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

DANIEL P. BJORLIN,

Plaintiff,

No. CIV S-10-1825 WBS EFB P

vs.

M.D. MCDONALD, et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. This case was referred to the undersigned under Local Rule 302(c)(17), pursuant to 28 U.S.C. § 636(b)(1). On December 10, 2010, the court screened plaintiff's original complaint, dismissed it with leave to amend and granted plaintiff thirty days to file an amended complaint. When plaintiff failed to timely comply, the undersigned recommended the case be dismissed for failure to prosecute. Dckt. No. 11. Plaintiff filed objections on February 7, 2011, Dckt. No. 12, and an amended complaint on March 4, 2011, Dckt. No. 14. Good cause appearing, the court vacates the January 31, 2011 findings and recommendations and screens plaintiff's second amended complaint pursuant to 28 U.S.C. § 1915.

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1 For the reasons stated below, the amended complaint is dismissed as frivolous, for failure
2 to state a claim, and for violating Rule 8 of the Federal Rules of Civil Procedure. The court will
3 grant plaintiff one final opportunity to amend his complaint.

4 **I. Background**

5 The court granted plaintiff leave to proceed *in forma pauperis* on December 10, 2010,
6 and dismissed the original complaint with leave to amend. Dckt. No. 8. That order explained
7 that pursuant to 28 U.S.C. § 1915A(a), the court is directed to identify cognizable claims or
8 dismiss the complaint, or any portion of the complaint, if it is frivolous, malicious, fails to
9 state a claim upon which relief may be granted, or seeks monetary relief from an immune
10 defendant.

11 The court dismissed the complaint as frivolous pursuant to 28 U.S.C. § 1915A(b)(1)
12 because it contained virtually identical allegations to a complaint plaintiff filed in an earlier
13 lawsuit. Dckt. No. 8 (referring to *Bjorlin v. Hubbard*, No. Civ. S-09-1793 GEB GGH Dckt. Nos.
14 1 (June 29, 2009 original complaint), 12 (October 22, 2009 amended complaint)); *see also Cato*
15 *v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995) (A complaint that “merely repeats
16 pending or previously litigated claims” may be dismissed as frivolous under the authority of 28
17 U.S.C. § 1915)). The court granted plaintiff leave to file an amended complaint that was not
18 duplicative of the earlier action, in that it should only include the allegations pertaining to events
19 allegedly occurring after October 22, 2009.

20 **II. Amended Complaint**

21 The amended complaint suffers from the same defect as plaintiff’s original complaint.
22 Despite the court’s previous admonishment, plaintiff’s amended complaint does not materially
23 differ from the original complaint. It appears that plaintiff made no attempt to comply with the
24 court’s original screening order. The allegations in the amended complaint are basically
25 identical to those raised in plaintiff’s earlier filed action, and thus, remain duplicative and
26 frivolous.

1 The amended complaint also violates Rule 8 of the Federal Rules of Civil Procedure.
2 Plaintiff appears to have submitted three slightly different, hand-written versions of the same
3 complaint. Rule 8 of requires a complaint to include “a short and plain statement of the claim”
4 showing entitlement to relief. Fed. R. Civ. P. 8(a)(2). Each averment of a pleading must be
5 simple, concise, and direct. Even where the factual elements of the causes of action are present,
6 but are scattered throughout the complaint and not organized into a “short and plain statement of
7 the claim,” dismissal for failure to satisfy Rule 8(a)(2) is proper. *McHenry v. Renne*, 84 F.3d
8 1172, 1178 (9th Cir. 1996).

9 Moreover, the allegations in the amended complaint regarding events alleged to have
10 occurred after October 22, 2009, fail to state a claim upon which relief can be granted. Plaintiff
11 alleges that defendant Dharlingue failed to properly investigate plaintiff’s claims of being
12 sexually assaulted in connection with an October 29, 2009 hearing on a Rules Violation Report
13 issued because of plaintiff’s refusal to accept a cellmate.

14 Plaintiff alleges Dharlingue, the hearing officer, violated his equal protection and due
15 process rights. To state a claim for a violation of the equal protection clause, a plaintiff must
16 show that the defendant acted with an intent or purpose to discriminate against the plaintiff based
17 upon membership in a protected class. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir.
18 1998); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). The court can conceive of no basis for an equal
19 protection claim based on plaintiff’s allegations.

20 Nor do the allegations state a cognizable due process claim. The Due Process Clause of
21 the Fourteenth Amendment protects prisoners from being deprived of liberty without due process
22 of law. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). However, “[p]rison disciplinary
23 proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant
24 in such proceedings does not apply.” *Id.* In a disciplinary proceeding where a liberty interest is
25 at stake, due process requires that “some evidence” support the disciplinary decision.
26 *Superintendent v. Hill*, 472 U.S. 445, 455 (1985). The inmate must also receive: “(1) advance

1 written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional
2 safety and correctional goals, to call witnesses and present documentary evidence in his defense;
3 and (3) a written statement by the factfinder of the evidence relied on and the reasons for the
4 disciplinary action.” *Id.* at 454 (citing *Wolff*, 418 U.S. at 563-67). Where an inmate is illiterate
5 or the facts of the case are complex, he may be entitled to seek the aid of a fellow inmate or staff.
6 *Wolff*, 418 U.S. at 570.

7 Plaintiff does not allege that the rules violation hearing affected any liberty interest or
8 that the disciplinary decision was not supported by some evidence. Nor does plaintiff allege that
9 any of the *Wolff* guarantees, discussed above, were not met. To the extent plaintiff claims he
10 was entitled to staff assistance in investigating his claim of sexual assault, that claim must also
11 fail because plaintiff’s allegations do not suggest he was entitled to such assistance.

12 **III. Final Opportunity to Amend**

13 The court will grant plaintiff a final opportunity to amend to attempt to cure the
14 deficiencies identified in this order, as well as in the court’s previous screening order. That
15 means plaintiff must omit all duplicative and frivolous allegations and focus solely on his
16 claim(s) pertaining to defendant Dharlingue and the October 29, 2009 Rules Violation Hearing.

17 Plaintiff is hereby warned that he may not change the nature of this suit by alleging new,
18 unrelated claims in an amended complaint. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007)
19 (no “buckshot” complaints).

20 Should plaintiff choose to file an amended complaint, he shall identify each defendant in
21 both the caption and the body of the amended complaint, and clearly set forth the allegations
22 against each such defendant. Pursuant to Rule 8 of the Federal Rules of Civil Procedure, any
23 amended complaint must include “a short and plain statement of the claim” showing entitlement
24 to relief. Fed. R. Civ. P. 8(a)(2).

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1 Any amended complaint must be complete in itself without reference to any prior
2 pleading. E.D. Cal. Local Rule 220; *see Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once
3 plaintiff files an amended complaint, the original pleading is superseded.

4 Accordingly, the court hereby ORDERS that:

- 5 1. The January 31, 2011 findings and recommendations, Dckt. No. 11, are vacated; and
- 6 2. The amended complaint is dismissed, with leave to amend within 30 days. The
7 second amended complaint must bear the docket number assigned to this case and be titled
8 "Second Amended Complaint." Failure to file an amended complaint will result in a
9 recommendation that this action be dismissed as frivolous and for failure to state a claim. If
10 plaintiff files an amended complaint stating a cognizable claim the court will proceed with
11 service of process by the United States Marshal.

12 DATED: May 2, 2012.

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14 EDMUND F. BRENNAN
15 UNITED STATES MAGISTRATE JUDGE
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