IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JEFFREY EBERLE, *et al.*,

Plaintiffs,

v. **Case No. 2:03-CV-272**
MAGISTRATE JUDGE KING

REGINALD WILKINSON, *et al.*,

Defendants.

OPINION AND ORDER

This matter is before the Court, with consent of the parties pursuant to 28 U.S.C. § 636(c), for consideration of the following motions: Defendants' *Motion for Summary Judgment on any of Plaintiff Blankenship's Remaining Non-Miller Claims*, Doc. No. 353; Defendants' *Motion to Strike*, Doc. No. 382; Plaintiff Blankenship's *Motion for Leave to Supplement*, Doc. No. 395; Plaintiff Blankenship's *Motion to Continue to Communicate with Plaintiffs*, Doc. No. 402; Plaintiff Blankenship's *Motions for Orders Permitting Legal Correspondence among Plaintiffs*, Doc. Nos. 405, 407; Plaintiff Blankenship's *Motion for Discovery*, Doc. No. 422; Plaintiff Blankenship's *Motion for Leave to Expand the Record*, Doc. No. 426; and Plaintiff Blankenship's *Motion for Appointment of Counsel*, Doc. No. 427.

I.

Plaintiff Blankenship is one of several inmates who commenced this action, pursuant to 42 U.S.C. § 1983, challenging on constitutional grounds certain events that occurred while

Plaintiff was incarcerated at the Warren Correctional Institution ["WCI]. The Court will detail the facts pertinent to Plaintiff Blankenship's claims, *infra*, in the context of resolving the pending motions.

II.

A. Defendants' Motion for Summary Judgment

Among the claims that Plaintiff Blankenship originally asserted in this action were certain claims relating to the practice of the Asatru religion. However, Plaintiff Blankenship was also a plaintiff in *Miller v. Wilkinson*, 2:98-CV-275 ["*Miller*"], a class action seeking accommodation for the Asatru religion. The claims asserted by Plaintiff Blankenship in this action for injunctive and declaratory relief in connection with his *Miller* claims were dismissed without prejudice to assertion in *Miller*, and his claims for monetary relief were stayed pending resolution of *Miller*. *Opinion and Order*, Doc. No. 318. *See also Opinion and Order*, Doc. No. 383.[1] Defendants now move for summary judgment on Plaintiff Blankenship's non-*Miller* claims.

The standard for summary judgment is well established. This standard is found in Rule 56 of the Federal Rules of Civil Procedure, which provides in pertinent part:

> The judgment sought shall be rendered if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). Pursuant to Rule 56(c), summary judgment is appropriate if "there is no genuine issue as to any material fact . . . ." *Id*. In making this determination, the evidence "must

[1]*Miller* has now been resolved. 2:98-CV-275, *Judgment* (S.D. Ohio September 30, 2010). Moreover, the claims of Plaintiff Blankenship for monetary damages in connection with his *Miller* claims were made the subject of a separate action, 2:10-CV-917.

be viewed in the light most favorable" to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). However, summary judgment is appropriate if the opposing party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The "mere existence of a scintilla of evidence in support of the [opposing party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [opposing party]." *Anderson*, 477 U.S. at 252.

The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions" of the record which demonstrate "the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250 (quoting Fed. R. Civ. P. 56(e)). "Once the moving party has proved that no material facts exist, the non-moving party must do more than raise a metaphysical or conjectural doubt about issues requiring resolution at trial." *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

1. First Amendment Retaliation Claim

Plaintiff Blankenship claims that his rights under the United States Constitution were violated when he was charged with and convicted of violating two rules as a result of an incident

that occurred in the prison dining room at WCI on January 11, 2002. On that date, Officer Gibson directed inmates who were finished eating to leave the dining hall. *See Conduct Report*, Exhibit A-1 attached to *Defendants' Motion for Summary Judgment*, Doc. No. 353. Plaintiff relocated to another table and "immediately began talking to inmates in line and called one over to his table." *Id.* Major Mockabee told Plaintiff to stop talking and to eat his meal. Plaintiff allegedly "became loud and stated, 'I have the right to talk with inmates and my attorney will hear about this.'" *Id.* Plaintiff stated that he was being "harassed" and "began yelling to other inmates to be his witness." *Id.* Major Mockabee then ordered Plaintiff handcuffed and taken to segregation. Plaintiff allegedly continued yelling. *Id.*

Plaintiff was charged with violation of Class II, Rule 1 (disobedience of a direct order) and Rule 4 (encouraging or creating a disturbance). *Id.* At the hearing held by the Rules Infraction Board ["RIB"], testimony was provided by Plaintiff Blankenship, Inmates Schatz and Weisheit, and Major Mockabee. *Exhibit B-1*, attached to Doc. No. 353. The RIB panel thereafter found Plaintiff guilty of both charges.

> The board believes that Inmate Blankenship [ ] did in fact violate rules of conduct by calling other inmates to his table, out of the serving line, where he was seated to talk to them. At this time, it was the morning meal and Inmate Blankenship [ ] immediately confronted Major Mockabee in a loud manner stating, "I have the right to talk with inmates and my attorney will hear about this," "I'll talk with inmates when I want."
>
> Inmate actions disrupted the normal activity in the chow hall and he continued to be loud and aggressive, continually stating harassment and his rights [*sic*]. Inmate also began yelling to other inmates in the chow hall to be his witness. Major Mockabee ordered [Inmate Blankenship] to be cuffed and taken to segregation. While being escorted out of the chow hall, Inmate continued to yell harassment and soliciting other inmates to be his witness. (Note: the morning meal was in progress and the area was full of inmates).

Exhibit A-2 attached to Doc. No. 353.

Plaintiff appealed the RIB's decision to the Warden, who affirmed the conviction for violation of Rule 4 but reversed the conviction for violation of Rule 1. *Exhibit A-3, id.* Plaintiff appealed this decision to the Director of the Department of Rehabilitation and Correction, defendant Wilkinson, who affirmed the conviction. *Exhibit A-4, id.*

Plaintiff claims that Defendant Mockabee instituted false disciplinary charges in retaliation for Plaintiff's exercise of his First Amendment rights. In particular, Plaintiff claims that, in June and July 2001, Mockabee "threatened" Plaintiff with placement in segregation if Plaintiff were seen eating with another inmate-adherent of the Asatru religion. *Complaint*, Doc. 1, at ¶ 52. Plaintiff claims that the "threat" was carried out when Mockabee initiated disciplinary charges against Plaintiff. *Id.* at ¶ 53. In opposing Defendants' *Motion for Summary Judgment*, Plaintiff offers the declaration of inmate Virgil Lee, who states that Plaintiff was not loud in the dining hall and did not create a disturbance. Exhibit A, attached to *Plaintiff's Memorandum contra*, Doc. No. 369.[2]

An inmate retains "those First Amendment rights that are not inconsistent with [his] status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Moreover, prison officials may not retaliate against inmates because of the an inmate's exercise of his First Amendment rights. *Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999). However, prison officials "should be accorded wide-ranging deference in the . . . execution of policy and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441

[2]Plaintiff also urges the Court to take judicial notice of "other inmate statements attesting to the events of January11, 2002." *Plaintiff's Memorandum contra*, Doc. No. 369 at 7. In particular, Plaintiff points to the statements of inmates Heath Wetzel and Cecil McQueen offered in the case of *Blankenship v. Brigano*, 1:02-CV-481(S.D. Ohio).

