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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001148-MR

ANTHONY LEE — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 12-CI-00684

BOBBY W. STONE, IN HIS INDIVIDUAL CAPACITY,
TONY PESINA, IN HIS INDIVIDUAL CAPACITY,
EMMA TOWNSEND, IN HER INDIVIDUAL CAPACITY,
AND HENRY BRANHAM, IN HIS
INDIVIDUAL CAPACITY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JONES, JUDGES.

JONES, JUDGE: Anthony Lee appeals from an order of the Clark Circuit Court granting summary judgment in favor of all Appellees, who had moved for

summary judgment on the basis of qualified immunity. For reasons more fully explained below, we affirm the Clark Circuit Court's Order.

I. BACKGROUND

On November 21, 2011, Anthony Lee was taken to the Clark County Detention Center ("CCDC"). Upon arriving at CCDC, Lee was interviewed by Deputy Jailer Tony Pesina, pursuant to CCDC booking procedures. Lee was then escorted to his jail cell, where he began playing cards with a few of his fellow cellmates. Approximately one hour later, Lee was attacked and severely beaten by his cellmates. The beatings were unprovoked and lasted for approximately two hours. Once guards were notified and discovered Lee in his beaten condition, he was immediately transferred to the local hospital, and then further transferred to the University of Kentucky Hospital, where he underwent surgery on his jaw for multiple fractures. Lee now has metal plates in his face and nerve damage, causing him to have no feeling in the lower half of his face.

The following November, Lee filed the present suit against Clark County Jailer Bobby W. Stone, Clark County Judge Executive Henry Branham, and Deputy Jailers Tony Pesina and Emma Townsend (collectively, the "Appellees") on the basis of negligence. Specifically, Lee alleged that Jailer Stone had been negligent in developing a classification policy for CCDC that did not meet all the requirements set forth in 501 KAR[1] 3:110; that Judge Branham had been negligent in approving that policy when it did not meet the requirements set

[1] Kentucky Administrative Regulations.

forth in 501 KAR 3:110;[2] and that Jailer Pesina, as the jailer who booked Lee, and Jailer Townsend, who was the shift commander at the time Lee was booked, had been negligent in placing Lee in a cell with inmates who were known to have violent propensities.

In August of 2014, Appellees moved the trial court to dismiss Lee's claims against them on summary judgment. In support of their motion, Appellees argued that each was entitled to qualified immunity and, as such, could not be held liable for Lee's claims. Appellees contended that, under Kentucky law, a jailer's determination on how to implement and enforce a classification system created under 501 KAR 3:110 is a discretionary function, which all relevant parties performed in good faith. Appellees additionally noted that the only party who had contact with Lee on the night of the incident at issue was Jailer Pesina. As to Judge Branham, Appellees contended that his approval of CCDC's classification policy was also a discretionary function, which Judge Branham fulfilled in good faith. Further, Appellees asserted that, contrary to Lee's claims, the inmate classification system used at CCDC and developed by Jailer Stone was compliant with 501 KAR 3:110, in that the policy contains criteria that deputy jailers must consider when classifying inmates and provides for housing assignments based on those classifications. Among the attachments to Appellees' memorandum in support of their motion for summary judgment were an affidavit from Jailer Stone and an affidavit from Jailer Pesina. Jailer Stone's affidavit stated that all deputy

[2] Lee's complaint did not state which of the requirements of 501 KAR 3:110 CCDC's classification policy failed to meet.

jailers had been trained to interview inmates to obtain information that may be useful for inmate classification purposes and to categorize inmates based on their level of risk. Jailer Pesina's affidavit stated that he had interviewed Lee pursuant to Jailer Stone's procedures before classifying Lee and placing him in the cell. Further, Jailer Pesina averred that, prior to placing Lee in his cell, he reviewed what other inmates were detained and in what cells those inmates were housed to ascertain if there could be a potential conflict.

In response, Lee argued that Jailer Stone and Judge Branham's respective duties to write and approve a classification policy in congruence with 501 KAR 3:110 are ministerial, and therefore, their noncompliance with those duties divests them of the protection of qualified immunity. Additionally, Lee contended that Jailers Pesina and Townsend were not entitled to qualified immunity because their negligent acts and/or omissions were ministerial in nature; in the alternative, Lee alleged that Jailers Pesina and Townsend were not entitled to qualified immunity because they performed discretionary duties in bad faith.

Lee's response to Appellees' motion for summary judgment also explained his reasoning behind the assertion that the CCDC classification policy was incompliant with 501 KAR 3:110. Lee pointed out that the regulation mandated that a prisoner classification system provide for the separation of certain categories of prisoners, including "a prisoner with a tendency to harm others, be harmed by others, or requiring administrative segregation and other prisoners[.]" Lee argued that CCDC's classification policy failed to abide by this mandate, in

that it failed to include a statement that prisoners with a tendency to harm others shall be separated from other prisoners. Lee acknowledged that CCDC's classification policy did include factors required to be considered when booking and classifying inmates, including the prisoner's sex, age, offense, legal status, history of violent or disruptive behavior, evidence of homosexuality or vulnerability to attack, evidence of mental or physical handicap, evidence of communicable disease, evidence of suicidal tendency, and evidence of disciplinary problems.

For reasons that are unclear from the record, the motion for summary judgment was not ruled on until July 5, 2016, almost two years later. The trial court granted summary judgment in favor of the Appellees, simply stating that "the Court finds that there are no genuine issues of material fact and the [Appellees] are entitled to judgment as a matter of law." This appeal followed.

II. Standard of Review

"The circuit court's decision to grant summary judgment is reviewed *de novo*." *Harstad v. Whiteman*, 338 S.W.3d 804, 809 (Ky. App. 2011) (citing *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001)). "In reviewing a trial court's grant of a motion for summary judgment, we must ascertain 'whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.'" *Henninger v. Brewster*, 357 S.W.3d 920, 924 (Ky. App. 2012) (quoting *Scrifes v.*

Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996); CR[3] 56.03). "All doubts are to be resolved in favor of the party opposing the motion [for summary judgment]." *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). "The party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *Id.*

III. Analysis

When sued in their individual capacities, as is the case here, "public officers and employees enjoy . . . qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment." *Yanero v. Davis*, 65 S.W.3d 510, 521 (Ky. 2001). Qualified immunity is only applicable when a public officer or employee, acting in good faith, negligently performs a discretionary act or function that is within the scope of his authority. *See id.* at 522. Discretionary acts are "those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment . . . . " *Id.* "An act is not necessarily 'discretionary' just because the officer performing it has some discretion with respect to the means or method to be employed." *Id.* (quoting *Franklin Cty. v. Malone*, 957 S.W.2d 195, 201 (Ky. 1996)). In contrast, an officer or employee who negligently performs a ministerial act is afforded no immunity from liability. *Id.* Ministerial acts include acts "that require[] only obedience to the orders of others, or when the officer's duty is

[3] Kentucky Rules of Civil Procedure.

absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Id.* (quoting *Franklin Cty*., 957 S.W.2d at 201). On appeal, Lee contends that the trial court erred in finding that there were no genuine issues of material fact as to all parties' entitlement to qualified immunity

Lee argues that Jailer Stone is not entitled to qualified immunity because his duty to create a classification policy compliant with 501 KAR 3:110 is ministerial. Likewise, Lee argues that Judge Branham is unable to claim the protection of qualified immunity because his duty to approve Jailer Stone's classification policy is a ministerial act under 501 KAR 3:110. If not for their negligence in failing to abide by their duties, Lee argues, his injuries would not have occurred.

Lee is correct that both Jailer Stone and Judge Branham's duties are considered ministerial. In pertinent part, 501 KAR 3:110 provides as follows:

> (1) Each jail ***shall*** develop a prisoner classification system, which shall be included in the facility's written policy and procedure manual.
>
> (2) The prisoner classification system ***shall*** provide for separation of the following categories of prisoners:
>
> (a) Male and female prisoners, except in diversion/holding;
> (b) Mental inquest detainee and other prisoners;
> (c) Mentally ill or mentally retarded prisoner and other prisoners;
> (d) Chemically incapacitated prisoner and other prisoners;
> (e) A prisoner with a tendency to harm others, be harmed by others, or requiring administrative segregation and other prisoners; and

(f) A prisoner with a communicable disease and other prisoners.

(3) The criteria to be used in the classification of other prisoner categories ***shall*** be as follows:
(a) Seriousness of current offense;
(b) Institutional behavioral history;
(c) Special needs;
(d) Known criminal history[.]

(Emphases added). The use of the word "shall" indicates that these duties are mandatory and, therefore, ministerial. *See Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 296 (Ky. 2010) ("In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command and . . . must be given a compulsory meaning."); *see also Carl v. Dixon*, No. 2010-CA-000676-MR, 2011 WL 919896, at *3 (Ky. App. Mar. 14, 2012) (finding that the duty to create a prisoner classification system under 501 KAR 3:110 is ministerial).[4] Lee does not dispute that Jailer Stone created, and Judge Branham approved, a policy under the directive of 501 KAR 3:110. Rather, he contends that because the policy created by Jailer Stone does not require the shift commander or any jail employee to assess the violent tendencies or behavior of prisoners *already* in the jail to determine where an incoming inmate should be placed, it does not comport with the requirement that "prisoners with a tendency to harm others . . . and other prisoners" be housed separately.

While CCDC's classification policy does not include the exact language that Lee contends it should, a review of the record shows that it is

[4] We do not cite *Carl v. Dixon* as precedent. We cite the case to insure jurisprudential consistency in the absence of any published authority directly on point. *See* CR 76.28(4)(c).

nonetheless compliant with the mandates of 501 KAR 3:110. The CCDC classification policy states, in pertinent part, as follows:

> A. For the preservation of security and for order of the jail and its staff, every inmate shall be classified upon admission to the facility and shall be assigned housing according to classification. . . .
>
> B. The shift commander shall review the admissions records and any existing facility records concerning the inmate for the following information:
>
> 1. sex
> 2. age (juvenile or adult)
> 3. offense
> 4. legal status
> . . .
> 5. history of violent or disruptive behavior
> 6. evidence of homosexuality or vulnerability to attack
> 7. evidence of mental or physical handicap
> 8. evidence of communicable disease
> 9. evidence of suicidal tendency
> 10. evidence of disciplinary problems
>
> C. This information shall be used by the shift commander to assure proper classification.
>
> . . .
>
> E. The Jailer or his designee shall review all classification assignments frequently.

Included in the factors that the shift commander is required to consider under the CCDC classification policy when classifying inmates are the inmate's "history of violent or disruptive behavior" and the inmate's "vulnerability to attack." Further, the policy mandates that the jailer review inmate classification assignments "frequently" to ensure proper housing. This complies with 501 KAR 3:110's

requirement that the classification system shall provide for the separation of prisoners with a tendency to harm others from other prisoners. Therefore, Jailer Stone complied with his ministerial duty to create such classification, and Judge Branham complied with his ministerial duty to approve the classification policy.

Lee additionally argues that Jailers Townsend and Pesina cannot claim qualified immunity. Lee contends that Jailer Townsend had a ministerial duty, which she did not fulfill, to review admissions records and existing faculty records to ensure that Lee was properly housed. As to Jailer Pesina, Lee argues that he had a ministerial duty to separate prisoners with a known tendency to harm others from other inmates, a duty that he failed when he placed Lee in his jail cell the night the incident occurred. In the alternative, Lee argues that both Jailer Townsend and Jailer Pesina performed discretionary duties in bad faith, in that they violated his clearly established right to be separated from violent inmates.

As an initial matter, we do not agree with Lee that the duties of Jailer Townsend and Jailer Pesina are ministerial. As stated above, discretionary acts are "those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment . . . ." *Yanero*, 65 S.W.3d at 522. The CCDC classification policy sets out *factors* to be considered when classifying and housing prisoners. It does not give a precise formula for the booking officers to follow, nor does it give a guide on what weight to give to each factor. Utilizing the enumerated factors in making an inmate classification is mandatory; however, how those factors are weighed and what result the booking officer comes to is a matter of judgment.

It is a discretionary act. *See Carl*, 2011 WL 919896, at *3 ("While [Appellant's] duties under 501 KAR 3:110 are mandatory, his decisions on how to enforce the system involve the use of judgment and discretion in a legally uncertain environment.").

Lee's argument that Jailers Pesina and Townsend performed their discretionary duties in bad faith is unmeritorious. "Once the officer or employee has shown *prima facie* that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith." *Yanero*, 65 S.W.3d at 523 (internal citations omitted). "Thus, the proof required necessarily focuses on 'bad faith,' rather than 'good faith.'" *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 481 (Ky. 2006).

> "[B]ad faith" can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded to a person in the plaintiff's position . . . or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with corrupt motive.

Yanero, 65 S.W.3d at 523. For a right to be considered clearly established, "the factual context of the occurrence must not exemplify a '"legally uncertain environment" in which qualified official immunity is appropriate.'" *Sloas*, 201 S.W.3d at 482 (quoting *Jefferson Cty. Fiscal Court v. Peerce*, 132 S.W.3d 824, 834 (Ky. 2004)).

Lee takes the position that the facts of this case demonstrate that both Jailer Pesina and Jailer Townsend violated his clearly established right under 501 KAR 3:110 to be separated from prisoners with a tendency to harm others, as is evinced by the fact that he was harmed by his fellow cellmates. Lee is mistaken in his interpretation of 501 KAR 3:110. The regulation states that jails must: develop a prisoner classification system; include that system in their written policy and procedure manuals; and provide for the separation of, among other categories, prisoners with a tendency to harm others and be harmed by others in that classification system. 501 KAR 3:110(1), (2)(e). It states requirements for jails; it does not confer rights. One of the aims of 501 KAR 3:110 appears to be to prevent inmates from being severely beaten while incarcerated and to protect incarcerated inmates' Eighth Amendment right to be free from cruel and unusual punishment. However, to demonstrate that Jailers Pesina and Townsend had violated this right would require Lee to put forth evidence showing that the Jailers *knew* that Lee faced a substantial risk of serious harm and then disregarded that risk. *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970, 1984, 128 L.Ed.2d 811 (1994).

Lee has failed to present sufficient evidence demonstrating that Jailers Pesina and Townsend had knowledge that Lee would be subjected to a substantial risk of harm when he was placed in his cell. The only evidence offered by Lee is a hearsay statement from a CCDC employee, Robert Cruse, to Lee, in which Mr. Cruse told Lee that he should not have been put in a cell with the inmates who beat him – a comment made in hindsight. Lee did not seek to depose Mr. Cruse. Lee

did not seek to depose Jailers Pesina and Townsend or any of the inmates housed at CCDC. There is nothing in the record indicating that Jailer Pesina or Jailer Townsend had any knowledge that Lee would be subjected to a risk of harm if they placed him in the cell that they did. Lee has not argued that Jailers Pesina and Townsend acted with an intent to harm him or had any corrupt motive. Accordingly, we do not find any issue of material fact as to whether Jailers Pesina and Townsend acted in good faith.

III. CONCLUSION

Based on the foregoing, we affirm the order of the Clark Circuit Court.

ALL CONCUR.

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