

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

Virgil Green,

Plaintiff,

v.

Case No. 12-14003

Michael Lennox, *et al.*,

Honorable Sean F. Cox

Defendants.

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**ORDER ADOPTING**  
**AUGUST 28, 2013 REPORT AND RECOMMENDATION**

Proceeding *pro se*, Plaintiff Virgil Green brought this prisoner civil rights action under 42 U.S.C. § 1983 against two employees of the Michigan Department of Corrections, Defendants Lennox and Kast.

This matter was referred to Magistrate Judge R. Steven Whalen for all pretrial proceedings, including hearing and determination of all non-dispositive matters pursuant to 28 U.S.C. § 636(b)(1)(A) and/or a report and recommendation on all dispositive matters pursuant to 28 U.S.C. § 636(b)(1)(B).

On August 28, 2013, Magistrate Judge Whalen issued a Report and Recommendation (“R&R”) wherein he recommends that this Court grant Defendants’ Motion to Dismiss or in the Alternative for Summary Judgment and dismiss Plaintiff’s Complaint with prejudice. (Docket Entry No. 15). In the R&R, the magistrate judge concludes that “Plaintiff has failed to properly exhaust his administrative remedies as to either Defendant Kast or Lennox.” (R&R at 4). The R&R explains that while a dismissal for failure to exhaust is ordinarily without prejudice,

§ 1997e(c)(2) provides that a Court may dismiss a claim on the merits without requiring exhaustion. (R&R at 6) (citations omitted). The R&R explains that “[a]t ¶ 35 of his complaint, Plaintiff concedes that he was found guilty of the misconduct that he claims was retaliatory,” and that under Sixth Circuit case law, that finding of guilt forecloses his retaliation claim and the same reasoning applies to Plaintiff’s state-law claims of retaliation and gross negligence. (*Id.* at 6). Thus, the R&R recommends that this Court dismiss Plaintiff’s Complaint with prejudice, notwithstanding his failure to exhaust. (*Id.* at 7).

Pursuant to FED. R. CIV. P. 72(b), a party objecting to the recommended disposition of a matter by a Magistrate Judge must file objections to the R&R within fourteen (14) days after being served with a copy of the R&R. “The district judge to whom the case is assigned shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge’s disposition to which specific written objection has been made.” *Id.*

Petitioner filed timely objections to the R&R on September 12, 2013. (Docket Entry No. 16). Plaintiff makes a variety of objections to the R&R, all of which this Court finds to be without merit.

Plaintiff asserts that “the motion to dismiss should have been denied, or converted into a motion for summary judgment, where extrinsic materials were submitted with the motion.” (Pl.’s Objs. at 2-3). That objection is without merit because Defendants filed a “Motion to Dismiss, or in the Alternative, a *Motion for Summary Judgment.*” (Docket Entry No. 10) (emphasis added).

Plaintiff also asserts that the magistrate judge erred in finding that Plaintiff has failed to properly exhaust his claims against Defendant Lennox. This Court, however, agrees with the

magistrate judge's analysis and conclusions regarding exhaustion. The Court also agrees with the magistrate judge's analysis and conclusion that Plaintiff's claims should be dismissed with prejudice, notwithstanding his failure to exhaust.

Accordingly, IT IS ORDERED that the August 28, 2013 R&R is ACCEPTED AND ADOPTED and Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment (Docket Entry No. 10) is GRANTED and Plaintiff's Complaint shall be DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: September 17, 2013

S/ Sean F. Cox  
Sean F. Cox  
U. S. District Court Judge

I hereby certify that on September 17, 2013, the foregoing document was served upon counsel of record by electronic means and upon Virgil Green by First Class Mail at the address below:

Virgil Green  
189440  
Macomb Correctional Facility  
34625 26 Mile Road  
New Haven, MI 48048

Dated: September 17, 2013

S/ J. McCoy  
Case Manager