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

HOSEA BYRD,

Plaintiff,

No. CIV S-10-0839 KJM DAD P

vs.

A. LYNN, et al.,

Defendants.

ORDER AND

FINDINGS & RECOMMENDATIONS

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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. The operative complaint before the court is plaintiff's amended complaint filed on May 26, 2010. (Doc. No. 16.) Pending before the court are plaintiff's motion to supplement his amended complaint and defendant's motion to dismiss on the grounds that plaintiff's claims are barred by the Supreme Court's decision in Heck v. Humphrey, 512 U.S. 477 (1994). (Doc. Nos. 51 & 55.)

**PROCEDURAL HISTORY**

On April 8, 2010, plaintiff filed his original civil rights complaint in this action. (Doc. No. 1.) On April 29, 2010, the court dismissed plaintiff's complaint and granted him leave to amend. (Doc. No. 10.) On May 26, 2010, plaintiff filed his amended complaint. (Doc. No. 16.) On August 26, 2010, the undersigned screened plaintiff's amended complaint and issued

1 findings and recommendations in which it was concluded that plaintiff had failed to state a  
2 cognizable due process claim and recommended that he be permitted to proceed only on his  
3 retaliation claim against defendant Lynn. (Doc. No. 18.) On March 29, 2012, the assigned  
4 District Judge adopted those findings and recommendations in their entirety. (Doc. No. 44.)<sup>1</sup>

5 On August 30, 2012, defendant filed a motion to dismiss the amended complaint.<sup>2</sup>  
6 (Doc. No. 55.) On September 20, 2012, plaintiff filed his opposition to defendant's motion.  
7 (Doc. No. 56.) On September 26, 2012, defendant filed a reply in support of the motion to  
8 dismiss. (Doc. No. 57.) On October 5, 2012, plaintiff filed an unauthorized "counter reply" to  
9 the pending motion. (Doc. No. 58.)<sup>3</sup>

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12 <sup>1</sup> While the August 26, 2010 findings and recommendations were pending, and prior to  
13 their adoption in full, plaintiff filed various motions to supplement his complaint with new  
14 allegations against numerous proposed new defendants, as well as second, third and fourth  
15 amended complaints. (Doc. Nos. 26, 28, 30, 34, and 37.) On March 26, 2012, plaintiff's  
16 motions were denied without prejudice to his raising of the proposed new causes of action in a  
17 separate civil action. (Doc. No. 43.) As noted, on March 29, 2012, the assigned District Judge  
18 adopted this court's findings and recommendations, recommending that plaintiff be allowed to  
19 proceed in this action solely on his retaliation claim against defendant Lynn. (Doc. No. 44.)  
20 Nonetheless, on May 21, 2012, plaintiff filed yet another motion to amend or supplement his  
21 amended complaint to attempt to once again state a due process claim against defendant Lynn.  
22 (Doc. Nos. 51 & 52.) The undersigned will recommend that plaintiff's motion to amend or  
23 supplement be denied in light of the assigned District Judge's order that this action is proceeding  
24 solely on plaintiff's retaliation claim against defendant Lynn. In addition, on April 9, 2012,  
25 plaintiff filed a motion for reconsideration of the District Judge's March 29, 2012 order adopting  
26 the undersigned findings and recommendations. (Doc. No. 46.) Therein, plaintiff merely repeats  
the arguments that he made in his objections. Accordingly, the undersigned will also recommend  
that plaintiff's motion for reconsideration (Doc. No. 46) be denied.

21 <sup>2</sup> On July 13, 2012, defendant filed a motion for a 45-day extension of time in which to  
22 file a responsive pleading. (Doc. No. 53.) The court inadvertently overlooked the motion and  
23 defendant has filed the pending motion to dismiss within the time requested. The court therefore  
now grants defendant's motion for extension of time in which to respond nunc pro tunc and finds  
defendant's motion to dismiss to be timely filed.

24 <sup>3</sup> In light of plaintiff's pro se status and out of an abundance of caution, the court has  
25 considered his unauthorized pleading. However, in light of the number of unauthorized  
26 pleadings including amended complaints plaintiff has submitted in this action, he is forewarned  
that the court will not do so in the future. Plaintiff will be required to comply with the Local  
Rules as well as the Federal Rules of Civil Procedure.

