

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHEAL SMITH,

Plaintiff,

No. 2:08-cv-2492-LKK-JFM (PC)

vs.

SGT. R. STOVALL, et al.,

Defendants.

ORDER

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Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On January 26, 2010, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. No objections were filed in this action within that time. On February 24, 2010, this court adopted the findings and recommendations in full, granted defendants' motion to dismiss in part, dismissed claims against several defendants, and directed two other defendants to answer the claims against them. On March 5, 2010, said defendants filed an answer.

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1 On March 8, 2010, plaintiff filed objections to the findings and recommendations.
2 The objections are accompanied by a proof of service in which plaintiff attests to service of the
3 objections on February 11, 2010. The reason for a delay of more than three weeks in receipt of
4 the objections is not clear. Good cause appearing, the court has, in accordance with the
5 provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, conducted a de novo review of this
6 case in light of plaintiff's objections. Plaintiff's principal objection concerns exhaustion. The
7 Magistrate Judge recommended dismissing claims against seven defendants for failure to exhaust
8 administrative remedies prior to suit. In connection with the motion to dismiss, defendants filed a
9 declaration indicating that administrative level appeals concerning the allegations underlying
10 claims against these defendants were heard *after* plaintiff filed the complaint in this action (Dkt.
11 No. 26-1, Declaration of N. Grannis). Plaintiff's objections indicate that he filed "many
12 administrative grievance[] forms before filing" this suit. However, plaintiff does not indicate the
13 subject of the grievance forms, whether they were exhausted, or when they were filed. The court,
14 together with the Magistrate Judge and the defendants, agrees that plaintiff did successfully
15 exhaust the administrative grievance procedures with regard to his claims against defendants
16 Lawrence and Stoval. See Findings and Recommendations at page 5, lines 10-16, and Defs.'
17 Motion at page 9, line 24 through page 10, line 4. Plaintiff has not demonstrated, however, that
18 he exhausted his remedies with respect to the other defendants' conduct prior to filing suit.

19 Having carefully reviewed the entire file, the court finds the findings and
20 recommendations to be supported by the record and by proper analysis.

21 In accordance with the above, IT IS HEREBY ORDERED that:

- 22 1. All provisions of this court's February 24, 2010 order except paragraph 4 of
23 the order clause thereof are vacated;
- 24 2. The findings and recommendations filed January 26, 2010, are adopted in full;
- 25 3. Defendants' August 20, 2009 motion to dismiss is granted in part; and
- 26 4. The claims against defendants Oshner, Hawkness, Aurich, Albonico, Weeks,

Scouce and Auigriu are dismissed and said defendants are dismissed from this action.

DATED: March 10, 2010.



LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT