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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DALE OWEN DUSTIN,

1:05-cv-00697-AWI-DLB (PC)

Plaintiff,

FINDINGS AND RECOMMENDATION TO
DISMISS AMENDED COMPLAINT
WITHOUT LEAVE TO AMEND

v.

(Doc. 19)

GEORGE GALAZA, et al.,

Defendants.

I. Findings

A. Procedural History

Plaintiff, Dale Owen Dustin, (hereinafter “plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s amended complaint, filed on May 10, 2007.

B. Screening Requirement

The court is required to screen complaints brought by prisoners when they are seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915(A). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(A)(b)(1). “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or

1 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

2 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon
3 which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in
4 support of the claim or claims that would entitle him to relief. See Hishon v. King & Spalding,
5 467 U.S. 69, 79 (1984), citing, Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Palmer v.
6 Roosevelt Lake Log Owners Ass’n, 651 F.2d 1289, 1294 (9th Cir. 1981). Reviewing under this
7 standard, the court must accept plaintiff’s allegations in his complaint are true. Hospital Bldg.
8 Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976). The court must also construe the
9 complaint in light most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor.
10 Jankins v. McKeithen, 395 U.S. 411, 421 (1969).

11 C. Plaintiff’s Amended Complaint

12 The court takes the facts from plaintiff’s amended complaint as best it can. Because it is
13 fourteen, mostly illegible, handwritten pages (lacking indenting of paragraphs and spacing
14 between words and lines); and mixes and repeats relevant and irrelevant facts and legal argument
15 in a confusing way, the court is not sure that it has correctly understood all the averments. If any
16 averments have not been correctly construed, plaintiff has only himself to blame.

17 Plaintiff names the following defendants in his amended complaint: Gazala, Ortiz,
18 Cordone, Yates, Stockman, Marshall, L. Meeronny, L. Hoffman, B. Streeter, V. Castillo,
19 Emerson, Ramirez, S. Ramirez, Martinez, Silva, Vogel, Sumata, A.A. Walker, Ortiz, Dill, N.
20 Zavala, Yale, R.W. Banks, J. Mendoza, M.F. Martinez, D. Berna, F. Braswell, Gonzales, F. A.
21 Brown, Gonzales, Ramirez, Gomez, Leamon, and Mears.

22 Plaintiff appears to allege that on March 20, 2000 he was placed on a stripped cell status.
23 While Plaintiff was in the strip cell, he was denied his clothing, bedding, mail, legal books,
24 transcripts, magazines, access to showers, and access to personal hygiene products.

25 Additionally, plaintiff appears to allege that denial of legal mail and transcripts interfered
26 with his right of court access in his pending cases, and causing him to lose two cases.

27 Plaintiff claims on April 13, 2000 and apparently also in 2001, he was given back most of
28 his property except his address book.

1 Plaintiff also appears to allege that for approximately three years, defendants retaliated
2 against him by conducting searches in his cell. During those searches, plaintiff contends that
3 defendants destroyed his legal transcripts, withheld his legal mail, and interfered with his access
4 to legal publications. Furthermore, plaintiff alleges Linda Starr had agreed to represent him in
5 his cases and asked him to provide transcripts. However, plaintiff could not provide the
6 transcripts because they were destroyed. Plaintiff contends that because he could not provide
7 transcripts, this interfered with Linda Starr’s legal representation.

8 II. Analysis

9 A. Section 1983 Linkage Requirement

10 The Civil Rights Act under which this action was filed provides:

11 Every person who, under color of [state law] . . . subjects, or causes to be
12 subjected, any citizen of the United States . . . to the deprivation of any rights,
13 privileges, or immunities secured by the Constitution . . . shall be liable to the
party injured in an action at law, suit in equity, or other proper proceeding for
redress.

14 42 U.S.C. § 1983. The statute plainly requires that there be an affirmative link or connection
15 between the actions of the defendant and the plaintiff’s alleged deprivation. See Monell v.
16 Department of Social Services, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). The
17 Ninth Circuit has held that “[a] person ‘subjects’ another to the deprivation of a constitutional
18 right, within the meaning of section 1983, if he does an affirmative act, participates in another’s
19 affirmative acts, or omits to perform an act which he is legally required to do that causes the
20 deprivation of which complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

21 First, section 1983 requires plaintiff to demonstrate how the conditions complained of
22 have resulted in a deprivation of plaintiff’s constitutional rights. See Ellis v. Cassidy, 625 F.2d
23 227 (9th Cir. 1980). The complaint must allege how each individually named defendant is
24 involved. As best as the court can tell, plaintiff lists groups of defendants and fails to explain
25 how each defendant is connected with plaintiff’s harm. Additionally, plaintiff names multiple
26 defendants with the same surnames – two with “Gonzales,” two with “Martinez,” and three with
27 “Ramirez.” Simply stating any of these three surnames within the allegations of fact, without
28 distinguishing which defendant with that surname the allegation attaches to, does not meet the

1 affirmative link or connection requirement. Plaintiff failed to distinguish which allegations he
2 was making against which defendant(s).

3 Plaintiff's complaint is not in compliance with section 1983 linkage requirements, as it
4 does not distinguish each of the plaintiff's claims and factual allegations amongst the defendants.

5 B. Illegibility and Failure to Comply with Rule 8

6 Plaintiff's amended complaint is, at best, difficult to read, and in places completely
7 illegible – due to the plaintiff's small handwriting, lack of letter formation, lack of spacing, lack
8 of indenting, and failure to separate/distinguish his claims. Plaintiff's handwriting and spacing
9 has been addressed in a prior proceeding before this very court. (See case no.1:03-cv-5626-AWI-
10 LJO (PC), Doc. 10.)¹ The court is cognizant that plaintiff's prior case in this court, was
11 dismissed for failure to comply with Rule 8(a) – despite three opportunities to amend. Thus, at
12 the time of filing the amended complaint at issue herein, plaintiff had knowledge that illegible
13 handwriting and lack of spacing was unacceptable and did not comply with Rule 8(a).

14 The court acknowledges that plaintiff has arthritis and writing is difficult for him. (See
15 case no.1:03-cv-5626-AWI-LJO (PC), Doc. 41.) However, there is no indication that plaintiff is
16 incapable of making his letters larger, indenting paragraphs, and using more generous spacing
17 (between words, between lines on the page, and between paragraphs) – all of which would result
18 in a more legible document.

19 Further, plaintiff's second amended complaint once again fails to comply with Rule 8,
20 which calls for a “short and plain statement of the claim showing that the pleader is entitled to
21 relief,” Fed. R. Civ. P. 8(a), and mandates that “[e]ach averment of a pleading shall be simple,
22 concise, and direct.” Fed. R. Civ. P. 8(e)(1). Rule 8(a) expresses the notion of notice-pleading,
23 whereby the pleader is only required to give the opposing party fair notice of a claim. Conley,
24 355 U.S. at 45-46. Thus, Rule 8(a) does not require an elaborate recitation of every fact a
25 plaintiff may rely upon at trial, but only a statement sufficient to “give the defendant fair notice
26 of what the plaintiff's claim is and the grounds upon which it rests.” Id. at 47. Plaintiff was

27
28 ¹The court takes judicial notice of all documents in case no. 1:03-cv-AWI-LJO (PC). Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n.1 (N.D. Cal. 1978), aff'd, 645 F.2d 699 (9th Cir.), cert. denied, 454 U.S. 1126 (1981).

1 previously cautioned that factual allegations against repetitious groups of defendants does not
2 meet the specificity requirements. As written, the court does not see means for any of the named
3 defendants to decipher which allegations in the amended complaint plaintiff is making against
4 whom.

5 Plaintiff's amended complaint also does not plainly lay out all of his claims in a
6 organized fashion as required under Rule 8(a). Rather, plaintiff appears to unnecessarily repeat
7 his claims, and does not concisely separate each claim amongst the defendants. Plaintiff's
8 complaint is not in compliance with section 1983 linkage requirements or Rule 8(a) because it
9 does not separate each of the plaintiff's claims and factual allegations against each defendant,
10 and does not consist of a short and plain statement of plaintiff's claims. The court notes that
11 plaintiff's original complaint in this case was in different, legible handwriting. The court further
12 notes that the screening order gave plaintiff directions for complying with Rule 8 and guidance
13 for stating cognizable claim(s). In addition to failing to comply with Rule 8, as best as the court
14 can decipher, plaintiff's amended complaint fails to cure the deficiencies identified by the court
15 in its screening order of September 19, 2006.

16 C. Eighth Amendment – Conditions of Confinement

17 To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison
18 conditions must involve “the wanton and unnecessary infliction of pain” Rhodes v.
19 Chapman, 452 U.S. 337, 347 (1981). Although prison conditions may be restrictive and harsh,
20 prison officials must provide prisoners with food, clothing, shelter, sanitation, medical care, and
21 personal safety. Id.; Toussaint v. McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986); Hoptowit v.
22 Ray, 682 F.2d 1237, 1246 (9th Cir. 1982). Where a prisoner alleges injuries stemming from
23 unsafe conditions of confinement, prison officials may be held liable only if they acted with
24 “deliberate indifference to a substantial risk of serious harm.” Frost v. Agnos, 152 F.3d 1124,
25 1128 (9th Cir. 1998).

