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

AILEEN DIAZ MORALES,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	**NO. 05-4032**
	:	
GEORGE TAVERAS, et al.,	:	
Defendants.	:	

MEMORANDUM AND ORDER

Stengel, J. January 18, 2007

On the evening of July 28, 2003, in Reading, Pennsylvania, Aileen Diaz Morales was cited and arrested for violating the City of Reading's noise ordinance. She alleges that the conduct of two Reading police officers, George Taveras and Matthew Mish, prior to and during her arrest violated her civil rights. As a result, she filed this action against the two police officers, the Chief of Police of Reading, Charles Broad, and the City of Reading. The eight-count Amended Complaint alleges, *inter alia*, that the defendants infringed on her rights under the First Amendment and Fourth Amendment of the U.S. Constitution in violation of 42 U.S.C. § 1983 and on her rights under Article I, § 8 of the Pennsylvania Constitution. Taveras and Mish filed the partial summary judgment motion under consideration with respect to four counts of the Amended Complaint.[1] For the

[1]Footnote 3 of the Defendants' Brief in Support of Motion for Partial Summary Judgment ("Def. Br.") states: "Plaintiff's counsel advised defense counsel that Plaintiff will voluntarily dismiss all claims against the City of Reading and Charles Broad." Def. Br. at 2 n.3. To date, no motion or stipulation has been filed with the Court to dismiss the claims against the City of Reading or Charles Board.

reasons set out below, I will grant the motion for summary judgment in part and deny it in part.

I. BACKGROUND[2]

On July 28, 2003, between 9:30 p.m. and 10:00 p.m., Reading Police Officers Taveras and Mish were dispatched to 219 North 3rd Street in Reading in response to a citizen complaint of yelling and screaming at that address. The address is the home of the plaintiff's cousin, Joelle Diaz. Officers Taveras and Mish were advised that: "Neighbors from above address yelling and screaming in front of their house. Comp[lainant] states this is a constant problem and the people from the address have been warned." See Computer Assisted Dispatch ("CAD") sheet at Ex. B to Def. Br.

Officers Taveras and Mish arrived on the scene in separate police vehicles. When Officers Taveras and Mish drove onto the 200 block of North 3rd Street, they heard noise coming from the vicinity of the Diaz porch. See Taveras Dep. at 171-72, 179-80;[3] Mish Dep. at 113.[4] When Taveras and Mish arrived, Morales, Diaz, and approximately ten

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[2] The facts have been taken from the Amended Complaint and the parties' statements of undisputed facts, and the exhibits thereto, filed in connection with this motion. The facts are viewed in the light most favorable to the non-moving party, the plaintiff.

[3] "I was detailed to a noise complaint, I turned the corner, I heard loud yelling. I got out of my car, I could hear more yelling, sounded to me like the same people who were yelling prior to my arrival, and as I turned the corner there . . . ." Taveras Dep. at 179.

[4] Q: All right. When you turned left onto Third Street, were your windows up, or down?
A: Down.
Q: What did you hear, if anything?
A: I could hear noise coming from the area of the call
Mish Dep. at 113.

children ranging in age from 2 to 18 were in the general vicinity. See Taveras Dep. at 174-75; Morales Dep. at 62-66. As the officers approached the porch of 219 North 3rd Street, Morales was sitting on the steps of the porch and Diaz was standing on the porch. Both women began to question Taveras about his presence at the scene. See Taveras Dep. at 175-76 ("And also Aileen was yelling towards me things of that nature, why are you here, we are not doing anything wrong, whatever."); id. at 187-89 ("There were things that she [Morales] said as I was arriving, again yelling, you know, what did we do, what are we doing, what's he problem here, why are people always calling the police. It was very loud.").

Officer Taveras questioned Morales and Diaz. Although the sequence of events is far from clear, he approached Morales and asked her for her name and address. Taveras obtained the same information from Diaz. The discussion between Diaz and Taveras was heated. Diaz acknowledged that she owned the house, but was rude to Taveras and did not cooperate with his request. She yelled at Taveras and said "this is my house and these are my kids and I can play on my porch all I want." See Morales Dep. at 90-91. During this time, Diaz's next door neighbor came out of his house. The neighbor yelled to the officers that the individuals at 219 North 3rd Street were always making loud noise. See Morales Dep. at 99-101; Taveras Dep. at 186-88. While Taveras questioned Diaz and Morales, Officer Mish was standing on the sidewalk in front of the porch. See Aff. of J. Golden at Ex. B of Pl. Br. Opp'n Defs.' Mot. Summ. J. ("Pl. Br."); Aff. of Diaz at Ex. C of Pl. Br.

After obtaining the preliminary identification information from Diaz and Morales, Officer Taveras informed both women that they would be receiving citations for violation of Reading's noise ordinance.[5] Morales attempted to dissuade Taveras, but Taveras abruptly stopped her. See Morales Dep. at 91-92 ("And I said, 'officer, I was just sitting here. I don't even live here. May I speak with you. Officer, may I speak with you.' And he turned around and put his hand up and said that, 'you don't have a damn thing to say that I want to hear.'").

Taveras returned to his vehicle to run the identification information through the police computer and to write the citations. When Taveras did not receive any response from the police system for the names and addresses that Morales and Diaz had given him, he returned to the porch to confirm their identities. Id. at 200. The police computer only contains information for individuals that have been issued a Pennsylvania driver's license or identification card. See Taveras Dep. at 198-200.

Taveras approached Morales, who was sitting on the porch stairs, and said "let me have your Social Security number." Morales Dep. at 101-02. After some urging from Diaz and another person at the scene, Morales informed Taveras that she would "like to

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[5]The relevant portion of the Reading noise ordinance states:

> The following acts, and the causing thereof, are declared to be noise disturbances and therefore in violation of this Part. . . . Engaging in loud or raucous yelling, shouting, hooting, whistling or singing: (1) On the public streets between the hours of 10 p.m. and 7 a.m. (2) At any time or place in such a manner as to create a noise disturbance.

READING, PA., CODE § 10-204 (2002).

reserve the right not to give that information," but she would be happy to take care of any citation the officers planned on issuing. See id. at 102-04. Taveras responded that she did not have a choice and Morales was required to provide her Social Security number. Ex. C of Def. Br. Taveras then grabbed his handcuffs and instructed Morales to stand up. When Morales did not obey the command to stand as promptly as Taveras wished, Taveras grabbed Morales by the arm and attempted to handcuff her. In the process of handcuffing Morales, Taveras slammed her several times against the porch handrail.[6] While Taveras handcuffed Morales, several of the individuals in the area interfered with Taveras's actions. See Taveras Dep. at 238; Morales Dep. at 107-09; Diaz Dep. at 37-39. During the period that Taveras attempted to handcuff Morales, Officer Mish was in close proximity observing Taveras's actions. See Aff. of J. Golden at Ex. B of Pl. Br.; Aff. of Diaz at Ex. C of Pl. Br.

On July 28, 2005, the plaintiff filed her eight-count Complaint with this court against Officer Taveras, Officer Mish, Chief Broad, and the City of Reading. On August 12, 2005, she amended the complaint. After several months of discovery, defendants Taveras and Mish filed the current motion for partial summary judgment on March 28, 2006 on the following counts of the Amended Complaint: (1) Count II against Taveras for unlawful seizure under § 1983; (2) Count III against Taveras for false arrest under § 1983;

[6]The specifics of the custodial arrest, in particular the force used by Taveras to handcuff the plaintiff, are relevant to Count I of the Amended Complaint — Excessive Force by Officer Taveras. Since this motion for partial summary judgment does not pertain to that count, there is no reason to address the factual allegations underlying that claim.

(3) Count IV against Mish for bystander liability under § 1983; and (4) Count VIII against Taveras and Mish for unlawful seizure under the Pennsylvania Constitution. The plaintiff responded to the defendants' motion on May 3, 2006.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is "genuine" 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, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

In this case, the defendants bear the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). While a plaintiff bears the burden of proof on a particular issue at trial, a defendant's initial Celotex burden can be met simply by pointing out to the court that there is an absence of evidence to support the plaintiff's case. Id. at 325. After the defendants have met their initial burden, the plaintiff's response, by affidavits or otherwise as provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e). That is, summary judgment is appropriate if the plaintiff

fails to rebut the defendants' assertions by making a factual showing sufficient to establish the existence of an element essential to her case, and on which she will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 322. Under Rule 56, the court must view the evidence presented on the motion in the light most favorable to the plaintiff. Liberty Lobby, Inc., 477 U.S. at 255. If the plaintiff has exceeded the mere scintilla of evidence threshold and has offered a genuine issue of material fact, then the court cannot credit the defendants' version of events against the plaintiff, even if the quantity of the defendants' evidence far outweighs that of the plaintiff's. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. DISCUSSION

A. § 1983 Claims and Qualified Immunity

1. The Requirements for a § 1983 Cause of Action

The plaintiff's federal civil rights claims are brought pursuant to 42 U.S.C. § 1983.[7] Under 42 U.S.C. § 1983, a private party may recover in an action against any person acting under the color of state law who deprives the party of his or her constitutional rights. Therefore, in order to succeed on a claim under § 1983, a plaintiff must demonstrate: (1) the violation of a right secured by the United States Constitution, and (2) that the

[7]Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

deprivation was committed by a person acting under the color of state law.[8] See West v. Atkins, 487 U.S. 42, 48 (1988); Wright v. City of Phila., 409 F.3d 595, 599 (3d Cir. 2005). Section 1983 does not by itself confer substantive rights, but instead provides a remedy for redress when a constitutionally protected right has been violated. Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985).

In Counts II, III, and IV of the Amended Complaint, the plaintiff alleges her federal constitutional rights were violated by either Taveras or Mish.[9] In Count II, Morales claims her Fourth Amendment rights were violated when Taveras unlawfully seized her when he issued her a citation without probable cause. In Count III, Morales's Fourth Amendment false arrest claim rests on Taveras lacking probable cause and proper authority to arrest her. In connection with this claim, Morales also alleges that Taveras violated her First Amendment rights. She avers that the custodial arrest was in retaliation for her refusal to provide Taveras her Social Security number. Finally, in Count IV, the plaintiff claims Mish violated her Fourth Amendment rights by not intervening to stop Officer Taveras in his unconstitutional conduct. Morales argues that Officer Mish had a duty to stop or

[8]Neither party disputes that Officer Taveras and Officer Mish were acting under the color of state law when they were performing their duties as members of the City of Reading Police Department.

[9]The plaintiff is unclear in her Amended Complaint as to the exact conduct of Officer Taveras that constitutes the unlawful seizure in Count II and the false arrest in Count III. Morales clarified her claims against Taveras in her response to the defendants' motion. The unlawful seizure relates to the alleged non-custodial arrest of Morales in the issuance of the citation. The false arrest relates to the custodial arrest of Morales. In addition, the First Amendment retaliation claim is contained in Count II, but it relates to the plaintiff's custodial arrest that is the subject of Count III. See Pl. Br. at 8-9; Am. Compl. ¶¶ 47-57.

prevent Taveras's unlawful seizure, false arrest, and excessive force.

When an officer's actions give to rise to a § 1983 claim, the privilege of qualified immunity may protect him from suit. The defendants argue that Counts II through IV must be dismissed based on this privilege.

2. Qualified Immunity[10]

"The primary purpose of affording public officials the privilege of qualified immunity, thus insulating them from suit, is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'" Wright, 409 F.3d at 599 (quoting Elder v. Holloway, 510 U.S. 510, 514 (1994)). A plaintiff can overcome a police officer's assertion of this privilege when she can demonstrate that the officer violated "'clearly established statutory or constitutional rights of which a reasonable person would have known.'" Id. at 599-600 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The Supreme Court explained the analytical process this court must undertake to determine whether the privilege of qualified immunity has been defeated by Morales:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. . . . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask

[10]"[T]he qualified immunity question must be resolved at the earliest possible stage in the litigation." Bennett v. Murphy, 274 F.3d 133, 136 (3d Cir. 2001) (internal quotations and citation omitted).

> whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . . .The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Saucier v. Katz, 533 U.S. 194, 201-02 (2001) (internal quotations and citations omitted).

This court will discuss each of the constitutional rights at issue in the context of the two-prong test for qualified immunity. The defendants will be entitled to qualified immunity unless Morales can prove both that a constitutional right has been violated, and then that the violated constitutional right was clearly established. But see Wright, 409 F.3d at 600-01 ("There is some disagreement [within the Third Circuit] as to how Saucier should be interpreted. Specifically, the dispute is whether a court must determine the issue of whether there has been a constitutional violation before reaching the qualified immunity question, or whether that inquiry is the first part of a two-pronged test for qualified immunity. . . . As a practical matter, the outcome will be the same whether we conclude that the officers are immune from suit or instead, that the plaintiff has no cause of action.").

B. Count II's Unlawful Seizure Claim

The plaintiff's unlawful seizure claim is based upon a violation of her Fourth Amendment rights. The Fourth Amendment to the U.S. Constitution, made applicable to the states by the Fourteenth Amendment, Ker v. California, 374 U.S. 23, 30 (1963),

provides in pertinent part that the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST., amend. IV. In order to establish a claim under the Fourth Amendment, the plaintiff must show that the actions of Officer Taveras: (1) constituted a "seizure" within the meaning of the Fourth Amendment, and (2) the seizure was "unreasonable" in light of the surrounding circumstances. See, e.g., Brower v. County of Inyo, 489 U.S. 593, 595-600 (1989) (affirming two-fold analysis).

1. Seizure Under Fourth Amendment

The plaintiff alleges Officer Taveras unlawfully seized her when he confronted her on Diaz's porch to issue her a citation for violation of the Reading noise ordinance. A seizure triggering the Fourth Amendment's protection occurs when a police officer makes "a show of authority that restrains the liberty of a citizen or a 'government termination of freedom of movement intentionally applied.' The caselaw also shows that an actual physical touching is not required to effect a seizure." Gallo v. City of Phila., 161 F.3d 217, 223 (3d Cir. 1998) (citing California v. Hodari D., 499 U.S. 621, 625-27 (1991) and quoting County of Sacramento v. Lewis, 523 U.S. 833 (1998)). According to United States v. Mendenhall, 446 U.S. 544, 554 (1980), "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." It is also worth pointing out that the Supreme Court has indicated that several types of seizures

exist. While a custodial arrest may be the most common type of seizure to which the Fourth Amendment applies, an investigative stop by a police officer can also constitute a seizure. See Terry v. Ohio, 392 U.S. 1 (1968).[11] Finally, the mere issuance of a citation does not necessarily trigger the Fourth Amendment. The issuance of a citation must also result in the individual's freedom of movement being restrained. See, e.g., Moyer v. Borough of North Wales, No. 00-1092, 2001 U.S. Dist. LEXIS 665 (E.D. Pa. Jan. 25, 2001) (holding that a written citation for disorderly conduct did not constitute a seizure); Neiglinger v. Brennan, No. 96-2704, 1998 U.S. Dist. LEXIS 6850 (E.D. Pa. May 5, 1998) (holding that the issuance of a summary offense citation did not constitute a seizure because plaintiff's freedom of movement was never restrained).

