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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEITH JACKSON,
Plaintiff,

No. C 08-4770 SI (pr)

ORDER OF SERVICE

v.

BEN CURRY, warden; et al.,
Defendants.

INTRODUCTION

Keith Jackson, an inmate at the Correctional Training Facility in Soledad, filed a pro se civil rights action under 42 U.S.C. § 1983. His complaint is now before the court for review under 28 U.S.C. § 1915A.

BACKGROUND

Jackson alleges the following in his complaint: He went to Natividad Medical Center for surgery on his varicose veins. He was discharged on February 27, 2007 from Natividad and returned to CTF-Soledad. Prison staff did not comply with hospital rules and policies that patients were to depart the hospital in wheelchairs. Instead, correctional officers M. Walker (badge # 56515) and R. Botello (badge # 64751) made him walk to the prison van. Once at the prison van, correctional officer Walker failed to put a seatbelt on Jackson. Jackson alleges that, due to reckless driving on the way back to the prison by correctional officer Botello, he “was thrown from the rear bench in the van which added more pain and damage to the surgery he had just experienced.” Complaint, p. 7. He also contends that due to being thrown in the transportation vehicle, he suffered an infection at the vein stripping site. Id. At 8.

1 Warden Ben Curry is the warden of CTF-Soledad. The “institution” denied Jackson’s
2 inmate grievance about the seatbelt incident and failed to take responsibility for any injuries.
3 Curry also knows of the seatbelt issue, but hasn’t corrected it.

4 Jackson also states that he was seen by Dr. Kallisher on February 27 at the prison, and
5 was issued a wooden cane for two weeks. Dr. Kallisher allegedly told Jackson to deal with the
6 pain but did not treat the pain. Id. At 8, 11. In a declaration attached to the complaint, Jackson
7 stated that he was “heavily medicated” and was medicated on morphine when he left the
8 hospital. One exhibit to the complaint states that Dr. Kallisher referred Jackson to the podiatry
9 clinic. Another exhibit indicates that Jackson was taken back to the hospital for symptoms of
10 an infection in his leg several days after his return to the prison.

11 12 DISCUSSION

13 A federal court must engage in a preliminary screening of any case in which a prisoner
14 seeks redress from a governmental entity or officer or employee of a governmental entity. See
15 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss
16 any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted,
17 or seek monetary relief from a defendant who is immune from such relief. See id. at
18 1915A(b)(1),(2). Pro se pleadings must be liberally construed. See Balistreri v. Pacifica Police
19 Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

20 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that
21 a right secured by the Constitution or laws of the United States was violated and (2) that the
22 violation was committed by a person acting under the color of state law. See West v. Atkins,
23 487 U.S. 42, 48 (1988).

24 The Eighth Amendment’s proscription of cruel and unusual punishment requires that
25 prison officials not be deliberately indifferent to serious risks to inmate safety. To state a claim
26 for deliberate indifference to a prisoner’s safety, the prisoner needs to allege that prison officials
27 knew of an objectively serious risk of harm and acted with deliberate indifference to it. See
28 Farmer v. Brennan, 511 U.S. 825, 833 (1994); Berg v. Kincheloe, 794 F.2d 457, 459 (9th Cir.

1 1986). Liberally construed, the allegations of the complaint state a cognizable claim against
2 defendants Walker and Botello for deliberate indifference to Jackson's safety for not securing
3 him in a seatbelt when they transported him in a van to the prison. Although courts have reached
4 conflicting results, and it is debatable whether an Eighth Amendment violation is stated for not
5 using a seatbelt on a shackled prisoner during transport, the law is not clearly against plaintiff
6 as to the existence of such a claim. See, e.g., Ford v. Fletes, 211 F.3d 1273 (9th Cir. 2000)
7 (unpublished table case) (prisoner may be able to allege facts showing deliberate indifference
8 based on transporting him in handcuffs in a vehicle without doors, seat belts or restraints from
9 which he fell); Brown v. Fortner, 518 F.3d 552 (8th Cir. 2008) (allowing deliberate indifference
10 claim); Spencer v. Knapheide Truck Equip. Co, 183 F.3d 902 (8th Cir. 1999) (no deliberate
11 indifference). Jackson has not, however, stated a claim against defendant Curry based on the
12 seatbelts, as his liability appears to be based on his role as the person in charge of the prison.
13 There is no respondeat superior liability under Section 1983, i.e. no liability under the theory that
14 one is responsible for the actions or omissions of an employee. Liability under Section 1983
15 arises only upon a showing of personal participation by the defendant. Taylor v. List, 880 F.2d
16 1040, 1045 (9th Cir. 1989). The denial of the inmate appeal after the incident did not make
17 Curry liable for the seatbelt incident in which he had no personal involvement.

18 Jackson's allegations that correctional officers Botello and Walker failed to comply with
19 hospital policy that departing patients were to leave the hospital by wheelchair does not state a
20 claim upon which relief cannot be granted. Leaving a hospital on foot simply does not rise to
21 the level of an objectively serious risk to one's safety under the circumstances alleged in the
22 complaint.

23 Deliberate indifference to serious medical needs violates the Eighth Amendment's
24 proscription against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 104
25 (1976); McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds,
26 WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc); Jones v.
27 Johnson, 781 F.2d 769, 771 (9th Cir. 1986). A determination of "deliberate indifference"
28 involves an examination of two elements: the seriousness of the prisoner's medical need and the

1 nature of the defendant's response to that need. See McGuckin, 974 F.2d at 1059. Even with
2 liberal construction, the complaint does not state a claim for deliberate indifference to Jackson's
3 medical needs. He alleges that he saw Dr. Kallisher, and alleges that Dr. Kallisher did provide
4 some treatment (i.e., authorized a cane for him) and his exhibits show that Dr. Kallisher referred
5 him to the podiatry clinic. Jackson was dissatisfied that Dr. Kallisher did not adequately treat
6 his pain, but Jackson's own declaration states that he was already heavily medicated and on
7 morphine that day. Dr. Kallisher did not act with deliberate indifference in not giving more pain
8 medicine to the already-medicated inmate.

9
10 **CONCLUSION**

11 For the foregoing reasons,

12 1. The amended complaint states a claim for relief under 42 U.S.C. § 1983 against
13 defendants Walker and Botello for deliberate indifference to a risk to Jackson's safety in
14 violation of his Eighth Amendment right to be free from cruel and unusual punishment. All
15 other defendants and claims are dismissed.

16 2. The clerk shall issue a summons and the United States Marshal shall serve, without
17 prepayment of fees, the summons, a copy of the amended complaint and a copy of all the
18 documents in the case file upon M. Walker (badge # 56515) and R. Botello (badge # 64751).
19 Both of these individuals apparently are correctional officers at CTF-Soledad.

20 3. In order to expedite the resolution of this case, the following briefing schedule for
21 dispositive motions is set:

22 a. No later than **June 12, 2009**, defendants must file and serve a motion for
23 summary judgment or other dispositive motion. If defendants are of the opinion that this case
24 cannot be resolved by summary judgment, they must so inform the court prior to the date the
25 motion is due.

26 b. Plaintiff's opposition to the summary judgment or other dispositive motion
27 must be filed with the court and served upon defendants no later than **July 17, 2009**. Plaintiff
28 must bear in mind the following notice and warning regarding summary judgment as he prepares

1 his opposition to any summary judgment motion:

2 The defendants may make a motion for summary judgment by which they
3 seek to have your case dismissed. A motion for summary judgment under Rule
4 56 of the Federal Rules of Civil Procedure will, if granted, end your case. [¶]
5 Rule 56 tells you what you must do in order to oppose a motion for summary
6 judgment. Generally, summary judgment must be granted when there is no
7 genuine issue of material fact -- that is, if there is no real dispute about any fact
8 that would affect the result of your case, the party who asked for summary
9 judgment is entitled to judgment as a matter of law, which will end your case.
10 When a party you are suing makes a motion for summary judgment that is
11 properly supported by declarations (or other sworn testimony), you cannot simply
12 rely on what your complaint says. Instead, you must set out specific facts in
13 declarations, depositions, answers to interrogatories, or authenticated documents,
14 as provided in Rule 56(e), that contradict the facts shown in the defendants'
15 declarations and documents and show that there is a genuine issue of material fact
16 for trial. If you do not submit your own evidence in opposition, summary
17 judgment, if appropriate, may be entered against you. If summary judgment is
18 granted, your case will be dismissed and there will be no trial. (See Rand v.
19 Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998).

20 c. If defendants wish to file a reply brief, the reply brief must be filed and
21 served no later than **August 7, 2009**.

22 4. All communications by plaintiff with the court must be served on a defendant's
23 counsel by mailing a true copy of the document to defendant's counsel. The court may disregard
24 any document which a party files but fails to send a copy of to his opponent. Until a defendant's
25 counsel has been designated, plaintiff may mail a true copy of the document directly to
26 defendant, but once a defendant is represented by counsel, all documents must be mailed to
27 counsel rather than directly to that defendant.

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

 6. Plaintiff is responsible for prosecuting this case. Plaintiff must promptly keep the
court informed of any change of address and must comply with the court's orders in a timely
fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
pursuant to Federal Rule of Civil Procedure 41(b). Plaintiff must file a notice of change of
address in every pending case every time he is moved to a new facility.

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7. Plaintiff is cautioned that he must include the case name and case number for this case on any document he submits to this court for consideration in this case.

IT IS SO ORDERED.

Dated: March 13, 2009



SUSAN ILLSTON
United States District Judge