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

BILLY PAUL BIRDWELL, II,

Plaintiff,

No. CIV S-10-0719 KJM GGH P

vs.

M. CATES, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

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Plaintiff is a prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. This action arises out of allegations that plaintiff’s ability to practice his religion was violated under the First Amendment and RLUIPA.

On April 11, 2011, plaintiff filed a motion for a preliminary injunction alleging that he was transferred from Mule Creek State Prison (MCSP) to another institution in retaliation for the instant litigation.¹ Plaintiff contends that defendants took this action as many of the claims in the instant federal civil rights action would become moot as a result of this transfer. Defendants were ordered to file a reply to plaintiff’s motion and defendants complied.

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¹ Plaintiff also filed a civil rights action in this court on March 11, 2011, containing the same allegations as the instant motion for a preliminary injunction. See S-11-0685 JAM EFB

1 Preliminary Injunction/Temporary Restraining Order

2 “The proper legal standard for preliminary injunctive relief requires a party to
3 demonstrate ‘that he is likely to succeed on the merits, that he is likely to suffer irreparable harm
4 in the absence of preliminary relief, that the balance of equities tips in his favor, and that an
5 injunction is in the public interest.’” Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir.
6 2009), quoting Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 S.Ct. 365, 374 (2008).
7 The “serious questions” on the merits test survives, but requires an even clearer showing of
8 irreparable harm and hardship if a preliminary injunction were not to be granted. Alliance for
9 the Wild Rockies, 632 F.3de 1127, 1131-32 (9th Cir. 2011).

10 In cases brought by prisoners involving conditions of confinement, any
11 preliminary injunction “must be narrowly drawn, extend no further than necessary to correct the
12 harm the court finds requires preliminary relief, and be the least intrusive means necessary to
13 correct the harm.” 18 U.S.C. § 3626(a)(2).

14 Plaintiff filed the instant complaint on March 25, 2010. Plaintiff was transferred
15 from MCSP to another prison on January 18, 2011. The court ordered service on defendants on
16 February 9, 2011. Plaintiff alleges that this transfer was retaliatory and many of his claims will
17 become moot as a result of the transfer. Plaintiff is classified as a Level III inmate in the
18 Sensitive Needs Yard (SNY). Plaintiff alleges that MCSP was still accepting new Level III
19 inmates when he was transferred. Defendants state that plaintiff was transferred based on the
20 loss of many Level III beds in MCSP as part of routine changes set forth by CDCR.

21 Defendants state that CDCR prepares an Institution Activation Schedule (IAS)
22 each fiscal year which is revised every two months to reflect changes in the number of inmates
23 requiring particular types of housing. Beds are activated (opened) or deactivated (closed) based
24 on changes in those numbers. An IAS that was issued in May 2010, was revised on September
25 30, 2010, and ordered that MCSP was to close 108 Level III beds in the B Dayroom beginning in
26 October 2010, and an additional 108 Level III beds were to be closed in the C Dayroom

1 beginning November, 2010. Opposition, Exh. C, Decl. of Fletes at ¶ 5; Exh. C, Attachment 1
2 Table.

3 As a result of the loss of so many beds, staff at MCSP needed to identify inmates
4 who could be moved to other institutions that housed Level III SNY inmates, and those inmates
5 who could not be moved. On October 10, 2010, a unit classification committee (UCC) hearing
6 was held to review plaintiff's status. Two of the members of the UCC committee are defendants
7 in this action. The committee found that plaintiff could be transferred without any adverse
8 effects and it would not change his custody level or work/privilege group status. Plaintiff
9 objected and alleged he was being transferred in retaliation for his lawsuit. The committee noted
10 the objections but recommended the transfer anyway.

11 Defendants also state that the transfer was ordered in 2010, but the court did not
12 order the complaint to be served until February 2011, and the defendants did not receive notice
13 until after that. Defendants argue that they could not retaliate against plaintiff for litigation as
14 they were not aware of the litigation and who was named as individual defendants. While
15 defendants raise a valid point, it is at least possible that they could have been aware that plaintiff
16 had filed grievances or named them as defendants in the instant complaint.

17 Yet, regardless of what defendants were aware of in terms of a filed litigation,
18 plaintiff has failed to meet his burden for a preliminary injunction. Plaintiff has failed to
19 demonstrate even serious questions that his transfer was in retaliation for this litigation.
20 Certainly, plaintiff has produced no evidence, but the transfer itself after litigation was filed (but
21 without service on defendants), that the motivation for the transfer involved retaliation.² Nor
22 does plaintiff support his assertion that defendants were aware of the legal status (potential
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24 ² The complaint and motion for a preliminary injunction only contain general allegations
25 that plaintiff was warned he would be transferred if he continued his litigation. Plaintiff never
26 identifies a specific defendant who made this statement and there are nearly 20 defendants in this
case. Even if one of the defendants made this statement there were only a few defendants
responsible for the transfer. These general allegations are insufficient.

1 mootness) for injunctive relief claims upon transfer.

2 More importantly, it is undisputed that MCSP had to close 216 beds for inmates
3 with the same status as plaintiff, and defendants succeeded in keeping plaintiff's status and
4 classification the same at the new facility. Had no beds been closed and plaintiff was forced to
5 transfer *by himself*, then it is possible that plaintiff would have a possibly meritorious claim.
6 However, the reality is that staff were confronted with having to close a large number of beds,
7 transfer inmates and attempt to keep all inmates in the same status and custody level. That
8 plaintiff had pending litigation and was transferred is insufficient to show retaliation in this
9 context. It is possible that other inmates had filed law suits and were transferred, but that does
10 not prove that all of those inmates were also the victims of retaliation. Plaintiff has failed to
11 show that he will probably succeed on the merits for this claim, or even serious questions going
12 to the merits, or that he will suffer irreparable harm. In fact, defendants have set forth facts that
13 show plaintiff has the ability to practice his religion at the new facility. For all these reasons
14 plaintiff's motion for a preliminary injunction should be denied.

15 Accordingly, IT IS HEREBY RECOMMENDED that plaintiff's motion for a
16 preliminary injunction (Doc. 38) be denied.

17 These findings and recommendations are submitted to the United States District
18 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
19 days after being served with these findings and recommendations, any party may file written
20 objections with the court and serve a copy on all parties. Such a document should be captioned
21 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
22 shall be served and filed within seven days after service of the objections. The parties are

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1 advised that failure to file objections within the specified time may waive the right to appeal the
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: June 2, 2011

4 /s/ Gregory G. Hollows

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UNITED STATES MAGISTRATE JUDGE

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