

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH GRIMES,
Plaintiff,

v.

KATHY CHISUM,
Defendant.

Case No. 16-01488 HRL (PR)

**ORDER OF SERVICE; DIRECTING
DEFENDANT TO FILE
DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION; INSTRUCTIONS TO
CLERK**

Plaintiff, a California state prisoner, filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983 against prison officials at the Salinas Valley State Prison (“SVSP”). Plaintiff’s motion for leave to proceed in forma pauperis will be addressed in a separate order.

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

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

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

8 **B. Plaintiff's Claims**

9 Plaintiff alleges that he has "DPW" status, which means that he is permanently
10 confined to a wheelchair. (Compl. Attach. at 3.) Plaintiff claims that while he was
11 incarcerated at SVSP, Defendant Kathy Chisum was deliberately indifferent to his serious
12 medical needs when she repeatedly denied his requests for medically prescribed leather
13 gloves for the use of his wheelchair. (Id.) For lack of these leather gloves, he developed
14 painful calluses which has resulted in "irr[e]parable injury because the painful calluses are
15 non-amenable to his health and well-being, with severe sharp pain shooting up and down
16 his shoulders, which restricts his mobility to wheel himself around. And as a result,
17 Plaintiff is permanently disabled." (Id. at 8.) Liberally construed, Plaintiff states a
18 cognizable claim for a violation of his rights under the Eighth Amendment. See Estelle v.
19 Gamble, 429 U.S. 97, 104 (1976).

20 Plaintiff also claims Defendant's actions violated the Americans with Disabilities
21 Act, 42 U.S.C. § 12101 et seq. ("ADA"), and seeks redress for "inhumane health care."
22 (Compl. Attach. at 2.) He claims that he has been denied "ADA accommodations and
23 appliances" and deprived of "federally-funded ADA accommodations contrary to
24 physicians orders." (Id. at 7.) Specifically, Plaintiff claims that the denial of leather
25 gloves has caused him to suffer excruciating pain on the inside of both arms, blisters, sores
26 and calluses, which has effectively caused his daily activities to be confined to his cell and
27 depriving him from access to various functions and programs offered by the prison,

1 including access to the law library, mental health group meetings, church, and medical
2 appointments. (Id. at 11.) Liberally construed, Plaintiff states a cognizable claim under
3 the ADA. See 28 C.F.R. § 35.130(b)(7).

4 **C. Doe Defendants**

5 Plaintiff also names “Defendant Does 1 thru 5” as various staff members at SVSP
6 “who had a hand in subjecting Plaintiff to deliberate indifference and cruel and unusual
7 punishment.” (Compl. Attach. at 3.) Plaintiff states that he will obtain the names and
8 positions of these Doe defendants through discovery. (Id.)

9 Although the use of “John Doe” to identify a defendant is not favored in the Ninth
10 Circuit, see Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980); Wiltsie v. Cal. Dep’t
11 of Corr., 406 F.2d 515, 518 (9th Cir. 1968), situations may arise where the identity of
12 alleged defendants cannot be known prior to the filing of a complaint. In such
13 circumstances, the plaintiff should be given an opportunity through discovery to identify
14 the unknown defendants, unless it is clear that discovery would not uncover their identities
15 or that the complaint should be dismissed on other grounds. See Gillespie, 629 F.2d at
16 642; Velasquez v. Senko, 643 F. Supp. 1172, 1180 (N.D. Cal. 1986). Accordingly, Doe
17 Defendants “1 thru 5” DISMISSED from this action. If, through discovery, Plaintiff is
18 able to identify the unknown defendants, he may then motion the Court for leave to amend
19 to name the intended defendants and to issue summons upon them. See Gillespie, 629
20 F.2d at 642; Barsten v. Dep’t of the Interior, 896 F.2d 422, 423–24 (9th Cir. 1990).
21 However, the Court notes that Plaintiff has failed to identify Doe Defendants “1 thru 5”
22 with any sort of particularity, or describe how they each acted to violate his Eighth
23 Amendment rights. Should Plaintiff seek leave to amend to name the intended defendants,
24 he must also, in a short and plain statement, give the newly named defendants fair notice of
25 the claim and the grounds upon which it rests. Swierkiewicz v. Sorema N. A., 534 U.S.
26 506, 512 (2002).

27 ///

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

CONCLUSION

For the reasons state above, the Court orders as follows:

1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint, all attachments thereto, and a copy of this order upon **Defendant Kathy Chisum at Salinas Valley State Prison (P.O. Box 1020, Soledad, CA 93960-1020)**. The Clerk shall also mail a copy of this Order to Plaintiff.

Defendant "Does 1 thru 5" are DISMISSED from this action.

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

3. No later than **ninety-one (91) days** from the date of this order, Defendants shall file a motion for summary judgment or other dispositive motion with respect to the claims in the complaint found to be cognizable above.

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

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

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

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

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

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

26 7. All communications by the Plaintiff with the Court must be served on
27 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
28

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

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.

IT IS SO ORDERED.

Dated:

7/6/16



HOWARD R. LLOYD
United States Magistrate Judge

Order of Service
PRO-SE\HRL\CR.16\01488Grimes_svc