

[Cite as *Roane v. Ohio Dept. of Rehab. & Corr.*, 2016-Ohio-5058.]

TERRANCE ROANE

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2015-00370-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} Plaintiff, Terrance Roane, an inmate, filed a complaint against defendant, Ohio Department of Rehabilitation and Correction (“ODRC”), and alleged that on the morning of November 9, 2014, while plaintiff was in the recreation cage, correction officer (“CO”) Miller said to plaintiff that “you have a sexy body.” Plaintiff further alleged that he told CO Miller several times prior to the alleged incident that her comments about his appearance made him uncomfortable and he asked her to stop. Plaintiff also alleged that CO Miller took plaintiff’s property and wrote a conduct report that resulted in plaintiff being given commissary restriction. Further, plaintiff alleged that he proved ownership of the property in CO Miller’s conduct report and wrote to the administration, but he believed his claims were not being taken seriously because he is a male. With his complaint, plaintiff provided an Informal Complaint Resolution and a conduct report written by CO Miller, both dated November 9, 2014, that detail the allegations in his complaint.

{¶2} Plaintiff also included the following reports with his complaint: November 9, 2014 Informal Complaint Resolution where plaintiff complained that CO Miller accused him of possessing stolen property because he told CO Miller that he was going to write her up for making sexual comments toward him; November 18, 2014 Notification of Grievance regarding CO Miller’s accusation that plaintiff possessed property that was not his; February 12, 2015 Informal Complaint Resolution explaining the November 9,

2014, incident with CO Miller and requesting that his allegations be investigated; February 25, 2015 Notification of Grievance explaining that on November 9, 2014, he sent his Unit Manager a complaint about CO Miller. In this Grievance, plaintiff also stated that CO Miller gets close to his private area while screening him for recreation. Plaintiff stated that Unit Manager Wolfe told him that his allegations would be investigated, but to date they were not; March 23, 2015 Disposition of Grievance where plaintiff's grievance was denied because of insufficient evidence to support plaintiff's claim; March 24, 2015 Appeal to the Chief Inspector explaining plaintiff's issues with the Disposition of Grievance from the Institutional Inspector, and that he felt that he was being accused of making false allegations over the conduct report that CO Miller wrote for contraband, even though he proved ownership of the property in the report and it was returned to him.

{¶3} Plaintiff seeks \$2,500.00 in reimbursement for sexual harassment, improper supervision, and cruel and unusual punishment. Plaintiff was not required to pay the filing fee.

{¶4} Defendant filed its investigation report and in it defendant contends that plaintiff did not submit a grievance to the Inspector regarding CO Miller's supervision until February 26, 2016, over three months later and far beyond the timeframe established by AR 5120-09-31. Defendant stated that between November 9 and February 26, plaintiff submitted four additional kites, grievance and/or informal complaint to various agents of defendant, none of which mentioned CO Miller's alleged inappropriate comments or pat-down.

{¶5} Defendant also contended that it is not liable for plaintiff's failure to follow policy and timely notify defendant of issues.

{¶6} Plaintiff filed a response to defendant's investigation report claiming that plaintiff's evidence proves that defendant's investigation report is not true in its entirety.

CONCLUSIONS OF LAW

{¶7} First, plaintiff is alleging that CO Miller sexually harassed him numerous times over his protests and requests for her to stop. Such action, if true, would clearly be outside the scope of CO Miller's employment. See R.C. 2743.02. Therefore, the complaint is beyond the jurisdiction of this court. *Glover v. CCI*, 2002-02809-AD, (2003).

{¶8} To determine if defendant should bear responsibility for an employee's wrongful act, a finding must be made, based on the facts presented, whether the injury-causing act was manifestly outside the course and scope of employment. *Elliott v. Dept. of Rehab. & Corr.*, 92 Ohio App. 3d 772, 775, 637 N.E.2d 106 (10th Dist. 1994); *Thomas v. Dept. of Rehab. & Corr.*, 48 Ohio App. 3d 86, 89, 548 N.E.2d 991 (10th Dist. 1988); *Peppers v. Dept. of Rehab. & Corr.*, 50 Ohio App. 3d 87, 90, 553 N.E.2d 1093 (10th Dist. 1988). It is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment. *James H. v. Dept. of Mental Health & Mental Retardation*, 1 Ohio App. 3d 60, 439 N.E.2d 437 (10th Dist. 1980). The act must be so divergent that it severs the employer-employee relationship. *Elliott*, at 775, citing *Thomas*, at 89, *Peppers*, at 90.

{¶9} Malicious purpose encompasses exercising "malice," which can be defined as the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified. *Jackson v. Butler Cty. Bd. of Cty. Commrs.*, 76 Ohio App.3d 448, 453-54, 602 N.E.2d 363 (12th Dist. 1991), citing *Teramano v. Teramano*, 6 Ohio St.2d 117, 118, 216 N.E.2d 375 (1966); and *Bush v. Kelley's Inc.*, 18 Ohio St.2d 89, 247 N.E.2d 745 (1969).

{¶10} The Supreme Court of Ohio established that an employer is liable for the tortious conduct of its employee only if the conduct is committed within the scope of employment and, if the tort is intentional, the conduct giving rise to the tort must facilitate or promote the business of which the employee was engaged. *Byrd v. Faber*,

57 Ohio St.3d 56, 565 N.E.2d 584 (1991), citing *Little Miami R.R. Co. v. Wetmore*, 19 Ohio St. 110 (1869), and *Taylor v. Doctors Hosp.*, 21 Ohio App.3d 154, 486 N.E.2d 1249 (10th Dist. 1985).

{¶11} Further, an intentional and willful tort committed by an employee for her own purposes constitutes a departure from the employment, so that the employer is not responsible. *Szydlowski v. Dept. of Rehab. & Corr.*, 79 Ohio App.3d 303, 607 N.E.2d 103 (10th Dist. 1992), citing *Vrabel v. Acri*, 156 Ohio St. 467, 103 N.E.2d 564 (1952). The facts of this case, taken as plaintiff asserted, would constitute an intentional tort committed by defendant's employee. Following this rationale, plaintiff cannot maintain a cause of action against defendant for the intentional, malicious act of its employee.

{¶12} Second, the court interprets plaintiff's claim of improper supervision as arising from the Ohio Administrative Code, specifically Ohio Admin. Code 5120-9-04(B). OAC 5120-9-04 states, in pertinent part, as follows: "(A) Discrimination with regards to supervision and administrative actions against any inmate * * * , on the basis of race, color, religion, gender, sexual orientation, disability, age or national origin, by any staff member * * * or individual representing the department is strictly prohibited. * * * (B) As used herein, the term 'inappropriate supervision' means any continuous method of annoying or needlessly harassing an inmate * * * , including, but not limited to, abusive language, racial slurs, and the writing of inmate conduct reports strictly as a means of harassment. A single incident may, due to its severity or egregiousness, be considered inappropriate supervision for purposes of this rule."

{¶13} Prison regulations "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-Ohio-139, 683 N.E.2d 1139, citing *Sandin v. Connor*, 515 U.S. 472, 481-82, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). Indeed, this court has held that "even if defendant had violated the Ohio Administrative Code, no cause of action would exist in this court. A breach of internal regulations in itself does

not constitute negligence.” *Williams v. Dept. of Rehab. & Corr.*, 67 Ohio Misc.2d 1, 3, 643 N.E.2d 1182 (Ct. of Cl. 1993). Accordingly, to the extent plaintiff asserts claims based upon alleged violations of internal rules and regulations, he fails to state a claim for relief.

{¶14} However, allegations that officials of the ODRC were negligent in hiring, supervising and disciplining a corrections officer, and in failing to protect a prison inmate from a continuing course of abusive and demeaning treatment at the hands of the corrections officer, may be sufficient to state a claim for relief against the state. *Blamer v. Dept. of Rehab. & Corr.*, 36 Ohio App.3d 134, 521 N.E. 2d 855 (10th Dist. 1987). Recovery under this premise is based on negligence principles.

{¶15} In order to prevail in a claim for negligence, 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 Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio–2573, 788 N.E.2d 1088, ¶ 8, citing *Meniffee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984).

{¶16} 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 Univ.*, 76-0368-AD (1997).

{¶17} “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, 788 N.E.2d 1121, ¶ 41 (2nd Dist.), 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).

{¶18} 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).

{¶19} The court finds plaintiff has failed to offer sufficient evidence to prove defendant violated Ohio Admin. Code 5120-9-04(B), "improper supervision." Additionally, the court finds plaintiff did not establish CO Miller engaged in harassing behavior when she issued a conduct report for certain rule violations. The fact that plaintiff subsequently proved ownership of his property and got his property back does not prove the conduct report was issued as a form of harassment proscribed by Ohio Adm. Code 5120-9-04(B).

{¶20} Finally, plaintiff includes a claim for damages for cruel and unusual punishment. Plaintiff is attempting to assert a civil rights claim for a violation of the 8th Amendment to the United States Constitution. It is well-settled that the court of claims does not have jurisdiction to hear constitutional claims brought against the state. *Bleicher v. Univ. of Cincinnati Coll. of Med.*, 78 Ohio App.3d 302, 604 N.E.2d 783 (10th Dist. 1992). The state is not a "person" for purposes of 42 U.S.C 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. CCI* 2002-02809-AD, (2003). Plaintiff would need to bring an action in a court that has jurisdiction over such matters.

{¶21} Plaintiff has failed to state a claim for which relief can be granted, therefore, plaintiff's claims are denied.

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Defendant

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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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