

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
EASTERN GRAND DIVISION

FILED

FEB 19 2010

Tennessee Claims Commission
CLERK'S OFFICE

DEXTER JOHNSON,

Claimant,

v.

STATE OF TENNESSEE,

Defendant.

Claims Commission No. 20090935

Small Docket

Heard by Affidavit

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C/S-COMM
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FINAL JUDGMENT

THIS MATTER is before the undersigned, Commissioner of the Tennessee Claims Commission ("the Commission"), Eastern Division, for final disposition upon the Record as a whole.

Pursuant to Tennessee Code Annotated, section 9-8-403(a)(2), this claim is on the Commission's small claims docket. Further, pursuant to Tennessee Claims Commission Rule 0310-1-1-.01(2)(d)(1), this Claim shall proceed upon the record without an in-person hearing.

Procedural History.

The Claimant, Dexter Johnson, is in the custody of the Tennessee Department of Correction ("TDOC") housed at its Northeast Correctional Complex ("NECX") facility in Mountain City, Tennessee. Mr. Johnson filed his Claim for Damages form Against the State of Tennessee with the Division of Claims Administration ("the Division") on February 18, 2009, as the result of an incident that occurred on February 6, 2009. In a letter dated April 14, 2009, the

Division denied Mr. Johnson's claim stating "there [was] a lack of evidence to indicate that an actual harm occurred and that it was proximately caused by negligence of TDOC officials".

The Claimant timely filed a Notice of Appeal and Original Complaint form with the Commission on May 4, 2009. He later filed an Amended Complaint on May 20, 2009.

On August 28, 2009, Mr. Johnson served notice on the State that he proposed to take the depositions upon written questions of correctional officers Terry Stout, Marty Kurtz, and Sergeant Judy Tolley on September 15, 2009, at NECX in Mountain City. Claimant's notice stated that the answers to the questions presented would be taken by a Ms. Gallagher in the NECX library, at certain times.

No motion opposing the taking of such depositions or for a protective order were filed by the State.

Subsequently, on February 8, 2010, Motions to Compel relating to those depositions upon written questions were received in the office of the Commission. The Certificate of Service shows that the same were mailed to the State on February 2, 2010, by the Claimant. Attached to the Motion were the Answers to the Depositions Upon Written Questions which apparently were taken by a Terri Jo Church on October 1, 2009, at NECX.¹

With regard to Sergeant Tolley's answers to the questions, Mr. Johnson contends that they were either evasive or incomplete. According to Mr. Johnson, the answers made under oath by Officer Stout were also evasive or incomplete. The same allegation is made with regard to the answers filed by Officer Kurtz.

¹ The fact that Ms. Church rather than Ms. Gallagher recorded the answers to the interrogatories is not important to a resolution of the issue before the Commission in this case.

Because he contends these answers were inadequate, Mr. Johnson requests payment to him of reasonable expenses, including attorney's fees, in order to obtain what he believes would be an adequate answer.

Mr. Johnson also requests that the Commission appoint counsel to assist him in obtaining more complete and satisfactory answers to his interrogatories.

The Commission does not find the answers to the interrogatories to be incomplete as will be discussed more fully hereinafter. Therefore, the Commission declines to appoint counsel to represent Mr. Johnson in connection with his Motions to Compel. (*See Goodwin v. Goodwin*, 1991 WL 66460, May 1, 1991.)

First, with regard to Ms. Tolley's responses, there is nothing incomplete about them. The documents attached to Mr. Johnson's Motion to Compel Answers from Sergeant Tolley have been fully reviewed by the Commission in reaching a decision in this case and there appears to be nothing incomplete regarding her response to the original questions.

In fact, the State has not contested the genuineness of the attached documents or their account of the results of the grievance proceeding.

With regard to Officer Stout's answers to the written questions presented to him, Mr. Johnson complains about his answer to interrogatory number 3 regarding the inmate's willingness to do his assigned job. Mr. Stout maintained that his job responsibilities did not include supervising inmate workers. However, his job description as a correctional officer includes supervising "inmate activities" in "work areas".

It should be noted that in answer to questions 3 and 5 presented to him by Mr. Johnson, Correctional Officer Marty Kurtz claimed not to be aware of Mr. Johnson's full job description or assignments and that it was not in his job description to supervise inmate workers although he

had the same correctional officer job description referred to in connection with Officer Stout's answers.

Specifically with regard to Officer Kurtz' answers, Officer Kurtz states that on February 6, 2009, Mr. Johnson contended that he had a class B medical excuse and "did not have to go" when he was directed by Officer Stalcup "to get chemicals".

The Commission sees nothing evasive or incomplete regarding the responses made by Sergeant Tolley and while officers Stout's and Kurtz' responses to questions 3 and 5 respectively do appear to be a bit disingenuous since their job descriptions clearly include supervising working inmates, Kurtz' response to question 3 does not appear to be insufficient since he claims not to know the full extent of Johnson's job description and work assignments. Again, although the answers of Stout to question 3 and Kurtz to question 5 are disingenuous, compelling them to answer the same more fully is not necessary in light of the Commission's disposition of this matter.

Therefore, Mr. Johnson's Motions to Compel and For Sanctions are respectfully **DENIED.**

In response to Mr. Johnson's claim, the State on December 7, 2009, filed its Answer.

Facts.

Mr. Johnson, in his Amended Complaint, states he has muscular dystrophy which severely affects the major life activities of performing manual tasks and walking. Because of this medical condition, the Claimant maintains he received a medical incentive job and was thus assigned a cleaning position (rockman). Inmate Relations Coordinator ("IRC") Sharon Stalcup was his supervisor.

On his Claim for Damages form, the Claimant lists the date of the event about which he complains as February 6, 2009. However, in explaining how the claim arose on that same form,

Mr. Johnson states the incident occurred on January 29, 2009, although in his Amended Complaint he maintains the incident occurred on January 26, 2009. The Tennessee Department of Correction TOMIS Disciplinary Report submitted as Exhibit A confirms the date of occurrence at issue here as January 26, 2009, at approximately 8:15 a.m.

Page 2 of Exhibit A to this claim contains a brief description of the incident at issue and was prepared by IRC Stalcup. She wrote that Inmate Johnson had been assigned to her as a cleaner in Unit 12, and that his name was on the supply rotation list which had been put up in the Unit. On January 26, 2009, she told Mr. Johnson to get supplies for the Unit and he told her "No, he was not going because he was a medical credit". She stated there were two other officers who were witnesses to this refusal. As a result, Mr. Johnson was charged with refusing a direct order.

Mr. Johnson maintains that he was written up by supervisor Stalcup for refusing a direct order. He stated that at the time he tried to explain to her that he was unable to push the cart because of his medical conditions. After being written up by Stalcup, Mr. Johnson stated that she "threaten[ed] to fire [him] from [his] job if [he] did not go with her down to the chemical supply room". Mr. Johnson avers that Stalcup was being discriminatory toward him because of his ongoing medical condition and did not use proper discretion in light of those conditions.

On February 2, 2009, Mr. Johnson filed a Disciplinary Report Appeal (Exhibit B) stating that he did not want a "job drop" and that he did not perform the task asked of him by Stalcup because of a "medical incentive" and that his health condition would not allow him to lift or pull anything heavy. The disciplinary charges against Mr. Johnson were dropped by the Warden on February 3, 2009. The reason/explanation listed for the disposition was that "based on AVO he would not be one to go get supplies to carry back to the unit. Replace in job – MC is only light duty in unit".

Exhibits D and E attached to Mr. Johnson's claim are documents regarding his Inmate Grievance in this matter. On January 26, 2009, Claimant Johnson filed an Inmate Grievance regarding the incident at issue and IRC Stalcup's actions. On January 28, 2009, the supervisor (Unit Manager Wade Tate) noted that Mr. Johnson's health classification was (B) and that according to TDOC policy 505.07 pushing a cart up or down hill was within his limitations. The Inmate Grievance Committee concurred with the supervisor's response on February 4, 2009, suggesting that Mr. Johnson "get his medical classification reviewed". On February 5, 2009, Warden Carlton disagreed with the Committee's response stating that "medical incentive jobs are not for pushing carts. Staff are to ensure inmate completes duties commensurate with medical incentive."

Attached to Mr. Johnson's Claim is a Notice of Denial of Program Credits marked as Exhibit G and dated February 25, 2009. From January 26, 2009, through February 25, 2009, Mr. Johnson was denied program credits by his supervisor, IRC Stalcup, because of the January 26, 2009, episode and also because of incidents of February 10 and 20, 2009, which Mr. McMillan claims were in retaliation for his success on the grievance he filed on January 26, 2009. Warden Carlton stated at the bottom of this document [on February 3, 2009] "you need to do assigned jobs and without argument". Additionally, per a Memo dated February 27, 2009, (Exhibit F) effective March 2, 2009, Mr. Johnson was given a "job drop" and placed on the job waiting list. He states that again this was further retaliation by IRC Stalcup for filing the grievance and his enforcement of rights under the Tennessee Disability Act and the Americans With Disabilities Act.

In his Complaint Form, Mr. Johnson largely complains about IRC Stalcup's direct violation of TDOC policy with regard to his health condition. Additionally, he avers she

committed perjury in connection with the January 26, 2009, episode, that her conduct was willful, and that she misled the Warden.

The State filed its Answer in response to this claim on December 7, 2009. The State denies that Claimant Johnson was “written up” for failing to perform duties which conflicted with his medical condition and limitations. The State admits Claimant is limited to two hours of strenuous activity at a time. The State maintains that the Claimant was simply asked to retrieve supplies and fulfill his job duties. When he refused this order, he was disciplined. Further, the State submits that the write-up was “subsequently removed from his disciplinary record”. Regarding the request to perform his job duties, the State maintains that Mr. Johnson was not asked to perform any strenuous activity as prohibited by the medical Limited Activity Notice and, in fact, was not asked to perform any strenuous activity at all.

The State maintains the Claimant has not suffered any physical, mental, or emotional injury. Further, it maintains Mr. Johnson has suffered no loss of work or wages. In fact, the State asserts that as a result of the incident alleged by Mr. Johnson, he has suffered no adverse consequences whatsoever.

Lastly, the State avers the Commission lacks jurisdiction to hear this claim because Claimant’s allegations involve charges of willful, malicious, or criminal acts by a state employee. As such, the State maintains the General Assembly has specifically legislated in the Tennessee Claims Commission Act that “the state will not be liable for willful, malicious, or criminal acts by state employees”. (Tenn. Code Ann. § 9-8-307(d).)

Rationale.

The original claim filed by Mr. Johnson requested damages in the amount of Three Thousand Dollars (\$3,000.00) and was based on Tennessee Code Annotated, Section 9-8-307(a)(1)(E) for negligent care, custody, and control of persons, which provides as follows:

9-8-307. Jurisdiction Claims Waiver of actions Standard for tort liability Damages Immunities Definitions Transfer of claims.

(a) (1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of state employees, as defined in 8-42-101(3), falling within one (1) or more of the following categories:

(E) Negligent care, custody and control of persons;

In his Amended Complaint Mr. Johnson alleges that he was retaliated against by correctional officer Stalcup, in consort with a job coordinator, correctional officer Fred Ramsey when he was placed on an unassigned basis on NECX's job waiting list. This change in status, according to the materials before the Commission, would preclude Mr. Johnson from working in the job of rockman which he was performing on January 26, 2009, when this dispute arose. Claimant alleges that this job category was appropriate for him based upon a condition known as muscular dysplasia as well as a back condition which Mr. Johnson also claims he suffers with.² The materials before the Commission do show that the write-up lodged against Mr. Johnson based on the events of January 26, 2009, was reversed by Warden Howard Carlton on two separate occasions.

First, on February 5, 2009, in disagreeing with the decision of the grievance committee, Warden Carlton wrote the following:

“Medical Incentive jobs are not got pushing carts. Staff are to ensure inmate completes duties commensurate with medical incentive.”

On February 2, 2009, Warden Carlton wrote on a disciplinary report appeal the following:

² There are no materials before the Commission documenting that fact that Mr. Johnson suffers from these conditions. However, this claim can be partially decided in the absence of such materials.

“Based on AVO he would not be one to go get supplies to carry back to the unit.
Replace in job – MC is only light duty in unit.”

In its Answer, the State alleges that Mr. Johnson presented no medical proof of any injury or of any detriment involving a loss of work or loss of wages. Therefore, the State contends that no adverse consequences resulted from the January 26, 2009, write-up.

Damages are an essential element of any claim filed before the Commission alleging negligence under Tennessee Code Annotated, Section 9-8-307(a)(1)(E) involving the negligent care, custody, or control of a prisoner. (See *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991.) Mr. Johnson alleges that he has “lost inmate wages, sentence credits, job status, and suffered from mental anguish and embarrassment”. He alleges financial damages in the amount of Three Thousand Dollars (\$3,000.00). However, he has not itemized and presented to the Commission how his lost wage and mental anguish and embarrassment damages were calculated. However, it apparently is the case that on February 27, 2009, effective March 2, 2009, he was placed on a “waiting list” by Inmate Job Coordinator Fred Ramsey which, according to his allegations, took him out of his position as a rockman which he alleges accommodated his medical problems and which he had been performing for some time. Additionally, on February 25, 2009, in a decision affirmed by Warden Carlton on March 3, 2009, Mr. Johnson did lose program credits because of incidents occurring on January 26, 2009, as well as on February 10 and February 20, 2009.

There is something disturbing about this claim. On February 2, 2009, in connection with the January 26, 2009, episode, a disciplinary report hearing summary does request a “job drop”. However, on February 3, 2009, Warden Carlton reversed the disciplinary decision regarding Mr. Johnson with the notation that he should be “[r]eplace[d] in job-MC is only light duty in unit”. Additionally, on February 5, 2009, Warden Carlton again overruled a decision, this time from the

grievance process, with the observation that “medical incentive jobs are not for pushing carts. Staff are to ensure inmate completes duties commensurate with medical incentive.” Nevertheless, on February 25, 2009, in part because of the events of January 26, 2009, Mr. Johnson was denied program credits, a decision which the Warden agreed with on March 3, 2009, with the statement “[y]ou need to do assigned jobs and without argument”.

Mr. Johnson disagreed with the denial of program credits implemented by Officer Stalcup and claimed that he was being retaliated against for prevailing with Warden Carlton in his two prior decisions regarding the January 26, 2009, event.

There appears to be something drastically wrong in the relationship between Mr. Johnson and the NECX staff. It is a suspicious development that Ramsey, in effect, took away Claimant’s rockman job sometime around February 27, 2009, two days after Stalcup denied him program credits in part because of the January 26, 2009, event concerning which the Warden had sustained Johnson’s position.

On the other hand, Stalcup also relied on events which took place on February 10 and 20, 2009, to justify her action.

Regardless of any prison official’s motivation in this case, Mr. Johnson clearly alleges that the loss of his rockman job happened in retaliation for his success regarding the January 26 charge.

If that is the case, then this Commission clearly has no jurisdiction over his claim under Tennessee Code Annotated, section 9-8-307(d) which provides, in part, that “[t]he State will not be liable for willful, malicious, or criminal acts by State employees,”

Mr. Johnson has clearly alleged retaliation which, of course, constitutes malicious or willful activity on the part of certain individuals at NECX. Since this is the case, the Tennessee

Legislature has not, pursuant to the Tennessee Claims Commission Act, given the Commission jurisdiction over this particular claim.

Here, Mr. Johnson alleges direct and willful activity on the part of, primarily, Officers Stalcup and Ramsey. Given those allegations, this Commission does not have jurisdiction over his claim and Mr. Johnson's complaints perhaps would be more appropriately made in another judicial or administrative jurisdiction and venue.

As stated above, it does appear that Mr. Johnson has a medical condition which restricts the prison work he is able to do. This has been acknowledged by the chief executive officer at NECX, Warden Carlton. However, the allegations Mr. Johnson has made in this case simply cannot be addressed in this litigation before the Tennessee Claims Commission.

Accordingly, this claim must be and is respectfully **DENIED**.

ENTERED this the 10th day of February, 2010.



William O. Shults, Commissioner
P.O. Box 960
Newport, TN 37822-0960

CERTIFICATE

I certify that a true and exact copy of the foregoing Order has been transmitted to:

Dexter Johnson, #130651
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Jennifer L. Brenner, Esq.
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This the 17th day of February, 2010.

