

United States District Court  
Northern District of California

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JACOB SILVERMAN,  
Plaintiff,  
v.  
HUMBOLDT COUNTY CORRECTIONAL  
FACILITY, et al.,  
Defendants.

Case No. [16-cv-06419-KAW](#) (PR)

**ORDER SERVING ONE COGNIZABLE  
CLAIM; DISMISSING ONE CLAIM  
WITH LEAVE TO AMEND;  
DIRECTING CLERK TO DESIGNATE  
CASE AS A CIVIL RIGHTS ACTION**

Jacob Silverman originally filed a petition for a writ of habeas corpus. On July 26, 2017, the Court issued an order finding the allegations in the petition asserted civil rights claims and, thus, should have been submitted in a civil rights action, not a habeas petition. The Court allowed Silverman to consent to convert the petition to a civil rights complaint under 42 U.S.C. § 1983 or to withdraw the petition. On August 4, 2017, Silverman filed an amended complaint, indicating that he wishes to convert this petition to a civil rights action. The clerk of the court is directed to designate this case as a civil rights action. Silverman has filed an updated request to proceed in forma pauperis, which is granted in a separate order. The Court now reviews the amended complaint.

**DISCUSSION**

**I. Preliminary Review of Complaint**

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

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

3 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the  
4 claim showing that the pleader is entitled to relief.” “Specific facts are not necessary; the  
5 statement need only “give the defendant fair notice of what the . . . claim is and the grounds upon  
6 which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted).

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

11 Liability may be imposed on an individual defendant under 42 U.S.C. § 1983 if the  
12 plaintiff can show that the defendant’s actions both actually and proximately caused the  
13 deprivation of a federally protected right. *Lemire v. Cal. Dept. Corrections & Rehabilitation*, 756  
14 F.3d 1062, 1074 (9th Cir. 2013); *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988). A person  
15 deprives another of a constitutional right within the meaning of section 1983 if he does an  
16 affirmative act, participates in another's affirmative act or omits to perform an act which he is  
17 legally required to do, that causes the deprivation of which the plaintiff complains. *Id.* at 633.  
18 Under no circumstances is there respondeat superior liability under section 1983. *Lemire*, 756  
19 F.3d at 1074. A supervisor may be liable under section 1983 upon a showing of (1) personal  
20 involvement in the constitutional deprivation or (2) a sufficient causal connection between the  
21 supervisor's wrongful conduct and the constitutional violation. *Henry A. v. Willden*, 678 F.3d 991,  
22 1003-04 (9th Cir. 2012).

23 Local governments are "persons" subject to liability under 42 U.S.C. § 1983 where official  
24 policy or custom causes a constitutional tort, *see Monell v. Dep't of Social Servs.*, 436 U.S. 658,  
25 690 (1978); however, a city or county may not be held vicariously liable for the unconstitutional  
26 acts of its employees under the theory of respondeat superior, *see Board of Cty. Comm'rs. of*  
27 *Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997); *Monell*, 436 U.S. at 691. To impose municipal  
28 liability under § 1983 for a violation of constitutional rights resulting from governmental inaction

1 or omission, a plaintiff must show: (1) that the plaintiff possessed a constitutional right of which  
2 he or she was deprived; (2) that the municipality had a policy; (3) that this policy amounts to  
3 deliberate indifference to the plaintiff's constitutional rights; and (4) that the policy is the moving  
4 force behind the constitutional violation. *Plumeau v. School Dist. #40 County of Yamhill*, 130  
5 F.3d 432, 438 (9th Cir. 1997).

6 **II. Plaintiff's Claim**

7 In his amended complaint, Plaintiff names as defendants Sergeant Nancy Corrale and  
8 Corporal Nunneman, employees at the Humboldt County Correctional Facility, and the Humboldt  
9 County Jail Owner, which would be Humboldt County. Plaintiff is a pretrial detainee in custody  
10 in the Humboldt County Correctional Facility who is representing himself in his criminal case. He  
11 alleges that, on October 25, 2016, when he was working on his legal motions, he mentioned to Sgt  
12 Corrale that he had legal mail to send out for his criminal case. Sgt. Corrale said that deputies do  
13 not have to send out mail. Plaintiff disagreed with Sgt. Corrale, who then ordered that Plaintiff be  
14 locked down on his bunk and not allowed to mail his legal mail. Sgt. Corrale ordered Corporal  
15 Nunneman to order other officers not to send out Plaintiff's legal mail.

16 Liberally construed, these allegations appear to give rise to a cognizable claim against Sgt.  
17 Corrale and Corporal Nunneman for denial of access to the courts. However, even liberally  
18 construed, the allegations do not give rise to a claim against Humboldt County. As discussed  
19 above, to allege a cognizable claim against the County, Plaintiff must allege that the County had a  
20 policy that amounts to deliberate indifference to Plaintiff's right to access the courts and that the  
21 policy was the moving force behind the violation committed by Sgt. Corrale and Corporal  
22 Nunneman. Plaintiff is given leave to remedy the deficiencies in this claim, if he truthfully can do  
23 so.

