

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 KEVIN L. HOPKINS,

No. C 09-2164 CW (PR)

4 Plaintiff,

ORDER DISMISSING ALL CLAIMS  
IN AMENDED COMPLAINT AND  
DENYING PLAINTIFF'S PENDING  
MOTIONS

5 v.

6 ALAMEDA COUNTY DEPUTY FESMIRE,  
7 et al.,

8 Defendants.

9 \_\_\_\_\_/

10 Plaintiff Kevin L. Hopkins, a state prisoner currently  
11 incarcerated at Avenal State Prison, filed this pro se civil rights  
12 action under 42 U.S.C. § 1983 alleging constitutional violations  
13 stemming from his incarceration at Santa Rita Jail in Alameda  
14 County.

15 On April 20, 2010, Plaintiff filed a "Motion for Temporary  
16 Injunction." At the time he filed his motion, Plaintiff stated  
17 that he was still being housed at Santa Rita. He alleges that he  
18 is in need of an "emergency preliminary injunction to be  
19 transferred to the Northern County Jail in Oakland to prevent  
20 reprisals for filing [this] lawsuit that alleged sexually malicious  
21 assault under color of state law by Deputy Fesmire." (Mot. for  
22 Temporary Injunction at 1.) The Court notes that since he filed  
23 his Motion for Temporary Injunction, Plaintiff has informed the  
24 Court that he has been transferred to Avenal State Prison. The  
25 transfer to a different prison makes his requested relief moot.  
26 Accordingly, Plaintiff's Motion for Temporary Injunction (docket  
27 no. 15) is DENIED as moot.

28 Following an initial review of the complaint, the Court issued  
an Order Dismissing Plaintiff's Complaint With Leave to Amend. The

1 following background relating to the exhaustion of the Plaintiff's  
2 claims in his complaint pursuant to the Prison Litigation Reform  
3 Act of 1995 (PLRA) is taken from the Court's May 7, 2010 Order:

4 Plaintiff contends that he "presented two grievances,  
5 first one being tracking #09G-50649, 4-11-09 and 09G-  
6 50670 4-15-09," both of which he has attached to his  
7 complaint. (Compl. at 2.) However, Plaintiff does not  
8 allege whether he received responses to his two  
9 grievances from the highest level of review available to  
10 him. As to grievance #09G-50649, it was "received" by  
11 Defendant Fesmire on April 11, 2009; however, it states  
12 that the grievance "can not [sic] be resolved at this  
13 level." (Attach. to Compl., Grievance #09G-50649.)  
14 There is no indication as to whether grievance #09G-  
15 50649 was forwarded to the Sergeant. (*Id.*) Meanwhile,  
16 grievance #09G-50670 was "received" by Deputy  
17 Christensen on April 15, 2009; however, there is no  
18 further information indicating whether it was resolved  
19 by Deputy Christensen or whether it was forwarded to the  
20 Sergeant. (Attach. to Compl., Grievance #09G-50670.)  
21 It thus appears Plaintiff has not exhausted his  
22 administrative remedies as required by 42 U.S.C.  
23 § 1997e(a).

24 (May 7, 2010 Order at 3-4.) The Court dismissed Plaintiff's  
25 complaint with leave to amend to show that he exhausted all of his  
26 claims against each Defendant prior to filing this action. The  
27 Court also indicated that in his original complaint, Plaintiff only  
28 named Defendants Alameda County Sheriff Gregory Ahern and Deputy  
Fesmire. In the body of the complaint, Plaintiff also mentioned a  
desire to sue the "Classification Deputies" who placed him in  
administrative segregation for non-disciplinary, allegedly  
retaliatory, reasons. The Court notified Plaintiff that if he was  
unable to determine the names of these unnamed defendants, then he  
may later attempt through discovery to ascertain their names and  
then move for leave to amend his complaint to add them as  
defendants. Plaintiff was also directed to explain what these  
individuals did that caused the violation of specific

1 constitutional rights.

2 On May 12, 2010, Plaintiff filed an amended complaint, which  
3 the Court now reviews to determine whether it states cognizable  
4 claims for relief.

5 In his amended complaint, Plaintiff alleges that "on April 10,  
6 2009, Defendant Fesmire conducted a cell search on cell #10." (Am.  
7 Compl. at 3.) Plaintiff states that the cell was occupied by both  
8 himself and inmate Vanburen. (Id.) Defendant Fesmire then "found  
9 stockpiled medications in both occupants of cell bed area." (Id.)  
10 Plaintiff alleges that he was "the only inmate that [Defendant  
11 Fesmire] conducted a pat down search fondling and groping [his]  
12 penis and testicles." (Id.) Plaintiff claims that Defendant  
13 Fesmire then handcuffed him and took him to an isolation cell where  
14 he was told to strip down. (Id.) Plaintiff alleges that the  
15 "strip search" Defendant Fesmire conducted on him "was intrusive  
16 and had homosexual undertones." (Id.) Plaintiff further alleges  
17 that during the "strip search," Defendant Fesmire "was aroused."  
18 (Id.) Plaintiff adds, "The search was excessive, vindictive . . .  
19 sexual harassment." (Id.) Plaintiff claims that Defendant Fesmire  
20 "made it obvious that he was acting in a aggressive homosexual  
21 nature." (Id.)

22 On April 11, 2009, Plaintiff filed a grievance against  
23 Defendant Fesmire, alleging that the search he conducted was with  
24 "flagrant disrespect" and also "humiliating." (Attach. to Am.  
25 Compl., Grievance #09G-S0649.<sup>1</sup>) Plaintiff claims that he was  
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27 <sup>1</sup> The Court notes that the grievance tracking numbers were  
28 incorrectly referred to as #09G-50649 and #09G-50670 in the Court's  
May 7, 2010 Order. The exhibits attached to the amended complaint

1 "further outraged" because Defendant Fesmire asked him if he had  
2 "some sexual stuff going on." (Id. at 3-1.)<sup>2</sup> Plaintiff alleges  
3 that inmate Vanburen told Defendant Fesmire that Plaintiff "was  
4 parading around cell butt naked." (Id.)

5 On April 13, 2009, Plaintiff filed a second grievance,  
6 "depicting [Defendant Fesmire's] actions" during the cell and strip  
7 search. (Attach. to Am. Compl., Grievance #09G-S0670.) Plaintiff  
8 adds that he has "exhausted all remedies as is attested by  
9 attachment of such responses." (Id. at 3-1.) Plaintiff claims  
10 that "there was no penological concern for [Defendant Fesmire] to  
11 strip [sic] search [him] after already giving [him] a sexually  
12 suggestive pat down search." (Id.) Plaintiff claims that jail  
13 officials had already conducted a search of his cell and  
14 "contraband prescribed meds were found in both inmates  
15 quarters . . . ." (Id.) Finally, Plaintiff claims that because of  
16 the strip search he suffered "outrage, humiliation, emotional[]  
17 distress and a host of reprisals, harassments from other staff  
18 members." (Id. at 3-2.)

19 Plaintiff alleges that he was then transferred out of Santa  
20 Rita on an unspecified date and that when he returned on April 10,  
21 2010, he "spoke with [the] Mental Health Counselor of the abuse  
22 [he] experienced." (Id.) He also claims that on April 23, 2010,  
23 he was housed with another inmate, Stanley Huff, who was "so  
24 despondent and so unattached with reality," that Plaintiff pressed  
25 \_\_\_\_\_  
26 show that the tracking numbers should be #09G-S0649 and #09G-S0670.  
(Attach. to Am. Compl., Grievance #09G-S0649 & #09G-S0670.)

27 <sup>2</sup> Plaintiff attached four pages to page three of his amended  
28 complaint; therefore, the Court has numbered them "3-1" through "3-  
4."

1 the "intercom that [is] used for emergencies" and attempted to  
2 alert jail officials that inmate Huff "should not [have] been  
3 housed with another inmate." (Id.) When no one responded to his  
4 call, Plaintiff alleges Inmate Huff "launched a physical attack" on  
5 him. (Id.) After the deputies separated the two inmates,  
6 Plaintiff claims that he needed medical attention for his injuries.  
7 (Id.) However, Deputy Mullencaux denied him medical attention.  
8 (Id.)

9 Finally, Plaintiff refers to the original claim involving  
10 Defendant Fesmire and generally alleges that "classification placed  
11 [him] in administrative segregation for non-disciplinary  
12 retaliatory reasons in concert with Deputy Fesmire . . . ." (Id.  
13 at 3-3.) However, Plaintiff does not name the "Classification  
14 Deputies" responsible for the alleged unconstitutional  
15 classification because he claims he "will later attempt to name all  
16 defendants through discovery to ascertain their names and ask for  
17 further permission for leave to amend this complaint." (Id.)

18 In sum, Plaintiff alleges that Defendant Fesmire violated his  
19 Eighth Amendment right to be free from cruel and unusual punishment  
20 and his Fourth Amendment right to be free from unreasonable  
21 searches. (Id. at 3-4.) Plaintiff raises new allegations stemming  
22 from the April 23, 2010 incident involving Inmate Huff and Deputy  
23 Mullencaux. (Id. at 3-3.) Plaintiff also claims that  
24 "Classification Deputies" violated his Fourteenth Amendment rights  
25 to procedural due process for "placing him in administrative  
26 segregation for non-disciplinary reasons." (Id. at 3-4.)  
27 Plaintiff claims he suffered "physical, emotional and mental  
28 injury." (Id.)

1 Finally, Plaintiff requests appointment of counsel to assist  
2 him in pursuing his claims. (Id. at 3-3.)

3 Also before the Court are Plaintiff's motions requesting  
4 service on Defendants (docket nos. 17, 25).

5 DISCUSSION

6 I. Exhaustion

7 Plaintiff has submitted new information relating to exhaustion  
8 in his amended complaint -- including the administrative appeals  
9 attached as exhibits -- showing that he received responses from the  
10 highest level of review available to him, the Commanding Officer.  
11 Therefore, Court concludes that, for the purposes of review of  
12 Plaintiff's amended complaint, he has satisfactorily shown that he  
13 has exhausted the claim relating to the April 10, 2009 incident  
14 involving Defendant Fesmire.

15 Plaintiff has not exhausted his available administrative  
16 remedies as to the new allegations in his amended complaint before  
17 filing his federal complaint, however. Specifically, as of the  
18 time he filed his amended complaint, Plaintiff claims that the  
19 exhaustion of his "new allegations" relating to the April 23, 2010  
20 incident involving Inmate Huff and Deputy Mullencaux is "still  
21 pending." (Am. Compl. at 3-4.) In addition, Plaintiff has not  
22 attached to his amended complaint any of the grievances he  
23 submitted relating to the April 23, 2010 incident. Therefore,  
24 Plaintiff seeks "leave to ammend [sic] when Plaintiff can  
25 incorporate new allegations procedurally." (Id.)

26 The Court stated as follows in its May 7, 2010 Order: "[T]he  
27 PLRA's exhaustion requirement applies to all inmate suits about  
28 prison life, whether they involve general circumstances or

1 particular episodes, and whether they allege excessive force or  
2 some other wrong." (May 7, 2010 Order at 3 (citing Porter v.  
3 Nussle, 534 U.S. 516, 532 (2002)).) The Court added: "Exhaustion  
4 of all 'available' remedies is mandatory; those remedies need not  
5 meet federal standards, nor must they be 'plain, speedy and  
6 effective.'" (Id.); Booth v. Churner, 532 U.S. 731, 739-40 & n.5  
7 (2001).

8 Non-exhaustion under § 1997e(a) is an affirmative defense  
9 which should be brought by defendants in an unenumerated motion to  
10 dismiss under Federal Rule of Civil Procedure 12(b). Wyatt v.  
11 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). However, a complaint  
12 may be dismissed by the court for failure to exhaust if a prisoner  
13 "conce[des] to nonexhaustion" and "no exception to exhaustion  
14 applies." Id. at 1120.

15 Here, Plaintiff concedes he has not exhausted his  
16 administrative remedies as to the new allegations relating to the  
17 April 23, 2010 incident. Plaintiff has not presented any  
18 extraordinary circumstances which might permit him to be excused  
19 from complying with PLRA's exhaustion requirement. Cf. Booth, 532  
20 U.S. at 741 n.6 (courts should not read "futility or other  
21 exceptions" into § 1997e(a)).

22 Accordingly, the claims in the amended complaint relating to  
23 the April 23, 2010 incident -- and specifically involving Inmate  
24 Huff and Deputy Mullencaux -- are DISMISSED without prejudice to  
25 refiling in a new action after exhausting California's prison  
26 administrative process. See McKinney v. Carey, 311 F.3d 1198,  
27 1199-1201 (9th Cir. 2002) (action must be dismissed without  
28 prejudice unless prisoner exhausted available administrative

1 remedies before he filed suit, even if prisoner fully exhausts  
2 while the suit is pending). Therefore, Plaintiff's request for  
3 leave to amend to add these new allegations is DENIED.

4 II. Legal Claims

5 A. Eighth Amendment Claim

6 Plaintiff claims that on April 10, 2009, Defendant Fesmire  
7 conducted a clothed body search on him after doing a cell search,  
8 and during the search began "fondling and groping [sic] his penis  
9 and testicles." (Am. Compl. at 3.)

10 The conduct alleged by Plaintiff does not rise to the level of  
11 an Eighth Amendment violation. Sexual assault, coercion and  
12 harassment certainly may violate contemporary standards of decency  
13 and cause physical and psychological harm. See Jordan v. Gardner,  
14 986 F.2d 1521, 1525-31 (9th Cir. 1993) (en banc). However, not  
15 every malevolent touch by a prison guard or official gives rise to  
16 an Eighth Amendment violation -- the Eighth Amendment's prohibition  
17 against cruel and unusual punishment necessarily excludes from  
18 constitutional recognition de minimis uses of force. See Hudson v.  
19 McMillian, 503 U.S. 1, 9-10 (1992); Berryhill v. Schriro, 137 F.3d  
20 1073, 1076 (8th Cir. 1998) (no Eighth Amendment violation where  
21 employees briefly touched inmate's buttocks with apparent intent to  
22 embarrass him). A prisoner therefore must establish that the  
23 alleged sexual harassment was egregious, pervasive and/or  
24 widespread in order to state a claim under the Eighth Amendment.  
25 See, e.g., Jordan, 986 F.2d at 1525-31 (prison policy requiring  
26 male guards to conduct body searches on female prisoners); Watson  
27 v. Jones, 980 F.2d 1165, 1165-66 (8th Cir. 1992) (correctional  
28 officer sexually harassed two inmates on almost daily basis for two

1 months by conducting deliberate examination of genitalia and anus).

2 Here, according to Plaintiff, Defendant Fesmire handled  
3 Plaintiff's penis and genitals during a clothed body search.

4 Plaintiff has not indicated that there was any more than a de  
5 minimis injury resulting from the isolated brief incident.

6 Accordingly, Plaintiff's Eighth Amendment claim against Defendant  
7 Fesmire is DISMISSED for failure to state a claim for relief.

8 B. Fourth Amendment Claim

9 The Fourth Amendment applies to the invasion of bodily privacy  
10 in prisons and jails. Bull v. San Francisco, 595 F.3d 964, 974-75  
11 (9th Cir. 2010) (en banc). To analyze a claim alleging a violation  
12 of this privacy right, the court must apply the test set forth in  
13 Turner v. Safley, 482 U.S. 78, 89 (1987), and determine whether a  
14 particular invasion of bodily privacy was reasonably related to  
15 legitimate penological interests. See Bull, 595 F.3d at 973.  
16 Prisoners and pretrial detainees in institutional settings may be  
17 subjected to strip searches and body cavity searches if they are  
18 conducted in a reasonable manner. See Bell v. Wolfish, 441 U.S.  
19 520, 561 (1979). The Fourth Amendment right to be secure against  
20 unreasonable searches extends to incarcerated prisoners, but the  
21 reasonableness of a particular search must be determined by  
22 reference to the prison context. See Michenfelder v. Sumner, 860  
23 F.2d 328, 332 (9th Cir. 1988).

24 Here, the search at issue involved a strip search at a jail.  
25 However, Plaintiff does not claim that the search by Defendant  
26 Fesmire was unreasonable or conducted in an abusive manner.  
27 Plaintiff alleges that he was transferred to an isolation cell and  
28 told to strip down. In his grievance, he specifically states that

1 Defendant Fesmire "conduct[ed] a humiliating strip search to view  
2 [his] anatomy." (Attach. to Am. Compl., Grievance No. 09G-S0649.)  
3 While he claims such a search was "intrusive and had homosexual  
4 undertones," (Am. Compl. at 3), such conclusory allegations do not  
5 amount to a constitutional violation. Moreover, Plaintiff seems to  
6 allege that it was only a visual strip search that was conducted by  
7 Defendant Fesmire. The record shows that the visual strip search  
8 was conducted after Defendant Fesmire had found "stockpiled  
9 medications" in Plaintiff's cell.

10 As noted above, the Court must consider the reasonableness of  
11 the search under Bell to determine if the search was reasonably  
12 related to legitimate penological interests under Turner. The  
13 prisoner bears the burden of showing that prison officials  
14 intentionally used exaggerated or excessive means to enforce  
15 security in conducting a search. See Thompson v. Souza, 111 F.3d  
16 694, 700 (9th Cir. 1997). In Thompson, the Ninth Circuit held that  
17 visual strip searches and urine tests to search for drugs were  
18 reasonably related to the prison officials' legitimate penological  
19 interest in keeping drugs out of prison. Id. Therefore, here, as  
20 in Thompson, the Court finds that Defendant Fesmire's visual strip  
21 search -- directly after finding "stockpiled medications" in  
22 Plaintiff's cell -- was reasonably related to the legitimate  
23 penological interest in keeping drugs out of Santa Rita.  
24 Therefore, there is no evidence that the strip search conducted  
25 here violated Plaintiff's Fourth and Fourteenth Amendment rights.

26 C. Claims Against "Classification Deputies" and Defendant  
27 Ahern

28 In its May 7, 2010 Order, the Court conducted an initial

1 screening of Plaintiff's due process claim against the  
2 "Classification Deputies" pursuant to 28 U.S.C. § 1915A(a), and  
3 also of his claim against Defendant Ahern. In his amended  
4 complaint, Plaintiff again asserts that the "Classification  
5 Deputies" placed him in administrative segregation for non-  
6 disciplinary reasons. However, Plaintiff does not amend his claim  
7 against Defendant Ahern. Therefore, all claims against Defendant  
8 Ahern are DISMISSED for failure to state a claim.

9       Reviewing Plaintiff's original claim against the  
10 "Classification Deputies," the Court found that he failed to  
11 provide any additional facts and that his allegations were not  
12 sufficient to state a plausible claim that his constitutional  
13 rights were violated. Therefore, the Court dismissed this claim  
14 with leave to amend to cure this pleading deficiency. In amending,  
15 Plaintiff was directed to "explain what these individuals did that  
16 caused the violation of specific constitutional rights." (May 7,  
17 2010 Order at 5 (citing Leer v. Murphy, 844 F.2d 628, 634 (9th Cir.  
18 1988)).) The Court added, "Conclusory allegations of wrongdoing,  
19 similar to his allegations in the instant complaint, will not do."  
20 Id. Finally, Plaintiff was directed to show that he exhausted his  
21 administrative remedies with respect to any claim against the  
22 "Classification Deputies" before he filed his suit. The amended  
23 complaint simply reiterates the same vague allegations against the  
24 "Classification Deputies" that were stated in the original  
25 complaint, including his conclusory allegations of being placed in  
26 administrative segregation for "non-disciplinary" reasons. (Am.  
27 Compl. at 3-3.) Nowhere in his amended complaint does Plaintiff  
28 allege additional facts sufficient to show that the "Classification

1 Deputies'" actions rose to the level of constitutional violations.  
2 While Plaintiff states that he "exhausted all grievance remedies,"  
3 (id. at 3-4), he has failed to explain how he exhausted his  
4 administrative remedies with respect to his claims against the  
5 "Classification Deputies." Finally, the Court finds that Plaintiff  
6 has failed to name the individually responsible defendants and to  
7 link them specifically to his due process claim. Accordingly, the  
8 Court finds that Plaintiff's amended complaint does not cure the  
9 pleading deficiency identified in the Court's Order dismissing his  
10 due process claim with leave to amend. Therefore, his due process  
11 claim against the "Classification Deputies" is DISMISSED without  
12 leave to amend, but without prejudice to refiling in a new  
13 complaint after exhausting administrative remedies. Any new,  
14 exhausted complaint must name the defendants and include sufficient  
15 facts to state a claim.

16 CONCLUSION

17 For the foregoing reasons, the Court orders as follows:

- 18 1. Plaintiff's Motion for Temporary Injunction (docket no.  
19 15) is DENIED as moot.
- 20 2. Plaintiff's claims in the amended complaint relating to  
21 the April 23, 2010 incident -- and specifically involving Inmate  
22 Huff and Deputy Mullencaux -- are DISMISSED without prejudice to  
23 refiling in a new action after exhausting California's prison  
24 administrative process. His request for leave to amend to add  
25 these new allegations is DENIED.
- 26 3. Plaintiff's remaining claims against Defendant Fesmire in  
27 his amended complaint are DISMISSED with prejudice and without  
28

1 leave to amend.

2 4. Plaintiff's claim against the "Classification Deputies"  
3 is DISMISSED without leave to amend, but without prejudice to  
4 refiling in a new complaint after exhausting administrative  
5 remedies.

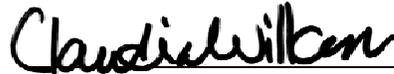
6 5. Because the Court has dismissed all claims in his amended  
7 complaint, Plaintiff's motion for appointment of counsel and his  
8 motions requesting service on defendants (docket nos. 17, 25) are  
9 DENIED.

10 6. The Clerk of the Court shall enter judgment in accordance  
11 with this Order, terminate all pending motions and close the file.

12 7. This Order terminates Docket nos. 15, 17 and 25.

13 IT IS SO ORDERED.

14 Dated: 3/28/2011



CLAUDIA WILKEN  
United States District Judge

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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 KEVIN L. HOPKINS,  
5 Plaintiff,

Case Number: CV09-02164 CW

**CERTIFICATE OF SERVICE**

6 v.

7 ALAMEDA COUNTY SHERIFFS DEPT. et al,  
8 Defendant.

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,  
10 Northern District of California.

11 That on March 28, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located  
14 in the Clerk's office.

15 Kevin L. Hopkins V76611  
16 Bldg. 510 / 40U  
17 Avenal State Prison  
18 P.O. Box 9  
19 Avenal, CA 93204

20 Dated: March 28, 2011

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk