

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

RONALD WESLEY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
NATHANIEL HOLLIS, et al.,	:	
Defendants	:	No. 03-3130

MEMORANDUM AND ORDER

PRATTER, DISTRICT JUDGE

JUNE 6, 2007

Plaintiff Ronald Wesley, a prisoner in the custody of the Pennsylvania Department of Corrections, sued three corrections officers, Nathaniel Hollis, Kevin Marsh and Kenneth Eason, pursuant to 28 U.S.C. § 1983 for damages as well as for declaratory and injunctive relief.

Following the Court’s ruling on the Defendants’ Motion to Dismiss,¹ the following causes of action remained: (1) retaliation in violation of Section 1983; (2) use of excessive force in violation of the Eighth Amendment; (3) assault and battery in violation of state law; and (4) claims brought pursuant to the Pennsylvania Constitution, Article I, Sections 7 and 13.

The Defendants now move for summary judgment, which Mr. Wesley opposes. For the reasons explained more fully below, the Court will grant summary judgment in favor of Lieutenant Eason on all claims and in favor of Lieutenant Marsh on all state law claims; but the Court will deny summary judgment on Mr. Wesley’s Section 1983 retaliation and excessive force

¹ In Wesley v. Hollis, 2004 WL 945134 (E.D. Pa. Apr. 29, 2004) (McGirr Kelly, J.), the Court dismissed Mr. Wesley’s First Amendment “access to the court” and Fourteenth Amendment Due Process claims against CO Hollis (id. at *3), his Section 1983 conspiracy claim against Officer Hollis and Lieutenant Marsh (id. at *4) and his Section 1983 claim against Lieutenant Eason for an allegedly inadequate or incomplete investigation (id. at *5). Upon the death of our respected colleague, this case was transferred to this Court’s docket.

claims against Officer Hollis and Lieutenant Marsh.

FACTUAL BACKGROUND

The following facts are undisputed.

Mr. Wesley has been incarcerated at Graterford Correctional Institution since July 30, 1996. (Wesley Dep. 4.) On the afternoon of June 10, 2001, a number of prison officials conducted cell searches on the upper tier of the L-Unit, a Restricted Housing Unit (“RHU”), where Mr. Wesley had been housed for the prior two months. (*Id.* at 15.) When Officer Hollis arrived at Mr. Wesley’s cell, he handcuffed Mr. Wesley through the “wicket”² without incident. (*Id.* at 14, 18; Hollis Dep. 83-84, 86-87.) The officers then opened the cell door, and Mr. Wesley stepped into the hall. (Wesley Dep. 18-20.) After searching Mr. Wesley’s person, CO Hollis and CO Yodis conducted a search of his cell. (Wesley Dep. 42-43.) Mr. Wesley watched from a distance of approximately three or four feet through the open door of the cell. (*Id.* at 20, 42-43.)

At the time of the search, Mr. Wesley had a considerable amount of paperwork on the top bunk in his cell. He used the top bunk as a table or desk. (*Id.* at 44-46.) CO Hollis proceeded to “flip through” these papers to screen them for contraband³. (Hollis Dep. 102, 105-06). Officer

² Each cell door in the RHU has a small hatch, called a “wicket” or “wicker,” which may be unlocked and opened out toward the exterior of the cell as a table or shelf for meals, mail delivery and handcuffing or uncuffing RHU inmates. *See* Marsh Dep. 106-08; *Hughes v. Smith*, 2006 WL 47360, at *3 (E.D. Pa. Jan. 6, 2006).

³ “Contraband” includes money, drugs, weapons, implements of escape or anything else that an inmate is not authorized to have. DC-ADM 203, “Searches of Inmates and Cells,” p. 2, *available at* http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_203_Searches_of_Inmates_and_Cells.pdf (last visited June 4, 2007). The use of authorized materials for a purpose other than their intended purpose may render such otherwise authorized materials contraband. (Marsh Dep. 100-103.) Thus, suggest the Defendants, as discussed in the text of this Memorandum, Mr. Wesley’s use of the cardboard legal pad backings as “dividers” was not their intended use and, therefore,

Hollis removed some pieces of cardboard (i.e., the backs of used-up notepads) and threw them on the floor. (Id. at 103-04; Wesley Dep. 47-48, 53.) There was writing on at least one of the pieces of cardboard. (Johnson Dep. 28-29, 68-69; Wesley Dep. 45-46.) When Mr. Wesley protested that the cardboard pieces were legal material and asked Officer Hollis not to discard them, Officer Hollis informed him that the cardboard was trash and therefore contraband. (Wesley Dep. 47-48, 53.)

After the search was completed, as Officer Hollis and Officer Yodis were leaving Mr. Wesley's cell, Officer Hollis kicked or swept aside the cardboard pieces, in addition to other materials,⁴ out of the cell with his foot. (Id. at 51.) As Mr. Wesley returned to his cell, he attempted to kick the cardboard pieces back inside the cell. (Id.) At this point, Mr. Wesley was admittedly "a little upset" and frustrated at the way Officer Hollis was "using his authority." (Id. at 58-59.) Nonetheless, when Officer Hollis told him stop, Mr. Wesley complied and returned to

the cardboard backing were contraband. (Def. Reply 4.) In contrast, however, the Defendants elsewhere argue that the cardboard backings were trash, not contraband, which is why no confiscation slip was issued for the removal of the cardboard. (See, e.g., Def. Reply 3-4.) Confiscation slips are not issued for trash. (Marsh Dep. 156.)

⁴ The parties dispute the nature of these materials. Mr. Wesley and Scott Davis Johnson, the inmate in the cell across from Mr. Wesley's, both testified that Officer Hollis kicked a pile of Mr. Wesley's legal materials out of the cell. (Wesley Dep. 51; Johnson Dep. 26-29.) Officer Hollis testified that he kicked a pile of trash containing old papers and newspapers and one torn cardboard backing with writing on it. (Hollis Dep. 118-19.) Because Officer Hollis said it was contraband, in accordance with institutional procedures, Mr. Wesley requested a contraband confiscation receipt, at which point Officer Hollis said it was trash, not contraband. (Wesley Dep. 53-54.) Officer Hollis did not issue a confiscation receipt or file a misconduct report for possession of contraband. (Hollis Dep. 107-09, 224-225; Wesley Dep. 53-54.) Lieutenant Marsh testified that the material taken from Mr. Wesley's cell "literally was garbage," but nonetheless conceded that "there may have been" pieces of cardboard backing in the pile. (Marsh Dep. 132, 138-39.) Mr. Johnson testified that he saw "a cardboard backing . . . with cases and notes And some other papers" removed from the cell. (Johnson Dep. 28-29; 68.)

his cell as ordered. (Id. at 62-63; Hollis Dep. 120.) At that time, Officer Hollis “pretty much knew” that Mr. Wesley was going to file a grievance against him. (Hollis Dep. 150.)

Once Mr. Wesley was back in his cell and the cell door was locked, Officer Hollis ordered Mr. Wesley to back up to the door to be uncuffed, and Mr. Wesley complied. (Id. at 123, 126.) Officer Hollis then grabbed the handcuffs⁵ through the wicket (Wesley Dep. 63) and proceeded to remove Mr. Wesley’s left cuff without any trouble (Hollis Dep. 129).⁶ While the parties dispute the events that followed, it is undisputed that Officer Hollis continued to hold the cuffs.

The Defendants contend that Mr. Wesley then began “pulling and twisting on the cuffs” and “hollering” for no apparent reason.⁷ (Hollis Dep. 121, 129-30; Hollis Witness Statement, Pl. Ex. R.) Conversely, Mr. Wesley maintains that Officer Hollis yanked the chain on his handcuffs with enough force to cause his head and back to slam against the steel cell door, and tightened the handcuffs around his wrists. (Wesley Dep. 63, 65-67.) The pins in Mr. Wesley’s handcuffs allegedly were not double-locked⁸ because he was out of his cell for only a few minutes during

⁵ The parties dispute whether it was standard practice or necessary for an officer to grab the chain between the two cuffs “in order to control the inmate.” (Compare Marsh Dep. 123-25 with Wesley Dep. 65.) However, it typically only takes an officer a matter of seconds to remove an inmate’s handcuffs. (Marsh Dep. 127, Johnson Dep. 12.)

⁶ It is undisputed that an officer must unlock each cuff separately because it is impossible to unlock both cuffs simultaneously. (Marsh Dep. 123-25.) However, Lieutenant Marsh testified that when he later intervened and removed Mr. Wesley’s cuffs, both handcuffs were still on Mr. Wesley. (Marsh Dep. 131.)

⁷ It is undisputed that during this portion of the parties’ interaction Mr. Wesley called Mr. Hollis a “pussy motherfucker” and stated “I better not find out where you live on the street, I’m not in jail forever.” (Wesley Dep. 66-67.)

⁸ Mr. Hollis testified that he *did* double-lock the handcuffs. (Hollis Dep. 87.)

the cell search. (Wesley Dep. 65-66.) For this reason, when Officer Hollis allegedly yanked on the cuffs, the cuff(s) tightened like a slip knot around Mr. Wesley's wrist(s). (Wesley Dep. 65-66.)

Mr. Wesley began screaming and yelling to be let go (Marsh Dep. 130), allegedly in excruciating pain (Wesley Dep. 65-67). Lieutenant Marsh testified that he saw Mr. Wesley trying to pull away from Officer Hollis, who was not struggling, but was continuing to hold the cuffs "with one hand." (Marsh Dep. 226, 130.) Mr. Wesley was screaming, "You're hurting my wrists" or "You're hurting me." (Hollis Dep. 157; Marsh Dep. 226.)⁹ Officer Hollis ordered Mr. Wesley to stop moving and back up to the door to be uncuffed. (Hollis Dep. 142; Marsh Dep. 130, 170.) Mr. Wesley concedes he may not have heard this order because he was screaming. (Wesley Dep. 69.)

Officer Hollis was aware that handcuffs could cause injuries to inmates, particularly if an officer is tugging, pulling or twisting the handcuffs. (Hollis Dep. 30.) Department of Corrections procedure, with which Officer Hollis was familiar, provides that an officer shall not apply handcuffs as punishment. (Handcuffing Policy, filed under seal, DC-ADM 20; Hollis Dep. 156-57.) Nonetheless, Officer Hollis refused to let go of the cuffs until Lieutenant Marsh succeeded in calming Mr. Wesley and removing the handcuffs. (Hollis Dep. 121.) Indeed, Officer Hollis did not consider any options other than continuing to hold onto the handcuffs.

⁹ Mr. Johnson testified that Officer Hollis was laughing and smiling (Johnson Dep. 34), which Officer Hollis disputes and denies (Hollis Dep. 153). In any event, it is undisputed that Officer Hollis was never intimidated by Mr. Wesley or feared for his safety at any time on June 10, 2001. (*Id.* at 124-25, 149, 200.) At the time of the incident, Officer Hollis was 31 years old, "a rather big guy" and "very strong," standing 6'2" tall and weighing 275 pounds. (Marsh Dep. 132, 148, 221, 224, 227; Hollis Dep. 8.) Mr. Wesley was 53 years old and "about average size . . . not a big guy at all." (Hollis Dep. 59.)

(Hollis Dep. 143 (“Not for one second, no. Never thought about letting him go once I had the cuff in my hand, no.”).)

Both Officer Hollis and Lieutenant Marsh testified that releasing a handcuffed inmate while the inmate was locked in a cell had happened before. (Hollis Dep. 143; Marsh Dep. 122.) That option, however, could cause an inmate to hurt himself or the officers who would then have to enter the cell to remove the cuffs, especially when an inmate is acting irrationally. (Marsh Dep. 122, 149-50, 211-12; Hollis Dep. 48-49.)

The parties dispute whether Lieutenant Marsh was present during the cell search and the events that followed. Officer Hollis and Mr. Wesley testified that Lieutenant Marsh was there the entire time (Hollis Dep. 132; Wesley Dep. 52), while Lieutenant Marsh testified that he was not present during the cell search or the beginning of the incident, but later was “called over to the wing” when he “heard Wesley screaming and yelling” (Marsh Dep. 129-30). It is undisputed, however, that Lieutenant Marsh unlocked and removed the handcuffs, which only took a couple of seconds. (Hollis Dep. 148-49.)

Upon Mr. Wesley’s request, Officer Williams and Officer Yodis then escorted Mr. Wesley to the dispensary where he was examined by Nurse Teresa Drumheller.¹⁰ (Wesley Dep. 92-93-95; Medical Incident/Injury Report, Def. Ex. 10 attached to Wesley Dep.) The nature of Mr. Wesley’s injuries is in dispute (compare Wesley Dep. 84, 117 with Marsh Dep. 173-74), as is the treatment, if any, Mr. Wesley received, and the issue of whether he refused treatment (compare Wesley Dep. 144, 105-06, 104 with Hollis Dep. 166, 170; Drumheller Dep. 36, 43-44,

¹⁰ It is standard procedure for officers to take an inmate to the prison dispensary if there has been any physical altercation. If an injury is visible, the inmate is automatically taken to the dispensary. (Hollis Dep. 161.)

51-52). Mr. Wesley filed a grievance regarding his alleged inadequate medical treatment. (Pl. Response Ex. W; Wesley Dep. 112-13.)

On the same day of the events recounted above, Officer Hollis wrote Misconduct Report No. A307443, charging Mr. Wesley with threatening an employee or his family with bodily harm, using abusive, obscene or inappropriate language to an employee, and refusing to obey an order. (Misconduct Report, Pl. Ex. Q.) Mr. Wesley was found guilty of the misconduct in a later hearing and received 90 days of disciplinary time. (Wesley Dep. 133, 136-37.) Mr. Wesley filed a grievance against Officer Hollis (Grievance of 6/10/01, Pl. Ex. P), which was reviewed solely by Lieutenant Eason (Eason Dep. 23, 61, 123). Lieutenant Eason concluded that Mr. Wesley's "allegations were unfounded" and there were "no infractions" by prison staff. (Eason Dep. 84-85; Eason Memo, Pl. Ex. Z.)

Eventually, this litigation ensued.¹¹

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

¹¹ By Order of August 25, 2005, the Court instructed the Clerk of the Court to appoint counsel for Mr. Wesley. On March 28, 2006, counsel was appointed, and the case then proceeded on the Scheduling Order of April 28, 2006.

A party seeking summary judgment always bears the initial responsibility for informing the Court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case," id. at 325, or by offering affirmative evidence which demonstrates that the plaintiff cannot prove his case, Lawrence v. Nat'l Westminster Bank N.J., 98 F.3d 61, 69 (3d Cir. 1996). After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The evidence provided by the nonmovant is to be believed, and the Court must draw all reasonable and justifiable inferences in the nonmovant's favor, Anderson, 477 U.S. at 255, and resolve all "doubts and issues of credibility against the moving party" Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 970, 874 (3d Cir. 1972). However, a nonmoving plaintiff cannot defeat a motion for summary judgment by merely restating the allegations of the complaint. Instead, the non-moving plaintiff must "point to concrete evidence in the record that supports each and every essential element in his case." Orsatti v. New Jersey State Police, 71 F.3d 480, 484 (3d Cir. 1995) (citing Celotex, 477 U.S. at 322). At the summary judgment stage, however, the Court's function "is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Brooks v. Kyler, 204 F.3d 102, 105 n.5 (3d Cir. 2000). In other words, the Court is not permitted to impose its own estimation of how factual disputes or credibility contests will be resolved, no matter how confident the Court may be as to

how the factual disagreements will be determined.

DISCUSSION

Section 1983 imposes civil liability upon any person who, acting under color of state law, deprives another person of any rights, privileges or immunities secured by the Constitution or laws of the United States. 42 U.S.C. § 1983; Greunke v. Seip, 225 F.3d 290, 298 (3d Cir. 2000). To state a cause of action under Section 1983, Mr. Wesley must allege sufficient facts which, if taken as true, show that the Defendants, while acting under color of state law, deprived him of a right secured by the Constitution or laws of the United States. Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995); Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993).

1. SECTION 1983 RETALIATION CLAIM

To state a *prima facie* retaliation claim under Section 1983, a plaintiff must allege that (1) the plaintiff had engaged in conduct that is protected under the First Amendment; (2) the defendant took adverse action against the plaintiff; and (3) there was a causal connection between the plaintiff's protected activity and the defendant's adverse action, i.e., the protected conduct was a "substantial or motivating factor" in the defendant's decision to take action against the plaintiff. Rausser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001) (citing Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)). Once the plaintiff meets this threshold, the burden then shifts to the defendant to prove that the defendant would have taken the same disciplinary action even in the absence of the protected activity for reasons reasonably related to a legitimate penological interest. Rausser, 241 F.3d at 333-34.¹²

¹² In deciding the Defendants' Motion to Dismiss, the Court determined that Mr. Wesley made out a *prima facie* claim for retaliation. See Wesley v. Hollis, No. 03-3130, 2004 WL 945134, at *4 (E.D. Pa. April 29, 2004).

a. Mr. Wesley Engaged in Protected Conduct.

An inmate's filing of a lawsuit or grievance is a "petition" for redress of grievances protected by the First Amendment. Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997) (lawsuit is protected activity); Milhouse v. Carlson, 652 F.2d 371, 373-74 (3d Cir. 1981) (grievance is protected activity); Stokes v. Cywinski, No. 03-1544, 2006 WL 952385, at *5 (M.D. Pa. April 12, 2006) (inmates' appeal of a misconduct sentence was considered "filing of grievances" and, therefore, "protected conduct"). Here, the evidence in the record is sufficient to permit a reasonable trier of fact to conclude that, prior to the handcuffing incident, Mr. Wesley intended to file a lawsuit of some kind and, more specifically, intended to file a grievance against Officer Hollis relating to the handling of the paper in Mr. Wesley's cell. It is undisputed that Mr. Wesley had legal materials and work in his cell and was known to be an outspoken "jailhouse lawyer," who assisted other inmates with their legal issues. (Hollis Dep. 60-61; Marsh Dep. 80; Yodis Dep. 34; Johnson Dep. 19.) It is also undisputed that Mr. Wesley requested a confiscation receipt, indicating an intent to formally challenge the removal of the cardboard from his cell. (Wesley Dep. 63, 72.) Indeed, Officer Hollis admits that, prior to handcuffing Mr. Wesley, he "pretty much knew" that Mr. Wesley would file a grievance against him. (Hollis Dep. 150.) Drawing all inferences in favor of Mr. Wesley, as the Court is obliged to do, the evidence in the record suffices to raise a genuine issue of fact as to whether Mr. Wesley engaged in a protected activity, both by engaging in legal work to file a lawsuit and by making known his intent to file a grievance.

Mr. Wesley further contends that his objection to the removal of the cardboard from his cell is protected speech. The First Amendment protects truthful speech on matters of public

concern. Bartnicki v. Vopper, 532 U.S. 514, 533-34 (2001). To form the basis for a retaliation claim in the prison context, the retaliation must operate to “deter public comment on a specific issue of public importance.” Crawford-El v. Britton, 523 U.S. 574 (1998). Thus, to receive constitutional protection from “retaliation,” Mr. Wesley’s objections must be on a substantial matter of public, or at least prison-wide, concern. Oriakhi, 2006 WL 859543, at *5 (citing McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005) (inmate’s inquiry about pay for lost job was not a matter of public concern)); Drexel v. Vaughn, No. 96-3918, 1998 WL 151798, at *7 (E.D. Pa. April 2, 1998) (denying summary judgment on retaliation claim where inmate participated in a state and federal investigation of corrupt practices at Graterford, “a matter of grave public concern”).

The alleged wrongful confiscation of legal materials would likely be a matter of prison-wide concern, making Mr. Wesley’s objections protected speech. The question of law, however, cannot be decided here, where the underlying material facts are in dispute (i.e., did the officers remove legal materials or did they only remove trash?). As noted by Lieutenant Marsh, legal papers are “very significant,” but they must actually be legal papers. (Marsh Dep. 137-38.) Thus, the genuine factual disputes presented here preclude the Court from determining, as a matter of law, whether Mr. Wesley was engaged in protected speech.

b. Officer Hollis Took Adverse Action Against Mr. Wesley.

The Defendants concede that the alleged assault and admitted misconduct report are sufficient to state an “adverse action” for purposes of a retaliation claim. (Def. Reply Mem. 8 n.3.)

c. The Adverse Action Was Causally Connected to the Protected Activity.

Prior to the incident in question, Mr. Wesley had not filed a lawsuit or grievance against Officer Hollis. Mr. Wesley also did not specifically tell Officer Hollis that he was planning on suing him or filing a grievance against him. (Wesley Dep. 72.) However, before handcuffing Mr. Wesley, Officer Hollis, by his own admission, “pretty much knew” that Mr. Wesley would file a grievance against him. (Hollis Dep. 150.)

The Defendants contend that “nothing in the record suggests that Officer Hollis was hostile toward [Mr.] Wesley on account of his legal activities, or that [Officer] Hollis acted with retaliatory animus of any kind against [Mr.] Wesley.” (Def. Mem. 11-12.) This argument, however, is belied by the sequence of events that took place and Officer Hollis’s own admission that he knew Mr. Wesley would file a grievance against him.

Based on the record presently before the Court, a reasonable trier of fact could find that Officer Hollis’s alleged use of excessive force was causally related to Mr. Wesley’s intentions to file a grievance against Officer Hollis for his treatment of the legal material and, more generally, Mr. Wesley’s legal activities.

d. Legitimate Non-retaliatory Reasons or Penological Objectives

The Defendants assert that even if Mr. Wesley has made out a *prima facie* case of retaliation under Section 1983, his claim fails because the record demonstrates that Officer Hollis would have taken the same actions in the absence of any protected activity. In other words, argue the Defendants, Officer Hollis’s actions were reasonably related to legitimate penological interests. Mount Healthy, 429 U.S. at 287; Rausser, 241 F.3d at 333-34.

If Mr. Wesley satisfies his burden of proving the first three elements, the burden shifts to the Defendants to prove that even if the adverse action was causally related to the protected activity, there were legitimate, non-retaliatory reasons for the adverse action. See Mount Healthy, 429 U.S. at 334. “Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” Drexel, 1998 WL 151798, at *7 (quoting Jones v. N. Carolina Prisoners’ Labor Union, Inc., 433 U.S. 119, 125 (1977)). An inmate retains only those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Id. (citing Pell v. Procunier, 417 U.S. 817, 822 (1974); Cruz v. Beto, 405 U.S. 319, 321-22 (1972) (per curiam)). Thus, prison officials may not retaliate against an inmate for engaging in communication that does not threaten the prison order, the security of other inmates or staff or implicate other legitimate penological interests. Todaro v. Bowman, 872 F.2d 43, 49 (3d Cir. 1989).

Here, Officer Hollis allegedly used excessive force and filed a misconduct report in retaliation for Mr. Wesley’s legal activities and intent to file a grievance against Officer Hollis.

i. The Misconduct Report

There is no genuine issue of fact as to whether Officer Hollis had a legitimate penological interest in filing a misconduct report. Mr. Wesley admits that he used obscenity and made threats against Officer Hollis and his family. (Wesley Dep. 66-67.) He also admits that he may not have heard Officer Hollis order him to back up to the door and, therefore, may have, albeit unwittingly, disobeyed an order. (Id. at 69.) Thus, Officer Hollis had a legitimate, non-retaliatory reason for filing a misconduct report against Mr. Wesley.

ii. The Alleged Use of Excessive Force

In contrast, there *is* a genuine issue of fact as to whether Officer Hollis had a legitimate, non-retaliatory reason for continuing to hold the handcuffs despite the pain it may have caused Mr. Wesley. While there is testimony suggesting that letting go of Mr. Wesley might have endangered him further (Marsh Dep. 122, 149-50, 211-12, 233-37; Hollis Dep. 48-49), there is also testimony suggesting, consistent with a certain amount of common sense, that inmates are motivated to, and generally do, cooperate when their handcuffs are removed, and that leaving Mr. Wesley's cuffs in place until he calmed down would not have been a problem (Marsh Dep. 121, 116, 149, 18; Hollis Dep. 49-50, 29; Drumheller Dep. 56; Johnson Dep. 12).¹³ Moreover, at least one court has held that prison officials may not place inmates in restraints for the purpose of punishment or to inflict pain. See Stewart v. Rhodes, 473 F. Supp. 1185 (D.C. Ohio 1979); see also Davidson v. Flynn, 32 F.3d 27 (2d Cir. 1994) (holding that officials violate the Constitution if they place handcuffs on an inmate too tightly because he has filed lawsuits against them).

Thus, there remains a genuine issue regarding the material fact of whether Officer Hollis had a legitimate, non-retaliatory reason for continuing to hold onto Mr. Wesley's handcuffs while he screamed and yelled, allegedly in pain. Consequently, the Court will deny the defense summary judgment on Mr. Wesley's retaliation claim.

¹³ Officer Hollis admitted that inmates do not frequently resist being uncuffed, testifying that "all of them want [the handcuffs] taken off" because being handcuffed behind the back is uncomfortable. (Hollis Dep. 49-50, 29.) Lieutenant Marsh agreed, stating that "[m]ost inmates won't resist getting the cuffs off. I don't know of any that want to keep the cuffs on." (Marsh Dep. 121, 116.) Most inmates tend to complain about handcuffs. (Drumheller Dep. 56; Johnson Dep. 12.) Indeed, Lieutenant Marsh testified that no officer had ever had a problem removing handcuffs from Mr. Wesley and, in his 26 years of experience, he had never encountered any problem *uncuffing* an inmate. (Marsh Dep. 149, 18.)

2. EIGHTH AMENDMENT CLAIM BASED ON EXCESSIVE FORCE

Mr. Wesley alleges that Officer Hollis's use of excessive force in removing his handcuffs violated the Eighth Amendment, and that Lieutenant Marsh failed to intervene to prevent Officer Hollis from hurting Mr. Wesley.

a. Claims Against Officer Hollis for Use of Excessive Force

Following conviction, the Eighth Amendment "serves as the primary source of substantive protection in cases where an inmate challenges a prison official's use of force as excessive and unjustified." Brooks v. Kyler, 204 F.3d 102, 106 (3d Cir. 2000). The central question in a claim of excessive force is whether the prison official applied force "in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Smith v. Mensinger, 293 F.3d 641, 649 (3d Cir. 2002); see also Brooks, 204 F.3d at 106 (quoting Hudson v. McMillian, 503 U.S. 1, 7 (1992)). To make this determination, courts must consider "(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 the 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 the response." Id. (quoting Whitley v. Albers, 475 U.S. 312, 321 (1986)); Smith, 293 F.3d at 649.

i. The Need for Force

The undisputed facts establish that Mr. Wesley was locked in his cell and handcuffed at the time the incident in question occurred. (Marsh Dep. 226; Hollis Dep. 133.) Thus, as an initial matter, while Mr. Wesley was in restraints it appears that there was no need for force whatsoever. Indeed, it is undisputed that Mr. Wesley fully cooperated when Officer Hollis

removed (or attempted to remove) the first cuff. According to Officer Hollis, Mr. Wesley backed up to the wicket as ordered (Hollis Dep. 126), and Officer Hollis proceeded to remove Mr. Wesley's left cuff without any trouble (*id.* at 129; Johnson Dep. 31-33).¹⁴

The Defendants contend that Officer Hollis had no choice but to maintain his hold on Mr. Wesley's handcuffs once Mr. Wesley began screaming and yelling because releasing him could have further endangered him. (Marsh Dep. 122, 149-50, 211-12; Hollis Dep. 48-49.) In effect, Officer Hollis suggests that his use of force was a necessary reaction to Mr. Wesley's conduct. (Hollis Dep. 120-21; Hollis Witness Statement, Pl. Ex. R.) Yet Mr. Wesley's testimony suggests that Officer Hollis's use of force *preceded and caused* Mr. Wesley to scream and pull away. (Wesley Dep. 63, 65-67.) Moreover, the Defendants concede that it is permissible, albeit undesirable, to let a inmate loose in a locked cell with handcuffs on. (Hollis Dep. 28, 143; Marsh Dep. 122, 149-50, 211-12.) Also weighing against the alleged need for force is the fact that Lieutenant Marsh was able to remove Mr. Wesley's handcuff(s) within a few seconds after intervening. (Hollis Dep. 149; Marsh Dep. 162.) This suggests that a trier of fact could conclude that Mr. Wesley was resisting not the removal of his handcuffs but the pain inflicted by Officer Hollis.

In Brooks, the defendant corrections officers maintained they used only the minimal force necessary to protect their safety and institutional security. Brooks, 204 F.3d at 106. The Court of Appeals noted that these considerations supported the defendants' position, but were controverted by the facts adduced by the plaintiff, who was shackled at the time of the incident,

¹⁴ According to Lieutenant Marsh, however, *both* cuffs were still on Mr. Wesley when Lieutenant Marsh arrived on the scene. (Marsh Dep. 131.)

minimizing the extent of the threat to prison staff members. Id. Here, as in Brooks, Mr. Wesley’s account of the events contradicts that of Officer Hollis. It is undisputed, however, that Mr. Wesley was locked in his cell and handcuffed at time of the alleged use of force. Thus, there is genuine issue of fact as to whether Officer Hollis’s use of force was necessary under the circumstances.

ii. Relationship Between Need and Amount of Force Used

The Court must “assess the degree of force employed in relation to the apparent need for it.” Brooks, 204 F.3d at 107 (citing Hudson v. McMillian, 503 U.S. 1, 9-10 (1992)). Because there is an issue of fact as to whether force was necessary at all, the Court cannot determine, as a matter of law, whether the force applied was proportional to the force needed to achieve a legitimate objective.

iii. Extent of the Injury Inflicted

The Defendants contend that Mr. Wesley’s Eighth Amendment claim fails because his injuries were *de minimis*. However, “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, 293 F.3d at 648.

While the Eighth Amendment does not protect an inmate against an objectively *de minimus* use of force, Smith, 293 F.3d at 648 (citing Hudson, 503 U.S. at 9-10), prison officials who “maliciously and sadistically use force against an inmate violate contemporary standards of decency even if the resulting injuries are not significant.” Id. at 647. Thus, “*de minimus* injuries do not necessarily establish *de minimus* force.” Id. at 649. As previously noted, the pivotal inquiry is “whether force was applied in a good-faith effort to maintain or restore discipline, or

maliciously and sadistically to cause harm.” Id. at 649 (citing Brooks, 204 F.3d at 106). Where the force used is “‘repugnant to the conscience of mankind,’ even a *de minimus* use of force could be constitutionally significant.” Brooks, 204 F.3d at 107 (quoting Hudson, 503 U.S. at 9-10).

In Brooks, the defendants asserted that the absence of medical evidence supporting the alleged violent beating was “conclusive proof” that the force they used was *de minimus* by constitutional standards. Brooks, 204 F.3d at 107. Rejecting this argument and reversing the district court’s grant of summary judgment, the Court of Appeals held that “the absence of objective proof of non-*de minimus* injury does not alone warrant dismissal” because “[r]equiring objective or independent proof of minor or significant injury” would “place protection from injury, instead of protection from wanton force, at the hub of the Eighth Amendment.” Id. at 108.

Similarly, in Smith, the Court of Appeals reversed the district court, which had granted summary judgment primarily because it determined that the plaintiff’s injuries were “so minor that the defendants’ account of the incident [wa]s more credible than Smith’s, and/or that the force used was not of constitutional dimension.” Smith, 293 F.3d at 649. The Court of Appeals held that this determination was “an issue of fact to be resolved by the fact finder based upon the totality of the evidence; it is not an issue of law a court can decide.” Id.

Here, as in Brooks and Smith, the Defendants contend that Mr. Wesley’s alleged injuries, namely, bruises, swelling, abrasions, knots on his head and back, and pain in his hip, are objectively *de minimis* and not constitutionally significant. In support of this contention, the Defendants rely on several cases from this district dismissing claims where the prisoner’s injuries

were deemed to be *de minimus*.¹⁵ These cases, however, were decided before the Court of Appeals for the Third Circuit decided Smith and Brooks, discussed above. Although Smith and Brooks both involved alleged beatings and thus arguably a more severe infringement, the strong, cautionary language in those cases makes clear that the *relatively* minor nature of an injury alone is not grounds for summary judgment.¹⁶ Rather, it is only one feature to be considered by the fact-finder in evaluating the allegations.

The evidence presented to the Court here does not establish sufficiently to support

¹⁵ Acosta v. McGrady, No. 96-2874, 1999 WL 158471, at *8-9 (E.D. Pa. Mar. 22, 1999) (alleged incident where corrections officer pulled sharply on prisoner's arms, which were handcuffed behind his back, and slammed him into the wall for no reason, causing him to suffer swollen hands and headaches for a few days, does not rise to level of Eighth Amendment violation) (citing, *inter alia*, Barber v. Grow, 929 F. Supp. 820 (E.D. Pa. 1996) (pulling chair out from under inmate, causing him to fall and suffer loose teeth, was not Eighth Amendment violation); Colon v. Wert, No. 96-4494, 1997 WL 137172 (E.D. Pa. Mar. 21, 1997) (allegation that guard slammed a cell door into prisoner's chest, thereby aggravating pre-existing back and neck injuries, was *de minimus*); Robinson v. Link, No. 92-4877, 1994 WL 463400 (E.D. Pa. Aug. 25, 1994) (prisoner's allegation that he was handcuffed, dragged along corridor and hit in the back was *de minimus*)). These cases are not necessarily analytically compelling here given that Acosta, Barber, and Colon turned on the lack of evidence of the defendants' culpable state of mind. Similarly, Reyes v. Chinnici, No. 01-2142, 2002 WL 31546515 (3d Cir. Nov. 18, 2002), a non-precedential case cited by the Defendants, is also factually distinct from this case. In Reyes, the court held that punching an RHU inmate in order to avoid being spit on was not excessive force, given the lack of reasonable alternatives and *de minimus* injury to the inmate. Here, Officer Hollis testified that Mr. Wesley was not a threat to him, and both Officer Hollis and Lieutenant Marsh testified that other options existed besides the use of force. (Hollis Dep. 58, 143; Marsh Dep. 122, 149-50, 211-12.)

¹⁶ It is by no means clear that Mr. Wesley's injuries were minor. There is a factual dispute as to this point. The testimony of Mr. Wesley and Mr. Johnson, and the fact that x-rays were eventually ordered and a cane issued to Mr. Wesley suggest that his injuries were not *de minimus*. (Wesley Dep. 84, 95-97, 100-107; Johnson Dep. 35-36.) In contrast, the report and testimony of Nurse Drumheller, and the testimony of Officer Hollis and Lieutenant Marsh suggest that Mr. Wesley's injuries were extremely minor or nonexistent. (See Medical Incident Report, Pl. Ex. V; Medical Records, Pl. Ex. X; Drumheller Dep. 35, 36, 45, 51, 54-55, 57; Hollis Dep. 161-62; Marsh Dep. 173-74.)

summary judgment how much force was actually used by Officer Hollis. Where the defendants' actions are contested, as they are here, the Court cannot determine that the use of force was objectively *de minimus*. Thus, the apparently relatively minor nature of the force used and of Mr. Wesley's resulting injuries is not, alone, grounds for entry of summary judgment.

iv. Extent of the Threat to the Safety of Staff and Inmates

As previously noted, it is undisputed that Mr. Wesley was handcuffed, locked in a cell and in solitary confinement at the time the incident took place. Officer Hollis testified that Mr. Wesley did not present any threat to his safety and that he was not afraid of or intimidated by Mr. Wesley at any time on June 10, 2001. (Hollis Dep. 124-25, 149, 200.) Moreover, Mr. Johnson testified that Officer Hollis was laughing and smiling while Mr. Wesley struggled, suggesting, according to Mr. Wesley, that Officer Hollis was not concerned or threatened. (Johnson Dep. 34.) And because Mr. Wesley was alone and locked in his cell, he did not pose a threat to other inmates. Thus, if Mr. Wesley posed any threat at all, it was only to himself.

While there are always safety issues when guards have contact with inmates, the Court of Appeals for the Third Circuit has noted that the "obvious security concerns inside the close confines of a prison" are "simply one factor that must be considered in determining if a particular application of force is reasonable." Smith, 293 F.3d at 651. Here, the undisputed facts indicate the absence of any security or safety issue, again weighing against summary judgment.

v. Efforts Made to Temper the Severity of the Response

The Defendants point to testimony demonstrating that Officer Hollis attempted to instruct Mr. Wesley to back up to the door, calm down and hold still so he could remove the handcuffs. (Marsh Dep. 131-32; Hollis Dep. 154.) Mr. Wesley does not recall Officer Hollis giving him any

such instructions but concedes that it is possible that he may not have heard. (Wesley Dep. 69.)

In contrast, the testimony of Mr. Wesley and Mr. Johnson suggests that, although Officer Hollis was much larger and stronger than Mr. Wesley, he kneeled or bent down in order to gain more leverage, causing Mr. Wesley excruciating pain. (Wesley Dep. 63, 65-66, 78; Johnson Dep. 30-32.) Moreover, Officer Hollis admits that he did not consider any other options in dealing with the situation besides holding onto the handcuffs. (Hollis Dep. 141, 143.) At his deposition, he testified that, in retrospect, he could have calmed Mr. Wesley down and then removed his handcuffs a few minutes later, a course of action “that’s always a possibility” according to Officer Hollis. (Hollis Dep. 143.) The fact that Lieutenant Marsh easily uncuffed Mr. Wesley (Marsh Dep. 162) also contradicts Officer Hollis’s version of the events.

In Miller v. Vaughn, No. 96-2994, 1996 WL 617667 (E.D. Pa. Oct. 24, 1996), a bench trial, the court found in favor of the inmate where the inmate alleged that the defendant corrections officer used excessive force in attempting to handcuff him. The officer denied striking the plaintiff and asserted that his only goal was to cuff the inmate, which he said he succeeded in doing. Id. at *2. While the officer and the plaintiff were on struggling on the floor, other officers arrived. Another officer testified that it was *he* who cuffed the plaintiff, and a third officer confirmed this. Id. at *4. The Court noted that “[t]he discrepancy in the testimony is significant because . . . C.O. Sutton’s testimony was that his entire enterprise in the shower was to cuff Miller’s unmanacled hand, and nothing more. Since it is clear that C.O. Lewis, and not C.O. Sutton, achieved this task, the natural inquiry is what, then, was C.O. Sutton really doing on the floor of the shower with Miller?” Id. The Court concluded that he was “quite simply, beating him up.” Id.

Here, as in Miller, there is a genuine issue of fact as to whether Officer Hollis “applied force not in a good faith effort to maintain discipline, but maliciously to cause harm” Id. at *5. With so many facts in dispute, it is difficult to answer the very basic and material question of “what happened,” much less whether Officer Hollis attempted to temper his response to Mr. Wesley’s behavior (behavior which, of course, Mr. Wesley contends was a reaction to Officer Hollis’s actions). Indeed, most of the material facts are in dispute. For these reasons, the Court must deny summary judgment on Mr. Wesley’s Eighth Amendment claim against Officer Hollis.

b. Lieutenant Marsh’s Failure to Intervene in a Timely Manner

A corrections officer’s failure to intervene in a beating can be the basis for liability for an Eighth Amendment violation under Section 1983 if the corrections officer had a reasonable opportunity intervene and simply refused to do so. Smith v. Mensinger, 293 F.3d 641, 650 (3d Cir. 2002); Shotts v. Capretti, No. 03-669, 2006 WL 544371, at *3 (W.D. Pa. March 6, 2006) (denying summary judgment given conflicting evidence of whether defendant was in a position to intervene and failed to do so).¹⁷ As the Court of Appeals noted, “[t]he restriction on cruel and unusual punishment contained in the Eighth Amendment reaches non-intervention just as readily as it reaches the more demonstrable brutality of those who unjustifiably and excessively employ fists, boots or clubs.” Smith, 293, F.3d at 651. Thus, “if [Mr. Wesley] can show at trial that an officer attacked him while [Lieutenant Marsh] ignored a realistic opportunity to intervene, he can

¹⁷ Mr. Wesley contends that courts have held that the lesser standard of deliberate indifference, not “malicious and sadistic” intent, applies. (Pl. Mem. 36 (citing Estate of Davis v. Delo, 115 F.3d 1388, 1395 (8th Cir. 1997).) The proper inquiry in the Third Circuit, however, is whether an officer had “a realistic and reasonable opportunity to intervene.” Smith, 293 F.3d at 651.

recover.” Smith, 293 F.3d at 652.¹⁸

In Smith, the defendant corrections officers allegedly beat the plaintiff, an inmate, in the Unit Manager’s Office. Id. at 644. The officer who allegedly failed to intervene made statements in his misconduct report that appeared to be eyewitness observations and the plaintiff testified that the officer was saw the beating, and that the door to the office remained opened throughout the incident. Id. at 652. The Court of Appeals reversed the District Court’s grant of summary judgment, holding that this evidence was sufficient for a fact finder to “conclude that [the officer in question] knew his fellow officers were using excessive force against [the plaintiff], had an opportunity to intervene, but refused to do so.” Id.

The Defendants contend that summary judgment is appropriate because Lieutenant Marsh did in fact intervene and no reasonable jury could find that Lieutenant Marsh should have intervened earlier because Mr. Wesley himself is not sure how long it actually took for Lieutenant Marsh to intervene. (Wesley Dep. 70-71.) It is not clear whether and how long Lieutenant Marsh was present at Mr. Wesley’s cell. (See Hollis Dep. 132, 148-49, 155; Marsh Dep. 129-30; Wesley Dep. 70; Johnson Dep. 27, 29-30.) Although Lieutenant Marsh did in fact intervene and remove Mr. Wesley’s handcuffs, he may not have intervened immediately (Johnson Dep. 31-32; Hollis Dep. 154-55). Thus, the dispositive question of how long

¹⁸ Mr. Wesley emphasizes that, as Officer Hollis’s supervisor, Lieutenant Marsh had the authority to prevent Officer Hollis from assaulting Mr. Wesley. The Court of Appeals for the Third Circuit has held, however, that “[t]he duty to uphold the law does not turn upon an officer’s rank” and “neither rank nor supervisory status is a factor in assessing whether [a corrections officer] had a ‘realistic opportunity to intervene.’” Smith, 293 F.3d at 651-52 (quoting Miller v. Smith, 220 F.3d 491, 495 (7th Cir. 2000)). Nonetheless, the court emphasized that “a fact finder could [] conclude that the conduct of a supervisor who fails to intervene is even more reprehensible and blameworthy than that of a more junior officer.” Id. at 652 n.8.

Lieutenant Marsh observed Officer Hollis's conduct before intervening remains in dispute, and cannot be resolved here. Therefore, because it is analytically possible that a reasonable trier of fact could find that Officer Hollis was using excessive force against Mr. Wesley, and Lieutenant Marsh had a "reasonable and realistic" opportunity to intervene, the Court cannot grant summary judgment in favor of Lieutenant Marsh.

3. QUALIFIED IMMUNITY

The Defendants invoke the doctrine of qualified immunity, which shields government officials performing discretionary functions from liability whenever "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." McGreevy v. Stroup, 413 F.3d 359, 364 (3d Cir. 2005) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); see also Anderson v. Creighton, 483 U.S. 635, 640 (1987). The defendant bears the burden of establishing that he is entitled to qualified immunity. Campbell v. Moore, No. 01-3474, 2004 WL 316081, at *4 (3d Cir. Jan. 14, 2004) (citing Beers-Capitol v. Whetzel, 256 F.3d 120, 142 n.15 (3d Cir. 2001)).

