



representation in the federal court case. Defendant, after an investigation, and with the advice of the state Attorney General's office, denied plaintiff's request. The federal case went to trial and a jury verdict was returned in plaintiff's favor. Thereafter, plaintiff filed the instant action pursuant to R.C. 109.364, which provides, in pertinent part:

{¶4} “If the attorney general denies representation to an officer or employee who made a request for representation under section 109.361 \*\*\* the officer or employee may, upon the termination of the action for which he requested the representation, commence an action in the court of claims against the employer \*\*\* for the reasonable expenses incurred in providing his own defense.

{¶5} “If the court of claims finds that the officer or employee was entitled to have the attorney general represent and defend him under section 109.361 \*\*\* the court shall enter judgment against the employer \*\*\* in the amount of the reasonable expenses incurred by the officer or employee in providing his own defense and in bringing the action authorized by this section. \*\*\*\*”

{¶6} A threshold issue in the trial before Judge Leach, and upon retrial, was whether plaintiff did, in fact, use excessive force against Torres. Plaintiff has consistently maintained that he used only the amount of allowable force needed under the circumstances. As Judge Leach stated in his decision: “[t]he evidence on the issue was conflicting, both at the time of the occurrence and at the trial, and any determination of the matter would necessarily depend upon which witnesses were believed.” Judge Leach went on to state: “\*\*\* this court is not convinced that it is required to determine plaintiff's culpability. To do so would amount to a retrial of the federal action in this court. The court does not read the statute so as to require such duplicative efforts; rather, the sole question before the court is whether defendant, as a result of its investigation, properly denied plaintiff legal representation.”

{¶7} The Court of Appeals disagreed with Judge Leach’s analysis. Specifically, the Court held that, although the case was one of first impression, the language of R.C. 109.364 “evidences a clear intent that the Court of Claims make an independent finding \*\*\*.” The Court found further support for its interpretation in the statutory limitation on commencement of such actions. Because the statute provides that the cause of action does not arise until “the termination of the action for which [the employee] requested the representation,” the Court of Appeals opined that the General Assembly intended that the outcome of the case be considered by this court when making its determination. In remanding the case the court stated:

{¶8} “Finally, our conclusion that the Court of Claims should have independently determined whether appellant was entitled to representation under R.C. 109.361 would seem to require that this matter be remanded for such a determination. ODRC argues, however, that the Court of Claims’ opinion indicates that as an alternative to finding against [plaintiff] based upon deference to the attorney general’s original determination, the court did in fact independently determine that [plaintiff] acted maliciously in striking Torres. While there is no doubt that the Court of Claims’ opinion suggests how the court would independently determine the issue of [plaintiff’s] entitlement to representation under R.C. 109.364, the opinion also plainly states that the court was making no such finding. Accordingly, this matter must be remanded for such a determination.”

{¶9} Upon review of the evidence and the arguments of counsel, this court finds as follows.

{¶10} This court agrees with Judge Leach’s statement that the evidence concerning the use of force was conflicting and that the outcome of the case necessarily depends on which witnesses are believed. Judge Leach deferred to the opinion of Assistant Attorney General Eric Holloway, who investigated the matter

and determined that representation should be denied. According to Mr. Holloway, plaintiff's conduct was "at the very least, malicious." He based his findings upon his review of the incident file and his interviews of witnesses. Of the witnesses that Holloway interviewed, he stated that CO Rick Bassinger was the most credible. Judge Leach also found Co Bassinger to be a credible witness and, further, that Holloway reasonably relied upon Bassinger's interview in reaching his conclusion. Bassinger was the only witness who expressed the opinion that plaintiff used excessive force in his treatment of Torres.

{¶11} In the trial before this judge of the court, the parties presented only the testimony of the two key witnesses from the first trial: plaintiff and CO Bassinger. The court also reviewed the transcript of the proceedings before Judge Leach.

{¶12} At the time of the occurrence, plaintiff had been employed by defendant for approximately 16 years. On the date of the incident in question, Torres was being taken to a dress-out room in preparation for going into isolation. Plaintiff stated that he was observing from outside the room when he heard Torres say "fuck you" to CO Hudson, then turn and strike CO Hudson in the face. Plaintiff then entered the room to assist three other COs in "taking Torres down," a process of getting him to the floor and securing him with handcuffs. Plaintiff testified that Torres was struggling and making threatening remarks to everyone involved in the process. Afterward, Torres had to be taken to another room and placed in four-way restraints. Once secured, Torres made a motion as if he were going to spit on the COs. Plaintiff testified that he used the palm on his hand against Torres' head, to push his head back and prevent him from spitting on plaintiff or the others in the room. He stated that he had used that technique many times and did not feel that it was anything unusual. However, in this instance, plaintiff was investigated for use of excessive force and was fired. Plaintiff brought an action for reinstatement and was ultimately returned to work, but at a lower rank.

{¶13} CO Bassinger had been employed by defendant for approximately three years at the time the incident with Torres occurred. He testified that plaintiff “cuffed” Torres in the face; that he was aware of the technique described by plaintiff, and that it was not the technique he observed. He testified that plaintiff struck Torres in retaliation for Torres striking CO Hudson, and that he made a statement to Torres to the effect that Torres deserved being struck for the way he had treated a CO. In the trial before Judge Leach, and upon retrial, CO Bassinger admitted that he had testified about the incident on three different occasions and that it was not until the third occasion that he came forth with information about plaintiff striking Torres. CO Bassinger also admitted that he received a written reprimand for withholding information. He stated that his motivation for recanting his original testimony was his Christian beliefs. As of the time of trial, CO Bassinger had continued to be employed by defendant at ACI.

{¶14} The standard for refusing representation of a state officer or employee is set forth in R.C. 109.362, in pertinent part, as follows: “\*\*\*. If the attorney general determines that \*\*\* any \*\*\* officer or employee was acting manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner, the attorney general shall not represent and defend the officer or employee.”

{¶15} Pursuant to R.C. 109.362 and the opinion of the Tenth District Court of Appeals, this court is called upon to determine, independent of Assistant Attorney General Holloway, whether plaintiff acted manifestly outside the scope of his employment with defendant, with malicious purpose, in bad faith, or in a wanton or reckless manner. Additionally, the Court of Appeals suggested that this court consider the outcome of the federal case in determining whether plaintiff is entitled to reimbursement for the cost of his legal representation.

{¶16} With respect to the testimony of the witnesses, this court has frequently cited *Adair v. Ohio Dept. of Rehab. & Corr.* (1998), 96 Ohio Misc.2d 8, 11, for the proposition that: “[i]n determining the issue of witness credibility, the court considers the appearance of each witness upon the stand; his manner of testifying; the reasonableness of the testimony; the opportunity he had to see, hear and know the things about which he testified; his accuracy of memory; frankness or lack of it; intelligence, interest, and bias, if any; together with all facts and circumstances surrounding the testimony.” See, also, 1 Ohio Jury Instructions (1994), Section 5.30.

{¶17} Applying the above criteria to the testimony presented herein the court finds, unlike Judge Leach, that plaintiff was an extremely credible witness and that CO Bassinger’s testimony was not persuasive. While the administrative rules are clear that striking an inmate in the face is not permissible at any time, and striking a physically restrained inmate is not a permissible use of force, the court finds that the totality of the evidence fails to establish that plaintiff did, in fact, strike Torres in the manner alleged by Torres or CO Bassinger. The incident took place quickly, Torres was combative and verbally abusive, the testimony was largely vague or conflicting as to the details of the occurrence, and plaintiff was an experienced employee who had never previously been disciplined for any use-of-force incidents. By contrast, the court finds that CO Bassinger was a less knowledgeable and less experienced officer than plaintiff, and that his motivations for changing his original statement of the facts were disingenuous. In short, this court simply did not find CO Bassinger’s testimony to be credible on the issue of



This case was tried to the court on the issue of liability. The court has considered the evidence, and for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in an amount to be determined after the damages phase of the trial. The court shall issue an entry in the near future scheduling a date for the trial on the issue of damages.

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J. WARREN BETTIS  
Judge

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