[Cite as *Chester v. Lima Correctional Inst.*, 2003-Ohio-3892.]

IN THE COURT OF CLAIMS OF OHIO

KENNETH CHESTER	:	
Plaintiff	:	
v.	:	CASE NO. 2003-01091-AD
LIMA CORRECTIONAL INSTITUTION	:	MEMORANDUM DECISION
Defendant	:	

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{¶1} On August 15, 2002, plaintiff, Kenneth Chester, an inmate incarcerated at defendant, Lima Correctional Institution (LCI), suffered personal injury from a dog bite. Specifically, plaintiff received scratches on his right thumb and was bitten on his left forearm by a dog, Zoe. At the time he was injured, plaintiff was involved in handling and training Zoe as part of a dog training program (H.E.L.P.) sponsored by defendant's institution. Additionally, plaintiff claimed his injuries occurred as a result of responding to direct orders from the supervisor of the H.E.L.P. program, Roberta Bible.

{¶2} Plaintiff received some treatment immediately after he was injured. This treatment was conducted at the scene of the injury by Roberta Bible. On August 16, 2002, plaintiff experienced swelling in his arm at the injury site and sought medical care at the LCI infirmary. At the infirmary plaintiff was examined and treated for infection by trained medical personnel. Plaintiff was charged a $3.00 co-pay for this medical visit related to an "on the job" injury. Plaintiff stated he discontinued working in the H.E.L.P. program. Plaintiff further stated he was denied overtime pay while either working or not working as a dog trainer. Plaintiff filed this complaint seeking to recover $2,500.00 in damages for "physical and emotional scars," plus work loss. Plaintiff contended his injury from the dog bite was the proximate result of negligence on the part of defendant's employees managing the H.E.L.P. program. Furthermore, plaintiff has alleged his bite injury was proximately

caused by defendant's negligence in providing inadequate training and supervision.

{¶3} Plaintiff provided his own narrative background relating the events leading up to and description of the August 15, 2002 personal injury occurrence. Plaintiff explained he became involved in the H.E.L.P. program at defendant's facility expecting to be educated as a professional dog trainer. According to plaintiff his training education consisted of watching videos and personal instruction from unidentified sources. After being assigned a dog for training, plaintiff related he was given hands on instruction from defendant's personnel. Plaintiff implied all his instruction was inadequate.

{¶4} Plaintiff argued that when he was bitten by the dog Zoe on August 15, 2002, the incident was due to neglect from defendant's Unit Manager, Gerald Burton and the staff member running the program, Roberta Bible. Plaintiff stated he and another inmate (Hall) involved in the H.E.L.P. program were told to take the dogs they were training out into the courtyard of defendant's institution. Plaintiff further stated he and inmate Hall were told to put the dogs on a leash and fasten each leash onto metal bolts attached to a building wall facing the institution courtyard. Neither the dog handled by plaintiff, nor the dog handled by inmate Hall was muzzled. Plaintiff maintained he and inmate Hall were instructed to tether the dogs in such a way where the dogs were close together, but could not physically make contact or attack each other. However, plaintiff explained inmate Hall tied his dog to a long leash and consequently, both tethered dogs were able to bite each other. Plaintiff professed that as the two dogs began to fight, both he and inmate Hall were instructed to pull the dogs apart. Plaintiff asserted he was bitten while he was following orders to pull the fighting dogs apart. Plaintiff implied his injury from the dog bite was the direct result of obeying a direct order, seemingly from Roberta Bible. Plaintiff also argued his dog bite injury was proximately caused from not receiving proper training techniques from defendant in handling dogs.

{¶5} The day after his injury, plaintiff related he was permitted to seek medical treatment for the dog bite he received. The bite area had become infected. Although the injury was work related, plaintiff asserted he was charged a $3.00 co-pay for his medical visit.

{¶6} Plaintiff stated he was reclassified and removed from the H.E.L.P. program shortly after the dog bite occurrence. Plaintiff contended his removal from the program

was due to disagreements he had seemingly with defendant's personnel. According to plaintiff, these disagreements were about treatment and training of dogs in the H.E.L.P. program.

{¶7} Plaintiff submitted a statement from inmate, Clarence Chizmar, a witness to the August 15, 2002 dog bite incident. Chizmar related he was present in the institution dog training yard along with plaintiff, Roberta Bible, several unidentified inmate dog trainers, and two female dogs, who were mutually antagonistic. Chizmar professed the two dogs were leashed to a wall, "upon request." After being leashed to the wall the dogs began fighting. Chizmar stated plaintiff immediately jumped in between the dogs grabbing one in an effort to separate the animals. Chizmar further stated he observed the dog bite site on plaintiff's left forearm and helped treat the injured area with hydrogen peroxide. Chizmar maintained plaintiff was then sent to the institution infirmary for additional treatment.

{¶8} Plaintiff filed a statement from inmate, Walter Spangler, who also witnessed the events of August 15, 2002. Spangler noted he was present in the institution courtyard and heard Roberta Bible instruct plaintiff and inmate Hall to tether the dogs they were training. Spangler also noted he observed the dogs start to fight and observed plaintiff attempt to pull the fighting dogs apart. Spangler indicated he witnessed plaintiff receive a bite on his left arm.

{¶9} Plaintiff submitted a statement from an inmate identified as Brad Fenimore, a former participant in the H.E.L.P. program. Fenimore, in his statement, expressed opinions concerning the quality of the H.E.L.P. program training at defendant's institution. Fenimore explained training instruction included access to written manuals and books, as well as video instruction and hands on teaching from experienced inmate trainers. Fenimore stated he had been dismissed by Roberta Bible from the dog training program in response to complaints from other inmates characterized as "informants." Fenimore suggested Roberta Bible responds to some complaints regarding inmate training techniques and ignores other complaints. Fenimore accused Roberta Bible of carrying out discriminatory practices in responded to various complaints. Fenimore offered the opinion that the H.E.L.P. program at defendant's facility in practice endangers animals and animal trainers.

{¶10} The court finds Fenimore is not qualified to offer an opinion regarding the

adequacy of instruction offered by defendant. His opinions shall be disregarded. Furthermore, the submitted statement of Fenimore in its entirety will be given the weight and credibility it merits.

{¶11} Additionally, plaintiff filed a statement from a fellow inmate, C.J. Thrall who expressed his opinion the training from the H.E.L.P. program at defendant's facility is inadequate and not proper. The court will give this statement the weight and credibility it deserves.

{¶12} Other statements from fellow inmates were also submitted. These statements neither add to nor detract from an evaluation of the issues presented.

{¶13} Defendant acknowledged plaintiff was bitten by a dog while performing his duties as a dog handler. However, defendant denied plaintiff's dog bite injury was the proximate result of not receiving sufficient instruction in the use of proper technique in training animals. Accordingly, defendant denied any injury plaintiff received was caused by any negligent act or omission on the part of LCI staff.

{¶14} Defendant maintained plaintiff's bite injury occurred during an attempt by plaintiff and another inmate handler to socialize the dogs they were training. Defendant explained, “the socialization procedure involves tethering the dogs to hooks on a wall where the dogs are in close proximity but cannot reach each other.” However, one dog was tethered to a long leash in such a manner that both tethered dogs were able to contact each other. Defendant asserted that once the two dogs contacted and began fighting, instructions were given to use a “fight stick” to break up the fight. Defendant related, “use of a fight stick is the preferred method of breaking up dog fights.” Utilizing this method entails thrusting the “fight stick” between the jaws of the aggressor dog. In a situation such as the instant claim, where a “fight stick” was unavailable, alternative methods of breaking up a dog fight can be initiated. Defendant insisted plaintiff received instruction on alternative methods of breaking up a dog fight. Defendant denied plaintiff was ordered to break up the dog fight by Roberta Bible. Defendant contended plaintiff was cautioned against breaking up any dog fight. Defendant maintained plaintiff, on his own volition, chose to use the least recommended method of separating two fight dogs when he opted to impose himself between the dogs and physically pull one dog away from the fight. Consequently, defendant has argued plaintiff's own negligence in his choice of method to

separate fighting dogs ultimately was the cause of his injury.

{¶15} Defendant's employee, Roberta Bible, compiled an incident report regarding her recollection and observation of the August 15, 2002 personal injury occurrence. Bible described how the two dogs were incorrectly restrained and began fighting. Bible recalled that when she saw the two dogs start fighting she issued verbal instructions to get the "fight stick." Bible related the "fight stick" was supposed to be available in the institution training yard, but acknowledged it had been confiscated during a previous shake down search. Bible asserted all inmate dog trainers had access to instruction regarding alternative techniques to use in breaking up a dog fight. Bible stated plaintiff had received and presumedly read books and pamphlets containing sections on dog fights. Bible professed she advised plaintiff to seek treatment at the institution infirmary immediately after he was bitten, but he declined. Furthermore, Bible stated plaintiff's bite wound was treated with hydrogen peroxide and plaintiff was supplied with ointment, bandages, and additional hydrogen peroxide so he could self administer additional treatment. Bible maintained plaintiff was bitten on the arm as he attempted to unlock the jaws of a fighting dog with his bare hands.

{¶16} On August 16, 2002, the day after he was bitten, plaintiff went to the LCI infirmary for medical treatment. A copy of the medical examination report compiled at the time of treatment was submitted. Plaintiff was examined by an LCI nurse who observed abrasions on plaintiff's right thumb, lacerations and scratches on his left forearm, and noted red streaks along with red areas on his left arm. Plaintiff also had an elevated body temperature. Acting on all information available plaintiff's wound was cleaned, antibiotic ointment was applied, and the wound was bandaged. A doctor was notified of plaintiff's symptoms. Consequently, antibiotic therapy was ordered and administered. Apparently, no further treatment was necessary for plaintiff's injuries.

{¶17} Plaintiff suggested he was denied overtime pay for his work as an animal trainer. Plaintiff advised this overtime pay issue represented an additional loss coupled with the damages claimed for his personal injury. Plaintiff claimed he is entitled to this overtime pay pursuant to defendant's own internal regulations. Plaintiff asserted he worked more than 140 hours per month as a dog trainer for the period from August 2001 through August 2002. According to plaintiff, defendant owes him overtime pay for all hours

worked in excess of 140 hours per month.

{¶18} Defendant denied plaintiff is entitled to any additional pay for his work as a dog trainer. Defendant argued plaintiff was not paid an hourly wage under his job classification. Therefore, there is no basis for overtime compensation. Plaintiff received payment of $18.00 per month, the standard payment for his inmate classification. Because plaintiff did not receive pay based on an hourly rate, defendant has denied overtime compensation can be at issue.

{¶19} Plaintiff insisted he is entitled to overtime compensation pursuant to the language of section 5120-3-08(B)(1) of the Ohio Administrative Code. Plaintiff contended he met all requirements for overtime compensation and should therefore, be awarded payment for all hours worked exceeding 140 hours during a one month period.

{¶20} On July 9, 2003, plaintiff submitted an affidavit from Clarence R. Chizman, a fellow inmate, who stated dog training was a 24 hour a day job. He stated the defendant credited community service hours on the basis of a 24 hour day.

{¶21} Ohio Adm. Code 5120-3-08(A)(6) states:

{¶22} "'Category six inmates' are those in full-time work assignments of apprenticeship training, of at least one hundred forty hours per month, or those who are full time students or those who are part-time students with part-time work assignments with a combined total of at least one hundred forty hours per month.

Maximum Security Level Grade	Close Security Level	Medium Security Level	Minimum Security Level	Level
Apprenticeship	$12.00	$13.00	$14.00	$16.00
General Labor	$16.00	$17.00	$18.00	$20.00
Semi-skilled	$17.00	$18.00	$19.00	$21.00
Skilled	$18.00	$19.00	$20.00	$22.00

{¶23} "Those inmates who are full-time students or part-time students with part-time work assignments shall be compensated at the general labor grade within the proper security level."

{¶24} From evidence presented, it appears plaintiff, Chester was classified under the administrative code as a "category six inmate."

{¶25} Furthermore, Ohio Adm. Code 5120-03-08(B) states:

{¶26} "(B) Overtime and incentive rates of compensation.

{¶27} "(1) Subject to the approval of the managing officer, category six and category seven inmates may be paid at the rate of one and one-half times their regular rate of pay for each hour in excess of one hundred forty hours per month, whenever the managing officer deems the additional employment of such inmates necessary and proper to the accomplishment of a special project or in the event of an emergency.

{¶28} "(2) The managing officer may adopt an incentive plan appropriate to designed work assignments, under which inmates may earn compensation in addition to their regular pay for the category to which they are assigned. Such incentive plan shall be based upon an established production quota or other like system developed by the department of rehabilitation and correction."

{¶29} This code language establishes the choice to pay overtime compensation to inmates is subject to approval of the institution's managing officer and completely discretionary in nature. Plaintiff, in the instant action, has failed to supply any supporting documentation to show the managing officer at LCI approved overtime pay for animal trainers. The state cannot be sued for the exercise of any executive decision characterized by the utilization of a high degree of discretion. *Reynolds v. State* (1984), 14 Ohio St. 3d 68. Overtime pay for inmates is not mandatory, but left to the discretion of the managing officer. Any claim plaintiff has initiated for overtime compensation is denied.

{¶30} Plaintiff denied he acted negligently when he was bitten. Plaintiff denied his injury was proximately caused by any negligence on his part. Plaintiff claimed his bite injury was the result of negligence on the part of Roberta Bible in 1) ordering two aggressive dogs be tied in close proximity to each other, 2) denying a request to provide muzzles for the dogs, 3) failing to have a "fight stick" close at hand, 4) failing to provide alternative reasonably safe means to break up a dog fight, and 5) failing to provide adequate instruction in dog training. Plaintiff contended he essentially had no choice when he moved between the two attacking dogs to break up the dog fight. Plaintiff asserted he was required to protect the dog in his care or be subjected to disciplinary consequences from defendant. Plaintiff seemingly asserted he had no other recourse than to physically put himself in harm's way in an attempt to separate the fighting dogs. Plaintiff denied his action in physically imposing himself between the two dogs constituted negligent conduct

on his part. Plaintiff implied the training he did receive was insufficient preparation for knowing how to respond to the type of situation which presented itself on August 14, 2002.

{¶31} Plaintiff, Chester, at the time he was injured, is classified under the law as a keeper of the dog that bit him since he had physical control over the dog. *Garrard v. McComas* (1982), 5 Ohio App. 3d 179. Concomitantly, defendant would be considered a harborer of the dog because it maintained possession and control of the premises where the dog lived and acquiesced to the dog's presence. See *Flint v. Holbrook* (1992), 80 Ohio App. 3d 21. It has been previously determined a keeper is not protected by statute (R.C. 955.28(B))[1] which holds the owner or harborer of a dog strictly liable for injuries caused by the dog. *Khamis v. Everson* (1993), 88 Ohio App. 3d 220, *Johnson v. Allonas* (1996), 116 Ohio App. 3d 447. Plaintiff, in the instant case, is barred from pursuing his claim under statutory strict liability and is limited to a common-law cause of action against defendant as harborer of the dog. *Pickett v. Department of Rehabilitation and Correction* (Dec. 27, 2001), Court of Claims No. 2000-02755. In order to establish liability under a common-law dog bite action against a harborer, plaintiff must show the harborer had knowledge of the dog's vicious propensities. *Pickett*, id. Plaintiff, Chester has failed to present any evidence to establish the dog who bit him had previously displayed vicious propensities or that defendant knew about any prior vicious nature.

{¶32} Additionally, plaintiff is prevented from any recovery based on the issues of inadequate training and failure to provide proper restraining devices. Evidence in this claim has predominantly shown plaintiff's injury was caused by his own wrongful act of physically imposing himself between two fighting dogs in a bare handed attempt to separate the animals. Ohio's comparative negligence statute, R.C. 2315.19, bars a plaintiff from recovery if his or her own negligence is greater than defendant's. "Contributory negligence" means "any want of ordinary care on the part of the person injured, which

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[1] R.C. 955.28(B) states:

"The owner, keeper, or harborer of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog, unless the injury, death, or loss was caused to the person or property of an individual who, at the time, was committing or attempting to commit a trespass or other criminal offense on the property of the owner, keeper, or harborer, or was committing or attempting to commit a criminal offense against any person, or was teasing, tormenting, or abusing the dog on the owner's, keeper's, or harborer's property."

combined and concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred." *Joyce-Couch v. DeSilva* (1991), 77 Ohio App. 3d 278 at 290. The court concludes, plaintiff's negligence in trying to separate the dogs outweighs any negligence which may be attributable to defendant or its employees.

{¶33} Plaintiff, Chester has asserted that once he was injured defendant failed to provide him with proper medical treatment or give him the opportunity to seek medical care. Plaintiff has insisted he suffered emotional injuries due to this alleged lack of proper treatment. Plaintiff has not presented any evidence, other than his own assertions, to indicate he endured substandard, insufficient, or untimely care and treatment. Plaintiff sought and received treatment when exacerbations of his injuries were manifested. Plaintiff received on the spot immediate treatment. Although evidence is in conflict regarding whether plaintiff was permitted an immediate opportunity to visit the institution infirmary for examination and treatment, plaintiff has failed to show a delay in treatment by one day is actionable under the facts of this claim. In order to prove a claim based on indifference to medical needs plaintiff is required to provide expert testimony on the standard of care required. *Buerger v. Ohio Dept. of Rehab. and Corr.* (1989), 64 Ohio App. 3d 394. Plaintiff has failed to present requisite proof to sustain his claim.

{¶34} Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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DANIEL R. BORCHERT
Deputy Clerk

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