UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JACOB R. BLODGETT, Plaintiff, v. JOHNATHEN BENNETT, DUSTIN DAVIS, MARY PETERSON, C/O KEYS, D. OYEN, K. WALKER, DARREL LEPIANE and CASEY KAECH, Defendants.	NO: 4:20-CV-5157-TOR ORDER OF DISMISSAL **1915(g)**

BEFORE THE COURT are Plaintiff's Second Amended Complaint consisting of 47 pages, ECF No. 15, and his third Motion for Appointment of Counsel, ECF No. 16, with accompanying declaration and memorandum, ECF Nos. 17, 18. Plaintiff, a prisoner at the Monroe Correctional Complex – Special Offenders' Unit, is proceeding *pro se* and *in forma pauperis*; Defendants have not been served. Plaintiff seeks monetary damages claiming violations of his First, Fifth, Eighth and Fourteenth Amendment rights.

As a general rule, an amended complaint supersedes the original complaint and renders it without legal effect. *Lacey v. Maricopa County*, 693 F.3d 896, 927 (9th Cir. 2012). Therefore, "[a]ll causes of action alleged in an original complaint which are not alleged in an amended complaint are waived." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (citing *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981)), overruled in part by *Lacey*, 693 F.3d at 928 (any claims voluntarily dismissed are considered to be waived if not repled). Furthermore, Defendants not named in an amended complaint are no longer defendants in the action. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).

Consequently, Defendants CUS Angela Sasser, CUS Scott Buttice and Sergeant Dwayne Evans have been terminated from this action, and Defendants Correctional Officer Keys, D. Oyen, K. Walker, Darrel Lepiane and Casey Kaech have been added. Liberally construing the Second Amended Complaint in the light most favorable to Plaintiff, however, the Court finds that it fails to cure the deficiencies of the initial and First Amended Complaints and does not state in a short and plain manner a claim entitling Plaintiff to relief.

On December 21, 2020, the Court had advised Plaintiff of the deficiencies of his First Amended Complaint and granted him the opportunity to file a Second Amended Complaint or to voluntarily dismiss. ECF No. 14. Plaintiff's repeated declarations in his Second Amended Complaint of a "Totality of Conditions" theory that allegedly culminated in his attempted suicide on November 9, 2019, *see* ECF

No. 15 at 6, 11, 19-21, 23, 25, 27-32 and 41-42, are insufficient to state a claim upon which relief may be granted. Having granted Plaintiff several opportunities to amend and for the reasons set forth below and in the previous Order, ECF No. 14, the Court finds that the Second Amended Complaint should be dismissed with prejudice under 28 U.S.C. §§ 1915A(b)(1),(2) and 1915(e)(2).

PLAINTIFF'S ALLEGATIONS

Plaintiff claims that his rights under the First, Fifth, Eighth and Fourteenth Amendments have been violated. The Due Process Clause and Equal Protection component of the Fifth Amendment only apply to actions of the federal government, not to those of state or local governments. *See Schweiker v. Wilson*, 450 U.S. 221, 227 (1981); *see also Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir. 2008); *Castillo v. McFaddan*, 399 F.3d 993, 1002 n. 5 (9th Cir. 2005) ("[Plaintiff's] citation of the Fifth Amendment was, of course, incorrect. The Fifth Amendment prohibits the federal government from depriving persons of due process, while the Fourteenth Amendment explicitly prohibits deprivations without due process by the several States."). Plaintiff does not allege any of the named Defendants are federal actors. Therefore, Plaintiff has failed to state a claim alleging a violation of the Fifth Amendment.

