

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

CHRISTOPHER LEE GAITHER, PRO SE,	§	
TDCJ-CID No. 1821218,	§	
Previous TDCJ-CID No. 805423,	§	
Previous TDCJ-CID No. 887150,	§	
USM No. 29999-280,	§	
	§	
Plaintiff,	§	
	§	
v.	§	2:15-CV-0104
	§	
Asst. Warden GREGORY S. DAVID,	§	
Cpt. RAY D. CRUZ,	§	
Cpt. GENE W. SMITH,	§	
CO V DEANA R. DAVIS, and	§	
Sgt. ANDREW M. GRATZ,	§	
	§	
Defendants.	§	

ORDER OF DISMISSAL

Plaintiff CHRISTOPHER LEE GAITHER, while a prisoner confined in the Texas Department of Criminal Justice, Correctional Institutions Division, filed suit pursuant to Title 42, United States Code, section 1983 complaining against the above-referenced defendants and has been granted permission to proceed *in forma pauperis*.

On March 22, 2016, the Magistrate Judge issued a Report and Recommendation analyzing plaintiff's claims and recommending dismissal with prejudice to being asserted again until the *Heck* conditions are met, *Johnson v. McElveen*, 101 F.3d 423, 424 (5th Cir. 1996), with prejudice as frivolous, and without prejudice pursuant to Rule 12(b)(1), Fed.R.Civ.Pro.

On April 7, 2016, plaintiff filed his Objections to the Report and Recommendation. By his Objections, plaintiff accuses the Magistrate Judge of ignoring or omitting his allegations that

defendants GRATZ and CRUZ utilized excessive force against plaintiff because of his race, as evidenced by his allegations of their use of “racist slurs” and “hostile epithets” toward him. This, plaintiff argues, shows the motive for their use of excessive force. Whatever the motive for defendants’ alleged use of excessive force, the Magistrate Judge expressly noted, on page 7 of the Report and Recommendation, that the sole relief plaintiff requested is monetary relief against them in their official capacities. Defendant was very explicit in his complaint, see page 4 of plaintiff’s original complaint at Section VI. As the Magistrate Judge explained in his Report and Recommendation, monetary relief cannot be awarded against the defendants’ in their official capacities.

Plaintiff requests a Spears hearing to permit him to clarify or amend and amplify his pleadings; however, in the six pages of his Objections, plaintiff does not state what he would change or how he would cure the pleading defect identified in the Report and Recommendation.

The Court has made an independent examination of the records in this case and has examined the Magistrate Judge’s Report and Recommendation, as well as the objections submitted by plaintiff.

The Court is of the opinion that plaintiff’s objections should be OVERRULED and the Report and Recommendation of the United States Magistrate Judge should be ADOPTED by the United States District Court.

This Court, therefore, does OVERRULE plaintiff’s objections, and does hereby ADOPT the Report and Recommendation of the United States Magistrate Judge.

IT IS THEREFORE ORDERED that the Civil Rights Complaint by CHRISTOPHER LEE GAITHER is DISMISSED WITH PREJUDICE TO BEING ASSERTED AGAIN UNTIL

THE HECK CONDITIONS ARE MET, *Johnson v. McElveen*, 101 F.3d 423, 424 (5th Cir. 1996), WITH PREJUDICE AS FRIVOLOUS, and WITHOUT PREJUDICE PURSUANT TO RULE 12(b)(1), FED.R.CIV.PRO.

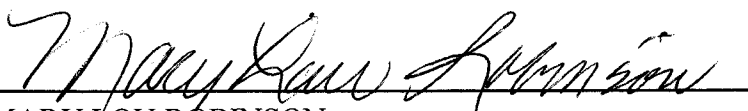
LET JUDGMENT BE ENTERED ACCORDINGLY.

All pending motions are DENIED.

The Clerk shall send a copy of this order to plaintiff and to any attorney of record. The Clerk shall also mail copies of this order to TDCJ-Office of the General Counsel, P.O. Box 13084, Austin, TX 78711; and to the Pro Se Clerk at the U.S. District Court for the Eastern District of Texas, Tyler Division.

It is SO ORDERED.

Signed this the _____ 14th day of June, 2016.


MARY LOU ROBINSON
United States District Judge