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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

HOWARD YOUNG,
CDCR #F-44590,

Plaintiff,

vs.

LARRY SMALLS, et al.,

Defendants.

Civil No. 09-2545 DMS (JMA)

**ORDER DISMISSING SECOND
AMENDED COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C.
§§ 1915(e)(2) & 1915A(b)**

I.

PROCEDURAL HISTORY

On November 10, 2009, Howard Young (“Plaintiff”), a state prisoner currently incarcerated at Kern Valley State Prison located in Delano, California, and proceeding in pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. The Court issued an Order on January 19, 2010 dismissing Plaintiff’s Complaint for failing to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b). The Plaintiff was notified of the deficiencies of pleading and provided an opportunity to file a First Amended Complaint. However, on that same day, Plaintiff filed his First Amended Complaint [Doc. No. 12].

1 Because Plaintiff could not have received the Court's Order in time to correct the
2 problems the Court identified in his previous pleading, the Court dismissed Plaintiff's First
3 Amended Complaint and gave him leave to file a Second Amended Complaint. On April 5,
4 2010, Plaintiff filed his Second Amended Complaint ("SAC") [Doc. No. 21].

5 II.

6 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

7 As the Court stated in its previous Order, the Prison Litigation Reform Act ("PLRA")
8 obligates the Court to review complaints filed by all persons proceeding IFP and by those, like
9 Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced for, or
10 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
11 probation, pretrial release, or diversionary program," "as soon as practicable after docketing."
12 See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions of the PLRA, the Court must
13 sua sponte dismiss complaints, or any portions thereof, which are frivolous, malicious, fail to
14 state a claim, or which seek damages from defendants who are immune. See 28 U.S.C. §§
15 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§
16 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A); see also *Barren v.*
17 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing § 1915A).

18 "[W]hen determining whether a complaint states a claim, a court must accept as true all
19 allegations of material fact and must construe those facts in the light most favorable to the
20 plaintiff." *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
21 "parallels the language of Federal Rule of Civil Procedure 12(b)(6)"). In addition, the Court's
22 duty to liberally construe a pro se's pleadings, see *Karim-Panahi v. Los Angeles Police Dept.*,
23 839 F.2d 621, 623 (9th Cir. 1988), is "particularly important in civil rights cases." *Ferdik v.*
24 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a
25 pro se civil rights complaint, the court may not "supply essential elements of claims that were
26 not initially pled." *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th
27 Cir. 1982). "Vague and conclusory allegations of official participation in civil rights violations
28 are not sufficient to withstand a motion to dismiss." *Id.*

1 **A. 42 U.S.C. § 1983 Liability**

2 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
3 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
4 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
5 United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 2122
6 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

7 2. *Fourteenth Amendment Due Process Claims*

8 In his Second Amended Complaint, Plaintiff alleges his due process rights were violated
9 when he was placed in Administrative Segregation (“Ad-Seg”). “The requirements of
10 procedural due process apply only to the deprivation of interests encompassed by the Fourteenth
11 Amendment’s protection of liberty and property.” *Board of Regents v. Roth*, 408 U.S. 564, 569
12 (1972). State statutes and prison regulations may grant prisoners liberty interests sufficient to
13 invoke due process protections. *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). However,
14 the Supreme Court has significantly limited the instances in which due process can be invoked.
15 Pursuant to *Sandin v. Conner*, 515 U.S. 472, 483 (1995), a prisoner can show a liberty interest
16 under the Due Process Clause of the Fourteenth Amendment only if he alleges a change in
17 confinement that imposes an “atypical and significant hardship . . . in relation to the ordinary
18 incidents of prison life.” *Id.* at 484 (citations omitted); *Neal v. Shimoda*, 131 F.3d 818, 827-28
19 (9th Cir. 1997).

20 In *Sandin*, the Supreme Court considered three factors in determining whether the
21 plaintiff possessed a liberty interest in avoiding disciplinary segregation: (1) the disciplinary
22 versus discretionary nature of the segregation; (2) the restricted conditions of the prisoner’s
23 confinement and whether they amounted to a “major disruption in his environment” when
24 compared to those shared by prisoners in the general population; and (3) the possibility of
25 whether the prisoner’s sentence was lengthened by his restricted custody. *Id.* at 486-87.

26 Therefore, to establish a due process violation, Plaintiff must first show the deprivation
27 imposed an atypical and significant hardship on him in relation to the ordinary incidents of
28 prison life. *Sandin*, 515 U.S. at 483-84. Plaintiff must allege “a dramatic departure from the

1 basic conditions” of his confinement that would give rise to a liberty interest before he can claim
2 a violation of due process. *Id.* at 485; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir.
3 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998). Here, Plaintiff alleges that while he was
4 housed in Ad-Seg, he was denied outdoor exercise for a period of nine months, was kept in a cell
5 that contained wastewater which caused him to contract an infection, and his cell lights remained
6 on twenty four (24) hours a day. Based on these allegations, the Court finds that Plaintiff has
7 alleged facts sufficient to allege a liberty interest in remaining free of ad-seg. *Sandin*, 515 U.S.
8 at 486.

9 Even if Plaintiff is able to establish a liberty interest, his allegations fail to state a claim
10 for denial of procedural due process regarding the disciplinary proceedings because they do not
11 satisfy the standards set forth in *Wolff v. McDonnell*, 418 U.S. 539, 563-70 (1974). Under *Wolff*,
12 a prisoner facing a disciplinary hearing are entitled to: (1) written notice of the charges at least
13 24 hours in advance of the hearing; (2) a written statement indicating upon what evidence the
14 fact finders relied and the reasons for the disciplinary action; (3) the opportunity to call witnesses
15 and present documentary evidence when doing so will not be unduly hazardous to institutional
16 safety or correctional goals; and (4) an impartial fact finder. *Wolff*, 418 U.S. at 564-71. Plaintiff
17 does not allege that he was denied any of the factors as set forth in *Wolff*.

18 Accordingly, Plaintiff’s due process claims under the Fourteenth Amendment are
19 dismissed for failing to state a claim upon which relief can be granted.

20 2. *Property Claims*

21 Plaintiff also alleges that prison officials confiscated his television while he was at
22 Calipatria State Prison. *See* SAC at 11. Where a prisoner alleges the deprivation of a liberty or
23 property interest caused by the unauthorized negligent or intentional action of a prison official,
24 the prisoner cannot state a constitutional claim where the state provides an adequate post-
25 deprivation remedy. *See Zinermon v. Burch*, 494 U.S. 113, 129-32 (1990); *Hudson v. Palmer*,
26 468 U.S. 517, 533 (1984). The California Tort Claims Act (“CTCA”) provides an adequate post-
27 deprivation state remedy for the random and unauthorized taking of property. *Barnett v.*
28 *Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994).

1 Thus, Plaintiff has an adequate state post-deprivation remedy and his claims relating to
2 the taking of his property are not cognizable in this § 1983 action, and must be dismissed
3 pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1).

4 3. *Restitution account claims*

5 Plaintiff also claims that his due process rights are being violated because the California
6 Department of Corrections and Rehabilitation (“CDCR”) is taking money from his trust account
7 to pay towards his restitution fine. *See* SAC at 9. Specifically, Plaintiff objects to the monies
8 he receives from his family as gifts being used to pay for his restitution. *Id.*

9 When a prisoner is sentenced in California, at times a restitution fine is imposed by Cal.
10 Pen. Code § 1202.4(b) to be collected in a manner set forth by Cal. Pen. Code § 2085.5(a) which
11 provides, in part, that:

12 “the Director of Corrections shall deduct a minimum of 20 percent or the balance owing
13 on the fine amount, whichever is less, up to a maximum of 50 percent from the wages and
14 trust account deposits of a prisoner, unless prohibited by federal law, and shall transfer
that amount to the California Victim Compensation and Government Claims Board for
deposit in the Restitution Fund in the State Treasury.”

15 Cal. Pen. Code § 2085.5(a)

16 The California Penal Code requires that the money be garnished from “the wages and
17 trust account deposits” of an inmate. *Id.* Plaintiff objects to garnishment of monies obtained and
18 deposited into his inmate trust account from family members. *See* SAC at 9. Initially, California
19 Penal Code § 2085.5 only provided for garnishment of inmate wages but this code section was
20 amended in 1992 to also allow for garnishments of other types of deposits into an inmate’s trust
21 account. *See Quarles v. Kane*, 482 F.3d 1154, 1155 (9th Cir. 2007).

22 The statute clearly provides for garnishment from wages and “trust account deposits”
23 which would include money that Plaintiff receives from family members. Title 15 of the
24 California Code of Regulations does provide some exemptions from this garnishment.

25 Certain monies in a prisoner’s trust account are exempt from withdrawal for payment of
26 restitution as follows:

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1 “Joint Venture Program Deposits, funds designated to pay the costs of a family visit
2 (“family visit funds”), Temporary Community Leave funds, federal disability payments,
3 veteran benefits, any reimbursement to an inmate as a result of a claim for lost or
damaged property, or money reimbursed to an inmate due to a failed attempt to purchase
merchandise are exempt for fines and direct orders of restitution.”

4 CAL. CODE REGS. TIT. 15, § 3097(j).

5 Plaintiff alleges no facts to demonstrate that the funds he received from his family would
6 fall under these exemptions. Thus, Plaintiff’s Fourteenth Amendment due process claims relating
7 to his inmate trust account are dismissed for failing to state a claim upon which relief may be
8 granted.

9 III.

10 CONCLUSION AND ORDER

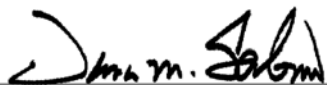
11 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

12 1. Plaintiff’s Second Amended Complaint is **DISMISSED** without prejudice
13 pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty
14 five (45) days leave from the date this Order is “Filed” in which to file a Third Amended
15 Complaint which cures all the deficiencies of pleading noted above. Plaintiff’s Amended
16 Complaint must be complete in itself without reference to the superseded pleading. *See* S.D.
17 Cal. Civ. L. R. 15.1. Defendants not named and all claims not re-alleged in the Amended
18 Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.
19 1987). Further, if Plaintiff’s Amended Complaint fails to state a claim upon which relief may
20 be granted, it may be dismissed without further leave to amend and may hereafter be counted
21 as a “strike” under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir.
22 1996).

23 2. The Clerk of Court is directed to mail a court approved § 1983 form to Plaintiff.

24 **IT IS SO ORDERED.**
25 **IT IS SO ORDERED.**

26 DATED: April 15, 2010

27 
28 HON. DANA M. SABRAW
United States District Judge