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NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT LEE ROBINS, JR.,)	No. C 03-0797 JF (PR)
)	
Plaintiff,)	ORDER GRANTING IN PART AND
)	DENYING IN PART DEFENDANTS'
v.)	MOTION TO DISMISS; REFERRING
)	CASE TO PRO SE PRISONER
A.A. LAMARQUE, et al.,)	SETTLEMENT PROGRAM;
)	STAYING CASE
Defendants.)	
_____)	(Docket No. 30)

Plaintiff, a California prisoner proceeding pro se, filed the instant civil rights action pursuant to 42 U.S.C. § 1983. Defendants have filed a motion to dismiss pursuant to Rules 12(b) and 12(b)(6) of the Federal Rules of Civil Procedure. See U.S.C. § 1997e(a). Although granted an opportunity to do so, Plaintiff has not filed an opposition. For the reasons described below, the motion to dismiss is granted in part and denied in part. The Court finds the surviving claims to be suitable for settlement proceedings, and refers the case to the Pro Se Prisoner Settlement Program.

BACKGROUND

Plaintiff alleges that on March 6, 2002, he was sexually harassed by a female prison guard, Defendant Sergeant Peralez, during a strip search. Plaintiff also alleges that on March 23, 2002, Defendants retaliated against him for submitting an administrative

1 grievance complaining of the harassment by assaulting him with pepper-spray and
2 explosive grenades during a cell extraction of Plaintiff's cellmate. Plaintiff further
3 alleges that Defendants further retaliated against him by denying him adequate cleaning
4 products to wash pepper-spray from him and placing him in administrative segregation
5 for an extended period of time. In addition, Plaintiff claims that Defendants did not
6 provide him with all the procedural protections required by due process before placing
7 him in administrative segregation. Finally, Plaintiff alleges that Defendants prevented
8 him from practicing his Muslim faith.

9 After reviewing the complaint pursuant to 28 U.S.C. § 1915A, the Court found
10 that, when liberally construed, Plaintiff's allegations state the following cognizable
11 claims: (1) Defendants violated his Fourth Amendment rights when Sergeant Peralez
12 sexually harassed Plaintiff and other male inmates during a strip search on March 6,
13 2002; (2) Defendants subjected Plaintiff to excessive force and acted maliciously and
14 sadistically to cause Plaintiff harm in violation of the Eighth Amendment when
15 Defendants threw explosive grenades into Plaintiff's cell and sprayed him with excessive
16 amounts of chemicals on March 23, 2002; (3) Defendants were deliberately indifferent to
17 Plaintiff's safety and medical needs after the March 23, 2002 incident in violation of the
18 Eighth Amendment; (4) Defendants actions set forth above and Defendants' placing
19 Plaintiff in administrative segregation were in retaliation for his exercise of his First
20 Amendment right to filing administrative grievances; (5) Defendants subjected Plaintiff to
21 unsanitary conditions in administrative segregation in violation of the Eighth
22 Amendment; (6) Defendant's actions in placing Plaintiff in administrative segregation
23 violated his right to due process under the Fourteenth Amendment; and (7) Defendants'
24 actions violated The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42
25 U.S.C. § 2000cc-1, in preventing Plaintiff from practicing his Muslim faith. The Court
26 dismissed Plaintiff's remaining claims for failure to state a cognizable grounds for relief.

27 Defendants make the following arguments in their motion to dismiss: (1) Plaintiff
28 has failed to exhaust his fifth, sixth, seventh and a portion of his fourth claims, as

1 described above; (2) Plaintiff has failed to adequately allege liability of three
2 supervisory Defendants; (3) Defendants are entitled to qualified immunity; and (4)
3 Plaintiff is not entitled to punitive damages.¹

4 DISCUSSION

5 A. Exhaustion

6 1. Standard of Review

7 Nonexhaustion under 42 U.S.C. § 1997e(a) is an affirmative defense; defendants
8 have the burden of raising and proving the absence of exhaustion. Wyatt v. Terhune, 315
9 F.3d 1108, 1119 (9th Cir. 2003). A nonexhaustion claim should be raised in an
10 unenumerated Rule 12(b) motion rather than in a motion for summary judgment. Id. In
11 deciding a motion to dismiss for failure to exhaust nonjudicial remedies, the court may
12 look beyond the pleadings and decide disputed issues of fact. Id. at 1119-20.² If the court
13 concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is
14 dismissal without prejudice. Id. at 1120.

