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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT COLEMAN,

 Plaintiff,

 v.

T. VIRGA, et al.,

 Defendants.

No. 2: 17-cv-0851 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 3, 2019, 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. On July 22, 2019, plaintiff filed a motion for reconsideration. (ECF No. 54.) The court construes the motion for reconsideration as 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 reviewed the file, the court adopts the findings and recommendations in part. The court declines to adopt the finding that plaintiff has failed to state a cognizable claim for relief against defendants Haring, Hinrich, Lynch or Virga.

1 The court concurs with the magistrate judge's January 26, 2018 order that plaintiff's September 5,
2 2017 amended complaint states cognizable claims against these four defendants. ECF No. 17 at
3 3-4. The findings and recommendations before the court on defendants' motion to dismiss rely in
4 significant part on interpretation of exhibits filed by plaintiff as a separate document on
5 September 1, 2017, ECF No. 12. Although arguably those exhibits might be considered
6 incorporated into the first amended complaint, the court has determined that consideration of such
7 exhibits suggests plaintiff's remaining claims should be tested by the standards and procedures
8 for a motion for summary judgment, which allow the presentation and consideration of all
9 evidence material to the claims. Accordingly, defendants' motion to dismiss plaintiff's claims for
10 failure to state a claim and on the grounds of qualified immunity will be denied without prejudice
11 to defendants' right to seek summary judgment on the merits of those claims and on the grounds
12 of qualified immunity.

13 Accordingly, IT IS HEREBY ORDERED that:

14 1. Plaintiff's motion for reconsideration (ECF No. 54) is construed as objections to the
15 findings and recommendations;

16 2. Sections I, II, III and V of the findings and recommendations filed July 3, 2019 are
17 adopted in full; section IV,¹ comprising page 7:3 to page 13:24, of the findings and
18 recommendations filed July 3, 2019 is not adopted;

19 3. Plaintiff's motion to amend (ECF No. 47) is denied;

20 4. Defendants' motion to dismiss (ECF No. 41) is denied without prejudice to defendants'
21 right to seek summary judgment on the merits of plaintiff's claims against defendants Haring,
22 Hinrich, Lynch and Virga and on the grounds these defendants are entitled to qualified immunity;
23 and

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27 ¹ Section IV is mislabeled Section V at page 7:3, but it is clear from context the heading should
28 start with IV. Section V begins at page 13:25.

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5. This matter is referred back to the assigned magistrate judge for further proceedings consistent with this order.

DATED: September 4, 2019.


UNITED STATES DISTRICT JUDGE