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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

LARRY SMITH,

Plaintiff,

vs.

SGT. J. GONZALES, et al.,

Defendants.

1:17-cv-00436-DAD-GSA-PC

FINDINGS AND RECOMMENDATIONS,  
RECOMMENDING THAT THIS ACTION  
PROCEED ONLY AGAINST DEFENDANTS  
SGT. GONZALES, JOHNSON, CASTRO,  
MINER, FLOREZ, AND POTZERNITZ FOR  
USE OF EXCESSIVE FORCE; DEFENDANTS  
FRITZ AND SCAIFE FOR FAILURE TO  
PROTECT; AND DEFENDANT SGT.  
GONZALES FOR RETALIATION; AND THAT  
ALL OTHER CLAIMS AND DEFENDANTS  
BE DISMISSED

OBJECTIONS, IF ANY, DUE IN 14 DAYS

**I. BACKGROUND**

Larry Smith (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on March 27, 2017. (ECF No. 1.) On June 23, 2017, Plaintiff filed the First Amended Complaint as a matter of course. (ECF No. 12.)

The court screened Plaintiff’s First Amended Complaint pursuant to 28 U.S.C. § 1915A and found that it states cognizable claims under § 1983 against defendants Sergeant Gonzales, Correctional Officer (C/O) Johnson, C/O Castro, C/O Miner, C/O Florez, and C/O Potzernitz for use of excessive force in violation of the Eighth Amendment; against defendants C/O Fritz

1 and C/O Scaife for failure to protect Plaintiff in violation of the Eighth Amendment; and  
2 against defendant Sergeant Gonzales for retaliation in violation of the First Amendment.<sup>1</sup> On  
3 March 30, 2018, Plaintiff was granted leave to either file an amended complaint or notify the  
4 court that he is willing to proceed only on the claims found cognizable by the court. (ECF No.  
5 16.) On April 17, 2018, Plaintiff filed a notice informing the court that he is willing to proceed  
6 only on the claims found cognizable by the court. (ECF No. 17.)

7 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 8 1. This action proceed only against defendants Sergeant Gonzales, Correctional  
9 Officer (C/O) Johnson, C/O Castro, C/O Miner, C/O Florez, and C/O Potzernitz  
10 for use of excessive force in violation of the Eighth Amendment; against  
11 defendants C/O Fritz and C/O Scaife for failure to protect Plaintiff in violation  
12 of the Eighth Amendment; and against defendant Sergeant Gonzales for  
13 retaliation in violation of the First Amendment;
- 14 2. All remaining claims and defendants be dismissed from this action;
- 15 3. Defendant C/O Gonzales be dismissed from this action based on Plaintiff's  
16 failure to state any claims against him upon which relief may be granted against  
17 him;
- 18 4. Plaintiff's claims for an improper strip search, due process violations, false  
19 reports, deprivation of personal property, detention in administrative  
20 segregation, loss of good-time credits, loss of privileges, improper appeals  
21 process, and cover-up be dismissed from this action based on Plaintiff's failure  
22 to state a claim upon which relief may be granted;
- 23 5. The Clerk of Court be directed to reflect the dismissal of C/O Gonzales (but not  
24 Sgt. J. Gonzales) from this case on the court's docket; and

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28 <sup>1</sup> The court notes that Plaintiff named two defendants in the First Amended Complaint with the  
last name Gonzales: (1) Sergeant J. Gonzales, and (2) Correctional Officer Gonzales. (ECF No. 12 at 1-4.) By  
this order, the court recommends dismissal of Correctional Officer Gonzales but not Sergeant J. Gonzales.

1           6.       This case be referred back to the Magistrate Judge for further proceedings,  
2                   including service of process.

3           These Findings and Recommendations will be submitted to the United States District  
4 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
5 fourteen (14) days after the date of service of these Findings and Recommendations, Plaintiff  
6 may file written objections with the Court. The document should be captioned “Objections to  
7 Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file  
8 objections within the specified time may waive the right to appeal the District Court’s order.  
9 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

10 IT IS SO ORDERED.

11 Dated: April 19, 2018

12 /s/ Gary S. Austin  
13 UNITED STATES MAGISTRATE JUDGE