[Cite as *Abuhilwa v. Corrections Med. Ctr.*, 2008-Ohio-3642.]

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

RIFAT A. ABUHILWA

Plaintiff

v.

CORRECTIONS MEDICAL CENTER

Defendant

[Cite as *Abuhilwa v. Corrections Med. Ctr.*, 2008-Ohio-3642.]

Case No. 2008-01049

Judge Joseph T. Clark
Magistrate Steven A. Larson

DECISION

{¶1} On April 22, 2008, plaintiff filed a motion for summary judgment. On May 5, 2008, plaintiff filed a motion to strike defendant's answers to plaintiff's requests for admissions. On May 16, 2008, defendant filed a response and a motion for leave to withdraw or amend its responses to plaintiff's requests for admissions. On May 19, 2008, defendant filed a response to plaintiff's motion for summary judgment and a cross-motion for summary judgment. On May 27, plaintiff filed a response to defendant's motion for leave. On May 29, 2008, plaintiff filed a response to defendant's motion for summary judgment and a memorandum in support of his motion for summary judgment. The motions are now before the court on a non-oral hearing pursuant to 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 *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶4} At all times relevant to this action, plaintiff was an inmate in the custody and control of the Department of Rehabilitation and Correction (DRC) pursuant to R.C. 5120.16. Plaintiff asserts claims of fraud; "harassment"; intentional and negligent infliction of emotional distress; negligent hiring, training and supervision; and cruel and unusual punishment stemming from plaintiff's transfer by defendant to a segregation unit at the Pickaway Correctional Institution (PCI). Specifically, plaintiff alleges that after he was transferred to PCI, Corrections Officer (CO) Vincent Goliday falsely told inmate Kevin Board, also housed in the segregation unit, that there was a "separation order" in

place for plaintiff and Board. Plaintiff asserts that no such order was in place and that Board immediately started harassing him as a result of Goliday's statement. Furthermore, plaintiff alleges that Board then told other inmates at PCI that plaintiff was a "snitch." Plaintiff claims that Goliday intentionally gave Board false information to spur harassment of plaintiff.

{¶5} Defendant argues that plaintiff cannot prove his claim of fraud or negligent hiring, training, and supervision; that he does not have a cognizable claim for harassment, or for intentional or negligent infliction of emotional distress; that the court does not have jurisdiction over his claim for cruel and unusual punishment; and that defendant is entitled to discretionary immunity for its decision to transfer plaintiff to PCI for placement in segregation.

{¶6} Plaintiff's motion for summary judgment is based upon his assertion that defendant did not timely respond to his requests for admissions and as such they should be deemed admitted as true pursuant to Civ.R. 36(A). In support of his motion, plaintiff provided his own affidavit and a copy of his first set of requests for admissions.

{¶7} Civ.R. 36 provides, in part:

{¶8} "(A) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. * * * The party to whom the requests for admissions have been directed shall quote each request for admission immediately preceding the corresponding answer or objection. The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. * * *

{¶9} "(B) Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing modification of a pretrial order, the court may permit withdrawal or amendment when the presentation of merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining his action or defense on the merits."

{¶10} In its May 16, 2008 motion, defendant admits that it did not timely respond to plaintiff's requests for admissions, but that responses were provided on April 24, 2008. Defendant explains that plaintiff served several different sets of admissions at different times and then subsequently "withdrew" some of them. Defendant mistakenly believed that plaintiff had withdrawn all of his requests, and only realized the mistake when plaintiff sent defendant's counsel a letter inquiring as to the status of the answers. Defendant asserts that the requests were answered and served upon plaintiff shortly thereafter. Defendant argues that the failure to timely respond was an inadvertent error and that plaintiff has not been prejudiced by the mistake, inasmuch as his requests were eventually answered. Defendant moves the court to deem the responses provided to plaintiff on April 24, 2008 as timely.

{¶11} Upon review, the court finds that plaintiff will not be prejudiced by allowing defendant to withdraw and amend its responses and that the presentation of the merits will be subserved thereby. Accordingly, defendant's May 16, 2008 motion is GRANTED such that defendant's responses served upon plaintiff on April 24, 2008, are deemed timely filed. Plaintiff's May 5, 2008 motion to strike is DENIED. Furthermore, inasmuch as plaintiff's motion for summary judgment is based entirely upon his assertion that his requests for admissions should be deemed admitted as true, the motion is DENIED.

{¶12} In defendant's motion for summary judgment, defendant argues that plaintiff has failed to allege facts to support his claim of fraud. Plaintiff asserts that CO Goliday's allegedly false statements to Board amount to fraud. In order to establish his

claim of fraud, plaintiff must show "(1) a representation or, where there is a duty to disclose, concealment of fact; (2) which is material to the transaction at hand; (3) made falsely, with the knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance." *State ex rel. Allied Holdings, Inc. v. Meade*, 10th Dist. No 06AP-1029, 2007-Ohio-5010, citing *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69. The court finds that plaintiff fails to allege facts sufficient to satisfy the above elements. Specifically, no "transaction" was involved when CO Goliday made allegedly false statements to Board. Plaintiff has also failed to present any evidence that would create an inference of such a transaction. Accordingly, plaintiff's fraud claim must fail.

{¶13} The court construes plaintiff's claim for "harassment" as a claim for intentional infliction of emotional distress. In order to sustain such a claim, plaintiff must show that: "(1) defendant intended to cause emotional distress, or knew or should have known that actions taken would result in serious emotional distress; (2) defendant's conduct was extreme and outrageous; (3) defendant's actions proximately caused plaintiff's psychic injury; and (4) the mental anguish plaintiff suffered was serious." *Hanly v. Riverside Methodist Hosp.* (1991), 78 Ohio App.3d 73, 82; citing *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 34.

{¶14} To constitute conduct sufficient to give rise to a claim of intentional infliction of emotional distress, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Yeager v. Local Union 20, Teamsters* (1983), 6 Ohio St.3d 369, 375, quoting 1 Restatement of the Law 2d, Torts (1965) 73, Section 46, Comment d.

{¶15} "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even

that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. * * * Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Id. at 374-375.

{¶16} Upon review, the court finds that no reasonable trier of fact could find the conduct alleged by plaintiff to be of such extreme and outrageous character necessary to support a claim for intentional infliction of emotional distress. Accordingly, plaintiff's claims of "harassment" and intentional infliction of emotional distress must fail.

{¶17} In Ohio, recovery for the negligent infliction of emotional distress is allowed only in those instances where a person is a bystander to an accident or experiences fear of physical peril. *Heiner v. Moretuzzo*, 73 Ohio St.3d 80, 1995-Ohio-65. Plaintiff has not alleged sufficient facts to assert a claim for negligent infliction of emotional distress.

{¶18} With regard to plaintiff's claim for negligent hiring, training and supervision, defendant filed the affidavit of Carey Sayers, an investigator for defendant, wherein Sayers states:

{¶19} "2. On March 14, 2007, [plaintiff] was being transported for disciplinary reasons from his housing at defendant to the segregation unit at PCI by CO Goliday and CO Smith.

{¶20} "3. These corrections officers had been instructed by [defendant's] officials to house [plaintiff] separately from other [of defendant's] inmates while in the segregation unit at PCI. Thus, CO Goliday informed officials at PCI that [plaintiff] should be separated from other [of defendant's] inmates, including inmate Kevin Board.

{¶21} "4. Where to house an inmate is a matter of discretion exercised by the institution and involves a number of factors including security.

{¶22} "5. CO Goliday did not violate any DRC policies or procedures in his interactions with [plaintiff] on March 14, 2007.

{¶23} "6. Prior to March 14, 2007, [defendant] had no reason to believe that CO Goliday would do anything to harm [plaintiff] or any reason to believe that he was not qualified for his employment with [defendant]."

{¶24} In order for plaintiff to prevail on a claim for negligent hiring or retention, he must prove: 1) the existence of an employment relationship; 2) the employee's incompetence; 3) the employer's actual or constructive knowledge of such incompetence; 4) the employer's act or omission causing plaintiff's injuries and 5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Evans v. Ohio State University* (1996), 112 Ohio App.3d. 724.

{¶25} Based upon Sayers' affidavit, and the fact that plaintiff has not provided the court with any evidence to the contrary, the court finds that plaintiff has failed to establish that CO Goliday was incompetent or that defendant had any knowledge of alleged incompetence. Therefore, plaintiff's claim of negligent hiring, training and supervision is without merit.

{¶26} With regard to plaintiff's claim of cruel and unusual punishment, it is well-settled that such claims are constitutional in nature and, thus, are not actionable in this court. See *Thompson v. Southern State Community College* (June 15, 1989), Franklin App. No. 89AP-114; *Burkey v. Southern Ohio Corr. Facility* (1988), 38 Ohio App.3d 170.

{¶27} Finally, to the extent that plaintiff asserts claims based upon his transfer to PCI and placement in segregation, the Supreme Court of Ohio has held that "[t]he language in R.C. 2743.02 that 'the state' shall 'have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties * * *' means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." *Reynolds v. State* (1984), 14 Ohio St.3d 68, 70; *Von Hoene v. State* (1985),

20 Ohio App.3d 363, 364. Prison administrators are provided "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish* (1979), 441 U.S. 520, 547.

{¶28} Upon review, the court finds that defendant's decisions regarding plaintiff's transfer to the segregation unit are characterized by a high degree of official judgment or discretion and that defendant is entitled to discretionary immunity on those claims.

{¶29} Based upon the foregoing, the court finds that no material questions of fact exist for trial and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment shall be granted and judgment shall be rendered in favor of defendant.

[Cite as *Abuhilwa v. Corrections Med. Ctr.*, 2008-Ohio-3642.]

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

RIFAT A. ABUHILWA

Plaintiff

v.

CORRECTIONS MEDICAL CENTER

Defendant

Case No. 2008-01049

Judge Joseph T. Clark
Magistrate Steven A. Larson

JUDGMENT ENTRY

[Cite as *Abuhilwa v. Corrections Med. Ctr.*, 2008-Ohio-3642.]

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.

_____
JOSEPH T. CLARK
Judge

cc:

Velda K. Hofacker Carr Assistant Attorney General 150 East Gay Street, 18th Floor Columbus, Ohio 43215-3130	Rifat A. Abuhilwa, #A283-108 2500 South Avon Belden Road Grafton, Ohio 44044

MR/cmd
Filed July 14, 2008
To S.C. reporter July 22, 2008