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

KYLE AVERY,

No. CIV S-08-2605-CMK-P

Plaintiff,

vs.

ORDER

JAMES WALKER, et al.,

Defendants.

\_\_\_\_\_ /

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s first amended complaint (Doc. 12).

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a).

In the first amended complaint, plaintiff names the following as defendants:

Walker, Vance, and Elia.<sup>1</sup> Plaintiff, who practices the Pagan/Wiccan religion, states that his claims are “based on the past approx. 6 months upon Plaintiff’s placement on C.S.P.– SAC Facility ‘A’ yard.” Specifically, he states that upon being placed in the Facility “A” yard, he “noticed that Pagans/Wiccans had no worship area and a very unstable policy that generally jeopardized any religious packages approved for being ordered without worry whether the

\_\_\_\_\_ <sup>1</sup> Plaintiff no longer names Jackson as a defendant and the Clerk of the Court will be directed to terminate this individual from the action.

1 approvals would be acceptable by a dep't such as R&R that had no set guideline in which was  
2 being followed." According to plaintiff, an outside space is essential for the practice of the  
3 Pagan/Wiccan faith, which is an earth-based religion requiring certain ceremonies be conducted  
4 outside under the open sky. He states that he decided to bring these issues to the attention of  
5 appropriate prison staff.

6 Plaintiff was provided with a "verbal interview" with defendant Vance and the  
7 business services manager, defendant Elia. He states that he told both Vance and Elia of the need  
8 for an outside space "in which Pagan/Wiccans (Plaintiff himself is a practitioner in) a worship  
9 area outside such as those types of areas referred to as Native American sweat lodge areas." He  
10 states that he provided defendants Vance and Elia with a proposal suggesting three outside areas  
11 which could be set aside for Pagan/Wiccan adherents. He further states that he expressed his  
12 concern to Vance and Elia that Pagans/Wiccans were not being provided the same opportunity to  
13 practice their religion as other groups, such as Native Americans. Plaintiff said this lack of  
14 opportunity could be considered a violation of the law.

15 According to plaintiff, defendant Vance responded to the proposal by suggesting  
16 that a "a very very unequally small portion of the Native American sweat lodge land be  
17 confiscated from that group and given to the Wiccans." Plaintiff states that he objected to this  
18 suggestion because he thought that taking space from the Native Americans and giving it to the  
19 Pagans/Wiccans would constitute a desecration of the "sacredly protected space" already set  
20 aside for another group. Plaintiff believes that defendant Vance's suggestion constitutes a  
21 "created burden to the [Pagan/Wiccan] religious practices" because it is not feasible or realistic  
22 given the animosity it would engender among the Native Americans. Plaintiff states that he then  
23 agreed to defendants' suggestion that he represent the Pagans/Wiccans on a committee to attempt  
24 to resolve the issue.

25 Plaintiff states that defendants Vance and Elia presented their original suggestion  
26 to more senior prison officials at a "Warden's Meeting" and that, because this was the only

1 suggestion presented, it was the plan adopted. According to plaintiff, “[t]he warden [defendant  
2 Walker] never got to hear Plaintiff’s proposal or warnings and would have likely disagreed to the  
3 defendant S.J. Vance’s plan if he had an idea of the burden to the groups beliefs such an idea  
4 would have caused.” Plaintiff claims that defendant Walker’s decision to adopt the plan of  
5 taking space away from the Native American area to give to the Pagans/Wiccans “adversely  
6 burdened the religious beliefs of both faiths.”

7           Plaintiff states that the Native Americans were forced to dig up part of their area  
8 so that a fence could be built to separate off the newly designated Pagan/Wiccan area. Plaintiff  
9 states that “[t]he land sat unattended & dug up for months until recently in which the land was  
10 returned to them [the Native Americans] and the issue of providing Wiccans land left ignored.”  
11 Plaintiff states that his appeals on the issue have been “screened out,” thereby leaving him no  
12 administrative avenue for redress.

13           Plaintiff’s original complaint was dismissed with leave to amend because plaintiff  
14 had not alleged a substantial burden. The court outlined the applicable law and stated:

15                           In this case, plaintiff has not alleged sufficient facts to show  
16 a substantial burden. To the contrary, it appears from plaintiff’s complaint  
17 that defendants attempted to provide him with an outdoor space for  
18 Wiccan ceremonies, but that plaintiff would not accept it. At this point,  
19 plaintiff’s assertion that sharing space with Native American inmates is  
20 purely speculative.

21 In the amended complaint, plaintiff now states that, despite the decision to devote a portion of the  
22 Native American sweat lodge space to the Pagan/Wiccan adherents, the land was never in fact  
23 used for that purpose and that the issue of providing Pagans/Wiccans an outside space has been  
24 “left ignored.” The complaint thus appears to state a cognizable claim for relief pursuant to 42  
25 U.S.C. § 1983 and 28 U.S.C. § 1915A(b). If the allegations are proven, plaintiff has a reasonable  
26 opportunity to prevail on the merits of this action. The court, therefore, finds that service is  
appropriate and will direct service by the U.S. Marshal without pre-payment of costs. Plaintiff is  
informed, however, that this action cannot proceed further until plaintiff complies with this order.

1 Plaintiff is warned that failure to comply with this order may result in dismissal of the action.

2 See Local Rule 11-110.

3 Accordingly, IT IS HEREBY ORDERED that:

4 1. The Clerk of the Court is directed to terminate Jackson as a defendant to  
5 this action;

6 2. The court authorizes service on the following defendant(s):

7 WALKER,

8 VANCE, and

9 ELIA;

10 3. The Clerk of the Court shall send plaintiff one USM-285 form for each  
11 defendant identified above, one summons, an instruction sheet, and a copy of the first amended  
12 complaint; and

13 4. Within 30 days of the date of service of this order, plaintiff shall complete  
14 the attached Notice of Submission of Documents and submit the following documents to the  
15 court:

- 16 a. The completed Notice of Submission of Documents;  
17 b. One completed summons;  
18 c. Three completed USM-285 form(s); and  
19 d. Four copies of the endorsed first amended complaint.

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22 DATED: April 14, 2009

23   
24 **CRAIG M. KELLISON**  
25 UNITED STATES MAGISTRATE JUDGE  
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\_\_\_\_\_ /

NOTICE OF SUBMISSION OF DOCUMENTS

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

- 1   completed summons form;
- \_\_\_\_\_ completed USM-285 form(s); and
- \_\_\_\_\_ copies of the first amended complaint.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Plaintiff