[Cite as *Dove v. Ohio Dept. of Rehab. & Corr.*, 2024-Ohio-854.]

IN THE COURT OF CLAIMS OF OHIO

KIMBERLY DOVE Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2019-00969JD Magistrate Robert Van Schoyck DECISION OF THE MAGISTRATE

{¶1} Plaintiff, a former chaplain at Lebanon Correctional Institution (LeCI), brought this action for assault and battery arising from an incident in which her supervisor, Deputy Warden Marva Allen, pushed her into a hallway where pepper spray had been deployed. Plaintiff also claimed that defendant discriminated against her because of a disability in violation of the Americans with Disabilities Act and R.C. Chapter 4112.

{¶2} The case came on for trial before the undersigned magistrate, who issued a decision recommending judgment for defendant on all claims. Plaintiff objected, and on April 17, 2023, the court issued a decision overruling the objections as to the disability discrimination claims but sustaining the objections as to the assault and battery claims, on which it entered judgment in favor of plaintiff. The parties subsequently filed briefs on the issue of damages for the assault and battery claims, which are now before the magistrate for consideration.

Findings of Fact

{¶3} On September 20, 2018, plaintiff looked through a window near her office to view a disturbance among inmates in the hallway on the other side of the window. To plaintiff's surprise, Allen came up from behind, put her hands on plaintiff's back, opened the door to the hallway, and pushed plaintiff into the hallway where pepper spray had been deployed. Plaintiff had heard a co-worker exclaim "don't do that to her" just before she felt hands on her, which made her initially believe an inmate was about to attack her.

Plaintiff tried to retreat from the hallway but could not get past Allen, leaving her exposed to the pepper spray for about five seconds.

{¶4} Though Allen used offensive physical force, the incident did not approximate a malevolent attack. As previously found by the Court, "the more serious nature of the assault was the conditions under which it took place—Plaintiff was pushed into an area where virulent pepper spray had been deployed, and she was exposed to it." (Decision, April 17, 2023.) In terms of physical effects, plaintiff temporarily felt a burning, choking sensation in her throat from the pepper spray. It does not appear from video of the incident that plaintiff was in acute distress after retreating from the hallway, though she was nonplussed about what had just happened and did not want to show weakness in the presence of inmates. Plaintiff and Allen resumed the meeting they had been having and plaintiff did not prepare an incident report that day.

{¶5} Plaintiff had difficulty sleeping that night. While at work the next morning, a Friday, plaintiff broke down emotionally and prayed with a co-worker over the matter. Plaintiff then wrote an incident report describing what had happened and how the incident compounded the fear she already had for her own safety based on past interactions with Allen. That Sunday, plaintiff shared her concerns directly with the warden of LeCI, who opened an investigation and directed Allen to stay away from plaintiff. But plaintiff, knowing that Allen had access to view cameras throughout LeCI and was trained in the use of force, and lacking confidence in the ability of prison management to keep Allen away from her, came to believe that Allen would do further harm to her. Plaintiff's fear of Allen was reasonable under the circumstances.

{¶6} One week after the incident, on Thursday, September 27, 2018, plaintiff called the state of Ohio Employee Assistance Program hotline to discuss her feelings and decided at that point that she needed to remove herself from LeCI. As a result, plaintiff began a leave of absence from work, during which time she received disability benefits.

{¶7} The incident continued to deeply affect plaintiff while she was away from LeCI. Plaintiff was sad and cried, had difficulty concentrating and did not feel like doing anything. Plaintiff had nightmares about Allen, including repeated dreams that Allen was entering her house at night. Plaintiff started sleeping on her couch so that she could see the door to her home and in late 2018 was only getting four to five hours of sleep a night. Plaintiff

came to feel that she must be able to see a door whenever she is in an enclosed space, so for example in restaurants she would sit with her back to the wall. To do her grocery shopping, plaintiff drove to supermarkets far away to lessen the chance of encountering Allen.

{¶8} Plaintiff obtained the names of several therapists from the Employee Assistance Program and began seeing one, Christine Rinehart, thus promptly taking measures to mitigate the harm she was experiencing from the assault and battery. Plaintiff saw a psychiatrist, Dr. Kenneth Manges, as requested either by defendant or the administrator of defendant's disability benefit program.

{¶9} On November 13, 2018, plaintiff began seeing a psychiatrist of her own choosing, Dr. Chole Mullen. Dr. Mullen diagnosed plaintiff with major depression based on plaintiff's trouble sleeping, low appetite, crying and sadness, not enjoying life, and being somewhat agitated. Dr. Mullen also diagnosed plaintiff with post-traumatic stress disorder (PTSD) based on plaintiff having experienced a traumatic incident and having nightmares, anxiety, intrusive thoughts, and hypervigilance. Dr. Mullen's treatment of plaintiff included prescribing medication.

{¶10} From the time of the incident until the latter part of December 2018, plaintiff was having trouble functioning to the point that it would have been difficult to perform the work of a chaplain. As both Dr. Mullen and plaintiff explained, however, from then on she could have returned to work as a chaplain so long as it was not in an environment where Allen would be present, because being exposed to Allen—regardless of whether Allen was her supervisor—could have triggered plaintiff's PTSD symptoms. Even at trial, it still triggered plaintiff emotionally to discuss Allen. To the extent Dr. Mullen certified in paperwork for plaintiff's disability benefits that she was unable to work, it was because plaintiff could not return to the same workplace as Allen.

{¶11} But for Allen's assault and battery, it is reasonably certain that plaintiff would have continued to work as a chaplain at LeCI without interruption for the foreseeable future.

{¶12} Plaintiff looked for job openings at other state facilities and in late 2018 applied for chaplain positions at two other state correctional institutions—one in Cleveland and one in Columbus—to which she was willing to relocate from her home in Fairfield.

Plaintiff also discussed with the human resources director of LeCI several times that she was able to return to work and wanted to find a way to do so, but that it could not involve her and Allen working at the same facility.

{¶13} In addition to diligently looking for work, whether at LeCI or elsewhere, plaintiff used her time during this period to develop her professional skills by undergoing training on pastoral counseling and performing volunteer work as a group therapy leader at an area hospital.

{¶14} As Dr. Mullen put it, plaintiff was "a little better" by the time they stopped treating in May 2019. It was around then that plaintiff's disability benefits expired, and as time went on, she experienced financial distress and could no longer afford the rent on her home in Fairfield, forcing her to relocate to Canton where she had family. Plaintiff continued looking for work in her chosen field, though, and in fall 2019 she received an interview for a full-time position with defendant at Chillicothe Correctional Institution but did not get the job.

{¶15} Although not the sort of full-time, union position that plaintiff sought, plaintiff was recruited by an official at London Correctional Institution to serve in the role of a contract chaplain there from October 2019 through, at the latest, the following June. Plaintiff initially accepted the role, but after making the two-hour drive from Canton and serving one day at London, she decided not to stay on there. Plaintiff apparently would have only been needed at London to temporarily fill in for a chaplain who was on leave, the position was non-union, meaning plaintiff would have no collective bargaining rights, the position was not accompanied by medical or retirement benefits, and it was not worth either commuting such a great distance or relocating under the circumstances. So plaintiff continued looking for the sort of full-time, permanent position with benefits that would be more equivalent to her former role at LeCI.

{¶16} Plaintiff had to rely on help from family and moved to North Carolina, where she had relatives. Plaintiff was forced to use some of her retirement savings and essentially lived out of her car for a time. The prolonged hardship caused her substantial anxiety, embarrassment, and distress. Plaintiff applied for several prison chaplain positions in Florida and North Carolina and got one or more interviews in North Carolina. But despite making reasonable efforts she remained without a job and eventually started

applying for work outside her chosen field. This was a difficult choice, as plaintiff had long ago found her calling in the ministry and social work and had started working as a prison chaplain, on a volunteer basis, in about 2006.

{¶17} In October 2021, plaintiff started working as a customer service representative for American Airlines, where she remained until obtaining a full-time, permanent chaplain position with the Department of Youth Services, where she began working on December 6, 2021.

{¶18} At the time of trial, plaintiff had largely recovered from the serious emotional harm that resulted from the assault and battery, but it still was painful for her to revisit this subject matter.

Conclusions of Law

{¶19} "As a general rule, the appropriate measure of damages in a tort action is the amount which will compensate and make the plaintiff whole." *N. Coast Premier Soccer, LLC v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-589, 2013-Ohio-1677, ¶ 17. "'The fundamental rule of the law of damages is that the injured party shall have compensation for all of the injuries sustained.'" *Landis v. William Fannin Builders, Inc.*, 193 Ohio App.3d 318, 2011-Ohio-1489, 951 N.E.2d 1078, ¶ 37 (10th Dist.), quoting *Fantozzi v. Sandusky Cement Prods. Co.*, 64 Ohio St.3d 601, 612, 597 N.E.2d 474 (1992).

{¶20} "'It is axiomatic that every plaintiff bears the burden of proving the nature and extent of his damages in order to be entitled to compensation.'" *Jayashree Restaurants, LLC v. DDR PTC Outparcel LLC,* 10th Dist. Franklin No. 16AP-186, 2016-Ohio-5498, ¶ 13, quoting *Akro-Plastics v. Drake Indus.*, 115 Ohio App.3d 221, 226, 685 N.E.2d 246 (11th Dist.1996). "[D]amages must be shown with reasonable certainty and may not be based upon mere speculation or conjecture * * *." *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d 523, 2007-Ohio-3739, 875 N.E.2d 993, ¶ 20 (10th Dist.).

Non-economic Damages

{¶21} Plaintiff seeks non-economic damages exclusively for psychological harm, not physical harm, resulting from the assault and battery. Regarding damages for pain and suffering, the Supreme Court of Ohio has said:

> Other elements such as pain and suffering are more difficult to evaluate in a monetary sense. The assessment of such damage is, however, a matter solely for the determination of the trier of fact because there is no standard by which such pain and suffering may be measured. In this regard, this court has recognized that "no substitute for simple human evaluation has been authoritatively suggested." *Flory v. New York Central RR Co.*, (1959), 170 Ohio St. 185, 190, 10 Ohio Op. 2d 126, 128, 163 N.E.2d 902, 905.

Fantozzi at 612. "[N]o specific yardstick, or mathematical rule exists for determining pain and suffering." *Kelly v. Northeastern Ohio Univ. College*, 10th Dist. Franklin No. 07AP-945, 2008-Ohio-4893, ¶ 8, quoting *Hohn v. Ohio Dept. of Mental Retardation & Dev. Disabilities*, 10th Dist. Franklin No. 93AP-106, 1993 Ohio App. LEXIS 6023, *10 (Dec. 14, 1993).

{¶22} In setting a monetary value for pain and suffering, "'"a court may consider awards given in comparable cases as a point of reference, but ultimately must evaluate each case *in light of its own particular facts*."'" (Emphasis sic.) *McCombs v. Ohio Dept. of Dev. Disabilities*, 2022-Ohio-1035, 1087 N.E.3d 610, ¶ 29 (10th Dist.), quoting *Kelly* at ¶ 8, quoting *Hohn* at *10.

{¶23} Plaintiff seeks an award of $150,000 for her emotional distress. As support, plaintiff points to cases involving persons who, like her, were diagnosed with PTSD, but the non-economic damage awards in these cases resulted from more significant injurious conduct and harm in the magistrate's view. *See Burton v. Dutiel*, 2015-Ohio-4134, 43 N.E.3d 874 (5th Dist.) (victim of rape); *Faieta v. World Harvest Church*, 10th Dist. Franklin No. 08AP-527, 2008-Ohio-6959 (two-year-old child abused in daycare program); *Gulley v. Markey*, 5th Dist. Holmes No. 01COA030, 2003-Ohio-335 (protracted tortious behavior by neighboring homeowner).

{¶24} Defendant argues that plaintiff is entitled to nothing more than "nominal" damages for emotional distress. Defendant points to *Coomer v. Opportunities for Ohioans with Disabilities*, Ct. of Cl. No. 2019-00086JD, 2021-Ohio-1139, where a plaintiff

was found to have sustained emotional distress in the amount of $10,000. But *Coomer* is distinguishable in that the plaintiff was found to have no new emotional issues as a result of the defendant's conduct, instead at most an exacerbation of preexisting issues. Defendant also points to *Jones v. Ohio Veteran's Home*, Ct. of Cl. No. 2002-03775, 2005-Ohio-3960, where a plaintiff was found to have $50,000 in damages, which included emotional distress but also wage loss; the amounts of each were not specified. But the plaintiff in *Jones* had significant preexisting issues that were found to be at least as significant in causing the emotional distress as the conduct for which the defendant was liable.

{¶25} In this case, the magistrate concludes that $50,000 is a fair amount to compensate plaintiff for her emotional suffering resulting from the assault and battery.

Economic Damages

{¶26} Plaintiff seeks damages for work loss from when she went on disability leave on September 29, 2018, until she began working as a chaplain with the Department of Youth Services on December 6, 2021.

{¶27} Defendant argues that plaintiff is not entitled to damages for work loss. Defendant reasons that plaintiff "did not appeal the disability separation, request to retain her employment longer, or initiate the reinstatement process at any time." (Defendant's Damages Brief, p. 2.) Defendant further reasons that plaintiff "did not put CCI or Lebanon Correctional Institution (LeCI) on notice of her application for [a chaplain position at CCI in 2019], did not communicate the possibility of a reasonable accommodation relating to the vacant position at CCI to the hiring committee or prior contacts at LeCI and she never requested a transfer to a vacant position when she was still an ODRC employee." (*Id.* at p. 3.) In essence, defendant contends that plaintiff failed to mitigate her damages by not taking these actions.

{¶28} Alternatively, defendant argues that if plaintiff were entitled to any damages for work loss, "the award should be cut off on October 30, 2019", the day plaintiff worked as a contract chaplain at London Correctional Institution. (*Id.*) According to defendant, "it was the same job with identical job duties – prison chaplain – that Ms. Dove held at LeCI." (*Id.*)

{¶29} "In Ohio if one is injured due to another's wrong, he should be compensated for all of the damages he has suffered." *Depouw v. Bichette*, 162 Ohio App.3d 336, 2005-Ohio-3695, 833 N.E.2d 744, ¶ 8 (2d Dist.), citing Restatement of the Law 2d, Torts, Section 920A, Comment b (1979). "'The jury may allow as damages such reasonable amount as it may find that the plaintiff lost, as earnings, as the direct and natural result of the [tortious conduct], taking into consideration all the evidence concerning the plaintiff's age and physical condition before the injury, and the character of the plaintiff's employment.'" *Id*., quoting 30 Ohio Jurisprudence 3d, Damages, Section 40 (2004).

{¶30} "In order to recover lost earnings, a plaintiff must establish the lost earnings with reasonable certainty." *Austin v. Chukwuani*, 2017-Ohio-106, 80 N.E.3d 1199, ¶ 21 (8th Dist.); *see also Brady v. Miller*, 2d Dist. Montgomery No. 19723, 2003-Ohio-4582, ¶ 8.

{¶31} "'The general rule is that an injured party has a duty to mitigate and may not recover for damages that could reasonably have been avoided.'" *Pep Boys – Manny, Moe & Jack of Delaware, Inc. v. Vaughn*, 10th Dist. Franklin No. 04AP-1221, 2006-Ohio-698, ¶ 45, quoting *Chicago Title Ins. Co. v. Huntington Natl. Bank*, 87 Ohio St.3d 270, 276, 719 N.E.2d 955 (1999).

{¶32} In this case, the assault and battery proximately caused plaintiff to sustain lost earnings from the time she went on disability leave from her job at LeCI until she began her job with the Department of Youth Services.

{¶33} Regarding defendant's arguments about plaintiff not taking certain measures to maintain or reinstate her employment at LeCI, plaintiff did request that defendant allow her to return to work in a workplace other than where Allen worked. Inasmuch as defendant either would not or could not arrange for her to return to work under such terms, which the evidence shows was the only way she could reasonably resume working for defendant, it does not appear that plaintiff could have reasonably avoided her damages by taking the measures that defendant now suggests.

{¶34} Regarding defendant's argument that any award for lost wages should end at the point when plaintiff was awarded a temporary, contract position at London Correctional Institution, the position was not substantially equivalent to her former position

at LeCI and she had no duty to relocate or make an extreme commute for that job under the circumstances.

{¶35} Based on the stipulation filed by the parties on July 21, 2023, plaintiff's lost wages from September 29, 2018, until beginning her job with the Department of Youth Services in December 2021, were $193,315.88 (when reduced by the amount of disability benefits plaintiff received for a portion of that time). *See* R.C. 2743.02(D) ("Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery that the claimant receives or is entitled to."). This amount shall be reduced by the interim income plaintiff received from American Airlines ($4,946.89) as well as unemployment benefits that plaintiff received ($53,525.00). Therefore, plaintiff's damages for work loss amount to $134,843.99.

Conclusion

{¶36} Based upon the foregoing, the magistrate finds that plaintiff is entitled to non-economic damages in the amount of $50,000 and work loss in the amount of $134,843.99. The parties stipulated that plaintiff's damages must be reduced by the proceeds of a settlement agreement that she made with a third party in the amount of $10,000; a copy of the agreement was filed under seal on February 7, 2022.

{¶37} It is also recommended that plaintiff be awarded the $25 filing fee cost. Accordingly, it is recommended that judgment be entered for plaintiff in the total amount of $174,868.99.

{¶38} *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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