The plaintiff contends Taveras's actions prior to the handcuffing equated to a non-custodial arrest. Officer Taveras categorizes his conduct as a Terry stop, *i.e.*, an investigatory stop. See Terry v. Ohio, 392 U.S. 1 (1968). The parties, therefore, agree that a seizure did occur; they only disagree on the intensity of the seizure. The classification of a seizure is important because it dictates the appropriate standard of reasonableness to apply to the seizure, namely probable cause or reasonable suspicion.

Viewing the evidence in the light most favorable to Morales, Taveras did not seize

[11]Under Terry v. Ohio, a law enforcement officer may, "consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (citing Terry, 392 U.S. at 30). "Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content[,] . . . but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." Alabama v. White, 496 U.S. 325, 330 (1990).

Morales when he initiated the conversation with her or when he informed Morales that he planned to issue her a citation. Taveras was attempting to obtain Morales's identification information and he gave no indication that she was barred from leaving the scene or retreating into the house. See Florida v. Bostick, 501 U.S. 429, 434-35 (1991) ("[W]e have held repeatedly that mere police questioning does not constitute a seizure. . . . [O]fficers . . . may generally . . . ask to examine the individual's identification, . . . as long as the police do not convey a message that compliance with their requests is required."). Officer Taveras did not make any show of authority towards the plaintiff. Rather, he departed from her presence and returned to his vehicle. In addition, the entire encounter took place in public. Taveras was on the sidewalk and the plaintiff was on Diaz's property. The record does not indicate that Taveras came so close to Morales as to threaten her. In short, the plaintiff's freedom of movement was not hampered in any manner by Officer Taveras during this initial encounter.

Moreover, Taveras did not conduct a Terry stop of Morales to determine if she had in fact violated the noise ordinance. Taveras's decision to issue the citation was made when he approached the porch and he heard Morales's voice. See Taveras Dep. at 189-90. Therefore, Taveras did not need to investigate whether criminal activity was afoot. He had already made that determination.

The dynamics of the situation changed when Officer Taveras informed Morales that she was required to provide him with her Social Security number. When a police officer

in uniform informs a person that she must abide by his orders, any reasonable person would believe that she was not free to leave the scene. See Bostick, 501 U.S. at 434-35. However, because the time sequence between when Officer Taveras asked for the number and when Officer Taveras grabbed the plaintiff to handcuff her is unclear, it is hard for me to determine whether a "seizure" occurred before the custodial arrest. Assuming that two different Fourth Amendment "events" occurred within what appears to be seconds, the plaintiff has satisfied her burden under the first prong of the unlawful seizure analysis. The next question is whether Officer Taveras had probable cause to "seize" Morales prior to the custodial arrest,[12] or was the seizure reasonable?

2. Probable Cause

A seizure by a law enforcement officer without a warrant "is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146 (2004). "Probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge [at the moment the arrest was made] are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested." Estate of Smith v. Marasco, 318 F.3d 497, 514 (3d Cir. 2003) (citing Orsatti v. New Jersey State Police, 71 F.3d 480, 482 (3d Cir.1995)); see also United States v. Myers, 308 F.3d 251, 255 (3d Cir. 2002) ("Probable cause exists whenever reasonably trustworthy

[12]I note that my probable cause analysis for Count II's illegal seizure claim will apply equally to Count III's false arrest claim.

information or circumstances within a police officer's knowledge are sufficient to warrant a person of reasonable caution to conclude that an offense has been committed by the person being arrested." (internal citations omitted)); Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (explaining the probable cause standard as seeking to "safeguard citizens from rash and unreasonable interferences with privacy" and, at the same time, to provide officers with "fair leeway for enforcing the law in the community's protection"). "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." Id. at 176.

A court must evaluate the "totality of the circumstances" in ascertaining whether there is probable cause. Sharrar v. Felsing, 128 F.3d 810, 818 (3d Cir. 1997); United States v. Glasser, 750 F.2d 1197, 1206 (3d Cir. 1984). "[T]he standard does not require that officers correctly resolve conflicting evidence or that their determinations of credibility were, in retrospect, accurate." Wright v. City of Phila., 409 F.3d 595, 603 (3d Cir. 2005). That is because a probable cause determination deals with probabilities as opposed to technicalities. Illinois v. Gates, 462 U.S. 213, 241 (1983). The Supreme Court has defined such probabilities as "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar, 338 U.S. at 175. In weighing these considerations, law enforcement authorities are

entitled to draw reasonable inferences based upon their personal knowledge and prior experience. United States v. Ortiz, 422 U.S. 891, 898 (1975). Furthermore, "the constitutional validity of the arrest does not depend on whether the suspect actually committed any crime." Wright, 409 F.3d at 601. "Probable cause need only exist as to any offense that could be charged under the circumstances." Id. at 602 (citing Barna v. City of Perth Amboy, 42 F.3d 809, 819 (3d Cir. 1994)).

The determination of whether a law enforcement officer had probable cause to arrest is generally a question for the jury in a §1983 action. Deary v. Three Un-Named Police Officers, 746 F.2d 185, 192 (3d Cir. 1984). However, "where no genuine issue as to any material fact exists and where credibility conflicts are absent, summary judgment may be appropriate." Id. The question of probable cause is one for the jury only when sufficient evidence exists that would allow a jury to reasonably conclude that a police officer did not have probable cause to arrest. Sharrar, 128 F.3d at 818.

Turning to this case, and viewing the evidence in the light most favorable to Morales, I find the facts and circumstances within Officer Taveras's knowledge at the moment he seized Morales were enough for a reasonable person to believe that Morales had violated the noise ordinance.

Initially, Officer Taveras relied on the information provided by the dispatcher about a noise violation. More specifically, at approximately 10:00 p.m. on July 28, 2003,

Taveras responded to a complaint that appeared on his vehicle computer.[13] The neighbor provided the dispatcher with her name and phone number. See Ex. B of Def. Br., the CAD Report. In addition, once Taveras was on the scene, the next door neighbor lodged the same general complaint about the persons at Diaz's house.

As Taveras turned his vehicle on to 3rd Street and approached Diaz's porch, he could hear, in addition to children laughing, people screaming and "being loud" from the vicinity of 219 N. 3rd Street. See Taveras Dep. 172-73. In front of Diaz's house, both Diaz and Morales addressed Taveras. They objected to his presence at the scene and sounded off about the neighbors' constant complaints. See id. at 175, 187. In Taveras's opinion, Diaz and Morales's voices were "similar" to the noise he heard when he turned the corner in his vehicle. See id. at 175-80.[14] Would a reasonable person with that knowledge believe that a violation of the noise ordinance had been or was being committed by Morales?

