

Court of Claims of Ohio

The Ohio Judicial Center
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BRIAN D. HENLEY

Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2014-00275

Magistrate Robert Van Schoyck

DECISION OF THE MAGISTRATE

{¶1} Plaintiff, an inmate in the custody and control of defendant, brought this action for negligence based upon allegations that a correctional lieutenant at the Richland Correctional Institution (RiCI) used excessive force upon him on November 20, 2013. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Plaintiff, who is in defendant's custody pursuant to convictions for felonious assault, attempted felonious assault, kidnapping, and rape, testified that he entered RiCI in April 2012. Plaintiff testified that shortly after 7:00 p.m. on November 20, 2013, he left his dormitory and began walking toward the recreation area, but that before he arrived there, a corrections officer announced over a megaphone that the recreation area was closed until further notice. Plaintiff stated that he and dozens of other inmates consequently started to walk back to the dormitory.

{¶3} According to plaintiff, before he got to the dormitory, Corrections Officer Lee Ann Praeuner asked him "Where the hell are you going?" and began to question him about why his identification badge was not visible and about a gray sweater he was wearing, which she told him was contraband. According to plaintiff, the sweater was one that he had worn to the recreation area many times and he had never before been

told that it was contraband. Plaintiff also stated that he had never before had any problems with Praeuner. Regardless, plaintiff stated that Praeuner took an aggressive tone and hurled obscenities at him, and that in response he “protested” and told her not to speak to him that way.

{¶4} Plaintiff testified that after Praeuner was instructed by a supervisor over the radio to escort him to the captain’s office, he and Praeuner started to walk that way and continued to have words with one another, at which point Corrections Officer Andrew Tarocco approached them and asked what was going on. According to plaintiff, Praeuner then ordered him to stop walking and to “cuff up,” meaning to place his hands together to be handcuffed. Plaintiff related that he turned to Tarocco and asked that Tarocco handcuff him instead, because, as he explained at trial, he was fearful of Praeuner on account of her hostility, but Tarocco declined and told him to comply with Praeuner’s orders. Plaintiff admitted that he is 5’10” tall and weighs 190 pounds, whereas he estimated Praeuner’s height to be 4’11” tall.

{¶5} According to plaintiff, Praeuner placed him in handcuffs and escorted him to the captain’s office, with Tarocco in tow. Plaintiff acknowledged that he continued to express his displeasure with Praeuner and that he had an upset tone to his voice, and when asked whether he used profanity with her he stated that he could not recall. Plaintiff testified that when they got to the office, he was confronted by Lieutenant Drew Crago, who came out of the office, saw him continuing to have words with Praeuner, and told him to sit down and be quiet. Plaintiff testified that he sat down and did not exhibit any physical aggression, but he did continue talking in contravention of Crago’s order, telling Crago that he should make Praeuner be quiet too, and at that point Crago proceeded to administer OC spray (also known as pepper spray) toward plaintiff’s eyes, deliberately reaching over plaintiff’s eyeglasses to make direct contact. Plaintiff stated that Praeuner and others were nearby when this occurred.

{¶6} Plaintiff stated that he had difficulty breathing and felt a painful burning sensation on his face and eyes as a result of the spray, and he was taken afterward to see a nurse in the clinic and was eventually able to rinse his face and eyes, but he continued to have problems with one of his eyes for some time afterward. Plaintiff filed an Informal Complaint Resolution form about the matter on November 27, 2013, followed by a Notification of Grievance on December 10, 2013. (Plaintiff's Exhibits 3,1.) Plaintiff also wrote to the Ohio State Highway Patrol and sought to have that office conduct an investigation. (Plaintiff's Exhibit 2; Defendant's Exhibit C.)

{¶7} Corrections Officer Lee Ann Praeuner testified that she has been employed with defendant at RiCI for 16 years, and at the time of the incident her regular assignment was as a "yard officer." Praeuner stated that it was in the course of her responsibilities as a yard officer that she was patrolling the yard around 7:45 p.m. on November 20, 2013, checking on an area between two of the buildings on the compound, when she received a radio call from Captain Adams, who was also in the yard at that time. According to Praeuner, plaintiff and several other inmates were walking back to their dormitory from the recreation area, and Adams requested that she stop plaintiff. Praeuner testified that plaintiff was wearing a sweater which was considered contraband under institutional rules due to the fact that it was gray. Praeuner stated that she had seen plaintiff wear this particular sweater before and had told him a few times previously that he needed to either mail it out of the institution or surrender it to a sergeant to be destroyed.

{¶8} Praeuner related that when she confronted plaintiff this time, he told her "I don't know why you have to start shit about this kind of stuff." Praeuner testified that she informed plaintiff that she was following Captain Adams' orders, but plaintiff carried on arguing with a tirade of derogatory and profane remarks. Praeuner stated that Captain Adams, who was still in the yard and was near enough to observe what was going on, called over the radio for her to escort plaintiff to his office. According to

Praeuner, she then ordered plaintiff to cuff up but he did not comply and instead started walking toward the office, and despite ordering him multiple times to stop and cuff up, he continued on until Corrections Officer Tarocco approached from the direction of the captain's office and intervened. Praeuner testified that plaintiff finally turned around and allowed her to apply handcuffs behind his back, and from there they proceeded on to the office while Tarocco went on his way.

{¶9} Praeuner explained that there is a space outside the captain's office where inmates are typically escorted when they have been summoned. Praeuner, who denied losing her temper or cursing at any point during the episode, testified that when they arrived at this area plaintiff was still yelling and carrying on in an argumentative fashion. Praeuner stated that Lieutenant Crago, who was the only person she remembered seeing in the vicinity, started to come out of the office and told plaintiff to remain seated and be quiet. According to Praeuner, plaintiff continued to yell and shout. Praeuner stated that she briefly spoke with Crago and asked if he wanted her to take plaintiff to the segregation unit, but he said that he would handle the matter, and at that point she left the building. Praeuner stated that she did not issue a Conduct Report charging plaintiff with any rules violations because the name-calling and disobedience that she observed by plaintiff up to the time she left, as well as his having a shirt of a prohibited color, were relatively common infractions that in her judgment were not worth leveling charges, for if she did so in all cases she would be writing Conduct Reports constantly.

{¶10} Corrections Officer Andrew Tarocco, who testified that he has been employed with defendant at RiCI for 10 years, recalled that he had gone into the building where the captain's office is located to get something to eat or drink and that when he exited the building he saw Corrections Officer Praeuner and plaintiff on the walkway ahead of him, and he also saw Captain Adams nearby in the yard. According to Tarocco, he heard Praeuner give plaintiff multiple directives to cuff up but plaintiff just

continued walking in front of her in the direction of the building, not allowing her to place him in handcuffs. Tarocco testified that as he got closer, he told plaintiff to stop and let Praeuner put the handcuffs on him, to which plaintiff responded by extending his hands toward Tarocco and saying that he would allow Tarocco to cuff him, and plaintiff offered no explanation for this. Tarocco stated that he told plaintiff to let Praeuner cuff him, and plaintiff then complied.

{¶11} According to Tarocco, Praeuner proceeded to escort plaintiff toward the captain's office. Tarocco stated that he was probably serving as a relief officer that day and cannot specifically remember where he went afterward, but he knows that he did not go back inside the building with Praeuner and plaintiff. Tarocco stated that he never heard Praeuner curse at plaintiff.

{¶12} Lieutenant Drew Crago testified that he has been employed with defendant for more than 18 years. According to Crago, on the evening when this incident took place he was inside the captain's office when he heard a commotion in the adjoining space just outside the office, prompting him go see what was going on. Crago testified that as he walked out of the office he observed plaintiff having a verbal dispute with Corrections Officer Praeuner. Crago stated that he initially did not know what the dispute was about but that plaintiff's voice was raised and it was quite clear that plaintiff was upset about something, and Crago felt that he should intervene, as he explained that he customarily does when he encounters inmates acting that way with a corrections officer. Crago stated that he told Praeuner he would take over, and he explained that he did so for the safety of all involved, not because of any inappropriate action by Praeuner. To the contrary, Crago stated that he did not see or hear Praeuner behave in a threatening, intimidating, or otherwise inappropriate manner toward plaintiff, nor did he hear her curse or insult plaintiff.

{¶13} Crago testified that Praeuner left the area at that point, whereupon he addressed plaintiff and told plaintiff to sit down and be quiet. According to Crago,

plaintiff did sit down but plaintiff refused all directives to be quiet, and instead carried on in a loud, agitated fashion without calming down at all to converse with Crago. Crago testified, moreover, that plaintiff made a sudden lunging movement toward him from the chair where he was seated, about two or three feet in front of where Crago stood. Crago stated that his canister of OC spray was already in his hand by this point because he normally removes it from its holster in any situation where there is the potential that it may need to be used, and when plaintiff made the lunging movement, which he perceived as threatening, he administered a burst of spray in the direction of plaintiff's brow, which is where he has been trained by defendant to direct the spray. According to the OC Canister Log maintained by RiCI, Crago used 20 grams of spray during the incident. (Plaintiff's Exhibit 6.)

{¶14} Crago testified that under defendant's use of force policies, force may be used in situations where inmates refuse to obey orders, and he also explained that the use of OC spray is the least amount of force available for staff to use under defendant's policies. As Crago explained, he did not feel it was necessary in this situation to use the spray when plaintiff was refusing his orders to be quiet, but when plaintiff made the additional lunging movement from the chair, Crago perceived this as threatening conduct which needed to be subdued through the use of the spray. While Crago acknowledged that plaintiff was handcuffed behind the back, he stated that there is a risk in such situations that an inmate may still kick, bite, spit, or even slip out of the cuffs.

{¶15} According to Crago, after administering the spray he escorted plaintiff near the medical department, where another officer took over and led plaintiff in to be checked in the clinic. Crago related that it is a policy that anyone who is in the vicinity where OC spray is administered must be seen in the clinic, so he too visited the clinic later on. Crago testified that no one else was in the area during this incident after Praeuner left, and he described the space outside the captain's office as being about

20 feet by 30 feet and containing mailboxes, a desk, and a couple of computers for officers to use. Afterward, Crago prepared an Incident Report documenting what had occurred and he also prepared a Conduct Report charging plaintiff with violating institutional Rules 8 and 21 ("Threatening bodily harm to another (with or without a weapon); Disobedience of a direct order"). (Defendant's Exhibits A, B; Plaintiff's Exhibit 4.)

{¶16} As previously stated, plaintiff's theory of recovery in this action is one of negligence. "To recover on a negligence claim, a plaintiff must prove by a preponderance of the evidence (1) that a defendant owed the plaintiff a duty, (2) that a defendant breached that duty, and (3) that the breach of the duty proximately caused a plaintiff's injury." *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-357, 2006-Ohio-2531, ¶ 10. "Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners' health, care, and well-being." *Ensman v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 06AP-592, 2006-Ohio-6788, ¶ 5.

{¶17} In addition to stating a claim for negligence, allegations of unnecessary or excessive force being used against an inmate may state a claim for battery. *Brown v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 13AP-804, 2014-Ohio-1810, ¶ 13. "To prove battery, the plaintiff must prove that the intentional contact by the defendant was harmful or offensive." *Miller v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-12, 2012-Ohio-3382, ¶ 11. "A defendant may defeat a battery claim by establishing a privilege or justification defense." *Brown* at ¶ 13, citing *Love v. Port Clinton*, 37 Ohio St.3d 98, 99 (1988).

