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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOHN I MCALLISTER,

CASE NO. 1:06-cv-00082-OWW-SKO PC

Plaintiff,

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS

v.

(Doc. 43)

PAUL M. SCHULTZ, et al.,

Defendants.

Plaintiff John I. McAllister (“Plaintiff”) is a federal prisoner proceeding pro se and in forma pauperis in this civil action pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971), which provides a remedy for civil rights violations committed by federal actors. 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 July 13, 2010, the Magistrate Judge issued a Findings and Recommendations which recommended that Defendants’ motion for summary judgment be partially granted and partially denied. (Doc. #43.) The Findings and Recommendations were served on all parties and contained notice that any objections to the Findings and Recommendations were to be filed within thirty (30) days of the date on which the Findings and Recommendations were served. Plaintiff filed objections to the Findings and Recommendations on September 2, 2010. (Doc. #45.)

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 305, this Court has conducted a de novo review of this case. Having carefully reviewed the entire file, the Court finds the Findings and Recommendations to be supported by the record and by proper analysis.

1 The Findings and Recommendations recommended that Plaintiff's claims against Defendant
2 Schultz be dismissed because Plaintiff failed to allege facts that plausibly support the conclusion that
3 Schultz deliberately ignored an excessive risk to Plaintiff's safety. Plaintiff argues that Schultz
4 watched soft balls come over the fence and hit the sidewalk near other inmates and was thus aware
5 that there was a chance that a soft ball could strike another inmate. However, the Court finds that
6 those facts do not plausibly support the conclusion that the risk of walking down the sidewalk was
7 so excessive that it violated Eighth Amendment standards.

8 Accordingly, the Court HEREBY ORDERS that:

- 9 1. The July 13, 2010 Findings and Recommendations are ADOPTED in full;
- 10 2. Plaintiff's claim against Defendant Schultz is dismissed based on the defense of
11 qualified immunity;
- 12 3. Defendants' motion for summary judgment is denied, without prejudice, on all other
13 grounds;
- 14 4. This action shall proceed on Plaintiff's retaliation claims against Defendants
15 McCarty, Gordon, Brown, Schultz, and Martin. IT IS SO ORDERED.

16 **Dated: September 22, 2010**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE