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

FILED
MAY 18 2009
Tennessee Claims Commission
CLERK'S OFFICE

DANNY ROGERS, #147104,	}	
	}	
Claimant,	}	
	}	
v.	}	**Claims Commission No. 20090424**
	}	**Small Docket**
STATE OF TENNESSEE,	}	
	}	
Defendant.	}	

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ORDER GRANTING STATE'S MOTION TO DISMISS

THIS MATTER is before the undersigned Commissioner of the Tennessee Claims Commission, Eastern Grand Division, on the State's Motion to Dismiss and Supporting Memorandum, Claimant's Complaint Form, affidavits on file, and upon the entire Record.

Motions pending before the Tennessee Claims Commission are to be decided without oral argument pursuant to Tennessee Claims Commission Rules, Rule 0310-1-1-.01(5)(a) unless otherwise ordered. There has been no order for oral argument in this matter. Further, there has been no motion by either party for oral argument. Therefore, the State's Motion is properly before the Commission and will be heard on the record.

Facts.

This case involves the claim of Mr. Danny Rogers who is currently an inmate at the Tennessee Department of Correction's ("TDOC") Northeast Correctional Complex ("NECX") in Mountain City, Johnson County, Tennessee.

Mr. Rogers' claim invokes the Commission's jurisdiction pursuant to Tennessee Code Annotated, Sections 9-8-307(a)(1)(A), (C), (E), and (N), and alleges that due to the negligent and gross actions and omissions of state employees at NECX, carried out while acting under color of law, his

rights and privileges under the United States Constitution and the Constitution of the State of Tennessee have been violated.

Mr. Rogers' Notice of Claims for deprivation of statutory and constitutional rights was received by the Division of Claims Administration in Nashville, Tennessee, on October 9, 2008, and was transferred to the Tennessee Claims Commission pursuant to Tennessee Code Annotated, Section 9-8-402(c) on January 8, 2009.

The underlying facts Mr. Rogers has alleged in support of his claims fall into four basic categories.

First, Mr. Rogers alleges that a liberty interest, created by TDOC policy number 503.07, has been violated in that the Warden at NECX has denied him the opportunity to marry while he is incarcerated in a maximum security portion of the NECX facility. Rogers also alleges that the Warden has informed him that he could marry once he is entitled to again have visitors.

Secondly, Mr. Rogers alleges that an ACE bandage which he had been provided at another TDOC facility for a left knee condition was inappropriately mailed out to his home in Chattanooga, Tennessee, and that he was not provided a replacement bandage for the same condition.

Third, Inmate Rogers alleges that he has been denied the opportunity to have one of his teeth crowned even though he claims his mother had offered to pay the expense necessary for such a dental procedure.

Finally, Mr. Rogers' claims that on July 6, 2008, he was inappropriately exposed to pepper spray by a correctional officer who sprayed him through the "pie hole" in his cell door which caused him some discomfort for a period of time.

Mr. Rogers alleges that the State owes him a duty to prohibit its employees from violating his United States Constitutional Rights under the Eighth Amendment and statutory rights prohibiting violation of civil rights under Title 18, Section 241 of the United States Code. Mr. Rogers claims that

in 1984, the General Assembly waived sovereign immunity under certain conditions and that both the State and its employees knew or should have known that they have no "qualified immunity" regarding any of their actions. He contends that his constitutional and federal rights were violated by the officer who subjected him to the pepper spray.

Mr. Rogers argues that Tennessee Code Annotated, Section 9-8-307(a)(1)(N) gives this Commission jurisdiction over claims alleging "negligent deprivations of statutory and constitutional rights". His petition closes with a demand for damages in the amount of seventy thousand dollars ($70,000.00).

On February 5, 2009, the State filed a Motion to Dismiss Mr. Rogers' claim to which he has not responded. The State's Motion is therefore ripe for decision by the Commission.

Decision.

Standards Applicable on Motions to Dismiss.

The State has filed a Motion to Dismiss Mr. Rogers' claims pursuant to the Tennessee Rules of Civil Procedure, Rules 12.02(1) and (6) citing a lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

Rules 12.02(1) and (6) provide as follows:

> **12.02. How Presented.** – Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in writing: (1) lack of jurisdiction over the subject matter, ... (6) failure to state a claim upon which relief can be granted, …

In *Northland Ins. Co. v. State*, 33 S.W.3d 727 (Tenn. 2002), the Tennessee Supreme Court set out the standard which the Commission must use in ruling on a motion to dismiss for lack of subject matter jurisdiction. There, the Court wrote as follows:

> A motion to dismiss for lack of subject matter jurisdiction falls under

> Tennessee Rule of Civil Procedure 12.02(1). The concept of subject matter jurisdiction involves a court's lawful authority to adjudicate a controversy before it. ... Subject matter jurisdiction involves the nature of the cause of action and the relief sought, ... and can only be conferred on a court by a constitutional or legislative act. *Id.* at 729, (emphasis supplied, citations omitted.)

Under Rule 12.02(6) a claim must be dismissed when, after construing a complaint liberally and taking all allegations set out therein as true, the Commission finds beyond doubt that the Claimant cannot prove any set of facts in support of his claims which would entitle him to relief. *Sullivant v. Americana Homes, Inc.*, 605 S.W.2d 246, 248 (Tenn. Ct. App. 1980).

The Commission will address each of the four categories of claims which Mr. Rogers has asserted in this case.

Claim Involving Pepper Spray Event of July 6, 2008.

Mr. Rogers asserts that on July 6, 2008, a correctional officer introduced pepper spray into his cell causing a period of discomfort for him because of the effects of the spray. Quite obviously, as alleged by the Claimant, the acts of the correctional officer constitute intentional actions.

Tennessee Code Annotated, Section 9-8-307 sets out the jurisdiction of this Commission. By virtue of that Section of the Code, the State of Tennessee has waived, in part, its sovereign immunity against suit in certain closely defined areas. Tennessee Code Annotated, Section 9-8-307(d) provides, as applicable here, that "...the state will not be liable for willful, malicious, or criminal acts by state employees..."

Clearly, Mr. Rogers has alleged a willful act on the part of a correctional officer, who has now resigned, in introducing pepper spray into his cell. However, the Tennessee Claims Commission Act, per the language just recited, has made it clear that the State has not waived its immunity against suit for such an intentional act by an employee. The Tennessee Supreme Court, in *Shell v. State*, 893 S.W.2d 416, 419 (Tenn. 1995), has confirmed this proposition. Therefore, Mr. Rogers' claim

regarding this event is not justiciable before this Commission.

An Analysis of Mr. Rogers' Constitutional Claims and Claims Under 42 U.S.C. 1983.

With regard to each of his claims, Mr. Rogers invokes the Commission's jurisdiction under Tennessee Code Annotated, Sections 9-8-307(a)(1)(A), (C), (E), and (N), and asserts that actions or inactions on the part of state employees at NECX violated his rights and privileges under the United States Constitution and the Constitution of Tennessee.

In particular in this regard, Mr. Rogers alleges that a liberty interest involving the right to marry his long-time girlfriend created pursuant to TDOC policy 503.07 has been abridged.

First of all, the Tennessee Claims Commission Act contains no waiver of the State's sovereign immunity in a case where there has been an alleged failure to comply with TDOC policy. (See Tenn. Code Ann. § 9-8-307, et. seq. and *Reid v. State*, 9 S.W.3d 788, 796 (Tenn. Ct. App. 1999).) The Court also addressed this issue in *Dailey v. State*, 869 S.W.2d 338 (Tenn. Ct. App. 1993) where it wrote as follows:

> If the General Assembly had intended to remove sovereign immunity of the state to allow claims for negligent deprivations of rights created by a state agency regulation, it could just as well included the term 'regulatory rights' as it had at one point included the provision 'constitutional rights'. *Id.* at 340.

This Commission has also addressed this issue in previous decisions. In *Haynes, Hunt and Thompson v. State*, claim numbers 86356, 85710, and 84949 (Tenn. Claims Comm., July 3, 1990), cited in *Gordon v. State*, No. W2005-00048-COA-R3-CV, 2005 WL 3504615 (Tenn. Ct. App.), the Commission observed the following:

> There is nothing in TCA § 9-8-301, et. seq. which authorizes the Commission to review whether the Department of Corrections abides by its own policies in dealing with inmates. The Claims Commission is not authorized to serve as an 'appellate court' to which inmates may turn when they feel the Department of Corrections has violated one of its own policies. *Id.* at *4.

To the extent that any of Mr. Rogers' four categories of claims asserts a negligent deprivation of constitutional rights, including his claim regarding a right to marry, those claims are not properly brought before this Commission.

It is true that prior to 1989, the Commission did have jurisdiction over negligent deprivation of constitutional rights claims. However, following the United States Supreme Court's decision in *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 62, 88 L.Ed.2d 62 (1996), the General Assembly amended the Claims Commission's jurisdictional grant as discussed in *Shell v. State*, 893 S.W.2d 416 (Tenn. 1995). There, the Court explained the removal of this Commission's jurisdiction over that sort of claim:

> In May 1984, the General Assembly enacted legislation which waived the State's sovereign immunity under certain conditions. Acts of 1984, Ch. 972, 1984 Tenn. Pub. Acts 10026 (now codified at Tenn. Code Ann. § 9-8-307). In this Act, the legislature created the Tennessee Claims Commission to hear certain claims against the State; one of the claims the Commission was designated to entertain was for the 'negligent deprivation of statutory or constitutional rights'. ... This section was eventually codified at Tenn. Code Ann. § 9-8-307(a)(1)(N). In May 1989, as part of an Act modifying several provisions of section 9-8-307, the General Assembly deleted the words 'or constitutional' from section 9-8-307(a)(1)(N). Acts of 1989, Ch. 491, section 1, 1989 Tenn. Pub. Acts 853, 854. *Id.* at 418 (some internal citations omitted.)

Further, since Mr. Rogers has alleged a violation of certain constitutional rights, 42 U.S.C. § 1983 is implicated in this claim. That section of the United States Code provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, and equity, or other proceeding for redress. ...

However, on several occasions, the courts have held that the State is not a "person" under 42 U.S.C. § 1983, and therefore, a cause of action based on that federal statute cannot be brought against the State in this case. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105

L.Ed.2d 45 (1989); see also, *Lattimer v. Tenn. Dept. of Correction*, No. M2000-03126-COA-R3-CV, 2002 WL 598558 (Tenn. Ct. App.); *Bowden Building Corp. v. Tennessee Real Estate Com'n*, 15 S.W.2d 434, 438 (Tenn. Ct. App. 2000); and *Daniels v. Williams, supra*.

Although a section 1983 suit might arguably be brought against an individual in a Tennessee Circuit Court, there is absolutely no jurisdiction under the Tennessee Claims Commission Act which would permit the filing of Mr. Rogers' constitutional claims with this Commission.

Further, the 1989 General Assembly's actions removing the power of this Commission to entertain constitutional claims applies not only to actions based on the United States Constitution but also any claims Mr. Rogers may assert on the basis of a violation of the Tennessee Constitution and specifically, Article I, Section 17, of that Constitution.

To the extent any of Mr. Rogers' claims allege a negligent violation of a state or federal constitutional right, this Commission does not have jurisdiction to consider such allegations.

An Analysis of Mr. Rogers' Claims Under Tennessee Code Annotated,

Sections 9-8-307(a)(1)(A), (C), and (N).

Mr. Rogers also has alleged jurisdiction in the Commission over each of his four claims pursuant to Tennessee Code Annotated, Section 9-8-307(a)(1)(A), (C), (E), and (N).

Those four provisions provide 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:
>
> **(A)** The negligent operation or maintenance of any motor vehicle or any other land, air, or sea conveyance. In addition, the state may be held liable pursuant to this subdivision for the negligent operation of state-owned motor vehicles or other conveyances by persons who are not state employees; provided, that such persons operated the vehicle or other conveyance with the permission of a state employee;

. . . .

> **(C)** Negligently created or maintained dangerous conditions on state controlled real property. The claimant under this subdivision (a)(1)(C) must establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures;
>
> . . . .
>
> **(E)** Negligent care, custody and control of persons;
>
> . . . .
>
> **(N)** Negligent deprivation of statutory rights created under Tennessee law, except for actions arising out of claims over which the civil service commission has jurisdiction. The claimant must prove under this subdivision (a)(1)(N) that the general assembly expressly conferred a private right of action in favor of the claimant against the state for the state's violation of the particular statute's provisions;

a.) Based on the allegations contained in Mr. Rogers' filing, there simply are no facts alleged which would suffice to give this Commission jurisdiction under the provisions of the Tennessee Claims Commission Act, subsections 9-8-307(a)(1)(A), (C), and (N) over the sorts of claim he has asserted here.

First, here there is no involvement whatsoever of a state vehicle in any of Mr. Rogers' claims which would implicate subsection A of Section 9-8-307(a)(1). Secondly, with regard to section 9-8-307(a)(1)(N), Mr. Rogers has failed to identify, as specifically required by that subsection, a statute "...expressly confer[ing] a private right of action in [his] favor...against the state for [the] state's violation of the particular statute's provisions;...". This is an absolute requirement under subsection N and Claimant has identified no such statutory right running in his favor in connection with the claims he has asserted here. This holding would apply to Mr. Rogers' claims regarding his right to marry, the alleged right to have a replacement ACE bandage provided, the refusal to let him have one of his teeth crowned, and the pepper spray incident of July 6, 2008. Third, with regard to Tennessee Code Annotated, Section 9-8-307(a)(1)(C), Mr. Rogers has failed to identify a negligently created and dangerous condition on State property which was foreseeable to the State and which the State was advised about in sufficient time for it to have had an opportunity to remedy the problem. This failure

precludes his action under subsection C.

b.) **Mr. Rogers' Claims Under Tennessee Code Annotated, Section 9-8-307(a)(1)(E).**

Mr. Rogers' seemingly alleges negligent care, custody, and control of his person in that the State mailed out an ACE bandage which he arrived with at NECX and secondly, that the State has failed to agree that he should be permitted to have one of his teeth crowned in a procedure to be paid for by his mother.

In this file, there is a memorandum to Mr. Rogers from the Health Administrator at NECX dated March 27, 2008, denying the requested crowning procedure on the basis that it was not medically indicated and that permitting him to undergo such treatment "...would be unfair to others in need of treatment" pursuant to TDOC policy # 113.60C-1.

Prison officials owe inmates a duty "to exercise ordinary and reasonable care for the protection of the persons in their custody." *Cockrum v. State*, 843 S.W.2d 433, 436 (Tenn. Ct. App. 1992).

The State correctly observes that in cases alleging negligence under the Tennessee Claims Commission Act, Tennessee Code Annotated, Section 9-8-307(c) measures such claims on the basis of traditional tort concepts and the reasonably prudent person's standard of care.

Traditional tort law requires that in any negligence case, the Claimant prove a duty owed by the State, conduct falling below the applicable standard of care amounting to a breach of the duty, an injury or loss, causation in fact, and proximate or legal cause. See *Coln v. City of Savannah*, 966 S.W.2d 34, 39 (Tenn. 1998), overruled on other grounds by *Cross v. City of Memphis*, 20 S.W.3d 642 (Tenn. 2000); see also, *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991).

The initial hurdle in any case is establishing a duty owed. Duty has been defined by the Tennessee courts as a legal obligation to conform to a reasonable person standard of conduct. The standard of conduct in a negligence action is always the same -- reasonable care in light of the

apparent risk. *Kellner, et al. v. Budget Car and Truck Rental, Inc., et al.*, 359 F.3d 399 (6th Cir. 2004), at 403; citing *Pittman v. Upjohn Company*, 890 S.W.2d 425, 428 (Tenn. 1994).

In determining whether or not a duty is present, a delicate balance must be found between the foreseeability and gravity of the consequence flowing from a potential defendant's action or inaction as compared to the burden facing the potential tort-feasor in taking measures to avoid such a consequence. *Staples v. CBL and Associates, Inc.*, 15 S.W.3d 83 (Tenn. 2000). A breach of duty occurs when a defendant fails to exercise reasonable care under the circumstances. *Kellner, supra*, at 403.

If a duty is proven, then secondly, proof that the duty owed has been breached must be presented by the Claimant.

Here, Mr. Rogers has failed to set out any medical justification necessitating the provision to him by the State of a new ACE bandage. Likewise, Mr. Rogers has failed to establish a duty owed to him and identify a breach of that duty in NECX's denial of the crowning of one of his teeth. In fact, the memorandum attached to his claim clearly sets out facts indicating that crowning the tooth would require cutting away good tooth structure and that as late as 2006, no decay was evident around the tooth. Further, the memorandum indicates that good dental hygiene as well as prophylactic examinations available to Mr. Rogers at the prison annually could forestall any problems with the tooth Mr. Rogers sought to have crowned.

In addition to the failure of Mr. Rogers' claim to identify a duty, regarding these two issues, and a breach of those duties, he has failed to allege in his Complaint any damages - the third element necessary to carry the burden of proof in a negligence action.

As previously discussed, any claim Mr. Rogers might have under Tennessee Code Annotated, Section 9-8-307(a)(1)(E) for "negligent care, custody and control of persons" are not viable here under Tennessee Code Annotated, Section 9-8-307(d) since those allegations arising from the pepper spray

incident assert willful actions on the part of a correctional officer.

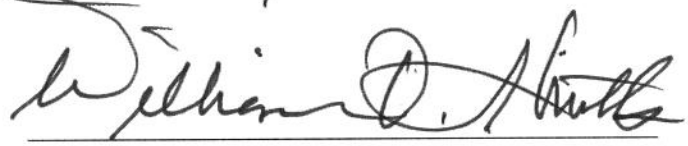
For these reasons, the Commission cannot and does not find that the State has breached the duty of ordinary and reasonable care of prisoners discussed in *Cockrum, supra,* and therefore, any allegations regarding that care under Tennessee Code Annotated, Section 9-8-307(a)(1)(E) must be **DISMISSED**.

Finally, there is no provision in the Tennessee Claims Commission Act under the subsections referenced by Mr. Rogers that would apply to his complaints regarding the Warden's decision to deny him the right to marry until such time as he is permitted to once again have visitors.

Conclusion

There being no subject matter jurisdiction in the Commission regarding any of the Claimant's constitutional claims and no viable claims under subsections 9-8-307(a)(1)(A), (C), (E), or (N) of the Tennessee Claims Commission Act, this claim must be and hereby is **DISMISSED** in its entirety.

ENTERED pursuant to Tenn. R. Civ. P. 58 on this the 13th day of May, 2009.



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

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing document has been forwarded to:

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Kellena Baker, Esq.
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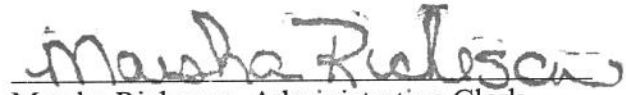
this the 18th day of May, 2009.



Marsha Richeson, Administrative Clerk