**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF RHODE ISLAND**

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| JASON COOK,<br>Plaintiff,<br><br>v.<br><br>ASHBEL T. WALL, individually and in his official capacity as director of the Rhode Island Department of Corrections; et al.<br>Defendants. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | C.A. No. 09- 169-S |

**PLAINTIFF'S OBJECTION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Now comes Plaintiff in the above-captioned matter and hereby respectfully requests that this Honorable Court deny Defendants' motion to dismiss and Defendants' motion for summary judgment. As grounds, Plaintiff incorporates the attached Memorandum of Law.

WHEREFORE, Plaintiff respectfully requests that the Court deny Defendants' two motions in their entirety.

Plaintiff,
By his Attorney,

/s/ Amato A. DeLuca
Amato A. DeLuca (#0531)
Matthew T. Jerzyk (#7945)
**RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION**
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DATED: June 29, 2009

**CERTIFICATION**

To:

Michael B. Grant, Esq.
R.I. Department of Corrections
40 Howard Avenue
Cranston, RI 02920

Rebecca Tedford Partington, Esq.
Assistant Attorney General
150 South Main Street
Providence, RI 02903

I hereby certify that on June 29, 2009, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Amato A. DeLuca

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| ASHBEL T. WALL, individually and in his official capacity as director of the Rhode Island Department of Corrections; et al.<br>Defendants. | : | |

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS OBJECTION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

## INTRODUCTION

There is no merit in the defendants' motion to dismiss, or, in the alternative, for summary judgment.[1] Their flaw is the misconception that the plaintiff is unable to access the federal courts with claims of constitutional deprivation after Sandin v. Conner, 515 U.S. 472 (1995): specifically, claims alleging retaliation and a denial of due process. Not so. Properly viewed in a light most favorable to Mr. Cook (here, the non-moving party) and with all reasonable inferences drawn in his favor, the record contains abundant factual allegations that the defendants are liable for the misconduct alleged. In addition, as plaintiff demonstrates below, the record shows that Mr. Cook abided by Rhode Island Department of Corrections ("RIDOC") policies and vigilantly submitted grievances and appeals, first to the Warden and, second to the Director for each act of retaliation by the defendants. Therefore, since Mr. Cook was compliant with prison grievance procedures, his grievances are considered

[1] Defendants' motion was brought on behalf of all of the defendants, excepting Correctional Officer Lawson, who has not yet been served.

properly exhausted and defendants' motion for summary judgment ought to be denied. As such, the Court ought to deny defendants' two motions in their entirety.

Contrary to defendants many assertions that inmates lack many constitutional protections, the First Circuit has been very clear that while the Court recognizes "that prison officials are to be accorded substantial deference in the way they run their prisons, this does not mean that we will rubber stamp or mechanically accept the judgments of prison administrators." Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 40 (1st Cir. 2007) quoting Lovelace v. Lee, 472 F.3d 174, 190 (4th Cir. 2006). Indeed, the Supreme Court has stated that federal courts must take cognizance of the valid constitutional claims of prison inmates. Turner v. Safley, 482 U.S. 78, 84 (1987). While inmates' constitutional rights must be evaluated within the context of a state's legitimate penological objectives,[2] "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." Id.

A prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime and the constitutional protections retained by prisoners include those afforded by the Due Process Clause against arbitrary deprivations of liberty. Wolff v. McDonnell, 418 U.S. 539, 555 (1974). In addition, courts have been clear that actions, which standing alone do not violate the constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right. Thaddeus-X v. Blatter, 175 F.3d 378, 386 (6th Cir. 1999) (en banc). Conduct on the part of prison officials that is 'not otherwise constitutionally deficient is actionable under § 1983 if done in retaliation for the exercise of constitutionally protected

[2] Legitimate penological objectives include crime deterrence, prisoner rehabilitation, and internal prison security. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 823 (1974)

first amendment freedoms.' L'Heureux v. Whitman, 1997 U.S. App. LEXIS 27942 (1st Cir. Oct. 9, 1997); Oropallo v. Parrish, No. 93-1953, 1994 U.S. App. LEXIS 9748, 1994 WL 168519, at 3 (D.N.H. May 5, 1994), *aff'd*, 23 F.3d 394 (1st Cir. 1994) (citing Ferranti v. Moran, 618 F.2d 888, 892 n.4 (1st Cir. 1980) ("actions otherwise supportable lose their legitimacy if designed to punish or deter an exercise of constitutional freedoms.") (citation omitted)). Therefore, while defendants' claim that plaintiff is unable to press his claims for the loss of his job, his wages, his good time and his liberty, defendants fail to address the fundamental point that these deprivations are certainly actionable within the context of a First Amendment retaliation claim.

For the foregoing reasons and for those detailed below, the Court ought to allow plaintiff's claims to move forward into discovery and deny defendants' motion to dismiss and motion for summary judgment.

**FACTS**

On April 6, 2009, plaintiff filed an action for declaratory and mandatory injunctive relief and for compensatory and punitive damages to redress deprivation, under color of law, of rights, privileges and immunities secured to the plaintiff by the First, Fifth, Eighth and Fourteenth Amendments of the United States Constitution and by Article I, Sections 2 and 21 of the Rhode Island Constitution. At the essence of the complaint, the plaintiff claims that defendants engaged in a series of unconstitutional acts in retaliation for plaintiff's published statement in the *Providence Journal* criticizing a newly implemented Department of Corrections policy and for plaintiff's bulletin board posting informing other inmates about the procedure for filing grievances. Further, on April 28, 2009, plaintiff filed a motion for a temporary restraining order with an attached affidavit accusing prison officials of continuing

their retaliatory behavior by intimidating and threatening the plaintiff for filing this instant lawsuit. The relevant facts from plaintiff's verified complaint and subsequent affidavit are as follows.

Mr. Cook made public statements that appeared on the front pages of the only statewide newspaper, the *Providence Journal*, on October 22, 2007, that were critical of a newly minted Department of Corrections policy that restricted books and other publications available to inmates: DOC Policy 24.01-5. Complaint ¶ 17. The article in the newspaper describes Mr. Cook's "crusade" against a policy he and others called unconstitutional and quotes Mr. Cook's letter to RIDOC director Ashbel T. Wall stating, "Come on, these are books. If anything, you should be helping us to find new ways to get them and encouraging the inmate population to start reading more." Complaint, Exhibit 1. As a result of Mr. Cook's activism, the RIDOC issued a memorandum six months later rescinding their restrictive policy on inmate access to literature. Complaint ¶ 30, Exhibit 11.

Shortly after his comments appeared in the newspaper, the plaintiff was fired from his job by defendant Izzo under the pretext that Cook was caught on a video camera stealing property. Complaint ¶ 18. In fact, Izzo told the plaintiff that he was caught stealing and that "the cameras don't lie." Complaint, Exhibit 2. The next day, defendant Meunier conducted a disciplinary hearing and found Cook guilty, without viewing the videotape, but told Cook that he would review the videotape and amend his finding appropriately.[3] Complaint ¶ 19, Exhibit 2. The disciplinary report lists Cook's sanctions as "reprimand," not loss of employment. Complaint ¶ 19, Exhibit 2. On November 7, 2007, Lt. Meunier tells Cook

[3] Plaintiff has requested the transcript of this hearing and all hearings with Mr. Cook in a request for production of documents to defendant Rhode Island Department of Corrections.

that after reviewing the tape, "there was no evidence that [he] had done anything wrong." Complaint, Exhibit 2. In a written appeal to defendant Auger, Cook asserted that, "I am really questioning weather [sic] my firing was due to my recent notariety [sic] due to a recent artical [sic] about me in the Providence Journal. Complaint, Exhibit 2. Cook further stated that "I am still without a job[;] I have lost my good time for working, my pay for working, my job, and I have a booking for a false allegation on my disciplinary record that has been untarnished for the entire 22 months that I have been incarcerated on this sentence." Complaint, Exhibit 2.

After waiting two months for a response to his appeals on his job and his good time, and, in the process being denied re-employment, Mr. Cook sent a second appeal to defendant Auger on January 15, 2008. Complaint, Exhibit 3. Ten days later, on January 25, 2008, defendant Boyd, the warden of Mr. Cook's facility, sent the plaintiff a signed memorandum stating that Mr. Cook was "found not guilty" and "no appeal is warranted" and that he should contact defendant Meunier for addressing his employment needs. Complaint, Exhibit 3. On February 7, 2008, Mr. Cook writes an appeal to defendant Wall requesting $270 in lost pay, 6-8 days of good time and access to re-employment. Complaint, Exhibit 3. Defendant Wall responds to plaintiff's appeal on February 11, 2008 and, contrary to defendant Boyd's signed memorandum, states that the plaintiff was "found guilty" and that he did not follow policy 11.01-4 ADOC, Code of Inmate Discipline. This response to plaintiff's appeal is inexplicable, since Cook clearly followed policy 11.01-4 when he 'submitted a written request for review of Hearing Officers' decision' to defendant Auger. Complaint, Exhibit 2.

Shortly after the Rhode Island affiliate of the American Civil Liberties Union intervened on Cook's behalf in the dispute over inmate mail, Complaint ¶ 22, Exhibit 5, defendants Lawson and Nakhlis conducted a module wide shakedown and violently directed and/or conducted a search of plaintiff's cell and destroyed his personal property, including stepping on and destroying plaintiff's food items. Complaint ¶ 23, Exhibit 6. After plaintiff asked defendant Lawson why they apparently weren't searching for anything and were instead intent on destroying his property, defendant Lawson replied that, "[he] would figure it out." Complaint, Exhibit 6. In his grievance filed the next day, plaintiff asserted that defendant Lawson's comments referred to Cook's association with the ACLU and the ACLU's decision to file a lawsuit on his behalf. Complaint, Exhibit 6.

After complaining to the Office of Inspections about the violent search, on March 3, 2008, Mr. Cook posts a notice on a module-wide inmate bulletin board informing other inmates that any complaints they might have regarding the violent search should be directed to the Investigator, in conformance with the Chief Investigator's stated desire. Complaint ¶s 24-26. Defendant Lawson removes Cook's bulletin board posting and disciplines Cook for "engaging in or encouraging a group demonstration and/or activities" whereupon Cook is strip searched and taken to segregation. Complaint ¶ 27, Exhibit 7. Subsequently, a disciplinary board hearing with defendant Jankowski was repeatedly postponed on or about March 7, 2008, March 11, 2008 and March 14, 2008 and plaintiff wrote appeals to defendants Boyd and Jankowski protesting the booking, his presence in segregation and the procedural missteps by the defendants. Complaint ¶ 28, Exhibits 8, 9. On March 18, Mr. Cook finally had a hearing, where he was unable to present and/or question witnesses and defendant Jankowski failed to present any material evidence against Cook. Complaint ¶ 28,

Exhibits 8, 9. After, Mr. Cook is found guilty and sanctioned with 30 days in segregation, the loss of 30 days of goodtime and the recommendation to be downgraded to the more restrictive maximum security facility, defendant Jankowski turned off the tape recorder and said that 'this is what happens when you get the ACLU involved in our business.' Complaint ¶ 28, Exhibits 8, 9. Plaintiff appropriately appealed defendant Jankowski's findings to defendant Boyd, who denied Cook's appeal. Complaint ¶ 29, Exhibit 10. On April 7, 2008, the RI ACLU wrote to defendant Boyd and requested that all copies and/or recording of Cook's disciplinary hearings be retained. Complaint ¶ 30, Exhibit 11.

At the direction of defendant Wall, Cook was once again strip searched and thrown into segregation on May 30, 2008, under the pretext that a letter he wrote to the Parole Board was threatening and, although a June 5, 2008 report from defendant Freeman promised that a Classification Board would convene to address Cook's status in segregation, no Board is convened and Cook remained in segregation for 18 days with another inmate who was serving time in punitive segregation. Complaint ¶ 31, Exhibit 12. Throughout his segregation, plaintiff's appeals and grievances to defendants Boyd and Wall went unanswered and/or were denied. Complaint, Exhibit 13.

On September 8, 2008, Mr. Cook was yet again subjected to a strip search, his cell was searched by defendants Freeman and Lawson and his property was destroyed. Complaint ¶ 34. Both defendants examined plaintiff's legal materials and continued their intimidation of plaintiff by asking whether he had spoken further with any *Providence Journal* reporters. Complaint ¶ 34. Shortly thereafter, plaintiff was strip searched again and thrown into segregation for 4 additional days, where his appeals and grievances went unanswered and/or were denied. Complaint ¶ 34, Exhibit 15. Defendants eventually responded to

plaintiff's grievance in an untimely fashion, denying his grievance on April 24, 2009. See Exhibit 16.

After the instant lawsuit was filed, on Sunday, April 26th, an agent of the defendants approached the plaintiff, intimidated him and attempted to solicit potentially privileged information regarding plaintiff's lawsuit. Plaintiff's Affidavit, Motion for a Temporary Restraining Order, May 1, 2009.

**STANDARD OF REVIEW**

Defendants admit that their bar is quite high when moving for a motion to dismiss pursuant to Rule 12(b)(6). A court ought to deny a motion to dismiss if a complaint contains sufficient factual matter that "states a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (U.S. 2009) citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id. In so doing, the Court must construe the complaint in the light most favorable to the plaintiff, taking all well-pleaded factual allegations as true and giving the plaintiff the benefit of all reasonable inferences.[4] Buck v. Am. Airlines, Inc., 476 F.3d 29, 32-33 (1st Cir. 2007). In addition, when a "complaint's factual allegations are expressly linked to -- and admittedly dependent upon -- a document (the authenticity of which is not challenged), that document effectively merges into the pleadings."[5] Roy v. GE, 544 F. Supp. 2d 103, 107 (D.R.I. 2008)(citations omitted); *See* Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 16 (1st Cir. 1998)(The First Circuit Court of Appeals has suggested a "practical,

[4] Contrary to defendants' argument that the Court should view inmate claims of retaliation with "skepticism," matters of credibility are not to be decided at this stage in the litigation.

[5] Plaintiff's complaint contained 15 exhibits – the authenticity of which was not challenged by the defendants.

commonsense approach" is best for determining what materials may be properly considered on a motion to dismiss.).

Further, in order to withstand a motion to dismiss pursuant to Rule 12(b)(6), the plaintiff need only allege "a chronology of events from which retaliation may plausibly be inferred." Price v. Wall, 2006 U.S. Dist. LEXIS 19570 (D.R.I., Mar. 14, 2006), *aff'd*, Price v. Wall, 2006 U.S. Dist. LEXIS 19570 (D.R.I., Mar. 28, 2006). Since plaintiff's verified complaint and affidavit contain abundant factual content that support his allegations, the Court ought to deny defendants' motion.

## ARGUMENT

### I. Properly viewed, Mr. Cook's complaint contains sufficient factual matter that is plausible on its face that plaintiff suffered retaliatory acts as a result of engaging in constitutionally protected activity; as such, defendants are not entitled to a dismissal.

Mr. Cook brings this action pursuant to 42 U.S.C. § 1983 which provides, in pertinent part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…" 42 U.S.C. § 1983 (2007). The initial inquiry in a Section 1983 action is (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether the conduct deprived the plaintiff of a constitutional right or a federal statutory right. Gomez v. Toledo, 446 U.S. 635, 640 (1980) as quoted in Price v. Wall, 2006 U.S. Dist. LEXIS 19570 (D.R.I., Mar. 14, 2006), *aff'd*, Price v. Wall, 2006 U.S.

Dist. LEXIS 19570 (D.R.I., Mar. 28, 2006); *See also* DeWitt v. Wall, 2004 U.S. Dist. LEXIS 1759 (D.R.I. Jan. 22, 2004), *aff'd*, DeWitt v. Wall, 121 Fed. Appx. 398, 2004 U.S. App. LEXIS 27190 (1st Cir. 2004); Ducally v. R.I. Dep't of Corr., 160 F. Supp. 2d 220, 226 (D.R.I. 2001). In this case, defendants do not contest that they were acting under color of state law when engaged in actions against the plaintiff.

At the heart of Mr. Cook's complaint is the assertion that he was unconstitutionally deprived of his First Amendment rights[6] when defendants engaged in retaliatory conduct as a result of his public criticism in the *Providence Journal*, his public posting of a grievance procedure on a module bulletin board and the filing of this instant lawsuit. For Mr. Cook's claim of retaliation to survive a motion to dismiss, courts have stated that a plaintiff need only allege a "chronology of events which may be read as providing some support for an inference of retaliation." McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979) as quoted in Price v. Wall, 428 F. Supp. 2d 52, 56 (D.R.I. 2006). Further, Plaintiff must allege (1) he engaged in constitutionally protected conduct, (2) he suffered an adverse action, and (3) there was a causal connection between the constitutionally protected conduct and the adverse action, so that it can be said that the constitutionally protected conduct was a motivating factor for the adverse action. Davis v. Goord, 2003 U.S. App. LEXIS 13030 (2d Cir. Feb. 10, 2003); Cossette v. Poulin, 573 F. Supp. 2d 456, 459-60 (D.N.H. 2008); Roy v. Wrenn, 2008 U.S. Dist. LEXIS 19944, 28-36 (D.N.H. Feb. 29, 2008), *aff'd*, 2008 U.S. Dist. LEXIS 28220 (D.N.H. Apr. 4, 2008).

[6] U.S. Const. amend. I states that "Congress shall make no law… abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The facts of this case clearly show that Mr. Cook's untarnished disciplinary record was suddenly altered upon the exercise of his First Amendment rights when he was subjected to eighteen months of harassment, intimidation, the loss of physical activity, destruction of his personal property, a labyrinth of appeals and grievances that yielded no results, the loss of his job, the loss of time that reduced his sentence, the threat of transfer to maximum security and over 52 days in segregation where the plaintiff was stuffed into a small cell for twenty-three hours a day. Further, plaintiff has alleged that these adverse actions were directly caused by his First Amendment activities and there is abundant circumstantial evidence in the record to support plaintiff's claims, including direct evidence in the form of a statement by Lt. Jankowski that 'this is what happens when you get the ACLU involved in our business.' Thus, since plaintiff has sufficiently alleged a "chronology of events which may be read as providing some support for an inference of retaliation," defendants' motion ought to be dismissed.

**A. Mr. Cook was engaged in constitutionally protected conduct when he (1) publicly criticized the RIDOC in the Providence Journal, (2) publicly posted grievance procedures on a module-wide bulletin board and (3) filed this federal civil rights lawsuit.**

In this case, plaintiff's constitutionally protected conduct is three-fold. First, plaintiff made public statements that appeared on the front pages of the only statewide newspaper, the *Providence Journal*, on October 22, 2007, that were critical of a newly minted Department of Corrections policy that restricted books and other publications available to inmates: DOC Policy 24.01-5. The article in the newspaper describes Mr. Cook's "crusade" against a policy he and others called unconstitutional and quotes Mr. Cook's letter to RIDOC director Ashbel T. Wall stating, "Come on, these are books. If anything, you should be helping us to find new ways to get them and encouraging the inmate population to start reading more." As

a result of Mr. Cook's activism, the RIDOC issued a memorandum six months later rescinding their restrictive policy on inmate access to literature. Second, in the intervening time, plaintiff posts a notice on a module-wide bulletin board on March 3, 2008, informing other inmates that any complaints they might have regarding a recent violent search should be directed to the Investigator, as he was recently instructed by the Chief Inspector. Third, plaintiff filed this verified complaint on April 6, 2009.

Each of these three activities is constitutionally protected activity. The First Amendment protects an individual's right to speak freely. *See* U.S. Const. amend. I. While there are unique instances when the First Amendment rights of prisoners can be abridged to the extent that the exercise of those rights is inconsistent with the legitimate penological objectives of the corrections system[7]," Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977), inmates "clearly retain protections afforded by the First Amendment." O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (citation omitted). Since Mr. Cook's comments in the Providence Journal, his public bulletin board posting about accessing the RIDOC grievance procedure and the filling of his lawsuit are not inconsistent with legitimate penological objectives such as crime deterrence, prisoner rehabilitation, and internal prison security, plaintiff clearly retains protections afforded by the First Amendment. Pell v. Procunier, 417 U.S. 817, 823 (1974)

The defendants' reliance on Cossette v. Poulin, 573 F.Supp. 2d 456 (D.N.H. 2008), for the proposition that prisoners have diminished First Amendment rights is misplaced since the Court in that case was considering a retaliation claim by a prison employee for

[7] This case is remarkably different from the line of cases which disallow First Amendment claims of inmates which are found to be threatening in nature. *See, e.g.*, Almeida v. Wall, 2008 U.S. Dist. LEXIS 103728 (D.R.I. Dec. 4, 2008).

speech that was personal in nature and not on a matter of public concern. Id. at 460. Clearly, plaintiff's three exercises of his First Amendment rights in this case – public comments criticizing a public policy in the state's largest newspaper, a module wide and public bulletin board posting on the procedures for filing a grievance and the filing of a federal civil rights lawsuit – are matters of public concern. In addition, there are many courts that recognize the First Amendment rights of prisoners without a "public concern" test. *See* Bridges v. Gilbert, 557 F.3d 541, 551 (7th Cir. 2009); Friedl v. City of New York, 210 F.3d 79, 87 (2d Cir. 2000); Cornell v. Woods, 69 F.3d 1383, 1388 (8th Cir. 1995); Jackson v. Cain, 864 F.2d 1235, 1248 (5th Cir. 1989).

Further, the First Amendment right to petition the government for a redress of grievances – such as when Mr. Cook filed this instant lawsuit – has been characterized as "among the most precious of the liberties safeguarded by the Bill of Rights." United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967). Retaliation for the exercise of this right, or any constitutionally protected right, is itself a violation of the constitution actionable under 42 U.S.C. § 1983. White v. Napoleon, 897 F.2d 103, 111-112 (3rd Cir. 1990). In the prison context, this means that inmates must be "permit[ted] free and uninhibited access… to both administrative and judicial forums for the purpose of seeking redress of grievances against state officers." Sostre v. McGinnis, 442 F.2d 178, 200 (2d Cir. 1971) (en banc).

In this case, the plaintiff exercised his First Amendment right to petition the government for a redress of grievances by filing this lawsuit. Accordingly, plaintiff alleges a First Amendment right sufficient to meet the first requirement for stating a retaliation claim.

**B. Mr. Cook suffered retaliation through various acts of the Defendants as a result of Mr. Cook's exercise of his First Amendment Rights**

Plaintiff alleges factual allegations that the Defendants subjected him to "conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." Roy v. Wrenn, 2008 U.S. Dist. LEXIS 19944, 28-36 (D.N.H. Feb. 29, 2008), *aff'd*, 2008 U.S. Dist. LEXIS 28220 (D.N.H. Apr. 4, 2008) (unpublished) citing Dawes v. Walker, 239 F.3d 489, 492 (2d Cir. 2001), *overruled in part on other grounds by* Phelps v. Kapnolas, 308 F.3d 180, 187 n.6 (2d Cir. 2002); *See* Starr v. Dube, 2009 U.S. App. LEXIS 13552 (1st Cir. June 24, 2009) (per curiam and unpublished)("a reasonable fact-finder could conclude that inmates of 'ordinary firmness' would be deterred from continuing to exercise their constitutional rights merely because of the filing of a disciplinary charge carrying potentially severe sanctions.") A retaliatory act is not *de minimis* if it "would chill or silence a person of ordinary firmness from future First Amendment activities." Starr at 13552. Further, courts have asserted that the filing of disciplinary charges such as those filed against the plaintiff is not *de minimis* because it exposes him to punitive penalties, including segregation and loss of good time. *See* Brown v. Crowley, 312 F.3d 782, 789 (6th Cir. 2002) (majority decision), cert. denied, 540 U.S. 823 (2003) (a reasonable jury could find that filing a retaliatory charge exposing an inmate to a "risk of significant sanctions" could deter persons of "ordinary firmness" from exercising their rights); Zarska v. Higgins, 171 Fed. Appx. 255, 259-60 (10th Cir. 2006) (unpublished decision) (filing retaliatory disciplinary proceedings "would chill a person of ordinary firmness" from future exercise of his or her rights) (citation omitted). Importantly, actions, which standing alone do not violate the constitution, may nonetheless be constitutional torts if motivated in substantial part by a

desire to punish an individual for exercise of a constitutional right. Thaddeus-X v. Blatter, 175 F.3d 378, 386 (6th Cir. 1999) (en banc).

The retaliatory conduct alleged by Mr. Cook would certainly chill "a person of ordinary firmness" from exercising his or her First Amendment rights in the future. Prior to the exercise of his First Amendment rights, Mr. Cook was an inmate with an untarnished disciplinary record for nearly two years. He had a job and was well on his way to combating the substance abuse problem that landed him in prison by obtaining placement in a residential treatment program.

However, Mr. Cook's life changed dramatically when he dared to challenge defendants' unconstitutional policy on the front pages of the *Providence Journal*. Then, this trouble-free inmate was subjected to eighteen months of harassment, intimidation, the loss of physical activity, destruction of his personal property, a labyrinth of appeals and grievances that yielded no results, the loss of his job, the loss of time that reduced his sentence, the threat of transfer to maximum security and, worst of all, the loss of his freedom. During these eighteen months, Mr. Cook spent over 52 days in segregation where the plaintiff was stuffed into a small cell for twenty-three hours a day. An inmate of ordinary firmness would certainly be chilled in his efforts to exercise his First Amendment rights if his efforts to do so were expected to be rewarded with such retaliatory acts.

Further, on a motion to dismiss for failure to state a claim, it is appropriate for the Court to infer a retaliatory state of mind from circumstantial evidence. Shabazz v. Cole, 69 F. Supp. 2d 177, 198 (D. Mass. 1999). Circumstantial evidence is often enough to support a claim that an adverse action was taken with retaliatory intent, as intentions are often difficult

to prove through direct evidence. *See* McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005) (plaintiff stated a sufficient claim when he alleged in "his complaint that [correctional officers] fired him, filed a 'bogus' disciplinary report to insulate their action, and then refused to accept the recommendation to reassign him to [another job] when the disciplinary case was shown to be unfounded -- all in retaliation for [plaintiff's criticisms of defendants]."); Beauchamp v. Murphy, 37 F.3d 700, 711 (1st Cir. 1994), cert. denied, 514 U.S. 1019 (1995); Ferranti v. Moran, 618 F.2d 888 (1st Cir. 1980), 618 F.2d at 892 (chronology of events provided support for inference of retaliation); McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979) (same); Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995), cert. denied, Palermo v. Woods, 516 U.S. 1084, (1996).

There is ample circumstantial evidence in this case for the Court to draw reasonable inferences that this trouble-free inmate became a victim of retaliation at the hands of the defendants. First, within a week of his comments being publicly aired, he was fired from his job with absolutely no evidence being offered against him and the admission of the hearing officer that the videotape showed that he did nothing wrong. Mr. Cook obviously believed that his job loss and his loss of good time were causally connected to his comments since he asserted it in his appeal to defendant Auger. Next, after defendants Lawson and Nakhlis conducted a module wide shakedown and violently destroyed plaintiff's personal property, defendant Lawson answered plaintiff's question regarding why they were destroying property (rather than conducting a search) by saying that, "[plaintiff] would figure it out:" a clear reference to Mr. Cook's public comments, his association with the ACLU and the ACLU's decision to file a lawsuit on his behalf. Further, after posting a message on the module bulletin board and being brought to segregation as a result, defendant Jankowski told Mr.

Cook that 'this is what happens when you get the ACLU involved in our business.' The assault on Mr. Cook continued, when at the direction of defendant Wall, plaintiff was once again strip searched and thrown into segregation for 18 days, under the pretext that a letter he wrote to the Parole Board was threatening.[8] In response to plaintiff's complaints, defendant Freeman promised to "hear" plaintiff's complaints, but never convened a board hearing. Subsequently, the plaintiff was forced to endure another 4 days in segregation after two familiar defendants – Freeman and Lawson – strip searched the plaintiff and "searched" his cell while examining plaintiff's legal materials and interrogating plaintiff about conversations with a *Providence Journal* reporter. Finally, after the instant lawsuit was filed, on Sunday, April 26th, an agent of the defendants approached the plaintiff, intimidated him and attempted to solicit potentially privileged information regarding plaintiff's lawsuit.

This sequence of events, along with the fact that the adverse actions against Mr. Cook followed closely on the heels of his public comments in the *Providence Journal*, present sufficient evidence of an adverse act specifically taken in response to plaintiff's exercise of his First Amendment rights to meet the third requirement for a retaliation claim. Accordingly, the Court ought to deny defendant's motion to dismiss.

## II. Mr. Cook's due process deprivations and loss of his job, wages, good time, property and his liberty are actionable within plaintiff's retaliation claim; as such, defendants are not entitled to a dismissal.

It is important to note that while Sandin and its progeny limit inmates' ability to seek redress in the federal courts for due process deprivations unless the deprivations impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of

[8] Plaintiff's letter to the Parole Board – itself an exercise of his First Amendment rights - was so persuasive that the Parole Board moved up his next hearing from 2010 to 2009 and requested that plaintiff prepare a residential placement; quite the opposite reaction from the "threatening" nature of the letter claimed by defendants.

prison life," Sandin 515 at 484, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." Cossette v. Poulin, 573 F. Supp. 2d 456, 459-60 (D.N.H. 2008) quoting Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996)(internal citations and quotation marks omitted). Thus, while an inmate might not have a constitutional right to a job assignment or good time, "prison officials must not… deny him a job assignment [or good time] in retaliation for the exercise of a constitutionally protected activity." Beauchamp v. Murphy, 37 F.3d 700, 710 (1st Cir. 1994) (emphasis added); *See also, e.g.*, Dupont v. Saunders, 800 F.2d 8, 10-11 (1st Cir. 1986); Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005); Vignolo v. Miller, 120 F.3d 1075, 1077-78 (9th Cir. 1997).

Therefore, while defendants' claim that plaintiff is unable to press his claims for the loss of his job, his wages, his property, his good time[9] and his liberty, defendants fail to address the fundamental point that these deprivations are certainly actionable within the context of a retaliation claim. The courts have been clear that actions, which standing alone do not violate the constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right. Thaddeus-X v. Blatter, 175 F.3d 378, 386 (6th Cir. 1999) (en banc). Conduct on the part of prison officials that is 'not otherwise constitutionally deficient is actionable under § 1983 if done in retaliation for the exercise of constitutionally protected first amendment freedoms.' L'Heureux v. Whitman, 1997 U.S. App. LEXIS 27942 (1st Cir. Oct. 9, 1997); Oropallo v. Parrish, No. 93-1953, 1994 U.S. App. LEXIS 9748, 1994 WL 168519, at 3 (D.N.H. May 5,

[9] In addition to claiming a loss of good time within the context of plaintiff's retaliation claim, plaintiff intends to seek leave of Court to amend his complaint to add a habeas claim for loss of good time, pursuant to DeWitt v. Wall, 121 Fed. Appx. 398, 399 (1st Cir. R.I. 2004)(unpublished).

1994), *aff'd*, 23 F.3d 394 (1st Cir. 1994) (citing Ferranti v. Moran, 618 F.2d 888, 892 n.4 (1st Cir. 1980) ("actions otherwise supportable lose their legitimacy if designed to punish or deter an exercise of constitutional freedoms.") (citation omitted)); *See* Goff v. Burton, 7 F.3d 734, 738 (8th Cir. 1993), cert. denied, 512 U.S. 1209, 114 S. Ct. 2684, 129 L. Ed. 2d 817 (1994) (prison officials cannot lawfully impose a disciplinary sanction against a prisoner in retaliation for the prisoner's exercise of his constitutional right).

Thus, since the loss of plaintiff's job, wages, good time, property and liberty are properly construed within a First Amendment retaliation claim, plaintiff's claims are actionable and defendants' motion to dismiss ought to be denied.

## III. Plaintiff is entitled to the due process guarantees of the Morris Rules; as such, defendants are not entitled to a dismissal.

The First Circuit has stated that the Morris Rules[10] "embody a binding declaration of constitutional rights." Morris v. Travisono, 509 F.2d 1358, 1361 (1st Cir. 1975) as quoted in Nicholson v. Moran, 835 F. Supp. 692, 693-694 (D.R.I. 1993). Specifically, the "Morris Rules" were the result of proceedings in the federal district court after inmates at the ACI brought a class action lawsuit (the class being all inmates then *in situ* and all future inmates) against Rhode Island prison authorities in 1969. *See* Morris v. Travisono, 509 F.2d 1358, 1359 (1st Cir. 1975). As a result of court-overseen negotiations, these rules came to fruition as a detailed set of procedures for disciplining and classifying prisoners. *See* Morris v. Travisono, 499 F. Supp. 149, 164 (D.R.I. 1980).

[10] *See* Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970) (Morris I); Morris v. Travisono, 373 F. Supp. 177 (D.R.I. 1974) (Morris II), *aff'd*, 509 F.2d 1358 (1st Cir. 1975) (Morris III); Morris v. Travisono, 499 F. Supp. 149, 161-74 (D.R.I. 1980) (Morris IV).

The Rhode Island Supreme Court has stated that the Morris Rules are a federal construct to be enforced in the Federal District Court. L'Heureux v. State Dep't of Corrections, 708 A.2d 549, 552 (R.I. 1998). In DiCiantis v. Wall, 795 A.2d 1121 (R.I. 2002) (per curiam), the Rhode Island Supreme Court unequivocally reaffirmed L'Heureux and held that claims asserted under the Morris Rules should be raised in Federal District Court. DiCiantis at 1124.

While the U.S. District Court in Rhode Island has not always agreed with this particular sentiment from the Rhode Island Supreme Court,[11] the Federal District Court has clearly stated that "[t]he long and short of it is that an inmate at the ACI, who claims that the Morris Rules were violated by personnel at the ACI, must make an allegation of a federal constitutional violation and bring an action under 42 U.S.C. § 1983 in order to be heard in this Court." Doctor v. Wall, 143 F. Supp. 2d 203, 205 (D.R.I. 2001) Since the plaintiff in this case has alleged a sufficient federal constitutional violation with his retaliation claim, plaintiff's allegations of violations of the Morris Rules are properly before this Court.

The First Circuit has stated that the Morris Rules create an enforceable liberty interest in remaining in the general prison population. Rodi v. Ventetuolo, 941 F.2d 22, 29 (1st Cir. 1991). For example, in Nicholson, similar to the facts in this case, the plaintiff was an inmate at the ACI who brought an action pursuant to 42 U.S.C. § 1983, seeking damages and injunctive relief for alleged deprivation of First Amendment rights, Fourteenth Amendment rights, and rights protected by the Morris Rules after he suffered retaliation for complaining of abuse by correctional officers. Nicholson 835 at 693. The Court found that

[11] For a history of the dispute between the state court and the federal court in the application of the Morris Rules, see United States Magistrate Judge Jacob Hagopian's report and recommendation and United States District Court Judge Ronald R. Lagueux's adoption of said report at Doctor v. Wall, 143 F. Supp. 2d 203 (D.R.I. 2001)

the ACI disciplinary board denied the plaintiff his liberty interest in remaining with the general inmate population without due process of law in violation of the Morris Rules and the Fourteenth Amendment when it punished him without "substantial evidence" in the record. Id. at 698. Specifically, the Court found the disciplinary board hearing's actions "clearly prohibited" in finding the plaintiff guilty and sentencing him to serve thirty days in segregation with an additional loss of thirty days of good time without "substantial evidence" in the record, as required by the Morris Rules. Id. The Court found that the disciplinary board report did not provide any summary of the testimony offered or state why the plaintiff's testimony led the board to find the plaintiff guilty and that there was clearly not enough corroborating evidence to overcome the burden of proof. Id.

Similar to Nicholson, the disciplinary hearing officers who disciplined Mr. Cook did not rely on substantial evidence and did not allow Mr. Cook to present evidence, call witnesses or examine witnesses in violation of Section III.C.4. of the Morris Rules. Further, despite the fact that the Morris Rules explicitly require the Classification Board to review all transfers within a week, plaintiff spent more than twice that amount of time in administrative segregation without being given any opportunity to be heard. This allegation alone is sufficient to state a claim for deprivation of procedural due process. Rodi 941 at 29. In addition, the 22 days which plaintiff spent in administrative segregation with inmates in punitive segregation were in violation of Section I.C of the Morris Rules which states that if an inmate is locked up pending an investigation, such detention must not be in the punitive segregation area, which is where plaintiff was held. *See* Morgan v. Ellerthorpe, 785 F. Supp. 295, 301 (D.R.I. 1992). Finally, defendants violated Section IV.A. of the Morris Rules when defendants failed to provide the plaintiff with timely notification that his appeal from the

disciplinary board's decision had been denied. For example, defendant Wall did not answer plaintiff's appeal of November 7, 2007 until February 11, 2008: far longer than the 3 day response time mandated by the Morris Rules.

In conclusion, since the plaintiff has alleged a sufficient federal constitutional violation with his retaliation claim, plaintiff's allegations of violations of the Morris Rules are properly before this Court. Indeed, the record is full of factual allegations that defendants curtailed plaintiff's rights mandated by the Morris Rules; as such, defendants' motion to dismiss should be denied.

## IV. Properly viewed, Mr. Cook's complaint contains sufficient factual matter that is plausible on its face that plaintiff was deprived of his liberty and property without the due process of law mandated by the Fourteenth Amendment; as such, defendants are not entitled to a dismissal.

The sequence of events outlined in plaintiff's complaint and in the record before the Court clearly shows a deprivation of plaintiff's liberty and property without due process since defendants have imposed an "atypical and significant hardship" on the plaintiff "in relation to the ordinary incidents of prison life." Sandin 515 at 484.

While the Rhode Island Supreme Court has opined in L'Heureux that the state's action in placing an inmate in disciplinary segregation for thirty days does not work a major disruption in that inmate's environment in violation of Sandin, this situation is far different from the 52 days in segregation, along with intimidation, harassment, the loss of a job, the loss of good time and the destruction of property suffered by the plaintiff in this case. L'Heureux 708 at 552. And far from the clear line asserted by the defendants, courts have struggled with determining whether segregative confinement and discipline 'imposes atypical

and significant hardship on the inmate' and how to characterize the comparative baseline -- i.e., how to define 'the ordinary incidents of prison life.' Hatch v. District of Columbia, 184 F.3d 846, 851 (D.C. Cir. 1999). Indeed, in this Circuit, in Dominique v. Weld, 73 F.3d 1156, 1160 (1st Cir. 1996), the Court has not yet characterized this comparative baseline.

The "ordinary incidents of prison life" were clearly upturned during plaintiff's eighteen months of unwarranted discipline, harassment, segregation and retaliation at every turn and this eighteen month course of retaliatory treatment presented a "dramatic departure from the basic conditions of [an inmate's] sentence." Sandin 515 at 485. Plaintiff's condition over these eighteen months is similar to the situation facing plaintiffs in Ohio's supermax, who were denied access to human contact, allowed exercise for only one hour per day in a small room, and whose placement was seemingly indefinite; a condition that the Supreme Court deemed in violation of the Fourteenth Amendment and the limitations of Sandin. See Wilkinson v. Austin, 125 S. Ct. 2384, 2393 (U.S. 2005). Further, defendants' denial of plaintiff's request to call witnesses and present documentary evidence during his March 18, 2008 disciplinary hearing is plainly violative of the Due Process clause since defendants never expressly offered a legitimate excuse for denying plaintiff's request. Morgan v. Ellerthorpe, 785 F. Supp. 295, 301-302 (D.R.I. 1992) quoting Wolff v. McDonnell, 418 U.S. 539, 5565 (1974); Ponte v. Real, 471 U.S. 491, 497 (1985). Finally, courts have long upheld claims – such as those offered by the plaintiff – that the deprivation of an inmate's personal property without due process violates the Fourteenth Amendment. *See* Hudson v. Palmer, 468 U.S. 517 (1984); Ferranti v. Moran, 618 F.2d 888 (1st Cir. 1980).

The Supreme Court has also made clear that the constitutional protections retained by prisoners include those afforded by the Due Process Clause against arbitrary deprivations

of "liberty. Wolff v. McDonnell, 418 U.S. 539, 555 (1974). In Wolff, the Court asserted that "a person's liberty is… protected, even when the liberty itself is a statutory creation of the State" [such as the Morris Rules] because "the touchstone of due process is protection of the individual against arbitrary action of government." Id. at 558 (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889). Indeed, this Court has recognized that Wolff remains good law. Lynch v. Whitman, 2005 U.S. Dist. LEXIS 7255 (D.R.I. Mar. 22, 2005) (unpublished).

Thus, since plaintiff has plead sufficient factual allegations that defendants have violated his due process rights pursuant to the Fourteenth Amendment, defendants' motion ought to be denied.

## V. Properly viewed, Mr. Cook's complaint contains sufficient factual matter that is plausible on its face that plaintiff was repeatedly strip searched and his cell violently searched in violation of the Eighth Amendment; as such, defendants are not entitled to a dismissal.

In Sandin, the Supreme Court said that prisoners "retain other protection from arbitrary state action" and identified one of these sources as the Eighth Amendment. Sandin v. Conner, 515 U.S. 472, 487 n.11 (1995). The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. In this case, Mr. Cook has plead factual allegations that the repeated strip searches of his body violate the Eighth Amendment. These strip searches are an unnecessary and wanton infliction of pain and constitute cruel and unusual punishment. Ducally v. R.I. Dep't of Corr., 160 F. Supp. 2d 220, 226 (D.R.I. 2001). Further, courts have found that continued cell searches within the context of retaliation violate the Eighth Amendment. *See* Scher v. Engelke, 943 F.2d 921, 924 (8th Cir. 1991). The critical question in such cases is whether the force was applied "maliciously" and "for the very

purpose of causing harm," rather than "in a good-faith effort to maintain or restore discipline." Skinner v. Cunningham, 430 F.3d 483, 488 (1st Cir. 2005) quoting Whitley v. Albers, 475 U.S. 312 (1986); Hudson v. McMillian, 503 U.S. 1 (1992). In this case, defendant Lawson's comments about the plaintiff "figuring out" why his property was being destroyed and defendants Lawson's and Freeman's interrogation of the plaintiff about speaking with a *Providence Journal* reporter provide a reasonable inference of malice and certainly do not show a good-faith effort at maintaining discipline. For these reasons, defendants' motion to dismiss of plaintiff's Eighth Amendment claim ought to be denied.

## VI. Properly viewed, Mr. Cook's complaint contains sufficient factual matter that is plausible on its face that the supervisory defendants had an affirmative role in the retaliation against the plaintiff; as such, defendants' motion to dismiss ought to be denied.

Plaintiff has alleged claims against defendants Wall, Boyd, Auger and Kaszyk under a theory of supervisory liability. In bringing this claim, plaintiff is not attempting to hold these defendants liable under a theory of *respondeat superior*. Rather, plaintiff seeks to hold these defendants liable on the basis of their own acts or omissions as well as their callous indifference to the constitutional rights of the plaintiff. *See* Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 (1st Cir. 1989). In his complaint, plaintiff alleges that these defendants acted with reckless disregard and deliberate indifference in the hiring, screening and training of defendant correctional officers as well as failed to provide adequate training, education and discipline to the non-supervisory defendants; these failures resulted in the denial of plaintiff's constitutional rights. Plaintiff alleges that defendants were aware of the violation of Mr. Cook's constitutional rights, and yet they failed to remedy the situation. Since a defendant supervisor can be held liable based on the defendant's actual notice of facts sufficient to render the supervisor responsible for reasonable inquiry into the matter,

the plaintiff has plead sufficient facts to survive a motion to dismiss. *See* Feliciano v. DuBois, 846 F. Supp. 1033, 1045 (D. Mass. 1994) citing Layne v. Vinzant, 657 F.2d 468 (1st Cir. 1981).

In addition, construing the allegations in plaintiff's complaint as true, as the Court is required to do at this stage of review, the facts readily demonstrate that "the supervisory defendants implicitly approved and supported the deprivation of [plaintiff's] First Amendment rights by failing to respond to [his] complaints in any meaningful way" and by "advancing policies that served to deprive [plaintiff] of his rights, they were directly responsible for the losses sustained by [plaintiff]." Starr v. Coulombe, 2007 U.S. Dist. LEXIS 48704 (D.N.H. July 3, 2007) (unpublished).

Finally, there is sufficient evidence in the record that defendants Wall, Boyd and Auger have repeatedly denied plaintiff's appeals and requests and, as the discovery process is allowed to proceed, plaintiff is expecting to prove that there is an "affirmative link" between the defendants' action or inaction and the "street-level misconduct" of the correctional officers in this case. *See* Gutierrez-Rodriguez v. Cartagena, 882 F.2d at 562.

## VII. Plaintiff has stated a claim against each named defendant; as such, defendants' motion to dismiss ought to be denied.

Defendants contention that plaintiff has failed to state a claim against certain individual defendants[12] is without merit. Plaintiff properly brings this action against the named individual defendants in their official capacity in order to obtain the prospective injunctive relief plaintiff seeks here. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 n.10 (1989). Since each defendant works for the RIDOC, a suit against them in their official

[12] As stated earlier, defendants' motion was brought on behalf of all of the defendants, excepting Correctional Officer Lawson, who has not yet been served.

capacities is a suit against the RIDOC. *See* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993). Similarly, plaintiff properly bring this action against the named individual defendants in their individual capacity in order to obtain the monetary damages that plaintiff seeks in this litigation. Taken together, the complaint, the exhibits incorporated into the complaint and the plaintiff's affidavit filed with his motion for a temporary restraining order contain sufficient pleadings against each defendant to survive a motion to dismiss.

## VIII. Properly viewed, the summary judgment record contains abundant evidence that the plaintiff has exhausted his administrative remedies pursuant to the Prison Litigation Reform Act (PLRA); as such, defendants are not entitled to summary judgment.

Since defendants have presented matters outside the pleadings, the Court must examine their motion as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d). The court ought to deny a motion for summary judgment if the pleadings and any affidavits show that there is a genuine issue as to any material fact. In making its determination, the Court may not weigh the evidence. Casas Office Machs., Inc. v. Mita Copystar Am., Inc., 42 F.3d 668 (1st Cir. 1994). And, the court examines the record in the "light most favorable to the nonmovant," and indulges all "reasonable inferences in that party's favor." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994). Once the moving party has averred that there is an absence of evidence to support the nonmoving party's case, the burden shifts to the nonmovant to establish the existence of at least one fact in issue that is both genuine and material. Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990) (citations omitted). A factual issue is 'genuine' if 'it may reasonably be resolved in favor of either party and, therefore, requires the finder of fact to make 'a choice between the parties' differing versions of the truth at trial.' DePoutout v. Raffaelly, 424 F.3d 112, 116 (1st Cir.

2005) quoting Garside, 895 F.2d at 48 (1st Cir. 1990). Based on this standard, defendants are not entitled to summary judgment since plaintiff has sufficiently shown in his verified complaint, in the exhibits incorporated into his verified complaint and his affidavit attached to his motion for a temporary restraining order that he has exhausted all of his administrative remedies before filing this instant lawsuit.

The Supreme Court has held that "to properly exhaust administrative remedies[13] prisoners must 'complete the administrative review process in accordance with the applicable procedural rules,'" Jones v. Bock, 549 U.S. 199, 218 (U.S. 2007) quoting Woodford v. Ngo, 548 U.S. 81, 88 (2006). In other words, "[c]ompliance with prison grievance procedures, therefore, is all that is required by the PLRA to "properly exhaust." Id. In this case, RIDOC policy clearly states that, for all grievable areas of prison life, the inmate must first seek resolution with the Warden of his facility and then seek resolution in a second grievance to the Director.[14] As plaintiff demonstrates below, he abided by the RIDOC policies and vigilantly submitted grievances and appeals, first to the Warden and, next, to the Director for each act of retaliation by the defendants. In doing so, the plaintiff has afforded the defendants the "opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." Woodford 548 U.S. at 89.

[13] Failure to exhaust is an affirmative defense under the PLRA and the plaintiff need not plead exhaustion in the complaint; rather, failure-to-exhaust must be asserted and proven by the defendant. Jones 549 at 216.
[14] Some courts have recognized that if a prison considers the substance of an untimely filed complaint and decides it on the merits, the prison has waived its right to argue a failure-to-exhaust defense. *See* Patel v. Fleming, 415 F.3d 1105, 1111 (10th Cir. 2005); Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002) (noting that a prison's acceptance of an untimely complaint makes the filing 'proper' and avoids exhaustion, default, and timeliness hurdles in federal court); Ellis v. Vadlamudi, 568 F. Supp. 2d 778, 785 (E.D. Mich. 2008) (equating waiver to the procedural default doctrine utilized in habeas cases).

Therefore, since Mr. Cook was compliant with prison grievance procedures, his grievances are considered properly exhausted and defendants' motion for summary judgment ought to be denied.

**The Termination of Mr. Cook**

The first area of retaliatory activity alleged by the plaintiff is his termination from his kitchen job, his loss of good time and the subsequent illegitimate disciplinary procedures utilized against him. The RIDOC Grievance Procedure explicitly labels "discipline decisions" as "Non-Grievable Areas of Facility Life." Defendants' Exhibit 1, III(B)(6)(a). Defendants incorrectly cite to their own grievance policy in asserting that Cook's disciplinary action was a grievable complaint. However, pursuant to the RIDOC's Code of Inmate Discipline 11.01-4, Mr. Cook did file timely appeals with defendant Auger (twice), defendant Boyd and defendant Wall. Plaintiff's Complaint, Exhibits 2, 3, 4.

Thus, since the defendants' grievance procedures do not permit grievances to be filed regarding disciplinary decisions and the disciplinary process has its own separate appeals process, which the plaintiff properly accessed and exhausted before filing the instant lawsuit, plaintiff has properly exhausted his administrative remedies.

**The Punitive Segregation of Mr. Cook**

The second area of retaliatory activity alleged by the plaintiff is the violent shakedown of his cell on March 3, 2008, his subsequent posting on a module-wide bulletin board and the defendants' disciplinary determination that Mr. Cook was "engaging in or encouraging a group demonstration" which resulted in Mr. Cook being disciplined with 30

days of punitive segregation, the loss of 30 days of good time and the recommendation that the plaintiff be downgraded to maximum security.

In response to these actions, plaintiff timely filed a grievance to defendant Boyd regarding the violent shakedown of his cell. Plaintiff's Complaint, Exhibit 6. In his grievance, plaintiff alleged retaliation and requested that the offending officers be disciplined. Plaintiff further requested that all of the destroyed items be replaced and that Internal Affairs be notified as to the officers' actions. Having not received a response within ten working days as required by RIDOC policy, Mr. Cook filed a second grievance with defendant Boyd with the same complaints and the same requested resolutions. Plaintiff's Complaint, Exhibit 6. After another ten working days passed without a response as required by RIDOC policy, plaintiff filed a third grievance with defendant Wall with the same complaints and the same requested resolutions. Plaintiff's Complaint, Exhibit 6. Affiant McCutcheon acknowledges receipt of the plaintiff's third grievance and asserts that he didn't feel the need to resolve plaintiff's three requested resolutions because Captain Amaral had restored some of the damaged items to the plaintiff. Affidavit of Robert McCutcheon ¶ 6.

In addition, plaintiff directly appealed his booking and the bogus disciplinary hearings directly to defendant Boyd as required by RIDOC policy. Plaintiff's Complaint, Exhibit 9. Further, plaintiff submitted an appeal to the disciplinary hearing officer, defendant Jankowski, requesting representation, witnesses and disputing the booking report. Plaintiff's Complaint, Exhibit 9. Twenty days after plaintiff was taken to segregation, defendant Boyd denied his appeal. Plaintiff's Complaint, Exhibit 10.

Since plaintiff both adequately grieved the offenses deemed grievable by RIDOC policy to both his Warden and the Director and also appealed the disciplinary charges against him, the plaintiff has exhausted his administrative remedies and defendants' motion ought to be denied.

**Eighteen Days in Administrative Segregation**

The third area of retaliatory activity alleged by the plaintiff involves being strip searched and thrown into segregation on May 30, 2008 for 18 days. Unable to file a grievance while in segregation, plaintiff filed his grievance with the Warden the day he was released from segregation on June 17, 2008. After his grievance was timely denied by defendant Boyd, plaintiff filed a grievance with defendant Wall. Plaintiff's Complaint, Exhibit 13. Having not heard back from defendant Wall as required by RIDOC policy, plaintiff sent him a letter on September 8, 2008, asking for resolution of his grievance. Plaintiff's Complaint, Exhibit 14. Seven and a half months later after the filing of his grievance, the Director's office responded by denying his grievance.[15] Thus, plaintiff once again fully exhausted his administrative remedies by both filing grievances with the Warden and with the Director.

**Cell Search and Four Days in Administrative Segregation**

The fourth area of retaliatory activity alleged by the plaintiff involves being strip searched, his cell violently searched, his property destroyed and being thrown into segregation for 4 days. After plaintiff noted on the grievance form that every Lieutenant had refused acceptance of his grievance, plaintiff sent his grievance by mail to Warden Boyd

[15] Plaintiff received the denial of his grievance shortly after his counsel requested his inmate file from the defendants' legal counsel in February 2009.

along with a letter explaining his reasons for doing so. Plaintiff's Complaint, Exhibit 15. While defendants claim to not have received plaintiff's grievance,[16] defendants eventually responded to plaintiff's grievance in an untimely fashion, denying his grievance on April 24, 2009.[17] See attached Exhibit 16.

Since plaintiff, at every turn, has adequately grieved the offenses deemed grievable by RIDOC policy to both his Warden and the Director and has also appealed the disciplinary charges against him pursuant to departmental policy, the plaintiff has clearly exhausted his administrative remedies and defendants' motion for summary judgment ought to be denied.

**A. If the Court finds a factual dispute as to whether Mr. Cook fully exhausted his administrative remedies, these questions of credibility should be submitted to the jury.**

A Massachusetts Federal Court recently examined the question of exhaustion within the context of factual disputes as to the presence of exhaustion and denied defendant's motion to dismiss having determined that disputes of fact remained. Maraglia v. Maloney, 499 F. Supp. 2d 93, 96 (D. Mass. 2007). The Court stated that, due to the factual dispute, "[t]his is simply not an instance in which the record conclusively establishes non-exhaustion." Id. at 97.

The Court stated that, ordinarily, where questions of fact are present, they are submitted to the jury. Id. at 95. This is also true where the questions of fact relate to an affirmative defense such as a statute of limitations: "[w]here questions of fact are presented,

[16] Defendants clearly had this grievance in their possession, since plaintiff received a copy of his grievance from the files of Captain Todd Amaral in order to file this instant lawsuit.

[17] With this recent response from the defendants, plaintiff plans on seeking leave of court to file an amended complaint to reflect the most recent denial of his grievance, along with further retaliatory activity that has continued against the plaintiff.

statute of limitations defenses are ordinarily submitted to the jury." Id. quoting Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 38 (1st Cir. 2001).

In this case, if the Court finds that the plaintiff asserts that he filed grievances in the time and place required by RIDOC Policy and the defendants assert that institutional records show that he did not, the resolution of the exhaustion question should go to the fact-finder on the issue of credibility and the defendants' motion ought to be denied.

**B. If the Court finds that any of plaintiff's claims have not been fully exhausted through administrative remedies, those particular claims should be the only claims stricken from the plaintiff's action.**

If the Court finds that any of plaintiff's claims have not been fully exhausted through administrative remedies, then plaintiff asks this Honorable Court to dismiss only the claims that it deems noncompliant with the PLRA. *See* Jones 549 U.S. at 221 quoting Robinson v. Page, 170 F.3d 747, 748-749 (CA7 1999) ("As a general matter, if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad. '[O]nly the bad claims are dismissed; the complaint as a whole is not. If Congress meant to depart from this norm, we would expect some indication of that, and we find none.'").

## CONCLUSION

For the foregoing reasons, plaintiff respectfully submits that the Court ought to deny defendants' motion to dismiss and motion for summary judgment.

Plaintiff,
By his Attorney,

/s/ Amato A. DeLuca

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DATED: June 29, 2009

**CERTIFICATION**

To:

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I hereby certify that on June 29, 2009, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Amato A. DeLuca