UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

RAMON ARMAS BORROTO, JR.
Plaintiff,

vs

CASE NO: 5:04CV165-RH/WCS

L. MC ~~DONALD~~ L. MCDONALD, PATE, SPEIGHT, MCKENZIE, and KENT
Defendants.

FILED
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PLAINTIFF'S REPLY TO DEFENDANTS' SPECIAL REPORT

PLAINTIFF, RAMON ARMAS BORROTO, JR., pro se, and pursuant to this Court's order, hereby submits this reply to the defendant's Special Report, as follows:

PLAINTIFF'S CLARIFICATION OF HIS STATEMENTS

The defendants' are trying to make the plaintiff's claims sound inconclusive and therefore the plaintiff begins by first clarifying several facts. The Plaintiff did not possess or have access to a watch or clock, on date of this incident nor did he have anyway of accurately telling the correct time which is why the plaintiff stated at "approximately" 8:30AM on 11/28/02 as the date and time of occurrence. The plaintiff also stated he was hit 6 or 7 times in the abdominal area, 3 or 4 times in the back of his head, and once on his left ear. In the plaintiff's point of view, being punched that many times is clearly ~~be~~ being punched repeatedly.

PLAINTIFF'S STATEMENT OF FACTS

ON November 28, 2002, the plaintiff was housed in Close Management, as a C.M. III level inmate. The Defendant's claim that because of exhibit B the plaintiff was seen by medical concerning his sinus problems. If the defendants said claim were in fact true, such a medical evaluation would be considered a sick call evaluation. Sick call evaluations per Department of Corrections procedures are conducted Monday through Friday with the exceptions of Holidays. Sick call evaluations are never conducted on Holidays, and November 28, 2002 was in fact the Holiday of Thanksgiving and therefore he would not have been seen for any sick call evaluations on said date. Nurse Kent fraudulently falsified documents in an attempt to cover up for the actions which took place on said date most likely out of fear.

The Plaintiff after being assaulted did not declare a staff assault immediately afterward due to fear of further assault, and abuse when the evening meal was served the plaintiff advised officers on the 3 PM to 11 PM shift of the assault. Ofc. John Doe contacted Sgt. English who came to the plaintiff's

cell only to tell him that he could not declare a staff assault because the Captain had left early. After shift changed again, the plaintiff declared another staff assault ~~because~~ to officer M. Dalton. The plaintiff was again brushed off by another officer covering up for the other officer's involved in the assault After approximately one hour and a half the majority of the inmate's became agitated in regards to the officer's continuously "turning a blind eye", and began yelling and kicking on the door. Officer's entered the wing attempting to quiet the inmate's who were yelling and kicking on the door. The inmate's yelled to the officer's stating that nobody was gonna stop until the plaintiff was attended to. The officers then and only then called the Captain and medical staff who finally came and interviewed the plaintiff. After the plaintiff was taken out of eyesight of the inmate's on the wing inmate's again began kicking and yelling out of fear that the plaintiff was being assaulted again. Once the Plaintiff was brought back into the eyesight of the wing the inmate's stopped. Captain Scott asked the plaintiff to advise the inmate's that he was not being further assaulted. The plaintiff was asked prior to the captains and nurses arrival to submit to handcuffs. Inmate's yelled to the plaintiff not to cuff up until the captain and nurse arrived because he would only be assaulted again. The Plaintiff did not submit to cuffs until the captain and nurse arrived out of fear of abuse.

