

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SHAWN ASSELIN,)	
)	
Plaintiff)	
)	
v.)	2:13-cv-00222-DBH
)	
MATHEW CHICK, et als.,)	
)	
Defendants)	

RECOMMENDED DECISION

In this action, Plaintiff Shawn Asselin alleges that Defendants violated his constitutional rights in connection with his incarceration at the Androscoggin County Jail and the Maine State Prison. The matter is before the Court on Defendants’ Motion for Summary Judgment (ECF No. 66).¹

In his response to the motion, Plaintiff represented that he wanted to dismiss his claims against Defendants Travys Fecteau, John Lebel, Joseph McCarthy, Daniel Levesque, Reginald Littlefield, and John Clevenger. He also asserted that he wanted to dismiss his First Amendment retaliation claim. This recommended decision will include the recommendation that the Court dismiss the claims.

As to the remaining claims, as explained below, following a review of the pleadings, and after consideration of the parties’ arguments, the recommendation is that the Court grant in part and deny in part the Motion for Summary Judgment.

¹ The Court referred the motion for report and recommended decision.

FACTUAL BACKGROUND²

Plaintiff's claims arise out of his incarceration, as a pretrial detainee, at the Androscoggin County Jail (ACJ) in 2013. During a portion of Plaintiff's incarceration – from May 7, 2013, to May 28, 2013 – Plaintiff was housed at the Maine State Prison. (Defendants' Statement of Material Facts ¶¶ 1-3, ECF No. 67.)³

Plaintiff specifically asserts the following claims: (1) an excessive force claim against Josiah Chick, based on events occurring on April 21, 2013; (2) an excessive force claim against Nicholas Stone, based on events occurring on July 4, 2013; (3) a procedural due process claim against Lane Feldman related to alleged transfers to administrative segregation; and (4) a procedural due process claim against Jeff Chute related to alleged transfers to administrative segregation.

The Defendants

Josiah Chick and Nicholas Stone are corrections officers who are currently and were in 2013 employed at the Androscoggin County Jail. (*Id.* ¶¶ 129, 172.) Jeff Chute is a Lieutenant at

² For purposes of summary judgment, the facts of a case are derived from the parties' Local Rule 56 statements of material facts, and are presented in the light most favorable to Plaintiff. Local Rule 56's requirements are mandatory. D. Me. Loc. R. 56(a) (“[A] motion for summary judgment and opposition thereto shall comply with the requirements of this rule.”). “Failure to comply with the Rule can result in serious consequences . . .” *Doe v. Solvay Pharm., Inc.*, 350 F. Supp. 2d 257, 260 (D. Me. 2004), *aff'd*, 153 Fed. App'x 1 (1st Cir. 2005). In particular: “Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.” D. Me. Loc. R. 56(f). In support of their Motion for Summary Judgment, Defendants filed a Statement of Material Facts consisting of 201 factual statements. In opposition to the Motion, Plaintiff did not comply with Local Rule 56. Instead, he attached a selection of documents to his response, and referred to the documents in his written argument. Given Plaintiff's non-compliance with the Local Rule, Defendants' statements are deemed admitted to the extent that they are supported by record citations. D. Me. Loc. R. 56(f). Although Plaintiff failed to comply with the Local Rule, some of Plaintiff's factual assertions are set forth herein.

³ Defendants assert that the material facts include events that occurred between March 21, 2013, and July 17, 2013. Although Defendants identify July 17 as the outside date, that representation is apparently based on Plaintiff's deposition testimony that his case does not involve anything that transpired after “the middle of July 2013.” (Deposition of Shawn Asselin at 11:16-20, ECF No. 67-1.) Despite this asserted timeframe, Defendants' factual statement includes some facts relating to August 2013. Plaintiff, therefore, was apparently held at the Androscoggin County jail after July 17, 2013.

the Jail and serves as assistant jail administrator. He was so employed in 2013. (*Id.* ¶ 92.) Lane Feldman is presently, and was in 2013, a Sergeant and the Classification Specialist for the Androscoggin County Jail (ACJ). (*Id.* ¶ 184.)

March 21 through April 20, 2013

Beginning on March 21, 2013, because of his failure to comply with jail rules, and his aggressive and disruptive behavior, Plaintiff was housed in the special management unit or in high maximum security within the ACJ. (*Id.* ¶ 188.) When Plaintiff refused to be housed in A-block on March 22, he was taken to an observation cell.

