

[Cite as *Tate v. Marion Correctional Inst.*, 2004-Ohio-897.]

IN THE COURT OF CLAIMS OF OHIO

PHILLIP TATE	:	
Plaintiff	:	
v.	:	CASE NO. 2003-05500-AD
MARION CORRECTIONAL	:	<u>MEMORANDUM DECISION</u>
INSTITUTION	:	
Defendant	:	
	:	

FINDINGS OF FACT

{¶1} 1) Plaintiff, Phillip Tate, an inmate incarcerated at defendant, Marion Correctional Institution (MCI), stated he had been exposed to environmental tobacco smoke when MCI employees and fellow inmates smoked around him during the period from July 26, 2002 to March 26, 2003. Although plaintiff lived in a nonsmoking cellblock, he contended he was subjected to smoke from MCI personnel and inmates who smoked at various locations throughout defendant's institution. Plaintiff asserted smoking was permitted despite the fact defendant's policy prohibits the conduct.

{¶2} 2) Plaintiff has alleged this smoking environment caused him personal injury. Plaintiff claimed to have been "physically nauseated, experienced coughing, choking and headaches, and have continued to endure and experience extreme mental and emotional distress, anguish, humiliation, and anxiety and fear of developing a future disease from the constant exposure to cigarette and tobacco smoke by agents of defendant."

{¶3} 3) Plaintiff alleged he suffered damages of \$2,500.00, the statutory maximum amount recoverable under R.C. 2743.10.

{¶4} 4) Defendant denied any liability for plaintiff's alleged injury. Defendant has contended plaintiff did not offer sufficient evidence to prove any part of his claim.

{¶5} 5) On October 27, 2003, plaintiff filed a response to defendant's investigation report. While plaintiff recites the evil of second hand smoke he fails to present any medical evidence it had an adverse affect on him medically.

CONCLUSIONS OF LAW

{¶6} 1) In order to prevail on his negligence claim, plaintiff must prove, by a preponderance of the evidence, that defendant owed him a duty, that defendant breached that duty, and that defendant's breach of duty proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d, 282, 295. In the context of a custodial relationship, the state owes its inmates a common-law duty of reasonable care and protection from unreasonable risks of physical harm; however, the state is not an insurer of inmate safety, and the special relationship between the state and the inmate does not expand or heighten the duty of ordinary reasonable care. *Woods v. Ohio Dept. of Rehab. & Corr.* (1998), 130 Ohio App. 3d 742, 744-745; *McCoy v. Engle* (1987), 42 Ohio App. 3d 204.

{¶7} 2) Health risks associated with environmental tobacco smoke may state a cause of action under Section 1983, Title 42 U.S. Code for violation of Cruel and Unusual Punishment clause of the Eighth Amendment. *Helling v. McKinney* (1993), 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed 2d 22. However, claims under Section 1983 are not actionable in the Court of Claims since states and agencies are not persons within the meaning of Section 1983, Title 42 U.S. Code. *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App. 3d 170.

{¶8} 3) In the instant claim defendant did not owe plaintiff a duty to prevent his being exposed to second hand smoke at all times. Plaintiff has failed to prove defendant breached any duty owed to him and has failed to prove he suffered any injury from exposure to tobacco smoke.

{¶9} Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, 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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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1/13
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