

ORIGINAL

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COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2015 MAR 23 AM 11:27

PAUL JOHNSON,

Plaintiff,

v.

Case No. 2012-08907

**OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION**

Defendant.

Magistrate Anderson M. Renick

**MEMORANDUM OF PLAINTIFF PAUL JOHNSON CONTRA
DEFENDANT'S OBJECTIONS TO THE MAGISTRATE'S DECISION**

I. INTRODUCTION AND GENERAL RESPONSE:

This is the era of comparative negligence and it is clear Defendant's food service coordinator allowed an untrained prisoner to use and operate a dangerous food slicer, knowing it did not have a guard on it. (See Deposition of Theresa Fetters, p. 13, 16.)

The Tenth District Court of Appeals in *Jenkins v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-787, 2013-Ohio-5106, in ¶ 8, states as follows:

In the context of a custodial relationship between the state and its prisoners, the state owes a common-law duty of reasonable care and protection from unreasonable risks. *McCoy v. Engle*, 42 Ohio App.3d 204, 207 (10th Dist.1987)...

The Supreme Court of Ohio in *Davison v. Flowers*, 123 Ohio St. 89, 174 N.E. 137 (1930), at page 93, defines "negligence" as follows:

Under the situation thus developed, the court charged the jury as follows: "Negligence is a failure to do what a reasonable and prudent person would ordinarily have done under all the conditions and circumstances of the particular situation, or the doing of what such a person under such conditions and circumstances would not have done. In other words, it is the failure to exercise ordinary care."

Black's Law Dictionary, (5th Edition, 1983) defines "ordinary care" as follows, at

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page 570:

Ordinary care. That degree of care which ordinarily prudent and competent person engaged in same line of business or endeavor should exercise under similar circumstances, and in law means same as "due care" and "reasonable care." That care which reasonably prudent persons exercise in the management of their own affairs, in order to avoid injury to themselves or their property, or the persons or property of others. Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances, as shown by the evidence in the case.

Theresa Fetters not only allowed Johnson to operate the equipment without the guard, but did not realize she was to have utilized only inmates who were trained. Fetters Depo, 15-16.

R.C. 2921.44(C)(5) requires compliance with policies and procedures. See: *State ex rel. Carter v. Schotten*, 70 Ohio St.3d 89, 1994-Ohio-37, 637 N.E.2d 306, at 93.

Fetters simply allowed an inmate who was not trained and who she knew little about to do a job that could and did result in injury. Fetters Depo, 18-19. In fact, Theresa Fetters had never used the equipment before. Fetters Depo, 20. She admitted she received a list of inmates assigned to her and Paul Johnson was not one of them. Fetters Depo, 24.

The incident report of Theresa Fetters, attached to her deposition, acknowledges her complete and utter lack of care, for it provides:

Sambers was in charge of cutting cheese but after awhile I noticed that Johnson (637985) was cutting cheese. After watching Johnson slice cheese I noticed that he was not using the guard so on several occasions I asked Johnson to use it. The next thing I new was Johnson pulling back and yelling he cut his finger and all I could see is blood.

Considering Johnson's lack of experience, training, his inmate status making it impossible to refuse a direct order, it is not proper to say he was so aware of the danger that he was more than 50% responsible. Johnson was neither trained nor authorized to do the job. Plaintiff Johnson was an inmate with little food service experience other than the short while

he worked as a utility worker in the kitchen at the Allen Correctional Institution. Johnson was never trained and had been in the kitchen for only a short time.

Plaintiff testified he received a direct order to slice the cheese and understood he could not refuse. This was confirmed by Inmate Samber in his deposition, at page 11. There was an urgency to getting the cheese sliced so the food could be distributed. Johnson did not or could not articulate how he got his finger cut off. Samber Depo, 9.

