

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

JOSUE HERNANDEZ

PLAINTIFF

v.

Civil No. 06-5180

SGT. SHARUM, Bethel Heights
Police Department

DEFENDANT

O R D E R

Now on this 1st day of September, 2009, comes on for consideration the **Report and Recommendation of the Magistrate Judge** (Doc. 47) herein and the **Defendant's Objections to the Report and Recommendation** (Doc. 48). The Court, being well and sufficiently advised, finds and orders as follows with respect thereto.

1. The plaintiff, Josue Hernandez, filed this pro se civil rights action pursuant to 42 U.S.C. § 1983. Hernandez maintains the defendant used excessive force against him during an arrest on April 21, 2005.

2. Defendant filed a motion for summary judgment (Doc. 27). In the motion for summary judgment, defendant argues that summary judgment should be granted (1) to him, in his individual capacity; and (2) to him, in his official capacity. The matter was referred to Judge Marschewski for a Report and Recommendation (R&R).

3. In the R&R, Judge Marschewski recommends that the motion for summary judgment be granted with respect to the official capacity claims, but denied with respect to plaintiff's claims against the defendant in his individual capacity.

4. In the defendant's objections (Doc. 48) he argues that summary judgment should be granted with respect to all claims. Specifically, the defendant argues that the plaintiff did not properly plead a individual capacity claim.

5. After thoroughly reviewing the R&R in light of defendant's objections, the Court concludes the objections are without merit and that they should be overruled.

6. Accordingly, the Court, having considered the R&R and having overruled the objections to it, finds that it is sound and correct both as to fact and law and that, therefore, it should be, and it hereby is, **adopted in toto** and ordered implemented.

IT IS, THEREFORE, ORDERED as follows:

- * defendant's objections to the R&R are overruled;
- * the R&R is adopted and ordered implemented; and
- * defendant's **motion for summary judgment (Doc. #27)** is **granted in part and denied in part**. The motion is **granted** with respect to the **official capacity claim against the defendant**; and, **denied** with respect to the **individual capacity claim against the defendant**.

IT IS SO ORDERED.

/s/ Jimm Larry Hendren
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE