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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JEFF AIDNIK,	)	2:08-cv-02583-HDM-RAM
	)	
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	
CALIFORNIA MEDICAL FACILITY, et	)	
al.,	)	
	)	
Defendants.	)	
_____	)	

Plaintiff is a state prisoner proceeding *pro se* in this action asserting civil rights claims under 42 U.S.C. § 1983. Defendants have filed a motion to dismiss (#35). Plaintiff has opposed the motion (#41), and defendants have replied (#42). Plaintiff has also filed an unauthorized surreply (#43), which the court will nonetheless consider.

In his complaint, plaintiff asserts that on July 11, 2006, defendant Grochall called him a "f\*\*\*ing rat" in front of and

1 within hearing distance of other inmates; a week later, defendant  
2 Grochall loudly and in front of other inmates ordered plaintiff's  
3 locker be searched and said three times, "Loose lips sink ships."  
4 Plaintiff alleges that defendant Grochall made these comments in  
5 retaliation for plaintiff's having complained a week earlier about  
6 Grochall's "abusive language" to a sergeant.

7 On August 5, 2006, plaintiff filed a grievance regarding  
8 defendant Grochall's July 11 actions. On August 8, 2006, plaintiff  
9 was placed in administrative segregation by defendant Sgt. Riley.  
10 While in administrative segregation, plaintiff was interviewed by  
11 Lt. Pulsipher, who told him that defendant Captain Moreno would be  
12 attending all administrative segregation hearings. On October 2,  
13 2006, Sgt. Lewis allegedly told plaintiff that if he dropped his  
14 complaint against defendant Grochall, he would be released from  
15 administrative segregation. On January 5, 2007, defendant Susan  
16 Hubbard, the warden, ordered Captain Moreno to release plaintiff  
17 from administrative segregation, telling plaintiff that he had not  
18 been placed there because of anything he had done wrong.

19 The court screened plaintiff's complaint and found plaintiff  
20 stated a colorable First Amendment retaliation claim for his  
21 placement in administrative segregation following his complaints  
22 about defendant Grochall's conduct. In so doing, the court noted  
23 that claims asserted against Hubbard under a respondeat superior  
24 theory could not stand.

25 Defendants move to dismiss the complaint on three grounds: (1)  
26 Plaintiff failed to exhaust his administrative remedies with regard  
27 to his claims against defendants Lewis, Riley, Pulsipher, Moreno,  
28 and Hubbard; (2) plaintiff has not asserted personal participation

1 in a constitutional violation by Hubbard; and (3) plaintiff's  
2 retaliation claim against defendant Grochall fails as a matter of  
3 law.

#### 4 I. Failure to Exhaust

5 Under the Prison Litigation Reform Act of 1995, "[n]o action  
6 shall be brought with respect to prison conditions under section  
7 1983 of this title, or any other Federal law, by a prisoner  
8 confined in any jail, prison, or other correctional facility until  
9 such administrative remedies as are available are exhausted." 42  
10 U.S.C. § 1997e(a). Exhaustion is mandatory and is a prerequisite  
11 to all suits about prison life. *Porter v. Nussle*, 534 U.S. 516,  
12 524, 532 (2002). Administrative remedies must be exhausted prior  
13 to filing suit; exhaustion during the pendency of the suit is  
14 insufficient. *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir.  
15 2002) (per curiam); *Vaden v. Summerhill*, 449 F.3d 1047, 1150-51 (9th  
16 Cir. 2006). There must be "proper exhaustion" of available  
17 administrative remedies, meaning the inmate must "us[e] all steps  
18 the agency holds out. . . ." *Woodford v. Ngo*, 548 U.S. 81, 90  
19 (2006).

20 Failure to exhaust is treated as a matter in abatement and is  
21 subject to an unenumerated Rule 12(b) motion. *Wyatt v. Terhune*,  
22 315 F.3d 1108, 1119 (9th Cir. 2003). In deciding a motion to  
23 dismiss on such grounds, "the court may look beyond the pleadings  
24 and decide disputed issues of fact." *Id.* at 1120. If the court  
25 finds the prisoner has not exhausted his administrative remedies,  
26 the proper remedy is dismissal without prejudice. *Id.*

27 Failure to exhaust is an affirmative defense; defendants thus  
28 bear the burden of raising and proving the absence of exhaustion.

1 *Brown v. Valoff*, 422 F.3d 926, 936 (9th Cir. 2005) (quoting *Wyatt*,  
2 315 F.3d at 1119). Further, before the court can find a failure to  
3 exhaust, the defendants must prove that "some relief remained  
4 available" that the prisoner failed to pursue, "whether at  
5 unexhausted levels of the grievance process or through awaiting the  
6 results of the relief already granted as a result of that process."  
7 *Id.* at 936-37 (emphasis original).

8 Prisoners in the State of California have the right to appeal  
9 administratively "any departmental decision, action, condition or  
10 policy which they can demonstrate as having an adverse effect upon  
11 their welfare." Cal. Admin. Code tit. 15, § 3084.1(a). To exhaust  
12 administrative remedies in the California system, a prisoner must  
13 proceed through several levels of appeal: (1) informal resolution;  
14 (2) formal written appeal on a CDC 602 inmate appeal form; (3)  
15 second-level appeal to the institution head or designee; and (4)  
16 third-level appeal to the Director of the California Department of  
17 Corrections. *Id.* § 3084.5; *Brodheim v. Cry*, 2009 WL 3448411, at \*1  
18 (9th Cir. Oct. 28, 2009). A final decision from the Director's  
19 level of review satisfies the exhaustion requirement. *Kirkpatrick*  
20 *v. Ayers*, 2007 WL 2694179, at \*1 (N.D. Cal. 2007) (unpublished  
21 disposition).

22 Defendants argue that plaintiff has failed to exhaust his  
23 administrative remedies as to his claims against defendants Lewis,  
24 Riley, Moreno, Hubbard, and Pulsipher. The declarations and  
25 exhibits filed by defendants in support of their motion indicate  
26 that between July 11, 2006, and August 31, 2007, plaintiff filed a  
27 number of prison grievances, some exhausted and others not. Two of  
28 those grievances related to plaintiff's claims in this action. The

1 first, log number 06-01672, involved only Grochall and the incident  
2 of July 11, 2006, in which he called plaintiff a "f\*\*\*ing rat."  
3 (N. Grannis Decl. ¶ 3).

4 While this grievance was fully exhausted, nothing in it may be  
5 read to include plaintiff's complaints against defendants Lewis,  
6 Riley, Moreno, Hubbard, and Pulsipher. Although it is not  
7 necessary for each individual defendant to be specifically named  
8 and each constitutional claim to be specifically identified, the  
9 grievance must at least touch on the actions or results that form  
10 the basis of plaintiff's constitutional claims. While log number  
11 06-01672 does state that plaintiff was placed in administrative  
12 segregation following the incident with Grochall, it gives no  
13 indication that any of the other defendants played a part in such  
14 placement. Accordingly, log number 06-01672 did not serve to  
15 exhaust plaintiff's claims against defendants Lewis, Riley, Moreno,  
16 Hubbard, and Pulsipher.

17 Plaintiff did file a grievance about his placement in  
18 administrative segregation, log number 06-01766. This grievance  
19 was denied at the second level of review; plaintiff did not pursue  
20 it any further. (Lewis Decl. ¶ 3). While this grievance might  
21 cover plaintiff's claims against these six defendants, it was not  
22 fully exhausted. Plaintiff has not provided any explanation or  
23 evidence indicating why he was unable to exhaust this grievance.  
24 He argues in his surreply that he exhausted his remedies because  
25 the defendants "were all part of the investigation in one part or  
26 more and 'ALL' read the appeal or s[h]ould have." It is unclear  
27 what plaintiff means by this, but at any rate it does not explain  
28 why he failed to pursue this grievance to the Director's level of

1 review.

2 No other grievance relevant to plaintiff's claims in this  
3 action was filed during the relevant time period. (See D. Lewis  
4 Decl. ¶ 3). Nor does plaintiff allege that he exhausted any  
5 grievance omitted from defendants' summary of his appeals filed  
6 from July 11, 2006, to August 31, 2007. Accordingly, the court  
7 finds that plaintiff has failed to exhaust his administrative  
8 remedies against defendants Lewis, Riley, Moreno, Hubbard,<sup>1</sup> and  
9 Pulsipher, and plaintiff's claims against those defendants are  
10 hereby dismissed.

11 II. Failure to State a Claim

12 The court must dismiss a prisoner's complaint if it fails to  
13 state a claim upon which relief may be granted. 28 U.S.C. §  
14 1915(e)(2)(B)(ii). Dismissal for failure to state a claim is  
15 appropriate if the complaint lacks a cognizable legal theory or  
16 contains insufficient facts under a cognizable legal claim.  
17 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th  
18 Cir. 1984).

