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6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
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9
10 ANTHONY MONEYHAM,
11 Plaintiff,

12 v.

13 A. WARREN, et al.

14 Defendant(s).
15

Case No. EDCV 17-496-BRO (KK)

ORDER DISMISSING FIRST
AMENDED COMPLAINT WITH
LEAVE TO AMEND

16
17 I.

18 **INTRODUCTION**

19 On April 7, 2017, Plaintiff Anthony Moneyham (“Plaintiff”), proceeding pro
20 se and in forma pauperis, constructively filed¹ a First Amended Complaint
21 (“FAC”) pursuant to Bivens v. Six Unknown Named Agents of the Fed. Bureau of
22 Narcotics (“Bivens”), 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). ECF
23 Docket No. (“Dkt.”) 7, FAC. Plaintiff sues defendants Case Manager A. Warren,
24

25 ¹ Under the “mailbox rule,” when a pro se prisoner gives prison authorities a
26 pleading to mail to court, the court deems the pleading constructively “filed” on
27 the date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010).
28 (citation omitted); Douglas v. Noelle, 567 F.3d 1103, 1107 (9th Cir. 2009) (stating
the “mailbox rule applies to § 1983 suits filed by pro se prisoners”); Mayer v.
Redix, No. CIV S-10-1552 GGH P, 2012 WL 360202, at *7 n.22 (E.D. Cal. Feb. 2,
2012) on reconsideration, No. CIV S-10-1552 GGH P, 2012 WL 1082044 (E.D.
Cal. Mar. 30, 2012) (applying “mailbox rule” to Bivens action).

1 Hearing Administrator Dwight Miller, Acting Administrator National Inmate
2 Appeals Roger, Warden Richard B. Ives, and Discipline Hearing Officer D. Elliot
3 (collectively “Defendants”), each in their individual capacity, for violation of his
4 First and Fifth Amendment rights. Id.

5 For the reasons set forth below, the FAC is dismissed with leave to amend.

6 **II.**

7 **BACKGROUND**

8 On March 8, 2017, Plaintiff constructively filed a Complaint pursuant to
9 Bivens against Defendants, each in their individual capacity. Dkt. 1, Compl. The
10 claims in the Complaint are substantially similar to those alleged in the FAC.
11 Compare id. and Dkt. 7, FAC.

12 On April 7, 2017, prior to the Court’s screening of the Complaint, Plaintiff
13 constructively filed the FAC against Defendants, each in their individual capacity.
14 Dkt. 7, FAC. Plaintiff alleges Defendants retaliated against him in violation of the
15 First Amendment by placing him in the Special Management Unit (“SMU”)
16 program because he filed a grievance against a staff member and requested a
17 criminal investigation. Id. Plaintiff also alleges his SMU placement violated his
18 due process rights under the Fifth Amendment because (a) he was denied staff
19 representation at the hearing; (b) he was denied copies of the Disciplinary Hearing
20 Officer (“DHO”) reports that were the grounds for his SMU placement; and (c)
21 he was transferred to SMU in violation of a prison policy requiring completion of
22 disciplinary segregation time and resolution of incident reports before transfer. Id.

23 As to Plaintiff’s allegations regarding each defendant, Plaintiff alleges
24 defendant Warren prepared the SMU packet based in part on Plaintiff’s DHO
25 report and ignored Plaintiff’s request for a staff representative. Id. Defendant
26 Miller conducted the SMU placement hearing where Plaintiff requested a
27 continuance so he “could ____ evidence why [he] should not be designated to the
28 SMU program.” Id. (blank in original). Defendant Miller denied the requested

1 continuance and defendant Ives “fail[ed] to intervene.” Id. Defendant Elliot
2 withheld disciplinary hearing reports so Plaintiff could not appeal the SMU
3 placement. Id. Plaintiff alleges he was transferred to the SMU program despite
4 having written an incident report, “which should have delayed the transfer.” Id.
5 Finally, defendant Roger denied Plaintiff’s appeal of the SMU placement after
6 Plaintiff explained the retaliation in his appeal. Id.

