient to state a
17 claim under the First Amendment.³ (#19 at 2-3). However, the Court found that Plaintiff had stated a
18 cognizable claim for retaliation under the First Amendment against Defendants Campbell and Heise
19 based on his allegation that Defendants denied Plaintiff the right to file prison grievances. (#19 at 3).
20 As a result, this action is proceeding solely upon Plaintiff's First Amendment retaliation claim that
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22 ² On May 28, 2009, the District Judge affirmed the Magistrate Judge's Findings and
23 Recommendations and dismissed several of the claims in Plaintiff's Third Amended Complaint for
24 failure to state a claim upon which relief can be granted. (#22).

25 ³ The Court noted that prisoners have a First Amendment right to file prison grievances, but do
26 not have a right to any particular response. (#19); *see also McDonald v. Smith*, 472 U.S. 479, 482 105
27 S.Ct. 2787, 2789 (1985) (right to petition is a right of expression); *Bruce v. Ylst*, 351 F.3d 1283, 1288
28 (9th Cir. 2003); *Apple v. Glenn*, 183 F.3d 477, 479-80 (6th Cir. 1999) (plaintiff who alleged public
officials violated his First Amendment right to petition the government by not responding to his letters
or taking the actions requested therein failed to state a claim).

1 Campbell and Heise denied him the right to file prison grievances and falsely charged him⁴ with battery.

2 **DISCUSSION**

3 **I. Plaintiff's First Amendment Retaliation Claim Based on Allegedly False Claim of Battery**

4 In it's screening of Plaintiff's Third Amended Complaint, the Court dismissed all causes of
5 action except for Plaintiff's claim of retaliation under the First Amendment. Defendants claim in their
6 Motion to Dismiss that Plaintiff's sole remaining claim is for retaliation by Defendants Campbell and
7 Heise based on the allegations that Defendants denied Plaintiff the right to file prison grievances.
8 (#41). However, Plaintiff's retaliation claim is based on two separate alleged actions of the defendants:
9 1) Defendants preventing Plaintiff from filing prison grievances and 2) Defendants filing a false charge
10 of battery against Defendant.

11 Defendants' confusion as to what bases remain for Plaintiff's claim of retaliation is
12 understandable. Plaintiff is a *pro se* litigant and his Third Amended Complaint was inartfully drafted.
13 The Third Amended Complaint states claims under § 1983 for Defendants Campbell and Heise's
14 alleged violations of Plaintiff's First and Fourteenth Amendment rights. (#16 at 7-8). However, the
15 complaint did not expressly state whether the defendants' filing of an allegedly false charge of battery
16 was the basis of a claim for violation of the First Amendment or the Fourteenth Amendment, or both.
17 (*Id.*)

18 In addition, the Court failed to specifically address in its screening order whether the allegation
19 that Defendants filed a false charge of battery constituted a cognizable retaliation claim under the First
20 Amendment. (*See* #19). However, the language of the Third Amended Complaint includes sufficient
21 factual allegations and details to constitute a cognizable claim for retaliation based on Defendants'
22 filing of an allegedly false battery charge against Plaintiff as a form of reprisal for Plaintiff's filing of
23 602 complaints. (#16 at 7-8). Based on that language, the complaint gives the defendants fair notice of
24 a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S.
25 544, 555 (2007).

26 As the Court never specifically dismissed the retaliation claim based on the false charge of
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28 ⁴ See discussion of Plaintiff's remaining First Amendment Claims, *infra* pp. 4-5.

1 battery, the cause of action remains active. In addition, the Court now specifically finds that the Third
2 Amended Complaint states a cognizable claim for retaliation based on the alleged false battery charge.
3 (See #16). Plaintiff has alleged that an individual state actor took adverse action against him for his
4 engagement in a constitutionally protected activity and that the adverse action chilled Plaintiff's
5 exercise of his rights and did not reasonably advance a legitimate penological goal. See *Rhodes v.*
6 *Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *Rizzo v. Dawson*, 778 F.2d 527, 531-32 (9th Cir.
7 1985). Therefore, Plaintiff has sufficiently pled a second retaliation cause of action based on the filing
8 of the battery charge.

