

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

JOHN CAUSEY (#349510)  
VERSUS  
TROY PORET, ET AL.

CIVIL ACTION  
NO. 07-238-FJP-SCR

O P I N I O N

The Court has independently reviewed the entire record in this case and hereby adopts the Magistrate Judge's Report as the Court's opinion in this case, a copy of which is attached as Appendix 1. The Court has also reviewed the objection filed by the defendants and finds the objection to be without merit insofar as the current Rule 12(b)(6) motion to dismiss is concerned.<sup>1</sup>

Therefore:

IT IS ORDERED that the defendants' motion to dismiss<sup>2</sup> shall be granted as to defendants Sgt. K. Revere, Lt. Phillip Maples and Lt. Kenneth Wilson unless the plaintiff files an amended complaint on or before September 21, 2007, alleging that their actions caused him an injury sufficient to support an Eighth Amendment excessive force claim.

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<sup>1</sup>The Court reserves to the parties the right to file a motion for summary judgment. The Court expresses no opinion on the merits of any summary judgment motion which may be filed.

<sup>2</sup> Rec. Doc. No. 12.

Doc#44640

IT IS FURTHER ORDERED that in all other respects the defendants's motion shall be denied.

Baton Rouge, Louisiana, August 23, 2007.

A handwritten signature in cursive script, appearing to read "Frank J. Polozola", is written over a solid horizontal line.

FRANK J. POLOZOLA  
MIDDLE DISTRICT OF LOUISIANA

Doc#44640

APPENDIX 1

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

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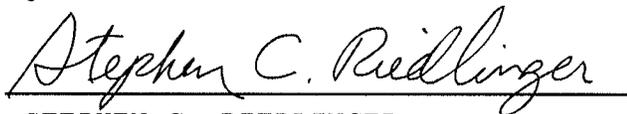
**NOTICE**

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U. S. District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have ten days after being served with the attached report to file written objections to the proposed findings of fact, conclusions of law, and recommendations set forth therein. Failure to file written objections to the proposed findings, conclusions and recommendations within ten days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Baton Rouge, Louisiana, August 8, 2007.



STEPHEN C. RIEDLINGER  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

JOHN CAUSEY (#349510)

VERSUS

CIVIL ACTION

TROY PORET, ET AL

NUMBER 07-238-FJP-SCR

MAGISTRATE JUDGE'S REPORT

This matter is before the court on the defendants' Motion to Dismiss. Record document number 12. The motion is opposed.<sup>1</sup>

Pro se plaintiff, an inmate confined at Louisiana State Penitentiary, Angola, Louisiana, filed this action pursuant to 42 U.S.C. § 1983 against Col. Troy Poret, Capt. Jeremy McKey, Lt. Nicholas Sanders, Lt. Phillip Maples, Lt. Kenneth Wilson and Sgt. K. Revere. Plaintiff alleged that on September 28, 2006, he was sprayed with mace<sup>2</sup> and was beaten without provocation in violation of his constitutional rights. Plaintiff also alleged that his rights were violated under state law. Plaintiff sought compensatory and punitive damages. Plaintiff also sought a declaratory judgment recognizing the constitutional violations, and injunctive relief enjoining further harassment and returning him to

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<sup>1</sup> Record document number 21.

<sup>2</sup> The actual substance used was reported to be Punch-2 chemical irritant. Record document number 8, Administrative Remedy Procedure records, Unusual Occurrence Report.

general population.

Defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted.

Subsection (c)(1) of 42 U.S.C. § 1997e provides the following:

(c) Dismissal.--(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

The court must accept as true the plaintiff's allegations and may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his claim which would entitle him to relief. *Boudeloche v. Grow Chemical Coatings Corp.*, 728 F. 2d 759 (5th Cir. 1984).

In order to overcome a Rule 12(b)(6) motion, a plaintiff's complaint should "contain either direct allegations on every material point necessary to sustain a recovery ... or contain allegations from which an inference may fairly be drawn that evidence on these material points will be addressed at trial." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (citation omitted). Plaintiff's complaint should not simply contain a litany of conclusory allegations, but must be pled with a certain level of factual specificity. *Collins v. Morgan Stanley*

*Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

The primary issue at this stage of the proceedings is not whether the plaintiff will ultimately prevail, but, whether the substantive nature of the allegations raised in the complaint are such that the plaintiff "is entitled to offer evidence to support his claim." *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999).

Plaintiff brought this action against the defendants in both their individual and official capacities. Defendants moved, on the basis of Eleventh Amendment immunity, to dismiss the plaintiff's claims against them insofar as the plaintiff sued them in their official capacity.

The distinction between personal and official capacity suits was clarified by the U.S. Supreme Court in *Hafer v. Melo, et al*, 502 U.S. 21, 112 S.Ct. 358 (1991). A suit against a state official in his official capacity is treated as a suit against the state. *Id.*, 502 U.S. at 25, 112 S.Ct. at 361, citing *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105 (1985). Because the real party in interest in an official-capacity suit is the governmental entity and not the named individual, the "entity's 'policy or custom' must have played a part in the violation of federal law." *Graham, supra*, at 166, 105 S.Ct. at 3105.

Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under of color of state law. A showing that the official, acting

under color of state law, caused the deprivation of a federal right is enough to establish personal liability in a § 1983 action. *Hafer*, 502 U.S. at 25, 112 S.Ct. at 362.

*Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304 (1989), makes it clear that the distinction between official-capacity suits and personal-capacity suits is more than a "mere pleading device." Officers sued in their personal capacity come to court as individuals. However, a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the state. *Will*, 491 U.S. at 71, 109 S.Ct. at 2311, n. 10, quoting *Kentucky v. Graham*, 473 U.S. at 167, 105 S.Ct. at 3106, n. 14.

Therefore, the plaintiff may recover money damages against the defendants insofar as the defendants were sued in their individual capacities for actions taken by them under color of state law which caused the deprivation of constitutional rights. Insofar as the plaintiff sought prospective injunctive relief against the defendants in their official capacities, his official capacity claim is also actionable under § 1983.

Defendants argued that the plaintiff's excessive force claim is barred by the Supreme Court's decisions in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), and *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584 (1997). Specifically, defendants argued that

the plaintiff was found guilty of several disciplinary infractions as a result of the September 28 incident. Defendants argued that because the plaintiff's § 1983 excessive force claim, if successful, would invalidate the decision of the disciplinary board regarding the aggravated disobedience and defiance disciplinary charges the claim is barred under *Heck*.

A review of the complaint showed that although the plaintiff alleged that he was issued disciplinary reports on September 28, the complaint is devoid of any facts related to the outcome of any disciplinary proceedings related to the September 28 disciplinary charges.

Recognizing that the plaintiff failed to allege any facts necessary to support their *Heck* argument, the defendants urged the court to look outside the allegations of the complaint and consider information contained in the record of the Administrative Remedy Procedure (ARP).<sup>3</sup> Defendants argued that because the ARP record is a public record and the court may take judicial notice of it, the results of the ARP may be considered without converting their Rule

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<sup>3</sup> The Secretary for the Louisiana Department of Public Safety and Corrections filed a certified copy of the results of the Administrative Remedy Procedure in response to an order issued by the court. Record document number 8. Prior to the Supreme Court's decision in *Jones v. Bock*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 910 (2007), the plaintiff's ARP record was examined to determine whether the plaintiff exhausted available administrative remedies.

12(b)(6) motion to a motion for summary judgment.<sup>4</sup>

The court rejects the defendants unsupported argument that the record of the ARP is a public record. Defendants did not cite any federal or state law which classifies prison disciplinary records as public records. None of the cases the defendants relied upon involved a Louisiana prison disciplinary report or hearing. Cases from other jurisdictions are not binding authority for the proposition that in Louisiana prison disciplinary records are classified as public records.

Because they are part of the record in this case, the court will take judicial notice of the ARP records filed in response to the court's 30 day stay order. However, the scope of that notice must be limited. On a motion to dismiss the court cannot resolve the disputes between the parties regarding the justification for issuing these disciplinary reports, i.e. what really happened during the September 28 incident. The court must accept as true the plaintiff's version of the events.

The complaint, combined with the plaintiff's version of the events as amplified by the ARP records, contains sufficient allegations to address the defendants' *Heck* argument in a Rule 12(b) motion to dismiss. Defendants' *Heck* argument is without merit.

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<sup>4</sup> Record document number 13, supporting memorandum, p. 3, n. 2.

*Heck* provides that in order to recover damages for an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. The Supreme Court has applied the *Heck* analysis to claims made by prisoners challenging prison disciplinary proceedings that result in a change to the prisoner's sentence, such as the loss of good time credits. *Edwards v. Balisok*, 520 U.S. at 643-649, 117 S.Ct. at 1586-89. However, *Heck* is not categorically applicable to all suits challenging prison disciplinary actions.

In *Muhammad v. Close* a prisoner filed a § 1983 action against a prison official, alleging that the official had charged him with threatening behavior and subjected him to mandatory pre-hearing lockup in retaliation for prior lawsuits and grievance proceedings the prisoner had filed against the prison official.<sup>5</sup> *Muhammad v. Close*, 540 U.S. 749, 753-54, 124 S.Ct. 1303, 1305-06 (2004) (per curiam). The district court entered summary judgment in favor of the prison official, holding that the prisoner failed to come

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<sup>5</sup> Defendant did not cite the *Muhammad* decision, nor any decision which cited it.

forward with sufficient evidence of retaliation. *Id.* The Sixth Circuit Court of Appeals upheld the dismissal of the suit on different grounds. The appellate court concluded that the action was barred by *Heck*. *Id.* at 753, 124 S.Ct. at 1306. The Supreme Court reversed, holding that because the magistrate judge expressly found no good-time credits were affected by the actions challenged in the law suit, the prisoner's § 1983 claims could not be "construed as seeking a judgment at odds with his conviction or with the State's calculation of time to be served in accordance with the underlying sentence." *Id.* at 754-55, 124 S.Ct. at 1306.

The same is true in this case. Plaintiff did not allege, nor did the defendants argue, that the disciplinary charges against the plaintiff resulted in a forfeiture of any good time credits or otherwise affect the length of the plaintiff's prison sentence.<sup>6</sup> Moreover, nothing in the record suggests that the plaintiff's excessive force claim, if successful, would result in any direct or indirect change in the length of his term of imprisonment. Consequently, *Heck* does not apply in this case.<sup>7</sup>

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<sup>6</sup> The ARP records show that the plaintiff was sentenced to a custody change and cell confinement.

<sup>7</sup> The cases cited by the defendants in support of their *Heck* argument, in addition to not being controlling in the circumstances of this case, are distinguishable. For example, *Johnson v. Sharp*, 2007 WL 5807667 (M.D. La. 2007), involved a loss of 180 days of good time credit. In *Deem v. Rodriguez*, 2004 WL 3752716 (W.D. Tex. 2004), the plaintiff suffered a loss of 365 days of good time as a result of the prison rule violation conviction. Likewise, in *Diaz* (continued...)

Defendants argued that they are entitled to qualified immunity because their conduct did not violate any of the plaintiff's clearly established constitutional or statutory rights of which a reasonable person would have known.

A state official sued in his individual capacity for damages may assert a qualified immunity defense. *Procunier v. Navarette*, 434 U.S. 555, 561, 98 S.Ct. 855, 859 (1978). This immunity is defeated if the official violated 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 (1982). In assessing the applicability of a qualified immunity defense, the court must first determine whether the plaintiff has asserted a violation of a clearly established right at all. *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789 (1991). If the court determines that there was a violation of a right secured by the Constitution, then it must determine whether the defendants could have reasonably thought their actions were consistent with the rights they are alleged to have violated.

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<sup>7</sup>(...continued)

*v. Mings*, 205 Fed. Appx. 307 (5th Cir. 2006), *Newsome v. Wexford Health Services*, 2007 WL 581812 (C.D. Ill. 2007), *Miles v. Murra*, 2006 WL 456269 (S.D. Tex. 2006), *Rivera v. Nelson*, 2006 WL 2038393 and *Burns v. Morgan*, 2006 WL 237018 (S.D. Tex. 2006), the plaintiffs lost good time credits as a result of the prison disciplinary rule violations.

The court in *Hall v. Stalder*, 2005 WL 2050288 (E.D. La. 2005), did not even mention the *Muhammad* decision's limitation on the application of *Heck* to prison disciplinary matters.

*Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038 (1987). The protections afforded by the qualified immunity defense turn on the "objective legal reasonableness" of the defendants' conduct examined by reference to clearly established law. *Id.*, at 639, 107 S.Ct. at 3038. The court does not ascertain solely whether the law was settled at the time of the defendants' conduct, but rather when measured by an objective standard, a reasonable officer would have known that his conduct was illegal. Even if a defendants' conduct actually violates a plaintiff's constitutional right, the defendants are entitled to qualified immunity if the conduct was objectively reasonable. *Duckett v. City of Cedar Park, Texas*, 950 F.2d 272 (5th Cir. 1992), citing *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990); *Melear v. Spears*, 862 F.2d 1177 (5th Cir. 1989); *Matherne v. Wilson*, 851 F.2d 752 (5th Cir. 1988).

At the time of the alleged incident, a reasonable corrections officer would have known that beating and spraying mace on a prisoner without provocation was not objectively reasonable. *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995 (1992); *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078 (1986) (force is excessive and violative of the Eighth Amendment only if applied maliciously and sadistically for the very purpose of causing harm, rather than a good faith effort to maintain or restore discipline). To prevail on an Eighth Amendment excessive force claim, the plaintiff must

establish that force was not "applied in a good-faith effort to maintain or restore discipline, [but] maliciously and sadistically to cause harm," and that he suffered an injury. *Eason v. Holt*, 73 F.3d 600, 601-02 (5th Cir. 1996). The Eighth Amendment's prohibition of cruel and unusual punishment excludes from constitutional recognition *de minimus* uses of physical force, provided that the use of force is not of a sort "repugnant to the conscience of mankind." *Hudson*, 503 U.S. at 10, 112 S.Ct. at 1000. The absence of serious injury, while relevant to the inquiry, does not preclude relief. The Fifth Circuit Court of Appeals has never directly held that injuries must reach beyond some arbitrary threshold to satisfy an Eight Amendment excessive force claim. *Brown v. Lippard*, 472 F.3d 384, 386 (5th Cir. 2006).

Plaintiff alleged that on September 28, while he was standing in the food service line, Sgt. Revere asked the plaintiff why he was looking at her. Plaintiff alleged that he denied looking at Sgt. Revere and she walked away. Plaintiff alleged that Sgt. Revere returned to the kitchen accompanied by Lt. Wilson and Lt. Maples. Plaintiff alleged that Lt. Wilson and Lt. Maples wrestled the plaintiff to the ground, struck him in the face, twisted his arms, and struck him with their fists. Plaintiff alleged that while he was being escorted out of the kitchen, he complained that the officers were hurting his arms. When they arrived on the West Yard of the Main Prison they were then joined by their supervisor,

Capt. McKey. Capt. McKey ran up to the plaintiff, warned the plaintiff not to talk back to his officers and punched the plaintiff in the face. Plaintiff alleged that he was shoved to the ground and then picked up and escorted to the shower in the Main Prison cell block unit.

Plaintiff alleged that while in the shower cell Capt. McKey attacked him, beating and choking him. Plaintiff alleged that Col. Poret joined in the attack, kicking the plaintiff. Plaintiff alleged that although he was restrained to the bars and offered no resistance, Lt. Sanders sprayed him in the face with mace. Plaintiff alleged he was blinded by the mace. Plaintiff alleged that following the incident he was not permitted to change his jumpsuit. About an hour after the macing incident a physician assessed the plaintiff's complaints and injuries and ordered a bottle of eye wash for the plaintiff. Plaintiff alleged that as a result of the incident he lost his vision temporarily, sustained serious skin irritation, and still suffers from blurry vision, burning eyes, and swelling to his throat and neck.

Plaintiff's allegations in the complaint and the ARP records are not sufficient to state an Eighth Amendment excessive force claim upon which relief can be granted against defendants Sgt. Revere, Lt. Wilson and Lt. Maples. Crediting the plaintiff's allegations, a reasonable trier of fact could find that defendants Lt. Wilson and Lt. Maples hit the plaintiff in the face without

provocation, i.e. when there was no need to use any force at all, then twisted the plaintiff's arms causing him pain. It can be reasonably inferred from the allegations that Sgt. Revere stood by did nothing to prevent their attack. Nonetheless, the plaintiff did not allege that their actions caused him any injury.

Plaintiff's allegations in the complaint and the ARP records are sufficient to state an Eighth Amendment excessive force claim upon which relief can be granted against defendants Capt. McKey, Lt. Sanders and Col. Poret. Plaintiff alleged that they jointly participated in the unprovoked and unjustified macing-choking-kicking which followed at the Main Prison cellblock. Their actions caused the plaintiff to sustain injuries, including temporary loss of vision, serious skin irritation, blurry vision, burning eyes, and swelling to his throat and neck.

Defendants moved to dismiss the plaintiff's claim based on lack of medical treatment. After a careful review of the plaintiff's complaint and the ARP records, the court cannot conclude that the plaintiff actually made a claim for denial of adequate medical care in violation of the Eighth Amendment.

Defendants moved to dismiss the plaintiff's claims for declaratory and injunctive relief on the grounds that the plaintiff lacks standing to seek a declaratory judgment or injunctive relief. Specifically, the defendants argued that there is no actual case or controversy for purposes of declaratory or injunctive relief.

Defendants relied on the Supreme Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660 (1983). Defendants argued that the plaintiff failed to allege a "credible threat" that he will be subject to the specific injury for which he seeks declaratory and injunctive relief. Defendants argument is without merit.

In *Lyons*, the Supreme Court held that Lyons, suing as a individual plaintiff, had no standing to sue for injunctive relief to stop the Los Angeles police department's practice of chokeholding. Lyons had no standing because "'(p)ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.'" *Id.*, at 102, 103 S.Ct. at 1665 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96, 94 S.Ct. 669, 675-76 (1974)). To obtain equitable relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future. *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992). Similar reasoning has been applied to suits for declaratory judgments. *Ashcroft v. Mattis*, 431 U.S. 171, 97 S.Ct. 1739 (1977) (for a declaratory judgment to issue, there must be a dispute which calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts).

Plaintiff sought an order directing prison officials to

release him from segregation into the general population where he was housed prior to the incident, restoration of all rights and privileges revoked as a result of the incident, and expungement of the disciplinary reports issued as a result of the September 28 incident. Plaintiff alleged that he suffers a continuing harm as a result of the defendants' actions. Plaintiff has standing to obtain the declaratory and prospective injunctive relief he sought.

Defendants argued that the plaintiff cannot recover for mental anguish, emotional distress or humiliation. This argument is premised on the belief that the plaintiff suffered no physical injury. However, the court must accept as true, for the purposes of this motion to dismiss, the plaintiff's allegations of actual injuries inflicted by the defendants. Therefore, the defendants' argument must be rejected.

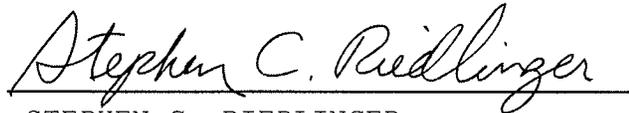
Defendants' argued that the plaintiff cannot recover punitive damages from them. Again, they are wrong. Plaintiff may recover punitive damages from the defendants sued in their individual capacity, providing he proves that they acted with malice or willfulness or with callous and reckless indifference to the safety or rights of the plaintiff. *Campbell v. Miles*, 228 F.3d 409 (2000); *Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994). Plaintiff's allegations are sufficient to meet this standard.

RECOMMENDATION

It is the recommendation of the magistrate judge that the defendants' motion to dismiss be granted as to defendants Sgt. K. Revere, Lt. Phillip Maples and Lt. Kenneth Wilson unless, within such time as the court may allow, the plaintiff files an amended complaint alleging that their actions caused him an injury sufficient to support an Eighth Amendment excessive force claim.

It is further recommended that in all other respects the defendants's motion be denied.

Baton Rouge, Louisiana, August 8, 2007.

A handwritten signature in cursive script that reads "Stephen C. Riedlinger". The signature is written in black ink and is positioned above a horizontal line.

STEPHEN C. RIEDLINGER  
UNITED STATES MAGISTRATE JUDGE