24 **CONCLUSION**

25 Based on the foregoing, the Court orders as follows:

26 1. The claim for denial of access to the court against Humboldt County is DISMISSED  
27 with leave to amend in accordance with the standards set forth above. The amended complaint  
28 must be filed within twenty-eight (28) days of the date this Order is filed and must include the

1 caption and civil case number used in this Order and the words SECOND AMENDED  
2 COMPLAINT on the first page. Because an amended complaint completely replaces the original  
3 complaint, Plaintiff must include in it all the claims he wishes to present. *See Ferdik v. Bonzelet*,  
4 963 F.2d 1258, 1262 (9th Cir. 1992). Plaintiff may not incorporate material from the original  
5 complaint by reference. Failure to amend within the specified time period will result in this claim  
6 being dismissed with prejudice.

7 2. The allegations, liberally construed, appear to give rise to a claim for denial of access to  
8 the court against Sgt. Corrrale and Corporal Nunneman. The Clerk of the Court shall mail a  
9 Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of  
10 Service of Summons, a copy of the amended complaint (docket no. 12), and all attachments  
11 thereto, a copy of this Order and a copy of the form “Consent or Declination to Magistrate Judge  
12 Jurisdiction” to Humboldt County Correctional Facility Sgt. Nancy Corrale and Humboldt County  
13 Correctional Facility Corporal Nunneman.. This form can also be found at  
14 [www.cand.uscourts.gov/civilforms](http://www.cand.uscourts.gov/civilforms). The Clerk shall also mail a copy of the amended complaint  
15 and a copy of this Order to the Office of the Humboldt County Counsel, and a copy of this Order  
16 to Plaintiff.

17 3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure require  
18 them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant  
19 to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of  
20 Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of  
21 such service unless good cause be shown for their failure to sign and return the waiver forms. If  
22 service is waived, this action will proceed as if Defendants had been served on the date that the  
23 waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve  
24 and file an answer before sixty days from the date on which the request for waiver was sent. (This  
25 allows a longer time to respond than would be required if formal service of summons is  
26 necessary.)

27 Defendants are advised to read the statement set forth at the foot of the waiver form that  
28 more completely describes the duties of the parties with regard to waiver of service of the

1 summons. If service is waived after the date provided in the Notice but before Defendants have  
2 been personally served, the answer shall be due sixty days from the date on which the request for  
3 waiver was sent or twenty days from the date the waiver form is filed, whichever is later.

4 4. Defendants shall file their Consent or Declination to Magistrate Judge Jurisdiction on or  
5 before the date their answer is due.

6 5. The following briefing schedule shall govern dispositive motions in this action:

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

14 At the time of filing the motion for summary judgment or other dispositive motion,  
15 Defendants shall comply with the Ninth Circuit's decision in *Woods v. Carey*, 684 F.3d 934 (9th  
16 Cir. 2012), and provide Plaintiff with notice of what is required of him to oppose a summary  
17 judgment motion. If the motion is based on non-exhaustion of administrative remedies,  
18 Defendants must comply with the notice and procedural requirements in *Albino v. Baca*, 747 F.3d  
19 1162 (9th Cir. 2014). *See Stratton v. Buck*, 697 F.3d 1004, 1008 (9th Cir. 2012).

20 b. Plaintiff's opposition to the motion for summary judgment or other dispositive  
21 motion shall be filed with the Court and served on Defendants no later than twenty-eight days after  
22 the date on which Defendants' motion is filed. The Ninth Circuit has held that the following notice  
23 should be given to *pro se* plaintiffs facing a summary judgment motion:

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

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

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

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

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

21 The same evidentiary requirement applies if the defendants file a motion for summary  
22 judgment for failure to exhaust administrative remedies. To oppose this motion, Plaintiff must  
23 present any evidence he may have which tends to show that he did exhaust administrative  
24 remedies or was excused from doing so. Again, the evidence may be in the form of declarations,  
25 that is statements of fact from himself or other witnesses signed under penalty of perjury, copies of  
26 documents accompanied by a declaration showing where they came from and why they are  
27 authentic, or discovery documents such as answers to interrogatories or depositions. In  
28 considering a summary judgment motion for failure to exhaust administrative remedies, the Court  
can decide disputed issues of fact with regard to this portion of the case. *See generally Albino*,  
747 F.3d at 1172-73; *Stratton*, 697 F.3d at 1008.

c. Defendants shall file a reply brief no later than fourteen days after the date  
Plaintiff's opposition is filed.

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

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.

6. Discovery may be taken in this action in accordance with the Federal Rules of Civil Procedure. No further court order pursuant to Rule 30(a)(2) or Local Rule 16 is required before the parties may conduct discovery.

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

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

9. The Clerk is directed to change the designation of this case from a habeas corpus action to a prisoner civil rights complaint.

IT IS SO ORDERED.

Dated: October 20, 2017



---

KANDIS A. WESTMORE  
United States Magistrate Judge