First, it is helpful to look at the ordinance itself, City of Reading Ordinance §10-204(B). Section 10-204(B) prohibits a person from "engaging in loud or raucous yelling,

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[13] As detailed in Part I supra, the complaint stated: "Neighbors from above address [219 N. 3rd St.] yelling and screaming in front of their house. Comp[lainant] states this is a constant problem and the people from the above address have been warned." Ex. B of Def. Br., the CAD Report.

[14]The volume of the plaintiff's voice when she addressed Officer Taveras is in dispute. Compare Taveras Dep. at 179 ("[T]hey [Diaz and Morales] began yelling at me.") with Golden Dep. at 32-35. In addition, the plaintiff claims that she was not loud and did not violate the noise ordinance on July 28, 2003. My conclusions are not undermined by accepting these statements as true, as I must, because I find probable cause existed based on the "totality of circumstances." See also Wright, 409 F.3d at 601 ("[The] validity of the arrest does not depend on whether the suspect actually committed any crime.").

shouting, hooting, whistling or singing: (1) on the public streets between the hours of 10 p.m. and 7 a.m. [and] (2) at any time or place in such a manner as to create a noise disturbance." A noise disturbance, as used in §10-204(B)(2), is defined in the ordinance as "any sound which . . . annoys or disturbs a reasonable person of normal sensitivities." READING, PA., CODE § 10-202 (2002).

The complaints of the neighbors should be given some weight. In assessing the credibility of an informant, the Third Circuit has articulated some guidelines:

> [W]hen an informant relates information to the police face to face, the officer has an opportunity to assess the informant's credibility and demeanor. And when an informant gives the police information about a neighbor . . . or someone nearby. . ., the informant is exposed to a risk of retaliation from the person named, making it less likely that the informant will lie. Similarly, as the Fourth Circuit noted, 'citizens who personally report crimes to the police thereby make themselves accountable for lodging false complaints.'

United States v. Valentine, 232 F.3d 350, 354 (3d Cir. 2000) (internal citations omitted) (quoting United States v. Christmas, 222 F.3d 141, 144 (4th Cir. 2000)).[15] At the same time, "a search or seizure of a person must be supported by probable cause *particularized with respect to that person.* This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another." Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (emphasis added).

[15]Under Supreme Court caselaw, the reliability of an informant's tip is determined by "a flexible standard that assesses the relative value and reliability of an informant's tip in light of the totality of the circumstances." Valentine, 232 F.3d at 354. This includes looking at "the basis of the informant's knowledge and the informant's reliability or veracity." Id.

Neither the CAD report nor Diaz's next door neighbor made reference to the specific individuals that were violating the noise ordinance. Since at least twelve children and adults were in the area of the dispatched location, Taveras needed specific information as to who was doing what. Taveras did not receive individualized information from these third party informants that Morales had violated the noise ordinance. Therefore, despite the fact that one neighbor's complaint was made face-to-face to Taveras and both neighbors could be held accountable and were exposed to a risk of retaliation, the general nature of their statements did not establish probable cause to seize Morales. The neighbors' complaints, however, are part of the "facts and circumstances" a reasonable person would consider in assessing whether Morales violated the noise ordinance.

Based on the neighbor complaints, the loud screaming that Taveras heard as he drove to the scene, and the plaintiff addressing Taveras as he approached her, Taveras was justified in concluding that the plaintiff had violated part (2) of the noise ordinance at the time of the seizure.[16] A reasonable person would consider: (1) the fact that two different neighbors had complained about noise from the same address, Shirley Newton in th CAD report and a gentleman next door; (2) the police officer heard noise from his vehicle, down the street from the plaintiff's location, that came from the vicinity of the plaintiff; (3) the

[16]Officer Taveras indicated in his deposition that he believed that the plaintiff had violated both parts of § 10-204(B). See Taveras Dep. at 182-83. However, since the plaintiff disputes the time at which the events occurred, see Morales Dep. at 79-80 ("Q: When do you think the police got there? A: Between 9:30 [p.m.] and 9:45 [p.m.]"), and the definition of "on the public streets" in part (1) is unclear, my analysis will focus on part (2) of the ordinance.

loud yelling and screaming that Officer Taveras heard from his vehicle were separate and distinct from the noises that children were making; (4) the loud voices heard from the vehicle sounded similar to the voices of the plaintiff and her cousin; (5) Diaz and Morales were the only adults in the area of the porch; (6) the time of night of the occurrence; and (7) the plaintiff had been on the porch long enough to be the subject of the complaints, even if she denied being loud. In weighing these considerations, a reasonable person with Officer Taveras's experience would conclude that the two adults at 219 North Third Street, Morales and Diaz, were yelling and shouting in such a manner to annoy a reasonable person of normal sensitivities.[17]

I recognize that the question of probable cause is typically one for the jury, but in this case there is not sufficient evidence for a jury to conclude that Officer Taveras did not have probable cause to cite Morales for the noise ordinance violation. This conclusion is warranted, especially when one examines City of Reading Ordinance §10-206, which defines when "prima facie evidence of a noise disturbance" exists under §10-204:

> Prima facie evidence of a noise disturbance shall exist if the noise from any of the acts prohibited in [§10-204]:
> (A) Disturbs two or more residents who are in general agreement as to the times and durations of the noise and who reside in separate residences . . .located across a property line (boundary) from the property on which the source of the noise is generated.

[17]The fact that the citation for the noise ordinance violation was eventually dismissed against Morales is inconsequential to this court's probable cause determination. See Wright, 409 F.3d at 602 ("[I]t is irrelevant to the probable cause analysis what crime a suspect is eventually charged with or whether a person is later acquitted of the crime for which she or he was arrested." (internal citations omitted)).

(B) One resident located across a property line (boundary) from the property on which the source of noise is generated, and corroborated by a police officer.
(C) Solely witnessed/observed by a police officer when citing [§10-204].

Here, viewing the evidence in the plaintiff's favor, prima facie evidence of a "noise disturbance" existed under §10-206(A) and (B). Under §10-206(A), Officer Taveras knew of two different neighbors who had complained of similar yelling and screaming from 219 North 3rd Street. The fact that the two neighbors may have lived in the same residence is not detrimental in a probable cause determination because "room must be allowed for some [reasonable] mistakes" on an officer's part. Under §10-206(B), Officer Taveras received, at a minimum, complaints from neighbors in one residence regarding the noise at Diaz's house and he heard that noise as he approached the scene. Therefore, Taveras clearly had prima facie evidence that a "noise disturbance" occurred. The identity of the noise makers was then determined by Officer Taveras's observations and reasonable inferences as he approached and spoke with the plaintiff.

The plaintiff sets forth a couple of reasons for why probable cause did not exist to issue the noise violation citation. First, Morales cites to Officer Taveras's deposition. Taveras testified that he would not have cited Morales for anything that he heard prior to exiting his vehicle and that he cited Morales for yelling at him when he walked towards her. See Taveras Dep. at 179, 188-91. That testimony does not change the finding that probable cause existed to seize Morales for the noise ordinance. While "the determination that probable cause exists for a warrantless arrest is fundamentally a factual analysis that

must be performed by the officers at the scene[, i]t is the function of the court to determine whether the objective facts available to the officers at the time of arrest were sufficient to justify a reasonable belief that an offense was being committed." United States v. Glasser, 750 F.2d 1197, 1206 (3d Cir. 1984). See Devenpeck v. Alford, 125 S. Ct. 588, 595 (2004) ("[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. . . . Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest." (internal citations omitted)). And as detailed above, I have found that the objective facts available to Officer Taveras at the time of the seizure were sufficient to justify a belief that Morales had violated City of Reading Ordinance §10-204(B)(2).

Second, Morales relies on her recollection of Officer Taveras's testimony at her hearing on the noise violation citation. According to the plaintiff, "he [Officer Taveras] couldn't testify that he physically saw me, heard me and can point me out as being the one making the noise." See Morales Dep. at 189. That statement, however, is not detrimental to my finding of probable cause because my finding is not grounded on Taveras viewing Morales violate the ordinance. Rather, probable cause to cite Morales existed because of the totality of the circumstances. Based on the facts and circumstances within Officer Taveras's knowledge at the time of the seizure, including the noise he heard as he turned the corner, the recognition of the plaintiff's voice as being similar to that noise, and the

complaints of the neighbors, the "probabilities" pointed to Morales and justified Taveras's seizure of Morales to issue the citation.

Accordingly, Officer Taveras's conduct in seizing Morales under Count II of the Amended Complaint does not amount to a violation of the plaintiff's constitutional rights. I find Officer Taveras had probable cause to seize Morales. Furthermore, there are no credibility issues as to any material fact and summary judgment is therefore appropriate on the plaintiff's unlawful seizure claim.

3. Clearly Established Law Under Qualified Immunity

Because Officer Taveras had probable cause to seize the plaintiff, there is no constitutional violation under Count II and the qualified immunity defense shields Officer Taveras from liability. See Bennett v. Murphy, 274 F.3d 133, 136 (3d Cir. 2002) ("If the plaintiff fails to make out a constitutional violation, the qualified immunity inquiry is at an end; the officer is entitled to immunity."). Even if the question of probable cause to seize Morales was in doubt, Taveras would still be entitled to summary judgment.[18]

Under the second part of the qualified immunity test, the question is: "[I]n the factual scenario established by the plaintiff, would a reasonable officer have understood

[18]There is no denying that the right to be free from seizure except on probable cause was "clearly established" at the time of Morales's arrest. "Finding that the right at issue was clearly established, however, does not end the court's inquiry. Nor does the court's decision turn merely on whether the official violated that clearly established right." Orsatti v. New Jersey State Police, 71 F.3d 480, 483 (3d Cir. 1995). Rather, my inquiry must focus on whether the law enforcement officer reasonably concluded that probable cause to make the arrest was present. "[I]n such cases those officers, like other officials who act in ways they reasonably believe to be lawful, will not be held personally liable." Id. (citing Anderson v. Creighton, 483 U.S. 635 (1987)).

that his actions were prohibited? . . . If it would not have been clear to a reasonable officer what the law required under the facts alleged, he is entitled to qualified immunity. If the requirements of the law would have been clear, the officer must stand trial." Id. at 136-37. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). Even law enforcement officials who "reasonably but mistakenly conclude that probable cause is present" are entitled to qualified immunity. Anderson v. Creighton, 483 U.S. 635, 641 (1987). After considering the facts I outlined in Part III.B.2. supra, no reasonable police officer would have believed that the law prohibited him or her from seizing Morales to issue her a noise violation citation. Therefore, Officer Taveras is entitled to qualified immunity and to summary judgment on the Count II seizure claim.

C. Count III's False Arrest Claim

In Count III, Morales's Fourth Amendment false arrest claim rests on: (1) Taveras lacking probable cause to arrest, and (2) Taveras not having authority under Pennsylvania law to make a custodial warrantless arrest for a summary offense. Clearly, Taveras had probable cause. See supra Part III.B.2.[19] The only question that remains is whether Officer Taveras possessed the authority to arrest Morales for a violation of the noise ordinance.

[19]"An arrest by a law enforcement officer without a warrant 'is reasonable under the Fourth Amendment where there is probable cause to believe a criminal offense has been or is being committed.'" Wright, 409 F.3d at 601 (quoting Devenpeck v. Alford, 543 U.S. 146 (2004)).

1. Authority to Arrest Under Pennsylvania Law

The defendants argue that Officer Taveras had authority to physically arrest the plaintiff for the noise violation. Their argument rests on: (1) Taveras's inability to verify Morales's identity using the police computer system; (2) the plaintiff's failure to provide Taveras with her Social Security number; and (3) the deposition testimony of Chief Broad.[20] The plaintiff disputes the legality of the warrantless arrest. Morales relies on Reading Police Department policy, as it was testified to by Chief Broad, and argues that Taveras should have requested other forms of identification from Morales after she declined to offer her Social Security number but before he arrested her.[21] In addition, Morales supports her position by arguing that Taveras did not have authority under Pennsylvania Rule of Criminal Procedure ("PRCP") 440 to take her into custody for a violation of a non-violent summary criminal offense.

The validity of an arrest is determined by the law of the state where the arrest occurred. United States v. Myers, 308 F.3d 251, 255 (3d Cir. 2002) (citing Ker, 374 U.S. at 37).[22] According to the PRCP, a police officer may institute criminal proceedings

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[20]Officer Taveras does not cite to any law to support his position that the arrest of Morales was legal, which is a curious way to prove that one is entitled to judgment as a matter of law.

[21]The plaintiff relies heavily on the so called "Reading Police Department policy" that she pieces together from the deposition testimony of various officers. Morales, however, does not include in the record copies of the department's training manuals, directives, or orders. In any event, the legality of an arrest is not determined by a police officer's deposition testimony, but by the law of the state where the arrest occurred. See United States v. Myers, 308 F.3d 251, 255 (3d Cir. 2002).

[22]Under the Reading Noise Control Ordinance, a person who violates §10-204 "shall be . . . sentenced to pay a fine not less than $25 nor more than $1,000 plus costs and, in default of payment of

against a person in a summary offense case either by: "(1) issuing a citation to the defendant; or (2) filing a citation; or (3) filing a complaint; or (4) arresting without a warrant when arrest is specifically authorized by law." PA. R. CRIM. P. 400.

The plaintiff focuses on the explanatory comment to PRCP 440 to sustain her false arrest claim. The Comment expands upon when an arrest is authorized for a summary offense by noting that it will only be "in exceptional circumstances such as those involving violence . . . or those involving a danger that the defendant will flee." PA. R. CRIM. P. 440 cmt. Morales argues that Officer Taveras did not have any basis to believe that she would not appear in court because Taveras never asked her for any form of identification. Since a Social Security number is not a proper form of identification, Morales claims that her failure to provide the number is inconsequential in the false arrest analysis. Although Officer Taveras does not cite to the PRCP, he appears to rely on the "danger of flight" argument to justify his arrest of Morales. Since Morales failed to provide her Social Security number, and her name and address did not appear in the police computer system, the plaintiff's arrest was necessary to confirm her identity and ensure her appearance in court.

Under the comments to PRCP 440, viewing the facts in the light most favorable to Morales, Morales fails to establish a genuine issue regarding her risk of flight when

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said fine and costs, to a term of imprisonment not to exceed 30 days." READING, PA., CODE § 10-209 (2002). Under the Pennsylvania Consolidated Statutes, an offense with such a penalty is classified as a summary offense. See 18 PA. CONS. STAT. § 106(c), (e).

Taveras arrested her. First, the information Morales initially provided Taveras, her name and address, did not register in the police computer system. This indicated to Officer Taveras either that the plaintiff gave false information or that she did not have a Pennsylvania driver's license or identification card. Second, Officer Taveras possessed no other information about Morales to assist him in locating her if she failed to respond to the citation. Taveras knew that Diaz lived at the address where he was dispatched, but he had no such specific information for Morales. Morales had provided him with a home address, but Taveras could not confirm it with any independent source. And while Officer Taveras may have not asked for any form of identification, the outcome of the police computer search would cause a reasonable police officer to believe Morales had no state-issued identification. Third, when Morales failed to cooperate in the issuance of the citation by providing her Social Security number, Taveras had ample ground to conclude that any citation he issued to Morales would not indicate her true identity. Finally, 219 N. 3rd Street was not the most conducive environment for playing the "identification game" with Morales. Diaz was belligerent and it is understandable that Officer Taveras would want to resolve the matter at police headquarters. See Broad Dep. at 60 ("If there is a disturbance taking place where the officer is attempting to make this arrest . . . [t]hat person will be removed from the scene and the ID will be furnished somewhere else.") Accordingly, no reasonable jury could find that Morales was not a fugitive risk. See Commonwealth v. Williams, 568 A.2d 1281, 1285 (Pa. Super. Ct. 1990) (discussing the "general intent" of

the flight risk provision in the PRCP and interpreting it broadly). Given Morales's refusal to provide a simple piece of information to a police officer, even if it was unnecessary to the issuance of the citation, and the fact that the information she did provide could not be verified, Officer Taveras was justified in arresting Morales to transport her to the police station to adequately identify her.

2. Clearly Established Law Under Qualified Immunity[23]

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[23] If Morales created a genuine issue of material fact regarding her flight risk, and the false arrest claim on that basis was not barred by qualified immunity, that would not end this court's analysis. The comment to PRCP 440 does not suggest that its list is an exhaustive list of the circumstances of when a warrantless arrest for a summary offense is lawful. To the contrary, the comments to the PRCP "while often helpful in resolving *ambiguities*, are *not* controlling. To the extent the comment purports to restrict express authority to arrest conferred by statute, it must be rejected." Williams, 568 A.2d at 1285 (internal citation omitted). Several Pennsylvania statutes and caselaw appear to grant express authority to a police officer to make a warrantless arrest for a summary offense. As PRCP 400 states, a police officer always may arrest for a summary offense "when [the] arrest is specifically authorized by law."

Two Pennsylvania statutes provide possible authority to a Reading police officer to make a warrantless arrest for a summary offense. See Hughes v. Shestakov, No. 00-6054, 2002 U.S. Dist. LEXIS 13817 (E.D. Pa. July 24, 2002) (discussing the conflicting Pennsylvania laws regarding a police officer's authority to make warrantless arrests for summary offenses and misdemeanors). Under § 8952 of Title 42 of the Pennsylvania Consolidated Statutes ("§ 8952"), a police officer can arrest an individual for committing *any* offense, be it a felony, misdemeanor, or summary offense, as long as that police officer has probable cause. See Commonwealth v. Elliot, 599 A.2d 1335, 1337-38 (Pa. Super. Ct. 1991). "This authority is not limited to offenses viewed by the officer but includes those offenses [for] which the officer has probable cause. . . . It is unquestionably the legislature's intent to establish a probable cause standard as a means of defining the bonds of police authority in arresting . . . an actor for a summary offense." Id. at 1338. See also Hughes, 2002 U.S. Dist. LEXIS 13817, at *11-17 (noting the probable cause standard to arrest in Pennsylvania, as found in Elliot, and observing that the Pennsylvania Supreme Court has not interpreted § 8952). Here, as established in Part III.B.2. supra, Officer Taveras had probable cause to believe that the plaintiff had violated the City's noise ordinance. Even though the violation equated to a summary offense, under § 8952 Taveras was authorized to arrest Morales for the offense.

Under § 37005 of Title 53 of the Pennsylvania Statutes ("§ 37005"), however, the legality of Officer Taveras's actions could not be determined as a matter of law. Section § 37005 allows a police officer to arrest an individual, without a warrant and upon view, for "breach of the peace, . . . riotous or disorderly conduct . . . or violating any of the ordinances of said city for the violation of which a fine or penalty is imposed." Commonwealth v. Williams, 568 A.2d 1281, 1284-85 (Pa. Super Ct. 1990) (applying a similar statute in the context of a warrantless arrest on a summary offense). Under this provision, Officer Taveras needed to witness the plaintiff violating the noise ordinance in order to make a valid arrest. The deposition testimony of Jessica Golden and the plaintiff establishes that an issue of

Even if the plaintiff could establish a genuine issue regarding her flight risk, her false arrest claim would be barred by Officer Taveras's qualified immunity. As noted several times above, under the qualified immunity analysis, a police officer must violate a clearly established right, *i.e.*, a right with " outlines [that] are sufficiently clear that a reasonable officer would understand that his actions violate the right.'" UA Theatre Circuit v. Twp. of Warrington, 316 F.3d 392, 399 (3d Cir. 2003) (quoting Sterling v. Borough of Minersville, 232 F.3d 190, 193 (3d Cir. 2000)). Here, a reasonable officer would not understand Officer Taveras's actions to violate the plaintiff's Fourth Amendment rights. Based on the information, or lack of information, in Taveras's knowledge at the time of

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material fact exists as to whether Officer Taveras viewed Morales create a noise disturbance under the ordinance. See Golden Dep. at 32-35; Morales Dep. at 189. Accordingly, viewing the plaintiff's submissions favorably, the application of § 37005 under the first prong of the qualified immunity doctrine would lead to the conclusion that a false arrest occurred and summary judgment must be denied. But see Hughes, 2002 U.S. Dist. LEXIS 13817, at *15-17 (discussing several Pennsylvania decisions that have applied a statute similar to § 37005, but noting that "[n]one of the cases . . . involved . . . any discussion or consideration of 42 PA. CONS. STAT. § 8952").

Although the outcome of Taveras's summary judgment motion on the false arrest claim might differ under the two statutes, no authority dictates which of the statutes applies under the facts of this case. That leads to the logical conclusion that Pennsylvania law with respect to the authority to make a warrantless arrest for a summary offense is far from certain, i.e., it is not "clearly established." The Superior Court's decision in Elliot applies § 8952's probable cause standard, while other cases appear to require the witnessing of the violation. Compare Elliot, 599 A.2d at 1337-38, with Commonwealth v. Clark, 735 A.2d 1248, 1253 (Pa. 1999) (observing that a police officer has not been granted the authority to make an arrest for a misdemeanor in the absence of the police officer witnessing the crime). Considering this state of Pennsylvania law and the information available to Taveras at the time of Morales's arrest, a reasonable police officer in Taveras's position could have believed that arresting Morales based on probable cause that she committed a summary offense was lawful under § 8952. See Paff v. Kaltenbach, 204 F.3d 425, 431 (3d Cir. 2000) ("The ultimate issue will then be whether, given the established law and the information available to [the defendant police officer], a reasonable law enforcement officer in [defendant]'s position could have believed that his conduct was lawful."); Hughes, 2002 U.S. Dist. LEXIS 13817, at *15-17 (granting defendant law enforcement officer qualified immunity because Pennsylvania law is unsettled in the area of police officer's authority to arrest for summary offenses). Therefore, qualified immunity would apply and the plaintiff's false arrest claim would still be barred.

Morales's arrest, it would not be clear to a reasonable officer that Taveras's conduct, *i.e.*, the arrest of Morales, was unlawful in the situation he confronted. Since qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," Officer Taveras would be entitled to qualified immunity and the false arrest claim barred.

D. Count III's First Amendment Retaliation Claim

The plaintiff asserts that her arrest by Officer Taveras was not only illegal under Pennsylvania law, but also that it was improperly motivated by her exercise of her First Amendment right to free speech.[24] "[A]n individual has a viable claim against the government when he is able to prove that the government took action against him in retaliation for his exercise of First Amendment rights." Anderson, 125 F.3d at 160 (citing Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)). The plaintiff's First Amendment retaliation claim has no merit, regardless of her ability to establish a prima facie case, because my finding of probable cause for the arrest, see supra Part III.B.2., entitles Officer Taveras to qualified immunity on this claim.

Although the Third Circuit has not ruled on the effect of probable cause on a retaliation claim involving an arrest, several other Courts of Appeal have. A review of that caselaw supports the position that the existence of probable cause prohibits a plaintiff

[24]The First Amendment of the Constitution provides: "Congress shall make no law ... abridging the freedom of speech ...." U.S. CONST. amend. I. This Amendment applies to the states and their political subdivisions under the Due Process Clause of the Fourteenth Amendment. See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000); Wallace v. Jaffree, 472 U.S. 38, 49-50 (1985).

from prosecuting a First Amendment retaliation claim. See, e.g., Dahl v. Holley, 312 F.3d 1228, 1236 (11th Cir. 2002); Curley v. Village of Suffern, 268 F.3d 65, 73 (2d Cir. 2001); Mozzochi v. Borden, 959 F.2d 1174, 1179-80 (2d Cir. 1992) ("An individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government."). If the rule was otherwise, a plaintiff on the verge of arrest can make any statement to a law enforcement officer and most likely make out a prima facie case of First Amendment retaliation and survive summary judgment.

In the absence of qualified immunity on the basis of probable cause to arrest, a plaintiff's First Amendment retaliation claim would survive a motion for summary judgment if she showed: (1) that she engaged in a protected activity; (2) that the law enforcement officers responded with retaliation; and (3) that the protected activity was the cause of the retaliation. See Estate of Smith v. Marasco, 318 F.3d 497, 512 (3d Cir. 2003); Anderson v. Davila, 125 F.3d 148, 160-61 (3d Cir. 1997). See also Ambrose v. Twp. of Robinson, 303 F.3d 488, 493 (3d Cir. 2002) (applying a three-step test to a claim that a public employee received an adverse employment action in retaliation for exercising his First Amendment rights); Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir. 2000) (discussing retaliation claim in Title VII context). Under the first prong of the prima facie case, "except for certain narrow categories deemed unworthy of full First Amendment protection -- such as obscenity, 'fighting words' and libel -- all speech is

protected by the First Amendment." Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 282-83 (3d Cir. 2004) (internal citations omitted). See also City of Houston, TX v. Hill, 482 U.S. 451, 461 (1987) ("The First Amendment protects a significant amount of verbal criticism and challenge directed at the police officers.").[25] The arrest itself would constitute the act of retaliation needed to complete the second prong. And under the final prong, the temporal proximity of the speech and the arrest would establish the necessary causal link. See Estate of Smith, 318 F.3d 497, 512 (quoting Krouse v. Am. Sterlizer Co., 126 F.3d 494, 503 (3d Cir. 1997)) (noting that if the timing of the alleged retaliatory action is "'unusually suggestive' of retaliatory motive" then a causal link will be inferred); Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989) (holding that such an inference could be made where two days separated the protected activity and the alleged retaliation).

The necessity of the application of qualified immunity for a First Amendment retaliation claim when probable cause existed for the alleged retaliatory arrest is justified not only because of my concern with the ease of stating a retaliation claim. If probable cause did not defeat the retaliation claim based on an arrest, qualified immunity could not defeat the plaintiff's prima facie case because "the First Amendment right to be free from retaliation in response to constitutionally-protected speech is clearly established . . . and . .

[25]Officer Taveras incorrectly relies on First Amendment caselaw that relates to the speech of public employees. He argues that the plaintiff's speech must be a matter of "public concern" before it is afforded any type of protection under the First Amendment. The "public concern" test, however, was formulated to address the speech restrictions a governmental entity can place on their own public employee. Connick v. Myers, 461 U.S. 138 (1983); Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 283 (3d Cir. 2004). As the Third Circuit has indicated, "the decisions of the Supreme Court and of our court have not established a public concern threshold to the protection of citizen private speech." Id. at 284.

. a reasonable officer should know that it is constitutionally-protected behavior." Corey v. Nassan, No. 05-114, 2006 U.S. Dist. LEXIS 68521, at *52-53 (W.D. Pa. Sept. 25, 2006). This result, at the summary judgment stage of a case, would be contrary to a recent warning from the Third Circuit. The Third Circuit cautioned that "a court in considering a First Amendment retaliation claim against a police officer should be cautious in allowing it to proceed to trial in the face of the officer's summary judgment motion. . . . Society may pay a high price if officers do not take action when they should do so." Estate of Smith, 318 F.3d at 513.

Based on the persuasive authority cited above and the Third Circuit's warning in Estate of Smith, I find that the existence of probable cause to arrest the plaintiff provides Taveras with qualified immunity and defeats Morales's First Amendment retaliation claim. See Gallis v. Borough of Dickson City, No. 3:05cv551, 2006 U.S. Dist. LEXIS 72091, at * 11-12 (M.D. Pa. Oct. 3, 2006) (holding that "a plaintiff must in fact establish a lack of probable cause to pursue a First Amendment retaliation action"). But see Anderson, 125 F.3d at 161 ("[A]n otherwise legitimate and constitutional government act can become unconstitutional when an individual demonstrates that it was undertaken in retaliation for his exercise of First Amendment speech. This doctrine demonstrates that, at least where the First Amendment is concerned, the motives of government officials are indeed relevant, if not dispositive, when an individual's exercise of speech precedes government action affecting that individual."); Corey v. Nassan, No. 05-114, 2006 U.S. Dist. LEXIS

68521 (W.D. Pa. Sept. 25, 2006) (holding that even if probable cause existed to *issue a citation* that would not defeat plaintiff's First Amendment retaliation claim).

E. Count IV's Failure to Intervene Claim

The plaintiff alleges in her Amended Complaint that Officer Mish violated her constitutional rights by observing Officer Taveras unlawfully seize, arrest, and use excessive force on her and not intervene to stop him. A police officer can be held liable under § 1983 if he fails to intervene when a constitutional violation occurs in his presence. See Smith v. Mensinger, 293 F.3d 641, 650-52 (3d Cir. 2002) ("'If a police officer, whether supervisory or not, fails or refuses to intervene when a constitutional violation such as an unprovoked beating takes place in his presence, the officer is directly liable under Section 1983." (quoting Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir. 1986))). A police officer has a duty to intervene if he had knowledge of and acquiesced in a § 1983 violation. See Mensinger, 293 F.3d at 650-51; Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir. 1995). See also Garbacik v. Janson, 111 Fed. Appx. 91, 94 (3d Cir. 2004). He cannot "escape liability by turning either a blind eye or deaf ear to the illegal conduct of [his] colleagues." Mensinger, 293 F.3d at 652. Since I have already determined that Officer Taveras did not violate the plaintiff's Fourth Amendment rights when he seized and arrested her, Officer Mish cannot be held liable under any bystander liability theory for those actions. Therefore, the only basis left to hold Officer Mish liable is for his failure to stop the beating of Morales. The plaintiff has demonstrated that a

genuine issue remains on this claim.

"'To state a claim for excessive force as an unreasonable seizure under the Fourth Amendment, a plaintiff must show that a 'seizure' occurred and that it was unreasonable.'" Kopec v. Tate, 361 F.3d 772, 776 (3d Cir. 2004) (quoting Estate of Smith, 318 F.3d at 515). A plaintiff can sustain an excessive force claim against an officer who did not participate directly in an arrest if the officer failed to intervene to prevent the use of excessive force when there was a reasonable opportunity to do so. See Mensinger, 293 F.3d at 650. Here, a jury crediting the plaintiff's version of events could conclude that: (1) the plaintiff's beating occurred in Officer Mish's presence and he had time to reach Officer Taveras to stop it;[26] and (2) Officer Mish did not intervene to prevent Taveras from using "unreasonable force" at the time of the arrest. According to eyewitness Jessica Golden's affidavit: "During th[e] entire time [of the arrest], Officer Mish stood close by and watched what happened. Officer Mish did nothing and said nothing to stop Officer Taveras from attacking and arresting [the plaintiff.]" Pl. Br. at Ex. B. See also Pl. Br. at Ex. C., Diaz Aff. ("Officer Mish stood close by on the sidewalk next to the steps of the house . . . and was watching us on the porch when Officer Taveras grabbed and attacked Ms. Morales."). Moreover, the requirement to intervene to prevent the use of excessive force was clearly established at the time of the arrest. See Green v. N.J. State Police, No.

[26]In Count I of the Amended Complaint, the plaintiff alleges sufficient facts to state a § 1983 claim of excessive force under the Fourth Amendment against Officer Taveras for his conduct when he arrested Morales. The defendants did not move for summary judgment on this count of the Amended Complaint.

04-0007, 2006 U.S. Dist. LEXIS 55334, at *6 (quoting Garbacik, 111 Fed. Appx. at 94). Accordingly, Officer Mish is not entitled to qualified immunity.

Therefore, I will dismiss all claims against Officer Mish, except for the excessive force claim against him based on his failure to intervene to stop Officer Taveras's unreasonable seizure of the plaintiff.

F. Count VIII - Pennsylvania Constitution Claims

Finally, the defendants argue that Count VIII of the Amended Complaint should be dismissed against them because there is no private right of action to monetary damages under the Pennsylvania Constitution. Count VIII of the Amended Complaint seeks damages based on the defendants violating Morales's rights under Article I, § 8 of the Pennsylvania Constitution.[27] The plaintiff does not address the viability of Count VIII in her response.

Pennsylvania law does not contain a statutory equivalent to 42 U.S.C. § 1983, which provides a cause of action for damages due to a federal constitutional violation. In addition, it is not settled whether the Pennsylvania Constitution provides a cause of action directly, for damages. "Although the Pennsylvania Constitution has been said to provide for an action for injunctive relief to enforce its equal rights provisions, there has been no such holding as to an action for damages." Kaucher v. County of Bucks, No. 03-1212, 2005 U.S. Dist. LEXIS 1679, at *31-32 (E.D. Pa. Feb. 7, 2005). See Morris v. Dixon, No.

[27]"The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures . . . ." PA. CONST. art. 1, § 8.

03-6819, 2005 U.S. Dist. LEXIS 7059, at *43-45 (E.D. Pa. Apr. 20, 2005). See also Jones v. City of Phila., 890 A.2d 1188 (Pa. Commw. Ct. 2006) (holding "there is no separate cause of action for monetary damages for the use of excessive force in violation of Article I, Section 8 of the Pennsylvania Constitution.").

There is a significant difference between actions seeking injunctive relief and actions seeking damages. See Kaucher, 2005 U.S. Dist. LEXIS 1679, at *31-32 (citing Mulgrew v. Fumo, 2004 U.S. Dist. LEXIS 14654 (E.D. Pa. July 29, 2004)). The courts in this Circuit that have considered whether there is a private cause of action for damages under the Pennsylvania Constitution have concluded that no such right exists. See, e.g., id.; Dooley v. City of Phila., 153 F. Supp. 2d 628, 663 (E.D. Pa. 2001); Sabatini v. Reinstein, No. 99-2393, 1999 U.S. Dist. LEXIS 12820, at *6-7 (E.D. Pa. Aug. 18, 1999); McMillian v. Phila. Newspapers, Inc., No. 99-2949, 1999 U.S. Dist. LEXIS 12240, at *10-11 (E.D. Pa. Aug. 4, 1999); Holder v. City of Allentown, No. 91-240, 1994 U.S. Dist. LEXIS 7220, at *11 (E.D. Pa. May 19, 1994). The plaintiff in this case provides me with no reason for why I should not reach the same conclusion.

Accordingly, based on this persuasive caselaw, Morales's state constitutional claims fail as a matter of law and I will dismiss this count in its entirety, *i.e.*, against all defendants.

IV. CONCLUSION

Based on the reasons set forth above, I will grant defendant Officer Taveras

summary judgment on the following counts: (1) Count II's unlawful seizure claim; (2) Count II's First Amendment retaliation claim; and (3) Count III's false arrest claim. I will grant defendant Officer Mish summary judgment on Count IV's bystander liability claim as it pertains to the seizure and arrest of the plaintiff. I will deny Officer Mish summary judgment as far as Count IV relates to his failure to intervene in Officer Taveras's use of excessive force on the plaintiff. Finally, I will grant the defendants summary judgment on Count VIII, unlawful seizure under the Pennsylvania Constitution, and dismiss the count in its entirety, with prejudice.

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

AILEEN DIAZ MORALES,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	**NO. 05-4032**
	:	
GEORGE TAVERAS, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of January, 2007, upon consideration of defendants George Taveras and Matthew Mish's Motion for Partial Summary Judgment (Docket No. 26), and the response thereto, it is hereby **ORDERED** that the motion is **GRANTED in part and DENIED in part**, as follows:

1.) Defendant Officer Taveras is granted summary judgment on Count II and Count III of the Amended Complaint.

2.) Defendant Officer Mish is granted summary judgment on Count IV's bystander liability claim as it pertains to the seizure and arrest of the plaintiff.

3.) Defendant Officer Mish is denied summary judgment on Count IV as it relates to his failure to intervene in Officer Taveras's use of excessive force on the plaintiff.

4.) The defendants are granted summary judgment on Count VIII, unlawful seizure under the Pennsylvania Constitution, and the count is dismissed in its entirety, with prejudice.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.