

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**

LAMON E. JACKSON,  
Plaintiff,

No. CIV S-08-2502-FCD-CMK-P

vs.

ORDER

D.K. SISTO, et al.,  
Defendants.

\_\_\_\_\_ /

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. The court has authorized service of this action on defendants Sisto, Sequira, Gums, and Fuizzotti and directed plaintiff to provide documentation for service of process by the United States Marshal. Plaintiff has submitted the required papers.<sup>1</sup>

///

///

\_\_\_\_\_

<sup>1</sup> Plaintiff also submitted service documents for another defendant, Jackson. However, the undersigned found service not appropriate for defendant Jackson as Plaintiff failed to state a claim against him. The undersigned has recommended defendant Jackson be dismissed from this action. As such, the court will not at this time order service on defendant Jackson. The Clerk of the Court will modify the summons submitted by Plaintiff to exclude defendant Jackson, and disregard the USM-285 form Plaintiff submitted for service of defendant Jackson.

1                   Accordingly, IT IS HEREBY ORDERED that:

2                   1.       The Clerk of the Court is directed to forward the instructions for service of  
3 process, the completed summons form(s), copies of the complaint, and a copy of this order and  
4 the court's Order re: Consent or Request for Reassignment to the United States Marshal;

5                   2.       Within ten days from the date of this order, the United States Marshal is  
6 directed to notify defendant(s) of the commencement of this action and to request a waiver of  
7 service of summons in accordance with the provisions of Federal Rule of Civil Procedure 4(d)  
8 and 28 U.S.C. § 566(c);

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

11                  4.       The United States Marshal shall file returned waivers of service of  
12 summons, as well as any requests for waivers that are returned as undelivered, as soon as they are  
13 received;

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

16                   a.       Personally serve process and a copy of this order upon the  
17 defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure and  
18 28 U.S.C. § 566(c), shall command all necessary assistance to execute this  
19 order, and shall maintain the confidentiality of all information provided  
20 pursuant to this order;

21                   b.       Within ten days after personal service is effected, the  
22 United States Marshal shall file the return of service for the defendant,  
23 along with evidence of any attempts to secure a waiver of service of  
24 summons and of the costs subsequently incurred in effecting service on  
25 said defendant;

26                   c.       Costs incurred in effecting service shall be enumerated on

1 the USM-285 form and shall include the costs incurred by the Marshal's  
2 office for photocopying additional copies of the summons and amended  
3 complaint and for preparing new USM-285 forms, if required; and

4 d. Costs of service will be taxed against the personally served  
5 defendant in accordance with the provisions of Federal Rule of Civil  
6 Procedure 4(d)(2);

7 6. Defendant(s) shall reply to the complaint within the time provided by the  
8 applicable provisions of Federal Rule of Civil Procedure 12(a);

9 7. Unless otherwise ordered, all motions to dismiss, motions for summary  
10 judgment, motions concerning discovery, motions pursuant to Rules 7, 11, 12, 15, 41, 55, 56, 59  
11 and 60 of the Federal Rules of Civil Procedure, and motions shall be briefed pursuant to Local  
12 Rule 78-230(m), and failure to oppose such a motion timely may be deemed a waiver of  
13 opposition to the motion; opposition to all other motions need be filed only as directed by the  
14 court;

15 8. If plaintiff is released from custody at any time during the pendency of this  
16 case, any party may request application of other provisions of Local Rule 78-230 in lieu of Local  
17 Rule 78-230(m), which will continue to govern all motions described in no. 7, above, in the  
18 absence of a court order granting such a request;

19 9. Pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003),  
20 plaintiff is advised of the following requirements for opposing a motion to dismiss for failure to  
21 exhaust administrative remedies made by defendant pursuant to non-enumerated Rule 12(b) of  
22 the Federal Rules of Civil Procedure: Such a motion is a request for dismissal of unexhausted  
23 claims without prejudice. The defendant may submit affidavits or declarations under penalty of  
24 perjury and admissible documentation to support the motion to dismiss. To oppose the motion,  
25 plaintiff may likewise file declarations under penalty of perjury and admissible documentation.  
26 Plaintiff may rely upon statements made under the penalty of perjury in the complaint if the

1 complaint shows that plaintiff has personal knowledge of the matters stated and plaintiff calls to  
2 the court's attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve  
3 and file one or more affidavits or declarations by other persons who have personal knowledge of  
4 relevant matters. Plaintiff may also rely upon written records, but plaintiff must prove that the  
5 records are what plaintiff claims they are. If plaintiff fails to contradict defendant's evidence  
6 with admissible evidence, the court may rely on the defendant's evidence. In the event both sides  
7 submit matters outside the pleadings, the court may look beyond the pleadings and decide  
8 disputed issues of fact. If plaintiff does not serve and file a written opposition to the motion, the  
9 court may consider the failure to act as a waiver of opposition to the defendant's motion. If the  
10 defendant's motion to dismiss, whether opposed or unopposed, is granted, plaintiff's  
11 unexhausted claims will be dismissed without prejudice.

12           10. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc),  
13 and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), plaintiff is advised of the following  
14 requirements for opposing a motion for summary judgment made by defendants pursuant to Rule  
15 56 of the Federal Rules of Civil Procedure: Such a motion is a request for an order for judgment  
16 in favor of defendants without trial. A defendant's motion for summary judgment will set forth  
17 the facts that the defendants contend are not reasonably subject to dispute and that entitle the  
18 defendants to judgment. To oppose a motion for summary judgment, plaintiff must show proof  
19 of his or her claims. Plaintiff may do this in one or more of the following ways. Plaintiff may  
20 rely upon statements made under the penalty of perjury in the complaint if the complaint shows  
21 that plaintiff has personal knowledge of the matters stated and plaintiff calls to the court's  
22 attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve and file one  
23 or more affidavits or declarations setting forth the facts that plaintiff believes prove plaintiff's  
24 claims; the person who signs an affidavit or declaration must have personal knowledge of the  
25 facts stated. Plaintiff may rely upon written records, but plaintiff must prove that the records are  
26 what plaintiff claims they are. Plaintiff may rely upon all or any part of the transcript of one or

