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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
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8 AARON McCOY,

No. C 09-4768 SI (pr)

9 Plaintiff,

ORDER OF SERVICE

10 v.

11 MIKE EVANS, warden; et al.,

12 Defendants.
13 _____/

14 **INTRODUCTION**

15 Aaron McCoy, a California prisoner currently housed at Corcoran State Prison, filed this
16 pro se civil rights action under 42 U.S.C. § 1983, concerning events at Salinas Valley State
17 Prison where he previously was housed. His complaint is now before the court for review under
18 28 U.S.C. § 1915A.
19

20 **BACKGROUND**

21 In his complaint, Aaron McCoy alleges the following: On July 14, 2005, Salinas Valley
22 was placed on lock-down after an attack on correctional officers. On October 17, 2005, facility
23 captain Ponder wrote a memo to all facility C staff and inmates explaining that the facility had
24 taken on a new mission, and that inmates from facility D would be moved to facility C.
25 Defendant Ponder drafted a CDC-128B "contract" that "basically was an agreement between
26 inmate and prison officials and staff that the signing inmate would obey all rules and regulations
27 and not participate in 'gang violence' and basically 'behave himself.'" Complaint, p. 6. This
28 reiterated behavior that was already mandated by prison rules and regulations.

On November 1, 2005, McCoy was interviewed. He answered questions and agreed to

1 behave himself, but he did not sign the CDC-128 contract. McCoy states that after reading the
2 contract, he "was left confused and unsure if he would somehow forfeit his legal or ADA rights
3 by signing the document. Therefore, plaintiff did not refuse to sign the contract but instead
4 wrote on the contract that he was CCCMS and would like to first speak to his clinician (mental
5 health staff) and Coleman attorneys before signing, which was 'reasonable accommodation.'" Id.
6 at 7.¹

7 On November 4, 2005, McCoy received a memorandum from captain Ponder that stated
8 that McCoy "was now identified as failing to successfully complete the interview process and
9 was therefore deemed 'a potential threat to staff or inmates.'" Id. at 8. As a result, his canteen
10 purchases were limited, he could not receive quarterly food packages, and he was not eligible
11 for contact visits with his fiancée. He also apparently was deprived of exercise for a lengthy
12 period of time. Id. at 17.

13 On November 29, 2005, McCoy tried to explain to captain Ponder, via a correctional
14 officer, that he had mental health concerns that had not been taken into account in the CDC-128
15 contract. Captain Ponder wasn't interested in his excuse/explanation. Ponder said that McCoy
16 was on his "conspiracy list." Id. at 12.

17 McCoy wrote to the Secretary of the California Department of Corrections and
18 Rehabilitation complaining about his problem. As a result, another interview of McCoy was
19 conducted on January 30, 2006, but there was no clinician/staff assistant present. At this point,
20 McCoy signed the CDC-128 contract, but above his signature "he wrote basically that as a
21 CCCMS inmate he in no way intended to give up any of his ADA rights or legal rights." Id. at
22 15. By this time, inmates who signed the contract without reservation were being allowed access
23 to outdoor exercise, canteen, contact visits, employment and (for CCCMS inmates) group
24 therapy.

25
26 ¹McCoy also states that he had a low reading score that "mandated" that he be provided
27 with a staff assistant under 15 Cal. Code Regs. § 3318. That regulation provided him no rights
28 with regard to the contract because it only applies when the inmate is facing discipline on a
serious rule violation report, which plainly was not the case here. See 15 Cal. Code Regs. §
3315, 3318.

1 McCoy was informed he would be put in the behavior modification unit ("BMU"), a
2 highly restrictive environment for inmates who were deemed to be program failures. Among
3 other things, BMU inmates' property was sent home, and they had to attend a three-step program
4 to be released. They also apparently were denied exercise, and had to be in mechanical restraints
5 whenever they went anywhere, such as the law library. See 18.² These restrictions were ordered
6 by Ponder and warden Evans. McCoy was interviewed by a clinician because he had
7 complained to class counsel in the Coleman class action. While being interviewed by her,
8 correctional officers searched his cell and confiscated 50+ Seroquel tablets, which he referred
9 to as his "'suicide kit.'" Id. at 17.

10 On March 13, 2006, McCoy was told by sergeant Kircher that he and his brother (who
11 was in the same facility) were considered program failures by captain Ponder for challenging
12 the CDC-128 contract, that they would not be offered further opportunities to program, and that
13 they were scheduled to be placed in the BMU. Kircher wouldn't listen to McCoy's complaints
14 about the situation.

15 On March 15, 2006, C/O J. Rodriguez told McCoy to pack up because he was being sent
16 to BMU. McCoy expressed suicidal thoughts and was put on suicide watch in a filthy holding
17 cell but was not taken to the correctional treatment center. This upset him further, so he began
18 to hallucinate and started banging his head on the wall. C/O S. Harper activated his alarm for
19 staff assistance. McCoy was removed from the cell and examined by a medical staff member
20 who found a contusion and said that McCoy needed to go to the infirmary. C/O Singh and C/O
21 Darrett began escorting him roughly and, when he complained, C/O Lutes called them back.
22 They then put McCoy in tight and painful mechanical restraints and returned him to a holding
23 cell where he remained for about 7 hours. He complained to C/O Harper to no avail. At 11:00
24 p.m. C/O Sharps, Carlos and Troncoso escorted him to the correctional treatment center but
25 refused to give him his shoes. It was painful to walk over sharp rocks, stones and pebbles on the
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28 ²The complaint is somewhat unclear as to which restrictions resulted from the lock-down and
which restrictions resulted from the BMU placement. The lack of clarity on this point does not affect
whether the complaint states a claim upon which relief may be granted.

1 half mile walk to the correctional treatment center.

2 The next day, March 16, 2006, he was sent to the BMU, where his brother and about 20
3 other inmates were housed. Their property had been confiscated, but it was returned the next
4 day. He had a "short stay in the BMU" where he was verbally harassed by C/O Fassbender. Id.
5 at 24. He complained to Fassbender about, among other things, her treatment of McCoy's
6 brother. Fassbender responded by transferring the brother to a separate section. On March 21,
7 2006, McCoy complained to lieutenant Celaya about Fassbender – thinking that, since Celaya
8 was engaged to marry Fassbender, he would help stop her harassment. Lt Celaya angrily
9 responded, "you're going down!" Id. at 25. On March 22, 2006, defendant Fassbender falsified
10 a rule violation report for "disrespect with potential to violence." On March 26, 2006, she
11 falsified another rule violation report for "sustained masturbation w/out exposure." Id. at 25.
12 On March 27, 2006, he was sent to administrative segregation for the second rule violation
13 report. The rule violation report was later reduced to "sexually based verbal epithets." Id. at 26.
14 On March 28, 2006, he was interviewed by captain Ponder about the ad-seg placement. Captain
15 Ponder admitted he was upset at the challenges to his programming, BMU, and CDC-128
16 contract. He told McCoy that he and his brother "won't have the last laugh." Id. at 27. On
17 April 4, 2006, McCoy learned from C/O J. Rodriguez that he was accused of conspiring with his
18 brother. Lt. Celaya ordered him placed in ad-seg again. The alleged conspiracy was
19 investigated and found to be untrue. On June 22, 2006, he received another CDC-114 ad-seg
20 placement notice so that prison staff could investigate alleged gang activity. The matter was
21 investigated and McCoy was cleared of any wrongdoing. On July 26, 2006, he received another
22 CDC-114 ad-seg placement notice, informing he would be retained in ad-seg pending transfer
23 to another institution. He later learned that captain Ponder put a chrono³ in his file that stated
24 that, after investigation, staff could not determine whether the information about the McCoy
25 brothers conspiring to assault staff or form a new prison gang was valid. The chrono directed
26 that the two brothers were to be kept apart. McCoy states that he and his brother never caused
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³A "chrono" is prison parlance for a memorandum.

1 a single disturbance while on facility C and programmed positively until they asserted their
2 constitutional rights regarding the interview process.

3 McCoy also alleges that, on November 9, 2006, some inmates flooded the top tier and
4 staff refused to promptly clean it up. He slipped and fell in a puddle the next day. He injured
5 his back. Id. at 32-34. The defendants for this claim – Winkfield, Carrasco and Delgado -- are
6 different from those for the other claims.

7 DISCUSSION

8 A federal court must engage in a preliminary screening of any case in which a prisoner
9 seeks redress from a governmental entity or officer or employee of a governmental entity. See
10 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss
11 any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted,
12 or seek monetary relief from a defendant who is immune from such relief. See id. at
13 1915A(b)(1),(2). Pro se pleadings must be liberally construed. See Balistreri v. Pacifica Police
14 Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

15 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that
16 a right secured by the Constitution or laws of the United States was violated and (2) that the
17 violation was committed by a person acting under the color of state law. See West v. Atkins,
18 487 U.S. 42, 48 (1988).

19 "Within the prison context, a viable claim of First Amendment retaliation entails five
20 basic elements: (1) An assertion that a state actor took some adverse action against an inmate
21 (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
22 exercise of his First Amendment rights, and (5) the action did not reasonably advance a
23 legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005)
24 (footnote omitted). Liberally construed, the complaint states a cognizable claim against
25 defendants Ponder, Evans, Kircher, Rodriguez, Harper, Singh, Darrett, Lutes, Sharps, Carlos,
26 Troncoso, Fassbender, and Celaya for retaliation based on the adverse actions they allegedly
27 took as payback for McCoy voicing his objection that he needed to consult with his clinician/aid
28 before he signed the CDC-128 contract, and for writing a note of objection when he later signed

1 the CDC-128 contract. The complaint also states a cognizable claim against Celaya and
2 Fassbender for retaliation based on the adverse actions they allegedly took as payback for
3 McCoy complaining about Fassbender's harassment.⁴

4 The complaint does not state a claim for an ADA violation. Although McCoy describes
5 it as a reasonable accommodation of his mental illness, what he wanted was legal advice as to
6 the CDC-128 contract. See Complaint, p. 7. McCoy allegedly wanted to talk to a clinician and
7 attorney before signing the CDC-128 contract to learn if he was forfeiting legal and ADA rights.
8 The duty to provide “reasonable accommodations” or “reasonable modifications” for disabled
9 people under Title II of the ADA arises only when a policy, practice or procedure discriminates
10 on the basis of disability. See Weinreich v. Los Angeles County MTA, 114 F.3d 976, 979 (9th
11 Cir.) (no claim under ADA or Rehabilitation Act where disabled individual's exclusion from
12 transit program was based on his financial inability to provide updated information that he still
13 qualified for program, not on his disability), cert. denied, 522 U.S. 971 (1997). The complaint
14 does not indicate that the CDC-128 contract, or the BMU program Ponder initiated discriminated
15 on the basis of a disability – indeed, McCoy alleges that everyone who did not sign the contract
16 faced the severe repercussions. The CDC-128 contract itself said nothing about legal rights
17 being forfeited, and nothing about the forfeiture of ADA rights. See Thomas, slip op. at 10293-
18 94. The alleged failure to provide legal advice, or to allow an inmate to obtain legal advice, did
19 not amount to the denial of a reasonable accommodation. The ADA claim is dismissed. The
20 court notes, however, that the retaliation claim discussed above does involve the ADA indirectly,
21 as McCoy's complaint indicates he was retaliated against when he tried to protest the perceived
22 intrusion on his legal and ADA rights.

23 The complaint, liberally construed, states a cognizable due process claim against
24 defendants Ponder, Kircher, and Evans based on the absence of process before the BMU
25 placement. The BMU allegedly involved severe restrictions on inmates' privileges and conduct.

27 ⁴Fassbender's verbal harassment is not independently actionable, however. See Keenan
28 v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996), amended 135 F.3d 1318 (9th Cir. 1998)
(disrespectful and assaultive comments by prison guard not enough to implicate 8th
Amendment).

1 Giving them the liberal construction to which they are entitled, the allegations of the complaint
2 appear to be sufficient to allege a deprivation of a liberty interest of real substance which
3 requires that due process be provided in connection therewith. See generally Toussaint v.
4 McCarthy, 801 F.2d 1080, 1100 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987)(when prison
5 officials initially determine whether a prisoner is to be segregated for administrative reasons and
6 a liberty interest of real substance is implicated, due process requires that they hold an informal
7 nonadversary hearing within a reasonable time after the prisoner is segregated, inform the
8 prisoner of the charges against him or the reasons segregation is being considered, and allow the
9 prisoner to present his views); Superintendent v. Hill, 472 U.S. 445, 455 (1985) (due process
10 also requires that there be an evidentiary basis for the prison officials' decision to place an
11 inmate in ad-seg).

12 The complaint does not state a due process claim for the several trips to administrative
13 segregation because they each appear to have been too short in duration and because McCoy has
14 not alleged anything to suggest the conditions were any worse than in the BMU, where he was
15 located before his movement to ad-seg.

16 The complaint states a cognizable Eighth Amendment claim for the denial of exercise
17 during plaintiff's stay in the BMU and/or before he was released to general population.
18 See Thomas v. Ponder, No. 09-15522, slip op. 10285 (9th Cir. July 16, 2010). Although the
19 complaint does not identify the exact number of weeks that McCoy was deprived of exercise,
20 he does suggest it was many weeks; defendants can learn the duration of the alleged deprivation
21 through discovery from plaintiff. Liberally construed, the complaint appears to link defendants
22 Ponder, Evans, Kircher, Fassbender, and Celaya to this claim.

23 The complaint states a cognizable Eighth Amendment claim for deliberate indifference
24 to his medical needs for the handling of the suicide watch on March 15, 2006, and the failure to
25 take him to the infirmary after a member of the medical staff said he needed to go to the
26 infirmary. The complaint states a claim against C/O Rodriguez, Harper, Singh, Darrett, and
27 Lutes for deliberate indifference to his medical needs. Liberally construed, the complaint also
28 states a cognizable deliberate indifference claim against C/O Sharps, Carlos and Troncoso for

1 requiring him to walk barefoot over sharp rocks, stones and pebbles for a half mile while in
2 mechanical restraints to get to the infirmary once he was finally allowed to go there.

3 Finally, the deliberate indifference to safety and medical needs claims regarding the slip
4 and fall on November 9, 2006 are dismissed because they are not properly joined with the other
5 claims. The claim about the slippery floor and the problems with medical care after McCoy fell
6 in a puddle in ad-seg are not properly joined with the claims the court has found cognizable
7 because no "right to relief is asserted against them jointly, severally, or in the alternative with
8 respect to or arising out of the same transaction, occurrence, or series of transactions or
9 occurrences" and no "question of law or fact common to all defendants will arise in the action."
10 Fed. R. Civ. P. 20(a)(2). These claims therefore are dismissed without prejudice to McCoy
11 filing another action in which he asserts those claims. Defendants Winkfield, Carrasco and
12 Delgado are dismissed.

14 CONCLUSION

15 For the foregoing reasons,

16 1. The second amended complaint states several claims for relief under 42 U.S.C. §
17 1983 for retaliation, a due process violation in connection with the placement in the BMU, an
18 Eighth Amendment violation based on the denial of exercise, and an Eighth Amendment claim
19 based on deliberate indifference to medical needs for the March 15, 2006 suicide watch incident.
20 The claim concerning the November 9, 2006 fall on the wet floor and medical needs thereafter
21 is dismissed as improperly joined.

22 2. The clerk shall issue a summons and the United States Marshal shall serve, without
23 prepayment of fees, the summons, a copy of the second amended complaint and a copy of all the
24 documents in the case file upon the following persons, all of whom apparently work at Salinas
25 Valley State Prison, and all of whom (except for the warden) work on Facility C.

- 26 - warden Mike Evans
- 27 - facility captain G. Ponder
- 28 - correctional sergeant Kircher
- correctional officer S. Fassbender (possibly a/k/a S. Celaya)
- correctional officer J. Celaya

- 1 - correctional officer J. Rodriguez
- 2 - correctional officer S. Harper
- 3 - correctional sergeant Lutes
- 4 - correctional officer Darrett
- 5 - correctional officer Singh
- 6 - correctional officer C. R. Sharps
- 7 - correctional officer Carlos
- 8 - correctional officer Troncoso

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

11 a. No later than **October 22, 2010**, defendants must file and serve a motion
12 for summary judgment or other dispositive motion. If defendants are of the opinion that this case
13 cannot be resolved by such a motion, they must so inform the court prior to the date the motion
14 is due.

15 b. Plaintiff's opposition to the summary judgment or other dispositive motion
16 must be filed with the court and served upon defendant no later than **November 26, 2010**.
17 Plaintiff must bear in mind the following notice and warning regarding summary judgment as
18 he prepares his opposition to any summary judgment motion:

19 The defendants may make a motion for summary judgment by which they seek to
20 have your case dismissed. A motion for summary judgment under Rule 56 of the
21 Federal Rules of Civil Procedure will, if granted, end your case. [¶] Rule 56 tells
22 you what you must do in order to oppose a motion for summary judgment.
23 Generally, summary judgment must be granted when there is no genuine issue of
24 material fact -- that is, if there is no real dispute about any fact that would affect
25 the result of your case, the party who asked for summary judgment is entitled to
26 judgment as a matter of law, which will end your case. When a party you are
27 suing makes a motion for summary judgment that is properly supported by
28 declarations (or other sworn testimony), you cannot simply rely on what your
complaint says. Instead, 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, your
case will be dismissed and there will be no trial. (See Rand v. Rowland, 154 F.3d
952, 962-63 (9th Cir. 1998).

Plaintiff also should take note that a defendant may file a motion to dismiss for failure to exhaust
administrative remedies instead of, or in addition to, a motion for summary judgment. A motion
to dismiss for failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a) will, if
granted, result in the termination of the action. The plaintiff must “develop a record” and present

1 it in his opposition to dispute any “factual record” presented by a defendant’s motion to dismiss.
2 Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003).

3 c. If defendant wishes to file a reply brief, the reply brief must be filed and
4 served no later than **December 17, 2010**.

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

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

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


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

21 8. Plaintiff's motion for referral to pro se prisoner settlement program is DENIED as
22 premature. (Docket # 3.) The court will not consider referring a case to that program until the
23 defendants have been served with process, and that has not yet occurred.

24 9. Plaintiff's request for the status of this case is GRANTED. (Docket # 5.) This
25 order does the initial screening and now some of the defendants will be served with process.

26 IT IS SO ORDERED.

27 Dated: July 26, 2010

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SUSAN ILLSTON
United States District Judge