The Defendant's L McDonald and C McKenzie have a history of abuse toward inmate's and have become learned in how to assault by strategically punching areas which will leave no marks, which is why there were no marks on the plaintiffs abdomen. The plaintiff has thick black hair and if there was a on the back of his head it could not be seen. Officer McDonald was punching the plaintiff in the back of his head when officer McDonald hit the plaintiff on his left ear while punching the plaintiff he could not even attempt to block the battery and assault, and due to Ofc. McDonalds misthrown punch the plaintiff sustained his only telling mark from the said assault and battery. The forces of the punches the plaintiff received were to the extent that although the plaintiff was punched on his ear, that punch left a bruise on his scalp behind his ear, [illegible] to the bruise left on his ear. The plaintiff's not having bruises on his abdominal area does not negate the fact that the plaintiff was in fact assaulted, and prison gaurds cannot beat inmate's as long as they leave no telling marks. The Plaintiffs eighth amendment right to freedom from cruel and unusual punishment was violated due to the excessive force which was sadistic and malicious and which resulted in physical pain to the plaintiff as well as the mental anguish cause by this beating. The force used was malicious and this can be proved because the force used was because the nurse said that the plaintiff was masturbating while talking to her at his cell door, and as a punishment for this act the plaintiff was beaten. The defendant's have tried to say that injuries sustained,

mainly his bruised ear was a slight bruise yet the mental health counselor noted the plaintiff ear to be of a ~~ye~~ greenish-yellow parlor.

The defendant's try to paint a picture of the plaintiff being a problematic inmate who is psychotic, but such references are entirely irrelevent as to the plaintiffs claim, but the plaintiff will refute and elaborate on the defendant's special report. The plaintiff is not psychotic or delusional. As stated by the plaintiff to Inspector Kraus of the inspector generals office and as noted by the psychiatrist the plaintiff manipulated his way out of the dorm by way of mental health out of fear of further abuse and due to advise from other inmate's.

After being beaten the plaintiff did go out to rec less than 12 hours later but with the motive of showing the other inmate's the bruise sustained by the plaintiff from the beating and to inform the other inmate's what exactly was done to him.

The plaintiff later went to the mental health isolation units After remaining there for a few days the plaintiff was sent back to the dorm, he was placed in the same exact dorm where he had previously been beaten. Prior to entering the dorm the plaintiff was threatened with further reprisal if he didn't keep his mouth shut.

Concerning the D.R which they gave the plaintiff defendant's exhibit T-1, the plaintiff never admitted to making any homemade weapon. These officer's lied about the plaintiff ~~admitting to said~~ concerning said statement and disciplinary report as further reprisal against the plaintiff. The plaintiff was advised by an older more experienced inmate that in order to leave from Washington C.I. he had to check in, and that he Charles Derry Berry his cellmate would help him in return for money The plaintiff's cellmate advised the plaintiff to tell the officer's that there was a shank under his (inmate Derry Berry's) bunk and that inmate Derry Berry had threatened to kill him (the plaintiff). The older more experienced inmate was simply trying to scam the plaintiff out of his money. As can be seen by the Defendant's exhibit V-4, the plaintiff is still ~~trying to~~ under the impression that inmate Derry Berry was still trying to help him. The extent of the plaintiff's fear was such that the plaintiff was willing to pay, and cut on his wrist, just to be moved from the environment and situation, where he was assaulted

As for the defendant's statements that "the incident simply did not happen", it is an entirely false and fraudulent statement. Cfc Speight not only was on duty on said date, but as noted in the 1983 complaint he was one of the officer's who were present in the room and who was deliberately indifferent. There is no ~~justifyable~~ justifiable reason for all those officer's to have been present in the room where the plaintiff was abused if the plaintiff was simply being seen for a routine sick call evaluation In addition if the defendant's claims were true in regards to the plaintiffs attitude, he would have simply been rescheduled rather then been pulled out. As further evidence the plaintiff is the fact that sick call evaluations are under no circumstances conducted on weekends or holidays This evidence the defendants claims to be fraudulent in regards to

the reasons for which the plaintiff was taken out of his cell. If the plaintiff was never beaten and if this incident never occurred the defendants' would not have to lie stating that the plaintiff was taken out of his cell for sick call evaluation when November 28, 2002, was the holiday of Thanksgiving and no routine sick call evaluations are ever conducted on holidays. So if the incident never occurred then why are the defendants' now lying as to why the plaintiff was taken out of his cell. The fact that the defendants' statements are fraudulent shows that the plaintiff was in fact beaten and that the defendant are also lying about this.

