

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

DELRAE MCKENZY SMITH

PLAINTIFF

VS.

CASE NO. 4:14-CV-4126

LT. ADAMS, *et al.*

DEFENDANTS

ORDER

Before the Court is the Report and Recommendation filed February 16, 2016 by the Honorable Barry A. Bryant, United States Magistrate Judge for the Western District of Arkansas. (ECF No. 28). Judge Bryant recommends that a Motion to Dismiss filed on behalf of Separate Defendants Nurse Emerson and Nurse Bruce (ECF No. 11) be granted. Plaintiff has filed objections. (ECF No. 29). After reviewing the record *de novo*, the Court adopts Judge Bryant's Report and Recommendation in part.

Defendants Bruce and Emerson filed a Motion to Dismiss requesting that the official capacity claims against them be dismissed for failure to state a claim. Defendants Bruce and Emerson argue that Plaintiff has failed to allege any policy or custom of their employer Southern Health Partners, Inc. which could support a claim of official capacity liability. Judge Bryant agrees with Defendants and recommends that the official capacity claims against them be dismissed with prejudice.

Plaintiff does not object to the substance of Judge Bryant's findings. Rather, Plaintiff requests that the dismissal of the official capacity claims be without prejudice. The Court agrees with Plaintiff that a dismissal without prejudice is more appropriate in this case since it is conceivable that Plaintiff could, at a later date, sufficiently allege a custom or policy. Accordingly, the Court declines to adopt the portion of the Report and Recommendation that recommends

dismissal with prejudice.

For the reasons stated herein and above, as well as those contained in the Report and Recommendation, Separate Defendants Nurse Emerson and Nurse Bruce's Motion to Dismiss (ECF No. 11) should be and hereby is **GRANTED**. Plaintiff's official capacity claims against these Defendants are **DISMISSED WITHOUT PREJUDICE**. Plaintiff's personal capacity claims against these Defendants remain for further consideration.

IT IS SO ORDERED, this 10th day of March, 2016.

/s/ Susan O. Hickey
Susan O. Hickey
United States District Judge