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NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEVONTE BERNARD HARRIS,)	No. C 09-00100 JF (PR)
Plaintiff,)	
vs.)	ORDER OF SERVICE; DENYING
)	MOTION FOR APPOINTMENT OF
)	COUNSEL; DIRECTING
)	DEFENDANTS TO FILE
JAMES THOM, et al.,)	DISPOSITIVE MOTION OR
)	NOTICE REGARDING SUCH
Defendants.)	MOTION
_____)	(Docket No. 3)

Plaintiff, a California prisoner proceeding pro se, filed the instant civil rights action pursuant to 42 U.S.C. § 1983 against officials of the Pelican Bay State Prison (“PBSP”). Plaintiff’s motion for leave to proceed in forma pauperis will be granted in a separate written order. Plaintiff has filed a motion for appointment of counsel. (Docket No. 3.)

DISCUSSION

A. 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. See 28 U.S.C. § 1915A(a). In its review, the court must identify

1 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a
2 claim upon which relief may be granted or seek monetary relief from a defendant who is
3 immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be
4 liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
5 1988).

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

10 **B. Plaintiff's Claims**

11 Plaintiff claims that his Eighth Amendment right against cruel and unusual
12 punishment was violated when Defendant James Thom used excessive force on
13 September 28, 2006. (Compl. 7-11.) Plaintiff alleges that Defendants James Harkin, O.
14 W. Spencer, S. N. Freeman, M. Knight and R. Rice violated the Eighth Amendment by
15 their deliberate indifference for his safety when they failed to intervene. Liberally
16 construed, Plaintiff's Eighth Amendment claims are cognizable under § 1983. See
17 Farmer v. Brennan, 511 U.S. 825, 832 (1994).

18 Plaintiff alleges that Defendants Troy Woods, Officer A. Griffin, and William
19 Barlow violated his First Amendment right to petition the government for redress in the
20 form of retaliation. (Compl. 15-16.) Plaintiff alleges that their actions with respect to a
21 small claims action he filed in state court against Defendant Thom for his use of excessive
22 force were carried out in "wreckless [sic] disregard of Plaintiff's federally protected
23 rights. (Id.) Prisoners may not be retaliated against for exercising their right of access to
24 the courts. See Schroeder v. McDonald, 55 F.3d 454, 461 (9th Cir. 1995). "Within the
25 prison context, a viable claim of First Amendment retaliation entails five basic elements:
26 (1) An assertion that a state actor took some adverse action against an inmate (2) because
27 of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
28 exercise of his First Amendment rights, and (5) the action did not reasonably advance a

1 legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005)
2 (footnote omitted). Accord Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995) (prisoner
3 suing prison officials under § 1983 for retaliation must allege that he was retaliated
4 against for exercising his constitutional rights and that the retaliatory action did not
5 advance legitimate penological goals, such as preserving institutional order and
6 discipline); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam) (same);
7 Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985) (contention that actions “arbitrary
8 and capricious” sufficient to allege retaliation). Plaintiff fails to state a retaliation claim
9 because he has failed to show all five necessary elements, *e.g.*, that Defendants’ actions
10 “chilled” the exercise of his First Amendment rights or that their actions did not
11 reasonably advance a legitimate correctional goal. See Rhodes, 408 F.3d at 567-68.
12 Because Plaintiff cannot show that their actions did not reasonably advance a legitimate
13 correctional goal, *i.e.*, to preserve institutional order and discipline, this claim is
14 dismissed without leave to amend.

15 **C. Motion for Appointment of Counsel**

16 Plaintiff’s motion for appointment of counsel (Docket No. 3) is DENIED without
17 prejudice for lack of exceptional circumstances. See Rand v. Rowland, 113 F.3d 1520,
18 1525 (9th Cir. 1997); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wilborn v.
19 Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986).

20
21 **CONCLUSION**

22 For the reasons stated above, the Court orders as follows:

- 23 1. Plaintiff’s retaliation claim is dismissed. Accordingly, Defendants Troy
24 Woods, Officer A. Griffin, and William Barlow are dismissed from this action. The
25 Clerk shall terminate these defendants from this action.
- 26 2. The Clerk of the Court shall issue summons and the United States Marshal
27 shall serve, without prepayment of fees, a copy of the complaint in this matter, all
28 attachments thereto, and a copy of this order upon **Correctional Officers James Thom,**

1 **O. W. Spencer, S. N. Freeman, M. Knight, R. Rice, and James Harkin at Pelican Bay**
2 **State Prison.** The Clerk shall also mail courtesy copies of the Complaint and this order
3 to the California Attorney General's Office.

4 3. No later than **sixty (60) days** from the date of this order, Defendants shall
5 file a motion for summary judgment or other dispositive motion with respect to the claims
6 in the complaint found to be cognizable above, or, within such time, notify the Court that
7 Defendants are of the opinion that this case cannot be resolved by such a motion.

8 a. If Defendants elect to file a motion to dismiss on the grounds that
9 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
10 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to
11 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.
12 Terhune, 540 U.S. 810 (2003).

13 b. Any motion for summary judgment shall be supported by adequate
14 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
15 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**
16 **nor qualified immunity found, if material facts are in dispute. If any Defendant is of**
17 **the opinion that this case cannot be resolved by summary judgment, he shall so**
18 **inform the Court prior to the date the summary judgment motion is due.**

19 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court
20 and served on Defendants no later than **thirty (30) days** from the date Defendants'
21 motion is filed.

22 a. In the event Defendants file an unenumerated motion to dismiss
23 under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

24 The Defendants have made a motion to dismiss pursuant to Rule
25 12(b) of the Federal Rules of Civil Procedure, on the ground you have not
26 exhausted your administrative remedies. The motion will, if granted, result
in the dismissal of your case. When a party you are suing makes a motion

27 ¹ The following notice is adapted from the summary judgment notice to be given to pro
28 se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).
See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 to dismiss for failure to exhaust, and that motion is properly supported by
2 declarations (or other sworn testimony) and/or documents, you may not
3 simply rely on what your complaint says. Instead, you must set out specific
4 facts in declarations, depositions, answers to interrogatories, or documents,
5 that contradict the facts shown in the Defendant's declarations and
6 documents and show that you have in fact exhausted your claims. If you do
7 not submit your own evidence in opposition, the motion to dismiss, if
8 appropriate, may be granted and the case dismissed.

9 b. In the event Defendants file a motion for summary judgment, the
10 Ninth Circuit has held that the following notice should be given to Plaintiffs:

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

15 Rule 56 tells you what you must do in order to oppose a motion for
16 summary judgment. Generally, summary judgment must be granted when
17 there is no genuine issue of material fact--that is, if there is no real dispute
18 about any fact that would affect the result of your case, the party who asked
19 for summary judgment is entitled to judgment as a matter of law, which will
20 end your case. When a party you are suing makes a motion for summary
21 judgment that is properly supported by declarations (or other sworn
22 testimony), you cannot simply rely on what your complaint says. Instead,
23 you must set out specific facts in declarations, depositions, answers to
24 interrogatories, or authenticated documents, as provided in Rule 56(e), that
25 contradict the facts shown in the defendants' declarations and documents
26 and show that there is a genuine issue of material fact for trial. If you do
27 not submit your own evidence in opposition, summary judgment, if
28 appropriate, may be entered against you. If summary judgment is granted
in favor of defendants, your case will be dismissed and there will be no
trial.

See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477
U.S. 317 (1986) (holding party opposing summary judgment must come forward with
evidence showing triable issues of material fact on every essential element of his claim).
Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary
judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and
granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,
53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

5. Defendants shall file a reply brief no later than **fifteen (15) days** after
Plaintiff's opposition is filed.

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

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

6 8. Discovery may be taken in accordance with the Federal Rules of Civil
7 Procedure. No further Court order is required before the parties may conduct discovery.

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

12 This order terminates Docket No. 3.

13 IT IS SO ORDERED.

14 DATED: 5/14/09

15 
16 _____
17 JEREMY FOGEL
18 United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DEVONTE B. HARRIS,
Plaintiff,

Case Number: CV09-00100 JF

CERTIFICATE OF SERVICE

v.

JAMES THOM, et al.,
Defendants.

_____/

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

That on 5/19/09, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Devonte Bernard Harris P 73399
Pelican bay State Prison
P.O. Box 7500
A-1-131
Crescent City, CA 95532

Dated: 5/19/09

Richard W. Wieking, Clerk