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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TOBIAS A. FRANK,)	NO. EDCV 12-1848 JAK (SS)
)	
Plaintiff,)	MEMORANDUM AND ORDER DISMISSING
)	COMPLAINT WITH LEAVE TO AMEND
v.)	
)	
DERRICK SCHULTZ, et al.,)	
)	
Defendants)	

I.
INTRODUCTION

On February 11, 2013, Plaintiff Tobias A. Frank, a federal prisoner proceeding pro se, filed a complaint alleging violations of his civil rights pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). (Dkt. No. 12). For the reasons stated below, the Complaint is dismissed with leave to amend.¹

¹ Magistrate judges may dismiss a complaint with leave to amend without approval of the district judge. See McKeever v. Block, 932 F.2d 795, 795 (9th Cir. 1991).

1 Congress mandates that district courts initially screen civil
2 complaints filed by prisoners seeking redress from a governmental entity
3 or employee. 28 U.S.C. § 1915A(b). This Court may dismiss such a
4 complaint, or any portions thereof, before service of process if the
5 Court concludes that the complaint (1) is frivolous or malicious, (2)
6 fails to state a claim upon which relief can be granted, or (3) seeks
7 monetary relief from a defendant who is immune from such relief. 28
8 U.S.C. § 1915A(b) (1)-(2); see also Lopez v. Smith, 203 F.3d 1122, 1126-
9 27 & n.7 (9th Cir. 2000) (en banc).

10
11 **II.**

12 **ALLEGATIONS OF THE COMPLAINT**

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14 The Complaint names as defendants three employees of the Federal
15 Bureau of Prisons ("BOP"): (1) Derrick Schultz, a correctional counselor
16 at Victorville Med. II; (2) R. Byrd, a disciplinary hearing officer at
17 Victorville Med. II; and (3) Juan D. Castillo, the Western Regional
18 Director of the BOP. (Complaint at 1). Defendants are sued in both
19 their individual and official capacities. (Id.).

20
21 While Plaintiff's specific claims are not entirely clear, the
22 gravamen of the Complaint appears to argue that Defendants violated
23 Plaintiff's constitutional rights by unlawfully imposing administrative
24 sanctions on him for serving as a witness to the signing of another
25 prisoner's legal documents. Plaintiff contends that on or about May 24,
26 2012, Defendant Schultz, in reviewing the institutional mail, observed
27 that Plaintiff had signed another inmate's legal documents as a witness.
28 (Id. at 2). Although Plaintiff asserts that no one ever told him that

1 such conduct was prohibited, Defendant Schultz filed an incident report
2 in which he stated that by signing the other inmate's documents,
3 Plaintiff had been in possession of unauthorized material in violation
4 of Code 305's broad prohibition on the possession by an inmate of
5 "anything unauthorized." (Id.). The incident report was referred to
6 Defendant Byrd on or about May 31, 2012. (Id.).
7

8 A disciplinary hearing was held on July 6, 2012 in which Defendants
9 Schultz and Byrd found Plaintiff guilty of violating Code 305. (Id. at
10 2; id., Exh. C). Plaintiff's conviction appears to have been based
11 solely on Defendants' belief that "Plaintiff's signature . . . on the
12 documents means that Plaintiff possessed the documents at some point in
13 time." (Id. at 3). However, Plaintiff was not provided with a written
14 statement of the specific evidence Defendants relied on and the reasons
15 for the disciplinary actions taken. (Id. at 2). As punishment,
16 Defendant Byrd revoked fourteen days of Plaintiff's good-time credits
17 and three months of commissary visits and visitation rights. (Id. at
18 3). Moreover, Plaintiff alleges that even though he was punished,
19 Defendant Byrd expunged the incident reports of the two other inmates
20 who were charged for the same conduct. (Id.).
21

22 Plaintiff appealed his conviction to Defendant Castillo. (Id.).
23 On September 20, 2012, Defendant Castillo granted partial relief and
24 expunged Plaintiff's incident report. (Id., Exh. C). However, Plaintiff
25 alleges that despite the expungement, Defendants failed to restore
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1 Plaintiff's forfeited good-time credits and visitation and commissary
2 privileges.² (Complaint at 3).

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4 **III.**

5 **PLAINTIFF'S CLAIMS**

6
7 Plaintiff claims that by imposing sanctions for signing legal
8 documents, Defendants Schultz and Byrd violated Plaintiff's First
9 Amendment rights of expression and association. (Complaint at 4).
10 Furthermore, Plaintiff alleges that Defendants Schultz and Byrd denied
11 him due process of law by failing to give fair notice or warning
12 regarding the prohibited conduct. (Id.). Also, Plaintiff claims that
13 Defendants Schultz and Byrd failed to provide any evidence of guilt,
14 reasons for the disciplinary actions taken, or a written statement of
15 the evidence they relied upon. (Id.).
16

