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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND DIVISION

EDWARD R. DUMBRIQUE,

Plaintiff,

vs.

BRUNNER, et. al.,

Defendants.

No. C 14-2598 PJH (PR)

**ORDER OF DISMISSAL WITH  
LEAVE TO AMEND**

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Plaintiff, a state prisoner at Pelican Bay State Prison, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

**DISCUSSION**

**A. Standard of Review**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). Although in order to state a claim a complaint "does not need detailed factual

1 allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'  
2 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
3 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief  
4 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
5 (citations omitted). A complaint must proffer "enough facts to state a claim to relief that is  
6 plausible on its face." *Id.* at 570. The United States Supreme Court has recently explained  
7 the "plausible on its face" standard of *Twombly*: "While legal conclusions can provide the  
8 framework of a complaint, they must be supported by factual allegations. When there are  
9 well-pleaded factual allegations, a court should assume their veracity and then determine  
10 whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662,  
11 679 (2009).

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
13 elements: (1) that a right secured by the Constitution or laws of the United States was  
14 violated, and (2) that the alleged deprivation was committed by a person acting under the  
15 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

16 **B. Legal Claims**

17 Plaintiff states that defendants retaliated against him for engaging in two separate  
18 hunger strikes.

19 "Within the prison context, a viable claim of First Amendment retaliation entails five  
20 basic elements: (1) an assertion that a state actor took some adverse action against an  
21 inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled  
22 the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably  
23 advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th  
24 Cir. 2005) (footnote omitted). *Accord Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995)  
25 (prisoner suing prison officials under § 1983 for retaliation must allege that he was  
26 retaliated against for exercising his constitutional rights and that the retaliatory action did  
27 not advance legitimate penological goals, such as preserving institutional order and  
28 discipline).

1 A prisoner must at least allege that he suffered harm, since harm that is more than  
2 minimal will almost always have a chilling effect. *Rhodes*, 408 F.3d at 567-68 n.11; see  
3 *Gomez v. Vernon*, 255 F.3d 1118, 1127-28 (9th Cir. 2001) (prisoner alleged injury by  
4 claiming he had to quit his law library job in the face of repeated threats by defendants to  
5 transfer him because of his complaints about the administration of the library).

6 In order to recover damages for an allegedly unconstitutional conviction or  
7 imprisonment, or for other harm caused by actions whose unlawfulness would render a  
8 conviction or sentence invalid, a 42 U.S.C. § 1983 plaintiff must prove that the conviction or  
9 sentence has been reversed on direct appeal, expunged by executive order, declared  
10 invalid by a state tribunal authorized to make such determination, or called into question by  
11 a federal court's issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S. 477,  
12 486-487 (1994). *Heck* also bars a claim for using the wrong procedures in a disciplinary  
13 hearing that resulted in the deprivation of time credits if "the nature of the challenge to the  
14 procedures [is] such as necessarily to imply the invalidity of the judgment." *Edwards v.*  
15 *Balisok*, 520 U.S. 641, 645 (1997).

16 Plaintiff states that prison officials circulated a letter to inmates on September 27,  
17 2011, which stated that participating in a mass disturbance such as a hunger strike or work  
18 stoppage could result in disciplinary action. Approximately two years later plaintiff chose to  
19 participate in two hunger strikes and received Rules Violation Reports for his participation.  
20 As a result, plaintiff was assessed 90 loss of credits and other privileges. Plaintiff contends  
21 that the Rules Violation Reports were in retaliation for engaging in a hunger strike.  
22 However, plaintiff was notified well in advance that engaging in a mass disturbance hunger  
23 strike could result in disciplinary action and prison officials trying to prevent mass  
24 disturbances appears to advance a legitimate correctional goal. In the complaint, plaintiff  
25 notes that he is not seeking restoration of his lost credits, yet he is seeking monetary  
26 damages which would call into question the underlying disciplinary finding. This claim will  
27 be dismissed with leave to amend for plaintiff to address these issues.

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1 Plaintiff also states that during one of the hunger strikes a defendant guard yelled in  
2 a loud voice in plaintiff's housing unit that plaintiff needed to pack up his property and get  
3 ready to move to the debriefer<sup>1</sup> unit. Plaintiff responded that he was not a debriefer but the  
4 defendant stated that plaintiff had to move. Plaintiff states a week later that another  
5 defendant guard yelled that plaintiff needed to report to the "D Pod" where the debriefers  
6 and hunger strikers were reporting. Plaintiff alleges that by referring to him as a debriefer  
7 he could be harmed by other inmates. This claim is also dismissed with leave to amend for  
8 plaintiff to provide more information to demonstrate retaliation. That inmates who were  
9 engaged in a hunger strike were moved to a different part of the prison where debriefers  
10 were also located does not necessarily show retaliation. Plaintiff should provide additional  
11 information to demonstrate a constitutional violation other than what different inmates were  
12 told by guards. Plaintiff must also address how this aspect of the claim is not barred by  
13 *Heck*.

#### 14 CONCLUSION

15 1. The complaint is **DISMISSED** with leave to amend in accordance with the  
16 standards set forth above. The amended complaint must be filed no later than **September**  
17 **5, 2014**, and must include the caption and civil case number used in this order and the  
18 words AMENDED COMPLAINT on the first page. Because an amended complaint  
19 completely replaces the original complaint, plaintiff must include in it all the claims he  
20 wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He may  
21 not incorporate material from the original complaint by reference.

22 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
23 court informed of any change of address by filing a separate paper with the clerk headed  
24 "Notice of Change of Address," and must comply with the court's orders in a timely fashion.  
25 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to  
26 Federal Rule of Civil Procedure 41(b).

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<sup>1</sup> It appears that plaintiff is referring to a gang debriefing.

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**IT IS SO ORDERED.**

Dated: July 31, 2014.

  
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PHYLLIS J. HAMILTON  
United States District Judge

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