[Cite as *White v. Ohio Dept. of Rehab. & Corr.*, 2005-Ohio-5063.]

IN THE COURT OF CLAIMS OF OHIO
www.cco.state.oh.us

REENA WHITE :

Plaintiff : CASE NO. 2004-04981
Judge J. Craig Wright

v. :

DECISION

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION :

Defendant

: : : : : : : : : : : : : : : : :

{¶ 1} Plaintiff brought this action against defendant, the Ohio Department of Rehabilitation and Correction (ODRC) alleging a claim of negligent hiring, retention, and supervision of Corrections Officer (CO) Anthony C. Peterson. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} Upon review of the evidence, testimony, and the arguments of counsel, this court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

{¶ 3} 1) At all times pertinent hereto, plaintiff was an inmate at the Franklin Pre-Release Center (FPRC) in the custody and control of defendant pursuant to R.C. 5120.16;

{¶ 4} 2) Peterson was hired by ODRC in August 1995 and worked at the Orient Correctional Institution until his transfer to FPRC on April 9, 2002. He worked as a CO on various shifts and in various locations in FPRC, including Dorm 5, until he was assigned to the

permanent position of first-shift CO of Dorm 5 on November 3, 2002;

{¶ 5} 3) Plaintiff resided in Dorm 5 throughout her confinement at FPRC;

{¶ 6} 4) Peterson began having consensual sexual relations with plaintiff some time in August 2002, and that conduct continued until plaintiff was transferred to Correction Medical Center in June 2003. The two met for this purpose once or twice a week either in plaintiff's room or the "tunnel" while others were at breakfast or lunch;

{¶ 7} 5) Rumors of the sexual relationship began to circulate as early as August 2002. Eventually, many people in the institution, including inmates, COs, captains and executive staff members became aware of the improper relationship;

{¶ 8} 6) In January and February 2003, Lea Pierce, Job Coordinator at FPRC, became aware that Peterson was improperly changing plaintiff's job assignments such that plaintiff was not where she was supposed to be at her assigned time. (Plaintiff's Exhibits 2 and 3.);

{¶ 9} 7) Pierce, whose office was located in Dorm 5, also observed that plaintiff was spending an inordinate amount of time at the officers' counter with Peterson. Further, she had heard the rumors that Peterson and plaintiff were involved in an improper relationship. (Plaintiff's Exhibit 4.);

{¶ 10} 8) On February 6, 2003, Pierce filed an incident report concerning Peterson's unauthorized changes of inmates' job assignments. The document begins with a notation that the subject of the report is "security" and "inappropriate inmate supervision." (Plaintiff Exhibit 2.);

{¶ 11} 9) At about the same time that she made her written incident report, Pierce verbally reported the rumors to Michelle Silvus, a warden's assistant, who was also an

inspector/investigator at FPRC and a member of the warden's executive staff. (Plaintiff's Exhibit 4.);

{¶ 12} 10) Silvus recalled that, in February 2003, she learned that Peterson and plaintiff were spending "lots of time together"; that Peterson had been improperly changing plaintiff's work schedule; that for at least three consecutive weeks he had failed to take corrective measures as directed by Pierce; and that there were "lots of rumors" of an inappropriate relationship. Silvus did not conduct any investigation, such as a review of the Dorm 5 log book, because it was not her responsibility to do so, and the reported rumors were filed away "in her head" or in "notes" in her desk;

{¶ 13} 11) Warden Andrews worked closely with her executive staff; and she was briefed frequently to keep herself "well-informed." The executive staff of FPRC consisted of Pat Andrews, Warden; Silvus, a warden's assistant; Victoria Graves, also a warden's assistant; and, Rebecca Hoffman, Deputy Warden, all of whom met daily as a group;

{¶ 14} 12) Pierce's February 6, 2003, Incident Report was timely discussed during one of these regular meetings. Warden Andrews instructed Silvus to note at the bottom of the report that the matter was assigned to Graves for investigation concerning the unauthorized changes of job assignments. (Plaintiff's Exhibit 2.);

{¶ 15} 13) Many inmates, including Jackie McCoy (plaintiff's cousin and roommate at FPRC), Paulette McNeal, Kelly Wilcox, and Shawn Darrington, as well as COs Fosten, McBroom, Taylor, and Hawkins, and at least one supervisor, Captain Abrams, were aware of Peterson's activities with plaintiff. Captain Tilley, another supervisor of Peterson, had also been apprised of the matter. (Plaintiff's Exhibit 5.);

{¶ 16} 14) As early as August 2002, Captain Abrams became

aware of the improper, sexual relationship that Peterson was involved in with plaintiff. He told plaintiff, during that time period, that he knew she was pregnant and threatened to send her for a pregnancy test. Captain Abrams also made comments about Peterson and plaintiff that convinced inmate McCoy that Abrams was aware that Peterson and plaintiff were having sexual relations. Captain Abrams stated to inmate Paulette McNeal that he knew that Peterson and plaintiff were "getting it on";

{¶ 17} 15) Inmate McCoy, plaintiff, and Captain Abrams were involved in an illegal tobacco distribution business at FPRC, which had adopted a tobacco-free policy. Captain Abrams brought in cigarettes that McCoy and plaintiff would sell to other inmates in exchange for cash, commissary credits, or items from inmates' food boxes. Captain Abrams was paid $200 per carton of cigarettes. The packs of cigarettes were then sold for $50 each in cash, or $120 each in commissary credit;

{¶ 18} 16) Captain Abrams was investigated for allegations of having an inappropriate relationship with an inmate and eventually resigned rather than face disciplinary proceedings. Although there were many reports of tobacco use by inmates at FPRC, Captain Abrams was never investigated in connection with that issue nor was he questioned regarding any knowledge he had of the relationship between Peterson and plaintiff;

{¶ 19} 17) Helen Banks, a former inmate in Dorm 5 at FPRC, contacted Silvus and stated that she had reported to Captain Tilley that plaintiff and Peterson were having sexual relations. Banks claimed that Captain Tilley had told her that she would be "looking for it." Banks also stated that she reported the same to Captain Abrams, who replied to her that "I've heard that rumor too." (Plaintiff's Exhibit 5.);

{¶ 20} 18) Banks offered to undergo a lie-detector test;

however, no further action was taken by Silvus because Banks later recanted her allegations. (Plaintiff's Exhibit 5.) Silvus never questioned Captain Abrams or Captain Tilley about Peterson's activities with plaintiff;

{¶ 21} 19) Likewise, Graves, who had been assigned to investigate Pierce's February 6, 2003, incident report, never questioned Captain Abrams or Captain Tilley about the activities of Peterson and plaintiff. (Plaintiff's Exhibit 4.);

{¶ 22} 20) Although members of the executive staff had substantial knowledge of the inappropriate activities of Peterson and plaintiff as early as February 2003, the matter was not investigated until June of that year, when an inmate reported that plaintiff appeared to be suffering from morning sickness. (Plaintiff's Exhibits 1-B, and 4.)

{¶ 23} 21) After it was confirmed that plaintiff was pregnant, defendant began an investigation in late June 2003. The matter was also reported to, and investigated by, the Ohio State Highway Patrol;

{¶ 24} 22) Peterson underwent disciplinary proceedings and his employment was ultimately terminated;

{¶ 25} 23) The executive staff knew that there were problems with three-fourths of the male COs who were transferred from Orient to the all-female inmate population at FPRC. However, after the initial hiring of personnel, there was no system in place to report any criminal activity of ODRC employees, other than self-reporting by COs. Defendant never learned that Peterson had been charged with three crimes involving use of force (domestic violence, assault, and resisting arrest) in 2001, and had been convicted of the resisting arrest offense;

{¶ 26} 24) As a result of his conduct with plaintiff, Peterson was indicted for sexual battery under R.C. 2907.03(A), which

provides in pertinent part that:

{¶ 27} "No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

{¶ 28} "***

{¶ 29} (6) The other person is in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplinary authority over the other person.

{¶ 30} "***

{¶ 31} (11) The other person is confined in a detention facility, and the offender is an employee of that detention facility."

CONCLUSIONS OF LAW

{¶ 32} 1) Plaintiff has conceded that there is no evidence to support her claim of negligent hiring. Thus, the question before the court is whether ODRC is liable to plaintiff for negligent retention and supervision of Peterson;

{¶ 33} 2) In order to prove her claim, plaintiff must establish:

{¶ 34} 1) the existence of an employment relationship; 2) the employee's incompetence; 3) the employer's actual or constructive knowledge of such incompetence; 4) the employee's act or omission causing plaintiff's injuries; and 5) the employer's negligence in *** retaining the employee as the proximate cause of plaintiff's injuries." *Evans v. Ohio State University* (1996), 112 Ohio App.3d 724, 739;

{¶ 35} 3) The parties have stipulated that Peterson was, at all times relevant to this case, a CO at FPRC. He was, therefore, an employee of ODRC for the purposes of branch one of the *Evans* test;

{¶ 36} 4) R.C. 2907.03(A) explicitly prohibits sexual conduct

between COs and inmates, whether or not it is consensual;

{¶ 37} 5) The parties stipulated that Peterson pleaded to, and was found guilty of, sexual battery as a result of his sexual conduct with plaintiff. The court finds that this is conclusive evidence of the second branch of the *Evans* test;

{¶ 38} 6) For the purposes of branch three of the *Evans* test, the court finds that ODRC had both actual and constructive knowledge of its employee's conduct, albeit at differing levels of supervision;

{¶ 39} 7) The legal concept of notice is of two distinguishable types, actual and constructive.

{¶ 40} The distinction between actual and constructive notice has long been recognized. The distinction is in the manner in which notice is obtained or assumed to have been obtained rather than in the amount of information obtained. Wherever, from competent evidence, either direct or circumstantial, the trier of the facts is entitled to hold as a conclusion of fact and not as a presumption of law that the information was personally communicated to or received by the party, the notice is actual. On the other hand, constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge. Actual notice may be (1) express or direct information, or (2) implied or inferred from the fact that the person had means of knowledge which he did not use." *In Re Estate of Fahle* (1950), 90 Ohio App. 195, 197-198;

{¶ 41} 8) Captain Abrams was a direct supervisor of Peterson and Captain Abrams had actual knowledge of an improper relationship between Peterson and plaintiff. Applying the criteria set forth in *Fahle*, this is an appropriate finding of fact, "from competent evidence, either direct or circumstantial," because the court "is entitled to hold as a conclusion of fact and not as a presumption

of law that the information was personally communicated to or received by" Captain Abrams. There was testimony by plaintiff that she reasonably inferred from his comments that he knew of the relationship; there was even stronger testimony from inmate McCoy that Captain Abrams knew; and inmate McNeal testified that Captain Abrams told her that he knew that Peterson and plaintiff were "getting it on." Thus, the court has express or direct information as to that knowledge, or such knowledge may be implied from the fact that Captain Abrams had means of knowledge which he did not use. Even if the court were to conclude that Captain Abrams would not have absolute or express actual notice, there is "sufficient means of knowledge" from which the trier of facts might infer implied actual notice. Id.;

{¶ 42} 9) There was no direct testimony that the personnel in the warden's office had actual knowledge of the relationship between Peterson and plaintiff. However, Silvus and Graves had substantial information, and it may be "implied or inferred from the fact that [they] had means of knowledge which [they] did not use." Id.;

{¶ 43} 10) Defendant's version of its purported knowledge of the sexual relationship underwent a metamorphosis during the history of this case. In the affidavit attached to ODRC's motion for summary judgment, Warden Andrews stated that she "did not know, *nor have reason to know*, Mr. Peterson was having a sexual relationship with Ms. White until such time it was discovered she was pregnant." (Affidavit of Patricia Andrews, ¶3.) (Emphasis added.) The same motion represents that "[w]hen FPRC learned that Mr. Peterson was *suspected* of having a sexual relationship with Ms. White, it investigated the matter *quickly*." (Motion for Summary Judgment, at p. 9.) (Emphasis added.) However, at trial, defendant chose not to call Warden Andrews. Instead, it called Lea

Pierce, who testified that Peterson was suspected of having a sexual relationship with plaintiff. Initially, Pierce used the phrase "numerous rumors," but she later modified that statement to "multiple" rumors. In any event, the rumors were reported to Silvus, who, in turn, testified that they were discussed at executive staff meetings in early February 2003, referred to Graves for investigation, and then "filed away." Silvus and Graves testified that they did not even inquire of Peterson, Captain Tilley, or Captain Abrams. There certainly was not a proper inquiry until after plaintiff's pregnancy became known in late June. The Graves-to-Andrews memo, Plaintiff's Exhibit 4, confirms that Pierce informed Silvus of the numerous rumors early in February 2003. Graves, also an executive in the warden's office, confirmed the same in her testimony. Warden Andrews said that "there were no adjustment or disciplinary issues to indicate" Peterson's incompetence, and "specifically, Mr. Peterson remained competent to supervise female inmates from the time of his transfer to FPRC April 21, 2002, to July 3, 2003, the date that he was placed on administrative leave for suspected unauthorized relationship." (Andrews Affidavit, ¶3.) Therefore, the testimony of the defendant's own personnel, its own documents, and the inconsistencies contained therein compel the court to conclude that defendant had knowledge of Peterson's sexual relationship with plaintiff. Moreover, based upon the totality of the circumstances, as set forth by defendant's personnel and corroborated by inmate testimony, the court attributes knowledge of the relationship to defendant, at least as early as February 6, 2003;

{¶ 44} 11) The court separately concludes that the executive officers of the prison ignored the problem. Indeed, their attention to the matter may constitute "willful blindness." At least one court has applied that concept in a civil context, and

defined the term as the "conscious tort of deliberate ignorance that's meant to be imposed when a defendant refuses to take basic investigatory steps." See *Childs v. Charske*, 129 Ohio Misc.2d 50, 57, 2004-Ohio-7331, quoting *United States v. Certain Real Property* (6th Cir. 1993), 1 F.3d 1242. Here, there was abundant evidence in defendant's own documents and in the statements of its personnel at trial, buttressed by the inmate witnesses, for the court to conclude that "defendant, whose suspicion has been aroused, deliberately failed to make further inquiry." See *U.S. v. Prince* (6th Cir., 2000) 214 F.3d 740. Accordingly, the court finds that there was willful blindness at the executive level. This is a totally independent basis upon which the court finds that defendant was negligent;

{¶ 45} 12) Based upon the actual knowledge of the defendant, the court concludes that the criminal conduct of Peterson was foreseeable by the defendant. Applying the totality-of-the-circumstances standard set forth in *Evans*, the court finds that defendant should have foreseen the danger to plaintiff. The probability of harm to plaintiff should have been foreseen because, unlike the malefactor in *Evans*, Peterson was not retained merely in a position of "limited contact." The "anticipated degree of contact" which Peterson had with plaintiff in performing his employment duties was very substantial. See *Evans*, supra at 743, quoting *Yunker v. Honeywell, Inc.* (1993), 496 N.W.2d 419, 422; *Connes v. Molalla Transport System, Inc.* (1992), 831 P.2d 1316, 1321. Moreover, there was an ongoing employment relationship between defendant and Peterson at the time of the criminal conduct. Id. at 743;

{¶ 46} 13) The foreseeability of Peterson's conduct under the circumstances was precisely that which moved the General Assembly to identify the special relationship, a special duty of care,

between jailer and inmate, imposing strict liability when it adopted R.C. 2907.03 to protect those who are in inherently coercive settings from even purportedly consensual relationships, including "sexual conduct with a prisoner *** by an offender who has supervisory or disciplinary authority over the victim." See 1974 Committee Comment to 511;

{¶ 47} 14) The causal connection between defendant's failure to intervene when it had knowledge of Peterson's conduct, at least from early February 2003 (and likely as early as August 2002) until late June 2003, and plaintiff's resulting injury is evident from the record. Here, Peterson had substantial control over plaintiff on a daily basis and defendant did nothing to correct the situation over a period of at least five, and as much as, ten months. Indeed, defendant did not make any effort to question Peterson when even a supervisory inquiry might have had some deterrent effect;

{¶ 48} 15) Defendant's negligent supervision and retention of Peterson was the proximate cause of plaintiff's injuries (including, inter alia, her continued subjection to Peterson's assaults, as defined by statute, her resulting pregnancy, and possibly the cost of child rearing, the compensation for which is deferred for determination in any subsequent proceedings). In *Evans*, the employer did not have "the right to control, nor [did] it manifest a right to control or supervise" the assailant. Id. at 747. Here, the uncontroverted evidence is just the opposite — namely a substantial command and control structure. In *Evans*, the court found that "there was *no evidence* that the [employer] had knowledge" of the improper activity. Id. at 748. Here, the knowledge is plain from the record. Defendant was negligent because it had knowledge of Peterson's misconduct, had a right and a duty to control and supervise him, and did not even attempt to do so, all to plaintiff's detriment;

{¶ 49} 16) Accordingly, the court concludes that plaintiff has proven her claim of negligent retention and supervision by a preponderance of the evidence. Judgment shall be entered in favor of plaintiff on the issue of liability.

{¶ 50} The court shall issue an entry in the near future scheduling a trial on the issue of damages. However, to the extent that plaintiff is seeking punitive damages on the basis of any willful misconduct of defendant, the court advises that such damages cannot be assessed against the state. See *Drain v. Kosydar* (1978), 54 Ohio St.2d 49.

IN THE COURT OF CLAIMS OF OHIO
www.cco.state.oh.us

REENA WHITE :		
Plaintiff	:	CASE NO. 2004-04981 Judge J. Craig Wright
v.	:	JUDGMENT ENTRY
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION	:	
Defendant	:	

: : : : : : : : : : : : : : : : :

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in an amount to be determined after the damages phase of the trial. The court shall issue an entry in the near future scheduling a date for the trial on the issue of damages.

J. CRAIG WRIGHT
Judge

Entry cc:

Benson A. Wolman — Attorney for Plaintiff
88 East Broad Street, Suite 1590
Columbus, Ohio 43215-3506

Eric A. Walker — Attorney for Defendant
Assistant Attorney General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

LH/cmd
Filed August 23, 2005/To S.C. reporter September 26, 2005