UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AMARE SELTON,

Plaintiff,

-against-

TROY MITCHELL; E. RIZZO; M. WOODARD; B. SMITH,

Defendants.

04-CV-0989

(LEK)(RFT)

DEFENDANTS' PRETRIAL MEMORANDUM OF LAW

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Date: November 6, 2006

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Preliminary Statement

In this 1983 prisoner pro se action, plaintiff alleges in his one count amended complaint that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. Plaintiff specifically claims that defendants used excessive and unnecessary force against him on March 14, 2004 at Auburn Correctional Facility in Auburn, New York.

STATEMENT OF FACTS

On March 14, 2004, plaintiff, a State prisoner, was housed at Auburn Correctional Facility in Auburn, N.Y. Following lunch, plaintiff deliberately blocked the view into his cell, which was located in the Special Housing Unit ("SHU") at Auburn. Because plaintiff would not respond to then-Sgt. Troy Mitchell's questions about his well-being and Mitchell could not see plaintiff, Mitchell ordered a group of officers to extract plaintiff from his cell. A small number of officers then lined up behind a lead officer who held a plexiglass shield in the corridor outside plaintiff's cell. As the cell door was opened, plaintiff rushed out swinging his fists in an attempt to assault the waiting officers. Plaintiff was immediately subdued, handcuffed and escorted off the SHU block.

During the escort, while waiting for the back door to the SHU block to be opened, plaintiff attempted to kick Sgt. Mitchell. Plaintiff was subdued again and then carried horizontally out the door to a holding cell in the mental health unit ("MHU"). The events in the SHU block were recorded on videotape by prison security cameras.

A short time later, Nurse John MacClellan examined plaintiff in the MHU cell and found only minor injuries: i.e., abrasions on his upper back, one on his left cheek and one in the center of his forehead; some dried blood on his lips; and a small cut on his big toe. Color pictures taken of plaintiff right after the examination confirmed the nurse's findings.

Plaintiff claims, however, that while waiting for the nurse to arrive, the four officers who had escorted him to the MHU cell attacked him by taking turns punching him in the face and neck, repeatedly slamming his face into the bare metal platform of a bed in the cell, stripped him naked and then kicked him in the buttocks and genitals. As a result, he supposedly "suffered extreme and excruciating pain and suffered injuries, including numerous bruises and lacerations to his face, legs and feet . . . ." Am. Cplt ¶ 32.

The officers, on the other hand, deny they attacked plaintiff, maintain that nothing remarkable happened in the MHU cell and assert that no force was used against plaintiff there.

POINT I

DEFENDANT IS ENTITLED TO DISMISSAL UNDER RULE 50 (A) OF THE 8TH AMENDMENT CLAIM

As explained by Judge Howell in the Southern District:

> An Eighth Amendment claim for cruel and unusual punishment may proceed only if the governmental action identified by the prisoner caused him "unnecessary and wanton infliction of pain." Whitley v. Albers, 475 U.S. 312, 319, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986) (citations omitted). In the context of prison security measures, the infliction of pain "does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense." Id. at 319. Particularly where a prison security measure is "undertaken to resolve a disturbance . . . that indisputably poses significant risks to the safety of inmates and prison staff," the [jury] must evaluate "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Id. at 320.

Sales v. Barizone, 2004 U.S. Dist. LEXIS 24366, **34-37 (S.D.N.Y. November 29, 2004).

Excessive force claims, as further explained by the court, have two elements, one "objective" and the other "subjective":

> The Supreme Court has illuminated the contours of excessive force claims in recognizing that prison officials "must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates" whether reacting to a riot or a lesser disruption. Hudson v. McMillian, 503 U.S. 1, 6, 117 L. Ed. 2d 156, 112 S. Ct. 995 (1992). As such, a prisoner must satisfy both an objective and subjective component to assert an excessive force claim under the Eighth Amendment. First, the objective component "focuses on the harm done," and the "amount of harm that must be shown depends on the nature of the claim." Sims, 230 F.3d at 21. This standard is "contextual and responsive to contemporary standards of decency," such that alleging a serious injury is relevant, but not necessary, in stating an excessive force claim.... Hudson, 503 .S. at 8, 10 (remarking that "the absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it"). . . .
>
> Second, the subject[ive] component requires the prisoner to allege that prison officials acted with a "malicious or sadistic" state of mind since "decision[s] to use force [are] generally made in haste, under pressure, and frequently without the luxury of a second chance." Trammell v. Keane, 338 F.3d 155, 162 (2d Cir. 2003). In other words, the prisoner must show that prison officials "had the necessary level of culpability, shown by actions characterized by wantonness." Sims [v. Artuz], 230 F.3d [14,] 21 (quotations omitted). This is consistent with the view that "excessive force does not, in and of itself, establish malice or wantonness for Eighth Amendment purposes." Romano v. Howarth, 998 F.2d 101, 106 (2d Cir. 1993).

Id.

Here, plaintiff will not be able to satisfy either element of an excessive force claim. First, he cannot establish the objective element since the jury will find his injuries were only *de minimus*. Hudson v. McMillian, 503 U.S. at 9-10. The evidence will show that plaintiff's injuries were minor, especially considering the context in which he received them. Nurse MacClellan found only abrasions on plaintiff's upper back, another on his left cheek and one in the center of his forehead, some dried blood on his lips and a small cut on his big toe. Thus, the injuries plaintiff received show that he was subjected only to as much force as was necessary for the defendants to gain control of plaintiff, which meant they acted reasonably throughout the incident and, therefore, in good faith.

See Blyden v .Mancuso, 186 F.3d 252, 262 (2nd Cir. 1999)(excessive force is force not applied in "good-faith").

Second, plaintiff cannot satisfy the subjective element either. Among the factors considered are " 'the need for the application of force, the relationship between the need and the amount of force that was used, the threat reasonably perceived by the reasonable officials,' and 'any efforts made to temper the severity of a forceful response.' " Id. at 7. The extent of the injuries are relevant. Id., see also Romano v. Howarth, 998 F.2d 101, 105 (2nd Cir. 1993). An inmate's provocation of a correctional officer may be considered as well. Miller v. Leathers, 913 F.2d 1085 (4th Cir. 1990).

In this case, the evidence will show that plaintiff provoked the entire incident by deliberately obstructing the view into his cell and refusing to answer defendant Mitchell's questions about his well-being. When his cell door was opened, plaintiff rushed out and tried to hit the officers with his fists. He was immediately subdued. At no time did defendant Mitchell gouge plaintiff's eye as plaintiff claimed. Next, during the escort off the block and while waiting for the back door to SHU to be opened, plaintiff tried again to strike out by kicking at Sgt. Mitchell. He was immediately subdued and then carried horizontally through the door to the MHU cell for examination by Nurse John MacClellan.

Nothing remarkable happened in the MHU cell during the short time before Nurse MacClellan arrived. Plaintiff alleged that he suffered a severe, prolonged and humiliating beating there. That is belied, however, by the undisputed evidence of minor injuries Nurse MacClellan found when he examined plaintiff. This is also corroborated by the color photos taken of plaintiff following the examination.

Accordingly, plaintiff's 8th Amendment claim fails to state a cause of action and no liability will be found.

CONCLUSION
FOR THE REASONS SET FORTH ABOVE, JUDGMENT SHOULD BE GRANTED IN FAVOR OF THE DEFENDANTS.

Dated: Albany, NY
November 6, 2006

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