

1 due to NDOC policies, including its "one good eye" policy. (ECF Nos. 1-1, 5.) Before filing his
2 original complaint, he filed grievance 2006-30-19027, which served to exhaust his administrative
3 remedies under the Prison Litigation Reform Act (PLRA) for the Eighth Amendment claim
4 asserted in the original and FAC. (ECF Nos. 75-2, 75-5, 92-2, 92-3.)

5 After obtaining counsel, it was determined that Plaintiff should seek leave to amend to
6 assert a claim under the Title II of the ADA against NDOC, alleging that he was discriminated
7 based on his disability of monocular blindness when NDOC failed to make a reasonable
8 accommodation by modifying its policies to make him eligible for surgery.

9 Before bringing that claim in federal court, Plaintiff, as instructed by counsel, filed a
10 grievance within NDOC, grievance 2006-30-85801, in order to exhaustion his administrative
11 remedies under the PLRA as to the ADA claim. (ECF Nos. 75-3, 92-8.) Plaintiff was disciplined
12 for abuse of the grievance procedure, with prison officials concluding that his grievance was
13 duplicative of his earlier grievance filed about his cataract issues. He was found guilty and
14 disciplined to 15-days loss of canteen privileges. (ECF Nos. 75-3 at 14, 16, 92-9 at 2.)

15 Plaintiff was granted leave to amend to assert the ADA claim in his second amended
16 complaint (SAC). (ECF Nos. 34, 35.)

17 Ms. Keyser-Cooper communicated to Mr. Rands that she and her client viewed the
18 disciplinary action over the grievance to be retaliatory under the ADA, and requested that NDOC
19 expunge the disciplinary action from Plaintiff's record, claiming his disciplinary record within
20 NDOC was exemplary up to that point. NDOC apparently refused. As a result, Plaintiff moved
21 for and was granted leave to amend to file the TAC which included an ADA retaliation claim
22 against NDOC. (ECF Nos. 70, 71.)

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1 The court notes that after Plaintiff had requested eye surgery over a nearly twenty-year
2 period, and was denied surgery, NDOC agreed to have the surgery performed several years after
3 Plaintiff initiated this litigation, in June of 2020. Unfortunately, the surgery was not successful.
4 (ECF No. 76 at 3 n. 2; ECF No. 92-7 at 7.)

5 Plaintiff has filed two motions for partial summary judgment. The motion at issue in this
6 order is the motion that seeks partial summary judgment on the issue of liability for the ADA
7 retaliation claim. (ECF No. 75.) In their response to Plaintiff's motion for partial summary
8 judgment, Defendants dispute that Plaintiff needed to file another grievance to exhaust his
9 administrative remedies as to the ADA claim, and argue that the grievance was duplicative of his
10 previously filed grievance. They also assert that he was required to file a separate form to assert a
11 reasonable accommodation request.

12 In the motion, Plaintiff stated specifically that he seeks partial summary judgment on the
13 issue of liability of the ADA retaliation claim against NDOC, and wished to go to trial on the
14 issue of *damages* for this claim. In his reply brief, however, Plaintiff states that he has withdrawn
15 his request for damages as subsequent research has determined Plaintiff's only possible relief in
16 an ADA Title II retaliation claim is *injunctive relief*. (ECF No. 96 at 2 n. 3, 5-6.) Plaintiff states
17 that because injunctive relief is the only available remedy, no jury trial is available.

18 Plaintiff's motion mentioned that after the TAC was filed, defense counsel offered to
19 dismiss the discipline from Plaintiff's record, which is the *injunctive relief* Plaintiff is seeking. It
20 is not clear, however, whether NDOC has in fact gone ahead and dismissed or expunged the
21 disciplinary charge, in which case the claim for injunctive relief under the ADA's anti-retaliation
22 provision would be rendered moot.


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CONCLUSION

The parties shall meet and confer on this issue and file a notice with the court by **5:00 p.m. on Tuesday, February 2, 2021**, regarding whether it has dismissed/expunged the disciplinary charge against Plaintiff for filing what NDOC deemed a duplicative grievance, and if so, whether this renders the ADA retaliation claim moot.

IT IS SO ORDERED.

Dated: January 28, 2021



William G. Cobb
United States Magistrate Judge

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