7 Plaintiff seeks compensatory and punitive damages as well as “an injunction
8 ordering Plaintiff[’s] release from punitive segregation.” Id. at 8.

9 III.

10 **STANDARD OF REVIEW**

11 As Plaintiff is proceeding in forma pauperis, the Court must screen the FAC
12 and is required to dismiss the case at any time if it concludes the action is frivolous
13 or malicious, fails to state a claim on which relief may be granted, or seeks
14 monetary relief against a defendant who is immune from such relief. 28 U.S.C. §
15 1915(e)(2)(B); 28 U.S.C. § 1915A(b); see Barren v. Harrington, 152 F.3d 1193, 1194
16 (9th Cir. 1998).

17 In determining whether a complaint fails to state a claim for screening
18 purposes, the Court applies the same pleading standard from Rule 8 of the Federal
19 Rules of Civil Procedure (“Rule 8”) as it would when evaluating a motion to
20 dismiss under Federal Rule of Civil Procedure 12(b)(6). See Watison v. Carter,
21 668 F.3d 1108, 1112 (9th Cir. 2012). Under Rule 8(a), a complaint must contain a
22 “short and plain statement of the claim showing that the pleader is entitled to
23 relief.” Fed. R. Civ. P. 8(a)(2).

24 A complaint may be dismissed for failure to state a claim “where there is no
25 cognizable legal theory or an absence of sufficient facts alleged to support a
26 cognizable legal theory.” Zamani v. Carnes, 491 F.3d 990, 996 (9th Cir. 2007)
27 (citation omitted). In considering whether a complaint states a claim, a court must
28 accept as true all of the material factual allegations in it. Hamilton v. Brown, 630

1 F.3d 889, 892-93 (9th Cir. 2011). However, the court need not accept as true
2 “allegations that are merely conclusory, unwarranted deductions of fact, or
3 unreasonable inferences.” In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th
4 Cir. 2008) (citation omitted). Although a complaint need not include detailed
5 factual allegations, it “must contain sufficient factual matter, accepted as true, to
6 ‘state a claim to relief that is plausible on its face.’” Cook v. Brewer, 637 F.3d
7 1002, 1004 (9th Cir. 2011) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct.
8 1937, 173 L. Ed. 2d 868 (2009)). A claim is facially plausible when it “allows the
9 court to draw the reasonable inference that the defendant is liable for the
10 misconduct alleged.” Cook, 637 F.3d at 1004 (citation omitted).

11 “A document filed pro se is to be liberally construed, and a pro se complaint,
12 however inartfully pleaded, must be held to less stringent standards than formal
13 pleadings drafted by lawyers.” Woods v. Carey, 525 F.3d 886, 889-90 (9th Cir.
14 2008) (citation omitted). “[W]e have an obligation where the p[laintiff] is pro se,
15 particularly in civil rights cases, to construe the pleadings liberally and to afford the
16 p[laintiff] the benefit of any doubt.” Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir.
17 2012) (citation omitted).

18 If the court finds the complaint should be dismissed for failure to state a
19 claim, the court has discretion to dismiss with or without leave to amend. Lopez v.
20 Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000). Leave to amend should be granted
21 if it appears possible the defects in the complaint could be corrected, especially if
22 the plaintiffs are pro se. Id. at 1130-31; see also Cato v. United States, 70 F.3d 1103,
23 1106 (9th Cir. 1995). However, if, after careful consideration, it is clear a complaint
24 cannot be cured by amendment, the court may dismiss without leave to amend.
25 Cato, 70 F.3d at 1107-11; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 972 (9th
26 Cir. 2009).

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1 IV.

