

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

WESLEY MITCHELL,

Plaintiff,

No. 2:11-cv-1240 JAM AC P

vs.

MATTHEW L. CATE, et,

Defendants.

FINDINGS AND RECOMMENDATIONS  
and ORDER

\_\_\_\_\_ /

Plaintiff, a state prisoner, is proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. By Order filed on April 15, 2013 (ECF No. 49), the Findings and Recommendations of the undersigned (ECF No. 48) were adopted. Defendant Miranda’s motion to dismiss under Rule 12(b)(6) was granted without prejudice to amendment, and plaintiff was granted twenty-eight days to file an amended complaint. Plaintiff has not filed an amended complaint and the time for doing so has now expired. Therefore, the court will now recommend dismissal of defendant Miranda with prejudice from this action.

The court also granted in part the motion to dismiss brought by defendants [RN J.] Clark, Davey, Gower, McDonald, Sanders and Van Leer. That motion was granted insofar as it sought dismissal for failure to exhaust administrative remedies as to the claim that plaintiff’s

1 Eighth Amendment rights were violated by exposure to extreme cold without adequate clothing  
2 and/or linens, but was denied as to all other claims. ECF No. 49. With respect to defendants J.  
3 Clark, Davey, Gower, McDonald, Sanders and Van Leer,<sup>1</sup> this action now proceeds only on  
4 those claims other than the dismissed Eighth Amendment claim.

5 Accordingly, IT IS RECOMMENDED that defendant Miranda be dismissed with  
6 prejudice from this action.

7 These findings and recommendations are submitted to the United States District  
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-  
9 one days after being served with these findings and recommendations, any party may file written  
10 objections with the court and serve a copy on all parties. Such a document should be captioned  
11 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
12 shall be served and filed within fourteen days after service of the objections. The parties are  
13 advised that failure to file objections within the specified time may waive the right to appeal the  
14 District Courts order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 IT IS ORDERED that defendants J. Clark, Davey, Gower, McDonald, Sanders  
16 and Van Leer be directed to file, within twenty-one days, their answer to the allegations of the  
17 complaint with the exception of the specific Eighth Amendment claim regarding exposure to the  
18 cold with inadequate clothing that has been previously dismissed as set forth above.

19 DATED: May 29, 2013

20   
21 ALLISON CLAIRE  
22 UNITED STATES MAGISTRATE JUDGE

23 AC:009/mitc1240.ofr

24 \_\_\_\_\_  
25 <sup>1</sup> Defendants Cate, Kernan, Chapman, Harkness and Dangler have previously been  
26 dismissed from the complaint. See Order at ECF No. 17. Defendant D. Clark was also  
dismissed previously. See Order at ECF No. 31.