

When a plaintiff files objections to a magistrate judge's report, the reviewing court conducts a *de novo* review of those portions of the report to which objection is made. 28 U.S.C. § 636(b)(1). To warrant *de novo* review, the objections must be both timely and specific. *Goney v. Clark*, 749 F.2d 5, 6-7 (3d Cir. 1984). The court may accept, reject or modify, in whole or in part, the findings made by the magistrate judge. 28 U.S.C. § 636(b)(1). Uncontested portions of the report are reviewed for clear error. *Cruz v. Chater*, 990 F. Supp. 375, 376-77 (M.D. Pa. 1998).

Upon review of Plaintiff's objections and the Report and Recommendation, for the reasons discussed below we conclude Plaintiff's objections are without merit and concur with the Magistrate Judge's recommendation. Therefore, we adopt the Report and Recommendation (Doc. 87), grant Defendants' motion for summary judgment (Doc. 45), deny Plaintiff's motion for summary judgment (Doc. 62), enter judgment in favor of Defendants and direct the Clerk of Court to close this case.

I. Background

Plaintiff is currently confined at the Pike County Correctional Facility, Lords Valley, Pennsylvania, where he has been an inmate since April of 2005 following his conviction for theft by unlawful taking and disposition, bad checks, identity theft and forgery. (Plaintiff's Deposition Testimony, Doc. 50-2 at

7.) Plaintiff reports that he was sentenced to six months to five years plus a day on the first charge and he received a sentence of "one to two years in an upstate facility" that was to run consecutive with the first sentence. (Doc. 50-2 at 8.) From 2001 until November of 2003 Plaintiff was also incarcerated at the Pike County Correctional Facility serving his sentence on charges of theft by unlawful taking and disposition, false imprisonment and impersonating a public servant. (Doc. 50-2 at 7.) He was released when he had served the maximum sentence. (*Id.*)

Upon his return to the Pike County Correctional Facility on April 27, 2005, Plaintiff was placed in the protective custody/maximum security status housing. (Defendants' Brief in Support of Summary Judgment, Doc. 50 at 3.) Defendants assert that the basis for the initial placement was Plaintiff's conduct during his previous incarceration when "he had chronically violated prison rules and frequently placed himself in a situation where he was in danger of assault by other prisoners." (*Id.*) Plaintiff appealed this classification on September 29, 2005, requesting to participate in "Arrow Program."¹ (Doc. 50-2 at 10-11.) Defendant

¹ In Plaintiff's words, the Arrow Program is

a program for the jail for the inmates who . . . work in the kitchen. It's a spiritual program. You work in the kitchen in the morning. Once you graduate the program--after 90 days you graduate the kitchen, you get a certificate for working in the kitchen and then you would be placed on a program called the

Warden Lowe replied to Plaintiff's appeal on October 5, 2005.

(*Id.*) Based on an investigation, Defendant Lowe dismissed a sanction which appeared in Plaintiff's records, telling Plaintiff "[t]his will provide you with a fresh start as you begin your quest to re-enter general population. The Classification Committee will continue to review your status on a weekly basis to determine if a change in your housing status is justified." (Doc. 50-2 at 71.)

Plaintiff again filed a classification appeal on October 30, 2005, seeking placement in the general population. (Doc. 50-2 at 13.) Defendant Lowe granted this appeal on November 3, 2005, informing Plaintiff "[y]ou will be moved to the Classification Housing Unit where you will once again be given another opportunity to enter the Arrow Program. If you become involved in any incident or you fail to follow the rules and regulations outlined in your handbook, you will be classified permanent maximum status." (Doc. 50-2 at 73.)

Plaintiff was moved to the protective custody/maximum security status unit on November 3, 2005, and on November 7, 2005, he was involved in an incident and was removed from the housing unit to protective custody. (Doc. 50-2 at 14-15.) Plaintiff appealed this

Core Program which is the next step of the Arrow Program. And then after you leave the Core Program and you leave the facility, then you go to Step 3 which is called the After Care Program.

(Doc. 50-2 at 11.)

move on November 14, 2005, and Assistant Warden Robert E. McLaughlin denied the appeal, informing Plaintiff that he had been warned of the consequences of failure to follow facility rules and regulations and that he would be permanently classified as maximum security status. (Doc. 50-2 at 75.)

Following this classification, Plaintiff filed numerous appeals seeking change of status which were denied, primarily based on prison conduct. (Doc. 50-2 *passim*.) Plaintiff was cited for misconduct on a total of ten occasions between June 18, 2005, and May 13, 2007. (Doc. 50 at 3.) Each of these incidents led to a disciplinary hearing at which, in all but one, Plaintiff pled guilty. (Doc. 50 at 3.) Plaintiff was allowed the opportunity to appeal the disciplinary actions and did appeal some of them. (Doc. 50-2 at 48-49.) On more than one occasion, Plaintiff's appeals were granted. (See, e.g., Doc. 50-2 at 50-53.)

Inmates housed in protective custody/maximum security are provided one hour of recreation per day and one hour of outdoor exercise five days per week. (Doc. 50 at 4.) Plaintiff was afforded these recreational opportunities. (Doc. 50-2 at 57.)

In February 2007, Plaintiff developed pain in his leg. (Doc. 50 at 4; Doc. 50-2 at 57-60.) He received prompt treatment both at Pike County Correctional Facility and at a nearby hospital, the Pocono Medical Center. (*Id.*) Plaintiff was diagnosed with a blood clot and was prescribed Coumidin, a blood thinner, which he

tolerated well. (*Id.*) Neither the doctor treating him for the blood clot nor any other physician prescribed specific physical activities. (*Id.* at 59.)

Based on alleged violations of rights guaranteed by the United States Constitution, Plaintiff filed this action on March 20, 2007. (Doc. 1.) He filed a Motion to Amend Complaint (Doc. 14) on June 1, 2007, which the Court construed as a supplement to his Complaint by Order of June 8, 2007 (Doc. 15). Because Plaintiff does not object to the Magistrate Judge's recitation of his allegations (see Doc. 88), and because we adopt the Report and Recommendation, we set out that section of the Report and Recommendation below.

The Complaint alleged that in April 2005, while confined at PCCF [Pike County Correctional Facility], Plaintiff was immediately placed, without notice or a hearing, in maximum security protective custody ("PC") "because of problems and rumors that was [sic] around the facility the last time [Plaintiff] was here [i.e. an inmate at PCCF]." (Doc. 1 A, p. 2). Plaintiff stated that, due to these events from his prior incarceration at PCCF, he was forced into PC, and that despite his appeals he filed with Defendant Lowe, he was denied his request to be returned to the general population at PCCF. (Doc. 7.) Plaintiff claimed that his due process rights were violated by the Defendants' classification of him in the PC without charging him with any disciplinary infraction, without giving him a hearing, and without allowing him to present witnesses. Plaintiff claimed the Defendants were liable for their failure to return him to the general population. Plaintiff stated that he filed many appeals to be placed back in general population, but that they were all denied. Plaintiff stated that "Warden Lowe

decided that the Plaintiff should remain in PC status where it would be safer for Plaintiff to live upon becoming perminet [sic] PC max" (Doc. 1 A, p. 2, and Doc. 1, p. 2).

In addition to claiming that his Fourteenth Amendment due process rights were violated, insofar as he was placed in PC without being giving [sic] a hearing, Plaintiff claimed that his confinement in PC violated his Eighth Amendment right to be free from cruel and unusual punishment due to the restrictive nature of A Unit housing at PCCF where PC inmates were placed. Plaintiff claimed that being placed in PC for his safety should not be punishment, but he stated that it became punishment since he was locked down 23 hours per day, he was not entitled to a TV or radio, he had limited commissary in which he could only get candy bars, he had limited hygiene items, he had to go to visitation in shackles and cuffs, he could not attend programs including religious programs, he had no law library, and he had only one hour of recreation time per day. Plaintiff stated that since he was in PC for his safety, the stated restrictions placed on him in PC amounted to punishment.

Also, as part of his Eighth Amendment claim, Plaintiff later alleged that that [sic] as a result of the restrictive nature of his PC confinement, he was not allowed sufficient time to exercise and developed a blood clot in his right leg. See 2007 WL 1366773 at *4.

Thus, Plaintiff claimed that Defendant Warden Lowe should not have forced him to be classified as PC status. Plaintiff also claimed that the Warden's decision, without providing him with a hearing, the right to present witnesses and evidence, and the right to defend himself, violated his Fourteenth Amendment due process rights. (Doc. 1 A, p. 3). Plaintiff also stated that the restrictive nature of the PC confinement

violated the Eighth Amendment since it amounted to cruel and unusual punishment. As relief, Plaintiff sought declaratory judgment that the conduct of Defendants violated his Constitutional rights, and he sought compensatory and punitive damages. (*Id.*, p. 4).

Plaintiff claimed that Defendant Greco violated his Constitutional right by denying his grievances regarding his attempt to re-enter the general population at PCCF. (*Id.*, ¶ 3., and Doc. 7, Ex. B).

(Doc. 87 at 3-5.)

The Magistrate Judge also notes that Plaintiff does not claim that he was denied proper medical care in violation of the Eighth Amendment with respect to his blood clot condition. (Doc. 87 at 4 n.4 (*citing* Doc. 75 at 5).)

In response to the Magistrate Judge's first Report and Recommendation (Doc. 9), the Court ordered that certain claims and Defendants be dismissed and others allowed to go forward. (Doc. 12 at 14.) Specifically, we allowed Plaintiff's Eighth and Fourteenth Amendment claims to go forward and Defendants Lowe and Greco to remain in the case. (*Id.*)

Defendants filed the Motion for Summary Judgment of Defendants Craig A. Lowe and Ronald Greco (Doc. 45) on February 14, 2008. They filed a supporting brief on February 26, 2008 (Doc 50), and Plaintiff filed his responsive brief on March 17, 2008 (Doc. 60). Defendant did not file a reply brief. Plaintiff filed his Motion for Summary Judgment of the Plaintiff Mr. Michael Joseph Scerbo

Against the Defendants on March 24, 2008 (Doc. 62), and his supporting brief on April 8, 2008 (Doc. 65). Plaintiff did not file a reply brief.

As noted above, the Magistrate Judge filed his Report and Recommendation concerning the parties' summary judgment motions on September 8, 2008 (Doc. 87), recommending the Court grant Defendants' motion and deny Plaintiff's motion. Plaintiff filed objections to the Report and Recommendation on September 16, 2008 (Doc. 88). We now consider the Magistrate Judge's Report and Recommendation and Plaintiff's objections to it.

II. Discussion

A. Plaintiff's Objections

Plaintiff submits twelve (12) objections to the Report and Recommendation. (Doc. 88.) Under the applicable standard set out above, we review Plaintiff's specific objections *de novo* and review the remainder of the Report and Recommendation for clear error.

1. Magistrate Judge's Reliance on Case Law

Plaintiff asserts the Magistrate Judge does not cite the case law that Plaintiff has cited in his filings. (Doc. 88 at 1.) Plaintiff does not identify how the Magistrate Judge's citation only to "the case laws he wants to use" has impacted his case, nor does Plaintiff point to any specific error in this regard. (*Id.*) Therefore, we conclude this objection lacks the specificity required and will not further discuss the case law which the

Magistrate Judge has relied upon in making his Report and Recommendation.

2. Magistrate Judge's Reference to Plaintiff's Previous Filings

With his second objection, Plaintiff complains of the Magistrate Judge's notation that Plaintiff filed three previous civil suits. (Doc. 88 at 1.) We conclude the Magistrate Judge's notation that Plaintiff filed three previous civil suits with this Court (Doc. 87 at 1 n.1) is not improper. We also note Plaintiff's previous filings did not impact the full consideration of this case.

3. Plaintiff's Evidentiary Requests and Presentation of Evidence

Plaintiff objects to the Magistrate Judge's statement that Plaintiff has not produced evidence, asserting that he requested certain evidence from Defendants which he did not receive. (Doc. 33 at 2.) Our review of the record reveals that the Magistrate Judge properly considered Plaintiff's requests for discovery throughout this case. (See, e.g., Docs. 42, 71, 85.) We also conclude the Magistrate Judge properly considered the evidence of record in his Report and Recommendation (Doc. 87). Therefore, Plaintiff's objection is without merit.

4. Lack of Sworn Testimony and Affidavits

Plaintiff claims Defendants are not entitled to summary judgment as a matter of law because they have violated his

constitutional rights and have not asked him for "interrogatories under oath" or provided affidavits. (Doc. 88 at 2.) Plaintiff's assertion that summary judgment is not proper because Defendants have violated his rights is a conclusory statement which will not be discussed as a valid objection to the Report and Recommendation. We further conclude Defendants support for their motion is consistent with the requirements for summary judgment found in Federal Rule of Civil Procedure 56.

5. Issue of Material Fact

Plaintiff's simple assertion regarding burden and the existence of a genuine issue of material fact requiring a jury trial (Doc. 88 at 2) is a conclusory statement which will not be discussed as a valid objection to the Report and Recommendation.

6. Plaintiff's Legal Support

Plaintiff asserts that he has given the Court enough evidence by way of cited case law that Defendants have violated his rights. (Doc. 88 at 2.) In addition to the conclusory nature of this objection, we further note that Plaintiff's case law citations (found only in his Brief in Support of Motion for Summary Judgment and Reply to Defendants' opposition brief (Docs. 65, 75; see also Docs. 60, 88)) in most instances set out legal principles without application to this case. Nonetheless, we have reviewed cases cited by Plaintiff, many from outside our Circuit, as well as relevant Third Circuit precedent and conclude the Magistrate

Judge's decision is based on solid legal principles. As will be discussed below, we conclude the Magistrate Judge has properly determined that no genuine issue of material fact exists in this case which would preclude summary judgment.

7. Duration of Plaintiff's Restrictive Housing Confinement

Plaintiff asserts that there is a genuine issue of material fact that his confinement in protective custody for over 742 days is an "atypical and significant hardship" and the fact that he was provided no reason for this placement clearly violates his rights. (Doc. 88 at 7.) This objection goes to the heart of Plaintiff's case and, although we agree with the Magistrate Judge's analysis of this issue, we will discuss Plaintiff's objection in detail.

Plaintiff's objection goes to the second element of a 42 U.S.C. § 1983 claim - whether the conduct complained of deprived Plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States, specifically whether he was denied Fourteenth Amendment "due process rights [which] are triggered by deprivation of a legally cognizable liberty interest." *Mitchell v. Horn*, 318 F.3d 523, 531 (3d Cir. 2003). *Mitchell* explained that "[f]or a prisoner, such a deprivation occurs when the prison 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'"² *Id.*

² The *Mitchell* Court also noted state prisoners have a protected liberty interest "in avoiding restraints that 'exceed the sentence in such an unexpected manner as to give rise to protection

(quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). What is an "atypical and significant hardship" is determined by "what a sentenced inmate may reasonably expect to encounter as a result of his or her conviction in accordance with due process of law." *Griffin v. Vaughn*, 112 F.3d 703, 706 (3d Cir. 1997). In the case of disciplinary or administrative custody, if the inmate had no protected liberty interest in remaining free of such custody, then the inmate was owed no process before or during his placement. *Mitchell*, 318 F.3d at 531. However, if it is determined that an interest is protected by the Due Process Clause, the question becomes what process is due to protect it. *Shoats v. Horn*, 213 F.3d 140, 143 (3d Cir. 2000).

The Third Circuit Court of Appeals has explained that in deciding whether a protected liberty interest exists under *Sandin*, the reviewing court must consider two factors: 1) the duration of the complained-of confinement; and 2) the conditions of that confinement in relation to other prison conditions. *Mitchell* 318 F.3d at 532 (citing *Shoats*, 213 F.3d at 144). The *Mitchell* court also noted the very fact-specific nature of the *Sandin* test. *Id.*

In *Griffin*, the court concluded the plaintiff's transfer to and confinement in administrative custody for a period of fifteen

by the Due Process Clause of its own force.'" *Mitchell*, 318 F.3d at 531 n.4 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). Examples would be involuntary administration of psychotropic medication or involuntary transfer to a state mental hospital, *id.* (citations omitted), situations not present here.

months where he did not have a hearing prior to the transfer and where "it was not extraordinary for inmates in a myriad of circumstances to find themselves exposed to the conditions to which [the plaintiff] was subjected," 112 F.3d at 108, did not impose an "atypical and significant hardship." *Id.* at 706-08. In *Shoats*, eight years in administrative confinement with conditions significantly more restrictive than ordinary prison conditions gave rise to a liberty interest triggering due process protection. *Shoats*, 213 F.3d at 144.

At the outset of our discussion of this issue, it is helpful to look at Plaintiff's confinement in the protective custody/maximum security housing unit in two separate time periods. The first time period began with his incarceration on April 27, 2005. The parties do not dispute that Plaintiff was placed in the protective custody/maximum status housing at this time because of Plaintiff's violation of prison rules and regulations during his previous incarceration at the Pike County Correctional Facility. (Doc. 50 at 2-3; Doc. 65 at 2; Doc. 75 at 4³.) The parties agree

³ We concur with the Magistrate Judge that Plaintiff's Reply Brief to Defendants [sic] Brife [sic] in Opposition to Plaintiff's Motion for Summary Judgment (Doc. 75) contains an attachment (Doc. 75 at 3-11) which reads as a "Declaration of Plaintiff" (Doc. 87 at 8 n.6). The Magistrate Judge determined the attachment should not be considered evidence because Plaintiff did not comply with the requirements of Federal Rule of Civil Procedure 56(e)(1). On closer inspection, it appears that "Exhibit A" attached to Document 75 is a copy of Plaintiff's Brief in Support of Motion for Summary Judgment (Doc. 65) excluding the first page of Document 65.

that Plaintiff did not have a hearing prior to his placement. This period of confinement continued until November 3, 2005, when Plaintiff was moved to the general population. (Doc. 50-2 at 14-15.)

During the period from April 27, 2005, to November 3, 2005, Plaintiff appealed his classification on two occasions. He first appealed on September 29, 2005. (Doc. 50-2 at 10.) In response to this appeal, Defendant Lowe dismissed a sanction which appeared in Plaintiff's records stemming from a misconduct which occurred in August 2005, informing Plaintiff that he was providing him "with a fresh start as you begin your quest to re-enter general population." (Doc. 50-2 at 12.) Defendant Lowe also informed Plaintiff that the Classification Committee would review his status weekly to determine if a change was warranted. (*Id.*)

Plaintiff appealed his classification for the second time on October 30, 2005. (Doc. 50-2 at 13.) It was in response to this request that Defendant Lowe allowed Plaintiff to move to general housing with the following warning: "If you become involved in any incident or you fail to follow the rules and regulations outlined in your handbook, you will be classified permanent maximum status." (Doc. 50-2 at 13-14.) Plaintiff was in general population from November 3, 2005, to November 7, 2005, when he was involved in an incident and was removed to protective custody/maximum status housing. (Doc. 50-2 at 14-15.)

November 7, 2005, marks the beginning of the second time period of restricted confinement. Plaintiff appealed his return to protective custody/maximum status housing on November 14, 2005, and Defendant Lowe denied the appeal, informing Plaintiff that he had been warned of the consequences of failure to follow facility rules and regulations and that he would be permanently classified as maximum security status. (*Id.* at 15.)

Following this classification, Plaintiff filed numerous appeals seeking change of status which were denied, primarily based on prison conduct. (Doc. 50-2 *passim.*) Plaintiff was cited for misconduct on a total of ten occasions between June 18, 2005, and May 13, 2007. (Doc. 50 at 3.) Each of these incidents led to a disciplinary hearing at which, in all but one, Plaintiff pled guilty. (Doc. 50 at 3.) Plaintiff was allowed the opportunity to appeal the disciplinary actions and did appeal some of them. (Doc. 50-2 at 48-49.)

a. April 27, 2005, to November 3, 2005, Protective Custody/Maximum Status Housing Placement

As to the first time period from April 27, 2005, to November 3, 2005, the Magistrate Judge concluded the evidence shows that Plaintiff had no protected liberty interest in his classification and, therefore, he was owed no process before his placement in protective custody/maximum status housing. (Doc. 87 at 16-18.) We concur with this determination. Plaintiff's six-month confinement does not have the durational element necessary to bring it within

the protection of the Fourteenth Amendment especially given the rationale for the placement. See *Griffin*, 112 F.3d at 108.

Similarly, the second pertinent factor, the conditions of the confinement, do not support finding a liberty interest.

Plaintiff's alleged deprivations - lack of television and radio and limited exercise time (Doc. 65 at 7) - are similar to those in *Griffin* which the Court found insufficient to be considered "significant and atypical." See *Griffin*, 112 F.3d at 706-08.)

Further, the totality of the circumstances in this case do not support the finding of a liberty interest in Plaintiff's initial six-month period of confinement to protective custody/maximum status housing. Plaintiff agrees that he violated prison rules and regulations during his previous confinement at the Pike County Correctional Facility (see Doc. 65 at 2), he was cited for misconduct at least twice during this initial period of assignment to protective custody/maximum status housing (see Doc. 50-2 at 86-94), he had a method available to seek review of his status from the time of his incarceration which he did not utilize until September 29, 2005 (Doc. 50-2 at 70), and he was moved to general population on November 3, 2005, following his second appeal (Doc. 50-2 at 73). Given the substantial interest prison officials have in maintaining order and security in a prison and the recognition that "[t]he administration of a prison . . . is at best an extraordinarily difficult undertaking," *Hudson v. Palmer*, 468 U.S.

517, 526 (1984), the confinement of a proven problematic inmate to protective custody/maximum status housing upon reincarceration is not an atypical or significant hardship. This conclusion is reinforced by the inmate's ongoing opportunity to appeal his status--a process that has been shown to be meaningful in this case by Defendant Lowe's granting of Plaintiff's October 2005 appeal.

b. Protective Custody/Maximum Status Housing Placement Beginning on November 7, 2005

Turning now to Plaintiff's confinement in protective custody/maximum status housing which began on November 7, 2005, we conclude the Magistrate Judge also properly determined this aspect of Plaintiff's case does not support a Fourteenth Amendment Due Process Clause claim (Doc. 87 at 19).

First, given Plaintiff's undisputed continuing pattern of misconduct (admittedly ten citations between June 18, 2005, and May 13, 2007 (Doc. 65 at 2)) his confinement from November 7, 2005, until at least the time he filed this action on March 20, 2007, would not likely be considered an atypical and significant hardship. See *Griffin*, 112 F.3d at 708. However, even if Plaintiff's continued protective custody/maximum status housing were so characterized, thus giving rise to due process protections, see *Sandin*, 515 U.S. at 484, we would conclude Defendants are entitled to summary judgment on this claim. This is so because the due process provided Plaintiff was sufficient.

The Supreme Court has emphasized that the "requirements . . .

are . . . flexible and variable dependent on the particular situation being examined." *Hewitt v. Helms*, 459 U.S. 460, 472 (1983), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995) (citations omitted)⁴. In the case of a transfer from

⁴ In *Wilkinson v. Austin*, 545 U.S. 209 (2005), the Supreme Court explained the impact of *Sandin* on *Hewitt*. Because Plaintiff relies on *Hewitt* (see, e.g., Doc. 65 at 7), we will set out that explanation here.

Sandin involved prisoners' claims to procedural due process protection before placement in segregated confinement for 30 days, imposed as discipline for disruptive behavior. *Sandin* observed that some of our earlier cases, *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), in particular, had employed a methodology for identifying state-created liberty interests that emphasized "the language of a particular [prison] regulation" instead of "the nature of the deprivation." *Sandin*, 515 U.S. at 481, 115 S. Ct. 2293. In *Sandin*, we criticized this methodology as creating a disincentive for States to promulgate procedures for prison management, and as involving the federal courts in the day-to-day management of prisons. *Id.*, at 482-483, 115 S. Ct. 2293. For these reasons, we abrogated the methodology of parsing the language of particular regulations.

. . . The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Meachum*. Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will generally be limited to freedom

general population to administrative segregation, if a liberty interest is found, only an informal, non-adversarial review is

from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to the protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. *Id.*, at 483-484, 115 S. Ct. 2293 (citations and footnote omitted).

After *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves "in relation to the ordinary incidents of prison life." *Id.*, at 484, 115 S. Ct. 2293.

Applying this refined inquiry, *Sandin* found no liberty interest protecting against a 30-day assignment to segregated confinement because it did not "present a dramatic departure from the basic conditions of [the inmate's] sentence." *Id.*, at 485, 115 S. Ct. 2293.

Wilkinson, 545 U.S. at 222-23.

We further note that *Hewitt's* identification of a liberty interest connected with placement in administrative segregation was based on the language found in regulations governing the administration of Pennsylvania state prisons using the language methodology rejected in *Sandin*. See *Hewitt*, 459 U.S. at 470. "Under *Sandin*, the mere fact of placement in administrative segregation is not in itself enough to implicate a liberty interest." *Leamer v. Fauver*, 288 F.3d 532, 546 (3d Cir. 2002). As we are dealing here with an inmate in a county prison and applying the appropriate *Sandin* methodology, *Hewitt* is of limited applicability.

required whereby the inmate receives “some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him.”

Stevenson v. Carroll, 495 F.3d 62, 70 (3d Cir. 2007) (quoting *Hewitt*, 459 U.S. at 476).⁵

Here Plaintiff had advance notice that he would be transferred back to protective custody/maximum status housing if he was “involved in any incident” while in the general population. (Doc. 50-2 at 73.) Plaintiff filed a Classification Appeal on November 14, 2005 - one week after his return to Protective Custody/Maximum Status Housing - in which he presented his views. (Doc. 50-2 at 74.) On November 18, 2005, Plaintiff received a response to his appeal, clarifying the reason for his classification. (Doc. 50-2 at 75.) The record reveals that Plaintiff’s status has been reviewed on numerous additional occasions and he has had an ongoing opportunity to present his views. (Doc. 50-2 at 76-85.) The record also reveals that Plaintiff has received the process due in connection with his disciplinary hearings. (Doc. 50-2 at 108-73.) Therefore, insofar as Plaintiff may have a liberty interest in the period of confinement in protective custody/maximum status housing which began on November 7, 2005, he has received due process and does not have a Fourteenth Amendment claim against Defendants.

Plaintiff vehemently asserts that he is confined in protective

⁵ See *supra* n.3.

custody/maximum status housing based on his past history at the Pike County Correctional Facility. (See, e.g., Doc. 65 at 3.) However, the circumstances of this case do not support a finding in Plaintiff's favor on this issue: his admitted pattern of misconduct during his current incarceration (Doc. 65 at 2) supports the prison administrator's reasons for his continuing placement.

8. Basis for April 2005 Placement

With this objection Plaintiff takes issue with the Magistrate Judge's statement that his placement in protective custody/maximum status housing on April 27, 2005, had nothing to do with his past. (Doc. 88 at 2.) Plaintiff does not provide a citation to the Report and Recommendation and we do not find this statement therein.

9. Seriousness of Plaintiff's Misconduct Charges

Plaintiff asserts that his misconduct charges are not serious enough to keep him housed in maximum security and that others found guilty of more serious offenses have been returned to the general population. (Doc. 88 at 2-3.) This conclusory statement is not relevant to the Court's analysis of Plaintiff's claims, an analysis which looks to whether Defendants' actions *related to Plaintiff* violated his constitutional rights.

10. Remand for Further Proceedings

Plaintiff requests that the Court not adopt the Report and Recommendation and remand the case for further proceedings. Based

on the facts of this case and the relevant body of law, we conclude there is no basis upon which to remand the case.

11. Plaintiffs' Labeling as an Informant

Plaintiff maintains Defendants' assertions that he is a security risk is a situation of their own making in that labeling him a snitch is what put him in danger. (Doc. 88 at 3.) Plaintiff mentioned this allegation previously but nowhere does he develop the argument. (See Doc. 65 at 3.) However, to the extent there may be truth in it, being labeled an informant does not entitle Plaintiff to relief.

In certain circumstances, courts have found that a prison guard's identification of an inmate as an informant may support an Eighth Amendment claim. See *Wheeler v. North Dakota*, No. 1:07-CV-75, 2008 WL 53544, at *4 (listing cases). Except in specific situations not applicable here, in cases where an Eighth Amendment violation has been considered supportive of a civil rights claim, actual harm to the inmate has occurred following disclosure of his informant status. See *Saunders v. Tourville*, 97 Fed. Appx. 648, 649 (7th Cir. 2004); *Northington v. Marin*, 102 F.3d 1564, 1567-68 (10th Cir. 1996); *Reece v. Goose*, 60 F.3d 487, 488 (8th Cir. 1995); *Harmon v. Berry*, 728 F.2d 1407, 1409 (11th Cir. 1984) (per curiam); *Gullatte v. Potts*, 654 F.2d 1007, 1012-14 (5th Cir. 1981).

Here, Plaintiff makes only a conclusory statement that this information was on his locator card and he was put into danger by

it. (Doc. 88 at 3.) Even assuming Plaintiff's statement to be true, if there was a risk of harm, it did not materialize. Rather, Plaintiff was placed in protective custody/maximum status housing and, in his continuing correspondence with the Court, has not alleged any injury related to being labeled an informant. Therefore, even assuming Plaintiff could show that other inmates thought him to be an informant based on information on his locator card, his allegations do not give rise to an Eighth Amendment claim.

12. Appeal of District Court Decision

With this objection, Plaintiff informs the Court of his intent to appeal an adverse decision on his summary judgment motion.

(Doc. 88 at 3.) This objection requires no comment or discussion.

B. Clear Error Review

We find no clear error in the portions of the Report and Recommendation to which Plaintiff has not objected. Specifically, the Magistrate Judge thoroughly analyzed any potential Eighth Amendment claim Plaintiff may have based on the evidence presented and properly found no basis for any alleged Eighth Amendment violation.⁶

⁶ Although Plaintiff does not object to the Report and Recommendation on any Eighth Amendment basis, we note that in addition to conditions of confinement, in his Brief in Support of Motion for Summary Judgment (Doc. 65) he claims his loss of earnings while in protective custody/maximum security status housing as a basis for entitlement to compensatory damages. (Doc. 65 at 6.) Because prisoners have no constitutional right to a

III. Conclusion

For the reasons discussed above, we adopt the Magistrate Judge's Report and Recommendation (Doc. 87), grant Defendants' motion for summary judgment (Doc. 45), deny Plaintiff's motion for summary judgment (Doc. 62), enter judgment in favor of Defendants, and direct the Clerk of Court to close this case. An appropriate Order follows.

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

DATED: September 29, 2008

prison job or the wages derived therefrom, Plaintiff is not entitled to relief for loss of earnings. See *Carey v. Johnson*, No. 06-1578, 2008 WL 724101, at * 9 (W.D. Pa. Mar. 17, 2008) (listing cases).

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL JOSEPH SCERBO, :
 :
 Plaintiff, : CIVIL ACTION NO. 3:07-CV-527
 :
 v. : (JUDGE CONABOY)
 : (Magistrate Judge Blewitt)
 CRAIG A. LOWE, et al., :
 :
 Defendants. :

ORDER

AND NOW, THIS 29th DAY OF SEPTEMBER 2008, FOR THE REASONS
DISCUSSED IN THE ACCOMPANYING MEMORANDUM, IT IS HEREBY ORDERED
THAT:

1. The Magistrate Judge's Report and Recommendation (Doc. 87) is ADOPTED;
2. Motion for Summary Judgment of the Defendants Craig A. Lowe and Ronald Greco (Doc. 45) is GRANTED;
3. Motion for Summary Judgment of the Plaintiff Mr. Michael Joseph Scerbo Against the Defendants (Doc. 62) is DENIED;
4. The Clerk of Court is directed to close this case.

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