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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF CALIFORNIA**
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10 JOSIAH SILVEIRA,
11 Plaintiff,
12 v.
13 R. FISHER JR., et al.,
14 Defendants.

Case No. 1:17-cv-00989-EPG (PC)

ORDER DENYING PLAINTIFF’S REQUEST
FOR COUNSEL WITHOUT PREJUDICE

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS ACTION
PROCEED AGAINST DEFENDANTS D.
STARKWEATHER AND J. QUINTERO FOR
RETALIATION IN VIOLATION OF THE
FIRST AMENDMENT, AND THAT ALL
OTHER CLAIMS AND DEFENDANTS BE
DISMISSED WITH PREJUDICE

(ECF NO. 1)

OBJECTIONS, IF ANY, DUE WITHIN
TWENTY-ONE DAYS

21 **I. BACKGROUND**

22 Josiah Silveira (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis*
23 in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the complaint
24 commencing this action on July 25, 2017. (ECF No. 1). He alleges that two correctional
25 officers retaliated against him for filing grievances against them.

26 For the reasons described below, the Court recommends finding that Plaintiff has stated
27 a claim against defendants Starkweather and Quintero for retaliation in violation of the First
28 Amendment. The Court recommends dismissing the claims against defendants Fisher and

1 Torres because they were not involved in the underlying conduct and are being sued for their
2 supervisory roles. Plaintiff may file objections to these findings and recommendations within
3 21 days from the date of service of this order.

4 II. SCREENING REQUIREMENT

5 The Court is required to screen complaints brought by prisoners seeking relief against a
6 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
7 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
8 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
9 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
10 § 1915A(b)(1), (2). As Plaintiff is proceeding *in forma pauperis* (ECF No. 6), the Court may
11 also screen the complaint under 28 U.S.C. § 1915. “Notwithstanding any filing fee, or any
12 portion thereof, that may have been paid, the court shall dismiss the case at any time if the court
13 determines that the action or appeal fails to state a claim upon which relief may be granted.”
14 28 U.S.C. § 1915(e)(2)(B)(ii).

15 A complaint is required to contain “a short and plain statement of the claim showing
16 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
17 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
18 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
19 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient
20 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id.
21 (quoting Twombly, 550 U.S. at 570). The mere possibility of misconduct falls short of meeting
22 this plausibility standard. Id. at 679. While a plaintiff’s allegations are taken as true, courts
23 “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d
24 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). Additionally, a
25 plaintiff’s legal conclusions are not accepted as true. Iqbal, 556 U.S. at 678.

26 Pleadings of *pro se* plaintiffs “must be held to less stringent standards than formal
27 pleadings drafted by lawyers.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (holding that
28 *pro se* complaints should continue to be liberally construed after Iqbal).

1 **III. SUMMARY OF PLAINTIFF’S COMPLAINT**

2 Plaintiff is an inmate at Valley State Prison (“VSP”) in Chowchilla, California. He
3 alleges that correctional officer defendants J. Quintero and D. Starkweather retaliated against
4 him for utilizing his right of inmate appeals process. On January 22, 2017, Plaintiff submitted
5 a staff complaint against defendant Quintero. After he filed the complaint, defendant Quintero
6 and Starkweather targeted him with harassment. On February 11, 2017, Quintero and
7 Starkweather were conducting morning feeding in the Facility C dining hall. They abruptly
8 cleared all inmates from the dining hall. Then Starkweather said to Plaintiff that she was going
9 to find a reason to write him up.

10 Quintero was eventually removed from the yard, but Starkweather was not and
11 continued to harass Plaintiff.

12 On April 22, 2017, Plaintiff got written up by Starkweather for not wearing his Mobility
13 Impaired Vest (“MIV”), even though wearing the MIV was optional. This write-up happened
14 when Plaintiff’s harassment appeal against Starkweather was pending.

15 Plaintiff contends he “can’t even complete his right to the appeals process without c/o
16 D. Starkweather continuing to make threats, stare down, harass, discriminate against and
17 involve additional officers by pointing the petition out to other officers then staring him down.”

18 On June 18, 2017, Starkweather wrote an Informational Chrono to the VSP Chief
19 Medical Officer, informing the medical department that Plaintiff needed to be re-evaluated for
20 his medical condition due to his not wearing his MIV. Plaintiff alleges that because of the
21 constant harassment he felt pressure to surrender his assigned ADA devices, despite his chronic
22 pain and medically needed use of the devices.

23 **IV. EVALUATION OF PLAINTIFF’S COMPLAINT**

24 **A. Section 1983**

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

26 Every person who, under color of any statute, ordinance, regulation, custom,
27 or usage, of any State or Territory or the District of Columbia, subjects, or
28 causes to be subjected, any citizen of the United States or other person
within the jurisdiction thereof to the deprivation of any rights, privileges, or

1 immunities secured by the Constitution and laws, shall be liable to the party
2 injured in an action at law, suit in equity, or other proper proceeding for
redress....

3 42 U.S.C. § 1983. “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely
4 provides ‘a method for vindicating federal rights elsewhere conferred.’” Graham v. Connor,
5 490 U.S. 386, 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see
6 also Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los
7 Angeles, 697 F.3d 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir.
8 2012); Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006).

9 To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted
10 under color of state law, and (2) the defendant deprived him of rights secured by the
11 Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.
12 2006); see also Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing
13 “under color of state law”). A person deprives another of a constitutional right, “within the
14 meaning of § 1983, ‘if he does an affirmative act, participates in another's affirmative act, or
15 omits to perform an act which he is legally required to do that causes the deprivation of which
16 complaint is made.’” Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th
17 Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite
18 causal connection may be established when an official sets in motion a ‘series of acts by others
19 which the actor knows or reasonably should know would cause others to inflict’ constitutional
20 harms.” Preschooler II, 479 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of
21 causation “closely resembles the standard ‘foreseeability’ formulation of proximate cause.”
22 Arnold v. Int'l Bus. Mach. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City
23 of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008).

24 Additionally, a plaintiff must demonstrate that each named defendant personally
25 participated in the deprivation of his rights. Iqbal, 556 U.S. at 676-77. In other words, there
26 must be an actual connection or link between the actions of the defendants and the deprivation
27 alleged to have been suffered by Plaintiff. See Monell v. Dep't of Soc. Servs. of City of N.Y.,
28 436 U.S. 658, 691, 695 (1978).

1 Supervisory personnel are generally not liable under section 1983 for the actions of
2 their employees under a theory of *respondeat superior* and, therefore, when a named defendant
3 holds a supervisory position, the causal link between him and the claimed constitutional
4 violation must be specifically alleged. Iqbal, 556 U.S. at 676-77; Fayle v. Stapley, 607 F.2d
5 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). To state a
6 claim for relief under section 1983 based on a theory of supervisory liability, Plaintiff must
7 allege some facts that would support a claim that the supervisory defendants either: personally
8 participated in the alleged deprivation of constitutional rights; knew of the violations and failed
9 to act to prevent them; or promulgated or “implemented a policy so deficient that the policy
10 ‘itself is a repudiation of constitutional rights’ and is ‘the moving force of the constitutional
11 violation.’” Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989) (internal citations
12 omitted); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). For instance, a supervisor may
13 be liable for his “own culpable action or inaction in the training, supervision, or control of his
14 subordinates,” “his acquiescence in the constitutional deprivations of which the complaint is
15 made,” or “conduct that showed a reckless or callous indifference to the rights of
16 others.” Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991) (internal citations,
17 quotation marks, and alterations omitted).

18 **B. Defendants R. Fisher, Jr., and S. Torres**

19 In addition to the two correctional officers who allegedly engaged in retaliation,
20 Plaintiff has sued defendant R. Fisher, Jr. (the Warden at VSP), and S. Torres (the Appeals
21 Coordinator). Plaintiff has not alleged that they directly violated Plaintiff’s constitutional
22 rights. Rather, they have been sued in their supervisory capacity. Under the law cited above,
23 defendants Fisher and Torres should be dismissed.

24 **C. Retaliation in Violation of the First Amendment**

25 Allegations of retaliation against a prisoner's First Amendment rights may support a
26 section 1983 claim. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985). See also
27 Valandingham v. Bojorquez, 866 F.2d 1135 (9th Cir. 1989); Pratt v. Rowland, 65 F.3d 802,
28 807 (9th Cir. 1995). A retaliation claim requires “five basic elements: (1) an assertion that a

1 state actor took some adverse action against an inmate (2) because of (3) that prisoner's
2 protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment
3 rights, and (5) the action did not reasonably advance a legitimate correctional goal.” Rhodes v.
4 Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted); accord Watson v. Carter,
5 668 F.3d 1108, 1114-15 (9th Cir. 2012); Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir.
6 2009).

7 While prisoners have no freestanding right to a prison grievance process, see Ramirez v.
8 Galaza, 334 F.3d 850, 860 (9th Cir.2003), “a prisoner's fundamental right of access to the
9 courts hinges on his ability to access the prison grievance system,” Bradley v. Hall, 64 F.3d
10 1276, 1279 (9th Cir.1995), overruled on other grounds by Shaw v. Murphy, 532 U.S. 223, 230
11 n. 2, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001). Because filing administrative grievances and
12 initiating civil litigation are protected activities, it is impermissible for prison officials to
13 retaliate against prisoners for engaging in these activities. Rhodes, 408 F.3d at 567.

14 The Court recommends finding that Plaintiff has stated a cognizable claim for
15 retaliation in violation of the First Amendment against defendants D. Starkweather and J.
16 Quintero. Plaintiff has alleged that they harassed him without justification soon after Plaintiff
17 filed grievances. Plaintiff alleges that a few weeks after Plaintiff filed a grievance, defendants
18 Quintero and Starkweather approached him in the dining hall and defendant Starkweather said
19 that she was going to find a reason to write him up. Plaintiff also alleges that they continued
20 harassing him while his grievance was pending. The Court finds that these allegations are
21 sufficient to proceed with this claim past the screening stage.

22 **V. PLAINTIFF’S REQUEST FOR COUNSEL AND ORDER**

23 Plaintiff requests that he be appointed pro bono counsel (ECF No. 1, p. 5), although he
24 does not explain why he needs counsel.

25 Plaintiff does not have a constitutional right to appointed counsel in this action, Rand v.
26 Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), withdrawn in part on other grounds, 154 F.3d
27 952 (9th Cir. 1998), and the Court cannot require an attorney to represent Plaintiff pursuant to
28 28 U.S.C. § 1915(e)(1), Mallard v. United States District Court for the Southern District of

1 Iowa, 490 U.S. 296, 298, 109 S.Ct. 1814, 1816 (1989). However, in certain exceptional
2 circumstances the Court may request the voluntary assistance of counsel pursuant to section
3 1915(e)(1). Rand, 113 F.3d at 1525.

4 Without a reasonable method of securing and compensating counsel, the Court will seek
5 volunteer counsel only in the most serious and exceptional cases. In determining whether
6 “exceptional circumstances exist, the district court must evaluate both the likelihood of success
7 of the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the
8 complexity of the legal issues involved.” Id. (internal quotation marks and citations omitted).

9 The Court will not order appointment of pro bono counsel at this time. The Court has
10 reviewed the record in this case, and at this time the Court cannot make a determination that
11 Plaintiff is likely to succeed on the merits of his claims. Moreover, based on the record, it
12 appears that Plaintiff can adequately articulate his claims.

13 Plaintiff is advised that he is not precluded from renewing his request for appointment
14 of pro bono counsel at a later stage of the proceedings.

15 For the foregoing reasons, Plaintiff’s request for appointment of pro bono counsel is
16 DENIED without prejudice.

17 **VI. CONCLUSION AND RECOMMENDATIONS**

18 The Court has screened the complaint, and recommends finding that it states a claim for
19 retaliation in violation of the First Amendment against D. Starkweather, a correctional officer
20 at VSP in January of 2017, and J. Quintero, a correctional officer at VSP in January of 2017.
21 The Court recommends dismissing all other claims and defendants.

22 The Court does not recommend granting leave to amend. The Court is recommending
23 that the central claim—retaliation by two correctional officers—be allowed to proceed. The
24 defendants subject to dismissal were not involved in the underlying conduct and should be
25 dismissed based on legal principles. Accordingly, further amendment would be futile as to
26 them.

27 Therefore, based on the foregoing, IT IS HEREBY RECOMMENDED that this case
28 proceed against defendants D. Starkweather and J. Quintero, and that all other claims and

1 defendants be dismissed with prejudice.

2 These findings and recommendations will be submitted to the United States district
3 judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
4 twenty-one (21) days after being served with these findings and recommendations, Plaintiff
5 may file written objections with the Court. The document should be captioned “Objections to
6 Magistrate Judge’s Findings and Recommendations.”

7 Plaintiff is advised that failure to file objections within the specified time may result in
8 the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014)
9 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

10 IT IS SO ORDERED.
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12 Dated: March 29, 2018

13 /s/ Eric P. Groj
14 UNITED STATES MAGISTRATE JUDGE
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