

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

LUIS ROSALES,

Plaintiff,

9:03-CV-601
(LES)

-against-

LIEUTENANT QUINN; *et al.*

Defendants.

DEFENDANTS' SUPPLEMENTAL PROPOSED JURY CHARGES

ANDREW M. CUOMO
Attorney General of the State
of New York
Attorney for Defendants
615 Erie Blvd. West, Suite 102
Syracuse, NY 13204
Telephone: (315) 448-4800

MARIA MORAN
Assistant Attorney General
Of Counsel

Second Element - Unlawful Use of Force Claims

With respect to plaintiff's claims that defendant Pfleuger used excessive force on him on February 17 and 18, 2003, and defendants Martens and Calhoun used excessive force on May 8, 2003, plaintiff must show, by a preponderance of the evidence, that the defendants intentionally committed the acts alleged. Plaintiff must also show that those acts violated his constitutional rights under the Eighth Amendment.

An unlawful use of physical force by a prison official against a prisoner may give rise to a federal constitutional claim. Even if some evidence in this case established physical contact between one of the defendants and the plaintiff which resulted in serious personal injury to the plaintiff is not proof in and of itself that the defendant acted beyond his lawful authority. The defendants, as law enforcement officers, had the lawful authority to use such physical force as may have been reasonably necessary to enforce compliance with proper instructions and to protect other prisoners and himself, as well, from physical harm at the hands of any prisoner, including the plaintiff himself.

Thus, even if you find from a preponderance of the evidence that certain of the acts alleged by the plaintiff were, in fact, knowingly done by a defendant, you should still find for the defendant if you also find that there was a plausible basis for the official's belief that the degree of force was necessary.

Not every push, shove or striking, even if it is hard, and even if it may later seem to be unnecessary while you sit here in court, is a constitutional violation. You must determine whether the defendant used force against plaintiff "in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of

causing harm.” The Eighth Amendment excludes from its coverage “*de minimis* uses of physical force” provided they are not of a sort “repugnant to the conscience of mankind.” The use of force in the course of a prison security measure does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force applied for security purposes was unreasonable, and hence unnecessary in the strict sense.

To determine if a constitutional violation has occurred you must consider the circumstances surrounding the use of force, the need for decisive action by the defendant, the need for the use of force, the amount of force actually used and the extent of the injury inflicted. In evaluating the plaintiff’s claims, you may also consider whether the plaintiff alleges any injury and whether the medical records support this.

If you do not find that defendants Pfleuger, Martens or Calhoun used excessive force against the plaintiff, then you must find for the defendants on that issue. If you find that one or more of those defendants did in fact use excessive force, then you must find in favor of the plaintiff.

Authority: *Whitley v. Albers*, 475 U.S. 312 (1986); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied* 414 U.S. 1033 (1973); *Hudson v. McMillian*, 112 S. Ct. 995, 999 (1992).

Dated: July 26, 2007
Syracuse, New York

ANDREW M. CUOMO
Attorney General of the State of New York
Attorney for the Defendants

BY: s/Maria Moran
MARIA MORAN
Assistant Attorney General
of Counsel
Bar Roll No. 302287
615 Erie Boulevard West, Suite 102
Syracuse, New York 13204-2465
Telephone: (315) 448-4800

To: Douglas J. Nash, Esq. (via CM/ECF)
Plaintiff's Pro Bono Trial Counsel

Luis Rosales (via U.S. Mail)
Plaintiff, *pro se*