

# Court of Claims of Ohio

The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
www.cco.state.oh.us

ROBERT E. PERDUE

Plaintiff

v.

LEBANON CORRECTIONAL  
INSTITUTION

Defendant

Case No. 2007-02971-AD

Deputy Clerk Daniel R. Borchert

## MEMORANDUM DECISION

### FINDINGS OF FACT

{¶1} 1) On November 15, 2006, plaintiff, Robert E. Perdue, an inmate incarcerated at defendant, Lebanon Correctional Institution (“LeCI”), was transferred from the LeCI general population to a segregation unit. Plaintiff estimated he was transferred sometime between, “11:45-12:01 AM.”

{¶2} 2) Plaintiff explained his personal property items that were left in his cell were subsequently packed by LeCI employee, Corrections Officer (“C/O”) Palbo. Plaintiff pointed out the packed property included legal work documents. Plaintiff related two active cases, one from Hamilton County and one from Warren County were among the legal documents packed by C/O Palbo. Plaintiff recalled he requested access to the documents from these two active cases at sometime after he entered segregation, but defendant’s staff failed to respond. Consequently, plaintiff filed several verbal and written complaints requesting he be granted access to the case file documents. According to plaintiff, he finally received the requested legal work on December 1, 2006, approximately 15 ½ days after he entered segregation. Plaintiff asserted the delay in access to the legal documents caused him to be, “much late on legal preparation (and) reading, research etc, for courts.”

{¶3} 3) Due to the delay in receiving the legal case documents, plaintiff

claimed he suffered emotional distress. Plaintiff filed this complaint seeking to recover \$2,000.00, for “stress” related to being separated from his active legal case files for a 15 ½ day period. Plaintiff was not required to pay a filing fee to prosecute this action. Plaintiff contended the delay by defendant in allowing him to retain his legal case documents caused him to be denied access to the courts, thereby violating his constitutional rights.

{¶4} 4) Defendant acknowledged plaintiff was transferred to a segregation unit on November 15, 2006, for violating an institutional rule of conduct. Defendant related plaintiff possessed a large amount of legal material at the time he was transferred and “could not determine what items he wanted to take to segregation.” Defendant asserted C/O Palbo instructed plaintiff to contact appropriate LeCI personnel to retrieve any legal documents he wanted to review while assigned to segregation. Defendant further asserted plaintiff filed a written complaint on November 30, 2006, requesting his legal material and LeCI staff complied with this request on December 1, 2006. Defendant denied receiving any verbal or written requests from plaintiff regarding access to legal material prior to November 30, 2006.

{¶5} 5) Defendant maintained plaintiff cannot recover any damages for “stress” resulting from any proven negligent conduct on the part of LeCI personnel in the performance of their duties. Defendant observed, “The Supreme Court of Ohio has held that recovery for negligent infliction of severe emotional distress is limited to instances where the plaintiff has either witnessed or experienced a dangerous accident and/or was subjected to actual physical peril.” *Heiner v. Moretuzzo* (1995), 73 Ohio St. 2d 80, 85-87. Defendant contended plaintiff’s specific damage claim for “stress” inflicted by delayed access to legal papers is inconsistent with the limited circumstances where such damages are recoverable.

{¶6} 6) Furthermore, defendant argued this court lacks jurisdiction over plaintiff’s claim since the action is grounded on an alleged denial of access to the courts, a claim based on violation of a right under the Constitution. Defendant cited,

*Bleicher v. University of Cincinnati College of Medicine* (1992), 78 Ohio App. 3d 302, 306, to support the argument that actions in this court are limited to those brought against private parties and therefore, a claim alleging a violation of the constitutional right to court access requires state action, not an act by a private entity. Consequently, defendant noted a, “claim predicated on the constitutional right to court access would be improperly before this Court.”

{¶7} 7) Plaintiff countered LeCI staff intentionally denied him access to his legal papers, acting in “retaliation” for his filing many complaints at LeCI. Plaintiff asserted he suffered stress as a result of defendant’s failure to provide him with his legal materials over a 15 ½ day period. Plaintiff maintained the actions of defendant whether intentional or unintentional caused him undue emotional distress. Plaintiff stated the denied access to his legal documents, “was reckless or possibly in bad faith as-well (as) a failure to act or deliberate indifference.” Plaintiff surmised LeCI personnel denied him his legal material to punish him.

{¶8} 8) Defendant argued that plaintiff’s claim based on the intentional infliction of emotional distress should be dismissed. Defendant related this court lacks jurisdiction to decide claims alleging a state employee, “acted with malicious purpose, in bad faith or in a wanton or reckless manner.” Defendant asserted such conduct by a state employee would be considered outside the course and scope of employment and therefore, this court would not have jurisdiction over matters founded on the particular misconduct alleged.

{¶9} 9) Plaintiff filed a response to defendant’s investigation report. He reasserted his right to damages in this matter.

#### CONCLUSIONS OF LAW

{¶10} Plaintiff essentially claimed the delayed receipt of his legal documents resulted in delayed access to the courts, an alleged violation of his constitutional rights. This court lacks subject matter jurisdiction over alleged violations of constitution rights and alleged violations under Section 1983, Title 42, U.S. Code. 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; *Gersper v. Ohio Dept. of Hwy. Safety* (1994), 95 Ohio App. 3d 1. Any constitutional violation claim or claim of federal civil rights violation is not cognizable. See *Howard v. Supreme Court of Ohio*, Franklin App. No. 04AP-1093, 2005-Ohio-2130; *Wright v. Dept. of Rehab. & Corr.* (Mar. 28, 1995), Franklin App. No. 94AP108-1169.

{¶11} Concomitantly, any claims involving retaliatory conduct are not cognizable in this court. In *Deavors v. Ohio Dept. of Rehab. and Corr.* (May 20, 1999), Franklin App. No. 98AP-1105, the court held that an inmate's claim regarding retaliatory conduct are properly classified as constitutional claims under Section 1983, Title 42, U.S. Code.

{¶12} Additionally, any claim by plaintiff that LeCI staff acted with malicious purpose, in bad faith or in a wanton or reckless manner is not recognizable by this court. R.C. 9.86 grants immunity to state employees, unless their actions occur outside the scope of their state employment. The statutory sections states in part:

{¶13} “[N]o officer or employee shall be liable in any civil action that arises under the law 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.”

{¶14} The Tenth District Court of Appeals has held that for determining statutory immunity, malice is the “willful and intentional design to do injury or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified.” *Lowry v. State Highway Patrol* (Feb. 27, 1997), Franklin App. No. 96AP107-835, quoting *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App. 3d 448, 453-454. Bad faith is defined as “a design to mislead or deceive another, \*\*\* not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.” *Lowry* quoting *Black’s Law Dictionary* (5 Ed. 1979), 127. The Supreme Court of Ohio has held that the term reckless involves a risk of harm that “is

substantially greater than that which is necessary to make [the actor's] conduct negligent" and a "reckless disregard of the safety of others \*\*\* knowing or having reason to know of facts which would lead a reasonable man to realize" that his conduct creates an unreasonable risk of harm to another. *Thompson v. McNeill* (1990), 53 Ohio St. 3d 102, 104-105. The term reckless is often used interchangeably with the term wanton. *Thompson*. Based on the plaintiff's own characterizations of the conduct of LeCI staff, the court finds the acts described to be outside the course and scope of employment and consequently, any claim involving alleged damages resulting from the described conduct is not recognizable in this forum.

{¶15} Even assuming defendant negligently delayed access of the legal papers to plaintiff, this court concludes plaintiff cannot recover damages for emotional distress presumed caused by negligent conduct. As defendant pointed out recovery of damages for emotional distress is limited to specific circumstances. See *Heiner* (1995), 73 Ohio St. 2d 80. Plaintiff is not entitled to the damages claimed based on the facts presented. Therefore, this claim is denied.



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MEMORANDUM DECISION

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### ENTRY OF ADMINISTRATIVE DETERMINATION

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.

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DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

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