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

TONY ASBERRY,

Plaintiff,

No. 2:09-cv-01494 MCE KJN P

vs.

MATTHEW CATE, et al.,

Defendants.

ORDER

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Plaintiff is a state prisoner at California State Prison-Sacramento (“CSP-SAC”), proceeding without counsel in this action filed against defendant correctional officers Phelps and Hernandez. The complaint asserts that defendant Phelps violated plaintiff’s constitutional rights to be free from racial discrimination, and from punishment that is cruel, arbitrary or capricious; the complaint also asserts a potentially cognizable due process claim against defendant Hernandez based on the alleged deprivation of plaintiff’s property. Defendants have been served and have filed a limited motion to dismiss one of plaintiff’s claims against defendant Phelps.

Presently pending is plaintiff’s second motion for preliminary injunctive relief, filed August 2, 2011. (Dkt. No. 32.) (Plaintiff’s first motion, which alleged numerous “reprisals” by unnamed staff, was denied by order filed July 28, 2011. (Dkt. No. 31.)) The instant motion broadly asserts that plaintiff is at risk of being killed or seriously injured by other

1 inmates as a result of being set up by CSP-SAC staff members. Plaintiff identifies several CSP-  
2 SAC staff members, but asserts that defendant Phelps is the most harassing and threatening  
3 toward plaintiff. (See Dkt. No. 32 at 8, 12-14.) On August 24, 2011, this court issued Findings  
4 and Recommendations, recommending that the motion be denied because it “fails to identify a  
5 specific harm that can or must be addressed by preliminary relief, or that is required in order to  
6 preserve the matter for a decision on the merits.” (Dkt. No. 34 at 4.) The court further noted,  
7 based on plaintiff’s statement that he intended to file a new civil rights action against several  
8 CSP-SAC members, that “[t]he majority of plaintiff’s claims set forth in the instant motion will  
9 not be heard on the merits in the underlying action. Rather, it appears that these claims, and the  
10 staff members against whom they are made, may be addressed in plaintiff’s anticipated future  
11 action(s).” (Id.) However, the court did note that defendant “Phelps, like all CSP-SAC staff  
12 members, is required to meet constitutional standards in his employment, which includes  
13 protecting plaintiff from harm.” (Id.)

14 In his objections (Dkt. No. 35), plaintiff states, “I’m not asking for this court to do  
15 anything except stopping CSP-SAC staff officials from killing me.” (Dkt. No. 35 at 5; reiterated  
16 throughout plaintiff’s objections). Given the alleged seriousness of plaintiff’s repeated  
17 assertions, the court will vacate its findings and recommendations, and require that defendants  
18 file a response to plaintiff’s pending motion for preliminary injunctive relief.

19 As a separate matter, the court notes that plaintiff has filed a new motion to  
20 proceed in forma pauperis (Dkt. No. 36), and inquired about the appropriateness of filing a new  
21 complaint (Dkt. Nos. 37, 38). These matters are not properly pursued in the instant case. If  
22 plaintiff wishes to pursue these matters, he must file a new action.

23 Finally, the court notes that plaintiff has not yet filed an opposition to defendants’  
24 pending motion to dismiss. The court warned plaintiff, on August 24, 2011, that “[a]bsent a  
25 timely response to th[e] order to show cause [Dkt. No. 33] and the filing of an opposition to the  
26 motion to dismiss, the court will grant defendants’ motion.” (Dkt. No. 34 at 5.) Plaintiff was

1 given thirty days within which to file his opposition, which ends on Friday, September 23, 2011.

2 For the foregoing reasons, IT IS HEREBY ORDERED that:

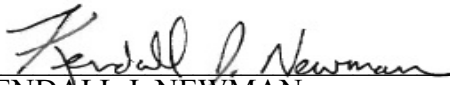
3 1. The Findings and Recommendations filed August 24, 2011 (Dkt. No. 34), are  
4 vacated pending further briefing on the motion.

5 2. Defendants shall file a response to plaintiff's motion for preliminary injunctive  
6 relief (Dkt. No. 32), within 21 days after the filing date of this order.

7 3. Plaintiff may, within 14 days after service of defendants' response, file a reply.

8 4. Plaintiff's motion to proceed in forma pauperis (Dkt. No. 36) is denied without  
9 prejudice to its refiling, in completed form, in a new action. Plaintiff's inquiries regarding the  
10 filing of a new complaint (Dkt. No. 37, 38) are also denied, for the reasons set forth above.

11 DATED: September 13, 2011

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14 KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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