

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 PERDUE

Case No. 2007-02319-AD

Plaintiff

Clerk Miles C. Durfey

v.

MEMORANDUM DECISION

LEBANON CORR. FAC.

Defendant

{¶ 1} Plaintiff, Robert Perdue, an inmate, filed this action alleging he was assaulted by a fellow inmate, Desmon Johnson, while under the custody of defendant, Lebanon Correctional Institution (“LeCI”). Plaintiff stated that he was attacked by Desmon Johnson #483-110 on May 6, 2006, and suffered neck and head injuries as a direct result of this attack. According to plaintiff, he was punched in the head and choked by Johnson and consequently suffered a concussion and lost consciousness. Plaintiff also claimed that he suffered “minor lacerations” on his arms from his physical confrontation with Johnson. Plaintiff recalled that he received medical treatment at LeCI for his physical injuries and also received some mental health counseling.

{¶ 2} Plaintiff filed this complaint against defendant alleging that LeCI staff “failed to control inmate Desmon Johnson.” Plaintiff contended that defendant acted inappropriately in supervising Johnson, which consequently placed plaintiff in a position of peril. Plaintiff implied that defendant’s conduct pertaining to inmate Johnson constitutes actionable negligence. In his complaint, plaintiff alleged that he suffered damages in the amount of \$2,412.00 for the personal injuries sustained as well as accompanying mental stress. Plaintiff was not required to pay a filing fee to pursue this action.

{¶ 3} Defendant denied any liability in this matter. Initially, defendant explained that “[t]here is no record of a person named Desmon Johnson (the alleged assailant

named by plaintiff) incarcerated in the Department of Rehabilitation and Correction.” Defendant did acknowledge that there is a record of plaintiff being involved in a fight with an inmate identified as Desmon Douglas #483-110 on June 5, 2006. Defendant has no record of plaintiff involved in any kind of physical altercation with anyone on May 6, 2006. In regard to the June 5, 2006 incident, defendant disputes plaintiff’s apparent interpretation that he was assaulted and choked to unconsciousness. Conversely, defendant asserted that both plaintiff and Desmon Douglas were engaged in a fist fight and were ordered to stop by an LeCI employee, but plaintiff continued throwing punches at Douglas. Defendant denied that any unprovoked assault as described by plaintiff actually occurred.

{¶ 4} Based on the June 5, 2006 fist fight, plaintiff was issued a Conduct Report (copy submitted) by LeCI employee, Officer C. Sharp. In this Conduct Report Sharp recorded he observed plaintiff “fighting on the second range (and) ran to the location of the fight.” Sharp stated that “[a]t that time I gave a direct order to stop fighting (but) inmate Perdue did not stop and he kept swinging.” Sharp noted that he then physically intervened in the fight, separating the two fighting inmates, physically subdued plaintiff, placed him in restraints, and escorted him to the LeCI infirmary. Plaintiff was charged in the Conduct Report (dated June 5, 2006) with fighting.

{¶ 5} The charge in the Conduct Report was heard by defendant’s Rules Infraction Board (“RIB”) on June 8, 2006. In a Disposition of the RIB (copy submitted), plaintiff was found guilty of fighting despite entering a statement to the effect that he was attacked. Based on plaintiff’s violation of the fighting prohibition, he was sentenced to fifteen days in the LeCI disciplinary control unit. The decision of the RIB was subsequently affirmed by the LeCI Warden’s Administrative Assistant.

{¶ 6} Defendant contended that plaintiff cannot prevail in an action grounded in the facts presented; essentially that plaintiff engaged in a voluntary fight with another inmate. Defendant related that plaintiff failed to present any evidence that any LeCI personnel had “prior notice of any potential threat or altercation between (p)laintiff and

Inmate Douglas.” Additionally, defendant asserted that plaintiff did not produce any evidence to establish LeCI staff failed to timely respond to the fight or acted negligently in breaking up the fight and defusing the situation.

{¶ 7} Furthermore, defendant disputed plaintiff’s allegations regarding the type and degree of personal injury claimed resulting from the inmate on inmate altercation. Defendant referenced the medical examination (copy submitted) of plaintiff conducted after the June 5, 2006 fight to support its contentions. According to the physical findings of the examining nurse, plaintiff suffered a “1/4” abrasion” on his right small knuckle and a “1” diameter hematoma (raised area)” on his left forehead. Treatment consisted of cleansing plaintiff’s knuckle and ice pack application to his forehead. Apparently no further treatment was needed.

{¶ 8} Plaintiff filed a response reasserting that he was in fact assaulted by an unstable unsupervised inmate he identified by the name Desmon Johnson #483-110. Plaintiff argues that defendant had a duty to protect him from harm including unforeseen assaults. Alternatively, plaintiff asserted that he did indeed inform defendant through requests for separation status from Desmon Johnson due to the threat Johnson imposed on his safety and well being. Plaintiff maintained that he notified defendant prior to the incident forming the basis of this claim of Desmon Johnson’s animosity towards him. Plaintiff contended that defendant knowingly exposed him to risk of being physically harmed by Johnson despite being put on notice of Johnson’s violent propensities.

{¶ 9} Plaintiff submitted a copy of an informal complaint that he stated was filed on May 8, 2006 and filed with LeCI employee identified as Major Cruchfield. In this informal complaint plaintiff requested that he be granted separation from D. Johnson #483-110 for his own safety and security. Plaintiff wrote that he had been attacked on May 6, 2006 and LeCI personnel had failed to draft a Conduct Report. In the body of the filed copy of this Informal Complaint Resolution appears a heading titled “Action Taken,” a section reserved for defendant’s personnel to address in writing the issues

raised in the complaint. No written response is contained in the "Action Taken" section. Additionally, the Informal Complaint Resolution contains a signature line for the appropriate LeCI staff member to sign. No signature of any LeCI staff member appears on the Informal Complaint Resolution plaintiff filed with his response.

{¶ 10} Plaintiff also submitted a copy of a document titled Inmate Confidential Statement dated May 8, 2006, wherein plaintiff made a request for separation from inmate D.J. Killer Johnson #483-110. Plaintiff alleged that he had been attacked by Johnson on May 6, 2006 and the LeCI 3rd shift officer failed to investigate the incident or issue a Conduct Report. This statement was signed by a witness identified only as D. Hoffman.

{¶ 11} Plaintiff submitted copies of three additional Informal Complaint Resolutions directed to "SCO-Personnel," "Mental Health, Dr. Kelly," and "Mental Health Dept," dated May 7, 2006, May 7, 2006 and May 9, 2006, respectively. In all of these documents plaintiff stated that he was attacked on May 6, 2006. There is no record of response to these complaints by LeCI staff and no record of receipt by LeCI staff.

{¶ 12} Plaintiff submitted copies of two prescription medication labels for medicine he received from Central Pharmacy. One medication plaintiff received on July 4, 2007, Parafon Forte is used to treat painful musculoskeletal conditions. The other medication, Indocin, received on October 17, 2007, is a nonsteroidal anti-inflammatory. Plaintiff suggested the fact that he had prescriptions for the above mentioned medications constitutes evidence that he was assaulted on May 6, 2006.

{¶ 13} Plaintiff filed an affidavit from a fellow inmate, Jerry Miller #487-391 who is currently incarcerated at the Southern Ohio Correctional Facility. The sworn statement from Miller follows in its entirety.

{¶ 14} "I've witnessed LeCI placed inmate Perdue #352167 wrongfully in harm way via by placing no separation, & placing inmate Johnson #483-110 and inmate Perdue #352167 back in B-Block after; 1st security incident; where Perdue was attacked by inmate Johnson #483-110 on 3rd shift during last part or beginning of March 2006 or

April 2006, prior to just of May 6, 2006 attack situation in B-Block on Perdue by inmate Johnson #483-110. Also, both inmate shouldve been separated in LeCI camp, also on 5-6-2006, officer Sharp & co's were unattentive to block activity's etc. . . ." [sic]

{¶ 15} In order to prevail, 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 proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.* 99 Ohio St. 3d 79, 81, 2003-Ohio-2573, 788 N.E. 2d 1088, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 472 N.E. 2d 707.

{¶ 16} "Whether a duty is breached and whether the breach proximately caused an injury are normally questions of fact, to be decided by . . . the court . . ." *Pacher v. Invisible Fence of Dayton*, 154 Ohio App. 3d 744, 753, 2003-Ohio-5333, 798 N.E. 2d 1121, citing *Miller v. Palson* (1994), 97 Ohio App. 3d 217, 221, 646 N.E. 2d 521; and *Mussivand v. David* (1989), 45 Ohio St. 3d 314, 318, 544 N.E. 2d 265.

{¶ 17} Ohio law imposes a duty of reasonable care upon the state to provide for its prisoner's health, care, and well-being. *Clemets v. Heston* (1985), 20 Ohio App. 3d 132, 136, 20 OBR 166, 485 N.E. 2d 287. Reasonable or ordinary care is that degree of caution and foresight which an ordinarily prudent person would employ in similar circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St. 2d 310, 31 O.O. 2d 573, 209 N.E. 2d 142.

{¶ 18} Defendant, however, is not an insurer of inmate safety. *Mitchell v. Ohio Dept. of Rehab. and Corr.* (1995), 107 Ohio App. 3d 231, 668 N.E. 2d 538. Where one inmate intentionally assaults another inmate, a claim for negligence arises only where there was adequate notice of an impending attack. *Mitchell*, at 235.

{¶ 19} A custodial officer is not obligated to act until he knows, or should know, that the custodial charge is endangered. The legal concept of notice is one of two distinguishable types: actual or constructive.

{¶ 20} "The distinction between actual and constructive notice has long been recognized. The distinction is in the manner in which notice is obtained or assumed to

have been obtained rather than in the amount of information obtained. Wherever, from competent evidence, either direct or circumstantial, the trier of facts is entitled to hold as a conclusion of fact and not as a presumption of law that the information was personally communicated to or received by the party, the notice is actual. On the other hand, constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge.” *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197-198, 47 O.O. 231, 105 N.E. 2d 429.

{¶ 21} In *Baker v. State* (1986), 28 Ohio App. 3d 99, 28 OBR 142, 502 N.E. 2d 261, the Tenth District Court of Appeals reviewed a prisoner’s claim for damages under similar allegations. In that case, plaintiff was assaulted by other inmates shortly after plaintiff had made some “vague statements” to prison guards about his need to be relocated. Plaintiff had also been slapped in the face by one of his assailants on the day of the assault. In affirming the trial court’s judgment in favor of defendant, the Court of Appeals held that the prison guards did not have adequate notice of an impending assault and, therefore, were not negligent in failing to prevent the assault. *Baker* at 100. In so holding, the court emphasized the fact that plaintiff had never requested protective custody or directly expressed his fears of an impending assault to any of defendant’s employees. *Baker* at 100. Plaintiff, in the instant claim, has asserted that he did indeed make written requests to defendant to separate him from inmate #483-110 after he was allegedly assaulted by inmate #483-110. Plaintiff submitted copies of grievances he drafted which he offered in support of his contentions that he put defendant on notice about being attacked by inmate #483-110 in March or April 2006 and again on May 6, 2006. Plaintiff did not assert that he had been attacked in March or April 2006. Plaintiff essentially contended that he offered sufficient evidence to prove defendant received adequate notice of an impending assault upon him after being notified of prior assaults.

{¶ 22} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O. 2d 366, 227 N.E. 2d 212, paragraph one of the syllabus. The court is free to

believe or disbelieve, all or any part of each witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 26 O.O. 2d 366, 197 N.E. 2d 548. The court does not find the assertions of plaintiff regarding an alleged assault upon him by inmate #483-110 on May 6, 2006 to be particularly persuasive. The court does not find the written statement from Jerry Miller to be particularly credible. Furthermore, the court does not believe plaintiff ever submitted to LeCI staff any Informal Complaint Resolutions regarding problems he experienced with inmate #483-110. All of plaintiff's offered evidence regarding a prior assault by inmate #483-110 is not persuasive.

{¶ 23} In order to prevail, plaintiff must show that the actions causing his injuries were foreseeable. In the case of an inmate upon inmate assault, actionable negligence arises only where defendant's staff had adequate notice of an *impending attack* (emphasis added). See *Metcalf v. Ohio Dept. of Rehab. & Corr.*, Franklin App. No. 01AP-292, 2002-Ohio-5082; *Kordelewski v. Ohio Dept. of Rehab. & Corr.* (June 21, 2001), Franklin App. No. 00AP-1109, unreported. Plaintiff, in the instant claim, has failed to establish that defendant either knew or should have known of an impending attack by inmate #483-110 on plaintiff. In fact, the incident occurring on June 5, 2006 involving plaintiff and inmate Desmon Douglas #483-110 was apparently not an attack but rather a fist fight. Submitted evidence from the RIB decision indicates a fight occurred on that date, not an attack. No credible evidence was presented to establish that defendant had any notice of any impending attack upon plaintiff. Plaintiff has failed to prove any actionable negligence on the part of defendant.

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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.

MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa

4/15

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