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

NAKIA MCCLAIN,

Case No. 1:07-cv-00945 JLT (PC)

Plaintiff,

ORDER SUA SPONTE DISMISSING
DEFENDANT SMITH

vs.

L. GONZALES, et al.,

Defendants.

_____ /

On August 30, 2011, Plaintiff filed his pretrial statement indicating that Defendant Smith had been dismissed from the action. (Doc. 80 at 10). However, there appears to be a discrepancy in that Defendant’s previous motion for summary judgement (Doc. 51), addressed only Plaintiff’s claim of excessive force as to Smith and had failed to address Plaintiff’s claim of retaliation as to this defendant. Based on Defendants’ moving papers, the Court’s order of August 19, 2011 addressing Defendants’ motion for summary judgment did not dismiss Plaintiff’s claim of retaliation as to Defendant Smith. (Doc. 75 at 19).

Review of the operative complaint indicates that Plaintiff did initially name Defendant Smith in his cause of action for retaliation. (Doc. 1 at 19). However, according to Plaintiff’s deposition testimony, Plaintiff has withdrawn this claim. (Doc. 51-8 at 36). Alternatively, the Court has reviewed all evidence provided in this case along with the entire record and concludes that Plaintiff has failed to

1 demonstrate that a reasonable jury could conclude that Defendant Smith retaliated against Plaintiff. See
2 28 U.S.C. §1915(e)(2) (“the court shall dismiss the case at any time if the court determines that . . . the
3 action fails to state a claim”); see also Byrd v. Maricopa County Sheriff’s Department, 565 F.3d 1205,
4 1212 (9th Cir. 2009) (affirming district court’s sua sponte dismissal of a prisoner’s equal protection claim
5 even though the defendants did not move for summary judgment on the claim).

6 Accordingly, the Court **ORDERS** Defendant A. L. Smith dismissed from the action.

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IT IS SO ORDERED.

Dated: October 24, 2011

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE