IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ERNEST MILLER,

Plaintiff, No. CIV S-09-0772 GGH P

vs.

MIKE MCDONALD, et al.

Defendants. ORDER

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Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. Plaintiff has consented to the jurisdiction of the undersigned. See Docket # 4. By Order, filed April 29, 2009 (docket # 6), plaintiff's complaint was dismissed with leave to file an amended complaint. Plaintiff has filed an amended complaint. Plaintiff also filed an inapposite motion for summary judgment, which in addition to being premature, wholly fails to comply with the requirements of Fed. R. Civ. P. 56 and Local Rule 56-260, and will be summarily denied.

In the order dismissing the original complaint with leave to amend, the deficiencies of the complaint were exhaustively set forth. See Docket # 6. Nevertheless, the amended complaint in no way cures the defects of the original. For example, plaintiff, an African American inmate, continues to allege that he is being discriminated against on the basis

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of his race because his 602 inmate appeals are being rejected beyond the six-month period permitted for restricting the filing of grievances pursuant to CAL. CODE REGS. tit.xv, § 3084.4(a), upon a determination of abuse of the grievance filing system. Amended Complaint (AC), p. 3. The court previously informed plaintiff that while under § 3084.4(a)(3), an inmate who has been found to have abused the prison grievance system may be restricted to one appeal a month for six consecutive months, CAL. CODE REGS. tit.xv, § 3084.4(a)(4), immediately following, indicates that the six-month period can be extended for subsequent appeal restriction violations. Docket # 6, p. 3. Plaintiff claims that the rejection of his March 9, 2009, grievance, the subject of which plaintiff does not reveal, was based on § 3084.4(a)(3), and the grievance restriction is being applied over a period of four years, not six months. AC, p. 3. Interestingly, however, although plaintiff does not attach either the grievance or the appeals screening form/rejection notice for the subject 602, plaintiff does submit copies of two rejection notices for grievances with his putative motion for summary judgment. Each of those notices indicate that the appeal at issue was being rejected due to untimeliness or incompleteness; neither notice references CAL. CODE REGS. tit.xv, § 3084.4(a)(3). See Docket # 10, pp. 3, 9.

Plaintiff appears to be claiming discrimination based on the fact that he was apparently assessed the loss of personal property for a period of 180 days as part of the discipline arising from plaintiff's having been found guilty of an undescribed offense, although, since plaintiff only submits a page or two of the disciplinary action with his amended complaint, it is difficult to discern. AC, pp. 6-7. Plaintiff primarily claims that as a black prisoner he is a member of a protected class and that he has the right to file an appeal, the allegation appearing to center on the alleged rejections of some of his inmate appeals at the earliest stages. But plaintiff also identifies four director's level decisions, the log numbers of which he lists along with dates, which may or may not be random, to demonstrate that CDCR[1] does not "honor" the appeals of

[1] California Department of Corrections and Rehabilitation.

black prisoners and to show that whether remedies are exhausted or not does not matter. AC, p. 3. Plaintiff does not provide the substance of any of these grievances or any copies of the appeal decisions. Of course, assuming the log nos. plaintiff includes represent third, or director's level, appeal denials of some of his own grievances, as he appears to be stating, the fact that they advanced to the director's level undercuts any representation that plaintiff's grievances are not being processed at the initial filing stage. Nor does plaintiff have a point if the grievances were denied at the third level or even if they were random decisions rendered as to other African American inmates' appeals. Denials of prison inmate appeals in and of themselves are not an indication of race-based discrimination. To the extent plaintiff seeks to raise an equal protection claim, he has failed to do so because he has failed to allege facts showing "purposeful, intentional discrimination in the...processing of grievances" by defendants. Azeez v. DeRobertis, supra, 568 F.Supp. at 10. And as plaintiff was previously informed:

> To the extent that plaintiff wishes to proceed on a claim of a violation of his equal protection rights on the basis of racial discrimination against him, it is true that "[a]ccording to well established precedent, '[p]risoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race.' Wolff v. McDonnell, 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (citing Lee v. Washington, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968)); see also Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (noting that "federal courts must take cognizance of the valid constitutional claims of prison inmates. Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."). More specifically, 'racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for "'the necessities of prison security and discipline.'" Cruz v. Beto, 405 U.S. 319, 321, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972) (per curiam) (quoting Lee, 390 U.S. at 334, 88 S.Ct. 994)." Johnson v. State of Cal., 207 F.3d 650, 655 (9th Cir. 2000).
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> Moreover, where a prison policy implicating classification by race is at issue, that policy is subject to strict scrutiny, that is, the prison must demonstrate that any such "policy is narrowly tailored to serve a compelling state interest." Johnson v. California, 543 U.S. 499, 509, 125 S. Ct. 1141, 1148 (2005). However, it is not sufficient to set forth a cognizable claim of racial discrimination in the prison's grievance system by simply asserting that one is being

> discriminated against, especially where as appears to be the case in this instance, plaintiff seems to be conceding that, at least at one point, he was deemed to be abusing the prison grievance procedure by excessive (and duplicative) filings. Plaintiff must provide some substance to his allegation of racial discrimination.

Order, at Docket # 6, pp. 5-6.

Plaintiff's allegations of discrimination continue to lack substance. Under the Supreme Court's decision in Ashcroft v. Iqbal, __U.S.__, 129 S.Ct. 1937 (2009), the allegations lack facial plausibility.

Plaintiff has named four defendants, High Desert State Prison Warden Mike McDonald, as well as three appeals coordinators, all correctional counselors (II), R. Dreith, T. Robertson, and P. Statti. Plaintiff was previously advised that:

> [P]risoners do not have a "separate constitutional entitlement to a specific prison grievance procedure." Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003), citing Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). Even the nonexistence of, or the failure of prison officials to properly implement, an administrative appeals process within the prison system does not raise constitutional concerns. Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). See also, Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993); Flick v. Alba, 932 F.2d 728 (8th Cir. 1991). Azeez v. DeRobertis, 568 F. Supp. 8, 10 (N.D.Ill. 1982) ("[A prison] grievance procedure is a procedural right only, it does not confer any substantive right upon the inmates. Hence, it does not give rise to a protected liberty interest requiring the procedural protections envisioned by the fourteenth amendment"). Specifically, a failure to process a grievance does not state a constitutional violation. Buckley, supra. State regulations give rise to a liberty interest protected by the Due Process Clause of the federal constitution only if those regulations pertain to "freedom from restraint" that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300 (1995).[[2] Footnote 3].

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[2] Footnote 3 in original: "[W]e recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. See also Board of Pardons v. Allen, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987). But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, see, e.g., Vitek v. Jones, 445 U.S. 480, 493, 100 S.Ct.1254, 1263-1264 (transfer to mental hospital), and Washington, 494 U.S. 210, 221- 222, 110 S.Ct. 1028, 1036-1037 (involuntary administration of psychotropic drugs), nonetheless imposes atypical and significant hardship on the inmate in

Order, at Docket # 6, pp. 4-5.

Thus, plaintiff fails to allege colorable due process claims against the defendants.

Moreover, although plaintiff alleges that all four defendants are "knowingly and intentionally" violating state regulations with regard to the 602 grievance process, plaintiff has also been advised that claims that the defendants have violated state regulations "do not ... on the face of it, rise to the level of, a violation of plaintiff's federal constitutional rights." Order, at Docket # 6, p. 4. Plaintiff was informed that this was so even had plaintiff adequately supported such a claim with sufficient factual allegations, something he continues to fail to do in his amended complaint. Plaintiff has failed to raise colorable claims as to any of the defendants. Further, as to defendant McDonald:

> The Civil Rights Act under which this action was filed provides as follows:
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> > Every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). "A person 'subjects' another to the deprivation of a constitutional right, within the meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

Moreover, supervisory personnel are generally not liable under § 1983 for the actions of their employees under a theory of respondeat superior and, therefore, when a named defendant holds a supervisorial position, the causal link between him and the claimed

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relation to the ordinary incidents of prison life." Sandin v. Conner, supra.

constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979). Vague and conclusory allegations concerning the involvement of official personnel in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

In his amended complaint, plaintiff's fails to set forth specific allegations against each of the defendants of violations of his constitutional rights. As to defendant McDonald, plaintiff does not make any showing of the warden's causal connection to the putative deprivations he claims in this action for money damages. This amended complaint should be dismissed with prejudice for plaintiff's failure to state a claim despite having had the opportunity to do so.

"Under Ninth Circuit case law, district courts are only required to grant leave to amend if a complaint can possibly be saved. Courts are not required to grant leave to amend if a complaint lacks merit entirely." Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000). See also, Smith v. Pacific Properties and Development Corp., 358 F.3d 1097, 1106 (9th Cir. 2004), citing Doe v. United States, 58 F.3d 494, 497(9th Cir.1995) ("a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not be cured by the allegation of other facts."). "[A] district court retains its discretion over the terms of a dismissal for failure to state a claim, including whether to make the dismissal with or without leave to amend." Lopez v. Smith, 203 F.3d at 1124. "The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." Metzler Inv. GMBH v. Corinthian Colleges, Inc. 540 F.3d 1049, 1072 (9th Cir. 2008), quoting In re Read-Rite Corp., 335 F.3d 843, 845 (9th Cir. 2003). In this instance, the court has provided plaintiff with an ample opportunity to amend to state a colorable claim but he has failed to do so and the court cannot discern how any further leave to amend could result in cognizable claims.

Accordingly, IT IS ORDERED that:

1. The amended complaint is dismissed with prejudice for plaintiff's continued failure to state a claim;

2. Plaintiff's premature, inapposite and otherwise defective motion for summary judgment, filed on July 13, 2009 (docket # 10), is summarily denied; and

3. This case is closed.

DATED: September 10, 2009

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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