UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY C. HERNANDEZ,

Plaintiff,

v.

GREEN, et al.,

Defendants.

No. 2:20-cv-2374-EFB P

ORDER AND FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in an action brought under 42 U.S.C. § 1983. On January 28, 2021, the court screened plaintiff's first amended complaint (ECF No. 10) and identified the following viable claims: (a) an Eighth Amendment excessive force claim against defendant Troung; (b) an Eighth Amendment deliberate indifference to safety claim against defendants Troung and Duneas; and (c) a First Amendment retaliation claim against defendants Green, Moreland, and Raya.[1] ECF No. 11 at 1-2. The court dismissed all other claims with leave to amend, informing plaintiff that his due process and equal protection claims could not survive screening. *Id.* at 3. Rather than proceeding with the claims identified by the court as viable, plaintiff filed a second amended complaint. ECF No. 14.

[1] Congress mandates that district courts engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).

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The second amended complaint repeats the claims previously identified by the court as viable. It also adds two defendants – appeals coordinators Richardson and DeJesus – and re-alleges claims for violations of plaintiff's due process and equal protection rights. *Id.* at 3. The purported due process claims are based on the allegation that Richardson and DeJesus "illegally closed" plaintiff's appeal. *Id.* at 6. As the court previously informed plaintiff, the failure to properly process an administrative appeal does not violate due process, as there are no constitutional requirements regarding how a grievance system is operated. *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003); *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993). The equal protection claim fares no better, as the allegations again fail to show that a defendant acted with an intent or purpose to discriminate against plaintiff because of his membership in a protected class. *See Thornton v. City of St. Helens*, 425 F.3d 1158, 1166-67 (9th Cir. 2005). Despite notice of the deficiencies in these claims and an opportunity to amend, plaintiff is no closer to articulating a cognizable due process or equal protection claim. Consequently, the court declines to offer him further opportunity to amend. *See McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 809-10 (9th Cir. 1988) ("Repeated failure to cure deficiencies by amendments previously allowed is another valid reason for a district court to deny a party leave to amend.").

Accordingly, it is ORDERED that:

1. Plaintiff's second amended complaint (ECF No. 14) alleges, for screening purposes, the following viable claims:
    a. An Eighth Amendment excessive force claim against defendant Troung;
    b. An Eighth Amendment deliberate indifference to safety claim against defendants Troung and Duneas; and
    c. A First Amendment retaliation claim against defendants Green, Moreland, and Raya.
2. The Clerk of the Court shall randomly assign a United States District Judge to this case.

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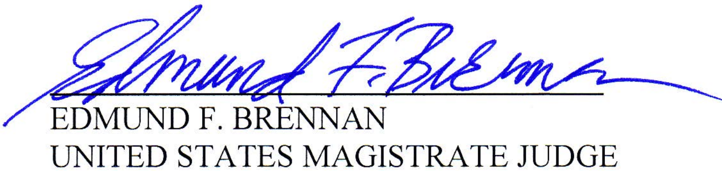
Further, it is RECOMMENDED that:

1. All claims in the second amended complaint, other than those identified as viable in this Screening Order, be dismissed without leave to amend;[2] and
2. This matter be referred back to the undersigned to initiate service of process of the viable claims against defendants Troung, Duneas, Green, Moreland, and Raya pursuant to the Court's E-Service pilot program for civil rights cases for the Eastern District of California.

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)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 16, 2021.



EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

[2] Plaintiff is advised that dismissal without leave to amend is not the same as "with prejudice." Dismissal without leave to amend merely precludes him from reviving those claims in the active proceeding.