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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VERNON WAYNE MCNEAL,

Plaintiff,

No. CIV S-07-2240 LKK EFB P

vs.

ERVIN, et al.,

Defendants.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Defendants have moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff has filed an opposition, a motion for leave to file an amended complaint and an amended complaint.¹ For the reasons explained, defendants' motion is denied, plaintiff's motion to file an amended complaint is granted, and this action must be dismissed for plaintiff's failure to state a claim.

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¹ Plaintiff filed a motion to file an amended complaint on September 21, 2001. Dckt. No. 21, 22. On October 5, 2009, he filed another motion to amend and an amended complaint. Dckt. No. 23, 24. All references to plaintiff's motion to amend and the amended complaint refer to those filed October 5, 2009.

1 **I. Background**

2 Plaintiff commenced this action with a complaint filed October 19, 2007. Dckt. No. 1.
3 He alleged therein that on July 11, 2004, in the course of moving him from the general
4 population to the ASU, defendants Ervin and Evert confiscated his legal materials and
5 intentionally inventoried them improperly. Compl., at 5, 6. Thus, the inventory sheet did not
6 reflect that plaintiff had possessed legal materials and they apparently were lost. *Id.* & Attach.,
7 at 1-2. While he was in the ASU, he filed grievances complaining about defendants' conduct
8 and requesting that his legal materials be returned. Compl., at 8-11. His attempts were of no
9 avail. When this court issued findings and recommendations on June 8, 2005, recommending
10 that his petition for a writ of habeas corpus in Case No. S-02-1413 LKK KJM be denied, he still
11 did not have his legal materials. Compl., at 14 (citing Ex. 19). Plaintiff sought and received two
12 extensions of time in order to obtain his legal materials and file objections. *Id.*, (citing Exs. 19,
13 20). However, his materials were not returned. *Id.*, at 14-15.

14 Notwithstanding the lack of legal materials, plaintiff filed objections to the findings and
15 recommendations, which are eight pages in length and present detailed legal arguments in
16 support of his case, offering factual support where necessary.² *Id.* & Case No. Civ S-02-1413
17 LKK KJM, Dckt. No. 35.³ Unpersuaded, the district judge adopted the findings and
18 recommendations and denied habeas relief. Am. Compl., at 15 (citing Ex. 21). Not to be
19 thwarted, petitioner filed a timely notice of appeal. *See* Case No. Civ.02-1413 LKK KJM, Dckt.
20 No. 37. About five weeks later, plaintiff filed a four-page, detailed application for a certificate
21 of appealability. *Id.*, (citing Ex. 22). The Ninth Circuit declined to review this court's judgment,
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24 ² Plaintiff challenged jury instructions and the length of his sentence. Thus, the analysis
was not fact-specific.

25 ³ Plaintiff did not submit all the documents to which he refers. Thus, the court takes
26 judicial notice of the proceedings in Case No. CIV S-02-1413. *United States v. Wilson*, 631 F.2d
118, 119-20 (9th Cir. 1980) (court may take judicial notice of its own records in other cases).

1 and denied his application for a certificate of appealability.⁴ *Id.*, (citing Ex. 23). Still
2 undeterred, plaintiff sought review in the United States Supreme Court. *See Id.*, at 17, 18. He
3 was unsuccessful, allegedly because he could not submit the decision for which he sought
4 review. *Id.*

5 Defendants have moved to dismiss this action on the ground that plaintiff has not alleged
6 he suffered any injury as required by *Lewis v. Casey*, 518 U.S. 343, 246 (1996). Def.’s Mot. to
7 Dism., at 4. In response, plaintiff moves to amend the complaint, restating his access to courts
8 claim and adding claims of retaliation. Pl.’s Am. Compl.

9 **II. Plaintiff’s Motion to Amend and Defendants’ Motion to Dismiss**

10 Under the applicable rule, “A party may amend its pleading once as a matter of course
11 before being served with a responsive pleading.” Fed. R. Civ. P. 15(a)(1)(A). As noted, plaintiff
12 seeks leave to amend in response to defendants’ motion to dismiss pursuant to Rule 12(b)(6),
13 which is not a responsive pleading. Fed. R. Civ. P. 7(a). Defendants have not filed a responsive
14 pleading. Accordingly, plaintiff’s motion to file an amended complaint is granted. Furthermore,
15 plaintiff’s amended complaint supersedes the prior complaint, which now is treated as
16 nonexistent. *Bullen v. De Bretteville*, 239 F.2d 824, 833 (9th Cir. 1956). Accordingly,
17 defendants’ motion to dismiss the earlier complaint is denied as moot.

18 **A. Review Pursuant to 28 U.S.C. § 1915A**

19 Having permitted plaintiff to file an amended complaint, the court must review it
20 pursuant to 28 U.S.C. § 1915A. For the reasons stated below, the court finds that plaintiff fails
21 to state a claim for relief.

22 **B. Standards for 28 U.S.C. § 1915A Review**

23 The relevant portion of § 1915A requires a court to dismiss a complaint that is “frivolous,
24 malicious, or fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915A(b)(1).

25
26 ⁴ Plaintiff claims never to have received the order of denial. *Id.*, at 15.

1 The notice pleading standard of Federal Rule of Civil Procedure 8(a) applies to actions brought
2 under section 1983. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512, (2002); Fed. R. Civ. P.
3 8(a). Thus, a complaint must contain “a short and plain statement of the claim showing that the
4 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). To proceed on a cause of action, a
5 plaintiff must allege facts which, if true, “state a claim to relief that is plausible on its face.” *Bell*
6 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Detailed factual allegations are not
7 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
8 conclusory statements, do not suffice.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
9 (2007); *see also Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (stating that Rule 8
10 “demands more than a more than an unadorned, the defendant unlawfully harmed me,
11 accusation.”). While factual allegations are accepted as true, legal conclusions are not.
12 *Twombly*, 550 U.S. at 555. In conducting this review, the court must construe a pro se pleading
13 “liberally” to determine if it states a claim and, before dismissal, tell a plaintiff of deficiencies in
14 his complaint and, if appropriate, give plaintiff the opportunity to cure them. *See Lopez v. Smith*,
15 203 F.3d 1122, 1130-31 (9th Cir. 2000). Notwithstanding plaintiff’s pro se status, the “[f]actual
16 allegations must be enough to raise a right to relief above the speculative level on the assumption
17 that all the allegations in the complaint are true (even if doubtful in fact).” *Twombly*, 550 U.S. at
18 555 (citations omitted).

19 **C. Analysis**

20 In the amended complaint, plaintiff claims that by improperly inventorying his property,
21 Ervin and Everet unconstitutionally interfered with his efforts to obtain habeas corpus relief.
22 Am. Compl., at 6, 7,8, 14. He also claims that defendants’ conduct was retaliatory. *Id.*, at 3, 5,
23 6, 11, 14.

24 **1. Access to the Courts**

25 Plaintiff alleges that defendants’ conduct ultimately denied him access to the courts by
26 causing him to miss a filing deadline in the United States Supreme Court. It is well established

1 that prisoners “have a constitutional right of access to the courts,” *Bounds v. Smith*, 430 U.S.
2 817, 821, (1977); *Lewis v. Casey*, 518 U.S. 343, 350 (1996). As the Supreme Court explained in
3 *Bounds*, this right “requires prison authorities to assist inmates in the preparation and filing of
4 meaningful legal papers by providing prisoners with adequate law libraries or adequate
5 assistance from persons trained in the law.” *Bounds*, 430 U.S. at 828. But the Supreme Court
6 also has instructed that “*Bounds* did not create an abstract, freestanding right to a law library or
7 legal assistance.” *Lewis*, 518 U.S. at 351. Rather, the touchstone of the right recognized in
8 *Bounds* was meaningful access. *Id.*, at 350. Thus, any claim that this right has been violated
9 must include an allegation of actual injury, i.e., that the alleged obstacle “hindered his efforts to
10 pursue a legal claim.” *Id.*, 351.

11 A prisoner suffers injury when, for example, a court dismisses an action for a prisoner’s
12 failure to satisfy deadlines or some other technical requirement because of state interference with
13 his right. *See Id.* It is clear from plaintiff’s allegations that defendants’ conduct did not create an
14 unconstitutional impediment to his pursuit of habeas relief. Plaintiff clearly knew how to, and in
15 fact did, navigate the federal court system. He timely made what appears to have been the same
16 effort as any other prisoner in overcoming the recommendation that habeas relief be denied.
17 Also, he timely filed legally and factually coherent, if unsuccessful, objections. His notice of
18 appeal was timely filed, and in his request for appellate review he cited legal precedent and
19 articulated factual support for his argument. Following the Ninth Circuit’s refusal to review this
20 court’s judgment, he attempted to file a petition for a writ of certiorari in the United States
21 Supreme Court. That court denied the petition for procedural reasons. This, however, is not
22 dispositive of the question.

23 Overall, petitioner did a remarkable job in pursuing habeas relief without his legal
24 materials. He satisfied every deadline and briefed the issues of concern to him, which is all that
25 is required under *Lewis*. Under *Twombly*, 550 U.S. at 555, 570 and *Iqbal*, 129 S.Ct. at 1591-92,
26 plaintiff must demonstrate that his entitlement to relief is at least plausible. Here, assuming the

1 truth of the facts alleged, plaintiff's conclusion that he was denied access to the court is not
2 plausible. Rather, the more likely explanation is that plaintiff failed to secure habeas relief not
3 because he lacked his legal materials, but because his case lacked merit. *See Iqbal*, 129 S.Ct. at
4 1951 (plaintiff's claim not plausible where a more likely explanation of the facts exists).
5 Plaintiff has not alleged facts which, taken as true, would make the element of injury any more
6 than a matter of speculation. Therefore, he has not satisfied the low threshold of pleading under
7 the Federal Rules. He has not stated a claim for relief, and this claim must be dismissed.

8 **2. Retaliation**

9 Plaintiff alleges that defendants' conduct with respect to confiscating his property was
10 motivated by an intent to retaliate. Am. Compl., at 5, 14. He alleges that Ervin and Evert intended
11 to retaliate against him because they learned that plaintiff's cell-mate had engaged in misconduct
12 with a guard. *Id.*, at 3, 5, 6, 11, 14. Thus, the act allegedly motivating the defendants' alleged
13 retaliation was not plaintiff's. Nor has plaintiff alleged facts associating him with the cell-mate's
14 constitutionally protected activity. To state a claim for retaliation, plaintiff must allege that
15 defendants took adverse action against him for his engagement in a constitutionally protected
16 activity, and that the adverse action chilled plaintiff's exercise of his rights, but did not
17 reasonably advance a legitimate penological goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68
18 (9th Cir. 2005); *Rizzo v. Dawson*, 778 F.2d 527, 531-32 (9th Cir. 1985). Plaintiff has made no
19 such allegations here. Rather, he alleges that defendants took adverse action against him because
20 they learned of misconduct on the part of others. He does not allege that he reported the
21 misconduct or that defendants would be motivated to retaliate against him if he had. Plaintiff's
22 allegations in no way implicate defendants in retaliatory conduct towards plaintiff. Accepting
23 plaintiff's allegations as true, there is no construction of plaintiff's complaint that would
24 "nudg[e] [his] claims" of retaliation "across the line from conceivable to plausible." *Twombly*,
25 550 U.S. at 570. Therefore, this claim must be dismissed.

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1 Plaintiff also alleges that defendants improperly inventoried his property because he had
2 dumped a food tray onto the floor. Am. Compl., at 11. Under the standard set out above, an act
3 is retaliatory only if it chills or undermines the exercise of a constitutional right. *See, e.g.,*
4 *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995) (pursuing civil rights litigation in the
5 courts); *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001) (complaints about the law
6 library); *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997) (use of grievance system). Here, the
7 act allegedly motivating defendants' conduct did not implicate plaintiff's exercise of a
8 constitutional right. Plaintiff's act cannot be seen as the exercise of a constitutional right. In
9 fact, upsetting a food tray is conduct which ought to be undermined. Thus, the realistic view of
10 plaintiff's behavior is that it amounts to a disruption wholly inconsistent with retaliation. *See*
11 *Iqbal*, 129 S.Ct. at 1951 (considering whether the facts alleged where "consistent" with
12 plaintiff's theory of relief). Taking the facts alleged as true, plaintiff has not stated a claim of
13 retaliation. Accordingly, this claim must be dismissed.

14 **III. Conclusion**

15 For the reasons explained above, plaintiff's motion to file an amended complaint is
16 granted, and defendants' motion to dismiss this action is denied as moot. Furthermore, plaintiff
17 has failed to state a claim for relief as to any claim in his amended complaint. Thus, this action
18 must be dismissed.

19 Accordingly, it is hereby ORDERED that:

- 20 1. Plaintiff's September 21, 2009, motion to file an amended complaint is granted.
- 21 2. Defendants' May 11, 2009, motion to dismiss is denied as moot.
- 22 3. The Clerk is directed to terminate docket numbers 21 and 22.

23 Further, it is hereby RECOMMENDED that this action is dismissed on the ground that
24 plaintiff fails to state a claim for relief. *See* 28 U.S.C. § 1915A(b)(1).

25 These findings and recommendations are submitted to the United States District Judge
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days

1 after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
4 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*
5 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

6 Dated: November 20, 2009.

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9 EDMUND F. BRENNAN
10 UNITED STATES MAGISTRATE JUDGE
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