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

IVAN DAVIS,	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	**NO. 04-01795**
	:	
BERKS COUNTY, et al.,	:	
Defendants.	:	

M E M O R A N D U M

STENGEL, J. **February 8, 2007**

This is a civil rights case filed by an inmate at the Berks County Prison. Plaintiff alleges that the prison violated his constitutional rights by using excessive force and depriving him of medical care. The parties have both filed motions for summary judgment. For the reasons discussed below, I will grant in part and deny in part defendants' motion. I will grant plaintiff's motion in its entirety.

I. BACKGROUND

Plaintiff Ivan Davis is an inmate at the Berks County Prison in Pennsylvania. Am. Compl. ¶ 2. Defendants include Berks County, Berks County Prison, Berks County Prison Board, Warden George Wagner, Correctional Officer James Cooper, Correctional Officer Frank Galonis, Correctional Officer Joi Franklin.[1] Id. ¶¶ 7-15.

On February 25, 2002, Davis was incarcerated at Berks County Prison on charges

[1] Plaintiff also sued eighteen unnamed prison employees as John Doe defendants. The court will dismiss the claims against these defendants because discovery has passed and the plaintiff has not amended his complaint or the caption to identify the John Doe defendants.

that he violated his probation by changing his address without telling his probation officer. Id. ¶ 17. The prison placed Davis in the Disciplinary Housing Unit ("D-Unit") without explanation. Id. ¶¶ 18-19.[2] While incarcerated on the D-Unit, Davis was segregated from the general prison population, locked in his cell for twenty-three hours a day, and only permitted one hour per day outside in the prison's exercise yard. Id. ¶ 20. While in the D-Unit, Davis was not permitted to make phone calls. Id. ¶ 19.

On September 10, 2002, on his return from the exercise yard, Davis attempted to use a pay telephone inside the D-Unit to call his family. Id. ¶¶ 20-21. Davis' hands were handcuffed in front of his body at the time. Id. ¶ 22. The prison's policy is to let prisoners come into the yard and walk to their cells unescorted, although the guards do not take off the handcuffs until the inmates are locked in their cells. Defs' Mot. Summ. J. Ex. F. Davis Dep. pp. 65-66.

Almost immediately after Davis placed the phone call, Defendant Cooper saw Davis and asked what he was doing. Id. p. 62. Davis hung up because he knew he was not supposed to be using the telephone. Id. Cooper grabbed Davis' neck and began squeezing, which made it difficult for Davis to breathe. Id. pp. 63-64. Cooper took Davis back to his cell. Id. p. 74. On the way to the cell, Cooper slammed Davis' head into the wall on two occasions, injuring his eye and making it bleed. Id. pp. 74-75. Another guard, Frank Galonis, observed the initial encounter between Cooper and Davis and did

[2] The parties sharply contest whether the prison was justified in placing and keeping Davis in the D-Unit. See Section III.2.d *infra*.

not try to stop it. Id.

Cooper then threw Davis inside the cell and started choking him with both hands. Id. pp. 78-79. Galonis also entered the cell, watched, and laughed. Id. p. 79, 83. The officers told Davis' cellmate to leave the cell and he did so voluntarily. Id. pp. 79-80. Cooper also kicked and punched Davis in the ribs and on the face, causing him to bleed in the eyebrow area. Id. pp. 85-87. Davis still has scars on his face from the attack. Id. p. 87.

Davis, fearing for his life, bit Cooper several times on his right arm.[3] Id. pp. 83-86. Galonis punched Davis in the jaw, dislocating it, to get Davis to stop biting Cooper. Id. p. 98. Galonis used a panic button on his uniform to call for back-up. Id. p. 92. When approximately fifteen back-up officers arrived, Cooper and Galonis left the cell and the other officers entered the cell and punched and kicked Davis. Id. pp. 93-94. Cooper did not know many of these officers, except for Sergeant Joi Franklin and Sergeant Cooley.[4] Id. pp. 94-96. Davis testified that all of the officers who responded to Galonis' call were involved in the incident. Id. p. 97. The officers moved Davis to a high security area, leaving the handcuffs on very tight and damaging his wrist. Id. p. 99.

As a result of the beating, Davis suffered a fractured jaw, severe cuts and bruises to his rib cage, hands, wrists, and legs. Am. Compl. ¶ 28. He also had difficulty

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[3] Davis was convicted of aggravated assault of defendant Cooper for this incident. See Defs' Mot. Summ. J. Exs. C & D. This is also the basis for Cooper's counterclaim. See Section III.B *infra*.

