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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

EDWARD GOMEZ,
Plaintiff,
v.
CDCR, et al.,
Defendants.

No. 2: 17-cv-1247 JAM KJN P

ORDER

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s amended complaint. (ECF No. 11.) For the reasons stated herein, the amended complaint is dismissed with leave to file a second amended complaint.

Named as a defendant is R. Diaz. Plaintiff raises three claims against defendant Diaz: retaliation; Eighth Amendment; and Fourteenth Amendment/due process.

Retaliation

Legal Standard

“Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate

1 correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005). “Prisoners have a
2 First Amendment right to file grievances against prison officials and to be free from retaliation for
3 doing so.” Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (citation omitted).

4 *Discussion*

5 Plaintiff alleges that on July 24, 2016, defendant Diaz threatened to retaliate against him
6 “under his or one of his nurses who would take exception of his treatment and redress that
7 exception grievance using an administrative appeal.” (ECF No. 11 at 3.) Plaintiff alleges that
8 defendant Diaz threatened to make plaintiff’s life difficult or to move plaintiff out of the housing
9 unit, where plaintiff had lived for more than two years. Plaintiff alleges that on August 1, 2016,
10 Correctional Officer Garcia told plaintiff that he had initiated papers to have plaintiff moved from
11 the unit for no reason. Plaintiff alleges that the harassment continued until September 19, 2016,
12 when plaintiff spoke to Lieutenant Thomas.

13 It appears that plaintiff is claiming that defendant Diaz threatened to retaliate against
14 plaintiff for filing grievances. Plaintiff appears to claim that defendant Diaz made good on his
15 threat to retaliate by having Correctional Officer Garcia start the process to have plaintiff moved
16 from the unit. However, plaintiff has not clearly pled that defendant Diaz told plaintiff that he
17 would retaliate against him for filing grievances. In other words, plaintiff has not pled sufficient
18 facts demonstrating that defendant Diaz threatened to have him moved to a different unit *because*
19 of grievances he filed.

20 Plaintiff’s statement that “under his or one of his nurses who would take exception to his
21 treatment and redress that exception grievance using an administrative appeal,” is the only
22 sentence in the amended complaint suggesting that defendant Diaz threatened to retaliate against
23 plaintiff for filing grievances. However, this sentence does not clearly state that defendant Diaz
24 threatened retaliation based on plaintiff’s filing of grievances. This sentence is somewhat
25 undecipherable. Accordingly, plaintiff’s retaliation claim is dismissed with leave to amend.

26 If plaintiff is claiming that defendant Diaz threatened to retaliate against him for filing
27 grievances, he shall make this clear in a second amended complaint. To the best of his
28 recollection, plaintiff shall include what defendant Diaz said to him to make him think that he was

1 threatening to retaliate against him for filing grievances. Plaintiff shall also describe the
2 grievances that allegedly caused defendant Diaz to retaliate against him. Moreover, it appears
3 that plaintiff was not moved – so what harm is plaintiff alleging?

4 Eighth Amendment

5 Plaintiff alleges that defendant Diaz’s alleged threats violated the Eighth Amendment.
6 The order dismissing the original complaint advised plaintiff that verbal threats, without more, are
7 generally insufficient to state a Section 1983 claim in violation of the Eighth Amendment. See
8 Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987) (per curiam). Plaintiff’s claim that defendant
9 Diaz threatened to make his life difficult and transfer him out of the unit does not state a
10 potentially colorable Eighth Amendment claim. Accordingly, plaintiff should not include an
11 Eighth Amendment claim in a second amended complaint.

12 Due Process


13 Plaintiff alleges that defendant Diaz violated his Fourteenth Amendment right to due
14 process. The amended complaint includes no factual allegations supporting a Fourteenth
15 Amendment claim.

16 Conclusion

17 Plaintiff’s amended complaint is dismissed with leave to file a second amended complaint
18 addressing the pleading defects discussed above with respect to plaintiff’s retaliation claim
19 against defendant Diaz.

20 Accordingly, IT IS HEREBY ORDERED that plaintiff’s amended complaint is dismissed
21 with thirty days to file a second amended complaint; failure to file a second amended complaint
22 within that time will result a recommendation of dismissal of this action.

23 Dated: January 30, 2018

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25 _____
26 KENDALL J. NEWMAN
27 UNITED STATES MAGISTRATE JUDGE

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