

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Eric Ho,

Civil No. 13-245 (DWF/LIB)

Plaintiff,

v.

**ORDER ADOPTING REPORT
AND RECOMMENDATION**

Brian Jett, Warden of FMC Rochester, individually;
Harley G. Lappin, BOP Director, individually;
Correctional Officer Lewis; Correctional Officer
Gora; John Doe, Federal Employees of the BOP
and/or FMC-Rochester, individually; Jane Doe,
Federal Employees of the BOP and/or FMC-Rochester,
individually; Dewayne Dugan; Lieutenant D. Tolliver;
North Central Regional Director, individually; and
Paul M. Laird, North Central Regional Director,
individually,

Defendants.

This matter is before the Court upon the Federal Defendants' objections (Doc. No. 76) to Magistrate Judge Leo I. Brisbois's January 27, 2014 Report and Recommendation (Doc. No. 75) insofar as it recommends that the Amended Complaint not be dismissed against Defendants Gora and Lewis and that summary judgment not be entered in their favor. Plaintiff Eric Ho ("Plaintiff") filed a response to the Federal Defendants' objections (Doc. No. 78) and a declaration (Doc. No. 79) on February 24, 2014.

The Court has conducted a *de novo* review of the record, including a review of the arguments and submissions of counsel, pursuant to 28 U.S.C. § 636(b)(1) and Local

Rule 72.2(b). The factual background for the above-entitled matter is clearly and precisely set forth in the Report and Recommendation and is incorporated by reference for purposes of the Federal Defendants' objections. Having carefully reviewed the record, the Court concludes that the objections do not warrant departure from the Magistrate's Recommendation, as modified below.

The Federal Defendants generally challenge Magistrate Judge Brisbois's recommendation with respect to the claims asserted against Defendants Gora and Lewis. Defendants Gora and Lewis object, in part, to the Magistrate's failure to address their motion for summary judgment on the merits and to consider the declarations submitted in support thereof. The Court agrees with Magistrate Judge Brisbois that, at this early stage, Plaintiff has stated plausible claims against Defendants Gora and Lewis for deliberate indifference to Plaintiff's serious medical need. The Court, however, also addresses the Federal Defendants' summary judgment motion with regard to those claims on the merits and has considered the record evidence pertaining to those claims. Having reviewed the relevant declarations (*see, e.g.*, Doc. Nos. 46 & 48), including Plaintiff's affidavit (Doc. No. 79), the Court finds that genuine issues of material fact exist as to the particular circumstances surrounding the alleged sexual assault and concludes that Defendants Gora and Lewis have not established that they are entitled to qualified immunity at this time. As such, with respect to Defendants Gora and Lewis, the Court denies the Federal Defendants' motion to dismiss and denies the Federal Defendants' motion for summary judgment without prejudice.

Based upon the *de novo* review of the record and all of the arguments and submissions of the parties and the Court being otherwise duly advised in the premises, the Court hereby enters the following:

ORDER

1. The Federal Defendants' objections (Doc. No. [76]) to Magistrate Judge Leo I. Brisbois's January 27, 2014 Report and Recommendation are **OVERRULED**.

2. Magistrate Judge Leo I. Brisbois's January 27, 2014 Report and Recommendation (Doc. No. [75]) is **ADOPTED AS MODIFIED**.

3. The Federal Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment (Doc. No. [41]) is **GRANTED IN PART** and **DENIED IN PART** as follows:

a. To the extent the Federal Defendants seek dismissal of the claims pertaining to Defendants Lewis and Gora's alleged deliberate indifference to Plaintiff's serious medical need, the motion is **DENIED**. To the extent the Federal Defendants seek summary judgment on those claims, the motion is **DENIED** on the current record **WITHOUT PREJUDICE** to renewing the motion after the close of discovery.

b. To the extent the Federal Defendants seek dismissal of the claims pertaining to the Federal Defendants' alleged deliberate indifference to the need to protect Plaintiff from a substantial risk of harm, the motion is **GRANTED**, and such claims are **DISMISSED WITHOUT**

PREJUDICE. To the extent the Federal Defendants seek summary judgment on those claims, the motion is **DENIED AS MOOT.**

c. To the extent the Federal Defendants seek dismissal of the *Bivens* claims against Defendants Jett, Lappin, and Nalley pertaining to the transfer of Defendant Dugan to FMC-Rochester, the motion is **GRANTED**, and such claims are **DISMISSED WITHOUT PREJUDICE.** To the extent the Federal Defendants seek summary judgment on those claims, the motion is **DENIED AS MOOT.**

d. To the extent the Federal Defendants seek dismissal of the *Bivens* claims against Defendants Jett and Tolliver pertaining to the placement of Plaintiff in solitary confinement, the motion is **GRANTED**, and such claims are **DISMISSED WITHOUT PREJUDICE.** To the extent the Federal Defendants seek summary judgment on those claims, the motion is **DENIED AS MOOT.**

e. To the extent the Federal Defendants seek dismissal of *Bivens* and 42 U.S.C. § 1985 conspiracy claims against them, the motion is **GRANTED**, and such claims are **DISMISSED WITHOUT PREJUDICE.** To the extent the Federal Defendants seek summary judgment on those claims, the motion is **DENIED AS MOOT.**

Dated: March 11, 2014

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge