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

TROY CROCKER

Plaintiff,

v.

Case No. 2:09-cv-00927
JUDGE FROST
MAGISTRATE JUDGE KING

OHIO DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

ORDER and
REPORT AND RECOMMENDATION

The matter before the Court is consideration of *Plaintiff's Motion to Amend and Supplement His Original Complaint and Show Good Reason to Allow this Complaint to Move Foreward* [sic] *and not be Dismissed under Civ. Rule 15*, Doc. No. 15 ("*Motion to Amend*"), and *Defendant, Drew Hildebrand's, Motion to Dismiss and/or for Summary Judgment*, Doc. No. 13 ("*Motion for Summary Judgment*"). For the reasons that follow, it is **ORDERED** that Plaintiff's *Motion to Amend* is **DENIED**; it is **RECOMMENDED** that Defendant's *Motion for Summary Judgment* be **GRANTED**.

I. BACKGROUND

Plaintiff, an inmate currently in the custody of the State of Ohio, brings this action under 42 U.S.C. § 1983, alleging that the Deputy Warden of the Chillicothe Correctional Institution ("CCI") failed to protect him from other inmates. *Complaint*, Doc. No. 3, p. 4 ("*Complaint*"). The Defendant in this action is the Assistant Chief of the Bureau of Ohio Penal Industries, Frank

Andrew Hildebrand, who was formerly the Deputy Warden Administrator at CCI.[1] *Complaint*, p. 1; *Exhibit A* (attached to *Motion to Dismiss*).

Plaintiff alleges that on April 15, 2009, he was attacked by three unidentified prisoners. *Complaint*, p. 4. These alleged attacks resulted in both short-term and long-term injuries, including migraine headaches and blurred vision. *Id.* Plaintiff further alleges that he was put into a medically induced coma to offset the pain from the attack. *Id.* Finally, Plaintiff alleges that the guard responsible for watching his cell block was absent during the attack. *Id.* Defendant's *Motion for Summary Judgment* contends that Defendant is not liable because he was not employed by CCI at the time the incident allegedly occurred. *Motion for Summary Judgment*, p. 2 (citing *Exhibit A*, ¶ 2 (attached thereto). Defendant also argues that, even if Defendant had been at CCI at the relevant time, Plaintiff's claim must nevertheless fail because § 1983 liability cannot be based on the theory of *respondeat superior*. *Id.* In apparent response to the *Motion for Summary Judgment*, Plaintiff filed the *Motion to Amend* in which he asks for leave to join as a defendant the officer who Plaintiff believes should have been at his post at the time of the alleged attack., arguing that F. R. Civ. P. 15 and the Constitution require this Court to permit the amendment. *Id.* at 2. Defendant argues that the proposed amendment would be futile because Plaintiff failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (PLRA).

[1]Originally, the Ohio Department of Rehabilitation and Corrections ("ODRC") was also a named defendant in this case. However, this Court dismissed ODRC on Eleventh Amendment grounds, leaving defendant Hildebrand as the sole named defendant in this case. *Initial Screen of the Complaint and Report and Recommendation*, Doc. No. 4, p. 1; *Order*, Doc. No. 7. Plaintiff's claim against defendant Hildebrand was allowed to proceed on Eighth Amendment grounds. *Id.*

II. DISCUSSION

A. Defendant's *Motion for Summary Judgment*

In his motion, Defendant argues that Plaintiff's *Complaint* should be dismissed on one of two alternative grounds: F. R. Civ. P. 12(b)(6) or F. R. Civ. P. 56. Where a motion under Rule 12(b)(6) presents matters outside the pleadings which are not excluded by the court, the motion must be resolved by reference to the standards governing motions for summary judgment, *i.e*., Rule 56. F.R. Civ.P. 12(d). Both parties, in addressing defendant's motion, have presented matters outside the pleadings. This Court therefore concludes that Defendant's motion should be resolved by reference to the standards governing motions for summary judgment.

1. Standard for Summary Judgment under Rule 56

The standard for granting summary judgment is found in F. R. Civ. P. 56. Rule 56(a) 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.

When considering a motion for summary judgment a court must view the evidence in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1969). Summary judgment will not be granted "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 some evidence on which the fact finder could reasonably find for the opposing party. *Anderson*, 477 U.S. at 251. Moreover, the court may

> grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it . . . .

F. R. Civ. P. 56(e)(3).

2. Analysis

Defendant argues that summary judgment is warranted because (1) Defendant had left his position at CCI more than a year before the incident took place, and (2) that even if Defendant had still been employed at CCI, Defendant would not be liable under § 1983. *Motion* for *Summary Judgment.*

In support of his motion, Defendant submits his own declaration in which he avers that he has not been employed at CCI since February 17, 2008. *Exhibit A* (attached to *Motion for Summary Judgment*). Significantly, Plaintiff concedes that Defendant is not the correct defendant in this case. *Motion to Amend*, pp. 2, 5. Because it is undisputed that Defendant had no involvement in the alleged incident, Defendant is entitled to summary judgment. *See* Rule 56(e)(3); *Anderson*, 477 U.S. at 251.

B. Plaintiff's *Motion to Amend*

Plaintiff seeks leave to amend the *Complaint* in order to name a new party defendant.

1. Standard for Leave to Amend

Plaintiff's motion is governed by Rule 15(a), which provides, in pertinent part:

A party may amend its pleadings once, as a matter of course within . . . 21 days after

> serving it, or . . . if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after a service of a motion under Rule 12(b), (e), or (f), whichever is earlier . . . [i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Rule 15(a)(1)-(2). When exercising its discretion as to whether or not to grant leave to amend a complaint, a court may consider, *inter alia*, the futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). If a plaintiff cannot, even with the proposed amendment, state a viable claim, then the amendment is futile and leave to amend should be denied. *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 421 (6th Cir. 2000).

2. Analysis

Defendant argues that the *Motion to Amend* should be denied on the basis that the proposed amendment would be futile because Plaintiff failed to exhaust his administrative remedies as required by the PLRA. *Memorandum in Opposition to Plaintiff's Motion to Amend and Supplement his Original Complaint*, Doc. No. 19, p. 1 ("*Opposition*"). Defendant's argument is well-taken.

The PLRA requires, *inter alia*, that prisoners exhaust available administrative remedies prior to filing an action that challenges conditions of confinement.

> No action shall be brought with respect to prison conditions under [§ 1983 of this title], or any other Federal law, by a prisoner confined to any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). Exhaustion under the PLRA requires that a prisoner use "'all steps that the agency holds out, and do so <u>properly</u> . . . .'" *Woodford v. Ngo*, 548 U.S. 81, 90 (2006), quoting *Puzo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)(emphasis in original).

The State of Ohio has a three-tiered prison grievance process. O.A.C. 5120-9-

31(K)(1–3). The first step requires the prisoner to file an "informal complaint to the direct supervisor or staff member." *Id.* The second step requires the prisoner to file a formal grievance with the inspector of institutional services. *Id.* The third step requires the prisoner to file an appeal from the inspector's decision with the Office of the Chief Inspector. *Id.*

Plaintiff's *Complaint* refers to a "grievance," *Complaint*, p. 3, but there is no indication in the record that Plaintiff properly exhausted his administrative remedies to the point of appeal to the Office of the Chief Inspector. Furthermore, Defendant submitted the affidavit of one Suzanne Evans, a grievance officer for the Chief Inspector's Office, who asserts that Plaintiff failed to appeal his grievance to the highest possible level. *Exhibit A*, ¶¶ 2, 8 (attached to *Opposition*). Plaintiff does not dispute this assertion. Therefore, it appears that Plaintiff failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a) and that his proposed claim against a new defendant would be futile. Under these circumstances, the Court's discretion is best exercised by the denial of Plaintiff's *Motion to Amend*. *See Rose*, 203 F.3d at 421.

Plaintiff argues that the denial of the *Motion to Amend* the *Complaint* would violate Plaintiff's Due Process rights under the Fifth and Fourteenth Amendments. *Motion to Amend*, p. 2. Plaintiff offers no authority for the proposition that the proper application of the PLRA and Rule 15 constitutes a denial of due process. The Court therefore rejects Plaintiff's contention in this regard.

WHEREUPON, Plaintiff's *Motion to Amend*, Doc. No. 15, is **DENIED.** It is **RECOMMENDED** that Defendant's *Motion for Summary Judgment*, Doc. No. 13, be **GRANTED**, and that Plaintiff's claims against Defendant be dismissed with prejudice.

If any party seeks review by the District Judge of this *Order and Report and*

Recommendation, that party may, within fourteen (14) days, file and serve on all parties objections to the *Order and Report and Recommendation*, specifically designating this *Order and 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 a failure to object to this *Order and 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 *Order and Report and Recommendation*. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Foundation of Teachers, Local 231, etc.*, 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

s/ Norah McCann King
Norah McCann King
United States Magistrate Judge

December 9, 2010

DATE