

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**LARRY CURLS,**

**Plaintiff,**

**v.**

**CITY OF TOPEKA,**

**Defendant.**

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**CIVIL ACTION**

**No. 10-4091-KHV**

**MEMORANDUM AND ORDER**

Plaintiff brings suit against the City of Topeka alleging violations of the Fourth and Fifth Amendments of the United States Constitution. See Complaint (Doc. #8) filed September 16, 2010. On January 19, 2011, under 28 U.S.C. 1915(e)(2)(B), Magistrate Judge Kenneth G. Gale recommended that the Court dismiss plaintiff's claims as frivolous or malicious and failing to state a claim on which relief may be granted. See Recommendation On Sufficiency Of Complaint (Doc. #11). The Clerk mailed a copy of this recommendation to plaintiff by certified mail. On February 10, 2011 the Postal Service returned the certified mail receipt unsigned. See Doc. #12. That same day, the Clerk re-mailed a copy to plaintiff by first class mail. Under Rule 72(b)(2), Fed. R. Civ. P. the parties had 14 days after service of the recommended disposition to file specific written objections to the proposed findings and recommendation.<sup>1</sup>

On January 27, 2010 (before the post office returned the certified mail receipt unsigned), plaintiff sent the Court a letter which asked whether he should have attached police reports and

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<sup>1</sup> Under Rule 5(b)(2)(C), the Court effectively served plaintiff with the report and recommendations by sending it to his last known address. Under D. Kan. Rule 5.1(c)(3), any notice mailed to the last address of record of a pro se party is sufficient notice.

audio disks to a proposed amended complaint. See Doc. #12.<sup>2</sup>

Plaintiff filed the amended complaint on September 16, 2010 and later filed a motion for leave to do so. See Complaint [sic] (Doc. #8) filed September 16, 2010 and Motion To Amend Complaint (Doc. #9) filed September 20, 2010. On October 18, 2010, Judge Gale denied plaintiff's motion to amend as moot because plaintiff had already filed the amended pleading. Judge Gale indicated he would address the sufficiency of the amended complaint in a subsequent ruling. See Doc. #10. In the Recommendation on Sufficiency of Complaint (Doc. #11) filed January 19, 2011, Judge Gale examined the allegations in the complaint and amended complaint. He found that plaintiff's allegations were based on the same factual allegations as those in a previous lawsuit (No. 10-4028-RDR-KGS) which District Judge Richard D. Rogers found had failed to state a viable claim for relief. Judge Gale recommended dismissal of this action for the same reasons (not because plaintiff had failed to attach police reports or audio tapes to the amended complaint).

After reviewing the Recommendation on Sufficiency of Complaint (Doc. #11) in its entirety, the Court agrees with Judge Gale that plaintiff's claims arise from the same operative facts as those alleged in No. 10-4028-RDR-KGS and that plaintiff's complaint and amended complaint fail to state a claim upon which relief can be granted.

**IT IS THEREFORE ORDERED** that the Court adopts Judge Gale's Recommendation on Sufficiency of Complaint filed January 19, 2011 in its entirety. Plaintiff's complaint be and hereby is **DISMISSED**.

Dated this 24th day of March, 2011 at Kansas City, Kansas.

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<sup>2</sup> It appears that the Court received this letter before plaintiff received the report and recommendations.

s/ Kathryn H. Vratil  
KATHRYN H. VRATIL  
United States District Judge