

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-2397
Summary Calendar

LONNIE EDWARD EASON,

Plaintiff-Appellee,

VERSUS

JOHNNY KLEVENHAGEN, Sheriff
Harris County, ET AL.,

Defendants,

R. P. QUIROGA, Sheriff's
Deputy,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(CA-H-89-565)

(February 25, 1994)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:*

This is an interlocutory appeal from the denial of Appellant's motion for summary judgment based on qualified immunity. Lonnie

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Edward Eason (Eason) alleges that Rudy P. Quiroga (Quiroga), a prison guard in the Harris County Jail, violated his civil rights through use of excessive force while Eason was a pre-trial detainee in the Harris County Jail. Quiroga asserts that he is entitled to qualified immunity from Eason's § 1983 suit. Because there are unresolved factual issues as to the nature of Quiroga's conduct, the district court's interlocutory order denying Quiroga's motion for summary judgment based on qualified immunity is not appealable, and we therefore dismiss this appeal.

Facts and Prior Proceedings

Eason filed a 42 U.S.C. § 1983 action, alleging that he sustained head, back, and neck injuries as a result of a beating by prison guard Quiroga on March 2, 1987 when he was a pre-trial detainee in the Harris County Jail. Eason alleges that Quiroga maliciously and without provocation jumped him from behind, knocked him down, and, along with four other officers, kicked and hit him. Eason contends that as a result of this beating, he suffered severe pain to his stomach and ribs, increased migraine headaches, and an exacerbation of pre-existing epilepsy.

In response to Eason's claims, Quiroga moved for summary judgment, arguing that he was entitled to qualified immunity. In support of his motion, Quiroga submitted his affidavit, the prison medical report, and excerpts of Eason's deposition which he contends refute Eason's allegations.

The district court denied Quiroga's motion for summary judgment based on the standards set forth in **Shillingford v.**

Holmes, 634 F.2d 263 (5th Cir. 1981). The district court concluded that summary judgment was not appropriate because the material facts concerning the severity of Eason's injuries, as well as the necessity and extent of Quiroga's force, were in dispute.

On appeal, Quiroga contends that the district court erred by denying his motion for summary judgment based on qualified immunity.

Discussion

An order denying a motion for summary judgment based on qualified immunity is immediately appealable under the collateral order doctrine if the denial turns on an issue of law. **Feagley v. Waddill**, 868 F.2d 1437, 1439 (5th Cir. 1989) (citations omitted). However, when only "disputed factual issues material to immunity are present, the district court's denial of summary judgment sought on the basis of immunity is not appealable." **Id.**

In assessing a claim of qualified immunity, we engage in a bifurcated analysis. **See Salas v. Carpenter**, 980 F.2d 299, 305 (5th Cir. 1992). The first inquiry is whether the plaintiff alleged the violation of a clearly established constitutional right. **Siegert v. Gilley**, 111 S.Ct. 1789, 1793 (1991). The second step is to determine whether the defendant's conduct was objectively reasonable. **Id.** "Even if an official's conduct violates a constitutional right, he is entitled to qualified immunity if the conduct was objectively reasonable." **Id.**

With regard to the first inquiry, the current analysis governing excessive force claims made by pre-trial detainees in the

context of institutional security requires that the plaintiff show that force was applied not "in a good faith effort to maintain or restore discipline," but rather that the force complained of was administered "maliciously and sadistically to cause harm." **See Valencia v. Wiggins**, 981 F.2d 1440, 1446-47 (5th Cir. 1993) (citing **Hudson v. McMillian**, 112 S.Ct. 995 (1992)). The district court in this case, however, analyzed Eason's claims under the former standard announced in **Shillingford**.¹ It appears from the record, however, that Eason's allegations and summary judgment proof are sufficient to satisfy the **Hudson** standard.² Eason has asserted by sworn affidavit that Quiroga was the aggressor, that the force used against him was applied maliciously and without provocation, and that he received severe injuries.³ Reviewing these allegations in the light most favorable to Eason, who was the nonmoving party below, it is clear that Eason has stated a claim for violation of

¹ The court in **Shillingford** held that a valid claim for excessive force required showing (1) a severe injury, which was (2) "grossly disproportionate" in relation to the need for action, and (3) was inspired by malice to such an extent that "it amounted to an abuse of official power that shocks the conscience." **Shillingford**, 634 F.2d at 265. **Hudson** removed the "severe" injury requirement in **Shillingford**. **Hudson**, 112 S.Ct. at 999.

² Both Quiroga's and Eason's depositions were made under oath and penalty of perjury. Declarations made under penalty of perjury are competent to raise a fact issue precluding summary judgment. 28 U.S.C. § 1746; **Nissho-Iwai American Corp. v. Kline**, 845 F.2d 1300, 1306 (5th Cir. 1988).

³ Eason alleged severe injuries, but this is not required by **Hudson**. **Hudson** provides a more lenient standard than **Shillingford**. Therefore, although the district court denied Quiroga's motion for summary judgment based on the stricter standard of **Shillingford**, the same result occurs when **Hudson** is applied.

a constitutional right under the controlling standard announced in **Hudson**. See **Rankin v. Klevenhagen**, 5 F.3d 103, 106-08 (5th Cir. 1993).

In the second inquiry, analyzing the objective reasonableness of Quiroga's conduct, both parties offer conflicting evidence concerning the circumstances surrounding their altercation. The resolution of whether or not Quiroga used unreasonable force under the circumstances is dependent on a fact-sensitive inquiry coupled with credibility determinations. It is simply unclear from the record at this point in the suit whether Quiroga beat Eason in an unprovoked attack or whether Eason struggled with Quiroga, prompting the forceful response. Therefore, it is not possible to conclude as a matter of law--considering the evidence in the light most favorable to Eason--that Quiroga acted in an objectively reasonable manner. Accordingly, the district court's denial of summary judgment sought on the basis of immunity is not appealable.

Conclusion

For reasons stated above, we determine that the order of the district court denying the defendant's motion for summary judgment based on qualified immunity is not an appealable order. The appeal is dismissed.