

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

**FILED**  
FEB 07 2017  
Clerk, U.S. District Court  
District Of Montana  
Missoula

BENJAMIN KARL SMITH,

Plaintiff,

vs.

WARDEN LEROY KIRKEGARD,  
IRL LAMBERTSON, OFFICER  
FOSNESS, and OFFICER MACHLER,

Defendants.

CV 15-13-H-DLC-JTJ

ORDER

United States Magistrate Judge John Johnston entered his Findings and Recommendations in this matter on January 6, 2017, recommending that Defendant Lambertson's Motion for Summary Judgment be granted. The parties failed to timely object to the Findings and Recommendations, and so waived their right to de novo review of the record.<sup>1</sup> 28 U.S.C. § 636(b)(1)(C). This Court reviews for clear error those findings and recommendations to which no party objects. *See McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear error

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<sup>1</sup> The Court notes that Plaintiff Benjamin Smith did file a response to Defendant Officer Fossens and Officer Machler's Motion for Summary Judgment (Doc. 95), but failed to object to the Findings and Recommendations.

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) (citations omitted).

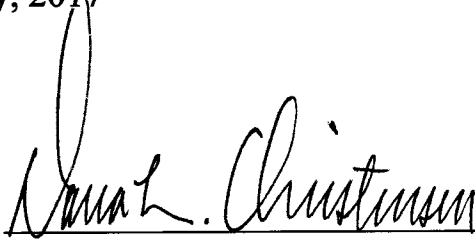
Having reviewed the Findings and Recommendations, the Court finds no clear error in Judge Johnston’s conclusion that Defendant Lambertson’s Motion for Summary Judgment should be granted because Plaintiff’s claims against him are barred by the doctrine of res judicata. Further, the Court finds no clear error in Judge Johnston’s finding that there is insufficient conduct to support a claim under 42 U.S.C. § 1983 because, at most, Defendant Lambertson acted negligently.

Accordingly, there being no clear error in Judge Johnston’s Findings and Recommendations, IT IS ORDERED that:

(1) Judge Johnston’s Findings and Recommendations (Doc. 90) are ADOPTED IN FULL.

(2) Defendant Lambertson’s Motion for Summary Judgment (Doc. 63) is GRANTED.

Dated this 7<sup>th</sup> day of February, 2017

  
Dana L. Christensen, Chief Judge  
United States District Court