

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
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

K. JAMEL WALKER,
Plaintiff,
v.
CALIFORNIA DEPARTMENT
OF CORRECTIONS, et al.,
Defendants.

No. 2:09-cv-0569 WBS KJN P

ORDER

Plaintiff is a state prisoner proceeding with a Second Amended Complaint (SAC) (ECF No. 46), following the court’s rulings on defendants’ motion to dismiss. Defendants request that the court screen the SAC, pursuant to 28 U.S.C. § 1915A(a), “for compliance with the Findings and Recommendations [] and dismiss any claim that is frivolous, malicious, time-barred, fails to state a claim upon which relief can be granted, or which seeks monetary relief from a defendant who is immune from such relief under section 1915A(a).” (ECF No. 48.)

The court finds that the SAC is generally consistent with the court’s findings and orders, and appears to contain no claim that is time-barred, or that is patently frivolous, malicious, or without potential merit. Therefore, this action should proceed forthwith on plaintiff’s SAC.

All defendants named in the SAC have been served. Accordingly, IT IS HEREBY ORDERED that:

////

1 1. Defendants shall file and serve a reply to the complaint within thirty days after the
2 filing date of this order.

3 2. Unless otherwise ordered, all motions to dismiss, motions for summary judgment,
4 motions concerning discovery, motions pursuant to Fed. R. Civ. P. 7, 11, 12, 15, 41, 55, 56, 59
5 and 60, and E.D. Cal. R. 110, shall be briefed pursuant to L.R. 230(l). Failure to timely oppose
6 such a motion may be deemed a waiver of opposition to the motion. See L.R. 230(l). Opposition
7 to all other motions need be filed only as directed by the court.

8 3. If plaintiff is released from prison while this case is pending, any party may request
9 application of the other provisions of L.R. 230 in lieu of L.R. 230(l). Until such a motion is
10 granted, L.R. 230(l) will govern all motions described in #2 above regardless of plaintiff's
11 custodial status. See L.R. 102(d).

12 4. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), and
13 Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), the court hereby informs plaintiff of the
14 following requirements for opposing a motion for summary judgment pursuant to Fed. R. Civ. P.
15 56. Such a motion is a request for an order for judgment in favor of the defendant without trial.
16 A defendant's motion for summary judgment will set forth the facts that the defendant contends
17 are not reasonably subject to dispute and that entitle the defendant to judgment. To oppose a
18 motion for summary judgment, plaintiff must show proof of his or her claims. Plaintiff may do
19 this in one or more of the following ways. Plaintiff may rely on plaintiff's statements made under
20 penalty of perjury in the complaint if the complaint shows that plaintiff has personal knowledge
21 of the matters stated and plaintiff specifies those parts of the complaint on which plaintiff relies.
22 Plaintiff may serve and file one or more affidavits or declarations setting forth the facts that
23 plaintiff believes prove plaintiff's claims; the person who signs an affidavit or declaration must
24 have personal knowledge of the facts stated. Plaintiff may rely on written records, but plaintiff
25 must prove that the records are what plaintiff asserts they are. Plaintiff may rely on all or any part
26 of the transcript of one or more depositions, answers to interrogatories, or admissions obtained in
27 this proceeding. If plaintiff fails to contradict the defendant's evidence with counteraffidavits or
28 other admissible evidence, the court may accept defendant's evidence as true and grant the

1 motion. If there is some good reason why such facts are not available to plaintiff when required
2 to oppose a motion for summary judgment, the court will consider a request to postpone
3 consideration of the defendant's motion. See Fed. R. Civ. P. 56(d). If plaintiff does not serve and
4 file a written opposition to the motion, or a request to postpone consideration of the motion, the
5 court may consider the failure to act as a waiver of opposition to the defendant's motion. See
6 L.R. 230(1). If the court grants the motion for summary judgment, whether opposed or
7 unopposed, judgment will be entered for the defendant without a trial and the case will be closed
8 as to that defendant.

9 5. If defendant moves for summary judgment, defendant must contemporaneously serve
10 with the motion, but in a separate document, a copy of the attached Rand Notice. See Woods v.
11 Carey, 684 F.3d 934, 935 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998)

12 **Failure to do so may constitute grounds for denial of the motion.**

13 6. On April 3, 2014, the United States Court of Appeals for the Ninth Circuit overruled
14 Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003), with respect to the proper procedural
15 device for raising the issue of administrative exhaustion. Albino v. Baca, ___ F.3d ___, 2014
16 WL 1317141, at *1 (9th Cir. Apr. 3, 2014) (*en banc*). Following the decision in Albino, a
17 defendant may raise the issue of exhaustion in either (1) a motion to dismiss pursuant to Rule
18 12(b)(6), in the rare event the failure to exhaust is clear on the face of the complaint, or (2) a
19 motion for summary judgment. Albino, 2014 WL 1317141, at *4 (quotation marks omitted). An
20 unenumerated Rule 12(b) motion is no longer the proper procedural device for raising the issue of
21 exhaustion. Albino, at *4. The court encourages defendant to bring motions raising exhaustion
22 issues early in the case. Id.

23 7. Unsigned affidavits or declarations will be stricken, and affidavits or declarations not
24 signed under penalty of perjury have no evidentiary value.

25 8. Each party proceeding without counsel shall keep the court informed of a current
26 address at all times while the action is pending. Any change of address must be reported
27 promptly to the court in a separate document captioned for this case and entitled "Notice of
28 Change of Address." A notice of change of address must be properly served on other parties.

1 Service of documents at the address of record for a party is fully effective. See L.R. 182(f). A
2 party's failure to inform the court of a change of address may result in the imposition of sanctions
3 including dismissal of the action.

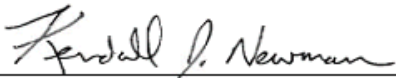
4 9. The Clerk of the Court shall again serve on plaintiff a copy of the Local Rules of
5 Court.

6 10. The failure of any party to comply with this order, the Federal Rules of Civil
7 Procedure, or the Local Rules of Court, may result in the imposition of sanctions including, but
8 not limited to, dismissal of the action or entry of default. See Fed. R. Civ. P. 41(b).

9 SO ORDERED.

10 Dated: May 16, 2014

11
12 /walk0569.8.SAC


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Rand Notice to Plaintiff**

2 This notice is provided to ensure that you, a pro se prisoner plaintiff, “have fair, timely and adequate notice
3 of what is required” to oppose a motion for summary judgment. See Woods v. Carey, 684 F.3d 934 (9th Cir. 2012);
4 Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998). The court requires that you be provided with this notice
5 regarding the requirements for opposing a motion for summary judgment under Rule 56 of the Federal Rules of Civil
6 Procedure.

7 When a defendant moves for summary judgment, the defendant is requesting that the court grant judgment
8 in defendant’s favor without a trial. If there is no real dispute about any fact that would affect the result of your case,
9 the defendant who asked for summary judgment is entitled to judgment as a matter of law, which will end your case
10 against that defendant. A motion for summary judgment will set forth the facts that the defendant asserts are not
11 reasonably subject to dispute and that entitle the defendant to judgment.

12 To oppose a motion for summary judgment, you must show proof of your claims.¹ To do this, you may
13 refer to specific statements made in your complaint if you signed your complaint under penalty of perjury and if your
14 complaint shows that you have personal knowledge of the matters stated. You may also submit declarations setting
15 forth the facts that you believe prove your claims, as long as the person who signs the declaration has personal
16 knowledge of the facts stated. You may also submit all or part of deposition transcripts, answers to interrogatories,
17 admissions, and other authenticated documents. For each of the facts listed in the defendant’s Statement of
18 Undisputed Facts, you must admit the facts that are undisputed, and deny the facts that are disputed. If you deny a
19 fact, you must cite to the proof that you rely on to support your denial. See L.R. 260(b). If you fail to contradict the
20 defendant’s evidence with your own evidence, the court may accept the defendant’s evidence as the truth and grant
21 the motion.

22 The court will consider a request to postpone consideration of the defendant’s motion if you submit a
23 declaration showing that for a specific reason you cannot present such facts in your opposition. If you do not respond
24 to the motion, the court may consider your failure to act as a waiver of your opposition. See L.R. 230(l).

25 If the court grants the defendant’s motion, whether opposed or unopposed, judgment will be entered for that
26 defendant without a trial and the case will be closed as to that defendant.

27 ¹ If the motion for summary judgment concerns the exhaustion of administrative remedies, you must submit
28 proof of specific facts regarding the exhaustion of administrative remedies. See Stratton v. Buck, 697 F.3d 1004,
1008 (9th Cir. 2012); Albino v. Baca, ___ F.3d ___, 2014 WL 1317141 (9th Cir. Apr. 3, 2014).