NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 2, 2023*
Decided November 8, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2717

MARTAOUSE C. HOLLOWAY,
Plaintiff-Appellant,

v.

JOHN DOE,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 22-C-741

William C. Griesbach,
Judge.

O R D E R

Martaouse Holloway contends that when a correctional officer struck his hand on Holloway's clothed buttocks, he violated the Eighth Amendment's prohibition on

* The appellees were not served with process and are not participating in this appeal. We have agreed to decide the case without oral argument because the brief and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

cruel and unusual punishment. *See* 42 U.S.C. § 1983. The district court correctly dismissed Holloway's amended complaint for failure to state a claim; thus, we affirm.

We accept the factual allegations in the complaint as true and draw all reasonable inferences in Holloway's favor. *Perez v. Fenoglio*, 792 F.3d 768, 776 (7th Cir. 2015). Holloway was lying clothed on his bunk late one morning at Green Bay Correctional Institution when his cell door opened "for [his] cellmate to go and take his medication." After the cellmate left, Holloway rolled over to sleep. "Moments later" he "felt a strike on [his] behind." He turned and saw "a staff member (C.O.) exiting [his] cell." Holloway asserts that he has been traumatized from this single incident.

Holloway sued the officer for sexually harassing him in violation of his Eighth Amendment rights. The district court dismissed Holloway's initial complaint, which alleged only that the defendant "slapped [him] on [his] butt," because the court "could not reasonably infer that a single slap on the butt amounts to sexual harassment." It granted Holloway leave to amend his complaint, suggesting that Holloway allege if the "slap was intentional," if the officer made comments, or if he interacted with Holloway before or after the incident. Holloway amended his complaint to add that his cellmate left the cell to get medication but said nothing about the guard's state of mind. The district court again dismissed the complaint for failure to state a claim. *See* 28 U.S.C. § 1915A. It explained that it could not infer from the allegations that the officer struck Holloway's buttocks "intentionally . . . let alone that he did so maliciously or sadistically or for sexual gratification." Also, the court added, a single strike of the hand on the buttocks did not violate the Eighth Amendment.

On appeal, Holloway argues that he pleaded enough facts to allege a sexual assault that violated his Eighth Amendment rights. To state an Eighth Amendment claim, a plaintiff must plausibly allege "the unnecessary and wanton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 320 (1986). That requires an allegation that the defendant had a "sufficiently culpable state of mind" and committed objectively "harmful" conduct. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). Holloway's claim fails both elements.

First, Holloway failed to allege that the officer had a "culpable state of mind." *Id*. An "unwanted touching" of a prisoner's private parts can violate Eighth Amendment rights if the officer "*intended* to humiliate the victim or gratify [his own] sexual desires." *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012) (emphasis added). But despite the district court's warning that Holloway must allege if the slap was intentional (or allege comments or other interactions from which intent to achieve sexual gratification could be inferred), Holloway did not. This failure alone dooms his claim.

Holloway offers two responses, but neither is availing. First, he argues that we should presume an officer intends to gratify his sexual desires whenever he touches a private area without penological justification. But Holloway cites no authority for this presumption, and we know of none. Moreover, Rule 9(b) of the Federal Rules of Civil Procedure allows plaintiffs to plead "intent" generally, yet Holloway refused to do so. Second, Holloway contends that we may reasonably infer that the officer had a culpable state of mind from his swift and silent entry and exit, which Holloway believes evinces "consciousness of guilt" and an intent to achieve sexual gratification. But an unelaborated allegation that an officer quickly entered and left a cell quietly as a prisoner was trying to sleep does not itself plausibly suggest the officer was aware of, let alone intended, any touching.

The second problem with Holloway's claim is that the force he received is not objectively "harmful." *Hudson*, 503 U.S. at 8. Not "every malevolent touch by a prison guard" violates the Eighth Amendment. *Id.* at 9. The conduct must involve "significant force," *Guitron v. Paul*, 675 F.3d 1044, 1046 (7th Cir. 2012), or, if it the force is de minimis, it must be "repugnant to the conscience of mankind." *Hudson*, 503 U.S. at 10 (quoting *Whitley*, 475 U.S. at 327). An isolated slap of a hand on clothed buttocks that causes no injury is not, by itself, cruel and unusual punishment under these standards.

Finally, we address Holloway's pending motion for status, in which he asks whether the appellee has filed a brief on appeal. Because no appellee was served with process, no appellee has participated in or otherwise filed a brief on appeal.

AFFIRMED