

[Cite as *McDougald v. Ohio Dept. of Rehab. & Corr.*, 2021-Ohio-1897.]

JERONE MCDOUGALD

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2020-00081JD

Judge Patrick E. Sheeran
Magistrate Gary Peterson

ENTRY GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

{¶1} On February 11, 2021, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). Plaintiff did not file a response. Defendant's motion for summary judgment is now before the court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4. For the reasons set forth below, defendant's motion will be granted.

{¶2} Civ.R. 56(C) states, in part, as follows:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶3} “[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.” *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id.* at 292-293.

{¶4} When a moving party makes a properly supported motion for summary judgment, the adverse party may not rest upon the mere allegations or denials in the pleadings but “by affidavit or as otherwise provided in [Civ.R. 56] must set forth specific facts showing that there is a genuine issue for trial.” Civ.R. 56(E). When ruling on a motion for summary judgment, the court may only consider the evidence properly before it pursuant to Civ.R. 56(C) and 56(E). *CitiMortgage, Inc. v. Wiley*, 10th Dist. Franklin No. 15AP-642, 2016-Ohio-5902, ¶ 10. The court must resolve all doubts and construe the evidence in favor of the nonmoving party. *Pilz v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-240, 2004-Ohio-4040, ¶ 8.

{¶5} On February 5, 2020, plaintiff, an inmate in the custody and control of defendant, filed a complaint for “negligence” based on an alleged failure to retain video footage. Plaintiff claims that while incarcerated at defendant’s Southern Ohio Correctional Facility, he was denied medical treatment and/or the opportunity to decontaminate following an incident where “OC spray” was used on him. Plaintiff provides that he discovered that defendant failed to retain/save/copy the video footage regarding the denial of medical care while attempting to view the video on February 16, 2018, as a part of the discovery process in related litigation that he had commenced in federal court. Plaintiff’s complaint does not take issue with the video regarding the use of force. Plaintiff does not identify the date upon which the events transpired; however, the alleged denial of medical treatment must have occurred prior to December 21, 2015, as plaintiff filed an informal complaint resolution on that date regarding being denied

medical treatment and an opportunity for decontamination. Plaintiff provides that because the video footage was not retained, his federal case was dismissed. Plaintiff's complaint seeks to hold defendant liable for the failure to retain the video footage and for a violation of defendant's policy 09-INV-01.

{¶6} Defendant argues in its motion for summary judgment that plaintiff's claim is barred by the two-year statute of limitations. Defendant also argues that it has discretionary immunity regarding the creation of its policies and that there is no cause of action for an alleged violation of prison rules, policies, and/or regulations. In support of its motion, defendant submitted the affidavit of Linnea Mahlman, the Institutional Inspector at SOCF, plaintiff's notification of grievance and its disposition of that grievance regarding this event, a verification that plaintiff reviewed video footage related to the underlying events, and defendant's policy 09-INV-01.

{¶7} Mahlman avers that in January 2016 she responded to plaintiff's grievance regarding a use of force that occurred on December 16, 2015. Mahlman avers that she reviewed incident reports, plaintiff's medical examination report, conduct reports, and surveillance video of the use of force. Mahlman provides that she informed plaintiff that she also reviewed the medical exam report following his medical assessment. Mahlman referred the matter to the Use-of-Force Committee for review, concluded that there was no policy violation, and denied his grievance. Plaintiff's grievance and Mahlman's written response are attached to her affidavit as exhibits.

{¶8} Mahlman further avers that on February 16, 2018, plaintiff viewed the December 16, 2015 use of force video numbered 567-15. Plaintiff signed a statement acknowledging that he reviewed the video. Plaintiff's signed statement is attached as an exhibit. Mahlman states that the video plaintiff viewed is the only video in connection to the use of force incident and that she has no knowledge as to any other video of the use of force incident.

{¶9} Regarding policy 09-INV-01, Mahlman states that it was created by defendant's central office and applies to all institutions in the state. The policy is attached as an exhibit and provides guidance as to which video surveillance should be retained beyond 14 days. Mahlman avers that because of the limited capacity on its servers, unless video surveillance falls within the enumerated categories of 09-INV-01, the video is automatically recorded over by new surveillance video. Mahlman provides that there was no active destruction of any surveillance video in response to the December 16, 2015 incident involving plaintiff. Defendant's policy 09-INV-01 provides for the retention of surveillance video that is part of an official investigation or official administrative process.

{¶10} As stated previously, plaintiff did not respond to defendant's motion for summary judgment. Civ.R. 56(E) provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." As a result, defendant's evidence is un rebutted.

{¶11} Regarding the applicable statute of limitations, R.C. 2743.16(A) provides, in pertinent part as follows: "[C]ivil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." "Generally, a cause of action accrues at the time the wrongful action is committed." *McDougald v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 20AP-218, 2020-Ohio-6697, ¶ 8, quoting *Union Savs. Bank v. Lawyers Title Ins. Co.*, 10th Dist. No. 10AP-226, 2010-Ohio-6396, ¶ 25.

{¶12} Here, the cause of action accrued 14 days after plaintiff was denied medical treatment when new video was recorded over the existing medical treatment video footage. *McDougald*, at ¶ 9 (holding that in an inmate's case concerning the failure to save video footage, the cause of action commenced when the video was recorded over with a new recording, not when the inmate discovered that the video no longer existed). Defendant provided the court with un rebutted evidence that unless a video falls within the enumerated categories of 09-INV-01, the video is automatically recorded over by new video surveillance. Additionally, there was no active destruction of any video. It follows therefore, that pursuant to 09-INV-01, the video plaintiff seeks was recorded over by new video surveillance 14 days after plaintiff was denied medical care on December 16, 2015. Thus, the two-year statute of limitations began to run on December 30, 2015 (December 16, 2015+14 days = December 30, 2015). Plaintiff had until December 30, 2017 to file his cause of action. However, plaintiff did not file this action until February 5, 2020, well after the statute of limitations had expired. Thus, plaintiff's cause of action is barred by the statute of limitations.

{¶13} To the extent plaintiff claims that defendant violated 09-INV-01 by failing to retain the video surveillance, it is well-settled that internal prison rules and regulations "are primarily designed to guide correctional officials in prison administration rather than to confer rights on inmates." *State ex rel. Larkins v. Wilkinson*, 79 Ohio St.3d 477, 479, 683 N.E.2d 1139 (1997), citing *Sandin v. Conner*, 515 U.S. 472, 481-482 (1995); *Williams v. Ohio Dept. of Rehab. & Corr.*, 67 Ohio Misc.2d 1, 3 (1993). Indeed, "those violations will not support a cause of action by themselves, even though violations of internal rules and policies may be used to support a claim of negligence." *Triplett v. Warren Corr. Inst.*, 10th Dist. Franklin No. 12AP-728, 2013-Ohio-2743, ¶ 10; *Peters v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-1048, 2015-Ohio-2668, ¶ 10. Accordingly, there is no claim for relief based solely upon the violation of defendant's internal rules and policies. Therefore, based upon the un rebutted evidence submitted

by defendant, the court concludes that there is no genuine issue of material fact and that defendant is entitled to a judgment as a matter of law.

{¶14} Based upon the foregoing, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK E. SHEERAN
Judge

Filed April 5, 2021
Sent to S.C. Reporter 6/4/21