Plaintiff asserts that he has been diagnosed with "bipolar disorder," and was housed in the South Intensive Management Unit ("IMU") at the Washington State Penitentiary ("WSP"). ECF No. 15 at 6. He states that his mental health disorder

was a "vulnerability used to exploit the subjectivity of [his] living conditions through the below postulations of the 'Totality of the conditions' theory with the objective of motivating [his] committance [sic] to suicide as [he] was often reminded as discriminatory retaliation for [his] commentary postulated under section 1.0 of this statement of facts." *Id.*

Plaintiff indicates that he attempted to hang himself on November 9, 2019, after Defendant Peterson, at Plaintiff's request, had increased his dosage of Effexor from 37.5 mg to 75 mg. ECF No. 15 at 23. Plaintiff claimed this was because he feared "becoming dependent upon it again and punitively forced into withdrawals for a fourth time." *Id.* The Court cannot infer from Plaintiff's expression of his own subjective intent that identified Defendants were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment.

Once again, Plaintiff fails to set forth a simple, concise, and direct statement of the factual grounds that form the basis for each defendant's liability as required by Rule 8(a)(2), Federal Rules of Civil Procedure. Therefore, his Second Amended Complaint shall be dismissed. *See Knapp v. Hogan,* 738 F.3d 1106, 1110 (9th Cir. 2013) (holding "dismissals following the repeated violation of Rule 8(a)'s 'short and plain statement' requirement, following leave to amend, are dismissals for failure to state a claim under § 1915(g)").

Defendant Davis:

Plaintiff states he filed a grievance complaining that excessive force was used

against him on June 10, 2019. ECF No. 15 at 6. He claims that at 5:30 p.m., Defendant Correctional Officer Dustin "skipped" him at dinner, and allegedly stated, "fags don't eat dinner, they only eat dick" and "you probably want to eat the food with your butt." *Id.* Plaintiff claims that this constituted "discrimination through cruel and unusual punishment. Thereby violating [his] Fourteenth and Eighth Amendment Rights of equal protection of the law and the right to safe and humane living conditions while in prison." ECF No. 15 at 6.

Plaintiff accuses Defendant Davis of making the additional statement, "fags go to hell," and calling Plaintiff a "weirdo" after reading Plaintiff's mental health journal on an unspecified date, thereby breaching the "normal code of conduct." ECF No. 15 at 7. Plaintiff then accuses Defendant Davis of returning at approximately 6:00 p.m. or 6:30 p.m. to proposition Plaintiff to "give him a blowjob if [Plaintiff] wanted dinner." *Id.* Plaintiff makes no allegation that he was compelled to engage in fellatio.

Assuming Plaintiff's factual allegations are true, they are obviously vulgar and unprofessional, but they do not rise to the level of a constitutional violation. Allegations of verbal harassment and abuse fail to state a claim cognizable under 42 U.S.C. § 1983. *See Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (directing vulgar language at prisoner does not state constitutional claim); *Burton v. Livingston*, 791 F.2d 97, 99 (8th Cir. 1986) ("mere words, without more, do not invade a federally

protected right"). In addition, a single missed meal does not state a constitutional violation against Defendant Davis. *See Foster v. Runnels*, 554 F.3d 807, 812–13 (9th Cir. 2009) (denial of two meals over a nine week period was not a sufficiently serious deprivation, but denial of sixteen meals in twenty-three days was a sufficiently serious deprivation for Eighth Amendment purposes).

Plaintiff has identified no harm to his health from missing dinner on June 10, 2019. Also, one missed meal is not an "atypical and significant hardship" sufficient to invoke procedural due process protections under *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Plaintiff's assertions are insufficient to state a Fourteenth Amendment due process claim.

Plaintiff's assertion of a "PREA" violation is also insufficient to state a claim upon which relief may be granted. The Prison Rape Elimination Act of 2003 ("PREA") was enacted by Congress to address the problem of rape in prison by creating national standards to prevent, detect, and respond to prison rape. *See* 42 U.S.C. §§ 15601, 15602, 15605. Congress enacted PREA with the intention of increasing accountability of prison officials and protecting the Eighth Amendment rights of prisoners. 42 U.S.C. § 15692. Nothing in the language of the statute, however, establishes a private right of action to enforce its terms. *See* 42 U.S.C. § 15607I (explicitly directing the Attorney General to enforce compliance with the PREA); *see also Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (explaining that absent Congressional intent "to create not just a private right but also a private

remedy . . . no private right of action exists."). Numerous other district courts have found that an individual plaintiff cannot bring a private cause of action. *See Denton v. Pastor*, 2017 WL 5068329, at *1 (W.D. Wash. Nov. 2, 2017); *Reed v. Racklin*, 2017 WL 2535388, at *2 (E.D. Cal. June 12, 2017); *Gonzalez v. Chriese*, 2016 WL 3231284, at *4 (N.D. Cal. June 13, 2016); *Grindling v. Diana*, 2016 WL 6080825, at *3 *4 (D. Haw. Sept. 12, 2016). Therefore, any claims brought as violations of PREA fail to state a claim for relief.

Plaintiff asserts that he was "frustrated" by Defendant Davis's immaturity and "insecure attempts at proving his sexuality," and made an unspecified comment. ECF No. 15 at 8. Plaintiff claims that "without reason or justifiable cause, Dustin Davis opened the 'cuffport' to [Plaintiff's] cell . . . and sadistically sprayed [Plaintiff] . . . with pepper spray continicusly [sic] for roughly six-seven seconds at full blast. While stating, 'if you are so hungry, eat my cock-meat sandwich.'" *Id.* It is unclear if this statement is separate from, or encapsulated by, Plaintiff's prior assertion of a request for fellatio in exchange for a meal. Because it is certainly plausible that a vulgar statement containing directives to engage in a sexual activity is meant to offend, rather than to invite an actual engagement in sexual activity, the Court is unable to infer a constitutional deprivation from the facts presented.

Plaintiff does not state that he was harmed by the seven second deployment of pepper spray, or that the deployment was unprovoked by his unspecified comment. Although Plaintiff claims Defendant Davis acted "sadistically" and

"without reason or justifiable cause," these are legal conclusions unsupported by any factual allegations.

In assessing whether the use of force violated the Eighth Amendment, the Court considers the following factors: (1) the extent of injury suffered by the inmate; (2) the need for the application of force; (3) the relationship between that need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) whether officials made any effort to temper the forceful response. *See Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (*citing Whitley v. Albers*, 475 U.S. 312, 321 (1986)). Force used by prison officials does not amount to a constitutional violation if it is "applied in a good faith effort to restore discipline and order and not 'maliciously and sadistically for the very purpose of causing harm.'" *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002) (quoting *Whitley*, 475 U.S. at 320–21).

Plaintiff presents no allegations indicating the amount of pepper spray used was "deadly" or excessive, or inconsistent with the standards for the use of tear gas. *See Spain v. Procunier*, 600 F.2d 189, 195 (9th Cir. 1979) (finding in the Eighth Amendment context that the use of tear gas in small amounts "may be a necessary prison technique if a prisoner refuses after adequate warning to move from a cell or upon other provocation presenting a reasonable possibility that slight force will be required. In these circumstances the substance may be a legitimate means for preventing small disturbances from becoming dangerous to other inmates or the prison personnel.") Although granted the opportunity to do so, Plaintiff has failed

to present facts from which the Court could infer that the use of pepper spray by Defendant Davis on June 10, 2019, for six or seven seconds, violated the Eighth Amendment.

Defendant Peterson:

Next, Plaintiff's allegations about tapering him off of the drug Effexor, *see* ECF No. 15 at 11-23, are insufficient to state an Eighth Amendment claim as they indicate only a difference of opinion between him and a Psychiatrist, Defendant Dr. Mary Peterson, regarding what was medically appropriate under the circumstances. *See Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989); *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016) ("A showing of medical malpractice or negligence is insufficient to establish a constitutional deprivation under the Eighth Amendment.").

Plaintiff claims Defendant Peterson "prompted [him] to commit suicide" when she stated at his cell front between 5:30 and 5:45 p.m. on July 23, 2019, that Plaintiff's "withdrawal symptoms were caused by being without olanzapine and [Plaintiff is] what's wrong with society." *Id.* at 12. Later in the Second Amended Complaint, Plaintiff asserts that Defendant Peterson had stated, "You should kill yourself, you're all that's wrong with society." *Id.* at 20.

This statement, buried in prolix and repetitive assertions, is not a short and plain statement entitling Plaintiff to relief. Plaintiff makes no assertion that he attempted suicide on July 23, 2019 at this alleged prompting. Without more, the

Court is unable to infer that these statements were calculated to cause Plaintiff "psychological damage." *See Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), *opinion amended on denial of reh'g*, 135 F.3d 1318 (9th Cir. 1998); *see also Oltarzewski*, 830 F.2d at 139. Plaintiff admits that he continued to meet with Dr. Peterson who re-instated lower dosages of Effexor, and allegedly promised to increase the dosage upon Plaintiff's good behavior. ECF No. 15 at 17-18, 21-22. Plaintiff's allegations against Defendant Dr. Peterson are insufficient to state an Eighth Amendment claim upon which relief may be granted.

Defendants Lepiane and Kaech:

Plaintiff asserts that on September 12, 2019, he "randomly and without cause" received an "additional program." ECF No. 15 at 25. He contends that he was expected to complete "in cell OCP," to be "eligible for the ART (Anger Management) class [he] had been waiting roughly 282 days for inductance for completion and thereby, become eligible to leave solitary confinement." *Id.* Plaintiff does not explain what "OCP" is or how its imposition is either arbitrary or capricious or otherwise violates due process. Plaintiff contends that the imposition of the new program was to "camouflage" the fact he was skipped for the anger management class necessary to leave solitary confinement.

Plaintiff accuses Defendants Darrel Lepiane and Casey Kaech, as well as four other individuals who are not named as Defendants in the Second Amended Complaint, of violating his Eighth and Fourteenth Amendment rights when they

"deliberately and without justifiable cause extended [Plaintiff's] confinement in solitary as contribution to the accumulative tactic used to group-wide, to motivate [his] committance [sic] to suicide," by "atypically prolonging [his] confinement in solitary as postulated under this section . . . proving yet another tactic of the accumulative tactic of negatively manipulating the 'Totality of Conditions' theory used objectively to exploit the subjective vulnerability of [his] Bipolar conditions and diminishing capacity within a sensory deprived environment with the group-shaped objective of manipulating [his] committance [sic] to suicide as it was attempted on 11/09/19." ECF No. 15 at 25.

Based on the numbers Plaintiff presents, it is unclear whether in September 2019, Plaintiff had been in solitary confinement for 288 days or 394 days. *See* ECF No. 15 at 25. Even if Plaintiff had been in solitary confinement for more than a year, he presents no factual support for his assertion of atypical conditions. *See Wilkinson v. Austin*, 545 U.S. 209, 223–24 (2005) (holding that prisoner was subject to an atypical and significant hardship by being given indefinite detention in a supermax prison where no conversation was permitted and lights were on for 24 hours a day).

Placement in administrative segregation or solitary confinement is clearly an "'action taken within the sentence imposed.'" *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) (*quoting Sandin*, 515 U.S. at 480). Plaintiff presents no facts indicating that either his initial placement or continued confinement was accomplished without due process. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1100

(9th Cir. 1986) (inmates in administrative segregation are entitled to due process protections consisting of periodic review, notice of hearings, and an opportunity to be heard), *abrogated in part on other grounds by Sandin*, 515 U.S. at 82-83.

Plaintiff implies the existence of continued hearings, including one held on September 12, 2019, at which the additional program was assigned for him. *See* ECF No. 15 at 25. Plaintiff does not allege that an identified Defendant imposed an additional program and he has presented no facts supporting his assertion that it was "without cause," (i.e., that he had maintained exemplary behavior and complied with all prior conditions). *Id.*

Plaintiff has identified no conditions of his solitary confinement sufficient to invoke Eighth Amendment concerns. He does not state what "sensory deprivation" occurred, or its extent. His conclusory assertions of "the most base conditions" or "atypical conditions," unsupported by facts, do not state an Eighth Amendment claim. Plaintiff makes no allegation that he has been denied meaningful review of his continued placement in solitary confinement. Plaintiff has failed to state a claim against Defendants Darrel Lepiane and Casey Kaech upon which relief may be granted.

