

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

United States District Court  
For the Northern District of California

\*E-Filed 2/28/11\*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DEVONTE B. HARRIS,

No. C 10-5231 RS (PR)

Plaintiff,

**ORDER DISMISSING COMPLAINT  
WITH LEAVE TO AMEND**

v.

ROBERT HOREL, et al.,

Defendants.

\_\_\_\_\_ /  
  
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 be granted or seek monetary relief from a defendant who is immune from such relief. *See id.*

No. C 10-5231 RS (PR)  
ORDER DISMISSING COMPLAINT WITH LEAVE TO AMEND

1 § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica*  
2 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

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

15 **B. Legal Claims**

16 Plaintiff alleges that in 2006 defendants, employees of Pelican Bay State Prison,  
17 unfairly put him on “no yard status,” thereby violating his constitutional rights to due process  
18 and to be free from cruel and unusual punishment. Plaintiff’s Eighth Amendment claims are  
19 hereby DISMISSED without leave to amend because these claims and the defendants named  
20 in the allegations are different from the “no yard” claims and defendants. *See Fed. R. Civ. P.*  
21 *15 & 20*. If plaintiff seeks relief for his Eighth Amendment claims, he must file a separate  
22 civil rights action.

23 As to his “no yard” claims, whatever their possible merits, they may be barred by the  
24 statute of limitations, an issue plaintiff has not addressed in his complaint. Section 1983  
25 takes its limitations period from the forum state’s statute of limitations for personal injury  
26 torts, *see Wilson v. Garcia*, 471 U.S. 261, 276 (1985), which, in California, is two years, *see*  
27 *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004). This two-year statute of limitations  
28

1 period is tolled for two years if the plaintiff is a prisoner serving a term of less than life, thus  
2 giving such prisoners effectively four years to file a federal suit. *See* Cal. Civ. Proc. Code §  
3 352.1(a). A prisoner-plaintiff, such as the one in the instant matter, who is serving a sentence  
4 of life with the possibility of parole, is serving a sentence of less than life and is entitled to  
5 the two-year tolling period. *See Martinez v. Gomez*, 137 F.3d 1124, 1125–26 (9th Cir. 1998).  
6 It appears that the latest constitutional violation plaintiff cites relate to actions taken on  
7 November 5, 2006. Plaintiff did not file his complaint until November 18, 2010, which is  
8 more than four years after the acts underlying his claim allegedly occurred. Plaintiff must  
9 address the issue of the statute of limitations before his suit can proceed.

10 Accordingly, the complaint is DISMISSED with leave to amend his “no yard” claims,  
11 and to address the issues arising from the statute of limitations for § 1983 actions. Plaintiff’s  
12 Eighth Amendment claims are DISMISSED without leave to amend, and must be brought in  
13 a separate action if plaintiff wishes to seek relief for such grievances. Plaintiff shall file an  
14 amended complaint addressing the concerns described herein within 30 days from the date  
15 this order is filed. The first amended complaint must include the caption and civil case  
16 number used in this order (10-5231 RS (PR)) and the words FIRST AMENDED  
17 COMPLAINT on the first page. Because an amended complaint completely replaces the  
18 previous complaints, plaintiff must include in his first amended complaint all the claims he  
19 wishes to present and all of the defendants he wishes to sue. *See Ferdik v. Bonzelet*, 963  
20 F.2d 1258, 1262 (9th Cir. 1992). Plaintiff may not incorporate material from the prior  
21 complaint by reference. Failure to file an amended complaint in accordance with this order  
22 will result in dismissal of this action without further notice to plaintiff.

23 //

24 //

25 //

26 //

27 //

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

**IT IS SO ORDERED.**

DATED: February 28, 2011

  
RICHARD SEEBORG  
United States District Judge