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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNETH B. GIBBS,
Plaintiff,

v.

T. FARLEY, et. al.,
Defendants.

Case No. [16-cv-0731-TEH](#)

ORDER OF SERVICE

Plaintiff, an inmate at California State Prison-Los Angeles County, filed this pro se civil rights action under 42 U.S.C. § 1983. Plaintiff is granted leave to proceed in forma pauperis in a separate order. His complaint is now before the Court for initial screening pursuant to 28 U.S.C. § 1915A.

I

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief." *Id.* § 1915A(b). Pleadings filed by pro se litigants, however, must be liberally construed. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010);

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Northern District of California

1 Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir.
2 1990).

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

8 II

9 Plaintiff alleges that while at Pelican Bay State Prison
10 ("PBSP") several correctional officers used excessive force
11 against him while other officers failed to protect him.

12 In its prohibition of "cruel and unusual punishment," the
13 Eighth Amendment places restraints on prison officials, who may
14 not, for example, use excessive force against prisoners. Hudson
15 v. McMillian, 503 U.S. 1, 6-7 (1992). Where a prisoner claims
16 that prison officials used excessive force, he must show that the
17 officials applied force maliciously and sadistically to cause
18 harm. Id.; Furnace v. Sullivan, 705 F.3d 1021, 1030 (9th Cir.
19 2013). Although the Eighth Amendment protects against cruel and
20 unusual punishment, this does not mean that federal courts can or
21 should interfere whenever prisoners are inconvenienced or suffer
22 de minimis injuries. Hudson, 503 U.S. at 9-10. In determining
23 whether the use of force was for the purpose of maintaining or
24 restoring discipline, or for the malicious and sadistic purpose
25 of causing harm, a court may evaluate the need for application of
26 force, the relationship between that need and the amount of force
27 used, the extent of any injury inflicted, the threat reasonably
28 perceived by the responsible officials, and any efforts made to

1 temper the severity of a forceful response. Id., 503 U.S. at 7;
2 LeMaire v. Maass, 12 F.3d 1444, 1454 (9th Cir. 1993); see also
3 Spain v. Procunier, 600 F.2d 189, 195 (9th Cir. 1979) (guards may
4 use force only in proportion to need in each situation).

5 Plaintiff asserts that on April 24, 2013, PBSP Officers T.
6 Farley and R. Graham came to Plaintiff's cell to escort him to
7 another area. Officer J. Andersen was also present. After
8 Plaintiff and Officer Farley exchanges some hostile words,
9 Officers Farley and Andersen handled Plaintiff aggressively,
10 making him feel that his welfare and security were at stake.

11 Upon exiting the building and out of sight of other inmates,
12 these Officers Farley and Anderson slammed Plaintiff against the
13 wall and told him that "if he moved, they were going to take him
14 down." The Officers then reversed direction and began escorting
15 Plaintiff back to his cell. Within a few feet of his cell,
16 someone placed their foot before Plaintiff, causing him to fall.
17 While Plaintiff was falling, Officer Andersen placed his knee
18 upon Plaintiff's back, causing Plaintiff's handcuffs to tighten
19 so that he felt excruciating pain. While Plaintiff was on the
20 ground, Officers Andersen and Farley jammed their elbows into
21 Plaintiff's neck, causing him more pain. During this entire
22 time, Plaintiff was not resisting the Officers. Other Officers
23 arrived at the scene. Officer Chisman kicked Plaintiff in his
24 loins. As a result of the Officers' use of excessive force,
25 Plaintiff suffered a swollen eye, a swollen knee, and a sprained
26 wrist.

27 Based on these allegations, Plaintiff alleges the following
28 claims: (1) an Eighth Amendment claim against Officers Farley,

1 Andersen, and Chisman based on their use of excessive force
2 against Plaintiff; (2) an Eighth Amendment claim against Officers
3 Graham and Chisman based on the fact that they were present when
4 the other Officers violated Plaintiff's Eighth Amendment rights
5 and did nothing to stop them. Liberally construed these claims
6 are sufficient to proceed.¹

7 III

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

10 1. The Clerk of the Court shall issue summons and the
11 United States Marshal shall serve, without prepayment of fees, a
12 copy of the complaint (Docket No. 1), and a copy of this order
13 upon the following Defendants at Pelican Bay State Prison:
14 Correctional Officers ("CO") T. Farley, R. Graham, J. Andersen
15 and R. Chisman.

16 2. In order to expedite the resolution of this case, the
17 Court orders as follows:

18 a. No later than 91 days from the date of service,
19 Defendants shall file a motion for summary judgment or other
20 dispositive motion. The motion shall be supported by adequate
21 factual documentation and shall conform in all respects to
22 Federal Rule of Civil Procedure 56, and shall include as exhibits
23 all records and incident reports stemming from the events at
24 issue. If Defendant is of the opinion that this case cannot be

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27 ¹ These same claims were brought in a prior action, Gibbs v.
28 Farley, Case No. 13-cv-2114-TEH. The claims were dismissed
without prejudice because Plaintiff filed the case prior to the
exhaustion of administrative remedies. Docket No. 87 in 13-cv-
2114.

1 resolved by summary judgment, he shall so inform the Court prior
2 to the date his summary judgment motion is due. All papers filed
3 with the Court shall be promptly served on the plaintiff.

4 b. At the time the dispositive motion is served,
5 Defendants shall also serve, on a separate paper, the appropriate
6 notice or notices required by Rand v. Rowland, 154 F.3d 952, 953-
7 954 (9th Cir. 1998) (en banc), and Wyatt v. Terhune, 315 F.3d
8 1108, 1120 n. 4 (9th Cir. 2003). See Woods v. Carey, 684 F.3d
9 934, 940-941 (9th Cir. 2012) (Rand and Wyatt notices must be
10 given at the time motion for summary judgment or motion to
11 dismiss for nonexhaustion is filed, not earlier); Rand at 960
12 (separate paper requirement).

13 c. Plaintiff's opposition to the dispositive motion,
14 if any, shall be filed with the Court and served upon Defendants
15 no later than thirty days from the date the motion was served
16 upon him. Plaintiff must read the attached page headed "NOTICE -
17 - WARNING," which is provided to him pursuant to Rand v. Rowland,
18 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and Klinge v.
19 Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988).

20 If Defendants file a motion for summary judgment claiming
21 that Plaintiff failed to exhaust his available administrative
22 remedies as required by 42 U.S.C. § 1997e(a), plaintiff should
23 take note of the attached page headed "NOTICE -- WARNING
24 (EXHAUSTION)," which is provided to him as required by Wyatt v.
25 Terhune, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003).

26 d. If Defendant wishes to file a reply brief, he shall
27 do so no later than fifteen days after the opposition is served
28 upon him.

1 e. The motion shall be deemed submitted as of the date
2 the reply brief is due. No hearing will be held on the motion
3 unless the court so orders at a later date.

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

8 4. Discovery may be taken in accordance with the Federal
9 Rules of Civil Procedure. No further court order under Federal
10 Rule of Civil Procedure 30(a)(2) is required before the parties
11 may conduct discovery.

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

19 IT IS SO ORDERED.

20 Dated: 04/14/2016



THELTON E. HENDERSON
United States District Judge

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NOTICE -- WARNING (SUMMARY JUDGMENT)

1 If defendants move for summary judgment, they are seeking to
2 have your case dismissed. A motion for summary judgment under
3 Rule 56 of the Federal Rules of Civil Procedure will, if granted,
4 end your case.

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

NOTICE -- WARNING (EXHAUSTION)

22 If defendants file a motion for summary judgment for failure
23 to exhaust, they are seeking to have your case dismissed. If the
24 motion is granted it will end your case.

25 You have the right to present any evidence you may have
26 which tends to show that you did exhaust your administrative
27 remedies. Such evidence may be in the form of declarations
28 (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.
If defendants file a motion for summary judgment for failure to
exhaust and it is granted, your case will be dismissed and there
will be no trial.