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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GRADY HARRIS,  
Plaintiff,  
v.  
JEFF MACOMBER, et al.,  
Defendants.

No. 2:16-cv-0830 TLN DB P

FINDINGS AND RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to this court pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On February 9, 2018, defendant Leavitt filed a motion to dismiss this action against him<sup>1</sup> pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 34). For the reasons stated below, the court will recommend herein that the motion be granted in part and denied in part.

**I. RELEVANT PROCEDURAL HISTORY**

Plaintiff filed his original civil rights complaint on April 21, 2016. (ECF No. 1). On April 29, 2016, the previously assigned magistrate judge screened the complaint. In so doing, it was determined that plaintiff had alleged two discrete incidents that had occurred when he was

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<sup>1</sup> Defendant Leavitt is represented by separate, private counsel. All other remaining named defendants are represented by the Office of the Attorney General.

1 housed at California State Prison – Sacramento. (See ECF No. 4 at 3). One of the incidents  
2 alleged retaliation in April 2014 by a prison official in the form of falsely charging him with  
3 hoarding because plaintiff had threatened to file a grievance against one of them. This, in turn,  
4 led to mistreatment by other defendants, including, but not limited to, the discontinuation of his  
5 pain medication. (See id. at 3). The other incident alleged mistreatment, humiliation, physical  
6 abuse and the use of unnecessary force in November 2014 by multiple prison officials after  
7 plaintiff had filed a grievance and had had an unpleasant verbal exchange with one of the named  
8 defendants. (See id. at 3-4).

9 Because the two claims were not properly joined as required by Federal Rule of Civil  
10 Procedure 20(a), the court dismissed the complaint with leave to amend. (See ECF No. 4 at 4, 7-  
11 9). At that time, plaintiff was informed that any amended complaint could raise claims from  
12 either event, but not from both. (See id. at 7-8).

13 On May 25, 2016, plaintiff filed the instant first amended complaint (“FAC”). (ECF No.  
14 10). In it, plaintiff raised claims stemming from the November 2014 incident. (See generally  
15 id.).

16 On August 3, 2016, the matter was reassigned to the undersigned. (ECF No. 11). A  
17 cursory screening of the FAC found that it states cognizable claims for relief pursuant to 42  
18 U.S.C. § 1983 and 28 U.S.C. § 1915A(b). (ECF No. 15 at 2). As a result, service was  
19 determined to be appropriate on defendants K. Rose, J. Munoz, M. Fong, S. Williamson, D.  
20 Calderon, M. Thompson, E. Cervantes, T. Fuller and D. Leavitt. (See id. at 5). Defendants Jeff  
21 Macomber, Bobbala and L. Daciois, who had been named as defendants in the original complaint  
22 (see ECF No. 1 at 2, 4), were dismissed from the action (see ECF No. 15 at 5).

23 On November 17, 2017, all defendants represented by the Office of the Attorney General  
24 filed an answer. (ECF No. 25). A discovery and scheduling order was issued for plaintiff and  
25 those defendants the same day.<sup>2</sup> (ECF No. 26). On February 9, 2018, defendant Leavitt filed the  
26 instant motion to dismiss. (ECF No. 34). On June 20, 2018, plaintiff filed his opposition to

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27 <sup>2</sup> Because this order solely addresses defendant Leavitt’s motion to dismiss, the subsequent  
28 procedural history of the remaining defendants’ filings is not detailed herein.

1 defendant Leavitt's motion to dismiss. (ECF No. 57). Defendant Leavitt did not file a reply. The  
2 motion is deemed submitted and ready for review.

## 3 **II. PLAINTIFF'S CLAIMS<sup>3</sup>**

4 Plaintiff alleges that defendant Leavitt and/or the other named defendants violated his  
5 rights under the First, Sixth, Eighth and Fourteenth Amendments as well as his rights under 42  
6 U.S.C. § 1997 when, in November 2014: (1) excessive force was used against him by defendants  
7 Munoz and Fong while handcuffing him too tightly and escorting plaintiff after plaintiff had had a  
8 verbal altercation with defendant Munoz; (2) his defendant escorts pushed him to walk faster than  
9 he could due to his mobility restriction and his inability to use his prescribed medical cane; (3)  
10 defendant Leavitt and other defendants "responded with attention" to plaintiff's escort as his  
11 shorts fell during the escort, exposing his buttocks and genitals to onlookers on the exercise yard;  
12 (4) defendants Munoz and Fong ignored plaintiff's repeated requests to help him pull up his  
13 shorts during the escort; (5) defendant Munoz dismissed plaintiff's pleas for assistance with his  
14 shorts, indicating that plaintiff deserved the treatment for "running [his] mouth" and filing 602  
15 grievance forms in August 2014 against people for having fallen down the stairs; (6) some  
16 defendants then slammed plaintiff to the concrete, scraping his face, injuring his shoulder and  
17 aggravating his previously injured back, and (7) some defendants raised plaintiff's handcuffed  
18 arms over his head and proceeded to kick and punch him in his arms, legs and torso, inflicting  
19 pain and dislocating his shoulder. (See ECF No. 10 at 5-7).

20 As a result, plaintiff states he had a bruised face and shoulders, a scarred shoulder,  
21 swollen and bruised wrists, pain and aggravation to his pre-existing back injury, and discomfort  
22 in both legs, and he contends that he suffered degradation and humiliation. (See id. at 5).

23 Plaintiff also states that the incident had a "chilling effect" on him. (See id. at 5).

24 In addition, plaintiff alleges that after having a medical evaluation which documented  
25 some of his injuries, defendant Leavitt and/or other defendants further violated these rights of  
26 plaintiff's when they wrongfully: (8) conspired to further retaliate and conceal plaintiff's assault

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27 <sup>3</sup> The enumeration of facts alleged by plaintiff herein is done for clarification and streamlining  
28 purposes. It is not intended to suggest that each fact is a separate claim.

1 by filing false peace officer reports which charged plaintiff with an assault against defendant  
2 Munoz. (See ECF No. 10 at 7-8).

3 Finally, plaintiff alleges that these rights were again violated when: (9) after filing a  
4 grievance in late November 2014 claiming use of excessive force, in January 2015, defendant  
5 Macomber improperly ignored camera footage that had recorded plaintiff's assault and upheld  
6 defendants' use of excessive force against him; (10) that same month, he was wrongfully  
7 convicted of assault of defendant Munoz based on defendants' "bogus retaliatory" charge filed  
8 against him, and (11) his appeal of the assault conviction was improperly upheld by defendant  
9 Macomber. (See id. at 8-9).

### 10 **III. DISCUSSION**

#### 11 **A. Rule 12(b)(6)**

##### 12 **1. Defendant Leavitt's Motion to Dismiss**

13 Defendant Leavitt has moved for the dismissal of plaintiff's FAC on the grounds that it  
14 fails to state sufficient facts to allege claims of violations of plaintiff's Eighth, First, Sixth, and  
15 Fourteenth Amendment rights, and it fails to state sufficient facts to allege a claim of a violation  
16 of 42 U.S.C. § 1997. (See ECF No. 34 at 1). He claims that the only allegations lodged against  
17 him are that: (1) he "responded" to defendants Munoz and Fong's escort of plaintiff, and (2) he,  
18 along with other defendants, filed false reports charging plaintiff with an assault and battery on  
19 defendant Munoz. (See ECF No. 34-1 at 2). Defendant Leavitt notes that plaintiff claims that he  
20 was punished as a result of the false reports, and that the "alleged false statements" that plaintiff  
21 mentions "are not described with any specificity." (See ECF No. 31-4 at 2).

##### 22 **2. Applicable Law**

23 Federal of Rule Civil Procedure 12(b)(6) permits an action to be dismissed if it fails to  
24 state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

25 In considering a motion to dismiss, the court must accept as true the allegations of the  
26 complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976),  
27 construe the pleading in the light most favorable to the party opposing the motion, and resolve all  
28 doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, reh'g denied, 396 U.S.

1 869 (1969). Moreover, pro se pleadings are held to a less stringent standard than those drafted by  
2 lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). Once a claim has been stated adequately,  
3 it may be supported by showing any set of facts consistent with the allegations in the complaint.  
4 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563 (2007). Thereafter, a plaintiff “receives the  
5 benefit of imagination, so long as the hypotheses are consistent with the complaint.” Sanjuan v.  
6 American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)

7 Conversely, to survive a motion to dismiss for failure to state a claim, a pro se complaint  
8 must contain more than “naked assertions,” “labels and conclusions,” or “a formulaic recitation of  
9 the elements of a cause of action.” See Twombly, 550 U.S. at 555-57. In other words,  
10 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
11 statements do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim upon which the  
12 court can grant relief must have facial plausibility. Twombly, 550 U.S. at 570. “A claim has  
13 facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
14 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at  
15 678.

## 16 **B. Eighth Amendment Claim: Excessive Force**

### 17 **1. Parties’ Arguments**

18 Regarding plaintiff’s Eighth Amendment argument, plaintiff’s FAC states that during his  
19 escort through the exercise yard by defendants Munoz and Fong, while he was still stripped down  
20 to boxer shorts and a t-shirt, his shorts began to fall down. As a result, his buttocks and genitals  
21 were exposed. (See ECF No. 10 at 6). This, plaintiff contends, “prompt[ed] prisoners on the  
22 exercise yard to laugh at [my] humiliation.” (Id. at 6) (brackets added). The FAC then states that  
23 defendant Leavitt along with several other defendants “responded with attention on the escort.”  
24 (Id. at 6). When plaintiff asked if defendants could slow down and pull up his shorts for him,  
25 defendant Munoz stated, “So what [?] You should of [sic] thought of that before you started to  
26 run your mouth and [started] filing 602’s [sic] against people for falling down the stairs.” (Id. at  
27 6) (brackets added). This, plaintiff contends, constituted an admission as to why plaintiff was

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1 being mistreated, namely, because he had filed a grievance in August 2017 after falling down the  
2 stairs. (See id. at 6-7).

3 Plaintiff further states that several of the defendants who “focused attention on [his] escort  
4 laughed at defendant Munoz’s comment in agreement.” (ECF No. 10 at 7). Plaintiff then states  
5 that defendants Munoz, Fong, Thompson, Williamson and Calderon “act[ed] in concert,”  
6 slamming him on the concrete floor, which scraped the left side of his face and shoulder and  
7 aggravated his previously injured back. These same defendants then began to “force [my]  
8 handcuffed arms raised high from behind then commence[d] to kick and punch with closed fist[s]  
9 [my] arms, legs, and torso repeatedly imposing vast pain and dislocation of [my] shoulders.” (Id.  
10 at 7) (brackets added).

11 Plaintiff goes on to state that after receiving a medical evaluation which documented some  
12 of his injuries, “Defendant’s [sic] Rose, Munoz, Fong, Williamson, Calderon, Thompson,  
13 Cervantes, Fuller, and Leavitt each conspired to further retaliate as well as conceal the assault  
14 imposed on [me] by filing false peace officer reports charging [me] with a bogus assault against  
15 defendant Munoz.” (ECF No. 10 at 7-8) (brackets added). “On November 30, 2014, [I] filed a  
16 grievance concerning excessive force used by defendants.” (Id. at 8) (brackets added).

17 In January 2015, plaintiff had a disciplinary hearing “on the bogus retaliatory assault  
18 charge” that allegedly happened to defendant Munoz. It resulted in plaintiff being found guilty of  
19 assault. (See id. at 8).

20 In response to plaintiff’s Eighth Amendment claim of excessive force, defendant Leavitt  
21 argues that plaintiff’s FAC fails to allege that he used any degree of force against plaintiff.  
22 Therefore, he argues, plaintiff has failed to state an Eighth Amendment claim against him. (See  
23 ECF No. 34-1 at 4).

## 24 **2. Applicable Law**

25 “In its prohibition of ‘cruel and unusual punishments,’ the Eighth Amendment places  
26 restraints on prison officials, who may not . . . use excessive physical force against prisoners.”  
27 Farmer v. Brennan, 511 U.S. 825, 832 (1994) (citing Hudson v. McMillian, 503 U.S. 1 (1992)).  
28 “[W]henever prison officials stand accused of using excessive physical force in violation of the

1 [Eighth Amendment], the core judicial inquiry is . . . whether force was applied in a good-faith  
2 effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Hudson,  
3 503 U.S. at 6-7 (brackets added) (referencing Whitley v. Albers, 475 U.S. 312 (1986)).

4 Incarcerated prisoners retain a limited right to bodily privacy. Michenfelder v. Sumner,  
5 860 F.2d 328, 333 (9th Cir. 1988). “Shielding one’s unclothed figure from the view of strangers .  
6 . . is impelled by elementary self-respect and personal dignity.” Id.

### 7 **3. Analysis**

8 Defendant Leavitt’s statement that the FAC fails to allege that he specifically used any  
9 degree of force against plaintiff is, on its face, technically accurate. However, throughout the  
10 FAC, when describing the events that occurred, at times plaintiff identifies specific defendants  
11 who engaged in specific acts, and at times plaintiff speaks about defendants and their actions in  
12 general. (See generally ECF No. 10). As a result, with respect to defendant Leavitt, to what  
13 extent he participated in the alleged humiliation and excessive beating of plaintiff is not  
14 completely clear.<sup>4</sup>

15 Despite these facts, the court is required to construe the complaint in a light that is most  
16 favorable to plaintiff and to resolve all doubts in the plaintiff’s favor. See Jenkins, 395 U.S. at  
17 421 (stating for purposes of motion to dismiss, material allegations of complaint are taken as  
18 admitted, and complaint is to be liberally construed in favor of plaintiff); see generally Twombly,  
19 550 U.S. at 563; see also Sanjuan, 40 F.3d at 251. The undersigned does so herein.

20 Plaintiff clearly identifies defendant Leavitt as someone who became a part of his escort  
21 after he had been handcuffed. (See ECF No. 10 at 5-6). Plaintiff states that defendants who  
22 “focused attention on [his] escort” laughed in agreement at defendant Munoz’s statement that he  
23 was being treated the way he was by defendants because he had previously filed a grievance after  
24 falling down the stairs. (See id. at 6-7). Plaintiff’s FAC then proceeds to name specific  
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26 <sup>4</sup> To the extent that plaintiff’s opposition attempts to provide more factual insight on this matter,  
27 when considering a motion to dismiss, the court may not consider new facts provided in an  
28 opposition to the motion. See Aktar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012); see also  
Schneider v. California Dep’t of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

1 defendants who are said to have slammed him on the ground, injuring his face, shoulder and back  
2 and who kicked and punched him in his arms, legs and torso. (See ECF No. 10 at 7). However,  
3 in the very next sentence, plaintiff then specifically identifies defendant Leavitt and several other  
4 defendants as ones who “conspired to further retaliate as well as conceal [plaintiff’s] assault” by  
5 filing false reports which charged plaintiff with a “bogus assault” on defendant Munoz. (See id.  
6 at 7-8) (underline added).

7 Implicit in plaintiff’s statement that defendant Leavitt and other defendants “conspired to  
8 further retaliate” is that defendant Leavitt had participated in the initial retaliation led by  
9 defendant Munoz, namely, the beating of plaintiff that occurred after plaintiff had been escorted  
10 handcuffed across the prison yard with his shorts down and his buttocks and genitals exposed to  
11 everyone. Pleadings are to be construed so as to do justice. Fed. R. Civ. P. 8(e). Viewed in a  
12 light most favorable to plaintiff if, while plaintiff was restrained in handcuffs, lying on the  
13 ground, and not resisting defendants’ efforts to secure him, if defendant Leavitt was part of the  
14 group that punched and kicked plaintiff, and/or if defendant Leavitt participated in the  
15 humiliating escort of plaintiff and forbid him to use his cane, there does not appear to be a  
16 penological interest that was served by defendant Leavitt doing this. Therefore, a threshold claim  
17 of excessive physical force used by defendant Leavitt in violation of plaintiff’s Eighth  
18 Amendment rights has been established.

19 Consequently, defendant Leavitt’s motion to dismiss this excessive force claim shall be  
20 denied.

### 21 **C. Sixth Amendment Claim**

#### 22 **1. Parties’ Arguments**

23 Plaintiff’s FAC claims that his Sixth Amendment rights have been violated. (See ECF  
24 No. 10 at 5). However, in the remainder of the pleading, plaintiff provides neither facts nor law  
25 to support this claim, nor does he describe how defendant Leavitt violated his Sixth Amendment  
26 rights. (See generally id.).

27 Defendant Leavitt argues that because: (1) the Sixth Amendment affords liberties to  
28 criminal defendants; (2) plaintiff makes no allegations that he interfered with any of plaintiff’s



1 Sixth Amendment rights, and (3) a disciplinary proceeding is not a criminal proceeding,  
2 plaintiff's Sixth Amendment claim is inapplicable given the facts. (See ECF No. 34-1 at 4-5).

### 3 **2. Applicable Law**

4 The Sixth Amendment to the Constitution applies only to criminal proceedings. Olhausen  
5 v. Comm'r, 273 F.2d 23, 27 (9th Cir. 1959). It does not apply to administrative hearings. See  
6 Hanna v. Larche, 363 U.S. 420, 440 (1960); see generally S.E.C. v. Jerry T. O'Brien, Inc., 467  
7 U.S. 735, 742 (1984) (stating administrative investigation adjudicates no legal rights). The "fact  
8 that a proceeding will result in loss of liberty does not ipso facto mean that the proceeding is a  
9 'criminal prosecution' for purposes of the Sixth Amendment." Middendorf v. Henry, 425 U.S.  
10 25, 37 (1976); Carty v. Nelson, 426 F.3d 1064, 1073 (9th Cir. 2005) (quoting Middendorf). On  
11 the contrary, [p]rison disciplinary proceedings are not a part of a criminal prosecution, and the  
12 full panoply of rights due a defendant in such proceedings do not apply." Wolff v. McDonnell,  
13 418 U.S. 539, 556 (1974) (brackets added).

### 14 **3. Analysis**

15 Plaintiff's FAC sheds no light on what plaintiff is intending to argue with respect to any  
16 Sixth Amendment rights he claims have been violated. The FAC only mentions the Sixth  
17 Amendment in a cursory manner at the beginning of his claim. (See generally ECF No. 10 at 5-  
18 9). To the extent that plaintiff's opposition attempts to provide more detail of his legal argument,  
19 suggesting that under the Sixth Amendment, he should have been provided an "impa[r]tial  
20 tribunal fact finder," during his disciplinary proceeding, or that Sixth Amendment protections  
21 should have applied to his disciplinary hearing because actual criminal charges were also pending  
22 related to the same alleged assault, or that "Defendant Leavitt "can not [sic] also file false charges  
23 to cover up a violation of plaintiff's rights" (see ECF No. 57 at 6), these attempts to add legal  
24 context to his Sixth Amendment claim are inadequate because plaintiff's disciplinary hearing was  
25 not a criminal proceeding eligible for constitutional protection under the Sixth Amendment.

26 For this reason, no relief can be provided to plaintiff based on this claim against defendant  
27 Leavitt. Accordingly, it shall be dismissed.

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1           **D. First Amendment Claims: Retaliation**

2                   **1. Parties' Arguments**

3           Plaintiff argues that defendant Leavitt violated his First Amendment rights when he  
4 retaliated against plaintiff. (See ECF No. 10 at 6-7; see also ECF No. 57 at 6). Referencing his  
5 FAC, plaintiff points to defendant Munoz's admission during the escort that plaintiff was being  
6 treated the way he was because he had "run his mouth" and had "file[d] 602[]s against people for  
7 falling down the stairs." (See ECF No. 57 at 6; see also ECF No. 10 at 6-8) (brackets added).  
8 The FAC notes that "several defendant[]s who focused attention on plaintiff's escort laughed at  
9 defendant Munoz's comment in agreement." (ECF No. 10 at 7) (brackets added). Plaintiff's  
10 opposition then appears to impute defendant Munoz's retaliatory statements to defendant Leavitt  
11 and other defendants given that they laughed at it and subsequently participated in plaintiff's  
12 beating with defendant Munoz for these reasons. (See ECF No. 57 at 6-7; see also ECF No. 10 at  
13 6-7).

14           Plaintiff also alleges that defendant Leavitt and other defendants "further retaliate[d]"  
15 against him by concealing their assault on him and by filing "false peace officer reports" which  
16 charged him with a "bogus" assault of defendant Munoz. (See ECF No. 10 at 7-8). Plaintiff  
17 contends that because the First Amendment prohibits jail and prison officials from retaliating  
18 against inmates who exercise their protected right to file grievances, he has stated a cognizable  
19 claim against defendant Leavitt. (See ECF No. 57 at 7).

20           In response, defendant Leavitt first points out that plaintiff makes allegations against  
21 defendant Munoz that defendant Munoz retaliated against him because of a complaint plaintiff  
22 filed in August 2014, but plaintiff makes no such allegations against him. (See ECF No. 34-1 at  
23 5). He acknowledges that plaintiff asserts that he filed a false report against plaintiff in an act of  
24 further retaliation. (See id. at 5). Defendant Leavitt argues, however, that because plaintiff has  
25 not identified the false statements that were made, the alleged retaliatory act cannot be  
26 determined. (See id. at 6). Furthermore, defendant Leavitt argues, for precisely what reason  
27 defendant Leavitt is to have retaliated is not clear. (See id. at 6). Finally, defendant Leavitt  
28 contends that to the extent that plaintiff alleges that the false report was made for the purpose of

1 covering up the misdeeds of defendant Munoz, a First Amendment claim cannot be supported  
2 because “[s]ubmitting a false report for the purpose of a cover-up . . . is not done in response to  
3 the exercise of protected conduct.” (See id. at 6).

## 4 **2. Applicable Law**

5 “Of fundamental import to prisoners are their First Amendment ‘right[s] to file prison  
6 grievances’ and to ‘pursue civil rights litigation in the courts.’” Rhodes v. Robinson, 408 F.3d  
7 559, 567 (9th Cir. 2005) (brackets in original) (quoting Bruce v. Ylst, 351 F.3d 1283, 1288 (9th  
8 Cir. 2003) and Schroder v. McDonald, 55 F.3d 454, 461 (9th Cir. 1995), respectively). “Because  
9 purely retaliatory actions taken against a prisoner for having exercised those rights necessarily  
10 undermine those protections, such actions violate the Constitution quite apart from any underlying  
11 misconduct they are designed to shield.” Rhodes, 408 F.3d at 567.

12 To state a viable First Amendment retaliation claim, a prisoner must allege five elements:  
13 “(1) An assertion that a state actor took some adverse action against an inmate (2) because of (3)  
14 that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First  
15 Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.”  
16 Rhodes, 408 F.3d at 567-68; Jones v. Williams, 791 F.3d 1023, 1035 (9th Cir. 2015) (citing  
17 Rhodes). A plaintiff who intends to assert a retaliation claim must show that the defendant was  
18 aware of plaintiff’s prior protected conduct and that the protected conduct was “the ‘substantial’  
19 or ‘motivating’ factor” behind the defendant’s alleged misconduct. Brodheim v. Cry, 584 F.3d  
20 1262, 1271 (9th Cir. 2009). A prisoner need not prove that the alleged retaliatory action, in itself,  
21 violated a constitutional right. Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995)

## 22 **3. Analysis**

23 Accepting the allegations in plaintiff’s FAC as true and construing his FAC in a light most  
24 favorable to him (see Hospital Bldg. Co., 425 U.S. at 740; see also Jenkins, 395 U.S. at 421), the  
25 court finds that plaintiff has stated actionable First Amendment claims against defendant Leavitt.  
26 Specifically, plaintiff has established a First Amendment claim as it relates to plaintiff’s  
27 humiliation and beating by defendant Leavitt and others for having filed earlier grievances. He

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1 has also established a First Amendment claim as it relates to the filing of false disciplinary reports  
2 by defendant Leavitt and others for having filed earlier grievances.

3 Plaintiff has stated that at a certain point during the incidents in question defendant Leavitt  
4 and other defendants “responded with attention on” plaintiff’s escort on the yard. (See ECF No.  
5 10 at 6-7). Thereafter, when plaintiff repeatedly asked for defendants to slow down and help him  
6 pull up his shorts, instead of doing so, defendants laughed in agreement at defendant Munoz’s  
7 discounting of plaintiff’s physical situation and at defendant Munoz’s statement that plaintiff was  
8 being treated as he was (i.e., paraded on the yard at a fast pace without his cane with his shorts  
9 down and his genitals exposed) because he had filed grievances against individuals for having  
10 fallen down the stairs. (See id. at 6-7). The facts stated appear to indicate that plaintiff’s  
11 subsequent beating by several defendants in his escort while he was restrained in handcuffs was  
12 contemporaneous with defendant Munoz’s statement. (See generally id. at 5-7). Thus, it appears  
13 that plaintiff’s beating was also part and parcel of defendants’ retaliation against plaintiff for  
14 having filed grievances at the prison, an act which is protected by the Constitution.

15 In addition, plaintiff has stated that defendant Leavitt and others continued their retaliation  
16 against plaintiff for having filed grievances by subsequently filing false reports which alleged that  
17 plaintiff had assaulted defendant Munoz and that this ultimately led to plaintiff being found guilty  
18 of the charge.<sup>5</sup> (See ECF No. 10 at 7-9). He also clearly asserts that these retaliatory actions  
19 taken by defendant Leavitt and others had a chilling effect on him. (See generally id. at 5).  
20 These facts, if found to be true, do not appear to reasonably advance a legitimate correctional  
21 goal. Rhodes, 408 F.3d at 567-68; Jones, 791 F.3d at 1035.

22 The ability to file a grievance is an activity that is protected under the First Amendment.  
23 Rhodes, 408 F.3d at 567. Plaintiff’s allegations against defendant Leavitt and the other  
24 defendants, if true, state First Amendment claims upon which relief could be granted.

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26 \_\_\_\_\_  
27 <sup>5</sup> Defendant Leavitt’s argument that plaintiff’s claim that the false reports were filed in order to  
28 cover up the fact that defendants had beaten plaintiff is not actionable (see ECF No. 34-1 at 6) is correct.

1 For these reasons, defendant Leavitt’s motion to dismiss with respect to these claims shall  
2 be denied.

3 **D. Fourteenth Amendment Claim**

4 **1. Parties’ Arguments**

5 Plaintiff’s FAC states that his Fourteenth Amendment rights were violated by defendants.  
6 (See ECF No. 10 at 5). In support of this claim, plaintiff then alleges that defendants filed false  
7 reports on plaintiff which ultimately led to his assault conviction and his subsequent punishment.  
8 (See id. at 7-9). However, the FAC does not make a clear link between the Fourteenth  
9 Amendment and the false reports. (See generally id.).

10 Defendant Leavitt argues that because plaintiff’s claims which, if sufficiently pled, would  
11 be addressed by the First and Eighth Amendments, Supreme Court law directs that the claims  
12 should be analyzed under those amendments, not under the substantive due process contained  
13 within the Fourteenth Amendment. Furthermore, defendant Leavitt argues, it is unclear to him  
14 upon which clause of the Fourteenth Amendment (e.g., equal protection or due process) plaintiff  
15 is relying. (See ECF No. 34-1 at 6-7) (citing Albright v. Oliver, 510 U.S. 266, 273 (1994)).

16 In response, plaintiff first notes that the Due Process Clause of the Fourteenth Amendment  
17 prohibits a state from depriving any person of life, liberty or property without due process of law.  
18 (See ECF No. 57 at 8). He then argues that the restrictions imposed upon him as a result of  
19 defendant Leavitt’s and others’ falsified report “created and imposed atypical and significant  
20 hardship on [him]” beyond the “ordinary incidents of prison life.” (See id. at 8). Specifically,  
21 plaintiff was found guilty – despite the absence of proof of any assault on his part – which led to  
22 his placement in administrative segregation for ten to twelve months. This, plaintiff contends,  
23 was “so removed from the original terms of confinement” that it “amounted to deprivations of  
24 liberty.” (See id. at 8).

25 **2. Applicable Law**

26 **a. No Constitutional Right to Be Free from False Accusations**

27 The Due Process Clause itself does not contain any language that grants a broad right to  
28 be free from false accusations. See Freeman v. Rideout, 808 F.2d 949, 951 (2nd Cir. 1986)

1 (stating filing of false disciplinary report against inmate not actionable under Section 1983 where  
2 procedural due process protections are provided); see also Hanrahan v. Lane, 747 F.2d 1137.  
3 1141 (7th Cir. 1984) (stating same). Prisoners, however, are entitled to be free from arbitrary  
4 actions of prison officials. Wolff, 418 U.S. at 558; Hanrahan, 747 F.2d at 1140 (citing Wolff).  
5 The protections against such arbitrary action are the procedural due process requirements set forth  
6 in Wolff.<sup>6</sup> Hanrahan, 747 F.2d at 1141. Thus, filing a false disciplinary charge against an inmate  
7 is not actionable under Section 1983 where procedural due process protections are provided.  
8 Freeman, 808 F.2d at 951-52.

### 9 **b. No Constitutional Right to Be Free from Administrative Segregation**

10 An inmate has no constitutionally protected right to be free from the punishment of  
11 administrative segregation. See Hewitt v. Helms, 459 U.S. 460, 466-67 (1983) (stating Due  
12 Process Clause does not create liberty interest in remaining in the general population or being free  
13 from administrative segregation); receded from by Sandin v. Conner, 515 U.S. 472 (1995); see  
14 May v. Baldwin, 109 F.3d 557, 565 (9th Cir. 1997) (concluding prisoners have no liberty interest  
15 in remaining free from administrative segregation or solitary confinement). On the contrary,  
16 “administrative segregation is the sort of confinement that inmates should reasonably anticipate  
17 receiving at some point in their incarceration.” Hewitt, 459 U.S. at 468.

### 18 **3. Analysis**

19 Construing the argument in a light most favorable to plaintiff, the court presumes that  
20 plaintiff’s Fourteenth Amendment claim relates to defendants’ filing and processing of allegedly  
21 false reports which led to plaintiff’s placement in administrative segregation. The FAC mentions  
22 the false reports, and plaintiff’s opposition appears to meld the defendants’ use of the reports and  
23 plaintiff’s placement in administrative segregation to allege a violation of his liberty interest.

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24  
25 <sup>6</sup> The Wolff procedural due process requirements are: (1) advance, written notice of violation;  
26 (2) provision of at least 24 hours to prepare for committee appearance; (3) written statement of  
27 fact-finding; (4) the right to present witnesses and evidence where it would not be unduly  
28 hazardous to institutional safety; (5) an impartial decision-making body, and (6) assistance if  
inmate is illiterate or if issues are complex. Wolff, 418 U.S. at 564-70; see generally Hanrahan,  
747 F.2d at 1140. These requirements protect prisoners from “arbitrary actions extinguishing their  
privileges.” Hanrahan, 747 F.2d at 1140 (citation omitted).

1 (See ECF No. 10 at 7-8; see also ECF No. 57 at 7-8). Viewed in total, the court believes plaintiff  
2 is arguing that his procedural due process rights were violated when he was placed in  
3 administrative segregation unjustly based upon false reports about a made-up assault. In other  
4 words, his procedural due process rights were violated during his disciplinary hearing because  
5 false reports were used to determine his guilt.

6 This argument fails to state a claim upon which relief can be granted. This is primarily  
7 because plaintiff has not stated that he was denied procedural due process as required under Wolff  
8 at the hearing that took place prior to the finding of guilt and his subsequent placement into  
9 administrative segregation. (See generally ECF No. 10). It is also because the Constitution does  
10 not protect prisoners from the isolated act of having false reports filed against them. See  
11 Freeman, 808 F.2d at 951; see also Hanrahan, 747 F.2d at 1141. It does not protect prisoners  
12 from being placed in administrative segregation, either. Hewitt, 459 U.S. at 466-67; May, 109  
13 F.3d at 565.

14 In sum, the false reports used and plaintiff's placement in administrative segregation  
15 because of them are not actions of constitutional proportions that require relief under the Due  
16 Process Clause of the Fourteenth Amendment. However, a claim with supporting facts that  
17 plaintiff's disciplinary hearing – whether wrongfully held or not – did not provide him with the  
18 procedural process required to be administered to him under Wolff likely would have created a  
19 viable procedural due process claim for plaintiff under the Fourteenth Amendment. Given that  
20 this is not the essence of plaintiff's Fourteenth Amendment argument, it fails to state a claim upon  
21 which relief may be granted.

22 Therefore, this claim must be dismissed against defendant Leavitt.

## 23 **E. 42 U.S.C. § 1997 Claims**

### 24 **1. Parties' Arguments**

25 Lastly, in the FAC, plaintiff generally states that his rights have been violated under 42  
26 U.S.C. § 1997. (See ECF No. 10 at 5). However, he neither provides facts nor makes an  
27 argument in support of this statement. (See generally id.). Defendant Leavitt's motion to dismiss  
28 points this out as well, further noting that plaintiff has failed to specify upon which subsections of

1 the statutes – from 1997a through 1997j – plaintiff is relying for relief. (See ECF No. 34-1 at 7).  
2 Therefore, he contends, the claim should be dismissed.

3 In response, plaintiff simply states, “Plaintiff has sufficiently stated his claims of First,  
4 Sixth, Eight[th] and Fourteenth Amendment along with the violation of [42] U.S.C. 1997(e)(a)  
5 [sic] claim.” (See ECF No. 57 at 8) (brackets added). The court construes this to mean that  
6 plaintiff believes that Sections 1997a and 1997e provide him with statutory rights and that they  
7 have been violated.

## 8 **2. Analysis**

9 Plaintiff fails to allege precisely how these statutes are applicable to him and/or how they  
10 relate to defendant Leavitt. Section 1997a discusses the discretionary authority of the Attorney  
11 General to initiate civil actions in situations where officials acting on behalf of the State have  
12 developed a pattern or practice of depriving inmates of rights, privileges or immunities secured by  
13 the Constitution or by the laws of the United States. (See 42 U.S.C. § 1997a). In sum, this statute  
14 does not afford plaintiff any specific rights under the law.

15 Section 1997e governs lawsuits brought by prisoners. It provides guidance to prisoners,  
16 attorneys and the court about how to manage actions brought under Section 1983 and other  
17 federal law. Nothing in it affords plaintiff any particular right or entitlement.

18 In light of these facts, plaintiff’s Section 1997a and Section 1997e claims fail to state a  
19 claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6).

20 Therefore, defendant Leavitt’s motion to dismiss this claim shall be granted.

## 21 **IV. CONCLUSION**

22 Plaintiff has sufficiently stated Eighth and First Amendment claims against defendant  
23 Leavitt upon which relief can be granted. He has not, however, sufficiently stated claims for  
24 relief against defendant Leavitt under the Sixth and Fourteenth Amendments or under 42 U.S.C. §  
25 1997.

26 Accordingly, IT IS HEREBY RECOMMENDED that:

27 1. Defendant Leavitt’s February 9, 2018 motion to dismiss this action against him  
28 pursuant to Federal Rule of Civil Procedure 12(b)(6) (ECF No. 34) be GRANTED IN PART and




1 DENIED IN PART as follows:

2 a. Defendant Leavitt's motion to dismiss plaintiff's, Sixth and Fourteenth  
3 Amendment claims and his 42 U.S.C. § 1997 claims be GRANTED for failure to state claims  
4 upon which relief can be granted, and

5 b. Defendant Leavitt's motion to dismiss plaintiff's First and Eighth Amendment  
6 claims pursuant to Federal Rule of Civil Procedure 12(b)(6) be DENIED.

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

15 Dated: March 22, 2019

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18   
DEBORAH BARNES  
UNITED STATES MAGISTRATE JUDGE

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