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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

EDUARDO NUNEZ

Plaintiff,

vs.

C/O F. RAMIREZ; CENTENO, Sgt.;  
CALDWELL, Lt.; WAGNER, C/O;  
JOHN DOE,

Defendants.

CASE NO. 09cv413 WQH (BGS)

ORDER

HAYES, Judge:

The matter before the Court is the Magistrate Judge's Report and Recommendation (ECF No. 51) filed on November 14, 2011, recommending that the Court grant in part and deny in part the Motion to Dismiss filed by Defendants Centeno, Wagner, and Caldwell (ECF No. 48) and the Motion to Dismiss filed by Defendant Ramirez (ECF No. 39).

**BACKGROUND**

On February 26, 2009, Plaintiff Eduardo Nunez, a pro se state prisoner, initiated this action by filing a Complaint alleging civil rights violations pursuant to 42 U.S.C. § 1983. (ECF No. 1). On February 25, 2011, Plaintiff filed a First Amended Complaint. (ECF No. 37). Plaintiff alleges that on May 12, 2007, Plaintiff was standing with a group of inmates in the prison "A" Yard when he was confronted by Defendants. *Id.* at 4. Plaintiff alleges that Defendant Ramirez accused Plaintiff of drinking illegally manufactured alcohol. *Id.* Plaintiff alleges that he and Ramirez exchanged a series of insults and that Plaintiff was

1 subjected to a strip search. *Id.* Plaintiff alleges that although Defendants did not find any  
2 alcohol, Plaintiff was cuffed and taken to the program office. *Id.* at 4-5. Plaintiff alleges  
3 that he was beaten by Ramirez while en route to the program office. *Id.* at 5. Plaintiff  
4 alleges that he was accused of “battery on a peace officer” and placed in administrative  
5 segregation. *Id.* Plaintiff alleges that when he was released from administrative segregation,  
6 Plaintiff was told that his property had been lost. *Id.* at 6. Plaintiff alleges that he was later  
7 placed back into administrative segregation for the same alleged rules violation of “battery  
8 on a peace officer.” *Id.* Plaintiff alleges that he was found guilty of a rules violation even  
9 though there was no evidence to support the violation. *Id.* Plaintiff asserts the following  
10 claims: (1) violation of the Fourteenth Amendment Due Process Clause based on his  
11 placement in administrative segregation; (2) violation of the Fourteenth Amendment Equal  
12 Protection Clause; (3) violation of Due Process based on his lost property; (4) violation of  
13 the Eighth Amendment based on excessive force; (5) violation of the Eighth Amendment  
14 based on the false accusation of a rules violation; (6) false arrest; and (7) defamation.

15 On May 26, 2011, Defendants filed a Motion to Dismiss the First Amended  
16 Complaint. (ECF No. 48). On August 2, 2011, Plaintiff filed an Opposition to the Motion  
17 to Dismiss. (ECF No. 50).

18 On November 14, 2011, the Magistrate Judge issued a Report and Recommendation  
19 recommending that the Court grant in part and deny in part the Motion to Dismiss the First  
20 Amended Complaint filed by Defendants. (ECF No. 51). The Report and  
21 Recommendation recommends:

22 (1) Plaintiff’s Fourteenth Amendment Due Process claim stemming  
23 from his placement in Administrative Segregation be DISMISSED  
24 without prejudice and with leave to amend; (2) Plaintiff’s Fourteenth  
25 Amendment Equal Protection claim be DISMISSED without  
26 prejudice and with leave to amend; (3) Plaintiff’s Due Process claim  
27 regarding his lost property be DISMISSED with prejudice; (4)  
28 Plaintiff’s Eighth Amendment Excessive Force claim be  
DISMISSED without prejudice as to Defendants Wagner, Centeno  
and Caldwell. The Court, however, recommends that Defendant  
Ramirez’s motion to dismiss Plaintiff’s excessive force claim be  
DENIED; (5) Plaintiff’s Eighth Amendment claim alleging  
Defendants falsely accused him of a rules violation be DISMISSED  
without prejudice and with leave to amend; (6) Plaintiff’s claim for  
false arrest be DISMISSED with prejudice; (7) Plaintiff’s claim for

1           defamation be DISMISSED without prejudice and with leave to  
2           amend.

