

[Cite as *Dorsey v. Grafton Correctional Inst.*, 2004-Ohio-2762.]

IN THE COURT OF CLAIMS OF OHIO

DARYL DORSEY :

Plaintiff : CASE NO. 2003-03299
v. : Judge Fred J. Shoemaker
DECISION
GRAFTON CORRECTIONAL :
INSTITUTION :
Defendant :

{¶1} On March 29, 2004, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On April 12, 2004, plaintiff filed a memorandum in opposition and a motion to strike. Upon review, plaintiff's motion to strike is DENIED. The case is now before the court for a non-oral hearing upon defendant's motion for summary judgment. Civ.R. 56(C) and L.C.C.R. 4.

{¶2} Civ.R. 56 (C) states, in part, as follows:

{¶3} "**** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion

for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. ***" See, also, *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶4} In his complaint, plaintiff alleges that on July 2, 2002, defendant chose to move him from a cell in the non-smoking pod of the cell block to a cell in a smoking pod in retaliation for plaintiff making complaints about the conduct of his cell mate. Plaintiff alleges deliberate indifference to his health and a breach of a "contract" between him and defendant, obligating defendant to keep him in a non-smoking cell. Plaintiff acknowledges that his complaint in this case is based upon the same conduct plaintiff complained of in a prior case he filed in this court, *Daryl Dorsey v. Grafton Correctional Inst.* (June 18, 2003), Court of Claims No. 2002-02329. Plaintiff admits that the only factual difference between this case and his prior case is that the instant case involves a subsequent change in his cell assignment.

{¶5} To the extent that plaintiff alleges claims based upon retaliation and/or deliberate indifference, actions against the state under Section 1983, Title 42, U.S.Code may not be brought in the Court of Claims because the state is not a "person" within the meaning of Section 1983. See, e.g., *Jett v. Dallas Indep. School Dist.* (1989), 491 U.S. 701; *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App.3d 170; *White v. Chillicothe Correctional Institution* (Dec. 29, 1992), Franklin App. No. 92AP-1230. Indeed, claims of retaliation are to be treated as an action for alleged violations of constitutional rights under Section 1983, Title 42, U.S.Code. Thus, this court is without jurisdiction to hear those claims.

{¶6} With regard to plaintiff's contract claim, the Tenth District Court of Appeals has recognized that "the relationship

between an inmate and the Department of Rehabilitation and Correction is custodial, not contractual." *Hurst v. Department of Rehabilitation & Cor.* (Feb. 17, 1994), Franklin App. No. 93AP-716.

Moreover, upon review of the alleged contract documents, the court finds no obligation on the part of defendant to continue to keep plaintiff in a non-smoking unit. Thus, plaintiff's claim based upon contract fails, as a matter of law.

{¶7} Finally, to the extent that plaintiff alleges a claim of negligence based upon the change in his cell assignment, defendant is generally immune from liability arising from decisions regarding inmate transfer and placement under the discretionary immunity doctrine expressed in *Reynolds v. State* (1984), 14 Ohio St.3d 68, 70. See *Holbert v. Ohio Dept. of Rehab. & Corr.* (Nov. 28, 1995), Court of Claims No. 94-03947. In this case, there is no dispute that at plaintiff's own request he was moved from his cell in the non-smoking pod because he had been having problems with his cell mate. Under defendant's regulations, there is no requirement that plaintiff be moved to another non-smoking pod. Moreover, defendant's decision to move plaintiff to a smoking pod in order to relieve the tension between plaintiff and his cell mate is the very type of discretionary decision protected by discretionary immunity under *Reynolds*, supra. See *Holbert*, supra; See, also, *Deavors v. Ohio Dept. Of Rehab. & Corr.* (May 20, 1999), Franklin App. No. 98AP-1105; *Reynolds v. State* (1984), 14 Ohio St.3d 68, 70; *Bell v. Wolfish* (1979), 441 U.S. 520, 547.

{¶8} In short, upon review of defendant's motion for summary judgment and the memoranda filed by the parties, and construing the evidence in plaintiff's favor, the court finds that no genuine issues of material fact exist and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment shall be GRANTED.

{¶9} Additionally, plaintiff's March 30, 2004, motion to visit the situs of the incident is DENIED as moot.

{¶10}A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and 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.

FRED J. SHOEMAKER
Judge

Entry cc:

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