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JOHN FRATUS,
Plaintiff,
v.
WASHINGTON, et al.,
Defendants.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 24-cv-03261 EJD (PR)

**ORDER OF SERVICE;
TERMINATING MOTION AS
MOOT; DIRECTING DEFENDANTS
TO FILE DISPOSITIVE MOTION
OR NOTICE REGARDING SUCH
MOTION; INSTRUCTIONS TO
CLERK**

(Docket No. 15)

Plaintiff, a state prisoner, filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983 against prison staff at Salinas Valley State Prison (“SVSP”) where he was previously housed. Dkt. No. 1. Plaintiff has paid the filing fee. Dkt. No. 16.

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 id. § 1915A(b)(1), (2). Pro se pleadings must, however, be liberally construed. See *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

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

B. Plaintiff's Claims

Plaintiff claims that on September 17, 2021, he was on suicide watch when a nurse reported him for indecent exposure. Dkt. No. 1 at 6. Plaintiff asserts that his gown was flimsy and the exposure was an accident. Id. Defendants Sgt. Washington and Correctional Officer Avila came to his cell and order Plaintiff to “cuff up.” Id. When Plaintiff objected, Defendants Sgt. Washington and Correctional Officer Avila entered his cell and punched Plaintiff in the face and head before slamming him down to the ground and placing him in handcuffs. Id. at 6-7. Plaintiff claims his injuries included lumps, bumps, bruises, and a black eye. Id. at 7. Plaintiff states that the nurse who was present, M. Gervacio, agreed that “[there] was no reason” for Defendants’ conduct. Id. at 8. Plaintiff claims Defendants’ actions violated his Eighth Amendment right to be free from cruel and unusual punishment due to their excessive force. Id. at 10. Plaintiff seeks damages. Id. at 11. Plaintiff’s allegations are sufficient to state a claim for excessive force. See *Hudson v. McMillian*, 503 U.S. 1, 6 (1992).

CONCLUSION

For the reasons set forth above, the Court orders as follows:

1. The following defendant at SVSP shall be served:
 - a. **Sgt. Washington**
 - b. **Correctional Officer Avila**

Service on the listed defendant(s) shall proceed under the California Department of Corrections and Rehabilitation's (CDCR) e-service program for civil rights cases from prisoners in CDCR custody. In accordance with the program, the clerk is directed to serve on CDCR via email the following documents: the operative complaint and any attachments thereto, (Dkt. No. 1), this order of service, a CDCR Report of E-Service Waiver form and a summons. The clerk also shall serve a copy of this order on the plaintiff.

No later than 40 days after service of this order via email on CDCR, CDCR shall provide the court a completed CDCR Report of E-Service Waiver advising the court which

1 defendant(s) listed in this order will be waiving service of process without the need for
2 service by the United States Marshal Service (USMS) and which defendant(s) decline to
3 waive service or could not be reached. CDCR also shall provide a copy of the CDCR
4 Report of E-Service Waiver to the California Attorney General's Office which, within 21
5 days, shall file with the court a waiver of service of process for the defendant(s) who are
6 waiving service.

7 Upon receipt of the CDCR Report of E-Service Waiver, the clerk shall prepare for
8 each defendant who has not waived service according to the CDCR Report of E-Service
9 Waiver a USM-205 Form. The clerk shall provide to the USMS the completed USM-205
10 forms and copies of this order, the summons and the operative complaint for service upon
11 each defendant who has not waived service. The clerk also shall provide to the USMS a
12 copy of the CDCR Report of E-Service Waiver.

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

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

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

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

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

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

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

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

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

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

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

25 10. Plaintiff's motion for an extension of time to pay the filing fee shall be
26 terminated as moot. Dkt. No. 15.

27 This order terminates Docket No. 15.

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1 **IT IS SO ORDERED.**

2 Dated: December 30, 2024

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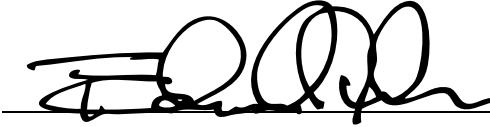
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EDWARD J. DAVILA
United States District Judge