

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| <b>DAVID TATE,</b>                              | : |                     |
| <b>Plaintiff,</b>                               | : | <b>CIVIL ACTION</b> |
|   | : |                     |
| <b>v.</b>                                       | : |                     |
|   | : |                     |
| <b>MARTIN L. DRAGOVICH,</b>                     | : |                     |
| <i>Deputy Superintendent of the State</i>       | : |                     |
| <i>Correctional Institution at Mahanoy,</i>     | : |                     |
| <b>ROBERT M. NOVOTNEY, Deputy</b>               | : |                     |
| <i>Superintendent of the State Correctional</i> | : |                     |
| <i>Institution at Mahanoy,</i>                  | : |                     |
| <b>PHILIP DUCK, State Correctional</b>          | : | <b>NO. 96-4495</b>  |
| <i>Institution at Mahanoy,</i>                  | : |                     |
| <b>Defendants.</b>                              | : |                     |

**MEMORANDUM AND ORDER**

Schiller, J.

August 14, 2003

Presently before the Court is Defendant Philip Duck's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial. For the reasons set forth below, I deny Defendant's motion.

**I. BACKGROUND**

**A. Procedural History**

On June 26, 1996, Plaintiff David Tate, then an inmate at the Pennsylvania State Correctional Institution at Mahanoy ("Mahanoy"), commenced this civil rights action against then Governor Tom Ridge, Commissioner of the State Department of Corrections Martin F. Horn, Superintendent of Mahanoy Martin Dragovich, Deputy Superintendent Robert Novotney, and Unit Manager Philip Duck as a class action on behalf of African-American inmates aged 14-29 in the Pennsylvania correctional system. On January 17, 1977, then District Court Judge Rendell dismissed Plaintiff's claims regarding lack of rehabilitative services and lack of African-American prison staff, denied

class certification and narrowed the case to Plaintiff's individual claims of harassment. On May 29, 1997, Judge Rendell issued an order denying class certification, denying Plaintiff's motion for a Temporary Restraining Order and preliminary injunction, and directing Plaintiff to file an amended complaint focusing on individualized discrimination and retaliation claims.

Mr. Tate filed his amended complaint on July 28, 1997. Therein, he alleged, in relevant part, that Mr. Duck had targeted and harassed him by, for example, refusing his request for a roll of toilet paper, expressing a personal dislike toward him, repeatedly calling him a "gang banger," telling other officers to monitor him, and repeatedly searching his cell. Mr. Tate further alleged that Messrs. Dragovich and Novotney failed to remedy Mr. Duck's treatment of him, despite his bringing it to their attention. Finally, Mr. Tate alleged that all three Defendants retaliated against him for "challenging discriminatory treatment." They did this, he alleged, by issuing false misconduct reports, placing him on cell restriction, referring to him in a racially derogatory manner, moving him into a cell with a smoker, removing his name from the list for vocational training, denying him haircuts, laundering his clothes in a way that caused a skin rash, denying his toilet paper request, and searching his cell.

On December 17, 1997, Judge Dalzell, to whom the case was reassigned on October 23, 1997, dismissed Plaintiff's complaint against Governor Ridge and Commissioner Horn with prejudice. On January 14, 1998, Judge Dalzell granted summary judgment for Messrs. Dragovich, Novotney, and Duck. On January 28, 1998, Plaintiff appealed the decision to the Third Circuit. On August 9, 1999, the Third Circuit affirmed the dismissal of claims against Gov. Ridge and Commissioner Horn. It affirmed the grant of summary judgment against Dragovich, Novotney and Duck as to claims that they discriminated against African-Americans in general, but vacated the

grant of summary judgment for Dragovich, Novotney and Duck as to Plaintiff's claims of retaliation and remanded for further proceedings. On July 11, 2000, the case was reassigned to me, and I granted Mr. Tate the right to proceed in forma pauperis and pro se.

On June 17, 2003 a jury trial took place for two full days on Mr. Tate's claim of retaliation against Messrs. Dragovich, Novotney and Duck. At the close of evidence, the Defendants made a proper motion for judgment as a matter of law, which the Court denied. Therein, among other things, Mr. Duck objected to the submission to the jury of the issue of punitive damages. On June 19, 2003, the jury returned a verdict for Mr. Dragovich and Mr. Novotney, but against Mr. Duck. The jury awarded Mr. Tate one dollar in nominal damages and ten thousand dollars in punitive damages. Subsequently, Mr. Duck timely filed the renewed motion for judgment as a matter of law or for a new trial that is the subject of this Memorandum and Order.

**B. Relevant Facts**

In July, 1994, Mr. Duck became a housing unit manager at SCI-Mahonoy. (June 17, 2003 Tr. at 163.) From that point until Mr. Duck left Mahanoy in September, 1999, Mr. Tate was "on and off" Mr. Duck's housing unit. (June 17, 2003 Tr. at 188.) Sometime during 1994, after Mr. Duck had assumed that post, Mr. Tate sent Mr. Duck a series of "interrogatories." (June 17, 2003 Tr. at 163.) In response to one such interrogatory relating to Mr. Duck's alleged refusal to provide Mr. Tate with toilet paper, Mr. Duck indicated that he had informed Mr. Tate about "legislation pending regarding frivolous lawsuits." (June 17, 2003 Tr. at 177.) On March 21, 1995, Mr. Tate filed a grievance regarding a conversation between himself and Mr. Duck about Mr. Tate obtaining early release from the prison. (June 17, 2003 Tr. at 168.) On March 22, 1995, Mr. Tate filed a grievance regarding Mr. Duck's alleged disrespectful tone toward Mr. Tate and his alleged discrimination against Mr. Tate

and other inmates. (Ex. D-5<sup>1</sup>; June 17, 2003 Tr. at 170.) The same day, Mr. Tate filed another grievance regarding Mr. Novotney's allegedly racist responses to his verbal complaints about Mr. Duck's treatment of Mr. Tate. (Ex. D-6.) On July 1, 1996, Mr. Tate filed a complaint with Superintendent Dragovich against Mr. Duck and several prison guards, who he claimed were writing false misconducts against him and harassing him. (June 17, 2003 Tr. at 22-23, 127-129; June 18, 2003 Tr. at 28, 87, 128.) Mr Tate's grievances in both instances were denied initially, on appeal by Mr. Dragovich, and on final review by a Central Office Review Committee of the state Department of Corrections. (Ex. D-5; Ex. D-6.) On February 14, 1997, Mr. Tate filed a grievance by letter to Mr. Novotney alleging that Mr. Duck had been "deliberately harassing" Mr. Tate in retaliation for Mr. Tate's filing of a federal law suit against Mr. Duck. (Ex. D-6.)

The jury heard evidence at trial that, after Mr. Tate complained to Mr. Duck about his laundry not being cleaned properly, Mr. Duck instructed an inmate working in the laundry room to put toilet cleanser in Mr. Tate's clothing sometime between 1995 and 1996. (June 17, 2003 Tr. at 70-73; June 18, 2003 Tr. at 78.) When Mr. Tate's clothes were returned to him, they were blue and thinned and the following day, he developed a rash in the areas where the clothes had touched his body. (Tr. at 81.) Mr. Tate testified that when he confronted Mr. Duck about his clothes, Mr. Duck responded that Mr. Tate was "always complaining" and that he had "just told them to add a little something to it to make your clothes a little cleaner." (June 18, 2003 Tr. at 82.) The jury heard evidence that Mr. Duck frequently searched Mr. Tate's cell and, on at least one occasion, knocked a few of Mr. Tate's items off a shelf. (June 17, 2003 Tr. at 71; June 18, 2003 Tr. at 84.) The jury also heard evidence that

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<sup>1</sup> "Ex. D-5" refers to Defense exhibit 5. All exhibits that were referenced during the trial were admitted into evidence at the conclusion of trial. (June 19, 2003 Tr. at 2.)

in 1997, Mr. Duck refused Mr. Tate's request for a roll of toilet paper and instead "rolled some toilet paper off [his hand] and gave it to [Mr. Tate]" (June 17, 2003 Tr. at 177-178, 194), while telling Mr. Tate to "go file another lawsuit" (June 18, 2003 Tr. at 91). Mr. Tate mentioned this incident as an example of Mr. Duck's alleged harassment in his February 14, 1997 grievance. (Ex. D-7.) The jury also heard evidence that Mr. Duck, who was in charge of cell assignments in his housing unit, knew that Mr. Tate was a nonsmoker and yet Mr. Tate frequently had cell mates who smoked (June 17, 2003 Tr. at 185-186), although the majority of inmates in the prison were smokers (June 17, 2003 Tr. at 190).

In response to special interrogatories, the jury found that: 1) Mr. Tate made good faith use of the prison grievance system or made a good faith communication to Mr. Duck about his use or intent to use the prison grievance system; 2) Mr. Duck took adverse action against Mr. Tate; and 3) Mr. Tate's use of the prison grievance system or communication about his use of the prison grievance system was a substantial or motivating factor in Mr. Duck taking adverse action against Mr. Tate. (June 18, 2003 Tr. at 23.)

## **II. STANDARD OF REVIEW**

### **A. Renewed Motion for Judgment as a Matter of Law**

Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, the court may grant a renewed motion for judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to have found for" the prevailing party. *Olefins Trading v. Han Yang Chem. Corp.*, 9 F.3d 282, 288 (3d Cir. 1993) (*quoting* FED. R. CIV. PROC. 50(b)). The "legally sufficient evidentiary basis" has also been characterized as a "minimum quantum of evidence," *Keith v. Truck*

*Stops Corp.*, 909 F.2d 743, 745 (3d Cir. 1990), or even as “any rational basis for the verdict.” *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3d Cir. 1987); *see also Stelwagon Manu. Co. v. Tarmac Roofing Sys., Inc.*, 862 F. Supp. 1361, 1364 (E.D. Pa.1994) (“A jury verdict can be displaced by judgment as a matter of law only if the record is critically deficient of the minimum quantum of evidence from which the jury might reasonably afford relief.”) (internal quotations omitted). A court must view the evidence in the light most favorable to the non-moving party, and ““every fair and reasonable inference”” must be drawn in that party’s favor. *McDaniels v. Flick*, 59 F.3d 446, 453 (3d Cir.1995) (*quoting Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir.1993)).

### **B. Motion for New Trial**

A court may grant a new trial “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.” FED. R. CIV. P. 59(a)(1). One such reason arises where “the verdict is contrary to the great weight of the evidence.” *Roebuck v. Drexel Univ.*, 852 F.2d 715, 735 (3d Cir.1988). The decision to grant or deny a motion for a new trial “is confided almost entirely to the discretion of the district court.” *Blancha v. Raymark Indus.*, 972 F.2d 507, 512 (3d Cir.1992). However, the court’s discretion is more limited when granting a new trial because the jury’s verdict is against the weight of the evidence. *See Hourston v. Harvlan, Inc.*, 457 F.2d 1105, 1107 (3d Cir.1972). A district court ought to grant a new trial on that basis “only where a miscarriage of justice would result if the verdict were to stand.” *Williamson v. Conrail*, 926 F.2d 1344, 1352 (3d Cir. 1991) (*citing EEOC v. Delaware Dep’t. of Health & Social Servs.*, 865 F.2d 1408, 1413 (3d Cir. 1989)).

## **III. DISCUSSION**

### **A. Adverse Action**

A prisoner alleging that prison officials have retaliated against him for exercising his constitutional rights must prove that: 1) the conduct in which he was engaged was constitutionally protected; 2) he suffered “adverse action” at the hands of prison officials; and 3) his constitutionally-protected conduct was a substantial or motivating factor in the decision to discipline him. *Rausser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001) (adopting *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). Once a prisoner has made his prima facie case, the burden shifts to the defendant to prove by a preponderance of the evidence that it “would have made the same decision absent the protected conduct for reasons reasonably related to penological interest.” *Rausser*, 241 F.3d at 334 (incorporating *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Defendant contends that Mr. Tate failed to establish that he suffered an adverse action in retaliation for exercising his first amendment rights and thus Mr. Duck is entitled to judgment as a matter of law.

An individual has suffered an adverse action where “the alleged retaliatory conduct was sufficient ‘to deter a person of ordinary firmness’ from exercising his First Amendment rights.” *Suppan v. Dadonna*, 203 F.3d 228, 235 (3d Cir. 2000) (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)). In this regard, several pieces of record evidence support the jury’s conclusion that Mr. Tate suffered an adverse action. When Mr. Tate complained to Mr. Duck about his laundry not being cleaned properly, Mr. Duck instructed another inmate to put toilet cleanser in Mr. Tate’s clothing. When Mr. Tate’s clothes were returned to him, he developed a rash. When Mr. Tate raised the issue, Mr. Duck responded that Mr. Tate was “always complaining” and that he had “just told them to add a little something to it to make your clothes a little cleaner.” Mr. Duck frequently searched Mr. Tate’s cell and, on at least one occasion, knocked Mr. Tate’s items off a shelf. On

another occasion, Mr. Duck refused Mr. Tate's request for a roll of toilet paper and instead rolled some toilet paper off his hand. Finally, Mr. Duck was in charge of cell assignments and knew that Mr. Tate was a nonsmoker, yet Mr. Tate frequently had cell mates who smoked. The jury was instructed that "an adverse action is one in which the alleged conduct is sufficient to deter a person of ordinary firmness from exercising his constitutional rights" and ultimately found that Mr. Duck took an adverse action against Mr. Tate.

The Third Circuit has specifically recognized that filing false misconduct reports and keeping a prisoner in administrative segregation qualify as adverse actions. *See Smith v. Mensinger*, 293 F.3d 641, 653 (3d Cir. 2002) ("We have previously held that falsifying misconduct reports in retaliation for an inmate's resort to legal process is a violation of the First Amendment's guarantee of free access to the courts.") (*citing Milhouse v. Carlson*, 652 F.2d 371, 374 (3d Cir. 1996)); *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000) (holding that allegation that prisoner was kept in administrative segregation to punish him for filing civil rights complaints stated retaliation claim). In *Rausser v. Horn*, the court found that a prisoner who was denied parole, transferred to a distant prison where his family could not visit him regularly, and penalized financially by prison officials had put forth evidence sufficient to survive summary judgment on the issue of adverse action. 241 F.3d 330, 333 (3d Cir. 2001).

Defendant argues that Mr. Duck's actions are not of sufficient severity to constitute an adverse action.<sup>2</sup> Unless the claimed retaliatory action is truly "inconsequential," the plaintiff's claim should survive a motion for judgment as a matter of law. *Bell v. Johnson*, 308 F.3d 594, 603

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<sup>2</sup> Defendant does not cite any case in which the court failed to find that an adverse action resulted from the punitive conduct of prison officials.

(6th Cir. 2002) (*quoting Thaddeus-X*, 175 F.3d at 398). In *Riley v. Coutu*, a case which defendant cites for the proposition that Mr. Duck's actions were "constitutionally de minimis," the court sought to identify a means of distinguishing those actions which, as a matter of law, would not support a claim of retaliation. *See* 172 F.R.D. 228, 233-34 (E.D. Mich. 1997) (declining to impose sanctions on defendant for filing second summary judgment motion having earlier ruled in plaintiff's favor on motion). There, the plaintiff, a prisoner, alleged the defendant prison official had taunted and harassed him and destroyed his legal papers in retaliation for the plaintiff's involvement in litigation against prison officials. *See id.* at 230. In rejecting the defendant's argument that retaliatory conduct must meet the substantive due process standard of egregiousness, the court wrote, "certain means of retaliation may be so de minimis as not to inhibit or punish an inmate's rights of free speech. Many verbal responses by official of resentment or even ridicule would fall into this safe harbor of permitted response." *Id.* at 235 (*quoting Riley v. Kurtz*, 893 F. Supp. 709, 716 n. 5 (E.D. Mich. 1995)). The court held that not only would the destruction of legal papers support a retaliation claim, it would meet the higher substantive due process standard as well. *Id.*

The question remains whether Mr. Duck's conduct would deter a person of ordinary firmness from exercising his right to use the prison grievance system. Viewing the evidence in the light most favorable to Mr. Tate, I hold that there is a legally sufficient basis for a reasonable jury to conclude that Mr. Duck's actions would have had such an effect. Mr. Duck's instructing an inmate to put cleanser in Mr. Tate's clothes, his response to Mr. Tate's request for toilet paper, his frequent searching of Mr. Tate's cell, and his inability to honor Mr. Tate's request to live with a non-smoker, in tandem with his comments to Mr. Tate about his use of the grievance and legal systems, certainly are of greater moment than mere ridicule. Indeed, a reasonable jury could regard Mr. Duck's actions

as having a deterrent effect equal to or greater than the destruction of legal documents.<sup>3</sup>

## **B. Punitive Damages**

### **1. PLRA Limitations on Relief**

The Prison Litigation Reform Act (“PLRA”) limits the relief available to prisoners who file suits addressing prison conditions. In particular, the Act provides that:

Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A) (2003). Under the PLRA, “prospective relief” is “all relief other than compensatory monetary damages.” 18 U.S.C. § 3626(g)(7) (2003). Mr. Duck, relying on *Johnson v. Breeden*, in which the Eleventh Circuit Court of Appeals held that “prospective relief” includes punitive damages, contends that the award of punitive damages should be “vacated.”<sup>4</sup> See 280 F.3d 1308, 1325 (11th Cir. 2002).

First, I will assume *arguendo* that term “civil action with respect to prison conditions”

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<sup>3</sup> The Court is mindful, in this regard, of the fact that the retaliatory action itself need not involve a liberty interest. See *Rausser*, 241 F.3d at 333 (holding that “the relevant question is not whether [plaintiff] had a protected liberty interest in the privileges he was denied, but whether he was denied those privileges in retaliation for exercising a constitutional right.”)

<sup>4</sup> I am perplexed by Defendant’s argument that the PLRA requires that the judge, not the jury, decide the issue of punitive damages. That is neither a holding of *Johnson* nor an express requirement anywhere in the PLRA. Indeed, as noted below, the *Johnson* court remanded the matter to the district court for a more detailed analysis of the jury’s punitive damage award in light of the PLRA’s limitations on prospective relief. 280 F. 3d at 1326.

encompasses retaliation claims such as Mr. Tate's,<sup>5</sup> although no court has expressly held as such.<sup>6</sup> Second, I will assume *arguendo* that the phrase "prospective relief" includes punitive damages. *See Johnson*, 280 F. 3d at 1325. In *Johnson*, the Eleventh Circuit sought to give the above quoted language of § 3626(a)(1)(A) "some meaning in the context of punitive damages." *Id.*<sup>7</sup> To that end, the court wrote:

We think those requirements mean that a punitive damages award

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<sup>5</sup> The PLRA defines the term "civil action with respect to prison conditions" as "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but . . . not including habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2) (2003). In *Booth v. Churner*, the Third Circuit held that the phrase "civil actions with respect to prison conditions" contained in the PLRA section dealing with exhaustion of administrative remedies (codified at 42 U.S.C. § 1997e) encompassed excessive force claims and all claims "with respect to" prison official's actions that have the effect of making prisoners' "lives worse." The Supreme Court recently agreed and held that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002). However, the Court limited its analysis to the meaning of "'prison conditions' in the context of § 1997e," and "express[ed] no definitive opinion on the proper reading of § 3626(g)(2)." *Id.* at 525, n. 3. Prior to the Supreme Court's decision in *Porter*, the Court of Appeals for the Second Circuit had recognized certain an exception to the PLRA's exhaustion requirement for individualized retaliation claims, holding that these claims did not fall within term of "prison conditions." *See Lawrence v. Goord*, 238 F.3d 182 (2d Cir. 2001). However, after the Supreme Court granted certiorari and remanded for consideration in light of *Porter*, *Goord v. Lawrence*, 535 U.S. 901 (2002), the Second Circuit determined that the retaliation claim before it fit "within the category of 'inmate suits about prison life.'" *Lawrence v. Goord*, 304 F.3d 198, 200 (2d. Cir. 2002) (*quoting Porter*, 534 U.S. at 532); *see also Jeanes v. United States DOJ*, 231 F. Supp. 2d 48, 50 (D.D.C. 2002).

<sup>6</sup> The Ninth Circuit, in a two-sentence footnote, determined that this provision encompassed a retaliation claim. *Gomez v. Vernon*, 255 F.3d 1118, 1129, n. 5 (9th Cir. 2001).

<sup>7</sup> This was no small undertaking. At first blush, it seems that one can neither "narrowly draw" punitive damages, nor adjust them to better "correct" a violation of rights, nor render them any more or less "intrusive." All this suggests, of course, that Congress may have intended the PLRA's "prospective relief" provisions to apply only to injunctive relief and not punitive damages.

must be no larger than reasonably necessary to deter the kind of violations of the federal right that occurred in the case. They also mean that such awards should be imposed against no more defendants than necessary to serve that deterrent function and that they are the least intrusive way of doing so. Many factors may enter into that determination. For example, the number of excessive force violations an individual defendant or institution has had might affect whether punitive damages were necessary, and if so, the amount required to deter future violations.

*Id.* at 1325-26. In addition, the court wrote, “[w]hile there may not be much to say about the factors that a district court is required to consider, the court should discuss those factors and enter findings that are as specific to the case as the circumstances permit. *Id.* at 1326.<sup>8</sup>

In *Johnson*, the plaintiff, a prisoner, filed a claim against prison officers for excessive force in violation of his Eighth Amendment rights against cruel and unusual punishment. *See id.* at 1312. At trial, the jury heard “sharply conflicting evidence,” with the plaintiff testifying that four of the defendant officers had beaten him to the point of serious injury and the defendants testifying that no one had attacked the plaintiff and his injuries – which, according to defendants’ medical expert were less serious than Plaintiff represented – were caused by plaintiff’s falling during their efforts to restrain him in his cell. *Id.* After hearing the conflicting evidence, the jury returned a verdict in plaintiff’s favor against two of the officers, awarding plaintiff \$25,000 in compensatory damages, plus \$45,000 in punitive damages (\$30,000 from one officer and \$15,000 from the other). *Id.* In

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<sup>8</sup> I treat the PLRA provisions as supplementing, but not supplanting those set forth in *Smith v. Wade*, 461 U.S. 30(1983), which set the standards for punitive damages awards in § 1983 cases. There, the Court held that “a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” *Id.* at 1640. The Court further required that the jury make the discretionary moral judgment that punishment or deterrence would be served by an award of punitive damages. *Id.* at 1638-39.

vacating the district court's punitive damage award and remanding, the circuit court did not hold that the award ran afoul of the PLRA, but instead required a more detailed analysis under the § 3626(a)(1)(A) standards; "[a]fter considering all the facts and circumstances, the district court in this case should have determined whether it was reasonably necessary that [one officer] be ordered to pay \$30,000 and that [the other officer] be ordered to pay \$15,000 (beyond the amount of the compensatory damages) in order to deter future Eighth Amendment excessive force violations by them or others at this institution. We cannot tell whether it did." *Id.* at 1325.

I can find no case applying § 3626(a)(1)(A) to a punitive damage award.<sup>9</sup> Other courts, however, have reviewed punitive damage awards in prisoner's civil rights cases under similar standards. In *McKinley v. Trattles*, the court reviewed the district court's overrule of a jury's award of \$15,000 in punitive damages to a prisoner who had been subjected to an especially invasive strip search in violation of his Fourth Amendment right to privacy. 732 F.2d 1320 (7th Cir. 1984). In particular, the court examined whether the award "exceed[ed] what was required to serve the objectives of deterrence and punishment," found that \$15,000 was excessive in this regard, and that \$6,000 would be a more appropriate award. *Id.* at 1327-28. In *Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994), the court upheld the district court's award of punitive damages of \$2,000 per defendant against two senior corrections officials who were found to have violated the equal protection rights by segregating prisoners cell-by-cell on the basis of race. Observing that the neither defendant was employed at the prison any longer, the district court in that case had reduced the magistrate judge's original punitive award of \$5,000 per defendant based on its determination that the elimination of racial segregation would "be better served by the threat of future contempt

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<sup>9</sup> On remand, no opinion issued from the district court in *Johnson*.

sanctions against the present warden than by the extraction of money from people no longer affiliated with” the prison. *Id.* Additionally, in *Davis v. Moss*, the court determined that \$25,000 in punitive damages was “necessary to deter [defendant] and other correctional officials from using unnecessary and malicious force against inmates.” 841 F. Supp. 1193, 1198 (M.D. Ga. 1994). There, following a bench trial, the court had concluded that the prisoner plaintiff’s Eighth Amendment right against cruel and unusual punishment was abridged by a corrections officer when he shoved the prisoner down the stairs of a fire escape.

Treating these cases as a helpful backdrop and applying the PLRA standards, as modified by *Johnson*, to the facts of the instant case, I find the award of \$10,000 was not larger than reasonably necessary to deter the violations of the First Amendment right access to the courts that occurred in this case.<sup>10</sup> Viewing the facts in the light most favorable to Mr. Tate, Mr. Duck abridged this right on several occasions through retaliatory conduct. In the case of ordering cleanser placed in Mr. Tate’s laundry, Mr. Duck’s conduct was particularly conniving and malicious, and evinced a willingness to use his institutional power over inmates to harm Mr. Tate. Defendants contend that the need for deterrence is minimal, since Mr. Tate is no longer housed in Mahanoy, where Mr. Duck remains. The punitive damage award, however, is evaluated for its ability to deter repeat violations of any Mahanoy inmates’ right of access to the courts by Mr. Duck. Because Mr. Duck is still employed at Mahanoy, the deterrent effect is still needed. Finally, because the award was only against Mr. Duck, I cannot say that more defendants than necessary were made to pay damages and cannot regard the imposition of punitive damages as intrusive.

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<sup>10</sup> Given the utter absence of caselaw supporting Defendant’s position, I regard Defendant’s argument as one more attempt to confound a pro se plaintiff and to derail his awards, which were justly won at a fair trial.

## 2. Excessiveness of Punitive Damage Award

Defendant also argues that the jury's punitive damage award was so grossly excessive as to violate the due process clause of the Fourteenth Amendment. Defendant seeks to have the award "stricken" and does not seek a remittitur. The award must be reviewed in accordance with the guideposts enunciated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), which are: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1529 (April 7, 2003)).

### a. Reprehensible Conduct

The degree of reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575-76. The Supreme Court has observed that "some wrongs are more blameworthy than others," noting that "trickery and deceit" are more reprehensible than negligence. *Id.* at 575-76 (citations omitted). Expanding on this theme, the Third Circuit has adopted a series of useful indicia of reprehensibility, including whether the defendant's conduct "caused economic rather than physical harm; would be considered unlawful in all states; involves repeated acts rather than a single one; is intentional; involves deliberate false statements rather than omissions; and is aimed at a vulnerable target." *Inter Med. Supplies, Ltd. v. Ebi Med. Sys.*, 181 F.3d 446, 467 (3d Cir. 1999) (quoting *Cont'l Trend Res.*, 101 F.3d 634, 638 (10th Cir. 1996)).

Here, Mr. Duck's actions bear several indicia of reprehensibility. First, the injury to Mr. Tate

was ostensibly emotional or physiological, in that the jury found Mr. Duck's conduct sufficient to deter a reasonable person from using the prison grievance system. I regard this as more reprehensible than strictly economic harm, if not equivalent to physical harm. Second, Mr. Duck's retaliatory conduct, which violated a federal constitutional right, would be unlawful in all states. Third, as noted, Plaintiff presented evidence of multiple instances of retaliatory conduct by Mr. Duck. Fourth, retaliation is necessarily a crime of intent and the jury specifically found that Mr. Tate's use of the prison grievance system or communication about his use of the prison grievance system was a substantial or motivating factor in Mr. Duck taking adverse action against Mr. Tate. In particular, Mr. Duck's comments to Mr. Tate that he was "always complaining," which was made when Mr. Tate confronted him about the laundry incident and that he should "go file another law suit," which was made while handing Mr. Tate sheets of toilet paper instead of a roll, as requested, strongly support the jury's finding that Mr. Duck took actions intentionally. Finally, as a prisoner, Mr. Tate certainly presented a "vulnerable target" to Mr. Duck, a fairly senior prison staff member.

**b. Relationship Between Harm and Punitive Award**

In *Gore*, the Supreme Court rejected any "mathematical formula" for determining the proper ratio between the actual and potential harm and the punitive damage award, 517 U.S. at 582, but found that the 500 to 1 ratio accompanying a \$2 million punitive damage award and \$4,000 compensatory damage award "raise[d] a judicial eyebrow" *Id.* at 583 (citations omitted). Of particular import to this case was the Court's observation that:

Low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm

might have been difficult to determine.

*Id.*; see also *Campbell*, 123 S. Ct. at 1524 (“Ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’”) (citations omitted).

Here, Plaintiff was barred from recovering compensatory damages for his alleged emotional and psychological injuries by § 803(d)(e) of the PLRA, which requires that proof of physical injury precede any consideration of mental or emotional harm, 42 U.S.C. § 1997e(e) (2003), and the jury was instructed as such (Tr. at 20). As noted, the jury awarded Mr. Tate \$1 in nominal damages and \$10,000 in punitive damages.

Defendant argues that Mr. Tate suffered no actual or potential harm and observes that the punitive award is “10,000 times the amount of non-punitive damages.” (Def.’s Mem of Law at 13-14.) This argument, while facially appealing, is unpersuasive. A straightforward reading of the Third Circuit’s opinion in *Allah v. Al-Hafeez* reveals that plaintiffs in Mr. Tate’s position are permitted to pursue both nominal and punitive damage claims. See 226 F.3d 247, 252 (3d Cir. 2000). In *Allah*, a pro se prisoner filed claims under § 1983 against two prison officials for deprivation of his First Amendment right to free exercise of religion and retaliation. *Id.* at 248-49. In reviewing the district courts dismissal of the case, the appellate court found that the plaintiff’s compensatory damage claims were barred by § 1997e. However, the court held that both nominal damages and punitive damages could be awarded to plaintiff, “provided the proper showing is made.” *Id.* at 251. A mathematical comparison of punitive damage awards to the nominal damage awards in civil rights cases where the plaintiff has not shown (or, as here, is legally barred from showing) cognizable compensatory damages will inevitably produce ratios well in excess of 500 to

1, since a punitive award of \$500 will constitute the minimum amount necessary to deter future unlawful conduct. To adopt Defendant's argument, therefore, is to ignore the Third Circuit's clear instruction in *Allah*, which was decided four years after *Gore*.

This reasoning is also supported by those cases that have held that, in the context of First Amendment claims, prisoners need not allege a physical injury to recover damages because “a deprivation of First Amendment rights standing alone is a cognizable injury,” regardless of any resulting mental or emotional injury. *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999) (emphasis added); *see also Searles v. Van Bebber*, 251 F.3d 869, 879-81 (10th Cir. 2001) (holding that nominal and punitive damages for First Amendment violation not barred); *Allah* 226 F.3d at 252 (3d Cir. 2000) (same); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (stating that any form of relief for First Amendment violations available, if not for mental or emotional injury). Here, the jury found that Mr. Tate suffered a deprivation of his First Amendment right of access to the courts. As noted, however, this injury could only be captured in nominal and punitive damages. An accurate comparison of the actual and potential harms to the punitive damage award, therefore, would account for the injury suffered through the deprivation of rights, and would result in a smaller ratio.

Finally, it is helpful to remember that the primary concern in this analysis should be for reasonableness. *Gore*, 517 U.S. at 583. In this regard, I am counseled by *Johnson v. Howard*, in which the court, applying *Gore*, upheld a verdict of \$15,000 in compensatory damages and \$300,000 in punitive damages on the Eighth Amendment excessive force claim of a prisoner who was severely beaten by a corrections officer. 24 Fed. Appx. 480, 486-87 (6th Cir. 2001) (unpublished); *see also Keech v. Amie*, Civ. A. No. 92-972 1994 U.S. Dist. LEXIS 14989, at \*18 (W.D. Mich. Aug. 23, 1994) (declining to remit \$50,000 punitive damage award for prisoner whom officers shackled to

wall of cell despite award of only \$4000 in compensatory damages).

**c. Civil Penalties in Comparable Cases**

When examining this third factor, the court may look both to other statutory penalties and to the amount of the punitive award necessary to deter similar misconduct in the future. *see Gore*, 517 U.S. at 584-85. I am unable to identify any statutory penalties for retaliation claims such as Plaintiff's, and thus unable to defer to legislative judgments regarding appropriate sanctions. As discussed above, I have concluded that the punitive damage award here is not larger than reasonably necessary to deter conduct of this type.

Defendant's argument centers on the absence of notice to Mr. Duck that his actions might result in a punishment of this sort. In both *Gore* and *Campbell*, the Supreme Court indicated that the three guideposts are designed to get at the broader question of whether a defendant received fair notice of the magnitude of the sanction imposed. 517 U.S. at 574; 123 S. Ct. At 1520. Defendant has inverted the analysis by suggesting that the alleged absence of notice informs the question of whether a disparity exists between the punitive damage award and civil or criminal penalties for comparable misconduct. I need not pursue that argument further.

In light of my findings above under the three guideposts set forth by the Supreme Court, I conclude that the punitive damage award is not so grossly excessive as to violate the due process clause.

**C. New Trial**

**1. Verdict Against Weight of Evidence**

Defendant seeks a new trial on the basis that the jury's verdict against Mr. Duck was against the weight of evidence. Specifically, Defendant contends that Mr. Tate failed to prove that Mr.

Duck's actions were taken in retaliation for Mr. Tate exercising his constitutional rights. As noted, my discretion is limited in granting a new trial because the jury's verdict is against the weight of the evidence. *See Hourston*, 457 F.2d at 1107 (3d Cir.1972), such that I may grant Defendant's motion "only where a miscarriage of justice would result if the verdict were to stand." *Williamson*, 926 F.2d at 1352 (citations omitted).

The jury was instructed that "the Plaintiff must prove by a preponderance of the evidence that his constitutionally protected conduct was a substantial or motivating factor for the defendants in taking any of the alleged adverse actions against him. Here you are looking into the Defendants' motives to see if a causal connection exists between Mr. Tate's alleged actions and the Defendants' alleged actions. You must determine whether, in allegedly taking the adverse actions, any of these defendants were motivated by the alleged fact that Mr. Tate made use of the prison grievance system." (Tr. at 174.) In responding to special interrogatories, the jury answered "yes" to the question of whether they found by a preponderance of the evidence that "Plaintiff's use of or communication about his use of the prison grievance system was a substantial or motivating factor in Defendant Duck taking and adverse action against the Plaintiff." (June 19, 2003 Tr. at 23.)

The jury's finding in this regard was not against the weight of evidence. First, the evidence strongly supports the jury's conclusion that Mr. Duck was motivated, at least in part, by Mr. Tate's protected activity. Mr. Duck indicated that he had informed Mr. Tate about "legislation pending regarding frivolous lawsuits." When Mr. Tate confronted Mr. Duck about his clothes, Mr. Duck responded that Mr. Tate was "always complaining." During the toilet paper incident, Mr. Duck told Mr. Tate to "go file another lawsuit." These examples occurred throughout the time period covered by the events giving rise to this lawsuit.

Second, Defendant's argument based on the timing of events is misplaced. Defendant raises the possibility that the incident involving Mr. Tate's laundry occurred prior to March 25, 1995, the date Defendant regards as marking Mr. Tate's first grievance filing. Mr. Tate began filing formal complaints to senior prison officials in 1994 with his "interrogatories" to Mr. Duck. Further, although Mr. Tate's first official grievance was filed in March 22, 1995, the likelihood that the laundry incident that a witness remembered as occurring in 1995 or 1996 occurred prior to March 22, 1995 is small. Defendant also misstates the law when he avers that Mr. Tate must show temporal proximity between the protected conduct and the retaliation. The law in this Circuit is that while suggestive timing is *relevant* to causation in retaliation cases, it is not dispositive. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 280 (3d Cir. 2000); *see also Rauser*, 241 F.3d at 334 (citing *Farrell* and noting temporal proximity as evidence supporting finding of causation).

Mr. Tate has set forth "a chronology of events from which retaliation may plausibly be inferred." *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995). There is sufficient evidence in the record to support the conclusion that the Mr. Tate's multiple uses of the grievance system over a two year time period were a motivating factor behind Mr. Duck's actions toward Mr. Tate during that same period. Accordingly, I conclude that the verdict is not against the weight of evidence.

## **2. Punitive Damages**

Defendant also seeks a new trial on the issue of punitive damages on the grounds that the jury's verdict resulted from "passion or prejudice." *Mason v. Texaco, Inc.*, 948 F.2d 1546 (holding excessiveness of award that results from jury passion and prejudice requires a new trial required). Defendant contends that the jury's "passion for" Mr. Tate (Def.'s Mem. of Law at 19) is evidenced by "one, if not more" of the jurors speaking to Mr. Tate after the verdict was read and "wish[ing] him

good luck or something to that effect.” (*Id.*) The trial transcript does not reflect any such exchange. Even if it did occur, more than mere speculation is required to compel the conclusion that the jury acted out of passion or prejudice. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.* 259 F.3d 1101, 1107 (9th Cir. 2001). This is particularly so where the award is not so excessive as to raise an inference of passion or prejudice.

Defendant also point to the jury’s alteration of the verdict sheet with respect to Mr. Novotney. Question 8 asked the jury if they found that “Defendant Novotney took adverse action against the plaintiff.” The jury’s response, as read by the foreperson, was “Yes. An adverse action and his lack of action and neglect.” (Tr. at 22.) Of course, the jury found in favor of Mr. Novotney, and it seems difficult to imagine how this would cause excessiveness in the award against Mr. Duck. In any event, my review of the jury’s award above indicates that the award is not unreasonable and suggests that the jury “performed the difficult balancing act of not allowing sympathy to overcome reason, and not allowing desire for result to overcome justice.” *Mason*, 948 F. 2d at 1560-61. Accordingly, Defendant is not entitled to a new trial.

#### **D. Qualified Immunity**

Although he failed to do so in his pretrial memorandum, proposed jury instructions, or rule 50(a) motion at the close of evidence, Mr. Duck now raises the qualified immunity issue first put forth in his answer as an affirmative defense. Government officials are entitled to qualified immunity if 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 (1982). In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court explained the two-part inquiry a court must make in order to determine whether a state official is entitled to qualified immunity:

- (1) Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?
- (2) If a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was *clearly established*.

*Id.* at 201. To be clearly established “the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). With respect to Plaintiff's claim, the right implicated under the first prong of the *Saucier* test for qualified immunity is the First Amendment right of prisoners to petition the court. *See Milhouse*, 652 F.2d at 373-374. Here, the analysis set forth above makes clear that the record amply supports the jury's finding that Mr. Duck violated this right and Defendant does not challenge this conclusion at this stage of his argument.

As to the second prong of the *Saucier* inquiry, *Milhouse* clearly established a prisoner's right to access the courts such that a reasonable prison official would know that he would violate this right if he retaliated against a prisoner for filing a lawsuit; “the right of access to the courts must be ‘adequate, effective and meaningful,’ . . . and must be freely exercisable without hindrance or fear of retaliation.” *Id.* at 374 (internal citation omitted) (*quoting Bounds v. Smith*, 430 U.S. 817, 822 (1977)). Specifically, the use of a prison administrative grievance system has long been recognized as protected conduct. *See Turner*, 482 U.S. at 84 (holding that prisoners retain their First Amendment “right to petition the Government for a redress of grievances.”); *Herron v. Harrison*, 203 F.3d 410, 415 (6th Cir. 2000) (holding that inmate has First Amendment right to file grievances against prison officials); *Babcock v. White*, 102 F.3d 267, 275-76 (7th Cir. 1996) (same); *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C.Cir.1996), *rev'd on other grounds*, 523 U.S. 574 (1998); *Bradley v. Hall*, 64 F. 3d 1276, 1281-82 (9th Cir. 1995); *Ruiz v. Estelle*, 679 F.2d 1115, 1153 (5th Cir.1982), *partially*

*vacated on other grounds*, 688 F.2d 266, 267 (5th Cir.1982); *Jones v. Soles*, Civ. A. No. 99-1237, 2001 U.S. Dist. LEXIS 19003, at \*15, 2001 WL 1636362, at \*5 (N.D. Tex. Nov. 20, 2001) (“The First Amendment right of access to the courts is well established and widely known, especially among prison officials, and the filing of grievances is arguably one of the most important initial administrative steps in exercising that constitutionally protected right”).

At the time of the events giving rise to Mr. Tate’s claim, Mr. Duck was the unit manager of an entire housing block at Mahanoy. I have reviewed the jury’s determination that Mr. Duck retaliated against Mr. Tate, and concluded that it is well supported by record evidence. Accordingly, I conclude that a reasonable official in Mr. Duck’s position would have understood that he was violating Mr. Tate’s rights. *See Jones*, 2001 U.S. Dist. LEXIS 19003, at \*15, 2001 WL 1636362, at \*5 (observing that logical outgrowth of finding of retaliation would be that defendant was cognizant of fact that adverse actions toward plaintiff would be tantamount to constitutional violation). Thus, Defendant is not entitled to qualified immunity.

#### **IV. CONCLUSION**

For the reasons set forth above, I deny Defendant’s motion. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

|   |   |                     |
|---|---|---------------------|
| <b>DAVID TATE,</b>                              | : |                     |
| <b>Plaintiff,</b>                               | : | <b>CIVIL ACTION</b> |
|   | : |                     |
| <b>v.</b>                                       | : |                     |
|   | : |                     |
| <b>MARTIN L. DRAGOVICH,</b>                     | : |                     |
| <i>Deputy Superintendent of the State</i>       | : |                     |
| <i>Correctional Institution at Mahanoy,</i>     | : |                     |
| <b>ROBERT M. NOVOTNEY, Deputy</b>               | : |                     |
| <i>Superintendent of the State Correctional</i> | : |                     |
| <i>Institution at Mahanoy,</i>                  | : |                     |
| <b>PHILIP DUCK, State Correctional</b>          | : | <b>NO. 96-4495</b>  |
| <i>Institution at Mahanoy,</i>                  | : |                     |
| <b>Defendants.</b>                              | : |                     |

**ORDER**

**AND NOW**, this 14<sup>th</sup> day of **August, 2003**, upon consideration of Defendant Philip Duck's Renewed Motion for Judgment as a Matter of Law, and for the reasons set forth above, it is hereby

**ORDERED** that:

Defendant's Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial (Document No. 138) is **DENIED**.

**BY THE COURT:**

\_\_\_\_\_  
**Berle M. Schiller, J.**