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FILED

JUL 16 2012

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

WILLIE GEORGE ERWIN, JR.,
Plaintiff,
v.
MATTHEW CATE and WARDEN R.
GROUNDS,
Defendants.

No. C 12-0031 LHK (PR)
ORDER OF SERVICE;
DIRECTING DEFENDANTS TO
FILE DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION

Plaintiff, a California state prisoner proceeding *pro se*, filed an amended civil rights action under 42 U.S.C. § 1983, against Director Matthew Cate and Warden R. Grounds. Plaintiff has been granted leave to proceed in forma pauperis in a separate order. For the reasons stated below, the Court will serve the amended complaint.

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 B. Legal Claim

4 According to the amended complaint, Plaintiff suffers from a permanent mobility
5 impairment. Plaintiff was initially placed in the Disability Placement Program at Central
6 Training Facility. At some unspecified time, however, Plaintiff asserts that he was improperly
7 excluded from the disability program called Disability Not Impacting Placement Mobility, even
8 though participation had been recommended by his Primary Care Physician. Liberally
9 construed, Plaintiff states a cognizable claim of deliberate indifference to his serious medical
10 needs.

11 **CONCLUSION**

12 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of
13 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the amended
14 complaint and all attachments thereto (docket no. 6), and a copy of this Order to **Warden Randy**
15 **Grounds at Correctional Training Facility and Director Matthew Cate at the CDCR.**

16 The Clerk of the Court shall also mail a courtesy copy of the amended complaint and a
17 copy of this Order to the California Attorney General's Office. Additionally, the Clerk shall
18 mail a copy of this Order to Plaintiff.

19 2. 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 complaint.
21 Pursuant to Rule 4, if Defendants, after being notified of this action and asked by the Court, on
22 behalf of Plaintiff, to waive service of the summons, fail to do so, they will be required to bear
23 the cost of such service unless good cause is shown for their failure to sign and return the waiver
24 form. If service is waived, this action will proceed as if Defendants had been served on the date
25 that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required
26 to serve and file an answer before **sixty (60) days** from the date on which the request for waiver
27 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 bottom 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
4 on which the request for waiver was sent or **twenty (20) days** from the date the waiver form is
5 filed, whichever is later.

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

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

13 b. Any motion for summary judgment shall be supported by adequate factual
14 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil
15 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**
16 **qualified immunity found, if material facts are in dispute. If Defendants are of the opinion**
17 **that this case cannot be resolved by summary judgment, they shall so inform the Court**
18 **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 and
20 served on Defendants no later than **twenty-eight (28) days** from the date Defendants' motion is
21 filed.

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

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

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

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

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

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

28 *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read
29 Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317
30 (1986) (holding party opposing summary judgment must come forward with evidence showing
31 triable issues of material fact on every essential element of his claim).

32 5. Defendants shall file a reply brief no later than **fourteen (14) days** after
33 Plaintiff's opposition is filed.

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

36 7. All communications by the Plaintiff with the Court must be served on Defendants
37 or Defendants' counsel, by mailing a true copy of the document to Defendants or Defendants'
38 counsel.

39 8. 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 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
3 and all parties informed of any change of address and must comply with the Court's orders in a
4 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
5 pursuant to Federal Rule of Civil Procedure 41(b).

6 IT IS SO ORDERED.

7 DATED: 7/16/12

Lucy H. Koh
LUCY H. KOH
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

WILLIE G. ERWIN JR. et al,
Plaintiff,

Case Number: CV12-00031 LHK

CERTIFICATE OF SERVICE

v.

R. GROUNDS et al,
Defendant.

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 July 16, 2012, 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.

Willie George Erwin T-64857
Central Facility
P.O. Box 689
Soledad, CA 93960-0689

Dated: July 16, 2012

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