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FILED

MAY 6 1997

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WILLIAM ROUSER,

NO. CIV. S-93-767 LKK/GGH P

Plaintiff,

v.

ORDER AFTER HEARING

THEO WHITE, et al.,

Defendants.

Defendants' motion to dismiss came on regularly for hearing on May 5, 1997, before the Honorable Lawrence K. Karlton, Chief Judge Emeritus. JOHN MAIER, REED PRUYN and JAMES ZAHRADKA Certified Student Attorneys, appeared for plaintiff; JAMES FLYNN appeared for defendants.

Upon consideration of the pleadings and papers on file herein, and after hearing the argument of counsel, the court announced its disposition of the motion and its reasons therefor into the record as follows:

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1 This matter is before me on defendants' motion to dismiss
2 plaintiff's first amended complaint. The standards for such
3 motions are well-known and need not be repeated. See Clark v.
4 Kizer, 758 F. Supp. 572, 574 (E.D. Cal. 1990).

5 Plaintiff's original complaint was filed May 6, 1993, nearly
6 three years before the Prison Litigation Reform Act ("PLRA") was
7 enacted. After denying defendants' motion for summary judgment,
8 see Order filed October 28, 1996, the court granted plaintiff leave
9 to file an amended complaint. See Order filed January 15, 1997
10 at 2.

11 Plaintiff's amended complaint filed February 12, 1997 relates
12 back to the original complaint because the claims arose out of the
13 same conduct plaintiff attempted to set forth in the original
14 pleading. See Fed. R. Civ. P. 15(c)(2). Therefore, filing an
15 amended complaint after the PLRA was enacted on April 26, 1996 does
16 not trigger PLRA provisions unless those provisions apply to
17 actions that are already pending.

18 The PLRA imposes a filing fee requirement whenever a prisoner
19 "brings a civil action or files an appeal." 28 U.S.C. § 1915(b).
20 Congress has prescribed the reach of this provision by the plain
21 language indicating that it applies prospectively when a prisoner
22 "brings" an action. And where Congress has done so, this court
23 need not analyze whether the provision is merely a procedural rule
24 that may be applied retroactively. See Landgraf v. USI Film
25 Products, Inc., 511 U.S. 244, ___, 114 S. Ct. 1483, 1505 (1994).
26 Plaintiff's amended complaint therefore does not trigger this

1 provision.

2 The language of § 1915(b) distinguishes this case from Marks
3 v. Slocum, 98 F.3d 494 (9th Cir. 1996), since the Circuit held
4 there that Congress had not prescribed the reach of 28 U.S.C.
5 § 1915(e)(2), which provides that courts "shall dismiss the case
6 at any time" if the action is frivolous or malicious, fails to
7 state a claim, or seeks monetary relief against a defendant who is
8 immune. Applying 28 U.S.C. § 1915(e)(2) to plaintiff's amended
9 complaint, the court finds no basis for dismissing the complaint.

10 Exhaustion requirements relative to plaintiff's state claims
11 must be distinguished from exhaustion requirements applicable to
12 plaintiff's federal claims under § 1983. It is well established
13 under California law that claims against the state or its employees
14 founded on the California Constitution are subject to the claims
15 presentation requirements of the California Tort Claims Act, Cal.
16 Gov't Code § 945.5. See City of San Jose v. Superior Court,
17 12 Cal.3d 447, 454-55 (1974); County of Contra Costa v. State of
18 California, 177 Cal.App.3d 62 (1986). Nevertheless, since
19 plaintiff's claims under the California Constitution only seek
20 injunctive relief, he is exempt from the claims presentation
21 requirement.¹ See M.G.M. Construction Co. v. Alameda County, 615
22 F. Supp. 149, 151 (N.D. Cal. 1985) (applying California law);
23 Independent Housing Servs. v. Fillmore Center, 840 F. Supp. 1328,

24
25 ¹Counsel for plaintiff stipulated at oral argument that any
26 claims for damages that plaintiff sought under the California
Constitution are dismissed.

1 1358 (N.D. Cal. 1993). Accordingly, defendants' motion to dismiss
2 plaintiff's claims under the California Constitution will be
3 denied.

4 On the other hand, the requirements of the California Tort
5 Claims Act do not apply to actions under § 1983. See Toscano v.
6 Los Angeles County Sheriff's Depart., 92 Cal.App.3d 775, 784
7 (1979). To the extent defendants contend that plaintiff's failure
8 to appeal his second grievance to the final level demonstrates that
9 he has not exhausted prison grievance procedures, the court first
10 concludes that the amended PLRA provision does not apply since, by
11 its terms, it applies to actions that "shall be brought." See
12 42 U.S.C. § 1997e (a). Thus, the court applies the standards of
13 the Civil Rights of Institutionalized Persons Act ("CRIPA") in
14 concluding that it will not exercise its discretion to stay this
15 action and require plaintiff to exhaust any administrative remedies
16 that he has not already exhausted. See 42 U.S.C. § 1997e(a) (1)
17 (1982).

18 Finally, in enacting 42 U.S.C. § 1997e(e), Congress has
19 prescribed that after April 26, 1996 "No Federal civil action may
20 be brought" by a prisoner seeking damages for emotional distress
21 absent physical injury. See 42 U.S.C. § 1997e(e). Since Congress
22 has prescribed that this provision will only apply to such actions
23 as "may be brought," and since the amended complaint relates back
24 to the original complaint, under these circumstances, the physical
25 injury requirement does not apply to plaintiff's claims for money
26 damages and therefore the court does not reach questions regarding

1 the constitutionality of this provision.

2 For all the foregoing reasons, the court makes the following
3 ORDERS:

4 1. Plaintiff's claims for money damages under the California
5 Constitution are DISMISSED;

6 2. Defendants' motion to dismiss plaintiff's fifth, sixth and
7 seventh causes of action seeking declaratory and injunctive relief
8 based on the California Constitution is DENIED;

9 3. Defendants' motion to dismiss the amended complaint for
10 failure to pay a filing fee is DENIED;

11 4. Defendants' motion to dismiss plaintiff's § 1983 claims
12 for failure to exhaust is DENIED; and

13 5. Defendants' motion to dismiss plaintiff's surviving claims
14 for damages for emotional distress is DENIED.

15 IT IS SO ORDERED.

16 DATED: May 5, 1997.

17 
18 LAWRENCE K. KARLTON
19 CHIEF JUDGE-EMERITUS
20 UNITED STATES DISTRICT COURT
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United States District Court
for the
Eastern District of California
May 6, 1997

* * CERTIFICATE OF SERVICE * *

2:93-cv-00767

Rouser

v.

White

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 6, 1997, 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.

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