

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

CHARLES CLARY,
Plaintiff,

vs.

REGINALD MICHAEL, et al,
Defendants.

CV 19-66-H-BMM-JTJ

ORDER

United States Magistrate Judge John Johnston entered two Findings and Recommendations in this matter on March 3, 2021. Docs. 58 & 59. Neither party filed objections to either Findings and Recommendations. The Court reviews for clear error the portions of a magistrate judge’s findings and recommendations to which a party fails to object. *Rosling v. Kirkegard*, 2014 WL 693315, at *3 (D. Mont. Feb. 21, 2014). Clear error exists if the Court maintains a “definite and firm conviction that a mistake has been committed.” *United States v. Syraz*, 235 F.3d 422, 427 (9th Cir. 2000).

FINDINGS AND RECOMMENDATION (DOC. 59).

Plaintiff Charles Clary (“Clary”) is a Montana State Prison (“MSP”) prisoner proceeding pro se on a 42 U.S.C. § 1983 claim against several State of Montana

Department of Corrections (“DOC”) employees. Clary’s complaint alleges assault and harassment in violation of 34 U.S.C. § 30201. Defendants filed several motions for summary judgment. Docs. 36 & 40. Judge Johnston determined that Clary had failed to exhaust his administrative remedies. Judge Johnston recommended that Defendants’ motions for summary judgment (Docs. 36 & 40) should be granted. The Court finds no clear error in Judge Johnston’s Findings and Recommendation (Doc. 59).

The record indicates that Clary filed several informal grievances related to this incident. Clary failed to advance to the formal grievance process all but one grievance. This grievance was denied, and Clary did not appeal the denial. The record indicates that Clary previously had taken separate and unrelated grievances through the DOC appeals process seven times. He was aware of the procedures. The failure to advance the informal grievances or appeal the denial of the formal grievance bars the present claims, and the case must be dismissed. *Woodford v. Ngo*, 548 U.S. 81, 87–88 (2006).

FINDINGS AND RECOMMENDATION (DOC. 58).

Clary filed the following motions: Motion to Compel (Doc. 31), Supplemental Motion to Compel and for Temporary Restraining Order (Doc. 32), Motion for Judicial Resolution (Doc. 34), Motion for Leave to Conventionally File (Doc. 43),

Motion to Strike (Doc. 45), Motion to Strike (Doc. 46), Motion for Continuance (Doc. 52), and Motion for Subpoena (Doc. 53). Judge Johnston recommended that Clary's Motion for Temporary Restraining Order (Doc. 32) should be denied. Judge Johnston denied all remaining motions. The Court finds no clear error in Judge Johnston's in his analysis in Findings and Recommendation (Doc. 58).

Regarding Clary's Motion to Compel (Doc. 31) and Supplemental Motion to Compel and for Temporary Restraining Order (Doc. 32), Judge Johnston correctly determined that Clary failed reasonably to limit the scope of his discovery request and failed to satisfy the burden that he must meet for a temporary restraining order. Doc. 58 at 4–5. Regarding Clary's Motion for Judicial Resolution (Doc. 34), Judge Johnston correctly determined that granting this motion would amount to granting impermissibly an advisory opinion. *Id.* at 5–6.

Judge Johnston correctly determined that Clary failed to pursue his Motion for Leave to Conventionally File (Doc. 43). Judge Johnston correctly determined that Clary's Motions to Strike (Doc. 45 & 47) improperly requests that the court strike the relevant documents rather than address the merits of the documents. Doc. 58 at 7. Regarding Clary's remaining motions (Docs. 52 & 53), Judge Johnston correctly determined that these motions are untimely because the deadlines for discovery have long since passed.

Clary's motions suffer a fatal flaw entirely separate from Judge Johnston's analysis in his Findings and Recommendations (Doc. 58). The Court's favorable disposition toward Defendants' dispositive Motions for Summary Judgment (Docs. 36 & 40) moots Clary's motions.

IT IS HEREBY ORDERED:

1. Judge Johnston's Finding and Recommendations (Doc. 59) is **ADOPTED IN FULL**.

- Defendants Michael, Guyer, Griner, Keele, Hossack, Zacher, and Weddington's Motion for Summary Judgment (Doc. 36) is **GRANTED**.
- Defendant Kraus' Motion for Summary Judgment (Doc. 40) is **GRANTED**.

2. Judge Johnston's Findings and Recommendations (Doc. 58) is **ADOPTED IN FULL**.

- Plaintiff Clary's Motion for Temporary Restraining Order (Doc. 32) is **DENIED**.

Dated the 5th day of April, 2021.



Brian Morris, Chief District Judge
United States District Court