

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

36  
AR

**CASE CLOSED**

HOWARD LAWSON,

Plaintiff )

vs. )

Civil Action No. 00-447

Judge Robert J. Cindrich/

DR. MOHAMED ISMAEL, DR. SACKS, )

Magistrate Judge Sensenich

PAUL STOWITZKY, Deputy, and )

M.J. MAHLMEISTER, Unit Manager, )

Defendants )

Re: Doc. #15

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MEMORANDUM ORDER

Plaintiffs' complaint was received by the Clerk of Court on March 6, 2000, and was referred to United States Magistrate Judge Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

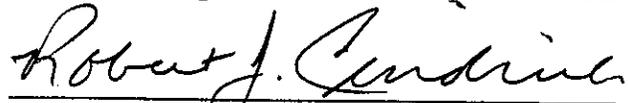
The magistrate judge's report and recommendation, filed on February 14, 2001, recommended that the complaint be dismissed for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6) and that Plaintiff's motion for sanctions be denied. Service of the report and recommendation was made on plaintiff at SCI Pittsburgh and on counsel for defendants. No objections to the report and recommendation were filed. After review of the pleadings and documents in the case, together with the report and recommendation, the following order is entered:

AND NOW, this 11 day of June, 2001;

IT IS HEREBY ORDERED that the complaint is dismissed for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6);

IT IS FURTHER ORDERED that Plaintiff's motion for sanctions is denied.

The report and recommendation of Magistrate Judge Sensenich, dated February 13, 2001 is adopted as the opinion of the court.



Robert J. Cindrich  
United States District Judge

cc: Ila Jeanne Sensenich  
U.S. Magistrate Judge

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 Plaintiff )  
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 vs. )  
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 DR. MOHAMED ISMAEL, DR. SACKS, )  
 PAUL STOWITZKY, Deputy, and )  
 M.J. MAHLMEISTER, Unit Manager )  
 )  
 Defendants )

Civil Action No. 00-447  
Judge Robert J. Cindrich/  
Magistrate Judge Sensenich  
Re: Doc. # 15

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**MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

**RECOMMENDATION**

It is recommended that the complaint be dismissed for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6) and that Plaintiff's motion for sanctions be denied.

**REPORT**

**A. Relevant Procedural History**

At all times relevant herein, Howard Lawson (Plaintiff) was incarcerated in the State Correctional Institution at Greene (SCI-Greene).<sup>1</sup> Plaintiff filed a motion (Doc. #1) to proceed in forma pauperis (IFP) on March 6, 2000. That motion was granted (Doc. #2) on March 22, 2000 and the complaint (Doc. #3) was filed. The complaint names the following individuals as defendants: Dr. Mohamed Ismael, a psychiatrist at SCI-Greene, and the following individual

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<sup>1</sup> Since the initiation of this suit, Plaintiff has been transferred to SCI-Pittsburgh. (Doc. #6.)

employees at SCI-Greene, Dr. Sacks, a psychologist, Paul Stowitzky, Deputy Superintendent for Centralized Services for Inmates, and M.J. Mahlmeister, the Unit Manager for Plaintiff's cell block.

Defendant Ismael filed a motion to dismiss (Doc. #13) and a brief in support (Doc. #14) on September 20, 2000. The remaining Defendants filed a motion to dismiss (Doc. #15) and a brief in support (Doc. #16) on September 25, 2000.<sup>2</sup> Both motions to dismiss assert that Plaintiff's complaint fails to state a claim upon which relief can be granted. On September 28, 2000, Plaintiff filed a response (Doc. #17) to Defendant Ismael's motion to dismiss. On October 24, 2000, Plaintiff filed a response (Doc. #19) to the other three Defendants' motion to dismiss. The motions to dismiss are now ready for disposition.

#### **B. Standard of Review - Motion to Dismiss**

Dismissal is proper under Rule 12(b)(6) if, as a matter of law, it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). The complaint must be read in the light most favorable to the plaintiff and all well-pleaded, material allegations of fact in the complaint must be taken as true. Estelle v. Gamble, 429 U.S. 97 (1976). Moreover, a court must employ less stringent standards when considering pro se pleadings than when judging the work product of an attorney. Haines v. Kerner, 404 U.S. 519 (1972). Notwithstanding this rule of liberal construction, a pro se plaintiff must allege specific facts supporting his claims to withstand dismissal for failure to state a claim. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991)

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<sup>2</sup> Defendant Ismael is represented by privately retained counsel. The other three Defendants are all represented by the Pennsylvania Attorney General's office.

("This is so because a pro se plaintiff requires no special legal training to recount the facts surrounding his alleged injury, and he must provide such facts if the court is to determine whether he makes out a claim on which relief can be granted."); Bracey v. Buchanan, 55 F.Supp.2d 416, 421 (E.D. Va. 1999); Wesley v. Don Stein Buick, Inc., 996 F.Supp. 1299, 1304 (D. Kan. 1998).

In addition to the complaint, courts may consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case in disposing of a motion to dismiss under Rule 12(b)(6). Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 n.2 (3d Cir. 1994); Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3d Cir. 1990).

To state a claim for relief under section 1983, a plaintiff must meet two threshold requirements. He must allege: 1) that the asserted misconduct was committed by a person acting under color of state law; and 2) that as a result, he was deprived of rights, privileges, or immunities secured by the Constitution or laws of the United States. West v. Atkins, 487 U.S. 42 (1988). A claim asserted under section 1983 must be dismissed if the court is satisfied that no relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v. King & Spalding, 467 U.S. at 73.<sup>3</sup>

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<sup>3</sup> The screening provisions of the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996), codified in relevant part at 28 U.S.C. § 1915(e)(2) and 42 U.S.C. § 1997e are applicable herein. However, those provisions are not necessary to the disposition of this case and, therefore, are not discussed, other than to note that 42 U.S.C. § 1997e(a) makes exhaustion of administrative remedies mandatory before initiating suit. In the instant suit, contrary to Defendants' contentions, Plaintiff has exhausted his administrative remedies with respect to his claims that he received inadequate psychiatric treatment. Plaintiff filed a grievance and pursued it to final appeal. (Doc. #17 and exhibits attached thereto.) Plaintiff seeks sanctions against Defendants' attorneys for their failure to adequately investigate their assertions that he failed to

### C. Plaintiff's Complaint

Plaintiff alleges that Defendants have known that he has had a long history of mental illness. He alleges that on or around February 11, 1999, he was transferred into SCI-Greene's Special Management Unit (SMU). He does not identify the reason for his transfer. On or about March 13, 1999, he was temporarily transferred to a Pittsburgh forensic unit for psychiatric evaluation and recommendations after a suicide threat. About March 25, 1999, he was transferred back to SCI-Greene's SMU and placed in a psychiatric observation cell. The complaint does not reveal when he was released from that cell. Then, on June 2, 1999, he was again placed in an SMU psychiatric observation cell after making a suicide threat. However, on that same day, he was transferred to the SCI-Greene medical department's psychiatric cell for treatment after he banged his head against a window in the SMU. On June 10, Plaintiff was transferred back to the SMU psychiatric observation cell. The complaint does not reveal when he was released from the SMU, but he was returned to the SMU's psychiatric observation cell around July 16, 1999 after he threatened to kill himself. At some point he was again released from the SMU's psychiatric observation cell only to return there on September 25, 1999, again after threatening suicide. In October 1999, Plaintiff was several times placed either in the SMU's psychiatric observation cell or in the medical department's psychiatric observation cell. On October 12, 1999, he was placed in a four part restraining device after he cut himself with a piece of glass.

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exhaust all three levels of the grievance process. (Docs. #17 and #19.) However, "[s]anctions should be sparingly imposed" Guzzello v. Venteau, 789 F.Supp. 112, 118 (S.D.N.Y. 1992), and it does not appear that the conduct of the attorneys in this case rises to the level that requires imposition of sanctions. Accordingly, Plaintiff's request for sanctions should be denied.

On November 7, 1999, Plaintiff filed a grievance, which stated in relevant part:

[y]esterday, 11-6-99, I talked to Dr. Mohamed Ismael who is my psychiatrist who the institution assigned to me. I explain[ed] to him that I need some help and ask[ed] him could he send me to the (MHU) [sic] or Waymart psychiatric hospital because I am extremely depress[ed], hearing voice [sic] and having suicidal thoughts. He refuse[d] my request and threatened to put me in the hard cell and strap me down to the bed if I do anything to hurt myself. . . .

I personally talked to Dr. Mohamed Ismael on the above date and he told me that the only help he is going to give me is medications. . . .

(Doc. # 17, Ex. 1.)

Notwithstanding the fact that he was sent to a forensic unit in Pittsburgh for a psychiatric evaluation and recommendation as to a course of treatment and notwithstanding the numerous times he was placed in a special psychiatric observation cell in response to his suicide threats and notwithstanding Dr. Ismael's meeting with him and suggesting treatment with psychotropic medication for his mental illness, Plaintiff complains that Defendants were deliberately indifferent to his medical needs. Subsequent to the filing of the grievance, he was again placed in the medical department's psychiatric observation cell on November 19, 2000 for, among other reasons, a suicide threat.

Plaintiff's complaint alleges that Defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by denying him medical care for his mental health condition. In addition, he alleges state law claims, asserting that Defendants violated Article 1, Section 13 of the Pennsylvania Constitution. Plaintiff also asserts that he has a cause of action under 42 Pa.C.S. § 5524 (which provides a two-year statute of limitations for various torts). Plaintiff brings this action against Defendants in both their individual and official capacities. His complaint seeks declaratory and injunctive relief as well as compensatory and punitive damages

against each Defendant.

**D. Discussion**

**(1) Eighth Amendment claims against all Defendants**

Plaintiff complains that Defendants violated his Eighth Amendment right to be free of cruel and unusual punishment.<sup>4</sup> The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

It has been held that the Eighth Amendment proscribes punishments that “involve the unnecessary and wanton infliction of pain.” Estelle v. Gamble, 429 U.S. at 102-03 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)(joint opinion of Stewart, Powell and Stevens, J.J.)).

Furthermore, the Supreme Court has held that “deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment.” Estelle, 429 U.S. at 104 (internal quotations omitted). The Court has held that “deliberate indifference” occurs when a prison “official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference.” Farmer v. Brennan, 511 U.S. 825, 837 (1994). As a corollary of the deliberate indifference standard, mere negligence by prison staff and physicians in treating prisoners is not sufficient to state an Eighth Amendment violation. Estelle, 429 U.S. at 105-06. The Supreme Court has held that

in the medical context, an inadvertent failure to provide adequate medical care

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<sup>4</sup> Technically, the Eighth Amendment applies to the states through the Fourteenth Amendment. See Estelle v. Gamble, 429 U.S. at 101-02 (citing Robinson v. California, 370 U.S. 660 (1962)).

cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Id. Moreover, deliberate indifference to a prisoner's medical needs is not only manifested by a health care provider's response or lack thereof to a prisoner but also by prison staff intentionally denying or delaying access to medical care or by intentionally interfering with the treatment once prescribed. Id. at 104-05.<sup>5</sup>

Defendants argue that the complaint's allegations are insufficient to state a cause of action under the Eighth Amendment because they fail to allege deliberate indifference but merely reveal his disagreement with the course of psychiatric care provided to him. Defendants essentially argue that from February 11, 1999 until November 25, 1999, Defendants' responses to Plaintiff's psychiatric needs are amply documented by the complaint. Over the course of these nine months, in response to Plaintiff's threats of suicide, Defendants placed him in a special psychiatric observation cell ten times. In addition, as early as March 13, 1999, merely one month after the initial problems identified in the complaint occurred, Defendants sent him to a Pittsburgh forensic unit for a psychiatric evaluation and recommendation as to a course of treatment. In addition, the Court takes note of Plaintiff's grievance attached to Doc. #17,

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<sup>5</sup> Plaintiff does not allege that Defendants denied him access to a psychiatrist or delayed his access to a psychiatrist or that once a course of treatment was prescribed, the Defendants intentionally interfered with that course of treatment. Rather, Plaintiff argues in essence that his treatment was so inadequate as to amount to no treatment at all.

wherein his own words revealed that Defendant Ismael wanted to treat him with psychotropic medications. Plaintiff objected to this course of treatment, wanting instead to be sent to the "MHU or Waymart Psychiatric Hospital." (Doc. #17, Ex. 1.)

The Court agrees with Defendants that the allegations of the complaint, in addition to the papers on file with the Court, even when read in a light most favorable to Plaintiff, simply fail to state a cause of action under the Eighth Amendment. It is apparent that Defendants were not deliberately indifferent to Plaintiff's psychiatric illness and suicide threats. His allegations simply fail as a matter of law to establish the deliberate indifference required for an Eighth Amendment violation. Accepting the allegations as true, they would not establish that Defendants knew of and disregarded an excessive risk to Plaintiff's health. At most, the allegations establish that they could have done more or treated Plaintiff's mental illness more aggressively or in a better fashion by, e.g., transferring him to a psychiatric hospital. This does not constitute deliberate indifference; it represents merely a disagreement as to the quality of medical treatment. See Daniels v. Delaware, 120 F.Supp.2d 411 (D. Del. 2000).

In Daniels, a plaintiff-prisoner alleged an Eighth Amendment violation due to the prison's deliberate indifference in failing to provide her with adequate psychiatric treatment. In rejecting her claim, the court held that

courts in this circuit have repeatedly recognized that deliberate indifference cannot be established where an inmate receives treatment, even if that treatment is not exactly the type of treatment the inmate requests. Norris v. Frame, 585 F.2d 1183, 1186 (3d Cir.1978); Calhoun v. Horn, 1997 WL 672629, \*4 (E.D. Pa. Oct. 29, 1997); Farley v. Doe, 840 F.Supp. 356 (E.D. PA. 1993) (holding that plaintiff did not establish constitutional violation where plaintiff received extensive medical treatment, but treatment was not entirely to his liking). . . . As this Court stated in Carrigan [v. Delaware], 957 F. Supp 1376, 1384 (D. Del. 1997),] "courts generally refrain from second- guessing the propriety or adequacy

of a particular type of psychological or psychiatric treatment and from recognizing claims of negligence, mistake or difference of opinion." 957 F.Supp. at 1384. Because . . . the record indicates that Plaintiff received treatment for her psychological condition, the Court concludes that Plaintiff's allegations are insufficient to support a finding that the Administrative Defendants were deliberately indifferent to Plaintiff's psychological needs.

Id. at 427-28. See also Norris v. Frame, 585 F.2d 1183, 1186 (3d Cir.1978) ("Where the plaintiff has received some care, inadequacy or impropriety of the care that was given will not support an Eighth Amendment claim."); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir.1980) ("[A] mere difference of opinion between the prison's medical staff and the inmate as to the diagnosis or treatment which the inmate receives does not support a claim of cruel and unusual punishment."), cert. denied, 450 U.S. 1041 (1981); Roberts v. DeRamus, 1988 WL 109095, at \*1 (E.D. Pa. Oct. 17, 1988) (holding that inmate's demand for "certain type of treatment" fails to state a claim under the Eighth Amendment).

Plaintiff counters however, that mere perfunctory treatment can constitute a violation of his Eighth Amendment rights. Assuming such treatment as alleged in Plaintiff's complaint does amount, in fact, to perfunctory treatment, such a claim still fails to allege an Eighth Amendment violation. See Unterberg v. Correctional Med. Systems, Inc., 799 F.Supp. 490 (E.D. Pa. 1992). In Unterberg, a plaintiff-prisoner claimed that the treatment she received was perfunctory and, therefore, constituted an Eighth Amendment violation. Id. at 495. In rejecting this claim, the Court concluded that perfunctory treatment, although it might constitute medical malpractice, does not amount to a constitutional violation. The court noted that

[i]n Hampton [v. Holmesburg Prison Officials], 546 F.2d 1077 (3d Cir. 1976)], the Third Circuit made clear that medical malpractice alone will not give rise to an Eighth Amendment claim. Hampton specifically states:

to establish a constitutional violation, the indifference must be deliberate and the actions intentional. . . . Neglect, carelessness or malpractice is more properly the subject of a tort action in the state courts.

Id. at 497. In the instant case, at most, Plaintiff's complaint alleges perfunctory treatment that amounts to no more than medical malpractice or negligence and not deliberate indifference. Hence, Plaintiff fails to state a claim under the Eighth Amendment, thus, his complaint should be dismissed.

## (2) Claims against Defendant Stowitzky

Plaintiff's only claim against Defendant Stowitzky is that he failed to respond to his grievance. (Compl. ¶26.) However, this is insufficient to state a claim under the Eighth Amendment because Defendant Stowitzky is not a physician and he cannot be considered deliberately indifferent simply because he failed to respond to Plaintiff's grievance. See, e.g., Durmer v. O'Carroll, 991 F.2d 64 (3d Cir. 1993). In Durmer, a plaintiff-prisoner brought an Eighth Amendment claim against the warden of the prison and the state commissioner of corrections. The plaintiff in Durmer alleged that he received inadequate treatment at the hands of a doctor employed by the prison and that he wrote letters to the warden and commissioner complaining of his inadequate treatment. The plaintiff in Durmer alleged that the failure of the warden and of the commissioner to respond to his letters in any way amounted to deliberate indifference in violation of the Eighth Amendment. The Court of Appeals rejected the plaintiff's Eighth Amendment claim against the warden and commissioner, reasoning that

[t]he only allegation against either of these two defendants [i.e., the warden and commissioner] was that they failed to respond to letters Durmer sent to them explaining his predicament. Neither of these defendants, however, is a physician, and neither can be considered deliberately indifferent simply because they failed

to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor.

Id. at 69 (footnote omitted). Likewise here, Plaintiff's grievance complained of the treatment he was receiving at the hands of Dr. Ismael. Defendant Stowitzky cannot be considered deliberately indifferent within the meaning of the Eighth Amendment simply because he failed to respond to Plaintiff's complaints about the inadequacy of psychiatric treatment.

Nor does Defendant Stowitzky's failure to respond to Plaintiff's grievance violate any other constitutional rights. See e.g., Guttridge v. Chesney, No. 97-3441, 1998 WL 248913, at \*5 (E.D. Pa. May 8, 1998) ("Plaintiff also claims that he filed a number of grievances in relation to all of the incidents discussed above and that those grievances were never processed. Claims that prison officials failed to respond to grievances filed by inmates are not cognizable under § 1983 because prisoners do not have a constitutional right to a grievance procedure." (citing cases)).

### (3) Plaintiff's Miscellaneous Claims

Plaintiff's claims for injunctive and declaratory relief are mooted by his transfer out of SCI-Greene. See, e.g., Fortes v. Harding, 19 F.Supp.2d 323, 326 (M.D. Pa. 1998). In Fortes, an inmate sought declaratory and injunctive relief to prevent the defendants therein from interfering with his right of access to the courts, however, when the court decided of the case, the inmate had been transferred to another institution. In granting the defendants' motion for summary judgment, the court stated that "Fortes' [i.e., the inmate's] transfer to another institution moots any claims for injunctive or declaratory relief." Id. Likewise here, Plaintiff's transfer to another institution moots any claims for injunctive and declaratory relief against Defendants who no longer have custody of Plaintiff.

Plaintiff's damage claims against Defendants in their official capacities must also be dismissed on the ground that the sovereign immunity provided by the Eleventh Amendment bars such damage claims. See, e.g., Bey v. Pennsylvania Dep't of Corrections, 98 F.Supp.2d 650, 657 (E.D. Pa. 2000); Teague v. S.C.I. Mahanoy Med. Dep't, No. 97-2589, 1999 WL 167727, at \*2 n.2 (E.D. Pa. Mar. 24, 1999).

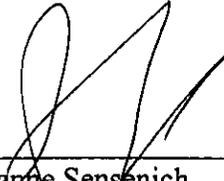
Lastly, Plaintiff's state law claims under Article 1, Section 13 of the Pennsylvania Constitution and any cause of action under 42 Pa.C.S. § 5524 should be dismissed as well. See, e.g., Boneburger v. Plymouth Township, 132 F.3d 20, 23 n.1 (3d Cir. 1997) ("where federal claims are dismissed before trial, the district court 'must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.'") (quoting Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir.1995)). See also 28 U.S.C. § 1367(c)(3), which permits a district court to "decline to exercise supplemental jurisdiction over a [state law] claim . . . if [it] has dismissed all claims over which it has original jurisdiction. . . ." Here, these considerations do not provide an affirmative justification for retaining supplemental jurisdiction and deciding matters of state law, especially given the preliminary stage of the proceedings. In fact, those considerations weigh in favor of Plaintiff pursuing his state constitutional law claim and other state tort claims in a state court which is in a better position to judge what the state's constitution means and to decide matters of state tort law. See, e.g., Kennedy v. United States, 643 F.Supp. 1072, 1084 (E.D.N.Y. 1986) ("Plaintiffs' claims of negligence, nuisance, and trespass, and violations of the New York State Constitution and a specific provision of the New York Environmental Conservation Law are causes of action the resolution of which is far better placed

in the hands of the New York State courts than in a federal court.”); Todd v. Rush County Schools, 983 F.Supp. 799, 807 (S.D. Ind. 1997), aff’d, 133 F.3d 984 (7th Cir. 1998), cert. denied, 525 U.S. 824 (1998).<sup>6</sup>

**CONCLUSION**

For the reasons discussed above, Plaintiff’s complaint should be dismissed for failure to state a claim.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) & (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of the objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.



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Ila Jeanne Sensenich  
U.S. Magistrate Judge

Dated: February 13, 2001

cc: The Honorable Robert J. Cindrich  
United States District Judge

Howard Lawson, AY-7150  
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P.O. Box 99901  
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(CERTIFIED MAIL, RETURN RECEIPT REQUESTED)

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<sup>6</sup> Plaintiff should note that he has up to thirty days from the date of a District Court’s order dismissing his claims during which he may re-file his state law claims in the appropriate state forum. 28 U.S.C. § 1367(d).

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