

Court of Claims of Ohio

The Ohio Judicial Center
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Columbus, OH 43215
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DEE CARTER

Plaintiff

v.

DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2005-08964

Judge J. Craig Wright

Magistrate Steven A. Larson

MAGISTRATE DECISION

{¶ 1} Plaintiff filed this claim alleging that he was assaulted by an employee of defendant. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability and any immunity issues that may exist.

{¶ 2} At all times relevant to this action, plaintiff was an inmate in the custody and control of defendant at the Madison Correctional Institution (MCI) pursuant to R.C. 5120.16. Plaintiff testified that, on August 3, 2004, he was attending a class at MCI that was taught by instructor Ron Davis. The class was interrupted by a telephone call, after which Davis informed plaintiff that he was not supposed to be in the class and that he could leave. Plaintiff asserts that when he came forward to exit the classroom, he was stopped by Davis and asked to give Davis some “dap”; a particular type of handshake. Plaintiff testified that he refused and that, as he turned to walk out the door, Davis kicked him sharply in the buttocks and that Davis’ foot also struck plaintiff’s testicles. In his complaint, plaintiff further contends that Davis’ conduct was willful,

wanton, and malicious; that defendant knew or should have known of Davis' violent tendencies; and that defendant failed to protect him from inevitable harm.

{¶ 3} Although not specifically pleaded as such, the court construes plaintiff's complaint to allege a claim of negligent hiring, retention, or supervision. In order to prevail on such a claim, plaintiff must establish the following elements: 1) the existence of an employment relationship; 2) the employee's incompetence; 3) the employer's actual or constructive knowledge of such incompetence; 4) the employer's act or omission causing plaintiff's injuries; and 5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Peterson v. Buckeye Steel Casings* (1999), 133 Ohio App.3d 715,729, citing *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724, 739.

{¶ 4} In support of his claim, plaintiff presented his own testimony and that of Corrections Officer (CO) Marlin Howard, CO Scott Bills, and Investigator Patrick Fisher. In addition, plaintiff submitted a variety of exhibits. Defendant also submitted exhibit evidence and presented the testimony of CO Joyce Wilson.

{¶ 5} Upon review of the evidence, testimony, and arguments of the parties, the court finds for the following reasons that plaintiff has failed to prove his claim by a preponderance of the evidence.

{¶ 6} Applying the above-referenced elements to the instant case, the court notes that it is undisputed that there was an employment relationship between Davis and MCI. However, the evidence fails to establish any of the other elements. Specifically, there is no evidence that Davis was incompetent, that he had violent tendencies, or that he had any past history of violence against inmates. It follows, then, that plaintiff could not show that defendant had any actual or constructive knowledge of Davis' alleged propensity for violence; that defendant acted or failed to act in any manner that proximately caused plaintiff's alleged injury; or that defendant was negligent in hiring, supervising, or retaining Davis.

{¶ 7} Moreover, the evidence fails to establish whether Davis actually committed the alleged assault of plaintiff. None of the COs who testified were present when the incident occurred. Investigator Fisher testified that he interviewed Davis and that Davis never admitted kicking plaintiff, but that Davis did state to at least one other individual that Fisher interviewed that Davis made a scuffing motion across the floor with his foot, as if to indicate “get out of here.”

{¶ 8} CO Bills testified that plaintiff told him about the incident when plaintiff saw Bills outside the classroom, and that Davis subsequently came out and “seemed upset” when he encountered plaintiff speaking with Bills.

{¶ 9} CO Wilson testified that plaintiff reported the incident to her as soon as he returned to his dorm and that she filed an incident report concerning the matter. Wilson stated that she was required to file the report, but that plaintiff had not wanted her to do so. Further, Wilson stated that she was also required to send plaintiff for a medical checkup, that plaintiff also resisted doing that, and that plaintiff told her that he was not hurt.

{¶ 10} The medical records submitted by the parties reveal that plaintiff was examined on the date of the occurrence and that “no redness, bruising, or open areas [were] noted around anal, buttocks, testicles or [upper] posterior side of legs. No treatment [was] required.” (Plaintiff’s Exhibits 7 and 8; Defendant’s Exhibit A.) The records include a further notation that plaintiff had returned to the medical department approximately one week later and reported that he had been unable to have a bowel movement since being kicked, and that he had stated to the staff that he had tried to come back sooner but felt that “it was too early to tell anything.” (Plaintiff’s Exhibit 7.) Plaintiff was prescribed milk of magnesia and, two days later, reported that the medication had worked and that he had no additional complaints. (Plaintiff’s Exhibit 8.)

{¶ 11} Finally, the parties submitted copies of the informal complaint, grievance, and appeal that plaintiff filed concerning the matter. (Plaintiff’s Exhibits 2-6;

Defendant's Exhibits C-E.) The court notes that plaintiff waited approximately nine months before initiating the grievance process.

{¶ 12} In his informal complaint, plaintiff alleges that there were four or five other inmates in the room at the time of the incident; that they could verify that plaintiff was assaulted; that they had been interviewed by Investigator Fisher and that Fisher had determined that the inmates were telling the truth. Plaintiff concluded the complaint by requesting that Davis be fired and by stating that he did not want the same thing to happen to anyone else. (Defendant's Exhibit B.) None of the inmates mentioned in the complaint were called as witnesses at the trial. Investigator Fisher testified that after his investigation he made a recommendation to "continue discipline" but stated he did not know the outcome of any action that was taken after he filed his report. However, there is no evidence of record regarding any disciplinary action that may have been taken against Davis. The institution's response to plaintiff's informal complaint was a short notation that the matter had already been investigated. (Plaintiff's Exhibit 2.)

{¶ 13} Similarly, the disposition of plaintiff's grievance states that both plaintiff's informal complaint and grievance were untimely filed; that the matter had previously been fully investigated; and that any issues that plaintiff had with the investigation should be addressed to Investigator Fisher. (Plaintiff's Exhibit 5.) Plaintiff appealed that disposition to the institution's chief inspector, who in turn, sent the grievance back for further action. (Plaintiff's Exhibit 4.) The final disposition of the grievance reiterates that the matter had been fully investigated, but includes a specific finding that the "staff action was a valid exercise of discretion." (Plaintiff's Exhibit 6.)

{¶ 14} In sum, the court finds that plaintiff's testimony regarding the incident lacked credibility and was not corroborated by any other evidence. Accordingly, the court is not persuaded that plaintiff was assaulted and, based upon the totality of the evidence presented, plaintiff cannot prevail on his claim of negligent hiring, retention, or supervision. To the extent that plaintiff may be alleging that defendant is liable for Davis' unauthorized use of force based upon a theory of respondeat superior, such a

claim would also fail because the court has found that no assault occurred. As a result of these findings, the court further finds the issue whether Davis acted outside the scope of his employment for the purposes of an immunity determination need not be addressed. It is therefore recommended that judgment be granted in favor of defendant.

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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LH/cmd
Filed June 12, 2008
To S.C. reporter June 30, 2008