

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

MARK E. WATKINS

Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2012-08877

Magistrate Anderson M. Renick

DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} At all times relevant, plaintiff was an inmate in the custody and control of defendant pursuant to R.C. 5120.16. Plaintiff alleges that he was assaulted by other inmates on numerous occasions at the Noble Correctional Institution (NCI), the Mansfield Correctional Institution (ManCI), and the Warren Correctional Institution (WCI). Plaintiff asserts that defendant had actual or constructive notice that he was being assaulted by predatory inmates and that defendant's employees were negligent in failing to protect him from being assaulted.

{¶3} Initially, the court notes that plaintiff alleges in his complaint that defendant violated "the Federal Prison Rape Elimination Act, Departmental Policy 79-ISA-02 or 28FCR, part B-115." The federal Prison Rape Elimination Act, 42 USC Section 15608, addresses requirements that must be met for accredited penal facilities to receive federal grants. The court notes that plaintiff did not address this claim at trial, nor has plaintiff provided any authority to show that the federal act creates a cause of action over which this court has jurisdiction.

{¶4} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused his injuries. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984). Ohio law imposes upon the state a duty of reasonable care and protection of its prisoners; however, the state is not an insurer of inmate safety. *Williams v. S. Ohio Corr. Facility*, 67 Ohio App.3d 517, 526 (10th Dist.1990).

{¶5} Defendant is not liable for the intentional attack on one inmate by another unless it has adequate notice, either actual or constructive, of an impending attack upon that specific inmate. The distinction between actual and constructive notice is in the manner in which notice is obtained rather than in the amount of information obtained. Whenever the trier of fact is entitled to find from competent evidence that information was personally communicated to or received by the party, the notice is actual. Constructive notice is that notice which the law regards as sufficient to give notice and is regarded as a substitute for actual notice. *In re Estate of Fahle*, 90 Ohio App. 195, 197-198 (1950). In the case of inmate-on-inmate violence, notice is lacking where defendant does not have any knowledge of prior problems, disputes, or altercations between the victim and the assailant and institutional staff have no indication that an attack is going to occur. *Elam v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-714, 2010-Ohio-1225, ¶ 11, citing *Doss v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 99AP-661 (Mar. 28, 2000), and *McDonald v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 02AP-735, 2003-Ohio-513.

{¶6} Plaintiff testified that in December 2011, he was incarcerated at NCI where he was victimized by members of the Cincinnati White Boys gang. Plaintiff stated that gang members stole his property and assaulted him. Plaintiff testified that he was moved to a different dormitory unit after corrections officers (COs) observed such an

incident. When plaintiff was attacked again by an inmate he did not know, he was placed in a segregation unit for his protection. Plaintiff testified that he was subsequently assigned to a dormitory where he encountered inmate James Ware, who represented that he was affiliated with the Cincinnati White Boys and that he could make plaintiff's trouble with the gang "go away" if he consented to have sex with Ware. Plaintiff stated that he agreed to meet Ware in the shower for sex, however, later that day, Ware assaulted him while he was sleeping in his bed. Plaintiff related that Ware was taken to segregation after COs learned of the assault and that he told NCI medical staff he had been sexually assaulted when he was taken to the infirmary.

{¶7} An NCI investigator questioned plaintiff about the alleged assault and plaintiff provided a false name when he was asked to identify who had attacked him. After further questioning, plaintiff admitted that Ware had assaulted him. Plaintiff was charged with lying during the investigation and he was subsequently moved to ManCI.

{¶8} At ManCI, plaintiff was placed in a cell with an inmate who plaintiff believed was a gang member. Plaintiff testified that, on more than one occasion, he was moved to a different cell after he informed COs that his cellmate had threatened him. Plaintiff was assigned to a cell with inmate Shawn Diaz. Plaintiff testified that he cared deeply for Diaz and had a sexual relationship with him, however, he was afraid of Diaz. Plaintiff stated that he agreed to take a "huge ticket" for making "hooch" that Diaz was responsible for, but that when Diaz became involved in heroin distribution, plaintiff cooperated with investigators and was moved to a segregation unit.

{¶9} After he was removed from protective custody, plaintiff was assaulted by a gang member, whereupon he was moved to a cell with inmate David Burns. Plaintiff testified that he complained to Sergeant Little when Burns threatened to assault him with a razor; however, plaintiff stated that he was not moved from the cell until after Burns had assaulted him. According to plaintiff, he was repeatedly assaulted by Burns over a two to three day period until he was eventually removed from the cell. After

plaintiff was treated at the ManCI infirmary, he was placed in segregation until he was transferred to WCI.

{¶10} During cross examination, plaintiff conceded that he cared about Diaz, that he had consensual sex with him, and that Diaz's actions were "not really" part of his claims against defendant. Plaintiff testified that he sent a letter to Burns because he wanted to move to Burns' cell, at least in part, because Burns was also gay. Plaintiff admitted that he did not notify defendant's staff that he had been threatened or assaulted by Burns during the time that they were cellmates.

{¶11} Inmate Ware testified by way of deposition that he met plaintiff a few months before the December 2011 incident, but that he typically did not associate with inmates who were known homosexuals, such as plaintiff, because Ware was "closeted" and did not want to be "out" about his bisexuality. Ware testified that he asked plaintiff to meet him in the shower, that plaintiff agreed, and that their encounter was consensual. Ware denied threatening plaintiff for sex. Ware explained that he became upset when he learned later that day that plaintiff told other inmates Ware was "gay." According to Ware, he found plaintiff in bed, and when plaintiff refused to go to the shower to fight, he began to punch plaintiff while other inmates watched.

{¶12} Ware testified that he was charged with assaulting plaintiff and that he told investigators he had attacked plaintiff for calling him gay. According to Ware, he decided to attack plaintiff almost immediately after learning that plaintiff had discussed Ware's sexuality and the assault lasted for approximately 40 seconds. Ware stated that he was interviewed by an investigator who asked him if he was affiliated with the Cincinnati White Boys gang and whether he had offered plaintiff protection in exchange for sex. Ware testified that he at first denied having sex with plaintiff, but that he later confessed to a consensual encounter when he learned that a video recording showed both plaintiff and Ware going into the shower at the same time. Ware stated that he was charged with having consensual sex with plaintiff.

{¶13} Inmate Diaz testified that he was plaintiff's cellmate for approximately two weeks and that during that time he considered plaintiff to be his best friend. According to Diaz, plaintiff sought his help to keep other inmates from assaulting plaintiff in retaliation for unpaid debts that plaintiff owed. Diaz stated that plaintiff agreed to help him financially in exchange for protection. Diaz subsequently learned that plaintiff had accused him of pressuring plaintiff for sex, which resulted in plaintiff being transferred to a segregation unit.

{¶14} Inmate Burns testified by way of deposition that he corresponded with plaintiff at ManCI by sending letters, wherein plaintiff asked him to be his cellmate. Burns testified that after sharing a cell with plaintiff for approximately two and one-half weeks, they began to argue about plaintiff's promise to pay Burns for sexual favors. According to Burns, he obtained a document that showed that plaintiff did not have money in his inmate account and Burns became angry plaintiff had lied to him. Burns testified that he exchanged punches with plaintiff, but neither sustained serious injury. After plaintiff moved out of the cell, Burns learned that plaintiff alleged that he had been raped by Burns. Burns denied sexually assaulting plaintiff. Burns testified that COs typically check cells every hour and that plaintiff neither wanted to leave the cell nor complained about feeling threatened by Burns.

{¶15} Defendant presented the testimony of Craig Aufdencamp, an investigator at NCI. Aufdencamp testified that he investigated the alleged assault by Ware and that plaintiff initially provided him two false names, Johnson and Law, before he identified Ware as the attacker. During his investigation, Aufdencamp learned that plaintiff had sought protection from other inmates to whom he owed money. According to Aufdencamp, it is not uncommon for inmates to incur such debt. Aufdencamp testified that plaintiff was charged with lying about who had assaulted him.

{¶16} Sharon Chilson, an investigator for defendant, testified that she was involved in the investigation of plaintiff's allegations that he was raped by Diaz and

Burns. Chilson interviewed plaintiff in preparation for administering a computerized voice stress analysis, an investigative tool for assessing credibility during an interview. During the pretest interview, plaintiff told Chilson that Burns was the only inmate who he was accusing of sexually assaulting him. According to Chilson, plaintiff admitted that he cared for Diaz and had a consensual sexual relationship with him. Chilson explained that she was not responsible for making the decision whether criminal charges were filed as a result of the allegations.

{¶17} Based upon the evidence and testimony presented, the court concludes that plaintiff has failed to establish that defendant had any notice, either actual or constructive, of an impending attack on plaintiff. Plaintiff's testimony that he was sexually assaulted by Ware was not credible. Plaintiff admitted he agreed to have sex with Ware, that he lied about the incident when defendant conducted an investigation, and that he did not notify defendant's staff about any threat against him prior to the subsequent assault by Ware.

{¶18} Regarding the assault by Burns, plaintiff admitted that he did not report any threat of assault to COs or medical staff during the three-day period when the alleged assault occurred. Furthermore, the court finds that plaintiff's testimony regarding his interactions with Burns was not credible; particularly plaintiff's testimony that he had no opportunity to notify defendant's staff that Burns had threatened him. Although plaintiff testified that he told Sgt. Little that Burns had threatened him with a razor, plaintiff conceded that Sgt. Little worked in the segregation unit where plaintiff was housed after defendant learned of the assault.

{¶19} As stated above, plaintiff admitted that he had a sexual relationship with Diaz. Plaintiff testified that he felt intimidated by Diaz, but that Diaz did not rape him. Furthermore, plaintiff admitted that he did not tell COs that he was fearful of Diaz and that defendant had no notice of an impending assault by Diaz.

{¶20} Although plaintiff contends that defendant failed to protect him when it was aware that he had repeatedly been a victim of predatory inmates, the evidence showed that defendant responded to each of plaintiff's reports of threats either by transferring him to another unit or institution or by placing him in protective custody. Defendant thoroughly investigated plaintiff's allegations of sexual assault and separated him from the alleged offenders.

{¶21} In short, the court finds that plaintiff failed to prove by a preponderance of the evidence that defendant had either actual or constructive notice of an impending assault against plaintiff. Accordingly, judgment is recommended in favor of defendant.

{¶22} A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

ANDERSON M. RENICK
Magistrate

cc:

Eric A. Walker
Assistant Attorney General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Richard F. Swope
6480 East Main Street, Suite 102
Reynoldsburg, Ohio 43068

Case No. 2012-08877

- 8 -

DECISION

Filed July 31, 2014

Sent To S.C. Reporter 11/04/15