

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LEO COWAN,

Plaintiff,

MEMORANDUM and ORDER
06-C-575-S

v.

JOSH SEELEY,

Defendant.

Plaintiff Leo Cowan was allowed to proceed on his excessive force claim against defendant Josh Seeley. In his complaint plaintiff alleges that defendant Seeley pushed him into his cell when he was incarcerated at the Dane County Jail.

On January 29, 2007 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, an affidavit and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding the defendant's motion for summary judgment the Court finds there is no genuine dispute as to any of the following material facts.

At all times material to this action plaintiff Leo Cowan was incarcerated at the Dane County Jail, Madison, Wisconsin. Plaintiff was 35 years old, 6 feet tall and weighed 201 pounds.

Defendant Josh Seeley is a Deputy Sheriff employed by Dane County. On Friday, August 11, 2006 defendant Seeley was assigned to work in a jail segregation area, 7 West, of the Dane County

Jail, in the City-County Building. He worked the 7:00 p.m. to 11:00 p.m. shift.

During his shift defendant Seeley was notified that plaintiff had a visitor. Due to the plaintiff's record of prior violence in jails and correctional institutions, he was to be moved from his cell only in the presence of two officers and only in full restraints which include handcuffs, leg shackles and a tether connecting the two. Defendant Seeley and Deputy Koratko went to plaintiff's cell to secure him and transport him to the visitation area.

Plaintiff was standing inside the cell and defendant Seeley was standing on the outside separated from him by the closed cell door. Defendant Seeley had not completed the procedure of double locking plaintiff's handcuffs when Deputy Koratko opened the cell door. Defendant Seeley verbally instructed plaintiff to stay in his cell but he took a step forward. Defendant Seeley placed his left hand on plaintiff's chest and directed him into the cell so he could close the cell door. Defendant Seeley used the force necessary to push the plaintiff past the door frame in order that the cell door could be closed and plaintiff could be properly restrained.

Defendant Seeley then double locked plaintiff's handcuffs on the tether and directed Deputy Koratko to open the cell door. After plaintiff stepped from his cell defendant Seeley finished the

restraint procedure. Defendant Seeley and Deputy Koratko escorted plaintiff to the visitation area.

Plaintiff did not complain of any pain or possible injury at that time. After returning to his cell from the visit, plaintiff complained of chest pains and difficulty breathing. Two jail nurses responded and evaluated plaintiff. They determined he could have a bruise on his chest. They provided ice and non-prescription pain pills for him.

MEMORANDUM

Plaintiff claims that defendant violated his Eighth Amendment rights by using excessive force when he pushed him into his cell. Defendant contends that the force he used was not excessive.

The intentional, wanton or unnecessary infliction of pain violates the Eighth Amendment. Hudson v. McMillian, 503 U.S. 1, 8 (1992). In Hudson, the Court held that the core judicial inquiry is whether the force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically to cause harm.

Viewing the facts in the light most favorable to plaintiff, defendant Seeley pushed plaintiff into the cell. There is no evidence, however, that this push was for any other reason than to place plaintiff back into the cell so that the cell door could be closed and plaintiff restrained. There is no evidence that the push was malicious or for the purpose of causing harm. The force

that defendant used was reasonable in order to properly restrain plaintiff for security purposes.

In Outlaw v. Newkirk, 259 F.3d 833, 840 (7th Cir. 2001), the United States Court of Appeals for the Seventh Circuit stated as follows:

While a plaintiff need not demonstrate a significant injury to state a claim for excessive force under the Eighth Amendment, "the degree of injury is relevant to determining [sic] whether the use of force could plausibly have been thought necessary in a particular situation," *Lunsford*, 17 F. 3d at 1582 (citation and internal quotation omitted), and a minor injury supports the conclusion that the incident was "at most ... a *de minimis* use of force not intended to cause pain or injury to the inmate."

The Court further stated:

Given the circumstances presented here, even if we were to find Mable's action to be an unnecessary application of force, the minor nature of the injury coupled with the absence of any other indicia of malice on Mable's part would force us to conclude that it does not rise to the level of a constitutional violation.

The minor nature of plaintiff Cowan's bruise, together with the absence of any inference of malice on the part of defendant Seeley supports the conclusion that plaintiff was not subjected to excessive force. Accordingly, defendant Seeley is entitled to judgment in his favor on plaintiff's Eighth Amendment excessive force claim.

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ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 27th day of February, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge