

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

WESLEY JEFFERSON,

PETITIONER

VS.

WENDY KELLEY ET.AL.

RESPONDANT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION APPENDIX TO PETITIONER'S
PETITION FOR WRIT OF CERTIORARI

PRO. SE. WESLEY JEFFERSON # 104933

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GRADY, AR. 71644

Index to appendices

Eighth Circuit Opinion _____ Appendix A

District Court Order _____ Appendix B

Exhibits from the record that support petitioners claim _____ Appendix C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-3650

Wesley Jefferson

Plaintiff - Appellant

v.

Wendy Kelley, Director, ADC, Central Unit; James Gibson, Warden, ADC, Varner Unit; Ashlee Shabazz, Lieutenant, ADC, Varner Unit; Terry Gibson, CI I, ADC, Varner Unit; Keith Waddle, Disciplinary Hearing Officer, ADC, Central Unit; Lorrie Taylor, Disciplinary Hearing Administrator, ADC, Central Unit and Internal Affairs, Administrator, ADC, Central Unit; Dexter Payne, Deputy Director, ADC, Central Unit

Defendants - Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:18-cv-00200-JM)

JUDGMENT

Before COLLOTON, BOWMAN and KOBES, Circuit Judges.

The court has reviewed the original file of the United States District Court. Appellant's application to proceed in forma pauperis is granted. The full \$505.00 appellate filing and docketing fees are assessed against the appellant. Appellant may pay the filing fee in installments in accordance with 28 U.S.C. § 1915(b). The court remands the assessment and collection of those fees to the district court.

It is ordered by the court that the judgment of the district court is summarily affirmed.

See Eighth Circuit Rule 47A(a).

April 29, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX(A-1)

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-3650

Wesley Jefferson

Appellant

v.

Wendy Kelley, Director, ADC, Central Unit, et al.

Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:18-cv-00200-JM)

ORDER

The petition for rehearing by the panel is denied.

July 08, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX (A-2)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

WESLEY JEFFERSON
ADC #104933

PLAINTIFF

v.

5:18CV00200-JM

KEITH WADDLE, Disciplinary Hearing Officer,
ADC, Central Unit; *et al.*

DEFENDANTS

ORDER

There is a pending motion for summary judgment filed by the remaining Defendants in this case. (Doc. No. 26). Plaintiff did not file a response to that motion. On November 19, 2018, after reviewing all the evidence submitted including a video tape of the incident at issue, United States Magistrate Judge Joe J. Volpe submitted Proposed Findings and Recommended Disposition recommending that Defendants' motion for summary judgment be granted. (Doc. No. 29). No objections have been filed, but on November 20, 2018, Plaintiff filed a notice of appeal related to a prior order of this Court and a motion for leave to file additional interrogatories. (Doc. Nos. 30, 31). Judge Volpe denied Plaintiff's motion for leave to file additional interrogatories without prejudice to refiling once this Court ruled on the Proposed Findings and Recommended Disposition. On December 3, 2018, Plaintiff filed a motion to extend time to file his objections on the basis that he has yet to receive outstanding discovery from Defendants, discovery which Defendants have asked that they not be required to answer until the Court has ruled on the Proposed Findings and Recommended Disposition. (Doc. Nos. 37, 34).

(After careful consideration, the Court concludes that the Proposed Findings and Recommended Disposition should be, and hereby are, approved and adopted in their entirety as this Court's findings in all respects. The outstanding discovery propounded by Plaintiff (Doc. No. 34-1), is not directed at the issues on which Judge Volpe recommended that the summary judgment be granted, namely failure to exhaust administrative remedies and Officer Gibson's

(EX-V.)

APPENDIX (B-1)

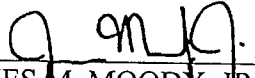
entitlement to qualified immunity under the facts.

IT IS, THEREFORE, ORDERED that:

1. Defendant's Motion to Stay Discovery (Doc. No. 34) is DENIED as moot.
2. Plaintiff's Motion to Extend Time to file objections (Doc. No. 37) is DENIED.
3. Defendants' Motion for Summary Judgment (Doc. No. 26) is GRANTED.
4. Plaintiff's remaining claims against Defendants Wendy Kelley, James Gibson, and Ashlee S. Shabazz are DISMISSED without prejudice for failure to exhaust administrative remedies; his claim against Defendant Terry Gibson is DISMISSED with prejudice; and his cause of action (Doc. No. 4) is DISMISSED.

5. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an *in forma pauperis* appeal from this Order adopting these recommendations and the accompanying Judgment would not be taken in good faith. Therefore, Plaintiff's Motion for Leave to Appeal in Forma Pauperis (Doc. No. 36) is DENIED.

DATED this 4th day of December, 2018.



JAMES M. MOODY, JR.
UNITED STATES DISTRICT JUDGE

(EX-W.)

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

WESLEY JEFFERSON
ADC #104933

PLAINTIFF

v.

5:18cv00200-JM-JJV

KEITH WADDLE, Disciplinary Hearing Officer,
ADC, Central Unit; *et al.*

DEFENDANTS

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

The following recommended disposition has been sent to United States District Judge James M. Moody, Jr. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before the District Judge, you must, at the same time that you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.
2. Why the evidence proffered at the hearing (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.

Appendix (B-3)

3. The details of any testimony desired to be introduced at the new hearing in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the new hearing.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing. Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

DISPOSITION

I. INTRODUCTION

Wesley Jefferson ("Plaintiff"), an inmate at the Varner Supermax Unit of the Arkansas Department of Correction ("ADC"), filed this action *pro se* pursuant to 42 U.S.C. § 1983. (Doc. Nos. 2, 4.) In his Amended Complaint, he alleges Defendant Terry Gibson, a correctional officer, subjected him to excessive force on August 21, 2017. (Doc. No. 4 at 19-20.) He also states related claims against Defendants Wendy Kelley, ADC Director, and James Gibson, Warden of the Varner and Varner Supermax Units, for failure to train and supervise (*Id.* at 11-16) and against Defendant Ashlee S. Shabazz, a correctional officer, for the falsification of an incident report (*Id.* at 20-21).¹ Plaintiff seeks compensatory and punitive damages as well as injunctive relief "prohibiting so said conduct." (*Id.* at 22.)

Defendants have now filed a Motion for Summary Judgment, contending Plaintiff failed to exhaust his administrative remedies against Defendants Kelley, James Gibson, and Shabazz and that Defendant Terry Gibson is entitled to judgment as a matter of law on Plaintiff's claim against

¹ Plaintiff's Amended Complaint included additional claims against additional Defendants, all of which were previously dismissed without prejudice. (Doc. Nos. 5, 15.)

must include “a brief statement that is specific as to the substance of the issue or complaint to include the date, place, personnel involved or witnesses, and how the policy or incident affected the inmate submitting the form.” (*Id.* at 5-6.) Following an attempt at informal resolution, an inmate may proceed by filing a formal grievance on the same Unit Level Grievance Form. (*Id.* at 8.) The warden or his designee must provide a written response within twenty working days of receipt. (*Id.* at 10.) If dissatisfied with the response, the inmate may appeal within five working days to the appropriate Chief Deputy/Deputy/Assistant Director. (*Id.* at 11.) The Chief Deputy/Deputy/Assistant Director must provide a written response within thirty working days. (*Id.* at 12.) “A written decision or rejection of an appeal at this level is the end of the grievance process.” (*Id.*) Administrative Directive 14-16 includes the following warning:

Grievances must specifically name each individual involved for a proper investigation and response to be completed by ADC. Inmates must fully exhaust the grievance prior to filing a lawsuit. Inmates who fail to name all parties during the grievance process may have their lawsuit or claim dismissed by the court or commission for failure to exhaust against all parties.

(*Id.* at 4-5.)

Defendants Kelley, James Gibson, and Shabazz contend Plaintiff did not file or fully exhaust any grievance against them pertaining to the claims in this lawsuit. (Doc. No. 27 at 5.) In support of their argument, they submit the Affidavit of Terri Grigsby-Brown, the ADC’s Grievance Coordinator. (Doc. No. 28-2.) According to her testimony, Plaintiff did not file any grievance alleging a failure to train and supervise on the part of Defendants Kelley or James Gibson, nor did he file any grievance alleging Defendant Shabazz falsified any records. (*Id.* at 2.) Ms. Grigsby-Brown states Plaintiff filed and exhausted only one grievance, VSM-17-02858, in the relevant timeframe. (*Id.* at 1.) In that grievance, which Defendants have also submitted, Plaintiff named only Defendant Terry Gibson and referenced only the excessive force incident of August 21, 2017.

(Doc. No. 28-3 at 5.) He did not name Defendants Kelley, James Gibson, or Shabazz and did not allege any wrongdoing on their behalf.

The evidence plainly shows Plaintiff failed to file or fully exhaust any grievance against Defendants Kelley, James Gibson, and Shabazz pertaining to the claims in this lawsuit. Therefore, he failed to “complete the administrative review process in accordance with the applicable procedural rules” with respect to his claims against these Defendants. *Jones*, 549 U.S. at 218 (quoting *Woodford*, 548 U.S. at 88). Accordingly, Plaintiff’s claims against these Defendants should be dismissed without prejudice.

B. Defendant Terry Gibson

According to Plaintiff’s Amended Complaint, Defendant Terry Gibson subjected him to excessive force on August 21, 2017, at approximately 7:17 p.m., when he “aggressively shoved” Plaintiff, placed him in a “bear hug type lock,” and slammed him face-down on the floor. (Doc. No. 4 at 19.) Plaintiff alleges he was pinned to the floor by Officer Gibson’s weight, unable to get up and “no longer posing any type of threat,” when Officer Gibson began to “barbariously beat the plaintiff with two closed fist[s] unjustifiably in the back of his head,” landing between fifty-six and one hundred punches. (*Id.* at 19-20.) Plaintiff states a sergeant “football tackled” Officer Gibson off his back. (*Id.* at 20.)

1. Official Capacity Claim

Plaintiff appears to seek relief from Officer Gibson in both his official and individual capacities. (Doc. No. 4 at 22.) To the extent he seeks money damages against this Defendant in his official capacity, that claim is barred pursuant to the doctrine of sovereign immunity. *See Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (a suit against a state official in his or her official capacity is not a suit against the official but rather a suit against the official’s office and,

willingness that it occur.” *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 321 (1986)). In determining whether a use of force was wanton and unnecessary, it is also proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response. *Id.* Thus, the extent of the resulting injury, “while material to the question of damages and informative as to the likely degree of force applied, is not in and of itself a threshold requirement” for proving an Eighth Amendment excessive force claim. *Williams v. Jackson*, 600 F.3d 1007, 1012 (2010) (citing *Wilkins v. Gaddy*, 559 U.S. 34 (2010) (per curiam)).

Officer Gibson contends the force he used on Plaintiff was applied in a good-faith effort to maintain or restore discipline, not maliciously and sadistically to cause harm. (Doc. No. 27 at 7.) After careful review of all the evidence, which includes surveillance video of the incident and affidavits from Officer Gibson and the sergeant who came to assist him, I agree. According to Officer Gibson’s Affidavit, he came to Plaintiff’s barracks to deliver two brooms to the barracks porter. (Doc. No. 28-4 at 1.) When he opened the barracks door, Plaintiff immediately came out, which he was not authorized to do, and “got into [Officer Gibson’s] personal space.” (*Id.*) Officer Gibson says Plaintiff was trying to take the brooms from him and did so. (*Id.*) Plaintiff ignored Officer Gibson’s orders to give the brooms back, instead threatening him and saying he was going to “bust” him with the brooms. (*Id.* at 1-2.) Officer Gibson says he secured the barracks door and then tried to regain control of the brooms, fearing Plaintiff would use them as weapons against him; when Plaintiff refused to give the brooms back, Officer Gibson took him to the ground “to minimize the threat.” (*Id.* at 2.) Plaintiff was on his back, with Officer Gibson on top of him, and a physical altercation ensued. (*Id.*) Plaintiff threw “several punches,” with one striking Officer Gibson in the face. (*Id.*) Officer Gibson then returned two punches. (*Id.*) According to Officer

Gibson's Affidavit, two other correctional officers, including Sergeant Tarrell McEwen, arrived to assist him "[a]lmost immediately after" he took Plaintiff to the ground. (*Id.*) The other officers secured Plaintiff, who was on the floor for less than a minute before being escorted away. (*Id.* at 3.)

Officer Gibson's testimony is corroborated by Sergeant McEwen's Affidavit. He says he answered a radio call for assistance and found Officer Gibson on the floor, trying to restrain Plaintiff. (Doc. No. 28-5 at 1.) Plaintiff was "physically resisting and was not obeying any of the orders for him to stop resisting and submit to handcuffs." (*Id.*) Sergeant McEwen says he witnessed Plaintiff "trying to punch" Officer Gibson and that Officer Gibson did strike Plaintiff "in an attempt to regain control of the situation," using the appropriate amount of force to do so. (*Id.* at 1-2.) Sergeant McEwen further states that after Officer Gibson was able to get off of Plaintiff and he himself tried to restrain Plaintiff, Plaintiff tried to bite him on his calf muscle. (*Id.* at 2.) He had to put Plaintiff in a "wrist lock" in order to get him handcuffed. (*Id.*) Like Officer Gibson, Sergeant McEwen says Plaintiff was on the floor for less than a minute before he was handcuffed and escorted away. (*Id.*)

Both Affidavits are corroborated by the video evidence. Officer Gibson can be seen approaching the barracks door with brooms in his hand. (Doc. No. 24 at 07:15:37.) As soon as he opens the door, Plaintiff exits the barracks and begins speaking to Officer Gibson, getting close enough to him that their faces are almost touching. (*Id.* at 07:15:45.) *Plaintiff then begins to push Officer Gibson against the door. (*Id.* at 07:15:54.) He holds Officer Gibson against the door for approximately fifteen seconds before Officer Gibson tries to push him away and Plaintiff grabs the brooms. (*Id.* at 07:16:10.) *Plaintiff then approaches Officer Gibson menacingly, pushing up against him with the brooms in hand. (*Id.* at 07:16:13.) *After approximately ten seconds, Officer

Gibson grabs Plaintiff around the torso with both arms and they fall to the ground just outside the view of the camera. (Id. at 07:16:24.) Two other officers can be seen entering the area only seconds later, with others following closely behind. (Id. at 07:16:28.) Officer Gibson can be seen in view of the camera as the other officers work to restrain Plaintiff. (Id. at 07:16:33.) Plaintiff is brought to his feet and led away in handcuffs only about thirty seconds later. (Id. at 07:17:01.)

This evidence clearly shows that Plaintiff acted aggressively toward Officer Gibson and instigated the physical altercation. He came out of the barracks unauthorized, immediately took on an aggressive posture toward Officer Gibson, pushed him against the barracks door, took the brooms from him, and threatened to use the brooms as weapons against him, ignoring Officer Gibson's orders to return the brooms. Officer Gibson's perception that Plaintiff posed a threat to him was obviously reasonable, and he used a reasonable amount of force in taking Plaintiff to the ground. Plaintiff himself implies he did constitute a threat, stating he "no longer" posed a threat after Officer Gibson took him to the ground and thus "regained control of the situation and the plaintiff." (Doc. No. 4 at 19.)

Although the ensuing altercation happened outside the view of the camera, Plaintiff's assertion that Officer Gibson punched him between fifty-six and one hundred times is simply not believable. The video evidence shows that only about four seconds elapsed between the time Plaintiff was taken to the ground and the other officers arrived, and Officer Gibson got off of Plaintiff and stood to the side, in view of the camera, immediately thereafter. The United States Supreme Court has held that when uncontested video evidence is submitted in support of a motion for summary judgment, the facts should be viewed in the light depicted by the video evidence. Scott v. Harris, 550 U.S. 372, 380-81 (2007). This is so despite the fact that summary judgment evidence is normally to be viewed in the light most favorable to the nonmoving party: "When

opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.* at 380.

Moreover, Plaintiff’s Amended Complaint does not allege he suffered any injury. Plaintiff did say in his grievance that he sustained a “big ball size knot on the back left hand side of [his] head.” (Doc. No. 28-3 at 5.) Even assuming Plaintiff sustained a knot to his head, the minor extent of this injury is further indication the force used was reasonable and necessary under the circumstances – and that Officer Gibson did not, as Plaintiff claims, punch him fifty-six to one hundred times. See *Whitley*, 475 U.S. at 321.

For these reasons, Plaintiff has failed to show Officer Gibson applied force maliciously and sadistically to cause harm, rather than in a good-faith effort to maintain or restore discipline. *Hudson*, 503 U.S. at 7. Because the facts alleged or shown, construed in the light most favorable to Plaintiff, do not establish a violation of a constitutional or statutory right, Defendant Terry Gibson is entitled to qualified immunity on Plaintiff’s claim against him in his personal capacity.

C. 28 U.S.C. § 1915(g) Strike

Defendants have requested Plaintiff be issued a strike pursuant to 28 U.S.C. § 1915(g) “because the video shows that the claim against Defendant Terry Gibson for excessive force is undeniably frivolous.” (Doc. No. 26 at 3.) While that may be so, Plaintiff’s claim against Defendant Terry Gibson is only one of several in this action. Plaintiff’s claims against Defendants Kelley, James Gibson, and Shabazz are recommended for dismissal on the basis that he failed to exhaust his administrative remedies. Such a dismissal is not a strike under § 1915(g). *Owens v. Isaac*, 487 F.3d 561, 563 (8th Cir. 2007) (per curiam). And the United States Court of Appeals for the Eighth Circuit has suggested an entire action must be dismissed for one of the enumerated

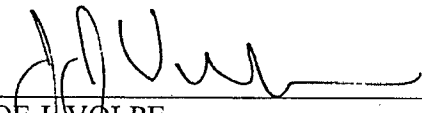
reasons for a strike to issue. *Orr v. Clements*, 688 F.3d 463, 466 (8th Cir. 2012) (citing *Tolbert v. Stevenson*, 635 F.3d 646, 650-51 (4th Cir. 2011) (“§ 1915 equates ‘action’ with an entire ‘case’ or ‘suit’”). Therefore, a strike should not issue in this case.

IV. CONCLUSION

IT IS, THEREFORE, RECOMMENDED that:

1. Defendants’ Motion for Summary Judgment (Doc. No. 26) be GRANTED.
2. Plaintiff’s remaining claims against Defendants Wendy Kelley, James Gibson, and Ashlee S. Shabazz be DISMISSED without prejudice for failure to exhaust administrative remedies; his claim against Defendant Terry Gibson be DISMISSED with prejudice; and his cause of action (Doc. No. 4) be DISMISSED.
3. The Court certify, pursuant to 28 U.S.C. § 1915(a)(3), that an *in forma pauperis* appeal from any Order adopting these recommendations and the accompanying Judgment would not be taken in good faith.

DATED this 19th day of November, 2018.



JOE J. VOLPE
UNITED STATES MAGISTRATE JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**