

No. 16-

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In the Supreme Court of the United States

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RONALD COUTTS,  
*Petitioner*

v.

JOSEPH WATSON,  
*Respondent*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

When a prisoner claims that he was charged with misconduct in retaliation for activity protected by the First Amendment, may he prevail on his claim when he was found guilty of the misconduct in a constitutionally adequate proceeding?

## PARTIES TO THE PROCEEDING

Petitioner is Ronald Coutts.<sup>1</sup>

Respondent is Joseph Watson.

Other respondents are Gerald L. Rozum, Daniel Gehlmann, Joseph Dupont, Leo Glass, Melissa Hainsworth, Captain Simosko, and Captain Snyder. They were aligned with petitioner in the courts below and, pursuant to this Court's Rule 12.6, petitioner has notified the Clerk of his belief that they have no interest in the outcome of this petition.

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<sup>1</sup> In the record below, petitioner is identified only as "Security Officer Coutts," but in fact his first name is Ronald.

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## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 834 F. 3d 417 and is appended to this petition at 3a. The memorandum order of the District Court, and the report and recommendation that the District Court adopted, are not reported and are appended at 39a and 42a respectively.

## STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 23, 2016. Petitioner filed a timely petition for rehearing that was denied on December 2, 2016, *see* Pet. App. 1a; and this petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. §1254.

## CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides in relevant part that “Congress shall make no law ... abridging the freedom of speech ... or the right of the people ... to petition the government for a redress of grievances.”

## STATEMENT OF THE CASE

Petitioner Ronald Coutts is a corrections officer who works at the State Correctional Institution at Somerset, Pennsylvania (SCI-Somerset). Respondent Joseph Watson, a prisoner at SCI-Somerset, sued petitioner and others, alleging, *inter alia*, that petitioner had issued a prison misconduct charge against him in retaliation for speech protected by the First Amendment. The District Court granted

summary judgment to petitioner on the ground that, after a hearing, respondent had been found guilty, and actually was guilty, of the misconduct in question. Petitioner had therefore established that, even absent respondent's protected activity, petitioner would have taken the same action for legitimate penological purposes. The Court of Appeals, however, reversed. The Third Circuit, rejecting the views of several other circuits, held that a conviction on the misconduct charge, even if supported by a constitutionally adequate quantum of evidence, did not foreclose respondent's retaliation claim.

1. The events that led to this action began on the morning of December 6, 2011 when, during a routine cell search, Corrections Officer Kline, (who is not a party) examined respondent's radio. According to respondent, his radio's antenna was loose and he had secured it with tape; and when Kline examined the radio, he broke the antenna.<sup>2</sup> Pet. App. 5a. A radio that is altered from its original state or broken is considered contraband under the Department of Corrections' rules, Pet. App. 5a n. 1; and Kline accordingly confiscated it. Pet. App. 5a. Respondent accompanied Kline to the officers' desk on the cellblock, where he accused Kline of breaking his radio. He asked that Kline fill out an incident report and, when Kline refused, asked for a grievance form. The captain on duty, however, refused to give him one. Pet. App. 5a-6a.

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<sup>2</sup> Kline, on the other hand, testified that the antenna was already broken, and fastened with tape, when he examined it. Pet. App. 5a. Here as elsewhere, we recount the facts in the light most favorable to Watson.

Later that day, respondent was summoned to the prison security office where he met with petitioner. According to respondent, petitioner told him that he would be charged with misconduct because he had been giving Kline and the other officers “a hard time, wanting a Grievance and an Incident Report filled out...”<sup>3</sup> Pet. App. 6a, 34a-35a n. 2. Petitioner did in fact charge respondent with a Class I misconduct for “destroying, altering, tampering with property,” i.e., for altering the antenna on his radio. Pet. App. 6a, 44a. Respondent received a hearing on the misconduct two days later. The hearing examiner, crediting Kline’s version of events, found him guilty but reduced the misconduct from a Class I to a Class II, and sanctioned respondent only with the confiscation of the radio. Pet. App. 7a, 45a.

Respondent produced three unsworn declarations from fellow prisoners who also possessed altered radios. In two of those cases, the prisoners were not charged with misconducts. In the third case, the prisoner was so charged and there was no suggestion that the action was retaliatory. Petitioner was not involved in any of those incidents. Pet. App. 36a-37a.

2. Respondent sued petitioner and seven others, asserting a variety of constitutional claims pursuant to 42 U.S.C. § 1983.<sup>4</sup> Among other things, he claimed that petitioner had violated his First Amendment rights by issuing a prison misconduct charge against him, in retaliation for announcing his intention to file

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<sup>3</sup> At that point, Watson had not actually filed a grievance, although he did so later, against Kline only. Pet. App. 6a.

<sup>4</sup> The District Court disposed of many of Watson’s claims at the motion to dismiss stage, *see* Pet. App. 7a, 43a; and Watson did not appeal those rulings.

a grievance against Kline. Petitioner moved for summary judgment on this claim, which the District Court granted.<sup>5</sup> *See* Pet. App. 38a-51a.

The District Court, adopting the report and recommendation of the magistrate judge to whom the motion had been referred, began his analysis by recapitulating the framework adopted by the Third Circuit for resolving prison retaliation claims, which the Third Circuit in turn had taken from *Mount Healthy Sch. Dist. v. Doyle*, 429 U.S. 274 (1977). Under that framework, the prisoner must establish 1) that he engaged in activity protected by the First Amendment; 2) that he suffered an “adverse action” from the defendant; and 3) that the protected conduct was a “substantial motivating factor” for the defendant’s action. At that point, 4) prison officials may still prevail by proving that they “would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest.” Pet. App. 47a, *citing Rauser v. Horn*, 241 F.3d 330, 333-334 (3d Cir. 2001) (internal quotation marks omitted).

The District Court, although doubtful that respondent had made out his prima facie case, found it unnecessary to resolve that issue because, in the District Court’s view, petitioner clearly prevailed at the fourth and final stage of the analysis: the “same decision” defense. In the District Court’s view, the fact that respondent was actually guilty of the misconduct sufficed to resolve this issue. “[Respondent] received the misconduct for possession of contraband because

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<sup>5</sup> Watson also asserted retaliation claims against four other defendants, and the District Court granted summary judgment to them as well. *See* Pet. App. 7a, 38a-41a.

he altered his radio's antenna ... and he readily admits that he did it. This very fact alone is dispositive of his [retaliation] claim.”<sup>6</sup> App. Pet. 40a. “[Petitioner] would have issued [respondent] the misconduct regardless of his insistent request for the grievance form ... simply because of the fact that the radio was indeed contraband.” Pet. App. 49a-50a. The District Court entered judgment accordingly.

3. A divided panel of the Court of Appeals reversed the grant of summary judgment to petitioner.<sup>7</sup> *See* Pet. App. 3a-19a. The court first held that respondent had established a prima facie case of retaliation against petitioner sufficient to fend off summary judgment, Pet. App. 10a-15a, and then turned to the “same decision” defense.

The Court of Appeals recognized that in *Carter v. McGrady*, 292 F.3d 152 (3d Cir. 2002), it had affirmed a grant of summary judgment for defendant prison officials in a similar case. Pet. App. 15a. In *Carter*, the prisoner had been convicted of a series of misconducts—possession of a stolen typewriter, unauthorized correspondence with other prisoners, excess property in his cell and authoring an unauthorized newsletter—which he claimed were issued in retaliation for his activity as a jailhouse lawyer. The Court of Appeals held that, even assuming that Carter had made out a prima facie

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<sup>6</sup> The District Court thought it immaterial whether the taped antenna on the radio was broken or merely loose, since in either case the radio was contraband. Pet. App. 40a.

<sup>7</sup> Watson also challenged the grant of summary judgment to the other defendants against whom he had asserted retaliation claims. The Court of Appeals affirmed as to all defendants except petitioner. *See* Pet. App. 19a.

case, the defendants were still entitled to summary judgment on the basis of the “same decision” defense, because it could not reasonably be disputed that he had in fact committed these offenses. *Id.*, 292 F.3d at 158-159. Emphasizing the “wide-ranging deference” that must be accorded to prison officials in matters of institutional discipline, *id.*, at 158, the court held that “Carter’s offenses ... were so clear and overt that we cannot say that the disciplinary action taken ... was retaliatory.” *Id.*, at 159. The Court of Appeals characterized *Carter* as recognizing that “most prisoners’ retaliation claims will fail if the misconduct charges are supported by the evidence.” Pet. App. 15a.

Nevertheless, the Court of Appeals distinguished the holding in *Carter* from the view, which it attributed to the Second, Eighth and Eleventh Circuits, that a retaliation claim fails if there is “some evidence” that the prisoner actually committed the misconduct with which he was charged. Pet. App. 16a & n. 24 (collecting cases). The Court of Appeals did not explain how this standard differed from that adopted in *Carter*.

Returning to this case, the Court of Appeals said that respondent’s situation was “different” from *Carter* because his offense—possession of a contraband radio—was not “clear and overt.” In reaching this conclusion, the Court of Appeals did not mention that respondent had been found guilty, and indisputably was guilty, of the misconduct with which he had been charged. To the contrary, “a plaintiff can make out a retaliation claim even though the charge against him may have been factually supported.” Pet. App. 18a. Rather, the Court of Appeals noted that respondent’s radio had allegedly been in its broken condition for a year, that two other prisoners with similar radios had not been disciplined and that

Officer Kline, while he had confiscated respondent's radio, had not issued him a misconduct. Pet. App. 18a.

Judge Ambro joined the majority opinion but wrote separately to expand on his understanding of the "same decision" defense and the correct application of *Carter*. Pet. App. 20a-29a. He too rejected the approach of other circuits: that a retaliation claim fails if the prisoner actually committed the misconduct. Pet. App. 21a-26a. In Judge Ambro's view of the *Carter* standard, whether a prisoner's misconduct is "clear and overt" depends not on whether the evidence shows that he actually committed it, but on the seriousness of the misconduct itself. Respondent's misconduct—which Judge Ambro thought an "ethereal" and "relatively minor" offense, Pet. App. 27a, 29a—did not qualify. Judge Ambro went on to say that even the commission of a "serious violation[]" would not necessarily preclude a retaliation claim, but would merely create a "strong presumption" that the charging official had acted for a proper motive. Pet. App. 28a-29a.

Judge Hardiman dissented. In his view, respondent had failed to establish that retaliation was the "but-for" cause of his misconduct citation; at most, he had shown that petitioner acted with a mixed motive. Pet. App. 29a-30a, 33a-34a. Judge Hardiman also disagreed that respondent's misconduct was not "clear and overt" within the meaning of *Carter*. "[T]here is no factual dispute that ... the radio was contraband, and respondent's possession of it was unquestionably a violation." Pet. App. 36a. Noting that "it is not difficult to see why a detached antenna poses a security risk in a prison," he pointed out that "[respondent] has not challenged the regulation's validity and its application to his radio is neither irrational nor fails to serve a legitimate penological

interest.” *Ibid.* Finally, Judge Hardiman disagreed with the majority’s suggestion that petitioner had engaged in discriminatory enforcement: there was no evidence that petitioner had known of, but ignored, the condition of the radio until respondent requested the grievance form; and he was involved in neither of the two incidents in which prisoners claimed that they had been allowed to retain broken radios. This evidence thus threw no light on petitioner’s own motives for issuing the misconduct. Pet. App. 36a-37a.

4. Petitioner timely petitioned for rehearing or rehearing en banc, which the Court of Appeals denied.

## REASONS FOR GRANTING THE WRIT

### I. The Third Circuit’s Decision Deepens a Split Among the Circuits.

As the Court of Appeals acknowledged, the circuits are deeply divided on the proper approach to prisoner retaliation claims where the retaliatory act is the issuance of a prison misconduct charge and the prisoner actually committed the misconduct. In the Eighth and Eleventh Circuits, such a claim is foreclosed if, in prison disciplinary proceedings, the prisoner was convicted of the misconduct and the conviction was supported by the constitutional minimum of “some evidence.”<sup>8</sup> *Henderson v. Baird*, 29 F.3d 454, 469 (8th Cir. 1994) (the finding of a prison disciplinary committee, “based on some evidence of

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<sup>8</sup> The “some evidence” standard is derived from *Superintendent v. Hill*, 472 U.S. 445, 454-456 (1985) (loss of good time credits for misconduct must be supported by “some evidence” of the misconduct). *See* Pet. App. 16a.

the violation ... checkmates [the] retaliation claim”); *O’Bryant v. Finch*, 637 F.3d 1207, 1215 (11th Cir. 2011) (“If a prisoner is found guilty of an actual disciplinary infraction after being afforded due process *and* there was evidence to support the disciplinary panel’s fact finding, the prisoner cannot later state a retaliation claim against the prison employee who reported the infraction”) (emphasis in original). In the Second Circuit, prison officials can prevail by showing that “there is no dispute that the plaintiff committed the most serious, if not all, of the prohibited conduct charged in the misbehavior report.” *Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002) (internal quotation marks and citations omitted). And, until its about-face in this case, the Third Circuit as well was in this camp. *See Carter v. McGrady, supra*.<sup>9</sup>

The Fifth, Seventh and Ninth Circuits, now joined by the Third, hold on the other hand that such evidence is not dispositive but merely probative. *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995) (declining to hold that a legitimate prison disciplinary report is an absolute bar to a retaliation claim); *Cain v. Lane*, 857 F.2d 1139, 1145 (7th Cir. 1988) (disciplinary committee’s finding, although supported by some evidence, did not bar retaliation claim); *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003) (same). *See also Thomas v. Eby*, 481 F.3d 434, 442 (6th Cir.

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<sup>9</sup> As Judge Ambro’s concurrence pointed out, both the district courts within the Third Circuit, and the Third Circuit itself, had consistently viewed *Carter* as adopting this approach. Pet. App. 21a. The panel’s attempt to distinguish *Carter* from these cases, and to reconcile its holding with the result in this case, is perfunctory and unconvincing.

2007) (acknowledging cases holding that “a proven infraction of prison rules” may bar a retaliation claim, but declining to apply the standard at the motion-to-dismiss stage).

There is no doubt that, had respondent’s claim arisen in the Second, Eighth or Eleventh Circuits, the outcome of this case would have been different. The Court should grant review to resolve this conflict, since the issue it embodies is both recurrent and important to prison administration.

## **II. The Issue Presented By This Case Recurs Frequently And Is Of Great Importance To Effective Prison Administration.**

Retaliation claims have become a staple of prison litigation. Prison officials control virtually every aspect of prisoners’ lives; and to support a retaliation claim, the effect of an action on a prisoner need only be “more than *de minimis*.” Pet. App. 11a, *citing McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006). Thus, “virtually any adverse action taken against a prisoner by a prison official ... can be characterized as a constitutionally proscribed retaliatory act. ... [T]he opportunities to characterize [such actions] as actionable retaliation are far greater than that for society at large.” *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir. 2001), *overruled on other grounds, Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). *Ibid.*

As a result, prisoners bring retaliation claims with great frequency. For example, a WestLaw search for the terms “prisoner” or “inmate” within the same paragraph as “retaliation” and its variants, turns up 2000 decisions in the district courts, plus another 150 in the courts of appeals, in 2016 alone.

Many of these claims challenge prison disciplinary actions. As the discussion in the preceding section illustrates, identifying the proper approach to dealing with such claims is a recurring issue that has provoked prolonged disagreement among the courts of appeals, and of course the reported appellate decisions are just the tip of the iceberg. The concurring judge in this case counted 80 district court decisions applying *Carter*, the (until now) leading decision on this issue in the Third Circuit. Pet. App. 21a. *Henderson*, one of the leading decisions in the Eighth Circuit, has been cited almost 400 times.

This issue is not only frequently recurring, it is important in its own right. Retaliation claims “pose a substantial risk of unwarranted intrusion into matters of general prison administration,” *Dawes*, 239 F.3d at 491; and prison disciplinary systems lie at the heart of prison administrators’ efforts to achieve the “essential goals” of institutional security and order. *Bell v. Wolfish*, 441 U.S. 520, 546 (1979). The Court should grant review to provide needed guidance on how far courts may go in second-guessing the outcomes of those systems.

### **III. A Conviction On A Disciplinary Charge, Supported By Some Evidence, Should Foreclose A Retaliation Claim Against The Charging Officer.**

The proper approach to retaliation claims of this kind was well stated by the Eleventh Circuit in *O’Bryant*: “If a prisoner is found guilty of an actual disciplinary infraction after being afforded due process *and* there was evidence to support the disciplinary panel’s fact finding, the prisoner cannot later state a retaliation claim against the prison

employee who reported the infraction.” *Id.*, 637 F.3d at 1215 (emphasis in original). This rule accords with the Court’s approach in closely related contexts, as well as with the Court’s frequent admonitions against undue judicial interference in prison administration.

First, as we mentioned above, the “some evidence” standard has its roots in *Superintendent v. Hill*, in which the Court held that a prison disciplinary process comports with procedural due process if the resulting findings are supported by “some evidence in the record.” *Id.*, 472 U.S. at 454. Judge Ambro in his concurrence thought that there was “very little justification” for using this standard in a retaliation case,<sup>10</sup> Pet. App. 24a, but this ignores *Hill’s* own emphasis on the context in which it arose: the “distinctive setting” of prison disciplinary proceedings. *Ibid.* The Court was acutely aware of the “legitimate institutional needs” of prison administrators, including “preserving the disciplinary process as a means of rehabilitation.” *Id.*, at 455. The Court crafted the “some evidence” standard to prevent arbitrary deprivations, without subjecting disciplinary decisions to “second-guessing upon review,” *ibid.*, or authorizing courts to “set aside decisions ... that have some basis in fact.” *Id.*, at 456.

Those same considerations are present with equal force in retaliation cases; and “second-guessing upon review” is no more appropriate in these cases than it is in procedural due process cases. Yet that is precisely the result of the Third Circuit’s approach. As the Eleventh Circuit put it, rejecting the “some evidence” standard “render[s] the prison disciplinary

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<sup>10</sup> The majority opinion did not discuss at all why it rejected the “some evidence” approach.

process impotent by inviting prisoners to petition the courts for a full retrial each time they are found guilty of an actual disciplinary infraction *after* having filed a grievance.” *O’Bryant*, 637 F.3d at 1216 (emphasis in original).

Second, this rule tracks that which the Court has adopted in the similar context of claims of retaliatory prosecutions. In *Hartman v. Moore*, 547 U.S. 250 (2006), the Court held that, in a retaliatory-prosecution action against an arresting or investigating officer, “a plaintiff ... must plead and show the absence of probable cause for pressing the underlying criminal charges.” *Id.*, at 257. Many of the considerations that led the Court to this result counsel in favor of adopting a similar rule here. When a prison misconduct charge goes to a hearing, there is apt to be, as with criminal charges, a “body of highly valuable circumstantial evidence ... to prove or disprove retaliatory causation, namely evidence showing whether there was or was not [some evidence] to bring the ... charge.” *Id.*, at 261. *See, e.g., Woods*, 60 F.3d at 1166 (evidence that prisoner actually committed the offense is “probative and potent”). In addition, just as the judgment of an independent prosecutor intervenes between the report of an arresting officer and the actual bringing of criminal charges, so the judgment of a neutral hearing examiner intervenes between the report of a charging prison official and the actual infliction of punishment. In *Hartman*, that gap—between the allegedly retaliatory official and the prosecutor who inflicted the harm—can be spanned by the absence of probable cause; in this case, it would be spanned by the absence of “some evidence” to support the misconduct charge.

Finally, this rule minimizes judicial interference in the internal administration of prisons. The Court has frequently reminded the courts to extend to prison administrators “wide-ranging deference in the adoption *and execution* of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Bell*, 441 U.S. at 547 (emphasis added). *Accord, e.g., Beard v. Banks*, 548 U.S. 521, 528 (2006) (“substantial deference to the judgment of prison administrators”); *Turner v. Safley*, 482 U.S. 78, 86 (1987) (“courts should ordinarily defer” to prison administrators’ judgments about prison security). Judge Ambro in his concurring opinion conceded that “it would produce chaos if prisoners could survive summary judgment on retaliation claims in response to every routine disciplinary action,” which in turn would be “inconsistent” with this Court’s instruction that, “in ‘the volatile prison environment, it is essential that ... officials be given broad discretion to prevent ... disorder.’” Pet. App. 29a, *quoting Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989). But the rule adopted by the Third Circuit in this case leaves open no viable route, short of trial, by which prison officials can rebut claims such as this one.

As this case illustrates, allegations of retaliation are easy to make: the evidence to support the inference of retaliation, as well as the evidence that respondent engaged in protected conduct in the first place, comes entirely from the unsupported word of respondent himself. The Third Circuit’s decision thus allows prisoners, virtually at will, to force prison officials to justify their disciplinary decisions at trial. That is not a rule of deference; it is its antithesis.

Allowing prisoners, virtually at will, to force prison officials to justify their disciplinary decisions at trial

**CONCLUSION**

The Court should grant the petition.

Respectfully submitted,

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March 2, 2017

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## APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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13-3510

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Joseph Watson,  
Appellant  
v.  
Gerald Rozum, et al.

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(D.C. No. 3-12-cv-00035)

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SUR PETITION FOR REHEARING

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Present: SMITH, Chief Judge, MCKEE, AMBRO,  
FISHER, CHAGARES, JORDAN, HARDIMAN,  
GREENAWAY, JR., VANASKIE, SHWARTZ and  
RESTREPO, Circuit Judges

The petition for rehearing filed by Petitioner in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular active service not having voted for

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rehearing, the petition for rehearing by the panel and by the Court en banc, is denied.

BY THE COURT,

s/ Theodore A. McKee  
Circuit Judge

Dated: December 2, 2016

UNITES STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 13-3519

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JOSEPH WATSON,

Appellant

v.

GERALD L. ROZUM, SUPERINTENDENT;  
DANIEL GEHLMANN, DEPUTY SUPT.; JOSEPH  
DUPONT, HEARING OFFICER AT SCI  
SOMERSET; LEO GLASS, MAJOR AT SCI  
SOMERSET; MELISSA HAINSWORTH, MAJOR  
AT SCI SOMERSET; SIMOSKO, SECURITY  
CAPTAIN AT SCI SOMERSET; SNYDER,  
SECURITY CAPTAIN AT SCI SOMERSET;  
COUTTS, SECURITY OFFICER AT SCI  
SOMERSET

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On Appeal from the United States District Court  
for the Western District of Pennsylvania  
(D.C. Civil Action No. 3-12-cv-00035)  
District Judge: Honorable Kim R. Gibson

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Argued October 8, 2015

Before: McKEE, Chief Judge, AMBRO, and  
HARDIMAN, Circuit Judges

(Opinion filed: August 23, 2016)

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Counsel for Appellant

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OPINION OF THE COURT

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McKee, Chief Judge

Joseph Watson, an inmate at the State Correctional Institution at Somerset, Pennsylvania, filed this action under 42 U.S.C. § 1983 alleging prison officials violated his First Amendment rights by improperly issuing a misconduct against him, and by retaliating against him for the exercise of his First Amendment rights.

The District Court dismissed Watson's suit against some of the officials with prejudice, and granted summary judgment in favor of the remaining officials on Watson's surviving retaliation claims. Watson then filed this appeal. For the following reasons, we will affirm in part, reverse in part, and remand for further proceedings on Watson's retaliation claim against Officer Coutts.

## I.

Watson's claims arise from the alleged mishandling and confiscation of his radio during a routine cell search conducted by Officer Kline at 8:30 A.M. on December 6, 2011. According to Watson, while inspecting Watson's radio, Kline pulled the antenna out so far that it broke off. Kline claims a portion of the antenna was already broken and had been secured with tape. Watson asserted that the antenna was merely loose and not broken, but agreed that it was secured with tape when Kline examined it. Watson accused Kline of breaking the radio and insisted that Kline have it repaired. According to Watson, he consented when Kline explained that a broken radio is considered contraband that had to be confiscated.<sup>1</sup> Watson accompanied Kline to the officer's desk on the cellblock to fill out the paperwork required when an inmate's property is confiscated.

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<sup>1</sup> Department of Corrections Policy, DC-ADM 815, Section 3.C.1. A broken radio, altered from its original state, is considered contraband pursuant to DOC rules and regulations.

In completing that paperwork, Kline noted that the antenna was already broken when he found it. Watson claimed Kline actually broke the radio and was not pleased that Kline did not take responsibility. Watson asked Kline to prepare an incident report documenting that Kline broke the antenna. Kline refused. Watson then asked Captain Simosko for a grievance form, but Simosko refused to give him one.

Later that day Watson was summoned to the prison security office where Officer Coutts purportedly asked Watson about the broken radio. During this exchange, Coutts purportedly stated that Watson had given Simosko and Kline a "hard time" by asking for a grievance form and insisting that the radio be repaired rather than just dropping the matter. Coutts allegedly told Watson that, as a result, he was going to give Watson a misconduct. According to Watson, Coutts said that he (Watson) had not handled the situation "the polite way" because he had insisted on filing a grievance.

Watson did eventually fill out a grievance form that he obtained from another prisoner. However, before Watson could file his grievance, he was summoned to pick up a misconduct notice that had been prepared by Coutts and approved and signed by Security Captain Snyder. The misconduct notice cited Watson with a Class I misconduct and stated that the radio had been confiscated as contraband. The misconduct form indicated that it was received at 2:23 P.M., nearly six hours after the search of Watson's cell. After receiving the misconduct, Watson filed his grievance against Kline. Watson did not file a grievance against anyone else who

had been involved with the confiscation of his radio or the misconduct that was filed against him.

Watson was ultimately found guilty of the charged misconduct at a hearing conducted by Hearing Officer Dupont. However, Dupont reduced the level of the misconduct from Class I to Class II. The penalty that was imposed was confiscation of Watson's radio. Watson's appeal of the imposition of a Class II misconduct was denied by the Department of Corrections' Program Review Committee. The Committee concluded that Dupont's decision was supported by the evidence at the hearing. Watson appealed that decision to the prison superintendent who sustained the prior decisions.

Thereafter, Watson filed the present lawsuit. The defendants were Gerald Rozum, Daniel Gehlman, Leo Glass, Melissa Hainsworth, Coutts, Dupont, Snyder, and Simosko. The District Court dismissed all of Watson's claims with prejudice, with the exception of Watson's retaliation claims against Dupont, Simosko, Snyder and Coutts.

Thereafter, the District Court adopted the Magistrate Judge's recommendations and granted summary judgment in favor of each of the remaining defendants and against Watson. The District Court agreed that summary judgment was appropriate even if the record established that Watson had made out a *prima facie* case of retaliation, because prison officials would have issued the misconduct regardless of Watson's protected activity (the "same decision" defense). This appeal followed.

## II.

We exercise plenary review over a District Court's grant of summary judgment.<sup>2</sup> Summary judgment is appropriate if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law.<sup>3</sup> The judge's function at the summary judgment stage is solely to determine whether there is a genuine issue of material fact for trial.<sup>4</sup>

Watson alleged due process violations, an unconstitutional search and seizure under the Fourth Amendment and Fifth Amendment, prison policy violations, state law violations and retaliation for engaging in conduct protected by the First Amendment. As noted, all of Watson's initial claims were dismissed with prejudice, except for his claim for relief based on the alleged retaliation. Watson now appeals the District Court's grant of summary judgment on the retaliation claims. Therefore, we need only decide if Watson's retaliation claims survive summary judgment.

Our analysis is guided by our decision in *Rauser v. Horn*.<sup>5</sup> In order to establish illegal retaliation for engaging in protected conduct, Watson must prove that: (1) his conduct was constitutionally protected; (2) he suffered an adverse action at the hands of prison officials;<sup>6</sup> and (3) his constitutionally

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<sup>2</sup> *Sutton v. Rasheed*, 323 F.3d 236, 248 (3d Cir. 2003).

<sup>3</sup> *Carter v. McGrady*, 292 F.3d 152, 157 n.2 (3d Cir. 2002).

<sup>4</sup> *Id.*

<sup>5</sup> 241 F.3d 330 (3d Cir. 2001).

<sup>6</sup> An adverse action is one "sufficient to deter a person of ordinary firmness from exercising his First Amendment (continued...)"

protected conduct was a substantial or motivating factor in the decision to discipline him.<sup>7</sup> Because motivation is almost never subject to proof by direct evidence, Watson must rely on circumstantial evidence to prove a retaliatory motive. He can satisfy his burden with evidence of either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing that suggests a causal link.<sup>8</sup>

However, even if Watson establishes a *prima facie* case, prison officials may still prevail if they establish that “they would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest.”<sup>9</sup> This is often referred to as the “same decision defense.” For purposes of this appeal, the named prison officials assume that Watson engaged in constitutionally protected conduct and that he suffered an adverse consequence. They argue that Watson cannot establish the required causal nexus between the two and that, even if he could, the same decision defense applies. However, since we conclude that the evidence was sufficient to survive summary judgment as to Coutts, we will explain why we believe Watson satisfied the first two prongs of his *prima facie* case rather than

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rights.” *See Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000) (internal quotation marks omitted).

<sup>7</sup> *Rausser*, 241 F.3d at 333–34.

<sup>8</sup> *See Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007).

<sup>9</sup> *Rausser*, 241 F.3d at 334.

merely relying on the defendants' assumption that he has.

*A. Whether Watson's Conduct was Constitutionally Protected*

Watson claims that he engaged in constitutionally protected activity when he filed a grievance against a corrections officer, and that defendants illegally retaliated by citing him for misconduct. In *Mitchell v. Horn*, we explained that filing such a grievance does “implicate[ ] conduct protected by the First Amendment.”<sup>10</sup> Here, the allegedly retaliatory conduct occurred *before* he filed his grievance. However, we do not believe that chronology necessarily defeats Watson's retaliation claim because he informed prison officials of his intent to file a grievance and requested an appropriate form from Simosko before any misconduct was filed against him. For purposes of Watson's retaliation claim, we cannot discern a substantive distinction between retaliation for informing prison officials of an intent to file a grievance or requesting the necessary forms to do so on the one hand, and actually filing such a grievance on the other. Accordingly, the record is sufficient to establish the first prong of Watson's *prima facie* case of retaliation.

*B. Whether Watson Suffered an Adverse Action at the Hands of Prison Officials*

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<sup>10</sup> 318 F.3d 523, 530 (3d Cir. 2003).

An adverse consequence “need not be great in order to be actionable[;]” rather, it need only be “more than *de minimis*.”<sup>11</sup> Watson clearly suffered an adverse consequence when Coutts charged him with a Class I misconduct. Class I misconducts subject inmates to a range of sanctions, including a disadvantageous change in housing assignment, placement in restricted housing or restrictive confinement for up to 90 days, or a detrimental change in program level.<sup>12</sup> They may also result in loss of the ability to participate in prerelease programs, including work release and temporary home furloughs for nine months.<sup>13</sup> These are clearly more than *de minimis* consequences. Moreover, even though his Class I misconduct was reduced to a Class II misconduct at his hearing, Watson lost his radio as a result and the Class II misconduct became part of his prison record. This is substantially more than a *de minimis* consequence for someone confined in a prison cell.

*C. Whether Watson’s Constitutionally Protected Conduct was a Substantial or Motivating Factor in the Decision to Discipline Him*

We now arrive at the main contention in this dispute—whether the deprivation that Watson suffered was the result of his protected activity as required to establish the third prong of his *prima*

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<sup>11</sup> *McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006) (internal quotations omitted).

<sup>12</sup> 37 Pa. Code § 93.10.

