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

TONY ASBERRY,

Plaintiff,

No. 2:09-cv-1494 MCE KJN P

vs.

MATHEW CATE, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner, incarcerated at California State Prison-Sacramento (“CSP-SAC”),¹ who proceeds without counsel and in forma pauperis, with a civil rights complaint filed pursuant to 42 U.S.C. § 1983. This action proceeds on the original complaint, against defendants Phelps and Hernandez.² Presently pending before the court are: (1) defendants’ motion to dismiss plaintiff’s Eighth Amendment claim; and (2) plaintiff’s second motion for a preliminary injunction. For the reasons that follow, this court recommends that defendants’ motion to dismiss be granted, and plaintiff’s motion for preliminary injunctive relief

¹ All references to “CSP-S,” in documents referenced and quoted throughout these findings and recommendations, have been changed to “CSP-SAC,” for purposes of uniformity.

² On April 15, 2011, defendants O’Brien, J. Walker, Bauser and Cate were dismissed from this action. (Dkt. No. 24; see also Dkt. Nos. 15, 17, 18.)

1 be denied.

2 I. Background

3 This action proceeds against defendants Phelps and Hernandez, based on the
4 following allegations, as summarized by the undersigned upon the initial screening of the
5 complaint, pursuant to 28 U.S.C. § 1915A:

6 Plaintiff, who is black, alleges that in April 2008, after plaintiff's
7 cellmate was placed in administrative segregation, defendant
8 correctional officer Phelps, a sergeant, ordered plaintiff to find
9 himself another cellmate so that Phelps could place two of his
10 "favorite" inmates, both white, in plaintiff's cell located in
11 CSP-S's "B-yard, Building Two." Plaintiff states that he found an
12 inmate to cell with . . . , signed and turned in the necessary
13 paperwork, but within the hour Phelps cancelled the move.
14 Plaintiff alleges that Phelps again ordered plaintiff to find a
15 cellmate. Plaintiff alleges that there were no other open cells, and
16 thus he was unable to find another cellmate. Plaintiff alleges that
17 Phelps responded by ordering plaintiff cuffed; that correctional
18 officer "John Doe 1" painfully cuffed plaintiff, verbally assaulted
19 him, stripped plaintiff to his boxer shorts, and then forced plaintiff
20 to stand in a holding cage in the cold for more than two hours.
21 Plaintiff alleges that when he requested to use a restroom,
22 correctional officer "John Doe 2" told plaintiff to "piss on
23 yourself," and stated that Phelps had told him to give plaintiff
24 nothing.

16 Plaintiff alleges that he was next moved to a suicide cell, for a
17 period of approximately twelve hours. Plaintiff alleges that the cell
18 was filthy, smelled of urine and feces, had no toilet paper, mattress,
19 or covers, and that plaintiff was required to sleep on the floor in his
20 boxer shorts. Plaintiff was then placed in a cell in "Building
21 Three." However, plaintiff alleges that Phelps again summoned
22 plaintiff and ordered him to find himself a cellmate. Plaintiff
23 alleges that he was unable to do so, and, as a result, correctional
24 officer "John Doe 3" cuffed, stripped, and threatened plaintiff, and
25 placed him in a holding cage for six hours with no protection from
26 the weather.

22 Plaintiff was then moved to administrative segregation. Plaintiff
23 alleges that Phelps and correctional officer "John Doe 4" falsified
24 the necessary documents, and that correctional officer "John Doe
25 5" affirmed the placement despite interviewing plaintiff. Plaintiff
26 contends that throughout this period he felt threatened and unsafe;
that he is a patient within the Correctional Clinical Case
Management System ("CCCMS"), and felt increased paranoia; that
he was afraid to return to B-yard and refused to leave
administrative segregation until defendant CSP-S Warden Walker

1 (who allegedly “did nothing about the situation in B-yard that led
2 to plaintiff being in ad/seg in the first place”) “personally ensured”
3 plaintiff’s safety.

4 . . . Plaintiff appears to state potentially cognizable claims against
5 defendant Phelps under the Eighth Amendment’s proscription
6 against cruel and unusual punishment, the Fourteenth
7 Amendment’s protections against arbitrary and capricious
8 punishment [substantive due process], and the Fourteenth
9 Amendment’s right to equal protection (right to be free from racial
10 discrimination). Plaintiff’s equal protection challenge is also made
11 pursuant to the California Constitution, Article I, section 7.
12 Accordingly, the court will authorize service of plaintiff’s
13 complaint on defendant Phelps.

14 . . . Plaintiff may [also] state a potentially cognizable due process
15 claim against defendant Hernandez, premised on the factual
16 allegations set forth in plaintiff’s attached administrative
17 grievances, which are not repeated (only referenced) in the
18 complaint. [These allegations include the contention that, in April
19 2008, when plaintiff was initially removed from his cell,
20 Hernandez boxed-up plaintiff’s personal property, delayed
21 preparing an inventory of plaintiff’s items, and failed to ensure the
22 return of two CDs, a fan, and a radio.] . . . The court will authorize
23 service on defendant Hernandez in order to clarify plaintiff’s
24 factual allegations and assess the merits of plaintiff’s claim against
25 him.

26 (Dkt. No. 7 at 3-5.)

27 II. Defendants’ Motion to Dismiss

28 Defendants move to dismiss plaintiff’s Eighth Amendment claim against
29 defendant Phelps, on the ground that plaintiff failed to administratively exhaust his allegations of
30 mistreatment when placed in the holding cages, and his allegation that the suicide cell in which
31 he was placed was “filthy.” See Estelle v. Gamble, 429 U.S. 97, 102 (1976) (the Eighth
32 Amendment prohibits the imposition of cruel and unusual punishment, and embodies “broad and
33 idealistic concepts of dignity, civilized standards, humanity and decency”) (quoting Jackson v.
34 Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

35 Review of the pertinent administrative grievance (Log. No. SAC-08-01839),
36 supports defendants’ representations: while plaintiff complained of Phelps’ allegedly capricious
and racially motivated conduct depriving plaintiff of his double-cell status, including temporary

1 placement in holding cells and a suicide cell, and then in administrative segregation, the
2 grievance does not address the alleged physical condition of the interim cells, or plaintiff's
3 alleged treatment by staff during his placement those cells. (See Dkt. No. 30-2 at 3-21.)

4 The Prison Litigation Reform Act ("PLRA") provides that, "[n]o action shall be
5 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by
6 a prisoner confined in any jail, prison, or other correctional facility until such administrative
7 remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Pursuant to this rule, prisoners
8 must exhaust their administrative remedies regardless of the relief they seek, i.e., whether
9 injunctive relief or money damages, even though the latter is unavailable pursuant to the
10 administrative grievance process. Booth v. Churner, 532 U.S. 731, 741 (2001). Exhaustion also
11 requires that the prisoner complete the administrative review process in accordance with all
12 applicable procedural rules, including deadlines. Woodford v. Ngo, 548 U.S. 81 (2006).

13 The PLRA requires that administrative remedies be exhausted prior to filing suit.
14 McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002). The exhaustion requirement is not
15 jurisdictional, but an affirmative defense that may be raised by a defendant in a motion to dismiss
16 pursuant to Federal Rule of Civil Procedure 12(b). See Jones v. Bock, 549 U.S. 199, 216 (2007)
17 ("inmates are not required to specially plead or demonstrate exhaustion in their complaints");
18 Wyatt v. Terhune, 315 F.3d 1108, 1117-19 (9th Cir. 2003) (failure to exhaust is an affirmative
19 defense). Defendants bear the burden of raising and proving the absence of exhaustion, and their
20 failure to do so waives the defense. Id. at 1119.

21 "In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the
22 court may look beyond the pleadings and decide disputed issues of fact." Wyatt, 315 F.3d at
23 1119. When the district court concludes that the prisoner has not exhausted administrative
24 remedies on a claim, "the proper remedy is dismissal of the claim without prejudice." Id. at
25 1120; see also Lira v. Herrera, 427 F.3d 1164, 1170 (9th Cir. 2005) ("mixed" complaints may
26 proceed on exhausted claims). Thus, "if a complaint contains both good and bad claims, the

1 court proceeds with the good and leaves the bad.” Jones, 549 U.S. at 221.

