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

ROBERT WILLIAM TUNSTALL, JR.,
Plaintiff,
v.
JOSEPH BICK, et al.,
Defendants.

No. 2:16-CV-2604-KJM-DMC-P

FINDINGS AND RECOMMENDATIONS

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983.

Following submission of the operative third amended complaint, the Court issued a screening order. See ECF No. 60. The Court concluded the third amended complaint was sufficient to state cognizable claims as to some defendants but not others. See id. Specifically, the Court stated that Plaintiff alleges sufficient facts in his first, third, fourth, fifth, and sixth claims, but not in his second, seventh, eighth, ninth, and tenth claims. See id. at 4. Plaintiff was provided an opportunity to file a fourth amended complaint to address deficient claims. See id. at 12.

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1 Following extensions of time, see ECF Nos. 62 and 65, Plaintiff filed his fourth
2 amended complaint, see ECF No. 68. In addressing the fourth amended complaint, the Court
3 stated:

4 Plaintiff’s present fourth amended complaint is far more
5 disorganized and does not rectify the defects in plaintiff’s third amended
6 complaint which were amendable to rectification. Plaintiff’s present
7 complaint does not address plaintiff’s First Amendment access to court
8 claim. Plaintiff’s amended complaint also does not remedy the issues with
9 plaintiff’s previous Fourteenth Amendment false accusation claims
10 because plaintiff only offers one conclusory statement that defendant
11 Rogers made false allegations. See ECF No. 60, pg. 7.

12 In addition, many of plaintiff’s previously cognizable
13 claims are no longer alleged with sufficient detail to pass screening. For
14 example, plaintiff’s third amended complaint states a cognizable Eighth
15 Amendment excessive force claim against “Asian Nurse Doe Defendant”
16 by claiming that “Asian Nurse” dropped her left knee on plaintiff’s hand,
17 shoved her right knee on plaintiff’s abdomen, and threatened to push
18 plaintiff off a gurney. See ECF No. 60, pg. 4. In his present complaint,
19 plaintiff only makes the conclusory assertions that “Asian Nurse”
20 assaulted him and that she is a terrorist. See ECF No. 68, pgs. 7-8.
21 Plaintiff’s fourth amended complaint contains numerous similar instances
22 where plaintiff’s new complaint does not allege sufficient factual
23 information to state a cognizable claim. Very few, if any, of plaintiff’s
24 claims would pass screening in his fourth amended complaint.

25 Because plaintiff has not been able to amend the defects in
26 his previous complaints, and because plaintiff’s third amended complaint
27 stated some cognizable claims, the Court will provide plaintiff an
28 opportunity to withdraw his current fourth amended complaint, in which
event the Court will direct service of the third amended complaint as to the
cognizable claims previously identified. If plaintiff elects not to withdraw
the fourth amended complaint, the Court will issue findings and
recommendations that the action be dismissed for failure to state a claim
upon which relief can be granted.

ECF No. 71, pgs. 3-4.

21 Plaintiff was provided an opportunity to withdraw the fourth amended complaint
22 and proceed on the cognizable claims alleged in the third amended complaint. See id. at 4. On
23 October 1, 2020, Plaintiff filed a notice to withdraw the fourth amended complaint and proceed
24 on the third amended complaint. See ECF No. 77. Pursuant to Plaintiff’s election, the Court now
25 recommends dismissal of those claims alleged in the third amended complaint which were found
26 defective in the Court’s prior screening order for the reasons stated therein.

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Based on the foregoing, the undersigned recommends that:

1. Plaintiff's election, ECF No. 77, to withdraw the fourth amended complaint and proceed on the third amended complaint pursuant to the Court's screening order, be approved;

2. This action proceed on Plaintiff's third amended complaint, ECF No. 57, against Defendants Bick, Elam, Balanon, Doss, Spada, Britton, Spata, Lee, Camper, Perez, Hemenez, Rabbon, and Spaulding on the following claims:

- a. Plaintiff's first claim against Defendants Bick and Elam;
- b. Plaintiff's third claim against Defendant Balanon;
- c. Plaintiff's fourth claim against Defendants Spaulding, Doss, Spada, Britton, and Spata;
- d. Plaintiff's fifth claim against Defendant Lee;
- e. Plaintiff's sixth claim against Defendants Camper, Perez, Hemenez, Rabbon, and Spaulding;

3. Plaintiff's second, seventh, eighth, ninth, and tenth claims, and all other defendants be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after being served with these findings and recommendations, any party may file written objections with the court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: October 25, 2021


DENNIS M. COTA
UNITED STATES MAGISTRATE JUDGE