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

FRANKLIN RAMIREZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
WARDEN SPEARMAN, et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

No. C 15-02469 EJD (PR)  
ORDER OF SERVICE; DIRECTING  
DEFENDANTS TO FILE  
DISPOSITIVE MOTION OR  
NOTICE REGARDING SUCH  
MOTION; INSTRUCTIONS TO  
CLERK

Plaintiff, a state prisoner at California Training Facility (“CTF”) in Soledad, California, filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983, against CTF prison officials. Plaintiff has filed a first amended complaint. (Docket No. 8.)

**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

1 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state  
2 a claim upon which relief may be granted or seek monetary relief from a defendant who  
3 is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must,  
4 however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,  
5 699 (9th Cir. 1988).

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

10 **B. Plaintiff's Claims**

11 According to the complaint, on July 14, 2014, Plaintiff was summoned by  
12 Defendant Correctional Officer Abanico for a random urine test, his second urine test  
13 within a two-week period. (Am. Compl. at 3.) Defendant Abanico ordered Plaintiff to  
14 strip naked, bend, and cough as he visually inspected Plaintiff's genital rectal area. (Id.)  
15 Defendant Abanico had Plaintiff stay bent for several minutes. (Id.) During this time,  
16 Defendant Abanico stared at Plaintiff; looked Plaintiff up and down; and behaved in an  
17 aggressive and malicious manner. (Id.) Defendant Abanico's actions made Plaintiff  
18 feel humiliated. (Id.) Defendant Abanico also failed to provide Plaintiff with disposable  
19 gloves after Plaintiff was searched for contaminants, and failed to have a witness  
20 present during the urine test, in violation of prison protocol. (Id.) Liberally construed,  
21 Plaintiff states a cognizable Eighth Amendment claim under § 1983 for sexual  
22 harassment against Officer Abanico. See Thomas v. District of Columbia, 887 F. Supp.  
23 1, 3–4 (D.D.C. 1995); see Jordan v. Gardner, 986 F.2d 1521, 1525–31 (9th Cir. 1993)  
24 (en banc).

25 Plaintiff claims that after he informed prison administration and staff members of  
26 the Defendant Abanico's abusive behavior, Defendants Spearman, Ellis and Artis failed  
27 to investigate, train, supervise and prevent Defendant Abanico from his unconstitutional  
28 misconduct and to properly punish him for it and prior similar misconduct. (Id. at 4.)

1 Plaintiff claims that Defendants knew or should have known of Defendant Abanico's  
2 prior misconduct and had they properly investigated his past behavior, Plaintiff would  
3 have been protected from Defendant Abanico's abusive conduct. (Id.) Liberally  
4 construed, Plaintiff states a cognizable claim against these defendants. See Henry A. v.  
5 Willden, 678 F.3d 991, 1003–04 (9th Cir. 2012).

### CONCLUSION

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

9 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for  
10 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a  
11 copy of the amended complaint, (Docket No. 8), all attachments thereto, and a copy of  
12 this order upon **Defendants Warden M. E. Spearman, Capt. G. Ellis, Capt. D. Artis**  
13 and **Officer E. Banico** at the **Correctional Training Facility** (P.O. Box 686 Soledad,  
14 CA 93960-0686). The Clerk shall also mail a copy of this Order to Plaintiff.

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

1 served, the Answer shall be due **sixty (60) days** from the date on which the request for  
2 waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever  
3 is later.

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

7 a. If Defendants elect to file a motion to dismiss on the grounds  
8 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.  
9 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to  
10 Wyatt v. Terhune, 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied Alameida v.  
11 Terhune, 540 U.S. 810 (2003). **The Ninth Circuit has held that Plaintiff must be**  
12 **provided with the appropriate warning and notice under Wyatt concurrently with**  
13 **Defendants’ motion to dismiss. See Woods v. Carey, 684 F.3d 934, 940 (9th Cir.**  
14 **2012).**

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

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

24 a. **In the event Defendants file a motion for summary judgment,**  
25 **the Ninth Circuit has held that Plaintiff must be concurrently provided the**  
26 **appropriate warnings under Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998)**  
27 **(en banc). See Woods v. Carey, 684 F.3d 934, 940 (9th Cir. 2012).**

28 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure

1 and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary  
2 judgment must come forward with evidence showing triable issues of material fact on  
3 every essential element of his claim). Plaintiff is cautioned that failure to file an  
4 opposition to Defendants' motion for summary judgment may be deemed to be a  
5 consent by Plaintiff to the granting of the motion, and granting of judgment against  
6 Plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per  
7 curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

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

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

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

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

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

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

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DATED: 1/4/2016

  
EDWARD J. DAVILA  
United States District Judge

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FRANKLIN CARRILLO RAMIREZ,

Plaintiff,

v.

M. E. SPEARMAN, et al.,

Defendants.

Case No. [5:15-cv-02469-EJD](#)

**CERTIFICATE OF SERVICE**

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 1/5/2016, 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.

Franklin Carrillo Ramirez ID: H-33263  
Facility A & B  
Correctional Training Facility (CTF)  
P.O. Box 705  
Soledad, CA 93960

Dated: 1/5/2016

Susan Y. Soong  
Clerk, United States District Court

By: Elizabeth C Garcia  
Elizabeth Garcia, Deputy Clerk to the  
Honorable EDWARD J. DAVILA