2 **DISCUSSION**

3 **A. PLAINTIFFS FAIL TO STATE A FIRST AMENDMENT**
4 **RETALIATION CLAIM**

5 **(1) APPLICABLE LAW**

6 Prisoners have a clearly established First Amendment right to file prison
7 grievances and to be free from retaliation for doing so. Brodheim v. Cry, 584 F.3d
8 1262, 1269 (9th Cir. 2009). Within the prison context, a viable claim of First
9 Amendment retaliation entails five basic elements: (1) the prisoner engaged in
10 protected conduct; (2) an assertion that a state actor took some adverse action
11 against an inmate; (3) the adverse action was “because of” the prisoner’s protected
12 conduct; (4) the adverse action chilled the inmate’s exercise of his First
13 Amendment rights; and (5) the action did not reasonably advance a legitimate
14 correctional goal. Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

15 “Because direct evidence of retaliatory intent rarely can be pleaded in a
16 complaint, allegation of a chronology of events from which retaliation can be
17 inferred is sufficient to survive dismissal.” Watison v. Carter, 668 F.3d 1108, 1114
18 (9th Cir. 2012); Pratt v. Rowland, 65 F.3d 802, 808 (9th Cir. 1995) (holding
19 “timing can properly be considered as circumstantial evidence of retaliatory
20 intent”).

21 The Ninth Circuit has held that “an objective standard governs the chilling
22 inquiry; a plaintiff does not have to show that ‘his speech was actually inhibited or
23 suppressed,’ by the adverse action but rather that the action at issue ‘would chill or
24 silence a person of ordinary firmness from future First Amendment activities.’”
25 Brodheim, 584 F.3d at 1270 (quoting Rhodes, 408 F.3d at 568–69); see also Pinard
26 v. Clatskanie School District, 467 F.3d 755, 770 (9th Cir. 2006).

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1 **(2) ANALYSIS**

2 Here, Plaintiff conclusorily alleges he was retaliated against for filing a
3 grievance. FAC at 7. However, Plaintiff does not allege any Defendant was aware
4 he had filed a grievance or even allege any facts, such as a chronology of events,
5 from which knowledge could be inferred. Therefore, Plaintiff has failed to
6 sufficiently allege retaliatory intent. In addition, Plaintiff fails to allege any facts
7 from which the Court could find placement in the SMU program “would chill or
8 silence a person of ordinary firmness from future First Amendment activities.”
9 Brodheim, 584 F.3d at 1270. Therefore, Plaintiff’s First Amendment retaliation
10 claim is subject to dismissal.

11 **B. PLAINTIFF FAILS TO STATE A FIFTH AMENDMENT DUE**
12 **PROCESS CLAIM**

13 **(1) APPLICABLE LAW**

14 The Due Process Clause of the Fifth Amendment guarantees that “[n]o
15 person shall . . . be deprived of life, liberty, or property, without due process of
16 law.” U.S.C.A. Const. Amend. V. “A liberty interest may arise from the
17 Constitution itself, by reason of guarantees implicit in the word ‘liberty,’ or it may
18 arise from an expectation or interest created by state laws or policies.” Wilkinson
19 v. Austin, 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005) (citations
20 omitted). Due process analysis “proceeds in two steps: We first ask whether there
21 exists a liberty or property interest of which a person has been deprived, and if so
22 we ask whether the procedures followed by the State were constitutionally
23 sufficient.” Swarthout v. Cooke, 562 U.S. 216, 219, 131 S. Ct. 859, 178 L. Ed. 2d
24 732 (2011).

25 Courts have held prisoners have “no constitutionally guaranteed immunity
26 from being falsely or wrongly accused of conduct which may result in the
27 deprivation of a protected liberty interest,” but they do have “the right not to be
28 deprived of a protected liberty interest without due process of law.” Freeman v.

1 Rideout, 808 F.2d 949, 951 (2d Cir. 1986); see also Sprouse v. Babcock, 870 F.2d
2 450, 452 (8th Cir. 1989) (finding inmate’s claims based upon falsity of charges
3 brought by a prison counselor did not state a constitutional claim). In order to
4 establish the deprivation of a protected liberty interest, a prisoner must allege an
5 “atypical, significant deprivation in which a State might conceivably create a liberty
6 interest.” Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 132 L. Ed. 2d 418
7 (1995) (holding “segregated confinement did not present the type of atypical,
8 significant deprivation in which a State might conceivably create a liberty
9 interest”).

10 In order to establish the denial of procedural protections afforded by due
11 process, a prisoner must allege denial of the requirements set forth in Wolff v.
12 McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), which include
13 written notice, the right to call witnesses, the right to present documentary
14 evidence, and the right to have a written statement by the factfinder as to the
15 evidence relied upon and the reasons for the disciplinary action taken. See Serrano
16 v. Francis, 345 F.3d 1071, 1077-78 (9th Cir. 2003).

17 **(2) ANALYSIS**

18 Here, Plaintiff’s due process claims suffers from a number of deficiencies.
19 Plaintiff alleges (a) he was denied staff representation at the hearing; (b) he was
20 denied copies of the Disciplinary Hearing Officer (“DHO”) reports that were the
21 grounds for his SMU placement; and (c) he was transferred to SMU in violation of
22 a prison policy requiring completion of disciplinary segregation time and resolution
23 of incident reports before transfer. FAC at 7.

24 First, Plaintiff fails to allege any fact to show SMU placement imposes an
25 “atypical and significant hardship . . . in relation to the ordinary incidents of prison
26 life.” Sandin, 515 U.S. at 486. Therefore, Plaintiff has failed to allege he has a
27 liberty interest protected by the Fifth Amendment and his due process claims must
28 be dismissed.

1 Second, to the extent Plaintiff contends defendant Roger’s denial of
2 Plaintiff’s appeal is itself a due process violation, Plaintiff fails to state a claim. See
3 Crim v. Mann, No. 1:12-CV-01089-LJO, 2013 WL 1338855, at *3 (E.D. Cal. Apr. 3,
4 2013), subsequently aff’d, No. 13-16085, 2017 WL 1350744 (9th Cir. Apr. 12, 2017)
5 (“There is no independent, substantive due process right in how Plaintiff’s inmate
6 grievance should have been processed.” (citing Ramirez v. Galaza, 334 F.3d 850,
7 860 (9th Cir. 2003))). Therefore, Plaintiff’s due process claim against defendant
8 Roger is subject to dismissal.

9 Third, while Plaintiff alleges the violation of the prison’s procedural
10 protections violated his due process rights, a violation of prison policy alone is
11 insufficient to state a due process claim. See Walker v. Sumner, 14 F.3d 1415, 1420
12 (9th Cir. 1994) (“[I]f state procedures rise above the floor set by the due process
13 clause, a state could fail to follow its own procedures yet still provide sufficient
14 process to survive constitutional scrutiny.”), overruled on other grounds by
15 Sandin, 515 U.S. at 483-84.

16 Fourth, Plaintiff’s sole allegation against defendant Ives is that he “failed to
17 intervene.” FAC at 7. However, without knowledge of the alleged constitutional
18 violations, there is no causal connection between defendant Ives’s failure to
19 intervene and the deprivation of Plaintiff’s due process rights. Cunningham v.
20 Gates, 229 F.3d 1271, 1289 (9th Cir. 2000), as amended (Oct. 31, 2000)
21 (“[O]fficers can be held liable for failing to intercede only if they had an
22 opportunity to intercede.”). Therefore, Plaintiff has failed to allege a due process
23 claim against defendant Ives.

24 Finally, to the extent SMU placement affected the length of Plaintiff’s
25 sentence (for example, by denial of good-time credits), he has not alleged the
26 results of the hearing have been invalidated. See Edwards v. Balisok, 520 U.S. 641,
27 648, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997) (holding a “claim for declaratory
28 relief and money damages, based on allegations . . . that necessarily imply the

1 invalidity of the punishment imposed,” including the deprivation of good-time
2 credits, “is not cognizable under § 1983”); Heck v. Humphrey, 512 U.S. 477, 487,
3 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (holding if “a judgment in favor of the
4 plaintiff would necessarily imply the invalidity of his conviction or sentence . . . the
5 complaint must be dismissed unless the plaintiff can demonstrate that the
6 conviction or sentence has already been invalidated”); see also Martin v. Sias, 88
7 F.3d 774, 775 (9th Cir. 1996) (order) (noting Heck applies to Bivens actions).
8 Therefore, a due process claim that would imply the invalidity of a disciplinary
9 hearing that would affect the length of Plaintiff’s incarceration must be dismissed
10 without prejudice.

11 **V.**

12 **LEAVE TO FILE A SECOND AMENDED COMPLAINT**

13 For the foregoing reasons, the FAC is subject to dismissal. As the Court is
14 unable to determine whether amendment would be futile, leave to amend is
15 granted. See Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per
16 curiam).

17 Accordingly, IT IS ORDERED THAT **within twenty-one (21) days** of the
18 service date of this Order, Plaintiff choose one of the following two options:

19 1. Plaintiff may file a Second Amended Complaint to attempt to cure the
20 deficiencies discussed above. **The Clerk of Court is directed to mail Plaintiff a**
21 **blank Central District civil rights complaint form to use for filing the Second**
22 **Amended Complaint, which the Court encourages Plaintiff to use.**

23 If Plaintiff chooses to file a Second Amended Complaint, Plaintiff must
24 clearly designate on the face of the document that it is the “Second Amended
25 Complaint,” it must bear the docket number assigned to this case, and it must be
26 retyped or rewritten in its entirety, preferably on the court-approved form. Plaintiff
27 shall not include new defendants or new allegations that are not reasonably related
28 to the claims asserted in the Complaint. In addition, the Second Amended

1 Complaint must be complete without reference to the Complaint or any other
2 pleading, attachment, or document.

3 An amended complaint supersedes the preceding complaint. Ferdik v.
4 Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). After amendment, the Court will
5 treat all preceding complaints as nonexistent. Id. Because the Court grants
6 Plaintiff leave to amend as to all his claims raised here, any claim raised in a
7 preceding complaint is waived if it is not raised again in the Second Amended
8 Complaint. Lacey v. Maricopa Cnty., 693 F.3d 896, 928 (9th Cir. 2012).

9 2. Alternatively, Plaintiff may voluntarily dismiss the action without
10 prejudice, pursuant to Federal Rule of Civil Procedure 41(a). **The Clerk of Court**
11 **is directed to mail Plaintiff a blank Notice of Dismissal Form, which the Court**
12 **encourages Plaintiff to use.**

13 The Court advises Plaintiff that it generally will not be well-disposed toward
14 another dismissal with leave to amend if Plaintiff files a Second Amended
15 Complaint that continues to include claims on which relief cannot be granted. “[A]
16 district court’s discretion over amendments is especially broad ‘where the court
17 has already given a plaintiff one or more opportunities to amend his complaint.’”
18 Ismail v. County of Orange, 917 F. Supp.2d 1060, 1066 (C.D. Cal. 2012) (citations
19 omitted); see also Ferdik, 963 F.2d at 1261. Thus, **if Plaintiff files a Second**
20 **Amended Complaint with claims on which relief cannot be granted, the**
21 **Second Amended Complaint will be dismissed without leave to amend and**
22 **with prejudice.**

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Plaintiff is explicitly cautioned that failure to timely file a Second Amended Complaint will result in this action being dismissed with prejudice for failure to state a claim, prosecute and/or obey Court orders pursuant to Federal Rule of Civil Procedure 41(b).

Dated: May 10, 2017



HONORABLE KENLY KIYA KATO
United States Magistrate Judge