NOT FOR PUBLICATION

FILED

FEB 25 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARNEST S. HARRIS, Plaintiff-Appellant, v. E. McCUMSEY, Ms.; Senior Librarian, The Law Library, Pelican Bay State Prison, Defendant-Appellee.	No. 18-15422 D.C. No. 3:16-cv-01487-JST MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Submitted February 19, 2019**

Before: FERNANDEZ, SILVERMAN, and WATFORD, Circuit Judges.

California state prisoner Earnest S. Harris appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging an access-to-courts claim. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Brodheim v. Cry*, 584 F.3d 1262, 1267 (9th Cir. 2009). We affirm.

---

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

a.2. Appendix A.

The district court properly granted summary judgment because Harris failed to raise a genuine dispute of material fact as to whether he suffered an actual injury as a result of defendant's conduct. *See Lewis v. Casey*, 518 U.S. 343, 353-54 (1996) (setting forth elements of access-to-courts claim and actual injury requirement).

We do not consider arguments raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

e.g. Appendix A.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EARNEST S. HARRIS,

Plaintiff,

v.

E. MCCUMSEY,

Defendant.

Case No. 16-cv-01487-JST

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Re: ECF No. 21

Plaintiff, an inmate at California State Prison – Corcoran, filed this pro se civil rights action under 42 U.S.C. § 1983 alleging that while he was incarcerated at Pelican Bay State Prison ("PBSP"), PBSP senior law librarian E. McCumsey denied him access to the courts in violation of the First Amendment. Now pending before the Court is Defendant McCumsey's motion for summary judgment.[1] ECF Nos. 21–26. Plaintiff has filed an opposition, ECF Nos. 29–30, and Defendant McCumsey has filed a reply, ECF No. 34.[2] For the reasons set forth below,

[1] Defendant McCumsey has filed a request for judicial notice in support of her summary judgment motion (ECF No. 26) which the Court GRANTS. Federal courts may "'take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue.'" U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (citing St. Louis Baptist Temple, Inc. v. FDIC, 605 F.2d 1169, 1172 (10th Cir. 1979)). Accordingly, the Court takes judicial notice of dockets in Harris v. Brown, Ninth Cir. C No. 08-15718; Harris v. Horel, Ninth Cir. C No. 08-15965; Harris v. Horel, N.D. Cal. C No. 06-cv-06231; Harris v. Lockyer, E.D. Cal. C No. 04-cv-01906; Harris v. Lewis, N.D. Cal. C No. 12-cv-06536; Harris v. Lewis, N.D. Cal. C No. 13-cv-01788. The Court also takes judicial notice of the existence of the following pleadings filed in these cases: the July 16, 2009 order issued in Harris v. Brown, Ninth Cir. C No. 08-15718; the August 31, 2009 order issued in Harris v. Horel, Ninth Cir. C No. 08-15965; the March 13, 2008 order issued in Harris v. Horel, N.D. Cal. C No. 06-cv-06231; the December 3, 2013 order issued in Harris v. Lockyer, E.D. Cal. C No. 04-cv-01906; the June 4, 2014 order issued in Harris v. Lewis, N.D. Cal. C No. 12-cv-06536; and the August 14, 2014 order issued in Harris v. Lewis, N.D. Cal. C No. 13-cv-01788.

[2] Plaintiff also filed a sur-reply on August 14, 2017. ECF No. 35. The Court struck this sur-reply because it was filed without prior court approval as required by Civil L.R. 7-3(d). ECF No. 38.

e.g. Appendix B

Defendant's motion for summary judgment is GRANTED.

I. BACKGROUND[3]

A. PBSP Law Library Operations and Procedures

During the relevant time period, Defendant McCumsey was the PBSP senior law librarian and the PBSP libraries operated as follows. ECF No. 23 ("McCumsey Decl.") ¶ 2.

PBSP has four libraries: a central library that provides support to all the satellite library; two satellite libraries used by the Yards A and B general population inmates; and a satellite library used by the Security Housing Unit ("SHU") inmates in Yards C and D. McCumsey Decl. ¶ 4. In 2007, the PBSP library staff consisted of five library technical assistants and one senior librarian. McCumsey Decl. ¶ 3. By 2016, the library staff had decreased to three technical assistants and one senior librarian. McCumsey Decl. ¶ 3. The senior librarian generally handles what is referred to as "back-room work," and the library technical assistants fulfill photocopying requests. McCumsey Decl. ¶ 9. If any library technical assistant was out sick or on vacation, the senior librarian would sometimes fill in for the library technical assistant. McCumsey Decl. ¶ 3. To access the libraries, inmates are required to submit requests for access. McCumsey Decl. ¶ 6. Based upon these requests, the library technical assistants schedule inmates to use the library. McCumsey Decl. ¶ 6.

For the purpose of prioritizing inmate access to the library, the PBSP library staff categorizes an inmate as either a Priority Legal User ("PLU") or a General Legal User ("GLU"). McCumsey Decl. ¶ 13. An inmate may apply for PLU status if he can show that he has an upcoming legal deadline. McCumsey Decl. ¶ 13. Library staff verify legal deadlines for PLU users, but generally does not verify deadlines for GLUs unless the GLU indicates the deadline on the library request form. McCumsey Decl. ¶ 13. PLU inmates have higher priority for library services, including photocopies. McCumsey Decl. ¶ 13.

Library policy is to turn around all library requests within sixteen days. McCumsey Decl. ¶ 15. It was extremely rare for an approved request for copies to take longer than sixteen days to

[3] The following facts are undisputed unless otherwise noted.

e.g. Appendix B

complete. McCumsey Decl. ¶ 15. During Defendant McCumsey's tenure as senior librarian, library staff strived to process photocopy requests the day they were received. McCumsey Decl. ¶ 15. However, a same-day turnaround was not always possible for several reasons. McCumsey Decl. ¶ 15. The most common reason was the volume of requests received at a certain time. McCumsey Decl. ¶ 15. Other reasons were staff being out sick or on vacation, and staff shortages due to economic conditions or reduced resources. McCumsey Decl. ¶ 15.

PBSP library maintains a log of photocopies requested. The log lists the name of the inmate making the request; the date the request was made; the date the library received the request; the date the documents were copied; and any relevant comments. McCumsey Decl. ¶ 10. PBSP library also maintains a log of PLUs and their library requests.

B. Plaintiff's Litigation Efforts

In the amended complaint, Plaintiff claims that, on several occasions, he delivered legal documents to Defendant McCumsey for photocopying and informed her of filing deadlines related to these deadlines, and that Defendant McCumsey intentionally lost or delayed returning these documents, causing him to lose or forego litigation that he was pursuing. ECF No. 10 at 3-5. In his discovery responses, Plaintiff identifies the impacted litigation as the following cases: Harris v. Brown, Ninth Cir. C No. 08-15718 ("Brown"); Harris v. Horel, Ninth Cir. C No. 08-15965 ("Horel I"); Harris v. Horel, N.D. Cal. C No. 06-cv-06231 ("Horel II"); Harris v. Lockyer, E.D. Cal. C No. 04-cv-1906 ("Lockyer"); Harris v. Harold, USAP No. 08-15965; and either Harris v. Lewis, N.D. Cal. C No. 12-cv-06536 ("Lewis I") or Harris v. Lewis, N.D. Cal. C No. 13-cv-01788 ("Lewis II"). The Court provides a brief summary of these cases below:

In Brown, Plaintiff appealed the district court's denial of his habeas petition challenging his conviction and sentence for rape, assault like to produce great bodily injury upon a police officer, and battery on a police officer. ECF No. 26-1 at 2–7. On July 13, 2009, the Ninth Circuit heard oral argument, and on July 16, 2009, the Ninth Circuit affirmed the district court's denial. Id. Plaintiff was represented during these proceedings. Id.

In Horel I, Plaintiff requested a certificate of appealability ("COA") which the Ninth Circuit denied. ECF No. 26-1 at 10. Plaintiff then sought leave to file a successive petition,

e.g. Appendix B

which the Ninth Circuit construed as a motion for reconsideration for the Ninth Circuit's denial of the COA. ECF No. 26-1 at 10-12. On August 31, 2010, the Ninth Circuit denied the motion for reconsideration because Plaintiff had failed to demonstrate that a successive petition was allowable under 28 U.S.C. § 2244(b)(2). Id.

In Horel II, Plaintiff filed a federal habeas corpus petition on September 21, 2006, challenging his March 18, 2004 state court sentence for his conviction on four criminal counts, including two counts of attempted battery. ECF No. 26-1 at 14–23. On March 13, 2008, the district court denied his petition as untimely under AEDPA because AEDPA's one-year limitations period expired on May 17, 2005, a year and four months prior to Plaintiff filing Horel II, and there was no basis for tolling, extending, or delaying the commencement of the limitations period. Id. Judgment was entered on March 14, 2008, and Plaintiff appealed and sought a COA on March 21, 2008. ECF No. 26-1 at 16. The district court denied the COA on April 1, 2008. Id. On December 16, 2008, the Ninth Circuit also denied the COA. Id.

In Lockyer, Plaintiff filed a federal habeas petition challenging a 2003 felony resentencing. Harris v. Lockyer, No. CIVS-041906 FCDKJMP, 2007 WL 2557402, at *1 (E.D. Cal. Sept. 4, 2007), report and recommendation adopted, No. CIVS04-1906 FCDKJMP, 2007 WL 2782861 (E.D. Cal. Sept. 24, 2007). On September 24, 2007, the district court adopted the findings and recommendation of the magistrate judge and denied the petition on the merits. Id. On July 16, 2009, the Ninth Circuit affirmed the denial of this petition. Harris v. Brown, 338 F. App'x 660 (9th Cir. 2009); ECF No. 26-1 at 29. On May 21, 2010, the district court directed that Plaintiff's habeas petition filed in C No. 07–0939 (E.D. Cal.) be filed in Lockyer as a motion to amend. Harris v. Lockyer, No. 2:04-CV-1906 GEB CKD, 2012 WL 3528980, at *1 (E.D. Cal. Aug. 15, 2012), report and recommendation adopted, No. CIV S-04-1906 GEB, 2012 WL 4490891 (E.D. Cal. Sept. 28, 2012). On June 23, 2010, the court recommended that the motion to amend be denied and that the case be closed. ECF No. 26-1 at 30. On September 2, 2010, the recommendation was adopted and the motion to amend was denied. Id. A COA was not issued. Id. Plaintiff appealed the September 2, 2010 judgment to the Ninth Circuit. Id. On March 21, 2012, the Ninth Circuit denied Plaintiff's request for a COA on that appeal. Id. On April 19,

e.g. Appendix B

2012, Plaintiff filed another motion to amend in the district court. ECF No. 26-1 at 31. On September 28, 2012, the district court adopted the findings and recommendations and denied the motion to amend. Id. On November 2, 2012, Plaintiff filed a motion requesting a COA. Id. On October 28, 2013, Plaintiff filed a motion seeking to amend the petition, relief from judgment, and for a COA. Id. On November 6, 2013, the motion was denied as duplicative. Id. On November 22, 2013, Plaintiff again sought a COA. Id. On December 3, 2013, the Lockyer court issued an order stating that this case was closed, that future pleadings filed by Plaintiff in Lockyer would be disregarded, and that no orders would issue in response to future filings. Id.

In Lewis I, Plaintiff filed a federal habeas petition challenging the calculation of time credits and the validity of a 2004 sentence. ECF No. 26-1 at 35–41. The district court dismissed three claims for failure to state cognizable grounds for federal habeas relief, and one claim for being procedurally defaulted from federal habeas review. Id. On June 4, 2014, the Court denied the sole remaining claim, an ex post facto claim, on the merits; declined to issue a COA; and entered judgment against Plaintiff. Id. On July 18, 2014, Plaintiff sought a COA, and on August 29, 2014, Plaintiff appealed the denial of the habeas petition. ECF No. 26-1 at 38. On September 12, 2014, the Ninth Circuit denied the COA. Id.

In Lewis II, Plaintiff filed a federal habeas petition challenging the validity of his 2002 conviction and sentence. ECF No. 26-1 at 43–49. The district court denied his petition as both being procedurally barred from federal habeas review and untimely by more than ten years; and declined to issue a COA. Id. at 46–49. On September 23, 2014, Plaintiff appealed. On October 8, 2014, Plaintiff sought a COA. ECF No. 26-1 at 45. On November 20, 2014, the Ninth Circuit denied the COA. Id.

C. Plaintiff's Grievance History

From April 2004 to April 2015, Plaintiff submitted seventy-three inmate grievances. Only two of these grievances are related to the library delays or denial-of-access-to-court claims raised in this action: PBSP-12-02906 and PBSP-13-01578.

In grievance number PBSP-12-02906, submitted on September 10, 2012, Plaintiff alleged that he submitted a photocopy request on August 26, 2012 and specified that these copies were

e.g. Appendix B

needed for a September 1, 2012 legal deadline. ECF No. 24-2. As of the date Plaintiff filed this grievance (September 10, 2012), he had not received the requested copies. In this grievance, Plaintiff sought the firing of "whoever is in charge of photocopying," and compensation for missing his legal deadline. ECF No. 24-2 at 2. The third-level reviewer agreed that two weeks to process Plaintiff's photocopy request was an unacceptable length of time. The third-level reviewer attributed the delayed delivery of Plaintiff's copies to statewide staffing issues and a state holiday. Id. at 17. The final level review of the grievance, issued on August 18, 2013, found that termination or reprimand of library staff was not required. ECF No. 24-2 at 17. The litigation at issue in grievance number PBSP-12-02906 appears to be Lockyer because it is the only case with September 2012 deadlines or filing dates. In Lockyer, the magistrate judge issued findings and recommendations on August 15, 2012, and Plaintiff filed a notice and two objections to these findings and recommendations on September 4, 2012 and September 19, 2012. ECF No. 26-1 at 31. None of the other cases identified by Plaintiff have any September 2012 deadlines or filings.[4]

In grievance number PBSP-13-01578, submitted on June 4, 2013, Plaintiff alleged that he had submitted legal documents for copying and had neither had his original documents returned to him, and nor had he received the requested copies. ECF No. 24-3. He also alleged that his legal photocopy requests were not being processed timely. ECF No. 24-3 at 20–21. Plaintiff requested that a new photocopy request form be created that would allow him to get a receipt from the floor correctional officer the day he submits the photocopying request; requested that the person in charge of the SHU library be fired; and requested that his lost legal paperwork be found, copied, and returned. Id. The final level review of the grievance, issued on October 28, 2013, found that Plaintiff received his missing legal documents and photocopies on June 6, 2013, and that the law library was in compliance with policy and procedures for legal photocopying. ECF No. 24-3 at

[4] The final court orders in Brown, Horel I, and Horel II were all issued by August 31, 2010, nearly two years prior to the referenced September 2012 deadline. In Brown, the final court action was the Ninth Circuit's September 4, 2009 issuance of its mandate. ECF No. 26-1 at 3. In Horel I, the final court action was the Ninth Circuit's August 31, 2010 denial of Plaintiff's motion for reconsideration of the denial of a COA. ECF No. 26-1 at 10. In Horel II, the final court action was the Ninth Circuit's December 16, 2008 denial of Plaintiff's request for a COA. ECF No. 26-1 at 16. Lewis I and Lewis II were filed after September 2012. Lewis I was filed on December 28, 2012, ECF No. 26-1 at 35; and Lewis II was filed on April 19, 2013, ECF No. 26-1 at 43.

e.g. Appendix B

20–21. The remainder of Plaintiff's requests were denied. ECF No. 24-3 at 20–21. It is unclear from the grievance whether it relates to any of the identified litigation.

II. DISCUSSION

A. Standard of Review

Summary judgment is proper where the pleadings, discovery and affidavits show there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See id.

A court shall grant summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial [,] . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." See Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). The moving party bears the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Id. The burden then shifts to the nonmoving party to "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" See id. at 324 (citing Fed. R. Civ. P. 56(e) (amended 2010)).

For purposes of summary judgment, the court must view the evidence in the light most favorable to the nonmoving party; if the evidence produced by the moving party conflicts with evidence produced by the nonmoving party, the court must assume the truth of the evidence submitted by the nonmoving party. See Leslie v. Grupo ICA, 198 F.3d 1152, 1158 (9th Cir. 1999). The court's function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence with respect to a disputed material fact. See T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

e.g. Appendix B

B. Legal Standard

Prisoners have a constitutional right of access to the courts. See Lewis v. Casey, 518 U.S. 343, 350 (1996); Bounds v. Smith, 430 U.S. 817, 821 (1977). To establish a claim for any violation of the right of access to the courts, the prisoner must prove that there was an inadequacy in the prison's legal access program that caused him an actual injury. See Lewis, 518 U.S. at 350–55. To prove an actual injury, the prisoner must show that the inadequacy in the prison's program hindered his efforts to pursue a non-frivolous claim concerning his conviction or conditions of confinement. See id. at 354–55.

The Ninth Circuit has "traditionally differentiated between two types of access to courts claims: those involving prisoners' right[s] to affirmative *assistance* and those involving prisoners' rights to litigate without active *interference*." Silva v. Di Vittorio, 658 F.3d 1090, 1102 (9th Cir. 2011) (emphasis in original). Here, Plaintiff alleges that Defendant McCumsey has actively interfered with his right to litigate. A prisoner's constitutional right to litigate without interference does not require prison officials to provide affirmative assistance in the preparation of legal papers, but rather forbids states from erecting barriers that impede the right of access of incarcerated persons. Silva, 658 F.3d at 1102. The right of access to the courts without undue interference extends beyond the pleading stages. Id. Claims for interference with the right to litigation fall into one of two categories. The first category consists of "forward-looking claims," or "claims that systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time." Christopher v. Harbury, 536 U.S. 403, 413 (2002). The second category consists of "backward-looking claims," or claims that stem from either the loss of a meritorious suit that cannot now be tried because of the interference of government officials or from the inadequate settlement of a meritorious case. Id. at 413–14.

Once the prisoner establishes a denial of access to the courts, the court should then determine whether the hindrance of the prisoner's access to court was reasonably related to legitimate penological interests. See Lewis, 518 U.S. at 361 (citing Turner v. Safley, 482 U.S. 78, 89 (1987)). If the hindrance passes the Turner test, the denial of access to the courts claim will fail even if there was actual injury.

e.g. Appendix B

C. Analysis

Defendant McCumsey argues that she is entitled to summary judgment for the following reasons. First, she argues that the amended complaint fails to state a cognizable denial-of-court access claim because the amended complaint does not identify the cases underlying the suit and fails to include allegations demonstrating that the underlying claims were not frivolous. Second, she argues that Plaintiff's claims are barred by the statute of limitations. Third, she argues that there is no evidence that Plaintiff suffered actual injury because of the delay in fulfilling photocopy requests and returning documents. Finally, she argues that, in the alternative, she is entitled to qualified immunity.

Plaintiff argues that his claims are timely because the statute of limitations ran from the date his administrative remedies were exhausted via grievance numbers PBSP-C-12-02906 and PBSP-C-13-01578, and that he first raised these First Amendment claims in Harris v. Harman, et al., C No. 15-cv-01117 KAW (PR) ("Harman"), which was filed on March 10, 2015. ECF No. 30. Plaintiff further argues that Defendant McCumsey is not entitled to qualified immunity because qualified immunity primarily applies to state officials who perform judicial functions or other functions typically performed by executive officers, and because Defendant McCumsey's actions and inactions violated the regulations governing her position. ECF No. 29.

Having carefully reviewed the record and viewing the evidence in the light most favorable to Plaintiff, the Court finds that while Plaintiff has stated cognizable First Amendment claims, there is no evidence of injury. The Court therefore GRANTS summary judgment in favor of Defendant McCumsey.

1. Failure to State a Claim

Defendant McCumsey argues that because Plaintiff's amended complaint does not identify the cases underlying this suit and also does not include allegations demonstrating that the underlying claims were not frivolous, Plaintiff's amended complaint fails to state a claim upon which relief could be granted. Plaintiff does not directly address this argument, although he reiterates that Defendant McCumsey denied him access to the courts, specifically referring to litigation referenced in grievances PBSP-C-12-02906 and PBSP-C-13-01578. See generally ECF

e.g. Appendix B

No. 30.

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." Fed. R. Civ. P. 8(a)(2). "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) (internal quotation marks and citations omitted). A complaint must proffer "enough facts to state a claim for relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Plaintiff is proceeding *pro se*, and *pro se* complaints are held to a different standard at the pleading stage. In conducting the mandatory preliminary screening of cases filed by prisoners proceeding *in forma pauperis* and evaluating whether a *pro se* complaint has met the Rule 8 pleading standards, federal courts are required to liberally construe *pro se* pleadings. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Liberally construed, the amended complaint states a cognizable claim that Defendant McCumsey denied Plaintiff his First Amendment right to access the courts. Furthermore, the allegations set forth in the amended complaint were sufficient to allow Defendant McCumsey to identify the potentially relevant litigation through discovery. Finally, Plaintiff's failure to identify the specific litigation or claims underlying his First Amendment claims would not result in a judgment in favor of Defendant McCumsey. The Court would be required to dismiss Plaintiff's claims with leave to amend to allow Plaintiff to specify the cases or legal claims underlying his First Amendment claims. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (court should freely grant leave to amend unless the pleading cannot possibly be cured by the allegation of other facts). Keeping in mind the requirement to liberally construe *pro se* complaints and the stage of this litigation, the Court finds that Plaintiff's amended complaint sufficiently stated cognizable First Amendment claims.

2. Actual Injury

Defendant McCumsey argues that she is entitled to summary judgment because the library delays did not cause any of the adverse rulings in the identified litigations. In his opposition, Plaintiff alleges that in grievance numbers PBSP-12-02906 and PBSP-13-01578, he identified the adverse effects as follows. In grievance number PBSP-12-02906, Plaintiff alleges that he missed a

e.g. Appendix B

deadline to mail out transcripts that would have served "as evidence to show the reviewing court the minutes and order of the record." ECF No. 30 at 2. In grievance number PBSP-13-01578, Plaintiff alleges that he missed a deadline to file his petition because Defendant McCumsey lost the legal transcripts that Plaintiff sent to the library for photocopying. ECF No. 30 at 2. Plaintiff also alleges that he previously raised these First Amendment claims in Harman. ECF No. 30 at 2. The Court therefore examined the pleadings filed in Harman to determine what adverse rulings were suffered by Plaintiff. In Harman, Plaintiff alleged three instances in which the law library's failure to promptly fulfill photocopy requests and return legal documents resulted in him missing legal deadlines. See Harman, ECF No. 1 at 8. He identifies one case as Brown. He does not identify the other two cases, but alleges that in one case he missed a February 5, 2009 deadline to file a writ of certiorari with the United States Supreme Court and that in the other case, he missed a September 1, 2012 deadline to file necessary evidence with his traverse. Id.

The only litigation that can be identified with any certainty from grievances PBSP-12-02906 and PBSP-13-01578, and from Harman, are Brown and Lockyer. Harman specifically identifies Brown as a case in which Plaintiff suffered an adverse ruling. Lockyer appears to be the litigation referenced in PBSP-12-02906; and appears to be the case referenced in Harman that has a September 2012 deadline. The Court has reviewed the dockets for both Brown and Lockyer and there is no evidence that Plaintiff missed any filing deadlines in these cases.

In Brown, the Ninth Circuit entered judgment on July 16, 2009. ECF No. 26-1 at 3. If Plaintiff sought to have the United States Supreme Court review the Ninth Circuit's judgment, Plaintiff was required to file a petition for a writ of certiorari by October 14, 2009. U.S. Sup. Ct. R. 13 (petition for a writ of certiorari must be filed within ninety days after entry of judgment). The docket indicates that Plaintiff did not file a writ of certiorari with the United States Supreme Court, but there is nothing in the record that supports a reasonable inference that Defendant McCumsey prevented Plaintiff from filing the a writ of certiorari. The library log of services requested by inmates indicates that Plaintiff made two service requests between July 16, 2009 and October 14, 2009: a July 23, 2009 copy request which was completed on July 27, 2009; and a July 30, 2009 copy request which was completed on July 31, 2009. ECF No. 23-1 at 2. The Court

e.g. Appendix B

makes all reasonable inferences in Plaintiff's favor and presumes that one of these requests was related to Brown. However, if Plaintiff received his copies by July 31, 2009, a failure to meet a deadline six weeks later cannot reasonably be attributed to the law library or Defendant McCumsey.

In grievance number PBSP-12-02906 and in his opposition, Plaintiff specifies that he missed a September 1, 2012 filing deadline, presumably in Lockyer. The Court has reviewed the docket in Lockyer and there is no indication that he missed a September 1, 2012 filing deadline. The magistrate judge issued findings and recommendations on August 15, 2012, and Plaintiff timely filed objections to these findings and recommendations on September 4, 2012 and September 19, 2012. ECF No. 26-1 at 31.

The Court has also reviewed the dockets of the four other actions cited by Plaintiff. There is no indication that the adverse rulings against Plaintiff in these actions were the results of missing deadlines caused by library delays.

To prove an actual injury for a First Amendment access to the courts claim, Plaintiff must show that Defendant McCumsey's actions or inactions hindered his efforts to pursue a non-frivolous claim concerning his conviction or conditions of confinement. See Lewis, 518 at 354–55. Plaintiff has failed to make a showing sufficient to establish the existence of actual injury. Accordingly, the Court GRANTS Defendant McCumsey's summary judgment motion. See Celotex Corp., 477 U.S. at 322–23 (court must grant summary judgment against a party who fails to make a showing sufficient to establish existence of an element essential to that party's case).

3. Statute of Limitations

Because the Court GRANTS Defendant McCumsey's summary judgment motion on the grounds that Plaintiff has failed to establish the existence of actual injury, the Court declines to address Defendant McCumsey's statute of limitations argument.

4. Qualified Immunity

Plaintiff incorrectly states the standard for qualified immunity. Qualified immunity is not limited to state officials who perform judicial functions, or other functions typically peformed by executive officials. Nor is qualified immunity unavailable to government officials who fail to

e.g. Appendix B

abide by the regulations governing their position. Rather, qualified immunity is an entitlement, provided to all government officials in the exercise of their duties, not to stand trial or face the other burdens of litigation. Saucier v. Katz, 533 U.S. 194, 200 (2001), overruled on other grounds by Pearson v. Callahan, 555 U.S. 223, 236 (2009). The doctrine of qualified immunity attempts to balance two important and sometimes competing interests – "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231 (2009). The doctrine thus intends to take into account the real-world demands on officials in order to allow them to act "swiftly and firmly" in situations where the rules governing their actions are often "voluminous, ambiguous, and contradictory." Mueller v. Auker, 576 F.3d 979, 993 (9th Cir. 2009) (internal citations and quotation marks omitted). "The purpose of this doctrine is to recognize that holding officials liable for reasonable mistakes might unnecessarily paralyze their ability to make difficult decisions in challenging situations, thus disrupting the effective performance of their public duties." Id.

To determine whether an officer is entitled to qualified immunity, the Court must consider whether (1) the officer's conduct violated a constitutional right, and (2) that right was clearly established at the time of the incident. Pearson, 555 U.S. at 232. Courts are not required to address the two qualified immunity issues in any particular order, and instead may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Id. at 236.

With respect to the second prong of the qualified immunity analysis, the Supreme Court has recently held that "[a]n officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it, meaning that existing precedent . . . placed the statutory or constitutional question beyond debate." City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015) (omission in original) (internal quotation marks omitted). This is an "exacting standard" which "gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." Id. (internal quotation marks omitted). In conducting this analysis, the Court must determine whether the pre-

e.g. Appendix B

existing law provided defendants with "fair notice" that their conduct was unlawful. Sheehan, 135 S. Ct. at 1777.

Because Defendant McCumsey did not violate Plaintiff's First Amendment right to access the courts, Defendant McCumsey prevails as a matter of law on her qualified immunity defense.

CONCLUSION

For the foregoing reasons, Defendant McCumsey's motion for summary judgment is GRANTED. The Clerk shall enter judgment for Defendant McCumsey and close the file.

This order terminates Docket No. 21.

IT IS SO ORDERED.

Dated: February 22, 2018

JON S. TIGAR
United States District Judge

United States District Court
Northern District of California

e.g. Appendix B