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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>MAYFIELD ALLEN KIPER,</p> <p style="text-align: center;">Plaintiff - Appellant,</p> <p style="text-align: center;">v.</p> <p>NEVADA STATE PRISON OFFICIALS; et al.,</p> <p style="text-align: center;">Defendants - Appellees.</p>

No. 07-17210

D.C. No. CV-06-00522-
LRH/RAM

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted August 20, 2009**

Before: WALLACE, HAWKINS, and THOMAS, Circuit Judges.

Mayfield Allen Kiper, a Nevada state prisoner, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging that

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

prison officials violated his civil rights. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo a dismissal under 28 U.S.C. § 1915(e). *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order). We affirm in part and vacate in part, and remand.

The district court properly dismissed Kiper's claim that defendant Adamson deprived him of property without due process because Kiper had an adequate post deprivation remedy under Nevada law. *See Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam) (“[A] negligent or intentional deprivation of a prisoner's property fails to state a claim under section 1983 if the state has an adequate post deprivation remedy.”); *see also* Nev. Rev. Stat. 41.0322.

The district court properly dismissed Kiper's claim against defendant Skolnik because the amended complaint did not allege facts to show that the Skolnik deprived Kiper of a constitutional or federal right. *See Lopez v. Dep't of Health Servs.*, 939 F.2d 881, 883 (9th Cir. 1991) (setting forth elements of a section 1983 claim).

Contrary to Kiper's contentions, the district court correctly dismissed without prejudice his claims alleging that various defendants conspired to deny him parole because judgment in his favor would “necessarily imply the invalidity

of his . . . sentence.” *Heck v. Humphrey*, 512 U.S. 477, 487 (1994); *Butterfield v. Bail*, 120 F.3d 1023, 1024-25 (9th Cir. 1997).

However, the district court improperly dismissed Kiper’s Eighth Amendment claim against defendant Weiss. The district court found that the amended complaint alleged that Kiper was housed with a smoker for only one day and was not exposed to secondhand smoke. Exhibit C, attached to Kiper’s amended complaint, states that Kiper had been living with the smoker for two months and enduring the smoke. Construed liberally, Kiper’s complaint and attachments thereto state a colorable Eighth Amendment claim for the purposes of satisfying section 1915 screening. *See Helling v. McKinney*, 509 U.S. 25, 35 (1993) (holding that a prisoner who alleges that prison officials have, with deliberate indifference, exposed him to levels of tobacco smoke that pose an unreasonable risk of serious damage to future health states an Eighth Amendment claim); *see also* Fed. R. Civ. P. 10(c) (stating that an exhibit to a pleading is a part of the pleading for all purposes).

Accordingly, we vacate the district court’s dismissal of Kiper’s Eighth Amendment claim and remand for further proceedings.

Kiper shall bear his own costs on appeal.

AFFIRMED in part; VACATED in part; REMANDED.