

{¶3} Plaintiff gave the following testimony regarding the events of June 30, 2000. As he was exiting the dormitory to participate in the tornado drill, plaintiff stopped to talk to another youth who was standing near a doorway. Plaintiff testified that JCO Steele had been assigned to work an extra shift that day and was already upset when he encountered plaintiff. According to plaintiff, JCO Steele complained that he was “tired of talking” to plaintiff and then struck plaintiff on the right side of his head with an open palm. Plaintiff testified that he experienced pain in his ear and heard a “ring” as a result of the blow. Plaintiff stated that he proceeded with the drill and was instructed to kneel and place his hands on his head, at which time he claims to have noticed that his ear was bleeding.

{¶4} After the drill was concluded, plaintiff was escorted back to the dormitory where he had another altercation with JCO Steele. Plaintiff testified that JCO Steele said “something” to him as he walked through the dormitory doorway and then smacked the left side of plaintiff’s head. Plaintiff responded by taking off his shirt as a gesture that he was ready to fight. Plaintiff testified that JCO Steele pushed the “panic button” in an attempt to call for assistance and then came toward him, grabbed him, and pulled him into the dormitory hall. According to plaintiff, JCO Steele pushed him to the floor, punched him, and placed his knees on plaintiff’s back and chest in an attempt to restrain him.

{¶5} At the time of the incident, JCO Steele had worked for defendant for approximately 13 years. After approximately three years of employment as a food service worker, Steele began work as a youth leader with duties that included supervising and escorting youths. In 1999, the title of Steele’s position changed to JCO, although his duties remained the same.

{¶6} In his trial testimony, JCO Steele recounted a different version of the events that occurred on June 30, 2000. According to JCO Steele, he escorted plaintiff out of the dormitory prior to the tornado drill without incident. JCO Steele testified that the incident began when plaintiff refused to count as he re-entered the dormitory after the drill had concluded. JCO Steele further testified that “words were exchanged” and that plaintiff

became belligerent after Steele explained that plaintiff would be placed in isolation if he did not comply with the order to count. JCO Steele stated that he called for assistance when plaintiff removed his shirt and made a verbal threat. JCO Steele testified that the physical altercation began when plaintiff rushed him, picked him up by his legs, and slammed him to the floor. According to JCO Steele, it was necessary for him to use force to gain control of plaintiff and restrain him.

{¶7} After plaintiff was restrained, he was escorted to the CHJCF medical clinic where he was examined and referred to a local emergency room to treat a perforated left tympanic membrane (eardrum). The medical records note that plaintiff had a slight reddened area on his left cheek and left shoulder blade. JCO Steele was also treated for an injury to his left shoulder which resulted in his taking disability leave for several months.

{¶8} As a preliminary matter, the court notes that plaintiff has alleged that defendant acted with deliberate indifference to his constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution and Section 1983, Title 42, U.S.Code. To the extent that plaintiff's complaint alleges claims for relief premised upon violations of either the Ohio or United States Constitution, this court is without jurisdiction to consider those claims. It has been consistently held that actions against the state cannot be brought under Section 1983, Title 42, U.S.Code, because the state is not a "person" within the meaning of Section 1983. See, e.g., *Jett v. Dallas Indep. School Dist.* (1989), 491 U.S. 701; *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App.3d 170; *White v. Chillicothe Correctional Institution* (Dec. 29, 1992), Franklin App. No. 92AP-1229. Accordingly, plaintiff's claims alleging violations of his constitutional rights cannot be addressed in this forum.

{¶9} Plaintiff's remaining claim alleges that defendant negligently hired, retained, or supervised JCO Steele and that JCO Steele negligently or intentionally inflicted severe emotional distress upon him.² In order for plaintiff to prevail upon his claim of negligence,

²Plaintiff, Criselda Taylor, alleges derivative claims for loss of

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.

{¶10} This court has previously observed that “R.C. 5139.01(A)(3) expressly provides that ‘*** the department [of youth services] has the following rights and responsibilities: the right to have physical possession of the child; the right and *duty* to train, *protect, and control****’ the children over which defendant maintains legal custody.” (Emphasis added.) *Shover v. Ohio Dept. of Youth Serv.* (Sept. 14, 1994), Court of Claims No. 93-04176.

{¶11} Pursuant to R.C. 5139.01(B), defendant’s director has the authority to adopt rules for the department that govern the conduct of its employees and the performance of its business. Defendant’s director approved its use-of-force policy that sets forth the circumstances under which force may be used. (Defendant’s Exhibit X.) Section “A” of defendant’s use of force policy states in relevant part:

{¶12} “1. Use of force is restricted to wholly justifiable instances which include: self-protection; protection of the youth or other person; prevention of property damage; and prevention of escape. The physical power, strength, device, or technique employed to restraint [sic] or control a youth is the minimum necessary. It is a temporary measure used only until control has been gained or to prevent escalation of the incident.”

{¶13} Although JCO Steele denied that he struck plaintiff’s head, there is no dispute that plaintiff and JCO Steele became involved in a physical altercation on June 30, 2000, and that medical staff observed a perforated left eardrum when plaintiff was examined after the incident. The issue, however, is whether the force utilized by JCO Steele was in the performance of his official duties, and whether such force was excessive under the circumstances. The testimony as to this incident was conflicting.

{¶14} Plaintiff's version of the incident was undermined by his prior statements to defendant's employees and his deposition. On the date of the incident, plaintiff signed a statement that he provided to Michele Lilly, his unit manager, wherein he alleged that his eardrum was perforated when JCO Steele smacked him twice as he left the dormitory to participate in the tornado drill. In that statement, plaintiff also claimed that JCO Steele pulled him into the hallway and "continued to beat" him when he returned from the drill. In a second statement provided to Lilly, plaintiff alleged that JCO Steele slapped him three times before the officer pushed the "panic button" and that JCO Steele slapped him a fourth time before plaintiff was pulled into the hallway, choked, punched, slammed on the stairs, and held to the floor for approximately five minutes with a knee on his throat. In plaintiff's second statement he claimed that blood was flowing from his left ear.

{¶15} Plaintiff's testimony and the medical evidence contradicted his prior statements. Several weeks before trial, plaintiff testified at a deposition that JCO Steele struck him at least twice on the right ear and that the impact caused his right ear to bleed. At trial, plaintiff also testified that JCO Steele struck both his right ear and his left ear and that he believed his left eardrum was "busted" even though he noticed blood coming from his right ear. Plaintiff testified that he was struck on the left ear upon returning to the dormitory after the tornado drill. Although plaintiff testified that his eardrums had not been damaged prior to the incident, records from the Cleveland Heights Medical Center show that plaintiff had chronic problems with his ears and had a surgical reconstruction (tympanoplasty) of the hearing mechanism of the middle ear, with restoration of the eardrum membrane in 1993. The records also reflect that in 1994 plaintiff was recommended for another operation to treat chronic otitis, an inflammation of the inner ear that can cause pain and hearing loss.

{¶16} Plaintiff also gave conflicting testimony regarding JCO Steele's disposition at the time of the incident. At trial, plaintiff contended that JCO Steele was upset and acted in a threatening manner because he had been forced to work overtime. However, during his

deposition, plaintiff testified that he did not believe JCO Steele was trying to hurt him during the altercation and that he believed Steele was just "trying to do his job." (Defendant's Exhibit C.) Both plaintiff and JCO Steele testified that they had never argued with each other prior to the incident.

{¶17} In contrast to plaintiff's testimony, JCO Steele's testimony regarding the incident was consistent. JCO Steele testified that plaintiff instigated the incident when he refused to count after returning to the dormitory. According to JCO Steele, plaintiff was at first verbally threatening and then escalated the incident to a physical altercation when he removed his shirt and rushed the officer. Plaintiff conceded that he intended to signal that he was ready to fight when he removed his shirt.

{¶18} In considering the conflicting testimony and credibility of the witnesses, the court finds more credible the testimony of JCO Steele that he used force to restrain plaintiff in response to what he reasonably perceived to be a threat of imminent bodily harm. In the face of this threat, and the fact that JCO Steele had little time to reflect, the officer's reaction in subduing plaintiff to end the confrontation did not constitute an unnecessary use of force. Rather, the court finds that JCO Steele properly defended himself by utilizing a reasonable degree of force under the circumstances, and the greater weight of the evidence does not support a finding that he acted maliciously or wantonly. See *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 93 (the law has traditionally held that "one has a right to defend oneself by force, if that force is not excessive"). Because plaintiff has failed to establish that defendant's employees utilized excessive force against him, he has also failed to show that defendant was negligent in supervising or training its employees. Based upon the foregoing, plaintiffs have failed to prove any of their claims by a preponderance of the evidence. Therefore, judgment is recommended in favor of defendant.

{¶19} Finally, in light of the above findings, the court concludes that the actions of JCO Steele were not outside the scope of his employment and that he did not act with

malicious purpose, in bad faith, or in a wanton or reckless manner. Thus, the magistrate recommends that the court make a determination that JCO Steele is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over civil actions against him 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

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