Appendix-A

NOT RECOMMENDED FOR PUBLICATION

No. 21-3169

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 28, 2022
DEBORAH S. HUNT, Clerk

JERMEAL WHITE,

Plaintiff-Appellant,

v.

RONALD ERDOS, Warden, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

O R D E R

Before: WHITE, THAPAR, and READLER, Circuit Judges.

Jermeal White, a pro se Ohio prisoner, appeals the district court's grant of summary judgment to the defendant, corrections officer Dominique C. Stringer, in White's civil-rights action. White also moves this court for an injunction pending appeal. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In his complaint, White alleged that Stringer provoked him as he was walking to the "chow hall" to eat and then used excessive force against him "for no reason" by putting him in handcuffs, punching him in the back, smashing him against a wall, and painfully bending his wrist. White raised an Eighth Amendment claim and sought both an injunction ordering his transfer to another prison and $300,000 in damages against Stringer. Claims against two other defendants were dismissed at screening, *see White v. Erdos*, No. 1:19CV1009, 2020 WL 729851 (S.D. Ohio Feb. 13, 2020) (order), and White neither objected to that decision nor raises arguments about it

on appeal, *see Grinter v. Knight*, 532 F.3d 567, 574 n.4 (6th Cir. 2008) (party waives arguments not raised on appeal).

White and Stringer engaged in discovery and then both moved for summary judgment. Stringer submitted declarations from himself and other witnesses and produced a video recording of the incident with White. The magistrate judge found that, as White walked to the cafeteria and saw Stringer, he "started using racial slurs and showing disrespect toward" him and ignored Stringer's orders, at which point Stringer "forcibly placed [White] against the wall to handcuff him." *White v. Erdos*, No. 1:19-CV-1009, 2020 WL 7253305, at *2 (S.D. Ohio Dec. 10, 2020) (report and recommendation). White "became aggressive and began to pull away as [Stringer] placed handcuffs on him," and so Stringer "began escorting plaintiff down the hall to restrictive housing using an escort technique." *Id.* at *3. Stringer "pushed [White] back on the wall as [he] resisted and pulled away, and [Stringer] gave [him] a direct order not to pull away and to comply with the escort," which White did without further incident. *Id.* A nurse evaluated White after the incident and found that he had sustained no injuries. *Id.* The magistrate judge noted that White relied on his verified complaint as evidence to defeat Stringer's summary judgment motion and to support his own. *Id.* The magistrate judge rejected that reliance because White did not distinguish between the statements in his complaint that were based on his personal knowledge and those that were based on information and belief and therefore could not count as evidence for summary judgment purposes. *Id.* (citing Fed. R. Civ. P. 56(c)(4)). The magistrate judge ultimately found that Stringer's evidence showed that he did not violate the Eighth Amendment during the use-of-force incident with White because he neither had the required state of mind nor inflicted any serious injury. *Id.* at *4-5.

The district court adopted that recommendation over White's objections and granted Stringer's motion for summary judgment. *White v. Erdos*, No. 1:19-CV-1009, 2021 WL 320736 (S.D. Ohio Feb. 1, 2021) (order). White reiterated that the allegations in his verified complaint should be considered evidence defeating summary judgment, but the district court held that they were not, for the reasons cited by the magistrate judge. *Id.* at *1. The district court also noted that White raised a general objection to the magistrate judge's review of the facts, which is insufficient

to support an objection. *Id.* at *2. The court also reviewed the video evidence and agreed with the magistrate judge that it supported Stringer's position and refuted White's allegations. *Id.* at *2 n.3.

On appeal, White argues that "[t]he District Court did not honestly review the facts of the video" and recounts his version of the events. He also argues once more that his verified complaint should count as evidence for summary judgment purposes.

We review a district court's grant of summary judgment de novo. *Bethel v. Jenkins*, 988 F.3d 931, 937 (6th Cir. 2021). Summary judgment is appropriate when "the movant shows that 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). In resolving a summary judgment motion, this court views the evidence in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

An excessive-force claim under the Eighth Amendment has both an objective and a subjective component. The objective part requires a prisoner to establish that he suffered a sufficiently serious injury; the subjective part requires proof that the defendant acted with a culpable state of mind, that is, that the defendant used force "maliciously and sadistically to cause harm" rather than "in a good-faith effort to maintain or restore discipline." *Cordell v. McKinney*, 759 F.3d 573, 580 (6th Cir. 2014) (quoting *Hudson v. McMillian*, 503 U.S. 1, 7 (1992)).

The district court determined that there was no genuine dispute that Stringer neither had the requisite state of mind during the use-of-force incident nor inflicted harm on White that would violate the Eighth Amendment. White maintains that the video would support his claim to the contrary. But both the magistrate judge and the district court reviewed the video while White did not. Our own review of the video supports Stringer's account and confirms the district court's finding. *Cf. Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 892 (6th Cir. 2021) ("[W]here, as here, the parties present video evidence, we 'view[] the facts in the light depicted by the videotape.'" (citation omitted)). White also argues that the allegations in his verified complaint defeat Stringer's summary judgment motion, but his verification statement fails to distinguish between allegations based on firsthand knowledge and those based merely on information and

belief. *See* Fed. R. Civ. P. 56(c)(4) (verified complaint "must be made on personal knowledge"). And his allegation that Stringer used force against him "for no reason" is so conclusory that it does not establish a genuine dispute of material fact in the face of the evidence submitted by Stringer. *See Reedy v. West*, 988 F.3d 907, 914 (6th Cir. 2021). White also claims that the nurse who saw him lied, but he did not name her as a defendant and does not otherwise show that he was injured. Given the evidence submitted by Stringer as well as the video evidence, White has not shown that there is a genuine dispute of material fact about his Eighth Amendment claim.

White also moves for an injunction pending appeal, seeking placement in a prison unit that is not staffed by officers with whom he is in litigation. But one of the factors that courts must evaluate in considering such a motion is "whether the applicant is likely to succeed on the merits of the appeal." *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 479 (6th Cir. 2020). Because White's appeal fails, as explained above, his motion for injunctive relief does too.

Accordingly, we **DENY** White's motion for an injunction pending appeal and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix-B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Jermeal White,

Plaintiff,

Case No. 1:19-cv-1009

v.

Judge Michael R. Barrett

R. Erdos, *et al.*,

Defendants.

ORDER

This matter is before the Court on the Report and Recommendation (R&R) issued by the Magistrate Judge on December 10, 2020. (Doc. 36).

The parties were given proper notice under Fed. R. Civ. P. 72(b), including notice that the parties would waive further appeal if they failed to file objections to the R&R in a timely manner. *See United States v. Walters*, 638 F.2d 947, 949–50 (6th Cir. 1981). Plaintiff has filed timely objections. (Doc. 37).

I. STANDARD OF REVIEW

Under 28 U.S.C. § 636(b)(1), determinations by a magistrate judge are subject to review by a district judge. With regard to dispositive matters, the district judge "must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). After review, the district judge "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.*; *see* 28 U.S.C. § 636(b)(1). The Court has engaged in a de novo review, which is set forth below.

II. ANALYSIS

In this civil rights action alleging excessive force in violation of the Eighth

Amendment, and as to the parties' cross-motions for summary judgment, the Magistrate Judge recommends that Plaintiff Jermeal White's motion (Doc. 19) be denied and Defendant Corrections Officer Dominique C. Stringer's motion (Doc. 32) be granted.

The Magistrate Judge explains that Plaintiff's motion for summary judgment is supported only by the allegations contained in Plaintiff's "verified" complaint, which this Court reprints below:

> On August 9, 2019 Plaintiff was walking to the chow hall to eat his food. As Plaintiff was walking pass Defendant D. Stringer was standing at the frist (sic) chow hall doors when he called Plaintiff. Thats when Plaintiff stoped (sic). Defendant D. Stringer turned around and called Plaintiff name, Plaintiff stoped (sic) Defendant Stringer walked up on Plaintiff pointing his finger telling Plaintiff to walk back to the unit[.]
>
> Thats when Plaintiff told Defendant Stringer he is allowed to eat and kept walking to the second chow hall. Thats when c/o Stringer followed Plaintiff to the second chow hall, as Plaintiff was about to enter the chow hall, Defendant Stringer told Plaintiff to put both of his hands on the wall, and Plaintiff did as Plaintiff had his hands on the wall Defendant Stringer was playing tricky games of wich (sic) one of Plaintiff's hand to cuff up frist (sic). As Plaintiff was cuffed up on the wall Defendant Stringer started punching Plaintiff in his back. It was three other officers right their Mr. Stringer was the only one who attended to me for no reason.
>
> As Plaintiff walked to J2 in the hallway Defendant Stringer smashed Plaintiff to the wall with excessive for force, and bent my left wrist so hard I can't move It. Plaintiff was refused medical attention, and the camera prove It.

(Doc. 1 at PageID 27–28; *see* Doc. 36 at PageID 325). Plaintiff states that the allegations in his "verified" complaint are true, "except as to the matters alleged on information and belief, and as to those, I believe them to be true." (Doc. 1 at PageID 32). But because Plaintiff's "verified" complaint does not distinguish between the statements he considers to be based on "information and belief" and those based on

firsthand knowledge, the Magistrate Judge concludes that Plaintiff's verification statement fails to comport with the requirement on summary judgment that a supporting affidavit or declaration be "made on personal knowledge." Fed. R. Civ. P. 56(c).[1] Thus, Plaintiff's "verified" complaint does not constitute admissible evidence showing there is a genuine issue of material fact for trial on Plaintiff's Eighth Amendment claim.

In contrast, the evidence Defendant submitted in support of his motion for summary judgment consists of video recordings of the August 9, 2019 use of force incident and sworn declarations from Defendant himself and other corrections officers. The Magistrate Judge explains that this evidence "establishes that C/O Stringer applied a measured amount of force to discipline plaintiff, a recalcitrant and disruptive prisoner, and restore order"[2] and notes that Plaintiff "has not introduced any evidence to refute the video evidence and the declarations of defendant and other corrections officers

[1] "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).

[2] The Magistrate Judge summarizes Defendant's evidence as follows: (1) As Plaintiff walked down the hallway toward the cafeteria, he approached Defendant standing at a set of doors at the entrance to the cafeteria; (2) Plaintiff started using racial slurs and showing disrespect toward Defendant; (3) Plaintiff said to Defendant, "fuck you house nigger;" (4) Defendant ordered Plaintiff to stop being disrespectful, but Plaintiff stopped walking and continued to shout racial slurs at Defendant; (5) As they spoke, Defendant twice pointed back in the direction that Plaintiff had come from; (6) Plaintiff began to walk away, yelling "I don't need to do anything house nigger;" (7) Defendant gave Plaintiff multiple direct orders to put his hands on the wall so that he could be handcuffed, but Plaintiff failed to comply; (8) Plaintiff told Defendant to "put me on the wall bitch;" (9) Plaintiff walked away past several corrections officers as Defendant followed him; (10) Plaintiff continued to argue with Defendant and to be disrespectful; (11) Other corrections officers also followed Plaintiff and one of them pointed toward the wall as he spoke to Plaintiff; (12) Plaintiff continued walking down the hallway; (13) Defendant then forcibly placed Plaintiff against the wall to handcuff him; (14) Plaintiff was yelling racial slurs at Defendant; (15) Two corrections officers who had followed Plaintiff stood by until he was handcuffed, then they walked back to the first set of cafeteria doors; (16) Lieutenant Dunlap stood next to Defendant as Defendant handcuffed Plaintiff; (17) Plaintiff became aggressive and began to pull away as Defendant placed handcuffs on him, so Defendant began escorting Plaintiff down the hall to restrictive housing using an escort technique; (18) Lieutenant Dunlap followed; (19) When Plaintiff resisted and pulled away, Defendant pushed Plaintiff back on the wall; (20) Defendant gave Plaintiff a direct order not to pull away and to comply with the escort; (21) Lieutenant Dunlap assisted Defendant with the escort technique, as they led Plaintiff to the J-block without further incident and place him in a cell. (Doc. 36 at PageID 323–25).

showing that C/O Stringer's use of force was reasonable." (Doc. 36 at PageID 328, 329). The follow-up medical report did not substantiate any injury, which likewise undercuts Plaintiff's allegation of excessive force. (*Id.* at PageID 325 (citing Doc. 32-3 at PageID 273)). Based on these undisputed facts, the Magistrate Judge concludes that Defendant's use of force does not rise to a level sufficient to sustain Plaintiff's Eighth Amendment claim. (*Id.* at PageID 331).

Plaintiff's objections are two-fold. Plaintiff states generally that the Magistrate Judge's assessment of the facts is wrong. (Doc. 37 at PageID 334 ("completely wrong and not based on facts. The Magistrate Judge failed to honestly review the video[.]"); at PageID 338 ("the Magistrate Judge assessment of this video camera use of force incident is wrong. [T]he Magistrate Judge has lied on Plaintiff in regard to the facts[.]"); at PageID 339 ("its (sic) safe for Plaintiff to say that the Magistrate Judge assessment of the video is not truthful and that she lied on Plaintiff in her report and recommendation in light of the videotape[.]")). A general disagreement with the conclusions contained within the R&R, however, is insufficient to direct the Court's attention to a specific issue within the recommended action. Thus, it is not an "objection" as contemplated by the statute. *Aldrich v. Bock*, 327 F. Supp. 2d 743, 747 (E.D. Mich. 2004) ("An 'objection' that does nothing more than state a disagreement with a magistrate [judge]'s suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context."); *see Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991) ("A general objection to the entirety of the [M]agistrate[Judge]'s report has the same effects as would a failure to object.").

Plaintiff's generalized statements, then, warrant no further discussion.[3]

More specifically, Plaintiff argues that the Magistrate Judge was bound to accept as evidence in support of summary judgment the facts alleged in his "verified" complaint, citing *Cobell v. Norton*, 310 F. Supp. 2d 77 (D.D.C. 2004). But the Magistrate Judge cites *Cobell* for the exact opposite proposition (*see* Doc. 36 at PageID 325–26), and correctly so. An unsworn declaration, certificate, verification, or statement may, under 28 U.S.C. § 1746, substitute for a sworn statement and support the matter asserted so long as the unsworn declaration, certificate, verification, or statement is executed "under penalty of perjury." *Cobell*, 310 F. Supp. 2d at 84–85. The defendant in *Cobell*, though, sought to provide instead certifications based only on "knowledge, information, and belief" rather than "under penalty of perjury." *Id.* at 85. Consequently, these certifications were rejected by the trial court and not considered when ruling on a motion for preliminary injunction. *Id.* As explained by the Magistrate Judge, and as this Court can read for itself, Plaintiff's verification of his complaint is similarly qualified:

> I have read the foregoing complaint and herby verify that the matters alleged therein are true, **except as to matters alleged on information and belief, and as to those, I believe them to be true**. I certify under penalty of perjury that the foregoing is true and correct.

(Doc. 1 at PageID 32 (emphasis added)). Because Plaintiff fails to distinguish between matters of which he has firsthand knowledge and matters he "believes" to be true, the Court finds no error in the Magistrate Judge's conclusion that Plaintiff's verification is not admissible evidence that can be considered either in support of his motion for summary

[3] Nevertheless, the Court has studied the video recordings of the August 9, 2019 use of force incident and wholeheartedly agrees with the Magistrate Judge that they *refute* rather than support the allegations in Plaintiff's complaint.

judgment or in opposition to Defendant's.

III. CONCLUSION

Based on the foregoing and after a de novo review, the Court **OVERRULES** Plaintiff's objections (Doc. 37) and **ACCEPTS and ADOPTS** the Magistrate Judge's December 10, 2020 R&R (Doc. 36) in its entirety. Accordingly, Plaintiff Jermeal White's Motion for Summary Judgment (Doc. 19) is **DENIED** and Defendant Corrections Officer Dominique D. Stringer's Motion for Summary Judgment (Doc. 32) is **GRANTED**. Further, pursuant to 28 U.S.C. § 1915(a)(3), the Court **CERTIFIES**, for the reasons expressed here as well as in the R&R, that an any appeal of this Order would not be taken in good faith. *See McGore v. Wrigglesworth*, 114 F.3d 601, 610–11 (6th Cir. 1997). Finally, this case is **CLOSED** and **TERMINATED** from the Court's docket.

IT IS SO ORDERED.

/s/ Michael R. Barrett
Michael R. Barrett, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JERMEAL WHITE,
Plaintiff,

vs.

WARDEN R. ERDOS, et al.,
Defendants.

Case No. 1:19-cv-1009
Barrett, J.
Litkovitz, M.J.

REPORT AND RECOMMENDATION

Plaintiff, an inmate at the Southern Ohio Correctional Facility (SOCF), brings this civil rights action under 42 U.S.C. § 1983 against SOCF employees claiming violations of his constitutional rights. This matter is before the Court upon plaintiff's letter requesting a preliminary injunction/temporary restraining order. (Doc. 14). Plaintiff alleges he is going through "some very serious stuff at this prison" and "fear[s] for his safety." (*Id.* at 1). He alleges that he is housed in the same unit as staff from Case No. 1:19-cv-33, and he is worried about "being set up, harassed and more." (*Id.* at 2).

Plaintiff appears to seek an injunction enjoining prison officials from harassing him and "set[ting] [him] up." (*Id.*).

In determining whether to issue a preliminary injunction/temporary restraining order, this Court must balance the following factors:

1. Whether the party seeking the injunction has shown a "strong" likelihood of success on the merits;

2. Whether the party seeking the injunction will suffer irreparable harm absent the injunction;

3. Whether an injunction will cause others to suffer substantial harm; and

4. Whether the public interest would be served by a preliminary injunction.

Liberty Coins, LLC v. Goodman, 748 F.3d 682, 689-90 (6th Cir. 2014); *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000)). The four factors are not prerequisites but must be balanced as part of a decision to grant or deny injunctive relief. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). "[A] district court is not required to make specific findings concerning each of the four factors used in determining a motion for preliminary injunction if fewer factors are dispositive of the issue." *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003), *abrogated on other gds. by Anderson v. City of Blue Ash*, 798 F.3d 338, 357 (6th Cir. 2015).

"The purpose of a preliminary injunction is to preserve the status quo until a trial on the merits." *S. Glazer's Distributors of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 848-49 (6th Cir. 2017) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). When a prisoner requests an order enjoining a state prison official, the Court must "proceed with caution and due deference to the unique nature of the prison setting." *White v. Corr. Med. Servs.*, No. 1:08-cv-277, 2009 WL 529082, at *2 (W.D. Mich. Mar. 2, 2009) (citing *Kendrick v. Bland*, 740 F.2d 432, 438 n. 3 (6th Cir. 1984); *Ward v. Dyke*, 58 F.3d 271, 273 (6th Cir. 1995)). In deciding if a preliminary injunction is warranted, the Court must "weigh carefully the interests on both sides." *Lang v. Thompson*, No. 5:10-cv-379-HRW, 2010 WL 4962933, at *4 (E.D. Ky. Nov. 30, 2010) (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)). A preliminary injunction is an extraordinary remedy that should only be granted "upon a clear showing that the plaintiff is entitled to such relief." *S. Glazer's Distributors of Ohio, LLC*, 860 F.3d at 849 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)); *see also Overstreet*, 305 F.3d at 573.

Plaintiff has not alleged facts sufficient to warrant a temporary restraining order/

preliminary injunction in this case. Plaintiff has made no attempt to apply the above factors to his situation. His conclusory allegations of vague threats and harassment are insufficient to warrant an injunction. He has not established a substantial likelihood of success on the merits of his constitutional claims or that he will suffer irreparable harm absent a preliminary injunction. In the event plaintiff succeeds on the merits of his claims, equitable relief is available to correct any ongoing constitutional harms plaintiff alleges.

A preliminary injunction is also not warranted in this case because the purpose of a preliminary injunction -- to preserve the status quo until a trial on the merits can be held, *see Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 102 (6th Cir. 1991) -- would not be served. The present status quo in this case is, according to plaintiff, that he has suffered numerous violations of his constitutional rights. The remedy plaintiff presently seeks is more than an injunction maintaining the status quo; he seeks an Order from this Court requiring defendants to affirmatively correct constitutional deficiencies yet to be proven. Such affirmative relief is generally beyond the scope and purpose of preliminary injunctive relief. *See id.*

Accordingly, it is **RECOMMENDED** that plaintiff's motion for preliminary injunction/temporary restraining order be **DENIED.**

Date: 3/4/2020

Karen L. Litkovitz
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JERMEAL WHITE,
Plaintiff,

vs.

WARDEN R. ERDOS, et al.,
Defendants

Case No. 1:19-cv-1009
Barrett, J.
Litkovitz, M.J.

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).