

1 The court has reviewed plaintiff’s amended complaint pursuant to § 1915A and concludes
2 that it must be dismissed without further leave to amend. Like the original complaint, the
3 amended complaint concerns defendant correctional officer Cox’s response to plaintiff and other
4 inmates shouting “Omaha!” when Cox entered the welding shop. According to plaintiff, he and
5 his classmates were instructed to shout “Omaha!” in order to alert others that sparks might be
6 flying. ECF No. 13 at 3. Defendant Cox, however, believed that shouting “Omaha!” was a
7 means of alerting other inmates that staff was present. *Id.* at 3, 3B. Plaintiff claims that Cox
8 violated his First Amendment right to free speech when Cox told plaintiff not to say “Omaha!”
9 when he entered the shop. Plaintiff also alleges that Cox retaliated against him in violation of the
10 First Amendment when he “wrote plaintiff up for battery on a peace officer because plaintiff
11 shouted ‘Omaha!’”² The court previously informed plaintiff of the legal standards applicable to
12 his intended claims for relief:

13 To state a First Amendment free speech claim, plaintiff must plead that his
14 speech was constitutionally protected, that defendant’s actions would chill an
15 ordinary person from continuing with the speech, and that defendant’s actions
16 were motivated by the speech. *Mendocino Environmental Center v. Mendocino*
17 *County*, 192 F.3d 1283, 1300-1301 (9th Cir. 1999). Protests and complaints that
18 involve a direct confrontation with prison officials enjoy limited constitutional
19 protection because such behavior may present the danger of a disturbance. *See,*
20 *e.g., Lockett v. Suardini*, 526 F.3d 866, 874 (6th Cir. 2008) (prisoner’s act of
21 calling hearing officer a “foul and corrupted bitch” not protected speech); *Smith v.*
22 *Mosley*, 532 F.3d 1270, 1277 (11th Cir. 2008) (prisoner’s “false and insubordinate
23 remarks” not protected speech). A California Department of Corrections and
24 Rehabilitation regulation explicitly prohibits such potentially disruptive behavior
25 and/or speech:

26 Inmates, parolees and employees will not openly display disrespect
27 or contempt for others in any manner intended to or reasonably
28 likely to disrupt orderly operations within the institutions or to
incite or provoke violence.

29 ² The amended complaint also alleges that “[a]s a direct result of being falsely written up
30 by Cox for battery on a peace officer, the punitive segregation property officer did not give me
31 my religious beads and cross which are needed to do a service to my Neterian Faith.” ECF No.
32 13 at 3B. To the extent that plaintiff is intending to assert a claim of religious discrimination
33 against an unidentified defendant, the court notes that unknown persons cannot be served with
34 process until they are identified by their real names and the court will not investigate the names
35 and identities of unnamed defendants.

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2 Cal. Code Regs. tit. 15, § 3004(b). “When a prison regulation impinges on
3 inmates’ constitutional rights, the regulation is valid if it is reasonably related to
4 legitimate penological interests.” *Turner v. Safely*, 482 U.S. at 89 (1987); *see also*
Barnett v. Centoni, 31 F.3d 813, 815-16 (9th Cir. 1994) (prison officials have a
strong interest in “preserving institutional order and discipline.”).

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6 To state a viable First Amendment retaliation claim, a prisoner must allege
7 five elements: “(1) An assertion that a state actor took some adverse action against
8 an inmate (2) because of (3) that prisoner’s protected conduct, and that such action
9 (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action
did not reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*,
408 F.3d 559, 567-68 (9th Cir. 2005).

10 ECF No. 8 at 4-5.

11 Once again plaintiff’s allegations fail to meet these standards and his amended complaint
12 fails to state a claim upon which relief could be granted. According to the amended complaint,
13 Cox believed that shouting “Omaha!” was a means of alerting other inmates to the presence of
14 staff. *See* ECF No. 13 at 3 (“It is customary for CSP-Solano Correctional Officers to discipline
15 inmates outside of the California Code of Regulations who alert other inmates that staff are
16 present”), 3B (“Cox expressed his personal belief that ‘an inmate cannot alert other inmates staff
17 is present’”). Thus, by plaintiff’s own allegations, Cox’s prohibition of plaintiff’s speech was
18 reasonably related to the legitimate correctional goal of preserving institutional order and
19 discipline. Taking plaintiff’s allegations as true, Cox’s accusation was motivated by this
20 legitimate correctional goal and the amended complaint fails to state a cognizable First
21 Amendment claim against defendant Cox.

22 Despite notice of the complaint’s deficiencies and an opportunity to amend, plaintiff is
23 unable to state a cognizable claim for relief and this action will be dismissed without further leave
24 to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (“Under Ninth Circuit case
25 law, district courts are only required to grant leave to amend if a complaint can possibly be saved.
26 Courts are not required to grant leave to amend if a complaint lacks merit entirely.”); *see also*
27 *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) (“[A] district court should grant leave to
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1 amend even if no request to amend the pleading was made, unless it determines that the pleading
2 could not be cured by the allegation of other facts.”).

3 Accordingly, IT IS HEREBY ORDERED that the amended complaint (ECF No. 13) is
4 dismissed without further leave to amend and the Clerk is directed to close the case.

5 DATED: October 3, 2017.

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7 EDMUND F. BRENNAN
8 UNITED STATES MAGISTRATE JUDGE
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