

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

CESAR ALFARO,	)	No. C 10-04416 JW (PR)
	)	
Plaintiff,	)	ORDER OF SERVICE; DIRECTING
vs.	)	DEFENDANTS TO FILE DISPOSITIVE
	)	MOTION OR NOTICE REGARDING
D. HIGGERSON, et al.,	)	SUCH MOTION; INSTRUCTIONS TO
	)	CLERK
	)	
Defendants.	)	
_____	)	

Plaintiff, an inmate at the Pelican Bay State Prison (“PBSP”) in Crescent City, California, filed a pro se civil rights complaint under 42 U.S.C. § 1983, challenging the conditions of his confinement. Plaintiff’s motion for leave to proceed in forma pauperis will be granted in a separate order. The Court will conduct its initial review of the complaint pursuant to 28 U.S.C. § 1915A.

**DISCUSSION**

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek 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

1 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief  
2 may be granted, or seek monetary relief from a defendant who is immune from such  
3 relief. Id. at 1915A(b)(1),(2).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a person  
5 acting under the color of state law committed a violation of a right secured by the  
6 Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988). Pro se  
7 pleadings must be liberally construed. Balistreri v. Pacifica Police Dep't, 901 F.2d 696,  
8 699 (9th Cir. 1990).

9 B. Plaintiff's Claim

10 Plaintiff claims that defendants validated him as a prison gang associate “based on  
11 unsupported, unuseable and uninvestigated [*sic*] allegations” by which he was placed  
12 indeterminately in the SHU. (Compl. at 3.) Liberally construed, plaintiff states a  
13 cognizable claim for the deprivation of his right to due process under Toussaint v.  
14 McCarthy, 801 F.2d 1080 (9th Cir. 1986). See Bruce v. Ylst, 351 F.3d 1283, 1287-88  
15 (9th Cir. 2003).

16 With respect to defendants James E. Tilton and G. Lewis, a supervisor may be  
17 liable under section 1983 upon a showing of (1) personal involvement in the  
18 constitutional deprivation or (2) a sufficient causal connection between the supervisor's  
19 wrongful conduct and the constitutional violation. Redman v. County of San Diego, 942  
20 F.2d 1435, 1446 (9th Cir. 1991) (en banc) (citation omitted). A supervisor therefore  
21 generally “is only liable for constitutional violations of his subordinates if the supervisor  
22 participated in or directed the violations, or knew of the violations and failed to act to  
23 prevent them.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Plaintiff has failed to  
24 show that defendants Tilton and Lewis are liable as supervisors because they either  
25 participated in the other defendants' unlawful actions or that they knew but failed to act to  
26 prevent the violation. Accordingly, the claims against defendants Tilton and Lewis are  
27 **DISMISSED.**

28 ///

1 **CONCLUSION**

2 For the foregoing reasons, the Court orders as follows:

3 1. The clerk of the Court shall issue summons and the United States  
4 Marshal shall serve, without prepayment of fees, a copy of the complaint, all attachments  
5 thereto, and a copy of this order upon **defendants D. Higerson, A. Barneburg, D. T.**  
6 **Hawkes, McKinney, Marquez, Everett W. Fisher, Daniel L. Smith and D. Spear at**  
7 **Pelican Bay State Prison, (P.O. Box 7000, Crescent City, CA 95531-7000).**

8 The claims against defendants James E. Tilton and G. Lewis are DISMISSED. The  
9 Clerk shall terminate these defendants from this action.

10 2. No later than **sixty (60) days** from the date of this order, defendants shall  
11 file a motion for summary judgment or other dispositive motion with respect to the claims  
12 in the amended complaint found to be cognizable above.

13 a. If defendants elect to file a motion to dismiss on the grounds plaintiff  
14 failed to exhaust his available administrative remedies as required by 42 U.S.C.  
15 § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion pursuant to  
16 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.  
17 Terhune, 540 U.S. 810 (2003).

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

24 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court  
25 and served on defendants no later than **thirty (30) days** from the date defendants' motion  
26 is filed.

27 a. In the event the defendants file an unenumerated motion to dismiss  
28

1 under Rule 12(b), plaintiff is hereby cautioned as follows:<sup>1</sup>

2 The defendants have made a motion to dismiss pursuant to Rule  
3 12(b) of the Federal Rules of Civil Procedure, on the ground you  
4 have not exhausted your administrative remedies. The motion will,  
5 if granted, result in the dismissal of your case. When a party you are  
6 suing makes a motion to dismiss for failure to exhaust, and that  
7 motion is properly supported by declarations (or other sworn  
8 testimony) and/or documents, you may not simply rely on what your  
9 complaint says. Instead, you must set out specific facts in  
10 declarations, depositions, answers to interrogatories, or documents,  
11 that contradict the facts shown in the defendant's declarations and  
12 documents and show that you have in fact exhausted your claims. If  
13 you do not submit your own evidence in opposition, the motion to  
14 dismiss, if appropriate, may be granted and the case dismissed.

15 b. In the event defendants file a motion for summary judgment,  
16 the Ninth Circuit has held that the following notice should be given to plaintiffs:

17 The defendants have made a motion for summary judgment by which  
18 they seek to have your case dismissed. A motion for summary  
19 judgment under Rule 56 of the Federal Rules of Civil Procedure will,  
20 if granted, end your case.  
21 Rule 56 tells you what you must do in order to oppose a motion for  
22 summary judgment. Generally, summary judgment must be granted  
23 when there is no genuine issue of material fact--that is, if there is no  
24 real dispute about any fact that would affect the result of your case,  
25 the party who asked for summary judgment is entitled to judgment as  
26 a matter of law, which will end your case. When a party you are  
27 suing makes a motion for summary judgment that is properly  
28 supported 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(e), that  
contradict the facts shown in the defendants' 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 in favor of defendants, your case will  
be dismissed and there will be no trial.

29 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to  
30 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477  
31 U.S. 317 (1986) (holding party opposing summary judgment must come forward with

---

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

1 evidence showing triable issues of material fact on every essential element of his claim).  
2 Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary  
3 judgment may be deemed to be a consent by plaintiff to the granting of the motion, and  
4 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,  
5 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

6 4. Defendants shall file a reply brief no later than **fifteen (15) days** after  
7 plaintiff's opposition is filed.

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

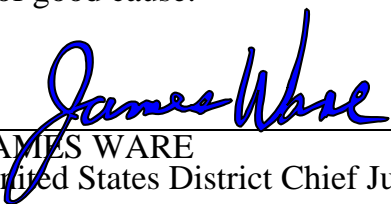
10 6. All communications by the plaintiff with the Court must be served on  
11 defendants, or defendants' counsel once counsel has been designated, by mailing a true  
12 copy of the document to defendants or defendants' counsel.

13 7. Discovery may be taken in accordance with the Federal Rules of Civil  
14 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or  
15 Local Rule 16-1 is required before the parties may conduct discovery.

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

20 9. Extensions of time must be filed no later than the deadline sought to be  
21 extended and must be accompanied by a showing of good cause.

22  
23 DATED: February 7, 2011

  
\_\_\_\_\_  
JAMES WARE  
United States District Chief Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

CESAR ALFARO,  
Plaintiff,

Case Number: CV10-04416 JW

**CERTIFICATE OF SERVICE**

v.

D. HIGGERSON, 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 2/7/2011, 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.

Cesar Alfaro E-68257  
Pelican Bay State Prison  
P. O. Box 7500  
Crescent City, CA

Dated: 2/7/2011

Richard W. Wieking, Clerk  
/s/ By: Elizabeth Garcia, Deputy Clerk