U.S. 520, 547 (1979). In order to state a claim for First Amendment retaliation, an inmate plaintiff must show that he engaged in protected conduct, that he was subjected to an adverse action, and that there existed a causal connection between the protected conduct and the adverse action. *Thaddeus-X*, 175 F.3d at 386. However, even where an inmate establishes that his protected conduct was a motivating factor in the adverse action, a defendant prison official "may thwart the retaliation claim by showing that [he] would have taken the same action even without the protected activity." *Thomas v. Eby*, 481 F.3d 434, 441, 442 (6th Cir. 2007)(citing *Mount Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 91977)). "A finding of guilt on a misconduct charge based on some evidence of a violation of prison rules 'essentially checkmates [a] retaliation claim.'" *Jackson v Madery,* 158 Fed. Appx. 656, 662 (6th Cir. 2005)**(**citing *Henderson v. Baird,* 23 F.3d 464, 469 (8th Cir. 1994)).

In this case, after reviewing the evidence presented to the RIB, the Court concludes that there is evidence to support Plaintiff's conviction. There was evidence presented during the hearing that Plaintiff called inmates to his table in the dining hall after being instructed not to do so and to eat his meal. Another inmate also testified that he observed Plaintiff become "loud" when being escorted out of the dining hall and asking other inmates to be his witness. *See Exhibit A-5* attached to Doc. No. 353. In the Court's view, Plaintiff's conviction for creating or encouraging a disturbance is clearly supported by some evidence so as to preclude Plaintiff's First Amendment retaliation claim. *See Jackson v. Madery*, *supra.*

In sum, the Defendants are entitled to summary judgment on Plaintiff's retaliation claim.

2. Eighth Amendment Claim

Plaintiff Blankenship also claims that his rights under the Eighth Amendment to the United

States Constitution were violated as a result of Defendant Dr. Washington's alleged deliberate indifference to Plaintiff's medical needs.

This claim arises as a result of various "death fasts" or "hunger strikes" which Plaintiff initiated throughout 2002. *See Memorandum contra,* Doc. No. 369, at 3. In the *Complaint*, Plaintiff states that, as a result of medical issues associated with his "fasts," Plaintiff was transferred to the Corrections Medical Center ["CMC"] on various occasions. Doc. No. 1 at ¶¶ 54-55, 62, 74, 86-91. Plaintiff claims that, although he made several requests for a mental health evaluation after returning from CMC, Defendant Dr. Washington failed to respond to those requests. *Id.* at ¶¶ 89-90. On December 8, 2002, Plaintiff filed a grievance against Defendant Washington, which was ultimately dismissed through the administrative process. *Id.* at ¶ 92.

In moving for summary judgment on Plaintiff's Eighth Amendment claim, Defendants provide the declaration of Defendant Dr. Washington, the Psychology Services Supervisor at WCI. *Declaration of Ken Washington, Ph.D.,* at ¶ 3, attached as Exhibit D to *Defendants' Motion for Summary Judgment*, Doc. No. 353. Dr. Washington avers that, between January 2002 and December 20, 2002, the weekly "mental health rounds" log for inmates in segregation reflect no request by Plaintiff Blankenship for treatment. *Id.* at ¶ 11. According to Dr. Washington, the Mental Health Services "kite" log reveals that Plaintiff sent two kites on November 5, 2002 seeking mental health services. *Id.* at ¶ 12. Dr. Washington met with Plaintiff on November 6, 2002, to discuss Plaintiff's request that he be placed in a special housing unit for inmates requiring mental health treatment. *Id.* at ¶ 14. Dr. Washington denied the request and advised Plaintiff that he could speak with mental health staff, upon request, during the segregation rounds. *Id.* at ¶ 15. Dr. Washington's psychology assistants visited Plaintiff and documented his condition on February 21, 2002; May 10, 2002; August 9, 2002 and November 2, 2002. *Id.* at ¶ 13. According

to Dr. Washington, Plaintiff did not evidence mental illness during these visits. *Id.*

Dr. Washington avers that he was aware of Plaintiff's hunger strikes and "understood that [Plaintiff] was being monitored by the WCI administration and its Inmate Health Service to assess his medical condition and needs." *Id.* at ¶ 17. "Prior to November 2002, however, [Plaintiff] did not make any request for mental health services [and] neither his intake evaluation [nor] his regular evaluations on segregation rounds between January 2002 and January 2003 showed any evidence of mental illness or any need for mental health services." *Id.*

In response, Plaintiff takes issue with Defendant Dr. Washington's assessment of Plaintiff's mental health. Plaintiff states that he "has a long and extensive history of mental health concerns" dating back to 1984. *See Plaintiff's Memorandum contra,* Doc. No. 369, at 11; *Declaration of Darryl Blankenship*, Exhibit B attached to *Memorandum contra ["Declaration"]*. Defendants move to strike Plaintiff's *Declaration* on the basis that the best evidence of Plaintiff's mental health is the medical records proffered by Defendants. *Motion to Strike*, Doc. No. 382. Plaintiff argues that only a portion of Plaintiff's mental health records have been submitted by Defendants; Plaintiff claims that other records "are stored in a vault" and that other records "were lost or destroyed in December 2007 and January 2008 when [Plaintiff] was arrested by prison staff . . . ." *Memorandum contra Motion to Strike*, Doc. No. 384, at 2. However, the Court will not disregard the evidence proffered by Defendants merely because Plaintiff charges, in conclusory fashion, that those records are incomplete.

Plaintiff has filed a *Motion for Leave to Supplement* his *Memorandum contra* to include evidence of Defendant Dr. Washington's responses to Plaintiff's requests for admissions. Doc. No. 395. Plaintiff explains that he was unable to locate the documents at the time that his *Memorandum contra* was filed. Plaintiff's motion is **GRANTED**.

Plaintiff has also filed a separate motion seeking to expand the record with respect to his deliberate indifference claim. Doc. No. 426. In this motion, Plaintiff states that, after leaving WCI, Plaintiff was housed in three prison facilities. According to Plaintiff, he was diagnosed as "bipolar with psychotic features, schizoeffective [sic] disorder and more based upon his self imposed starvations." Doc. No. 426, at 2. Plaintiff seeks to expand the record in this case to include medical records from 2007 to the present.

The Court denies Plaintiff's request to expand the record to include mental health records from 2007 to the present. Records relating to Plaintiff's mental condition for the period after the events leading to Plaintiff's claim for deliberate indifference are not relevant to the claim presently before the Court.[3] The Court notes that Plaintiff details some of his alleged mental health history following his incarceration at WCI, in his *Declaration*, Exhibit B, offered in opposition to the *Defendants' Motion for Summary Judgment*. Again, to the extent that such history post-dates the events giving rise to the claim for deliberate indifference against Defendant Dr. Washington, that history is not relevant. Those portions of Plaintiff's *Declaration*, ¶¶ 8-13 and 16-17, will therefore not be considered by the Court. The Court will, however, consider Plaintiff's *Declaration* insofar as it describes events giving rise to the claim for deliberate indifference against Defendant Dr. Washington. To this extent, Defendants' motion to strike is denied.[4]

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[3]Plaintiff has also filed *Motion for Discovery Disclosure*, Doc. No. 422, which seeks disclosure of his mental health records from April 2007 to the present. This motion is denied for the reason that such records post-date Plaintiff's claim for deliberate indifference. Plaintiff has also filed a *Motion for Appointment of Counsel* with respect to this deliberate indifference claim. Doc. No. 427. Plaintiff seeks counsel in order to assist in establishing evidence of his mental health following his incarceration at WCI. This motion is, for the same reason, **DENIED**.

[4]Although the Court agrees with Defendants that the best evidence of Plaintiff's medical diagnoses are reflected in the records proffered by Defendants, Plaintiff's *Declaration* also describes events surrounding the claim for deliberate indifference. Thus, to this extent, the *Declaration* will be considered in resolving the *Motion for Summary Judgment*.

The Court now addresses the merits of Plaintiff's Eighth Amendment claim. The United States 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 v. Gamble*, 429 U.S. 97, 104-05 (1976). "A constitutional claim for deliberate indifference to serious medical needs requires a showing of objective and subjective components." *Phillips v. Roane County*, 534 F.3d 531, 539 (6th Cir. 2008). Plaintiff must show the existence of a "sufficiently serious medical need to satisfy the objective component." *Id.* The United States Court of Appeals for the Sixth Circuit has explained that a condition is "sufficiently serious" when the need for medical care is obvious even to a lay person. *Blackmore v. Kalamazoo County*, 390 F.3d 890, 899-900 (6th Cir. 2004). "To satisfy the subjective component, the plaintiff must allege facts which, if true, would show that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk." *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001). The requisite state of mind "entails something more than mere negligence" but "less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

Not every claimed denial of adequate medical treatment states a violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. at 105. The United States Court of Appeals for the Sixth Circuit distinguishes "between cases where a complaint alleges a complete denial of medical care and those cases where the claim is that the prisoner received inadequate medical treatment." *Westlake v. Lucas*, 537 F.2d 857, 860 n.5 (6th Cir. 1976). Where a prisoner has received some medical attention and the dispute is over the adequacy of that treatment, federal

courts are generally reluctant to second guess medical judgments and to constitutionalize claims that actually sound in state tort law. *Id.*

In reviewing the evidence submitted, the Court concludes that no genuine issue of material fact exists on Plaintiff's Eighth Amendment claim for deliberate indifference. First, the evidence fails to show that Plaintiff suffered from a sufficiently serious medical condition, for purposes of the objective component of the claim. Plaintiff's medical evaluation at WCI displayed no evidence of mental illness. Attachment 1 to Exhibit D, *Declaration of Dr. Washington*, attached to *Defendants' Motion for Summary Judgment*, Doc. No. 369. Although Plaintiff asked to be placed in a Residential Treatment Unit in November 2002, his request was denied after Dr. Washington determined that such placement was not appropriate. *Declaration of Dr. Washington* at ¶¶ 15-16, Exhibit D attached to Doc. No. 369. Further, during the time that Plaintiff engaged in hunger strikes, he was monitored by staff at the Ohio State University Medical Center and the Corrections Medical Center. *Id.* at ¶¶ 16-17.

In the Court's view, Plaintiff's claim amounts to a disagreement with Dr. Washington over treatment, not a denial of care. Furthermore, even if the evidence demonstrated a sufficiently serious condition so as to satisfy the objective component of the claim, there is no evidence in the record to show that Dr. Washington was deliberately indifferent to Plaintiff's mental health needs. Dr. Washington visited and evaluated Plaintiff on at least two occasions and his staff evaluated Plaintiff on various other occasions. In addition, Dr. Washington was aware of Plaintiff's condition during the times that Plaintiff was hospitalized as a result of his hunger strikes. In view of the evidence, the Court concludes that Defendants are entitled to summary judgment on Plaintiff's Eighth Amendment claim.

3. Thirteenth Amendment Claim

Defendants move for summary judgment on Plaintiff's claim that he has been required to work while incarcerated in violation of the prohibition against slavery contained in the Thirteenth Amendment to the United States Constitution. Plaintiff also claims that the work requirement violates Article I, section 6 of the Ohio Constitution as well as O.R.C. § 5145.16(A); § 5147.17-.20; Ohio Criminal Rule 32(c) and O.R.C. § 2901.04(A).[5] Plaintiff previously moved for summary judgment on these claims and this Court denied that motion. *Opinion and Order*, Doc. No. 59. Defendants' present motion is based upon the Court's reasoning in that *Opinion and Order*.

Plaintiff claims that, because his conviction did not include a "stipulation of labor," he cannot be required to perform prison work assignments. *Plaintiff's Memorandum contra*, Doc. No. 369, at 14. Compelling prisoners to work does not violate the Thirteenth Amendment's prohibition against involuntary servitude. *Sims v. Parke Davis & Co.*, 334 F.Supp. 774, 792-93 (E.D. Mich. 1971), *aff'd*, 453 F.2d 1259 (6th Cir. 1971); *Harris v. Michigan Dep't of Corrections*, No. 08-13383, 2008 WL 4647991 at *2 (E.D. Mich. Oct. 21, 2008); *see also Aceves v. Jeffers*, 196 Fed. Appx. 637, 639 (10th Cir. 2006). Thus, the Court concludes that Defendants are entitled to summary judgment on Plaintiff's Thirteenth Amendment claim. Defendants are also entitled to summary judgment to the extent that Plaintiff raises an involuntary servitude claim under Article I, section 6 of the Ohio Constitution because that provision has been interpreted as coextensive with federal law. *State ex rel. Heller v. Miller*, 61 Ohio St.2d 6, 8 (1980).

[5]Plaintiff's reliance on §§ 5147.17-.20 is misplaced because these provisions apply to persons "confined in any [county] workhouse or jail" as opposed to a state prison.

In addition, inmate labor is not unlawful under Ohio statutory law. O.R.C. § 5145.16(A) specifically authorizes the Ohio Department of Rehabilitation and Correction ["ODRC"] to "establish work programs in some form of labor for as many prisoners as possible . . . ." Section 5145.14 provides that "[l]abor or service shall not be performed by a prisoner . . . unless the labor or service is expressly authorized by rules adopted by the [ODRC]. . . ." Such rules have been established pursuant to O.A.C. Chapter 5120-3. Thus, Defendants are entitled to summary judgment to the extent that Plaintiff claims that prison work assignments violate Ohio statutory law.

B. Plaintiff's Motions

Plaintiff Blankenship was released on parole in April 2009, although he has since been returned to prison. *See Returned Mail*, Doc. No. 415; *Plaintiff Darryl Blankenship's Notice of Change of Address*, Doc. No. 421. Prior to his release, Plaintiff filed a *Motion to Continue to Communicate with Incarcerated Plaintiffs or, in the alternative, for Appointment of Counsel*. Doc. No. 402. Defendants opposed the motion. Doc. No. 403. Plaintiff also filed a *Motion for Order to Permit Plaintiff to Send and Receive Copies of Pleadings and Motions to Co-Plaintiffs*, Doc. No. 405, and a *Motion to Permit Legal Correspondence with Plaintiffs*, Doc. No. 407. Defendants opposed these motions as well. Doc. No. 418.

Because all these motions were predicated on Plaintiff Blankenship's release from prison and because he has now been returned to prison, the foregoing motions are denied as moot.

III.

In light of the foregoing, Defendants' *Motion for Summary Judgment*, **Doc. No. 353** is

GRANTED. The non-*Miller* claims asserted by Plaintiff Blankenship in this action are hereby **DISMISSED.** Defendants' *Motion to Strike*, **Doc. No. 382**, is **GRANTED in part and DENIED in part**. Plaintiff's *Motion for Leave to Supplement*, **Doc. No. 395**, is **GRANTED**. Plaintiff's *Motion to Continue to Communicate with Plaintiffs* and Plaintiff's *Motions for Orders Permitting Correspondence*, **Doc. Nos. 402, 405 and 407** are **DENIED as moot.** Plaintiff's *Motion for Discovery*, **Doc. No. 422** is **DENIED**. Plaintiff's *Motion to Expand the Record*, **Doc. No. 426** is **DENIED**. Plaintiff's *Motion for Appointment of Counsel*, **Doc. No. 427** is **DENIED**.

November 24, 2010
DATE

s/ Norah McCann King
NORAH McCANN KING
UNITED STATES MAGISTRATE JUDGE