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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BEN TOSCANO,
Plaintiff,
v.
SCOTT KERNAN, et al.,
Defendants.

1:16-CV-01554-EPG (PC)
ORDER DENYING PLAINTIFF’S MOTION
FOR RECONSIDERATION
(ECF NO. 23)
ORDER DENYING PLAINTIFF’S MOTION
PRODUCING MORE FALSE EVIDENCE BY
THE ATTORNEY GENERAL
(ECF. NO. 24)
ORDER DENYING PLAINTIFF’S MOTION
FOR MEDIATION
CONFERENCE/SETTLEMENT
(ECF. NO. 25)

Ben Toscano (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983.

Plaintiff’s complaint asks for a Court ruling that he be permitted to stay in the special housing unit (SHU) at Corcoran indefinitely. On December 28, 2016, this Court dismissed Plaintiff’s complaint with leave to amend. (ECF No. 22) That order contained a detailed summary of Plaintiff’s allegations as well as the legal standards for Plaintiff’s constitutional

1 claims. The Court then explained why Plaintiff's very brief complaint failed to state a claim
2 under these legal standards. The Court gave Plaintiff 30 days to file an amended complaint.

3 Rather than amend his complaint, plaintiff filed a motion for reconsideration on January
4 17, 2017. (ECF No. 23) For the reasons described below, the Court does not believe it made a
5 legal error in its prior order and Plaintiff's initial complaint failed to state a claim. Plaintiff has
6 another thirty days to file an amended complaint.

7 **I. PLAINTIFF'S MOTION FOR RECONSIDERATION**

8 Plaintiff argues in his motion for reconsideration that Plaintiff does not belong in the
9 modified step down program, the Ashker settlement does not apply to him, Plaintiff was on
10 "administrative" SHU status rather than indeterminate or validation status, and the Attorney
11 General misled the Court by saying that Plaintiff was in the Step Down program. Plaintiff also
12 attaches numerous exhibits.

13 Federal Rule of Civil Procedure 60(b) governs grounds for relief from an order:

14 On motion and just terms, the court may relieve a party or its legal
15 representative from a final judgment, order, or proceeding for the
16 following reasons: (1) mistake, inadvertence, surprise, or excusable
17 neglect; (2) newly discovered evidence that, with reasonable
18 diligence, could not have been discovered in time to move for a
19 new trial under Rule 59(b); (3) fraud (whether previously called
20 intrinsic or extrinsic), misrepresentation, or misconduct by an
opposing party; (4) the judgment is void; (5) the judgment has been
satisfied, released, or discharged; it is based on an earlier judgment
that has been reversed or vacated; or applying it prospectively is no
longer equitable; or (6) any other reason that justifies relief.

21 Fed. R. Civ. P. 60.

22 Plaintiff has failed to show that he meets any of the above-mentioned reasons for granting
23 relief from the order dismissing his complaint. The Court based its decision dismissing Plaintiff's
24 complaint by evaluating Plaintiff's brief complaint against the legal standards and determining
25 the Plaintiff had not stated any claim. Plaintiff's motion for reconsideration does not provide a
26 reason to reconsider that decision. Indeed, Plaintiff's motion does not point to any specific
27 allegations that meet the elements of legal claims. Instead, Plaintiff argues that the prison
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1 violated its own policy regarding him. This alone does not state a constitutional claim. *See, e.g.,*
2 *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988) (providing that inmates lack a constitutional
3 entitlement to specific prison policies and procedures).

4 As the Court described in its earlier order, Plaintiff's complaint is difficult to understand.
5 It is very brief, uses many acronyms without explanation, and fails to identify any specific
6 defendants. It discusses a policy and then is unclear whether that policy applies to him or not. It
7 appears that Plaintiff is claiming that certain prison authorities violated his constitutional rights by
8 taking him out of the SHU and putting him in an elevated security population in a different
9 prison. The closest constitutional claim related to these allegations is based on the Eighth
10 Amendment, which guarantees the right to be free from cruel and unusual punishment. The Court
11 set forth the law regarding such a claim in its earlier order:

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13 To establish a violation of this duty, the prisoner must establish that prison
14 officials were "deliberately indifferent to a serious threat to the inmate's safety." *Farmer*, 511 U.S. at 834. The question under the Eighth Amendment is whether
15 prison officials, acting with deliberate indifference, exposed a prisoner to a
16 sufficiently "substantial risk of serious harm" to his future health. *Id.* at 843 (citing
17 *Helling v. McKinney*, 509 U.S. 25, 35 (1993)). The Supreme Court has explained
18 that "deliberate indifference entails something more than mere negligence . . . [but]
something less than acts or omissions for the very purpose of causing harm or with
the knowledge that harm will result." *Farmer*, 511 U.S. at 835. The Court defined
this "deliberate indifference" standard as equal to "recklessness," in which "a
person disregards a risk of harm of which he is aware." *Id.* at 836-37.

19 The deliberate indifference standard involves both an objective and a subjective
20 prong. First, the alleged deprivation must be, in objective terms, "sufficiently
21 serious." *Id.* at 834. Second, subjectively, the prison official must "know of and
22 disregard an excessive risk to inmate health or safety." *Id.* at 837; *Anderson v.*
County of Kern, 45 F.3d 1310, 1313 (9th Cir. 1995). To prove knowledge of the
23 risk, however, the prisoner may rely on circumstantial evidence; in fact, the very
24 obviousness of the risk may be sufficient to establish knowledge. *Farmer*, 511
25 U.S. at 842; *Wallis v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995).

