[Cite as *Hester v. Grafton Correctional Inst.*, 2004-Ohio-1475.]

IN THE COURT OF CLAIMS OF OHIO

CHRISTOPHER HESTER	:	
Plaintiff	:	CASE NO. 2003-01059 Magistrate Steven A. Larson
v.	:	MAGISTRATE DECISION
GRAFTON CORRECTIONAL INSTITUTION	:	
	:	
Defendant		

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{¶1} This case was tried before a magistrate of the court on November 24, 2003, at the Grafton Correctional Institution (GCI). Plaintiff alleges that defendant was negligent when it failed to move him away from his cell mate and that, as a consequence, he was assaulted and injured on October 9, 2002.

{¶2} At all times relevant to this action, plaintiff was an inmate in the custody and control of defendant pursuant to R.C. 5120.16 at GCI. Plaintiff was housed in a two-man cell with bunk beds. On September 5, 2002, plaintiff was moved from a cell where he had been assigned to a top bunk to a cell where he was assigned to a bottom bunk due to a medical restriction. Plaintiff testified that from the time that he moved into the cell he was unable to get along with his new cell mate, Thomas Finklea. Plaintiff complained that Finklea verbally threatened him, awakened him during the night in order to fight, used all of the cell's electrical outlets so that plaintiff could not operate any electrical equipment, and cleaned the cell several times a day which would force plaintiff to leave the cell. Additionally, plaintiff speculated that Finklea was upset because he smoked and Finklea did not.

{¶3} On September 19, 2002, plaintiff submitted an Informal Complaint Resolution to his Unit Manager, Karen Maschmeier, and requested that he be moved to a new cell. (Defendant's Exhibit A.) Plaintiff wrote in his complaint: "*** it appears everything that I do inside the cell bothers Finklea. Whether it's dressing, washing up, relieving myself, reading, or just 'SLEEPING' it bothers Finklea to the point where he's expressing anger more and more." Plaintiff characterized the situation as "very uncomfortable" and requested Maschmeier's assistance in resolving the situation.

{¶4} Maschmeier spoke to plaintiff on September 24, 2002, regarding his concerns and told him that she would submit his request to move. On October 1, 2002, Maschmeier submitted the request to her superior. (Defendant's Exhibit M.) On October 2, 2002, plaintiff received a written response which stated that his request for a move "will be submitted to Mr. Williams the decision is his. [sic]"

{¶5} On October 3, 2002, but before the receipt of Maschmeier's response, plaintiff filed a Notification of Grievance directed to the Inspector of Institutional Services, Darlene Karandall. (Defendant's Exhibit B.) In his grievance, plaintiff reiterated his complaints about Finklea and stated that he had tried to resolve them by way of an informal complaint. Plaintiff once again described the situation as "very uncomfortable." Although plaintiff did not state in the body of the grievance that Finklea was violent or was threatening violence, he did check the "Yes" box that followed a statement on the grievance form which read, "I will experience a substantial risk of personal injury or serious, irreparable harm if this grievance is not resolved immediately."

{¶6} Darlene Karandall, Institutional Inspector at GCI, testified that she reviewed inmate grievances and that she was familiar with defendant's policies and procedures as they related to grievances. Karandall explained that it was common for an inmate who filed a grievance to affirmatively answer the question on the grievance form which asks about risk of injury or serious harm should the grievance not be resolved immediately, but that she relied on the facts stated in the body of the complaint to determine whether a threat of harm actually existed. When reviewing grievances for the likelihood of harm, Karandall

said that she looked for expressions such as “scared for my life,” “threats,” or “to be hurt” in the body of the document to make her judgment. Karandall testified that she reviewed the body of both plaintiff’s Informal Complaint Resolution and his grievance and did not find any language that indicated that plaintiff’s situation constituted an emergency.

{¶7} Plaintiff testified that on October 9, 2002, at approximately 8:30 a.m., he got into an argument with Finklea. According to plaintiff, Finklea spit on him, grabbed him in a bear hug and bent him over backwards, causing injury to his back and finger.

{¶8} Plaintiff explained that he freed himself but that he did not immediately report the assault to a corrections officer (CO), because he went to the visiting room to meet with his attorney regarding an unrelated legal matter. Plaintiff testified that after the meeting with his attorney, he reported the incident to Captain Brownlee who ordered both plaintiff and Finklea to be examined by medical personnel. The captain then referred the case to the Institutional Investigator, Eddie Young.

{¶9} Young testified that he has been an investigator at GCI for 13 years. As a result of plaintiff’s allegation, Young conducted an investigation, then referred the case to the Ohio State Highway Patrol. Young first spoke with plaintiff who alleged that he and Finklea exchanged words and that then Finklea grabbed him in a bear hug. Plaintiff told Young that he was screaming during the incident; however, COs who were 30 feet from the cell reported that they did not hear anything. Young testified that Finklea first denied the altercation but that when he was questioned further, he admitted that he did have a confrontation with plaintiff but that it was not serious. Young explained that both participants told him that they did not want to jeopardize their pending parole proceedings. According to Young, both plaintiff and Finklea told him that the altercation was not serious and that it was over. Young put the case in an investigation status and both plaintiff and Finklea were ordered to security control for possible disciplinary action. Young sent a recommendation to the warden that the two be separated.

{¶10} On October 9, 2002, the day of the alleged assault, a nurse examined plaintiff and Finklea for injuries. The nurse's notation for both individuals states, "no apparent signs [of injury] or scratches." (Defendant's Exhibits G and H.)

{¶11} On October 11, 2002, plaintiff was released from security control without additional discipline; he was also moved to a new cell.

{¶12} Inmate Wallace Hambrick testified that Finklea had a history of making threats and that others had difficulty getting along with him. Hambrick, who previously was in a cell with Finklea, testified that he almost got in a fight with Finklea three to four times and that Finklea continuously tried to control the living arrangements in their cell. Hambrick asserted that he had notified defendant of Finklea's potential for violence prior to plaintiff's altercation with Finklea by filing an Informal Complaint Resolution in which he cited Finklea's threatening behavior. However, Hambrick conceded that he had celled with Finklea for only nine days and that after he had filed his complaint, he was promptly moved.

{¶13} Plaintiff's negligence claim is based on defendant's alleged failure to provide him with protection once he notified defendant of the potential for violence. Ohio law imposes upon defendant a duty of reasonable care and protection of its prisoners. *Clemets v. Heston* (1985), 20 Ohio App.3d 132, 136. Defendant, however, is not the insurer of inmate safety. *Mitchell v. Ohio Dept. of Rehab. and Corr.* (1995), 107 Ohio App.3d 231. Where one inmate intentionally assaults another inmate, a claim for negligence arises only where there was adequate notice of an impending attack. *Mitchell*, supra at 235.

{¶14} A custodial officer is not obligated to act until he knows, or should know, that the custodial charge is endangered. The legal concept of notice is one of two distinguishable types: actual and constructive.

{¶15} "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." *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197.

{¶16} In *Baker v. State* (1986), 28 Ohio App.3d 99, the Tenth District Court of Appeals reviewed a prisoner's claim for damages under similar facts. In that case, plaintiff was assaulted by other inmates shortly after plaintiff had made some "vague statements" to prison guards about his need to be relocated. Plaintiff had also been slapped in the face by one of his assailants on the day of the assault. In affirming the trial court's judgment in favor of defendant, the Court of Appeals held that the prison guards did not have adequate notice of an impending assault and, therefore, were not negligent in failing to prevent the assault. Id. at 100. In so holding, the court emphasized the fact that plaintiff had never requested protective custody or directly expressed his fears of an impending assault to any of defendant's employees. Id.

{¶17} The court finds that plaintiff failed to prove by a preponderance of the evidence that defendant had either actual or constructive notice that Finklea would assault plaintiff. Plaintiff, in both his Informal Complaint Resolution and his grievance characterizes living with Finklea as merely "very uncomfortable." Additionally, plaintiff cited alleged problems that Finklea's former cell mates had when they lived with him, none of which included assault. The court finds that the language in the body of both documents fails to articulate any specific threats or facts that would notify defendant or even cause defendant to infer that plaintiff was in imminent danger of harm. Furthermore, Maschmeier spoke with plaintiff during her investigation, and plaintiff did not mention to her that he was in any imminent danger.

{¶18} Plaintiff argues that an affirmative answer to the statement on the bottom of the grievance form: "I will experience a substantial risk of personal injury or serious, irreparable harm if this grievance is not resolved immediately," gives rise to notice of an impending assault. The court finds that Karandall's explanation of the significance of these words on the grievance form, without additional facts, fails to establish that there was potential for harm to plaintiff.

{¶19} In the final analysis, plaintiff failed to prove that defendant breached a duty of care owed to him. Accordingly, judgment is recommended in favor of defendant.

{¶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).*

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STEVEN A. LARSON
Magistrate

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SAL/cmd
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