17 Lastly, Plaintiff claims that Defendants Byrd and Castillo violated
18 Plaintiff's right to equal protection. (Id.). Specifically, Plaintiff
19 contends that Defendant Byrd violated his right to equal protection by
20 expunging the incident reports of the other two inmates who were charged
21 for the same offense while finding Plaintiff guilty. Moreover,
22 Plaintiff argues that Defendant Castillo violated Plaintiff's right to
23

24
25 ² Plaintiff later contended in his Response to the Court's February
26 12, 2013 Order to Show Cause Why Plaintiff's Claims Are Not Heck-Barred
27 and in his Objections to the Court's March 18, 2013 Report and
28 Recommendation recommending dismissal for failure to prosecute that his
credits and privileges were in fact fully restored on October 3, 2012,
nearly two weeks before Plaintiff signed the instant Complaint. (Dkt.
No. 27 at 1; Dkt. No. 29 at 2; see also Complaint at 5).

1 equal protection by failing to restore Plaintiff's credits and
2 privileges after expunging the incident report. (Id.). As such,
3 Plaintiff claims he was denied an equal opportunity to receive visits
4 and to shop at the commissary like other inmates. (Id. at 5).
5

6 Plaintiff contends that he now suffers from emotional distress,
7 depression, anxiety, and an impaired state of mind due to Defendants'
8 actions. (Id. at 4-5). Plaintiff requests declaratory relief,
9 compensatory damages in the amount of \$100,000 against Defendants
10 Schultz and Byrd jointly and severally, \$50,000 against Defendant
11 Castillo, punitive damages in the amount of \$150,000 against all
12 Defendants jointly and severally, and recovery of his costs in this
13 suit. (Id. at 5).
14

15 **IV.**
16 **DISCUSSION**
17

18 Pursuant to 28 U.S.C. § 1915A(b), the Court must dismiss
19 Plaintiff's Complaint due to defects in pleading. Pro se litigants in
20 civil rights cases, however, must be given leave to amend their
21 complaints unless it is absolutely clear that the deficiencies cannot be
22 cured by amendment. See Lopez, 203 F.3d at 1128-29. Accordingly, the
23 Court grants Plaintiff leave to amend, as indicated below.

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1 **A. Plaintiff Fails To State A Claim Against Defendants In Their**
2 **Official Capacities**

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4 A suit for damages against federal employees in their official
5 capacity is functionally a suit against the United States. Gilbert v.
6 DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). However, a civil rights
7 action against a federal defendant under Bivens may be brought only
8 against an offending individual officer or officers, not the United
9 States or its agencies. Correctional Services Corp. V. Malesko, 534
10 U.S. 61, 72, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001); id. at 70-71
11 (explaining that because the "purpose of Bivens is to deter individual
12 federal officers from committing constitutional violations," the
13 "deterrent effects of the Bivens remedy would be lost" if the Court
14 "were to imply a damages action directly against federal agencies"). As
15 such, no cause of action is available under Bivens against federal
16 employees sued in their official capacities. Ibrahim v. Dept. of
17 Homeland Sec., 538 F.3d 1250, 1257 (9th Cir. 2008).

18
19 Here, the Complaint names as defendants three employees of the
20 Federal Bureau of Prisons. The Complaint states that "each defendant is
21 sued individually and in his official capacity." (Complaint at 1).
22 However, as stated above, no cause of action is available under Bivens
23 against federal employees in their official capacities. Accordingly,
24 the Complaint must be dismissed.

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1 **B. Plaintiff Fails To State An Equal Protection Claim**

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3 The Equal Protection Clause requires the government to treat all
4 similarly situated people equally. Hartman v. California Dept. of
5 Corrections and Rehabilitation, 707 F.3d 1114, 1123 (9th Cir. 2013).
6 This does not mean, however, that all prisoners must receive identical
7 treatment and resources. (Id.). To prevail on an Equal Protection
8 claim, a plaintiff typically must allege facts plausibly showing that
9 the defendant acted with an intent or purpose to discriminate based upon
10 the plaintiff's membership in a protected class. (Id.). However,
11 courts have recognized successful equal protection claims brought by a
12 "class of one" where the plaintiff alleges that he or she has been
13 intentionally treated differently from others similarly situated and
14 that there is no rational basis for the difference in treatment.
15 Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145
16 L. Ed. 2d 1060 (2000).

17
18 Here, Plaintiff claims that Defendants violated his right to equal
19 protection when they expunged the other inmates' incident reports for
20 the same offense of which they found Plaintiff guilty and failed to
21 restore Plaintiff's credits and privileges. (Complaint at 3-5).
22 However, as stated above, the government is not obligated to treat all
23 inmates identically. Moreover, the Complaint does not allege that
24 Defendants acted with the intent to discriminate against Plaintiff or
25 explain why there was no rational basis for the difference in treatment
26 between Plaintiff and the other inmates. Accordingly, the Complaint
27 must be dismissed with leave to amend.

1 **C. The Complaint Fails To Satisfy Federal Rule Of Civil Procedure 8**

2
3 Federal Rule of Civil Procedure 8(a)(2) requires that a complaint
4 contain "'a short and plain statement of the claim showing that the
5 pleader is entitled to relief,' in order to 'give the defendant fair
6 notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. V. Twonbly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167
7 L. Ed. 2d 929 (2007). Although detailed factual allegations are not
8 required, the Rule does call for sufficient factual matter, accepted as
9 true, to state a claim to relief that is plausible on its face.
10 Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d
11 868. "A claim has facial plausibility when the pleaded factual content
12 allows the court to draw the reasonable inference that the defendant is
13 liable for the misconduct alleged." (Id.).

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16 The Complaint fails to satisfy the requirements of Rule 8. For
17 example, it is unclear which claims, exactly, Plaintiff is attempting to
18 assert against Defendant Castillo because Castillo in fact granted
19 Plaintiff the relief he sought by expunging the incident report from
20 Plaintiff's record. (Id. at 3; id., Exh. C). Moreover, the allegations
21 in the Complaint appear to contradict Plaintiff's assertions in other
22 filings related to the same incident. Specifically, Plaintiff asserts
23 in separate filings that his claims are not Heck-barred because his
24 credits and privileges were fully restored following expungement of the
25 incident report. (Dkt. No. 27 at 1; Dkt. No. 29 at 2). In the
26 Complaint, however, Plaintiff states that Defendants "failed to restore
27 Plaintiff's forfeited goodtime credits, visitation, and commissary
28 privilege[s] [even] after the incident report had been expunged."

1 (Complaint at 3). Therefore, the Complaint is confusing because it is
2 not clear whether Plaintiff's sanctions were reversed or what the
3 precise injuries that Plaintiff suffered were.

4
5 Furthermore, although Plaintiff appears generally to assert a First
6 Amendment claim, Plaintiff is advised that prison regulations that
7 infringe on a prisoner's First Amendment rights are valid so long as
8 they are reasonably related to legitimate penological interests. Turner
9 v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). To
10 succeed on a First Amendment claim, a plaintiff must show five elements:
11 1) an assertion that the government actor took some adverse action
12 against the inmate 2) because of 3) that prisoner's protected conduct,
13 and that such action 4) chilled the inmate's exercise of his First
14 Amendment rights, and 5) the action did not reasonably advance a
15 legitimate correctional goal. Rhodes v. Robinson, 408 F.3d 559, 567-68
16 (9th Cir. 2005). In any future amended complaint, Plaintiff should
17 allege facts address these elements of his claim. Accordingly, the
18 Complaint must be dismissed with leave to amend.

19
20 **V.**

21 **CONCLUSION**

22
23 For the reasons stated above, the Complaint is dismissed with leave
24 to amend. If Plaintiff still wishes to pursue this action, he is
25 granted **thirty (30) days** from the date of this Memorandum and Order
26 within which to file a First Amended Complaint. In any amended
27 complaint, the Plaintiff shall cure the defects described above. The
28 First Amended Complaint, if any, shall be complete in itself and shall

1 bear both the designation "First Amended Complaint" and the case number
2 assigned to this action. It shall not refer in any manner to any
3 previously filed complaint in this matter.
4

5 In any amended complaint, Plaintiff should confine his allegations
6 to those operative facts supporting each of his claims. Plaintiff is
7 advised that pursuant to Federal Rule of Civil Procedure 8(a), all that
8 is required is a "short and plain statement of the claim showing that
9 the pleader is entitled to relief." **Plaintiff is strongly encouraged to**
10 **utilize the standard civil rights complaint form when filing any amended**
11 **complaint, a copy of which is attached.** In any amended complaint,
12 Plaintiff should identify the nature of each separate legal claim and
13 make clear what specific factual allegations support each of his
14 separate claims. Plaintiff is strongly encouraged to keep his
15 statements concise and to omit irrelevant details. It is not necessary
16 for Plaintiff to cite case law or include legal argument. Plaintiff is
17 also advised to omit any claims for which he lacks a sufficient factual
18 basis. Furthermore, the First Amended Complaint may not include new
19 Defendants or claims not reasonably related to the allegations in the
20 Complaint.
21

22 **Plaintiff is explicitly cautioned that failure to timely file a**
23 **First Amended Complaint, or failure to correct the deficiencies**
24 **described above, will result in a recommendation that this action be**
25 **dismissed with prejudice for failure to prosecute and obey Court orders**
26 **pursuant to Federal Rule of Civil Procedure 41(b). Plaintiff is further**
27 **advised that if he no longer wishes to pursue this action, he may**
28 **voluntarily dismiss it by filing a Notice of Dismissal in accordance**

1 with Federal Rule of Civil Procedure 41(a)(1). A form Notice of
2 Dismissal is attached for Plaintiff's convenience.

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4 DATED: April 29, 2013

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6 /S/
7 SUZANNE H. SEGAL
8 UNITED STATES MAGISTRATE JUDGE
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