{¶18} "The use of force is sometimes necessary to control inmates." *Jodrey v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-477, 2013-Ohio-289, ¶ 17. "Correctional officers considering the use of force must evaluate the need to use force based on the circumstances as known and perceived at the time it is considered." *Brown* at ¶ 15, citing Ohio Adm.Code 5120-9-01(C). "[T]he precise degree of force

required to respond to a given situation requires an exercise of discretion by the corrections officer.” *Ensman* at ¶ 23. “In Ohio Adm.Code 5120-9-01, the Ohio Administrative Code sets forth the circumstances under which correctional officers are authorized to use force against an inmate.” *Id.* at ¶ 6.

{¶19} Ohio Adm.Code 5120-9-01 provides, in pertinent part:

{¶20} “(C) Guidelines regarding the use of force. * * *

{¶21} “* * *

{¶22} “(2) Less-than-deadly force. There are six general circumstances in which a staff member may use force against an inmate or third person. A staff member may use less-than-deadly force against an inmate in the following circumstances:

{¶23} “(a) Self-defense from physical attack or threat of physical harm.

{¶24} “(b) Defense of another from physical attack or threat of physical attack.

{¶25} “(c) When necessary to control or subdue an inmate who refuses to obey prison rules, regulations or orders.

{¶26} “(d) When necessary to stop an inmate from destroying property or engaging in a riot or other disturbance.

{¶27} “(e) Prevention of an escape or apprehension of an escapee; or

{¶28} “(f) Controlling or subduing an inmate in order to stop or prevent self-inflicted harm.”

{¶29} “Pursuant to Ohio Adm.Code 5120-9-01(C)(1)(a), correctional officers ‘may use force only to the extent deemed necessary to control the situation.’ Additionally, correctional officers ‘should attempt to use only the amount of force reasonably necessary under the circumstances to control the situation and shall attempt to minimize physical injury.’ Ohio Adm.Code 5120-9-01(C)(1)(b).” *Brown* at ¶ 16. Also pertinent is Ohio Adm.Code 5120-9-01(B)(3), which defines “excessive force” as “an application of force which, either by the type of force employed, or the extent to which

such force is employed, exceeds that force which reasonably appears to be necessary under all the circumstances surrounding the incident.”

{¶30} Upon review of the evidence presented at trial, the magistrate finds that on November 20, 2013, Corrections Officer Praeuner, acting upon the request of her supervisor, Captain Adams, stopped plaintiff in the prison yard and informed him that the gray sweater he had on was considered contraband under defendant’s rules and, consequently, he needed to either mail the article of clothing to someone outside the prison or surrender it to an appropriate prison official. Plaintiff argued with Praeuner about the matter. Captain Adams, who was in the yard at the time, then ordered Praeuner to escort plaintiff to what is known as the “captain’s office.” Praeuner directed plaintiff to cuff up before going to the office, but plaintiff did not comply and began walking ahead of Praeuner toward the office, refusing to be cuffed until Corrections Officer Tarocco confronted him later on the sidewalk and ordered that he follow Praeuner’s instructions. Praeuner escorted plaintiff into the space outside the captain’s office and had him sit down on a chair.

{¶31} Lieutenant Crago, upon hearing a commotion as plaintiff and Praeuner approached, came out of the office and ordered plaintiff to be quiet and to sit down, or to remain seated. Plaintiff disobeyed Crago’s orders to be quiet, however, and instead told Crago that Praeuner too should be made to be quiet and plaintiff continued yelling argumentatively. With the aim of deescalating the situation and calming plaintiff down, Crago had Praeuner leave the area and tried to speak with plaintiff one-on-one and understand what the problem was. In spite of Crago’s orders to quiet down, however, as well as Crago’s order for plaintiff to remain seated, plaintiff would not be quiet and he made a sudden forward movement from the chair toward Crago, who stood two to three feet in front of plaintiff. Crago reasonably perceived this action by plaintiff as a threat of physical harm and, in response, administered a burst of OC spray at plaintiff’s brow, having had the canister of spray in his hand already based upon the fact that in his

judgment the situation had the potential to escalate to such a point. In accordance with defendant's policies on the administration of OC spray, plaintiff was subsequently taken to the clinic to be examined and he was able to wash up.

{¶32} Considering the circumstances surrounding the incident, including plaintiff's belligerent refusal to obey orders to be quiet, plaintiff's failure to remain seated as he was ordered, and the threat of physical harm perceived by Crago, the magistrate finds that Crago was justified and privileged to use force. Further, the degree of force used by Crago was not excessive and satisfied the duty of reasonable care. Whereas plaintiff argues that Crago acted merely out of frustration, the magistrate finds that Crago reasonably perceived a threat of physical harm given his proximity to plaintiff, plaintiff's agitated state, and the sudden move that plaintiff made, and while plaintiff was wearing handcuffs, plaintiff still had the potential to cause physical harm, whether by head-butting, kicking, biting, or spitting, and Crago did not have to wait and see if plaintiff was actually going to attempt some harm before he was justified in using force. While plaintiff described his actions that evening as being more subdued such that Crago could not have reasonably perceived him to pose a threat, he admittedly refused direct orders to be quiet, he had earlier refused Praeuner's orders to cuff up, and the description of plaintiff's conduct that evening by Crago, Praeuner, and Tarocco, which was more persuasive than plaintiff's own description, establish that he was engaged in a course of conduct that was out of control and not acceptable in a prison environment, and Crago's description of plaintiff making a sudden movement toward him was credible.

{¶33} To the extent that plaintiff asserts that the 20 grams of OC spray discharged from Crago's canister during the incident was significant, there was no evidence offered to establish its significance, and, moreover, the magistrate finds that Crago used only the amount of spray that was reasonably necessary. Further, Crago administered the spray at plaintiff's brow in accordance with his training, and while

plaintiff testified that the spray was angled downward deliberately to contact his eyes, in light of the fact that Crago was standing and plaintiff was lower to the ground, it is apparent that the angle of the spray described by plaintiff was a result of that height disparity.

{¶34} Plaintiff also advanced the argument at trial that defendant should be held liable under the independent theory that its employees acted in violation of either Ohio Adm.Code 5120-9-04, which sets forth defendant's administrative regulations pertaining to "Appropriate supervision, discrimination and racial issues", or R.C. 2921.44(C), which is a criminal statute pertaining to the misdemeanor offense of dereliction of duty. The court of claims, however, does not have jurisdiction to determine defendant's civil liability for violation of R.C. 2921.44(C). *Peters v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-1048, 2015-Ohio-2668, ¶ 12, citing *Allen v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-619, 2015-Ohio-383, ¶ 15. And, regulations like those set forth in Ohio Adm.Code 5120-9-04 "are primarily designed to guide correctional officials in prison administration rather than to confer rights on inmates." *State ex rel. Larkins v. Wilkinson*, 79 Ohio St.3d 477, 479 (1997). The regulation plaintiff cites does not, independently, furnish him a cause of action. *Peters* at ¶ 10.

{¶35} Finally, to the extent that the issue of whether Lieutenant Crago is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86 was to be determined with the trial on the merits, as set forth in the order of June 19, 2014, "R.C. 2743.02(F) vests the Court of Claims with exclusive jurisdiction to determine whether a state employee is immune from personal liability in a civil action allowed by R.C. 9.86." *Ries v. Ohio State Univ. Med. Ctr.*, 137 Ohio St.3d 151, 2013-Ohio-4545, ¶ 20. Here, the magistrate finds that Crago acted at all times pertinent within the scope of his state employment and did not act with malicious purpose, in bad faith, or in a wanton or reckless manner. Indeed, it was established during closing arguments that this is not in dispute.

{¶36} Based on the foregoing, the magistrate finds that plaintiff failed to prove his claim by a preponderance of the evidence. Accordingly, judgment is recommended in favor of defendant. Further, it is recommended that the court issue a determination that Lieutenant Drew Crago is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.

{¶37} *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).*

ROBERT VAN SCHOYCK
Magistrate

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