

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Nov 19, 2021**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

GRAHAM SHERRILL,

Plaintiff,

v.

CUS WATKINS and SGT. ACALA,

Defendants.

NO: 2:21-CV-00201-RMP

ORDER DISMISSING SECOND  
AMENDED COMPLAINT

**1915(g)**

Before the Court is Plaintiff Graham Sherrill's Second Amended Complaint. ECF No. 12. Plaintiff, a prisoner at the Airway Heights Corrections Center, is proceeding *pro se* and *in forma pauperis*; Defendants have not been served. Plaintiff seeks unspecified monetary and declaratory relief, claiming that he "has suffered emotional distress, sleeplessness, anxiety, [and] mental health issues." *Id.* at 5, 7 and 8. He also seeks the "removal of defendant(s) . . . from [their] supervisory position over inmates." *Id.* at 9.

As previously advised, a prisoner may not bring a civil action for emotional or mental injury that he or she suffered while in custody without showing a

1 physical injury that need not be significant but must be more than *de minimis*.  
2 *Oliver v. Keller*, 289 F.3d 623, 627–30 (9th Cir. 2002); 42 U.S.C. § 1997e(e).  
3 Plaintiff has not made this showing.

## 4 **SECOND AMENDED COMPLAINT**

5 As a general rule, an amended complaint supersedes the original complaint  
6 and renders it without legal effect. *Lacey v. Maricopa County*, 693 F.3d 896, 928  
7 (9th Cir. 2012). Therefore, “[a]ll causes of action alleged in an original complaint  
8 which are not alleged in an amended complaint are waived.” *King v. Atiyeh*, 814  
9 F.2d 565, 567 (9th Cir. 1987) *overruled in part by Lacey*, 693 F.3d at 928 (any  
10 claims voluntarily dismissed are considered to be waived if not re-pled).

11 In his initial complaint, Plaintiff stated that he was reprimanded for playing  
12 cards in the dayroom on June 28, 2021, and then infraacted, while others were  
13 allowed to play cards later in the day. ECF No. 1 at 5. The initial complaint was  
14 received on July 2, 2021. *Id.* In the First Amended Complaint, Plaintiff alleged  
15 that he was infraacted for playing cards on or about June 28, 2021, but “peers of  
16 color” were not.” ECF No. 10 at 8. It does not appear that Plaintiff could have  
17 fully exhausted any claim regarding the June 28, 2021 infraction, prior to the first  
18 time he presented it on July 2, 2021, as required by 42 U.S.C. § 1997e(a).

19 In the Second Amended Complaint, Plaintiff asserts that Defendant CUS  
20 Watkins subjected him to violations of the Equal Protection Clause and the Eighth  
21 Amendment when he “acted within own interests and with discrimination towards

1 plaintiff,” by approaching the table where Plaintiff was seated and “asked for Id’s  
2 and celled us in, for playing cards a social and productive activity.” ECF No. 12 at  
3 4. Plaintiff asserts that, at that time, others were “playing cards at other tables,”  
4 and he “told Watkins [that there] is no policy, rule or posting of such non activity  
5 and [] others [were] playing cards.” Plaintiff claims that “defendant did knowingly  
6 and willfully discriminate against Plaintiff by saying go ‘cell your white ass in’  
7 Further infracting for conduct, which serves as a double sanction.” ECF No. 12 at  
8 5.

9 Plaintiff asserts that because this “was an action addressed thru on site  
10 adjustment” it could “not be concidered [sic] a General violation.” ECF No. 12 at  
11 5. He claims that Defendant Sgt. Acala “willfully and intentionally showed a [sic]  
12 Indifference by giving infraction hearing and denying Plaintiff fairness, finding  
13 guilty before chance to be heard or make a statement, violating policy 460.000, and  
14 WAC: 137-28-2AS.” *Id.* at 6. The failure to follow prison policy, however, does  
15 not establish a constitutional violation. *See Cousins v. Lockyer*, 568 F.3d 1063,  
16 1070 (9th Cir. 2009).

17 As previously advised, a prisoner has no constitutionally guaranteed  
18 protection from being wrongly accused of conduct; rather, he has a constitutional  
19 right not to be deprived of a protected liberty interest without due process. *See*  
20 *Freeman v. Rideout*, 808 F.2d 949, 951 (2d Cir.1986), *cert. denied*, 485 U.S. 982  
21 (1988). According to the United States Supreme Court’s decision in *Sandin v.*

1 *Conner*, 515 U.S. 472 (1995), a district court must focus on the nature of the  
2 deprivation imposed when determining whether an inmate is entitled to procedural  
3 due process protections.

4 To invoke such protections a prison restraint must impose “atypical and  
5 significant hardship on the inmate in relation to his ordinary incidents of prison  
6 life.” *Sandin*, 515 U.S. at 483–84. As stated in *Meachum v. Fano*, 427 U.S. 215,  
7 224 (1976), the Due Process Clause does not protect every change in the  
8 conditions of confinement, not even ones having a “substantial adverse impact” on  
9 the prisoners. “Discipline by prison officials in response to a wide range of  
10 misconduct falls within the expected perimeters of the sentence imposed by a court  
11 of law.” *Sandin*, 515 U.S. at 485.

12 Plaintiff does not state the results of the disciplinary infraction hearing but  
13 attaches a General Infraction Report indicating that he was sanctioned with  
14 confinement to quarters for five days for the June 28, 2021 infraction. ECF No. 12  
15 at 10. This sanction would not constitute an atypical and significant hardship  
16 entitling Plaintiff to procedural due process protections under *Sandin*. Therefore,  
17 he has failed to state a due process claim upon which relief may be granted  
18 regarding the June 28, 2021, infraction.

19 Plaintiff’s assertion of discrimination based on the directive to “cell your  
20 white ass in,” is also insufficient to state a constitutional claim. Allegations of  
21 verbal harassment and abuse simply fail to state a claim cognizable under 42

1 U.S.C. ' 1983. *See Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997); *see, e.g.,*  
2 *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), *amended* 135 F.3d 1318 (9th  
3 Cir. 1998) (disrespectful and assaultive comments by prison guard are not enough  
4 to implicate the Eighth Amendment); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139  
5 (9th Cir. 1987) (directing vulgar language at prisoner does not state constitutional  
6 claim); *Burton v. Livingston*, 791 F.2d 97, 99 (8th Cir. 1986)(“mere words, without  
7 more, do not invade a federally protected right”). This is so even if the verbal  
8 harassment is racially motivated. *See Hoptowit v. Ray*, 682 F.2d 1237, 1252 (9th  
9 Cir. 1982) (federal court cannot order guards to refrain from using racial slurs to  
10 harass prisoners); *Burton*, 791 F.2d at 101 n. 1 (use of racial slurs in prison does  
11 not offend Constitution). While the Court in now way condones disrespectful  
12 speech, it does not rise to the level of a constitutional violation under the facts of  
13 this case.

14 Plaintiff again fails to allege facts supporting a claim of retaliation. “Within  
15 the prison context, a viable claim of First Amendment retaliation entails five basic  
16 elements: (1) An assertion that a state actor took some adverse action against an  
17 inmate (2) because of (3) that prisoner's protected conduct, and that such action (4)  
18 chilled the inmate's exercise of his First Amendment rights, and (5) the action did  
19 not reasonably advance a legitimate correctional goal,” *Rhodes v. Robinson*, 408  
20 F.3d 559, 567–68 (9th Cir. 2005); *accord Watison v. Carter*, 668 F.3d 1108, 1114–  
21 15 (9th Cir. 2012); *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). Here,

1 Plaintiff presents no facts supporting a plausible claim that adverse action was  
2 taken against him because he engaged in conduct protected under the First  
3 Amendment. Engaging in a recreational activity, unlike filing a prison grievance,  
4 is not a constitutionally protected activity. Plaintiff's bare assertion of retaliatory  
5 motive does not support a claim for relief. *Watison*, 668 F.3d at 1114; *Brodheim*,  
6 584 F.3d at 1269.

7 Although granted numerous opportunities to amend to state plausible claims  
8 for relief, Plaintiff has failed to do so. Liberally construing the Second Amended  
9 Complaint in the light most favorable to Plaintiff, the Court finds that it does not  
10 cure the deficiencies of the initial and First Amended Complaints. Therefore, **IT**  
11 **IS ORDERED** that the Second Amended Complaint is **DISMISSED with**  
12 **prejudice** for failure to state a claim upon which relief may be granted under 28  
13 U.S.C. § 1915(e)(2).

14 Pursuant to 28 U.S.C. § 1915(g) a prisoner who brings three or more civil  
15 actions or appeals which are dismissed as frivolous or for failure to state a claim  
16 will be precluded from bringing any other civil action or appeal *in forma pauperis*  
17 "unless the prisoner is under imminent danger of serious physical injury." 28  
18 U.S.C. § 1915(g). **Plaintiff is advised to read the statutory provisions of 28**  
19 **U.S.C. § 1915. This dismissal of Plaintiff's complaint may count as one of the**  
20 **three dismissals allowed by 28 U.S.C. § 1915(g) and may adversely affect his**  
21 **ability to file future claims in forma pauperis.**

