

FILED
COURT OF CLAIMS
OF OHIO

2021 DEC 17 AM 9:06

IN THE COURT OF CLAIMS OF OHIO

TERI GARKO

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

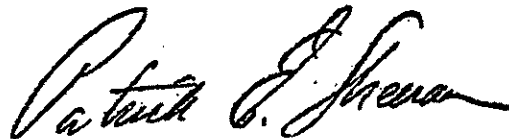
Defendant

Case No. 2020-00369JD

Judge Patrick E. Sheeran
Magistrate Holly True Shaver

JUDGMENT ENTRY

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. All other pending motions are DENIED as moot. All previously scheduled events are hereby VACATED. 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.



PATRICK E. SHEERAN
Judge

cc:

TERI GARKO
#W84140
Ohio Reformatory for Women
1479 Collins Ave
Marysville, OH 43040

Lauren D. Emery
Jeanna V. Jacobus
Lindsey M. Grant
Assistant Attorneys General
30 East Broad Street, 16th Floor
Columbus, OH 43215

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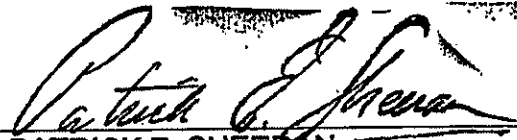
DECISION

"the party must demonstrate that a good faith effort was made to obtain the report" and must still identify the expert.

In support of its motion, defendant filed the affidavit of Jeanna Jacobus, counsel for defendant, wherein she avers that she never received any expert report from plaintiff. Defendant's motion and the affidavit of counsel attached thereto establish that plaintiff failed to disclose an expert and provide a report by the August 6, 2021 deadline previously set by the court.

The court finds there is no genuine issue of material fact regarding plaintiff's failure to retain an expert and provide a report. Lacking expert testimony, reasonable minds could only conclude that plaintiff cannot sustain her burden regarding the standard of care, breach of that standard of care, and proximate cause. As plaintiff must present expert testimony to prevail on her medical malpractice claim and has failed to procure an expert, defendant is entitled to judgment as a matter of law.

Accordingly, for the foregoing reasons, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant.


PATRICK E. SHEERAN
Judge

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OF OHIO
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TERRI GARKO

--Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2020-00369JD

Judge Dale A. Crawford
Magistrate Holly True Shaver

ENTRY OF PARTIAL DISMISSAL

On July 13, 2020, defendant filed a motion to dismiss plaintiff's complaint, in part, pursuant to Civ.R. 12(B)(1), lack of jurisdiction over the subject matter, and 12(B)(6), failure to state a claim upon which relief can be granted. Plaintiff did not file a response. For the reasons discussed below, defendant's motion shall be granted.

Standard of Review

When deciding a motion to dismiss based on lack of subject-matter jurisdiction, the court must determine "whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989). In construing a motion to dismiss pursuant to Civ.R. 12(B)(6), the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 532 N.E.2d 753 (1988). Then, before the court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling her to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975).

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Factual Background

According to her complaint, plaintiff is an inmate in the custody and control of defendant at Dayton Correctional Institution. Complaint, ¶ 2. In 2017, plaintiff was housed at the Ohio Reformatory for Women (ORW). *Id.*, ¶ 6. Plaintiff asserts that while she was housed at ORW, she was physically and sexually abused by corrections officers. *Id.*, ¶ 7-8. Plaintiff asserts that she was placed under various security restrictions in retaliation for her use of the grievance procedure about the abuse she sustained. *Id.*, ¶ 10. In June 2019, plaintiff was diagnosed with a traumatic eye injury, and eventually lost vision in one eye. *Id.*, ¶ 13, 17. Plaintiff asserts that the eye injury and permanent loss of vision were caused by physical abuse by defendant's employees. *Id.*, ¶ 15. Plaintiff also alleges that throughout her incarceration, she has been denied mail and various publications in violation of her constitutional rights. *Id.*, ¶ 20. Plaintiff asserts that the "denial of publications and books violated Article 1, Section 11 of the Constitution of the State of Ohio and the First Amendment to the Constitution of the United States of America." *Id.*, ¶ 25. Plaintiff asserts claims of cruel and unusual punishment under the Fourth, Eighth, and Fourteenth Amendments; claims of First Amendment violations for denying her books and publications, and; claims under 42 U.S.C. 1983 et seq. *Id.*, ¶ 27-29. Plaintiff also seeks punitive damages. *Id.*, page 4.

Law and Analysis

Inmate claims regarding retaliation are treated as constitutional claims under 42 U.S.C. 1983. *Deavors v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 98AP-1105, 1999 Ohio App. LEXIS 2338 (May 20, 1999). Claims regarding access to the institutional grievance system are treated as challenges to the conditions of confinement arising under 42 U.S.C. 1983. *State ex rel. Carter v. Schotten*, 70 Ohio St.3d 89, 91 (1994). A claim for cruel and unusual punishment is construed as alleging a violation of Eighth Amendment rights. *Hiles v. Franklin County Bd. of Commissioners*,

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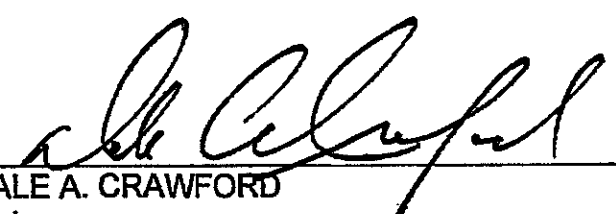
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ENTRY

10th Dist. Franklin No. 05AP-253, 2006-Ohio-16, ¶ 22. It is well-settled that such claims are not actionable in the Court of Claims. *Young v. State*, 10th Dist. Franklin No. 17AP-272, 2018-Ohio-2604, 116 N.E.3d 781, ¶ 49 ("At the outset, we note this court has consistently held that the Court of Claims does not have jurisdiction over actions brought pursuant to 42 U.S.C. 1983."). Accordingly, plaintiff's constitutional claims and challenges to the conditions of confinement must be dismissed for lack of subject-matter jurisdiction. In addition, plaintiff seeks punitive damages. However, punitive damages are not recoverable in the Court of Claims. See *Drain v. Kosydar*, 54 Ohio St.2d 49 (1978).

Conclusion

Based on the foregoing, defendant's motion to dismiss plaintiff's state and federal constitutional claims, and her claim for punitive damages is GRANTED. Plaintiff's claims regarding violations of constitutional rights and conditions of confinement are DISMISSED pursuant to Civ.R. 12(B)(1). Plaintiff's claim for punitive damages is DISMISSED pursuant to Civ.R. 12(B)(6). Plaintiff's other claims remain for trial.


DALE A. CRAWFORD
Judge

cc:

Jeanna V Jacobus
Lauren D Emery
Assistant Attorneys General
150 East Gay Street 18th Floor
Columbus OH 43215-3130

Sean C Buchanan
One Cascade Plaza Suite 2210
Akron OH 44308

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