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

DAVID P. NELLUM,

Plaintiff,

v.

Case No. 2:09-CV-296
JUDGE WATSON
MAGISTRATE JUDGE KING

MS. HARRIS (H.C.A.), *et al.*,

Defendants.

ORDER and
REPORT AND RECOMMENDATION

This matter is before the Court for consideration of defendants' *Motion for Summary Judgment*, Doc. No. 54, plaintiff's *Motion for Summary Judgment*, Doc. No. 50, and plaintiff's *Motion to Strike*, Doc. No. 53. For the reasons that follow, it is recommended that defendants' motion be granted and that plaintiff's motions be denied.

I.

Plaintiff David P. Nellum ["Plaintiff"] brings this action pursuant to 42 U.S.C. § 1983, claiming that his Eighth Amendment rights were violated while he was incarcerated at the Ross Correctional Institution ["RCI"]. Defendants in this action are Ms. Harris, Healthcare Administrator at RCI; Ms. Jewell, a Registered Nurse at RCI; and Ms. Good, a Licensed Practical Nurse at RCI. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343.

In his *Complaint*, Doc. No. 5, Plaintiff alleges that Defendants failed to comply with Ohio Department of Rehabilitation and Correction ["ODRC"] policy when Plaintiff reported for

medical treatment after an incident that occurred in his cell on January 24, 2008. On that date, Plaintiff's cellmate, Inmate Carl Hall, allegedly "made wine in the cell and [drank] it with [Plaintiff]. . . ." *See Inmate Voluntary Statement*, Exhibit C attached to *Affidavit of Michael Sheets - Warden RCI*, Exhibit A attached to *Defendants' Motion for Summary Judgment*, Doc. No. 54. Inmate Hall then allegedly "punch[ed] [Plaintiff] and said I know what it is . . . ." *Id.* According to Plaintiff, that statement was a sexual advance and Plaintiff "was left no choice but to defend myself so I grab [*sic*] some piece of metal and hit him with it." *Id.*

Corrections officers working in the housing unit witnessed Plaintiff and Inmate Hall fighting. Plaintiff was interviewed regarding the incident by Mr. Baker, Chief Institutional Inspector at RCI, who avers that Plaintiff "struck Inmate Hall several times with the metal in the head, arm and hand." *Affidavit of David Baker* at ¶ 4, attached as Exhibit B to *Defendants' Motion for Summary Judgment*, Doc. No. 54. Inmate Hall, who was bleeding from the head and arm, was transferred to the hospital for treatment of his severe wounds. *Id.* Plaintiff was treated by medical staff at RCI for minor injuries. *Id.* Plaintiff admitted to Mr. Baker that he had been drinking and that he had assaulted Inmate Hall. *Id.* at ¶¶ 5-6.

Defendant Jewell examined Plaintiff upon his arrival at the medical unit. Plaintiff "sustained a small cut to the fifth digit on his right hand as a result of the fight and was treated. [Plaintiff] was otherwise alert and ambulatory [and] complained of no other injuries." *Affidavit of Brenda Jewell* at ¶ 4, attached as Exhibit D to *Defendants' Motion for Summary Judgment*, Doc. No. 54. Defendant Jewell denies that Plaintiff reported being sexually assaulted when he was seen on January 24, 2008. *Id.*, at ¶ 8.

Approximately one week after the altercation with Inmate Hall, on January 31,

Plaintiff reported to a mental health liaison an alleged history of sexual assaults by his cellmate.[1] *See* Exhibits E, F, attached to *Affidavit of Michael Sheets – Warden RCI*, attached as Exhibit A to *Defendants' Motion for Summary Judgment.*

On February 4, 2008, Mr. Baker and Ohio State Highway Patrol Trooper M. Maughmer interviewed Plaintiff "concerning his accusation of sexual assault by Inmate Hall." *Baker Affidavit* at ¶ 8. Mr. Baker avers that Plaintiff complained of "trouble with Hall since the day they moved in together." *Id.* In particular, Plaintiff stated that Inmate Hall "would rub him and ask for oral sex [and] one time Hall put his finger in [Plaintiff's] rectum." *Id.* Plaintiff told Mr. Baker that, on the night of the fight, Plaintiff "thought something happened to him but he couldn't say for sure." *Id.*

Mr. Baker and Trooper Maughmer concluded that, due to the length of time that had transpired since the alleged sexual assault combined with the lack of physical evidence of an assault, no criminal report was required. Mr. Baker and Trooper Maughmer also concluded that Plaintiff need not be sent to the hospital for a rape kit. *Id.* at ¶ 9. Mr. Baker avers that, pursuant to ODRC policy, a rape kit need not be performed when an sexual assault allegedly occurred more than seventy-two hours prior to the report. *Id.*

As a result of the incident with Inmate Hall, Plaintiff's security level was upgraded and he was transferred to the Warren Correctional Institution ["WCI"]. *Affidavit of Michael Sheets - Warden RCI* at ¶ 9. At Plaintiff's request, Plaintiff was tested by medical staff at WCI for HIV/AIDS. *Id.*

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[1]Plaintiff met with a mental health liaison the day after the fight with Inmate Hall but did not report a sexual assault at that time. *See Affidavit of Michael Sheets - Warden RCI* at ¶ 7 attached to *Defendants' Motion for Summary Judgment*, Doc. No. 54.

In his *Complaint*, Doc. No. 5, Plaintiff claims that Defendants failed to follow proper policy. In particular, Plaintiff alleges that Defendants "didn't show any regard for my physical and mental well being after being aware of what took place earlier in the day [January 24, 2008] . . . ." *Id.* at 5.

Defendants move for summary judgment on Plaintiff's claim that he was denied adequate medical treatment at RCI. Plaintiff moves for summary judgment in his favor on the claim.

II.

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 court shall grant summary judgment 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)(2010). In making this determination, the evidence "must 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 former 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)).

III.

A. Plaintiff's *Motion to Strike*

Plaintiff has filed a *Motion to Strike*, Doc. No. 53, Defendants' *Motion for Summary Judgment* on the basis of "fraudulent entries and ambiguous exhibits that were procured after [Plaintiff's] motion for discovery." *Motion to Strike*, Doc. No. 53, at 1. Plaintiff takes specific issue with the time recorded on the January 31, 2008 *Incident Report* James M. Pratt, the mental health liaison to whom Plaintiff complained of a sexual assault on January 31, 2008. *See* Exhibit E attached to *Affidavit of Michael Sheets - Warden RCI.* As Plaintiff points out, Mr. Pratts' typed *Incident Report* reflects an "incident time" of 4:30 p.m. on January 31, 2008. However, the handwritten notes from that date reflect a time of 3:30 p.m. on January 31, 2008. *See* Exhibit F attached to *Affidavit of Michael Sheets - Warden RCI.* Plaintiff argues that this discrepancy

indicates that Defendants are attempting to "get away" with something. *Motion to Strike*, Doc. No. 53, at 3.

In the Court's view, this discrepancy in time is immaterial to the merits of Plaintiff's claim. Whether Plaintiff made his report to the mental health liaison on January 31, 2008 at 3:30 p.m. or 4:30 p.m. simply does not matter. The Court finds no reason to strike Defendants' *Motion for Summary Judgment* because of that discrepancy. Plaintiff's *Motion to Strike*, Doc. No. 53, is denied.

B. *Motions for Summary Judgment*

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 (2008). An inmate 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 to even 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 treatment constitutes 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 treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims that actually sound in state tort law. *Id.*

In this case, Defendants move for summary judgment on the basis that there is insufficient evidence to support Plaintiff's Eighth Amendment claim. In particular, Defendants argue that there is no evidence to satisfy either the objective or the subjective elements of the claim.

Defendants argue that they were not aware on January 24, 2008 that Plaintiff suffered from a "sufficiently serious medical need," *i.e.*, an alleged sexual assault by Inmate Hall. In opposition to the Defendants' motion, Plaintiff states that he told Defendants Jewell and Good but "they never responded to my statement or complaint." *Plaintiff's Memorandum contra* at 3. Plaintiff maintains that he should have been treated for a sexual assault when he was seen in the medical unit immediately after the altercation on January 24, 2008.

As Defendants observe, Plaintiff has offered no evidence that he informed any of the Defendants of a sexual assault on January 24, 2008. In opposing the Defendants' motion,

Plaintiff does not argue that he actually reported the sexual assault to Defendants on January 24, 2008; he argues instead that Defendants should have been aware of the alleged assault by virtue of Plaintiff informing them of Hall's statement "you know how it is." *Plaintiff's Memorandum contra*, Doc. No. 56, at 2-3. In the Court's view, Plaintiff's statement was insufficient to place Defendants on notice that Plaintiff had been the alleged victim of a sexual assault. Furthermore, as documented in the January 31, 2008 reports of the mental health liaison – both hand-written and typed -- Plaintiff had not reported these assaults for fear of reprisal by Hall and of being humiliated in the eyes of other inmates. Exhibits G, F attached to *Affidavit of Michael Sheets - Warden RCI.* There is simply no evidence that Plaintiff reported the alleged assault prior to January 31, 2008.

In sum, the Court finds insufficient evidence to create a genuine issue of material fact with respect to the subjective element of an Eighth Amendment claim. The evidence does not show that Defendants were aware, on January 24, 2008, that Plaintiff suffered from a serious medical need. Rather, the evidence establishes that Defendants were not aware of an alleged sexual assault until January 31, 2008 when Plaintiff reported it to the mental health liaison. At that point, the matter was investigated in accordance with ODRC policy. There is simply no evidence that Defendants disregarded a substantial risk of harm to Plaintiff.

The evidence demonstrates that Plaintiff received adequate and prompt medical treatment for the injuries he sustained as a result of having initiated a fight with Inmate Hall on January 24, 2008. The evidence further demonstrates that Defendants were aware of no other alleged injuries to Plaintiff at that time. There is nothing in the record to show that Defendants acted in violation of the Eighth Amendment in connection with Plaintiff's medical treatment.

For these reasons, the Court recommends that Defendants' *Motion for Summary Judgment*, Doc. 54, be granted and that Plaintiff's *Motion for Summary Judgment*, Doc. No. 50, be denied.

IV.

Plaintiff's *Motion to Strike*, **Doc. No. 53**, is **DENIED**.

It is **RECOMMENDED** that Defendants' *Motion for Summary Judgment*, **Doc. No. 54**, be **GRANTED** and that Plaintiff's *Motion for Summary Judgment*, **Doc. No. 50**, be **DENIED**.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within fourteen (14) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1); F.R. Civ. P. 72(b). Response to objections must be filed within fourteen (14) days after being served with a copy thereof. F.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 (1985); *Smith v. Detroit Federation of Teachers, Local 231 etc.*, 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

December 20, 2010
DATE

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