

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita Leeson Weinshienk

Civil Action No. 08-cv-02038-ZLW-MJW

KHALIF ABDUL QAWI MUJAHID, a/k/a KEITH E. GAFFNEY,

Plaintiff,

v.

ROBERT WILEY, Warden,
CHRISTOPHER B. SYNSVOLL, Legal Supervisor,
THERESA MONTOYA, Senior Attorney,
CARMEN DIEHL, Staff Attorney,
LIEUTENANT M. BIER,
LIEUTENANT D. CLARK,
LIEUTENANT LOA,
OFFICER GOFF, and
OFFICER S. TAYLOR,

Defendants.

ORDER

The matter before the Court is Defendants Wiley, Synsvoll, Montoya, Diehl, Bier, Clark, and Goff's Motion To Dismiss (Doc. No. 34). Pursuant to this Court's Order dated February 11, 2009 (Doc. No. 15), all dispositive motions are referred to Magistrate Judge Michael J. Watanabe.¹ On December 14, 2009, Magistrate Judge Watanabe indicated that the Motion To Dismiss was converted to a motion for summary judgment pursuant to Fed. R. Civ. P. 12(d). On February 12, 2010, Magistrate Judge Watanabe issued his Recommendation (Doc. No. 41) that the motion for summary

¹See D.C.COLO.LCivR 72.1; 28 U.S.C. § 636(b)(1)(A).

judgment be granted and that this Court should issue a Show Cause Order as to why the remaining Defendants should not be dismissed for the same reasons as outlined in the Recommendation. Plaintiff timely filed an objection on February 26, 2010.²

Plaintiff's objection has been liberally construed because he is *pro se*.³

The Court has reviewed Plaintiff's objection, the Magistrate Judge's Recommendation, and the original motion, response, and reply. As required by 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(3), the Court has reviewed *de novo* the portions of the Recommendations to which Plaintiff objected. The Court overrules these objections and adopts the Recommendation in its entirety.

Critically, nowhere in Plaintiff's objection, outside of his conclusory statements, does Plaintiff present either evidence or argument that his administrative remedies were exhausted. The Court agrees with the Magistrate Judge that the Defendants have met their burden in establishing that Plaintiff did not exhaust his administrative remedies.⁴

Therefore, this Court lacks jurisdiction to hear Plaintiff's claims.⁵

To the extent Plaintiff makes arguments as to unserved Defendants Loa or Taylor, these arguments are irrelevant to the present motion since the Recommendation does not resolve any issues with respect to these Defendants.

²Doc. No. 44.

³See Trackwell v. United States, 472 F.3d 1242, 1243 (10th Cir. 2007).

⁴See 42 U.S.C. § 1997e(a); Jones v. Bock, 549 U.S. 199, 216 (2007).

⁵See Beaudry v. Corrections Corp. of Am., 331 F.3d 1164, 1167 n.5 (10th Cir. 2003).

Plaintiff's remaining objections are irrelevant or lack cognizable merit.⁶

Accordingly, it is

ORDERED that the Recommendation dated February 12, 2010 (Doc. No. 41) is accepted and adopted in its entirety. It is

FURTHER ORDERED that the Defendants' Motion To Dismiss (Doc. No. 34; July 27, 2009), treated as a motion for summary judgment, is granted. It is

FURTHER ORDERED that Defendants Wiley, Synsvoll, Montoya, Diehl, Bier, Clark, and Goff are dismissed without prejudice for failure to exhaust administrative remedies. It is

FURTHER ORDERED that Plaintiff shall show cause in writing on or before July 21, 2010, why his claims against unserved Defendants Loa and Taylor should not be dismissed without prejudice based upon his failure to exhaust his administrative remedies. It is

⁶Plaintiff appears to argue that he never received Defendants' Motion To Dismiss. See Objections (Doc. No. 44), at 1-2, 7. This objection is not taken in good faith as Plaintiff himself has previously referred to the Motion To Dismiss in previous Court filings. See, e.g., Points And Authorities In Support Of The Traverse (Doc. No. 36; Aug. 12, 2009), at 1.

FURTHER ORDERED that if Plaintiff does not show cause on or before July 21, 2010, this action will be dismissed for lack of subject matter jurisdiction.

DATED at Denver, Colorado, this 28th day of June, 2010.

BY THE COURT:

A handwritten signature in blue ink that reads "Zita Leeson Weinsienk". The signature is written in a cursive style with a light blue background behind it.

ZITA LEESON WEINSHIENK, Senior Judge
United States District Court