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

LARRY W. KIRK,

Plaintiff,

No. CIV S-10-0373 KJN (TEMP) P

vs.

T. RICHARDS,

Defendant.

ORDER TO SHOW CAUSE

_____/

Plaintiff is a California prisoner proceeding without counsel, with an action for alleged violation of civil rights under 42 U.S.C. § 1983. Defendant is an employee of the California Department of Corrections and Rehabilitation. Plaintiff is proceeding against defendant on a claim for failure to protect plaintiff from violence arising under the Eighth Amendment. Defendant has filed a motion for summary judgment.

In a declaration attached to defendant’s motion, defendant’s counsel asserts the following requests for admission were served upon plaintiff on July 30, 2010:

1. RICHARDS did not violate your rights under the Eighth Amendment;
2. RICHARDS did not violate your constitutional rights; and
3. You suffered no injury as a result of the actions of RICHARDS.

Defendant’s counsel asserts plaintiff never responded to these requests for admission.

1 Under Federal Rule of Civil Procedure 36(a)(3), a request for admission is
2 deemed admitted if a response to the request is not served within thirty days of service of the
3 request. Defendant understandably argues that the court should deem the requests for admission
4 identified above as admitted given plaintiff's failure to file a timely response to the requests.

5 Plaintiff has not indicated whether he received defendant's requests for admission
6 or whether he served a timely response.

7 Therefore, plaintiff will be ordered to show cause within twenty-one days why the
8 requests for admissions identified above should not be deemed admitted pursuant to Federal Rule
9 of Civil Procedure 36(a)(3). Plaintiff might show cause by establishing that he did not receive
10 the requests for admission described above, or that he did receive them and served timely
11 responses. However, plaintiff is cautioned that any evidence that he submits in support of his
12 response, including affidavits, must be signed under penalty of perjury.

13 With his response to the order to show cause, plaintiff might consider filing a
14 motion for withdrawal of admissions under Federal Rule of Civil Procedure 36(b). Under that
15 rule, the court can deem an admission withdrawn if it is established that withdrawal would
16 "promote the presentation of the merits" of the claims before the court, and "if the court is not
17 persuaded that it would prejudice the requesting party in . . . defending the action on the merits."¹

18 Accordingly, IT IS HEREBY ORDERED that:

19 1. Plaintiff show cause within twenty-one days why the requests for admission
20 identified herein should not be deemed admitted pursuant to Federal Rule of Civil Procedure
21 36(a)(3).

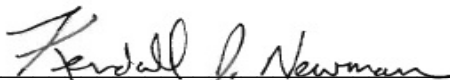
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24 ¹ However, by indicating that plaintiff may consider filing such a motion, the undersigned
25 does not intend to imply how he would rule upon such a motion. In fact, one of the factors
26 would be the plaintiff's alleged good cause for failing to respond to the request for admissions in
a timely manner.

1 2. Plaintiff's failure to respond to this order will result in a recommendation that
2 defendant's pending motion for summary judgment be granted.

3 DATED: July 8, 2011

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5 
6 KENDALL J. NEWMAN
7 UNITED STATES MAGISTRATE JUDGE

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