On April 1, Plaintiff objected to the removal of contraband from his cell; made obscene comments to corrections officers; threatened to “knock” an officer “out;” covered the window of his cell door with toilet paper and notebook paper; caused water to escape from under the door of his cell into the day space; and told officers that he had defecated on the paper plate used to serve him lunch. (*Id.* ¶¶ 4-9.) As the result of his conduct, on April 1, Plaintiff was placed in lockdown for 48 hours. (Defendants’ Statement ¶¶ 10, 134.)

On April 15, Plaintiff pounded on his cell door; told an officer that he would break the window to force the jail to take him to the holding area; asserted that he wanted to go to the holding area in order to threaten the life of a woman whom he suspected was an informant against him; informed officers that he had arranged to have a confidential informant killed and would do it again to stay out of jail; pounded on his door repeatedly and yelled “you’re a dead bitch, do you hear me”; said that he would have “his boys” snatch the supposed informant and burn her body; and disobeyed several orders given to him by a corrections officer. (*Id.* ¶¶ 13-17.) As the result of this conduct, Plaintiff lost his television privileges for 24 hours. (*Id.* ¶ 18.)

On April 19, Plaintiff repeatedly goaded another inmate to yell, bang his door, and smear feces throughout his cell; encouraged the other inmate to disregard orders from an officer; and yelled insults at corrections officers. (*Id.* ¶¶ 19-21.) As the result of this conduct, at the direction of Officer Chick, Plaintiff was locked down for 24 hours. (*Id.* ¶¶ 22, 134.) Plaintiff continued his disrespectful behavior and derogatory comments toward corrections officers on April 20. (*Id.* ¶ 23.) As a result of this conduct, at the direction of Officer Chick, Plaintiff was locked down for 24 hours. (*Id.* ¶¶ 24, 136.)

The April 21, 2013, Incident

Plaintiff's claim of excessive force against Officer Chick is based on an incident that occurred on April 21.⁴ On April 21, Plaintiff wrote on his cell wall an obscenity regarding Officers Chick and Fecteau, extended his arms out of his cell through the tray slot, and made a movement to spill milk on a corrections officer. (*Id.* ¶¶ 25-27.) While on his knees in front of the tray slot, Plaintiff asked Corporal Fecteau "[w]ho was kicking my [expletive deleted] door last night?" When he took the cup from CO Chick, Plaintiff made a motion to pour the milk on CO Chick. CO Chick reacted by pushing the cup away. Some milk spilled on the floor, and some on Plaintiff. Although Plaintiff claims that his thumb was hurt in this incident, he did not request nor receive medical attention. (*Id.* ¶¶ 137-142.) After being placed in lockdown by Officer Chick for this conduct,⁵ Plaintiff kicked his door and yelled a warning that he would keep the corrections officers busy all night and used vulgar language in reference to the officers. (*Id.* ¶¶ 28-29.)⁶

⁴ Plaintiff cites no other incident in which Officer Chick used physical force. (Defendants' Statement ¶¶ 130-131.)

⁵ For his actions on April 21, Plaintiff was locked down for 24 hours. (*Id.* ¶ 30.)

⁶ According to Plaintiff, during the April 21 incident, Officer Chick, while serving Plaintiff his breakfast, grabbed the cup of milk in Plaintiff's hand and pushed it back through the tray slot in the cell door. Plaintiff complains that milk was spilled on him in the process and that he sustained "a sprained right thumb." (Plaintiff's Opposition Memorandum at 4, ECF No. 79.) He does not cite any record evidence in support of these statements.

April 22 through May 6, 2013

On April 22, Plaintiff sent an inmate request form to the mental health department with an obscene message. (*Id.* ¶ 31.) On April 28, Plaintiff threatened to throw a cup of urine and feces on another inmate if he was not moved from C-block; poured the cup with urine and feces under another inmate's cell door; and refused to be locked down in his cell. (*Id.* ¶¶ 32-33.) For the conduct, Plaintiff was locked down for 24 hours. (*Id.* ¶ 34.)

Overnight between April 29 and April 30, Plaintiff banged on his cell door; yelled all night long; shouted obscenities to the female corrections officer on duty; threatened to stop using his toilet and to urinate and defecate under his door; urinated under his door and into the day space of the housing unit; tossed his plate and bowl of cereal all over the day space floor; and threatened to throw feces at an officer. (*Id.* ¶¶ 35-38.) For this conduct, Plaintiff was locked down for 48 hours. (*Id.* ¶ 39.) On May 5, Plaintiff again engaged in disruptive behavior for which he received another 24 hours of lockdown. (*Id.* ¶¶ 43-45.)

May 7 through May 28, 2013

Plaintiff was an inmate at the Maine State Prison from May 7 through May 28, 2013. The record does not reflect whether Plaintiff had a hearing on the issue of his transfer to the prison. According to the Maine State Prison records, Plaintiff was placed at the prison in a "safe keeper" status because of his unruly behavior at the ACJ. While at the prison, Plaintiff was the subject of multiple "reviews" in connection with his detention, which reviews ultimately resulted in a finding on May 22 that he would be removed from "administrative segregation status." (Plaintiff's Exhibit F, ECF No. 79-10.) The Maine State Prison's Administrative Segregation Status Review Minutes reflect that Plaintiff had the opportunity to be heard on the issue of this placement.

May 28 through July 3, 2013

From May 8 through July 3, 2013, Plaintiff was generally held in either medium or maximum security units. (Defendants' Statement ¶ 195.) On June 4 and on June 21, Plaintiff engaged in further disruptive behavior at the ACJ and received 24 hours of lockdown. (*Id.* ¶¶ 46-48.) On July 2, Plaintiff threatened to instigate a fight with corrections officers; threw his food tray against a wall; cursed at officers; spit on the floor several times; and challenged Sergeant Littlefield to fight. (*Id.* ¶¶ 49-54.) As a result of his actions on July 2, Plaintiff was locked down for 48 hours. (*Id.* ¶ 55.) On July 3, Plaintiff covered the window in his cell door with paper, shouted that he was bleeding, and was found cutting his left arm with a soap dish. He was placed in a suicide smock to prevent further self-harm. (*Id.* ¶¶ 56-58.)

The July 4, 2013, Incident

On July 4, Plaintiff failed to obey repeated orders from corrections staff to move away from the block door and to stop screaming at the officers. He subsequently swore at the officers, attempted to slam his cell door on an officer, and struck a fighting stance when Officer Stone proceeded to lock him down in his cell. (*Id.* ¶¶ 59-62.) For this conduct, Plaintiff was locked down for 24 hours. (*Id.* ¶ 63.)

According to Plaintiff's unverified assertions, as Officer Stone closed the cell door, Stone pushed the door "extremely hard"⁷ against Plaintiff's back, which caused severe bruising. (Plaintiff's Opposition Memorandum at 11.) Kenneth Sales, another inmate who was present during the incident, asserted that he saw Officer Stone "slam the door into the back of Asselin hitting his right side extremely hard," while Mr. Asselin had his back turned to Officer Stone. (Affidavit of Kenneth Sales at 1-2, ECF No. 79-2.)

⁷ In a grievance form filed at the time Plaintiff wrote, "Stone hit me pretty hard with the edge of the door." (ECF No. 76-1, PageID # 463.)

Defendants maintain that Officers Stone and Chick spoke to Plaintiff about a scheduled visitation and informed him that he would have to wear the suicide smock if he wanted to see his visitor. Plaintiff refused to go to his visit and began screaming at Officer Chick and other officers. The officers ordered Plaintiff several times to back away from the door and to stop screaming at the officers. They also warned Plaintiff that if he continued to stand at the door and scream at the officers, he would be placed on lockdown for 24 hours. Plaintiff continued his conduct and the officers informed him that he was going to be locked down for 24 hours. When Officer Stone escorted Plaintiff to his cell for lockdown, Plaintiff pushed his cell door at Stone in what Stone believed was an effort to slam the door on him. (Defendants' Statement ¶¶ 144-153.)

August 2013

On August 13 or August 14, Plaintiff asserted that he wanted to move back to the maximum security unit. As part of his effort to return to maximum security, he threatened to bang on his cell door, cover his cell door window with paper, and break his cell door window. (*Id.* ¶ 66.) Plaintiff was reclassified to maximum security. (*Id.* ¶ 67.) On August 14, in an attempt to force a transfer to Maine State Prison or another jail, Plaintiff clogged his toilet with his mattress and flooded his cell and day space. (*Id.* ¶ 68.)

Jeff Chute, Lane Feldman, and Plaintiff's housing classifications

Plaintiff contends that Lt. Chute and Sgt. Feldman denied him due process in connection with Plaintiff's classification and assignment. Plaintiff alleges that Sgt. Feldman (as the ACJ's classification specialist), is responsible for all classification and housing decisions and "was also responsible for conducting disciplinary boards on the plaintiff for the write-ups." (Plaintiff's Opposition at 16.) Plaintiff also asserts that Lt. Feldman was responsible for reviewing and approving Sgt. Feldman's classification decisions, housing assignments, and disciplinary boards.

(*Id.* at 17.) Plaintiff’s claim is based on the assertion that he was placed repeatedly in “administrative segregation” within the ACJ’s special management unit and was twice⁸ sent to the “supermax” unit at the Maine State Prison without first receiving write-ups and without ever appearing in front of a disciplinary board. (*Id.*) Plaintiff complains that he spent approximately 110 days in administrative segregation and only received a disciplinary board proceeding for the July 4 incident, which proceeding resulted in a \$20 fine to pay for a broken trash can. (*Id.* at 19.)

Plaintiff’s original housing assignment was based on the completion of a form used by the ACJ to determine the appropriate assignment. (Defendants’ Statement ¶ 186.) Reclassification to higher security occurred when Plaintiff failed to conform to jail rules or for safety reasons; reclassification to lower security occurred when Plaintiff complied with jail regulations and exhibited good behavior.

From March 21, 2013, to May 7, 2013, Plaintiff was generally housed in the special management unit or in high maximum security due to his failure to comply with jail rules, his aggressive or violent behavior, and his history of aggressive or violent behavior at the ACJ. (*Id.* ¶ 188.) Maximum security and high maximum security allow inmates less time out of their cells for recreation (up to an hour per day) and less time out of their cells for other activities such as showers and phone calls (again, up to an hour per day). (*Id.* ¶ 189.) Inmates in maximum security and high maximum security also do not have television time. (*Id.* ¶ 190.) The special management unit

⁸ The second transfer to the Maine State Prison, according to Plaintiff, occurred between August 23 and November 6, 2013. (Plaintiff’s Opposition at 19.) In an inmate request form dated July 10, 2013, Plaintiff advised Lt. Chute that he was looking forward to a transfer to the MSP:

Can you please not send me to the supermax please. I will be so good if you don’t. I’m almost in tears tonight writing this. NOT! Go [expletive deleted] yourself and have me there by ten a m. you [expletive deleted]. Can’t wait to get there! Way better than this place. Your doing me a favor.
Thanks.

(Defendants’ Statement ¶ 103.)

differs from maximum security principally in the type of cell used – the cells have trap doors that minimize the inmate’s contact with Jail staff. (*Id.* ¶ 191.)

According to the ACJ’s records, Plaintiff was not placed in administrative segregation from March 21, 2013, to July 17, 2013. (*Id.* ¶ 192.) Plaintiff disputes the assertion that he never was placed on administrative segregation. Plaintiff maintains that special management is administrative segregation. (Plaintiff’s Opposition at 17.)

Plaintiff was transferred to the Maine State Prison on May 7, 2013, as the result of problems that he was causing at the Jail. (Defendants’ Statement ¶ 99.) Lt. Chute coordinated Plaintiff’s return to the Jail on May 28, 2013, to coincide with transportation of another inmate. (*Id.* ¶ 100.) Plaintiff complains that although he was cleared to return from the Maine State Prison on May 22, 2013, he was not transported by the ACJ for another six days. (Plaintiff’s Opposition at 18.)

DISCUSSION

A. Summary Judgment Standard

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “After the moving party has presented evidence in support of its motion for summary judgment, ‘the burden shifts to the nonmoving party, with respect to each issue on which he has the burden of proof, to demonstrate that a trier of fact reasonably could find in his favor.’” *Woodward v. Emulex Corp.*, 714 F.3d 632, 637 (1st Cir. 2013) (quoting *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir.1998)).

The Court reviews the factual record in the light most favorable to the non-moving party, resolving evidentiary conflicts and drawing reasonable inferences in the non-movant’s favor.

Hannon v. Beard, 645 F.3d 45, 47-48 (1st Cir. 2011). If the Court’s review of the record reveals evidence sufficient to support findings in favor of the non-moving party on one or more of his claims, a trial-worthy controversy exists, and summary judgment must be denied to the extent of the supported claims. Unsupported claims are properly dismissed. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (“One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses.”).

B. Voluntary Dismissal

In his response to the motion for summary judgment, Plaintiff states that he “dismisses” multiple claims against multiple defendants (Clevenger, Fecteau, Lebel, Levesque, Littlefield, and McCarthy) “without prejudice.” (Plaintiff’s Opposition at 2.) At this stage of the proceedings, Plaintiff cannot simply unilaterally dismiss his claims without prejudice. Fed. R. Civ. P. 41(a)(1). Instead, dismissal must be “by court order, on terms that the court considers proper.” Fed. R. Civ. P. 41(a)(2). Defendants have moved for summary judgment based on their lack of personal involvement in the alleged conduct. Because Plaintiff has failed to controvert any of Defendants’ factual assertions, or otherwise suggest a legitimate basis for the claims to proceed, dismissal of the claims with prejudice is appropriate.

C. Excessive Force (Defendants Chick and Stone)

Plaintiff was at all times a pretrial detainee. Although the standard by which courts must evaluate an allegation of excessive force involving a pretrial detainee is somewhat unsettled, the Fourteenth Amendment due process analysis is a sound approach. In *Graham v. Connor*, 490 U.S. 386, 394 n.10 (1989), the Supreme Court noted that “the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.” The Court also determined that an “objective reasonableness” standard governed the assessment of an officer’s conduct. *Id.*

at 388. Subsequently, in the context of a pretrial detainee's claim related to certain jail conditions, the First Circuit wrote, "[p]rior to an adjudication of guilt ... a state government may not punish a pretrial detainee without contravening the Fourteenth Amendment's Due Process Clause. The government may, however, impose administrative restrictions and conditions upon a pretrial detainee that effectuate his detention, and that maintain security and order in the detention facility. When confronted with a charge by a pretrial detainee alleging punishment without due process, the 'court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate purpose.'" *O'Connor v. Huard*, 117 F.3d 12, 16 (1st Cir. 1997) (quoting *Bell v. Wolfish*, 441 U.S. 520, 538 (1979)). Consistent with the analysis and observations of the Supreme Court and the First Circuit, the appropriate analysis, employing the standard of objective reasonableness, is whether a corrections officer intentionally used excessive force for the purpose of punishment. Within that analysis, one must also be mindful that "a *de minimis* quantum of force is not actionable under the Due Process Clause." *Jackson v. Buckman*, 756 F.3d 1060, 1067-68 (citing *Bell v. Wolfish*, 441 U.S. at 539 n. 21 ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned.")) (quoting *Ingraham v. Wright*, 430 U.S. 651, 674 (1977)).

As part of its evaluation, a court must also determine whether Defendants are entitled to qualified immunity. "Government officials are entitled to qualified immunity from civil damages so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity arises when (1) the plaintiff has not demonstrated a violation of a constitutional right, or (2) the court concludes that the right at issue was not clearly established at the time of the official's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). As

to the status of the right at the time, the inquiry has two aspects. “The first focuses on the clarity of the law at the time of the violation. The other aspect focuses more concretely on the facts of the particular case and whether a reasonable defendant would have understood that his conduct violated the plaintiff’s constitutional rights.” *Drumgold v. Callahan*, 707 F.3d 28, 42 (1st Cir. 2013) (citation omitted). “The ‘salient question’ is whether the state of the law at the time of the violation gave the defendant fair warning that his particular conduct was unconstitutional.” *Id.* (quoting *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009)).

In this case, regardless of whether a claim arises under the Fourth or Fourteenth Amendment, the constitutional prohibition against the use of excessive force has long been clearly established. *See, e.g., Morelli v. Webster*, 552 F.3d 12, 23-24 (1st Cir. 2009). Therefore, “the inquiry focuses on an evaluation of the defendants’ conduct ‘in light of the particular circumstances known at the time the challenged conduct took place.’” *Cookish v. Powell*, 945 F.2d 441, 443 (1st Cir. 1991) (quoting *Brennan v. Hendrigan*, 888 F.2d 189, 192 (1st Cir. 1989)). In this context, courts “must take care ‘to avoid the chilling effect of second-guessing where the officer, acting in the heat of events, made a defensible (albeit imperfect) judgment.’” *Raiche v. Pietroski*, 623 F.3d 30, 36 (1st Cir. 2010) (quoting *Statchen v. Palmer*, 623 F.3d 15, 18 (1st Cir. 2010)).

Officer Chick

Plaintiff contends that on April 21, 2013, Officer Chick used excessive force when, after Plaintiff extended his arm through the tray slot on his cell door, Officer Chick grabbed Plaintiff’s hand and pushed Plaintiff’s arm back into the cell. Preliminarily, the record contains no facts upon which a fact finder could rationally conclude that Officer Chick was attempting to punish Plaintiff in violation of his constitutional rights. In addition, because the “facts” upon which Plaintiff relies

were not presented in accordance with Local Rule 56, Plaintiff has failed to controvert Defendants' account of the incident. The record evidence, therefore, establishes that Officer Chick simply pushed back Plaintiff's hand through the tray slot in the door. Without more, Officer Chick's conduct constitutes a *de minimis* application of force that is not actionable.

Assuming, *arguendo*, that the conduct was not *de minimus*, Officer Chick is entitled to qualified immunity. An objectively reasonable officer under the same circumstances (*i.e.*, an inmate deliberately attempting to spill liquid outside his cell) would not have known that to push Plaintiff's hand back into the cell would constitute a constitutional violation. Under the circumstances, therefore, as a matter of law, Officer Chick is shielded from liability by the doctrine of qualified immunity.

Officer Stone

Plaintiff's claim against Officer Stone is based on the July 4, 2013, incident during which Officer Stone allegedly made contact with Plaintiff when he closed the cell door while implementing a lock down of Plaintiff. Once again, the record does not and would not support a finding that Officer Stone's conduct was unconstitutionally punitive. Given the affidavit testimony of Kenneth Sales (Officer Stone "slam[med] the door into the back of Asselin hitting his right side extremely hard"), however, the record contains a factual dispute as to the degree of force used. For purposes of summary judgment, therefore, the issue is whether Officer Stone is entitled to qualified immunity even assuming that Officer Stone used the degree of force described by Mr. Sales.

On July 4, 2013, Officer Stone was in the process of "locking down" an inmate (Plaintiff) who during his confinement had regularly engaged in disruptive and threatening behavior. Plaintiff's conduct on July 4 was once again disruptive and threatening. In an apparent attempt to

reduce the likelihood that the conduct would escalate and to deter future similar conduct, Officer Stone attempted to place Plaintiff in a lockdown in his cell. When Plaintiff refused to move away from the door after being warned to do so, Officer Stone used force to close the door. To the extent that Plaintiff was hit by the door, he was hit because he refused to move as instructed. His failure to move demonstrates the need to close the door to prevent an escalation of the situation. A corrections officer, confronted with the same situation, would not have known that closing the door would constitute a violation of Plaintiff's constitutional rights. Under the circumstances, therefore, as a matter of law, Officer Stone cannot be liable as he has qualified immunity for his actions.

D. Procedural Due Process (Defendants Feldman and Chute)

In no event may state prison authorities punish a pretrial detainee based on the unproven criminal charges for which he is detained. Punishment imposed for that purpose, if established, is unconstitutional. *Collazo–Leon v. U.S. Bureau of Prisons*, 51 F.3d 315, 318 (1st Cir. 1995). Additionally, arbitrary or disproportionately severe sanctions that would not serve a proper institutional objective are likewise proscribed. *Surprenant v. Rivas*, 424 F.3d 5, 13 (1st Cir. 2005). In this case, Plaintiff has not argued nor demonstrated facts that would suggest that Defendants intended to punish him for the underlying criminal charges or that they subjected him to arbitrary or disproportionately severe sanctions given his misconduct. Rather, Plaintiff contends that he was placed in “administrative segregation” without appearing before a disciplinary board (*i.e.*, without a hearing).

As a pretrial detainee, as a general rule, Plaintiff is entitled to some pre-deprivation process before he can be subjected to punitive action or conditions. *Wolfish*, 441 U.S. at 535; *Surprenant*, 424 F.3d at 13. In other words, although it is appropriate for Defendants “within appropriate limits,

to sanction [Plaintiff] for infractions of reasonable prison regulations,” *Collazo–Leon*, 51 F.3d at 318, Defendants were required to provide notice and an opportunity to be heard before subjecting Plaintiff to a sanction that imposed punitive conditions of confinement. *See Goguen v. Gilblair*, No. 2:12-CV-00048-JAW, 2013 WL 5407225, at *21 (D. Me. Sept. 25, 2013) (Kravchuk, Mag. J., recommended decision, affirmed over objection, Woodcock, C.J.) (citing, *inter alia*, *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974)). *See also Johnston v. Maha*, 606 F.3d 39, 41 (2d Cir. 2010) (“This Circuit has found that procedural due process requires that pretrial detainees can only be subjected to segregation or other heightened restraints if a pre-deprivation hearing is held to determine whether any rule has been violated.”); *Best v. New York City Dep’t of Correction*, No. 12-CV-7028, 2014 WL 1612984, at *4-5 (S.D.N.Y. Mar. 31, 2014).

Plaintiff asserts that he had a constitutional right, as a pretrial detainee, to receive a hearing by the ACJ’s disciplinary board before any change in his housing classification that imposed greater restrictions on his liberty than were imposed upon his entry to the ACJ. He alleges that he was transferred to the Maine State Prison’s “supermax” unit on two occasions without first receiving a hearing, and that while at the ACJ, he was classified as special management and/or maximum security classification (what amounted to segregation) without first receiving a hearing. (Plaintiff’s Opposition at 16-20.)

The record establishes that Plaintiff’s liberty to exit his cell was limited to no more than one hour per day while he was subject to the challenged classifications/assignments.⁹

⁹ Whether conditions of confinement amount to punishment for due process purposes is determined based on certain traditional “guideposts”:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry[.]

