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

WILLIAM DALE RUSS,

Plaintiff,

No. CIV S-11-0214 WBS GGH P

vs.

McDONALD, Warden,

Defendant.

FINDINGS & RECOMMENDATIONS

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On September 6, 2011, defendant filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff has not opposed the motion.

Local Rule 230(l) provides in part: "Failure of the responding party to file written opposition or to file a statement of no opposition may be deemed a waiver of any opposition to the granting of the motion . . . ." On June 6, 2011, plaintiff was advised of the requirements for filing an opposition to a motion to dismiss and that failure to oppose such a motion may be deemed a waiver of opposition to the motion.

Accordingly, plaintiff's failure to oppose should be deemed a waiver of opposition to the granting of the motion.

In the alternative, the court has reviewed the motion and finds that it has merit. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as

1 true, to state a claim to relief that is plausible on its face. Ashcroft v. Iqbal, — U.S. — , 129 S.  
2 Ct. 1937, 1949 (2009). A claim has facial plausibility when the plaintiff pleads factual content  
3 that allows the court to draw the reasonable inference that the defendant is liable for the  
4 misconduct alleged. Id. The current complaint reads that defendant “creates a policy of  
5 discrimination” which “encourages a campaign of callousness to violate plaintiff’s 5<sup>th</sup> and 8<sup>th</sup>  
6 Amendment rights....” See Doc. No. 1, p. 3. However, plaintiff has not offered any additional  
7 information in support of his bare allegations, and so plaintiff has failed to establish that any act  
8 or policy directly attributable to defendant plausibly caused plaintiff’s alleged constitutional  
9 deprivation. See Ashcroft v. Iqbal, 129 S. Ct. at 1950-51; see also Ivey v. Bd. of Regents, 673  
10 F.2d 266, 268 (9th Cir. 1983) (district court properly dismissed discrimination complaint where  
11 complaint was devoid of specific factual allegations showing defendants’ participation in  
12 allegedly discriminatory practice).

13 In addition, the entire action may be moot. As relief, plaintiff asked the court to  
14 order defendant to transfer plaintiff to lower altitude climate. See Doc. No. 1, p. 3. The motion  
15 to dismiss reads that “[plaintiff]’s prison records indicate that [plaintiff] was transferred from  
16 High Desert State Prison to California Substance Abuse Treatment Facility and State Prison at  
17 Corcoran.” See Doc. No. 20, p. 7, n.2.

18 IT IS HEREBY RECOMMENDED that:

- 19 1. Defendant’s September 6, 2011 motion to dismiss be granted; and
- 20 2. This action be dismissed.

21 These findings and recommendations are submitted to the United States District  
22 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
23 days after being served with these findings and recommendations, any party may file written  
24 objections with the court and serve a copy on all parties. Such a document should be captioned  
25 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
26 shall be served and filed within fourteen days after service of the objections. The parties are

1 advised that failure to file objections within the specified time may waive the right to appeal the  
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: November 29, 2011

4 /s/ Gregory G. Hollows  
5 UNITED STATES MAGISTRATE JUDGE

6 GGH:rb  
7 russ0214.46.ggh2

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