UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JASON COX,

Plaintiff,

v.

ELDON VAIL, et al.,

Defendants.

CASE NO. C12-5421 BHS

ORDER ADOPTING REPORT AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation ("R&R") of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 27), and Plaintiff Jason Cox's ("Cox") objections to the R&R (Dkt. 28).

On October 9, 2012, Judge Strombom issued the R&R recommending that the Court grant Defendants' motion to dismiss Cox's complaint with prejudice and without leave to amend. Dkt. 27. Judge Strombom found that Cox failed to state a claim for relief because the state prison did not violate Cox's constitutional rights when it denied him the opportunity to work in the prison's furniture factory. *Id.* Cox objects, arguing that he should be allowed leave to amend and that his constitutional rights were violated. Dkt. 28.

The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject; or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

In this case, Cox's complaint should be dismissed without leave to amend. First, the majority of Cox's legal theories are based on the position that the prison's denial of a particular job is a constitutional violation. It is well established that there is no constitutional right to any job, let alone a particular job, while incarcerated. *See Baumann v. Arizona Dept. of Corrections*, 754 F.2d 841, 846 (9th Cir. 1985).

Second, Cox was not denied his right to redress his grievances. In fact, he alleges that his grievances were accepted and processed. Dkt. 5, ¶¶ 52–64. The fact that Cox does not agree with the administrators' decisions on the grievances does not give rise to a constitutional violation.

Third, Cox's Supremacy Clause argument is premised on an incorrect reading of *Haywood v. Drown*, 556 U.S. 729 (2009). In *Haywood*, the Court held that New York's attempt to divest its courts with jurisdiction over prisoner claims against correction officers violated the Supremacy Clause. *Id.* In Washington, once a judgment is obtained against a correction officer, the prisoner must seek satisfaction of the judgment against the state. RCW 4.92.075. These are entirely different procedures and Cox has failed to make any showing that Washington's procedure is unconstitutional in light of *Haywood*.

Fourth, Cox is not entitled to leave to amend his complaint because it is based on erroneous legal theories. On a 12(b)(6) motion, "a district court should grant leave to

amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990). No amendment can cure Cox's legal deficiencies.

Therefore, the Court having considered the R&R, Cox's objections, and the remaining record, does hereby find and order as follows:

(1) The R&R is **ADOPTED**;

(2) Defendants' motion to dismiss is **GRANTED**;

(3) Cox's federal claims are **DISMISSED with prejudice**;

(4) Cox's state claims are **DISMISSED without prejudice**;

(5) Cox's *in forma pauperis* status is **REVOKED**; and

(6) The Clerk shall close this case.

Dated this 20th day of November, 2012.

BENJAMIN H. SETTLE
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JASON COX,

Plaintiff,

v.

DAN PACHOLKE, PAT GLEBE, LIZA RHORER, TERA MCELRAVY, DENNIS DAHNE, MARILYN MALDRICH, KATELYN DAUGHERTY, TAMARA ROWDEN, G. PRESSEL, WASHINGTON STATE, WASHINGTON DEPARTMENT OF CORRECTIONS, WASHINGTON DEPARTMENT OF ENTERPRISE SERVICES, JOHN AND JANE DOES 1-10,

Defendants.

No. C12-5421 BHS/KLS

**REPORT AND RECOMMENDATION**
**Noted for: November 2, 2012**

Presently before the Court is Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff Jason Cox, a *pro se* inmate, filed claims under 42 U.S.C. § 1983 for alleged violations of his First, Eighth, and Fourteenth Amendment rights; a claim of conspiracy under 42 U.S.C. § 1985(3), and a claim based on the Supremacy Clause, all of which allegedly arose after he was terminated from his prison job. Plaintiff also asserts a number of state tort claims. ECF No. 5.

Defendants argue that all of Plaintiff's federal claims should be dismissed for failure to state a claim upon which relief can be granted, that this Court should decline to exercise

jurisdiction over his pendent state law claims, and that Plaintiff's actions merit a strike under 28 U.S.C. § 1915(g). Included in Defendants' motion is a request that all discovery be stayed until the Court rules on their motion to dismiss. *Id.*, at 22. That motion was granted under separate order.

Having carefully considered the motion, Plaintiff's response (ECF No. 22), Defendants' reply (ECF No. 25), and balance of the record, the Court recommends that the motion be granted, Plaintiff's claims dismissed without leave to amend as he has failed to state cognizable claims under 42 U.S.C. § 1983, that the Court decline to exercise jurisdiction over pendent state court claims, and the dismissal counted as a "strike" under 28 U.S.C. § 1915(g).

**BACKGROUND**

In August 2010, Plaintiff was transferred from McNeil Island Corrections Center (MICC), which was closing, to Stafford Creek Corrections Center (SCCC). ECF No. 5, ¶ 37. While he was housed at MICC, Plaintiff had been employed by the Department of Correctional Industries (CI) furniture factory. *Id.*, ¶ 35. When he arrived at SCCC, Plaintiff was informed of a policy which prohibits certain offenders from having access to certain parts of the facility, based upon the structure of their sentence and their remaining time to be served. *Id.*, ¶ 39.

Under Washington law, sex offenders convicted after September 1, 2001, like the Plaintiff, are sentenced to indeterminate sentences with a minimum and maximum term of confinement. *See* RCW 9.94A.507 (*formerly* RCW 9.94A.712). The maximum term is to be the "statutory maximum sentence for the offense." *Id.* In Plaintiff's case, the maximum term for his offenses was life, and thus his indeterminate sentence is structured as confinement from a minimum term to life. *See* RCW 9A.44.076(2). These sex offenders become eligible for "parole," as they reach their minimum term. *See* RCW 9.95.420.

Because Plaintiff was sentenced under the "ISRB or Community Custody Board" and was not yet eligible for "parole," his sentence structure dictated that, pursuant to the SCCC Operational Memorandum, he was not currently permitted in the section of the prison housing the furniture factory. ECF No. 5, ¶¶ 38-40. As a result, Plaintiff was not able to continue his prison job in the furniture factory after being moved to SCCC. *Id.* Plaintiff claims this policy and the resulting loss of his prison job violates his Fourteenth Amendment equal protection and due process rights, as well as his Eighth Amendment right to be free of cruel and unusual punishment. *Id.*, ¶ 67. Plaintiff does not allege that he has been denied all prison employment and in fact, according to Defendants, he has been employed in various prison jobs since being moved to SCCC. See ECF No. 25, p. 3, fn. 1.

Plaintiff filed grievances and a State tort claim with regard to the policy and his job. *See id.*, ¶ ¶ 44-57. The grievances and tort claim were denied through all levels to which he appealed. *Id.* Plaintiff claims that these denials violated his First Amendment "right to a prison grievance system which is functional and can accomplish resolution of problems." *Id.*, ¶ 70. Finally, Plaintiff claims that the State of Washington has, through legislation providing for legal defense of individual employees who acted in good faith and State satisfaction of judgments against them, set up a scheme that is in conflict with 42 U.S.C. § 1983. *See id.*, ¶ 71.

The "right to legal representation and satisfaction of judgments" referred to by Plaintiff comes from RCW 4.92.060, 4.92.070 and 4.92.075. Plaintiff also lists, broadly, RCW Chapters 60 and 61 as conflicting, but provides no further explanation. These chapters cover "Liens" and "Mortgages, deeds of trust, and real estate contracts," respectively. Plaintiff provides no explanation of how real estate law conflicts with Section 1983.

**STANDARD OF REVIEW**

The Court's review of a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6) is limited to the complaint. *Lee v. City of Los Angeles*, 250 F.3d 668 at 688 (9th Cir. 2001). All material factual allegations contained in the complaint are taken as admitted and the complaint is to be liberally construed in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Lee*, 250 F.3d at 688. A complaint should not be dismissed under Fed. R. Civ. P. 12(b) (6), unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Although pro se pleadings should be construed liberally, the court may not supply essential elements of the claim that were not pled. *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir.1985); *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.1982); see also *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir.1992).

In order to survive a motion to dismiss, a complaint must also contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009), *citing Bell Atlantic v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Fed. R. Civ. P. 8(a)(2) "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949. "[N]aked assertion[s]" of illegal conduct devoid of "further factual enhancement" do not suffice. *Id.*, quoting *Twombly*, 550 U.S. at 557.

"Under Ninth Circuit case law, district courts are only required to grant leave to amend if a complaint can possibly be saved. Courts are not required to grant leave to amend if a complaint lacks merit entirely." *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

## DISCUSSION

### A. Section 1983 Claims

To state a claim under 42 U.S.C. § 1983, at least two elements must be met: (1) the defendant must be a person acting under color of state law; and (2) his conduct must have deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds, Daniels v. Williams,* 474 U.S. 327, 330-31 (1986). Implicit in the second element is a third element of causation. *See Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 286-87 (1977); *Flores v. Pierce*, 617 F.2d 1386, 1390-91 (9th Cir. 1980), *cert. denied*, 449 U.S. 875 (1980). When a plaintiff fails to allege or establish one of the three elements, his complaint must be dismissed. The Civil Rights Act, 42 U.S.C. § 1983, is not merely a "font of tort law." *Parratt*, 451 U.S. at 532. The plaintiff may have suffered harm, even due to another's negligent conduct, but that does not in itself necessarily demonstrate an abridgement of Constitutional protections. *Davidson v. Cannon*, 474 U.S. 344 (1986).

#### 1) First Amendment Claim

Plaintiff alleges that his First Amendment rights were violated because he was denied his "right to administrative remedy," because the Department did not find in his favor during the grievance process. ECF No. 5, ¶ 1. However, inmates have no constitutional right to a prison grievance system. *Mann v. Adams*, 855 F.2d 639 (9th Cir. 1988); *Stewart v. Block*, 938 F. Supp. 582 (C.D. Cal. 1996); *Hoover v. Watson*, 886 F. Supp. 410 (D. Del. 1995) (*aff'd*, 74 F.3d 1226). Even if the state elects to provide a grievance mechanism, violations of its procedures do not give rise to § 1983 claims. *Hoover v. Watson, supra, Brown v. Dodson*, 863 F. Supp. 284, 285 (W.D. Va. 1994); *Allen v. Wood*, 970 F. Supp. 824, 832 (E.D. Wash. 1997).

Here, Plaintiff alleges that he was able to file multiple prison grievances and appeal those grievances. He also filed a state tort claim. ECF No. 5, ¶ ¶ 52 – 64. The grievances, appeals, and tort claim were apparently all processed, investigated and eventually denied. *Id.* Therefore, Plaintiff has not been constitutionally denied his First Amendment right to a grievance process. Plaintiff is certainly not constitutionally guaranteed a particular result.

Plaintiff has failed to plead that his First Amendment constitutional rights were actually violated and therefore, has failed to state a claim upon which relief can be granted. This claim should be dismissed.

**2) Eighth Amendment Claim**

Inmates alleging Eighth Amendment violations based on prison conditions must demonstrate that prison officials were deliberately indifferent to their health or safety by subjecting them to a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970 (1994); *Wallis v. Baldwin*, 70 F.3d 1074, 1076 (9th Cir. 1995). Prison officials display a deliberate indifference to an inmate's well-being when they consciously disregard an excessive risk of harm to the inmate's health or safety. *Farmer*, 511 U.S. at 838-40; *Wallis*, 70 F.3d at 1077. Under the rubric of *Farmer*, prison officials are required to provide humane conditions of confinement and take reasonable steps to ensure the safety of the prisoners that live in that environment. *Osolinski v. Kane*, 92 F.3d 934, 936-37 (9th Cir. 1996). Conditions of confinement only rise to a level of a constitutional violation when they deprive an inmate of the minimal measures of life's necessities. *Farmer*, 511 U.S. at 834 (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

Here, Plaintiff asserts that his termination from his prison employment violated his Eighth Amendment right. There is no constitutional right to receive and retain a particular prison

job assignment. See *Garza v. Miller*, 688 F.2d 480, 486 (7th Cir.1982), *cert. denied*, 459 U.S. 1150 (1983). See also *Barno v. Ryan*, 399 F. Appx. 272, 273 (9th Cir. 2010) (unpublished opinion) (loss of a prison job as a result of erroneous sex offender classification does not rise to Eighth Amendment level of claim) *cert. denied,* 131 S. Ct. 942, 178 L. Ed. 2d 780 (U.S. 2011); *Clark v. Maryland Dept. of Public Safety and Correctional Services,* 316 F. Appx. 279, 281 (4th Cir. 2009) (unpublished opinion) ("as prisoners do not have a constitutionally protected right to work while incarcerated, termination from a prison job does not constitute an Eighth Amendment violation").

As the loss of his prison job does not violate any federal constitutional right, Plaintiff cannot state an Eighth Amendment claim for its loss. The undersigned recommends that this claim be dismissed.

**3) Fourteenth Amendment Due Process Claim**

The Fourteenth Amendment Due Process Clause states that no state may "deprive any person of life, liberty, or property without due process of law." The procedural component of the Due Process Clause ensures a fair adjudicatory process before a person is deprived of life, liberty, or property. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950). To prevail on this claim, Plaintiff bears the burden of pleading and proving: (1) a liberty or property interest protected by the Constitution; (2) a deprivation of that interest by the government; and (3) the lack of process. *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993).

A district court must focus on the nature of the deprivation imposed when determining whether an inmate is entitled to procedural due process protections. An inmate's constitutional due process rights are implicated only when he faces a situation that imposes "atypical and significant hardship on the inmate in relation to his ordinary incidents of prison life." *Sandin v.*

*Conner*, 515 U.S. 472, 483-84 (1995). The Due Process Clause does not protect every change in the conditions of confinement, not even ones having a "substantial adverse impact" on the prisoners. *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

A prisoner has no federal constitutional liberty or property interest in prison employment. *Lyon v. Farmer*, 727 F.2d 766, 769 (8th Cir. 1984) (prisoners have no constitutional entitlement to tenure in prison jobs); see also *Bauman v. Arizona Dep't of Corrections*, 754 F.2d 841, 846 (9th Cir. 1985) (denial of work and home furlough does not implicate constitutional interests because no state created liberty interest).

Plaintiff's claim of being denied access to an area of the prison and denial of the furniture factory job does not "impose atypical and significant hardship" on him "in relation to the ordinary incidents of prison life" and, therefore, does not implicate a state created liberty interest. *See Sandin,* 515 U.S. at 483-84. Because Plaintiff has no liberty interest in his prison job, he has failed to state a Fourteenth Amendment due process claim for which relief may be granted. The undersigned recommends that this claim also be dismissed.

**4) Fourteenth Amendment Equal Protection Claim**

The Fourteenth Amendment's Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). To bring a successful equal protection claim, a plaintiff must show differential treatment from a similarly situated class. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). For this differential treatment to give rise to a claim under 42 U.S.C. § 1983, "one must show intentional or purposeful discrimination." *Draper v. Rhay*, 315 F.2d 193, 198 (9th Cir. 1963) (inmate failed to show § 1983 violation in absence of "intentional or purposeful discrimination"), *cert. denied*, 375 U.S. 915; *City of Cuyahoga Falls v. Buckeye Community*

*Hope Foundation*, 538 U.S. 188, 194 (2003) ("We have made clear that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.") (brackets and internal quotation marks omitted).

The United States Supreme Court has observed that "showing that different persons are treated differently is not enough without more, to show a denial of Equal Protection." *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 230 (1964). Plaintiff alleges that he was treated differently than other prisoners at SCCC who had different sentence structures or release dates. However, sex offenders are not a suspect class. *See United States v. Juvenile Male*, 670 F.3d 999, 1009 (9th Cir. 2012) (Ninth Circuit has previously "rejected the argument that sex offenders are a suspect or protected class.") (citing *United States v. LeMay,* 260 F.3d 1018, 1030-31 (9th Cir. 2001)). Nor has Plaintiff alleged that Defendants' actions were intentionally or purposefully based on discriminatory motives. *See Flores v. Morgan Hill Unified School Dist.,* 324 F.3d 1130, 1134 (9th Cir. 2003). For Plaintiff to prevail, this "discriminatory purpose" must be clearly shown since a purpose cannot be presumed. *See Snowden v. Hughes*, 321 U.S. 1, 8 (1944) (there must be a showing of "intentional or purposeful discrimination... [A] discriminatory purpose is not presumed").

Because treating different people differently is not enough to establish a constitutional violation under the Equal Protection Clause and because he has failed to allege any specific discriminatory motive, the undersigned recommends that Plaintiff's equal protection claim should be dismissed.

**5) State Statutory Right to Employment**

Plaintiff argues that his Section 1983 claim may be based on allegations that his state law rights were violated, e.g., what he believes is a *state* statutory right to prison employment. *See*

ECF No. 24, at 10-13. However, Plaintiff does not allege that he has been denied all prison employment. And, according to Defendants, Plaintiff has been employed in various other prison jobs since being moved to SCCC. ECF No. 25, p. 3 n. 1. As pointed out by Defendants, Plaintiff fails to provide any support for the contention most applicable to this case – that is, that the state has created a right to prison employment *of his choosing*. As noted above, there is certainly no federal constitutional right to receive and retain a particular prison job assignment.

Moreover, Section 1983 does not provide a cause of action for violations of state law. *See Galen v. County of Los Angeles*, 477 F.3d 652, 662 (9th Cir. 2007); *Ove v. Gwinn*, 264 F.3d 817, 824 (9th Cir. 2001); *Sweaney v. Ada County, Idaho*, 119 F.3d 1385, 1391 (9th Cir. 1997); *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996); *Ybarra v. Bastian*, 647 F.2d 891, 892 (9th Cir. 1981). And, Washington courts agree that a prison job, and other privileges like going to the hobby shop, are not protected and their loss "does not rise to the level of atypical and significant hardship." *In re Petition of Nelson*, 123 Wash. App. 1059 (2004) (*citing Sandin*, 515 U.S. at 485-86; *In re Dowell*, 100 Wn.2d 770, 773, 674 P.2d 666 (1984)).

Based on the foregoing, the undersigned finds that Plaintiff's First, Eighth and Fourteenth Amendment claims fail to state a claim for which relief may be granted and therefore, all of his claims under § 1983 should be dismissed.

**B. 42 U.S.C. § 1985(3) – Conspiracy Claim**

In order to properly state "a cause of action under § 1985(3), a complaint must allege (1) a conspiracy, (2) to deprive any person or a class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage or a deprivation of any right or privilege of a citizen of the United States." *Gillespie v. Civiletti,* 629 F.2d 637, 641 (9th

Cir. 1980) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)); *see also Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992) "The language requiring intent to deprive of equal protection . . . means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. at 102; *see also RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1056 (9th Cir. 2002); *Butler v. Elle*, 281 F.3d 1014, 1028 (9th Cir. 2002) (per curiam); *Sever*, 978 F.2d at 1536.

Within the Ninth Circuit, § 1985(3) extends "beyond race only when the class in question can show that there has been a governmental determination that its members require and warrant special federal assistance in protecting their civil rights." *Sever*, 978 F.2d at 1536 (citation and internal quotations omitted). Such an extension beyond race "require[s] 'either that the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection.'" *Id.* (quoting *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (per curiam)); *see also Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005); *Maynard v. City of San Jose*, 37 F.3d 1396, 1403 (9th Cir. 1994); *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1990); *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 720 (9th Cir. 1981).

Plaintiff has not alleged that he was denied access to the furniture factory because of his race. Instead, he alleges that he was denied access to that area because of his sentence structure, which was imposed because of his status as a sex offender. Plaintiff argues that sex offenders are a protected class because they are "politically unpopular." ECF No. 24, at 20. However, as noted above, sex offenders are not a protected class. *Juvenile Male*, 670 F.3d at 1009 (citing *LeMay,* 260 F.3d at 1030-31).

Additionally, a § 1985 claim "must allege facts to support the allegation that defendants conspired together. A mere allegation of conspiracy without factual specificity is insufficient." *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988); *see also Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1039 (9th Cir. 1990). Plaintiff's complaint does not contain any factual specific allegations of the conspiracy.

The undersigned recommends that Plaintiff's civil rights conspiracy claim under § 1985 be dismissed.

**C. 42 U.S.C. § 1986 Claims**

"Section 1986 authorizes a remedy against state actors who have negligently failed to prevent a conspiracy that would be actionable under § 1985." *Cerrato v. S.F. Cmty. Coll. Dist.*, 26 F.3d 968, 971 n.7 (9th Cir. 1994). "A claim can be stated under [§] 1986 only if the complaint contains a valid claim under [§] 1985." *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988); *see also Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1040 (9th Cir. 1991); *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1990).

Plaintiff has failed to state a claim under § 1985. Therefore, his claim under § 1986 also fails and should be dismissed.

**D. Supremacy Clause Claim**

Through the Supremacy Clause, "Congress has the power to preempt state law." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). This preemption can be achieved (1) expressly, (2) through field preemption, or (3) through conflict preemption. *Id.*, at 2500-2501. Conflict preemption "includes cases where 'compliance with both federal and state regulations is a physical impossibility,' and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Arizona*,

132 S. Ct. at 2501 (*citing Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143, (1963); *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 373, 120 S. Ct. 2288 (2000).

In his complaint, Plaintiff argues that state statutes are "removing the ability to collect lawfully awarded judgments against [state officials] for their unlawful actions," allegedly in conflict with 42 U.S.C. §§ 1983, 1985, 1986. ECF No. 5, ¶ 5. In his response, Plaintiff argues that RCW 4.92.075, by guaranteeing satisfaction of judgments from the state rather than the individual state official, interferes with Congress' intent in passing § 1983. ECF No. 24, at 18-19.

The Supreme Court has repeatedly opined that "the central objective of the Reconstruction-Era civil rights statutes ... is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Felder v. Casey*, 487 U.S. 131, 139, 108 S. Ct. 2302, 2307 (1988) (*quoting Burnett v. Grattan,* 468 U.S. 42, 55, 104 S. Ct. 2924, 2932 (1984)). Plaintiff has presented nothing to indicate how the state law conflicts with the core right to "recover damages or secure injunctive relief" against officials because he cannot do so. There is no conflict between the cited statutes and federal law.

In addition, Plaintiff personally lacks standing to bring this type of claim forward. The "irreducible constitutional minimum of standing contains three elements," which are injury, causation and the possibility of redress by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, (1992). To support standing, Plaintiff must establish an "'injury in fact'-an invasion of a legally protected interest which is (a) concrete and

particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.*, at 560-561 (internal citations and quotation marks omitted).

In his complaint, Plaintiff states that the statutes of which he complains interferes with the collection of lawfully obtained judgments, but he does not allege that he has been awarded or been hindered in collecting any such judgment and therefore, has not alleged any injury. ECF No. 5, ¶¶ 5, 71. In his response, Plaintiff states the statutory scheme has caused him to suffer a violation of his due process and equal protection rights. ECF No. 24, at 21. However, as noted above, Plaintiff has failed to state due process and equal protection claims and therefore has not shown the "injury" he claims. Also, even if he suffered this injury, he fails to allege any facts supporting a causal link between the statutes he complains of and these alleged injuries.

The undersigned recommends that Plaintiff's preemption claim should be dismissed.

**E. Supplemental Jurisdiction – State Law Claims**

Defendants argue that this Court should decline to exercise supplemental jurisdiction on the Plaintiff's state claims because dismissal of the foregoing federal claims extinguishes the basis for federal jurisdiction and the nature of this case is not of federal policy significance.

Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726 (1966); *see also McKinney v. Carey*, 311 F.3d 1198, 1200 (9th Cir. 2002). The undersigned agrees and recommends that this Court should dismiss the state claims and decline to exercise supplemental jurisdiction upon dismissal of the federal claims.

**F. Plaintiff's Actions Merit a "Strike"**

Defendants argue that dismiss of Plaintiff's claims merit a "strike" under 28 U.S.C. § 1915(g) because he filed this action without stating a federal claim upon which relief can be granted and asserted a completely frivolous and illogical supremacy clause claim. In addition, Plaintiff attempts to support his frivolous Supremacy Clause argument by analogizing state officials with Nazi war criminals. *See* ECF No. 24, at 18. As noted by Defendants, if an actual basis existed for his claim, such offensive comments would be unnecessary.

The "strike" provision of the PLRA, 28 U.S.C. § 1915(g), provides courts with the means "to deter frivolous prisoner litigation." *Taylor v. Delatoore*, 281 F.3d 844, 849 (9th Cir. 2002). Congress outlined three situations in which an inmate may receive a "strike." *Smith v. Duke*, 296 F. Supp. 2d 965, 967 (E.D. Ark. 2003). Courts have read related situations into § 1915(g) when a claim is baseless, without merit, or an abuse of the judicial process. While these situations are not literally within § 1915(g), they are clearly associated with actions that are frivolous, malicious, or fail to state a claim upon which relief may be granted. *Id.* Moreover, a court can impose a strike even where a case is dismissed without prejudice, including where an inmate has failed to exhaust his administrative remedies. *See O'Neal v. Price*, 531 F.3d 1146, 1155-56 (9th Cir. 2008) (citing *Day v. Maynard*, 200 F.3d 665, 667 (10th Cir. 1999) ("[A] dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is frivolous, malicious, or fails to state a claim.").

Plaintiff has failed to state any federal claim upon which relief can be granted and, as noted below, his complaint is fundamentally flawed such that amendment will not cure the deficiencies. Considered as a whole, Plaintiff's actions may be considered frivolous and an

abuse of the judicial process. Imposing a § 1915(g) "strike" under these circumstances is merited and appropriate.

**G. Leave to Amend**

Plaintiff requests that the Court issue a statement of deficiencies and allow him to amend his complaint. ECF No. 24, at 4. However, "district courts are only required to grant leave to amend if a complaint can possibly be saved. Courts are not required to grant leave to amend if a complaint lacks merit entirely." *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000). *See also, Smith v. Pacific Properties and Development Corp.*, 358 F.3d 1097, 1106 (9th Cir. 2004), *citing Doe v. United States,* 58 F.3d 494, 497 (9th Cir. 1995) ("a district court should grant leave to amend... unless it determines that the pleading could not be cured by the allegation of other facts.").

It is clear that Plaintiff has not been deprived of any rights, privileges, or immunities secured by the Constitution or laws of the United States. His entire case is based on his desire for a particular prison job and the denial of that specific job, which was the result of his sentence structure. This cannot survive as the basis for a federal constitutional claim. Moreover, there is no basis for a federal preemption claim and even if there were, Plaintiff has no standing to bring such a claim. No amount of amendments can cure these fundamental deficiencies. Therefore, the undersigned recommends that the complaint be dismissed without leave to amend and that the Court decline to exercise jurisdiction over any remaining state court claims. The dismissal should be counted as a strike under Section 1915(g).

**CONCLUSION**

For the reasons stated above, the undersigned concludes that Plaintiff's complaint should be dismissed without prejudice without leave to amend pursuant to Rule 12(b)(6) for failure to

state a claim upon which relief may be granted and the dismissal counted as a strike under Section 1915(g).

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **November 2, 2012**, as noted in the caption.

**DATED** this 9th day of October, 2012.

Karen L. Strombom
United States Magistrate Judge