

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

FILED

FEB 11 2015

Clerk, U.S. District Court
District Of Montana
Missoula

DURWOOD OSTERHOUT,

CV 14-21-H-DLC-JTJ

Plaintiff,

vs.

ORDER

DAVE JENKINS,

Defendant.

United States Magistrate Judge John T. Johnston entered his Findings and Recommendation on January 6, 2015, recommending that Osterhout's Complaint be dismissed for failure to state a claim. Plaintiff failed to timely object to the Findings and Recommendation, and so waived the right to *de novo* review of the record. 28 U.S.C. § 636(b)(1). The Court will therefore review the record 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). There is no clear error in Judge Johnston's

Findings and Recommendation and the Court adopts them in full.

Judge Strong's previous Order in this case (Doc. 11) stated that Osterhout failed to allege facts sufficiently demonstrating that Dr. Jenkins was deliberately indifferent to Plaintiff's serious medical need. Pursuant to Judge Strong's Order, Osterhout could have filed a second amended complaint by December 15, 2014, to attempt to correct the Complaint's defects with allegations of additional facts. Judge Johnston did not clearly err in finding that Plaintiff failed to file a second amended complaint by December 15, 2014. There is no clear error in Judge Johnston's reliance on Judge Strong's previous finding that Osterhout has failed to state a claim for which relief may be granted. This finding is so clear no reasonable person could suppose an appeal would have merit.

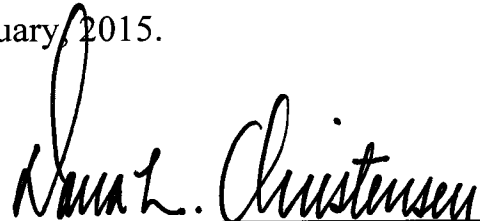
Accordingly, IT IS ORDERED that Judge Johnston's Findings and Recommendation (Doc. 13) are ADOPTED IN FULL. A certificate of appealability is DENIED.

IT IS FURTHER ORDERED that the Clerk of Court shall close this matter and enter judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the docket shall reflect that the Court certifies pursuant to Fed.R.App.P. 24(a)(3)(A) that any appeal of this decision would not be taken in good faith.

IT IS FURTHER ORDERED that the docket shall reflect that this dismissal counts as a strike pursuant to 28 U.S.C. § 1915(g) because Plaintiff has failed to state a claim and his claims are frivolous.

Dated this 11th day of February 2015.

A handwritten signature in black ink, reading "Dana L. Christensen". The signature is written in a cursive style with a large initial "D".

Dana L. Christensen, Chief Judge
United States District Court