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

JOHN E. JAMES, III,
Plaintiff,

v.

B. ESSER,
Defendant.

No. C 07-6193 JSW (PR)

**ORDER OF PARTIAL DISMISSAL
AND OF SERVICE**

Plaintiff, currently incarcerated at the Pleasant Valley State Prison, has filed a civil rights complaint under 42 U.S.C. § 1983. The complaint was dismissed with leave to amend, and Plaintiff filed a timely amended complaint. On November 8, 2010, the amended complaint was dismissed, and Plaintiff was given leave to amend a second time. Plaintiff has filed a second amended complaint against one defendant, Correctional Officer B. Esser, an employee of Salinas Valley State Prison where plaintiff was formerly housed. For the reasons discussed below, the claims in the second amended complaint will be served, and the claims against defendants not named in the second amended complaint will be dismissed.

DISCUSSION

I. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the

1 complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or
2 fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a
3 defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be
4 liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
5 1990).

6 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements:
7 (1) that a right secured by the Constitution or laws of the United States was violated, and
8 (2) that the alleged violation was committed by a person acting under the color of state
9 law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

10 II Legal Claims

11 The allegations in Plaintiff’s second amended complaint, when liberally
12 construed, state cognizable claims against defendant B. Esser for retaliation, in violation
13 of the First Amendment, and for the use of excessive force, in violation of the Eighth
14 Amendment.

15 Plaintiff has not included in the second amended complaint the defendants named
16 in the original or first amended complaint. Defendants not named in an amended
17 complaint are no longer defendants. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th
18 Cir.1992). Consequently, the claims against the other defendants will be dismissed.

19 CONCLUSION

20 For the foregoing reasons, the Court orders as follows:

21 1. The claims against all defendants other than Correctional Officer B. Esser are
22 DISMISSED.

23 2. The Clerk of the Court shall issue summons and the United States Marshal
24 shall serve, without prepayment of fees, a copy of the second amended complaint and all
25 attachments thereto, and a copy of this order upon: Defendant **Correctional Officer B.**
26 **Esser at Salinas Valley State Prison.**

1 The Clerk shall also mail a courtesy copy of the second amended complaint and
2 this order to the California Attorney General.

3 The Clerk shall also serve a copy of this order on Plaintiff.

4 3. In order to expedite the resolution of this case, the Court orders as follows:

5 a. No later than **ninety (90) days** from the date this order is filed,
6 Defendants shall either file a motion for summary judgment or other dispositive motion,
7 or a notice to the Court that they are of the opinion that this matter cannot be resolved by
8 dispositive motion. The motion shall be supported by adequate factual documentation
9 and shall conform in all respects to Federal Rule of Civil Procedure 56.

10 **Defendants are advised that summary judgment cannot be granted, nor**
11 **qualified immunity found, if material facts are in dispute. If defendants are of the**
12 **opinion that this case cannot be resolved by summary judgment, they shall so**
13 **inform the Court prior to the date the summary judgment motion is due.**

14 All papers filed with the Court shall be promptly served on the Plaintiff.

15 b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with
16 the court and served upon defendants no later than thirty days from the date the motion is
17 filed. Plaintiff must read the attached page headed "NOTICE -- WARNING," which is
18 provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir. 1998) (en
19 banc), and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

20 If defendants file an unenumerated motion to dismiss claiming that plaintiff failed
21 to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
22 plaintiff should take note of the attached page headed "NOTICE -- WARNING
23 (EXHAUSTION)." *See Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003)

24 c. Defendants shall file a reply brief no later than **fifteen (15) days** after
25 Plaintiff's opposition is filed.

26 d. The motion shall be deemed submitted as of the date the reply brief is
27

1 due. No hearing will be held on the motion unless the Court so orders at a later date.

2 3. Discovery may be taken in accordance with the Federal Rules of Civil
3 Procedure. No further Court order under Federal Rule of Civil Procedure 30(a)(2) or
4 Local Rule 16 is required before the parties may conduct discovery.

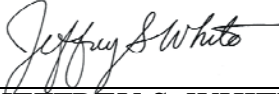
5 4. Extensions of time are not favored, though reasonable extensions will be
6 granted. Any motion for an extension of time must be filed no later than **five** days prior
7 to the deadline sought to be extended.

8 5. All communications by Plaintiff with the Court must be served on Defendant,
9 or Defendant's counsel once counsel has been designated, by mailing a true copy of the
10 document to Defendant or Defendant's counsel.

11 6. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
12 Court informed of any change of address and must comply with the Court's orders in a
13 timely fashion. Failure to do so may result in the dismissal of this action for failure to
14 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

15 IT IS SO ORDERED.

16 DATED: February 1, 2011

17 
18 _____
JEFFREY S. WHITE
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 JOHN E. JAMES III,
6 Plaintiff,

Case Number: CV07-06193 JSW

7 **CERTIFICATE OF SERVICE**

8 v.

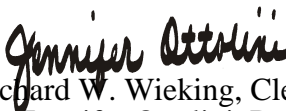
9 MIKE S. EVANS et al,
10 Defendant.

11 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
12 Court, Northern District of California.

13 That on February 1, 2011, I SERVED a true and correct copy(ies) of the attached, by placing
14 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
15 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office
16 delivery receptacle located in the Clerk's office.

17 John E. James P-13474
18 P.O. Box 5104
19 Delano, CA 93216

20 Dated: February 1, 2011


Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk

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