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

ERNESTO ESPINOZA,

Plaintiff,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

NO. CIV 08-1168BHS

ORDER

This matter comes before the Court on Magistrate Judge Gregory G. Hollows' Findings and Recommendations (Dkt. 9) and Plaintiff's failure to file an amended complaint. This action was reassigned to the undersigned on January 22, 2009. Dkt 11. This Court has reviewed the record de novo and concurs with the Findings and Recommendations and the magistrate judge's order dismissing the original complaint and granting leave to amend (Dkt. 6).

I. BACKGROUND AND DISCUSSION

On May 28, 2008, Plaintiff filed a civil rights complaint and emergency request for injunctive relief. Dkt. 1. Plaintiff alleges that his constitutional rights are being violated because the Governor has ordered his transfer to an out-of-state prison. Plaintiff also requested emergency relief to stop his transfer.

1 On July 22, 2008, the magistrate judge granted Plaintiff's application to proceed *in*
2 *forma pauperis*, but dismissed the complaint with leave to amend. Dkt. 6. Plaintiff was
3 directed to file an amended complaint within 30 days of the order, and was advised that
4 failure to file an amended complaint would result in a recommendation that the action be
5 dismissed. *Id.* at 6. Plaintiff has not filed an amended complaint. The magistrate judge
6 also issued Findings and Recommendations and concluded that, for the same reasons that
7 the complaint was deficient, Plaintiff failed to demonstrate that his request for emergency
8 relief should be granted. Dkt. 9. Plaintiff did not file objections to the Findings and
9 Recommendations.

10 This Court concludes that Plaintiff has been provided the opportunity to amend his
11 complaint to address the deficiencies addressed in the magistrate judge's order, but has
12 failed to do so. This Court concurs with the magistrate judge's opinion that Plaintiff's
13 complaint fails to state a claim upon which relief may be granted. In addition, this Court
14 concludes that Plaintiff has failed to demonstrate that emergency relief in the form of an
15 injunction is warranted.

16 First, the magistrate judge correctly concluded that Plaintiff failed to state a claim
17 upon which relief may be granted because an out-of-state transfer does not constitute
18 cruel and unusual punishment under the Eighth Amendment.

19 Second, the magistrate judge properly concluded that Plaintiff's claim that he was
20 being denied access to the courts because of the transfer failed because Plaintiff did not
21 allege whether he was represented by counsel. If Plaintiff were represented by counsel, he
22 could not state a claim for a violation of access to the courts. The magistrate judge
23 properly granted Plaintiff leave to amend his complaint, and instructed Plaintiff to address
24 whether he was represented by counsel, and if he was not represented by counsel, to
25 address the issue of whether the prison to which he is being transferred grants access to a
26 law library through a reasonable alternative to an actual library, such as an interlibrary
27 loan system.

1 Third, with regard to Plaintiff's claim that he would not be able to pursue relief by
2 appealing within the California Department of Corrections and Rehabilitation if he is
3 transferred out-of-state, the magistrate judge properly concluded that Plaintiff's right of
4 access to the courts does not include the right to pursue administrative grievances.

5 Fourth, Judge Hallows properly concluded that Plaintiff's claim that his transfer
6 violates the Thirteenth amendment fails because the prohibition against slavery does not
7 apply to the imprisonment of a person lawfully convicted of a crime.

8 Finally, the magistrate judge properly concluded that Plaintiff was not entitled to
9 injunctive relief for the same reasons discussed above.

10 **II. ORDER**

11 In accordance with the above, IT IS HEREBY ORDERED that Plaintiff's action is
12 **DISMISSED WITH PREJUDICE.**

13 DATED this 5th day of February, 2009.

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17 BENJAMIN H. SETTLE
18 United States District Judge
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