

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

SCOTT KELLY HANSEN,

Plaintiff,

v.

Civil Action 2:09-cv-00517

Judge John D. Holschuh

Magistrate Judge E. A. Preston Deavers

TERRY J. COLLINS,

Defendant.

ORDER

This matter is before the Court for consideration of Plaintiff's Objections to the June 22, 2010 Report and Recommendation (Doc. 27).¹ In the Report and Recommendation, the Magistrate Judge recommended that the Court grant Defendant's Motion for Summary Judgment (Doc. 24) and dismiss Plaintiff's action without prejudice. Plaintiff filed his Objection to the Report and Recommendation on July 6, 2010. For the following reasons, the Court **OVERRULES** Plaintiff's Objection and **ADOPTS** the Report and Recommendation.

I. BACKGROUND

A. Relevant Facts

Plaintiff is currently in a Minnesota prison serving a sentence for federal crimes and is scheduled for release in January 2014. Plaintiff allegedly committed the federal crimes while on parole from an Ohio conviction. The Ohio Department of Rehabilitation and Correction ("ODRC") has placed a parole holder on Plaintiff. Plaintiff brings this action to prevent his

¹ Because there are two relevant Report and Recommendations in this matter, the Court will cite to their document number within the record.

return to Ohio following his release from prison in January 2014. Interpreting the *pro se* Complaint liberally, the Court characterizes Plaintiff's Complaint as a claim that ODRC is acting with deliberate indifference to a substantial threat to his safety, in violation of the Eighth Amendment.

Plaintiff specifically contends that he will be in grave danger if returned to Ohio because of testimony he gave during the 1990s. Plaintiff was placed in the federal witness protection program in 1994 and 1997. He moves for the production of classified threat assessments as evidence of the danger he will face if the ODRC returns him to Ohio. (*See* Doc. 19.)

Through its January 29, 2010 Order, this Court adopted the January 4, 2010 Report and Recommendation (Doc. 13) denying Defendant's Motion to Dismiss. Defendant essentially contended that Plaintiff's claim was not ripe because he could not demonstrate an imminent injury. (*See* Def.'s Mot. to Dismiss 3–4.) The Magistrate Judge who issued the Report and Recommendation disagreed, finding Plaintiff had alleged a concrete injury and that the issue presented, whether Defendant is deliberately indifferent to a substantial threat of Plaintiff's safety, was a suitable issue for judicial decision.

Defendant filed a Motion for Summary Judgment in May 2010. Although Defendant once again challenged the ripeness of Plaintiff's action, Defendant's Motion raised practical concerns regarding the difficulty of litigating this case when Plaintiff's release was over three years away. (Def.'s Mot. for Summ. J. 3–4.) In the June 22, 2010 Report and Recommendation, the Magistrate Judge found that for prudential considerations, the Court would be in a better position to consider the case at a future date. Specifically, the Magistrate Judge found that factual record is presently underdeveloped.

In his Objection, Plaintiff maintains that the Court should follow the earlier Report and Recommendation, finding that the case was ripe for review, and reject the more recent Report and Recommendation finding that ripeness was lacking. Plaintiff maintains that the ODRC letter attached to his Complaint demonstrates ODRC's intention of returning him to Ohio. (Pl.'s Objection 3.) Furthermore, Plaintiff contends that while the factual record is currently underdeveloped, it will not be if the Court grants his motion for the production of classified documents. (*Id.*)

II. STANDARD

If a party objects within the allotted time to a report and recommendation, the Court “shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b). Upon review, the Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1).

The Magistrate Judge's Report and Recommendation considered Defendant's Motion for Summary Judgment. Summary judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. of Civ. P. 56(c). “In considering a motion for summary judgment, the district court must draw all reasonable inferences in favor of the nonmoving party.” *Colvin v. Caruso*, 605 F.3d 282, 288 (6th Cir. 2010) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

III. LEGAL ANALYSIS

Plaintiff's first contention is that the Court should reject the June 22, 2010 Report and

Recommendation because an earlier adopted Report and Recommendation found that Plaintiff's case was ripe. In the June 22, 2010 Report and Recommendation, the Magistrate Judge appropriately highlighted the prudential aspect of ripeness considerations. Specifically, the Magistrate Judge emphasized the discretionary nature of applying the ripeness doctrine:

Under the Constitution, federal court jurisdiction is limited to cases and controversies. U.S. Const. art. III, § 2; *In re Cassim*, 594 F.3d 432, 437 (6th Cir. 2010). Accordingly, “[t]he ripeness doctrine has developed ‘to ensure that courts decide only existing, substantial controversies . . .’” *Cassim*, 594 F.3d at 437 (quoting *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377, 399 (6th Cir. 2001)). Nevertheless, “the ripeness doctrine arises ‘both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.’” *Id.* (quoting *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 n.18 (1993)). Accordingly, “[t]he ripeness doctrine not only depends on the finding of a case and controversy and hence jurisdiction under Article III, but it also requires that the court exercise its discretion to determine if judicial resolution would be desirable under all of the circumstances.” *Id.* at 437–38 (quoting *Brown v. Ferro Corp.*, 763 F.2d 798, 801 (6th Cir. 1985)).

(Doc. 27 at 4.) Additionally, the Magistrate Judge set forth the different factors the Court may consider in determining ripeness:

[T]he Court looks to “(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings.” *Id.* (quoting *Insomnia, Inc. v. City of Memphis, Tenn.*, 278 Fed.Appx. 609, 612 (6th Cir. 2008)) (internal quotations omitted). The first factor indicates that “[r]ipeness while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in fact be certainly impending.” *Casden v. Burns*, 306 Fed. Appx. 966, 971 (6th Cir. 2009) (quoting *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996)). The second and third factors, however, “reflect the ‘prudential aspect of ripeness.’” *Id.* at 972 (quoting *Nat'l Treasury Employees Union*, 306 Fed. Appx. at 1427–28).

(Doc. 27 at 4–5.); *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (noting that ripeness depends on “(1) the fitness of the issues for judicial decision and

(2) the hardship to the parties of withholding court consideration”).

In the January 4, 2010 Report and Recommendation, the Magistrate Judge addressed the issues of ripeness and standing. In particular, the Magistrate Judge found that Plaintiff is seeking relief “that is concrete, particularized and imminent.” (Doc. 13 at 5.) The Magistrate Judge also briefly noted, taking Plaintiff’s allegations as true, that Plaintiff would suffer hardship without Court redress and that the questions that the case presented was a suitable question for judicial decision. (Doc. 13 at 5–6.) Nevertheless, taking these conclusions within the context of the Report and Recommendation, it is clear that the Magistrate Judge was not considering certain prudential concerns such as the current state of the factual record.² (*See id.*) Furthermore, the Magistrate Judge was called upon to take the allegations as true, and to determine whether Plaintiff had stated a cause of action at all.

The June 22, 2010 Report and Recommendation did not challenge the legal conclusions of the earlier Report and Recommendation. Rather, the Magistrate Judge found, based on timing considerations that Defendant raised in his Motion for Summary Judgment, that the case was not ripe for review due to prudential concerns. Moreover, at the summary judgment stage, the Court had no obligation to consider the allegations in the Complaint as true, and instead was required to analyze the evidence of record, which in this case, included an affidavit from William Eleby, the Chief of the Bureau of Classification and Reception for the ODRC. Accordingly, the Court sees no need to reject the latter opinions of the Magistrate Judge based on any inconsistencies

² Defendant had not raised these factual concerns in his Motion to Dismiss.

between the two Reports and Recommendations.³

The Court now moves to Plaintiff's substantive contentions. Specifically, Plaintiff states that the only reason the factual record is underdeveloped in this case is because the Court has not granted his Motion for the Production of Classified Government Threat Assessments. (Pl.'s Objection 3.) According to Plaintiff, once the Court sees the nature of the threat he faces in returning to Ohio, the circumstances surrounding Plaintiff's transfer and Ohio imprisonment three years from now will not matter. (*Id.*) Although the Court is sympathetic with regard to Plaintiff's safety concern, it disagrees with his conclusion. Specifically, despite Plaintiff's contentions to the contrary, the circumstances and conditions surrounding the transfer of Plaintiff and any subsequent imprisonment, which would occur over three years from now, do matter to his claim.

As noted above, Plaintiff is claiming an Eighth Amendment violation, asserting that the ODRC is acting with deliberate indifference to a substantial threat to his safety by seeking his return to Ohio. As the United States Court of Appeals for the Sixth Circuit has noted, "the elements of an Eighth Amendment violation have both objective and subjective components." *Mingus v. Butler*, 591 F.3d 474, 479–80 (6th Cir. 2010) (citing *Curry v. Scott*, 249 F.3d 493, 506 (6th Cir.2001)). The objective element requires that "the failure to protect from risk of harm must be objectively sufficiently serious." *Id.* at 480 (internal quotation omitted). To prove the subjective element "the inmate must demonstrate that the official acted with 'deliberate

³ Even if the June 22, 2010 Report and Recommendation had been inconsistent with the earlier adopted Report and Recommendation, the "district court may always reconsider and revise its interlocutory orders while it retains jurisdiction over the case." *In re Life Investors Ins. Co. of Am.*, 589 F.3d 319, 326 n.6 (6th Cir. 2009).

indifference to inmate . . . safety.’” *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 833 (1994)).

In other terms, this component requires that the defendant have knowledge of and disregard the risk involved. *Id.*; see also *Jackson v. Herrington*, No. 08-5613, 2010 WL 3398900, at *7 (6th Cir. Aug. 31, 2010) (internal quotation omitted) (“The subjective component requires demonstration of a state of mind more blameworthy than negligence.”).

The Court agrees with the Magistrate Judge that the factual record to consider these components of an Eighth Amendment violation is underdeveloped at this time. With regards to this issue the Magistrate Judge stated:

Attachments to Plaintiff’s Complaint indicate that the Federal Bureau of Prisons will not release him until January of 2014, well over three years from the current date. (Doc. 2–1 at 5.) Thus, any judicial decision at this stage would undergo the difficult task of assessing the prison safety conditions that will exist over three years from now. Similarly, the Court would be required to evaluate the deliberate indifference of ODRC regarding a transfer that is not going to occur until January 2014.

(Doc. 27 at 5.) The Court has no reasons to doubt that the classified documents Plaintiff requests may provide an indication of an objectively serious threat to Plaintiff. Nevertheless, the Court must still consider the subjective component of Plaintiff’s claim. After all, for Plaintiff to succeed in this action he must not only establish that he faces a serious risk of harm, but must also demonstrate that the ODRC is aware of this risk and is deliberately disregarding it. Consequently, Plaintiff’s action will not only involve the issue of whether or not Plaintiff is returning to Ohio, but also what steps the ODRC is taking to assure Plaintiff’s safety.⁴ The

⁴ The affidavit of Mr. Eleby provides some insight into the problems the Court would face in adjudicating this matter at this early stage. Mr. Eleby states, for example, “[i]f information is received by the State of Ohio that Plaintiff Hansen is at risk of serious harm, arrangements could be made prior to his arrival in the State of Ohio to assure that he is kept separated from other inmates.” (Doc. 24-1 ¶ 7.) Because none of these arrangements have been

Court finds that such questions are much more difficult, if not impossible, to address three years from when the relevant transfer will take place, and instead must be decided at a time closer to Plaintiff's release.

Once again, the Court emphasizes that it is not indifferent to Plaintiff's concerns. As the Report and Recommendation indicated, the dismissal is without prejudice, which means that Plaintiff may, if he so chooses, re-file an action for injunctive relief approximately one year before his January 2014 release.⁵ At that time, the Court will be a better position to adjudicate the issues of the case.⁶ Furthermore, a copy of the Report and Recommendation was mailed to Assistant United States Attorney Joseph R. Wilson in order that the Department of Justice may anticipate future litigation in this matter and the potential need for classified materials.

IV. CONCLUSION

For the above reasoning, the Court **ADOPTS** the Magistrate Judge's June 22, 2010 Report and Recommendation, and **GRANTS** Defendant's Motion for Summary Judgment (Doc. 24). Plaintiff's cause of action is **DISMISSED** without prejudice. Furthermore, Plaintiff's Motion to Set-Aside Courts Previous Order to Stay Plaintiff's Motion for production of Classified U.S. Government Threat Assessments (Doc. 19) is **DENIED** as moot.

IT IS SO ORDERED.

or are in the process of being arranged, the Court cannot assess whether the ORDC is adequately accounting for the safety needs of Plaintiff at this time.

⁵ The Court also encourages both Plaintiff and Defendant to seek an extra-judicial resolution to this matter prior to any further litigation.

⁶ To the extent Plaintiff is concerned that a future action might be too late to address his request for relief, the Court is capable of expediting review of Plaintiff's action as his date of release approaches.

Date: September 16, 2010

/s/ John D. Holschuh
John D. Holschuh, Judge
United States District Court