

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-5274
Summary Calendar

JAMES MILLER KEITH, IV,

Plaintiff-Appellant

VERSUS

CARL GRIFFITH, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(1:93cv82)

(May 3, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:¹

James Miller Keith (Keith) appeals the dismissal of his § 1983 suit against Officer Fisher, his jailer and the jailer's employer, the Sheriff of Jefferson County. We affirm.

I.

Keith was detained in the Jefferson County, Texas jail, on October 8, 1992. According to Keith, other inmates set a bag of

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

garbage afire and slid it to his cell. After Keith pushed the bag away from his cell, Officer Michael Fisher sprayed the burning bag with a fire extinguisher and then sprayed directly into Fisher's cell. Keith and Fisher then cursed and spit on each other. As Keith approached the bars to spit on Fisher again, Fisher sprayed Keith directly in the face with the fire extinguisher.

The next day a physician examined Keith. The physician prescribed Maalox, but did not examine Keith's eyes. Later that day, a nurse gave Keith some eyedrops. On October 12, an infirmary physician told Keith that his eyes were fine and prescribed optical salve. Later that same day, Keith returned to the infirmary for an eye examination. His vision was blurry in his right eye and his left eye would not focus. He was transferred to the Texas Department of Criminal Justice, Institutional Division (TDCJ) on October 16. On October 27, a TDCJ ophthalmologist prescribed eyedrops for Keith.

Keith filed a verified complaint under 42 U.S.C. § 1983 against Fisher and Jefferson County Sheriff Carl Griffith (Griffith). Keith alleges that he suffers from vision and respiratory difficulties as a result of having been sprayed in the face by Fisher. With respect to Griffith, Keith alleges only that he employs Fisher. Keith attached to his complaint several unsworn but signed statements from other prisoners who state that they witnessed Fisher spray Keith in the face.

The district judge dismissed Keith's claim against Griffith as frivolous because Keith sought to hold Griffith liable solely on

the ground that he was Fisher's employer. The district judge entered final judgment on that claim.

Before the district judge disposed of Keith's claim against Griffith, both Griffith and Fisher had moved for summary judgment. In the motion, the defendants asserted that Fisher sprayed Keith with the fire extinguisher inadvertently as he attempted to dodge Keith's spit. Griffith and Fisher then moved to supplement their motion with Keith's medical records and the reports of jail guards, including Fisher, regarding the spraying incident. The magistrate judge granted the motion to add the records and reports. Keith responded to the summary judgment motion by stating that he did not know how to respond to the motion.

The magistrate judge recommended that the district judge grant summary judgment in favor of Fisher. The magistrate judge found that Keith had failed to refute Fisher's version of the facts.

Keith then moved for summary judgment. He objected to the magistrate judge's report and recommendations and moved for reconsideration of the order dismissing his claim against Griffith.

The district judge adopted the magistrate judge's report and recommendations and denied Keith's motion to reinstate Griffith as a defendant. The district judge reasoned that Keith had not alleged an excessive force claim because

the intentional use of the fire extinguisher was in the prevention of further assault that plaintiff admits he intended to conduct had the fire extinguisher not stopped him Whether the force was inadvertent o[r] intentional the pleadings agree that the force was conducted to prevent further attacks upon the defendant. In viewing the actions of the

defendant in hind sight other action might be recommended. However, defendant's action do[es] not amount to cruel and unusual punishment upon the plaintiff given the facts as set forth by the plaintiff.

The district judge granted summary judgment for Fisher.

II.

A.

Keith contends first that the district court erred in dismissing Griffith. He argues that Griffith should be held liable because his employer, Fisher, had access to an out-of-date fire extinguisher and because he trained Fisher. Keith therefore seeks to hold Griffith liable because he supervises the jail and because he trained Fisher. Keith does not allege that Griffith was personally involved in the spraying incident or that Griffith's conduct was sufficiently connected to the incident to impose liability. Nor does Keith allege that the spraying occurred as a result of jail policy. The district court therefore did not abuse its discretion when it dismissed Keith's claim against Griffith as frivolous.

B.

Keith contends next that Fisher, intending to injure him, deliberately sprayed him in the face with the fire extinguisher. Keith therefore contends that the district court erred in granting Fisher's motion for summary judgment.

A party is entitled to a summary judgment "if the 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 cases . . . where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may be properly made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' Such a motion, whether or not accompanied by affidavits, will be 'made and supported as provided in the rule,' and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate "specific facts showing that there is a genuine issue for trial.'

Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "An appellate court reviews a grant of summary judgment de novo." **Krim v. Banctexas Group, Inc.**, 989 F.2d 1435, 1444 (5th Cir. 1993).

The district judge granted summary judgment because he found that Keith and Fisher, in their pleadings, agreed that Fisher sprayed Keith in an attempt to avoid being spat upon and because the "defendant's action d[id] not amount to cruel and unusual punishment upon the plaintiff given the facts as set forth by the plaintiff." "A **pro se** complaint . . . should not be dismissed unless it appears that the plaintiff can prove no set of facts which would entitle him to relief." **Moawad v. Childs**, 673 F.2d 850, 851 (5th Cir. 1982). In other words, the pro se complaint should not be dismissed if "`within the universe of theoretically provable facts there exists a set which can support a cause of

action under this complaint, indulgently read.'" **Id.** (quoting **Covington v. Cole**, 528 F.2d 1365, 1370 (5th Cir. 1976)).

When considering an excessive force claim, "the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." **Hudson v. McMillian**, ___ U.S. ___, 112 S.Ct. 995, 999, 117 L.Ed.2d 156 (1992). Stated differently, in order to state a claim under the Eighth Amendment for excessive use of force, the amount of force applied must be "grossly disproportionate under the circumstances" so as to amount to "an abuse of official power that shocks the conscience." **Stevens v. Corbell**, 832 F.2d 884 (5th Cir. 1987).

In his verified complaint, Keith alleged that Fisher sprayed him in the face with the fire extinguisher after Keith approached the bars to spit on Fisher.² As the district court found, Keith agreed that Fisher acted to avoid being spat upon, that is, to restore or maintain order. No questions of fact remain therefore as to whether Fisher sprayed Keith to attempt to restore order or whether the force used was grossly disproportionate under the circumstances. The district court correctly granted summary judgment.

² Keith's verified complaint may be considered as summary judgment evidence in opposition to the defendant's summary judgment motion. **See Barker v. Norman**, 651 F.2d 1107, 1114-15 (5th Cir. Unit A 1981).

C.

Finally, Keith requests the appointment of an investigator to locate witnesses and, evidently, to ascertain whether the district judge is related to Fisher. There is no need to appoint an investigator. Keith has not shown that his imprisonment has rendered him unable to locate witnesses. Nor has he alleged any facts beyond the district judge's last name to indicate that the judge is related to Fisher.

AFFIRMED.