

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID SLOAN MCNEES,

Plaintiff,

v.

G. TORREY, et al.,

Defendants.

Case No. 1:19-cv-121

HON. JANET T. NEFF

OPINION AND ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. On August 15, 2019, Defendant Torrey filed a motion for partial summary judgment based on Plaintiff's alleged failure to exhaust administrative remedies, and the matter was referred to the Magistrate Judge. On October 11, 2019, Plaintiff filed a response to the summary judgment motion. On October 17, 2019, the Magistrate Judge issued a Report and Recommendation (R&R), which this Court rejected inasmuch as the Report and Recommendation was issued before the briefing cycle was complete. On January 16, 2020, Plaintiff was permitted to supplement his retaliation claims by filing an Amended Complaint. On January 24, 2020, Defendant Torrey filed a reply to the response. On February 28, 2020, the Magistrate Judge issued a Supplemental Report and Recommendation, recommending the Court deny Defendant Torrey's motion. The matter is presently before the Court on Defendant Torrey's objections to the Supplemental Report and Recommendation. Plaintiff filed a response to the objections.¹ In accordance with 28 U.S.C.

¹ Plaintiff also filed a Motion for an Extension of Time (ECF No. 54); however, because Plaintiff's response was timely filed, the Court denies the motion as moot.

§ 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Supplemental Report and Recommendation to which objections have been made. For the following reasons, the Court denies the objections and issues this Opinion and Order.

Defendant Torrey first briefly argues that the Magistrate Judge erred by not dismissing his motion as moot once Plaintiff filed an Amended Complaint (Obj., ECF No. 53 at PageID.263-264). Defendant Torrey relies on a conclusion reached in *Glass v. Kellogg Co.*, 252 F.R.D. 367, 368 (W.D. Mich. 2008): “[b]ecause the original complaint has been superseded and nullified, there is no longer a live dispute about the propriety or merit of the claims asserted therein; therefore, any motion to dismiss such claims is moot” (*id.* at PageID.264). However, as the Magistrate Judge explained in granting Plaintiff leave in this case, Plaintiff sought to supplement, not amend, his Complaint (Order, ECF No. 40). The exhaustion of Plaintiff’s two retaliation claims at issue in Defendant’s motion for partial summary judgment was still a “live dispute” that Defendant Torrey fully addressed in his Reply (ECF No. 43), after the Amended Complaint was filed. Under these circumstances, the Court finds no error in the Magistrate Judge’s decision to consider the motion as being addressed to the supplemented pleading. *See generally* 6 Wright & Miller, FED. PRACTICE AND PROCEDURE § 1476 (explaining that a defendant “should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending”). Defendant Torrey’s first objection is therefore denied.

Second, Defendant Torrey also objects to the Report and Recommendation “insofar as it recommends that the Court find that LCF-18-11-1156-2z exhausted McNeese’s claim that Torrey retaliated against him” (Obj., ECF No. 53 at PageID.264). According to Defendant Torrey, Plaintiff’s vague allegation that Torrey was “still punish[ing]” him was insufficient to alert MDOC that Plaintiff was alleging retaliation against Torrey (*id.* at PageID.264-265). Defendant Torrey’s

objection is misplaced. The Magistrate Judge thoroughly considered Defendant Torrey's argument and Plaintiff's response under the controlling policy directives and case law (Supp. R&R, ECF No. 48 at PageID.243-246). The Magistrate Judge concluded that "[e]ven if Torrey's alleged retaliation was a new issue, the MDOC considered the appeal on the merits and did not reject it for raising a new issue" (*id.* at PageID.246 [emphasis added]). Defendant Torrey's objection does not address—let alone refute—the Magistrate Judge's conclusion. This objection is therefore also properly denied. Accordingly:

IT IS HEREBY ORDERED that Plaintiff's Motion for Extension of Time (ECF No. 54) is DENIED as moot.

IT IS FURTHER ORDERED that the Objections (ECF No. 53) are DENIED and the Supplemental Report and Recommendation of the Magistrate Judge (ECF No. 48) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that Defendant Torrey's Motion for Partial Summary Judgment (ECF No. 20) is DENIED.

Dated: April 27, 2020

/s/ Janet T. Neff

JANET T. NEFF
United States District Judge