26 The deliberate indifference standard involves an objective and a subjective prong. First,
27 the alleged deprivation must be, in objective terms, “sufficiently serious” Farmer v.
28 Brennan, 511 U.S. 825, 834 (1994) (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)). Second,

1 the prison official must “know[] of and disregard[] an excessive risk to inmate health or safety . .
2 . . .” Farmer, 511 U.S. at 837. Thus, a prison official may be held liable under the Eighth
3 Amendment for denying humane conditions of confinement only if he knows that inmates face a
4 substantial risk of harm and disregards that risk by failing to take reasonable measures to abate it.
5 Id. at 837-45. Prison officials may avoid liability by presenting evidence that they lacked
6 knowledge of the risk, or by presenting evidence of a reasonable, albeit unsuccessful, response to
7 the risk. Id. at 844-45. Mere negligence on the part of the prison official is not sufficient to
8 establish liability, but rather, the official’s conduct must have been wanton. Id. at 835.

9 “What is necessary to show sufficient harm for purposes of the Cruel and Unusual
10 Punishment Clause depends upon the claim at issue” Hudson v. McMillian, 503 U.S. 1, 8
11 (1992). “The objective component of an Eighth Amendment claim is . . . contextual and
12 responsive to contemporary standards of decency.” Id. at 8 (quotations and citations omitted).
13 “[E]xtreme deprivations are required to make out a[n] [Eighth Amendment] conditions-of-
14 confinement claim.” Id. at 9 (citation omitted). With respect to this type of claim, “[b]ecause
15 routine discomfort is part of the penalty that criminal offenders pay for their offenses against
16 society, only those deprivations denying the minimal civilized measure of life’s necessities are
17 sufficiently grave to form the basis of an Eighth Amendment violation.” Id. (quotations and
18 citations omitted).

19 The Ninth Circuit has held that “subjection of a prisoner to lack of sanitation that is
20 severe or prolonged can constitute an infliction of pain within the meaning of the Eighth
21 Amendment.” Anderson v. County of Kern, 45 F.3d 1310, 1314 (9th Cir. 1995); see also Johnson
22 v. Lewis, 217 F. 3d 726, 731 (9th Cir. 2000); Hoptowit v. Spellman, 753 F.2d 779, 783 (9th Cir
23 1985). Also, “indigent inmates have the right to personal hygiene supplies such as toothbrushes
24 and soap.” Keenan v. Fall, 83 F.3d 1083, 1091 (9th Cir. 1996), amended by 135 F. 3d 1318 (9th
25 Cir. 1998). Finally, “the denial of adequate clothing can inflict pain under the Eighth
26 Amendment.” Walker v. Sumner, 14 F.3d 1415, 1421 (9th Cir. 1994) (citing Hoptowit, 682 F.2d
27 at 1246).

28 In this instant case, plaintiff appears to allege that defendants withheld his clothing

1 bedding, mail, legal books, transcripts, magazines, access to showers, and access personal
2 hygiene products. The court is unable to decipher whether plaintiff has specified if defendants
3 knew plaintiff faced a substantial risk of harm, and if defendants did or did not take reasonable
4 measures to abate the harm. Also, plaintiff does not connect or state how each individual
5 defendant is involved with the alleged conduct. Plaintiff appears to merely contend that many
6 defendants withheld a number of items. Thus, the amended complaint fails to state a claim for
7 violation of his rights under the Eighth Amendment.

8 D. Access to Court

9 Prisoners have a constitutional right of access to the courts. Lewis v. Casey, 518 U.S.
10 343, 346 (1996). The right of access is merely the right to bring to court a grievance the inmate
11 wishes to present, and is limited to direct criminal appeals, habeas petitions, and civil rights
12 actions. Id. at 354. The right of access to the courts is only a right to bring complaints to the
13 federal court and not a right to discover such claims or to litigate them effectively once filed with
14 a court. See Lewis, 518 U.S. at 354-55; Madrid v. Gomez, 190 F.3d 990, 995 (9th Cir. 1999).

15 To establish a violation of the right of access to the courts, a prisoner must establish that
16 he or she has suffered an actual injury. See Lewis, 518 U.S. at 349; Madrid, 190 F.3d at 996. An
17 “actual injury” is “actual prejudice with respect to contemplated or existing litigation, such as
18 the inability to meet a filing deadline or to present a claim.” Lewis, 518 U.S. at 348; see also
19 Madrid, 190 F. 3d at 996; Keenan, 83 F.3d at 1094; Vandelft v. Moses, 31 F.3d 794, 796 (9th Cir.
20 1994); Sands v. Lewis, 886 F.2d 1166, 1171 (9th Cir. 1989) (per curiam). Delays in providing
21 legal materials or assistance that result in actual injury are “not of constitutional significance” if
22 “they are the product of prison regulations reasonably related to legitimate penological interests.”
23 Lewis, 518 U.S. at 362.

24 Plaintiff contends that his right to court access was violated because defendants withheld
25 his legal mail and transcripts. Withholding legal mail and transcripts is not an actual injury and
26 does not violate the right to court access. Furthermore, delays and denials in providing legal
27 materials resulting in an actual injury do not violate the right to court access. Only denials of
28 filing a claim, or meeting a court deadline, constitute a violation of access to the court. Thus,

1 plaintiff's contention that he did not have access to this Court and Court of Appeals because his
2 legal mail and transcripts were withheld is not a violation of his right to court access.

3 E. Retaliation

4 Allegations of retaliation against a prisoner's First Amendment rights to speech or to
5 petition the government may support a section 1983 claim. Rizzo v. Dawson, 778 F.2d 527, 532
6 (9th Cir. 1985); see also Valandingham v. Borjorquez, 866 F.2d 1135 (9th Cir. 1989); Pratt v.
7 Rowland, 65 F.3d 802, 807 (9th cir. 1995). To establish a prima facie case, plaintiff must allege
8 and show that defendants acted to retaliate for his exercise of a protected activity, and
9 defendants' actions did not serve a legitimate penological purpose. See Barnett v. Centoni, 31
10 F.3d 818, 816 (9th Cir. 1994); Resnick v. Hayes, 213 F.3d 443, 449 (9th Cir. 2000).

11 A plaintiff asserting a retaliation claim must demonstrate a "but-for" causal nexus
12 between the alleged retaliation and plaintiff's protected activity (i.e., filing a claim). McDonald
13 v. Hall, 610 F.2d 16, 18 (1st Cir. 1979); see Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle,
14 429 U.S. 274 (1977). The prisoner must submit evidence, either direct or circumstantial to
15 establish a link between the exercise of constitutional rights and the allegedly retaliatory action.
16 Pratt, 65 F.3d at 806. Timing of the events surrounding the alleged retaliatory intent. See Pratt
17 65 F.3d at 808; Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1316 (9th Cir. 1989).

18 In the instant case, plaintiff has failed to state a cognizable claim because the court is
19 unable to decipher alleged facts linking each defendant to an adverse action or omission that was
20 undertaken *because of* plaintiff's exercise of a First Amendment protected right or right to
21 petition against the government. Rather, plaintiff once again appears to contend many
22 defendants' withheld his legal mail and destroyed his transcripts some time between 2000-2003.
23 The amended complaint does not appear to contain facts supporting a claim that defendants acted
24 because of plaintiff's engaging in protected activities. Thus, plaintiff has failed to state a claim
25 for retaliation.

26 F. Due Process Clause of the Fourteenth Amendment

27 Plaintiff apparently alleges that his personal property was destroyed and/or taken. The
28 Due Process Clause protects prisoners from being deprived of property without due process of

1 law, Wolff v. McDonnell, 418 U.S. 539, 556 (1974), and prisoners have a protected interest in
2 their personal property. Hansen v. May, 502 F.2d 728, 730 (9th Cir. 1974). However, while an
3 authorized, intentional deprivation of property is actionable under the Due Process clause, see
4 Hudsen v. Palmer, 468 U.S. 517, 532, n.13 (1984) (citing Logan v. Zimmerman Brush Co., 455
5 U.S. 422 (1982)); Quick v. Jones, 754 F.2d 1521, 1524 (9th Cir. 1985), neither negligent nor
6 unauthorized intentional deprivations of property by a state employee “constitute a violation of
7 the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a
8 meaningful post deprivation remedy for the loss is available.” Hudson, 468 U.S. at 533.

9 Plaintiff appears to contend that defendants’ have confiscated and destroyed his legal mail
10 and transcripts and that this is a deprivation of property under the Due Process clause of the
11 Fourteenth Amendment. However, plaintiff once again has not alleged sufficient facts for the
12 court to determine whether the deprivation was authorized or unauthorized action. Furthermore,
13 in the event that the destruction was authorized, plaintiff will not be able to allege any facts
14 suggesting that he was deprived of due process. As long as plaintiff was provided with process,
15 prison officials may deprive him of his property. Thus, plaintiff has failed to state a claim for
16 violation of his rights under the Due Process clause of the Fourteenth Amendment.

17 G. Failure To Comply

18 On September 19, 2006, the court issued an order dismissing plaintiff’s complaint for
19 failure to comply with the linkage requirements in section 1983 and Rule 8(a) and requiring
20 plaintiff to file an amended complaint within thirty days. On November 20, 2006, findings and
21 recommendations were served on plaintiff recommending the court dismiss this action for
22 plaintiff’s failure to file an amended complaint – to which plaintiff objected, indicating he
23 required a copy of his original complaint. On February 10, 2007, the court ordered a courtesy
24 copy of plaintiff’s original complaint be provided to plaintiff and granted plaintiff thirty days in
25 which to file an amended complaint. Subsequently, plaintiff requested three extensions of time
26 within which to file his amended complaint. Two extensions were granted, and plaintiff filed his
27 amended complaint, on May 10, 2007, before the third was granted nunc pro tunc. For the
28 reasons stated above, the court finds that plaintiff’s amended complaint failed to cure the defects

1 identified in the September 19, 2006 order.

2 Local Rule 11-110 provides that “failure of counsel or of a party to comply with these
3 Local Rules or with any order of the Court may be grounds for the imposition by the Court of any
4 and all sanctions. . . within the inherent power of the Court.” District courts have the inherent
5 power to control their dockets and “in the exercise of that power, they may impose sanctions
6 including, where appropriate . . . dismissal of a case.” Thompson v. Housing Auth., 782 F.2d
7 829,831 (9th Cir. 1986). A court may dismiss an action, with prejudice, based on a party’s
8 failure to prosecute an action, failure to obey a court order, or failure to comply with local rules.
9 See, e.g. Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for noncompliance with
10 local rule); Ferdik v. Bonzelet, 963 F.2d 1258,1260-61 (9th Cir. 1992) (dismissal for failure to
11 comply with an order requiring amendment of complaint); Carey v. King, 856 F.2d 1439, 1440-
12 41 (9th Cir. 1988) (dismissal for failure to comply with local rule requiring pro se plaintiffs to
13 keep court apprised of address); Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir.
14 1987) (dismissal for failure to comply with court order); Henderson v. Duncan, 779 F.2d 1421,
15 1424 (9th Cir. 1986) (dismissal for lack of prosecution and failure to comply with local rules).

16 In determining whether to dismiss an action for lack of prosecution, failure to obey a
17 court order, or failure to comply with local rules, the court must consider several factors: (1) the
18 public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket;
19 (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on
20 their merits; and (5) the availability of less drastic alternatives. Thompson, 782 F.2d at 831;
21 Henderson, 779 F.2d at 1423-24; Malone, 833 F.2d at 130; Ferdik, 963 F.2d at 1260-61; Ghazali,
22 46 F.3d at 53. In the instant case, the court finds that the public’s interest in expeditiously
23 resolving this litigation and the court’s interest in managing the docket weigh in favor of
24 dismissal as this case has been pending since 2005. The third factor, risk of prejudice to
25 defendants, also weighs in favor of dismissal, since a presumption of injury arises from the
26 occurrence of unreasonable delay in prosecuting an action. Anderson v. Air West, 542 F.2d 522,
27 524 (9th Cir. 1976). The fourth factor – public policy favoring disposition of cases on their
28 merits – is greatly outweighed by the factors in favor of dismissal discussed herein. As to the

1 fifth factor, while the alternative to allow plaintiff to file a second amended complaint is
2 available. However, in light of plaintiff's history of filings in this court, such alternative would
3 be futile as it appears plaintiff is neither able to state a cognizable claim, or do so in
4 legible/decipherable fashion.

5 III. Conclusion

6 The court finds that plaintiff has failed to state a claim against any of the named
7 defendants. The court further finds that plaintiff's amended complaint is illegible and fails to
8 comply with Rule 8(a). Accordingly, it is HEREBY RECOMMENDED that this entire action be
9 dismissed without leave to amend.

10 These Findings and Recommendations will be submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).

12 Within **thirty (30) days** after being served with these Findings and Recommendations,
13 plaintiff may file written objections with the court. The document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that
15 failure to file objections within the specified time may waive the right to appeal the District
16 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 IT IS SO ORDERED.

18 **Dated: February 5, 2008**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE