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United States District Court
For the Northern District of California

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

ERNESTO MARTINEZ,)	No. C 09-0069 MMC (PR)
Plaintiff,)	ORDER OF SERVICE
v.)	
MICHAEL S. EVANS, et al.,)	
Defendants.)	

On January 8, 2009, plaintiff, a California prisoner incarcerated at Corcoran State Prison and proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983. In his complaint, plaintiff alleged that correctional officers at Salinas Valley State Prison (“SVSP”), where plaintiff was incarcerated when the events at issue in the complaint occurred, had conspired to deprive him of his right to equal protection, used excessive force against him in violation of the Eighth Amendment, and retaliated against him in violation of the First Amendment. Upon reviewing the allegations in the complaint, the Court concluded that plaintiff’s excessive force claim was cognizable against defendants A. Villalobos, Machuca, Picazo, M.A. Celso, Vasquez and Crawford, but that the conspiracy and retaliation claims were subject to dismissal because plaintiff had failed to provide sufficient facts for the Court to determine whether cognizable claims for relief could be stated. Consequently, the Court dismissed the conspiracy and retaliation claims, and afforded plaintiff leave to file an amended complaint if he could allege, in good faith, facts to cure the noted pleading

1 deficiencies.

2 Now pending before the Court is plaintiff's amended complaint ("AC").

3 **DISCUSSION**

4 A. Standard of Review

5 A federal court must conduct a preliminary screening in any case in which a prisoner
6 seeks redress from a governmental entity or officer or employee of a governmental entity.
7 See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and
8 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may
9 be granted or seek monetary relief from a defendant who is immune from such relief. See id.
10 § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v.
11 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C.
12 § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the
13 Constitution or laws of the United States was violated, and (2) that the alleged violation was
14 committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42,
15 48 (1988).

16 B. Plaintiff's Claims

17 As noted, plaintiff's excessive force claim has been found cognizable. In the AC,
18 plaintiff alleges that the defendants conspired to deny him equal protection of the laws and
19 retaliate against him for the assertion of his First Amendment rights, in particular, his
20 statements to defendants that he would file, and his filing of, an administrative appeal and
21 court action with respect to defendants' use of excessive force.

22 Plaintiff's equal protection claim will be dismissed. The Court explained to plaintiff
23 in the order of dismissal with leave to amend that he must specify which facts support his
24 assertion of an equal protection violation. He has not done so, however. In particular,
25 plaintiff has alleged no facts showing any of the defendants acted with an intent or purpose to
26 discriminate against plaintiff based upon his membership in a protected class. Lee v. City of
27 Los Angeles, 250 F.3d 668, 686 (9th Cir.2001) (internal quotation and citation omitted).

28 When liberally construed, plaintiff's allegations of conspiracy and retaliation state a

1 cognizable claim for relief against defendants Celso and Villalobos, whom he alleges
2 conspired to file a retaliatory administrative rules violation report against him and to search
3 his cell, and defendants Machuca, Villalobos and Picazo, whom he alleges conspired to
4 persuade other inmates to pressure plaintiff into recanting his accusations and reports of
5 abuse. Plaintiff's additional conspiracy allegation, specifically, his allegation that after he
6 filed an administrative appeal reporting the abuses giving rise to the instant action,
7 defendants Villalobos, Machuca, Picazo, Celso, Vasquez and Crawford "removed black
8 gloves and applauded and congratulated each other on their abuses of plaintiff" (AC at 3),
9 does not, however, state a cognizable claim for a conspiracy to retaliate, as no "adverse
10 action" was taken against plaintiff. See Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir.
11 2005) ("Within the prison context, a viable claim of First Amendment retaliation entails five
12 basic elements: (1) An assertion that a state actor took some adverse action against a
13 prisoner (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled
14 the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably
15 advance a legitimate correctional goal.")

16 CONCLUSION

17 For the reasons stated above, the Court orders as follows:

18 1. Plaintiff's equal protection claim is hereby DISMISSED.

19 2. As noted, plaintiff's allegations, when liberally construed, state cognizable claims
20 for relief against the defendants listed below. The Clerk of the Court shall issue summons
21 and the United States Marshal shall serve, without prepayment of fees, a copy of the AC in
22 this matter and all attachments thereto (Docket No. 9), and a copy of this order upon the
23 following defendants, all at Salinas Valley State Prison: A. Villalobos, Machuca, Picazo,
24 M.A. Celso, Vasquez and Crawford.

25 The Clerk shall also mail a courtesy copy of the AC and this order to the California
26 Attorney General's Office.

27 3. Within **ninety (90)** days of the date this order is filed, defendants shall file a
28 motion for summary judgment or other dispositive motion with respect to the claims found to

1 be cognizable above. **If defendants are of the opinion that this case cannot be resolved**
2 **by summary judgment or other dispositive motion, defendants shall so inform the**
3 **Court prior to the date the motion for summary judgment or other dispositive motion is**
4 **due.**

5 4. The Court hereby extends the time to file an answer or waiver of answer, see 42
6 U.S.C. § 1997e(g)(1), to a date to be set after the Court has ruled on the above-referenced
7 motion or received notice that such a motion cannot be filed.

8 5. If defendants elect to file a motion to dismiss on the grounds plaintiff failed to
9 exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
10 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune,
11 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810
12 (2003).

13 6. Any motion for summary judgment shall be supported by adequate factual
14 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil
15 Procedure.

16 7. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
17 served on defendants no later than **thirty (30)** days from the date defendants' motion is filed.

18 a. In the event defendants file an unenumerated motion to dismiss under Rule
19 12(b), plaintiff is hereby cautioned as follows:¹

20 The defendants have made a motion to dismiss pursuant to Rule 12(b) of
21 the Federal Rules of Civil Procedure, on the ground you have not exhausted
22 your administrative remedies. The motion will, if granted, result in the
23 dismissal of your case. When a party you are suing makes a motion to dismiss
24 for failure to exhaust, and that motion is properly supported by declarations (or
25 other sworn testimony) and/or documents, you may not simply rely on what
26 your complaint says. Instead, you must set out specific facts in declarations,
depositions, answers to interrogatories, or documents, that contradict the facts
shown in the defendant's declarations and documents and show that you have
in fact exhausted your claims. If you do not submit your own evidence in
opposition, the motion to dismiss, if appropriate, may be granted and the case
dismissed.

27 ¹The following notice is adapted from the summary judgment notice to be given to pro
28 se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).
See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

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2 b. In the event defendants file a motion for summary judgment, the Ninth
3 Circuit has held that the following notice should be given to plaintiffs:

4 The defendants have made a motion for summary judgment by which
5 they seek to have your case dismissed. A motion for summary judgment under
6 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

7 Rule 56 tells you what you must do in order to oppose a motion for
8 summary judgment. Generally, summary judgment must be granted when there
9 is no genuine issue of material fact--that is, if there is no real dispute about any
10 fact that would affect the result of your case, the party who asked for summary
11 judgment is entitled to judgment as a matter of law, which will end your case.
12 When a party you are suing makes a motion for summary judgment that is
13 properly supported by declarations (or other sworn testimony), you cannot
14 simply rely on what your complaint says. Instead, you must set out specific
15 facts in declarations, depositions, answers to interrogatories, or authenticated
16 documents, as provided in Rule 56(e), that contradict the facts shown in the
17 defendants' declarations and documents and show that there is a genuine issue
18 of material fact for trial. If you do not submit your own evidence in opposition,
19 summary judgment, if appropriate, may be entered against you. If summary
20 judgment is granted in favor of defendants, your case will be dismissed and
21 there will be no trial.

22 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
23 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S.
24 317 (1986) (holding party opposing summary judgment must come forward with evidence
25 showing triable issues of material fact on every essential element of his claim). Plaintiff is
26 cautioned that failure to file an opposition to defendants' motion for summary judgment may
27 be deemed to be a consent by plaintiff to the granting of the motion, and granting of
28 judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir.
1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

8. Defendants shall file a reply brief no later than **fifteen (15)** days after plaintiff's
opposition is filed.

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

10. All communications by the plaintiff with the Court must be served on defendants,
or defendants' counsel once counsel has been designated, by mailing a true copy of the
document to defendants or defendants' counsel.

11. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.


1 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is
2 required before the parties may conduct discovery.

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

7 13. Any motion for an extension of time must be filed no later than the deadline
8 sought to be extended and must be accompanied by a showing of good cause.

9 IT IS SO ORDERED.

10 DATED: April 19, 2010

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12 MAXINE M. CHESNEY
13 United States District Judge
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