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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EUGENE JONES, III,

Plaintiff,

v.

J. WALKER; (WARDEN), et al., J.
LEBECK, CORRECTIONAL
OFFICER, K. SPITZER;
CORRECTIONAL OFFICER
KL. WOOTEN; CORRECTIONAL
OFFICER; CADET RAMOS,

Defendants.

NO. CV-08-2534-RHW

ORDER DIRECTING SERVICE

On October 24, 2008, Plaintiff, a California state inmate, filed a pro se civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff contends that his civil rights were violated when Defendant Lebeck sprayed him with pepper spray. Plaintiff is seeking over \$35 million dollars in damages. Plaintiff has also filed an application to proceed *in forma pauperis*, which is granted in a separate order filed simultaneously.

PRELIMINARY REVIEW

Pursuant to 28 U.S.C. § 1915(A), this court must conduct a preliminary review of the complaint to identify any cognizable claims, and to dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. § 1915(A)(b)(1),(2).

ORDER DIRECTING SERVICE ~ 1

1 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
2 elements: (1) that a violation of a right secured by the Constitution or laws of the
3 United States was violated, and (2) that the alleged deprivation was committed by a
4 person acting under the color of state law. In his complaint, Plaintiff alleged
5 claims of excessive force, racial discrimination, harassment, assault, and reckless
6 endangerment of human life.

7 The underlying conduct at the heart of Plaintiff's claims is the unprovoked
8 use of pepper spray. According to Plaintiff, Defendant Lebeck pepper-sprayed
9 him, notwithstanding the fact that he was sitting at a table in the dayroom and did
10 nothing to provoke the attack. The Court finds Plaintiff's allegations, when
11 liberally construed, state a cognizable claim that Defendant Lebeck violated his
12 constitutional rights. *See Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002)
13 (stating that in order to establish a claim for excessive force as the result of the use
14 of pepper spray, inmates must show that the officials applied the pepper spray
15 maliciously and sadistically for the very purpose of causing harm). Additionally,
16 the Court finds Plaintiff's allegations that Defendant Lebeck used the pepper spray
17 because he and his cellmate are African-American, when liberally construed, states
18 a cognizable Equal Protection claim.

19 Plaintiff also names as Defendants J. Walker (Warden), K. Spitzer, R.
20 Wooten, and Cadet Ramos. Plaintiff does not allege that these Defendants sprayed
21 pepper spray or used excessive force, or committed any other act against Defendant
22 other than to participate in the search. To state a claim under § 1983, a plaintiff
23 must set forth specific facts as to each individual defendant's conduct that
24 proximately caused a violation of his rights. *Leer v. Murphy*, 844 F.2d 628, 634
25 (9th Cir. 1988). Moreover, Plaintiff's inclusion of the Warden as a Defendant
26 based on a respondeat superior theory is insufficient to state a § 1983 claim. *See*
27 *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978). Accordingly, the
28 claims against these Defendants will be dismissed.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Plaintiff has failed to state a cognizable claim for relief against
3 Defendants J. Walker, K. Spitzer, R. Wooten, and Cadet Ramos, and the claims
4 against these Defendants are **DISMISSED**. The Clerk shall **terminate** these
5 Defendants from this action. Service is appropriate for J. Lebeck, at New Folsom
6 State Prison, in Represa, California.

7 2. The Clerk of the Court shall send Plaintiff one (1) USM-285 form, one
8 summons, an instruction sheet and a copy of the complaint.

9 3. Within thirty (30) days from the date of this order, Plaintiff shall
10 complete the attached Notice of Submission of Documents and submit the
11 following documents to the Court:

- 12 a. The completed Notice of Submission of Documents;
- 13 b. One completed summons;
- 14 c. The completed USM-285 form for Defendant J. Lebeck; and
- 15 d. Two (2) copies of the endorsed complaint.

16 4. Plaintiff need not attempt service on Defendant and need not request
17 waiver of service. Upon receipt of the above-described documents, the Court will
18 direct the United States Marshal Service to serve the above-named Defendants
19 pursuant to Federal Rules of Civil Procedure 4 without payment of costs.

20 5. The Clerk of the Court shall also mail a courtesy copy of the complaint,
21 all attachments thereto, and this order to the California Attorney General's Office
22 and serve a copy of this order on Plaintiff.

23 6. All communications by the Plaintiff with the Court must be served on
24 Defendants, or Defendants' counsel once counsel has been designated, by mailing
25 a true copy of the document to Defendants or Defendants' counsel.

26 7. Discovery may be taken in accordance with the Federal Rules of Civil
27 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2)
28 or Local Rule 16-1 is required before the parties may conduct discovery.

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

EUGENE JONES, III,

Plaintiff,

No. CIV

vs.

J. WALKER; (WARDEN), et al., J.
LEBECK, CORRECTIONAL
OFFICER, K. SPITZER;
CORRECTIONAL OFFICER
KL.WOOTEN; CORRECTIONAL
OFFICER; CADET RAMOS,

NOTICE OF SUBMISSION
OF DOCUMENTS

Defendants.

_____ /

Plaintiff hereby submits the following documents in compliance with the court's
order filed _____:

- _____ completed summons form
- _____ completed USM-285 forms
- _____ copies of the _____
Complaint/Amended Complaint

DATED:

Plaintiff