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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIARICKEY PAUL MURRAY,
Plaintiff,
v.
J. IBARRA, et al.,
Defendants.Case No. [20-cv-00675-DMR](#) (PR)**ORDER OF SERVICE; AND DENYING
PLAINTIFF'S MOTION FOR
EXTENSION OF TIME TO RETAIN
ATTORNEY**

(Dkt. 10)

I. INTRODUCTION

Plaintiff, who is currently in custody at the California Medical Facility, filed a *pro se* civil rights complaint under 42 U.S.C. § 1983 against prison officials of the Correctional Training Facility (“CTF”), where he had been “temporarily transferred” in 2019. Dkt. 1. He had named the following Defendants from CTF: Chief Deputy Warden K. Hoffman, Correctional Counselor II G. Guinn, Correctional Officers J. Ibarra, Y. Martinez and M. Zavala. *Id.* at 2. Plaintiff seeks monetary damages. *Id.* at 3. He has consented to magistrate judge jurisdiction. Dkt. 3. His motion for leave to proceed *in forma pauperis* has been granted. Dkt. 7.

On July 13, 2020, the original complaint was dismissed with leave to amend. Dkt. 8. Thereafter, Plaintiff filed his amended complaint. Dkt. 9. Plaintiff’s amended complaint is now before the court for review pursuant to 28 U.S.C. § 1915A(a). Plaintiff again names Defendants Ibarra, Martinez, and Zavala. *Id.* at 3.

Plaintiff’s amended complaint is now before the court for review pursuant to 28 U.S.C. § 1915A(a). Also before the court is Plaintiff’s motion for an extension of time to retain counsel in this matter. Dkt. 10.

1 **II. BACKGROUND**

2 In his original complaint, Plaintiff asserted as follows, as taken from the court’s July 13,
3 2020 Order:

4 Plaintiff alleges that on March 18, 2019, he was “temporarily
5 transferred” to CTF as an “out-to-court” inmate. Dkt. 1 at 3. Plaintiff
6 claims that he was “immediately placed on a status that is usually
7 reserved for serious rule violators and those who commit crimes while
8 incarcerated, which is commonly known as “CTQ” or “confined to
9 quart[er]s.” *Id.* (brackets added). He complains that he was “denied
10 basic needs,” including “general access to courts, relig[i]ous services,
11 clothing, hyg[i]ne, cosmetics, station[er]y, blankets and sheets,
12 adequate medication, canteen, phones” *Id.* (brackets added).
13 Plaintiff was placed in a cell with “half a dozen broken
14 windows” *Id.* Plaintiff “attempted to speak with a correctional
15 counselor or sergeant on numerous occasions and was repeatedly
16 ignored and threatened with disciplinary actions by housing unit staff
17 [Defendants] J. Ibarra, Y. Martinez, and M. Zavala.” *Id.* at 4. Plaintiff
18 claims that the “same staff members” denied him access to the
19 “following basic needs”: “toothbrush, toothpaste, deodorant, soap
20 and/or shampoo, clean clothing, dual blanket and sheets, a change of
21 clothing, a warm place to sleep, shaving razors, fingernail and toenail
22 clippers, and an adequate amount of previously prescribed
23 medications.” *Id.* Petitioner claims these conditions “added to the
24 stress, mental anguish, and the torturous symptoms of Eczema ([his]
25 condition is severe).” *Id.*

26 Dkt. 8 at 3.

27 As mentioned, the court reviewed Plaintiff’s original complaint and dismissed it with leave
28 to amend. *See id.* at 6. In its July 13, 2020 Order, the court noted as follows: “Plaintiff’s claim
that he suffered the aforementioned conditions during his temporary incarceration at CTF may be
sufficient to state a cognizable Eighth Amendment claim against Defendants Ibarra, Martinez and
Zavala, but Plaintiff does not indicate the time frame of this deprivation.” *Id.* at 4. Thus, the court
concluded that the complaint “d[id] not adequately plead an objectively serious condition because
Plaintiff only state[d] that it was a “temporary” transfer, but he d[id] not indicate how long he had
to endure the aforementioned conditions.” *Id.* Without this information, the court could not
determine whether this was a problem only at the beginning of his incarceration at CTF or whether
it was a consistent problem during the entire time frame of his temporary stay. The court also
determined that the complaint

d[id] not adequately plead the subjective element because he states
only that Defendants Ibarra, Martinez and Zavala ignored his requests
to ‘speak with a correctional counselor or sergeant,’ and such an
allegation fail[ed] to indicate whether or not these Defendants knew

1 of and disregarded an excessive risk to inmate health or safety when
2 they refused to allow Plaintiff to speak with a correctional counselor
3 or sergeant.

