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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED

KENNETH GIBBS

: Civil Action

v.

JUN 8 1990

MICHAEL CHURNER

NO. 89-0618
By *[Signature]* Clerk

ORDER - MEMORANDUM

AND NOW, this *7th* day of June, 1990 defendant Michael Churner's motion for summary judgment is granted - excepting the claim based on the alleged assault on December 2, 1988, as to which it is denied. Fed.R.Civ.P. 56.¹

In this §1983 action, the amended complaint alleges that plaintiff Kenneth Gibbs, an inmate at the State Correctional Institute at Graterford, was verbally harassed and physically abused by defendant Michael Churner, a correctional officer, and was otherwise mistreated. It contains constitutional and pendent state law claims. Jurisdiction is federal question. 28 U.S.C. §1331.

One set of claims is based on the allegation that on December 2, 1988 defendant slammed a metal door in plaintiff's

1. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Once the movant has asserted that there is no triable issue, the nonmovant having the burden of proof at trial cannot rely on the pleadings but must refer to facts in the evidentiary record. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Williams v. Borough of West Chester, 891 F.2d 458, 460, 463-64 (3d Cir. 1989).

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Cramer, Esq.
Legal Clerk
Churner*

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face, cutting him above the eye, grabbed him and repeatedly attempted to ram his head against a wall.²

A claim under the Eighth and Fourteenth Amendments against a correctional officer must establish "more egregious conduct than that adequate to support a common law tort." Williams v. Mussomelli, 722 F.2d 1130, 1133 (3d Cir. 1983). The constitution prohibits "'wanton and unnecessary' infliction of pain upon persons in custody. . . . The test of 'cruel and unusual' is a strict one which considers whether the infliction grossly exceeds the legitimate need for force and violates the standards of contemporary society." Mussomelli 722 F.2d at 1134 (quoting Rhodes v. Robinson, 612 F.2d 766, 771 (3d Cir. 1979)). The use of force by correctional officers "exceeding that which is reasonable and necessary under the circumstances" is actionable under §1983. Davidson v. O'Lone, 752 F.2d 817, 827 (1984), aff'd, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); Hodgin v. Agents of Montgomery County, 619 F.Supp. 1550, 1552 (E.D. Pa. 1985).

Under this standard, whether assaultive conduct by a correctional officer amounts to a constitutional violation or simply a state tort claim depends on the nature and degree of the violence and the circumstances under which it occurred. See e.g., not actionable under §1983 - Fuller v. Bowers, No. 87-7316 slip op. (E.D. Pa. Jan. 31, 1989) (officer alleged to have struck inmate in chest); Lenegan v. Althouse, 1988 U.S. Dist LEXIS 4959

2. Pltf.'s declaration ¶17; Pltf.'s dep. 86-91.

(E.D. Pa. May 26, 1988) (officer alleged to have pulled inmate's hair, ear, and hit head); Ricketts v. Derello, 574 F.Supp. 645 (E. D. Pa. 1983) (officer alleged to have shoved inmate). See e.g., triable issue - Norris v. District of Columbia, 737 F.2d 1148 (D.C. Cir. 1984) (inmate alleged to have been sprayed with mace, handcuffed, kicked and punched by four guards); Hodgin v. Agents of Montgomery County, 619 F.Supp. 1550 (E.D. Pa. 1985) (handcuffed inmate alleged to have been punched, kicked, pushed down stairs and beaten by group of officers).

Here, plaintiff's declaration and deposition describe an assault in which plaintiff received a "Superficial Laceration 1/2" long over Lt upper eye." Pltf.'s Ex. N. More serious are the assertions that defendant "repeatedly" attempted "to ram" plaintiff's head against a wall, although the inmate offered no resistance. If these facts are true,³ whether they constitute a constitutional violation is an issue to be decided at trial.

Plaintiff's other §1983 claims are not actionable. One is a spitting incident on November 1, 1988. Another sets forth verbal harassment claims. These do not rise to the level of a constitutional violation. See Oltarzewski v. Ruggiero, 830 F.2d 136 (9th Cir. 1987); Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973); Ricketts v. Derello, 574 F.Supp. 645 (E.D. Pa. 1983).

3. Defendant's version is that plaintiff provoked the incident. In a prison disciplinary proceeding, plaintiff was found to have assaulted defendant. Pltf.'s Ex. O.

Also, according to plaintiff's response to the present motion, defendant's actions were part of a campaign to prevent plaintiff from exercising his constitutional rights. While this could be a cognizable claim, see Hodgin v. Agents of Montgomery County, 619 F. Supp. at 1553, there is no evidentiary support in the record.

The claim that defendant falsely accused plaintiff of assault, thereby violating his due process rights, is subsumed by the administrative hearing held on the disciplinary violation charge.⁴ Freeman v. Rideout, 808 F.2d 949, 951 (2d Cir.), reh. denied en banc, 826 F.2d 194 (1987), cert. denied, 485 U.S. 982, 108 S.Ct. 1273, 99 L.Ed.2d 484 (1988); Vines v. Howard, 658 F.Supp. 34, 37 (E.D. Pa. 1987).

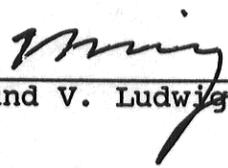
Plaintiff's deposition does not substantiate the claim that in August, 1988 he was refused medical care.⁵ Even if it did, an Eighth Amendment lack of treatment violation - "deliberate indifference to serious medical needs" - has not been established. Estelle v. Gamble, 429 U.S. 97, 105, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976). See Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976). Similarly, the facts made out as to unsuitable prison conditions (e.g., not allowed to clean up cell on August 13, 1988, refused clean towel on August 11, 1988, yelling and defecation by other prisoners from time to

4. Plaintiff now appears to have abandoned this theory. Pltf.'s response at 24.

5. Pltf.'s dep. 65-66. Although plaintiff complained about the extent of treatment he received during August, he admitted that he was seen by a health care worker who prescribed and delivered medication.

time, being awakened by guard) do not portray the serious deprivation of basic human needs necessary to sustain §1983 jurisdiction. See Peterkin v. Jeffes, 855 F.2d 1021, 1024 (3d Cir. 1988).

Given these rulings, pendent jurisdiction over plaintiff's state claims unrelated to the incident on December 2, 1988 will not be exercised. Because these state claims do not arise from the same occurrence as the alleged assault, jurisdiction for pendent purposes is limited. See Ambromovage v. United Mine Workers of America, 726 F.2d 972, 989-90 (3d Cir. 1984). Moreover, discretionary factors of convenience, judicial economy and fairness militate against exercising jurisdiction. Id.



Edmund V. Ludwig, J.

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By *[Signature]*
Clerk

M E M O R A N D U M

Ludwig, J.

August 30, 1990

Plaintiff Kenneth Gibbs moves for a new trial,¹ asserting error in three trial rulings and in the refusal to submit the state tort of assault and battery to the jury. Upon review of these grounds, the motion will be denied.

This §1983 action centered on the alleged physical mistreatment of plaintiff, an inmate at SCI Graterford, by defendant Michael Churner, a state prison guard. The jury answered the following question in the negative: "On December 2, 1988 did defendant Michael Churner violate plaintiff Kenneth Gibbs' rights under the 8th Amendment to the U.S. Constitution?"

At trial, defendant's objections to certain of plaintiff's evidentiary offers were sustained. These rulings, which were explained on the record, excluded the following:

1. Although this motion is styled, in the alternative, as one for judgment notwithstanding the verdict, the memorandum of law addresses only a new trial. As to judgment n.o.v., the motion will be denied because there was competent evidence from which a rational jury could have found for the defendant. See Bhaya v. Westinghouse Electric, 832 F.2d 258, 259 (3d Cir. 1987), cert. denied, 488 U.S. 1004, 109 S.Ct. 782, 102 L.Ed.2d 774 (1989).

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Clerk

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1. A Department of Corrections letter dated June 5, 1989 notifying defendant of a one-week suspension that related to an incident involving another guard and a different inmate. Defendant was reprimanded for not reporting the other guard's use of excessive force. The probative value that the disciplinary letter may have had was substantially outweighed by the danger of unfair prejudice and jury confusion. F.R.E. 403.

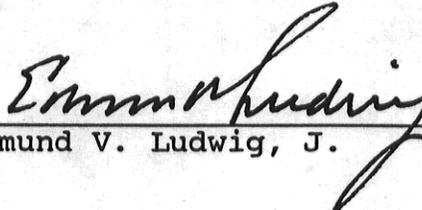
2. A misconduct report made by defendant as to plaintiff's alleged refusal to obey defendant's order to leave a shower on March 19, 1989. This incident post-dated the altercation at issue. It had no bearing on the parties' relationship as of December 2, 1988 and raised the collateral question of the parties' post-incident animus and its problematical causes. F.R.E. 402, 403.

3. An unauthenticated, undated "petition" alleging racist conduct by defendant purporting to have been signed by more than 60 inmates at Graterford, but never filed or submitted. If the "petition" in that form was relevant, its probative value was substantially outweighed under Rule 403. F.R.E. 402, 403.

The complaint alleged that, in addition to the 8th Amendment violation, defendant had committed an assault and battery under Pennsylvania law. Plaintiff's request to submit this issue to the jury was refused. The distinction, if any, between the constitutional violation and the state tort would appear, in these particular circumstances, to be immaterial. There is no precedential basis in state law for defining the

custodial duty of a prison guard to an inmate without utilizing the same factors as are inherent in 8th Amendment analysis. Also, under the facts presented, the issue was credibility. If, as plaintiff contended, he was attacked and beaten up by the guard, his claim was constitutionally actionable. Under defendant's version of the facts, plaintiff was the aggressor and defendant acted in reasonable self-defense - in which event there was no liability under state tort law.

Much of the parties' prior relationship as depicted by plaintiff and his witnesses was received into evidence over defendant's objection. The trial was conducted fairly, and the parties were well represented. The jury chose not to credit plaintiff's evidence over defendant's.


Edmund V. Ludwig, J.

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AUG 31 1990

O R D E R

AND NOW, this 30th day of August, 1990,
plaintiff's motion for judgment notwithstanding the verdict or,
in the alternative, for a new trial is denied.

Edmund V. Ludwig, J.

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