

I. FACTS¹

Plaintiff has asthma and does not smoke. SCI-Graterford medical personnel first diagnosed Plaintiff as asthmatic in 1988. (Defs.' Renewed Summ. J. Mot., Ex.2, Pl.'s Dep. at 91-92.) From that time on, Plaintiff has received inhalers as treatment for his asthma from SCI-Graterford. (Id.) Beginning in approximately November 1994, Plaintiff was housed in the A-Unit in the same cell with an inmate, Lawrence Butler, a heavy cigarette smoker. (Id. at 15, 31.) Plaintiff spent significant portions of most days in his cell with Mr. Butler. (Id. at 19-24.) During a visit on May 15, 1995 with Dr. Drizin, one of the physicians at SCI-Graterford, Plaintiff asked Dr. Drizin for a fan; the prison gave Plaintiff a fan. (Id. at 49-51, 146.) Some time after seeing Dr. Drizin for the fan, Dr. Drizin recommended that Plaintiff be placed in a non-smoking cell. (Id. at 98.) Plaintiff suffered an asthma attack and was administered oxygen for approximately 40 minutes by prison medical personnel on April 15, 1996. (Id. at 85-90.) In July 1996, Plaintiff was moved from the A-Unit and was no longer housed with a smoker. (Id. at 120.) He currently resides on E-Unit.

Plaintiff sent written grievances or request slips to all of the Commonwealth Defendants during the period of time that he was

¹Except where noted, the following facts are undisputed.

housed with smokers.² The contents of the grievances were generally the same. Plaintiff explained that he had asthma, that he was housed with a smoker, that the smoke was bothering him, and that he needed to be housed in a non-smoking cell. Plaintiff placed the grievances in the prison mailbox, a locked box that was part of the internal mail system at SCI-Graterford. (Id. at 29, 55-56.) Since then, a number of his written grievances have been returned to him. (Id. at 161.) Each of the Commonwealth Defendants denies receiving Plaintiff's grievances on or about the time that Plaintiff has testified that he placed them in the prison mailbox.

Defendant Kleitches, a block sergeant at SCI-Graterford, had no authority to authorize a cell move. (Defs.' Renewed Summ. J. Mot. Ex. 3, Kleitches Aff. at ¶ 5.) Defendant Tierney, Plaintiff's counselor on the A-Unit, had no authority to make cell assignments or cell moves. (Defs.' Renewed Summ. J. Mot. Ex. 5, Tierney Aff. at ¶ 5.) Defendant Yanis, A-Unit Manager, was responsible for making cell assignments and cell moves. (Defs.' Renewed Summ. J. Mot. Ex. 7, Yanis Aff. at ¶ 5.) Defendant Williams, the Grievance Coordinator at SCI-Graterford, has no responsibility for cell assignments. (Defs.' Renewed

²In addition, Plaintiff contends that he spoke with Defendant Yanis about his asthma, his smoking cell-mate, and Dr. Drizin's recommendation that he be placed in a non-smoking cell. Defendant Yanis denies that he had such a conversation with Plaintiff.

Summ. J. Mot. Ex. 10, Williams Interrog. Resp. at ¶ 7.) Defendant Stachelek, Deputy Superintendent for Centralized Services, was not responsible for cell assignments. (Defs.' Renewed Summ. J. Mot. Ex. 12, Stachelek Interrog. Resp. at ¶ 5.) Until his retirement on November 8, 1995, Defendant Winder was the Deputy Superintendent for Facilities Management and was in charge of unit management and institutional security. (Defs.' Renewed Summ. J. Mot. Ex. 14, Winder Interrog. Resp. at ¶ 1.) During the relevant time period that Plaintiff was housed on A-Unit with a smoker, Defendant Vaughn was the Superintendent at SCI-Graterford. (Defs.' Renewed Summ. J. Mot. Ex. 16, Vaughn Interrog. Resp. at ¶¶ 1-2.) During the relevant time period that Plaintiff was housed on A-Unit with a smoker, Defendant Horn was the Commissioner of the Department of Corrections. (Defs.' Renewed Summ. J. Mot. Ex. 18, Horn Interrog. Resp.)

II. LEGAL STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is sufficient evidence with which a reasonable jury could find for

the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only "material" if it might affect the outcome of the case. Id.

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S. Ct. at 2552.

III. DISCUSSION

Plaintiff's Complaint for damages, filed under the Civil Rights Act, 42 U.S.C. § 1983 (West Supp. 1997), is based on an

alleged Eighth Amendment violation concerning the conditions of his confinement while at SCI-Graterford due to his exposure to ETS.³ The Eighth Amendment prohibition of "cruel and unusual punishments" provides the basis for a prisoner's challenge to the conditions of confinement. As the Supreme Court explained in Helling v. McKinney, 509 U.S. 25, 31, 113 S. Ct. 2475, 2480 (1993), "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."

A prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285 (1976). To establish an Eighth Amendment violation relating to conditions of confinement, two requirements must be met. First, "the deprivation alleged must be, objectively, sufficiently serious." Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977 (1994)(internal quotations and citation omitted). Second, a prison official must be deliberately indifferent to inmate health or safety. Id.

In Helling, the Supreme Court addressed Eighth Amendment claims based on exposure to ETS. To meet the first requirement

³Plaintiff also includes in his Complaint what appears to be an Equal Protection Claim based on the alleged preferential assignment of single cells to white inmates at SCI-Graterford. This claim will be addressed below.

of serious harm, a prisoner must show that prison officials "exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health." Helling, 509 U.S. at 35, 113 S. Ct. at 2481. In addition, in determining whether a prisoner has been exposed to unreasonably high levels of ETS,

a court [must] assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate.

Id.

The Supreme Court has explained the second requirement of "deliberate indifference" as follows:

[A]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.

Farmer, 511 U.S. at 842, 114 S. Ct. at 1981.

A. Commonwealth Defendants' Motion for Summary Judgment

Defendants Horn, Vaughn, Winder, Stachelek, Williams, Yanis, Tierney, and Kleitches have moved for summary judgment on the following grounds: (1) Plaintiff's exposure to ETS does not constitute an "injury" as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e)(West Supp. 1997), and the physical harm suffered by Plaintiff is constitutionally de

minimis;⁴ (2) a correctional officer's failure to respond to an inmate grievance does not give rise to a cognizable claim under Section 1983 or the Eighth Amendment to the Constitution; (3) Plaintiff concedes that Defendants never received his request slips seeking a cell change for himself or for his smoking cell-mate; (4) Defendants are entitled to qualified immunity; and (5) in making cell assignments, Defendant Yanis did not violate Plaintiff's equal protection rights. The Court will address each of these arguments in turn below.

1. Plaintiff's Exposure to ETS

Defendants argue that the physical harm suffered by Plaintiff -- defined by Defendants as "one mild asthma attack" -- does not constitute a physical injury as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e). In a related argument, Defendants contend that Plaintiff's injury is constitutionally de minimis. They seek summary judgment on these two related grounds as a matter of law.

In advancing these arguments, Defendants misstate the Rule 56 submissions concerning the harm suffered by Plaintiff and mischaracterize the law on injury in fact in the context of ETS.

⁴Defendants do not move for summary judgment on the ground that the submissions do not raise a genuine issue of fact regarding the level of Plaintiff's exposure to ETS and whether that exposure posed an unreasonable risk of future harm to Plaintiff. Helling, 509 U.S. at 35, 113 S. Ct. at 2481.

In support of their argument that Plaintiff's harm does not rise to the level necessary to state a constitutional violation under the Eighth Amendment, Defendants cite to cases in which prisoners have suffered a single, isolated injury of a minor nature, such as superficial cuts and bruises. (Defendants' Renewed Summ. J. Mot. at 14-15.) These cases are inapposite. Contrary to Defendants' assertion, Plaintiff's injury is not limited to his "mild" asthma attack. There are disputed issues of fact as to whether Plaintiff suffered additional injuries, as well as future harm, due to his direct exposure to ETS while on the A-Unit at SCI-Graterford.

The Supreme Court in Helling recognized that exposure to ETS can constitute an injury in fact if the prisoner can prove that he was exposed to ETS and that such exposure posed an unreasonable risk of serious damage to his future health. Helling, 509 U.S. at 35, 113 S. Ct. at 2481. On the record currently before the Court, the Court will deny Defendants' Motion on the grounds that Plaintiff's alleged harm is constitutionally de minimus and does not state an injury under the Prison Reform Act.

2. Defendants' Failure to Respond to Plaintiff's Grievances

Defendants argue that, as a matter of law, their failure to respond to Plaintiff's written grievances is not actionable under

Section 1983 and the Eighth Amendment. In support of their argument, Defendants rely on Durmer v. O'Carroll, 991 F.2d 64 (3d Cir. 1993) and Griffin v. Spratt, 768 F.Supp. 153 (E.D.Pa. 1991), reversed on other grounds, 969 F.2d 16 (3d Cir. 1992). The Court finds that Durmer is not controlling and Griffin is inapposite.

The Court of Appeals for the Third Circuit ("Third Circuit") in Durmer approved the grant of summary judgment in favor of two prison officials accused of deliberate indifference to the plaintiff's serious medical needs where the plaintiff was under the care of the prison doctor. In Durmer, "[t]he only allegation against either of these two defendants was that they failed to respond to letters Durmer sent to them explaining his predicament." Id. at 69. The Third Circuit held that

Neither of these defendants ... is a physician, and neither can be considered deliberately indifferent simply because they failed to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor.

The Court does not read Durmer as standing for the broad proposition asserted by Defendants. Instead, this Court agrees with the following reasoning set forth in Saunders v. Horn, 960 F.Supp. 893, 896 (E.D.Pa. 1997): "Durmer seems to mean that high-level officials cannot be held liable for Eighth Amendment violations when the officials rely on expertise of professional staff that they themselves lack." Accord Chase v. SCI Graterford, 1997 WL 118078 (E.D.Pa. 1997).

Defendants' reliance on Griffin is also misplaced. The plaintiff in Griffin asserted that his due process rights were violated because of the denial of his grievance. The district court held that denying an inmate's grievance did not constitute a violation of the inmate's due process rights. Griffin, 768 F.Supp. at 158. Defendants argue here that "[a] corrections official's failure to respond to an inmate's grievance or written complaint concerning his medical condition does not give rise to an actionable claim under either Section 1983 or the Eighth Amendment." (Defs.' Renewed Summ. J. Mot. at 1.) For this reason, Griffin is not relevant here. Accord Saunders v. Horn, 959 F.Supp. 689, 694 n.2 (E.D. Pa. 1996). Therefore, the Court will deny Defendants' Motion on this ground.

3. Defendants' Receipt of Plaintiff's Grievances

Defendants Kleitches, Tierney, Yanis, Stachelek, Winder, and Vaughn contend that they never received Plaintiff's written grievances. Defendants Williams and Horn admit that they did receive the written complaints Plaintiff sent to them, but they received the complaints long after Plaintiff sent them. Defendants argue that because they did not receive the grievances, or untimely received the grievances, they had no knowledge of the alleged harm suffered by Plaintiff due to his exposure to ETS, were not personally involved in Plaintiff's

alleged constitutional deprivation, and therefore cannot be held liable under Section 1983 or the Eighth Amendment. (Defs' Renewed Summ. J. Mot. at 11-12.) The Court will address this argument as it applies to two different categories of Commonwealth Defendants

The Court finds that it is undisputed that Defendants Kleitches, Tierney, Williams, and Stachelek did not have authority to make cell assignments or cell moves at SCI-Graterford. Even drawing all inferences in favor of Plaintiff and assuming for the purposes of this Motion that these four Defendants had knowledge of the contents of the grievances that Plaintiff sent to them, they did not have the authority to move Plaintiff to a non-smoking cell. Under the deliberate indifference standard that the Supreme Court defined in Farmer, these Defendants are entitled to summary judgment as a matter of law.

It is also undisputed that Defendants Yanis, Winder, Vaughn and Horn did have the authority to move Plaintiff to a non-smoking cell, thereby alleviating the inhumane prison conditions that Plaintiff contends that he was forced to endure at SCI-Graterford. The question posed by the current Motion, with respect to these four Defendants, is whether the facts contained in the Rule 56 submissions are undisputed as to Defendants' alleged deliberate indifference.

The Supreme Court in Farmer discussed the issue of proof of deliberate indifference as follows:

Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. . . .Because, however, prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety. That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so. Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.

Farmer, 511 U.S. at 842, 844, 114 S. Ct. at 1981-1982.

The Third Circuit has observed that

[w]hen state of mind is an essential element of the nonmoving party's claim, resolution of the claim by summary judgment is often inappropriate because a party's state of mind is inherently a question of fact which turns on credibility.

Young v. Quinlan, 960 F.2d 351, 360 n.21 (3d Cir. 1992).

With these principles in mind, the Court finds that disputed issues of fact exist, based on the Rule 56 submissions, with respect to whether these Defendants were "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed]" and whether they drew this inference.

Farmer, 511 U.S. at 837, 114 S. Ct. at 1979. The Court bases its conclusion on the following, drawing all inferences in favor of

Plaintiff as the Court must under Rule 56: Plaintiff's placement of his written grievances in the official prison mail system and the lack of explanation provided by Defendants for the apparent failure to deliver these grievances to their intended recipients; Plaintiff's initial diagnosis as an asthmatic at SCI-Graterford; Plaintiff's regular receipt of medication for his asthma, in the form of an inhaler, from the prison dispensary; Plaintiff's receipt of a fan from the prison, apparently for Plaintiff's use in his cell because of the smoke generated by his cell-mate; Dr. Drizin's recommendation that Plaintiff be placed in a non-smoking cell; and Plaintiff's verbal communication with Defendant Yanis concerning Dr. Drizin's recommendation that Plaintiff be placed in a non-smoking cell because of his asthma.⁵

Therefore, Defendants Yanis, Winder, Vaughn and Horn are not entitled to summary judgment in their favor on this ground.

4. Qualified Immunity

Defendants seek summary judgment in their favor on the grounds that they are immune from Plaintiff's suit for money damages by operation of the doctrine of qualified immunity. The qualified immunity doctrine provides that "government officials

⁵Defendants argue that Plaintiff has conceded that they did not receive his written grievances. Whether Plaintiff has made such a concession or not does not affect the Court's finding because the Rule 56 submissions provide circumstantial evidence of Defendants' knowledge.

performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). Qualified immunity does not apply, however, "if reasonable officials in the defendants' position at the relevant time could have believed, in light of what was in the decided case law, that their conduct would be unlawful." Abdul-Akbar v. Watson, 4 F.3d 195, 202 (3d Cir. 1993)(internal quotation omitted).

In advancing this argument, Defendants do not contend -- nor could they -- that the law with respect to prisoner's exposure to ETS was not clearly established. The Supreme Court held in Helling in 1993 that prisoners can state an Eighth Amendment violation based on exposure to ETS. The Supreme Court's decision was issued over a year before Plaintiff was first housed with a smoking cell-mate. Therefore, the Court finds that Plaintiff's constitutional rights in this regard were clearly established at the time of Defendants' alleged inaction.

Defendants argue that their actions were objectively reasonable and, therefore, the doctrine of qualified immunity shields them from Plaintiff's suit. The Court notes that qualified immunity is an affirmative defense, and therefore, Defendants bear the burden of proof on this issue. Harris v.

Pernsley, 755 F.2d 338, 343 (3d Cir. 1985). Based on the Rule 56 submissions, and in light of the numerous issues of material fact that are in dispute and Defendants' burden under Rule 56(c), the Court finds that Defendants have not established at this time that they are entitled to qualified immunity.

5. Plaintiff's Equal Protection Claim

Plaintiff alleges that in making assignments for single cells in the A-Unit, Defendant Yanis gave preference to white inmates over non-white inmates. Plaintiff lists a number of white inmates, who Plaintiff contends have been assigned single cells. Defendants do not dispute that the white inmates identified by Plaintiff were assigned single cells. Instead, Defendants have submitted the Affidavit of Defendant Yanis, who states the following: race does not play a role in his assignment of single cells to inmates; it is his practice, and to his knowledge the practice of other Unit Managers in the prison, to assign single cells to inmates who have been incarcerated for ten consecutive years and have remained misconduct free during that time; when a single cell becomes available, the inmate on the list with the most seniority is given the cell; the demand for single cells far outstrips the availability of such cells and so many inmates at SCI-Graterford have to be housed in double cells; and the practice of assigning single cells was designed to reward

inmates who have made a good adjustment to prison over a long period of time." (Yanis Aff. at ¶ 7.) Plaintiff has not made any submissions that dispute Defendant Yanis's sworn testimony.

Plaintiff's race-based equal protection claim is brought under the Equal Protection Clause of the Fourteenth Amendment. To bring a successful equal protection claim under Section 1983, Plaintiff must show that he "was a member of a protected class, was similarly situated to members of an unprotected class, and was treated differently from the unprotected class." Wood v. Rendell, C.A. No. 94-1489, 1995 WL 676418, at *4 (E.D.Pa. Nov. 3, 1995)(citation omitted); see also Sims v. Mulcahy, 902 F.2d 524 (7th Cir. 1990) (holding that prima facie case for violation of Equal Protection under Section 1983 requires showing that plaintiff was member of protected class, was similarly situated to members of unprotected class, and was treated differently from unprotected class).

Plaintiff must also show purposeful discrimination. "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252,

264-65, 97 S. Ct. 555, 563 (1977)(quotation and citation omitted).

The Court finds that Plaintiff was not similarly situated to members of the unprotected class -- that is, white inmates with single cells. It is undisputed that in September 1993, Plaintiff was returned to SCI-Graterford as a parole violator. (Pl.'s Dep. at 5, 158). With this instance of misconduct, Plaintiff did not meet a key criteria for assignment to a single cell and, as such, was not similarly situated to the misconduct-free white inmates who were assigned single cells. Therefore, he has failed to satisfy this essential element of his prima facie case.

Moreover, Plaintiff has failed to provide any evidence of discriminatory intent on the part of Defendant Yanis or any of the other Commonwealth Defendants in the assignment of single cells. Even if the Court were to assume that the method of assigning single cells resulted in a disproportionate number of white inmates housed in single cells, this in and of itself does not make Defendant Yanis's actions unconstitutional. Village of Arlington, 429 U.S. at 264-65, 97 S. Ct. at 563. The absence of any evidence of discriminatory intent is another factor fatal to Plaintiff's Equal Protection Claim. For these reasons, Defendants' Motion for Summary Judgment as to Plaintiff's Equal Protection Claim will be granted and judgment entered against Plaintiff as to his Equal Protection Claim.

B. Defendant Moyer's Motion for Summary Judgment

With respect to Dr. Moyer, the following facts are undisputed. Dr. Moyer was the Medical Director of SCI-Graterford at all times relevant to Plaintiff's Complaint. (Moyer's Summ. J. Mot. Ex. B, Moyer Aff. at ¶ 2.) Although the prison medical records establish that Plaintiff was seen several times by Dr. Moyer, these records demonstrate that Dr. Moyer never treated Plaintiff for his asthma. (Moyer's Summ. J. Mot. Ex. D, Med. Records.) According to Dr. Moyer, he never saw, treated, or examined Plaintiff for his asthma condition. (Moyer Aff. at ¶¶ 4, 5.) Dr. Moyer's testimony is confirmed by Plaintiff. During his deposition, Plaintiff testified that he saw Dr. Moyer for treatment for his gunshot wound and to secure medical clearance so that Plaintiff could work in the prison kitchen. (Pl.'s Dep. at 139.) When Plaintiff was asked whether Dr. Moyer had ever treated him for his asthma, Plaintiff answered, "Not that I can remember." (Id. at 142.) Plaintiff testified that the only reason that he sent a request slip to Dr. Moyer concerning his asthma and his housing with a smoker was that it was his understanding that Dr. Moyer was the head of the prison hospital. (Id.)

Even drawing all inferences in favor of Plaintiff and assuming for the purposes of this Motion that Dr. Moyer had

knowledge of the contents of the request slip that Plaintiff sent to Dr. Moyer, the Court finds no basis in law or fact for keeping Dr. Moyer in this law suit. Dr. Moyer could only recommend a cell change for Plaintiff if he had some medical basis for such a decision. Here, it is undisputed that such a medical basis was completely lacking. Dr. Moyer never treated Plaintiff for asthma and therefore had no knowledge that Plaintiff had asthma. Moreover, as discussed above with respect to certain of the Commonwealth Defendants, Dr. Moyer did not have the power or authority to effectuate cell assignments. At most, he was able to recommend that Plaintiff should be placed in a non-smoking cell.

On this undisputed record, Plaintiff's Eighth Amendment claim against Dr. Moyer fails as a matter of law. The Court finds that Defendant Moyer is entitled to summary judgment in his favor and will grant Defendant Moyer's Motion.

C. Plaintiff's Motion for Summary Judgment

As the Court has set out above, issues of material fact exist as to both the objective and the subjective prongs of the Helling test to establish his Eighth Amendment claim. For this reason, and as counsel for Plaintiff concedes,⁶ summary judgment

⁶In his Response to Commonwealth Defendants' Renewed Motion for Summary Judgment, Plaintiff states as follows: "Under FRCP Rule 56(c), summary judgment is appropriate only if 'there is no

is not warranted, and Plaintiff's Motion will be denied.

An appropriate Order follows.

genuine issue as to any material fact.' Such requirement cannot be satisfied by the Commonwealth Defendants, nor in all candor by the Plaintiff, as can readily be seen by comparing Mr. Caldwell's complaint/deposition testimony to the statements of the Commonwealth Defendants." (Pl.'s Resp. at ¶ 1.)