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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL MOOTRY,

Plaintiff,

v.

E. G. FLORES, et al.,

Defendants.

CASE NO. 1:09-cv-01252-LJO-BAM PC

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS AND GRANTING IN PART AND DENYING IN PART DEFENDANTS MOTION TO DISMISS (ECF No. 47)

ORDER DENYING PLAINTIFF’S MOTION TO AMEND AS MOOT (ECF No. 35)

THIRTY-DAY DEADLINE

Plaintiff Michael Mootry (“Plaintiff”) 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 302.

On November 16, 2011, the Magistrate Judge filed a [Findings and Recommendations](#) herein which was served on the parties and which contained notice to the parties that any objections to the Findings and Recommendations were to be filed within thirty days. On December 19, 2011, Plaintiff filed an [Objection](#). In his Objection Plaintiff raises new arguments and presents additional factual allegations that were not included in the [First Amended Complaint](#) or the [Opposition](#) to the [Motion to Dismiss](#). The Court declines to exercise its discretion to consider Plaintiff’s arguments asserted for the first time in the Objection to the Findings and Recommendations. [Espinosa -Matthews v. California](#), 432 F.3d 1021, 1026 n.4 (9th Cir. 2005); [United States v. Howell](#), 231 F.3d 615, 621-622 (9th Cir. 2000).

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a

1 de novo review of this case. Having carefully reviewed the entire file, the undersigned finds the
2 findings and recommendations to be supported by the record and by proper analysis.

3 Accordingly, IT IS HEREBY ORDERED that:

- 4 1. The Findings and Recommendations, filed June 6, 2011, is adopted in full;
- 5 2. Defendants' Motion to Dismiss, filed June 10, 2011, is granted in part and denied in
6 part as follows:
 - 7 a. Plaintiff's Religious Land Use and Institutionalized Persons claims are
8 dismissed, without leave to amend, as moot;
 - 9 b. Plaintiff's First Amended Complaint is dismissed, with leave to amend for
10 failure to state a claim;
 - 11 c. Defendants' Motion to Dismiss based upon qualified immunity is denied,
12 without prejudice;
- 13 3. Within thirty days from the date of service of this order Plaintiff shall file a Second
14 Amended Complaint;
- 15 4. Plaintiff's Motion to Amend, filed June 30, 2011, is denied as moot; and
- 16 6. If Plaintiff fails to file an amended complaint in compliance with this order, this
17 action will be dismissed, with prejudice, for failure to state a claim.

18 IT IS SO ORDERED.

19 **Dated: December 20, 2011**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE