

United States District Court
For the Northern District of California

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E-Filed 8/23/10

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ROBERT I. MASK,
Plaintiff,

No. C 10-0758 RS (PR)

ORDER OF SERVICE

v.

E. MEDIAN, et al.,
Defendants.

This is a federal civil rights action filed by a *pro se* state prisoner pursuant to 28 U.S.C. § 1983 in which it is alleged that defendants, officers and employees at Salinas Valley State Prison (“SVSP”), violated his First and Eighth Amendment rights.

DISCUSSION

A. 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 it, if the complaint “is frivolous, malicious, or fails to state a claim upon

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

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

8 **B. Legal Claims**

9 Plaintiff alleges that in 2009, (1) defendant E. Medina, the appeals coordinator at
10 SVSP, failed to process his inmate appeal and denied him access to the grievance process,
11 violating his First Amendment rights, and thereby denying him access to proper medical care
12 in violation of his Eighth Amendment rights; (2) defendants Maria Hill, S. Keller Halls,
13 Feichter, L. Fox, and A. Joaquin provided constitutionally inadequate medical care to
14 plaintiff; and (3) Brikholm Orthopedics, a private company, withheld his knee brace for more
15 than a year in violation of the Eighth Amendment. Liberally construed, plaintiff’s claims
16 appear to be cognizable under § 1983.

17 **MOTION**

18 Plaintiff’s motion for the appointment of counsel (Docket No. 13) is DENIED without
19 prejudice for lack of exceptional circumstances. *See Rand v. Rowland*, 113 F.3d 1520, 1525
20 (9th Cir. 1997). The decision to request counsel to represent an indigent litigant under
21 § 1915 is within “the sound discretion of the trial court and is granted only in exceptional
22 circumstances.” *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). A finding of the
23 “exceptional circumstances” of the plaintiff seeking assistance requires an evaluation of the
24 likelihood of the plaintiff’s success on the merits and an evaluation of the plaintiff’s ability to
25 articulate his claims pro se in light of the complexity of the legal issues involved. *See*
26 *Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004). Neither the
27 need for discovery, nor the fact that the pro se litigant would be better served with the
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1 assistance of counsel, necessarily qualify the issues involved as complex. *See Rand*, 113
2 F.3d at 1525. Plaintiff has not shown that exceptional circumstances exist in this case.

3 CONCLUSION

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

5 1. The Clerk of the Court shall issue summons and the United States
6 Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all
7 attachments thereto, and a copy of this order upon the following defendants at Salinas Valley
8 State Prison: E. Medina, Maria Hill, S. Kellerhals, Feichter, L. Fox, A. Joaquin, and
9 Brikholm Orthopedics. The Clerk shall also mail courtesy copies of the complaint and this
10 order to the California Attorney General's Office.

11 3. No later than ninety (90) days from the date of this order, defendants shall file
12 a motion for summary judgment or other dispositive motion with respect to the claims in the
13 amended complaint found to be cognizable above.

14 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
15 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
16 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*,
17 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810
18 (2003).

19 b. Any motion for summary judgment shall be supported by adequate
20 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
21 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
22 qualified immunity found, if material facts are in dispute. If any defendant is of the opinion
23 that this case cannot be resolved by summary judgment, he shall so inform the Court prior to
24 the date the summary judgment motion is due.

25 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
26 served on defendants no later than forty-five (45) days from the date defendants' motion is
27 filed.

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

The defendants have made a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative remedies. The motion will, if granted, result in the dismissal of your case. When a party you are suing makes a motion to dismiss for failure to exhaust, and that motion is properly supported by declarations (or other sworn testimony) and/or documents, you may not simply rely on what 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.

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

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 summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact — that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by 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

1 own evidence in opposition, summary judgment, if appropriate, may be entered against you.
2 If summary judgment is granted in favor of defendants, your case will be dismissed and there
3 will be no trial. *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff
4 is advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v.*
5 *Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward
6 with evidence showing triable issues of material fact on every essential element of his claim).
7 Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary
8 judgment may be deemed to be a consent by plaintiff to the granting of the motion, and
9 granting of judgment against plaintiff without a trial. *See Ghazali v. Moran*, 46 F.3d 52,
10 53-54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

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

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

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

18 8. Discovery may be taken in accordance with the Federal Rules of Civil
19 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
20 Rule 16-1 is required before the parties may conduct discovery.

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

25 10. Extensions of time must be filed no later than the deadline sought to be
26 extended and must be accompanied by a showing of good cause.

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11. Plaintiff's motion for the appointment of counsel is DENIED.

12. This order terminates Docket No. 13.

IT IS SO ORDERED.

DATED: August 23, 2010



RICHARD SEEBORG
United States District Judge