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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANCISCO MERINO,  
  
                                Plaintiff,  
  
                  v.  
  
GOMEZ, et al.,  
  
                                Defendants.

No. 2: 21-cv-0572 JAM KJN P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s third amended complaint. (ECF No. 88.) For the reasons stated herein, the undersigned orders defendants Navarro and Gomez to file a response to the third amended complaint and recommends dismissal of defendant Lynch.

Background

Plaintiff named Correctional Officers Navarro and Gomez and Warden Lynch as defendants in the second amended complaint. (ECF No. 75.) In the second amended complaint, plaintiff alleged that his cellmate attacked him on October 23, 2020. (Id. at 4.) In the days leading up to the attack, plaintiff allegedly told correctional officers assigned to his housing unit that his cellmate was physically and verbally abusive and that something serious was about to happen. (Id.) Defendants Navarro and Gomez allegedly told plaintiff to just deal with the situation and they were not going to move plaintiff or his cellmate. (Id.)

1 In the second amended complaint, plaintiff also alleged that prior to October 23, 2020, he  
2 told defendants Navarro and Gomez that he (plaintiff) could not go back in the cell because  
3 plaintiff's safety was in jeopardy. (Id.) Defendant Gomez told plaintiff that he did not have a  
4 choice, and that if plaintiff did not return to the cell, defendants Navarro and Gomez would  
5 forcibly put plaintiff back in the cell. (Id.) Plaintiff returned and was later attacked by his  
6 cellmate. (Id.)

7 On April 14, 2022, the undersigned found that plaintiff's second amended complaint  
8 stated a potentially colorable Eighth Amendment claim against defendants Navarro and Gomez.  
9 (ECF No. 79.) On May 4, 2022, defendants Navarro and Gomez answered the second amended  
10 complaint. (ECF No. 82.)

11 On April 14, 2022, the undersigned found that the second amended complaint failed to  
12 state a potentially colorable claim for relief against defendant Lynch. (ECF No. 79.) The  
13 undersigned recommended dismissal of defendant Lynch. (Id.)

14 On April 26, 2022, plaintiff filed objections to the findings and recommendations. (ECF  
15 No. 81.) After reviewing plaintiff's objections, the undersigned found that plaintiff may be able  
16 to state a potentially colorable claim for relief against defendant Lynch. (ECF No. 84.)  
17 Accordingly, on May 18, 2022, the undersigned vacated the April 14, 2022 findings and  
18 recommendations and granted plaintiff thirty days to file a third amended complaint. (Id.)

19 On June 6, 2022, plaintiff filed a third amended complaint. (ECF No. 88.) For the  
20 reasons stated herein, the undersigned finds that the third amended complaint fails to state a  
21 potentially colorable claim for relief against defendant Lynch.

## 22 Discussion

23 In the third amended complaint, plaintiff alleges that before the "incident," he wrote an  
24 Inmate Request and a 602 grievance addressed to defendant Lynch. (Id. at 3.) Plaintiff alleges  
25 that neither the Inmate Request nor the 602 grievance were returned to plaintiff. (Id.) After the  
26 incident plaintiff submitted another 602 grievance. (Id.) Plaintiff received a response to this  
27 grievance signed by defendant Lynch. (Id.)

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1 Plaintiff appears to allege that defendant Gomez threw away the first request plaintiff sent  
2 to defendant Lynch. (Id. at 4.) Plaintiff alleges that defendant Gomez throws away inmate  
3 complaints and letters that belong to inmates. (Id.) Plaintiff alleges that defendant Lynch, “did  
4 not receive but my last grievance right after this dude beat the crap out of me...” (Id. at 6.)  
5 Plaintiff alleges that defendant Lynch denied the second grievance he submitted after his cellmate  
6 beat him up. (Id. at 4.) In the second grievance, plaintiff asked not to be again housed with  
7 violent cellmates. (Id.)

8 The Eighth Amendment requires that prison officials take reasonable measures to  
9 guarantee the safety of prisoners. Farmer v. Brennan, 511 U.S. 825, 832 (1994). In particular,  
10 prison officials have a duty to protect prisoners from violence at the hands of other prisoners. Id.  
11 at 833; Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005). The failure of prison officials to  
12 protect inmates from attacks by other inmates or from dangerous conditions at the prison violates  
13 the Eighth Amendment when: (1) the deprivation alleged is, objectively, sufficiently serious; and  
14 (2) the prison official is, subjectively, deliberately indifferent to inmate health or safety. Farmer,  
15 511 U.S. at 834. A prison official is deliberately indifferent if he or she knows of, and disregards,  
16 an excessive risk to inmate health or safety by failing to take reasonable steps to abate it. Id. at  
17 837.

18 Plaintiff claims that defendant Lynch failed to protect him from the cellmate who attacked  
19 him. However, plaintiff pleads no facts demonstrating that defendant Lynch knew of the alleged  
20 risk of harm plaintiff faced from his cellmate prior to the attack. Plaintiff appears to allege that  
21 defendant Lynch did not receive the first 602 and Inmate Request plaintiff sent before the attack  
22 because these documents were intercepted by defendant Gomez. If defendant Lynch did not  
23 receive the first 602 or Inmate Request, defendant Lynch could not have known of the risk of  
24 harm plaintiff faced from his cellmate prior to the alleged attack.

25 The undersigned also finds that plaintiff’s second grievance did not put defendant Lynch  
26 on notice of the risk of harm plaintiff faced from his cellmate because plaintiff submitted the  
27 second grievance after the alleged attack.

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1           Because plaintiff fails to demonstrate that defendant Lynch had knowledge of the alleged  
2 risk of harm plaintiff faced before the alleged attack, plaintiff fails to demonstrate that defendant  
3 Lynch acted with deliberate indifference. Accordingly, plaintiff’s third amended complaint does  
4 not state a potentially colorable Eighth Amendment claim against defendant Lynch.

5           The allegations and claims raised against defendants Navarro and Gomez in the third  
6 amended complaint are very similar to the allegations and claims raised against these defendants  
7 in the second amended complaint. In the third amended complaint, plaintiff alleges that  
8 defendants Navarro and Gomez did not move plaintiff out of the cell away from his cellmate who  
9 was physically and verbally abusive toward plaintiff. (ECF No. 88 at 7.) Plaintiff alleges that  
10 before his cellmate attacked him, he told defendants Navarro and Gomez on several occasions  
11 about the situation plaintiff was in and requested a cell move. (Id.) Plaintiff alleges that  
12 defendants told plaintiff to go back to his cell and handle his own problems. (Id.) Plaintiff  
13 alleges that he is now blind in his left eye as a result of the attack by his cellmate. (Id.)

14           The allegations against defendants Navarro and Gomez in the third amended complaint  
15 state a potentially colorable Eighth Amendment claim. Accordingly, defendants Navarro and  
16 Gomez shall file a response to the third amended complaint within twenty-one days of the date of  
17 this order.

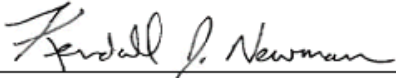
18           Accordingly, IT IS HEREBY ORDERED that within twenty-one days of the date of this  
19 order, defendants Navarro and Gomez shall file a response to the third amended complaint (ECF  
20 No. 88); and

21           IT IS HEREBY RECOMMENDED that the claims against defendant Lynch raised in the  
22 third amended complaint be dismissed.

23           These findings and recommendations are submitted to the United States District Judge  
24 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
25 after being served with these findings and recommendations, any party may file written  
26 objections with the court and serve a copy on all parties. Such a document should be captioned  
27 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
28 objections shall be filed and served within fourteen days after service of the objections. The

1 parties are advised that failure to file objections within the specified time may waive the right to  
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: June 10, 2022

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KENDALL J. NEWMAN  
6 UNITED STATES MAGISTRATE JUDGE

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