

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8350  
Summary Calendar  
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KENNETH LEE JOHNSON,

Plaintiff-Appellant,

versus

RICHARD DAVID,  
ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the  
Western District of Texas  
(W-91-CV-105)  
S)))))))))Q  
(July 14, 1994)

Before GARWOOD, SMITH and BARKSDALE, Circuit Judges.\*

PER CURIAM:

Plaintiff-appellant Kenneth Lee Johnson (Johnson), a Texas state prisoner, proceeding *pro se* and *in forma pauperis* (IFP), filed a complaint for damages under 42 U.S.C. § 1983 alleging the excessive use of force and the deliberate indifference to a serious medical need. An evidentiary hearing was conducted pursuant to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

*Spears v. McCotter*, 766 F.2d 179, 182 (5th Cir. 1985). The magistrate judge recommended that all claims be denied and the petition dismissed pursuant to 28 U.S.C. § 1915(d). The district court partially adopted the magistrate judge's recommendation, dismissed the denial of medical care claims, but found the excessive force claims "sufficient to resist dismissal under § 1915(d)."

After discovery, the defendants filed a motion to dismiss, or in the alternative, a motion for summary judgment. Although Johnson filed a "Motion to Object to Defendants Motion to Dismiss," and a "Motion to Counter Defendants' Motion for Summary Judgment," he failed to offer any rebuttal evidence except to reurge the allegations contained in his initial complaint.

The district court then granted the defendants' motion for summary judgment, finding that Johnson's injuries were *de minimis*. Final judgment denying Johnson's section 1983 claims and dismissing his state law claims without prejudice was entered accordingly.

When the party moving for summary judgment carries its burden, to avoid summary judgment the opposing party "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986).

In their motion for summary judgment, the defendants argued that they were entitled to qualified immunity. They are correct.

Although the district court granted summary judgment because it found that Johnson's injury was *de minimis* only, this Court can affirm on other grounds. *Hanchey v. Energas Co.*, 925 F.2d 96, 97 (5th Cir. 1990).

A bifurcated analysis is employed when assessing a defendant's claim of qualified immunity. *Rankin v. Klevenhagen*, 5 F.3d 103, 105 (5th Cir. 1993). This Court's first inquiry is whether the plaintiff has "'alleg[ed] the violation of a clearly established constitutional right.'" *King v. Chide*, 974 F.2d 653, 656 (5th Cir. 1992) (quoting *Siegert v. Gilley*, 111 S.Ct. 1789, 1793 (1991)). The Court "must utilize currently applicable constitutional standards" to determine whether the plaintiff has alleged the constitutional violation. *Rankin*, 5 F.3d at 106. Johnson's claim that the defendants used excessive force implicates the Eighth Amendment's guarantee against cruel and unusual punishment. See *id.* at 108-09.

"To state an Eighth Amendment excessive force claim, a prisoner . . . must 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.'" *Rankin* at 106 (quoting *Hudson v. McMillian*, 112 S.Ct. 995, 999 (1992)). Johnson's allegations in their entirety may be at least arguably sufficient to state a constitutional violation under *Hudson*.

The law in effect at the time of the offense, October 1, 1990, is used to evaluate the reasonableness of the defendants' conduct to determine their eligibility for qualified immunity. Johnson

must show: (1) a significant injury; which (2) resulted directly and only from the use of force that was clearly excessive to the need; the excessiveness of which was (3) clearly unreasonable; and (4) that the action constituted an unnecessary and wanton infliction of pain. *Huguet v. Barnett*, 900 F.2d 838, 841 (5th Cir. 1990).

Summary judgment evidence demonstrates that Johnson did not sustain a significant injury. In his initial complaint, Johnson alleged that defendant Davis "sprayed [fire] extinguisher liquid directly into [Johnson's] face, without warning or reason, discharging a gritty liquid substance into [Johnson's] face and eyes." Johnson further alleged that: (1) he retreated from the cell door; (2) crouched behind his commode; (3) Davis continued to spray the extinguisher about the cell, saturating personal effects such as photographs, letters, books, and other items; and (4) Davis then again began to spray, the spray hitting Johnson on the back, at which time Johnson stood up, slipped, and "bash[ed] his face against the edge of the commode sink, causing a gash to appear over [his] nose."

On appeal, Johnson alleges for the first time that he received a scar across his nose as a result of the incident. This allegation was never made below and thus is not properly before this Court. *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985).

At the *Spears* hearing, Johnson admitted starting the fire outside his cell which necessitated the use of fire extinguishers.<sup>1</sup>

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<sup>1</sup> It is plausible that after the fire was put out, there was no need for further force. Thus, if the defendants actually continued

Johnson also testified that although he received eye irritation, "the only physical injury [he] received was to [his] nose." Johnson further testified that he was taken to the infirmary for medical treatment.

Also at the *Spears* hearing, Dr. Hurley testified that Johnson's medical records showed that on October 1, 1990, at 9:50 p.m., Johnson complained that he had "slipped and fallen in the shower." The examination revealed a small, "very superficial" cut on Johnson's nose, with a "very small amount of bleeding." Hurley also testified that on October 4, 1990, Johnson complained that an officer had caused him to slip and injure his nose on the commode, resulting in dizziness and pain. Hurley also testified that on October 5, 1990, Johnson submitted another sick call form complaining of eye problems and requesting an examination for eye strain.

Johnson's medical records, specifically clinic notes, indicate that on October 1, 1990, at 9:50 p.m., he slipped and fell in the shower and sustained a small superficial cut on the bridge of his nose, with a small amount of bleeding. There is no indication of any complaints concerning eye irritation on that date. Johnson's medical records also indicate that on October 4, 1990, prison officials received complaints that an officer caused Johnson to

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to spray the fire extinguisher, which Johnson alleges, that action could be a factor in deciding whether the injury was significant. See *Oliver v. Collins*, 914 F.2d 56, 59 (5th Cir. 1990). However, in this case, there was at least some provocation in the form of Johnson's dousing of the officers. Also, there were at least three other fires in that area that night and one section had been flooded, all in inmate reaction to Monday Night Football not being shown on television.

slip and strike his nose on the commode, resulting in dizziness and pain, because he was assaulted by "fire extinguisher liquid spray in his cell." Once again, there was no indication that Johnson complained about eye problems.

Johnson's medical records further indicate that on October 5, 1990, he complained about eye problems and requested an eye examination. The medical records also indicate that on October 9, 1990, Johnson complained of having a gritty sensation in his eyes because he was sprayed with a fire extinguisher but that he "feels better now." Johnson was prescribed Visine, three times a day for thirty days.

Johnson has failed to offer any evidence controverting the contents of his medical records, and has failed to show a genuine issue of material fact regarding a significant injury. Therefore, the defendants, based on the law in effect during October 1990, have shown an entitlement to qualified immunity. Thus, the district court's grant of summary judgment on the excessive force claim is affirmed.

On the claim of deliberate indifference to serious medical needs, dismissal was proper under section 1915(d) for the reasons explained by the magistrate and adopted by the district court. Johnson's pleadings and his testimony at the *Spears* hearing clearly show neither "serious medical needs" nor "deliberate indifference" thereto. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (emphasis added).

The judgment of the district court is

AFFIRMED.