

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

KEVIN A. TOLLIVER,

Plaintiff,

vs.

Civil Action 2:08-CV-722
Judge Sargus
Magistrate Judge King

TERRY COLLINS, Director
O.D.R.C., et al.,

Defendants.

ORDER AND
REPORT AND RECOMMENDATION

This is a civil rights action in which plaintiff Tolliver, a state inmate proceeding without the assistance of counsel, alleges that defendants¹ exposed plaintiff, against his will, to secondhand smoke in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution. This matter is before the Court on plaintiff's requests for a temporary restraining order. Doc. Nos. 17, 19, 21 and 32.² For the reasons stated below, the Magistrate Judge **RECOMMENDS** that plaintiff's requests be **DENIED**.

¹Plaintiff has sued the following defendants in their official and individual capacities: Terry Collins, director of Ohio Department of Rehabilitation and Correction ("ODRC"); Michael Sheets, Warden of Ross Correctional Institute ("RCI"); Charlene Payne, RCI's unit manager administrator; Cassie Johnson, RCI's unit manager for inmate housing facility number 7, which was a non-smoking facility at the time this action was filed; and unnamed corrections officers and staff members. *Complaint*, ¶¶ 5, 13-17, 32, Doc. No. 4.

²In addition to a request for a temporary restraining order, one of plaintiff's motions seeks declaratory judgment, Doc. No. 17, and another moves for summary judgment, Doc. No. 19. However, only plaintiff's request for a temporary restraining order contained in those motions is addressed *infra*.

I. BACKGROUND

On August 6, 2008, plaintiff filed this action alleging that he was involuntarily exposed to secondhand smoke even though he was housed in a "Tobacco Free Housing" unit at RCI, Unit 7A. *Complaint*, ¶¶ 31-43. Plaintiff alleges that defendants' deliberate indifference resulted in his injury and subjected him to risk of violence from inmates who smoked in his unit and in the common areas. *Id.* at, *inter alia*, ¶¶ 7, 20, 45, 47-50, 55-58. Plaintiff further alleges that he complained about the secondhand smoke for two years and exhausted his administrative remedies prior to filing this action. *Id.* at ¶¶ 44, 46.

On November 14, 2008, plaintiff filed his first motion for a temporary restraining order. Doc. No. 17. Plaintiff reiterated his allegations in the Complaint and requested the following injunctive relief:

Defendants shall not permit inmates living in the designated tobacco-free housing units at Ross Correctional Institute to purchase any products which contain tobacco and shall expedite [housing] moves of those [inmates] wishing to relocate upon request as soon as practicable.

Id. ¶ 10. Plaintiff requested a hearing on this motion. *Id.*

On the same day, in a separate filing, plaintiff reiterated his request for injunctive relief and again requested a hearing. Doc. No. 19. On November 21, 2008, plaintiff supplemented his request for a temporary restraining order. Doc. No. 21. On January 29, 2009, plaintiff again requested a temporary restraining order, seeking the same injunctive relief in addition to asking for a "special investigator to look in to" a physical altercation between an inmate who smoked and a non-smoking inmate. Doc. No. 32.

Defendants oppose plaintiff's requests for injunctive relief.

Doc. No. 40.

II. STANDARD

Plaintiff asks this Court to issue a temporary restraining order. Although plaintiff cites to Fed. R. Civ. P. 57 as the basis for his relief, it is Fed. R. Civ. P. 65(a) and (b) that permits a party to seek injunctive relief when a plaintiff believes that he will suffer irreparable harm or injury. A temporary restraining order relates only to restraints sought without written or oral notice to the adverse party or his attorney, whereas the application is properly treated as one for a preliminary injunction where the adverse party was given notice. *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 650 (6th Cir. 1993) (citing *Reed v. Cleveland Bd. of Educ.*, 581 F.2d 570, 573 (6th Cir. 1978)); Fed. R. Civ. P. 65(a), (b). In this action, defendants were noticed of plaintiff's intent to seek injunctive relief, and indeed, responded in opposition to the request. Thus, the Court will address plaintiff's motion as one for a preliminary injunction.

The decision whether or not to issue a preliminary injunction falls within the sound discretion of the district court. *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982). A preliminary injunction is an extraordinary remedy that requires the movant to establish the following four factors:

(1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.

Leary v. Daeschner, 228 F.3d 729, 736 (6th Cir.2000) (citing *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc), quoting *Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, 1030 (6th Cir. 1995)). Courts have often recognized that the first factor is traditionally of greater importance than the remaining three. See *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 537 (6th Cir.1978)). In fact, the United States Court of Appeals for the Sixth Circuit has held that, where it appears that the claimant has no chance of success on the merits of the claim, the Court may dismiss the motion for interim injunctive relief without considering the other three factors. See *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997).

III. DISCUSSION

Defendants argue that plaintiff's request for injunctive relief should be denied as moot. Doc. No. 41. Specifically, defendants offer the declaration of Charlie Heiss, the administrative assistant to RCI's Warden. *Declaration of Charlie Heiss*, ¶ 2, attached to Doc. No. 40 ("*Heiss Decl.*"). Mr. Heiss states that in January 2009, "RCI discontinued all sales of tobacco products, which had previously been available for purchase at the commissary. Since January 2009, no tobacco products have been available for sale at RCI." *Id.* at ¶ 3. Mr. Heiss further stated that "[a]s of March 1, 2009, the entire complex of RCI, both the inside and outside of all buildings, has been designated tobacco-free. Since March 1, 2009, no inmate or staff member may use tobacco in any form inside the buildings or outside on the grounds of RCI." *Id.* at ¶ 4.

Here, plaintiff seeks an injunction precluding inmates who are living in RCI's designated tobacco-free housing units from purchasing any tobacco products and requiring the relocation of inmates, as appropriate, to or from tobacco-free housing. Plaintiff "concedes that since March 1, 2009 the institution [RCI] has technically become tobacco-free in policy." Doc. No. 43, p. 2. However, plaintiff argues that, in anticipation of this policy change, inmates had "stocked up on tobacco products[.]" *Id.* As a result, plaintiff contends that RCI "still [has] quite a bit of smoking. Though it is substantially less every day Plaintiff is still exposed daily to involuntary [tobacco smoke]." *Id.* Plaintiff again asks for tobacco-free housing at RCI. *Id.*

Plaintiff offers no affidavit or other evidence to support his allegation that inmates are continuing to smoke at RCI since the policy change in March 2009. Without such evidence, Mr. Heiss's declaration that RCI's entire complex has been smoke-free since March 2009 remains uncontroverted. Accordingly, plaintiff has not presented evidence that he will suffer irreparable injury if his requests are not granted because RCI housing is currently tobacco-free and has been since March 1, 2009.

Under these circumstances, this Court concludes that plaintiff's requests are moot and therefore his requests for a temporary restraining order are without merit.³

³Plaintiff's request for a "special investigator" to examine an alleged altercation between two inmates is also without merit. Plaintiff's affidavit regarding this altercation is premised on his own unsupported speculation that defendants were at fault for this altercation. Such an assertion is insufficient. Moreover, it is not apparent from the record whether ODRC officials already investigated this matter if indeed it did occur.

It is therefore **RECOMMENDED** that plaintiff's requests for a temporary restraining order, Doc. Nos. 17, 19, 21 and 32, be **DENIED as moot.**⁴

Because the issues presently before the Court can be resolved based on the materials currently before the Court, plaintiff's request for a hearing, Doc. Nos. 17 and 19, is **DENIED**.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within ten (10) days, file and serve on all parties objections to the Report and Recommendation, and the part thereof in question, as well as the basis for the objection thereto. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Responses to objections must be filed within ten (10) days after being served with a copy thereof. Fed. R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to de novo review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994); *Smith v. Detroit Fed'n of Teachers, Local 231, Am. Fed'n of Teachers, AFL-CIO*, 829 F.2d 1370 (6th Cir. 1987).

July 17, 2009

s/Norah McCann King
Norah M^cCann King

⁴As stated *supra*, this *Report and Recommendation* does not address plaintiff's motions for summary judgment and for declaratory judgment, which were combined with his requests for a temporary restraining order.

United States Magistrate Judge