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

ROBERT L. WILLIAMS,	:	
Plaintiff	:	Civil Action 2:09-cv-86
v.	:	Judge Watson
DAVID MARTIN, *et al.*,	:	Magistrate Judge Abel
Defendants.	:	

REPORT AND RECOMMENDATION AND ORDER

This matter is before the Court pursuant to Defendants' motion for summary judgment (Doc. 31), as well as Plaintiff's motions to compel (Doc. 26) and for an extension of time (Doc. 32). Plaintiff did not file a timely response to Defendants' motion for summary judgment. However, he later filed a motion for extension of time which was, in effect, a motion under Fed. R. Civ. Pro. 56(f).[1] This court ordered (Doc. 33) that, although Plaintiff's request was untimely, and it took the form of demands for discovery made three months after the expiration of discovery,

[1] Plaintiff's 56(f) motion attached what are, on their faces, two reports of the Gallia County Health Department concerning conditions in the Gallia County Jail. (Doc. 32 at 3-7.) These are addressed below. While his motion referred to other reports which he wished to obtain, there is no particular reason to believe, based upon his complaint and deposition testimony, that these would overcome summary judgment on grounds of lack of standing or failure to state a claim as described herein.

Plaintiff would have an opportunity to file a supplemental motion setting forth by affidavit specific reasons why he was unable to respond to summary judgment.

Plaintiff later filed a supplemental motion (Doc. 34). However, his response is unsatisfactory. Fed. R. Civ. Pro. 56(f) states that if a litigant can show "by affidavit, that, for specified reasons, it cannot present facts essential to justify its opposition", the Court can order a continuance or take other appropriate action. Plaintiff, although he states that his funds were limited during his period of incarceration and he is better able to obtain records due to his recent release, has not offered an explanation for why he failed either to timely request an extension of time in the first place to respond to Defendants' motion or to request an extension of the discovery deadline. Plaintiff's motion (Doc. 32) is accordingly **DENIED**, and the Court will proceed to evaluate Defendants' motion for summary judgment on the merits.[2]

Summary judgment.

Summary judgment is appropriate "if the pleadings, the discovery and

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[2] Plaintiff also filed a motion to compel (Doc. 26), stating that he had served discovery requests to which Defendants had not responded. Defendants, in their memorandum contra, argued first that Plaintiff's motion had been itself filed on the day when their responses were due, second that they had received Plaintiff's discovery requests on the last day of the discovery period, and third that the requests were unduly burdensome and not reasonably calculated to lead to admissible evidence. Plaintiff did not respond to these arguments. Moreover, the Court observes that Plaintiff made no indication in his motion that he had attempted to exhaust extrajudicial means of resolving the discovery dispute before filing a motion to compel, as required by S. D. Ohio Civ. R. 37.1. Accordingly, the motion to compel (Doc. 26) is **DENIED**.

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). The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388-89 (6th Cir. 1993). To avoid summary judgment, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *accord Moore v. Philip Morris Cos.*, 8 F.3d 335, 340 (6th Cir. 1993). "[S]ummary 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 nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (concluding that the court must draw all reasonable inferences in favor of the nonmoving party and must refrain from making credibility determinations or weighing evidence). In responding to a motion for summary judgment, however, the nonmoving party "may not rest upon its mere allegations [...] but [...] must set forth specific facts showing that there is a genuine issue for

trial." Fed. R. Civ. P. 56(e); *see Celotex*, 477 U.S. at 324. Furthermore, the existence of a mere scintilla of evidence in support of the nonmoving party's position will not be sufficient; there must be evidence on which the jury reasonably could find for the nonmoving party. *Anderson*, 477 U.S. at 251; *see Matsushita*, 475 U.S. at 587-88 (finding reliance upon mere allegations, conjecture, or implausible inferences to be insufficient to survive summary judgment).

Underlying facts.

Plaintiff's lawsuit, brought under 42 U.S.C. §1983, was filed on February 6, 2009. In his complaint, he alleged that he had been incarcerated in the Gallia County Jail since September 26, 2008, and that the conditions of his confinement there were unconstitutional. He specifically claimed: (1) lack of medical facilities and care; (2) failure to prevent prisoners from assaulting one another; (3) inadequate staff; (4) inadequate food; (5) no educational opportunities or facilities; (6) no access to a law library; (7) no opportunity for exercise; (8) exposure to infectious disease; (9) no functioning hot or cold water in any cell; (10) overcrowding; (11) inadequate fire prevention and suppression systems; (12) frequent sewage backups; (13) "health hazards"; (14) no segregation of violent offenders; (15) inadequate staff training; (16) inadequate heating and ventilation; and (17) a lack of grievance procedures. Plaintiff named as defendants David Martin, who served as Gallia County Sheriff until January 20, 2009, in his official capacity, Joe Browning, Mr. Martin's successor in office, in his official capacity, and

the Gallia County Commissioners, in their official capacities.[3] He sought punitive damages, nominal damages, and compensatory damages, as well as an order that the Gallia County Jail be closed.

Plaintiff is no longer being held in the Gallia County Jail. He testified at deposition that in approximately September 2008, he was imprisoned in the Gallia County Jail for violation of probation. (Doc. 29 at 10.) He was held there until February or March 2009, when he was transferred to the Scioto County Jail. Plaintiff was thereafter transferred back to Gallia County on April 1, 2009 for two days, and thence into the Ohio state penal system. (*Id.* at 9-11.) At the time of his deposition, he was a prisoner at the London Correctional Facility. (*Id.* at 5.) On April 19, 2010, Plaintiff filed a notice with the Court that he was no longer a prisoner. (Doc. 35.)

Deliberate indifference.

"It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney*, 509 U.S. 25, 31 (1993). The Constitution requires prison officials to provide humane conditions of confinement, including "adequate food, clothing, shelter, and medical care, and must 'take reasonable

[3] If an action under 42 U.S.C. §1983 is brought against an official of a governmental entity in his official capacity, the suit should be construed as brought against the governmental entity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). Therefore, the Court will construe Plaintiff's claims as being against Gallia County itself.

measures to guarantee the safety of the inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984). However, a prison official is found to have violated the Eighth Amendment by depriving a prisoner of basic needs only where a plaintiff can show that the defendant acted with "deliberate indifference" to the inmate's safety.

This standard has two requirements. First, the deprivation must be, "objectively, 'sufficiently serious'". *Farmer*, 511 U.S. at 834, quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). The prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Second, the deprivation must result from the official knowing of and disregarding a substantial risk of serious harm to the inmate's health and safety. *Watkins v. City of Battle Creek*, 273 F.3d 682, 686 (6th Cir. 2001). "Deliberate indifference" is not negligence; it is a subjective standard under which the official must have been both aware of facts which which the inference could be drawn that a substantial risk of serious harm existed, and the official must have drawn the inference. *Id.* Deliberateness requires a state of mind that is "tantamount to intent to punish." *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir. 1994).

Plaintiff did not, in his complaint (or later in his deposition testimony), allege with respect to several of his claims that he suffered a serious deprivation of basic needs. He alleged that the Gallia County Jail offered no educational facilities or programs, and no access to a law library. However, he did not state any way in

which he had been harmed by this lack of facilities. In deposition, he argued merely that persons who did not have a GED should be able to learn to read in prison, and that a prison should offer assistance in learning to use the legal system.[4] Furthermore, he did not, either in his pleadings or his deposition, state that he had suffered any particular injury from the lack of access to a proper law library. He did state at one point in his deposition that he had requested and been refused a copy of the Ohio rules of criminal procedure. (*Id.* at 27.) In order to state a proper claim for denial of meaningful access to the courts, however, a prisoner must plead and prove some prejudice stemming from the alleged violation. *Pilgrim v. Littlefield*, 92 F.3d 413, 417 (6th Cir. 1996). Plaintiff has not, here, alleged that he suffered some adverse result in specific litigation as a result of lack of access to a law library, and thus has not stated a claim upon which relief can be granted.

In addition, Plaintiff alleged that he was permitted "no exercise at all" and that there was "inadequate heating and ventilation". His complaint, again, did not allege any adverse health effects resulting from being deprived exercise or from inadequate heating or ventilation. He alleged that there was no hot and cold running water in any cell, but stated in deposition that:

> Q. No working water in the cells.
> A. No.
> Q. Do you believe that that's required?
> A. Yeah.
> Q. You were allowed to shower, though, correct?

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[4] Plaintiff stated in deposition that he himself had a GED (*id.* at 50), and his pleadings in this case manifestly demonstrate an ability to read and write.

> A. Oh, yeah, you could shower all you want, but if you have – they have one drinking fountain in the day room or out in the area and that was about it. If you're put in detention they have one room. They give you a gallon jug and a cup.

(*Id.* at 35.)[5] Plaintiff claimed also that there was inadequate food for prisoners, explaining at deposition that he received three meals per day, but that the food was cold and the portions inadequate. (*Id.* at 22-23.) He asserted that he had lost thirty pounds while in the jail. When asked, however, whether he had suffered any health problems as a result, Plaintiff said that he didn't know and that "nobody can guarantee" that he would not have health problems later. (*Id.* at 23.) He has not otherwise presented any evidence that he was seriously deprived of adequate food.[6]

Plaintiff additionally claimed in his complaint that "the floor drain back up with raw sewage, this is an ongoing problem." The repeated discharge of raw sewage into the Gallia County Jail is, objectively, a sufficiently serious deprivation of humane living conditions. However, Plaintiff has not shown that Defendants were deliberately indifferent towards the problem. He testified that, in periods of rainfall, floor drains would back up into the jail, and that this had happened about

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[5] Plaintiff testified that prisoners, during the day, could come and go into the day room. (*Id.* at 43-44.)

[6] Plaintiff's Rule 56(f) motion was accompanied by a document which, on its face, appears to be an October 5, 2006 Gallia County Health Department report on conditions at the Gallia County Jail. The inspector, in response to a complaint about cold and inadequate food, concluded that the food was cooked, delivered, and served at proper temperature, and that the daily caloric intake provided was adequate. (Doc. 32 at 4.) This report, which was issued two years before Plaintiff arrived at the jail, addresses a different caterer than that which Plaintiff claims was used during his imprisonment.

six times during his period of confinement there. The prisoners were organized to clean up the jail, and Plaintiff occasionally saw maintenance personnel in the area. (*Id.* at 37-39.) This indicates that Defendants knew of, and did not disregard, the risk to the prisoners' health. Moreover, Plaintiff testified with respect to Sheriff Joe Browning, who had responsibility for the prison:

> A. It would appear to me or it felt to me that Joe Browning was making an attempt, he was making an attempt to get this straightened out and he walked into a mess and I felt sorry for the guy, I really did. He's a good guy. I told him there's nothing bad about the guy. Yeah, he's trying to make a difference, I believe.
> [...]
> Q. And you agree with me that Joe Browning was a reasonable and attentive administrator doing the best he could with the resources he had?
> A. Yeah.

(*Id.* 58, 66.) From the allegations in Plaintiff's complaint, and his deposition testimony, there appears to be no genuine issue of material fact as to whether Defendants were indifferent to a danger to Plaintiff to a degree "tantamount to intent to punish".[7]

Defendants are therefore entitled to judgment as a matter of law on

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[7] Plaintiff alleged also, as his seventeenth claim, "[i]nadequate grievance procedures, or the lack of." In deposition, Plaintiff admitted that there was a grievance procedure, that he understood how it worked, and that he had utilized it. (*Id.* at 29-30.) Though he complained that grievances "magically just disappear", "you get the run-around" and "[t]hey just don't care", his claim ultimately appears to be that he did not receive redress for his grievances, not that no procedure existed. The Court need not determine in this analysis whether utilizing the grievance process of the Gallia County Jail satisfies the requirement that a prisoner exhaust his administrative remedies. The alleged problems raised in his grievances are otherwise addressed herein.

Plaintiff's fourth, fifth, sixth, seventh, ninth, twelfth, thirteenth, sixteenth, and seventeenth claims.[8]

Medical claims.

Plaintiff's first claim in his complaint was for "[n]o medical services at the jail, no doctor, no dentist, no nurse, no medical facility. Plaintiff has several broken teeth." (Doc. 4 at 4.) When, at deposition, Plaintiff was questioned concerning medical services available at the Gallia County Jail, he testified that he had not meant that *he* had several broken teeth:

> Q. And you list no medical services at the jail, no doctor, no dentist, no nurse, no medical facility. Plaintiff has several broken teeth. Your teeth were not broken while you were –
> [...]
> A. It's supposed to be prisoners, not me either.

(*Id.* at 14-15.) He later stated, however, that he had himself suffered two broken teeth while in the jail:

> A. I had a broken tooth in the back. I had to get it taken out at CRC because I told them, I said, I need medical treatment. They said, You can get it at Scioto County. Scioto County just gave me these antibiotics. I went back to the county jail before I got prosecuted and it was like so what, you're going to prison. So for all this time back and forth I couldn't get no medical treatment so that was part of that one.
> [...]
> A. [...] I was eating salad and something broke off the tooth and I told them about it. I wouldn't complain to the diner because it's just a little bitty diner. They basically told me so live with it. So that's since November, yeah, November or December.

(*Id.* at 16.) Plaintiff went on to testify that he had filled out a medical request form,

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[8] The Court concludes that Plaintiff's thirteenth claim, for "health hazards" without other elaboration, is simply duplicative of his other claims.

but that nothing had come of it, and that later once his jaw began to swell he verbally complained.[9]

Dental needs can form the basis of an Eighth Amendment claim, because "[d]ental care is one of the most important needs of inmates." *McCarthy v. Place*, 313 Fed.Appx. 810, 814 (6th Cir. 2008). Whether a deliberate indifference to a prisoner's need for dental care is cognizable at law depends upon various factors such as the pain suffered by the plaintiff, the deterioration of the teeth due to a lack of treatment, or the inability to engage in normal activities. *Flanory v. Bonn*, 604 F.3d 249, 253 (6th Cir. 2010). A serious medical need, however, is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Harrison v. Ash*, 539 F.3d 510, 518 (6th Cir. 2008).

Nevertheless, the question presently before the Court is not whether Plaintiff has stated a claim at all for deliberate indifference to his medical needs, but whether Defendants have shown 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. Pro. 56(c)(2). The Court has elicited Plaintiff's presumed claim for failure to treat his broken tooth from his deposition testimony, not from the allegations in his complaint. Plaintiff has presented neither argument nor evidence that this alleged failure rose to the level of a violation of his Eighth Amendment rights. At

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[9] Plaintiff testified both that he had "a broken tooth in the back" (*id.* at 16) and "two, the very back two" broken teeth (*id.* at 17).

deposition, he conceded that the broken teeth were not an obvious injury which jail personnel could have been expected to recognize as serious. (*Id.* at 17.) Plaintiff did testify that his jaw eventually began to swell, and that this led him to begin verbally complaining about a lack of care. (*Id.* at 18-19.) However, he did not testify that the broken teeth had caused him significant pain or discomfort, had prevented him from eating, or had caused other health problems. The extent of Defendants' alleged indifference, at least according to Plaintiff's testimony, was telling him that he should seek medical treatment after being transferred to the Scioto County Jail.[10]

Even with all the available evidence construed most strongly in Plaintiff's favor, the Court determines that Defendants are entitled to judgment as a matter of law on Plaintiff's first claim. There are no facts in the record from which a reasonable finder of fact could conclude that Defendants both knew of, and disregarded, a substantial risk of serious harm to Plaintiff's health from his broken teeth. Furthermore, Plaintiff has neither alleged in his complaint nor testified at deposition any other basis for a claim that he was harmed by "no medical services at the jail, no doctor, no dentist, no nurse, no medical facility."

Standing.

Every person who wishes to bring a lawsuit must have standing to do so.

