

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

SHANNON RILEY, No. C 10-2088 CW (PR)
Plaintiff,
v. ORDER FOR SERVICE OF ORIGINAL
CORRECTIONAL OFFICERS S. ROACH COMPLAINT; DISMISSING NEW
AND MORRIS, COMPLAINT AS UNEXHAUSTED; AND
Defendants. ADDRESSING PENDING MOTIONS

INTRODUCTION

Plaintiff Shannon Riley, a state prisoner incarcerated at Salinas Valley State Prison (SVSP), filed a civil rights complaint, a motion for a preliminary injunction, and requests for modification and reduction of the filing fee.

He has also filed a new complaint entitled, "Comlaint [sic] Under the Civil Rights Act Tit. 42 USC 1983."

BACKGROUND

The background of Plaintiff's claims is taken from his original complaint, his new complaint and the attached exhibits.

In Plaintiff's original complaint dated April 13, 2010, he states that Defendant SVSP Correctional Officer S. Roach "has continued to retaliate and harass [him] by filing false rule violation reports, refusing to release [him] for work and ultimately causing [him] to seek a job change [due] to the continuous harassment and retaliation." (Compl. at 3.) In Plaintiff's new complaint, he specifies that the alleged retaliation took place in 2009, after he filed a grievance against SVSP Correctional Officer Vasquez, one of Defendant Roach's

1 "buddies." (Apr. 25, 2010 Compl., Ex. E at 101.) Plaintiff claims
2 that on July 6, 2009, Defendant Roach retaliated against him by
3 "refus[ing] to release [him] for his work assignment." (Id. at
4 99.) Plaintiff claims that he was not allowed to "perform his work
5 assignment" from July 7, 2009 through July 9, 2009. (Id. at 101.)
6 Plaintiff claims that on July 8, 2009, he confronted Defendant
7 Roach "about his reason for refusing to release [him] for his work
8 assignment," and Defendant Roach "responded by stating he don't
9 [sic] like I/M paper pushers specifically when I/M's file against
10 one of his buddies C/O Roach was referring to the a [sic]
11 complaint [Plaintiff] filed against C/O Vasquez." (Id.) Plaintiff
12 also identifies the staff member "who signs the time cards" as
13 Defendant SVSP Correctional Officer Morris, and claims Defendant
14 Morris "'falsely documented' [his] time card as [Plaintiff] was
15 allowed out to perform his duties." (Id. at 100-101.)

16 Plaintiff filed an administrative grievance relating to his
17 retaliation claim, and his allegations were investigated at the
18 second level of review. In the second level decision, dated
19 September 3, 2009, it was determined that his appeal was "partially
20 granted" because an inquiry into Plaintiff's allegations had been
21 conducted. (Id. at 104.) The details of the inquiry were not
22 disclosed, but the reviewer concluded: "The inquiry is complete.
23 Staff did not violate CDCR policy." (Id.) At the third level of
24 review the second level findings were upheld.

25 As mentioned above, Plaintiff filed a new complaint dated
26 April 25, 2010, pertaining to events which occurred after the
27 incident of alleged retaliation by Defendants Roach and Morris
28 mentioned above. Plaintiff claims that on August 19, 2009, he

1 "continued to experience harassment and retaliation from both
2 officers C/O Morris and Roach." (Apr. 25, 2010 Compl. at 5.) He
3 attempted to file another grievance; however, it was "returned by
4 the appeals coordinator alleging it to be a 'duplicate' thereby
5 preventing [him] from exercising his due process rights and access
6 to court." (Id.) Plaintiff seems to be alleging a claim relating
7 to the grievance process and names the following appeals
8 coordinators as Defendants: E. Medina, P. Nickerson and Smith.

9 Plaintiff alleges he "attempted to secure a job change in
10 order to remove himself away from the building staff, [but] this
11 request was denied." (Id.) He "continued to be subjected to
12 retaliatory tactics by his building staff C/O Morris and C/O
13 Roach;" however, all his grievances were "returned." (Id.)
14 Plaintiff claims "as a result, [he] never could exhaust his
15 administrative remedies in regards [sic] to C/O Morris. (Id. at 6.)
16 Plaintiff then asked his mother to write to the "California State
17 Personal [sic] Board, the Office of Internal Affairs." (Id.) He
18 also "continued to write the warden in an effort to seek assistance
19 from him." (Id.) While Plaintiff received a response, he claims
20 the warden "failed to intervene and reprimand [sic] his staff."
21 (Id. at 7.) On January 1, 2010, Plaintiff was "successful in
22 securing a job change in an effort to remove himself from the
23 continuous verbal assaults, arbitrary 'locing [sic] petitioner in
24 his cell' and/or 'refusing to release petitioner out for work,' but
25 continuing to run regular program for all other inmates [sic] housed
26 in facility D, building 7." (Id.)

27 Plaintiff alleges that on March 5, 2010, Defendant Roach filed
28 a "false rules violation report" against him for "Disobeying a

1 Direct Order." (Id.; Apr. 25, 2010 Compl., Ex. X at 187.)
2 Plaintiff was "found guilty of the offense alleged and was
3 sentenced to 30 days credit loss, LOP (loss of privileges, i.e.,
4 one quarter canteen draw, loss of yard except for one hour a day
5 that is every other day (mon, weds, fri), no phone calls, no
6 quarterly packages/special purchase." (Apr. 25, 2010 Compl. at 8.)
7 Plaintiff claims that "there was no evidentiary basis for the
8 finding of guilt on the initial (CDC 115)" (Id. at 9.)
9 Plaintiff adds that Defendant SVSP Correctional Lieutenant R. A.
10 Boccella "violated [his] due process rights by failing to provide
11 [him] with all of the witnesses he requested . . . [by] refus[ing]
12 to review and consider the falsehood of C/O Roach's allegqtion
13 [sic] that he counseled petitioner in the past." (Id.) Finally,
14 Plaintiff claims that he "has yet to exhaust his administrative
15 remedies to said rules violation report being that [he] has yet to
16 receive his final copy of the rules violation report (CDC-115)."
17 (Id.)

18 He seeks injunctive relief and monetary damages.

19 DISCUSSION

20 I. Standard of Review

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

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

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
6 (2) that the alleged violation was committed by a person acting
7 under the color of state law. See West v. Atkins, 487 U.S. 42, 48
8 (1988).

9 II. Legal Claims

10 A. Retaliation Claim in Original Complaint

11 "Within the prison context, a viable claim of First Amendment
12 retaliation entails five basic elements: (1) An assertion that a
13 state actor took some adverse action against an inmate (2) because
14 of (3) that prisoner's protected conduct, and that such action
15 (4) chilled the inmate's exercise of his First Amendment rights,
16 and (5) the action did not reasonably advance a legitimate
17 correctional goal." Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th
18 Cir. 2005) (footnote omitted). To prove retaliation, a plaintiff
19 must show that the defendants took adverse action against him or
20 her that "would chill or silence a person of ordinary firmness from
21 future First Amendment activities." White v. Lee, 227 F.3d 1214,
22 1228 (9th Cir. 2000) (citing Mendocino Env'tl. Ctr. v. Mendocino
23 County, 192 F.3d 1283, 1300 (9th Cir. 1999)).

24 In his original complaint, Plaintiff alleges that Defendants
25 Roach and Morris retaliated against him by refusing to release him
26 for his work assignment and falsely documenting his time card to
27 say he was allowed out to perform his duties, respectively.

28 Plaintiff claims Defendants Roach and Morris acted in this matter

1 because Plaintiff filed a complaint against another officer,
2 Officer Vasquez. Liberally construed, Plaintiff's allegations
3 state a cognizable retaliation claim against Defendants Roach and
4 Morris.

5 B. Claims in New Complaint

6 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134,
7 110 Stat. 1321 (1996) (PLRA), amended 42 U.S.C. § 1997e to provide
8 that "[n]o action shall be brought with respect to prison
9 conditions under [42 U.S.C. § 1983], or any other Federal law, by a
10 prisoner confined in any jail, prison, or other correctional
11 facility until such administrative remedies as are available are
12 exhausted." 42 U.S.C. § 1997e(a). The exhaustion requirement is
13 mandatory. Wyatt v. Terhune, 315 F.3d 1108, 1117 n.9 (9th Cir.),
14 cert. denied, 540 U.S. 810 (2003). While non-exhaustion under
15 § 1997e(a) is an affirmative defense, a prisoner's concession to
16 non-exhaustion is a valid ground for dismissal, so long as no
17 exception to the exhaustion requirement applies. Id. at 119-20.
18 Accordingly, the court may dismiss a claim without prejudice if it
19 is clear from the record that the prisoner has conceded that he did
20 not exhaust administrative remedies. See id.

21 The State of California provides its inmates and parolees the
22 right to appeal administratively "any departmental decision,
23 action, condition or policy perceived by those individuals as
24 adversely affecting their welfare." See Cal. Code Regs. tit. 15,
25 § 3084.1(a). It also provides its inmates the right to file
26 administrative appeals alleging misconduct by correctional
27 officers. See id. § 3084.1(e). In order to exhaust available
28 administrative remedies within this system, a prisoner must proceed

1 through several levels of appeal: (1) informal resolution,
2 (2) formal written appeal on a CDC 602 inmate appeal form,
3 (3) second level appeal to the institution head or designee, and
4 (4) third level appeal to the Director of the California Department
5 of Corrections. See id. § 3084.5; Barry v. Ratelle, 985 F. Supp.
6 1235, 1237 (S.D. Cal. 1997). This satisfies the administrative
7 remedies exhaustion requirement under § 1997e(a). See id. at 1237-
8 38.

9 Here, the retaliation claim raised in Plaintiff's original
10 complaint was pursued through the third level of review.¹ However,
11 the claims raised in Plaintiff's new complaint appear not to have
12 been exhausted through the administrative grievance procedure.
13 Unlike Plaintiff's original complaint, in which he states
14 specifically that he did exhaust his administrative grievances, his
15 new complaint does not so state. Nowhere in the new complaint does
16 Plaintiff allege that he exhausted his due process claim against
17 Defendant Bocella or his claim relating to the grievance process
18 against Defendants Medina, Nickerson and Smith. Therefore, it
19 appears from the face of the new complaint that Plaintiff has not
20 exhausted his administrative remedies as to these claims.

21 Accordingly, Plaintiff's claims in his new complaint are
22

23 ¹Plaintiff specifically concedes that he has not exhausted his
24 administrative remedies as to his retaliation claim against
25 Defendant Morris. Plaintiff contends he attempted to file an
26 administrative grievance relating to his claims against Defendant
27 Morris; however, it was "returned" without being answered. It thus
28 appears he has not exhausted his 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 DISMISSED as unexhausted. Plaintiff may refile his claims if he is
2 able to exhaust his administrative remedies in compliance with
3 Title 15 of the California Code of Regulations § 3084. However,
4 Plaintiff must refile his due process claim against Defendant
5 Bocella in a separate action from his claim relating to the
6 grievance process against Defendants Medina, Nickerson and Smith,
7 because the two claims are not properly joined.

8 III. Motion for a Preliminary Injunction

9 Plaintiff seeks immediate injunctive relief (docket nos. 3,
10 5). Prior to granting a preliminary injunction, however, notice to
11 the adverse party is required. See Fed. R. Civ. P. 65(a)(1).
12 Therefore, a motion for preliminary injunction cannot be decided
13 until the parties to the action are served. See Zepeda v. INS, 753
14 F.2d 719, 727 (9th Cir. 1983). A temporary restraining order (TRO)
15 may be granted without written or oral notice to the adverse party
16 or that party's attorney only if: (1) it clearly appears from
17 specific facts shown by affidavit or by the verified complaint that
18 immediate and irreparable injury, loss or damage will result to the
19 applicant before the adverse party or the party's attorney can be
20 heard in opposition, and (2) the applicant's attorney certifies in
21 writing the efforts, if any, which have been made to give notice
22 and the reasons supporting the claim that notice should not be
23 required. See Fed. R. Civ. P. 65(b). Although Plaintiff swears
24 under penalty of perjury that the information contained in his
25 pleadings is true and correct, and thus the pleadings may be deemed
26 affidavits, and although the first pleading describes Plaintiff's
27 circumstances with a fair amount of specificity, it does not
28 clearly appear from the pleadings that Plaintiff will suffer

1 immediate injury before Defendants can be given an opportunity to
2 respond. Plaintiff claims that Defendant Roach has filed "two
3 false violation reports within a three month period." (May 17,
4 2010 Mot. for TRO at 2.) As a result of receiving these rule
5 violation reports, Plaintiff claims that he has lost some of his
6 privileges. (Id.) If Plaintiff receives one more rule violation
7 report, he claims he could be placed in the "Behavior Management
8 Program," where inmates will be "required to send almost all of
9 their personal property home at the inmates' expense." (Id. at 1.)
10 To date, Plaintiff has not alleged that he has received a third
11 rule violation report. Therefore, no specific date of placement in
12 "Behavior Management Program" is looming.

13 In light of these circumstances, the Court directs Defendants
14 Roach and Morris to respond to the motion for preliminary
15 injunction as directed below.

16 CONCLUSION

17 1. Plaintiff presents a constitutionally cognizable
18 retaliation claim against Defendants Roach and Morris in his
19 original complaint.

20 2. Plaintiff's claims in his new complaint are unexhausted;
21 therefore, they are DISMISSED without prejudice to refileing his
22 claims if he is able to exhaust his administrative remedies. As
23 mentioned above, Plaintiff is directed to file each claim in a
24 separate action.

25 3. The Clerk shall mail a Notice of Lawsuit and Request for
26 Waiver of Service of Summons, two copies of the Waiver of Service
27 of Summons, a copy of the original complaint and all attachments
28 thereto (docket no. 1) and a copy of this Order to: SVSP

1 Correctional Officers S. Roach and Morris. The Clerk shall also
2 mail a copy of the complaint and a copy of this Order to the State
3 Attorney General's Office in San Francisco. The Clerk shall mail a
4 copy of this Order to Plaintiff.

5 4. Defendants are cautioned that Rule 4 of the Federal Rules
6 of Civil Procedure requires Defendants to cooperate in saving
7 unnecessary costs of service of the summons and complaint.

8 Pursuant to Rule 4, if Defendants, after being notified of this
9 action and asked by the Court, on behalf of Plaintiff, to waive
10 service of the summons, fails to do so, Defendants will be required
11 to bear the cost of such service unless good cause be shown for
12 their failure to sign and return the waiver form. If service is
13 waived, this action will proceed as if Defendants had been served
14 on the date that the waiver is filed, except that pursuant to Rule
15 12(a)(1)(B), Defendants will not be required to serve and file an
16 answer before sixty (60) days from the date on which the request
17 for waiver was sent. (This allows a longer time to respond than
18 would be required if formal service of summons is necessary.)

19 Defendants are asked to read the statement set forth at the foot of
20 the waiver form that more completely describes the duties of the
21 parties with regard to waiver of service of the summons. If
22 service is waived after the date provided in the Notice but before
23 Defendants have been personally served, the Answer shall be due
24 sixty (60) days from the date on which the request for waiver was
25 sent or twenty (20) days from the date the waiver form is filed,
26 whichever is later.

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

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

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

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

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

1 there is a genuine issue of material fact for trial. If
2 you do not submit your own evidence in opposition,
3 summary judgment, if appropriate, may be entered against
4 you. If summary judgment is granted [in favor of the
5 defendants], your case will be dismissed and there will
6 be no trial.

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

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

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

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

27 6. The Court further orders as follows:

28 a. On the same date their answer is due, Defendants
29 shall respond to the motion for preliminary injunction (docket nos.
30 3, 5). The response to the motion for preliminary injunction shall

1 be supported by adequate factual documentation and shall conform in
2 all respects to the Federal Rules of Civil Procedure, and all
3 papers filed with the Court shall be promptly served on Plaintiff.
4 Defendants are specifically directed to inform the Court if
5 Plaintiff has received any more rule violation reports, or if there
6 are any plans to place Plaintiff in the Behavior Management
7 Program.

8 b. Plaintiff may file a reply within fourteen (14) days
9 of the date Defendants' response is filed. Plaintiff's reply
10 should be supported by factual documentation and should demonstrate
11 why Plaintiff satisfies the following standard:

12 Under the traditional test for granting preliminary injunctive
13 relief, Plaintiff must: (1) establish a strong likelihood of
14 success on the merits; (2) show the possibility of irreparable
15 injury to Plaintiff if the preliminary relief is not granted;
16 (3) show a balance of hardships favoring Plaintiff; and (4) show
17 that granting the injunction favors the public interest. See Los
18 Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 634 F.2d
19 1197, 1200 (9th Cir. 1980).

20 The Prison Litigation Reform Act requires further that
21 preliminary injunctions relating to prison conditions "be narrowly
22 drawn, extend no further than necessary to correct the harm the
23 court finds requires preliminary relief, and be the least intrusive
24 means necessary to correct that harm." 18 U.S.C. § 3626(a)(2).
25 The Court must give "substantial weight to any adverse impact on
26 public safety or the operation of a criminal justice system caused
27 by the preliminary relief." 18 U.S.C. § 3626(a)(2).

28 7. Discovery may be taken in this action in accordance with

1 the Federal Rules of Civil Procedure. Leave of the Court pursuant
2 to Rule 30(a)(2) is hereby granted to Defendants to depose
3 Plaintiff and any other necessary witnesses confined in prison.

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

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

13 10. Plaintiff's requests for modification and reduction of
14 the filing fee (docket nos. 9, 10) are DENIED.

15 11. This Order terminates Docket nos. 9 and 10.

16 IT IS SO ORDERED.

17 DATED: 12/8/2010



18 CLAUDIA WILKEN
19 United States District Judge

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

4 SHANNON RILEY,

5 Plaintiff,

6 v.

7 ROACH et al,

8 Defendant.

Case Number: CV10-02088 CW

CERTIFICATE OF SERVICE

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

11 That on December 8, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

15 Shannon Riley E-48875 D7-125
16 SALINAS VALLEY STATE PRISON (1050)
17 PO BOX 1050
18 SOLEDAD, CA 93960-1050

19 Dated: December 8, 2010

20 Richard W. Wieking, Clerk
21 By: Nikki Riley, Deputy Clerk
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