Defendants Bennett and Keys:

Plaintiff claims that Defendant Sergeant Johnathen Bennett and C/O Keys "exhibited proofs of overt-objectivity of malicious intent through deliberate indifference as deliberate indifference proves the following malicious intentions of

overt-objectivity through deprivation of liberty . . . .” ECF No. 15 at 28. Plaintiff claims that he had been “skipped for months” prior to November 1, 2019 and had not received entertainment appliances, including a radio and television. *Id.* The Court is unable to infer from the facts presented that either Defendant Bennett or Defendant Keys violated Plaintiff’s constitutionally protected rights.

Plaintiff’s assertion that he received a “security snack” for a seven-day period between June 30, 2019 and July 6, 2019, ECF No. 15 at 30, is also insufficient to state a claim upon which relief may be granted. *See LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993) (“The Eighth Amendment requires only that prisoners receive food that is adequate to maintain health; it need not be tasty or aesthetically pleasing.”). As previously advised, Plaintiff’s contention regarding a “security smock” for a seven-day period between July 30, 2019 and August 6, 2019, ECF No. 15 at 31, also fails to state either an Eighth Amendment or due process claim against Defendant Bennett upon which relief may be granted.

Defendants Oyen and Walker:

In the Second Amended Complaint, Plaintiff identifies Grievance Coordinators D. Oyen and K. Walker as Defendants to this action, ECF No. 15 at 1, 4, 34. Apart from his conclusory assertions, however, he presents no facts from which the Court could infer that they retaliated against him for filing grievances. *See Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005).

Plaintiff contends that Defendants Oyen and Walker utilized tactics "objectively to negatively set [him] up for [his] positive use of the grievance system in [an] attempt to address and remedy [his] ongoing subjectivity." ECF No. 15 at 34. It is unclear what Plaintiff is alleging. He seems to indicate that he was infracted and then found "not guilty" of a serious infraction on November 6, 2019. *Id.*

A prisoner has no constitutionally guaranteed protection from being wrongly accused of conduct; rather, he has a constitutional right not to be deprived of a protected liberty interest without due process. *See Freeman v. Rideout*, 808 F.2d 949, 951 (2d Cir. 1986). The fact Plaintiff was found "not guilty" at a disciplinary hearing indicates he was not deprived of due process.

In any event, the existence of an administrative remedy process does not create any substantive rights and mere dissatisfaction with the remedy process or its results cannot, without more, support a claim for relief for violation of a constitutional right, *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir.1988). Again, the failure of prison officials to respond to or process a grievance does not violate the Constitution. *See Flick v. Alba*, 932 F.2d 728, 729 (8th Cir. 1991); *see also Baltoski v. Pretorius*, 291 F.Supp.2d 807, 811 (N.D. Ind. 2003) ("[t]he right to petition the government for redress of grievances, however, does not guarantee a favorable response, or indeed any response, from state officials"). Plaintiff's assertions against Defendants Oyen

and Walker do not state a claim upon which relief may be granted and are subject to dismissal.

ACCORDINGLY, IT IS ORDERED:

1. The claims asserted in Plaintiff's Second Amended Complaint, ECF No. 15, are **DISMSISED with prejudice.**
2. This dismissal will count as a "strike" under 28 U.S.C. § 1915(g).
3. Plaintiff's *in forma pauperis* status is hereby **REVOKED.**
4. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal of this Order would not be taken in good faith and would lack any arguable basis in law or fact.
5. Plaintiff's Motion for Appointment of Counsel, **ECF No. 16,** is **DENIED as moot.**
6. The Clerk of Court is further directed to forward a copy of this Order to the Office of the Attorney General of Washington, Criminal Justice Division.

IT IS SO ORDERED. The Clerk of Court is directed to enter this Order and Judgment accordingly, forward copies to Plaintiff at his last known address, and **CLOSE** the file.

DATED February 17, 2021.

THOMAS O. RICE
United States District Judge