

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

FILED

SEP 11 2018

Clerk, U.S. Courts
District Of Montana
Missoula Division

TOBY KITTRELL,

Plaintiff,

vs.

MARC JOHNSON, LUKE
JOHNSON, LIZ FISHER, and
HEATHER SMITH,

Defendants.

CV 18-00105-M-DLC-JCL

ORDER

United States Magistrate Judge Jeremiah C. Lynch entered his Order and Findings and Recommendations (Doc. 4) in this case on June 20, 2018, recommending that Plaintiff Toby Kittrell's ("Kittrell") complaint be dismissed. Because Kittrell did not object to the Findings and Recommendations, he has waived his right to de novo review thereof. 28 U.S.C. § 636(b)(1)(C). This Court reviews for clear error findings and recommendations to which no party objects. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc); *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear error exists when 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 Judge Lynch's Findings and Recommendations, this Court finds no clear error in the conclusion that Kittrell's Complaint should be dismissed for failure to state a viable claim against Defendants for First Amendment retaliation. As Judge Lynch points out, Kittrell's speech was not protected and, even if it were, the alleged infringement of his freedom of speech was justified because it was reasonably related to a legitimate penological interest. *See, e.g., Lockett v. Suardini*, 526 F.3d 866, 874 (6th Cir. 2008); *Turner v. Safely*, 482 U.S. 78, 89 (1987).

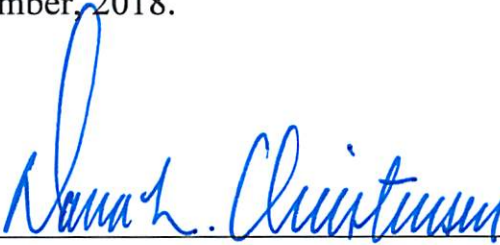
Accordingly, IT IS ORDERED that Judge Lynch's Findings and Recommendations (Doc. 4) are ADOPTED IN FULL. This matter is DISMISSED for failure to state a claim.

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

IT IS FURTHER ORDERED that the Clerk of Court is directed to have the docket reflect that the Court certifies pursuant to Rule 24(a)(3)(A) of the Federal Rules of Appellate Procedure that any appeal of this decision would not be taken in good faith. The record makes plain the Complaint lacks arguable substance in law or fact.

IT IS FURTHER ORDERED that the Clerk of Court is directed to have the docket reflect that this dismissal counts as a strike pursuant to 28 U.S.C. § 1915(g) because Kittrell failed to state a claim upon which relief may be granted.

DATED this 11th day of September, 2018.



Dana L. Christensen, Chief Judge
United States District Court