

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

Civil Action No. 12-cv-00383-WYD-KMT

THERON JOHNNY MAXTON, # 85599-071,

Plaintiff,

v.

UNITED STATES OF AMERICA;
BOP DIRECTOR, Washington, D.C.;
T.K COZZA-RHODES, Warden F.C.I.;
CHARLES DANIEL, Warden F.C.I.;
S. COLLINS, Health Service, U.S.P.;
LT. ANTHONY, U.S.P. Florence,

Defendants.

**ORDER AFFIRMING AND ADOPTING RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

This matter is before the Court on the following motions: (1) Defendant United States and BOP Director's Motion to Dismiss for Lack of Jurisdiction filed April 30, 2013, and (2) Defendants Cozza Rhodes, Daniel, Collins, and Anthony's Motion to Dismiss filed June 10, 2013. These motions were referred to Magistrate Judge Boland, who issued a Recommendation of United States Magistrate Judge ("Recommendation") on October 8, 2013.

By way of background, the Recommendation notes that Plaintiff is asserting an Eighth Amendment claim for cruel and unusual punishment. (Recommendation at 4.) Plaintiff seeks monetary damages and an order removing him from the "Smooth Program" at USP Lewisburg. (*Id.* at 5.)

Magistrate Judge Boland recommends that the United States and BOP Director's Motion to Dismiss for Lack of Jurisdiction be granted in part and denied in part. Specifically, he recommends that the claim against the United States be dismissed because "Bivens creates a cause of action only against federal officials in their individual capacities for money damages; it does not create a cause of action against the United States." (Recommendation at 5.) In addition, he recommends that the United States' motion be granted as to the claims against the BOP director (1) in his official capacity "because '[t]here is no such animal as a Bivens suit against a public official tortfeasor in his or her official capacity'" (*id.*) (quotation omitted), and (2) in his individual capacity for failure to state a claim upon which relief can be granted, as Plaintiff failed to establish personal participation. (*Id.* at 7.) It is recommended that the United States' motion be denied insofar as it seeks dismissal of the claims for injunctive relief against the United States and the BOP Director in his official capacity. (*Id.* at 6-7.) Finally, Magistrate Judge Boland recommends that Cozza Rhodes, Daniel, Collins, and Anthony's Motion to Dismiss be denied as Plaintiff "has alleged sufficient facts to put the defendants on notice of plausible claims against them." (*Id.* at 8.)

The Recommendation advised that specific, written objections were due within fourteen (14) days after service of the Recommendation. (Recommendation at 9 n. 5.) No objections were filed to the 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.

Having reviewed the Recommendation, I am satisfied that there is no clear error on the face of the record. I agree with Magistrate Judge Boland's analysis and adopt it in its entirety. Accordingly, it is

ORDERED that the Recommendation of United States Magistrate Judge filed October 8, 2013 (ECF No. 84) is **AFFIRMED AND ADOPTED**. In accordance therewith, it is

ORDERED that Defendant United States and BOP Director's Motion to Dismiss for Lack of Jurisdiction (ECF No. 64) is **GRANTED IN PART AND DENIED IN PART**. It is **GRANTED** as to the claims against the United States and the BOP Director in his official capacity for monetary damages and as to the claims against the BOP Director in his individual capacity. It is **DENIED** insofar as to the claims for injunctive relief against the United States and the BOP Director in his official capacity. It is

FURTHER ORDERED that Defendants Cozza-Rhodes, Daniel, Collins, and Anthony's Motion to Dismiss (ECF No. 77) is **DENIED**.

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).

Dated: November 18, 2013

BY THE COURT:

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