

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

JAN 5 2011

GREGORY C. LANGHAM
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-02559-BNB

NICKY L. SMITH,

Plaintiff,

v.

CPT. SCOTT GIBSON, and
WARDEN KEVIN MILYARD,

Defendants.

ORDER TO DISMISS IN PART AND TO DRAW CASE
TO A DISTRICT JUDGE AND TO A MAGISTRATE JUDGE

Plaintiff, Nicky L. Smith, is a prisoner in the custody of the Colorado Department of Corrections at the Sterling Correctional Facility in Sterling, Colorado. Mr. Smith has filed *pro se* a Prisoner Complaint pursuant to 42 U.S.C. § 1983. Mr. Smith specifically alleges in the complaint that he was subjected to excessive force that caused serious physical injuries on February 19, 2009, and that Defendant Gibson participated in the alleged use of excessive force. Mr. Smith does not assert any claim against Defendant Milyard, the prison warden, and he does not allege any facts that implicate Defendant Milyard in the alleged use of excessive force. Therefore, on November 17, 2010, Magistrate Judge Boyd N. Boland ordered Mr. Smith to file an amended complaint if he wishes to pursue any claim against Defendant Milyard. Mr. Smith was warned that Defendant Milyard would be dismissed as a party to this action if he failed to file an amended complaint within thirty days.

Mr. Smith has failed to file an amended complaint within the time allowed. Therefore, Defendant Milyard will be dismissed as a party to this action because no claim is asserted against him.

Upon completion of the Court's review pursuant to D.C.COLO.LCivR 8.2C, the Court has determined that the excessive force claim asserted against Defendant Gibson does not appear to be appropriate for summary dismissal and that the case should be drawn to a district judge and to a magistrate judge. See D.C.COLO.LCivR 8.2D. Accordingly, it is

ORDERED that Defendant Warden Kevin Milyard is dismissed as a party to this action because Plaintiff fails to assert any claim against him. It is

FURTHER ORDERED that this case shall be drawn to a district judge and to a magistrate judge.

DATED at Denver, Colorado, this 5th day of January, 2011.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF MAILING

Civil Action No. 10-cv-02559-BNB

Nicky L. Smith
Doc No. 98861
Sterling Correctional Facility
PO Box 6000
Sterling, CO 80751

I hereby certify that I have mailed a copy of the **ORDER** to the above-named individuals on January 5, 2011.

GREGORY C. LANGHAM, CLERK

By:  _____

Deputy Clerk