[Cite as *Culbreth v. Dept. of Rehab. & Corr.*, 2017-Ohio-7510.]

HARVEY T. CULBRETH Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2016-00374 Magistrate Gary Peterson DECISION OF THE MAGISTRATE

{¶1} Plaintiff, an inmate in the custody and control of defendant at the Madison Correctional Institution, brought this action alleging that on February 9, 2016, while incarcerated at the Southern Ohio Correctional Facility (SOCF), corrections officers inflicted injuries upon him through the excessive use of force. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} At trial, plaintiff testified that on February 9, 2016, he was housed in a segregation unit known as J2. Plaintiff stated that the unit was "loud" and that he was also contributing to the noisy atmosphere in the unit. Plaintiff testified that a captain thereafter escorted him to a different holding location. After he arrived, plaintiff told corrections officers that he wanted his personal property and that if he did not receive it, he would intentionally harm himself. Plaintiff reported that corrections officers brought him his personal property but that he was missing several items; plaintiff responded by cutting himself.

{¶3} Plaintiff testified that he was subsequently escorted to the infirmary. Plaintiff added that whenever a segregation unit inmate is escorted to the infirmary, the corrections officers place handcuffs and leg irons on the inmate and that such restraints were placed on him at this occasion. Plaintiff testified that after arriving at the infirmary, a nurse inquired about his injury and left to obtain his medical file. Plaintiff testified that

Lieutenant Joseph Kaut thereafter removed his glasses and hit him in the back of the head with a nightstick. According to plaintiff, Kaut also made racist and derogatory comments and threatened to end plaintiff's life. Plaintiff reported that another corrections officer who was also present held plaintiff's leg irons while Kaut punched plaintiff multiple times. Plaintiff stated that at some point during the altercation, he told Kaut that he was going to make Kaut kill him. Plaintiff testified that the nurse entered the infirmary and began cleaning plaintiff's wound while Kaut forcibly held plaintiff by the back of the neck. According to plaintiff, the nurse also made racial comments and spoke derogatorily toward plaintiff. Plaintiff admitted stating to the nurse to "get out of my face because your breath stinks." Plaintiff asserted that Kaut subsequently placed a spit sock, which is a mesh covering that prevents an inmate from spitting on staff, over his head after which plaintiff was escorted to a holding cell. At some point thereafter, plaintiff filed a grievance regarding the incident. (Exhibit A).

{¶4} Kaut testified that he began working at SOCF 19 years ago and that in 2007 he was promoted to the rank of lieutenant. Kaut related that on February 9, 2016, he received a call informing him that plaintiff had cut himself. Kaut testified that he went to plaintiff's cell and put handcuffs and leg irons on plaintiff and then took him to the infirmary. According to Kaut, nurse Brandon Lindamood asked plaintiff what happened at which point plaintiff began using profanity. Kaut reports that Lindamood observed plaintiff's arm and stepped out of the room. Kaut testified that he instructed plaintiff to cease acting disrespectfully at which point plaintiff began acting belligerently. According to Kaut, at some point plaintiff made allegations that he was going to spit on someone and lunged up out of the chair where he had been sitting. Kaut testified that he responded by placing a spit sock over plaintiff's head. A photo of a spit sock was admitted as an exhibit. (Exhibit B). Kaut stated that after the nurse completed treatment, plaintiff was returned to J2 where he was placed on suicide watch. Kaut denied striking plaintiff with his hands or fists and denied using racially offensive

language. Kaut added that he did not see anyone step on plaintiff's leg irons and did not see anyone hit plaintiff. Kaut subsequently completed an incident report (Exhibit C) and a conduct report. (Exhibit D).

{¶5} Lee Burchett testified that he has worked as a corrections officer at SOCF for the previous 17 years. Using an incident report (Exhibit E) that he wrote regarding the February 9, 2016 incident to refresh his recollection of the events, Burchett testified that he received a call on that date that plaintiff had cut his arm. Burchett stated that he proceeded to plaintiff's cell, placed handcuffs and leg irons on plaintiff as per policy, and with Kaut's assistance escorted plaintiff to the infirmary. Burchett recalled that plaintiff threatened to spit on Kaut which resulted in the placement of a spit sock over plaintiff's head. Burchett testified that plaintiff used offensive language while speaking to Kaut and the nurse providing treatment. In the incident report that Burchett wrote, he details events that are consistent with those described by Kaut; Burchett wrote that plaintiff lunged at Kaut and that they responded by placing a spit sock on plaintiff's head. Burchett denied striking plaintiff with a nightstick and denied seeing Kaut strike plaintiff.

{¶6} Brandon Lindamood testified that he is a registered nurse and that he has been employed at SOCF for the previous 17 years. Lindamood recalled that he treated plaintiff for a flesh wound to his arm and that for some reason plaintiff, at least initially, did not want medical attention and was angry. According to Lindamood, plaintiff was disrespectful and used vulgar language. After Lindamood treated plaintiff's injury, he completed an incident report. (Exhibit F). Lindamood added that he did not see any injuries to plaintiff consistent with being hit by a nightstick or struck with fists. Lindamood denied seeing anyone strike plaintiff and denied hearing anyone use racially offensive language directed at plaintiff.[1]

{¶7} Plaintiff's complaint lists several claimed causes of action including "cruel and unusual punishment 10th/Amendment and violation of my Eighth Amendment * * *

[1]Jenifer Tackett also testified at trial, but she was not aware of the incident involving plaintiff.

pain and suffering caused by; Intentional infliction * * * Emotional/distress." (Plaintiff's complaint ¶ 12). As an initial matter, the court lacks jurisdiction of alleged constitutional violations. *Thompson v. S. State Community College*, 10th Dist. Franklin No. 89AP-114, 1989 Ohio App. LEXIS 2338 (June 15, 1989); *Burkey v. S. Ohio Corr. Facility*, 38 Ohio App.3d 170 (10th Dist.1988). While plaintiff does not identify his cause of action as one for unnecessary use of force, the magistrate construes plaintiff's complaint to allege such a claim.

{¶8} Turning to plaintiff's claim of excessive use of force, "[t]o 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.

{¶9} 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).

{¶10} "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.

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

{¶12} "(C) Guidelines regarding the use of force. * * *

{¶13} "* * *

{¶14} "(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:

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

{¶16} "(b) Defense of another from physical attack or threat of physical attack.

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

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

{¶19} "(e) Prevention of an escape or apprehension of an escapee; or

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

{¶21} "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."

{¶22} Upon review of the evidence, the magistrate finds that plaintiff failed to prove by preponderance of the evidence a claim for unnecessary or excessive use of force. The magistrate further finds that on February 9, 2016, plaintiff intentionally harmed himself by cutting his arm. Plaintiff was subsequently placed in handcuffs and leg irons and escorted to the infirmary for treatment. By all accounts, and by plaintiff's own version of events, plaintiff acted disrespectfully to the nurse who was attempting to treat plaintiff's wound. Plaintiff even admitted to stating to the nurse something like "get out of my face; your breath stinks." At some point plaintiff also threatened to spit on defendant's staff members and a spit sock was placed on plaintiff's head. Kaut and Burchett both recalled plaintiff lunging out of his seat shortly before placing the spit sock on plaintiff's head.

{¶23} Plaintiff maintains that Kaut struck him with both his nightstick and his fists. However, the nurse who provided treatment at that time did not notice any wounds consistent with such conduct. Additionally, Kaut and Burchett both credibly testified that neither struck plaintiff with fists or a nightstick. While some force may have been justified given plaintiff's threatening behavior and belligerent attitude, it does not appear that Kaut or Burchett used any unnecessary force in this instance. Therefore, plaintiff's claim fails.

{¶24} With respect to the allegation of intentional infliction of emotional distress, plaintiff failed to prove such a claim. "A claim for intentional infliction of emotional distress requires plaintiff to show that (1) defendant intended to cause emotional distress, or knew or should have known that actions taken would result in serious emotional distress; (2) defendant's conduct was extreme and outrageous; (3) defendant's actions proximately caused plaintiff's psychic injury; and (4) the mental anguish plaintiff suffered was serious." *Hanly v. Riverside Methodist Hosps.*, 78 Ohio

App.3d 73, 82 (10th Dist.1991). Liability in such cases "'has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"'" *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 374 (1983), quoting Restatement of the Law 2d, Torts, Section 46, comment d (1965). Plaintiff failed to demonstrate that defendant intended to cause any emotional distress or that defendant's actions resulted in any psychic injury.

{¶25} Based upon the foregoing, the magistrate concludes that plaintiff has failed to prove his claims by a preponderance of the evidence. It is recommended that a judgment be entered in favor of defendant and that any claim regarding an alleged constitutional violation be dismissed for lack of jurisdiction.

{¶26} *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).*

GARY PETERSON
Magistrate

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