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Blackhawk v. Pennsylvania, 381 F.3d 202, 215 (3d Cir. 2004). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." Brosseau v. Haugen, 543 U.S. 194, 198 (2004). Thus, "[a] court presented with a claim of qualified immunity must examine both the law that was clearly established at the time of the alleged violation and the facts available to the officer at that time, and must then determine, in light of both, whether a reasonable official could have believed his conduct was lawful." Paff v. Kaltenbach, 204 F.3d

425, 431 (3d Cir. 2000). Where qualified immunity is raised as a defense, its availability is “an objective question to be decided by the court as a matter of law.” Carswell v. Borough of Homestead, 381 F.3d 235, 242 (3d Cir. 2004). Indeed, the issue of qualified immunity is separate and distinct from the issue of whether unreasonable force was used. Saucier v. Katz, 533 U.S. 194, 197 (2001).

The threshold inquiry is whether, taken in the light most favorable to the party asserting the injury, the facts alleged show a constitutional violation. Saucier, 533 U.S. at 201; Sherwood v. Muvihill, 113 F.3d 396, 401 (3d Cir. 1997). If the plaintiff cannot show a constitutional violation, the officer is entitled to qualified immunity.

If, however, the plaintiff demonstrates that a constitutional injury occurred, the court must determine whether the constitutional right was “a clearly established one, about which a reasonable person would have known.” McGreevy, 413 F.3d at 364 (quoting Gruenke v. Seip, 225 F.3d 290, 298 (3d Cir. 2000)). “Clearly established” means “some but not precise factual correspondence between relevant precedents and the conduct at issue,” although “officials need not predict the future course of constitutional law.” McLaughlin v. Watson, 271 F.3d 566, 571 (3d Cir. 2001). The “salient question” is whether the law at the time of the incident gives a defendant “fair warning” that the defendant’s conduct was unconstitutional. Hope v. Pelzer, 536 U.S. 730, 741 (2002) (citing United States v. Lanier, 520 U.S. 259 (1997)). “[I]n some cases ‘a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.’” Rivas v. City of Passaic, 365 F.3d 181, 200 (3d Cir. 2004) (quoting Hope, 536 U.S. at 741).

Here, in the particular circumstances of this case at this moment in time, the Court must conclude that Officer Hollis and Lieutenant Marsh are not entitled to qualified immunity. First, and foremost, the alleged facts, taken in the light most favorable to Mr. Wesley, demonstrate a constitutional violation. Second, the rights of prisoners to engage in protected activities without retaliation and to be free from excessive force were clearly established at the time of the incident. See Bey v. Pennsylvania Dept. of Corrections, 98 F. Supp. 2d 650, 663 n.28 (E.D. Pa. 2000).

If Mr. Wesley's version of the facts is true, no reasonable officer in Officer Hollis's position could have believed that, where an inmate was securely locked alone in his cell, it was lawful to cause an inmate's handcuffs to be tightened painfully on his wrists and to slam the inmate into his cell door. It follows that no reasonable officer in Lieutenant Marsh's position, observing Officer Hollis's actions as is alleged, could have believed that it was lawful to let such conduct continue.¹⁹ As discussed above, there is sufficient evidence to raise a genuine issue of fact as to whether Officer Hollis used excessive force in violation of the Eighth Amendment. If he did, he would have known that, under these circumstances, it was unlawful. While an allegation of malice cannot defeat the qualified immunity defense as long as the officer acted in an objectively reasonable manner, Malley v. Briggs, 475 U.S. 335, 341 (1986), there are sufficient facts in the record for a reasonable jury to find that Officer Hollis's conduct was malicious and sadistic. See Whitley v. Albers, 475 U.S. 312, 322 (1986) ("Unless 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 under the standard we have described, the case should not

¹⁹ It should not go unobserved that should the fact-finder determine that Lieutenant Marsh timely intervened, or did so as soon as reasonably and realistically possible, he would not be liable on the underlying Section 1983 claim.

go to the jury.”).

The Court recognizes and embraces the reality that “[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” Whitley, 475 U.S. at 321-322 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)). The duties and dangers incident to law enforcement personnel deserve no less. However, that judicial deference does not “insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.” Id. at 322. Mindful of this deference, the Court nonetheless cannot grant summary judgment of basis of qualified immunity where, as here, the evidence in the record at least minimally suffices to raise a genuine issue of fact as to the nature and purpose of the actions taken by Officer Hollis and of Lieutenant Marsh’s alleged failure to act in a timely manner.

Officer Hollis likewise is not entitled to qualified immunity on Mr. Wesley’s retaliation claim. The evidence in the record is sufficient to support a finding that Mr. Wesley intended to file a lawsuit or a grievance, and/or protested the confiscation of his legal materials. The case law was clear at the time of the incidents in question, as it is now, that these are protected activities. A reasonable person in Officer Hollis’s position would have known that an adverse action in retaliation for those activities would be unlawful. Because it is not clear what was confiscated from Mr. Wesley’s cell, or whether Officer Hollis had a legitimate, non-retaliatory reason for his actions, it cannot now be said as a matter of law that Officer Hollis acted reasonably. These factual questions depend primarily on credibility determinations, which

cannot be properly resolved by the Court at this stage of the proceedings.

4. STATE LAW CLAIMS

Mr. Wesley asserts pendent state law intentional tort claims against Officer Hollis for assault and battery and against both Officer Hollis and Lieutenant Marsh for violating his rights under Article I, Sections 7²⁰ and 13²¹ of Pennsylvania Constitution.

The Defendants contend that all of Mr. Wesley's state law claims are barred under the doctrine of sovereign immunity. The doctrine of sovereign immunity, codified at 42 Pa. C.S.A. § 8522, protects the Commonwealth and Commonwealth parties from suit unless the cause of action falls within one of several statutory exceptions, or the individual's conduct falls outside the scope of his employment. Savage v. Judge, No. 05-2551, 2007 WL 29283, at *5 (E.D. Pa. Jan. 2, 2006) (citing Stackhouse v. Pennsylvania, 892 A.2d 54, 58-59, n.5 (Pa. Commw. Ct. 2006)).

The Pennsylvania Department of Corrections is an agency of the Commonwealth of Pennsylvania. See Waters v. Tennis, No. 04-2497, 2006 WL 2136248, at *2 (M.D. Pa. Jul. 26, 2006). As such, it is governed by Section 8522, which does not provide an exception for willful misconduct. See Kranson v. Valley Crest Nursing Home, 755 F.2d 46, 52 (3d Cir. 1985); Holt v.

²⁰ Article I, Section 7 of the Pennsylvania Constitution provides in relevant part: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and write on any subject, being responsible for the abuse of that liberty." Pa. Const. Art. I, § 7.

²¹ Article I, Section 13 of the Pennsylvania Constitution provides in relevant part that "cruel punishments [shall not be] inflicted." Pa. Const. Art. I, § 13. Courts analyze excessive force claims under Article I, § 13 of the Pennsylvania Constitution in the same way as claims brought under the Eighth Amendment to the United States Constitution. Commonwealth v. Parker, 718 A.2d 1266, 1268 (Pa. Super. 1998).

Northwest Pennsylvania Training P' ship Consortium, Inc., 694 A.2d 1134, 1140 (Pa. Commw. 1997) (“Unlike for local agency employees, willful misconduct does not vitiate a Commonwealth employee’s immunity.”).²²

Mr. Wesley’s state law claims against Officer Hollis and Lieutenant Marsh do not fall within one of the exceptions to sovereign immunity listed in Section 8522. The claims are therefore barred unless Officer Hollis and Lieutenant Marsh were acting outside the scope of their employment during the alleged assault and battery. Mr. Wesley contends that Officer Hollis and Lieutenant Marsh acted outside the scope of their duties, while the Defendants counter that a dispute over the *manner* in which Officer Hollis and Lieutenant Marsh performed their duties does not take their actions out of the scope of employment.

