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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FERNANDO GUZMAN REYEROS,  
Plaintiff,  
v.  
MANUEL TAJON,  
Defendant.

Case No. [18-cv-01529-DMR](#) (PR)  
**ORDER OF SERVICE**

**INTRODUCTION**

Plaintiff, a state prisoner who was previously incarcerated at Salinas Valley State Prison (“SVSP”), has filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983. He alleges an Eighth Amendment claim of sexual harassment against Defendant Manuel Tajon, a psychologist assigned to SVSP’s mental health department. Plaintiff seeks monetary damages as well as declaratory and injunctive relief. Plaintiff has consented to magistrate judge jurisdiction. Dkt. 7. Therefore, this matter has been assigned to the undersigned Magistrate Judge.

His motion for leave to proceed *in forma pauperis* will be granted in a separate written Order.

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

**DISCUSSION**

**I. STANDARD OF REVIEW**

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

1 monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b)(1), (2). *Pro se*  
2 pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th  
3 Cir. 1988).

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

8 **II. EIGHTH AMENDMENT CLAIM**

9 A prisoner may state an Eighth Amendment claim under section 1983 for sexual  
10 harassment if the alleged sexual harassment was sufficiently harmful, i.e., a departure from “the  
11 evolving standards of decency that mark the progress of a maturing society,” and the defendant  
12 acted with intent to harm the prisoner. *Thomas v. District of Columbia*, 887 F. Supp. 1, 3-4  
13 (D.D.C. 1995) (citing *Hudson v. McMillian*, 503 U.S. 1, 6, 8 (1992)) (internal quotations and  
14 citation omitted). Sexual assault, coercion and harassment certainly may violate contemporary  
15 standards of decency and cause physical and psychological harm. *See Jordan v. Gardner*, 986  
16 F.2d 1521, 1525-31 (9th Cir. 1993) (en banc). However, not every malevolent touch by a prison  
17 guard or official gives rise to an Eighth Amendment violation—the Eighth Amendment’s  
18 prohibition against cruel and unusual punishment necessarily excludes from constitutional  
19 recognition *de minimis* uses of force. *See Hudson*, 503 U.S. at 9-10; *Berryhill v. Schriro*, 137 F.3d  
20 1073, 1076 (8th Cir. 1998) (no Eighth Amendment violation where employees briefly touched  
21 inmate’s buttocks with apparent intent to embarrass him). A prisoner therefore must establish that  
22 the alleged sexual harassment was egregious, pervasive and/or widespread in order to state a claim  
23 under the Eighth Amendment. *See, e.g., Jordan*, 986 F.2d at 1525-31 (prison policy requiring  
24 male guards to conduct body searches on female prisoners); *Watson v. Jones*, 980 F.2d 1165,  
25 1165-66 (8th Cir. 1992) (correctional officer sexually harassed two inmates on almost daily basis  
26 for two months by conducting deliberate examination of genitalia and anus).

27 Plaintiff alleges that sometime between February and March of 2016, Defendant  
28 approached Plaintiff and told him to ask his assigned clinician to add him to Defendant’s Spanish

1 Depression Group. Dkt. 1 at 5. Plaintiff requested such an assignment. *Id.* Approximately two  
2 weeks later, he was assigned to the group and began attending the weekly sessions. *Id.* In late  
3 March of 2016, Defendant became Plaintiff’s newly assigned clinician after Plaintiff’s case load  
4 was re-assigned to him, which required mandatory one-on-one sessions with Defendant. *Id.* In  
5 late June or early July 2016, during one of the sessions, Defendant “approached [Plaintiff] and  
6 proceeded to stick one of his hands down [Plaintiff’s] pants and began to grab and stroke  
7 [Plaintiff’s] penis.” *Id.* at 6. The “sexual advances progressed to that of [Defendant] performing  
8 repeat[ed] acts of masturbation on [Plaintiff] there in the isolate room.” *Id.* at 7. From August to  
9 September 2016, Plaintiff claims that “there [were] approximately four occasions during one-on-  
10 one[] [sessions] when [Defendant’s] sexual advances progressed to him performing oral  
11 copulation on [Plaintiff].” *Id.* Plaintiff claims that the “sexual misconduct” continued until  
12 October 2016. *Id.* Plaintiff further alleges as follows:

13 . . . after engaging himself in the numerous sexual acts with  
14 [Defendant], and the abusive use of drugs consisting of heroin and  
15 methamphetamine that were being given [to him] from [Defendant]  
16 through the entire ordeal described in this complaint, [Plaintiff]  
subsequently fell into a stage of deep depression and  
shameful[ness]; and attempted to commit suicide by the way of  
over-dosing off the heroin that was given to him by [Defendant].

