

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

FILED

SEP 03 2015

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

RICHARD WAYNE GILLINGHAM,

CV 14-57-H-DLC-JTJ

Plaintiff,

vs.

ORDER

UNIT MANAGER JOVANOVICH and
SERGEANT MCDONALD,

Defendants.

United States Magistrate Judge John T. Johnston entered his Findings and Recommendation on April 9, 2015 recommending that Gillingham's Complaint be dismissed with prejudice for failure to state a claim upon which relief may be granted. Gillingham timely objected to the Findings and Recommendations and so the Court will conduct *de novo* review of the record. 28 U.S.C. § 636(b)(1). The portions of the findings and recommendations not specifically objected to will be reviewed for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). For the reasons listed below, the Court adopts Judge Johnston's Findings and Recommendation in full.

Gillingham filed this action alleging that Defendants denied him shoes for one week. Gillingham further alleged that this resulted in the loss of his job and

prevented him from going to the dining hall to get his meals. Lastly, he included a vague allegation that his treatment was different based upon his national origin.

On February 18, 2015, Judge Johnston issued an Order indicating that the Complaint, as pled, failed to state a claim for relief and gave a detailed account of how the defects could be cured by an amended complaint. Judge Johnston ordered Gillingham to file an amended complaint no later than March 20, 2015. When Gillingham failed to do so, Judge Johnston issued his Findings and Recommendation recommending dismissal.

Gillingham objects to the Findings and Recommendation only insofar as it states that he has shown his ability to communicate with the Court in writing. He states that further written factual allegations would be a waste of the Court's time and requests to be heard orally before a jury. Prior to Judge Johnston's Order dated February 18, 2015, Gillingham had filed his written Complaint (Doc. 2), and two supplements to his Complaint (Docs. 6, 8), the first of which included a detailed and typed statement of facts pertaining to his allegations. Gillingham clearly has the capacity and capability of submitting written documents to the Court. By failing to amend his Complaint with additional facts to cure the defects, Gillingham has failed to state a claim for which relief may be granted.

Judge Johnston did not clearly err in finding there was insufficient factual

allegations to show that the alleged denial of shoes rises to the level of an Eighth Amendment violation. As pled, Gillingham at most alleges a de minimus injury. Further, Gillingham has not shown that he possessed a protected liberty interest in his prison job. Lastly, there is no clear error in Judge Johnston's finding that Gillingham has not provided sufficient information to plausibly suggest intentional discrimination because of national origin. Gillingham states only that American inmates did not face the same "abuse." (Doc. 6 at 3.)

There being no clear error in Judge Johnston's remaining Findings and Recommendation,

IT IS ORDERED that Judge Johnston's Findings and Recommendation (Doc. 11) are ADOPTED IN FULL. Gillingham's Complaint (Doc. 2) is DISMISSED WITH PREJUDICE.

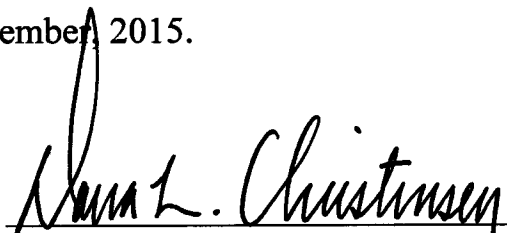
IT IS FURTHER ORDERED that the Clerk of Court shall close this matter and enter judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

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 3rd day of September, 2015.

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

Dana L. Christensen, Chief Judge
United States District Court