

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RAUL HERNANDEZ,

Plaintiff,

v.

T. SMITH, et al.,

Defendants.

CASE NO. 1:09-cv-00828-OWW-GSA PC

ORDER STRIKING PLAINTIFF’S MOTION TO FILE AMENDED COMPLAINT AS MOOT AND REQUIRING PLAINTIFF TO EITHER FILE AMENDED COMPLAINT OR NOTIFY COURT OF WILLINGNESS TO PROCEED ONLY AGAINST DEFENDANT R. D. SMITH WITHIN THIRTY DAYS

(Doc. 9)

Plaintiff Raul Hernandez, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on May 11, 2009. Plaintiff, who is currently housed at Chuckawalla Valley State Prison, brings this action against dentists T. Smith, R. D. Smith, and L. Kirk whom he was treated by at Avenal State Prison, alleging deliberate indifference to his serious medical needs, in violation of the Eighth Amendment of the United States Constitution.

On December 2, 2009, Plaintiff’s Complaint was screened and an order issued for Plaintiff to choose and advise whether he wished to attempt to cure the identified deficiencies in his claims via filing an amended compliant, or if he wished to proceed on his claims against Defendant R. D. Smith as those were the only claims found cognizable therein. (Doc. 8.)

On March 12, 2010, Plaintiff filed a motion to amend his complaint. (Doc. 9.) Since the prior Order of this Court granted Plaintiff leave to file an amended complaint (if he choose to attempt to cure the defects in various of his claims rather than simply proceeding on the one

1 cognizable claim), Plaintiff's motion to amend his complaint is moot. Plaintiff's motion to
2 amend his complaint sets out a number of factual allegations such that Plaintiff might have
3 intended the document he titled "Motion to Amend Plaintiff Complaint" to function as a first
4 amended complaint. (Doc. 9.) If Plaintiff intended for his "Motion to Amend Plaintiff
5 Complaint" to function as a first amended complaint, so as to remove any ambiguity, he must re-
6 file it under the title "First Amended Complaint."

7 Accordingly, it is HEREBY ORDERED that:

- 8 1. Plaintiff's motion to amend Plaintiff complaint, filed December 31, 2009 is
9 DENIED as moot;
- 10 2. Within **thirty (30) days** from the date of service of this order, Plaintiff must
11 either:
 - 12 a. File a first amended complaint curing the deficiencies previously identified
13 by the Court; or
 - 14 b. Notify the Court in writing that he does not wish to file an amended
15 complaint and is willing to proceed only on his claim that was previously
16 identified as cognizable against Defendant R. D. Smith; and
- 17 3. If Plaintiff fails to comply with this order, this action will be dismissed for failure
18 to obey a court order.

19
20 IT IS SO ORDERED.

21 **Dated: March 29, 2010**

22 /s/ Gary S. Austin
23 UNITED STATES MAGISTRATE JUDGE
24
25
26
27
28