9 **II. Motion to Dismiss**

10 **A. Standard for Motion to Dismiss**

11 A court may dismiss a Plaintiff's complaint for failure to state a claim upon which relief can be
12 granted. Fed.R.Civ.P. 12(b)(6). Generally, a district court may not consider any material beyond the
13 pleadings in ruling on a Rule 12(b)(6) motion. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896
14 F.2d 1542, 1555 n. 19 (9th Cir. 1990). "The focus of any Rule 12(b)(6) dismissal . . . is the complaint."
15 *Schneider v. California Dept. of Corr.*, 151 F.3d 1194, 1197 n. 1 (9th Cir. 1998).

16 A properly pled complaint must provide "a short and plain statement of the claim showing that
17 the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
18 555 (2007); *Conley v. Gibson*, 355 U.S. 41, 47 (1957). While Rule 8 does not require detailed factual
19 allegations, it demands more than labels and conclusions or a formulaic recitation of the elements of a
20 cause of action. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Papasan v. Allain*, 478 U.S. 265,
21 286 (1986)). Factual allegations must be enough to rise above the speculative level. *Twombly*, 550
22 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to
23 state a claim for relief that is plausible on its face. *Iqbal*, 129 S.Ct. at 1949 (internal citation omitted).

24 In considering a motion to dismiss for failure to state a claim, the court must accept as true the
25 allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738,
26 740, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), construe the pleading in the light most favorable to the
27 party opposing the motion, and resolve all doubts in the pleader's favor. *Jenkins v. McKeithen*, 395
28 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404, reh'g denied, 396 U.S. 869, 90 S.Ct. 35, 24 L.Ed.2d 123

1 (1969). In *Iqbal*, the Supreme Court recently clarified the two-step approach district courts are to apply
2 when considering motion to dismiss. First, the court must accept as true all well-pled factual allegations
3 in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950.
4 Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not
5 suffice. *Id.* at 1949. Second, the Court must consider whether the factual allegations in the complaint
6 allege a plausible claim for relief. *Id.* at 1950. A claim is facially plausible when the Plaintiff's
7 complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable
8 for the alleged misconduct. *Id.* at 1949. Where the complaint does not permit the court to infer more
9 than the mere possibility of misconduct, the complaint has alleged, but not shown that the pleader is
10 entitled to relief. *Id.* (internal quotation marks omitted). When the claims in a complaint have not
11 crossed the line from conceivable to plausible, Plaintiff's claim must be dismissed. *Twombly*, 550 U.S.
12 at 570.

13 **B. Defendants' Motion to Dismiss Retaliation Claim**

14 A viable claim of First Amendment retaliation contains five elements: (1) an assertion that a
15 state actor took some adverse action against an inmate (2) because of (3) that inmate's protected
16 conduct and that such action (4) chilled the inmate's exercise of his First Amendment rights (or that the
17 inmate suffered more than minimal harm) and (5) the action did not reasonably advance a legitimate
18 correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *see also Hines v. Gomez*,
19 108 F.3d 265, 267 (9th Cir. 1997). Retaliation claims must be evaluated in light of the concerns of
20 excessive judicial involvement in day-to-day prison management, and courts must therefore "afford
21 appropriate deference and flexibility" to prison officials in the evaluation of proffered legitimate
22 penological reasons for conduct alleged to be retaliatory. *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir.
23 1995.) Prisoners have a constitutionally-protected right to file grievances and to pursue civil rights
24 litigation without retaliation. *Rhodes*, 408 F.3d at 567; *Hines*, 108 F.3d at 267 (prisoner may not be
25 retaliated against for use of grievance system).

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1 **1. Motion to Dismiss Claim Against Defendant Campbell**

2 Defendants argue that the Court should dismiss the retaliation claim based on allegations that
3 Defendant Campbell prevented Plaintiff from filing complaints against Campbell because Plaintiff has
4 not alleged that Campbell engaged in retaliatory action. (#41 at 5). Plaintiff responds that Campbell's
5 failure to respond to Plaintiff's 602 complaints constituted retaliatory action. (#42 at 2).

6 A prison official's failure or refusal to respond to a prisoner's complaint does not constitute a
7 retaliatory action. While prisoners have a First Amendment right to file prison grievances, *Bruce v.*
8 *Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003), they do not have a right to any particular response. *See*
9 *McDonald v. Smith*, 472 U.S. 479, 482 105 S.Ct. 2787, 2789 (1985) (right to petition is a right of
10 expression); *see also Apple v. Glenn*, 183 F.3d 477, 479-80 (6th Cir. 1999) (finding a plaintiff who
11 alleged public officials violated his First Amendment right to petition the government by not
12 responding to his letters or taking the actions requested therein failed to state a claim). Plaintiff does
13 not allege that Campbell stopped him from filing 602 complaints, only that Campbell did not respond to
14 Plaintiff's numerous 602 complaints. The Court finds that Plaintiff is unable to demonstrate retaliatory
15 action on this basis.

16 Alternatively, Plaintiff's Third Amended Complaint could be interpreted as arguing that
17 Campbell chose, as a retaliatory act, not to file the 602 complaint that Plaintiff allegedly threw at him.
18 However, the Third Amended Complaint only alleges that Campbell handed the 602 complaint to his
19 supervisor, Sgt. Heise. (#16 at 7-8). The simple delivery of a prisoner's complaint to a supervisor,
20 without more, does not constitute a retaliatory action. Plaintiff has not alleged that Campbell destroyed
21 the 602 complaint or that he told Defendant Heise not to file it. As a result, Plaintiff's claim that
22 Campbell retaliated against him by preventing Plaintiff from filing 602 complaints fails to state a
23 retaliation claim upon which relief may be granted and the Court will recommend that the cause of
24 action be dismissed.

25 **2. Motion to Dismiss Claim Against Defendant Heise**

26 Defendants argue that the retaliation claim against Defendant Heise based on his destruction of
27 Plaintiff's 602 complaint should be dismissed because Heise did not know Plaintiff was engaging in
28 protected conduct. (#41 at 5-6). Defendants argue that Heise was unaware whether or not the

1 grievance had ever been filed and merely destroyed paper that had been thrown at and struck a prison
2 official. (*Id.*)

3 A prisoner's filing of a grievance constitutes protected conduct. *Bruce*, 351 F.3d at 1288. Here,
4 Plaintiff allegedly threw his 602 complaint at Campbell. While this is not the proper procedure for
5 filing a prison complaint, it is plausible that Plaintiff intended to file the complaint by filling it out and
6 delivering it to Campbell. Similarly, it is plausible that a prison official, handed a completely filled out
7 grievance form, would know that the prisoner intended to or attempted to file the complaint by giving it
8 to the officer. As the officials at Mule Creek well know, prison is not a genteel institution. Prison
9 guards and prisoners tend to have an antagonistic relationship. Within this context, it is not clear that a
10 grievance issued in a violent, frustrated or offensive manner is not legitimate. It is similarly plausible
11 that prison officials would know a prisoner intended to file a filled out grievance even through it was
12 improperly filed. In this instance, Defendant Heise was handed a filled out 602 complaint by Campbell.
13 Based on these factual allegations, it is possible for Plaintiff to demonstrate through evidence that a
14 prison guard handed a grievance form that the prisoner had taken time to fill with allegations against
15 another prison guard would know that the prisoner intended to file the grievance. Therefore, the
16 question of whether Heise knew Plaintiff attempted to file the grievance by giving it to Campbell is a
17 question of fact, rather than law. The Court will deny Defendants' motion to dismiss the retaliation
18 claim if Heise is not entitled to qualified immunity.

19 3. Qualified Immunity

20 "Qualified immunity serves to shield government officials 'from liability for civil damages
21 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a
22 reasonable person would have known.'" *San Jose Charter of Hells Angels Motorcycle Club v. City of*
23 *San Jose*, 402 F.3d 962, 971 (9th Cir. 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct.
24 2727, 73 L.Ed.2d 396 (1982)). If the law is not clearly established, or, if the Defendants could have
25 reasonably believed that their conduct was lawful, they are entitled to qualified immunity. *Thompson v.*
26 *Souza*, 111 F.3d 694, 698 (9th Cir. 1997). The Supreme Court has set forth the following two-pronged
27 inquiry to resolve all qualified immunity claims:
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1 First, taken in the light most favorable to the party asserting the injury, do the facts
2 alleged show the officers' conduct violated a constitutional right? Second, if so, was that
3 right clearly established? The relevant, dispositive inquiry in determining whether a right
4 is clearly established is whether it would be clear to a reasonable officer that his conduct
5 was unlawful in the situation he confronted. This inquiry is wholly objective and is
6 undertaken in light of the specific factual circumstances of the case.

7 *Id.* (internal quotations and citations omitted); *see also Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct.
8 2151, 150 L.Ed.2d 272 (2001) (stating whether “[t]aken in the light most favorable to the party
9 asserting the injury, ... the facts alleged show the [defendants’] conduct violated a constitutional right.
10 [I]f a violation could be made out on a favorable view of the parties’ submissions, the next, sequential
11 step is to ask whether the right was clearly established.”). *Id.* Thus, a district court should “concentrate
12 at the outset on the definition of the constitutional right and determine whether, on the facts alleged, a
13 constitutional violation could be found.” *Billington v. Smith*, 292 F.3d 1177, 1184 (9th Cir. 2002)
14 (internal quotations and citations omitted). If a constitutional violation can be found, the court then
15 decides whether the violation was the source for clearly established law that was contravened in the
16 circumstances of the case. *Id.* “Whether a right is ‘clearly established’ for purposes of qualified
17 immunity is an inquiry that ‘must be undertaken in light of the specific context of the case, not as a
18 broad general proposition.’ In other words, ‘[t]he contours of the right must be sufficiently clear that a
19 reasonable official would understand that what he is doing violates that right.’” *Graves v. City of Coeur*
20 *d’Alene*, 339 F.3d 828, 846 (9th Cir.2003) (quoting *Saucier*, 533 U.S. at 201-02 (other citations
21 omitted)).

22 Under the first element of qualified immunity analysis, the Court finds that “taken in the light
23 most favorable” to Plaintiff, the facts alleged show the officer’s conduct violated a constitutional right.
24 *See Thompson*, 111 F.3d at 698. The constitutional protection against retaliation is clearly established.
25 The Ninth Circuit has pointed out that, “the prohibition against retaliatory punishment is ‘clearly
26 established law’ . . . for qualified immunity purposes.” *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir.
27 1995) (citing *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir.1995)). As discussed above, taken in
28 the light most favorable to Plaintiff, Sgt. Heise destroyed a prisoner’s filled out grievance form after
Plaintiff attempted to file the grievance in an improper and rude manner. An officer’s choice to destroy
a prisoner’s grievance, rather than filing it, violation of Plaintiff’s constitutional rights.

1 Under the second element of qualified immunity, Defendants argue the right was not established
2 because it would not be clear to a reasonable officer that the destruction of paper thrown at another
3 prison officer was unlawful. Defendants' argument fails to take into account that the grievance form
4 was completed and not merely a blank form. Taken in the light most favorable to Plaintiff, the Third
5 Amended Complaint alleges that Heise was aware that the 602 grievance form was filled out and Heise
6 chose to destroy it. The Court finds that it would be clear to a corrections officer that the destruction of
7 a filled out grievance form, even one tossed at an officer, constituted unlawful conduct. Therefore,
8 Heise's conduct is not entitled to qualified immunity and the Court will deny Defendants' motion to
9 dismiss the retaliation claim as to Heise.

10 **III. Motion to Proceed**

11 On July 6, 2010, Plaintiff filed a motion to proceed (#44). In light of the delay in ruling on
12 Defendants' Motion to Dismiss (#41), the Court will set a discovery schedule in a separate order.
13 Accordingly,

14 **IT IS HEREBY ORDERED** that Defendants R.L. Heise, Jr. and C. Campbell's Motion to
15 Dismiss (#41) be **granted in part** and **denied in part**, as follows:

- 16 1. The Court will recommend that Defendants' motion to dismiss the retaliation claim
17 against Defendant Campbell based on allegations that Campbell prevented Plaintiff from
18 filing an administrative grievance be **granted**; and
- 19 2. The motion to dismiss the retaliation claim against Defendant Heise based on allegations
20 that Heise destroyed Plaintiff's grievance is **denied**.

21 **RECOMMENDATION**


22 **IT IS HEREBY RECOMMENDED** that Plaintiff's retaliation claim against Defendant
23 Campbell based on allegations that Campbell prevented Plaintiff from filing administrative grievances
24 be **dismissed**. Plaintiff's allegations that Campbell failed to adequately respond to the grievance and
25 prevented Plaintiff from filing the grievance when Campbell delivered the grievance to Heise fail to
26 state a claim upon which relief may be granted.

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1 **NOTICE**

2 These findings and recommendations are submitted to the United States District Judge assigned
3 to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any objection to this Finding and
4 Recommendation must be in writing and filed with the Clerk of the Court within twenty (20) days. The
5 Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to
6 the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This
7 circuit has also held that (1) failure to file objections within the specified time and (2) failure to
8 properly address and brief the objectionable issues waives the right to appeal the District Court's order
9 and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157
10 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

11 DATED this 22nd day of September, 2010.

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14 **GEORGE FOLEY, JR.**
15 **UNITED STATES MAGISTRATE JUDGE**
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