

Court of Claims of Ohio

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TODD DELCOL

Plaintiff

v.

DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2005-04861

Judge Joseph T. Clark
Magistrate Steven A. Larson

MAGISTRATE DECISION

{¶ 1} Plaintiff brought this action to recover damages as a result of injuries that he sustained in an alleged assault. The issues of liability and damages were bifurcated and the case proceeded to trial on the issues of liability and civil immunity.

{¶ 2} At all times relevant, plaintiff was an inmate at Madison Correctional Institution (MaCI), in the custody and control of defendant pursuant to R.C. 5120.16. Plaintiff contends that his assault was provoked by the conduct of Corrections Officer (CO) Kandy Sollars, who became angry when she discovered a large container of coffee creamer missing from her workstation. Plaintiff testified that when Sollars discovered the missing creamer she stood on a chair and shouted at the inmates in her area, using derogatory language and accusing them of stealing from her. Plaintiff further testified that Sollars threatened that if the inmates did not “take care of this internally” she would see to it that their belongings were “trashed.” Plaintiff explained that Sollars’ language meant that the inmates should find out who took the creamer and get it back to her. The term “trashing” was explained as a method other than a

“shakedown” or routine search whereby COs would go through inmates’ property, throw it around, and generally make a mess of the inmates’ living areas. Plaintiff contends that inmates dislike having their cubicles trashed; thus, certain inmates got together to find Sollars’ creamer and return it to her.

{¶ 3} Plaintiff’s cubicle was located in Unit C of the Banneker dorm at MaCI. According to plaintiff, he was in his cubicle talking to inmate Michael Duffy in the early afternoon after Sollars had made her threats when he observed three inmates from Unit D, one of whom he identified as R.J. Johnson, come into the area. Plaintiff testified that the inmates assaulted Duffy. Much later in the evening, plaintiff again saw inmates from Unit D coming into his unit. He stated that approximately five or ten inmates were in the group. Plaintiff testified that he went to several other cubicles to ask what was going on, and that no one could give him a definitive answer. Plaintiff stated that he got out a belt and slid a padlock onto it, then jumped on the top bunk in his cubicle to “get ready.” He testified that one of the Unit D inmates came in and attempted to grab at his feet, and that another of the inmates came over the approximately six-foot wall of the cubicle behind him. Plaintiff stated that he looked back at the inmate coming over the wall and was struck in the eye as he did so. Plaintiff stated that, at that point, he began banging the belt and padlock against a nearby wardrobe in order to make enough noise to attract COs. He related that the Unit D inmates then left the area.

{¶ 4} In his complaint, plaintiff asserts that Sollars communicated to other inmates that she suspected him, Duffy, and James Coots, of stealing the coffee creamer and that she “put a hit out” for them. He alleges that she also asked inmate Johnson and others to carry out such orders. Plaintiff further alleges that, after the incident, he and Coots were interviewed by Unit Manager Jondrea Parrish but that nothing was done about Sollars’ conduct. He asserts that Parrish protected Johnson because he was scheduled for a parole hearing and that Johnson’s involvement in the incidents would have negatively influenced the outcome. Finally, plaintiff alleges that

the conduct of Sollars and Parrish was malicious, wanton, and reckless, and that their actions were manifestly outside the scope of their employment.

{¶ 5} Upon review of the complaint and the testimony offered at trial, the court construes plaintiff's allegations to assert a claim of civil conspiracy.

{¶ 6} The tort of civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419, 1995-Ohio-61, quoting *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 126; *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 219.

{¶ 7} In addition to his own testimony, plaintiff offered the testimony of inmates Norman Whiteside and David Landers, and that of defendant's employees, CO Charles Fultz, and Unit Manager Jondrea Parrish.

{¶ 8} Both Whiteside and Landers testified that they heard Sollars speaking in a very loud tone of voice about her missing creamer. Whiteside corroborated that Sollars told the inmates to take care of the matter internally or she would have the inmates' cubicles trashed. Whiteside did not hear or observe any contact between Sollars and inmate Johnson. He did not witness the assault of Duffy, but testified that he heard some inmates "coming for Duffy" and saying that Duffy had taken the creamer. Whiteside further testified that he was called into Parrish's office to talk about the incidents after they occurred, and that Parrish had questioned whether Johnson was involved. Whiteside stated that he told Parrish that Sollars had made similar threats on one other occasion when she had discovered some cookies missing from her workstation.

{¶ 9} Landers was a resident of Unit D. He stated that Johnson also lived in that unit and that he knew that Johnson did not want his cubicle to get thrashed. Landers testified that he heard Sollars comment to the effect that she would "tear up Banneker" if she did not get back her creamer. Landers did not hear or observe any

contact between Sollars and Johnson and had no further testimony about the alleged assaults.

{¶ 10} CO Fultz testified that he had been a CO at MaCI for approximately 12 years at the time of the incidents alleged in plaintiff's complaint. According to the evidence, he was the only prison official who was present when Sollars discovered the missing creamer. Fultz testified that he came on duty with Sollars at 6:00 a.m., that he was assigned to Unit D at Banneker dorm, and that Sollars was assigned to Unit C. Fultz stated that he knew that Sollars was "pissed" about the missing creamer, but he did not testify with any specificity as to what Sollars said to the inmates. He testified that he and Sollars performed shakedowns of four or five inmate cubicles; that they did not find the missing creamer; and that he simply accepted that it was gone. He stated that he did not hear everything that Sollars said because he left the common area between Units C and D after the shakedowns and went to his own unit.

{¶ 11} Parrish testified that she was the manager of Units C and D at Banneker dorm at the time of the incidents in question, and that she had worked at MaCI for approximately eight years prior to that time. She testified that she was not on duty at the time that the incidents occurred but that, when she returned to work, she had a number of "kites" from inmates about the incidents. She further testified that she subsequently talked to several inmates, including plaintiff and Coots. Parrish stated that she investigated the alleged assault of Duffy and opined that "he got jumped" because Sollars had "indirectly" accused him. She further testified that she investigated the conduct of both plaintiff and Coots, who had admitted to swinging belts and padlocks when the Unit D inmates came into to their area in the late evening after the assault of Duffy. Parrish related that she did a shakedown of plaintiff's and Coots' cubicles but that she did not find any padlocks or weapons fashioned from belts and padlocks. She stated that neither plaintiff nor Coots were issued tickets as a result of their admitted use of such devices.

{¶ 12} After consideration of all of the evidence, the court concludes that plaintiff failed to prove a claim of civil conspiracy. One of the essential elements of such a claim is “an underlying unlawful act which is actionable in the absence of a conspiracy.” *Gosden*, supra, at 220. In addition, the evidence must establish malice. In the context of civil conspiracy, malice has been defined as “that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another.” *Id.* at 219, quoting *Pickle v. Swinehart* (1960), 170 Ohio St. 441, 443.

{¶ 13} Here, the evidence is insufficient to prove that Sollars committed a “wrongful act purposely” as is required to establish malice. It has been held that “[a]n otherwise lawful act is not made unlawful merely because two or more persons have joined together to commit it in hopes of causing injury to the plaintiff, even if they succeed.” *Id.* at 220 citing *Palmer v. Westmeyer* (1988), 48 Ohio App.3d 296, 301. While both Sollars’ reaction to her lost creamer and the statements she made were clearly inappropriate for an employee of defendant, the evidence fails to establish that Sollars intended that violence be used, or that her comments could reasonably have been construed to authorize violence. The evidence also fails to establish that anyone other than Duffy was ever accused; that Sollars put out “hits” for Duffy or any other inmate; or that she conspired with Johnson to carry out any such directives. Rather, the weight of the evidence suggests that because Johnson wanted to avoid a trashing of his cubicle he simply elected to find Sollars’ creamer and get it back to her by whatever means he deemed necessary. There was no evidence that Sollars was disciplined, or that any other action was taken against her as a result of the incidents, or as a result of Parrish’s investigation into Duffy’s assault.¹ Accordingly, plaintiff’s civil conspiracy claim must fail.

¹While it is alleged that Parrish hid the truth in order to protect Johnson, the court found Parrish to be a competent, credible witness and there was no evidence to substantiate that her actions were motivated by any personal interest in Johnson’s future with the parole board.

{¶ 14} The court is also called upon to determine whether Sollars and Parrish are entitled to civil immunity.

{¶ 15} Pursuant to R.C. 2743.02(F) and 9.86, an employee who acts in the performance of his duties is immune from liability. “However, if the state employee acts manifestly outside the scope of his or her employment or acts with malicious purpose, in bad faith, or in a wanton or reckless manner, the employee will be liable in a court of general jurisdiction. ‘It is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment.’ Even if an employee acts wrongfully, it does not automatically take the act outside the scope of the employee’s employment even if the act is unnecessary, unjustified, excessive, or improper. The act must be so divergent that its very character severs the relationship of employer and employee.” *Thomson v. University of Cincinnati College of Medicine* (Oct. 17, 1996), Franklin App. No. 96API02-260, at 13. (Internal citations omitted.)

{¶ 16} For the purposes of immunity, “malice” is defined as the “willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified.” *Lowry v. Ohio State Hwy. Patrol* (Feb. 27, 1997), Franklin App. No. 96API07-835, quoting *Jackson v. Butler Cty. Bd. of Cty. Comms.* (1991), 76 Ohio App. 3d 448, 453-454. “Bad faith” is defined as “a design to mislead or deceive another, * * * not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.” *Id.*, quoting *Black’s Law Dictionary* (5 Ed.1979) 127. “Reckless” conduct is defined as that where an individual “does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to

make his conduct negligent.” Id., quoting *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105.

{¶ 17} Based upon the totality of the evidence presented, the court finds that CO Sollars and Unit Manager Parrish acted within the scope of their employment with defendant at all times relevant hereto. Applying the definitions set forth above, the court further finds that the evidence is wholly insufficient to establish that Sollars or Parrish acted with malicious purpose, in bad faith, or in a wanton or reckless manner toward plaintiff. Consequently, CO Sollars and Unit Manager Parrish are entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas do not have jurisdiction over any civil actions that may be filed against them based upon the allegations in this case.

{¶ 18} For these reasons, it is recommended that judgment be rendered in favor of defendant and that Kandy Sollars and Jondrea Parrish be found to be immune from civil liability.

A party may file written objections to the magistrate’s decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court’s adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

STEVEN A. LARSON
Magistrate

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MAGISTRATE DECISION

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LH/cmd
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