E-FILED
Tuesday, 28 March, 2017 01:14:30 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

JALANCE MOORE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No.: 16-2006-EIL**
	)	
	)	
ROSE WALKER,	)	
	)	
Defendant.	)	

ORDER

ERIC I. LONG, U.S. Magistrate Judge:

This cause is before the Court on Defendant Rose Walker's motion for summary judgment. As explained more fully below, Walker is entitled to summary judgment because Plaintiff Jalance Moore failed to exhaust his administrative remedies prior to filing this suit. In addition, Walker is entitled to summary judgment because Moore failed to offer any evidence with which to create a genuine issue of material fact sufficient to preclude summary judgment in Walker's favor on Moore's failure to protect claim.

Federal Rule of Civil Procedure 56(a) provides that summary judgment shall be granted 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); *Ruiz-Rivera v. Moyer,* 70 F.3d 498, 500-01 (7th Cir. 1995). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Gracia v. Volvo Europa Truck, N.V.,* 112 F.3d

291, 294 (7th Cir. 1997). "[A] party moving for summary judgment can prevail just by showing that the other party has no evidence on an issue on which that party has the burden of proof." *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993). "As with any summary judgment motion, we review cross-motions for summary judgment construing all facts, and drawing all reasonable inferences from those facts, in favor of the nonmoving party." *Laskin v. Siegel*, 728 F.3d 7314, 734 (7th Cir. 2013) (internal quotation marks omitted).

Accordingly, the non-movant cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine triable issue; he must do more than simply show that there is some metaphysical doubt as to the material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 261 (Brennan, J., dissenting) (1986)(quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 818 (7th Cir. 1999). Finally, a scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252.

Moore filed this suit under 42 U.S.C. § 1983 alleging that Defendant Rose Walker, a correctional officer at the Vermillion County Jail ("the Jail"), violated his constitutional rights. Specifically, Moore avers that Walker failed to protect him from an attack by other inmates on August 3, 2015.

However, Moore failed to exhaust his administrative remedies prior to filing this suit. The Prison Litigation Reform Act requires an inmate to exhaust the available administrative remedies before filing a § 1983 lawsuit. 42 U.S.C. § 1997e(a)("[n]o action shall be brought with respect to prison conditions . . . by a prisoner . . . until such administrative remedies as are

available are exhausted."); *Massey v. Wheeler*, 221 F.3d 1030, 1034 (7th Cir. 2000). Exhaustion is mandatory. *Woodford v. Ngo*, 548 U.S. 81, 95 (2006)("The benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance. The prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules."); *Dole v. Chandler*, 43 F.3d 804, 809 (7th Cir. 2006).

No futility, sham, or substantial compliance exception exists to this requirement, and a plaintiff seeking only monetary damages must still utilize the grievance procedure in place before filing suit. *Massey v. Helman*, 259 F.3d 641, 646 (inmate alleging failure to repair a hernia timely must exhaust administrative remedies even though surgery was performed and only money damages claim remained); *Booth v. Churner*, 532 U.S. 731, 736-37 (2001)(the PLRA requires administrative exhaustion even where grievance process does not permit award of money damages, if "some action" in response to a grievance can be taken).

Exhaustion means properly and timely taking each step in the administrative process established by the applicable procedures. *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002)(failure to file timely administrative appeal constitutes failure to exhaust administrative remedies and bars a § 1983 suit). "[I]f a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, the prisoner must utilize that administrative system before filing a claim." *Massey v. Helman*, 196 F.3d 727, 733 (7th Cir. 1999). A dismissal for failure to exhaust is without prejudice, so reinstatement is not barred unless the time for exhaustion has expired. *Walker v. Thompson*, 288 F.3d 1005, 1009 (7th Cir. 2002). Although a court may hold an evidentiary hearing to determine whether a prisoner properly exhausted his administrative remedies, no evidentiary hearing is necessary if there are "no disputed facts regarding exhaustion" and "only a legal question" is presented. *Doss v.*

Gilkey, 649 F. Supp. 2d 905, 912 (S.D. Ill. 2009).

Here, the Jail maintains a policy that requires inmates to file grievances if the inmate has a complaint while at the Jail. The Jail's policy regarding inmate grievances requires the inmate to provide certain information in the grievance including the date of the incident, a description of the incident, and the name(s) of any correctional staff or inmates involved.

During his deposition, Moore admitted that he did not submit a grievance pursuant to the Jail's policy regarding the August 3, 2015 attack by the other inmates. Moore testified that he did not believe that his grievance would be considered, and so, he did not file one. However, Moore was required to file a grievance under the Jail's policy, and his belief that submitting the grievance would be futile did not relieve him of his obligation to exhaust his administrative remedies. *Massey*, 259 F.3d at 646; *Keith v. Ruples*, 2017 WL 237624, * 8 (E.D. Wis. Jan. 19, 2017)(finding that exhaustion requirement applied to a failure to protect claim).

"To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require." *Pozo*, 286 F.3d at 1025. "[A] prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by § 1997e(a) from litigating." *Id*. Moore admitted that he did not take each step in the administrative process. Therefore, Moore cannot proceed on his claim in this case.

