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United States District Court
For the Northern District of California

E-Filed 9/20/10

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

GARY WAITERS,
Plaintiff,

No. C 10-3092 RS (PR)

**ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND**

v.

SERGEANT MITCHELL,
Defendant.

_____ /
This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. The Court now reviews the 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. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may

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ORDER DISMISSING COMPLAINT

1 be granted or seek monetary relief from a defendant who is immune from such relief. *See id.*
2 § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica*
3 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

4 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim
5 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)
6 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
7 plausibility when the plaintiff pleads factual content that allows the court to draw the
8 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
9 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions
10 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from
11 the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).
12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
13 (1) that a right secured by the Constitution or laws of the United States was violated, and
14 (2) that the alleged violation was committed by a person acting under the color of state law.
15 *See West v. Atkins*, 487 U.S. 42, 48 (1988).

16 **B. Legal Claims**

17 Plaintiff, who is currently incarcerated in South Carolina, alleges that defendant
18 Sergeant Mitchel twice touched plaintiff inappropriately. Plaintiff has not stated a claim on
19 which relief can be granted. Specifically, plaintiff has not alleged in which institution these
20 alleged acts took place, or the dates of the alleged actions. Accordingly, the complaint is
21 DISMISSED with leave to amend. Plaintiff shall file an amended complaint correcting the
22 deficiencies described in this order within 30 days from the date this order is filed.

23 It also appears that plaintiff has not exhausted his administrative remedies as to this
24 claim. “No action shall be brought with respect to prison conditions under [42 U.S.C.
25 § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other
26 correctional facility until such administrative remedies as are available are exhausted.”
27 42 U.S.C. § 1997e(a). Exhaustion is mandatory and no longer left to the discretion of the
28

1 district court. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (citing *Booth v. Churner*, 532 U.S.
2 731, 739 (2001)).

3 Accordingly, plaintiff must (1) restate his claim against Sgt. Mitchel, and include the
4 dates of the alleged incidents, and in which institution they took place; and (2) show that he
5 has exhausted his administrative remedies for this claim. The first amended complaint must
6 include the caption and civil case number used in this order (10-3092 RS (PR)) and the
7 words FIRST AMENDED COMPLAINT on the first page. Because an amended complaint
8 completely replaces the previous complaints, plaintiff must include in his first amended
9 complaint all the claims he wishes to present and all of the defendants he wishes to sue.
10 *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Plaintiff may not incorporate
11 material from the prior complaint by reference. Failure to file an amended complaint in
12 accordance with this order will result in dismissal of this action without further notice to
13 plaintiff.

14 It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
15 informed of any change of address by filing a separate paper with the clerk headed "Notice
16 of Change of Address." He must comply with the Court's orders in a timely fashion or ask
17 for an extension of time to do so. Failure to comply may result in the dismissal of this action
18 pursuant to Federal Rule of Civil Procedure 41(b).

19 **CONCLUSION**

20 The complaint is DISMISSED with leave to amend. Plaintiff shall file an amended
21 complaint correcting the deficiencies described in this order within 30 days from the date this
22 order is filed. Failure to file an amended complaint by such time will result in dismissal of
23 the action without further notice to plaintiff.

24 **IT IS SO ORDERED.**

25 DATED: September 20, 2010

26 
27 RICHARD SEEBORG
28 United States District Judge