

other COs who responded to a “man-down” call which resulted in an attempt to restrain the inmate.

{¶ 3} Seccession claimed that plaintiff “kneed” his left eye while he was on the floor in a prone position with his hands handcuffed behind his back. As a result of the incident, Seccession sustained a “blowout fracture” of his left orbital socket.

{¶ 4} Seccession’s 1983 action in the Lorain County Court of Common Pleas alleged that plaintiff maliciously used excessive force during the incident. As a result of Seccession’s complaint, plaintiff submitted a request to defendant seeking state-sponsored legal representation. A letter dated April 10, 2001, informed plaintiff that his request for representation had been denied because the Office of the Ohio Attorney General had determined that he had acted manifestly outside the scope of his employment, with malicious purpose, in bad faith, or in a wanton or reckless manner regarding the incident. (Plaintiff’s Exhibit 4.) Seccession’s case against plaintiff in the court of common pleas was subsequently dismissed pursuant to Civ.R. 3(A) because Seccession failed to obtain service on plaintiff. On December 5, 2001, the Ninth District Court of Appeals dismissed Seccession’s appeal from the decision of the trial court because Seccession failed to timely file his appellate brief. Thereafter, plaintiff filed the instant action pursuant to R.C. 109.364, which provides, in pertinent part:

{¶ 5} “If the attorney general denies representation to an officer or employee who made a request for representation under section 109.361 *** the officer or employee may, upon the termination of the action for which he requested the representation, commence an action in the court of claims against the employer *** for the reasonable expenses incurred in providing his own defense.

{¶ 6} “***.

{¶ 7} “If the court of claims finds that the officer or employee was entitled to have the attorney general represent and defend him under section 109.361 *** the court shall enter judgment against the employer in favor of the officer or employee in the amount of the reasonable expenses incurred by the officer or employee in providing his own defense and in bringing the action authorized by this section. ***”

{¶ 8} The Tenth District Court of Appeals has held that the language of R.C. 109.364 “evidences a clear intent that the Court of Claims make an independent finding on the issue of whether an officer or employee was entitled to be represented by the attorney general under R.C. 109.361.” *Colley v. Ohio Dept. of Rehab. & Corr.*, 150 Ohio App.3d 483, 2002-Ohio-6751, at ¶16. R.C. 109.364 also provides that an officer or employee may not commence an action under the section until “the termination of the action for which he requested the representation.” In *Colley*, the Court of Appeals observed that “[t]his limitation suggests that the General Assembly intended the outcome of the case for which the officer or employee sought representation to be considered by the Court of Claims in deciding a claim for litigation expenses.” *Id.*

{¶ 9} Although plaintiff asserts that the dismissal of Secession’s “meritless” suit in the common pleas court must be considered as a factor in determining whether plaintiff is entitled to reimbursement, the evidence in this case shows that the common pleas court did not reach the merits of Secession’s claims. Therefore, this court finds that the outcome of Secession’s 1983 action against plaintiff is not a significant factor in determining whether plaintiff is entitled to recover the reasonable expenses he incurred in defending the suit.

{¶ 10} In addition to plaintiff’s testimony, four COs and four inmates testified regarding the incident. The testimony of the COs corroborated plaintiff’s assertion that Secession became combative after the verbal altercation and that he continued to fight the COs who attempted to place him in restraints. CO Andrew Zeigler testified that he witnessed the verbal confrontation and that he helped to restrain Secession after Secession began to fight plaintiff. CO Zeigler further testified that his nose was broken during the struggle when Secession struck him with a closed fist. Neither CO Zeigler nor any of the other COs who testified at trial saw plaintiff strike Secession. The COs also testified that Secession failed to yield to authority and remained combative throughout the incident.

{¶ 11} Although the four inmates who testified at trial were generally critical of plaintiff’s conduct towards Secession, none of the inmates observed plaintiff use his knee

to strike Secession.¹ Ali Vinson, a former inmate, was the only witness who claimed to have seen plaintiff strike Secession. According to Vinson, plaintiff hit Secession with an “uppercut” punch before the other COs arrived to help restrain Secession. By contrast, inmate Larry Dennis testified that he saw Secession “slammed” against a wall but he did not see the COs throw any punches. Inmate Anthony Perteet testified that he observed the entire altercation but he did not see plaintiff knee Secession.

{¶ 12} Ohio Adm.Code 5120-9-01 sets forth the circumstances in which force may be lawfully utilized by prison officials and employees in controlling inmates. Ohio Adm.Code 5120-9-01(C) states in relevant part:

{¶ 13} “(C) There are six general situations in which a staff member may legally use force against an inmate:

{¶ 14} “***

{¶ 15} “(3) Controlling or subduing an inmate who refuses to obey prison rules and regulations;

{¶ 16} “***.”

{¶ 17} This court has previously noted that “corrections officers have a privilege to use force upon inmates under certain conditions. *** However, such force must be used in the performance of official duties and cannot exceed the amount of force which is reasonably necessary under the circumstances. *** Force may be used to control or subdue an inmate in order to enforce the institution’s rules and regulations. *** Obviously, ‘the use of force is a reality of prison life’ and the precise degree of force required to respond to a given situation requires an exercise of discretion by the corrections officer.” *Mason v. Ohio Dept. of Rehab. & Corr.* (1990), 62 Ohio Misc.2d 96, 101-102. (Citations omitted.)

{¶ 18} As stated above, none of the witnesses observed plaintiff using his knee to strike Secession. Even the inmate witnesses who claimed that plaintiff used excessive force did not corroborate Secession’s version of the incident. Additionally, the COs who

1

Inmate Secession’s testimony was provided by deposition.

testified corroborated plaintiff's statement that Secession refused to be restrained and fought with the COs. The court finds plaintiff's testimony regarding the incident to be credible. Plaintiff was an experienced CO who had never previously been disciplined for any use-of-force violations. Upon review of the testimony and evidence, the court finds that there is insufficient evidence to establish that plaintiff struck Secession in the manner alleged by defendant.

{¶ 19} Accordingly, the court concludes that plaintiff's conduct involving Secession was not manifestly outside the scope of his employment with defendant; and that he did not act with malicious purpose, in bad faith, or in a wanton or reckless manner. Therefore, plaintiff was entitled to legal representation in the 1983 action brought against him by Secession. Accordingly, judgment shall be rendered in favor of plaintiff.

IN THE COURT OF CLAIMS OF OHIO

WILLIAM J. TREASE	:	
Plaintiff	:	CASE NO. 2003-05828
		Judge J. Warren Bettis
v.	:	
		<u>JUDGMENT ENTRY</u>
OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, et al.	:	
Defendants	:	
.....	:	

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in an amount to be determined after the damages

phase of the trial. The court shall issue an entry in the near future scheduling a date for the trial on the issue of damages.

J. WARREN BETTIS
Judge

Entry cc:

Leo R. Ward
Michael A. Heller
820 W. Superior Ave., Suite 600
Cleveland, Ohio 44113

Attorneys for Plaintiff

Eric A. Walker
Assistant Attorney General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

Attorney for Defendants

AMR/cmd/Filed February 7, 2005/To S.C. reporter February 23, 2005