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

ROGER A. GRIGGS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 15-cv-00335-JPG-DGW
	)	
USA, *et al*.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter comes before the court on the Report and Recommendation ("R & R") (Doc. 74) of Magistrate Judge Donald G. Wilkerson with regard to defendant United States of America's Motion (Doc. 64) to Dismiss, or in the Alternative, for Summary Judgment. The United States filed an objection (Doc. 78) to the R & R and the plaintiff filed a response (Doc. 79) 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). In this matter, the Court has received an objection to the R & R and will review those portions of the R & R *de novo*.

1. **Background**.

According to the amended complaint (Doc. 47), defendant United States failed to prevent an attack on the plaintiff by his cellmate on June 23, 2014. Plaintiff alleges that he informed several prison officials of his cellmate's threat and that the plaintiff, "feared for his life as a result

of his cellmate's behavior." (Doc. 47, ¶ 12). However, the defendant failed to move the plaintiff to another cell and as a result; plaintiff was brutally assaulted and injured by his cellmate.

Defendant moved for dismissal on the basis that this Court lacks subject matter or in the alternative, that there is no evidence that prison officers were negligent. Taking all evidence in a light most favorable to the plaintiff, the R & R determined that there remains a number of material disputed facts and as such, summary judgment is not appropriate.

2. **Standard.**

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.

3. **Analysis**.

The plaintiff is proceeding on one count against the United States under the Federal Tort Claims Act ("FTCA"). Defendant moved for summary judgment arguing that the above acts and/or omissions fell 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 and 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 found that that the pertinent issue was whether "there was a policy, statute, or regulation mandating a certain course of action to address Plaintiff's complaint that he feared for his life." The defendant argues in his objection that there is no policy "unless the referenced threat was directed against [the plaintiff]" and not a general threat to "kill someone" – such as the plaintiff's roommate had stated. However, the plaintiff testified that he informed several officials that he feared for his life and that there "was clearly a policy."

At this stage, the Court takes all facts in the light most favorable to the nonmoving party and in doing so, finds there exists a dispute of material fact on whether there a policy exist. Therefore, the Court agrees with the R & R that dismissal is not appropriate.

The Court also agrees with the R & R analysis with regard to negligence. The defendant's objection states that it has "proven absolutely that Plaintiff's case manager was not at the prison and Plaintiff could not have reported to her." However, confusion over a time-line

is insufficient to warrant dismissal. The Court agrees with the R & R that there remains, "a genuine dispute as to whether staff acted appropriately and with adequate care in addressing Plaintiff's concerns for his life and safety."

4. **Conclusion**.

Based on the above, the Court hereby **ADOPTS** the Report and Recommendation in its entirety (Doc. 74) and **DENIES** Defendant United States' Motion (Doc. 64) for Summary Judgment.

IT IS SO ORDERED.

DATE: 7/31/2017

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