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E-Filed 7/30/14

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

VINCENT PRICE MCCOWAN,
Plaintiff,
v.
B. HEDRICK, et al.,
Defendants.

No. C 13-3554 RS (PR)

ORDER OF SERVICE;
**ORDER DIRECTING DEFENDANTS
TO FILE DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION;**
INSTRUCTIONS TO CLERK

INTRODUCTION

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. In response to plaintiff’s first amended complaint (Docket No. 4), defendants are directed to file a dispositive motion or notice regarding such motion on or before November 1, 2014, unless an extension is granted. The Court further directs that defendants are to adhere to the notice provisions detailed in Sections 2.a and 10 of the conclusion of this order.

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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United States District Court
For the Northern District of California

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 conclusions
12 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from
13 the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).
14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1)
15 that a right secured by the Constitution or laws of the United States was violated, and (2)
16 that the alleged violation was committed by a person acting under the color of state law. *See*
17 *West v. Atkins*, 487 U.S. 42, 48 (1988).

18 **B. Claims**

19 Plaintiff alleges that (1) on June 29, 2013, Soledad State Prison Correctional Officers
20 J. Marquez, Huff, Barroso, M. Johnson, and J. Hopark used excessive force on him, and
21 (2) Barroso, F. Atrisco, B. Beebe, Harring, and M. Curiel filed false reports and committed
22 perjury. When Claim 1 is liberally construed, plaintiff has stated a claim for excessive force
23 against the listed correctional officers. His allegations regarding false reports and perjury do
24 not contain sufficient factual matter to state a claim. Plaintiff does not describe what sort of
25 report was filed, what consequences resulted from the report, or exactly how the report
26 violated his constitutional rights. Claim 2 is therefore DISMISSED.

1 Plaintiff also raises claims regarding medical treatment and the law library. These
2 claims involve different claims against different defendants. Consequently, they are
3 DISMISSED without prejudice. If plaintiff seeks relief on such claims, he must file separate
4 civil rights actions. The claims against defendants B. Hedrick, R. Parin, J. Stevenson,
5 Esparza, M. Curiel, F. Atrisco, B. Beebe, LVN Rodriguez, LVN Carrasco, Harrington, and
6 K.E. Heard are DISMISSED, and these persons are TERMINATED as defendants in this
7 action.

8 CONCLUSION

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

10 1. The Clerk of the Court shall issue summons and the United States
11 Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all
12 attachments thereto, and a copy of this order upon J. Marquez, Huff, Barroso, M. Johnson,
13 and J. Hopark at Soledad State Prison. The Clerk shall also mail courtesy copies of the
14 complaint and this order to the California Attorney General's Office.

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

18 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
19 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
20 defendants shall do so in a motion for summary judgment, as required by *Albino v. Baca*, No.
21 10-55702, slip op. at 4 (9th Cir. Apr. 3, 2014) (en banc).

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

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

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

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

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

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

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

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

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

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

5 10. A recent decision from the Ninth Circuit requires that *pro se* prisoner-plaintiffs
6 be given “notice of what is required of them in order to oppose” summary judgment motions
7 at the time of filing of the motions, rather than when the court orders service of process or
8 otherwise before the motions are filed. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012).

9 **Defendants shall provide the following notice to plaintiff when they file and serve any**
10 **motion for summary judgment:**

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

14 Rule 56 tells you what you must do in order to oppose a motion for summary
15 judgment. Generally, summary judgment must be granted when there is no
16 genuine issue of material fact — that is, if there is no real dispute about any
17 fact that would affect the result of your case, the party who asked for summary
18 judgment is entitled to judgment as a matter of law, which will end your case.
19 When a party you are suing makes a motion for summary judgment that is
20 properly supported by declarations (or other sworn testimony), you cannot
21 simply rely on what your complaint says. Instead, you must set out specific
22 facts in declarations, depositions, answers to interrogatories, or authenticated
23 documents, as provided in Rule 56(e), that contradict the facts shown in the
24 defendants’ declarations and documents and show that there is a genuine issue
25 of material fact for trial. If you do not submit your own evidence in opposition,
26 summary judgment, if appropriate, may be entered against you. If summary
27 judgment is granted, your case will be dismissed and there will be no trial.

21 *Rand v. Rowland*, 154 F.3d 952, 962–63 (9th Cir. 1998).

22 **IT IS SO ORDERED.**

23 DATED: July 30, 2014


RICHARD SEEBORG
United States District Judge