



1 Recommendation.

2 In his "Motion in Opposition," which like Plaintiff's  
3 earlier pleadings is at times difficult to understand, Plaintiff  
4 appears to complain that contrary to the Magistrate Judge's  
5 finding, he did preserve and raise Equal Protection claims  
6 against the Defendants in the TAC. (Opp'n at 2.) Perhaps the  
7 Magistrate Judge thought those claims had been abandoned because,  
8 as with all three prior complaints, nowhere in the TAC does  
9 Plaintiff allege that he was intentionally treated differently  
10 from others similarly situated and that there was no rational  
11 basis for the different treatment. See Vill. of Willowbrook v.  
12 Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074, 145 L. Ed. 2d  
13 1060 (2000). Plaintiff's admissions in the TAC that he had "on  
14 occasion" urinated in public at the park and created other  
15 disturbances provides the rational basis for any different  
16 treatment he received. See Weisbuch v. Cnty. of L.A., 119 F.3d  
17 778, 783 n.1 (9th Cir. 1997) ("[A] plaintiff may plead [him]self  
18 out of court" if he "plead[s] facts which establish that he  
19 cannot prevail on his [constitutional] claim.").<sup>1</sup> As previously  
20 explained to Plaintiff, any attempt to claim that he is a member  
21 of a suspect class - ex-felons - and therefore subject to a  
22 higher level of scrutiny also fails. See Rodriguez v. Cook, 169  
23 F.3d 1176, 1179 (9th Cir. 1999) (prisoners not suspect class);

---

24  
25  
26 <sup>1</sup>Throughout his "Opposition" Plaintiff seems to assert that  
27 by relying on the principle of law underlying Weisbuch and other  
28 cases, the Court is somehow raising a qualified immunity defense  
for Defendant Torres. Instead, the Court simply relies on facts  
that Plaintiff himself pleaded to find that he cannot state a  
claim upon which relief might be granted.

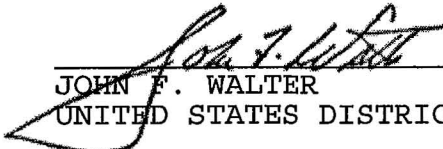
1 United States v. Rosales-Garay, 283 F.3d 1200, 1203 n.4 (10th  
2 Cir. 2002) (ex-felons not suspect class); United States v.  
3 Jester, 139 F.3d 1168, 1171 (7th Cir. 1998) (same). Accordingly,  
4 any alleged violations of the Equal Protection Clause fail to  
5 state a claim upon which relief might be granted.

6 Plaintiff alleges that the TAC raised § 1985 and 1986 claims  
7 that the Report and Recommendation did not even address. (Opp'n  
8 at 2.) In fact, the Report and Recommendation notes that to the  
9 extent Plaintiff continued to make allegations that the Court had  
10 already dismissed without leave to amend, the Report would not  
11 discuss them. (Report at 5.) The Court's Order of September 12,  
12 2011, specifically dismissed without leave to amend "the section  
13 1985(2) and 1985(3) claims" and "the section 1986 claim" (Order  
14 at 33-34) on the ground that the underlying theories behind the  
15 claims were fatally flawed (*id.* at 31-32). As Plaintiff admits,  
16 he has not pleaded any new facts in the TAC, and his legal  
17 theories have not changed either. Accordingly, Plaintiff was  
18 barred from raising any such claims in the TAC, no matter who the  
19 defendant.

20 IT THEREFORE IS ORDERED that the TAC is dismissed for the  
21 reasons stated in the Report and Recommendation and this action  
22 is dismissed with prejudice.

23 LET JUDGMENT BE ENTERED ACCORDINGLY.

24  
25 DATED: March 19, 2012

  
\_\_\_\_\_  
JOHN F. WALTER  
UNITED STATES DISTRICT JUDGE