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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

FRANK LEE DEARWESTER,  
  
Plaintiff,  
  
v.  
  
CALIFORNIA DEPT. OF  
CORR. & REHAB., et al.,  
  
Defendants.

Case No. 1:15-cv-00354-SKO (PC)  
  
FIRST SCREENING ORDER DISMISSING  
COMPLAINT, WITH LEAVE TO AMEND,  
FOR FAILURE TO STATE A CLAIM  
UNDER SECTION 1983  
  
(Doc. 1)  
  
THIRTY-DAY DEADLINE

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**First Screening Order**

**I. Screening Requirement and Standard**

Plaintiff Frank Lee Dearwester, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on February 27, 2015. The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(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. § 1915A(b)(1), (2). “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 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

1 A complaint must contain “a short and plain statement of the claim showing that the  
2 pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
3 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
4 conclusory statements, do not suffice,” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937  
5 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)), and  
6 courts “are not required to indulge unwarranted inferences,” *Doe I v. Wal-Mart Stores, Inc.*, 572  
7 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). While factual  
8 allegations are accepted as true, legal conclusions are not. *Iqbal*, 556 U.S. at 678.

9 Under section 1983, Plaintiff must demonstrate that each defendant personally participated  
10 in the deprivation of his rights. *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). This  
11 requires the presentation of factual allegations sufficient to state a plausible claim for relief. *Iqbal*,  
12 556 U.S. at 678-79; *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). The mere  
13 possibility of misconduct falls short of meeting this plausibility standard. *Iqbal*, 556 U.S. at 678;  
14 *Moss*, 572 F.3d at 969. However, prisoners proceeding pro se in civil rights actions are still  
15 entitled to have their pleadings liberally construed and to have any doubt resolved in their favor.  
16 *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (citations omitted).

## 17 **II. Discussion**

### 18 **A. Summary of Action**

19 Section 1983 provides a cause of action for the violation of Plaintiff’s constitutional or  
20 other federal rights by persons acting under color of state law. *Nurre v. Whitehead*, 580 F.3d  
21 1087, 1092 (9th Cir 2009); *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006);  
22 *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). “Section 1983 is not itself a source of  
23 substantive rights, but merely provides a method for vindicating federal rights elsewhere  
24 conferred.” *Crowley v. Nevada ex rel. Nevada Sec’y of State*, 678 F.3d 730, 734 (9th Cir. 2012)  
25 (citing *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865 (1989)) (internal quotation  
26 marks omitted). To state a claim, Plaintiff must allege facts demonstrating the existence of a link,  
27 or causal connection, between each defendant’s actions or omissions and a violation of his federal  
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1 rights. *Lemire v. California Dep't of Corr. and Rehab.*, 726 F.3d 1062, 1074-75 (9th Cir. 2013);  
2 *Starr v. Baca*, 652 F.3d 1202, 1205-08 (9th Cir. 2011).

3 In this case, Plaintiff alleges that Defendant K. Acosta, a correctional officer at North Kern  
4 State Prison, violated his right to due process and retaliated against him. Plaintiff alleges that  
5 when he moved to a different building, he was not allowed to pack his own property. Defendant  
6 Acosta brought Plaintiff's legal work to the patio but refused to get anything else. Defendant  
7 Acosta later told inmate Vaca to pack Plaintiff's property and put it outside the cell for pick up.  
8 Defendant Acosta's inmate porters thereafter distributed Plaintiff's property to other inmates.

9 **B. Due Process Claim**

10 The Due Process Clause of the Fourteenth Amendment of the United States Constitution  
11 protects prisoners from being deprived of property without due process of law, *Wolff v.*  
12 *McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2974 (1974), and prisoners have a protected interest  
13 in their personal property, *Hansen v. May*, 502 F.2d 728, 730 (9th Cir. 1974). However, the  
14 procedural component of the Due Process Clause is not violated by a random, unauthorized  
15 deprivation of property if the state provides an adequate post-deprivation remedy. *Hudson v.*  
16 *Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194, 3204 (1984); *Barnett v. Centoni*, 31 F.3d 813, 816-17  
17 (9th Cir. 1994). In this case, Plaintiff's personal property was placed outside a cell and Defendant  
18 Acosta's inmate porters subsequently gave Plaintiff's property to other inmates. Notwithstanding  
19 Plaintiff's failure to adequately link the theft of his property to Defendant Acosta, the events  
20 described in the complaint evidence an unauthorized deprivation of Plaintiff's property, and in as  
21 much as Plaintiff has an adequate post-deprivation remedy under California law, his attempt to  
22 pursue a claim under federal law for the loss of his personal property items fails as a matter of law.  
23 *Barnett*, 31 F.3d at 816-17 (citing Cal. Gov't Code §§810-895).

24 **C. Retaliation Claim**

25 Plaintiff alleges, in one conclusory sentence, that he was punished in retaliation for  
26 reporting he was being extorted. Allegations of retaliation against a prisoner's First Amendment  
27 rights to speech or to petition the government may support a section 1983 claim. *Silva v. Di*  
28 *Vittorio*, 658 F.3d 1090, 1104 (9th Cir. 2011); *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir.

1 1985); *see also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989); *Pratt v. Rowland*, 65  
2 F.3d 802, 807 (9th Cir. 1995). “Within the prison context, a viable claim of First Amendment  
3 retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action  
4 against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4)  
5 chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably  
6 advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir.  
7 2005); *accord Watison v. Carter*, 668 F.3d 1108, 1114-15 (9th Cir. 2012); *Silva*, 658 at 1104;  
8 *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). In this instance, Plaintiff’s complaint is  
9 devoid of any specific facts showing that Defendant Acosta violated his constitutional rights by  
10 retaliating against him, and he fails to state a claim.

11 **D. Verbal Harassment Claim**

12 Plaintiff also alleges that he was belittled. However, mere verbal harassment or abuse does  
13 not give rise to a claim for relief under section 1983. *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139  
14 (9th Cir. 1987).

15 **E. Loss of Hygiene Items**

16 Finally, Plaintiff alleges that the theft of his property resulted in the loss “of basic hygiene  
17 [sic] and health/comfort items.” (Comp., 6:14.) Extreme deprivations are required to make out a  
18 conditions of confinement claim, and only those deprivations denying the minimal civilized  
19 measure of life’s necessities are sufficiently grave to form the basis of an Eighth Amendment  
20 violation. *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S.Ct. 995 (1992) (citations and quotations  
21 omitted). To support a claim, prisoners are required to show that prison officials knew of and  
22 disregarded a substantial risk of serious harm to their health or safety. *E.g., Farmer v. Brennan*,  
23 511 U.S. 825, 847, 114 S.Ct. 1970 (1994); *Thomas v. Ponder*, 611 F.3d 1144, 1150-51 (9th Cir.  
24 2010); *Foster v. Runnels*, 554 F.3d 807, 812-14 (9th Cir. 2009); *Frost v. Agnos*, 152 F.3d 1124,  
25 1128 (9th Cir. 1998). Although the Eighth Amendment entitles prisoners to have their basic  
26 hygiene needs met, Plaintiff’s loss of his personal bar of Irish Spring soap does not give rise to a  
27 viable claim for relief and the loss of comfort items is not protected under the Eighth Amendment.

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1 **III. Conclusion and Order**

2 Plaintiff's complaint fails to state any claims upon which relief may be granted under  
3 section 1983. In an abundance of caution, the Court will provide Plaintiff with one opportunity to  
4 file an amended complaint. *Akhtar v. Mesa*, 698 F.3d 1202, 1212-13 (9th Cir. 2012); *Lopez v.*  
5 *Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000); *Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir.  
6 1987). Plaintiff may not change the nature of this suit by adding new, unrelated claims in his  
7 amended complaint, *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007), and Plaintiff is cautioned  
8 that an amended complaint supercedes the original complaint, *Lacey v. Maricopa County*, 693  
9 F.3d 896, 907 (9th Cir. 2012) (en banc), and it must be "complete in itself without reference to the  
10 prior or superceded pleading," Local Rule 220.

11 Accordingly, it is HEREBY ORDERED that:

- 12 1. Plaintiff's complaint is dismissed, with leave to amend, for failure to state a claim;
- 13 2. The Clerk's Office shall send Plaintiff a civil rights complaint form;
- 14 3. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file an  
15 amended complaint; and
- 16 4. If Plaintiff fails to file an amended complaint in compliance with this order, this  
17 action will be dismissed, with prejudice, for failure to state a claim.

18 IT IS SO ORDERED.

19 Dated: June 8, 2015

20 /s/ Sheila K. Oberto  
21 UNITED STATES MAGISTRATE JUDGE

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