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

DAVID RAYMOND ANDREWS,)	No. C 11-2526 LHK (PR)
)	
Plaintiff,)	ORDER OF PARTIAL
)	DISMISSAL; ORDER OF
v.)	SERVICE; DIRECTING
)	DEFENDANTS TO FILE
J. AURELIO, et al.,)	DISPOSITIVE MOTION OR
)	NOTICE REGARDING SUCH
Defendants.)	MOTION

Plaintiff, a state prisoner proceeding *pro se*, filed a second amended civil rights complaint pursuant to 42 U.S.C. § 1983. For the reasons stated below, the Court orders service upon named Defendants.

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. § 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v.*

1 *Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

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

6 B. Plaintiff's Claims

7 Plaintiff complains that he was improperly given an inmate custody designation with an
8 "R" suffix, which is customarily given to those inmates incarcerated for rape or other sex-related
9 crimes. He asserts that Defendants placed this improper suffix upon him in retaliation for
10 pursuing grievances. In addition, he argues that the incorrect labeling violated his right to due
11 process. Liberally construed, Plaintiff has state cognizable claims of retaliation and a violation
12 of due process.

13 C. Dismissed Defendants

14 Plaintiff also names the California Department of Corrections and Rehabilitation
15 ("CDCR"). However, the CDCR is immune from suit by the Eleventh Amendment. *See Brown*
16 *v. Cal. Dep't of Corrs.*, 554 F.3d 747, 752 (9th Cir. 2009) (California Department of Corrections
17 and California Board of Prison Terms entitled to 11th Amendment immunity). Thus, the CDCR
18 is DISMISSED with prejudice.

19 Plaintiff also lists "Doe" Defendants. Although the use of "John Doe" to identify a
20 defendant is not favored in the Ninth Circuit, *see Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th
21 Cir. 1980), situations may arise where the identity of alleged defendants cannot be known prior
22 to the filing of a complaint. In such circumstances, the plaintiff should be given an opportunity
23 through discovery to identify the unknown defendants, unless it is clear that discovery would not
24 uncover their identities or that the complaint should be dismissed on other grounds. *See id.*
25 Should Plaintiff discover the identities of the Doe Defendants, he may move to amend his second
26 amended complaint to include them in this action at a later date.

1 **CONCLUSION**

2 1. Defendant CDCR is dismissed with prejudice. Doe Defendants are dismissed
3 without prejudice.

4 2. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of
5 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the second
6 amended complaint and all attachments thereto (docket no. 24) and a copy of this Order to
7 **Correction Counselor J. Aurelio; Correction Counselor D. Melton, Appeals Coordinator S.**
8 **C. Walch, H. Ortiz, and Classification Staff Representative R. Carriedo at PBSP.**

9 The Clerk of the Court shall also mail a courtesy copy of the second amended complaint
10 and a copy of this Order to the California Attorney General’s Office. Additionally, the Clerk
11 shall mail a copy of this Order to Plaintiff.

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

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

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

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

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

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

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

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

The defendants have made a motion for summary judgment by which

¹ 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 they seek to have your case dismissed. A motion for summary judgment under
2 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

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

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

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

28 7. 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.

8. All communications by the Plaintiff with the court must be served on Defendants'
counsel, by mailing a true copy of the document to Defendants' counsel.

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

10. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
and all parties informed of any change of address and must comply with the Court's orders in a

1 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
2 pursuant to Federal Rule of Civil Procedure 41(b)

3 IT IS SO ORDERED.

4 DATED: 1/24/12


LUCY H. KOH
United States District Judge

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