19 In considering a motion to dismiss for failure to state a  
20 claim under Fed. R. Civ. P. 12(b)(6), the court must accept as true  
21 all material allegations in the complaint as well as all reasonable  
22 inferences that may be drawn from such allegations. *LSO, Ltd. v.*  
23 *Stroh*, 205 F.3d 1146, 1150 (9th Cir. 2000). The allegations of the  
24 complaint also must be construed in the light most favorable to the

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26 <sup>1</sup>The court has determined that plaintiff's claims against defendant  
27 Hubbard have not been fully exhausted. None of the additional allegations  
28 against Hubbard made by plaintiff in his response and surreply are covered  
by the sole exhausted grievance in this action. Accordingly, defendants'  
argument that plaintiff has failed to allege any personal participation in  
a constitutional violation by Hubbard is moot.

1 nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th  
2 Cir. 2000). The purpose of a motion to dismiss under Rule 12(b)(6)  
3 is to test the legal sufficiency of the complaint. *Navarro v.*  
4 *Block*, 250 F.3d 729, 732 (9th Cir. 2001).

5 The allegations of a *pro se* plaintiff's complaint are held to  
6 a less stringent standard than those drafted by a lawyer. *Haines*  
7 *v. Kerner*, 404 U.S. 519 (1972) (*per curiam*). "Specific facts are  
8 not necessary" in a *pro se* complaint; the complaint "need only give  
9 the defendant fair notice of what the claim is and the grounds upon  
10 which it rests." *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197,  
11 2200 (2007) (internal punctuation and citations omitted). Even so,  
12 "a liberal interpretation of a *pro se* civil rights complaint may  
13 not supply essential elements of a claim that were not initially  
14 pled." *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992)  
15 (internal punctuation omitted) (*italics added*).

16 "A prisoner suing prison officials under [§] 1983 for  
17 retaliation must allege that he was retaliated against for  
18 exercising his constitutional rights and that the retaliatory  
19 action does not advance legitimate penological goals, such as  
20 preserving institutional order and discipline." *Barnett v.*  
21 *Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994) (*per curiam*). There  
22 is a First Amendment right to petition the government through  
23 prison grievance procedures. See *Rhodes v. Robinson*, 408 F.3d 559,  
24 567 (9th Cir. 2005). Such claims must be evaluated in light of the  
25 deference that must be accorded to prison officials. See *Vance v.*  
26 *Barrett*, 345 F.3d 1083, 1093 (9th Cir. 2003). The prisoner must  
27 submit evidence to establish a link between the exercise of  
28 constitutional rights and the allegedly retaliatory action. See

1 *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). And the  
2 prisoner must show his First Amendment rights were actually chilled  
3 by the retaliatory action. See *Rhodes*, 408 F.3d 568.

4 A retaliation claim is comprised of five elements: (1) an  
5 assertion that a state actor took some adverse action against an  
6 inmate (2) because of (3) that prisoner's protected conduct and  
7 that such action (4) chilled plaintiff's First Amendment rights and  
8 (5) the action did not reasonably advance a legitimate correctional  
9 goal. *Id.* at 567-68. Plaintiff bears the burden of showing there  
10 was no legitimate correctional purpose motivating the actions of  
11 which he complains. *Pratt*, 65 F.3d at 808. He must also present  
12 evidence, either direct or circumstantial, to establish a link  
13 between the exercise of constitutional rights and the alleged  
14 retaliatory actions. See *id.*

15 Defendant asserts plaintiff's retaliation claim fails as a  
16 matter of law because verbal threats do not constitute adverse  
17 action. However, a First Amendment violation does exist where a  
18 correctional officer calls a prisoner a snitch in front of other  
19 prisoners in retaliation for the prisoner's filing of grievances.  
20 *Valandingham v. Bojorquez*, 866 F.2d 1135, 1138 (9th Cir. 1989).  
21 That is precisely what plaintiff alleges here. Moreover,  
22 retaliatory placement in administrative segregation for filing  
23 grievances also states a claim. *Austin v. Terhune*, 367 F.3d 1167,  
24 117 (9th Cir. 2004). Accordingly, plaintiff has stated a claim for  
25 relief against defendant Grochall, and Grochall's motion to dismiss  
26 plaintiff's claims against him is DENIED.

27 **Conclusion**

28 Defendants' motion to dismiss (#35) is hereby **GRANTED IN PART**



1 and **DENIED IN PART**. The motion is **GRANTED** as to defendants Lewis,  
2 Riley, Moreno, Hubbard, and Pulsipher, and those defendants are  
3 hereby dismissed from this action. The motion is **DENIED** as to  
4 defendant Grochall.

5 **IT IS SO ORDERED.**

6 DATED: This 9th day of November, 2009.

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9 UNITED STATES DISTRICT JUDGE

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