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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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|-----------------------------|---|---------------------------------------|
| BOBBY JOE DANIELS, |) | Civil No. 05-CV-922-L(NLS) |
| |) | |
| Plaintiff, |) | ORDER ADOPTING REPORT AND |
| |) | RECOMMENDATION; OVERRULING |
| v. |) | OBJECTIONS; GRANTING MOTION |
| |) | TO DISMISS SECOND AMENDED |
| KUZIL RUAN, <i>et al.</i> , |) | COMPLAINT [doc. #]; DIRECTING |
| |) | ENTRY OF JUDGMENT |
| Defendants. |) | |
| |) | |

On April 29, 2005, Bobby Joe Daniels ("plaintiff"), a state prisoner proceeding *pro se*, filed this action alleging violation of his constitutional rights under 42 U.S.C. § 1983. After the Court granted defendants' motion for judgment on the pleadings [doc. #69], plaintiff filed a First Amended Complaint ("FAC"). Defendants filed a motion to dismiss the FAC that the magistrate judge recommended be granted along with leave to amend as to plaintiff's first amendment retaliation claim and his eighth amendment failure to protect claim only. The Court adopted the Report.

Plaintiff then filed a Second Amended Complaint ("SAC") that defendants move to dismiss. The magistrate judge filed a Report with respect to the SAC that recommends dismissal

1 of plaintiff's claims¹ with prejudice and without leave to amend.

2 The district court's role in reviewing a Magistrate Judge's report and recommendation is
3 set forth in 28 U.S.C. § 636(b)(1). Under this statute, "the district judge must review the
4 magistrate judge's findings and recommendations de novo *if objection is made*, but not
5 otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.) (*en banc*), *cert.*
6 *denied*, 124 S. Ct. 238 (2003).

7 **First Amendment Retaliation Claim**

8 As noted in the Report, plaintiff asserts that he was subjected to retaliation in the form of
9 a transfer from Calipatria State Prison to Tehachapi prison's segregated housing unit. The
10 retaliation allegedly was in response to plaintiff's attempt to exercise his right to an appeal of a
11 disciplinary hearing.

12 A stabbing incident occurred at Calipatria State Prison on August 17, 2003. Plaintiff was
13 suspected of involvement in the stabbing and a contraband weapon was found in plaintiff's
14 toilet. He was transferred to administrative segregation during the investigation. A disciplinary
15 hearing was conducted and plaintiff was found guilty of possession of an inmate-manufactured
16 weapon. He was given a 15-month term in a segregated housing unit at6 Tehachapi.

17 Within the prison context, a viable claim of First Amendment retaliation entails five basic
18 elements: (1) An assertion that a state actor took some adverse action against an inmate (2)
19 because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
20 exercise of his First Amendment rights, and (5) the action did not reasonably advance a
21 legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)(citing
22 *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000)).

23 As both the defendants and the magistrate judge noted, plaintiff has failed to allege that
24 his First Amendment rights were chilled. Indeed, plaintiff filed administrative grievances and
25 has litigated this action vigorously with respect to his transfer to segregated housing.

26
27 ¹ In the SAC, plaintiff re-alleges a due process violation that was dismissed with
28 prejudiced previously. Accordingly, the Court does not address any due process violations in
this Order.

1 Further, plaintiff has not objected to his transfer as being a legitimate correctional goal
2 under the factual situation here. Although plaintiff disagrees that he was involved in the
3 underlying actions that resulted in his transfer, he does not argue that prison officials permit the
4 transfer of prisoners to more restrictive housing conditions when wrongful activities on the part
5 of inmates are shown after a hearing on the activities has taken place. Plaintiff was found guilty
6 of possessing an inmate-manufactured weapon. Therefore, plaintiff's transfer was made as a
7 legitimate penological goal.

8 Because plaintiff cannot allege a First Amendment retaliation claim, this claim will be
9 dismissed with prejudice and without leave to further amend the complaint.

10 **2. Eighth Amendment failure to protect**

11 Plaintiff alleges his transfer to segregated housing placed him in danger because that
12 particular housing unit at Tehachapi also housed three of plaintiff's documented enemies.

13 As the magistrate judgment correctly noted, "[p]rison officials have a duty . . . to protect
14 prisoners from violence.'" *Farmer v. Brennan*, 114 S. Ct. 1970, 1976-77 (1994) (quoting
15 *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir.)), *cert. denied*, 488 U.S. 823
16 (1988); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th
17 Cir. 1986). "[A] prison official cannot be found liable under the Eighth Amendment for denying
18 an inmate humane conditions of confinement unless the official knows of and disregards an
19 excessive risk to inmate health or safety; the official must be both aware of the facts from which
20 the inference could be drawn that a substantial risk of serious harm exists, and he must also draw
21 the inference." *Id.* at 1979; *Wilson*, 501 U.S. at 302-303.

22 Thus, a prisoner can state a section 1983 claim against prison personnel under the Eighth
23 Amendment by establishing that the prison personnel acted with "deliberate indifference" in
24 creating the condition that violates the Eighth Amendment. *See Leer*, 844 F.2d at 633; *Berg*, 794
25 F.2d at 459. The "deliberate indifference" standard requires proving some degree of "individual
26 culpability," but does not require proof of an express intent to punish. *Id.*, citing *Haygood*, 769
27 F.2d at 1354-55.

28 In his objections plaintiff contends that the magistrate judge is biased and has turned a

1 blind eye to his claim that he was in danger with his transfer to Tehachapi. But plaintiff fails to
2 allege any facts that call into question the level of protection that he was provided during his
3 incarceration at Tehachapi. It is undisputed that he suffered no injuries or assaults while in the
4 segregated housing unit.

5 Moreover, plaintiff has not set forth any facts to show that the named defendants acted
6 with deliberate indifference to his safety. Although plaintiff contends that defendants knew of
7 the three enemies plaintiff had at Tehachapi, plaintiff makes no allegation that defendants placed
8 plaintiff with his enemies or that defendants acted to place him in danger. Plaintiff does not
9 assert a causal connection between the alleged danger to plaintiff's safety and defendants'
10 actions in transferring plaintiff to a segregated housing unit.


11 Plaintiff's objections are overruled. Plaintiff has been given two opportunities to allege
12 facts that show an Eighth Amendment violation on failure to protect plaintiff. Further
13 amendment would be futile. Accordingly, the Court adopts the Report and dismisses with
14 prejudice plaintiff's Eighth Amendment claim without leave to amend.

15 **Conclusion**

16 Having carefully reviewed *de novo* the Report, the motion papers, and plaintiff's
17 objections, the Court finds that the magistrate judge has submitted a thorough and well-reasoned
18 analysis of plaintiff's claims and the law as it is applied to a motion to dismiss. Plaintiff's
19 objections do not provide any basis for denying defendants' motion. Based on the foregoing,
20 the Report and Recommendation is **ADOPTED** in its entirety [doc. #134]; plaintiff's objections
21 to the Report are **OVERRULED** [doc. #135]; defendants' motion to dismiss the second
22 amended complaint is **GRANTED** with prejudice [doc. #131]. The Clerk of the Court is
23 directed to enter judgment in accordance with this Order.

24 **IT IS SO ORDERED.**

25 DATED: September 2, 2008

26 
27 M. James Lorenz
28 United States District Court Judge

1 COPY TO:

2 HON. NITA L. STORMES
3 UNITED STATES MAGISTRATE JUDGE

4 ALL PARTIES/COUNSEL

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