Magistrate Renick saw and heard Johnson's testimony. The Magistrate's findings, contained at pages 1 and 2 of his Decision, summarize his conclusion as follows:

...According to plaintiff, he informed Fetters that he was not properly trained to use the slicer; however, she gave him a direct order to use the machine to slice cheese for the sandwiches. Plaintiff described the cheese he was provided as blocks of "government" cheese that were approximately one foot long.

Plaintiff identified a picture of a slicer which he believed was similar to the one that he had operated and he explained that there were at least two somewhat different models that were used in the bakery. (Plaintiff's Exhibit 10.) Plaintiff testified that Samber told him to put the cheese blocks on the slicer, but he did not otherwise train plaintiff on the use of the machine. Plaintiff stated that he had never used such equipment before the day of the incident. Plaintiff related that the machine he used continued to run after the block of cheese had been sliced and that he did not turn the machine off before placing another block of cheese onto the slicer. Plaintiff testified that he had sliced a couple of blocks of cheese and he was placing a new block of cheese on the slicer when fingers on his left hand contacted the blade of the slicer.

Magistrate Renick's findings as to Theresa Fetters, are as follows, at pages 3-4 of his Decision:

Theresa Fetters, the kitchen coordinator who was on duty at the time of the incident, testified by deposition that she worked as a contract employee for "Diversity Group," and that she was trained and supervised by defendant's employees to serve in place of defendant's food service workers who were on leave. At the time of the incident, Fetters had been working at ACI for approximately one month. Fetters testified that she received a two-hour training session on defendant's policies and procedures, followed by on-the-job training. Fetters stated that she did not receive specific training regarding supervising inmates using the slicer. Her primary duties included supervising inmates who cooked and cleaned in the kitchen. Fetters recalled that plaintiff

began operating the slicer after Samber gave her "a hard time" and she estimated that she was approximately 30 feet away from plaintiff when the incident occurred. Fetters testified that she noticed plaintiff was using the slicer without a guard in place and that she instructed him several times to use the guard. Fetters described the guard as a device that was designed to "flip up" to allow the user to load food onto the slicer, but plaintiff did not replace the guard when he operated the machine. Fetters testified that she did not know either plaintiff's job assignment or whether he had been trained to use the slicer. According to Fetters, if plaintiff had flipped the guard down after he placed the block of cheese on the slicer, his fingers could not have come into contact with the blade. Fetters testified that she was not watching plaintiff when he cut his fingers.

Magistrate Renick, at pages 4 and 5 of his Decision, further found:

Although Fetters was employed by a private contractor, there is no dispute that she worked under the direction and control of defendant's employees, that she was expected to follow defendant's policies, rules, and procedures, and that she had the authority both to give direct orders to plaintiff and to issue citations in the event that he disobeyed her orders or otherwise violated defendant's rules. Therefore, the court finds that Fetters was an agent of defendant during the time in question. See *Wright v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-153, 2014-Ohio-4359.

The Magistrate then concluded that plaintiff to a degree violated his duty to utilize ordinary care and then analyzed the evidence and determined his actions contributed to a 40% level. The Court, in doing an independent analysis, must conduct a de novo independent review to determine if the Magistrate's analysis was supported by credible evidence. The definition of ordinary care supports Magistrate Renick's determination since Johnson must be judged by his prior experiences, his lack of training, his present circumstances, and the pressure he was under to perform a task he had not done before and for which he received no formal training.

Magistrate Matthew Rambo in *Morgan v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2010-05986, 2011-Ohio-4852, (Mag. Dec. Aug. 1, 2011), conducted the same analysis when Inmate Morgan cut the tip of his finger off. In *Morgan*, as in this case, the inmate was using the machine in an unsafe manner with the knowledge of the coordinator who failed to

stop him. In assessing Morgan's actions, Magistrate Rambo found, at pages 1-2 of his decision:

According to plaintiff, this particular task was part of his duties in the LCI officer's dining room kitchen and he had performed the task "at least once a week for eighteen months" before the incident. Plaintiff testified that the safety guard cannot be effectively used during the second and third steps of the process because the turkey is too "flimsy." Plaintiff also testified that while knives are available in the kitchen for slicing the turkey logs, the deli slicer was faster and the knives were frequently being used by other inmates to cut vegetables and other food items. However, plaintiff admitted that he was running late and that he was working that afternoon because he and his fellow inmates had not finished cutting the turkey logs that morning.

Magistrate Rambo then assessed 40% comparative negligence on Morgan. Note Morgan was trained, it was a job he performed for eighteen months, and he was hurried because he was running late.

In *Shawn Martin v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2003-04899, 2007-Ohio-5421, Magistrate Renick found in plaintiff's favor where food coordinators were aware of Martin's utilizing unsafe practices and again diminished the award by 40% because of comparative negligence.

Based on the totality of the circumstances, Magistrate Renick correctly assessed the part Johnson played in the accident. Johnson could have been stopped and should not have been slicing cheese since he was not trained. He should not have been allowed to continue when Fetters saw him operating improperly. He was not even on her roster of inmates assigned to her.

Both Magistrate Renick and Magistrate Rambo properly judged the amount of lack of ordinary care demonstrated in the cases cited, based on the inmates' background, work experience, training, their inability to make free choices and fear of violating a direct order, resulting in a trip to segregation and loss of job. The defense refuses to judge plaintiff on these factors and judges Johnson as a reasonable, well-educated, free person.

II. INDIVIDUAL RESPONSES TO DEFENDANT'S ENUMERATED OBJECTIONS ARE AS FOLLOWS:

Defendant's Objection A.) The Magistrate erred in admitting Plaintiff's Exhibits 1, 2, 3, 4, and 5 (over Defendant's objection) as they were clearly hearsay and inadmissible.

The defense objects to the following exhibits:

Exhibit 1 - Informal complaint resolution

Exhibit 2 - Notice of grievance

Exhibit 3 - Disposition of grievance

Exhibit 4 - Appeal to Chief Inspector

Exhibit 5 - Decision of Chief Inspector

The definition of "hearsay" contained in Evid.R. 801(C) as follows:

(C) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Exhibits 1 and 2 are statements by Defendants in official documents adopted by Defendants to allow inmates to secure relief from perceived misconduct by Defendants.

The bottom of Exhibit 1 is Defendant's response to Plaintiff's informal complaint. Plaintiff's Exhibit 3 is the Defendant's response to his grievance admitting he should not have been operating the machine without training and that he did not receive training.

Exhibit 4 is again Plaintiff's appeal of the disposition of grievance, not a third party. Exhibit 5 is the Defendant's Chief Inspector's response to his appeal, again containing admissions as well as denials.

Not only were these admissions and statements of Defendant's agents and employees, they were also records and reports sanctioned and mandated by Defendant's policies, regulations and procedures, admissible under Evid.R. 801(D)(2) and Evid.R. 803(6)(8).

The Court of Appeals in *Jelinek v. Abbott Laboratories*, 10th Dist. Franklin No.

11AP-996, 2013-Ohio-1675, at ¶ 25, states:

{¶ 25} Evid.R. 801(D)(2) defines an admission by a party opponent as not hearsay. Insani was a party opponent in the 2011 trial. The rule applies to Insani's statement because the statement was "offered against a party and is * * * the party's own statement, in either an individual or a representative capacity." Evid.R. 801(D)(2)(a). Thus, the trial court erred in excluding Insani's statement.

They also are records of regularly conducted activity. All were discussed and identified by Plaintiff.

Defendant's Objection B.) The Magistrate erred in overlooking, misinterpreting, or ignoring Teresa Fetters' testimony that the plaintiff was told not to use the slicer without the safety guard in place.

