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

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| **RALPH MCCLAIN,** | : | **Civil No. 1:21-CV-992** |
| | : | |
| **Plaintiff,** | : | |
| | : | **(Judge Rambo)** |
| **v.** | : | |
| | : | **(Magistrate Judge Carlson)** |
| **H.K. HOOVER, et al.** | : | |
| | : | |
| **Defendants.** | : | |

## REPORT AND RECOMMENDATION

## I. Statement of Facts and of the Case

Ralph McClain is a state prisoner and a prodigious, if often prodigiously unsuccessful, litigant in federal court.[1] Moreover, many of McClain's past litigative

[1] See e.g., McClain v. Kale, No. 1:10-cv-35 (M.D. Pa.) (judgment for Defendants entered 12/12/13); McClain v. Corbett, No. 1:10- cv-1517 (M.D. Pa.) (dismissed 03/15/11); McClain v. Cash, No. 1:10-cv-2529 (M.D. Pa.) (dismissed 03/23/11); McClain v. Walsh, No. 1:12-cv-265 (M.D. Pa.) (dismissed 11/05/12); McClain v. Davis, No. 1:12-cv-352 (M.D. Pa.) (judgment for Defendants entered 11/13/12); McClain v. Legget, No. 1:13-cv-2057 (M.D. Pa.), transferred, 2:13-cv-1248 (W.D. Pa.) (dismissed 09/26/14); McClain v. Mosier, No. 1:13-cv-3011 (M.D. Pa.) (dismissed 09/17/14); McClain v. Kormanic, No. 2:09-cv-691 (W.D. Pa.) (dismissed 08/20/09); McClain v. Prebish, No. 3:10-cv-132 (W.D. Pa.) (dismissed 10/15/10); McClain v. Scire, No. 2:10-cv-32(W.D. Pa.) (dismissed 03/02/10); McClain v. Kupachella, No. 3:11-cv-230(W.D. Pa.) (dismissed 12/30/11); McClain v. Servello, No. 2:10-cv-838 (W.D. Pa.) (dismissed 10/15/10); McClain v. Clark, No. 2:22-cv-958(W.D. Pa.) (dismissed 01/23/12), aff'd, (3d Cir. 06/07/12); McClain v. Kushner, No. 2:11-cv-177 (W.D. Pa.) (dismissed 01/23/12), aff'd, (3d Cir. 06/07/12); McClain v. Flemming, No. 2:11-cv-1068 (W.D. Pa.) (dismissed 01/23/12), aff'd,

efforts from inside the prison have had an overtly sexual element. For example, in 2012 McClain, who was then using the name Capachino Capone, filed a motion for preliminary injunction which:

> [D]emand[ed] that this court provide him with "reasonable accommodations for plaintiff to engage in sacred coital Royal Majestic rituals with plaintiff's Royal Majestic harem consorts, physically, spiritually and psychicly [sic]," [which] we construe[d] ... as a request for contact visitation with a broad class of person described by McClain as "plaintiff's sacred and Majestic harem and/or earth bound celestial goddesses and/or priestessesque [sic] women with divine and/or saintly qualities."

McClain v. Walsh, No. 1:12-CV-265, 2012 WL 5398604, at *4 (M.D. Pa. Sept. 28, 2012), report and recommendation adopted, No. 1:12-CV-265, 2012 WL 5395823 (M.D. Pa. Nov. 5, 2012). More recently, McClain has sued prison officials asserting that their efforts to discipline him for making what were construed to be sexually suggestive comments to prison staff violated his First Amendment rights. See McClain v. Pennsylvania Dep't of Corr., No. 1:19-CV-1951, 2021 WL 5227677, at *5 (M.D. Pa. Sept. 10, 2021), report and recommendation adopted in part, rejected in part, No. 1:19-CV-1951, 2021 WL 5205948 (M.D. Pa. Nov. 9, 2021).

These themes continue to recur in McClain's current lawsuit. The instant case, which comes before us for consideration of two defense motions to dismiss, (Docs.

(3d Cir. 06/07/12); McClain v. Coleman, No. 2:11-cv-1091 (W.D. Pa.) (dismissed 12/30/11); McClain v. Lockett, No. 2:11- cv-1289 (W.D. Pa.) (dismissed 12/30/11); McClain v. Lesure, No. 2:11-cv-1430 (W.D. Pa.) (dismissed 12/30/11).

57 and 62), represents one of McClain's latest legal forays and presents an array of constitutional claims cast against the backdrop of a striking set of facts. In this case McClain concedes that he "clearly violated a legitimate prison regulation by mailing" a communication to a female correctional staff member, (Doc. 77 at 8), but nonetheless attempts to sue the prison officials who sanctioned him for his acknowledged rules violation by arguing that the subject matter of his communication, McClain's sexually charged assertion to the staff member that "I love you," was constitutionally protected speech.

The well-pleaded facts set forth in McClain's second amended complaint, which is the operative pleading in this case, allege that in the summer of 2019 McClain was transferred to SCI Rockview and was enrolled in the Secure Residential Treatment Unit (SRTU) at this facility where he received individual psychotherapy from Kimberly Blocher, a Psychological Services Specialist at the prison. (Doc. 71-10, ¶¶ 16-17). On July 18, 2019, prison officials learned that McClain had violated prison regulations by mailing correspondence of a sexual nature to Ms. Blocher; namely, a letter in which McClain stated "I love you." (Id. ¶ 19). In light of this sexually suggestive communication, the Deputy Superintendent at SCI Rockview, Morris Houser, directed that McClain be reassigned to a different Psychological Services Specialist, and prohibited McClain from attending treatment groups conducted by female staff. (Id. ¶ 20). McClain was also instructed by Unit

Manager Hoover to no longer try to communicate with Ms. Blocher. (Id. ¶ 22). According to McClain, as a result of these restrictions he was unable to secure sufficient mental health care and treatment. (Id.)

Moreover, McClain asserts that notwithstanding the clear instruction that he refrain from communicating with Ms. Blocher, on July 31, 2019, he received a misconduct citation for shouting "I love you Ms. Blocher" at this female staff psychological support specialist. McClain was later cited for further misconduct when he attempted to communicate with Ms. Blocher in writing through a request slip. (Id. ¶¶ 25, 26). Following disciplinary proceedings on these citations, according to McClain he was found guilty of rules violations and was sanctioned to disciplinary time and loss of phone privileges as a result of these incidents, penalties which McClain believes were disproportionate to those meted out to other inmates. (Id. ¶¶ 26-31).

On September 17, 2019, prison officials decided that McClain should not advance from Phase 4 to Phase 3 of the SRTU program due to his misconducts involving these communications targeting Ms. Blocher. (Id. ¶ 31). Despite his instructions to refrain from contacting Blocher, McClain alleges that several days later he contacted Ms. Blocher and chastised her, stating: "Blocher that's fucked up that you complained . . . I haven't been yelling shit to you when I know your [sic] around, and I haven't sent you no fucking request slips." (Id. ¶ 33). This outburst, in

turn, led prison officials to further delay McClain's progress through the SRTU program in October of 2019, because the defendants wanted to see McClain go longer without trying to communicate with Blocher. (Id. ¶ 36).

In addition to these allegations relating to the SRTU program, McClain has also alleged that he was denied access to the prison law library for several months between August and October 2019, resulting in the plaintiff being unable to meet filing deadlines in other litigation. (Id. ¶¶ 38-42).

On the basis of these well-pleaded facts, McClain has sued eleven correctional and medical officials, including Deputy Superintendent Morris Houser; Unit Manager H.K. Hoover; Kimberly Blocher, Adam Harshberger, both of whom were Psychological Services Specialists at SCI Rockview; another Psychological Services Specialist named Fetteroff; three prison counselors named Teirra Moore, Collins and Hoover; a psychiatrist who is only identified as Weber; a psychology manager identified as Metz; and a prisoner hearing examiner named Pelosi. (Id. ¶¶ 3-13). McClain's amended complaint brings four legal claims against these correctional and medical defendants. Two of the constitutional torts alleged by McClain entail First Amendment retaliation claims and are premised upon the notion that McClain's sexually suggestive communications directed at Ms. Blocher, a correctional employee, constitute protected speech in a prison setting. First, McClain alleges that

the disciplinary hearing officer, Defendant Pelosi,[2] retaliated against him when that hearing officer found McClain guilty of prison rules infractions and sanctioned him. (Id. Count I). Additionally, in Count III of his complaint McClain alleges that defendants Hoover, Blocher, Fetteroff, Harshberger, Collins, Hoover, Moore, Metz, and Weber all retaliated against him for his sexualized remarks by delaying his advancement through the SRTU program. (Id. Count III).

In addition to these First Amendment retaliation claims, McClain's amended complaint sues defendant Houser and Harshberger, alleging that they denied him mental health treatment for a period of time in violation of the Eighth Amendment to the United States Constitution. (Id. Count II). Finally, in his amended complaint, McClain alleges that Defendant Hoover's decision to deny him law library access for an extended period in the summer of 2019 deprived him of his First Amendment right of access to the courts. (Id. Count IV).

With McClain's allegations framed in this fashion, the defendants have filed two motions to dismiss this amended complaint, arguing that McClain has failed to state a claim against the individual defendants upon which relief may be granted.

[2] We note that there is some confusion regarding the identity of this defendant. McClain's complaint calls the defendant Pelosi, the defendants' motion to dismiss asserts that the hearing officer was named Walter rather than Pelosi. McClain's rejoinder is that Walter and Pelosi are one and the same, an assertion the defendants do not further contest. As discussed below, we need not resolve this dispute since McClain's claim fails on independent grounds.

(Docs. 57 and 62). These motions have been briefed by the parties and are, therefore, ripe for resolution. For the reasons set forth below, it is recommended that the motions be granted, in part, and denied, in part. Specifically, it is recommended that McClain's First Amendment retaliation claims be dismissed, but that the motions to dismiss the Eighth Amendment and First Amendment access to courts claims be denied without prejudice to prompt renewal of these defenses through fully documented motions for summary judgment.

## II. Discussion

### A. Standard of Review – Motion to Dismiss

The defendants have moved to dismiss the claims against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, "failure to state a claim upon which relief can be granted." With respect to this benchmark standard for legal sufficiency of a complaint, the United States Court of Appeals for the Third Circuit has aptly noted the evolving standards governing pleading practice in federal court, stating that:

> Standards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court's opinion in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) continuing with our opinion in Phillips [v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008)]and culminating recently with the Supreme Court's decision in Ashcroft v. Iqbal –U.S.–, 129 S. Ct. 1937 (2009) pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.

Fowler v. UPMC Shadyside, 578 F.3d 203, 209-10 (3d Cir. 2009).

In considering whether a complaint fails to state a claim upon which relief may be granted, the Court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom are to be construed in the light most favorable to the plaintiff. Jordan v. Fox Rothschild, O'Brien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir. 1994). However, a court "need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). Additionally, a court need not "assume that a ... plaintiff can prove facts that the ... plaintiff has not alleged." Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983). As the Supreme Court held in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), in order to state a valid cause of action a plaintiff must provide some factual grounds for relief which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of actions will not do." Id. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level." Id.

In keeping with the principles of Twombly, the Supreme Court has underscored that a trial court must assess whether a complaint states facts upon which relief can be granted when ruling on a motion to dismiss. In Ashcroft v. Iqbal, 556 U.S. 662 (2009), the Supreme Court held that, when considering a motion to

dismiss, a court should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Id. at 679. According to the Supreme Court, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678. Rather, in conducting a review of the adequacy of complaint, the Supreme Court has advised trial courts that they must:

> [B]egin by identifying pleadings that because they are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at 679.

Thus, following Twombly and Iqbal, a well-pleaded complaint must contain more than mere legal labels and conclusions. Rather, a complaint must recite factual allegations sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation. As the Third Circuit has stated:

> [A]fter Iqbal, when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.' In other words, a complaint must do more than allege the plaintiff's

> entitlement to relief. A complaint has to 'show' such an entitlement with its facts.

Fowler, 578 F.3d at 210-11.

> Two years after Fowler, the Third Circuit further observed:
>
> > The Supreme Court in Twombly set forth the "plausibility" standard for overcoming a motion to dismiss and refined this approach in Iqbal. The plausibility standard requires the complaint to allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570, 127 S. Ct. 1955. A complaint satisfies the plausibility standard when the factual pleadings "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556, 127 S. Ct. (1955)). This standard requires showing "more than a sheer possibility that a defendant has acted unlawfully." Id. A complaint which pleads facts "merely consistent with" a defendant's liability, [ ] "stops short of the line between possibility and plausibility of 'entitlement of relief.'"

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011).

In practice, consideration of the legal sufficiency of a complaint entails a three-step analysis:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Iqbal, 129 S. Ct. at 1947. Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Id. at 1950. Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." Id.

Santiago v. Warminster Tp., 629 F.3d 121, 130 (3d Cir. 2010).

In addition to these pleading rules, a civil complaint must comply with the requirements of Rule 8(a) of the Federal Rules of Civil Procedure, which defines what a complaint should say and provides that:

> (a) A pleading that states a claim for relief must contain (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8(a).

Thus, a well-pleaded complaint must contain more than mere legal labels and conclusions. Rather, a plaintiff's complaint must recite factual allegations which are sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation, set forth in a "short and plain" statement of a cause of action.

**B. McClain's First Amendment Retaliation Claims Fail**

At the outset, McClain brings First Amendment retaliation claims against a number of these defendants, asserting that the prison misconducts he received and the decision to delay his progress through the SRTU program were undertaken in retaliation for what McClain deems to be First Amendment protected speech; namely, his offensive and sexually suggestive statements to Ms. Blocher.

McClain's efforts to characterize this conduct, which he acknowledges "clearly violated a legitimate prison regulation by mailing" a communication to a

female correctional staff member, (Doc. 77 at 8), as constitutionally protected activity are unavailing. A prisoner claiming that prison officials have retaliated against him for exercising his constitutional rights must first prove the following three elements: (1) the conduct in which he engaged was constitutionally protected; (2) he suffered adverse action at the hands of prison officials; and (3) his constitutionally protected conduct was a substantial motivating factor in the defendants' conduct. Carter v. McGrady, 292 F.3d 152, 158 (3d Cir. 2002). With respect to the obligation to demonstrate that he suffered an adverse action, a plaintiff must demonstrate that he suffered action that "was sufficient to deter a person of ordinary firmness from exercising his rights." Allah v. Seiverling, 229 F.3d 220, 225 (3d Cir. 2000). However, it is well-settled that *de minimis* actions do not rise to the level of constitutionally cognizable retaliation. Thaddeus-X v. Blatter, 175 F.3d 378, 396 (6th Cir. 1999) ("It is not necessarily true, however, that every action, no matter how small, is constitutionally cognizable.") As one court has observed:

> The *de minimis* standard . . . achieves the proper balance between the need to recognize valid retaliation claims and the danger of "federal courts embroil[ing] themselves in every disciplinary act that occurs in state penal institutions." Woods, 60 F.3d at 1166. The purpose of allowing inmate retaliation claims under § 1983 is to ensure that prisoners are not unduly discouraged from exercising constitutional rights. See Crawford-El, 523 U.S. at 588 n. 10, 118 S. Ct. 1584. Some acts, though maybe motivated by retaliatory intent, are so *de minimis* that they would not deter the ordinary person from further exercise of his rights. Such acts do not rise to the level of constitutional violations and cannot form the basis of a § 1983 claim.

Morris v. Powell, 449 F.3d 682, 686 (5th Cir. 2006). See, e.g., Pope v. Bernard, No. 10 1443, 2011 U.S. App. LEXIS 2764, 2011 WL 478055, at *2 (1st Cir. Feb. 10, 2011).

The third essential element to a retaliation claim is that there be a causal link between the exercise of a constitutional right and the adverse action taken against the prisoner. Rauser, 241 F.3d at 333-34. To establish this third, and crucial, component to a constitutional retaliation claim, causation, McClain must make an exacting showing. In this setting:

> To establish the requisite causal connection a plaintiff usually must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link. See Krouse v. American Sterilizer Co., 126 F.3d 494, 503-04 (3d Cir. 1997); Woodson v. Scott Paper Co., 109 F.3d 913, 920-21 (3d Cir. 1997). In the absence of that proof the plaintiff must show that from the "evidence gleaned from the record as a whole" the trier of the fact should infer causation. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 281 (3d Cir. 2000).

Lauren W. ex rel. Jean W. v. DeFlaminis, 480 F.3d 259, 267 (3d Cir. 2007).

Judged against these benchmarks, we believe that McClain's First Amendment retaliation claims fail for several reasons. First, we reject the initial premise underlying these claims, McClain's argument that his sexually suggestive communications to Ms. Blocher constituted protected speech in the setting of a maximum security prison. While inmates retain those First Amendment rights that are consistent with institutional safety and order, they do not enjoy an untrammeled

right to engage in sexually offensive commentary targeting female staff. Quite the contrary, when assessing prison policies which limit inmate speech:

> [T]he Court applies a reasonableness standard. See Turner v. Safley, 482 U.S. 78 (1987) (reasonableness standard applied to prison regulation regarding incoming mail); Thornburgh v. Abbott, 490 U.S. 401, 414 (1989) (reasonableness standard applied to BOP regulation regarding incoming publications and warden's rejection of certain publication containing sexual content). A reasonableness standard asks whether a prison regulation that impinges on inmates' constitutional rights is "reasonably related" to legitimate penological interests. Turner, 482 U.S. at 78. The reasonableness standard considers the following four factors: (1) whether there is a "valid, rational connection" between the regulation and a legitimate and neutral governmental interest; (2) whether there are alternative means of exercising the asserted constitutional right that remain open to inmates; (3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, on inmates' liberty, and on the allocation of limited prison resources; and (4) whether the regulation represents an "exaggerated response" to prison concerns. See Turner, 482 U.S. at 78-79.
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> The United States Court of Appeals for the Third Circuit has developed a two-step analysis regarding the Turner factors. See Sharp v. Johnson, 669 F.3d 144, 156 (3d Cir. 2012). "First, the prison has the burden of demonstrating the first Turner factor. This burden is slight, and in certain instances, the connection may be a matter of common sense." Id. (citing Wolf v. Ashcroft, 297 F.3d 305, 308 (3d Cir. 2002)). Second, if the prison meets its burden under the first Turner factor, then the Court considers the other Turner factors. See id. The inmate has the burden of production regarding the other Turner factors, and the inmate retains the overall burden of persuasion . . . .

Cousins v. Dutton-McCormick, No. CV 16-302-LPS, 2021 WL 780745, at *5 (D. Del. Mar. 1, 2021), aff'd, No. 21-1561, 2022 WL 67330 (3d Cir. Jan. 6, 2022).

Applying the Turner analytical paradigm to McClain's conduct, we have little difficulty concluding that the defendants' decisions to sanction McClain's sexually harassing remarks targeting a female staff member were rationally related to legitimate penological goals. Indeed, it would be antithetical to the orderly administration of a correctional institution to give an inmate a license to verbally and sexually harass female staff. Moreover, beyond his general, and factually unsupported,[3] assertion that he believes these sexually suggestive remarks targeting staff are entitled to constitutional protection, McClain provides no grounds for questioning whether these disciplinary and programming decisions were a reasonable response to unacceptable institutional conduct by the plaintiff. Therefore, as a threshold matter McClain errs when he suggests that he had a constitutional right to sexually harass female staff at SCI Rockview.

Moreover, McClain also errs when he suggests that a First Amendment retaliation claim can rest upon disciplinary and programming decisions that prison officials were compelled to make given the plaintiff's misconduct in verbally

[3] For his part, McClain suggests that there was nothing about his statements that was sexually suggestive or harassing, but this argument is risible. When considering the logical import of words, content and context matter. These statements were made inside the prison by an inmate to a woman prison employee in a fashion which carried obvious sexual implications. It strains credulity for McClain to suggest, as he does, that his repeated entreaties to Ms. Blocher were nothing more than some platonic form of courtly love. Prison officials justifiably discounted this incredible suggestion when acting in this case.

badgering and harassing Ms. Blocher. McClain's efforts to contort justifiable discipline and programming decisions into unconstitutional retaliation are unavailing. It is well established that "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." Wolff v. McDonnell, 418 U.S. 539, 556 (1974). The Supreme Court has, however, recognized a set of minimum procedural protections that must apply to prison disciplinary proceedings, including the right to: (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety or correctional goals, to call witnesses and present documentary evidence as part of a defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. Id. at 563-67. Due process also requires that a prison disciplinary tribunal be sufficiently impartial. Meyers v. Alldredge, 492 F.2d 296, 305-07 (3d Cir. 1974). The requirement of an impartial tribunal "prohibits only those officials who have a direct personal or otherwise substantial involvement, such as major participation in a judgmental or decision-making role, in the circumstances underlying the charge from sitting on the disciplinary committee." Meyers, 492 F.2d at 306.

A prison disciplinary determination comports with due process if it is based on "some evidence." See Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 454-56 (1985) ("[T]he relevant question is whether there is any evidence in the

record that could support the conclusion reached by the disciplinary board"). This standard is minimal and does not require examination of the entire record, an independent assessment of the credibility of witnesses, or even a weighing of the evidence. See id. at 455; Thompson v. Owens, 889 F.2d 500, 501-02 (3d Cir. 1989). Therefore, it is well settled that disciplinary decisions are entitled to considerable deference by a reviewing court and must be upheld whenever there is "some evidence" to support the decision. Hill, 472 U.S. at 457; Elkin v. Fauver, 969 F.2d 48 (3d Cir. 1992); Thompson v. Owens, 889 F.2d 500 (3d Cir. 1989); Franco v. Kelly, 854 F.2d 584, 588 (2d Cir. 1988); Freeman v. Rideout, 808 F.2d 949, 955 (2d Cir. 1986). Thus, in this setting the "function [of the court] is to determine whether there is some evidence which supports the decision of the [hearing officer]." Freeman, 808 F.2d at 954. As the Supreme Court has observed, the "some evidence" standard is a highly deferential standard of review and:

> Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.

Hill, 472 U.S. at 455-456.

Provided that a prisoner is afforded these due process protections during the disciplinary hearing process, it is well-settled that a claim that a misconduct report was false, standing alone, does not state a valid cause of action. As the United States

Court of Appeals for the Third Circuit has aptly observed: "[F]iling false disciplinary charges does not itself violate a prisoner's constitutional rights, so long as procedural due process protections were provided. See e.g., Freeman v. Rideout, 808 F.2d 949, 952-53 (2d Cir. 1986) (the filing of false charges does not constitute a claim under § 1983 so long as the inmate was granted a hearing and an opportunity to rebut the charges); Hanrahan v. Lane, 747 F.2d 1137, 1140 (7th Cir. 1984)." Richardson v. Sherrer, 344 F. App'x 755, 757-758 (3d Cir. 2007); see also Booth v. Pence, 141 F. App'x 66 (3d Cir. 2005); Smith v. Mensinger, 293 F.3d 641, 653-54 (3d Cir. 2002).

These principles also directly apply to inmate retaliation claims stemming from prison disciplinary proceedings. A prisoner claiming that prison officials have retaliated against him for exercising his constitutional rights must prove the following three elements: (1) the conduct in which he engaged was constitutionally protected; (2) he suffered adverse action at the hands of prison officials; and (3) his constitutionally protected conduct was a substantial motivating factor in the defendants' conduct. Carter v. McGrady, 292 F.3d 152, 158 (3d Cir. 2002). With respect to the obligation to demonstrate that he suffered an adverse action, a plaintiff must demonstrate that he suffered action that "was sufficient to deter a person of ordinary firmness from exercising his rights." Allah v. Seiverling, 229 F.3d 220, 225 (3d Cir. 2000). While filing false misconduct reports may constitute the type of action that will, in certain cases, support a retaliation claim, Mitchell v. Horn, 318

F.3d 523, 530 (3d Cir. 2003), in a prison discipline context, an inmate's retaliation claim fails whenever the defendant shows that there is "some evidence" to support the discipline citation. As the United States Court of Appeals for the Third Circuit has observed: "[an inmate's] retaliatory discipline claim fails [when] there is 'some evidence' supporting the guilty findings . . . . See Henderson v. Baird, 29 F.3d 464, 469 (8th Cir. 1994) (stating that a finding of 'some evidence' to support a prison disciplinary determination 'checkmates' the prisoner's retaliation claim)." Nifas v. Beard, 374 F. App'x 241, 244 (3d Cir. 2010). Since a finding of some evidence to support a misconduct citation checkmates a retaliation claim involving prison discipline, McClain's admissions in his amended complaint that he committed various acts of misconduct bars him from citing the discipline he received for his wrongdoing as some form of retaliation.

This rationale applies with equal force to McClain's First Amendment retaliation claims which are premised on the decision to delay the plaintiff favorable treatment, advancement through the SRTU program, given his persistent, harassing misconduct targeting Ms. Blocher. The well-pleaded facts recited by McClain himself indicate that he persisted in this misconduct even after being instructed to refrain from communicating with Ms. Blocher. Therefore, it is evident that McClain's lack of advancement in the SRTU program was due to his own misconduct, rather than any retaliatory motive on the part of the defendants. Since a

finding of prison misconduct effectively checkmates a retaliation claim, McClain's undisputed misconduct defeats these claims that the discretionary decision to delay his progress through this program while he engaged in misdeeds violated the constitution. See Rosa-Diaz v. Rivello, No. 1:19-CV-1914, 2022 WL 819222, at *14 (M.D. Pa. Jan. 25, 2022), report and recommendation adopted, No. 1:19-CV-1914, 2022 WL 808492 (M.D. Pa. Mar. 16, 2022).

Further, while cast as a First Amendment retaliation claim, it appears that there may be equal protection allegations lurking about in McClain's amended complaint since the plaintiff also insists that he was punished more severely than some other inmates for these prison infractions. However, to the extent that McClain is attempting to advance an equal protection claim, that claim fails since:

> [I]t is well-settled that the touchstone to any equal protection claim is disparate treatment of similarly-situated persons. Thus, the Equal Protection Clause requires that all people similarly situated be treated alike. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). "[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (quotations omitted). Claims for equal protection violations are subject to differing levels of scrutiny depending on the status of the claimant. Statutes or actions that substantially burden a fundamental right or target a suspect class must be reviewed under "strict scrutiny," which means that in order to be valid, they must be narrowly tailored to serve a compelling governmental interest. Plyler v. Doe, 457 U.S. 202, 216–17, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); Abdul–Akbar v. McKelvie, 239 F.3d

> 307, 317 (3d Cir. 2000). In contrast, if state action neither burdens a fundamental right nor targets a suspect class, it does not violate the Fourteenth Amendment's Equal Protection clause, so long as the state action bears a rational relationship to some legitimate end. Romer v. Evans, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); Abdul–Akbar, 239 F.3d at 317.

Moore v. Wetzel, No. 1:18-CV-1523, 2019 WL 1397405, at *10 (M.D. Pa. Mar. 6, 2019), report and recommendation adopted, No. 1:18-CV-1523, 2019 WL 1383631 (M.D. Pa. Mar. 27, 2019).

Further it is clear that prisoners do not constitute a suspect class for Fourteenth Amendment purposes. Therefore, an inmate's generalized equal protection claim, like the claim made here, is governed by rational-basis review. See Myrie v. Comm'r, N.J. Dep't of Corr., 267 F.3d 251, 263 (3d Cir. 2001); Abdul–Akbar, 239 F.3d at 317. Accordingly, to sustain this Equal Protection claim, McClain must meet the burden of showing that he has been arbitrarily treated differently from similarly situated inmates, that the defendants did so intentionally, and that this difference in treatment bears no rational relation to any legitimate penological interest. See Hill v. Borough of Kutztown, 455 F.3d 225, 239 (3d Cir. 2006); See also Moore, 2019 WL 1397405, at *10; McKeithan v. Kerestes, No. 1:11-CV-1441, 2014 WL 3734569, at *9–10 (M.D. Pa. July 28, 2014).

Likewise, if we treat McClain's complaint as asserting a "class of one" equal protection claim, the plaintiff must still meet exacting burdens of pleading and proof. As we have noted when addressing a similar class of one equal protection claim:

> The Equal Protection Clause of the Fourteenth Amendment directs that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. [The plaintiff's] equal protection claim in this case apparently advances what is called a "class of one" claim, an assertion that the plaintiff has been treated differently than all others in some invidious fashion. In order to sustain a "class of one" equal protection claim "a plaintiff must allege that (1) the defendant treated him differently from others similarly situated; (2) the defendant did so intentionally; and (3) there was no rational basis for the difference in treatment". Hill v. Borough of Kutztown, 455 F.3d 225 (3d Cir. 2006). So, "to state a claim for 'class of one' equal protection, a plaintiff must at a minimum allege that he was intentionally treated differently from others similarly situated by the defendant and that there was no rational basis for such treatment." Phillips v. Cty. of Allegheny, 515 F.3d 224, 243 (3d Cir. 2008).

Bailey v. Kauffman, No. 1:19-CV-1458, 2021 WL 5846942, at *6 (M.D. Pa. Dec. 9, 2021).

Judged by these benchmarks McClain's equal protection claim encounters insurmountable legal and factual obstacles. First, as a legal matter, the plaintiff's bare-bones allegation that some other inmates received lesser sanctions for their misconduct, by itself, does not describe the type of arbitrary, capricious, or irrational and invidiously discriminatory behavior which is necessary for an equal protection claim in this setting. Moreover, factually, McClain's efforts to describe this conduct as irrationally unfair run afoul of an immutable fact: McClain's complaint recites that the plaintiff repeatedly violated prison rules and staff orders in the course of sexually harassing Ms. Blocher. These prison infractions provided a reasonable, rational basis for disciplining McClain and delaying his progress through this

program. Given this rational reason for these actions by the defendants McClain's newly minted equal protection claims fail and should be dismissed.

Finally, even if we concluded that McClain had somehow cobbled together a colorable First Amendment retaliation claim, the defendants would still be entitled to qualified immunity in this case. The analysis of qualified immunity claims is guided by familiar legal principles. As we have observed:

> "Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." Reichle v. Howards, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). A qualified immunity analysis involves two questions: whether the official violated a statutory or constitutional right, and whether that right was clearly established at the time of the challenged conduct. Ashcroft v. al-Kidd, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). Lower courts have the discretion to decide which question to analyze first. Pearson v. Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). The Supreme Court has cautioned courts to "think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case." Id. (internal quotations omitted); see also al-Kidd, 563 U.S. at 735, 131 S.Ct. 2074.
>
> An official's conduct violates clearly established law when, "at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.' " al-Kidd, 563 U.S. at 741, 131 S.Ct. 2074 (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). The Supreme Court has stated that this standard does not require a case directly on point, but requires that "existing precedent must have placed the statutory or constitutional question beyond debate." al-Kidd, 563 U.S. at 741, 131 S.Ct. 2074. "When properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law." Id. at

> 743, 131 S.Ct. 2074 (quoting Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)); see also Taylor v. Barkes, 575 U.S. 822, 135 S. Ct. 2042, 2044, 192 L.Ed.2d 78 (2015).
>
> The dispositive question that the court must ask is "whether the violative nature of *particular* conduct is clearly established." Mullenix v. Luna, 577 U.S. 7, 136 S. Ct. 305, 308, 193 L.Ed.2d 255 (2015) (quoting al-Kidd, 563 U.S. at 742, 131 S.Ct. 2074). The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id.; see also Davenport v. Borough of Homestead, 870 F.3d 273, 281 (3d Cir. 2017). This "clearly established" standard ensures that an official can reasonably anticipate when his or her conduct may give rise to liability, and "protects the balance between vindication of constitutional rights and government officials' effective performance of their duties." Reichle, 566 U.S. at 664, 132 S.Ct. 2088.

Woodward v. Sabo, No. 1:19-CV-2048, 2022 WL 620597, at *4–5 (M.D. Pa. Jan. 21, 2022), report and recommendation adopted, No. 1:19-CV-2048, 2022 WL 614920 (M.D. Pa. Mar. 2, 2022).

> Furthermore, when undertaking this qualified immunity analysis:
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> At the "clearly established" step of the qualified immunity analysis, the question is "whether the officer had fair notice that her conduct was unlawful." Courts judge reasonableness against the backdrop of the law at the time of the conduct. "Although there need not be 'a case directly on point for a right to be clearly established, existing precedent must have placed the ... constitutional question beyond debate.' " We first look to factually analogous precedent in the Supreme Court and the Third Circuit Court of Appeals to determine whether that body of law clearly establishes the right at issue in such a way that "a reasonable officer would anticipate liability for this conduct." We then consider whether a "robust consensus" of persuasive authority clearly establishes the right.

Rivera v. Monko, 37 F.4th 909, 919 (3d Cir. 2022) (footnotes omitted).

Here it cannot be said that Supreme Court precedent or a robust consensus of persuasive authority supports the proposition that McClain's sexualized comments targeting a female prison employee constituted protected speech under the First Amendment. Quite the contrary, the great weight of authority seems to reject this proposition. Therefore, acknowledging as we must that "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law[ ]" Mullenix, 577 U.S. at 12 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)), we find that the First Amendment right which McClain attempts to assert in this case—a right to sexually harass female staff in prison—was not clearly established. Therefore, the defendants are entitled to qualified immunity on these First Amendment retaliation claims.

**C. McClain's Claims Against Medical Defendants Weber and Metz are Time-Barred.**

Beyond these overarching shortcomings of his First Amendment retaliation claims, McClain's allegations against two of the medical defendants, a psychiatrist identified as Weber and a psychology manager identified as Metz, fail for a more prosaic reason. They are untimely barred by the statute of limitations.

It is well-settled that claims brought pursuant to 42 U.S.C. § 1983 are subject to the state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). In Pennsylvania, the statute of limitations for a personal injury action is two years. 42 Pa.Con.Stat. § 5524. A cause of action accrues for

statute of limitations purposes when the plaintiff knows or has reason to know of the injury that constitutes the basis of the cause of action. Sameric Corp. of Delaware, Inc. v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998); see also, Nelson v. County of Allegheny, 60 F.3d 1010 (3d Cir. 1995).

While this two-year limitations period may be extended based upon a continuing wrong theory, a plaintiff must make an exacting showing to avail himself of this grounds for tolling the statute of limitations. For example, it is well settled that the "continuing conduct of [a] defendant will not stop the ticking of the limitations clock [once] plaintiff obtained requisite information [to state a cause of action]. On discovering an injury and its cause, a claimant must choose to sue or forego that remedy." Barnes v. American Tobacco Co., 161 F.3d 127, 154 (3d Cir. 1998) (quoting Kichline v. Consolidated Rail Corp., 800 F. 2d 356, 360 (3d Cir. 1986)). See also Lake v. Arnold, 232 F.3d 360, 266-68 (3d Cir. 2000). Instead:

> The continuing violations doctrine is an "equitable exception to the timely filing requirement." West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir.1995). Thus, "when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred." Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am., 927 F.2d 1283, 1295 (3d Cir.1991). In order to benefit from the doctrine, a plaintiff must establish that the defendant's conduct is "more than the occurrence of isolated or sporadic acts." West, 45 F.3d at 755 (quotation omitted). Regarding this inquiry, we have recognized that courts should consider at least three factors:

> (1) subject matter-whether the violations constitute the same type of discrimination, tending to connect them in a continuing violation; (2) frequency-whether the acts are recurring or more in the nature of isolated incidents; and (3) degree of permanence-whether the act had a degree of permanence which should trigger the plaintiff's awareness of and duty to assert his/her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. See id. at 755 n. 9 (citing Berry v. Board of Supervisors of Louisiana State Univ., 715 F.2d 971, 981 (5th Cir.1983)). The consideration of "degree of permanence" is the most important of the factors. See Berry, 715 F.2d at 981.

Cowell v. Palmer Township. 263 F.3d 286, 292 (3d Cir. 2001).

In this case with respect to the application of the statute of limitations the essential facts are undisputed. According to McClain he was denied phase promotions in the SRTU program in September and October 2019 (Doc. 51, ¶ 33). These phase promotion denials form the gravamen of McClain's complaint against Defendants Weber and Metz, and the harm alleged by McClain would have been apparent to the plaintiff when these denials took place. In fact, McClain's October 2019 prison grievance specifically included references to Metz and Weber. Thus, it is clear that McClain had an understanding of the alleged roles of these defendants in these events which he believed violated his rights in the Fall of 2019.

While McClain's exhaustion of prison grievances would have briefly tolled the statute of limitations, Pearson v. Sec'y Dep't of Corr., 775 F.3d 598, 603 (3d Cir. 2015), by the time McClain received the final grievance appeal decision on February

5, 2020, the statute of limitations would have commenced to run. Accordingly, McClain had until February 5, 2022 to name Defendants Weber and Metz as defendants in this action. However, the first pleading specifically naming Weber and Metz as defendants, is McClain's Second Amended Complaint, which was not filed until August 8, 2022, two and one half years after his grievance appeal was denied. Thus, under the applicable two years limitations period, McClain's claims against these defendants are time-barred and should be dismissed.

**D. McClain's Eighth Amendment and First Amendment Access to Courts Claims Call for Consideration of Matters Outside the Pleadings.**

Having addressed McClain's primary legal claims, his First Amendment retaliation allegations, we turn to two ancillary claims made by the plaintiff in his amended complaint. Count II of McClain's amended complaint sues defendant Houser and Harshberger, alleging that they denied him mental health treatment for several months in 2019 in violation of the Eighth Amendment to the United States Constitution. (Id. Count II). Finally, in Count IV of his amended complaint, McClain alleges that Defendant Hoover denied him law library access for an extended period in the summer of 2019 denying him of his First Amendment right of access to the courts. (Id. Count IV).

McClain must meet exacting legal standards to ultimately sustain each of these claims. For example, while prison officials may also violate an inmate's rights

under the Eighth Amendment to the United States Constitution by displaying "deliberate indifference" to the inmate's medical needs, in order to sustain such a claim an inmate must plead facts which:

> [M]eet two requirements: (1) "the deprivation alleged must be, objectively, sufficiently serious;" and (2) the "prison official must have a sufficiently culpable state of mind." Farmer v. Brennan, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (quotation marks and citations omitted). In prison conditions cases, "that state of mind is one of 'deliberate indifference' to inmate health or safety." Id. "Deliberate indifference" is a subjective standard under Farmer—the prison official—defendant must actually have known or been aware of the excessive risk to inmate safety.

Beers-Capitol v. Whetzel,256 F.3d 120, 125 (3d Cir. 2001).

However, it is also clear that the mere misdiagnosis of a condition or medical need, or negligent treatment provided for a condition, is not actionable as an Eighth Amendment claim because medical malpractice is not a constitutional violation. Estelle, 429 U.S. at 106. Thus, such complaints fail as constitutional claims under § 1983 since "the exercise by a doctor of his professional judgment is never deliberate indifference." Gindraw v. Dendler, 967 F.Supp. 833, 836 (E.D. Pa. 1997). In short, in the context of the Eighth Amendment, any attempt to second-guess the propriety or adequacy of a particular course of treatment is disavowed by courts since such determinations remain a question of sound professional judgment. Inmates of

Allegheny Cty. Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979) (quoting Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977)).

Likewise, with respect to McClain's First Amendment access-to-courts claim as we have previously explained to the plaintiff:

> McClain faces an exacting burden in advancing these claims. Since 1977, the United States Supreme Court has recognized that inmates have a constitutional right of access to the courts. Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).
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> As the Supreme Court initially observed, this right of access to the courts is satisfied when corrections officials facilitate "meaningful" access for those incarcerated, either through legal materials or the assistance of those trained in the law. Id. at 827 ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.")
>
> Two decades later, in 1996, the Supreme Court provided further definition and guidance regarding the scope and nature of this right of access to the courts in Lewis v. Carey, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). In Lewis, the Court eschewed efforts to define this right in abstract, or theoretical terms, but rather cautioned courts to focus on concrete outcomes when assessing such claims. As the Court observed:
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> > Because Bounds did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's ... legal assistance program is subpar in some theoretical sense.... Insofar as the right vindicated by Bounds is concerned, "meaningful access to the courts is the touchstone," id., at 823, 97 S.Ct., at 1495 (internal quotation marks omitted), and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the ... legal assistance program hindered

> his efforts to pursue a legal claim Although Bounds itself made no mention of an actual-injury requirement, it can hardly be thought to have eliminated that constitutional prerequisite. And actual injury is apparent on the face of almost all the opinions in the 35–year line of access-to-courts cases on which Bounds relied, see id., at 821–825, 97 S.Ct., at 1494–1497. Moreover, the assumption of an actual-injury requirement seems to us implicit in the opinion's statement that "we encourage local experimentation" in various methods of assuring access to the courts. Id., at 832, 97 S.Ct., at 1500.

Lewis v. Casey, 518 U.S. 343, 351–52, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).

> Thus, following Lewis courts have consistently recognized two guiding principles which animate access-to-court claims by prisoners. First, such claims require some proof of an actual, concrete injury, in the form of direct prejudice to the plaintiff in the pursuit of some legal claim. See, e.g., Oliver v. Fauver, 118 F.3d 175 (3d Cir.1997); Demeter v. Buskirk, No. 03–1005, 2003 WL 22139780 (E.D. Pa. Aug.27, 2003); Castro v. Chesney, No. 97–4983, 1998 WL 150961 (E.D. Pa. March 31, 1998).
>
> Moreover, consistent with the Supreme Court's express view that " 'we encourage local experimentation' in various methods of assuring access to the courts," Lewis v. Casey, 518 U.S. at 352, courts have long recognized that public officials can provide meaningful access to the courts through a wide variety of means.

McClain v. Walsh, No. 1:12-CV-265, 2012 WL 5388149, at *9–10 (M.D. Pa. Oct. 12, 2012), report and recommendation adopted, No. 1:12-CV-265, 2012 WL 5395823 (M.D. Pa. Nov. 5, 2012)

Yet, while caselaw sets exceedingly high benchmarks for these legal claims, in our view application of these legal precepts to the instant case would require us to foray beyond the pleadings themselves to assess factual matters relating to the extent of medical care provided to McClain and the degree to which the plaintiff was provided alternate means of access to the courts. These matters cannot be definitively addressed on the pleadings alone in our view. Rather, they require some factual development beyond the pleadings, a task which must await another day, and another motion in the nature of a summary judgment motion. In short, "resolution of the constitutionality of care decisions . . . is often a fact-bound determination which is not subject to resolution on a motion to dismiss, where we are limited to a consideration of the pleadings alone." Murray v. Wetzel, No. 3:17-CV-491, 2019 WL 1303217, at *11 (M.D. Pa. Mar. 1, 2019), report and recommendation adopted, No. 3:17-CV-00491, 2019 WL 1298826 (M.D. Pa. Mar. 21, 2019). Therefore, it is recommended that the motion to dismiss these individual liability claims be denied without prejudice to renewal through a properly documented motion for summary judgment.

## III. Recommendation

Accordingly, for the foregoing reasons, IT IS RECOMMENDED THAT the defendants' motions to dismiss the plaintiff's complaint (Docs. 57 and 62) be GRANTED IN PART AND DENIED IN PART as follows: IT IS

RECOMMENDED THAT the motion be GRANTED with respect to Counts I and III of the plaintiff's amended complaint, but DENIED with respect to Counts II and IV of the plaintiff's amended complaint without prejudice to renewal through a properly documented motion for summary judgment.

The parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 26th day of January 2023.

*S/ Martin C. Carlson*
Martin C. Carlson
United States Magistrate Judge