

1 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
2 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a
3 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

4 A complaint must contain “a short and plain statement of the claim showing that the pleader
5 is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
6 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
7 do not suffice,” Ashcroft v. Iqbal, ___ U.S. ___, ___, 129 S.Ct. 1937, 1949 (2009) (citing Bell
8 Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)), and courts “are not required
9 to indulge unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir.
10 2009) (internal quotation marks and citation omitted). While factual allegations are accepted as true,
11 legal conclusions are not. Iqbal, 129 S.Ct. at 1949.

12 To state a claim, Plaintiff must demonstrate that each defendant personally participated in
13 the deprivation of his rights. Id. at 1949. This requires the presentation of factual allegations
14 sufficient to state a plausible claim for relief. Iqbal, 129 S.Ct. at 1949-50; Moss v. U.S. Secret
15 Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of
16 meeting this plausibility standard. Iqbal, 129 S.Ct. at 1949-50; Moss, 572 F.3d at 969.

17 **II. Summary of Amended Complaint**

18 **A. Allegations**

19 Plaintiff brings this suit against California Department of Corrections and Rehabilitation
20 (CDCR) Secretary Matthew Cate, former Sierra Conservation Center (SCC) Warden Ivan Clay,
21 Correctional Counselor T. Esquer, Chief Deputy Warden F. X. Smith, and Appeals Coordinator
22 Semsen based on events which occurred during the time he was incarcerated at SCC, which is in
23 Jamestown, California. Plaintiff’s allegations suggest he is pursuing claims for violation of the Due
24 Process and Equal Protections Clauses of the Fourteenth Amendment.

25 Plaintiff alleges that during his classification committee hearing at SCC on January 28, 2009,
26 Defendant Esquer insisted that Plaintiff be classified with a “P,” which is a violence designation
27 code. Defendant Esquer relied upon a probation report in which Plaintiff’s co-defendant made
28 comments that were later proven to be lies and found to be false by a jury. Plaintiff was not

1 convicted of inflicting bodily injury on the victim of his crime, and Captain Overstreet briefly tried
2 to persuade Defendant Esquer to consider the facts. In insisting Plaintiff receive a “P” code for
3 violence, Defendant Esquer stated, “Look at him,” referring to Plaintiff’s physical appearance.
4 Plaintiff alleges that he is black, bald, 6’3, and 300 pounds.

5 As a result of the “P” code, Plaintiff was ineligible for the fire camp program, for which he
6 was otherwise deemed eligible and which would have allowed him to reduce his sentence.² Plaintiff
7 alleges that Defendant Esquer violated CDCR policy and procedure, which provided that only
8 inmates convicted of a violent or serious felony or of a rules violation for violence may be subject
9 to a “P” code, none of which applied to Plaintiff. Plaintiff also alleges that he learned Defendant
10 Esquer frequently assigned black inmates a “P” code while white inmates with worse, more violent
11 criminal convictions, were not assigned a “P” code.

12 **B. Due Process Claim**

13 The Due Process Clause protects Plaintiff against the deprivation of liberty without the
14 procedural protections to which he is entitled under the law. Wilkinson v. Austin, 545 U.S. 209,
15 221, 125 S.Ct. 2384 (2005). To state a claim, Plaintiff must first identify the interest at stake.
16 Wilkinson, 545 U.S. at 221. Liberty interests may arise from the Due Process Clause or from state
17 law. Id. The Due Process Clause itself does not confer on inmates a liberty interest in avoiding more
18 adverse conditions of confinement, id. at 221-22 (citations and quotation marks omitted), and under
19 state law, the existence of a liberty interest created by prison regulations is determined by focusing
20 on the nature of the condition of confinement at issue, id. at 222-23 (citing Sandin v. Conner, 515
21 U.S. 472, 481-84, 115 S.Ct. 2293 (1995)) (quotation marks omitted). Liberty interests created by
22 prison regulations are generally limited to freedom from restraint which imposes atypical and
23 significant hardship on the inmate in relation to the ordinary incidents of prison life. Wilkinson, 545
24 U.S. at 221 (citing Sandin, 515 U.S. at 484) (quotation marks omitted); Myron v. Terhune, 476 F.3d
25 716, 718 (9th Cir. 2007).

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28 ² Although Plaintiff refers only to “camp program” in his amended complaint, the Court takes judicial notice of his original complaint, in which he alleges he was denied participation in the fire camp program.

1 Plaintiff does not have a liberty interest in earning work time credits, Toussaint v. McCarthy,
2 801 F.2d 1080, 1094-95 (9th Cir. 1986), abrogated in part by Sandin, 515 U.S. 472 (1995), or in
3 participating in vocational or other rehabilitative programs, Sandin, 515 U.S. at 484; Coakley v.
4 Murphy, 884 F.2d 1218, 1221 (9th Cir. 1989); Rizzo v. Dawson, 778 F.2d 527, 531 (9th Cir. 1985).
5 Because Plaintiff does not have a protected liberty interest in earning time credits or in participating
6 in the fire camp program, he fails to state a cognizable due process of law.

7 **C. Equal Protection Claim**

8 The Equal Protection Clause requires that persons who are similarly situated be treated alike.
9 City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249 (1985); Shakur
10 v. Schriro, 514 F.3d 878, 891 (9th Cir. 2008). An equal protection claim may be established by
11 showing that Defendants intentionally discriminated against Plaintiff based on his membership in
12 a protected class, Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 702-03
13 (9th Cir. 2009); Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir. 2003), Lee v. City of Los Angeles,
14 250 F.3d 668, 686 (9th Cir. 2001), or that similarly situated individuals were intentionally treated
15 differently without a rational relationship to a legitimate state purpose, Engquist v. Oregon
16 Department of Agriculture, 553 U.S. 591, 601-02, 128 S.Ct. 2146 (2008); Village of Willowbrook
17 v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073 (2000); Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580,
18 592 (9th Cir. 2008); North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008).

19 The Court finds that Plaintiff's allegations are sufficient to support the claim that Defendant
20 Esquer intentionally discriminated against Plaintiff based on his race. However, Plaintiff's
21 allegations do not support a claim against Defendants Cate, Clay, Smith, and Semsen. The amended
22 complaint is devoid of any facts showing that Defendants Cate, Clay, Smith, and Semsen were
23 personally involved in intentionally discriminating against Plaintiff, and Plaintiff may not impose
24 liability on them either under a theory of *respondeat superior* or based on their involvement in
25 administratively reviewing his inmate appeal of the assessment of the "P" code.³ Iqbal, 129 S.Ct.
26 at 1948-49; Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009).

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28 ³ Plaintiff does not specify the precise grounds for liability, but given Defendants' positions, the Court infers
that the bases are their positions of authority within CDCR and/or their involvement in reviewing his inmate appeal.

1 **III. Conclusion and Recommendation**

2 Plaintiff's amended complaint states a cognizable equal protection claim against Defendant
3 Esquer, but it does not state a due process or any claims against Defendants Cate, Clay, Smith, and
4 Semsen. Plaintiff was previously provided with notice of the deficiencies in his claims and leave
5 to amend, and based on the record, further leave to amend is not warranted. Lopez v. Smith, 203
6 F.3d 1122, 1130 (9th Cir. 2000); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

7 Accordingly, it is HEREBY RECOMMENDED that:

- 8 1. This action proceed on Plaintiff's amended complaint, filed March 17, 2010, against
9 Defendant Esquer on Plaintiff's equal protection claim;
- 10 2. Plaintiff's due process claim be dismissed, with prejudice, for failure to state a claim
11 under section 1983; and
- 12 3. Defendants Cate, Clay, Smith, and Semsen be dismissed from this action based on
13 Plaintiff's failure to state any claims against them.

14 These Findings and Recommendations will be submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30)**
16 **days** after being served with these Findings and Recommendations, Plaintiff may file written
17 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
18 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
19 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d
20 1153 (9th Cir. 1991).

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22 IT IS SO ORDERED.

23 **Dated: May 6, 2011**

24 /s/ Sheila K. Oberto
25 UNITED STATES MAGISTRATE JUDGE
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