

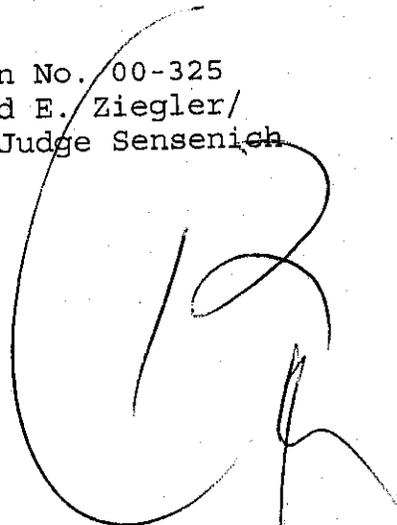
IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DEMETRIUS BAILEY, )  
Plaintiff )

vs. )

CO I MARANO; CO I MEGA; )  
JOHNSON; CAPT. FORD; LT. BURNS; )  
BEN ANSELL; CO I WORTSELL; )  
CAPT. MUCCINO; M.J. MATTHEWS; )  
MR. WARMAN; CONNER BLAINE; )  
ROBERT BITNER; DR. KELLY; )  
SUE TURNER; T.D. JACKSON; )  
MR. STOWITZKY; MR. ROSSI; )  
MR. DITTSWORTH; MR. HEWITT; )  
LT. TUSTIN; MR. STEWART; CO )  
I ABEREGG; MAJ. HASSETT; )  
LT. FORTE; MR. McCRAE; MR. )  
SPARBANIE; LT. GRAINEY; CO I )  
VENOM; CAPT. LANTZ; MR. )  
SEIVERLING; CO I KOVALCHUK, )  
Defendants )

Civil Action No. 00-325  
Judge Donald E. Ziegler/  
Magistrate Judge Sensenich



MEMORANDUM ORDER

Plaintiff's complaint was received by the Clerk of Court on February 18, 2000, and was referred to United States Magistrate Judge Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on November 2, 2000, recommended that Plaintiff's Complaint be dismissed in accordance with 28 U.S.C. § 1915(e)(2)(B)(ii) and/or 28 U.S.C. § 1915A for failure to state a claim upon which relief can be granted under 42 U.S.C. § 1983 and that his Motion for a

Temporary Restraining Order and Preliminary Injunction be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on plaintiff at SCI Greene. Plaintiff filed objections to the report and recommendation on November 7, 2000. Plaintiff has submitted an amended complaint, a motion for court order to use law library two times a week, a motion for appointment of counsel and a letter to this court requesting an order to make service of the complaint. The amended complaint suffers from the same deficiencies as the original complaint and therefore all of these motions will be denied. After de novo review of the pleadings and documents, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 22<sup>nd</sup> day of Nov., 2000;

IT IS HEREBY ORDERED that Plaintiff's Complaint is dismissed in accordance with the Prison Litigation Reform Act, 28 U.S.C. § 1915(e)(2)(B)(ii) and/or 28 U.S.C. § 1915A for failure to state a claim upon which relief can be granted under 42 U.S.C. § 1983;

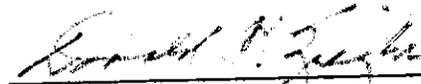
IT IS FURTHER ORDERED that his Motion for a Temporary Restraining Order and Preliminary Injunction is denied;

IT IS FURTHER ORDERED that plaintiff's motion for court order to use law library two times a week is denied;

IT IS FURTHER ORDERED that plaintiff's motion for appointment of counsel is denied;

IT IS FURTHER ORDERED that plaintiff's letter to the court dated October 24, 2000 asking to have the complaint served is denied.

The report and recommendation of Magistrate Judge Sensenich, dated November 1, 2000, is adopted as the opinion of the court.



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Donald E. Ziegler  
Chief United States District Judge

cc: Ila Jeanne Sensenich  
U.S. Magistrate Judge

Demetrius Bailey, CP-7819  
S.C.I. Greene  
175 Progress Drive  
Waynesburg, PA 15370



and conducting disciplinary proceedings against him, placing him in administrative custody, subjecting him to weekly urinalysis testing and instituting false criminal charges against him.

