

[Cite as *Harris v. Ohio Dept. of Rehab. & Corr.*, 2015-Ohio-5647.]

THOMAS A. HARRIS, JR.

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2014-00791

Magistrate Robert Van Schoyck

DECISION OF THE MAGISTRATE

{¶1} Plaintiff, who is an inmate in the custody and control of defendant at the Marion Correctional Institution (MCI), brought this action for negligence arising from an incident in which another inmate at MCI stabbed him on February 24, 2014. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Plaintiff testified at trial that on April 12, 2012, defendant transferred him to MCI from the Toledo Correctional Institution in conjunction with his security level being lowered from level three to level two. Plaintiff stated that the following year, Unit Manager Martha Jerew asked him if he would like to move to the honor camp located outside the main compound at MCI in order to participate in a program known as Marion Matters, which offered community reintegration programming for offenders from the Marion area. Plaintiff stated that he accepted the offer and, given that housing in the camp was mostly limited to security level one inmates, his security level was lowered accordingly at the time he moved to the camp in September 2013.

{¶3} Plaintiff testified that he completed the Marion Matters program, which ran through October or November 2013, and he remained assigned to the camp thereafter. Plaintiff testified, though, that he still had to go inside the main compound with some frequency for certain things such as visiting the medical department and attending

classes while he worked on his GED. According to plaintiff, at times while visiting the main compound, especially when he attended classes, inmates affiliated with the Heartless Felons gang approached him with the aim of recruiting him into the gang, and they threatened to harm him if he did not join. Plaintiff, who explained that inmates in the camp had greater privileges and liberties than those living in the main compound, also stated that these individuals pressured him to bring them tobacco, which is considered contraband within the prison system.

{¶4} Plaintiff testified that on or about November 5, 2013, a corrections officer issued a Conduct Report charging him with possession of tobacco in violation of institutional rules. (Defendant's Exhibit I.) Plaintiff stated that he was found guilty of the charge by the Rules Infraction Board, and that the Unit Manager for the camp told him that he might be moved back inside the main compound as a result. Plaintiff stated that on November 7, 2013, he prepared an Inmate Confidential Statement form and submitted it to Case Manager Christina Sopher, expressing to her that he was concerned for his safety if he should be moved inside the main compound due to the threats he had received from the Heartless Felons. (Plaintiff's Exhibit 2.) According to plaintiff, Sopher met with him to discuss his concerns and asked to know the names of those who were threatening him, and at that time he gave her the names of at least three members of the Heartless Felons who were in the classes he was attending. Plaintiff stated that Sopher indicated to him that the staff at the camp would keep an eye on him, and he felt comfortable enough with the situation that on November 8, 2013, he completed another Inmate Confidential Statement for Sopher in which he wrote that he did not want to be placed in protective custody and that he felt "safe at the camp here." (Defendant's Exhibit B.)

{¶5} Plaintiff stated that on or about December 4, 2013, he was again cited in a Conduct Report for possession of tobacco. (Defendant's Exhibit H.) Plaintiff testified that on December 7, 2013, he sent a kite (a handwritten form of institutional

correspondence) to a Major Grisham, relating that he had just gotten in trouble and might be moved back inside the main compound, and he expressed concern for his safety in that unidentified “gang members” were demanding that he bring them tobacco and threatening to harm him if he moved back inside. (Plaintiff’s Exhibit 1.) The response reads “You need to speak w/Ms. Jerew. Major.” According to plaintiff, after spending approximately one week in segregation related to this latest Conduct Report, he talked to Jerew when he saw her in a hallway and he related his concerns to her.

{¶6} Plaintiff testified that in spite of his concerns, prison officials moved him back into the main compound on December 11 or 12, 2013, assigning him to a housing unit known as “5 Dorm.” Plaintiff further testified that once he made the move, members of the Heartless Felons again threatened him in an effort to recruit him, and some of the gang members who were pressuring him lived in 5 Dorm. Plaintiff recounted that he told both the Unit Manager of 5 Dorm, a Ms. Donahue, as well as a Case Manager Hamm that he feared for his safety and that he wanted to move back to the camp, although he admitted that he did not identify the Heartless Felons or any individual gang members to Donahue or Hamm because he was afraid that it might get back to those individuals. Plaintiff stated that he also spoke with unidentified corrections officers around this time and expressed his concerns, but the officers wanted him to put any such concerns down in writing in the form of a kite, which he did not do. Plaintiff also stated that on December 21, 2013, he submitted an Informal Complaint Resolution form to the Chief of Unit Management for MCI, Michell Dunkle, requesting that he be moved from 5 Dorm back to the camp on the basis that the more recent citation for tobacco possession had been withdrawn, but he did not mention any concern for his safety. (Defendant’s Exhibit C.)

{¶7} Plaintiff stated that after living in 5 Dorm for approximately two months, he spoke with a Mr. Ferguson, who oversaw another housing unit known as Buckeye Unit, about his desire to move, although he did not specifically identify the Heartless Felons

as the source of his concern. Plaintiff stated that while he had no desire to move anywhere other than the camp, Ferguson did arrange for him to move to the Buckeye Unit as a result of their discussion, and he thus moved from 5 Dorm to the K Block of Buckeye Unit approximately two weeks before the attack at issue in this case occurred.

{¶8} On the subject of the attack, plaintiff testified that on February 24, 2014, he went to have a new inmate identification card made. Plaintiff related that the office where the cards are made is off of a hallway that leads to the medication dispensary, and along that section of the hallway there are offices belonging to sergeants, lieutenants, and captains. Plaintiff stated that while waiting for his identification card to be made, he stood in the hallway by an office belonging to a Sergeant Ruggles. According to plaintiff, an inmate named Slone came walking down the hallway and stopped to talk to him. Plaintiff testified that Slone lived in 5 Dorm, and that they had first met one another there. Plaintiff related that he owed Slone a debt because he had purchased tobacco from Slone during his time living in 5 Dorm, and that this was what Slone wanted to discuss.

{¶9} As plaintiff explained, he told Slone to make a list of commissary items that he would accept to settle the debt, Slone agreed, and Slone wrote a list of what he wanted: one package of coffee and three Little Debbie cakes. According to plaintiff, he told Slone he would purchase those items for him at the commissary, and Slone stated that he was headed to the dispensary and he proceeded that way without making any sort of threat toward plaintiff. In fact, plaintiff stated that their conversation had been friendly and that Slone did not seem upset.

{¶10} Plaintiff testified that he then went into the office and obtained his new identification card. According to plaintiff, when he left the office he saw Slone in the hallway. Plaintiff stated that he stopped for a moment to fasten the new identification card, whereupon Slone stabbed him three times in the left side of his midsection, and Slone looked at him briefly before leaving. As plaintiff recalled, a Corrections Officer

Zeigler approached and asked what was going on, to which plaintiff initially did not respond but he soon told Zeigler what happened. Plaintiff stated that there had been no other corrections officers in the area and that the only inmate he recognized in the area was Drake Phillips. Plaintiff testified that Zeigler put him in handcuffs and escorted him first to a captain's office and then placed him in a holding cell while an investigation took place, and finally he was taken to the medical department and seen by a nurse, who completed a Medical Exam Report. (Plaintiff's Exhibit 10.) The Medical Exam Report documented two puncture wounds in the left side of plaintiff's back, measuring 0.1 and 0.2 centimeters deep.

{¶11} As plaintiff explained, he was surprised by Slone's attack and did not know why it occurred. Plaintiff acknowledged that he never thought Slone posed any threat and that he never told any staff members at MCI that he was afraid of Slone. Plaintiff, who is black, also testified that, while he had been concerned about black gang members affiliated with the Heartless Felons, Slone is white and was affiliated with the Aryan Brotherhood.

{¶12} Inmate Drake Phillips testified by way of deposition. (Plaintiff's Exhibit 12.) Phillips testified that he witnessed Slone's attack while walking down the hallway to meet with a captain about a visitation matter. Phillips recalled seeing Slone standing in the hallway near the Recovery Services office and seeing plaintiff walking down the hallway, looking at Slone with obvious concern, and from the body language of both men it appeared to Phillips that there was some problem between them. As Phillips related, when plaintiff continued along the hallway and passed Slone, it looked as if Slone punched plaintiff, for Phillips did not see the weapon that Slone used nor did he realize at that point that plaintiff had been stabbed.

{¶13} Phillips stated that plaintiff turned around and ran toward Corrections Officer Zeigler, who was positioned in front of a housing unit known as R Block. According to Phillips, an officer was regularly posted in that area and would monitor the

hallway and the entrances to both the R Block and the O Block housing units. Phillips testified that as plaintiff spoke with Zeigler, Slone remained close by as if lying in wait, but when Zeigler ordered plaintiff to stand against the wall and then handcuffed plaintiff, Slone walked away. Phillips stated that Zeigler and a Lieutenant Ash came to him afterward and he provided them with a statement of what he observed.

{¶14} Michell Dunkle testified that she is employed at MCI as the Chief of Unit Management and that her responsibilities include, among other things, oversight of the process by which inmates are moved between housing units at the institution. Dunkle authenticated a record from defendant's electronic system for tracking inmates' housing information. (Defendant's Exhibit D.) As established in this record, the date when plaintiff moved to the camp was September 10, 2013; plaintiff moved to the segregation unit on December 4, 2013; plaintiff moved to 5 Dorm on December 11, 2013; and, plaintiff moved to the K Block of Buckeye Unit on February 14, 2014.

{¶15} Dunkle testified that it is not unusual for her to receive inquiries or requests relating to housing assignments from staff or inmates at the institution, which she said houses approximately 2,600 inmates. Dunkle stated that plaintiff sent her an Informal Complaint Resolution form dated December 21, 2013, wherein he stated that he felt he should be moved back to the camp because his recent Conduct Report for possessing tobacco had been withdrawn. (Defendant's Exhibit C.) Dunkle stated that she wrote the response at the bottom, informing plaintiff that he was not entitled to such a move and that his eligibility for the camp had recently been considered and resulted in a determination that he not be placed there.

{¶16} Dunkle also stated that she subsequently received a kite from plaintiff, asking again to be moved back to the camp in light of the Conduct Report being withdrawn. Dunkle related that she consequently sent an e-mail on January 12, 2014, to the Unit Manager of the camp at that time, Martha Jerew, asking if Jerew would reconsider plaintiff's placement at the camp. (Defendant's Exhibit E.) As Dunkle

explained, it was her practice to allow unit managers to make these kinds of decisions about which inmates they would admit to their housing units, so she felt in this instance that it was a matter for Jerew's discretion.

{¶17} Dunkle stated that she also received an e-mail on January 14, 2014, from plaintiff's mental health care professional at MCI who wanted to see if Dunkle would reconsider plaintiff's housing assignment and move him back to the camp, again based on the withdrawal of the most recent Conduct Report. (Defendant's Exhibit F.) In her response, Dunkle wrote that plaintiff had already sent her the aforementioned kite and that the matter was under consideration by the Unit Manager.

{¶18} Although Dunkle testified that she does not have any recollection of learning that the Heartless Felons were threatening plaintiff at any time, she acknowledged that a copy of a November 8, 2013 e-mail Sopher sent after meeting with plaintiff appears to show that she was copied on the message, in which Sopher noted, among other things, that the Heartless Felons were trying to recruit plaintiff.

{¶19} Martha Jerew testified that she is employed as the Unit Manager of the Hickory Unit at MCI and that prior to managing that housing unit she managed the camp for approximately one year, mostly in 2013. Jerew explained that she supervises all the employees who work in her housing unit and, among her responsibilities, she makes determinations as to whether an inmate may stay at or move to her unit.

{¶20} Jerew stated that she managed the camp while plaintiff was assigned there. Jerew explained that plaintiff came to the camp so that he could participate in the Marion Matters program, which was a federally funded, 12-week program for offenders from Marion County, and that she had arranged for plaintiff's security level to be reduced to level one specifically so that he would be eligible to move to the camp.

{¶21} Jerew testified that she recalled seeing one or both of the confidential statements plaintiff wrote for Sopher on November 7 and 8, 2013, and that she and Sopher exchanged e-mails about the matter at that time. (Plaintiff's Exhibits 2 & 7;

Defendant's Exhibits B & G.) (Additionally, to the extent that one of the e-mail messages includes a question about whether Sopher was referring to an inmate whom "the warden said to manage at the camp," Jerew testified that plaintiff was not that inmate.) Jerew stated that she was thus aware that plaintiff had reported concerns about the Heartless Felons, and she stated further that there had been similar concerns raised by other inmates around that time regarding the Heartless Felons. Jerew also noted that some of the Heartless Felons, including leaders of the gang, lived in the camp at the same time as plaintiff. With respect to the different prison gangs or "Strategic Threat Groups" operating at MCI, Jerew explained that the Heartless Felons gang is predominately comprised of black inmates. Jerew stated that the Heartless Felons are aligned with another gang comprised predominately of white inmates called the Dirty White Boys. According to Jerew, the Aryan Brotherhood is an altogether separate gang of white inmates.

{¶22} Jerew explained that when an inmate notifies staff that he fears for his life, the practice at MCI is that the staff will ask the inmate if he would like to be considered for placement in protective control, which is a specialized housing unit at a specific institution within defendant's prison system, and an inmate's placement in protective control requires obtaining approval of prison officials through a formal process. Jerew stated that if an inmate declines to be considered for protective control, the practice at MCI is that the inmate is asked to fill out a statement to document the same, like the one plaintiff prepared for Sopher on November 8, 2013. (Defendant's Exhibit B.)

{¶23} Jerew testified that once plaintiff was issued his second Conduct Report relating to tobacco possession, she reviewed the matter and decided that plaintiff would be moved back inside the main compound because he had broken the rules twice and it appeared that he might be "muling" tobacco from the camp to the main compound. Jerew explained that there was a significant problem around that time with tobacco at MCI, and typically the tobacco would be obtained initially by inmates working on the

farm, then conveyed into the camp which she was responsible for managing, and then conveyed into the main compound. Jerew also stated that plaintiff had only recently had his security level lowered in order to participate in the Marion Matters program, the program had concluded, and plaintiff failed to live up to the expectations that are set for those living in the camp.

{¶24} According to Jerew, it was the practice that when an inmate was found with tobacco, he was issued a Conduct Report and was placed in a segregation housing unit. Jerew testified that when inmates from the camp were sent to the segregation housing unit, she was responsible for visiting them there at least once every seven days. While Jerew did not have any specific recollection of speaking with plaintiff while he was there, she stated that it was her habit to make the weekly visits to the segregation housing unit and see any inmates from the camp. Jerew denied any suggestion that she refused to listen to plaintiff's concerns about moving inside the main compound.

{¶25} "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. "In the context of a custodial relationship between the state and its prisoners, the state owes a common-law duty of reasonable care and protection from unreasonable risks." *Jenkins v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-787, 2013-Ohio-5106, ¶ 8. "This duty does not, however, make ODRC the insurer of inmate safety." *Kordelewski v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 00AP-1109 (June 21, 2001). "Although the state is not an insurer of the safety of inmates, once it becomes aware of a dangerous condition it must take reasonable care to prevent injury to the inmate." *Briscoe v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 02AP-1109, 2003-Ohio-3533, ¶ 20. "Reasonable care is

that degree of caution and foresight an ordinarily prudent person would employ in similar circumstances, and includes the duty to exercise reasonable care to prevent an inmate from being injured by a dangerous condition about which the state knows or should know.” *McElfresh v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-177, 2004-Ohio-5545, ¶ 16.

{¶26} “Where one inmate attacks another inmate, actionable negligence arises only when there was adequate notice of an impending attack.” *Lucero v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-288, 2011-Ohio-6388, ¶ 18. “Notice may be actual or constructive, the distinction being the manner in which the notice is obtained rather than the amount of information obtained.” *Watson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 9. “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.” *Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-1052, 2010-Ohio-4736, ¶ 14.

{¶27} Upon review of the evidence presented at trial, the magistrate finds as follows. Defendant lowered plaintiff’s security classification from level two to level one so that he could move from the main compound at MCI to the camp to participate in the Marion Matters program in September 2013. On November 5, 2013, and again on December 4, 2013, corrections officers cited plaintiff for possession of tobacco, which was prohibited under institutional regulations. After each citation, plaintiff notified MCI staff that he wanted to remain in the camp because the Heartless Felons had threatened to harm him if he did not join the gang. After the second citation, Unit Manager Jerew determined that based upon plaintiff’s citations and the amount of tobacco involved, he appeared to be involved in smuggling tobacco, which was an ongoing issue at the camp, and she exercised her discretion to move plaintiff back to

the main compound. In the main compound, plaintiff was assigned to the 5 Dorm housing unit beginning on December 11, 2013, but on February 14, 2014, he was moved to the K Block of the Buckeye Unit. Plaintiff had purchased tobacco while living in 5 Dorm from inmate Slone, who also lived in 5 Dorm and was apparently affiliated with the Aryan Brotherhood. After plaintiff moved out of 5 Dorm without paying the debt he owed Slone for the tobacco, Slone approached plaintiff in the hallway where the security supervisors' offices were located and discussed how plaintiff would settle the debt. While it appeared, at least according to plaintiff, that he and Slone came to an agreement, a few minutes later Slone returned to the hallway and stabbed plaintiff, inflicting two small puncture wounds on the left side of plaintiff's back.

{¶28} Even if it is assumed that the concerns plaintiff raised with staff about the Heartless Felons were genuine and not a ploy in the face of his tobacco citations to maintain his more desirable assignment at the camp, those concerns had no connection with Slone or the Aryan Brotherhood. Indeed, plaintiff did not even know Slone at the time he raised his concerns about the Heartless Felons. Moreover, after plaintiff moved back into the main compound, he lived in the same housing unit as Slone for more than two months and obviously was acquainted with Slone to the extent that he purchased tobacco from Slone in contravention of prison rules, yet plaintiff testified that Slone never threatened him, he had no reason to think Slone would attack, and he was surprised when the attack occurred. Thus, plaintiff did not foresee the attack and it certainly was not proven that defendant's employees should have foreseen the attack.

{¶29} Plaintiff argues, though, that defendant owed a duty not to move him back into the main compound in light of his concerns about the Heartless Felons, and that Slone's attack would not have occurred but for his being moved into the main compound. Whether or not it was reasonable to move plaintiff back into the main compound based upon the concerns he raised about the Heartless Felons, it is clear that defendant's decision to do so was not the proximate cause of the harm plaintiff

suffered, for any duty on the part of defendant to take further action when it learned of plaintiff's concerns about the Heartless Felons pertained to protecting plaintiff from members of that gang, not Slone or the Aryan Brotherhood. Defendant had no notice whatsoever, constructive or actual, from which it knew or should have known of an impending attack by Slone upon plaintiff.

{¶30} Insofar as plaintiff alleges that liability should be imposed on the basis that defendant should have protected him from an inmate with a higher security level than his own, "it is the inevitable nature of penal institutions that they will contain a fair proportion, perhaps a preponderance, of violent and dangerous individuals." *Kordelewski v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 00AP-1109 (June 21, 2001); see also *Allen v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-619, 2015-Ohio-383, ¶ 22. Liability cannot be imposed solely on the basis that that the general inmate population at MCI is dangerous, as defendant is not an insurer of inmate safety. *Elam v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-714, 2010-Ohio-1225, ¶ 16. While plaintiff asserts that Slone's security classification was level two, plaintiff himself had been a level two offender until a few months before the attack when prison authorities lowered him to level one specifically to enable him to participate in the Marion Matters program. Furthermore, it was not established that defendant violated any regulation or rule in not separating inmates with security levels one and two, nor was there credible evidence that there was a history of assaultive behavior on the part of Slone, any threats of violence toward plaintiff or any other inmates by Slone, or any sufficient factor to suggest that defendant had a duty to take further action to protect plaintiff from Slone. Additionally, with respect to the weapon used by Slone, there is some suggestion in the evidence that it was a writing instrument but the nature of the weapon was not established to any substantial degree of certainty, and, regardless, it was not shown that Slone's use of the weapon resulted from negligence on the part of defendant.

{¶31} Plaintiff also argues that security was deficient in the hallway where the attack occurred and that defendant should be held liable on that basis. The attack occurred, however, in an area of the prison containing administrative offices, including the offices of the highest ranking security officials at MCI, and there was a corrections officer posted close by who quickly became involved. Credible evidence was not presented to establish that the level of supervision fell below the standard of care. Moreover, plaintiff's argument challenges defendant's allocation or posting of corrections officers and defendant is immune from liability for its decision in this matter of prison security and administration under the doctrine of discretionary immunity. *Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-1052, 2010-Ohio-4736, ¶ 18.

{¶32} Finally, to the extent that the complaint includes an allegation that defendant owed a statutory duty to protect plaintiff under R.C. 2921.44(C) in addition to its common law duty, R.C. 2921.44(C) is a criminal statute pertaining to the misdemeanor offense of dereliction of duty and the court of claims does not have jurisdiction to determine defendant's civil liability for violation of the statute. *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.

{¶33} Based on the foregoing, the magistrate finds that plaintiff failed to prove his claims by a preponderance of the evidence. Accordingly, judgment is recommended in favor of defendant.

{¶34} *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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