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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JERRY W. KOHL,

Plaintiff,

v.

MICHAEL E. SCHWARTZ,

Defendant.

Case No. C01-5510FDB

ORDER ADOPTING REPORT AND  
RECOMMENDATION AND  
DENYING PLAINTIFF'S MOTION  
FOR VOLUNTARY DISMISSAL

The Court referred this civil rights action to Magistrate Judge J. Kelley Arnold. Pursuant to the Order of Reference, Judge Arnold first granted Plaintiff leave to proceed *in forma pauperis*, and then shortly afterwards issued a Report recommending that Plaintiff's complaint be dismissed as frivolous and that the action should count as a strike under 28 U.S.C. § 1915(g). Plaintiff has responded to the Report by moving for a voluntary dismissal under Fed. R. Civ. P. 41.

The Court agrees with Judge Arnold that Plaintiff's complaint is frivolous. The only issue is whether Plaintiff should be allowed to avoid a strike under 28 U.S.C. § 1915(g) by taking a voluntary dismissal. Fed. R. Civ. P. 41(a) provides that "an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs." Defendant in this

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1 case has not even been served. Nonetheless, the Court believes that a Report by a Magistrate urging  
2 dismissal must be seen as the equivalent of a motion for summary judgment. Otherwise, a  
3 significant portion of the lawsuits dismissed as frivolous pursuant to 28 U.S.C. § 1915(e)(2) could  
4 be protected from strikes under 28 U.S.C. § 1915(g) by the simple expedient of filing a motion to  
5 dismiss as soon as an unfavorable Report is issued. The Court will not interpret Rule 41 so as to  
6 thwart the clear intent of § 1915(g) to discourage the filing of frivolous lawsuits.

7 ACCORDINGLY, the Court hereby ORDERS that:

- 8 1) Judge Arnold's Report and Recommendation is ADOPTED;
- 9 2) Plaintiff's cause of action is DISMISSED as frivolous pursuant to 28 U.S.C. § 1915(e); and
- 10 3) Plaintiff's motion for voluntary dismissal (dkt. # 8) is DENIED.

11 DATED this 6 day of November, 2001.

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14 FRANKLIN D. BURGESS  
15 UNITED STATES DISTRICT JUDGE  
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