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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JUANITA MACHADO,
Plaintiff,
v.
J.A. LIZARRAGO,
Defendant.

No. 2:17-cv-02430-TLN-CKD PS

ORDER

Plaintiff is proceeding in this action pro se and in forma pauperis. This proceeding was referred to this court by Local Rule 302(c)(21).

Background

On October 18, 2018, the undersigned issued findings and recommendations recommending that defendant Lizarrago’s motion to dismiss plaintiff’s first amended complaint be granted. (ECF No. 33.) The findings and recommendations found that plaintiff did not sufficiently allege causation in her First Amendment claim because plaintiff offered nothing but conclusory statements concerning defendant Lizarrago’s knowledge of plaintiff’s participation in litigation, which plaintiff claims is the substantial or motivating factor behind defendant’s conduct. (*Id.* at 4–5.) Regarding plaintiff’s conspiracy claim, the undersigned found that plaintiff’s conclusory allegations that defendant Lizarrago conspired with unnamed Doe defendants to retaliate against her in violation of the First Amendment are not sufficient for the

1 same reasons plaintiff's First Amendment claim failed to state a claim upon which relief could be
2 granted. (Id. at 5.)

3 On January 15, 2019, District Judge Troy L. Nunley adopted the findings and
4 recommendations and granted plaintiff leave to amend the complaint. (ECF No. 38.) Plaintiff
5 was instructed to cure the deficiencies noted in the findings and recommendations and allege facts
6 that show causation and that the adverse action did not reasonably advance any legitimate
7 correctional goal. (Id. at 2.)

8 On March 11, 2019, plaintiff filed the operative second amended complaint ("SAC").
9 (ECF No. 41.)

10 On March 26, 2019, defendant filed a request for screening of plaintiff's second amended
11 complaint, ECF No. 42, which the undersigned granted on April 2, 2019, ECF No. 43.

12 On June 24, 2019, plaintiff filed a motion to appoint counsel. (ECF No. 44.)

13 **Plaintiff's Second Amended Complaint**

14 The federal in forma pauperis statute authorizes federal courts to dismiss a case if the
15 action, among other things, fails to state a claim upon which relief may be granted. 28 U.S.C.
16 § 1915(e)(2). In order to avoid dismissal for failure to state a claim a complaint must contain
17 more than "naked assertion[s]," "labels and conclusions" or "a formulaic recitation of the
18 elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555–57 (2007).
19 In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere
20 conclusory statements do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Furthermore,
21 a claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570.
22 "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
23 draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556
24 U.S. at 678. When considering whether a complaint states a claim upon which relief can be
25 granted, the court must accept the allegations as true, Erickson v. Pardus, 551 U.S. 89, 93–94
26 (2007), and construe the complaint in the light most favorable to the plaintiff, see Scheuer v.
27 Rhodes, 416 U.S. 232, 236 (1974).

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1 Here, the court finds that plaintiff failed to cure the previously-noted deficiencies in her
2 second amended complaint. The allegations in plaintiff's second amended complaint remain
3 vague and conclusory. More specifically, plaintiff's allegations do not provide sufficient
4 particularity to support plaintiff's claims, namely that any of the defendants were aware that
5 plaintiff was assisting her husband with litigation before the adverse acts took place, or that the
6 assistance was a motivating factor in their actions. Plaintiff only alleges that "CSP-LAC officials
7 were made aware that Mr. Machado filed lawsuits against them," SAC ¶ 24, officials told Mr.
8 Machado that he was not popular with Lancaster and Corcoran and if he engages in litigation he
9 will be transferred, SAC ¶ 27, that defendant Lizarraga knew of Mr. Machado's litigation, SAC
10 ¶ 29, and that at some time defendant Lizarraga was made aware that plaintiff and Mr. Machado
11 were drafting court documents, SAC ¶ 30. This is not sufficient to show that defendant Lizarraga
12 knew of plaintiff's assistance before the adverse acts at issue in the second amended complaint
13 took place and that this knowledge was the reason for the adverse acts. This is even more
14 insufficient as to the eight new defendants plaintiff attempts to name in the second amended
15 complaint. Although it can be difficult to establish the motive or intent of a defendant or
16 defendants, a plaintiff may rely on circumstantial evidence. Bruce v. Ylst, 351 F.3d 1283, 1289
17 (9th Cir. 2003) (finding that a prisoner established a triable issue of fact regarding prison
18 officials' retaliatory motives by raising issues of suspect timing, evidence, and statements); Hines
19 v. Gomez, 108 F.3d 265, 267-68 (9th Cir. 1997) (finding that the evidence presented in that case
20 supported the inference that the defendant knew, at least to some extent, of the plaintiff's use of
21 the grievance system, which in turn supported the jury's finding that the defendant filed a
22 disciplinary report in retaliation for the plaintiff's use of the grievance system); Pratt v. Rowland,
23 65 F.3d 802, 808 (9th Cir. 1995) (explaining that "timing can properly be considered as
24 circumstantial evidence of retaliatory intent" but finding in that case that there was little else to
25 support the inference). The second amended complaint alleges no facts, circumstantial or
26 otherwise, supporting an inference that the protected conduct motivated the defendants to separate
27 plaintiff from her husband by excluding her as a visitor at any CDCR facility. At best, plaintiff
28 only speculates that the defendants' conduct was motivated by the fact that she participated with

1 her husband in drafting lawsuits against prison staff.

