

[Cite as *Elliott v. Ohio Dept. of Rehab. & Corr.*, 1992-Ohio-285.]

IN THE COURT OF CLAIMS OF OHIO

DAVID ELLIOTT, #226-650 :  
Plaintiff : CASE NO. 91-08743  
v. : DECISION  
OHIO DEPARTMENT OF : Judge Russell Leach  
REHABILITATION AND CORRECTION :  
Defendant :

: : : : : : : : :

Plaintiff is an inmate in the custody and control of defendant, Ohio Department of Rehabilitation and Correction, pursuant to R.C. 5120.16. On August 3, 1992, a trial was conducted in this action at the Chillicothe Correctional Institution (CCI), on the sole issue of liability.

Plaintiff filed this action July 31, 1991, after he was struck by Byron Turner, a corrections officer employed by defendant. Plaintiff alleges that defendant's liability results from the negligent hiring, training and supervision of Officer Turner.

Defendant responded that the officer acted outside the course and scope of his employment by striking plaintiff, and that therefore it would not be liable for the conduct by Corrections Officer Turner.

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The incident occurred on September 9, 1990, at which time plaintiff was incarcerated at CCI, and was assigned to cut hair in the prison barbershop. On the day of the incident, Officer Byron Turner was in charge of the inmates in the barbershop.

Turner, seated behind the officer's desk in the barbershop, began questioning plaintiff concerning plaintiff's alleged failure to report to work at the barbershop on the previous day.

Turner then told plaintiff he would receive a ticket (a written reprimand) for missing work. The tone of the exchange remained moderate. The officer questioned Elliott further as to whether "he (plaintiff) had a problem" and if plaintiff thought he could "kick his (Turner's) ass."

Turner ended the initial questioning by dismissing plaintiff, but recalled him before he could leave the barbershop.

A brief exchange and a second dismissal of plaintiff immediately followed. Turner then arose and came from behind the desk. He again recalled plaintiff. Turner again asked Elliott whether he thought he could "kick his (Turner's) ass," and then immediately followed this by striking plaintiff once in the head with his fist.

Plaintiff at no point raised his hands, even in defense. Elliott fell back from the blow at which time other inmates in the barbershop stepped between him and the corrections officer.

Elliott was helped from the barbershop by a fellow inmate. Officer Turner immediately reported the incident to his supervisor.

Although plaintiff alleges defendant's direct negligence in the hiring, training and supervising of Officer Turner was the proximate cause of plaintiff's injury, evidence neither sufficient nor pertinent in nature to the negligence claim was put forth by plaintiff at trial.

However, this court is not bound by the legal theories alleged and does amend the pleading to conform to the evidence. The court finds the blow delivered to plaintiff to be a battery, which is defined as:

Battery is the unlawful touching the person of another or the striking, beating, or wounding of another by the aggressor with the intent of inflicting injury upon the person assaulted \*\*\* such intent need not, however, be an expressed intent but may be inferred from the nature of the defendant's act or conduct, nor is it necessary that the defendant act in anger or with malice toward the person whom the battery was directed.

6 Ohio Jurisprudence 3d (1978) 103, Assault, Civil Aspects, Section 4.

Plaintiff has also asked for a determination of whether Turner is entitled to civil immunity. The initial focus is on R.C. 2743.02(F) which provides in pertinent part as follows:

A civil action against a state officer or employee that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed *against the state* in the court of claims, which has exclusive, original jurisdiction to *determine* initially, whether the officer or employee is entitled to civil immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. (Emphasis added.)

R.C. 9.86, in pertinent part, reads:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the laws of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were *manifestly* outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or *reckless* manner. (Emphasis added.)

This court finds that Turner's use of force against plaintiff for the alleged failure to report to work the previous day was unreasonable, and at the very least, reckless and it follows that the courts of common pleas have jurisdiction over the civil action if brought by plaintiff against Turner.

Paragraph two of R.C. 2743.02(A)(1) reads in pertinent part as follows:

\* \* \* filing a civil action in the Court of Claims results in a complete *waiver* of any cause of action, based on the same act or omission, which the filing party *has against any state officer or employee*. The *waiver* shall be *void* if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or *reckless* manner.

As the Supreme Court of Ohio set forth in *Nease v. Medical College Hospital* (1992), 64 Ohio St. 3d 396, when an action against the state is filed, a cause of action *against a state employee* is waived. However, that waiver is void upon a finding that the employee acted with malicious purpose, in bad faith, or in a wanton or *reckless* manner. The reckless manner in which Byron Turner proceeded against plaintiff serves to void the waiver of plaintiff's cause of action against Turner.

Defendant asserts that it has no liability because Corrections Officer Turner acted beyond the scope of his employment when he struck plaintiff.

This court's finding that Byron Turner is not entitled to civil immunity does not automatically relieve defendant from liability for his actions. The last sentence of R.C. §9.86 expressly states that the liability of the state, with regard to

civil immunity, will not be affected. The pertinent part of the statute reads:

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section *does not affect* the liability of the state in an action filed against the state in the Court of Claims pursuant to Chapter 2743. of the Revised Code. (Emphasis added.)

This court finds that the acts of defendant's employee, Byron Turner, were not outside the course and scope of his employment. An agent is acting outside the scope of his authority where the act has no relationship to the conduct of the principal's business or the conduct is so divergent that its very character severs the relationship of employer-employee. *Thomas v. Ohio Dept. of Rehab. and Correction* (1988), 48 Ohio App. 3d 86, 89. The use of force by Turner, although heedless and unnecessary, was not outside the authority of a corrections officer charged by the defendant to maintain and discipline an inmate population. *Id.*

The determination of an infraction of a rule or regulation and the discipline to accompany it is largely at the discretion of the corrections officer. Officer Turner questioned and

ultimately struck plaintiff for his alleged failure to report to an assigned duty on the previous day.

Turner used force in furtherance of defendant's duty to maintain an inmate population through rules and regulations. The use of force for disciplining inmates is consistent with the scope of authority given to a corrections officer in the discharge of his duties. The Ohio Administrative Code 5120-9-01(E) provides in pertinent part:

The \* \* \* staff members of a correctional institution is authorized to use force, other than deadly force, when and to the extent he *reasonably* believes that such force is *necessary* to enforce the lawful rules and regulations of the institution \* \* \*.  
(Emphasis added.)

This court finds defendant vicariously liable for the reckless acts of Byron Turner because those same acts were not outside the scope of his employment. The doctrine of *respondeat superior* establishes the liability of the employer for the inappropriate acts of his employee in furtherance of that employer's business. Byron Turner's use of force was expressly granted to him to use in carrying on the business of defendant on the maintenance and discipline of the inmate population. The inappropriateness or the excessiveness of the force used against

plaintiff in this case does not take Byron Turner beyond the scope of his employment.

The Court of Appeals in *Thomas v. Ohio Department of Rehabilitation and Correction* (1988), 48 Ohio App. 3d 86, rejected the converse argument that the use of excessive force would carry the employee beyond the scope of employment, to its logical conclusion:

If such were the case, the statute would be devoid of any meaning since anytime the use of force was unjustified the state would be shielded from any liability even where the conduct, as here, was actuated, at least in part, by the purpose to serve the master and in furtherance of prison business.

*Id.* at 90.

In summation, this court finds that Corrections Officer Turner committed a battery on plaintiff within the scope of his employment. Officer Turner is not entitled to immunity from civil liability because his actions have been determined to be at least reckless. The defendant, employer, which waived its defense of sovereign immunity is held liable for the acts of Turner under the doctrine of *respondeat superior*.

R.C. 2743.02(D) reads in part that recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral "received" by the claimant.

Inasmuch as the court has found that the correction officer is not immune from personal suit, plaintiff may or may not have sources of recovery other than this pending action. However, the court sees no reason to postpone the trial to determine damages and directs the clerk to set such trial on the schedule at the earliest practical time.

RUSSELL LEACH  
Judge

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REHABILITATION AND CORRECTION :  
Defendant :

: : : : : : : : :

The court has considered the evidence and rendered a decision filed herein. Judgment is rendered in favor of plaintiff and against defendant. The clerk is directed to schedule the trial on damages at the earliest possible time.

— RUSSELL LEACH  
Judge

Entry cc:

Richard F. Swope, Esq.  
6504 East Main Street  
Reynoldsburg, Ohio 43068

Attorney for Plaintiff

Peter E. DeMarco, Esq.  
Capitol Square Office Building  
65 East State Street, Suite 700  
Columbus, Ohio 43215

Assistant Attorney General

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