

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

FILED
BILLINGS DIV.
2010 OCT 18 AM 11 22
PATRICK E. DUFFY, CLERK
BY _____
DEPUTY CLERK

JOHN SMITH, JR.,

Plaintiff,

vs.

MIKE FERRITER, Director,
Department of Corrections;
STEVE RAY, Warden, D.C.C.F.;
LORI LOVATO, R.N., D.C.C.F.;
DR. HEIDT,

Defendants.

CV 10-109-BLG-RFC-CSO

Order Adopting Findings and
Recommendations of U.S. Magistrate Judge

United States Magistrate Judge Carolyn Ostby has entered Findings and Recommendation (*Doc. 4*) with respect to the 28 U.S.C. §§ 1915(d)(2), 1915A(a), (b) prescreening of Smith's pro se prisoner complaint (*Doc. 2*). Magistrate Judge Ostby recommends the complaint be dismissed for failure to state a claim upon which relief may be granted.

Upon service of a magistrate judge's findings and recommendation, a party has 14 days to file written objections. 28 U.S.C. § 636(b)(1). Smith has filed timely objections (*Doc. 7*), which obligate this Court to make a *de novo*

determination of those portions of the Findings and Recommendations to which objection is made. 28 U.S.C. § 636(b)(1). For the following reasons, Smith's objections are overruled.

Smith first objects that whether or not the Dawson County Correctional Facility ("D.C.C.F.") was deliberately indifferent to his medical needs is such a fact intensive endeavor that he believes dismissal is improper. Regardless, Magistrate Judge Ostby is correct the record reflects that DCCF was responsive to Smith's needs by changing his medication when he complained.

Smith also asks that his complaint be construed liberally. But that is exactly what Magistrate Judge Ostby did by construing his complaint as one brought under 42 U.S.C. § 1983, even though Smith provided no legal basis for the relief he requested.

After a de novo review, the Court determines the Findings and Recommendation of Magistrate Judge Ostby are well grounded in law and fact and adopts them in their entirety.

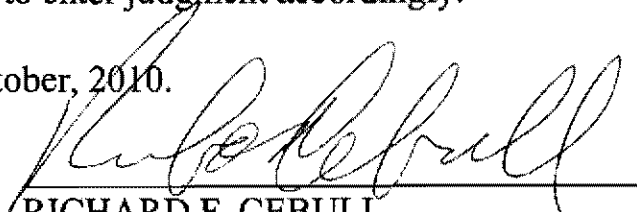
Accordingly, **IT IS HEREBY ORDERED** as follows:

- (1) Smith's complaint (Doc. 2) is **DISMISSED** for failure to state a claim on which relief may be granted;
- (2) Smith's Motion to Appoint Counsel (*Doc. 6*) is **DENIED AS MOOT**;

- (3) the docket in this matter shall reflect that the filing of this action constitutes one strike against Smith pursuant to 28 U.S.C. § 1915(g); and
- (4) this Court certifies, pursuant to Fed. R. App. P. 24(a)(3)(A), that any appeal of its disposition would not be taken in good faith.

The Clerk of Court is directed to enter judgment accordingly.

DATED this 16th day of October, 2010.


RICHARD F. CEBULL
UNITED STATES DISTRICT JUDGE