**A. Standard of Review**

In the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996), Congress adopted major changes affecting civil rights actions brought by prisoners in an effort to curb the increasing number of frivolous and harassing law suits brought by persons in custody. The authority granted to federal courts for *sua sponte* screening and dismissal of prisoner claims in that Act is applicable to this case.

One of the new statutory provisions is entitled "Screening" and requires the court to review complaints filed by prisoners seeking redress from a governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). If the complaint is "frivolous, malicious, or fails to state a claim upon which relief can be granted," or "seeks monetary relief from a defendant who is immune from such relief," the new screening provision requires the court to dismiss the complaint. See 28 U.S.C. § 1915A(b).

In addition, Congress significantly amended Title 28 of the United States Code, section 1915, which establishes the criteria for allowing an action to proceed in forma pauperis ("IFP"),

i.e., without prepayment of costs. Section 1915(e) (as amended) requires the federal courts to review complaints filed by persons that are proceeding in forma pauperis and to dismiss, at any time, any action that is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B).

Plaintiff is considered a "prisoner" as that term is defined under the PLRA<sup>1</sup> and he is seeking redress from officers or employees of a governmental entity. In addition, Plaintiff has been granted approval to proceed in forma pauperis in this action (Doc. # 2). Thus his allegations must be reviewed in accordance with 28 U.S.C. §§ 1915A & 1915(e). In reviewing complaints under 28 U.S.C. §§ 1915A & 1915(e), a federal court applies the same standard applied to motions to dismiss under Federal Rule of Civil Procedure 12(b)(6).<sup>2</sup> Dismissal is proper under Rule 12(b)(6) if, as a matter of law, it is clear that no relief could be granted under any set of facts that could be proved consistent with the

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1. Sections 1915 and 1915A, as amended, define the term "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." See 28 U.S.C. §§ 1915(h); 1915A(c).

2. See, e.g., Anvanwutaku v. Moore, 151 F.3d 1053 (D.C. Cir. 1998); Mitchell v. Farcass, 112 F.3d 1483, 1484 (11th Cir. 1997); Powell v. Hoover, 956 F. Supp. 564, 568 (M.D. Pa. 1997) (applying Rule 12(b)(6) standard to claim dismissed under 28 U.S.C. § 1915(e)(2)(B)(ii)); Tucker v. Angelone, 954 F. Supp. 134 (E.D. Va.), *aff'd*, 116 F.3d 473 (Table) (4th Cir. 1997).

allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41 (1957). Notwithstanding, a plaintiff must allege specific facts supporting his claims to withstand dismissal for failure to state a claim. Brock v. St. Joseph's Hosp., 104 F.3d 358 (4th Cir. 1996); Whitehead v. Becton, 1996 WL 761937 (D.C. Cir. Dec. 20, 1996).

**B. Plaintiff's Allegations**

Plaintiff claims that on February 26, 1998, he was placed in administrative custody (AC) on the basis of allegations by Defendant Seiverling that he was a danger to others in the institution. Plaintiff claims that he did not receive any hearing concerning his placement in AC. Sometime thereafter, he was criminally charged with possession of marijuana. Plaintiff alleges that the marijuana charges stemmed from an incident report by Lt. Tustin in which he alleged that Plaintiff passed a bowel movement that contained a balloon filled with marijuana. Plaintiff claims that Defendants Forte, Hassett, Aberegg, Lanz and Sparbanie all were involved in the fabrication that resulted in the criminal charges. After Plaintiff's attorney talked with the district attorney, the criminal charges were dismissed, allegedly due to lack of evidence.

Plaintiff also alleges that on September 17, 1998, Defendant Marano ordered him to provide a urine sample for analysis. A few days later, Plaintiff received a misconduct report alleging that

his urine specimen tested positive for PCP. Plaintiff contends that Defendant Marano contaminated his urine sample in retaliation for making comments about his unethical conduct. In support of this contention, Plaintiff asserts that a laboratory report from PharmChem Laboratories indicates that his sample was received on September 18, 1998 and reported on September 22, 1989. Because the PharmChem laboratory is located in the state of California, Plaintiff asserts that it could not have received his specimen within 24 hours after it was provided. He further claims that the PharmChem report is not authentic because it does not provide evidence of chain of custody and does not contain a technician's signature.

Due to the results of the Plaintiff's urine analysis contained in the PharmChem laboratory reports, Plaintiff was found guilty of the drug use charged in his misconduct and received 90 days of disciplinary custody. Plaintiff appealed the misconduct but his efforts were unsuccessful.

Plaintiff further alleges that on July 13 and July 19, 1999, Defendant Marano ordered him to produce urine samples for analysis. He states that on July 23, 1999, he received two misconduct reports alleging that both of his urine samples tested positive for PCPs. Plaintiff again alleges that Defendant Marano contaminated his urine samples in retaliation for Plaintiff exercising his right to complain. He claims that the purpose of

the false reports is to establish a history of drug offenses, which can result in the permanent denial of contact visits. He complains about the SCI-Greene urinalysis procedure and his inability to afford a defense against the "false" laboratory reports.

Next, Plaintiff complains that he is subjected to weekly urinalysis testing that is motivated by retaliatory purposes. He alleges that he received misconduct reports on August 2, 1999 and on August 24, 1999 for failing to obey orders to provide urine samples. He was found guilty of both misconducts and received 90 days of disciplinary custody for each. His appeals from both misconducts were unsuccessful.

On August 2, 1999, Plaintiff requested to be separated from Defendants Marano, Mega and Muccino. On August 11, 1999, Defendant Warman responded to Plaintiff's request by informing him that inmates do not need protection or separation from staff.

Plaintiff claims that Defendants Sparbanie, Tustin, Lantz, Venom, Stewart, Hassett, Forte and Aberegg maliciously prosecuted him in violation of his First and Fourteenth Amendments by providing false information resulting in the initiation of criminal charges against him. He further claims that Defendants Blaine, Bitner, Turner, Kelly, Jackson, Stowitzky, Rossi, Dittworth and Hewitt violated his First and Fourteenth Amendment rights by failing to act and by concurring in the fabricated

misconduct reports. He states that Defendant Grainey is liable because he ordered Defendants Marano and Wurtzell to harass and retaliate against him by requiring him to provide frequent urine samples for analysis. He further complains that Defendants Ford, Cantz and Burns are liable based on their approvals of the fabricated misconduct reports issued to him. He claims that Defendants McCrae and Warman were deliberately indifferent towards his claims of abuse and that Defendants Ansell, Mathews, Seiverling, Ford, Lanyz and Burns violated his due process rights with respect to his disciplinary hearings and restrictive confinement. He alleges that Defendant Seiverling violated his due process rights by placing him in administrative custody without a hearing, which deprived him of a chance to defend himself.

In addition, Plaintiff has filed a Motion for a temporary Restraining Order to prohibit Defendants from requiring him to provide "non-random" weekly urine samples for analysis.

**C. Liability under Section 1983**

In order to state a claim under 42 U.S.C. § 1983, a plaintiff must meet two threshold requirements: 1) the alleged misconduct must have been committed by a person acting under color of state law; and 2) the defendants' conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535

(1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327, 330-331 (1986).

Plaintiff claims that Defendants' actions violated his rights as protected by the First and Fourteenth Amendments. However, the discussion below reveals that Plaintiff's allegations, construed in his favor, do not demonstrate that he has suffered any violation of his constitutional rights.

Plaintiff claims that Defendants violated his due process rights by issuing a false misconduct, refusing to allow him to present exculpatory evidence during his disciplinary hearing, finding him guilty of the misconduct, and failing to overturn the decision on appeal. The Due Process Clause of the Fourteenth Amendment prohibits the state from depriving an individual of a constitutionally protected interest without due process of law. In this context, to state a claim for relief, a plaintiff must set forth facts that demonstrate that he had a "protected liberty interest" that was impaired by the defendant's actions. Hewitt v. Helms, 459 U.S. 460 (1983); Morrissey v. Brewer, 408 U.S. 471 (1972).

**a. Plaintiff's Disciplinary Actions**

Plaintiff's claims concerning his disciplinary actions are governed by the rules set forth by the United States Supreme Court in Sandin v. Conner, 515 U.S. 472 (1995). In Sandin, the Supreme

Court developed a new criteria for determining whether a deprivation suffered by an inmate constituted a protected liberty interest. Specifically, the Court held that an inmate did not have a protected liberty interest in his conditions of confinement unless those conditions imposed an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 515 U.S. at 484 (emphasis added). Applying this test, the Supreme Court concluded that the prisoner in Sandin did not have a protected liberty interest in remaining free of disciplinary detention or segregation because his thirty-day disciplinary detention, though punitive, did not present a dramatic departure from the basic conditions of his sentence.

As a result of the misconduct reports, Plaintiff alleges that he received several sanctions of 90 days of disciplinary custody as a result of his misconducts. Employing the due process analysis announced in Sandin, the United States Court of Appeals for the Third Circuit has concluded that placement in restrictive confinement for a period of up to fifteen months does not trigger a constitutionally protected liberty interest as it does not constitute an atypical and significant hardship in relation to the ordinary incidents of prison life. See Griffin v. Vaughn, 112 F.3d 703 (3d Cir. 1997) (it is not atypical to be exposed to conditions of administrative custody for periods as long as

15 months as such stays are within the expected parameters of an inmate's sentence).<sup>3</sup>

Plaintiff has not alleged that his disciplinary actions have resulted in more than fifteen months of confinement in disciplinary custody. As such, under the authority from the Third Circuit, this Court must conclude that Plaintiff's disciplinary detentions did not impose an atypical and significant hardship in relation to the ordinary incidents of his prison sentence sufficient to give rise to a protected liberty interest. Accordingly, Plaintiff's due process claim concerning his disciplinary proceedings should be dismissed.

**b. Fabricated Misconduct Reports**

Plaintiff also asserts that Defendants violated his constitutional rights by filing false misconduct reports and by fabricating false laboratory analyses, which resulted in his disciplinary custody in the RHU. However, a prisoner does not have a constitutional right to be free from being falsely or wrongly accused of conduct that may result in the deprivation of a protected liberty interest. Freeman v. Rideout, 808 F.2d 949, 951

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3. See also Mackey v. Dyke, 111 F.3d 460 (Unpublished Disposition), 1997 WL 179322 (6th Cir.) (thirteen month detention in administrative segregation did not create a liberty interest), cert. denied, 522 U.S. 848 (1997); Williams v. Craigie, 110 F.3d 66 (Unpublished Disposition), 1997 WL 144240 (6th Cir. 1997) (at least thirteen months - no liberty interest); Jones v. Fields, 104 F.3d 367 (Unpublished Disposition), 1996 WL 731240 (10th Cir. 1996) (a plaintiff housed for fifteen months in administrative segregation failed to establish a liberty interest).

(2d Cir. 1986), cert. denied, 485 U.S. 982 (1988). In other words, the mere filing of false charges against an inmate does not constitute a *per se* constitutional violation. *Id.*

Before the Supreme Court handed down its opinion in Sandin, the federal courts had determined that the filing of unfounded administrative charges against an inmate may result in a procedural due process violation only when such charges were not subsequently reviewed in a misconduct hearing. Freeman, 808 F.2d at 952 (an allegation that a prison guard planted false evidence fails to state a claim where the procedural due process protections as required in Wolff v. McDonnell are provided) (citation omitted). Thus, even if false charges impaired a protected liberty interest, as long as prison officials granted the inmate a hearing and an opportunity to be heard, the filing of unfounded charges did not give rise to a procedural due process violation actionable under section 1983. Accord Jones v. Coughlin, 45 F.3d 677 (2d Cir. 1995); Franco v. Kelly, 854 F.2d 584, 587 (2d Cir. 1988); McClellan v. Seclor, 876 F. Supp. 695 (E.D. Pa. 1995). In light of the Supreme Court's ruling in Sandin, however, Plaintiff has not even demonstrated that he had a constitutionally protected liberty interest in his disciplinary proceeding that was offended by Defendants' actions. Thus, it is unlikely that the filing of false charges, even in the absence of

a misconduct hearing, would state a constitutional claim on the facts before this Court. See Strong v. Ford, 108 F.3d 1386 (Unpublished Opinion), 1997 WL 120757 (9th Cir. 1997) (the alleged making of a false charge, however reprehensible or violative of state law or regulation, does not constitute deprivation of a federal right protected by 42 U.S.C. § 1983 when it does not result in the imposition of an atypical hardship on the inmate in relation to the ordinary incidents of prison life).

**c. Confinement in Administrative Custody**

Plaintiff also complains that Defendant Seiverling placed him in AC without a hearing on the basis that he was a threat to others in the institution. Plaintiff claims that his placement in AC without a hearing denied him the right to defend himself against such accusations.<sup>4</sup>

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4. Pennsylvania correctional institutions have two basic types of housing, general population and restricted housing. Inmates in disciplinary and administrative custody are confined in Restricted Housing Units (RHU). Inmates are housed in disciplinary custody when, following a hearing, they have been found guilty of a prison misconduct. The maximum period of confinement that an inmate may be confined in disciplinary custody is ninety (90) days per misconduct. DC-ADM 801 § VI(C)(2). Administrative custody is substantially similar to disciplinary custody. Inmates in administrative custody and disciplinary custody typically are housed together in the RHU. A Pennsylvania inmate may be confined in administrative custody for a variety of reasons. DC-ADM 802 § VI(A). Under DOC policy, an inmate should receive written notice of the reason for his placement in administrative custody and he is entitled to receive a hearing before a Program Review Committee ("PRC") within six days of the initial transfer to administrative custody. An inmate can appeal the decision of the PRC concerning initial placement in administrative custody to the Superintendent and, if necessary, to the Central Office Review Committee (CORC).

Unlike disciplinary confinement, however, there is no maximum limit to the duration of confinement in administrative custody. Consequently, confinement in administrative custody is for an indeterminate period of time. As a result, unless prison officials determine that the inmate no longer needs

(continued...)

Plaintiff alleges that he was confined in AC without an initial hearing from February of 1998 until sometime in September or October of 1998 when he was placed in disciplinary custody for 90 days due to his September 28, 1998 misconduct for which he was found guilty. Thus, assuming the truth of Plaintiff's allegations, he was confined in restrictive custody from February of 1998 at least until late December of 1998 (i.e., 90 days from the date of his misconduct hearing), or a little under one year. As stated above, confinement in restricted housing for periods of less than fifteen months does not trigger a liberty interest that is protected by the due process clause. As such, even if Plaintiff did not receive an initial hearing prior to or shortly after his placement in AC, he has not suffered any violation of his due process rights as he does not have any liberty interest that was adversely affected by Defendants' actions.<sup>5</sup> As he has

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4. (...continued)

administrative segregation, an inmate can remain in administrative custody until the expiration of his or her sentence. In this regard, DOC Policy requires the PRC to review an inmate's administrative custody status at least once every thirty days for potential release from administrative custody to general population. DC-ADM 802 § VI(C). The PRC's decision to continue an inmate in administrative custody following each 30-day review is appealable only to the Superintendent; no further review is available. DC-ADM 802 § VI(B)(4).

5. Moreover, he does not allege that he did not receive his 30-day PRC reviews with respect to his continued confinement in AC. The United States Court of Appeals for the Third Circuit has held that the Pennsylvania procedures for continued placement in AC clearly comply with due process requirements. See Shoats v. Horn, 213 F.3d 140, 145 (3d Cir. 2000). Thus, it is doubtful whether Plaintiff could allege a due process violation even assuming that he did have a liberty interest that was impacted by Defendants' actions.

failed to state a constitutional violation, Plaintiff's allegations concerning his confinement in AC do not state a claim upon which relief may be granted under 42 U.S.C. § 1983.

**d. Retaliation**

Plaintiff also asserts that Defendants filed false misconduct reports and subjected him to weekly urine analysis in retaliation for his filing grievances and for complaining about Defendants' conduct. Retaliation for the exercise of a constitutionally-protected right is itself a violation of rights secured by the Constitution, which is actionable under section 1983. White v. Napoleon, 897 F.2d 103, 112 (3d Cir. 1990). However, merely alleging the fact of retaliation is insufficient; in order to prevail on a retaliation claim, a plaintiff must show three things: (1) that he was engaged in a protected activity; (2) that he was subjected to adverse actions by a state actor (here, the prison officials); and (3) the protected activity was a substantial motivating factor in the state actor's decision to take the adverse action. See Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Anderson v. Davila, 125 F.3d 148, 163 (3d Cir. 1997). Such motivation may be established by alleging a chronology of events from which retaliation plausibly may be inferred. Tighe v. Wall, 100 F.3d 41, 42 (5th Cir. 1996); Goff v. Burton, 91 F.3d 1188 (8th Cir. 1996); Pride v. Peters,

72 F.3d 132 (Table), 1995 WL 746190 (7th Cir. 1995). If the plaintiff proves these elements, the burden shifts to the state actor to prove that he or she would have taken the same action without the unconstitutional factors. Mt. Healthy, 429 U.S. at 287. Because retaliation claims can be easily fabricated, district courts must view prisoners' retaliation claims with sufficient skepticism to avoid becoming entangled in every disciplinary action taken against a prisoner. See Cochran v. Morris, 73 F.3d 1310, 1317 (4th Cir. 1996); Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995), cert. denied, 516 U.S. 1084 (1996); Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995).

A prisoner's ability to file grievances and lawsuits against prison officials is a protected activity for purposes of a retaliation claim. See Milhouse v. Carlson, 652 F.2d 371, 373-74 (3d Cir. 1981) (retaliation for exercising right to petition for redress of grievances states a cause of action for damages arising under the constitution); Woods, 60 F.3d at 1165 (prison officials may not retaliate against an inmate for complaining about a guard's misconduct). Thus, Plaintiff has alleged the first element of a retaliation claim. With respect to the second element, Plaintiff alleges that he received "false" misconduct reports and, as a result, received 90 days disciplinary time for each misconduct. Thus, it appears that Plaintiff was subjected to

various "adverse" actions by various prison officials. However, with respect to the accusation that Defendants' actions in filing misconducts were retaliatory in nature, Plaintiff's own allegations show that he cannot prove the essential third element for this retaliation claim, i.e., that the protected activity was a substantial motivating factor in the state actor's decision to take the adverse action.

In this regard, the filing of a disciplinary report is not actionable under 42 U.S.C. § 1983 as prohibited "retaliation" unless the report is, in fact, false. In other words, the finding of guilt of the underlying misconduct charge satisfies a defendant's burden of showing that he would have brought the misconduct charge even if plaintiff had not filed a grievance. See Harris-Debardelaben v. Johnson, 121 F.3d 708, 1997 WL 434357, at \*1 (6th Cir. July 31, 1997); Hynes v. Squillace, 143 F.3d 653, 657 (2d Cir.), cert. denied, 525 U.S. 907 (1998); Henderson v. Baird, 29 F.3d 464, 469 (8th Cir. 1994) (a finding of guilty of a prison rule violation based on some evidence "essentially checkmates [the] retaliation claim."), cert. denied, 515 U.S. 1145 (1995).

With respect to his misconducts, Plaintiff received disciplinary hearings where it was determined that he was guilty of the charges in the misconduct reports. Whether this Court

agrees with that determination is not relevant to the question of whether Plaintiff's constitutional rights have been violated. It is not the prerogative of the Court to second guess decisions made by prison officials. As Plaintiff has failed to allege a chronology of events from which retaliation for filing false misconducts plausibly may be inferred, his retaliation claim should be dismissed for failure to state a claim upon which relief may be granted. Accord Wright v. Kellough, 202 F.3d 271, 1999 WL 1045787 (6th Cir. Nov. 8, 1999) (inmate could not state claim of retaliation where he was found guilty of misconduct charge giving rise to retaliation claim); Goff v. Burton, 7 F.3d 734, 738 (8th Cir. 1993) (if discipline which the prisoner claims to have been retaliatory was imposed for actual violation of prisoner rules, prisoner's claim of retaliation must fail), *cert. denied*, 512 U.S. 1209 (1994).

**e. Malicious Prosecution**

Plaintiff also claims that Defendants Sparbanie, Tustin, Lantz, Venom, Stewart, Hassett, Forte and Aberegg maliciously prosecuted him in violation of his First and Fourteenth Amendment rights by providing false information to initiate criminal charges against him. Prior to the Supreme Court's decision in Albright v. Oliver, 510 U.S. 266 (1994), a plaintiff in this circuit was able to recover claims for malicious prosecution under section 1983

merely by showing the elements of the common law tort.<sup>6</sup> However, in Albright, the Supreme Court examined whether a claim for malicious prosecution could rise to the level of constitutional significance so as to be actionable under section 1983. The Court decided, in a four-justice plurality decision written by Chief Justice Rehnquist, that, to be actionable under section 1983, malicious prosecution claims must be predicated upon an explicit textual source of constitutional protection; such claims could not rest merely on the general notion of substantive due process. Albright, 510 U.S. at 271-73. Since the decision in Albright, many courts have restricted malicious prosecution claims to claims arising only under the Fourth Amendment.<sup>7</sup> However, the Court of Appeals for the Third Circuit has interpreted Albright as allowing claims for malicious prosecution to be based on a constitutional provision other than the Fourth Amendment, including the procedural component of the Due Process Clause, so long as it was not based on substantive due process. See Merkle v. Upper Dublin Sch. Dist., 211 F.3d 782 (3d Cir. 2000) (court interpreted

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6. Under Pennsylvania law, the common law tort of malicious prosecution consists of the following four elements: the defendant initiated the criminal proceeding; the criminal proceeding ended in the plaintiff's favor; the criminal proceeding was initiated without probable cause; and the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice. See Hilferty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996).

7. See e.g., Murphy v. Lynn, 118 F.3d 938, 944 (2d Cir. 1997); Whiting v. Traylor, 85 F.3d 581, 584-86 (11th Cir. 1996); Taylor v. Meacham, 82 F.3d 1556, 1561 (10th Cir. 1996); Taylor v. Waters, 81 F.3d 429, 435-37 (4th Cir. 1996); Smart v. Board of Trustees, 34 F.3d 432, 434 (7th Cir. 1994).

Albright as allowing a malicious prosecution claim to be based on either the Sixth or First Amendment); Torres v. McLaughlin, 163 F.3d 169, 173 (3d Cir. 1998) (court interpreted Albright as allowing a malicious prosecution claim to be based on the procedural component of the Due Process Clause).

In the case at bar, Plaintiff claims that certain Defendants maliciously prosecuted him because of his history of filing grievances. Accordingly, Plaintiff seems to be asserting his malicious prosecution claim under the First Amendment. Although the Third Circuit recently accepted the viability of such a claim in Merkle, Plaintiff is precluded from proceeding with his malicious prosecution claim because he failed to exhaust his administrative remedies, as required by 42 U.S.C. § 1997(e) with respect to this claim.

In this regard, through the PLRA, Congress amended 42 U.S.C. § 1997(e) to prohibit prisoners from bringing an action with respect to prison conditions pursuant to 42 U.S.C. § 1983 or any other federal law, until such administrative remedies as are available are exhausted. Specifically, the act provides, in pertinent part, as follows.

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.

42 U.S.C. § 1997(e).

The United States Court of Appeals for the Third Circuit recently analyzed the applicability of the exhaustion requirement in 42 U.S.C. § 1997e in Nyhuis v. Reno, 204 F.3d 65 (3d Cir. 2000) (Bivens action brought by a federal inmate) and Booth v. Churner, 206 F.3d 289 (3d Cir. 2000) (civil rights action brought by a state prisoner), petition for cert. filed (June 5, 2000). In each of these cases, the Court of Appeals announced a bright line rule that inmate-plaintiffs must exhaust all available administrative remedies before they can file an action in federal court concerning prison conditions. In so holding, the court specifically rejected the notion that there is ever a futility exception to section 1997e(a)'s mandatory exhaustion requirement. Booth, 206 F.3d at 300; Nyhuis, 204 F.3d at 66.

In the case at bar, Plaintiff alleges that he pursued his administrative remedies with respect to his misconducts. Accordingly, the exhaustion requirement does not preclude him from proceeding with the claims he has raised that concern his misconducts. However, he does not allege that he pursued the DOC grievance procedure<sup>8</sup> with respect to his claim that certain

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8. With respect to matters that do not involve the issuance of a misconduct, the administrative remedy available to Pennsylvania prisoners is contained in (continued...)

Defendants retaliated against him by filing false criminal charges against him that ultimately were dismissed.

In Booth, 206 F.3d at 294, the Court of Appeals for the Third Circuit determined that, in interpreting the phrase "action . . . with respect to prison conditions" in 42 U.S.C. § 1997e(a), courts should employ the definition of "civil action with respect to prison conditions" as set forth in 18 U.S.C. § 3626(g)(2), which provides as follows:

the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

18 U.S.C. § 3626(g)(2) (emphasis added). Plaintiff's malicious prosecution action concerns the effect of Defendants' actions in allegedly falsely accusing him of criminal activity. Clearly, such an action comes within the language in section 3626(g)(2),

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8. (...continued)

the "Consolidated Inmate Grievance Review System," DOC Policy Statement No. DC-ADM 804-1. The purpose of the grievance system is "to insure that every inmate confined in a Bureau of Correction facility has an avenue through which prompt resolution of any problem which arises during the course of confinement may be sought." DC-ADM 804 ¶ 1. The grievance system applies to all state correctional institutions and provides three levels of review: 1) initial review by the grievance coordinator; 2) appeal of initial review to the superintendent or regional director; and 3) final appeal to the central office. DC-ADM 804 ¶ VI. The policy further provides that, prior to utilizing the grievance system, prisoners are required to attempt to resolve problems on an informal basis through direct contact or by sending an inmate request slip to the appropriate staff member. DC-ADM 804 ¶ V.

which refers to any civil proceeding arising under federal law with respect to "the effects of actions by government officials on the lives of persons confined in prison." See Booth, 206 F.3d at 295 (requirement to exhaust administrative remedies applies to inmate's excessive force claim as it concerns the effect of actions by government officials).

As stated by the Third Circuit, "it is beyond the power of this court--or any other--to excuse compliance with the exhaustion requirement, whether on the ground of futility, inadequacy or any other basis." Nyhuis, 204 F.3d at 73 (quotation omitted). Consequently, this Court is required to dismiss Plaintiff's malicious prosecution claim without prejudice due to his failure to have exhausted his available administrative remedies as required by 42 U.S.C. § 1997e(a). See Ahmed v. Sromovski, 2000 WL 863111 (E.D. Pa. June 27, 2000); Rivers v. Horn, 2000 WL 1022890 (E.D. Pa. July 18, 2000).

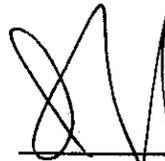
**D. Pending Motion**

Also pending before the Court is Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. Since he has failed to show any likelihood of success on the merits in the instant action, his Motion for a Temporary Restraining Order and Preliminary Injunction should be denied.

### III. CONCLUSION

For the reasons stated above, it is recommended that Plaintiff's Complaint be dismissed in accordance with the Prison Litigation Reform Act, 28 U.S.C. § 1915(e)(2)(B)(ii) and/or 28 U.S.C. § 1915A for failure to state a claim upon which relief can be granted under 42 U.S.C. § 1983. In addition, his Motion for a Temporary Restraining Order and Preliminary Injunction should be denied.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.



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ILA JEANNE SENSENICH  
U.S. Magistrate Judge

Dated: November 1, 2000

cc: The Honorable Donald E. Ziegler, Chief Judge  
United States District Court

Demetrius Bailey, CP-7819  
S.C.I. Greene  
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