[Cite as *Hemphill v. Dept. of Rehab. & Corr.*, 2019-Ohio-5466.]

MARCUS HEMPHILL Plaintiff v. DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2018-01094JD Magistrate Gary Peterson DECISION OF THE MAGISTRATE

{¶1} Plaintiff, an inmate in the custody and control of defendant, brings this action alleging that staff at the Southern Ohio Correctional Facility (SOCF) harassed him in an attempt to coerce him to be an informant. The issues of liability and damages were bifurcated, and the case proceeded to trial on the issue of liability.

{¶2} At trial, plaintiff testified that the harassment started sometime before August 2017. Plaintiff recounted that on August 12, 2017, lieutenant Boggs awakened him at 2:30 a.m., and sprayed him in the face with chemical spray. Plaintiff asserted that he was attempting to put on his glasses when he was sprayed and that Boggs lied about plaintiff trying to flush something down the toilet in his cell. According to plaintiff, Boggs told him that these types of incidents will continue to occur until he agrees to cooperate and become an informant regarding the actions of corrections officer Kennison.

{¶3} Plaintiff testified that staff members at SOCF harassed him by falsifying drug tests. Plaintiff related one such instance where a staff member claimed to have found a folded up white paper with a green leafy substance in the pocket of plaintiff's pants. Plaintiff added that he does not have pants pockets. Regarding another instance, plaintiff testified that a corrections officer removed him from the shower and escorted him to the library where he was subjected to a drug test. Plaintiff believes the drug test should have been performed in the shower. Concerning a third instance, plaintiff testified that corrections officer Hale claimed that plaintiff failed a drug test.

Plaintiff added that he submitted to a drug test eight days later and there were no drugs in his system.

{¶4} Regarding the drug testing process, plaintiff explained that if an inmate tests positive, the inmate is supposed to have the option of sending the sample to a third party for independent testing. If the independent test results in a negative, the inmate is not charged $25 for the drug test. Plaintiff added that failing a drug test is a rule violation and refusing to take a drug test is also a rule violation. Plaintiff stated that he has never been charged with refusing to take a drug test. Plaintiff maintained that defendant's conduct amounted to inappropriate supervision in violation of Ohio Adm.Code 5120-9-04.

{¶5} Rick Broughton testified that he is employed at SOCF as a lieutenant and has been so employed for the previous seven years. Broughton recalled conducting a shakedown of plaintiff's cell. Broughton asserted that plaintiff was not compliant with orders to come out of the cell and submit to handcuffs; rather, plaintiff was attempting to flush something down the toilet. According to Broughton, Boggs, who was also conducting the shakedown, ordered plaintiff to stop, but plaintiff refused. Broughton testified that as a result, Boggs used his chemical spray, which he explained is the lowest amount of force that can be used. Broughton authored an incident report following the event. Defendant's Exhibit F. Plaintiff was given an opportunity to make a statement, but he declined. Defendant's Exhibit G.

{¶6} Curtis Scott testified that he has been employed as a corrections officer at SOCF since 2012. Scott stated that on October 29, 2017, he performed a strip search of plaintiff. Scott recalled plaintiff being escorted to the library because the shower was full. Scott reported that he found synthetic marijuana in plaintiff's pants. Scott denied planting the drugs and was unaware of any conspiracy to get plaintiff to be an informant. Scott added that recruiting an inmate to inform would not be part of his job duties.

{¶7} Stephen Hale testified that he is the assistant drug coordinator at SOCF, but he also spent seven years as a corrections officer. Regarding drug testing, Hale explained that if an inmate tests positive, the inmate can either admit to using drugs or request that the test be sent out of the prison for an additional test, which would be charged to the inmate if the test is positive. Hale recalled taking plaintiff for a drug test after a strip search revealed synthetic marijuana in plaintiff's pants pocket. Plaintiff was given a conduct report and a drug test. Hale did not know why the test was performed in the library. The test was negative. Defendant's Exhibit I. Hale denied asking plaintiff to be an informant and denied being involved in a general conspiracy to coerce plaintiff to become an informant. Hale added that asking an inmate to inform would not be part of his job duties.

{¶8} Michael Dotson testified that he has been employed as a corrections officer at SOCF for 20 years. Dotson recalled performing a drug test on plaintiff on August 9, 2017. Plaintiff tested positive and Dotson thought plaintiff might be under the influence of drugs based on how he was acting. Dotson reported that plaintiff refused to sign the test. Defendant's Exhibit H. Dotson asserted that plaintiff did not request the sample be sent out for testing. Dotson denied ever refusing to send a sample out for additional testing and denied being aware of any conspiracy to falsify a test.

{¶9} Gary Haywood testified that he is a lieutenant at SOCF and has been so employed since 2011. Haywood asserted that his duties include conducting investigations of other corrections officers as directed by the major or the warden. According to Haywood, he never investigated corrections officer Kennison and he was not aware of anyone asking plaintiff to inform on Kennison. Haywood added that he was not aware of any conspiracy to falsify drug tests.

{¶10} William Bauer testified that he has been employed as a lieutenant at SOCF for the previous 8 years. Bauer denied ever instructing corrections officers to falsify plaintiff's drug tests. Bauer stated that he never performed an investigation of

Kennison. Bauer recalled an instance where plaintiff offered to provide information in an attempt to evade a urine test. Bauer added that plaintiff did not say what information he had or about whom. Bauer added that he is not authorized to open an investigation of a corrections officer.

{¶11} Fred Denny testified that he is employed at SOCF as a strategic threat group gang coordinator and drug coordinator. Denny explained that five percent of the inmate population must be drug tested each month. A computer program is used to generate a list of inmates and provides dates for tests. Denny added that a for cause drug test can be ordered at any time where there is reasonable suspicion of drug activity. Denny stated that after a test is administered, if the result is positive, the inmate may self-admit or request additional testing. If the second test is also positive, the inmate is charged the cost of the test. Denny added that not every corrections officer is trained to interpret the urinalysis test. Denny testified that a positive test result does not help him to know when the inmate used the drug.

{¶12} Linnea Mahlman testified that she is employed as an inspector at SOCF and has been so employed for 13 years. Mahlman stated that she oversees the grievance procedure and investigates allegations of inappropriate supervision. Mahlman recalled assisting plaintiff to obtain the proper shoe size, but she asserted that she did not investigate any of plaintiff's complaints for inappropriate supervision because in her view, plaintiff's complaints did not rise to the level of inappropriate supervision.

{¶13} Jason Massie testified that he is employed at SOCF as a corrections officer and has been so employed for 8 years. Massie stated that his duties include performing three daily shakedowns, while looking for any contraband. Massie recalled that drugs were found on plaintiff during a strip search, and as a result, he performed a shakedown of plaintiff's cell on December 8, 2017. Massie reported finding a suboxone strip folded inside a piece of paper. Defendant's Exhibit C. Massie added that plaintiff

was not present for the shakedown. Massie denied planting drugs. Massie added that a corrections officer would not ask an inmate to become an informant as it is not part of the job duties.

{¶14} Plaintiff argues that the above-mentioned conduct amounted to inappropriate supervision and harassment. However, the Tenth District Court of Appeals has held that allegations of "inappropriate supervision" and/or "harassment" in violation of Ohio Adm.Code 5120-9-04(B) do not supply an inmate with an independent cause of action. *Peters v. Dept. of Rehab. & Corr*., 10th Dist. Franklin No. 14AP-1048, 2015-Ohio-2668, ¶ 10. Furthermore, such prison regulations "will not support a cause of action by themselves, even though violations of internal rule and policies may be used to support a claim of negligence." *Triplett v. Warren Corr. Inst*., 10th Dist. Franklin No. 12AP-728, 2013-Ohio-2743, ¶ 10, citing *Horton v. Ohio Dept. of Rehab. & Corr*., 10th Dist. Franklin No. 05AP-198, 2005-Ohio-4785, ¶ 29.

{¶15} However, no allegation of negligence appears in the complaint and at no point did plaintiff argue negligence at trial. If plaintiff had, he would be required to prove "the existence of a duty, a breach of that duty, and an injury proximately caused by the breach." *Franks v. Ohio Dept. of Rehab. & Corr*., 195 Ohio App.3d 114, 2011-Ohio-2048, ¶ 12, 958 N.E.2d 1253 (10th Dist.), citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 15 Ohio B. 179, 472 N.E.2d 707 (1984). Plaintiff did not present such evidence or argument for the court.

{¶16} To the extent plaintiff's claim could be construed as one for intentional infliction of emotional distress, to prevail on such a claim, plaintiff must prove

> (1) the defendant intended to cause emotional distress or knew or should have known that actions taken would result in severe emotional distress; (2) the defendant's conduct was so extreme and outrageous that it went beyond all bounds of decency, and was such as to be considered utterly intolerable in a civilized

> community; (3) the defendant's actions proximately caused plaintiff psychic suffering; and (4) the plaintiff suffered serious mental anguish of a nature that no reasonable man could be expected to endure.

Gordon v. Ohio Dept. of Rehab. & Corr., 10th Dist. Franklin No. 17AP-792, 2018-Ohio-2272, ¶ 20.

{¶17} Plaintiff did not present evidence that defendant intended to cause emotional distress or that plaintiff suffered mental anguish or psychic injury the nature of which no reasonable man could be expected to endure.

{¶18} Turning to the claim that plaintiff was sprayed with chemical spray without provocation, it has been held that "[a]llegations of use of unnecessary or excessive force against an inmate may state claims for battery and/or negligence." *Brown v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 13AP-804, 2014-Ohio-1810, ¶ 13. "To prove battery, the plaintiff must prove that the intentional contact by the defendant was harmful or offensive. * * * Ohio courts have held that, in a civil action for assault and battery, the defendant has the burden of proving a defense of justification, such as the exercise of lawful authority." *Miller* at ¶ 11; *see also Brown* at ¶ 13 ("A defendant may defeat a battery claim by establishing a privilege or justification defense.").

{¶19} "To recover on a negligence claim, a plaintiff must prove by a preponderance of the evidence (1) that a defendant owed the plaintiff a duty, (2) that a defendant breached that duty, and (3) that the breach of the duty proximately caused a plaintiff's injury." *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-357, 2006-Ohio-2531, ¶ 10. "Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners' health, care, and well-being." *Ensman v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 06AP-592, 2006-Ohio-6788, ¶ 5.

{¶20} "The use of force is sometimes necessary to control inmates." *Jodrey v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-477, 2013-Ohio-289, ¶ 17.

"Correctional officers considering the use of force must evaluate the need to use force based on the circumstances as known and perceived at the time it is considered." *Brown* at ¶ 15, citing Ohio Adm.Code 5120-9-01(C). "[T]he precise degree of force required to respond to a given situation requires an exercise of discretion by the corrections officer." *Ensman* at ¶ 23. "In Ohio Adm.Code 5120-9-01, the Ohio Administrative Code sets forth the circumstances under which correctional officers are authorized to use force against an inmate." *Id*. at ¶ 6.

{¶21} Ohio Adm.Code 5120-9-01 provides, in pertinent part:

"(C) Guidelines regarding the use of force. * * *

"* * *

"(2) Less-than-deadly force. There are six general circumstances in which a staff member may use force against an inmate or third person. A staff member may use less-than-deadly force against an inmate in the following circumstances:

"(a) Self-defense from physical attack or threat of physical harm.

"(b) Defense of another from physical attack or threat of physical attack.

"(c) When necessary to control or subdue an inmate who refuses to obey prison rules, regulations or orders.

"(d) When necessary to stop an inmate from destroying property or engaging in a riot or other disturbance.

"(e) Prevention of an escape or apprehension of an escapee; or

"(f) Controlling or subduing an inmate in order to stop or prevent self-inflicted harm."

{¶22} "Pursuant to Ohio Adm.Code 5120-9-01(C)(1)(a), correctional officers 'may use force only to the extent deemed necessary to control the situation.' Additionally, correctional officers 'should attempt to use only the amount of force reasonably necessary under the circumstances to control the situation and shall attempt to minimize physical injury.' Ohio Adm.Code 5120-9-01(C)(1)(b)." *Brown* at ¶ 16. Also

pertinent is Ohio Adm.Code 5120-9-01(B)(3), which defines "excessive force" as "an application of force which, either by the type of force employed, or the extent to which such force is employed, exceeds that force which reasonably appears to be necessary under all the circumstances surrounding the incident."

{¶23} While plaintiff did not argue that the officers used excessive force, nevertheless, the magistrate will analyze whether plaintiff prevailed on such a claim. Broughton credibly testified that he, along with corrections officer Boggs, conducted a shakedown of plaintiff's cell at 2:30 a.m. on August 12, 2017. Broughton reported that plaintiff was ordered by Boggs to exit his cell and submit to being handcuffed. Plaintiff, nevertheless, attempted to flush something down the toilet. Despite orders to cease his activity, plaintiff persisted, and as a result, Boggs deployed chemical spray. Chemical spray is the least amount of force necessary and no other force was used. Plaintiff's claim that he was in his bed and attempting to put on his glasses at the time lacks credibility. At no point did plaintiff present any corroborating evidence that he believed officers used excessive force. Indeed, he did not argue or assert as much at trial and it appears that plaintiff never filed any informal complaints with prison authorities alleging that such conduct amounted to excessive use of force. Based upon the testimony and evidence, it appears the force used was reasonable and necessary given the circumstances because corrections officers may use force to subdue an inmate who refuses orders. As a result, to the extent plaintiff's claim included such a cause of action, plaintiff failed to prove such a claim by a preponderance of the evidence. Plaintiff did not present evidence regarding other potential claims he may have alleged in his complaint.

{¶24} Based upon the forgoing, the magistrate recommends that judgment be entered in favor of defendant.

{¶25} *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).

GARY PETERSON
Magistrate

Filed December 5, 2019
Sent to S.C. Reporter 1/24/20