

receipts to prove ownership of certain items. According to Follrod, plaintiff responded by stating, "I don't have to show you shit." Plaintiff then grabbed some commissary receipts, threw them on his bed and stated, "I'm a real live killer, you're going to have to make it death row." Believing he had been threatened, Follrod placed plaintiff in handcuffs and escorted him to a holding cell. Plaintiff was later sent to isolation. After the incident, Follrod wrote plaintiff a ticket for two Class II rule violations: 1) disobeying a direct order; and, 2) making threats to a staff member. (Defendant's Exhibits A and C.)

{¶ 3} Plaintiff testified that Follrod used the premise of looking for contraband as a way to retaliate against him for filing grievances and lawsuits for himself and other inmates. Plaintiff stated that the above-quoted remarks were rap lyrics and that after he sang, Follrod spun him around, placed him in handcuffs, slammed him against a wall, and then made him sit in a holding cell without access to a restroom. Plaintiff further testified that Follrod adjusted the handcuffs too tightly and that once he was in segregation, a nurse examined his wrists and gave him some ointment. Plaintiff also claims that defendant should have been aware of Follrod's violent tendencies and that plaintiff has suffered anxiety and depression as a result of Follrod's actions.

{¶ 4} The Rules Infraction Board (RIB) found plaintiff guilty of both violations. (Defendant's Exhibit C.) The RIB decision was affirmed on appeal. (Defendant's Exhibits D-F.)

{¶ 5} The magistrate finds that the crux of plaintiff's claim is that the RIB decision was erroneous. As a general rule, this court has no jurisdiction to review decisions of the RIB. *Saxton v. Ohio Dept. of Rehab. & Corr.* (1992), 80 Ohio App.3d 389.

{¶ 6} To the extent that plaintiff alleges violations of his constitutional rights, actions against the state under Section 1983, Title 42, U.S.Code may not be brought in the Court of Claims because the state is not a "person" within the meaning of Section 1983. See, e.g., *Jett v. Dallas Independent School Dist.* (1989), 491 U.S. 701; *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App.3d 170; *White v. Chillicothe Correctional Inst.* (Dec. 29, 1992), Franklin App. No. 92AP-1230. To the extent that plaintiff alleges that he was sent to isolation in retaliation for filing grievances and lawsuits, the Tenth District Court of Appeals has held that claims of retaliation are to be treated as an action for alleged violations of constitutional rights under Section 1983, Title 42, U.S.Code. *Deavors v. Ohio Dept. of Rehab. & Corr.* (May 20, 1999), Franklin App. No. 98AP-1105; *Johnson v. Adult Parole Authority* (Feb. 15, 2000), Franklin App. No. 99AP-522. Additionally, to the extent that plaintiff alleges that he was deprived of access to a restroom, inmate complaints regarding the conditions of confinement are treated as claims arising under Section 1983, Title 42, U.S.Code. *State ex rel. Carter v. Schotten*, 70 Ohio St.3d 89, 91, 1994-Ohio-37. Therefore, the magistrate concludes that this court lacks jurisdiction to consider plaintiff's claims of First Amendment violations, retaliation, and denial of access to a restroom.

{¶ 7} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. The standard of care is that which

is reasonable and ordinary for the health, care and well-being of the prisoner. *Clemets v. Heston* (1985), 20 Ohio App.3d 132, 136.

{¶ 8} Dr. Edward Okel, a licensed psychologist, testified that he began treating plaintiff for anxiety in July 2003. After reviewing plaintiff's medical records, Dr. Okel testified that although there was a December 26, 2002, reference in plaintiff's medical file regarding complaints of stress in dealing with a certain Sergeant Campbell, there was no mention of any incident with Follrod on December 9, 2002.

{¶ 9} Lieutenant Jason Berchtold testified that he was chairman of the RIB and stated that there was no mention of an assault by Follrod in plaintiff's appeal of the RIB decision.

{¶ 10} Virginia Workman, the institutional inspector at MaCI, testified that she had conducted an investigation regarding plaintiff's complaint that his right to free speech was violated when he was disciplined for singing a rap song. However, Workman stated that plaintiff did not assert that Follrod assaulted him or that he had been denied access to a restroom. Workman further testified that plaintiff filed an informal complaint, a notification of grievance, an appeal to the central office, and an appeal to the chief inspector regarding the free speech violation, but that no assault or deprivation of restroom access was mentioned in any of those documents. Workman added that no use of force report was written regarding any alleged assault of plaintiff by Follrod.

{¶ 11} The determination of whether defendant breached a duty owed to plaintiff necessarily turns upon witness credibility. "In determining the issue of witness credibility, the court considers the appearance of each witness upon the stand; his manner of

testifying; the reasonableness of the testimony; the opportunity he had to see, hear, and know the things about which he testified; his accuracy of memory; frankness or lack of it; intelligence, interest, and bias, if any; together with all facts and circumstances surrounding the testimony." *Adair v. Ohio Dept. of Rehab. & Corr.* (1998), 96 Ohio Misc.2d 8, 11; See 1 Ohio Jury Instructions (1994), Section 5.30.

{¶ 12} Applying these criteria to the testimony presented herein, the magistrate finds that plaintiff's assertion that he was assaulted by Follrod is not credible. Upon cross-examination, plaintiff admitted that he had not filed an informal complaint against Follrod and that he had not mentioned any assault by Follrod in his appeal of the decision of the RIB. Furthermore, plaintiff presented no medical records to support his claim that he sustained any injury on December 9, 2002. Upon review of the evidence presented at trial, the magistrate finds that plaintiff has failed to prove by a preponderance of the evidence that he was assaulted by Follrod on December 9, 2002. In addition, the magistrate finds that plaintiff has failed to prove his claims of negligent hiring, retention, and supervision by a preponderance of the evidence. The magistrate therefore recommends to the court that judgment be made in favor of defendant.

{¶ 13} Regarding the issue of civil immunity, R.C. 2743.02(F) provides, in part:

{¶ 14} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or

in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***"

{¶ 15} R.C. 9.86 provides, in part:

{¶ 16} "*** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were *manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.* ***." (Emphasis added.)

{¶ 17} The Tenth District Court of Appeals has stated:

{¶ 18} "Under R.C. 9.86, an employee who acts in the performance of his duties is immune from liability. However, if the state employee acts manifestly outside the scope of his or her employment or acts with malicious purpose, in bad faith, or in a wanton or reckless manner, the employee will be liable in a court of general jurisdiction. 'It is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment.' *James H. v. Dept. of Mental Health & Mental Retardation* (1980), 1 Ohio App.3d 60, 61. Even if an employee acts wrongfully, it does not automatically take the act outside the scope of the employee's employment even if the act is unnecessary, unjustified, excessive, or improper. *Thomas v. Ohio Dept. of Rehab. & Corr.* (1988), 48 Ohio App.3d 86. The act must be

so divergent that its very character severs the relationship of employer and employee. *Wiebold Studio, Inc. v. Old World Restorations, Inc.* (1985), 19 Ohio App.3d 246." *Thomson v. University of Cincinnati College of Medicine* (Oct. 17, 1996), Franklin App. No. 96API02-260, at p. 13.

{¶ 19} Based upon the totality of the evidence presented, the magistrate concludes that Timothy Follrod, Melody Lewis, Virginia Workman, Reginald Wilkinson, and Alan Lazaroff¹ did not act manifestly outside the scope of their employment, with malicious purpose, in bad faith, or in a wanton or reckless manner. It is therefore recommended that the court issue a determination that these individuals are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86 and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against them based upon the allegations in this case.

{¶ 20} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision. A party shall not assign as error on appeal the court's adoption of any finding or conclusion of law contained in the magistrate's decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).*

STEVEN A. LARSON
Magistrate

Entry cc:

¹On February 3, 2004, the court granted defendant's motion to quash the subpoena of Warden Alan Lazaroff. Neither Lazaroff nor Reginald Wilkinson testified at trial.

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