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

HAROLD SHAMBURGER,)	No. C 09-3745 JSW (PR)
)	
Plaintiff,)	ORDER OF SERVICE;
)	DIRECTING DEFENDANT TO FILE
)	DISPOSITIVE MOTION OR
v.)	NOTICE THAT SUCH MOTION IS
)	NOT WARRANTED
)	
M. DODSON, Correctional Sergeant and)	
A. MURPHY, Correctional Sergeant,)	(Docket No. 2)
)	
Defendants.)	

INTRODUCTION

Plaintiff, a prisoner of the State of California currently incarcerated at Pelican Bay State Prison, in Crescent City, California, has filed this pro se civil rights complaint under 42 U.S.C § 1983 alleging that Defendants have interfered with his access to the courts. Plaintiff has also filed an application to proceed *in forma pauperis* which is GRANTED in a separate order filed simultaneously. This Court now reviews the Complaint pursuant to 28 U.S.C. § 1915A and serves the complaint as set forth below.

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 U.S.C. § 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

1 fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a
2 defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be
3 liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
4 1990).

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

9 Prisoners have a constitutional right of access to the courts. *Lewis v. Casey*, 518
10 U.S. 343, 350 (1996). To establish a claim for any violation of the right of access to the
11 courts, the prisoner must prove that there was an inadequacy in the prison's legal access
12 program that caused him an actual injury. *See id.* at 350-55. To prove an actual injury,
13 the prisoner must show that the inadequacy in the prison's program hindered his efforts to
14 pursue a non-frivolous claim concerning his conviction or conditions of confinement. *Id.*
15 at 354-55.

16 Having reviewed the complaint, the Court finds Plaintiff's allegations, when
17 liberally construed, state a cognizable claim that Defendants violated his right to access
18 the courts by stealing his legal affidavits. While Plaintiff does not establish in the
19 pleadings currently before the court the actual injury suffered, his allegations are
20 sufficient to warrant service of the complaint on Defendants.

21 CONCLUSION

22 For the foregoing reasons, the Court orders as follows:

23 1. The Clerk of the Court shall issue summons and the United States Marshal
24 shall Clerk of the Court shall issue summons and the United States Marshal shall serve,
25 without prepayment of fees, a copy of the Complaint and all attachments thereto, and a
26 copy of this order upon: **Pelican Bay Correctional Sergeants M. Dodson and A.**
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1 **Murphy at Pelican Bay State Prison.** The Clerk shall also mail a courtesy copy of the
2 Complaint, all attachments thereto, and this order to the California Attorney General's
3 Office and serve a copy of this order on Plaintiff.

4 2. No later than **sixty (60) days** from the date of this order, Defendant shall either
5 file a motion for summary judgment or other dispositive motion, or a notice to the Court
6 that he/she is of the opinion that this matter cannot be resolved by dispositive motion.
7 The motion shall be supported by adequate factual documentation and shall conform in
8 all respects to Federal Rule of Civil Procedure 56.

9 a. If Defendant elects to file a motion to dismiss on the grounds that
10 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
11 § 1997e(a), Defendant **shall** do so in an unenumerated Rule 12(b) motion pursuant to
12 *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 & n.4 (9th Cir. 2003).

13 b. Any motion for summary judgment shall be supported by adequate
14 factual documentation and shall conform in all respects to Federal Rule of Civil
15 Procedure 56. **Defendant is advised that summary judgment cannot be granted, nor**
16 **qualified immunity found, if material facts are in dispute. If Defendant is of the**
17 **opinion that this case cannot be resolved by summary judgment, she/he shall so**
18 **inform the Court prior to the date the summary judgment motion is due.**

19 All papers filed with the Court shall be promptly served on the Plaintiff.

20 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
21 served on Defendant no later than **thirty (30) days** from the date Defendant's motion is
22 filed.

23 a. In the event the Defendant files an unenumerated motion to dismiss
24 under Rule 12(b), Plaintiff is hereby cautioned pursuant to *Wyatt v. Terhune*, 315 F.3d
25 1108, 1119-20 & n.4 (9th Cir. 2003):

26 If defendants file an unenumerated motion to dismiss for failure to
27 exhaust, they are seeking to have your case dismissed. If the motion is

1 granted it will end your case.

2 You have the right to present any evidence you may have which
3 tends to show that you did exhaust your administrative remedies. Such
4 evidence may be in the form of declarations (statements signed under
5 penalty of perjury) or authenticated documents, that is, documents
6 accompanied by a declaration showing where they came from and why
7 they are authentic, or other sworn papers, such as answers to
8 interrogatories or depositions.

9 If defendants file a motion to dismiss and it is granted, your case
10 will be dismissed and there will be no trial.

11 b. In the event Defendant files a motion for summary judgment, the Ninth
12 Circuit has held that the following notice should be given to pro se Plaintiffs:

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

17 Rule 56 tells you what you must do in order to oppose a motion for
18 summary judgment. Generally, summary judgment must be granted when
19 there is no genuine issue of material fact--that is, if there is no real dispute
20 about any fact that would affect the result of your case, the party who
21 asked for summary judgment is entitled to judgment as a matter of law,
22 which will end your case. When a party you are suing makes a motion for
23 summary judgment that is properly supported by declarations (or other
24 sworn testimony), you cannot simply rely on what your complaint says.
25 Instead, you must set out specific facts in declarations, depositions,
26 answers to interrogatories, or authenticated documents, as provided in Rule
27 56(e), that contradict the facts shown in the defendants' declarations and
28 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.

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

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

HAROLD B. SHANBURGER,
Plaintiff,

Case Number: CV09-03745 JSW

CERTIFICATE OF SERVICE

v.


M DODSON et al,
Defendant.

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 January 25, 2010, 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.

Harold B. Shamburger
D-16530
P.O. Box 7500
CrescentCity, CA 95531

Dated: January 25, 2010


Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk