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E-Filed 5/16/11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JESSE CARABAY,
Plaintiff,
v.
MICHAEL C. SAYRE, et al.,
Defendants.

No. C 11-0289 RS (PR)
ORDER OF SERVICE;
DIRECTING DEFENDANTS TO FILE
DISPOSITIVE MOTION OR NOTICE
REGARDING SUCH MOTION;
INSTRUCTIONS TO CLERK

United States District Court
For the Northern District of California

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner against employees of Pelican Bay State Prison (“PBSP”). 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.*

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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 (1) Michael C. Sayre, Chief Medical Officer at PBSP; (2) Claire
17 Williams, a physician at PBSP; (3) Kay Vail, a nurse at the prison; and (4) Nancy Madison, a
18 registered nurse at the prison were deliberately indifferent to plaintiff’s serious back pain and
19 other medical needs, in violation of the Eighth Amendment. Liberally construed, plaintiff’s
20 claims appear to be cognizable under § 1983.

21 **CONCLUSION**

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

23 1. The Clerk of the Court shall issue summons and the United States
24 Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all
25 attachments thereto, and a copy of this order upon the following defendants at Pelican Bay
26 State Prison: Michael C. Sayre, Claire Williams, Kay Vail, and Nancy Madison. The Clerk
27 shall also mail courtesy copies of the complaint and this order to the California Attorney
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1 General's Office.

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

5 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
6 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
7 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*,
8 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810
9 (2003).

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

16 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
17 served on defendants no later than forty-five (45) days from the date defendants' motion is
18 filed.

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

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

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

6 The defendants have made a motion for summary judgment by which they
7 seek to have your case dismissed. A motion for summary judgment under Rule
8 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

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

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

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

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

1 7. 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 8. 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 9. 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: May 16, 2011


RICHARD SEEBORG
United States District Judge