[4] Cooley is not a named defendant in this lawsuit.

breathing, eating, chewing, and moving for several weeks. Id. Davis wrote to the warden the day after the incident requesting medical treatment. Davis Dep. p. 108. Davis also made verbal requests for medical assistance. Id. pp. 109-112. Defendants refused to provide him with medical treatment despite Davis' requests. Id. ¶ 30. Davis has several lasting injuries as a result of the incident including a problem with his right ankle, back, jaw, general pain, and difficulties sleeping. Id. pp. 117-122.

On May 12, 2004, Davis filed a complaint against Defendants.[5] He filed a second amended complaint on March 16, 2006 alleging violations of the Eighth and Fourteenth Amendments for (1) excessive force, (2) failure to intervene, (3) failure to provide medical care, and (4) due process violations of the Fourteenth Amendment. Defendants have now moved for summary judgment on these claims. Davis also moves for summary judgment to dismiss defendant Cooper's counterclaim.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party initially bears the burden of showing the absence of a

[5] This case has had a particularly elongated procedural history. On August 5, 2004, the court granted defendants' motion to dismiss for failure to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6). On June 23, 2005, the Third Circuit vacated this ruling and remanded the case, permitting Davis, who was proceeding *pro se* at the time, to amend his complaint. On July 5, 2005 and August 31, 2005, the court ordered Davis to amend his complaint within 30 days. Davis submitted a document on September 16, 2005, which the court and the defendants construed as the first amended complaint. Defendants moved to dismiss this complaint on September 23, 2005 under Rule 12(b)(6). On January 20, 2006, the court appointed counsel to represent Davis. On March 16, 2006, the parties stipulated that Davis could file a second amended complaint, which was filed on the same day. Defendants answered the second amended complaint on April 11, 2006, bringing a counterclaim against Davis at this time, almost two years after Davis first filed his complaint.

genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met simply by demonstrating "to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. A fact is "material" only when it could affect the result of the lawsuit under the applicable law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non[-]moving party." Id. The moving party must establish that there is no triable issue of fact as to all of the elements of any issue on which the moving party bears the burden of proof at trial. See In re Bessman, 327 F.3d 229, 237-38 (3d Cir. 2003) (citations omitted).

After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); see also Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A motion for summary judgment looks beyond the pleadings and factual specificity is required of the party opposing the motion. Celotex, 477 U.S. at 322-23. The non-moving party may not merely restate allegations made in its pleadings or rely upon "self-serving conclusions, unsupported by specific facts in the record." Id. Rather, the non-moving party must support each essential element of its claim with specific evidence from the record. See id.

A district court analyzing a motion for summary judgment "must view the facts in the light most favorable to the non-moving party" and make every reasonable inference in favor of that party. Hugh v. Butler County Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005) (citations omitted). The standards governing cross-motions for summary judgment are the same, although the court must construe the motions independently, viewing the evidence presented by each moving party in the light most favorable to the nonmovant. Grove v. City of York, 342 F. Supp.2d 291, 299 (M.D. Pa. 2004). Summary judgment is therefore appropriate when the court determines that there is no genuine issue of material fact after viewing all reasonable inferences in favor of the non-moving party. See Celotex, 477 U.S. at 322.

III. DISCUSSION

A. Defendants' Motion for Summary Judgment

(1) Failure to exhaust administrative remedies

The Prison Litigation Reform Act ("PLRA") requires a prisoner to exhaust a correctional facility's administrative remedies before he can initiate a Section 1983 action in federal court challenging conditions at the facility. The PLRA states that "[n]o action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983) or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies *as are available* have been exhausted." 42 U.S.C. § 1997e(a) (emphasis added).

The Third Circuit has noted that the PLRA qualifies the exhaustion of administrative remedies with the phrase "as are available," implying that a prisoner cannot be expected to exhaust administrative remedies that are not available. Camp v. Brennan, 219 F.3d 279, 281 (3d Cir. 2000). Where no administrative remedies are available, a prisoner is relieved from satisfying Section 1997e(a) of the PLRA. Id. The availability of administrative remedies to a prisoner is a question of law. Brown v. Croak, 312 F.3d 109, 113 (3d Cir. 2002). Failure to exhaust administrative remedies is an affirmative defense to be pled and proven by the defendant. Brown v. Croak, 312 F.3d 109, 113 (3d Cir. 2002).

Defendants argue that Davis failed to submit a grievance in accordance with the procedure outlined in the Inmate Handbook for the Berks County Prison. See Defs' Mot. Summ. J. Ex. K Berks County Prison Inmate Handbook, Section 9 Communication and Grievance, pp. 34-47. Davis testified that the prison never gave him an inmate handbook and that he did not have access to one. Id. Ex. F. Davis Dep. pp. 29-30. Chief Deputy Warden Eliot Werst confirmed this by testifying that Davis probably did not have a personal copy of the handbook because in 2002, the prison did not issue handbooks to inmates although they were available on the housing units. Id. Ex. G. pp. 36-37. Werst also stated that the prison did not have inmate grievance forms in 2002. Id. pp. 20-23. The prison's grievance procedures required prisoners to submit grievances on these non-existent forms, although Werst suggested that inmates could use an inmate communication form to submit a grievance. Id.

Defendants have not met their burden of proving that administrative remedies were available to Davis and that he failed to exhaust them. Davis testified that he never received an inmate handbook and did not have access to one. Even if he had received a handbook, the grievance forms inmates were required to use did not exist in 2002. Administrative remedies were not available to Davis and therefore, Davis is not required to satisfy Section 1997e(a).

(2) Section 1983 Claims

Section 1983[6] does not by itself confer substantive rights, but instead provides a remedy for redress when a constitutionally protected right has been violated under the color of state law. Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985). In order to succeed on a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate: (1) the violation of a right secured by the Constitution, and (2) that the constitutional deprivation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

Defendants concede that they are state actors. They urge the court to grant summary judgment by contending that Davis cannot prove defendants violated his constitutional rights. Alternatively, defendants argue summary judgment is proper

[6] Section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983.

because the individual defendants have qualified immunity and Davis cannot prove Monell liability against Berks County.

(a) Excessive force in violation of the 8th and 14th Amendment

(1) Davis states an excessive force claim under Brooks.

In the Third Circuit, the central issue when evaluating an excessive force claim under the Eighth Amendment is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Brooks v. Kyler, 204 F.3d 102, 106 (3d Cir. 2000) (quoting Hudson v. McMillian, 503 U.S. 1, 7 (1992)). To determine whether a corrections officer has used excessive force, courts must examine the following factors: "(1) "the need for the application of force"; (2) "the relationship between the need and the amount of force that was used"; (3) "the extent of injury inflicted"; (4) "the extent of the threat to the safety of staff and inmates, as reasonably perceived by responsible officials on the basis of the facts known to them"; and (5) "any efforts made to temper the severity of a forceful response." Id. (quoting Whitley v. Albers, 475 U.S. 312, 322 (1986)). A court should not grant summary judgment to the defendant if "it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain." Id. (citations omitted).

Davis resists summary judgment by asserting facts that show defendants applied force to inflict pain and not in a good-faith effort to maintain and restore discipline and

order. Applying the factors test discussed in Brooks, a reasonable jury could find that Davis states a claim for excessive force. Although Davis violated prison procedures by using the telephone, Davis was handcuffed at the time of this non-violent violation. Under the first factor of the Brooks test, prison guards used excessive force to stop Davis from using the telephone. Cooper slammed Davis' head against the wall despite the fact that Davis was complying and walking back to his cell. Once Cooper had fully secured Davis, who was still handcuffed, in his cell, Cooper continued to choke, kick and punch him. Under the second Brooks factor, choking, kicking, and punching were not necessary to enforce phone rules, particularly after Cooper placed Davis back in his cell.

As to the third Brooks factor, accepting Davis' testimony as true, the extent of his injuries are sufficient to state a claim for excessive force. The Third Circuit has repeatedly emphasized that "the Eighth Amendment analysis must be driven by the extent of the force and the circumstances in which it is applied; not by the resulting injuries." Smith v. Mensinger, 293 F.3d 641, 648 (3d Cir. 2002) (overturning district court decision to grant summary judgment on plaintiff's excessive force claim when the handcuffed plaintiff was punched and kicked while under the control of several guard). While "[t]here exists some point at which the degree of force used is so minor that a court can safely assume that no reasonable person could conclude that a corrections officer acted maliciously and sadistically," the degree of force used by officers against Davis does not qualify as *de minimus*. Reyes v. Chinnici, 54 Fed. Appx. 44, 48 (3d Cir. 2002) (affirming

summary judgment for the defendant because a guard's single punch to the shoulder to avoid being spit on by the plaintiff did not violate the Eight Amendment's prohibition on the use of excessive force).

Even though Davis bit Cooper, Davis was handcuffed throughout the incident, successfully placed back in his cell where he could have been locked down, and under the control of multiple guards. Therefore, the extent of the threat to the staff and other inmates could not have been high under the fourth Brooks factor. Finally, the fifth Brooks factor requires the court to assess the prison's efforts to temper the severity of the response. The prison scores poorly on this factor as well, considering the guards continued to beat Davis after they placed him handcuffed in his cell. Accepting Davis' allegations as true, a jury could find that defendants acted out of malice and not in good-faith to restore order.

(2) Davis' prior conviction for aggravated assault does not preclude his excessive force claim.

Alternatively, defendants argue that Davis' conviction for aggravated assault for biting defendant Cooper precludes his current claim for excessive force because "...a criminal conviction collaterally estops a defendant from denying his acts in a subsequent civil trial." Shaffer v. Smith, 673 A.2d 872, 874 (Pa. 1996). Defendants argue that since the trial conclusively established Davis' guilt, the officers' responsive use of force on Davis was reasonable.

In determining the effect of Davis' conviction on this litigation, the court must be

cognizant of the Supreme Court's decision in Heck v. Humphrey, 512 U.S. 477 (1994), which examined the relationship between a plaintiff's Section 1983 claim and his prior conviction. In Heck, the court ruled that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." Id. at 487.

Essentially, Heck limits using a Section 1983 action to challenge a conviction that has not been reversed. The relationship between Davis' prior conviction and current Section 1983 action differs significantly from Heck.[7] In a case similar to the one at bar, the Third Circuit found that a petitioner could bring a Section 1983 action for excessive force even though he had been convicted of resisting arrest. Nelson v. Jashurek, 109 F.3d 142 (3d Cir. 1997). The Third Circuit reasoned that the jury's verdict meant that patrolman Jashurek was justified in using substantial force to effectuate the arrest of plaintiff. Id. at 145. The verdict, however, did not preclude Nelson's Section 1983 claim

[7] The Heck ruling results from the unique facts of the case. The petitioner in Heck essentially tried to use a Section 1983 action to challenge the validity of his underlying conviction. After being convicted of the voluntary manslaughter of his wife, Heck brought a Section 1983 action against the prosecutors and state police investigator in his case alleging that they conducted an unlawful investigation and knowingly destroyed exculpatory evidence that could have proven his innocence. 512 U.S. 477, 478-79.

because "the fact that Jashurek was justified in using 'substantial force' to arrest Nelson does not mean that he was justified in using an excessive amount of force and thus does not mean that his actions in effectuating the arrest necessarily were objectively reasonable. In short, there undoubtedly could be 'substantial force' which is objectively reasonable and 'substantial force' which is excessive and unreasonable." Id. Accordingly, the Third Circuit permitted Nelson's Section 1983 claim to go forward because a judgment in his favor on this claim would not "throw the validity of his conviction into doubt." Id. at 146.

The same rational applies in this case: Davis' Section 1983 must go forward because success in this lawsuit would not invalidate his prior conviction. Davis was convicted of aggravated assault[8] for biting defendant's Cooper's arm. The jury instructions at trial dictated that the jury find Davis guilty of this offense if he attempted to cause serious bodily injury to Cooper and he was not justified in believing that his actions were necessary to avoid harm to himself. Defs' Mot. Summ. J. Ex. C Trial Transcript Commonwealth v. Davis, pp. 150-152. This guilty verdict precludes Davis from challenging this conviction via a Section 1983 action. However, the jury did not address the validity of defendant Cooper's actions in disciplining Davis–choking, punching, and slamming his head against the wall–or the actions of the other guards who kicked Davis. Further, under the reasoning of Nelson, a jury could still find the guards

[8] See 18 PA. CONS. STAT. ANN. § 2702(a) for the elements of this offense.

conduct objectively unreasonable even if Davis was not justified in biting Cooper. Davis has properly brought a Section 1983 claim to challenge these acts.[9]

(b) Failure to intervene in violation of the Eighth and Fourteenth Amendment

The Third Circuit has held that "a corrections officer's failure to intervene in a beating can be the basis of liability for an Eighth Amendment violation under § 1983 if the corrections officer had a reasonable opportunity to intervene and simply refused to do so....a corrections officer can not escape liability by relying upon his inferior or non-supervisory rank vis-a-vis the other officers." Smith, 293 F.3d at 650. Plaintiff has plead sufficient facts to establish a claim for use of excessive force. See Section III.A.2.a *supra*. Plaintiff also contends that defendants Galonis and Franklin,[10] along with other unnamed officers, watched but did not intervene and stop defendant Cooper. The court should not dismiss Davis' claims against Galonis and Franklin for failure to intervene.

(c) Failure to provide medical care in violation of the Eighth and Fourteenth Amendment.

The Supreme Court has recognized that deliberate indifference to serious medical needs of prisoners violates the Eighth Amendment because inmates rely on prison authorities to care for and treat their medical problems. Estelle v. Gamble, 429 U.S. 97,

[9] While Davis' claim is permitted to go forward, the court must carefully instruct the jury concerning the validity of Davis' prior conviction. See Nelson, 109 F.3d at 146.

[10] While the court notes that defendant Franklin testified that she arrived after the incident, Davis has testified to the contrary. The court must make all inferences in Davis' favor as the non-movant and therefore Davis' claim against Franklin will not be dismissed.

104 (1976). The Third Circuit promulgated a two-pronged test for failure to provide medical treatment claims: (1) deliberate indifference on the part of the prison officials and (2) a prisoner's serious medical need. Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987).

A plaintiff can establish deliberate indifference by showing that prison authorities were aware of a prisoner's medical problem, denied reasonable requests for medical treatment, and that this denial caused the inmate undue suffering or threatened a tangible residual injury. Id. at 346. Since Davis' injuries resulted from a disciplinary violation that injured a guard, the prison had reason to evaluate Davis for injuries after the incident.[11] Davis testified that he made verbal and written requests for medical assistance following the incident and never received medical attention. These allegations support a showing of deliberate indifference.

A medical condition is serious if "it is one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." Id. at 347. Cuts, scrapes, bruises and black eyes do not "standing alone" necessitate immediate medical treatment. Banks v. Beard, No. 03-659, 2006 U.S. Dist. LEXIS 52985, at *41 (E.D. Pa. Aug. 1, 2006). However, Davis has testified that he believed his jaw was dislocated and that his right ankle and back were

[11] While defendants argue that there is a lack of objective medical evidence to prove Davis was injured in the attack, they can not point to a written medical evaluation of Davis soon after the incident finding Davis was not injured.

injured. As a matter of law, the court cannot say that Davis' collective injuries from the incident were not a serious medical condition. See Taylor v. Hendricks, No. 04-5864, 2005 U.S. Dist. LEXIS 16029 (D.N.J. July, 29 2005) (finding that a dislocated and broken ankle constituted a serious condition because the injuries limited plaintiff's range of motion and caused significant pain); Petrichko v. Kurtz, 117 F. Supp.2d 467, 470 (E.D. Pa. 2000) (ruling that a dislocated shoulder is a serious injury).

Defendants argue that Davis' claim must fail because he presents no objective evidence that he had the injuries he has alleged. Defs' Mot. Summ. J. p. 22. Deputy Warden Elliot West testified that he spoke to Davis a couple of days after the incident and Davis did not complain of any injuries and Werst did not observe any. Defs' Mot. Summ. J. Ex. G. Deposition of Warden Elliot Werst p. 126. This is not an appropriate basis for granting Defendants' motion because credibility determinations are appropriately left to the trier of fact. Since Defendants cannot point to conclusive evidence that Davis was not injured–e.g. a physician's evaluation of Davis after the incident showing no injuries–their motion must fail because the court is required to interpret the facts in a light most favorable to the non-movant.

(d) Fourteenth Amendment due process violation

In count four of his complaint, Davis asserts a Fourteenth Amendment due process violation for his placement in disciplinary confinement without justification. In Sandin v. Conner, 515 U.S. 472, 484 (1995), the Supreme Court held that only prison restrictions

that impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" infringe the liberty interest protected by the Due Process Clause. As examples of this "atypical and significant hardship," the Court cited transfers to a mental hospital and involuntary administration of psychotropic drugs. Id. The Court held that the prisoner's discipline in "segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." Id. at 486.

The Third Circuit has reinforced this rule stating that placement in administrative confinement will not generally create a liberty interest.[12] Allah v. Seiverling, 229 F.3d 220, 224 (3d Cir. 2000). The Third Circuit has further instructed that the baseline for determining what is atypical and significant in relation to the ordinary incidents of prison life "is ascertained by what a sentenced inmate may reasonably expect to encounter as a result of his or her conviction" and that "discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law." Griffin v. Vaughn, 112 F.3d 703, 706 (3d Cir. 1997) (finding no due process violation when the prison held an inmate in restrictive housing for fifteen months because he was suspected of raping and beating a female prison guard).

[12] There are two exceptions to this rule that do not apply on the facts of this case. The first is if the placement in restrictive custody is retaliatory. Allah, 229 F.3d at 224. Davis' complaint alleges that defendants' placement of Davis in disciplinary confinement was without justification but he does not allege that it was retaliatory. The second exception is when prison discipline is instituted for the sole purpose of retaliating against an inmate for exercising a constitutional right. Smith, 293 F.3d at 653. Davis' complaint lacks any allegation that he was retailiated against for exercising a constitutional right.

Defendants argue that they placed Davis in disciplinary housing because according to their policies and procedures, any inmate leaving the prison while serving a disciplinary sentence is required to resume the disciplinary sentence if they return to the prison. Defs' Mot. Summ. J. Ex. K p. 22. Defendants assert that when Davis was re-incarcerated in February 2002, he owed disciplinary time and therefore was appropriately placed in the D-Unit. Id. at Ex. I. Once there, he committed violations that increased his D-unit time. Id. at Ex. L.

While there is no general liberty interest to be free from placement in restrictive housing under Sandin and Third Circuit precedent, Davis argues that his placement in solitary confinement was arbitrary, without justification, and beyond the "ordinary incidents of prison life." First, Davis points out that the prison's policies went into effect on June 1, 2002. Since Davis was re-incarcerated in February 2002, the policy concerning owed disciplinary time was not in effect at this time. Second, Davis only owed ninety days of disciplinary time and this figure was increased by seven days due to the write-ups he received. Therefore, defendants were only justified in maintaining Davis in the disciplinary unit until May 28, 2002. Yet, he remained there until the September 10, 2002 incident.

Even though inmates do not possess a liberty interest in being free from restrictive housing, Davis' due process claim survives summary judgment because the "time owed" policy was not in effect when he was reincarcerated and the prison continued to hold him

in restrictive housing for several months after Davis had served his "time owed."

(e) Qualified immunity for the individual defendants

The Third Circuit uses a two-part test to determine whether qualified immunity is available as a defense. Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir. 1997). First, "the court must determine whether the facts, taken in the light most favorable to the plaintiff, show a constitutional violation." Id. If the plaintiff cannot show a constitutional violation, the analysis ends and the officer is granted immunity. If, however, there is a constitutional violation, the court must determine whether the constitutional right was clearly established. Id. In other words, the court must determine "in the factual scenario established by the plaintiff, would a reasonable officer have understood that his actions were prohibited?" Id. The officer is entitled to qualified immunity only if "it would not have been clear to a reasonable officer what the law required under the facts alleged...." Id. at 136-37.

Granting defendants qualified immunity is not appropriate. Davis has met the first element of the qualified immunity test by sufficiently pleading violations of the Eighth and Fourteenth Amendment. Second, the parties sharply contest the what happened on September 10, 2002. In this regard, the Third Circuit has cautioned that

> ...the imperative to decide qualified immunity issues early in the litigation is in tension with the reality that factual disputes often need to be resolved before determining whether the defendant's conduct violated a clearly established constitutional right. Just as the granting of summary judgment is inappropriate when a genuine issue exists as to any material fact, a decision on qualified

> immunity will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis. Thus, while we have recognized that it is for the court to decide whether an officer's conduct violated a clearly established constitutional right, we have also acknowledged that the existence of disputed, historical facts material to the objective reasonableness of an officer's conduct will give rise to a jury issue. Curley v. Klem, 298 F.3d 271, 278 (3d Cir. 2002).

It is improper to grant qualified immunity to the defendants because there remain significant factual disputes regarding whether defendants were justified in using force to protect themselves and to compel Davis to comply with orders.

(e) Monell liability

In Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691 (1978) the Supreme Court held that municipalities may not be found liable on a theory of *respondeat superior* under Section 1983. See also Colburn v. Upper Darby Township, 946 F.2d 1017, 1027 (3d Cir. 1991). Section 1983 municipal liability is only proper when a municipal employee or official deprives the plaintiff of his or her federally protected rights pursuant to a municipal policy,[13] custom,[14] or practice. 436 U.S. at 691. In order to

[13] A municipal policy, for purposes of section 1983, is a "statement, ordinance, regulation, or decision officially adopted and promulgated by [a government] body's officers." Monell, 436 U.S. at 690; see also Berg v. County of Allegheny, 219 F.3d 261, 275 (3d Cir. 2000) ("Policy is made when a 'decisionmaker possessing final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict.") (citation omitted). Such a policy "generally implies a course of action consciously chosen from among various alternatives." Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985). Limiting liability to identifiable policies ensures that municipalities are only liable for "deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." Brown, 520 U.S. at 403-04.

[14] A custom, while not formally adopted by the municipality, may lead to liability if the "relevant practice is so widespread as to have the force of law." Brown, 520 U.S. at 404. This requirement should not be construed so broadly as to circumvent Monell: "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy...". Oklahoma City v. Tuttle, 471 U.S. 808, 823-824 (1985).

recover from a municipality under Section 1983, a plaintiff must: (1) identify a policy or custom that deprived him or her of a federally protected right, (2) demonstrate that the municipality, by its deliberate conduct, acted as the "moving force" behind the alleged deprivation, and (3) establish a direct causal link between the policy or custom and the plaintiff's injury. Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 404 (1997). Alternatively, a plaintiff can also plead a Monell claim "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 387-88 (1989).

There is no basis for a Monell claim in this case. In Davis' response to defendants' motion for summary judgment, Davis admits that he has not established a basis for Monell liability. Instead, Davis argues that the court should defer ruling on this issue until the plaintiff has the opportunity to depose Warden George Wagner, who is the prison's key decision maker. Over four months have passed since this request and Davis has not supplemented his response to defendants' motion for summary judgment with facts that support his Monell claim. Therefore, I will grant summary judgment to Berks County, the Berks County Prison, Berks County Prison Board, and Warden Wagner.

B. Plaintiff's Motion for Summary Judgment

Davis moves to dismiss defendant Cooper's counterclaim as barred by the statute of limitations. Under Pennsylvania law,[15] actions for assault and battery must be commenced within two years. 42 PA. CONS. STAT. ANN. § 5524. Cooper filed a counterclaim for assault and battery on April 11, 2006 based on the incident on September 10, 2002. Davis argues that this counterclaim is time-barred because it was filed nineteen months late.

Defendant Cooper advances three arguments in support of his counterclaim, none of which are persuasive. First, Cooper argues that some Pennsylvania courts have permitted filing a counterclaim beyond the statute of limitations. The two cases defendant cites are distinguishable because they involved counterclaims filed a few days late, not nineteen months. See Bennere v. Interrante, 21 Pa. D & C.3d 507 (Pa. Com. Pl. Ct. 1981); Marafine v. Campolongo, 3 Pa. D & C.3d 735 (Pa. Com. Pl. Ct. 1977). The general rule in Pennsylvania is that counterclaims must be raised within the time provided by the statute of limitations. Bednar v. Bednar, 688 A.2d 1200, 1205 (Pa. Super. Ct. 1997); Harmer v. Hulsey, 467 A.2d 867, 869 (Pa. Super. Ct. 1983); Gumienik v. Lund, 314 F. Supp. 749, 751 (W.D. Pa. 1970) ("We find the general rule in Pennsylvania to be that a cause of action which would be barred as an original action, because of the statute

[15] Pennsylvania law applies because defendant Cooper's counterclaim is governed by state law and is only brought in federal court under supplemental jurisdiction. Cohen v. Wolgin, No. 87-2007, 1995 U.S. Dist. LEXIS 972, at *21 (E.D. Pa. 1995) (citing Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548, 552-54 (3d Cir. 1985) (applying Pennsylvania tolling provisions to state-law claim)).

of limitations, may not be asserted as a counterclaim after the expiration of the statutory period.")

Second, Cooper argues that the court can permit an untimely counterclaim under Federal Rule of Civil Procedure Rule 13(f).[16] This Rule governs omitted counterclaims and states that "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment." Further, "a counterclaim amended pursuant to Rule 13(f) may relate back to the date of the original answer when the counterclaim arises out of the same transaction that was pleaded in the answer and there is no prejudice to the opposing party's ability to defend the merits of the counterclaim." Perfect Plastics Industries, Inc. v. Cars & Concepts, Inc., 758 F. Supp. 1080, 1083 (W.D. Pa. 1991).

Rule 13(f) cannot save Cooper's counterclaim. Cooper is not trying to amend his timely counterclaim to include another, now untimely, claim. Instead, Cooper is trying to use this rule to bring an entirely untimely counterclaim. Even if the court were to grant

[16] It is not altogether clear whether this court can use the Federal Rules of Civil Procedure to trump state statute of limitations rules governing supplemental state law claims. One federal court has refused to allow an untimely affirmative counterclaim under Rule 13(f). See Gumienik, 314 F. Supp. at 751 ("The statute of limitations involves a matter of state law....Where one is barred from recovery in the state court he is likewise barred in the federal court."). Other federal courts sitting in diversity have applied Rule 13(f). See Perfect Plastics Indus., Inc. v. Cars & Concepts, Inc., 758 F. Supp. 1080 (W.D. Pa. 1991). Further, Cooper cites no case law to support the proposition that Rule 13(f) can be applied at this point in the proceedings. In Perfect Plastics, the defendant raised this defense early in the litigation through a motion to amend answer to add counterclaims. Id. at 1081. Defendants here are not seeking to add another claim to a timely filed counterclaim but to permit an entire untimely counterclaim.

the motion, the counterclaim would only relate back to the date of the original answer, which was nineteen months untimely. Id.at 1083. Rule 13(f) is inapplicable.[17]

Third, defendant Cooper argues that his counterclaim should be permitted because Pennsylvania permits untimely counterclaims that seek recoupment. Cohen v. Wolgin, No. 87-2007, 1995 U.S. Dist. LEXIS 972, at *23-24 (E.D. Pa. Jan. 24, 1995) (citing Harmer v. Hulsey, 11, 467 A.2d 867, 868-69 (Pa. Super. Ct. 1983)). One court has explained that "Pennsylvania law draws a distinction between a counterclaim that seeks affirmative relief (known as a "set-off") and a counterclaim that involves only the claim averred by the plaintiff and raises no possibility of affirmative relief (known as a "recoupment"). A counterclaim asserted as a recoupment is allowed even after the limitations period has run, while a counterclaim asserted as a set-off is not." J.B. Hunt Transport, Inc. v. Falcon Transport Co., 723 F. Supp. 359, 361 (W.D. Pa. 1989) (citations omitted); see also Cohen, 1995 U.S. Dist. LEXIS 972, at *23-24 (explaining that "[a] recoupment concerns solely the claim asserted by the plaintiff and no affirmative relief may be obtained by the defendant, while a set-off will permit an affirmative judgment for

[17] Cooper's rationale for invoking Rule 13(f) is also without merit. Cooper asserts that he filed his counterclaim at the first practical opportunity after Davis clarified his allegations at issue in his complaint. While the complaint and first amended complaint submitted by Davis, when he was acting *pro se* are confusing, both of these documents suggest that Davis' lawsuit focused on the incidents of September 10, 2002–an incident and date the prison was well aware of considering that Davis was prosecuted for his assault on Cooper. From Davis' initial complaint, filed on April 17, 2004, Davis' allegations are not entirely clear. The complaint seems to focus on whether inmates are handcuffed in the front or back. The complaint does reference using the telephone and in the relief sought section of the form, Davis explicitly says that he is seeking damages "from the assault of Correctional Officer James Cooper." The document that the court construed as the first amended complaint, filed on September 16, 2005, however, makes it explicit that Davis' complaint focused on Cooper's alleged assault of Davis by choking. While Davis does not provide a date or time of the incident, defendants should have been aware that Davis was referencing the September 10, 2002 incident because of Davis' prior prosecution and conviction for biting Cooper.

defendant."). Cooper's claim is for affirmative relief because it requests judgment against Davis. See J.B. Hunt Transport, Inc., 723 F.Supp. at 261 (refusing to construe counterclaims for negligence that requested affirmative relief as recoupment claims). Cooper's counterclaim is for set-off, not recoupment, and is therefore time-barred.

IV. CONCLUSION

I will grant defendants' motion for summary judgment as to all claims against the John Doe defendants, Berks County, Pennsylvania Berks County Prison, Berks County Prison Board, and Warden George Wagner. In all other respects, defendants' motion is denied. Plaintiff's motion for summary judgment is granted. An appropriate order follows.

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

IVAN DAVIS,	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	**NO. 04-01795**
	:	
BERKS COUNTY, et al.,	:	
Defendants.	:	

O R D E R

AND NOW, this 8th day of February, 2007, upon consideration of plaintiff's motion for summary judgment (Document No. 48), defendants' motion for summary judgment (Document No. 46) and the responses thereto, it is hereby **ORDERED** that plaintiff's motion is **GRANTED** and defendant Cooper's counterclaim is dismissed. It is **FURTHER ORDERED** that defendants' motion is **GRANTED** in part. All claims against the John Doe defendants, Berks County, Pennsylvania Berks County Prison, Berks County Prison Board, and Warden George Wagner are dismissed. In all other respects, defendants' motion is **DENIED**.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.