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

PAUL PERAZA,	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL NO. 3:CV-12-376
	:	
THOMAS R. CAIN, ET AL.,	:	(Judge Conaboy)
	:	
Defendants	:	

MEMORANDUM
Background

Paul Peraza, an inmate presently confined at the United States Penitentiary, Beaumont, Texas initiated this pro se civil rights action. An Amended Complaint was thereafter filed. See Doc. 6.

By Memorandum and Order dated September 17, 2014, Defendants' motion for partial dismissal was granted in part. Dismissal was granted with respect to: (1) the claims against Defendants Kane, Watts, Norwood, Breckton, and Holt;[1] (2) all claims associated with the handling of grievances and the allegations of conspiracy; and (3) Counts Two and Four of the Amended Complaint. The motion to dismiss was denied with respect to the allegations of retaliation. Those claims, along with the unaddressed failure to protect and excessive force allegations, were allowed to proceed.

1. Captain Breckon is not identified by name in the Amended Complaint.

Remaining Defendants are the following officials at Plaintiff's prior place of confinement the Canaan United States Penitentiary, Waymart, Pennsylvania (USP-Canaan): Physician's Assistant (PA) Kenneth Kaiser; Lieutenant Jamie Burning; Lieutenant Brian Sudul; Unit Manager Kyle Lindsay; Case Manager Kylie Bigart; Disciplinary Hearing Officer (DHO) Marc Renda; as well as Correctional Officers (CO) Jeremy Dominick, Ryan Burns, John Schwartz, Michael Moran, Jessie Seana, Jenkens, and Joseph Pellicano.

The Amended Complaint asserts claims based on events which purportedly transpired between May 11, 2011 and July 4, 2011. Plaintiff first states that on May 11, 2011 his cell mate Inmate Burke signed up for outdoor recreation in order to inform prison staff that he could no longer live with Peraza.[2] See Doc. 6, ¶ 28. A few minutes later, Defendants Schwartz, Burning, Dominick, and Moran allegedly brought Burke back to the cell he shared with the Plaintiff. Those officers then asked Plaintiff to submit to handcuffs. After receiving a second command, Peraza eventually agreed and while still handcuffed Burke was placed in the cell.

Peraza admits that after the cell door was closed and his handcuffs were removed first, he struck Burke on the side of his head. See Doc. 252, ¶ 11. Schwartz then directed that Burke be uncuffed. Plaintiff responded by striking his cell mate an additional 3 or 4 more times. Peraza was again handcuffed and

2. Some portions of the Amended Complaint were illegible. However, a declaration provided by Plaintiff (Doc. 252) adds clarity to his allegations.

taken from the cell. It is next asserted that Correctional Officer Schwartz verbally abused Plaintiff and identified him as being a child molester as the inmate was being removed from his cell to the prison's Special Housing Unit (SHU). Peraza acknowledges that he responded to those remarks with an obscenity. See id. at ¶ 50.

The escorting correctional officers allegedly physically and excessively assaulted Peraza after escorting him from his cell to a security camera blind spot. It is alleged that the officers attempted to make it appear that they were responding to resistance from the Plaintiff. This attack purportedly included a sexual battery in that Schwartz ran his hand over the inmate's buttocks and subjected the prisoner to additional verbal sexual harassment. Peraza claims that he lost consciousness and suffered loss of vison in his left eye for approximately five (5) minutes; dizziness; nausea; a sprained left ankle; knee and wrist pain; and a forehead laceration that caused nerve damage.

After the incident, Plaintiff was shackled in leg irons and placed in a nearby holding cell. He was then taken to a medical examination room where his injuries were assessed and initially treated by Defendant PA Kaiser.[3] See id. at ¶ 65. Peraza was later transported to an outside hospital for further treatment of his forehead laceration and closer examination of his ankle and wrists. See id. at ¶ 70. It is alleged that Kaiser refused to report the incident allegedly informing Peraza that the prisoner could personally report any claim to the Captain.

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3. In response to a question, Kaiser allegedly told Plaintiff that the inmate would have to be the one to report the incident.

The Amended Complaint next asserts that one day later, Plaintiff discovered that his newly assigned SHU cell mate, Inmate Rodriguez, had been classified as being a protective custody inmate. In light of that development, Peraza asserts that the prisoners agreed that they should no longer be housed together. However, Defendants Pelicano and Sudul denied their mutual request for a cell change. The Plaintiff then admittedly struck Rodriguez on the side of the head in order to have that prisoner moved from the cell. See id. at ¶ 83.

On or about May 17, 2011, Plaintiff states that he was handcuffed and brought to the Lieutenants' office where he met with a member of the prison's Psychology staff with respect to a sexual assault claim which the inmate filed against Officer Schwartz. Defendants Schwartz and Burning were initially present during this meeting, however, Schwartz was later directed to leave the room. The psychology staff member told Plaintiff that allegations of sexual abuse by staff should be reported to Special Investigative Services (SIS). Thereafter, Plaintiff tiled an internal complaint with SIS via Case Manager Smith which allegedly went unanswered.

On May 21, 2011 Plaintiff had a disciplinary hearing regarding misconduct charges he was issued for the May 11 & 12, 2011 incidents. He was found guilty of the charges and received sanctions which included loss of good time credits.

The Amended Complaint next asserts that during the week of May 23, 2011 Plaintiff and his latest cell mate, Inmate Anderson, were put in an outdoor recreation cage. A Mexican gang member in an adjoining cage had a private conversation with Anderson and subsequently told Plaintiff that Defendants Schwartz and Jenks were

telling prisoners that Peraza was a child molester. On or about June 7, 2011, Defendant Schwartz assigned Inmate Salmoran to be Peraza's new cellmate after Salmoran had been in a fight with his former cellmate. See id. at ¶ 115. When Plaintiff discovered that Salmoran was a protective custody inmate, the prisoners agreed to request a cell change. However, Defendant Schwartz refused Salmoran's request to be moved.

Peraza admits that he proceeded to physically assault Inmate Salmoran in order to obtain the cell change. See id. at ¶¶ 127-132. During a resulting medical assessment, PA Kaiser refused to report the incident although Plaintiff had stated that SHU officers were forcing inmates to fight one another like gladiators. See id. at ¶ 143. Peraza was then left in the handicapped shower area for two hours with his hands handcuffed behind his back.

On July 4, 2011, Correctional Officer Schwartz allegedly placed two inmates in a recreation cage with Plaintiff for the purpose of having those prisoners attack Peraza. The two inmates proceeded to assault Plaintiff based upon their belief that he was a child molester. Peraza suffered lacerations and bruising to the face and neck which required treatment at an outside hospital. Following the incident, Defendant Jenkens/Jenks purportedly planted and then confiscated a homemade weapon from Peraza during a pat down search. See id. at ¶¶ 162-63.

Peraza concludes that he was subjected to excessive use of force and improperly labeled as being a child molester in an effort to place him at risk of assault by other prisoners. The Amended Complaint also asserts that many of the above actions were taken in retaliation for his initiation of administrative

grievances. Plaintiff seeks compensatory and punitive damages as well as injunctive relief, namely, a transfer to a medium security correctional facility.

Presently pending is Remaining Defendants' motion for summary judgment. See Doc. 219. The motion argues that entry of summary judgment is appropriate because: (1) the naming of Defendant Jenkens is improper; (2) Plaintiff failed to exhaust his available administrative remedies regarding any of the claims in his Amended Complaint; (3) his allegations which imply the invalidity of disciplinary findings rendered against Peraza are barred by the favorable termination rule; (4) the undisputed record shows that a viable excessive force claim has not been stated; (5) the record fails to support Peraza's deliberate indifference claims; (6) Plaintiff's allegations do not support actionable claims of retaliation; and (7) Defendants are entitled to qualified immunity.

Discussion

Standard of Review

Summary judgment is proper if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); See also Saldana v. Kmart Corp., 260 F.3d 228, 231-32 (3d Cir. 2001). A factual dispute is "material" if it might affect the outcome of the suit under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "genuine" only if there is a sufficient evidentiary basis that

would allow a reasonable fact-finder to return a verdict for the non-moving party. Id. at 248. The court must resolve all doubts as to the existence of a genuine issue of material fact in favor of the non-moving party. Saldana, 260 F.3d at 232; see also Reeder v. Sybron Transition Corp., 142 F.R.D. 607, 609 (M.D. Pa. 1992). Unsubstantiated arguments made in briefs are not considered evidence of asserted facts. Versarge v. Township of Clinton, 984 F.2d 1359, 1370 (3d Cir. 1993).

Once the moving party has shown that there is an absence of evidence to support the claims of the non-moving party, the non-moving party may not simply sit back and rest on the allegations in its complaint. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Instead, it must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Id. (internal quotations omitted); see also Saldana, 260 F.3d at 232 (citations omitted). Summary judgment should be granted where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." Celotex, 477 U.S. at 322-23. "'Such affirmative evidence – regardless of whether it is direct or circumstantial – must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance.'" Saldana, 260 F.3d at 232 (quoting Williams v. Borough of West Chester, 891 F.2d 458, 460-61 (3d Cir. 1989)).

Defendant Jenkens

The Amended Complaint names Correctional Officer Jenkens as a defendant. See Doc. 6, ¶ 24. Remaining Defendants contend that there no correctional officer named Jenkens or Jenkins was employed at USP-Canaan during the relevant time period. See Doc. 230, p. 8, n. 1. As such they assert that this improperly named defendant should be dismissed.

A review of the record shows that Correctional Officer Shawn Jenks, Sr. previously executed a waiver of service of the summons. See Doc. 30, p. 14. Since Jenks has previously indicated that he is the Defendant named Jenkens in the pro se Amended Complaint this argument will be dismissed as meritless.

Excessive Force

Remaining Defendants maintain that the assertion that Peraza was subjected to excessive force on May 11, 2011 should not proceed because the undisputed record, including videotape footage, shows that the actions of the escorting officers "were necessary to bring Peraza under control." Doc. 230, p. 20.

A correctional officer's use of force in order to constitute cruel and unusual punishment, must involve the "unnecessary and wanton infliction of pain." Whitley v. Albers, 475 U.S. 312, 319 (1986). "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize[s] that conduct prohibited by the Cruel and Unusual Punishment Clause, whether the conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." Id.

In a later ruling, the United States Supreme Court recognized that the use of force may constitute cruel and unusual punishment even if the prisoner does not sustain "significant" injuries. Hudson v. McMillian, 503 U.S. 1, 9 (1992). The core judicial inquiry is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically to cause harm." Fuentes v. Wagner, 206 F.3d 335, 345 (3d Cir.), cert. denied, 531 U.S. 821(2000); Brooks v. Kyler, 204 F.3d 102, 106 (3d Cir. 2000)(even a de minimis use of force, if repugnant to the conscience of mankind, may be constitutionally significant). As explained in Fuentes:

> Resolution of an Eighth Amendment claim therefore 'mandate[s] an inquiry into a prison official's state of mind.' Two considerations define that inquiry. We must first determine if the deprivation was sufficiently serious to fall within the Eighth Amendment's zone of protections. If not, our inquiry is at an end. In other words, we must determine if they were motivated by a desire to inflict unnecessary and wanton pain. 'What is necessary to establish an "unnecessary and wanton infliction of pain. . ." varies according to the nature of the alleged constitutional violation.'However, if the deprivation is sufficiently serious, we must determine if the officials acted with a sufficiently culpable state of mind.

Fuentes, 206 F.3d at 344.

It is undisputed that on May 11, 2011, Peraza physically assaulted his cell mate. Following this incident, Plaintiff permitted himself to be handcuffed and was removed from his cell. The escorting officers were Schwartz, Burning, Dominick, and Moran with Schwatrz being on one side of Peraza and Moran on the other side.

According to the Amended Complaint, Schwartz became verbally abusive, Plaintiff admittedly responded to that officer with an obscenity. See Doc. 6, ¶ 50. Upon reaching a security camera blind spot, Schwartz purportedly pulled on Plaintiff's handcuffs and falsely stated that the inmate was resisting.[4] It is next asserted that Schwartz pushed Peraza forward slamming him to his knees and with the assistance of the other escorting officers eventually to the floor. Plaintiff states that he suffered a laceration when his head hit the floor. See Doc. 252, ¶ 26. Peraza maintains that Defendant Moran then punched him 5 or 6 times and Schwartz ran his hand over his buttocks. In addition, Defendant Dominick allegedly twisted Plaintiff's left foot in a painful manner.

In support of their summary judgment argument, Remaining Defendants have submitted declarations under penalty of perjury by Correctional officers Moran, Dominick, and Schwartz. Although Dominick admits being involved in the incident, the officer denies that he twisted Plaintiff's ankle. Correctional Officer Moran avers that he was involved in the May 11, 2011 escort of Peraza and contends that it was Peraza not Schwartz who became verbally abusive and physically resistant in that he attempted to pull away from Moran. As a result of that conduct, the inmate was taken to the floor. Moran adds that although Peraza attempted to spit blood and kick staff while on the floor, Moran did not punch or kick the inmate. See Doc. 229-4, ¶ 5.

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4. Peraza indicates that correctional officers often use a stop resisting command as a ploy to justify use of force. See at ¶ 53.

A declaration by Senior Officer Specialist Schwartz (Doc. 229-5) similarly admits that he and Moran escorted Plaintiff from his cell on May 11, 2011. Schwartz specifically denies making any statements describing the inmate as being a child molester and indicates that it was Peraza who became verbally and physically aggressive. According to the declaration, Moran and Schwartz along with other officers regained control over the Plaintiff by placing him on the ground and applying leg restraints. Schwartz denies that the Plaintiff was intentionally slammed to the floor and adds that he did not see Moran punch or kick the prisoner. Furthermore, the correctional officer denies touching the inmate in a sexual manner stating that if he touch the prisoner's buttocks during the take down it was neither intentional nor sexual.

A declaration by Lieutenant Burning provides that while being escorted Peraza "spun away and broke the two points of contact from escorting staff." Doc. 229-10 ¶ 5. As a result, correctional staff took the prisoner to the ground and leg restraints were applied. In addition to their declarations Domminick, Buning, Schwartz and Moran have provided copies of written memorandums they prepared following the incident.

Also submitted for consideration is video footage from a fixed USP-Canaan surveillance camera. See Tindell v. Beard, 351 Fed. Appx. 591, 596 (3d Cir. 2009)(consideration of video footage when considering summary judgment argument is appropriate). The video footage lacks audio and is approximately a minute and a half long. It does not show the initiation of the incident but rather begins with a shot of a group of officers forcing the Plaintiff to the floor.

Based upon a review of the video evidence in a light most favorable to the Plaintiff, it cannot be determined that Peraza attempted to spit blood on or kick the escorting officers while on the floor. However, there is also no indication that any of the escorting officers attempted to punch, kick or maliciously twist the ankle of the inmate. Rather, the admittedly limited video footage supports the contention that Plaintiff was forced to the floor by a group of officers with other non-participating officers present in the same vicinity. It also appears that the Plaintiff and escorting officers first brushed against a wall before going to the ground. For most of the video Plaintiff's body is covered by the bodies of the correctional officers. After being released, Peraza was clearly able to walk from the area on his own undermining any claim of a serious leg injury. There is also indication that he was nauseous. A separate videotaped medical assessment clearly shows that Peraza suffered a facial laceration and recorded statements by the examining medical staff person add that the prisoner also incurred bruising of his knees and hand and perhaps ankle.

The videotape does not show that the Plaintiff was punched or kicked in the manner alleged in the Amended Complaint. Rather, it only shows being forced to the ground for a brief period (approximately 1 minute). There is no evidence that he was intentionally struck by any of the involved officers. Unlike the scenario in Smith v. Price, 610 Fed. Appx. 113 (3d Cir. 2015) there is no evidence that Plaintiff's face is being forcefully pushed to the ground or does it depict any upper body movements by the officers which could be deemed punches.

However, given the belated starting point of the video, there are still issues of disputed material facts as to whether it was necessary for the Plaintiff to be taken to the ground. Thus, the record does not blatantly contradict Peraza's allegation that there was no need to exercise force as contemplated by Smith. Although the video evidence does not substantiate Peraza's version of the amount of force used against him, based upon an application of the standards announced by the Court of Appeals in Smith, this Court still cannot find that Remaining Defendants are entitled to entry of summary judgment with respect to this argument.

In conclusion, there are still issues of material facts as to whether the decision to take the Plaintiff to the ground was a good faith effort to bring him under control or a malicious or sadistic attempt to inflict harm by the escorting correctional officers which cannot be resolved by viewing the videotape. Since there are issues of genuine material fact, Remaining Defendants are not entitled to entry of summary judgment with respect to this argument.

Administrative Exhaustion

Remaining Defendants next contend that Peraza failed to properly exhaust his administrative remedies with respect to any claim asserted in the Amended Complaint. See Doc. 230, p. 12. Specifically, they state that although Plaintiff filed two grievances regarding alleged staff misconduct the denials of those grievances (nos. 664227 & 664228) were not administratively appealed in a timely manner to the Bureau of Prisons (BOP) Regional Office. Plaintiff counters that Defendant Unit Manager Lindsay

frustrated his attempts to pursue a Regional Office appeal of a grievance pertaining to the July 4, 2011 incident.

Section 1997e(a) of title 42 U.S.C. provides:

> No 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 are exhausted.

Section 1997e(a) requires administrative exhaustion "irrespective of the forms of relief sought and offered through administrative avenues." Porter v. Nussle, 122 S.Ct. 983, 992 (2002); Booth v. Churner, 532 U.S. 731, 741 n. 6 (2001). Claims for monetary relief are not excused from the exhaustion requirement. Nyhuis v. Reno, 204 F.3d 65, 74 (3d Cir. 2000). Dismissal of an inmate's claim is appropriate when a prisoner has failed to exhaust his available administrative remedies before bringing a civil rights action. Ahmed v. Sromovski, 103 F. Supp. 2d 838, 843 (E.D. Pa. 2000). "[E]xhaustion must occur prior to filing suit, not while the suit is pending." Tribe v. Harvey, 248 F.3d 1152, 2000 WL 167468, *2 (6th Cir. 2000)(citing Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999)); Oriakhi v. United States, 165 Fed. Appx. 991, 993 (3d Cir. 2006).

The United States Supreme Court in Jones v. Bock, 127 S.Ct. 910, 923 (2007), stated that the primary purpose of the exhaustion requirement is to allow "a prison to address complaints about the program it administers before being subjected to suit, reducing litigation to the extent complaints are satisfactorily resolved, and improving litigation that does occur by leading to the

preparation of a useful record." Id. The administrative exhaustion mandate also implies a procedural default component. Spruill v. Gillis 372 F.3d 218, 222 (3d Cir. 2004).

As explained by the Third Circuit Court of Appeals, a procedural default rule "prevents an end-run around the exhaustion requirement." Id. at 230. It also ensures "prisoner compliance with the specific requirements of the grievance system" and encourages inmates to pursue their administrative grievances "to the fullest." Id. Similarly, the Supreme Court has observed that proper exhaustion of available administrative remedies is mandatory, meaning that prisoners must comply with the grievance system's procedural rules, including time limitations. Woodford v. Ngo, 548 U.S. 81 (2006).

The BOP has a well established three (3) step Administrative Remedy Program whereby a federal prisoner may seek review of any aspect of his imprisonment. See 28 C.F.R. §§ 542.10-542.19. After attempting to informally resolve the issue, a BOP inmate can initiate the first step of the grievance process by submitting "a formal written Administrative Remedy Request, on the appropriate form (BP-9)," within twenty (20) calendar days "following the date on which the basis for the Request occurred." See 28 C.F.R. § 542.14(a). The Warden has twenty (20) calendar days from the date the Request or Appeal is filed in which to respond." See 28 C.F.R. § 542.18. If not satisfied with the Warden's response, an inmate may appeal (step two) on the appropriate form (BP-10) to the Regional Director within twenty (20) calendar days of the date the Warden signed the response. See 28 C.F.R. § 542.15. Finally, if the inmate is dissatisfied with the Regional Director's response,

that decision may then be appealed (step three) on the appropriate form (BP-11) to the General Counsel within thirty (30) calendar days from the date the Regional Director signed the response. Id. Additionally, "[i]f the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level." Id.

The Court of Appeals for the Third Circuit has recognized that "[t]here is no futility exception" to the exhaustion requirement. Brown v. Croak, 312 F.3d 109, 112 (3d cir. 2002) (citing Nyhuis, 204 F.3d at 75. A more recent decision by the Third Circuit Court of Appeals reiterated its no futility exception by rejecting an inmate's argument that exhaustion should be excused because prisoner grievances were regularly rejected. Hill v. Smith, 186 Fed. Appx. 271, 274 (3d Cir. 2006).

An inmate is not required to specifically plead or demonstrate exhaustion in his or her complaint. See Jones v. Bock, 549 U.S. 199, 216 (2007); see also Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002)(a prisoner does not have to allege in his complaint that he has exhausted administrative remedies). Rather, pursuant to the standards announced in Williams v. Runyon, 130 F.3d 568, 573 (3d Cir. 1997), it is the burden of a defendant asserting the defense of non-exhaustion to plead and prove it.[5] Consequently, any failure by Plaintiff to allege or establish compliance with the exhaustion requirement is not by itself a sufficient basis for

5. In Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003), the United States Court of Appeals for the Third Circuit similarly stated that "[f]ailure to exhaust administrative remedies is an affirmative defense for the defendant to plead."

entry of dismissal under the criteria established in Jones and Williams.

Remaining Defendants point out that Plaintiff successfully filed and administratively exhausted multiple grievances while in federal custody. Moreover, even if Defendant Lindsay did prevent the initiation of a grievance regarding the July 4, 2011 incident, Plaintiff has still not provided any explanation as to why grievances were not initiated for the incidents of May 11-12, 2011 or June 7, 2011. See Doc. 230, p. 14.

In support of their non-exhaustion argument, a declaration under penalty of perjury by BOP Regional Office Legal Assistant Donna Broome has been submitted. See Doc. 229-2. Broome states that based upon her review of the BOP's computerized index of administrative remedy requests, Peraza "has not exhausted his available Administrative Remedies with respect to any allegation raised in the Amended Complaint." Id. at ¶ 6. Broome notes that while incarcerated Plaintiff filed or attempted to file 80 administrative grievances, 64 of which were rejected for technical reasons, such as being untimely. Also submitted are copies of Plaintiff's relevant BOP administrative remedy records.

The Amended Complaint alleges that Plaintiff submitted a sensitive grievance regarding the July 4, 2011 incident to Unit Manager Lindsay. See Doc. 6, ¶ 182. It is alleged that Lindsay did not process or forward that grievance. In his opposing brief Peraza contends that he allegedly gave the sensitive grievance to

Lindsey between July 11-23, 2011 and it included claims pertaining May 11, 2011; May 12, 20 11; or June 7, 2011 incidents.[6]

Based on a review of the Amended Complaint, Plaintiff's administrative remedy records and Broome's declaration, as well as recognizing Plaintiff's established familiarity with the BOP administrative remedy procedures, this Court agrees that the undisputed record shows no indication that Peraza ever properly filed and exhausted grievances regarding the May 11, 2011; May 12, 20 11; or June 7, 2011 incidents. It is apparent that Plaintiff filed grievances on June 16, 2011 including one regarding the May 11, 2011 incident(Doc. 251, pp. 9, 25). An appeal of the grievance regarding the May 11 incident was rejected as being untimely by the Regional Office and General Counsel's Office (Id. at p. 42 & 46).

It is specifically noted that the record which includes voluminous documentary filings by the parties at best shows that Plaintiff pursued an administrative appeal of a grievance pertaining to the May 11, 2011 allegations which was properly rejected without a merits review by the BOP. Based upon a review of the record, it is the conclusion of this Court that Remaining Defendants have satisfied their burden of establishing non-exhaustion with respect the allegations relating to the May 11, 2011; May 12, 2011; or June 7, 2011 events three, the request by Remaining Defendants for entry of summary judgment on the basis of failure to exhaust administrative remedies will be granted with

6. Plaintiff waited until July 11, 2011 to initiate grievances concerning the May 11, 2011; May 12, 20111; or June 7, 2011 events any such alleged initial filing would be untimely under the BOP's well established administrative procedures.

respect to Plaintiff's claims relating to May 11, 2011; May 12, 2011; or June 7, 2011.

With respect to the July 4, 2011 allegations, Plaintiff generally contends that Defendant Lindsey threw away a sensitive grievance addressed to the BOP Regional Office. This bald assertion lacks credibility given that Plaintiff first claimed that the allegedly discarded grievance concerned only the July 4, 2011 based allegations but later indicated that the grievance addressed all of the claims asserted in his pending action. Adding to the confusion, are separate documents showing that Plaintiff had already filed a grievance regarding the May 11, 2011 events and the inmate's failure to offer an explanation as to why he waited a substantial amount of time before initiating a further inquiry as to the status of the purportedly discarded grievance. In conclusion, Plaintiff has not presented any credible facts showing that he should be excused from compliance with the exhaustion requirement with respect to his July 4, 2011 based claims. The Court finds that Remaining Defendants have fulfilled their burden of establishing that none of Peraza's pending contentions were properly exhausted prior to the filing of this action.

Favorable Termination

Remaining Defendants' next argument contends that Peraza's claims are barred by the favorable termination rule. See Doc. 230, p. 14. On May 11, 2011, Plaintiff was issued a misconduct asserting that he attempted to assault correctional officers while being escorted from his cell after the assault on Inmate Burke. He was found guilty of the charge and received sanctions which included a loss of good conduct time.

On July 4, 2011, Plaintiff was issued a misconduct charging with possession of a homemade weapon. He was also found guilty of that charge following a disciplinary proceeding and received in part a sanction of a loss of good conduct time.

Remaining Defendants argue that until the results of those two disciplinary proceedings have been invalidated or overturned via a grant of federal habeas corpus relief, his claims for monetary damages with respect to his allegations relating to those incidents are barred under Heck v. Humphrey, 512 U.S. 477 (1994).

Inmates challenging the duration of their confinement or seeking earlier or speedier release must assert such claims in a properly filed habeas corpus petition. Preiser v. Rodriguez, 411 U.S. 475 (1975). The United States Supreme Court in Edwards v. Balisok, 520 U.S. 641, 646 (1997), concluded that a civil rights claim for declaratory relief "based on allegations ... that necessarily imply the invalidity of the punishment imposed, is not cognizable" in a civil rights action. Id. at 646.

In Heck, the Supreme Court ruled that a cause of action for damages does not accrue "for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid", until the Plaintiff proves that the "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Id. at 486-87.

This Court agrees that Plaintiff's claims that he was subjected to an excessive use of force on May 11, 2011 and that a

weapon was planted on him by a correctional officer on July 4, 2011 which led to the filing of two institutional disciplinary charges and resulted in a loss of good time credits clearly attack the length of his federal sentence.

The claims directly related to the alleged May 11, 2011 use of excessive force and the alleged July 4, 2011 planting of a weapon of Peraza, if proven, would undermine the validity of the two disciplinary proceedings. Under Heck those pending claims must be initially raised via properly filed habeas corpus petitions. Consequently, those pending claims are clearly premature because Peraza cannot maintain a cause of action for damages until the related misconduct charges have been rendered invalid via federal habeas corpus proceedings. In accordance with the mandates of Heck, entry of summary judgment in favor of the Remaining Defendants is also appropriate with respect to the May 11, 2011 allegations of excessive force and the July 4, 2011 claim that Peraza was improperly charged with possession of a planted weapon.

Failure to Protect

Plaintiff contends that Remaining Defendants failed to protect his safety in that they: (1) failed to prevent and/or report the use of excessive force and the labeling of Peraza as being a child molester on May 11, 2011; (2) assigning Plaintiff cell mates when they knew he would fight with those inmates; (3) failure to allow Plaintiff to report the July 4, 2011 event; (5) spreading rumors that Peraza was a child molester and placing him in a recreation cage with prisoners who they knew would carry out an assault.

Prison officials violate an inmate's right to be free from cruel and unusual punishment when, through intentional conduct or deliberate indifference, they subject the inmate to violence at the hands of another prisoner. Young v. Quinlan, 960 F.2d 351, 361 (3d Cir. 1992); Riley v. Jeffes, 777 F.2d 143, 147 (3d Cir. 1985). A plaintiff must prove more than that he had a fight with another inmate, see Beard v. Lockhart, 716 F.2d 544, 545 (8th Cir. 1983), and mere negligent conduct that leads to serious injury of a prisoner by a prisoner does not expose a prison official to liability under § 1983. Davidson v. Cannon, 474 U.S. 344, 347-48 (1986). Therefore, when one inmate assaults another, the victim's custodian is exposed to civil rights liability only when "he knows or should have known of a sufficiently serious danger to [the] inmate." Young, 960 F.2d at 361; see also Martin v. White, 742 F.2d 469, 474 (8th Cir. 1984); Mosby v. Mabry, 697 F.2d 213, 215 (8th Cir. 1982).

The Court of Appeals "stress[ed], however, that in constitutional context 'should have known' is a phrase of art with a meaning distinct from its usual meaning in the context of the law of torts." Young, 960 F.2d at 361. As our Court of Appeals explained the phrase, "does not refer to a failure to note a risk that would be perceived with the use of ordinary prudence." Colburn v. Upper Darby Township, 946 F.2d 1017, 1025 (3d Cir. 1991). Instead, "[i]t connotes something more than a negligent failure to appreciate the risk . . ., though something less than subjective appreciation of that risk." Id. Moreover, "the risk of . . . injury must be not only great, but also sufficiently apparent that a lay custodian's failure to appreciate it evidences an

absence of any concern for the welfare of his or her charges." Id. Consequently, liability only attaches when there is aas there are no facts alleged showing that Lindsey was aware of the existenmce of a pervasive risk of harm to Peraza. "pervasive risk of harm to inmates from other prisoners,[7] . . . and that the prison officials have displayed 'deliberate indifference' to the danger." Riley, 777 F.2d at 147.

Plaintiff acknowledges that he assaulted three prisoners who were assigned to be cell mates. The Amended Complaint asserts that he attacked those prisoners not because they posed a direct threat to his safety but rather because they were designated as being protective custody prisoners. Given Plaintiff's admissions, there is no basis for a claim that he was assigned cell mates who posed a direct threat to his safety.

Bigart, Renda, and Kaiser

Plaintiff contends that Defendants Case Manager Bigart, DHO Renda and PA Kaiser failed to protect Peraza's safety by not reporting staff misconduct. There is no assertion by Peraza that any of those officials actually witnessed the alleged events of May 11-12, 2011, June 7, 2011 and July 4, 2011 or personally overheard any prison staff member make remarks indicating that Plaintiff was a child molester. As such, those three officials were clearly under no obligation to report conduct they did not actually witness. Moreover, Plaintiff readily admits that he was advised

7. The Court of Appeals for the Third Circuit has noted that "prison officials should, at a minimum, investigate each allegation of violence or threat of violence." Young, 960 F.2d at 363 n.23.

that he needed to personally report any violations of his rights to the appropriate prison officials.

Pursuant to the well established standards listed above a viable claim of failure to protect has not been raised against those three officials simply because they did not report conduct which they did not personally see and or accept the veracity of Plaintiff's allegations over contrary statements offered by the involved correctional staff members.

Sena

This Court agrees that there is no basis for a failure to protect claim against Defendant Sena because she was the camera operator who videotaped the medical assessment and staff debriefing following the May 11, 2011 incident. However, a review of the Amended Complaint (Doc 6 ¶ 67) shows that Plaintiff contends that Sena was present during the May 11, 2016 and failed to intervene. The videotape of the event does show the presence of a female officer who was present but not actively involved in the restraint of Peraza. As such, Plaintiff's failure to intervene claim against Sena is not subject to dismissal as being factually insufficient. However, it is not apparent from the videotape that Sena witnessed any conduct which posed an obivous threat to Plaintiff's safety and required her intervention.

Lindsay

The Amended Complaint maintains that Unit Manager Lindsay threw away a sensitive grievance which Plaintiff attempted to file with the BOP's Regional Office (Doc. 6 at ¶ 182) following the July 4, 2011 incident. This Court previously concluded that the claim

that Lindsey failed to protect Plaintiff from a known safety risk could proceed.

Unlike some of Plaintiff's other allegations there is no contention that Lindsay deliberately placed the prisoner in harm's way. Based upon an application of the above standards the failure to protect claim against Lindsay is insufficient since there are no factual allegations showing that Lindsay was aware of the existence a pervasive risk of harm to the Plaintiff and that the Unit Manager's alleged discarding of a grievance constituted deliberate indifference to that risk. This conclusion is bolstered by the fact that prison officials did investigate Plaintiff's contentions that prison staff were spreading false child molester rumors about him.

July 4, 2011

It is asserted that the some Remaining Defendants told Mexican gang members that Plaintiff was a child molester. Thereafter, on July 4, 2011 Plaintiff was intentionally placed in a recreation cage with two inmate4s immediately assaulted him.

Plaintiff voluntarily entered the recreation cage on July 4, 2011. There are no facts alleged indicating that the two inmates who assaulted Peraza had previously been determined to pose a threat to the Plaintiff or that a pnding threat was obivious. Third, a review of the videotape evidence shows that the prisoners who assaulted Peraza were not of Mexican descent. Finally, Plaintiff has clearly admitted that prior to that date he had assaulted three other prisoners.

A supporting declaration by Moran states that when he arrived at the July 4, 2011 scene Plaintiff and already been placed

in the recreation cage and the altercation had already started. See Doc. 229-4, ¶ 7. Defendant Schwartz's declaration denies that the officer told either of the two inmate assailants or any other prisoner that Peraza was a child molester. See Doc. 229-5, ¶ 8.

Based upon an application of the above well settled failure to protect standards to the factual evidence presented by the parties, a viable civil rights claim has not been stated. There are simply no facts showing that the involved correctional staff knew or should have known that the inmates in the recreation cage posed a threat to Plaintiff's safety. There are also no facts alleged which could support a claim that any of the Remaining Defendants told those two assailants that Plaintiff was a child molester on or before the July 4, 2011 incident. This determination is bolstered by the undisputed fact that Plaintiff did not even hesitate before entering the recreation cage. Summary judgment will be granted with the failure to protect claims stemming from the July 4, 2011 incident.

Cell Assignments

Plaintiff's final failure to protect allegation claims that prison officials intentionally assigned him cell mates because they knew that he would assault those prisoners. Peraza repeatedly admits that he assaulted three prisoners assigned to be his cell mates because those prisoners were designated as protective custody prisoners.

There is no assertion by Peraza that he had any pre-existing animosity towards those inmates and he acknowledges that he was not provoked by those prisoners in any way. Likewise, Plaintiff provides no reason as to why he should not have been assigned

protective custody inmates other then his own personal feelings.[8] It is also noted that Plaintiff was confined in the prison's SHU which is used to house inmates who require greater supervision. Given those undisputed circumstances, entry of summary judgment is appropriate.

Retaliation

Plaintiff states that Defendants Schwartz and Jenks retaliated against the Plaintiff or pursuing administrative relief with respect to the May 11, 2011 incident. Specifically, it is alleged that those two Remaining Defendants spread false rumors that the inmate was a child molester which resulted in the July 4, 2011 assault. Other Remaining Defendants also allegedly retaliated against him by assigning him a cell mates they knew the Plaintiff would fight with.

Remaining Defendants' final argument asserts that Plaintiff's claim that Schwartz and Jenks retaliated against him for filing a grievance by spreading false rumors that the inmate was a child molester is insufficient because it is "based on pure conjecture." Doc. 230, p. 33. They also argue the retaliation claim against Sudul and Schwartz because the housing assignment decisions would have been made regardless of any action taken by Plaintiff in response to the May 11, 2011 incident.

To establish a Section 1983 retaliation claim, a plaintiff bears the burden of satisfying three (3) elements. First, a plaintiff must prove that he was engaged in a constitutionally

8. As discussed below, Remaining Defendants assert that none of the three assigned cell mates were verified protective custody prisoners.

protected activity. Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001). Second, a prisoner must demonstrate that he "suffered some 'adverse action' at the hands of prison officials." (Id.)(quoting Allah v. Seiverling, 229 F.3d 220, 225 (3d Cir. 2000)). This requirement is satisfied by showing adverse action "sufficient 'to deter a person of ordinary firmness' from exercising his First Amendment rights." (Id.)(quoting Suppon v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000)). Third, a prisoner must prove that "his constitutionally protected conduct was 'a substantial or motivating factor' in the decision to discipline him." Rauser, 241 F.3d at 333-34(quoting Mount Health Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)). The mere fact that an adverse action occurs after a complaint or grievance is filed is relevant, but not dispositive, for the purpose of establishing a causal link between the two events.[9] See Lape v. Pennsylvania, 157 Fed. App'x. 491, 498 (3d Cir. 2005).

Once Plaintiff has made a prima facie case, the burden shifts to the Defendants to prove by a preponderance of the evidence that they "would have made the same decision absent the protected conduct for reasons reasonably related to penological interest." Carter v. McGrady, 292 F.3d 152, 158 (3d. Cir. 2002)(internal quotation and citation omitted). When analyzing a retaliation claim, it must be recognized that the task of prison administrators and staff is difficult, and the decisions of prison

9. Only where the facts of a particular case are "unusually suggestive" of a retaliatory motive will temporal proximity, standing alone, support an inference of causation. Krouse v. American Sterlizer Co., 126 F.3d 494, 503 (3d Cir. 1997).

officials require deference, particularly where prison security is concerned. Rauser, 241 F.3d at 334.

The Amended Complaint clearly alleges that Plaintiff accused multiple officers of physically assaulting him and Schwartz of sexual assault on May 11, 2011. Thereafter, Plaintiff asserts that as a result of raising that complaint retaliatory actions were undertaken against him by the Remaining Defendants. The submission of grievances is a constitutionally protected conduct. See Mitchell v. Horn, 318 F.3d 523, 530 (3d Cir. 2003). Remaining Defendants do not dispute and this Court will accept that the first prong of Rauser, i.e., that the Plaintiff be engaged in a constitutionally protected activity, has been satisfied.

The second prong of Rauser adverse action requires that Peraza allege that he suffered adverse action sufficient to deter a person of ordinary firmness from exercising his First Amendment rights. Third, he must show that his pursuit of grievances was a substantial or motivating factor behind the alleged abuse by correctional staff as required under Rauser.

A supporting declaration (Doc. 229-230 under penalty of perjury by Lieutenant Sudul who states that during the relevant time period Plaintiff was housed in the SHU. Sudul acknowledges that cell assignments are made by the SHU Lieutenant and that SHU inmates are double celled and that inmates who are known risks to each other are not celled together. See id. at ¶ 10.

Sudul adds that at USP-Canaan during 2011, inmates who were verified protective custody inmates would not be assigned a cell mate who was not a verified protective custody prisoner. See id. During the relevant time period Peraza was not a verified

protective custody inmate and he was not assigned a verified protective custody inmate as his SHU cell mate on May 12, 2011 and June 7, 2011. Moreover, the cell mates assigned to Peraza on those dates had not been listed as prisoners whom needed to be kept separated from the Plaintiff..

Based upon a review of the undisputed record, there are simply no facts set forth by Peraza which could arguably support a claim under Rauser that any of the Remaining Defendants intentionally subjected him to a retaliatory assignment of inappropriate cell mates or intentionally placed him in a recreation cage where he would be assaulted as a consequence for pursuing a constitutionally protected activity. Remaining Defendants' request for entry of summary judgment with respect to the assertion of retaliation will be granted.

Conclusion

Pursuant to the above discussion, Plaintiff failed to exhaust his available administrative remedies with respect to any of his pending claims and he has not adequately demonstrated a reason to be excused from requirement. Second, the favorable termination rule bars consideration of any claims related to the issuance of misconduct charges on May 11, 2011 and July 4, 2011. Third, based on the Remaining Defendants' factual submissions Plaintiff has not alleged viable claims of failure to protect and

retaliation. Remaining Defendants' motion for summary judgment will be granted. An appropriate Order will enter.[10]

S/Richard P. Conaboy
Richard P. Conaboy
United States District Judge

DATED: March 13, 2017

10. Based upon the Court's determination herein a discussion as to the merits of the qualified immunity argument is not warranted.