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

MALIK JONES,

No. CIV S-08-0096 FCD EFB P

Plaintiff,

vs.

T. FELKER, et al.,

ORDER AND
FINDINGS AND RECOMMENDATIONS

Defendants.

_____/

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Pursuant to this court’s orders dated February 12, 2010 (Dckt. No. 79, granting plaintiff leave to amend the complaint) and March 17, 2010 (Dckt. No. 81, granting in part defendants’ motions to dismiss), plaintiff filed a First Amended Complaint on March 29, 2010. The court has reviewed the amended complaint and, for the limited purposes of § 1915A screening, finds that it states the following cognizable claims:

- (1) Against defendants Betti, Brauntingham, Cunningham, and Hunter for the use of excessive force against plaintiff in his cell on September 13, 2007 in violation of the 8th Amendment and the 14th Amendment (equal protection). Am. Compl. (Dckt. No. 82) at ¶¶ 12-17, 23-25.

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1 (2) Against defendant Callison for interfering with plaintiff's medical treatment in
2 violation of the 8th Amendment and the 14th Amendment (equal protection).
3 Am. Compl. (Dckt. No. 82) at ¶¶ 19, 26.

4 (3) Against defendant Lebeck for using excessive force in the course of transporting
5 plaintiff to the Correctional Training Center in violation of the 8th Amendment
6 and the 14th Amendment (equal protection). Am. Compl. (Dckt. No. 82) at
7 ¶¶ 20-21, 27.

8 (4) Against defendant Felker for deliberately disregarding the above-alleged conduct
9 despite knowledge of it in violation of the 8th Amendment and 14th Amendment
10 (equal protection).

11 The complaint does not state cognizable claims against defendants Betti, Brautingham,
12 Cunningham, Hunter, Callison, Lebeck, or Felker for violating due process. The court has
13 previously ordered plaintiff's due process claim against defendant Callison dismissed. Order
14 filed March 17, 2010 (Dckt. No. 81). The due process claims against the remaining defendants
15 are defective for the same reason – plaintiff's allegations fall within the more specific guarantees
16 of the 8th Amendment and the Equal Protection Clause of the 14th Amendment, and thus must
17 be analyzed under those principles rather than the more generalized guarantee of substantive due
18 process. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (Rehnquist, C.J., for plurality) (quoting
19 *Graham v. Connor*, 490 U.S. 386, 395 (1989)); *Patel v. Penman*, 103 F.3d 868, 874 (9th Cir.
20 1996). As the facts alleged do not give rise to a claim separately analyzable under substantive
21 due process principles, leave to amend to state a substantive due process claim would be futile
22 and should therefore not be granted. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725-26
23 (9th Cir. 2000).

24 For the foregoing reasons, it is ORDERED that:

25 1. Service is appropriate for defendants Betti, Brautingham, Cunningham, Hunter,
26 Lebeck, Callison, and Felker.

1 2. With this order, the Clerk of the Court shall provide to plaintiff a blank summons, a
2 copy of the Amended Complaint filed March 29, 2010, one USM-285 form and instructions for
3 service of process on defendant Felker, who has not yet appeared in this action.

4 3. Within 30 days of service of this order, plaintiff shall return the attached Notice of
5 Submission of Documents with the completed summons, the completed USM-285 form, and two
6 copies of the March 29, 2010 Amended Complaint.

7 4. Upon receipt of the necessary materials, the court will direct the United States
8 Marshal to serve defendant Felker pursuant to Federal Rule of Civil Procedure 4 without
9 payment of costs.

10 5. Failure to comply with this order will result in a recommendation that this action be
11 dismissed.

12 6. Defendants shall reply to the complaint within the time provided in Fed. R. Civ. P.
13 12(a).

14 It is further RECOMMENDED that the due process claims against defendants Betti,
15 Brauntingham, Cunningham, Hunter, Callison, Lebeck, and Felker be dismissed without leave to
16 amend.

17 These findings and recommendations are submitted to the United States District Judge
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one
19 days after being served with these findings and recommendations, any party may file written
20 objections with the court and serve a copy on all parties. Such a document should be captioned
21 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
22 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*
23 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

24 Dated: July 20, 2010.

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26 EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

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

MALIK JONES,

Plaintiff,

No. CIV S-08-0096 FCD EFB P

vs.

T. FELKER, et al.,

Defendants.

NOTICE OF SUBMISSION OF DOCUMENTS

_____ /

Plaintiff hereby submits the following documents in compliance with the court's order
filed _____:

- 1 completed summons form
- 1 completed forms USM-285
- 2 copies of the March 29, 2010 Amended Complaint

Dated:

Plaintiff