In any event, Moore failed to offer any evidence with which to create a genuine issue of material fact sufficient to preclude summary judgment in Walker's favor. Moore was a pre-trial detainee when he was detained at the Jail. Therefore, Moore's claim against Walker arises under the Fourteenth Amendment's Due Process Clause. *Banks v. Patton*, 2017 WL 706217, * 10 (E.D. Wis. Feb. 22, 2017)("As a pretrial detainee, the plaintiff's claims arise under the Due Process

clause of the Fourteenth Amendment instead of the Eighth Amendment's Cruel and Unusual Punishment clause, which applies to convicted prisoners."). The deliberate indifference analysis is the same whether viewed under the Fourteenth or the Eighth Amendment. *Smith v. Dart*, 803 F.3d 304, 309 (7th Cir. 2015); *Phillips v. Sheriff of Cook County*, 828 F.3d 541, 554 n. 31 (7th Cir. 2016); *Mitchell v. Richter*, 2017 WL 752162, * 10 (E.D. Wis. Feb. 27, 2017)(noting that the two standards are "functionally identical").

According to the Seventh Circuit Court of Appeals, the legal standard for this type of case is as follows:

> Under the [Constitution], prison officials have a duty to protect prisoners from violence at the hands of other prisoners. An inmate can prevail on a claim that a prison official failed to protect him if the official showed deliberate indifference; that is, that the defendant was subjectively aware of and disregarded a substantial risk of serious harm to the inmate. To make a guard subjectively aware of a serious risk of attack, the inmate must communicate a specific and credible danger. But even when he is aware of a substantial risk of serious harm to an inmate, a prison guard is not liable if he responds reasonably to the risk, whether or not his response ultimately prevents the harm.

Gidarisingh v. Pollard, 2014 WL 3511697, * 3 (7th Cir. July 17, 2014)(internal quotations and citations omitted). "In failure to protect cases, a prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." *Pope v. Shafer*, 86 F.3d 90, 92 (7th Cir. 1996). "Once prison officials know about a serious risk of harm, they have an obligation to take reasonable measures to abate it." *Dale v. Poston*, 548 F.3d 563, 569 (7th Cir. 2008)(internal quotation omitted). "If prison officials are aware of a serious threat and do nothing, that is deliberate indifference." *Gidarisingh*, 2014 WL 3511697 at * 4. However, "a general risk of violence in a maximum security unit does not by itself establish knowledge of a substantial risk of harm." *Shields*, 664 F.3d at 181.

In the instant case, Moore has offered no evidence with which to create a genuine issue of material fact that Walker violated his Constitutional rights. The Court sent a notice to Moore regarding Walker's motion for summary judgment informing him of the consequences for failing to respond to the motion, but Moore failed to respond.

Despite Moore's failure to respond, the Court is cognizant that "[s]ummary judgment cannot be granted by default even if there is a complete failure to respond to the motion." *Boyd v. Habeck*, 2013 WL 518966, * 1 (E.D. Wis. Feb. 12, 2013)(citing Fed. R. Civ. Pro. 56(e) advisory committee note to 2010 amendments). Accordingly, the Court has reviewed the evidence submitted by Walker, including Moore's deposition testimony, to determine whether a genuine issue of material fact exists that would preclude summary judgment in Moore's favor.

The Court finds that no such disputed fact exists and that Walker is entitled to judgment as a matter of law. *Abbot v. Gale*, 896 F.2d 323, 326 (8th Cir. 1990)(holding that where a defendant denies the allegations of the complaint and a plaintiff then fails "to respond with evidence in support of [her] claim," the court is justified in granting summary judgment.). Moore acknowledged in his deposition that he never told Walker that he was being threatened by any specific inmate prior to the attack. In fact, Moore testified that he only told Walker that he "did not feel safe" and that he wanted to be moved. Even assuming, *arguendo*, that Walker told Moore to "man up" in response to Moore's complaints, this response is insufficient to preclude summary judgment because Moore never presented a credible threat to Walker that she allegedly ignored. Without any evidence that Walker was subjectively aware of a credible threat, there can be no question of fact regarding her deliberate indifference to Moore's safety.

IT IS, THEREFORE, ORDERED:

1. Defendant's Motion for Summary Judgment [27] is GRANTED. The Clerk of the Court is directed to enter judgment in Defendant's favor and against Plaintiff. All pending motions are denied as moot, and this case is terminated with the Parties to bear their own costs. All deadlines and settings on the Court's calendar are vacated.

2. If Plaintiff wishes to appeal this judgment, he must file a notice of appeal with this Court within 30 days of the entry of judgment. Fed. R. App. P. 4(a)(4).

3. If Plaintiff wishes to proceed in forma pauperis on appeal, his motion for leave to appeal in forma pauperis must identify the issues that he will present on appeal to assist the Court in determining whether the appeal is taken in good faith. *See* Fed. R. App. P. 24(a)(1)(c); *Celske v. Edwards*, 164 F.3d 396, 398 (7th Cir. 1999)(an appellant should be given an opportunity to submit a statement of his grounds for appealing so that the district judge "can make a responsible assessment of the issue of good faith."); *Walker v. O'Brien*, 216 F.3d 626, 632 (7th Cir. 2000)(providing that a good faith appeal is an appeal that "a reasonable person could suppose . . . has some merit" from a legal perspective). If Plaintiff chooses to appeal, he will be liable for the $505.00 appellate filing fee regardless of the outcome of the appeal.

ENTERED this 28th day of March, 2017

s/ Eric I. Long
ERIC I. LONG
UNITED STATES MAGISTRATE JUDGE