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E-FILED - 10/15/08

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

ARMEN YAPUNDZHIAN,)	No. C 06-2729 RMW (PR)
)	
Plaintiff,)	ORDER OF DISMISSAL WITH
)	LEAVE TO AMEND
vs.)	
)	
COUNSELOR C.C.I. HERRERA, et al.,)	
)	
Defendants.)	
_____)	

Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. On March 2, 2007, the court ordered plaintiff to file an amended complaint because his original complaint failed to state a cognizable claim and failed to link the named defendants to the alleged cause of action. Plaintiff filed an amended complaint on March 30, 2007. Pursuant to 28 U.S.C. § 1915, the court again dismisses plaintiff’s complaint with leave to amend.

STATEMENT

Plaintiff alleges that on September 8, 2005, during his incarceration at Salinas Valley State Prison, he was housed in the Administrative Segregation Unit (“ASU”) pending an investigation into his alleged misconduct. Plaintiff claims that his right to due process and equal protection rights were violated when the defendants retained him in ASU pending an investigation of a claim by his homosexual cellmate accusing him of rape. Plaintiff contends

1 that defendants violated his constitutional right under the Fourteenth Amendment and that this
2 situation has caused him great suffering and stress.

3 **DISCUSSION**

4 A. Standard of Review

5 Federal courts must engage in a preliminary screening of cases in which prisoners
6 seek redress from a governmental entity or officer or employee of a governmental entity. 28
7 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any
8 claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or
9 seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2).
10 Pro se pleadings must, however, be liberally construed. Balistreri v. Pacifica Police Dep't, 901
11 F.2d 696, 699 (9th Cir. 1988).

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 violated,
14 and (2) that the alleged deprivation was committed by a person acting under the color of state
15 law. West v. Atkins, 487 U.S. 42, 48 (1988).

16 B. Legal Claims

17 In its earlier order of dismissal with leave to amend, the court identified the basic flaws in
18 plaintiff's complaint and provided plaintiff with thirty days in which to file an amended
19 complaint. The court specifically notified plaintiff that to state a claim, he needed to set forth
20 specific detailed facts regarding what each defendant did and how the conduct violated his
21 Fourteenth Amendment rights. The court also explained to plaintiff the legal standard for stating
22 a due process claim implicating a constitutional violation with respect to administrative
23 segregation.

24 **1. Due Process**

25 The hardship associated with administrative segregation, such as loss of recreational and
26 rehabilitative programs or confinement to one's cell for a lengthy period of time, is not so severe
27 as to violate the Due Process Clause itself. See Toussaint v. McCarthy, 801 F.2d 1080, 1091-92
28 (9th Cir. 1986) (applying Hewitt v. Helms, 459 U.S. 460 (1983)).

1 Prisoners retain their right to due process subject to the restrictions imposed by the nature
2 of the penal system. See Wolff v. McDonnell, 418 U.S. 539, 556 (1974). Thus although prison
3 disciplinary proceedings are not part of a criminal prosecution and the full panoply of rights due
4 a defendant in such proceedings does not apply, where serious rules violations are alleged and
5 the sanctions to be applied implicate state statutes or regulations which narrowly restrict the
6 power of prison officials to impose the sanctions and the sanctions are severe, the Due Process
7 Clause requires certain minimum procedural protections. Id. at 556-57, 571-72 n.19.

8 The placement of a California prisoner in isolation or segregation as a result of
9 disciplinary proceedings, for example, is subject to Wolff's procedural protections if (1) state
10 statutes or regulations narrowly restrict the power of prison officials to impose the deprivation,
11 and (2) the liberty in question is one of "real substance." Sandin v. Conner, 515 U.S. 472, 477-
12 87 (1995). However, placement in segregation pending investigation of disciplinary charges
13 does not implicate a protected liberty interest absent a showing that the conditions of
14 confinement constituted an "atypical and significant hardship . . . in relation to the ordinary
15 incidents of prison life." Resnick v. Hayes, 213 F.3d 443, 448-49 (9th Cir. 2000) (quoting
16 Sandin). Typically, placement in segregated housing in and of itself does not implicate a
17 protected liberty interest. Serrano v. Francis, 345 F.3d 1071, 1078 (9th Cir. 2003). Mere
18 allegations by a prisoner that he was denied due process in connection with the decision to
19 administratively segregate him do not present a constitutionally cognizable claim, absent a
20 showing that the specific deprivation at play meets the "real substance" test. See, e.g., May v.
21 Baldwin, 109 F.3d 557, 565 (9th Cir. 1997).

22 Here, plaintiff fails to allege an "atypical and significant hardship . . . in relation to the
23 ordinary incidents of prison life," nor does he sufficiently allege a lack of proper procedural due
24 process. As such, plaintiff will be given leave to amend the complaint to allege sufficient facts
25 to cure this deficiency, if he can do so in good faith.

26 2. Equal Protection

27 Plaintiff also seems to be raising a new claim of equal protection. He alleges that he is a
28 heterosexual and he was unwillingly housed with a homosexual, which violates his equal

1 protection rights and harms him emotionally. He claims that he is being discriminated against
2 because of his sexual preference.

3 A plaintiff alleging denial of equal protection under 42 U.S.C. § 1983 based on race or
4 other suspect classification must plead intentional unlawful discrimination or allege facts that are
5 at least susceptible of an inference of discriminatory intent. Monteiro v. Tempe Union High
6 School Dist., 158 F.3d 1022, 1026 (9th Cir. 1998). To state a claim for relief, the plaintiff must
7 allege that the defendant state actor acted at least in part because of plaintiff's membership in a
8 protected class. Serrano v. Francis, 345 F.3d 1071, 1081-82 (9th Cir. 2003). Proof of a
9 discriminatory intent or purpose is required to show an equal protection violation. City of
10 Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 193-94 (2003).

11 Where state action does not implicate a fundamental right or a suspect classification, the
12 plaintiff can establish an equal protection claim by demonstrating that he "has been
13 intentionally treated differently from others similarly situated and that there is no rational basis
14 for the difference in treatment." Squaw Valley Development Co. v. Goldberg, 375 F.3d 936,
15 944 (9th Cir. 2004) (quoting Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)),
16 overruling recognized by Action Apartment Assn., Inc. v. Santa Monica Rent Control Board,
17 509 F.3d 1020, 1025 (9th Cir. 2007). The plaintiff may pursue such an equal protection claim by
18 raising a triable issue of fact as to whether the defendants' asserted rational basis was merely a
19 pretext for differential treatment. Id. at 945-46.

20 Here, plaintiff fails to allege facts specific enough to state a cognizable claim for relief
21 with respect to an equal protection claim. As such, plaintiff will be given leave to amend the
22 complaint to allege sufficient facts to cure this deficiency, if he can do so in good faith.

23 **3. Named Defendants**

24 Plaintiff's complaint makes reference to the "defendants," but does not allege any facts
25 describing how each defendant's conduct violated his constitutional rights. Plaintiff names
26 Counselor C.C.I. Herrera, A.W. Moore, G. Lewis, and Dr. Torres in his complaint as defendants,
27 but again fails to explain how these defendants were specifically involved in any violation of his
28 constitutional rights.

1 For a claim to be cognizable, a plaintiff must “set forth specific facts as to each
2 individual defendant’s deprivation of protected rights. Leer v. Murphy, 844 F.2d 628, 634 (9th
3 Cir. 1988). A person deprives another of a constitutional right within the meaning of section
4 1983 if he does an affirmative act, participates in another’s affirmative act or omits to perform an
5 act which he is legally required to do, that causes the deprivation of which the plaintiff
6 complains. Id. at 633; Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995).

7 Plaintiff must allege facts supporting his claim against each defendant separately in his
8 amended complaint showing his entitlement to relief from each defendant. Plaintiff should list
9 the constitutional right he has, describe what each defendant did or failed to do, and describe
10 how each defendant’s acts or omissions caused him injury. Plaintiff must be careful to allege
11 facts showing the basis for liability for each individual defendant. He should not refer to the
12 defendants as a group, i.e., “the defendants;” rather, he should identify each involved defendant
13 by name and link each of them to a specific claim by explaining what each defendant did or
14 failed to do that caused a violation of his constitutional rights.

15 The complaint does not state a cognizable claim against any of the named defendants.
16 Plaintiff will be given leave to amend the complaint to cure this deficiency.

17 **4. Damages**

18 Plaintiff again seeks relief in the form of monetary damages for his suffering and stress.
19 However, “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison or
20 other correctional facility for mental or emotional injury suffered while in custody without a
21 prior showing of physical injury.” 42 U.S.C. § 1997e(e). The Prisoner Litigation Reform Act
22 (PLRA) provides that prisoners may recover for mental or emotional injuries suffered while
23 incarcerated only if they first show that they suffered a physical injury. 42 U.S.C. § 1997e(e).

24 Here, because plaintiff does not allege any physical injury, much less *de minimis* injury,
25 his claim for damages based upon his suffering and stress is DISMISSED with prejudice. See
26 generally Oliver v. Keller, 289 F.3d 623, 630 (9th Cir. 2002) (allowing claims for compensatory,
27 nominal, and punitive damages for other violations of Fourteenth Amendment rights but not for
28 alleged mental or emotional injuries pursuant to § 1997e(e)).

1 IT IS SO ORDERED.

2 DATED: 10/10/08

Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

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