

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ERIC J. ONTIVEROS,)	No. C 06-02122 CW (PR)
)	
Plaintiff,)	ORDER OF SERVICE AND REFERRING
)	CASE TO PRO SE PRISONER
v.)	SETTLEMENT PROGRAM
)	
HAYWARD POLICE DEPARTMENT,)	
)	
Defendant.)	
_____)	

INTRODUCTION

Plaintiff Eric J. Ontiveros has filed a pro se civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff has been granted leave to proceed in forma pauperis.

BACKGROUND

According to the allegations in the complaint, Plaintiff was subjected to improper force during the course of his arrest. Plaintiff alleges that on May 20, 2004, while he was in a vehicle parked in the driveway of his friend's residence, "two plain unmarked vehicles (vans) immediately surrounded [his] vehicle and 8 to 10 officers jumped out of both vans and immediately attacked [him] while [he] was seated" in his vehicle. (Compl. at 3.) He was "shot in [his] body several times" by a taser, but he was "neither resisting nor attempting to flea [sic]." (Id.) The officers then "forcefully removed [him] from the vehicle and began kicking, punching . . . and shot [him] a few times on [his] back while [he] was on the floor." (Id.) He was also "hit on [his] left eye and on top of [his] head with a hard object." (Id.) He was then transported by ambulance to a hospital. (Id.)

1 Plaintiff states a physician "discovered ten different areas
2 to [his] body" where he had been shot by a taser." (Compl.
3 Attach., Pl.'s "Accurate Account of Actions" at 2.) He was treated
4 for open wounds above his left eye and on the back of his head.
5 (Id.) Plaintiff also told the physician that he "felt excruciating
6 pain in the neck and body." (Id.)

7 Plaintiff seeks monetary damages for his physical and mental
8 injuries.

9 DISCUSSION

10 I. Standard of Review

11 A federal court must conduct a preliminary screening in any
12 case in which a prisoner seeks redress from a governmental entity
13 or officer or employee of a governmental entity. See 28 U.S.C.
14 § 1915A(a). In its review, the court must identify cognizable
15 claims and dismiss any claims that are frivolous, malicious, fail
16 to state a claim upon which relief may be granted or seek monetary
17 relief from a defendant who is immune from such relief. See id.
18 § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally
19 construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
20 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a
21 plaintiff must allege two essential elements: (1) that a right
22 secured by the Constitution or laws of the United States was
23 violated, and (2) that the alleged violation was committed by a
24 person acting under the color of state law. See West v. Atkins,
25 487 U.S. 42, 48 (1988).

26 II. Excessive Force During Arrest

27 According to the allegations in the complaint, eight to ten
28 officers from the Hayward Police Department used excessive force

1 against Plaintiff when they arrested him on May 20, 2004.

2 A claim that a law enforcement officer used excessive force in
3 the course of an arrest or other seizure is analyzed under the
4 Fourth Amendment reasonableness standard. See Graham v. Connor,
5 490 U.S. 386, 394-95 (1989); Forrester v. City of San Diego, 25
6 F.3d 804, 806 (9th Cir. 1994), cert. denied, 513 U.S. 1152 (1995).
7 "Determining whether the force used to effect a particular seizure
8 is 'reasonable' under the Fourth Amendment requires a careful
9 balancing of 'the nature and quality of the intrusion on the
10 individual's Fourth Amendment interests' against the countervailing
11 governmental interests at stake." See Graham, 490 U.S. at 396
12 (citations omitted).

13 Plaintiff claims that the officers beat him and shot him with
14 a taser several times. Plaintiff alleges that he did not resist
15 arrest or attempt to flee. Liberally construed, Plaintiff's
16 complaint states a cognizable Fourth Amendment claim.

17 III. Defendants

18 Liability may be imposed on an individual defendant under
19 § 1983 if the plaintiff can show that the defendant proximately
20 caused the deprivation of a federally protected right. See Leer v.
21 Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City of
22 Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives
23 another of a constitutional right within the meaning of § 1983 if
24 he does an affirmative act, participates in another's affirmative
25 act or omits to perform an act which he is legally required to do,
26 that causes the deprivation of which the plaintiff complains. See
27 Leer, 844 F.2d at 633. The inquiry into causation must be
28 individualized and focus on the duties and responsibilities of each

1 individual defendant whose acts or omissions are alleged to have
2 caused a constitutional deprivation. See id. Sweeping conclusory
3 allegations will not suffice; the plaintiff must instead "set forth
4 specific facts as to each individual defendant's" violation of his
5 protected rights. Id. at 634.

6 A supervisor may be liable under § 1983 upon a showing of
7 personal involvement in the constitutional deprivation or a
8 sufficient causal connection between the supervisor's wrongful
9 conduct and the constitutional violation. Redman v. County of San
10 Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc) (citation
11 omitted). A supervisor therefore generally "is only liable for
12 constitutional violations of his subordinates if the supervisor
13 participated in or directed the violations, or knew of the
14 violations and failed to act to prevent them." Taylor v. List, 880
15 F.2d 1040, 1045 (9th Cir. 1989). A supervisor may be liable for
16 implementing "a policy so deficient that the policy itself is a
17 repudiation of constitutional rights and is the moving force of the
18 constitutional violation." Redman, 942 F.2d at 1446; see Jeffers
19 v. Gomez, 267 F.3d 895, 917 (9th Cir. 2001).

20 A. Municipal Liability Defendant

21 Plaintiff alleges that the use of force was sanctioned by the
22 policies and practices of the Hayward Police Department. Local
23 governments are "persons" subject to liability under 42 U.S.C.
24 § 1983 where their official policy or custom causes a
25 constitutional tort, see Monell v. Dep't of Social Servs., 436 U.S.
26 658, 690 (1978); however, a city or county may not be held
27 vicariously liable for the unconstitutional acts of its employees
28

1 under the theory of respondeat superior, see Board of County
2 Comm'rs v. Brown, 520 U.S. 397, 403 (1997); Monell, 436 U.S. at
3 691; Fuller v. City of Oakland, 47 F.3d 1522, 1534 (9th Cir. 1995).
4 To impose municipal liability under § 1983 for a violation of
5 constitutional rights, a plaintiff must show: (1) that the
6 plaintiff possessed a constitutional right of which he or she was
7 deprived; (2) that the municipality had a policy; (3) that this
8 policy amounts to deliberate indifference to the plaintiff's
9 constitutional rights; and (4) that the policy is the moving force
10 behind the constitutional violation. See Plumeau v. School Dist.
11 No. 40 County of Yamhill, 130 F.3d 432, 438 (9th Cir. 1997).

12 Plaintiff contends that the use of excessive force by the
13 Hayward Police Department on May 20, 2004 is an example of its
14 "aggressive actions." (Compl. Attach. at 3.) He claims he filed a
15 complaint with the Office of Ethical Standards against the Hayward
16 Police Department. (Compl. at 2.) Liberally construed,
17 Plaintiff's allegations are sufficient to state a cognizable
18 municipal liability claim against the Hayward Police Department.
19 See Galbraith v. County of Santa Clara, 307 F.3d 1119, 1127 (9th
20 Cir. 2002) (holding that it is improper to dismiss on the pleadings
21 alone a § 1983 complaint alleging municipal liability even if claim
22 is based on nothing more than bare allegation that individual
23 employee's conduct conformed to official policy, conduct or
24 practice); accord Leatherman v. Tarrant County Narcotics
25 Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993)
26 (allegations of municipal liability do not require heightened
27 pleading standard).

1 B. Doe Defendants

2 Plaintiff names the "officers of the Hayward Police Dept." as
3 Defendants. He contends that there were eight to ten Hayward
4 police officers involved in the encounter. These officers are Doe
5 Defendants whose names he apparently intends to learn through
6 discovery. The use of Doe Defendants is not favored in the Ninth
7 Circuit. See Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir.
8 1980). However, where the identity of alleged defendants cannot be
9 known prior to the filing of a complaint, the plaintiff should be
10 given an opportunity through discovery to identify them. Id.
11 Failure to afford the plaintiff such an opportunity is error. See
12 Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999).

13 Accordingly, Plaintiff's claims against the Doe Defendants are
14 DISMISSED. Should Plaintiff learn the identities of the Hayward
15 police officers who used excessive force against him, he may move
16 for leave to amend to add them as named defendants. See Brass v.
17 County of Los Angeles, 328 F.3d 1192, 1195-98 (9th Cir. 2003).

18 IV. Pro Se Prisoner Settlement Program

19 This case has been pending for almost three years and the
20 events at issue occurred more than four years ago. If the case
21 must go to trial even further delay in resolution will be incurred,
22 as will expenses. Having considered all of these factors, the
23 Court finds that it is in the best interests of the parties and
24 judicial efficiency to refer this action to a Magistrate Judge for
25 court-ordered settlement proceedings.

26 The Northern District of California has established a Pro Se
27 Prisoner Settlement Program. Certain prisoner civil rights cases
28

1 may be referred to a neutral magistrate judge for settlement
2 proceedings. The proceedings will consist of one or more
3 conferences as determined by Magistrate Judge Nandor Vadas. The
4 conferences shall be conducted at a location to be determined by
5 Magistrate Judge Vadas with Plaintiff, who has since been released
6 from custody, as well as Defendant and/or the representative for
7 Defendant attending.

8 Good cause appearing, the present case will be REFERRED to
9 Magistrate Judge Vadas for settlement proceedings pursuant to the
10 Pro Se Prisoner Settlement Program. The proceedings shall take
11 place within ninety (90) days after the date of this Order; or as
12 soon thereafter as is convenient to the magistrate judge's
13 calendar. Magistrate Judge Vadas shall coordinate a time and date
14 for a settlement proceeding with all interested parties and/or
15 their representatives and, within ten (10) days after the
16 conclusion of the settlement proceedings, file with the Court a
17 report regarding the settlement proceedings.

18 CONCLUSION

19 1. Plaintiff's complaint states a cognizable excessive force
20 claim, and a cognizable municipal liability claim against the
21 Hayward Police Department.

22 2. Plaintiff's claims against the Doe Defendants are
23 DISMISSED. Should Plaintiff learn the identities of the Hayward
24 police officers who used excessive force against him, he may move
25 for leave to amend to add them as named defendants. See Brass, 328
26 F.3d at 1195-98.

27 3. Plaintiff's action is referred to the Pro Se Prisoner
28

1 Settlement Program. The Clerk of the Court shall provide a copy of
2 the court documents that are not available electronically,
3 including a copy of this Order, to Magistrate Judge Vadas in
4 Eureka, California.

5 4. The Clerk of the Court shall mail a Notice of Lawsuit and
6 Request for Waiver of Service of Summons, two copies of the Waiver
7 of Service of Summons, a copy of the complaint and all attachments
8 thereto (docket no. 1) and a copy of this Order upon: the Hayward
9 Police Department. The Clerk of the Court shall also mail copies
10 of the complaint, supplemental complaint and this Order to the City
11 Attorney of the City of Hayward. Additionally, the Clerk shall
12 serve a copy of this Order upon Plaintiff.

13 5. Defendant is cautioned that Rule 4 of the Federal Rules
14 of Civil Procedure requires Defendant to cooperate in saving
15 unnecessary costs of service of the summons and complaint.
16 Pursuant to Rule 4, if Defendant, after being notified of this
17 action and asked by the Court, on behalf of Plaintiff, to waive
18 service of the summons, fail to do so, Defendant will be required
19 to bear the cost of such service unless good cause be shown for
20 Defendant's failure to sign and return the waiver form. If service
21 is waived, this action will proceed as if Defendant had been served
22 on the date that the waiver is filed, except that pursuant to Rule
23 12(a)(1)(B), Defendant will not be required to serve and file an
24 answer before sixty (60) days from the date on which the request
25 for waiver was sent. (This allows a longer time to respond than
26 would be required if formal service of summons is necessary.)
27 Defendant is asked to read the statement set forth at the foot of
28

1 the waiver form that more completely describes the duties of the
2 parties with regard to waiver of service of the summons. If
3 service is waived after the date provided in the Notice but before
4 Defendant has been personally served, the Answer shall be due sixty
5 (60) days from the date on which the request for waiver was sent or
6 twenty (20) days from the date the waiver form is filed, whichever
7 is later.

