

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

THOMAS PAYTON GARLAND,

No. C 13-04779 SBA (PR)

Plaintiff,

v.

D. JACOBSEN, et al.,

Defendants.

**ORDER OF SERVICE; AND
DENYING PLAINTIFF'S
MOTION FOR APPOINTMENT
OF COUNSEL**

INTRODUCTION

Plaintiff, a state prisoner, has filed a pro se civil rights action pursuant to 42 U.S.C. § 1983 alleging that Defendants were deliberately indifferent to his serious medical needs.

He also filed a motion for leave to proceed in forma pauperis as well as a motion for appointment of counsel.

Venue is proper because the events giving rise to the claim are alleged to have occurred at Pelican Bay State Prison ("PBSP"), which is located in this judicial district. See 28 ¹U.S.C. § 1391(b).

In his complaint, Plaintiff names the following Defendants at PBSP: Chief Medical Executive Officer D. Jacobson; Family Nurse Practitioners S. Risenhoover and M. McLean; and Registered Nurse S. Ray. Plaintiff seeks monetary damages.

DISCUSSION

I. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner

¹ In the caption of his complaint, Plaintiff lists the following Defendants from Wasco State Prison ("WSP") and the California Substance Abuse Treatment Facility ("CSATF") in as defendants: A. Walker; Dr. Zepp; B. Anderson; G. Bukenya; I. Ruff; S. Sais; D. Halman; and K. Kachare. However, Plaintiff make no mention of these putative defendants in the body of his complaint. Because neither WSP nor CSATF are in this judicial district, Plaintiff must present any claims regarding his conditions of confinement at those prisons by filing an action in the Eastern District of California, where WSP and CSATF are both located. The instant action will be limited to damages for the PBSP Defendants' actions or omissions while Plaintiff was incarcerated at PBSP.

1 seeks redress from a governmental entity or officer or employee of a governmental entity.
2 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and
3 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may
4 be granted or seek monetary relief from a defendant who is immune from such relief. Id.
5 § 1915A(b)(1), (2). Pro se pleadings must be liberally construed. Balistreri v. Pacifica
6 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

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

11 **II. Deliberate Indifference Claim**

12 Deliberate indifference to serious medical needs violates the Eighth Amendment's
13 proscription against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 104
14 (1976); McGuckin 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 Cir. 1997) (en banc);
16 Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986). A determination of "deliberate
17 indifference" involves an examination of two elements: the seriousness of the prisoner's
18 medical need and the nature of the defendant's response to that need. See McGuckin, 974
19 F.2d at 1059. A "serious" medical need exists if the failure to treat a prisoner's condition
20 could result in further significant injury or the "unnecessary and wanton infliction of pain."
21 Id. (citing Estelle v. Gamble, 429 U.S. at 104). A prison official is deliberately indifferent if
22 he or she knows that a prisoner faces a substantial risk of serious harm and disregards that
23 risk by failing to take reasonable steps to abate it. Farmer v. Brennan, 511 U.S. 825, 837
24 (1994).

25 Plaintiff's allegation that he suffers from "painful skin conditions that [he] believes is
26 some form of skin cancer" is sufficient to support an inference that he has serious medical
27 needs. (Compl. at 2.) Liberally construed, Plaintiff's allegations that prison medical staff
28 failed to provide adequate medical treatment for his skin condition -- while he was housed

1 there from July, 2012 to February, 2013 -- state a cognizable deliberate indifference claim
2 against Defendants Jacobson, Risenhoover, McLean and Ray. Accordingly, this claim may
3 proceed against these Defendants.

4 **III. Motion for Appointment of Counsel**

5 Plaintiff has filed a motion for appointment of counsel to represent him in this action.

6 There is no constitutional right to counsel in a civil case unless an indigent litigant
7 may lose his physical liberty if he loses the litigation. See Lassiter v. Dep't of Soc. Servs.,
8 452 U.S. 18, 25 (1981); Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997) (no
9 constitutional right to counsel in § 1983 action), withdrawn in part on other grounds on reh'g
10 en banc, 154 F.3d 952 (9th Cir. 1998) (en banc). The court may ask counsel to represent an
11 indigent litigant under 28 U.S.C. § 1915 only in "exceptional circumstances," the
12 determination of which requires an evaluation of both (1) the likelihood of success on the
13 merits, and (2) the ability of the plaintiff to articulate his claims pro se in light of the
14 complexity of the legal issues involved. See id. at 1525; Terrell v. Brewer, 935 F.2d 1015,
15 1017 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986). Both of
16 these factors must be viewed together before reaching a decision on a request for counsel
17 under § 1915. See id.

18 The Court is unable to assess at this time whether exceptional circumstances exist
19 which would warrant seeking volunteer counsel to accept a pro bono appointment. The
20 proceedings are at an early stage and it is premature for the Court to determine Plaintiff's
21 likelihood of success on the merits. Moreover, Plaintiff has been able to articulate his claims
22 adequately pro se in light of the complexity of the issues involved. See Agyeman v. Corrs.
23 Corp. of Am., 390 F.3d 1101, 1103 (9th Cir. 2004). Accordingly, the request for
24 appointment of counsel is DENIED without prejudice. The Court's denial of Plaintiff's
25 request at this juncture does not foreclose consideration of a renewed motion later in the
26 proceedings, e.g., after Defendants have been served and have filed their dispositive motion.

27

28

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. Plaintiff states a cognizable Eighth Amendment claim for deliberate indifference to serious medical needs against Defendants Jacobson, Risenhoover, McLean and Ray.

2. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint and all attachments thereto (docket no. 1) and a copy of this Order to Defendants Jacobson, Risenhoover, McLean and Ray. The Clerk of the Court shall also mail a copy of the complaint and a copy of this Order to the State Attorney General's Office in San Francisco. Additionally, the Clerk shall mail a copy of this Order to Plaintiff.

3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure requires them to cooperate in saving unnecessary costs of service of the summons and amended complaint. Pursuant to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of such service unless good cause be shown for their failure to sign and return the waiver form. If service is waived, this action will proceed as if Defendants had been served on the date that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve and file an answer before **sixty (60) days** from the date on which the request for waiver was sent. (This allows a longer time to respond than would be required if formal service of summons is necessary.) Defendants are asked to read the statement set forth at the foot of the waiver form that more completely describes the duties of the parties with regard to waiver of service of the summons. If service is waived after the date provided in the Notice but before Defendants have been personally served, the Answer shall be due **sixty (60) days** from the date on which the request for waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever is later.

4. Defendants shall answer the amended complaint in accordance with the

1 Federal Rules of Civil Procedure. The following briefing schedule shall govern dispositive
2 motions in this action:

3 a. No later than **ninety (90) days** from the date their answer is due,
4 Defendants shall file a motion for summary judgment or other dispositive motion. The
5 motion must be supported by adequate factual documentation, must conform in all respects
6 to Federal Rule of Civil Procedure 56, and must include as exhibits all records and incident
7 reports stemming from the events at issue. A motion for summary judgment also must be
8 accompanied by a Rand² notice so that Plaintiff will have fair, timely and adequate notice of
9 what is required of him in order to oppose the motion. Woods v. Carey, 684 F.3d 934, 935
10 (9th Cir. 2012) (notice requirement set out in Rand must be served concurrently with motion
11 for summary judgment). A motion to dismiss for failure to exhaust available administrative
12 remedies must be accompanied by a similar notice. Stratton v. Buck, 697 F.3d 1004, 1008
13 (9th Cir. 2012); Woods, 684 F.3d at 935 (notice requirement set out in Wyatt v. Terhune,
14 315 F.3d 1108 (9th Cir. 2003), must be served concurrently with motion to dismiss for
15 failure to exhaust available administrative remedies).

16 If Defendants are of the opinion that this case cannot be resolved by summary
17 judgment, they shall so inform the Court prior to the date the summary judgment motion is
18 due. All papers filed with the Court shall be promptly served on Plaintiff.

19 b. Plaintiff's opposition to the dispositive motion shall be filed with the
20 Court and served on Defendants no later than **twenty-eight (28) days** after the date on which
21 Defendants' motion is filed.

22 c. Plaintiff is advised that a motion for summary judgment under Rule 56
23 of the Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you
24 what you must do in order to oppose a motion for summary judgment. Generally, summary
25 judgment must be granted when there is no genuine issue of material fact -- that is, if there is
26 no real dispute about any fact that would affect the result of your case, the party who asked
27

28

² Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998).

1 for summary judgment is entitled to judgment as a matter of law, which will end your case.
2 When a party you are suing makes a motion for summary judgment that is properly
3 supported by declarations (or other sworn testimony), you cannot simply rely on what your
4 amended complaint says. Instead, you must set out specific facts in declarations,
5 depositions, answers to interrogatories, or authenticated documents, as provided in Rule
6 56(e), that contradicts the facts shown in the defendant's declarations and documents and
7 show that there is a genuine issue of material fact for trial. If you do not submit your own
8 evidence in opposition, summary judgment, if appropriate, may be entered against you. If
9 summary judgment is granted, your case will be dismissed and there will be no trial. Rand,
10 154 F.3d at 962-63.

11 Plaintiff also is advised that a motion to dismiss for failure to exhaust available
12 administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your case, albeit
13 without prejudice. You must "develop a record" and present it in your opposition in order to
14 dispute any "factual record" presented by the defendants in their motion to dismiss. Wyatt,
15 315 F.3d at 1120 n.14. You have the right to present any evidence to show that you did
16 exhaust your available administrative remedies before coming to federal court. Such
17 evidence may include: (1) declarations, which are statements signed under penalty of perjury
18 by you or others who have personal knowledge of relevant matters; (2) authenticated
19 documents -- documents accompanied by a declaration showing where they came from and
20 why they are authentic, or other sworn papers such as answers to interrogatories or
21 depositions; (3) statements in your amended complaint insofar as they were made under
22 penalty of perjury and they show that you have personal knowledge of the matters state
23 therein. In considering a motion to dismiss for failure to exhaust, the court can decide
24 disputed issues of fact with regard to this portion of the case. Stratton, 697 F.3d at 1008-09.

25 (The Rand and Wyatt/Stratton notices above do not excuse Defendants' obligation to
26 serve said notices again concurrently with motions to dismiss for failure to exhaust available
27 administrative remedies and motions for summary judgment. Woods, 684 F.3d at 935.)

28 d. Defendants shall file a reply brief no later than **fourteen (14) days** after

1 the date Plaintiff's opposition is filed.

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

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

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

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

14 8. Extensions of time are not favored, though reasonable extensions will be
15 granted. Any motion for an extension of time must be filed no later than **fourteen (14) days**
16 prior to the deadline sought to be extended.

17 9. Plaintiff's request for appointment of counsel (Docket No. 3) is DENIED
18 without prejudice.

19 10. This Order terminates Docket No. 3.

20 IT IS SO ORDERED.

21 DATED: 1/22/14


LAUNDRA BROWN ARMSTRONG
United States District Judge

23

24

25

26

27

28