APPENDIX

"Appendix-A"

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-2226

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 23, 2019
DEBORAH S. HUNT, Clerk

TRENT BROWN, Plaintiff-Appellant, v. MARK MCCULLICK, Warden, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: ROGERS, SUTTON, and READLER, Circuit Judges.

Trent Brown, a pro se Michigan prisoner, appeals the district court's dismissal of his 42 U.S.C. § 1983 civil rights complaint and the denial of his motion for in camera review of video footage and for a free copy of his deposition transcript. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). Brown also moves for the appointment of counsel.

In 2016, Brown sued the following St. Louis Correctional Facility (SLF) staff: Steven Rivard, the warden during the relevant time period of this lawsuit; Mark McCullick, the deputy warden; Kathleen Parsons, a grievance coordinator; Forrest Williams, an assistant resident unit supervisor; and Stephen Barnes, a correctional officer. His claims stemmed from an incident occurring on June 17, 2014, when Brown participated "in what he believe[d] [was] a wrestling match [with] his 'bunkie.'" Barnes saw Brown "in a superimposed position" on his bunkmate and ordered the two to separate. Brown replied that he could not comply because his bunkmate was

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holding him. "Barnes then discharge[d] his taser on [Brown] for approximately 10 to 20 seconds" and warned that he would tase him again. Brown complied with Barnes's commands after his bunkmate let go of him.

Barnes issued a misconduct report against Brown for assault resulting in serious physical injury, which stated that Barnes saw Brown's hands wrapped around his bunkmate's neck. Barnes later admitted, however, that he could not see where Brown's hands were because a desk was in the way. A hearing officer found Brown guilty of misconduct, relying on Barnes's observations, a surveillance video that showed "Brown on top [of his bunkmate] with his hands close" to his bunkmate's neck, and the nearly $9000 in medical injuries that the bunkmate suffered, which Brown was ordered to pay as restitution, among other sanctions.

Brown filed a grievance (SLF-14-07-0807-27A), stating that Barnes violated his due process rights because Barnes falsely stated that he saw Brown's hands around his bunkmate's neck. This grievance was rejected as "not grievable" because it was construed as being connected to Brown's misconduct finding, which under prison policy directives could be appealed but not grieved. This decision was upheld at steps II and III of the grievance process.

The day after Brown was tased, SLF staff confiscated some of his property as contraband because it exceeded the amount of property allowable. Brown filed a grievance (SLF-14-07-0885-07a), stating that Unit Staff Officer Bierstetel issued a contraband removal recommendation against him and that "RUM [Resident Unit Manager] Havelka" conducted a hearing and determined that the property was to be destroyed. Brown asked that the destruction of his property be halted until he could have a hearing on whether the excess property was legal property and thus permissible. The grievance was denied, and this decision was upheld at steps II and III of the grievance process. Brown was eventually transferred to a different prison.

In his complaint, Brown claimed that Barnes used excessive force in tasing him and defamed him by stating that he saw his hands wrapped around his bunkmate's neck. He claimed that Rivard and McCullick enabled Barnes "to maintain a defamatory false report" and retaliated against him for filing a grievance by transferring him to a different prison. He also raised various state law claims.

The defendants moved for summary judgment, arguing, in part, that Brown's grievances were insufficient to exhaust his administrative remedies. A magistrate judge recommended granting the motion as to Brown's claims against Rivard, McCullick, Parsons, and Williams because Brown did not mention them "in his Step I grievances." The magistrate judge also recommended granting the motion as to Brown's excessive force claim against Barnes because Brown did not grieve "the alleged excessive force used in the tasering incident." However, the magistrate judge recommended denying the motion as to Brown's defamation claim stemming from Barnes's allegedly false allegations in the misconduct report, finding that Brown adequately grieved this claim. The district court adopted the report over both parties' objections.

Subsequently, Brown and Barnes moved for summary judgment. Brown also moved for the district court to review in camera security video of the tasing incident and to provide him with a free copy of his deposition transcript. The magistrate judge recommended denying Brown's motions but concluded that Barnes's motion for summary judgment was proper because Brown's defamation claim did "not rise to the level of a federal claim recognizable under § 1983." The magistrate judge also recommended that the district court decline to accept supplemental jurisdiction over Brown's state law claims. The district court adopted the report over Brown's objections and dismissed the case. On appeal, Brown argues that he did not procedurally default his claims against Rivard, McCullick, Parsons, and Williams; that the district court erred in granting Barnes's motion for summary judgment on his defamation claim; and that the district court erred in denying his motion for in camera review of video footage and for a free copy of his deposition transcript.

We review an order granting summary judgment de novo. *See S. Rehab. Grp., PLLC v. Sec'y of Health & Human Servs.*, 732 F.3d 670, 676 (6th Cir. 2013). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Stricker v. Township of Cambridge*, 710 F.3d 350, 357 (6th Cir. 2013).

To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Federal Constitution or laws and that the violation was committed by a person acting under color of state law. *Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir. 2006) (citing *West v.*

Atkins, 487 U.S. 42, 48 (1988)). "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); *Jones v. Bock*, 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the [Prison Litigation Reform Act] and that unexhausted claims cannot be brought in court.").

To exhaust his administrative remedies, an inmate must comply with the grievance procedures established by his prison. *Jones*, 549 U.S. at 218. "The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not [federal laws], that define the boundaries of proper exhaustion." *Id.* Proper exhaustion requires compliance with "deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006). Failure to exhaust administrative remedies is an affirmative defense. *Jones*, 549 U.S. at 216.

The defendants raised Brown's failure to exhaust his administrative remedies in their motion for summary judgment, arguing that he failed to name Rivard, McCullick, Parsons, and Williams as individuals being grieved. According to the applicable policy directive they cited, a grievant must provide the facts underlying the issue being grieved and include "[d]ates, times, places, and *names* of all those involved." MDOC Policy Directive 03.02.130 ¶ R (emphasis added). The district court granted summary judgment as to these defendants.

On appeal, Brown argues that the district court incorrectly decided that he failed to exhaust his administrate remedies against Rivard, McCullick, Parsons, and Williams because grievance SLF-14-07-0885-07a was decided on the merits and because Brown mentioned some of the defendants at step III of the grievance process.

Brown's argument that this grievance was being decided on the merits is significant because in *Reed-Bey v. Pramstaller*, 603 F.3d 322, 325 (6th Cir. 2010), we held that "[w]hen prison officials decline to enforce their own procedural requirements," such as the requirement to identify the names of those involved in the issue being grieved, and instead "opt to consider otherwise-

defaulted claims on the merits, so as a general rule will we." However, *Reed-Bey* does not stretch to meet the facts of this case.

In *Reed-Bey*, the inmate failed to name a single individual in his grievance, and it would have thus been clear to prison officials when they addressed the merits of the grievance that they were waiving their own procedural requirement to include the names of those involved in the grievance. *See id.* at 324. But here, Brown listed two people at step I of the grievance, Bierstetel and Havelka. Accordingly, prison officials would naturally assume that Brown complied with the requirement to name those involved, and defendants cannot be said to have waived the exhaustion defense when they had no way of knowing that they would be the subject of a later lawsuit. *See Luther v. White*, No. 5:17-CV-138-TBR, 2019 WL 511795, at *8 (W.D. Ky. Feb. 8, 2019) (declining to apply *Reed-Bey* where inmate named a specific individual in grievance but not later defendants to the lawsuit).

Additionally, Brown's argument that he named some of the defendants at step III of the grievance process likewise fails because for *Reed-Bey* to apply, Brown would have had to receive a response on the merits as to the defendants at each step of the grievance process. *Lee v. Willey*, 789 F.3d 673, 681 (6th Cir. 2015); *Cook v. Caruso*, 531 F. App'x 554, 563 (6th Cir. 2013). He did not. In addition to Brown's not mentioning the defendants at steps I or II of the grievance process, the step III grievance response did not mention any of the defendants. Accordingly, because Brown failed to name Rivard, McCullick, Parsons, and Williams at step I of this grievance, he failed to exhaust his claims against them. *See Sullivan v. Kasajaru*, 316 F. App'x 469, 470 (6th Cir. 2009).

Brown next argues that the district court erred in granting summary judgment on his defamation claim against Barnes. Although the parties argue whether Brown waived appellate review by failing to file specific objections to the magistrate judge's report, it is more expedient to address the merits of Brown's claim that the district court erred in determining that his defamation claim failed as a matter of law.

"[A] prisoner has no constitutional right to be free from false accusations of misconduct." *Jackson v. Hamlin*, 61 F. App'x 131, 132 (6th Cir. 2003). To the extent that false accusations of misconduct implicate due process concerns, the false charges "do not constitute a deprivation of

constitutional rights where the charges are subsequently adjudicated in a fair hearing." *Cromer v. Dominguez*, 103 F. App'x 570, 573 (6th Cir. 2004). Although Brown acknowledges that he had a misconduct hearing, he argues that he did not have a full and fair opportunity to litigate the misconduct finding "[d]ue to special circumstances beyond his control"—a fellow prisoner's failure to mail his appeal of the misconduct finding. However, the failure to pursue an appeal through mishap or inadvertence is not the same thing as the denial of a full and fair hearing. Accordingly, even if Barnes accused Brown of false charges, Brown has not stated the deprivation of a constitutional right. *See id.* ("Because Cromer was provided a due process hearing for the misconduct charge, his constitutional rights were not violated and he may not maintain a § 1983 claim for the alleged false misconduct report.").

Lastly, Brown argues that the district court erred in denying his motion for in camera review of video footage and for a free copy of his deposition transcript. The district court's denial of this motion is reviewed for an abuse of discretion. *Lavado v. Keohane*, 992 F.2d 601, 604 (6th Cir. 1993). Because Brown's defamation claim failed as a matter of law, the district court did not abuse its discretion in declining to review video evidence in camera. Further, Brown had no right to a free copy of his deposition transcript in the district court. *See* 28 U.S.C. § 753(f). Moreover, he has failed to show how this transcript would have helped his cause.

Accordingly, we **AFFIRM** the district court's judgment and **DENY** Brown's motion for counsel.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

"Appendix-B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Trent Brown,

Plaintiff,

v.

S. Rivard, M. McCullick, K. Parsons, F. Williams, and S. Barnes,

Defendants.

_____/

Case No. 16-cv-12362

Judith E. Levy
United States District Judge

Mag. Judge Anthony P. Patti

OPINION AND ORDER ADOPTING THE REPORT & RECOMMENDATION [33], DENYING DEFENDANTS' OBJECTIONS [34], DENYING PLAINTIFF'S OBJECTIONS [38], AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [25]

Plaintiff, proceeding *pro se*, filed his complaint on June 23, 2016. (*See* Dkt. 1.) On January 10, 2017, defendants filed a motion for summary judgment, which was fully briefed by March 31, 2017. The Magistrate Judge filed his Report and Recommendation on May 24, 2017, recommending that the motion be granted as to defendants Rivard, McCullick, Parsons, and Williams, but denied in part as to the defamation claim against defendant Barnes. For the reasons set forth

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below, the parties' objections are denied, the Report and Recommendation is adopted in full, and defendants' motion for summary judgment is granted in part and denied in part.

I. Background

The Court adopts the factual background set forth in the Report and Recommendation, except as otherwise noted. (Dkt. 33 at 1-4.)

By way of summary, plaintiff, an inmate, brings excessive force, defamation, conspiracy, and retaliatory transfer claims under 42 U.S.C. § 1983. He alleges that a footlocker containing legal property was confiscated without a hearing upon his arrival at Saint Louis Correctional Facility on March 20, 2014. (On July 10, 2015, he was granted a replacement footlocker.)

On June 17, 2014, plaintiff was having an altercation in his cell with his bunkmate, resulting in plaintiff being tasered by defendant Barnes. According to plaintiff, defendant Barnes falsified the misconduct report, stating that plaintiff had his "hands wrapped around his bunkie's neck," even though Barnes later admitted that he could not see plaintiff's hands because there was a desk in the way. At the misconduct hearing, no video of the altercation was shown, but the

hearing officer determined that plaintiff "had to be tazed [*sic*] by staff." And on June 18, 2014, plaintiff alleges that staff from the correctional facility confiscated certain of plaintiff's property (purportedly contraband), which was destroyed over his protests. Plaintiff was transferred to the Alger Correction Facility on August 20, 2014.

Plaintiff filed grievances regarding the allegedly falsified misconduct report by defendant Barnes and for the destruction of his property. The misconduct report grievance was denied on procedural grounds (as related to a misconduct hearing), which was affirmed through the three-step grievance procedure.

The Magistrate Judge recommends that the claims against defendants Williams, Parsons, McCullick, and Rivard be dismissed because plaintiff failed to exhaust the claims through the prison's administrative procedures, but that the defamation claim against defendant Barnes was both fully exhausted and properly pleaded, and should thus be allowed to proceed. (Dkt. 33 at 11-17.) Defendant objects to the Report and Recommendation, arguing that the due process defamation claim against defendant Barnes was not properly exhausted, because the claim pertained to the misconduct process for

which plaintiff was required under Michigan Department of Corrections ("MDOC") policy to seek rehearing, not file a grievance. (Dkt. 34 at 2-5.) Defendant also objects that the Magistrate Judge erred in recommending that plaintiff's due process defamation claim against defendant Barnes is sufficiently pleaded. (*Id.* at 5-7.)

Plaintiff also filed objections, eleven in total. (*See* Dkt. 38.) Most of plaintiff's objections are based on what plaintiff believes are mischaracterizations of the facts, and each will be addressed with specificity below. In his ninth objection, plaintiff argues that the Magistrate Judge misconstrues the MDOC grievance process. (*Id.* at 15-17.)

II. Legal Standard

District courts review *de novo* those portions of a report and recommendation to which a specific objection has been made. 28 U.S.C. § 636(b)(1)(C). "*De novo* review in these circumstances entails at least a review of the evidence that faced the magistrate judge; the Court may not act solely on the basis of a report and recommendation." *Spooner v. Jackson*, 321 F. Supp. 2d 867, 869 (E.D. Mich. 2004). But objections to the Report and Recommendation must not be overly general, such as

objections that dispute the correctness of the Report and Recommendation but fail to specify findings believed to be in error. *Spencer v. Bouchard*, 449 F.3d 721, 725 (6th Cir. 2006); *see also Howard v. Sec'y of HHS*, 932 F.2d 505, 509 (6th Cir. 1991). "The objections must be clear enough to enable the district court to discern those issues that are dispositive and contentious." *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995).

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court may not grant summary judgment if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court "views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 135 (6th Cir. 2004) (citing *Skousen v. Brighton High Sch.*, 305 F.3d 520, 526 (6th Cir. 2002)).

III. Analysis

a. Defendants' objections

i. Objection No. 1

In defendants' Objection No. 1, they argue that the Magistrate Judge erred by finding that the due process defamation claim pleaded against defendant Barnes was properly exhausted. (Dkt. 34 at 2-5.) After defendant Barnes tasered plaintiff, defendant Barnes allegedly filed an incident report in which he states plaintiff had his hands around his bunkmate's neck, but defendant Barnes later revealed that he could not actually see plaintiff's hands. As noted by the Magistrate Judge, neither plaintiff nor defendant Barnes gave sworn testimony regarding the allegation, because the Step I grievance was denied as a non-grievable issue related to a misconduct ticket. That procedural decision was upheld at Steps II and III.

Defendants' objection misconstrues plaintiff's claim and the Magistrate Judge's recommendation. Plaintiff's due process defamation claim does not take issue with the misconduct decision itself, which, as defendants argue, could only be administratively exhausted by requesting a rehearing. Rather, plaintiff's claim is that defendant

Barnes defamed him and deprived him of due process by falsifying the misconduct report, resulting in a fine of nearly $9000.

Under Michigan law, "[a] prisoner aggrieved by a final decision or order of a hearings officer shall file a motion or application for rehearing in order to exhaust his or her administrative remedies before seeking judicial review of the final decision or order." MICH. COMP. LAWS § 791.255. And defendants argue that under MDOC policy, any "issues pertaining to the misconduct process are not grievable." (Dkt. 34 at 2.) But per the terms of the cited policy, non-grievable issues include "*[d]ecisions* made in hearings" and "*[d]ecisions* made in minor misconduct hearings." (Dkt. 25-2 at 2-3.)

The policy is not so broad that all "issues pertaining to the misconduct process are not grievable," as defendants argue. Rather, plaintiffs cannot grieve the *decisions* of *hearing officers* made in misconduct hearings. Defendants cite *Siggers v. Campbell* to support their argument, but that case is not helpful. Plaintiff does not seek to have the misconduct decision overturned. He seeks damages from defendant Barnes for defaming him in an allegedly falsified misconduct report, which is collateral to the misconduct decision itself. *See, e.g.*,

Anthony v. Ranger, No. 11-2199, 2012 U.S. App. LEXIS 27031, at *4-5 (6th Cir. June 19, 2012) (claim relating to defendant's decision to "file a misconduct report rather than a decision made by a hearing officer" must be exhausted through administrative grievance procedure)[1] (citing

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[1] The Sixth Circuit affirmed the district court's dismissal of the claim as unexhausted, which in turn had adopted the Magistrate Judge's recommendation that the claim be dismissed for failure to exhaust. To add clarity, the relevant part of that Report and Recommendation is as follows:

> Plaintiff argues that because a major misconduct report starts the disciplinary hearing process and is the document upon which the hearing officer bases his decision, a grievance against a prison official based on a misconduct report is akin to a grievance of the hearing officer's decision on the misconduct itself. . . .
>
> Plaintiff has not shown that his retaliation claim against [d]efendant . . . was non-grievable. The fact that the MDOC rejected [his grievance] for raising non-grievable issues when it was filed against a hearing officer and hearing investigator has no bearing on whether [p]laintiff could have grieved his retaliation claim against [d]efendant Williams. The affidavit of Richard Stapleton states that a prisoner may file a grievance against an MDOC staff person for retaliation, including an allegedly retaliatory major misconduct ticket, as long as the prisoner grievance indicates that it is for the alleged retaliation and is not attacking a guilty finding on the ticket itself. Defendant Williams' decision to issue major misconduct tickets to [p]laintiff . . . was not a "decision[] made in hearings conducted by hearing officers." Therefore, Policy Directive 03.02.130(F)(1) does not preclude [p]laintiff from filing grievances against [d]efendant Williams for issuing retaliatory major misconduct reports. Plaintiff's argument that it would have been futile to file a grievance does not excuse him from exhausting his administrative remedies as required under 42 U.S.C. § 1997e(a).

Anthony v. Ranger, No. 08-CV-11436, 2011 U.S. Dist. LEXIS 97129, at *7-9 (E.D. Mich. May 9, 2011) (citations to the docket omitted). MDOC would like to have it both ways: to have these claims dismissed when grieved, because they are non-

Siggers v. Campbell, 652 F.3d 681, 692 (6th Cir. 2011)); *Green v. Messer*, No. 12-12319, 2013 U.S. Dist. LEXIS 129327, at *4-5 (E.D. Mich. Sep. 11, 2013) (plaintiff required to exhaust claim related to issuance of misconduct report because issue was grievable); *Green v. Lennox*, No. 12-14003, 2013 U.S. Dist. LEXIS 132761, at *8-9 (E.D. Mich. Aug. 28, 2013) (retaliatory misconduct claim must be exhausted through administrative grievance process). For these reasons and those set out in the Magistrate Judge's Report and Recommendation, defendants' Objection No. 1 is denied.

ii. Objection 2

In defendants' Objection No. 2, they argue that the Magistrate Judge erred by finding that plaintiff established a due process defamation claim against defendant Barnes. (Dkt. 34 at 5-7.) The Magistrate Judge held that plaintiff established the claim by alleging that defendant Barnes "lied and defamed him on his misconduct report," and that as a result he was "improperly found guilty of the misconduct charge, and required to pay restitution in the amount of $8,936.63." As the Magistrate Judge noted, "a prisoner has a liberty

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grievable, and dismissed when ungrieved, for failure to exhaust them through the grievance process. MDOC cannot.

interest in his good reputation" and a "right to be free from false accusations by public officials." (Dkt. 33 at 14-18.)

Defendants argue that even if plaintiff has a liberty interest in being free from defamation by a public official, the claim must be dismissed because plaintiff "failed to demonstrate how the sanction that flowed from Barnes' alleged misstatement on the misconduct report inevitably affected the duration of [plaintiff]'s sentence or imposed an atypical and significant hardship on [him]." (Dkt. 34 at 8-9 (quoting *Ellington v. Karkkila*, No. 2:16-CV-230, 2017 WL 1531879, at *5 (W.D. Mich. Apr. 28, 2017).) Rather, defendants imply, the nearly $9000 fine is insufficient to meet the atypical and significant hardship standard as set forth in *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

Although the Sixth Circuit has previously held that "a $4.00 fine do[es] not constitute an atypical and significant hardship in the context of prison life," see *McMillan v. Fielding*, 136 F. App'x 818, 820 (6th Cir. 2005), the same cannot be said for a disciplinary fine of nearly $9000. To be sure, a monetary fine will generally not implicate an inmate's due process rights. *See Wheeler v. Hannigan*, 37 F. App'x 370, 372 (10th Cir. 2002) ("[N]either placement in disciplinary segregation, nor the

extraction of a monetary fine, generally implicate[s] an inmate's due process rights."). But the fine in this case is so atypical that the Court could not find any cases in which a plaintiff challenged prison disciplinary sanctions anywhere near that amount. *See, e.g., Gard v. Kaemingk*, No. 4:13-CV-04062-LLP, 2015 U.S. Dist. LEXIS 131424, at *37-38 (D.S.D. Jan. 30, 2015) ($99 fine imposed within prison disciplinary system not atypical); *Green v. Howard*, No. 3:13-cv-0020, 2013 U.S. Dist. LEXIS 4406, at *19 (M.D. Tenn. Jan. 10, 2013) ($4 fine does not "exceed[] the basic discomforts indicative of the 'ordinary incidents of prison life.'") (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)); *Henderson v. Virginia*, Civil Action No. 7:07-cv-00266, 2008 U.S. Dist. LEXIS 5230, at *33-34 (W.D. Va. Jan. 23, 2008) ($12 fine does not constitute atypical and significant hardship).

For these reasons and those set forth in the Magistrate Judge's Report and Recommendation, defendants' Objection No. 2 is denied.

b. Plaintiff's objections

i. Objection No. 1

Plaintiff's first objection to the Report and Recommendation challenges the Magistrate Judge's characterization that "[a]ccording to

[p]laintiff, staff did not conduct a hearing on excess legal property." (*See* Dkt. 33 at 2.) Because plaintiff's objection has no bearing on whether the claim was exhausted, the objection is denied.

ii. Objection No. 2

Plaintiff's second objection to the Report and Recommendation challenges the Magistrate Judge's characterization that "[d]uring the misconduct hearing, a video of the altercation was not shown, but the hearing officer determined that [p]laintiff was on top of his bunkmate and 'had to be tazed by staff.'" (*See* Dkt. 33 at 3.) Because plaintiff's objection has no bearing on whether the claim was exhausted, the objection is denied.

iii. Objection No. 3

Plaintiff's third objection to the Report and Recommendation challenges the Magistrate Judge's characterization that "[o]n June 18, 2014, just after the tasing incident, unnamed staff packed up [p]laintiff's property and confiscated several items as contraband." (*See* Dkt. 33 at 3.) Because plaintiff's objection has no bearing on whether the claim was exhausted, the objection is denied.

iv. Objection No. 4

Plaintiff's fourth objection to the Report and Recommendation challenges the Magistrate Judge's characterization that plaintiff "asserts that [d]efendant Parsons informed him that a hearing on this issue would be held on August 18, 2014. The hearing was postponed, however, and [p]laintiff was transferred to the Alger Correctional Facility ("LMF") on August 20, 2014." (*See* Dkt. 33 at 3-4.) Because plaintiff's objection has no bearing on whether the claim was exhausted, the objection is denied.

v. Objection No. 5

Plaintiff's fifth objection to the Report and Recommendation challenges the Magistrate Judge's "partial quoting" (Dkt 38 at 9), when the Magistrate Judge writes that "if a particular Defendant was not named in a specific claim, it was because that person was 'not intended to be held liable' for that claim." (*See* Dkt. 33 at 4 (quoting Dkt. 28 at 57).) Because plaintiff's objection has no bearing on whether the claim was exhausted, the objection is denied.

vi. Objection No. 6

Plaintiff's sixth objection to the Report and Recommendation "expressly contends through clarification" that when the Magistrate Judge writes "[g]rievant states excess pro-party is result and SLF [unreadable] is getting my footlocker," it should read "[g]rievant states excess property is result of SLF confiscating my footlocker." (*See* Dkt. 38 at 11.) Because plaintiff's objection has no bearing on whether the claim was exhausted, the objection is denied.

vii. Objection No. 7

Plaintiff's seventh objection to the Report and Recommendation challenges the Magistrate Judge's characterization that "[i]n his Step II grievance, [plaintiff] mentions that Parsons' Step I response was tardy." (*See* Dkt. 33 at 10.) Because plaintiff's objection has no bearing on whether the claim was exhausted, the objection is denied.

viii. Objection No. 8

Plaintiff's eighth objection to the Report and Recommendation challenges the Magistrate Judge's characterization:

> Later, [p]laintiff indicates that he overheard Barnes stating that he "couldn't see" where his hands were located because there was a desk in the way. Plaintiff mentions that Rivard questioned Barnes about his statement. The grievance was denied and [p]laintiff filed a Step II appeal on July 31, again

> noting that Barnes filed "an intentionally false/misleading conduct report," and later admitted that he could not see [p]laintiff's hands to Rivard and McCullick. His Step II grievance was denied and Plaintiff appealed to Step III, which was also denied.

(*See* Dkt. 33 at 10 (citations omitted).) Because plaintiff's objection has no bearing on whether the claim was exhausted, the objection is denied.

ix. Objection No. 9

Plaintiff's ninth objection to the Report and Recommendation challenges the Magistrate Judge's finding that plaintiff failed to exhaust his claims by failing to specifically name defendants Rivard, McCullick, Parsons, and Williams.

According to plaintiff, because the Magistrate Judge quoted the policy and added the words "at Step I," the Magistrate Judge erred as a matter of law. (Dkt. 38 at 16.) Plaintiff is incorrect. The Magistrate Judge did not err in quoting the MDOC policy in this a manner. The policy requires plaintiff "to file a Step I grievance," and "[d]ates, times, places, and names of all those involved in the issue being grieved are to be included." MDOC Policy Directive 03.02.130, ¶ R, *available at* http://www.michigan.gov/documents/corrections/03_02_130_200872_7.pdf. The Magistrate Judge thus correctly described the policy.

Plaintiff similarly argues that the Magistrate Judge erred by stating "inmates must include the '[d]ates, times, places and names of all those involved in the issue being grieved' in their initial grievance." (Dkt. 33 at 11 (quoting *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2010)). In fact, the Magistrate Judge quoted directly from a Sixth Circuit case, which binds this Court. The Magistrate Judge did not err by quoting a recent and binding case on point. Plaintiff's objection is thus denied.

x. Objection No. 10

Plaintiff's ninth objection to the Report and Recommendation challenges the Magistrate Judge's finding that "[p]laintiff does *not* mention [d]efendants Rivard, McCullick, Parsons, and Williams in his Step I grievances." (Dkt. 33 at 11.) Plaintiff cites one of his Step I grievances, in which plaintiff had written:

> Shortly following the . . . exchange, Warden B. Rivard . . . questioned officer Barnes about statement in question. Said officer against admitted he couldn't see. And when asked why he stated that he saw grievant's hands around another inmate's neck, officer Barnes replied, "the sergeant told me to!"

(*See* Dkt. 25-3 at 19.)

Plaintiff is technically correct that defendant Rivard was "mentioned" in the Step I grievance. But, as noted in the case cited by plaintiff, the purpose of the exhaustion requirement of the Prison Litigation Reform Act of 1995 "is to allow prison officials 'a fair opportunity' to address grievances on the merits, to correct prison errors that can and should be corrected[,] and to create an administrative record for those disputes that eventually ended up in court." *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2010).

In this particular grievance, plaintiff sought an "[i]investigat[ion] and reprimand [of] c/o Barnes and Sgt. Sevenson." (Dkt. 25-3 at 19.) The only defendant in this case against whom a claim was exhausted through Step III was thus defendant Barnes. Plaintiff must first take his specific claim against defendant Rivard through the grievance procedure. Because he did not, plaintiff's objection is denied.

xi. Objection No. 11

Plaintiff's eleventh objection to the Report and Recommendation challenges the Magistrate Judge's finding that plaintiff's "grievance against [d]efendant Barnes properly addresses his allegations that [d]efendant Barnes defamed him by filing a false report, but does not

address the alleged excessive force used in the tasering incident." (Dkt. 38 at 16.)

Plaintiff first argues that because he is not a physician or attorney, he did not "fully realize[]" the "magnitude of [d]efendant Barnes' tasing . . . before [plaintiff's] Step I grievance submission." (Dkt. 38 at 24.) He also argues that a video showed what defendant Barnes did, and in any case, defendants waived the issue of non-exhaustion due to lack of specificity when they did not raise the issue during the administrative process. (*Id.* at 24-25.) But defendants could not have known to make such a defense during the administrative process because plaintiff did not specify that he wished to bring an excessive force claim. (*Id.* at 25.) These arguments do not excuse the requirement that plaintiff raise and exhaust his excessive force claim before proceeding on such a claim here.

Finally, plaintiff argues that this Court should not dismiss his Eighth Amendment excessive force claim before reviewing the video footage of the incident, as "requested in [p]laintiff's comprehensive complaint." (*Id.* at 25.) Plaintiff misunderstands that the exhaustion requirement precludes the Court from doing so until he proceeds with

his claim through the prison grievance procedure. For these reasons, plaintiff's objection is denied.

IV. Conclusion

For the reasons set forth above, defendants' objections (Dkt. 34) are DENIED, plaintiff's objections (Dkt. 38) are DENIED, the Report and Recommendation (Dkt. 33) is ADOPTED, and defendants' motion for summary judgment (Dkt. 25) is GRANTED IN PART AND DENIED IN PART.

Plaintiff's claims against defendants Rivard, McCullick, Parsons, and Williams are dismissed for failure to exhaust. Plaintiff's excessive force claim against defendant Barnes is dismissed for failure to describe that event in his grievances, and thus failure to exhaust the claim. Plaintiff's due process defamation claim against defendant Barnes may proceed. The case is referred back to the Magistrate Judge for all pretrial proceedings.

IT IS SO ORDERED.

Dated: August 9, 2017
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on August 9, 2017.

s/Shawna Burns
Shawna Burns
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Trent Brown,

Plaintiff,

v.

S. Rivard, M. McCullick, K. Parsons, F. Williams, and S. Barnes,

Defendants.

_____/

Case No. 16-12362

Judith E. Levy
United States District Judge

Mag. Judge Anthony P. Patti

OPINION AND ORDER ADOPTING THE REPORT & RECOMMENDATION [57], DENYING PLAINTIFF'S OBJECTIONS [62, 63], DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [46] AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [49]

This is the second report and recommendation in this case. The first Report and Recommendation was adopted, granting defendants' summary judgment motion as to all of plaintiff Trent Brown's claims except his due process defamation claim against defendant Stephen Barnes. (Dkt. 39 at 19.) The parties then filed cross-motions for summary judgment on the remaining claim. (Dkts. 46, 49.) The Magistrate Judge

issued the second Report and Recommendation (Dkt. 57) and denied plaintiff's motion to compel and for enjoining restitution (Dkt. 53). (Dkt. 58.) Plaintiff submitted objections to this Report and Recommendation (Dkt. 62) and the order denying his motion to compel and for enjoining restitution. (Dkt. 63.)

I. Background

The Court adopts the factual background set forth in the Report and Recommendation, except as otherwise noted:

a. June 17, 2014 altercation

> On June 17, 2014, Plaintiff had a physical altercation in his cell with another prisoner, his "bunkie," which Defendant Barnes discovered during his rounds. (DE 1, ¶¶ 12-14.) Plaintiff was sitting on top of the other prisoner and Barnes aimed his electronic control device (ECD) or taser at the men, while instructing them to separate. (*Id.* ¶¶ 14-15.) Plaintiff asserts that he was unable to follow Barnes' order because his bunkmate was holding him down, and that he attempted to make this known by repeatedly stating "he's holding me." (*Id.* ¶ 16) Barnes then tased Plaintiff for "approximately 10 to 20 seconds." (*Id.* ¶ 17.) Plaintiff was subsequently handcuffed and escorted out of the housing unit. (*Id.* ¶ 18.)
>
> The other prisoner was seen first by the St. Louis Correctional Facility's healthcare staff and then was sent to a local hospital via ambulance due the severity of his head injuries. The other prisoner's medical bills totaled $8,936.63. (*Id.* at 52.)

b. Misconduct report

Following the incident, Barnes issued a major misconduct to Plaintiff for Assault Resulting in Serious Physical Injury (Inmate Victim). (*Id.*; DE 49-2.) In the report, Barnes stated that he saw Plaintiff [sic] of top of another prisoner and that Plaintiff had his "hands wrapped around" the other prisoner's neck. Barnes further reported that he ordered Plaintiff to get off the other prisoner, that Plaintiff refused to comply with that order, and that he then deployed his ECD. (DE 1 at 52.)

Plaintiff alleges that six days later, while standing in front of Plaintiff's cell, Barnes admitted that he "'couldn't see' the placement of Plaintiff's hands, for the 'desk was in the way,'" and that Barnes also informed Defendants Rivard and McCullick that Plaintiff and his cellmate "'were grabbing' one another's 'arms' during his observance" and "that 'the sergeant made me do it!' in reference to the false report issuance." (*Id.* ¶¶ 20-24.)

c. Misconduct report hearing

On June 26, 2014, an administrative hearing was conducted on the major misconduct report issued by Barnes. The hearing officer reviewed the report with Plaintiff, along with a number of memoranda and statements from other individuals. (DE 1 at 54.) A critical incident report and five medical bills for the other prisoner were marked confidential, and the hearing officer informed Plaintiff that he had also previously reviewed two videos of the incident and a confidential witness (CW) statement, all marked confidential for security purposes. (*Id.*) At the hearing, Plaintiff argued that he is not guilty and that he never "had [the other prisoner] around the neck and [he] never hit him," but rather that "he was grabbed and held to the ground," "it was horseplay," and "we were wrestling." (*Id.*) Plaintiff further

claimed that Barnes later admitted that he could not see Plaintiff's hands. (*Id.*)

The hearing officer found that the video evidence supports the misconduct charge, and that it showed Plaintiff on top of the other prisoner with his hands close to the other prisoner's neck, and that when he was told to get off the other prisoner, Plaintiff did not do so and "had to be tazed by staff with a ECD." (DE 1 at 54.) The hearing officer further expressly found that Barnes "observed [Plaintiff] on top of prisoner Jackson on his bed with his hands wrapped around prisoner Jackson's neck choking him[,] which is consistent with the confidential witness statement and found credible," and that Plaintiff's allegation that "this was horseplay" "is not logical because prisoner Jackson had head injuries and 8,936.63 in medical bills." (*Id.*) The hearing officer awarded restitution in the amount of $8,936.63 to be paid by Plaintiff to the State of Michigan for injuries to the other prisoner, as well as 10 days of detention and 30 days loss of privileges. (*Id.*)

d. Grievance 807-27a

On June 24, 2017, Plaintiff submitted a Step 1 grievance based on Barnes' allegedly false misconduct report. The grievance was denied on procedural grounds because it was directly related to the misconduct hearing, and this denial was affirmed through the three-step grievance procedure. (DE 25-3 at 16-20.) This Court previously found that Plaintiff's due process defamation claim against Barnes was properly exhausted through Grievance 807-27a. (DE 33 at 11-12; DE 39 at 9.)

(Dkt. 57 at 2-6.)

After the first Report and Recommendation was adopted, the parties engaged in discovery on the remaining due process defamation

claim. Plaintiff argued that defendant lied in his misconduct report by saying plaintiff's hands were around the other inmate's neck and defamed plaintiff, resulting in a guilty determination and a restitution order. The parties filed cross-motions for summary judgment (Dkts. 46, 49.) The Magistrate Judge issued the Report and Recommendation, finding that plaintiff's due process defamation claim failed as a matter of law; declining to address defendant's qualified immunity argument; recommending that the Court decline to exercise supplemental jurisdiction over state claims; and recommending that the Court decline plaintiff's requests for evidentiary and monetary sanctions. (Dkt. 57.) The Report and Recommendation stated that objections must be filed within fourteen days of service, or by July 9, 2018. (*Id.* at 29.) The Magistrate Judge denied plaintiff's motion to compel video footage of the tazing and enjoin the award of restitution the same day he issued the Report and Recommendation. (Dkt. 58.)

II. Legal Standard

A party may object to a Magistrate Judge's order on a nondispositive pretrial matter and to a report and recommendation on dispositive motions. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(a)-(b). A

district judge must resolve those objections. § 636(b)(1)(para); Fed. R. Civ. P. 72(a)-(b). District courts review objections to nondispositive pretrial motions under a "clearly erroneous or contrary to law" standard, § 636(b)(1)(A); *United States v. Curtis*, 237 F.3d 598, 603 (6th Cir. 2001), and objections to a report and recommendation on dispositive motions under a de novo standard, § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). "De novo review in these circumstances entails at least a review of the evidence that faced the Magistrate Judge; the Court may not act solely on the basis of a report and recommendation." *Spooner v. Jackson*, 321 F. Supp. 2d 867, 869 (E.D. Mich. 2004).

A successful objection specifically identifies the portion of the pretrial order or report and recommendation that the objecting party takes issue with, and then identifies the factual or legal basis of the error. E.D. Mich. Loc. R. 71.1(d)(1); *Robert v. Tesson*, 507 F. 3d 981, 994 (6th Cir. 2007). The objecting party must "pinpoint the Magistrate Judge's alleged errors." *Andres v. Comm'r of Soc. Sec.* 733 F. App'x 241, 244 (6th Cir. 2018). Objections to a report and recommendation that only dispute the general correctness of a report and recommendation are improper. *Spencer v. Bouchard*, 449 F.3d 721, 725 (6th Cir. 2006), *abrogated on*

other grounds by Andres v. Comm'r of Soc. Sec. 733 F. App'x 241 (6th Cir. 2018). The objections must go to "factual and legal" issues "that are at the heart of the parties' dispute." *Thomas v. Arn*, 474 U.S. 140, 147 (1985); *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995).

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court may not grant summary judgment if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court "views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 135 (6th Cir. 2004) (citing *Skousen v. Brighton High Sch.*, 305 F.3d 520, 526 (6th Cir. 2002)).

III. Analysis

Plaintiff filed eleven objections to the Report and Recommendation (objections one through eleven) (Dkt. 62) and three to the denial of his motion to compel and enjoin (objections twelve through fourteen). (Dkt. 63.) Although the objections appear to be over a week late on the docket,

plaintiff included the date the objections to the Report and Recommendation were postmarked and the Court assumes that both sets of objections were sent together based on their sequential numbering. Because plaintiff is a pro se prisoner and his objections were postmarked before the July 30, 2018 deadline, the Court treats these objections as timely under the prisoner's mailbox rule. *See Houston v. Lack*, 487 U.S. 266, 273 (6th Cir. 2002). Each objection is addressed individually below, applying de novo review to plaintiff's proper objections to the Report and Recommendation and the clearly erroneous and contrary to law standard to proper objections to the order denying plaintiff's motion to compel and for enjoining the restitution order.

a. Objections 1, 2, 3, 4, 6, and 7

In objections one, two, three, four, six, and seven, plaintiff points to portions of the Magistrate Judge's fact section and offers a different formulation of the facts, as well as additional facts. (Dkt. 62 at 1-7.) Though plaintiff's objections are specific in terms of which part of the Report and Recommendation he objects to, he fails to state the bases for his objections as Local Rule 71.1(d)(1) and *Robert* require. And contrary to *Andres*, he does not pinpoint how the alleged mischaracterization of

fact affected the Magistrate Judge's analysis of his due process defamation claim. Rather, plaintiff's objection states the facts as he perceives them and would prefer the Magistrate Judge to have characterized them. These objections have no bearing on his due process defamation claim and are denied.

b. Objection 5

In plaintiff's fifth objection, he corrects a statement of law in his motion for summary judgment. (Dkt. 62 at 4-5.) This is not a proper objection because he does not identify an error the Magistrate Judge made, but one he made. The objection is denied.

c. Objection 8

Plaintiff's eighth objection is in effect multiple objections which are identified as clearly as possible below based upon plaintiff's sub-headings.

i. Sub-heading One (Dkt. 62 at 9-12)

This is a generalized objection to the Magistrate Judge's Report and Recommendation. Plaintiff restates the standard for summary judgment and summarizes parts of his earlier arguments about his due process defamation claim that defendant defamed him by lying in a false

misconduct report, resulting in a guilty determination and a restitution order. (*Id.*) He does not specify the error the Magistrate Judge made as Rule 71.1(d)(1) and *Robert* require. The objection amounts to a dispute as to the general correctness of the portions of the Report and Recommendation plaintiff references and is improper. *Spencer*, 449 F.3d at 725. The objection is denied.

ii. Sub-heading Two (Dkt. 62 at 12)

Plaintiff states "[i]n objection to the magistrate's statement that – 'a. Defamation without more does not state a due process claim' (*id.* at 12-14) – see Plaintiff's "First" counterpoint above." Plaintiff does not specify the basis of his objection or give any indication what error he believes the Magistrate Judge made, factual or legal. This objection is denied. (See pg. 13 fn., 14.)

iii. Sub-heading Three (Dkt. 62 at 12-25)

Under this subheading, plaintiff seems to make several objections, which are addressed by page range.

First, plaintiff restates applicable law and summarizes what the Magistrate Judge did in his Report and Recommendation. (Dkt. 62 at 13-14.) This is an improper objection because it does not specifically pinpoint

an error. *See Andres*, 733 F. App'x at 244. To the extent this is an objection, it is denied.

Second, plaintiff asserts that the Magistrate Judge misunderstood his "argument against preclusion" and that the Court has jurisdiction to reconsider the facts. (*Id.* at 14-17.) This objection is proper and warrants de novo review.

The first part of the objection presumably means that the Magistrate Judge improperly determined that the facts found by the misconduct hearing officer were entitled to stand given this Court's previous opinion and order denying defendant's objection that plaintiff had to exhaust his due process defamation claim through the grievance process. (Dkt. 39 at 6-9.) There, this Court held that because plaintiff's defamation claim was "collateral to the misconduct decision itself," it was unnecessary for plaintiff to exhaust his defamation claim. (*Id.* at 7.)

However, plaintiff misunderstands the effect of the Court's earlier opinion and order, which considered the exhaustion of his defamation claim. Exhaustion of grievances is required by state law before a prisoner can seek judicial review of the final decision. Mich. Comp. Laws § 791.255. Now, plaintiff is asking the Court to decide the merits of his

claim, which is properly before the Court because it did not need to be exhausted with the Michigan Department of Corrections. When the Court held that plaintiff's claim did not need to be exhausted in the grievance procedure because it was collateral to the disciplinary hearing, it did not mean that the facts found in the hearing would have no bearing on this claim or that plaintiff could relitigate facts properly found by the hearing officer, even facts related to plaintiff's claim. There is "no previous determination" that the Magistrate Judge needed to consider on this matter. (*See* Dkt. 62 at 15.)

In the second part of the objection, plaintiff asserts that the Court has the jurisdiction to reconsider the facts found by the hearing officer that underlie his due process defamation claim. Presumably, plaintiff means he wishes to litigate the question of whether the report defendant filed was false.[1] (*See id.* at 15-17.) The Magistrate Judge declined to do

[1] To establish a due process defamation claim, plaintiff must show defamation and "a further injury, such as . . . loss of a legal right or status[.] [D]efamation, by itself, does not constitute a remedial constitutional claim." *Voyticky v. Village of Timberblake, Ohio*, 412 F.3d 669, 677 (6th Cir. 2005) (citing *Paul v. Davis*, 424 U.S. 693, 701-03 (1976)); *Mertik v. Blalock*, 983 F.3d 1353, 1362 (6th Cir. 1993). Based on plaintiff's defamation claim as he pleaded it, he could theoretically establish an additional injury from defendant's alleged defamation by showing that a false report implicated a liberty interest, that the restitution order implicated a liberty interest,

so, finding that there was "some evidence in the record supporting the hearing officer's conclusion" that there was misconduct by plaintiff. (Dkt. 57 at 18-19.)

Fact disputes are more properly resolved by the hearing officer. *Gibson v. Rousch*, 587 F. Supp. 504, 506 (E. D. Mich. 1984). "Federal district courts do not sit as appellate courts to review the fact findings of hearing officers in prison disciplinary hearings." *Id.* at 505-06. As long as there is "some evidence" to support the factual findings, the factual findings may stand without violating due process. *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455-56 (1985). The misconduct report that defendant filed, the statements of witnesses, the video evidence, and the injuries to the other inmate support the hearing officer's finding. *See Id.* at 455; *Selby v. Caruso*, 734 F.3d 554, 559 (6th Cir. 2013). Therefore, plaintiff is not entitled to relitigate the factual findings of the hearing officer.

Plaintiff argues that "the facts alleged by Plaintiff and the facts rendered by the hearing offer can peacefully co-exist" under *University of*

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or that the restitution order implicated a property interest, and that he was deprived of those interests without due process. (*See* Dkt. 1 at 5-10; Dkt. 24 at 4-7.)

Tennessee v. Elliot, 478 U.S. 788 (6th Cir. 1986). (Dkt. 16.) Plaintiff does not point to which facts, however. The basis of plaintiff's defamation claim is that defendant lied about where plaintiff's hands were, and the hearing officer determined that the misconduct detailed in the report was true. Therefore, even if the facts were relitigated and conformed to plaintiff's expectations, the facts plaintiff needs to prove his claim cannot coexist with the facts found by the hearing officer.

Even if newly litigated facts showed the misconduct report was false, it would not satisfy plaintiff's burden to show that in addition to defendant defaming him, plaintiff suffered a further injury through the false misconduct report. "A prisoner has no constitutional right to be free from false accusations of misconduct" alone. *Jackson v. Hamlin*, 61 F. App'x 131, 132 (6th Cir. 2003). Plaintiff must have been denied adequate procedural due process, in the form of a fair hearing, regarding the false report. *See Cromer v. Dominguez*, 103 F. App'x 570, 573 (6th Cir. 2004). Plaintiff does not object to the Magistrate Judge's finding that he was provided due process, and so this objection is moot. The objection is denied.

Third, plaintiff states that he never argued that the findings in his misconduct disciplinary hearing should be overturned; that he should not be penalized for using a "demonstrative argument;" and recounts the series of filings made before the Magistrate Judge and how those filings "concede[ ] to all of Plaintiff's counter-arguments articulated in his Response." (Dkt. 62 at 18-19.) These objections do not point to an error the Magistrate Judge made, and so they are denied.

Fourth, plaintiff objects to the footnote regarding his motion to compel production of video footage (Dkt. 58). (Dkt. 62 at 19 to 21.) This objection is improper because it is a generalized objection—the objection merely states the video is necessary for summary judgment. Even if the objection were proper, as set forth previously, that objection is moot, and it is denied.

iv. Sub-heading Four (Dkt. 62 at 21-35)

Plaintiff objects to the Magistrate Judge's recommendation that the restitution order does not implicate a liberty or property interest. (Dkt. 57 at 20-25.) First, he points to what the Court previously stated in its earlier opinion and order adopting the Magistrate Judge's first report and recommendation, which indicated that plaintiff had established a due

process defamation claim against defendant. (Dkt. 39 at 9.) The Court stated "the fine in this case is so atypical that the Court could not find any cases in which a plaintiff challenged prison disciplinary cases anywhere near that amount." (*Id.* at 11.) This is a proper objection that warrants de novo review.

As a preliminary matter, plaintiff appears to take this statement as a final decision that the restitution order violated his liberty and property interests. This is incorrect for two reasons. First, the Court's earlier decision was a denial of summary judgment, which is not a final decision on the facts. *See Kovacaevich v. Kent State University*, 224 F.3d 806, 835 (6th Cir. 2000). This case is now at a different stage of litigation because the record has been further developed, and now the second set of summary judgment motions must be decided to determine if there are any material issues of factual dispute for a jury to decide. *Id.* ("District courts may in their discretion permit renewed or successive motions for summary judgment, particularly when the moving party has expanded the factual record on which summary judgment is sought.").

Second, the Court's earlier decision did not address whether plaintiff had been deprived of a liberty interest without due process. In

addition to showing that he had a liberty interest implicated by an atypical and significant hardship in the context of prison life, plaintiff must also demonstrate that he was denied that liberty interest without due process.[2] *See McMillian v. Fielding*, 136 F. App'x 818, 820 (6th Cir. 2005) (citing *Freeman v. Rideo*, 808 F.2d 949, 951 (2d Cir. 1986)). Plaintiff has not properly objected to the Magistrate Judge's determination that he was given the process he was due. It is not enough that the fine may have implicated plaintiff's liberty interest; plaintiff must show that he suffered an undue deprivation of a liberty interest without being afforded the proper notice and opportunity to be heard.

Next, plaintiff objects by arguing that he has a protected liberty and property interest implicated by the restitution order. (Dkt. 62 at 21-25.) Plaintiff has a property interest in his funds, but he again must show that he was deprived of this interest without due process. *See Hampton v. Hobbs*, 106 F.3d 1281, 1287 (6th Cir. 1997). Plaintiff does not object to the Magistrate Judge's determination that he was not denied due process, and so this objection is moot as well. The objection is denied.

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[2] Though the Court received and read plaintiff's exhibits and letters regarding his medical records (Dkts. 64, 65), these filings do not affect the outcome on de novo review because plaintiff has not shown he was deprived of due process of law.

d. Objection 9

Plaintiff objects to the Magistrate Judge's conclusion that it was unnecessary to address defendant's qualified immunity argument. (Dkt. 62 at 26.) Plaintiff adds, "[i]n objection, Plaintiff contends – *see* objection No. 8, 'Fourth' counterpoint.'" The Magistrate Judge did not reach this issue, and so it is unclear what plaintiff objects to. The objection is denied.

e. Objection 10

First, plaintiff objects to the lack of detail in the Magistrate Judge's reference to "state law claims." (Dkt. 62 at 26.) Then, plaintiff seems to object to the Magistrate Judge's finding that the state law claims convey a private right of action. (*Id.*) Both objections are improper. The first part of plaintiff's objection does not point out a factual or legal error that goes to the heart of the dispute the Magistrate Judge addressed in that portion of his report and recommendation—supplemental jurisdiction over state law claims. *See Thomas*, 474 U.S. at 140; *see generally* 28 U.S.C. § 1367(c). The second part also does not go to the heart of the supplemental jurisdiction issue because whether the state claims could set forth a private cause of action does not affect this Court's discretion to dismiss

state law claims when the case no longer has a federal character. The objection is denied.

f. Objection 11

Plaintiff objects to the Magistrate Judge's findings that spoliation sanctions are unwarranted in this case. (Dkt. 62 at 27.) Specifically, he takes issue with the video the Magistrate Judge determined he had requested and that defendant had told him was no longer available. If there was confusion about plaintiff's requests and defendant's response, the objection is moot because defendant later clarified that the video still exists. (Dkt. 50 at 5.) The objection is denied.

g. Objection 12

Plaintiff objects to the Magistrate Judge's denial of his motion to compel video evidence. Much of the objection is general disagreement with the Magistrate Judge's conclusion and that the denial of the motion to compel is "a veiled credibility judgment and weighing of the evidence." (Dkt. 63 at 1-5.) This does not state error. However, plaintiff properly objects when he states that the Court has jurisdiction to reevaluate the facts, presumably by allowing plaintiff to compel the video evidence of the altercation in the cell. This objection to the nondispositive pretrial

order warrants review under the clearly erroneous or contrary to law standard.

Plaintiff points to nothing in his objection that shows the Magistrate Judge's order denying his motion to compel was clearly erroneous or contrary to law. The Magistrate Judge relied on *Mullins v. Smith* for the proposition that a court does not have jurisdiction to "relitigate de novo the determinations made in prison disciplinary settings." 14 F. Supp. 2d 1009, 1012 (E.D. Mich. 1998). This is consistent with this Court's de novo review of the same argument. *Supra*, Section III.c.iii.

Plaintiff makes several arguments, but he does not show the decision was in clear error or contrary to law. First, he argues that Rule 56 permits him to relitigate facts found by the hearing officer, but Rule 56 describes the legal standard and process parties must follow to receive a judgment without trial. Second, plaintiff points again to his argument that his defamation claim is collateral to the disciplinary hearing and that the facts can peacefully coexist. For the reasons set forth above, this argument lacks merit. *See* Section III.c.iii. Therefore, the Magistrate

Judge's decision to deny plaintiff's motion to compel was not clearly erroneous or contrary to law. The objection is denied.

h. Objection 13

Plaintiff objects to the Magistrate Judge's denial of his motion to compel the production of a copy of his deposition transcript. (Dkt. 62 at 7-10.) Plaintiff argues that the Magistrate Judge did not cite to any binding authority and cites to the Sixth Amendment, Fourteenth Amendment, and Federal Rules of Civil Procedure 5(a)(1), 26(b)(1), 30(e), 32, and 34 to show he is entitled to a free copy of his deposition transcript. This is a proper objection that warrants review under the clearly erroneous or contrary to law standard.

Plaintiff fails to show that the Magistrate Judge's decision was clearly erroneous or contrary to law. The Magistrate Judge cited adequate authority showing that a civil plaintiff is not entitled to a free copy of a transcript and "[a]n indigent plaintiff bears his own litigation expenses." *Green v. Miller*, No. 2:13-cv-14247, 2015 WL 1014914, at *2 (E.D. Mich. Mar. 9, 2015) (alteration in original) (quoting *Dujardine v. Mich. Dept. of Corr.*, No. 1:07-cv-701, 2009 WL 3401172, at *1 (W.D. Mich. Oct. 19, 2009)). Furthermore, under these circumstances, nothing

in the Constitution, the Federal Rules of Civil Procedure, or the Local Rules of the Eastern District of Michigan entitle plaintiff to a free copy of his deposition transcript. The most plaintiff could have asked for was to review the transcript and make changes within thirty days. Fed. R. Civ. Pro. 30(e). But only if plaintiff pays "reasonable charges" would the court reporter have been obligated to produce a copy of the transcript. *See* Fed. R. Civ. 30(f)(3).

Plaintiff argues that the Magistrate Judge did not cite to binding authority and therefore his denial of his motion to compel was in error. (Dkt. 63 at 9.) In the absence of binding or mandatory authority, courts are free to turn to persuasive authority, as the Magistrate Judge did. *See United States v. Tucker*, 28 F.3d 1420, 14425 (6th Cir. 1994) (looking to other circuits); *King v. Handorf*, 821 F.3d 650, 655 (6th Cir. 2016) (illustrating the general principle that courts may turn to persuasive authority in the absence of mandatory authority). Further, plaintiff does not cite any binding authority that he is entitled to a free transcript of his deposition.

Plaintiff next cites to the Confrontation Clause of the Sixth Amendment and the Fourteenth Amendment Due Process Clause (Dkt.

63 at 8, 10), but his reliance is misplaced. The Confrontation Clause only applies to criminal defendants. *United States v. Collins*, 799 F.3d 554, 576 (6th Cir. 2015) (citing *United States v. Johnson*, 581 F.3d 320, 324 (6th Cir. 2009)). The same prevents him from relying on the Fourteenth Amendment. *Bruce v. Welch*, 572 F. App'x 325, 329 (6th Cir. 2014) ("The Due Process Clause of the Fourteenth Amendment requires fair notice of *criminal charges* sufficient to allow a *defendant* to prepare an adequate defense." (emphasis added)). Moreover, these constitutional provisions are not designed to help him access a copy of his deposition without charge.

Last, the Federal Rules of Civil Procedure do not support plaintiff's argument that he should be given a copy of his deposition transcript free of cost. Rule 5 does not provide for a free copy of the transcript because plaintiff believes that he may need it if he appeals. (Dkt. 63 at 10.) The portion of Rule 26 that plaintiff cites also does not provide for discovery that is free of cost to plaintiff. Rule 30(e) addresses the review of depositions by witnesses for accuracy. Rule 32 describes the use of depositions in court, and Rule 34 details how parties request, respond to, and object to discovery requests. These rules do not accomplish what

plaintiff argues they do. The objection is denied because plaintiff fails to show the Magistrate Judge's decision was clearly erroneous or contrary to law.

i. Objection 14

Plaintiff objects to the Magistrate Judge's denial of plaintiff's motion to enjoin the restitution order. However, he fails to show that the Magistrate Judge's finding that he did not face an atypical and significant hardship as a result of the restitution order was clearly erroneous and contrary to law standard. The Magistrate Judge points to ample case law in his decision regarding the $8,936.63 restitution order. *E.g.*, *Sturges v. Heyns*, No. 14-cv-14120, 2014 WL 7012671, at *3 (E.D. Mich. Dec. 11, 2014). Plaintiff does not show that this determination was in clear error or contrary to law.

Plaintiff also objects for the first time to the process he was given, which is necessary to show the restitution order deprived him of a liberty interest. *See McMillian*, 136 F. App'x at 820 (citing *Freeman*, 808 F.2d at 951). Plaintiff argues that the Michigan Department of Corrections manual does not permit restitution through false charges and impaired hearings. (Dkt. 63 at 13.) But this begs the question. Plaintiff does not

show that the Magistrate Judge's decision that plaintiff was not denied adequate due process in his disciplinary hearing was clearly erroneous or contrary to law. The objection is denied.

IV. Conclusion

Accordingly, plaintiff's objections (Dkt. 62) are DENIED and the Report and Recommendation (Dkt. 57) is ADOPTED. Plaintiff's objections (Dkt. 62) to the Magistrate Judge's order denying his motion to compel and for an order enjoying restitution (Dkt. 58) are DENIED. Defendant Barnes' motion for summary judgment is GRANTED.

Dated: October 10, 2018
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on October 10, 2018.

s/Shawna Burns
SHAWNA BURNS
Case Manager

"Appendix-C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TRENT BROWN,

Plaintiff,

v.

S. RIVARD, *et al.*,

Defendants.
_____/

Case No. 5:16-cv-12362
District Judge Judith E. Levy
Magistrate Judge Anthony P. Patti

REPORT AND RECOMMENDATION TO GRANT IN PART AND DENY IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DE 25)

I. RECOMMENDATION: The Court should grant in part and deny in part Defendants' motion for summary judgment. Specifically, the Court should grant the motion with respect to Plaintiff's claims against Defendants Rivard, McCullick, Parsons, and Williams, and deny the motion with respect to Plaintiff's defamation claim against Defendant Barnes.

II. REPORT

A. Background

1. Factual Background

a. Commencement of Suit and Parties

Appendix-C

Plaintiff, a state inmate who is proceeding without the assistance of counsel, filed his complaint and request to proceed *in forma pauperis* on June 23, 2016. The Court granted his request on June 28, 2016. (DE 3.) He brings claims of excessive force, defamation, conspiracy, and retaliatory transfer pursuant to 42 U.S.C. § 1983 against Saint Louis Correctional Facility ("SLF") staff, specifically: S. Rivard, the Warden during the relevant time period; M. McCullick, the Deputy Warden; K. Parsons, the grievance coordinator; F. Williams, the Assistant Resident Unit Supervisor ("ARUS"); and, S. Barnes, a correctional officer. He bases his claims on the following events.

b. Plaintiff at SLF

Plaintiff was transferred to SLF on March 20, 2014, bringing with him an admittedly "dilapidated" footlocker containing "legal property." (DE 1 at ¶ 10.) The footlocker was confiscated upon his arrival to SLF. According to Plaintiff, staff did not conduct a hearing on excess legal property. On July 10, 2015, however, hearing officer L. Maki agreed that Plaintiff had enough legal property for a replacement footlocker.

On June 17, 2014, Plaintiff had a physical altercation with his "bunkie," which Defendant Barnes discovered during his rounds. Defendant Barnes aimed his taser at the men, while instructing them to separate. Plaintiff asserts that he was unable to follow Defendant Barnes' order because his bunkmate was holding

him down, and that he attempted to make this known by repeatedly stating "he's holding me." (DE 1 at ¶ 11.) Defendant Barnes then tased Plaintiff for "approximately 10 to 20 seconds." (Id. at ¶ 12.)

Following the incident, Defendant Barnes issued a misconduct report, stating that he saw Plaintiff's "hands wrapped around his bunkie's neck." (Id. at ¶ 19, internal quotations omitted). However, Plaintiff asserts that Defendant Barnes later admitted that he could not see his hands because there was a desk in the way. Plaintiff claims that Defendant Barnes, together with Rivard and McCullick discussed Barnes' false misconduct report. During the misconduct hearing, a video of the altercation was not shown, but the hearing officer determined that Plaintiff was on top of his bunkmate and "had to be tazed by staff." (DE 1 at ¶ 26.) On June 24, 2017, Plaintiff submitted a Step 1 grievance based on Barnes' allegedly false misconduct report. The grievance was denied because it was directly related to the misconduct hearing.

On June 18, 2014, just after the tasing incident, unnamed staff packed up Plaintiff's property and confiscated several items as contraband. On July 10, 2014, SLF staff held a hearing to determine the disposition of the confiscated property, which resulted in the property being destroyed over Plaintiff's protests. Plaintiff grieved this issue as well. He asserts that Defendant Parsons informed him that a hearing on this issue would be held on August 18, 2014. The hearing was

postponed, however, and Plaintiff was transferred to the Alger Correctional Facility ("LMF") on August 20, 2014.

2. The Instant Motion

Defendants filed the instant motion for summary judgment on January 10, 2017, asserting that they are entitled to summary judgment for three reasons. First, they argue that Plaintiff failed to exhaust his administrative remedies against Defendants Williams, Parsons, McCullick, and Rivard because he did not mention them by name aqnd failed to grieve the issues raised in his complaint. Second, they assert that he only alleged personal involvement of the Defendants in his excessive force claim. Finally, Defendants argue that they are entitled to qualified immunity.

Plaintiff opposes the motion. He argues that he properly exhausted his administrative remedies by naming in his grievances all the events and individuals involved that he was aware of at the time. Next, he asserts that he properly alleged personal involvement of the Defendants and if a particular Defendant was not named in a specific claim, it was because that person was "not intended to be held liable" for that claim. (DE 28 at 57.) Finally, he counters that Defendants are not entitled to qualified immunity because they committed their actions with bad faith.

B. Standard

Under Federal Rule of Civil Procedure 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the case under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court "views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 135 (6th Cir. 2004) (internal citations omitted).

"The moving party has the initial burden of proving that no genuine issue of material fact exists . . . ." *Stansberry v. Air Wis. Airlines Corp.*, 651 F.3d 482, 486 (6th Cir. 2011) (internal quotations omitted); cf. Fed. R. Civ. P. 56 (e) (2) (providing that if a party "fails to properly address another party's assertion of fact," then the court may "consider the fact undisputed for the purposes of the motion."). "Once the moving party satisfies its burden, 'the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.'" *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The nonmoving party must "make an affirmative showing with proper evidence in order to defeat the motion." *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009); *see also*

Metro. Gov't of Nashville & Davidson Cnty., 432 F. App'x 435, 441 (6th Cir. 2011) ("The nonmovant must, however, do more than simply show that there is some metaphysical doubt as to the material facts . . . . [T]here must be evidence upon which a reasonable jury could return a verdict in favor of the non-moving party to create a genuine dispute.") (internal quotation marks and citations omitted). Summary judgment is appropriate when "a motion for summary judgment is properly made and supported and the nonmoving party fails to respond with a showing sufficient to establish an essential element of its case. . . ." *Stansberry*, 651 F.3d at 486 (citing *Celotex Corp. v. Catrett*, 477 U.S. 371, 322-23 (1986)).

C. Discussion

1. Exhaustion of Administrative Remedies

a. Exhaustion Under the PLRA

Under the PLRA, a prisoner may not bring an action "with respect to prison conditions under section 1983 of this title, or any other Federal law . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Congress enacted this provision to address the "outsized share" of prisoner litigation filings and to ensure that "the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones v. Bock*, 549 U.S. 199, 203-04 (2007). Put another way, the purpose of

§ 1997e(a) is to "reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). In addition, exhaustion "gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of [the agency's] procedures." *Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (internal quotations and citations omitted).

"There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought into court." *Jones*, 549 U.S. at 211. The prison's grievance process determines when a prisoner has properly exhausted his or her claim. *Id.* at 219 ("The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion."). Even where a prisoner has made some attempts to go through the prison's grievance process, "[t]he plain language of the statute makes exhaustion a precondition to filing an action in federal court." *Freeman v. Francis*, 196 F.3d 641, 645 (6th Cir. 1999). The prisoner "may not exhaust his [or her] administrative remedies during the pendency of the federal suit." *Id.* (citations omitted); *see also Woodford*, 548 US at 95 ("A prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction . . . .").

However, "inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones*, 549 U.S. at 216. Instead, failure to exhaust administrative remedies is an affirmative defense under the PLRA. As such, Defendants bear the burden of proof on exhaustion. *Surles v. Andison*, 678 F.3d 452, 456 (6th Cir. 2012).

b. Grievance Procedures at the MDOC

Pursuant to its Policy Directive dated July, 9, 2007, the administrative remedies available at the MDOC are as follows. First, the inmate must attempt to resolve any issue with the staff member involved within two days of becoming aware of a grievable issue. (DE 25-2, ¶ P.) If the issues are not resolved within five days, the inmate may file a Step 1 grievance using the appropriate form. The inmate should receive a response within fifteen days of filing his or her grievance. If the inmate is dissatisfied with the disposition of the grievance, or does not receive a response ten days after the due date, he or she may file a Step II grievance using the appropriate form. (Id. at ¶ BB.) Similarly, if the inmate is dissatisfied with the Step II response or does not receive a response within ten days after the response was due, he or she may file a Step III grievance. (Id. at ¶ FF.) Step III grievances are "logged on a computerized grievance tracking system." (Id. at ¶ GG.) The matter is fully exhausted after the disposition of the Step III

grievance. *Surles*, 678 F.3d at 455 ("A grievant must undertake all steps of the MDOC process for his grievance to be considered fully exhausted.").

Here, Defendants acknowledge that Plaintiff filed two grievances while housed at SLF: 1) SLF-14-07-885-07a ("885-07a") and 2) SLF-14-07-807-27a (807-27a). They do not dispute that the grievances were pursued through Step III. Instead, they argue that Plaintiff failed to provide their names at Step I and failed to grieve the issues raised in his complaint. They assert that these missteps prevented them from addressing and reviewing his claims prior to his lawsuit, in contravention of the PLRA's exhaustion requirements. Plaintiff counters that he named all relevant individuals that he was aware of at the time he filed his grievances. A brief summary of the grievances at issue is in order.

i. 885-07a

Plaintiff filed his Step I grievance on July 10, 2014 and described the issue as follows:

> 6/17/2014: Grievant is placed in segregation for alleged misconduct. 6/18/2014: Unit Staff Officer Bierstetel issues contraband removal record for excess personal property. 7/10/14: RUM Havelka conducts hearing and determines property is to be destroyed. Grievant states excess pro-party is result and SLF [unreadable] is getting my footlocker upon transfer from DRF on 3/20/2014, and resultant excess legal property combining with non-legal personal property. And that grievant needs extra storage provision (container, duffle bag) for legal property.

(DE 25-3 at 10 and DE 1 at 68.) The grievance was denied by Deputy Warden Barnett on September 17, 2014 and Plaintiff filed a Step II appeal on September 18, 2014. (DE 25-3 at 8 and 11.) In his Step II grievance, he mentions that Parsons' Step I response was tardy. (DE 25-3 at 8.) Rivard denied his Step II grievance on October 7, 2014. Plaintiff appealed to Step III, indicating that Rivard and McCullick were retaliating against him and mentions Parsons' "tardy" Step I response. His Step III grievance was denied on August 28, 2015.

ii. 807-27a

Plaintiff filed his Step I grievance on June 24, 2014. He notes that Barnes issued a misconduct report that incorrectly described seeing "Grievant's hands around another inmate's neck." (DE 25-3 at 19.) Later, Plaintiff indicates that he overheard Barnes stating that he "couldn't see" where his hands were located because there was a desk in the way. Id. Plaintiff mentions that Rivard questioned Barnes about his statement. The grievance was denied and Plaintiff filed a Step II appeal on July 31, again noting that Barnes filed "an intentionally false/misleading conduct report," and later admitted that he could not see Plaintiff's hands to Rivard and McCullick. (DE 25-3 at 17.) His Step II grievance was denied and Plaintiff appealed to Step III, which was also denied.

c. Plaintiff Failed to Exhaust His Grievances Against Defendants Rivard, McCullick, Parsons, and Williams.

To be sure, "exhaustion is not per se inadequate [under the PLRA] simply because an individual later sued was not named in the grievances." *Okoro v. Hemingway*, 481 F. 3d 873, 874 (6th Cir. 2007). "However, if such a requirement is written into the prison's administrative procedures, compliance is mandatory if a defendant is to be considered exhausted." *Washington v. Hutchinson*, No. 08-12787, 2009 WL 2923162, at *4 (E.D. Mich. Sept. 10, 2009). Defendant cites to current Michigan Department of Corrections ("MDOC") policy stating that the "[d]ates, times, places, and names of all those involved in the issue being grieved are to be included" at Step 1. MDOC Policy Directive 03.02.130, ¶ R, http://www.michigan.gov/documents/corrections/03_02_130_200872_7.pdf (last visited May 2, 2017); *see also Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2010) ("Under the [Michigan] Department of Corrections' procedural rules, inmates must include the "[d]ates, times, places and names of all those involved in the issue being grieved" in their initial grievance.").

Defendants' argument is therefore partially meritorious. Plaintiff does *not* mention Defendants Rivard, McCullick, Parsons, and Williams in his Step I grievances. However, in 807-27a, Plaintiff specifically mentions Barnes as the individual who filed a false report against him, which echoes the due process claim

in his complaint. Accordingly, Plaintiff did not fail to exhaust his administrative remedies with respect to Defendant Barnes and his due process claim because it provided the agency sufficient information to "correct its own mistakes" before being haled into federal court. *Ngo*, 548 U.S. at 89. I therefore recommend that Defendants' motion be granted as to Plaintiff's claims against Defendants Rivard, McCullick, Parsons, and Williams based on his failure to exhaust his administrative remedies.

As Plaintiff indicated in his response brief, he did not name Defendants in the counts in which he did not intend to hold them liable. A review of his complaint indicates that he specifically named Barnes in his claims for excessive force (DE 1 at ¶ 50) and filing a false report (¶ 51). His grievance against Defendant Barnes properly addresses his allegations that Defendant Barnes defamed him by filing a false report, but does not address the alleged excessive force used in the tasering incident. As such, I recommend that Plaintiff's excessive force claim against Defendant Barnes be dismissed for failure to exhaust. Thus, the only remaining claim in this action is Plaintiff's Due Process claim, arising out of his allegations that Defendant Barnes lied in his misconduct report. Plaintiff also styles this claim as one for "defamation." (*See* DE 1 at 12, ¶ 2.)[1]

[1] In his complaint, Plaintiff asserts that, in addition to violating his Due Process rights, Defendant Barnes' alleged false report violated Michigan state law. As best as the Court can discern, he is referring to Michigan Penal Code § 750.411a, which

2. Plaintiff Alleged Barnes' Personal Involvement.

Defendants assert that Plaintiff failed to allege their personal involvement in the events described in his complaint. Defendants are correct that, in analyzing a case under § 1983, "each defendant's liability must be assessed individually based on his [or her] own actions." *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010). However, as to the remaining Due Process claim against Defendant Barnes, Plaintiff properly pleaded personal involvement in his complaint. Plaintiff describes his claim as follows:

> The actions of defendant Barnes in filing a false report through malicious intent, denied the plaintiff due process of the laws, in violation of the Fourteenth Amendment to the United States Constitution and Article I, § 17 to the Michigan Constitution.

(DE 1 at ¶ 51.) In his statement of facts, he indicates that Defendant Barnes issued a misconduct report stating that he could see Plaintiff's hands wrapped around his bunkmate's neck, but later indicated that he could not see Plaintiff's hands because his view was obstructed by a desk. (Id. at ¶¶ 19-20.) Plaintiff asserts that, as a result of Defendant Barnes' misconduct report, he was found guilty of the

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covers false reports of crime. However, this provision does not confer a private right of action. *See, e.g.*, Kelly v. Rich, No. 16-CV-12624, 2016 WL 5219638, at *5 (E.D. Mich. Aug. 3, 2016), report and recommendation rejected as moot following Plaintiff's voluntary dismissal, No. 16-CV-12624, 2016 WL 5118529 (E.D. Mich. Sept. 21, 2016).

misconduct charge, in violation of his due process rights. Plaintiff sufficiently pleaded Defendant Barnes' personal involvement in his allegations.

3. Defendant is Not Entitled to Qualified Immunity.

"Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.'" *Phillips v. Roane Cnty.,* 534 F.3d 531, 538 (6th Cir.2008) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). The Court conducts a two-step analysis in assessing qualified immunity. First, the Court determines whether "the violation of a constitutional right has occurred" and second, whether the "constitutional right at issue was clearly established at the time of defendant's alleged misconduct." *Grawey v. Drury*, 567 F.3d 302, 309 (6th Cir. 2009). During the analysis, the Court must view the facts in the light most favorable to the plaintiff. *Id.* The Sixth Circuit recently laid out the Court's analysis of qualified immunity as follows:

> To deny qualified immunity, the court need not conclude that the inferences drawn by the Plaintiff are the only reasonable inferences that could be drawn, but must simply find that the inferences drawn are reasonable and not blatantly contradicted.

Harris v. Lasseigne, 602 F. App'x 218, 222 (6th Cir. 2015). "Once the qualified immunity defense is raised, the burden is on the plaintiff to demonstrate that the

officials are not entitled to qualified immunity." *Moldowan v. City of Warren,* 578 F.3d 351, 375 (6th Cir. 2009).

Here, Plaintiff brings his claim under the Fourteenth Amendment, asserting that he was deprived of Due Process because Defendant Barnes lied and defamed him on his misconduct report. "The Fourteenth Amendment forbids state actors from depriving individuals of life, liberty or property without due process of law." *Quinn v. Shirey*, 293 F.3d 315, 319–20 (6th Cir. 2002). "[A] person's reputation, good name, honor, and integrity are among the liberty interests protected by the due process clause of the fourteenth amendment." *Chilingirian v. Boris,* 882 F.2d 200, 205 (6th Cir.1989). "However, defamation alone is not enough to invoke due process concerns," and Plaintiff must also demonstrate "[s]ome alteration of a right or status previously recognized by state law." *Quinn*, 293 F.3d at 320 (internal quotations omitted). "In other words, when a plaintiff alleges the loss, infringement or denial of a government right or benefit previously enjoyed by him, coupled with communications by government officials having a stigmatizing effect, a claim for deprivation of liberty without due process of law will lie." *Mertik v. Blalock*, 983 F.2d 1353, 1362 (6th Cir. 1993).

Plaintiff asserts that Defendant Barnes lied on the misconduct report, filed on June 17, 2014, in which he states that Plaintiff "had his hands around [his bunkmate's] neck." (DE 1 at 52.) The misconduct report is signed by Defendant

Barnes, but does not indicate that it was sworn under oath. As a result of this statement, Plaintiff alleges, he was improperly found guilty of the misconduct charge, and required to pay restitution in the amount of $8,936.63. (Id. at 54.) During the misconduct hearing, Plaintiff stated that he "never had him around the neck" and that Defendant Barnes "told the warden he could not see . . . ." (Id.) Again, there is no indication that Plaintiff's statements were made under oath. Accordingly, the Court is left with Plaintiff's unsworn statement that Defendant Barnes lied about his actions and Defendant Barnes' unsworn account of those actions.

Defendants argue that Barnes statements were made during the course of his work and are therefore privileged. As support for this proposition, they point to *Graves v. Bowles*, 419 F. App'x 640, 645 (6th. Cir. 2011), which states that "[s]tatements made in the course of work or for the enforcement of law" warrant a public interest privilege. *Id.* at 644. However, this privilege applies to statements that are made "as confidentially as circumstances will permit, to aid in detecting felonies[.]" *Id.* Here, Defendant Barnes wrote his observations on a misconduct report, which Plaintiff clearly received because he provided a copy of it with his complaint. It is unclear how Defendant Barnes is attempting to describe his statements as privileged, or what such a privilege would do in the face of

Plaintiff's claim. As Defendants note later, Barnes' statement in the misconduct report was simply him "report[ing] what he observed." (DE 25 at 25.)

In the absence of sworn evidence indicating that Defendant Barnes did not lie on his misconduct report, I conclude that Plaintiff survives the first step of the qualified immunity analysis: specifically, the inferences drawn by Plaintiff are reasonable and not blatantly contradicted such that a reasonable jury could conclude that a Constitutional violation occurred. Defendant Barnes does not dispute that he made a false statement, Plaintiff's reputation is a liberty interest protected by the Due Process clause, and Plaintiff has also demonstrated an alteration of a right or status, namely that he was found guilty of the misconduct report and fined.

As to the second prong of the analysis, no one disputes that the right to due process was clearly established at the time of Defendant Barnes' actions, much less that a prisoner has a liberty interest in his good reputation or a right to be free from false accusations by prison officials.

Finally, to the extent Defendants argue that Barnes' actions were objectively reasonable, such an argument is unavailing. Specifically, Defendant Barnes' actions in recounting his observations of Plaintiff's skirmish with his bunkmate *may* have been reasonable. However, he has provided no evidence to demonstrate that Plaintiff's allegations that he *lied about those events* are false. It is not

objectively reasonable for an officer to lie when making a report. *See, e.g., Mejia v. City of Silverton*, No. CIV. 03-461-TC, 2004 WL 183927, at *3 (D. Or. Aug. 16, 2004) *report and recommendation adopted* 2004 WL 2203272 (D. Or. Sept. 29, 2004) ("If plaintiff's version of the facts turns out to be true, defendant Rice will not be entitled to qualified immunity as no reasonable officer could believe filing a false report is lawful."); *Bassett v. City of Burbank*, No. 14CV01348, 2014 WL 12573410, at *5 (C.D. Cal. Nov. 5, 2014) (Concluding that "no reasonable officer would think [authoring false reports] is acceptable . . . ."). Accordingly, I recommend that Defendants' motion be denied as to Plaintiff's claim of defamation in violation of the Fourteenth Amendment against Defendant Barnes .

D. Conclusion

In sum, I recommend that Defendants' motion for summary judgment be **GRANTED IN PART AND DENIED IN PART**. Specifically, Plaintiff failed to exhaust his administrative remedies with respect to his claims against Defendants Rivard, McCullick, Parsons, and Williams, because he did not mention them in his Step I grievances. Additionally, Plaintiff failed to exhaust his administrative remedies with respect to his excessive force claim against Defendant Barnes because he did not describe that event in his grievances. Finally, Defendant Barnes is not entitled to judgment as a matter of law on Plaintiff's defamation claim.

III. PROCEDURE ON OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1981). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 932 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1273 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," and "Objection No. 2," *etc.* Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed. R. Civ. P. 72(b)(2); E.D. Mich LR 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," *etc.* If the Court determines that any objections are without merit, it may rule without awaiting the response.

Dated: May 24, 2017

s/Anthony P. Patti
Anthony P. Patti
UNITED STATES MAGISTRATE JUDGE

I hereby certify that a copy of this document was sent to parties of record on May 24, 2017, electronically and/or by U.S. Mail.

s/Michael Williams
Case Manager for the
Honorable Anthony P. Patti

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TRENT BROWN,

Plaintiff,

v.

STEPHEN BARNES,

Defendant.
_____/

Case No. 5:16-cv-12362
District Judge Judith E. Levy
Magistrate Judge Anthony P. Patti

REPORT AND RECOMMENDATION TO DENY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DE 46) AND GRANT DEFENDANT BARNES' MOTION FOR SUMMARY JUDGMENT (DE 49)

I. RECOMMENDATION: The Court should deny Plaintiff's motion for summary judgment and for spoliation sanction and grant Defendant Barnes' motion for summary judgment. If this recommendation is fully adopted, this case will be brought to a close.

II. REPORT

A. Background

1. Procedural background

Plaintiff Trent Brown (#210522) is a state prisoner currently incarcerated at the Michigan Department of Corrections (MDOC) Baraga Correctional Facility (AMF), in Baraga, Michigan. (DEs 1, 56.) On June 23, 2016, while incarcerated at the MDOC's Alger Correctional Facility (LMF) in Munising, Michigan,

Plaintiff filed the instant lawsuit *in pro per*, alleging claims of excessive force, defamation, conspiracy, and retaliatory transfer pursuant to 42 U.S.C. § 1983 against Saint Louis Correctional Facility (SLF) staff, specifically: S. Rivard, the Warden during the relevant time period; M. McCullick, the Deputy Warden; K. Parsons, the grievance coordinator; F. Williams, the Assistant Resident Unit Supervisor ("ARUS"); and, S. Barnes, a correctional officer. (DE 1.) On August 9, 2017, the Court entered an Opinion and Order adopting my report and recommendation, granting in part and denying in part Defendants' motion for summary judgment, and holding that Plaintiff failed to exhaust his administrative remedies with respect to his claims against Defendants Williams, Parsons, McCullick and Rivard, and that he failed to exhaust his administrative remedies with respect to his excessive force claim against Defendant Barnes. (DEs 39, 33.) Accordingly, the only claim remaining is Plaintiff's due process defamation claim against Defendant Barnes.

The underlying facts in this matter have been laid out and discussed in my previous report and recommendation. (DE 33.) Accordingly, I will only address here those facts necessary to decide the instant motions for summary judgment.

2. Factual background

a. June 17, 2014 altercation

On June 17, 2014, Plaintiff had a physical altercation in his cell with another prisoner, his "bunkie," which Defendant Barnes discovered during his rounds. (DE 1, ¶¶ 12-14.) Plaintiff was sitting on top of the other prisoner and Barnes aimed his electronic control device (ECD) or taser at the men, while instructing them to separate. (*Id.* ¶¶ 14-15.) Plaintiff asserts that he was unable to follow Barnes' order because his bunkmate was holding him down, and that he attempted to make this known by repeatedly stating "he's holding me." (*Id.* ¶ 16) Barnes then tased Plaintiff for "approximately 10 to 20 seconds." (*Id.* ¶ 17.) Plaintiff was subsequently handcuffed and escorted out of the housing unit. (*Id.* ¶ 18.)

The other prisoner was seen first by the St. Louis Correctional Facility's healthcare staff and then was sent to a local hospital via ambulance due the severity of his head injuries. The other prisoner's medical bills totaled $8,936.63. (*Id.* at 52.)

b. Misconduct report

Following the incident, Barnes issued a major misconduct to Plaintiff for Assault Resulting in Serious Physical Injury (Inmate Victim). (*Id.*; DE 49-2.) In the report, Barnes stated that he saw Plaintiff on top of top of another prisoner and that Plaintiff had his "hands wrapped around" the other prisoner's neck. Barnes further reported that he ordered Plaintiff to get off the other prisoner, that Plaintiff

refused to comply with that order, and that he then deployed his ECD. (DE 1 at 52.)

Plaintiff alleges that six days later, while standing in front of Plaintiff's cell, Barnes admitted that he "'couldn't see' the placement of Plaintiff's hands, for the 'desk was in the way,'" and that Barnes also informed Defendants Rivard and McCullick that Plaintiff and his cellmate "'were grabbing' one another's 'arms' during his observance" and "that 'the sergeant made me do it!' in reference to the false report issuance." (*Id.* ¶¶ 20-24.)

c. Misconduct report hearing

On June 26, 2014, an administrative hearing was conducted on the major misconduct report issued by Barnes. The hearing officer reviewed the report with Plaintiff, along with a number of memoranda and statements from other individuals. (DE 1 at 54.) A critical incident report and five medical bills for the other prisoner were marked confidential, and the hearing officer informed Plaintiff that he had also previously reviewed two videos of the incident and a confidential witness (CW) statement, all marked confidential for security purposes. (*Id.*) At the hearing, Plaintiff argued that he is not guilty and that he never "had [the other prisoner] around the neck and [he] never hit him," but rather that "he was grabbed and held to the ground," "it was horseplay," and "we were wrestling." (*Id.*)

Plaintiff further claimed that Barnes later admitted that he could not see Plaintiff's hands. (*Id.*)

The hearing officer found that the video evidence supports the misconduct charge, and that it showed Plaintiff on top of the other prisoner with his hands close to the other prisoner's neck, and that when he was told to get off the other prisoner, Plaintiff did not do so and "had to be tazed by staff with a ECD." (DE 1 at 54.) The hearing officer further expressly found that Barnes "observed [Plaintiff] on top of prisoner Jackson on his bed with his hands wrapped around prisoner Jackson's neck choking him[,] which is consistent with the confidential witness statement and found credible," and that Plaintiff's allegation that "this was horseplay" "is not logical because prisoner Jackson had head injuries and 8,936.63 in medical bills." (*Id.*) The hearing officer awarded restitution in the amount of $8,936.63 to be paid by Plaintiff to the State of Michigan for injuries to the other prisoner, as well as 10 days of detention and 30 days loss of privileges. (*Id.*)

d. Grievance 807-27a

On June 24, 2017, Plaintiff submitted a Step 1 grievance based on Barnes' allegedly false misconduct report. The grievance was denied on procedural grounds because it was directly related to the misconduct hearing, and this denial was affirmed through the three-step grievance procedure. (DE 25-3 at 16-20.) This Court previously found that Plaintiff's due process defamation claim against

Barnes was properly exhausted through Grievance 807-27a. (DE 33 at 11-12; DE 39 at 9.)

B. The Instant Motions

1. Plaintiff's motion for summary judgment (DE 46)

On February 13, 2018, Plaintiff filed his motion for summary judgment in which he primarily recites the procedural history of this case, including his recap of the arguments made in the prior motion for summary judgment, response brief and reply brief, the report and recommendation granting in part and denying in part that motion for summary judgment, the parties' objections to the report and recommendation, and the Court's opinion and order adopting the report and recommendation. Plaintiff asserts that Defendant Barnes has not clearly shown that he "did not defam[e] Plaintiff Brown, through his false statement in, and filing of, said report" and that "Defendants' complete failure of proof establishing that there is no genuine dispute that Defendant Barnes had in fact, filed a defamatory report against Plaintiff Brown" entitles Plaintiff to judgment as a matter of law.

Plaintiff also seeks evidentiary and monetary sanctions for asserted spoliation of video evidence relevant to Plaintiff's claims by Defendants. Plaintiff accurately points out that Defendants represented to the Court on June 7, 2017 that the security video of the June 17, 2014 incident can be made available for review (*see* DE 34 at 5, n.2); however, when Plaintiff requested a copy of the security

video of the June 17, 2014 incident in discovery in November 2017, Defendants responded that the video no longer exists because it is beyond the facility's 90 day retention schedule. (*See* DE 46 at 40.) Plaintiff seeks sanctions because Defendants failed "to preserve relevant video evidence by knowingly disposing of it prematurely[.]" (DE 46 at 29.)

Defendant Barnes responds that Plaintiff's motion for summary judgment should be denied because Plaintiff, as the party with the burden of proof, has failed to set forth any facts, arguments or scenarios to meet his high burden that the evidence is so powerful that no reasonable jury would be free to disbelieve it. Defendant relies on his motion for summary judgment filed concurrently with his response. Defendant further argues that Plaintiff's request for sanctions should be denied because Plaintiff's discovery requests sought security camera footage from the housing unit wing and walkway, and such footage is subject to a document retention schedule which ran prior to the fling of this lawsuit. Defendant asserts that video footage from the ECD tazer that was deployed during the incident still exists and is maintained by Defendant's counsel and is available for *in camera* review. However, Defendant objects to production of the footage to Plaintiff, a currently incarcerated prisoner, for security reasons.

Plaintiff filed a reply brief claiming that Defendant concedes, in his concurrently filed motion for summary judgment, that he defamed Plaintiff through

intentionally filing a false report. Plaintiff also accuses Defendant of playing "video charades" and argues that the video(s) requested will support his "recollections and perspectives."

2. Defendant Barnes' motion for summary judgment (DE 49)

On March 27, 2018, Defendant Stephen Barnes filed his motion for summary judgment in which he argues that the facts from the Class I Misconduct hearing are entitled to preclusive effect, and that according to these facts, Plaintiff cannot establish a due process defamation claim and "there is no evidence other than Plaintiff's unfounded legal conclusions and beliefs that Defendant 'lied.'" Defendant also argues that he is entitled to qualified immunity because he did not violate Plaintiff's clearly established constitutional rights.

Plaintiff opposes Defendant's motion in a well-written brief and supporting declaration (DE 55), arguing that Defendant is not entitled to summary judgment because there are genuine issues of material fact in dispute which a jury should resolve – specifically whether his hands were wrapped around another prisoner's neck or that he was ordered to get off the prisoner but simply refused. Plaintiff argues that the hearing examiner's findings of fact are not entitled to preclusive effect because he contends that he was unable to file an appeal of the adverse judgment of the hearings officer "due to special circumstances beyond his control." (DE 55 at 13.) However, he also alleges that he gave his "letter and appeal form to

an inmate to mail out for me" and that "the disposition of my letter and appeal from is currently outside of my cognizance." (*Id.* at 7.) Plaintiff further argues that the restitution order imposing 100% restitution for medical costs of nearly $9,000.00 can be considered "atypical," that his reputation, good name, honor and integrity are among the liberty interests protected by the Due Process Clause, and that he has a protected property interest in his prison trust fund account. Plaintiff also contends that Defendant has the burden of proof and thus must meet a substantially higher burden on his motion for summary judgment. Finally, Plaintiff contends that Barnes is not entitled to qualified immunity because a constitutional violation has occurred and Plaintiff's right to be free from arbitrary and egregious defamation from state officials was clearly established.

C. Standard

Under Federal Rule of Civil Procedure 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the case under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court "views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 135 (6th Cir. 2004) (internal citations omitted).

"The moving party has the initial burden of proving that no genuine issue of material fact exists . . . ." *Stansberry v. Air Wis. Airlines Corp.*, 651 F.3d 482, 486 (6th Cir. 2011) (internal quotations omitted); cf. Fed. R. Civ. P. 56 (e) (2) (providing that if a party "fails to properly address another party's assertion of fact," then the court may "consider the fact undisputed for the purposes of the motion."). "Once the moving party satisfies its burden, 'the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.'" *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The nonmoving party must "make an affirmative showing with proper evidence in order to defeat the motion." *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009); *see also Metro. Gov't of Nashville & Davidson Cty.*, 432 F. App'x 435, 441 (6th Cir. 2011) ("The nonmovant must, however, do more than simply show that there is some metaphysical doubt as to the material facts . . . . [T]here must be evidence upon which a reasonable jury could return a verdict in favor of the non-moving party to create a genuine dispute.") (internal quotation marks and citations omitted). Summary judgment is appropriate when "a motion for summary judgment is properly made and supported and the nonmoving party fails to respond with a showing sufficient to establish an essential element of its case. . . ." *Stansberry*, 651 F.3d at 486 (citing *Celotex Corp. v. Catrett*, 477 U.S. 371, 322-23 (1986)).

The fact that Plaintiff is *pro se* does not lessen his obligations under Rule 56. Rather, "liberal treatment of pro se pleadings does not require lenient treatment of substantive law." *Durante v. Fairlane Town Ctr.*, 201 F. App'x 338, 344 (6th Cir. 2006). In addition, "[o]nce a case has progressed to the summary judgment stage, . . . 'the liberal pleading standards under *Swierkiewicz* [*v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002)] and [the Federal Rules] are inapplicable.'" *Tucker v. Union of Needletrades, Indus. & Textile Employees*, 407 F.3d 784, 788 (6th Cir. 2005) (quoting *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004)). The Sixth Circuit has made clear that, when opposing summary judgment, a party cannot rely on allegations or denials in unsworn filings and that a party's "status as a pro se litigant does not alter [this] duty on a summary judgment motion." *Viergutz v. Lucent Techs., Inc.*, 375 F. App'x 482, 485 (6th Cir. 2010); *see also United States v. Brown*, 7 F. App'x 353, 354 (6th Cir. 2001) (affirming grant of summary judgment against a pro se plaintiff because he "failed to present any evidence to defeat the government's motion").

D. Discussion

1. Plaintiff's due process defamation claim fails as a matter of law

Plaintiff claims that Barnes "defamed" him by filing a false misconduct report and thus violated his Fourteenth Amendment due process rights. (DE 1, ¶ 51, "Relief Requested" ¶ 2.) He also claims that the "intentional filing of a false

report against the plaintiff ... constitutes the torts of false report under the laws of the State of Michigan." (*Id.* ¶ 55.)

a. Defamation, without more, does not state a due process claim

Generally, to state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) a deprivation of rights secured by the "Constitution and laws" of the United States; which was (2) committed by a defendant acting "under color of [state] law." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). A Fourteenth Amendment procedural due process claim, as alleged here, depends upon the existence of a constitutionally cognizable liberty or property interest with which the state has interfered. *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1993).

Generally, defamation is an issue of state statutory or common law, not of federal constitutional law, and defamation, without more, does not state a claim under § 1983 because harm or injury to reputation does not implicate any "liberty" or "property" interest sufficient to invoke the procedural protections of the due process clause. *See Paul v. Davis*, 424 U.S. 693, 712 (1976) (holding that "the interest in reputation ... is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law"). In *Paul*, the Louisville Police Department distributed a flyer to local merchants that identified the plaintiff as "a person[ ] who [had] been arrested ... or [had] been active in various criminal

fields...." *Id.* at 695. Upon receiving the flyer, the plaintiff's employer issued the plaintiff a warning and threatened to fire him if he engaged in any misconduct. The plaintiff then sued the police department, alleging that the defamatory statements in the flyer "seriously impair[ed] his future employment opportunities." *Id.* at 696-97. In rejecting the plaintiff's claim, the Supreme Court observed that "[t]he interest in reputation alone which respondent seeks to vindicate ... is quite different from the liberty or property [interests] recognized in [the Court's due process jurisprudence]." *Id.* at 711. As the Court went on to explain, a plaintiff cannot recover under § 1983 for injuries to his reputation alone; the alleged defamatory statements must also result in the deprivation of a constitutionally protected right or interest. *Id.*

"The Supreme Court has stressed that 42 U.S.C. § 1983 is not an avenue for redress of any and all possible tort claims against the government, and that there exists 'no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.'" *Mertik v. Blalock*, 983 F.2d 1353, 1362 (6th Cir. 1993) (quoting *Paul*, 424 U.S. at 702). Rather, to be actionable under § 1983, the defamation must "satisfy the 'stigma-plus' standard established by *Paul v. Davis*, which requires a plaintiff to demonstrate the infringement of 'some more tangible interest[]' than reputation alone, 'such as employment'" or alteration of a

recognized interest or status created by the state. *Harris v. Detroit Pub. Sch.*, 245 F. App'x 437, 444 (6th Cir. 2007); *see also Voyticky v. Vill. of Timberlake, Ohio*, 412 F.3d 669, 677 (6th Cir. 2005) ("Absent a further injury, such as loss of a government job or loss of a legal right or status, defamation, by itself, does not constitute a remediable constitutional claim."); *Mertik*, 983 F.2d at 1362-63 (explaining that the plaintiff must allege that the defamatory statement did more than simply injure his reputation, he must allege that it deprived him of a liberty or property interest protected by the Fourteenth Amendment).

Here, as discussed below, Plaintiff has not alleged or shown that the damage to his reputation from the alleged false misconduct report resulted in the deprivation of a constitutionally protected right or interest. Accordingly, his defamation allegations do not rise to the level of a federal claim recognizable under § 1983.[1]

b. "False" disciplinary charges do not implicate a protected liberty interest

[1] In Defendants' first motion for summary judgment, they argued, in the context of asserting that Plaintiff failed to demonstrate that Defendants were personally involved in any unconstitutional conduct and that Defendants were entitled to qualified immunity, that Plaintiff's due process defamation claim against Barnes fails because Barnes' statements were made during the course of his work and therefore are privileged. (DE 25 at 20, 25.) That privilege argument was rejected by the Court, which concluded, based on the record before it, that Plaintiff survives the first step of the qualified immunity analysis. (DE 33 at 14-18; DE 39 at 9-11.) Defendant does not make the privilege argument here.

Plaintiff alleges that Barnes defamed him in violation of his constitutional due process rights by filing a false misconduct report. However, it is well settled that the filing of false disciplinary charges against a prisoner does not constitute a constitutional violation redressable under § 1983 where there is a fair hearing on that charge. *Jackson v. Madery*, 158 F. App'x 656, 662 (6th Cir. 2005) ("False accusations of misconduct filed against an inmate do not constitute a deprivation of constitutional rights where the charges are adjudicated in a fair hearing."), *abrogated on other grounds by Maben v. Thelen*, 887 F.3d 252, 262 (6th Cir. 2018); *Cromer v. Dominguez*, 103 F. App'x 570, 573 (6th Cir. 2004); *Jackson v. Hamlin*, 61 F. App'x 131, 132 (6th Cir. 2003) (A "prisoner has no constitutional right to be free from false accusations of misconduct."). As this Court has previously explained, "[a] prisoner has no constitutionally protected immunity from being falsely accused of misconduct. The prisoner only has a right to due process of law during the disciplinary proceedings against him concerning the allegedly false misconduct charges." *Riley v. Church*, 874 F.Supp. 765, 768 (E.D. Mich. 1994) (citations omitted), *aff'd*, 81 F.3d 161 (6th Cir. 1996); *see also Madery*, 158 F. App'x at 662 ("Jackson was provided due process hearings for the misconduct charges; as such, his due process rights were not violated and he may not maintain a § 1983 claim for the allegedly false misconduct reports.") (citations omitted); *see also Freeman v. Rideout*, 808 F.2d 949, 953 (2d Cir 1986) ("Since

Freeman was granted a hearing, and was afforded the opportunity to rebut the charges against him, the defendant's filing of unfounded charges did not give rise to a *per se* constitutional violation under section 1983.").

A prisoner's right to due process in prison disciplinary proceedings includes the right to: (1) written notice of charges at least twenty-four hours before the disciplinary hearing; (2) an opportunity to call witnesses and present documentary evidence; and (3) a written statement of the evidence relied on and the reasons for the disciplinary action. *Wolff v. McDonnell*, 418 U.S. 539, 563-66 (1974) (noting, however, that the Constitution does not impose the requirement of confrontation and cross-examination in prison disciplinary hearings). In addition, there must be "some evidence" supporting the hearing officer's decision. *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 455 (1985). "[F]ederal courts do not have jurisdiction to relitigate *de novo* the determinations made in prison disciplinary hearings. So long as some evidence in the record supports the factfinder's decision, the factfinder's resolution of factual disputes, *including credibility disputes between witnesses*, is binding and final." *Mullins v. Smith*, 14 F.Supp.2d 1009, 1012 (E.D. Mich. 1998) (emphasis added) (citing *Superintendent*, 472 U.S. at 455-56).

Here, it is undisputed that Plaintiff was provided a due process hearing for the misconduct charge: (1) the June 26, 2014 major misconduct hearing regarding

the incident at the St. Louis Correctional Facility on June 17, 2014 was timely held more than 24 hours after Plaintiff received written notice of the charges; (2) Plaintiff was allowed to present his version of the events and heard the evidence against him, and there is no showing that he was prevented from calling witnesses on his own behalf if he so chose;[2] and (3) the hearing officer provided detailed reasons for the findings of guilt and the sanctions imposed, including restitution in the amount of $8,936.63, expressly finding that "the reporting officer observed prisoner Brown on top of prisoner Jackson on his bed with his hands wrapped around prisoner Jacksons [sic] neck choking him *which is consistent with the confidential witness statement and found credible*" and that the video evidence "*does support the charge*." (DE 1 at 54 (emphasis added).) It is well-settled that, notwithstanding Plaintiff's dispute with Barnes' report of the events in the June 17, 2014 misconduct report, "[s]o long as some evidence in the record supports the

[2] Although Plaintiff was not permitted to see the medical bills for this incident because they were for expenses incurred in treating the other prisoner, and was not permitted to see the confidential witness statement or view the videos because that evidence was marked confidential for security purposes and so that the capability of the cameras will not be known to Plaintiff, the Supreme Court has long recognized that "there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission." *Wolff*, 418 U.S. at 565. Obviously, personal medical information, confidential witness statements, and the security or ECD video footage implicates the safety of the other prisoners and the institution and were properly kept confidential, and the hearing report properly documented the omission of these materials from Plaintiff's review.

factfinder's decision, the factfinder's resolution of factual disputes, *including credibility disputes between witnesses*, is binding and final." *Mullins*, 14 F.Supp.2d at 1012 (emphasis added) (citing *Superintendent*, 472 U.S. at 455-56); *see also Glenn v. Napel*, No. 2:17-cv-105, 2018 WL 446342, at *7 (W.D. Mich. Jan. 17, 2018) ("A prisoner's claim that he was falsely accused of a major misconduct is barred when there has been a finding of guilt based on some evidence of a violation of prison rules."); *Turner v. Gilbertson*, No. 2:17-cv-65, 2017 WL 1457051, at *10-11 (W.D. Mich. Apr. 25, 2017) (holding that the hearing officer found that the misconduct charge was not false and that Plaintiff had in fact committed two different infractions; as a result, plaintiff's suggestion that defendant filed a false misconduct is precluded by the hearing officer's determination). As such, Plaintiff's due process rights were not violated and he may not maintain a § 1983 claim for the allegedly false misconduct report.

This Court is not permitted, much less required, to resolve factual disputes or make an independent assessment of evidence or the credibility of witnesses regarding the underlying misconduct charge. *Superintendent*, 472 U.S. at 455.[3]

[3] Plaintiff has separately filed a motion to compel: (1) production of the video evidence to the Court for *in camera* review; (2) a final copy of his deposition transcript; and, (3) an order to enjoin the restitution award. (DE 53.) Although this motion will be addressed under separate cover, the Court notes here that because it "do[es] not have jurisdiction to relitigate *de novo* the determinations made in prison disciplinary hearings," *Mullins*, 14 F.Supp.2d at 1012, *in camera* review of the video evidence—which the hearing officer reviewed and expressly

The conflict in evidence between Plaintiff's and Barnes' versions of the event was resolved by the hearing officer in favor of Barnes' version. To the extent there was a dispute as to the factual circumstances here, it was the function of the hearing officer, not this Court, to resolve it. *Gibson v. Roush*, 587 F.Supp. 504, 506 (W.D. Mich. 1984). Instead, the relevant question is whether there is "some evidence" in the record supporting the hearing officer's conclusion. *Id.* Here, in addition to Barnes' misconduct report, the hearing officer also relied on statements and memoranda from other witnesses and individuals, as well as the video evidence, which readily constitutes "some evidence" to support the hearing officer's misconduct finding. (See DE 49-2, filed under seal.)

Thus, Plaintiff received at least the minimal procedural safeguards to which he was entitled prior to the order to pay restitution and he fails to state a due process claim against Defendant Barnes based on the allegedly false misconduct report. *See Black v. Mich. Dep't of Corr.*, No 2:10-CV-11211, 2013 WL 878675, at *4 (E.D. Mich. Jan. 23, 2013) ("Because plaintiff was given a fair hearing and there was some evidence to support the hearing officer's decision, plaintiff cannot establish a due process violation based on the allegedly false misconduct report.");

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found "does support the charge"—is not necessary for the Court's ruling on the pending motions for summary judgment. Further, Plaintiff does not allege in his motion or his response to Defendant's motion for summary judgment that he needs a copy of his deposition transcript to bring or respond to the pending motions, nor has he filed a motion to that effect under Rule 56(d).

see also McMillan v. Fielding, 136 F. App'x 818, 820 (6th Cir. 2005) ("McMillan's complaint with regard to the false charges fails to state a Fourteenth Amendment claim.... Even if McMillan had a liberty interest in remaining free from lock up, loss of package privileges, and a fine, his due process right was fulfilled by his disciplinary hearing."); *Cromer*, 103 F. App'x at 573 ("False accusations of misconduct filed against an inmate do not constitute a deprivation of constitutional rights where the charges are subsequently adjudicated in a fair hearing.").[4]

c. The restitution award does not implicate a protected liberty or property interest

Further, Plaintiff cannot establish a due process violation as a result of the hearing and the restitution order because the result of the hearing, including the award of restitution, does not implicate a protected liberty or property interest. A prison disciplinary proceeding does not give rise to a protected liberty interest unless the restrictions imposed constitute an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). As the District Court for the Western District of

[4] Although issuing false and unjustified disciplinary charges can amount to a violation of substantive due process if the charges were issued in retaliation for the exercise of a constitutional right, *Black v. Lane*, 22 F.3d 1395, 1402-03 (7th Cir. 1994), there has been no allegation of retaliatory animus made in this case.

Michigan has recently explained in *Ellington v. Karkkila*, No. 2:16-CV-230, 2017 WL 1531879, at *5 (W.D. Mich. Apr. 28, 2017) (Jonker, C.J.) (DE 34-2):

> A prisoner does not have a protected liberty interest in prison disciplinary proceedings unless the sanction "will inevitably affect the duration of his sentence" or the resulting restraint imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *See Sandin v. Conner*, 515 U.S. 472, 486-87 (1995). The Sixth Circuit routinely has held that misconduct convictions that do not result in the loss of good time are not atypical and significant deprivations and therefore do not implicate due process. *See, e.g., Ingram v. Jewell*, 94 F. App'x 271, 273 (6th Cir. 2004); *Carter v. Tucker*, 69 F. App'x 678, 680 (6th Cir. 2003); *Green v. Waldren*, No. 99-1561, 2000 WL 876765, at *2 (6th Cir. June 23, 2000); *Staffney v. Allen*, No. 98-1880, 1999 WL 617967, at *2 (6th Cir. Aug. 12, 1999).

Thus, confinement to segregation, the loss of privileges, fines and restitution do not constitute an atypical and significant hardship in the context of prison life. *See McMillan v. Fielding,* 136 F. App'x 818, 820 (6th Cir. 2005) ("Ten days in lock up, the loss of package privileges, and a $4.00 fine do not constitute an atypical and significant hardship."); *Brown v. Westbooks*, No. 3:17-cv-00686, 2017 WL 3868275, at *2 (M.D. Tenn. Sept. 5, 2017) (citing *Freeman v. Rideout*, 808 F.2d 949, 951 (2d Cir. 1986)). Plaintiff bears the burden of establishing that the restitution award here constitutes an "atypical and significant hardship." *See Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 403 (6th Cir. 1992) ("The non-moving party must present affirmative evidence on critical issues sufficient to allow a jury to return a verdict in its favor."). Plaintiff has not met his burden.

Here, the potential sanction of restitution is disclosed in the MDOC policy directive regarding prisoner discipline, which clearly states that restitution is one of four sanctions the hearing officer may impose upon a finding of guilt for a Class I Misconduct. MDOC Policy Directive 03.03.105 (effective April 9, 2010), Attachment D Disciplinary Sanction. As Defendant points out, "[i]t is not atypical in a misconduct hearing to order restitution to pay for the damage caused directly by the prisoner." (DE 49 at 14-15) (citing *Payne v. Heyns*, No. 2:12-cv-312, 2012 WL 5182800 (W.D. Mich. Oct. 18, 2012) (finding that "it was entirely reasonable" for the hearing officer to order the prisoner to pay $2,000 in restitution for the medical care of the officers he injured); *Parker v. Corr. Corp. of Am.*, No. 13-1009-JDT-EGB, 2014 WL 2481874 (W.D. Tenn. June 3, 2014) (restitution does not constitute an atypical and significant hardship); *Sturges v. Heyns*, No. 14-CV-14120, 2014 WL 7012671, at *3 (E.D. Mich. Dec. 11, 2014) (Duggan, J.) (restitution order of $11,766.12 does not implicate a protected liberty interest because although amount of restitution may be an atypical punishment and significant hardship on plaintiff, "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law") (quoting *Sandin*, 515 U.S. at 485).) *See also Carthen v. Marutiak*, No. 2:16-CV-13219, 2016 WL 5791454, at *2 (E.D. Mich. Oct. 4, 2016) (Rosen, J.) (discipline, including restitution award of $5,748.35, does not

state a constitutional due process claim); *Loard v. Sorenson*, No. 2:11-cv-596-CW, 2013 WL 12066122, at *6 (D. Utah Sept. 6, 2013) (discipline, including restitution order in the amount of $15,030.52, did not violate plaintiff's due process rights); *Monterrosa v. Anderson*, No. CV02-6304-JE, 2006 WL 1794771, at *5 (D. Ore. June 26, 2006) (discipline, including restitution orders totaling $18,224, did not violate plaintiff's due process rights).[5] Moreover, the amount of restitution does not appear to be arbitrary; in fact, it is the exact amount of the medical bills found to have been incurred in treating Plaintiff's injured cell mate. (DE 1 at 54.) Plaintiff has failed to present any evidence in support of his claim that the restitution award here imposes an unconstitutional, atypical and significant hardship.

The Sixth Circuit has held that a prisoner has a protected property interest in his inmate trust fund account. *See Hampton v. Hobbs*, 106 F.3d 1281, 1287 (6th Cir. 1997). Consequently, Plaintiff may not be deprived of his prison trust fund account funds without due process of law. *See Wolff*, 418 U.S. at 566. However, as explained above, the record here demonstrates that Plaintiff received all the process he was due. Plaintiff received timely notice and an opportunity to be

[5] Although the Court previously noted, in *dicta*, that it "could not find any cases in which a plaintiff challenged prison disciplinary sanctions anywhere near [the amount imposed in this case,]" the above cases illustrate that such an award is not atypical. In any event, it is Plaintiff's burden to establish that the sanction imposed constitutes an atypical and significant hardship, *see Guarino*, 980 F.2d at 403, and he has failed to meet that burden here.

heard, detailed reasons for the finding of guilt, and notice that restitution was ordered. He therefore fails to state a due process claim against Barnes for any possible relief. *See Sturges*, 2014 WL 7012671, at *3 ("[D]ebiting funds from [a prisoner's] account in satisfaction of a properly imposed restitution order does not amount to a taking or other wrongful interference with a property interest.") (quoting *Barber v. Wall*, 66 F. App'x 215, 216 (1st Cir. 2003)). Accordingly, Plaintiff's due process defamation claim fails and Barnes is entitled to summary judgment.

2. Qualified Immunity

In light of the above conclusion that Defendant Barnes is entitled to summary judgment on Plaintiff's defamation due process claim, this Report and Recommendation need not, for the second time, address Defendants' alternative qualified immunity argument.

3. State Law Claims

Finally, although not addressed by the parties' motions, to the extent Plaintiff's complaint presents claims under state law (*i.e.* a claim for defamation or "false report"), I recommend that the Court decline to exercise supplemental jurisdiction under 28 U.S.C. 1367(c) over any state law claims asserted against Defendant Barnes following dismissal of the federal claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26 (1966); *see also Musson Theatrical, Inc. v. Federal*

Exp. Corp., 89 F.3d 1244, 1254-55 (6th Cir. 1996) ("When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims....").[6]

4. Plaintiff's Request for Evidentiary and Monetary Sanctions Should be Denied

Plaintiff includes within his motion for summary judgment a request for spoliation sanctions. He alleges that Defendants have destroyed relevant video evidence, and he seeks evidentiary and monetary sanctions for spoliation of evidence. Plaintiff states that he requested in discovery video footage of the housing unit wing and walkway, and that Defendants responded that the "video from 2014 no long exists because it is beyond the facility's 90 day retention schedule." Plaintiff argues that such video evidence should have been preserved "for at least two years" and is relevant because he claims it would support his allegations that his hands could not be seen by Defendant Barnes, nor the hearing officer who reviewed the video. (DE 46 at 21, 27; *see also id.* at 40.) Plaintiff also points out that Defendants have now stated to the Court that video footage is

[6] Further, as I stated in my May 24, 2017 Report and Recommendation, to the extent Plaintiff purports to state a claim for "false report" under Michigan Penal Code § 750.411a, which covers false reports of crime, the claim fails because that provision does not confer a private right of action. *See, e.g, Kelly v. Rich*, No. 16-CV-12624, 2016 WL 5219638, at *5 (E.D. Mich. Aug. 3, 2016), *report and recommendation rejected as moot following Plaintiff's voluntary dismissal*, 2016 WL 5118529 (E.D. Mich. Sept. 21, 2016). (See DE 33 at 12, n.1.)

available for *in camera* review (DE 49 at 7 n.1), and he accuses Defendant of playing "video charades." (DE 52 at 4-5.)

"'Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'" *Barrette Outdoor Living, Inc. v. Michigan Resin Representatives,* No. 11-13335, 2013 WL 3983230, at *9 (E.D. Mich. Aug.1, 2013) (quoting *Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd.,* No. 06-CV-13143, 2009 WL 998402, at *1 (E.D. Mich. Apr. 14, 2009)). In the Sixth Circuit, a party seeking sanctions for the destruction of evidence must show three things: (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the evidence was destroyed with a "culpable state of mind;" and (3) the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *See Adkins v. Wolever,* 692 F.3d 499, 503–04 (6th Cir. 2012) (quoting *Beaven v. United States Dep't of Justice,* 622 F.3d 540, 553–54 (6th Cir. 2010)).

With respect to the first factor, Plaintiff must show that Defendants "had an obligation to preserve [the allegedly spoliated evidence] at the time it was destroyed." *Forest Labs., Inc.*, 2009 WL 998402, at *2 (internal quotations omitted). "The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that

the evidence may be relevant to future litigation." *Id.* Thus, "the first step in the analysis is to determine the 'trigger date,' or 'the date a party is put on notice that it has a duty to preserve evidence.'" *Id.* (citation omitted). As the Western District of Michigan recently found, the mere filing of a grievance "would not have alerted anyone to preserve evidence from a hallway security camera." *Briggs v. Plichta*, No. 1:13-cv-1280, 2017 WL 4051694, at *3 (W.D. Mich. Aug. 11, 2017) (explaining that "the Sixth Circuit has cautioned that federal courts should avoid interfering with the ability of prisoner administrators to manage their institutions" and "[p]risoner grievances threatening litigation are very common"), *report and recommendation adopted*, 2017 WL 3981096 (W.D. Mich. Sept. 11, 2017). Here, Defendants had an obligation to preserve evidence at least as of June 23, 2016, when Plaintiff filed his complaint in this case. *See Barrette Outdoor Living*, 2013 WL 3983230, at *9 ("In most cases, the duty to preserve evidence is triggered by the filing of a lawsuit."). There is no argument or evidence that Defendants destroyed any relevant video evidence after that date.

With respect to the second factor, Plaintiff must show that the evidence was destroyed with a "culpable state of mind." *Adkins*, 692 F.3d at 504. This Court has recognized that "failure to produce relevant evidence falls 'along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality ....'" *Forest Labs, Inc.*, 2009 WL 998402, at *5 (citation omitted).

Here, Defendants state that the video footage from the ECD exists and is available for *in camera* review, but they object to producing that footage to Plaintiff for security purposes. Defendants admit, however, that the regular security footage from the housing unit on June 17, 2014, which Plaintiff sought over three years later in his September 28, 2017 discovery requests, has been destroyed pursuant to the MDOC's 90-day retention schedule, which ran prior to the filing of this lawsuit. (DE 50 at 5; *see also* DE 46 at 40.) Destruction of that video evidence pursuant to a regular document retention schedule, and well before the filing of this lawsuit, simply does not rise to the level of culpability necessary for the imposition of sanctions.

Lastly, Plaintiff must "produce 'some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files.'" *Forest Labs, Inc.*, 2009 WL 998402, at *6 (citation omitted). For the reasons explained *supra*, such video evidence is not relevant to the Court's determination of the parties' competing summary judgment motions, and thus this factor does not support the imposition of sanctions.

For all the reasons discussed above, the Court does not find that Defendant acted in bad faith or that Plaintiff has been denied the ability to adequately assert his claims. Accordingly, Plaintiff's request for sanctions should be **DENIED**.

E. Conclusion

In sum, I recommend that Plaintiff's motion for summary judgment and for spoliation sanctions be **DENIED** and that Defendant's motion for summary judgment be **GRANTED**.

III. PROCEDURE ON OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1981). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 932 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1273 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," and "Objection No. 2," *etc.* Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the

objections in length and complexity. Fed. R. Civ. P. 72(b)(2); E.D. Mich LR 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," *etc.* If the Court determines that any objections are without merit, it may rule without awaiting the response.

Dated: June 25, 2018

s/Anthony P. Patti
Anthony P. Patti
UNITED STATES MAGISTRATE JUDGE

Certificate of Service

I hereby certify that a copy of the foregoing document was sent to parties of record on June 25, 2018, electronically and/or by U.S. Mail.

s/Michael Williams
Case Manager for the
Honorable Anthony P. Patti

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TRENT BROWN #210522,

Plaintiff

v.

STEPHEN BARNES,

Defendant.
_____/

Case No. 5:16-CV-12362
District Judge Judith Levy
Magistrate Judge Anthony P. Patti

ORDER DENYING PLAINTIFF'S MOTION TO COMPEL AND FOR ORDER ENJOINING RESTITUTION (DE 53)

Pending is Plaintiff's April 10, 2018 motion to compel and for order enjoining restitution, and Defendant Stephen Barnes' response. (DEs 53, 54.) Plaintiff filed the instant lawsuit alleging, in relevant part, that Defendant Barnes "defamed" him by filing a false misconduct report regarding a physical altercation in his cell, and thus violated his Fourteenth Amendment due process rights. (DE 1, ¶ 51, "Relief Requested" ¶ 2.) Plaintiff's motion seeks an order compelling production of video footage of the altercation to the Court for *in camera* review in conjunction with a determination on the parties' pending summary judgment motions. The motion also seeks to compel Defendant to provide Plaintiff with a free copy of his deposition transcript. Finally, the motion seeks an order enjoining the restitution award. (DE 53.)

First, for the reasons set forth in the Court's report and recommendation on the parties' motions for summary judgment (DE 57), Plaintiff's motion to compel production of the video footage for in camera review is **DENIED**. In its motion for summary judgment, Defendant offered to provide video footage to the court for *in camera* review. (DE 49 at 7, n.1.) However, as the Court explained in its report and recommendation, because it "do[es] not have jurisdiction to relitigate *de novo* the determinations made in prison disciplinary hearings," *Mullins v. Smith*, 14 F.Supp.2d 1009, 1012 (E.D. Mich. 1998), and because there is "some evidence" in the record supporting the hearing officer's findings, the Court's independent review of the video evidence—which the hearing officer reviewed and expressly found "does support the charge"—is not necessary for the Court's ruling on the pending motions for summary judgment.

Second, Plaintiff's motion to compel production of a copy of his deposition transcript is **DENIED**. Plaintiff is responsible for his own litigation expenses, including a copy of his deposition transcript. *See, e.g., Green v. Miller*, No. 2:13-CV-14247, 2015 WL 1014914, at *2 (E.D. Mich. Mar. 9, 2015) ("'An indigent plaintiff bears his own litigation expenses.'") (quoting *Dujardine v. Mich. Dep't of Corrs.*, No. 1:07-cv-701, 2009 WL 3401172, at *1 (W.D. Mich. Oct. 19 2009)); *see also Taylor v. Burt*, No. 1:16-cv-9, 2017 WL 4271747, at *4 (W.D. Mich. May 24, 2017) (defense counsel properly denied plaintiff's request that defendant

provide him, at no cost a copy of his deposition transcript), *report and recommendation adopted*, 2017 WL 4238919 (W.D. Mich. Sept. 25, 2017). Further, Defendant did not introduce or otherwise rely upon Plaintiff's deposition testimony in support of its motion for summary judgment, and Plaintiff has not demonstrated that his deposition transcript was necessary for determination of his or Defendant's motions for summary judgment.

Finally, Plaintiff's motion for an order enjoining the award of restitution is **DENIED**, for the reasons stated in my most recent report and recommendation. (DE 57.) The potential sanction of restitution is disclosed in the MDOC policy directive regarding prisoner discipline, which clearly states that restitution is one of four sanctions the hearing officer may impose upon a finding of guilt for a Class I Misconduct, MDOC Policy Directive 03.03.105 (effective April 9, 2010), Attachment D Disciplinary Sanction, and the Court found in its report and recommendation that the restitution award here does not implicate a protected liberty or property interest and that the award was neither atypical nor arbitrary.

IT IS SO ORDERED.

Dated: June 25, 2018

s/Anthony P. Patti
Anthony P. Patti
UNITED STATES MAGISTRATE JUDGE

Certificate of Service

I hereby certify that a copy of the foregoing document was sent to parties of record on June 25, 2018, electronically and/or by U.S. Mail.

s/Michael Williams
Case Manager for the
Honorable Anthony P. Patti

"Appendix-D"

No. 18-2226

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 19, 2019
DEBORAH S. HUNT, Clerk

TRENT BROWN,

Plaintiff-Appellant,

v.

MARK McCULLICK, WARDEN. ET AL.,

Defendants-Appellees.

ORDER

BEFORE: ROGERS, SUTTON, and READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix-D

Additional material from this filing is available in the Clerk's Office.