

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

MARCUS D. McQUEEN, #177303,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIV. ACT. NO. 1:18-cv-109-TFM-MU
	)	
WETTERMARK KEITH, <sup>1</sup>	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION AND ORDER**

On August 16, 2019, the Magistrate Judge entered a Report and Recommendation (Doc. 23) to which no objections have been filed.

In the Report and Recommendation, the Magistrate Judge recommends dismissal of the sole defendant – Defendant Wettermark Keith. Specifically, Plaintiff brings claims pursuant to 42 U.S.C. § 1983 and Plaintiff does not allege that Defendant acted under of color of state law or that it is a state actor. As such, the case should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) as frivolous.

28 U.S.C. § 1915(e)(2)(B) provides, in pertinent part: “[T]he court shall dismiss the case at any time if the court determines that . . . the action or appeal – (i) is frivolous or malicious, (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” In addition to the Magistrate Judge recommending

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<sup>1</sup> The Court agrees with the Magistrate Judge that the original defendants were dropped by the Plaintiff from his original complaint (Doc. 1) and the sole defendant under the amended complaint is Defendant Wettermark Keith. *See* Doc. 15 at 5; *see also* Doc. 23 at 1-2. The Clerk of Court is **DIRECTED** to update the docket sheet accordingly.

this case be dismissed as frivolous, the Court also finds that (ii) failure to state a claim on which relief may be granted is also an appropriate basis for dismissal.

However, the Report and Recommendation is not clear on whether it suggests dismissal with prejudice or without prejudice. *Compare* Doc. 13 at 1 and 5. For the facts in this case, the Court determines that a dismissal without prejudice is more appropriate for this matter. Though Defendant cannot be sued under § 1983, there Court has insufficient information to reach the determination that there are no causes of action that may be appropriate. A dismissal with prejudice may trigger preclusion of those claims. The Court is only evaluating the case under the current § 1983 complaint and finds dismissal is appropriate, but foreclosure of all future claims may not be. As such, the Court shall dismiss the case without prejudice.

Accordingly, after due and proper consideration of all portions of this file deemed relevant to the issues raised, the Report and Recommendation of the Magistrate Judge (Doc. 23) is **ADOPTED as modified** as the opinion of this Court. It is therefore **ORDERED** that this action is **DISMISSED without prejudice**, prior to service or process, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i)-(ii).

Final judgment shall issue separately in accordance with this order and Federal Rule of Civil Procedure 58.

**DONE and ORDERED** this the 16th day of September 2019.

/s/Terry F. Moorner  
TERRY F. MOORER  
UNITED STATES DISTRICT JUDGE