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

CARLOS ANTHONY
HAWTHORNE II,

No. C 08-1473 WHA (PR)

ORDER OF SERVICE

Plaintiff,

v.

R. AYERS, JR.; A. COTA; R. W.
FOX; J. PICKETT; D. LEE; T. HOLT;
S. ROBINSON; and R. CRUZ;

Defendant.

_____ /

This is a civil rights case filed pro se by a state prisoner. The complaint was dismissed with leave to amend in the initial review order. Plaintiff has amended.

DISCUSSION

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam) (citations omitted). Although in order to state a claim a complaint "does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the

1 speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations
2 omitted). A complaint must proffer "enough facts to state a claim for relief that is plausible on
3 its face." *Id.* at 1974.

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

8 One of the claims in the original complaint was an Eighth Amendment claim involving
9 conditions on the exercise yard that plaintiff used. He has omitted that claim from the amended
10 complaint, so it will be dismissed without further leave to amend. *See London v. Coopers &*
11 *Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) ("a plaintiff waives all causes of action alleged in
12 the original complaint which are not alleged in the amended complaint.").

13 Plaintiff's other claim is that the defendants, who were members of the Institutional
14 Classification Committee, classified him for a "walk alone" exercise yard because he is
15 African-American. He asserts that this was done because the yard where had he been assigned
16 for eight years had "too many blacks." This is sufficient to state an equal protection claim.

17 CONCLUSION

18 1. Plaintiff's Eighth Amendment claim against defendants arising from conditions on
19 the exercise yard is **DISMISSED** with prejudice.

20 2. The clerk shall issue summons and the United States Marshal shall serve, without
21 prepayment of fees, copies of the complaint in this matter and copies of this order upon the
22 following defendants: R. Ayers, Jr.; A. Cota; R. W. Fox; J. Pickett; D. Lee; T. Holt; S.
23 Robinson; and R. Cruz. Plaintiff say that they can be found at San Quentin State Prison.

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

25 a. No later than sixty days from the date of service, defendants shall file a
26 motion for summary judgment or other dispositive motion. If defendants are of the opinion that
27 this case cannot be resolved by summary judgment, they shall so inform the court prior to the
28 date their summary judgment motion is due.

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

6 If defendants file an unenumerated motion to dismiss claiming that plaintiff failed to
7 exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff
8 should take note of the attached page headed "NOTICE -- WARNING (EXHAUSTION)," which is
9 provided to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir.
10 2003).

11 c. If defendants wish to file a reply brief, they shall do so no later than fifteen
12 days after the date of service of the opposition.

13 d. The motion shall be deemed submitted as of the date the reply brief is due.
14 No hearing will be held on the motion unless the court so orders at a later date.

15 4. All communications by the plaintiff with the court must be served on defendants, or
16 defendants' counsel once counsel has been designated, by mailing a true copy of the document
17 to defendants or defendants' counsel.

18 5. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
19 informed of any change of address and must comply with the court's orders in a timely fashion.
20 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to
21 Federal Rule of Civil Procedure 41(b).

22 **IT IS SO ORDERED.**

23 Dated: December 15, 2008.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE