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

BRIAN EDWARDS,

Plaintiff,

No. CIV S-10-2852 GEB GGH P

vs.

H.D.S.P., et al.

Defendants.

ORDER

_____/

This case was removed to federal court from Lassen County Superior Court pursuant to 28 U.S.C. § 1441(b) on the basis that this court has original jurisdiction of plaintiff’s claims arising under the First and Fourteenth Amendments. Plaintiff is a state prisoner proceeding pro se under 42 U.S.C. § 1983. See Docket # 2. Defendants have paid the filing fee.

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact.

1 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
2 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
3 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
4 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
5 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
6 Cir. 1989); Franklin, 745 F.2d at 1227.

7 A complaint must contain more than a “formulaic recitation of the elements of a
8 cause of action;” it must contain factual allegations sufficient to “raise a right to relief above the
9 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).
10 “The pleading must contain something more...than...a statement of facts that merely creates a
11 suspicion [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal
12 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). “[A] complaint must contain sufficient
13 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft
14 v. Iqbal, No. 07-1015, 2009 WL 1361536 at * 12 (May 18, 2009) (quoting Twombly, 550 U.S. at
15 570, 127 S.Ct. 1955). “A claim has facial plausibility when the plaintiff pleads factual content
16 that allows the court to draw the reasonable inference that the defendant is liable for the
17 misconduct alleged.” Id.

18 In reviewing a complaint under this standard, the court must accept as true the
19 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
20 738, 740, 96 S.Ct. 1848 (1976), construe the pleading in the light most favorable to the plaintiff,
21 and resolve all doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct.
22 1843 (1969).

23 Plaintiff alleges that when he asked for a cell move to Building C-4 on December
24 27, 2009, defendant Correctional Officer (C/O) B. Crawford said “We don’t want your kind over
25 there,” a remark plaintiff claims was racist. Complaint, Docket # 2, Exhibit A, p. 5. On January
26 5, 2010, while plaintiff was waiting for his laundry, defendant Crawford called him to the front

1 of the program office and asked plaintiff: “Why are you looking at me?” Id. Plaintiff alleges,
2 based on these two instances, that this defendant “has issues with black men.” Id. at 6. He
3 claims this to be a violation of prison regulations, the state penal code and the employee code of
4 conduct. Id.

5 Plaintiff further claims that defendant Lieutenant (Lt.) Koenig is implicated for
6 allowing defendant Crawford to make racist remarks to plaintiff and for refusing to reprimand
7 and remove defendant Crawford from the yard, thereby allowing Crawford to continue to racially
8 discriminate against plaintiff and other black inmates. Dkt. # 2, Ex. A, pp. 6-7. Plaintiff also
9 claims that defendant Warden McDonald tried to cover up defendant Crawford’s racist statement
10 by not processing plaintiff’s 602 inmate appeal and that defendant Correctional Counselor II T.
11 Robertson violated his procedural due process rights by not processing the appeal, which plaintiff
12 claims was a violation of his equal protection rights. Id. at 7.

13 Plaintiff then goes on to claim that, on January 31, 2010, he was removed from
14 Building C-4, having just been moved from a cell in C-3 on January 29, 2010. Dkt. # 2, Ex. A,
15 p. 8. (Plaintiff evidently, despite his allegations against the defendants named above was
16 permitted the cell move he had sought). Plaintiff claims that his removal from his C-4 cell was
17 caused by C/O M. Rice on the basis of racial discrimination, evidenced by her having told
18 inmates and unnamed C/O’s that plaintiff is a predator, also violating CAL. CODE REGS. tit.XV, §
19 3004(a)(b)(c)¹ and CAL. CODE REGS. tit.XV, § 3391(a).² Id. at 8-10. Plaintiff also claims that
20 defendant Koenig, on Feb. 18, 2010, apparently as well as defendant Rice, retaliated against him
21 for filing an inmate grievance against C/O Rice, apparently in the form of having plaintiff forced
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23 ¹ This regulation recognizes, inter alia, the right of inmates and parolees to respectful and
24 impartial treatment by employees and provides that neither inmates and parolees nor employees
25 are to show open disrespect or contempt for others or to subject others to any form of
26 discrimination, including, of course, racial discrimination.

² This regulation addresses employee conduct, directing employees, among other things,
to refrain from “indecent” or “abusive” language on duty and cautioning employees against
unethical conduct on or off duty.

