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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. 2:13-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 February 13, 2015, the magistrate judge filed findings and recommendations, which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. Plaintiff has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case. Having carefully reviewed the file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

In his objections, plaintiff apparently contends that the alleged incident of April 21, 2012 was included in Appeal Log No. SAC-12-01340, a grievance that was cancelled as duplicative of

1 Appeal Log No. SAC-12-01047. *See* ECF No. 52 at 2; ECF No. 30-7 ¶ 14. With their motion,
2 defendants presented evidence that Appeal Log No. SAC-12-01340 had been cancelled as
3 duplicative of Appeal Log No. SAC-12-01047, but did not include a copy of the former grievance
4 with the evidence tendered in support of the motion for summary judgment. *See* Jibson Decl.
5 ¶ 14, ECF No. 30-7. Plaintiff himself has not provided a copy of Appeal Log No. SAC-12-01340
6 with his objections or with his opposition to the motion for summary judgment. The magistrate
7 judge finds, correctly, that “Appeal Log No. SAC-12-01047 does not set forth any allegations that
8 defendant sexually touched plaintiff on April 21, 2012.” ECF No. 49 at 12. The sexual innuendo
9 allegations in that grievance concerning the events of April 21, 2012 are distinguishable from the
10 allegations that defendant Leininger “physically touch[ed] and grabb[ed] [plaintiff’s] buttocks”
11 on April 21, 2012. *Compare* ECF No. 1 at 5 with ECF No. 30-10 at 12. To the extent plaintiff’s
12 objections are construed to suggest that allegations of sexual touching on April 21, 2012 were
13 included in Appeal Log No. SAC-12-01340, it is plaintiff’s burden to show that Appeal Log No.
14 SAC-12-01340 did contain those specific allegations and that the appeal was improperly screened
15 out as duplicative. *See Albino v. Baca*, 697 F.3d 1023, 1033 (9th Cir. 2012) (quoting *Sapp v.*
16 *Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010)). He has not met this burden.

17 Accordingly, IT IS HEREBY ORDERED that:

- 18 1. The findings and recommendations filed February 13, 2015 (ECF No. 49) are adopted
19 in full;
- 20 2. Defendant’s motion for summary judgment (ECF No. 30) is granted; and
- 21 3. This matter is referred back to the assigned magistrate judge for further pretrial
22 proceedings.

23 DATED: March 30, 2015.

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25 _____
26 UNITED STATES DISTRICT JUDGE
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