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

CARLOS ANTHONY HAWTHORNE II,)
)
Plaintiff,)
)
v.)
)
R. AYERS, JR.; A. COTA; R. W. FOX; J.)
PICKETT; D. LEE; T. HOLT; S. ROBINSON;)
and R. CRUZ;)
)
Defendants.)
_____)

No. C 08-1473 WHA (PR)
**ORDER DISMISSING AND
STRIKING IN PART SECOND
AMENDED COMPLAINT;
GRANTING REQUEST FOR
EXTENSION OF TIME;
DENYING MOTION FOR
APPOINTMENT OF COUNSEL;
REFERRING CASE TO PRO SE
PRISONER MEDIATION
PROGRAM; STAYING CASE**
(Docket Nos. 62, 64, 65)

This is a civil rights case filed pro se by a state prisoner. Plaintiff filed a first amended complaint against employees at San Quentin State Prison. The amended complaint was found to state a cognizable claim that defendants R. Ayers, Jr., A. Cota, R. W. Fox, J. Pickett, D. Lee, T. Holt, S. Robinson, and R. Cruz violated his right to equal protection by assigning him to a “walk alone” exercise yard because he is African-American. Defendants’ summary judgment motion was granted in favor of defendant Ayers but denied to the other defendants because plaintiff had created a genuine issue of material fact as to whether they discriminated against him based upon his race.

Because the first amended complaint requested forms of injunctive relief not available to him, plaintiff was given leave to file a second amended complaint in which he set forth an available form of relief, such as money damages. Plaintiff has filed a second amended complaint.

1 **A. Second Amended Complaint**

2 The second amended complaint substantially deviates from the instructions in the order
3 granting him leave to file it. First, plaintiff continues to seek relief not available to him.
4 Specifically, he requests that the court “certify” that this is a “conspiracy” action and that the
5 court travel to his exercise yard to inspect it in his presence. The court is not aware of any
6 conspiracy “certification” available to plaintiffs or what the purpose of such a “certification”
7 would be. There is no need for the court, which is not the fact-finder, to inspect his exercise
8 yard. In addition to these unavailable forms of relief, plaintiff does seek a declaratory judgment
9 that defendants denied his equal protection rights. This form of relief is available to him.
10 Plaintiff specifically states that he does not seek money damages. Plaintiff was cautioned in the
11 last order that if he failed to amend his complaint in accordance with the instructions of the
12 court, i.e. to set forth a form of relief available to him based on his equal protection claim, this
13 case would be dismissed. The case will not be dismissed because the second amended
14 complaint seeks relief available to him, i.e. his request for declaratory relief. Plaintiff’s requests
15 for relief in his second amended complaint, other than for declaratory relief for the violation of
16 is Equal Protection rights, are **STRICKEN** from the second amended complaint.

17 Also, plaintiff adds new claims and new defendants to the second amended complaint,
18 which he was not given leave to do, nor is he entitled to do so at this late stage of this case.
19 Adding new claims or defendants by way of amendment should not be allowed where it would
20 cause the opposing party undue prejudice. *See Janicki Logging Co. v. Mateer*, 42 F.3d 561, 566
21 (9th Cir. 1994) (attempt to amend complaint requiring amendment of scheduling order under
22 Fed. R. Civ. P. 16 must be based upon good cause). This is especially true where, as here, the
23 plaintiff has previously filed an amended complaint. *See Wagh v. Metris Direct, Inc.*, 363 F.3d
24 821, 830 (9th Cir. 2003). Adding new claims at this late stage, after the case has been pending
25 for more than two years and after dispositive motions have been filed, briefed and ruled upon,
26 would be unduly burdensome and prejudicial to the defendants, and will not be allowed. *See*
27 *Brass v. County of Los Angeles*, 328 F.3d 1192, 1197-98 (9th Cir. 2003) (upholding district
28 court’s finding that plaintiff waived new § 1983 arguments raised for the first time in his motion

1 for summary judgment where nothing in the counts in the amended complaint suggested he was
2 raising those arguments and he offered no excuse or justification for his failure to raise them
3 earlier). All new claims against new defendants in the second amended complaint, which
4 consists of all the claims other than the claim for the violation of the Equal Protection Clause
5 against the defendants A. Cota, R. W. Fox, J. Pickett, D. Lee, T. Holt, S. Robinson, and R.
6 Cruz, are **DISMISSED**.

7 **B. Referral to Pro Se Prisoner Mediation Program**

8 The court has established a Pro Se Prisoner Mediation Program. Certain prisoner civil
9 rights cases may be referred to a neutral magistrate judge for prisoner mediation proceedings.
10 The proceedings consist of one or more conferences as determined by the mediator. The
11 conferences are conducted at the plaintiff's institution, with the defendants or their
12 representatives attending by videoconferencing if they wish.

13 This case is **REFERRED** to Magistrate Judge Vadas pursuant to the Pro Se Prisoner
14 Mediation Program. All further proceedings in this case except those related to the mediation
15 and compliance with the subpoena as ordered above are **STAYED** pending completion of that
16 procedure.

17 The mediation proceedings shall take place within 120 days of the date this order is
18 entered. Magistrate Judge Vadas shall coordinate a time and date for a mediation proceeding
19 with all interested parties or their representatives and, within five days after the conclusion of
20 the mediation proceedings, file a report. All mediation proceedings shall be confidential and no
21 statement made therein will be admissible in any proceedings in the case, unless the parties
22 otherwise agree. No part of the mediation proceeding shall be reported, or otherwise recorded,
23 without the consent of the parties, except for any memorialization of a settlement.

24 The clerk shall mail a copy of the court file, including a copy of this order, to Magistrate
25 Judge Nandor Vadas in Eureka, California.

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Plaintiff's request for appointment of counsel (docket number 64) is **DENIED**. Plaintiff's request for an extension of time (docket number 62) is **GRANTED**. Defendant's request that the second amended complaint be screened (docket number 65) is **GRANTED**.

IT IS SO ORDERED.

Dated: October 29, 2010.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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