

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

LARRY NEWELL, JR.,)	
)	
Plaintiff,)	Civil Action No. 7:01cv00241
)	
v.)	<u>Memorandum Opinion</u>
)	
RONALD J. ANGELONE, <u>et al.</u>)	
)	By: Samuel G. Wilson
Defendants.)	Chief United States District Judge
)	

Newell, an inmate at Red Onion State Prison, proceeding pro se, brings this action under 42 U.S.C. § 1983, with jurisdiction under 28 U.S.C. § 1343. On April 2, 2001, this court entered an opinion and order dismissing several of Newell's claims for failure to state a claim upon which relief may be granted. Again, on June 13, 2001, this court entered an opinion and order dismissing more of Newell's claims for failure to state a claim upon which relief may be granted and failure to correct pleading deficiencies.

Two of Newell's claims remain. First, Newell claims that on April 30, 2000, Defendants assaulted him and placed him in restraints without justification, in violation of the Eighth and Fourteenth Amendments. As to this claim, Defendants move for summary judgment on the grounds of qualified immunity. Second, Newell claims that on October 2, 2000, Defendants placed him in restraints without justification, in violation of the Eighth and Fourteenth Amendments. As to this claim, Defendants move for dismissal for failure to exhaust administrative remedies. For the reasons stated below, the court will grant in part and deny in part Defendants' motion for summary judgment and grant Defendants' motion to dismiss.

I.

On April 30, 2000, at approximately 10:47 p.m., Officers Hall, Kilbourne and O'Quinn searched Newell's cell. Newell was handcuffed and shackled during the search. Newell claims that from the beginning Officers Hall, Kilbourne and O'Quinn intended to assault him and that Captain Fleming allowed the assault to occur. Newell alleged the following.

After the officers searched his cell, Officer Hall intentionally lowered his shoulder and bumped into Newell. Newell was told to kneel down and one of the officers yelled "I said get down!" Then, Officers Hall, Kilbourne and O'Quinn "slammed" Newell to the floor. O'Quinn told the other officers that Newell head butted him, although Newell denies it. O'Quinn, Hall and Kilbourne held Newell to the floor, put their knees on Newell's head, knee and ankle, and cursed and threatened him. When Captain Fleming walked by the door, the officers let Newell up. The officers then threw Newell against the wall and into the sink, injuring Newell's lip. The officers laid Newell on the bed face down. Newell's lip was bleeding and blood was on his face. The officers escorted Newell to the strapdown cell and placed him in restraints. While in restraints, Newell received four stitches for the cut on his lip. Newell remained in restraints for approximately forty hours and was released on May 2, 2000 around 4:51 p.m. Although the medical records indicate that Newell did not have any injuries, he alleges that both of his thumbs were numb, his shoulders were aggravated, his lip was cut, his wrists were scarred, his ankles and heels were cut, his knee had an abrasion, his upper abdomen had abrasions, and his chest nipples had abrasions. Newell's version of the April 30 incident is supported somewhat by affidavits from fellow inmates.

The affidavits from the Defendant corrections officers, however, tell a different story.

According to the Defendants, Officers O'Quinn, Hall and Kilbourne searched Newell's cell because they suspected tobacco was in his cell. At first, Newell refused to comply with the search of his cell, and the officers notified Captain Fleming. After Captain Fleming talked to Newell, Newell agreed to be handcuffed and shackled. Captain Fleming then left Newell's cell. However, Newell continued to be disruptive and cursed at the officers. Once the search was complete, O'Quinn told Newell to kneel down so he could remove the leg irons. Newell head butted O'Quinn, striking him in the forehead. In response, Hall and O'Quinn took Newell to the floor in an attempt to gain control over him. Newell was held on the floor until Captain Fleming arrived. When Newell was let up off the floor, the corrections officers noticed that his lip was bleeding. Newell was then moved and placed face down in the bed. Captain Fleming secured authorization from Warden True to place Newell in five-point restraints due to his misbehavior. Another corrections officer relieved O'Quinn so he could report to the medical department. The medical staff noted that O'Quinn had a small red swollen area on the middle of his forehead.

The facts regarding Newell's second claim are as follows. On October 2, 2000, Newell was allegedly caught masturbating at his cell door. Corrections officers escorted Newell from his cell to the pod office to talk to Lieutenant Rose and counselor Tate. Newell alleges that Tate and Rose made inappropriate comments, that Rose ordered that Newell's room be "ransacked," and that, without justification, Rose ordered that Newell be placed in five-point restraints.¹

On October 4, 2000, Newell filed an informal complaint regarding the inappropriate comments, the ransacking of his room, and being placed in restraints. On October 16, 2000,

¹Newell's claims regarding inappropriate comments and "ransacking" his room have already been dismissed by this court. All that is left for the court to consider is Newell's claim that he was placed in five-point restraints without justification.

Warden True responded to Newell's informal complaint. True stated, "concerning your being placed in ambulatory restraints, I have read the documentation and I concur with Lt. Rose's decision to place you in ambulatory restraints. Staff denies making threats to you. Therefore, your complaint has no merit."(Plaintiff's Motion for Attachments, Exhibit E)

On October 18, 2000, Newell filed a formal grievance in which he complained of the inappropriate comments, the ransacking of his room and being placed in restraints. However, the grievance form instructs the inmates that "Only one issue per grievance will be addressed." (Id.)

On the reverse side of Newell's grievance form is a section titled: "INTAKE. Grievances should be accepted for logging unless returned for the following reasons." (Id.) A list of reasons why a grievance should not be accepted is printed underneath the title. A check mark appears beside the line: "Insufficient Information. You need to provide the following information before the grievance can be processed." (Id.) Handwritten underneath this line were the words: "Please rewrite your grievance addressing only one issue. You have raised several issues and we do not know which issue you want addressed." (Id.) This section was signed by Pam Saul, Grievance Coordinator for Red Onion, on October 19, 2000. However, in her affidavit, Saul does not state that she returned Newell's grievance to him.

Also, below the "INTAKE" section, signed by Saul, is a section titled "REGIONAL REVIEW of INTAKE." (Id.) Under this section, a check mark appears beside the line: "The grievance meets the criteria for intake and is being returned to the Warden/Superintendent for logging." (Id.) This section was signed by the Regional Ombudsman on October 23, 2000.

According to Pam Saul's affidavit, the grievance office received Newell's grievance on

October 26, 2000.² However, since “only one issue per grievance is addressed,” the grievance office only “addressed the issue of inappropriate statements made by staff.” (Saul’s Affidavit)

On November 6, 2000, the Level I grievance decision-maker issued a response to Newell’s grievance; however, he only addressed Newell’s claims that the staff made inappropriate comments. He found Newell’s grievance “unfounded.” (Plaintiffs Motion for Attachments, Exhibit E) He also wrote: “It is noted that you have raised other issues in this grievance; however, per DOP 866-7.14 only one issue per grievance form will be addressed.” (*Id.*) Subsequently, the Level II and Level III decision makers upheld the Level I decision.

On April 4, 2001, Newell initiated this action. However, according to Pam Saul’s affidavit, Newell did not submit a grievance regarding being placed in five-point restraints on October 2, 2000.

II.

In regard to the claims of excessive force occurring on April 30, 2000, Defendants argue that they are entitled to qualified immunity. In regard to the claims of excessive force occurring on October 2, 2000, Defendants argue that Newell has not exhausted his administrative remedies. The court will consider each of these arguments in turn.

A. April 30, 2000 Incident: Qualified Immunity

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

² Newell submitted a document titled “Virginia Department of Corrections Adult grievance Receipt Form” in which a prison official acknowledged receipt of Newell’s grievance on October 26, 2000. (Plaintiff’s Motion for Attachments, Exhibit E).

U.S. 800, 815 (1982). However, “[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.” Id. at 818-19. In determining whether a government official is entitled to qualified immunity, the court must “(1) identify the right allegedly violated, (2) determine whether the constitutional right violated was clearly established at the time of the incident, and (3) evaluate whether a reasonable offic[ial] would have understood that the conduct at issue violated the clearly established right.” Henderson v. Simms, 233 F.3d 267, 271 (4th Cir. 2000) (quotations omitted). These steps are sequential. The court must first determine whether the plaintiff has alleged a constitutional violation before proceeding to determine whether the right was clearly established or whether a reasonable official would have understood that he was violating the clearly established right. See id. Therefore, the court will first address whether Newell has alleged a violation of the Eighth and Fourteenth Amendments.

The Eighth Amendment, enforced against the states through the Fourteenth Amendment, prohibits the infliction of “cruel and unusual punishments.” U.S. Const. amends. VIII, XIV. The Eighth Amendment protects individuals against excessive prison sentences as well as inhumane treatment and excessive force while imprisoned. To establish an Eighth Amendment excessive force claim against a prison official, an inmate must satisfy a subjective component (did the official act with a sufficiently culpable state of mind?) and an objective component (was the harm sufficiently serious?). Williams v. Benjamin, 77 F.3d 756, 761 (1999).

When addressing the subjective component of an excessive force claim, the question “ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.” McCright v.

Davis, 168 F.3d 482, No. 97-7826, 1999 WL 11277, at **3 (4th Cir. January 13, 1999)

(unpublished opinion).³ The Supreme Court and the Fourth Circuit have set out the following factors to consider in determining whether a prison official acted maliciously and sadistically:

(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.

Hudson, 503 U.S. at 7; Williams, 77 F.3d at 762.

Also, the inmate must satisfy a requirement that the corrections officer's actions were objectively harmful enough to amount to a constitutional violation. Although there is no requirement that an inmate suffer significant injury, "injuries can be so insignificant as to justify a conclusion that excessive force was not employed." Norman v. Taylor, 25 F.3d 1259, 1263 n.2 (4th Cir. 1994) (finding insufficient injury to establish an Eighth Amendment violation when a prison guard hit an inmate on the thumb with his keys causing inmate to suffer a sore thumb). "[A]bsent the most extraordinary circumstances, a plaintiff cannot prevail on an Eighth Amendment excessive force claim if his injury is de minimis." Taylor v. McDuffie, 155 F.3d 479, 483 (1998). In the Fourth Circuit, "a de minimis injury, without more, is dispositive of an excessive force claim." Id. at 486 (Murnaghan, J., dissenting) (criticizing the majority's "fiction that de minimis injury means de minimis force").

However, a de minimis injury may amount to an Eighth Amendment violation if the force used was of the sort "repugnant to the conscience of mankind." In Norman v. Taylor, the Fourth Circuit stated:

³Although unpublished opinions of the Fourth Circuit are not binding precedent, they are entitled "to the weight they generate by the persuasiveness of their reasoning." Hupman v. Cook, 640 F.2d 497, 501 n.7 (4th Cir. 1981).

We recognize that there may be highly unusual circumstances in which a particular application of force will cause relatively little, or perhaps no, enduring injury, but nonetheless will result in an impermissible infliction of pain. In these circumstances, we believe that either the force used will be “of a sort ‘repugnant to the conscience of mankind,’” and thus expressly outside the de minimis force exception, or the pain itself will be such that it can properly be said to constitute more than de minimis injury.

25 F.3d at 1263 n.4 (citations omitted).

Here, the court finds that Newell’s alleged injuries were more than de minimis. Newell alleges that he was assaulted by Hall, Kilbourne, and O’Quinn and that their false allegations caused him to be placed in five-point restraints for forty hours. Newell’s alleged physical injuries include a cut on his lip which required four stitches and various cuts, abrasions and soreness to his thumbs, ankles, wrists, knee and chest. In addition to physical manifestations of injury, Newell suffered forty hours in five-point restraints.⁴ Newell’s alleged injuries coupled with his forty hours in restraints is objectively harmful enough to establish an Eighth Amendment violation.

Also, the court finds that if the events occurred as Newell alleged, then he may also meet the subjective requirement of an Eighth Amendment claim. Newell alleges that O’Quinn, Hall and Kilbourne conspired to assault him and falsely claim that Newell head butted O’Quinn in order to cover up their assault. Defendants, on the other hand, claim that Newell head butted O’Quinn and that they only used force to restore discipline. If the court credits Defendants’ version, then the officers applied force in a good faith effort to restore discipline. However, if the court credits Newell’s version, then the officers’ acted maliciously and sadistically for the very purpose of

⁴In Williaims v. Benjamin, 77 F.3d 756 (1996), the Fourth Circuit implied that the use of four-point restraints for eight hours under harsh conditions could be sufficient to establish the objective component of an Eighth Amendment violation. Id. at 762 (noting that “[m]ankind has devised some tortures that leave no lasting physical evidence of injury”).

causing harm. Since, there is genuine issue as to a material fact, the court cannot find, on this summary judgment motion, that O'Quinn, Hall and Kilbourne acted constitutionally.

However, viewing the facts in the light most favorable to Newell, the court finds that Captain Fleming did not violate Newell's constitutional rights. According to Newell, Captain Fleming left Newell's cell before the altercation with the corrections officers. By the time Captain Fleming returned, the officers were struggling with Newell and claimed that Newell assaulted O'Quinn. Based on the information available to Captain Fleming, which he did not have reason to doubt, he acted in a good faith effort to restore discipline. Therefore, the court will grant summary judgment on Newell's claim against Captain Fleming.

Since the court finds that Newell has alleged a constitutional violation against O'Quinn, Hall and Kilbourne, the next question is whether the constitutional right was clearly established at the time of the incident and whether a reasonable official would have understood that his conduct violated the clearly established right. It has been clearly established for some time that the use of excessive force by a corrections officer violates an inmate's Eighth and Fourteenth Amendment rights. Additionally, Williams v. Benjamin, 77 F.3d 756 (4th Cir. 1996), makes it clear that punitive use of restraints on an inmate for extended periods of time is constitutionally problematic. Thus, on April 30, 2000, a reasonable corrections officer would have understood that assaulting an inmate for no reason and falsely charging the inmate with assault so that the inmate is placed in five-point restraints is unconstitutional. Viewing the facts in the light most favorable to Newell, as the court is required to do on a motion for summary judgment, the court finds that Defendants O'Quinn, Hall, and Kilbourne are not entitled to qualified immunity.

B. October 2, 2000 Incident: Failed to Exhaust Administrative Remedies

Defendants argue that Newell's claim against Rose and Tate should be dismissed because Newell failed to exhaust his administrative remedies. According to Pam Saul, the Grievance Coordinator at Red Onion State Prison, on October 26, 2000, she received a grievance, filed by Newell, in which he listed multiple issues including inappropriate statements made to him by staff and his placement in restraints on October 2, 2000. However, inmates are only allowed to address one issue per grievance. Thus, only Newell's claims regarding inappropriate statements were addressed. Newell did not submit another grievance regarding his placement in restraints. Thus, Defendants argue that Newell did not exhaust his administrative remedies and that the court should dismiss his claim.

Under the Prison Litigation and Reform Act, "No action shall be brought with respect to prison conditions under § 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).⁵ Newell has the burden of demonstrating that he had exhausted the prison grievance procedure with respect to his claims. See Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir.), cert. denied, 119 S. Ct. 88 (1998).

Here, Newell has not demonstrated that he had exhausted his administrative remedies. He could have followed instructions and filed a separate grievance for each claim that he wished to raise; however, he did not do so. See Wilson v. Jamrog, 205 F.3d 1343, 2000 WL 145455, **1

⁵The Supreme Court recently held that the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong. Porter v. Nussle, ___ U.S. ___, 2002 WL 261683 at *10 (February 26, 2002). Also, in Booth v. Churner, 523 U.S. 731, 121 S. Ct. 1819 (2001), the Supreme Court held that under § 1997e(a) a prisoner must exhaust his administrative remedies even when the relief the prisoner seeks (money damages) is not available in the prison grievance proceedings. Id. at 1825.

(6th Cir. February 1, 2000) (unpublished) (affirming a dismissal without prejudice for failing to exhaust administrative remedies because prisoner failed to follow instruction and use a separate grievance form for each issue); Wilbon v. Braddock, 208 F.3d 216, 2000 WL 282467, **1 (6th Cir. March 9, 2000) (unpublished) (same). Since Newell has not shown that he had exhausted his administrative remedies or that such remedies were not available, the court will dismiss this action without prejudice.⁶

III.

For the reasons stated above, the court will deny Defendants' motion for summary judgment on Newell's claims against Officers O'Quinn, Hall and Kilbourne, grant Defendants' motion for summary judgment on Newell's claims against Captain Fleming, and grant Defendants' motion to dismiss Newell's claims against Lieutenant Rose and Warden True. An order in accordance with this opinion will be entered this day.

⁶ Although it is clear from the record that Newell did not properly follow grievance procedures and exhaust his administrative remedies when they were available to him, it is not clear whether Newell still has an administrative remedy available to him or whether he is now time-barred from filing another grievance. Therefore, the court does not have the opportunity to decide whether a prisoner who is time-barred from pursuing administrative remedies that were once available to him is permitted under § 1997e(a) to file an action in federal court. Compare Hartsfield v. Vindor, 199 F.3d 305, 309 (6th Cir. 1999) (holding that "an inmate cannot simply fail to file a grievance or abandon the process before completion and claim that he has exhausted his remedies or that it is futile for him to do so because his grievance is now time-barred under the regulations") and Wright v. Morris, 111 F.3d 414, 417 n.3 (6th Cir. 1997) (same) with Hattie v. Hallock, 16 F. Supp. 2d 834, 837 (N.D. Ohio 1998) (noting that the reasoning in Wright is "somewhat harsh"), Johnson v. True, 125 F. Supp. 2d 186, 189 (W.D. Va. 2000) (suggesting that when a prisoner is time-barred from filing a grievance, he does not have an administrative remedy available to him and § 1997e(a) does not require dismissal of his claim), Graves v. Detella, 1998 WL 196459, *3 (N.D. Ill. April 17, 1998) (same), and Mitchell v. Shomig, 969 F. Supp. 487, 492 (N.D. Ill. 1997) (same). See also Coronado v. Goord, 2000 WL 52488 (S.D.N.Y. January 24, 2000) (noting that the question is unanswered); Cruz v. Jordan, 80 F. Supp. 2d 109, 126 (S.D.N.Y. 1999) (noting conflict among the courts on the question) and Marsh v. Jones, 53 F.3d 707, 710 (5th Cir. 1995) (addressing the same question, before the PLRA amendments).

ENTER: This ____ day of March, 2002.

CHIEF UNITED STATES DISTRICT JUDGE

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

LARRY NEWELL, JR.,)	
)	
Plaintiff,)	Civil Action No. 7:01cv00241
)	
v.)	<u>ORDER</u>
)	
RONALD J. ANGELONE, <u>et al.</u>)	
)	
Defendants.)	By: Samuel G. Wilson
)	Chief United States District Judge
)	

In accordance with the court’s Memorandum Opinion entered this day, it is **ORDERED** and **ADJUDGED** that:

(1) Defendants’ motion for summary judgment on Newell’s claims against Officers O’Quinn, Hall, and Kilbourne is **DENIED**;

(2) Defendants’ motion for summary judgment on Newell’s claims against Captain Fleming is **GRANTED**;

(3) Defendants’ motion to dismiss for failure to exhaust administrative remedies on Newell’s claims against Lieutenant Rose and Warden True is **GRANTED**; and those claims are **DISMISSED** without prejudice..

ENTER: This ____ day of March, 2002.

CHIEF UNITED STATES DISTRICT JUDGE