United States Court of Appeals
for the Fifth Circuit

No. 20-30627
Summary Calendar

TONY JOSEPH TABOR,

Plaintiff—Appellant,

versus

VINCENT COLEMAN,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:18-CV-1308

Before JOLLY, WILLETT, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Tony Joseph Tabor, Louisiana prisoner # 478277, filed a civil rights complaint against three prison officials, including Vincent Coleman. In an amended complaint, Tabor dismissed the other two defendants. He asserted a variety of claims against Coleman. The district court dismissed some of

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Tabor's claims for failure to state a claim, and it dismissed other claims because they were duplicative of claims Tabor was pursuing in a separate pending civil action.

The claim that Coleman used excessive force when he sprayed Tabor with a chemical agent was the subject of summary judgment motions filed by both parties. The district court denied Tabor's summary judgment motion, but it granted summary judgment in favor of Coleman on the excessive force claim. Tabor timely appealed.

In his pro se brief, which we liberally construe, *see Morrow v. FBI*, 2 F.3d 642, 643 n.2 (5th Cir. 1993), Tabor raises several issues. He asserts that the district court "neglected" to order the production of the camera footage of the incident in which Coleman sprayed him with a chemical agent. We construe Tabor's brief as raising a challenge to the denial of his motion to compel production of the camera footage, a decision we review for abuse of discretion. *See Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 817 (5th Cir. 2004). "The standard of review poses a high bar; a district court's discretion in discovery matters will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse." *Marathon Fin. Ins., Inc., RRG v. Ford Motor Co.*, 591 F.3d 458, 469 (5th Cir. 2009) (internal quotation marks omitted).

As the magistrate judge observed in her report, which the district court determined was correct, the discovery period had expired before Coleman moved to compel production of the camera footage. Tabor has therefore not shown an abuse of discretion. *See Brand Servs., L.L.C. v. Irex Corp.*, 909 F.3d 151, 156 (5th Cir. 2018).

Tabor also complains that the district court failed to issue an order compelling a response to his interrogatories. Here, although Tabor filed in the district court a set of interrogatories seemingly also sent to defense

counsel, he did not move in the district court to compel a response to his interrogatories. Absent "unusual circumstances," a district court does not abuse its discretion by not ordering discovery sua sponte. *See Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 545 (5th Cir. 2005). Because Tabor has pointed to no "unusual circumstances," he has not shown an abuse of discretion. *See id.*

Next, Tabor argues that the district court should have appointed counsel to represent him. "A civil rights complainant has no right to the automatic appointment of counsel." *Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982). Because the instant case did not present "exceptional circumstances," the district court did not err in failing to appoint counsel. *See id.*

Because Tabor does not brief a challenge to the district court's summary judgment rulings on his excessive force claim, and likewise he does not brief any challenge to the district court's earlier dismissal of his other claims for failure to state a claim and as duplicative, he has waived any challenge to the dispositions of these claims. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993); *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). To the extent that Tabor argues that the district court erred by failing to address a claim under the Americans with Disabilities Act, his contention fails, as the passing reference to "the A.D.A." in his amended complaint, unaccompanied by factual allegations that would support a claim under the Americans with Disabilities Act, was insufficient to raise such a claim.

In view of the foregoing, the judgment of the district court is AFFIRMED. Tabor's motion for the appointment of counsel is DENIED. His motion for a temporary restraining order and a preliminary injunction is also DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

TONY JOSEPH TABOR #478277	**CASE NO. 5:18-CV-01308 SEC P**
VERSUS	**JUDGE S. MAURICE HICKS, JR.**
VINCENT COLEMAN ET AL	**MAGISTRATE JUDGE KAREN L. HAYES**

JUDGMENT

The Report and Recommendation of the Magistrate Judge, as supplemented, having been considered, together with the written objections filed with this Court, and, after a *de novo* review of the record, finding that the Magistrate Judge's Report and Recommendation is correct,

IT IS ORDERED that Defendant's Motion for Summary Judgment (Record Document 31) is **GRANTED** and Plaintiff's claims are **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment (Record Document 33) is **DENIED**.

The Clerk of Court is directed to close this case.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 3rd day of September, 2020.

S. MAURICE HICKS, JR.
CHIEF, UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

TONY JOSEPH TABOR	**CASE NO. 5:18-CV-01308 SEC P**
VERSUS	**JUDGE S. MAURICE HICKS, JR.**
VINCENT COLEMAN, ET AL.	**MAG. JUDGE KAREN L. HAYES**

SUPPLEMENTAL REPORT AND RECOMMENDATION

Before the undersigned magistrate, on reference from the District Court, are cross-motions for summary judgment filed by plaintiff Tony Tabor [doc. # 33] and remaining defendant, Vincent Coleman [doc. # 31]. Also before the court are plaintiff's letter-motions for an extension of time to comply [doc. # 40] and for production of video surveillance evidence [doc. # 41]. For reasons assigned below, it is again recommended that plaintiff's motion for summary judgment be DENIED, and that defendant's motion for summary judgment be GRANTED. It is further ordered that plaintiff's motions for extension of time and for production of video surveillance evidence are DENIED.

Background

On December 16, 2019, the undersigned issued a report recommending that plaintiff's motion for summary judgment be denied, that defendant's motion for summary judgment be granted, and that plaintiff's claims be dismissed. (Report and Recommendation ("R&R") [doc. # 38]). As modified below, the prior R&R is adopted by reference and made a part hereof as if copied in extenso.

On December 30, 2019, plaintiff filed a "MOTION TO ALTER Judgements [sic]," which the Clerk of Court docketed as an objection to the R&R. [doc. # 39]. In his objection, plaintiff stated, *inter alia*, that he had asked defense counsel to produce a copy of video footage from the

subject incident. *Id.* Plaintiff attached to his submission a copy of a motion to compel all video tape footage evidence for the cell camera of N-3, A-tier, cell one that he purportedly filed on August 25, 2019. *Id.*, Exh. 1.

On January 13, 2020, plaintiff filed the instant letter-motion in each of his three cases before this court (Civil Action Nos. 17-0907, 18-0621, and 18-1308), wherein he requested an extension of time to comply with "each issue in these three cases . . ." stemming from a delay associated with his legal mail. [doc. # 40]. By separate document, plaintiff submitted a copy of a motion to compel defendant to produce video footage from February 7, 2017, at David Wade Correctional Center ("DWCC"), N-3 Unit, A-tier, cell one, that he purportedly transmitted to opposing counsel on, or about April 10, 2018. [doc. # 41]. In his cover letter, however, plaintiff acknowledged that the original version of the motion that he sent to the Clerk of Court must have been lost in the mail. *Id.*

In light of plaintiff's objection and letter-motions, the District Court remanded the case to the undersigned for further consideration. (Feb. 28, 2020, Order [doc. # 42]). On March 2, 2020, the Clerk of Court issued notices that set briefing deadlines for plaintiff's motions. [doc. #s 44-45].

On March 23, 2020, defendant Vincent Coleman filed a response to the motions in which counsel represented that he never received a letter from plaintiff dated April 10, 2018, requesting video footage of the February 7, 2017, incident. (Def. Opp. Memo. [doc. # 46]). Defendant added that he did not even make an appearance in this matter until March 2019, i.e., almost one year after plaintiff purportedly sent his request for video surveillance evidence. *Id.* Furthermore, even if defendant had received a request for video footage regarding the February 7, 2017,

incident, he would have informed plaintiff that the DWCC purges and recycles the video feed from the server every thirty (30) days because of the facility's limited storage capacity. *Id.*

Plaintiff did not file a reply brief, and the time to do so has lapsed. *See* Notices of Motion Setting [doc. #s 44-45]. Accordingly, the matter is ripe.

Discussion

As an initial matter, the discovery period in this case ended no later than July 15, 2019. *See* Dec. 3, 2018, Mem. Order [doc. # 13]. Further, there is no indication that plaintiff sought to compel defendant to produce video camera footage within that deadline. Even if he had, defendant represented that the footage was not preserved.[1] Needless to say, the court cannot compel defendant to produce evidence that he does not possess.

Rule 37 addresses a party's failure to preserve electronically stored information:

> [i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> **(A)** presume that the lost information was unfavorable to the party;
>
> **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> **(C)** dismiss the action or enter a default judgment.

Fed.R.Civ.P. 37(e).

[1] In the future, defense counsel should support such representations via declaration or affidavit from the proper custodian of DWCC's video footage.

Thus, four predicate elements must be established before Rule 37(e) applies: 1) the existence (at least at one time) of electronically stored information ("ESI") that should have been preserved;[2] 2) the ESI has been lost; 3) the ESI was lost because of a party's failure to take reasonable steps to preserve it; and 4) the ESI cannot be restored or replaced. *UMG Recordings, Inc. v. Grande Commc'ns Networks, LLC*, No. 17-365, 2019 WL 4738915, at *1 (W.D. Tex. Sept. 27, 2019).

Once the court determines that the foregoing elements have been established, *then* it may consider imposition of the appropriate responsive measure. If a party has been prejudiced by the loss of the ESI, the court "*may* order measures no greater than necessary to cure the prejudice . . ." If, on the other hand, the court finds that the party who lost the ESI "acted with the intent to deprive another party of the information's use in the litigation," then the court *may* choose to impose one of three, more severe, sanctions.

Here, the record contains evidence that plaintiff asked the DWCC to preserve the camera footage in his initial grievance that he submitted to the DWCC on February 16, 2017. [doc. # 26-1, pg. 5]. Certainly, at that point, the DWCC had notice that the video camera evidence was potentially relevant to the subject incident and that it needed to be preserved. However, the evidence, assuming it existed, was not preserved.

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[2] A party's duty to preserve evidence arises when "the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Toth v. Calcasieu Parish*, Civ. Action No. 06-0998, 2009 WL 528245 (W.D. La. Mar. 2, 2009) (Trimble, J.) (citation and internal quotation marks omitted); *Dixon v. Greyhound Lines, Inc.*, Civ Action No. 13-0179, 2014 WL 6087226, at *3 (M.D. La. Nov. 13, 2014). A person "anticipat[ing] being a party . . . to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary." *Toth, supra.* The duty to preserve extends to evidence that a party "knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." *Id.*

The question is whether the DWCC's omission may be attributed or extended to Coleman. To the extent that Coleman may be held responsible for the DWCC's failure to preserve ESI, plaintiff has not demonstrated that he was prejudiced by the loss of the ESI or that Coleman intended to deprive him of the use of the ESI.

The court emphasizes that plaintiff has not supported or opposed the pending motions for summary judgment with competent summary judgment such as his own affidavit or declaration made under penalty of perjury pursuant to 28 U.S.C. § 1746. Therefore, there is no indication that he in good faith contests defendant's version of events at all.

Furthermore, even if the lost ESI supported plaintiff's unsworn allegations, that does not change the outcome. According to plaintiff, Coleman administered up to three rounds of pepper spray in response to plaintiff's vocal outbursts. Afterwards, however, it is uncontroverted that plaintiff was seen by DWCC medical personnel, offered an eye wash, and permitted to shower. (Affidavit of Terrance Haulcy; Def. MSJ, Exh. 2 [doc. # 31-5]). His cell also was cleaned and sanitized. *Id.* Given the prompt remedial measures, plaintiff has failed to show that it was clearly established at the time that defendant's actions violated the Constitution. *See McCoy v. Alamu*, 950 F.3d 226, 233 (5th Cir.2020) (not clearly established that unwarranted pepper spraying was unconstitutional). Accordingly, defendant is entitled to qualified immunity.[3]

[3] Insofar as plaintiff also intended to sue Coleman in his official capacity, the court observes that official-capacity suits, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105 (1985) (citing, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55 (1978)). To impose § 1983 liability against a government entity for the misconduct of one of its employees or officers, plaintiff must demonstrate that the constitutional deprivation was caused by a policy or custom of the entity. *Kohler v. Englade*, 470 F.3d 1104, 1115 (5th Cir. 2006) (citing *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 690-691, 98 S.Ct. 2018, 2036 (1978)). "In a Section 1983 case, the burden of proving the

Conclusion

For the foregoing reasons,

IT IS ORDERED that plaintiff Tony Tabor's letter-motions for an extension of time to comply [doc. # 40] and for production of video surveillance evidence [doc. # 41] are DENIED.[4]

IT IS RECOMMENDED that defendant Vincent Coleman's motion for summary judgment [doc. # 31] be GRANTED and that plaintiff Tony Tabor claims be DISMISSED, *with prejudice*,[5] in their entirety.

IT IS FURTHER RECOMMENDED that plaintiff's motion for summary judgment [doc. # 33] be DENIED.

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and FRCP Rule 72(b), the parties have **fourteen (14) days** from service of this Report and Recommendation to file specific written objections with the Clerk of Court. A party may respond to another party's objections within **fourteen (14) days** after being served with a copy. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the District Judge before making a final ruling.

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existence of an unconstitutional municipal policy or established custom rests upon the plaintiff." *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir. 1989). Plaintiff has not made the requisite showing here. In fact, he maintains that Coleman failed to follow DWCC use of force procedures.

[4] As these motions are not excepted in 28 U.S.C. § 636(b)(1)(A), nor dispositive of any claim on the merits within the meaning of Rule 72 of the Federal Rules of Civil Procedure, this ruling is issued under the authority thereof, and in accordance with the standing order of this court. Any appeal must be made to the district judge in accordance with Rule 72(a) and L.R. 74.1(W).

[5] The initial R&R mistakenly recommended that plaintiff's claims be dismissed *without prejudice*.

Failure to file written objections to the proposed findings, conclusions, and recommendations contained in this Report and Recommendation within fourteen (14) days from the date of its service, shall bar an aggrieved party, except on grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions accepted by the District Judge.

In Chambers, Monroe, Louisiana, this 22nd day of April 2020.

KAREN L. HAYES
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

TONY JOSEPH TABOR #478277	**CASE NO. 5:18-CV-01308 SEC P**
VERSUS	**JUDGE S. MAURICE HICKS, JR.**
VINCENT COLEMAN ET AL	**MAGISTRATE JUDGE KAREN L. HAYES**

REPORT AND RECOMMENDATION

Pro se Plaintiff Tony Tabor filed suit against Defendant Officer Vincent Coleman under 42 U.S.C. § 1983. The parties have filed cross motions for summary judgment. This matter has been referred to the undersigned for review, report, and recommendation in accordance with 28 U.S.C. § 636 and the standing orders of the Court. For reasons that follow, it is recommended that Tabor's motion be **DENIED,** that Coleman's motion be **GRANTED,** and that Tabor's claims be **DISMISSED WITH PREJUDICE.**

Background

This is a Section 1983 case stemming from an incident at Davis Wade Correctional Center ("DWCC") on February 7, 2017, when Coleman sprayed Tabor in his face with mace. Tabor is an offender in the custody of the Louisiana Department of Public Safety and Corrections and is currently imprisoned at Elayn Hunt Correctional Center in St. Gabriel, Louisiana.

On October 4, 2018, Tabor filed the instant proceeding, alleging his constitutional rights were violated when excessive force was used against him for no reason. [doc. # 1]. Tabor alleges that Coleman instructed him to "come to the cell bars" and then sprayed him with an excessive, "non-policy" amount of chemical agent in the eyes, nose, and mouth. [doc. #s 1, pp. 3-5; 11, p.1].

Conversely, Coleman says that on the evening of February 7, 2017, Tabor refused to stop yelling, was given several direct verbal orders to stop yelling, and was warned that he would be sprayed with a chemical agent if he did not comply. (doc. #s 31-4, ¶ 8; 31-5, ¶ 8). Because Tabor refused to stop yelling, Coleman sprayed Tabor with a short burst of mace to his head and shoulder area. *Id.* After the chemical agent took effect, Coleman verbally ordered Tabor to come to the bars to be restrained, and Tabor complied. *Id.* Tabor was then given the opportunity to receive medical care. *Id.* This version of events is supported by affidavits from Officer Terrance Haulcy and Officer Vince Coleman himself.

Tabor asks the Court to demote defendant, and he seeks $100,000, $250 for each day he was deprived of bedding, and an injunction prohibiting Coleman from using a "chemical agent to harm anyone else." [doc. #s 1, p. 7; 11, p.4].

On December 3, 2018, the undersigned issued a report and recommendation recommending that, with the exception of Tabor's excessive force claim, his claims be dismissed. [doc. # 12] On December 27, 2018, the District Judge adopted the report and recommendation. [doc. # 17].

On August 23, 2019, Coleman filed a motion for summary judgment. [doc. # 31]. On September 5, 2019, Tabor filed a cross-motion for summary judgment. [doc. # 33]. On October 4, 2019, Tabor filed a memorandum in opposition to Tabor's motion for summary judgment. [doc. # 37]. The matter is ripe.

Summary Judgment Principles

Summary judgment is appropriate when the evidence before the court shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if proof of its existence or nonexistence would affect the

outcome of the lawsuit under the applicable law in the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

The moving party bears the initial burden in summary judgment and must demonstrate through portions of the pleadings, depositions, answers to interrogatories, admissions and/or affidavits that no genuine issue of material fact exists. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). Once the moving party has successfully demonstrated the absence of a genuine issue of material fact, the burden shifts to the non-moving party to show the opposite. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In doing so, the non-moving party may not merely rely on the allegations and conclusions contained within the pleadings; rather, he "must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996). Furthermore, these specific facts must be shown through something more than "some metaphysical doubt as to the material facts, by conclusory unsubstantiated allegations, or by a mere scintilla of evidence." *Little v. Liquid Air. Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

Discussion

a. Tabor does not produce any competent summary judgment evidence.

Rule 56(c)(1)(A) of the Federal Rules of Civil Procedure requires a plaintiff asserting that a fact is genuinely disputed to support that assertion by:

> Citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.

"An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(C)(1)(4).

28 U.S.C. § 1746 relaxes the requirement for an affidavit and grants an unsworn declaration made under the penalty of perjury the same effect, but only when the unsworn declaration is (1) "in writing of such a person which is subscribed by him," (2) declared "true under the penalty of perjury," and (3) dated. Unsworn documents are not competent summary judgment evidence. *Martin v. John W. Stone Oil Dist.*, 819 F.2d 547, 549 (5th Cir. 1987).

In response to Coleman's motion, Tabor filed his own motion for summary judgment, unaccompanied by a statement of material facts.[1] [doc. # 36]. The motion is not made under penalty of perjury, making it incompetent summary judgment evidence. Tabor claims that a videotape of the incident will prove the veracity of his allegations but fails to produce the video.[2] [doc. # 33, p. 1]. Tabor's complaint was also not made under penalty of perjury, making it incompetent summary judgment evidence. Thus, he has not produced any competent summary judgment evidence and his motion for summary judgment should be denied.

The uncontroverted evidence, as gleaned from the affidavits of Officer Coleman and Officer Haulcy, establishes the following facts:

1. On February 7, 2017, Major Vincent Coleman sprayed only a short burst of chemical agent to the head and shoulder area of Tabor following Tabor's refusal to comply with several orders to stop yelling and hold the noise.
2. On February 7, 2017, only the amount of force (chemical agent) necessary to prevent offender Tabor from continuing to create a disturbance, restore discipline and gain

[1] Tabor did not submit a memorandum in support of his motion but does include a discussion in the motion itself.

[2] Though his initial complaint stated Tabor intended to ask for "the video footage to be brought to light," he never filed a motion to compel this videotape. [doc. # 1, p. 4].

compliance was used following Tabor's refusal to comply with several orders to stop yelling.

b. Coleman is entitled to qualified immunity because Tabor did not demonstrate a genuine dispute of material fact as to a violation of a constitutional right.

Qualified immunity often protects public officials from liability in Section 1983 actions brought against a person acting under the color of state law in his individual capacity.[3] The doctrine of qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). "The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation." *Ashcroft v. Iqbal*, 556 U.S. 662, 685, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)(internal quotations and citations omitted).

Once the defendant, as he did here, raises a qualified immunity defense, the plaintiff carries the burden of demonstrating the inapplicability of qualified immunity. *See Floyd v. City of Kenner*, 351 Fed. Appx. 890, 893 (5th Cir. 2009). First, the court must determine whether the plaintiff demonstrated a genuine dispute of material fact as to a violation of a constitutional right. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815 (2009). Second, the court must determine whether the constitutional right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id.* A defendant can only be held liable if he violates a right that is clearly established at the time of the violation. *Id.*

[3] Though Tabor provides the court with citations to cases where the defendant was sued in his official capacity, he sues Coleman in his individual capacity.

When a prison official is accused of using excessive physical force in contravention of the Eighth Amendment's Cruel and Unusual Punishments Clause, the core judicial inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S.Ct. 995, 999 (1992)(citing *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078 (1986)); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). At the time of the suit, it was clearly established that using mace does not constitute excessive use of force, when, as alleged by defendant Coleman, it is employed in response to an inmate's refusal to cease disruptive behavior that interferes with the facility's safety—even where the inmate is restrained inside of his cell. *See Scott v. Hanson*, 330 Fed. Appx. 490, 491 (5th Cir. 2009).

The competent summary judgment evidence produced by defendant establishes that Coleman's use of force was lawful. Coleman applied only the amount of mace necessary to maintain discipline after Tabor's disruptive behavior. Coleman neither intended to cause harm to Tabor nor used mace sadistically. Because the force applied to Tabor does not rise to the level of a constitutional violation, Coleman is entitled to summary judgment, unless Tabor produces competent summary judgment evidence in his objection to this report and recommendation.

Conclusion

For the foregoing reasons,

IT IS RECOMMENDED that Defendant's motion for summary judgment [doc. # 31] be **GRANTED** and Plaintiff's claims be **DISMISSED** without prejudice.

IT IS FURTHER RECOMMENDED that Plaintiff's motion for summary judgment [doc. # 33] be **DENIED**.

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