

**United States District Court**  
For the Northern District of California

KARLOS L. FRYE, ) No. C 08-5288 CW (PR)  
 )  
Plaintiff, ) ORDER OF SERVICE  
 )  
v. )  
 )  
OFFICER OLESHEA, et al., )  
 )  
Defendants. )

## INTRODUCTION

Plaintiff Karlos L. Frye is a state prisoner incarcerated at Salinas Valley State Prison (SVSP). He has filed this civil rights action under 42 U.S.C. § 1983 alleging that SVSP officers violated his Fourth Amendment right to be free from unreasonable searches, his Eighth Amendment right to be free from cruel and unusual punishment, and his Fourteenth Amendment rights to procedural due process and to equal protection. His motion for leave to proceed in forma pauperis has been granted.

On April 6, 2009, Plaintiff filed his first amended complaint.

Venue is proper in this Court because the injuries complained of occurred at SVSP, which is located within the Northern District of California. See 28 U.S.C. §§ 84(a), 1391(b).

## BACKGROUND

Plaintiff alleges five constitutional violations. First, he alleges prison officials violated his Fourth Amendment rights by conducting an "invasive and unreasonable strip search" without any evidence of wrongdoing. (Am. Compl. at 7.) Plaintiff alleges that a prison official told him that his mother had been "observed . . . making suspicious movements" during a visit. (Id. at 3, 5.) Plaintiff's visit was terminated, and he was strip-

1 searched twice. (Id.) Plaintiff alleges that SVSP Correctional  
2 Officer Oleshea led this search. (Id. at 3.)

3 Second, Plaintiff alleges that he was subjected to "inhumane  
4 savage cruelty and oppressive treatment" between 3 p.m. on December  
5 2, 2007 and 1:30 p.m. on December 4, 2007. (Id. at 6.) During this  
6 time, Plaintiff was "on contraband watch," wearing only his  
7 underwear, which was taped to his bare skin. (Id. at 5.)  
8 Plaintiff's legs and hands were handcuffed. (Id.) He was put in a  
9 cell containing only a small wooden bench. (Id.) He was "not given  
10 a short not mattress to sleep on and a bright light was kept on."  
11 (Id.) Because he was not provided with toilet paper, soap, or  
12 water, he was forced to clean himself after going to the bathroom  
13 with his bare hands. (Id. at 6.) Furthermore, he was not provided  
14 with utensils with which to eat, nor were his handcuffs removed, so  
15 he had to eat his food on his hands and knees "like a savage  
16 animal." (Id.)

17 Third, Plaintiff alleges that prison officials violated his  
18 Fourteenth Amendment rights. Plaintiff alleges that he was  
19 subjected to a "'feces watch' without . . . procedural due process,  
20 which is required before punishment of feces watch." (Id. at 8.)  
21 He argues that he was "entitled to a hearing within a reasonable  
22 time before and after the 'feces watch' started." (Id. at 11.)  
23 Plaintiff also alleges that prison officials intentionally prevented  
24 him from exhausting his 602 inmate appeal, in violation of his  
25 Fourteenth Amendment right to due process. (Id. at 12.) Finally,  
26 Plaintiff alleges that he was "targeted" for these actions, because  
27 he "is black and his fiancé is white." (Id. at 7.)

28 Plaintiff filed a 602 appeal on December 11, 2007, challenging  
the allegedly suspicionless three-day "feces watch," which took

1 place between December 2 and 4, 2007, and alleging inhumane  
2 treatment during this period. (Am. Compl., Ex. A at 1.) The 602  
3 appeal was returned to Plaintiff on February 11, 2008, with bypass  
4 stamps at the informal and formal levels of review, but it was not  
5 given a log number, a date or otherwise signed. (Id.) On that same  
6 day, Plaintiff requested an interview with the appeals coordinator  
7 in order to obtain a response to his 602 appeal, which he could then  
8 appeal to the next level. (Am. Compl. at 3-8.) Plaintiff alleges  
9 he never received a response. (Id. at 2.) Nine months later, on  
10 November 21, 2008, Plaintiff filed his original complaint under  
11 section 1983. As mentioned above, he filed his amended complaint on  
12 April 6, 2009.

13 Plaintiff names the following Defendants: SVSP Correctional  
14 Officer Oleshea, Defendants "John Doe" 1 through 6, and the "appeals  
15 coordinator." He seeks monetary damages.

#### 16 DISCUSSION

##### 17 I. Standard of Review

18 A federal court must conduct a preliminary screening in any  
19 case in which a prisoner seeks redress from a governmental entity or  
20 officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).  
21 In its review, the court must identify any cognizable claims and  
22 dismiss any claims that are frivolous, malicious, fail to state a  
23 claim upon which relief may be granted or seek monetary relief from  
24 a defendant who is immune from such relief. Id. § 1915A(b)(1), (2).

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

1 pleadings must be liberally construed. Balistreri v. Pacifica  
2 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

3 II. Legal Claims

4 A. Fourth Amendment Unreasonable Search Claim

5 The Supreme Court has not decided whether prison inmates retain  
6 Fourth Amendment rights. See Thompson v. Souza, 111 F.3d 694, 699,  
7 701 n.4 (9th Cir. 1997). The Ninth Circuit has, however, held that  
8 the Fourth Amendment right to be secure against unreasonable  
9 searches extends to incarcerated prisoners, although the  
10 reasonableness of a particular search must be determined by  
11 reference to the prison context. See Michenfelder v. Sumner, 860  
12 F.2d 328, 332 (9th Cir. 1988). Factors to consider in determining  
13 the reasonableness of a search include the scope of the particular  
14 intrusion, the manner in which it is conducted, the justification  
15 for initiating it, and the place at which it is conducted. See  
16 Thompson, 111 F.3d at 700.

17 Although Plaintiff does not describe exactly how the strip  
18 searches were carried out, he alleges that Defendant Oleshea  
19 subjected him to two "invasive and unreasonable strip search[es],"  
20 even though he posed no particular security risk to the institution.  
21 Liberally construed, the Court finds that Plaintiff has stated a  
22 COGNIZABLE Fourth Amendment claim stemming from the strip searches  
23 by Defendant Oleshea.

24 B. Eighth Amendment Claim

25 The Constitution does not mandate comfortable prisons, but  
26 neither does it permit inhumane ones. See Farmer v. Brennan, 511  
27 U.S. 825, 832 (1994). The treatment a prisoner receives in prison  
28 and the conditions under which he is confined are subject to

1 scrutiny under the Eighth Amendment. See Helling v. McKinney, 509  
2 U.S. 25, 31 (1993). The Eighth Amendment imposes duties on prison  
3 officials, who must provide all prisoners with the basic necessities  
4 of life such as food, clothing, shelter, sanitation, medical care  
5 and personal safety. See Farmer, 511 U.S. at 832; DeShaney v.  
6 Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200  
7 (1989); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982).

8 A prison official violates the Eighth Amendment when two  
9 requirements are met: (1) the deprivation alleged must be,  
10 objectively, sufficiently serious, see Farmer, 511 U.S. at 834  
11 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)), and (2) the  
12 prison official must possess a sufficiently culpable state of mind,  
13 see id. (citing Wilson, 501 U.S. at 297).

14 In determining whether a deprivation of a basic necessity is  
15 sufficiently serious to satisfy the objective component of an Eighth  
16 Amendment claim, a court must consider the circumstances, nature,  
17 and duration of the deprivation. The more basic the need, the  
18 shorter the time it can be withheld. See Johnson v. Lewis, 217 F.3d  
19 726, 731 (9th Cir. 2000). Substantial deprivations of shelter,  
20 food, drinking water or sanitation for four days, for example, are  
21 sufficiently serious to satisfy the objective component of an Eighth  
22 Amendment claim. See id. at 732-33.

23 In prison-conditions cases, the necessary state of mind is one  
24 of "deliberate indifference." See, e.g., Farmer, 511 U.S. at 834. A  
25 prison employee is deliberately indifferent if he knows that a  
26 prisoner faces a substantial risk of serious harm and disregards  
27 that risk by failing to take reasonable steps to abate it. Id. at  
28 837.

1        Liberally construed, the Court finds that Plaintiff's  
2 allegations that SVSP prison officials deprived him of clothes, a  
3 mattress, basic sanitation products and utensils for forty-eight  
4 hours present a COGNIZABLE Eighth Amendment claim for deliberate  
5 indifference to his basic life necessities.

6        In the section of the complaint form where he sets forth his  
7 allegations of his Eighth Amendment claim, Plaintiff identifies  
8 "John Does" 1 through 6 as those who were present and participated  
9 in the deliberate indifference to his basic life necessities. As  
10 explained below, a claim stated against Doe Defendants without  
11 further identifying information is not favored in the Ninth Circuit.  
12 See Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980).  
13 Therefore, Plaintiff's Eighth Amendment claim cannot proceed unless  
14 he amends his complaint to cure this pleading deficiency.

15        Accordingly, Plaintiff's Eighth Amendment claim is DISMISSED  
16 WITH LEAVE TO AMEND.

17        C.     Fourteenth Amendment Due Process Claims

18             1.     "Feces Watch"

19        Prisoners retain their right to due process subject to the  
20 restrictions imposed by the nature of the penal system. See Wolff  
21 v. McDonnell, 418 U.S. 539, 556 (1974). Thus, although prison  
22 disciplinary proceedings are not part of a criminal prosecution and  
23 the full panoply of rights due a defendant in such proceedings does  
24 not apply, the Due Process Clause requires certain minimum  
25 procedural protections if (1) state statutes or regulations narrowly  
26 restrict the power of prison officials to impose the deprivation,  
27 and (2) the liberty in question is one of "real substance." See  
28 Sandin v. Conner, 515 U.S. 472, 477-87 (1995); Wolff, 418 U.S. at

1 556-57, 571-72 n.19.

2 California's regulations concerning discipline provide explicit  
3 standards that narrowly fetter official discretion. See Cal. Code  
4 Regs. tit. 15, § 3320(1) (requiring guilt to be proven by  
5 preponderance of evidence standard); § 3320(a) (requiring notice);  
6 § 3320(b) (requiring hearing); Walker v. Sumner, 14 F.3d 1415, 1419  
7 (9th Cir. 1994) (finding Nevada regulations, which are similar to  
8 California's, create liberty interest). The Court assumes for the  
9 purpose of this discussion that the "feces watch" sanctions imposed  
10 against Plaintiff were deprivations of liberty of real substance.

11 Wolff established five procedural requirements for prison  
12 disciplinary hearings implicating the Due Process Clause. First,  
13 "written notice of the charges must be given to the disciplinary-  
14 action defendant in order to inform him of the charges and to enable  
15 him to marshal the facts and prepare a defense." Wolff, 418 U.S. at  
16 564. Second, "at least a brief period of time after the notice, no  
17 less than 24 hours, should be allowed to the inmate to prepare for  
18 the appearance before the [disciplinary committee]." Id. Third,  
19 "there must be a 'written statement by the factfinders as to the  
20 evidence relied on and reasons' for the disciplinary action." Id.  
21 (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)). Fourth,  
22 "the inmate facing disciplinary proceedings should be allowed to  
23 call witnesses and present documentary evidence in his defense when  
24 permitting him to do so will not be unduly hazardous to  
25 institutional safety or correctional goals." Id. at 566; see also  
26 Bartholomew v. Watson, 665 F.2d 915, 917-18 (9th Cir. 1982) (right  
27 to call witnesses is basic to fair hearing and decisions to preclude  
28 should be on case by case analysis of potential hazards of calling

1 particular person). Fifth, "[w]here an illiterate inmate is  
2 involved . . . or where the complexity of the issues makes it  
3 unlikely that the inmate will be able to collect and present the  
4 evidence necessary for an adequate comprehension of the case, he  
5 should be free to seek the aid of a fellow inmate, or . . . to have  
6 adequate substitute aid . . . from the staff or from a[n] . . .  
7 inmate designated by the staff." Wolff, 418 U.S. at 570.

8 In Superintendent v. Hill, 472 U.S. 445, 454 (1985), the Court  
9 held that the minimum requirements of procedural due process also  
10 require that the findings of the prison disciplinary board be  
11 supported by some evidence in the record. Id. at 454. An  
12 examination of the entire record is not required nor is an  
13 independent assessment of the credibility of witnesses or weighing  
14 of the evidence. See id. The relevant question is whether there is  
15 any evidence in the record that could support the conclusion reached  
16 by the disciplinary board. Id. at 455. The Ninth Circuit  
17 additionally has held that there must be some indicia of reliability  
18 of the information that forms the basis for prison disciplinary  
19 actions. See Cato v. Rushen, 824 F.2d 703, 704-05 (9th Cir. 1987).

20 The fact that a prisoner may have been innocent of disciplinary  
21 charges brought against him, however, does not give rise to a  
22 constitutional claim. The Constitution demands due process in  
23 prison disciplinary procedures, not error-free decision-making. See  
24 Ricker v. Leapley, 25 F.3d 1406, 1410 (8th Cir. 1994); McCrae v.  
25 Hankins, 720 F.2d 863, 868 (5th Cir. 1983).

26 Liberally construed, Plaintiff's allegations that he was not  
27 granted a hearing before or after he was put on "feces watch" state  
28 a COGNIZABLE claim of a violation of his due process rights. See



1 Meachum v. Fano, 427 U.S. 215, 223-27 (1976); Sandin v. Conner, 515  
2 U.S. 472, 484 (1995); Toussaint v. McCarthy, 926 F.2d 800, 1098  
3 (9th Cir. 1990), cert. denied, 502 U.S. 874 (1991).

4       However, in the section of the complaint form where he sets  
5 forth his allegations of his due process claim, Plaintiff identifies  
6 "John Does" 1 through 6 as those who were present and participated  
7 in denying him a hearing. Plaintiff's due process claim cannot  
8 proceed unless he amends his complaint because, as explained below,  
9 a claim stated against Doe Defendants is not favored in the Ninth  
10 Circuit. See Gillespie, 629 F.2d at 642.

11       Accordingly, Plaintiff's due process claim is DISMISSED WITH  
12 LEAVE TO AMEND to cure this pleading deficiency.

13               2. Claim Relating to Grievance Process

14       Interests protected by the Due Process Clause may arise from  
15 two sources -- the Due Process Clause itself and laws of the States.  
16 See Meachum v. Fano, 427 U.S. 215, 223-27 (1976). There is no  
17 constitutional right to a prison administrative appeal or grievance  
18 system. Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003).

19       However, California Code of Regulations, title 15 section 3084,  
20 et seq. grants state prisoners the right to a prison appeals  
21 process. The regulations are purely procedural -- they require the  
22 establishment of a procedural structure for reviewing prisoner  
23 complaints and set forth no substantive standards. Instead, they  
24 provide for flexible appeal time limits, see Cal. Code Regs. tit.  
25 15, § 3084.6, and, at most, that "no reprisal shall be taken against  
26 an inmate or parolee for filing an appeal," id. § 3084.1(d). A  
27 provision that merely sets procedural requirements, even if  
28 mandatory, cannot form the basis of a constitutionally cognizable

1 liberty interest. Smith v. Noonan, 992 F.2d 987, 989 (9th Cir.  
2 1993); see, e.g., Antonelli v. Sheahan, 81 F.3d 1422, 1430 (7th Cir.  
3 1996) (prison grievance procedure is procedural right that does not  
4 give rise to protected liberty interest requiring procedural  
5 protections of Due Process Clause); Buckley v. Barlow, 997 F.2d 494,  
6 495 (8th Cir. 1993) (same); Azeez v. DeRobertis, 568 F. Supp. 8, 10  
7 (N.D. Ill. 1982) (same). Accordingly, a prison official's failure  
8 to process grievances, without more, is not actionable under § 1983.  
9 See Buckley, 997 F.2d at 495; see also Ramirez, 334 F.3d at 860  
10 (prisoner's claimed loss of liberty interest in processing of his  
11 appeals does not violate due process because prisoners lack a  
12 separate constitutional entitlement to a specific prison grievance  
13 system). Although there is a First Amendment right to petition  
14 government for redress of grievances, there is no right to a  
15 response or any particular action. See Flick v. Alba, 932 F.2d 728  
16 (8th Cir. 1991) ("prisoner's right to petition the government for  
17 redress . . . is not compromised by the prison's refusal to  
18 entertain his grievance.").

19 Here, Plaintiff's claim that his constitutional rights were  
20 violated by the failings of the prison administrative grievance  
21 system is DISMISSED with prejudice and without leave to amend.

22 Plaintiff names the "appeals coordinator" as a Defendant in his  
23 complaint. Plaintiff has failed to state a claim against the  
24 "appeals coordinator." Accordingly, Plaintiff's claim against the  
25 "appeals coordinator" relating to the grievance process is DISMISSED  
26 with prejudice.

27 However, the Court will take into account Plaintiff's  
28 allegations if it needs to decide whether he can be excused from

1 failing to exhaust his administrative remedies with respect to his  
2 other claims.<sup>1</sup>

3 D. Fourteenth Amendment Equal Protection Claim

4 "The Equal Protection Clause of the Fourteenth Amendment  
5 commands that no State shall 'deny to any person within its  
6 jurisdiction the equal protection of the laws,' which is essentially  
7 a direction that all persons similarly situated should be treated  
8 alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432,  
9 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)).

10 To state a claim for relief under the Equal Protection Clause,  
11 a plaintiff must allege that the defendant acted at least in part  
12 because of the plaintiff's membership in a protected class. See  
13 Serrano v. Francis, 345 F.3d 1071, 1081-82 (9th Cir. 2003). Proof  
14 of a discriminatory intent or purpose is also required. City of  
15 Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 194  
16 (2003). In the prison context, an allegedly discriminatory prison  
17 regulation or practice is valid as long as it is "reasonably related  
18 to legitimate penological interests." Turner v. Safley, 482 U.S.  
19 78, 89 (1987).

20 Here, Plaintiff makes the conclusory allegation that "John  
21 Does" 1 through 6 discriminated against him because of his race and  
22 his fiance's race by putting him on "feces watch" in December, 2007.  
23 Plaintiff alleges no facts showing that similarly situated inmates,  
24

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25 <sup>1</sup> Plaintiff contends he filed administrative appeals  
26 (grievances) on the issues in his amended complaint, which have  
27 never been answered. It thus appears he has not exhausted his  
28 administrative remedies as required by 42 U.S.C. § 1997e(a). If  
the allegations that his appeals have not been answered are true,  
however, it may be that administrative remedies are not "available"  
within the meaning of the statute. This is an issue better  
resolved at a later stage of the case.

1 who are not African-American, or who have fiances of a different  
2 ethnicity, were not put on "feces watch" in similar circumstances.  
3 The Court finds that Plaintiff does not state a cognizable equal  
4 protection claim against Defendants "John Does" 1 through 6 or  
5 Defendant Oleshea. Accordingly, Plaintiff's equal protection claim  
6 is DISMISSED WITH LEAVE TO AMEND. Plaintiff may reassert his equal  
7 protection claim by filing an amended claim if he can allege in good  
8 faith, and by citing actual examples which are subject to proof,  
9 that Defendants "John Does" 1 through 6 or Defendant Oleshea placed  
10 him on "feces watch" but did not do so for other similarly situated  
11 prisoners of other races.

12 E. Claims Against Doe Defendants

13 Plaintiff identifies "John Does" 1 through 6 as Defendants  
14 whose names he intends to learn through discovery. The use of Doe  
15 Defendants is not favored in the Ninth Circuit. See Gillespie, 629  
16 F.2d at 642. However, where the identity of alleged defendants  
17 cannot be known prior to the filing of a complaint the plaintiff  
18 should be given an opportunity through discovery to identify them.  
19 Id. Failure to afford the plaintiff such an opportunity is error.  
20 See Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999).

21 Accordingly, the claims against the Doe Defendants are  
22 DISMISSED from this action without prejudice. Should Plaintiff  
23 learn their identities, he may move to file an amendment to the  
24 complaint to add them as named defendants. See Brass v. County of  
25 Los Angeles, 328 F.3d 1192, 1195-98 (9th Cir. 2003).

26 CONCLUSION

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

- 28 1. Plaintiff has stated a COGNIZABLE Fourth Amendment claim

1 against Defendant Oleshea stemming from the strip searches conducted  
2 in December, 2007.

3 2. Plaintiff's Eighth Amendment claim for deliberate  
4 indifference to his basic life necessities is DISMISSED WITH LEAVE  
5 TO AMEND.

6 3. Plaintiff's Fourteenth Amendment claim that his due  
7 process rights were violated when he was not given a hearing before  
8 or after he was put on "feces watch" is DISMISSED WITH LEAVE TO  
9 AMEND.

10 4. Plaintiff's Fourteenth Amendment claim that his due  
11 process rights were violated through SVSP's grievance process and  
12 his claim against the "appeals coordinator" relating to the  
13 grievance process are DISMISSED WITH PREJUDICE.

14 5. Plaintiff's Fourteenth Amendment equal protection claim is  
15 DISMISSED WITH LEAVE TO AMEND.

16 6. Within thirty (30) days of the date of this Order  
17 Plaintiff may file an amendment to the complaint with his amended  
18 Eighth Amendment, due process and equal protection claims as set  
19 forth above in Section II(B),(C)(1), and (D) of this Order.  
20 (Plaintiff shall resubmit only those claims and not the entire  
21 complaint.) The failure to do so will result in the dismissal  
22 without prejudice of his Eighth Amendment, due process and equal  
23 protection claims.

24 7. The Clerk of the Court shall mail a Notice of Lawsuit and  
25 Request for Waiver of Service of Summons, two copies of the Waiver  
26 of Service of Summons, a copy of the complaint and amended complaint  
27 and all attachments thereto (docket nos. 1, 10) and a copy of this  
28 Order to Correctional Officer Oleshea at SVSP. The Clerk of the

1 Court shall also mail a copy of the complaint and a copy of this  
2 Order to the State Attorney General's Office in San Francisco.  
3 Additionally, the Clerk shall mail a copy of this Order to  
4 Plaintiff.

5 8. Defendant is cautioned that Rule 4 of the Federal Rules of  
6 Civil Procedure requires him to cooperate in saving unnecessary  
7 costs of service of the summons and complaint. Pursuant to Rule 4,  
8 if Defendant, after being notified of this action and asked by the  
9 Court, on behalf of Plaintiff, to waive service of the summons,  
10 fails to do so, he will be required to bear the cost of such service  
11 unless good cause be shown for their failure to sign and return the  
12 waiver form. If service is waived, this action will proceed as if  
13 Defendant had been served on the date that the waiver is filed,  
14 except that pursuant to Rule 12(a)(1)(B), Defendant will not be  
15 required to serve and file an answer before sixty (60) days from the  
16 date on which the request for waiver was sent. (This allows a  
17 longer time to respond than would be required if formal service of  
18 summons is necessary.) Defendant is asked to read the statement set  
19 forth at the foot of the waiver form that more completely describes  
20 the duties of the parties with regard to waiver of service of the  
21 summons. If service is waived after the date provided in the Notice  
22 but before Defendant has been personally served, the Answer shall be  
23 due sixty (60) days from the date on which the request for waiver  
24 was sent or twenty (20) days from the date the waiver form is filed,  
25 whichever is later.

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

1           a. No later than ninety (90) days from the date his  
2 answer is due, Defendant shall file a motion for summary judgment or  
3 other dispositive motion. The motion shall be supported by adequate  
4 factual documentation and shall conform in all respects to Federal  
5 Rule of Civil Procedure 56. If Defendant is of the opinion that  
6 this case cannot be resolved by summary judgment, he shall so inform  
7 the Court prior to the date the summary judgment motion is due. All  
8 papers filed with the Court shall be promptly served on Plaintiff.

9           b. Plaintiff's opposition to the dispositive motion  
10 shall be filed with the Court and served on Defendant no later than  
11 sixty (60) days after the date on which Defendant's motion is filed.  
12 The Ninth Circuit has held that the following notice should be given  
13 to pro se plaintiffs facing a summary judgment motion:

14           The defendant has made a motion for summary judgment  
15 by which they seek to have your case dismissed. A motion  
16 for summary judgment under Rule 56 of the Federal Rules of  
Civil Procedure will, if granted, end your case.

17           Rule 56 tells you what you must do in order to oppose  
18 a motion for summary judgment. Generally, summary  
19 judgment must be granted when there is no genuine issue of  
20 material fact -- that is, if there is no real dispute  
21 about any fact that would affect the result of your case,  
22 the party who asked for summary judgment is entitled to  
23 judgment as a matter of law, which will end your case.  
24 When a party you are suing makes a motion for summary  
25 judgment that is properly supported by declarations (or  
26 other sworn testimony), you cannot simply rely on what  
27 your complaint says. Instead, you must set out specific  
28 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 [in favor of the defendants],  
your case will be dismissed and there will be no trial.

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

Plaintiff is advised to read Rule 56 of the Federal Rules of

1 Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)  
2 (party opposing summary judgment must come forward with evidence  
3 showing triable issues of material fact on every essential element  
4 of his claim). Plaintiff is cautioned that because he bears the  
5 burden of proving his allegations in this case, he must be prepared  
6 to produce evidence in support of those allegations when he files  
7 his opposition to Defendant's dispositive motion. Such evidence may  
8 include sworn declarations from himself and other witnesses to the  
9 incident, and copies of documents authenticated by sworn  
10 declaration. Plaintiff will not be able to avoid summary judgment  
11 simply by repeating the allegations of his complaint.

12 c. If Defendant wishes to file a reply brief, he shall do  
13 so no later than thirty (30) days after the date Plaintiff's  
14 opposition is filed.

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

18 10. Discovery may be taken in this action in accordance with  
19 the Federal Rules of Civil Procedure. Leave of the Court pursuant  
20 to Rule 30(a)(2) is hereby granted to Defendants to depose Plaintiff  
21 and any other necessary witnesses confined in prison.

22 11. All communications by Plaintiff with the Court must be  
23 served on Defendant, or Defendant's counsel once counsel has been  
24 designated, by mailing a true copy of the document to Defendant or  
25 Defendant's counsel.

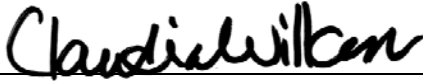
26 12. It is Plaintiff's responsibility to prosecute this case.  
27 Plaintiff must keep the Court informed of any change of address and  
28 must comply with the Court's orders in a timely fashion.



1        13. Extensions of time are not favored, though reasonable  
2 extensions will be granted. Any motion for an extension of time  
3 must be filed no later than fifteen (15) days prior to the deadline  
4 sought to be extended.

5        IT IS SO ORDERED.

6 DATED: 7/6/09

  
\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 KARLOS L FRYE,

5 Plaintiff,

6 v.

7 OLESHEA et al,

8 Defendant.  
9 \_\_\_\_\_/

Case Number: CV08-05288 CW

**CERTIFICATE OF SERVICE**

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

12 That on July 6, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said  
13 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
14 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located  
15 in the Clerk's office.

16 Karlos L. Frye T05458  
17 D7-129  
18 Salinas Valley State Prison  
19 P.O. Box 1050  
20 Soledad, CA 93960-1050

21 Dated: July 6, 2009

22 Richard W. Wicking, Clerk  
23 By: Sheilah Cahill, Deputy Clerk  
24  
25  
26  
27  
28