IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AMARE SELTON,

Plaintiff,

v.

TROY MITCHELL; E. RIZZO; M. WOODARD; B. SMITH,

Defendants.

Civil Action Case No.
9:04-CV-0989 (LEK/RFT)

PLAINTIFF'S TRIAL BRIEF

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PRELIMINARY STATEMENT

On March 16, 2004, Plaintiff, Amare Selton was severely beaten by several New York State Corrections Officers while housed in the Special Housing Unit ("SHU") at Auburn Correctional Facility. Plaintiff contends that these beatings were in retribution for his defiance of orders, resulting in an extraction from his cell aduring which Plaintiff struck Defendant Correctional Officer Woodard. Mr. Selton commenced the instant action seeking compensation for damages sustained as a result of this beating. Mr. Selton has asserted claims for use of excessive force under 42 U.S.C. 1983 and the Eighth Amendment of the United States Constitution.

STATEMENT OF FACTS

On March 16, 2004, Plaintiff Amare Selton ("Mr. Selton"), an inmate in the custody of the New York State Department of Corrections, was being housed at the SHU at Auburn Correctional Facility. In the preceding month, Mr. Selton had made grievances against, among others, Defendant Mitchell, claiming that they were harassing him by, *inter alia*, banging on the rear wall of his cell during sleeping hours, turning the water off and denying him access to the law library. Mr. Selton attempted to address his concerns regarding this harassment with Captain J. Gummerson, the Defendants' ranking officer. However, he was unable to convey his concerns in such a way as to prompt a solution. At about 12:20 p.m., Mr. Selton began blocking the view to his cell in an effort to gain Captain Gummerson's attention. Within a few minutes, the Defendant Corrections Officers decided forcibly extract Mr. Selton from his cell.

Upon the cell door's opening, Mr. Selton charged at Corrections Officer Rizzo and attempted to get past the riot shield. During the brief melee, Mr. Selton struck Corrections Officer Woodard in the forehead with his fist. Within seconds, other Corrections Officers,

including all of the named Defendants, were upon Mr. Selton. Mr. Selton was taken to the ground and placed in handcuffs and leg restraints. While helpless on the ground and restrained, Defendant Mitchell came around to his right side and viciously bored his finger into Mr. Selton's right eye.

Eventually, Mr. Selton was pulled up from the floor by the Defendants and dragged to the red door leading to the Mental Health Unit ("MHU"). While waiting for the door to open, Mr. Selton feebly attempted to raise his legs to kick at Defendant Mitchell. Mr. Selton was again placed on the ground and physically restrained until he offered no more resistance. Immediately thereafter, he was carried through the red door and into a cell, where there were no cameras to document events, and he was set upon and assaulted by Defendants Mitchell, Rizzo, Woodard and Smith, among other unnamed Corrections Officers, while still mechanically restrained and unable to defend or protect himself.

Mr. Selton sustained injuries to his back, shoulders, neck, head, eyes and face immediately following the beating and for several weeks thereafter. As a result of this beating, Mr. Selton has also suffered and continues to suffer from great emotional distress, night-terrors and a lack of respite.

ARGUMENT

I. The Defendants Used Excessive Force in Violation of the Constitution.

To prevail on a claim of excessive force, a plaintiff must prove two elements. First, that the alleged use of force is "objectively sufficiently serious or harmful enough to be actionable." *Rivera v. Goord*, 989 CIV 1683, 2003 U.S. Dist. Lexis 4889, *27-28 (S.D.N.Y., March 28, 2003) (*citations omitted*). This objective component is "context specific turning upon contemporary standards of decency." *Nunez v. Goord*, 172 F. Sup. 2d 417, 432 (S.D.N.Y., 2001) (*citations*

omitted). An excessive force claim may be established even if the victim does not suffer serious or significant injury if it can be demonstrated that the amount of force used is more than *de minimus* or otherwise involved force repugnant to the conscience of mankind. *Rivera*, 2003 U.S. Dist. Lexis 4889 at *28.

In addition to the objective component, a plaintiff alleging excessive force must also meet a subjective requirement by showing that the defendants acted wantonly and with "a sufficiently culpable state of mind." *Id.* Where a state official is accused of using excessive physical force against an inmate, the inquiry turns on whether the force was applied in a good faith effort to maintain or restore discipline, or instead, was applied maliciously and sadistically to cause harm. *Id.* at 29. A prison official's malicious and sadistic use of force is a *per se* violation of the Eighth Amendment because that conduct, regardless of injury, "always violates contemporary standards of decency." *Nunez*, 172 F. Supp. 2d at 432.

Here, the evidence will show that Mr. Selton was handcuffed and shackled immediately after being taken to the floor in the SHU. The evidence will also show that, contrary to the Defendants' assertions, Mr. Selton suffered a beating with fists and feet *after* being restrained. As the State's own video evidence shows, once restrained, Mr. Selton was easily controlled and the Defendants simply had no need to strike Mr. Selton to "restore discipline." The repeated blows and eye gouging suffered by Mr. Selton after being handcuffed were well in excess of the force necessary to "restore discipline" under any circumstances. *See Franklin v. City of Kansas City*, 959 F. Supp. 1380, 1383 (D. Kan. 1997) (conduct consisting of choking an arrestee who is not resisting arrest and who is already in handcuffs is clearly an objectively unreasonable use of force). Moreover, the attack upon a restrained Mr. Selton once he was removed from the SHU and taken to the Mental Health Unit in obvious retribution for striking a fellow corrections

officer is precisely the type of conduct that is repugnant to the conscience. Thus, Mr. Selton will be able to establish both the objective and subject components of his excessive force claim.

II. The Defendants Are Not Entitled to Qualified Immunity.

Qualified immunity is an affirmative defense that must be proven by the Defendants. *See Tellier v. Fields*, 230 F.3d 502, 511 (2d Cir. 2000). To establish a qualified immunity defense on an excessive use of force claim, an officer must establish either that the alleged conduct did not violate clearly established right of which a reasonable person would have known or that it was objectively reasonable to believe that the acts did not violate clearly establish rights. *See Finnegan v. Fountain*, 915 F.2d 817, 823 (2d Cir. 1990). The right to be free from the use of excessive force was clearly established at the time of Mr. Selton's altercation with the Defendants. *See, e.g.*, *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973). Moreover, the Defendants simply cannot claim it was objectively reasonable to believe that their conduct toward Mr. Selton (e.g., beating him and gouging his eyes) was permissible.

As an initial matter, Mr. Selton will testify and the video evidence will show that while he did strike Officer Woodard while exiting his cell, he did not resist the officers once taken to the ground and handcuffed. Moreover, it is clear that once Mr. Selton was handcuffed, there was no objectively reasonable basis for the Defendants to believe that continuing to hit and kick Mr. Selton was in any way permissible. *See, e.g., Samuels v. Dalsheim, et. al.*, 81 Civ 7050, 1995 U.S. Dist. Lexis 22044, * 52-54 (S.D.N.Y. Aug. 22 1995) (not objectively reasonable to believe that running inmate into the wall and hitting him after he was handcuffed was permissible.); *see also Naccarato v. Oliver*, 882 F. Supp. 297, 304 (E.D.N.Y. 1995) (noting that "if an officer kicked a handcuffed arresttee in the back, that act would violate a clearly established constitutional right and this Court would not grant immunity from liability for such conduct.)

III. Plaintiff Is Entitled to Recovery of Damages, Including Compensatory Damages and Punitive Damages

In this action, Mr. Selton seeks remedies available to him under 42 U.S.C. § 1983 including, *inter alia*, compensatory damages for pain and suffering, mental anguish and emotional distress, as well as punitive damages.[1]

A. Compensatory Damages

Compensatory damages are a form of relief available to a successful plaintiff under 42 U.S.C. § 1983. Fair and reasonable compensatory damages are appropriate where the plaintiff's injury was caused by the violation of a constitutional right. *Arroyo Lopez v. Nuttall,* 25 F. Supp. 2d 407, 410 (S.D.N.Y. 1998). Mr. Selton will ask the jury in this case to award him compensatory damages based upon his physical injuries, mental anguish and emotional distress suffered during his incarceration relative to the incidents which form the core of this case. Moreover, in this type of case, the testimony of a plaintiff alone provides a sufficient basis for a jury to award damages for mental anguish and emotional distress and punitive damages. *Courtney v. City of New York*, 20 F. Supp. 2d 655, 661 (S.D.N.Y. 1998) (holding that a plaintiff "is not required to corroborate [her] testimony regarding mental anguish in order to support a compensatory damage award." (*citation omitted*)).

B. Punitive Damages

Punitive damages may be awarded in § 1983 cases "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Mathie v. Fries*, 121 F.3d 808, 815 (2d Cir. 1997) (*quoting Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640 (1983)). Punitive

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[1] Plaintiff will also seek an award of costs, including reasonable attorneys' fee, and respectfully reserves the right to make an application for such an award following the entry of final judgment. *See* Fed. R. Civ. P. Rule 54(b)(2).

damages may also be awarded "in a proper case under § 1983 for the purpose of deterring or punishing a violation of constitutional rights." *Carey v. Piphus*, 435 U.S. 247, 257 n. 11, 98 S. Ct. 1042, 1049 n. 11 (1978); *see also, In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1272 (2d Cir.), *cert. denied*, 502 U.S. 920, 112 S. Ct. 331 (1991) (reviewing history of punitive damages).

Here, Mr. Selton's claims indicate that punitive damages are entirely appropriate. The Defendants' blatant disregard for Mr. Garcia's constitutional rights - including repeatedly gouging Mr. Selton's eyes, punching, kicking and stomping him all while he was mechanically restrained - and unable to protect himself - begs to be sanctioned as mere compensatory damages would be insufficient to provide a true disincentive. *See, e.g., Duckworth v. Whisenant*, 97 F.3d 1393, 1395 (11th Cir. 1996) (awarding punitive damages against officer who had kicked handcuffed Plaintiff in the groin area).

IV. Preclusion of Evidence

A. Evidence of Prior Convictions

Mr. Selton is a felon convicted of murder, robbery and escape. The Federal Rules of Evidence permit the impeachment of a witness by prior convictions punishable in excess of one year. *See* Fed. R. Evid. 609(a). However, the evidence is only admissible "if the court determines that the probative value . . . outweighs its prejudicial effect." Fed. R. Evid. 609(a). The following factors are considered in determining the balance between probative value and prejudicial effect: (1) the impeachment value of the prior crime, (2) the remoteness of the prior conviction, (3) the similarity between the past crime and the conduct at issue, and (4) the importance of the credibility of the witness.

The factors here indicate a finding of low probative value and high prejudice because any of the evidence of Mr. Selton's prior conviction is of relatively little impeachment value in an unrelated civil action over a decade later, particularly where the conviction does not relate to truthfulness or dishonesty. *See, e.g., East Coast Novelty Co., Inc v. City of New York*, 842 F. Supp. 117, 120 (S.D.N.Y. 1994). Moreover, the prior crime is unrelated to the alleged conduct that occurred here.

Even if Mr. Selton's prior criminal record is found admissible under the balancing provision, revealing any evidence of the details of his crime can create unfair prejudice in the minds of the jurors. *See Daniels v. Loizzo*, 986 F. Supp. 245, 251 (S.D.N.Y. 1997). For this reason, courts in this circuit have limited the introduction of evidence to the fact and date of the conviction and have barred evidence of the nature of the conviction or the title of the crime. *See Morello v. James*, 797 F. Supp. 223, 228 (W.D.N.Y. 1992) (precluding questioning into nature of felony conviction beyond fact that plaintiff was a felon).

The risk of unfair prejudice is even greater in an unrelated civil case, such as the instant action, where the particulars of the conviction do not pertain to any of the issues at hand. Thus, the details of Mr. Selton's prior criminal history should be found inadmissible, regardless of the admissibility of the fact and date of the conviction, due to their severe prejudicial nature and total lack of relevance.

B. Testimony and/or Documentation Regarding Plaintiff's Disciplinary Record Should Be Deemed Inadmissible

As explained *supra* with regard to prior convictions, irrelevant evidence relating to a plaintiff's past disciplinary conduct while incarcerated is inadmissible. *See* Fed. R. Evid. Rule 402. Here, any conduct prior to the relevant time period in this case which resulted in sanctioning is irrelevant as to whether the Defendants retaliated and used excessive force against

Mr. Selton. Accordingly, these prior "bad acts" are irrelevant to the time period at issue here and Defendants should be precluded from introducing Mr. Selton's disciplinary records or evidence relating to his conduct while incarcerated.

In addition to being irrelevant, the admission of prior "bad acts" is objectionable under Fed. R. Civ. P. 404(b) on the basis that character evidence is not admissible to prove conformity therewith on a particular occasion. *See Hynes v. Coughlin*, 79 F.3d 285, 291 (2d Cir. 1996). In *Hynes*, the court clearly signaled that prior disciplinary records should only be admitted when one of the enumerated exceptions of Rule 404 apply, such as to show intent, planning, motive, *et cetera*. Here, none of the exceptions apply and the evidence could only be used to impermissibly sway the jury into believing that Mr. Selton was historically a disciplinary problem and thus deserving of the beatings by the Defendants. As explained, this use of the prior record is impermissible under Rule 404(b). Accordingly, Defendants should be precluded from introducing evidence relating to Mr. Selton's prior conduct.

CONCLUSION

The testimony at trial together with the documentary evidence shall establish that Mr. Selton's rights were violated, and that he should be fully compensated for such violations. Moreover, the Defendants should be precluded from introducing evidence any evidence as to Mr. Selton's prior conviction or disciplinary record.

DATED: November 6, 2006

Respectfully submitted,

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