[Cite as *Perkins v. Ohio Dept. of Rehab. & Corr.*, 2014-Ohio-5896.]

Court of Claims of Ohio

The Ohio Judicial Center
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CHARLES M. PERKINS, JR.

Plaintiff
v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS

Defendant

Case No. 2012-08460-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} Plaintiff, Charles Perkins, filed a complaint against defendant, Ohio Department of Rehabilitation and Correction ("ODRC") in which he claimed he suffered injuries due to falling from the top bunk. He asserted, he was assigned to a top bunk, even though he had a valid lower-bunk restriction and informed all appropriate staff of said restriction prior to and after the assignment. On September 23, 2011, while attempting to climb up to the top bunk, his knee gave out and he fell and injured his back and knees. He contended the fall was caused in part by his medical condition and by the fact that the bed in question did not have any "step ladder pieces . . . [or] foot stool, to assist you to the top bunk." He suggested that having such safety equipment was required, by state law. He did not cite to any specific statute or ordinance.

{¶2} Plaintiff asserted he had a long term lower-bunk restriction in place for several years, after multiple facilities, before being transferred to Warren Correctional Institution ("WCI"), which was extended by a doctor whose name plaintiff could not recall. His lower bunk restriction was again extended by Dr. Herrington who replaced this unknown doctor. This restriction was allegedly granted by Dr. Herrington prior to his incident.

However, plaintiff provided no evidence of said restriction. On April 25, 2012, plaintiff was transferred to Ross Correctional Institution ("RCI"). According to plaintiff, Dr. Cook[1] informed him that his bunk restriction would expire in six months, so he extended it by signing a new copy. Plaintiff provided a copy of this lower-bunk restriction. Plaintiff asserted that Dr. Cook never examined him, and therefore could have only made his decision to extend his bunk restriction by looking at his medical chart, implying that the chart must have said he had an active bunk restriction issued by RCI. He argued that this was not a new restriction, rather it was a renewed restriction. This is contrary to defendant's assertion that plaintiff did not have a bottom bunk restriction in place upon arrival. Further, plaintiff argued that defendant admitted he had a lower bunk restriction in place upon arrival at WCI on April 25, 2012. He cited the Decision of the Chief Inspector on a Grievance Appeal, dated July 25, 2012 in which defendant stated: "on 4-25-12 your bottom bunk restriction was discontinued by Nurse Practitioner Hawk."

{¶3} Plaintiff provided a witness statement from his cellmate, purportedly proving defendant was aware of his bottom bunk restriction, yet failed to adhere to it. The witness explained on Friday February 24, 2012 he and the plaintiff were placed in the same cell, however, they each had bottom bunk restrictions and informed the corrections officer who apparently refused to accommodate their request for a move. This does not prove defendant was aware of plaintiff's bottom bunk restriction prior to his incident, as this note describes an event that occurred over five months later.

{¶4} Plaintiff asserted his injuries are permanent and he is in constant pain and discomfort. He contended defendant was negligent in failing to ensure he was evaluated by a specialist, and the lack of medical attention has exacerbated his injuries.

{¶5} Plaintiff makes a claim of abuse of power related to an allegation that the WCI Health Care Administrator is having an affair with the Institutional Inspector, resulting in bias and unfair investigations into his claims and the claims of other inmates. He provided no evidence related to claim.

{¶6} Plaintiff argued that his grievances have been largely ignored, and in a response to an informal complaint, dated October 7, 2011, the Health Care Administrator ("HCA") stated: "Mr. Sarwar [unit manager] is aware of your bunk restriction you can sign up for

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[1] This court believes, based on review of the evidence before it that the Dr. Cook plaintiff referred to is in fact Nurse Cook, RN.

sick call if you have knew issues." Plaintiff contended this is proof that the "person in charge of medical moves, and restrictions" was aware of his bunk restriction. This, alone, does not prove defendant was aware of the bunk restriction prior to plaintiff's incident. Rather, it demonstrates knowledge of some bunk restriction after his incident. Plaintiff argued defendant's claim that he only had a 3 day temporary bunk restriction in place, after his incident, from September 23, 2011 through September 26, 2011 is false, because he had a bunk restriction in place before and after this temporary restriction was granted. He based this assertion on the fact that the unknown doctor extended his restriction, and The HCA's admission of the existence of a restriction on October 11, 2011 proves his restriction was in effect beyond the three day temporary restriction issued by Dr. Hearrington. Plaintiff contended, Dr. Hearrington, being new at WCI did not do a thorough job reviewing his files, and therefore was unaware of the long-term bunk restriction in place before he, Dr. Hearrington, arrived. He argued that even though Dr. Hearrington expressed his opinion that plaintiff did not need a bottom bunk restriction, he also prescribed a narcotic for plaintiff's pain, which plaintiff believes is contradictory.

{¶7} Plaintiff contended, due to defendant's negligence in failing to move him out of his cell at WCI, his life was put in danger, as he was assaulted by his cellmate. He provided no evidence of any injuries from this incident, nor does he claim any damages related to this incident in his prayer relief.

{¶8} Plaintiff contended he had a second incident. On the first night after arrival at RCI, after he received a one year bottom bunk restriction from Dr. Cook, he was placed in a cell with another inmate who had a bottom bunk restriction. He informed the Lieutenant in charge of his restriction, and was told that he would have to discuss the matter with unit staff, who had left for the day and that there were no other bunks available. He asserted he showed his restriction to the unit staff the next day, and they informed him they would have to call to confirm it, but even if they confirm it there was nowhere else that they could place him that night. While waiting for a move plaintiff asserted he fell from his bunk and broke his patella. He provided no specific day or time for this incident. He was told by defendant, due to budget restraints, he would not be able to get the surgery to repair his knee. Therefore, he is "crippled, in my right knee, with endless pain, and perminate [sic] swelling in it."

{¶9} Plaintiff seeks $2,500 in damages for cruel and unusual punishment, mental anguish, malpractice, inappropriate supervision, and dereliction of duties.

{¶10} Defendant filed an investigation report in which it denied liability for plaintiff's injuries based on the contention that plaintiff was mistaken in his assertion that he had an active bottom bunk restriction at the time of his fall on September 23, 2011. Defendant contended, despite plaintiff's assertion of negligent medical care, he "has received an abundance of medical care for his knew and back." In fact, he was evaluated by health care professionals on September 28, 2011, and the x-ray of his knee was "normal" indicating "he did not need a restriction at that time". The doctor noted an old patella injury that did "not correlate with the symptoms he was experiencing at that time." He was ultimately diagnosed with a "knee strain" on October 3, 2011. Later, on October 20, 2011 defendant contended plaintiff was caught "cheeking" his medication, and at that point discontinued the pain medication and ordered his Benadryl to be administered by the nurse. Additional x-rays were taken on October 24, 2011, and on October 27, 2011 medical staff determined, based on these x-rays, an MRI was not approved. Rather, an alternative treatment plan, involving exercises was ordered. On November 2, 2011, a bottom bunk was ordered for one year, and he was given a knee sleeve. Defendant admitted, at the time of writing, plaintiff had a long term bunk restriction in place, ordered by a doctor in his current facility, Trumbull Correctional Institution ("TCI"). Regarding plaintiff's second incident, review of documents provided by defendant indicate conflicting accounts of how plaintiff was injured. On May 3, 2012, plaintiff allegedly told Nurse Hawk that he fell getting into bed. When he described the incident to Nurse Practitioner Cardaras he allegedly said he fell jumping out of his top bunk. Plaintiff's charts reveal he had a short term bunk restriction, ordered by Nurse Hawk at RCI, from May 11, 2012 through June 11, 2012. He also had a short term crutch restriction from May 5, 2012 through May 9, 2012 after he was seen during a nurse sick call on May 2, 2012. In a letter from Gwen Lewis, RN, Director of Nursing at TCI, to defendant's staff counsel, defendant admitted a one year bottom bunk restriction was ordered on November 2, 2011, by staff at WCI, however, this chart was never received by TCI before or after plaintiff's transfer. She indicated that she could not make out the physician's name on the order. Further, she did not see any orders for a bottom bunk restriction that covered September 23, 2011 in chart #3 that she had at TCI. Even if plaintiff had a one year bunk restriction ordered on

