

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

HENRY J. BUNCH

PLAINTIFF

v.

Civil No. 06-5220

ROBERT ALLEN RILEY, et al.

DEFENDANTS

O R D E R

Now on this 18th day of September, 2008, comes on for consideration the **Magistrate Judge's Report and Recommendation (Doc. 30)**, the **Defendants' Motion to Strike Plaintiff's Response to Defendants' Motion for Summary Judgment (Doc. 31)**, and the **Defendants' Objections to the Magistrate Judge's Report and Recommendation (Doc. 33)**. The Court has reviewed this case *de novo* and, being well and sufficiently advised, finds and orders as follows:

1. Plaintiff, an inmate in the Arkansas Department of Correction, instituted this action alleging that he was subjected to excessive force during the course of his arrest on November 14, 2004. On August 25, 2008, Magistrate Judge James R. Marschewski issued a Report and Recommendation, recommending that defendants' Motion for Summary Judgment (Doc. 23) be granted in part and denied in part. Specifically, Magistrate Judge Marschewski recommended that the motion be granted with regard to plaintiff's claims against defendants Nathaniel Coy and Thomas Reed, as they were not involved in the alleged use of force. Magistrate Judge Marschewski

recommended that defendants' summary judgment motion be denied with regard to plaintiff's claims against the remaining five defendants.

2. In ruling on defendants' summary judgment motion, Magistrate Judge Marschewski considered plaintiff's response to the motion, even though it was not filed with the Clerk of the Court until August 22, 2008, four days after the August 18, 2008 deadline. Defendants now move to strike plaintiff's response to the summary judgment motion on the grounds that it was untimely. Plaintiff responds that he put his response "in the mailing system by the said deadline, in accordance to the mailbox rule" (Doc. 34.)

Plaintiff is correct that, under the mailbox rule, his response was timely if he deposited it in the prison's internal mail system on or before the last day for filing. See Sulik v. Taney County, 316 F.3d 813, 814-15 (8th Cir. 2003). The postmark on the envelope in which plaintiff mailed his response is August 18, 2008. Thus, plaintiff's response was timely filed and defendants' Motion to Strike Plaintiff's Response (Doc. 31) is **DENIED.**

3. Defendants have also filed objections to the Report and Recommendation, asserting that Magistrate Judge Marschewski erred in finding that the circumstances the officers were faced with in effectuating plaintiff's arrest were not "volatile or deadly." Defendants assert that Magistrate Judge Marschewski also erred in

finding that plaintiff was already handcuffed when tasered by a stun gun.

The Court sees no merit to defendants' objections. As pointed out in the Report and Recommendation, plaintiff's version of events, which have to be accepted as true at the summary judgment stage, was drastically different than the defendants'. Plaintiff contended that he was already restrained by handcuffs when the defendants allegedly tasered him with the stun gun and beat him and that he never resisted the defendants. The Court agrees with Magistrate Judge Marschewski that this was sufficient to create a genuine issue of material fact concerning whether the amount of force used after plaintiff was restrained was excessive. Accordingly, defendants' objections are OVERRULED.

6. Based on the foregoing, the Court hereby **ADOPTS** the **Report and Recommendation** in its entirety and orders as follows:

- * Defendants' **Motion to Strike Plaintiff's Response to Defendants' Motion for Summary Judgment (Doc. 31)** is **DENIED**.
- * Defendants' **Objections to the Magistrate Judge's Report and Recommendation (Doc. 33)** are **OVERRULED**.
- * Defendants' **Motion for Summary Judgment (Doc. 23)** is **GRANTED** with regard to plaintiff's claims against defendants Nathaniel Coy and Thomas Reed and these defendants are **DISMISSED** from this action.

* Defendants' **Motion for Summary Judgment (Doc. 23)** is **DENIED** with regard to plaintiff's claims against the remaining five defendants.

* This matter is referred back to Magistrate Judge Marschewski for further disposition.

IT IS SO ORDERED.

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