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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LEANDRO LEONEL GONZALEZ
CASTILLO,

Plaintiff,

v.

E. OCHOA, et al.

Defendants.

No. 2:18-cv-0767-KJM-EFB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff, a state prisoner proceeding without counsel in an action brought pursuant to 42 U.S.C. § 1983, seeks leave to proceed in forma pauperis. ECF Nos. 2. He has also filed motions for a temporary restraining order and a preliminary injunction (ECF No. 3), and a motion to expedite review of his motion for injunctive relief (ECF No. 7).

Application to Proceed In Forma Pauperis

Plaintiff’s application makes the showing required by 28 U.S.C. § 1915(a)(1). Accordingly, his request to proceed in forma pauperis is granted. By separate order, the agency having custody of plaintiff will be directed to forward payments from his account to the Clerk of Court each time the amount in the account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

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1 requires that the complaint (1) arise under a federal law or the U. S. Constitution, (2) allege a
2 “case or controversy” within the meaning of Article III, § 2 of the U. S. Constitution, or (3) be
3 authorized by a federal statute that both regulates a specific subject matter and confers federal
4 jurisdiction. *Baker v. Carr*, 369 U.S. 186, 198 (1962). To invoke the court's diversity
5 jurisdiction, a plaintiff must specifically allege the diverse citizenship of all parties, and that the
6 matter in controversy exceeds \$75,000. 28 U.S.C. § 1332(a); *Bautista v. Pan American World*
7 *Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir. 1987). A case presumably lies outside the jurisdiction
8 of the federal courts unless demonstrated otherwise. *Kokkonen*, 511 U.S. at 376-78. Lack of
9 subject matter jurisdiction may be raised at any time by either party or by the court. *Attorneys*
10 *Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 594-95 (9th Cir. 1996).

11 II. Analysis

12 Plaintiff alleges that, on August 10, 2017 and while incarcerated at Mule Creek State
13 Prison (“MCSP”), defendant Orozco ordered him to submit to a search of his person. ECF No. 1
14 at 8. He claims that, in the course of the search, another officer – Defendant Ochoa - twice
15 fondled his left nipple. *Id.* Plaintiff describes this act as a “clear sexual assault” which made him
16 feel “mental[ly] and emotional[ly] bad.” *Id.* Plaintiff alleges that the foregoing act was
17 undertaken to deter him from pursuing a grievance against defendant Parks – whom plaintiff had
18 previously accused of acting in bad faith by ordering him to submit frequent searches. *Id.* at 7-10.

19 The court finds that the complaint, as currently articulated, fails to state a viable claim.
20 With respect to the alleged sexual assault, plaintiff has not alleged facts which rise to the level of
21 an Eighth Amendment violation. The allegations here are comparable in degree of seriousness to
22 those the Ninth Circuit considered in *Watison v. Carter*, 668 F.3d 1108 (9th Cir. 2012). In
23 *Watison*, the Ninth Circuit affirmed dismissal of an inmate’s Eighth Amendment sexual
24 harassment claim where a correctional officer approached an inmate while he was on the toilet,
25 rubbed his thigh against the inmate’s thigh, “began smiling in a sexual contact (sic),” and left the
26 cell laughing. *Id.* at 1112-14. Similarly, the Eighth Circuit’s decision in *Berryhill v. Schriro* –
27 which the *Watison* court cited with approval – found no Eighth Amendment violation where an
28 inmate alleged that prison maintenance employees grabbed him by the shoulders and buttocks

1 “briefly.” 137 F.3d 1073, 1074-75 (8th Cir. 1998). The court stresses that plaintiff’s allegations
2 against Ochoa – if true – indicate an appalling lack of professionalism and perhaps grounds for
3 administrative discipline. Nevertheless, they do not amount to a viable constitutional claim.

4 Next, the court finds that plaintiff has failed to plead sufficient allegations to support his
5 claim that Ochoa’s actions were part of a conspiracy to deter him from pursuing a grievance
6 against Parks. He simply alleges that, after an interview on August 10, 2017 with defendant
7 Orozco concerning his grievance against Parks, he “understood” that Ochoa’s actions were
8 intended as deterrence. ECF No. 1 at 9. Plaintiff does not allege how he came to this
9 understanding or what evidence supported such a conclusion. He does allude to the existence of a
10 “buddy system” at MCSP, but his allegations on this system are vague and fail to explain how
11 plaintiff could, with any degree of confidence, be certain that Ochoa’s actions were connected to
12 his grievance against Parks. “The tenet that a court must accept as true all of the allegations
13 contained in a complaint is inapplicable to legal conclusions,” and courts “are not bound to accept
14 as true a legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)
15 (internal quotations and citations omitted).