Additionally, the record reflects that Plaintiff was subjected to these conditions for a lengthy period of his detention.¹⁰ Given the significant change in Plaintiff's conditions of confinement, Plaintiff has raised an issue as to whether Defendants restricted Plaintiff's liberty interest without the necessary due process.

“Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.” *Wolff*, 418 U.S. at 556. “[O]ne cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.” *Id.* at 560. “The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961). In *Wolff*, the Supreme Court held that adequate pre-deprivation procedures include notice, in writing, of the charge, the evidence relied on to support the charge, and the reasons for the disciplinary action taken together with “a brief period of time after the notice, no less than 24 hours, [for] the inmate to prepare for the appearance” before the state-specified decision maker. 418 U.S. at 563-64. “[A]s to the disciplinary action itself, the provision for a written record helps to insure that administrators,

Wolffish, 441 U.S. at 537-38 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). From the summary judgment record, a reasonable inference may be drawn that enhanced housing classifications were designed to punish Plaintiff for misconduct and deter future misconduct, and that the duration of these classifications exceeded any need for administrative segregation pending the provision of due process procedures. Protracted confinement in segregation, with no more than one hour outside of a cell, is unlike the conditions reviewed in *Bell*, where the Supreme Court found that universally applicable restrictions on the receipt of books and other packages from outside the facility, post-contact-visit strip searches, and unannounced cell searches were rational restrictions related to legitimate institutional concerns and did not amount to punishment under the Due Process Clause. *Id.* at 560-62.

¹⁰ Because Plaintiff claims Defendants did not afford him the required procedural due process, this recommended decision focuses on the process by which Defendants disciplined Plaintiff, and does not specifically address whether jail officials were justified in their reclassification or disciplinary decisions.

faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly.” *Id.* at 565.¹¹

Here, although the record contains a number of disciplinary reports by corrections officers describing Plaintiff’s misconduct and some of the discipline imposed, the record lacks evidence (1) of notice to Plaintiff of all of the disciplinary action by which Plaintiff’s liberty was significantly restricted, (2) of an opportunity for Plaintiff to be heard before all of the disciplinary action was formalized, or (3) of a written decision in each instance by the ultimate decision maker (either Sergeant Feldman, acting as classification specialist, or Lieutenant Chute acting as Assistant Jail Administrator) as to the process followed and the bases of each decision. In addition, Plaintiff maintains that he did not have the opportunity to appear before a disciplinary board before the imposition of some of the more significant discipline (*e.g.*, transfer to the supermax facility), and that he otherwise did not receive due process before changes were made in his classification. (Deposition of Shawn Asselin at 99-107, ECF No. 67-1.) On this record, therefore, a factual issue exists as to Defendants’ compliance with the due process requirements articulated in *Wolff*.

Following *Wolff*, the Supreme Court acknowledged that in the context of prison discipline, immediate action is often necessary. In *Hewitt v. Helms*, the Supreme Court held that “an informal, nonadversary evidentiary review is sufficient both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him.” 459 U.S. 460, 476 (1983).

¹¹ The Court further stated it was “also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.” *Wolff*, 418 U.S. at 566. The procedures outlined in *Wolff v. McDonnell* were deemed by the Supreme Court sufficiently streamlined to avoid “scuttl[ing] the disciplinary process as a rehabilitative vehicle.” *Id.* at 568. “Within the limits set forth in [*Wolff* the Supreme Court was] content . . . to leave the continuing development of measures to review adverse actions affecting inmates to the sound discretion of corrections officials administering the scope of such inquiries.” *Id.*

In this context, “[a]n inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation.” *Id.* The *Hewitt* Court held, in other words, that administrative segregation is an appropriate tool for prison authorities to use pending the completion of an investigation prior to providing the more specific procedures outlined in *Wolff*.

One cannot definitively discern from this record whether Defendants implemented administrative segregation before affording the appropriate due process. In fact, a review of the record only generates questions as to the process that Defendants provided. Although Defendants assert that they did not place Plaintiff in administrative segregation between March 21, 2013, and July 17, 2013, the disciplinary records reflect that he was on occasion placed in “holding” to alleviate an immediate concern. Defendants, therefore, conceivably could have satisfied the process authorized by the Supreme Court in *Hewitt* (*i.e.*, administrative segregation followed by some additional, perhaps even informal, process).¹² The process that Defendants followed after Plaintiff was placed in “holding,” however, is not entirely clear on this record. In short, the record contains a material factual dispute as to whether Defendants placed Plaintiff in administrative segregation and otherwise provided Plaintiff with the appropriate process before they restricted Plaintiff’s liberty through a reclassification.

Defendants nevertheless argue that they are entitled to qualified immunity. (Motion for Summary Judgment at 13-14.) More specifically, they contend that “the lockdowns and housing assignments imposed by officers in response to Mr. Asselin’s conduct (often times conduct intentionally designed to provoke action by Jail officers) would not strike any reasonable officer

¹² The Supreme Court wrote that under the circumstances presented in *Hewitt*, the jail was “obligated to engage only in an informal, nonadversary review of the information supporting [the detainee’s] administrative confinement, including whatever statement [detainee] wished to submit, within a reasonable time after confining him to administrative segregation.” 459 U.S. at 472.

as a violation of Mr. Asselin’s . . . Fourteenth Amendment rights.” (*Id.* at 15.) They maintain that a “reasonable officer could certainly believe that minor discipline or a maximum security housing assignment implemented to preserve the safety and security of the Jail—particularly in response to Mr. Asselin’s repeated transgressions—did not violate his clearly established rights.” (*Id.* at 16.)

As explained above, government officials are entitled to qualified immunity from civil damages so long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), with the focus on whether the law gave the defendant fair warning that his particular conduct was unconstitutional. *Drumgold*, 707 F.3d at 42.

The inquiry is whether Defendants had fair warning of the applicable due process requirements. Simply stated, the process outlined by the Supreme Court in *Wolff*, in 1974, and *Hewitt*, in 1983, was well known. Indeed, the process is consistent with basic principles of due process. In the event that Defendants did not afford Plaintiff with the required pre-deprivation process on at least some of his reclassifications or transfers, one cannot conclude as a matter of law that a reasonable official under the same circumstances would have acted similarly.¹³ On this record, therefore, Defendants are not entitled to summary judgment based on qualified immunity.

CONCLUSION

Based on the foregoing analysis, the recommendation is that the Court grant in part and deny in part Defendants’ Motion for Summary Judgment. In particular, the recommendation is

¹³ As the Supreme Court recognized in *Hewitt*, corrections officials often must take immediate action to address disruptive conduct. The uncontroverted record establishes that at least in some instances, Defendants were justified in taking prompt action. However, the need for immediate action does not relieve Defendants of their obligation to provide Plaintiff with due process. *Hewitt*, in fact, outlines the process (*i.e.*, administrative segregation before further process provided) that is appropriate in emergent circumstances. One issue in dispute is whether Defendants provided the process permitted by *Hewitt*.

that the Court (1) dismiss with prejudice Plaintiff's Complaint against, or enter judgment in favor of, Defendants Clevenger, Fecteau, Lebel, Levesque, Littlefield, and McCarthy; (2) dismiss with prejudice, or enter judgment in favor of Defendants on, Plaintiff's First Amendment retaliation claim; (3) enter judgment in favor of Defendants Chick and Stone on Plaintiff's excessive force claims; and (4) deny Defendants' motion on Plaintiff's procedural due process claims against Defendants Feldman and Chute.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within fourteen (14) days of being served with a copy thereof. A responsive memorandum shall be filed within fourteen (14) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ John C. Nivison
U.S. Magistrate Judge

Dated this 19th day of November, 2014.

ASSELIN v. CHICK et al
Assigned to: JUDGE D. BROCK HORNBY
Referred to: MAGISTRATE JUDGE JOHN C.
NIVISON
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 06/12/2013
Jury Demand: Both
Nature of Suit: 550 Prisoner: Civil
Rights
Jurisdiction: Federal Question

Plaintiff

SHAWN ASSELIN

represented by **SHAWN ASSELIN**
MDOC NO. 20104
MAINE CORRECTIONAL
CENTER
17 MALLISON FALLS ROAD
WINDHAM, ME 04062
PRO SE

V.

Defendant

TRAVYS FECTEAU

represented by **JOHN J. WALL , III**
MONAGHAN LEAHY, LLP
P. O. BOX 7046 DTS
PORTLAND, ME 04112-7046
774-3906
Email: jwall@monaghanleahy.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

JEFF CHUTE

represented by **JOHN J. WALL , III**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

JOHN LEBEL

*Individually and in his official
capacity as Captain for the
Androscoggin County Jail*

represented by **JOHN J. WALL , III**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

JOSIAH CHICK

represented by **JOHN J. WALL , III**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

NICHOLAS STONE

represented by **JOHN J. WALL , III**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

JOSEPH MCCARTHY

represented by **JOHN J. WALL , III**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

DANIEL LEVESQUE

represented by **JOHN J. WALL , III**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

LANE FELDMAN

represented by **JOHN J. WALL , III**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

REGINALD LITTLEFIELD

represented by **JOHN J. WALL , III**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

JOHN CLEVINGER

represented by **JOHN J. WALL , III**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED