UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THOMAS A. HIGHTOWER, Plaintiff, v. JAMES TILTON, et al, Defendants.	CASE NO. 2:08-cv-01129-MJP ORDER PARTIALLY GRANTING DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on Defendants L.B. Reaves, E.A. Reyes, N. Grannis, and James Tilton's motion to dismiss Plaintiff's complaint and Defendant's joinder of parties to the motion. After reviewing the motion, response, reply and documents submitted in support thereof, the Court GRANTS and DENIES the motion to dismiss in part.

I. Background

Pro se plaintiff Thomas Hightower is a disabled prisoner incarcerated at Mule Creek State Prison in Ione, CA who filed a complaint in the Eastern District of California on May 22, 2008. He seeks declaratory judgment, injunctive relief, monetary relief, and punitive damages under 42 U.S.C. § 1983 for alleged violations of his First, Eighth, and Fourteenth Amendment rights. He also seeks redress under various California state laws. Named defendants are

sixteen prison officials employed, or formerly employed, by the Mule Creek State Prison ("MCSP") and the California Department of Corrections and Rehabilitation ("CDCR"). The present motion concerns six of these officials – L.B. Reaves, E.A. Reyes, N. Grannis, Silvia H. Garcia, Richard Subia, and James Tilton.

Reaves is either a correctional counselor or associate warden at MCSP. Plaintiff allegedly approached Reaves to complain about prison guards' behavior toward him, and accuses Reaves of "refus[ing] to even acknowledge any serious violations of law . . . personally choosing to ignore the actions of [the other] defendants." (Dkt. No. 1 at 22.)

Reyes is also either a correctional counselor or associate warden at MCSP. Reyes is allegedly responsible for processing prisoner appeals at MCSP, and Plaintiff accuses him of intentionally stalling the administrative appeal process. (Id. at 33.)

Grannis is the Chief of Inmate Appeals of the CDCR. Plaintiff claims that Grannis was "responsible for establishing protocols and/or procedures, that, she/he knew was causing … unconstitutional conditions of confinement," (Id. at 7), and that he "cannot deny [he] know[s]" of other defendants' reputation for retaliation." (Id. at 15.) It is unclear whether Plaintiff ever directly contacted Grannis.

Garcia is the former chief deputy warden at MCSP. Plaintiff accuses Garcia of retaining him in solitary confinement for retaliatory reasons, allegedly against the recommendation of the appeals board. (Id. at 24.)

Subia is the former warden of the MCSP. Plaintiff accuses Subia of creating a prisoner classification called "A2B" that denies prisoners certain privileges, including showers and

recreation. Plaintiff avers that the privileges denied are not actually privileges, but inalienable constitutional rights, and that Subia widely applied the A2B classification to the general prison population simply due to overcrowding. (Id. at 26-35.)

Tilton is the former head of the CDCR. Plaintiff claims that he complained about poor prison conditions and the "punitive" effects of the "A2B" status directly to Tilton, but received no response. Plaintiff claims that this is tantamount to Tilton's approval of the conditions and their punitive nature. (Id. at 35.)

On January 15, 2010, Reaves, Reyes, Grannis, and Tilton filed a motion to dismiss. (Dkt. No. 22.) Defendants assert that the Plaintiff's complaint fails to meet the Fed. R. Civ. P. 8(a)(2) pleading standard. They also claim qualified immunity. Defendants did not move to dismiss any of Plaintiff's state law claims, nor did their motion specifically address Plaintiff's Fourteenth Amendment claims.

On February 11, 2010, Plaintiff moved for additional time to file his response to Defendants' motion. (Dkt. No. 26.) The Court did not rule on the motion before Plaintiff filed a response on March 16, 2010. (Dkt. No. 31.) On March 23, 2010, Defendants moved for an extension to file their reply (Dkt. No. 33), which was granted on April 1, 2010 (Dkt. No. 37).

Defendants filed a reply on April 6, 2010, asking for Plaintiff's response to be stricken as untimely. (Dkt. No. 39.) In separate filings, defendants Subia and Garcia joined the motion to dismiss. (Dkt. No. 40; Dkt. No. 41.) On April 23, 2010, Plaintiff filed an opposition against Garcia's joinder, but remained silent regarding Subia's joinder. (Dkt. No.

43.)

The remaining defendants, mostly prison guards accused of direct retaliation, are not party to the motion to dismiss. Most joined in a separate answer to Plaintiff's complaint. (Dkt. No. 21.)

II. Propriety of Joinder

Plaintiff challenges the Defendants' attempted joinder of Garcia to the motion to dismiss. (Dkt. No. 43 at 1.) Joinder in a motion after filing is appropriate when the addition of new parties is timely and can be done without changing the motion's underlying legal premises. White v. Hegerhorst, 418 F.2d 894, 895 n.1 (9th Cir. 1969).

A. Joinder of Garcia

Plaintiff first asserts that Garcia's joinder was untimely. (Dkt. No. 43 at 1.) In an order entered on March 31, 2010, the Court specifically granted Defendants an extension to April 6, 2010 "to reply to Plaintiff's opposition . . . and to file their request to join [Garcia] to their motion to dismiss or to their answer." (Dkt. No. 37.) Defendants complied, filing both their request for joinder (Dkt. No. 40) and their reply to Plaintiff's opposition (Dkt. No. 39) on April 6, 2010. The requests were timely and will be considered.

Plaintiff also claims that Garcia "offers no factual basis that would permit a proper weighing of the validity of standing to file her Motion to Dismiss." (Dkt. No. 43 at 1.) Like Garcia, the motion's existing parties Reaves and Grannis are "policy making" prison officials. (Dkt. No. 1 at 22.) Garcia moves to dismiss on analogous grounds, and thus properly joined in the motion to dismiss.

B . Subia's Joinder

Subia's joinder in the motion to dismiss was timely and Plaintiff did not challenge it. Accordingly, Subia will be allowed to join in the motion to dismiss.

III. Motion to Dismiss

A. Timeliness of Plaintiff's Response to Defendant's Motion to Dismiss

Defendants challenge Plaintiff's opposition to the motion as untimely. (Dkt. No. 39 at 2.) Plaintiff's response to the motion was filed on March 16, 2010. However, it was due on February 9, 2010. On February 11, 2010, Plaintiff requested additional time to file the response, but the Court did not respond before he filed the response. (Dkt. No. 26.) In their reply brief, Defendants ask to strike Plaintiff's opposition because it was neither filed timely by the original due date, nor by the requested extended date had the extension been granted. (Dkt. No. 39 at 2.)

Pro se plaintiffs in prisoner litigations are given latitude. McGuckin v. Smith, 974 F.2d 1050, 1055 (9th Cir. 1992). Courts must apply "considerable leeway when assessing whether a pro se civil rights litigants' failure to comply strictly with time limits . . . should be excused for "good cause," especially when that litigant is incarcerated." Id. at 1058.

Here, the Court gave Defendants the opportunity to respond to Plaintiff's late response. Defendants have not suffered any prejudice from Plaintiff's response and the Court declines to strike it.

B. Fed. R. Civ. P. 8(a)(2) Pleading Standard

Fed. R. Civ. P. 8(a)(2) requires "a short and plain statement of the claim showing that

the pleader is entitled to relief." Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) established a two-prong test defining the pleading standard. First, pleadings must not contain legal conclusions unsupported by fact. A claimant need not offer detailed factual support for his claims, but must still make "a [factual] 'showing,' rather than a blanket assertion, of entitlement to relief." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 n.3 (2007). Second, if the factual allegations are well-pleaded, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 129 S. Ct. at 1950 (emphasis added). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 1955.

Both prongs of the Iqbal test must be satisfied for a pleading to survive a motion to dismiss. However, within this framework, pro se prisoner litigants' pleadings are construed liberally. McGuckin, 974 F.2d at 1055.

i. Plaintiff's Claims Against Reaves, Grannis, and Garcia

Plaintiff advances a First Amendment retaliation claim against Defendants Reaves, Grannis, and Garcia. To sustain such a claim, plaintiff must factually support "(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).

Plaintiff claims that Reaves and Grannis "refused to even acknowledge any serious

violations of law . . . personally choosing to ignore the actions of [the other] defendants." (Dkt. No. 1 at 22.) This echoes his allegation that Grannis, as the Chief of Inmate Appeals, was "responsible for establishing protocols and/or procedures, that, [sic] she/he knew was causing the unconstitutional conditions of confinement," (id. at 7), and that he "cannot deny [he] know[s]" of other defendants' reputation for retaliation." (Id. at 15.) Plaintiff uses similar language in describing Reaves's duties. (Id. at 8-9.) Plaintiff further asserts that he "battled with . . . Reaves and Grannis" to complete an administrative appeal. (Id. at 25.) These are Plaintiff's only mentions of Reaves or Grannis.

Taken in totality, these claims are factually insufficient to show either Reaves' or Grannis' retaliatory intent. Reaves and Grannis are implicated merely because they allegedly knew of Plaintiff's plight. This, as Defendants point out, (Dkt. No. 22 at 4-5), is insufficient to meet Iqbal's first prong.

In his response to the motion, Plaintiff attempts to add additional facts supporting his claims against Reaves and Grannis, (Dkt. No. 31 at 4-5), but they must be ignored because they do not appear in his original complaint. In their current state, Plaintiff's claims against Reaves and Grannis are insufficiently plead, but the defects may be curable by amendment.

Plaintiff provides more allegations implicating Garcia, but they also fall short of Iqbal's plausibility standard. Plaintiff claims that, when appearing before an appeal committee apparently recommending his release back into a program of higher privilege, Garcia "smiled and stated she was retaining plaintiff in [administrative segregation], and would even send plaintiff to a [special/secure housing unit] term if she wanted," in spite of his lack of

disciplinary history. (Dkt. No. 1 at 24.) Furthermore, Garcia allegedly stated that "plaintiff could appeal the decision if he liked, since he was so good at litigating." (Id.) These actions, Plaintiff argues, "show [Garcia's] retaliatory basis." (Id.)

While they may hint at Garcia's retaliatory demeanor, the facts given are insufficient to make the claim plausible. Plaintiff essentially argues that Garcia's disagreement with the appeal committee's recommendation is tantamount to retaliation. He only supports this conclusion with allegations that she "smiled" while doing so and impliedly used a sarcastic tone to describe Plaintiff's appeal options. Even when read in the light most favorable to Plaintiff, there is insufficient factual substance to render the claim plausible under Iqbal or Twombly. Like Plaintiff's claims against Reaves and Grannis, however, the defects in his claim against Garcia are curable by amendment.

ii. Plaintiff's Claim Against Reyes

The basis for Plaintiff's action against Reyes is unclear, though it bears resemblance to a Fourteenth Amendment due process claim. Plaintiff claims that Reyes "established policies and procedures, that are designed to block, delay, and totally deny access to the prison [appeals] process" with "intent to prevent plaintiff's access to the courts." (Dkt. No. 1 at 33.) To support this assertion, he alleges that Reyes refused to process Plaintiff's group appeal on behalf of several inmates because of an error on the form. (Id.) Plaintiff contends that he had to submit the appeal twice more before the appeal was accepted, and that this delay in the appeals process amounted to harm. (Id.) However, Plaintiff admits that the appeal was eventually accepted; there was ultimately no deprivation of recognized rights. Furthermore,

Plaintiff has not alleged any harm as a result of the delay.

Plaintiff neither asserts any recognized cause of action against Reyes nor has factually shown a harm to be redressed. However, Plaintiff will be given an opportunity to amend his claims against Reyes.

iii. Plaintiff's Claims Against Subia and Tilton

Plaintiff levels Eighth Amendment claims against Subia and Tilton. When inhumane prison conditions are alleged, the claim must first factually establish an extreme deprivation of the "minimal civilized measure of life's necessities." Hudson, 503 U.S. at 8-9. "Routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society.'" Id. at 9 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). The plaintiff's factual allegations must also support the inference that the accused prison official was conscious of, and deliberately indifferent to, a substantial risk of harm to the prisoner. Farmer v. Brennan, 511 U.S. 825, 847 (1994). Furthermore, they must show that the official "disregard[ed] that risk by failing to take reasonable measures to abate it." Id.

Plaintiff offers several concrete examples of the deprivations he and his fellow prisoners suffered, ostensibly as a result of the MCSP's policies. For example, he argues that he has been denied regular shower access, even in hot weather, due to his undeserved "A2B" privilege classification. (Dkt. No. 1 at 29-30.) Within the context of the Hudson test, Plaintiff's extreme deprivation claim initially meets the pleading standard.

However, that does not end the inquiry. Farmer also requires Plaintiff to demonstrate that the deprivation resulted from the deliberate indifference and inaction of the prison official.

Farmer, 511 U.S. at 847. Plaintiff claims that Subia and Tilton "instructed staff to begin denying A2B[-classified] inmates any programs outside their cells . . . [including] showers . . . except on a very limited basis," (Dkt. No. 1 at 27); he complains that Tilton and Subia have "constantly term[ed] showers a privilege, and not a right." (Id. at 29.) He asserts that Tilton and Subia created the "A2B" privilege classification to "deny inmates all movement, showers, phones, yard, dayroom, etc. [sic] on weekends, holidays, [sic] evenings." (Id. at 26.) He reasons that Tilton and Subia created the "A2B" classification in response to prison overcrowding; as a result, other "A2B" classified inmates are also being arbitrarily punished because of overcrowding. (Id. at 30.) He cites Subia's internal memoranda to support his assertion, though those memoranda are not on record. (Id. at 34.) Plaintiff contends that Tilton and Subia are personally keeping him in the "A2B" privilege group, thus denying him certain basic rights for no other reason than punishment for his ongoing litigation. (Id. at 26-27.) He claims that Subia was personally notified of the lack of, e.g., shower access by way of his group appeal on behalf of other "A2B"-classified inmates, but Subia replied in writing that no such denial of privileges was occurring. (Id. at 35.) Similarly, Plaintiff claims that he "personally informed" Tilton of the deleterious effects of the "A2B" policy, but Tilton ignored his complaints. (Id. at 35-36.)

When taken in the light most favorable to Plaintiff, his claims against Subia and Tilton are sufficiently pleaded. By asserting Subia's response to his group appeal outlining the deprivation, Plaintiff establishes that Subia was aware of the situation. Plaintiff also claims that he directly advised Tilton of the matter. It is intuitive that as policymakers for the MCSP

and the CDCR, respectively, Subia and Tilton had the power to grant or deny shower access to certain classes of the prison population. However, in spite of their notice of the conditions and their ability to improve them, Defendants failed to act and no improvement occurred.

Plaintiff plausibly demonstrates that he was both a) severely deprived of a basic human need, and b) denied this need as a result of official inaction, thus meeting both Farmer requirements for Eighth Amendment claims. His claims against Tilton and Subia will not be dismissed.

C. Qualified Immunity

Defendants also claim qualified immunity from suit. (Dkt. No. 22 at 6.) For Plaintiff to overcome a government actor's qualified immunity from suit, he must prove two elements. First, when taken in the light most favorable to the plaintiff, the facts must show that the official conduct violated a constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001). Second, "the contours of that right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Qualified immunity need not be determined for Grannis, Reaves, Reyes, or Garcia, as Plaintiff failed to assert any valid constitutional claims against them.

For Tilton and Subia, Plaintiff's claims sufficiently allege that a constitutional right was withheld as a direct result of Tilton and Subia's policies or inaction, satisfying the first prong of the qualified immunity test. Thus, the inquiry turns on whether Tilton and Subia could have reasonably believed that their actions violated a constitutional right. Plaintiff directly apprised both Tilton and Subia of the deprivation of basic necessities resulting from their policies. As

previously noted, the alleged deprivations are severe, and the policies assumedly promulgated by Tilton and Subia can be directly connected to a withholding of constitutional rights. Assuming these allegations are all true, it is plausible that Tilton and Subia understood their actions to be constitutionally invalid. As a result, Plaintiff sufficiently fulfills both prongs of the qualified immunity test, and neither Tilton nor Subia are entitled to qualified immunity.

D. State Law Claims

The Defendants' reply to Plaintiff's opposition attempts to move the Court to also dismiss Plaintiff's state causes of action against Tilton. (Dkt. No. 39 at 4-5.) However, Defendants never discussed state law in their original motion to dismiss; they only addressed Plaintiff's First and Eighth Amendment claims. Just as Plaintiff is disallowed from stating new facts or causes of action in his response, Defendants are barred from adding new challenges in their reply. Plaintiff's state law claims will not be dismissed.

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IV. Conclusion

Defendants' motion to dismiss Plaintiff's claims against Reaves, Grannis, Garcia, and Reyes is GRANTED without prejudice. Plaintiff must file his amended complaint with this Court no later than September 20, 2010. Defendants' motion to dismiss Plaintiff's claims against Subia and Tilton is DENIED. All unaddressed state law and Fourteenth Amendment claims remain intact against all parties.

The Clerk is ordered to distribute copies of this Order to all counsel and mail a copy to Plaintiff.

Dated: August 19, 2010.

Marsha J. Pechman
United States District Judge