16 Leave to Amend

17 Plaintiff may choose to amend his complaint. He is cautioned that any amended
18 complaint must identify as a defendant only persons who personally participated in a substantial
19 way in depriving him of his constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.
20 1978) (a person subjects another to the deprivation of a constitutional right if he does an act,
21 participates in another’s act or omits to perform an act he is legally required to do that causes the
22 alleged deprivation). Plaintiff may also include any allegations based on state law that are so
23 closely related to his federal allegations that “they form the same case or controversy.” *See* 28
24 U.S.C. § 1367(a).

25 The amended complaint must also contain a caption including the names of all defendants.
26 Fed. R. Civ. P. 10(a).

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1 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. *See*
2 *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007). Nor may he bring multiple, unrelated claims
3 against more than one defendant. *Id.*

4 Any amended complaint must be written or typed so that it so that it is complete in itself
5 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
6 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
7 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
8 F.3d 1467, 1474 (9th Cir. 1997) (the ““amended complaint supersedes the original, the latter
9 being treated thereafter as non-existent.””) (*quoting Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
10 1967)).

11 Any amended complaint should be as concise as possible in fulfilling the above
12 requirements. Fed. R. Civ. P. 8(a). Plaintiff should avoid the inclusion of procedural or factual
13 background which has no bearing on his legal claims. He should also take pains to ensure that his
14 amended complaint is as legible as possible. This refers not only to penmanship, but also spacing
15 and organization. Plaintiff should carefully consider whether each of the defendants he names
16 actually had involvement in the constitutional violations he alleges. A “scattershot” approach in
17 which plaintiff names dozens of defendants will not be looked upon favorably by the court.

18 Motion for Temporary Restraining Order and Preliminary Injunction

19 Plaintiff states that he is “suffering and will continue to suffer sexual abuses and
20 retaliation for speech” at the hands of the defendants if the court fails to grant his motion for
21 preliminary injunctive relief. ECF No. 3 at 2. The court, for the reasons stated hereafter,
22 recommends that this motion be denied.

23 Injunctive relief – either temporary or permanent – is an “extraordinary remedy, never
24 awarded as of right.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). The Supreme
25 Court has held that:

26 A plaintiff seeking a preliminary injunction must establish that he is
27 likely to succeed on the merits, that is likely to suffer irreparable
28 harm in the absence of preliminary relief, that the balance of the
equities tips in his favor, and that an injunction is in the public
interest.

1 *Id.* at 20. Here, the court has already determined that plaintiff's complaint does not state a
2 cognizable claim under section 1983. Thus, he cannot establish that he is likely to succeed on the
3 merits at this time. Moreover, plaintiff has not shown that he is likely to suffer irreparable harm
4 in the absence of his requested preliminary relief. As noted above, he vaguely alleges that he will
5 continue to suffer sexual abuses and suppression of his speech, but he offers no specific, concrete
6 allegations that either harm is actually imminent. To meet the irreparable harm requirement,
7 plaintiff must demonstrate, rather than simply allege, the existence of irreparable harm.
8 *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). This requires
9 Plaintiff to demonstrate by *specific* facts that there is a credible threat of immediate and
10 irreparable harm. *See* Fed. R. Civ. P. 65(b).

11 Conclusion

12 Accordingly, it is ORDERED that:


- 13 1. Plaintiff's application to proceed in forma pauperis (ECF No. 2) is GRANTED;
- 14 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected
15 in accordance with the notice to the California Department of Corrections and Rehabilitation filed
16 concurrently herewith;
- 17 3. Plaintiff's complaint (ECF No. 1) is dismissed with leave to amend within 30
18 days of service of this order; and
- 19 4. Failure to comply with any part of this this order may result in dismissal of this
20 action.
- 21 5. Plaintiff's motion for expedited review of his motion for temporary restraining
22 order and preliminary injunction (ECF No. 7) is denied a moot.

23 Further, it is RECOMMENDED that plaintiff's motion for temporary restraining order
24 and preliminary injunction (ECF No. 3) be DENIED.

25 These findings and recommendations are submitted to the United States District Judge
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
27 after being served with these findings and recommendations, any party may file written
28 objections with the court and serve a copy on all parties. Such a document should be captioned

1 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
2 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*
3 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: October 18, 2018.

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6 EDMUND F. BRENNAN
7 UNITED STATES MAGISTRATE JUDGE
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