4 *Id.* Finally, Plaintiff had also named as Defendants Hoffman and Guinn but added no facts in his
5 original complaint linking them to his allegations of wrongdoing.

6 In his amended complaint, Plaintiff only names Defendants Ibarra, Martinez, and Zavala.
7 Dkt. 9 at 3. Therefore, all claims against Defendants Hoffman and Guinn are DISMISSED
8 without prejudice. Plaintiff has also indicated that the time-frame was fifteen days during which
9 had to endure the aforementioned conditions. *Id.* at 3. Plaintiff also clarifies that he specifically
10 asked the named Defendants “for basic necessities of the simplest kind, such as: clean cloths,
11 linen, blankets, soap shampoo, toothpaste, toothbrush, shaving razors, etc.” *Id.* at 3-4. Plaintiff
12 states that his requests were denied and “[t]hese three correctional officers deprived [him] of based
13 needs . . . on a daily basis without regard to [his] well-being of his overall health and/or mental
14 state for an extended time frame.” *Id.* at 4. Plaintiff claims Defendants also denied him “Law
15 Library access, phone time and paper, pen and envelopes.” *Id.* Plaintiff claims that he “has a
16 history of depression [and] suffers from eczema all over his body.” *Id.* Plaintiff states that
17 Defendants “did not take into consideration [his] medical and mental condition, even though [he]
18 expressed these issues and the effect it would have on [him] by being deprived [the
19 aforementioned basic necessities] for extended periods of time.” *Id.* During this time, Defendants
20 “did not ask or refer [Plaintiff] to any physician” and “stuck by their initial response, which was to
21 remind [him] that [he] was still on CTQ.” *Id.* at 5. As a result, Plaintiff claims that he “suffer[s]
22 from a pinched nerve in [his] lower back due to stress and lack of mobility.” *Id.* He claims that
23 his “skin condition has also worsened” during the fifteen-day aforementioned deprivation, which
24 led to “uncontrollable itching and scratching brought on by the stress, lack of basic needs and
25 enhanced depression” *Id.* He continues to seek monetary damages “to compensate [him] for
26 [his] pain and suffering” *Id.* at 6.

27 **III. STANDARD OF REVIEW**

28 A federal court must engage in a preliminary screening of any case in which a prisoner
seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28

1 U.S.C. § 1915A(a). The court must identify any cognizable claims, and dismiss any claims which
2 are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary
3 relief from a defendant who is immune from such relief. *See* 28 U.S.C. §1915A(b)(1),(2).

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

8 **IV. LEGAL CLAIMS**

9 The Constitution does not mandate comfortable prisons, but neither does it permit
10 inhumane ones. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994). The treatment a prisoner
11 receives in prison and the conditions under which he is confined are subject to scrutiny under the
12 Eighth Amendment. *See Helling v. McKinney*, 509 U.S. 25, 31 (1993).

13 The Eighth Amendment also imposes duties on these officials, who must provide all
14 prisoners with the basic necessities of life such as food, clothing, shelter, sanitation, medical care,
15 and personal safety. *See Farmer*, 511 U.S. at 832; *DeShaney v. Winnebago County Dep't of*
16 *Social Servs.*, 489 U.S. 189, 199-200 (1989). A prison official violates the Eighth Amendment
17 when two requirements are met: (1) the deprivation alleged must be, objectively, sufficiently
18 serious, *see Farmer*, 511 U.S. at 834 (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)), and
19 (2) the prison official possesses a sufficiently culpable state of mind, *see id.* (citing *Wilson*, 501
20 U.S. at 297). In determining whether a deprivation of a basic necessity is sufficiently serious to
21 satisfy the objective component of an Eighth Amendment claim, a court must consider the
22 circumstances, nature, and duration of the deprivation; the more basic the need, the shorter the
23 time it can be withheld. *See Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). In determining
24 whether a deprivation of a basic necessity is sufficiently serious to satisfy the objective component
25 of an Eighth Amendment claim, a court must consider the circumstances, nature, and duration of
26 the deprivation. The more basic the need, the shorter the time it can be withheld. *See Johnson v.*
27 *Lewis*, 217 F.3d 726, 731 (9th Cir. 2000).

28 When liberally construed, Plaintiff's allegations are sufficient to state a cognizable claim

1 for the violation of Plaintiff’s Eighth Amendment rights. *See Keenan v. Hall*, 83 F.3d 1083, 1091
2 (9th Cir. 1996), *amended*, 135 F.3d 1318 (9th Cir. 1998) (Eighth Amendment guarantees state
3 prisoner’s right to personal hygiene, including toothbrushes and soap); *see also Toussaint v.*
4 *McCarthy*, 597 F. Supp. 1388, 1411 (N.D. Cal. 1984) (“A sanitary environment is a basic human
5 need that a penal institution must provide for all inmates”).

6 **V. PLAINTIFF’S PENDING MOTION**

7 As mentioned, Plaintiff has filed a motion for an extension of time “to seek and retain
8 adequate counsel” in this matter. Dkt. 10 at 1. He claims he is “unfamiliar and [a] layman to the
9 laws and rules of [the] court in what may result in future proceedings” *Id.*

10 First, to the extent that Plaintiff requests the appointment of counsel in this matter, there is
11 no constitutional right to counsel in a civil case unless an indigent litigant may lose his physical
12 liberty if he loses the litigation. *See Lassiter v. Dep’t of Social Services*, 452 U.S. 18, 25 (1981);
13 *Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997) (no constitutional right to counsel in
14 section 1983 action), *withdrawn in part on other grounds on reh’g en banc*, 154 F.3d 952 (9th Cir.
15 1998) (en banc). The court may ask counsel to represent an indigent litigant under 28 U.S.C.
16 § 1915 only in “exceptional circumstances,” the determination of which requires an evaluation of
17 both (1) the likelihood of success on the merits, and (2) the ability of the plaintiff to articulate his
18 claims *pro se* in light of the complexity of the legal issues involved. *See id.* at 1525; *Terrell v.*
19 *Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th
20 Cir. 1986). Both of these factors must be viewed together before reaching a decision on a request
21 for counsel under section 1915. *See id.* Here, the court finds that exceptional circumstances
22 entitling Plaintiff to court appointed counsel do not exist. The likelihood of Plaintiff’s success on
23 the merits cannot be ascertained at this point in the proceedings, and the legal issues are not
24 complex. Accordingly, if the court construes Plaintiff’s motion as a request for appointment of
25 counsel, such a request is DENIED without prejudice.

26 The court now turns to Plaintiff’s request for an extension of time in which to retain
27 counsel in this matter. First, there is no deadline for Plaintiff to retain counsel in this matter; he
28 may do so whenever he chooses. As a result, there is no need for an extension of time to retain

1 counsel. Second, the court notes that Plaintiff does not provide any details as to his efforts to
2 obtain counsel. He has not identified any particular attorney he plans to retain, nor has he
3 explained how granting him an extension of time will enable him to retain counsel. Therefore,
4 Plaintiff's request for an extension of time to retain counsel is DENIED. Dkt. 10.

5 **CONCLUSION**

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

- 7 1. All claims against Defendants Hoffman and Guinn are DISMISSED without
8 prejudice.
- 9 2. Plaintiff's amended complaint states a cognizable Eighth Amendment claim against
10 Defendants Ibarra, Martinez, and Zavala.
- 11 3. The Clerk of the Court shall send a Notice of Lawsuit and Request for Waiver of
12 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the amended
13 complaint and all attachments thereto (dkt. 9), a Magistrate Judge jurisdiction consent form, and a
14 copy of this Order to the following Defendants at CTF: **Correctional Officers J. Ibarra, Y.
15 Martinez and M. Zavala.**

16 The Clerk shall also send a copy of the amended complaint and a copy of this Order to the
17 State Attorney General's Office in San Francisco. Additionally, the Clerk shall send a copy of this
18 Order to Plaintiff.

- 19 4. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure
20 requires them to cooperate in saving unnecessary costs of service of the summons and amended
21 complaint. Pursuant to Rule 4, if Defendants, after being notified of this action and asked by the
22 court, on behalf of Plaintiff, to waive service of the summons, fail to do so, they will be required
23 to bear the cost of such service unless good cause be shown for their failure to sign and return the
24 waiver form. If service is waived, this action will proceed as if Defendants had been served on the
25 date that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be
26 required to serve and file an answer before **sixty (60) days** from the date on which the request for
27 waiver was sent. (This allows a longer time to respond than would be required if formal service of
28 summons is necessary.) Defendants are asked to read the statement set forth at the foot of the

1 waiver form that more completely describes the duties of the parties with regard to waiver of
2 service of the summons. If service is waived after the date provided in the Notice but before
3 Defendants have been personally served, the Answer shall be due **sixty (60) days** from the date on
4 which the request for waiver was sent or **twenty (20) days** from the date the waiver form is filed,
5 whichever is later. **Defendants shall also respond to the Notice of Assignment of Prisoner**
6 **Case to a United States Magistrate Judge for Trial by filing a consent/declination form on**
7 **the date the Answer is due.**

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

11 a. No later than **sixty (60) days** from the date their answer is due, Defendants
12 shall file a motion for summary judgment or other dispositive motion. The motion must be
13 supported by adequate factual documentation, must conform in all respects to Federal Rule of
14 Civil Procedure 56, and must include as exhibits all records and incident reports stemming from
15 the events at issue. A motion for summary judgment also must be accompanied by a *Rand*¹ notice
16 so that Plaintiff will have fair, timely and adequate notice of what is required of him in order to
17 oppose the motion. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out
18 in *Rand* must be served concurrently with motion for summary judgment). A motion to dismiss
19 for failure to exhaust available administrative remedies must be accompanied by a similar notice.
20 However, the court notes that under the new law of the circuit, in the rare event that a failure to
21 exhaust is clear on the face of the amended complaint, Defendants may move for dismissal under
22 Rule 12(b)(6) as opposed to the previous practice of moving under an unenumerated Rule 12(b)
23 motion. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc) (overruling *Wyatt v.*
24 *Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), which held that failure to exhaust available
25 administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), should be
26 raised by a defendant as an unenumerated Rule 12(b) motion). Otherwise if a failure to exhaust is
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28 ¹ *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998).

1 not clear on the face of the amended complaint, Defendants must produce evidence proving failure
2 to exhaust in a motion for summary judgment under Rule 56. *Id.* If undisputed evidence viewed
3 in the light most favorable to Plaintiff shows a failure to exhaust, Defendants are entitled to
4 summary judgment under Rule 56. *Id.* But if material facts are disputed, summary judgment
5 should be denied and the district judge rather than a jury should determine the facts in a
6 preliminary proceeding. *Id.* at 1168.

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

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

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

27 Plaintiff also is advised that—in the rare event that Defendants argue that the failure to
28 exhaust is clear on the face of the amended complaint—a motion to dismiss for failure to exhaust

1 available administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your case, albeit
2 without prejudice. To avoid dismissal, you have the right to present any evidence to show that
3 you did exhaust your available administrative remedies before coming to federal court. Such
4 evidence may include: (1) declarations, which are statements signed under penalty of perjury by
5 you or others who have personal knowledge of relevant matters; (2) authenticated documents—
6 documents accompanied by a declaration showing where they came from and why they are
7 authentic, or other sworn papers such as answers to interrogatories or depositions; (3) statements
8 in your amended complaint insofar as they were made under penalty of perjury and they show that
9 you have personal knowledge of the matters state therein. As mentioned above, in considering a
10 motion to dismiss for failure to exhaust under Rule 12(b)(6) or failure to exhaust in a summary
11 judgment motion under Rule 56, the district judge may hold a preliminary proceeding and decide
12 disputed issues of fact with regard to this portion of the case. *Albino*, 747 F.3d at 1168.

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

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

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

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

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

25 8. It is Plaintiff’s responsibility to prosecute this case. Plaintiff must keep the court
26 informed of any change of address and must comply with the court’s orders in a timely fashion.
27 Pursuant to Northern District Local Rule 3-11 a party proceeding *pro se* whose address changes
28 while an action is pending must promptly file a notice of change of address specifying the new

1 address. *See* L.R. 3-11(a). The court may dismiss without prejudice a complaint when: (1) mail
2 directed to the *pro se* party by the court has been returned to the court as not deliverable, and
3 (2) the court fails to receive within sixty days of this return a written communication from the pro
4 se party indicating a current address. *See* L.R. 3-11(b).

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

7 10. Plaintiff’s motion for an extension of time to retain counsel is DENIED. Dkt. 10.
8 And even if the court construes Plaintiff’s motion as a request for appointment of counsel, such a
9 request is DENIED without prejudice.

10 11. This Order terminates Docket No. 10.

11 IT IS SO ORDERED.

12 Dated: January 11, 2021



DONNA M. RYU
United States Magistrate Judge

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