November 2, 2011, and therefore, had a valid restriction in effect at the time of his second incident, in a Decision of the Chief Inspector on a Grievance Appeal, dated July 25, 2011, defendant stated: "[m]edical restrictions do not automatically transfer from facility to facility." Rather, the medical provider in the new facility performs and independent evaluation and determines the necessity for such a restriction.

{¶11} Plaintiff filed a response to defendant's investigation report in which he reiterated that an unknown doctor renewed his bunk restriction upon his arrival at WCI on April 12, 2011. Plaintiff asserted that defendant could not have properly investigated his claims because neither Ms. Gwen Lewis, RN or Mr. Gregory C. Trout has access to all of his medical files, as evidenced by Ms. Lewis' statement that TCI never received all of his medical charts. Plaintiff argued that there is a pattern in his medical charts which reflect that he was getting his bunk restrictions renewed every year, even at different institutions. Specifically, he referenced the following restrictions found in his charts: Mansfield Correctional Institution ("MaCI"), April 17, 2009 – April 17, 2010; WCI, November 2, 2011 – November 2, 2012; RCI, April 25, 2012 – April 25, 2013; TCI, December 20, 2012 – December 20, 2013.

{¶12} Plaintiff provided a kite he sent to his case manager at WCI, dated September 10, 2011, in which he claims she negligently disregarded his request to be moved pursuant to his bottom bunk restriction. The case manager responded on September 29, 2011 by stating: "[a]s I told you before, medical has to verify the restriction with count office."

{¶13} He provided a copy of another kite, with a response purportedly written by Dr. Herrington indicating that plaintiff's bunk restriction was renewed on November 2, 2011. Plaintiff argued this is proof that he already had a bunk restriction in place as the doctor could only renew a restriction if one already existed. This document is not signed by Dr. Herrington, and could easily be interpreted to imply that Dr. Herrington was renewing some previous restriction, it does not exclusively imply that plaintiff had an active bunk restriction on November 2, 2011. He again, reiterated that fact that the HCA and Mr. Sarwar admitted they were aware of a bunk restriction, and asserted this as "proof of my bottom bunk restriction (long term) that I had already in place, befor [sic] the temporary one came into place, on September 23, 2011 to September 26, 2011.

{¶14} Plaintiff indicated that he had proof that documents "had been redone and

alterations, of original documents have been changed to mislead, and falsely indicate, wrong issues of the facts, purposely to the courts." He provided no evidence from which the court can infer any intentional wrongdoing on the part of defendant in its investigation or documentation presented to the court. Rather, he cited relatively minor errors in documentation that have little bearing on the Court's final determination.

{¶15} Again, plaintiff references an inappropriate relationship between the HCA and Institutional Inspector at WCI, but offers no evidence of such relationship, nor any proof for how such alleged relationship directly affected his claims. He cited several contradictions in Mr. Gregory Stout's report. First, he asserted, he was admitted to the infirmary on September 23, 2011, not September 28, 2011 as asserted by defendant, and "issued a wheelchair, along with a pair of crutches, and placed into the clinic hospital for 4 nights and 5 days, I was released on a Tuesday back to population, admitted to infirmary on a Friday." This discrepancy indicates that plaintiff was not seen by a doctor for five days, and an x-ray was not ordered on the day of the incident, but rather five days after the incident. Further, he asserted, despite defendant's contention, Dr. Herrington never specifically indicated plaintiff did not need a bunk restriction, and defendant has provided no documentation of this decision by Dr. Herrington. Plaintiff failed to cite the fact that the Institutional Inspector's statement regarding Dr. Herrington's decision was not based solely on the Inspector's review of the charts, but also the "Inspector interviewed Dr. Herrington who stated that [plaintiff] was examined by him and no bottom bunk restriction would be granted at that time."

{¶16} Plaintiff provided an additional witness statement from inmate Walls who stated he and the plaintiff were placed in segregation together on January 28, 2013 even though each of them had bottom bunk restrictions. According to inmate Walls, Sgt. Croyle (sp.) was informed of the predicament and responded by telling them one could sleep on the bottom bunk and the other could sleep on the floor. Again on February 2, 2013, Ms. Loomis was informed of the issue and she allegedly told the two inmates should would fix the problem, however as of the date Mr. Walls wrote the witness statement it was unresolved.

{¶17} Plaintiff also asserted that defendant lied about the fact that he was cheeking pills. He based this assertion on the fact that only one of the medications was discontinued. However, the one that was not discontinued, Benadryl, was then only

administered by a nurse. Plaintiff's assertion is without merit, as it is highly unlikely he was prescribed Benadryl for any reason related to his knee pain, or any other pain for that matter.

CONCLUSIONS OF LAW

{¶18} In regards to plaintiff's constitutional rights claims that he suffered cruel and unusual punishment, the law is well established that this court does not have jurisdiction to hear claims of civil rights violations brought against the state. The state is not a 'person' for purposes of 42 USC 1983 actions and has not otherwise submitted to the jurisdiction of this court for claims such as this. *Burkey v. SOCF*, 38 Ohio App.3d 170, 528 N.E.2d 607 (10th Dist. 1988); *Glover v. Chillicothe Correctional Institution*, 2002-02809-AD (2003). Thus, this court has no jurisdiction over any of the claims related to violations of plaintiff's constitutional rights and plaintiff would need to bring an action in a court that has jurisdiction over such matters.

{¶19} In regards to plaintiff's claim of medical malpractice, this court finds that plaintiff's characterization of his claim as a medical malpractice claim is inaccurate. Plaintiff is not asserting that he was never issued a bunk restriction, and such inaction by the medical staff caused his injuries. Rather, he asserted he was issued many bunk restrictions, which were renewed each year and were valid during each of his injurious falls. Generally, *Civ.R. 10(D)(2)* requires a medical claim within the definition of *R.C. 2305.113* be accompanied by an affidavit of merit from a medical professional. While this requirement applies to an inmate's claim, it does not apply to the prisoner's negligence claims based on the conduct of non-medical personnel. *Foster v. Ohio Dept. of Rehab. & Corr.*, 2013 Ohio App. LEXIS 812, No. 12AP-503 (10th Dist. 2013).

{¶20} To assert an actionable claim of negligence, plaintiff must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that defendant's breach proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.,* 99 Ohio St. 3d 79, 2003-Ohio-2573,788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.,* 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707 (1984).

{¶21} 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, 2003-Ohio-5333, 788 N.E. 2d 1121 (2nd Dist. 2003), citing *Miller v. Paulson*, 97 Ohio App. 3d 217, 221, 646 N.E. 2d 521 (10th Dist.

1994); *Mussivand v. David*, 45 Ohio St. 3d 314, 318, 544 N.E. 2d 265 (1989).

{¶22} Plaintiff has the burden of proving, by a preponderance of the evidence, that he suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University*, 76-0368-AD (1977).

{¶23} Plaintiff must produce evidence which affords a reasonable basis for the conclusion that defendant's conduct is more likely a substantial factor in bringing about the harm. *Parks v. Department of Rehabilitation and Correction*, 85-01546-AD (1985).

{¶24} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass*, 10 Ohio St. 2d 230, 227 N.E. 2d 212 (1967), 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*, 176 Ohio St. 61, 197 N.E. 2d 548 (1964). The court is not persuaded by plaintiff's argument that he had a valid bunk restriction at the time of his fall on September 23, 2011. No such documentation has been provided to substantiate plaintiff's claim that he had a valid bunk restriction at the time of his incident at WCI. In fact, by plaintiff's own account, there seems to be substantial gap of time where he did not have a bunk restriction. Plaintiff asserted MaCI issued a one year restriction from April 17, 2009 through April 17, 2010, and the next issued restriction was at RCI on November 2, 2011 (after his incident). The burden of proof is on the plaintiff, and he has failed to meet this burden. As noted above, the purported truth he offered that he had a bunk restriction in place at the time of this incident is insufficient. His assertion that he had had "numerous medical bunk restrictions, from many different prisons, and re-orders upon arrivals, of first doctor's visits" does not prove beyond a preponderance of the evidence that a doctor at WCI issued a bunk restriction covering the date of his first incident. Further, the various statements by defendant which plaintiff argue prove he had a bunk restriction in place and that is was renewed in November, 2011, do not conclusively prove that one existed on September 23, 2011. Rather, the statements could refer to the three-day temporary restriction, or any number of restrictions before that. While plaintiff has failed to meet his burden regarding the 2011 incident, this court is persuaded by plaintiff's version of the facts pertaining to the April 2012 incident. Particularly, this court finds that defendant completely fails to address the 2012 incident, neither refuting nor admitting to any liability. The court must therefore make a determination based on of the evidence that was actually provided.

{¶25} Plaintiff has produced a lower bunk restriction, dated April 25, 2012, purportedly signed by Ms. Cook, RN of RCI. While there is no physician signature, nor Certified Nurse Practitioner signature present on the document, defendant has not refuted the authenticity of this restriction. Further, the witness statement by D.P. Christopher (#626-639) shows that defendant's agent, Corrections Officer Wolfe was made aware of plaintiff's bunk restriction and informed plaintiff that "they had nowhere else to put him." As noted above, review of plaintiff's medical charts from May 3, 2012 through May 18. 2-12 reveals plaintiff gave conflicting accounts of facts of his fall. Further, as indicated by Certified Nurse Practitioner, Cardaras, the x-ray taken of plaintiff on May 3, 2012 shows an old facture to plaintiff's patella that was "seen on previous film 2010." Accordingly, plaintiff's assertion that he broke his patella during this fall does not comport with his medical records. In fact, his records indicate that the fracture of his patella occurred sometime before the September 2011 bunk fall incident. Plaintiff has provided no evidence pertaining to his back and spine injuries, nor evidence that the injuries were caused by either one of the two falls. This court is persuaded by plaintiff's testimony that he fell from his bunk on or about May 3, 2012, and by his assertion that defendant was aware of his condition and put on notice that he may have a lower bunk restriction, but failed to accommodate his request to move. However, plaintiff has failed to prove any damages beyond those limited to minor pain and suffering.

{¶26} "It is the duty of a party on whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his claim. If the evidence so produced furnishes only a basis for a choice among different possibilities as to any issue in the case, he fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.*, 145 Ohio St. 198, 61 N.E. 2d 198 (1945), approved and followed. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski*, 14 Ohio St. 3d 51, 471 N.E. 2d 477 (1984). Although strict rules of evidence do not apply in administrative determinations, plaintiff must prove his case by a preponderance of the evidence. *Underwood v. Dept. of Rehabilitation and Correction* (1985), 84-04053-AD. Under the facts of the instant claim, plaintiff has proven defendant was negligent in failing to take reasonable precautions to avoid injury after it was made aware of plaintiff's condition which required accommodation.

{¶27} As trier of fact, this court has the power to award reasonable damages based on

evidence presented. *Sims v. Southern Ohio Correctional Facility*, 61 Ohio Misc. 2d 239, 577 N.E. 2d 160 (1988). Based on the evidence before the court, judgment is awarded in favor of plaintiff in the amount of $500.00.

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Deputy Clerk Daniel R. Borchert

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 plaintiff in the amount of $500.00. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Charles M. Perkins, #512-626

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DJM/tad
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