1 off the yard when he sought an inmate declaration about Rice having called plaintiff a predator,
2 violating a state regulation regarding plaintiff's right to appeal. Id. at 9, 11. Plaintiff also alleges
3 that defendant Koenig permitted defendant Rice's alleged discrimination, refusing to reprimand
4 her. Id. at 9. Plaintiff alleges two correctional counselors, defendants Robertson and Statti,
5 violated his equal protection rights by refusing to process his staff complaint against defendant
6 Rice. Id. at 11.

7 Plaintiff then segues rather awkwardly into a claim that various state regulations
8 and the First Amendment were violated when defendant C/O M. Thompson, on March 19, 2010,
9 flung his mail on the floor and had opened his legal mail outside plaintiff's presence. Dkt. # 2, p.
10 12. According to plaintiff, defendant Thompson responded inappropriately when plaintiff asked
11 for a cell move on March 21, 2010. Id. at 12-13. Defendant Thompson returned his 602
12 grievance crumbled up on March 25, 2010. Id. at 13. When plaintiff refused to stand for count
13 later, defendant Thompson locked the tray slot, apparently saying, "you won't stand then you
14 weren't fucking eating." Id. at 13, 15. Another C/O, named Reynolds, made sure plaintiff (and
15 apparently his cellmate) were fed. Id. at 13. Plaintiff claims that, in retaliation for plaintiff's
16 having failed to stand, plaintiff's cell was searched with only his property being searched. Id. at
17 13, 15. Plaintiff claims that defendant Thompson the next day told another inmate to take care of
18 the problem referring to plaintiff. Id. at 13. Plaintiff accuses defendant Appeal Coordinator
19 Statti of refusing to process his appeal and allowing "the malice behavior [sic]" to continue and
20 in general of violating his equal protection rights by not processing his appeals. Id. at 15, 17-19.
21 Plaintiff also claims that defendant Lieutenant D. Sisson condoned defendant Thompson's
22 conduct and aided the retaliation against plaintiff, noting a rules violation report, the substance of
23 which is not set forth. Id. at 16. In addition to inappropriately asking for "declaratory relief" in
24 the form of having his grievances against various defendants being made a permanent part of
25 their personnel files, plaintiff also seeks money, including varying amounts of punitive damages.
26 Id. at 6-7, 9-10, 13-15, 19.

1 Inmates have a right to be free from the filing of false disciplinary charges in
2 retaliation for the exercise of constitutionally protected rights. Pratt v. Rowland, 65 F.3d 802,
3 807 (9th Cir. 1995); Schroeder v. McDonald, 55 F.3d 454, 461 (9th Cir. 1995); Rizzo v. Dawson,
4 778 F.2d 527, 532 (9th Cir. 1985). The Ninth Circuit treats the right to file a prison grievance as
5 a constitutionally protected First Amendment right. Hines v. Gomez, 108 F.3d 265 (9th Cir.
6 1997); see also Hines v. Gomez, 853 F. Supp. 329 (N.D. Cal. 1994) (finding that the right to
7 utilize a prison grievance procedure is a constitutionally protected right, cited with approval in
8 Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995)); Graham v. Henderson, 89 F.3d 75 (2nd Cir.
9 1996) (retaliation for pursuing a grievance violates the right to petition government for redress of
10 grievances as guaranteed by the First and Fourteenth Amendments); Jones v. Coughlin, 45 F.3d
11 677, 679-80 (2nd Cir. 1995) (right not to be subjected to false misconduct charges as retaliation
12 for filing prison grievance); Sprouse v. Babcock, 870 F.2d 450, 452 (8th Cir. 1989) (filing
13 disciplinary actionable if done in retaliation for filing inmate grievances); Franco v. Kelly, 854
14 F.2d 584, 589 (2nd Cir. 1988) (“Intentional obstruction of a prisoner’s right to seek redress of
15 grievances is precisely the sort of oppression that section 1983 is intended to remedy” (alterations
16 and citation omitted)); Cale v. Johnson, 861 F.2d 943 (6th Cir. 1988) (false disciplinary filed in
17 retaliation for complaint about food actionable).

18 In order to state a retaliation claim, a plaintiff must plead facts which suggest that
19 retaliation for the exercise of protected conduct was the “substantial” or “motivating” factor
20 behind the defendant’s conduct. See Soranno’s Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th
21 Cir. 1989). The plaintiff must also plead facts which suggest an absence of legitimate
22 correctional goals for the conduct he contends was retaliatory. Pratt at 806 (citing Rizzo at 532).
23 Verbal harassment alone is insufficient to state a claim. See Oltarzewski v. Ruggiero, 830 F.2d
24 136, 139 (9th Cir. 1987). However, even threats of bodily injury are insufficient to state a claim,
25 because a mere naked threat is not the equivalent of doing the act itself. See Gaut v. Sunn, 810
26 F.2d 923, 925 (9th Cir. 1987). Mere conclusions of hypothetical retaliation will not suffice, a

1 prisoner must “allege specific facts showing retaliation because of the exercise of the prisoner’s
2 constitutional rights.” Frazier v. Dubois, 922 F.2d 560, 562 (n. 1) (10th Cir. 1990).

3 This is not to say that a vexatious grievance filer can never be punished.
4 Vexatious litigants may be the subject of court discipline, and the undersigned would find it
5 incongruous that while the courts can punish vexatious filings, prison officials may not. Indeed,
6 the right to petition for grievances is not absolutely protected; such a right has no greater
7 protection than speech in general. Rendish v. City of Tacoma, 123 F.3d 1216 (9th Cir. 1997). In
8 the prison context, one’s free speech rights are more constricted from what they would be on the
9 outside. O’Lone v. Estate of Shabazz, 482 U.S. 342, 107 S. Ct. 2400 (1987). Again, plaintiff
10 must show that the actions or omissions constituting the “retaliation” served no legitimate
11 penological goal.

12 With regard to plaintiff’s claims of retaliation by defendant Thompson for
13 plaintiff’s having refused to stand for count, plaintiff does not frame a First Amendment claim
14 because it can hardly be said that such conduct comes within the rubric of “protected conduct.”
15 Nor does plaintiff frame a claim against defendant Sisson for retaliation based on defendant
16 Thompson’s conduct simply by claiming that an undescribed rules violation report was
17 generated. These claims will be dismissed with leave to amend.

18 As to plaintiff’s being told by defendant Crawford that his “kind” was not wanted
19 in a particular cell block to which plaintiff admits he was later moved, this is not enough to frame
20 a claim of an equal protection violation in the form of racial discrimination in the context of all
21 the allegations. While an inference of discrimination can be drawn from the “not your kind”
22 comment, in the context of the granted request to transfer, the alleged comment takes on no more
23 legal significance than a very inappropriate, but isolated, epithet. However, isolated comments
24 without more cannot form the basis of a prison civil rights action. See Oltarzewski v. Ruggiero,
25 830 F.2d at 139. Neither is plaintiff’s claim that defendant Rice allegedly told inmates and staff
26 that plaintiff was a predator. This comment has no clear racial significance at all. As to

1 plaintiff's claim that defendant Crawford threatened him, also as noted above, threats of bodily
2 injury are not sufficient to frame a claim, because a mere naked threat is not the equivalent of
3 doing the act itself. See Gaut v. Sunn, 810 F.2d at 925.

4 However, plaintiff may be seeking to frame a failure to protect claim, i.e., a
5 violation of the Eighth Amendment in his allegations with regard to defendant Rice calling him a
6 predator to others and defendant Crawford allegedly indicating that another inmate should "take
7 care of" plaintiff. "[P]rison officials have a duty...to protect prisoners from violence at the
8 hands of other prisoners." Farmer v. Brennan, 511 U.S. 825, 833, 114 S.Ct. 1970, 1976 (1994).
9 "[A] prison official violates the Eighth Amendment when two requirements are met. First, the
10 deprivation alleged must be, objectively, 'sufficiently serious'.... For a claim (like the one here)
11 based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions
12 posing a substantial risk of serious harm." Id. at 834, 114 S.Ct. at 1977. Second, "[t]o violate
13 the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable
14 state of mind' ... [T]hat state of mind is one of 'deliberate indifference' to inmate health or
15 safety." Id. The prison official will be liable only if "the official knows of and disregards an
16 excessive risk to inmate health and safety; the official must both be aware of facts from which
17 the inference could be drawn that a substantial risk of serious harm exists, and he must also draw
18 the inference." Id. at 837, 114 S.Ct. at 1979. Plaintiff's claims regarding claimed racist
19 comments by defendants Crawford and Rice are dismissed with leave to amend. To the extent
20 that plaintiff seeks to implicate defendants Koenig and McDonald for failing to take action as a
21 result of defendant Crawford's allegedly racist comments, those claims are dismissed as well.

22 Plaintiff's claim that defendants Koenig and Rice engaged in retaliation for his
23 having filed a grievance against defendant Rice in the form of plaintiff's being compelled to
24 leave a yard, plaintiff's allegation that he was trying to obtain more information to process an
25 appeal does not sufficiently allege that retaliation was the "substantial" or "motivating" factor
26 behind the defendants' claimed conduct. This claim will be dismissed with leave to amend.

1 Prisoners do not have a “separate constitutional entitlement to a specific prison
2 grievance procedure.” Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003), citing Mann v.
3 Adams, 855 F.2d 639, 640 (9th Cir. 1988). Even the non-existence of, or the failure of prison
4 officials to properly implement, an administrative appeals process within the prison system does
5 not raise constitutional concerns. Mann v. Adams, 855 F.2d at 640. See also, Buckley v.
6 Barlow, 997 F.2d 494, 495 (8th Cir. 1993); Flick v. Alba, 932 F.2d 728 (8th Cir. 1991). Azeez v.
7 DeRobertis, 568 F. Supp. 8, 10 (N.D.Ill. 1982) (“[A prison] grievance procedure is a procedural
8 right only, it does not confer any substantive right upon the inmates. Hence, it does not give rise
9 to a protected liberty interest requiring the procedural protections envisioned by the fourteenth
10 amendment”). Specifically, a failure to process a grievance does not state a constitutional
11 violation. Buckley, supra. State regulations give rise to a liberty interest protected by the Due
12 Process Clause of the federal constitution only if those regulations pertain to “freedom from
13 restraint” that “imposes atypical and significant hardship on the inmate in relation to the ordinary
14 incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300 (1995).³
15 Plaintiff’s due process claims against defendants McDonald, Robertson, Statti for their part in the
16 processing, or lack thereof, of his grievances, will be dismissed but plaintiff will be granted leave
17 to amend.

18 With regard to plaintiff’s claim against defendant Thompson that his mail was, on
19 some occasion, flung to the ground, that is not enough to implicate the First Amendment. Nor
20 does plaintiff’s allegation that this defendant opened his legal mail outside his presence when it
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22 ³ “[W]e recognize that States may under certain circumstances create liberty interests
23 which are protected by the Due Process Clause. See also Board of Pardons v. Allen, 482 U.S.
24 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987). But these interests will be generally limited to
25 freedom from restraint which, while not exceeding the sentence in such an unexpected manner as
26 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[v.
Harper], 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
relation to the ordinary incidents of prison life.” Sandin v. Conner, supra.

1 is not made clear whether plaintiff is referencing a single or occasional instance rather than a
2 routine practice:

3 The Ninth Circuit and other circuits have held that an isolated
4 instance or occasional opening of inmate legal mail, outside of the
5 inmate's presence, does not violate the Constitution. See
6 Stevenson v. Koskey, 877 F.2d 1435, 1441 (9th Cir.1989) (prison
7 guard's opening of inmate's legal mail outside of the inmate's
8 presence was, at most, negligence, and did not reach the level of
9 intent necessary for constitutional violation); Brewer v. Wilkinson,
10 3 F.3d 816, 825 (5th Cir.1993); Gardner v. Howard, 109 F.3d 427,
431 (8th Cir.1997) (isolated, single instance of opening incoming
confidential legal mail does not support a constitutional claim);
Smith v. Maschner, 899 F.2d 940, 944 (10th Cir.1990) (isolated
incident of opening inmate legal mail "without evidence of
improper motive or resulting interference with [the inmate's] right
to counsel or to access the courts, does not give rise to a
constitutional violation").

11 Oliver v. Pierce County Jail, 2007 WL 1412843 *3 (W.D. Wash. 2007). This claim will be
12 dismissed but plaintiff will be granted leave to amend.

13 Finally, plaintiff lumps together a conglomeration of apparently unrelated claims
14 against multiple defendants. Such an amalgamation is inappropriate.

15 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
16 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See
17 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms
18 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless
19 there is some affirmative link or connection between a defendant's actions and the claimed
20 deprivation. Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976); May v. Enomoto, 633 F.2d
21 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore,
22 vague and conclusory allegations of official participation in civil rights violations are not
23 sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

24 In addition, plaintiff is informed that the court cannot refer to a prior pleading in
25 order to make plaintiff's amended complaint complete. Local Rule 220 requires that an amended
26 complaint be complete in itself without reference to any prior pleading. This is because, as a

1 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375
2 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no
3 longer serves any function in the case. Therefore, in an amended complaint, as in an original
4 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

5 In accordance with the above, IT IS HEREBY ORDERED that the complaint is
6 dismissed for the reasons discussed above, with leave to file an amended complaint within
7 twenty-eight days from the date of service of this order. Failure to file an amended complaint
8 will result in a recommendation that the action be dismissed.

9 DATED: March 3, 2011

10 /s/ Gregory G. Hollows

11 _____
12 GREGORY G. HOLLOWES
13 UNITED STATES MAGISTRATE JUDGE

14 GGH:009
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