2 Defendants persuasively argue that these considerations, particularly the goal of
3 according prison officials sufficient notice of a potentially remediable condition, are significant
4 here, where plaintiff complains of past physical conditions of confinement that were not
5 challenged, and therefore not documented, at the relevant time. The resulting constraints on now
6 proving or disproving these allegations underscore the importance of administrative exhaustion.

7 In a statement of non-opposition, plaintiff concedes that he did not
8 administratively exhaust the allegations of his complaint that challenge the physical condition of
9 the interim cells in which he was confined, and the alleged treatment by staff while plaintiff was
10 so confined, thus requiring dismissal of his Eighth Amendment claim on this basis. (See Dkt.
11 No. 35 at 26-40, Dkt. No. 44, 45.) However, the fact of these interim placements remains
12 relevant to plaintiff’s remaining claims, particularly plaintiff’s Fourteenth Amendment
13 substantive due process claim that he was treated arbitrarily and capriciously. In addition, should
14 plaintiff prevail, the measure of his damages may include reference to both the fact and alleged
15 condition of his cell placements, particularly in light of plaintiff’s CCCMS status and his
16 allegedly increased feelings of paranoia as a result of the challenged conduct.

17 For these reasons, and subject to the noted qualifications, the court recommends
18 dismissal of plaintiff’s Eighth Amendment claim against defendant Phelps, based on the alleged
19 physical condition of the holding cells and suicide cell in which plaintiff was temporarily
20 confined, and the alleged treatment by staff while plaintiff was so confined.

21 III. Plaintiff’s Motion for Preliminary Injunction

22 In his first motion for preliminary injunctive relief, filed April 18, 2011, plaintiff
23 asserted, in a 145-page brief, that he was suffering a “long list of reprisals,” included an assault;
24 denial of showers and toilet; denial of exercise; mail tampering; food tampering; denial of
25 adequate medical care; that staff was turning general population inmates against plaintiff in an
26 effort to get him hurt or killed; and that plaintiff was being set up to be assaulted so the prison

1 wouldn't be held liable for plaintiff's back injury. (Dkt. No. 25 at 1-8.) Plaintiff sought an order
2 of this court directing "defendants, their successors, agents and employees and all persons acting
3 in concert with them to stop deliberately violating plaintiff's rights;" plaintiff also sought an
4 order directing plaintiff's transfer to another prison. (Id. at 9.) The motion was denied by order
5 filed July 28, 2011, on the grounds, inter alia, that plaintiff failed to identify any individual
6 allegedly responsible for the challenged conduct, failed to demonstrate irreparable harm, and
7 because the challenged conduct was not related to the allegations of this action. (Dkt. No. 31;
8 see also Dkt. No. 29 (findings and recommendations).)

9 On August 2, 2011, plaintiff filed a second motion for preliminary injunctive
10 relief, 55-pages in length. (Dkt. No. 32.) Plaintiff alleges therein that he is at risk of being killed
11 or seriously injured by other inmates as a result of CSP-SAC staff improperly labeling plaintiff a
12 "snitch." Plaintiff states that staff are harassing him and making him vulnerable to attack by
13 other inmates, e.g., by housing mentally ill and dangerous inmates with plaintiff; by tampering
14 with plaintiff's food, showers, and cell; and by providing inadequate medical care. Plaintiff
15 seeks an order of this court directing CSP-SAC to protect plaintiff by placing him in a special
16 needs unit, or by transferring him to another institution.

17 On August 24, 2011, the undersigned issued findings and recommendations
18 recommending that plaintiff's motion be denied. (Dkt. No. 34.) The court found that plaintiff's
19 current allegations, like those in his prior motion, are too imprecise and wide-ranging to warrant
20 injunctive relief. While plaintiff's second motion is more precise, specifically alleging that
21 defendant Phelps, in January 2010, knowingly moved a dangerous prisoner into plaintiff's cell
22 (id. at 12-14), and thus touches upon matters in the pending action, the court found that this
23 allegation failed to provide a basis for granting injunctive relief. Not only did the alleged event
24 take place two years ago but, as the court noted, while plaintiff's "safety is fundamental to
25 preserving the court's power to render a meaningful decision in this case . . . the instant motion
26 fails to identify a specific harm that can or must be addressed by preliminary relief, or that is

1 required in order to preserve the matter for a decision on the merits.” (Dkt. No. 34 at 3-4.) The
2 court further noted that “prisoners have no reasonable expectation that they will be housed in a
3 particular facility,” and thus found that “[p]laintiff’s request for an order directing his transfer to
4 another prison, or to a specific program within CSP-SAC, is not a matter subject to preliminary
5 injunctive relief.” (Id. at 4.) Therefore, this court recommended that plaintiff’s motion be
6 denied. (Id. at 4-5.)

7 However, pursuant to objections filed by plaintiff on September 7, 2011 (Dkt. No.
8 35), the court vacated its findings and recommendations, and directed defendants to file a
9 response. (See Dkt. No. 39.) The court observed:

10 The instant motion [Dkt. No. 32] broadly asserts that plaintiff is at
11 risk of being killed or seriously injured by other inmates as a result
12 of being set up by CSP-SAC staff members. Plaintiff identifies
13 several CSP-SAC staff members, but asserts that defendant Phelps
14 is the most harassing and threatening toward plaintiff. (See Dkt.
15 No. 32 at 8, 12-14.) On August 24, 2011, this court issued
16 Findings and Recommendations, recommending that the motion be
17 denied because it “fails to identify a specific harm that can or must
18 be addressed by preliminary relief, or that is required in order to
19 preserve the matter for a decision on the merits.” (Dkt. No. 34 at
20 4.) The court further noted, based on plaintiff’s statement that he
21 intended to file a new civil rights action against several CSP-SAC
22 members, that “[t]he majority of plaintiff’s claims set forth in the
23 instant motion will not be heard on the merits in the underlying
24 action. Rather, it appears that these claims, and the staff members
25 against whom they are made, may be addressed in plaintiff’s
26 anticipated future action(s).” (Id.) However, the court did note
that defendant “Phelps, like all CSP-SAC staff members, is
required to meet constitutional standards in his employment, which
includes protecting plaintiff from harm.” (Id.)

21 In his objections (Dkt. No. 35), plaintiff states, “I’m not asking for
22 this court to do anything except stopping CSP-SAC staff officials
23 from killing me.” (Dkt. No. 35 at 5; reiterated throughout
24 plaintiff’s objections). Given the alleged seriousness of plaintiff’s
25 repeated assertions, the court will vacate its findings and
26 recommendations, and require that defendants file a response to
plaintiff’s pending motion for preliminary injunctive relief.

(Dkt. No. 39 at 1-2.)

Defendants timely filed an opposition to plaintiff’s motion, addressing each of the

1 five specific events³ that plaintiff contends demonstrate the existence of a plot to harm him. (See
2 Dkt. No. 47.) As previously noted, only one of these events is related to the claims alleged in
3 plaintiff's complaint, viz., that defendant Phelps, in January 2010, deliberately housed plaintiff
4 with a mentally unstable inmate, which led to a physical altercation. (Dkt. No. 32 at 12-14.)
5 Plaintiff's motion makes no other, more current, allegations against Phelps, and no allegations at
6 all against Hernandez.

7 Defendants suggest that plaintiff's myriad accusations "are implausible on their
8 face," and the "[i]t is far more likely that plaintiff has a mental condition that causes him to
9 perceive threats that do not actually exist." (Dkt. No. 47 at 4.) Defendants have submitted,
10 under seal, the declaration of plaintiff's prison psychologist, Dr. S. Bergman, Ph.D. (Dkt. No.
11 50.) Dr. Bergman's declaration, which the court has now reviewed, supports defendants' theory.

12 Moreover, defendants state, with a supporting declaration from CSP-SAC
13 Correctional Counselor J. Polich, that plaintiff is currently assigned to a single cell, pending
14 transfer to another prison within California. (Dkt. No. 47 at 1,4; Dkt. No. 48.) This housing
15 assignment gives plaintiff "walk-alone status," which accords him private use of an enclosed,
16 open-air, exercise facility, without the presence of any other inmates. (Id.) Defendants assert
17 that "plaintiff's current safety is, therefore, assured because no other inmates have access to him.
18 And [p]laintiff's continuing concerns that CSP-SAC presents a threat to him will be resolved

19
20 ³ In addition to plaintiff's allegations against defendant Phelps, plaintiff alleges that: (1)
21 that officer McElroy placed plaintiff at risk of assault by other inmates, by implying that plaintiff
22 is a "snitch," or a child molester; (2) that CSP-SAC Chief Deputy Warden Macomber keeps
23 scheduling plaintiff's classification committee meeting at the same time that plaintiff is
24 scheduled to undergo a colonoscopy, in an effort to hold the meeting without plaintiff, so that
25 plaintiff can be ordered back to a double cell where he can more easily be assaulted by other
26 inmates (thus, plaintiff states that he keeps declining a colonoscopy); (3) that Dr. Dillon keeps
scheduling plaintiff for a blood draw, on the pretenses that plaintiff is infected with Hepatitis C,
although she really intends to inject plaintiff with the virus so that he can be moved to the
infectious disease ward, where it would be easier for other inmates to assault him; and (4) that a
flood of waste water in the cell next to plaintiff was deliberately engineered by plumbers for the
purpose of requiring plaintiff's movement to another location where he could more easily be
assaulted. (See generally Dkt. No. 32.)

1 once he is transferred out of CSP-SAC in the near future.” (Dkt. No. 47 at 4.)

2 Plaintiff concedes that he is currently housed in a single cell (Dkt. No. 51 at 1),
3 but reiterates his several reasons for seeking a preliminary injunction.

4 As this court previously emphasized, a preliminary injunction should not issue
5 unless necessary to prevent threatened injury that would impair the court’s ability to grant
6 effective relief in a pending action. Fed. R. Civ. P. 65; Sierra On-Line, Inc. v. Phoenix Software,
7 Inc., 739 F.2d 1415, 1422 (9th Cir. 1984); Gon v. First State Ins. Co., 871 F.2d 863 (9th Cir.
8 1989). The principal purpose of preliminary injunctive relief is to preserve the court’s
9 power to render a meaningful decision pursuant to a trial on the merits. See 11A Charles Alan
10 Wright & Arthur R. Miller, Federal Practice and Procedure, § 2947 (2d ed. 2010). Implicit in
11 this required showing is that the relief awarded is only temporary, and that there will be a full
12 hearing on the merits of the claims when the action is brought to trial.

13 The court again finds that plaintiff has failed to demonstrate the possibility of
14 irreparable harm in the absence of preliminary injunctive relief, particularly to plaintiff’s safety.
15 The court further finds that plaintiff has identified no matter in his motion that must be addressed
16 by preliminary injunctive relief in order to preserve the issue for a decision on the merits in the
17 present action. This court therefore recommends, once again, that plaintiff’s second motion for
18 preliminary injunctive relief be denied.

19 V. Admonition

20 Plaintiff is cautioned that a litigant proceeding in forma pauperis may suffer
21 restricted access to the court where it is determined that he has filed excessive motions in a
22 pending action. DeLong v. Hennessey, 912 F.2d 1144 (9th Cir. 1990); see also Tripati v.
23 Beaman, 878 F.2d 351, 352 (10th Cir. 1989). The court finds that plaintiff’s motions for
24 preliminary injunctive relief filed in this action, both in content and length, have been frivolous.
25 Plaintiff is directed to refrain from filing in this action any further motion for injunctive relief,
26 absent an extraordinary and compelling reason that is clearly related to the merits of this case.

1 Should plaintiff fail to abide by this admonition, the court will consider whether it is necessary to
2 restrict plaintiff's access to the court.

3 V. Conclusion

4 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

5 1. Defendants' motion to dismiss plaintiff's Eighth Amendment claim against
6 defendant Phelps (Dkt. No. 30), should be granted.

7 2. This action should proceed on plaintiff's substantive due process and equal
8 protection claims against defendant Phelps, and plaintiff's due process claim against defendant
9 Hernandez.

10 3. Defendants should be directed to file an answer, within twenty-one days after
11 the adoption of these findings and recommendations, on plaintiff's remaining claims.

12 4. Plaintiff's second motion for a preliminary injunction (Dkt. No. 32), should be
13 denied.

14 These findings and recommendations are submitted to the United States District
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 21 days
16 after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
19 objections shall be filed and served within 14 days after service of the objections. The parties are
20 advised that failure to file objections within the specified time may waive the right to appeal the
21 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

22 DATED: January 26, 2012

23
24 
25 _____
26 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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