[Cite as *Moore v. Ohio Dept. of Rehab. & Corr.*, 2024-Ohio-1482.]

IN THE COURT OF CLAIMS OF OHIO

BENJAMIN R. MOORE Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2022-00320JD Magistrate Robert Van Schoyck DECISION OF THE MAGISTRATE

{¶1} Plaintiff, formerly an inmate in the custody and control of defendant at Belmont Correctional Institution (BCI), brings this action for negligence arising from an attack upon him by another inmate, Steven Toby, on May 28, 2019. The case proceeded to trial before the undersigned magistrate, and the parties filed post-trial briefs. As explained below, the magistrate recommends judgment for defendant.

Summary of Testimony

{¶2} Plaintiff testified via deposition, explaining that he could not travel to Columbus for the trial.[1] (Plaintiff's Exhibit 18.) At the time of the attack, plaintiff stated, he was assigned to a dormitory-style housing unit at BCI known as 2 House, which was divided into two sides known as A and B, the former being the side where his bed was located.

{¶3} Plaintiff recounted having known Toby since moving into the dormitory about a year earlier, and that they had sat together in the chow hall at lunch the day before the attack. Sometime later that day, after returning to the dormitory from the chow hall, plaintiff and Toby got into an argument over Toby purchasing materials to make wine from an inmate who had earlier agreed to sell the materials to plaintiff, he stated.Plaintiff testified that he was angry with Toby and that Toby used epithets toward him. According

[1] The objections raised in the deposition transcript are OVERRULED.

to plaintiff, he eventually punched Toby in the face, apparently briefly rendering him unconscious, and plaintiff left the area before Toby got up. This occurred around 7:00 or 8:00 p.m., plaintiff estimated.

{¶4} Plaintiff recounted that a close friend he had known since childhood lived in the same dormitory and acted as an intermediatory after the altercation, and this friend told him later that evening that the matter had been resolved, and as a result plaintiff "thought it was completely over with." Plaintiff added that he subsequently spoke to Toby himself, who confirmed "that it was over with." Plaintiff testified that he went to sleep that night not expecting Toby would try to harm him. Plaintiff also testified that he did not notify any prison staff about his altercation with Toby, nor otherwise communicate any concern for his safety.

{¶5} Plaintiff described waking up and feeling a burning sensation which he discovered was from hot water that Toby poured on him, and then Toby started punching him. Surveillance video footage shows that the attack occurred at 4:46 a.m. (Plaintiff's Exhibit 5.) Plaintiff recalled going to the shower after the attack and subsequently going to the officers' station to summon medical attention. Plaintiff was burned on the face, arms, back, chest, and shoulders, he stated, and spent about three weeks at The Ohio State University Wexner Medical Center in Columbus for treatment. Plaintiff described the intense pain he experienced for a couple of months and how he still has difficulty today taking a hot shower.

{¶6} Plaintiff described the layout of the dormitory, including a kitchenette in the middle that contained a microwave and a sink, as well as an officers' station in the middle, and he explained that his bed was not close to the officers' station. Inmates regularly used the microwave to heat food and beverages, according to plaintiff. But, to the extent Toby had heated water in the microwave before attacking plaintiff, there was no legitimate reason for Toby to have used the microwave at that time of morning, in plaintiff's view. Plaintiff testified that based on his familiarity with the dormitory, an inmate in the kitchenette would have been visible from the officers' station and officers there would have been able to hear the microwave.

{¶7} Corrections Officer (CO) Michael Neavin testified that BCI is a level 1 to 2, low security institution where he has worked since 2018. At the time of the incident,

CO Neavin stated, he was working on the third shift, from 10 p.m. to 6 a.m., in the 2 House dormitory together with his partner that night, former CO Bethany Williams. CO Neavin stated that his responsibilities include making security rounds every 30 minutes, conducting counts to ensure all inmates are accounted for, and generally maintaining order.

{¶8} CO Neavin testified that the dormitory housed about 260 inmates at the time, evenly divided between the A and B sides. CO Neavin explained where the officers' station, kitchenette, bathrooms, and showers were situated, between the two sides of the dormitory, and he authenticated a floor plan. (Plaintiff's Exhibit 6.) The kitchenette area included, among other things, a microwave, sink, and instant hot water tap that dispensed 190-degree water, and there were also two adjacent ice machines, CO Neavin stated. Inmates used these resources for preparing food and beverages, which they were permitted to have in their bed areas, CO Neavin explained; for example, heating water in the microwave for coffee, or boiling a bowl of water in the microwave for soup. Inmates also frequented the ice machines during warm weather to fill bowls with ice for keeping beverages cool, as the dormitory was not air conditioned, CO Neavin stated.

{¶9} According to CO Neavin, inmates were permitted to use the bathroom anytime of night except during counts, which during the third shift occurred at 11:30 p.m., 2:00 a.m., and 4:00 a.m., and when the first shift officers arrived they conducted another count at 6:00 a.m. CO Neavin testified that once the 4:00 a.m. count cleared, which normally happened by 4:30 a.m., all inmates in the dormitory were permitted to use the kitchenette. Some inmates regularly got up at that time to go to jobs elsewhere on the compound or to attend medical appointments, as they would leave the dormitory around 4:45 a.m., CO Neavin explained.

{¶10} CO Neavin testified that he was trained on BCI's policies and procedures, which were approved by the Major, who was the official in charge of security, and there was no policy or procedure restricting an inmate like Toby from using the kitchenette at 4:45 a.m. When asked if he was aware of a unit manager indicating via email at any point that inmates should not use the kitchenette at that time, CO Neavin said he received no such message. As CO Neavin explained, the job duties of corrections officers are defined by policies and post orders, and to his knowledge neither he nor CO Williams violated

any policy or post order that morning in relation to this incident; to his knowledge, neither of them were investigated over this incident and he does not know why Williams no longer works at BCI. CO Neavin also explained that he is familiar with the BCI Inmate Handbook, and he denied that it requires inmates to stay in bed until 6:00 a.m.

{¶11} CO Neavin stated that sometime after the incident he viewed a video recording of Toby's actions in the kitchenette and that there was nothing that stood out to him as something Toby should not have been doing. At the time Toby was in the kitchenette, CO Neavin stated, he and CO Williams were in the nearby officers' station which did not have a door and from which he would have been able to see the microwave. But according to CO Neavin, it would not have raised suspicion to see Toby heating up a bowl of water, given that inmates regularly heat up bowls of food or boil bowls of water to make ramen soup. CO Williams at that time was at the lone computer in the officers' station, CO Neavin recalled, where officers usually had the electronic logbook displayed on the monitor. CO Neavin testified that officers could view the live feed from security cameras in the dormitory on the computer, but they typically only did so when they were aware of an incident, and in this case they had no reason to know of the attack until after it occurred.

{¶12} As CO Neavin described, from the officers' station it would have been difficult to hear any commotion at plaintiff's bed, as there was a great deal of noise from several large, loud fans operating throughout the dormitory that morning, a malfunctioning shower that would not turn off, and the ice machines. CO Neavin testified that neither Toby nor plaintiff had reported to him that they had been in an altercation the night before, and if they had done so they would have been placed in segregation. CO Neavin stated that he only learned of the incident after Toby approached the officers' station saying he refused to live in the dormitory any longer, and subsequently plaintiff walked into the kitchenette area. Medical personnel were then summoned to care for plaintiff, CO Neavin stated.

{¶13} Plaintiff called James Drozdowski as an expert witness. Drozdowski testified that he served in the Lorain County Sheriff's Office for 31 years, including as director of the Lorain County Jail from 2002 to 2009. Drozdowski testified that he is now the public information officer and records custodian for the Avon Police Department, and he does

some consulting as a forensic mechanic for the Introtech Accident Reconstruction firm. Drozdowski explained that he worked as a mechanic earlier in his career and spent several years as the vehicle maintenance coordinator for the Lorain County Sheriff's Office. Drozdowski admitted that he never testified as a corrections expert prior to this case, and that there are differences between jails and state correctional institutions.

{¶14} Drozdowski testified that he understood from a performance evaluation of CO Williams, which was not admitted into evidence, that a Unit Manager Ruiz had sent an email to someone at some point indicating that inmates (excluding porters) were not permitted to use the microwave at the time of morning when Toby used the microwave, although the specific hours when the microwave was supposedly off limits were not identified. According to Drozdowski, the officers on duty at the time of the incident therefore should have stopped Toby from using the microwave. Drozdowski admitted that he never saw the email, nor any written policy or directive restricting the use of the microwave or kitchenette at that time of morning. Drozdowski also noted, though, that in his review of a video recording of Toby in the kitchenette, he did not observe anyone else in the kitchenette. Drozdowski acknowledged that the state cannot always guarantee the safety of inmates, but in his opinion this attack was preventable.

{¶15} According to Drozdowski, even if there was no policy restricting Toby from using the microwave at that time of morning, he understood inmates (excluding porters) were supposed to remain at their beds until 6:00 a.m., although he did not make clear from what evidence he derived this understanding. Drozdowski stated that it is the responsibility of a corrections officer to maintain safety and security within the institution, and as part of that they have an obligation in certain circumstances to stop inmates and find out what they are doing. In this case, Drozdowski opined that it was unusual for an inmate to be up walking around with a bowl at approximately 4:45 a.m. and it should have raised suspicion with the officers on duty such that they had a duty to intercede. Drozdowski opined that had an officer stopped Toby and asked what he was doing, the incident probably would not have occurred.

{¶16} Drozdowski admitted his opinion might be affected if there were testimony that it was not unusual for inmates to be up and using the kitchenette at that time. When asked if he knew whether it was normal for there to be a lot of activity in the dormitory

around 4:45 a.m., Drozdowski stated that in the video he reviewed he did see some inmates active in the bunk areas, but not in the kitchenette; he assumed inmates did not leave for work details or other business earlier than 6:30 a.m. Drozdowski stated that he assumes inmates were allowed to get up and use the bathrooms at that time of day but did not know specifically, nor did he know if hot water was available in the bathroom or if inmates could take bowls there to wash or fill with hot water. Drozdowski admitted that he did not know but would assume that inmates were permitted to eat at their bunks and to fill bowls with ice to help them stay cool. Drozdowski also acknowledged that the dormitory contained low security inmates.

Law and Analysis

{¶17} "To establish negligence, a plaintiff must show the existence of a duty, a breach of that duty, and injury resulting proximately therefrom." *Taylor v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-1156, 2012-Ohio-4792, ¶ 15. "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. "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.

{¶18} "However, while 'prison officials owe a duty of reasonable care and protection from unreasonable risks to inmates, * * * they are not the insurers of inmates' safety.'" *Morris v. Ohio Dept. of Rehab. & Corr.*, 2021-Ohio-3803, 180 N.E.3d 1211, ¶ 31 (10th Dist.), quoting *Phelps v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 16AP-70, 2016-Ohio-5155, ¶ 12. "When one inmate attacks another inmate, 'actionable negligence arises only where prison officials had adequate notice of an impending attack.'" *Skorvanek v. Ohio Dept. of Rehab. & Corr.,* 10th Dist. Franklin No. 17AP-222, 2018-Ohio-3870, ¶ 29, quoting *Metcalf v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 01AP-292, 2002-Ohio-5082, ¶ 11; *see also Watson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist.

Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 9 ("The law is well-settled in Ohio that ODRC is not liable for the intentional attack of one inmate by another, unless ODRC has adequate notice of an impending assault."). "'Whether ODRC had or did not have notice is a question that depends on all the factual circumstances involved.'" *Skorvanek* at ¶ 29, quoting *Frash v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-932, 2016-Ohio-3134, ¶ 11.

{¶19} "Notice may be actual or constructive, the distinction being the manner in which the notice is obtained rather than the amount of information obtained." *Lucero v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-288, 2011-Ohio-6388, ¶ 18. "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.

{¶20} Upon review of the evidence presented, the magistrate finds as follows. Plaintiff did not notify prison staff of any concern for his safety before the attack. Indeed, plaintiff went to bed that evening having no concern for his safety vis-à-vis Toby and the attack came as a surprise to him.

{¶21} Neither plaintiff nor Toby notified prison staff of their altercation the evening before the attack. Plaintiff argues that officers on duty that evening knew or should have known from surveillance cameras of the altercation in which plaintiff—who was a significantly larger person than Toby—violently punched Toby, and that this put defendant on notice of the impending attack, but it was not shown that the altercation was captured on any surveillance video, much less that any prison staff saw or should have seen any such video.

{¶22} Plaintiff argues that Toby's presence in the kitchenette at approximately 4:45 a.m. was not permitted, and taken together with his activities in the kitchenette, officers knew or should have known of the impending attack. Plaintiff failed to show by a preponderance of the evidence, however, that Toby was not permitted to be in the kitchenette. Plaintiff argues that the BCI Inmate Handbook that was in effect at the time "banned inmates from the prison kitchenette until approximately 6:00 to 6:30 AM when

the inmates were allowed to leave their bunks for breakfast in what was known as chow time in the prison kitchen area." (Plaintiff's Brief, p. 5.) But there is no such provision in the portion of the handbook plaintiff offered into evidence. The handbook does provide, in part, that "Unit dayrooms are opened after the 6:00 a.m. count clears and are closed at times posted in the dorms", but Toby was in the kitchenette and there was no credible evidence establishing that the kitchenette was considered part of the dayroom. (Plaintiff's Exhibit 16, p. 23.) Whereas plaintiff's expert claimed that inmates were required to remain at their beds until 6:00 a.m., CO Neavin's testimony established that this was not true. The handbook does provide that "At the 11:10 a.m. and 4:10 p.m. counts, the kitchenette area will be closed until the dorm is called to chow." (*Id.* at p. 25.) Notably, however, this provision does not pertain to the 4:00 a.m. count.

{¶23} Plaintiff and his expert also relied on personnel records obtained from defendant concerning CO Bethany Williams as evidence that Toby was not allowed to be in the kitchenette, but for reasons identified on the record the documents were not admitted. Even if they had been admitted, there was no supporting testimony and the documents would not outweigh the credible, persuasive testimony from CO Neavin, who established that inmates—including Toby—were allowed to use the kitchenette once the 4:00 a.m. inmate count cleared, typically by 4:30 a.m. Plaintiff's testimony that Toby had no reason to be microwaving water at 4:45 a.m. was conclusory and again is outweighed by CO Neavin's credible testimony that Toby was allowed to use the kitchenette and that inmates commonly obtained heated water there, whether from the microwave or hot water tap, for preparing beverages or food. It was not shown that either officer violated any institutional policy, procedure, or post order.

{¶24} Furthermore, Toby's actions in the kitchenette were not adequate to give notice of an impending attack. According to surveillance video footage, Toby walked to and from the kitchenette in a calm manner and was only there for approximately 65 seconds. (Plaintiff's Exhibit 5.) To the extent that he heated water in the microwave within that timeframe, CO Neavin's testimony demonstrates that this behavior was not out of the ordinary for inmates. It was not proven that Toby's conduct should have raised suspicion of an impending attack and prompted either officer to intervene.

{¶25} In short, defendant's employees did not have actual or constructive notice that Toby would attack plaintiff. Therefore, defendant is not liable for Toby's attack.

{¶26} Finally, insofar as the complaint raises a claim for negligent training, supervision, and retention, relief cannot be granted on this theory since there is no proof of an underlying tort or wrong by an employee of defendant. *See Ford v. Brooks*, 10th Dist. Franklin No. 11AP-664, 2012-Ohio-943, ¶ 22 ("An underlying requirement in actions for negligent hiring, supervision, and training is that the employee is individually liable for a tort or guilty of a wrong against a third party, who seeks recovery against the employer").

Conclusion

{¶27} Based upon the foregoing, the magistrate finds that plaintiff did not prove his claims by a preponderance of the evidence. Accordingly, judgment is recommended in favor of defendant.

{¶28} *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

Filed March 1, 2024
Sent to S.C. Reporter 4/18/24