

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge William J. Martínez**

Civil Action No. 11-cv-02342-WJM-KLM

FRANKIE L. MCCONNELL,

Plaintiff,

v.

DEBRA REILLY,

Defendant.

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**ORDER ADOPTING FEBRUARY 26, 2013 RECOMMENDATION OF MAGISTRATE  
JUDGE,  
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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This matter is before the Court on the February 26, 2013 Recommendation of United States Magistrate Judge Kristen L. Mix (the "Recommendation") (ECF No. 47) that Defendant's Motion for Summary Judgment (ECF No. 42) be granted. The Recommendation is incorporated herein by reference. See 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

The Recommendation advised the parties that specific written objections were due within fourteen days after being served with a copy of the Recommendation. (ECF No. 47, at 10.) Despite this advisement, no objections to the Magistrate Judge's Recommendation have to date been filed by either party.

The Court concludes that the Magistrate Judge's analysis was thorough and sound, and that there is no clear error on the face of the record with respect to the issue of administrative exhaustion under the Prison Litigation Reform Act ("PLRA"). Resolution

of that issue is dispositive of the instant matter.<sup>1</sup> See Fed. R. Civ. P. 72(b) advisory committee's note ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."); see also *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) ("In the absence of timely objection, the district court may review a magistrate's report under any standard it deems appropriate.").

In accordance with the foregoing, the Court ORDERS as follows:

- (1) The Magistrate Judge's Recommendation (ECF No. 47) is ADOPTED in its entirety;
- (2) Defendant's Motion for Summary Judgment (ECF No. 42) is GRANTED;
- (3) Plaintiff's Eighth Amendment claim against Defendant is DISMISSED WITHOUT PREJUDICE;<sup>2</sup> and
- (4) The Clerk shall enter judgment in favor of Defendant. Each party shall bear her own costs.

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<sup>1</sup> In addition, and for reasons stated in Defendant's Motion for Summary Judgment, Plaintiff's claims are indeed "wholly contradicted by the record." (ECF No. 43) This only reinforces the result against Plaintiff as already provided for in the Magistrate Judge's Recommendation under the PLRA. Accordingly, because Plaintiff cannot demonstrate a violation of her Eighth Amendment right to medical care, Defendant is also entitled to qualified immunity based on the first and second prongs of the relevant test. *Saucier v. Katz*, 533 U.S. 194, 200 (2001) quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

<sup>2</sup> *Arocho v. Lappin*, 2011 WL 2292187, at \*8 (D. Colo. Apr. 21, 2011) (citing *Fields v. Okla. State Penitentiary*, 511 F.3d 1109, 1113 (10th Cir. 2007) (noting that dismissal of unexhausted claims on summary judgment should be without prejudice.)

Dated this 29<sup>th</sup> day of March, 2013.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "William J. Martinez", written over a horizontal line.

William J. Martinez  
United States District Judge