

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

| | | |
|------------------------|---|---------------------------------|
| MARK HIMMELBERGER, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | CIVIL ACTION NO. 2:09-CV-43-TMH |
| |) | [WO] |
| |) | |
| OFFICER DAVIS, et al., |) | |
| |) | |
| Defendants. |) | |

RECOMMENDATION OF THE MAGISTRATE JUDGE

This cause of action is pending before the court on a 42 U.S.C. § 1983 complaint filed by Mark Himmelberger [“Himmelberger”], a former state inmate, on January 21, 2009. In his complaint, Himmelberger challenges a fall and the medical treatment provided to him for a back injury suffered in such fall during his confinement at the Bullock County Correctional Facility.

Pursuant to the orders of this court, the defendants filed written reports supported by relevant evidentiary materials in which they addressed the claims for relief presented by Himmelberger. The reports and evidentiary materials refute the self-serving, conclusory allegations presented in the instant cause of action. The court thereafter issued an order directing Himmelberger to file a response to the written reports. *Order of March 17, 2009 - Court Doc. No. 23*. The order advised Himmelberger that his failure to respond to the defendants’ written reports would be treated by the court “**as an abandonment of the claims set forth in the complaint and as a failure to prosecute this action.**” *Id.* at 1 (emphasis

in original). Additionally, the order “**specifically cautioned [the plaintiff] that [his failure] to file a response in compliance with the directives of this order**” would result in the dismissal of this civil action. *Id.* The time allotted Himmelberger for filing a response in compliance with the directives of this order expired on May 11, 2009. As of the present date, Himmelberger has failed to file a requisite response in opposition to the defendants’ written reports. In light of the foregoing, the court concludes that this case should be dismissed.

The court has reviewed the file in this case to determine whether a less drastic measure than dismissal is appropriate. After such review, it is clear that dismissal of this case without prejudice is the proper course of action. Himmelberger is indigent. Thus, the imposition of monetary or other punitive sanctions against him would be ineffectual. Additionally, Himmelberger has exhibited a lack of deference for this court and its authority as he has failed to comply with the directives of the orders entered in this case. It is therefore apparent that any additional effort by this court to secure Himmelberger’s compliance would be unavailing. Consequently, the court concludes that the plaintiff’s abandonment of his claims, his failure to comply with the orders of this court and his failure to properly continue prosecution of this cause of action warrant dismissal of this case.

CONCLUSION

For the foregoing reasons, it is the RECOMMENDATION of the Magistrate Judge that this case be dismissed without prejudice. It is further

ORDERED that **on or before June 4, 2009** the parties may file objections to the Recommendation. Any objections filed must specifically identify the findings in the

