

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

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EDWARD KOEHL, : 10 Civ. 3808 (SHS)

Plaintiff, :

-against- : ORDER

DR. FREDERICK BERNSTEIN, *ET AL.*, :

Defendants. :

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SIDNEY H. STEIN, U.S. District Judge.

On June 6, 2011, Magistrate Judge Gabriel W. Gorenstein issued a Report and Recommendation recommending that defendants' motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) be granted in part and denied in part. The Court has received plaintiff's objections to the Report and Recommendation dated August 19, 2011, and September 13, 2011. After a *de novo* review of the Report and Recommendation dated June 6, 2011, and plaintiff's objections dated August 19, 2011, and September 13, 2011,

IT IS HEREBY ORDERED that:

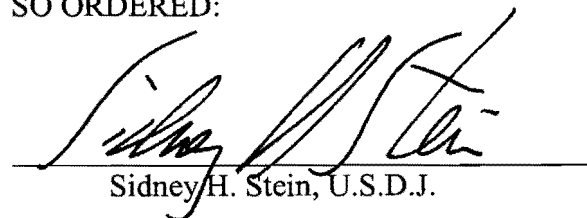
1. Magistrate Judge Gorenstein's Report & Recommendation is adopted; and
2. Defendants' motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) [docket no. 25] is granted in part and denied in part as follows: (1) all claims against the State of New York for damages and against the defendants brought in their official capacities are DISMISSED; (2) the Fourteenth Amendment due process claims against Brennan, Fischer, and Hilliar based on disciplinary proceedings are DISMISSED; (3) the First Amendment retaliation claims (a) against Evans, Edwards, Herman, and Tracy with regard to Koehl's executive

clemency application, and (b) against Fischer and Brennan with regard to the tier III misbehavior report and against Sawyer with regard to the tier II misbehavior report are DISMISSED and (4) the Eighth Amendment claims (a) against Cunningham for his involvement in Koehl's 60 day assignment to a cell with "chain smokers," (b) against Fischer, Ercole, Lee, Cunningham, and Dr. Bernstein for their failure to enforce the New York ban on smoking in prisons, (c) against Ercole, Cunningham, and Lee with regard to Koehl's cell assignments and transfers generally, (d) against Fischer, Ercole, and Lee for their failure to provide Koehl with weather appropriate clothing, (e) against Fischer and Wright for their failure to provide Koehl with dental care, (f) against Dr. Weinstein for his failure to treat Koehl's cervical spine and back injuries, and (g) against Dr. Bernstein, Dr. Fein, Dr. Wright, Ercole, Lee, Cunningham, and Fischer for their failure to treat Koehl's lung disease are DISMISSED.

The following claims remain: (1) Fourteenth Amendment Due Process claims against Harvey, Sawyer, and Russo based on disciplinary proceedings; (2) First Amendment retaliation claims (a) against Cunningham with regard to Koehl's facility transfer, (b) against Cunningham with regard to Koehl's executive clemency application, and (c) against Russo and Harvey with regard to Koehl's tier III misbehavior report and against Hilliar with regard to the tier II misbehavior report; (3) Eighth Amendment claims (a) against Ercole for his involvement in Koehl's 60 day assignment to a cell with "chain smokers," and (b) against Fischer, Dr. Wright, and Dr. Bernstein for their failure to treat Koehl's cervical spine and back injuries.

Dated: New York, New York
September 21, 2011

SO ORDERED:



Sidney H. Stein, U.S.D.J.