UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LEWIS DOMINIC SHAW,

Plaintiff,

v.

L. THOMAS, et al.,

Defendants.

Case No. 17-cv-00462-YGR (PR)

ORDER OF SERVICE

Plaintiff, a state prisoner currently incarcerated at Pelican Bay State Prison ("PBSP"), has filed a *pro se* civil rights complaint under 42 U.S.C. § 1983. He alleges a claim of deliberate indifference to medical needs against PBSP employees stemming from inadequate treatment for a compound fracture and subsequent infection in his right thumb. Dkt. 1 at 6, 8.[1] He also claims that he was retaliated against for submitting a related inmate 602 appeal ("602 appeal"). *Id.* at 26-27. Plaintiff has filed a motion for leave to proceed *in forma pauperis*, which will be granted in a separate written Order.

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

In his complaint, Plaintiff has named the following Defendants: PBSP Physicians N. Ikegbu, Dorfman, Adam, C. Sayre, Venes; PBSP Registered Nurses M. Hansen, B. Fellows, Alpaugh; PBSP Physician's Assistant L. Thomas; PBSP Family Nurse Practitioner Risenhoover; PBSP Chief Executive Officer D. Jacobsen; PBSP Chief Medical Officer M. Mclean; and PBSP Correctional Officer C. George. Plaintiff seeks injunctive relief as well as declaratory and monetary damages.

DISCUSSION

I. STANDARD OF REVIEW

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

[1] Page number citations refer to those assigned by the Court's electronic case management filing system and not those assigned by Plaintiff.

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

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

II. LEGAL CLAIMS

A. Eighth Amendment Claims

Deliberate indifference to serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986). A determination of "deliberate indifference" involves an examination of two elements: the seriousness of the prisoner's medical need and the nature of the defendant's response to that need. *See McGuckin*, 974 F.2d at 1059. A "serious" medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." *Id.* (citing *Estelle*, 429 U.S. at 104). A prison official is deliberately indifferent if he or she knows that a prisoner faces a substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

Plaintiff claims that on December 5, 2014, he was "targeted during a prison riot on B-Facility, and viciously attacked by several inmates." Dkt. 1 at 6. Soon thereafter, Plaintiff was "transported to an outside medical facility—Sutter Coast Hospital." *Id.* Plaintiff claims that Dr. Helmuth F. Vollger "re-set the fracture in plaintiff[']s thumb." *Id.*

Plaintiff alleges that from December 6, 2014 through mid-April 2015, he suffered "unnecessary pain and suffering" in his fractured right thumb. Dkt. 1 at 6, 7-8, 12, 15-16. His injured right thumb initially required re-setting as well as a spica splint[2] and, subsequently, Plaintiff had to take antibiotics to treat an infection. *Id.* Extensive physical therapy is now necessary in order to get the full range of motion in his thumb back. *Id.* The aforementioned allegations support an inference that Plaintiff has serious medical needs. Liberally construed, Plaintiff's allegations that PBSP medical staff failed to provide adequate medical treatment for the compound fracture in his right thumb and subsequent infection state cognizable Eighth Amendment claims of deliberate indifference to his serious medical needs against Defendants Hansen, George, Fellows, Risenhoover, Ikegbu, Dorfman, Adam, Thomas, Sayre, Venes, Alpaugh, Jacobsen, and Mclean. Specifically, Plaintiff claims he was denied the following requests: (1) to have his wound cleansed by Defendants Hansen, George, and Fellows; (2) to be treated in a timely manner with an effective course of antibiotics by Defendants Risenhoover, Ikegbu, Dorfman, Adam, Thomas, Sayre, Venes, and Alpaugh; (3) to be transported to a medical appointment, with or without having to remove his arm sling so that he could be double cuffed, by Defendants George and Fellows; (4) to have the blood work done (as ordered by Defendant Ikegbu) by Defendants George and Fellows; (5) to retain possession of the arm sling and spica splint as part of his ongoing medical treatment plan by Defendants Ikegbu, Thomas, Jacobsen, and Mclean; (6) to place back on the spica splint after x-rays showed his thumb was still in the infancy stages of healing by Defendants Thomas and Jacobsen; (7) to be provided effective follow-up care by Defendant Thomas and extensive physical therapy by Defendants Jacobsen and Thomas; and (8) to have his request for a surgical intervention taken seriously, if not otherwise granted, by Defendant Ikegbu. *See id.* at 6-16. Accordingly, these Eighth Amendment claims may proceed against the aforementioned Defendants.

[2] According to the internet encyclopedia, Wikipedia, a "spica splint" is a type of orthopedic splint used to immobilize the thumb and/or wrist while allowing other digits freedom to move. *See* https://en.wikipedia.org/wiki/Spica_splint (last accessed on February 20, 2017).

B. Retaliation Claim

Plaintiff also claims that Defendant Thomas retaliated against him for submitting a 602 appeal "complaining of the many arbitrary and capri[ci]ous medical decisions [Defendant Thomas] had subjected [Plaintiff] too." *Id.* at 13-14; 26-27. Plaintiff claims that after he filed the aforementioned appeal against Defendant Thomas, Plaintiff had an appointment with Defendant Thomas on February 24, 2015. *Id.* at 14. Prior to turning her attention to Plaintiff, Defendant Thomas first told the prison guards who escorted him to the appointment that ". . . these guys wanting to come in here are just a bunch of whiners and complainers with little else to do than put in sick call slips and file 602s." *Id.* Defendant Thomas then told Plaintiff that his thumb "had healed fine, and she did not think he needed any physical therapy." *Id.* Plaintiff claims that he attempted to explain why he disagreed with her, but that she instructed the prison guards to take him back to his cell, thereby "discontinuing [his] health care appointment prematurely in retaliation for the submission" of his 602 appeal against her. *Id.* Plaintiff claims that as a "pretext to justifying denying [him] his medical treatment, [D]efendant Thomas knowingly lied by claiming [Plaintiff] had bec[o]me 'uncooperative, argumentative and loud.'" *Id.* at 14.

Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). The right of access to the courts extends to the exercise of established prison grievance procedures, *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995), such that a prisoner may not be retaliated against for using such procedures. *Rhodes*, 408 F.3d at 567; *Bruce v. Ylst*, 351 F3d 1283, 1288 (9th Cir. 2003).

Liberally construed, Plaintiff's allegations appear to state a cognizable retaliation claim against Defendant Thomas. *See Rhodes*, 408 F.3d at 567-68.

III. CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. Plaintiff states a cognizable Eighth Amendment claim for deliberate indifference to

Plaintiff's serious medical needs against the named Defendants.

2. Plaintiff also states a cognizable retaliation claim against Defendant Thomas.

3. 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 (dkt. 1), and a copy of this Order to the following Defendants: **PBSP Physicians N. Ikegbu, Dorfman, Adam, C. Sayre, Venes; PBSP Registered Nurses M. Hansen, B. Fellows, Alpaugh; PBSP Physician's Assistant L. Thomas; PBSP Family Nurse Practitioner Risenhoover; PBSP Chief Executive Officer D. Jacobsen; PBSP Chief Medical Officer M. Mclean; and PBSP Correctional Officer C. George.** The Clerk 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.

4. 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 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, Defendants will be required to bear the cost of such service unless good cause can be shown for the 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.

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

a. No later than **sixty (60) days** from the date their answer is due, Defendants shall file a motion for summary judgment or other dispositive motion. The motion must be supported by adequate factual documentation, must conform in all respects to Federal Rule of Civil Procedure 56, and must include as exhibits all records and incident reports stemming from the events at issue. A motion for summary judgment also must be accompanied by a *Rand*[3] notice so that Plaintiff will have fair, timely, and adequate notice of what is required of him in order to oppose the motion. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out in *Rand* must be served concurrently with motion for summary judgment). A motion to dismiss for failure to exhaust available administrative remedies must be accompanied by a similar notice. However, the Court notes that under the new law of the circuit, in the rare event that a failure to exhaust is clear on the face of the complaint, Defendants may move for dismissal under Rule 12(b)(6), as opposed to the previous practice of moving under an unenumerated Rule 12(b) motion. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (overruling *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), which held that failure to exhaust available administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), should be raised by a defendant as an unenumerated Rule 12(b) motion). Otherwise, if a failure to exhaust is not clear on the face of the complaint, Defendants must produce evidence proving failure to exhaust in a motion for summary judgment under Rule 56. *Id.* If undisputed evidence viewed in the light most favorable to Plaintiff shows a failure to exhaust, Defendants are entitled to summary judgment under Rule 56. *Id.* But if material facts are disputed, summary judgment should be denied and the district judge, rather than a jury, should determine the facts in a preliminary proceeding. *Id.* at 1168.

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

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

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

motion is filed.

c. Plaintiff is advised that a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you must do in order to oppose a motion for summary judgment. 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, which will end your case. When a party you are suing makes a motion for summary judgment that is supported properly by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(c), 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, your case will be dismissed and there will be no trial. *Rand*, 154 F.3d at 962-63.

Plaintiff also is advised that—in the rare event that Defendants argue that the failure to exhaust is clear on the face of the complaint—a motion to dismiss for failure to exhaust available administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your case, albeit without prejudice. To avoid dismissal, you have the right to present any evidence to show that you did exhaust your available administrative remedies before coming to federal court. Such evidence may include: (1) declarations, which are statements signed under penalty of perjury by you or others who have personal knowledge of relevant matters; (2) authenticated documents—documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers such as answers to interrogatories or depositions; (3) statements in your complaint insofar as they were made under penalty of perjury and they show that you have personal knowledge of the matters state therein. As mentioned above, in considering a motion to dismiss for failure to exhaust under Rule 12(b)(6) or failure to exhaust in a summary judgment motion under Rule 56, the district judge may hold a preliminary proceeding and decide disputed issues of fact

with regard to this portion of the case. *Albino*, 747 F.3d at 1168.

(The notices above do not excuse Defendants' obligation to serve similar notices again concurrently with motions to dismiss for failure to exhaust available administrative remedies and motions for summary judgment. *Woods*, 684 F.3d at 935.)

d. Defendants shall file a reply brief no later than **fourteen (14) days** after the date Plaintiff's opposition is filed.

e. 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. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to Defendants to depose Plaintiff and any other necessary witnesses confined in prison.

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

8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court informed of any change of address and must comply with the Court's orders in a timely fashion. Pursuant to Northern District Local Rule 3-11, a party proceeding *pro se* whose address changes while an action is pending must promptly file a notice of change of address specifying the new address. *See* L.R. 3-11(a). The Court may dismiss without prejudice a complaint when: (1) mail directed to the *pro se* party by the Court has been returned to the Court as not deliverable, and (2) the Court fails to receive within sixty days of this return a written communication from the *pro se* party indicating a current address. *See* L.R. 3-11(b).

9. Upon a showing of good cause, requests for a reasonable extension of time will be granted provided they are filed on or before the deadline they seek to extend.

IT IS SO ORDERED.

Dated: July 18, 2017

YVONNE GONZALEZ ROGERS
United States District Judge