

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN ERIC SANDLES,
Plaintiff,

v.

MEMORANDUM and ORDER

UNITED STATES OF AMERICA,

06-C-155-S

Defendant.

Plaintiff John Eric Sandles was allowed to proceed on his Federal Tort Claims Act claim that he was injured because of the negligence of a federal employee.

On April 30, 2007 defendant moved to dismiss plaintiff's complaint for lack of subject matter jurisdiction or in the alternative for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, an affidavit and a brief in support thereof. Pursuant to this Court's March 26, 2007 scheduling order plaintiff's response to this motion was to be filed not later than May 21, 2007 and has not been filed to date.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if

not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

At all times material to this action plaintiff John Eric Sandles was an inmate at the Federal Correctional Institution, Oxford, Wisconsin (FCI-Oxford).

On February 26, 2005 Lieutenant Tim Vaught was the Evening Watch Unit officer on plaintiff's unit at FCI-Oxford. At approximately 11:25 p.m. Vaught allowed Sandles and other inmates to finish watching a movie. At about 11:40 when the inmates were moving to their cells, Vaught heard Sandles raising his voice and went to investigate. Since Vaught did not see any fighting or threatening behavior by any inmate he directed the inmates including Sandles to enter their cells. Sandles did not advise Vaught that he was threatened or feared for his safety. Vaught decided that no BOP regulation had been violated and no action was necessary.

Plaintiff was assaulted in his cell at approximately 6:30 a.m. the following morning by another inmate.

Plaintiff filed an administrative claim pursuant to the Federal Tort Claims Act (No. TRT-NCR-2005-3286) with the Bureau of Prisons alleging that he was injured because of Officer Vaught's failure to report the February 26, 2005 incident. He did not file a claim under the Act for negligence based on medical treatment.

Plaintiff's FTCA claim was denied by the BOP on November 3, 2005. On March 30, 2006 plaintiff filed this civil action. The Court ordered him to pay an initial partial filing fee of \$21.86 by April 19, 2006 but granted him an extension until May 10, 2006. On May 17, 2006 this Court dismissed the complaint without prejudice

and entered judgment. On December 18, 2006 the above entitled case was reopened when plaintiff paid his initial partial filing fee.

MEMORANDUM

The government argues that this Court lacks subject matter jurisdiction of plaintiff's complaint because it was filed more than six months after his Federal Tort Claims Act claim was denied. See 28 U.S.C. § 2401(b). In Elmore v. Henderson, 227 F.3d 1009, 1011 (7th Cir. 2000), the Court held that the filing of a suit stops the running of the statute of limitations but that if a suit is dismissed without prejudice it is treated as if it had never been filed. The statute of limitations is then deemed to continue running from whenever the cause of action accrued. Id.

In this case plaintiff filed suit within six months of the denial of his Federal Tort Claims Act claim but did not pay his initial partial filing fee. The case was then dismissed on May 17, 2006 without prejudice. Plaintiff did not move to reopen the case by paying his initial partial filing fee until December 18, 2006 seven months after the case was dismissed without prejudice and over a year after his claim was denied by the BOP. Pursuant to Elmore, plaintiff's claim may be barred.

In the alternative the Court will also consider the merits of plaintiff's claim that he was injured by the negligence of a federal employee. The Court does not address plaintiff's claim

concerning denial of medical care because he did not exhaust his administrative remedies on that claim pursuant to 18 U.S.C. §2675(a).

In opposing defendants' motion for summary judgment plaintiff cannot rest on the mere allegations of his pleadings but must submit evidence that there is a genuine issue of material fact for trial. Plaintiff has failed to submit any affidavit or other evidence which contradicts the affidavits submitted by the defendants. There is no genuine issue of material fact, and this case can be decided on summary judgment as a matter of law.

The Federal Tort Claims Act allows individuals to sue the United States for injury caused by the negligent acts or omissions of employees of the United States acting in the course of their employment. 28 U.S.C. §§ 2671-80. In his complaint plaintiff alleges that he was assaulted by another inmate because of a federal employee's negligence in failing to file a report concerning an earlier incident.

There is absolutely no evidence in the record that the earlier incident on February 26, 2004 when Vaught heard Sandles raise his voice had any connection to the subsequent assault of plaintiff by another inmate. Vaught had no notice from Sandles that he felt threatened or feared that he would be assaulted. No evidence has presented that the assault on plaintiff by another inmate was a result of Vaught's actions on February 26, 2004. Accordingly,

plaintiff cannot prevail on his claim against the United States of America under the Federal Tort Claims Act. The government's motion for summary judgment will be granted.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claim must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 24th day of May, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge