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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF CALIFORNIA**

9
10 CION PERALTA,
11 Plaintiff,
12 v.
13 J. SWETALLA, *et al.*,
14 Defendants.

Case No. 1:18-cv-01023-DAD-EPG (PC)
FINDINGS AND RECOMMENDATIONS
RECOMMENDING THAT THIS ACTION
PROCEED ONLY ON PLAINTIFF'S CLAIMS
AGAINST DEFENDANT SWETALLA FOR
SEXUAL ASSAULT AND EXCESSIVE
FORCE IN VIOLATION OF THE EIGHTH
AMENDMENT, RETALIATION IN
VIOLATION OF THE FIRST AMENDMENT,
AND NEGLIGENCE; AGAINST DEFENDANT
MACHADO FOR RETALIATION IN
VIOLATION OF THE FIRST AMENDMENT;
AND AGAINST DEFENDANTS POWERS
AND CANO FOR DENIAL OF DUE PROCESS
IN VIOLATION OF THE FOURTEENTH
AMENDMENT
(ECF NO. 1)
TWENTY-ONE (21) DAY DEADLINE

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21 Cion Peralta ("Plaintiff"), an inmate at Mule Creek State Prison, is proceeding *pro se*
22 with this civil rights action pursuant to 42 U.S.C. § 1983. On July 30, 2018, Plaintiff
23 commenced this action by filing a Complaint against J. Swetalla, L. Machado, V. Powers, J.
24 Sebok, and Xavier Cano (collectively, "Defendants"). (ECF No. 1). Plaintiff brings claims
25 under the First, Eighth, and Fourteenth Amendments of the U.S. Constitution, as well as the
26 Prison Rape Elimination Act and various provisions of state law.

27 On November 8, 2018, the Court issued a screening order directing Plaintiff to either (1)
28 file an amended complaint; (2) notify the Court in writing that he is willing to go forward only

1 with his claims against Defendant Swetalla for sexual assault and excessive force in violation
2 of the Eighth Amendment and retaliation in violation of the First Amendment; against
3 Defendant Machado for retaliation in violation of the First Amendment; and against
4 Defendants Powers and Cano for denial of due process in violation of the Fourteenth
5 Amendment; or (3) notify the Court in writing that he wishes to stand on his complaint,
6 subject to the Court issuing findings and recommendations consistent with this order to the
7 assigned district judge. (ECF No. 5).

8 On November 19, 2018, Plaintiff filed a response to the screening order. (ECF No. 6).
9 Plaintiff states that he agrees with the Court's analysis of the Complaint, except that he
10 disagrees with the Court's finding that he did not comply with the Tort Claims Act. *Id.*

11 Plaintiff is correct. In the Complaint, Plaintiff states, "All of these claims are exhausted
12 through the state via the Victims Compensation Government Claims Board, and the plaintiff
13 has attached proof of such to this complaint." (ECF No. 1 at 5). Plaintiff also attaches to the
14 Complaint correspondences with the California Victim Compensation and Government Claims
15 Board. (ECF No. 1 at 13-19). Thus, Plaintiff has alleged compliance with the Tort Claims Act.

16 Accordingly, and for the reasons discussed below, the Court recommends that this
17 action proceed on Plaintiff's claims against Defendant Swetalla for sexual assault and
18 excessive force in violation of the Eighth Amendment, retaliation in violation of the First
19 Amendment, and negligence; against Defendant Machado for retaliation in violation of the
20 First Amendment; and against Defendants Powers and Cano for denial of due process in
21 violation of the Fourteenth Amendment. The Court further recommends dismissal of all other
22 claims and defendants, including Defendant Sebok.

23 **I. SCREENING REQUIREMENT**

24 The Court is required to screen complaints brought by prisoners seeking relief against a
25 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
26 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
27 legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or
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1 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
2 § 1915A(b)(1), (2).

3 A complaint is required to contain “a short and plain statement of the claim showing
4 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
5 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
6 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
7 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient
8 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.*
9 (quoting *Twombly*, 550 U.S. at 570). The mere possibility of misconduct falls short of meeting
10 this plausibility standard. *Id.* at 679. While a plaintiff’s allegations are taken as true, courts
11 “are not required to indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d
12 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). Additionally, a
13 plaintiff’s legal conclusions are not accepted as true. *Iqbal*, 556 U.S. at 678.

14 Pleadings of *pro se* plaintiffs “must be held to less stringent standards than formal
15 pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (holding
16 that *pro se* complaints should continue to be liberally construed after *Iqbal*).

17 **II. SUMMARY OF THE COMPLAINT**

18 **A. Defendant Swetalla (Claim I)**

19 Plaintiff alleges that in May 2015, while Plaintiff was housed at the California
20 Correctional Institution (“CCI) at Tehachapi, California, Officer D. Knowles and Defendant
21 Officer J. Swetalla threatened Plaintiff with physical violence if he did not mind his own
22 business. These threats were a result of Plaintiff writing to the U.S. Attorney and the FBI.
23 Swetalla told Plaintiff that he (Swetalla) had a copy of Plaintiff’s letter to the FBI and also told
24 Plaintiff that “complaints do not leave the prison.” (ECF No. 1 at 3.) Plaintiff was attempting
25 to contact agencies outside the prison for help because of the extreme corruption at Tehachapi,
26 and this made prison staff extremely angry.

27 On October 27, 2015, Swetalla took Plaintiff to the gymnasium “under the guise of an
28 unclothed body search.” (*Id.* at 4.) Following orders, Plaintiff turned around and faced the

1 wall. “This is when defendant Swetalla began hitting plaintiff in the back of the head about 5
2 times. Defendant Swetalla then yelled some words and shoved an object between plaintiff’s
3 butt cheeks.” *Id.* At this point, Plaintiff was in shock and fearing for his life, and did not hear
4 what Swetalla said. “Now, for the second time, defendant Swetalla again shoved this object
5 between plaintiff’s butt cheeks to his anus. Swetalla then state[d]: ‘Keep your fucking mouth
6 shut.’” *Id.* Swetalla engaged in this conduct in retaliation for Plaintiff’s acts of reaching
7 outside the prison to seek help, and to oppress, threaten, and degrade Plaintiff.

8 **B. Defendant Machado (Claim II)**

9 Plaintiff suffered extreme emotional trauma as a result of the sexual and physical
10 assault by Swetalla. Plaintiff was seen by C. Sanders, a psychologist at CCI, to deal with this
11 trauma. Plaintiff begged Sanders not to report the assault, but Sanders reported it anyway,
12 which placed Plaintiff in danger from the guards in charge of Facility C. “Although [Sanders]
13 was only doing her job and what she thought to be right, it still placed plaintiff in danger.”
14 (ECF No. 1 at 8.)

15 After Sanders reported the sexual assault of Plaintiff by Swetalla, Defendant Officer L.
16 Machado, a prison guard supervisor, began threatening, degrading, and cussing at Plaintiff,
17 stating, “You won’t wake up once we get you to administrative segregation.” *Id.* Rather than do
18 his job as supervisor, Machado “refused to call OIA [the Office of Internal Affairs] and report
19 plaintiff’s complaints as required by well established federal law. Specifically, L. Machado
20 refused to help the plaintiff and do his legal duties as the Prison Rape Elimination Act
21 mandates.” *Id.* Instead, Machado “called the plaintiff stupid, a piece of shit, and all types of
22 other vile names all for reporting these crimes by [Machado’s] subordinates.” *Id.*

23 Plaintiff informed Machado of the extreme corruption and abuse of Plaintiff by the
24 guards, and begged Machado several times to contact the OIA, and report the assault. However,
25 Machado refused to do so and refused to document the acts of sexual violence against Plaintiff,
26 and instead threatened, degraded, and cussed at Plaintiff, and called Plaintiff names.

27 **C. Defendant Sebok (Claim III)**

28 Almost a month after the physical and sexual assault occurred, Defendant Officer

1 J. Sebok took Plaintiff’s audio and video statement while Plaintiff was at the California State
2 Prison, Los Angeles County (“CSP-LAC”) in Lancaster, California. (ECF No. 1 at 9.) Plaintiff
3 asked Sebok who decides whether Plaintiff’s case goes to OIA, and Sebok responded, “It’s me,
4 I decide if it goes or not.” *Id.* Sebok had a duty to report the sexual assault to OIA yet he
5 refused to do so. As a result, the physical and sexual assault of Plaintiff has never been
6 investigated by OIA or California Department of Corrections and Rehabilitation (“CDCR”)
7 staff. (*Id.* at 9-10.)

8 **D. Defendants Powers and Cano (Claim IV)**

9 On November 16, 2015, Plaintiff was placed in a “very restrictive and oppressive”
10 administrative segregation (“Ad-Seg”) at CSP-LAC. Plaintiff was placed in Ad-Seg because he
11 had been sexually assaulted while housed at CCI. Plaintiff should have, instead, been placed
12 into the general population because Plaintiff was at no time in danger from other inmates at
13 CSP-LAC—the sexual assault had occurred at a different prison (CCI) and was perpetrated by
14 staff, not other inmates. “Despite these obvious and documented facts, it was almost three
15 months before plaintiff was released from Ad-Seg and placed back in the general population.”
16 (ECF No. 1 at 11.) Plaintiff also requested, but was denied, placement in non-disciplinary
17 segregation.

18 That Plaintiff was finally placed back in the general population demonstrates that
19 Plaintiff had never been in any danger at CSP-LAC and that his placement in Ad-Seg was not
20 justified. “There was no just or legal reason for defendants V. Powers, or Xavier Cano to place
21 and keep plaintiff in such oppressive living conditions because he was victimized at a
22 completely different prison.” *Id.*

23 **III. ANALYSIS OF PLAINTIFF’S CLAIMS**

24 **A. Defendant Swetalla (Claim I)**

25 ***1. Eighth Amendment Sexual Assault Claim***

26 Sexual harassment or abuse of an inmate by a corrections employee is a violation of the
27 Eighth Amendment. *Wood v. Beauclair*, 692 F.3d 1041, 1045-46 (9th Cir. 2012) (citing
28 *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (“In the simplest and most absolute

1 of terms . . . prisoners [have a clearly established Eighth Amendment right] to be free from
2 sexual abuse. . . .”). “[S]exual contact between a prisoner and a prison [employee] serves no
3 legitimate role and is simply not part of the penalty that criminal offenders pay for their
4 offenses against society. Where there is no legitimate penological purpose for a prison
5 official’s conduct, courts have ‘presum[ed] malicious and sadistic intent.’” *Wood*, 692 F.3d at
6 1050-51 (quoting *Giron v. Corr. Corp. of Am.*, 191 F.3d 1281, 1290 (10th Cir. 1999)). Even
7 sexual contact that is not violent and leaves no physical injury is presumed unlawful when
8 committed with malicious and sadistic intent. *Id.*

9 The Complaint states a claim against Defendant Swetalla for sexual assault in violation
10 of the Eighth Amendment based on allegations that Swetalla shoved an object between
11 plaintiff’s butt cheeks and pushed it to Plaintiff’s anus.

12 **2. Eighth Amendment Excessive Force Claims**

13 “In its prohibition of ‘cruel and unusual punishments,’ the Eighth Amendment places
14 restraints on prison officials, who may not . . . use excessive physical force against prisoners.”
15 *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). “[W]henver prison officials stand accused of
16 using excessive physical force in violation of the [Eighth Amendment], the core judicial inquiry
17 is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or
18 maliciously and sadistically to cause harm.” *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992).

19 When determining whether the force was excessive, the court looks to the “extent of
20 injury suffered by an inmate . . . , the need for application of force, the relationship between that
21 need and the amount of force used, the threat ‘reasonably perceived by the responsible
22 officials,’ and ‘any efforts made to temper the severity of a forceful response.’” *Hudson*, 503
23 U.S. at 7 (quoting *Whitley v. Albers*, 475 U.S. 312, 321 (1986)). While *de minimis* uses of
24 physical force generally do not implicate the Eighth Amendment, significant injury need not be
25 evident in the context of an excessive force claim, because “[w]hen prison officials maliciously
26 and sadistically use force to cause harm, contemporary standards of decency always are
27 violated.” *Hudson*, 503 U.S. at 9.

1 The Complaint alleges that Swetalla took Plaintiff to the gymnasium “under the guise of
2 an unclothed body search,” hit Plaintiff in the back of the head about five time, and shoved an
3 object between Plaintiff’s butt cheeks and anus. Plaintiff alleges that Swetalla engaged in this
4 conduct only because Plaintiff was reaching outside the prison to seek help, and that Plaintiff
5 still has bumps on his head from this incident. The Complaint states a cognizable claim against
6 Defendant Swetalla for use of excessive force in violation of the Eighth Amendment.

7 **3. First Amendment Retaliation Claims**

8 “Within the prison context, a viable claim of First Amendment retaliation entails five
9 basic elements: (1) An assertion that a state actor took some adverse action against an inmate
10 (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the
11 inmate’s exercise of his First `Amendment rights, and (5) the action did not reasonably advance
12 a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)
13 (footnote and citations omitted). Retaliation is not established simply by showing adverse
14 activity by a defendant after protected speech; rather, the plaintiff must show a nexus between
15 the two. *See Huskey v. City of San Jose*, 204 F.3d 893, 899 (9th Cir. 2000) (retaliation claim
16 cannot rest on the “logical fallacy of post hoc, ergo propter hoc, literally, ‘after this, therefore
17 because of this’”). A plaintiff can allege retaliatory intent (factor three) by alleging a
18 chronological time line of events from which retaliation can be inferred. *Watison v. Carter*, 668
19 F.3d 1108, 1114 (9th Cir. 2012).

20 To state a claim for retaliation, a plaintiff must allege specific facts demonstrating that a
21 defendant took an adverse act because of plaintiff’s First Amendment activity. The plaintiff’s
22 protected conduct must have been “the ‘substantial’ or ‘motivating’ factor behind the
23 defendant’s conduct.” *Brodheim*, 584 F.3d at 1271 (quoting *Soranno’s Gasco, Inc. v. Morgan*,
24 874 F.2d 1310, 1314 (9th Cir.1989)). The adverse action must not have reasonably advanced a
25 legitimate correctional goal.

26 The Complaint alleges that Defendant Swetalla threatened and physically and sexually
27 assaulted Plaintiff because Plaintiff was reaching outside of the prison to seek help by writing
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1 letters to the U.S. Attorney and the FBI. These allegations are sufficient to state a claim against
2 Defendant Swetalla for retaliation in violation of the First Amendment.

3 **4. State Law Negligence Claim**

4 To state a cognizable claim for negligence under California law, plaintiff “must
5 establish four required elements: (1) duty; (2) breach; (3) causation; and (4) damages.” *Wells*
6 *Fargo Bank, N.A. v. Renz*, 795 F.Supp.2d 898, 924–25 (N.D.Cal.2011) (citing *Ileto v. Glock,*
7 *Inc.*, 349 F.3d 1191, 1203 (9th Cir. 2003)). A duty of care may arise through statute, contract,
8 the general character of the activity, or the relationship between the parties. *The Ratcliff*
9 *Architects v. Vanir Constr. Mgmt., Inc.*, 88 Cal.App.4th 595, 604–05 (2001) (citing *J'Aire*
10 *Corp. v. Gregory*, 24 Cal.3d 799, 803 (1979)). Further, where the state law negligence claim is
11 asserted against a state employee, the complaint must allege compliance with the California
12 Tort Claims Act.

13 The California Tort Claims Act requires, as a condition precedent to suit against a
14 public entity or public employee, the timely and proper presentation of a written claim and the
15 rejection of the claim in whole or in part. *Mangold v. California Pub. Utils. Comm'n*, 67 F.3d
16 1470, 1477 (9th Cir. 1995) (citing *Snipes v. City of Bakersfield*, 145 Cal.App.3d 861 (1983)).
17 “Where compliance with the Tort Claims Act is required, the plaintiff must allege compliance
18 or circumstances excusing compliance, or the complaint is subject to general demurrer.” *Id.*;
19 *see also Karim–Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 627 (9th Cir. 1988) (state
20 tort law claims are barred unless presented to public entity before commencing suit) (citing Cal.
21 Gov't Code §§ 905, 945.4, 950.2); *Ortega v. O'Connor*, 764 F.2d 703, 707 (9th Cir. 1985)
22 (failure to comply with claim-filing requirements imposed by California Torts Claims Act bars
23 pendent state claims), *rev'd on other grounds*, 480 U.S. 709 (1987); *Neal v. Gatlin*, 35
24 Cal.App.3d 871, 877-78 (1973) (where public employee was acting within employee’s express
25 or implied authority, notwithstanding wrongful nature of the act, complaint based on such act
26 was properly dismissed for failure to allege filing of claim with employing public entity).

27 Here, the Complaint alleges facts demonstrating that Defendant Swetalla had a duty to
28 refrain from using unnecessary and excessive force against Plaintiff, and that Swetalla breached

1 that duty when he physically and sexually assaulted Plaintiff, causing Plaintiff physical and
2 emotional trauma. The Complaint further alleges compliance with the California Tort Claims
3 Act. Accordingly, the Complaint states a cognizable claim for negligence against Defendant
4 Swetalla.

5 **5. Prison Rape Elimination Act Claim**

6 Plaintiff seeks to bring a claim for violation of the Prison Rape Elimination Act of 2003,
7 42 U.S.C. § 15601 (“PREA”). The PREA does not, however, create a private right of action.
8 *See, e.g., Bell v. County of Los Angeles*, 2008 WL 4375768 (C.D. Cal. 2008) (“Plaintiff has no
9 claim under the Prison Rape Elimination Act; the Act does not create a private right of
10 action.”); *Porter v. Jennings*, 2012 WL 1434986, at *1 (E.D. Cal. 2012) (noting same). Rather,
11 the PREA was enacted to study the problem of prison rape. *Pirtle v. Hickman*, 2005 WL
12 3359731 (D. Idaho 2005). Nothing in the Act suggests that it created a private right of action,
13 enforceable under § 1983. *See Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997) (statutory
14 provision gives rise to federal right enforceable under § 1983 where the statute “unambiguously
15 imposed a binding obligation on the States” by using “mandatory, rather than precatory,
16 terms”). The PREA in itself contains no private right of action, nor does it create a right
17 enforceable under § 1983. The Complaint accordingly fails to state a claim based on a violation
18 of the PREA against Defendant Swetalla.

19 **6. 15 CCR § 3401.5(a)(2)(D), (F) Claim**

20 California Code of Regulations, Title 15, section 3401.5,¹ prohibits CDCR staff from
21 engaging in sexual misconduct involving or directed at an inmate or parolee. 15 CCR
22 3401.5(a). The existence of this and the other regulations under Title 15 does not entitle
23 Plaintiff to bring a civil claim seeking damages for violation of the regulations. Accordingly,
24 Plaintiff cannot state a claim for relief under 15 CCR § 3401.5(a)(2)(D), (F). *See e.g., Davis v.*

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26 ¹ Although the Complaint cites to 15 CCR § 3401, rather than § 3401.5, the Court assumes Plaintiff
27 intended to rely on § 3401.5 because that section prohibits CDCR staff from engaging in sexual
28 misconduct directed at an inmate and requires reporting of incidents of sexual misconduct. However,
whether Plaintiff intended to rely on § 3401 or § 3401.5, the result is the same—neither section
provides a private right of action to Plaintiff.

1 *Powell*, 901 F. Supp. 2d 1196, 1211 (S.D. Cal. 2012) (“There is no implied private right of
2 action under title fifteen of the California Code of Regulations”); *Hill v. White*, 2014 WL
3 711016, at *5 (E.D. Cal. 2014) (Title 15 of the California Code of Regulations does not provide
4 a private right of action); *Vasquez v. Tate*, 2012 WL 6738167, at *9 (E.D. Cal. 2012) (same).

5 **B. Claims against Defendant Machado (Claim II)**

6 For the reasons discussed *supra*, Plaintiff’s claims against Defendant L. Machado based
7 on violation of the PREA and violation of provisions of Title 15 of the CCR are not cognizable.

8 Plaintiff also alleges that Machado threatened Plaintiff by stating to Plaintiff, “You
9 won’t wake up once we get you to administrative segregation,” in response to finding out that
10 Plaintiff had complained about the sexual and physical assault by Swetalla. These allegations
11 are sufficient to state a claim for retaliation against Machado. *See Watison v. Carter*, 668 F.3d
12 1108, 1114 (9th Cir. 2012) (setting forth elements of retaliation claim and noting that “the
13 mere threat of harm can be an adverse action” sufficient to support a claim for retaliation)
14 (citation omitted).

15 The Complaint also alleges a claim for negligence under California law but does not
16 allege facts demonstrating that Machado breached a duty of care that he owed to Plaintiff that
17 caused injury to Plaintiff. *See Ladd v. County of San Mateo*, 911 P.2d 496, 498 (Cal. 1996)
18 (elements of a general negligence claim under California law are “(a) a legal duty to use due
19 care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the
20 resulting injury”).² Accordingly, the Complaint fails to state a cognizable claim for negligence
21 against Defendant Machado.

22 **C. Claims against Defendants Sebok (Claim III), Powers, and Cano (Claim IV)**

23 For the reasons discussed *supra*, Plaintiff’s claims against Defendants Sebok, Powers,
24 and Cano based on violation of the PREA and violation of provisions of Title 15 of the CCR
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26
27 ² Plaintiff also alleges a claim of “threatening a victim of sexual assault,” and “oppression” against
28 Machado, but does not provide a legal basis in support of such claims beyond a citation to 15 CCR
§ 3401.5. As noted, Title 15 does not provide a private cause of action and accordingly cannot support a
cognizable claim for violation of its provisions.

1 are not cognizable.

2 Plaintiff also alleges claims against these Defendants for violation of his due process
3 rights and negligence based on Plaintiff's placement into Ad-Seg for a period of almost three
4 months.

5 ***1. Due Process***

6 The Due Process Clause protects prisoners from being deprived of life, liberty, or
7 property without due process of law. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). To prevail
8 on a claim of deprivation of due process, a plaintiff must first establish the existence of a liberty
9 or property interest for which the protection is sought. *See Ingraham v. Wright*, 430 U.S. 651,
10 672 (1977); *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972).

11 Liberty interests can arise both from the Constitution and from state law. *See Hewitt v.*
12 *Helms*, 459 U.S. 460, 466 (1983); *Meachum v. Fano*, 427 U.S. 215, 224-27 (1976); *Smith v.*
13 *Sumner*, 994 F.2d 1401, 1405 (9th Cir.1993). In determining whether the Constitution itself
14 protects a liberty interest, the court should consider whether the practice in question "is within
15 the normal limits or range of custody which the conviction has authorized the State to impose."
16 *Wolff*, 418 U.S. at 557-58; *Smith*, 994 F.2d at 1405.

17 ***a. Defendant Sebok***

18 Plaintiff alleges that his due process rights were violated by Sebok when Sebok refused
19 to report to the OIA or other CDCR officials Plaintiff's allegations that Swetalla sexually and
20 physically assaulted Plaintiff. Plaintiff has not, however, alleged facts demonstrating that he
21 had a protected property or liberty interest in having the alleged assault reported.

22 Plaintiff cites to 15 CCR § 3401.5(c), which requires an employee who observes or
23 receives information concerning staff sexual misconduct to "immediately report the
24 information or incident," and provides that the failure to report may subject an employee to
25 disciplinary action. 15 CCR § 3401.5(c). As noted previously, the provisions of Title 15 of the
26 CCR do not create a private right of action and thus do not provide a protected property or
27 liberty interest in an inmate who is a victim of sexual misconduct. Sebok's alleged violation of
28 a duty to report does not, therefore, create a cognizable claim for violation of due process.

1 Defendants Sebok, Powers, and Cano but does not allege facts demonstrating that these
2 Defendants breached a duty of care that they owed to Plaintiff that caused injury to Plaintiff.
3 *See Ladd*, 911 P.2d at 498 (elements of a general negligence claim under California law); *see*
4 *also Hebbe*, 627 F.3d at 341-42 (although *pro se* pleadings are to be construed liberally, a
5 plaintiff must present factual allegations sufficient to state a plausible claim for relief).
6 Accordingly, the Complaint fails to state a cognizable claim for negligence against Defendants
7 Sebok, Powers, and Cano.

8 **IV. CONCLUSION AND RECOMMENDATIONS**

9 The Court has screened Plaintiff’s Complaint and finds that it states cognizable claims
10 against Defendant Swetalla for sexual assault and excessive force in violation of the Eighth
11 Amendment, retaliation in violation of the First Amendment, and negligence; against
12 Defendant Machado for retaliation in violation of the First Amendment; and against
13 Defendants Powers and Cano for denial of due process in violation of the Fourteenth
14 Amendment. The Court finds that Plaintiff’s complaint fails to state any other cognizable
15 claims.

16 Accordingly, the Court HEREBY RECOMMENDS that:

- 17 1. This action proceed only on Plaintiff’s claims against Defendant Swetalla for
18 sexual assault and excessive force in violation of the Eighth Amendment,
19 retaliation in violation of the First Amendment, and negligence; against
20 Defendant Machado for retaliation in violation of the First Amendment; and
21 against Defendants Powers and Cano for denial of due process in violation of
22 the Fourteenth Amendment; and
- 23 2. All other claims and defendants, including Defendant Sebok, be dismissed.

24 These findings and recommendations are submitted to the district judge assigned to the
25 case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **twenty-one (21) days** after
26 being served with these findings and recommendations, Plaintiff may file written objections
27 with the court. Such a document should be captioned, “Objections to Magistrate Judge’s
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1 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the
2 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d
3 834, 839 (9th Cir. 2014) (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).
4

5 IT IS SO ORDERED.

6 Dated: December 5, 2018

7 /s/ Eric P. Groj
8 UNITED STATES MAGISTRATE JUDGE
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