UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

LOUIS ALDINI, Jr.	:	**Case No. 3:07-CV-183**
	:	
Plaintiff,	:	
	:	**Magistrate Judge Merz**
v.	:	
	:	**PLAINTIFF'S MEMORANDUM IN**
DUSTIN L. JOHNSON, et al.,	:	**OPPOSITION TO DEFENDANTS'**
	:	**MOTION FOR SUMMARY**
Defendants.	:	**JUDGMENT**
	:	

Summary judgment should be denied because there are material issues of fact in dispute about whether the defendants were justified in using force against Plaintiff Louis Aldini. Thus, qualified immunity must be denied and the case proceed to trial as scheduled in January 2009.

FACTS

A. Louis Aldini Was Injured by Defendants

Louis Aldini was a 24 year old Air Force First Lieutenant who was based at Wright Patterson Air Force Base in Montgomery County, Ohio in 2006. He started his military career in ROTC in college and by the time of his deposition was a Program Manager for the Guardian Angels weapons system. He is active duty and is highly deployable to Iraq or Afghanistan but has no orders to leave this country in the next year. Aldini Dep. 10-13, 16. On Friday evening May 12, 2006 Mr. Aldini was celebrating his birthday with his friends at a bar in Dayton. He was asked to leave the bar after midnight and on the way out he kicked the door, which broke the glass. He immediately apologized and offered to pay for the damage. *Id.* 28. Nonetheless, he was arrested for criminally damaging and disorderly conduct by the Dayton Police on May 13, 2006

Mr. Aldini arrived at the Montgomery County Jail at 2:11 in the morning. The booking process could not be completed until his photograph was taken. Defendant Dustin Johnson was tasked with taking Mr. Aldini's photograph. Defendant Johnson is a civilian detention officer. He is not a sworn deputy. Johnson Dep.11. He did not take the photograph immediately. Instead, Mr. Aldini was told to wait in the booking area. Aldini Dep. 73-74. The booking area of the jail is essentially one large room, where the detainees waiting to be booked are on one side and the detainees who have been booked are on the other side. Telephones are available for booked detainees to use.

While Mr. Aldini was in booking waiting to be photographed and the booking process to be completed he kept asking for a phone call. Aldini Dep. 81-82. Mr. Aldini wanted to make a telephone call to let his friends know where he was so they could post his bond. He repeatedly asked to make a phone call. *Id*. 80-82. Mr. Aldini testified he must have "pushed their buttons" and "got on their nerves" because he had asked too many times for his phone call. He was told to go to a cell. *Id*. 81-82. Mr. Aldini complied. Defendant Johnson placed Aldini in cell 134. The cells line the back wall of the booking room. The cell door was not closed. No other detainee was in the cell. *Id*. 83-84. When Mr. Aldini was asking for the phone call he did not yell or swear or become abusive, but he would say he was demanding. *Id*. 82, 86.

As Officer Johnson walked away from cell 134 Aldini raised his voice, said "hey" and demanded to make a call. Officer Johnson became irritated with Mr. Aldini' persistent demands to use the phone. Officer Johnson turned around, said "that's it" and came after Mr. Aldini. Johnson entered the cell and started coming at Aldini. Aldini, thinking he was about to be cuffed, backed up, placed his hands behind his head and said

"I'm not resisting." Johnson pushed Aldini up against the back wall of the cell, and then other officers arrived in the cell. Aldini was then spun around and taken to the ground and viciously beaten and kicked. Aldini never resisted, constantly said he was not resisting, was in a submissive position, and kept saying "cuff me." Aldini Dep. 66-70, 90, 92-93. The officers held his body up – elevated above the floor – with a person holding each leg and arms in a crucifix position. The officers punched and kicked him and said "how do you like taking these orders officer." Aldini screamed for help but no one came to stop the beating. *Id*. 94-98. It was chaos in the cell. Aldini was begging them to stop but the beating continued for several minutes before they brought in the taser. *Id*. 96. Sgt. Bodine said nothing before he tased Aldini multiple times for about 10 minutes. Aldini Dep. 100-102. Aldini screamed for them to stop. Someone said he was going to die in the jail that night. Aldini said "just kill me" because it felt like he was being tortured. *Id*. 102. The defendants just laughed. *Id*.

When the officers were done Aldini was bleeding profusely all over his face. He asked for help. *Id*. 103. They took him to another cell and put a hood on him and restrained him in a chair. He was scared and was afraid they would beat him again once he was tied down. *Id*. 103-04, 107. This was about 3:00 a.m. (The first tasing took place at 2:51 a.m.[1] according to the taser report Exhibit F and lasted about 10 minutes.) Sometime later the officers brought Aldini to the desk to sign papers and then returned him to the restraint chair and placed in a different room. *Id*. 111-116. This second

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[1] Sgt. Bodine testified that the time on the taser report was wrong and should have said it was 4:05 when he first tased Aldini. Bodine Dep. 33-34. But this corrected time is not credible given that the video of Aldini in the restraint chair starts at 4:05 and lasts to 6:00 showing no tasings in those 2 hours; the log states Aldini entered the restraint room at 4:05 (Ex. E p. 6) and despite allegedly knowing the report times were wrong, Bodine did not amend the printout or note the correct time in his report. Bodine Dep. 35-36.

restraint was preserved on videotape which started recording Aldini in the restraint chair at 4:05 a.m. Exhibit A Video of Restraint.[2] The jail took photographs of Mr. Aldini's injuries and while the hood was on his face. Exhibit B.[3] The photographs clearly show Mr. Aldini' injuries from the beating. Mr. Aldini was terrified by the beating, the tasing, and then being restrained.

At 4:15 or 4:30 Mr. Aldini's friend and girlfriend paid his bond. Phelps Dep. 41. As is obvious from the video, Mr. Aldini was calm and submissive while he was restrained. However he was not released from the restraints until 6:00 a.m. After he was released he was ordered to clean his face to remove the blood so his booking photo could be taken. Aldini Dep. 121-122. Exhibit C Booking Photo.[4] Soon after he cleaned up his face he was photographed and released.

Mr. Aldini's friends then took him to Miami Valley Hospital where he was treated. The medical records indicated he had a 3 cm laceration over his left eye and a 1 cm laceration that required 6 sutures total, he had multiple taser marks on his back, and complained of pain to his back. His head showed signs of trauma including multiple areas of swelling and bruising. He also had bruising on his back and skin irritation on his wrists. Mr. Aldini was in pain all over including the side of his head, his nose, neck, and back. See Exhibit D for selected photographs and Exhibit G for all photographs of injuries. The Dayton Police arrived, took a statement and photographs of Mr. Aldini, however the statement and photographs have not been recovered.[5]

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[2] Exhibit A is a disk containing the video of Aldini in the restraint chair and will be filed manually.
[3] Exhibit B are photographs identified in Johnson's deposition as Ex. 3.
[4] Exhibit C is the booking photograph identified in Johnson's deposition as Ex. 2.

B. <u>Defendants Fabricated Justification for Their Use of Force</u>

The jail policies prohibit the use of force and the use of restraints as punishment but do allow force as "a last resort" in controlling inmates. Force is to be in direct proportion to an appropriate objective and is to be used "only when the situation absolutely demands it." Exhibit H Use of Force policies. Thus, in order to justify their force and explain Aldini's injuries, the defendants fabricated an explanation for their actions. Whether they were justified in their use of force is a disputed material fact.

After force is used, the practice at the jail is for the officers to write their narratives and use of force reports soon after the use of force. Defendant Johnson opened a report on the computer at 4:10 a.m. and each defendant then immediately started to draft their statements. As is their standard procedure, prior to writing their statements, the four defendants met and discussed the incident "so that way everybody is, you know, clear on what everybody did so that way you can provide an accurate report and that way if there's anything that should be, any concern, then the sergeant can bring it up to you." Kaczmarek Dep. 57. Defendant Sgt. Bodine conducted the briefing asking each officer who hit Aldini and why so they could answer in front of all the other officers. *Id.* at 58. Once the briefing was over the officers start typing their narratives. While they are typing they could open other officers' narratives and compare statements. *Id.* 60-61. See Exhibit E Use of force reports and narratives.[6] Sgt. Bodine signed off on all the other defendant's use of force reports as being appropriate.

Officer Johnson attempts to justify his force on Aldini (three punches and a knee to the ribs Johnson Dep. 74-76, 79, 120) as necessary because Aldini was a safety risk to

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[5] Dayton Police and counsel for former defendant Dayton Police Officer Jones exhausted their thorough search for the photographs without finding them.

others, ignored verbal direction, displayed physical danger cues, was actively resisting, and attempt to harm others. Ex. E p. 4. In his written narrative Johnson stated Aldini "placed his hands up in a fighting position and began to charge me" but he could not close the door. Ex. E. p. 9. However, in his deposition Johnson testified he when he decided to close the door on Aldini's cell, Johnson was in the doorway and Aldini was five to six feet away from him and the door could be shut in seconds. Johnson Dep. 100-01, 112, 81. But instead of closing the door Johnson pushed Aldini against the wall and took him down to the floor. Johnson admitted that Aldini never used force, threw a punch, kicked, used his legs feet or knees, struck, injured, used a weapon or spit on Johnson or anyone else. Johnson Dep. 109-113.

Officer Kaczmarek's justification for twice punching and kneeing Aldini was Aldini's alleged attempt to grab Officer Johnson's shirt and his resistance to being belted into the restraint chair. Ex. E p. 11. Interestingly, Officer Johnson never stated that Aldini tried to grab his shirt. (See Johnson Deposition and statements in Ex. E). Officer Kaczmarek's use of force reported checked off the same justifications as Johnson's. Ex. E p. 1.

Officer Leopold's justification for punching Aldini was his resistance, after being cuffed, to having the lap belt put on the restraint chair. Ex. E p. 9, Leopold Dep. 19-20. His use of force reported checked off the same justifications as Johnson's. Ex. E p. 3.

Sgt. Bodine's justification for the takedown and force in the cell was that when Aldini allegedly stood in the doorway blocking Johnson from closing the door, Aldini was attempting to escape. Bodine Dep. 59-61, 72. Sgt. Bodine justifies his tasing Mr. Aldini because he resisted being cuffed in the cell after he was taken to the ground.

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[6] Exhibit E is the use of force reports and narratives identified in Johnson's deposition as Ex. 4.

When Mr. Aldini allegedly resisted being restrained in chair, while cuffed, Sgt. Bodine tased him again while the other officers punched him. Ex. E p. 10.

While he was writing his report Sgt. Bodine downloaded the information from his taser. Bodine Dep. 31-32. This is against policy, since the employee is required to submit his taser to a supervisor who is then required to download the taser information. Exhibit F taser policy.[7] The reason for this policy is obvious. As Sgt. Bodine explained, when downloading the taser information the person can limit the information downloaded by date and time. Bodine Dep. 31. Bodine's taser report (Exhibit R. p. 7) only shows two tasings: the first at 2:51 a.m. for 9 seconds and the second at 2:55 for 5 seconds. Aldini testified he was tased more than three times in 10 minutes (Aldini Dep. 100-102). Additionally, the photos of his back (Ex. D) clearly show at least half a dozen twin taser marks. Aldini denies being tased in the restraint chair. He was only tased in the cell after he was punched and kicked. Aldini Dep. 100-102.

Sgt. Bodine also was responsible for collecting the video from the jail cameras to preserve for the use of force investigation. He looked at the video and chose to save only the video of Mr. Aldini in the restraint room from 4:05 a.m. to 6:00 a.m. as evidence. He did not save the rest of the video from that night. Bodine Dep. 15-18. Sgt. Bodine purposefully did not preserve evidence relevant to the material disputed facts in this case. For example, the video would have shown when the incident in 134 started and ended, who entered when, what was going on in cell 134, whether Mr. Aldini was in 1 restraint room or 2, whether he was in the restrained chair for more than the allowed 2 hours, and most importantly, what started the whole incident. It is undisputed that the video camera would be able to capture the image of an inmate standing in doorway of 134 and blocking

the door from closing. Kaczmarek Dep. 23, 25. If Aldini had stood in the doorway trying to escape as Sgt. Bodine claims, why did the Sergeant not save the video? The inference that a reasonable trier of fact may draw from the failure to preserve evidence is that the video did not show Aldini blocking the doorway, but instead showed Johnson charging toward Aldini without justification.

Finally, when deciding the credibility of a witness it is appropriate to consider the defendant officers' use of force history.[8] Officer Johnson had close to 100 uses of forces in his 4 year career at the jail, but has never been disciplined. Johnson Dep. 132-33. Defendant Leopold was had less than 10 uses of forces but he has a history of being disciplined for use of force. In January 2007 he was given a 30 suspension and two years probation for lying on a use of force report. He stated he only hit an inmate when what he really did was hit the inmate and then kick him in the back after he was cuffed and down on the ground. Leopold Dep. 7-9. Defendant Kaczmarek was suspended for failing to complete a use of force report in 2005 and was ordered terminated in 2006 for using excessive force on a cuffed inmate. He pushed the inmate and caused injuries to this head and wrists and left me on the floor. His incident report was false and he lied about what happened. Apparently before he was terminated, Kaczmarek quit. Kaczmarek Dep. 12, 66-71[9], Ex. I Kaczmarek Discipline documents.

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[7] Exhibit F is Montgomery County Sheriff's Office ("MCSO") policy 1.1.3 (G) Use of Taser.

[8] Fed. R. Evid. 608 allows the credibility of a witness to be attacked for untruthfulness.

[9] Defendant Kaczmarek failed to reveal his termination at first when asked about discipline in his deposition (p. 10-14), but later volunteered it (p. 65 – 71).

III. LEGAL ARGUMENT

A. Summary Judgment Standard

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "If ... the defendant disputes the plaintiff's version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of [summary judgment]." *Phelps v. Coy*, 286 F.3d 295, 298 (6th Cir. 2002). "[W]hen the non-moving party presents direct evidence refuting the moving party's motion for summary judgment, the court must accept the evidence as true." *Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994). The Court may not inquire into the credibility of the direct evidence. *Id.*

The evidence presented is construed in the light most favorable to the non-moving party, which is given the benefit of all favorable inferences that can be drawn there from. *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S. Ct. 993 (1962); *Cox v. Kentucky Dept. of Transp.,* 53 F.3d 146, 150 (6th Cir. 1995) (in resolving a motion for summary judgment, the court "must afford all reasonable inferences, and construe the evidence in the light most favorable to the non-moving party"). Nor may the Court weigh the evidence or determine the truth of the matter; the Court "determines whether there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2510 (1986). In fact, when a plaintiff testifies to a material fact that is sufficient to defeat summary judgment. *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 904 (6th Cir. 2006) (plaintiff's testimony created a genuine issue of material fact as to whether or not a

vessel was seaworthy); *D'Agastino v. City of Warren*, 2003 WL 22220530, *5 (6th Cir. 2003) (holding that for purposes of summary judgment the court must "take the plaintiff's version of the facts as true" and that if that testimony creates a question of fact, summary judgment should not be granted). "The central issue is '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.'" *Spadafore v. Gardner*, 330 F.3d 849, 852 (6th Cir. 2003). Defendants cannot meet this burden.

B. The Fourth Amendment Standard Applies in a Use of Force Case Involving A Detainee During Booking

Defendants argue that the Eight Amendment standard applies in this case because Mr. Aldini was no longer in the custody of the arresting officers when force was used on him. However the Fourth Amendment is the proper standard. The Fourth Amendment protects the rights of citizens to be free from unreasonable searches and seizures during arrests and investigative stops. *Graham v. Connor,* 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Under the Fourth Amendment reasonableness standard, an officer's use of force must be objectively reasonable. Factors considered in determining whether the use of force was reasonable include: the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Id. citing Tennessee v. Garner,* 471 U.S., at 8-9, 105 S.Ct., at 1699-1700. The officer's subjective intentions are irrelevant to the Fourth Amendment analysis. *Id.* at 397.

The other alternative is to apply the Fourteenth Amendment standard in a pre-trial detainee case. The due process clause of the Fourteenth Amendment protects a pre-trial detainee from excessive force. *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979). A

pre-trial detainee, the court noted, has not been convicted of a crime, but has had a judicial determination of probable cause and, if arrested for a violation of federal law, a bail hearing. *Id.*

The United States Supreme Court has not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins. *Graham*, 490 U.S. at 395, FN10. This unresolved question has created "a murky area between the Fourth and Eighth Amendments" *Phelps v. Coy*, 286 F.2d 295, 300 (6th Cir. 2002), quoting *Gantt v. Akron Corr. Facility*, 1996 WK 6530 (6th Cir. 1996). With respect to which amendment provides protection, the Eighth Circuit has stated that "between arrest and sentencing lies something of a legal twilight zone." *Wilson v. Spain*, 209 F.3d 713, 715 (8th Cir. 2000).

The Sixth Circuit has not yet resolved what standard should be used in analyzing a claim of excessive force by a pre-trial detainee. *Gantt v. Akron Corrections Facility*, 73 F.3d 361. 1996 WL 6530 (6th Cir., 1996). As recently as this past summer, the Sixth Circuit restated the ambiguity of the protections afforded to a pre-trial detainee, stating: "[w]hile there is room for debate over whether the Due Process Clause grants pretrial detainees more protections than the Eighth Amendment does, we need not resolve that debate here." *Leary v. Livingston County*, 528 F.3d 438 (6th Cir., 2008).

Although the Sixth Circuit has not resolved the standard for pretrial detainees, it has extended the Fourth Amendment protections through the booking process. The Court has held that during booking and prior to bonding, a person is entitled to the Fourth Amendment protection against unreasonable seizure. *Phelps v. Coy*, 286 F.3d 295 (6th

Cir., 2002), *see also Moore v. Novak*, 146 F.3d 531 (8th Cir., 1998) (applying the Fourth Amendment standard in case where plaintiff alleged excessive force occurred while plaintiff was being booked). In *Phelps*, the plaintiff was in the process of being booked for a misdemeanor. An officer asked the plaintiff to lift his foot so that the officer could take the plaintiff's shoe off. Another officer say this and believed that the plaintiff was attempting to kick the other officer. The officer tackled the plaintiff, and both fell to the floor. The officer was on top of the handcuffed plaintiff. The officer told the plaintiff not to try to kick one of his officer, and he hit the plaintiff in the face twice. He then grabbed the plaintiff's shirt and banged his head into the floor at least three times. There was no evidence that the plaintiff posed a threat to the officer or anyone else after the officer had tackled him. As the plaintiff had not yet been booked or bonded, the Sixth Circuit affirmed the district court's decision to apply the Fourth Amendment standard for excessive force in this case. Further, the Sixth Circuit affirmed the district court's finding that the plaintiff's version stated a clearly established constitutional violation, and decision to deny the defendant's motion for summary judgment. *Id.*

District Courts have come to similar conclusions. In *Harris v. City of Circleville*, 2008 WL 211363, *6 (S.D.Ohio, January 23, 2008), state highway patrol troopers arrested the plaintiff for speeding and OVI. The officers then began to transport the plaintiff to the Circleville Jail. En route, the officers alerted the jail officers that the plaintiff was "a resister." At the jail, the plaintiff was taken directly to "the drunk tank." In the cell, they initiated booking by removing the plaintiff's jewelry and belt. The plaintiff became uncooperative, and did not want the police to taken his belongings. The jail officers then kicked the plaintiff's leg out from under him, causing him to fall and hit

his head on the floor. Officers then moved the plaintiff out of the drunk tank and into the booking area so that their attempt to take the plaintiff's belongings would be caught on surveillance. The officers commanded that the plaintiff kneel on the floor. The plaintiff contended that he could not because of the handcuffs and the angle that his arm was being held at. The jail officers then administered a takedown maneuver, and two strikes to the plaintiff's thigh. The plaintiff fell to the ground, and the officers placed their knees in the plaintiff's back. At this time, the plaintiff heard a pop and began to scream in pain. Doctor reports would later reveal that the plaintiff's back was broken. The District Court noted that the force occurred after the arrest, but before booking was completed, and as such, the Fourth Amendment reasonableness standard applies. *Id.* at *6. The court further held that the officers were not entitled to qualified immunity because if the plaintiff's version of events were to believed, there was no question that the officer's conduct violated his established right to be free from excessive force. *Id.* at *12. *See also Boyer v. City of Mansfield*, 3 F.Supp.2d 843 (N.D.Ohio, April 21, 1998), *Bucherl v. Miller*, 2006 WL 2850460 (N.D. Ohio, October 2, 2006) (applying Fourth Amendment reasonableness analysis to claim of excessive force during booking).

Therefore, Fourth Amendment protection applies to from the time of arrest until booking is completed. As Mr. Aldini had not completed the booking process at the time that he was beaten and tased, his right to be free of excessive force was protected by the Fourth Amendment, and consequently his claim should be analyzed using the Fourth Amendment reasonableness test.

C. Under the Fourth Amendment Standard Whether Defendants Used Excessive Force is a Material Fact in Dispute

Defendants must be willing to concede the most favorable view of the facts to the plaintiff in a qualified immunity summary judgment motion. Additionally when Plaintiff submits direct evidence to dispute the motion for summary judgment, that direct evidence must be accepted as true and credibility cannot be questioned, even when the evidence is Plaintiff's own testimony. Defendants have refused to concede Plaintiff's facts and cite only their version of their justification for using force. Defendants have also ignored Plaintiff's testimony denying he charged Officer Johnson or resisted being cuffed or restrained.

As the facts clearly show, Plaintiff has submitted sufficient direct evidence for reasonable minds, drawing all inferences in Plaintiff's favor, to conclude that the Defendants were not objectively reasonable when Defendant Johnson charged Mr. Aldini for asking for a telephone call and the other Defendants joined him in the vicious punching, kicking, tasing and taunting. Nor were Defendants reasonable when they covered Mr. Aldini's head with a hood and restrained him to a chair and left him a small room for several hours. A reasonable trier of fact, believing Plaintiff's facts, could easily conclude Defendants behavior was unconstitutional. Therefore, the Defendants are not entitled to qualified immunity. Furthermore there is no question that the Fourth Amendment right to be free from excessive force was clearly established long before May 2006.

D. Even if the Eighth Amendment Standard Applied, Whether Defendants Used Excessive Force is a Material Fact in Dispute

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment. The Supreme Court has interpreted this to mean that the Eighth Amendment prohibits punishments which are incompatible with the evolving standards

of decency that mark the progress of a maturing society. *Estelle v. Gamble*, 429 U.S. 97, 102 97 S.Ct. 285, 290 (1976).

In excessive force cases, this amendment prevents prison officials from unnecessarily and wantonly inflicting pain upon prisoners. *Whitley v. Albers*, 475 U.S. 312, 318, 106 S.Ct. 1078 (1986). In these cases "the question of whether the officer's conduct violated the Eighth Amendment turns upon whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm." *Id.* at 320; *Hudson v. McMillian,* 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

When prison officials maliciously and sadistically use force to cause harm; contemporary standards of decency always are violated. *Hudson,* 503 U.S. at 9. To determine whether the officials maliciously and sadistically used force to cause harm, courts are instructed to consider: the extent of injury suffered by an inmate, the need for application of force, the relationship between that need and the amount of force used, the threat 'reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response. *Combs v. Wilkinson*, 315 F.3d 548 (6th Cir., 2002), *citing Hudson v. McMillian,* 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

An inmate states a constitutional violation when he claims that, without provocation, officers assaulted him. *Johnson v. Perry*, 106 Fed.Appx. 467, 2004 WL 1987151 (6th Cir., September 03, 2004). In *Perry*, the plaintiff stated that he was leaving a prison hearing when he saw the three defendant corrections officers gathered in a group. One of the officers told the plaintiff to move faster. The plaintiff ignored the officers, and then one of the officers tripped him, causing him to fall down the stairs. He

was put in a choke hold and pushed by the other officers onto the floor. The officer stated that when the plaintiff was to return to his cell, the plaintiff refused and began cursing. The Sixth Circuit found that there was a dispute as to whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." As such, the district court erred in granting summary judgment to the defendants.

A plaintiff stated an Eighth Amendment excessive force claim that he asserts was beaten by officers after he complied with the police officer's ordered *Dellis v. Corrections Corp. of America*, 257 F.3d 508 (6th Cir., 2001). The appellate court found that the district court erred in dismissing the Eighth Amendment claim, finding that the district court erred because even if it had determined that the use of force was necessary for to maintain or restore discipline, the court was not construing the facts in the light most favorable to the plaintiff. *Id*. Similarly, a plaintiff states an Eighth Amendment violation when a prison guard attacks an inmate simply for failing to comply with the demands of the corrections officer. *Thaddeus-X v. Love,* 215 F.3d 1327, (6th Cir., 2000). In this case, the plaintiff observed the defendant corrections officer eating while at a prison desk in violation of the prison's policies. The plaintiff told the officer that he was going to file a grievance against the officer as a result. The next day, the officer asked the plaintiff to give him the grievance that the plaintiff had written. When the plaintiff reached for his food tray, the officer grabbed the plaintiff's hand and began slamming it with the food tray door. The officer stated that he never closed the door because the plaintiff did not remove his hands from the slots. Based upon these facts, the appellate

court found that the district court erred in granting summary judgment for the defendant because there was a question of material fact remaining. *Id* at *2.

Like these cases, Defendants are not entitled to summary judgment. Mr. Aldini has testified and the evidence is sufficient to show that the initial attack and subsequent tasing and restraint were done because Mr. Aldini demanded a telephone call, not to restore order or for any other good faith reason, but to punish him. Thus, qualified immunity under even the Eight Amendment must be denied.

E. Defendants are Not Entitled to Summary Judgment on the Official Capacity Claims

Sgt. Bodine gathered the defendants to make sure everyone knew what each other was going to report. He also was the supervisor of the three defendant officers and approved their use of force reports. No defendant was disciplined for his actions. As such, it could be argued that the Sheriff ratified the actions of the defendants.

One way to establish local government liability is by proving a failure to supervise employees that is so serious that it amounts to deliberate indifference to the rights of persons with whom the employees come into contact. *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1247-48 (6th Cir. 1989). In that case a county was held liable for failure to provide adequate medical care to disabled inmates in a jail. The court stated that,

> Under the principles articulated in *Monell*, Leach must demonstrate that his maltreatment was the result of a policy or custom of the governmental entity. The policy involved here is one of deliberate indifference to the medical needs of paraplegic and physically incapacitated prisoners in the Shelby County Jail. The manifestation of this policy here has two aspects: first, the Sheriff failed to supervise his employees adequately when he knew or should have known of the danger that inmates such as Leach were likely to receive inadequate care and second, the Sheriff failed to investigate

> this incident and punish those responsible, in effect ratifying their actions.

Id. *See also DiSorbo v. Hoy*, 343 F.3d 172, 176-79 (2d Cir. 2003) (describing facts that led to jury verdict, affirmed by appeals court, that city was liable for police misconduct due to its deliberate indifference to need to supervise officers); *Frey v. Hicks*, 992 F.2d 1450, 1455-58 (6th Cir. 1993) (affirming jury verdict finding defendant liable for failure to supervise); *McKenna v. City of Memphis*, 785 F.2d 560 (6th Cir. 1986) (recognizing theory of municipal liability based on failure to supervise and discipline officers); *Bordanaro v. McLeod*, 871 F.2d 1151, 1157-59 (1st Cir. 1989) (same).

The term "deliberate indifference" in cases involving failure to supervise is based upon an interpretation of § 1983 and the notion that a "policy" is a course of action chosen among various alternatives.[10] The policy of failing to train or supervise must be a "deliberate" or "conscious" choice by the municipality. *See Canton*, 489 U.S. at 389. Ratification can be evidence of deliberate indifference and municipal liability. *Kohler v. City of Wapakoneta*, 381 F.Supp.2d 692 (N.D. Oh 2005), citing *Leach v, Shelby Co Sheriff*, 891 F. 1241, 1247 (6th Cir. 1989); *Marchese v. Lucas*, 758 F.2d 181, 182 (6th Cir. 1985); *Otero v. Wood*, 2004 WL 1009788 at p. 13 (S.D. Ohio 2004) (when a city ratifies the unlawful conduct of it its employees, the city subjects itself to § 1983 liability by failing to meaningfully investigate those acts); *Wright v. City of Canton*, 138 F. Supp.2d 955, 966 (N.D. Ohio 2001) (municipal liability can be established when a final policymaker approved an inadequate investigation into police use of excessive force).

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[10] In *Monistere*, *supra*, the Sixth Circuit did not require the plaintiffs to demonstrate deliberate indifference in order to succeed on a "failure to supervise" claim. Instead, the court held that because a jury could have concluded that the practice of granting lead investigators "complete discretion to conduct their own investigation" led to the unconstitutional strip searches of the plaintiffs, municipal liability under § 1983 was appropriate. 115 Fed. Appx. at 851. Here, the evidence is sufficient to allow a jury to find that

In the case at bar Sgt. Bodine allowed the defendants to avoid discipline for their actions, therefore his actions ratified their use of excessive force and make him liable in his official capacity.

F. Defendants are Not Entitled to Summary Judgment on the State Law Claims

Plaintiff's claims for assault and battery and intentional infliction of emotional distress should not be dismissed on summary judgment for the same reasons qualified immunity should be denied: Plaintiff has submitted sufficient evidence to show that Defendant's actions were not in good faith, were malicious, or wanton or reckless. Thus, Defendants are not entitled to immunity under O.R.C. § 2744.

Finally, Defendants incorrectly state that Defendants must be convicted of a crime for Plaintiff to state a claim under O.R.C. § 2307.60. This statute provides that any victim of a criminal act may recover "full damages" in a civil action. The section specifically provides that a criminal conviction of the crime is not a condition precedent to civil liability. *Gonzalez v. Spofford*, 2005 WL 1541016 (Ohio App. 8 Dist., 2005). Defendants misconstrue O.R.C. §2307.60 and cases interpreting that statute. Citing to *Hite v. Brown*, defendants state that there is no liability under O.R.C. § 2307.60 in this case because the defendants were not convicted of a crime. 100 Ohio App.3d 606, 654 N.E.2d 452 (Ohio App. 8 Dist., 1995). However, nothing in *Hite* nor R.C. § 2307.60 requires that a criminal conviction occur; instead both require a criminal "violation." In fact, one Ohio court has stated "[i]t is clear that the legislature did not intend "criminal act" to amount to a criminal conviction that requires proof beyond a reasonable doubt. Had the legislature intended such a requirement for purposes of R.C. 2307.61, it would

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the policy of not supervising the individual defendants was the moving force behind the deprivation of

have used the words "criminal conviction " in R.C. 2307.60." *Red Ferris Chevrolet, Inc. v. Aylsworth*, 2008 WL 4377549 (Ohio App. 9 Dist., September 29, 2008) (original emphasis). Therefore, this claim should not be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiff requests that the motion for summary judgment be denied on all claims and the case proceed to trial.

ORAL ARGUMENT REQUESTED

Plaintiff requests oral argument on the motion to answer any questions the Court may have.

Respectfully submitted,

/s/ Jennifer L. Branch
Alphonse A. Gerhardstein (0032053)
Trial Attorney for Plaintiff
Jennifer L. Branch (0038893)
Attorney for Plaintiff
GERHARDSTEIN & BRANCH CO. LPA
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202
(513) 621-9100
(513) 345-5543 (fax)
agerhardstein@gbfirm.com
jbranch@gbfirm.com

Plaintiffs' constitutional rights.

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2008, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/ Jennifer L. Branch
Attorney for Plaintiff