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United States District Court  
For the Northern District of California

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

DAVID LOPEZ,	)	No. C 12-04554 EJD (PR)
	)	
Plaintiff,	)	ORDER OF PARTIAL DISMISSAL
	)	AND OF SERVICE; DIRECTING
v.	)	DEFENDANTS TO FILE
	)	DISPOSITIVE MOTION OR
M. E. SPEARMAN, et al.,	)	NOTICE REGARDING SUCH
	)	MOTION; INSTRUCTIONS TO
Defendant.	)	CLERK
	)	
_____	)	

Plaintiff has filed a civil rights action under 42 U.S.C. § 1983, against Correctional Training Facility medical officials. The original and first amended complaints were dismissed with leave to amend. Plaintiff has filed a second amended complaint (“SAC”). (Docket No. 10.)

**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,

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

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

9 **B. Plaintiff's Claims**

10 Plaintiff claims that on October 1, 2008, he suffered a “work related injury of  
11 his right side in the upper hip area” when he experienced “a sharp initial and  
12 shooting pain which seemed to stop quickly.” (SAC at 3.) In July 2009, Plaintiff  
13 was assigned to an upper bunk, and after about three weeks of climbing to the top  
14 bunk, he began to experience a “throbbing and shooting ‘fire’ and ‘ice’ stye  
15 sensation[] down [his] leg to, and under, the heel of [his] foot.” (Id.) Plaintiff states  
16 that from then on, his pain levels increased “drastically.” (Id.) On August 5, 2009,  
17 Plaintiff submitted a request for medical attention and a request for a bottom bunk  
18 chrono. (Id. at 3-A.) He was seen by Dr. Friedrichs who ordered an x-ray. The x-  
19 ray revealed that Plaintiff had a “Mild <R> Hip DJD.” (Id.) Plaintiff claims that six  
20 months passed between the time Dr. Friedrichs determined that a bottom bunk  
21 chrono was required on August 12, 2009, and when he actually requested one on  
22 February 2, 2010. (Id.)

23 In February 2011, Plaintiff was seen again by Dr. Friedrichs to whom he  
24 stated that the pain associated with his hip had steadily increased. (Id.) Plaintiff  
25 also told the doctor that he was continuing to experience “shooting and tingling  
26 sensations in and through [his] leg to [his] foot” and requested an MRI to “determine  
27 the cause and establish the basis for a treatment plan.” (Id.) Dr. Friedrichs informed  
28 Plaintiff that he did not qualify for an MRI. The doctor requested approval for

1 another bottom bunk chrono, prescribed Tylenol, and completed a Medical  
2 Classification Chrono diagnosing the condition as permanent. (Id.)

3 On March 29, 2011, Dr. Friedrichs completed a Medical Progress Report,  
4 stating that Plaintiff's x-rays did not show severe problems, only "mild degenerative  
5 changes on his right hip." (Id.; Ex. 4.) Plaintiff takes issues with the doctor's  
6 assessment that "all conditions are stable and fairly well controlled," asserting that  
7 he continued to have extreme pain and suffering. (Id. at 3-A.)

8 Plaintiff claims that on June 7, 2011, he spoke with Mrs. Fernandez for an  
9 appeal interview, and that she refused to hear anything about his medical condition  
10 as Dr. Friedrichs' diagnosis was that there was nothing wrong with his hip. Plaintiff  
11 continued to file requests for medical treatment to no success. (Id. at 3-B.)

12 On September 17, 2011, Plaintiff saw Dr. Lam, who stated that there was  
13 something wrong with Plaintiff's leg and hip. Dr. Lam ordered an x-ray, blood test,  
14 and new pain medication. (Id.) On October 16, 2011, Dr. Lam informed Plaintiff  
15 that Dr. Friedrichs had "made a mistake in most all areas associated with [Plaintiff's]  
16 conditions and complaints [*sic*]." (Id.) Dr. Lam stated that Plaintiff should never  
17 have lost the bottom bunk chrono, and that "the type and amount of medication the  
18 circumstances called for was inappropriate." (Id.) Although Dr. Lam transcribed  
19 new orders and made an appointment for Plaintiff "to be reduced" in 30 days,  
20 Plaintiff had not been "reduced" as of the date of the filing of the original  
21 complaint, nor has he received treatment for his condition or prescribed any pain  
22 medicine. (Id.)

23 Liberally construed, Plaintiff states cognizable claims against Defendants Dr.  
24 Friedrichs and Nurse M. Fernandez, for deliberate indifference to serious medical  
25 needs. See Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin v. Smith, 974  
26 F.2d 1050, 1059 (9th Cir. 1992).

27 Plaintiff's claims against remaining defendants are insufficient to state a  
28 claim. Liability may be imposed on an individual defendant under 42 U.S.C. § 1983

1 if the plaintiff can show that the defendant proximately caused the deprivation of a  
2 federally protected right. See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988);  
3 Harris v. City of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives  
4 another of a constitutional right within the meaning of section 1983 if he does an  
5 affirmative act, participates in another's affirmative act or omits to perform an act  
6 which he is legally required to do, that causes the deprivation of which the plaintiff  
7 complains. See Leer, 844 F.2d at 633. The inquiry into causation must be  
8 individualized and focus on the duties and responsibilities of each individual  
9 defendant whose acts or omissions are alleged to have caused a constitutional  
10 deprivation. See Leer, 844 F.2d at 633 (citations omitted). Plaintiff must "set forth  
11 specific facts as to each individual defendant's" actions which violated his rights.  
12 Leer, 844 F.2d at 634. At the pleading stage, "[a] plaintiff must allege facts, not  
13 simply conclusions, that show that an individual was personally involved in the  
14 deprivation of his civil rights." Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir.  
15 1998). Plaintiff's general allegations that Defendants M.E. Spearman, J. Clark, M.  
16 Sepulvida, and G. Ellis acted with deliberate indifference are not supported by  
17 specific facts as to each individual's actions which violated his rights. Plaintiff does  
18 not mention any of these defendants by name in his statement of facts or show how  
19 each personally was involved in the alleged deprivation. Plaintiff was given two  
20 opportunities to correct this deficiency. Accordingly, the claims against these  
21 defendants are DISMISSED.

## 22 CONCLUSION

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

24 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for  
25 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a  
26 copy of the second amended complaint, (Docket No. 10), all attachments thereto,  
27 and a copy of this order upon **Defendants Dr. T, Friedrichs and Nurse M.**  
28

1 **Fernandez at the Correctional Training Facility - Soledad** (P.O. Box 689,  
2 Soledad, CA 93960). The Clerk shall also mail a copy of this Order to Plaintiff.

3 The Clerk shall terminate all other defendants from this action as Plaintiff has  
4 failed to state cognizable claims against them in the second amended complaint.

5 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil  
6 Procedure requires them to cooperate in saving unnecessary costs of service of the  
7 summons and the second amended complaint. Pursuant to Rule 4, if Defendants,  
8 after being notified of this action and asked by the Court, on behalf of Plaintiff, to  
9 waive service of the summons, fail to do so, they will be required to bear the cost of  
10 such service unless good cause shown for their failure to sign and return the waiver  
11 form. If service is waived, this action will proceed as if Defendants had been served  
12 on the date that the waiver is filed, except that pursuant to Rule 12(a)(1)(B),  
13 Defendants will not be required to serve and file an answer before **fifty-six (56)**  
14 **days** from the day on which the request for waiver was sent. (This allows a longer  
15 time to respond than would be required if formal service of summons is necessary.)  
16 Defendants are asked to read the statement set forth at the foot of the waiver form  
17 that more completely describes the duties of the parties with regard to waiver of  
18 service of the summons. If service is waived after the date provided in the Notice  
19 but before Defendants have been personally served, the Answer shall be due **fifty-**  
20 **six (56) days** from the date on which the request for waiver was sent or **twenty-one**  
21 **(21) days** from the date the waiver form is filed, whichever is later.

22 3. No later than **fifty-six (56) days** from the date of this order,  
23 Defendants shall file a motion for summary judgment or other dispositive motion  
24 with respect to the claims in the second amended complaint found to be cognizable  
25 above.

26 a. If Defendants elect to file a motion to dismiss on the grounds  
27 Plaintiff failed to exhaust his available administrative remedies as required by 42  
28 U.S.C. § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion

1 pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied  
2 Alameida v. Terhune, 540 U.S. 810 (2003). **The Ninth Circuit has held that**  
3 **Plaintiff must be provided with the appropriate warning and notice under**  
4 **Wyatt concurrently with Defendants' motion to dismiss. See Woods v. Carey,**  
5 **Nos. 09-15548 & 09-16113, slip op. 7871, 7874 (9th Cir. July 6, 2012).**

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

13 4. Plaintiff's opposition to the dispositive motion shall be filed with the  
14 Court and served on Defendants no later than **twenty-eight (28) days** from the date  
15 Defendants' motion is filed.

16 a. **In the event Defendants file a motion for summary**  
17 **judgment, the Ninth Circuit has held that Plaintiff must be concurrently**  
18 **provided the appropriate warnings under Rand v. Rowland, 154 F.3d 952, 963**  
19 **(9th Cir. 1998) (en banc). See Woods, Nos. 09-15548 & 09-16113, slip op. at**  
20 **7874.**

21 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil  
22 Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party  
23 opposing summary judgment must come forward with evidence showing triable  
24 issues of material fact on every essential element of his claim). Plaintiff is cautioned  
25 that failure to file an opposition to Defendants' motion for summary judgment may  
26 be deemed to be a consent by Plaintiff to the granting of the motion, and granting of  
27 judgment against Plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54  
28 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

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

6. 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.

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

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

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

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

DATED: 4/26/2013

  
EDWARD J. DAVILA  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

DAVID LOPEZ,  
Plaintiff,

Case Number: CV12-04554 EJD

**CERTIFICATE OF SERVICE**

v.

M. E. SPEARMAN, 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 4/29/2013, 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.

David Lopez D-24657  
Correctional Training Facility  
P. O. Box 689  
Soledad, CA 93960

Dated: 4/29/2013

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