17 *Id.* On October 11, 2016, Plaintiff was “transferred to [an] outside hospital due to [a] suspected  
18 over-dose.” *Id.* Plaintiff claims that prison officials searched his cell and “the drugs that were  
19 given by [Defendant] to [Plaintiff] as well as a phone charger were found and confiscated . . . .”  
20 *Id.* Plaintiff was subsequently rehoused at a “crisis bed” at SVSP. *Id.* Plaintiff then reported to  
21 prison officials the alleged sexual harassment by Defendant. *Id.* Plaintiff claims that he “suffered  
22 and continues to suffer a great deal of psychological pain and distress as a result of [Defendant’s]  
23 actions and [that] the injury and damage is irrepa[]rable.” *Id.* at 8.

24 Liberally construed, Plaintiff’s allegations state a cognizable Eighth Amendment claim for  
25 sexual harassment against Defendant. Accordingly, this claim may proceed against Defendant.

## 26 CONCLUSION

27 For the foregoing reasons, the court orders as follows:

- 28 1. Plaintiff complaint state a cognizable Eighth Amendment claim of sexual

1 harassment against Defendant.

2           2.       The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of  
3 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint  
4 and all attachments thereto (Dkt. 1), a Magistrate Judge jurisdiction consent form, and a copy of  
5 this Order to **SVSP Psychologist Manuel Tajon**.

6           The Clerk shall also mail a copy of the complaint and a copy of this Order to the State  
7 Attorney General’s Office in San Francisco. Additionally, the Clerk shall mail a copy of this  
8 Order to Plaintiff.

9           3.       Defendant is cautioned that Rule 4 of the Federal Rules of Civil Procedure requires  
10 them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant  
11 to Rule 4, if Defendant, after being notified of this action and asked by the court, on behalf of  
12 Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of  
13 such service unless good cause be shown for their failure to sign and return the waiver form. If  
14 service is waived, this action will proceed as if Defendant had been served on the date that the  
15 waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendant will not be required to serve  
16 and file an answer before **sixty (60) days** from the date on which the request for waiver was sent.  
17 (This allows a longer time to respond than would be required if formal service of summons is  
18 necessary.) Defendant is asked to read the statement set forth at the foot of the waiver form that  
19 more completely describes the duties of the parties with regard to waiver of service of the  
20 summons. If service is waived after the date provided in the Notice but before Defendant has been  
21 personally served, the Answer shall be due **sixty (60) days** from the date on which the request for  
22 waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever is later.  
23 **Defendant shall also respond to the Notice of Assignment of Prisoner Case to a United States**  
24 **Magistrate Judge for Trial by filing a consent/declination form on the date the Answer is**  
25 **due.**

26           4.       Defendant shall answer the complaint in accordance with the Federal Rules of Civil  
27 Procedure. The following briefing schedule shall govern dispositive motions in this action:

28           a.       No later than **sixty (60) days** from the date their answer is due, Defendant

1 shall file a motion for summary judgment or other dispositive motion. The motion must be  
2 supported by adequate factual documentation, must conform in all respects to Federal Rule of  
3 Civil Procedure 56, and must include as exhibits all records and incident reports stemming from  
4 the events at issue. A motion for summary judgment also must be accompanied by a *Rand*<sup>1</sup> notice  
5 so that Plaintiff will have fair, timely and adequate notice of what is required of him in order to  
6 oppose the motion. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out  
7 in *Rand* must be served concurrently with motion for summary judgment). A motion to dismiss  
8 for failure to exhaust available administrative remedies must be accompanied by a similar notice.  
9 However, the court notes that under the new law of the circuit, in the rare event that a failure to  
10 exhaust is clear on the face of the complaint, Defendant may move for dismissal under Rule  
11 12(b)(6) as opposed to the previous practice of moving under an unenumerated Rule 12(b) motion.  
12 *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc) (overruling *Wyatt v. Terhune*, 315  
13 F.3d 1108, 1119 (9th Cir. 2003), which held that failure to exhaust available administrative  
14 remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), should be raised by a  
15 defendant as an unenumerated Rule 12(b) motion). Otherwise if a failure to exhaust is not clear on  
16 the face of the complaint, Defendant must produce evidence proving failure to exhaust in a motion  
17 for summary judgment under Rule 56. *Id.* If undisputed evidence viewed in the light most  
18 favorable to Plaintiff shows a failure to exhaust, Defendant is entitled to summary judgment under  
19 Rule 56. *Id.* But if material facts are disputed, summary judgment should be denied and the  
20 district judge rather than a jury should determine the facts in a preliminary proceeding. *Id.* at  
21 1168.

22 If Defendant is of the opinion that this case cannot be resolved by summary judgment, they  
23 shall so inform the court prior to the date the summary judgment motion is due. All papers filed  
24 with the court shall be promptly served on Plaintiff.

25 b. Plaintiff's opposition to the dispositive motion shall be filed with the court  
26 and served on Defendant no later than **twenty-eight (28) days** after the date on which Defendant's  
27

28 <sup>1</sup> *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998).

1 motion is filed.

2 c. Plaintiff is advised that a motion for summary judgment under Rule 56 of  
3 the Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you  
4 must do in order to oppose a motion for summary judgment. Generally, summary judgment must  
5 be granted when there is no genuine issue of material fact—that is, if there is no real dispute about  
6 any fact that would affect the result of your case, the party who asked for summary judgment is  
7 entitled to judgment as a matter of law, which will end your case. When a party you are suing  
8 makes a motion for summary judgment that is properly supported by declarations (or other sworn  
9 testimony), you cannot simply rely on what your complaint says. Instead, you must set out  
10 specific facts in declarations, depositions, answers to interrogatories, or authenticated documents,  
11 as provided in Rule 56(e), that contradicts the facts shown in the defendant’s declarations and  
12 documents and show that there is a genuine issue of material fact for trial. If you do not submit  
13 your own evidence in opposition, summary judgment, if appropriate, may be entered against you.  
14 If summary judgment is granted, your case will be dismissed and there will be no trial. *Rand*, 154  
15 F.3d at 962-63.

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

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

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

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

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

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

12 6. All communications by Plaintiff with the court must be served on Defendant or  
13 their counsel, once counsel has been designated, by mailing a true copy of the document to them.

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

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

24 IT IS SO ORDERED.

25 Dated: July 20, 2018



26  
27 DONNA M. RYU  
United States Magistrate Judge

28

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3 FERNANDO GUZMAN REYEROS,

4 Plaintiff,

5 v.

6 MANUEL TAJON, et al.,

7 Defendants.  
8

Case No. [4:18-cv-01529-DMR](#)

**CERTIFICATE OF SERVICE**

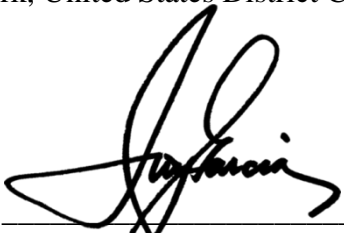
9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.  
10 District Court, Northern District of California.

11  
12 That on July 20, 2018, I SERVED a true and correct copy(ies) of the attached, by placing  
13 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
14 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
15 receptacle located in the Clerk's office.

16  
17 Fernando Guzman Reyeros ID: T-36989  
18 P.O. Box 3461  
19 3A-03-136-low  
20 Corcoran, CA 93212-3461

Dated: July 20, 2018

21  
22 Susan Y. Soong  
23 Clerk, United States District Court

24  
25   
26 By: \_\_\_\_\_  
27 Ivy Lerma Garcia, Deputy Clerk to the  
28 Honorable DONNA M. RYU