[Cite as *Howard v. Ohio Dept. of Rehab. & Corr.*, 2003-Ohio-3002.]

IN THE COURT OF CLAIMS OF OHIO

DERRICK C. HOWARD	:	
Plaintiff	:	CASE NO. 2001-01108
v.	:	MAGISTRATE DECISION
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION	:	Steven A. Larson, Magistrate
Defendant	:	

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{¶1} Plaintiff brought this action against defendant alleging claims of negligence. The issues of liability and damages were bifurcated and the case was tried to a magistrate of the court on the issue of liability.

{¶2} At all times relevant to this action, plaintiff was an inmate in the custody and control of defendant at the Lebanon Correctional Institution (LeCI) pursuant to R.C. 5120.16. His claim arises as a result of an assault that occurred on April 8, 1999. On that date, plaintiff was stabbed twice in the back with a handmade "shank" wielded by a fellow inmate, John McAllister. Plaintiff alleges that defendant is liable for the injuries he sustained because: 1) the weapon used in the assault was made at Ohio Prison Industries (OPI) facility and defendant was negligent in its supervision and search of inmates at that facility; 2) defendant knew or should have known that plaintiff was going to be assaulted and was negligent in failing to place him in protective custody; and 3) defendant was negligent in failing to have an

adequate number of corrections officers (COs) on duty in the recreation yard to prevent the assault.

{¶3} In order to prevail on a claim of negligence, a complainant must prove by a preponderance of the evidence that defendant owed a duty, that it breached that duty, and that the breach proximately caused the alleged injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. In the context of a custodial relationship between the state and its prisoners, the state owes a common law duty of reasonable care and protection from unreasonable risks. *McCoy v. Engle* (1987), 42 Ohio App.3d 204, 207. Reasonable or ordinary care is that degree of caution and foresight which an ordinarily prudent person would employ in similar circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St.2d 310.

{¶4} In support of his claims at trial, plaintiff presented his own testimony as well as that of inmate John McAllister, Sergeant Thomas Matson, and LeCI Inspector Timothy Sowards. Defendant denied liability on each of plaintiff's claims. Following denial of its motion to dismiss pursuant to Civ.R. 41(B), defendant presented the testimony of Assistant Chief Inspector John Arbogast, H-Henry Unit-Manager Cara Salley; CO David Graham, and Major George Crutchfield. The direct testimony of Sergeant Matson and Inspector Sowards was also presented in response to plaintiff's evidence.

{¶5} Upon review of all of the evidence and testimony presented, and for the reasons set forth below, the court finds that plaintiff has failed to prove any of his claims by a preponderance of the evidence.

{¶6} Plaintiff's first allegation of negligence is based upon the weapon used in the assault and defendant's supervision of inmates at OPI where the weapon was allegedly made. With respect to that claim, the court finds that plaintiff presented insufficient evidence to establish how or where the weapon was made, or how it came into McAllister's possession. Accordingly, plaintiff cannot establish a prima facie claim of negligence based upon these allegations.

{¶7} Plaintiff's second claim concerns whether defendant knew or should have known that plaintiff was in danger and/or in need of protective custody. With respect to this claim, it is alleged that defendant was put on notice, on or about March 18, 1999, that plaintiff's safety had been compromised. According to plaintiff, it was at about that time that he was approached in the chow hall by inmate Jamie Naegle and questioned as to whether he knew an individual named Pamela McClanahan who resided in New Richmond, Ohio. Pam McClanahan and her husband Larry had previously been targets of an FBI investigation involving insurance fraud. Plaintiff had resided with the couple at the time that the alleged fraud took place and had also been involved in the investigation. Plaintiff stated that he believed that Pamela McClanahan thought he had been an informant for the FBI in the course of its investigation. As a result, plaintiff feared that the McClanahans intended to do him harm. He testified that the conversation in the chow hall "set off warning bells" that he was being sought out by these individuals.

{¶8} As a result of Naegle's comment, plaintiff immediately returned to his assigned cell block, "A-Adam," and related his concerns to block-Sergeant Thomas Matson. Plaintiff testified that

he told Sergeant Matson about the FBI investigation and his involvement in it and informed Sergeant Matson that, if the McClanahans knew of his whereabouts, they would attempt to do him harm. The evidence is conflicting as to whether plaintiff stated that the McClanahans would attempt to do harm by putting a "hit" out on plaintiff, or whether he used more generic terminology. In any event, plaintiff maintains that Sergeant Matson told him that he could not waste time on assumptions. Plaintiff further maintains that when he attempted to persuade Sergeant Matson that his concerns were real, Sergeant Matson simply stated that if plaintiff found out anything more he should report back to him. Plaintiff subsequently made one unsuccessful attempt to discuss the matter with A-Adam Unit Manager, Mr. Case, but otherwise took no further action regarding his concerns. However, on March 23, 1999, plaintiff was moved to "H-Henry" cell block due to his previous request for housing in a nonsmoking unit. (Defendant's Exhibit G.)

{¶9} After the transfer to H-Henry, plaintiff did not relate his safety concerns to any of the COs or administrative officials at that location. He did speak to his new cell mate, Harry Walker, about his former sexual relationship with Pamela McClanahan. In a statement to Trooper Leach of the Ohio State Highway Patrol (Defendant's Exhibit B), plaintiff related that at the time he was moved he was satisfied to get away from Naegle, because he thought that Naegle was the threat to his security. He further related to Trooper Leach that he did not know that McAllister was at LeCI, or residing in H-Henry, when he transferred. He became aware of McAllister's presence on the H-Henry unit only after he was approached by an inmate and told that McAllister wanted to speak with him.

{¶10} Plaintiff testified that he knew that McAllister was a friend of the McClanahans and also that McAllister corresponded with Pamela; she was referred to as McAllister's "pen pal." Plaintiff explained that when he resided with the McClanahans, Pamela had read to him from McAllister's letters and had shown him McAllister's photograph. When plaintiff spoke with McAllister at H-Henry it was the first time the two had ever met. Plaintiff testified that the subject of the alleged insurance fraud was raised and McAllister accused plaintiff of informing on the McClanahans. However, plaintiff stated that McAllister also told plaintiff that he was not worried about it because Pamela had not been sentenced to any jail time. Plaintiff said that McAllister "got loud" during the conversation, but did not make any threatening statements. There was no further contact between the two prior to the assault.

{¶11} The assault occurred on April 8, 1999, approximately two weeks after plaintiff's transfer. At the time, plaintiff was standing in line with other inmates who were filing out of the H-Henry recreation area. Plaintiff testified that he felt a pain in his back and realized he had been stabbed. He stated that he turned around to face the assailant and was stabbed again, in the left shoulder. He stated that he then began backing away; that McAllister kept coming at him; that he avoided being stabbed in the chest and that, upon realizing that he was becoming "faint" and could not protect himself, he turned and ran for the recreation building.

{¶12} Based upon this testimony and evidence alone, the court cannot find that defendant is liable for any negligence in failing to recognize that plaintiff was in danger or in failing to place

him in protective custody. It has consistently been held that the state is not liable for the intentional attack on one inmate by another unless there is adequate notice of an impending assault. *Baker v. State* (1986), 28 Ohio App.3d 99; see, also, *Williams v. Southern Ohio Correctional Facility* (1990), 67 Ohio App.3d 517; *Belcher v. Ohio Dept. of Rehab. and Corr.* (1991), 61 Ohio Misc.2d 696.

{¶13} In *Baker*, supra, plaintiff/inmate was assaulted and brutally beaten by three other inmates. He subsequently filed a negligence suit in this court alleging that the COs on duty in his unit had failed to follow a procedure requiring them to remain on the ranges while inmates were out of their cells. Further, Baker alleged that the COs failed to follow a procedure requiring them to place him in protective custody after he reported a fear of being assaulted. The Tenth District Court of Appeals affirmed this court's ruling that the COs acted with reasonable care and were not negligent. In so doing, the Court of Appeals noted that Baker "did not specifically request protective custody or directly express his fear of an impending assault." Id. at 100. Thus, the court concluded that defendant could not be held liable.

{¶14} Similarly, in the present case, plaintiff did not specifically request protective custody. Rather, he contends that it was defendant's responsibility to take action after learning of the comment by Naegle and of plaintiff's former involvement with the FBI and the McClanahans. However, just as in *Baker*, the weight of the evidence in the instant case establishes that plaintiff did not directly express a fear of impending assault. To the contrary, plaintiff merely stated to Sergeant Matson that "if," based on his own interpretation of the statement made by Naegle, the McClanahans

knew where plaintiff was, they would attempt to cause him harm. The court is not persuaded that plaintiff told Sergeant Matson that a "hit" would be put out by the McClanahans. Neither plaintiff nor the H-Henry COs knew that McAllister was a potential threat. Moreover, even after speaking with McAllister and being accused of informing on the McClanahans, plaintiff took no steps to reiterate any fears he had concerning the matter, or to request protective custody. Accordingly, defendant was not given adequate notice of any impending danger to plaintiff and cannot be held liable on this basis.

{¶15} While the court finds that plaintiff's own testimony is sufficient to support the above-stated conclusion, it is also noted that, even if his additional witnesses were considered, they added no persuasive evidence to this portion of the claim. For example, the testimony of inmate McAllister was ambiguous at best and, otherwise, wholly lacking in credibility. He did not admit to assaulting plaintiff and would not reveal why he believed the assault took place. He stated that he had no harsh feelings toward plaintiff and had never exchanged harsh words with him, "ever." Furthermore, he stated that he was aware of the McClanahan insurance fraud; but claimed he did not know any particulars. When asked whether he was aware that plaintiff had been sexually involved with Pam McClanahan; McAllister stated that it did not upset him and added, "more power to him." In short, nothing of value was offered by this witness.

{¶16} Likewise, neither the testimony of Sergeant Matson nor of Inspector Sowards added anything of substance to support plaintiff's claims. Sergeant Matson admitted that he had a conversation with plaintiff on or about March 18, 1999. However,

he further stated that he did not recall plaintiff expressing any specific fears for his safety. He did state unequivocally that plaintiff never used the terminology that a "hit" would be put out by the McClanahans. He did recall that plaintiff expressed concern that someone might send a letter to the institution in an attempt to cause problems. According to Sergeant Matson, plaintiff requested only that any mail coming in from New Richmond be screened. He was positive that plaintiff did not request protective custody at any time.

{¶17} Inspector Sowards testified regarding the grievance procedure pursued by plaintiff after the assault. Specifically, plaintiff filed an "Informal Complaint" with the A-Adam unit manager alleging that Sergeant Matson was negligent, and that such negligence resulted in the assault. The matter was reviewed and no negligence was found. That decision was appealed (Plaintiff's Exhibits 1 and 2) and, after review by Inspector Sowards, there was again a finding of no negligence on the part of Sergeant Matson. (Defendant's Exhibit E.) The disposition sheet states that both Sergeant Matson and Mr. Case advised that plaintiff never requested protective custody or stated that he feared for his safety. It was also found that the assault occurred as a result of plaintiff's former sexual relationship with Pamela McClanahan, not his involvement with the FBI. Plaintiff then appealed to the Chief Investigator, John Arbogast, and the result was the same; Inspector Soward's decision was affirmed. Thus, the court found nothing in this or Sergeant Matson's testimony to substantiate this portion of plaintiff's claim.

{¶18} Plaintiff's third claim concerns the number of COs on duty in the recreation yard on April 8, 1999. According to

plaintiff, there was only one CO to supervise approximately 100 inmates, and that COs were not in a position to view the entire area. However, that allegation was not supported by any persuasive evidence. To the contrary, CO Graham testified that there were three or four guards assigned to patrol the recreation area at the time the assault occurred and that all of the guards that were assigned that day were present. His recall of the day was persuasive because he also administered first aid before medical help arrived, and took a statement from plaintiff following the assault. Both of these activities were of a nature that would tend to aid a witness' memory of an event. Morever, even McAllister stated that there were three or four guards on duty that day. While his testimony was generally unworthy of belief, this portion of McAllister's statements was not self-serving in any way and was believable because, as the person who committed the offense, he would certainly have an interest in the number of COs that were present at the scene.

{¶19} Finally, Major Crutchfield testified regarding the institution's safety and security policies. Although he had no personal knowledge of how many officers were present on the recreation yard in 1999, his testimony was that there was a 10-foot-high, manned observation tower on the post from which a guard could see the entire recreation area and communicate via telephone. Additionally, he stated that there would have been a perimeter patrol and a mobile, area patrol. Major Crutchfield also confirmed that there can be as many as 100 inmates, or more, on the recreation yard at one time, and that at least four guards were typically required in such circumstances. He stated that this

amount was sufficient to supervise 100 or more inmates, but that, it was "humanly impossible" to watch all of them all of the time.

{¶20} Based upon the evidence and testimony presented, the court cannot find that defendant was negligent in its supervision of the recreation yard or that it created a situation that allowed the assault to take place. It has often been stated that: "[f]oresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. ***" See, e.g., *Grabill v. Worthington Industries, Inc.* (1994), 98 Ohio App.3d 739, 745, citing *Hetrick v. Marion-Reserve Power Co.*(1943), 141 Ohio St. 347. Here, since there is no evidence that defendant was on notice of any potential hostility between plaintiff and McAllister, and it has not been shown that any fewer than the required number of COs were present, it follows that no negligence can be attributed to defendant.

{¶21} Accordingly, judgment is recommended in favor of defendant.

STEVEN A. LARSON
Magistrate

Entry cc:

Richard F. Swope — Attorney for Plaintiff
6504 East Main Street
Reynoldsburg, Ohio 43068

Velda K. Hofacker Carr — Attorney for Defendant
Assistant Attorney General
65 East State St., 16th Fl.
Columbus, Ohio 43215

LH/cmd
Filed 6-9-2003
To S.C. reporter 6-12-2003