

[Cite as *Simmons v. Toledo Correctional Inst.*, 2008-Ohio-4209.]

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

GRADY SIMMONS

Plaintiff

v.

TOLEDO CORRECTIONAL INSTITUTION

Defendant

Judge Joseph T. Clark
Magistrate Steven A. Larson

DECISION

{¶ 1} On April 28, 2008, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On May 9, 2008, plaintiff filed 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. Wean 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 the Department of Rehabilitation and Correction (DRC) at the Toledo Correctional Institution (ToCI) pursuant to R.C. 5120.16. Plaintiff asserts claims of defamation and negligent supervision that are based upon two separate conduct reports: one prepared by Corrections Officer (CO) Jeff Cluckey, and one prepared by CO Thomas Carver. Cluckey charged plaintiff with “causing or attempting to cause serious physical harm to another.” Carver charged plaintiff with “causing physical harm to another.” Plaintiff was found guilty by the Rules Infractions Board (RIB) in both

cases, but those findings were reversed on appeal. Plaintiff alleges that the conduct reports contained false and defamatory statements.

{¶ 5} Defendant argues that its employees are entitled to a qualified privilege with regard to statements made in the conduct reports, and that plaintiff cannot establish a prima facie case for negligent supervision.

{¶ 6} In support of its motion, defendant provided the affidavits of Cluckey, Carver, and Scott Mathias. In Cluckey's affidavit he authenticates a copy of his conduct report and states:

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

{¶ 8} "3. On April 28, 2007, I observed [plaintiff] throw punches to the neck region of a fellow inmate, who put his arms up to defend himself. I also observed an ink pen thrown in the air. After the inmates were separated, I observed a gash and bleeding on the side of the other inmate's neck;

{¶ 9} "4. Based on my senses, knowledge, and experience as a correctional officer, I wrote a conduct report on [plaintiff] for causing or attempting to cause serious physical harm to another;

{¶ 10} "5. This conduct report was written as part of my duty, on behalf of DRC, to maintain the safety and security of ToCI;

{¶ 11} "6. When I wrote the conduct report, it was my belief that [plaintiff] had violated the rule listed in the conduct report;

{¶ 12} "7. While performing my duties in writing the conduct report on [plaintiff], ToCI and DRC policy was properly followed;

{¶ 13} "8. I was properly trained and supervised regarding the writing of conduct reports."

{¶ 14} Carver also authenticates a copy of his conduct report and he states in his affidavit:

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

{¶ 16} "3. On June 4, 2007, [plaintiff] headbutted me. This happened after I was escorting [plaintiff] to outside recreation, but [plaintiff] attempted to pull away to get a sergeant's attention. After I stated to [plaintiff] that I was taking him to recreation, and

not to the sergeant's office, [plaintiff] told me, "Don't try to act tough or I'll bend you in half." [Plaintiff] then turned to me and headbutted me;

{¶ 17} "4. Based on my senses, knowledge, and experience as a correctional officer, I wrote a conduct report on [plaintiff] for causing physical harm to another;

{¶ 18} "5. This conduct report was written as part of my duty, on behalf of DRC, to maintain the safety and security of ToCI;

{¶ 19} "6. When I wrote the conduct report, it was my belief that [plaintiff] had violated the rule listed in the conduct report;

{¶ 20} "7. While performing my duties in writing the conduct report on [plaintiff], ToCI and DRC policy was properly followed;

{¶ 21} "8. I was properly trained and supervised regarding the writing of conduct reports."

{¶ 22} In his affidavit, Scott Mathias states, in part:

{¶ 23} "1. I am currently employed as a full time employee by [DRC] as a captain at [ToCI]. I formerly worked at ToCI as a lieutenant as my duties included reviewing conduct reports written against inmates in my role as Chair/Segregation Supervisor of the [RIB];

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

{¶ 25} "3. After [plaintiff] was found guilty by the [RIB] of causing or attempting to cause serious physical harm to another based on the April 28, 2007, conduct report written by C.O. Cluckey, the charge was reversed by the Director of DRC for insufficient evidence, but the Director allowed the case to be reheard;

{¶ 26} "4. After the April 28, 2007 incident was reheard, the [RIB] once again found [plaintiff] guilty. However, the Warden reversed the decision on a procedural ground: the original conduct report was not properly rewritten;

{¶ 27} "5. After [plaintiff] was found guilty by the [RIB] of causing physical harm to another based on the June 4, 2007 conduct report written by CO Carver, the charge was reversed on a procedural ground because another correctional officer who witnessed the headbutting was not available for the hearing;

{¶ 28} "6. As Chair/Segregation Supervisor of the [RIB], I approved both conduct reports and found [plaintiff] guilty of the charges in both cases;

{¶ 29} “7. While performing my duties in reviewing the conduct reports on [plaintiff], ToCI and DRC policy was properly followed;

{¶ 30} “8. I was properly trained and supervised regarding making decisions as Chairman/Segregation Supervisor of the [RIB].”

{¶ 31} Captain Mathias also authenticated the documents referred to in his affidavit and attached thereto.

{¶ 32} “Defamation is defined as ‘the unprivileged publication of a false and defamatory matter about another * * * which tends to cause injury to a person’s reputation or exposes him to public hatred, contempt, ridicule, shame or disgrace * * *.’ *McCartney v. Oblates of St. Francis deSales* (1992), 80 Ohio App.3d 345, 353. As suggested by the definition, a publication of statements, even where they may be false and defamatory, does not rise to the level of actionable defamation unless the publication is also unprivileged. Thus, the threshold issue in such cases is whether the statements at issue were privileged or unprivileged publications.” *Sullivan v. Ohio Dept. of Rehab.& Corr.*, Ct. of Cl. No. 2003-02161, 2005-Ohio-2122, ¶8.

{¶ 33} Privileged statements are those that are “made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, publication in a proper manner and to proper parties only.” *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 244.

{¶ 34} Furthermore, a qualified privilege can be defeated only by clear and convincing evidence of actual malice. *Bartlett v. Daniel Drake Mem. Hosp.* (1991), 75 Ohio App.3d 334, 340. “Actual malice” is “acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity.” *Jacobs v. Frank* (1991), 60 Ohio St.3d. 111, 116.

{¶ 35} Based upon both the unrefuted affidavit testimony provided by defendant, and a review of the attached conduct reports, the court finds that no reasonable trier of fact could conclude that the statements contained therein were made either with

knowledge that they were false or with reckless disregard as to their truth or falsity. Thus, the statements are protected by a qualified privilege as a matter of law.

{¶ 36} With regard to plaintiff's negligent supervision claim, 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.

{¶ 37} Based upon the affidavits provided by defendant and plaintiff's failure to provide any contrary evidence, the court finds that plaintiff has failed to produce any evidence in support of his allegation that defendant's employees were "incompetent" or that defendant had knowledge of any alleged incompetence. Therefore, defendant is entitled to judgment as a matter of law on plaintiff's claim of negligent supervision.

{¶ 38} For the foregoing reasons, the court finds that no material questions of fact exist for trial and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment shall be granted and judgment shall be rendered in favor of defendant.



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JUDGMENT ENTRY

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A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. 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.

JOSEPH T. CLARK
Judge

cc:

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MR/cmd
Filed July 23, 2008
To S.C. reporter August 18, 2008