2 Regarding plaintiff's conspiracy claim, a conspiracy claim brought under section 1983
3 requires proof of "an agreement or meeting of the minds to violate constitutional rights,"
4 Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2001) (quoting United Steelworkers of Am. v.
5 Phelps Dodge Corp., 865 F.2d 1539, 1540–41 (9th Cir. 1989) (additional quotations omitted)),
6 and an actual deprivation of constitutional rights, Hart v. Parks, 450 F.3d 1059, 1071 (9th Cir.
7 2006) (quoting Woodrum v. Woodward Cnty., Okl., 866 F.2d 1121, 1126 (9th Cir. 1989)). "To
8 be liable, each participant in the conspiracy need not know the exact details of the plan, but each
9 participant must at least share the common objective of the conspiracy." Franklin, 312 F.3d at
10 441 (quoting United Steelworkers, 865 F.2d at 1541). Although accepted as true, the "[f]actual
11 allegations must be enough to raise a right to relief above the speculative level" Twombly,
12 550 U.S. at 546. A bare allegation that the defendants conspired with each other to violate
13 plaintiff's constitutional rights will not suffice to give rise to a conspiracy claim under section
14 1983. As with above, plaintiff's allegations fail to establish a conspiracy claim against defendant
15 Lizarraga or any of the eight new defendants.

16 For these reasons, the court has determined that the second amended complaint does not
17 state a claim upon which relief can be granted. Although the Federal Rules adopt a flexible
18 pleading policy, a complaint must give fair notice and state the elements of the claim plainly and
19 succinctly. Jones v. Cmty. Redev. Agency of City of L.A., 733 F.2d 646, 649 (9th Cir. 1984).
20 Plaintiff must allege with at least some degree of particularity overt acts the defendants engaged
21 in that support plaintiff's claim. Id. Because plaintiff has failed to comply with these
22 requirements, the second amended complaint must be dismissed. The court will, however, grant
23 leave to file a third amended complaint.

24 If plaintiff chooses to amend the complaint again, plaintiff must demonstrate how the
25 conduct complained of has resulted in a deprivation of plaintiff's federal rights. See Ellis v.
26 Cassidy, 625 F.2d 227 (9th Cir. 1980). This must include allegations of the defendants'
27 knowledge of plaintiff's participation in drafting lawsuits and a connection between this
28 knowledge and the defendants' alleged misconduct. In that regard, plaintiff's second amended

1 complaint consists largely of allegations pertaining to defendants' knowledge of her husband's
2 legal actions—not plaintiff's involvement in certain legal proceedings.

3 Finally, plaintiff is informed that the court cannot refer to a prior pleading in order to
4 make plaintiff's third amended complaint complete. Local Rule 220 requires that an amended
5 complaint be complete in itself without reference to any prior pleading. This is because, as a
6 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375
7 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files a third amended complaint, the previous
8 complaints no longer serve any function in the case. Therefore, in an amended complaint, as in
9 an original complaint, each claim and the involvement of each defendant must be sufficiently
10 alleged.

11 **Plaintiff's Request for the Appointment of Counsel**

12 On June 24, 2019 plaintiff filed a request for the appointment of counsel. (ECF No. 44.)
13 In the request, plaintiff states that appointment of counsel is appropriate because (1) the case
14 involves substantial and complex procedural and legal factual questions, (2) plaintiff lacks legal
15 education, (3) this case will require experts, (4) plaintiff is indigent and cannot investigate crucial
16 facts, and (5) this is a case where the parties dispute the facts.

17 Any successful application for appointment of counsel must comply with criteria set forth
18 in Bradshaw v. Zoological Society of San Diego, 662 F.2d 1301 (9th Cir. 1981). Before
19 appointing counsel to plaintiff, the court must consider (1) plaintiff's financial resources, (2) the
20 efforts already made by plaintiff to secure counsel, and (3) plaintiff's likelihood of success on the
21 merits. Id. at 1318. Appointment of counsel is not a matter of right. See Ivey v. Bd. of Regents,
22 673 F. 2d 266 (9th Cir. 1982).

23 Because plaintiff is proceeding in forma pauperis, the first factor, which relates to her
24 financial condition, is a fortiori resolved in her favor. As to the second factor, plaintiff does not
25 provide the efforts she made to obtain counsel, if any. As to the third factor, after reviewing the
26 second amended complaint, the court has determined appointment of counsel is not warranted in
27 this matter. For these reasons, the court will deny plaintiff's request without prejudice to
28 renewing the request.

1 **Conclusion**

2 In accordance with the above, IT IS HEREBY ORDERED that:

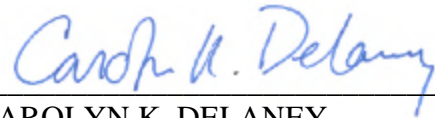
3 1. Plaintiff's second amended complaint is dismissed;

4 2. Plaintiff is granted thirty days from the date of service of this order to file an amended
5 complaint that complies with the requirements of the Federal Rules of Civil Procedure, and the
6 Local Rules of Practice; the amended complaint must bear the docket number assigned this case
7 and must be labeled "Third Amended Complaint;" plaintiff must file an original and two copies
8 of the amended complaint;

9 3. Failure to file an amended complaint in accordance with this order will result in a
10 recommendation that this action be dismissed; and

11 4. Plaintiff's motion to appoint counsel (ECF No. 44) is DENIED without prejudice.

12 Dated: August 2, 2019



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14 CAROLYN K. DELANEY
15 UNITED STATES MAGISTRATE JUDGE

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