IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9118
Conference Calendar

CASTORIAN L. KIRBY,

Plaintiff-Appellee,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division, ET AL.,

Defendants-Appellants.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 1:93-CV-74
- - - - - - - - - - -
(July 19, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

An order denying a motion for summary judgment based on a claim of qualified immunity in an action under 42 U.S.C. § 1983, to the extent that it turns on an issue of law, is immediately appealable. See Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). If disputed factual issues material to immunity are present, however, the district court's denial of summary judgment sought on the basis of immunity is not appealable. Lampkin v. City of Nacogdoches, 7 F.3d 430, 431 (5th

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Cir. 1993) (citing Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989)), cert. denied, 114 S. Ct. 1400 (1994).

In assessing a claim of qualified immunity, the Court must first determine whether the plaintiff has alleged the violation of a clearly established constitutional right. Salas v. Carpenter, 980 F.2d 299, 305 (5th Cir. 1992). The Court must then decide whether the defendants's conduct was "objectively reasonable." Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993).

On appeal, the defendants challenge the first prong of the qualified-immunity test: they assert that Castorian L. Kirby has not shown the violation of a constitutional right. To establish an excessive-force claim under the Eighth Amendment, a prisoner must show that the force was not applied "in a good faith effort to maintain or restore discipline," but, rather, that the force was administered "maliciously and sadistically to cause harm." Rankin v. Klevenhagen, 5 F.3d 103, 107 (5th Cir. 1993) (internal quotations and citations omitted). Although a prisoner does not need to show a significant injury, he must have suffered at least some injury that is not de minimis. Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993).

The defendants specifically contend that Kirby has not established that his injuries are more than de minimis. As the defendants set out in their own brief, there are questions of fact regarding a possible injury: it is disputed whether Kirby's head, right ankle, and/or foot were injured. The defendants have not shown that these injuries are de minimis. See Oliver v.

Collins, 914 F.2d 56, 59 (5th Cir. 1990) (whether the force was unprovoked may be a factor in determining the quantum of the injury). Because questions of material fact remain regarding Kirby's constitutional claim, this Court lacks jurisdiction. See Lampkin, 7 F.3d at 431.

DISMISSED.