

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8501
Summary Calendar

JEANNETTE JENKINS,

Plaintiff-Appellant,

versus

JAMES A. LYNAUGH, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W-91-CV-73)

(April 6, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

This case is before us on appeal after remand of appellant Jenkins' § 1983 action against correctional officers Patrick Anderson and Charlotte Walker who were alleged to have used excessive force upon her at the Mountain View Unit of the Texas Department of Criminal Justice. On remand, the district court reconsidered the case under Hudson v. McMillian, ___ U.S. ___, 112

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

S. Ct. 995 (1992), together with the appellees' answers and motion to dismiss for qualified immunity, and again dismissed the case. The court held that Jenkins failed to state a claim for excessive use of force because, based on evidence submitted by Jenkins herself, appellees used no more force than was necessary under the circumstances. Alternatively, the court held that the same facts demonstrated that appellees are entitled to qualified immunity. Finding no error, we affirm the dismissal.

This court may not uphold a Rule 12(b)(6) dismissal of a prisoner complaint unless "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief.'" Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594 (1972) (citations omitted). Under Hudson v. McMillian, 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. 112 S. Ct at 999. The availability of the qualified immunity defense depends upon whether the correctional officers' conduct was objectively reasonable in light of the law as it existed at the time of the conduct in question. Rankin v. Klevenhagen, 5 F.3d 103, 108 (5th Cir. 1993). On May 16, 1990, the date of this incident, the Fifth Circuit required a plaintiff to show, among other things, a significant injury as part of an eighth amendment excessive force claim. Huquet v. Barnett, 900 F.2d 838,

841 (5th Cir. 1990). Jenkins's claim satisfies neither Hudson or Huquet.

Jenkins alleged in her complaint that on May 16, 1990, she was holding the arm of another inmate, Tamara Gilmore, and that when she refused to obey Walker's order to release Gilmore's arm, Anderson ran up behind her, pinned her arms to her sides, lifted her off the ground, and maliciously "body slammed" her onto the cement. Anderson then began choking her and struck her twice on the forehead and right side of her face. Walker took no action to interfere but instead assisted Anderson by sitting on her legs, while Anderson sat on her chest. Jenkins alleged that she offered no resistance at all to the defendants. She alleged that she suffered lacerated, bleeding arms, a swollen face, and severe lower back pain. She alleged that she continues to have back pain and that her arms are scarred.

Jenkins filed a motion for a temporary restraining order and/or preliminary injunction with her complaint, to which she attached her affidavit and the affidavits of several other inmates regarding this incident. In her affidavit, Jenkins admitted that she refused to obey an order by not immediately releasing Gilmore's arm. She alleged that while Anderson and Walker were sitting on her, she was crying and asking them to get off of her because her back was hurting. She asserted that the defendants' actions were unprovoked and were an unnecessary use of force. Tamara Gilmore's affidavit coincides with Jenkins' account of the incident. Gilmore asserted that she and Jenkins were talking in front of the cell

block and that Jenkins was loosely holding her arm. Her affidavit does not contain any assertions that Jenkins provoked the defendants' actions. She stated that when Anderson was choking Jenkins, she attempted to stop him by reaching for his hands and screamed at him to stop, asking why he was doing that to Jenkins. Linda Payne, another inmate, asserted in her affidavit that she observed Jenkins and Gilmore standing and talking and that Jenkins was holding Gilmore's arm asking her to return to recreation. Walker told Jenkins several times to turn Gilmore's arm loose and told them to move along, orders which they did not obey. Walker called for back-up, and Anderson came up behind Jenkins and grabbed her. Jenkins tried to jerk away, and Anderson picked her up and body slammed her down onto the cement and jumped on her. Jenkins tried to get up, and Walker then ran over and jumped on her legs. They handcuffed her, and Jenkins laid there face down for 35-45 minutes.

Jenkins' testimony at the Spears¹ hearing was consistent, for the most part, with her allegations in her complaint. She again admitted that she had refused to obey the order to release Gilmore's arm. Id. at 3. She denied that she fought with or struck Anderson. Id. at 6, 20. She stated that when he was sitting on her, she was trying to get him off of her because her back was hurting, and that she kept telling the defendants that her back was hurt, but they would not release her. Id. at 6, 16. She alleged that Anderson used force on her for no reason at all. Id.

¹ Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

at 7, 16. The medical records showed abrasions but do not objectively corroborate a back injury.

Under these circumstances, we agree with the district court's finding that Jenkins did not state a claim for relief under the Hudson eighth amendment test for excessive force. The facts, including her own admissions and the affidavit submitted by Ms. Payne, showed that she ignored Officer Walker's orders and, when physically restrained by Officer Anderson, resisted. The injuries she suffered in this incident were slight. Neither those injuries nor the inflated description of the conduct to which Jenkins was exposed suggests that the officers acted maliciously and sadistically to cause harm rather than simply to maintain discipline. Further, Jenkins's slight injuries would not qualify as "significant" for purposes of this court's Huquet test, which determines the standard of excessive force for qualified immunity purposes at the time in question.

In short, the district court did not abuse his discretion in concluding that Jenkins's complaint lacks an arguable basis either in law or in fact and therefore dismissing it as frivolous. 28 U.S.C. § 1915(d); Denton v. Hernandez, 112 S. Ct. 1728, 1734 (1992).

The judgement of the district court is **AFFIRMED**.