

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

BENJAMIN MARCUM,

Plaintiff,

v.

Civil Action No. 2:21-cv-107

**SUPERINTENDENT DONNIE AMES,
and CORPORAL CHARLES MOLES,**

Defendants.

FIRST AMENDED COMPLAINT

1. This case arises from the excessive use of force against Plaintiff at Mount Olive Correctional Complex and Jail (MOCC) by a correctional officer. In the action at hand, without provocation, Defendant Charles Moles wrongfully used excessive amounts of highly concentrated pepper spray against Plaintiff while he was locked alone in a cell presenting no threat to himself, others, or the facility.

2. Plaintiff Benjamin Marcum, an individual incarcerated in MOCC, located in Mount Olive, West Virginia, submits this First Amended Complaint, pursuant to 42 U.S.C. § 1983, for violations of his rights under the Eighth Amendment to the United States Constitution and state law. Mr. Marcum seeks monetary damages to compensate him for his injuries, and injunctive relief to ensure he is not subjected to these violations again.

PARTIES

3. Plaintiff Benjamin Marcum is, and at all relevant times herein was, a citizen of the United States in the custody of the West Virginia Division of Corrections and Rehabilitation (WVDCR), and incarcerated within MOCC.

4. Defendant Donnie Ames is the Superintendent of MOCC. In that capacity, Defendant Ames is tasked by law with the care and custody of Mr. Marcum and all other prisoners incarcerated at MOCC. Defendant Ames is vested with executive authority and responsibility for the safe staffing, administration, operation, and control of MOCC, including the oversight of all MOCC employees and the authority to promulgate, amend, and implement all policies and procedures within MOCC to ensure constitutional confinement and treatment of those individuals incarcerated within. Defendant Ames is named in his official capacity for the purposes of seeking injunctive and declaratory relief.

5. Defendant Charles Moles was, at all relevant times herein, a correctional officer employed at MOCC. At all times alleged herein, Defendants were acting under the color of law and within the apparent scope of his scope as a correctional officer employed at MOCC. Said Defendant is sued in his individual capacity up to the limits of the insurance policy which provides liability coverage for their actions and inactions. Said Defendant is only sued in his official capacity for injunctive and declaratory relief.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the federal claims presented in this action pursuant to 28 U.S.C. §§ 1331, 1343 and under the Court's authority to decide pendent state law claims. Declaratory relief is authorized by 28 U.S.C. §§ 2201-2202.

7. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because all of the events that support the allegations occurred in this judicial district and because Mr. Marcum is incarcerated in this judicial district.

FACTUAL BACKGROUND

Mr. Marcum Is Attacked By Defendant Moles

8. On or around the evening of September 15, 2020, Mr. Marcum was locked inside his cell in the Quilliams II Unit at the Mt. Olive Correctional Facility.

9. The Quilliams II Unit is made up of multiple pods, each consisting of 16 individual cells. Those cells are divided in rows of 8 on two different tiers. Mr. Marcum's cell at that time was on the second tier of the pod.

10. At the time the events occurred that led to this lawsuit, people incarcerated at Mt. Olive had restricted phone access because of the COVID-19 pandemic.

11. The only opportunity for someone incarcerated to make a phone call was via a "roller" telephone that correctional officers would bring from cell to cell, once each day.

12. At or around approximately 11 p.m. that evening, Defendant Moles entered the pod.

13. Defendant Moles removed a phone, which was designated by the facility to be used by people incarcerated at Mt. Olive, from a cell that neighbored Mr. Marcum's.

14. Mr. Marcum, seeking to call his elderly grandmother, who was sick at the time, asked Defendant Moles if he could use the phone.

15. Defendant Moles told Mr. Marcum that he could not use the phone but would not provide a reason why he refused to do so.

16. Defendant Moles did not give Mr. Marcum any reason to believe that he would be allowed to use the phone that day, and therefore Mr. Marcum believed he would not be able to call his grandmother as he normally would have been allowed to do.

17. Frustrated, Mr. Marcum asked to speak to "a fucking gold badge," by which he meant a request for someone with authority above Defendant Moles.

18. In response, Defendant Moles said “[H]ere is your gold badge,” and then took out a canister of highly concentrated pepper spray with a hose attached to it, and began spraying under the door into Mr. Marcum’s tiny cell, which was approximately 6 feet by 10 feet in size.

19. Defendant Moles did not give Mr. Marcum any directives or warnings prior to spraying Mr. Marcum.

20. At the time Defendant Moles deployed the pepper spray, Mr. Marcum was fully compliant, was securely locked alone in a cell, and presented no immediate threat or risk to the safety of himself or others or to the property of MOCC.

21. Mr. Marcum was shocked and quickly overwhelmed by the effects of the spray. He had difficulty breathing, began vomiting, and pleaded with Defendant Moles to stop spraying the pepper spray.

22. Defendant Moles continued spraying short bursts of pepper spray for approximately 25 to 30 seconds.

23. The amount of pepper spray used was so excessive that people housed in cells in Mr. Marcum’s pod began suffering from the effects of the spray.

24. Although Mr. Marcum also requested to be removed from his cell because he could not breathe because of the effects of the pepper spray, Defendant refused and told Mr. Marcum that it was necessary for him to bring a camera in there first.

25. Prolonging Mr. Marcum’s suffering, two other people were removed from their cells to get fresh air in the recreational yard before Mr. Marcum was allowed out of his cell.

26. Finally, Defendant Moles and other officers entered the unit with a hand-held camera and ordered Mr. Marcum to “strip out and cuff up” so that he could be removed for treatment.

27. Mr. Moles was then transported to an area in which he was examined by a nurse, and then allowed to shower.

28. Mr. Marcum later learned that numerous other people incarcerated had to be removed from their cells in his pod following the incident, due to the copious amounts of spray directed at Mr. Marcum by Defendant Moles.

29. Upon information and belief, the OC used by Defendant Moles was an extreme chemical agent containing active ingredients including oleoresin capsicum (OC) and major capsaicinoids that deliver a concentrated burst of pepper spray measuring around 2,000,000 on the Scoville Heat Unit (SHU).¹

30. As a result of Defendant Moles' actions and the use of the pepper spray, Mr. Marcum suffered chemical burns and blisters on his genitals, legs, and feet.

31. Because of the severity of his injuries, Mr. Marcum had to be treated twice a day with medical ointment for over two weeks.

32. It took two to three more weeks before Mr. Marcum's physical pain and sensitivities from the chemical burns completely subsided.

Mr. Marcum files Grievances Seeking to Preserve Evidence

33. On or around September 16, 2020, Mr. Marcum filed a grievance seeking to preserve all video footage from the wall-mounted cameras in the pod from the night of the incident.

34. On or around September 20, 2020, Mr. Marcum filed a grievance regarding the use of excessive pepper spray and the injuries it caused, and asking the officers at MOCC be prohibited from using spray on incarcerated people.

¹ The SHU is a measurement of the heat, traditionally used to represent the spicy heat of peppers. As a point of comparison, the hottest pepper in the world, the Carolina Reaper, has a recorded SHU of approximately 1,569,300.

35. On or around September 23, 2020, Mr. Marcum filed a grievance to preserve all footage between 7 p.m. on September 15, 2020, and September 16, 2020, at 7 a.m. in the Quilliams II Unit recreational yard.

36. On or around September 23, 2020, Mr. Marcum filed a grievance to preserve all handheld video footage from the September 15, 2020 incident.

A Pattern of Excessive Force

37. Upon information and belief, Defendant Moles has deployed highly concentrated pepper spray on multiple other people incarcerated at MOCC, including one person twice within a one-month period, without constitutionally adequate justification.

38. Upon information and belief, Defendant Ames is aware, or should be aware, of Defendant Moles' pattern and practice of using excessive force on people incarcerated at MOCC.

39. Upon information and belief, Defendant Ames has taken no actions to discipline Defendant Moles for his pattern of using excessive force, nor has Defendant Ames taken any steps to provide additional training to Defendant Moles, or otherwise curb Defendant Moles' repeated uses of excessive force.

40. In his capacity as Superintendent, Defendant Ames knows, or should know, that the acts of Defendant Moles against Mr. Marcum were unconstitutional.

41. Upon information and belief, as part of his responsibilities as Superintendent, Defendant Ames reviews all grievances filed by people who are incarcerated regarding excessive use of force.

42. Upon information and belief, as part of his responsibilities as Superintendent, Defendant Ames reviews all incident reports and investigations relating to allegations of excessive force.

43. Defendant Ames's failure to stop the abusive and excessive uses of force by Defendant Moles, despite his actual knowledge of those occurrences, amounts to deliberate indifference to the care and safety of, and a tactic approval of such force against, the individuals incarcerated at MOCC.

44. Defendant Ames's approval of practices such as those undertaken by Defendant Moles proximately caused the constitutional injuries and harm suffered by Mr. Marcum.

45. Defendant Ames's conduct was, and remains, objectively unreasonable and constitutes an unwarranted invasion upon Mr. Marcum's clearly established rights under the Eighth Amendment to the United States Constitution, of which reasonable prison administrators in Defendant Ames's position should have known.

Mr. Marcum Suffers Injuries

46. As a result of Defendants' actions, Mr. Marcum has suffered physical injuries, including burns, swelling, and blistering on his legs, feet, and genitals, as well as pain, anxiety, and severe emotional distress.

Exhaustion of Administrative Remedies

47. Mr. Marcum has exhausted his administrative remedies with respect to all claims.

CLAIMS FOR RELIEF

COUNT I VIOLATIONS OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION (EXCESSIVE FORCE) (42 U.S.C. § 1983)

48. Mr. Marcum incorporates and re-alleges, by reference, the allegations of the previous paragraphs of this complaint.

49. Defendant Moles, while acting under the color of law, violated Mr. Marcum's Eighth Amendment right against cruel and unusual punishment, resulting in Plaintiff's pain and suffering.

50. Defendant Moles violated Mr. Marcum's federal constitutional right, as described and identified herein, by authorizing, committing, condoning, and/or failing to remedy the excessive and wrongful force, employed without efforts to temper, without provocation, and without justification against Mr. Marcum on or about September 15, 2020.

51. Defendant Ames, while acting in a supervisory capacity, explicitly and/or tacitly condoned the unconstitutional actions of Defendant Moles.

52. The Eighth Amendment to the United States Constitution forbids cruel and unusual punishment and prohibits deliberate indifference to excessive uses of force that are unnecessary, unjustified, or applied with malicious and sadistic intent for the purpose of punishment and to cause harm.

53. On September 15, 2020, it was clearly established that the use of mace, tear gas, or other chemical agents "in quantities greater than necessary or for the sole purpose of infliction of pain" violated the Eighth Amendment of the United States Constitution. *See Iko v. Shreve*, 535 F.3d 225, 240 (4th Cir. 2008). It was further clearly established that the assault as described herein violated the Eighth Amendment of the United States Constitution. *See Douty v. Ballard, et al.*, Civ. Act. No. 2:13cv32832 (S.D.W. Va. June 16, 2016) (Copenhaver, J.) (Order adopting PF&R, denying summary judgment on allegations of use of pepper spray while plaintiff was locked alone in his segregation cell).

54. By using force as described above without efforts to temper the severity of the force and for no justifiable reason, Defendant Moles applied nontrivial force against Mr. Marcum that

was excessive, unnecessary, and unreasonable, or for the purpose of wantonly causing harm and punishment to Mr. Marcum, in violation of the Eighth Amendment.

55. There was no good-faith need for the application of force, given that Mr. Marcum was locked inside his cell; did not resist any order; and made no verbal or physical threat to his own safety, the safety of the officers and staff, other incarcerated individuals, property, or the security and good order of the facility.

56. The relationship between the need for force and the amount of force used was excessive. In fact, no amount of force against Mr. Marcum was necessary, given that he was locked alone inside his cell; did not break any prison rule nor resist any order; and was not a threat to his own safety, the safety of the officers and staff, other incarcerated individuals, property, or the security and good order of the facility.

57. Defendant Moles could not reasonably perceive Mr. Marcum, who was compliant, passive, and safely secured in his cell, to be a threat at the time he committed the excessive use of force against him.

58. No efforts were made to temper the severity of the force used against Mr. Marcum.

59. Defendant Moles' conduct conflicts with WVDCR Policy Directives that establish clear guidelines concerning the appropriate use of physical, less-lethal force, including OC pepper spray, by division personnel.

60. Here, no physical force or disciplinary detention was required against Mr. Marcum, much less the force described above.

61. The actions of Defendants were committed under the color of state law, unreasonable, excessive, and deprived Mr. Marcum of his clearly established constitutional rights to safety and not to be subjected to cruel and unusual punishment of which a reasonable

correctional officer should have known pursuant to the Eighth Amendment to the United States Constitution.

62. As a direct or proximate result of the Defendants' unconstitutional actions or inactions, Mr. Marcum seeks to recover damages that compensate him for:

- A. Physical pain and suffering, past and future;
- B. Mental pain and suffering, past and future;
- C. Humiliation, embarrassment, and degradation; and
- D. All other injuries proven by a preponderance of evidence proximately caused by the Defendants.

63. In addition to these compensatory fees, Mr. Marcum also seeks to recover, under 42 U.S.C. § 1988, the attorneys' fees and costs incurred during the course of this litigation.

64. Mr. Marcum additionally requests that this Court issue a declaratory judgment stating that the excessive and unnecessary abuse of Mr. Marcum September 15, 2020, violated his rights under the Eighth Amendment to the United States Constitution.

65. To ensure the protection of Mr. Marcum in the future, as well as all people who are or will be confined at MOCC, Mr. Marcum requests that this Court issue an injunction ordering Defendants' prohibiting Defendant Moles from carrying chemical agents on his person while working at MOCC, or, in the alternative, requiring Defendant Moles to wear a body camera with audio while working, to ensure that any future unconstitutional actions are recorded and preserved.

66. In a further effort to protect himself from suffering the same violation of constitutional rights again in the future, Mr. Marcum also seeks to have the Court order Defendants as well as the other correctional officers and administrators employed by MOCC to: (1) undergo additional training and education addressing such uses of excessive and wrongful force, (2)

develop clear policies to preclude such illegal actions from occurring in the future, (3) develop procedures to ensure that reviews are ordered into all claims of excessive force and performed without bias by people qualified to determine whether the force violated the constitution, (4) and implement disciplinary measures and counseling against Defendants and others who similarly use wrongful and excessive force so that they are held accountable for their wrongful actions and may learn how to correct their behaviors.

67. The actions or inactions of Defendants against Mr. Marcum were reprehensible, willful and wanton, malicious, and in blatant and intentional disregard of the rights owed to Mr. Marcum, thereby justifying an award of punitive damages, to the extent that such damages are covered by Defendants' applicable insurance coverage.

COUNT II ASSAULT AND BATTERY

68. Mr. Marcum incorporates and re-alleges, by reference, the allegations of the previous paragraphs of this complaint.

69. By making no efforts to temper the severity of the force, and directly threatening the use of force against Mr. Marcum, Defendant Moles intended to create an apprehension within Mr. Marcum of immediate physical harm.

70. As a result of said Defendant Moles' un-tempered and threatening conduct, Mr. Marcum felt threatened and was put in imminent apprehension of being harmed.

71. As a direct result of being battered, Mr. Marcum suffered injuries.

72. In addition to the physical injuries caused by Defendant Moles, Mr. Marcum has suffered multiple forms of mental anguish, including but not limited to, fear, nightmares, anxiety, embarrassment, humiliation, and depression.

73. Defendants are liable for their inappropriate conduct and the use of excessive force.

74. As a direct and/or proximate result of Defendants' assault and battery, Mr. Marcum seeks to recover damages to compensate him for:

- A. Physical pain and suffering, past and future;
- B. Mental pain and suffering, past and future;
- C. Humiliation, embarrassment, and degradation; and
- D. All other injuries proven by a preponderance of evidence proximately caused by the defendants.

75. The actions or inactions of Defendants against Mr. Marcum were reprehensible, willful and wanton, malicious, and in blatant and intentional disregard of the rights owed to Mr. Marcum, thereby justifying an award of punitive damages.

PRAYER

WHEREFORE, based on the above stated facts, Plaintiff Marcum respectfully requests that this Honorable Court award all damages, including attorneys' fees and costs, to Mr. Marcum to compensate him for the injuries he suffered as the direct and/or proximate result of Defendants' actions. Mr. Marcum also seeks an award of punitive damages to deter other similarly situated correctional officers from committing similar acts, and to hold Defendant Ames accountable in his supervisory capacity. Finally, Mr. Marcum seeks whatever equitable relief the Court deems appropriate, such as, but not limited to, the injunctive relief requested above.

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

Respectfully submitted,

Plaintiff,
BENJAMIN MARCUM,
By Counsel,

/s/ Loree Stark

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