

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

SUSAN OCKERT,

Plaintiff,

vs.

STATE OF MONTANA, DEPT OF
COMMERCE, DORE SCHWINDEN,
ANDY POOLE, MARY CRAIGLE
and MARTY ROOS, individually
and as agents of the Dept. of Commerce,

Defendants.

CV 12-23-H-DLC-RKS

ORDER

FILED

SEP 19 2012

PATRICK E. DUFFY, CLERK
By _____
DEPUTY CLERK, MISSOULA

Defendants have two motions to dismiss for failure to state a claim pending in this matter. United States Magistrate Judge Keith Strong entered Findings and Recommendation on June 22, 2012, and recommended granting the motions in part. The parties did not timely object to the Findings and Recommendation, and so have waived the right to de novo review of the record. 28 U.S.C. § 636(b)(1).

This Court will review the Findings and Recommendation for clear error.


McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a “definite and firm conviction that a mistake has been committed.” United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000).

After briefing the motions to dismiss, the parties agreed that some claims should be dismissed. Judge Strong found that the finite remaining issues as to whether the Amended Complaint states a claim under 42 U.S.C. § 1983 against Defendants Schwinden and Craigle, and whether Plaintiff’s claim for prospective relief apart from reinstatement states a claim under 42 U.S.C. § 1983 could be resolved in the form of Findings and Recommendations. Judge Strong recommended that the motions be granted. He concluded this matter is early in the discovery period, and that it is appropriate to dismiss some claims without prejudice to allow Plaintiff to state a claim by amendment. After a review of Judge Strong’s Findings and Recommendation, I find no clear error. Accordingly,

IT IS HEREBY ORDERED that Judge Strong’s Findings and Recommendation (doc. 33) are adopted in full. Defendants’ Motion to Dismiss for Failure to State a Claim (doc. 12) is **GRANTED**. Defendants’ Partial Motion to Dismiss - § 1983 Claims (doc. 10) is **GRANTED IN PART** as follows:

- (a) Plaintiff's claims against Defendants Schwinden and Craigle are DISMISSED WITHOUT PREJUDICE;
- (b) Plaintiff's claims against individual Defendants in their official capacities are DISMISSED WITHOUT PREJUDICE;
- (c) Plaintiff's substantive due process claim is DISMISSED WITHOUT PREJUDICE; and
- (d) The State of Montana and the Montana Department of Commerce are DISMISSED from this case WITHOUT PREJUDICE.

DATED this 19th day of September 2012.



Dana L. Christensen, District Judge
United States District Court