

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

MARTIN PELAYO,

No. 2:15-cv-1246-CMK-P

Plaintiff,

vs.

ORDER

COLLINS, et al.,

Defendants.

_____ /

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff has consented to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c) and no other party has been served or appeared in the action. Pending before the court is plaintiff’s complaint (Doc. 1).

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if it: (1) is frivolous or malicious; (2) fails to state a claim upon which relief can be granted; or (3) seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1), (2). Moreover, the Federal Rules of Civil Procedure require that complaints contain a “short and plain statement

1 of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This means
2 that claims must be stated simply, concisely, and directly. See McHenry v. Renne, 84 F.3d 1172,
3 1177 (9th Cir. 1996) (referring to Fed. R. Civ. P. 8(e)(1)). These rules are satisfied if the
4 complaint gives the defendant fair notice of the plaintiff’s claim and the grounds upon which it
5 rests. See Kimes v. Stone, 84 F.3d 1121, 1129 (9th Cir. 1996). Because plaintiff must allege
6 with at least some degree of particularity overt acts by specific defendants which support the
7 claims, vague and conclusory allegations fail to satisfy this standard. Additionally, it is
8 impossible for the court to conduct the screening required by law when the allegations are vague
9 and conclusory.

10 I. PLAINTIFF’S ALLEGATIONS

11 Plaintiff alleges his property was lost or stolen when he was sent into
12 administrative segregation. Some of the property he lost included legal documents, which makes
13 it difficult to continue with his case. He also appears to be alleging retaliation, but he has not
14 provided sufficient facts for the court to determine what he is being retaliated against for.

15 II. DISCUSSION

16 Plaintiff’s complaint suffers from a number of defects. Initially, to state a claim
17 under 42 U.S.C. § 1983, the plaintiff must allege an actual connection or link between the actions
18 of the named defendants and the alleged deprivations. See Monell v. Dep’t of Social Servs., 436
19 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). “A person ‘subjects’ another to the
20 deprivation of a constitutional right, within the meaning of § 1983, if he does an affirmative act,
21 participates in another’s affirmative acts, or omits to perform an act which he is legally required
22 to do that causes the deprivation of which complaint is made.” Johnson v. Duffy, 588 F.2d 740,
23 743 (9th Cir. 1978). Vague and conclusory allegations concerning the involvement of official
24 personnel in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d
25 266, 268 (9th Cir. 1982). Rather, the plaintiff must set forth specific facts as to each individual
26 defendant’s causal role in the alleged constitutional deprivation. See Leer v. Murphy, 844 F.2d

1 628, 634 (9th Cir. 1988).

2 **A. Loss of Property**

3 Where a prisoner alleges the deprivation of a liberty or property interest caused by
4 the random and unauthorized action of a prison official, there is no claim cognizable under 42
5 U.S.C. § 1983 if the state provides an adequate post-deprivation remedy. See Zinermon v.
6 Burch, 494 U.S. 113, 129-32 (1990); Hudson v. Palmer, 468 U.S. 517, 533 (1984). A state’s
7 post-deprivation remedy may be adequate even though it does not provide relief identical to that
8 available under § 1983. See Hudson, 468 U.S. at 531 n.11. A due process claim is not barred,
9 however, where the deprivation is foreseeable and the state can therefore be reasonably expected
10 to make pre-deprivation process available. See Zinermon, 494 U.S. at 136-39. An available
11 state common law tort claim procedure to recover the value of property is an adequate remedy.
12 See id. at 128-29.

13 Plaintiff’s claims regarding his missing property fails to state a cognizable claim
14 under 42 U.S.C. § 1983. Whether the property was misplaced or stolen, the state provides an
15 adequate remedy. This claim will be dismissed without leave to amend.

16 **B. Access to Court**

17 Prisoners have a First Amendment right of access to the courts. See Lewis v.
18 Casey, 518 U.S. 343, 346 (1996); Bounds v. Smith, 430 U.S. 817, 821 (1977); Bradley v. Hall,
19 64 F.3d 1276, 1279 (9th Cir. 1995) (discussing the right in the context of prison grievance
20 procedures). This right includes petitioning the government through the prison grievance
21 process. See id. Prison officials are required to “assist inmates in the preparation and filing of
22 meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance
23 from persons trained in the law.” Bounds, 430 U.S. at 828. The right of access to the courts,
24 however, only requires that prisoners have the capability of bringing challenges to sentences or
25 conditions of confinement. See Lewis, 518 U.S. at 356-57. Moreover, the right is limited to
26 non-frivolous criminal appeals, habeas corpus actions, and § 1983 suits. See id. at 353 n.3 &

1 354-55. Therefore, the right of access to the courts is only a right to present these kinds of claims
2 to the court, and not a right to discover claims or to litigate them effectively once filed. See id. at
3 354-55.

4 As a jurisdictional requirement flowing from the standing doctrine, the prisoner
5 must allege an actual injury. See id. at 349. “Actual injury” is prejudice with respect to
6 contemplated or existing litigation, such as the inability to meet a filing deadline or present a
7 non-frivolous claim. See id.; see also Phillips v. Hust, 477 F.3d 1070, 1075 (9th Cir. 2007).
8 Delays in providing legal materials or assistance which result in prejudice are “not of
9 constitutional significance” if the delay is reasonably related to legitimate penological purposes.
10 Lewis, 518 U.S. at 362.

11 Here, plaintiff’s claims are unclear. It appears that plaintiff is attempting to claim
12 his right to access the court has been violated by defendants Collins and Welch misplacing his
13 legal documents. However, his allegations are vague, especially in relation to any specific injury.
14 While he claims the loss of his legal documents makes it impossible for him to continue to
15 appeal his case, he fails to provide the court with any specifics as to what documents went
16 missing and how those documents were essential to a specific case. As stated above, the right of
17 access to the court is a limited right, and the prisoner must allege an actual injury. Vague
18 references to difficulties is insufficient. However, it is possible that the deficiencies in this claim
19 can be cured through amendment, and plaintiff will be provided an opportunity to file an
20 amended complaint in relation to this claim.

21 **C. Retaliation**

22 In order to state a claim under 42 U.S.C. § 1983 for retaliation, the prisoner must
23 establish that he was retaliated against for exercising a constitutional right, and that the
24 retaliatory action was not related to a legitimate penological purpose, such as preserving
25 institutional security. See Barnett v. Centoni, 31 F.3d 813, 815-16 (9th Cir. 1994) (per curiam).
26 In meeting this standard, the prisoner must demonstrate a specific link between the alleged

1 retaliation and the exercise of a constitutional right. See Pratt v. Rowland, 65 F.3d 802, 807 (9th
2 Cir. 1995); Valandingham v. Bojorquez, 866 F.2d 1135, 1138-39 (9th Cir. 1989). The prisoner
3 must also show that the exercise of First Amendment rights was chilled, though not necessarily
4 silenced, by the alleged retaliatory conduct. See Resnick v. Hayes, 213 F.3d 443, 449 (9th Cir.
5 2000), see also Rhodes v. Robinson, 408 F.3d 559, 569 (9th Cir. 2005). Thus, the prisoner
6 plaintiff must establish the following in order to state a claim for retaliation: (1) prison officials
7 took adverse action against the inmate; (2) the adverse action was taken because the inmate
8 engaged in protected conduct; (3) the adverse action chilled the inmate’s First Amendment
9 rights; and (4) the adverse action did not serve a legitimate penological purpose. See Rhodes,
10 408 F.3d at 568.

11 As to the chilling effect, the Ninth Circuit in Rhodes observed: “If Rhodes had not
12 alleged a chilling effect, perhaps his allegations that he suffered harm would suffice, since harm
13 that is more than minimal will almost always have a chilling effect.” Id. at n.11. By way of
14 example, the court cited Pratt in which a retaliation claim had been decided without discussing
15 chilling. See id. This citation is somewhat confusing in that the court in Pratt had no reason to
16 discuss chilling because it concluded that the plaintiff could not prove the absence of legitimate
17 penological interests. See Pratt, 65 F.3d at 808-09. Nonetheless, while the court has clearly
18 stated that one of the “basic elements” of a First Amendment retaliation claim is that the adverse
19 action “chilled the inmates exercise of his First Amendment rights,” id. at 567-68, see also
20 Resnick, 213 F.3d at 449, the comment in Rhodes at footnote 11 suggests that adverse action
21 which is more than minimal satisfies this element. Thus, if this reading of Rhodes is correct, the
22 chilling effect element is essentially subsumed by adverse action.

23 Here, plaintiff alleges defendants Collins, Welch, Kemp and the warden are
24 retaliating against him by losing his property on purpose. However, he fails to allege that any
25 adverse action was taken against him, that he was engaged in some type of protective conduct,
26 how his First Amendment rights were chilled, or that some adverse action did not serve a

1 legitimate penological purpose. As the only action involved in this case relates to lost/stolen
2 property, it does not appear that any actual adverse action was taken against plaintiff. Thus, it
3 does not appear that this claim is subject to cure through amendment, and this claim is dismissed
4 without leave to amend.

5 **D. Harassment**

6 The treatment a prisoner receives in prison and the conditions under which the
7 prisoner is confined are subject to scrutiny under the Eighth Amendment, which prohibits cruel
8 and unusual punishment. See Helling v. McKinney, 509 U.S. 25, 31 (1993); Farmer v. Brennan,
9 511 U.S. 825, 832 (1994). The Eighth Amendment “embodies broad and idealistic concepts of
10 dignity, civilized standards, humanity, and decency.” Estelle v. Gamble, 429 U.S. 97, 102
11 (1976). Conditions of confinement may, however, be harsh and restrictive. See Rhodes v.
12 Chapman, 452 U.S. 337, 347 (1981). Nonetheless, prison officials must provide prisoners with
13 “food, clothing, shelter, sanitation, medical care, and personal safety.” Toussaint v. McCarthy,
14 801 F.2d 1080, 1107 (9th Cir. 1986). A prison official violates the Eighth Amendment only
15 when two requirements are met: (1) objectively, the official’s act or omission must be so serious
16 such that it results in the denial of the minimal civilized measure of life’s necessities; and (2)
17 subjectively, the prison official must have acted unnecessarily and wantonly for the purpose of
18 inflicting harm. See Farmer, 511 U.S. at 834. Thus, to violate the Eighth Amendment, a prison
19 official must have a “sufficiently culpable mind.” See id. Allegations of verbal harassment do
20 not state a claim under the Eighth Amendment unless it is alleged that the harassment was
21 “calculated to . . . cause [the prisoner] psychological damage.” Oltarzewski v. Ruggiero, 830
22 F.2d 136, 139 (9th Cir. 1987); see also Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996),
23 amended by 135 F.3d 1318 (9th Cir. 1998). In addition, the prisoner must show that the verbal
24 comments were unusually gross, even for a prison setting, and that he was in fact psychologically
25 damaged as a result of the comments. See Keenan, 83 F.3d at 1092.

26 ///

1 Here, plaintiff's claims of harassment solely involve his lost property. None of
2 the property plaintiff states was lost were essential, at least not to the extent the loss of any such
3 items would be a denial of life's necessities. Nor does plaintiff allege any of the defendants acted
4 with malice in depriving him of these items. There simply is not sufficient support for any type
5 of harassment claim, which does not appear to be subject to cure through amendment. This
6 claim is dismissed without leave to amend.

7 III. CONCLUSION

8 Because it is possible that some of the deficiencies identified in this order may be
9 cured by amending the complaint, plaintiff is entitled to leave to amend prior to dismissal of the
10 entire action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc).
11 Plaintiff is informed that, as a general rule, an amended complaint supersedes the original
12 complaint. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). Thus, following
13 dismissal with leave to amend, all claims alleged in the original complaint which are not alleged
14 in the amended complaint are waived. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987).
15 Therefore, if plaintiff amends the complaint, the court cannot refer to the prior pleading in order
16 to make plaintiff's amended complaint complete. See Local Rule 220. An amended complaint
17 must be complete in itself without reference to any prior pleading. See id.

18 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
19 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See
20 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The complaint must allege in specific terms how
21 each named defendant is involved, and must set forth some affirmative link or connection
22 between each defendant's actions and the claimed deprivation. See May v. Enomoto, 633 F.2d
23 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

24 Because some of the defects identified in this order cannot be cured by
25 amendment, plaintiff is not entitled to leave to amend as to such claims. Plaintiff, therefore, now
26 has the following choices: (1) plaintiff may file an amended complaint which does not allege the

1 claims identified herein as incurable, in which case such claims will be deemed abandoned and
2 the court will address the remaining claims; or (2) plaintiff may file an amended complaint which
3 continues to allege claims identified as incurable, in which case the court will issue findings and
4 recommendations that such claims be dismissed from this action, as well as such other orders
5 and/or findings and recommendations as may be necessary to address the remaining claims.

6 Finally, plaintiff is warned that failure to file an amended complaint within the
7 time provided in this order may be grounds for dismissal of this action. See Ferdik, 963 F.2d at
8 1260-61; see also Local Rule 110. Plaintiff is also warned that a complaint which fails to comply
9 with Rule 8 may, in the court's discretion, be dismissed with prejudice pursuant to Rule 41(b).
10 See Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 673 (9th Cir. 1981).

11 Accordingly, IT IS HEREBY ORDERED that:

- 12 1. Plaintiff's complaint is dismissed with leave to amend; and
- 13 2. Plaintiff shall file an amended complaint within 30 days of the date of
14 service of this order.

15
16 DATED: October 12, 2016

17 
18 **CRAIG M. KELLISON**
19 UNITED STATES MAGISTRATE JUDGE
20
21
22
23
24
25
26