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

COREY JEROME ELDER,

Plaintiff,

v.

SILVA, et al.,

Defendants.

No. 2:16-CV-1925-DMC-P

ORDER

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is Plaintiff’s complaint (Doc. 1). Plaintiff alleges Defendants violated his rights by destroying his portraits/drawings, violated his First Amendment rights by retaliating against him for filing complaints as a result of their destruction, and subsequently violated his rights by searching and seizing his papers.

I. SCREENING REQUIREMENT AND STANDARD

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).

1 again stated that his officer “fucked up.”

2 Plaintiff then appealed to the next level. That appeal was allegedly denied by R.
3 St. Andre on November 24, 2014. During this appeal Plaintiff alleges that defendants produced
4 property card containing a forged signature on it that allegedly consented to the destruction of the
5 items. Plaintiff also contends that he was warned that continued complaining would make things
6 “more difficult” for him.

7 Plaintiff alleges several acts of retaliation related to his complaints. First on
8 September 7, 2014, Plaintiff was not issued his lunch. When Plaintiff inquired about the reason
9 Defendant Joksch stated “I don’t give a fuck about your lunch.” Plaintiff subsequently filed a
10 staff complaint. The next day, September 8, 2014, Joksch informed Plaintiff he would be moving
11 to another cell. When Plaintiff inquired as to why, he was written up for “willfully delaying a
12 peace officer by refusing assigned housing.” Plaintiff alleges he was wrongfully found guilty of
13 this violation by Defendant J. Ramsey who assessed 90 days lost credit, and was denied canteen,
14 appliances, vendor packages, telephone privileges and personal property for 90 days. Petitioner
15 informed Defendant Whitcome of this wrongful act, but Plaintiff alleges Whitcome did nothing in
16 response. Similarly, Plaintiff alleges he informed Defendant D. Clark of the situation but Clark
17 also did nothing. Finally, Plaintiff alleges on February 18, 2015, he was taken out of his cell,
18 placed in the shower, and all his paper work and legal work were taken for a “future search.”

20 III. ANALYSIS

21 A. Destruction of Property

22 “[A]n unauthorized intentional deprivation of property by a state employee does
23 not constitute a violation of the procedural requirements of the Due Process Clause of the
24 Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available.”
25 Hudson v. Palmer, 468 U.S. 517, 533 (1984); see also Barnett v. Centoni, 31 F.3d 813, 816 (9th
26 Cir.1994) (“[N]egligent or intentional deprivation of a prisoner's property fails to state a claim
27 under section 1983 if the state has an adequate post deprivation remedy.”). The Ninth Circuit has
28 specifically held that the California Tort Claims Act, Cal. Gov't Code § 810 et seq., provides an

1 adequate postdeprivation remedy for loss of property. See Barnett, 31 F.3d at 816–17.

2 Therefore, because Plaintiff has an adequate state law tort remedy for the taking of
3 his property, he cannot allege a cognizable due process claim.

4 **B. Retaliation**

5 In order to state a claim under 42 U.S.C. § 1983 for retaliation, the prisoner must
6 establish that he was retaliated against for exercising a constitutional right, and that the retaliatory
7 action was not related to a legitimate penological purpose, such as preserving institutional
8 security. See Barnett v. Centoni, 31 F.3d 813, 815-16 (9th Cir. 1994) (per curiam). In meeting
9 this standard, the prisoner must demonstrate a specific link between the alleged retaliation and the
10 exercise of a constitutional right. See Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995);
11 Valandingham v. Bojorquez, 866 F.2d 1135, 1138-39 (9th Cir. 1989). The prisoner must also
12 show that the exercise of First Amendment rights was chilled, though not necessarily silenced, by
13 the alleged retaliatory conduct. See Resnick v. Hayes, 213 F.3d 443, 449 (9th Cir. 2000), see also
14 Rhodes v. Robinson, 408 F.3d 559, 569 (9th Cir. 2005). Thus, the prisoner plaintiff must
15 establish the following in order to state a claim for retaliation: (1) prison officials took adverse
16 action against the inmate; (2) the adverse action was taken because the inmate engaged in
17 protected conduct; (3) the adverse action chilled the inmate’s First Amendment rights; and (4) the
18 adverse action did not serve a legitimate penological purpose. See Rhodes, 408 F.3d at 568.

19 Plaintiff alleges that Defendants retaliated against him for filing complaints and
20 appeals related to the destruction of his personal property. Based on the facts of the complaints
21 this Court finds that Plaintiff demonstrated a sufficiently specific link between the alleged
22 retaliation and his exercise of constitutional rights to proceed. Plaintiff has plead sufficient facts
23 that the prison officials took adverse action against him—denial of lunch, change of cell, written
24 reprimand, punitive action, deprivation of privileges—there are sufficient facts to tie these actions
25 to plaintiff’s complaints, there is evidence of chilled speech, and there seems no penological
26 purpose to the actions based on the alleged facts. For that reason, Plaintiff has satisfied the
27 pleading standard for his retaliation claim.

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1 cured by amending the complaint, plaintiff is entitled to leave to amend. See Lopez v. Smith, 203
2 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc). Plaintiff is informed that, as a general rule, an
3 amended complaint supersedes the original complaint. See Ferdik v. Bonzelet, 963 F.2d 1258,
4 1262 (9th Cir. 1992). Therefore, if plaintiff amends the complaint, the court cannot refer to the
5 prior pleading in order to make plaintiff's amended complaint complete. See Local Rule 220. An
6 amended complaint must be complete in itself without reference to any prior pleading. See id.

7 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
8 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See
9 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The complaint must allege in specific terms how
10 each named defendant is involved, and must set forth some affirmative link or connection
11 between each defendant's actions and the claimed deprivation. See May v. Enomoto, 633 F.2d
12 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

13 Because the complaint appears to otherwise state a cognizable claim, if no
14 amended complaint is filed within the time allowed therefor, the court will issue findings and
15 recommendations that plaintiff's due process claim arising from destruction of his property be
16 dismissed, as well as such further orders as are necessary for service of process as to the
17 cognizable claims.

18 19 V. CONCLUSION

20 Accordingly, IT IS HEREBY ORDERED that plaintiff may file a first amended
21 complaint within 30 days of the date of service of this order.

22
23 Dated: November 15, 2018



24 DENNIS M. COTA
25 UNITED STATES MAGISTRATE JUDGE