Magistrate Renick summarized Ms. Fetters' testimony as to the use of the slicer, as follows, at page 3 of his Decision:

Theresa Fetters, the kitchen coordinator who was on duty at the time of the incident, testified by deposition that she worked as a contract employee for "Diversity Group," and that she was trained and supervised by defendant's employees to serve in place of defendant's food service workers who were on leave. At the time of the incident, Fetters had been working at ACI for approximately one month. Fetters testified that she received a two-hour training session on defendant's policies and procedures, followed by on-the-job training. Fetters stated that she did not receive specific training regarding supervising inmates using the slicer. Her primary duties included supervising inmates who cooked and cleaned in the kitchen. Fetters recalled that plaintiff began operating the slicer after Samber gave her "a hard time" and she estimated that she was approximately 30 feet away from plaintiff when the incident occurred...

Theresa Fetters testified at page 13 of her deposition, as follows:

Q. Okay. Well, when you looked and saw that the guard wasn't on there, did you ask Sambers what happened to the guard?

A. Sambers wasn't in the area.

Q. Well, did you ask Johnson where it was?

A. I asked Johnson on several occasions to put the guard on.

Q. I thought you only learned that Johnson was using the slicer when you looked back and saw him; isn't that correct?

A. I saw Johnson using it, yes, on several occasions.

Q. Before he cut his fingers?

A. Yes.

Q. And at that time, did you see that the guide wasn't on there?

A. Yes.

Q. Did you tell him not to?

A. I told him to put the guard on.

There is no misinterpretation. Theresa simply ignored the obvious and was the primary cause of the accident.

Defendant's Objection C.) The Magistrate erred in deciding that plaintiff (a convicted felon) was more credible in his testimony that he was given a direct order to use the cheese slicer when Teresa Fetters testified to the contrary.

Theresa Fetters was obviously in a position where she had to save face for her obvious lack of care. What she said made no sense. Why would Johnson simply start doing a job he had not been trained for? Fetters knew, as pointed out, she had assigned workers and Johnson was not one of them. Is she going to admit she ordered an untrained unassigned worker to do a job he should not have been doing?

Just because you are convicted of a felony does not mean that automatically discredits everything you say. Here, the Magistrate could consider it, compare it to Fetters, and decide. Theresa simply was not going to confess her mistake. Furthermore, Inmate Samber, at page 11 of his deposition, lines 7-11, says Theresa gave Johnson a direct order to slice cheese. Again, Defendant claims Samber's conviction automatically makes this a lie.

Defendant's Objection D.) The Magistrate erred in assigning any credibility to plaintiff's testimony when he repeatedly contradicted his prior sworn testimony at trial.

The defense utilizes a confusing rambling cross-examination of Johnson that simply points out Johnson's inability to explain how he cut his fingers. Defendants seem to think

cutting vegetables with a knife makes you capable, without training, to operate an automatic slicer. Basically Johnson explains he did once use a knife, but even that required training. R. 26, 27, 28. Johnson was a clean up man, a utility worker who was required to do a job he was neither trained nor experienced with.

Note knives are guarded and attached to tables. R. 21. At page 31 of Johnson's deposition, it is clear he thought the process was simple and he could handle it. Samber spent no length of time with Johnson. Johnson had never done the job before, nor had he had the formal training required.

The record is clear from Defendant's question that Johnson did not have a clue how the accident happened or how dangerous the machine could be. R. 37, 38. It is obvious Johnson did not have a clue as to when to shut it off or allow it to continue to function. Johnson's testimony makes it clear Johnson's accident came from his lack of training, experience, and his lack of ability. R. 32.

The Defendant's argument that these sections of the record establish lack of credibility are incorrect. As the court can tell, this inmate simply should not have been operating this machine and his ignoring possible danger has been assessed considering all of the factors we have discussed.

Defendant's Objection E.) The Magistrate erred in finding credibility to convicted murderer inmate Samber who testified that plaintiff only used the slicer for "not more than three minutes," when this is contradicted by plaintiff's own trial testimony of using the slicer for 15-20 minutes before his injury.

The Defendant's objection characterized Plaintiff's estimate of time as impeaching Samber or the Plaintiff, thus undermining the Magistrate's Decision.

Magistrate Renick, in his Decision, simply stated at page 2:

Inmate Samber testified by way of deposition that, at the time of the incident, plaintiff had recently started working in the bakery and that at the

beginning of their work shift, Samber was operating the slicer and plaintiff was removing sliced cheese from a pan to assemble the sandwiches. Samber stated that Fetters was in the bakery watching the inmates work when she gave plaintiff "the go ahead" to finish slicing the blocks of cheese. Samber testified that plaintiff told Fetters he was not trained to use the slicer, but Fetters gave plaintiff a direct order to perform the task, whereupon Samber instructed plaintiff on operating the machine...

Fifteen or twenty minutes is not a long time, nor is it inconsistent with Samber's estimate of two or three minutes. The estimate of time made by a witness is a guess, particularly when an estimate is made after the expiration of time. The Magistrate did not rely on or indicate acceptance of either estimate.

Defendant's Objection F.) The Magistrate erred in overlooking, misinterpreting, or ignoring evidence that the plaintiff admitted his own fault for the accident to Correctional Officer Governor Thompson.

Certainly a questionable statement, purportedly made by and denied by Plaintiff to the correctional officer bears little weight. The correctional officer had good reason to help his employer, and it must be judged in that light. Even if made, Plaintiff was in pain, minus the tips of two fingers. Certainly there is no way to analyze Magistrate Renick's feeling regarding this claim. This has no bearing on the analysis.

Defendant's Objection G.) The Magistrate erred in overlooking, misinterpreting, or ignoring evidence that plaintiff knew, prior to the accident, to keep his hands away from the moving slicer blade as that had been explained to him by inmate Samber prior to the accident.

The mere fact you are warned or realize a danger does not guarantee when you are not experienced, concerned about the job, and under pressure to get the job done, that the knowledge will protect you. Plaintiff should not have been placed in this position without training and without supervision. Certainly when the coordinator saw how he was using the machine, she should have stopped him.

Defendant's Objection H.) The Magistrate erred in not finding plaintiff at least 51% at fault as he admitted that if he had turned off the slicer between slicing blocks of cheese he would not have cut off his fingers.

Defendant's Objection I.) The Magistrate erred in not finding plaintiff at least 51% at fault for his injuries when he made a clear admission of negligence when he testified as follows: "If the machine was off my wouldn't have got (sic) cut off, yes. I think that's common sense, yes."

Defendant's Objection J.) The Magistrate erred in not finding plaintiff at least 51% at fault when plaintiff testified that his injury was caused when he put his hand in the moving slicer blade when he was placing a new block of cheese on the slicer.

Defendant's Objection K.) The Magistrate's Decision is against the manifest weight of the evidence.

Defendant's Objection L.) The Magistrate erred as a matter of law in finding that Defendant's acts and/or omissions caused plaintiff's injury.

Defendant's Objection M.) DRC breached no duty in this case and was not a proximate cause of this injury.

Defendant's Objection N.) Defendant incorporates all other objections contained in the Introduction and Conclusion.

These objections basically boil down to the fact Defendant claims the Magistrate should have analyzed and decided the case on the Defendant's theories of non-liability.

An inexperienced, untrained operator will and usually does make mistakes. The argument Plaintiff should have done certain things misses the point. Theresa Fetters should have stopped Plaintiff when she was alerted to the performance and better yet, he should not have been allowed to do the job.

Eric Morgan, an experienced operator, made a mistake, but in spite of it, was not the major contributing factor, nor was Plaintiff in this case.

How does the statement about turning off the machine make Plaintiff knowledgeable or more than 50% negligent? Defendant forgets this was a continuous process necessitating

continuous operation to meet the schedule. Again, what weight the Magistrate placed on such argument is obvious. Magistrate Renick weighed it with all factors. He looked at Johnson and how he should have conducted himself in the same and similar circumstances. The factors we have outlined justify 40% contributory negligence. The Magistrate heard and saw Paul Johnson and evaluated him.

The Court of Appeals in *Jelinek v. Abbott Laboratories*, 10th Dist. Franklin No. 11AP-996, 2013-Ohio-1675, at ¶ 11, points out even in a de novo review, that:

"It is well established that the decision to admit or exclude evidence is within the sound discretion of the trial court and that an appellate court will not disturb that decision absent an abuse of discretion. This is because the trial court is in a much better position than we are to evaluate the authenticity of evidence and assess the credibility and veracity of witnesses." (Citations omitted.) *America's Floor Source, L.L.C. v. Joshua Homes*, 191 Ohio App.3d 493, 2010-Ohio-6296, ¶ 27 (10th Dist.)...

Magistrate Renick is an experienced Magistrate with the ability to assess and determine comparative fault and did so.

Plaintiff is anything but clear on exactly how he cut his fingers off and considering his lack of experience, the need for producing, his lack of training required, this type of reasoning is meaningless. For all the reasons and arguments made, the Magistrate's Decision is not against the manifest weight of the evidence.

The Ohio Supreme Court in *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, summarizes the meaning of weight of weight of the evidence, at ¶ 12, as follows:

...Weight is not a question of mathematics, but depends on its *effect in inducing belief*.

(Emphasis sic.) *Id.* at 387, quoting *Black's* at 1594.

The Magistrate simply determined the Defendant, contrary to their own policies and procedures, placed an untrained inexperienced prisoner on a machine that was a danger to

the experienced, all over his protest. It was more than foreseeable that this accident would occur. It is clear a reasonable prudent coordinator would never have allowed an inmate, not on her roster, without required training and without knowledge of his qualifications to operate the machine. By every standard of violation of the duty of ordinary care, Defendants failed to meet the standard. The Magistrate did not commit an error of law or ignore the fact Defendant was not free of partial responsibility, nor did he fail to make the correct determination as to proximate cause. Assessing all factors, the Magistrate correctly evaluated contributory fault.

All objections should be overruled and the Magistrate's decision made an order of the Court.

Conclusion

Defendants have, in food service operations, consistently failed in their supervision and adherence to their own policies and procedures. Theresa Fetters was ill-trained, uninformed, and overwhelmed by the job. She drafted an inexperienced untrained prisoner to do a job he was not prepared for on a machine that presented an even more present danger.

Johnson could not disobey her direct order, but Theresa could have, when she observed his performance, stopped him. She did not, even after she admitted she saw him working without a safety mechanism.

The Magistrate, as in other cases decided by the court, weighed Plaintiff's contributory negligence, considered the factors we have outlined, and got it right.

The Court should accept the Magistrate's ruling.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Objections was served upon Brian M. Kneafsey, Jr., Assistant Attorney General, Court of Claims Defense, 150 East Gay Street, 18th Floor, Columbus, Ohio 43215, by regular U.S. mail, postage prepaid, on the 20th day of March, 2015.



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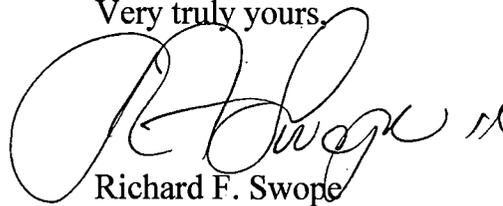
Re: *Paul Johnson v. Ohio Dept. of Rehab. & Corr.*
Case No. 2012-08907

Dear Sir or Madam:

Please find enclosed an original and two copies of a Memorandum of Plaintiff Paul Johnson Contra Objections to the Magistrate's Decision which we wish to file with the Court in the above-captioned case.

We would appreciate your filing the same and returning a file-stamped copy in the enclosed self-addressed envelope. Thank very much you for your cooperation. *RS*

Very truly yours,



Richard F. Swope

RFS/sr
Enclosures
cc: client