

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GENE PAUL WHEATON,  
  
Plaintiff,  
  
v.  
  
J. MCCOMBER, *et al.*,  
  
Defendants.

Case No. 2:22-cv-01434-JDP (PC)

ORDER THAT THE CLERK OF COURT  
ASSIGN A DISTRICT JUDGE TO THIS  
ACTION

FINDINGS AND RECOMMENDATIONS  
THAT THIS ACTION BE DISMISSED FOR  
FAILURE TO STATE A CLAIM

ECF No. 23

Plaintiff, a state prisoner, has filed a fourth amended complaint alleging that defendants violated his Eighth and Fourteenth Amendment rights by assigning him an “R-Suffix” prisoner classification, thereby causing him to be attacked by unknown assailants. ECF No. 23 at 11. This allegation fails to state a cognizable claim, and I now recommend that this action be dismissed.



1           **II.     Analysis**

2           Plaintiff alleges that he was assigned an “R-Suffix” by defendants Vanenburg, Baughman,  
3 Alazar, and Pulley in April 2015. ECF No. 23 at 11. Six years later, on December 19, 2021, he  
4 allegedly suffered an unprovoked attack by other inmates because of this designation. *Id.* These  
5 allegations do not state a viable Eighth Amendment claim. To state a viable Eighth Amendment  
6 failure-to-protect claim, plaintiff must allege facts demonstrating that (1) he faced a “substantial  
7 risk of serious harm” to his health or safety, and (2) that defendants were deliberately indifferent  
8 to those risks. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). To establish deliberate indifference  
9 plaintiff must show that defendants knew of and disregarded a substantial risk of serious harm to  
10 his health and safety. *Id.* Given that the attack occurred more than six years after the designation,  
11 plaintiff has not made a credible allegation that defendants knew about the substantial risk to  
12 plaintiff’s safety when the “R-Suffix” was assigned.

13           Neither can plaintiff maintain a due process claim based on the assignment of the suffix.  
14 Inmates have no liberty interest in a particular classification. *See Moody v. Daggett*, 429 U.S. 78,  
15 88 n.9 (1976). And, even if plaintiff could show that he had a liberty interest in avoiding this  
16 classification, he has failed to allege facts showing that he did not receive the process he was due.  
17 He broadly alleges that the decision to affix the suffix was wrong and arbitrary, but does not  
18 otherwise allege that he was due some specific procedure he did not receive. *See Hogg v. Cox*,  
19 656 F. App’x 374, 374 (9th Cir. 2016) (finding dismissal proper where plaintiff “failed to allege  
20 facts sufficient to show that his classification as a sex offender implicated a liberty interest and  
21 that he was denied procedural due process protections prior to his classification . . .”).

22           Assuming classification implicates a liberty interest, the only process plaintiff was due was  
23 written notice of the decision to classify him as a sex offender and a notification as to the reasons  
24 for the classification. *See Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997). As best I can tell,  
25 plaintiff does not allege he did not receive these protections. If he did not receive these  
26 protections, he may allege as much in any objections to these findings and recommendations.

27           This is now plaintiff’s fourth amended complaint; the case has been pending at the  
28 screening stage since August 2022. This counsels against granting further opportunities to

1 amend.

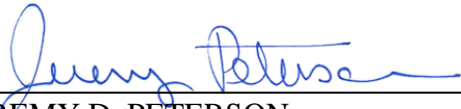
2 Accordingly, the Clerk of Court is directed to assign a district judge to this action.

3 Further, it is RECOMMENDED that the Fourth Amended Complaint, ECF No. 23, be  
4 DISMISSED without further leave to amend and for failure to state a claim.

5 These findings and recommendations are submitted to the United States District Judge  
6 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
7 after being served with these findings and recommendations, any party may file written  
8 objections with the court and serve a copy on all parties. Such a document should be captioned  
9 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
10 objections shall be served and filed within fourteen days after service of the objections. The  
11 parties are advised that failure to file objections within the specified time may waive the right to  
12 appeal the District Court’s order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez*  
13 *v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

14  
15 IT IS SO ORDERED.

16 Dated: December 11, 2023

  
\_\_\_\_\_  
JEREMY D. PETERSON  
UNITED STATES MAGISTRATE JUDGE

19  
20  
21  
22  
23  
24  
25  
26  
27  
28