IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GERALD HILL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 13-cv-00307-JPG-RJD
	)	
USA,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter comes before the court on the Report and Recommendation ("R & R") (Doc. 103) of Magistrate Reona J. Daly with regard to Defendant USA's Third Motion (Doc. 96) for Summary Judgment. Plaintiff filed an objection (Doc. 105) to the R & R and defendant filed a response (Doc. 107) to the objection.

The Court may accept, reject or modify, in whole or in part, the findings or recommendations of the magistrate judge in a report and recommendation. Fed. R. Civ. P. 72(b)(3). The Court must review *de novo* the portions of the report to which objections are made. The Court has discretion to conduct a new hearing and may consider the record before the magistrate judge anew or receive any further evidence deemed necessary. *Id.* "If no objection or only partial objection is made, the district court judge reviews those unobjected portions for clear error." *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999). The Court has received an objection from the defendant and will review *de novo* those portions of the report.

1. **Background.**

Plaintiff was inmate at FCI Greenville when another inmate assaulted him with a Masterlock combination lock. Plaintiff suffered significant injuries and has filed this claim of negligence under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-2680.

2. **Standards.**

Summary judgment must be granted, "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). The reviewing court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Chelios v. Heavener*, 520 F.3d 678, 685 (7th Cir. 2008); *Spath*, 211 F.3d at 396.

The initial summary judgment burden of production is on the moving party to show the Court that there is no reason to have a trial. *Celotex*, 477 U.S. at 323; *Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 2013). Where the non-moving party carries the burden of proof at trial, the moving party may satisfy its burden of production in one of two ways. It may present evidence that affirmatively negates an essential element of the non-moving party's case, *see* Fed. R. Civ. P. 56(c)(1)(A), or it may point to an absence of evidence to support an essential element of the non-moving party's case without actually submitting any evidence, *see* Fed. R. Civ. P. 56(c)(1)(B). *Celotex*, 477 U.S. at 322-25; *Modrowski*, 712 F.3d at 1169. Where the moving party fails to meet its strict burden, a court cannot enter summary judgment for the moving party even if the opposing party fails to present relevant evidence in response to the motion. *Cooper v. Lane*, 969 F.2d 368, 371 (7th Cir. 1992).

In responding to a summary judgment motion, the nonmoving party may not simply rest upon the allegations contained in the pleadings, but must present specific facts to show that a genuine issue of material fact exists. *Celotex*, 477 U.S. at 322-26; *Anderson*, 477 U.S. at 256-57; *Modrowski*, 712 F.3d at 1168. A genuine issue of material fact is not demonstrated by the mere

existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, or by "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson,* 477 U.S. at 252.

"It is, of course, well established that, as a general matter, a district court exercising jurisdiction because the parties are of diverse citizenship must apply state substantive law and federal procedural law." *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 670 (7th Cir. 2008) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

3. **Analysis.**

Plaintiff is alleging that the USA was negligence in the following matter manner which facilitated the assault on the plaintiff: failed to have sufficient staff; failed to have sufficient lighting and cameras; overcrowding of the prisoner population; and the use of an improper area as a holding facility. (Doc. 6).

Defendant moved for summary judgment arguing that the above acts and/or omissions fall within the discretionary function exception to the FTCA. The FTCA is a limited waiver of the Government's sovereign immunity. It gives federal courts;

> exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

However, Congress crafted several exceptions to § 1346(b)(1)'s waiver of immunity. 28 U.S.C. § 2680; *see, e.g., Rothrock v. United States*, 62 F.3d 196, 197 (7th Cir. 1995) (no jurisdiction over cases involving discretionary function). One such exception is for claims arising from government acts and decisions that are based on considerations of public policy. *See United States v. Gaubert*, 499 U.S. 315, 322-23 (1991). This so-called "discretionary function exception" provides that the Court has no jurisdiction over:

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

To fall within the discretionary function exception, the acts giving rise to the suit must meet two requirements: (1) the acts must be discretionary in nature in that they involve an element of judgment or choice and (2) the judgment exercised in the act must be the type of judgment that the discretionary function exception was designed to shield. *Gaubert*, 499 U.S. at 322-23 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984)).

To determine whether an act is discretionary because it involves an element of judgment or choice, the Court must examine the nature of the act, not the status of the actor. *Gaubert*, 499 U.S. at 322. For example, although it is common for high level government workers to exercise judgment or choice in making planning-level decisions to advance policy goals, it is possible that a low level employee may also be charged with making the same types of judgment calls. *See Varig Airlines*, 467 U.S. at 820. By the same token, the conduct of high level government employees may be prescribed by statute, regulation or policy such that any element of judgment

or choice is absent. *Gaubert*, 499 U.S. at 322. A government employee does not exercise discretion when statutes, regulations or policies dictate his or her conduct. In that case, the employee has no rightful option but to conform his or her conduct to the rule, and there is no room for judgment or choice. *Gaubert*, 499 U.S. at 322.

Even if an act is discretionary because it involves an element of judgment or choice, the discretionary function exception to jurisdiction will not apply unless the judgment exercised was the type that the exception was designed to shield from liability. *Gaubert*, 499 U.S. at 322-23. The exception was designed to "'prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Gaubert*, 499 U.S. at 323 (quoting *Varig Airlines*, 467 U.S. at 814). Thus, for the discretionary function exception to apply, the judgment exercised must be based on considerations of public policy. *Gaubert*, 499 U.S. at 323.

In this case, the R & R notes that, "the staffing, lighting, cameras, and conversion of the television room did not deviate from any federal statute, regulation, or policy and that FCI Greenville management exercised its discretion within broad directives and guidelines for housing and the associated security measures." (Doc. 103 at 4). Upon *de novo* review, the Court agrees. The evidence presented by the plaintiff indicates that no official at FCI Greenville was aware of the potential threat against the plaintiff - in fact, plaintiff testified that he was not even aware of any potential threat of violence. Housing, lighting, security, and staffing all fall within the board discretion of prison administrators as they involve an element of judgment or choice and are within the type that the exception was designed to shield from liability.

Plaintiff's objection also raise the issue that, "the Bureau of Prisons (BOP) introduced metal padlocks into FCI-Greenville thus violating 18 U.S.C. § 1792." However, the Court agrees with

the R & R that the possession of a padlock was not the proximate cause of the plaintiff's injuries. The proximate cause of plaintiff's injuries was the conduct of his fellow prisoner.

4. **Conclusion**.

Based on the above, the Court hereby **ADOPTS** the Report and Recommendation in its entirety (Doc. 103) and **GRANTS** Defendant United States' Motion (Doc. 96) for Summary Judgment. As there are no other defendants, this matter is **DIMISSED** with prejudice. The Clerk of Court is **DIRECTED** to enter judgment in favor of Defendant United States of America and against plaintiff Gerald J. Hill.

IT IS SO ORDERED.

DATED: 7/19/2017

s/J. Phil Gilbert
J. PHIL GILBERT
U.S. DISTRICT JUDGE