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STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 63-1-09 Wrcv

Gordon E. Campbell, Jr.
Plaintiff

v.

Andrew Pallito, Ellen McWard,
Lynn Hayward, Melanie Williams,
Brian Kearns, Lynn Roberto, and
various John & Jane Does
Defendants

OPINION AND ORDER RE: SUMMARY JUDGMENT

This matter is before the court on the remaining Defendants'[1] motion for summary judgment. They are represented by Assistant Attorney General David McLean. Plaintiff Gordon Campbell opposes summary judgment, and he is representing himself. For the reasons below, Defendants' motion is GRANTED.

FACTS

On January 29, 2009, Plaintiff filed the instant civil rights action. In his complaint, Plaintiff alleged that he is in the custody of the Department of Corrections (DOC), and Defendants are agents of the DOC. According to Plaintiff, another inmate named Ryan Morrissey approached Plaintiff; there was a hostile exchange, and Morrissey struck Plaintiff. Plaintiff alleges that he warned Defendants that Morrissey had threatened him before, and Defendants failed to keep Plaintiff safe from harm. Plaintiff now seeks damages from Defendants. In their answer, Defendants deny that they knew or should have known that Plaintiff was in danger at the time of the assault.

According to Defendants' statement of undisputed facts,[2] Plaintiff was an inmate at the Southern State Correctional Facility, where he was housed in a unit dedicated to sex offenders.

[1] The remaining Defendants are Andrew Pallito, Ellen McWard, Brian Kearns, and Lynn Roberto. Defendant Lynn Hayward was voluntarily dismissed from this action by order dated July 16, 2009. Defendant Melanie Williams was dismissed after the court ordered summary judgment in her favor on February 19, 2010. The remaining Defendants are hereafter referred to simply as "Defendants."

[2] The court accepts Defendants' statement of undisputed facts as true because Plaintiff has not filed a statement in response denying Defendants' facts. Defendants' statement is supported by admissible evidence, and Plaintiff has failed to submit any admissible evidence controverting Defendants' facts. Plaintiff cannot rest on the allegations in his unverified complaint to rebut credible affidavits submitted by Defendants. See *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 5, 175 Vt. 413. Therefore, Defendants' statement of facts is deemed admitted for

Plaintiff would refer to other sex offenders in his unit in derogatory terms. This behavior created tense relationships with other inmates. Defendants Roberto and Kearns had previously discussed this problematic behavior with Plaintiff. Plaintiff told Roberto and Kearns that he felt unsafe in his unit; however, Plaintiff never reported any specific threat and had only vague feelings that other inmates were out to get him.

On December 20, 2007, at around 10:30 a.m., Morrissey, another sex offender in Plaintiff's unit, approached Plaintiff in the common area to talk to him. After the conversation ended, Morrissey began to walk away, and Plaintiff called out to him: "At least I'm not a snapper like you." The term "snapper" is a derogatory reference to someone convicted of a crime involving pedophilia.

Plaintiff had been previously warned by corrections staff about using that term around other inmates. Upon hearing Plaintiff's statement, Morrissey rushed back to confront Plaintiff. Corrections Officer Lloyd Laurendeau was standing nearby during this incident and warned Morrissey to stay away from Plaintiff to avoid getting into trouble. When Morrissey reached where Plaintiff was sitting, Morrissey challenged Plaintiff to repeat what Plaintiff had just said. When Plaintiff did not respond, Morrissey punched Plaintiff in the face. Plaintiff then stood up and walked away with a bloody face. According to Laurendeau, the whole exchange lasted approximately five seconds. Afterward, Plaintiff was sent to the hospital for treatment.

In connection with this motion, all four remaining Defendants submitted affidavits. In their affidavits, all Defendants stated: (1) they had no knowledge Plaintiff was in danger of being assaulted by Morrissey before December 20, 2007; (2) Plaintiff had not warned them that he was in danger of being assaulted by Morrissey before December 20, 2007; and (3) Plaintiff never complained about the prison's security procedures prior to his assault.

In a handwritten, unnotarized letter to the court, Plaintiff counters that he notified Defendants of Morrissey's threats against him before the assault. The letter indicates that Plaintiff has documentary evidence to support this fact, but no such evidence appears in the record.

STANDARD OF REVIEW

Defendants move for summary judgment on the complaint. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment "has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists." *Price v. Leland*, 149 Vt. 518, 521 (1988). However, "[s]ummary judgment is mandated . . . where, after an adequate time for discovery, a party 'fails to make a showing sufficient to establish the existence of an element'

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purposes of this motion. See V.R.C.P. 56(c)(2); *Boulton*, 2003 VT 72, ¶ 29 (facts in moving party's statement are deemed undisputed when supported by record and not controverted by facts in nonmoving party's statement which are also supported by evidence in record).

essential to his case and on which he has the burden of proof at trial." *Poplaski v. Lamphere*, 152 Vt. 251, 254-55 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The court derives the undisputed facts from the parties' statements of fact under V.R.C.P. 56(c)(2). Facts in the moving party's statement are deemed undisputed when supported by the record and not controverted by facts in the nonmoving party's statement which are also supported by evidence in the record. See *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413 (citing *Richart v. Jackson*, 171 Vt. 94, 97 (2000)).

DISCUSSION

Defendants argue that they are entitled to summary judgment because (1) Plaintiff failed to exhaust his administrative remedies, and (2) Plaintiff has failed to show that Defendants breached a duty they owed to him. Each argument is addressed below.

A. Administrative Remedies

Plaintiff has brought this suit under 42 U.S.C. § 1983. However, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Section 1997e(a) requires administrative exhaustion prior to an inmate's filing of a civil rights lawsuit even where the grievance process does not permit an award of money damages, and the inmate seeks only money damages, as long as the grievance tribunal has authority to take some action in response to the inmate's complaint. See *Booth v. Churner*, 532 U.S. 731, 733 (2001).

In this case, there is no allegation by Plaintiff that he exhausted his administrative remedies. Defendants have submitted the affidavit of John Murphy, the DOC's grievance coordinator. According to Murphy's unrebutted affidavit, the DOC has a grievance policy established by Department Directive 320.01, and the DOC maintains a database of grievance appeals sent to DOC executives. After review of this database, Murphy found no grievance filed by Plaintiff concerning the matters addressed in Plaintiff's complaint.

In his letter to the court, Plaintiff states that he did not file a grievance because he was threatened with retaliation by DOC staff. He also states that he has a copy of a letter he wrote to the former DOC commissioner complaining of Plaintiff's condition. However, Plaintiff has not submitted this letter to the court as evidence. Furthermore, Plaintiff has failed to file any admissible evidence, e.g., a personal affidavit, that substantiates his claim that he was threatened when he asked to file a grievance. Without any admissible evidence to controvert Murphy's affidavit, or at lease to explain Plaintiff's noncompliance with the grievance procedure, there is no factual dispute precluding summary judgment. Because Plaintiff failed to exhaust his administrative remedies in accordance with § 1997e(a), his civil rights suit is barred, and summary judgment is GRANTED in favor of Defendants.

B. Breach of Duty

Even if Plaintiff had exhausted his administrative remedies, or had a valid excuse for failing to do so, Defendants would still be entitled to summary judgment because Plaintiff has failed to show that Defendants breached a duty they owed him.

"Prison inmates have a clearly established Eighth Amendment right to be protected from violence by other inmates." *Curry v. Crist*, 226 F.3d 974, 977 (8th Cir. 2000) (citing *Farmer v. Brennan*, 511 U.S. 825, 833 (1994)). "A prison official violates this right when he is deliberately indifferent to the need to protect an inmate from a substantial risk of serious harm from other inmates." *Id.* (quotation omitted).

> [U]nder 42 U.S.C. § 1983, prison officials are liable for harm incurred by an inmate if the officials acted with "deliberate indifference" to the safety of the inmate. However, to state a cognizable section 1983 claim, the prisoner must allege actions or omissions sufficient to demonstrate deliberate indifference; mere negligence will not suffice.
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> The test for deliberate indifference is twofold. First, the plaintiff must demonstrate that he is incarcerated under conditions posing a substantial risk of serious harm. Second, the plaintiff must demonstrate that the defendant prison officials possessed sufficient culpable intent. The second prong of the deliberate indifference test, culpable intent, in turn, involves a two-tier inquiry. Specifically, a prison official has sufficient culpable intent if he has knowledge that an inmate faces a substantial risk of serious harm and he disregards that risk by failing to take reasonable measures to abate the harm.

Hayes v. New York City Dept. of Corrections, 84 F.3d 614, 620 (2d Cir. 1996) (citations omitted).

After giving Plaintiff the benefit of all reasonable doubts and inferences, the undisputed facts in this case demonstrate that Defendants' actions were, at worst, merely negligent. Plaintiff has failed to demonstrate that Defendants acted with deliberate indifference.[3] Even if we assume that Plaintiff was incarcerated under conditions posing a substantial risk of serious harm, he has failed to show that Defendants acted with culpable intent. Specifically, he has failed to submit admissible evidence that Defendants had *knowledge* that Plaintiff faced a *substantial* risk of serious harm from Morrissey. Defendants' unrebutted affidavits deny any such knowledge.

Furthermore, some of the prison officials knew that Plaintiff's use of derogatory terms towards other inmates "created tense relationships with other inmates in the past." (Roberto Aff. ¶ 5; Kearns Aff. ¶ 5.) However, those officials acted reasonably to abate potential harm to Plaintiff by repeatedly warning Plaintiff not to call other inmates derogatory names. Plaintiff has failed to submit any evidence to the contrary, e.g., expert opinion, that suggests that Defendants'

[3] Plaintiff filed his suit a year and a half ago and has had adequate time for discovery. However, he has failed to make a showing sufficient to establish the existence of deliberate indifference by Defendants. This is an essential element to his case on which he has the burden of proof at trial. Therefore, summary judgment is mandated in this case. See *Poplaski v. Lamphere*, 152 Vt. 251, 254-55 (1989).

responses were unreasonable. Therefore, Plaintiff has failed to show that Defendants acted with deliberate indifference, and they are entitled to summary judgment in their favor.

ORDER

For the reasons given above, Defendants' motion for summary judgment is GRANTED. All outstanding motions are DENIED as moot.

Dated at Woodstock, Vermont this 8 day of July, 2010.

Harold E. Eaton, Jr.
Superior Court Judge