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NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEVONTE BERNARD HARRIS,) No. C 09-00100 JF (PR)
Plaintiff,) ORDER GRANTING MOTION
vs.) FOR SUMMARY JUDGMENT
JAMES THOM,)
Defendant.) (Docket No. 57)

Plaintiff, a California prisoner proceeding pro se, brings the instant civil rights action pursuant to 42 U.S.C. § 1983 against officials of the Pelican Bay State Prison (“PBSP”). The Court found that the complaint, when liberally construed, stated cognizable claims, and ordered service on Defendants.¹ The only remaining Defendant is James Thom. Thom moves for summary judgment with respect to Plaintiff’s claim of excessive force on the grounds that there is no genuine issue as to any material fact and that he is entitled to qualified immunity. (Docket No. 57.) Plaintiff has filed opposition,

¹ In the same order, the Court dismissed Plaintiff’s retaliation claim against Defendants Troy Woods, Officer A. Griffin, and William Barlow for failure to state a claim. (See Docket No. 5.)

1 and Defendant has filed a reply.

2 DISCUSSION

3 **I. Statement of Facts**

4 The following facts are not disputed unless otherwise indicated. All the events
5 giving rise to this action took place on September 28, 2006, when Plaintiff was scheduled
6 to go to a Unit Classification Committee hearing. (Compl. at 7.) The facility was on
7 lockdown at the time because of an inmate assault on a correctional officer. (Id.)
8 Plaintiff's hands were handcuffed behind his back from the time he exited his cell and
9 was escorted to the hearing which was held in the rotunda of C-section of building 7
10 where Plaintiff was housed. (Id. at 8.) The hearing was conducted by Correctional
11 Counselor D. Melton and Captain Robertson, who informed Plaintiff that he was being
12 placed in the Behavioral Modification Unit because of his past behavior. (Oppo. at 2; J.
13 Thom Decl. at 2, Docket No. 60.) According to Thom, Plaintiff then became very loud,
14 argumentative and agitated. (Mot. at 4.) Plaintiff alleges that he was attempting to
15 exercise his right "to participate and express disagreement with the committee's action."
16 (Compl. at 8.) He claims that Thom interrupted him by asking Counselor Melton if she
17 was done, to which she responded that she was. (Id.) Plaintiff alleges that Thom and
18 Defendant Spencer² then picked him up out of his chair and dragged him back to this cell.
19 (Id.) Thom asserts that Plaintiff resisted by refusing to stand and walk, and that he and
20 Spencer had to lift Plaintiff out of the chair and force him to his feet in order to escort him
21 back to his cell. (Thom Decl. at 2.) Plaintiff admits that he "passively resisted... by not
22 making an effort to stand on [his] own." (Oppo. at 3.) Plaintiff continued to yell over his
23 shoulder to the committee members that he had a right to participate in committee.
24 (Compl. at 8.) Thom and Spencer state that they gave numerous orders to Plaintiff to stop

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26
27 ² On July 29, 2010, the Court granted Spencer's motion to dismiss Plaintiff's Eighth
28 Amendment claim for failure to state a claim. (See Docket No. 65.)

1 resisting and walk. (Thom Decl. at 2; Spencer Decl. at 2.) Defendant Freeman³ also
2 states that he observed Plaintiff resisting the escort by refusing to walk and dragging his
3 feet. (S. Freeman Decl. at 2, Docket No. 62.) Freeman followed the escort from behind
4 as Thom and Spencer took Plaintiff back to his cell in C-section. Defendant Harkin,⁴ the
5 control booth operator in building 7, opened the C-section door for the escorting officers
6 and observed Plaintiff yelling at staff and refusing to walk. (J. Harkins Decl. at 2, Docket
7 No. 63.)

8 According to Defendants, Plaintiff attempted to stop the escort at the door of C-
9 section by placing both feet on the floor and pushing back toward Thom and Spencer.
10 (Thom Decl. at 2; Spencer Decl. at 2; Freeman Decl. at 2.) Thom states that he was on
11 Plaintiff's left side, holding his upper left arm with both of his hands, and Spencer was
12 grasping Plaintiff's right bicep. (Id.) Thom and Spencer used their body weight and
13 forced Plaintiff to the ground in a prone position. (Id.) Plaintiff continued to be resistive
14 while on the ground, twisting, turning, yelling and trying to get to his feet and stand up.
15 (Thom Decl. at 2.) Thom states that he was afraid that Plaintiff was going to spit on him
16 or get to his feet, so in response he put his right arm around Plaintiff, using a hold in order
17 to control Plaintiff's head and upper body from moving and to prevent Plaintiff from
18 possibly spitting on him. (Id.) Thom kept Plaintiff's face turned to the right facing away
19 from him. (Id.) Meanwhile, Spencer attempted to control Plaintiff's lower body while
20 Plaintiff resisted by kicking his legs from side to side. (Spencer Decl. at 2.) Spencer
21 eventually managed to gain control by crossing Plaintiff's legs, bending them at the knees
22 and then holding his feet to his buttocks. (Id.; Freeman Decl. at 2.) Freeman retrieved a
23 pair of leg restraints from Harkin, who sounded the alarm. (Id.; Harkin Decl. at 2.)

25 ³ On March 5, 2010, the Court granted the motion of Defendants S. N. Freeman, M.
26 Knight, and R. Rice to dismiss Plaintiff's Eighth Amendment claims for failure to state a
27 claim on March 5, 2010. (See Docket No. 48.)

28 ⁴ Defendant Harkin was dismissed from this action at Plaintiff's request. (See Docket
No. 44.)

1 Plaintiff continued to resist while Freeman secured the restraints on Plaintiff's legs.
2 (Freeman Decl. at 2.) Responding officers arrived, and Plaintiff was escorted out of the
3 building by Thom and Officer Sanders to a holding cell in the facility B hobby shop. (Id.;
4 Harkins Decl. at 2; Thom Decl. at 3.)

5 Plaintiff alleges that when he entered the dayroom of C-section, he was tripped and
6 slammed to the floor by Thom, who then lay across Plaintiff's back and began choking
7 him from behind. (Compl. at 8-9.) Plaintiff claims that Thom choked him to the point
8 where he could not breath, all the while calling Plaintiff "bitch." (Id. at 9.) Plaintiff
9 alleges that Thom continued to choke him for approximately one to one and a half
10 minutes with no interference from fellow correctional officers. (Id.) The rest of
11 Plaintiff's account essentially is consistent with that of Defendants.

12 Later that day, a videotape interview and investigation of the incident was
13 conducted by Defendant Rice.⁵ On the same day, all officers involved, including Thom,
14 provided written reports of the incident that reflect the same account attested to by them.
15 (See R. Rice Decl., Ex. A, Docket No. 59.) According to the incident report, Thom and
16 Plaintiff both were examined for injuries. Thom suffered an abrasion on his right elbow,
17 and Plaintiff had pain in his neck, an abrasion on his left hip, and an abrasion in the
18 middle of his back near the shoulder blades. (Id.) In accordance with PBSP policy, an
19 investigation was conducted as a result of the use of force on Plaintiff, (see O'Bannan
20 Decl., Ex. Y); there was no finding of excessive force by the executive review committee,
21 and no Defendant was disciplined. (Thom Decl. at 3; Spencer Decl. at 2.)

22 Plaintiff alleges that he suffered soreness in his throat and had difficulty
23 swallowing for a week as a result of being choked. (Compl. at 10.) He also alleges that
24 he experienced pain in his left arm and sustained multiple abrasions on his hip and back.
25 (Id.) Plaintiff claims that Thom subjected him to excessive force in violation of the
26 Eighth Amendment's prohibition against cruel and unusual punishment.

27
28 ⁵ See *supra* note 3.

1 **II. Summary Judgment**

2 **A. Standard of Review**

3 Summary judgment is proper where the pleadings, discovery and affidavits show
4 that there is ‘no genuine issue as to any material fact and [that] the moving party is
5 entitled to judgment as a matter of law.’ Fed. R. Civ. P. 56(c). A court will grant
6 summary judgment “against a party who fails to make a showing sufficient to establish
7 the existence of an element essential to that party’s case, and on which that party will bear
8 the burden of proof at trial . . . since a complete failure of proof concerning an essential
9 element of the nonmoving party’s case necessarily renders all other facts immaterial.”
10 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A fact is material if it might affect
11 the outcome of the lawsuit under governing law, and a dispute about such a material fact
12 is genuine “if the evidence is such that a reasonable jury could return a verdict for the
13 nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

14 Generally, the moving party bears the initial burden of identifying those portions
15 of the record which demonstrate the absence of a genuine issue of material fact. See
16 Celotex Corp., 477 U.S. at 323. Where the moving party will have the burden of proof on
17 an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could
18 find other than for the moving party. But on an issue for which the opposing party will
19 have the burden of proof at trial, the moving party need only point out “that there is an
20 absence of evidence to support the nonmoving party’s case.” Id. at 325. If the evidence
21 in opposition to the motion is merely colorable, or is not significantly probative, summary
22 judgment may be granted. See Liberty Lobby, 477 U.S. at 249-50.

23 The burden then shifts to the nonmoving party to “go beyond the pleadings and by
24 her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on
25 file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” Celotex
26 Corp., 477 U.S. at 324 (citations omitted). If the nonmoving party fails to make this
27 showing, “the moving party is entitled to judgment as a matter of law.” Id. at 323.

28 The court’s function on a summary judgment motion is not to make credibility

1 determinations or weigh conflicting evidence with respect to a disputed material fact. See
2 T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.
3 1987). The evidence must be viewed in the light most favorable to the nonmoving party,
4 and the inferences to be drawn from the facts must be viewed in a light most favorable to
5 the nonmoving party. See id. at 631. It is not the task of the district court to scour the
6 record in search of a genuine issue of triable fact. Keenan v. Allan, 91 F.3d 1275, 1279
7 (9th Cir. 1996). The nonmoving party has the burden of identifying with reasonable
8 particularity the evidence that precludes summary judgment. Id. If the nonmoving party
9 fails to do so, the district court may grant summary judgment in favor of the moving
10 party. See id.; see, e.g., Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026,
11 1028-29 (9th Cir. 2001).

12 **B. Legal Claims and Analysis**

13 Plaintiff claims that Thom used excessive force when he tripped him and choked
14 him during the escort back to his cell. When prison officials stand accused of using
15 excessive force in violation of the Eighth Amendment, the core judicial inquiry is whether
16 force was applied in a good-faith effort to maintain or restore discipline, or maliciously
17 and sadistically to cause harm. Hudson v. McMillian, 503 U.S. 1, 6-7 (1992); Whitley v.
18 Albers, 475 U.S. 312, 320-21 (1986). In determining whether the use of force was for the
19 purpose of maintaining or restoring discipline, or for the malicious and sadistic purpose of
20 causing harm, a court may evaluate the need for application of force, the relationship
21 between that need and the amount of force used, the extent of any injury inflicted, the
22 threat reasonably perceived by the responsible officials, and any efforts made to temper
23 the severity of a forceful response. Hudson, 503 U.S. at 7; LeMaire v. Maass, 12 F.3d
24 1444, 1454 (9th Cir. 1993); see also Spain v. Procunier, 600 F.2d 189, 195 (9th Cir. 1979)
25 (guards may use force only in proportion to need in each situation); see, e.g., Watts v.
26 McKinney, 394 F.3d 710, 712-13 (9th Cir. 2005) (finding that kicking the genitals of a
27 prisoner who was on the ground and in handcuffs during an interrogation was “near the
28 top of the list” of acts taken with cruel and sadistic purpose to harm another); Clement v.

1 Gomez, 298 F.3d 898, 904 (9th Cir. 2002) (pepper-spraying fighting inmates a second
2 time after hearing coughing and gagging from prior spray was not malicious and sadistic
3 for purpose of causing harm, where initial shot of spray had been blocked by inmates'
4 bodies).

5 Thom contends that he is entitled to summary judgment because the force he used
6 to restore order and control Plaintiff was justified under the circumstances. According to
7 undisputed evidence in the record, Plaintiff had a history of violent and disruptive
8 behavior. (Rice Decl. at 2-3.) In a five and a half year period, Plaintiff received twenty-
9 three rules violation reports for disobeying a direct order, disrespecting an officer, or
10 engaging in behavior that could lead to violence. (Id.; D. O'Bannon Decl., Exs. B thru
11 X.) If an inmate has a history of disruptive behavior, the Unit Classification Committee
12 may place an inmate in the Behavior Modification Unit Program. (Id.) The committee
13 had made just such a decision on the day of the incident, which lead to Plaintiff's
14 agitation at the conclusion of the hearing. (Id.; Compl. at 8.) Thom offers evidence of a
15 similar incident that occurred on January 4, 2006, when Plaintiff appeared before the
16 committee and refused to leave when ordered to do so. (Mot. at 4; O'Bannon Decl., Ex.
17 R.) During that incident, Plaintiff also refused to get up from the chair and walk, and
18 officers had to pick Plaintiff up from the chair while Plaintiff continued to resist by
19 twisting his upper body. (Id.) The escorting officers were able to regain control by using
20 their weight to push Plaintiff down on his back and applying leg restraints. (Id.)

21 Thom contends that he was required to act immediately in response to Plaintiff's
22 violent behavior and continued resistance on the day of the incident at issue here. (Mot.
23 at 10.) Thom asserts that for his own safety and for the safety and security of the
24 institution, and in light of Plaintiff's continued resistance, non-compliance with lawful
25 orders, and aggressive behavior, he made a good-faith effort to restore order and gain
26 control of Plaintiff. (Thom Decl. at 3.) Thom contends that he used the minimal amount
27 of force necessary given the circumstances, and that the force was reasonable because of
28 Plaintiff's violent behavior. (Mot. at 10.)

1 In his opposition papers, Plaintiff repeats the allegations of his complaint, insisting
2 that Thom and Spencer dragged him through the rotunda even while he was attempting to
3 walk on his own. (Oppo. at 2.) Plaintiff alleges that when he entered the dayroom of C-
4 section, Thom tripped him, slammed him to the ground, and choked him to the point of
5 asphyxiation. (Id. at 2-3.) In support of these allegations, he provides the declarations of
6 several inmates who witnessed the incident. (Id., Attach.) He also contends that Thom's
7 fear that Plaintiff would spit on him was not "reasonably perceive[d]" because Plaintiff
8 was unlikely able to turn his head to spit on Thom while in a prone position. (Id. at 15.)
9 Plaintiff also suggests that Thom could have obtained a spithood if he genuinely
10 perceived such a threat, and that he could have communicated his concerns to other
11 officers but did not do so. (Id. at 6.) Finally, Plaintiff insists that the force used by
12 Defendants was excessive, as he weighs only 150 pounds while the combined weight of
13 Thom and Spencer is 500 pounds, and that under such circumstances he did not present a
14 genuine threat. (Oppo. at 15-16.) In reply, Thom contends that the standard for
15 determining the reasonableness of force used is not to weigh the numerous options an
16 officer has available to him against the actions taken. (Reply at 1.) Rather, the relevant
17 inquiry is whether force was applied in a good-faith effort to maintain or restore
18 discipline, or maliciously and sadistically for the purpose of causing harm. See Hudson,
19 503. U.S. at 6-7. Thom contends that he used force not with the malicious intent to cause
20 harm but to regain control over Plaintiff. (Reply at 6.)

21 Based on the submitted pleadings, discovery and affidavits, the Court concludes
22 that there is no genuine issue as to any material fact and that Thom is entitled to judgment
23 as a matter of law on Plaintiff's excessive force claim. Fed. R. Civ. P. 56(c). With
24 respect to the events in the committee hearing room, Plaintiff admits that he "passively
25 resisted" by not making an effort to stand on his own. (Oppo. at 3.) Nor does Plaintiff
26 dispute that he was given a lawful order to which he failed to comply. Accordingly, it
27 cannot be said that Defendant acted unreasonably and with minimum force necessary to
28 get Plaintiff back to his cell by lifting him out of the chair and carrying him from the

1 room with the help of another officer.

2 The situation admittedly became more complicated when Plaintiff and the
3 escorting officers reached the entrance to C-section, where Plaintiff claims Thom tripped
4 and slammed him to the floor. However, even viewing this evidence in the light most
5 favorable to Plaintiff, the Court cannot conclude that Thom acted inappropriately under
6 the circumstances. The declarations offered by Thom give consistent accounts of
7 Plaintiff's resistance from the hearing room to the entrance of C-section, where Plaintiff
8 attempted to stop the escort by placing his feet on the floor and pushing his body
9 backwards. See supra at 3-4. Both Thom and Spencer state that because Plaintiff had
10 planted his feet on the floor and had begun to push his body backwards and forwards,
11 they had to use their body weight to move Plaintiff to the floor into a prone position.
12 (Mot. at 9.) These actions to force Plaintiff to the floor would account for the "tripping"
13 to which Plaintiff and his witnesses attest. Furthermore, the declarations of the inmate
14 witnesses offered by Plaintiff actually do not contradict Thom's evidence but instead
15 confirm that Plaintiff was not walking of his own accord and had to be dragged. (See
16 Oppo., Attach.) Moreover, because these inmates were in their cells at the time of the
17 incident, they obviously have no knowledge of Plaintiff's behavior prior to his arrival at
18 the entrance of C-section.

19 Plaintiff also alleges that Thom choked him to the point where he could not
20 breathe for approximately one to one and a half minutes. Assuming that these allegations
21 are true, the Court is not persuaded that the force used was excessive in relation to the
22 need. According to the undisputed facts, Thom released his hold on Plaintiff once leg
23 restraints were applied; the declarations submitted by Thom and by Plaintiff are
24 consistent on this point. Further, Plaintiff himself states that when Thom put him in the
25 hold, he went into "involuntary convulsions" such that his "legs possibly were kicking
26 from side to side in an attempt to save itself." (Oppo. at 5.) Under these circumstances, it
27 appears that Thom maintained control of Plaintiff's upper body long enough to enable
28 other officers to secure Plaintiff's legs, indicating that Thom acted with the purpose of

1 maintaining control rather than malicious intent to cause harm. Hudson, 503 U.S. at 7.

2 Plaintiff also alleges that Thom repeatedly called him “bitch” while applying the
3 choke hold, a fact which tends to show a malicious and sadistic intent to cause harm.
4 (Oppo. at 16.) Plaintiff also claims that Thom’s excessive use of force “was undoubtedly
5 based partly on resentment harbored in the aftermath of one of his fellow officers being
6 assaulted by an inmate with Plaintiff’s same ethnic background.” (Id.) However, this
7 allegation is conclusory and speculative and lacks any evidence to support it. Assuming
8 that the name calling occurred, it is insufficient by itself to show malicious intent in light
9 of evidence that Thom applied no more than the minimum amount of force required and
10 no longer than necessary to regain control of Plaintiff.

11 While certain aspects of the subject incident are disputed, Thom has presented
12 overwhelming evidence showing that Plaintiff’s was resistant and non-compliant
13 throughout the incident. Under these circumstances, the Court concludes that no
14 reasonable jury could return a verdict for Plaintiff. Liberty Lobby, 477 U.S. at 248.

16 CONCLUSION

17 For the foregoing reasons, Thom’s motion for summary judgment is GRANTED.
18 (Docket No. 57.) The excessive force claim against Thom is DISMISSED with
19 prejudice.

20 This order terminates Docket No. 57.

21 IT IS SO ORDERED.

22 DATED: 3/29/11
23 _____

24 
25 JEREMY FOGEL
26 United States District Judge
27
28

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DEVONTE B. HARRIS,
Plaintiff,

Case Number: CV09-00100 JF

CERTIFICATE OF SERVICE

v.

JAMES THOM,
Defendant.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 3/29/11, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Devonte Bernard Harris P 73399
CA State Prison-Corcoran II
P.O. Box 3481
4B3L-07L
Corcoran, CA 93212

Dated: 3/29/11

Richard W. Wieking, Clerk