

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

JOSEPH WAYNE TICE,

Plaintiff,

v.

DR. KOHUT, MONTANA STATE
PRISON MEDICAL DEPT. (people
unknown), and MONTANA STATE
PRISON (people unknown),

Defendants.

CV-17-58-H-BMM-JTJ

**ORDER ADOPTING MAGISTRATE
JUDGE'S FINDINGS AND
RECOMMENDATIONS**

Plaintiff Joseph Tice ("Tice") filed his Complaint on May 19, 2017. (Doc. 1). The Complaint alleges denial of medical care and seeks emergency injunctive relief in the form of an order to transfer Tice from Montana State Prison to Community Hospital in Missoula. (Doc. 1 at 2.)

United States Magistrate Judge John Johnston issued an Order and Findings and Recommendations in this matter on November 6, 2017. (Doc. 6.) Judge Johnston found that Tice has a "reasonable opportunity to prevail on the merits" of his denial of medical care claim and ordered Defendant Kohut to respond. (Doc. 6 at 2.)

Judge Johnston recommended that the Court deny Tice's motion for injunctive relief. (Doc. 6 at 7.) Judge Johnston further recommended that the Court dismiss Defendants Montana State Prison Medical Department and Montana State Prison ("State Defendants"). (Doc. 6 at 7.)

No party filed objections to Judge Johnston's Findings and Recommendations. The Court has thus reviewed the Findings and Recommendations for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

I. DISCUSSION

Preliminary injunctive relief is an "extraordinary and drastic" remedy. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations omitted). Specifically, in the prison litigation context, Congress has instructed the Court to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system." 18 U.S.C. § 3626(a)(2). As Judge Johnston acknowledged, transferring Tice from incarceration to a hospital would have "significant adverse impact on public safety and the operation of the criminal justice system." (Doc. 6 at 5.) The Court finds no clear error in Judge Johnston's recommendation to deny the relief sought.

Judge Johnston further recommends that the Court dismiss the State Defendants because the State of Montana has not waived its Eleventh Amendment

immunity against suit in federal court. (Doc. 6 at 2.) Montana has specifically waived its immunity for tort claims brought in state court. Mont. Code Ann. § 2-9-311. The State has enacted no corresponding waiver for claims brought in federal court. The Court finds no error in Judge Johnston's recommendation to dismiss the State defendants.

II. ORDER

Accordingly, **IT IS ORDERED** that Magistrate Judge Johnston's Findings and Recommendations (Doc. 6) is **ADOPTED IN FULL**.

Defendants Montana State Prison Medical Department and Montana State Prison are **DISMISSED** pursuant to the Eleventh Amendment.

Tice's motion for injunctive relief is **DENIED**.

DATED this 28th day of November, 2017.



Brian Morris
United States District Court Judge