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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

JONATHAN CROMP,

Plaintiff,

v.

B. CONWAY,

Defendant.

CASE NO. 1:10-cv-00802-LJO-BAM PC

ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS AND GRANTING IN  
PART AND DENYING IN PART  
DEFENDANT’S MOTION TO DISMISS

(ECF Nos. 33, 34)

Plaintiff JONATHAN CROMP (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on the [complaint](#), filed May 10, 2010, against Defendant Conway for deliberate indifference to serious medical needs in violation of the Eighth Amendment. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On February 7, 2012, the Magistrate Judge issued [Findings and Recommendations](#) recommending that Defendant’s Motion to Dismiss be granted in part and denied in part. The parties were given thirty days within which to file Objections, and Plaintiff filed an [Objection](#) on February 28, 2012.

Plaintiff objects to the Findings and Recommendations stating that the Magistrate Judge incorrectly considered failure to exhaust sua sponte and requests that Defendant’s Motion to Dismiss for Failure to Exhaust be dismissed with prejudice. Plaintiff misunderstands the recommendations. In the Findings and Recommendations the Magistrate Judge considered Plaintiff’s inmate appeal. This was not to determine if Plaintiff had exhausted his administrative remedies, but to consider

1 whether Plaintiff was entitled to equitable tolling under the California Government Tort Claim Act  
2 while he was exhausting his administrative remedies. The Magistrate Judge correctly determined  
3 that the issue was more appropriately addressed in a motion for summary judgment and  
4 recommended that the Motion to Dismiss State Law Claims be denied, without prejudice.

5 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a  
6 de novo review of this case. Having carefully reviewed the entire file, the Court finds the Findings  
7 and Recommendations to be supported by the record and by proper analysis.

8 Accordingly, IT IS HEREBY ORDERED that:

- 9 1. The Findings and Recommendations, filed February 7, 2012, is adopted in full;
- 10 2. Defendant’s Motion to Dismiss, filed October 6, 2011, is DENIED IN PART and  
11 GRANTED IN PART as follows:
  - 12 a. Defendant’s Motion to Dismiss Plaintiff’s Official Capacity Claim is  
13 GRANTED;
  - 14 b. Defendant’s Motion to Dismiss Plaintiff’s State Law Claims is DENIED,  
15 without prejudice;
- 16 2. Plaintiff’s request for declaratory relief is DISMISSED as unnecessary;
- 17 3. This action shall proceed on the complaint, filed May 10, 2010, against Defendant  
18 Conway, in her individual capacity, for deliberate indifference in violation of the  
19 Eighth Amendment and medical negligence under state law for damages; and
- 20 4. This action is referred back to the Magistrate Judge for further proceedings.

21 IT IS SO ORDERED.

22 **Dated: February 29, 2012**

23 /s/ Lawrence J. O’Neill  
24 UNITED STATES DISTRICT JUDGE  
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