

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**

MICHAEL AVINA,

No. CIV S-08-0020-LKK-CMK-P

Plaintiff,

vs.

ORDER

R. BAILEY, et al.,

Defendants.

_____ /

Plaintiff, a state prisoner proceeding with appointed counsel, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff's amended complaint (Doc. 32).

Plaintiff's original complaint was found to state a claim for cruel and unusual punishment arising from the use of excessive force, but deficient in stating a claim for verbal harassment and equal protection. Plaintiff was provided an opportunity to file an amended complaint, which he failed to do in a timely manner. Consequently, the court issued an order dismissing the deficient claims and allowing this case to proceed against the named defendants for the use of excessive force. Plaintiff then filed an application for reconsideration which was granted, and counsel was appointed to assist plaintiff.

1 Defendants have filed a motion to dismiss plaintiff's complaint, which remains
2 pending before the court. However, after counsel was appointed to assist plaintiff, he was
3 provided another opportunity to file an amended complaint. Plaintiff filed his amended
4 complaint on January 20, 2009. Defendants' motion to dismiss is therefore moot, as it seeks to
5 dismiss a complaint which is no longer the operative complaint. The Clerk of the Court will be
6 directed to terminate this motion as a pending motion.

7 The court is required to screen complaints brought by prisoners seeking relief
8 against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C.
9 § 1915A(a). In his amended complaint, plaintiff alleges the defendants used excessive force
10 against him, in violation of his Eighth Amendment rights, by ignoring his calls for assistance and
11 then kicking him while he was down, suffering from a seizure. In addition, plaintiff alleges
12 defendant Bailey was deliberately indifferent to his medical needs by not responding to plaintiff's
13 pleas for medical assistance and failing to summon medical assistance for plaintiff during his
14 seizure. Finally, plaintiff claims the defendants used excessive force on another occasion by
15 verbally assaulting him for filing a inmate grievance, and then physically grabbing him, throwing
16 him to the floor and then forcing him into his wheelchair.

17 The first amended complaint appears to state a cognizable claim for relief
18 pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b). If the allegations are proven, plaintiff
19 has a reasonable opportunity to prevail on the merits of this action. The defendants have already
20 appeared in this action by way of filing a motion to dismiss plaintiff's original complaint. As
21 that motion is now moot, they will be provided another opportunity to respond to the first
22 amended complaint.

23 Accordingly, IT IS HEREBY ORDERED that:

24 1. The pending motion to dismiss (Doc. 22) is moot due to the filing of an
25 amended complaint;

26 ///

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

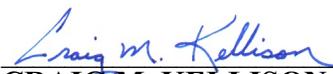
2. The Clerk of the Court is directed to terminate the motion to dismiss (Doc. 22) as a pending motion;

3. The court finds the first amended complaint is sufficient to state a claim against defendants Bailey and Moses;

4. Defendants shall respond to plaintiff's first amended complaint within 30 days of the date of this order; and

5. As all parties are now represented by counsel, motions filed in this case shall no longer be briefed as provided in Local Rule 78-230(m), but shall proceed as motions filed a standard civil cases under Local Rule 78-230.

DATED: January 27, 2009



CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE