

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

ADRIAN NATHANIEL BACON,)	
)	
Plaintiff,)	Case No. 7:13cv00350
)	
v.)	<u>REPORT AND</u>
)	<u>RECOMMENDATION</u>
)	
C/O C. ROSE, et al.,)	By: Pamela Meade Sargent
)	United States Magistrate Judge
Defendants.)	

The pro se plaintiff, Adrian Nathaniel Bacon, is a Virginia Department of Corrections, (“VDOC”), inmate housed at Red Onion State Prison, (“ROSP”). This case was tried to the court on June 5, 2014. The matter is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). The undersigned now submits the following report and recommended disposition.

I. Facts and Procedural Background

Bacon brings this civil rights action pursuant to 42 U.S.C. § 1983 for violation of his Eighth Amendment right to be free from cruel and unusual punishment against Correctional Officer C. Rose. Bacon claims that Rose purposefully closed his cell door’s tray slot on his left hand, injuring three of his fingers.

At trial, Bacon testified that he was being housed at ROSP on June 19, 2013. Bacon said that he had been an inmate at ROSP housed in segregation since October 2010. On June 19, Bacon said, he was standing at his cell door with his

left hand on the ledge just below the tray slot talking to Rose. Bacon said the tray slot had been left open after receiving his supper tray. Bacon said that, when Rose saw that the tray slot was open, Rose slammed the tray slot shut without any warning. Bacon said that he tried to pull his left hand out of the way of the sliding tray slot cover, but the cover caught his fingers, cutting them. Bacon said that Rose simply turned and walked away.

Bacon at first testified that he knew that Sgt. Deel was in the cell block on the bottom tier, and he kicked on his cell door to gain Deel's attention after he was injured. When Deel came to his cell door and saw Bacon bleeding, Deel said he would call medical, Bacon said. Nurse Mullins and Nurse Cox then came to Bacon's cell to assess his injuries, Bacon said.

Bacon testified the cuts to his fingers healed after about two weeks, with the only residual being a scar on his ring finger.

According to Bacon, he and Rose had a verbal dispute earlier in the day on June 19. Bacon admitted that he had the window on his cell door covered earlier in the day, in violation of ROASP rules. Bacon further said that Rose told him to uncover the window and that he would not get a shower that day as punishment for covering his window. While Bacon testified that Rose tried to antagonize him by telling him that he was going to deny him a shower, Bacon did not provide any evidence of any threat or even a particularly provocative comment made by Rose. Bacon said that, when Rose began pulling inmates for showers that day, Rose did not pull Bacon. Bacon stated that he became upset because covering his cell door window did not justify taking away his shower.

At this point, Bacon testified that he kicked his cell door to get Deel's attention so he could complain about the denial of a shower. Bacon said that Rose returned to his cell and told him to stop kicking his cell door stating, "you are not getting your shower." It was then, Bacon said, that Rose saw his hand in the open tray slot and slammed the tray slot cover shut.

Rose also testified at the June 5 trial. According to Rose, he worked as a Correctional Officer at ROSP on June 19, 2013. Rose stated that he was collecting supper trays when Bacon refused to return his supper tray. At one point, Rose testified that he went to Bacon's cell, opened the tray slot and Bacon refused to surrender his supper tray. Rose said that he then shut the tray slot cover back and was not aware Bacon's fingers were in the way of the tray slot cover.

At a later point in his testimony, Rose agreed that the tray slot on Bacon's cell door was open when he approached it to retrieve Bacon's supper tray. When Bacon refused to return his supper tray, Rose said that he tried to close the tray slot cover. Rose said that he noticed Bacon jerk his hand away and that Bacon showed him that his fingers had been cut. Rose said that he then went and told Sgt. Deel what had happened. He said he then went to Lt. Payne's office to notify him of what had happened.

On cross-examination, Rose agreed that ROSP policy required the correctional officers to close the cell door tray slot after giving an inmate his meal. Rose then, again, changed his testimony on this point to state that, when he arrived at Bacon's cell door to retrieve his supper tray, he opened the tray slot.

