IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CLIFFORD J. WILLIAMS, No. 2:07-CV-02726-NRS

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this action filed pursuant to 42 U.S.C. § 1983. By order filed June 11, 2008, Plaintiff's complaint was dismissed with leave to file an amended complaint. On July 10, 2008, Plaintiff filed a second amended complaint. Because Plaintiff has not amended his complaint to sufficiently address the problems identified by the June 11, 2008 order, the Court dismisses Plaintiff's second amended complaint without prejudice.

Under 28 U.S.C. § 1915A(a), the Court must screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. The Court will dismiss a complaint, or portion thereof, if the prisoner has raised claims that are, among other things, legally "frivolous or malicious" or fail to state a claim upon which relief may be granted. 28 U.S.C. §

1915A(b)(1)&(2).

"[A] complaint . . . is frivolous where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). "[The Court's] inquiry is whether any of Jackson's claims has an arguable basis in law and fact." *Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989), *superseded by statute on other grounds as stated in Lopez v. Smith*, 203 F.3d 1122, 1130–31 (9th Cir. 2000). However, because the Court is only considering Plaintiff's pleadings at this stage of litigation, the Court's order is necessarily dictated by Rule 8 of the Federal Rules of Civil Procedure. Rule 8(a)(2) requires "a short and plain statement of the claim," Fed. R. Civ. P. 8(a)(2), "enough to raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In reviewing the Plaintiff's pleadings, the Court accepts as true the allegations in his complaint and construes the pleading in the light most favorable to the Plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). "Accordingly, a pleading must give fair notice [to defendants] and state the elements of the claim plainly and succinctly." *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (internal quotation marks, alterations, and citation omitted).

Plaintiff has now filed a complaint and two amended complaints. Since the outset, Plaintiff has alleged that his Eighth and Fourteenth Amendment rights were violated when the prison staff: (1) slandered him by starting rumors that he was homosexual; (2) denied him medical care by not giving him antibiotics and "trays;" (3) provided him "tainted food;" (4) made "plots and staff assaults;" and (5) committed sexual misconduct by starting rumors that he was "gay" or "homosexual."

Both Plaintiff's complaint and first amended complaint were dismissed as being too vague and conclusory. In the order denying Plaintiff's first amended

complaint, the Court noted "plaintiff . . . failed to adequately allege specific instances of the claimed constitutional violations, including when they took place, how they took place, and specifically who was involved in them." Specifically, the Court noted Plaintiff's first amended complaint failed to "give fair notice to the defendants" and should have "allege[d] facts that support the elements of the claim plainly and succinctly." Because Plaintiff has not addressed these concerns, the Court dismisses Plaintiff's second amended complaint.

As to Plaintiff's claim that he was slandered by staff's rumors that he was homosexual, Plaintiff makes virtually the same allegation in his second amended complaint that he did in his first. He states nothing more than that rumors were started against him, which led to "divorce, [a]ttempted [m]urder, [and] [b]attery." Plaintiff does not state who committed the slander, how exactly the slander started or led to the alleged abuse, or even when exactly the slander took place. Moreover, a claim of defamation will not support a § 1983 claim unless accompanied by "some more tangible interests." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Certainly, battery, divorce, and attempted murder might constitute a "more tangible interest," however, Plaintiff has not pleaded whether he suffered those things or how the alleged defamation even lead to them. In sum, Plaintiff made only vague and conclusory statements in support of this claim.

As to Plaintiff's claim that he was denied medical care, he again makes virtually the same claim in his second amended complaint as he did in his first. Plaintiff has provided no facts to support this claim, other than to state, in conclusory fashion, that he was denied medical care and lost weight.

As to Plaintiff's claim that he was provided "tainted food," Plaintiff again has restated his claim in the first amended complaint. He has provided no facts about this claim. He has merely stated that he was given "tainted food," which led

to weight loss. The pleading rules require more than such bare, conclusory statements.

As to Plaintiff's claim that the staff made plots and assaults on him, Plaintiff says nothing more than that assaults took place "to and from the shower; while in handcuffs." He does not allege who made the plots, the nature of the plots, the timing of the plots, or anything else. In sum, Plaintiff's pleadings have not given Defendants fair notice of the facts and claims being alleged against them.

As to the claim that the staff committed sexual misconduct, Plaintiff has also failed to properly plead facts sufficient to sustain this claim. Admittedly, Plaintiff, in contrast with his first amended complaint, did provide the names of those starting rumors against him and the dates on which they did it. However, this is still not enough. Plaintiff has provided nothing more than their names and dates. He has not alleged what they said or even how they committed "sexual misconduct." Plaintiff has alleged only that certain individuals started rumors about him that he was gay and homosexual. However, this is merely a restatement of Plaintiff's first claim. He has not pleaded enough facts to support this claim. Nor has he pleaded a more tangible loss, sufficient to make his defamation claim a cognizable § 1983 claim.

In sum, Plaintiff's pleadings fail to give Defendants fair notice of the claims being brought against them.

Finally, Plaintiff's request for appointment of counsel also fails, because there are no exceptional circumstances to justify the Court's appointment of one. *See Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).

If Plaintiff chooses to file a third amended complaint, the Court refers him to its Order dated June 11, 2008. In that order, the Court provided helpful guidance on pleading a successful § 1983 action, which Plaintiff seemingly ignored. The

Court, therefore, refers Plaintiff back to the June 11, 2008 order.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's July 10, 2008 second amended complaint is dismissed;

2. Plaintiff is granted thirty days from the date of service of this order to file a third amended complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil Procedure, and the Local Rules of Practice; the third amended complaint must bear the docket number assigned to this case and must be labeled "Third Amended Complaint;" failure to file a third amended complaint in accordance with this order will result in a recommendation that this action be dismissed with prejudice;

3. The Clerk of the Court is directed to send Plaintiff the Court's form for filing a civil rights action; and

4. Plaintiff's July 10, 2008 request for appointment of counsel is denied.

DATED: **December 15, 2009**

Honorable N. Randy Smith
Ninth Circuit Court of Appeals Judge