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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GEORGE K. COLBERT,
Plaintiff,
v.
D. LEININGER, et al.,
Defendants.

No. 13-cv-0382-KJM-KJN-P

ORDER

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On July 9, 2013, the magistrate judge filed findings and recommendations, which were served on plaintiff and which contained notice to plaintiff that any objections to the findings and recommendations were to be filed within fourteen days. Plaintiff has not filed objections to the findings and recommendations.

The court presumes that any findings of fact are correct. *See Orand v. United States*, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge’s conclusions of law are reviewed de novo. *See Britt v. Simi Valley Unified School Dist.*, 708 F.2d 452, 454 (9th Cir. 1983). Having carefully reviewed the file, the court finds the findings and recommendations to be supported overall by the record and by the proper analysis.

1 However, one passage in the magistrate judge's order gives this court pause,
2 insofar as the passage may have informed the magistrate judge's findings and recommendations
3 on plaintiff's motion for a preliminary injunction. The magistrate judge noted that plaintiff did
4 not attach proof of exhaustion of administrative remedies vis-à-vis defendant Leininger's alleged
5 sexual harassment and assault or any other threats or deprivations Leininger or any other
6 correctional staff caused plaintiff. (ECF 9 at 4.) The court notes of course that absence of
7 exhaustion is an affirmative defense not a pleading requirement; as such, the burden of raising
8 and proving it is on defendants, not plaintiff. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir.
9 2003).

10 Accordingly, IT IS HEREBY ORDERED that:

- 11 1. The findings and recommendations as to plaintiff's motion for a preliminary injunction
12 filed July 9, 2013, are adopted; and
- 13 2. Plaintiff's motion for preliminary injunctive relief (ECF No. 8) is denied.

14 DATED: September 10, 2013.

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18 UNITED STATES DISTRICT JUDGE
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