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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CLARENCE HOWARD,
Plaintiff,

CASE NO. 1:05-cv-00906-AWI-GBC (PC)

v.

ORDER ADOPTING IN PART FINDINGS
AND RECOMMENDATIONS

GRADTILLO, et al.,
Defendants.

(Doc. 57)

_____ /

I. Procedural History

Plaintiff Clarence Howard (“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 Plaintiff’s amended complaint, filed June 22, 2009, against Defendants Bennett, Avila and Jones (“Defendants”) for excessive force on April 3, 2003, in violation of the Eighth Amendment. (Doc. 22, First Amd. Comp.; Doc. 27, a Cog Claim Ord.). 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 May 18, 2011, Defendants filed a motion to declare Plaintiff a vexatious litigant and for the Court to require Plaintiff to post security. (Doc. 53). On September 8, 2011, the Magistrate Judge filed a Findings and Recommendations herein which was served on the parties which contained notice that any objections to the Findings and Recommendations were to be filed within thirty days. (Doc. 57). Defendants filed objections to the findings and recommendations on November 7, 2011. (Doc. 65).

1 **II. Conclusion and Order**

2 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a de
3 novo review of this case. Defendants' sole objection regards the findings and recommendations'
4 reference to *Morton v. Wagner*, 156 Cal.App.4th 963, 970-71 (Cal. App. 6 Dist. 2007) which applies
5 § 391(b)(3) when Defendants are seeking declaration of Plaintiff as a vexatious litigant under the
6 procedure provided in § 391(b)(1). Doc. 65. However, Defendants do not challenge the findings and
7 recommendations' application of *Fink v. Shemtov*, 180 Cal.App.4th 1160, 1172, which found that
8 Defendants' proffered appellate cases would not count towards concluding that the Plaintiff is vexatious
9 under § 391(b)(1). Nor do Defendants' object to the findings and recommendations with regard to its
10 application of substantive federal law precluding a finding that Plaintiff is a vexatious litigant. Doc. 65.

11 The Court finds that the findings and recommendations are correct in its application of federal
12 substantive law that the focus of a vexatiousness inquiry is on the number of suits that were frivolous
13 or harassing in nature rather than on the number of suits that were simply adversely decided. *See De*
14 *Long v. Hennessey*, 912 F.2d 1144, 1147-48 (9th Cir. 1990). As such, the Court finds that the ultimate
15 recommendation denying Defendants' motion for declaring plaintiff a vexatious litigant is correct and,
16 therefore, the Court will adopt the findings and recommendations IN PART to the extent that it will not
17 adopt the additional argument citing *Morton v. Wagner*, 156 Cal.App.4th 963, 970-71 (Cal. App. 6 Dist.
18 2007) and its application of § 391(b)(3).

19 Accordingly, IT IS HEREBY ORDERED that:

- 20 1. The Findings and Recommendations filed on October 19, 2011, is adopted IN PART as
21 described above (Doc. 57);
22 2. Defendants' motion for an order declaring plaintiff a vexatious litigant, filed May 18,
23 2011, is denied (Doc. 53); and
24 2. Defendants' motion to stay discovery, filed June 28, 2011, is denied (Doc. 55).

25 IT IS SO ORDERED.

26 Dated: December 23, 2011

27 
28 CHIEF UNITED STATES DISTRICT JUDGE