1 **BACKGROUND**

2 Plaintiff is proceeding in this action on his 46-page amended complaint filed on  
3 May 26, 2010. (Am. Compl. (Doc. No. 16).) Therein, plaintiff alleges that he was transferred to  
4 High Desert State Prison (HDSP) from Calipatria State Prison on July 23, 2009 in retaliation for  
5 his filing of a civil rights complaint against Calipatria prison officials.<sup>4</sup> (Id. at 10.<sup>5</sup>) On August  
6 5, 2009, defendant Lynn recommended to HDSP’s Classification Committee that plaintiff be  
7 assigned to Privilege Group C. (Id. at 10 and 25.) Plaintiff alleges that defendant Lynn based her  
8 classification recommendation solely on instructions given to her by Calipatria prison officials,  
9 that the recommendation was made in violation of applicable regulations, and that no legitimate  
10 penological goals were served by his assignment to Privilege Group C. (Id. at 10-11.) Plaintiff  
11 alleges that the classification recommendation reflected defendant Lynn’s participation in the  
12 continuing retaliation against, and harassment of, plaintiff by prison officials at Calipatria. (Id. at  
13 11.) Specifically, plaintiff alleges in his amended complaint that

14 The defendant [Lynn] retaliated by altering certain documents with  
15 in [sic] the plaintiff’s central file[.] With out [sic] any  
16 authorization the defendant [Lynn] on 1-26-09 altered CDC R.R.  
17 115 violations to make them appear as if the plaintiff had a history  
18 of SHU terms wish [sic] justified the placement of the plaintiff on  
19 privilege group “C.”

20 (Id.) Plaintiff suggests that he had suffered no disciplinary convictions within the previous four  
21 months that would support his “C” classification and that defendant Lynn altered the disciplinary  
22 records in his central file to support that classification decision and in retaliation for plaintiff

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24 <sup>4</sup> In this regard, plaintiff’s amended complaint refers to Case No. 09-55522 D.C. No.  
25 3:09-cv-01459-DMS which he filed in the U.S. District Court for the Southern District of  
26 California. In that case the Ninth Circuit affirmed the district court’s dismissal of plaintiff’s  
Eighth Amendment and Due Process claims. See Byrd v. Arias, 411 Fed. Appx. 105 (9th Cir.),  
cert. denied, 131 U.S. 2453 (2011).

<sup>5</sup> Page number citations to to the parties’ filings, such as this, are to the page numbers  
reflected on the court’s CM/ECF system and not to page numbers assigned by the parties.

1 filing the his inmate appeal and the petitions for writ of mandate in the Lassen County Superior  
2 Court. (Id. at 4, 6, 9 & 11-12.)

3           On October 25, 2009, plaintiff filed an inmate appeal challenging both his  
4 classification assignment to Privilege Group C and defendant Lynn’s refusal to change that  
5 classification. (Id. at 6, 11, 13, and 23.) On November 5, 2009, defendant Lynn denied  
6 plaintiff’s appeal at the informal level of review, concluding that plaintiff did not meet the  
7 requirements to be removed from Privilege Group C status and that a classification hearing  
8 would be scheduled for him. (Id. at 23.) On November 31, 2009, plaintiff filed two petitions for  
9 writ of mandate in the Lassen County Superior Court seeking a court order requiring that he be  
10 provided a new classification hearing and that the rejection of his inmate appeals be reversed.<sup>6</sup>  
11 (Id. at 6 and 11.) On December 4, 2009, plaintiff’s inmate appeal was received by the appeals  
12 coordinator at the first formal level of review. (Id. at 23.) On the same day, the appeals  
13 coordinator screened out plaintiff’s inmate appeal because it was filed after the applicable 15-day  
14 time limit. (Id. at 14 and 22.)

15           Plaintiff’s classification hearing was scheduled for December 8, 2009, but was  
16 postponed until January 27, 2010. (Id. at 6.) At that hearing, plaintiff appeared before a panel  
17 which included defendant Lynn. (Id. at 8.) The classification committee again assigned plaintiff  
18 to Privilege Group C. (Id.)

19           On January 27, 2010, after his classification hearing, plaintiff submitted another  
20 inmate appeal against defendant Lynn for “falsification of information, not classification,” which  
21 was received by the appeals coordinator on January 29, 2010. (Id.; see also Pl.’s Opp’n (Doc.  
22 No. 56) at 9.) On January 29, 2010, that inmate appeal was screened out. (Pl.’s Opp’n (Doc. No.  
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24           <sup>6</sup> On March 4, 2010, plaintiff’s petition for writ of mandate in which he sought an order  
25 requiring that he be provided a classification hearing was denied by the Lassen County Superior  
26 Court as moot. (Am. Compl. (Doc. No. 16), 34.) On that same date, plaintiff’s petition for writ  
of mandate in which he challenged the screening out of his inmate appeal was denied on the  
grounds that his inmate appeal was improperly and untimely filed. (Id. at 45.)

1 56), 9-10.) On February 3, 2010, plaintiff resubmitted the inmate appeal. (Id. at 9.) On February  
2 5, 2010, that inmate appeal was screened out once again. (Id. at 9 and 11.)

3 In short, plaintiff's remaining retaliation claim is based on his contention that  
4 defendant Lynn falsified disciplinary records in his central file to assign him to Privilege Group  
5 C and that she did so in retaliation for plaintiff filing of an inmate appeal and petitions for a writ  
6 of mandate in state court. (Am. Compl. (Doc. No. 16), 8 and 11-12.) Attachments incorporated  
7 into the amended complaint include CDCR prison disciplinary records for plaintiff reflecting  
8 discipline imposed upon plaintiff for various RVRs in 2009. (Id. at 42-43.)

#### 9 **ARGUMENTS OF THE PARTIES**

10 Defendant moves to dismiss the amended complaint solely on the grounds that  
11 plaintiff's success on his retaliation claim would necessarily invalidate the prison disciplinary  
12 convictions, the records of which he claims were falsified in retaliation for his pursuit of  
13 administrative and legal remedies. (Mem. of P. & A. (Doc. No. 55-1), 1, 3-5.) Defendant asserts  
14 that such success would "necessarily imply the invalidity of his R.R. and 90-day forfeiture of  
15 credit." (Id. at 4.) Defendant asserts that under the decision in Heck v. Humphrey, 512 U.S. 447  
16 (1994), plaintiff cannot pursue his retaliation claim unless he first overturns the disciplinary  
17 convictions, the records pertaining to which he claims were falsified by defendant. (Id. at 4-5.)

18 Plaintiff's opposition to defendant's motion to dismiss is difficult to decipher.  
19 However, it appears that plaintiff is arguing that in his amended complaint he specifically does  
20 not challenge his disciplinary convictions, but rather seeks to challenge only defendant Lynn's  
21 acts of altering his disciplinary records so as to support his adverse classification which she  
22 undertook in retaliation against him. (Pl.'s Opp'n (Doc. No. 56), 1-4; Pl.'s Counter Reply Opp'n  
23 (Doc. No. 58) at 2.) In this regard, plaintiff suggests that his retaliation claim has no connection  
24 to the validity of any disciplinary conviction he may have suffered.

25 In reply, defendant suggests that plaintiff may be contending that because no  
26 disciplinary hearing was held at the time defendant Lynn allegedly falsified his R.R. records he is

1 not required to overturn his disciplinary conviction before pursuing his retaliation claim. (Def.'s  
2 Reply (Doc. No. 57) at 2-3.) Defendant then argues in conclusory fashion that any such  
3 argument is unpersuasive because it ignores the fact that plaintiff was found guilty at a  
4 disciplinary hearing.

5 For the reasons set forth below the court concludes that all of the arguments  
6 advanced by the parties, both those that are conclusory as well as those that are convoluted, have  
7 missed the mark.

## 8 DISCUSSION

### 9 I. Retaliation

10 Defendant moves to dismiss plaintiff's sole claim, his retaliation claim, under  
11 Federal Rule of Civil Procedure 12(b)(6) on the basis that a plaintiff cannot state a claim on  
12 which relief could be granted. See Beets v. County of Los Angeles, 669 F.3d 1038, 1041 (9th  
13 Cir. 2012) (“[W]hether plaintiff's civil action is barred by Heck is a question of law . . . .”)

14 Under the First Amendment, retaliation by a state actor for the exercise of a  
15 constitutional right is actionable under 42 U.S.C. § 1983 even if the act, when taken for different  
16 reasons, would have been proper. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84  
17 (1977). Although retaliation is not expressly referred to in the Constitution, it is actionable  
18 because retaliatory actions may tend to chill the exercise of constitutional rights. Perry v.  
19 Sindermann, 408 U.S. 593 (1972). “Within the prison context, a viable claim of First  
20 Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some  
21 adverse action against an inmate<sup>7</sup> (2) because of (3) that prisoner's protected conduct, and that

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25 <sup>7</sup> For purposes of evaluating a retaliation claim, an adverse action is action that “would  
26 chill a person of ordinary firmness” from engaging in that activity. Pinard v. Clatskanie School  
Dist., 467 F.3d 755, 770 (9th Cir. 2006); White v. Lee, 227 F.3d 1214, 1228 (9th Cir. 2000).

1 such action (4) chilled the inmate’s exercise of his First Amendment rights<sup>8</sup>, and (5) the action  
2 did not reasonably advance a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559,  
3 567-68 (9th Cir. 2005) (footnote omitted).

#### 4 II. Application of Heck v. Humphrey

5 As noted above, defendant contends that a judgment in plaintiff’s favor on his  
6 retaliation claim would necessarily imply the invalidity of a prison disciplinary conviction  
7 suffered by plaintiff since his retaliation claim is based on the contention that his prison  
8 disciplinary record was falsified and/or altered by defendant Lynn. As such, defendants argue,  
9 his retaliation claim is barred by the favorable termination rule announced in Heck v. Humphrey,  
10 512 U.S. 447 (1994).

11 In Heck, the Supreme Court held that “in order to recover damages for allegedly  
12 unconstitutional conviction or imprisonment, or for other harm caused by actions whose  
13 unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that  
14 the conviction or sentence has been [overturned].” Id. at 486-87. The holding in Heck applies in  
15 the context of prison disciplinary convictions where the loss of good time credits is assessed.  
16 Edwards v. Balisok, 520 U.S. 641, 648 (1997) (claims for declaratory relief and money damages  
17 challenging prison disciplinary procedures were Heck-barred because the nature of the  
18 allegations, if proven, would necessarily imply the invalidity of the result of the prison  
19 disciplinary hearing); see also Nonnette v. Small, 316 F.3d 872 (9th Cir. 2002).

20 However, “Heck’s requirement to resort to state litigation and federal habeas  
21 before § 1983 is not implicated by a prisoner’s challenge that threatens no consequence for his  
22 conviction or the duration of his sentence.” Muhammad v. Close, 540 U.S. 749, 751 (2004).  
23 Thus, in order for Heck to apply, it must be found that a judgment in plaintiff’s favor would

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24 <sup>8</sup> Prisoners have a constitutional right to file prison grievances and pursue civil rights  
25 litigation in the courts. See Rhodes, 408 F.3d at 567. Prison officials may not retaliate against  
26 prisoners for exercising these rights. See Id. at 568; see also Hines v. Gomez, 108 F.3d 265, 267  
(9th Cir. 1997); Bradley v. Hall, 64 F.2d 1276, 1279 (9th Cir. 1995).

1 necessarily imply the invalidity of his prison disciplinary conviction. See Lockett v. Saurdini,  
2 526 F.3d 866, 873 (6th Cir. 2008) (“[W]e conclude that Lockett’s First Amendment retaliation  
3 claim is analytically distinct from [his prison disciplinary conviction] and therefore does not  
4 implicate Heck.”); see also Woods v. Smith, 60 F.3d 1161, 1165 (5th Cir. 1995) (Declining to  
5 impose a Heck bar to a claim of a retaliatory prison disciplinary charge because, “[a]n action  
6 motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if  
7 the act, when taken for different reason, might have been legitimate.”), cert. denied, 516 U.S.  
8 1084 (1996)

9 Here, plaintiff specifically disavows challenging any disciplinary conviction that  
10 actually appear in his records. Rather, apparently the sole basis for plaintiff’s retaliation claim is  
11 his allegation that defendant Lynn falsified or altered those disciplinary records to make his  
12 record of receiving RVRs to appear more serious and/or more recent than they were. Plaintiff  
13 alleges that defendant Lynn falsified or altered his record in this way in retaliation for his filing  
14 of an inmate appeal and petitions for a writ of mandate. Under these circumstances, were  
15 plaintiff to prevail on his retaliation claim no prison disciplinary conviction that he actually  
16 suffered would be called into question in the slightest. Accordingly, his retaliation claim is not  
17 Heck-barred.<sup>9</sup>

## 18 CONCLUSION

19 The court pauses to note that the analysis undertaken above is not intended to  
20 suggest any view of the merits of plaintiff’s strikingly unusual claim that defendant Lynn  
21 falsified and/or altered his prison disciplinary records in order to support an adverse classification

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22 <sup>9</sup> Moreover, plaintiff is alleging that as a result of the retaliatory altering of his  
23 disciplinary record he received an adverse classification with limited programming and  
24 privileges. In this regard, his retaliation claim does not appear to implicate the duration of his  
25 confinement but instead focuses on the conditions of his confinement - a proper subject of a §  
26 1983 action. See Muhammad, 540 U.S. at 751; Ramirez v. Galaza, 334 F.3d 850, 858 (9th Cir.  
2003) (“[W]e hold that the favorable termination rule does not apply to § 1983 suits challenging  
a disciplinary hearing or administrative sanction that does not affect the overall length of a  
prisoner’s confinement.”)



1 decision and that she did so in retaliation for his pursuing of inmate appeals and legal actions.  
2 Indeed, those allegations may strain one's credulity to the maximum extent permissible. See Bell  
3 Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). Nonetheless, plaintiff's retaliation  
4 claim as presented by him is not Heck-barred. However, that claim would certainly seem  
5 susceptible to pre-trial resolution by way of summary judgment motion if the veracity of the  
6 disciplinary record with respect to plaintiff relied upon by the Classification Committee and/or  
7 the lack of a retaliatory intent by defendant Lynn was established by the undisputed evidence  
8 placed before the court.<sup>10</sup>

9           Accordingly, IT IS HEREBY ORDERED that defendant's July 13, 2012 request  
10 for an extension of time (Doc. No. 53) is granted nunc pro tunc;

11           Also, IT IS HEREBY RECOMMENDED that:

12           1. Plaintiff's April 9, 2012 motion for reconsideration (Doc. No. 46) of the  
13 court's March 29, 2012 order be denied;

14           2. Plaintiff's May 21, 2012 motion to amend or supplement his amended pleading  
15 (Doc. No. 51) be denied; and

16           3. Defendant's August 30, 2012 motion to dismiss (Doc. No. 55) 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, plaintiff may file written  
20 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
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22           <sup>10</sup> To show that the adverse action was taken because of protected conduct, a plaintiff  
23 must submit evidence linking the alleged retaliation to the exercise of a constitutional right. See  
24 Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995). A prisoner must also establish that the  
25 protected conduct was a substantial or motivating factor for the alleged retaliatory acts. See Mt.  
26 Healthy City Board of Ed., 429 U.S. at 285-86. However, retaliatory motive may be inferred  
from the timing and nature of the alleged retaliatory activities. See Soranno's Gasco, Inc. v.  
Morgan, 874 F.2d 1310, 1314-16 (9th Cir. 1989). Nonetheless, a mere allegation of a retaliatory  
motive is insufficient to defeat a motion for summary judgment. See Barnett v. Centoni, 31 F.3d  
813, 815-16 (9th Cir. 1994).

1 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the  
2 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951  
3 F.2d 1153 (9th Cir. 1991).

4 DATED: March 6, 2013.

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8 DALE A. DROZD  
9 UNITED STATES MAGISTRATE JUDGE

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