8 6. Defendant shall answer the complaint in accordance with
9 the Federal Rules of Civil Procedure. The following briefing
10 schedule shall govern dispositive motions in this action:

11 a. No later than thirty (30) days from the date the
12 answer is due, Defendant shall file a motion for summary judgment
13 or other dispositive motion. The motion shall be supported by
14 adequate factual documentation and shall conform in all respects to
15 Federal Rule of Civil Procedure 56. If Defendant is of the opinion
16 that this case cannot be resolved by summary judgment, Defendant
17 shall so inform the Court prior to the date the summary judgment
18 motion is due. All papers filed with the Court shall be promptly
19 served on Plaintiff.

20 b. Plaintiff's opposition to the dispositive motion
21 shall be filed with the Court and served on Defendant no later than
22 thirty (30) days after the date on which Defendant's motion is
23 filed. The Ninth Circuit has held that the following notice should
24 be given to pro se plaintiffs facing a summary judgment motion:

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

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

22 See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en
23 banc).

24 Plaintiff is advised to read Rule 56 of the Federal Rules of
25 Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)
26 (party opposing summary judgment must come forward with evidence
27 showing triable issues of material fact on every essential element
28 of his claim). Plaintiff is cautioned that because he bears the
burden of proving his allegations in this case, he must be prepared
to produce evidence in support of those allegations when he files
his opposition to Defendant's dispositive motion. Such evidence
may include sworn declarations from himself and other witnesses to
the incident, and copies of documents authenticated by sworn
declaration. Plaintiff will not be able to avoid summary judgment
simply by repeating the allegations of his complaint.

c. If Defendant wishes to file a reply brief, Defendant
shall do so no later than fifteen (15) days after the date

1 Plaintiff's opposition is filed.

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

5 7. Discovery may be taken in this action in accordance with
6 the Federal Rules of Civil Procedure. Leave of the Court pursuant
7 to Rule 30(a)(2) is hereby granted to Defendant to depose Plaintiff
8 and any other necessary witnesses confined in prison.

9 8. All communications by Plaintiff with the Court must be
10 served on Defendant, or Defendant's counsel once counsel has been
11 designated, by mailing a true copy of the document to Defendant or
12 Defendant's counsel.

13 9. It is Plaintiff's responsibility to prosecute this case.
14 Plaintiff must keep the Court informed of any change of address and
15 must comply with the Court's orders in a timely fashion.

16 10. Extensions of time are not favored, though reasonable
17 extensions will be granted. Any motion for an extension of time
18 must be filed no later than fifteen (15) days prior to the deadline
19 sought to be extended.

20 IT IS SO ORDERED.

21 DATED: 10/20/08

22 
23 _____
24 CLAUDIA WILKEN
25 United States District Judge
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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
4

5
6 ERIC J. ONTIVEROS,
7 Plaintiff,

Case Number: CV06-02122 CW

CERTIFICATE OF SERVICE

8 v.

9 HAYWARD POLICE DEPARTMENT et al,
10 Defendant.
11 _____/

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
13 Court, Northern District of California.

14 That on October 20, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
16 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
17 located in the Clerk's office.

18 Eric J. Ontiveros
19 1780 A St., Apt. #11
20 Castro Valley, CA 94546

21 Magistrate Judge Nador Vadas
22 U.S. District Court
23 514 H Street
24 P.O. Box 1306
25 Eureka, CA 95502

26 Dated: October 20, 2008

27 Richard W. Wieking, Clerk
28 By: Sheilah Cahill, Deputy Clerk

United States District Court
For the Northern District of California