

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1430

Summary Calendar

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REGINALD WASHINGTON,

Plaintiff-Appellant,

versus

D. Moore, Deputy Sheriff of  
Dallas County, Texas,

Defendant-Appellee.

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Appeal from the United States District Court for the  
Northern District of Texas  
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March 30, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:\*

Reginald Washington, proceeding pro se, brought this civil rights claim against Darrell Moore, a deputy sheriff at the Dallas County Jail in Dallas, Texas. Washington alleges that, while being held on a charge of attempted capital murder for committing an assault on police, three charges of aggravated

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, we have determined that this opinion should not be published.

robbery, and one charge of aggravated assault, he was subjected to pain and humiliation during a forced body cavity search at the Dallas County Jail. Moore moved for summary judgment, and the district court granted that motion. Washington now appeals, asserting that an affidavit he submitted in response to Moore's motion for summary judgment raises genuine issues of material fact. Finding that Washington's affidavit does raise genuine issues of material fact, we reverse and remand for further proceedings.

#### **I. BACKGROUND**

On the morning of August 21, 1990, Washington, along with other inmates of the Dallas County Jail, was subjected to a "shakedown" search for contraband. During the course of this procedure, Washington and the other inmates were ordered to stand in the hallway while clothed only in their underwear. According to Washington, while he and the other inmates were standing in the hallway, Moore grinned and fondled himself while looking directly at him, forced only Washington to remove his underwear, and then conducted an aggressive body cavity search on Washington in front of the other inmates--thereby subjecting Washington to both unnecessary physical pain and humiliation. In sum, Washington alleges that Moore conducted an aggressive body cavity search on him solely for the purpose of sexual gratification.

Washington filed an inmate grievance, which was denied as unfounded. This denial was largely based upon the statements of nine detention officers who, along with Moore, carried out the

shakedown procedure. Without exception, these officers corroborated the testimony of officer Moore that no incident occurred during the shakedown.

Washington then brought this action pursuant to 42 U.S.C. § 1983, alleging that Moore violated his rights under the Fourth, Eighth, and Fourteenth Amendments. Moore responded by denying all the allegations in Washington's complaint--Moore contends that he never even conducted a body cavity search on Washington--and asserting the defense of qualified immunity. Moore also moved to delay discovery until the district court determined whether he is entitled to qualified immunity. Although, pursuant to Rule 34 of the Federal Rules of Civil Procedure, Washington filed a motion to obtain information regarding the inmates he named as witnesses, the district court granted Moore's motion for a protective order.<sup>1</sup> This protective order was conditioned on Moore's filing a motion to dismiss on the grounds of qualified immunity.

Moore then moved for summary judgment, asserting the defense of qualified immunity and that Washington failed to come forward with summary judgment evidence sufficient to create a genuine issue of material fact. Washington responded by filing (1) an affidavit again setting forth the facts alleged in his complaint, (2) a "Statement of Material Facts," and (3) an "Opposition to Defendant's Motion for Summary Judgment and Brief in Support."

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<sup>1</sup> Washington also filed interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure which were barred by the protective order.

All of these documents contain a "verification clause" stating that they were made under penalty of perjury pursuant to 28 U.S.C. § 1746.<sup>2</sup>

Moore then filed a "Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment" and contended, in part, that Washington's "spurious" claims set forth in an "unsworn" affidavit did not state a genuine issue for trial sufficient to comply with Rule 56. Washington again responded, this time by filing an "Amended Complaint with a Jury Demand" and a "Response to Defendant's Reply," in which he asserted that he had filed an affidavit in compliance with 28 U.S.C. § 1746 and sought an evidentiary hearing to introduce testimony of the inmates who allegedly witnessed the body cavity search.

Two days later, the district court granted Moore's motion for summary judgment and dismissed Washington's action, concluding that "Washington has failed to introduce sufficient evidence to raise a material and triable issue of fact with respect to any of his claims." The district court also characterized Washington's claims as "conclusory factual and legal allegations." Washington appeals from this dismissal.

## **II. STANDARD OF REVIEW**

In reviewing a grant of summary judgment, we apply the same standard as the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989) (we review grants of summary judgment de novo). Specifically, we ask whether "the

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<sup>2</sup> Section 1746 is quoted infra at note 3.

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In answering the first part of this question, we view all the evidence and inferences drawn from that evidence in the light most favorable to the party opposing the motion. Reid v. State Farm Mutual Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

To defeat a motion for summary judgment, Rule 56(e) requires the non-moving party to set forth specific facts sufficient to establish that there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). While a mere allegation of the existence of a dispute over material facts is not sufficient to defeat a motion for summary judgment, if the evidence shows that a reasonable jury could return a verdict for the non-moving party, the dispute is genuine. Anderson, 477 U.S. at 247-48, 106 S. Ct. at 2510. On the other hand, if a rational trier of fact, based upon the record as a whole, could not find for the non-moving party, there is no genuine issue for trial. Amoco Production Co. v. Horwell Energy, Inc., 969 F.2d 146, 147-48 (5th Cir. 1992).

In our review of a district court's decision to grant a motion for summary judgment, we will affirm that decision if, after examining the entire record, we are convinced that the standard set forth in Rule 56(c) of the Federal Rules of Civil

Procedure has been met. See id. Where, as here, the party moving for summary judgment advanced two independent arguments in district court in support of his motion for summary judgment--(1) qualified immunity and (2) Washington's alleged failure to establish the presence of a genuine issue of material fact--we will affirm if either of these grounds supports the district court's decision. See Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351, 1355 n.3 (5th Cir. 1986) (a court of appeals is not bound by grounds articulated by a district court and may affirm a grant of summary judgment on other appropriate grounds).

### III. DISCUSSION

The district court granted summary judgment in this case based wholly on the grounds that Washington failed to meet his summary judgment burden of establishing the presence of genuine issues of material fact; Moore's assertion of qualified immunity is not even addressed in the district court's opinion. In granting Moore's motion for summary judgment, the court simply stated:

The court has reviewed the summary judgment evidence and concludes that Washington has failed to introduce sufficient evidence to raise a material fact and triable issue of fact with respect to any of his claims. See Matter of Placid Oil Co., 932 F.2d 394 (5th Cir. 1991). Washington's conclusory factual and legal allegations are insufficient to withstand Moore's motion for summary judgment. Fontenot v. Upjohn, 780 F.2d 1190, 1195-96 (5th Cir. 1986).

In considering Washington's challenge to the district court's grant of summary judgment in favor of Moore, we begin by

considering Moore's assertion that Washington failed to submit an affidavit in opposition to Moore's summary judgment motion pursuant to Rule 56(e) of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 56(e) (once the moving party has supported its motion for summary judgment, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"). Specifically, according to Moore, Washington "did not respond to [the motion for summary judgment] with any evidence deemed competent under FED. R. CIV. P. 56. His only response was a document entitled `affidavit' which was not sworn to before a notary public." We disagree, for the affidavit Washington submitted in February 1992--as well as Washington's other written statements made under the penalty of perjury--satisfies the requirements of 28 U.S.C. § 1746, thereby constituting a valid affidavit for the purposes of Rule 56.<sup>3</sup>

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<sup>3</sup> Section 1746 provides:

Whenever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same . . . , such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

\* \* \*

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare

Second, we conclude that the documents submitted by Washington describe the civil rights violation he alleges--a violation resulting from a forced disrobing and unnecessary body cavity search inflicted upon him solely for the purpose of Moore's sexual gratification--in graphic detail, thereby satisfying the factual specificity requirement of Rule 56 of the Federal Rules of Civil Procedure.<sup>4</sup> See FED. R. CIV. P. 56(e); Anderson, 477 U.S. at 250, 106 S. Ct. at 2511 (to defeat a motion for summary judgment, Rule 56(e) requires the nonmoving party to set forth specific facts sufficient to establish that there is a genuine issue for trial). The essence of Moore's argument on appeal is not that Washington has failed to meet the specificity requirements of Rule 56(e). Rather, Moore asserts that Washington's allegations cannot be believed; according to Moore, "[b]asically stated, the Plaintiff's claim is simply too incredulous to justify a trial of this action." It is not possible for us to make such a credibility determination based upon the limited record, especially since we must "review the facts drawing all inferences most favorable to [Washington,] the party opposing the [summary judgment] motion." Reid, 784 F.2d.

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(or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

<sup>4</sup> We note that, although discovery was barred by the district court's protective order of January 14, 1992, Washington's affidavit identifies, by both name and prisoner identification number, ten inmates who allegedly witnessed the body cavity search.

at 578. In light of Moore's affidavit, which wholly denies that any body cavity search on Washington ever took place, we conclude that Washington's affidavit raises a genuine factual dispute between the parties which is material to Washington's section 1983 claim. See FED. R. CIV. P. 56(e).

Finally, although the district court did not rely upon the defense of qualified immunity in granting Moore's motion for summary judgment, Moore advanced this defense below. Accordingly, we consider it now as a possible grounds for affirming the district court's grant of summary judgment in his favor. See Coral Petroleum, 797 F.2d at 1355 n.3 (a court of appeals may affirm a grant of summary judgment on any appropriate grounds).

The Supreme Court recently clarified the analytical structure for reviewing an appeal regarding a motion for summary judgment asserting qualified immunity. See Siegert v. Gilley, \_\_\_ U.S. \_\_\_, 111 S. Ct. 1789, 1793 (1991); see also Enlow v. Tishomingo County, Mississippi, 962 F.2d 501, 508 (5th Cir. 1992). First, we must determine whether Washington alleges a violation of a clearly established constitutional right and, second, accepting Washington's allegations as true,<sup>5</sup> we must

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<sup>5</sup> See Enlow, 962 F.2d at 508 ("We examine the appellees' claims, taken as true, to ascertain whether they are sufficient to allege the existence of violations of their clearly established constitutional rights.") (emphasis added); see also Reid, 784 F.2d at 578 (when reviewing facts for summary judgment purposes, we must "[draw] all inferences most favorable to the party opposing the motion").

determine whether Moore's actions may be considered objectively reasonable and consistent with that constitutional right. Id.

Washington asserts several causes of action based upon violations of his constitutional rights: (1) the right to be free of unreasonable and illegal searches under the Fourth Amendment; (2) the right to be free from cruel and unusual punishment under the Eighth Amendment; and (3) the right to equal protection and due process under the Fourteenth Amendment. The Supreme Court has established that, in determining whether body cavity searches violate the Fourth Amendment, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place where in which it is conducted." Bell v. Wolfish, 441 U.S. 561, 559, 99 S. Ct. 1861, 1884 (1979) (privacy interests of inmates are balanced against security interests, and a strip search may, under appropriate circumstances, be carried out for less than probable cause); see also Watt v. City of Richardson Police Dept., 849 F.2d 195, 198 (5th Cir. 1988) (strip search cases under similar policies are best determined on a case-by-case basis). In short, courts must balance "the significant and legitimate security interests of the institution against the privacy interests of the inmates . . . ." Id. at 560, 99 S. Ct. at 1885.

As for Washington's Eighth Amendment claim, Washington was a pretrial detainee at the time of the alleged attack and, therefore, he cannot state a cause of action under the Eighth

Amendment.<sup>6</sup> Nevertheless, under the Fourteenth Amendment, "a pretrial detainee, not yet found guilty of any crime, may not be subjected to punishment of any description." Hill v. Nicodemus, 979 F.2d 987, 991 (4th Cir. 1992) (emphasis added), citing City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 245, 103 S. Ct. 2979, 2983 (1983); see Swofford v. Mandrell, 969 F.2d 547, 549 (7th Cir. 1992) ("A pretrial detainee's right not to be punished is at least as expansive as a convicted prisoner's freedom from cruel and unusual punishment under the Eighth Amendment."). Moreover,

[w]hile it is true that '[n]ot all force used by police rises to a constitutional violation,' it is equally true that the use of excessive force against an arrestee or pretrial detainee . . . is actionable under § 1983 as a deprivation of life or liberty without due process of law, in violation of the Fourteenth Amendment.

Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988) (citations omitted). As this court recently stated,

when a court is called upon to examine the amount of force used on a pretrial detainee for the purpose of institutional security, the appropriate analysis is '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.'

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<sup>6</sup> Thibodeaux v. Bordelon, 740 F.2d 329, 333-34 (5th Cir. 1984) ("The Supreme Court has made it clear that the eighth amendment protects only those who have been convicted of a crime. . . . The amendment does not protect pretrial detainees."), citing Ingraham v. Wright, 430 U.S. at 664, 671-72, 97 S. Ct. at 1408, 1412-13 (1977) ("Eighth Amendment scrutiny is appropriate only after the state has complied with the constitutional guarantees traditionally associated with criminal prosecutions."); see also City of Revere v. Massachusetts General Hospital, 463 U.S. 245, 244, 103 S. Ct. 2979, 2983 (1983) (stating that Eighth Amendment concerns follow a formal adjudication of guilt).

Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir. 1993).

Washington does not allege, and Moore does not defend, a body cavity search performed in accordance with the legitimate security interests of the Dallas County Jail. Washington's claim is essentially that, under the pretense of carrying out a body cavity search to ensure security, Moore singled him out for sexual gratification. As a result, Washington was allegedly subjected to what may be characterized as physically and psychologically abusive behavior not serving legitimate security interests--in other words, force applied "maliciously and sadistically for the very purpose of causing harm." Valencia, 981 F.2d at 1446. Similarly, Moore does not assert that he conducted a justifiable body cavity search in compliance with Dallas County Jail policy. Rather, he asserts that no such search ever took place.

In short, we are left with a fact question, and Washington, having described the alleged sexual attack in vivid detail in his complaint to support his assertion that Moore acted "wantonly, willfully and with a gross disregard for [his] rights[,]" has provided enough specificity to satisfy the heightened pleading requirement imposed in cases against state actors. See King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992); see generally Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 1993 WL 52174, at \*3 (1993) (limiting application of the heightened scrutiny standard). Accordingly, we hold that, based upon the summary judgment record before us,

it cannot be conclusively determined that the doctrine of qualified immunity bars Washington's action. Therefore, the doctrine of qualified immunity does not provide a basis for the district court's grant of summary judgment. See Siegert, \_\_\_ U.S. at \_\_\_, 111 S. Ct. at 1793; Enlow, 962 F.2d at 508.

In sum, having reviewed the record in the light most favorable to Washington, we find that Washington's affidavit and other sworn statements raise genuine issues of material fact pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Anderson, 477 U.S. at 250; Frquire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir. 1992) (a dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party). We conclude, therefore, that the district court erred when it granted Moore's motion for summary judgment.

#### **IV. CONCLUSION**

For reasons set forth above, we REVERSE the district court's grant of summary judgment in favor of Moore and REMAND the case for further proceedings.