Under Pennsylvania law, an action falls within the scope of employment if it: (1) is the kind that the employee is employed to perform; (2) occurs substantially within the job’s authorized time and space limits; (3) is motivated at least in part by a desire to serve the employer; and (4) if force was used by the employee against another, the use of force is not unexpected by the employer. Savage, 2007 WL 29283, at *5 (citing Restatement (Second) of Agency § 228; Brumfield v. Sanders, 232 F.3d 376, 380 (3d Cir. 2000) (noting that the Pennsylvania Supreme Court has adopted the Restatement’s definition of “scope of employment”); Robus v. Pennsylvania Dep’t of Corrections, No. 04-2175, 2006 WL 2060615, at *8 (E.D. Pa. Jul. 20, 2006)). As noted above, there is no bright line rule drawn at willful misconduct or intentional torts; “[e]ven willful misconduct does not vitiate a Commonwealth

²² The Political Subdivisions Tort Claims Act, 42 Pa. C.S.A. § 8550, by its express terms applies to local agencies, not Commonwealth parties.

employee's immunity if the employee is acting within the scope of his employment”

Cooper v. Beard, No. 06-0171, 2006 WL 3208783, at *16 (E.D. Pa. Nov. 2, 2006) (citing Holt, 694 A.2d at 1140).

Where the alleged intentional tort was unprovoked, unnecessary or unjustified by security concerns or penological goals, courts have ruled that such conduct does not, as a matter of law, fall within the scope of employment. For example, in Robus, the defendant corrections officer allegedly beat the plaintiff and placed him, without justification, in the restricted housing unit. Robus, 2006 WL 2060615, at *3. Concluding that if the defendant acted as alleged, then his conduct fell outside the scope of his employment, the court declined to dismiss the plaintiff's claims against that defendant on sovereign immunity grounds.

Similarly, in Velykis v. Shannon, No. 06-0124, 2006 WL 3098025 (M.D. Pa. Oct. 30, 2006), where a defendant corrections officer allegedly slammed a van door on the plaintiff's head, the court held that the defendant was not entitled to dismissal at the pleading stage on the basis of sovereign immunity. In so concluding, the court noted that “[t]he intentional use of force alleged here is not of a kind and nature [the defendant] was employed to perform, it does not appear to have been intended to serve any purpose of the Department of Corrections, and while the Department would expect that force might be used at some point against an inmate, it would not expect the deliberate and unjustified use of force, apparently totally divorced from any need of the officer to exert control over the prisoner.” Id. at *3-4.

Likewise, in Savage, the defendant allegedly assaulted the plaintiff in order to punish him for agreeing to testify against corrections officers in a different case. Denying in part a motion to dismiss on sovereign immunity grounds, the court concluded that the record failed to establish

that the defendant's alleged retaliatory motive "was in part a desire to serve his employer, the Department of Corrections," and noting that "although [the defendant's] employer might expect that [he] would use force during the course of his employment, it would not necessarily expect the use of excessive force 'divorced from any need of the officer to exert control over the prisoner.'" Savage, 2007 WL 29283, at *5 (citations omitted). See also Johnson v. Knorr, No. 01-3418, 2005 WL 3027401, at *1 (E.D. Pa. Nov. 9, 2005) (holding that the jury must resolve the state parole agent's defense of sovereign immunity where the plaintiff sued him for assault, false arrest and fabrication of evidence).

By contrast, in Cooper, the defendants allegedly asked the plaintiff participate in an internal sting operation against corrupt prison officials and, when he refused, took retaliatory actions, such as placing him in administrative custody and seizing his property. Cooper, 2006 WL 3208783, at *16. The court held that the plaintiff's claims were barred by sovereign immunity because "[a]t all times [the defendants] were acting as DOC and/or Graterford prison officials, thus sovereign immunity applies." Id. Likewise, in Story v. Mechling, 412 F. Supp. 2d 509 (W.D. Pa. 2006), the defendant corrections officer was entitled to sovereign immunity on an assault claim brought by a co-worker because the defendant "was acting within the scope of his employment at the time of the alleged 'assault' and because 'assault' does not fall within any of the nine exceptions to sovereign immunity." Id. at 519.

Mr. Wesley concedes that Officer Hollis and Lieutenant Marsh were at Graterford, on duty and working their regular hours when the incident in question occurred. (Wesley Dep. 164.) If Mr. Wesley's allegations are true, however, Officer Hollis's use of force was unprovoked and unwarranted. As in Savage, Velykis and Robus, such a use of force, "divorced from any need of

the officer to exert control over the prisoner,” is not the type of force expected or permitted by the Department of Corrections. Therefore, Officer Hollis is not entitled to sovereign immunity as a matter of law at this stage of the proceedings on Mr. Wesley’s state law claims.

However, as Officer Hollis’s supervisor, Lieutenant Marsh is in a different position than Officer Hollis. Specifically, Mr. Wesley does not allege that Lieutenant Marsh personally used any force in violation of Pennsylvania Constitution. In the context of sovereign immunity, this distinction is significant because in supervising Officer Hollis, Lieutenant Marsh was clearly acting within the scope of his employment. Whether he adequately or properly supervised Officer Hollis is a separate matter, but for purposes of sovereign immunity analysis it is sufficient that he was doing precisely what he was employed to do, i.e., supervising. Unlike Officer Hollis, who is alleged to have acted maliciously without any legitimate purpose, Lieutenant Marsh is alleged merely to have failed to intervene. Despite having support in the record, this allegation does not bring Lieutenant Marsh’s conduct outside the scope of his employment. Therefore, he is entitled to sovereign immunity on all state law and state constitutional claims.

CONCLUSION

The existence of genuine issues of material fact preclude summary judgment on Mr. Wesley’s Section 1983 retaliation and excessive force claims against Officer Hollis and Lieutenant Marsh. Officer Hollis likewise is not entitled to qualified immunity or protection under sovereign immunity. However, the Court will grant summary judgment in favor of Lieutenant Marsh on all of Mr. Wesley’s state law claims because he is entitled to sovereign immunity. Finally, the Court will also grant summary judgment in favor of Lieutenant Eason on

all claims, which Mr. Wesley does not oppose.

BY THE COURT:

S/Gene E.K. Pratter

GENE E.K. PRATTER

UNITED STATES DISTRICT JUDGE

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

RONALD WESLEY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
NATHANIEL HOLLIS, et al.,	:	
Defendants	:	No. 03-3130

ORDER

AND NOW, this 6th day of June, 2007, upon consideration of the Defendants' Amended Motion for Summary Judgment (Docket No. 50), the Plaintiff's Response thereto (Docket No. 53), the Defendants' Reply (Docket No. 58) and the Plaintiff's Surreply (Docket No. 59), it is hereby ORDERED that the Motion is GRANTED IN PART and DENIED IN PART as follows:

1. Summary judgment is granted in favor of Defendant Kenneth Eason on all claims;
2. Summary judgment is granted in favor of Defendant Kevin Marsh on all state law claims;
3. Summary judgment is denied with respect to Defendant Kevin Marsh on the Section 1983 retaliation and excessive force claims; and
4. Summary judgment is denied with respect to Defendant Nathaniel Hollis on all claims.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE