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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT LEE JENKINS, JR., Plaintiff, v. CORRECTIONAL OFFICER CAPLAN, Defendant.	No. C 02-5603 RMW (PR) ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Robert Lee Jenkins, Jr., proceeding pro se, filed a third amended civil rights complaint on June 7, 2007, pursuant to 42 U.S.C. § 1983 against officials and employees of Central Training Facility in Soledad, where plaintiff was housed. Plaintiff alleges that he was denied his Eighth Amendment right to be free from excessive force and his First Amendment right to be free from retaliation. On February 9, 2010, the court granted defendants' motions to dismiss for failure to exhaust and ordered personal service on the remaining defendant, Correctional Officer Caplan. On June 1, 2010, Caplan filed a motion for summary judgment. Plaintiff has not filed an opposition.[1] For the reasons stated below, the court GRANTS Caplan's

[1] On February 23, 2010, plaintiff filed a motion for certificate of appealability from this court's February 9, 2010 order dismissing all served defendants. On June 14, 2010, plaintiff

motion for summary judgment.

BACKGROUND[2]

As an initial matter, in the court's February 9, 2010 order, the court concluded that plaintiff's only properly exhausted claim relating to any of the named defendants was the claim of retaliation against Caplan for filing a false CDC 128-B chrono against plaintiff in retaliation for plaintiff's filing a grievance against Caplan. (Dkt No. 118 at 7.) Accordingly, although plaintiff's third amended complaint ("TAC") and other pleadings in this action refer to accusations against dismissed defendants as well as other allegations of retaliation by Caplan, the court has previously concluded that the above stated claim is the only remaining and properly exhausted claim.

In his pleadings, plaintiff states that in May 2002, he repeatedly told Caplan that he did not want to be housed with smokers because second-hand smoke made him ill. (Dkt. No. 71 at 6.)[3] Plaintiff alleges that Caplan refused to believe him and continued placing inmates who

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filed a motion to stay proceedings until the Ninth Circuit Court of Appeals addressed his appeal of the order dismissing defendants for failure to exhaust. On August 2, 2010, this court denied the motion for a certificate of appealability as inapplicable to 42 U.S.C. § 1983 proceedings and noted that plaintiff had not provided nor had the court discovered any pending appeal in the Ninth Circuit. The court also denied the motion to stay, explaining that because the February 9, 2010 order was not a "final" order, no appeal was appropriate at this time. On August 17, 2010, plaintiff provided a docket number from the Ninth Circuit Court of Appeal and again requested that this court stay the proceedings until the Ninth Circuit addresses his appeal. The motion is DENIED. See Nascimento v. Dummer, 508 F.3d 905, 909-10 (9th Cir. 2007) (noting that an order dismissing some but not all defendants is not a final, appealable order).

[2] The underlying facts are undisputed unless otherwise indicated.

[3] Although the plaintiff did not file an opposition, verified pleadings may be used as opposing affidavits under Federal Rule of Civil Procedure 56. Cf. Schroeder v. McDonald, 55 F.3d 454, 460 nn. 10 & 11 (9th Cir. 1995); Lew v. Kona Hosp., 754 F.2d 1420, 1423 (9th Cir. 1995) ("A verified complaint may be treated as an affidavit to the extent that the complaint is based on personal knowledge and sets forth facts admissible in evidence and to which the affiant is competent to testify."). Thus, the court will consider plaintiff's facts as set out in both his verified TAC and his verified January 6, 2009 reply to defendants' motion to dismiss. (Dkt. No. 71.) The court will not consider plaintiff's unverified September 16, 2009 reply to defendants' motions to dismiss. (Dkt. No. 111.)

smoked into plaintiff's cell with him. (Id.) In response, plaintiff filed an inmate grievance appeal against Caplan. (Id.) Plaintiff asserts that, in retaliation against plaintiff for filing the grievance, Caplan authored a CDC 128-B chrono containing false statements about plaintiff. (Id.) In general, the CDC 128-B chrono stated that plaintiff was unable to be housed with the general population and opined that plaintiff had a hard time verbalizing emotions without becoming confrontational. (Id. at 6-7.)

ANALYSIS

I. Standard of Review

Summary judgment is proper where the pleadings, discovery and affidavits demonstrate that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. But on an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The court is only concerned with disputes over material facts and "factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248. It is not the task of the court to scour the record in search of a genuine issue of triable fact. Keenan v. Allen, 91 F.3d 1275, 1279 (9th Cir. 1996). The

nonmoving party has the burden of identifying, with reasonable particularity, the evidence that precludes summary judgment. Id. If the nonmoving party fails to make this showing, "the moving party is entitled to judgment as a matter of law." Celotex Corp., 477 U.S. at 323.

II. Plaintiff's claim[4]

Plaintiff claims that he filed an inmate grievance appeal against Caplan, alleging that even after plaintiff informed Caplan in May 2002 that he could not be housed with any inmates who smoked -- because plaintiff alleged it made him very ill -- Caplan continued to place inmates who smoked in plaintiff's cell with him. (Dkt. No. 71 at 6.) After plaintiff filed the inmate grievance appeal, plaintiff alleges that Caplan created a false CDC 128-B chrono in retaliation for plaintiff's filing the inmate grievance appeal. (Id. at 6-7.)

Retaliation by a state actor for the exercise of a constitutional right is actionable under 42 U.S.C. § 1983. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84 (1977). "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 correctional goal." Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted).

Here, plaintiff has failed to demonstrate a genuine dispute of material fact that Caplan took some adverse action against him. An adverse action is action that "would chill a person of ordinary firmness" from engaging in that activity. Pinard v. Clatskanie School Dist., 467 F.3d 755, 770 (9th Cir. 2006). In the prison context, the action taken must be clearly adverse to the plaintiff. See e.g., Rhodes, 408 F.3d at 568 (noting that arbitrary confiscation and destruction of

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[4] Even assuming that plaintiff's other allegations of retaliation by Caplan have been properly exhausted, the allegations are wholly conclusory and unsupported. Plaintiff claims that Caplan "continued to harass me and retaliate against me, constant "cell searchs" [sic] and moving my non-smoking cell-mates simply because I filed and excersized [sic] first amendment right to file a prison grievance C/O Caplan violated my First Amendment right by retaliating against me . . . " (Dkt. No. 71 at 7.) Conclusory claims are not sufficient to demonstrate a disputed issue of triable fact.

property, initiation of a prison transfer, and assault in retaliation for filing grievances was sufficient to plead an adverse action); Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995) (re-affirming that an allegation of retaliatory prison transfer and double-cell status sufficiently states a claim of retaliation). Caplan states that a CDC 128-B chrono is an "informational custodial counseling memoranda" that is "used to document an inmate's actions or behavior" and that his only purpose for writing the chrono was for informational purposes only. (Decl. Caplan at ¶¶ 6, 8 and Ex. A.) Caplan adds, "The 128-B has no disciplinary consequences to the inmate. However if inmate receives multiple 128-Bs, showing a pattern of disruptive behavior, the 128-Bs could be used later in a disciplinary process. The inmate does not lose credits because of an informational 128-B." (Id. at ¶ 7.) Plaintiff has failed to proffer any evidence to explain why the CDC 128-B chrono was an adverse action against him. See e.g., Williams v. Woodford, 2009 WL 3823916, *3 (E.D. Cal. 2009) ("the alleged filing of the false administrative chrono fails to state a claim because it is not a sufficient adverse action for a retaliation claim because the chrono was merely informational"); Samano v. Copeland, 2008 WL 2168884, *2 (E.D. Cal. 2008) (dismissing retaliation claim for failure to state a claim because issuing a counseling chrono did not constitute an adverse action). Thus, there is no genuine issue of material fact that Caplan's CDC 128-B was not an adverse action against plaintiff sufficient to establish the first element of retaliation.

With respect to the second element of retaliation, plaintiff must show a causal connection between a defendant's retaliatory animus and subsequent injury in any sort of retaliation action. Hartman v. Moore, 547 U.S. 250, 259 (2006). The requisite causation must be but-for causation, without which the adverse action would not have been taken; upon a prima facie case of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of. Id. at 260. If there is a finding that retaliation was not the but-for cause of the action complained of, the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind. Id.

Here, plaintiff has not demonstrated a genuine issue of material fact regarding whether Caplan acted "because of" plaintiff's protected conduct. In order to create an issue of material fact on retaliatory motive in the First Amendment context, a plaintiff must establish "in addition to evidence that the defendant knew of the protected speech, at least (1) evidence of proximity in time between the protected speech and the allegedly retaliatory decision; (2) evidence that the defendant expressed opposition to the speech; or (3) evidence that the defendant's proferred reason for the adverse action was pretextual." Corales v. Bennett, 567 F.3d 554, 568 (9th Cir. 2009) (internal citation and emphasis omitted).

Drawing all reasonable inferences from the facts before the court in favor of the plaintiff, plaintiff has failed to demonstrate any causal connection between Caplan's allegedly retaliatory conduct and his filing of plaintiff's inmate grievance(s). See Pratt, 65 F.3d at 807. Nor has plaintiff submitted any evidence showing that his filing of grievances was a "substantial" or "motivating" factor in the Caplan's alleged actions. See Hines v. Gomez, 108 F.3d 265, 267-68 (9th Cir. 1997). Plaintiff assumes that because he filed inmate grievances against Caplan, Caplan must have acted in retaliation when he created the CDC 128-B chrono. However, plaintiff has not submitted any evidence that Caplan even knew that plaintiff filed any grievance against Caplan prior to his creation of the CDC 128-B chrono. See Corales, 576 F.3d at 568.

Further, plaintiff has not provided, and the court cannot discover, the grievance that allegedly sparked Caplan's retaliation. Plaintiff submitted one grievance, filed the day before Caplan filed his CDC 128-B chrono. (TAC, Ex. O.) However, that grievance did not mention Caplan at all. In the grievance, plaintiff complained that because he was continuously being housed with smokers, he was being exposed to high levels of second hand smoke. (Id.) The only grievances that plaintiff submitted which were filed against Caplan were both filed after Caplan authored his CDC 128-B chrono and, therefore, could not have been the impetus for any retaliatory action. (TAC, Exs. A-1, A-2.) Accordingly, plaintiff has tendered no evidence of a retaliatory motive.

Because plaintiff cannot demonstrate a genuine issue of material fact as to the first two

elements of retaliation, see Rhodes, 408 F.3d at 567-68, it is unnecessary to discuss the remaining elements. For the foregoing reasons, plaintiff's argument is insufficient to preclude summary judgment. Viewing the facts in the light most favorable to plaintiff, the evidence does not demonstrate that Caplan retaliated against plaintiff for filing grievances against him, in violation of plaintiff's First Amendment right. Accordingly, the court GRANTS defendant's motion for summary judgment.

CONCLUSION

Defendant's motion for summary judgment is GRANTED. The Clerk shall terminate all pending motions, enter judgment, and close the file.

IT IS SO ORDERED.

DATED: 9/16/10

Ronald M. Whyte
RONALD M. WHYTE
United States District Judge