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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOE L. McKENNEY, JR.,)	Civil No. 07cv1735-L(POR)
)	
Plaintiff,)	ORDER ADOPTING REPORT AND
)	RECOMMENDATION AND
v.)	GRANTING IN PART
)	DEFENDANTS' MOTION TO
R. HERNANDEZ <i>et al.</i> ,)	DISMISS WITH LEAVE TO AMEND
)	
Defendants.)	
_____)	

Plaintiff Joe L. McKenney, Jr., a state prisoner proceeding *pro se* and *in forma pauperis*, filed this action under 42 U.S.C. § 1983 alleging numerous constitutional violations under the Eighth Amendment, First Amendment and the Due Process Clause. The case was referred to United States Louisa S. Porter for a report and recommendation in accordance with 28 U.S.C. § 636(b)(1)(B) and Civil Local Rule 72.3.

Defendants filed a motion for summary judgment arguing that Plaintiff failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). Upon review of the motion filings, on July 10, 2008, the Magistrate Judge issued a Report and Recommendation, recommending Defendants' motion to dismiss be denied in part and granted in part with leave to amend. Plaintiff objected to the Report and Recommendation. Defendants did not file a response.

A district judge "may accept, reject, or modify the recommended decision" on a dispositive matter prepared by a magistrate judge proceeding without the consent of the parties

1 for all purposes. Fed. R. Civ. P. 72(b); *see* 28 U.S.C. § 636(b)(1). “The court shall make a *de*
2 *nov*o determination of those portions of the [report and recommendation] to which objection is
3 made.” 28 U.S.C. § 636(b)(1). Section 636(b)(1) does not require some lesser review by the
4 district court when no objections are filed. *Thomas v. Arn*, 474 U.S. 140, 149-50 (1985). The
5 “statute makes it clear that the district judge must review the magistrate judge’s findings and
6 recommendations *de novo if objection is made, but not otherwise.*” *United States v.*
7 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*) (emphasis in the original); *see*
8 *Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1225-26 & n.5 (D. Ariz. 2003).

9 Plaintiff objects to three of the Magistrate Judge’s recommendations. She recommended
10 to grant Defendants’ motion as to Plaintiff’s claims for (1) violation of his Eighth Amendment
11 rights by Defendants Hernandez, Stout and Tillman; (2) violation of his Eighth Amendment
12 rights by depriving him of yard recreation; and (3) violation of his First Amendment rights by
13 depriving him of access to the courts. In all three instances, the Magistrate Judge granted
14 Plaintiff leave to amend. In his objections, Plaintiff elaborates on his factual basis for these
15 claims.

16 Upon review of the pleadings, the court finds that dismissal with leave to amend is
17 warranted. Because Plaintiff is granted leave to amend his complaint and include these
18 additional factual allegations in the amended complaint, Plaintiff’s objections are
19 **OVERRULED**. In the absence of any other objections and upon review of the Report and
20 Recommendation, the Report and Recommendation is **ADOPTED**.

21 Accordingly, **IT IS HEREBY ORDERED** as follows:

22 1. To the extent Defendants’ motion is based on sovereign immunity, the motion is
23 **granted** without leave to amend insofar as Plaintiff names Defendants in their official capacities,
24 and **denied** insofar as he names them in their individual capacities.

25 2. With respect to the Eighth Amendment claim against Defendants Ramirez and
26 Gasgonia on the grounds of excessive force, Defendants’ motion is **denied**.

27 /////

28 /////

1 3. With respect to the Eighth Amendment claim against Defendants Hernandez, Stout
2 and Tillman for their respective supervisory or investigatory roles in the excessive force,
3 Defendants' motion is granted **with leave to amend**.

4 4. With respect to the Eighth Amendment claim for deprivation of yard recreation,
5 Defendants' motion is granted **with leave to amend**.

6 5. With respect to the Eight Amendment claim based on denial of double cell occupancy
7 during administrative segregation, Defendants' motion is **granted** without leave to amend.

8 6. With respect to the First Amendment claim for denial of access to the courts,
9 Defendants' motion is granted **with leave to amend**.

10 7. With respect to the Due Process claim pertaining to administrative remedies,
11 Defendants' motion is **granted** without leave to amend.

12 **IT IS HEREBY FURTHER ORDERED** that Plaintiff is **GRANTED** forty five (45)
13 days' leave from the date this Order is "Filed" in which to file a First Amended Complaint which
14 cures all the deficiencies of pleading as stated in the Report and Recommendation. Plaintiff's
15 Amended Complaint must be complete in itself without reference to the superseded pleading.
16 *See* Civil Local Rule 15.1. Defendants not named and all claims not re-alleged in the Amended
17 Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.
18 1987).

19 **IT IS SO ORDERED.**

20 DATED: September 8, 2008

21
22 
M. James Lorenz
United States District Court Judge

23 COPY TO:

24 HON. LOUISA S. PORTER
25 UNITED STATES MAGISTRATE JUDGE

26 ALL PARTIES/COUNSEL
27
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