15 2. Exhaustion Requirement

16 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321
17 (1996) (“PLRA”), amended 42 U.S.C. § 1997e to provide that “[n]o action shall be
18 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal
19 law, by a prisoner confined in any jail, prison, or other correctional facility until such
20 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The
21 exhaustion requirement applies equally to prisoners held in private or government
22 facilities. See Roles v. Maddox, 439 F.3d 1016, 1017-18 (9th Cir. 2006). Exhaustion is
23 mandatory and no longer left to the discretion of the district court. Woodford v. Ngo,

24
25 ¹Because the Court concludes, below, that the seventh (RLUIPA) claim must be
26 dismissed for failure to exhaust, the Court does not reach Defendants’ alternative argument that
the claim should be dismissed for failure to state a cognizable claim for relief.

27 ² If the court looks beyond the pleadings in deciding an unenumerated motion to dismiss
28 for failure to exhaust -- a procedure closely analogous to summary judgment -- the court must
give the prisoner fair notice of his opportunity to develop a record. Wyatt, 315 F.3d at 1120
n.14. Plaintiff was given such notice in the order of service.

1 126 S. Ct. 2378, 2382 (2006) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)).
2 “Prisoners must now exhaust all ‘available’ remedies, not just those that meet federal
3 standards.” Id. Even when the relief sought cannot be granted by the administrative
4 process, *i.e.*, monetary damages, a prisoner must still exhaust administrative remedies. Id.
5 at 2382-83 (citing Booth, 532 U.S. at 734).

6 Administrative remedies are not exhausted where the grievance, liberally
7 construed, does not have the same subject and same request for relief. See O’Guinn v.
8 Lovelock Correctional Center, 502 F.3d 1056, 1062-63 (9th Cir. 2007) (even with liberal
9 construction, grievance requesting a lower bunk due to poor balance resulting from a
10 previous brain injury was not equivalent to, and therefore did not exhaust administrative
11 remedies for, claims of denial of mental health treatment in violation of the ADA and
12 Rehabilitation Act).

13 The State of California provides its inmates and parolees the right to appeal
14 administratively “any departmental decision, action, condition, or policy which they can
15 demonstrate as having an adverse effect upon their welfare.” Cal. Code Regs. tit. 15,
16 § 3084.1(a). It also provides its inmates the right to file administrative appeals alleging
17 misconduct by correctional officers. See id. § 3084.1(e). In order to exhaust available
18 administrative remedies within this system, a prisoner must proceed through several
19 levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate
20 appeal form, (3) second level appeal to the institution head or designee, and (4) third level
21 appeal to the Director of the California Department of Corrections and Rehabilitation. Id.
22 § 3084.5; Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). This satisfies the
23 administrative remedies exhaustion requirement under § 1997e(a). Id. at 1237-38. A
24 prisoner need not proceed further and also exhaust state judicial remedies. Jenkins v.
25 Morton, 148 F.3d 257, 259-60 (3d Cir. 1998).

26 3. Analysis

27 Defendants argue that Plaintiff has failed to exhaust the following claims for relief:
28 (1) the portion of his retaliation claim that alleges that Defendants placed him in

1 administrative segregation in retaliation for filing a prison grievance;³ (2) Defendants
2 subjected Plaintiff to unsanitary conditions in administrative segregation; (3) Defendants'
3 placed him in administrative segregation without due process; and (4) Defendants'
4 violated RLUIPA by preventing Plaintiff from practicing his Muslim faith.

5 Plaintiff's complaint alleges that he exhausted his claims in three administrative
6 grievances, numbered SVSP-02-01145, SVSP-02-01371, and SVSP-02-02218.⁴
7 Defendants do not argue that Plaintiff failed to exhaust SVSP-02-01145 and SVSP-02-
8 01371. Those grievances did not raise Plaintiff's administrative segregation and RLUIPA
9 claims, however, and consequently do not exhaust such claims. See O'Guinn, 502 F.3d at
10 1062-63. The administrative segregation claims were raised only in SVSP-02-02218.
11 Defendants have submitted the Declaration of E. Medina, an Appeals Coordinator at
12 SVSP, indicating that SVSP-02-02218 was never presented to the Director's level of
13 review (Medina Decl., Ex. A at AG-003), and Plaintiff has no offered no evidence to the
14 contrary. As there is uncontradicted evidence that Plaintiff never presented this grievance
15 to the final level of administrative review, Plaintiff's administrative segregation claims
16 raised therein have not been exhausted. The evidence is also uncontradicted that Plaintiff
17 RLUIPA claim was not raised in any of the grievances, SVSP-02-01145, SVSP-02-
18 01371, or SVSP-02-02218. (Id. Ex. B at AG-001.) Consequently, Plaintiff's RLUIPA
19 claim is also unexhausted.

20 Plaintiff has failed to present to the highest available level of administrative review
21 his claims that Defendants placed him in administrative segregation in retaliation for
22 filing grievances, that such placement violated his right to due process, that he was
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24 ³Defendants do not argue that Plaintiff has failed to exhaust the other half of his
25 retaliation claim, namely that the March 23, 2002 incident was retaliation for Plaintiff's filing of
26 grievances.

27 ⁴Plaintiff does not assert that he filed any other administrative grievances. To the extent
28 he may have since filed any further grievances since the filing of this action, such grievances
would not satisfy the exhaustion requirement, which requires Plaintiff to exhaust his
administrative remedies *before* filing suit. McKinney v. Carey, 311 F.3d 1198, 1199 (9th
Cir. 2002).

1 exposed to unsanitary conditions in administrative segregation, and that Defendants
2 violated his rights under RLUIPA. Consequently, these claims must be dismissed for
3 failure to exhaust all available administrative remedies.

4 B. Failure to State a Claim Upon Which Relief May Be Granted

5 1. Standard of Review

6 A case should be dismissed under Rule 12(b)(6) if it fails to state a claim upon
7 which relief can be granted. Parks School of Business, Inc., v. Symington, 51 F.3d 1480,
8 1483 (9th Cir. 1995). Dismissal for failure to state a claim is a ruling on a question of
9 law. Id. "The issue is not whether plaintiff will ultimately prevail, but whether he is
10 entitled to offer evidence to support his claim." Usher v. City of Los Angeles, 828 F.2d
11 556, 561 (9th Cir. 1987). "While a complaint attacked by a Rule 12(b)(6) motion to
12 dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide
13 the 'grounds of his 'entitle[ment] to relief' requires more than labels and conclusions, and
14 a formulaic recitation of the elements of a cause of action will not do. . . . Factual
15 allegations must be enough to raise a right to relief above the speculative level." Bell
16 Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A
17 motion to dismiss should be granted if the complaint does not proffer "enough facts to
18 state a claim for relief that is plausible on its face." Id. at 1974. A pro se pleading must
19 be liberally construed, and "however inartfully pleaded, must be held to less stringent
20 standards than formal pleadings drafted by lawyers." Id.

21 Review is limited to the contents of the complaint, Clegg v. Cult Awareness
22 Network, 18 F.3d 752, 754-55 (9th Cir. 1994), including documents physically attached
23 to the complaint or documents the complaint necessarily relies on and whose authenticity
24 is not contested. Lee v. County of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001).
25 Allegations of fact in the complaint must be taken as true and construed in the light most
26 favorable to the non-moving party. Symington, 51 F.3d at 1484. "Conclusory allegations
27 without more are insufficient to defeat a motion to dismiss for failure to state a claim."
28 McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988).

1 2. Supervisor Defendants

2 Defendants argue that Plaintiff's allegations fail to establish the liability of three
3 supervisor Defendants: Warden Lamarque, Chief Deputy Warden Calderon, and Captain
4 Allison. Liability may be imposed on an individual defendant under § 1983 only if the
5 Plaintiff can show that the Defendant proximately caused the deprivation of a federally
6 protected right. See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988). A supervisor
7 may be liable under section 1983 upon a showing of (1) personal involvement in the
8 constitutional deprivation or (2) a sufficient causal connection between the supervisor's
9 wrongful conduct and the constitutional violation. Redman v. County of San Diego, 942
10 F.2d 1435, 1446 (9th Cir. 1991) (en banc). A supervisor therefore generally "is only
11 liable for constitutional violations of his subordinates if the supervisor participated in or
12 directed the violations, or knew of the violations and failed to act to prevent them."
13 Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Under no circumstances is there
14 respondeat superior liability under section 1983. Id.

15 Plaintiff simply includes Lamarque in a long list of Defendants, but the complaint
16 does not allege any specific conduct by him, let that he was personally involved in, or
17 caused, any of the alleged constitutional violations. With respect to Defendants Calderon
18 and Allison, Plaintiff simply alleges that they ordered the March 6, 2002, strip search of
19 him and other inmates. Plaintiff claims that Defendant Peralez sexually harassed him
20 during that search, but he does not allege that the search itself was unlawful. Plaintiff
21 also does not allege that Calderon and Allison ordered Peralez to sexually harass him
22 during the search, or that they knew or had any reason to know that she would do so.
23 Consequently, Plaintiff's allegations, even liberally construing them in Plaintiff's favor
24 and assuming them to be true, do not establish that Calderon or Allison were personally
25 involved in the alleged constitutional violations, or that their conduct as supervisors in
26 ordering the search proximately caused the alleged sexual harassment by Peralez.
27 Accordingly, Plaintiff's claims against Defendants Lamarque, Allison and Calderon will
28 be dismissed for failure to state a cognizable claim for relief.

1 3. Qualified Immunity

2 Defendants also make a cursory argument that they are entitled to qualified
3 immunity on Plaintiff’s surviving claims. The threshold question is whether, taken in the
4 light most favorable to the party asserting the injury, the facts alleged show the officer's
5 conduct violated a constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001). If a
6 violation could be made out on the allegations, the next sequential step is to ask whether
7 it would be clear to a reasonable officer that his conduct was unlawful in the situation he
8 confronted. Id. at 202. If the law did not put the officer on notice that his conduct would
9 be clearly unlawful, qualified immunity is appropriate. Id.

10 Liberally construing all of the allegations as true and viewing them in a light most
11 favorable to Plaintiff, as the Court must do at this stage, Plaintiff’s allegations of sexual
12 harassment, excessive force, deliberate indifference to safety and medical needs, and
13 retaliation plainly amount to violations of his constitutional rights. The Court has already
14 made such a determination in the order of service, and Defendants do not offer any
15 authority to the contrary. Defendants simply argue that there is no constitutional violation
16 because they have “investigated Plaintiff’s alleged issues and addressed Plaintiff’s
17 assertions.” (Mot. To Dismiss at 17.) Defendants’ investigation into Plaintiff’s claims
18 after the alleged events plainly does not preclude their having violated his constitutional
19 rights during the course of the events themselves. Defendants also do not describe in any
20 way how they have “addressed” Plaintiff’s claims.

21 Defendants argue, also in conclusory fashion, that they “reasonably believed” at
22 the time that their conduct was lawful. (Id.) Defendants provide no authority to support
23 the proposition that they could reasonably believe that sexual harassment of inmates was
24 permissible, or that it was lawful to apply excessive pepper-spray on an inmate, throw
25 explosive grenades into his cell because his cellmate was uncooperative, fail to provide
26 him with materials for cleaning up the chemicals afterwards, and do all of this to retaliate
27 against Plaintiff for filing grievances against him. Defendants could not reasonably have
28 held such beliefs at the time of the alleged incidents in 2002. See e.g. Hudson v.

1 McMillian, 503 U.S. 1, 6 (1992) (excessive force against prisoners violates the Eighth
2 Amendment); Frost v. Agnos, 152 F.3d 1124, 1128-29 (9th Cir. 1998) (Eighth
3 Amendment prohibits deliberate indifference to unsafe conditions in prison); Schroeder v.
4 McDonald, 55 F.3d 454, 461 (9th Cir. 1995) (prisoners may not be retaliated against for
5 exercising their right of access to the courts); Bradley v. Hall, 64 F.3d 1276, 1279 (9th
6 Cir. 1995) (right of access to courts extends to filing of grievances); Jordan v. Gardner,
7 986 F.2d 1521, 1525-31 (9th Cir. 1993) (en banc) (sexual harassment of male inmate by
8 female guard during strip search amounts to Eighth Amendment violation).

9 Accordingly, Defendants' motion to dismiss Plaintiff's claims on the basis of
10 qualified immunity is denied.

11 4. Punitive Damages

12 Defendants make a conclusory argument that Plaintiff has failed to sufficiently
13 allege a basis for punitive damages. Punitive damages may only be awarded against
14 Defendants if Plaintiff establishes that they had an evil motive or intent, or that their
15 actions involved a reckless or callous indifference to Plaintiff's constitutional rights. See
16 Dang v. Cross, 422 F.3d 800, 807 (9th Cir. 2005). The Court has already found in its
17 order of service that Plaintiff's allegations, when liberally construed, sufficiently allege
18 that Defendants' actions involved a reckless or callous indifference to one or more of his
19 constitutional rights. Defendants submit no authority to undermine such a finding.
20 Accordingly, Defendants' motion to dismiss Plaintiff's punitive damages claim is denied.

21 C. Settlement Proceedings

22 The Northern District of California has established a Pro Se Prisoner Settlement
23 Program. Certain prisoner civil rights cases may be referred to a neutral magistrate judge
24 for prisoner settlement proceedings. The proceedings will consist of one or more
25 conferences as determined by Magistrate Judge Nandor Vadas.

26 The claims that have survived Defendants' motion to dismiss, and now remain in
27 this action are: (1) Defendants violated his Fourth Amendment rights when Sergeant
28 Peralez sexually harassed Plaintiff; (2) Defendants subjected Plaintiff to excessive force

1 and acted maliciously and sadistically to cause Plaintiff harm in violation of the Eighth
2 Amendment; (3) Defendants were deliberately indifferent to Plaintiff's safety and medical
3 needs in violation of the Eighth Amendment; (4) Defendants actions set forth above were
4 retaliation for his exercise of his First Amendment rights. The court finds good cause to
5 refer this matter to Magistrate Judge Vadas pursuant to the Pro Se Prisoner Settlement
6 Program for settlement proceedings on these surviving claims.

7 CONCLUSION

8 1. For the foregoing reasons, Defendants' motion to dismiss (Docket No. 30)
9 is GRANTED IN PART AND DENIED IN PART. The following claims are
10 DISMISSED without prejudice to refile after Plaintiff has exhausted them through all
11 available administrative remedies: (1) Defendants retaliated against for his exercise of his
12 First Amendment right to filing prison grievances by placing him in administrative
13 segregation; (2) Defendants subjected Plaintiff to unsanitary conditions in administrative
14 segregation in violation of the Eighth Amendment; (3) Defendants violated Plaintiff's
15 right to due process by placing him in administrative segregation; and (4) Defendants
16 violated Plaintiff's rights under RLUIPA.

17 2. All of Plaintiff's claims against Defendants Lamarque, Allison and
18 Calderon are DISMISSED for failure to state a cognizable claim for relief.

19 3. The instant case is REFERRED to Magistrate Judge Vadas pursuant to the
20 Pro Se Prisoner Settlement Program for settlement proceedings on the remaining claims
21 in this action, as described above. The proceedings shall take place **within ninety (90)**
22 **days** of the date of this order. Magistrate Judge Vadas shall coordinate a time and date
23 for a settlement conference with all interested parties or their representatives and, **within**
24 **ten (10) days** after the conclusion of the settlement proceedings, file with the court a
25 report regarding the prisoner settlement proceedings

26 4. The clerk of court shall mail a copy of the court file, including a copy of
27 this order, to Magistrate Judge Vadas in Eureka, California.

28 5. The instant case is STAYED pending the settlement conference

1 proceedings.

2 6. It is plaintiff's responsibility to prosecute this case. All communications by
3 the plaintiff with the court must be served on defendants, or defendants' counsel once
4 counsel has been designated, by mailing a true copy of the document to defendant or
5 defendants' counsel. Plaintiff must keep the court and the parties informed of any change
6 of address and must comply with the court's orders in a timely fashion. Failure to do so
7 may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule
8 of Civil Procedure 41(b).

9 This order terminates Docket No. 30.

10 IT IS SO ORDERED.

11 DATED: 8/22/08


12 JEREMY FOGEL
United States District Judge

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