The Emergency Room Record, Diagram of Injury, and Infirmary Progress Record the plaintiff sustained injury. Although the ~~injury~~ injuries were not life threatening they were injuries all the same proving that the plaintiff was in fact assaulted and further shows the fraudulence of the defendants' claims as to this incident never happening. Documentation of the most visable bruise can be seen on the defendants' exhibits F, G, and Q-1.

The defendants' claim that inspector Kraus transferred the plaintiff for simply a "population adjustment". The fraudulence of this reason can be deduced from the fact that once the inspector interviewed the plaintiff he saw the need to immediately call someone on the phone and the plaintiff was immediately transferred by himself to Santa Rosa C.I. less than 45 minute's after the inspector generals phone call. As to further refute this if the plaintiff was indeed transferred for a common population adjustment, the transfer would not have been labeled "High" priority. The plaintiff was strip searched by the Inspector general and Inspector Kraus checked the plaintiff for bruises and marks prior to being placed on the van for transfer. The plaintiff upon arriving at the new prison Santa Rosa C.I., had to remain in the intake area until another inspector stripped the plaintiff and checked for new bruises, marks, and lumps which were not noted by the previous inspectors inspection. No other inmate's were transferred with the plaintiff.

MEMORANDUM OF LAW

I. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGEMENT

Convicted prisoner's are protected from misuse of force by the Cruel and Unusual Punishment Clause of the Eighth Amendment. Whether the force violate's the Eight Amendment depends entirely on whether it was "applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically to cause harm." See Hudson v. McMillian 503 ___ 112 S.Ct. 995, 998 (1).

When prison officials maliciously and sadistically to cause harm, ~~"See~~ "contemporary standards of decency are always violated, unless the "force" is deminimis A correctional officer assaulting an inmate for a punishment does not constitute deminimis "force". If there is no need for force, the constitution may be violated by relatively small amounts of force, even a push or shove. See Felix v. McCarthy 939 F.2d 699, 701-02 (throwing a prisoner into a wall without reason violate the 8th Amendment). Jones v. Huff 759 F Supp 526, 536, (unwarranted kicks in the buttocks violated the eight Amendment) Bee v. DeKalb County 679 F Supp 1107, 1109, 1113, (Allegation of unprovoked blow to the face created a factual issue as to excessive force.

Prisoners need not prove a serious or significant injury to establish an Eight Amendment violation. The degree of injury is "relevant to the Eight Amendment inquiry but does not end it." See Hudson, supra; McHenry v. Chadwick. 896 F.2d 184, 187.

Force may be used to restore or maintain order in a jail or prison. That does not mean anything goes once a prisoner has misbehaved, force that is unnecessary, or excessive to the need, may still be unconstitutional. See United States v. Cobb 905 F2d 784 (verbal provocation does not excuse a physical assault by a law Enforcement officer). Furthermore correctional officers may not use excessive force by assaulting prisoners as long as they make sure that they leave few or no marks and/or if such marks are only classified as deminimis injury. Use of force on a prisoner who is handcuffed and subdued or not a threat in any way is unconstitutional. See Jones v Huff 759 F Supp. 526, 536, (slapping and punching a handcuffed inmate violated the Eighth Amendment); Caudle-El v. Peters 727 F Supp 1175, 1180.