26 Those are the elements the Court will evaluate for such a claim. In other words, in order
27 to state a claim for violating the Eighth Amendment based on a failure to protect, Plaintiff must
28 file an amended complaint that states facts showing that a specific person or persons was
deliberately indifferent to a serious threat to Plaintiff's safety, as described above. The Court
needs information regarding who made the decision to release him into his current housing, what

1 did that person or persons consider, what is Plaintiff's current security situation, why does
2 Plaintiff believe that he is under an excessive risk to his health and safety now. Plaintiff's
3 original complaint did not meet those elements for the reasons stated in the order, including that it
4 did not describe who made the decision, what they considered in doing so, how they deliberately
5 disregarded Plaintiff's safety, and how Plaintiff faced an excessive risk to his health and safety
6 now.

7 If Plaintiff files an amended complaint, it should contain "a short and plain statement of
8 the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). It should name
9 specific persons as defendants that Plaintiff believes have violated his constitutional rights. Long
10 v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006) ("To state a claim under section
11 1983, a plaintiff must allege that (1) the defendant acted under color of state law and (2) the
12 defendant deprived him of rights secured by the Constitution or federal law."); see also Marsh v.
13 Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing "under color of state law").

14 Moreover, Plaintiff must include all facts in the amended complaint. The Court will look
15 to that amended complaint and only that amended complaint to see if it states a claim. If Plaintiff
16 believes that exhibits are needed to state his claim, he should attach them to that amended
17 complaint.

18 Plaintiff should note that although he has been given the opportunity to amend, it is not for
19 the purposes of adding allegations of events occurring or claims arising after the original
20 Complaint. Plaintiff may not change the nature of this suit by adding new, unrelated claims in his
21 amended complaint.

22 If Plaintiff fails to comply with this order, this action may be dismissed for failure to
23 comply with a Court order.

24 **II. PLAINTIFF'S MOTION PRODUCING MORE FALSE EVIDENCE BY**
25 **THE ATTORNEY GENERAL AND DCD-(OSS) LT. M. LUJAN**

26 Plaintiff also filed a document entitled "Motion Producing More False Evidence by the
27 Attorney General and CDC-(OSS) Lt. M. Lujan." (ECF No. 24). In it, Plaintiff argues that the
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1 submission by the Attorney General had misstatements, including saying that a committee took
2 place on a Saturday, when such meetings only take place on Wednesday. Plaintiff claims that the
3 Attorney General fabricated this chrono in order to commit murder. Plaintiff asks for the Court to
4 immediately put him in non-disciplinary SHU segregation.

5 Plaintiff's motion will be denied. The Court appreciates the discrepancies Plaintiff points
6 out. It is worth noting that the Court's earlier ruling that Plaintiff's complaint failed to state a
7 viable claim was based the finding that Plaintiff's allegations in his complaint, if true, did not
8 meet the legal standards for a constitutional claim. In other words, setting aside everything said
9 by the Attorney General, Plaintiff's brief complaint does not demonstrate, if true, that a specific
10 person or persons violated his Constitutional rights.

11 That said, the Court did make note that the Attorney General submitted lengthy
12 documents demonstrating that the prison had evaluated Plaintiff's safety. For example, prison
13 officials refused to release Plaintiff to a GP yard at Corcoran for safety reasons and ultimately
14 transferred him to another prison and also put him in a restricted yard. Plaintiff does not state that
15 this information is false. The Court noted that these documents appear to show that prison
16 authorities carefully considered the issues regarding Plaintiff's safety. It is not the Court's job to
17 independently evaluate where Plaintiff should be housed. Instead, the Court looks to see whether
18 Plaintiff states a legal claim by alleging facts that prison authorities were "deliberately
19 indifferent" to "an excessive risk to his safety."

20 The Court will deny Plaintiff's request to release him based on the information in
21 Plaintiff's motion. If Plaintiff files an amended complaint, the Court will look at the factual
22 allegations in that complaint only to determine whether it states a legal claim under these, or other
23 applicable, standards.

24 **III. PLAINTIFF'S MOTION FOR MEDIATION CONFERENCE /**
25 **SETTLEMENT**

26 Finally, Plaintiff has filed a Motion for Mediation Conference/Settlement. (ECF No. 25).
27 Plaintiff offers to pursue settlement rather than ask for sanctions against the government. He also
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1 requests immediate transfer to Corcoran to conduct the settlement conference and further
2 proceedings.

3 The Court denies Plaintiff's request to order a settlement conference. Plaintiff does not
4 have an operative complaint in this case. The defendants have not yet been served. It is
5 premature to require a settlement conference.

6 **IV. CONCLUSION**

7 Accordingly, based on the foregoing, it is ORDERED that:

- 8 1. Plaintiff's Motion for Reconsideration (ECF No. 23) is DENIED;
- 9 2. Plaintiff's Motion Producing More False Evidence by the Attorney General and
10 CDC (ECF No. 24) is DENIED;
- 11 3. Plaintiff's Motion for Mediation Conference/Settlement (ECF No. 24) is DENIED;
- 12 4. Plaintiff has thirty (30) days from the date of service of this order to comply with
13 the screening order dated December 28, 2016 (ECF No. 23).

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16 IT IS SO ORDERED.

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18 Dated: February 14, 2017

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/s/ Eric P. Gray
UNITED STATES MAGISTRATE JUDGE