

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Wiley Y. Daniel

Civil Action No. 06-cv-02303-WYD-MJW

RALPH MERCADO,

Plaintiff,

v.

R. WILEY,
R. HOOD,
M. BARBEE,
R. BAUER,
CHUCK TURNER,
MARK MASER,
JOHN DOE #1,
JO WADAS,
H. TRAPP,
R. CURRIN,
RALPH SMITH,
HARRELL WATTS,
JOHN OR JANE DOE #2,
UNKNOWN CRAWFORD,
UNKNOWN HAVERY [sic], and
JOHN DOE#3,

Defendants.

**ORDER ADOPTING AND AFFIRMING
MAGISTRATE JUDGE'S RECOMMENDATION**

THIS MATTER is before the Court in connection with Defendants' Motion to Dismiss filed June 2, 2008. This motion was referred to Magistrate Judge Watanabe for a recommendation by Order of Reference dated April 18, 2008, and Memorandum dated June 3, 2008. A Recommendation on Defendants' Motion to Dismiss was issued on January 29, 2009, and is incorporated herein by reference. See 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

Magistrate Judge Watanabe recommends therein that Defendants' Motion to Dismiss be granted in part and denied in part. Recommendation at 23. Specifically, he recommends that Defendant's motion be granted: (1) without prejudice as to Claim Six for failure to exhaust; (2) without prejudice as to the claim against Defendant Harrell Watts for lack of personal jurisdiction (the claim is contained in Claim Three); (3) with prejudice as to Claim Four for failing to state a claim upon which relief can be granted; and (4) with prejudice as to Plaintiff's claims against Defendants Wiley, Bauer, Turner and Watts (based on supervisory liability). *Id.* at 12-23. Magistrate Judge Watanabe recommends that the motion to dismiss be denied in all other respects. *Id.* at 7-23.

Magistrate Judge Watanabe advised the parties that they have ten (10) days after service of the Recommendation to file and serve specific, written objections. Recommendation at 23. Despite this advisement, no objections were filed by any party to the Magistrate Judge's Recommendation. No objections having been filed, I am vested with discretion to review the Recommendation "under any standard [I] deem[] appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); *see also Thomas v. Arn*, 474 U.S. 140, 150 (1985) (stating that "[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a de novo or any other standard, when neither party objects to those findings"). Nonetheless, though not required to do so, I review the Recommendation to "satisfy [my]self that there is no clear error on the face of the record."¹ See FED. R. CIV. P. 72(b) Advisory Committee Notes.

¹ Note, this standard of review is something less than a "clearly erroneous or contrary to law" standard of review, FED. R. CIV. P. 72(a), which in turn is less than a de novo review, FED. R. CIV. P. 72(b).

Having reviewed the Recommendation, I am satisfied that there is no clear error on the face of the record. I agree with Magistrate Judge Watanabe that Claim Six should be dismissed for failure to exhaust, Claim Three against Defendant Harrell Watts should be dismissed for lack of personal jurisdiction, and Claim Four should be dismissed for failing to state a claim upon which relief can be granted. I also agree that Plaintiff has not alleged supervisory liability as to Defendants Wiley, Bauer, Turner and Watts and that the claims against them should be dismissed on that basis. Finally, I agree with the Recommendation to deny the motion to dismiss in all other respects. In so finding, I note that the Recommendation is well reasoned and supported by law. Accordingly, it is hereby

ORDERED that the Recommendation of United States Magistrate Judge dated January 29, 2009, is **AFFIRMED and ADOPTED**. In accordance therewith, it is

ORDERED that Defendants' Motion to Dismiss is **GRANTED IN PART AND DENIED IN PART**. Specifically, it is

ORDERED that the Motion to Dismiss is **GRANTED** as to Claim Three against Defendant Harrell Watts and Claim Six and these claims are **DISMISSED WITHOUT PREJUDICE**. It is

FURTHER ORDERED that the Motion to Dismiss is **GRANTED** as to the fourth claim and the claims against Defendants Wiley, Bauer, Turner and Watts based on supervisory liability and these claims are **DISMISSED WITH PREJUDICE**. Defendants Wiley, Bauer, Turner and Watts shall hereafter be taken off the caption. Finally, it is

ORDERED that the Motion to Dismiss is **DENIED** in all other respects.

Dated: February 23, 2009

BY THE COURT:

s/ Wiley Y. Daniel
Wiley Y. Daniel
Chief United States District Judge