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

JEANINE SANTIAGO,)	
)	
Plaintiff(s),)	No. C 08-3837 VRW (PR)
)	
v.)	ORDER OF SERVICE
)	
FEDERAL BUREAU OF PRISONS, et al,)	
)	
Defendant(s).)	

Plaintiff, a prisoner at the Federal Correctional Institution in Dublin, California (FCI – Dublin), has filed a pro se complaint under Bivens v Six Unknown Named Agents, 403 US 388 (1971), challenging various aspects of her confinement at FCI – Dublin. She seeks damages and injunctive relief.

DISCUSSION

A. 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 USC § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief." Id § 1915A(b). Pro se pleadings must be liberally construed, however. Balistreri v Pacifica Police Dep't, 901 F2d 696, 699 (9th Cir 1990).

1 To state a claim under Bivens v Six Unknown Named Agents, 403 US 388
2 (1971), and its progeny, plaintiff must allege: (1) that a right secured by the
3 Constitution of the United States was violated, and (2) that the alleged violation
4 was committed by a federal actor. See Van Strum v Lawn, 940 F2d 406, 409 (9th
5 Cir 1991) (42 USC § 1983 and Bivens actions are identical save for replacement
6 of state actor under § 1983 by federal actor under Bivens).

7 B. Legal Claims

8 Plaintiff alleges that on December 3, 2006, she fell while climbing down
9 from her bunk bed and was "impaled by [a] protruding screw." Plaintiff
10 received initial medical attention, but alleges that prison medical staff have since
11 denied and/or delayed medical care for her continued pain and related maladies.
12 Plaintiff further alleges that the unsafe living conditions and inadequate medical
13 care she has experienced are the result of serious overcrowding at FCI – Dublin.

14 Deliberate indifference to safety and/or serious medical needs violates
15 the Eighth Amendment's proscription against cruel and unusual punishment. See
16 Farmer v Brennan, 511 US 825, 832-34 (1994). Deliberate indifference requires
17 that a prison official know of and disregard an excessive risk to inmate health or
18 safety. See *id* at 837. Neither negligence nor gross negligence is enough to state
19 a claim under the Eighth Amendment. See *id* at 835-36 & n4.

20 Although regrettable, plaintiff's allegations regarding her December 3,
21 2006 accident are dismissed for failure to state a claim under Bivens because they
22 do not amount to more than a claim for negligence or gross negligence. See *id*.
23 Plaintiff may well bring such a claim under the Federal Tort Claims Act, 28 USC
24 §§ 1346(b), 2671-2680 (FTCA), but she must do so in a separate action against
25 the United States. See FDIC v Meyer, 510 US 471, 478 (1994) (if suit is
26 cognizable under FTCA, remedy under FTCA is exclusive).

1 properly supported by declarations (or other sworn testimony), you cannot simply
2 rely on what your complaint says. Instead, you must set out specific facts in
3 declarations, depositions, answers to interrogatories, or authenticated documents,
4 as provided in Rule 56(e), that contradicts the facts shown in the defendant's
5 declarations and documents and show that there is a genuine issue of material
6 fact for trial. If you do not submit your own evidence in opposition, summary
7 judgment, if appropriate, may be entered against you. If summary judgment is
8 granted, your case will be dismissed and there will be no trial. Rand v Rowland,
9 154 F3d 952, 962-63 (9th Cir 1998) (en banc) (App A).

10 Plaintiff is also advised that a motion to dismiss for failure to exhaust
11 administrative remedies under 42 USC § 1997e(a) will, if granted, end your case,
12 albeit without prejudice. You must “develop a record” and present it in your
13 opposition in order to dispute any “factual record” presented by the defendants in
14 their motion to dismiss. Wyatt v Terhune, 315 F3d 1108, 1120 n14 (9th Cir
15 2003).

16 d. Defendants shall file a reply brief within 15 days of the date
17 on which plaintiff serves them with the opposition.

18 e. The motion shall be deemed submitted as of the date the
19 reply brief is due. No hearing will be held on the motion unless the court so
20 orders at a later date.

21 3. Discovery may be taken in accordance with the Federal Rules of
22 Civil Procedure. No further court order is required before the parties may
23 conduct discovery.

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

1 5. It is plaintiff's responsibility to prosecute this case. Plaintiff must
2 keep the court and all parties informed of any change of address and must comply
3 with the court's orders in a timely fashion. Failure to do so may result in the
4 dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).

5 SO ORDERED.



6
7 VAUGHN R WALKER
United States District Chief Judge