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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

EDDIE BREWER,

Plaintiff,

v.

WILLIAM MCGUINNESS, et al.,

Defendants.

CASE NO. 1:07-cv-00120-AWI-GSA PC

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS, GRANTING IN PART AND DENYING IN PART DEFENDANT MCGUINNESS'S MOTION TO DISMISS, AND SUA SPONTE DISMISSING CERTAIN CLAIMS PURSUANT TO SCREENING AUTHORITY, WITH LEAVE TO AMEND

(Docs. 36 and 46)

ORDER REQUIRING PLAINTIFF TO FILE A THIRD AMENDED COMPLAINT WITHIN THIRTY DAYS

Plaintiff Eddie Brewer is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302.

On August 31, 2009, United States Magistrate Judge Gary S. Austin recommended that Defendant McGuinness's motion to dismiss be granted in part and denied in part. Judge Austin also sua sponte screened the claims in light of the issuance of Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009), and recommending dismissal with leave to amend. 28 U.S.C. § 1915A. The parties were given thirty days within which to object. No objections have been filed.

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

4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1. The Findings and Recommendations, filed August 31, 2009, is adopted in full;
- 6 2. Defendant McGuinness's motion to dismiss, filed April 30, 2009, is GRANTED IN  
7 PART and DENIED IN PART as follows:
  - 8 a. Defendant's motion to dismiss the claim against him based on Eleventh  
9 Amendment immunity is denied;
  - 10 b. Defendant's motion to dismiss the negligence claim against him for failure  
11 to comply with the California Tort Claims Act is denied; and
  - 12 c. Defendant's motion to dismiss the negligence claim against him for failure  
13 to state a claim is granted;
- 14 3. Plaintiff's Eighth Amendment claims against Defendants McGuinness and Grannis  
15 are dismissed for failure to state a claim;
- 16 4. Plaintiff's negligence claim against Defendant Grannis is dismissed for failure to  
17 state a claim;
- 18 5. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file a  
19 third amended complaint; and
- 20 6. If Plaintiff fails to file a third amended complaint in compliance with this order, this  
21 action will be dismissed, with prejudice, for failure to state a claim.

22  
23 IT IS SO ORDERED.

24 **Dated: October 26, 2009**

25 /s/ Anthony W. Ishii  
26 CHIEF UNITED STATES DISTRICT JUDGE  
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