

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

MARQUISE PERRY

Plaintiff

v.

SOUTHERN OHIO CORRECTIONAL FACILITY, et al.

Defendants

Case No. 2006-06787

Judge J. Craig Wright
Magistrate Steven A. Larson

DECISION

{¶ 1} On February 28, 2008, defendants filed a motion for summary judgment pursuant to Civ.R. 56(B). Plaintiff did not file a response. The motion is now before the court on a non-oral hearing pursuant to L.C.C.R. 4.

{¶ 2} Civ.R. 56(C) states, in part, as follows:

{¶ 3} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to

have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wear United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 4} At all times relevant to this action, plaintiff was an inmate in the custody and control of defendants at the Southern Ohio Correctional Facility pursuant to R.C. 5120.16. Plaintiff alleges that on October 19, 2006, Corrections Officer (CO) Gary Shepherd assaulted him. Plaintiff further alleges that on October 20, 2006, CO Brian Barney assaulted him. Defendants argue that no force was used on October 19, 2006, and that the October 20, 2006, incident involved the authorized use of five-point restraints to control plaintiff after he threw unknown liquids on two of defendants' employees. Defendants assert that their employees used necessary force in responding to the situation and that plaintiff was not injured during the incident.

{¶ 5} The Ohio Administrative Code sets forth the circumstances under which force may be lawfully utilized by prison officials and employees in controlling inmates. Ohio Adm.Code 5120-9-01(C) provides, in relevant part:

{¶ 6} "(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:

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

{¶ 8} "(b) Defense of another from physical attack or threat of physical attack;

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

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

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

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

{¶ 13} The court has recognized that “corrections officers have a privilege to use force upon inmates under certain conditions. * * * However, such force must be used in the performance of official duties and cannot exceed the amount of force which is reasonably necessary under the circumstances. * * * Obviously, ‘the use of force is a reality of prison life’ and the precise degree of force required to respond to a given situation requires an exercise of discretion by the corrections officer.” *Mason v. Ohio Dept. of Rehab. & Corr.* (1990), 62 Ohio Misc.2d 96, 101-102. (Internal citations omitted.)

{¶ 14} In support of their motion, defendants submitted the affidavits of the following people: Corrections Lieutenant Michael Moore, CO Brian Barney, CO Ronnie Boggs, CO Mark Lewis, CO Aaron Rayburn, CO Gary Shepherd, CO Sean Wright, Dennis Packard, RN, Bertha Goodman, RN, and Danielle Holtz, LPN. Defendants also submitted relevant incident and conduct reports.

{¶ 15} In his affidavit, CO Wright states, in part:

{¶ 16} “2. I have personal knowledge, and I am competent to testify to the facts contained in this Affidavit;

{¶ 17} “3. On October 20, 2006, while in the shower, [plaintiff] threw an unidentified liquid on Nurse Danielle Holtz and myself while the two of us were on a pill run, delivering medications to inmates;

{¶ 18} “4. After throwing the unidentified liquid, [plaintiff] began to curse at Nurse Holtz and threaten prison staff with bodily harm;

{¶ 19} “* * *

{¶ 20} “5. Also on October 20, 2006, and based upon this same incident, I wrote a conduct report against [plaintiff] for violating the following rules: #6: throwing, expelling, or otherwise causing a bodily substance to come into contact with another; #7: throwing any other liquid or material on or at another; #18: creating a disturbance; #26: disrespect to an officer, staff member, visitor, or other inmate; and #61: any violation of any published institutional rule, regulations, or procedure.”

{¶ 21} CO Wright verified that true and accurate copies of both his incident report and conduct report from that day were attached to his affidavit. Nurse Holtz's affidavit corroborates CO Wright's affidavit testimony.

{¶ 22} Lieutenant Moore states in his affidavit, in part:

{¶ 23} "2. I have personal knowledge, and I am competent to testify to the facts contained in this Affidavit;

{¶ 24} "3. On October 20, 2006, after [plaintiff] threw an unidentified liquid on [CO Wright and Nurse Holtz], and then began to curse at Nurse Holtz and threaten prison staff with bodily harm, Captain Greg Miller authorized to have [plaintiff] be placed into 5-Way Restraints in order to prevent the threat of substantial bodily harm to the inmate and others to prevent any security risk;

{¶ 25} "4. I was in charge of the security team responsible for the physical restraint, which included [CO Rayburn, CO Shepherd, CO Lewis, CO Tackett, and CO Barney];

{¶ 26} "5. [Plaintiff] did comply with the use of force, and there was no excessive force used by the staff;

{¶ 27} "6. During the use of force incident, prison medical staff periodically checked [plaintiff];

{¶ 28} "7. During the use of force incident, no prison staff assaulted [plaintiff];

{¶ 29} "8. During the use of force incident, [defendants'] policy was properly followed by the prison staff;

{¶ 30} "9. All of the prison staff in question were properly trained and supervised regarding the use of force incidents;

{¶ 31} "10. After the use of the 5-Way Restraints, prison staff escorted [plaintiff] back to his cell."

{¶ 32} Lieutenant Moore verified that a true and accurate copy of his report from the incident was attached to his affidavit. The affidavits of COs Rayburn,

Shepherd, Lewis, and Barney include essentially the same statements as those contained in the affidavit of Lieutenant Moore: that they were part of the team that restrained plaintiff; that no excessive force was used; that plaintiff complied with their orders; that proper procedure was followed; and that after plaintiff was released from the five-way restraints, he was returned to his cell without incident. CO Shepherd also states that “[o]n October 19, 2006, I did not assault [plaintiff], nor use excessive force against him.”

{¶ 33} Nurse Goodman states in her affidavit that she witnessed plaintiff being restrained, that there was no excessive force used, and that she examined plaintiff after he was put in restraints and he had no injuries. Nurse Packard states in his affidavit that he examined plaintiff following his release from the restraints and found no injuries.

{¶ 34} Based upon the undisputed affidavit testimony provided by defendants, the court finds no evidence to support plaintiff’s allegation that defendants’ employees used excessive force against him on October 20, 2006. Furthermore, based upon the undisputed affidavit testimony, the court finds that CO Shepherd did not assault or use any force against plaintiff on October 19, 2006.

{¶ 35} To the extent that plaintiff asserts a claim of negligent supervision, the court notes that in order to prove such a claim, plaintiff has the burden to establish: “1) the existence of an employment relationship; 2) the employee’s incompetence; 3) the employer’s actual or constructive knowledge of such incompetence; 4) the employee’s act or omission causing plaintiff’s injuries; and 5) the employer’s negligence in * * * retaining the employee as the proximate cause of plaintiff’s injuries.” *Evans v. Ohio State University* (1996), 112 Ohio App.3d 724, 739.

{¶ 36} Inasmuch as plaintiff has provided the court with no evidence to support his claims of excessive force, plaintiff’s claim for negligent supervision fails as a matter of law. Accordingly, defendants’ motion for summary judgment shall be granted and judgment shall be rendered in favor of defendants.

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Case No. 2006-06787

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DECISION

[Cite as *Perry v. S. Ohio Correctional Facility*, 2008-Ohio-3400.]

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JUDGMENT ENTRY

[Cite as *Perry v. S. Ohio Correctional Facility*, 2008-Ohio-3400.]

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A non-oral hearing was conducted in this case upon defendants' motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendants' motion for summary judgment is GRANTED and judgment is rendered in favor of defendants. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. CRAIG WRIGHT
Judge

cc:

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MR/cmd
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