In the present case the plaintiff was masturbating while talking to the nurse The nurse told Ofc. McDonald who was escorting her through the wing. They left. Ofc McDonald and Pate returned and handcuffed the plaintiff behind his back. Upon entering the Disciplinary Hearing Room/Medical Evaluation Room the plaintiff observed that Nurse Kent, Ofc. Speight, and Sgt. McKenzie were already in this room. The plaintiff was told to stand across from the nurse. Ofc. McDonald made a little speech about dis-respecting the nurse. He then proceeded to punch the plaintiff in his abdomen, head, and ear and then drop him on his head as punishment for disrespecting the nurse. No use of force was necessary and by beating the plaintiff his Eighth Amendment is clearly violated.

As in the present case, infliction of injuries such as bruises and abrasions will be found unconstitutional if there was no need to use force at all, or if there is evidence of malicious or sadistic behavior by the defendants. See Malton v. City of Cleveland 839 F.2d 240, 249-50 (bruises abrasions, and a nose

bleed state a claim); Williams v Omodt 640 F.Supp. 120, 121-23, (damages awarded for "bruises, contusions, swelling, and considerable pain" where there was no justification for any use of force.

Therefore an Eighth Amendment claim is not weighed by the extent of injury sustained but by "whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. See Hudson, supra; Whitley v. Albers 475 U.S. 312, 320-21, 106 S.Ct. 1078; Howard v Barnett 21 F.3d 868, 872, Cummings v Malone 995 F.2d 817, 822. And due to the defendants having beaten the plaintiff while he was handcuffed behind his back while no force was necessary, and simply to punish the plaintiff for masturbating, shows that said officer intentions were purely malicious and sadistic see Clark v. Collins 914 F.2d 56 (testimony that a beating was completely gratuitous and that no force was necessary would ~~show~~ support a finding of malice).

In conclusion the extent of injury is relevent to damages but is not a prerequisite to suit. See Gray v Spillman 925 F.2d 90, 93; Felix v McCarthy, supra (minor injuries are actionable when force is completely unjustified); Johnson v. Doherty 713 F.Supp. 69, 71 (where injury is minor, court must consider the context in which the injury occurred), Henson v Thezan 698 F.Supp. 150, 152 (allegation that a prisoner was abused for 3 hours could not be dismissed on absense of injury.)

Furthermore the plaintiff further claimed mental, emotional, and psychological anguish, fear, and torture, in addition to the physical abuse. See Parrish v Johnson 800 F.2d 600, 605, (significant "mental anguish."); Parker v. Asher 701 F.Supp 192, 194, ("gratitious fear"). Northington v Jackson 973 F.2d at 1524.

The Defendants Document # 37 of this case shows the investigative report made by the inspector general. Either the Inspector General or of administrative officers who switched video evidence by submitting a fraudulent video of another date ~~to~~ not of consequence to the present incident under review in an attempt to cover up the abuse. In the investigave report # 02-13942 made by the inspector generals office on page 3 it note's "Other Pertinent Information:"

"Review of the video tape-recording of quad four in "G" dormitory during the morning of November 28, 2002, revealed that Inmate Berreto was not taken out of his cell and that no one entered his cell beteen the hours of 7:AM and 11:AM." Yet the defendants now claim that approximately 9:AM on said date that the plaintiff was only taken out of his cell for a medical evaluation by Nurse Kent. So either the Inspector filled out a fraudulent report covering up for the officers, or the administrative staff at the prison purposely committed fraud by submitting a fraudulent video tape-recording to the Inspector to cover up for their officer's actions.

II. THE PLAINTIFFS REQUEST FOR MONETARY COMPENSATION IS PROPER.

The defendants claim that the plaintiffs request for monetary compensation must be stricken due to the provision of the PLRA 42 U.S.C. § 1997e(e). This provision of the PLRA 42 U.S.C. 1997e(e) states:

"No Federal civil action may be brought by a prisoner confined in a jail, ~~or~~ prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

Section 1997e(e) clearly illustrates actions requesting damages for emotional and mental injury, and only effects actions brought solely for mental or emotional injury, and does not impair a prisoners right to bring action for physical injury. Congress made the obvious determination that suits brought solely for mental or emotional injury were more likely to be without ~~merit~~ merit than cases in which a prisoner sustains some physical injury. See HARRIS V. GARNER 216 F.3d 970, at 1005-06.

In the present case the plaintiff brought action for assault and battery, excessive force which was of malicious and sadistic nature, and ~~as direct~~ as a direct result of these actions by the defendants for emotional, ~~and~~ ~~psy~~ psychological, and mental pain, fear, anguish and torture

The plaintiff in the present case sustained injury, but the only telling mark the defendants left on him was a bruised ear and the bruise on his directly behind his ear, which he sustained from one of ofc. McDonald's punches. Said bruises resulted from a physical beating. Not only is the injury ~~to~~ suppose to be under scruting, but also the manner in which the injuries were sustained. See Hudson v. McMillian at 10, 112 S.Ct. 1000. ~~In support of the defendants claims for why~~ (that the injury must be more than deminimis, but need not be significant), Whitley v Albers supra; Oliver v Collins, supra; Gray v Spillman supra. In support of the defendants claims for why the plaintiff requested relief should be stricken the defendant's cite several cases. None of these cases are relative to the plaintiffs claims. Most are for claims that concern medical nature. Also in Siglar v Hightower 112 F.3d 191 Although similar as far as injury goes the actions which cause the injuries are entirely unrelated. In siglar the plaintiff's bruised ear was a deminimis when looking at the context in which the injury resulted, the plaintiff's ear in that case was merely pinched. In the present case the plaintiffs bruised ear and scalp resulted from a beating at the hands of a prison prison officer while other officer's present only watched while the plaintiff who was handcuffed behind his back was beaten. The defendant's have not cited one case in which court's have labled any injury received as a direct result of a beating to be deminimis injury and they cannot find one.

Even considering the ~~plaintiffs~~ defendant's claims as to this point they would only effect the compensatory damages for only the emotional, mental, and psychological claims. Even so the plaintiff would not be precluded from seeking punitive damages for ~~for~~ the emotional, mental, and psychological claims. See Allah v. Al-Haffeez 226 F.3d 247; Searles v. Van Bebber 251 F.3d 869, 879-81 Therefore the plaintiff's claims compensatory and punitive damages are sufficient for his claims for violations of his Eighth Amendments Right to Freedom from Cruel and Unusual Punishment, due to the excessive force applied in a malicious and sadistic manner, and 4th Amendments Freedom from Assault, as well as punitive damages for his emotional, mental, and ~~phyp~~ psychological Anguish. See Molton v. City of Cleveland 839 F.2d 240, 249-50; and Williams v. Omodt 640 F.Supp 120, 121-23

Furthermore ~~v~~ 42 U.S.C §1997e(e) does not note that a injury must be more than deminimis. See 42 U.S.C §1997e(c).

CONCLUSION

WHEREFORE, based on the foregoing, ~~Defendants~~ the plaintiff requests that this Honerable Court accept this response to the defendants special report in support of a denial for summary judgement in favor of the plaintiff~~s~~.

Respectfully Submitted,

R Rob

Ramon Borrero X27461

F.S.P. B 1316

7819 N W 228th St

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OATH OF VERIFICATION

UNDER PENALTIES OF PERJURY, I RAMON ARMAS BORRETO, JR., declare that I have read the foregoing and that it is true and correct.

12/26/05
DATE

R Borreto

CERTIFICATE OF SERVICE

I hereby certify that I A copy of the foregoing has been turned in to A prison officials hand to be mailed by U.S.P.S. to:

Caryl Kilinski ; Joy A. Shubbs
Attorney Generals office
The Capitol, PL-01
Tallahassee, FL 32399-1050

on this 5TH day of JANUARY, 200.

R Borreto
RAMON BORRETO

LEGAL MAIL
PROVIDED TO
FLORIDA STATE PRISON
DATE 1-5-05 FOR MAILING.
INMATES INITIALS RB