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[10] This transfer appears to have taken place three or four months later. (*Id.* at 10, 16.) When he arrived at the Scioto County Jail, Plaintiff was given antibiotics. Later, the broken teeth were extracted at Corrections Medical Center. (*Id.* at 16.)

Standing, an essential jurisdictional requirement, means that "a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling." *Horne v. Flores*, 129 S.Ct. 2592 (2009). The prisoner must have "a personal stake in the outcome of the controversy". *Id.*, quoting *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009). Moreover, a showing of standing to sue requires the demonstration of an actual injury, not a theoretical one. *Mitchell v. Kentucky Dep't of Corrections*, 234 F.3d 1269 at *3 (6th Cir. 2000).

A plaintiff may not assert claims that are not personal to him. *Coal Operators & Assoc., Inc. v. Babbitt*, 291 F.3d 912, 915-16 (6th Cir. 2002). He therefore cannot raise a claim on behalf of other inmates. Defendants point out that in deposition Plaintiff admitted, with respect to inmate safety:

> A. Okay. Can I clarify something? You guys read the complaint wrong. It said prisoners are assaulted, not the plaintiff. I didn't say the plaintiff. There's a whole bunch of questions. I was never assaulted by staff or inmate, anybody.

(Doc. 29 at 13.) He elsewhere repeated affirmatively that he had never been assaulted by staff or prisoners or physically intimidated or mistreated while in the jail.[11] (*Id.* at 21, 65.) Accordingly, Plaintiff admitted that he had no standing to bring his second and fourteenth claims, because any complained-of injury had

[11] Despite the claim in his pleading that there was no classification or segregation of prisoners, Plaintiff stated at deposition that A and B Blocks were for general population, but that C Block was for "medium to maximum security", and that D Block was an isolation cell. (*Id.* at 42-43.)

happened to other prisoners.

Plaintiff likewise admitted that the lack of sufficient staff he alleged had not put him in any danger, and that, to the extent that it might have permitted inmate theft, any materials issued to him by the jail that were stolen were replaced. (*Id.* at 20-21.) He testified that, to his knowledge, he had not contracted any infectious diseases, and that he had not been affected by any lack of fire safety equipment. (*Id.* at 35-36.) Plaintiff also stated that the lack of adequate staffing he alleged had not affected him individually, but might have in the case of an emergency at night (*id.* at 40), and that, with respect to overcrowding:

> Q. You say continuous overcrowding.
> A. Yeah.
> Q. How's that affect you?
> A. The same as being infectious diseases, threat of assault, just that way.

(*Id.* at 35-36.) Plaintiff therefore, according to his deposition testimony, has no standing to bring his third, eighth, tenth, eleventh, and fifteenth claims, because he had not actually been injured.

Conclusions.

For the foregoing reasons, it is hereby **ORDERED** that Plaintiff's motion to compel (Doc. 26) and for an extension of time pursuant to Fed. R. Civ. Pro. 56(f) (Doc. 32) are **DENIED**. Furthermore, I **RECOMMEND** that Defendants' motion for summary judgment (Doc. 31) be **GRANTED** as to all claims.

With respect to Plaintiff's motion to compel (Doc. 26) and for an extension of time (Doc. 32): Under the provisions of 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R.

Civ. P. and Eastern Division Order No. 91-3, pt. F, 5, either party may, within fourteen (14) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by the District Judge. The motion must specifically designate the order, or part thereof, in question and the basis for any objection thereto. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

With respect to Defendants' motion for summary judgment (Doc. 31): If any party objects to this Report and Recommendation, that party may, within fourteen (14) days, file and serve on all parties a motion for reconsideration by the Court, specifically designating this Report and Recommendation, and the party thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1)(B); Rule 72(b), Fed. R. Civ. P.

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 waiver of the right to appeal the judgment of the District Court. *Thomas v. Arn*, 474 U.S. 140, 150-52 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also*, *Small v. Secretary of Health and Human Services*, 892 F.3d 15, 16 (2d Cir. 1989).

s/Mark R. Abel
United States Magistrate Judge