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

REGINALD L. BAKER,)	No. C 08-3592 CW (PR)
)	
Plaintiff,)	ORDER OF SERVICE
)	
v.)	
)	
WARDEN ROBERT HOREL, et al.,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Plaintiff Reginald Baker is a state prisoner incarcerated at Pelican Bay State Prison (PBSP). He has filed this civil rights action under 42 U.S.C. § 1983. His motion for leave to proceed in forma pauperis has been granted.

Venue is proper in this Court because the injuries complained of occurred at PBSP in Del Norte County, which is located within the Northern District of California. See 28 U.S.C. §§ 84(a), 1391(b).

BACKGROUND

Plaintiff alleges that PBSP officials wrongfully deprived him of personal property and also violated his First Amendment rights. Specifically, on September 25, 2007, PBSP Correctional Captain C. Ducart signed a "Notice of Disapproval" from PBSP's "Receiving and Release," which refused to allow Plaintiff to possess two "art books," which he "in good faith, ordered through his family." (Compl. at 3.) Plaintiff alleges the books contained "drawings of fictional characters, not real people." (Compl., Ex. B at 8.) PBSP prison officials allege that the books contained "frontal nudity," including "drawings of women with exposed breasts" on

1 three pages of one book and "drawings of women's breasts,
2 genitalia, and various sexual explicit images" on five pages of
3 another book. (Compl., Ex. D at 14.) Plaintiff claims that he
4 asked the officers to remove the pages containing nudity from both
5 books, but they refused to do so. (Compl., Ex. B. at 10.)
6 Plaintiff sought permission to receive these books, using an inmate
7 grievance form, but his request was denied at all three levels of
8 administrative review.

9 Plaintiff names the following Defendants: California
10 Department of Corrections and Rehabilitation (CDCR) Secretary M.
11 Cate, Chief of the Inmate Appeals Branch N. Grannis, Appeals
12 Examiner J. Hutchins, PBSP Warden R. Horel, PBSP Associate Warden
13 M. Yax, PBSP Correctional Captain C. Ducart and PBSP Correctional
14 Sergeant S. Bradley. In this action, he seeks to enjoin the CDCR
15 from enforcing the regulation preventing his possession of the art
16 books, to propose an amendment to the regulation "for exceptions
17 regarding art material," to be reimbursed for the books that were
18 destroyed and to be awarded "any other damages the Court sees fit
19 to order." (Compl. at 4.)

20 DISCUSSION

21 I. Standard of Review

22 A federal court must conduct a preliminary screening in any
23 case in which a prisoner seeks redress from a governmental entity
24 or officer or employee of a governmental entity. 28 U.S.C.
25 § 1915A(a). In its review, the court must identify any cognizable
26 claims and dismiss any claims that are frivolous, malicious, fail
27 to state a claim upon which relief may be granted or seek monetary
28 relief from a defendant who is immune from such relief. Id.
§ 1915A(b)(1), (2).

1 To state a claim under 42 U.S.C. § 1983, a plaintiff must
2 allege two essential elements: (1) that a right secured by the
3 Constitution or laws of the United States was violated, and
4 (2) that the alleged violation was committed by a person acting
5 under the color of state law. West v. Atkins, 487 U.S. 42, 48
6 (1988). Pro se pleadings must be liberally construed. Balistreri
7 v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

8 II. Legal Claims

9 A. Deprivation of Property Claim

10 When a prisoner suffers a property loss under the authority of
11 state law, a due process claim may be stated. That is, where the
12 confiscation is made by officials acting under the apparent
13 authority of state procedures, regulations or statutes designed to
14 control the actions of state officials, due process requires a
15 meaningful hearing on the matter. See Logan v. Zimmerman Brush
16 Co., 455 U.S. 422, 437 (1982); Armendariz v. Penman, 31 F.3d 860,
17 866 (9th Cir. 1994), aff'd in part on relevant grounds and vacated
18 in part on other grounds on reh'g en banc, 75 F.3d 1311 (9th Cir.
19 1996) (en banc). Here, Plaintiff was deprived of his property
20 because it met the state definition of prison contraband;
21 therefore, the deprivation occurred under the authority of state
22 law.

23 When a prisoner suffers a property loss that is random and
24 unauthorized his remedy lies with the state, as neither the
25 negligent nor intentional deprivation of property states a due
26 process claim under § 1983 under such circumstances. See Parratt
27 v. Taylor, 451 U.S. 527, 535-44 (1981) (state employee negligently
28 lost prisoner's hobby kit), overruled in part on other grounds,

1 Daniels v. Williams, 474 U.S. 327, 330-31 (1986); Hudson v. Palmer,
2 468 U.S. 517, 533 (1984) (intentional destruction of inmate's
3 property). The availability of an adequate state post-deprivation
4 remedy, for example a state tort action, precludes relief because
5 it provides adequate procedural due process. King v. Massarweh,
6 782 F.2d 825, 826 (9th Cir. 1986). If the deprivation is not
7 random and unauthorized, but the result of "established state
8 procedure," the availability of a post-termination tort action does
9 not necessarily provide due process. See Logan, 455 U.S. at 435-
10 37. Parratt does not apply where the state has procedures designed
11 to control the actions of state officials and the officials act
12 pursuant to those procedures. See Zimmerman v. City of Oakland,
13 255 F.3d 734, 738 (9th Cir. 2001); Armendariz, 31 F.3d at 866. In
14 those instances, the Fourteenth Amendment requires "'an
15 opportunity . . . granted at a meaningful time and in a meaningful
16 manner,' . . . for a hearing appropriate to the nature of the
17 case.'" Logan, 455 U.S. at 437.

18 Here, it is clear from the complaint that Plaintiff was
19 provided with a meaningful hearing and an opportunity to express
20 his views with respect to the property's confiscation.¹
21 Accordingly, Plaintiff's deprivation of property claim is DISMISSED
22 with prejudice for failure to state a claim upon which relief may
23 be granted.

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26 ¹ The hearing need not always be prior to deprivation, as "the
27 necessity of quick action by the state or the impracticability of
28 any pre-deprivation process" are important considerations. See
Logan, 455 U.S. at 436 (quoting Parratt, 451 U.S. at 539);
Armendariz, 31 F.3d at 866 (summary governmental action taken in
emergencies and designed to protect public health, safety and
welfare do not violate due process).

1 B. First Amendment Claim

2 Plaintiff asserts that Defendants' refusal to allow him access
3 to his art books violated his First Amendment right to freedom of
4 speech. A prison inmate retains those First Amendment rights not
5 inconsistent with his status as a prisoner or with legitimate
6 penological objectives of the corrections system. See Pell v.
7 Procunier, 417 U.S. 817, 822 (1974). Regulations affecting
8 prisoners' access to publications are valid if they are reasonably
9 related to legitimate penological interests. See Thornburgh v.
10 Abbott, 490 U.S. 401, 413 (1989) (citing Turner v. Safley, 482 U.S.
11 78, 89 (1987)).

12 In Turner, the Supreme Court identified four factors to
13 consider when determining whether a regulation is reasonably
14 related to legitimate penological interests: (1) whether there is
15 a "valid, rational connection between the prison regulation and the
16 legitimate governmental interest put forward to justify it";
17 (2) "whether there are alternative means of exercising the right
18 that remain open to prison inmates"; (3) "the impact accommodation
19 of the asserted constitutional right will have on guards and other
20 inmates and on the allocation of prison resources generally"; and
21 (4) the "absence of ready alternatives", or, in other words,
22 whether the rule at issue is an "exaggerated response to prison
23 concerns." Turner, 482 U.S. at 89-90. A regulation restricting
24 certain publications is "neutral" if prison administrators draw
25 distinctions between publications solely on the basis of their
26 potential implications for prison security. See, e.g., Mauro v.
27 Arpaio, 188 F.3d 1054, 1059-60 (9th Cir. 1999) (en banc) (ban on
28

1 "sexually explicit materials . . . that show frontal nudity"
2 expressly aimed at maintaining jail security, rehabilitating
3 inmates and reducing sexual harassment of female detention officers
4 found "neutral" because jail administrators drew distinction
5 between materials solely on the basis of the materials' potential
6 effect on the jail's legitimate objectives). Conversely,
7 regulations to be viewed with caution include those which
8 categorically prohibit access to a broad range of materials, or
9 "fairly invite prison officials and employees to apply their own
10 personal prejudices and opinions as standards for [] censorship."
11 Thornburgh, 490 U.S. at 416 n.14 (citation omitted); see, e.g.,
12 Pepperling v. Crist, 678 F.2d 787, 790 (9th Cir. 1982) (prison
13 officials may not capriciously apply blanket regulation prohibiting
14 sexually explicit magazines).

15 The parties dispute whether the books in question are subject
16 to the "art material" exception to the prison regulation.
17 Furthermore, there could have been other "ready alternatives" to
18 forfeiture of these types of books, for example, allowing inmates
19 to agree to the removal of offensive pages as opposed to forfeiting
20 the entire book. As mentioned above, Plaintiff alleges that he
21 asked the officers to remove the pages containing nudity instead of
22 forfeiting the entire book, but they refused to do so. Thus,
23 Plaintiff's allegations, when liberally construed, state a
24 cognizable First Amendment claim against Defendant Ducart. See
25 Thornburgh, 490 U.S. at 413 (holding prison regulations limiting
26 inmates' access to publications or other information must be
27 reasonably related to legitimate penological interests).

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1 C. Claim Relating to Grievance Process

2 Plaintiff also alleges that Defendants Bradley, Yax, Horel,
3 Hutchins and Grannis, who reviewed Plaintiff's appeals, did not
4 remedy the alleged constitutional violation. Although there is a
5 First Amendment right to petition government for redress of
6 grievances, there is no right to a response or any particular
7 action. See Flick v. Alba, 932 F.2d 728 (8th Cir. 1991)
8 ("prisoner's right to petition the government for redress . . . is
9 not compromised by the prison's refusal to entertain his
10 grievance."). Plaintiff has therefore failed to state a claim
11 against Defendants Bradley, Yax, Horel, Hutchins and Grannis
12 relating to the grievance process. Accordingly, Plaintiff's claim
13 against these Defendants relating to the grievance process is
14 DISMISSED with prejudice.

15 D. Supervisory Liability Claim

16 In addition to naming Defendants Ducart, Bradley, Yax, Horel,
17 Hutchins and Grannis, Plaintiff also names CDCR Secretary M. Cate
18 in his supervisory capacity. A supervisor may be liable under
19 § 1983 upon a showing of (1) personal involvement in the
20 constitutional deprivation or (2) a sufficient causal connection
21 between the supervisor's wrongful conduct and the constitutional
22 violation. Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th
23 Cir. 1991) (en banc) (citation omitted). Here, Plaintiff has
24 alleged neither.

25 Accordingly, Plaintiff's supervisory liability claim against
26 Defendant Cate is DISMISSED with leave to amend. Plaintiff may
27 file an amendment to the complaint alleging supervisory liability
28 under the standards explained above.

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. Plaintiff's deprivation of property claim is DISMISSED with prejudice for failure to state a claim upon which relief may be granted.

2. Plaintiff has stated a cognizable First Amendment claim against Defendant Ducart.

3. Plaintiff's claim against Defendants Bradley, Yax, Horel, Hutchins and Grannis relating to the grievance process is DISMISSED with prejudice.

4. Plaintiff's supervisory liability claim against Defendant Cate is DISMISSED WITH LEAVE TO AMEND as indicated above.

5. Within thirty (30) days of the date of this Order Plaintiff may file an amended supervisory liability claim against Defendant Cate as set forth above in Section II(C) of this Order. (Plaintiff shall resubmit only that claim and not the entire complaint.) The failure to do so will result in the dismissal without prejudice of the supervisory liability claim against Defendant Cate.

6. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint and all attachments thereto (docket no. 1) and a copy of this Order to Correctional Captain C. Ducart at PBSP. The Clerk of the Court shall also mail a copy of the complaint and a copy of this Order to the State Attorney General's Office in San Francisco. Additionally, the Clerk shall mail a copy of this Order to Plaintiff.

7. Defendant is cautioned that Rule 4 of the Federal Rules

1 of Civil Procedure requires him to cooperate in saving unnecessary
2 costs of service of the summons and complaint. Pursuant to Rule 4,
3 if Defendant, after being notified of this action and asked by the
4 Court, on behalf of Plaintiff, to waive service of the summons,
5 fails to do so, he will be required to bear the cost of such
6 service unless good cause be shown for their failure to sign and
7 return the waiver form. If service is waived, this action will
8 proceed as if Defendant had been served on the date that the waiver
9 is filed, except that pursuant to Rule 12(a)(1)(B), Defendant will
10 not be required to serve and file an answer before sixty (60) days
11 from the date on which the request for waiver was sent. (This
12 allows a longer time to respond than would be required if formal
13 service of summons is necessary.) Defendant is asked to read the
14 statement set forth at the foot of the waiver form that more
15 completely describes the duties of the parties with regard to
16 waiver of service of the summons. If service is waived after the
17 date provided in the Notice but before Defendant has been
18 personally served, the Answer shall be due sixty (60) days from the
19 date on which the request for waiver was sent or twenty (20) days
20 from the date the waiver form is filed, whichever is later.

21 8. Defendant shall answer the complaint in accordance with
22 the Federal Rules of Civil Procedure. The following briefing
23 schedule shall govern dispositive motions in this action:

24 a. No later than ninety (90) days from the date his
25 answer is due, Defendant shall file a motion for summary judgment
26 or other dispositive motion. The motion shall be supported by
27 adequate factual documentation and shall conform in all respects to
28 Federal Rule of Civil Procedure 56. If Defendant is of the opinion

1 that this case cannot be resolved by summary judgment, he shall so
2 inform the Court prior to the date the summary judgment motion is
3 due. All papers filed with the Court shall be promptly served on
4 Plaintiff.

5 b. Plaintiff's opposition to the dispositive motion
6 shall be filed with the Court and served on Defendant no later than
7 sixty (60) days after the date on which Defendant's motion is
8 filed. The Ninth Circuit has held that the following notice should
9 be given to pro se plaintiffs facing a summary judgment motion:

10 The defendant has made a motion for summary
11 judgment by which they seek to have your case dismissed.
12 A motion for summary judgment under Rule 56 of the
13 Federal Rules of Civil Procedure will, if granted, end
14 your case.

15 Rule 56 tells you what you must do in order to
16 oppose a motion for summary judgment. Generally, summary
17 judgment must be granted when there is no genuine issue
18 of material fact -- that is, if there is no real dispute
19 about any fact that would affect the result of your case,
20 the party who asked for summary judgment is entitled to
21 judgment as a matter of law, which will end your case.
22 When a party you are suing makes a motion for summary
23 judgment that is properly supported by declarations (or
24 other sworn testimony), you cannot simply rely on what
25 your complaint says. Instead, you must set out specific
26 facts in declarations, depositions, answers to
27 interrogatories, or authenticated documents, as provided
28 in Rule 56(e), that contradict the facts shown in the
defendant's declarations and documents and show that
there is a genuine issue of material fact for trial. If
you do not submit your own evidence in opposition,
summary judgment, if appropriate, may be entered against
you. If summary judgment is granted [in favor of the
defendants], your case will be dismissed and there will
be no trial.

See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en
banc).

Plaintiff is advised to read Rule 56 of the Federal Rules of
Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)

1 (party opposing summary judgment must come forward with evidence
2 showing triable issues of material fact on every essential element
3 of his claim). Plaintiff is cautioned that because he bears the
4 burden of proving his allegations in this case, he must be prepared
5 to produce evidence in support of those allegations when he files
6 his opposition to Defendant's dispositive motion. Such evidence
7 may include sworn declarations from himself and other witnesses to
8 the incident, and copies of documents authenticated by sworn
9 declaration. Plaintiff will not be able to avoid summary judgment
10 simply by repeating the allegations of his complaint.

11 c. If Defendant wishes to file a reply brief, he shall
12 do so no later than thirty (30) days after the date Plaintiff's
13 opposition is filed.

14 d. The motion shall be deemed submitted as of the date
15 the reply brief is due. No hearing will be held on the motion
16 unless the Court so orders at a later date.

17 9. Discovery may be taken in this action in accordance with
18 the Federal Rules of Civil Procedure. Leave of the Court pursuant
19 to Rule 30(a)(2) is hereby granted to Defendants to depose
20 Plaintiff and any other necessary witnesses confined in prison.

21 10. All communications by Plaintiff with the Court must be
22 served on Defendant, or Defendant's counsel once counsel has been
23 designated, by mailing a true copy of the document to Defendant or
24 Defendant's counsel.

25 11. It is Plaintiff's responsibility to prosecute this case.
26 Plaintiff must keep the Court informed of any change of address and
27 must comply with the Court's orders in a timely fashion.

28 12. Extensions of time are not favored, though reasonable

1 extensions will be granted. Any motion for an extension of time
2 must be filed no later than fifteen (15) days prior to the deadline
3 sought to be extended.

4 IT IS SO ORDERED.

5 DATED: 7/7/09



6 CLAUDIA WILKEN
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 REGINALD L. BAKER,

5 Plaintiff,

6 v.

7 M. CATE et al,

8 Defendant.
_____ /

Case Number: CV08-03592 CW

CERTIFICATE OF SERVICE

9
10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on July 7, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

15 Reginald L. Baker F-24891
16 Pelican Bay State Prison
17 P.O. Box 7500
18 Crescent City, CA 95532

19 Dated: July 7, 2009

Richard W. Wicking, Clerk
By: Sheilah Cahill, Deputy Clerk

United States District Court
For the Northern District of California