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7 IN THE UNITED STATES DISTRICT COURT
8
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 JOSE LUIS MARTINEZ,

No. C 13-0515 WHA (PR)

11 Plaintiff,

ORDER OF SERVICE

12 v.

13 T. BREWER; M. MENDENHALL,

14 Defendants
15
16 _____/

17 **INTRODUCTION**

18 Plaintiff, a pro se prisoner, filed this civil rights case under 42 U.S.C. 1983 against two
19 correctional officers at Pelican Bay State Prison. He has been granted leave to proceed in forma
20 pauperis in a separate order. For the reasons discussed below, the complaint is ordered served
21 upon defendants.

22 **ANALYSIS**

23 **A. STANDARD OF REVIEW**

24 Federal courts must engage in a preliminary screening of cases in which prisoners seek
25 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
26 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims
27 which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek
28 monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro

se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citations omitted). Although in order to state a claim a complaint "does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A complaint must proffer "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1974.

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

B. LEGAL CLAIMS

Plaintiff makes two claims. In his first claim, he alleges that defendant Brewer has retaliated against him for filing "complaints" against both Brewer and another correctional officer. Brewer has retaliated by, allegedly, falsely reporting plaintiff to the prison's mental health unit for treatment, and thereby endangering him among other inmates, and by reporting him for a minor infraction of having a torn t-shirt. When liberally construed, these allegations state a cognizable claim against Brewer for violating plaintiff's First Amendment rights by retaliating against him for filing inmate grievances.

In his second claim, plaintiff alleges that defendant Mendenhall has falsely stated that plaintiff is gay loudly enough for the other inmates in his housing section to overhear. Plaintiff knows that this will subject him to physical attacks by the other inmates. When liberally

1 construed, this states a cognizable claim for the violation of his Eighth Amendment rights.
2 Plaintiff additionally alleges that Mendenhall retaliated against him for failing to inform her
3 about an inmate hunger strike by searching his cell in a disrespectful manner and confiscating
4 unnamed items. These allegations do not state a cognizable claim, however, because they do
5 not allege retaliation for his exercise of his First Amendment or other constitutional rights.

6 CONCLUSION

7 For the reasons set out above, Accordingly, it is hereby ordered as follows:

8 1. The retaliation claim against Mendenhall is **DISMISSED**. The other claims, as
9 described above, are cognizable when liberally construed.

10 2. The clerk shall issue summons and the United States Marshal shall serve, without
11 prepayment of fees, a copy of the complaint with all attachments thereto, and a copy of this
12 order upon defendants: **Correctional Officer T. Brewer, and Correctional Officer M.**
13 **Mendenhall at Pelican Bay State Prison.** A courtesy copy of the amended complaint with
14 attachments and this order shall also be mailed to the California Attorney General's Office.

15 3. In order to expedite the resolution of this case:

16 a. No later than **91 days** from the date this order is filed, defendants shall file a
17 motion for summary judgment or other dispositive motion. If defendants are of the opinion that
18 this case cannot be resolved by summary judgment, they shall so inform the court prior to the
19 date the summary judgment motion is due. All papers filed with the court shall be promptly
20 served on the plaintiff.

21 b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the
22 court and served upon defendants no later than **28 days** from the date of service of the motion.
23 Plaintiff must read the attached page headed "NOTICE -- WARNING," which is provided to
24 him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and
25 *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

26 If defendants file an unenumerated motion to dismiss claiming that plaintiff failed to
27 exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff
28 should take note of the attached page headed "NOTICE -- WARNING (EXHAUSTION),"

which is provided to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir.),
cert. denied, *Alameida v. Wyatt*, 124 S.Ct 50 (2003).

c. Defendants **shall** file a reply brief no later than **14 days** after the date of
service of the opposition.

d. 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.

e. Along with their motion, defendants shall proof that they served plaintiff the
applicable warning(s) required by *Woods v. Carey*, No. 09-15548, slip op. 7871 (9th Cir. July 6,
2012) and/or *Stratton v. Buck*, No. 10-35656, slip op. 11477 (9th Cir. Sept. 19, 2012), at the
same time they served him with their motion. Failure to do so will result in the summary
dismissal of their motion without prejudice.

4. All communications by the plaintiff with the court must be served on defendant, or
defendant's counsel once counsel has been designated, by mailing a true copy of the document
to defendant or defendant's counsel.

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

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

IT IS SO ORDERED.

Dated: April _____, 2013.

5/1/2013


WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

NOTICE -- WARNING (SUMMARY JUDGMENT)

If defendants move for summary judgment, they are seeking 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 defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

NOTICE -- WARNING (EXHAUSTION)

If defendants file a motion to dismiss for failure to exhaust administrative remedies, they are seeking to have your case dismissed. If the motion is granted it will end your case and there will be no trial.

A motion to dismiss for failure to exhaust administrative remedies is similar to a motion for summary judgment in that the court will consider materials beyond the pleadings. You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions. In considering a motion to dismiss for failure to exhaust administrative remedies, the court can decide disputed factual matters with regard to the exhaustion question. Because the court can resolve factual disputes, unlike a summary judgment opposition, it is not enough to merely show a genuine issue of material fact in opposition to the motion to dismiss.