

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

CHARLES ASHFORD
ADC #133975

PLAINTIFF

V.

NO: 5:09CV00023 JMM/HDY

RODERICK JOHNSON *et al.*

DEFENDANTS

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

The following recommended disposition has been sent to United States District Judge James M. Moody. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before the District Judge, you must, at the same time that you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.
2. Why the evidence proffered at the hearing before the District Judge (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.
3. The detail of any testimony desired to be introduced at the

hearing before the District Judge in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the hearing before the District Judge.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

Mail your objections and “Statement of Necessity” to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

DISPOSITION

A hearing was scheduled in this matter for November 17, 2009 (docket entry #20). The morning of the hearing, counsel for Defendants notified the Court that Plaintiff refused transport to the hearing, and the Court entered an order relieving the Arkansas Department of Correction of its obligation to transport Plaintiff to the hearing (docket entry #33).

Defendants have now filed a motion to dismiss for lack of prosecution, pursuant to Fed.R.Civ.P. 41(b) (docket entry #35). Defendants have attached to their motion affidavits of Sgt. Radawn Dunmore and Sgt. Wozell Stanley, both of whom state that Plaintiff refused transportation the morning of the hearing. Plaintiff filed a response in which he indicated that he informed prison officials that he wanted to be transported (docket entry #37). Defendants filed a reply (docket entry #39), which was also responsive to a motion for a temporary restraining order Plaintiff filed (docket entry #36). Defendants also filed a video recording of the events on the morning of November 17, 2009, which demonstrates that Plaintiff was uncooperative when prison officials attempted to transport him to the hearing (docket entry #38). Accordingly, Defendants’ motion should be granted,

and Plaintiff's complaint should be dismissed with prejudice, pursuant to Fed.R.Civ.P. 41(b), for lack of prosecution.

IT IS THEREFORE RECOMMENDED THAT:

1. Defendants' motion to dismiss (docket entry #35) be GRANTED, and Plaintiffs' complaint be DISMISSED WITH PREJUDICE for failure to prosecute.

2. All pending motions be DENIED AS MOOT.

3. The Court certify that an *in forma pauperis* appeal taken from the order and judgment dismissing this action is considered frivolous and not in good faith.

DATED this 4 day of December, 2009.



UNITED STATES MAGISTRATE JUDGE