3           (ECF No. 51 at 16).

4           On December 15, 2011, Plaintiff filed Objections to the Report and  
5           Recommendation. (ECF No. 52). Plaintiff “pleads the Court to give an opportunity to  
6           present evidence for the claims not recommended to be dismissed with prejudice.” *Id.* at 2.  
7           Plaintiff contends that he would allege that he was placed in administrative segregation for  
8           217 days in mechanical restraints which constitutes atypical and significant hardship in  
9           violation of the due process clause. *Id.* at 1. Plaintiff contends that he was the only  
10          Mexican inmate charged with a rule violation in violation of the equal protection. *Id.*  
11          Plaintiff contends that Correctional Officer Wagner, Sergeant Centeno, and Lieutenant  
12          Caldwell have “incurred liability” for excessive force in violation of the Eighth  
13          Amendment. *Id.* at 2. Plaintiff contends that he has documentation of a due process  
14          violation to support his claim that he was wrongfully accused in violation of the Eighth  
15          Amendment. *Id.*

16                 Defendants have not filed a response to Plaintiff’s objections.

### 17                                 DISCUSSION

18           The duties of the district court in connection with the Report and Recommendation  
19           of a Magistrate Judge are set forth in Rule 72(b) of the Federal Rules of Civil Procedure  
20           and 28 U.S.C. § 636(b)(1). The district court “must make a *de novo* determination of those  
21           portions of the report . . . to which objection is made,” and “may accept, reject, or modify,  
22           in whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. §  
23           636(b)(1); *United States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989).

24           The Court has considered all of Plaintiff’s objections and reviewed *de novo* all  
25           portions of the R&R and filings in this case and concludes that the Magistrate Judge  
26           correctly recommended that Defendants’ Motion to Dismiss be GRANTED in part and  
27           DENIED in part. Plaintiff has filed objections to the Report and Recommendation in which  
28           he seeks leave to file a Second Amended Complaint re-alleging the claims that were  
          dismissed from the First Amended Complaint without prejudice and with leave to amend.


1 The Court concludes that the Magistrate Judge correctly dismissed the claims without  
2 prejudice and correctly recommended that Plaintiff be given leave to amend. Plaintiff's  
3 request to file a Second Amended Complaint re-alleging the claims that were dismissed  
4 from the First Amended Complaint without prejudice and with leave to amend is  
5 GRANTED.

6 IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 51) is  
7 ADOPTED in its entirety. The Motion to Dismiss filed by Defendants Centeno, Wagner,  
8 and Caldwell (ECF No. 48) and the Motion to Dismiss filed by Defendant Ramirez (ECF  
9 No. 39) are GRANTED in part and DENIED in part. Plaintiff's claim for violation of the  
10 Due Process Clause contained in the Fourteenth Amendment based on his placement in  
11 administrative segregation is DISMISSED without prejudice and with leave to amend.  
12 Plaintiff's claim for violation of Due Process based on his lost property is DISMISSED  
13 with prejudice. Plaintiff's claim for violation of the Equal Protection clause contained in  
14 the Fourteenth Amendment is DISMISSED without prejudice and with leave to amend.  
15 Plaintiff's claim for excessive force in violation of the Eighth Amendment against  
16 Correctional Officer Wagner, Sergeant Centeno, and Lieutenant Caldwell have incurred  
17 liability is DISMISSED without prejudice and with leave to amend. Plaintiff's claim for  
18 excessive force in violation of the Eighth Amendment against Ramirez is DENIED.  
19 Plaintiff's claim for violation of the Eighth Amendment based on false accusation of a rules  
20 violation is DISMISSED without prejudice and with leave to amend. Plaintiff's claim for  
21 false arrest is DISMISSED with prejudice. Plaintiff's claim for defamation is DISMISSED  
22 without prejudice and with leave to amend.

23 Plaintiff may file a Second Amended Complaint no later than thirty (30) days from  
24 the date of this order.

25 IT IS SO ORDERED.

26 DATED: January 24, 2012

27   
28 **WILLIAM Q. HAYES**  
United States District Judge