Rose stated that he did not recall having any verbal argument with Bacon earlier that day. He specifically denied trying to antagonize Bacon. Rose testified

that he did not know that Bacon's hand was in the way when he attempted to close the tray slot. Rose said that he was not present at Bacon's cell when medical personnel responded to assess his injuries.

Bacon specifically denied that he had refused to return his supper tray or that he was attempting to hold the tray slot cover open. Bacon said that, if he had done either of these acts, he should have been charged with a disciplinary infraction, and he was not charged.

Deel testified that he was the sergeant assigned to the C building at ROSP on June 19, 2013. Deel said that he was in the building with a qualified mental health professional speaking to another inmate when Bacon hit his cell door and motioned for Deel to come to his cell. Deel testified that, on his way to Bacon's cell, Rose informed him that he had shut the tray slot, catching Bacon's fingers in the slot. Deel stated that he notified the medical department and his lieutenant of Bacon's injuries. He also said that he went with Bacon while he was treated in the medical department.

A video recording from the C building "rapid-eye" camera system does not support Deel's testimony that Rose told him of Bacon's injury as Deel was walking up to Bacon's cell. In fact, the video recording, which was admitted into evidence as Plaintiff's Exhibit No. 1, shows that Rose left the C building some time before Deel walked up to Bacon's cell.

Nurse Trisha Cox, a licensed practical nurse who works at ROSP, testified that she assessed and treated Bacon's injuries on June 19, 2013. Cox stated that she and Nurse Mullins responded to Bacon's cell and asked that he be taken to the medical department so that they could better assess his injuries. Cox said that

Bacon had lacerations on the fingers of his left hand from his middle finger to his pinkie finger. Cox stated that she and Mullins cleaned the cuts, placed Dermabond on the cut on the ring finger and put adhesive bandage strips on the other two fingers. Cox stated that the cut on Bacon's left ring finger was the most severe and it was about one-inch long. Cox testified that Dermabond is a type of glue used to hold the skin together to promote healing.

Cox testified that Bacon was seen again by the medical department regarding his injuries on June 24, 2013. On this date, Bacon complained of the cut on his ring finger not healing. According to the medical report completed by Nurse Mullins on this date, Bacon had pulled off the Dermabond that had been placed on the cut on his ring finger on June 19. According to the report, which was admitted into evidence as the second page of Defendant's Exhibit No. 4, Mullins instructed Bacon to keep the cut clean and open to the air without a bandage.

Cox testified that ROSP's medical records do not show that Bacon received any further treatment with regard to the injuries sustained on June 19. In particular, Cox testified that none of the medical reports indicated that Bacon's hand was ever swollen or bruised, which could indicate a broken bone.

ROSP Investigator John McQueen testified that, based on his investigation of the incident, he had concluded that Rose did not intentionally close the tray slot cover on Bacon's hand. McQueen stated that he reviewed the Internal Incident Reports completed by Rose and Deel, the relevant video footage and the medical reports.

II. Analysis

The Eighth Amendment to the U.S. Constitution not only prohibits excessive sentences, but it also protects prison inmates from inhumane treatment and conditions while imprisoned. *See Williams v. Benjamin*, 77 F.3d 756, 761 (4th Cir. 1996). The unnecessary and wanton infliction of pain by a prison official through the use of excessive force upon an inmate has been clearly established as a violation of the Eighth Amendment's prohibition on cruel and unusual punishment for a number of years. *See Hudson v. McMillian*, 503 U.S. 1, 5 (1992); *Whitley v. Albers*, 475 U.S. 312, 319 (1986). The Eighth Amendment also requires prison officials to take reasonable measures to guarantee the safety of inmates. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984).

The determination of whether the use of force by a prison official violates the Eighth Amendment includes both a subjective and objective component. *See Williams*, 77 F.3d at 761 (citing *Wilson v. Seiter*, 501 U.S. 294, 302 (1991)). Not every malevolent touch by a prison guard amounts to a deprivation of constitutional rights. *See Hudson*, 503 U.S. at 9 (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). To meet the objective component in an excessive force case, an inmate must show that the force used was “nontrivial,” *Wilkins v. Gaddy*, 559 U.S. 34, 39 (2010), given that “contemporary standards of decency always are violated... whether or not significant injury is evident.” *Hudson*, 503 U.S. at 9. “This is not to say that the ‘absence of serious injury’ is irrelevant to the Eighth Amendment inquiry.” *Wilkins*, 559 U.S. at 37 (quoting *Hudson*, 503 U.S. at 7). In fact, the extent of the injury may suggest that “‘the use of force could plausibly have been thought necessary’ in a particular situation” or “provide some indication

of the amount of force applied.” *Wilkins*, 559 U.S. at 37 (quoting *Hudson*, 503 U.S. at 7). For example, “[a]n inmate who complains of a [mere] ‘push or shove’ that causes no discernible injury almost certainly fails to state a valid excessive force claim.” *Wilkins*, 559 U.S. at 37 (quoting *Johnson*, 481 F.2d at 1033). As *Wilkins* clarified, it is the nature of the force “that ultimately counts” and provides the “core judicial inquiry” in an excessive force case. 559 U.S. at 37, 38. In particular, courts must consider “whether [the force] was nontrivial and ‘was applied...maliciously and sadistically to cause harm.’” *Wilkins*, 559 U.S. at 39 (quoting *Hudson*, 503 U.S. at 7).

To meet the subjective component in an excessive force case, the inmate must show that the prison official applied force “maliciously and sadistically for the very purpose of causing harm.” *Whitley*, 475 U.S. at 320-21. The inquiry under the subjective standard is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson*, 503 U.S. at 7. The Supreme Court in *Whitley* set out several factors which should be considered in determining whether prison officials acted maliciously and sadistically. In particular, the court should consider:

- 1) The need for application of force,
- 2) The relationship between that need and the amount of force used,
- 3) The threat “reasonably perceived by the responsible officials,” and
- 4) “any efforts made to temper the severity of a forceful response.”

Williams, 77 F.3d at 762 (citing *Whitley*, 475 U.S. at 321).

Based on the evidence before the court, I find that Bacon has failed to meet his burden of proving both the subjective and objective components of an

excessive force claim. With regard to the objective component, the uncontradicted evidence is that Rose simply shut the tray slot cover on Bacon's cell door. The uncontradicted evidence also shows that ROSP policy required that cell door tray slot covers remain shut at all times, except when being used to pass an item to or from an inmate. The act of shutting a tray slot cover is not an objectively malicious or sadistic act designed to cause harm. Furthermore, the extent of Bacon's injuries, three small cuts on three fingers of his left hand, do not suggest that an unnecessary or unreasonable amount of force was used by Rose when shutting the tray slot cover.

Regarding the subjective component, Rose testified that he did not know that Bacon's fingers were in the way of the tray slot cover when he closed it. While Bacon testified that Rose saw his hand in the way before closing the tray slot cover, Bacon has no way of knowing what Rose did or did not see before closing the tray slot cover. Bacon did not produce any evidence that Rose made any type of incriminating statement with regard to an attempt to purposefully injure Bacon's hand. In fact, insofar as Bacon claims that he and Rose had a verbal altercation earlier in the day over Bacon's shower privileges, Bacon admitted that all Rose said to him was that he was not going to get a shower because he had covered his cell door window.

I should note that none of the witnesses who testified at trial were particularly credible. With the exception of Investigator McQueen, who had no first-hand knowledge of the events at issue, each of the other witnesses either contradicted his own testimony at some point or changed her testimony when presented with the documentary evidence or his testimony was not supported by the video evidence. It is the plaintiff who has the burden of proof. Put simply, if the

evidence is such that the court does not know which version of events to believe, the plaintiff has failed to meet his burden of proof.

PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. The plaintiff has failed to meet his burden of proving the subjective component of an excessive force claim;
2. The plaintiff has failed to meet his burden of proving the objective component of an excessive force claim; and
3. The plaintiff has failed to meet his burden of proving that the force applied against him violated his right to be free from cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution.

RECOMMENDED DISPOSITION

Based on the above-stated reasons, I recommend that the court enter judgment in favor of the defendant.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo

determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record and unrepresented parties.

DATED: this 7th day of July, 2014.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE