

UNITED STATES DISTRICT COURT
IN AND FOR SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROMEO HARDIN,	:	
	:	
Plaintiff,	:	CIVIL NO: 4-99-CV-80723
	:	
vs.	:	
	:	
WILL FULLENKAMP, MIKE WILKINS,	:	REPORT AND RECOMMENDATION
MATTHEW THORNTON,	:	ON DEFENDANTS' MOTION
DAVE DEGRANGE, JAMES SHOUP,	:	FOR SUMMARY JUDGMENT
STEVE YOUNG, and GARY REA,	:	
	:	
Defendants.	:	

This matter comes before the court on Defendants' Motion for Summary Judgment. (Clerk's No. 36.) Plaintiff, Romeo Hardin, is an inmate at Iowa State Penitentiary (ISP), Fort Madison, Iowa. Defendants Will Fullenkamp, Matthew Thornton, Jim Shoup, and Mike Wilkins are correctional officers; Steve Young is a unit manager; and Dave DeGrange is a grievance officer. Hardin brings this action under 42 U.S.C. § 1983, claiming Defendants violated his constitutional rights by subjecting him to excessive force, retaliation, and conditions of confinement that transgressed his right to be free from cruel and unusual punishment. He seeks compensatory damages and injunctive relief, including a plan to insure his safety and prevent similar future acts.

In the present Motion, Defendants assert Hardin has set forth insufficient evidence to establish the elements of his retaliation and excessive-force claims, and that he has failed to exhaust available administrative remedies. Defendants also maintain they are entitled to qualified immunity.

This case was referred to the undersigned for a Report and Recommendation under 28 U.S.C. § 636(b)(1)(B). Defendants filed their Motion for Summary Judgment on January 5, 2001. Hardin filed a Resistance on February 20, 2001, and an affidavit on March 6, 2001. A hearing was held on May 9, 2001. Hardin filed a supplement to his Resistance on May 24, 2001, and Defendants filed a

Reply on June 7, 2001. This matter is fully submitted. After carefully considering the evidence in the record and the memoranda submitted by the parties, the court finds and recommends as follows on the issues presented.

I. STANDARDS FOR SUMMARY JUDGMENT

A court shall grant a motion for summary judgment only if there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A court must consider the facts and the inferences to be drawn from them in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

To preclude the entry of summary judgment, the nonmovant must make a showing sufficient to establish the existence of every element essential to his case, and on which he has the burden of proof at trial. *Celotex*, 477 U.S. at 322-23; *Reed v. ULS Corp.*, 178 F.3d 988, 989 (8th Cir. 1999). When a motion is made and supported as required in Federal Rule of Civil Procedure 56(a), the adverse party may not rest upon the mere allegations or denials in his pleadings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. At the summary judgment stage, the court may not make determinations about the credibility of witnesses or the weight of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

II. MATERIAL FACTS NOT IN DISPUTE

Unless otherwise indicated, the following facts are either undisputed or viewed in the light most favorable to Hardin.

On September 22, 1999, Defendant Wilkens and Officer Nick Clark, Jr., each wrote a disciplinary notice (Nos. 99-9-156 and 99-9-157) accusing Hardin of various rules violations, including verbal abuse. (Defs.' Ex. D at 1-3.) Wilkens reported that when he approached Hardin and told him

his radio was too loud, the inmate yelled and referred to the officer using profanities. Clark's disciplinary notice corroborates Wilken's report.

Prison officials apparently removed Hardin's radio from his cell, because on September 23, 1999, Hardin filed an inmate memorandum referring to Wilkens' disciplinary notice and appealing the decision to remove his radio. (Defs.' Ex. D at 7; Pl.'s Ex. 1 at 1.)

Hardin contends that on September 24, 1999, he filed a grievance against Wilkens, alleging that Wilkens threatened him because of a previous grievance Hardin had written against Wilkens. (Pl.'s Compl. at 4; Pl.'s Ex. 4.) In their Answers to Interrogatories, Defendants DeGrange and Wilkins state that Hardin never filed a grievance against Wilkins, that Wilkins did not threaten Hardin, and that Hardin did not write a subsequent grievance against Wilkins accusing the correctional officer of threatening him. (Defs.' Ex. P at 2, 6; *see* Defs.' Statement Facts at 8.) Hardin has no copy of the grievance, and ISP does not have the original or a copy in its records.

On September 27, 1999, an administrative law judge (ALJ) found Hardin guilty of violating Disciplinary Rule 26, Verbal Abuse, in case numbers 99-9-156 and 99-9-157. (Defs.' Ex. C at 2, Ex. D at 8.) Hardin received a suspended sentence of 15 days of disciplinary detention and loss of 16 days good-time credit. *Id.* Hardin's appeals were denied. (Defs.' Ex. D at 10.)

Also on September 27, Hardin alleges, Wilkins told him he knew Hardin had filed a grievance against him, and the officer again threatened Hardin. That day, Wilkins wrote a disciplinary notice, No. 99-9-187, charging Hardin with threatening Wilkins, by saying to the officer extremely loudly as the officer walked past Hardin's cell on a security check, "Here he is now, with the snap of two fingers he will be gone." (Defs.' Ex. E.) In response, Hardin stated, "I never said no such thing - I don't know how I intimidate or threaten him. He threaten me." *Id.*

Later that day, correctional officers transferred Hardin from Cellhouse 219 to Cellhouse 319, a lock-up unit. Fullenkamp told a prison investigator that when Fullenkamp and Thornton brought Hardin's television to his new cell, the inmate said the television was wet. (Defs.' Ex. G at 12.) Before taking the television into Hardin's cell, Fullenkamp handcuffed the inmate's hands in front of his waist, rather than following standard procedure of handcuffing behind his back. *Id.* Fullenkamp opened the

cell door, and Hardin ran toward Fullenkamp with his hands raised above his head, hitting the officer on the forehead with the handcuffs. *Id.* Thornton helped Fullenkamp try to take Hardin down to the ground. *Id.* Fullenkamp and another officer, Shoup, each sounded an alarm, and responding staff subdued Hardin. *Id.*

Hardin, in contrast, claims that during the transfer, Officer Fullenkamp punched him in the side of the head and stated, “See where the grievance got you?” (Compl. at 4.) Defendants deny that Fullenkamp punched Hardin's head during the transfer. After arriving in his new cell, Hardin claims he noticed his ear was bleeding as a result of Fullenkamp’s punch. Hardin asserts he told Fullenkamp he was going to file a grievance against him. *Id.* Shortly thereafter, Hardin alleges, Fullenkamp, Thornton, and Shoup took Hardin out of his cell, hit him with their fists and kicked him. According to Hardin, other officers joined in the assault, re-handcuffing Hardin behind his back and hitting the back of his head and neck with their knees. Hardin alleges the pressure from the knees in his back caused him to faint from lack of oxygen. *Id.*

Hardin maintains he suffered cuts and bruises as a result of the assault. (Hardin Aff. ¶ 3; Defs.’ Ex. H at 18-19.) Sometime after Hardin was restrained on September 27, officers took him to the prison hospital, where he moaned and said he had pain in his back, neck, and wrist, as well as a cut on his wrist and on his jaw. (Defs.’ Ex. H at 18.)

On September 27, Fullenkamp and other officers wrote disciplinary notices (Nos. 99-9-189 through 99-9-193, and 99-10-02) accusing Hardin of rules violations stemming from the September 27, 1999, altercation. (Defs.’ Ex. H at 1-11.) The same day, officials transferred Hardin to an administrative segregation cellhouse, where he alleges he was confined without clothes in a cell that was unsanitary and lacking running water.

In a memorandum dated September 28, 1999, Officer James Burton, an investigator, stated that a prison physician had examined Hardin that day, because Hardin said he was hurt, and the physician saw no visible injury. (Defs.’ Ex. G at 11.) Medical notes from September 28, 1999, indicate Hardin had bruises, and the inmate reported that his jaw, wrist, and neck hurt. (Defs.’ Ex. H at 19.)

On approximately September 29 or October 1, 1999, Hardin was placed in investigative segregation in cellhouse 220. In his Complaint and Amended Complaint, Hardin asserts a claim based on the conditions of his confinement in segregation. Defendants do not challenge these claims in the present Motion.

On October 4, 1999, an ALJ found Hardin of verbally threatening Wilkins on September 27, 1999, in case 99-9-187. (Defs.' Ex. F at 3.) The ALJ imposed a sanction of 30 day disciplinary detention and loss of 16 days good-time credit. *Id.*

On October 24, 1999, Hardin wrote an inmate memorandum seeking grievance-appeal forms for two grievances that prison officials had denied. (Pl.'s Ex. 4.) One denied grievance dealt "with the threats on my life and disrespect I received from ISP staff employee Wilkins 9/23/99 (filed)." *Id.* On November 1, DeGrange replied that he had sent Hardin's grievance appeal to the warden for his review. *Id.*

In October 1999, Hardin wrote three grievances complaining about conditions of confinement and the prison staff's actions in cellhouse 220. (Pl.'s Ex. 2, 3, 5.)

On November 3, 1999, an ALJ found that Hardin was guilty of assaulting Fullenkamp on September 27, 1999. (Defs.' Ex. H at 33; *see* Ex. N at 10 (showing a rule violation #02 is for assault)). The decision states as follows:

At approximately 7:45 p.m. on 9/27/99 in CH319, inmate Hardin was cuffed, in his cell, and told to face the wall, while staff issued his property. When the cell door was opened, inmate Hardin turned around, pushed the cell door and struck [Officer] Fullenkamp in the head with the cuffs Minimum force was then used to control inmate Hardin.

Defs.' Ex. H at 33. The ALJ stated that in reaching his decision, he relied on officers' written reports and "Statement of inmate Hardin considered." *Id.* Hardin received a sanction of 365 days in disciplinary detention and loss of 365 days of good-time credit. *Id.* In his appeal of the disciplinary decision, Hardin contended that prison officials denied him the opportunity to call witnesses and present documentary evidence in his defense. (Defs.' Ex. H at 35-36.) Hardin's appeals, including an appeal to the Department of Corrections, were denied.

Hardin alleges that he filled out a form for filing an action under 42 U.S.C. § 1983, and that on November 25, 1999, Officers Gary Rea and Mike Busard questioned him about his § 1983 complaint, became verbally abusive, and denied him exercise. Hardin further alleges that on November 25, 1999,¹ Officers Rea and Busard subjected him to verbal abuse and beat him after his shower in retaliation for grievances he had filed. (Pl.'s Mot. Amend. Parties at 4; Pl.'s Ex. 11 at 2.) Hardin did not refer to the November 25, 1999, incident or name Rea as a defendant in his Complaint or Amended Complaint. In a second Motion to Amend, however, filed May 3, 2000 (Clerk's No. 15), Hardin asserted an excessive-force claim against Rea based on the events of November 25, 1999. On May 8, 2000, the court directed the Clerk of Court to appoint counsel for Hardin, and, because the inmate would then have counsel, denied Hardin's second Motion to Amend, providing that after consultation with his attorney, Hardin could seek to amend his complaint. (Clerk's No. 18.) In relation to the present Motion for Summary Judgment, both parties briefed the claim regarding Rea's alleged use of excessive force on November 25, 1999. At the summary judgment hearing, Hardin's counsel said the inmate was asserting an excessive-force claim against Rea. The court treats this issue as a renewed motion to amend under Fed. R. Civ. P. 15(b), and grants the motion, adding Rea as a defendant.

Inmate Sydney Charles, who resided two cells away from Hardin in cellhouse 220, testified that on November 25, 1999, he saw Rea and another officer begin to escort Hardin to exercise, but then return Hardin quickly to his cell. (Charles Dep. at 18.) Charles heard Hardin ask for a grievance form. *Id.* Charles stated that after Hardin wrote the grievance, an officer picked up the grievance, read it, and told Hardin, "We'll deal with you." *Id.* A few minutes later, Charles saw officers escort Hardin, who was handcuffed, to the shower. After approximately 10 minutes, officers returned to escort Hardin back to his cell. One officer stopped by Charles' cell and told the inmate to "mind [his] own business," or else officers were "going to deal with" him. *Id.* at 68-69. When the officers opened the shower door, Charles saw Rea grab Hardin and push him to the ground and hit him behind the head.

¹ In the record, the date appears variously as November 24, 25, and 26, 1999. For purposes of analyzing this Motion, the court will use the date November 25, 1999.

Charles testified that Hardin had not aggressively charged toward the officers. Charles saw officers beat and kick Hardin while the inmate was handcuffed. *Id.* at 89. Hardin maintains that Rea punched him repeatedly while he was on the ground and that handcuffs were applied extremely tightly, cutting him. (Pl.'s Mot. Amend. Parties at 4, 8.) Charles saw guards shackle Hardin and then beat him afterwards. (Charles Dep. at 79-80.) Charles did not see any wounds or evidence of bleeding on the inmate. Hardin contends that Rea, holding Hardin's hair, and two other officers, holding his chains, dragged him down the range to his cell. (Pl.'s Mot. Amend. Parties at 8.)

After he saw Rea and two other officers carry Hardin back to his cell, Charles heard noises that sounded like Hardin was being beaten in his cell. (Charles Dep. at 84-85.) Hardin alleges that after the officers returned him, handcuffed and shackled, to his cell, they kicked him in his side and left him lying on his stomach in chains. (Pl.'s Mot. Amend. Parties at 4, 8.) Hardin asserts he suffered several injuries as a result. *Id.* at 4. Charles saw Rea leave Hardin's cell. Hardin states that Steve Young was present when these events happened, but did not intervene to stop his staff. *Id.* at 8. Charles testified that later that day, before lunch, he saw Hardin limping while officers escorted him. (Charles Dep. at 100.)

Hardin contends that when he filed a grievance concerning the matter, prison officials denied him access to cleaning supplies to clean his cell. (Pl.'s Mot. Amend. Parties at 4.) The record contains no copy of the grievance or a response.

On November 25, 1999, Officer Rea wrote a disciplinary notice (No. 99-11-137) alleging that Hardin began striking and kicking Rea while the officer was opening the shower door. (Defs.' Ex. N at 1-2.) Rea stated that Busard helped Rea wrestle Hardin to the ground. *Id.* at 1. Another officer arrived to help subdue Hardin, and the officers recuffed him, applied leg irons, and took him back to his cell. Rea stated in his disciplinary notice that Hardin broke Rea's glasses; injuring them beyond repair. *Id.* at 2, 6. Busard and another officer also wrote disciplinary notices (Nos. 99-11-138, 99-11-139) concerning the incident. *Id.* at 3-5.

Hardin contends that when inmate Charles, whom Hardin states he named as a witness to the November 25 attack, gave a witness statement, two officers beat Charles, breaking two ribs. (Pl.'s Mot. Amend. Parties at 4.)

Hardin did not attend the hearing on the November 25, 1999, disciplinary notices. The ALJ found Hardin guilty of assault. (Defs.' Ex. N at 10.) In his decision, the ALJ stated as follows:

At approximately 12:30 P.M. on 11-25-99 in cellhouse 220, as Correctional Officer Rea opened the shower door to release inmate Hardin, inmate Hardin, who was cuffed behind his back, was able to step through the cuffs, allowing the cuffs to be in his front. Upon the shower door being opened, inmate Hardin then ran out and began kicking and striking Correctional Officer Rea. Correctional Officer Rea was struck on the side of his face causing his (Correctional Officer Rea's) personal glasses to break. Additional staff arrived and was able to control the situation, recuffing inmate Hardin, and escorting him to his cell. Violation #02-Assault.

Id. The sentence included 180 days of disciplinary detention, loss of 180 days of good time, and the cost of replacing Rea's glasses. On appeal, Hardin asserted that he did not assault the officers, and that he did not refuse to attend the hearing, but was denied a timely escort to the hearing. *Id.* at 12. Hardin further stated in his appeal as follows:

While captive Hardin . . . was on the floor and in hand cuffs, Rea and Busard . . . punched captive Hardin . . . 3 to 5 times and another employee stepped on captive Hardin's hand. . . . Mike Busard, Jason Stolenberg, Scott and Wellmend (ISP staff employees) carried captive Hardin to his cell by his hair, hand cuffs and sha[c]kle chains, drag[g]ing him half way and carrying him . . . half way. Once inside cell A 3, Rea . . . kicked the cuffed and sha[c]kled captive Hardin . . . in the ribs.

Id. Hardin claimed that ISP officers acted with unnecessary force and brutality. *Id.* at 13. In his appeal, Hardin also claimed he was denied the opportunity to call witnesses and present documentary evidence. *Id.* at 13. A prison official denied Hardin's appeal on the basis that because the inmate had not attended the disciplinary hearing, he had waived his right to appeal. *Id.* at 15.

Hardin denies Defendants' statements regarding November 25, 1999. (Pl.'s Statement Disputed and Undisputed Mat'l Facts at 3.) He asserts that Defendants and other prison staff assaulted him on September 27, 1999, and again on November 25, 1999, and that Hardin was injured by staff during both assaults. *Id.*; Hardin Aff. at ¶¶ 2, 3.

III. CONCLUSIONS OF LAW

A. Physical Injury Requirement

Defendants ask the court to dismiss Hardin's claims, because he did not suffer physical injuries sufficient to sustain his case under 42 U.S.C. § 1997e(e) as a result of either the September 27 or November 25, 1999, incidents.

Section 1997e(e), entitled "Limitation on recovery," states as follows: "No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). The PLRA does not define "physical injury." *Harris v. Garner*, 190 F.3d 1279, 1286 (11th Cir. 1999). The Eighth Circuit has not established a standard for analyzing whether an inmate has sustained the necessary physical injury to support a claim for mental or emotional suffering under § 1997e(e).

Applying Eighth Amendment standards to determine whether an inmate has sustained the necessary physical injury to support a claim for mental or emotional suffering, the Fifth Circuit held, "the injury must be more than *de minimis*, but need not be significant." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997) (holding alleged injury was *de minimis*, and inmate had not raised valid excessive-force claim under Eighth Amendment, when guard twisted inmate's ear, causing sore, bruised ear lasting three days)); *see Gomez v. Chandler*, 163 F.3d 921, 924 (5th Cir. 1999) (applying *Siglar*'s standard, but holding inmate's injuries were more than *de minimis* under § 1997e(e), when officers knocked inmate down so his head struck concrete floor, scraped his face against floor, and repeatedly punched inmate in face for five minutes, and third officer kicked inmate in face and head, after which officer hit inmate with fists, and inmate suffered cuts, scrapes, and contusions to face, head and body; distinguishing case from *Siglar*, where application of force to inmate's body "was obviously far briefer and of a character far less intense and less calculated to produce real physical harm"). *Gomez* left open the possibility that a physical injury that is only *de minimis* might satisfy both the Eighth Amendment and § 1997e(e) if the force is "repugnant to the conscience of mankind." *Gomez*, 163 F.3d at 924 n.4 (quoting *Hudson v. McMillian*, 503 U.S. 1 (1992) and *Siglar*, 112 F.3d at 193).

In an unpublished opinion, the Eighth Circuit cited with approval the *Siglar* court's dismissal of an inmate's claims pursuant to § 1997e(e) when the alleged physical injury was merely *de minimis*. See *Smith v. Moody*, 175 F.3d 1025 (table), 1999 WL 197228 (8th Cir. Mar. 26, 1999) (affirming dismissal of inmate's complaint, when inmate failed to allege any physical injury).

As in *Siglar*, the Eighth Circuit has held that the Eighth Amendment's prohibition of cruel and unusual punishment "necessarily excludes from constitutional recognition *de minimis* use of force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Jones v. Shields*, 207 F.3d 491, 495 (8th Cir. 2000) (quoting *Hudson*, 503 U.S. at 9-10). Although serious or permanent injury is not required to establish an Eighth Amendment claim, some actual injury must be shown. *Id.*; *Lambert v. Dumas*, 187 F.3d 931, 936 (8th Cir. 1999) (holding single small cut on eyelid and small scrapes on a knee and upper calf satisfied requirement to show actual injury). In determining whether actual injury has been shown, a court considers the extent of pain inflicted. Compare *Jones*, 207 F.3d at 495 (holding pain inmate had from application of capstun was *de minimis* for Eighth Amendment purposes; noting capstun is water-soluble agent composed of natural ingredients, the effects of which last no longer than 45 minutes in an extreme case) with *Hickey v. Reeder*, 12 F.3d 754, 757 (8th Cir. 1993) (holding stun gun, which left no physical marks, nevertheless caused physical injury, including "a painful and frightening blow" which temporarily rendered the victim helpless, and was sufficient injury to support Eighth Amendment claim). Because the Eighth and Fifth Circuits apply substantially similar standards in evaluating Eighth Amendment claims, and because the Eighth Circuit has cited *Siglar* with approval, the court will apply Eighth Amendment standards to determine whether Hardin has sustained the necessary physical injury under § 1997e(e) to support his claims.

Here, Hardin has pointed to sufficient evidence in the record to generate a genuine issue of material fact concerning whether he sustained more than *de minimis* injury during his September 27, 1999, encounter with prison guards. Hardin alleges he suffered cuts and bruises as a result of the assault. (Hardin Aff. ¶ 3; Defs.' Ex. H at 18-19.) On both September 27 and 28, he told medical staff he had pain in his back, neck, and wrist. See *Hickey*, 12 F.3d at 757. Hardin had a cut on his wrist and on his jaw. (Defs.' Ex. H at 18.) Considering these injuries and the inference of the extent of pain

inflicted during the altercation, the court finds the PLRA's physical-injury requirement does not bar Hardin's claim.

The evidence that Hardin sustained injury during the November 25, 1999, incident includes his affidavit statement that he was cut and bruised (Hardin Aff. at ¶ 3), and Charles' testimony that he saw Rea and other officers beating Hardin and saw the inmate limping shortly after the beating (Charles Dep. at 79-80, 100). The court finds that Hardin has raised a genuine issue of material fact concerning whether he sustained sufficient injury to satisfy the PLRA's physical-injury requirement.

The court respectfully recommends that Hardin's claims regarding the September 27 and November 25, 1999, events not be dismissed on this basis.

B. Exhaustion of Administrative Remedies

Defendants next assert that the court must dismiss Hardin's claims because he has not satisfied the PLRA's requirement to exhaust all available remedies.

The PLRA provides as follows: "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) (Supp. 2000). The statute defines "civil action with respect to prison conditions" as meaning "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2); *Castano v. Nebraska Dep't of Corr.*, 201 F.3d 1023, 1024 n.2 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 266 (2000).

Hardin bears the initial burden of showing that he exhausted available administrative remedies. *Cf. McAlphin v. Morgan*, 216 F.3d 680, 682 (8th Cir. 2000) (per curiam) (to satisfy § 1997e(a)'s requirements, inmate must allege exhaustion of available administrative remedies and should attach administrative decision, if it is available, showing disposition of his complaint).

Hardin argues the exhaustion requirement does not bar his claims because excessive force is not among the prison conditions referred to in 42 U.S.C. § 1997e(a) as requiring exhaustion, and because no available administrative remedies existed.

1. Prison Conditions

Regarding Hardin's first argument, the circuits are divided over whether an excessive-force claim falls outside the purview of the PLRA's exhaustion requirement. *Compare Nussle v. Willette*, 224 F.3d 95, 100 (2d Cir. 2000) (collecting cases; holding excessive-force claims not encompassed under § 1997e(a)), *cert. granted*, 69 USLW 3399 (U.S. June 4, 2001) (No. 00-853), *with Booth v. Churner*, 206 F.3d 289, 293-98 (3d Cir. 2000) (collecting cases; holding excessive-force claims included in "prison conditions" under § 1997e(a)), *aff'd on other grounds*, 532 U. S. ___, 121 S. Ct. 1819 (2001) (analyzing § 1997e(a)'s requirement that inmate exhaust available administrative remedies before suing over prison conditions, when inmate seeks only money damages), *and Johnson v. Garraghty*, 57 F. Supp. 2d 321, 325-27 (E.D. Va. 1999) (same). The Eighth Circuit has not addressed the question.

"Because 'prison conditions' must be given the same meaning throughout the PLRA," the *Johnson* court stated, "it follows that Congress is appropriately assumed to have intended the definition of 'civil action with respect to prison conditions' used in § 3636(g)(2) to apply equally to the phrase 'action . . . with respect to prison conditions' in § 1997e(a)." *Johnson*, 57 F. Supp. 2d at 327. Civil actions by inmates raising excessive-force claims satisfy § 3636(g)(2)'s definition of "civil action[s] with respect to prison conditions," in that such claims encompass the effects of officials' acts on an inmate's life. *Id.* Therefore, the *Johnson* court reasoned, because excessive-force claims fall within § 3636(g)(2)'s use of "prison conditions," the claims also fall within the scope of "prison conditions" under § 1997e(a). *Id.* (citing several cases where courts have similarly reasoned).

Courts also are split over whether § 1997e(a)'s phrase "prison conditions" encompasses retaliation claims, thus requiring exhaustion. *Compare White v. Fauver*, 19 F. Supp. 2d 305, 317-18 (D.N.J. 1998) (holding that under § 1997e(a), term "prison conditions" applied not only to allegedly poor prison conditions, but also to false disciplinary charges and retaliation for filing suit) (citing *Brown*

v. Tooms, 139 F.3d 1102, 1104 (6th Cir. 1998)) with *Lawrence v. Goord*, 238 F.3d 182, 185-86 (2d Cir. 2001) (holding term “prison conditions” did not include particularized instances of retaliatory conduct directed against inmate).

The Eighth Circuit has characterized § 3636(g)(2)’s definition as one that “cuts broadly.” *Castano*, 201 F.3d at 1024 (stating PLRA’s language does not suggest Congress intended deliberately chosen statutory language to have some special, limited meaning). “We believe ‘prison conditions’ must be given the same meaning throughout the PLRA.” *Id.* Keeping in mind the Eighth Circuit’s broad view of “prison conditions” under the PLRA, and the Circuit’s view that the term must be given the same meaning throughout the PLRA, the court finds persuasive the reasoning of those courts that have held that § 1997e(a)’s exhaustion requirement encompasses excessive-force and retaliation claims. See *Booth*, 206 F.3d at 293-98; *Johnson*, 57 F. Supp. 2d at 325-27; *White*, 19 F. Supp. 2d at 317-18. The court finds the exhaustion requirement applies to Hardin’s claims, unless he can establish that an exception to the exhaustion requirement applies.

2. Available Administrative Remedies

Hardin next asserts his claim is not barred by § 1997e(a)’s exhaustion requirement for two reasons. First, he argues that money damages are the only remedy, and money damages were unavailable through the prison’s administrative process. The court notes, however, that in addition to money damages, Hardin requests injunctive relief, (Compl. at 4). Moreover, the Supreme Court recently held that to satisfy § 1997e(a)’s requirement that an inmate exhaust “such administrative remedies as are available” before suing, the inmate seeking only money damages “must complete a prison administrative process that could provide some sort of relief on the complaint stated, but no money.” *Booth v. Churner*, 532 U. S. ___, ___, 121 S. Ct. 1819, 1821 (2001) (holding inmate had to exhaust administrative remedies, regardless of relief offered, when inmate claimed officers violated his Eighth Amendment rights by assaulting him and denying him medical treatment for his injuries). This argument does not establish for Hardin an exception to the exhaustion requirement.

Second, Hardin asserts that prison policy prevents inmates from grieving matters that arise out of the same factual situation that was the subject of a disciplinary matter, thus making administrative remedies unavailable.

A “remedy that prison officials prevent a prisoner from ‘utiliz[ing]’ is not an ‘available’ remedy under § 1997e(a).” *Miller v. Norris*, No. 00-1053, 2001 WL 360644, at *3 (8th Cir. April 12, 2001) (holding inmate’s allegations raised inference that he was prevented from using prison’s administrative remedies) (citing with approval *Johnson*, 57 F. Supp. 2d at 329 (holding dispute as to whether inmate was prevented from exhausting remedies required evidentiary hearing to determine if remedies were available)); *see Booth*, 532 U. S. at ___, 121 S. Ct. at 1822 n.4 (“Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust”; stating parties did not dispute that state grievance system at issue had authority to take some responsive action with respect to type of allegations that inmate raised). An inmate’s subjective beliefs, however, about the administrative remedies available to him are irrelevant for purposes of determining whether the inmate satisfied § 1997e(a)’s exhaustion requirement. *See Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1106 (2001).

The Iowa Department of Corrections’ grievance policy describes nongrievable complaints and exclusions from the grievance program as follows: “Policies which have formal appeal mechanisms. (Disciplinary process, classification decisions, work release decisions, publications review.) Parole Board decisions are also not grievable.” (Defs.’ Ex. O at 2.)

At the summary-judgment hearing, Defendants argued that under prison policy, an inmate can grieve an excessive-force issue that is separate from the disciplinary matter. On March 13, 2000, Hardin wrote a grievance complaint in which he stated, “Now that the grievance policy has been upgraded to prevent loss of grievance[s], I re-grieve issues that have been previously grieved but lost or not responded to all together (as informal resolution).” (Pl.’s Ex. 11 at 1.) The inmate re-grieved the alleged assault by Rea on November 25, 1999. *Id.* at 2. An unsigned response to Hardin’s grievance

states, “Hardin – This is an issue that has been responded to by the grievance officer and is a disciplinary issue.” *Id.* at 1.

Viewing the record, and all reasonable inferences, in the light most favorable to Hardin, the court finds he has generated genuine issues of material fact precluding summary judgment, including whether administrative officers had no authority to act in response to his excessive-force claims arising out of the same factual situations that were the subject of disciplinary hearings, in that prison officials considered such claims to be non-grievable; and whether the grievance system was a remedy available to Hardin for his excessive-force claims.

In their Reply, (Clerk’s No. 48), Defendants argue alternatively that Hardin failed to exhaust his administrative remedies, in that he failed to raise any of the issues he now raises in the disciplinary process. Defendants seem to be arguing that the administrative remedy available to Hardin was to raise the issue of excessive force during the disciplinary process.

The purpose of prison disciplinary hearings is to ascertain if inmates have been guilty of misconduct and, if so, to impose sanctions against them. *See Wolff v. McDonnell*, 418 U.S. 539, 562 (1974). Disciplinary hearings are part of the correctional process, and they “play a major role in furthering the institutional goal of modifying the behavior and value systems of prison inmates.” *Id.* If Defendants are correct, the ALJ would have had to determine not only whether Hardin was guilty of assault, but also, if Hardin had asserted his excessive-force claims, whether officers violated the inmate’s Eighth Amendment right to be free of cruel and unusual punishment. Defendants cite no authority in support of their contention that grievance proceedings provide a forum not only for ascertaining a prisoner’s misconduct and imposing sanctions, but also for analyzing prisoner’s claims of constitutional violations that arise out of that same factual situation as the misconduct charges.

The court need not decide the issue, however, because even if Defendants are correct in their contention, evidence exists indicating Hardin satisfied the exhaustion requirement by raising his excessive-force claims in the disciplinary process. First, regarding the September 27, 1999, claim, the record shows that Hardin gave a statement at his disciplinary hearing. (Defs.’ Ex. H at 33.) The inference most favorable to Hardin is that his statement included his claim that officers used excessive

force against him during the altercation. Second, when Hardin appealed the disciplinary decision regarding the November 25, 1999, events, he alleged that Rea used excessive force. (Defs.' Ex. N at 12.)

Hardin has raised genuine issues of material fact regarding whether he exhausted available administrative remedies. The court finds that § 1997e(a) does not bar Hardin's claims for excessive force. The court respectfully recommends that Hardin's claims not be dismissed on this basis.

C. *Heck*-barred claims

Defendants argue that Hardin's retaliation and excessive-force claims are barred, because a judgment in his favor necessarily implies the invalidity of the loss of good-time credits in the following disciplinary cases: Nos. 99-9-156 (Defs.' Ex. D), regarding the September 22, 1999, verbal-abuse incident; No. 99-9-187, concerning Hardin's threatening statement to Wilkins on September 27, 1999; No. 99-9-189 (Defs.' Ex. H), regarding the September 27, 1999, excessive-force claim; and No. 99-11-137 (Defs.' Ex. N), regarding the November 25, 1999, excessive-force claim). (Defs.' Mem. Support Mot. Summ. J. at 13.) Under *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), if a judgment in a prisoner's favor in a § 1983 action would necessarily imply the invalidity of his conviction, continued imprisonment, or sentence, "no claim for damages lies unless the conviction or sentence is reversed, expunged, or called into question by issuance of a writ of habeas corpus." *Smith v. Shalala*, 46 F.3d 45, 45 (8th Cir. 1995). The rule applies to claims of unconstitutional deprivations of good-time credits. *Id.* The court disregards the form of relief sought, but looks instead to the nature of the claims. *Sheldon v. Hundley*, 83 F.3d 231, 233 (8th Cir. 1996) (holding *Heck* barred inmate's § 1983 claim for money damages, not only his claim for good-time credits, when he asserted that discipline for his negative remark about warden violated his First Amendment rights; if inmate was correct about First Amendment, then result of disciplinary proceeding was wrong and punishment for rule violation was wrong).

As a preliminary matter, the court notes that Hardin's retaliation and excessive-force claims relate to Defendants' actions on September 27 and November 25, 1999, and not to events that occurred on September 22, 1999, which is the subject of case 99-9-156. Therefore, Hardin's claims

do not challenge the fact or length of his conviction in case 99-9-156. Defendants have not shown how a decision in Hardin's favor on his retaliation and excessive-force claims would necessarily mean the result of the disciplinary proceeding was wrong and punishment for the rule violation was wrong in case 99-1-187, which was based on Hardin's statement about Wilkens: "Here he is now, with the snap of two fingers, he will be gone." (Defs.' Ex. E.) The court therefore finds that Hardin's claims do not challenge the fact or length of his conviction in case 99-9-187.

Hardin argues that his claims are not barred because they are excessive-force claims. Hardin relies on *Henson v. Brownlee*, No. 00-3788, 2001 WL 121987, at *1 (8th Cir. Feb. 13, 2001) (per curiam) (table) (holding inmate's excessive-force and deliberate-indifference claims did not challenge fact or length of his confinement) (citing *Huey v. Stine*, 230 F.3d 226, 230 (6th Cir. 2000) ("Generally, Eighth Amendment claims do not run afoul of *Heck* because the question of the degree of force used by a police or corrections officer is analytically distinct from the question whether the plaintiff violated the law.")).

Defendants counter that under the circumstances of this case, the general rule that *Heck* does not bar Eighth Amendment excessive-force claims does not apply. Here, Defendants argue, Hardin claims he was violating no rules at the times of the alleged excessive force, as distinct from those excessive-force cases where the inmate admittedly was breaking a rule but alleges the officers used force that was excessive under the circumstances. The disciplinary committee found that Hardin violated the prison's rule against assault on September 27 and November 25, 1999. Defendants maintain that if the court finds in Hardin's favor on his excessive-force claims, the finding will necessarily invalidate the ALJ's findings that Hardin was guilty of assault.

At the hearing on the present Motion, Hardin's counsel countered that under the "some evidence" standard for disciplinary cases, if the court finds untrue the officers' reports on which the disciplinary decisions at issue were based, that will not invalidate the disciplinary decisions, because a disciplinary decision is valid if it is based on some evidence, and a guard's report constitutes some evidence at the time the decision was made, even if the report is later found to be false.

A disciplinary committee “may find a guard’s report to be credible and therefore take disciplinary action,” even when substantial evidence to the contrary exists. *Hrbek v. Nix*, 12 F.3d 777, 781 (8th Cir. 1993). The guard’s report alone may thus satisfy the “some evidence” standard required to support a disciplinary hearing determination. *Id.* Whether the record contains “some evidence,” however, is irrelevant when “the basis for attacking the judgment is not insufficiency of the evidence.” *Edwards v. Balisok*, 520 U.S. 641, 648 (1997). Here, as discussed below, Hardin’s retaliation and excessive-force claims do pose an attack on the sufficiency of the evidence at the disciplinary hearings.

In *Huey*, the court stated that while *Heck* generally does not bar Eighth Amendment claims, “if the claim is founded *solely* on an allegation that a corrections officer falsified a misconduct report, then *Heck* applies.” *Huey*, 230 F.3d at 231 (emphasis supplied) (holding *Heck* barred Eighth Amendment claim, when inmate did not claim officer’s actions were an excessive response to his attempt to gain control of handcuff key, but claimed that officer’s arm-twisting was cruel and unusual punishment because inmate had done nothing wrong and therefore should not have been punished at all). On the other hand, if the plaintiff’s claim is not that an officer falsely arrested him, but rather that the officer “effectuated a lawful arrest in an unlawful manner,” the plaintiff’s state court conviction for resisting arrest does not prohibit him from pursuing a § 1983 excessive-force claim against the arresting officer. *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1125 (10th Cir. 1999) (quoting *Nelson v. Jashurek*, 109 F.3d 142, 145-46 (3d Cir. 1997)). When it is unclear whether the plaintiff’s claim is founded solely on an allegation that an officer issued a false misconduct report, *Heck* does not apply. *Huey*, 230 F.3d at 231 (contrasting plaintiff’s claim with claim in *Nelson v. Sharp*, No. 96-2149, 1999 WL 520751 (6th Cir. July 14, 1999), “where the basis of the plaintiff’s claim is unclear”). A court may not consider any facts in support of an inmate’s excessive-force claim that would call into question the validity of the disciplinary judgment against the inmate. *Concepcion v. Morton*, 125 F. Supp. 2d 111, 123 (D.N.J. 2000) (holding inmate, in resisting summary judgment motion, failed to produce sufficient evidence that officers used excessive force prior to his restraint, when court would not consider inmate’s denial that he struck officer, because it would imply invalidity of inmate’s aggravated assault conviction).

All charges arising out of a single incident need not be disposed of in the same manner. *See Martinez*, 184 F.3d at 1126 (analyzing case, on motion for summary judgment, in two parts: the first part leading up to officers' attempts to place plaintiff in custody, and second half involving officers' acts while placing plaintiff in custody); *Concepcion*, 125 F. Supp. 2d 111, 123 (D.N.J. 2000) (finding that up to and including point of being restrained, the force used by officers to restrain prisoner did not constitute excessive force, but that prisoner's testimony that officers assaulted him and kicked him in the face after prisoner was restrained, and urgency to restore order had abated, raised genuine issues of material fact concerning whether officer used excessive force).

With these principles in mind, the court will analyze Hardin's claims regarding events on September 27 and November 25, 1999.

1. September 27, 1999

Hardin asserts that officers retaliated against him and used excessive force on September 27, 1999, in the manner they used to restrain him. Viewing the facts and inferences in the light most favorable to Hardin, the court finds that either his claim is not "founded solely on an allegation that a corrections officer falsified a misconduct report," or that the basis of the claim is unclear, and thus is not necessarily barred under *Heck*. *Huey*, 230 F.3d at 231.²

The court will not consider any facts in support of Hardin's excessive-force claim that would call into question the validity of the disciplinary judgment against him. *See Concepcion*, 125 F. Supp.

² The court notes that in his Statement of Disputed and Undisputed Material Facts, Hardin denied paragraph 8 in Defendants' Statement of Facts, which stated Hardin charged Officer Fullenkamp, hitting the officer in the forehead with his handcuffs. Paragraph 8, however, contains six sentences describing various alleged facts, including the following:

[T]he afternoon of September 27, 1999, Hardin was transferred from Cellhouse 219 to Cellhouse 319, a lockup unit. During the move, Hardin asked COs Fullenkamp and Thornton if they would bring Hardin his property from Cellhouse 219 to Cellhouse 319. Hardin wanted his television. Later that evening at around 7:45 p.m. COs Fullenkamp and Thornton in fact did bring Hardin his property from Cellhouse 219. Upon reaching Hardin's cell, CO Fullenkamp cuffed Hardin in front.

Defs.' Statement Undisputed Mat'l Facts at ¶ 8. It is unclear on what basis Hardin denies the facts set forth in paragraph 8. The court views his general denial of the paragraph in the light most favorable to him.

2d at 123. The judgment against Hardin was for assaulting a correctional officer. Although the ALJ stated that “[m]inimum force” was used to control Hardin, the record does not indicate what is entailed in the prison’s standard for “minimum force.” Such force may or may not have constituted excessive force in violation of the Eighth Amendment under the circumstances of this case. *See Nelson*, 109 F.3d at 145 (holding that where jury must have concluded that officer was justified in using “substantial force” to arrest plaintiff, that did not mean officer was justified in using excessive force; “there undoubtedly could be ‘substantial force’ which is objectively reasonable and ‘substantial force’ which is excessive and unreasonable”). The court could find that officers used excessive force in the manner they used to restrain Hardin, without also contradicting the disciplinary committee by finding he did not assault an officer. A finding in Hardin’s favor on this claim would not necessarily invalidate the ALJ’s finding that Hardin violated the prison rule against assault.

The court respectfully recommends that summary judgment be denied on this claim.

2. November 25, 1999

Hardin asserts that officers retaliated and used excessive force on November 25, 1999, in the manner they used to restrain him, and in their actions after restraining him. The court will analyze Hardin’s claim in two parts: The first part covering events that led up to and included the officers’ restraint of Hardin; and the second part covering the period after Hardin was restrained. *See Martinez*, 184 F.3d at 1126.

a. Before Restraint

The inmate maintains that before he was restrained, “The Defendants assaulted Mr. Hardin, rather than Mr. Hardin assaulted the Defendants.” (Pl.’s Statement of Disputed and Undisputed Mat’l Facts at ¶ 17.) Hardin specifically claims he was not guilty of assault, and that Rea’s use of force was cruel and unusual punishment because Hardin had done nothing wrong and therefore should not have been punished at all. *See Huey*, 230 F.3d at 231. A finding in Hardin’s favor on his claim would necessarily invalidate the ALJ’s finding that he was guilty of assault. *Id.*

The court therefore finds that *Heck* bars Hardin's claim that when he was not assaulting anyone, Defendants used excessive force before and while restraining him on November 25, 1999. The court respectfully recommends that summary judgment be granted on this claim.

b. After Restraint

Hardin asserts that after he was restrained, including being shackled, officers retaliated and used excessive force on November 25, 1999. A finding in Hardin's favor on this claim would not necessarily invalidate the ALJ's finding that the inmate was guilty of assault before officers restrained him. *Concepcion*, 125 F. Supp. 2d at 123. *Heck*, therefore, does not bar this claim.

The court respectfully recommends that summary judgment be denied on this claim.

D. Judgment as a Matter of Law on Excessive-Force Claims

Defendants contend that Hardin has failed to establish his excessive-force claims because his injury was *de minimis*, and because officers applied force to Hardin in a good faith effort to maintain or to restore discipline and not for the purpose of causing harm. *See Hudson v. McMillian*, 503 U.S. 1, 7 (1992). Specifically, Defendants assert they acted to control an unruly inmate who had a history of violence, was creating a disturbance, and was assaulting staff, and that they used force appropriately. (Mem. Support Defs.' Mot. Summ. J. at 16-17.) Defendants contend that Hardin's injuries resulted from his struggling, not from Defendants' intentional use of excessive force. *Id.* at 17. Hardin denies Defendants' assertions.

When a court analyzes an Eighth Amendment claim of excessive physical force, "the 'core judicial inquiry' is whether the force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Jones v. Shields*, 207 F.3d 491, 495 (8th Cir. 2000) (quoting *Hudson*, 503 U.S. at 7). Factors a court considers include the need for application of force, the relationship between the need for physical force and the amount of force applied; and the extent of the injury the inmate suffered. *Id.*

Unless "it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain . . . the case should not go to the jury." *Johnson v. Bi-State Justice Ctr.*, 12 F.3d 133, 136 (8th Cir. 1993) (quoting *Whitley v.*

Albers, 465 U.S. 312, 310 (1986)). As discussed above, the court will not consider any facts that would call into question the validity of the disciplinary judgments against Hardin. *See Concepcion*, 125 F. Supp. 2d at 123.

Viewing the facts and inferences in the light most favorable to Hardin, the court finds Hardin has generated fact questions that preclude entry of summary judgment against him. Concerning September 27, 1999, these fact questions include, but are not limited to, the existence of grievances Hardin claims were the motivation for Defendants' use of excessive force, whether Fullenkamp punched Hardin's head during the cellhouse transfer, whether Hardin told Fullenkamp he would file a grievance against the officer, whether Fullenkamp and two other officers took the handcuffed Hardin out of his cell and hit and kicked him after he was down on the ground, whether the officers were angry with Hardin for having assaulted Fullenkamp, whether pressure from officers' knees in Hardin's back caused the inmate to faint, the security threat reasonably perceived by Defendants, the relationship between the need for physical force and the amount of force applied. *See Burgess v. Moore*, 39 F.3d 216, 218 (8th Cir. 1994) (holding genuine issue of material fact existed as to whether officers applied force maliciously and sadistically for purpose of causing harm on inmate, whose feet and hands were bound and who became violent and vandalized interior of squad car); *Johnson*, 12 F.3d at 136-37 (reversing dismissal of excessive-force claim where alleged facts could support reliable inference of unnecessary and wanton infliction of pain against inmate who created disturbance and then acted to prevent closing of security door).

Concerning the November 25, 1999, incident, these questions include, but are not limited to, whether an officer told Hardin, "We'll deal with you," after reading the inmate's grievance; whether Rea assaulted Hardin after he was handcuffed and shackled; the security threat reasonably perceived by Defendants; and the relationship between the need for physical force and the amount of force applied. *See id.*

As previously discussed, the court finds that Hardin's injuries were more than *de minimis*. Based on the evidence discussed above, the court finds Hardin's injuries are sufficient to support his excessive-force claims based on Defendants' actions on September 27 and after Hardin was restrained

on November 25, 1999. The court respectfully recommends that judgment as a matter of law be denied on this claim.

E. Judgment as a Matter of Law on Retaliation Claims

Defendants next argue that the undisputed facts show that the force Defendants used on Hardin on September 27 and November 25, 1999, was related to penological objectives. They contend that the grievances he posited as the reason for the retaliation did not exist, and that he thus cannot establish that “but for” his grievances, staff would not have used force on him on September 27 and November 25, 1999. Hardin disputes these allegations.

When an inmate brings a retaliatory discipline claim, the inmate has a heavy burden of proving that, but for the unconstitutional, retaliatory motive, discipline would not have been imposed. *See Rouse v. Benson*, 193 F.3d 936, 940 (8th Cir. 1999); *Goff v. Burton*, 7 F.3d 734, 736-38 (8th Cir. 1993). Finding that an impermissible retaliatory motive was a factor in the disciplinary decision is insufficient to establish a claim in a prisoner discipline case. *Goff*, 7 F.3d at 738. On a claim for excessive force and retaliation, when the “summary judgment record confirms that no more than minimal force was applied in response to misconduct for which [the inmate] was convicted of a disciplinary infraction,” those facts preclude recovery for excessive force or retaliation. *Graves v. Davis*, 205 F.3d 1345 (table), 2000 WL 127508, at *1 (8th Cir. Feb. 4, 2000) (citing *Hudson*, 503 U.S. at 9, and *Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994)).

As previously discussed, Hardin has raised genuine issues of material fact that preclude summary judgment against him on his excessive-force claims regarding Defendants’ actions on September 27, and after Hardin was restrained on November 25, 1999. Defendants therefore cannot show they are entitled to summary judgment on these claims by establishing, based on the summary judgment record, that “no more than minimal force was applied in response to misconduct for which [the inmate] was convicted of a disciplinary infraction.” *Graves*, 205 F.3d 1345 (table), 2000 WL 127508, at *1.

Hardin has pointed to sufficient evidence to support a reasonable inference of retaliation. This evidence, including disputed factual issues, includes the following: (1) the inmate's October 24, 1999, memorandum seeking an appeal form for his grievance concerning "the threats on my life and disrespect I [received] from ISP staff employee Wilkins," and DeGrange's reply that he had sent Hardin's grievance appeal to the warden for his review, (Pl.'s Ex. 4); (2) Hardin's September 27, 1999, statement to Fullenkamp that he was going to file a grievance against him; (3) Hardin's three October 1999 grievances, in which he complains about the prison staff's actions and the conditions of confinement in cellhouse 220, (Pl.'s Ex. 2, 3, and 5); and (4) Charles' testimony that on November 25, 1999, an officer on duty with Rea told Hardin, "We'll deal with you," after reading the inmate's grievance.

Viewing the facts in the light most favorable to Hardin, the court finds Hardin has generated fact questions that preclude entry of summary judgment against him on his retaliation claims relating to September 27, and to the period after he was restrained November 25, 1999. The court respectfully recommends that judgment as a matter of law be denied on these claims.

F. Qualified Immunity

Qualified immunity protects government officials from suit when their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Sexton v. Martin*, 210 F.3d 905, 909 (8th Cir. 2000) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In deciding whether an official is entitled to qualified immunity on a claim, including an excessive-force claim, a court must use the following two-part inquiry. *Saucier v. Katz*, No. 99-1977, slip op. at 5 (U.S. June 18, 2001). First, a court must consider the following threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.*; see *Tlamka v. Serrell*, 244 F.3d 628, 632 (8th Cir. 2001) ("whether the plaintiff has alleged the deprivation of an actual constitutional right at all") (quoting *Wilson v. Layne*, 526 U.S. 603, 609 (1999)). If no constitutional right would have been violated were the facts alleged established, the court need make no further inquiries, and the defendant

would be entitled to qualified immunity. *Saucier*, No. 99-1977, slip op. at 6; *see Tlamka*, 244 F.3d at 632.

If, on the other hand, “a violation could be made out on a favorable view of the parties’ submissions, the next, sequential step is to ask whether the right was clearly established.” *Saucier*, No. 99-1977, slip op. at 6. Under this step, a court must undertake its inquiry in light of the specific context of the case, not as a broad general proposition. *Id.*

On an excessive-force claim, an officer might correctly perceive all relevant facts but have a mistaken understanding as to whether a given amount of force is legal in those circumstances. *Id.* at 10. If, however, that mistake is reasonable under the standard of “reasonableness at the moment” the force was used, the officer is entitled to qualified immunity. *Id.* at 10-11. “The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.” *Id.* at 12; *see Lambert v. City of Dumas*, 187 F.3d 931, (8th Cir. 1999) (“there must be no genuine issues of material fact as to whether a reasonable official would have known that the alleged action violated that right”).

At the summary judgment stage, a court determining qualified immunity must consider true those facts asserted by plaintiff and properly supported in the record. *Tlamka*, 244 F.3d at 632 (citing *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996)). A court cannot grant summary judgment on the qualified immunity issue, if a genuine dispute exists concerning predicate facts material to qualified immunity. *Id.* An official asserting qualified immunity has the burden of proving the defense. *Sanchez v. Taggart*, 144 F.3d 1154, 1157 (8th Cir. 1998). When a defendant asserts qualified immunity, the plaintiff has the burden to show that a question of fact precludes summary judgment. *Yellow Horse v. Pennington County*, 225 F.3d 923, 927 (8th Cir. 2000). Once predicate facts are established, the reasonableness of the official's conduct under the circumstances is a question of law. *Tlamka*, 244 F.3d at 632.

The court first determines whether Hardin has alleged the deprivation of an actual constitutional right.

Hardin's complaint alleges excessive force and retaliation for the inmate's grievances. The Eighth Amendment protects incarcerated prisoners from cruel and unusual punishment by prison officials using excessive physical force. *Jones*, 207 F.3d at 494-95; *Johnson*, 12 F.3d at 136. This protection extends to an inmate who creates a security threat, and the Eighth Amendment prohibits officers from using unreasonable force and wantonly inflicting pain on the inmate. *See Burgess*, 39 F.3d at 218; *Johnson*, 12 F.3d at 136-37. The First Amendment right of access to the courts includes the right to file grievances under existing prison grievance procedures. *Dixon v. Brown*, 38 F.3d 379, 379 (8th Cir. 1994). Prison officials may not retaliate against an inmate for filing a prison grievance. *Id.*; *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990); *Sisneros v. Nix*, 884 F. Supp. 1313, 1333 (S.D. Iowa 1995), *rev'd on other grounds*, 95 F.3d 749 (8th Cir. 1996). As the court found above, Hardin has established genuine issues of material fact precluding summary judgment on his excessive-force and retaliation claims. The court finds that, taken in the light most favorable to Hardin, the facts alleged show Defendants' conduct violated his constitutional rights.

The court next addresses whether the claims implicate clearly established law. At the time of the actions at issue, this Circuit's rule prohibiting an officer from using excessive force and retaliation against an inmate as Defendants did was well established. *See Burgess*, 39 F.3d at 218; *Dixon*, 38 F.3d at 379; *Munz v. Michael*, 28 F.3d 795, 800 (8th Cir. 1994) (holding law was clearly established than an officer is not entitled to beat a bound prisoner in a jail cell); *Johnson*, 12 F.3d at 136-37; *Orebaugh*, 910 F.2d at 528; *Sisneros*, 884 F. Supp. at 1333. Viewing the facts and inferences in the light most favorable to Hardin, the court finds that any reasonable officer would have known that Defendants' actions on September 27, 1999, and in continuing to strike Hardin after he was restrained on November 25, 1999, would have violated Hardin's constitutional rights. The court respectfully recommends that summary judgment be denied on the claim for qualified immunity.

IV. RECOMMENDATION AND ORDER

For the reasons stated above,

IT IS RESPECTFULLY RECOMMENDED, under 28 U.S.C. § 636(b)(1)(B), that Defendants' Motion for Summary Judgment (Clerk's No. 36), should be **denied** with respect to Hardin's retaliation and excessive-force claims based on events on September 27, 2001.

The court grants Hardin's renewed motion to amend under Fed. R. Civ. P. 15(b), adding Gary Rea as a defendant.

IT IS RESPECTFULLY RECOMMENDED, concerning Hardin's retaliation and excessive-force claims against Rea based on events on November 25, 2001, that Defendants' Motion for Summary Judgment (Clerk's No. 36), should be **granted** with respect to Rea's actions before and during Hardin's restraint, because the claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), but that the Motion should be **denied** with respect to Rea's actions after Hardin's restraint.

Hardin's claims for conditions of confinement based on cell conditions remain.

IT IS ORDERED that the parties have until July 20, 2001, to file written objections to this Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. *Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir.1990); *Wade for Robinson v. Callahan*, 976 F. Supp. 1269, 1276 (E.D. Mo.1997). The court will freely grant such extensions. Any objections filed must identify the specific portions of the Report and Recommendation and relevant portions of the record to which the objections are made and must set forth the basis for such objections. *See* Fed.R.Civ.P. 72; *Thompson*, 897 F.2d at 357. Failure to timely file objections may constitute a waiver of a party's right to appeal questions of fact. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir.1994); *Halpin v. Shalala*, 999 F.2d 342, 345 & n.1, 346 (8th Cir.1993); *Thompson*, 897 F.2d at 357.

The Evidentiary Hearing will be set after the District Court rules on this Report and Recommendation and any objections.

IT IS SO ORDERED.

Dated this ____ day of June, 2001.

CELESTE F. BREMER
UNITED STATES MAGISTRATE JUDGE