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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CHESTER RAY WISEMAN,  
  
vs.  
  
ROBERT J. HERNANDEZ, Warden; et al.,  
  
Plaintiff,  
  
Defendant.

CASE NO. 08cv1272-LAB (NLS)  
**ORDER ADOPTING REPORT  
AND RECOMMENDATION**

**I. Introduction**

Plaintiff Chester Ray Wiseman is a California prisoner currently incarcerated at Pleasant Valley State Prison in Coalinga, CA. The defendants are prison officials at R.J. Donovan Correctional Facility in San Diego, CA (where Wiseman was previously incarcerated), officials with the California Department of Corrections and Rehabilitation, and the Department of Corrections itself. Wiseman alleges that his constitutional rights were violated when he was denied access to the law library and deprived of outdoor exercise while incarcerated at R.J. Donovan.

The Court **ADOPTS** the R&R almost in its entirety. The only point of departure is that the Court does not believe amendment is justified with respect to certain defendants and claims.

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1 **II. Procedural History**

2 Wiseman filed this lawsuit on July 14, 2008, and pursuant to 28 U.S.C. § 636(b) and  
3 Civil Local Rules 72.1(c) and (d) it was referred to Magistrate Judge Nita Stormes for a  
4 Report and Recommendation (“R&R”). On March 11, 2009, Wiseman filed a second  
5 amended complaint. The defendants filed a motion to dismiss two weeks later, on March  
6 25, 2009. Judge Stormes issued her R&R on November 24, 2009, recommending that the  
7 motion to dismiss be granted in part and denied in part. Wiseman filed an objection on  
8 December 10, 2009. The defendants did not file an objection.

9 **III. Legal Standards**

10 This Court has jurisdiction to review the R&R pursuant to Rule 72 of the Federal Rules  
11 of Civil Procedure. “The district judge must determine de novo any part of the magistrate  
12 judge’s disposition that has been properly objected to. The district court may accept, reject,  
13 or modify the recommended disposition; receive further evidence; or return the matter to the  
14 magistrate judge with instructions.” Fed. R. Civ. P. 72(b)(3). The district judge “must  
15 review the magistrate judge’s findings and recommendations de novo *if objection is made*,  
16 but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en  
17 banc).

18 Because Wiseman is a prisoner and is proceeding pro se, the Court construes his  
19 pleadings liberally and affords him the benefit of any doubt. See *Karim-Panahi v. L.A. Police*  
20 *Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988). That said, “[p]ro se litigants must follow the same  
21 rules of procedure that govern other litigants.” *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.  
22 1987).

23 **IV. Wiseman’s Claims**

24 Wiseman divides his claims into three “counts.” The first alleges he was “denied,  
25 prevented, delayed, and deprived of his rights to due process, access to a law library, legal  
26 assistance, access to the courts, equal protection under the laws, and subjected to cruel and  
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1 unusual punishment.” (Compl. at 3(a).<sup>1</sup>) At root, this claim concerns three pending cases  
2 in state and federal court that Wiseman alleges he could not litigate because he was denied  
3 library access and basic legal assistance. On the Court’s reading, this claim is only directed  
4 at defendants Hernandez, Garcia, Contreras, Marrero, Clardy, Van Cleave, Peterson, and  
5 presumably Sterling.<sup>2</sup> (See Compl. at 3(b)–(f).)

6 The second claim, very similar to the first, alleges that Wiseman “was denied,  
7 prevented, delayed, deprived of his rights to due process, access to his legal property,  
8 access to a law library, access to legal assistance, access to the courts, equal protection  
9 under the laws and subjected to undue cruel and unusual punishment.” (Compl. at 4(a).)  
10 The section of Wiseman’s complaint devoted to his second claim is lengthy and reads as a  
11 running commentary of grievances, but the core grievance appears to be that his legal  
12 property (presumably papers and research relating to his pending cases) was taken from  
13 him, stored, and never properly returned when he was placed in administrative segregation.  
14 Unlike his first claim, which names the specific defendants at whom the claim is directed, the  
15 second claim only references certain defendants in its running commentary: Hernandez,  
16 Morris, Warren, Van Cleave, Sterling, Cobb, and McBride.

17 Wiseman’s third claim alleges that when he was housed in administrative segregation,  
18 for a period of six months, he was deprived of outdoor exercise. The third claim, like the  
19 second, does not explicitly name the defendants at whom it is directed, but in the  
20 accompanying statement of facts Wiseman names Hernandez, Garcia, Morris, McBride,  
21 Hubbard, and Moore.

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25 <sup>1</sup> The Court will use the same pagination scheme as the R&R in referring to  
26 Wiseman’s complaint.

27 <sup>2</sup> It may be that a page is missing from Wiseman’s complaint that names Morris and  
28 Warren under count one. The section devoted to count one names the defendants in  
sequential order and from page 3(d) to page 3(e) skips from Marrero to Clardy. Sterling is  
only *presumably* implicated by count one because she isn’t directly named, but rather  
referenced in the supporting statement of facts.

1 **V. Defendants' Motion to Dismiss and the Report and Recommendation**

2 Defendants state six grounds upon which Wiseman's claims should be dismissed.  
3 The first two are grounds upon which certain defendants cannot be held liable in the first  
4 instance. The Department of Corrections, defendants argue, is absolutely immune under  
5 the Eleventh Amendment, and defendants Hernandez, Garcia, Contreras, Marrero, Clardy,  
6 Peterson, McBride, Moore and Hubbard cannot be held liable under a theory of respondeat  
7 superior. Defendants also argue that Wiseman has failed to exhaust his administrative  
8 remedies for his cruel and unusual punishment claim based upon his alleged deprivation of  
9 outdoor exercise. Finally, they argue that Wiseman has failed to state a claim for denial of  
10 access to the courts, denial of due process, and denial of equal protection.

11 The R&R mostly goes along with the motion to dismiss. It recommends dismissing  
12 Contreras, Marrero, Clardy, Hubbard, Moore, and Peterson, but not Hernandez, Garcia, or  
13 McBride. It also recommends dismissing Wiseman's cruel and unusual punishment claim,  
14 access to courts claim, due process claim, and equal protection claim, but without prejudice  
15 and with leave to amend.

16 **VI. Discussion**

17 **A. Liability of the California Department of Corrections**

18 The R&R concluded the California Department of Corrections is immune as a state  
19 agency under the Eleventh Amendment. This is right, and Wiseman did not object anyway.  
20 The defendants' motion to dismiss the Department as a party is therefore **GRANTED**.

21 **B. Supervisory Liability of Individual Defendants**

22 Wiseman's case against the individual defendants is a section 1983 action, and as  
23 a general rule there is no respondeat superior liability under the section. "[T]here must be  
24 a showing of personal participation in the alleged rights deprivation." *Jones v. Williams*, 297  
25 F.3d 930, 934 (9th Cir. 2002). This may include knowledge of the deprivation coupled with  
26 the failure to stop it, or even failing to train or supervise the personnel who are responsible  
27 for the deprivation. *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680  
28 (9th Cir. 1984).

1 The R&R recommends dismissing Contreras, Marrero, Clardy, Hubbard, Moore, and  
2 Peterson, but not Hernandez, Garcia, or McBride, on supervisory liability grounds.  
3 Defendants did not object to the R&R's conclusion with respect to Hernandez, Garcia, and  
4 McBride, and the Court agrees with the R&R that Wiseman's complaint alleges these  
5 individuals knew of the alleged deprivations and failed to prevent them. Therefore,  
6 Defendants' motion to dismiss this action as against Hernandez, Garcia, and McBride is  
7 **DENIED**.

8 Wiseman does not object to the R&R's conclusion with respect to Contreras, Marrero,  
9 Clardy, and Peterson, and defendants' motion to dismiss them from this case is therefore  
10 **GRANTED**, without leave to amend. Wiseman does object, on the other hand, to the R&R's  
11 conclusion with respect to Hubbard and Moore.

12 Wiseman's sole allegation against Hubbard in his complaint is that she "is responsible  
13 for policy making and did know or reasonably should have known of the unconstitutional  
14 prison condition which caused plaintiff to have to suffer undue cruel and unusual punishment  
15 for six months with no opportunity for any outdoor exercise yard as mandated." (Compl. at  
16 5.) By itself, this is insufficient to survive a motion to dismiss because, as the R&R observes,  
17 it is a "threadbare recital" of the standard for respondeat superior liability, and is simply too  
18 conclusory. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009). Defendants' motion to  
19 dismiss Hubbard is therefore **GRANTED**, but without prejudice and with leave to amend  
20 given that Wiseman alleges in his objection to the R&R that he "made defendant Hubbard  
21 aware of the denials of outdoor exercise yard at RJDCF with a letter and citizen's  
22 complaint . . . ." (Obj. to R&R at 2.)

23 **C . Exhaustion of Cruel and Unusual Punishment Claims**

24 The Prison Litigation Reform Act requires inmates to exhaust administrative remedies  
25 before filing suit. 42 U.S.C. § 1997e(a). This certainly applies to Wiseman's claim that he  
26 was deprived of outdoor exercise in violation of his Eighth Amendment rights. The R&R  
27 concludes, however, that "Defendants have shown by the best evidence available that  
28 Plaintiff did not pursue his grievance beyond the first level of appeal." (R&R at 18.) In other

1 words, Wiseman has not exhausted his Eighth Amendment claim. The Court agrees with  
2 this conclusion. Wiseman explains in his objection to the R&R that he attempted to exhaust  
3 the second level of review, but he cites to Exhibit C1 of his complaint, which relates to his  
4 grievance that he was denied access to the law library and to legal assistance.

5 Part of the problem here, as the R&R notes, is that Wiseman's complaint is 145  
6 pages long and not very well organized. The Court simply does not see in his many pages  
7 of exhibits the appeal he claims he has filed that would prove he has exhausted his cruel and  
8 unusual punishment claim. Without proof of that appeal, the Defendants' evidence that  
9 there was no appeal, based upon a thorough search of the Inmate Appeal Tracking System,  
10 is overwhelming. Defendants motion to dismiss Wiseman's cruel and unusual punishment  
11 claim is **GRANTED**, but the claim is **DISMISSED WITHOUT PREJUDICE AND WITH**  
12 **LEAVE TO AMEND**. The Court notes that in Wiseman's objection to the R&R he alleges  
13 that "his ability to exhaust administrative remedies was impaired more then [sic] once by  
14 state prison officials." (Obj. to R&R at 3.) The opportunity to amend his complaint will allow  
15 Wiseman to make that point in the first instance and direct the Court to the evidence that  
16 substantiates it.

17 **D. Access to Courts**

18 There is no doubt that inmates have a right of access to the courts under the First and  
19 Fourteenth Amendments to the Constitution. *Lewis v. Casey*, 518 U.S. 343, 346 (1996).  
20 The R&R makes very clear, though, that "[t]o state a claim for denial of access to the courts,  
21 Plaintiff must allege a specific actual injury involving a non-frivolous direct appeal, habeas  
22 corpus proceeding or section 1983 action." (R&R at 19.) It then explains, by a thorough  
23 review of Wiseman's complaint, where Wiseman has failed to make these necessary  
24 allegations, and the Court approves the R&R's analysis. In his objection to the R&R, it's  
25 worth adding, Wiseman just repeats in broad strokes that he has a constitutional right to  
26 access the courts and that inmates are entitled to assistance in preparing and filing legal  
27 papers, but he is utterly unresponsive to the specific deficiencies with his complaint  
28 highlighted by the R&R.

1           The motion to dismiss Wiseman’s access-to-courts claim is **GRANTED**, but  
2 **WITHOUT PREJUDICE AND WITH LEAVE TO AMEND**. The Court encourages Wiseman  
3 to go through the R&R and understand what he must plead in order state a claim that can  
4 survive a motion to dismiss. The Court recommends, if Wiseman chooses to amend his  
5 complaint, that he devote a small section to each case of his that he believes suffered on  
6 account of the defendants’ alleged misbehavior. Each section should explain why the case  
7 is not frivolous and how the defendants’ actions caused him to either lose the case or lose  
8 the ability to litigate it. The R&R’s survey of the relevant case law is thorough, and Wiseman  
9 is urged to familiarize himself with it before filing an amended complaint.

10           **E.     Due Process Claims**

11           Wiseman incorporates a due process claim into each of his three counts in his  
12 complaint. That is, he asserts that his due process rights were violated when he was  
13 allegedly denied library access and legal assistance, when his legal documents were  
14 allegedly taken from him and not returned, and when he was allegedly placed in segregated  
15 housing and denied outdoor exercise. It is far from clear, however, what factual allegations  
16 constitute the basis of Wiseman’s due process claim; it is obviously not enough to just allege  
17 a violation of due process up front and leave it to the defendants and the Court to discern  
18 the basis for the claim.

19           As best the Court can tell, Wiseman alleges a violation of his right to procedural due  
20 process when defendant Morris attempted to interview him about a complaint he filed against  
21 Morris regarding access to the law library; Wiseman insists the complaint necessitated a  
22 formal response from the higher ranking official to whom it was sent. (Compl. at 4(j)–(k).)  
23 Wiseman also alleges a violation of his due process rights when, as a result of not  
24 consenting to an interview by Morris, he was forced “to become double cell inmate status.”  
25 (Compl. at 4l.) Finally, in count three of his complaint, Wiseman accuses defendant Moore  
26 of violating his right to procedural due process “by responding to the formal citizen’s  
27 complaint with an informal letter response.” (Compl. at 5.)

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1           The R&R explains well that a procedural due process claim requires the deprivation  
2 of a liberty or property interest protected by the Constitution. See *Wright v. Riveland*, 219  
3 F.3d 905, 913 (9th Cir. 2000). In the prison context, these interests “will generally be limited  
4 to freedom from restraint which . . . imposes atypical and significant hardship on the inmate  
5 in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 483–84  
6 (1995). Wiseman’s due process claims fail for this reason: The alleged improper handling  
7 of a grievance, and being forced to share a cell with another inmate, are not atypical and  
8 significant hardships in the broader context of prison life. Nor do they infringe on Wiseman’s  
9 liberty or property. See *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (“inmates lack  
10 a separate constitutional entitlement to a specific prison grievance procedure”); *Bell v.*  
11 *Wolfish*, 441 U.S. 520, 542 (1979) (no “one man, one cell” principle lurking in the Due  
12 Process Clause”).

13           Wiseman responds in his objection to the R&R that his due process claims have been  
14 misunderstood and that he contends “defendant Morris denied him due process, law library  
15 access and meaningful access to the courts as a form of punishment for refusing to accept  
16 a cellmate in retaliation.” (Obj. to R&R at 4.) The Court does not find this response very  
17 availing. In fact, the Court is very satisfied with the R&R’s analysis of Wiseman’s due  
18 process claims, and accordingly **GRANTS** the defendants’ motion to dismiss them, but  
19 **WITHOUT PREJUDICE AND WITH LEAVE TO AMEND.**

20           **F. Equal Protection Claims**

21           The R&R states the legal standard for pleading an equal protection claim and shows  
22 clearly that Wiseman’s complaint fails to meet it. The motion to dismiss the equal protection  
23 claim is therefore **GRANTED**. The R&R suggests that Wiseman be granted leave to amend  
24 his equal protection claim, but his objection to the R&R Wiseman does not object to this  
25 analysis. The equal protection claim is therefore **DISMISSED WITH PREJUDICE AND**  
26 **WITHOUT LEAVE TO AMEND.**

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1           **G.     Request for Injunctive Relief**

2           Because Wiseman is no longer housed at R.J. Donovan Correctional Facility, his  
3 request for injunctive relief is indeed moot. The motion to dismiss this request is **GRANTED**.

4           **H.     Violations of Rule 8 and Local Rule 8.2**

5           The Court approves of the manner in which the R&R handles the defendants'  
6 argument that Wiseman's complaint should be dismissed because it is too long and  
7 confusing. At 145 pages, Wiseman's is not a model complaint; there is no doubt about that.  
8 But it would be entirely too severe to dismiss the complaint outright on account of its length.  
9 More than many that this Court sees, Wiseman's complaint actually does a fair job of  
10 informing the defendants of the claims against them. With the R&R and this order to rely on  
11 going forward, the Court believes Wiseman can plead a briefer, more lucid complaint with  
12 the leave to amend he has been granted. Wiseman is hereby on notice, however, that the  
13 Court expects a concise and coherent complaint the next time around, and it will not freely  
14 grant leave to amend after receiving the motion to dismiss that the defendants will inevitably  
15 file. The Court urges Wiseman to only attach those exhibits to his amended complaint that  
16 are absolutely necessary.

17       **VII.   Conclusion**

18           It will be useful to the parties to summarize the Court's conclusions in list form, similar  
19 to the R&R.

- 20           •       The California Department of Corrections is dismissed as a defendant.  
21                    Because amendment would be futile, this dismissal is with prejudice.
- 22           •       Defendants Contreras, Marrero, Clardy, and Peterson are also  
23                    dismissed from this case, without leave to amend.
- 24           •       The motion to dismiss defendants Hernandez, Garcia, and McBride is  
25                    denied. Wiseman has alleged sufficient facts to include them in this  
26                    lawsuit.

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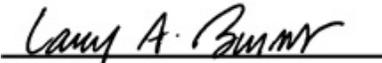
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- Defendants Hubbard and Moore<sup>3</sup> are dismissed, but without prejudice. Wiseman may name them as defendants in his amended complaint.
- Wiseman’s claim that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment is dismissed, but with leave to amend to show that he has in fact exhausted his administrative remedies.
- Wiseman’s access-to-courts and due process claims are dismissed, but without prejudice and with leave to amend.
- Wiseman’s equal protection claim is dismissed *with* prejudice and *without* leave to amend.

Wiseman may file an amended complaint no later than 30 calendar days from the date this order is entered.

**IT IS SO ORDERED.**

DATED: February 26, 2010

  
**HONORABLE LARRY ALAN BURNS**  
United States District Judge

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<sup>3</sup> The Court did not fully address Moore above because the R&R’s analysis of his place in this lawsuit spanned two different discussions. The R&R recommended denying the defendants’ motion to dismiss Moore on the ground that Wiseman alleged sufficient facts to give rise to respondeat superior liability on his part. (R&R at 13.) It recommended dismissing Moore, however, because Wiseman failed to exhaust his administrative remedies for his cruel and unusual punishment claim, which implicated Moore. Because the Court will grant leave to amend the cruel and unusual punishment claim, it will grant leave to include Moore in an amended complaint.