<sup>13</sup> *Id.* § 94.3(a)(4).

*facie* case for illegal retaliation. We agree with the District Court's conclusion that Watson failed on this prong and that summary judgment was appropriate for Dupont, Simosko and Snyder.

There is no evidence of improper motivation or involvement in the issuance of the misconduct on the part of Simosko. As for Snyder and Dupont, Watson attempted to connect the confiscation of his radio to lawsuits he previously filed against those two. According to Watson, Snyder approved the misconduct, and Dupont upheld it, in retaliation for a lawsuit that he filed against Snyder in 2008 and for a separate lawsuit against Dupont in 2009. Watson has conceded, however, that Dupont did not retaliate against him regarding the grievance, and that his claim was based solely on a prior lawsuit against Dupont. Indeed, the timing between the prior suit against Dupont in 2009 and the confiscation of Watson's radio two years later is just too remote to suggest a retaliatory motive here. Likewise, the timing for Snyder is even weaker, as he would have approved the misconduct charge despite the previous lawsuit Watson filed in 2008. Nothing here suggests that those lawsuits had any connection whatsoever to the fact that Watson's radio was deemed to be contraband.

However, Coutts is in a different situation. As we shall explain, the record supports conflicting inferences regarding Coutts' motive in issuing Watson's misconduct. Accordingly, disputed issues of fact surround the retaliation claim against Coutts. Summary judgment in favor of him was not appropriate.

As we noted earlier, Watson can establish the third element of a *prima facie* case of retaliation with evidence of: (1) an unusually suggestive

temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link.<sup>14</sup> However, “the timing of the alleged retaliatory action must be ‘unusually suggestive’ of retaliatory motive before a causal link will be inferred.”<sup>15</sup> Moreover, causation, like any other fact, can be established from the evidence gleaned from the record as a whole.<sup>16</sup> “[W]here the temporal proximity is not so close as to be ‘unduly suggestive,’ ” the appropriate test is “timing plus other evidence.”<sup>17</sup> Here, Coutts’ statements to Watson satisfy any requirement for “other evidence.”

In reviewing a grant of summary judgment, we “view the evidence and all justifiable inferences to be drawn therefrom in the light most favorable to

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<sup>14</sup> *Lauren W.*, 480 F.3d at 267; *Rausser*, 241 F.3d at 334 (concluding that “Rausser has demonstrated a suggestive temporal proximity between his insistence on his First Amendment rights and his [prison] transfer and wage reduction.”).

<sup>15</sup> *Estate of Smith v. Marasco*, 318 F.3d 497, 512 (3d Cir. 2003) (internal quotation marks omitted) (quoting *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997)).

<sup>16</sup> *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000) (concluding “that the District Court employed too restrictive a view of the type of evidence that can be considered probative of the causal link. It is not limited to timing and demonstrative proof, such as actual antagonistic conduct or animus. Rather, it can be other evidence gleaned from the record as a whole from which causation can be inferred.”).

<sup>17</sup> *Id.* at 280.

the non-moving party.”<sup>18</sup> We must determine if the record, viewed in this light, contains a genuine dispute of material fact as to whether Watson was punished for engaging in protected conduct apart from the legitimate misconduct Coutts charged him with.

Watson argues that the proximity between his constitutionally protected action and the challenged adverse action is sufficient to establish causation.<sup>19</sup> According to Watson, only a few hours elapsed between his request for a grievance form and the issuance of the misconduct. The confiscated items receipt was filled out at 8:40 A.M., soon after Kline searched Watson’s cell and discovered Watson’s radio. However, the misconduct was not issued until 2:23 P.M. that same day; nearly six hours after his radio was seized and only after Watson had declared that he was going to file a grievance.

Before Coutts issued the misconduct, he purportedly told Watson that he was being written up for giving Kline and Simosko a “hard time” and for not being “polite.” Here Coutts never elaborated on what he meant by saying Watson gave the officers a “hard time” or was not being “polite,” and inferences must be drawn in favor of Watson, as the nonmoving party. Accordingly, Watson has established a *prima facie* case against Coutts, because there is a genuine issue of material fact as to whether Watson’s decision to file a grievance

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<sup>18</sup> *Rauser*, 241 F.3d at 334.

<sup>19</sup> *Id.* (concluding that “Rauser has demonstrated a suggestive temporal proximity between his insistence on his First Amendment rights and his transfer and wage reduction.”) (internal citation omitted).

motivated Coutts to charge him with misconduct. Since he has established a *prima facie* case, we then look to whether Coutts satisfies the same decision defense.

### III.

We begin our discussion of whether Coutts was entitled to judgment as a matter of law with our decision in *Carter v. McGrady*.<sup>20</sup> There, an inmate claimed that he was given a misconduct because prison officials resented his functioning as a jailhouse lawyer. In rejecting that claim, we noted that most prisoners' retaliation claims will fail if the misconduct charges are supported by the evidence. We explained that "[e]ven if prison officials were motivated by animus to jailhouse lawyers, Carter's offenses, such as receiving stolen property, were so clear and overt that we cannot say that the disciplinary action taken against Carter was retaliatory."<sup>21</sup> Accordingly, we "[could] not say that the prison officials' decision to discipline Carter for his violations of prison policy was not within the 'broad discretion' that we must afford them."<sup>22</sup> In reaching that conclusion, we emphasized the "great deference" that the decisions of prison administrators are entitled to in the context of disciplinary proceedings.<sup>23</sup>

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<sup>20</sup> 292 F.3d 152 (3d Cir. 2002).

<sup>21</sup> *Carter*, 292 F.3d at 159.

<sup>22</sup> *Id.* (citing *Thornburgh v. Abbott*, 490 U.S. 401, 403 (1989) (quotations in original)).

<sup>23</sup> *Id.* at 158.

Not all Circuit Courts of Appeals agree on this standard. The Courts of Appeals for the Second, Eighth and Eleventh Circuits have formulated a same decision defense based on some evidence of prisoner misconduct,<sup>24</sup> which originates from the Supreme Court decision in *Superintendent, Mass. Corr. Inst., Walpole v. Hill*.<sup>25</sup> There, the Court held that prison disciplinary convictions may be upheld if they are supported by “some evidence” of misconduct. The Courts of Appeals for the Fifth and Seventh Circuits, however, have found that

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<sup>24</sup> See, e.g., *Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002) (“The burden then shifts to the defendant to show that the plaintiff would have received the same punishment even absent the retaliatory motivation. The defendant can meet this burden by demonstrating that there is no dispute that the plaintiff ‘committed the most serious, if not all, of the prohibited conduct charged in the misbehavior report.’”) (citation omitted); *Hartsfield v. Nichols*, 511 F.3d 826, 829 (8th Cir.2008) (reviewing allegations of false disciplinary reports and concluding “claims of retaliation fail if the alleged retaliatory conduct violations were issued for the actual violation of a prison rule.”) (citation omitted); *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir.1990) (noting that “[N]o claim can be stated when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform.”); *Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994) (holding if there is “some evidence” that a prisoner committed the alleged misconduct, that “essentially checkmates his retaliation claim.”); *O’Bryant v. Finch*, 637 F.3d 1207, 1217 (11th Cir. 2011)(noting that “if the [prison] official can show that he would have taken the disciplinary action in the absence of the prisoner’s protected conduct, he cannot be held liable.”).

<sup>25</sup> 472 U.S. 445, 447 (1985) (concluding “that where good time credits constitute a protected liberty interest, a decision to revoke such credits must be supported by some evidence.”).

some evidence is not an absolute bar and permit claims by prisoners to go to trial if the prisoner can offer evidence that contradicts prison officials' explanations for their action against the inmate.<sup>26</sup> However, in *Rausser*, we held that the defendant must establish that the same decision would have been made even absent any retaliatory motive.<sup>27</sup>

As noted, in *Carter* we explained that we evaluate the “the quantum of evidence” of the misconduct to determine whether the prison officials' decision to discipline an inmate for his violations of prison policy was within the broad discretion we must afford them.<sup>28</sup> Given the force of

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<sup>26</sup> *Woods v. Smith*, 60 F.3d 1161, 1164–65 (5th Cir.1995) (noting that a retaliation claim focuses not on the merits of the disciplinary proceeding but on the retaliatory “interference, asking only whether there has been an obstruction of the exercise of a constitutional right.”). The “concern is whether there was retaliation for the exercise of a constitutional right, separate and apart from the apparent validity of the underlying disciplinary” conviction. *Id.*; *Greene v. Doruff*, 660 F.3d 975, 977–80 (7th Cir.2011) (adopting but-for causation with burden-shifting mechanism, and noting that once prisoner shows that the violation was a motivating factor, “the burden shifts to the defendant to show that the harm would have occurred anyway.”). Although a state appellate court decision, the Indiana Court of Appeals provides an example of a more flexible approach. *See Medley v. Lemmon*, 994 N.E.2d 1177, 1190 (Ind. Ct. App. 2013)(noting that it is not clear whether a “retaliation claim should automatically be defeated in such a situation, especially where the decision of what punishment to impose on a prisoner for a rules infraction is entirely discretionary.”).

<sup>27</sup> *Rausser*, 241 F.3d at 334 n.2 (citing *Goff v. Burton*, 7 F.3d 734, 737 (8th Cir.1993) as an example of a Circuit that takes an opposing approach to ours).

<sup>28</sup> *Carter*, 292 F.3d at 159.

the evidence that Carter was guilty of receiving stolen property, we held that there was no genuine issue of material fact that his misconduct citation was reasonably related to legitimate penological interests, and that Carter would have been disciplined notwithstanding his jailhouse lawyering.<sup>29</sup>

Watson's situation is different. Watson's broken radio was not so "clear and overt" a violation that we can conclude that he would have been written up if he had not also given prison officials "a hard time." The radio had allegedly been in the same condition for more than a year. Moreover, there is evidence that other inmates had radios with loose or broken antennas, but those items were not confiscated and the inmates did not receive a misconduct. Finally, Kline did not charge Watson with a misconduct when he confiscated the radio. Accordingly, a reasonable fact finder could conclude that the misconduct was issued in retaliation for Watson's statement that he was going to file a grievance, and not in furtherance of legitimate penological goals.

We note that this is not the first time that we have held that a plaintiff can make out a retaliation claim even though the charge against him may have been factually supported.<sup>30</sup> In *Hill v. City of Scranton*, four police officers survived summary judgment on their claims that the city had retaliated against them by selectively enforcing an ordinance to punish them for a lawsuit that they

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<sup>29</sup> *Id.*

<sup>30</sup> 411 F.3d 118, 130 (3d. Cir. 2005).

had brought even though it was clear that three officers violated the relevant ordinance.<sup>31</sup> We reasoned that it was not necessary for the officers to allege or prove compliance with the ordinance to prevail on their First Amendment claim.<sup>32</sup>

#### IV.

For the reasons set forth above, we will affirm the District Court's grant of summary judgment on Watson's retaliatory claims against Dupont, Simosko and Snyder, but reverse the grant of summary judgment in favor of Coutts and remand for further proceedings on that claim.

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<sup>31</sup> *Id.* (noting that "The officers certainly do not need to allege or prove compliance with the ordinance to prevail on their First Amendment claim. Discriminatory enforcement of a statute or ordinance is not justified simply because the enforcement is otherwise valid.").

AMBRO, Circuit Judge, concurring

Imagine a guard tells an inmate accused of misconduct that he never would have been charged if he had not filed a complaint against prison officials. The inmate admits to the misconduct but argues that the retaliatory enforcement is nonetheless unlawful. Can the guard, having conceded that the outcome would have been different without the complaint, still take advantage of something we call the “same decision” defense? If we are to give any meaning to the name of the defense, the answer must be “no.”

However, some panels of our Court have come out differently in non-precedential opinions, leading to confusion in the district courts about the state of our law. Those outcomes, though incorrect in my view, draw support from decisions in some of our sister circuits. Thus, in addition to joining Chief Judge McKee’s excellent opinion, which fully resolves our case, I write separately to discuss the application of the same decision defense in future lawsuits.

In our Court, the confusion starts with our decision in *Carter v. McGrady*, 292 F.3d 152 (3d Cir. 2002). That case involved a prisoner who was disciplined for “egregious violations of prison policy,” including receiving a stolen typewriter and sending unauthorized letters. *Id.* at 154. He argued that the reason for the disciplinary charges was that prison officials resented him for working as a jailhouse lawyer. However, there was overwhelming evidence of his guilt and nothing concrete to suggest that he was being charged only because he helped other inmates with their legal matters. We therefore concluded that, even if he

could establish a *prima facie* First Amendment retaliation case, the same decision defense applied. We wrote:

Given the quantum of evidence of Carter’s misconduct, we cannot say that the prison officials’ decision to discipline Carter for his violations of prison policy was not within the broad discretion that we must afford them. Even if prison officials were motivated by animus to jailhouse lawyers, Carter’s offenses, such as receiving stolen property, were so clear and overt that we cannot say that the disciplinary action taken against Carter was retaliatory.

*Id.* at 159 (internal quotation marks and citation omitted).

This passage raised two questions. First, what “quantum” of evidence is required to trigger *Carter*? And in cases where that “quantum” has been reached, can the same decision defense nonetheless fail? Until today’s decision we had never addressed either question in a precedential opinion. However, a series of non-precedential opinions from panels of our Court suggested that the answer to the first question is merely “some evidence” and that the answer to the second is “no.” *See, e.g., Bullock v. Buck*, 611 Fed.Appx. 744, 748 (3d Cir. 2015); *Dockery v. Beard*, 509 Fed.Appx. 107, 111 (3d Cir. 2013). Under Internal Operating Procedure 5.7, these non-precedential opinions do not speak for the full Court or constitute binding precedent. However, our district courts have applied these answers in more than 80 cases, and the time has come for us to clarify.

So from where, if not *Carter*, do these answers come? As it turns out, our district courts and our non-precedential opinions have borrowed them

from the Eighth Circuit. In *Orebaugh v. Caspari*, 910 F.2d 526 (8th Cir. 1990), that Court held that, “[w]hile a prisoner can state a claim of retaliation by alleging that disciplinary actions were based upon false allegations, no claim can be stated when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform.” *Id.* at 528. It reasoned that a contrary holding “would allow a prisoner to openly flout prison rules after filing a grievance and then bring a claim under section 1983 arguing that prison officials disciplined him in retaliation for his filing a grievance.” *Id.* Thus, it gave a “no” answer to our second question—whether a prisoner can ever succeed in a retaliation lawsuit when there is sufficient evidence that he was disciplined for misconduct he actually committed. As for the first question—the amount of proof required—the Court implied that the standard is “some evidence” supporting the misconduct charge. *Id.*

Next, in *Henderson v. Baird*, 29 F.3d 464 (8th Cir. 1994), the Court expressly adopted the “some evidence” standard. Specifically, it held that a “finding [of misconduct that] was based on some evidence of the violation ... essentially checkmates [a] retaliation claim.” *Id.* at 469. Lest anyone draw too much encouragement from the word “essentially,” the Court later restated its test without that qualifier. *See Hartsfield v. Nichols*, 511 F.3d 826, 829 (8th Cir. 2008) (“[C]laims of retaliation fail if the alleged retaliatory conduct violations were issued for the actual violation of a prison rule. Thus, a defendant may successfully defend a retaliatory discipline claim by showing *some evidence* the inmate actually committed a

rule violation.”) (emphasis added) (internal quotation marks and citation omitted).

Our district courts and our non-precedential opinions have treated these Eighth Circuit cases as a way to give meaning to *Carter's* standards. This is a problem for two reasons. First, *Carter* never said that “some evidence” is a sufficient “quantum” or that it is impossible for a prisoner to succeed in a retaliation case when there is enough evidence of misconduct. And second, I believe that the Eighth Circuit’s cases were wrongly decided and that, even if that were not so, our precedent prevents us from importing them into our law.

Judge Heaney’s partial dissent in *Orebaugh* persuasively explains the problems with the Eighth Circuit’s reasoning. He wrote that “no court has heretofore articulated ... a rule” that “the legitimate reasons the prison officials have advanced”—*i.e.*, that the prisoner actually engaged in misconduct—“are dispositive of [a] retaliation claim.” 910 F.2d at 529–30 (Heaney, J., concurring in part and dissenting in part). He said that a prisoner instead “deserves the opportunity to try to show that the reasons given for disciplining him were a pretext for the prison officials’ retaliatory animus.” *Id.* He concluded by observing:

In its zeal to stem the tide of prisoner litigation and in a misguided attempt to discourage the open flouting of prison rules, the majority ... denies *Orebaugh* ... equal access to the adversarial process ... and deprives this court of the opportunity to review *Orebaugh's* retaliation claim on an adequately developed record. In so doing, the majority immunizes from review any trivial disciplinary charge that prison officials can support with some evidence, allowing such

officials to inhibit prisoners' constitutional right of access to grievance procedures with impunity. *Id.* at 530.

The Fifth Circuit has agreed with Judge Heaney. It noted that the Eighth Circuit's approach might make sense for malicious prosecution claims, which require plaintiffs to show that the charges against them were legally "groundless." *Woods v. Smith*, 60 F.3d 1161, 1164–65 (5th Cir. 1995). A "retaliation claim, on the other hand, focuses on ... interference, asking only whether there has been an obstruction of the exercise of a constitutional right." *Id.* at 1165. It therefore held that an "action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate." *Id.* Any other ruling "would unfairly tempt corrections officers to enrobe themselves and their colleagues in what would be an absolute shield against retaliation claims." *Id.*

Meanwhile, other than concerns over an onslaught of lawsuits, the Eighth Circuit has given very little justification for its approach. The closest we get is a citation in *Henderson* to the Supreme Court's decision in *Superintendent v. Hill*, 472 U.S. 445, (1985). That decision does use the term "some evidence," but in a different context. The Supreme Court addressed a claim that officials violated a prisoner's Fifth Amendment due process rights by arbitrarily taking away his good time credits, which would have lowered his sentence based on good behavior. The Court ruled that the Constitution requires, at a minimum, that prison disciplinary decisions be supported by "some evidence" before officials can interfere with an inmate's protected liberty interests. *Id.* at 447.

Nothing in *Hill* requires, or even suggests, its use in First Amendment retaliation cases, and the Eighth Circuit has not explained why it has applied that standard. *Hill* says that a disciplinary proceeding will not be constitutionally infirm if there is “some evidence.” But officials cannot cleanse a First Amendment violation merely by complying with the Fifth Amendment. Due process requires that a prisoner have a fair opportunity to show that he did not commit the misconduct. The First Amendment provides that, even if he did commit it, he has a right to be free from enforcement that would not have occurred if he had not filed a complaint. *See, e.g., Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996) (“The issue in *Hill* was merely whether there was, and whether there needed to be, some evidence to support a prison disciplinary decision. The issue here is whether the disciplinary decision was improperly motivated.”).

There is another reason not to apply the Eighth Circuit’s test in our cases. In that Circuit a plaintiff has the burden to disprove the same decision defense. *See Goff v. Burton*, 7 F.3d 734, 737 (8th Cir. 1993). The Eighth Circuit has acknowledged that, in the employment retaliation context, the Supreme Court has put the burden of establishing the defense on the defendant. *See id.* at 737–38 (citing *Mount Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977)). However, it has declined to use the *Mount Healthy* test in prisoner retaliation cases. *Id.*

By contrast, we have rejected *Goff* and, per *Mount Healthy*, placed the burden in prisoner retaliation cases on the defendant to establish the same decision defense. *See Rauser v. Horn*, 241

F.3d 330, 333 & n.2 (3d Cir. 2001) (adopting *Mount Healthy* and disagreeing with *Goff*). Our use of *Mount Healthy* is significant. That is because, as Chief Judge McKee notes in our panel’s majority opinion, we already have held that the same decision defense from *Mount Healthy* does not automatically bar liability when a plaintiff is charged, based on retaliatory motivations, for misconduct that he actually committed.

For instance, in *Hill v. City of Scranton*, 411 F.3d 118 (3d Cir. 2005), police officers were fired for violating an ordinance. It was clear that they did not comply with the ordinance, but they argued that the City would not have enforced it had they not engaged in constitutionally protected activity. We held that under *Mount Healthy* the officers did not need to show “compliance with the ordinance to prevail on their First Amendment claim” because “[d]iscriminatory enforcement of a statute or ordinance is not justified simply because the enforcement is otherwise valid.” *Id.* at 130. The same should be true here.<sup>1</sup>

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<sup>1</sup> The Eleventh Circuit has adopted the Eighth Circuit’s approach. *See O’Bryant v. Finch*, 637 F.3d 1207, 1215 (11th Cir. 2011). Thus, my criticisms of the latter’s test apply with equal force to the former’s. Meanwhile, the Second Circuit has reached a similar result, albeit by different reasoning. *See Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002) (“The burden then shifts to the defendant to show that the plaintiff would have received the same punishment even absent the retaliatory motivation. The defendant can meet this burden by demonstrating that there is no dispute that the plaintiff ‘committed the most serious, if not all, of the prohibited conduct charged in the misbehavior report.’”) (internal citation omitted) (quoting *Hynes v. Squillace*, 143 F.3d 653, 657 (2d Cir. 1998)). *Hynes*, in turn, relies on a “presumption (continued...)”

Today's decision takes an important step toward clarifying that *Carter* does not incorporate the Eighth Circuit's approach. In particular, there is undoubtedly "some evidence" that Joseph Watson's prison radio was contraband. But we correctly hold that this is not the type of "clear and overt" misconduct that satisfies *Carter's* "quantum of evidence" standard. *See Carter*, 292 F.3d at 159.

Indeed, this case provides an example of why Judge Heaney and the Fifth Circuit in my view are correct. Watson's radio was normal in all respects but one—it had a small piece of tape securing the antenna. Prison regulations define contraband to include "any item altered from its original state." *See* Department of Corrections Policy, DC-ADM 815, Section 3.C.1. Under this definition, ethereal in the kindest sense, Watson's taped-up radio counted. And, as Chief Judge McKee notes, punishment for contraband violations can include up to 90 days in restrictive confinement. If officials were allowed to hunt for every minor instance of misconduct in an effort to punish inmates for their speech, the First Amendment would ring hollow inside a prison's walls.

Though Chief Judge McKee's opinion provides needed guidance on the first question left open by

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that a prison official's acts to maintain order are done for a proper purpose." 143 F.3d at 657 (internal quotation marks omitted). The problem is that the Court never explains why this presumption cannot be rebutted. Surely there are circumstances where evidence can show that an official was not acting for a proper purpose. But this test closes the door to such proof. I note, however, that the Second Circuit's approach, though one I disagree with, at least requires that there be "no dispute" as opposed to merely "some evidence."

*Carter* (the “quantum” of evidence that is needed), it has no occasion to reach the second (whether the same decision defense can ever fail if there is a sufficient “quantum”). For this second question to arise, the evidence of misconduct would need to be greater (a sufficient “quantum” under *Carter*) than it was here, and the proof that the official would not have taken the same action in the absence of constitutionally protected activity would need to be stronger. Take, for instance, the hypothetical at the beginning of this concurring opinion, where the guard admits that there would have been no charge without the complaint. What then?

This is an important question, and I hope that in future cases we will be able to provide a clear answer. As discussed, in *Carter* we held that, “[e]ven if prison officials were motivated by animus to jailhouse lawyers,” the offenses “were so clear and overt that we cannot say that the disciplinary action taken against Carter was retaliatory.” 292 F.3d at 159. But I do not read this to mean that all “clear and overt” violations will lead to the same result. In that case, there was no direct evidence that the officials were motivated *solely* by a desire to retaliate. Rather, the best scenario for the inmate was that the officials had mixed motivations—some legitimate and others not. This is the situation in which the same decision defense is supposed to apply. However, in cases where there is direct evidence that retaliation drove a charging decision, the defense does not shield a defendant from liability. The defense’s very name belies its applicability.

To discourage overreading this concurrence, I note that I have no doubt that an official who disciplines an inmate for a “clear and overt”

violation should enjoy a strong presumption that the same decision defense applies. As the Eighth Circuit has recognized, it would produce chaos if prisoners could survive summary judgment on retaliation claims in response to every routine disciplinary action. Such an outcome would be inconsistent with the Supreme Court's instruction that, in "the volatile prison environment, it is essential that ... officials be given broad discretion to prevent ... disorder." *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989). Thus, though a "legitimate prison disciplinary report" is not an "absolute bar to a retaliation claim," it is "probative and potent summary judgment evidence." *Woods*, 60 F.3d at 1166. But the Eighth Circuit has overcorrected for the problem. There is no reason to disregard normal First Amendment standards by closing the door entirely. The power to prevent disorder is not a license to retaliate. With the right evidence, the presumption should be rebuttable.

In sum, today's majority opinion clarifies that not every violation of prison protocols supported by some evidence will bar a First Amendment retaliation claim. That is particularly so with relatively minor offenses, such as a radio antenna secured by tape. The standards for more serious violations will need to be decided in future cases.

HARDIMAN, Circuit Judge, dissenting.

The Court's opinion and the concurrence shed light on a lacuna in our precedent on First Amendment retaliation claims in the prison context, namely whether and how a prisoner can overcome the "same decision" defense when the adverse action complained of is a charge of prison

misconduct and the prisoner concedes the facts giving rise to the charge. Unlike my colleagues, however, I do not see this appeal as the appropriate vehicle for answering that question. Under the current state of the law, courts are required to uphold government action motivated by retaliatory animus as long as the responsible government officials can show that the same action would have occurred for reasons unrelated to retaliation—a mixed-motive defense. Here, the evidence the parties have proffered on summary judgment establishes at most that a prison guard acted with mixed motive, which is not enough. Because I believe Watson’s appeal flounders on that evidentiary ground, I respectfully dissent.

## I

In *Rauser v. Horn*, 241 F.3d 330, 333–34 (3d Cir. 2001), we “imported” the burden-shifting scheme enunciated by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 288 (1977), to adjudicate First Amendment retaliation claims brought by prisoners. Under *Mt. Healthy*, the causal relationship between protected conduct and adverse action requires a showing of but-for causation. Instead of placing the heavy burden of proving but-for causation solely on the prisoner, however, we “divided the burden of proof relating to causation between the parties.” *Greene v. Doruff*, 660 F.3d 975, 980 (7th Cir. 2011). Thus, once a prisoner shows that a retaliatory motive was a “substantial or motivating factor” leading to the adverse action, the burden shifts to prison officials to show that “they would have made the same

decision absent the protected conduct for reasons reasonably related to a legitimate penological interest.” See *Rausser*, 241 F.3d at 334. Accordingly, *Rausser*’s same-decision defense essentially requires prison officials to *disprove* that the retaliatory motive was a but-for cause of the adverse action.<sup>1</sup>

The upshot of *Mt. Healthy* and *Rausser*’s emphasis on but-for causation is that a prisoner cannot negate a same-decision defense merely by pointing to the existence of retaliatory motive on the part of prison officials, *i.e.*, that the prison officials acted with mixed motives. Instead, the prisoner must counter a same-decision defense directly, that is, with evidence demonstrating that retaliation was a but-for cause. To hold otherwise would permit the prisoner to override the same-decision defense using exactly the same evidence relevant to establishing his prima facie case. This, in turn, would vitiate the inference of but-for causation that arises when prison officials fail to prove the same-decision defense, see *Greene*, 660 F.3d at 979, and would undermine the purpose of allowing a mixed-motive defense in the first place: achieving an appropriate balance between protecting the prisoner’s constitutional rights, and avoiding the “undesirable consequences not

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<sup>1</sup> Some of our sister courts impose a higher burden on prisoners. See *Rausser*, 241 F.3d at 334 n.2 (citing *Goff v. Burton*, 7 F.3d 734, 737–38 (8th Cir. 1993); *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995); *McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir. 1979)); see also *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005) (requiring the prisoner to prove that the adverse action “did not reasonably advance a legitimate correctional goal”).

necessary to the assurance of those rights.” 429 U.S. at 287.

## II

The Majority references but-for causation only in passing, and instead focuses its attention on the open question of what (if any) evidence a prisoner can offer to overcome the same-decision defense. It confronts this open question in a scenario that has received significant judicial attention but upon which we have opined only in limited fashion. Specifically, Watson has conceded the factual predicates giving rise to his misconduct—that his radio’s antenna was “loose” and “wiggly” and that he had secured the antenna to the radio with tape, *see* Watson Br. 16—but nonetheless contends that he was issued a misconduct in retaliation for requesting a grievance form. Several of our sister courts would foreclose his claim merely by virtue of the fact that his misconduct is supported by “some evidence,” *Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994), or because “there is no dispute that [Watson] committed the most serious, if not all, of the prohibited conducted charged.” *Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002) (internal quotation marks omitted). *See also O’Bryant v. Finch*, 637 F.3d 1207, 1215 (11th Cir. 2011) (“[A]n inmate cannot state a claim of retaliation for a disciplinary charge involving a prison rule infraction when the inmate was found guilty of the actual behavior underlying that charge after being afforded adequate due process.”). Our only precedential foray into this area acknowledges that a “clear and overt” violation of prison regulations could potentially preclude a genuine dispute of

material fact on the same-decision defense. *See Carter v. McGrady*, 292 F.3d 152, 159 (3d Cir. 2002).

These decisions suggest that a certain “quantum” of misconduct evidence, *id.* will “checkmate[ ]” a prisoner’s retaliation claim, *Henderson*, 29 F.3d at 469, a proposition that the Court today neither accepts nor rejects. Instead, the Majority asserts that the record in this case supports opposing inferences that establish a genuine dispute of material fact on Officer Coutts’s same-decision defense. Thus, the Majority contrasts this appeal with *Carter v. McGrady* by stating:

Watson’s situation is different. Watson’s broken radio was not so “clear and overt” a violation that we can conclude that he would have been written up if he had not also given prison officials “a hard time.” The radio had allegedly been in the same condition for more than a year. Moreover, there is evidence that other inmates had radios with loose or broken antennas, but those items were not confiscated and the inmates did not receive a misconduct. Finally, [Officer] Kline did not charge Watson with a misconduct when he confiscated the radio. Accordingly, a reasonable fact finder could conclude that the misconduct was issued in retaliation for Watson’s statement that he was going to file a grievance, and not in furtherance of legitimate penological goals.

Majority Op. 426.

Based on my examination of the summary judgment record, I do not agree that “Watson’s situation is different.” At best, his evidence reiterates that retaliation was among Coutts’s motivations for issuing the misconduct, but does

not demonstrate that Watson would not have received the misconduct in the absence of that retaliatory motive. In other words, Watson's evidence fails to establish a genuine dispute concerning the element of but-for causation (or lack thereof) that lies at the center of the same-decision defense. Accordingly, this appeal does not present an occasion for us to consider whether and how the same-decision defense can be overcome.

The Majority places substantial weight on statements made by Coutts to the effect that he issued the misconduct because Watson gave the guards a "hard time." This evidence comes by way of Watson's deposition testimony, and I excerpt the relevant portions of the record in the margin.<sup>2</sup> The

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<sup>2</sup> A. Officer Coutts ... was interrogating me about the radio, saying that I gave his Captains and the other Officer a hard time by wanting my radio antenna fixed, instead of just leaving it alone. Now I'm going to get a Misconduct and Mr. DuPont is going to keep my radio.

App. 62.

Q. They're going to keep your radio? That's what [Coutts] said? A. Right ... So we go back and forth. So I was telling [Coutts] that the [sic] Officer Kline broke it. So I was just asking him, could he fill out an incident report, so I could have my radio antenna fixed. And then he was saying ... that I didn't do it in a polite way and I wanted an incident report filled out. But then I asked for a Grievance, you know. And I said, yeah, well, that's the policy, you know. I need an incident report filled out so that the Officer that broke the antenna, so I can have my radio fixed. But I still have to make a Complaint.

Anyway, he said, well, go back to the Unit and they going to call you back down here to pick up your Misconduct.

App. 62-63.

(continued...)

important point here is that Watson's testimony establishes at most that Coutts acted with retaliatory motive, but it hardly demonstrates that his motive was a but-for cause of the misconduct. By permitting such an inference from Coutts's admission, the Majority undoes the careful balance underlying the same-decision defense by allowing Watson to survive summary judgment simply by asserting that Coutts acted with mixed motive. Moreover, by acknowledging that other prison officials in Coutts's chain of command "would have approved the misconduct" irrespective of his request for a grievance, Majority Op. 423, the Majority's inference of but-for causation with respect to Coutts cannot be squared with its conclusions regarding causation as to the other defendants because all of them had a hand in bringing about the challenged conduct—the issuance of the misconduct.

The Majority's consideration of the remaining evidence is equally unpersuasive. First, the Majority asserts that Watson's broken radio was not a "clear and overt" violation of prison

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Q. But you had thought that [Coutts] was calling you down to pick up your radio; right? A. Right. But, the point is, when I got down here, he was interrogating me and he had told me, being that I gave his Captain and the other Officer a hard time, I'm going to be written-up.

App. 65.

A. Right. [Coutts] stated, you gave my Captain and the other Officers a hard time, wanting a Grievance and an Incident Report filled out. For that, you're getting a Misconduct.

App. 90.

regulations in contradistinction to *Carter*. However, under these regulations, “any item altered from its original state (state issued or personal) may be considered contraband,” App. 4 (quoting DC-ADM-815 § 3.C.1), and there is no factual dispute that Watson altered his radio’s antenna by securing it to the radio with tape. As such, the radio was contraband, and Watson’s possession of it was unquestionably a violation. To the extent that the Majority disagrees, it is worth noting that Watson has not challenged the regulation’s validity, and its application to his radio is neither irrational nor fails to serve a legitimate penological interest. *See Turner v. Safley*, 482 U.S. 78, 89 (1987). Indeed, it is not difficult to see why a detached antenna poses a security threat in a prison.

Second, the Majority emphasizes the temporal aspects surrounding the issuance of Watson’s misconduct, specifically that Officer Kline failed to issue a misconduct when he confiscated Watson’s radio, and the radio had been contraband for over a year without action from prison officials. It is not clear how these considerations should cut with respect to Coutts, as opposed to Kline or the other officers. There is no suggestion that Coutts failed to act immediately when he learned of Watson’s radio, or that he (or any other officer for that matter) was simply hunting for an infraction of prison rules. Thus, I do not agree that the timing of the misconduct issued against Watson supports an inference of but-for causation against Coutts.

Finally, the Majority suggests that Watson has shown discriminatory application of the contraband regulation based on evidence that similarly situated prisoners with broken radios were not

issued misconducts because they did not make requests to file grievances. I agree that the disparate treatment of similarly situated individuals can support an inference of but-for causation, but Watson's evidence falls far short of the mark. The evidence in question comprises declarations filed by three of Watson's fellow prisoners: Frank Trainer, Harry Montgomery, and Ronald Banks. The affidavits filed by Trainer and Montgomery are not probative in this case because they fail to identify any of the officers responsible for the averred conduct; Banks's declaration names Captains Simosko and Dupont, but says nothing about Coutts, so it too is of limited value. Banks's declaration actually cuts against Watson because it mentions an instance in which Simosko and Dupont upheld a misconduct charge involving an "altered" radio in the absence of a grievance request, *i.e.* a paradigmatic nonretaliatory application of the contraband regulation. *See App. 127.* Thus, I cannot agree with the Majority that Watson's evidence suffices to create a genuine dispute as to whether he would have received his misconduct in the absence of his request to file a grievance.

For the foregoing reasons, I respectfully dissent.

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

JOSEPH	:	
WATSON,	:	
Plaintiff	:	Civil Action No. 12-35J
	:	
v.	:	District Judge Kim R.
	:	Gibson
GERALD ROZUM,	:	
et al.,	:	Chief Magistrate Judge
Defendants	:	Lisa Pupo Lenihan
	:	

**MEMORANDUM ORDER**

This action is before the Court on the Report and Recommendation of Chief Magistrate Judge Lenihan issued on July 16, 2013, recommending that Defendants' Motion for Summary Judgment be granted and that Plaintiff's Motion for Summary Judgment be denied. The parties were served with the Report and Recommendation and informed that they had until August 2, 2013, to file written objections. Plaintiff filed timely objections on August 1, 2013. Upon review, the Court finds that Plaintiff's objections do not undermine the recommendation of the magistrate judge and the Report and Recommendation will therefore be adopted as the Opinion of the Court. However, the Court will address the following objections.

First, Plaintiff objects on the ground that the magistrate judge cited to the wrong section of the

Pennsylvania Department of Corrections policy regarding contraband. Plaintiff is mistaken, the magistrate judge correctly cited to the section that contains the DOC's policy on contraband, which expressly states that "any item altered from its original state (state issued or personal) may be considered contraband." DC-ADM 815, § 3(C)(1). Plaintiff's objection on the basis that the magistrate judge did not cite to the exact *subsection* wherein that definition is located is frivolous and immaterial.

Second, Plaintiff attempts to raise a new claim in his objections; specifically, that Defendants denied him access to the courts because they would not provide him with a grievance form when he requested it on the day he received the misconduct. Plaintiff may not raise a new claim through his objections, but, this objection is without merit because he was provided with a grievance form, albeit later that day, and was able to grieve the incident that is the subject of this lawsuit. Hence, he was not denied access to the courts.

Third, Plaintiff claims that he was not afforded due process in his misconduct hearing because the hearing examiner was not impartial, because his radio was not present at the hearing and because the evidence was not sufficient to sustain his sanction. Plaintiff's due process claims were dismissed on November 29, 2012, and the Court refers Plaintiff to the magistrate judge's previous Report and Recommendation dated October 29, 2012 regarding this objection.

Fourth, Plaintiff claims that the taking of his radio was in violation of the Takings Clause. This claim was also disposed of on November 29, 2012, and the Court again refers Plaintiff to the

magistrate judge's previous Report and Recommendation as to why this claim is without merit.

Fifth, Plaintiff has presented many objections based on the fact that Defendants failed to follow their own policy and procedures in numerous respects. This issue, too, was addressed in the magistrate judge's previous Report and Recommendation. Plaintiff may refer to that report for an explanation of why a claim based on prison officials' failure to follow their own internal policies and procedures does not amount to a constitutional violation in and of itself.

Finally, Plaintiff objects on the basis that it was not he who broke his radio's antenna, but instead Officer Kline broke it during the search of Plaintiff's cell. Therefore, he maintains that he should not have been given the misconduct. The fact that Officer Kline may have further broken the antenna, which was already loose, is completely irrelevant to the misconduct Plaintiff received. Plaintiff received the misconduct for possession of contraband because he altered his radio's antenna by securing it to the radio it with tape. This occurred *prior* to the search of his cell and he readily admits to that he did it. This very fact alone is dispositive of the sole remaining claim before the Court; which is whether Plaintiff was issued and found guilty of the misconduct in retaliation for requesting a grievance and for lawsuits he had previously filed (some which are still pending) in this Court. Whether or not Office Kline broke his radio's antenna after Plaintiff had already secured it with tape is completely irrelevant to this issue.

Therefore, after *de novo* review of the pleadings and documents in the case, together with the

Report and Recommendation, the following order is entered.

**AND NOW**, this *6th* day of August, 2013,

**IT IS HEREBY ORDERED** that the Motion for Summary Judgment filed by Defendants Dupont, Simosko, Snyder and Coutts (ECF No. 32) is **GRANTED** and Plaintiff's Motion for Summary Judgment (ECF No. 37) is **DENIED**.

**IT IS FURTHER ORDERED** that the magistrate judge's Report and Recommendation dated July 16, 2013 (ECF No. 41), as it is supplemented herein, is adopted as the Opinion of this Court.

**IT IS FURTHER ORDERED** that the Clerk of Court mark this case **CLOSED**.

**AND IT IS FURTHER ORDERED** that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, Petitioner has thirty (30) days to file a notice of appeal as provided by Rule 3 of the Federal Rules of Appellate Procedure.

By the Court  
/s/ Kim R. Gibson  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF  
PENNSYLVANIA

JOSEPH :  
WATSON, :  
Plaintiff : Civil Action No. 12-35J  
 :  
v. : District Judge Kim R.  
 : Gibson  
GERALD ROZUM, :  
et al., : Chief Magistrate Judge  
Defendants : Lisa Pupo Lenihan  
 :  
 : ECF Nos. 32, 37  
 :

**REPORT AND RECOMMENDATION**

**I. RECOMMENDATION**

For the following reasons, it is respectfully recommended that the Motion for Summary Judgment filed by Defendants Dupont, Simosko, Snyder and Coutts (ECF No. 32) be granted and that Plaintiff's Motion for Summary Judgment (ECF No. 37) be denied.

**II. REPORT**

Joseph Watson ("Plaintiff") is a Pennsylvania state prisoner currently incarcerated at the State Correctional Institution at Somerset. He initiated

this action on February 15, 2012, pursuant to the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983. *See* ECF No. 1. Plaintiff's Complaint and Supplement thereto were docketed on February 17, 2012. (ECF Nos. 3, 5).

Defendants moved to dismiss Plaintiff's claims by motion filed on May 10, 2010. (ECF No. 21.) The undersigned then issued a Report and Recommendation, recommending that all claims be dismissed with prejudice with the exception of Plaintiff's retaliation claims against Defendants Dupont, Simosko, Snyder and Coutts. (ECF No. 24.) The Court adopted the Report and Recommendation in full and Plaintiff's claims were dismissed on November 29, 2012. (ECF No. 25 .)

Defendants Dupont, Simosko, Snyder and Coutts have filed a Motion for Summary Judgment (ECF No. 32), which is now pending before the Court. In response, Plaintiff has also filed a Motion for Summary Judgment. (ECF No. 37.) For the following reasons, Defendants' Motion should be granted and Plaintiff's Motion should be denied.

### **A. Factual Background**

A general search of Plaintiff's pod, which included his cell, was conducted on December 6, 2011. *See* ECF No. 35-4. A radio belonging to Plaintiff was discovered in his cell, which had a loose antenna secured to it with tape. *See* ECF No. 35-1; No. 35-4. According to Plaintiff, the antenna had come loose during a prison transfer so he put tape on it to hold it in place. *See* ECF No. 5 at ¶ 14.

Plaintiff maintains that Officer Kline, the officer who searched his cell, broke the top portion of the

radio's antenna during the search. *See* ECF No. 5 at ¶ 13. The radio was confiscated and declared as contraband pursuant to DOC policy DC-ADM 815, Section 3. *See* ECF No. 35-1; No. 35-4. DOC policy defines contraband as "any item possessed by an inmate or found within the facility that is prohibited by law or expressly prohibited by those legally charged with the administration and operations of the facility or program. Additionally, any item altered from its original state (state issued or personal) may be considered contraband." DC-ADM, Section 3.<sup>1</sup> Officer Kline issued Plaintiff a Confiscation Items Receipt, which Plaintiff refused to sign, indicating that he attempted to fix the broken antenna. *See* ECF No. 35-1.

Plaintiff claims that, following the search, he had a verbal confrontation with Defendant Simosko, the Captain overseeing the searches, because Officer Kline denied breaking the radio's antenna. *See* ECF No. 5 at ¶ 16. Plaintiff then requested and was denied a grievance form by Defendant Simosko, in order to complain about Officer Kline breaking the antenna. *Id.* He was subsequently issued a misconduct by Defendant Coutts at the direction of Defendant Simosko. *See* ECF No. 35-4. The misconduct was approved by Defendant Snyder and charged Plaintiff with "Destroying, Altering, Tampering with, or Damaging Property." *Id.* Plaintiff, however, maintains that he was issued the misconduct out of retaliation for requesting a grievance form and for

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<sup>1</sup> Available in full at: [http://www.cor.state.pa.us/portal/server.pt/community/doc\\_policies/20643](http://www.cor.state.pa.us/portal/server.pt/community/doc_policies/20643).

a prior lawsuit that he had filed against Defendant Snyder in 2008. *See* ECF No. 5 at ¶ 20. Nevertheless, Plaintiff was able to file the grievance later that day. *See* ECF No. 35–3. The grievance was denied and the denial was upheld on appeal. *Id.*

Plaintiff's disciplinary hearing was held on December 8, 2011. *See* ECF No. 35–4. Defendant Dupont presided over the hearing as the hearing examiner and found Plaintiff guilty of the charged offense. *Id.* Plaintiff was thereafter sanctioned with the confiscation of his radio. *Id.* Plaintiff claims that Defendant Dupont found him guilty because of a lawsuit he filed against him in 2009. *See* ECF No. 5 at ¶ 17.

## **B. Standard**

Summary judgment is appropriate if, drawing all inferences in favor of the non-moving party, the record indicates 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). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element to that party's case and for which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The moving party bears the initial burden of identifying evidence or the lack thereof that demonstrates the absence of a genuine issue of material fact. *National State Bank v. Federal Reserve Bank of New York*, 979 F.2d 1579, 1582 (3d Cir.1992). Once that burden has been met, the

non-moving party must set forth “specific facts showing that there is a genuine issue for trial” or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The inquiry, then, involves determining “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Brown v. Grabowski*, 922 F.2d 1097, 1111 (3d Cir.1990) (quoting *Anderson*, 477 U.S. at 251–52).

If a court, having reviewed the evidence with this standard in mind, concludes that “the evidence is merely colorable ... or is not significantly probative,” then summary judgment may be granted. *Anderson*, 477 U.S. at 249–50. Finally, while any evidence used to support a motion for summary judgment must be admissible, it is not necessary for it to be in admissible form. See Fed.R.Civ.P. 56(c); *Celotex*, 477 U.S. at 324; *J.F. Feeser, Inc., v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir.1990).

### C. Discussion

Defendants move for summary judgment on Plaintiff’s remaining claims involving retaliation in relation to his misconduct. It is well settled that retaliation for the exercise of a constitutionally protected activity is itself a violation of rights

secured by the Constitution, which is actionable under section 1983. *Rausser v. Horn*, 341 F.3d 330 (3d Cir.2001); *White v. Napoleon*, 897 F.2d 103, 112 (3d Cir.1990). However, merely alleging the fact of retaliation is insufficient; in order to prevail on a retaliation claim, a plaintiff must show three things: (1) that the conduct in which he engaged was constitutionally protected; (2) that he suffered “adverse action”<sup>2</sup> at the hands of prison officials; and (3) that his constitutionally protected conduct was a substantial motivating factor in the defendants’ conduct.<sup>3</sup> *Rausser*, 241 F.3d at 333 (adopting *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). Once all three criteria are met, the burden then shifts to the defendants “to prove by a preponderance of the evidence that it would have taken the same disciplinary action even in the absence of the protected activity.” *Rausser*, 241 F.3d at 333. This means that “prison officials may still prevail by proving that they would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest.” *Id.* at 334 (incorporating *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

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<sup>2</sup> An adverse action is one “sufficient to deter a person of ordinary firmness from exercising his rights.” *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir.2000).

<sup>3</sup> The crucial third element, causation, requires a plaintiff to prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link. See *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir.2007); *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503–04 (3d Cir.1997).

Plaintiff claims that the misconduct was issued in retaliation for requesting to file a grievance against Officer Kline and for a lawsuit that he filed against Defendant Snyder in 2008. He also claims that he was found guilty of the misconduct in retaliation for a lawsuit he filed against Defendant Dupont in 2009. First, Defendants argue that requesting to file a grievance is not a constitutionally protected activity for purposes of a retaliation claim. They analogize a “request” to file a grievance to a “threat” to file a grievance and maintain that the case law is clear that no such threat is protected activity. Instead, the protected activity is the actual filing of the grievance; it is not the intent to, or threat of, engaging in that speech. They further argue that the misconduct alleged in this case cannot stem from Plaintiff’s actual grievance, which he filed later that day because the misconduct was issued prior to the filing of that grievance.

Defendants cite to *Griffin-El v. Beard*, Civ. No. 06–2719, 2013 WL 228098 (E.D. Pa. Jan 22, 2013), and *Stewart v. Varano*, Civ. No. 1:10–CV–1701, 2011 WL 3585409 (M.D.Pa. Aug.15, 2011), in support of their argument. The plaintiff in *Griffin-El* threatened prison guards with a complaint if they persisted with an ongoing search of his cell and seizure of his personal legal materials. *Griffin-El*, at \*8. The plaintiff argued that his threat to file a complaint was protected by the First Amendment and that defendants retaliated against him by continuing the search. *Id.* The Eastern District ruled that the plaintiff’s threat did not satisfy the first element of a retaliation claim. *Id.* Likewise, the Middle District held that the plaintiff in *Stewart* did not engage in protected conduct when

he threatened to file a grievance against a prison guard who would not permit him to use the bathroom until the inmate count was complete. *Stewart*, at \*1.

In the instant case, Plaintiff's conduct can be readily distinguishable from the conduct at issue in *Griffin-El* and *Stewart*. Here, Plaintiff intended to invoke the grievance process. He followed prison procedure by requesting a grievance form from staff so that he could properly grieve the fact that Officer Kline broke his radio's antenna. By threatening to file a grievance, the plaintiff in *Griffin-El* merely intended to obstruct the search of his cell and the plaintiff in *Stewart* wanted the guard to let him use the restroom. Plaintiff's conduct here was intended to grieve an incident that had already occurred.

Nevertheless, the undersigned will not go so far as to say Plaintiff's request to file a grievance was a constitutionally protected activity for purposes of a retaliation claim. This issue, however, along with the second and third elements of a retaliation claim, is not dispositive to the outcome of this case because Defendants have shown that they would have issued and found Plaintiff guilty of the misconduct even absent any protected activity.<sup>4 5</sup>

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<sup>4</sup> The undersigned notes that Defendants concede that the filing of a lawsuit is constitutionally protected activity for purposes of a retaliation claim. Plaintiff, therefore, has satisfied this first element with regard to his allegations of retaliation for filing lawsuits against Defendants Snyder and Dupont.

<sup>5</sup> It is questionable whether the issuance of a misconduct and confiscation of a radio is a sufficient adverse action to deter a prisoner of ordinary firmness from exercising his constitutional rights. Because Defendants have met their (continued...)

Plaintiff testified in his deposition that Defendants told him he received the misconduct because he gave them a “hard time” when he requested a grievance form instead of simply leaving the situation alone. *See* ECF No. 35–2 at 32. Even if Plaintiff were able to prove that this is correct, it is quite clear from the record that Defendants Simosko and Coutts would have issued Plaintiff the misconduct regardless of his insistent request for a grievance form. Moreover, it is equally as clear that Defendant Snyder would have approved the misconduct and Defendant Dupont would have found Plaintiff guilty of the misconduct despite previous lawsuits Plaintiff had filed against them simply because of the fact that the radio was indeed contraband pursuant to DOC rules and regulations. Plaintiff’s radio was altered from its original state because the antenna was broken and Plaintiff attempted to fix it with tape. Despite its somewhat nonsensical application to this situation, Plaintiff’s radio clearly constituted contraband as defined by DOC rules and regulations. The Third Circuit has held that courts, “should [ ] give significant deference to judgments made by prison officials in establishing, interpreting, and applying prison regulations.” *Fraise v. Terhune*, 283 F.3d 506, 515 (3d Cir.2002). As such, Plaintiff’s conclusory allegations about the evidence and applicability of DOC regulations are unavailing.

The undersigned concludes that, based on the evidence in the record, no reasonable fact finder

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burden of showing that they would have issued and found Plaintiff guilty of the misconduct even absent any protected activity, this second element will not be addressed herein.

would conclude that Plaintiff was issued and found guilty of the misconduct in this case in retaliation for requesting a grievance form and for lawsuits he had filed against Defendants Snyder and Dupont. Consequently, Defendants' Motion for Summary Judgment should be granted and Plaintiff's Motion should be denied.

### **III. CONCLUSION**

For the reasons stated above, it is respectfully recommended that the Motion for Summary Judgment filed by Defendants Dupont, Simosko, Snyder and Courts (ECF No. 32) be granted and that Plaintiff's Motion for Summary Judgment (ECF No. 37) be denied.

In accordance with the Magistrate Judge's Act, 28 U.S.C. § 636(b) (1)(B) and (C), and Local Rule of Court 72.D.2, the parties are allowed fourteen (14) days from the date of service to file objections to this Report and Recommendation. Any party opposing the objections shall have fourteen (14) days from the date of service of objections to respond thereto. Failure to file timely objections will constitute a waiver of any appellate rights.

Dated: July 16, 2013

/s/ Lisa Pupo Lenihan  
Chief United States Magistrate Judge