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NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | | |
|--------------------|---|----------------------------|
| RON PERNELL WALLS, |) | No. C 09-01959 JF (PR) |
| |) | |
| Plaintiff, |) | ORDER OF SERVICE; |
| |) | DIRECTING DEFENDANTS TO |
| vs. |) | FILE DISPOSITIVE MOTION OR |
| |) | NOTICE REGARDING SUCH |
| A. D. LEE, et al., |) | MOTION; INSTRUCTIONS TO |
| |) | CLERK |
| Defendants. |) | |
| |) | |
| _____ |) | |

Plaintiff, a California prisoner incarcerated at California State Prison - Solano in Vacaville, filed the instant civil rights action in pro se pursuant to 42 U.S.C. § 1983 against prison officials at San Quentin State Prison (“SQSP”) for unconstitutional acts. Plaintiff’s motion for leave to proceed in forma pauperis will be granted in a separate written order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a

1 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify
2 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a
3 claim upon which relief may be granted or seek monetary relief from a defendant who is
4 immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be
5 liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
6 1988).

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

11 **B. Plaintiff's Claims**

12 Plaintiff's claims arise from a rules violation report ("RVR") charging him with
13 participating in a prison riot which occurred on November 28, 2005 at SQSP. Plaintiff
14 challenged the RVR, and was found not guilty thereof in an informal appeal response
15 issued on March 4, 2009. (Compl. at 14-15.)

16 Plaintiff alleges the following claims: (1) Defendants subjected Plaintiff to
17 retaliation in violation of the First Amendment by increasing Plaintiff's custody level
18 points resulting in a transfer to a higher security prison after Plaintiff filed a grievance
19 against them for filing a false RVR; (2) Defendants violated Plaintiff's right to due
20 process by placing him in administrative segregation ("ad-seg") without providing
21 procedural protections; and (3) Defendants violated Plaintiff's constitutional rights by
22 knowingly using false information to place him in ad-seg. Plaintiff alleges that he has
23 exhausted administrative remedies for these claims. Plaintiff seeks declaratory relief and
24 damages. Liberally construed, Plaintiff's claims are cognizable under § 1983.

25 **C. Defendant John Doe**

26 Plaintiff names Defendants John Doe One in his complaint. Although the use of
27 "John Doe" to identify a defendant is not favored in the Ninth Circuit, see Gillespie v.
28 Civiletti, 629 F.2d 637, 642 (9th Cir. 1980); Wiltsie v. Cal. Dep't of Corrections, 406 F.2d

1 515, 518 (9th Cir. 1968), situations may arise where the identity of alleged defendants
2 cannot be known prior to the filing of a complaint. In such circumstances, the plaintiff
3 should be given an opportunity through discovery to identify the unknown defendants,
4 unless it is clear that discovery would not uncover their identities or that the complaint
5 should be dismissed on other grounds. See Gillespie, 629 F.2d at 642; Velasquez v.
6 Senko, 643 F. Supp. 1172, 1180 (N.D. Cal. 1986). Accordingly, Defendant John Doe
7 One is DISMISSED from this action. If through discovery Plaintiff is able to identify the
8 unknown defendant, he may then motion the Court for leave to amend to name the
9 intended defendant and to issue summons upon him. See Gillespie, 629 F.2d at 642;
10 Barsten v. Dep't of the Interior, 896 F.2d 422, 423-24 (9th Cir. 1990).

11 12 CONCLUSION

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

14 1. Defendant John Doe One is DISMISSED from this action. The Clerk shall
15 terminate this defendant from the docket.

16 2. The Clerk of the Court shall issue summons and the United States Marshal
17 shall serve, without prepayment of fees, a copy of the complaint in this matter, all
18 attachments thereto, and a copy of this order upon **Lieutenant A. D. Lee, Sergeant T. A.**
19 **Lee, Lieutenant L. Rodriguez, Correctional Officer R. Grant and Counselor W.**
20 **Burkhart at San Quentin State Prison.** The Clerk shall also mail courtesy copies of the
21 Complaint and this order to the California Attorney General's Office.

22 3. No later than **sixty (60) days** from the date of this order, Defendants shall
23 file a motion for summary judgment or other dispositive motion with respect to the claims
24 in the complaint found to be cognizable above, or, within such time, notify the Court that
25 Defendants are of the opinion that this case cannot be resolved by such a motion.

26 a. If Defendants elect to file a motion to dismiss on the grounds that
27 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
28 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to

1 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.
2 Terhune, 540 U.S. 810 (2003).

3 b. Any motion for summary judgment shall be supported by adequate
4 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
5 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**
6 **nor qualified immunity found, if material facts are in dispute. If Defendants are of**
7 **the opinion that this case cannot be resolved by summary judgment, they shall so**
8 **inform the Court prior to the date the summary judgment motion is due.**

9 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court
10 and served on Defendants no later than **thirty (30) days** from the date Defendants'
11 motion is filed.

12 a. In the event Defendants file an unenumerated motion to dismiss
13 under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

14 The Defendants have made a motion to dismiss pursuant to Rule
15 12(b) of the Federal Rules of Civil Procedure, on the ground you have not
16 exhausted your administrative remedies. The motion will, if granted, result
17 in the dismissal of your case. When a party you are suing makes a motion
18 to dismiss for failure to exhaust, and that motion is properly supported by
19 declarations (or other sworn testimony) and/or documents, you may not
20 simply rely on what your complaint says. Instead, you must set out specific
21 facts in declarations, depositions, answers to interrogatories, or documents,
22 that contradict the facts shown in the Defendant's declarations and
23 documents and show that you have in fact exhausted your claims. If you do
24 not submit your own evidence in opposition, the motion to dismiss, if
25 appropriate, may be granted and the case dismissed.

26 b. In the event Defendants file a motion for summary judgment, the
27 Ninth Circuit has held that the following notice should be given to Plaintiff:

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

Rule 56 tells you what you must do in order to oppose a motion for

¹ The following notice is adapted from the summary judgment notice to be given to pro 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.

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

9 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).

10 Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and
11 Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment
12 must come forward with evidence showing triable issues of material fact on every
13 essential element of his claim). Plaintiff is cautioned that failure to file an opposition to
14 Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to
15 the granting of the motion, and granting of judgment against plaintiff without a trial. See
16 Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18
17 F.3d 651, 653 (9th Cir. 1994).

18 5. Defendants shall file a reply brief no later than **fifteen (15) days** after
19 Plaintiff's opposition is filed.

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

22 7. All communications by the Plaintiff with the Court must be served on
23 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
24 copy of the document to Defendants or Defendants' counsel.

25 8. Discovery may be taken in accordance with the Federal Rules of Civil
26 Procedure. No further Court order is required before the parties may conduct discovery.

27 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
28 Court informed of any change of address and must comply with the Court's orders in a

1 timely fashion. Failure to do so may result in the dismissal of this action for failure to
2 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

3 IT IS SO ORDERED.

4 DATED: 8/17/09
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JEREMY FOGEL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

RON PERNAELL WALLS,
Plaintiff,

Case Number: CV09-01959 JF

CERTIFICATE OF SERVICE

v.

AD. LEE, et al.,

Defendants.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 8/26/09, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Ron Pernell Walls P-54358
California State Prison-Solano
PO Box 4000
(7-237)
Vacaville, CA 95696

Dated: 8/26/09

Richard W. Wieking, Clerk