

NOV 29 2018

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

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

WAYNE DALE KELLBERG,

Plaintiff,

vs.

FBI SUPERVISOR RICKY  
SHELBOURNE,

Defendant.

CV 18-176-M-DLC-JCL

ORDER

United States Magistrate Judge Jeremiah C. Lynch entered his Order and Findings and Recommendation on October 12, 2018, granting Plaintiff Wayne Dale Kellberg's motion for leave to proceed in forma pauperis and recommending that the Court dismiss Kellberg's complaint without leave to amend. (Doc. 3.) Kellberg failed to timely object to the Findings and Recommendations,<sup>1</sup> and so waived the right to de novo review of the record. 28 U.S.C. § 636(b)(1). This Court reviews for clear error those findings and recommendations to which no party objects. *See Thomas v. Arn*, 474 U.S. 140, 149-53 (1985). Clear error

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<sup>1</sup> Kellberg filed a proposed amended complaint before the deadline for his objections. (Doc. 4.) That document is considered within the court's discussion of whether Kellberg should be granted leave to amend.

exists if the Court is left with a “definite and firm conviction that a mistake has been made.” *Wash. Mut., Inc. v. United States*, 856 F.3d 711, 721 (9th Cir. 2017) (citation omitted).

Having reviewed the Findings and Recommendation (Doc. 4), the Court finds no clear error in Judge Lynch’s recommendation that this case be dismissed. Kellberg alleges slander on the part of a federal government official acting in his official capacity, and the United States has not waived sovereign immunity as to slander. 28 U.S.C. § 2680(h). Because the government cannot be sued without its consent, Kellberg’s complaint cannot survive.

Nor does the Court find clear error in the recommendation to dismiss this case with prejudice rather than to grant leave to amend. The standard for dismissal with prejudice is high: “[d]ismissal of a pro se complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.” *Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007). However, the Court agrees with Judge Lynch that is met here. As a matter of law, a claim for slander cannot be brought against the United States, and Kellberg cannot plead around this clear legal principle. Further, Kellberg filed an amended complaint after the Findings and Recommendation were entered, and the amended pleading does not correct the deficiencies identified by Judge Lynch.

Accordingly, IT IS ORDERED that:

(1) Judge Lynch's Findings and Recommendation (Doc. 3) are ADOPTED  
IN FULL;

(2) Kellberg's complaint is DISMISSED with PREJUDICE; and

(3) The Clerk of Court shall close this case and enter judgment pursuant to  
Federal Rule of Civil Procedure 58.

DATED this 29<sup>th</sup> day of November, 2018.



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Dana L. Christensen, Chief Judge  
United States District Court