

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JESSE WASHINGTON,

Plaintiff,

No. CIV S-06-1994 WBS DAD P

vs.

J. BROWN, et al.,

Defendants.

ORDER AND ORDER DIRECTING SERVICE

BY THE UNITED STATES MARSHAL

WITHOUT PREPAYMENT OF COSTS

Plaintiff is proceeding in forma pauperis pursuant to 28 U.S.C. § 1915. The court previously determined that plaintiff’s amended complaint states cognizable claims for relief against defendant Mohamed under the First Amendment and the Religious Land Use and Institutionalized Persons Act. On March 25, 2009, the court ordered plaintiff to file the documents necessary to effect service on defendant Mohamed. However, plaintiff failed to timely submit the documents, so on May 20, 2009, the court issued findings and recommendations, recommending dismissal of this defendant. Plaintiff filed timely objections to the findings and recommendations, together with a motion to compel defendants to provide him with information on defendant Mohamed’s whereabouts. Defendants filed a statement of non-opposition to plaintiff’s motion to compel, explaining that defense counsel had recently wrote to

1 plaintiff informing him that defendant Mohamed was employed as the Chaplain at Mule Creek
2 State Prison. On June 26, 2009, plaintiff filed a motion for a court order effecting service of his
3 amended complaint on defendant Mohamed, together with the documents necessary to effect
4 service. In light of the recent developments in this case, the court will vacate its findings and
5 recommendations, deny plaintiff's motion to compel as moot, grant plaintiff's motion for a court
6 order effecting service of his amended complaint on defendant Mohamed, and direct the United
7 States Marshal to effect service in accordance with this order.

8 Plaintiff has also filed a supplemental motion to compel. At this time, the court
9 will not rule on plaintiff's supplemental motion. Rather, in accordance with the Local Rules of
10 Court and this court's October 31, 2006 order, defendants Kissinger and Brewer will be provided
11 an opportunity to file an opposition or a statement of non-opposition to plaintiff's motion. See
12 Local Rule 78-230(m).

13 Accordingly, IT IS HEREBY ORDERED that:

14 1. The Clerk of the Court is directed to forward plaintiff's instructions for service
15 of process, the completed summons, copies of the amended complaint, copies of the form
16 regarding consent or request for reassignment, and copies of this order to the United States
17 Marshal.

18 2. Within ten days from the date of this order, the United States Marshal is
19 directed to notify defendant Mohamed of the commencement of this action and to request a
20 waiver of service of summons from the defendant in accordance with the provisions of Fed. R.
21 Civ. P. 4(d) and 28 U.S.C. § 566(c).

22 3. The United States Marshal is directed to retain the sealed summons and a copy
23 of the amended complaint in their file for future use.

24 4. The United States Marshal shall file returned waivers of service of summons as
25 well as any requests for waivers that are returned as undelivered as soon as they are received.

26 ////

1 5. If a waiver of service of summons is not returned by a defendant within sixty
2 days from the date of mailing the request for waiver, the United States Marshal shall:

3 a. Personally serve process and a copy of this order upon the defendant
4 pursuant to Rule 4 of the Federal Rules of Civil Procedure and 28 U.S.C.
5 § 566(c) and shall command all necessary assistance from the California
6 Department of Corrections and Rehabilitation (CDCR) to execute this
7 order. The United States Marshal shall maintain the confidentiality of all
8 information provided by the CDCR pursuant to this order.

9 b. Within ten days after personal service is effected, the United States
10 Marshal shall file the return of service for the defendant, along with
11 evidence of any attempts to secure a waiver of service of summons and of
12 the costs subsequently incurred in effecting service on said defendant. The
13 costs shall be enumerated on the USM-285 form and shall include the
14 costs incurred by the Marshal's office for photocopying additional copies
15 of the summons and amended complaint and for preparing new USM-285
16 forms, if required. Costs of service will be taxed against the personally
17 served defendant in accordance with the provisions of Fed. R. Civ. P.
18 4(d)(2).

19 6. Defendants shall reply to the amended complaint within the time provided by
20 the applicable provisions of Fed. R. Civ. P. 12(a).

21 7. Unless otherwise ordered, all motions to dismiss, motions for summary
22 judgment, motions concerning discovery, motions pursuant to Rules 7, 11, 12, 15, 41, 55, 56, 59
23 and 60 of the Federal Rules of Civil Procedure, and motions pursuant to Local Rule 11-110 shall
24 be briefed pursuant to Local Rule 78-230(m). Failure to oppose such a motion timely may be
25 deemed a waiver of opposition to the motion. Opposition to all other motions need be filed only
26 as directed by the court.

1 8. If plaintiff is released from prison at any time during the pendency of this case,
2 any party may request application of other provisions of Local Rule 78-230 in lieu of Local Rule
3 78-230(m). In the absence of a court order granting such a request, the provisions of Local Rule
4 78-230(m) will govern all motions described in #7 above regardless of plaintiff's custodial status.
5 See Local Rule 1-102(d).

6 9. Pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003),
7 plaintiff is advised of the following requirements for opposing a motion to dismiss for failure to
8 exhaust administrative remedies made by defendant pursuant to non-enumerated Rule 12(b) of
9 the Federal Rules of Civil Procedure. Such a motion is a request for dismissal of unexhausted
10 claims without prejudice. The defendant may submit affidavits or declarations under penalty of
11 perjury and admissible documentation to support the motion to dismiss. To oppose the motion,
12 plaintiff may likewise file declarations under penalty of perjury and admissible documentation.
13 Plaintiff may rely upon statements made under the penalty of perjury in the complaint if the
14 complaint shows that plaintiff has personal knowledge of the matters stated and plaintiff calls to
15 the court's attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve
16 and file one or more affidavits or declarations by other persons who have personal knowledge of
17 relevant matters. Plaintiff may also rely upon written records, but plaintiff must prove that the
18 records are what plaintiff claims they are. If plaintiff fails to contradict defendant's evidence
19 with admissible evidence, the court may rely on the defendant's evidence. In the event both sides
20 submit matters outside the pleadings, the court may look beyond the pleadings and decide
21 disputed issues of fact. If plaintiff does not serve and file a written opposition to the motion, the
22 court may consider the failure to act as a waiver of opposition to the defendant's motion. If the
23 defendant's motion to dismiss, whether opposed or unopposed, is granted, plaintiff's
24 unexhausted claims will be dismissed without prejudice.

25 10. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc),
26 and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), plaintiff is advised of the following

1 requirements for opposing a motion for summary judgment made by defendants pursuant to Rule
2 56 of the Federal Rules of Civil Procedure. Such a motion is a request for an order for judgment
3 in favor of defendants without trial. A defendant's motion for summary judgment will set forth
4 the facts that the defendants contend are not reasonably subject to dispute and that entitle the
5 defendants to judgment. To oppose a motion for summary judgment, plaintiff must show proof
6 of his or her claims. Plaintiff may do this in one or more of the following ways. Plaintiff may
7 rely upon statements made under the penalty of perjury in the complaint if the complaint shows
8 that plaintiff has personal knowledge of the matters stated and plaintiff calls to the court's
9 attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve and file one
10 or more affidavits or declarations setting forth the facts that plaintiff believes prove plaintiff's
11 claims; the person who signs an affidavit or declaration must have personal knowledge of the
12 facts stated. Plaintiff may rely upon written records, but plaintiff must prove that the records are
13 what plaintiff claims they are. Plaintiff may rely upon all or any part of the transcript of one or
14 more depositions, answers to interrogatories, or admissions obtained in this proceeding. If
15 plaintiff fails to contradict the defendants' evidence with counteraffidavits or other admissible
16 evidence, the defendants' evidence may be taken as the truth and the defendants' motion for
17 summary judgment granted. If there is some good reason why such facts are not available to
18 plaintiff when required to oppose a motion for summary judgment, the court will consider a
19 request to postpone considering the defendants' motion. If plaintiff does not serve and file a
20 written opposition to the motion or a request to postpone consideration of the motion, the court
21 may consider the failure to act as a waiver of opposition to the defendants' motion. If the
22 defendants' motion for summary judgment, whether opposed or unopposed, is granted, judgment
23 will be entered for the defendants without a trial and the case will be closed.

24 11. A motion or opposition supported by unsigned affidavits or declarations will
25 be stricken.

26 ////

1 12. Each party shall keep the court informed of a current address at all times
2 while the action is pending. Any change of address must be reported promptly to the court in a
3 separate document captioned for this case and entitled "Notice of Change of Address." A notice
4 of change of address must be properly served on other parties. Pursuant to Local Rule 83-182(f),
5 service of documents at the record address of a party is fully effective. Failure to inform the
6 court of a change of address may result in the imposition of sanctions including dismissal of the
7 action.

8 13. The Clerk of the Court shall serve upon plaintiff a copy of the Local Rules of
9 Court.

10 14. The failure of any party to comply with this order, the Federal Rules of Civil
11 Procedure, or the Local Rules of Court may result in the imposition of sanctions including, but
12 not limited to, dismissal of the action or entry of default.

13 15. The court's May 20, 2009 findings and recommendations are vacated.

14 16. Plaintiff's June 8, 2009 motion to compel (Doc. No. 87) is denied as moot.

15 17. Plaintiff's June 26, 2009 motion for a court order effecting service of his
16 amended complaint on defendant Mohamed (Doc. No. 89) is granted.

17 DATED: July 14, 2009.

18
19 
20 _____
21 DALE A. DROZD
22 UNITED STATES MAGISTRATE JUDGE

21 DAD:9
22 wash1994.8moh