

United States District Court  
For the Northern District of California

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\*E-Filed 9/9/10\*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DAVID MILLS,

No. C 10-1751 RS (PR)

Plaintiff,

**ORDER OF SERVICE;**

v.

**DIRECTING DEFENDANTS TO FILE  
DISPOSITIVE MOTION OR NOTICE  
REGARDING SUCH MOTION;**

ALAMEDA COUNTY SHERIFF'S  
OFFICE, et al.,

**INSTRUCTIONS TO CLERK**

Defendants.

This is a federal civil rights action filed by a *pro se* state prisoner pursuant to 42 U.S.C. § 1983 against officials and employees of Pelican Bay State Prison (“PBSP”) and the California Department of Corrections and Rehabilitation (“CDCR”). The original complaint was dismissed with leave to amend. The Court now reviews the amended complaint pursuant to 28 U.S.C. § 1915A(a).

**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 governmental entity.

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

6 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim  
7 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)  
8 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial  
9 plausibility when the plaintiff pleads factual content that allows the court to draw the  
10 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting  
11 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal  
12 conclusions cast in the form of factual allegations if those conclusions cannot reasonably be  
13 drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th  
14 Cir. 1994).

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

19 **B. Legal Claims**

20 Plaintiff makes the following due process claims, as construed and combined by this  
21 Court: (1) defendant J. J. King, a deputy sheriff at the Oakland City Jail isolated plaintiff and  
22 put waist restraints on him; (2) an unnamed defendant, a “Santa Rita classification deputy,”  
23 placed plaintiff in administrative segregation (“ad seg”) without a hearing; (3) defendants  
24 Ayala, Graves, Ditzenberger, Haynes, Armstrong, Rosas, and McGrory failed to provide  
25 plaintiff with a hearing during his time in ad seg, or failed to have sufficient reasons for  
26 keeping plaintiff in ad seg, resulting in an atypical hardship and mental and emotional stress;  
27 (4) defendants Ditzenberger and Carth falsified documents in order to keep plaintiff in ad  
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1 seg; (5) defendants Ditzenberger, Carth, Haynes, and Armstrong lied to plaintiff about the  
2 reasons he was being kept in ad seg; and (6) defendants Ayala, Graves, and Ditzenberger  
3 violated plaintiff's liberty interest, failed to review plaintiff's confinement in a meaningful  
4 way, and deprived plaintiff of due process.

5 Claim 1 is DISMISSED on grounds that it arises from a different set of operative  
6 facts. *See* Fed. R. Civ. P. 15 & 20. If plaintiff seeks relief on this claim, he must file a  
7 separate civil rights action. Claim 2 is DISMISSED because plaintiff has not named the  
8 defendant, and it involves different claims against different defendants. Plaintiff may wish to  
9 pursue this claim in a separate action. Claim 6 is DISMISSED as it is duplicative of other  
10 claims. The remaining claims, 3, 4, & 5, are, when liberally construed, cognizable under  
11 § 1983.

## 12 CONCLUSION

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

14 1. The Clerk of the Court shall issue summons and the United States  
15 Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all  
16 attachments thereto, and a copy of this order upon the following defendants at the Alameda  
17 County Sheriff's Department: Sgt. Ditzenberger, Deputy Carth, Deputy D. Armstrong,  
18 Deputy D. Haynes, Facility Captain Ayala, Sgt. P. Graves, Deputy Rosas, and Deputy  
19 McGrory. The Clerk shall also mail courtesy copies of the complaint and this order to the  
20 California Attorney General's Office.

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

24 a. If defendants elect to file a motion to dismiss on the grounds plaintiff  
25 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
26 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*,  
27 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810  
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1 (2003).

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

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

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

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

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

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

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1 Rule 56 tells you what you must do in order to oppose a motion for summary  
2 judgment. Generally, summary judgment must be granted when there is no genuine issue of  
3 material fact — that is, if there is no real dispute about any fact that would affect the result  
4 of your case, the party who asked for summary judgment is entitled to judgment as a matter  
5 of law, which will 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 testimony), you cannot  
7 simply rely on what your complaint says. Instead, you must set out specific facts in  
8 declarations, depositions, answers to interrogatories, or authenticated documents, as provided  
9 in Rule 56(e), that contradict the facts shown in the defendants’ declarations and documents  
10 and show that there is a genuine issue of material fact for trial. If you do not submit your  
11 own evidence in opposition, summary judgment, if appropriate, may be entered against you.  
12 If summary judgment is granted in favor of defendants, your case will be dismissed and there  
13 will be no trial. *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff  
14 is advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v.*  
15 *Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward  
16 with evidence showing triable issues of material fact on every essential element of his claim).  
17 Plaintiff is cautioned that failure to file an opposition to defendants’ motion for summary  
18 judgment may be deemed to be a consent by plaintiff to the granting of the motion, and  
19 granting of judgment against plaintiff without a trial. *See Ghazali v. Moran*, 46 F.3d 52,  
20 53-54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

21 5. Defendants shall file a reply brief no later than fifteen (15) days after plaintiff’s  
22 opposition is filed.

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

25 7. All communications by the plaintiff with the Court must be served on  
26 defendants, or defendants’ counsel once counsel has been designated, by mailing a true copy  
27 of the document to defendants or defendants’ counsel.

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

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

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

10           **IT IS SO ORDERED.**

11           DATED: September 8, 2010

  
RICHARD SEEBORG  
United States District Judge