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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HARVEY D. BLACKBURN,	)	No. C 10-1422 LHK (PR)
	)	
Plaintiff,	)	ORDER OF PARTIAL
	)	DISMISSAL; ORDER OF
v.	)	SERVICE; DIRECTING
	)	DEFENDANT TO FILE
MONTEREY COUNTY JAIL and TERRY	)	DISPOSITIVE MOTION OR
WHITING,	)	NOTICE REGARDING SUCH
	)	MOTION
Defendants.	)	

Plaintiff, a state prisoner proceeding *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 alleging that Physician’s Assistant Terry Whiting and the Monterey County Jail violated his constitutional rights. Plaintiff is granted leave to proceed in forma pauperis in a separate order.

**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 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. *See* 28 U.S.C.

1 § 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v.*  
2 *Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

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

7 B. Plaintiff's Claims

8 Plaintiff claims that on January 18, 2010, his wrist was so painful that he made an  
9 appointment to see medical personnel. Defendant Whiting prescribed him Motrin.  
10 Unbeknownst to Plaintiff, he should not have been prescribed Motrin because Plaintiff has no  
11 spleen. As a result of the Motrin, Plaintiff suffered severe nosebleeds for three days and broke  
12 out in blisters. Plaintiff returned to see medical personnel, and Whiting attended to him again.  
13 Whiting looked at Plaintiff's outbreak, concluded they were bruises, and refused to conduct a  
14 blood test as Plaintiff requested. Whiting refused to believe Plaintiff's suggestion that he was  
15 having a reaction and dismissed Plaintiff. The following day, because of his condition and  
16 persistent nosebleed, Plaintiff was rushed to medical and admitted into Natividad Medical  
17 Center. From there, he was transferred to Salinas Valley Memorial Hospital where he had to  
18 undergo several blood transfusions and other procedures. On January 26, 2010, Plaintiff was  
19 discharged. On February 1, 2010, Plaintiff was transported to state prison.

20 Deliberate indifference to serious medical needs violates the Eighth Amendment's  
21 proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104  
22 (1976). A determination of "deliberate indifference" involves an examination of two elements:  
23 the seriousness of the prisoner's medical need and the nature of the Defendant's response to that  
24 need. *See McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*,  
25 *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). Liberally  
26 construed, Plaintiff has stated a cognizable claim of deliberate indifferent to serious medical  
27 needs against Defendant Whiting.

1 Plaintiff also sues the Monterey County Jail. However, Plaintiff fails to state a  
2 cognizable claim against it. A city or county may not be held vicariously liable for the  
3 unconstitutional acts of its employees under the theory of respondeat superior. *See Board of*  
4 *County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997). To impose municipal liability under  
5 § 1983 for a violation of constitutional rights, Plaintiff must show: (1) that he possessed a  
6 constitutional right of which he or she was deprived; (2) that the municipality had a policy; (3)  
7 that this policy amounts to deliberate indifference to Plaintiff's constitutional rights; and (4) that  
8 the policy is the moving force behind the constitutional violation. *See Plumeau v. School Dist.*  
9 *#40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). Here, Plaintiff does not even hint that  
10 the Monterey County Jail had an unlawful policy. In fact, the only mention of the County in  
11 Plaintiff's complaint is to say that the County did not send any of his medical files to the prison.  
12 In addition, Plaintiff does not assert which individual was responsible for any alleged  
13 constitutional violation. Even at the pleading stage, "[a] plaintiff must allege facts, not simply  
14 conclusions, that show that an individual was personally involved in the deprivation of his civil  
15 rights." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Finally, the failure to send  
16 medical files to the prison, without more, fails to state a cognizable claim for relief. Thus, the  
17 Monterey County Jail is DISMISSED as a defendant. If Plaintiff believes in good faith that he  
18 can cure the above mentioned deficiencies, he may file a motion to amend his complaint  
19 accompanied by an amended complaint.

## 20 CONCLUSION

21 For the foregoing reasons, the court hereby orders as follows:

- 22 1. The Court DISMISSES Monterey County Jail as a defendant.
- 23 2. The Clerk shall issue a summons, and the United States Marshal shall serve,  
24 without prepayment of fees, copies of the complaint in this matter (docket no. 1), all attachments  
25 thereto, and copies of this order on **TERRY WHITING, PHYSICIAN'S ASSISTANT** at the  
26 **Monterey County Jail in Monterey, California**. The Clerk shall also serve a copy of this  
27 Order on Plaintiff and mail a courtesy copy of the complaint to the California Attorney General's  
28

1 Office.

2 2. No later than **ninety (90) days** from the date of this order, Defendant shall file a  
3 motion for summary judgment or other dispositive motion with respect to the cognizable claims  
4 in the complaint.

5 a. If Defendant elects to file a motion to dismiss on the grounds that Plaintiff  
6 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
7 Defendant shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*, 315  
8 F.3d 1108, 1119-20 (9th Cir. 2003).

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

15 3. Plaintiff's opposition to the dispositive motion shall be filed with the court and  
16 served on Defendant no later than **thirty (30) days** from the date Defendant's motion is filed.

17 a. In the event Defendant files an unenumerated motion to dismiss under  
18 Rule 12(b), Plaintiff is hereby cautioned as follows:<sup>1</sup>

19 The defendants have made a motion to dismiss pursuant to Rule 12(b) of  
20 the Federal Rules of Civil Procedure, on the ground you have not exhausted your  
21 administrative remedies. The motion will, if granted, result in the dismissal of  
22 your case. When a party you are suing makes a motion to dismiss for failure to  
23 exhaust, and that motion is properly supported by declarations (or other sworn  
24 testimony) and/or documents, you may not simply rely on what your complaint  
25 says. Instead, you must set out specific facts in declarations, depositions, answers  
26 to interrogatories, or documents, that contradict the facts shown in the defendant's  
27 declarations and documents and show that you have in fact exhausted your  
28 claims. If you do not submit your own evidence in opposition, the motion to  
dismiss, if appropriate, may be granted and the case dismissed.

b. In the event Defendants file a motion for summary judgment, the

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<sup>1</sup> The following notice is adapted from the summary judgment notice to be given to pro 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 Ninth Circuit has held that the following notice should be given to plaintiffs:

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

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

20 *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read  
21 Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317  
22 (1986) (holding party opposing summary judgment must come forward with evidence showing  
23 triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that  
24 failure to file an opposition to Defendant's motion for summary judgment may be deemed to be a  
25 consent by plaintiff to the granting of the motion, and granting of judgment against Plaintiff  
26 without a trial. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); *Brydges v.*  
27 *Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

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

          5. 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. All communications by the Plaintiff with the court must be served on Defendant,  
or Defendant's counsel once counsel has been designated, by mailing a true copy of the  
document to Defendant or Defendant's counsel.

          7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.

1 No further court order is required before the parties may conduct discovery.

2 For Plaintiff's information, the proper manner of promulgating discovery is to send  
3 demands for documents or interrogatories (questions asking for specific, factual responses)  
4 directly to Defendant's counsel. *See* Fed. R. Civ. P. 33-34. The scope of discovery is limited to  
5 matters "relevant to the claim or defense of any party . . ." *See* Fed. R. Civ. P. 26(b)(1).  
6 Discovery may be further limited by court order if "(i) the discovery sought is unreasonably  
7 cumulative or duplicative, or is obtainable from some other source that is more convenient, less  
8 burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by  
9 discovery in the action to obtain the information sought; or (iii) the burden or expense of the  
10 proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2). In order to comply  
11 with the requirements of Rule 26, before deciding to promulgate discovery Plaintiff may find it  
12 to his benefit to wait until Defendant has filed a dispositive motion which could include some or  
13 all of the discovery Plaintiff might seek. In addition, no motion to compel will be considered by  
14 the Court unless the meet-and-confer requirement of Rule 37(a)(2)(B) and N.D. Cal. Local Rule  
15 37-1 has been satisfied. Because Plaintiff is detained, he is not required to meet and confer with  
16 Defendant in person. Rather, if his discovery requests are denied and he intends to seek a  
17 motion to compel, he must send a letter to Defendant to that effect, offering her one last  
18 opportunity to provide him with the sought-after information.

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

23 IT IS SO ORDERED.

24 DATED: 8/30/2010

  
LUCY H. KOH  
United States District Judge