

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

4 TODD ASHKER,

No. 09-02948 CW

5 Plaintiff,

ORDER REVIEWING
FIRST AMENDED
COMPLAINT UNDER
28 U.S.C.

6 v.

7 MATTHEW CATE, et al.,

§ 1915A, ORDERING
SERVICE OF
COGNIZABLE CLAIMS
AND DISMISSING
NON-COGNIZABLE
CLAIMS

8 Defendants.
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United States District Court
For the Northern District of California

On June 30, 2009, Plaintiff, an inmate at Pelican Bay State Prison (PBSP), filed this civil rights complaint against several Defendants alleging, among other things, an Eighth Amendment claim for deliberate indifference to his serious medical needs and a state medical malpractice claim. On February 16, 2010, this Court issued an Order Reviewing Complaint Under 28 U.S.S. § 1915A and found that Plaintiff had stated a cognizable Eighth Amendment claim against Defendants James Flowers, Sue Risenhoover, Michael Sayre and Maureen McLean and that he had stated a cognizable medical malpractice claim against the aforementioned Defendants and Defendants Pam Labans and R. Robinson. The Court dismissed with leave to amend Plaintiff's Eighth Amendment claim against Defendants Matthew Cate, Francisco Jacquez, Pam Labans, R. Robinson, and Dwight Winslow and the negligence claim against Defendants Cate, Jacquez and Winslow. Plaintiff has filed a First Amended Complaint (FAC) seeking to state an Eighth Amendment claim against these Defendants. The Court reviews the FAC under 28

1 U.S.C. § 1915A.

2 LEGAL STANDARD

3 A federal court must conduct a preliminary screening in any
4 case in which a prisoner seeks redress from a governmental entity
5 or officer or employee of a governmental entity. 28 U.S.C.
6 § 1915A(a). In its review, the court must identify any cognizable
7 claims and dismiss any claims that are frivolous, malicious, fail
8 to state a claim upon which relief may be granted or seek monetary
9 relief from a defendant who is immune from such relief. 28 U.S.C.
10 § 1915A(b).

11 Deliberate indifference to serious medical needs violates the
12 Eighth Amendment's proscription against cruel and unusual
13 punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin
14 v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other
15 grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th
16 Cir. 1997) (en banc). A determination of "deliberate indifference"
17 involves an examination of two elements: the seriousness of the
18 prisoner's medical need and the nature of the defendant's response
19 to that need. Id.

20 A "serious" medical need exists if the failure to treat a
21 prisoner's condition could result in further significant injury or
22 the "unnecessary and wanton infliction of pain." Id. (citing
23 Estelle, 429 U.S. at 104). The existence of an injury that a
24 reasonable doctor or patient would find important and worthy of
25 comment or treatment; the presence of a medical condition that
26 significantly affects an individual's daily activities; or the
27 existence of chronic and substantial pain are examples of

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1 indications that a prisoner has a "serious" need for medical
2 treatment. Id. at 1059-60 (citing Wood v. Housewright, 900 F.2d
3 1332, 1337-41 (9th Cir. 1990)).

4 A prison official is deliberately indifferent if he knows that
5 a prisoner faces a substantial risk of serious harm and disregards
6 that risk by failing to take reasonable steps to abate it. Farmer
7 v. Brennan, 511 U.S. 825, 837 (1994). The prison official must not
8 only "be aware of facts from which the inference could be drawn
9 that a substantial risk of serious harm exists," but he "must also
10 draw the inference." Id. If a prison official should have been
11 aware of the risk, but was not, then the official has not violated
12 the Eighth Amendment, no matter how severe the risk. Gibson v.
13 County of Washoe, 290 F.3d 1175, 1188 (9th Cir. 2002).

14 In order for deliberate indifference to be established,
15 therefore, there must be a purposeful act or failure to act on the
16 part of the defendant and resulting harm. McGuckin, 974 F.2d at
17 1060; Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404,
18 407 (9th Cir. 1985). A finding that the defendant's activities
19 resulted in "substantial" harm to the prisoner is not necessary,
20 however.

21 Once the prerequisites are met, it is up to the fact-finder to
22 determine whether deliberate indifference was exhibited by the
23 defendant. Such indifference may appear when prison officials
24 deny, delay or intentionally interfere with medical treatment, or
25 it may be shown in the way in which prison officials provide
26 medical care. McGuckin, 974 at 1062.

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DISCUSSION

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2 In the February 16, 2010 Order, the Court found that Plaintiff
3 had alleged that he had a serious medical need. Whether Plaintiff
4 has a cognizable claim against a particular Defendant for violation
5 of the Eighth Amendment due to deliberate indifference depends on
6 the nature of the Defendant's response to that need. The following
7 are Plaintiff's new allegations against Defendants.

8 I. Matthew Cate

9 Defendant Cate is the Secretary-Director of the California
10 Department of Corrections and Rehabilitation (CDCR). On February
11 1, 2008, Defendant Cate denied Plaintiff's 602 Appeal #07-11142
12 which addressed the alleged unconstitutional medical care PBSP
13 medical staff had provided to Plaintiff. On July 21, 2008,
14 Defendant Cate denied another 602 appeal addressing the ongoing
15 alleged unconstitutional medical treatment. On January 13, 2009,
16 Plaintiff sent another 602 appeal to Defendant Cate. Although
17 appeals are supposed to be reviewed and decided within sixty days,
18 it was not until December 16, 2009 that Defendant Cate responded by
19 denying the appeal.

20 In the February 16, 2010 Order, the Court dismissed the claims
21 against Defendant Cate because "the only specific allegations
22 concerning Defendant Cate are his failure to grant Plaintiff's 602
23 appeals. These allegations do not state a cognizable claim."

24 The allegations against Defendant Cate in the FAC are also
25 that he failed to grant Plaintiff's 602 appeals. As stated
26 previously, these allegations do not state a cognizable claim.
27 Therefore, all claims against Defendant Cate are dismissed.

1 II. Francisco Jacquez and Dwight Winslow

2 The FAC does not make any allegations against Defendants
3 Jacquez and Winslow. Therefore, all claims against them are
4 dismissed.

5 III. Pam Labans and R. Robinson

6 Defendants Labans and Robinson are registered nurses employed
7 by PBSP. On March 19, 2008, they denied, at the first level of
8 review, Plaintiff's January 14, 2008 602 appeal regarding his
9 alleged unconstitutional medical treatment. As stated in the
10 February 16, 2010 Order, there is no cognizable claim for the
11 denial of a 602 appeal. Therefore, Plaintiff's allegations against
12 Labans and Robinson fail to state a cognizable Eighth Amendment
13 claim.

14 CONCLUSION

15 Based on the foregoing and the February 16, 2010 Order,
16 Plaintiff has stated the following cognizable claims for relief:

17 1. An Eighth Amendment claim for deliberate indifference to
18 serious medical needs against Defendants Flowers, Risenhoover,
19 Sayre and McLean.

20 2. A state law claim in negligence for breach of a
21 professional duty of care against Defendants Flowers, Risenhoover,
22 Sayre, McLean, Labans and Robinson.

23 3. All other claims against all other Defendants are
24 dismissed.

25 Because it appears that Plaintiff has not served his original
26 complaint on Defendants, the following, which was stated in the
27 Court's February 16, 2010, remains applicable.

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1 4. Because Plaintiff is not proceeding in forma pauperis in
2 this action, he may not rely on the United States Marshal for
3 service of the summons, complaint and First Amended Complaint
4 without paying for this service. See Fed. R. Civ. P. 4(c)(3).
5 Title 28 U.S.C. § 1921(a)(A) provides that the United States
6 Marshal shall routinely collect, and the court may tax as costs,
7 fees for serving a summons and complaint. Title 28 C.F.R.
8 § 0.114(a)(3) provides that the United States Marshal shall collect
9 a fee for personal service of a summons and complaint at the rate
10 of \$55.00 per hour, or portion thereof, plus travel expenses.
11 Consequently, Plaintiff may himself arrange for service of all of
12 the Defendants against whom cognizable claims for relief have been
13 found or he may request the Court to order the Marshal to do so.
14 If Plaintiff wishes the Marshal to serve the summons and complaint,
15 he must inform the Court of this within twenty days of the date of
16 this Order and he must arrange to pay the required fee. Rule 4(m)
17 of the Federal Rules of Civil procedure provides:

18 If service and summons of a complaint is not made upon a
19 defendant within 120 days after the filing of the
20 complaint, the court, upon motion or on its own
21 initiative after notice to the plaintiff, shall dismiss
the action without prejudice as to that defendant or
direct that service be effected within a specified time
. . . .

22 Fed. R. Civ. P. 4(m).

23 5. Alternatively, Plaintiff may accomplish service of
24 Defendants pursuant to Federal Rule of Civil Procedure 4(d) which
25 provides that plaintiffs may send to the defendants a notice that
26 they are being sued and a request that they waive service of a
27 summons. The notice must be in writing, addressed to the
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1 individual defendants, name the court where the complaint was
2 filed, be accompanied by a copy of the complaint and amended
3 complaint, two copies of the waiver form, and a prepaid means for
4 returning the form, be sent by first class mail or other reliable
5 means, state the date the request was sent and give the defendant a
6 reasonable time, at least thirty days after the request was sent,
7 to return the waiver. See Fed. R. Civ. P. 4(d)(1)(A)-(G). The
8 Clerk shall mail to Plaintiff sufficient copies of the Court's
9 official "Waiver of Service of Summons" forms.

10 6. If Plaintiff asks that Defendants waive service, Defendants
11 are cautioned that Rule 4(d) requires them to cooperate in saving
12 unnecessary costs of service of the summons and complaint.
13 Pursuant to Rule 4(d)(2), if Defendants, after being notified of
14 this action and requested by Plaintiff to waive service of the
15 summons, fail to do so, they will be required to bear the cost of
16 such service unless good cause be shown for their failure to sign
17 and return the waiver form. If service is waived, this action will
18 proceed as if Defendants had been served on the date that the
19 waiver is filed, except that pursuant to Rule 12(a)(1)(A)(ii),
20 Defendants will not be required to serve and file an answer before
21 sixty (60) days from the date on which the request for waiver was
22 sent. (This allows a longer time to respond than would be required
23 if formal service of summons is necessary.) Defendants are asked
24 to read the statement set forth at the foot of the waiver form that
25 more completely describes the duties of the parties with regard to
26 waiver of service of the summons. If service is waived after the
27 date provided in the Notice but before Defendants have been
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1 personally served, the Answer shall be due sixty (60) days from the
2 date on which the request for waiver was sent or twenty (20) days
3 from the date the waiver form is filed, whichever is later.

4 7. Defendants shall answer the complaint in accordance with
5 the Federal Rules of Civil Procedure. The following briefing
6 schedule shall govern dispositive motions in this action:

7 a. No later than ninety (90) days from the date their
8 answer is due, Defendants shall file a motion for summary judgment
9 or other dispositive motion. The motion shall be supported by
10 adequate factual documentation and shall conform in all respects to
11 Federal Rule of Civil Procedure 56. If Defendants are of the
12 opinion that this case cannot be resolved by summary judgment, they
13 shall so inform the Court prior to the date the summary judgment
14 motion is due. All papers filed with the Court shall be promptly
15 served on Plaintiff.

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

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

24 Rule 56 tells you what you must do in order to
25 oppose a motion for summary judgment. Generally, summary
26 judgment must be granted when there is no genuine issue
27 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.

1 When a party you are suing makes a motion for summary
2 judgment that is properly supported by declarations (or
3 other sworn testimony), you cannot simply rely on what
4 your complaint says. Instead, you must set out specific
5 facts in declarations, depositions, answers to
6 interrogatories, or authenticated documents, as provided
7 in Rule 56(e), that contradict the facts shown in the
8 defendant's declarations and documents and show that
9 there is a genuine issue of material fact for trial. If
10 you do not submit your own evidence in opposition,
11 summary judgment, if appropriate, may be entered against
12 you. If summary judgment is granted in favor of
13 defendants, your case will be dismissed and there will be
14 no trial.

15 Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).

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

28 c. If Defendants wish to file a reply brief, they shall
do so no later than thirty (30) days after the date Plaintiff's
opposition is filed.

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.

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

5 9. All communications by Plaintiff with the Court must be
6 served on Defendants, or Defendants' counsel once counsel has been
7 designated, by mailing a true copy of the document to Defendants or
8 Defendants' counsel.

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

12 11. Extensions of time are not favored, though reasonable
13 extensions will be granted. Any motion for an extension of time
14 must be filed no later than seven days prior to the deadline sought
15 to be extended.

16 12. The Court orders the Clerk of the Court to send this
17 Order to PBSP Litigation Coordinator Harlan Watkins and to the
18 California Attorney General and to mail courtesy copies to each
19 Defendant so that Defendants have prior notice of this lawsuit and
20 of the consequences if they fail to waive formal service and
21 require service by the United States Marshal.

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23 IT IS SO ORDERED.

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25 Dated: June 1, 2010

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CLAUDIA WILKEN
United States District Judge

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

4 TODD ASHKER,

5 Plaintiff,

6 v.

7 MATHEW CATE et al,

8 Defendant.

Case Number: CV09-02948 CW

CERTIFICATE OF SERVICE

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

11 That on June 1, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies)
12 in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in
13 the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's
14 office.

15 Todd Ashker C58191
16 D1-119
17 Pelican Bay State Prison
18 P.O. Box 7500
19 Crescent City, CA 95532

20 Dated: June 1, 2010

21 Richard W. Wieking, Clerk
22 By: Ronnie Hersler, Administrative Law Clerk
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