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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS LEE GLEASON,
Plaintiff,
v.
B. BOTKIN,
Defendant.

No. 2:19-cv-1868 TLN DB P
ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action under 42 U.S.C. § 1983. Before the court are plaintiff’s motion to proceed in forma pauperis and plaintiff’s complaint for screening. For the reasons set forth below, this court grants plaintiff’s motion to proceed in forma pauperis and finds plaintiff states a cognizable claim for retaliation under the First Amendment. In addition, this court will recommend plaintiff’s due process claim be dismissed.

IN FORMA PAUPERIS

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct

1 the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and
2 forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments
3 of twenty percent of the preceding month's income credited to plaintiff's prison trust account.
4 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time
5 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. §
6 1915(b)(2).

7 **SCREENING**

8 **I. Legal Standards**

9 The court is required to screen complaints brought by prisoners seeking relief against a
10 governmental entity or an officer or employee of a governmental entity. See 28 U.S.C. §
11 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims
12 that are legally "frivolous or malicious," that fail to state a claim upon which relief may be
13 granted, or that seek monetary relief from a defendant who is immune from such relief. See 28
14 U.S.C. § 1915A(b)(1) & (2).

15 A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke
16 v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir.
17 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably
18 meritless legal theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at
19 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an
20 arguable legal and factual basis. See Franklin, 745 F.2d at 1227. Rule 8(a)(2) of the Federal
21 Rules of Civil Procedure "requires only 'a short and plain statement of the claim showing that the
22 pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and
23 the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)
24 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

25 However, in order to survive dismissal for failure to state a claim a complaint must contain
26 more than "a formulaic recitation of the elements of a cause of action;" it must contain factual
27 allegations sufficient "to raise a right to relief above the speculative level." Bell Atlantic, 550
28 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the

1 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
2 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all
3 doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

4 The Civil Rights Act under which this action was filed provides as follows:

5 Every person who, under color of [state law] . . . subjects, or causes
6 to be subjected, any citizen of the United States . . . to the deprivation
7 of any rights, privileges, or immunities secured by the Constitution .
8 . . shall be liable to the party injured in an action at law, suit in equity,
9 or other proper proceeding for redress.

10 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
11 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
12 Monell v. Dept. of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). “A
13 person ‘subjects’ another to the deprivation of a constitutional right, within the meaning of §
14 1983, if he does an affirmative act, participates in another's affirmative acts or omits to perform
15 an act which he is legally required to do that causes the deprivation of which complaint is made.”
16 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

15 **II. Analysis**

16 **A. Allegations of the Complaint**

17 Plaintiff is an inmate at California State Prison-Solano (“CSP-Solano”). He identifies one
18 defendant: Botkin, a correctional officer there. In his first claim, plaintiff contends that in
19 January 2019, he told Botkin that Botkin was keeping him up all night by slapping his keys
20 against his can of mace, stomping through the dorms, and banging on plaintiff’s bed every time
21 he did a prisoner count. When Botkin responded that he did not care, plaintiff told Botkin he
22 intended to file a 602 appeal complaining of Botkin’s conduct. Botkin told plaintiff if he
23 submitted a 602, Botkin would make up a rules violation against him. He then did so – falsifying
24 a counseling chrono that stated plaintiff failed to provide identification when Botkin asked for it.
25 (ECF No. 1 at 3.) Plaintiff alleges this act was retaliatory.

26 In his second claim, plaintiff alleges that Botkin’s conduct violated plaintiff’s First
27 Amendment right to freedom of speech. (ECF No. 1 at 5.)

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1 In his third claim, plaintiff alleges the falsification of the counseling chrono violated his right
2 to due process. (ECF No. 1 at 6.)

3 Plaintiff seeks nominal and compensatory damages and the removal of the counseling chrono
4 from his file. (ECF No. 1 at 7.)

5 **B. Does Plaintiff State Cognizable Claims?**

6 The allegations in plaintiff's first claim for relief are sufficient to state a claim for retaliation
7 in violation of plaintiff's First Amendment rights. Plaintiff alleges Botkin took adverse action
8 against him because of plaintiff's protected conduct for no legitimate correctional reason. See
9 Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005). Plaintiff will be permitted to proceed
10 on this First Amendment retaliation claim.

11 To the extent plaintiff is attempting to allege a separate First Amendment claim, plaintiff is
12 advised that his First Amendment rights are implicated in his first claim.

13 With respect to plaintiff's claim of a due process violation. Plaintiff is advised that there is
14 no due process right to be free from false disciplinary charges. The falsification of a disciplinary
15 report does not state a stand-alone constitutional claim. See Luster v. Amezcua, No. 1:16-cv-
16 0554-DAD-GSA-PC, 2017 WL 772141, at *5 (E.D. Cal. Feb. 27, 2017). Accordingly, this court
17 will recommend plaintiff's due process claim be dismissed.

18 For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED as
19 follows:

- 20 1. Plaintiff's motion to proceed in forma pauperis (ECF No. 2) is granted.
- 21 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff is
22 assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. §
23 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to
24 the Director of the California Department of Corrections and Rehabilitation filed
25 concurrently herewith.
- 26 3. Service is appropriate for defendant B. Botkin.
- 27 4. The Clerk of the Court shall send plaintiff one USM-285 forms, one summons, an
28 instruction sheet and a copy of the complaint filed September 17, 2019.


- 1 5. Within thirty days from the date of this order, plaintiff shall complete the attached Notice
2 of Submission of Documents and submit the following documents to the court:
3 a. The completed Notice of Submission of Documents;
4 b. One completed summons;
5 c. One completed USM-285 form for defendant Botkin; and
6 d. Two copies of the endorsed complaint filed September 17, 2019.

7 6. Plaintiff need not attempt service on defendant and need not request waiver of service.
8 Upon receipt of the above-described documents, the court will direct the United States
9 Marshal to serve the above-named defendant pursuant to Federal Rule of Civil Procedure
10 4 without payment of costs.

11 Further, IT IS RECOMMENDED that plaintiff's due process claim be dismissed.

12 These findings and recommendations will be submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
14 after being served with these findings and recommendations, plaintiff may file written objections
15 with the court. The document should be captioned "Objections to Magistrate Judge's Findings
16 and Recommendations." Plaintiff is advised that failure to file objections within the specified
17 time may result in waiver of the right to appeal the district court's order. Martinez v. Ylst, 951
18 F.2d 1153 (9th Cir. 1991).

19 Dated: September 27, 2019

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23 DEBORAH BARNES
24 UNITED STATES MAGISTRATE JUDGE

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NOTICE OF SUBMISSION

Plaintiff submits the following documents in compliance with the court's order filed

- _____:
- _____ completed summons form
 - _____ completed USM-285 forms
 - _____ copies of the Complaint

DATED:

Plaintiff