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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ROBERT TREVINO,

Plaintiff,

v.

MCBRIDE, et al.,

Defendants.

CASE NO. 1:08-cv-01649-AWI-DLB PC

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DISMISSAL OF CERTAIN  
DEFENDANTS

(Docs. 6, 7)

RESPONSE DUE WITHIN THIRTY DAYS

**I. Findings and Recommendations Following Screening of Amended Complaint**

Plaintiff Robert Trevino (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed his complaint on October 29, 2008. (Doc. 1.)

On March 17, 2009, the Court issued an order finding that Plaintiff’s allegations give rise to cognizable claims for relief under section 1983 against defendants Roberts and for retaliation in violation of the First Amendment. (Doc. 6.) However, the Court found that Plaintiff’s allegations do not give rise to any claims for relief against defendants McBride, Yates, and the director of the CDC. The Court ordered Plaintiff to either file an amended complaint or notify the Court that he wishes to proceed only on his cognizable claims. On April 6, 2009, Plaintiff notified the Court that he does not wish to amend and wishes to proceed only on claims identified by the Court as cognizable. (Doc. 7.) Based on Plaintiff’s notice, the instant Findings and Recommendations now issues.

**A. Screening Requirement**

1 The Court is required to screen complaints brought by prisoners seeking relief against a  
2 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
3 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
4 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or  
5 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.  
6 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been  
7 paid, the court shall dismiss the case at any time if the court determines that . . . the action or  
8 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §  
9 1915(e)(2)(B)(ii).

10 “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited  
11 exceptions,” none of which applies to section 1983 actions. Swierkiewicz v. Sorema N. A., 534  
12 U.S. 506, 512 (2002); Fed. R. Civ. Pro. 8(a). Pursuant to Rule 8(a), a complaint must contain “a  
13 short and plain statement of the claim showing that the pleader is entitled to relief . . .” Fed. R.  
14 Civ. Pro. 8(a). “Such a statement must simply give the defendant fair notice of what the  
15 plaintiff’s claim is and the grounds upon which it rests.” Swierkiewicz, 534 U.S. at 512.  
16 However, “the liberal pleading standard . . . applies only to a plaintiff’s factual allegations.”  
17 Neitze v. Williams, 490 U.S. 319, 330 n.9 (1989). “[A] liberal interpretation of a civil rights  
18 complaint may not supply essential elements of the claim that were not initially pled.” Bruns v.  
19 Nat’l Credit Union Admin., 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents,  
20 673 F.2d 266, 268 (9th Cir. 1982)).

21 **B. Summary of Plaintiff’s Complaint**

22 Plaintiff is currently a state prisoner at Pleasant Valley State Prison (“PVSP”) in  
23 Coalinga, California, where the acts he complains of occurred. Plaintiff names the following  
24 defendants: correctional sergeant McBride and correctional officers Cano and Roberts. (Doc. 1,  
25 pp. 2:16-3:8.) Plaintiff also lists Yates, warden of PVSP, and the Director of the California  
26 Department of Corrections (“CDC”) as parties to the complaint. (Id., p. 3:14-19.)

27 Plaintiff alleges the following. Defendants Cano and Roberts pulled Plaintiff and his  
28 former cell mate out of their cell to conduct a search. (Id., p. 4:22-24.) This was the second cell

1 search in a week. (Id., pp. 25-26.) All the personal property that was confiscated was not  
2 contraband, and some of the property was legal property pertaining to two active cases. (Id., pp.  
3 4:27-5:3.) Plaintiff confronted defendants Cano and Roberts regarding the confiscation of his  
4 property, and demanded a confiscation receipt from defendants Cano and Roberts. (Id., pp.5:23-  
5 6:1.)

6 Two or three days after this incident, Plaintiff confronted defendant McBride and told  
7 him that defendant Roberts had placed Plaintiff's property inside the "hot-trash" room. (Id., p.  
8 6:10-16.) Plaintiff requested a return of his items. (Id.) Defendant McBride ignored Plaintiff's  
9 request. (Id., p. 6:17-21.) Plaintiff was placed in the hole for things he did not do, and is now up  
10 for transfer. (Id., pp. 6:27-7:5.)

11 Plaintiff seeks injunctive relief, appointment of counsel, and monetary damages. (Id., pp.  
12 11:20-12:2.)

### 13 C. **Plaintiff's Claims**

#### 14 1. ***Due Process - Property***

15 Plaintiff alleges that defendants Cano and Roberts deprived Plaintiff of his property  
16 without good cause. This implicates the Due Process Clause of the Fourteenth Amendment. The  
17 Due Process Clause protects prisoners from being deprived of property without due process of  
18 law, Wolff v. McDonnell, 418 U.S. 539, 556 (1974), and prisoners have a protected interest in  
19 their personal property, Hansen v. May, 502 F.2d 728, 730 (9th Cir. 1974). However, while an  
20 authorized, intentional deprivation of property is actionable under the Due Process Clause, see  
21 Hudson v. Palmer, 468 U.S. 517, 532, n.13 (1984) (citing Logan v. Zimmerman Brush Co., 455  
22 U.S. 422 (1982)); Quick v. Jones, 754 F.2d 1521, 1524 (9th Cir. 1985), neither negligent nor  
23 unauthorized intentional deprivations of property by a state employee "constitute a violation of  
24 the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a  
25 meaningful postdeprivation remedy for the loss is available," Hudson v. Palmer, 468 U.S. 517,  
26 533 (1984). California provides such a remedy. Barnett v. Centoni, 31 F.3d 813, 816-17 (9th  
27 Cir. 1994) (per curiam).

1 Plaintiff has not alleged sufficient facts for the court to determine whether the deprivation  
2 was authorized or unauthorized. If Plaintiff is alleging an unauthorized deprivation, Plaintiff will  
3 not be able to state a cognizable due process claim under section 1983. Further, in the event that  
4 the destruction was authorized and therefore actionable under section 1983, Plaintiff has not  
5 alleged any facts suggesting that he was deprived of due process. As long as Plaintiff was  
6 provided with process, prison officials may deprive him of his property. As plead, Plaintiff fails  
7 to state a cognizable due process claim against defendants Cano and Roberts.

## 8 **2. Retaliation**

9 Plaintiff alleges that defendants retaliated against Plaintiff for filing civil lawsuits by  
10 depriving Plaintiff of his property. Allegations of retaliation against a prisoner's First  
11 Amendment rights to speech or to petition the government may support a section 1983 claim.  
12 Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985); see also Valandingham v. Bojorquez, 866  
13 F.2d 1135 (9th Cir. 1989); Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995). "Within the  
14 prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An  
15 assertion that a state actor took some adverse action against an inmate (2) because of (3) that  
16 prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First  
17 Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal."  
18 Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

19 In the prison context, cases in this Circuit addressing First Amendment retaliation claims  
20 involve situations where the action taken by the defendant was clearly adverse to the plaintiff.  
21 Rhodes v. Robinson, 408 F.3d 559, 568 (9th Cir. 2005) (arbitrary confiscation and destruction of  
22 property, initiation of a prison transfer, and assault in retaliation for filing grievances); Austin v.  
23 Terhune, 367 F.3d 1167, 1171 (9th Cir. 2004) (retaliatory placement in administrative  
24 segregation for filing grievances); Bruce v. Ylst, 351 F.3d 1283, 1288 (9th Cir. 2003) (retaliatory  
25 validation as a gang member for filing grievances); Hines v. Gomez, 108 F.3d 265, 267(9th Cir.  
26 1997) (retaliatory issuance of false rules violation and subsequent finding of guilt); Pratt v.  
27 Rowland, 65 F.3d 802, 806 (9th Cir. 1995) (retaliatory prison transfer and double-cell status in  
28

1 retaliation); Valandingham v. Bojorquez, 866 F.2d 1135, 1138 (9th Cir. 1989) (inmate labeled  
2 him a snitch and approached by other inmates and threatened with harm as a result); Rizzo v.  
3 Dawson, 778 F.2d 527, 530-32 (9th Cir. 1985) (retaliatory reassignment out of vocational class  
4 and transfer to a different prison).

5 Based on the pleadings, Plaintiff alleges cognizable retaliation claims against defendants  
6 Cano and Roberts.

7 Plaintiff also makes allegations against defendant McBride, and appears to name Warden  
8 Yates and the director of the CDC as defendants. Plaintiff's allegations against these defendants  
9 appear to be based on their supervisory roles. Supervisory personnel are generally not liable  
10 under section 1983 for the actions of their employees under a theory of respondeat superior and,  
11 therefore, when a named defendant holds a supervisory position, the causal link between him  
12 and the claimed constitutional violation must be specifically alleged. See Fayle v. Stapley, 607  
13 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert.  
14 denied, 442 U.S. 941 (1979). To state a claim for relief under section 1983 based on a theory of  
15 supervisory liability, plaintiff must allege some facts that would support a claim that supervisory  
16 defendants either: personally participated in the alleged deprivation of constitutional rights; knew  
17 of the violations and failed to act to prevent them; or promulgated or "implemented a policy so  
18 deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force  
19 of the constitutional violation.'" Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989) (internal  
20 citations omitted); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

21 Furthermore, the argument that anyone who knows about a violation of the Constitution,  
22 and fails to cure it, has violated the Constitution himself is not correct. "Only persons who cause  
23 or participate in the violations are responsible. Ruling against a prisoner on an administrative  
24 complaint does not cause or contribute to the violation. A guard who stands and watches while  
25 another guard beats a prisoner violates the Constitution; a guard who rejects an administrative  
26 complaint about a completed act of misconduct does not." George v. Smith, 507 F.3d 605, 609-  
27 10 (7th Cir. 2007) citing Greeno v. Daley, 414 F.3d 645, 656-57 (7th Cir.2005); Reed v.

1 McBride, 178 F.3d 849, 851-52 (7th Cir.1999); Vance v. Peters, 97 F.3d 987, 992-93 (7th  
2 Cir.1996). Although accepted as true, the “[f]actual allegations must be [sufficient] to raise a  
3 right to relief above the speculative level . . . .” Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955,  
4 1965 (2007) (citations omitted). Plaintiff’s allegations against defendants McBride, Yates, and  
5 the director of the CDC amount at most to a respondeat superior theory, which is insufficient to  
6 state a cognizable retaliation claim under section 1983.

7 **II. Recommendation**

8 Plaintiff has stated cognizable claims against defendants Roberts and Cano for retaliation  
9 in violation of the First Amendment. Plaintiff does not state a cognizable claim against  
10 defendants McBride, Yates, and the director of the CDC. The Court provided Plaintiff with the  
11 opportunity to file an amended complaint but Plaintiff opted to proceed on the claims found to be  
12 cognizable by the Court. Accordingly, it is HEREBY RECOMMENDED that:

- 13 1. This action proceed only against defendants Cano and Roberts for retaliation in  
14 violation of the First Amendment; and
- 15 2. Defendants McBride, Yates, and the director of the CDC be dismissed from this  
16 action with prejudice for Plaintiff’s failure to state any claims upon which relief  
17 may be granted.

18 These Findings and Recommendations will be submitted to the United States District  
19 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
20 **thirty (30)** days after being served with these Findings and Recommendations, Plaintiff may file  
21 written objections with the court. The document should be captioned “Objections to Magistrate  
22 Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections  
23 within the specified time may waive the right to appeal the District Court’s order. Martinez v.  
24 Ylst, 951 F.2d 1153 (9th Cir. 1991).

25 IT IS SO ORDERED.

26 **Dated: April 9, 2009**

/s/ Dennis L. Beck  
27 UNITED STATES MAGISTRATE JUDGE  
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