

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

MICHAEL ALBERT,

Plaintiff,

v.

HEIDI ABBOT, et. al.,

Defendants.

CV-17-69-H-BMM-JTJ

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

Plaintiff Michael Albert ("Albert") filed a complaint on June 12, 2017, alleging six civil rights and sexual harassment claims arising under the Eighth and Fourteenth Amendments. (Doc. 2.) Defendants Alvin Fode, Jim Salmonsens, Steve Kremer, Russ Dahaher, and Leroy Kirkegard moved to Dismiss Count IV of the Complaint with prejudice because Albert cannot assert claims against them individually under the Americans with Disabilities Act. (Doc. 15.)

United States Magistrate Judge John Johnston issued Findings and Recommendations in this matter on May 3, 2018. (Doc. 21.) Judge Johnston found

that because Albert had titled Count IV an Eighth Amendment claim but raised allegations that could be construed as ADA claims, the Court must liberally construe Count IV to raise claims under both the ADA and the Eighth Amendment. (Doc. 21 at 2.) Judge Johnston further found that the ADA does not provide for suits against state officials in their individual capacity. *Id.* at 3.

Judge Johnston recommended that Defendants' motion should be granted as to ADA claims raised in Count IV against Defendants in their individual capacities, and as to ADA claims raised in Count IV against Defendants Fode, Kremer, Dahaher, and Kirkegard in their official capacities. *Id.* at 4-5. Judge Johnston further recommended that the Court should deny the motion as to Albert's Eighth Amendment claims raised in Count IV and as to ADA claims raised in Count IV against Defendant Salmonsens. *Id.* at 5.

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). The Court finds no error in Judge Johnston's Findings and Recommendations, and adopts them in full.

I. ORDER

Accordingly, **IT IS ORDERED** that Magistrate Judge Johnston's Findings and Recommendations (Doc. 21) is **ADOPTED IN FULL**.

IT IS FURTHER ORDERED that Defendants Fode, Salmonsens, Kremer, Danaher, and Kirkegard's Motion to Dismiss Count IV of the Complaint (Doc. 15) is **GRANTED IN PART** as to Albert's ADA claims raised in Count IV against Defendants in their individual capacities and as to Defendants Fode, Kremer, Dahaher, and Kirekegard in their official capacities.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Count IV of the Complaint (Doc. 15) is **DENIED IN PART** as to Albert's Eighth Amendment claims raised in Count IV, and as to Albert's ADA claims raised in Count IV against Defendant Salmonsens in his official capacity as Interim Warden of Montana State Prison. These Defendants are required to respond to these claims.

DATED this 18th day of July, 2018.



Brian Morris
United States District Court Judge