UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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JAIQUAN ALLAH,

Plaintiff,

v.

9:23-CV-0785
(LEK/ML)

RYAN LAWSON, Sergeant; ARAGONA, Sergeant; STRATTA, Sergeant; GRIMMICK, Sergeant; ANTHONY TORRISI, Lieutenant; THOMAS PLEAT, Correctional Officer; ADAM MOLESKY, Correctional Officer; CAROL ANN CAVANAUGH, Grievance Coordinator/Hearing Officer; BONNACI, Correctional Officer; ANDREW LACROSSE, Correctional Officer, Badge #434; ANDREW COHEN, formerly known as John Doe, Badge #257; and PAUL SPADINGER, formerly known as John Doe, Badge # 329,

Defendants.

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APPEARANCES: OF COUNSEL:

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MIROSLAV LOVRIC, United States Magistrate Judge

**REPORT and RECOMMENDATION**

Currently before the Court, in this civil rights action filed by Jaiquan Allah ("Plaintiff") against Ryan Lawson, Aragona, Stratta, Gimmick, Anthony Torrisi, Thomas Pleat, Adam

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Molesky, Carol Ann Cavanaugh, Bonnaci, Lacozzi, Andrew Cohen, and Paul Spadinger (collectively "Defendants"), is Defendants' motion to dismiss for failure to state a claim upon which relief may be granted and judgment on the pleadings pursuant to Fed. R. Civ. P. 12(b)(6) and 12(c). (Dkt. No. 49.) For the reasons set forth below, I recommend that Defendants motion be granted in part and denied in part.

## I. BACKGROUND

### A. Procedural History

On June 29, 2023, Plaintiff commenced this action by the filing of a Complaint. (Dkt. No. 1.) On July 31, 2023, Plaintiff filed a motion for leave to proceed *in forma pauperis* ("IFP"). (Dkt. No. 5.)

On September 19, 2023, Senior United States District Judge Lawrence E. Kahn granted Plaintiff's IFP application and ordered that the following claims survive *sua sponte* review: (1) Plaintiff's First Amendment retaliation claim against Defendant Torrisi based on the search of Plaintiff's cell and issuance of a false misbehavior report against him on February 26, 2023, in response to a lawsuit Plaintiff filed regarding a "slip and fall accident" that occurred two days earlier; (2) Plaintiff's First Amendment retaliation claim against Defendants Molesky, Lawson, and Spadinger based on these officials searching Plaintiff's cell and issuing him a false misbehavior report on March 18, 2023, in response to Plaintiffs submission of a grievance on February 28, 2023; (3) Plaintiff's First Amendment retaliation claim against Defendant Lawson based on this official placing Plaintiff on suicide watch on March 23, 2023, in response to Plaintiff's submission of a grievance regarding the cell search on March 18, 2023; (4) Plaintiff's First Amendment retaliation claim against Defendants Aragona and Pleat based on these officials destroying (or directing others to destroy) Plaintiff's personal property following his stated intent

to file a grievance against them on May 14, 2023; (5) Plaintiffs First Amendment retaliation claim against Defendants Stratta and Pleat based on these officials initiating a use-of-force incident on May 20, 2023, in response to Plaintiff's earlier engagement in protected activity; (6) Plaintiff's Fourth Amendment unlawful strip frisk claim against Defendants Aragona and Pleat based on the strip search that occurred on May 14, 2023; (7) Plaintiff's Fourteenth Amendment conditions-of-confinement claim against Defendant Lawson based on his exposing Plaintiff to cold temperatures in the suicide watch cell for hours on March 23, 2023; (8) Plaintiff's Fourteenth Amendment conditions-of-confinement claims against Defendants Aragona and Lawson based on their denial of Plaintiff's access to the bathroom on May 20, 2023; (9) Plaintiff's Fourteenth Amendment excessive force claims against Defendants Stratta, Pleat, Bonnaci, Lacoozi, Lawson, Spadinger, and Cohen based on the alleged use of force incident that occurred on May 20, 2023; (10) Plaintiff's Fourteenth Amendment failure-to-intervene claims against Defendants Aragona and Grimmick based on the alleged use of force incident that occurred on May 20, 2023; (11) Plaintiff's Fourteenth Amendment disciplinary due process claim against Defendant Cavanaugh based on Defendant Cavanaugh's disciplinary sanction imposed against Plaintiff on May 24, 2023; and (12) Plaintiff's Fourteenth Amendment equal protection claim against Defendant Lawson based on his use of racial slurs in connection with placing Plaintiff on suicide watch and subjecting Plaintiff to excessive force. (Dkt. No. 8 at 13-25.) Judge Kahn dismissed without prejudice all remaining claims and terminated Defendants Sheehan and Grimes from this action. (*Id*. at 27-28.)

On February 2, 2024, Defendants filed a verified answer. (Dkt. No. 23.) On February 7, 2024, Defendants filed an amended verified answer. (Dkt. No. 25.)

On March 13, 2024, Plaintiff filed an amended complaint naming the Doe defendants. (Dkt. No. 31.)

On March 21, 2024, the undersigned issued a text order that, among other things, directed the Clerk of the Court to update the docket with respect to identifying defendants who were previously listed as "John Doe." (Dkt. No. 33.)

On March 21, 2024, the Clerk of the Court filed Plaintiff's Amended Complaint pursuant to the undersigned's directive. (Dkt. No. 34.) On May 17, 2024, Plaintiff filed a one-page document titled "Amendment of Complaint – Adding Damages," which purports to amend the relief requested in the complaint "by inserting punitive damages in the amount of $500,000" and "compensatory damages in the amount of $2,850,000."[1] (Dkt. No. 48.)

On May 28, 2024, Defendants filed the pending motion to dismiss for failure to state a claim upon which relief may be granted and judgment on the pleadings. (Dkt. No. 49.)

**B. Parties' Briefing on Defendants' Motion to Dismiss**

**1. Defendants' Memorandum of Law**

Generally, in support of their motion to dismiss, Defendants assert that Plaintiff fails to state a claim upon which relief may be granted. (*See generally* Dkt. No. 49, Attach. 2.)

More specifically, with respect to Plaintiff's First Amendment retaliation claim related to the misbehavior report of February 26, 2023, Defendants argue that Plaintiff failed to allege that Defendant Torrisi took any adverse action against Plaintiff because the filing of a "false misbehavior report[] is, at best, [a] *de minimis* action." (Dkt. No. 49, Attach. 2 at 15.) In

[1] Plaintiff is cautioned that ordinarily, the filing of an amended pleading supersedes any previously filed pleading in its entirety. However, given Plaintiff's *pro se* status, the undersigned construed the operative pleading as Dkt. No. 34 with the addition of damages set forth in Dkt. No. 48.

addition, Defendants argue that the Amended Complaint fails to allege non-conclusory allegations sufficient to connect the slip and fall grievance and the allegedly false misbehavior report of February 26, 2023. (*Id*.) Defendants argue that the Amended Complaint fails to allege facts plausibly suggesting that Defendant Torrisi's shake down of Plaintiff and multiple other inmates was substantially motivated by Plaintiff's prior grievance. (*Id*.) In addition, Defendants assert that the documents attached to the Amended Complaint show that Defendants would have taken the allegedly adverse action of filing the misbehavior report, even in the absence of Plaintiff's grievance because Plaintiff attempted to pass an item to another inmate and refused to surrender the item when directed. (Dkt. No. 49, Attach. 2 at 15-16.)

With respect to Plaintiff's First Amendment retaliation claim related to the misbehavior report of March 18, 2023, Defendants argue that the Amended Complaint fails to allege (1) an adverse action, or (2) a causal connection between an alleged adverse action and the protected conduct. (Dkt. No. 49, Attach. 2 at 16-18.) Defendants argue that an allegedly false misbehavior report is not an adverse action because it would not deter a similarly situated inmate. (*Id*.) Defendants also assert that the Amended Complaint is devoid of allegations connecting a specific grievance with Plaintiff allegedly getting set up to "get his ass beat," the search of his cell, and the misbehavior report that was filed on March 18, 2023. (*Id*.) Further Defendants argue that, as evidenced by the documents attached to the Amended Complaint (1) Plaintiff was found guilty of the contraband (loose screw) found in his cell, (2) Plaintiff pleaded guilty to the charges stemming from the fight with another inmate, and (3) Defendants would have taken the adverse action even in the absence of Plaintiff's grievances based on the odor of smoke, burnt rolled toilet paper located in his cell, and loose screw located in his cell. (*Id*.)

With respect to Plaintiff's First Amendment retaliation claim related to searches of his cell, Defendants argue that retaliatory searches of an inmate and their cell are not actionable. (Dkt. No. 49, Attach. 2 at 18-20.) Defendants assert that wholly random searches are essential to effective security and even searches conducted with retaliatory intent or those that are especially thorough in execution are not adverse actions. (*Id*.) Defendants assert that the Amended Complaint fails to assert facts plausibly suggesting a causal connection between Plaintiff's protected speech and the allegedly retaliatory searches. (*Id*.) Finally, Defendants argue that, based on the documents attached to the Amended Complaint, even in the absence of Plaintiff's protected speech, the searches would have occurred because they were in response to (1) Plaintiff passing a note to a fellow inmate, and (2) the odor of smoke generated by burning toilet paper. (*Id*.)

With respect to Plaintiff's retaliatory administrative segregation in the suicide watch cell claim, Defendants argue that it should be dismissed because it was an administrative action taken because of the fight that Plaintiff was admittedly involved in "in Medical" between Plaintiff and another inmate. (Dkt. No. 49, Attach. 2 at 20-21.) Defendants argue that the record belies Plaintiff's allegation that he was placed on suicide watch, instead, Defendants assert that Plaintiff was placed in administrative segregation based on the fight "in Medical." (*Id*.) Moreover, Defendants argue that Plaintiff fails to allege facts plausibly suggesting a causal connection between his placement in a suicide watch cell (or, administrative segregation) and any protected speech. (*Id*.)

With respect to Plaintiff's retaliatory destruction claim, Defendants argue that the Amended Complaint fails to allege facts plausibly suggesting that Defendants Aragona and Pleat were personally involved in the destruction of his property. (Dkt. No. 49, Attach. 2 at 21-22.)

With respect to Plaintiff's First Amendment Retaliation claim related to the alleged use-of-force incident on May 20, 2023, Defendants argue that the Amended Complaint fails to allege facts plausibly suggesting that the use of force was precipitated by any specific grievance or investigation. (Dkt. No. 49, Attach. 2 at 22-24.) Defendants argue that the documents attached to the Amended Complaint indicate that the use of force was appropriate, not retaliatory, and would have been used in the absence of any grievance. (*Id*.)

With respect to Plaintiff's Fourth Amendment strip frisk claim, Defendants argue that the documents attached to the Amended Complaint and the grievance that Plaintiff filed undermine Plaintiff's allegation that Defendant Pleat was involved in the strip search. (Dkt. No. 49, Attach. 2 at 24-25.) Moreover, Defendants argue that because routine, random strip searches of inmates do not violate the Fourth Amendment, the strip search of Plaintiff and five other inmates on May 14, 2023, is not actionable and should be dismissed. (*Id*.)

With respect to Plaintiff's Fourteenth Amendment conditions of confinement claims, Defendants argue that they must be dismissed. (Dkt. No. 49, Attach. 2 at 26-28.) Defendants assert that Plaintiff failed to assert facts plausibly suggesting that placement in the suicide watch cell constituted "atypical action" resulting in a "significant deprivation" of any liberty interest he may have possessed. (*Id*.) Moreover, Defendants argue that the Amended Complaint does not allege that Plaintiff's placement in the suicide watch cell posed a substantial risk of serious harm or that Defendant Lawson possessed sufficient culpable intent. (*Id*.) With respect to the May 20, 2023, denial of the bathroom use, Defendants argue that Plaintiff's failure to mention denial of the bathroom in his grievance dated May 21, 2023, related to the incident, "indicates that the allegation is false and must be dismissed as wholly contradicted by a sworn statement he relies on." (*Id*. at 28.) In addition, Defendants argue that Plaintiff failed to allege any "serious

physical harm or a serious risk of contamination" arising out of the claimed conduct, nor has he overcome the proposition that urinating on himself, without more, does not rise to a Constitutional violation. (*Id*.)

With respect to Plaintiff's Fourteenth Amendment excessive force claims, Defendants argue that the documents attached to the Amended Complaint reflect that the use of force was either (1) objectively reasonable, or (2) *de minimus*. (Dkt. No. 49, Attach. 2 at 28-30.) Defendants argue that Plaintiff was the subject of a weekly security risk group shake down, Plaintiff threw his shirt at staff and punched officers; officers unsuccessfully attempted to gain control through verbal directives and ultimately administered OC spray. (*Id*.)

With respect to Plaintiff's failure to intervene claims, Defendants argue that the Amended Complaint fails to allege facts plausibly suggesting that Defendants Aragona and Grimmick were present during the use of force incident and thus, had a fair opportunity to intervene. (Dkt. No. 49, Attach. 2 at 30-31.)

With respect to Plaintiff's Fourteenth Amendment disciplinary due process claim, Defendants argue that it must be dismissed because a 60-day confinement in the SHU, even coupled with the loss of assorted privileges and the imposition of a surcharge, did not implicate a liberty interest under the Fourteenth Amendment. (Dkt. No. 49, Attach. 2 at 31-32.) Moreover, Defendants argue that in light of the "commonplace imposition of SHU placement as a disciplinary sanction, Plaintiff's confinement cannot plausibly be characterized as 'atypical' or a 'significant deprivation' with respect to similarly situated inmates." (*Id*. at 32.)

With respect to Plaintiff's Fourteenth Amendment equal protection claims, Defendants argue that the Amended Complaint fails to allege facts plausibly suggesting any concomitant

physical injury with the alleged racial slurs, sufficient to elevate them to Constitutionally actionable speech. (Dkt. No. 49, Attach. 2 at 32.)

**2. Plaintiff's Response in Opposition**

Generally, in opposition to Defendants' motion to dismiss, Plaintiff argues that (1) with respect to his First Amendment retaliation claim arising out of the misbehavior report of February 26, 2023, Defendant Torrissi authorized officers to shake Plaintiff down and issue him a ticket, which is sufficiently adverse to plausibly suggest a claim for retaliation; (2) with respect to his First Amendment retaliation claim related to the misbehavior report of March 18, 2023, he sufficiently alleged a causal connection between the cell ambush and his grievance of February 28, 2023 because (a) Defendant Molesky warned Plaintiff not to "start a war you can't finish," (b) there was no justification for the search including no physical evidence of the alleged odor of smoke or burnt rolls allegedly located in Plaintiff's cell, (c) there was no body worn camera footage of the search and there should have been, and (d) Plaintiff was found not guilty of the loose screw ticket; (3) with respect to the retaliatory searches of Plaintiff's cell, the incident on (a) February 26, 2023, involved passing a note, which is not dangerous and does not provide a basis for conducting a search and, in any event, no hearing was ever held which "shows the intent, motive, and animosity [Defendant] Torrissi had towards Plaintiff," and (b) March 18, 2023, resulted in a misbehavior report, which indicated that the search was conducted 21 minutes after Plaintiff left for recreation so (Plaintiff argues) it is doubtful that smoke was emanating from his cell; (4) with respect to the retaliatory admission to the suicide cell watch, Defendant Lawson told Plaintiff that if he writes another grievance, Defendant Lawson will make sure Plaintiff stays in the SHU forever, then placed Plaintiff in suicide watch without the required mental health evaluation; (5) with respect to his retaliatory destruction of property claim, the

search was extraordinary in that, almost everything in Plaintiff's cell was destroyed, and after conclusion of the strip search, Defendant Aragona stated ". . . fuck this all was for nothing"; (6) with respect to the First Amendment Retaliation claim related to the use of force incident on May 20, 2023, the close temporal proximity between Plaintiff's receipt that the Notice of Claim for his slip and fall incident was delivered on May 17, 2023, and the premeditated attack on May 20, 2023, sufficiently alleges a causal connection to survive Defendants' motion to dismiss; (7) with respect to the Fourth Amendment unlawful strip frisks claims, (a) his grievance mentioned "John Doe badge #166," who has since been identified as Defendant Pleat, and (b) Defendants Aragona and Pleat lacked reasonable cause to believe that Plaintiff was engaging in misconduct or criminal activity before the strip search; (8) with respect to his Fourteenth Amendment conditions of confinement claim, Defendant Lawson failed to act with reasonable care when he placed Plaintiff in a suicide watch cell with the window open, causing the temperature in the cell to be "freezing" and telling Plaintiff that if he writes another grievance, Defendant Lawson would be sure that Plaintiff stays in the cold cell forever; (9) with respect to the excessive force claim, (a) he complied with orders and did not resist, and (b) when he was cleared from the scanning machine he was sent to the booking room where the beating began, he was then put in handcuffs and escorted to medical where the beating continued in the medical shower, he was then evaluated by a nurse in medical and assaulted again, he was then strapped to a chair while still handcuffed and punched and kicked again, all of which was unreasonable; (10) with respect to his Fourteenth Amendment disciplinary due process claim he adequately alleged a violation because (a) he was not present during the entirety of his disciplinary hearing, and (b) he was not permitted to present witnesses and evidence; (11) with respect to his Fourteenth Amendment equal protection claims, Defendant Lawson's racial slur and Plaintiff's physical and mental

injuries sustained on March 23, 2023, and May 20, 2023, were sufficient; (12) with respect to his Fourteenth Amendment failure to intervene claim, Defendants Aragona and Grimmick knew, based on comments made by other officers, that an assault against Plaintiff was forthcoming, and—instead of "part[ing] ways"—they should have made an effort to stop or limit the amount of force applied. (*See generally* Dkt. No. 57.)

## II. LEGAL STANDARD GOVERNING MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED[2]

It has long been understood that a dismissal for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), can be based on one or both of two grounds: (1) a challenge to the "sufficiency of the pleading" under Fed. R. Civ. P. 8(a)(2); or (2) a challenge to the legal cognizability of the claim. *Jackson v. Onondaga Cnty.*, 549 F. Supp. 2d 204, 211, nn.15-16 (N.D.N.Y. 2008) (McAvoy, J., adopting Report-Recommendation on *de novo* review).

Because such dismissals are often based on the first ground, a few words regarding that ground are appropriate. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain "a *short and plain* statement of the claim *showing* that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). In the Court's view, this tension between permitting a "short and plain statement" and requiring that the statement "show[]" an entitlement to relief is often at the heart of misunderstandings that occur regarding the pleading standard established by Fed. R. Civ. P. 8(a)(2).

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[2] "The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001) (collecting cases).

On the one hand, the Supreme Court has long characterized the "short and plain" pleading standard under Fed. R. Civ. P. 8(a)(2) as "simplified" and "liberal." *Jackson*, 549 F. Supp. 2d at 212, n.20 (citing Supreme Court case). On the other hand, the Supreme Court has held that, by requiring the above-described "showing," the pleading standard under Fed. R. Civ. P. 8(a)(2) requires that the pleading contain a statement that "give[s] the defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests." *Jackson*, 549 F. Supp. 2d at 212, n.17 (citing Supreme Court cases) (emphasis added).[3]

The Supreme Court has explained that such *fair notice* has the important purpose of "enabl[ing] the adverse party to answer and prepare for trial" and "facilitat[ing] a proper decision on the merits" by the court. *Jackson*, 549 F. Supp. 2d at 212, n.18 (citing Supreme Court cases); *Rusyniak v. Gensini,* 629 F. Supp. 2d 203, 213 & n.32 (N.D.N.Y. 2009) (Suddaby, J.) (citing Second Circuit cases). For this reason, as one commentator has correctly observed, the "liberal" notice pleading standard "has its limits." 2 *Moore's Federal Practice* § 12.34[1][b] at 12-61 (3d ed. 2003). For example, numerous Supreme Court and Second Circuit decisions exist holding that a pleading has failed to meet the "liberal" notice pleading standard. *Rusyniak,* 629 F. Supp. 2d at 213, n.22 (citing Supreme Court and Second Circuit cases); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-52 (2009).

Most notably, in *Bell Atlantic Corp. v. Twombly*, the Supreme Court reversed an appellate decision holding that a complaint had stated an actionable antitrust claim under 15 U.S.C. § 1. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). In doing so, the Court "retire[d]" the famous statement by the Court in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957),

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[3] *Accord, Flores v. Graphtex*, 189 F.R.D. 54, 54 (N.D.N.Y. 1999) (Munson, J.); *Hudson v. Artuz*, 95-CV-4768, 1998 WL 832708, at *1 (S.D.N.Y. Nov. 30, 1998); *Powell v. Marine Midland Bank*, 162 F.R.D. 15, 16 (N.D.N.Y.1995) (McAvoy, C.J.).

that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly*, 127 S. Ct. at 1968-69. Rather than turn on the *conceivability* of an actionable claim, the Court clarified, the "fair notice" standard turns on the *plausibility* of an actionable claim. *Id*. at 1965-74. The Court explained that, while this does not mean that a pleading need "set out in detail the facts upon which [the claim is based]," it does mean that the pleading must contain at least "some factual allegation[s]." *Id*. at 1965. More specifically, the "[f]actual allegations must be enough to raise a right to relief above the speculative level [to a plausible level]," assuming (of course) that all the allegations in the complaint are true. *Id*.

As for the nature of what is "plausible," the Supreme Court explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "[D]etermining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged–but it has not show[n]–that the pleader is entitled to relief." *Iqbal*, 129 S. Ct. at 1950 [internal quotation marks and citations omitted]. However, while the plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully," *id*., it "does not impose a probability requirement." *Twombly*, 550 U.S. at 556.

Because of this requirement of factual allegations plausibly suggesting an entitlement to relief, "the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action,

supported by merely conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. Similarly, a pleading that only "tenders naked assertions devoid of further factual enhancement" will not suffice. *Iqbal*, 129 S. Ct. at 1949 (internal citations and alterations omitted). Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citations omitted).

However, "in a *pro se* case, the court must view the submissions by a more lenient standard than that accorded to 'formal pleadings drafted by lawyers.'" *Govan v. Campbell*, 289 F. Supp. 2d 289, 295 (N.D.N.Y. 2007) (Sharpe, M.J.) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)) (other citations omitted). The Second Circuit has opined that the court is obligated to "'make reasonable allowances to protect *pro se* litigants'" from inadvertently forfeiting legal rights merely because they lack a legal education. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006) (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)). As a result, *Twombly* and *Iqbal* notwithstanding, the court must continue to "construe [a complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggests." *Weixel v. Bd. of Educ.*, 287 F.3d 139, 146 (2d Cir. 2002).

## III. ANALYSIS[4]

### A. Whether Plaintiff Sufficiently Alleged a First Amendment Retaliation Claim Against Defendant Torrisi

After carefully considering the matter, I answer this question in the affirmative for the reasons set forth below.

[4] While the Court shares Defendants' desire to dispose early of any causes of action that fail to state a claim upon which relief may be granted, defense counsel is cautioned to only include conceivably meritorious arguments in the future; some of defense counsel's arguments were borderline frivolous.

A cognizable claim of retaliation pursuant to 42 U.S.C. § 1983 lies when prison officials take an adverse action against an inmate that is motivated by the inmate's exercise of a constitutional right, including the free speech provisions of the First Amendment. *See Friedl v. City of N.Y.*, 210 F.3d 79, 85 (2d Cir. 2000) ("In general, a section 1983 claim will lie where the government takes negative action against an individual because of his exercise of rights guaranteed by the Constitution or federal laws."). As the Second Circuit has repeatedly cautioned, however, because such claims are easily incanted and inmates often attribute adverse action, including the issuance of misbehavior reports, to retaliatory animus, courts must approach such claims "with skepticism and particular care." *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir. 2001), *overruled on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *accord, Davis v. Goord*, 320 F.3d 346, 352 (2d Cir. 2003).

To state a *prima facie* claim pursuant to 42 U.S.C. § 1983 for retaliatory conduct, a plaintiff must advance non-conclusory allegations establishing that (1) the conduct at issue was protected, (2) the defendants took adverse action against the plaintiff, and (3) there was a causal connection between the protected activity and the adverse action–in other words, that the protected conduct was a "substantial or motivating factor" in the prison officials' decision to take action against the plaintiff. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Dillon v. Morano*, 497 F.3d 247, 251 (2d Cir. 2007); *Garrett v. Reynolds*, 99-CV-2065, 2003 WL 22299359, at *4 (N.D.N.Y. Oct. 3, 2003) (Sharpe, M.J.).

For purposes of this motion, it is undisputed that Plaintiff engaged in constitutionally protected speech by the filing of a grievance and/or lawsuit. (Dkt. No. 49, Attach. 2 at 14-15 ["Defendants concede that the filing of grievances is protected speech."]); *see Davis v. Goord*, 320 F.3d at 352-53 ("[T]he filing of prison grievances is a constitutionally protected activity.");

*Flood v. Cappelli*, 18-CV-3897, 2019 WL 3778736, at *7 (S.D.N.Y. Aug. 2, 2019) (collecting cases) (holding that the filing of a grievance is protected speech).

Although a "prison inmate has no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in the deprivation of a protected liberty interest," *Freeman v. Rideout*, 808 F.3d 949, 951 (2d Cir. 1986), there are "two exceptions to this rule: when an inmate is 'able to show either (1) that he was disciplined without adequate due process as a result of the report; or (2) that the report was issued in retaliation for exercising a constitutionally protected right." *Willey v. Kirkpatrick*, 801 F.3d 51, 64 (2d Cir. 2015) (citing *Freeman*, 808 F.2d at 951-53; *Franco v. Kelly*, 854 F.2d 584, 589-90 (2d Cir. 1988)). Plaintiff's claim relates to the second exception set forth in *Willey*; Plaintiff alleges that he was issued the misbehavior report in retaliation for exercising a constitutionally protected right. Thus, the undersigned rejects Defendants' assertion that Plaintiff's retaliation "claim must be dismissed, because as a matter of law, false accusations in a misbehavior report do not state a cause of action under 42 U.S.C. § 1983." (Dkt. No. 49, Attach. 2 at 14.)

Moreover, I reject Defendants' assertion that the alleged false misbehavior report was *de minimis*." (*Id*. at 15.) Plaintiff alleges that Defendant Torrisi directed a "shake down" of Plaintiff—which the undersigned interprets to mean a strip search—and issued a false ticket (Dkt. No. 34 at 7), which "could constitute sufficiently adverse actions that would deter a prisoner of 'ordinary firmness' from exercising his rights." *Abreu v. Lipka*, 778 F. App'x 28, 33 (2d Cir. 2019) (holding that "a severe beating, false misbehavior reports, or the withholding of medication" each individually, could constitute an adverse action).

Defendants argue, without any citation to the record, that "Plaintiff concedes that false misbehavior reports did not constitute the type of action that would deter a similarly situated

inmate, who may be required to tolerate more than both public employees and average citizens, from exercising their constitutional rights." (Dkt. No. 49, Attach. 2 at 15.) To the extent that Defendants' assertion is based on the conclusion that *Plaintiff* was not deterred from filing additional grievances, I reject that argument. While "[i]t might seem that, because [an inmate] continued to file grievances even after the alleged retaliation, the defendants' actions were not sufficiently adverse . . . such a view misperceives what constitutes adverse action. The test is objective, and the plaintiff is not required to show that he was actually deterred." *Brandon v. Kinter*, 938 F.2d 21, 40 (2d Cir. 2019).

In addition, at this stage of the litigation, Plaintiff adequately alleges a causal connection between his protected speech and the adverse actions he experienced on February 26, 2023. First, the incident on February 26, 2023, followed closely in time to Plaintiff's protected speech. (Dkt. No. 34 at 7 [alleging that the incident happened "2 days after Plaintiff['s] slip and fall incident"]); *see Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009) ("[a] plaintiff can establish a causal connection that suggests retaliation by showing that protected activity was close in time to the adverse action"). Second, the Amended Complaint alleges that immediately preceding the incident with Defendant Torrisi on February 26, 2023, Defendant Torrisi asked Plaintiff about his lawsuit and when Plaintiff declined to discuss, Defendant Torrisi allegedly said "you wanna play games, I can play too." (Dkt. No. 34 at 7.) These alleged statements by Defendant Torrisi provide further context for the incident and causally connect Plaintiff's protected speech with the alleged shakedown and false misbehavior report.

Finally, the undersigned rejects Defendants' circular argument that the false misbehavior report establishes that Defendants would have taken the same action (issuing the misbehavior report) in the absence of Plaintiff's protected conduct. In addition, the Amended Complaint

alleges that the basis for the misbehavior report—that Plaintiff was passing something to another inmate—was merely a *post hoc* justification for the search of Plaintiff. (Dkt. No. 34 at 7.)

As a result, I recommend that Defendants' motion to dismiss Plaintiff's First Amendment retaliation claim against Defendant Torrisi be denied.

**B. Whether Plaintiff Sufficiently Alleged a First Amendment Retaliation Claim Against Defendants Molesky, Lawson, and Spadinger**

After carefully considering the matter, I answer this question in the affirmative.

First, as set forth above in Part III.A. of this Report and Recommendation, the first element of a retaliation claim does not appear to be in dispute. (Dkt. No. 34 at 7 [alleging that Plaintiff turned in a grievance on February 28, 2023]; Dkt. No. 49, Attach. 2 at 16-18 [Defendants arguments related to this claim, which do not raise the issue of whether Plaintiff engaged in protected activity].)

Second, as set forth above in Part III.A. of this Report and Recommendation, I reject Defendants' argument that a false misbehavior report cannot constitute an adverse action. Plaintiff alleges that he was set up to "get his ass beat" and his cell was searched during which a loose screw was planted by officers and a false misbehavior report was written as a result. (Dkt. No. 34 at 7.) "The planting of evidence and issuance of a false misbehavior report based upon that evidence has been found to constitute adverse action for purposes of a retaliation claim." *Shakur v. Thomas*, 14-CV-0427, 2016 WL 11478237, at *11 (N.D.N.Y. June 2, 2016) (Dancks, M.J.) (collecting cases), *report and recommendation adopted*, 2016 WL 4617242 (N.D.N.Y. Sept. 6, 2016) (D'Agostino, J.); *accord Henson v. Gagnon*, 13-CV-0590, 2015 WL 9809874, at *10 (N.D.N.Y. Dec. 10, 2015) (Dancks, M.J.), *report and recommendation adopted*, 2016 WL 204494 (N.D.N.Y. Jan. 15, 2016) (Suddaby, C.J.).

Third, at this juncture, the temporal proximity between Plaintiff's protected speech on February 28, 2023, and the incident on March 18, 2023, is enough to plausibly suggest a causal connection. *See Brandon v. Kinter*, 13-CV-0939, 2023 WL 2382637, at *23 (N.D.N.Y. Mar. 6, 2023) (Sannes, C.J.) (finding that three weeks between the grievances and adverse action was sufficiently close temporal proximity to plausibly infer retaliatory intent and causal connection); *Zaire v. Doe*, 03-CV-0629, 2006 WL 1994848, at *5 (N.D.N.Y. July 13, 2006) (Scullin, J.) (finding that two weeks between Plaintiff's protected speech and the adverse action sufficient circumstantial evidence of retaliation for purposes of a causal connection). In addition, the Amended Complaint alleges that when he filed his grievance, Defendant Molesky—who was involved in the subsequent alleged search and planting of the loose screw in Plaintiff's cell—forewarned Plaintiff to not "start a war you can't finish." (Dkt. No. 34 at 7.) Thus, I find that the Amended Complaint adequately alleged a causal connection between Plaintiff's protected speech and the adverse actions.

Finally, I reject, at this juncture, Defendants' argument that Plaintiff's retaliation claim should be dismissed because they would have taken the same action in the absence of Plaintiff's protected speech. Plaintiff alleges that the loose screw was planted by Defendants and thus, even if there was an independent basis for the search, Defendants present no basis for planting contraband in Plaintiff's cell.

As a result, I recommend that Defendants' motion to dismiss Plaintiff's First Amendment retaliation claim against Defendants Molesky, Lawson, and Spadinger be denied.

### C. Whether Plaintiff Sufficiently Alleged a First Amendment Retaliation Claim Against Defendant Lawson Based on Placement in Suicide Watch

After carefully considering the matter, I answer this question in the affirmative.

The undersigned rejects Defendants' argument that Plaintiff failed to allege facts plausibly suggesting a causal connection between his placement in the suicide watch cell and his protected speech. (Dkt. No. 49, Attach. 2 at 20-21.) The Amended Complaint alleges that Plaintiff was placed in the suicide watch cell by Defendant Lawson two days after filing a grievance with Defendant Lawson. (Dkt. No. 34 at 8.) As set forth above, the temporal proximity between Plaintiff's protected speech and the alleged adverse action are enough at this procedural posture to sufficiently infer a causal connection. *See Hendricks v. Mallozzi,* 20-CV-1035, 2022 WL 1129887, at *5 (N.D.N.Y. Jan. 14, 2022) (Lovric, M.J.) (citations omitted) ("Although there is significant case law to support the contention that temporal proximity alone is insufficient to survive a motion for summary judgment, the same is not true at the motion to dismiss stage."), *report and recommendation adopted,* 2022 WL 856885 (N.D.N.Y. Mar. 23, 2022) (D'Agostino, J.).

In addition, the Amended Complaint alleges that "[a]fter placing Plaintiff in the [suicide watch] cell [Defendant] Lawson said 'your [sic] in my custody now, black monkey. You play by my rules. If you write another grievance, I'll make sure you'll stay here forever.'" (Dkt. No. 34 at 8.) Defendant Lawson's alleged statement also provides support that a causal connection exists between Plaintiff's protected speech and the allegedly adverse action.

Although Defendants argue that Plaintiff was placed in the suicide watch cell as an administrative action, the Amended Complaint does not appear to contest Plaintiff's placement in the SHU. (*Compare* Dkt. No. 34 at 8, *with* Dkt. No. 49, Attach. 2 at 24-25.) Plaintiff's issue relates to his placement in a specific cell within the SHU—the suicide watch cell—with the window open by Defendant Lawson. (Dkt. No. 34 at 8.)

As a result, I recommend that Defendants' motion to dismiss Plaintiff's First Amendment retaliation claim against Defendant Lawson based on Plaintiff's placement in the suicide watch cell be denied.

**D. Whether Plaintiff Sufficiently Alleged a First Amendment Retaliation Claim Against Defendants Aragona and Pleat Based on Property Destruction**

After carefully considering the matter, I answer this question in the negative for the reasons stated in Defendants' memorandum of law. (Dkt. No. 49, Attach. 2 at 21-22.) Plaintiff fails to allege the personal involvement of Defendants Aragona and Pleat in the alleged destruction of his property. (Dkt. No. 34 at 10.) Instead, Plaintiff alleges that Defendants Aragona and Pleat conducted a scan and strip search of his person, made inappropriate comments, and when he returned to "his cell, all his property was destroyed including his commissary and clothes." (*Id*.) The Amended Complaint fails to allege facts plausibly suggesting who was responsible for the destruction of Plaintiff's property in his cell. Plaintiff's argument that "[t]his was no ordinary search on [his] cell," does not change the fact that he fails to allege who was responsible for the alleged adverse action.

As a result, I recommend that Defendants' motion to dismiss Plaintiff's First Amendment retaliation claim against Defendants Aragona and Pleat based on the destruction of property in Plaintiff's cell, be granted.

**E. Whether Plaintiff Sufficiently Alleged a First Amendment Retaliation Claim Against Defendants Stratta and Pleat Based on Use of Force on May 20, 2023**

After carefully considering the matter, I answer this question in the affirmative.

Contrary to Defendants' assertions, Plaintiff sufficiently alleges that the use of force incident with Defendants Stratta and Pleat was in retaliation for grievances filed and his notice of claim. (Dkt. No. 34 at 11); *see Barnett v. City of Yonkers*, 15-CV-4013, 2018 WL 4680026, at

*9 (S.D.N.Y. Sept. 28, 2018) (holding that the plaintiff "engaged in protected speech by filing the notice of claim").

Plaintiff alleges that on May 17, 2023, he received a certified mail receipt that the Albany County Clerk and the Municipal Government Agency received the Notice of Claim regarding his slip and fall incident on February 24, 2023. (Dkt. No. 34 at 11.) Plaintiff alleges that during the alleged incident Defendant Stratta stated, "we seen the little grievance you wrote and your notice of claim." (*Id*.) Thus, even assuming *arguendo* that the reference to "little grievance" was not sufficiently clear (because Plaintiff filed multiple grievances), the Amended Complaint contains reference to only one Notice of Claim. (*See generally* Dkt. No. 34.) Therefore, the undersigned rejects Defendants' argument that the allegations are "generally conclusory and unsupported" regarding the protected conduct that triggered the incident with Defendants Stratta and Pleat. (Dkt. No. 49, Attach. 2 at 24.)

To the extent that Defendants present a different factual recitation of the alleged incident, at this juncture, the Court must accept the factual allegations contained in the Amended Complaint.

As a result, I recommend that Defendants' motion to dismiss Plaintiff's First Amendment retaliation claim against Defendants Stratta and Pleat based on the use of force on May 20, 2023, be denied.

**F. Whether Plaintiff Sufficiently Alleged a Fourth Amendment Unlawful Strip Search Claim**

After carefully considering the matter, I answer this question in the affirmative (albeit, barely).

Plaintiff asserts in his opposition memorandum of law, that John Doe badge #166—who was identified in his grievance—is Defendant Pleat. (Dkt. No. 57 at 8 [referring to Dkt. No. 34,

Attach. 1 at 9].) Although Plaintiff did not direct the Court to any portion of the Amended Complaint supporting his assertion that Defendant Pleat is John Doe badge #166, given Plaintiff's *pro se* status, the Court may consider it. *See Drake v. Delta Airlines, Inc.*, 147 F.3d 169, 170, n. 1 (2d Cir. 1998) (per curiam) ("[W]e deem Drake's complaint to include the facts contained in his memorandum of law filed in response to Delta's 1996 motion to dismiss."); *Gill v. Mooney*, 824 F.2d 192, 195 (2d Cir. 1987) ("In his affidavit submitted in opposition to defendants' motion to dismiss, Gill asserts that Mooney's actions amounted to deliberate and willful indifference. Liberally construed under *pro se* pleading standards, Gill's allegations against Mooney involve more than ordinary lack of due care for the prisoner's interests or safety, . . . and therefore state a colorable claim under the Eighth and Fourteenth Amendments.") (internal quotation marks and citation omitted); *Donhauser v. Goord*, 314 F. Supp. 2d 119, 121 (N.D.N.Y. 2004) (Sharpe, M.J.) ("[I]n cases where a *pro se* plaintiff is faced with a motion to dismiss, it is appropriate for the court to consider materials outside of the complaint to the extent they "are consistent with the allegations in the complaint.") (collecting district court cases), *vacated on other grounds*, 317 F. Supp. 2d 160 (N.D.N.Y. 2004) (Hurd, J.). Hence, the undersigned rejects Defendants argument that Plaintiff failed to allege the personal involvement of Defendant Pleat because the grievance did not mention Defendant Pleat.[5]

To the extent that Defendants argue that the search was *per se* constitutional as a "routine, random strip search," (Dkt. No. 49, Attach. 2 at 24-25) I reject that argument for two reasons.

[5] This argument also appears to be a veiled attempt to assert that Plaintiff failed to exhaust his administrative remedies before commencing the action, which is not ripe for a motion to dismiss and instead, must be made on a motion for summary judgment.

First, the Amended Complaint alleges that Plaintiff experienced a visual body cavity search, not a strip search. A strip search is "an inspection of a naked individual, without any scrutiny of the subject body's cavities." *Harris*, 818 F.3d at 58. "A strip search is distinguishable from a 'visual body cavity search,' which extends to visual inspection of the anal and genital areas, or a 'manual body cavity search,' which includes some degree of touching or probing of body cavities." *Jenkins v. City of New York*, 18-CV-7024, 2020 WL 6700087, at *2 n.4 (E.D.N.Y. Nov. 12, 2020) (quoting *Harris*, 818 F.3d at 58). The scope of the intrusion varies with the type of search and visual body cavity searches are more intrusive than a mere strip search.[6] *Harris*, 818 F.3d at 58. Plaintiff alleges that Defendant Pleat directed Plaintiff to "spread your ass, so I can see inside your black ass," to bend over, and to squat three times. (Dkt. No. 34 at 10.) Hence, Defendants' blanket argument (that the search was constitutional because it was routine and random), which applies to a mere strip search, is inapplicable. *See Bell v. Wolfish*, 441 U.S. 520, 559 (1979) ("The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."). Moreover, the Amended Complaint appears to allege that the visual body cavity search was not routine and random, but that Plaintiff was singled out in retaliation for his protected speech. (Dkt. No. 34 at 10.)

Second, at this juncture, the record is incomplete and lacking relevant information to properly analyze whether Defendants Aragona and Pleat infringed Plaintiff's right to bodily privacy.

[6] Moreover, manual body cavity searches tend to be more intrusive than visual body cavity searches.

"Courts assessing an inmate's claim that officers infringed his or her right to bodily privacy must undertake a two-part inquiry: (1) First, the court must determine whether the inmate has 'exhibit[ed] an actual, subjective expectation of bodily privacy'; and (2) second, the court must determine 'whether the prison officials had sufficient justification to intrude on [the inmate's] fourth amendment rights.'" *Harris v. Miller*, 818 F.3d 49, 57 (2d Cir. 2016) (quoting *Covino v. Patrissi*, 967 F.2d 73, 77-78 (2d Cir. 1992)).

With respect to the first inquiry, "there is no dispute that a visual body cavity search is a 'serious invasion of privacy.'" *Velez-Shade v. Population Mgmt.*, 18-CV-1784, 2019 WL 4674767, at *9 (D. Conn. Sept. 25, 2019) (citing *Harris*, 818 F.3d at 58). Thus, at this early stage, the undersigned will assume that Plaintiff had an "actual, subjective expectation of bodily privacy" that society was prepared to accept as reasonable. *See Velez-Shade*, 2019 WL 4674767, at *9 (concluding that the plaintiff had an actual, subjective expectation of bodily privacy where the plaintiff was required to squat and cough during a strip search).

With respect to the second inquiry, Plaintiff's Fourth Amendment claim challenges an isolated search—as opposed to a prison or jail policy or regulation—and thus, the Court must apply the standard set forth in *Bell v. Wolfish*, 441 U.S. 520 (1979):

> [i]n each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider [1] the scope of the particular intrusion, [2] the manner in which it is conducted, [3] the justification for initiating it, and [4] the place in which it is conducted.

441 U.S. at 559.

The undersigned is lacking substantial information regarding each of these factors. However, the information that is available when viewed in the light most favorable to Plaintiff, weighs in favor of allowing the claim to proceed.

**1. The Scope of the Intrusion**

When considering the scope of the intrusion, courts have considered (1) the type of search, and (2) the person who performs the search. *Harris*, 818 F.3d at 58.

With respect to the type of search, "a visual body cavity search, such as the one conducted here is invasive: 'A strip search that involves a stranger peering without consent at a naked individual, and in particular at the most private portions of that person's body is a serious invasion of privacy.'" *Harris*, 818 F.3d at 58-59 (quoting *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 344-45 (2012) (Breyer, J., dissenting); *see also Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) ("[O]ne of the clearest forms of degradation in Western Society is to strip a person of his clothes. The right to be free from strip searches and degrading body inspections is thus basic to the concept of privacy."; *Cookish v. Powell*, 945 F.2d 441, 446 (1st Cir. 1991) ("[A] 'severe if not gross interference with a person's privacy [ ] occurs when guards conduct a vision inspection of body cavities.")).

With respect to who performed the search, "it is generally considered a greater invasion to have one's naked body viewed by a member of the opposite sex." *Canedy*, 16 F.3d at 185. Here, Plaintiff (male) alleges that Defendant Pleat (a male officer) conducted the visual inspection.

**2. The Manner in Which the Search Was Conducted**

"A strip search conducted in a professional manner is more reasonable than one that is not." *Harris*, 818 F.3d at 59-60 (citing *Grummett v. Rushen,* 779 F.2d 491, 496 (9th Cir.1985) (emphasizing that "[t]he record indicates that the searches are performed by the female guards in a professional manner and with respect for the inmates"); *Byrd,* 629 F.3d at 1143 ("[W]e have

consistently recognized the 'frightening and humiliating invasion' occasioned by a strip search, 'even when conducted with all due courtesy.'")).

Here, it is unclear from the record, viewed in the light most favorable to Plaintiff, why the visual body cavity search was conducted or involved the use of verbally aggressive orders. Plaintiff alleges that upon entering the room for the search, Defendant Pleat was "threatening and harassing" him and threatened to spray Plaintiff. (Dkt. No. 34 at 10.)

**3. The Justification for Initiating the Search**

Defendants provide no justification for the strip search at this juncture other than to suggest that it was a routine, random strip search. (Dkt. No. 49, Attach. 2 at 24-25 [arguing that "because 'routine, random strip searches of inmates' do not violate the Fourth Amendment, the May 14, 2023 strip search to which Plaintiff was subjected is not actionable and should be dismissed as Plaintiff has not alleged a plausible cause of action."].) "[I]t is difficult, if not impossible, for courts to determine the reasonableness of a visual body cavity search without record evidence supporting the officer's justification for initiating the search." *Harris*, 818 F.3d at 61 (citing *Byrd,* 629 F.3d at 1149 (Smith, J., concurring in part, dissenting in part) ("It is appropriate to begin the analysis by looking at the justification for initiating the search, because, in the absence of a proper justification, even the most unintrusive search is unreasonable.")).

The Amended Complaint suggests that there was no legitimate justification for the search. (Dkt. No. 34 at 10 [alleging that Plaintiff asked why he was being searched, Defendant Aragona told him, "shut up your [sic] getting stripped and if everything goes well your [sic] head back to your unit," and Plaintiff said "this cant [sic] be a Srg shakedown because I just had one 3 days ago and Srg shakedown is once a week."].)

#### 4. The Place in Which the Search Was Conducted

The Second Circuit has held that searches "conducted in the presence of only those individuals needed to conduct the search" are more reasonable than those "conducted in the presence of unnecessary spectators." *Harris*, 818 F.3d 62.

Based on the allegations contained in the Amended Complaint, it appears that Defendants Pleat and Aragona were the only individuals present for the visual body cavity search. (Dkt. No. 34 at 10.)

Given the substantial information lacking regarding a justification for the search—if any—and any additional facts regarding the manner in which the search was conducted, the undersigned finds that at this juncture, the factors weigh slightly in favor of allowing the claim to proceed.

For each of these reasons, I recommend that Defendants' motion to dismiss Plaintiff's Fourth Amendment unlawful strip search claim against Defendants Aragona and Pleat be denied.

### G. Whether Plaintiff Sufficiently Alleged a Fourteenth Amendment Conditions-of-Confinement Claim Against Defendant Lawson Related to March 23, 2023

After carefully considering the matter, I answer this question in the negative.

"Numerous courts, including those in the Second Circuit, have found that excessive hot or cold conditions may be unconstitutional." *Harlow v. St. Andrews*, 18-CV-0648, 2020 WL 5834219, at *7 (N.D.N.Y. Oct. 1, 2020) (Kahn, J.) (citing *Wingate v. Robert N. Davoren Ctr.*, 12-CV-5521, 2013 WL 4856573, at *3 (S.D.N.Y. Sept. 10, 2013)). However, district courts in this Circuit have also found "allegations of exposure to extreme temperatures for short periods of time are insufficient to state an Eighth or Fourteenth Amendment claim." *Wingate*, 2013 WL 4856573, at *3.

The Amended Complaint alleges that Plaintiff was placed in a cell with "the window wide open freezing Plaintiff for hours." (Dkt. No. 34 at 8.) These conclusory allegations—which fail to allege the temperature of the room, what (if any) clothing or bedding Plaintiff had access to, or a more specific length of time that Plaintiff was exposed to the cold—are insufficient to plausibly suggest a conditions-of-confinement claim. *See Scott v. Lopez*, 11-CV-0809, 2012 WL 75430, at *2 (S.D.N.Y. Jan. 5, 2012) (citing *Gardner v. Mental Health Unit of Sullivan Corr. Facility,* 07-CV-5535, 2009 WL 1834382, at *3 (S.D.N.Y. June 17, 2009) (no constitutional violation where prisoner was "very cold" for no more than seven days); *Felmine v. City of New York,* 09-CV-3768, 2011 WL 4543268, at *22 (E.D.N.Y. Sept. 29, 2011) (no constitutional violation where pre-trial detainee was kept in cold cell overnight for 6-7 hours)) ("several hours of confinement in a chilly room is not a constitutional violation. [The plaintiff]'s temporary deprivation was not sufficiently serious, and therefore does not satisfy the objective component of the inquiry."); *Williams v. Grant*, CV408-203, 2009 WL 3317262, at *4 (S.D. Ga. Oct. 14, 2009) (allegations that the plaintiff was subjected to three hours of cold temperatures insufficient to state a conditions of confinement claim); *see also Abdullah v. NYPD 30th Precinct*, 2024 WL 325385, at *6 (S.D.N.Y. Jan. 29, 2024) (collecting cases regarding exposure to cold and concluding that the plaintiff's allegations that he was locked up in a cold prison cell without a sweater or jacket causing flu like symptoms were insufficient to plausibly suggest a constitutional violation because he failed to allege how long he was held in the cold cell or the severity of the temperature of the cell).

As a result, I recommend that Defendants' motion to dismiss Plaintiff's Fourteenth Amendment conditions-of-confinement claim against Defendant Lawson related to the suicide watch cell on March 23, 2023, be granted.

### H. Whether Plaintiff Sufficiently Alleged a Fourteenth Amendment Conditions-of-Confinement Claim Against Defendants Lawson and Aragona Related to May 20, 2023[7]

After carefully considering the matter, I answer this question in the affirmative.

"The temporary deprivation of the right to use the toilet, in the absence of serious physical harm or a serious risk of contamination, does not rise to the level of an objective constitutional violation." *DeLaney v. Canfield*, 19-CV-6729, 2020 WL 3893272, at *5 (S.D.N.Y. July 10, 2020) (collecting cases denying Eighth Amendment claims asserting denial of bathroom access for between seventy minutes and three hours). However, denying someone detained by the State the ability "to eat, drink, or use the bathroom for several hours" may be sufficient to state a claim. *Cano v. City of New York*, 44 F. Supp. 3d 324, 334 (E.D.N.Y. 2014) (pretrial detainees who were denied access to a restroom, among other deprivations, for ten to twenty-four hours stated a Fourteenth Amendment claim).

District courts in the Second Circuit appear to primarily be concerned with (1) the length of the deprivation, and (2) whether the plaintiff was exposed to unsanitary or dangerous conditions as a result of the deprivation. *Compare Urena v. City of New York*, 22-CV-4758, 2024 WL 3607662, at *6 (S.D.N.Y. July 10, 2024) (concluding that the plaintiff's allegation that

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[7] Plaintiff, as a pretrial detainee, asserts a conditions-of-confinement claim pursuant to the Fourteenth Amendment. The analysis contained in Part III.G. of this Report and Recommendation contains citations to cases that consider conditions of confinement under both the Eighth and Fourteenth Amendments. "A detainee's Fourteenth Amendment due process rights concerning the conditions of his confinement are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *Bourdon v. Roney*, 99-CV-0769, 2003 WL 21058177, at *10 (N.D.N.Y. Mar. 6, 2003) (Sharpe, M.J.) (citing *City of Revere v. Massachusetts General Hospital,* 463 U.S. 239, 244 (1983) (citations omitted)). Hence, a case concluding that a complaint asserted facts plausibly suggesting a conditions-of-confinement claim pursuant to the Eighth Amendment also logically holds that the complaint asserted facts plausibly suggesting a conditions-of-confinement claim pursuant to the Fourteenth Amendment (however, the inverse of this statement is not true).

he was confined to a bus overnight while handcuffed fails to allege an unreasonable risk of serious damage to his health where there is no allegation that there were dangerous or unsanitary conditions on the bus), *with Colson v. Mingo*, 18-CV-2765, 2024 WL 1018582, at *13 (S.D.N.Y. Mar. 8, 2024) (finding that the plaintiff adequately alleged a conditions of confinement claim where the plaintiff alleged that he was handcuffed on a bus for fifteen hours in close proximity to shattered glass, his own human waste, and vomit, feces, and urine of other passengers with no access to a bathroom, water, or hygienic materials).

Construing the Amended Complaint in the light most favorable to Plaintiff, it alleges that he was deprived access to the bathroom on May 20, 2023, from approximately 7 p.m. until 2 a.m. on May 21, 2023. (Dkt. No. 34 at 11-12.) Plaintiff alleges that at approximately 9:50 p.m. on May 20, 2023, he informed Defendants Aragona and Lawson that he needed to use the bathroom, but he continued to be denied access to the bathroom for approximately four additional hours. (Dkt. No. 34 at 12.) The Amended Complaint alleges that "after 6 hours of being in the restraint chair, Plaintiff urinated on himself 3 times and was spitting blood." (*Id*.) I find that these allegations, which include exposure to unsanitary conditions, plausibly suggest a conditions-of-confinement claim pursuant to the Fourteenth Amendment. *See Rashid v. Kurtulus*, 23-CV-0722, 2023 WL 5672589, at *6 (D. Conn. Sept. 1, 2023) (concluding that the plaintiff's allegations that he was restrained from approximately 7 p.m. until 1 a.m. without access to the bathroom causing him to soil himself, sufficient to alleges a conditions-of-confinement claim).

As a result, I recommend that Defendants' motion to dismiss seeking dismissal of Plaintiff's conditions of confinement claim against Defendants Aragona and Lawson related to the incident on May 20, 2023, be denied.[8]

**I. Whether Plaintiff Sufficiently Alleged a Fourteenth Amendment Excessive Force Claim Against Defendants Stratta, Pleat, Bonnaci, Lacoosi, Lawson, Spadinger, and Cohen Related to May 20, 2023**

After carefully considering the matter, I answer this question in the affirmative.

Although the documents attached to the Amended Complaint illustrate a different scene on May 20, 2023, than the Amended Complaint alleges, Plaintiff's allegations are enough at this juncture for this claim to proceed. *Iqbal*, 129 S. Ct. at 1949 ("a court must accept as true all of the allegations contained in the complaint"). Defendants appear to argue that an issue of fact exists with respect to the use of force incident, and witness credibility is a function reserved for the jury. *In re Fosamax Products Liability Litigation*, 707 F.3d 189, 194 n.4 (2d Cir. 2013).

As a result, I recommend that Defendants' motion to dismiss Plaintiff's use of force claim against Defendants Stratta, Pleat, Bonnaci, Lacoozi, Lawson, Spadinger, and Cohen be denied.

**J. Whether Plaintiff Sufficiently Alleged a Fourteenth Amendment Failure-to-Intervene Claim Against Defendants Aragona and Grimmick Related to May 20, 2023**

After carefully considering the matter, I answer this question in the affirmative with respect to Defendant Grimmick and I answer this question in the negative with respect to Defendant Aragona.

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[8] Defendants again appear to include a veiled argument that Plaintiff failed to exhaust his administrative remedies before commencing the action, which is not ripe for a motion to dismiss and instead, must be made on a motion for summary judgment. *See*, *supra*, note 5.

Failure to intervene claims brought by pretrial detainees arise under the Fourteenth Amendment's Due Process Clause and must satisfy the following standards: (1) an objective showing that the challenged conditions were sufficiently serious to constitute a due process violation; and (2) a subjective showing that the official either knowingly or recklessly failed to act regarding an excessive risk to health or safety. *Velez v. City of New York*, 17-CV-9871, 2019 WL 3495642, at *3 (S.D.N.Y. Aug. 1, 2019); *see also McDaniel v. City of New York*, 19-CV-8735, 2022 WL 421122, at *8-10 (S.D.N.Y. Feb. 11, 2022). The subjective prong is met where an officer "has adequate time to assess a serious threat against an inmate and a fair opportunity to protect the inmate without risk to himself, yet fails to intervene." *McDaniel*, 2022 WL 421122, at *10; *see also Williams v. Salvucci*, 20-CV-5098, 2022 WL 17586326, at *8 (S.D.N.Y. Dec. 12, 2022). Courts may ask whether a defendant "observed or had reason to know the plaintiff was involved in a physical altercation" and "had an extended opportunity to stop the attack but failed to take any action to do so." *Blake v. Sexton*, 12-CV-7245, 2016 WL 1241525, at *4 (S.D.N.Y. Mar. 24, 2016) (alterations and internal quotation marks omitted); *McDaniel*, 2022 WL 421122, at *10.

The Amended Complaint alleges that Defendant Grimmick was present in booking for the scan of Plaintiff, during which a conversation ensued between Plaintiff and Defendants Stratta and Grimmick. (Dkt. No. 34 at 11.) The Amended Complaint alleges that Defendant Grimmick said "Allah you draw a lot of heat to yourself, you need to try to fallback because at the end of the day we always win." (*Id.*) Plaintiff alleges that after he was cleared from the scanner machine, he was taken across the hall to the male booking strip room where he was "jumped on . . . immediately" by Defendants Stratta, Pleat, and Bonnaci. (*Id.*) The Amended Complaint alleges that after the incident in the male booking strip room, he was escorted to

medical. (*Id*.) Plaintiff alleges that during the escort to medical, he saw Defendant Grimmick and said "word that what we doing Broomstick. Yall gonna jump me, yall gonna pay for this" and Defendant Grimmick smiled and said "don't start a war you can't finish." (*Id*.)

Although these allegations are sparse, as Plaintiff identifies in his opposition memorandum of law, the comments made by Defendant Grimmick immediately preceding and following the incident in the male booking strip room, viewed in the light most favorable to Plaintiff, plausibly suggest Defendant Grimmick was aware that Defendants Stratta, Pleat, and Bonnaci intended to "brutalize" Plaintiff. (Dkt. No. 57 at 10.) Thus, it is reasonable to infer, at this juncture, that Defendant Grimmick had reason to know that a physical altercation involving Plaintiff was about to occur, had an opportunity to stop it, and failed to do so. (Dkt. No. 57 at 14-15.)

However, the undersigned reaches a different conclusion with respect to Defendant Aragona. The Amended Complaint does not allege that Defendant Aragona was present on May 20, 2023, until approximately 8:10 p.m., after the conclusion of the alleged use of force incident. (Dkt. No. 34 at 11-12.) Thus, the Amended Complaint fails to allege facts plausibly suggesting that Defendant Aragona had reason to know Plaintiff was involved in a physical altercation and had a fair opportunity to stop it.

As a result, I recommend that Defendants' motion to dismiss Plaintiff's failure to intervene claim against Defendant Grimmick be denied, but that Defendants' motion to dismiss Plaintiff's failure to intervene claim against Defendant Aragona be granted.

### K. Whether Plaintiff Sufficiently Alleged a Fourteenth Amendment Disciplinary Due Process Claim Against Defendant Cavanaugh

After carefully considering the matter, I answer this question in the affirmative.

Defendants' sole contention with respect to this claim relates to whether Plaintiff's placement in the SHU constituted an "atypical, significant deprivation" which might "conceivably create a liberty interest." (Dkt. No. 49, Attach. 2 at 31-32.) However, as set forth in Senior District Judge Kahn's Memorandum-Decision and Order dated September 19, 2023, "[p]retrial detainees have a liberty interest in being free from punishment prior to conviction under the Due Process Clause." *Washington v. Falco*, 20-CV-3009, 2021 WL 797658, at *7 (S.D.N.Y. Mar. 1, 2021) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)). In situations in which a restriction is placed on a pretrial detainee for disciplinary reasons, "[p]rocedural due process requires that a pretrial detainee be given written notice, adequate time to prepare a defense, a written statement of the reasons for action taken, and a limited ability to present witnesses and evidence . . . ." *Almighty Supreme Born Allah v. Milling*, 876 F.3d 48, 55 n.3 (2d Cir. 2017) (internal quotation marks omitted).

The Amended Complaint alleges that on May 24, 2023, Plaintiff was taken to a disciplinary hearing conducted by Defendant Cavanaugh, and he was not provided due process of law. (Dkt. No. 34 at 13.) The Amended Complaint alleges that Plaintiff was later provided a copy of his disposition, which imposed a sanction of Plaintiff fifteen day of SHU confinement and twenty-one days of keeplock confinement. (Dkt. No. 34 at 12; Dkt. No. 34, Attach. 1 at 13.) Senior District Judge Kahn referred to Defendant Cavanaugh's sanction as a "disciplinary determination." (Dkt. No. 8 at 24.) This disciplinary determination that included disciplinary restrictions required written notice, adequate time to prepare a defense, a written statement of the reasons for action taken, and a limited ability to present witnesses and evidence. Thus, the undersigned rejects Defendants' argument that the sanctions imposed did not implicate a liberty interest and thus no procedures were required.

As a result, I recommend that Defendants' motion to dismiss Plaintiff's Fourteenth Amendment disciplinary due process claim against Defendant Cavanaugh be denied.

### L. Whether Plaintiff Sufficiently Alleged a Fourteenth Amendment Equal Protection Claim Against Defendant Lawson

After carefully considering the matter, I answer this question in the affirmative with respect to the physical altercation on May 20, 2023, and I answer this question in the negative with respect to the placement in suicide watch cell.

As set forth by Senior District Judge Kahn, "Courts in this circuit and elsewhere have held that officers' use of racial epithets may be regarded as direct evidence of racial animus and, when combined with physical abuse or other unlawful actions, may establish an equal protection violation." *Ali v. Connick*, 136 F. Supp. 3d 270, 280 (E.D.N.Y. 2015); *see also Cole v. Fischer*, 379 F. App'x 40, 43 (2d Cir. 2010) ("When the verbal harassment and simultaneous physical abuse alleged in the amended complaint are considered together, we have little trouble concluding that plaintiff's allegations were sufficient to state a § 1983 claim for discrimination on the basis of race and religion.").

As set forth by Defendants, Plaintiff failed to allege any physical injury related to his placement in the suicide watch cell. Instead, Plaintiff alleged that he was "freezing" and cold. (Dkt. No. 8.) However, with respect to the incident on May 20, 2023, Plaintiff alleged that he sustained a chipped tooth and bruising on the right side of his eye. (Dkt. No. 34 at 12; Dkt. No. 34, Attach. 1 at 12; Dkt. No. 57 at 13.)

As a result, I recommend that Defendants' motion to dismiss Plaintiff's Fourteenth Amendment equal protection claim against Defendant Lawson be granted with respect to the suicide watch cell placement and denied with respect to the alleged assault on May 20, 2023.

**ACCORDINGLY**, it is

**RECOMMENDED** that Defendants' motion to dismiss (Dkt. No. 49) be **GRANTED** in part and Plaintiff's Amended Complaint (Dkt. No. 34) be **DISMISSED**, pursuant to Fed. R. Civ. P. 12 to the extent that it asserts the following claims:

(1) Plaintiff's First Amendment retaliation claim against Defendants Aragona and Pleat based on these officials destroying (or directing others to destroy) Plaintiff's personal property following his stated intent to file a grievance against them on May 14, 2023;

(2) Plaintiff's Fourteenth Amendment conditions-of-confinement claim against Defendant Lawson based on his exposing Plaintiff to cold temperatures in the suicide watch cell for hours on March 23, 2023;

(3) Plaintiff's Fourteenth Amendment failure-to-intervene claims against Defendant Aragona based on the alleged use of force incident that occurred on May 20, 2023; and

(4) Plaintiff's Fourteenth Amendment equal protection claim against Defendant Lawson based on his placement of Plaintiff in the suicide watch cell on March 23, 2023;

and it is further respectfully

**RECOMMENDED** that Defendants' motion to dismiss (Dkt. No. 49) be **DENIED** in part and the following claims from Plaintiff's Amended Complaint (Dkt. No. 34) **SURVIVE**:

(1) Plaintiff's First Amendment retaliation claim against Defendant Torrisi based on the search of Plaintiff's cell and issuance of a false misbehavior report against him on February 26, 2023, in response to a lawsuit Plaintiff filed regarding a "slip and fall accident" that occurred two days earlier;

(2) Plaintiff's First Amendment retaliation claim against Defendants Molesky, Lawson, and Spadinger based on these officials searching Plaintiff's cell and issuing him a

false misbehavior report on March 18, 2023, in response to Plaintiffs submission of a grievance on February 28, 2023;

(3) Plaintiff's First Amendment retaliation claim against Defendant Lawson based on this official placing Plaintiff on suicide watch on March 23, 2023, in response to Plaintiff's submission of a grievance regarding the cell search on March 18, 2023;

(4) Plaintiffs First Amendment retaliation claim against Defendants Stratta and Pleat based on these officials initiating a use-of-force incident on May 20, 2023, in response to Plaintiff's earlier engagement in protected activity;

(5) Plaintiff's Fourth Amendment unlawful strip frisk claim against Defendants Aragona and Pleat based on the strip search that occurred on May 14, 2023;

(6) Plaintiff's Fourteenth Amendment conditions-of-confinement claims against Defendants Aragona and Lawson based on their denial of Plaintiff's access to the bathroom on May 20, 2023;

(7) Plaintiff's Fourteenth Amendment excessive force claims against Defendants Stratta, Pleat, Bonnaci, Lacoozi, Lawson, Spadinger, and Cohen based on the alleged use of force incident that occurred on May 20, 2023;

(8) Plaintiff's Fourteenth Amendment failure-to-intervene claims against Defendant Grimmick based on the alleged use of force incident that occurred on May 20, 2023;

(9) Plaintiff's Fourteenth Amendment disciplinary due process claim against Defendant Cavanaugh based on Defendant Cavanaugh's disciplinary sanction imposed against Plaintiff on May 24, 2023; and

(10) Plaintiff's Fourteenth Amendment equal protection claim against Defendant Lawson based on his use of racial slurs in connection with subjecting him to excessive force;

and it is further

**ORDERED** that the Clerk of the Court shall file a copy of this Report and Recommendation on the docket of this case and serve a copy upon the parties in accordance with the local rules.[9]

**NOTICE:** Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report.[10] Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW**. 28 U.S.C. § 636(b)(1) (Supp. 2013); FED. R. CIV. P. 6(a), 6(d), 72; *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989)).

Dated: February 18, 2025
Binghamton, New York

Miroslav Lovric
U.S. Magistrate Judge

[9] The Clerk shall also provide Plaintiff with copies of all unreported decisions cited herein in accordance with *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).

[10] If you are proceeding *pro se* and served with this report, recommendation, and order by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date that the report, recommendation, and order was mailed to you to serve and file objections. FED. R. CIV. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. FED. R. CIV. P. 6(a)(1)(C).

2003 WL 22299359
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Troy GARRETT, Plaintiff,
v.
Edward REYNOLDS, Superintendent, Mohawk Corr. Facility; James A. Mance, Deputy Superintendent of Programs; John O'Reilly, [1] Deputy Superintendent; J. Burge, First Deputy; M. Maher, DSS; R. Centore, Correctional Officer, Defendants.

No. Civ.9:99CV2065NAMGLS.
|
Oct. 7, 2003.

**Attorneys and Law Firms**

Troy Garrett, Peekskill, NY, Plaintiff, pro se.

Hon. Eliot Spitzer, Attorney General State of New York, Syracuse, NY, for the Defendants.

Maria Moran, Asst. Attorney General, of counsel.

*REPORT-RECOMMENDATION*

SHARPE, Magistrate J.

## I. *Introduction* [2]

***1** Plaintiff, *pro se* Troy Garrett filed an action under 42 U.S.C. § 1983 claiming that the defendants violated his civil rights when they retaliated against him for his activities as an IGRC representative by subjecting him to verbal harassment, physical abuse and subsequently, a transfer. Garrett also claims that the supervisory defendants failed to properly investigate his complaints and failed to train/supervise their employees. This court recommends denying the motion for summary judgment in part and granting it in part.

## II. *Procedural History*

On July 13, 2001, Garrett filed an amended complaint against the defendants claiming that they violated his civil rights under the First, Sixth Eighth, and Fourteenth Amendments. [3] On September 28, 2001, the defendants filed a motion for summary judgment. On January 18, 2002, this court issued an order informing Garrett of his obligation to file a response and extended his time to respond for thirty days. On April 24, 2002, this court granted an additional sixty days to respond to the defendants' motion. Despite having been given multiple opportunities to respond, Garrett has failed to file a response.

## III. *Facts* [4]

On June 17, 1999, Garrett filed a grievance against Officer Kelley for verbal harassment. [5] This grievance was denied by the Central Office Review Committee (CORC) on July 21, 1999. On March 19, 2000, Garrett filed a grievance claiming that defendant Burge used intimidation tactics. Defendant Reynolds investigated the grievance and it was denied based on a finding that no harassment occurred. Garrett appealed to the CORC and they denied the grievance on April 5, 2000. On April 10, 2000, defendant Centore wrote a misbehavior report against Garrett for creating a disturbance and employee harassment. On April 12, 2000, Lieutenant Manell presided over Garrett's Tier 2 disciplinary hearing and he was found guilty of both charges. He was given a 21 day recreation penalty, and loss of packages and commissary. However, his recreation penalty was suspended and deferred. Garrett appealed the determination and it was affirmed on April 19, 2000.

On April 17, 2000, Garrett filed a grievance against Centore for harassment. Burge denied his grievance on May 4, 2000, and subsequently, the CORC denied it. On May 12, 2000, Garrett sent a letter to Burge concerning further harassment by Centore. On May 16, 2000, Garrett filed another grievance against Centore for harassment. His grievance was denied on May 26, 2000. After Garrett appealed, his grievance was again denied by the CORC. On June 22, 2000, the Superintendent's Office received a letter from Garrett alleging that Centore threw a piece of paper with a picture of a plunger and the words “always gets the job done” into his cell. He wrote a grievance against Centore for harassment due to the paper that he threw into his cell. Burge forwarded the grievance to the CORC on August 10, 2000. The CORC accepted the grievance on August 30, 2000, in order to investigate.

***2** On June 23, 2000, the Inspector General's Office interviewed Garrett at the Mohawk Correctional Facility regarding his complaints of Centore. That same day, Captain Naughton filed an administrative segregation recommendation. On June 29, 2000, an administrative segregation hearing was held. On July 14, 2000, Garrett was transferred [6] to the Mid-State Correctional Facility.

Finally, Garrett filed a claim alleging that his property was lost or damaged on October 8, 1999. However, he was paid $75.00 for this claim and he signed a release on December 13, 1999.

## IV. *Discussion*

### A. *Legal Standard*

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... 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." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986); *accord F.D.I.C. v. Giammettei,* 34 F.3d 51, 54 (2d Cir.1994). The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Thomas v. Roach,* 165 F.3d 137, 142 (2d Cir.1999). "When a motion for summary judgment is made and supported ... an adverse party may not rest upon the mere allegations or denials of the ... pleading, but the adverse party's response, by affidavits or as otherwise provided in [Federal Rule of Civil Procedure 56(e) ], must set forth specific facts showing that there is a genuine issue for trial." *St. Pierre v. Dyer,* 208 F.3d 394, 404 (2d Cir.2000). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]" *Rexford Holdings, Inc. v. Biderman,* 21 F.3d 522, 525 (2d Cir.1994)(alternation in original) (citation omitted). However, it is well settled that on a motion for summary judgment, the court must construe the evidence in the light most favorable to the non-moving party. *Tenenbaum v. Williams,* 193 F.3d 581, 593 (2d Cir.1999).

Furthermore, in a *pro se* case, the court must view the submissions by a more lenient standard than that accorded to "formal pleadings drafted by lawyers." *Haines v. Kerner,* 404 U .S. 519, 520 (1972); *see Estelle v. Gamble,* 429 U.S. 97, 106 (1976); *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994)(a court is to read a *pro se* party's "supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest"). Indeed, the Second Circuit has stated that "[i]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training." *Traguth v. Zuck,* 710 F.2d 90, 95 (2d Cir.1983). Any ambiguities and inferences drawn from the facts must be viewed in the light most favorable to the non-moving party. *Thompson v. Gjivoje,* 896 F.2d 716, 720 (2d Cir.1990); *see LaFond v. General Physics Serv. Corp.,* 50 F.3d 165, 171 (2d Cir.1995).

***3** This liberal standard, however, does not excuse a *pro se* litigant from following the procedural formalities of summary judgment. *Showers v. Eastmond,* 00 CIV. 3725, 2001 WL 527484, at *2 (S.D.N.Y. May 16, 2001). More specifically, Local Rule 7.1(a)(3) of this court specifically provides that "any facts set forth in the [moving party's] Statement of Material Facts shall be deemed admitted unless specifically controverted by the opposing party." Local Rule 7.1(a)(3) further requires that the "non-movant shall file a Statement of Material Fact which mirrors the movant's statement in matching numbered paragraphs and which set forth a specific reference to the record where the material fact is alleged to arise." The courts of the Northern District have adhered to a strict application of Local Rule 7.1(a)(3)'s requirement on summary judgment motions. *Giguere v. Racicot,* 00-CV-1178, 2002 WL 368534, at *2 (N.D.N.Y. March 1, 2002)(interalia citing *Bundy Am. Corp. v. K-Z Rental Leasing, Inc.,* 00-CV-260, 2001 WL 237218, at *1 (N.D.N.Y. March 9, 2001)).

Furthermore, this Circuit adheres to the view that nothing in Rule 56 imposes an obligation on the court to conduct a search and independent review of the record to find proof of a factual dispute. *Amnesty America v. Town of West Hartford,* 288 F.3d 467, 470 (2d Cir.2002). As long as the local rules impose a requirement that parties provide specific record citations in support of their statement of material facts, the court may grant summary judgment on that basis. *Id.* at 470-71.

In this case, Garrett did not file a response to the motion for summary judgment. Consequently, this court will accept the properly supported facts contained in the defendants' 7.1 Statement (*Dkt. No. 49* ) as true for purposes of this motion. [7] With this standard in mind, the court now turns to the sufficiency of Garrett's claims.

B. *Eleventh Amendment*

In Garrett's complaint, he raises claims against the defendants in their official and individual capacity. The Eleventh Amendment provides that: "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. Although the Amendment does not specifically prohibit suits against a state by its own citizens, the Supreme Court has consistently applied that immunity to such cases. *See Burnette v. Carothers,* 192 F.3d 52, 57 (2d Cir.1999)(citing *Edelman v. Jordan,* 415 U.S. 651, 662-63 (1974)). Moreover, it is well established that Eleventh Amendment immunity applies not only when a state is a named defendant, but when liability must be paid from state coffers. *See New York City Health & Hosp. Corp. v. Perales,* 50 F.3d 129, 134 (2d Cir.1995)(citing *Edelman,* 415 U .S. at 665); *Dawkins v. State of New York,* 93-CV-1298, 1996 WL 156764, at *2 (N.D.N.Y. Mar. 28, 1996).

***4** In this case, Garrett raises claims against the defendants in their official and individual capacities. Since the Eleventh Amendment bars official capacity claims against these state officers, this court recommends dismissal of Garrett's claims against the defendants in their official capacity.

C. *Retaliation*

In this case, Garrett claims that during the course of his appointment as an IGRC representative, he has been subjected to repeated acts of harassment, both verbal and physical, threatened with physical assaults, placed into disciplinary confinement in the SHU, and transferred.[8] The Second Circuit has held that retaliation against a prisoner for pursuing a grievance is actionable under § 1983. *Graham v. Henderson,* 89 F.3d 75, 80 (2d Cir.1996). Moreover, the Second Circuit has recognized both the near inevitability of decisions and actions by prison officials to which prisoners will take exception and the ease with which claims of retaliation may be fabricated. Thus, prisoners' claims of retaliation are examined with skepticism and particular care. *See Flaherty v. Coughlin,* 713 F.2d 10 (2d Cir.1983).

In order for a plaintiff to prevail on a First Amendment retaliation claim, a plaintiff must advance non-conclusory allegations establishing: (1) that the speech or conduct at issue was protected; (2) that the defendant took adverse action against the plaintiff; and, (3) that there was a causal connection between the protected speech and the adverse action. *See Dawes v. Walker,*[9] 239 F.3d 489, 492 (2d Cir.2001) (citation omitted) *overruled on other grounds, Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002). If Garrett makes these showings, DOCS may evade liability if it demonstrates that it would have disciplined or transferred him " 'even in the absence of the protected conduct." ' *Bennett v. Goord,* 343 F.3d 133, 137 (2d Cir.2003) (citations omitted).

An inmate has a constitutional right to be protected from retaliation based upon his activities as an IGRC representative. *Alnutt v. Cleary,* 913 F.Supp. 160, 170 (W.D.N.Y.1996). However, a claim brought under "42 U.S.C. § 1983 is not designed to rectify harassment or verbal abuse." *Gill v. Hoadley,* 261 F.Supp 2d 113, 129 (N.D.N.Y.2003)(citing *Alnutt,* 913 F.Supp at 165-66)). Ordinarily, a claim for verbal harassment is not actionable under 42 U.S.C. § 1983. *Aziz Zarif Shabazz v. Picco,* 994 F.Supp. 460, 474 (S.D.N.Y.1998). Moreover, "verbal harassment or profanity alone, unaccompanied by an injury no matter how inappropriate, unprofessional, or reprehensible it might seem, does not constitute the violation of any federally protected right and therefore is not actionable under 42 U.S.C. § 1983." *Aziz Zarif Shabazz,* 994 F.Supp. at 474.

In this case, Garrett claims that defendant Centore harassed him for his activities as an IGRC representative. Garrett also claims that he was removed as an IGRC representative when he was transferred. In addition, Garrett claims that defendants Reynolds, Mance, Burger and Maher failed to properly investigate his allegations against Centore. Garrett claims that these defendants failed to properly investigate his claims in retaliation for his activities as an IGRC representative.

***5** More specifically, Garrett claims that Reynolds and Mance recalled IGRC passes for one day in order to interfere with an investigation inquiry into a correctional officer's conduct involving inmates who were left in the yard during inclement weather. Finally, Garrett claims that his property was destroyed while he was in the SHU.[10] Garrett filed grievances against Centore in April, May, and June of 2000. One of his complaints involved Centore throwing a folded piece of paper into his cell which had a picture of a plunger with the words "always gets the job done" on it. On June 23, 2000, he was placed in administrative segregation in the SHU. Three weeks later he was transferred.[11]

Viewing the facts in the light most favorable to Garrett, the non-moving party, this court cannot, as a matter of law, find that Garrett fails to state a claim for which relief can

be granted. He claims that he was retaliated against for his activities as an IGRC representative. As noted, verbal harassment alone will not constitute a violation of a prisoner's constitutional rights but in this case, it appears that he was transferred for his activities as an IGRC representative. The defendants rely on numerous grievances which were denied by the CORC to show that their actions were proper. They also claim that Garrett has failed to show injury, however, at this juncture of the litigation with virtually no discovery in this case, this court cannot recommend dismissal as a matter of law.

D. *Personal Involvement*

It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983. *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995)(*citation omitted* ). Since there is no respondeat superior liability, the defendant must be shown to have personal involvement in the alleged deprivation of rights. *Al-Jundi v. Estate of Rockefeller,* 885 F.2d 1060, 1065 (2d Cir.1989). Supervisory officials cannot be held liable under § 1983 solely for the acts of their subordinates. *See Monell v. Department of Social Serv.,* 436 U.S. 658, 690-695 (2d Cir.1978). However, a supervisory official can be held liable for constitutional violations if he or she: (1) directly participated in the violation; (2) failed to remedy the violation after learning of it through a report or appeal; (3) created a custom or policy fostering the violation after learning of it; or (4) was grossly negligent in supervising subordinates who caused the violation. *Sealey v. Giltner,* 116 F.3d 47, 51 (2d Cir.1997) (citing *Williams v. Smith,* 781 F.2d 319, 323-24 (2d Cir.1986)).

Garrett contends that defendants Reynolds and Mance allowed staff members under their supervision to violate his rights. More specifically, Mance refused to properly investigate Garrett's complaints. Garrett also claims that defendant Burge refused to grant his request for redress against defendant Centore. Finally, Garrett claims that the defendants collectively failed to properly train and supervise their employees.

***6** The defendants contend that the claims against the supervisory defendants should be dismissed for lack of personal involvement. However, this court finds this contention without merit since it appears that all of the defendants were involved in the investigation process of Garrett's complaint and he accuses all of them of continuing the alleged constitutional violation by failing to properly investigate the grievances he filed. Accordingly, this court recommends denying the defendants' motion for summary judgment based on the lack of personal involvement.

WHEREFORE, for the foregoing reasons, it is hereby

RECOMMENDED, that Garrett's claims against the defendants in their official capacity under the Eleventh Amendment should be dismissed since these claims are barred; and it is further

RECOMMENDED, that defendant O'Reilly be dismissed since he was never served; and it is further

RECOMMENDED, that the defendants' motion for summary judgment be denied in all other respects; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Report-Recommendation upon the parties by regular mail.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court within TEN days. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. *Roldan v. Racette,* 984 F.2d 85 (2d Cir.1993); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

**All Citations**

Not Reported in F.Supp.2d, 2003 WL 22299359

## Footnotes

1 In this case, the defendants maintain and the docket confirms that defendant John O'Reilly has never been served. Service must be made upon a defendant within 120 days of filing the complaint or any claims against

that defendant will be dismissed. See Fed.R.Civ.P. 4(m). The original complaint, which named O'Reilly, was filed on November 26, 1999, and the amended complaint was filed on July 13, 2001. However, O'Reilly was never served. Since this defendant has never been served, this court lacks jurisdiction over him, and this court recommends the dismissal of this defendant.

2 This matter was referred to the undersigned for a Report-Recommendation by the Hon. Norman A. Mordue, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c).

3 Although Garrett claims to be raising violations under the Sixth, Eighth, and Fourteenth Amendments, the only viable claim based on this court's interpretation of the complaint is under the First Amendment for retaliation.

4 The facts are taken from the defendants' statement of undisputed material facts since Garrett failed to file a response.

5 Not a party in this suit.

6 The defendants suggest that Garrett has failed to exhaust his administrative remedies concerning his transfer. They claim that he agreed to the transfer and participated in the administrative hearing which resulted in his transfer. The issue of transfer will not be addressed in this Report-Recommendation because the court has insufficient information to determine whether he exhausted his remedies.

7 The court notes that this does not apply to the various conclusions of law contained in the defendants' 7.1 Statement.

8 This case turns on the interpretation of the complaint. Garret's complaint is not a model of clarity and as noted, he has failed to file a response to the motion for summary judgment. Nonetheless, a careful reading of Garrett's opening paragraph under the title “Facts” compels this court to interpret this complaint as one claiming retaliation for his activities and status as an IGRC representative.

9 Dawes' complaint was dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

10 However, the defendants provide the court with documents which show that he was paid $75.00 in settlement of this claim.

11 The defendants maintain that Garrett failed to exhaust this claim. At this juncture, it is unclear whether or not he exhausted this claim. As such, this court cannot, as a matter of law, recommend dismissal because the court has insufficient information to determine this issue.

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Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Joseph V. FLOOD, Plaintiff,
v.
Officer J. CAPPELLI; Officer Carl E. DuBois, Defendants.

No. 18-CV-3897 (KMK)
|
Signed 08/12/2019

**Attorneys and Law Firms**

Joseph V. Flood, Goshen, NY, Pro Se Plaintiff.

Karen D. Edelman-Reyes, Esq., Orange County District Attorney's Office, Goshen, NY, Counsel for Defendants.

OPINION & ORDER

KENNETH M. KARAS, United States District Judge:

***1** Joseph V. Flood ("Plaintiff"), currently incarcerated at Orange County Jail ("OCJ"), brings this Action under 42 U.S.C. § 1983, against Officer J. Cappelli ("Cappelli") and Officer Carl E. DuBois ("DuBois") (collectively, "Defendants"). Plaintiff alleges that Defendants violated his constitutional rights when they searched and sexually assaulted him and retaliated against him for filing a grievance. (Compl. (Dkt. No. 2).) Before the Court is Defendants' Motion To Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (*See* Not. of Mot. (Dkt. No. 17).) For the reasons stated herein, the Motion is granted.

I. Background

A. Factual Background

The following facts are drawn from Plaintiff's Complaint, and a letter Plaintiff submitted in opposition to Defendants' Motion, (*see* Compl.; Letter from Plaintiff to Court (Nov. 26, 2018) ("Pl.'s Letter") (Dkt. No. 24)), and are taken as true for the purpose of resolving the instant Motion. [1]

Plaintiff alleges that on April 1, 2018, at 9:15 a.m., he was sexually assaulted outside the door to his cell by Cappelli while being pat frisked. (Compl. 2–3.) Cappelli allegedly swiped his hand between the backside of Plaintiff's rear end. (*Id.* at 3) Plaintiff told Cappelli that this conduct was not necessary and Cappelli smirked and responded that Plaintiff probably liked it. (*Id.*; Pl.'s Letter 2.) While he does not name them individually as Defendants in this Action, Plaintiff alleges that several of Cappelli's coworkers were present, specifically Officer Cappelli's brother, who was standing behind Plaintiff, Officer Mackey, Officer Mendoza, and Sergeant Berlinski, all of whom Plaintiff lists as part of the Emergency Response Team. (Compl. 3.) Plaintiff alleges that Sheriff Dubois is the sheriff in charge of OCJ, so that although his "involvement [was] not direct," he is responsible for the conduct of his employees "to a degree." (Pl.'s Letter 3.)

Plaintiff alleges that he filed a grievance, which remains pending on appeal, and reported the incident to the PREA hotline, during which he spoke to someone who was supposed to investigate the alleged incident. (*Id.* at 2.) [2] Plaintiff alleges that he was confined to his cell for approximately six days in retaliation for filing the grievance. (*Id.* at 2–3; Compl. 3) Plaintiff alleges that upon explaining his fear of being alone with Cappelli to the mental health counselor, Plaintiff was confined by Sergeant Zepplin ("Zepplin"), who is a sergeant of the unit wing where Cappelli also works. (Pl.'s Letter 3.) [3] Plaintiff believes that, because he expressed his feelings to the mental health counselor, Zepplin's conduct was an act of retaliation for "making an issue out of" the matter. (*Id.*) Plaintiff further alleges that Cappelli put a "no contact" on him. (*Id.*)

***2** Plaintiff cites a PREA video that all inmates allegedly view upon intake that states that OCJ has a zero-tolerance policy for sexual abuse or sexual assault from staff or inmates alike as the basis for his grievance. (*Id.* at 2.) Plaintiff alleges that, as a result of this incident, his mental health has been disrupted. (Compl. 3.) Specifically, he felt violated and alleges that the incident has reminded him of the sexual abuse he experienced as an adolescent in foster care. (*Id.*) As a result of this alleged misconduct, Plaintiff alleges that he has experienced depression, mental anguish, humiliation, sleepless nights, and mental trauma. (*Id.*)

Plaintiff noted in his Complaint that he filed a grievance at OCJ, and that the grievance procedure at the jail covered his claims. (*Id.* at 4.) However, Plaintiff also noted that he did not know if the grievance procedure did not cover some of his claims, and answered affirmatively to the question "If you did not file a grievance, did you inform any officials of

your claim(s)?" (*Id.* at 4–5.) Plaintiff noted that he informed "mental health," which submitted a report, and informed Lieutenant Potter, a Grievance and PREA Coordinator, for whom Plaintiff provided a written statement. (*Id.* at 5.) Finally, Plaintiff asserts that nothing has been sent back to him on "this [r]eport," although it is unclear what report he is specifically referencing. (*Id.*) In response to the question on the Complaint asking Plaintiff to detail all steps he took to grieve his claims, Plaintiff alleges that his initial grievance was denied for lack of merit, his appeal to the Chief Administrative Officer was denied on merit, and he is presently appealing to the Citizens' Policy and Complaint Review Council. (*Id.* at 4.) Plaintiff asserts that the grievance remains pending on appeal, with no response to date. (Pl.'s Letter 2.)

B. Procedural History

Plaintiff's Complaint and application to proceed in forma pauperis ("IFP") were filed on May 1, 2018. (Dkt. Nos. 1, 2.) The Court granted Plaintiff's IFP application on May 15, 2018. (Dkt. No. 6.) On May 24, 2018, the Court issued an Order directing service on Defendants. (Dkt. No. 8.) On August 6, 2018, Defendants filed a letter requesting a pre-motion conference in anticipation of filing a Motion To Dismiss. (Letter from Karen Edelman-Reyes, Esq. to Court (Dkt. No. 14).) The Court granted the request and set a briefing schedule on August 21, 2018. (Dkt. No. 15.)

On September 12, 2018, Defendants filed the instant Motion To Dismiss and accompanying papers. (Not. Of Mot.; Decl. of Karen Edelman-Reyes, Esq. ("Edelman-Reyes Decl.") (Dkt. No. 18); Mem. of Law in Supp. of Mot. ("Defs.' Mem.") (Dkt. No. 19); Not. of Mot. to a Pro Se Litigant (the "Notice") (Dkt. No. 20).)[4] On November 5, 2018, Defendants filed a declaration in further support of the Motion To Dismiss. (Decl. of Karen Edelman-Reyes, Esq. in Further Supp. of Mot. To Dismiss ("Edelman-Reyes's Reply Decl.") (Dkt. No. 22).) Plaintiff filed a response in opposition to the Motion on November 26, 2018. (Pl.'s Letter.) On December 6, 2018, Defendants filed a reply. (Letter from Karen Edelman-Reyes, Esq., to Court (Dkt. No. 25).) The Motion was deemed fully submitted on December 7, 2018. (Dkt. No. 26.)

## II. Discussion

Defendants argue that Plaintiff fails to sufficiently allege personal involvement by Dubois, fails to state a claim for violations of his Fourth and Eighth Amendment rights, fails to state a claim for retaliation under the First Amendment, fails to state a claim for due process violations under the Fourteenth Amendment, and that Plaintiff failed to exhaust his administrative remedies. (Defs.' Mem. 1.) County Defendants also argue they are entitled to qualified immunity. (*Id.*) The Court will address each argument to the extent necessary.

A. Standard of Review

***3** The Supreme Court has held that, while a complaint "does not need detailed factual allegations" to survive a motion to dismiss, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations, quotation marks, and alterations omitted). Indeed, Rule 8 of the Federal Rules of Civil Procedure "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (quotation marks and alteration omitted). Rather, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Although "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *id.* at 563, and a plaintiff need allege "only enough facts to state a claim to relief that is plausible on its face," *id.* at 570, if a plaintiff has not "nudged [his or her] claim[ ] across the line from conceivable to plausible, the[ ] complaint must be dismissed," *id.*; *see also Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.' " (citation omitted) (second alteration in original) (quoting Fed. R. Civ. P. 8(a)(2))); *id.* at 678–79 ("Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

In considering a motion to dismiss, the Court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *see*

*also Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) ("In addressing the sufficiency of a complaint we accept as true all factual allegations...." (quotation marks omitted)). Further, "[f]or the purpose of resolving [a] motion to dismiss, the Court ... draw[s] all reasonable inferences in favor of the plaintiff." *Daniel v. T & M Prot. Res., Inc.*, 992 F. Supp. 2d 302, 304 n.1 (S.D.N.Y. 2014) (citing *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012)). Where, as here, a plaintiff proceeds pro se, the "complaint[ ] must be construed liberally and interpreted to raise the strongest arguments that [it] suggest[s]." *Sykes v. Bank of Am.*, 723 F.3d 399, 403 (2d Cir. 2013) (per curiam) (quotation marks omitted). However, "the liberal treatment afforded to pro se litigants does not exempt a pro se party from compliance with relevant rules of procedural and substantive law." *Bell v. Jendell*, 980 F. Supp. 2d 555, 559 (S.D.N.Y. 2013) (quotation marks omitted); *see also Caidor v. Onondaga County*, 517 F.3d 601, 605 (2d Cir. 2008) ("[P]ro se litigants generally are required to inform themselves regarding procedural rules and to comply with them." (italics and quotation marks omitted)).

Generally, "[i]n adjudicating a Rule 12(b)(6) motion, a district court must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Leonard F. v. Isr. Disc. Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999) (quotation marks and citation omitted). When a plaintiff proceeds pro se, however, the Court may consider "materials outside the complaint to the extent that they are consistent with the allegations in the complaint," *Alsaifullah v. Furco*, No. 12-CV-2907, 2013 WL 3972514, at *4 n.3 (S.D.N.Y. Aug. 2, 2013) (quotation marks omitted), including, as relevant here, "documents that a pro se litigant attaches to his opposition papers," *Agu v. Rhea*, No. 09-CV-4732, 2010 WL 5186839, at *4 n.6 (E.D.N.Y. Dec. 15, 2010) (italics omitted).

B. Analysis

1. Personal Involvement of Defendant Dubois

Defendants argue that the Complaint should be dismissed against Dubois because he was not personally involved in the alleged constitutional violations. (Defs.' Mem. 4–6.) "It is well settled that, in order to establish a defendant's individual liability in a suit brought under § 1983, a plaintiff must show ... the defendant's personal involvement in the alleged constitutional deprivation." *Grullon v. City of New Haven*, 720 F.3d 133, 138 (2d Cir. 2013). To establish personal involvement, a plaintiff must show that:

> ***4** (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

*Id.* at 139 (italics and internal quotation marks omitted) (citing *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995)). In other words, "[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676. Therefore, Plaintiff must plausibly allege that Defendants' actions fall into one of the five categories identified above. *See Lebron v. Mrzyglod*, No. 14-CV-10290, 2017 WL 365493, at *4 (S.D.N.Y. Jan. 24, 2017) (holding that the five categories "still control[ ] with respect to claims that do not require a showing of discriminatory intent" post-*Iqbal*).

Plaintiff has failed to plausibly allege the personal involvement of Dubois. Plaintiff's Complaint alleges that Cappelli sexually assaulted him and describes the events leading up to and following this event. (*See* Compl. 2–3.) The Complaint contains no allegations whatsoever that Dubois was involved in, aware of, or somehow permitted these incidents to take place. Indeed, his name and position appears nowhere in the Complaint, other than in the caption and summarily on page two. (*See* Compl. 1–5.) Plaintiff admits that Dubois was not directly involved but argues he should be held accountable as a supervisor. (Pl.'s Letter 3.) This alone is grounds to dismiss the claims against him. *See Davis v. Cheverko*, No. 16-CV-4034, 2017 WL

6397749, at *4 (S.D.N.Y. Dec. 13, 2017) (collecting cases); *Perkins v. City of New York*, No. 14-CV-3779, 2017 WL 1025987, at *2 (S.D.N.Y. Mar. 15, 2017) ("Where the complaint names a defendant in the caption but contains no allegations indicating how the defendant violated the law or injured the plaintiff, a motion to dismiss the complaint in regard to that defendant should be granted." (alteration and internal quotation marks omitted)). That Dubois allegedly held a supervisory role does not change the analysis. *See Iqbal*, 556 U.S. at 676 ("[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Banks v. Annucci*, 48 F. Supp. 3d 394, 416 (N.D.N.Y. 2014) ("Where a defendant is a supervisory official, a mere 'linkage' to the unlawful conduct through the 'chain of command' (i.e., under the doctrine of respondeat superior) is insufficient to show his or her personal involvement in that unlawful conduct." (citations omitted)). There are, in sum, no alleged facts showing that Dubois was personally involved in the alleged unconstitutional deprivation at issue. *See Falls v. Pitt*, No. 16-CV-8863, 2018 WL 3768036, at *6 (S.D.N.Y. Aug. 8, 2018) (holding that personal involvement was not established where the plaintiff failed to allege the defendants were "present" for the alleged violation or "participated directly" in or "somehow permitted" the alleged violation). Accordingly, all claims against DuBois are dismissed.

2. Eighth Amendment Sexual Assault Claim

***5** Plaintiff also claims that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment. Specifically, Plaintiff alleges that on April 1, 2018, Cappelli violated his Eighth Amendment rights by groping him under the guise of conducting a body pat frisk. (Compl. 3.) Cappelli argues that Plaintiff has not plausibly alleged an Eighth Amendment violation. (Defs.' Mem. 6–10.)

The Eighth Amendment protects prisoners from cruel and unusual punishment by prison officials. *See Wilson v. Seiter*, 501 U.S. 294, 296–97 (1991).[5] "To state an Eighth Amendment claim, a prisoner must allege two elements, one subjective and one objective." *Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015). "First, the prisoner must allege that the defendant acted with a subjectively 'sufficiently culpable state of mind.' Second, he must allege that the conduct was objectively 'harmful enough' or 'sufficiently serious' to reach constitutional dimensions." *Id.* (citations and internal quotation marks omitted) (quoting *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)).

Here, Plaintiff alleges Cappelli "[l]iterally swiped [h]is [h]and in [b]etween my [b]ackside of my [r]ear end" during a pat down frisk outside his cell door in the presence of other corrections officers. (Compl. 2–3.) When Plaintiff "told [Cappelli] [ ] he didn't need to put his hand in between the crack of my [a]ss" Cappelli told Plaintiff "you probably liked it." (*Id.* at 3.) Even assuming that these allegations are sufficient to satisfy the objective prong, *but see Perez v. Ponte*, 236 F. Supp. 3d 590, 619 (E.D.N.Y. 2017) (collecting cases for proposition that " 'pat frisks' ... typically do not violate the Eighth Amendment's proscription against Cruel and Unusual Punishment"), *adopted by* 2017 WL 1050109 (E.D.N.Y. Mar. 15, 2017), they are insufficient to plausibly show that Cappelli acted "to arouse or gratify [himself] or humiliate [Plaintiff]," *Crawford*, 796 F.3d at 257–58. The Second Circuit has held that "[a] corrections officer's intentional contact with an inmate's genitalia or other intimate area, which serves no penological purpose and is undertaken with the intent to gratify the officer's sexual desire or humiliate the inmate, violates the Eighth Amendment." *Id.* at 257; *see also id.* (holding that "a single incident of sexual abuse" can constitute cruel and unusual punishment "if sufficiently severe or serious" (citing *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997)). "In determining whether an Eighth Amendment violation has occurred, the principal inquiry is whether the contact is incidental to legitimate official duties, such as a justifiable pat frisk or strip search, or by contrast whether it is undertaken to arouse or gratify the officer or humiliate the inmate." *Id.* at 257–58 (citing *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986)). The only allegation regarding Cappelli's intent or state of mind is his comment to Plaintiff that Plaintiff "probably liked it." (Compl. 3.) This conclusory allegation is not sufficient to state an Eighth Amendment claim for sexual assault. *See Boddie*, 105 F.3d at 859–61 (finding no Eighth Amendment violation from incidents including a female corrections officer making a pass at the plaintiff, squeezing his hand, touching his penis, calling him a "sexy black devil," and bumping into him "with her whole body vagina against penis"); *Grant v. Norfleett*, No. 17-CV-328, 2017 WL 1902150, at *3 (D. Conn. May 9, 2017) ("[T]he Complaint includes only a conclusory allegation that the defendants conducted the search for their own sexual gratification, and an assertion that on occasions after the plaintiff was strip searched, the defendants 'watched him like a piece of meat.' "); *see also Shaw v. Prindle*, 661 F. App'x 16, 19 (2d Cir. 2016) (noting that the court "cannot infer solely from

the thoroughness of the search"—described as "excessive searching of [the] crotch area and in between his buttocks and massaging of his rectum and groin area"—that the defendant "intended to search ... with intent to arouse or gratify [his] sexual desires or to humiliate [the plaintiff]" (alterations and internal quotation marks omitted); *cf.* *Crawford*, 796 F.3d at 257–58 (finding Eighth Amendment violation where the defendant "fondl[ed] and squeeze[ed] [the plaintiff's] penis in order to make sure [he] did not have an erection," because "[t]here is no penological justification for checking to see if an inmate has an erection"); *id.* at 258–59 (noting that "demeaning comments, including the statements 'that doesn't feel like a penis to me,' 'I'll run my hands up the crack of your ass if I want to,' and subsequent taunts about having seen [the plaintiff's] penis," all "suggest[ed] that [the defendant] under took the search in order to arouse himself, humiliate [the plaintiff], or both"). Thus, the Court grants Defendants' Motion To Dismiss the Eighth Amendment claim.

3. First Amendment Retaliation Claim

***6** Defendants argue that Plaintiff's six-day confinement was not a retaliatory action and that Plaintiff fails to allege a causal connection between the filing of his grievance and the six-day confinement. (Defs.' Mem. 13–16.) [6]

"Prisoners have a constitutional right to petition the government, and it is a violation of § 1983 for prison officials to retaliate against prisoners for the exercise of that right." *Bartley v. Collins*, No. 95-CV-10161, 2006 WL 1289256, at *4 (S.D.N.Y. May 10, 2006) (citing *Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002)). To state a First Amendment retaliation claim, Plaintiff must allege "(1) that the speech or conduct at issue was protected, (2) that ... [D]efendant took adverse action against ... [P]laintiff, and (3) that there was a causal connection between the protected conduct and the adverse action." *Holland v. Goord*, 758 F.3d 215, 225 (2d Cir. 2014) (citation, alteration, and quotation marks omitted); *see also* *Washington v. Chaboty*, No. 09-CV-9199, 2015 WL 1439348, at *9 (S.D.N.Y. Mar. 30, 2015) (same). "[B]ecause virtually any adverse action taken against a prisoner by a prison official—even those otherwise not rising to the level of a constitutional violation—can be characterized as a constitutionally proscribed retaliatory act," the Second Circuit has instructed district courts to "approach prisoner retaliation claims with skepticism and particular care." *Dolan v. Connolly*, 794 F.3d 290, 295 (2d Cir. 2015) (citation and quotation marks omitted); *see also* *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996) ("Retaliation claims by prisoners are prone to abuse since prisoners can claim retaliation for every decision they dislike." (citation and quotation marks omitted)).

Plaintiff asserts that he filed a grievance at OCJ, specifically a claim of sexual assault and/or abuse with a PREA investigator, (Compl. 4), and that he was subsequently locked in his cell for approximately six days in retaliation for his complaint, (*id.* at 3). Plaintiff asserts that he told a mental health counselor that he was fearful of walking alone within the facility hallways while Cappelli was on hallway detail because he was fearful he would be searched again. (Pl.'s Letter 3.) Plaintiff was subsequently confined by Zepplin in what Plaintiff alleges was an act of retaliation. (*Id.*) Finally, Plaintiff alleges that Cappelli, who works in the same unit as Zepplin, put a "no contact" on him. (*Id.*)

***7** Defendants do not contest that filing a grievance is protected speech, as indeed "[i]t is well-established that inmates' filing of grievances is a constitutionally protected exercise of their right under the First Amendment to petition the government for the redress of grievances." *Mateo v. Bristow*, No. 12-CV-5052, 2013 WL 3863865, at *4 (S.D.N.Y. July 16, 2013) (citations omitted); *see also* *Dolan*, 794 F.3d at 294 ("It is well established that retaliation against a prisoner for pursuing a grievance violates the right to petition [the] government for the redress of grievances guaranteed by the First and Fourteenth Amendments and is actionable under § 1983." (citation and quotation marks omitted)).

Defendants do, however, argue that six days of confinement does not constitute an adverse action for purposes of a First Amendment retaliation claim. (Defs.' Mem. 14.) An adverse action is any "retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." *Davis v. Goord*, 320 F.3d 346, 353 (2d Cir. 2003) (citation omitted). In determining whether a prison official's conduct constitutes adverse action, "the court's inquiry must be tailored to the different circumstances in which retaliation claims arise, bearing in mind that prisoners may be required to tolerate more than average citizens." *Id.* (citation, quotation marks, and alterations omitted). "[T]he test, however, is not whether [the] plaintiff ... himself was chilled (if that were the standard, no plaintiff likely would prevail, for the very commencement of a lawsuit could be used by [the] defendants to argue that the plaintiff was not chilled)." *Id.* at 354 (citation

omitted). Defendants notably do not cite any caselaw for the proposition that being placed in confinement for six days cannot constitute an adverse action, and indeed they cannot because the Second Circuit and lower courts therein have found that being placed in keeplock or being otherwise confined is indeed an adverse action. *See Gill v. Pidlypchak*, 389 F.3d 379, 384 (2d Cir. 2004) (holding that placing plaintiff in keeplock for three weeks was an adverse action); *Hayes v. Dahkle*, No. 16-CV-1368, 2018 WL 7356343, at *15 (N.D.N.Y. Dec. 11, 2018) (assuming that placing plaintiff in keeplock for one day constitutes an adverse action); *Lugo v. Van Orden*, No. 07-CV-879, 2008 WL 2884925, at *4–5 (S.D.N.Y. July 23, 2008) (assuming that placing plaintiff in keeplock for five days constitutes an adverse action, stating that the holding of *Gill* was not that confinement must have lasted for *weeks*, and pointing out that "less adverse" action such as being moved to a different housing unit have been held to be sufficient to state a claim for retaliation); *Keesh v. Goord*, No. 04-CV-271, 2007 WL 2903682, at *10 (W.D.N.Y. Oct. 1, 2007) (holding that placing plaintiff in keeplock for one day during which he may have missed meals constituted an adverse action). [7] Therefore, the Court finds that Plaintiff alleges an adverse action.

***8** Plaintiff must, however, also allege a "causal connection" between the protected conduct and the adverse action. *Garcia v. Watts*, No. 08-CV-7778, 2009 WL 2777085, at *11 (S.D.N.Y. Sept. 1, 2009); *see also Dawes,* 239 F.3d at 492 (holding that in order to satisfy the causation requirement, allegations must be "sufficient to support the inference that the speech played a substantial part in the adverse action" (citation, alteration, and quotation marks omitted)). To meet this burden, Plaintiff must allege facts suggesting that the protected conduct was a " 'substantial or motivating factor' in the prison officials' decision to take action against [him]." *Smith v. Christopher*, No. 06-CV-1196, 2008 WL 4283519, at *10 (N.D.N.Y. Sept. 18, 2008) (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)); *Van Dunk v. Brower*, No. 11-CV-4564, 2013 WL 5970172, at *8 (S.D.N.Y. Nov. 7, 2013) ("The element of intent [in a First Amendment retaliation claim] requires an assessment of what evidence, if any, demonstrates that Defendants' conduct 'was motivated by or substantially caused by [Plaintiff's] exercise of free speech.' " (ultimately quoting *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 194 (2d Cir. 1994))); *Tomlins v. Vill. of Wappinger Falls Zoning Bd. of Appeals*, 812 F. Supp. 2d 357, 371 (S.D.N.Y. 2011) (same); *cf. Washington v. Afify*, 681 F. App'x 43, 46 (2d Cir. 2017) (reinstating retaliation claim in part because there was evidence of "retaliatory animus" where plaintiff alleged that officers confronted him directly about his practice of filing grievances before they issued the allegedly false misbehavior report against him); *Fann v. Graham*, No. 15-CV-1339, 2018 WL 1399331, at *9 (N.D.N.Y. Jan. 11, 2018) (denying summary judgment motion where there was evidence the correction officer made comments to plaintiff that could be interpreted as threatening before issuing him an allegedly false misbehavior report), *adopted by* 2018 WL 1399340 (N.D.N. Y Mar. 19, 2018). Circumstantial facts suggesting a retaliatory motive include "(i) the temporal proximity between the protected activity and the alleged retaliatory act; (ii) the inmate's prior good disciplinary record; (iii) vindication at a hearing on the matter; and (iv) statements by the defendant concerning his motivation." *Baskerville v. Blot*, 224 F. Supp. 2d 723, 732 (S.D.N.Y. 2002) (citing *Colon*, 58 F.3d at 872–73).

Here, Plaintiff alleges that he filed a grievance alleging sexual assault with a PREA investigator and that he was subsequently locked in his cell for six days in retaliation for this grievance. (Compl. 2–3.) Plaintiff further alleges that he told a mental health counselor that he was fearful of walking in the hallway while Cappelli was on hallway detail and that he was fearful he would be searched again, and that he was subsequently confined by Zepplin in an act of retaliation. (Pl.'s Letter 3.) Plaintiff also alleges that Cappelli, who works in the same unit as Zepplin, put a "no contact" on him. (*Id.*)

Plaintiff does not, however, allege the dates during which he was confined to his cell or how soon after he filed his grievance his confinement took place. "At most, Plaintiff may have intended to rely on temporal proximity between his complaints and his [confinement to his cell] to demonstrate a causal connection," however, Plaintiff did not specify when he was confined to his cell, and this prevents the Court from inferring retaliation based on temporal proximity alone. *Ahmad v. White Plains City Sch. Dist.*, No. 18-CV-3416, 2019 WL 3202747, at *10 (S.D.N.Y. July 16, 2019) (holding that court could not infer retaliation based on temporal proximity where plaintiff alleged when the adverse action occurred but failed to allege when the protected speech occurred); *see also Feliciano v. City of New York*, No. 14-CV-6751, 2015 WL 4393163, at *9 (S.D.N.Y. July 15, 2015) (holding that where plaintiff did "not provide the date" he engaged in protected activity, it was "impossible for the Court to determine the temporal proximity of the alleged retaliatory acts to the protected conduct"); *Henry v. NYC Health & Hosp. Corp.*, 18 F. Supp. 3d 396, 412 (S.D.N.Y. 2014) (dismissing

retaliation claim where the complaint "fails to state with even a modicum of specificity when the relevant events occurred").

Moreover, Plaintiff fails to allege any connection between the individuals with whom he filed his grievances and the individuals who retaliated against him. For example, Plaintiff does not allege that the mental health counselor or the PREA investigator told anyone about Plaintiff's statements or that the officers who ultimately confined Plaintiff had any knowledge of those statements. Nor does Plaintiff allege that Zepplin and Cappelli ever discussed Plaintiff or his grievances or his confinement. Plaintiff merely alleges that Zepplin and Cappelli worked together, (Pl.'s Letter 3), but fails to provide any specifics about how the individuals who received his grievances and the individuals who implemented Plaintiff's confinement were connected. *See Soto v. Iacavino*, No. 01-CV-5850, 2003 WL 21281762, at *1–2 (S.D.N.Y. June 4, 2003) (dismissing First Amendment retaliation claim where plaintiff alleged he filed a grievance and nursing staff subsequently failed to provide him with medical care because plaintiff failed to allege any causal connection whatsoever); *Jones v. Harris*, 665 F. Supp. 2d 384, 399–400 (S.D.N.Y. 2009) (dismissing First Amendment retaliation claim where plaintiff failed to allege any facts tending to show that one corrections officers destroyed Plaintiff's property at the behest of another CO); *see also Trisvan v. Annucci*, 284 F. Supp. 3d 288, 303 (S.D.N.Y. 2018) (dismissing First Amendment retaliation claim where plaintiff failed to allege "the dates and details of all relevant events as well as any facts that plausibly support the inference that he was subjected to adverse actions in retaliation for having engaged in the protected activity"). Accordingly, Plaintiff's First Amendment retaliation claim must be dismissed.

4. Fourth Amendment Unreasonable Search Claim

***9** Plaintiff cites the Fourth Amendment in his filings and the Court thus liberally reads his Complaint to allege a Fourth Amendment violation for the invasive pat-frisk. (Compl. 3.) Plaintiff alleges that, in the presence of other prison officials, Cappelli "literally swiped his hand in between the backside of my rear end." (*Id.*) Defendants argue that Plaintiff fails to sufficiently allege a violation of his Fourth Amendment Rights. (Defs.' Mem. 10–13.)

"The Fourth Amendment 'protects individual privacy against certain kinds of governmental intrusion,' and it is well-established that its protections extend to prisoners and pretrial detainees." *Holland v. City of New York*, 197 F. Supp. 3d 529, 542 (S.D.N.Y. 2016) (quoting *Katz v. United States*, 389 U.S. 347, 350 (1967)). Thus, "although the inmates' right to privacy must yield to the penal institution's need to maintain security, it does not vanish altogether." *Jean-Laurent v. Lawrence*, No. 12-CV-1502, 2013 WL 1129813, at *8 (S.D.N.Y. Mar. 19, 2013) (alteration and quotation marks omitted); *see also Little v. City of New York*, No. 13-CV-3813, 2014 WL 4783006, at *2 (S.D.N.Y. Sept. 25, 2014) ("Although the constitutional rights of prison inmates are restricted because of the institutional needs of imprisonment, the Fourth Amendment still requires that strip searches of inmates be reasonable." (citation omitted)); *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 328 (2012) ("[C]orrectional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities."). "The reasonableness of a strip search, in turn, requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted...." *Holland*, 197 F. Supp. 3d at 542 (citations and quotation marks omitted). Additionally, "[t]he presence of other inmates and officers, males and females, does not alter th[e] determination" that strip searches are constitutional. *Israel v. City of New York*, No. 11-CV-7726, 2012 WL 4762082, at *3 (S.D.N.Y. Oct. 5, 2012). Finally, "[b]ecause an inmate 'bears the burden of showing that a search was unreasonable,' to survive a motion to dismiss, the plaintiff "must 'plead facts sufficient to give rise to a plausible inference' that the search he challenges was unreasonable under the standards described above." *Little*, 2014 WL 4783006, at *2 (citation and quotation marks omitted).

Plaintiff summarily alleges that he was searched outside his cell and that Cappelli swiped his hand between Plaintiff's backside. (Compl. 2–3.) Plaintiff does not allege why he was searched and offers no detail about the duration of the search or any other facts about the search. Plaintiff's allegation that Cappelli swiped his hand between his backside, without any further detail as to the unreasonableness of the search, is insufficient to allege a violation of the Fourth Amendment. *See Green v. Martin*, 224 F. Supp. 3d 154, 166–67 (D. Conn. 2016) (dismissing Fourth Amendment claim where prisoner alleged that he was strip searched in his cell while his cellmate was present, but failed to allege any facts that the search was unreasonable); *Friedman v. Young*, 702 F. Supp.

433, 438 (S.D.N.Y. 1988) (dismissing Fourth Amendment claim because even "[a]ssuming [officer's] pat-down included touching [the plaintiff's] genitalia while conducting the search, such conduct is not unreasonable in the absence of any showing of excessive force"). Here, Plaintiff has not pled any facts to suggest that the alleged search was unreasonable or unrelated to legitimate penological interests. Moreover, even accepting Plaintiff's allegation that Cappelli told him he probably "[l]iked it," (Compl. 3; Pl.'s Letter 2),"verbal harassment during the [strip] search does not cause the search to become unconstitutional." *Bowden v. Duffy*, No. 13-CV-717, 2014 WL 338786, at *4 (S.D.N.Y. Jan. 30, 2014); *see also Vaughn v. Strickland*, Nos. 12-CV-2696, 12-CV-3335, 12-CV-2995, No. 12-CV-3333, 2013 WL 3481413, at *6–7 (S.D.N.Y. July 11, 2013) (dismissing Fourth Amendment claim where a prisoner alleged verbal abuse during an intrusive strip search). Accordingly, Plaintiff's Fourth Amendment claim is dismissed.

5. Fourteenth Amendment Procedural Due Process Claim

***10** Plaintiff cites the Fourteenth Amendment in his filings and the Court thus liberally reads his Complaint to allege a Fourteenth Amendment violation. (Compl. 3.) Defendants argue that Plaintiff fails to state a Fourteenth Amendment Claim "presumably regarding" a disciplinary hearing against him. (Defs.' Mem. 16–18.) "To present a due process claim, a plaintiff must establish (1) that he possessed a liberty interest and (2) that the defendant(s) deprived him of that interest as a result of insufficient process." *Ortiz v. McBride*, 380 F.3d 649, 654 (2d Cir. 2004) (alterations and quotation marks omitted). The Supreme Court has held that inmates retain due process rights in prison disciplinary proceedings. *See Wolff v. McDonnell*, 418 U.S. 539, 563–72 (1974) (describing the procedural protections that inmates are to receive when subject to significant disciplinary punishment). However, the Supreme Court has clarified that "[p]rison discipline implicates a liberty interest [only] when it 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.' " *Ortiz*, 380 F.3d at 654 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). The Second Circuit has further explained that "[t]he length of disciplinary confinement is one of the guiding factors in applying *Sandin*'s atypical and significant hardship test." *Hanrahan v. Doling*, 331 F.3d 93, 97 (2d Cir. 2003) (citation and quotation marks omitted). The duration of disciplinary confinement, however, is "not the only relevant factor," and the Second Circuit has "explicitly avoided a bright line rule that a certain period of ... confinement automatically fails to implicate due process rights." *Palmer v. Richards*, 364 F.3d 60, 64 (2d Cir. 2004) (citations and quotation marks omitted). Indeed, "[t]he conditions of confinement are a distinct and equally important consideration in determining whether a confinement ... rises to the level of atypical and severe hardship," and, therefore, courts should consider "the extent to which the conditions of the disciplinary segregation differ from other routine prison conditions." *Id.* (citations and quotation marks omitted); *see also Sealey v. Giltner*, 197 F.3d 578, 586 (2d Cir. 1999) ("Both the conditions and their duration must be considered, since especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical." (citation omitted)).

As a guidepost to determine whether due process protections are required in the prison context, the Second Circuit has instructed that "[w]here the plaintiff was confined for an intermediate duration—between 101 and 305 days—development of a detailed record of the conditions of the confinement relative to ordinary prison conditions is required." *Palmer*, 364 F.3d at 64–65 (citation and quotation marks omitted); *see also Abdur-Raheem v. Caffery*, No. 13-CV-6315, 2015 WL 667528, at *5 (S.D.N.Y. Feb. 17, 2015) (same). Indeed, the Second Circuit has cautioned that "[i]n the absence of a detailed factual record, [it has] affirmed dismissal of due process claims only in cases where the period of time spent in [confinement] was exceedingly short—less than the 30 days that the *Sandin* plaintiff spent in SHU—and there was no indication that the plaintiff endured unusual ... conditions." *Palmer*, 364 F.3d at 65–66.

Regarding the process an inmate is due, a disciplinary hearing comports with due process when an inmate receives "advance written notice of the charges; a fair and impartial hearing officer; a reasonable opportunity to call witnesses and present documentary evidence; and a written statement of the disposition, including supporting facts and reasons for the action taken." *Luna v. Pico*, 356 F.3d 481, 487 (2d Cir. 2004) (citation omitted). "In the context of prison disciplinary hearings, the Second Circuit has said that its 'conception of an impartial decisionmaker is one who, inter alia, does not prejudge the evidence and who cannot say, with ... utter certainty ..., how he would assess evidence he has not yet seen.' " *Rahman v. Acevedo*, No. 08-CV-4368, 2011 WL 6028212, at *7 (S.D.N.Y. Dec. 5, 2011) (italics omitted) (quoting *Patterson v. Coughlin*, 905 F.2d 564, 570 (2d Cir. 1990)).

"[E]ven if an inmate is segregated for fewer than 101 days, his liberty interest may still be implicated if 'the conditions were more severe than the normal punitive segregation conditions ... or a more fully developed record showed that even relatively brief confinements under normal punitive segregation conditions were, in fact, atypical.' " *Samuels v. Davis*, No. 14-CV-7204, 2015 WL 4653238, at *2 (S.D.N.Y. July 28, 2015) (alterations omitted) (quoting *Palmer*, 364 F.3d at 65). However, Plaintiff's due process claim must be dismissed nonetheless because Plaintiff has asserted *no* facts whatsoever that would allow the Court to assess whether the "regime to which [he] was subjected" constituted a significant and atypical hardship compared with ordinary prison conditions. *Brooks*, 1997 WL 436750, at *4. Plaintiff alleges that he "was confined by a Sergeant Zepplin for [ ] expressing [his] feelings to the mental health counselor in what [he] believed was a re[tal]iation for me making an issue out of [t]his matter;" specifically, Plaintiff alleges that he "was subjected to cell confinement for a period of six days." (Pl.'s Letter 2–3.) Plaintiff does not, however, allege that any type of disciplinary hearing was held, let alone that there were any shortcomings with respect to that disciplinary hearing. Plaintiff also does not allege any factual details about the specifics of his six-day confinement. *See Samuels*, 2015 WL 4653238, at *3 (dismissing due process claim where "the complaint does not allege *any* facts about the conditions [of confinement], including whether they were atypical or unusually harsh"); *Landron v. City of New York*, No. 14-CV-1046, 2014 WL 6433313, at *5 (S.D.N.Y. Nov. 7, 2014) (holding that plaintiff who was held in disciplinary confinement for 18 days but did not indicate "that he endured any unusual conditions during his confinement ... ha[d] not stated a claim for deprivation of a liberty interest cognizable under [§] 1983"); *Torres v. Logan*, No. 10-CV-6951, 2011 WL 1811003, at *4 (S.D.N.Y. May 11, 2011) (dismissing due process claim based on confinement of "a little over two-thirds" of his 90-day sentence where the plaintiff "fail[ed] to allege any facts regarding the conditions of his confinement, including whether they were abnormal or unusual" (alteration omitted)), *adopted by* 2011 WL 3894386 (S.D.N.Y. June 13, 2011); *Dawkins v. Gonyea*, 646 F. Supp. 2d 594, 607 (S.D.N.Y. 2009) (finding that a plaintiff failed to plead "a cognizable liberty interest" based on 280 days of disciplinary confinement because the plaintiff "failed to make any allegations detailing the conditions of his confinement ..., and because the duration of his confinement was shorter than confinements that courts in this Circuit have deemed sufficient to impose per se atypical or significant hardship"). Therefore, because Plaintiff has not alleged facts suggesting that he was deprived of a liberty interest, his procedural due process claim fails. *See Palmer*, 364 F.3d at 64 (noting that there is "no right to due process at [a disciplinary] hearing *unless* a liberty interest was infringed as a result" (citations, quotation marks, and original alterations omitted)). [8]

## III. Conclusion

***11** For the reasons stated above, Defendants' Motion To Dismiss is granted. Because this is the first adjudication of Plaintiff's claims, the dismissal is without prejudice. If Plaintiff wishes to file an amended complaint, Plaintiff must do so within 30 days of the date of this Opinion. Plaintiff should include within that amended complaint all changes to correct the deficiencies identified in this Opinion that Plaintiff wishes the Court to consider. Plaintiff is advised that the amended complaint will replace, not supplement, the instant Complaint. The amended complaint must contain *all* of the claims, factual allegations, and exhibits that Plaintiff wishes the Court to consider. If Plaintiff fails to abide by the 30-day deadline, his claims may be dismissed with prejudice.

The Clerk is respectfully directed to terminate the pending Motion, (*see* Dkt. No. 17), the Notice to Plaintiff that also appears as a motion, (Dkt. No. 16), and mail a copy of this Opinion to Plaintiff.

SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2019 WL 3778736

## Footnotes

1 Plaintiff's filings do not have consistent pagination. To avoid confusion, the Court cites to the ECF-generated page numbers at the top right corner of the relevant page.

2 Plaintiff does not define "PREA" in his Letter, but he is likely referring to an inmate education video sponsored by the National Prison Rape Elimination Act ("PREA") Resource Center. National PREA Resource Center, https://www.prearesourcecenter.org/ (last visited July 17, 2019).

3 Plaintiff does not clarify whether the confinement by Zepplin mentioned in Plaintiff's Letter is the same as the six-day period of confinement mention in his Complaint, or if Plaintiff is alleging separate additional confinements.

4 The Notice to Plaintiff was filed twice on the docket, the first time as Dkt. No. 16, and the second time as Dkt. No. 20.

5 Because Plaintiff was a convicted prisoner at the time of the events underlying the Complaint, (*see* Edelman-Reyes Decl., Ex. B (Certificate of Disposition as to Indictment 696-2017), Ex. C (Certificate of Disposition as to Information 118S-2018)), his conditions of confinement claim arises under the Eighth Amendment. *See Delacruz v. City of New York*, No. 15-CV-3030, 2017 WL 2377984, at *3 (S.D.N.Y. May 31, 2017) ("Conditions of confinement claims brought by convicted prisoners are governed by the Cruel and Unusual Punishments Clause of the Eighth Amendment, whereas claims brought by pre-trial detainees are governed by the Due Process Clause of the Fourteenth Amendment." (citing *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017))), *adopted by*, 2017 WL 2963490 (S.D.N.Y. July 11, 2017), *appeal dismissed*, No. 17-2542, 2018 WL 6267098 (2d Cir. 2018).

The Court is entitled to take notice of matters of public records, such as Plaintiff's convictions, and therefore considers that he was a convicted inmate at all times relevant to this Motion. *See Medcalf v. Thompson Hine LLP*, 84 F. Supp. 3d 313, 321 (S.D.N.Y. 2015) ("In considering a motion to dismiss, a court is permitted to take judicial notice of public records...."); *Wims v. New York City Police Dep't*, No. 10-CV-6128, 2011 WL 2946369, at *2 (S.D.N.Y. July 20, 2011) (noting that " 'a district court may rely on matters of public record in deciding a motion to dismiss ... including arrest reports, criminal complaints, indictments and criminal disposition data"); *U.S. Fid. & Guar. Co. v. Petroleo Brasileiro S.A.-Petrobras*, No. 98-CV-3099, 2001 WL 300735, at *9 n.7 (S.D.N.Y. Mar. 27, 2001) ("With respect to materials from the [s]tate [c]ourt [a]ction, the [c]ourt may take judicial notice of the relevant pleadings, motion papers, orders, and judgments in the [s]tate [c]ourt [a]ction without converting [the defendant's] motion to one for summary judgment.").

6 Defendants improperly submit Plaintiff's disciplinary record and attempt to interject arguments based on documents that the Court may not consider at the pleading stage. (*See* Defs.' Mem. 15 (citing Edelman-Reyes's Decl. Ex. E (Plaintiff's Disciplinary Record ("Pl.'s Disciplinary Hearing Record")))).) As noted, the Court "must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Leonard F.*, 199 F.3d at 107. Defendants argue that Plaintiff's Prison Disciplinary Hearing Record is incorporated by reference, (Defs.' Mem. 4), but Plaintiff's Complaint does not reference any disciplinary hearing, and it is not at all clear to the Court that Plaintiff possessed or knew about the records that Defendants now submit when he brought this Action. The Court therefore does not consider Defendants' arguments based on Plaintiff's disciplinary record.

7 Defendants also argue that there was no retaliation here because Plaintiff was able to and ultimately did file grievances and this lawsuit after the allegedly retaliatory conduct occurred. (Defs.' Mem. 14.) This argument fails because in *Gill*, the Second Circuit explained that although "subjective chilling is a general requirement, where a plaintiff alleges that the protected conduct at issue is the prior filing of a *grievance* or *lawsuit* against the defendant, it would be unfair in the extreme to rule that plaintiff's bringing of the subsequent claim in

itself defeated his claim of retaliation." *Gill*, 389 F.3d at 383–84. Thus, it is not dispositive that Plaintiff filed grievances even after the alleged adverse action.

8 Because the Court dismisses the Complaint on other grounds it need not separately decide whether Plaintiff failed to exhaust his administrative remedies. (*See* Defs.' Mem. 18–21.) The Court notes, however, that although the Prison Litigation Reform Act's ("PLRA") exhaustion requirement is mandatory, *see Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016), and "requires proper exhaustion, which means using all steps that the prison grievance system holds out," *Williams v. Priatno*, 829 F.3d 118, 122 (2d Cir. 2016) (citations, alterations, and quotation marks omitted), failure to exhaust is an affirmative defense, not a pleading requirement, *see Grullon v. City of New Haven*, 720 F.3d 133, 141 (2d Cir. 2013) (citations omitted). As such, Defendants bear the burden of proving failure to exhaust, *see McCoy v. Goord*, 255 F. Supp. 2d 233, 248 (S.D.N.Y. 2003), and "inmates are not required to specially plead or demonstrate exhaustion in their complaints," *Jones v. Bock*, 549 U.S. 199, 216 (2007). Therefore, "dismissal is appropriate on a motion to dismiss where failure to exhaust is clear on the face of the complaint." *Brinson v. Kirby Forensic Psych. Ctr.*, No. 16-CV-1625, 2018 WL 4680021, at *6 (S.D.N.Y. Sept. 28, 2018) (citations omitted).

Here, Plaintiff alleges several specific facts regarding his attempts to exhaust his administrative remedies. Plaintiff alleges he filed a grievance at the OCJ; informed mental health, who submitted a report; and informed Lieutenant Potter, a Grievance Coordinator, for whom he provided a written statement. (Compl. 4–5.) Plaintiff detailed the steps he took to file his grievance, specifically, Plaintiff noted that his initial grievance was denied for lack of merit, his appeal to the Chief Administrative Officer was denied on merit, and he is presently appealing to the Citizens Policy and Complaint Review Council. (*Id.* at 4.) Plaintiff asserts that the grievance remains pending on appeal, with no response to date. (Pl.'s Letter 2.) Defendants correctly point out that according to Plaintiff's own submissions he has not yet received a final determination as to his appeal, and thus he may not have gone through all the required steps of New York's three-tiered grievance process. (Defs.' Mem. 19–20.) *See Colon v. Annucci*, No. 17-CV-4445, 2018 WL 4757972, at *17 (S.D.N.Y. Sept. 28, 2018); *Terry v. Hulse*, No. 16-CV-252, 2018 WL 4682784, at *6 (S.D.N.Y. Sept. 28, 2018). However, Defendants do not and cannot at this stage submit documentation or other proof that the Court may consider detailing what the status of Plaintiff's appeal is. In support of their Motion To Dismiss, Defendants include Plaintiff's Complaint, certificates of disposition, Plaintiff's grievance attached to his Complaint, and Plaintiff's disciplinary record at OCJ during the time period at issue. (*See* Edelman-Reyes's Decl.) This information does not clarify the grievance process available to Plaintiff nor elucidate whether Plaintiff failed to complete the grievance process. *See Madison v. Wright*, No. 02-CV-10299, 2004 WL 816429, at *1 (S.D.N.Y. Apr. 13, 2004) (noting that "the issue of exhaustion is generally not amenable to resolution by way of a motion to dismiss," and that "the defendants must present proof of non-exhaustion" (citation and quotation marks omitted)). If Plaintiff choses to amend his Complaint, the Parties should address these concerns. Also because the Court concludes that Plaintiff fails to plausibly allege any violation of his constitutional rights, it need not at this stage consider Defendants' argument that they are entitled to qualified immunity. (Defs. Mem. 21–22.)

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United States District Court, N.D. New York.

Shabaka SHAKUR, Plaintiff,
v.
Justin THOMAS, et al., Defendants.

9:14-CV-00427 (MAD/TWD)
|
Signed 06/02/2016

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**ORDER AND REPORT-RECOMMENDATION**

THÉRÈSE WILEY DANCKS, United States Magistrate Judge

***1** This pro se prisoner civil rights action, commenced pursuant to 42 U.S.C. § 1983, has been referred to me for Report and Recommendation by the Honorable Mae A. D'Agostino, United States District Judge, pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c). Currently before the Court for report and recommendation is Defendants' motion to dismiss Plaintiff's Amended Complaint (Dkt. No. 39) for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 41.) For the reasons that follow, the Court recommends that Defendants' motion to dismiss be granted in part and denied in part.

## I. PROCEDURAL HISTORY

On April 16, 2014, Plaintiff Shabaka Shakur commenced this civil rights action asserting claims for the violation of his rights protected under the First, Eighth, and Fourteenth Amendments to the United States Constitution and the Religious Land Use and Institutionalized Person Act ("RLUIPA"), 42 U.S.C. § 2000cc, *et seq.*, arising out of his confinement at Auburn Correctional Facility ("Auburn") from September 2012 through September 2013. [1] (Dkt. No. 1.) Plaintiff originally named eleven Department of Corrections and Community Supervision ("DOCCS") employees working at Auburn as Defendants. (Dkt. No. 1.)

### A. Initial Review

By Decision and Order dated May 1, 2015, the Court dismissed all but three of Plaintiff's causes of action on initial review pursuant to 28 U.S.C. §§ 1915(e) and 1915A. (Dkt. No. 12.) The following causes of action survived initial review: (1) First Amendment Free Exercise Clause claim against Defendants Corrections Officer Pelc ("Pelc"), food service administrator Martin ("Martin"), Deputy Superintendent Thomas ("Thomas"), Corrections Officer Hewite ("Hewite"), and G. Steinberg ("Steinberg"); (2) First Amendment retaliation claims against Defendant Security Captain Chutty ("Chutty"), Corrections Officer Gifford ("Gifford"), Corrections Captain Fagan ("Fagan"), and Steinberg; and (3) Plaintiff's Fourteenth Amendment Equal Protection claim against Defendants Chutty and Gifford. *Id.* A number of Plaintiff's claims were dismissed without prejudice and with leave to amend. (*See* Dkt. Nos. 6 and 12.)

### B. Motion to File an Amended Complaint

On September 16, 2015, Plaintiff moved for leave to file an amended complaint. (Dkt. No. 34.) Defendants did not oppose the Plaintiff's motion, subject to the Court's review and Defendants' ability to fully respond. (Dkt. No. 35.) By Decision and Order dated September 28, 2015, the Court granted in part and denied in part Plaintiff's motion. (Dkt. No. 38.)[2]

The Court granted the motion to amend as to the following claims: (1) violation of Plaintiff's rights under the First Amendment Free Exercise Clause by Defendants Pelc, Martin, and Thomas in denying Plaintiff an Eid ul-Adha ("Eid") religious meal on October 27, 2012, (Dkt. No. 39 at ¶¶ 108-110); (2) violation of Plaintiff's rights under the First Amendment Free Exercise Clause by Defendant Thomas in refusing to provide Plaintiff with halal meals and sahur bags from July 29, 2013, through August 3, 2013, thereby preventing him from participating in the mandatory religious fasting during Ramadan, *id.* at ¶¶ 111-12; (3) violation of Plaintiff's rights under the First Amendment Free Exercise Clause by Defendants Hewite and Steinberg in preventing Plaintiff from participating in the religious

congregational prayer during Shawwal and denying him a halal meal on August 12, 2013, *id.* at ¶¶ 113-15; (4) retaliation in violation of Plaintiff's First Amendment rights and violation of his rights under the Fourteenth Amendment Equal Protection Clause by Defendants Chutty and Gifford with regard to the September 17, 2012, urine test, cell search, planting a weapon in Plaintiff's cell, and filing a false misbehavior report against Plaintiff, resulting in his placement in the Special Housing Unit ("SHU"), *id.* at ¶¶ 118-19; (5) First Amendment retaliation claim against Defendant Steinberg with regard to the August 12, 2013, urine test and retaliatory false misbehavior report, *id.* at ¶ 120; and (6) First Amendment retaliation claim against Defendant Fagan for placing Plaintiff in administrative segregation in retaliation for filing grievances to redress violations of his rights under the First Amendment Free Exercise Clause. *Id.* at ¶ 121.

## II. BACKGROUND

### A. September 12, 2012

***2** In September of 2012, while confined at Auburn, Plaintiff was the inmate facilitator for the Muslim Shia community at Auburn, and Rashad Ruhani ("Ruhani") was the inmate facilitator for the Muslim Sunni community. (Dkt. No. 39 at ¶ 21.) On September 12, 2012, Plaintiff learned from Ruhani that they were the subject of an investigation by Corrections Sergeant Hai because they were allegedly planning a work stoppage/protest for September 13, 2012, in commemoration of the Attica riot in 1971. *Id.* at ¶¶ 20, 22. The investigation had been ordered by Defendant Chutty. *Id.* at ¶ 23.

There was no protest on September 13, 2012. *Id.* at ¶ 24. On September 17, 2012, Defendant Chutty ordered Plaintiff to undergo a urine test, which was negative for drugs. *Id.* at ¶¶ 25-26. Upon Defendant Chutty's orders, Plaintiff's cell was then searched by Defendant Gifford. (Dkt. No. 39 at ¶ 27.) According to Plaintiff, Defendant Gifford planted a weapon in his cell, and Plaintiff was immediately escorted to Special Housing Unit ("SHU") and served with a false misbehavior report because of the weapon. *Id.* at ¶¶ 28-30. On September 19, 2012, Plaintiff was told by Auburn Muslim Chaplain, Ali Muhsin, that Ruhani had also been brought to SHU for a weapon allegedly found in his cell by Defendant Gifford on September 17, 2012. *Id.* at ¶ 32. The Chaplain told Plaintiff that he believed Plaintiff was being targeted because of his position as Muslim Shia inmate facilitator. *Id.* at ¶ 31. Plaintiff was found guilty of weapon possession at the hearing on the misbehavior report and given ninety days in SHU, including ninety days loss of phone, packages, and commissary. *Id.* at ¶ 33. Plaintiff's appeal was denied by the DOCCS central office. *Id.* at ¶ 55. However, on or about April 29, 2013, the misbehavior report of September 17, 2012, was expunged after review by Superintendent Graham. *Id.* at ¶ 62. Plaintiff's request to be reinstated to honor block status in light of the expungement was denied per Defendant Chutty. *Id.* at ¶ 63.

### B. Eid ul-Adha Religious Feast

Plaintiff, registered as a member of the Islamic faith while at Auburn, was in SHU at the time of the Eid feast in October of 2012. (*Id.* at ¶ 38.) The policy in place at Auburn allowed prisoners confined to SHU to observe the Eid by making the Eid prayer in their cells, and they were provided a halal meal. *Id.* at ¶ 39. Although Plaintiff placed Defendant Pelc on notice that he was a practicing Muslim and would be observing the Eid feast in his cell, on the morning of October 27, 2012, when Plaintiff inquired about his halal meal at lunch time, he was told by Pelc that the mess hall had not sent any halal meals to SHU. *Id.* at ¶¶ 40-41. Plaintiff did not receive his halal meal and since he was in SHU had no alternative halal food supply of his own. (Dkt. No. 39 at ¶ 44.)

Plaintiff wrote to Defendant Martin to find out why he had not been given his halal meal, and she responded that the halal meals had been prepared and delivered to SHU. *Id.* at ¶ 48. An investigation revealed that none of the Muslim inmates in SHU had received a halal meal on October 27, 2012. *Id.* at ¶ 53. Plaintiff filed a grievance regarding the denial of the halal meal and requesting that a procedure be implemented to ensure that inmates in SHU receive their religious meals. *Id.* at ¶ 51. The grievance response from Defendant Thomas stated that the food service had been reminded to closely monitor special diet delivery locations but did not address Plaintiff's suggestion for implementation of a special procedure. *Id.* at ¶ 56.

### C. Prison Shutdown During Ramadan in 2013

***3** On July 8, 2013, Plaintiff began his thirty-day fast of Ramadan. (Dkt. No. 39 at ¶ 66.) Auburn was shut down for a routine facility search from July 29, 2013, to August 3, 2013, and during that time no halal meals or sahur bags were distributed. [3] *Id.* at ¶ 67, second ¶ 70. The Auburn Muslim Chaplain made an announcement to the Muslim community that he had asked Defendant Thomas to provide Muslim inmates with halal meals, and Thomas had refused. *Id.* at ¶ 71.

Plaintiff filed a grievance regarding the halal meals and sahur bags on August 7, 2013, and on August 8, 2013, was warned by an inmate who worked as a prison grievance clerk, that Plaintiff's name had come up in a discussion among officers in the grievance office as a litigator who would cause trouble over the prison shutdown. (Dkt. No. 39 at ¶¶ 72-73.) On August 11, 2013, Plaintiff was interviewed by a crisis intervention officer who indicated he had been assigned by the security captain to investigate allegations that Plaintiff was "riling up" the Muslim inmates to protest the shutdown of the prison during Ramadan. *Id.* at ¶ 74. Plaintiff assured the officer that he was not instigating problems and had followed the facility sanctioned process of filing a grievance. *Id.* at ¶ 75. On August 29, 2013, the Inmate Grievance Review Committee ("IGRC") reached a deadlocked decision on Plaintiff's August 7, 2013, grievance with Defendant Martin stating that the facility did not have to provide the Muslim inmates with their halal meal. *Id.* at ¶ 97. Plaintiff passed the grievance on to Superintendent Graham. *Id.*

**D. Urine Test**

On August 12, 2013, while Plaintiff was in the mosque during the six day fast of Shawwal, he was summoned for a urine test and was unable to make the Shawwal congregational prayer or have his halal meal. *Id.* at ¶ 76. Plaintiff was told by Defendant Hewite that the test had been authorized based on confidential information. *Id.* at ¶ 77. Plaintiff informed Defendant Hewite that he had been fasting for fifteen hours and was dehydrated. *Id.* at ¶ 78. Plaintiff requested water in accordance with a DOCCS directive governing urine testing and was told by Hewite that he would be given three cups of water, one each hour. *Id.* at ¶¶ 78-79. Plaintiff also requested that his halal meal be sent to the clinic where he had been taken for the urine test, or to his cell. *Id.* at ¶ 78. Hewite gave Plaintiff one cup of water at approximately 8:30pm and placed him in the waiting pens. *Id.* at ¶¶ 79-80. Plaintiff was not given the remaining cups of water. *Id.* at ¶ 82. At 11:25pm, Defendant Steinberg removed Plaintiff from the waiting area and ordered him to urinate. *Id.* at ¶ 81. When Plaintiff explained to Steinberg that he had not been given the three cups of water and could not urinate, Steinberg escorted Plaintiff to his cell and placed him in keeplock. (Dkt. No. 39 at ¶ 82.) Plaintiff was not given his halal meal or anything else to eat. *Id.* at ¶ 83.

On August 13, 2013, Plaintiff was served with what he claims to have been a fabricated misbehavior report in which Defendant Steinberg falsely implied that he had personally given Plaintiff three cups of water. *Id.* at ¶ 84. At the August 16, 2013, hearing on the urine test misbehavior report, Plaintiff argued that the misbehavior report was false and was written in response to a grievance filed by Plaintiff. *Id.* at ¶ 90. Plaintiff was found not guilty and the charge was dismissed. *Id.* at ¶ 91.

***4** On August 15, 2013, Plaintiff filed a grievance over not having been given his halal meal on August 12, 2013. *Id.* at ¶ 89. On September 5, 2013, the IGRC reached a deadlocked decision on Plaintiff's grievance. *Id.* at ¶ 98. The grievance was passed on to Superintendent Graham. *Id.* On September 16, 2013, Plaintiff received a decision on his grievance from Graham, who concluded that Plaintiff should have been given his halal meal for Shawwal on August 12, 2013. *Id.* at ¶ 104.

**E. Administrative Segregation**

On August 13, 2013, Plaintiff was taken to SHU and placed in administrative segregation based upon confidential information. (Dkt. No. 39 at ¶ 85.) On August 15, 2013, Plaintiff was served with an administrative segregation recommendation authored by Defendant Fagan and alleging that Plaintiff was a "facilitator of information" and detrimental to the safety and security of the facility. *Id.* at ¶ 88. At Plaintiff's administrative segregation hearing, which commenced on August 23, 2013, there was testimony from two Muslim inmates that they had also had their cells searched, urine taken, and were placed in SHU on administrative segregation after filing complaints regarding the Ramadan shutdown. *Id.* at ¶¶ 93-943. On August 28, 2013, hearing officer Deputy Superintendent Robinson upheld the administrative segregation stating that while he did not believe Plaintiff was a threat, he could not risk placing him back in general population and risk having an incident occur. *Id.* at ¶ 96. Plaintiff was transferred to Wende Correctional Facility just over a week later on September 6, 2013. *Id.* at 99. Albert Prack, DOCCS Director of SHU, subsequently upheld the determination on the administrative segregation on appeal. *Id.* at ¶ 107.

## III. LEGAL STANDARD GOVERNING MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM

A defendant may move to dismiss a complaint "for failure to state a claim upon which relief can be granted" under Rule 12(b)(6). The motion tests the formal legal sufficiency of the complaint by determining whether it conforms to Federal Rule of Civil Procedure 8(a)(2), which requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Bush*

*v. Masiello*, 55 F.R.D. 72, 74 (S.D.N.Y. 1972). Satisfaction of the requirement that a plaintiff "show" that he or she is entitled to relief requires that the complaint "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ). "Determining whether a complaint states a plausible claim for relief ... requires the ... court to draw on its judicial experience and common sense.... [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Iqbal,* 556 U.S. at 679 (internal citation and punctuation omitted).

A complaint may be dismissed, pursuant to Rule 12(b)(6), only where it appears that there are not "enough facts to state a claim that is plausible on its face." *Twombly.* 550 U.S. at 570. While Rule 8(a)(2) "does not require detailed factual allegations, ... it demands more than an unadorned, the-defendant-harmed-me-accusation." *Iqbal,* 556 U.S. at 678 (citation and internal quotation marks omitted). A complaint which "tenders 'naked assertion[s]' devoid of 'further factual enhancement' " does not suffice. *Id.* (citation omitted).

***5** "In reviewing a complaint for dismissal under Rule 12(b)(6), the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994) (citation omitted). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

In considering a Rule 12(b)(6) motion, "the court considers the complaint, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case." *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (citation and internal quotation marks omitted); *see also Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (A court may consider "any written instrument attached [to the complaint] as an exhibit or documents incorporated in it by reference."). "The mandate to read the papers of *pro se* litigants generously makes it appropriate to consider a plaintiff's papers in opposition to a defendant's motion to dismiss as effectively amending the allegations of the plaintiff's complaint, to the extent that those factual allegations are consistent with the allegations of the Plaintiff's complaint." *Robles v. Bleau*, No. 07-CV-0464, 2008 WL 4693153, at *6 and n.41 (N.D.N.Y. Oct. 22, 2008) [4] (collecting cases); *Donhauser v. Goord*, 314 F. Supp. 2d 119, 121 (N.D.N.Y. 2004) (where a *pro se* is faced with a motion to dismiss, a court may consider materials outside of the complaint "to the extent they are consistent with the allegations in the complaint."), *vacated in part on other grounds*, 317 F. Supp. 2d 160 (N.D.N.Y. 2004); *see also Gil v. Mooney*, 824 F.2d 192, 195 (2d Cir. 1987) (in reviewing district court's dismissal of *pro se* plaintiff's claim, Second Circuit considered plaintiff's affidavit submitted in opposition to motion to dismiss). The Court has taken judicial notice of papers filed in other litigation involving Plaintiff and has considered documents in Plaintiff's submissions in opposition to the extent they are consistent with the allegations in Plaintiff's Amended Complaint.

Where a party is proceeding pro se, the court is obliged to "read [the pro se party's] supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest." *See Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) (citations omitted); *see also Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (courts remain obligated to construe pro se complaints liberally even after *Twombly* ).

Where a pro se complaint fails to state a cause of action, the court generally "should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (citation and internal quotation marks omitted). An opportunity to amend is not required where "the problem with [the plaintiff's] causes of action is substantive" such that "better pleading will not cure it." *Id.* (citation omitted).

## IV. ANALYSIS

### A. Denial of Plaintiff's Eid ul-Adha Meal (First Cause of Action)

***6** Plaintiff claims that Defendants Pelc, Martin, and Thomas violated the First Amendment Free Exercise Clause by denying him a religious meal on the Eid festival on October 27, 2012. (Dkt. No. 39 at ¶¶ 108-110.) "Prisoners have long been understood to retain some measure of the constitutional protection afforded by the First Amendment's Free Exercise Clause." *Ford v. McGinnis*, 352 F. 3d 582, 588 (2d Cir. 2003) (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974) ). The reach of the free exercise clause extends to the "right to participate in congregate religious services," *Salahuddin*

*v. Coughlin*, 993 F.2d 306, 308 (2d Cir. 1993), and to "an inmate's diet and participation in religious meals." *Johnson v. Guiffere*, No. 9:04-CV-57 (DNH/DEP), 2007 WL 3046703, at *4 (N.D.N.Y. Oct. 17, 2007) ("Courts have generally found that to deny prison inmates the provision of food that satisfies the dictates of their faith does unconstitutionally burden their free exercise rights.").

In *Holland v. Goord*, 758 F.3d 215, 220-21 (2d Cir. 2014), the Second Circuit clarified that it had yet to decide "whether, to state a claim under the First Amendment's Free Exercise Clause, a 'prisoner must show at the threshold that the disputed conduct substantially burdens his sincerely held religious beliefs.' " (quoting *Salahuddin v. Goord*, 467 F.3d 263, 274-75 (2d Cir. 2006) ). Because Plaintiff argues in this case that his sincerely held religious beliefs were substantially burdened by denial of the Eid meal (Dkt. No. 43 at 4), the threshold requirement issue need not be resolved. *See Williams v. Does*, No. 15-692, 2016 WL 2610028 (Mem), at *1 (2d Cir. May 6, 2016). Assuming that the substantial burden requirement does apply, Second Circuit precedent leads to the conclusion that denial of Plaintiff's Eid religious meal did substantially burden what the Court accepts to be, for purposes of this motion, Plaintiff's sincerely held religious beliefs.

Defendants seek dismissal of Plaintiff's claim on the grounds that denial of one or two religious meals is *de minimis* and does not substantially burden an inmate's sincerely held religious beliefs. (Dkt. No. 41-1 at 6.[5]) In *McEachin v. McGuinnis*, 357 F.3d 197, 203 n.6 (2d Cir. 2004), the Second Circuit recognized that "[t]here may be inconveniences [to one's religious practices] so trivial that they are most properly ignored." A number of district court decisions in the Circuit have subsequently concluded that the denial of a single or small number of religious meals represents a *de minimis*, or insubstantial burden on an inmate's ability to freely exercise his religion. *See, e.g., Wilson v. Woodburne Correctional Facility,* No. 9:11-CV-1088 (DNH/ATB), 2012 WL 1377615, at *3 (N.D.N.Y. March 21, 2012) ("The withholding of a single meal ... is at most, a *de minimis* burden on plaintiff's religious expression.") (collecting cases); *Thaxton v. Simmons*, No. 10-CV-1318, 2012 WL 360104, at *6 (N.D.N.Y. Jan. 5, 2012) ("[T]he minor disruption of two kosher meals during a four-month period can hardly be called a substantial burden. At best, these incidents present a *de minimis,* or insubstantial, burden on Plaintiff's ability to freely exercise his religion.)

In seeking dismissal of Plaintiff's claim, however, Defendants have completely ignored the Second Circuit decision in *Ford*, 352 F.3d at 595 n.12, in which the Court recognized that Eid religious meals are "sufficiently unique in [their] importance within Islam to distinguish the present case from those in which the mere inability to provide a small number of meals commensurate with a prisoner's religious dietary restrictions was found to be a *de minimis* burden." *See also Shakur v. Selsky*, 391 F.3d 106, 120 (2d Cir. 2004) (reversing the district court holding that "the missing of a single Eid ul Fitr feast simply does not amount to a 'substantial burden' on his religious exercise.").

***7** In light of the Second Circuit decisions in *Ford* and *Selsky*, the Court finds that Plaintiff has stated a claim for violation of the First Amendment Free Exercise Clause against Defendants Pelc, Martin, and Thomas with regard to being deprived of his Eid religious meal, and recommends that their motion to dismiss Plaintiff's first cause of action for failure to state a claim be denied.

**B. Denial of Halal Meals and Sahur Bags During Ramadan (Second Cause of Action)**

Plaintiff also claims that Defendant Thomas violated his First Amendment Free Exercise Clause rights by refusing to provide him with halal meals and sahur bags during the prison shutdown from July 29, 2013, through August 3, 2013, thereby preventing him from participating in the mandatory religious fasting during Ramadan. (Dkt. No. 39 at ¶¶ 111-12.)

In *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987), the Supreme Court acknowledged that while prisoners do not abandon their constitutional rights when they become incarcerated, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations of our prison system." (citation and internal quotation marks omitted). "Accordingly, the Court held that a challenged prison regulation [or conduct] is judged 'under a reasonableness test less restrictive than that ordinarily applied': a regulation [or conduct] that burdens a protected right passes constitutional muster 'if it is reasonably related to legitimate penological interests.' " *Salahuddin*, 467 F.3d at 274 (quoting *O'Lone*, 482 U.S. at 349) (some internal quotation marks omitted). Once a plaintiff has established that a sincere religious belief has been substantially burdened, "[t]he defendants then bear the relatively limited burden of identifying the legitimate penological interests that justify the impinging conduct; the burden remains with the prisoner to show that these

articulated concerns were irrational." *Id.* at 275 (quoting *Ford*, 352 F. 3d at 595).

When determining whether an action that impinges on an inmate's constitutional rights can be sustained as reasonably related to a valid legitimate penological interest, a court evaluates four factors: (1) whether there is a valid, rational connection between the action and the claimed legitimate penological interest; (2) whether there are alternative means of exercising the right that remain open to inmates; (3) the impact that accommodation of the asserted constitutional right will have on fellow inmates or prison staff; and (4) whether there is an alternative to the conduct that accommodates the asserted constitutional right at a *de minimis* cost to the legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89-91 (1987) (citations omitted).

Defendants have conceded solely for purposes of this motion that the denial of religious meals for six days of Ramadan burdened Plaintiff's sincerely held religious beliefs. (Dkt. No. 41-1 at 10.) They seek dismissal of the claim instead on the ground that there was a legitimate penological purpose for the denial of halal meals and sahur bags during the prison shutdown. (Dkt. No. 41-1 at 9-12.)

In support of their motion for dismissal of the claim, Defendants rely on Plaintiff's failure to contest that the shutdown was imposed for legitimate reasons, namely, a routine facility search.[6] *Id.* at 12. The question, however, is not whether there was a legitimate penological interest for the shutdown, but rather whether there was a legitimate penological interest in withholding Ramadan meals from Muslim inmates during the shutdown.

***8** "[The] Turner factors are highly fact-intensive and, therefore commonly cannot be adequately addressed until the summary judgment stage." *Colón v. Davis*, No. 11-cv-01169-WJM-KMT, 2012 WL 4120001, at *6 (D. Colo. Aug. 8, 2012); *Beerheide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002) ("*Turner* thus requires courts, on a case-by-case basis, to look closely at the facts of a particular case and the specific regulations and interests of the prison system in determining whether prisoner's constitutional rights may be curtailed."); *Ford v. Fischer*, No. 09-CV-723, 2011 WL 856416, at *12 (N.D.N.Y. Jan. 31, 2011) ("Because prison officials have some burden to demonstrate a penological justification for restricting an inmate's right to marry, and to satisfy elements of the *Turner* test, such claims are not conducive to resolution in the context of a Rule 12(b)(6) motion to dismiss."); *Al-Owhali v. Mukasey*, No. 07-cv-02214-LTB-BNB, 2012 WL 5651033, at *11 (D. Colo. June 17, 2010) ("[The *Turner*] analysis requires facts that are not properly before the court on a motion to dismiss pursuant to Rule 12(b)(6).").

The *Turner* analysis required to determine whether Thomas had a legitimate penological interest in denying Plaintiff his halal meals and sahur bags during six days of Ramadan due to the facility shutdown will be fact intensive. Therefore, the Court therefore concludes that the issue of legitimate penological interest claim cannot be resolved in the context of a Rule 12(b)(6) motion and recommends that Thomas's motion to dismiss the free exercise claim alleged in Plaintiff's second cause of action for failure to state a claim be denied.

### C. Denial of Participation in Congregational Prayer During Shawwal and Halal Meal (Third Cause of Action)

Plaintiff has alleged that Defendants Hewite and Steinberg violated his First Amendment Free Exercise Clause rights by preventing him from participating in the religious congregational prayer during Shawwal and denying him a halal meal without any legitimate penological interest on August 12, 2013. (Dkt. No. 39 at ¶¶ 113-15.) Defendants argue that while Plaintiff has alleged that Hewite and Steinberg denied him the right to congregational prayer during the Muslim holiday of Shawwal, missing one or two religious services is *de minimis*, and that Plaintiff has in any event failed to allege he was prevented from worshipping privately in his cell, or participating in other religious ceremonies, prayer, or discussion. *Id.* at 7. Defendants further assert that being denied one or two religious meals over the course of approximately 359 days was *de minimis*. *Id.* at 6.

In Plaintiff's opposing papers, which as noted above may properly be considered by the Court as effectively amending his Amended Complaint, *Robles*, 2008 WL 4693153, at *6, n.41, he has explained the religious significance of his removal from the Shawwal congregational prayer on August 12, 2013. (Dkt. No. 43 at 4-5.) According to Plaintiff, the significance of the Shawwal congregational prayer, which is followed by a supplication and halal meal, is that it allows for the proper breaking of the Shawwal fast. *Id.* at 5. In addition, Plaintiff points out that, contrary to Defendants' claim, he was not allowed to go to his cell to worship privately because he was taken from the mosque to the clinic for the urine test. *Id.*

"A substantial burden exists where the state puts substantial pressure on an adherent to modify his behavior and to violate

his beliefs." *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (quotation and alterations omitted). In *McEachin*, 357 F.3d at 203, the Second Circuit explained that "[w]e have reasoned that when determining whether a prisoner's religious beliefs have been substantially burdened, the relevant question is whether the infringed-upon religious activity is considered central or important to the prisoner's practice of his religion. *See also Lopez v. Cipolini*, 136 F. Supp. 3d 570, 588 (S.D.N.Y. 2015) (dismissing without prejudice plaintiff's claim that her ability to exercise her religious beliefs was substantially burdened by missing two religious services where plaintiff did not allege that the services were "central or important to [her] faith.") (quoting *Rossi v. Fischer*, No. 13-cv-3167 (PKC)(DF), 2015 WL 769551, at *8 (S.D.N.Y. Feb. 24, 2015) (finding that plaintiff, who had shown that celebrating the four holy days at issue, refraining from work and programming, attending a congregate worship service, and sharing a holy day meal were central or important to his faith, had plausibly alleged a substantial burden on his religious beliefs) ).

***9** Recently, in its unpublished decision in *Williams* 2016 WL 2610028, at *1, the Second Circuit, in rejecting the district court's determination that the burden on the plaintiff's sincerely held religious beliefs was *de minimis* because only a few of his Ramadan meals had been delivered prematurely, explained that a proper focus in considering substantial burden is on whether the religious expression of which Plaintiff has been deprived is considered by him to be "central or important" to the practice of his religion, not only whether the deprivation occurred a small number of times. *Id.* The Court finds that Plaintiff, in his Amended Complaint as amended by his opposition papers, has made a plausible showing that the Shawwal congregate prayer and supplication, and the halal meal intended to break the fast were important to his religious faith, and that the denial of those things by Defendants Hewite and Steinberg as a result of ordering Plaintiff to undergo a urine test substantially burdened his sincerely held religious beliefs. Therefore, the Court recommends that Defendants Hewite and Steinberg's motion to dismiss the third cause of action in Plaintiff's Amended Complaint be denied. [7]

**D. Retaliation Claim against Defendants Chutty and Gifford (Fourth Cause of Action)**

Plaintiff claims that Defendants Chutty and Gifford violated his First Amendment right to freely exercise his religious beliefs when they retaliated against him because of his leadership position in the Muslim community as Muslim Shia inmate facilitator by forcing him to undergo a urine test, searching his cell, planting a weapon during the search, filing a false misbehavior report, and placing him in SHU. (Dkt. No. 39 at ¶¶ 24-30, 118-19.)

To prevail on a First Amendment retaliation claim, an inmate must establish "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) there was a causal connection between the protected speech [or conduct] and the adverse action." *Holland,* 758 F.3d at 225 (quoting *Espinal v. Goord*, 558 F.3d 119, 128 (2d Cir. 2009) ); *see also Gill v. Pidlypchak*, 389 F.3d 379, 380 (2d Cir. 2004) (quoting *Dawes v. Walker*, 239 F.3d 489, 492 (2d Cir. 2001), *overruled on other grounds, Swierkiewicz v. Sorema,* 534 U.S. 506, 508 (2002) ). "Adverse action" for purposes of a retaliation claim has been defined objectively as "retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising ... constitutional rights." *Pidlypchak*, 389 F.3d at 381. The Second Circuit has made clear that the objective test applies even where a particular plaintiff was not himself subjectively deterred and continued the protected conduct. *Id.*

Several factors may be considered in determining whether a causal connection exists between the plaintiff's protected activity and a prison official's actions. *Baskerville v. Blot*, 224 F. Supp. 2d 723, 732 (N.D.N.Y. 2002) (citing *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) ). Those factors include: (1) the temporal proximity between the protected activity and the alleged retaliatory act; (2) the inmate's prior good disciplinary record; (3) vindication at a hearing on the matter; and (4) statements by the defendant concerning his or her motivation. *Id.* (citing *Colon*, 58 F.3d at 872-73). The causal connection must be sufficient to support an inference that the protected conduct played a substantial part in the adverse action." *Id.*

***10** Because of the relative ease with which claims of retaliation can be incanted, however, courts have scrutinized such retaliation claims with particular care. *See Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983), *overruled on other grounds, Swierkiewicz,* 534 U.S. 506. As the Second Circuit has noted,

> [t]his is true for several reasons. First, claims of retaliation are difficult to dispose of on the pleadings because they involve questions of intent and

> are therefore easily fabricated. Second, prisoners' claims of retaliation pose a substantial risk of unwarranted judicial intrusion into matters of general prison administration. This is so because virtually any adverse action taken against a prisoner by a prison official – even those otherwise not rising to the level of a constitutional violation – can be characterized as a constitutionally proscribed retaliatory act.

Once the plaintiff has made the requisite showing to state a claim for retaliation, the burden shifts to the defendant to show that he would have taken exactly the same action absent the improper motive. *Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir. 2003) (citing *Mt. Healthy City Sch. Dist. Bd. Of Educ. V. Doyle*, 429 U.S. 274, 287 (1977) ).

1. Urine Test

Prison inmates retain First Amendment protection of the free exercise of religion. *O'Lone*, 482 U.S. at 348. The Court finds that for purposes of this motion to dismiss Plaintiff has made a plausible showing that maintaining a leadership position in the Muslim community as Muslim Shia inmate facilitator at Auburn was conduct protected under the First Amendment for purposes of his retaliation claim against Chutty and Gifford.

However, the Court also finds that requiring Plaintiff to undergo a single urine test on September 17, 2012, does not constitute adverse action for purposes of a retaliation claim. In *Bumpus v. Canfield*, 495 F. Supp. 2d 316, 327 (W.D.N.Y. 2007), the court explained that, "[p]risoners may be required to tolerate more than average citizens, before a [retaliatory] action taken against them is considered adverse. Urine tests are a fact of prison life, and ... one urine test would [not] chill a prisoner of ordinary firmness from filing grievances." (quoting, *inter alia*, *Dawes,* 239 F.3d at 491 (2d Cir. 2001) (internal quotation marks omitted) ). *See also Fann v. Arnold*, No. 14-CV-6187-FPG, 2016 WL 2858927, at *3 (W.D.N.Y. May 16, 2016) (subjecting plaintiff to a single urine test did not constitute adverse action); *Partak v. Behrle*, No. 9:09-CV-1256 (FJS/ATB), 2011 WL 7629500, at *14 (N.D.N.Y. Sept. 12, 2011) (three urine tests in three days did not constitute adverse action for purposes of a retaliation claim); *Carl v. Griffin*, No. 08 Civ. 4981(RMB) (MHD), 2011 WL 723553, at *5 (S.D.N.Y. March 2, 2011) (being forced to give a urine sample on one occasion not an adverse action because it is not sufficient to deter a person of ordinary firmness from exercising First Amendment rights).

Therefore, the Court finds that Plaintiff has failed to state a retaliation claim against Chutty and Gifford with regard to ordering him to undergo a urine test on September 12, 2012.

2. Cell Search

"It is well-settled that retaliatory cell searches are not actionable under section 1983." *Partak,* 2011 WL 7629500, at *14 (citing *Salahuddin v. Mead*, No. 95 Civ. 8581 (MBM), 2002 WL 1968329, at * 5 (S.D.N.Y. Aug. 26, 2002) ); *Jones v. Harris*, 665 F. Supp. 2d 384, 398 (S.D.N.Y. 2009) ("If a prisoner, who enjoys no Fourth Amendment privacy right in his cell, can be expected to tolerate such interruptions in the ordinary course, it is hard to see how the three searches of which plaintiff complains, taken together, would qualify as an 'adverse action' for purposes of the First Amendment retaliation analysis."); *Lashley v. Wakefield*, 367 F. Supp. 2d 461, 470 (W.D.N.Y. 2005) (no constitutional protection from retaliatory cell searches).

***11** Therefore, the Court finds that Plaintiff has failed to state a retaliation claim against Chutty and Gifford with regard to the cell search on September 12, 2012.

3. Planting a Weapon and False Misbehavior Report

The Court finds that Plaintiff has stated retaliation claims against Gifford with respect to his claim that Gifford planted a weapon in his cell (Dkt. No. 39 at ¶ 28), and against both Gifford and Chutty with respect to filing a false misbehavior report based upon the planted weapon in retaliation for Plaintiff's actions as Muslim Shia inmate facilitator. *Id.* at ¶ 118. According to Plaintiff, Gifford planted a weapon in his cell during a cell search, and as a result, Plaintiff was taken to SHU. (Dkt. No. 39 at ¶¶ 27-28.) Gifford, with Chutty's alleged involvement, thereafter authored a false misbehavior report alleging that Plaintiff was in possession of a weapon. *Id.* at ¶¶ 30, 118-19. Although Chutty is alleged to have instructed Gifford to search Plaintiff's cell and to have been involved in the filing of a false misbehavior report, there are no allegations in Plaintiff's Amended Complaint plausibly

showing Chutty's involvement in the alleged planting of a weapon. *Id.* at ¶¶ 28, 118-19.

The planting of evidence and issuance of a false misbehavior report based upon that evidence has been found to constitute adverse action for purposes of a retaliation claim. *See Pidlypchak*, 389 F.3d at 384 (filing a false misbehavior report constitutes adverse action); *Colon,* 58 F.3d at 872-73 (finding adverse action where plaintiff alleged that prison officials had planted contraband in his cell); *Williams v. King*, 56 F. Supp. 3d 308, 328 (S.D.N.Y. 2014) (the alleged planting of contraband and allegedly disproportionate administrative actions that follow have been found serious enough to constitute adverse action for retaliation purposes), *order clarified on other grounds, Williams v, King*, 56 F. Supp. 3d 389 (S.D.N.Y. 2014); *Payne v. Axelrod*, 871 F. Supp. 1551, 1556 (N.D.N.Y. 1995) (valid § 1983 retaliation claim stated where prisoner alleged that corrections officers planted contraband evidence in his cell and falsely charged him with possession).

Furthermore, the allegations in Plaintiff's Amended Complaint plausibly show a causal connection between Plaintiff's position as Muslim Shia inmate facilitator and the alleged planting of a weapon in his cell by Gifford and false misbehavior report by Gifford and Chutty. Plaintiff has alleged that on September 19, 2012, he was informed by Muslim Chaplain Muhsin that he believed Plaintiff was being targeted because of his position as inmate facilitator. *Id.* at ¶ 31. The existence of a causal connection finds further support in the allegation that Muslim Sunni inmate facilitator Ruhani had been taken to SHU on the same day as Plaintiff for a weapon allegedly found in his cell by Defendant Gifford. *Id.* at ¶ 32.

Based on the foregoing, the Court finds that Plaintiff has stated a retaliation claim against Gifford with regard to planting a weapon in Plaintiff's cell and filing a false misbehavior report, and a retaliation claim against Chutty with respect to filing a false misbehavior report. The Court further finds that Plaintiff has failed to state a retaliation claim against Chutty with regard to planting a weapon in his cell.

4. Summary

***12** The Court recommends that Defendant Chutty and Gifford's motion to dismiss Plaintiff's retaliation claims with respect to the urine test and cell search be granted. Because the law is well-settled that neither a urine test nor a cell search constitutes an adverse action for retaliation purposes, the Court recommends that the dismissal be with prejudice. *See Cuoco,* 222 F.3d at 112 (opportunity to amend is not required where the problem is substantive such that a better pleading will not cure it).

In addition, Court recommends that Gifford's motion to dismiss Plaintiff's retaliation claim with respect to planting the weapon and the false misbehavior report be denied. As to Defendant Chutty, the Court recommends that the motion to dismiss Plaintiff's retaliation claim with respect to planting the weapon be granted and the claim be dismissed, and that the motion be denied as to the false misbehavior report. The Court further recommends that dismissal of the retaliation claim against Chutty with respect to planting the weapon be without prejudice and with leave to amend in light of Plaintiff's pro se status and the allegations in Plaintiff's Amended Complaint, which although inadequate to state a conspiracy claim, may suggest Chutty's possible involvement in the alleged planting of a weapon. *Id.* at ¶ 119.

**E. Fourteenth Amendment Equal Protection Claim Against Defendants Chutty and Gifford (Fourth Cause of Action)**

Plaintiff claims that Defendants Chutty and Gifford violated his rights under the Fourteenth Amendment Equal Protection Clause because of his leadership position in the Muslim community by: (1) ordering an investigation by Sergeant Hai of Plaintiff and Muslim Sunni inmate facilitator Ruhani's involvement in a planned work stoppage/protest in commemoration of the Attica riot of 1971, while none of the non-muslim inmate facilitators were investigated; and (2) ordering a urine test, searching Plaintiff's cell, planting a weapon in Plaintiff's cell, and filing a false misbehavior report regarding the weapon, because of his position as a Muslim Shia inmate facilitator. (Dkt. No. 39 at ¶¶ 20, 22-23; 25-30; 118-19.)

The Equal Protection Clause provides that "no State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause "bars the government from selective adverse treatment of individuals compared with other similarly situated individuals if 'such selective treatment was based on impermissible considerations such as race, religion, intent

to inhibit or punish the exercise of constitutional rights, *or malicious or bad faith intent to injure a person.*' " *Bizzarro v. Miranda*, 394 F.3d 82, 86 (2d Cir. 2005) (quoting *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980) ) (emphasis added).

Thus, a plaintiff asserting an equal protection claim must allege facts plausibly suggesting that (1) he was treated differently from similarly situated individuals; and (2) the defendants treated him differently due to his membership in a suspect class, inhibited his exercise of a fundamental right, acted out of malice, or acted irrationally and arbitrarily. *Harlen Assocs. V. Incorp. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001).

Plaintiff claims that he was treated differently than non-Muslim inmate facilitators with respect to the investigation conducted by Sergeant Hai because of his leadership status in the Muslim community at Auburn. (Dkt. No. 39 at ¶ 21.) The Amended Complaint is, however, devoid of factual allegations providing information regarding the identity or religion of the non-Muslim inmate facilitators, or their connection, if any, to the alleged planning of a work stoppage/ protest. Conclusory assertions are not sufficient to state a claim. *See Gebhardt v. Allspect*, 96 F. Supp. 2d 331, 333 (S.D.N.Y. 2000) ("Generally, conclusory assertions or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss") (citation and internal quotation marks and punctuation omitted). As to the urine test, cell search, planted weapon, and false misbehavior report, Plaintiff has not identified similarly situated persons who were treated differently. Given the foregoing, the Court finds that Plaintiff has failed to state an equal protection claim against Chutty and Gifford.

***13** Even if the Court were to find that Plaintiff had stated an equal protection claim, because the claim involves the same set of facts implicated in his retaliation claim against Chutty and Gifford, Plaintiff's equal protection claim would be redundant. *See Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005) (dismissing equal protection and Eighth Amendment claims based on the same circumstances as free exercise claim because free exercise claim "gains nothing by attracting additional constitutional labels"); *Williams v. Snyder*, 150 F. App'x 549, 552 (7th Cir. 2005) (dismissing as redundant equal protection claim which involved same set of facts as in retaliation and free exercise claims); *Washington v. Afify*, 968 F. Supp. 2d 532, 541 (W.D.N.Y. 2013) (claims that plaintiff has been "singled out" for retaliatory treatment are more properly addressed in the context of his retaliation claims); *Frisenda v. Incorp. Vill. Of Malverne*, 775 F. Supp. 2d 486, 518 (E.D.N.Y. 2011) ("To the extent that plaintiff also may be attempting to assert an equal protection claim based upon retaliation for First Amendment activity ..., such a claim is completely duplicative of the First Amendment retaliation claim and, therefore, should not go forward.").

Based upon the foregoing, the Court recommends dismissal of Plaintiff's equal protection claim against Chutty and Gifford with prejudice for failure to state a claim and on redundancy grounds inasmuch as it merely duplicates his retaliation claim against the Defendants.

**F. Retaliation Claim Against Defendant Steinberg (Fourth Cause of Action)**

Plaintiff claims that Defendant Steinberg ordered him to undergo a urine test on August 12, 2013, and filed a false misbehavior report implying that he had given Plaintiff three cups of water and Plaintiff had failed to comply with the urine test. (Dkt. No. 39 at ¶¶ 82, 84.) Plaintiff claims that the actions were taken in retaliation for the filing of grievances by Plaintiff to redress the violation of his First Amendment right to the free exercise of his religion. *Id.* at ¶ 120.

The filing of grievances has been found to constitute protected First Amendment conduct for purposes of a retaliation claim. *See Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996) ("Retaliation against a prisoner for pursuing a grievance violates the right to petition government for the redress of grievances guaranteed by the First and Fourteenth Amendment.") Therefore, Plaintiff has made a plausible showing as to the first element of a retaliation claim.

As discussed above, being required to undergo a urine test does not constitute adverse action for purposes of a retaliation claim, *Bumpus,* 495 F. Supp. 2d at 327, while the filing of a false misbehavior report does. *See Pidlypchak*, 389 F.3d at 384. On the question of a causal relationship, Plaintiff has failed to identify the grievance that he claims was the cause for Steinberg's retaliation. Allegations in the Amended Complaint, however, reveal that on or about August 7, 2013, less than a week before Steinberg's alleged retaliatory actions, Plaintiff filed a grievance regarding the failure of the facility to provide him with halal meals and sahur bags for a number of days during Ramadan. (Dkt. No. 39 at ¶ 72.) In addition, Plaintiff has alleged that on August 8, 2013, he was warned by the inmate grievance clerk that his name had come up in discussions by officers in the grievance office as a litigator

who would cause trouble over the Ramadan matter. *Id.* at ¶ 73. On August 11, 2013, Plaintiff was interviewed by a crisis intervention officer assigned to investigate whether Plaintiff was riling up the Muslim inmate population to protest in response to the Ramadan matter. *Id.* at ¶ 74. The urine test, which led to the false misbehavior report occurred just a day after the interview. *Id.* at ¶ 12.

The temporal proximity between the protected activity and the alleged retaliatory act is one of the factors given consideration in determining causal connection. *See Baskerville,* 224 F. Supp. 2d at 732; *see also Bennet v. Goord*, 343 F.3d 133, 138 (2d Cir. 2003) ("the temporal proximity of an allegedly retaliatory misbehavior report to a grievance may serve as circumstantial evidence of retaliation.") (citation and internal quotation marks omitted). Although the Amended Complaint does not allege a direct connection between the grievance and Steinberg, the Court finds for purposes of Defendant's motion to dismiss, that the extremely close temporal proximity to the filing of Plaintiff's grievance, along with the allegation that two other Muslim inmates were subjected to urine tests after complaining about Ramadan, *id.* at ¶ 94, plausibly shows a causal connection between the grievance and the filing of the allegedly false misbehavior report by Steinberg.

***14** Therefore, the Court recommends that Steinberg's motion to dismiss be granted with prejudice as to Plaintiff's retaliation claim with regard to the urine test and be denied with regard to the alleged filing of a false misbehavior report.

**G. Retaliation Claim Against Defendant Fagan (Fourth Cause of Action)**

Plaintiff has alleged that on August 15, 2013, he was served with an administrative segregation recommendation authored by Defendant Fagan, in which it was alleged that Plaintiff was a "facilitator of information" and detrimental to the safety and security of the facility. (Dkt. No. 39 at ¶ 88.) Plaintiff learned at his administrative segregation hearing that a member of the Muslim Sunni Community and a member of the NOI Muslim Community had both had their cell searched and urine taken and were also placed in SHU on administrative segregation after filing complaints about the shutdown during Ramadan. *Id.* at ¶ 94. Plaintiff was in administrative segregation from August 15, 2013, until his transfer to Wende Correctional Facility on September 6, 2013. *Id.* at ¶¶ 88, 99.

Plaintiff has alleged that he was placed in administrative segregation by Fagan for filing a grievance to redress the violations of his First Amendment rights to freely exercise his religion. *Id.* at ¶ 121. As noted above, Plaintiff filed a grievance on August 7, 2013, regarding the failure to provide him with halal meals and sahur bags for Ramadan during the lockdown. *Id.* at ¶ 72. In light of the temporal proximity between the filing of the grievance and Plaintiff's placement in administrative segregation, the Court finds that for purposes of this motion, Plaintiff has sufficiently alleged protected conduct.

In *Allah v. Seiverling*, 229 F.3d 220, 225-26 (3d Cir. 2000), the Third Court vacated a district court order that had dismissed the plaintiff's retaliation claim on initial review in part based upon a finding that being placed in administrative segregation did not constitute adverse action. The Court explained that

> [a]lthough it is possible that in some cases placement in administrative segregation would not deter a prisoner of ordinary firmness from exercising his or her First Amendment rights, we cannot say that such action can never amount to adverse action. On the contrary, whether a prisoner-plaintiff has met that prong of his or her retaliation claim will depend on the facts of a particular case.

In *Allah*, the plaintiff had specifically alleged in his complaint that his confinement in administrative segregation resulted, *inter alia*, in reduced access to recreation, phone calls, commissary, rehabilitative programs, and access to legal research materials, and he was confined to his cell for all but five hours a week. *Id.* at 225.

Although unlike the plaintiff in *Allah*, Plaintiff has not included allegations in his Amended Complaint regarding the conditions to which he was subjected during the approximately three weeks he remained in administrative segregation, the Amended Complaint does allege that he was placed in SHU for administrative segregation. *Id.* at ¶ 85. Thus, while Plaintiff may not ultimately be able to establish adverse action, the Court is not willing to find on Defendants' 12(b)(6) motion that Plaintiff has failed to sufficiently allege adverse action with regard to his retaliation claim against Fagan.

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***15** The Court finds for purposes of the motion to dismiss that Plaintiff has also made a plausible showing of a causal connection between his grievance regarding Ramadan and his being placed in administrative segregation. Not only was there a close temporal proximity, but according to Plaintiff's Amended Complaint, two other Muslin inmates had been placed in administrative segregation following their complaints regarding Ramadan. *Id.* at ¶ 94.

Therefore, based upon the foregoing, the Court recommends that Fagan's motion to dismiss Plaintiff's retaliation claim against him for failure to state a claim be denied.

**ACCORDINGLY**, it is hereby

**RECOMMENDED** that Defendants' motion to dismiss (Dkt. No. 41) for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure be **GRANTED IN PART AND DENIED IN PART**; and it is further

**RECOMMENDED** that the motion to dismiss be **GRANTED** as to Plaintiff's retaliation claim against Defendants Chutty and Gifford with regard to ordering Plaintiff to undergo a urine test and searching his cell on September 12, 2012 (Fourth Cause of Action), and that the claim be **DISMISSED WITH PREJUDICE**; and it is further

**RECOMMENDED** that the motion to dismiss be **GRANTED** as to Plaintiff's retaliation claim against Defendant Chutty with regard to the planting of a weapon in Plaintiff's cell on September 12, 2012 (Fourth Cause of Action), and that the claim be **DISMISSED WITHOUT PREJUDICE AND WITH LEAVE TO AMEND**; and it is further

**RECOMMENDED** that the motion to dismiss be **GRANTED** as to Plaintiff's Fourteenth Amendment Equal Protection Clause claim against Defendants Chutty and Gifford and retaliation claim against Defendant Steinberg with regard to ordering Plaintiff to undergo a urine test on August 12, 2013 (Fourth Cause of Action), and that those claims be **DISMISSED WITH PREJUDICE**; and it is further

**RECOMMENDED** that Defendants' Rule 12(b)(6) motion to dismiss be in all other respects **DENIED**, including as to Plaintiff's claims for: (1) violation of his rights under the First Amendment Free exercise Clause against Defendants Pelc, Martin, and Thomas with respect to the denial of his Eid meal (First Cause of Action); (2) violation of his rights under the First Amendment Free Exercise Clause against Defendant Thomas with respect to denial of Ramadan meals (Second Cause of Action); (3) violation of his rights under the First Amendment Free Exercise Clause against Defendants Hewite and Steinberg with respect to denial of participation in religious congregational prayer during Shawwal and denial of a halal meal; (4) First Amendment retaliation claim against Defendant Steinberg with respect to filing a false misbehavior report; (5) First Amendment retaliation claim against Defendant Gifford with respect to planting a weapon in Plaintiff's cell and filing a false misbehavior report (Fourth Cause of Action); (6) First Amendment retaliation claim against Defendant Chutty with respect to issuing a false misbehavior report (Fourth Cause of Action); and (7) First Amendment retaliation claim against Defendant Fagan with respect to placing Plaintiff in administrative segregation (Fourth Cause of Action); and it is hereby

**ORDERED** that the Clerk provide Plaintiff with a copy of this Order and Report-Recommendation, along with copies of the unpublished decisions cited herein in accordance with the Second Circuit decision in *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).

***16** Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW**. *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989) ); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72.

**All Citations**

Not Reported in Fed. Supp., 2016 WL 11478237

## Footnotes

1 Plaintiff was released from Department of Corrections and Community Supervision custody in June 2015. (Dkt. No. 27.)

2 The Amended Complaint (Dkt. No. 39) as accepted by the Court (Dkt. No. 38) became the operative pleading in this case.

3 Sahur is the light pre-dawn meal eaten by Muslims during Ramadan. *See* http://en.islamway.net/article/12571/suhur-pre-dawn-meal (last visited May 25, 2016).

4 The Court will provide Plaintiff with copies of all unpublished decisions cited herein in accordance with the Second Circuit's decision in *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).

5 **Error! Main Document Only.** Page references to documents identified by docket number are to the numbers assigned by the CM/ECF docketing system maintained by the Clerk's Office.

6 Despite acknowledging that the lockdown was for a routine facility search, Defendants rely on *McLeod v. Scully*, No. 81 Civ. 3139 (RLC), 1984 WL 692, at *1 (S.D.N.Y. July 30, 1984) in support of their argument that "there are clearly legitimate penological purposes for any denial of Plaintiff's religious meals during the Auburn C.F. lockdown." (Dkt. No. 41-1 at 11.) The lockdown in *Scully*, however, was hardly for a routine facility search. In *Scully*, a lockdown was ordered when a corrections officer was reported missing on duty and there had been an unsuccessful initial search to locate her. The lockdown in *Scully* was continued after the body of the officer, who had been brutally murdered, was found the following day in a landfill twenty miles from the correctional facility. *Id.* Given the dramatic reason for the lockdown in *Scully*, Defendants' reliance on the court's description of a lockdown *Scully* as "undoubtedly one of the most extreme and disruptive measures a prison can impose ... [where] '[g]enerally, dining room meals are suspended and in some cases, only two meals per day are served for a period of time," to establish legitimate penological interest is questionable. *Id.* at *1.

7 Defendants argue that ordering Plaintiff to undergo a urine test on August 12, 2013, did not violate his rights under the First Amendment Free Exercise Clause by requiring him to drink water during the Shawwal fast. (Dkt. No. 41-1 at 8-9.) *See Holland*, 758 F.3d at 221 (ordering plaintiff to drink water in violation of his Ramadan fast to produce a urine sample substantially burdened his religious expression where plaintiff submitted evidence that breaking his fast prior to sundown would be a grave sin). Plaintiff does not claim that he was forced to drink water and has not asserted a free exercise claim regarding drinking water so that he could comply with the urine test in his Amended Complaint. (Dkt. Nos. 39 at ¶¶ 113-15; 41-1 at 8-9.) Plaintiff has alleged that he requested that he be given the three cups of water he was entitled to under a DOCCS directive. (Dkt. No. 39 at ¶ 77.) Moreover, in his opposition papers, Plaintiff states that Defendants did not force him to drink water. (Dkt. No. 43 at 5.)

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Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Shabaka SHAKUR, Plaintiff,

v.

Justin THOMAS, individually and in his official capacity as Deputy Superintendent of Programs; Chutty, individually and in his official capacity as Security Captain; E. Fagan, individually and in his official capacity as Captain; G. Steinberg, individually and in his official capacity as Correctional Officer; Gifford, individually and in his official capacity as Correctional Officer; Pelc, individually and in his official capacity as Correctional Officer; Hewite, individually and in his official capacity as Correctional Officer; and Donna Martin, individually and in her official capacity as Food Service Administrator, Defendant.

9:14-CV-00427(MAD/TWD)
|
Signed 09/06/2016

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## MEMORANDUM-DECISION AND ORDER

Mae A. D'Agostino, U.S. District Judge

## I. INTRODUCTION

On April 16, 2014, Plaintiff Shabaka Shakur commenced this civil rights action asserting claims for the violation of his rights protected under the First, Eighth, and Fourteenth Amendments to the United States Constitution and the Religious Land Use and Institutionalized Person Act ("RLUIPA"), arising out of his confinement at Auburn Correctional Facility ("Auburn C.F.") from September 2012 through September 2013. *See* Dkt. No. 1. [1]

On September 16, 2015 Plaintiff moved for leave to file an amended complaint. *See* Dkt. No. 34. By Decision and Order dated September 28, 2015, Magistrate Judge Dancks granted in part and denied in part Plaintiff's motion. *See* Dkt. No. 38. Specifically, Magistrate Judge Dancks granted the motion to amend as to the following claims: (1) violation of Plaintiff's rights under the First Amendment Free Exercise Clause by Defendants Pelc, Martin, and Thomas in denying Plaintiff an Eid ul-Adha ("Eid") religious meal on October 27, 2012; (2) violation of Plaintiff's rights under the First Amendment Free Exercise Clause by Defendant Thomas in refusing to provide Plaintiff with halal meals and sahur bags from July 29, 2013, through August 3, 2013, thereby preventing him from participating in the mandatory religious fasting during Ramadan; (3) violation of Plaintiff's rights under the First Amendment Free Exercise Clause by Defendants Hewite and Steinberg in preventing Plaintiff from participating in the religious congregational prayer during Shawwal and denying him a halal meal on August 12, 2013; (4) retaliation in violation of Plaintiff's First Amendment rights and violation of his rights under the Fourteenth Amendment Equal Protection Clause by Defendants Chutty and Gifford with regard to the September 17, 2012, urine test, cell search, planting a weapon in Plaintiff's cell, and filing a false misbehavior report against Plaintiff, resulting in his placement in the Special Housing Unit ("SHU"); (5) First Amendment retaliation claim against Defendant Steinberg with regard to the August 12, 2013, urine test and retaliatory false misbehavior report; and (6) First Amendment retaliation claim against Defendant Fagan for placing Plaintiff in administrative segregation in retaliation for filing grievances to redress violations of his rights under the First Amendment Free Exercise Clause. *See* Dkt. No. 39.

On October 13, 2015, Defendants moved to dismiss the remaining claims in Plaintiff's amended complaint. *See* Dkt. No. 41. In a June 2, 2016 Order and Report-Recommendation, Magistrate Judge Dancks recommended that the Court grant in part and deny in part Defendants' motion. *See* Dkt. No. 45. Specifically, Magistrate Judge Dancks recommended that the Court deny the motion to dismiss with respect to the following claims: (1) the First Amendment Free Exercise claim against Defendants Pelc, Martin, and Thomas with respect to the denial of his Eid meal (First Cause of Action); (2) the First Amendment Free Exercise claim against Defendant Thomas with respect to the denial of Ramadan meals (Second Cause of Action); (3) the First Amendment Free Exercise claim against Defendants Hewite and Steinberg with respect to

the denial of participation in religious congregation prayer during Shawwal and denial of a halal meal; (4) the First Amendment retaliation claim against Defendant Steinberg with respect to filing a false misbehavior report; (5) the First Amendment retaliation claim against Defendant Gifford with respect to planting a weapon in Plaintiff's cell and filing a false misbehavior report (Fourth Cause of Action); (6) the First Amendment retaliation claim against Defendant Chutty with respect to issuing a false misbehavior report (Fourth Cause of Action); and (7) the First Amendment retaliation claim against Defendant Fagan with respect to placing Plaintiff in administrative segregation (Fourth Cause of Action). *See id.*

***2** On June 20, 2016, Defendants objected to Magistrate Judge Dancks' Order and Report-Recommendation insofar as it recommended denying the motion to dismiss as to Plaintiff's retaliation claim against Defendants Chutty and Gifford for allegedly planting a weapon in Plaintiff's cell and writing a false misbehavior report. *See* Dkt. No. 46. Currently before the Court is Magistrate Judge Dancks' Order and Report-Recommendation and Defendants' objection thereto.

## II. DISCUSSION [2]

### A. Standard of Review

When specific objections to a magistrate judge's report-recommendation and order are made, the district court makes a "*de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). If, however a party files "[g]eneral or conclusory objections or objections which merely recite the same arguments [that he presented] to the magistrate judge," the magistrate judge's recommendations are reviewed for clear error. *O'Diah v. Mawhir*, No. 9:08-CV-322, 2011 WL 933846, at *1 (N.D.N.Y. Mar. 16, 2011) (citations and footnote omitted). The court will "ordinarily refuse to consider argument[s] that could have been, but [were] not, presented to the magistrate judge in the first instance." *Mosley v. Superintendent of Collins Corr. Facility*, No. 9:11-CV-1416, 2015 U.S. Dist. LEXIS 6985, at *5, 2015 WL 277133 (N.D.N.Y. Jan. 22, 2015) (citations omitted). Upon review, "the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

A litigant's failure to file objections to a magistrate judge's report and recommendation, even when that litigant is proceeding *pro se*, waives any challenge to the report on appeal. *See Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003) (holding that, "[a]s a rule, a party's failure to object to any purported error or omission in a magistrate judge's report waives further judicial review of the point" (citation omitted)). A *pro se* litigant must be given notice of this rule; notice is sufficient if it informs the litigant that the failure to timely object will result in the waiver of further judicial review and cites pertinent statutory and civil rules authority. *See Frank v. Johnson*, 968 F.2d 298, 299 (2d Cir. 1992); *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (holding that a *pro se* party's failure to object to a report and recommendation does not waive his right to appellate review unless the report explicitly states that failure to object will preclude appellate review and specifically cites 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and former 6(e) of the Federal Rules of Civil Procedure).

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the party's claim for relief. *See Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007) (citation omitted). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Although a court's review of a motion to dismiss is generally limited to the facts presented in the pleading, the court may consider documents that are "integral" to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002)).

***3** To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," *see* Fed. R. Civ. P. 8(a)(2), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief[,]' " *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *see id.* at 555 (citation omitted), and present claims that are "plausible on [their] face," *id.* at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation omitted). "Where a complaint pleads facts that are 'merely consistent

with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief." ' " *Id.* (quoting [*Twombly*, 550 U.S.] at 557, 127 S. Ct. 1955). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly*, 550 U.S. at 558, or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the[ ] complaint must be dismissed[,]" *id.* at 570.

"[I]n a *pro se* case, the court must view the submissions by a more lenient standard than that accorded to 'formal pleadings drafted by lawyers.' " *Govan v. Campbell*, 289 F. Supp. 2d 289, 295 (N.D.N.Y. 2007) (quoting *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L.Ed. 2d 652 (1972)) (other citations omitted). The Second Circuit has opined that the court is obligated to "make reasonable allowances to protect *pro se* litigants" from inadvertently forfeiting legal rights merely because they lack a legal education. *Govan v. Campbell*, 289 F. Supp. 2d 289, 295 (N.D.N.Y. 2007) (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)).

**B. Defendants' objection**

Plaintiff claims that Defendants Chutty and Gifford violated his First Amendment right to freely exercise his religious beliefs when they retaliated against him because of his leadership position as a Muslim Shia inmate facilitator by planting a weapon in his cell during a search and filing a false misbehavior report against him. Defendants contend that Magistrate Judge Dancks erred in her Order and Report-Recommendation when she held that Plaintiff made a plausible showing that " 'maintaining a leadership position in the Muslim community as Muslim Shia inmate facilitator at Auburn was conduct protected under the First Amendment for purposes of his retaliation claim against Chutty and Gifford.' " Dkt. No. 46 at 1 (quoting Dkt. No. 45 at 21). Defendants contend that they were unable to find any legal authority to support the proposition that "an inmate's mere employment as a Muslim Shia inmate facilitator, or any religious leader, constitutes protected conduct for a retaliation claim." *Id.*

"To prevail on a First Amendment retaliation claim, an inmate must establish '(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) there was a causal connection between the protected speech [or conduct] and the adverse action.' " *Holland v. Goord*, 758 F.3d 215, 225 (2d Cir. 2014) (quoting *Espinal v. Goord*, 558 F.3d 119, 128 (2d Cir. 2009)).

In the present matter, the Court finds that Magistrate Judge Dancks correctly determined that "for purposes of this motion to dismiss Plaintiff has made a plausible showing that maintaining a leadership position in the Muslim community as Muslim Shia inmate facilitator at Auburn was conduct protected under the First Amendment for purposes of his retaliation claim against Chutty and Gifford." Dkt. No. 45 at 21. First, the Court notes that, in their motion to dismiss, Defendants do not directly address whether serving as the Muslim Shia inmate facilitator could be considered protected speech or conduct in their motion to dismiss. *See* Dkt. No. 41-1 at 14. In his amended complaint, Plaintiff specifically alleges that he was retaliated against because of his leadership position in the Muslim community, as well as for filing grievances to redress continuous and repetitive violations of his rights. *See* Dkt. No. 39 at ¶ 117. In their motion, Defendants do not address whether Plaintiff's position in the Muslim community could satisfy the first element of his retaliation claim. Instead, they simply focus on the allegation that he was retaliated against for " 'filing grievances to redress the continuous and repetitive violations of his free exercise of religion rights.' " Dkt. No. 41-1 at 14. Although specific situations may warrant a district court addressing arguments raised for the first time in objections to a magistrate judge's report and recommendation, this is not such a situation. *See Stock Market Recovery Consultants Inc. v. Watkins*, No. 13-cv-193, 2015 WL 5771997, *3 (E.D.N.Y. Sept. 30, 2015) (discussing situations in which a district court should exercise its discretion to consider arguments raised for the first time in objections to a magistrate judge's report and recommendation) (citations omitted). Plaintiff clearly and specifically alleges that he was retaliated against "because of plaintiff's leadership position in the [M]uslim community...." Dkt. No. 39 at ¶ 117. Defendants have failed to raise any excuse for its failure to make this argument before Magistrate Judge Dancks and permitting Defendants to belatedly raise this theory would thwart " 'the efficiencies gained through the Magistrates Act[.]' " *Watkins*, 2015 WL 5771997, at *3. As such, they cannot properly raise this argument for the first time in their objections to the Order and Report-Recommendation. *See Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137-38 (2d Cir. 1994) (finding no abuse of discretion in the district court's refusal to consider supplemental evidence); *Pan American World Airways, Inc. v. International Bhd. of Teamsters*, 894 F.2d 36, 40 n.3 (2d Cir. 1990) (holding that the district court did not abuse its discretion in denying the plaintiff's request to present additional testimony where the plaintiff offered no

justification for not offering the testimony at the hearing before the magistrate judge).

***4** Second, even assuming Defendants had not waived this argument, the Court nevertheless finds that Magistrate Judge Dancks correctly determined that, for purposes of the pending motion to dismiss, Plaintiff has plausibly alleged that maintaining a leadership position in the Muslim community as Muslim Shia inmate facilitator at Auburn was conduct protected under the First Amendment. In *Lowrance v. Coughlin*, 862 F. Supp. 1090 (S.D.N.Y. 1994), the plaintiff "held several leadership roles in the Muslim community while in prison, including Imam, or prayer leader." *Id.* at 1102. The plaintiff testified that, upon arriving a new facility, one of the defendant's informed the plaintiff that he was not welcome "because his institutional files demonstrated that [he] was a Muslim leader." *Id.* at 1106. The plaintiff also alleged that the guards repeatedly harassed him for "proselytizing" and counseling other Muslim prisoners. *See id.* Additionally, the plaintiff introduced evidence that the reasons for his repeated transfers between prison facilities was due to the fact that he was " 'a leader in the Muslim Community and has a strong following of inmates.' " *Id.* at 1108. After a bench trial, the court found that this evidence, among other things, was sufficient to support the plaintiff's First Amendment retaliation claims. *See id.* at 1106-1120.

Similar to the situation in *Lowrance*, the Court finds that Plaintiff has plausibly alleged that his leadership position as a Muslim Shia inmate facilitator is protected speech or conduct for purposes of his retaliation claim. "Inmate Facilitators" are specifically discussed in DOCCS Directive Number 4202, Religious Programs and Practices. The directive discusses the important role the facilitators play in ensuring that all inmates can practice their particular religion and details the process by which such facilitators are selected and approved. *See Religious Programs and Practices*, Attachment "A," at 12, *available at* http://www.doccs.ny.gov/directives/4202.pdf (last visited September 2, 2016). According to the directive, it is clear that inmate facilitators actively engage with prison staff to help ensure that inmates of their faith are able to follow the various tenets of their religion. *See id.* at 12-13. Considering Plaintiff's *pro se* status and the special solicitude afforded to such litigants, the Court finds that Plaintiff has plausibly alleged that his position as a Muslim Shia inmate facilitator is a protected activity or conduct for purposes of this claim. *See Dolan v. Connolly*, 794 F.3d 290, 294-95 (2d Cir. 2015) (holding that prison officials violate the First Amendment when they retaliation against a prisoner "for filing or voicing grievances on behalf of a prison population as a member of an inmate grievance body" and suggesting that the First Amendment extends not just to activity by an inmate in filing his own grievance, but also to activity that assists another inmate to file a grievance).

**C. Remaining claims**

Upon careful review of the remaining claims addressed in the Order and Report-Recommendation, to which neither party objected, the Court finds no clear error in Magistrate Judge Dancks' findings and adopts the Order and Report-Recommendation as the opinion of the Court. Accordingly, Defendants' motion to dismiss the amended complaint is granted in part and denied in part as set forth in Magistrate Judge Dancks' June 2, 2016 Order and Report-Recommendation.

## III. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

**ORDERS** that Magistrate Judge Dancks' June 2, 2016 Order and Report-Recommendation is **ADOPTED** in its entirety for the reasons stated therein; and the Court further

**ORDERS** that Defendants' motion to dismiss the amended complaint (Dkt. No. 41) is **GRANTED** in part and **DENIED** in part; and the Court further

**ORDERS** that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

**IT IS SO ORDERED.**

Dated: September 6, 2016.

**All Citations**

Not Reported in Fed. Supp., 2016 WL 4617242

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## Footnotes

1 Plaintiff was released from the custody of the Department of Corrections and Community Supervision in June of 2015. *See* Dkt. No. 27.

2 For a complete statement of the underlying facts in this case, the Court refers the parties to Magistrate Judge Dancks' June 2, 2016 Order and Report-Recommendation. Dkt. No. 45.

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United States District Court, N.D. New York.

Bruce HENSON, Plaintiff,
v.
GAGNON, et al., Defendants.

9:13-CV-0590 (GTS/TWD)
|
Signed December 9, 2015
|
Filed 12/10/2015

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***ORDER AND REPORT AND RECOMMENDATION***

THÉRÈSE WILEY DANCKS, United States Magistrate Judge

***1** Plaintiff Bruce Henson commenced this *pro se* civil rights action under 42 U.S.C. § 1983 asserting claims arising out of his incarceration at Upstate Correctional Facility ("Upstate").[1] (*See generally* Dkt. No. 1[2].) A number of originally named defendants and the majority of the claims asserted by Plaintiff in his complaint were dismissed from the case by the Hon. Glenn T. Suddaby, Chief United States District Judge, on initial review done pursuant to 28 U.S.C. §§ 1915(e) and 1915A. (Dkt. No. 10.) The sole remaining claims are: (1) First Amendment retaliation claims against Defendant Sergeant Brian Gagnon ("Gagnon") and Corrections Officer Eric DuFrane ("DuFrane") for allegedly planting evidence in his cell during a cell search and filing a false Misbehavior Report against Plaintiff based upon the planted evidence, and including a factually unsupported smuggling claim in retaliation for grievances he had filed against Upstate staff; (2) a First Amendment retaliation claim against Hearing Officer Don Haug ("Haug"), incorrectly sued as "Hough," based upon Haug's decision and the penalty imposed by him in Plaintiff's disciplinary hearing on the Misbehavior Report; and (3) a claim for deliberate indifference against former Upstate Superintendent David Rock ("Rock") for failing to correct misconduct by his staff after receiving reports disclosing it. *Id*. at 34–35.

This matter is now before the Court on the remaining Defendants' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. (Dkt. No. 40.) Plaintiff has opposed the motion. (Dkt. No. 43.) For the reasons that follow, the Court recommends that Defendants' motion for summary judgment be granted.

## I. BACKGROUND

### A. Random Cell Frisk/Search Procedure at Upstate

According to Defendant Gagnon, he receives a list of randomly selected cells to be frisked/searched for security purposes on a daily basis and, in his role as Sergeant, often directs corrections officers under his supervision to conduct the cell searches and to report any concerns to him. (Dkt. No. 40–4 at 11 4–5.) Gagnon receives the list of cells to be searched in a memorandum from the Captain's Office to the Watch Commander. *Id*. at ¶ 6. The day and time of the searches is varied to prevent predictability, which would be counterproductive to the searches. *Id*. at ¶ 5. Plaintiff acknowledged in his deposition testimony that random searches are done at every facility. (Dkt. No. 40–5 at 13.)

***2** Defendant Corrections Officer DuFrane has been trained to do cell searches by the Department of Corrections and Community Supervision ("DOCCS"). (Dkt. No. 40–3 at 11 3–4.) DuFrane, who conducts multiple routine cell searches a week at the direction of his supervisor, described the routine cell frisk/search procedure in his Declaration. *Id*. at ¶ 7. In accordance with DOCCS policy, DuFrane examines the cell for contraband, including drugs, and weapons or items. *Id*. at ¶ 9. DuFrane also examines State and personal property of the inmate for damage. *Id.* at ¶ 10.

For security purposes, DuFrane is required to examine the bars, windows, locks/locking mechanisms, interior and exterior walls, secure cabinets, vents, and lighting and plumbing fixtures in the cell, because an inmate could hide contraband in the lighting and plumbing. *Id*. at 11 11–12. As a part of the inspection, DuFrane looks at the security screws in the cover of the light in the cell and the screws in the doors. *Id*. at ¶ 13.

According to DuFrane, Special Housing Unit ("SHU") inmates have an exercise area outside of their cell which is controlled by DOCCS, and only a DOCCS official can open or close the exercise door. *Id.* at ¶¶ 14–15. The control panel to open and close the exercise door is covered by a steel plate secured by security screws, which are difficult to unthread in order to prevent an inmate from opening the panels to hide contraband or escape to the outside area. *Id*. at ¶¶ 16–17. Loosening of the screws generally requires a special security screwdriver. *Id*. at ¶ 17. However, DuFrane knows of many inmates who have removed the screws, despite the difficulty, and many more who have attempted to do so by unthreading them. *Id*. at ¶ 18. The integrity of the security screws is important to facility security, not only because if an inmate were to remove the screws he could open the exercise door, but because the inmate could gain access to the cavity behind the steel plate and use the space for contraband, and the screws could be used as a weapon or part of a weapon. *Id.* at ¶¶ 19–22.

**B. Random Cell Frisk/Search of Plaintiff's Cell on November 29, 2012**

Plaintiff was transferred from the SHU at Coxsackie Correctional Facility to the SHU at Upstate on September 24, 2012. (Dkt. No. 43–1 at 4.) Plaintiff's cell, B–14 in SHU 8 Building, which he shared with his cellmate Edward Saldano ("Saldano"), was randomly selected to be frisked/searched for security purposes on November 29, 2012. (Dkt. No. 40–4 at ¶¶ 9–10.) Plaintiff and Saldano had been moved into the cell on October 25, 2012. (Dkt. No. 40–8 at 37.)

Gagnon was working the 2:00pm to 10:00pm shift on 8–Block on November 29, 2012, when he received the memorandum identifying the cells to be searched that day. (Dkt. No. 40–4 at ¶¶ 7–9 and 8.) Plaintiff's cell was included on the list. *Id*. at 8. Although according to Gagnon, he directed Defendant DuFrane to conduct the cell frisk/search that included Plaintiff's cell, (Dkt. No. 40–4 at ¶ 11), Plaintiff claims that there were seven corrections officers, as well as Gagnon, present during the search. [3] (Dkt. No. 1 at 27–28.)

DuFrane informed Plaintiff and Saldano that he was going to search their cell and, in accordance with DOCCS policy, removed them from the cell to conduct the search. (Dkt. Nos. 1 at 27; 40–3 at ¶¶ 32–33.) During the search, DuFrane discovered that the steel plate covering the electronic mechanism that controlled the exercise door was missing a screw and that three other screws were loose. (Dkt. No. 40–3 at ¶ 34.) DuFrane was concerned with what he perceived to be a serious violation that threatened the safety and security of staff, inmates, and the public. *Id*. at ¶ 35. DuFrane was most troubled by the missing screw, which could have been used as an anchor for a dragline to pass contraband from one cell to another, or passed to another inmate who might have used it to make a weapon. *Id*. at ¶ 36.

***3** DuFrane also found ripped up State sheets which had been formed into draglines in the corner of Plaintiff's cell. *Id*. at ¶ 37. According to DuFrane, draglines are used to drag, fish, or throw contraband from one cell to another. *Id*. DuFrane, who given both the missing screw and the draglines, was concerned that Plaintiff had been passing contraband, or was intending to pass or receive contraband, immediately notified his area Supervisor Gagnon. *Id*. at ¶¶ 38–39. Upon being notified, Gagnon went to Plaintiff's cell and saw both the draglines and the missing and loose screws in the steel plate. (Dkt. No. 40–4 at ¶¶ 13–14.) Gagnon also considered it to be a very serious violation that threatened the safety and security of the facility. *Id*. at ¶ 15. According to Gagnon and DuFrane, Plaintiff had not told either one of them about the missing and loose screws or torn sheets prior to the search on November 29, 2012, although he was required to advise staff of both of those things. (Dkt. Nos. 40–3 at ¶¶ 49–50; 40–4 at ¶¶ 26–27.)

DuFrane drafted a Misbehavior Report, dated November 29, 2012, describing what he had seen and found in Plaintiff's cell. (Dkt. Nos. 40–3 at ¶¶ 42–43; 40–8 at 46.) In accordance with DOCCS policy, DuFrane took photographs of the draglines and steel plate with the missing and loose screws and attached them to the Misbehavior Report. (Dkt. Nos. 40–3 at ¶¶ 45–46; 408 at 47–48.) Gagnon signed off on the Misbehavior Report and endorsed the charges of smuggling in violation of 114.10, tampering with property in violation of 116.11, and property damage or loss in violation of 116.10. (Dkt. Nos. 40–4 at ¶ 24; 40–8 at 46.)

Plaintiff claims that DuFrane planted the evidence used to support the Misbehavior Report during the November 29, 2012, cell search. (Dkt. Nos. 1 at 42–43; 43 at ¶ 24.) In addition, he claims that DuFrane and Gagnon filed a Misbehavior Report that contained a smuggling claim for which there was no factual basis for the purpose of increasing the Tier level of the Report to Tier III. (Dkt. Nos. 1 at 42–43.) Plaintiff contends that they did so in retaliation for grievances filed against other corrections officers by Plaintiff, and a grievance Plaintiff's cellmate Saldano filed against DuFrane on or about October 27, 2012, regarding Saldano's failure to

receive his underclothes for forty days of his confinement at Upstate. (Dkt. No. 1 at 24, 26, 42–43.)

### C. Hearing Before Defendant Haug on the Misbehavior Report

At the designation of the Superintendent at Upstate, Defendant Haug, Food Service Administrator at Upstate, serves as an impartial hearing officer for Tier III disciplinary hearings. (Dkt. No. 40–8 at ¶¶ 2–3.) Haug was appointed by the Superintendent to act as the impartial hearing officer at the disciplinary hearing on the Misbehavior Report on Plaintiff prepared by DuFrane and endorsed by Gagnon *Id*. at ¶ 8–9. Prior to the hearing, Haug received the Misbehavior Report and attached pictures of the steel plate with the missing and loose screws and draglines found in Plaintiff's cell during the search. *Id*. at ¶¶ 12, 17–19.

According to Haug, he commenced Plaintiff's disciplinary hearing on December 6, 2012, and the hearing was concluded on January 4, 2013. *Id*. at ¶ 8. The hearing was conducted on December 6, 2012, December 20, 2012, and January 4, 2013. *Id.* at 14, 20, and 30. On the initial hearing date, Plaintiff brought up the smuggling charge and asked Haug what it was he was supposed to have smuggled. *Id*. at 18–19. Haug indicated they would deal with the smuggling issue when the hearing resumed. *Id*. Plaintiff brought up the smuggling charge again on January 4, 2013, noting that he was charged with smuggling even though the Misbehavior Report said nothing about smuggling. *Id*. at 36. No witness testimony was given on December 6, 2012. *Id*. at 14–19.

Corrections Officer Keleher testified at Plaintiff's request when the hearing resumed on December 20, 2012. (Dkt. No. 40–8 at ¶ 25 and 20–21.) Plaintiff claimed that no search had been conducted before he and his cellmate were moved into the cell on October 25, 2012, and he wanted Keleher to testify as the signator of the October 26, 2012, Cell Inventory Checklist, which Plaintiff claimed was a fake. (Dkt. Nos. 1 at 17–18, 20; 43 at 4; 43–1 at ¶ 27.) Plaintiff also claimed that his signature on the Checklist had been forged. *Id*. Presumably, Plaintiff was attempting to establish that there had been no search, and therefore no record of whether the screws were already missing and loose and there were already draglines made from sheets in the cell when Plaintiff and Saldano were moved in.

***4** Keleher testified regarding the October 26, 2012, Checklist prepared in connection with a cell search he had done on Plaintiff's cell, which indicated that there were no issues with the cell, *i.e*., no contraband found or torn sheets. (Dkt. No. 40–8 at ¶ 20 and 49.) Keleher testified that the Checklist included both his and Plaintiff's signatures.[4] *Id*. at 20. When asked by Haug, Keleher testified that the inspection was done on October 26, 2012, because Plaintiff and his cellmate had to be in the cell at the time of the inspection. *Id*. at 22. Plaintiff disagreed, stating that the New York Code of Rules and Regulations and DOCCS Supervision Directive 4933 required that the inspection be done before inmates are moved into a cell. *Id*. at 23.

Plaintiff informed Haug that he needed the testimony of the movement officer regarding when Plaintiff had been moved into the cell, and Haug indicated he would "check on the movement thing" but would have to postpone the hearing again. *Id*. Plaintiff also requested that the SHU log and cell search logs and a videotape of the search on November 29, 2012, be provided to him. *Id*. at 26–28. Haug told Plaintiff there was no videotape that would show inside the cell. *Id*. at 28. When the hearing resumed on January 4, 2013, Haug gave Plaintiff a copy of the cell search log he had requested. *Id*. at 30. Haug also told Plaintiff that he had compared his handwriting sample with the signature on the October 26, 2012, Checklist and concluded that they were pretty close, and there was no reason to think someone else had signed it for him. *Id*. Plaintiff renewed his request that the movement officer be called to testify as to the exact date he moved into the cell in order to clarify that a cell search was not done the day he and Saldano moved in. *Id*. at 30. According to Plaintiff, the movement officer had testified at Saldano's disciplinary hearing that they were moved into the cell on October 25, 2012. (Dkt. No. 40–8 at 31.) Haug, who noted that Keleher had not disputed Plaintiff's claim that he moved in on October 25, 2012, and had indicated that the inspection was not done before Plaintiff moved in but on October 26, 2012, did not call the movement officer as a witness at the hearing *Id*. at 31–32.

Plaintiff's cellmate Saldano was called to testify on January 4, 2013, at Plaintiff's request. *Id*. at 34. Saldano testified that at his disciplinary hearing, Keleher had testified that he did a cell inspection on October 26, 2012, prior to Saldano coming into the cell, and that the movement officer had testified that Plaintiff and Saldano had moved into the cell on October 25, 2012. *Id.* at 37. Saldano testified he knew for a fact that Keleher did not do a cell search before they moved in because while they were in the hallway, before they had been in the cell, Keleher opened the door and trashed up the garbage left in the cell by the former occupant and kicked it into the hall. *Id.* at 37–38.

At Haug's request, Gagnon also testified on January 4, 2013. *Id*. at 40. Haug showed Gagnon the Misbehavior Report and, presumably showing him the picture of the torn sheets, asked Gagnon if they were the sheets he took out of Plaintiff's cell. Gagnon answered in the affirmative and indicated that the sheets were piled in the corner of the cell. *Id*.

**D. Haug's Determination and Modification on Review**

Haug issued a written decision on the charges in the Misbehavior Report on January 4, 2013. (Dkt. No. 40–8 at 42–43.) Haug found Plaintiff guilty of 114.10 smuggling, 116.10 property damage or loss, and 116.10 tampering with property. *Id*. Haug relied upon the Misbehavior Report written by DuFrane and sponsored by Gagnon; the October 26, 2012, Cell Inventory Checklist showing no damage and bearing what Haug had determined to be Plaintiff's signature; Keleher's testimony regarding a search having been done before Plaintiff entered the cell; Saldano's testimony that Keleher was in the cell before he and Plaintiff entered it; Gagnon's testimony that the sheets were found in the corner near the exercise pen; Plaintiff's failure to present evidence contradicting the testimony; and the invalidity of Plaintiff's objections. (Dkt. No. 40–8 at 42–43.)

***5** Haug imposed a penalty of nine months in SHU, three months loss of good time, and restitution in the amount of $13.00 for the two sheets and one pillow case. *Id*. Haug's articulated rationale for the penalty was to act as a deterrent for future misconduct that could result in a more serious disposition. *Id*.

Plaintiff requested a discretionary review of Haug's determination by Defendant Superintendent Rock. (Dkt. No. 43–1 at 9.) Rock explained in his determination of January 9, 2013, that a superintendent's discretionary review looked at the charges and the penalty imposed, and that the superintendent had discretion to lower the amount of the penalty, which he declined to do. *Id.* On appeal to Albert Prack, Director SHU/Inmate Discipline, Prack modified Haug's determination by dismissing the 114.10 smuggling charge on the grounds that it could not be substantiated by the Misbehavior Report. (Dkt. No. 43–1 at 21–22.)

**E. Plaintiff's Retaliation Claim Against Haug**

The sole claim against Haug that survived initial review is Plaintiff's claim that Haug's discliplinary hearing decision and penalty, which Plaintiff claimed were not based upon the evidence, were "vengeful" and in retaliation for grievances Plaintiff submitted against Haug prior to the completion of the disciplinary hearing. (Dkt. No. 1 at 8.) The first grievance against Haug, dated December 19, 2012, complained that Haug's false statement that he had to seek an extension on the disciplinary hearing on Plaintiff's Misbehavior Report because of an extensive witness list was retaliatory and vengeful and violated Plaintiff's constitutional rights because it kept him in SHU for a longer period of time.[5] (Dkt. No. 43–1 at 5–7.)

In the second grievance against Haug, dated December 21, 2012, Plaintiff reiterated his previous grievance against Haug regarding the allegedly false pretenses relied upon by Haug in seeking an extension on the disciplinary hearing. Plaintiff also complained about the escorting officers, including a claim that Haug looked to one of the escorting officers as if asking her for advice each time Plaintiff asked for pertinent pieces of evidence from the hearing officer, further showing Haug's bias and partiality. *Id*. at 25.

There is no evidence in the record that either of the grievances was filed with the Inmate Grievance Office at Upstate or acted upon by the Inmate Grievance Resolution Committee. According to Plaintiff's complaint, as of January 17, 2013, well after Haug had issued the allegedly retaliatory decision and penalty, Plaintiff had yet to receive grievance numbers or any acknowledgment of receipt of the grievances dated December 19, 2012, and December 21, 2012, from the Inmate Grievance Program. (Dkt. No. 1 at 13.) Plaintiff allegedly complained to Rock that Sergeant Gravlin withheld the grievances Plaintiff filed against Haug until the conclusion of the disciplinary hearing so that he could then dismiss the grievances. *Id*. at 8, 41.

***6** Haug denies having had any knowledge during the hearing that Plaintiff had filed a grievance against him. (Dkt. No. 40–8 at ¶¶ 31–33.) Haug asserts that given his lack of knowledge, he was not influenced in any way by the grievance in rendering a decision and issuing a disposition in Plaintiff's disciplinary hearing. *Id*. at ¶ 34. According to Haug, he conducts numerous hearings each year, and "[t]he fact that a grievance may be filed against me by a disgruntled inmate, who is the subject of a disciplinary hearing over which I am presiding, does not affect my partiality in any manner, and in no way influences my disciplinary decisions." *Id*. at ¶ 35. Haug claims that he reasonably relied upon the hearing evidence in rendering his decision and defended his decision as supported by the evidence and the penalty imposed as

reasonable and appropriate to the charges. *Id*. at ¶¶ 37–56. Haug contends that despite Prack's dismissal of the smuggling charge on appeal, it was reasonable, based on the hearing evidence, for Haug to find Plaintiff guilty of all of the charges in the Misbehavior Report. *Id*. at ¶¶ 58–61.

Plaintiff testified at his deposition that he "never grieved the hearing" because "there was no reason for [him] to file a grievance for the hearing because he appealed it." (Dkt. No. 40–5 at 14, 16.)

**F. Supervisory Claim Against Rock**

Claims that former Upstate Superintendent Rock exercised deliberate indifference by failing to take corrective action after receiving, reviewing, and responding to complaints and letters regarding staff misconduct and other matters are spread throughout Plaintiff's complaint. Plaintiff has alleged that Rock failed to take action when Plaintiff complained about the operation of the grievance procedure in connection with a September 29, 2012, grievance filed by him against Corrections Officer Sevey ("Sevey") regarding Plaintiff's medical diet food trays. (Dkt. No. 1 at 9.) According to Plaintiff, Rock responded but took no action. *Id*. On October 16, 2012, Plaintiff submitted another complaint to Rock regarding bias and the partial investigation done on the Sevey grievance. *Id*. at 21. On October 26, 2012, Rock denied the grievance which, according to Plaintiff, proved that the investigation had been suspect and biased. *Id.* In addition, Plaintiff complained to Rock regarding Sevey's alleged disposal of Plaintiff's library request forms under the direction of Sergeant Gravlin on January 5, 2013, thereby denying Plaintiff access to courts as needed. *Id*. at 8. Plaintiff also complained to Rock about F.O.I.L. Officer L. Demarse's intentional withholding of documentary evidence requested by Plaintiff regarding the deprivation order issued as a result of the November 29, 2012, cell search findings. *Id*.

Plaintiff has also alleged that he sent a complaint to Rock on November 16, 2012, expressing disappointment with the Progressive Inmate Movement System ("PIMS"). *Id*. at 10. Plaintiff was interviewed by Gagnon, who allegedly made a threatening comment, and no further action was taken. *Id.* On November 15, 2012, Plaintiff sent Rock another complaint regarding his disappointment with PIMS. *Id*. at 26. According to Plaintiff, Rock did nothing towards resolving the situation and advised Plaintiff to go through the grievance program. *Id*.

Plaintiff has alleged he authored another complaint, which was sent to Rock on November 28, 2012, because Sevey was purposely not giving him toilet tissue. *Id*. at 26–27. Plaintiff contends that he received the same response from Rock (presumably being told to go through the grievance procedure) despite letting Rock know the urgency of the situation. *Id*.

When in addition to filing a grievance, Plaintiff complained to Rock about the allegedly retaliatory cell search by DuFrane, false Misbehavior Report, and deprivation order by Gagnon, Rock again responded in the same way, with no resolution even after numerous complaints. (Dkt. No. 1 at 11–12, 28.) Plaintiff also complained to Rock about Haug's bias while the disciplinary hearing was ongoing, Haug's bias in imposing a penalty of nine months in SHU when it was not based on the evidence presented, and Sergeant Gravlin's actions in holding the grievances Plaintiff filed against Haug until the conclusion of the hearing so that he could then dismiss them. *Id*. at 8, 41.

***7** According to Rock, inmates file numerous grievances and complaints on a daily basis, and it was not typical for him to personally review or respond to all such complaints in his role as Superintendent. (Dkt. No. 40–6 at ¶ 7.) Rock often delegated investigations surrounding complaints of staff misconduct or conditions of confinement to his executive staff and fully relied upon their investigations and findings in the matters. *Id*. at ¶ 8. Complaints received regarding staff misconduct might be referred to the Deputy of Security of the Facility for review and investigation or to the Inspector General's Office if seemed appropriate. *Id*. at ¶ 9. As Superintendent, Rock also advised inmates to seek resolution through the Inmate Grievance Program, which was designed to provide an orderly, fair, and expeditious method of resolving complaints. *Id*. at ¶ 10. Rock would review the findings of those to whom he had given a complaint for investigation, and if it was determined that no evidence existed to support an inmate complaint, Rock would have no reason to believe any further action was required. *Id.* at ¶ 13.

Rock has no recollection of ever being made aware of any violation of Plaintiff's constitutional or federal rights. *Id*. at ¶ 15.

## II. APPLICABLE LEGAL STANDARDS FOR SUMMARY JUDGMENT MOTIONS

Summary judgment may be granted only if the submissions of the parties taken together "show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251–52 (1986).

The party moving for summary judgment bears the initial burden of showing, through the production of admissible evidence, that no genuine issue of material fact exists. *Salahuddin v. Goord,* 467 F.3d 263, 272–73 (2d Cir.2006). A dispute of fact is "genuine" if "the [record] evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248.

Only after the moving party has met this burden is the nonmoving party required to produce evidence demonstrating that genuine issues of material fact exist. *Salahuddin,* 467 F.3d at 272–73. The nonmoving party must do more than "rest upon the mere allegations ... of the [plaintiff's] pleading" or "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986). "Conclusory allegations, conjecture and speculation ... are insufficient to create a genuine issue of fact." *Kerzer v. Kingly Mfg.,* 156 F.3d 396, 400 (2d Cir.1998).

A party opposing summary judgment is required to submit admissible evidence. *See Spiegel v. Schulmann,* 604 F.3d 72, 81 (2d Cir.2010) ("It is well established that in determining the appropriateness of a grant of summary judgment, [the court] ... may rely only on admissible evidence.") (citation and internal quotation marks omitted). A plaintiff's verified complaint is to be treated as an affidavit. *Colon v. Coughlin,* 58 F.3d 865, 872 (2d Cir.1995) ("A verified complaint is to be treated as an affidavit ... and therefore will be considered in determining whether material issues of fact exist ....") (citations omitted).

In *Jeffreys v. City of New York,* 426 F.3d 549, 554 (2d Cir.2005), the Second Circuit reminded that on summary judgment motions "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could *reasonably* find for the plaintiff." "To defeat summary judgment, ... nonmoving parties "may not rely on conclusory allegations or unsubstantiated speculation." *Jeffreys,* 426 F.3d at 554 (citation and internal quotation marks omitted). "At the summary judgment stage, a nonmoving party must offer some hard evidence showing that its version of the events is not wholly fanciful." *Id.* (citation and internal quotation marks omitted). Statements "that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment." *Bickerstaff v. Vassar Coll.,* 196 F.3d 435, 452 (2d Cir.1999).

***8** In determining whether a genuine issue of material fact exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Major League Baseball Props., Inc. v. Salvino, Inc.,* 542 F.3d 290, 309 (2d Cir.2008). "[I]n a *pro se* case, the court must view the submissions by a more lenient standard than that accorded to formal pleadings drafted by lawyers." *Govan v. Campbell,* 289 F.Supp.2d 289, 295 (N.D.N.Y.2003) (quoting *Haynes v. Kerner,* 404 U.S. 519, 520 (1972)) (other citations omitted). The Second Circuit has opined that the court is obligated to "make reasonable allowances to protect *pro se* litigants" from inadvertently forfeiting rights merely because they lack a legal education. *Id.* (quoting *Traguth v. Zuck,* 710 F.2d 90, 95 (2d Cir.1983)). The court is obliged to "read [the *pro se* party's] supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest." *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994). However, this does not mean that a *pro se* litigant is excused from following the procedural formalities of summary judgment, *Govan,* 289 F.Supp.2d at 295, and "a *pro se* party's 'bald assertion,' unsupported by evidence, is not sufficient to overcome a motion for summary judgment." *Cole v. Artuz,* No. 93 Civ. 5981(WHP)(JCF), 1999 WL 983876 at *3, 1999 U.S. Dist. LEXIS 16767 at *8 (S.D.N.Y. Oct. 28, 1999) [6] (citing *Carey v. Crescenzi,* 923 F.2d 18, 21 (2d Cir.1991)). Moreover, the latitude accorded a *pro se* litigant "does not relieve him of the obligation to respond to a motion for summary judgment with sufficient admissible evidence." *Hamlett v. Srivastava,* 496 F.Supp.2d 325, 328 (S.D.N.Y.2007) (citing *Jorgensen v. Epic/Sony Records,* 351 F.3d 46, 50 (2d Cir.2003)).

## III. ANALYSIS

### A. Deficiencies in Plaintiff's Opposition Papers

As required under N.D.N.Y. Local Rule ("L.R.") 7.1, Defendants have filed a statement of material facts with citations to the summary judgment record. (Dkt. No. 40–1.) Although Plaintiff has responded to the statement of material facts filed by Defendants (Dkt. No. 43–1 at 34–38), he has failed to do so in the manner required under L.R. 7.1(a)(3). Under the rule, the opposing party's response to the movant's statement of material facts "shall mirror the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in matching numbered paragraphs. Each denial shall set forth a specific citation to the record where the factual issue arises." L.R. 7.1(a)(3).

Plaintiff's "Challenge to Statement of Facts" consists of challenges to and commentary on certain of Defendants' numbered statements of material fact, with citations to the record limited to Plaintiff's challenges to statements 45, 56, 60, 63, 75–76, 86, 89, 95, and 99. (Dkt. No. 43–1 at 34–38.) As to those, Plaintiff's citations are not to admissible evidence. Where, as in this case, a party has failed to respond to the movant's statement of material facts in the manner required under L.R. 7.1(a)(3), the L.R. provides that facts in the movant's statement will be accepted as true (1) to the extent they are supported by evidence in the record, [7] and (2) the nonmovant, if proceeding *pro se,* has been specifically advised of the possible consequences of failing to respond to the motion. [8] *See Champion v. Artuz,* 76 F.3d 483, 486 (2d Cir.1996).

***9** The Second Circuit, acknowledging a court's broad discretion to determine whether to overlook a failure to comply with local rules, has held that "while a court is not required to consider what the parties fail to point out in their [local rule statements of material facts], it may in its discretion opt to conduct an assiduous review of the entire record even where one of the parties has failed to file such a statement." *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir.2001) (citation and internal quotation marks omitted). The Court has opted to review the entire record in this case. However, the Court's review has revealed that Plaintiff's opposition, consisting of unsigned commentary on Defendants' submissions and a number of documents, but no affidavits or declarations, contains very little in the way of admissible evidence. Moreover, since Plaintiff's complaint is not verified, it may not properly be treated as an affidavit in opposition to Defendants' motion. [9] (*See* Dkt. No. 1.)

**B. Exhaustion of Administrative Remedies on Plaintiff's Retaliation Claim Against Haug**

Although it is not entirely clear, it appears that Defendant Haug may be arguing that he is entitled to summary judgment on Plaintiff's retaliation claim on the ground that Plaintiff failed to exhaust his administrative remedies with regard to the claim. (Dkt. No. 40–2 at 3.) Plaintiff has acknowledged that he did not file a grievance with regard to the hearing. (Dkt. No. 40–5 at 14, 16.) However, "[w]here an inmate's federal claims arise directly out of a disciplinary or administrative segregation hearing, ... (*e.g.*, a claim of denial of procedural due process), he exhausts his administrative remedies by presenting his objections in the administrative appeals process, not by filing a separate grievance instead of or in addition to his ordinary appeal." *Sweet v. Wende Correctional Facility,* 514 F.Supp.2d 411, 413 (W.D.N.Y.2007) (internal quotations omitted) (quoting *Rosales v. Bennett,* 297 F.Supp.2d 637, 639 (W.D.N.Y.2004)); *see also Harvey v. Harder,* No. 9:09–CV–154 (TJM/ATB), 2012 WL 4093792, at * 4, 2012 U.S. Dist. LEXIS 132248, at * 16 (N.D.N.Y. July 31, 2012) ("Generally, exhaustion of administrative remedies involves utilizing the facility's grievance process, however, when an inmate's federal claims arise directly out of a disciplinary or administrative segregation hearing or confinement, he exhausts his administrative remedies by presenting his objections in the administrative appeals process.").

Plaintiff pursued an administrative appeal from Haug's decision. (Dkt. No. 43–1 at 21–22.) However, since Plaintiff's submission on that appeal is not included in the record, the Court cannot determine whether Plaintiff raised his retaliation claim in the appeal. Because failure to exhaust is an affirmative defense, a defendant bears the burden of showing by a preponderance of the evidence that a plaintiff has failed to exhaust his available administrative remedies. *See Murray v. Palmer,* No. 9:03–CV–1010 (GTS/GHL), 2010 WL 1235591, at *4, 2010 U.S. Dist. LEXIS 32014, at *16 (N.D.N.Y. Mar. 31, 2010). Haug has not done so. Therefore, the Court recommends that summary judgment in his favor for failure to exhaust be denied.

**C. Retaliation Claims**

To prevail on a First Amendment retaliation claim, an inmate must establish "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) there was a causal connection between the protected speech [or conduct] and the adverse action." *Holland v. Goord,* 758 F.3d 215, 225 (2d Cir.2014) (quoting *Espinal v. Goord,* 558 F.3d 119, 128 (2d Cir.2009)); *see also Gill v. Pidlypchak,* 389 F.3d 379, 380 (2d Cir.2004) (quoting *Dawes v. Walker,* 239 F.3d 489, 492 (2d Cir.2001), *overruled on other grounds, Swierkiewicz v. Sorema,* 534 U.S. 506, 508 (2002)). "Adverse action" for purposes of a retaliation claim has been defined objectively as "retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising ... constitutional rights." *Pidlypchak,* 389 F.3d at 381.

***10** An inmate bears the burden of showing that "the protected conduct was a substantial or motivating factor" in the defendants' decision to take action against the plaintiff. *Graham v. Henderson,* 89 F.3d 75, 79 (2d Cir.1996). In

evaluating whether a causal connection exists between the plaintiff's protected activity and a prison official's actions, "a number of factors may be considered, including: (i) the temporal proximity between the protected activity and the alleged retaliatory act; (ii) the inmate's prior good disciplinary record; (iii) vindication at a hearing on the matter; and (iv) statements by the defendant concerning his or her motivation. *Baskerville v. Blot,* 224 F.Supp.2d 723, 732 (S.D.N.Y.2002) (citing *Colon,* 58 F.3d at 873). "The causal connection must be sufficient to support an inference that the protected conduct played a substantial part in the adverse action." *Id.* A showing of temporal proximity, without more, has been found insufficient to survive summary judgment. *See Roseboro v. Gillespie,* 791 F.Supp.2d 353, 370 (S.D.N.Y.2011) (citations omitted).

Even if a plaintiff makes the appropriate showing of retaliation, a defendant may avoid liability if he demonstrates that he would have taken the adverse action in the absence of the protected conduct. *See Scott v. Coughlin,* 344 F.3d 282, 287–88 (2d Cir.2003) ("Regardless of the presence of retaliatory motive, ... a defendant may be entitled to summary judgment if he can show ... that even without the improper motivation the alleged retaliatory action would have occurred.") (citation omitted); *Roseboro,* 791 F.Supp.2d at 371.

Because of the relative ease with which claims of retaliation can be incanted, courts have scrutinized retaliation claims with particular care. *See Flaherty v. Coughlin,* 713 F.2d 10, 13 (2d Cir.1983), *overruled on other grounds, Swierkiewicz,* 534 U.S. 506. As the Second Circuit has noted,

> [t]his is true for several reasons. First, claims of retaliation are difficult to dispose of on the pleadings because they involve questions of intent and are therefore easily fabricated. Second, prisoners' claims of retaliation pose a substantial risk of unwarranted judicial intrusion into matters of general prison administration. This is so because virtually any adverse action taken against a prisoner by a prison official—even those otherwise not rising to the level of a constitutional violation—can be characterized as a constitutionally proscribed retaliatory act.

*Dawes*, 239 F.3d at 491. Accordingly, claims of retaliation must be supported by specific facts; conclusory statement are not sufficient. *Flaherty*, 713 F.2d at 13. Even where a complaint or affidavit contains specific assertions, the allegations "may still be deemed conclusory if [they are] (1) 'largely unsubstantiated by any other direct evidence' and (2) 'so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in the complaint.' " *Smith v. Woods*, No. 9:03–CV–480 (DNH/GHL), 2006 WL 1133247, at * 3 & n.11, 2006 U.S. Dist. LEXIS 29745, at * 14 n.11 (N.D.N.Y. Apr. 24, 2006) (quoting *Jeffreys*, 426 F.3d at 554–55), *aff'd.* 219 F. App'x 110 (2d Cir.2007).

1. *Retaliation Claim Against DuFrane*

Plaintiff claims that DuFrane planted evidence in his cell during a cell search, filed a false Misbehavior Report against him based upon the planted evidence, and added a factually unsupported smuggling charge in retaliation for grievances Plaintiff had filed against Upstate staff and a grievance Plaintiff's cellmate had filed against DuFrane. (Dkt. No. 1 at 24, 26, 42–43.)

The filing of grievances has been found to constitute protected First Amendment conduct for purposes of a retaliation claim. *See David v. Goord,* 320 F.3d 346, 352–53 (2d Cir.2003). Furthermore, the planting of evidence and issuance of a false misbehavior report based upon that evidence has been found to constitute adverse action for purposes of a retaliation claim. *See Pidlypchak*, 389 F.3d at 384 (filing a false misbehavior report constitutes adverse action); *Colon v. Coughlin*, 58 F.3d 865, 872–73 (2d Cir.1995) (finding adverse action where plaintiff alleged that prison officials had planted contraband in his cell); *Williams v. King*, 56 F.Supp.3d 308, 328 (S.D.N.Y.2014) (the alleged planting of contraband and allegedly disproportionate administrative actions that follow have been found serious enough to constitute adverse action for retaliation purposes); *Payne v. Axelrod*, 871 F.Supp. 1551, 1556 (N.D.N.Y.1995) (valid § 1983 retaliation claim stated where prisoner alleged that corrections officers planted contraband evidence in his cell and falsely charged him with possession).

***11** However, DuFrane has denied Plaintiff's claim that he planted evidence and filed a false misbehavior report. According to DuFrane, he was not asked by any corrections official to plant evidence in Plaintiff's cell or damage his exercise door by removing screws, and he did not have torn, ripped sheets with him or a special screwdriver to unthread the screws when he went to Plaintiff's cell to conduct a routine search. (Dkt. No. 40–3 at ¶¶ 56–57.) In addition, according to DuFrane, he had not been in Plaintiff's cell prior to the search, and he would not have had an opportunity to damage Henson's state owned property or the steel plate during the search as there is such limited access to the cell. *Id*. at ¶ 58. DuFrane contends that he acted in accordance with DOCCS policy when he found the damage in Plaintiff's cell by advising Gagnon, taking photographs, and drafting the Misbehavior Report that was approved by Gagnon. *Id*. at ¶ 59. Furthermore, while the Misbehavior Report does not appear to include facts clearly supporting the smuggling charge that was dismissed by Prack on appeal, the review officer left in the smuggling charge and designated the Misbehavior Report as a Tier III. [10] (Dkt. No. 40–8 at ¶ 6.)

The record is devoid of evidence, admissible or otherwise, that supports Plaintiff's conclusory assertion that he was framed by DuFrane, and that the Misbehavior Report was based upon evidence planted by DuFrane. *See Jeffreys,* 426 F.3d 554 (nonmoving parties may not rely on "conclusory allegations or unsubstantiated speculation" to defeat summary judgment). In his unsigned, unverified response to DuFrane's Declaration, Plaintiff claims that inmates have no access to the special screwdrivers DuFrane claimed were generally required to unthread the security screws. (Dkt. Nos. 40–3 at ¶ 17; 43–1 at 45.) However, according to DuFrane, he has known of many inmates who have removed security screws and others who have attempted to do so by unthreading them. (Dkt. No. 40–3 at ¶ 18.)

At his disciplinary hearing, Plaintiff attempted to defend against the charges in the Misbehavior Report by attacking the validity of the October 26, 2012, Cell Inventory Checklist indicating no contraband was found in the room and his signature, and claiming that the cell was not inspected prior to the time he and his cellmate were moved there on October 25, 2012. (Dkt. No. 40–8 at 17–18, 49.) However, Keleher testified that an inspection of Plaintiff's cell was done, and the October 26, 2012, Cell Inventory Checklist was valid. (Dkt. No. 40–8 at 20–22.) Furthermore, Plaintiff's cellmate Saldano testified that when he and Plaintiff were in the hallway before being allowed in the cell, Saldano saw Keleher open the door, trash up the garbage left in the cell by the former occupant, and kick it in the hall. (Dkt. No. 40–8 at 37–38.) One could reasonably infer from Saldano's testimony that had there been draglines in the cell at the time, they would have been discovered and placed in the trash that Keleher kicked into the hall. Even if Plaintiff had been able to establish that there had been no search of the cell when Plaintiff moved in a month before the random frisk/search by DuFrane, that would not necessarily support an inference that the draglines and missing and loose screw were there when Plaintiff and his cellmate moved in. Furthermore, if they were, Plaintiff was required to report it to facility staff and did not. (Dkt. No. 40–3 at ¶¶ 49–50.)

***12** Even if there were sufficient evidence to create an issue of material fact with regard the adverse action element of Plaintiff's retaliation claim, his claim against DuFrane falters on the third element, establishment of a causal connection between the protected conduct and the adverse action. *See Holland,* 758 F.3d at 225. There is no evidence in the record that Plaintiff himself had filed a grievance against DuFrane prior to the November 29, 2012, random frisk/search of his cell, and Plaintiff has conceded that his retaliation claim is based upon grievances he filed against other corrections officers and a grievance Saldano filed against DuFrane.

Plaintiff's exercise of his First Amendment rights was not involved in Saldano's filing of a grievance against DuFrane regarding Saldano's undergarments. Moreover, as a general matter, it is difficult to establish that a defendant had cause to retaliate against a plaintiff for filing a grievance against another party, in this case other corrections officers. *See Wright v. Goord,* 554 F.3d 255, 274 (2d Cir.2009) (dismissing retaliation claim against a corrections officer when the only alleged basis for retaliation was a complaint about an incident involving another corrections officer); *Guillory v. Ellis,* No. 9:11–CV–600 (MAD/ATB), 2014 WL 4365274, at 18, 2014 U.S. Dist. LEXIS 120709, at * 49 (N.D.N.Y. Aug. 28, 2014) ("it is difficult to establish one defendant's retaliation for complaints against another defendant"); *Roseboro,* 791 F.Supp.2d at 369 (failure by plaintiff to provide any basis to believe corrections counselor would retaliate for a grievance in which she was not personally named); *Ciaprazi v. Goord,* No. 9:02–CV–915 (GLS/DEP), 2005 WL 3531464, at * 8–9, 2005 U.S. Dist. LEXIS 38232, at * 22 (N.D.N.Y. Dec. 22, 2005) (granting summary judgment and dismissing retaliation claim based only on plaintiff's conclusory allegations that the manifest falsity of the misbehavior report and testimony during the

disciplinary hearing indicate the disciplinary matters were motivated by retaliatory animus due to grievances plaintiff filed against individuals other than the defendants involved in the disciplinary hearing).

As noted above, conclusory statements are not sufficient to support causation on retaliation claims; the claims must be supported by specific facts. *Flaherty,* 713 F.2d at 13. The record is devoid of evidence, admissible or otherwise, that supports Plaintiff's conclusory assertion that DuFrane planted evidence and issued the Misbehavior Report based upon evidence in retaliation for grievances Plaintiff had filed against other corrections officers. DuFrane states in his Declaration that he was not the subject of any grievance filed by Plaintiff at the time of the cell search. (Dkt. No. 40–3 at ¶ 55.) DuFrane does not work closely with the Inmate Grievance Program and would not be aware of how many grievances Plaintiff had filed against other corrections officers prior to November 29, 2012. *Id*. at ¶ 52. Moreover, according to DuFrane, it was of no concern to him whether Plaintiff files grievances against other corrections officer, and Plaintiff doing so would not motivate DuFrane to treat Plaintiff one way or another. *Id*. at ¶ 53. DuFrane was never asked by any corrections official to plant evidence in Plaintiff's cell or file a false misbehavior report against him. *Id*. at ¶ 56. There is no evidence disputing DuFrane's statement that he was unaware of grievances previously filed by Plaintiff prior to conducting the cell search on November 29, 2012, and therefore was in no way influenced by such grievances in conducting the search or filing the Misbehavior Report. *Id*. at ¶ 54.

***13** In summary, Plaintiff's grievances were protected First Amendment conduct, and planting evidence and issuing a false misbehavior report based on the evidence constitutes adverse action. However, in light of the absence of record evidence establishing that DuFrane engaged in the alleged adverse action, and the lack of specific facts showing that DuFrane acted in retaliation for Plaintiff's filing of grievances against other corrections officers, the Court recommends that DuFrane be granted summary judgment.

2. *Retaliation Claim Against Gagnon*

Plaintiff also claims that Gagnon was involved in planting evidence in his cell during the cell search, that he signed off on DuFrane's allegedly false Misbehavior Report against Plaintiff based upon the planted evidence, and that he endorsed the factually unsupported smuggling charge in retaliation for grievances Plaintiff had filed against Upstate staff. (Dkt. No. 1 at 24, 26, 42–43.) As with DuFrane, Plaintiff claims that Gagnon engaged in those acts in retaliation for Plaintiff's filing of grievances against other corrections officials prior to the November 29, 2012, cell search. (Dkt. No. 1 at 24, 26, 42–43.)

According to Gagnon, after being advised by DuFrane of the results of the search of Plaintiff's cell, he went to the cell and personally saw the sheets, or draglines, in the corner of Plaintiff's cell and the missing and loose screws in the steel plate. (Dkt. No. 40–4 at ¶¶ 12–14.) Gagnon signed off on the Misbehavior Report having personally seen the draglines and missing and loose screws. *Id.* at ¶ 24. Gagnon has admitted endorsing the charges, including the smuggling charge. *Id*. at ¶ 25. Gagnon has denied ever asking any corrections official to falsify a misbehavior report against Plaintiff. *Id*. at ¶ 37.

The record contains no evidence, admissible or otherwise, that Gagnon was involved in planting evidence in Plaintiff's cell or knowingly approving a Misbehavior Report based upon planted evidence. As with DuFrane, Plaintiff may not rely on his "conclusory allegations" to defeat summary judgment. *Jeffreys,* 426 F.3d at 554.

Even if Plaintiff had raised a material question of fact on the issue of adverse action, his retaliation claim against Gagnon, as with his claim against DuFrane, falters on the issue of causation. As discussed above, it is difficult to establish that a defendant had cause to retaliate against a plaintiff for filing a grievance against other corrections officers. *Wright,* 554 F.3d 255 at 274. Gagnon's statement that he was unaware of grievances filed by Plaintiff prior to the November 29, 2012, cell search is undisputed by record evidence. (Dkt. No. 40–4 at ¶ 39.) Plaintiff's claim that Gagnon was acting in retaliation is wholly conclusory which, as with DuFrane, is not enough to survive summary judgment. *See Flaherty,* 713 F.2d at 13 (claims of retaliation must be supported by specific facts).

In light of the foregoing, the Court recommends that summary judgment be granted in Gagnon's favor.

3. *Retaliation Claim Against Haug*

Plaintiff's submission of grievances against Haug was protected First Amendment conduct. However, even were the Court to assume for purposes of this motion that Haug's

decision finding Plaintiff guilty on all charges and the penalty imposed by him constituted adverse action, Plaintiff has failed to raise a question of material fact on the issue of causation. According to Haug, he had no knowledge during the hearing that Plaintiff had submitted grievances against him. (Dkt. No. 40–8 at ¶¶ 31–33.) Moreover, according to Haug, the fact that a disgruntled inmate who is the subject of a disciplinary hearing before him files a grievance does not affect his impartiality or influence his decisions or the penalty imposed by him. *Id*. at ¶ 34. Haug claims to have relied upon the evidence in rendering his decision, and he contends that despite Prack's dismissal of the smuggling charge on appeal, it was reasonable for him to have found Plaintiff guilty on the charge based on the evidence. [11] *Id*. at ¶ 35.

***14** Plaintiff's submissions, albeit largely inadmissible, offer support for Haug's claim that he did not know Plaintiff had filed grievances against him during the hearing. According to Plaintiff, Sergeant Gravlin withheld Plaintiff's grievances against Haug from filing during the disciplinary hearing, and as of January 17, 2013, nearly two weeks after the hearing ended, Plaintiff had yet to receive grievance numbers or any acknowledgment of receipt of the grievances. (Dkt. No. 1 at 8, 13, 41.) Given Haug's denial and the absence of evidence showing that Haug had knowledge of the grievances at the time he rendered his decision and imposed penalty at the disciplinary hearing, no reasonable juror could conclude that a causal connection existed between Plaintiff's grievances against Haug and Haug's decision and penalty in the disciplinary hearing.

Therefore, the Court recommends that Defendant Haug be granted summary judgment. [12]

**D. Deliberate Indifference Claim Against Rock**

Plaintiff claims that after receiving, reviewing, and responding to a number of complaints regarding staff misconduct submitted by Plaintiff, Rock failed or correct, or was deliberately indifferent to the misconduct. [13] (Dkt. No. 1 at 9–10, 13, 21, 26–29, and 41.) The now dismissed Defendants alleged by Plaintiff to have committed constitutional violations to which Rock was allegedly indifferent included Sevey, Gravlin, and Demarse. [14] Plaintiff also claims indifference by Rock with regard to his claims against DuFrane, Gagnon, and Haug. *Id*. at 11–12, 28.

The law is clear that "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *McKinnon v. Patterson,* 568 F.2d 930, 934 (2d Cir.1977). "Because vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal,* 556 U.S. at 676. ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat* superior."). "Holding a position in a hierarchical chain of command, without more, is insufficient to support a showing of personal involvement." *Groves v. Davis*, No. 9:11–CV–1317 (GTS/RFT), 2012 WL 651919, at *6, 2012 U.S. Dist. LEXIS 25367, at *22–23 (N.D.N.Y. Feb. 28, 2012) (citing *McKinnon*, 568 F.2d at 934); *see also Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.2003) (a "mere 'linkage in the prison chain of command' is insufficient to implicate a state commissioner of corrections ... in a § 1983 claim") (quoting *Ayers v. Coughlin*, 780 F.2d 205, 210 (2d Cir.1985)). Therefore, "a plaintiff must ... allege a tangible connection between the acts of a defendant and the injuries suffered." *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir.1986).

The Second Circuit has held that personal involvement by a supervisor necessary to state a claim under § 1983 may be found where: "(1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring." *Colon,* 58 F.3d at 873. [15]

***15** Plaintiff's supervisory liability claim appears to fall within the second and fifth *Colon* categories. However, where as in this case a plaintiff "has not established any underlying constitutional violation, [he] cannot state a claim for § 1983 supervisor liability." *Elek v. Incorp. Vill. of Monroe,* 815 F.Supp.2d 801, 807–08 (S.D.N.Y.2011) (collecting cases); *see also Tompkins v. City of New York*, 50 F.Supp.3d 426, 434 (S.D.N.Y.2014) (same); *Vail v. Lashway*, No. 9:12–CV–1245 (GTS/RFT), 2014 WL 4626490, at * 20, 2014 U.S. Dist. LEXIS 129516, at * 50 (N.D.N.Y. Sept. 15, 2014) (same).

Plaintiff's underlying § 1983 claims against Sevey, Demarse, Gravlin, and all other originally named Defendants except DuFrane, Gagnon, and Haug, were dismissed for failure to

state a claim on initial review. (Dkt. No. 10 at 50–51.) There is no evidence in the summary judgment record establishing that any of the original defendants dismissed from the case on initial review violated Plaintiff's constitutional rights. In addition, the Court is recommending summary judgment in DuFrane, Gagnon, and Haug's favor with respect to the retaliation claims remaining against them after initial review. If the District Court adopts this Court's recommendations, Plaintiff will also have failed to establish underlying constitutional violations against those Defendants. Therefore, the Court recommends that Rock be granted summary judgment on Plaintiff's supervisory liability claim.

**ACCORDINGLY** it is hereby

**RECOMMENDED** that Defendants' motion for summary (Dkt. No. 40) be **GRANTED**, and it is hereby

**ORDERED** that the Clerk provide Plaintiff with copies of all unpublished decisions cited herein in accordance with *Lebron v. Sanders,* 557 F.3d 76 (2d Cir.2009) (per curiam).

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. ***FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW***. *Roldan v. Racette,* 984 F.2d 85 (2d Cir.1993) (citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72.

Attachment



2005 WL 3531464
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Roberto CIAPRAZI, Plaintiff,
v.
Glenn S. GOORD; et al. Defendants.

No. Civ.9:02CV00915(GLS/. | Dec. 22, 2005.

**Attorneys and Law Firms**

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Hon. Eliot Spitzer, Attorney General, State of New York, The Capitol, Albany, New York, for the Defendants.

Patrick F. MacRae, Assistant Attorney General, of counsel.

***MEMORANDUM-DECISION AND ORDER***

SHARPE, J.

**I. *Introduction***

*1 Plaintiff *pro se* Roberto Ciaprazi brings this action pursuant to 42 U.S.C. § 1983. Ciaprazi alleges that the defendants violated his First, Eighth, and Fourteenth Amendment rights. Pending are Ciaprazi's objections to Magistrate Judge David E. Peebles' Report-Recommendation. Upon careful consideration of the arguments, the relevant parts of the record, and the applicable law, the court adopts the Report-Recommendation in its entirety. [1]

**II. *Procedural History***

Ciaprazi commenced this action on July 15, 2002. *Dkt. No. 1.* On February 27, 2003, the defendants moved for summary judgment. *Dkt. No. 39.* On March 14, 2004, Judge Peebles issued a Report-Recommendation which recommended that the defendants' motion for summary judgment be granted in part, and denied in part. *Dkt. No. 47.* Ciaprazi objected. *Dkt. No. 48.* His objections are now before this court.

**III. *Discussion*** [2]

**A. *Standard of Review***

When objections to a magistrate judge's Report-Recommendation are lodged, the Court makes a "*de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *See* 28 U.S.C. § 636(b)(1). After such a review, the court may "accept, reject, or modify, in whole or in part, the findings or the recommendations made by the magistrate judge." *Id.* Having reviewed the unobjected to portions of the Report-Recommendation, the court adopts them in their entirety because they are not clearly erroneous.

**B. *Report-Recommendation***

Although Judge Peebles examined the merits of the case and found that many of Ciaprazi's claims were meritless, this court only conducts *de novo* review of the objected to portions of the Report-Recommendation. Specifically, Judge Peebles found no evidence tending to establish that the adverse actions taken against Ciaprazi were motivated by disciplinary animus, and thereby recommended dismissing Ciaprazi's First Amendment retaliation claim. *Report and Recommendation, pp. 13-23, 45, Dkt. No. 47.* He further found that Ciaprazi lacked standing to bring a cause of action challenging the Tier III disciplinary system under the Eighth Amendment. *Id. at 27.* Lastly, Judge Peebles dismissed both of Ciaprazi's claims under international law and his personal involvement claim against defendant Goord. *Id. at 41, 43-4.* [3]

**C. *Objections***

**1. *First Amendment Claim***

First, Ciaprazi contends that his retaliation claim under the First Amendment should not have been dismissed because the defendants did not satisfy their initial evidentiary burden. *Pl. Objs. pp. 1-7, Dkt. No. 48.* Specifically, he argues that Judge Peebles did not properly consider the falsity of a misbehavior report as evidence of retaliation by the defendants.

The court rejects Ciaprazi's argument because as Judge Peebles noted, a prisoner does not have a right to be free from false misbehavior reports. *Freeman v. Rideout,* 808 F.2d 949, 951 (2d Cir.1986). As Judge Peebles further noted, the defendants have shown sufficient evidence to establish that there is no specific link between Ciaprazi's grievances and the

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defendants' actions. Accordingly, Ciaprazi's retaliation claim is dismissed.

**2. *Eighth Amendment***

*2 Next, Ciaprazi objects to Judge Peebles' finding that he did not have standing to challenge the disciplinary authority of the Tier III system. *Pl. Objs. p. 7, Dkt. No. 48.* This objection is without merit. As Judge Peebles noted, since the length of Ciaprazi's disciplinary confinement was within the bounds of constitutionally acceptable levels, he has no standing to sue. Second, as Judge Peebles further noted, any generalized complaints Ciaprazi has against the Tier III system are more appropriately addressed as part of his due process claims. Accordingly, Ciaprazi's claims against the Tier III system are dismissed.

**3. *Human Rights Claims***

Ciaprazi also objects to Judge Peebles' finding that he did not have claims under the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Ciaprazi's contention is without merit. As Judge Peebles noted, Ciaprazi has failed to establish that these treaties provide private causes of action. *See Report Recommendation p. 41, Dkt. No. 47.* Accordingly, Ciaprazi's claims under international law are dismissed.

**4. *Personal Involvement***

Ciaprazi also objects to Judge Peebles' dismissal of his personal involvement claim against defendant Goord. As Judge Peebles noted, Ciaprazi merely made allegations against Goord in his supervisory capacity. Accordingly, the personal involvement claim against Goord was properly dismissed.

**IV. *Conclusion***

Having reviewed the objected-to portions of the Report and Recommendation *de novo*, the remainder under a clearly erroneous standard, and Ciaprazi's objections, this court accepts and adopts the recommendation of Judge Peebles for the reasons stated in the March 14, 2004 Report-Recommendation.

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that defendants' summary judgment motion (Dkt. No. 39) be GRANTED in part, and that all of plaintiff's claims against defendant Goord, and all of plaintiff's claims against the remaining defendants except his procedural due process and Eighth Amendment conditions of confinement causes of action, be DISMISSED, but that to the extent of those claims, with respect to which triable issues of fact exist, the defendants' motion be DENIED.

IT IS SO ORDERED.

**REPORT AND RECOMMENDATION**

PEEBLES, Magistrate J.

Plaintiff Roberto Ciaprazi, a New York State prison inmate who by his own account has frequently lodged complaints against prison officials and been openly critical of their practices, has commenced this proceeding against the Commissioner of the New York State Department of Correctional Services ("DOCS") and several of that agency's employees pursuant to 42 U.S.C. § 1983, complaining of constitutional violations occurring during the course of his confinement. In his complaint, Ciaprazi alleges that 1) a misbehavior report was filed against him in retaliation for his having previously engaged in protected activity; 2) he was deprived of procedural due process during the course of the hearing and resulting adverse finding associated with that misbehavior report; and 3) the conditions which he faced while in disciplinary confinement, following that hearing, were cruel and unusual. Plaintiff asserts claims pursuant to the First, Eighth and Fourteenth Amendments to the United States Constitution, as well as under certain international human rights accords.

*3 Currently pending before the court is a motion by the defendants seeking summary judgment dismissing plaintiff's complaint in its entirety. Having carefully reviewed the record in light of Ciaprazi's claims and defendants' arguments, I find that many of plaintiff's causes of action are devoid of merit, as a matter of law, and thus subject to dismissal. Because I find the existence of genuinely disputed issues of material fact surrounding certain of plaintiff's claims, however, including notably his due process claim against defendants Melino, Kohl, Graham, Fitzpatrick, and Rogers, I recommend denial of defendants' motion seeking dismissal of plaintiff's claims against them.





**I. *BACKGROUND***

At the times relevant to his complaint, Ciaprazi was a prisoner entrusted to the custody of the DOCS. Plaintiff alleges that after having been confined within the Clinton Correctional Facility since February, 1997, he was transferred into the Coxsackie Correctional Facility in April of 1998. Complaint (Dkt. No. 1) ¶ 3. Ciaprazi asserts that while at Coxsackie he was administered more than a dozen allegedly false misbehavior reports, resulting in disciplinary cell confinement of over 200 days as well as other "deprivations" of an unspecified nature. *Id.* ¶ 3. Plaintiff contends that the issuance of those misbehavior reports was motivated by his having filed multiple complaints involving conduct of corrections workers and staff at Coxsackie.

At the heart of plaintiff's claims in this action is an incident which occurred at Coxsackie on July 31, 1999. On that date, Ciaprazi and various other prisoners were taken to an enclosed holding area to provide specimens for use in conducting drug screening urinalysis testing. As a result of an interaction occurring during the course of that testing between the plaintiff and defendant Fitzpatrick, a corrections lieutenant at the facility, plaintiff was placed in keeplock confinement and issued a misbehavior report on the following day, charging him with creating a disturbance (Rule 104.13), interference with a prison employee (Rule 107.10), harassment (Rule 107.11), refusal to obey a direct order (Rule 106.10), and making threats (Rule 102.10).[1] Defendants' Motion (Dkt. No. 39) Exh. A.

On July 31, 1999, following the underlying events and the imposition of keeplock confinement but prior to receiving the misbehavior report, plaintiff filed a grievance regarding the incident; plaintiff followed the filing of that grievance with a request on August 3, 1999 for prehearing release from confinement. Complaint (Dkt. No. 1) ¶ 19. Plaintiff received no response to that grievance. *Id.*

A Tier III disciplinary hearing in connection with the charges stemming from the July 31, 1999 incident was conducted by defendant Melino, a corrections counselor at Coxsackie, beginning on August 4, 1999, and concluding on August 10, 1999. Defendants' Motion (Dkt. No. 39) Exh. A at 2; *id.* Exh. B at 17, 152.[2] Defendant Cole, who according to the plaintiff is a civilian employee working at Coxsackie, was assigned as plaintiff's inmate assistant in connection with that hearing. The evidence adduced at that hearing included the misbehavior report, as well as testimony from the plaintiff, Corrections Lieutenant Fitzpatrick, Corrections Officer Marshal, Corrections Counselor Cole, Corrections Officer Rogers, Corrections Officer Simonik, Corrections Lieutenant McDermott, and Corrections Officer Phillips. Defendants' Motion (Dkt. No. 39) Exh. B.

*4 At the conclusion of the hearing, plaintiff was found guilty on all five counts, and a penalty of ten months of disciplinary confinement within the Coxsackie Special Housing Unit ("SHU"), with a corresponding loss of commissary, telephone and package privileges, was imposed.[3] Defendants' Motion (Dkt. No. 39) Exh. A at 00. Ciaprazi was not present when Hearing Officer Melino read her decision into the record, having previously been removed from the proceeding for engaging in what the hearing officer regarded as disruptive behavior. *See* Defendants' Motion (Dkt. No. 39) Exh. B at 152. Plaintiff appealed the hearing officer's decision to Donald Selsky, the DOCS Director of Special Housing/Inmate Disciplinary Program, who on September 27, 1999 affirmed the determination. Complaint (Dkt. No. 1) ¶ 51.

On August 20, 1999, plaintiff was transferred into the Upstate Correctional Facility, where he was apparently placed in SHU confinement to serve his disciplinary sentence. Complaint (Dkt. No. 1) ¶ 52. Plaintiff asserts that during that period, as well as while in keeplock confinement at Coxsackie, he was subjected to significant deprivations, which are described in summary fashion in his complaint, until September 16, 1999 when he was transferred into Clinton and exposed to similarly unpleasant conditions. *Id.* ¶¶ 53-55; Ciaprazi Aff. (Dkt. No. 46) ¶¶ 54-57. Plaintiff describes the keeplock confinement conditions at Coxsackie as even more unpleasant than those experienced in SHU, having included the deprivation of certain personal items such as food and snacks, toiletries, musical instruments, and other similar amenities. Ciaprazi Aff. (Dkt. No. 46) ¶ 54. The deprivations experienced by the plaintiff while in keeplock confinement at Coxsackie also entailed being subjected to "loud and non-stop noise from other frustrated prisoners yelling and banging on the doors," as well as the denial of access to the law library, books and other reading materials, and various programs available to those in general population. *Id.* ¶ 55. While at Upstate, plaintiff contends that he was exposed to cell lighting between 6:00 am and 1:00 am; he was denied reading materials; his medical requests "were ignored"; and he experienced cold conditions and the inability to participate in available recreation due to the lack of warm clothing. *Id.* ¶ 57; Complaint (Dkt. No. 1) ¶ 53. Similar conditions

were experienced by the plaintiff while at Clinton, including exposure to cold and lack of warm clothing and blankets, together with the deprivation of medical and mental health services. Ciaprazi Aff. (Dkt. No. 46) ¶ 57; Complaint (Dkt. No. 1) ¶ 54.

**II. *PROCEDURAL HISTORY***

The plaintiff, who is proceeding *pro se* and *in forma pauperis*, commenced this action on July 15, 2002. Dkt No. 1. Named as defendants in plaintiff's complaint are New York DOCS Commissioner Glenn S. Goord; Ellen J. Croche, Chair of the New York State Commission of Correction; Fred Lamey, a member of the New York Commission of Correction; Donald Selsky, the DOCS Director of Special Housing/ Inmate Disciplinary Program; Corrections Counselor Melino, whose first name is unknown; Cole, another DOCS employee whose complete name is unknown to the plaintiff; H.D. Graham, Deputy Superintendent for Security at Coxsackie; Corrections Lieutenant Fitzpatrick; and Corrections Officer Rogers. *Id.* In his complaint, plaintiff asserts nine separate causes of action, including claims 1) against defendants Rogers and Fitzpatrick, for infringement of his First Amendment right to free speech, and due process and equal protection violations under the United States Constitution, as well as under the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR"); 2) against defendant Graham, for failure to investigate plaintiff's grievance and to take actions to prevent infringement of his constitutional rights; 3) against defendant Cole, for failing to properly perform his duties as Ciaprazi's inmate assistant; 4) against defendant Melino, for deprivation of due process, based upon her conduct and bias during the disciplinary hearing; 5) of retaliation against defendant Melino, asserting that her actions were taken in response to the filing of complaints and grievances by the plaintiff; 6) against defendants Goord and Selsky, based upon their failure to overturn plaintiff's disciplinary conviction and remediate the constitutional deprivations suffered by him; 7) against defendants Goord and Selsky for retaliation, based on plaintiff's prior filing of complaints and grievances; 8) against defendants Croche, Lamey and Goord, in their supervisory capacities, for failure to properly oversee DOCS employees and enact policies to prevent such abuses; and 9) against defendants Goord, Croche and Lamey, for maintaining and fostering a policy of widespread and disportionate disciplinary punishments within the state's prison system. Complaint (Dkt. No. 1) at 14-16.Plaintiff's complaint seeks both injunctive and monetary relief. *Id.*

*5 Following the filing of an answer on behalf of the eight defendants who have been served in the action on December 3, 2002, generally denying plaintiff's allegations and setting forth various affirmative defenses, Dkt. No. 13, and pretrial discovery, on February 27, 2004 those defendants moved seeking entry of summary judgment on various bases.[4] Dkt. No. 39.Aided only by plaintiff's complaint, the record related to the relevant internal disciplinary proceedings against the plaintiffs, and answers by plaintiff to defendants' interrogatories, and without the benefit of either a transcript of plaintiff's deposition or any affidavits, other than from their counsel, defendants have moved for summary judgment seeking dismissal of plaintiff's claims on various grounds. *Id.* In their motion, defendants argue that 1) plaintiff has failed to offer proof from which a reasonable factfinder could conclude that cognizable constitutional violations have occurred; 2) defendants Goord and Selsky lack the requisite personal involvement in the constitutional violations alleged; and 3) plaintiff should be denied the injunctive relief which he seeks. *Id.* Plaintiff has since submitted papers in opposition to defendants' summary judgment motion.[5] Dkt. No. 46.Defendants' motion, which is now ripe for determination, has been referred to me for the issuance of a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local Rule 72.3(c).*See also*Fed.R.Civ.P. 72(b).

**III. *DISCUSSION***

**A. *Summary Judgment Standard***

Summary judgment is warranted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... 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); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10 (1986); *Security Insurance Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 82-83 (2d Cir.2004). When summary judgment is sought, the moving party bears an initial burden of demonstrating that there is no genuine dispute of material fact to be decided with respect to any essential element of the claim in issue; the failure to meet this burden warrants denial of the motion. *Anderson*, 477 U.S. at 250 n. 4, 106 S.Ct. at 2511 n. 4; *Security Insurance*, 391 F.3d at 83.





In the event this initial burden is met, the opposing party must show, through affidavits or otherwise, that there is a material issue of fact for trial.[6] Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553; *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511. When deciding a summary judgment motion, the court must resolve any ambiguities, and draw all inferences from the facts, in a light most favorable to the nonmoving party.*Wright v. Coughlin*, 132 F.3d 133, 137-38 (2d Cir.1998). Summary judgment is inappropriate where "review of the record reveals sufficient evidence for a rational trier of fact to find in the [nonmovant's] favor."*Treglia v. Town of Manlius*, 313 F.3d 713, 719 (2d Cir.2002) (citation omitted); *see also Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511 (summary judgment is appropriate only when "there can be but one reasonable conclusion as to the verdict.").

**B. *Plaintiff's First Amendment Retaliation Claim***

*6 Plaintiff's complaint asserts several claims of unlawful retaliation. In his first cause of action, plaintiff asserts that the actions of defendants Rogers and Fitzpatrick in confining him to a cell and issuing, or directing the issuance of, misbehavior reports were taken in retaliation for his having filed prior grievances and complaints regarding DOCS officials, including those working at Coxsackie. Complaint (Dkt. No. 1) First Cause of Action. Plaintiff's second claim alleges that defendant Rogers' failure to investigate plaintiff's complaint regarding the allegedly false misbehavior report, and to order his release from confinement pending a disciplinary hearing, were similarly retaliatory. *Id.* Second Cause of Action. Plaintiff further alleges in his fifth cause of action that the actions of Hearing Officer Melino, including in finding him guilty on all five counts, were motivated by Ciaprazi's filing of prior grievances and complaints. *Id.* Fifth Cause of Action. Plaintiff's seventh claim similarly attributes the failure of defendants Goord and Selsky to reverse the hearing officer's determination, on appeal, to retaliation for his having engaged in protected activity. *Id.* Seventh Cause of Action. Defendants maintain that these retaliation claims are legally deficient, and that the record contains no evidence upon which a factfinder could conclude that unlawful retaliation occurred.

Claims of retaliation like those asserted by the plaintiff find their roots in the First Amendment. *See Gill v. Pidlypchak*, 389 F.3d 379, 380-81 (2d Cir.2004). Central to such claims is the notion that in a prison setting, corrections officials may not take actions which would have a chilling effect upon an inmate's exercise of First Amendment rights. *See id.* at 81-83.Because of the relative ease with which claims of retaliation can be incanted, however, as exemplified by plaintiff's claims in this action, the courts have scrutinized such retaliation claims with particular care. *See Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir.1983). As the Second Circuit has noted,

> [t]his is true for several reasons. First, claims of retaliation are difficult to dispose of on the pleadings because they involve questions of intent and are therefore easily fabricated. Second, prisoners' claims of retaliation pose a substantial risk of unwarranted judicial intrusion into matters of general prison administration. This is so because virtually any adverse action taken against a prisoner by a prison official-even those otherwise not rising to the level of a constitutional violation-can be characterized as a constitutionally proscribed retaliatory act.

*Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir.2001) (citations omitted), *overruled on other grounds*, *Swierkewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 (2002).

In order to state a *prima facie* claim under section 1983 for unlawful retaliation in a case such as this, a plaintiff must advance non-conclusory allegations establishing that 1) the conduct or speech at issue was protected; 2) the defendants took adverse action against the plaintiff; and 3) there was a causal connection between the protected activity and the adverse action-in other words, that the protected conduct was a "substantial or motivating factor" in the prison officials' decision to take action against the plaintiff. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977); *Gill*, 389 F.3d at 380 (citing *Dawes*, 239 F.3d at 492). If the plaintiff carries this burden, the defendants must then show, by a preponderance of the evidence, that they would have taken action against the plaintiff "even in the absence of the protected conduct."*Mount Healthy*, 429 U.S. at 287, 97 S.Ct. at 576. Under this analysis, adverse action taken for both proper and improper reasons may be upheld if the action would have been taken based on the proper reasons alone. *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir.1996) (citations omitted).

*7 As can be seen, evaluation of claims of retaliation is a particularly fact-laden exercise, since such claims revolve around both the engaging in protected conduct and establishment of a nexus between that conduct and the adverse action ultimately taken. In making the required analysis in this case, however, the court is somewhat disadvantaged by virtue of the fact that defendants' summary judgment motion is not particularly enlightening as to the basis for their claim that the court is positioned to find, as a matter of law, that plaintiff's retaliation claims are lacking in merit.

In their motion the defendants, in the context of the now-familiar standard governing analysis of First Amendment retaliation claims, acknowledge that the plaintiff, who has lodged formal complaints of prison conditions and treatment of inmates, has engaged in protected activity. That plaintiff has filed an unusually large number of grievances and lawsuits, and taken other steps to complain publicly about matters associated with his confinement by the DOCS, is both apparent from the record before the court, and not controverted by the defendants. Indeed, in his response to defendants' summary judgment motion, plaintiff proudly states that he has "systematically exposed, vehemently criticized, and even ridiculed the inappropriate and arbitrary policies and actions of the staff at Coxsackie, including the actions of defendant Goord and of the Superintendent and Deputy Superintendents of Coxsackie." [7] Plaintiff's Affidavit (Dkt. No. 46) ¶ 32. Plaintiff has therefore established, at least for purposes of the instant motion, that he was engaged in protected activity sufficient to trigger First Amendment rights against acts taken in retribution for having voiced those types of complaints. *Graham*, 89 F.3d at 80; *Morello v. James*, 810 F.2d 344, 346-47 (2d Cir.1987).

Defendants argue, however, that the record is lacking in evidence to establish the requisite connection between that protected activity and the adverse actions taken against Ciaprazi by prison officials. Defendants' legal position is advanced, in part, in an affidavit from their counsel, Patrick F. MacRae, Esq., outlining the evidence relied upon by the defendants in making their motions. [8] Defendants also note, in further support of their motion, the requirement that retaliation claims rest upon more than mere conclusory allegations regarding the state of mind of prison officials. *See* Dkt. No. 39 at 8-9; *e.g., Flaherty*, 713 F.2d at 13.

As plaintiff correctly notes, the applicable pleading requirements, including Rule 8 of the Federal Rules of Civil Procedure, provide for mere "notice" pleading, and do not require that complaints contain every detail associated with a plaintiff's claims except in categories not applicable to this case. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-69, 113 S.Ct. 1160, 1162-63 (1993). Accordingly, the mere fact that the plaintiff's retaliation claims are pleaded in non-specific, conclusory terms does not alone entitle defendants to summary dismissal of those claims.

*8 In this case the defendants have satisfied their initial, modest threshold burden of establishing the lack of evidentiary support for plaintiff's retaliation claims. Though conventional wisdom might dictate the submission of affidavits from the primary actors, including notably defendants Rogers and Fitzpatrick, disavowing any retaliatory motives associated with their actions, defendants' decision to rely instead upon the lack of evidentiary support for plaintiff's retaliation claims, including through plaintiff's responses to defendants' interrogatories as well as the proceedings associated with the underlying disciplinary matter, is sufficient to cast the burden upon the plaintiff to come forward with evidence demonstrating the existence of genuinely disputed material issues of fact for trial with regard to those claims. *Celotex*, 477 U.S. at 323-34, 106 S.Ct. at 2553; *see also Anderson*, 477 U.S. at 249, 106 S.Ct. at 2511. There is no requirement under Rule 56 of the Federal Rules of Civil Procedure or otherwise that a party affidavit be submitted to support such a motion, which instead can be based upon any admissible evidence. *Id.*

To demonstrate that a reasonable factfinder could discern a nexus between plaintiff's filing of grievances and the disciplinary matters associated with the incident at issue, Ciaprazi essentially makes two arguments. First, he contends that the manifest falsity of the misbehavior report as well as testimony proffered during the disciplinary hearing give rise to an inference that the disciplinary matters were motivated toward retaliatory animus. Secondly, plaintiff argues that the sheer number of grievances and formal complaints lodged by him, including some close in temporal proximity to the underlying incident, similarly gives rise to a legitimate inference of retaliatory motivation. *See* Ciaprazi Memorandum (Dkt. No. 46) at 14.

Plaintiff's argument in this regard is significantly diluted by the sheer number of complaints lodged by him over time. By his own admission, plaintiff has regularly and openly complained of prison policies and practices and





during the relevant time period prior to the July 31, 1999 incident, and indeed had filed many formal complaints regarding his treatment while at Coxsackie. Yet, plaintiff has submitted no evidence that any of those complaints related to defendants Rogers or Fitzpatrick, the two principal actors in this case, nor has he pointed to any collaboration between those named in his prior complaints and Fitzpatrick and Rogers. At best, plaintiff has argued that prior to July 31, 1999 he "filed complaints and/or grievances against Lieutenants Sweeney, Armstrong, Skrocky and McDermott, all colleagues of defendant Fitzpatrick of the same rang [sic] with defendant Fitzpatrick." *Id.* ¶ 32.

In an equally tenuous attempt to link his protected activity with the issuance of a misbehavior report, plaintiff notes that on May 26, 1999 he filed a grievance for harassment against an employee named Fitzpatrick, who was assigned to assist him in connection with another Tier III disciplinary hearing, stating his naked belief, lacking in evidentiary support, that the employee named in that complaint "may be and apparently is a relative of defendant Fitzpatrick." *Id.* ¶ 33, Exh. 39. Plaintiff also notes that on July 21, 1999 he filed a grievance accusing defendant Goord of "gross abuse of power", requesting an investigation of defendant Goord by the New York State Police and federal authorities, and that five days later, on July 26, 1999, he filed a complaint with various agencies including the United States Department of Prisons complaining of mistreatment. *Id.* ¶¶ 34, 35.

*9 While there is some appeal to finding the requisite fact issue to avoid the entry of summary judgment on plaintiff's retaliation claims based upon the timing of these events, that factor is undermined by the steady stream of grievances filed by him on a regular and continuing basis. Were the plaintiff someone who had rarely if ever complained about prison conditions, but shortly before being issued a misbehavior report had lodged a formal complaint against or implicating the conduct of the officer who issued the disciplinary citation, a very different set of circumstances would be presented, and summary judgment would not be warranted. In this case, however, plaintiff can point to no complaints lodged by him against or implicating the conduct of defendant Fitzpatrick, who issued the disputed misbehavior report. Accordingly, I find that the defendants have established that they are entitled to summary dismissal of plaintiff's retaliation claims based upon plaintiff's failure to establish a basis on which a reasonable factfinder could find the requisite connection between plaintiff's grievance activities and the issuance of the misbehavior report and subsequent disciplinary hearing. [9] *E.g., Williams v. Goord*, 111 F.Supp.2d 280, 290 (S.D.N.Y.2000); *Mahotep v. DeLuca*, 3 F.Supp.2d 385, 389 (W.D.N.Y.1998).

***C. Plaintiff's Eighth Amendment Cruel And Unusual Punishment Claim***

In his complaint Ciaprazi, in somewhat indiscriminate fashion, asserts that the actions taken against him by the various defendants resulted in his exposure to cruel and unusual punishment, in violation of the Eighth Amendment. [10] Plaintiff's cruel and unusual punishment claims appear to center upon the conditions which he faced as a result of the disciplinary proceedings against him and resulting in SHU confinement initially at Coxsackie, and later at Upstate and at Clinton. In their motion, defendants assert that these claims are similarly deficient as a matter of law.

The Eighth Amendment's prohibition of cruel and unusual punishment encompasses punishments that involve the "unnecessary and wanton infliction of pain" and are incompatible with "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102, 104, 97 S.Ct. 285, 290, 291 (1976); *see also Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1076, 1084 (1986) (citing, *inter alia, Estelle* ). The Eighth Amendment does not mandate comfortable prisons, but yet it does not tolerate inhumane ones either; thus the conditions of an inmate's confinement are subject to Eighth Amendment scrutiny. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 1976 (1994) (citing *Rhodes v. Chapman*, 452 U.S. 337, 349, 101 S.Ct. 2392, 2400 (1981)).

A claim alleging that prison conditions violate the Eighth Amendment must satisfy both an objective and subjective requirement-the conditions must be "sufficiently serious" from an objective point of view, and the plaintiff must demonstrate that prison officials acted subjectively with "deliberate indifference". *See Leach v. Dufrain*, 103 F.Supp.2d 542, 546 (N.D.N.Y.2000) (Kahn, J .) (citing *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321 (1991)); *Waldo v. Goord*, No. 97-CV-1385, 1998 WL 713809, at *2 (N.D.N.Y. Oct. 1, 1998) (Kahn, J. and Homer, M.J.); *see also, generally, Wilson*, 501 U.S. 294, 111 S.Ct. 2321. Deliberate indifference exists if an official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837, 114 S.Ct. at

1978; *Leach*, 103 F.Supp.2d at 546 (citing *Farmer* ); *Waldo*, 1998 WL 713809, at *2 (same).

*10 Plaintiff's cruel and unusual punishment claim challenges the fact that 1) he was placed in a double bunk cell at Upstate; 2) was placed in isolation and exposed to light except for five hours each night; 3) was deprived of such amenities such as writing paper and envelopes, proper access to the law library, medical care, access to newspapers, magazines and books, access to the courts, and legal papers; 4) was exposed to loud and boisterous behavior on the part of other inmates; 5) was denied essential clothing and bedding as well as personal hygiene materials, radios or headphones, books, newspapers and magazines; and 6) was exposed to cold conditions, leading him to suffer at least one case of the flu. Complaint (Dkt. No. 1) ¶¶ 52-56; *see also* Plaintiff's Affidavit (Dkt. No. 46) ¶¶ 53-57. To counter these allegations, defendants have submitted nothing to reflect the lack of a basis upon which a reasonable factfinder could conclude that plaintiff was exposed to cruel and unusual punishment while in disciplinary isolation as a result of the Tier III determination now at issue. Instead, defendants' motion focuses upon a narrow aspect of plaintiff's Eighth Amendment claim, in which they assert that the lack of policies guaranteed to result in uniformity throughout the DOCS system of punishments to result in a Eighth Amendment violation.

As skeptical as perhaps one may be regarding plaintiff's ability to ultimately persuade a factfinder that the admittedly unpleasant conditions to which he was apparently exposed and the deprivations suffered while in disciplinary confinement rise to a constitutionally significant level, I am unable to state, based upon the record as currently constituted, that no reasonable factfinder could so conclude. I therefore recommend denial of defendants' motion to dismiss plaintiff's Eighth Amendment cruel and unusual punishment claim relating to the conditions of his confinement. [11]

Included within his Eighth Amendment claim, though more appropriately grouped with his due process cause of action, is plaintiff's contention that because the Tier III hearing officer was provided the unfettered discretion, in the event of finding of guilt, to impose a penalty of whatever magnitude seen fit, the disciplinary scheme in place at the DOCS is constitutionally infirm. In plaintiff's case, however, the imposed penalty of ten months of disciplinary confinement, 180 days of which were deferred, fell comfortably within the bounds of acceptable levels under the Eighth Amendment. Consequently, whatever may be said about plaintiff's arguments regarding the discretion affording to hearing officers, he lacks standing to raise such a claim. *See Trammell v. Mantello*, No. 90-CV-382, 1996 WL 863518, at *8-*9 (W.D.N.Y. June 10, 1996) (Tier III regulations pass constitutional muster).

**D. *Plaintiff's Procedural Due Process Claim***

In their motion, defendants also challenge plaintiff's contention that he was denied procedural due process during the course of the disciplinary hearing which resulted in his disciplinary confinement for a period of five months. In support of their motion, defendants argue both that plaintiff was not deprived of a constitutionally cognizable liberty interest, and that even assuming he was, he was afforded the requisite process due under the Fourteenth Amendment in connection with that deprivation.

*11 To successfully state a claim under 42 U.S.C. § 1983 for denial of due process arising out of a disciplinary hearing, a plaintiff must show that he or she both (1) possessed an actual liberty interest, and (2) was deprived of that interest without being afforded sufficient process. *See Tellier v. Fields*, 260 F.3d 69, 79-80 (2d Cir.2000) (citations omitted); *Hynes*, 143 F.3d at 658; *Bedoya v. Coughlin*, 91 F.3d 349, 351-52 (2d Cir.1996).

**1. *Liberty Interest***

Addressing the first of these required showings, in *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293 (1995), the United States Supreme Court determined that to establish a liberty interest, a plaintiff must sufficiently demonstrate that (1) the State actually created a protected liberty interest in being free from segregation; and that (2) the segregation would impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."*Id.* at 483-84, 115 S.Ct. at 2300; *Tellier*, 280 F.3d at 80; *Hynes*, 143 F.3d at 658.

Defendants challenge the applicability of both of these factors. Initially, defendants question whether New York has, by statute or otherwise, created a protected liberty interest in prisoners remaining free from segregation, including for disciplinary reasons, arguing that it has not. Defendants' Memorandum (Dkt. No. 39) at 14.The cases cited in support of that proposition, however, which relate to whether there is a constitutional or liberty interest in being assigned to a particular program, job assignment, or facility, are inapposite. *See, e.g., Klos v. Haskell*, 48 F.3d 81, 87-88 (2d Cir.1995)





(involving revocation of assignment to "shock incarceration" program); *Hall v. Unknown Named Agents of N.Y. State Dept. for Corr. Servs. for APPU Unit at Clinton Prison*, 825 F.2d 642, 645-46 (2d Cir.1987) (involving assignment to Assessment Program and Preparation Unit); *see also Montanye v. Haymes*, 427 U.S. 236, 243, 96 S.Ct. 2543, 2547 (1976) (no constitutional right of inmate to be placed in any particular facility); *Frazer v. Coughlin*, 81 F.3d 313, 318 (2d Cir.1996) ("no protected liberty interest in a particular job assignment"). Despite defendants' assertion to the contrary, it is now firmly established that through its regulatory scheme, New York State has created a liberty interest in prisoners remaining free from disciplinary confinement, thus satisfying the first *Sandin* factor. *See, e.g., Palmer v. Richards*, 364 F.3d 60, 64 n. 2 (2d Cir.2004) (citing *Welch v. Bartlett*, 196 F.3d 389, 394 n. 4 (2d Cir.1999)); *see also LaBounty v. Coombe*, No. 95 CIV 2617, 2001 WL 1658245, at *6 (S.D.N.Y. Dec. 26, 2001); *Alvarez v. Coughlin*, No. 94-CV-985, 2001 WL 118598, at *6 (N.D.N.Y. Feb. 6, 2001) (Kahn, J.).

Having rejected defendants' contention that the State has not created such an interest, I next turn to examination of whether the conditions of plaintiff's disciplinary confinement, as alleged by him, rise to the level of an atypical and significant hardship under *Sandin*.Atypicality in a *Sandin* inquiry normally presents a question of law. [12] *Colon v. Howard*, 215 F.3d 227, 230-31 (2d Cir.2000); *Sealey v. Giltner*, 197 F.3d 578, 585 (2d Cir.1999). When determining whether a plaintiff possesses a cognizable liberty interest, district courts must examine the specific circumstances of confinement, including analysis of both the length and conditions of confinement. *See Sealey*, 197 F.3d at 586; *Arce v. Walker*, 139 F.3d 329, 335-36 (2d Cir.1998); *Brooks v. DiFasi*, 112 F.3d 46, 48-49 (2d Cir.1997). In cases involving shorter periods of segregated confinement where the plaintiff has not alleged any unusual conditions, however, a detailed explanation of this analysis is not necessary. [13] *Hynes*, 143 F.3d at 658; *Arce*, 139 F.3d at 336.

*12 Given that plaintiff has shown that he was subjected to disciplinary confinement for a period of five months, and has alleged his exposure to conditions beyond those normally associated with such SHU confinement, as described in the applicable regulations, at this juncture I am unable to conclude, as a matter of law, that he was not deprived of a constitutionally significant liberty interest as a result of the disciplinary proceeding at issue. I therefore recommend against summary dismissal of plaintiff's due process claims on this basis.

**2. *Due Process***

The procedural protections to which a prison inmate is entitled before being deprived of a recognized liberty interest are well established, the contours of the requisite protections having been articulated in *Wolff v. McDonnell*, 418 U.S. 539, 564-67, 94 S.Ct. 2963, 2978-80 (1974). Under *Wolff*, the constitutionally mandated due process requirements include 1) written notice of the charges; 2) the opportunity to appear at a disciplinary hearing and present witnesses and evidence, subject to legitimate safety and penological concerns; 3) a written statement by the hearing officer explaining his or her decision and the reasons for the action being taken; and 4) in some circumstances, the right to assistance in preparing a defense. *Wolff*, 418 U.S. at 564-67, 94 S.Ct. at 2978-80;*see also Eng v. Coughlin*, 858 F.2d 889, 897-98 (2d Cir.1988).

Plaintiff's procedural due process claim is multi-faceted. In that claim, Ciaprazi maintains that 1) he was denied meaningful assistance by defendant Cole, who refused his request to interview potential witnesses identified by the plaintiff; 2) Hearing Officer Melino effectively denied the plaintiff access to witnesses since witness waiver forms, not to plaintiff's liking in form, were allegedly presented by an unknowledgeable corrections officer to those inmates whose testimony was requested by Ciaprazi, following which those inmates apparently refused to sign the waiver forms and appear to testify on his behalf; 3) the hearing officer was biased and partial, and demonstrated open hostility toward the plaintiff; 4) the hearing officer's disciplinary determination was not supported by the evidence; and 5) the hearing officer refused plaintiff's suggestion to administer polygraph tests to defendants Rogers and Fitzpatrick, as well as to Ciaprazi. Also implicit in plaintiff's due process claim is his contention that his constitutional rights were violated through the issuance of a false misbehavior report. [14]

Plaintiff's arguments relating to the sufficiency of evidence supporting the hearing officer's finding of guilt can be swiftly discounted. The Constitution, including its Due Process Clause, requires only that there be some evidence of guilt supporting a prison disciplinary determination. *Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455-56, 105 S.Ct. 2768, 2774 (1985). Having reviewed the record of plaintiff's disciplinary proceeding in light of his submissions, I find that this standard has been met.

***13** Plaintiff's claims regarding the allegedly false misbehavior report also lack merit. It is well established that in the absence of other aggravating factors, an inmate enjoys no constitutional right against the issuance of a false misbehavior report.[15] *Freeman v. Rideout*, 808 F.2d 949, 951 (2d Cir.1986), *cert. denied*,485 U.S. 982, 108 S.Ct. 1273 (1988). The rationale supporting this general rule is that an inmate's procedural due process rights are adequately safeguarded by the opportunity to challenge and present evidence to rebut the false accusations at a disciplinary hearing. *Freeman*, 808 F.2d at 953.

As for plaintiff's contention that his due process rights were violated when polygraph tests were not administered to key corrections officials, as requested by him, plaintiff has cited no cases-nor is the court aware of any-which require the administering of polygraph tests in connection with parties and witnesses in the context of an inmate disciplinary determination. *See Hinebaugh v. Wiley*, 137 F.Supp.2d 69, 79 (N.D.N.Y.2001) ("some evidence" does not require independent examination of credibility and therefore "certainly does not require" court to order personnel to submit to polygraph to ascertain if hearing testimony was truthful). This issue, then, provides no basis for finding the existence of a procedural due process violation.

Plaintiff's allegations regarding the ineffectiveness of his assigned assistant provide a greater basis for pause. While the requirements associated with the provision of such assistance are modest, they are not non-existent. Under *Wolff*, an inmate facing a Tier III disciplinary hearing is entitled to meaningful assistance in preparing his or her defense. *Eng*, 858 F.2d at 897-98. In this case, plaintiff asserts that while he was assigned an assistant, he was denied meaningful assistance from that individual. In support of this contention, plaintiff alleges that he identified certain witnesses critical to his defense, but that his assistant refused to interview those witnesses with an eye toward requesting their testimony during the hearing. Complaint (Dkt. No. 1) ¶¶ 20-21; Ciaprazi Aff. (Dkt. No. 46) ¶ 40. This, if true, could establish a due process violation based on the inadequacy of the inmate assistance provided to the plaintiff. *See Ayers v. Ryan*, 152 F.3d 77, 81 (2d Cir.1998).

In light of my inability to find, as a matter of law, that plaintiff did not suffer the deprivation of a liberty interest as a result of his five month period of disciplinary confinement, and additionally to conclude that no reasonable factfinder could find the existence of a due process violation associated with that disciplinary confinement, I recommend denial of the portion of defendants' summary judgment motion which seeks dismissal of plaintiff's due process claims.

**F. *Equal Protection***

In his complaint plaintiff also complains of the alleged deprivation of equal protection. Defendants contend that this claim is also subject to dismissal as a matter of law.

***14** "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tx. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254 (1985) (citation omitted). The general rule is that a policy is presumed to be valid and will be sustained if the classification drawn by that policy is rationally related to a legitimate state interest. *Id.* at 440, 105 S.Ct. at 3254. One exception to that rule, however, is when a policy classifies by race, alienage, or national origin-"[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy-a view that those in the burdened class are not as worthy or deserving as others." *Id.* For this reason, these policies are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *Id.* The essence of a cognizable equal protection claim includes a showing of "clear and intentional discrimination." *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401 (1944) (internal quotation and citations omitted).

The apparent basis for plaintiff's equal protection claim is his contention that in light of his national origin, he was treated differently than United States citizen counterparts.[16] In the face of defendants' summary judgment motion, it was incumbent upon the plaintiff to come forward with evidence which could support a claim that he was treated differently than other inmates, and that the difference in treatment could properly be attributed to his status as a Romanian. As such evidence, plaintiff offers only a statement made to him by defendant Fitzpatrick at one point, in substance, that plaintiff had "now ... learned to speak English." *See* Plaintiff's Memorandum (Dkt. No. 46) at 29.Beyond this slender reed, plaintiff offers no evidence to support his claim that he was treated differently than inmates not of his national origin, and indeed acknowledges mere speculation on his





part as to this premise, arguing that "discrimination based on national origin *may*... have placed [sic] a role in defendants' unlawful actions[.]" Plaintiff's Memorandum (Dkt. No. 46) at 29 (emphasis added). Instead, plaintiff's equal protection claims consist of mere surmise and speculation, and are subject to dismissal on this basis. *See, e.g., Barr v. Abrams*, 810 F.2d 358, 363 (2d Cir.1987) ( "complaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning").

Despite being obligated to do so at this juncture, plaintiff has failed to adduce any evidence to show either that he was treated differently than his non-Romanian counterparts, and that the difference in treatment was based upon his national origin. I therefore recommend dismissal of plaintiff's equal protection claims as a matter of law.

**G. *United Nations Resolutions***

***15** Each of plaintiff's eight causes of action is based, in part, upon two international agreements, including the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR"). Defendants maintain that as a matter of law, those provisions do not support claims under section 1983.

Section 1983 provides, in pertinent part, for a right of action on behalf of any person deprived of "any rights, privileges, or immunities secured by the Constitution and laws[.]"42 U.S.C. § 1983. Plaintiff argues that because the United States is a signatory to these two treaty-like provisions, they have the force of law and can be implemented, and individual treaty violations can give rise to recourse, under section 1983.

It is true that violation of a treaty entered into by the United States can serve as a basis for a claim for damages under section 1983, provided that the treaty allows for a private right of action to redress any alleged violations of its provisions. *Standt v. City of New York*, 153 F.Supp.2d 417, 422-30 (S.D.N.Y.2001) (finding private right of action under section 1983 for violation of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 101 T.I.A .S. No. 6820, 596 U.N.T.S. 261 (April 24, 1963)). To the extent that the defendants argue otherwise, and contend that treaties-as distinct from constitutional and other types of federal statutory provisions-cannot support a claim for section 1983 liability, *see* Defendants' Memorandum (Dkt. No. 39) at 17-18, that position therefore lacks support.

As can be seen, analysis of the sufficiency of plaintiff's claims under the cited treaty provisions turns upon whether those international agreements confer individual rights of action. In order to be found deserving of enforcement under section 1983 as a "law", a treaty ratified by the Senate must either be found to be self-executing or, alternatively, must have been the subject of implementing legislation by Congress. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir.1979).

Since plaintiff has pointed to no applicable implementing legislation, nor is the court aware of any, the availability of the ICCPR to support plaintiff's section 1983 claim depends upon whether it is self-executing. The majority of the courts addressing this issue, however, including within the Second Circuit, have concluded that it is not.[17] *See, e.g., Poindexter v. Nash*, 333 F.3d 372, 379 (2d Cir.2003); *Murray v. Warden, FCI Raybrook*, No. 9:01-CV-255, 2002 WL 31741247, at *11 n. 10 (N.D.N.Y. Dec. 5, 2002) (Sharpe, M.J.) (citing *U.S. ex rel. Perez v. Warden, FMC Rochester*, 286 F.3d 1059, 1063 (8th Cir.2002) and *Reaves v. Warden*, No. Civ. A3:01-CV-1149, 2002 WL 535398, at *9 (M.D.Pa. Mar. 22, 2002). Similarly, the UDHR has been characterized by the Second Circuit as "non-binding." *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 167-68 (2d Cir.2003).

***16** Based upon the foregoing, and without deciding whether the evidence in the record demonstrates a genuine issue of material fact as to whether those provisions were violated by defendants' alleged actions toward the plaintiff, I find that Ciaprazi's claims under the ICCPR and UDHR are legally deficient as a matter of law. I therefore recommend dismissal of plaintiff's claims which are dependent on those two international agreements.

**H. *Personal Involvement***

Defendants claim that plaintiff's claims against defendants Goord and Selsky are legally deficient, in that the record fails to establish their requisite personal involvement in the constitutional violations alleged.

Personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under section 1983. *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994) (citing *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir.1991) and *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir.1977), *cert. denied*,434 U.S. 1087, 98 S.Ct. 1282

(1978)). In order to prevail on a section 1983 cause of action against an individual, a plaintiff must show some tangible connection between the constitutional violation alleged and that particular defendant. *See Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir.1986).

A supervisor cannot be liable for damages under section 1983 solely by virtue of being a supervisor-there is no *respondeat superior* liability under section 1983. *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.2003); *Wright*, 21 F.3d at 501. A supervisory official can, however, be liable in one of several ways: 1) the supervisor may have directly participated in the challenged conduct; 2) the supervisor, after learning of the violation through a report or appeal, may have failed to remedy the wrong; 3) the supervisor may have created or allowed to continue a policy or custom under which unconstitutional practices occurred; 4) the supervisor may have been grossly negligent in managing the subordinates who caused the unlawful event; or 5) the supervisor may have failed to act on information indicating that unconstitutional acts were occurring. *Richardson*, 347 F.3d at 435; *Wright*, 21 F.3d at 501; *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir.1986).

The basis for asserting liability against defendant Selsky arises exclusively from plaintiff's appeal from his disciplinary determination. That appeal was addressed by defendant Selsky, whose review of that appeal sufficiently establishes his personal involvement in any alleged due process violations based upon his being positioned to discern and remedy the ongoing effects of any such violations. *See, e.g., Gilbert v. Selsky*, 867 F.Supp. 159, 166 (S.D.N.Y.1994).

Plaintiff's claim against defendant Goord is far more tenuous. Plaintiff asserts that because his appeal was mailed directly to defendant Goord who, consistent with his established practice, then referred it to defendant Selsky for review, the Commissioner "presumably read [its] contents." *See* Plaintiff's Memorandum (Dkt. No. 46) at 32.This, coupled with his contention that as the ultimate supervisor of the DOCS defendant Goord was positioned to remedy the violations which he suffered, forms the sole basis for his claims against defendant Goord. These are merely claims against defendant Goord in his supervisory capacity; to sanction them would be to allow for *respondeat superior* liability. Since it is well established that such liability does not lie under section 1983, and there is no other discernible basis to conclude defendant Goord's awareness of or involvement in the matters alleged in plaintiff's complaint, I recommend that defendants' motion be granted and plaintiff's claims against defendant Goord be dismissed based upon lack of personal involvement. *Richardson*, 347 F.3d at 435 (quoting *Ayers v. Coughlin*, 780 F.2d 205, 210 (2d Cir.1985); "mere 'linkage in the prison chain of command' is insufficient to implicate a state commissioner of corrections or a prison superintendent in a § 1983 claim"); *Scott v. Coughlin*, 78 F.Supp.2d 299, 312 (S.D.N.Y.2000) (Commissioner's act of forwarding appeals addressed to him to Selsky insufficient to establish personal involvement; citing, *inter alia*, *Sealey v. Giltner*, 116 F.3d 47, 51 (2d Cir.1991)).

## IV. *SUMMARY AND RECOMMENDATION*

***17** The plaintiff, an experienced and well-versed *pro se* litigant, has commenced this action asserting various claims arising out of the issuance of a disciplinary misbehavior report and the process which followed, including the punishment received. Upon examination of the record, I find no evidence tending to demonstrate that the adverse actions taken against the plaintiff were motivated by disciplinary animus, and thereby recommend the entry of summary judgment dismissing his retaliation claim. I do, however, find the existence of triable issues of fact regarding whether or not Ciaprazi was deprived of a constitutionally significant liberty interest, and whether the assistance provided to the plaintiff in anticipation of his hearing was constitutionally adequate, and therefore recommend against summary dismissal of plaintiff's procedural due process claims.

Addressing plaintiff's Eighth Amendment claims I find, particularly in view of the lack of any evidence to the contrary, that the conditions described by the plaintiff could lead a reasonable factfinder to conclude that they amounted to cruel and unusual punishment, and therefore recommend against the entry of summary judgment dismissing plaintiff's Eighth Amendment claim. I further find, however, no basis to conclude that a reasonable factfinder could find an Eighth amendment violation based on the Tier III regulatory scheme, a violation of the Equal Protection Clause of the Fourteenth Amendment, or that the international treaty provisions cited give rise to a private right of action. Accordingly, I recommend dismissal of those claims.

Finally, I recommend dismissal of plaintiff's claims against defendant Goord based upon the lack of his personal involvement, but against dismissal of plaintiff's claims against defendant Selsky on this basis. It is therefore hereby





RECOMMENDED that defendants' summary judgment motion (Dkt. No. 39) be GRANTED in part, and that all of plaintiff's claims against defendant Goord, and all of plaintiff's claims against the remaining defendants except his procedural due process and Eighth Amendment conditions of confinement causes of action, be DISMISSED, but that to the extent of those claims, with respect to which triable issues of fact exist, I recommend that defendants' motion be DENIED.

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have TEN days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. Fed.R.Civ.P. 6(a), 6(e), 72; 28 U.S.C. § 636(b)(1); *Roldan v. Racette*, 984 F.2d 85 (2d Cir.1993) (citations omitted); and it is further hereby

ORDERED that the Clerk of the Court serve a copy of this Report and Recommendation upon the parties by regular mail.

**All Citations**

Not Reported in F.Supp.2d, 2005 WL 3531464

Footnotes

1 The Clerk is hereby directed to attach the Report-Recommendation to constitute a complete record of the court's decision in this matter.

2 The court adopts the factual summary in Magistrate Judge Peebles' Report-Recommendation and assumes familiarity with the facts alleged in Ciaprazi's Complaint. *Dkt. Nos. 47,1.*

3 Ciaprazi also makes several procedural objections. For instance, he asserts that defendants' motion is procedurally defective since none of the moving papers are signed, as required by FRCP 11. Second, Ciaprazi objects to the defendants' alteration of the case caption. Third, Ciaprazi objects to the defendants' use of a name that did not appear in the original complaint. These arguments are without merit and this court adopts Judge Peebles articulated reasons for the their denial. *See Report Recommendation p. 10-11 n. 5, Dkt. No. 47.*

1 Keeplock confinement is defined by regulation to include restriction to one's prison room or cell. *See, e.g.*,7 N.Y.C.R.R. 251-2.2.

2 The DOCS conducts three types of inmate disciplinary hearings. Tier I hearings address the least serious infractions, and can result in minor punishments such as the loss of recreation privileges. Tier II hearings involve more serious infractions, and can result in penalties which include confinement for a period of time in the Special Housing Unit (SHU). Tier III hearings concern the most serious violations, and could result in unlimited SHU confinement and the loss of "good time" credits. *See Hynes v. Squillace*, 143 F.3d 653, 655 (2d Cir.), *cert. denied*,525 U.S. 907, 119 S.Ct. 246 (1998).

3 Of those sanctions, five months were suspended and deferred for a to tal of one hundred eighty days. Defendants' Motion (Dkt. No. 39) Exh. A at 00. The record is unclear regarding the amount of disciplinary confinement actually served by the plaintiff as a result of the hearing determination.

4 There is no indication on the docket sheet that defendant Fitzpatrick has been served in the action. While plaintiff requested and obtained the entry of that defendant's default on June 20, 2003, *see* Dkt. Nos. 20, 21, his default was subsequently vacated by order issued by District Judge David N. Hurd on January 13, 2004, based upon plaintiff's failure to prove that defendant Fitzpatrick had in fact been served. *See*Dkt. No. 35.

5 In his papers in opposition to defendants' summary judgment motion, plaintiff has raised several procedural objections to defendants' motion papers. In addressing those objections I am mindful of the preference that matters before the court, whenever possible, be decided on their merits rather than on the basis of technical procedural shortcomings. *See, e.g., Upper Hudson Planned Parenthood, Inc. v. Doe*, 836 F.Supp. 939, 943 n. 9 (N.D.N.Y.1993) (McCurn, S.J.). In any event, plaintiff's procedural objections are not well-founded.

In his opposition papers, plaintiff asserts that defendants' motion is procedurally defective since none of the moving papers are signed, as required under Rule 11 of the Federal Rules of Civil Procedure. *See* Plaintiff's Memorandum (Dkt. No. 46) at 1. While not bearing signatures in the traditional sense, all of defendants' original moving papers, which were filed electronically with the court in accordance with this court's case management and electronic case filing requirements (see Northern District of New York Local Rule 5.1.2 and General Order No. 22), were properly signed. Plaintiff also complains of alterations by the defendants to the caption of the case as set forth in his complaint. Specifically, Ciaprazi challenges defendants' addition of the word "unknown" in relation to defendants Melino and Cole, who are identified in plaintiff's complaint only by last names. Since it is well established that the caption of a pleading

is not substantive in nature, and therefore does not control, the addition of that word does not provide a basis to reject defendants' motion papers. See 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure Civil § 1321 (3d ed. 2004) ("Although helpful to the district court ... the caption is not determinative as to the identity of the parties to the action"); see also Prisco v. State of New York, 804 F.Supp. 518, 521 (S.D.N.Y.1992) (citing an earlier edition of Wright & Miller).

As plaintiff notes, defendants' Local Rule 7.1(a)(3) statement of uncontested, material facts, submitted along with the various other papers in support of their motion, indicates that it is submitted on behalf of a defendant Landry, even though there is no person by that name identified as a defendant in plaintiff's complaint. SeeDkt. No. 39.Because this is an obvious typographical error, and the contents of the statement obviously relate to the facts of this case, I decline plaintiff's invitation to reject and treat the statement as a nullity on this basis.

I note that Ciaprazi, who appears to be well versed in the applicable requirements of the federal and local rules, himself has overlooked the important requirement that legal memoranda submitted in connection with motions to not exceed twenty-five pages in length. Northern District of New York Local Rule 7.1(a)(1). Plaintiff's memorandum, which is thirty-four pages in length, has been accepted by the court, without objection by the defendants, despite his failure to obtain prior permission to file an oversized brief. Plaintiff is admonished that in the future, just as he seeks to hold defendants to the requirements of the governing rules, he too must conform to those requirements.

6 A material fact is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."Anderson, 477 U.S. at 248, 106 S.Ct. at 2510. Though pro se plaintiffs are entitled to special latitude when defending against summary judgment motions, they must establish more than merely "metaphysical doubt as to the material facts."Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986); but see Vital v. Interfaith Med. Ctr., 168 F.3d 615, 620-21 (2d Cir.1999) (noting obligation of court to consider whether pro se plaintiff understood nature of summary judgment process).

7 Plaintiff has referred to his efforts in this regard as a "blitz of grievances and complaints[.]" Plaintiff's Aff. (Dkt. No. 46) ¶ 52.

8 The attorney's affirmation in and of itself is, of course, of no evidentiary value in determining the motion for summary judgment since none of the facts upon which such a finding would ostensibly be based are within his personal knowledge. Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1011-12 (2d Cir.1986).

9 Prior to the Second Circuit's recent decision in Gill, defendants perhaps could have effectively argued that defendants' actions were not likely to deter, and in fact have not chilled, plaintiff's exercise of his First Amendment rights, and therefore do not give rise to a retaliation claim. E.g., Colombo v. O'Connell, 310 F.3d 115, 117 (2d Cir.2002); Curley v. Village of Suffern, 268 F.3d 65, 72-73 (2d Cir.2001); Spear v. Town of West Hartford, 954 F.2d 63, 68 (2d Cir.1992). In its recent decision in Gill, however, the Second Circuit clarified that such a finding does not end the inquiry, since the critical focus is not upon the subjective element, but is instead objective, examining whether the retaliatory conduct alleged "would deter a similarly situated individual of ordinary firmness from exercising ... constitutional rights."Gill, 389 F.3d at 381 (quoting Davis v. Goord, 320 F.3d 346, 353 (2d Cir.2003), superseded by 2003 U.S.App. LEXIS 13030 (2d Cir. Feb. 10, 2003)).

10 That amendment provides, in pertinent part, that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."U.S. Const. amend. VIII.

11 In their motion, defendants have not argued lack of personal involvement with regard to their Eighth Amendment claims. It therefore remains to be seen whether plaintiff can establish the defendants' participation in the Eighth Amendment violations alleged.

12 In cases where there is factual dispute concerning the conditions or duration of confinement, however, it may nonetheless be appropriate to submit those disputes to a jury for resolution. Colon v. Howard, 215 F.3d 227, 230-31 (2d Cir.2000); Sealey v.. Giltner, 197 F.3d 578, 585 (2d Cir.1999).

13 While not the only factor to be considered, the duration of a disciplinary keeplock confinement remains significant under Sandin.Colon, 215 F.3d at 231. Specifically, while under certain circumstances confinement of less than 101 days could be shown to meet the atypicality standard under Sandin (see id. at 232 n .5), the Second Circuit generally takes the position that SHU confinement under ordinary conditions of more than 305 days rises to the level of atypicality, whereas normal SHU confinement of 101 days or less does not. Id. at 231-32 (305 days of SHU confinement constitutes an atypical and sufficient departure). In fact, in Colon v. Howard a Second Circuit panel split markedly on whether or not adoption of a 180-day "bright line" test for examining SHU confinement would be appropriate and helpful in resolving these types of cases. See id. at 232-34 (Newman, C.J.), 235-37 (Walker, C.J. and Sack, C.J., concurring in part).

14 Among the due process violations alleged in plaintiff's complaint is the claim that by taking into account his prior disciplinary record when determining the appropriate punishment to be imposed based upon the finding of guilt, hearing officer Melino violated the constitutional guaranty against double jeopardy. Since it is well established that the double





jeopardy clause does not apply in the prison disciplinary setting, this claim lacks merit. Bolanos v. Coughlin, No. 91 Civ. 5330, 1993 WL 762112, at *13 (S .D.N.Y. Oct. 15, 1993). Plaintiff's contention that the hearing officer's actions in this regard also violated an unspecified New York regulation fares no better, since such an allegation does not automatically support a claim of civil rights violations under 42 U.S.C. § 1983. Alnutt v. Cleary, 913 F.Supp. 160, 168 (W.D.N.Y.1996).

15 Unquestionably, a prisoner does enjoy a substantive due process right against the issuance of a false misbehavior report as retribution for having engaged in protected activity. Jones v. Coughlin, 45 F.3d 677, 679-80 (2d Cir.1995). In light of my finding of no connection between plaintiff's complaints and the issuance by defendant Fitzpatrick of the misbehavior report, however, such a claim does not lie in this action.

16 Plaintiff is a Romanian citizen. Complaint (Dkt. No. 1) at 3.

17 Even in one of the cases relied heavily upon by the plaintiff, Maria v. McElroy, 68 F.Supp.2d 206, 231 (E.D.N.Y.1999)-a case which has since been effectively overruled on other grounds, see Restrepo v. McElroy, 369 F.3d 627 (2d Cir.2004)-the court recognized that the ICCPR was not "self-executing".68 F.Supp.2d at 231.

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United States District Court, S.D. New York.

Craig COLE, Plaintiff,
v.
Christopher P. ARTUZ, Superintendent, Green Haven Correctional Facility, R. Pflueger, A. Glemmon, Sgt. Stevens, Lt. Haubert, Capt. W.M. Watford, Capt. T. Healey, and John Doe # 1–5, all as individuals, Defendants.

No. 93 Civ. 5981(WHP) JCF. | Oct. 28, 1999.

**Attorneys and Law Firms**

Mr. Craig Cole, Barc Hill Correctional Facility, Malone, New York, Legal Mail, Plaintiff, pro se.

William Toran, Assistant Attorney General, Office of the Attorney General of the State of New York, New York, New York, for Defendant.

***MEMORANDUM & ORDER***

PAULEY, J.

***1** The remaining defendant in this action, Correction Officer Richard Pflueger, having moved for an order, pursuant to Fed.R.Civ.P. 56, granting him summary judgment and dismissing the amended complaint, and United States Magistrate Judge James C. Francis IV having issued a report and recommendation, dated August 20, 1999, recommending that the motion be granted, and upon review of that report and recommendation together with plaintiff's letter to this Court, dated August 28, 1999, stating that plaintiff does "not contest the dismissal of this action", it is

ORDERED that the attached report and recommendation of United States Magistrate Judge James C. Francis IV, dated August 20, 1999, is adopted in its entirety; and it is further

ORDERED that defendant Pflueger's motion for summary judgment is granted, and the amended complaint is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly and close this case.

***REPORT AND RECOMMENDATION***

FRANCIS, Magistrate J.

The plaintiff, Craig Cole, an inmate at the Green Haven Correctional Facility, brings this action pursuant to 42 U.S.C. § 1983. Mr. Cole alleges that the defendant Richard Pflueger, a corrections officer, violated his First Amendment rights by refusing to allow him to attend religious services. The defendant now moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, I recommend that the defendant's motion be granted.

***Background***

During the relevant time period, Mr. Cole was an inmate in the custody the New York State Department of Correctional Services ("DOCS"), incarcerated at the Green Haven Correctional Facility. (First Amended Complaint ("Am.Compl.") ¶ 3). From June 21, 1993 to July 15, 1993, the plaintiff was in keeplock because of an altercation with prison guards. (Am.Compl.¶¶ 17–25). An inmate in keeplock is confined to his cell for twenty-three hours a day with one hour for recreation. (Affidavit of Anthony Annucci dated Dec. 1, 1994 ¶ 5). Pursuant to DOCS policy, inmates in keeplock must apply for written permission to attend regularly scheduled religious services. (Reply Affidavit of George Schneider in Further Support of Defendants' Motion for Summary Judgment dated September 9, 1996 ("Schneider Aff.") ¶ 3). Permission is granted unless prison officials determine that the inmate's presence at the service would create a threat to the safety of employees or other inmates. (Schneider Aff. ¶ 3). The standard procedure at Green Haven is for the captain's office to review all requests by inmates in keeplock to attend religious services. (Schneider Aff. ¶ 3). Written approval is provided to the inmate if authorization is granted. (Affidavit of Richard Pflueger dated April 26, 1999 ("Pflueger Aff.") ¶ 5). The inmate must then present the appropriate form to the gate officer before being released to attend the services. (Pflueger Aff. ¶ 5).

***2** On June 28, 1993, the plaintiff submitted a request to attend the Muslim services on July 2, 1993. (Request to Attend Scheduled Religious Services by Keep–Locked Inmate dated June 28, 1993 ("Request to Attend Services"), attached as Exh. B to Schneider Aff.) On June 30, 1993, a supervisor identified as Captain Warford signed the request





form, indicating that the plaintiff had received permission to attend the services. (Request to Attend Services). Shortly before 1:00 p.m. on July 2, 1993, the plaintiff requested that Officer Pflueger, who was on duty at the gate, release him so that he could proceed to the Muslim services. (Pflueger Aff. ¶ 3). However, Officer Pflueger refused because Mr. Cole had not presented the required permission form. (Pflueger Aff. ¶ 3). The plaintiff admits that it is likely that he did not receive written approval until some time thereafter. (Deposition of Craig Cole dated February 28, 1999 at 33–35, 38).

On August 25, 1993, the plaintiff filed suit alleging that prison officials had violated his procedural due process rights. On December 4, 1995, the defendants moved for summary judgment. (Notice of Defendants' Motion for Summary Judgment dated December 4, 1995). The Honorable Kimba M. Wood, U.S.D.J., granted the motion and dismissed the complaint on the grounds that the plaintiff failed to show that he had been deprived of a protected liberty interest, but she granted the plaintiff leave to amend. (Order dated April 5, 1997). On May 30, 1997, the plaintiff filed an amended complaint, alleging five claims against several officials at the Green Haven Correctional Facility. (Am.Compl.) On November 16, 1998, Judge Wood dismissed all but one of these claims because the plaintiff had failed to state a cause of action or because the statute of limitations had elapsed. (Order dated Nov. 16, 1998). The plaintiff's sole remaining claim is that Officer Pflueger violated his First Amendment rights by denying him access to religious services on July 2, 1993. The defendant now moves for summary judgment on this issue, arguing that the plaintiff has presented no evidence that his First Amendment rights were violated. In addition, Officer Pflueger contends that he is entitled to qualified immunity. (Defendants' Memorandum of Law in Support of Their Second Motion for Summary Judgment).

***A. Standard for Summary Judgment***

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where "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 judgment as a matter of law."Fed.R.Civ.P. 56(c); *see alsoTomka v. Seiler Corp.*, 66 F.3d 1295, 1304 (2d Cir.1995); *Richardson v. Selsky*, 5 F.3d 616, 621 (2d Cir.1993). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact."*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the movant meets that burden, the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute concerning material facts.Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In assessing the record to determine whether there is a genuine issue of material fact, the court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. *Anderson*, 477 U.S. at 255; *Vann v. City of New York*, 72 F.3d 1040, 1048–49 (2d Cir.1995). But the court must inquire whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party" and grant summary judgment where the nonmovant's evidence is conclusory, speculative, or not significantly probative. *Anderson*, 477 U.S. at 249–50 (citation omitted)."The litigant opposing summary judgment may not rest upon mere conclusory allegations or denials, but must bring forward some affirmative indication that his version of relevant events is not fanciful."*Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 101 (2d Cir.1997) (citation and internal quotation omitted); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (a non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts"); *Goenaga v. March of Dimes Birth Defects Foundation*, 51 F.3d 14, 18 (2d Cir.1995) (nonmovant "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible") ((citations omitted)). In sum, if the court determines that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial." ' *Matsushita Electric Industrial Co.*, 475 U.S. at 587 (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288 (1968)); *Montana v. First Federal Savings & Loan Association*, 869 F.2d 100, 103 (2d Cir.1989).

***3** Where a litigant is *prose*, his pleadings should be read liberally and interpreted "to raise the strongest arguments that they suggest."*McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir.1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994)). Nevertheless, proceeding *prose* does not otherwise relieve a litigant from the usual requirements of summary judgment, and a *prose* party's "bald assertion," unsupported by evidence, is not sufficient to overcome a motion for summary judgment. *SeeCarey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir.1991); *Gittens v. Garlocks Sealing Technologies*, 19 F.Supp.2d 104, 110 (W.D.N.Y.1998); *Howard Johnson International, Inc. v. HBS Family, Inc.*, No. 96 Civ. 7687, 1998 WL 411334, at *3 (S.D .N.Y. July 22, 1998); *Kadosh v. TRW, Inc.*, No. 91 Civ. 5080, 1994 WL 681763, at *5 (S.D.N.Y. Dec. 5, 1994) ("the work

product of *prose* litigants should be generously and liberally construed, but [the *prose*' s] failure to allege either specific facts or particular laws that have been violated renders this attempt to oppose defendants' motion ineffectual"); *Stinson v. Sheriff's Department*, 499 F.Supp. 259, 262 (S.D.N.Y.1980) (holding that the liberal standard accorded to *prose* pleadings "is not without limits, and all normal rules of pleading are not absolutely suspended").

**B. *Constitutional Claim***

It is well established that prisoners have a constitutional right to participate in congregate religious services even when confined in keeplock.*Salahuddin v. Coughlin*, 993 F.2d 306, 308 (2d Cir.1993); *Young v. Coughlin*, 866 F.2d 567, 570 (2d Cir1989). However, this right is not absolute. *SeeBenjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir.1990) (right to free exercise balanced against interests of prison officials). Prison officials can institute measures that limit the practice of religion under a "reasonableness" test that is less restrictive than that which is ordinarily applied to the alleged infringement of fundamental constitutional rights. *O'Lone v. Estate of Shaabazz*, 482 U.S. 342, 349 (1986). In *O'Lone*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."*Id.* at 349 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). The evaluation of what is an appropriate and reasonable penological objective is left to the discretion of the administrative officers operating the prison.*O'Lone*, 482 U.S. at 349. Prison administrators are "accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."*Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

The policy at issue here satisfies the requirement that a limitation on an inmate's access to religious services be reasonable. The practice at Green Haven was to require inmates in keeplock to present written approval to the prison gate officer before being released to attend religious services. This policy both accommodates an inmate's right to practice religion and allows prison administrators to prevent individuals posing an active threat to security from being released. The procedure is not overbroad since it does not permanently bar any inmate from attending religious services. Rather, each request is decided on a case-by-case basis by a high ranking prison official and denied only for good cause.

*4 Furthermore, in order to state a claim under § 1983, the plaintiff must demonstrate that the defendant acted with deliberate or callous indifference toward the plaintiff's fundamental rights. *SeeDavidson v. Cannon* 474 U.S. 344, 347–48 (1986) (plaintiff must show abusive conduct by government officials rather than mere negligence). Here, there is no evidence that the defendant was reckless or even negligent in his conduct toward the plaintiff or that he intended to violate the plaintiff's rights. Officer Pflueger's responsibility as a prison gate officer was simply to follow a previously instituted policy. His authority was limited to granting access to religious services to those inmates with the required written permission. Since Mr. Cole acknowledges that he did not present the necessary paperwork to Officer Pflueger on July 2, 1993, the defendant did nothing improper in denying him access to the religious services. Although it is unfortunate that the written approval apparently did not reach the plaintiff until after the services were over, his constitutional rights were not violated. [1]

***Conclusion***

For the reasons set forth above, I recommend that the defendant's motion for summary judgment be granted and judgment be entered dismissing the complaint. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days to file written objections to this report and recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable William H. Pauley III, Room 234, 40 Foley Square, and to the Chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

**All Citations**

Not Reported in F.Supp.2d, 1999 WL 983876

Footnotes

1 In light of this finding, there is no need to consider the defendant's qualified immunity argument.

2012 WL 651919
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Kenneth Carl GROVES, Sr., Plaintiff,
v.
Brett DAVIS, Secure Care Treatment Aid; David W. Sill, Secure Care Treatment Aid; Thomas Nicolette, RN, Ward Nurse; Charmaine Bill, Treatment Team Leader; Jill E. Carver, Social Worker, Primary Therapist; Edwin Debroize, Psychologist Assist; Jeff Nowicki, Chief of Mental Health Treatment Serv.; Terri Maxymillian, Ph.D., Dir. of Mental Health Serv.; Sgt. Sweet, Security Services, CNYPC; Michael Hogan, Comm'r, Dep't of Mental Health, Defendants.

No. 9:11–CV–1317 (GTS/RFT). | Feb. 28, 2012.

**Attorneys and Law Firms**

Kenneth Carl Groves, Sr., Marcy, NY, pro se.

***MEMORANDUM DECISION and ORDER***

Hon. GLENN T. SUDDABY, District Judge.

*1 Currently before the Court, in this *pro se* civil rights action filed by Kenneth Carl Groves, Sr. ("Plaintiff"), against numerous employees of New York State or the Central New York Psychiatric Center ("Defendants"), are Plaintiff's motion to proceed *in forma pauperis,* his motion for a temporary restraining order and preliminary injunction, and his motion for appointment of counsel. (Dkt.Nos.2, 3, 4.)[1] For the reasons set forth below, Plaintiff's motion to proceed *in forma pauperis* is granted; his motion for a preliminary injunction is denied; his motion for appointment of counsel is denied; Plaintiff's claims of deliberate indifference to his mental health needs against Defendants Bill, Carver and DeBroize are *sua sponte* dismissed with prejudice; Plaintiff's claims against Defendants Bill, Carver, DeBroize, Nowicki, Maxymillian, and Hogan arising from their alleged personal involvement in the August 8, 2011 assault are *sua sponte* dismissed without prejudice and with leave to amend in this action in accordance with Fed.R.Civ.P. 15; Sgt. Sweet is *sua sponte* dismissed without prejudice as a Defendant in this action; the Clerk is directed to issue summonses, and the U.S. Marshal is directed to effect service of process on Defendants Davis, Sill, and Nicolette.

**I. RELEVANT BACKGROUND**

On November 7, 2011, Plaintiff commenced this action *pro se* by filing a civil rights Complaint, together with a motion to proceed *in forma pauperis.*(Dkt. Nos.1, 2.)[2] Liberally construed, Plaintiff's Complaint alleges that the following constitutional violations against him occurred during his confinement at Central New York Psychiatric Center ("CNYPC"): (1) Defendants Davis and Sill used excessive force against him under the Eighth and/or Fourteenth Amendments; (2) Defendant Nicolette knew of and failed to take action to protect Plaintiff from the assault under the Eighth and/or Fourteenth Amendments; (3) Defendants Bill, Carver, and DeBroize were deliberately indifferent to his mental health needs under the Eighth and/or Fourteenth Amendments; and (4) Defendants Bill, Carver, DeBroize, Nowicki, Maxymillian, Bosco, and Hogan failed to "adequately train the staff under their supervision" and to take appropriate action in response to the incident. (*See generally*Dkt. No. 1.) For a more detailed description of Plaintiff's claims, and the factual allegations giving rise to those claims, the reader is referred to Part III.B of this Decision and Order.

**II. MOTION TO PROCEED *IN FORMA PAUPERIS***

Because Plaintiff sets forth sufficient economic need, the Court finds that Plaintiff may properly commence this action *in forma pauperis.*(Dkt. No. 2.)

**III. *SUA SPONTE* REVIEW OF PLAINTIFF'S COMPLAINT**

In light of the foregoing, the Court must now review the sufficiency of the allegations that Plaintiff has set forth in his Complaint in light of 28 U.S.C. § 1915(e)(2)(B). This is because Section 1915(e)(2)(B) directs that, when a plaintiff seeks to proceed *in forma pauperis,*"(2) ... the court shall dismiss the case at any time if the court determines that—... (B) the action ... (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief."28 U.S.C. § 1915(e)(2)(B).[3]

**A. Governing Legal Standard**





*2 It has long been understood that a dismissal for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6), can be based on one or both of two grounds: (1) a challenge to the "sufficiency of the pleading" under Fed.R.Civ.P. 8(a)(2); or (2) a challenge to the legal cognizability of the claim. *Jackson v. Onondaga Cnty.,* 549 F.Supp.2d 204, 211, nn. 15–16 (N.D.N.Y.2008) (McAvoy, J., adopting Report–Recommendation on *de novo* review).

Because such dismissals are often based on the first ground, a few words regarding that ground are appropriate. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain "a *short and plain* statement of the claim *showing* that the pleader is entitled to relief."Fed.R.Civ.P. 8(a)(2) [emphasis added]. In the Court's view, this tension between permitting a "short and plain statement" and requiring that the statement "show[ ]" an entitlement to relief is often at the heart of misunderstandings that occur regarding the pleading standard established by Fed.R.Civ.P. 8(a)(2).

On the one hand, the Supreme Court has long characterized the "short and plain" pleading standard under Fed.R.Civ.P. 8(a)(2) as "simplified" and "liberal." *Jackson,* 549 F.Supp.2d at 212, n. 20 (citing Supreme Court case). On the other hand, the Supreme Court has held that, by requiring the above-described "showing," the pleading standard under Fed.R.Civ.P. 8(a)(2) requires that the pleading contain a statement that "give[s] the defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests."*Jackson,* 549 F.Supp.2d at 212, n .17 (citing Supreme Court cases) (emphasis added).

The Supreme Court has explained that such *fair notice* has the important purpose of "enabl[ing] the adverse party to answer and prepare for trial" and "facilitat[ing] a proper decision on the merits" by the court. *Jackson,* 549 F.Supp.2d at 212, n. 18 (citing Supreme Court cases); *Rusyniak v. Gensini,* 629 F.Supp.2d 203, 213 & n. 32 (N.D.N.Y.2009) (Suddaby, J.) (citing Second Circuit cases). For this reason, as one commentator has correctly observed, the "liberal" notice pleading standard "has its limits." 2*Moore's Federal Practice* § 12.34[1][b] at 12–61 (3d ed.2003). For example, numerous Supreme Court and Second Circuit decisions exist holding that a pleading has failed to meet the "liberal" notice pleading standard. *Rusyniak,* 629 F. Supp .2d at 213, n. 22 (citing Supreme Court and Second Circuit cases); *see also Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949–52, 173 L.Ed.2d 868 (2009).

Most notably, in *Bell Atlantic Corp. v. Twombly,* the Supreme Court reversed an appellate decision holding that a complaint had stated an actionable antitrust claim under 15 U.S.C. § 1. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In doing so, the Court "retire[d]" the famous statement by the Court in *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."*Twombly,* 127 S.Ct. at 1968–69. Rather than turn on the *conceivability* of an actionable claim, the Court clarified, the "fair notice" standard turns on the *plausibility* of an actionable claim. *Id.* at 1965–74.The Court explained that, while this does not mean that a pleading need "set out in detail the facts upon which [the claim is based]," it does mean that the pleading must contain at least "some factual allegation[s]." *Id .* at 1965.More specifically, the "[f]actual allegations must be enough to raise a right to relief above the speculative level [to a plausible level]," assuming (of course) that all the allegations in the complaint are true. *Id.*

*3 As for the nature of what is "plausible," the Supreme Court explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."*Iqbal,* 129 S.Ct. at 1949."[D]etermining whether a complaint states a plausible claim for relief ... [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.... [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief."*Id.* at 1950 [internal quotation marks and citations omitted]. However, while the plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully,"*id.,* it "does not impose a probability requirement."*Twombly,* 550 U.S. at 556.

Because of this requirement of factual allegations plausibly suggesting an entitlement to relief, "the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by merely conclusory statements, do not suffice."*Iqbal,* 129 S.Ct. at 1949. Similarly, a pleading that only "tenders naked assertions devoid of further factual enhancement" will not suffice. *Iqbal,* 129 S.Ct. at 1949 (internal citations and alterations

omitted) Rule 8"demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."*Id.* (citations omitted).

This pleading standard applies even to *pro se* litigants. While the special leniency afforded to *pro se* civil rights litigants somewhat loosens the procedural rules governing the form of pleadings (as the Second Circuit has observed), it does not completely relieve a *pro se* plaintiff of the duty to satisfy the pleading standards set forth in Fed.R.Civ.P. 8, 10 and 12.[4] Rather, as both the Supreme Court and Second Circuit have repeatedly recognized, the requirements set forth in Fed.R.Civ.P. 8, 10 and 12 are procedural rules that even *pro se* civil rights plaintiffs must follow.[5] Stated more simply, when a plaintiff is proceeding *pro se*,"all normal rules of pleading are not absolutely suspended."*Jackson*, 549 F.Supp.2d at 214, n. 28 [citations omitted].[6]

**B. Analysis of Plaintiff's Complaint**

The Court prefaces its analysis of Plaintiff's Complaint by noting that, although Plaintiff is a civilly committed sex offender and no longer a prisoner, the Court will look to cases addressing prisoner's rights in analyzing Plaintiff's claims, because "confinement of civilly committed patients is similar to that of prisoners."*Holly v. Anderson*, 04–CV–1489, 2008 WL 1773093, at *7 (D.Minn. Apr.15, 2008); *see also Morgan v. Rabun*, 128 F.3d 694, 697 (8th Cir.1997) ("The governmental interests in running a state mental hospital are similar in material aspects to that of running a prison."). Thus, whereas claims of excessive force by convicted criminals are analyzed under the Eighth Amendment to the United States Constitution, because Plaintiff is a civilly committed sex offender and no longer a prisoner, his substantive rights to be free from unsafe conditions of confinement arise under the Due Process Clause of the Fourteenth Amendment. In *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), the Court stated "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed-who may not be punished at all-in unsafe conditions."*Youngberg*, 457 U.S. at 315–16. As have numerous other courts which have considered the issue, this Court has found that "the standard for analyzing a civil detainee's Fourteenth Amendment [conditions of confinement] claim is the same as the Eighth Amendment standard."*Groves v. Patterson*, 09–CV–1002, Memorandum–Decision and Order at *15–16 (N.D.N.Y. filed Nov. 18, 2009).[7]

**1. Excessive Force Claims Against Defendants Davis, Sill and Nicolette**

*4 Plaintiff alleges that on August 8, 2011, Defendant Davis entered Plaintiff's dorm room at CNYPC and "viciously attacked and brutally assaulted and battered" him. (Dkt. No. 1 at 4.) During the course of this assault, Defendant Sill is alleged to have entered Plaintiff's room and "jump[ed] on the plaintiff's legs holding and pinning them as Defendant Davis [continued to beat Plaintiff]."(*Id.*)As alleged in the Complaint, although Defendant Nicolette knew in advance that this assault was planned, he "remained in the Nurses Station" and "did nothing to interceed [sic] or stop the brutal attack on the plaintiff."(*Id.* at 5.)

To validly assert a violation of the Eighth Amendment through the use of excessive force, an inmate must allege the following: (1) subjectively, that the defendants acted wantonly and in bad faith; and (2) objectively, that the defendants' actions violated "contemporary standards of decency." *Blyden v. Mancusi*, 186 F.3d 252, 262–63 (2d Cir.1999) (internal quotation marks omitted) (citing *Hudson v. McMillian*, 503 U.S. 1, 8 [1992] ).

Here, construing the factual allegations of Plaintiff's Complaint with special leniency, the Court finds that Plaintiff appears to have alleged facts plausibly suggesting that he was subjected to excessive force by Defendants Davis and Sill. In addition, by alleging that Defendants Davis, Sill and Nicolette discussed the assault in advance of it occurring, and that Nicolette was in the vicinity of Plaintiff's room and had an opportunity to intervene to prevent it, the Complaint sufficiently alleges that Defendant Nicolette was personally involved and/or failed to protect Plaintiff from the assault. *See Bhuiyan v. Wright*, 06–CV–0409, 2009 WL 3123484, at *7 (N.D.N.Y. Sept.29, 2009) (Scullin, J.) ("The fact that defendant Davis was not in the room, but was acting as a 'lookout' so that no one came into the room while plaintiff was being beaten, would not absolve him from liability for the assault. An officer's failure to intervene during another officer's use of excessive force can itself constitute an Eighth Amendment violation unless the assault is "sudden and brief," and the defendant had no real opportunity to prevent it."); *Jeffreys v. Rossi*, 275 F.Supp.2d 463, 474 (S.D.N.Y.2003) (holding that an officer may be personally involved in the use of excessive force if he either directly participates in the assault or if he was present during the assault, yet failed to intervene on behalf of the victim, even though the officer had a reasonable opportunity to do so).





As a result, a response to these claims is required from Defendants David, Sill, and Nicolette. In so ruling, the Court expresses no opinion as to whether Plaintiff's claims can withstand a properly filed motion to dismiss or for summary judgment.

**2. Deliberate Indifference Claims Against Defendants Bill, Carver and DeBroize**

Plaintiff alleges that on August 9, 2011, the day after the alleged assault, he attempted to "discuss the incident and what transpired" with Defendants Bill and Carver. (Dkt. No. 1 at 5.) Plaintiff alleges that Defendant Bill told him, "I don't want to discuss this Mr. Groves, we're too busy for your foolishness and the matter is being investigated."(*Id.*) Plaintiff's effort to explain that he was frightened by the incident was rebuffed by Defendant Bill, who told Plaintiff to "grow up." (*Id.* at 5–6.)The following day, Plaintiff attempted to discuss the incident with Defendant Carver, his primary therapist, again without success. A further attempt at discussion later that day was met with Defendant Carver "stating to the plaintiff in a snotty tone 'grow the hell up!' " (*Id.* at 6.) On August 10, 2011, Plaintiff attempted to discuss the incident "and his current fears and feelings," during his Monday afternoon "Process Group," which is facilitated by Defendant DeBroize. As alleged, Defendant DeBroize told Plaintiff and the other group members that the matter was under investigation "so no one could discuss the incident with anyone." (*Id.* at 6.)

*5 To state a claim of deliberate indifference to a serious medical and/or mental health need under the Eighth Amendment, a plaintiff must first allege facts plausibly suggesting that prison officials acted with "deliberate indifference to serious medical needs."*Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)."[T]he plaintiff must allege conduct that is 'repugnant to the conscience of mankind' or 'incompatible with the evolving standards of decency that mark the progress of a maturing society.' " *Ross v. Kelly*, 784 F.Supp. 35, 44 (W.D.N.Y.), *aff'd*,970 F.2d 896 (2d Cir.1992) (quoting *Estelle v. Gamble*, 429 U.S. at 102, 105–06). The "deliberate indifference standard embodies both an objective and a subjective prong," both of which the plaintiff must establish. *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir.1994), *cert. denied*,513 U.S. 1154, 115 S.Ct. 1108, 130 L.Ed.2d 1074 (1995). "First, the alleged deprivation must be, in objective terms, 'sufficiently serious.' " *Id.* (citations omitted). Second, the defendant "must act with a sufficiently culpable state of mind." *Id.*

With regard to the first element, generally, to be sufficiently serious for purposes of the Constitution, a medical condition must be "a condition of urgency, one that may produce death, degeneration, or extreme pain."*Nance v. Kelly*, 912 F.2d 605, 607 (2d Cir.1990) (Pratt, J. dissenting) [citations omitted], *accord, Hathaway*, 37 F.3d at 66; *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir.1998).).[8] Under the subjective component, a plaintiff must also allege facts plausibly suggesting that the defendant acted with "a sufficiently culpable state of mind."*Hathaway*, 37 F.3d at 66. The requisite culpable mental state is similar to that of criminal recklessness. *Wilson v. Seiter*, 501 U.S. 294, 301–03, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). A physician's negligence in treating or failing to treat a prisoner's medical condition does not implicate the Eighth Amendment and is not properly the subject of a Section 1983 action. *Estelle*, 429 U.S. at 105–06; *Chance*, 143 F.3d at 703.[9]

Here, even when construed with the utmost special liberality, Plaintiff's Complaint fails to allege facts plausibly suggesting that Defendants Bill, Carver, and DeBroize acted with deliberate indifference to Plaintiff's serious mental health condition when they declined to discuss the incident of August 8, 2011. There is nothing in the Complaint that even remotely suggests that the requested conversations were integral to Plaintiff's treatment as a convicted sex offender involuntarily committed to CNYPC, or that Defendants' refusal to discuss the incident with Plaintiff when he requested to do so caused Plaintiff to suffer any harm or worsening of his condition. In addition, Plaintiff does not allege that any of these Defendants acted with the requisite culpable state of mind.

Moreover, the statements made by Defendants Bill and Carver that he should "grow up," even if construed as verbal harassment, do not give rise to a cognizable claim that may be pursued under Section 1983. Allegations of verbal harassment are insufficient to support a Section 1983 claim. *Johnson v. Eggersdorf*, 8 F. App'x 140, 143 (2d Cir.2001); *see also Purcell v. Coughlin*, 790 F.2d 263, 265 (2d Cir.1986) ("[A]llegations of verbal harassment are insufficient to base a § 1983 claim if no specific injury is alleged .").

*6 For these reasons, Plaintiff's deliberate indifference claims against Defendants Bill, Carver, and DeBroize are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and Fed.R.Civ.P. 12(b)(6). Moreover, because the Court cannot imagine how Plaintiff might correct this claim through better pleading, he is not granted leave to attempt to do so in an

amended pleading.[10] Rather, this claim is hereby dismissed with prejudice.

**3. Failure to Supervise Claims Against Defendants Bill, Carver, DeBroize, Nowicki, Maxymillian, and Hogan**

To prevail on a claim under 42 U.S.C. § 1983, a defendant must be personally involved in the plaintiff's constitutional deprivation. *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir.1977). Generally, for purposes of 42 U.S.C. § 1983, supervisory personnel may be considered "personally involved" only if they (1) directly participated in the violation, (2) failed to remedy that violation after learning of it through a report or appeal, (3) created, or allowed to continue, a policy or custom under which the violation occurred, (4) had been grossly negligent in managing subordinates who caused the violation, or (5) exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that the violation was occurring.[11]

Holding a position in a hierarchical chain of command, without more, is insufficient to support a showing of personal involvement. *McKinnon*, 568 F.2d at 934. Rather, a plaintiff must demonstrate" 'a tangible connection between the acts of the defendant and the injuries suffered.' " *Austin v. Pappas*, 04–CV–7263, 2008 WL 857528, at *2 (S.D.N.Y. Mar.31, 2008) (quoting *Bass v. Jackson*, 790 F.2d 260, 263 [2d Cir.1986] ) (other citation omitted). An official's failure to respond to grievance letters from inmates, however, "does not establish supervisory liability." *Watson v. McGinnis*, 964 F.Supp. 127, 130 (S.D.N.Y.1997).[12] Moreover, "the law is clear that inmates do not enjoy a constitutional right to an investigation of any kind by government officials." *Pine v. Sealy*, 9–CV–1198, 2011 WL 856426, at *9 (N.D.N.Y. Feb.4, 2011).[13]

In his Complaint, Plaintiff alleges in wholly conclusory terms that Defendants Bill, Carver, DeBroize, Nowicki, Maxymillian, and Hogan failed to "adequately train the staff under their supervision and fail[ed] to act within the scope and training of the position and job title they hold."(Dkt. No. 1 at 8.) Plaintiff alleges that he submitted a letter of complaint to Defendant Hogan and wrote to Defendant Nowicki on several occasions expressing concern his complaint had not been responded to, only to be advised that in September, 2011 that an investigation was ongoing. (*Id.* at 6–7.)Plaintiff does not allege that any of these Defendants personally participated in the alleged assault on August 8, 2011.

Here, even when construed with the utmost special liberality, Plaintiff's Complaint fails to allege facts plausibly suggesting any personal involvement by these Defendants in the alleged used of excessive force on August 8, 2011. As a result, Plaintiff's claims against Defendants Bill, Carver, DeBroize, Nowicki, Maxymillian, and Hogan arising from this incident are *sua sponte* dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and Fed.R.Civ.P. 12(b)(6). This dismissal is without prejudice to Plaintiff's right to file an Amended Complaint that corrects the above-described pleading defects, and states a viable claim against these Defendants. The Court notes that, at this early stage of the case, Plaintiff has the right—without leave of the Court—to file an Amended Complaint within the time limits established by Fed.R.Civ.P. 15(a)(1)(B). However, if he seeks to file an Amended Complaint after those time limits, he must file a motion for leave to file an Amended Complaint in accordance with Fed.R.Civ.P. 15(a)(2). In either event, Plaintiff is advised that *any Amended Complaint must be a complete pleading that will replace and supersede the original Complaint in its entirety, and that may not incorporate by reference any portion of the original Complaint*. *See* N.D.N.Y. L.R. 7.1(a) (4).

**7 Finally, although Plaintiff names Sgt. Sweet as a Defendant in the caption of the complaint and in the listing of the parties, he has not set forth in the Complaint any allegations of fact regarding the conduct of this Defendant complained of. (*See generally*Dkt. No. 1.) As a result, the Complaint fails to state a claim upon which relief may be granted and Sgt. Sweet is dismissed from this action without prejudice to Plaintiff's right to file an Amended Complaint as set forth above.

**IV. MOTION FOR INJUNCTIVE RELIEF**

A preliminary injunction is an "extraordinary remedy that should not be granted as a routine matter."*Patton v. Dole*, 806 F.2d 24, 28 (2d Cir.1986). In most cases, to warrant the issuance of a preliminary injunction, a movant must show (a) irreparable harm and (b) either (1) a likelihood of success on the merits of the claim or (2) sufficiently serious questions going to the merits, and a balance of hardships tipping decidedly in favor of the moving party. *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 510 (2d Cir.2006) (quotation omitted)."The purpose of issuing a preliminary injunction is to 'preserve the status quo and prevent irreparable harm until the court has an opportunity to rule on the ... merits.' " *Candelaria v. Baker*, 00–CV–912, 2006 WL 618576, at *3 (W.D.N.Y. Mar.10, 2006) (quoting *Devose v. Herrington*, 42 F.3d 470, 471 [8th





Cir.1994] ). Preliminary injunctive relief " 'should not be granted unless the movant, by a clear showing, carries the burden of persuasion.' " *Moore v. Consolidated Edison Co. of New York, Inc.*, 409 F.3d 506, 510 (2d Cir.2005) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 [1997] ). "Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances." *Moore*, 409 F.3d at 510 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). The same standards govern consideration of an application for a temporary restraining order. *Perri v. Bloomberg*, 06–CV–0403, 2008 WL 2944642, at *2 (E.D.N.Y. Jul.31, 2008) [citation omitted]. The district court has broad discretion in determining whether to grant a preliminary injunction.*Moore*, 409 F.3d at 511.

"The Second Circuit has defined 'irreparable harm' as 'certain and imminent harm for which a monetary award does not adequately compensate,' noting that 'only harm shown to be non-compensable in terms of money damages provides the basis for awarding injunctive relief.' " *Perri*, 2008 WL 2944642, at *2 (citing *Wisdom Import Sales Co., L.L.C. v. Labatt Brewing Co., Ltd.*, 339 F.3d 101, 113–14 [2d Cir.2003] ); *see also Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir.2002) ("To establish irreparable harm, a party seeking preliminary injunctive relief must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation.") (internal quotation omitted). Speculative, remote or future injury is not the province of injunctive relief. *Los Angeles v. Lyons*, 461 U.S. 95, 111–12, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *see also Hooks v. Howard*, 07–CV–0724, 2008 WL 2705371, at *2 (N.D.N.Y. Jul.3, 2008) (citation omitted) ("Irreparable harm must be shown to be imminent, not remote or speculative, and the injury must be such that it cannot be fully remedied by monetary damages.").

**8 Plaintiff has submitted a document entitled "Order to Show Cause for Preliminary Injunction and Tempor[ary] Restraining Order."(Dkt. No. 3.) Construed liberally, Plaintiff's submission seeks a temporary restraining order and injunctive relief enjoining Defendants from "submitting and filing false and untrue statements and reports" regarding the August 11, 2011 incident, and to "stop all retaliatory actions against the plaintiff ...." (*Id.* at 1.) Plaintiff also seeks an "Order of Seperation [sic]" directing that Defendants Davis, Sill, Nicolette, Bill, Carver and DeBroize be "restrained from being within 100 feet from the plaintiff in any form or matter." (*Id.* at 2.)

The Court has reviewed Plaintiff's motion papers thoroughly and considered the claims asserted therein in the light most favorable to Plaintiff, as a *pro se* litigant. Based upon that review, the Court finds that the harm Plaintiff alleges is purely speculative and, therefore, not "irreparable." Plaintiff's motion is supported only by a recitation of the alleged assault in August, 2011. (*Id.* at 1–4.)Plaintiff has not supported the claims of ongoing misconduct set forth in his motion papers with any factual allegations, such as the dates on which the misconduct occurred, the nature of the injuries he claims to have suffered, the identities of the persons responsible for the conduct he seeks to enjoin, or the relationship between those actions and the claims asserted in his Complaint. Simply stated, Plaintiff's alleged fear of future wrongdoing by the Defendants is not sufficient to warrant the extraordinary remedy of preliminary injunctive relief.

The Court further notes that the requested injunctive relief cannot be granted unless there is also proof that Plaintiff has a likelihood of succeeding on the merits of his claim, or evidence that establishes sufficiently serious questions going to the merits of his claim and a balance of hardships tipping decidedly toward him. *See Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir.1992). Plaintiff has failed to submit *proof or evidence* that meets this standard. Plaintiff's allegations, standing alone, are not sufficient to entitle him to preliminary injunctive relief. *See Ivy Mar Co. v. C.R. Seasons Ltd.*, 907 F.Supp. 547, 561 (E.D.N.Y.1995) ("[B]are allegations, without more, are insufficient for the issuance of a preliminary injunction."); *Hancock v. Essential Resources, Inc.*, 792 F.Supp. 924, 928 (S.D.N.Y.1992) ("Preliminary injunctive relief cannot rest on mere hypotheticals."). Without evidence to support his claims that he is in danger from the actions of anyone at CNYPC, the Court will not credit Plaintiff's conclusory allegations that he will be retaliated against or harmed in the future.

Plaintiff has failed to establish either of the two requisite elements discussed above. As a result, Plaintiff's request for a temporary restraining order and/or injunctive relief is denied.

**V. MOTION FOR APPOINTMENT OF COUNSEL**

**9 Courts cannot utilize a bright-line test in determining whether counsel should be appointed on behalf of an indigent party. *Hendricks v. Coughlin*, 114 F.3d 390, 392–93 (2d

Cir.1997). Instead, a number of factors must be carefully considered by the court in ruling upon such a motion:

> [T]he district judge should first determine whether the indigent's position seems likely to be of substance. If the claim meets this threshold requirement, the court should then consider the indigent's ability to investigate the crucial facts, whether conflicting evidence implicating the need for cross examination will be the major proof presented to the fact finder, the indigent's ability to present the case, the complexity of the legal issues and any special reason in that case why appointment of counsel would be more likely to lead to a just determination.

*Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1341 (2d Cir.1994) (quoting *Hodge v. Police Officers*, 802 F.2d 58, 61 [2d Cir.1986] ). This is not to say that all, or indeed any, of these factors are controlling in a particular case. [14] Rather, each case must be decided on its own facts. *Velasquez v. O'Keefe*, 899 F.Supp. 972, 974 (N.D.N.Y.1995) (McAvoy, C.J.) (citing *Hodge*, 802 F.2d at 61).

Upon due consideration, the Court finds that the relevant factors weigh decidedly against granting Plaintiff's motion at this time. For example, the Court finds as follows: (1) the case does not present novel or complex issues; (2) it appears to the Court as though, to date, Plaintiff has been able to effectively litigate this action; (3) while it is possible that there will be conflicting evidence implicating the need for cross-examination at the time of the trial, as is the case in many actions brought under 42 U.S.C. § 1983 by *pro se* litigants, "this factor alone is not determinative of a motion for appointment of counsel," *Velasquez*, 899 F.Supp. at 974; (4) if this case survives any dispositive motions filed by Defendants, *it is highly probable that this Court will appoint trial counsel at the final pretrial conference*; (5) this Court is unaware of any special reasons why appointment of counsel at this time would be more likely to lead to a just determination of this litigation; and (6) Plaintiff's motion for counsel is not accompanied by documentation that substantiates his efforts to obtain counsel from the public and private sector.

For these reasons, Plaintiff's motion for the appointment of counsel is denied without prejudice. After the Defendants have responded to the allegations in the Complaint which survive *sua sponte* review, and the parties have undertaken discovery, Plaintiff may file a second motion for the appointment of counsel, at which time the Court may be better able to determine whether such appointment is warranted in this case. Plaintiff is advised that any second motion for appointment of counsel must be accompanied by documentation that substantiates his efforts to obtain counsel from the public and private sector.

***10 ACCORDINGLY,** it is

**ORDERED** that Plaintiff's motion to proceed *in forma pauperis* (Dkt. No. 2) is ***GRANTED;*** [15] and it is further

**ORDERED** that Plaintiff's motion for injunctive relief (Dkt. No. 3) is ***DENIED;*** and it is further

**ORDERED** that Plaintiff's motion for appointment of counsel (Dkt. No. 4) is ***DENIED* without prejudice;** and it is further

**ORDERED** that Plaintiff's claims of deliberate indifference against Defendants Bill, Carver and DeBroize are *sua sponte* ***DISMISSED* with prejudice** pursuant to 28 U.S.C. § 1915(e)(2) (B)(ii) and Fed.R.Civ.P. 12(b)(6); and it is further

**ORDERED** that Plaintiff's claims against Defendants Bill, Carver, DeBroize, Nowicki, Maxymillian, and Hogan arising from their alleged personal involvement in the August 8, 2011 incident are *sua sponte* ***DISMISSED* without prejudice and with leave to amend** in this action in accordance with Fed.R.Civ.P. 15 (as described above in Part III.B.3. of this Decision and Order), pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and Fed.R.Civ.P. 12(b)(6); and it is further

**ORDERED** that Defendant Sweet is *sua sponte* ***DISMISSED* without prejudice and with leave to be reinstated** as a Defendant in this action in accordance with Fed.R.Civ.P. 15, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and Fed.R.Civ.P. 12(b)(6); and it is further

**ORDERED** that Plaintiff's Complaint (Dkt. No. 1) is otherwise accepted for filing (i.e., as to the claims against Defendants Davis, Sill, and Nicolette arising from the August 8, 2011 incident); and it is further

**ORDERED** that Plaintiff provide a summons, USM–285 form and a copy of the complaint for Defendant Davis, Sill and Nicolette for service, and upon receipt from Plaintiff of the documents required for service of process, the Clerk shall (1) issue summonses and forward them, along with copies of the Complaint to the United States Marshal for service upon the remaining Defendants, and (2) forward a copy of the summons and Complaint by mail to the Office of the New York State Attorney General, together with a copy of this Decision and Order; and it is further

**ORDERED** that, after service of process on Defendants, a response to the Complaint shall be filed by the Defendants or their counsel as provided for in the Federal Rules of Civil Procedure; and it is further

**ORDERED** that all pleadings, motions and other documents relating to this action be filed with the Clerk of the United States District Court, Northern District of New York, 7th Floor, Federal Building, 100 S. Clinton St., Syracuse, New York 13261–7367. **Any paper sent by a party to the Court or the Clerk must be accompanied by a certificate showing that a true and correct copy of it was mailed to all opposing parties or their counsel. Any document received by the Clerk or the Court which does not include a certificate of service showing that a copy was served upon all opposing parties or their attorneys will be stricken from the docket .**Plaintiff must comply with any requests by the Clerk's Office for any documents that are necessary to maintain this action. All parties must comply with Local Rule 7.1 of the Northern District of New York in filing motions. **Plaintiff is also required to promptly notify, in writing, the Clerk's Office and all parties or their counsel of any change in Plaintiff's address; his failure to so may result in the dismissal of this action.**All motions will be decided on submitted papers without oral argument unless otherwise ordered by the Court.

**All Citations**

Not Reported in F.Supp.2d, 2012 WL 651919

Footnotes

1 This is the fourth civil rights action filed by Plaintiff in this District. Generally, two of these actions arose out of Plaintiff's refusal to consent to a strip search and the subsequent actions taken against Plaintiff as a result of his refusal. *See Groves v. New York*, 09–CV–0406, Decision and Order (N.D.N.Y. filed May 11, 2009) (Hurd, J.) (*sua sponte* dismissing complaint pursuant to 28 U.S.C. § 1915[e][2][B] ); *Groves v. The State of New York*, 9:09–CV–0412, Decision and Order (N.D.N.Y. filed Mar. 26, 2010) (Sharpe, J.) (granting defendants' motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12[b][6] ). The third action alleged numerous violations of Plaintiff's constitutional rights during the period July 23, 2009, and August 26, 2009, and was dismissed without prejudice upon Plaintiff's request in October, 2010. *See Groves v. Maxymillian*, 9:09–CV–1002, Decision and Order (N.D.N.Y. filed Oct. 8, 2010) (Suddaby, J.). As a result, it does not appear that the current action is barred because of res judicata, collateral estoppel, and/or the rule against duplicative litigation.

2 At that time, Plaintiff also filed motions for injunctive relief and for appointment of counsel. (Dkt.Nos.3, 4.)

3 The Court notes that, similarly, Section 1915A(b) directs that a court must review any "complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity" and must "identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint ... is frivolous, malicious, or fails to state a claim upon which relief may be granted; or ... seeks monetary relief from a defendant who is immune from such relief."28 U.S.C. § 1915A(b).

4 *See Vega v. Artus*, 610 F.Supp.2d 185, 196 & nn. 8–9 (N.D.N.Y.2009) (Suddaby, J.) (citing Second Circuit cases); *Rusyniak*, 629 F.Supp.2d at 214 & n. 34 (citing Second Circuit cases).

5 *See Vega*, 610 F.Supp.2d at 196, n. 10 (citing Supreme Court and Second Circuit cases); *Rusyniak*, 629 F.Supp.2d at 214 & n. 34 (citing Second Circuit cases).

6 It should be emphasized that Fed.R.Civ.P. 8's plausibility standard, explained in *Twombly*, was in no way retracted or diminished by the Supreme Court's decision (two weeks later) in *Erickson v. Pardus*, in which (when reviewing a *pro se* pleading) the Court stated, "*Specific* facts are not necessary" to successfully state a claim under Fed.R.Civ.P. 8(a)(2).*Erickson v. Pardus*, 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) [emphasis added]. That statement was merely an abbreviation of the often-repeated point of law—first offered in *Conley* and repeated in *Twombly*—that a pleading need not "set out *in detail* the facts upon which [the claim is based]" in order to successfully state a claim. *Twombly*, 127 S.Ct. 1965, n. 3 (citing *Conley*, 355 U.S. at 47) [emphasis added]. That statement did not mean that all pleadings may achieve the requirement of "fair notice" without ever alleging any facts whatsoever. Clearly, there must

still be enough fact set out (however set out, whether in detail or in a generalized fashion) to raise a right to relief above the speculative level to a plausible level. *See Rusyniak*, 629 F.Supp.2d at 214 & n. 35 (explaining holding in *Erickson* ).

7 *See Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir.1996) ("[W]hile the Supreme Court has not precisely limned the duties of a custodial official under the Due Process Clause to provide needed medical treatment to a pretrial detainee, it is plain that an unconvicted detainee's rights are at least as great as those of a convicted prisoner."); *Walton v. Breeyear*, 05–CV–0194, 2007 WL 446010, at *8, n. 16 (N.D.N.Y. Feb.8, 2007) (Peebles, M.J.) (noting that pretrial detainees enjoy protections under the due process clause of the Fourteenth Amendment parallel to those afforded to sentenced prisoners by the Eighth Amendment); *Vallen v. Carrol*, 02–CV–5666, 2005 WL 2296620, at ——8–9 (S.D.N.Y. Sep.20, 2005) (finding that the Eighth Amendment standard of "deliberate indifference" is the correct one for Section 1983 claims brought by involuntarily committed mental patients based on alleged failures to protect them that violated their substantive due process rights); *Bourdon v. Roney*, 99–CV–0769, 2003 WL 21058177, at *10 (N.D.N.Y. Mar.6, 2003) (Sharpe, M.J.) ("The standard for analyzing a pretrial detainee's Fourteenth Amendment [conditions of confinement] claim is the same as the Eighth Amendment standard.").

8 Relevant factors informing this determination include whether the plaintiff suffers from an injury that a "reasonable doctor or patient would find important and worthy of comment or treatment," a condition that "significantly affects" a prisoner's daily activities, or "the existence of chronic and substantial pain." *Chance*, 143 F.3d at 702.

9 Thus, a physician who "delay[s] ... treatment based on a bad diagnosis or erroneous calculus of risks and costs" does not exhibit the mental state necessary for deliberate indifference. *Harrison*, 219 F.3d at 139. Likewise, an inmate who disagrees with the physician over the appropriate course of treatment has no claim under Section 1983 if the treatment provided is "adequate." *Chance*, 143 F.3d at 703. The word "adequate" reflects the reality that "[p]rison officials are not obligated to provide inmates with whatever care the inmates desire. Rather, prison officials fulfill their obligations under the Eighth Amendment when the care provided is 'reasonable.' " *Jones v. Westchester Cnty. Dept. of Corr.*, 557 F.Supp.2d 408, 413 (S.D.N.Y.2008). In addition, "disagreements over medications, diagnostic techniques (e.g., the need for X-rays), forms of treatment, or the need for specialists or the timing of their intervention are not adequate grounds for a section 1983 claim." *Sonds v. St. Barnabas Hosp. Corr. Health Servs.*, 151 F.Supp.2d 303, 312 (S.D.N.Y.2001). However, if prison officials consciously delay or otherwise fail to treat an inmate's serious medical condition "as punishment or for other invalid reasons," such conduct constitutes deliberate indifference. *Harrison*, 219 F.3d at 138.

10 The Court notes that, generally, leave to amend pleadings shall be freely granted when justice so requires. Fed.R.Civ.P. 15(a). However, an opportunity to amend is not required where amendment would be futile. *John Hancock Mut. Life Ins. Co. v. Amerford Int'l Corp.*, 22 F.3d 458, 462 (2d Cir.1994) (*John Hancock Mut. Life Ins. Co.*, 22 F.3d at 462. The Second Circuit has explained that "[w]here it appears that granting leave to amend is unlikely to be productive, ... it is not an abuse of discretion to deny leave to amend." *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir.1993); *see Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir.2000) ("The problem with [Plaintiff's] cause of action is substantive; better pleading will not cure it. Repleading would thus be futile. Such a futile request to replead should be denied."). This rule is applicable even to *pro se* plaintiffs. *See, e.g., Cuoco*, 222 F.3d at 103.

11 *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995) (adding fifth prong); *Wright*, 21 F.3d at 501 (adding fifth prong); *Williams v. Smith*, 781 F.2d 319, 323–324 (2d Cir.1986) (setting forth four prongs).

12 *See also Gillard v. Rosati*, 08–CV–1104, 2011 WL 4402131, at *7 (N.D.N.Y. Aug.22, 2011) (Peebles, J.) ("It is well-established that without more, 'mere receipt of letters from an inmate by a supervisory official regarding a medical claim is insufficient to constitute personal liability.'"[internal quotation marks and brackets omitted] ); *Greenwaldt v. Coughlin*, 93–CV–6551, 1995 WL 232736, at *4 (S.D.N.Y. Apr.19, 1995) ("it is well-established that an allegation that an official ignored a prisoner's letter of protest and request for an investigation of allegations made therein is insufficient to hold that official liable for the alleged violations."); *Clark v. Coughlin*, 92–CV 0920, 1993 WL 205111, at *5 n. 2 (S.D.N.Y. Jun.10, 1993) ("Courts in this jurisdiction have consistently held that an inmate's single letter does not constitute the requisite personal involvement in an alleged constitutional deprivation to trigger the Commissioner's liability.")

13 *See also Bernstein v. N.Y.*, 591 F.Supp.2d 448, 460 (S.D.N.Y.2008) ("Courts within the Second Circuit have determined that there is no constitutional right to an investigation by government officials."[internal quotation marks, brackets and ellipsis omitted] ).

14 For example, a plaintiff's motion for counsel must always be accompanied by documentation that substantiates his efforts to obtain counsel from the public and private sector, and such a motion may be denied solely on the failure of the plaintiff to provide such documentation. *See Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1341 (2d Cir.1994); *Cooper v. Sargenti Co., Inc.*, 877 F.2d 170, 172, 174 (2d Cir.1989) [citation omitted].





15 Plaintiff should note that he will still be required to pay fees that he may incur in this action, including but not limited to copying and/or witness fees.

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United States District Court,
N.D. New York.

Patrick GUILLORY, Plaintiff,
v.
Kurt ELLIS, et al, Defendants.

No. 9:11–CV–600 (MAD/ATB). | Signed Aug. 29, 2014.

**Attorneys and Law Firms**

Patrick Guillory, Dannemora, NY, pro se.

Office of the New York State Attorney General, The Capitol, Gregory J. Rodriguez, AAG, of Counsel, Albany, NY, for Defendants.

**MEMORANDUM–DECISION AND ORDER**

MAE A. D'AGOSTINO, District Judge.

**I. INTRODUCTION**

***1** Plaintiff, an inmate currently in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), commenced this civil rights action, pursuant to 42 U.S.C. § 1983, on May 31, 2011. *See* Dkt. No. 1. The remaining claims are that Defendants violated Plaintiff's constitutional rights under the First Amendment's Free Exercise Clause, as well as his rights under the Religious Land Use and Institutionalized Person's Act ("RLUIPA"), and subsequently retaliated against him for attempting to exercise these rights by destroying Plaintiff's mail and thus denying him access to the courts. *See* Dkt. Nos. 1, 210.

In a very thorough Report–Recommendation dated July 23, 2014, Magistrate Judge Baxter recommended that the Court grant Defendants' motion for summary judgment and dismiss Plaintiff's complaint in its entirety. *See* Dkt. No. 210. Specifically, Magistrate Judge Baxter first found that in relation to the December 7, 2010 incident, Defendant Ready acted within the bounds of his employment and according to the documentation before him and thus, his inadvertent denial that caused Plaintiff to miss one religious service did not substantially burden Plaintiff's free exercise of his religion. *See id.* at 14. With regards to the March 20, 2011 incident, Magistrate Judge Baxter found that Defendant Ellis was not responsible for the shortened duration of the Purim celebration, and that while the delay may have been an inconvenience, Plaintiff was still able to participate in the service, thus satisfying the requirements of the First Amendment and RLUIPA. *See id.* at 19–20. Magistrate Judge Baxter also found that neither Defendant Ellis, nor Defendant Ready engaged in the conduct mentioned above as a way to retaliate against Plaintiff for any grievances that he had previously filed either against them or any other correctional officer. *See id.* at 39–40. Moreover, Magistrate Judge Baxter found that Defendant Kupiec did not interfere with Plaintiff's mail as a means to either retaliate against him or to deny him access to the courts. *See id.* 35–36. Finally, Magistrate Judge Baxter found that Plaintiff failed to establish that he suffered an adverse action as a result of Defendant Kupiec's alleged conduct. On August 4, 2014, the Court received objections to the Report–Recommendation from Plaintiff. *See* Dkt. No. 211.

**II. DISCUSSION**

**A. Plaintiff's objections**

In his objection to Magistrate Judge Baxter's Report–Recommendation, Plaintiff states that he objects to the Report in its entirety. *See id.* Plaintiff relays his astonishment at Magistrate Judge Baxter's choice to "excuse Def [endant] Kupiec's conduct" and at his finding that Plaintiff's position is "unfounded." *See id.* Plaintiff further objects to Magistrate Judge Baxter's Report on the grounds that he looked outside the pleadings and "only to the Defendants Affidavits" when making his determination to grant Defendants' motion for summary judgment. *See id.*

**B. Standard of review**

***2** A court may grant a motion for summary judgment only if it determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the movant as a matter of law. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir.1994) (citations omitted). When analyzing a summary judgment motion, the court "cannot try issues of fact; it can only determine whether there are issues to be tried." *Id.* at 36–37 (quotation and other citation omitted). Moreover, it is well-settled that a party opposing a motion for summary judgment may not simply rely on the assertions in its pleadings. *See*





*Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed.R.Civ.P. 56(c)(c)).

In assessing the record to determine whether any such issues of material fact exist, the court is required to resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. *See Chambers*, 43 F.3d at 36 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2502, 2513–14, 91 L.Ed.2d 202 (1986)) (other citations omitted). Where the non-movant either does not respond to the motion or fails to dispute the movant's statement of material facts, the court may not rely solely on the moving party's Rule 56.1 statement; rather the court must be satisfied that the citations to evidence in the record support the movant's assertions. *See Giannullo v. City of N.Y.*, 322 F.3d 139, 143 n. 5 (2d Cir.2003) (holding that not verifying in the record the assertions in the motion for summary judgment "would derogate the truth-finding functions of the judicial process by substituting convenience for facts").

"[I]n a *pro se* case, the court must view the submissions by a more lenient standard than that accorded to 'formal pleadings drafted by lawyers.' " *Govan v. Campbell*, 289 F.Supp.2d 289, 295 (N.D.N.Y.2007) (quoting *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)) (other citations omitted). The Second Circuit has opined that the court is obligated to "make reasonable allowances to protect *pro se* litigants" from inadvertently forfeiting legal rights merely because they lack a legal education. *Govan v. Campbell*, 289 F.Supp.2d 289, 295 (N.D.N.Y.2007) (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir.1983)). "However, this does not mean that a *pro se* litigant is excused from following the procedural requirements of summary judgment. *See id.* at 295 (citing *Showers v. Eastmond*, 00 CIV. 3725, 2001 WL 527484, *1 (S.D.N.Y. May 16, 2001)). Specifically, "a *pro se* party's 'bald assertion,' completely unsupported by evidence, is not sufficient to overcome a motion for summary judgment." *Lee v. Coughlin*, 902 F.Supp. 424, 429 (S.D.N.Y.1995) (citing *Cary v. Crescenzi*, 923 F.2d 18, 21 (2d Cir.1991)).

When a party files specific objections to a magistrate judge's report-recommendation, the district court makes a "*de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). However, when a party files "[g]eneral or conclusory objections or objections which merely recite the same arguments [that he presented] to the magistrate judge," the court reviews those recommendations for clear error. *O'Diah v. Mawhir*, No. 9:08–CV–322, 2011 WL 933846, *1 (N.D.N.Y. Mar. 16, 2011) (citations and footnote omitted). After the appropriate review, "the court may accept, reject, or modify, in whole or in part, the findings or recommendation made by the magistrate judge." 28 U.S.C. § 636(b) (1).

**C. Application**

***3** In the present matter, although Plaintiff has filed objections to Magistrate Judge Baxter's Report–Recommendation, the objections that are given are mostly conclusory and "merely recite the same arguments" that were originally presented to Magistrate Judge Baxter. *See O'Diah*, 2011 WL 933846, at *1; *see generally* Dkt. No. 211. Moreover, some of the objections that Plaintiff makes are of an accusatory nature, in that he charges Magistrate Judge Baxter with excusing the behavior of Defendant Kupiec based on her race, and supporting "the Defendants [r]eckless lies." *See* Dkt. No. 211 at 1 ("I'm sure if Kupiec was black you would have treated her like all of the blacks who appear before you who are 'ignorant of the law' "). Nearly all of Plaintiff's "objections" lack the specificity needed to make a *de novo* determination. In light of his *pro se* status, however, the Court will address the arguments raised.

Plaintiff argues that Magistrate Judge Baxter improperly considered disputed facts in rendering his recommendation. *See* Dkt. No. 211 at 3. Having reviewed the Report–Recommendation, the Court finds that Magistrate Judge Baxter correctly relied only on undisputed facts in rendering his determination or construed any disputed facts in Plaintiff's favor in finding that Plaintiff's allegations were insufficient as a matter of law to support his claims. *See, e.g.*, Dkt. No. 210 at 39 (finding that "neither the action allegedly taken by defendant Ready, nor the action allegedly taken by defendant Ellis rises to the level of an 'adverse action' under the case law"). Further, contrary to Plaintiff's allegations, Defendants' motion for summary judgment was properly supported by the record, including affidavits and deposition transcripts.

Finally, contrary to Plaintiff's assertions, Magistrate Judge Baxter correctly determined that Defendant Boll was not personally involved in the alleged conduct. The letter to which Plaintiff refers clearly establishes that Defendant Boll did not conduct an investigation into the underlying subject of Plaintiff's grievance, but was merely conducting an "investigation" into the status of Plaintiff's grievance and a reminder that the "Inmate Grievance Program was instituted to handle issues such as yours." Dkt. No. 202–6 at Exhibit

"A." Defendant Boll then stated that "[t]he CORC will conduct a thorough investigation to assure that your rights are observed and your issues are addressed. If any corrective action is needed, you will be notified. As your appeal to the CORC is pending, it is recommended that you await the decision." *Id.* Magistrate Judge Baxter correctly determined that Defendant Boll's response to Plaintiff was insufficient to establish her personal involvement. *See Rivera v. Fischer*, 655 F.Supp.2d 235, 238 (W.D.N.Y.2009).

The Court has thoroughly reviewed the parties' submissions and Magistrate Judge Baxter's comprehensive Report–Recommendation and finds that Magistrate Judge Baxter correctly recommended that the Court grant Defendants' motion for summary judgment and dismiss this case.

### III. CONCLUSION

***4** After carefully reviewing Magistrate Judge Baxter's Report–Recommendation, the parties' submissions and the applicable law, and for the reasons stated herein, the Court hereby

**ORDERS** that Magistrate Judge Baxter's Report–Recommendation (Dkt. No. 210) is **ADOPTED** in its entirety for the reasons stated therein; and the Court further

**ORDERS** that Defendants' motion for summary judgment (Dkt. No. 202) is **GRANTED;** and the Court further

**ORDERS** that the Clerk of the Court shall enter judgment in Defendants' favor and close this case; and the Court further

**ORDERS** that the Clerk of the Court shall serve a copy of this Memorandum–Decision and Order on all parties in accordance with the Local Rules.

**IT IS SO ORDERED.**

### REPORT–RECOMMENDATION

ANDREW T. BAXTER, United States Magistrate Judge.

This matter has been referred to me for Report and Recommendation pursuant to 28 U.S.C. § 636(b) and LOCAL RULES N.D.N.Y. 72.3(c). In this civil rights complaint, plaintiff alleges that defendants subjected him to religious discrimination, denial of access to courts, and retaliation for the exercise of his First Amendment Rights, while he was incarcerated at Mid–State Correctional Facility. (Compl.; Dkt. 1). Plaintiff seeks monetary and injunctive relief.

#### I. *Procedural History*

This case has had a long and complicated procedural history, complete with an appeal of the denial of a preliminary injunction to the Second Circuit, which dismissed plaintiff's appeal as lacking an arguable basis in law or fact.[1] (Dkt. No. 133). The court will attempt to briefly state the important aspects of the docket and outline the remaining issues. On October 31, 2012, defendants made a motion for judgment on the pleadings. (Dkt. No. 123). Plaintiff responded in opposition to that motion, but then also made a variety of other motions relating to venue, recusal, and discovery. (Dkt. Nos.119, 139, 140, 144, 145, 149).

On April 3, 2013, I issued an Order and Report–Recommendation, denying some of plaintiff's non-dispositive motions and recommending dismissal of some of his substantive claims on the pleadings. (Dkt. No. 148). On May 15, 2013, Judge D'Agostino affirmed my order and approved my recommendation. (Dkt. No. 155). Judge D'Agostino's order also disposed of plaintiff's Motion Requesting the Court to Take Judicial Notice of Plaintiff's State Court Decision (Dkt. No. 149), his "Motion for Reconsideration," (Dkt. No. 122), and ordered a response to plaintiff's discovery motion (Dkt. No. 119). (Dkt. No. 155).

After Judge D'Agostino's Order, plaintiff filed additional motions: another Motion to Compel (Dkt. No. 159) and a Motion for Sanctions (Dkt. No. 160). On July 2, 2013, I held a telephonic conference with the parties regarding the outstanding motions, denying in part and granting in part, plaintiff's motions to compel (Dkt.Nos.119, 159); denying his motion for sanctions (Dkt.Nos.160); and finding that no action was necessary on other letters submitted by plaintiff. (Dkt.Nos.161–62). On September 13, 2013, plaintiff made a motion to "stop transfer" and requested that his deposition be held at his current facility, Wyoming Correctional Facility. (Dkt.Nos.173, 175). Plaintiff's transfer to Greene Correctional Facility rendered that motion moot, and it was denied on that basis. (Dkt. No. 178).

***5** On October 10, 2013, plaintiff made a motion for injunctive relief and appointment of counsel, which plaintiff later clarified was only a motion for appointment of counsel.





(Dkt.Nos.182, 187). This court denied the motion on October 31, 2013, and plaintiff then sent the court a letter stating that he did not wish to be appointed counsel at the time of trial. (Dkt.Nos.189, 190). On January 7, 2014, plaintiff stipulated to the dismissal of all claims against defendants Fischer and Marlenga, which was "so ordered" by Judge D'Agostino on January 8, 2014. (Dkt.Nos.196–97). Defendants filed this summary judgment motion on February 4, 2014. (Dkt. No. 202). Plaintiff responded in opposition to the motion, and requested oral argument. (Dkt. Nos.205, 207). I denied plaintiff's motion for oral argument on April 18, 2014. (Dkt. No. 208).

Presently pending before me is the remaining defendants' motion for summary judgment, together with plaintiff's response in opposition. (Dkt.Nos.202, 205). Based upon Judge D'Agostino's order approving my recommendation on May 15, 2013 (Dkt. No. 155) and the parties' stipulation to dismiss all claims against defendants Fischer and Marlenga, the following defendants and claims remain:

1. A First Amendment Free Exercise Clause claim against defendants Ready and Ellis. (Compl.¶¶ 37–47, 65).
2. A Religious Land Use and Institutionalized Persons Act ("RLUIPA"), claim against defendants Ready and Ellis. (*Id.*)
3. A retaliation claim against defendants Ready and Ellis relating to the above First Amendment and RLUIPA issues.
4. First Amendment retaliation claims against defendant Kupiec relating to the opening, loss, or destruction of plaintiff's mail in retaliation for grievances filed against Kupiec and defendant Ready. (Compl.¶¶ 58–64).
5. A First Amendment denial of access to courts claim against defendant Kupiec. (Compl.¶¶ 67).

#### II. *Facts*

Rather than engage in a lengthy discussion of the facts at the outset, the court will discuss the facts associated with each of plaintiff's claim within the relevant sections below.

#### III. *Summary Judgment*

Summary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Salahuddin v. Goord*, 467 F.3d 263, 272–73 (2d Cir.2006). "Only disputes over [ "material" ] facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). It must be apparent that no rational finder of fact could find in favor of the non-moving party for a court to grant a motion for summary judgment. *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1224 (2d Cir.1994).

The moving party has the burden to show the absence of disputed material facts by informing the court of portions of pleadings, depositions, and affidavits which support the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies its burden, the nonmoving party must move forward with specific facts showing that there is a genuine issue for trial. *Salahuddin v. Goord*, 467 F.3d at 273. In that context, the nonmoving party must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). However, in determining whether there is a genuine issue of material fact, a court must resolve all ambiguities, and draw all inferences, against the movant. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Salahuddin v. Goord*, 467 F.3d at 272.

#### IV. *Religion Claims*

##### A. Legal Standards

###### 1. First Amendment

***6** Inmates have the right under the First and Fourteenth Amendments to freely exercise a chosen religion. *Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir.2003) (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). However this right is not limitless, and may be subject to restrictions relating to legitimate penological concerns. *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir.1990). The analysis of a free exercise claim is governed by the framework set forth in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) and *Turner v. Safely*, 482 U.S. 78, 84 (1987). This framework is one of reasonableness and is less restrictive than the standard ordinarily applied to the alleged infringements of fundamental constitutional rights. *Ford*, 352 F.3d at 588.

In *O'Lone*, the Supreme Court held that a regulation that burdens a protected right withstands a constitutional challenge if that regulation is reasonably related to legitimate penological interests. 482 U.S. at 349 (quoting *Turner*, 482

U.S. at 89). An individualized decision to deny an inmate the ability to engage in a religious exercise is analyzed under the same standard. *Salahuddin v. Goord*, 467 F.3d 263, 274 n. 4 (2d Cir.2006) (citations omitted). In *Farid v. Smith*, 850 F.2d 917, 926 (2d Cir.1988), the Second Circuit held that to assess a free exercise claim, the court must determine "(1) whether the practice asserted is religious in the person's scheme of beliefs and whether the belief is sincerely held; (2) whether the challenged practice of prison officials infringes upon the religious belief; and (3) whether the challenged practice of the prison officials furthers some legitimate penological interest."

The court must examine whether the challenged action has a legitimate, rational connection to the governmental objective; whether prisoners have alternative means of exercising the burdened right; the impact on guards, inmates, and prison resources of accommodating that right; and the existence of alternative means of facilitating the exercise of that right that have only a *de minimis* adverse effect on the valid penological interests. *See King v. Bennett*, No. 02–CV–349, 2007 WL 1017102, at *4 (W.D.N.Y. March 30, 2007) (citing *Salahuddin*, 467 F.3d at 274). Finally, once prison officials state a legitimate penological interest to justify their actions, the burden shifts to plaintiffs to show that the defendants' concerns are "irrational." *Ford*, 352 F.3d at 595.

**2. Religious Land Use and Institutionalized Persons Act**

RLUIPA provides that

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

*7 42 U.S.C. § 2000cc–1(a). Under RLUIPA, the plaintiff bears the burden of showing that his religious exercise has been burdened and that the burden is substantial. *Marria v. Broaddus*, 200 F.Supp.2d 280, 297 (S.D.N.Y.2002) (citing 42 U.S.C. § 2000cc–2(b)). The burden then shifts to the government to show that the burden furthers a compelling governmental interest ***and*** that it is the ***least restrictive*** means of achieving that interest. *Id* . The act defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."42 U.S.C. § 2000cc–5(7)(A).

A "substantial burden" is one that places "substantial pressure on an adherent to modify his behavior and to violate his beliefs."*Singh v. Goord*, 520 F.Supp.2d 487, 498 (S.D.N.Y.2007) (citing, *inter alia*, *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir.1996)). Inconvenience alone is insufficient to establish a substantial burden. *Id.* (citing *Westchester Day School v. Village of Mamaroneck*, 379 F.Supp.2d 550, 557 (S.D.N.Y.2005)). Furthermore, the substantial evidence test presupposes that some inconveniences may be so minor that they do not amount to a violation. *See McEachin v. McGuinnis*, 357 F.3d 197, 203 n. 6 (2d Cir.2004) (discussing in a footnote the applicability of the "time-honored maxim *'de minimis non curat lex'* " ). However, the court should not attempt to engage in resolving disputes as to whether a particular practice is "central" or "mandatory" to a particular religion in determining whether a burden was substantial. *See Ford v. McGinnis*, 352 F.3d 582, 593–94 (2d Cir.2003) (discussing First Amendment protections).

**B. Application**

**1. December 7, 2010 Incident:**

Plaintiff alleges that defendant Ready denied plaintiff the right to attend Jewish Services for Lubavitch on December 7, 2010, even though he was on the call-out list for the service, and while making disparaging remarks about plaintiff's religion. (Compl.¶¶ 37–47). This court originally recommended denying defendant's motion for judgment on the pleadings, notwithstanding defendants' argument that one interference with plaintiff's religious services would not rise to the level of a constitutional violation. I found, instead, that plaintiff claimed that Ready intentionally denied plaintiff the opportunity to attend this religious service, and that this action was also in retaliation for plaintiff filing a successful grievance against defendants Johnston and Ellis. (Dkt. No. 148 at 13). Based only on the facts as stated by plaintiff, and with a very liberal review by the court, this court recommended denying the motion for judgment on the pleadings.[2] (*Id.* at 14) (this court also noted that it was "unclear" how plaintiff's claims would fare after a well-supported summary judgment motion).

Defendant Ready has submitted a declaration in support of summary judgment. He states that he has been a corrections officer ("CO") at Mid–State since September of 2010. (Ready





Decl. ¶ 2) (Dkt. No. 202–3). On December 7, 2010, he was working on Unit 7–2. (*Id.* ¶ 5). His duties included running the desk at the entrance door of Building 7—the Program Building, ensuring that inmates were where they were scheduled to be, and permitting movement as necessary pursuant to "call-out sheets." (*Id.*) When an inmate is listed on a call-out sheet, defendant Ready requires the inmate to sign out from his program, and then he is allowed to go to the "call-out." (*Id.* ¶ 6).

*8 Defendant Ready states that on December 7, 2010, plaintiff came to him and stated that he had to leave his program for a "call-out." However, plaintiff's name was not listed on the call-out sheets that defendant Ready was given for that day. (*Id.* ¶ 8). If an inmate's name is not on the sheet, he is not permitted to go to the "call-out," so defendant Ready informed plaintiff that he had to return to his program because his name was not on the sheet.(*Id.* ¶ 1). Defendant Ready states that he never made any comment about plaintiff's religion. (*Id.* at 11). Plaintiff did not seem upset or angry, did not ask to see a sergeant or supervisor, and "merely complied with [defendant Ready's] instructions and returned to class."(*Id.* ¶ 12).

Defendant Ready states that the only reason that he prevented plaintiff from going to the call-out (religious service) was because his name was not on any of the call-out sheets that he had been given, and defendant Ready was not authorized to allow plaintiff to attend the call-out. (*Id.* ¶¶ 10, 14). Finally, defendant Ready points out that he had just transferred to Mid–State in September of 2010, thus, he was not aware of plaintiff's September 2010 grievance when Ready did not allow plaintiff to attend the religious service on December 7, 2010. (*Id.* ¶ 13).

As Exhibit I to plaintiff's complaint, he attaches a copy of the "call-out" for Tuesday, December 7, 2010. Plaintiff's name clearly appears on that call-out. (Compl.Ex. I). Father Robert Weber[3] has filed a declaration in support of defendants' motion for summary judgment, stating that in December 2010, he was the Coordinating Chaplain at Mid–State. (Weber Decl. ¶ 3) (Dkt. No. 202–7). Father Weber states that when he arrived at work on December 7, 2010, he realized that there was no call-out for the Lubavitch Youth Organization, members of which were visiting the Jewish inmates for Chanukah.(*Id.* ¶ 6). In an attempt to rectify this error, Father Weber "caused a callout to be generated with the names of those inmates who regularly attend Jewish Services ."(*Id.* at 7). Although Father Weber states that a copy of the call-out is attached to his declaration as Exhibit A, no such copy is attached. The court will assume that the call-out to which Father Weber refers is the one that is attached to plaintiff's complaint as Exhibit I. (Dkt. No. 1 at 46). Plaintiff's name is on that call-out.

Father Weber then states that, after Deputy Superintendent for Programs ("DSP") Phillips approved the call-out, it was "hand-delivered to the Housing Units within the correctional facility."(Weber Decl. ¶ 8)."Inadvertently, the callout was not added to the daily callout packet nor was it delivered to the program areas that day."(*Id.* ¶ 9). Although plaintiff's name certainly appears on the call-out, unfortunately defendant Ready, who was at the Program Building that day, did not have that call-out in front of him when plaintiff approached to ask about going to services, and defendant Ready was justified in refusing to let plaintiff attend the services. The Superintendent's investigation of plaintiff's grievance resulted in the same finding:

> *9 The facility investigation revealed that the Jewish Services call-out was not submitted with the other scheduled inmate call-outs on the day before (12/6/10), which is normal procedure; therefore, it was not included with 12/7/10 facility call-out packet. The inmate call-out packets are normally distributed to all program areas, housing units as well as other staff/inmate areas the day before the call-outs are scheduled. On the morning of the posted call-out (12/7/10), this error was brought to the attention of the Coordinating Chaplain, who then had the Jewish Services call-out hand delivered to the housing units but not to the program areas. Although the 7–2 officer [Ready] and the grievant's general business instructor [Gruen] reviewed the p.m. call-outs to verify/confirm the grievant's statements, neither staff member would have been aware the grievant was listed on the 12/7/10 Jewish Services call-out scheduled for 2:00 p.m. nor would they have been aware that there was an addition to the original call-out packet

because it was never delivered to their program area.

(Compl.Ex. L) (Dkt. No. 1 at 50).[4] This document, attached as an exhibit to plaintiff's complaint, corroborates defendant Ready's and Father Weber's version of the events. Defendant Ready did not intentionally deny plaintiff the opportunity to attend the service on December 7, 2010 because although plaintiff's name was on the call-out list, defendant Ready did not have that list in front of him,[5] and he would not even have been aware that the list existed because it was not delivered to the program area. This one, clearly inadvertent incident, does not rise to the level of a constitutional violation committed by defendant Ready.[6]

In his response to defendants' motion for summary judgment, plaintiff states that the defendants are lying, and that the call-out was delivered to *"all"* program areas. (Pl.'s Mem. ¶ 10) (Dkt. No. 205–1 at 9). Plaintiff states that he reaches this sweeping *conclusion* because "[t]he location where the Jewish Services [are] held (Building # 101) is *a Program Area,"* and security staff in that area must have had the call-out because they would not have let the thirteen other Jewish inmates in the building. (*Id.*) (emphasis added). If one program area had the call-out, then all the program "areas" must have had the call-out. However, plaintiff's argument misses the point. Defendant Ready was not in Building # 101. He was in Unit 7–2 in Building 7,[7] and the fact that the building in which the religious services were actually held had the call-out,[8] does not "prove" or even raise a question of fact regarding whether the call-out had been sent to the other program areas, in the face of Father Weber's sworn statement that he did not send the call-out to the program areas. Although plaintiff states that Building # 101 is "a" program area, it is not "the" Program Building.[9]

In my prior report, I recommended denying defendants' motion to dismiss on the pleadings, notwithstanding case law holding that missing one religious service does not constitute a substantial burden on the inmate's right to the free exercise of his religion under either under the First Amendment or under RLUIPA. (Dkt. No. 148 at 13) (citing inter alia *Troy v. Kuhlmann*, No. 96 Civ. 7190, 1999 WL 825622, at * 15 (S.D.N.Y. Oct. 15, 1999)). In granting ***summary judgment,*** the court in *Troy* stated that "courts in the Second Circuit have held that an inmate's right to practice his religion is not substantially burdened if an inmate missed one religious service for ***a valid reason.***" *Id.* (emphasis added). I did not rely on *Troy* in my prior report, because the defendants in this case brought a motion for judgment on the pleadings, and this court was bound by the facts as stated in plaintiff's complaint. Now that defendants have moved for summary judgment, the court may consider material outside the complaint, such as sworn declarations, in determining that, while plaintiff missed one religious service through the actions of defendant Ready, this inadvertent denial did not substantially burden the plaintiff's free exercise of his religion. In denying plaintiff the opportunity to attend his call-out, defendant Ready acted according to the documentation before him. Even if a mistake were made, it was the lack of proper documentation that caused plaintiff to miss his service.[10] Neither the First Amendment, nor RLUIPA was violated by defendant Ready.

**2. The March 20, 2011 Incident**

***10** The second incident occurred on March 20, 2011, when plaintiff claims that defendant Ellis intentionally cut short a visit from Lubavitch Rabbis who had come from Brooklyn to see plaintiff[11] at the facility. (Compl.¶ 65). Plaintiff claims that he was scheduled to meet with the Rabbis for one and one half hours in order to celebrate the Purim holiday. (*Id.*) Plaintiff claims that defendant Ellis cut the service to a matter of minutes and sent all of the Jewish inmates back to their housing units.

Defendant Ellis has submitted a declaration in support of defendants' motion for summary judgment. (Ellis Decl.) (Dkt. No. 202–5). Kurt Ellis is employed by DOCCS as a Protestant Reverend, and at the time of the declaration, held the position of Chaplain at Mid–State. (Ellis Decl. ¶¶ 1–2). Defendant Ellis states that on March 20, 2011, Rabbi Theodore Max scheduled a Purim celebration in the small chapel at MidState with some members of the Lubavitch organization.(*Id.* ¶ 5). The call-out was approved for 2:30 p.m. on March 20, 2011. Defendant Ellis spoke with Corrections Officer ("CO") Backer, the Building 101 main console officer and explained that the call-out was for 2:30, but that the Rabbi might be late because he was making Purim rounds at other facilities, and a delay was possible. (*Id.* ¶¶ 6–7).

Defendant Ellis states that at approximately 1:45 p.m., he noticed that plaintiff was working in the Law Library, which is adjacent to the Building 101 console. (*Id.* ¶ 8). Defendant Ellis mentioned to CO Backer that plaintiff was on the Purim call-out, but Ellis was not sure if plaintiff would need to go back to his housing unit at the 2:15 "go back" and then return





for the Purim call-out. (*Id.*) CO Backer told defendant Ellis that plaintiff would have to go back to his housing unit and then return when it was time for the Purim call-out. (*Id.*)

Defendant Ellis told plaintiff that he knew that plaintiff had "an issue" before, and Ellis wanted to make sure that plaintiff did not have any trouble that day. (*Id.* ¶ 9). Ellis told plaintiff that, because he was currently signed out for the Law Library, he would have to go back to his housing unit at 2:15 p.m. and then return "when they call for the service."Plaintiff responded that he did not have to go back and asked the Law Library officer whether plaintiff could go directly to the service from the Law Library at 2:30. CO Ippolito, the Law Library Officer gave plaintiff permission to do so. Defendant Ellis states that he left, but informed CO Backer what CO Ippolito told plaintiff, and CO Backer agreed that CO Ippolito "should not have said that." (*Id.*)

Reverend Ellis states that he has no authority over the procedure for "inmate movement" at the facility because movement is a matter of security. (*Id.* ¶ 10). At approximately 2:30 p.m., defendant Ellis went to the small chapel to see if the Rabbi had arrived, but the Rabbi was not there yet. Defendant Ellis went to check with CO Backer. Plaintiff also approached the "security bubble" to check with CO Backer. Plaintiff was told by CO Backer and by defendant Ellis that the Rabbi had not arrived, and plaintiff went back to the Law Library.(*Id.* ¶ 11).

***11** Defendant Ellis then went to see if Rabbi Max had arrived, but was told that the Rabbi had not been seen. Defendant Ellis did his "weekly rounds in the Visitor's Center, signing into the Log Book at 2:45 p.m."(*Id.* ¶ 12). After a brief conversation with a staff member, defendant Ellis saw the Lubavitch volunteers pulling into the parking lot. Defendant Ellis greeted Rabbi Max and continued on his daily rounds, stopping at the Watch Commander's Office to inform him that Rabbi Max had arrived. (*Id.*)

Defendant Ellis states that he was not involved in calling inmates for the Purim Service, nor did he attend the Service on March 20, 2011.[12] Defendant Ellis continued with his daily rounds and did not return to his office until approximately 3:45 p.m ., at which time he noticed the inmates in the small chapel with the Rabbis. (*Id.* ¶ 16). Defendant Ellis states that after the service ended, he spoke to Rabbi Max, who stated that the service went well. (*Id.* ¶ 17). Defendant Ellis states that he was not in charge of the Service, he had no involvement in the time that the Service began or ended, and he did not order the inmates back to their housing units at the conclusion of the Service. (*Id.* ¶¶ 18–20).

Defendants have also submitted the declaration of Rabbi Theodore Max,[13] who states that he is a Chaplain who is responsible for leading the primary congregational worship and prayer services for Jewish inmates. (Max Decl. ¶¶ 1–3). He is assigned to multiple correctional facilities, including Mid–State. (*Id.* ¶ 4). Rabbi Max states that he coordinated the Purim celebration, and he was advised to schedule the call-out for 2:30, even though he was not scheduled to arrive until 2:45 that day. The Service was scheduled to last approximately one hour. (*Id.* ¶¶ 6–7). Rabbi Max states that he was on a "very tight" schedule on March 20, 2011 because he was scheduled to visit "at least three correctional facilities" before his visit to Mid–State.(*Id.*) When he and the members of the Lubavitch organization arrived at Mid–State, there was a long line of visitors, which delayed their entrance into the facility, causing the Purim celebration to begin later than 2:45 p.m. (*Id.* ¶ ¶ 10–11). Rabbi Max states that pursuant to facility rules, the inmates were still required to return to their cells at 3:45 p.m., and that the Purim celebration ended at that time. (*Id.* ¶ 12).

Plaintiff does not claim that he missed the celebration, only that the celebration was shorter than originally scheduled. Rabbi Max has explained that he arrived late, causing the service to begin later, and run shorter than anticipated. Defendant Ellis had nothing to do with scheduling the event, with Rabbi Max being late, or with shortening the service.

Plaintiff argues that defendant Ellis sent plaintiff back to the law library and the other Jewish inmates back to their housing units, for the purpose of shortening the service. In his response to the motion for summary judgment plaintiff states that during *his* deposition, the defendants "admitted" that defendant Ellis sent the Jewish inmates back to their cells to shorten the service. (Pl.'s Mem. ¶ 19) (citing Deposition Transcript ("DT") at 49). The deposition transcript is not an "admission" by defendants, and does not state that defendant Ellis sent the inmates back to their cells.

***12** During his deposition, plaintiff testified that Reverend Ellis allows *Protestant* inmates to come to the chapel before Ellis is ready to conduct the service, but does not allow Jewish inmates to go to their place of worship and wait if the Rabbi is not there. (DT at 49)."Whenever we go to the Jewish services, he sends us all back. 'Go back to your housing unit.' " (*Id.*) Defense counsel then asked plaintiff a question: "even though the rabbis came a little bit late, and even though they sent

some of the inmates back to their cells, you were able to meet with the rabbis that day and have a short prayer service." (*Id.*) This *question by counsel* is **not** an *admission by a defendant*, and counsel was making the point that "even if" what plaintiff said were true—that someone sent the Jewish inmates back to their cells because Rabbi Max had not arrived—plaintiff still attended the service, notwithstanding that it was shorter than anticipated.

Rabbi Max's declaration shows that ***he*** was late beginning the service, and the inmates were required to return to their cells at 3:45. Defendant Ellis had nothing to do with the length of the service.[14] Under the appropriate definition, plaintiff's religious rights were not substantially burdened. In order for the defendant's interference to be a "substantial burden" on the inmate's religious exercise, the interference must be more than an inconvenience, and plaintiff must demonstrate that the government's action pressured plaintiff to commit an act forbidden by his religion or prevented him from engaging in conduct or having a religious experience mandated by his faith. *Pugh v. Goord*, 571 F.Supp.2d 477, 504–05 (S.D.N.Y.2008); *Graham v. Mahmood*, No. 05–10071, 2008 WL 1849167, at * 14 (S.D.N.Y. Apr. 22, 2008); *Gill v. Defrank*, No. 98 Civ. 7851, 2000 WL 897152, at *1 (S.D.N.Y. July 6, 2000) (citing *Boomer v. Irvin*, 963 F.Supp.2d 227, 230 (W.D.N.Y.1997)).

In addition, although plaintiff may disagree, the shortening of his Purim celebration because the Rabbi was late or because plaintiff had to wait for other inmates to come back from their housing units did not amount to a "substantial burden." This delay may certainly have been "an inconvenience." However, plaintiff admits that the Service did occur, that prayers were said, and that the inmates were allowed to eat the food, albeit too quickly for plaintiff's liking. Thus, neither the Constitution, nor RLUIPA were violated by defendant Ellis. Plaintiff's retaliation claim will be discussed below.

**V. *Mail/Access to Courts/Retaliation***

**A. Legal Standards**

**1. Mail**

Among the protections enjoyed by prison inmates, subject to appropriate limitations, is the right "to the free flow of incoming and outgoing mail" guaranteed by the First Amendment. *LeBron v. Swaitek*, No. 05–CV–172 (GLS/DRH), 2007 WL 3254373, at *6 (N.D.N.Y. Nov. 2, 2007) (Sharpe, J.) (quoting *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir.2003)). "The boundary between an inmate's First Amendment right to free speech and the ability of prison officials to open or otherwise interfere with an inmate's mail is not precise." *Cancel v. Goord*, No. 00 CIV 2042, 2001 WL 303713, at *5 (S.D.N.Y. March 29, 2001). This right, however, must yield to the legitimate penological interests of prison officials when mail is monitored for the purpose of ensuring order in the prison by preventing illegal activities. *Duamutef v. Hollins*, 297 F.3d 108, 112–13 (2d Cir.2002) (citing, *inter alia*, *U.S. v. Workman*, 80 F.3d 688, 699 (2d Cir.1996)). "The [Supreme] Court has counseled judicial restraint in the federal courts' review of prison policy and administration, noting that 'courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.' " *Giano v. Senkowski*, 54 F.3d 1050, 1053 (2d Cir.1995) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)).

***13** Actions taken by prison administrators directed toward inmate mail are subject to the overarching consideration that a prison regulation infringing on an inmate's constitutional rights is valid so long as the regulation is "reasonably related to the legitimate penological interests." *Turner v. Safley*, 482 U.S. at 89. Applying this precept, "[c]ourts have constitutionally afforded greater protection ... to outgoing mail than to incoming mail." *Davis*, 320 F.3d at 351 (citations omitted). Nonetheless, the Second Circuit has held that " 'where good cause is shown, outgoing mail can be read' without violating inmates' First Amendment rights." *Workman*, 80 F.3d at 698 (quoting *Wolfish v. Levi*, 573 F.2d 118, 130 n. 27 (2d Cir.1978), *rev'd in part on other grounds sub nom., Bell v. Wolfish*, 441 U.S. 520 (1979)).

Prison security is a legitimate penological interest that justifies limitations on an inmate's First Amendment rights related to regular mail. *See Cancel v. Goord*, 2001 WL 303713, at *6. "[T]he interception of a prisoner's correspondence does not violate that individual's First Amendment rights 'if prison officials had good or reasonable cause to inspect the mail." *Knight v. Keane*, No. 99 Civ. 3955, 2005 U.S. Dist. LEXIS 18702, at *18 (S.D.N.Y. August 26, 2005) (citing *United States v. Felipe*, 148 F.3d 101, 108 (2d Cir.1998)) (Rep't–Rec.), *adopted* 2006 WL 89929 (S.D.N.Y. Jan. 12, 2006). To establish a claim for interference with regular, non-legal mail, the plaintiff must show " 'a pattern and practice of interference that is not justified by any legitimate penological concern." *Singleton v. Williams*, No. 12 Civ.2021, 2014 WL 2095024, at *3 (S.D.N.Y. May 20, 2014) (quoting *Cancel, supra.*) An isolated incident is





generally insufficient to establish a constitutional violation. *Id.* (citing *Davis*, 320 F.3d at 351).

Legal mail is entitled to a higher degree of protection than regular mail, and "prison policies or practices which interfere with legal mail on a regular basis whether incoming or outgoing must be supported by a legitimate penological interest other than mere general security concerns which permit interference with regular mail. *Cancel v. Goord*, 2001 WL 303713, at *6–7 (citing *Washington v. James*, 782 F.2d 1134, 1139 (2d Cir.1986)). Plaintiff must still show that prison officials " 'regularly and unjustifiably interfered with the ... legal mail." *Singleton*, 2014 WL 2095024, at *4 (quoting *Cancel, supra.*) As few as two incidents of mail tampering may constitute an actionable violation if the incidents suggest and ongoing practice of censorship that is unjustified by a substantial governmental interest or if the tampering unjustifiably chilled the inmate's right to access to courts as discussed below or impaired legal representation that plaintiff received. *Vega v. Rell*, No. 3:09–CV–737, 2013 WL 6273283, at *10 (D.Conn. Dec. 4, 2013) (citing *Washington*, 782 F.2d at 1139).

**2. Access to Courts**

***14** Legal mail claims are sometimes related to claims that defendants have denied an inmate access to courts by interfering with legal mail. It is well-settled that inmates have a constitutional right to "meaningful" access to the courts. *Bounds v. Smith*, 430 U.S. 817, 823 (1977). The Supreme Court held in *Bounds* that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828.

"Mere 'delay in being able to work on one's legal action or communicate with the courts does not rise to the level of a constitutional violation.' " *Davis v. Goord*, 320 F.3d 346, 352 (2d Cir.2003) (citing *Jermosen v. Coughlin*, 877 F.Supp. 864, 871 (S.D.N.Y.1995). In addition, "to establish a constitutional violation based on a denial of access to the courts, a plaintiff must show that the defendant's conduct was deliberate and malicious, and that the defendant's actions resulted in actual injury to the plaintiff." *Lewis v. Casey*, 518 U.S. 343, 351 (1996). *See Collins v. Goord*, 581 F.Supp.2d 563, 573 (S.D.N.Y.2008). In order to show actual injury, the defendants' conduct must have "hindered [plaintiff's] efforts to pursue a legal claim." 518 U.S. at 351.

**3. Retaliation**

In order to establish a claim of retaliation for the exercise of a First Amendment right, plaintiff must show that he engaged in constitutionally protected speech or conduct, and that the protected activity was a substantial motivating factor for "adverse action" taken against him by defendants. *Bennett v. Goord*, 343 F.3d 133, 137 (2d Cir.2003) (citing *Gayle v. Gonyea*, 313 F.3d 677 (2d Cir.2002); *see also Hendricks v. Coughlin*, 114 F.3d 390 (2d Cir.1997). The Second Circuit has defined "adverse action" in the prison context as "retaliatory conduct 'that would deter a similarly situated individual of ordinary firmness from exercising ... constitutional rights.' " *Gill v. Pidlypchak*, 389 F.3d at 381 (citation omitted). This objective test applies whether or not the plaintiff was himself subjectively deterred from exercising his rights. *Id.*

To establish retaliation, the plaintiff must also establish a causal connection between the protected speech or conduct and the adverse action. *Gill v. Pidlypchak*, 389 F.3d 379, 380 (2d Cir.2004). Although a " 'plaintiff can establish a causal connection that suggests retaliation by showing that protected activity was close in time to the adverse action[,]' "[s]uch circumstantial evidence of retaliation, ... without more, is insufficient to survive summary judgment." *Roseboro v. Gillespie*, 791 F.Supp.2d 353, 370 (S.D.N.Y.2011) (citations omitted).

Even if plaintiff makes the appropriate showing of retaliation, defendants may avoid liability if they demonstrate that they would have taken the adverse action even in the absence of the protected conduct. *Id.* at 371. "Regardless of the presence of retaliatory motive, ... a defendant may be entitled to summary judgment if he can show ... that even without the improper motivation the alleged retaliatory action would have occurred." *Scott v. Coughlin*, 344 F.3d 282, 287–88 (2d Cir.2003) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

***15** The court must keep in mind that claims of retaliation are "easily fabricated" and "pose a substantial risk of unwarranted judicial intrusion into matters of general prison administration." Accordingly, plaintiff must set forth non-conclusory allegations to sustain a retaliation claim. *Bennett*, 343 F.3d at 137. Even where a complaint or affidavit contains specific assertions, the allegations "may still be deemed conclusory if [they are] (1) 'largely unsubstantiated by any other direct evidence' and (2) 'so replete with inconsistencies

and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in the complaint.' " *Smith v. Woods*, 9:03–CV–480 (DNH/GHL), 2006 WL 1133247, at *3 & n. 11 (N.D.N.Y. Apr. 24, 2006) (quoting *Jeffreys v. City of New York*, 426 F.3d 549, 554–55 (2d Cir.2005)). To be sufficient to create a "factual issue," in the context of a summary judgment motion, an allegation in an affidavit or verified complaint "must, among other things, be based 'on personal knowledge.' " *Id.*, 2006 WL 1133247, at *3 & n. 7 (collecting cases); Fed.R.Civ.P. 56(c)(4).

**B. Application**

**1. Defendant Kupiec**

**a. Relevant Facts—Interference/Retaliation**

In his complaint, plaintiff alleged that after he filed a grievance against defendant Ready, which was denied on January 14, 2011, defendant Kupiec [15] began to lose and/or destroy plaintiff's packages that were received in the mail room. [16] (Compl.¶¶ 57–64). Plaintiff claims that on January 14, 2011, the same day that the Superintendent rendered a decision on plaintiff's grievance against defendant Ready, plaintiff received a package from Stratford Career Center, to study for his paralegal degree. (Compl.¶ 58). Plaintiff states "Defendant Theda Kupiec 'got word' of the complaint contra the aforesaid officers and started to intentionally lose and destroy the plaintiff's legal packages from said school." (*Id.*) Plaintiff states that the "package" with his text and exams was never recovered, but he did "receive the Paralegal Course from the school on the said date in question." [17] (*Id.* & Ex. M).

Plaintiff states that he "was never once called down to the package room or mail room in the entire month of [J]anuary, 2011."(Compl.¶ 58). He then states that "this only indicates that anytime an inmate (in this case the plaintiff) files a grievance against the defendant's [sic]—retaliation takes place."(*Id.*) Plaintiff speculates that retaliation can take the form of missing packages or "planting weapons on the inmate ... to make sure that the inmates [sic] goes to the box (Special Housing Units) where he is limited to legal materials." [18] (*Id.*)

The complaint also alleges that after he appealed the Superintendent's decision regarding the December 7, 2010 incident against Ready, a "Notice of Intention to File a Claim" ("Notice") was improperly sent "regular" mail, rather than by Certified Mail as is required under New York State Law and notwithstanding that plaintiff paid for certified mail. (Compl.¶¶ 60–63). Plaintiff alleges that on March 15, 2011, his parents sent him a food package that he never received, purportedly due to the retaliation by defendant Kupiec. (Compl.¶ 63). Several paragraphs later, plaintiff states that, on May 17, 2011, defendant Kupiec "slashed open" plaintiff's legal mail, removed the documents outside of his presence, and sent the documents to plaintiff in a coffeestained, "stampless" envelope. (Compl.¶ 82). In plaintiff's response to defendants' motion for summary judgment, he also mentions an incident that is not part of the complaint. Plaintiff alleges that defendant Kupiec opened his mail and ripped up his "law school exam scores." (Dkt. No. 205–1, ¶ 33). This court will not consider this final allegation against defendant Kupiec. [19]

**16 Defendants have filed the declaration of defendant Theda Kupiec, Senior Mail Clerk at Mid–State. (Kupiec Decl. ¶¶ 1–2) (Dkt. No. 202–4). Defendant Kupiec states that her responsibilities include sorting outgoing mail and placing the appropriate postage after verification that the inmate has sufficient funds, in addition to sorting incoming mail for distribution to the housing units. (*Id.* ¶ 6). Defendant Kupiec states that she has no responsibility "whatsoever" with respect to "packages" that are received for inmates. She states that the mail room in which she works is located in Building 20 of the Administration Building, which is located outside of the secure fence around the facility. However, the "package room" is located in Building 101, which is located inside the secure fence. (*Id.* ¶¶ 7–8).

Defendant Kupiec states that she was not aware of any grievance plaintiff may have filed against defendant Ready, and that she does "not personally know Correction Officer Ready."(*Id.* ¶¶ 11–12). Defendant Kupiec states that "at some point," she became aware of plaintiff's claim that he did not receive the Stratford Career Institute package, but because defendant Kupiec does not work in the package room, and has no responsibility for packages, she has no knowledge of the result of plaintiff's complaint. (*Id.* ¶ 14).

Defendant Kupiec states that she did inadvertently mail plaintiff's Notice via regular mail. (*Id.* ¶ 15). Plaintiff requested that the envelope be sent Certified, and defendant Kupiec first sent the mail to the Business Office to verify that plaintiff had adequate funds for certified mail. When the mail was returned to her with the authorization, defendant Kupiec inadvertently sent the mail with regular postage. Defendant Kupiec states that she realized her mistake when plaintiff filed





a grievance, to which she responded by admitting her error and reimbursing plaintiff for the difference in the postage. Defendant Kupiec states that the mistake was hers, and no one "told" her to send the mail out via regular mail rather than certified. (*Id.* ¶¶ 15–16 & Ex. A). Exhibit A to defendant Kupiec's declaration is a copy of the memorandum that she sent to plaintiff apologizing for the error and reimbursing him for the cost of the mailing. [20] Defendant Kupiec states that she is completely unaware of plaintiff's missing food package because she does not work in the package room. (*Id.* ¶ 17).

Defendant Kupiec also states that on May 18, 2011, she received a manila envelope from the package room with plaintiff's name and DIN number on it, with no indication that it was legal mail. [21] She opened the envelope to record the contents, and when she realized that the mail was from a court, she wrote which court the mail came from on the front of the envelope and send the mail to the Legal Officer. (*Id.* ¶ 19 & Ex. B). Exhibit B is the memorandum that defendant Kupiec wrote to the IGRC, explaining what happened with the manila envelope. [22] (*Id.*) Defendant Kupiec states that she did not open plaintiff's legal mail intentionally or in retaliation for any grievance, but merely in the "normal course of [her] job duties ...." (*Id.* ¶ 20).

**b. Discussion**

**17 These incidents do not show constitutional interference with plaintiff's mail, nor do the facts show that defendant Kupiec was retaliating against plaintiff for his grievances. First, it is clear that defendant Kupiec does not work in the package room, and had no personal involvement in, and would not have been responsible for, either plaintiff's alleged text book "loss" or the alleged loss of his kosher food. [23] The court will focus on plaintiff's allegations that defendant Kupiec tampered with his mail on February 25, 2011 (certified mail claim) and on May 17, 2011 (opening of legal mail).

The fact that plaintiff's Notice was sent regular mail, rather than certified is not interference with plaintiff's mail. The mail was sent, it was just sent by a different method of delivery. [24] This mistake shows neither intent, nor a "pattern and practice" of interference. At worst, it shows an error by defendant Kupiec in sending out plaintiff's mail, for which plaintiff was reimbursed. [25] The incident in which defendant Kupiec sent plaintiff documents in a plain manilla envelope after she realized that the documents were sent by a court also shows an error by facility staff in the package room, that defendant Kupiec attempted to rectify by writing which court the documents came from on the envelope and having it delivered to plaintiff through the proper channels for legal mail. [26] Defendant Kupiec states that the court documents were already in the plain manilla envelope when she received them.

Plaintiff claims that defendant Kupiec was retaliating against plaintiff for the grievances that he filed. Plaintiff first mentions the grievance he filed against defendant Ready after the December 7, 2010 incident, which was denied by the Superintendent on January 14, 2011. [27] Plaintiff's statement that defendant Kupiec was aware of plaintiff's grievance against defendant Ready because an inmate named "Rogers" told defendant Kupiec about the grievance, is completely conclusory. The first time plaintiff ever mentioned inmate Rogers was at plaintiff's deposition. (Pl.'s Dep. at 61). Plaintiff stated that Inmate Rogers worked in the grievance office and knew who was filing grievances against officers, so Inmate Rogers told defendant Kupiec about the decision on plaintiff's grievance against Ready "because [plaintiff] was already putting in paperwork on why my legal mail was being messed with."(Pl.'s Dep. at 62). This statement by plaintiff is not even plausible. *See Jeffreys v. City of New York*, 426 F.3d 549, 555 (2d Cir.2005) (no genuine issue of material fact when plaintiff's explanation is not even plausible); *Haust v. United States*, 953 F.Supp.2d 353, 361 (N.D.N.Y.2013) (court may discredit plaintiff's self-serving testimony when it is so replete with inconsistencies and improbabilities that no reasonable fact-finder would undertake the suspension of disbelief necessary to credit the allegations made in his complaint) (quoting *Jeffreys, supra*).

**18 Defendant Kupiec states that she does not know defendant Ready, and that plaintiff's allegation that an inmate named "Rogers" informed Kupiec of the grievance against Ready is untrue. (Kupiec Decl. ¶ 13). Although defendant Kupiec is aware that Inmate Rogers works in the grievance office, she could not identify Rogers, nor has she ever had any contact with him. (*Id.*) The grievance against defendant Ready had to do with religion, not mail. The fact that plaintiff may have begun "putting paperwork together" regarding a grievance about his legal mail against defendant Kupiec, which plaintiff did not file until March or April of 2011, would not support Inmate Rogers deciding to tell defendant Kupiec about a grievance filed against a different defendant, coincidentally on the same day that plaintiff claims a package was delivered for him. [28] As stated above, defendant Kupiec

does not work in the package room and would not have been responsible for the alleged loss of any package delivered to the facility for plaintiff in January of 2011 or any other time.

In addition, it is difficult to establish one defendant's retaliation for complaints against another defendant. *See, e.g., Hare v. Hayden*, 09 Civ. 3135, 2011 WL 1453789, at *4 (S.D.N.Y. Apr. 14, 2011) ("As a general matter, it is difficult to establish one defendant's retaliation for complaints against another defendant.") (citing *Wright v. Goord*, 554 F.3d 255, 274 (2d Cir.2009) (dismissing retaliation claim against a corrections officer when only alleged basis for retaliation was complaint about a prior incident by another corrections officer); *Rosehoro v. Gillespie*, 791 F.Supp.2d 353, 369 (S.D.N.Y.2011) (plaintiff failed to provide any basis to believe that a corrections counselor would retaliate for a grievance that she was not personally named in) (collecting cases); *Ciaprazi v. Goord*, No. 9:02–CV–915 (GLS/DEP), 2005 WL 3531464, at *8–9 (N.D.N.Y. Dec. 22, 2005) (granting summary judgment and dismissing retaliation claim based only on plaintiff's conclusory allegations that the manifest falsity of the misbehavior report and testimony during the disciplinary hearing indicated the disciplinary matters were motivated by retaliatory animus due to grievances plaintiff filed against individuals other than the defendants involved in the disciplinary action).*See also Faulk v. Fisher*, 545 F. App'x 56, 58–59 (2d Cir.2013) (temporal proximity to the protected action and excellent disciplinary history prior to the allegedly retaliatory misbehavior reports were insufficient to avoid summary judgment when there was no additional evidence, and neither of the officers were involved in the successful grievance); *Bennett v. Goord*, No. 06–3818–pr, 2008 WL 5083122, at *2 (2d Cir. Dec. 2, 2008) (citing *inter alia McPherson v. N.Y. City Dep't of Educ.*, 457 F.3d 211, 215 (2d Cir.2006) (speculation alone is insufficient to defeat a motion for summary judgment)).

*19 Plaintiff also may be claiming that defendant Kupiec's subsequent actions were in retaliation for the grievance that plaintiff ultimately filed against defendant Kupiec in March or April of 2011. In her declaration, defendant Kupiec denies ever opening plaintiff's legal mail in retaliation for a grievance filed against *her*.[29] (Kupiec Decl. ¶ 18). In any event, plaintiff suffered no adverse action, as defined by the case law,[30] as the result of defendant Kupiec inadvertently opening plaintiff's legal mail that was sent to her from the package room.[31] This action would not deter a similarly situated inmate from exercising his constitutional rights. This action also would not deter a similarly situated inmate from asserting his rights.[32] It does not show malice or retaliation by defendant Kupiec. Plaintiff's mail interference and retaliation claims may be dismissed.

**b. Access to Courts**

Plaintiff claims that defendant Kupiec's failure to send his Notice by certified mail denied plaintiff access to courts because he was forced to withdraw his action.[33] Plaintiff's allegation has no basis whatsoever. Plaintiff concedes that he withdrew his New York Court of Claims action of his own accord. At his deposition, plaintiff stated "I had to dismiss [the Court of Claims action] because after I found out about these reckless lies, I had to dismiss it."(Pl.'s Dep. at 79). At plaintiff's deposition, the Assistant Attorney General asked why plaintiff did not just send a new Notice if he really believed that his case would be dismissed without a notice sent by certified mail. It was clear that plaintiff would have had time to send a new one, and plaintiff had been reimbursed for the mail that was improperly sent.(*Id.* at 80–82). Plaintiff then stated that the notice covered earlier incidents, and would have been untimely for the "earlier" incidents. (*Id.* at 82).

At the same time, plaintiff stated that he withdrew the action because he "wanted to change his theory" and go to federal court, because plaintiff stated that the "Court of Claims is only [for] negligence and property damage."(*Id.* at 83). Plaintiff then reasserted that the "Court" ***would have*** stricken his "motion"[34] because he did not serve the Attorney General with his Notice by certified mail. Plaintiff cannot "create" an access to courts claim by voluntarily withdrawing his action and then speculating what the court would have done if he had not withdrawn the action.

According to plaintiff, the Notice was required to be served on the Attorney General, not the Court. (T. 81). The court would have no way of knowing that the Notice was not served by certified mail, unless the Attorney General made a motion to dismiss on that basis. Even if the Attorney General made such a motion, plaintiff could have opposed the motion by stating that a mistake was made in mailing the item. There is no way to know that plaintiff's case would have been dismissed. In any event, it is clear from plaintiff's deposition that he would not have stayed in the Court of Claims. At his deposition, he clearly stated that he "wanted to change his theory" and go to Federal Court. (DT at 83). That is not a denial of access to courts "caused" by defendant Kupiec's conduct. Thus, plaintiff's access to courts claim may be dismissed.





**2. Defendants Ready and Ellis**

*20 Plaintiff alleges that the actions taken by defendants Ready and Ellis were taken in retaliation for a grievance that plaintiff filed on September 20, 2010 against defendant Ellis and CO Johnston.[35] Defendant Ready states that he did not know about the September 20, 2010 grievance on December 7, 2010, because he was transferred to Mid–State in September of 2010. (Ready Decl. ¶ 13). In his response, plaintiff argues that defendant Ready must have known about the September grievance because "it was not until November 24, 2010 that the Grievance Supervisor disciplined the officers including Ready regarding allowing inmates ... to adhere to Jewish memos and callouts."(Pl.'s Mem. at ¶ 24) (Dkt. No. 205–1 at 18).

First, the court notes that there is no indication the Ready, or any other officer was "disciplined." The Superintendent's response states that the facility policies were reviewed and "corrective action taken."[36] This does not mean "discipline." The Superintendent's response also states that the "referenced employees were advised and clarification given with regards to this matter."(Pl.'s Ex. N(1) (Dkt. No. 205–1 at 93). Defendant Ready was not one of the employees referenced in the grievance and was not involved in the September incident.[37] Thus, he would not have been disciplined or even "advised" of the incident. The memorandum cited by plaintiff, dated November 24, 2010 was between C. Tapia, the IGP Supervisor and DSP Phillips.

The fact that the defendants work in the same facility, or even on the same unit, is not sufficient to show that defendant Ready was aware of plaintiff's grievance against two other officers or that he would have retaliated against plaintiff for a grievance in which she was not involved. As stated above, generally, it is difficult to show retaliation for actions taken against another officer. *Hare v. Hayden, supra*, 09 Civ. 3135, 2011 WL 1453789, at *4.

Further, the court finds that neither the action allegedly taken by defendant Ready, nor the action allegedly taken by defendant Ellis rises to the level of an "adverse action" under the case law. Keeping plaintiff out of one service because defendant Ready did not have the correct call-out list, is not an action that would deter a "similarly situated" individual from exercising his rights. With respect to defendant Ellis, even assuming that he had anything to do with shortening the Purim service (which this court has found that he did not), this action would certainly not deter someone similarly situated to plaintiff from asserting his rights.[38] Additionally, plaintiff claims that defendant Ellis was responsible for sending *all* the inmates back to their housing unit to wait for the Rabbis. Clearly, even if that were true, plaintiff concedes that he did not return to his housing unit, and defendant Ellis could not have been retaliating against plaintiff by taking action against other inmates.[39] Therefore, any retaliation claims against defendants Ellis and Ready may be dismissed.

**VII. *Personal Involvement***

**A. Legal Standards**

*21 Personal involvement is a prerequisite to the assessment of damages in a section 1983 case, and respondeat superior is an inappropriate theory of liability. *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994) (citation omitted); *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.2003). In *Williams v. Smith*, 781 F.2d 319, 323–24 (2d Cir.1986), the Second Circuit detailed the various ways in which a defendant can be personally involved in a constitutional deprivation, and thus be subject to individual liability.

A supervisory official is personally involved if that official directly participated in the infraction. *Id.* The defendant may have been personally involved if, after learning of a violation through a report or appeal, he or she failed to remedy the wrong. *Id.* Personal involvement may also exist if the official created a policy or custom under which unconstitutional practices occurred or allowed such a policy or custom to continue. *Id.* Finally, a supervisory official may be personally involved if he or she were grossly negligent in managing subordinates who caused the unlawful condition or event.*Id. See also Iqbal v. Hasty*, 490 F .3d 143, 152–53 (2d Cir.2007) (citing *Colon v. Coughlin*, 58 F.3d 865, 873) (2d Cir.1995)), *rev'd on other grounds, Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The mere receipt of a letter or similar complaint is insufficient to constitute personal involvement; otherwise, a plaintiff could create personal involvement by any supervisor simply by writing a letter. (*Id.*) (citing *Johnson v. Wright*, 234 F.Supp.2d 352, 363 (S.D.N.Y.2002)). In order for a letter to suffice to establish personal involvement, plaintiff would have to show that the supervisor conducted a personal investigation or personally took action on the letter or grievance. *Rivera v. Fischer*, 655 F.Supp.2d 235, 238 (W.D.N.Y.2009); *Bodie v. Morgenthau*, 342 F.Supp.2d 193, 203 (S.D.N.Y.2004). However, personal action does *not*

include referring the letter to a subordinate for investigation. *Id.* (citing *Sealy v. Giltner*, 116 F.3d 47, 51 (2d Cir.1997)); *Hartnett v. Barr*, 538 F.Supp.2d 511, 524 (N.D.N.Y.2008).

**B. Application**

In my April 3, 2013 recommendation, I noted that in Judge D'Agostino's initial order, the allegations of personal involvement against defendants Fischer and Boll were "rather sparse." (Dkt. No. 148 at 24). Notwithstanding these "sparse" allegations, Judge D'Agostino allowed the case to continue as against these supervisory defendants. (*Id.*) In a conclusory fashion, plaintiff claimed that he had so many documents from these two defendants, he could "flood the docket." (*Id.*) (citing Dkt. No. 129 at 22). Plaintiff's response to the defendants' motion for judgment on the pleadings implied that he could make the appropriate showing, perhaps by amending his complaint. Because at that time, I was recommending that this action proceed at least to a properly supported motion for summary judgment, I did not recommend dismissing the action as against defendants Fischer and Boll based on lack of personal involvement. (*Id.*)

***22** Plaintiff did not amend his complaint, and he later stipulated to dismissing the action as against Fischer. However, in his response to the motion for summary judgment, he maintains that defendant Boll was personally involved in the alleged constitutional violations because she stated in her response to interrogatories that her "office" became aware of plaintiff's September 9, 2010 grievance when a copy of plaintiff's correspondence to a Deputy Commissioner of Program Services was "forwarded to my office." (Dkt. No. 205–3 at 355). Defendant Boll states that she had no personal knowledge or recollection of the grievance itself because the Office of Counsel is not the appropriate department to file a grievance. (*Id.* at 355–56). Defendant Boll also states that "upon receipt of your letter, the matter was investigated by the Office of Counsel, and I responded to you on December 2, 2010. (Exhibit B attached hereto)."(*Id.* at 356). Plaintiff seizes upon this statement, and accuses defendant Boll of lying to the court because she "admits" that she responded to plaintiff.

First, it is unclear whether plaintiff's September 9, 2011 grievance against defendant Ellis has anything to do with the facts of this case.[40] Plaintiff has seen fit not to include the letter that defendant Boll said that she wrote to him in response.[41] However, defendant Boll has included the letter as an attachment to her declaration in support of the summary judgment motion. (Boll Decl. Ex. A) (Dkt. No. 202–6). In her declaration, defendant Boll states that as Deputy Commissioner and Counsel for DOCCS, she serves as legal counsel for the Commissioner of DOCCS and oversees DOCCS Office of Legal Counsel which is responsible for all of the legal services necessary for the day-to-day operation of the DOCCS Central Office and the correctional institutions that make up the department. (Boll Decl. ¶ 5).

Defendant Boll states that her office routinely received hundreds of letters per year from inmates or on behalf of inmates. (*Id.* ¶ 6). When the Office receives one of these letters, one of the defendant's support staff reads it and determines which of the attorneys on her staff or other staff person should address the issues in the letter. The letter is then forwarded to the attorney or other staff person to investigate and prepare a response, if warranted. The response may be prepared for the attorney's signature, a Deputy Counsel's signature, or defendant Boll's signature "depending on the circumstances." (*Id.*)

Contrary to plaintiff's accusations that defendant Boll is somehow trying to hide her involvement, defendant Boll admits responding to three letters received from the plaintiff. (*Id.* ¶ 7). The letter that plaintiff apparently believes is the "smoking gun" which shows that defendant Boll was personally involved in whatever constitutional violation the plaintiff alleged, is actually a letter reminding plaintiff that he had filed a grievance, and that his grievance had been appealed to the Central Office Review Committee ("CORC"), and a decision was pending. (*Id.* ¶ 8). In the letter, plaintiff was advised that the CORC would conduct a thorough investigation, and that plaintiff would be notified of its decision. (*Id.* & Ex. A). Defendant Boll states that she did not take any action to "investigate the claims contained in plaintiff's Inmate Grievance Complaint that [she] referenced in [her] December 2, 2010 letter to plaintiff."[42] (*Id.* ¶ 9).

***23** A reading of defendant Boll's letter supports her declaration. Her office's "investigation" was not an investigation of the "merits" of the grievance, it was merely an "investigation" of the status of plaintiff's grievance and a reminder that the "Inmate Grievance Program was instituted to handle issues such as yours."(*Id.* Ex. A). Defendant Boll was reporting to plaintiff that an investigation had been conducted by other officials of DOCCS. Defendant Boll then stated:





> The CORC will conduct a thorough investigation to assure that your rights are observed and your issues are addressed. If any corrective action is needed, you will be notified. As your appeal to the CORC is still pending, it is recommended that you await the decision.

(*Id.*) If an individual were able to create "personal involvement" by simply writing a letter to a superior, who was good enough to answer with an explanation such as this, it would eviscerate the well-settled principle that respondeat superior does not apply in civil rights cases. Clearly, defendant Boll did not conduct a "personal investigation" of the religious issue outlined in plaintiff's grievance.

Defendant Boll wrote another letter, dated January 28, 2011, in response to a new letter from plaintiff, dated December 20, 2011. (Boll Decl. ¶ 10 & Ex. B). Defendant Boll's letter merely stated that she had already written to plaintiff on December 2, 2010, and noted that the CORC had completed its review by correspondence dated December 8, 2010, accepting plaintiff's grievance in part. (Boll Decl. Ex. B). Defendant Boll further stated that plaintiff had been told "to bring further concerns to the attention of area supervisory staff, at [his] facility, at the time of the incident, for any remedial action deemed necessary."(*Id.*)

By the time of plaintiff's second letter to defendant Boll, the December 7th incident had occurred, and defendant Boll noted the "reoccurrence," stating that Superintendent William Hulihan had investigated the incident, "and advised you of his findings and actions on January 14, 2011."(*Id.*) Defendant Boll's explanatory letter does not create personal involvement as it is clear from the letter that she did not have anything to do with investigating the incident. She just determined that an investigation had taken place and was advising the plaintiff that he "should continue to follow the Directive for any further incidences that [h]e may have."(*Id.*)

Finally, plaintiff wrote to defendant Boll again, and she responded on March 3, 2011. (Boll Decl. ¶ 12 & Ex. C). Plaintiff claimed that no corrective action had been taken with regard to one of his grievances, and defendant Boll merely advised plaintiff that her office had contacted the staff at the correctional facility, who advised defendant Boll that plaintiff's claims had been properly investigated and corrective action had been taken. Defendant Boll took no further action. (Boll Decl. ¶¶ 12, 14). Defendant Boll states that she took no investigative action on any of plaintiff's letters. (Boll Decl. ¶ 15). She merely inquired into the status of plaintiff's grievances and reported her findings to plaintiff. Defendant Boll's letters support her assertions, and plaintiff's attempt to create personal involvement by citing portions of one of the defendant's letters, without the entire letter must fail.

***24** Plaintiff may not understand the above-cited law and may be under the misapprehension that the simple fact that defendant Boll responded to his letters made her personally involved in the subject matter of the letter. The cases cited above show that this is not the law. Plaintiff is confusing the difference between a letter, telling him that someone else did an investigation, with a personal investigation of the merits after receipt of the letter. The former is not personal involvement, while the latter is personal involvement. Thus, the complaint may also be dismissed as against defendant Boll on this basis as well.

**WHEREFORE,** based on the findings above, it is

**RECOMMENDED,** that defendants' motion for summary judgment (Dkt. No. 202) be **GRANTED** and the complaint **DISMISSED IN ITS ENTIRETY.**

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.***Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 6(a), 6(e), 72.

Dated: July 23, 2014.

**All Citations**

Slip Copy, 2014 WL 4365274

Footnotes

1 Plaintiff then attempted to appeal the Second Circuit decision to the United States Supreme Court. (Dkt. No. 130) (Notice of Appeal).

2 Plaintiff's response seems to take issue with the fact that defendants have now filed a motion for summary judgment because the case survived a prior motion for summary judgment, filed by plaintiff and a motion for judgment on the pleadings, filed by defendants. (Pl.'s Mem. at ¶ ¶ 1–7) (Dkt. No. 205–1). Plaintiff faults the court for allowing defendants to respond to plaintiff's motion for summary judgment with a letter. (*Id.* ¶ 5). The court would point out that the lack of a "formal" response from the defendants did not prejudice plaintiff. The defendants did not, as plaintiff put it, "[get] away" with anything. *See* Pl.'s Mem. at 5. I noted in the Report–Recommendation that defendants had not formally responded to the motion for summary judgment. (Dkt. No. 54 at 8–9). The standard for summary judgment places the burden on the party moving for summary judgment to show that no question of material fact exists.*Celotex Corp. v. Catrett*, 477 U.S. at 323; Fed.R.Civ.P. 56(a). Unless that initial burden is met, the non-moving party need not make any showing. *See Salahuddin v. Goord*, 467 F.3d at 272–73. Only if the moving party satisfies its burden, is the non-moving party required to move forward with specific facts showing that there is a genuine issue for trial. *Id.* The fact that the court found, based upon the documents submitted by plaintiff, that a genuine issue of fact existed does not preclude a subsequent motion for *summary judgment* by defendants. The defendants' interim motion for judgment on the pleadings was denied because, based upon the facts stated in the complaint, plaintiff's claims had been stated. The summary judgment motion contains additional facts in the form of affidavits and deposition testimony. SeeFed.R.Civ.P. 56(c). Even if the defendants had made a prior motion for summary judgment, the court has the discretion to consider multiple motions for summary judgment if the successive motion is supported by new material. *Robinson v. Henschel*, No. 10 Civ. 6212, 2014 WL 1257287, at *8 (S.D.N.Y. March 26, 2014) (citing inter alia *Wechsler v. Hunt Health Sys., Ltd.*, 198 F.Supp.2d 508, 514 (S.D.N.Y.2002)).*See also Rodriguez v. It's Just Lunch, Internat'l*, No. 07 Civ. 9227, 2013 WL 1749590, at *1 (S.D.N.Y. April 23, 2013) (considering cross-motions for summary judgment "[f]ollowing discovery proceedings and multiple motions to dismiss.")

3 Father Weber is not a defendant in this action.

4 Unless otherwise specified, the pages associated with a docket number will be the pages assigned to the document by the court's electronic filing system. (CM/ECF).

5 Plaintiff was deposed on October 8, 2013, and a copy of his deposition transcript has been included in defendants' summary judgment motion. (Dkt. No. 202–2). During his deposition, plaintiff testified that defendant Ready "had the call-out on his desk."(Dkt. No. 202–2 at 22). While defendant Ready may have had a call-out or call-outs on his desk, he did not have one with the plaintiff's name on it.

6 Plaintiff has also alleged a retaliation claim based on this incident, and the court will discuss that claim below.

7 (Ready Decl. ¶¶ 5).

8 This court makes no such finding.

9 Plaintiff's own exhibits confirm this finding. (Pl.'s Ex. G) (Dkt. No. 205–3 at 26). In his grievance documents, plaintiff states that "I signed out of Mr. Gruen's class and informed him that I had a call-out per DSP Phillips to ***report to Bldg # 101*** to attend Jewish Services. I subsequently attempted to sign out @ the 7–2 security desk whereby Correctional Officer Ready ... asked me where I was going."(*Id.*) Clearly, Building # 101 is not the same as Building # 7. Thus, whether an officer in Building # 101 has a document does not prove that someone in Building # 7 was given the same document.

10 To the extent that the failure to provide the appropriate call-out sheet was negligent or simply a mistake, defendant Ready was not responsible for that omission, and in any event, negligence is not actionable under section 1983. *Riehl v. Martin*, No. 13–CV–439, 2014 WL 1289601 at *8 n. 14 (N.D.N.Y. March 31, 2014). In his response to the motion for summary judgment, plaintiff asks why, even if defendant Ready did not have the call-out, "did he fail to pick up the phone and just call the Chaplain's Office to verify that the [plaintiff] was on the call-out?"(Pl.'s Mem. at 15). The fact that defendant Ready may or may not have acted correctly or logically, at worst, could constitute negligent action, which is not actionable under section 1983 or under RLUIPA. *Id. See also Booker v. Mely*, No. 9:12–CV–246, 2014 WL 1289579, at *25 (N.D.N.Y. March 31, 2014) (mistakes not actionable under the U.S. Constitution) (citations omitted); *Scott v. Shansiddeen*, No.2013 WL 3187071, at *4 (N.D.N.Y. June 20, 2013) (negligent actions that 'impinge to some degree on an inmate's religious practices' are insufficient to support a claim under RLUIPA) (citing 42 U.S.C. § 2000cc, et seq.; *Carter v. Washington Dep't of Corr.*, No. C11–5626, 2013 WL 1090753, at *14 (W.D.Wash. Feb. 27, 2013); *Lovelace v. Lee*, 472 F.3d 174, 194 (4th Cir.2006) (simple negligence does not suffice to meet the fault requirement under section 3 of RLUIPA)).

11 Although the complaint initially states that the Rabbis came to see "the plaintiff," it is clear that there were other Jewish inmates who were scheduled to participate in the Purim Services.





12 The declaration says "March 20, 2011." Although plaintiff refers to this as the March 30, 2011 incident, Purim was actually March 19–20, 2011. The discrepancy in the dates is not relevant to this court's decision because it is clear that all parties are referring to the same incident.

13 Rabbi Max is not a defendant in this action.

14 In his response to defendants' motion for summary judgment, plaintiff has submitted his grievance and the Superintendent's response to plaintiff's grievance regarding this incident. (Dkt. No. 205–3, Pl.'s Exs. R–Z). In this grievance, plaintiff alleged that defendant Ellis "felt the need to answer for the officers in the bubble by stating ...'The Rabbi is not here so go back to the law library.'" (Pl.'s Ex. R at 2; CM/ECF p. 123). Plaintiff claimed that he complied, after the other officer repeated that plaintiff should go back to the law library. (*Id.*) Plaintiff asked to use the bathroom, and while using the bathroom, "he overheard the the 'voice over the mic [sic]' direct the other Jewish inmates back to their housing units because the Rabbis had not arrived."(*Id.* & Ex. Z). The issue in the grievance appeared to be that the inmates were not allowed to enter the chapel and wait for the Rabbis. Plaintiff complained that "the Rabbis arrived at approximately 2:43 p.m., and by the time the inmates who were sent back to their units arrived for the second time; the services did not start until 3:15 p.m. ***As a result, the Jewish Services were shortened*** and they were dismissed at 3:45 p.m." (Pl.'s Ex. Z) (emphasis added). The fact that the inmates were not allowed to enter the chapel prior to the Rabbi's arrival, has nothing do with shortening the service (which would have been cut short anyway, because it is clear that the Rabbis were late in arriving). Plaintiff seems to speculate that Ellis was responsible for the other officer ordering the inmates back to their units. (Pl.'s Ex. R, Dkt. No. 205–3 at 123). In his declaration, defendant Ellis states that he disagreed that plaintiff should have been allowed to return to the library to wait for the Rabbis, but this did not affect plaintiff's attendance at the Purim celebration.

15 Plaintiff originally named Sheila Marlenga, the "Facility Steward," as a defendant in connection with plaintiff's mail claims. The complaint was dismissed with prejudice as against Ms. Marlenga by stipulation, dated January 8, 2014. (Dkt. No. 197). Thus, the complaint has proceeded only as against defendant Kupiec with regard to the remaining issues.

16 The court notes that the allegations in plaintiff's complaint relate more to retaliation than simply interference with his mail. However, in his memorandum of law in opposition to defendants' summary judgment motion he has one paragraph in which he discusses both interference and retaliation separately. (Dkt. No. 205–1 at ¶ 34). Because interference with mail may be a separate and independent claim from retaliation, the court will discuss all possible claims that plaintiff may have regarding the alleged interference with his mail.

17 The allegations in the complaint are a little unclear. In his deposition, plaintiff states that he ultimately received the package. (DT at 107). A reading of plaintiff's grievance documents indicates that he may have received a replacement package after plaintiff's father contacted the school to explain that plaintiff did not receive the January 2011 package. (Pl.'s Ex. Z(12), Dkt. No. 205–3 at 223). The court also notes that materials relating to a paralegal "course" do not constitute "legal mail." Legal mail is included in the definition of "Privileged Correspondence" and is defined, in relevant part, as correspondence with attorneys, legal representatives, and legal services organizations. *See* DOCCS Directive 4421(II)(A)(2) (citing 7 NYCRR § 721.2).

18 The court notes that plaintiff's statement about "planting weapons" is irrelevant because there is no such claim in this case.

19 A plaintiff may not amend his complaint in a memorandum of law or other filing. *Bryant v. Greater New Haven Transit Dist.*, No. 3:12–CV–71, 2014 WL 2993754, at *7 (D.Conn. July 2, 2014) (citation omitted). The court notes that this final incident could not have been included in the complaint because it occurred after plaintiff filed this action, and plaintiff was still exhausting administrative remedies regarding this allegation, long after this complaint was filed. (*See* Pl.'s Ex. Z(16), Dkt. No. 205–3 at 250) (IGRC's September 22, 2011 response to plaintiff's grievance—this action was filed on May 31, 2011). Plaintiff will not be prejudiced by this court's failure to consider this allegation against defendant Kupiec because he has raised the same claim in a subsequent action that has been assigned to Senior Judge Lawrence E. Kahn and Magistrate Judge Treece. *Guillory v. Fischer*, No. 9:12–CV–280.Magistrate Judge Treece declined to recommend dismissal of this allegation in a Report–Recommendation, noting that notwithstanding my consideration of the issue in recommending denial of plaintiff's motion for summary judgment, the claim was more properly before him. *See id.* at 13–16 (Dkt. No. 46 in 12–CV–280). It is more appropriate for Judge Treece to consider the allegations regarding plaintiff's test scores along with another factual allegation against defendant Kupiec that has not been mentioned in any part of this action and that occurred after the filing of this case.

20 A review of plaintiff's exhibits shows that, at the time plaintiff filed this action in May of 2011, he had not completed the exhaustion of administrative remedies as to his certified mail claim. He did not receive the CORC denial of his grievance until July 27, 2011. (Pl.'s Ex. Z(24), Dkt. No. 205–3 at 275). Although defendants raised failure to exhaust as a defense in their answer (Dkt. No. 46, ¶ 12), they have not argued failure to exhaust in their motion for summary judgment. While

defendants would not have had the opportunity to argue non-exhaustion for claims that had not been raised prior to the motion for summary judgment (the test score claim discussed above), they would have had the opportunity to argue non-exhaustion as to claims that were in the complaint. Technically defendants have not waived the exhaustion requirement by raising it in their answer. *Castillo v. Rodas*, No. 09 Civ. 9919, 2014 WL 1257274, at *15 (S.D.N.Y. March 25, 2014). This court finds that it may recommend dismissal on the merits and will do so, rather that finding only that administrative remedies were not exhausted because defendants did not argue this in their motion.

21 A review of plaintiff's exhibits also shows that when he filed this action, he had not exhausted his administrative remedies regarding the allegation that defendant Kupiec "destroyed" his legal mail. The document, purporting to be a "grievance," in addition to various other things, was dated May 23, 2011. (Pl.'s Ex. Z(32), Dkt. No. 205–3 at 291–302, 293). It was addressed not only to the "Complaint Department" at Mid–State, but also to District Court Judge Mordue, Ruth Goldway from the Postal Regulatory Commission, and Anne Gallaudet from the U.S. Postal Service.(*Id.* at 291). The Superintendent's decision was dated June 16, 2011, after plaintiff filed this action. (Pl.'s Ex. Z(33), Dkt. No. 205–3 at 304). However, defendants have not argued non-exhaustion in their motion, and as stated in footnote 20 above, the court will consider the merits of the claim.

22 The memorandum explains that the envelope must have been delivered inadvertently to the package room. (Kupiec Decl. Ex. B). An individual working in the package room (defendant Kupiec speculated that it might have been a "fill in"), opened the envelope, realized it was legal mail, put it in a plain manilla envelope with plaintiff's name and number on it, and then sent it "over to the Mailroom for processing."(*Id.*) She noted that this was the "normal procedure for mail received in packages."(*Id.*) The court also notes that this memorandum is further support for defendant Kupiec's statement that the mail room and the package room are in two different locations.

23 Personal involvement is a prerequisite to the assessment of damages in a section 1983 case. *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.2003).

24 Contrary to plaintiff's implication, there is no indication that defendant Kupiec would have been aware of the effect of her action. Defendant Kupiec is the senior mail room clerk. There is no indication that defendant Kupiec has any legal training or would have known the possible effect of sending plaintiff's Notice by regular mail.

25 To the extent that defendant Kupiec's actions could be considered negligent, as stated above, negligence is not actionable under section 1983. *See* n. 10, *supra*.

26 Plaintiff's response makes much of the fact that the "package" went to defendant Kupiec's office when she stated that she had nothing to do with packages. Plaintiff believes that this "admission" proves that defendant Kupiec was also tampering with his packages. Clearly, the item was not a "package," and that is why the package office sent it to defendant Kupiec. Unfortunately someone in the package office had already made a mistake in opening the envelope, placing the documents in another envelope with plaintiff's name and prison number on it. The only contact that defendant Kupiec states that she had with this mail was to place the name of the court on the envelope and have it delivered to plaintiff through the proper channels. This statement is not, as plaintiff claims, inconsistent with defendant Kupiec's statement that she does not work in the package room and has nothing to do with the packages that are delivered for inmates.

27 (Dkt. No. 1 at 50) (Superintendent's Decision dated 1/14/11). The September 2010 grievance is mentioned in this decision, but that grievance was against defendant Ellis. (*Id.*)

28 It is also unclear how inmate Rogers would know that plaintiff was contemplating a grievance against Kupiec because plaintiff only stated that he was "putting paperwork together" for a grievance about his mail, not that such a grievance had been filed. The connection between defendant Kupiec and defendant Ready is non-existent.

29 Plaintiff filed a grievance against defendant Kupiec on April 22, 2011. (Compl.Ex. Z(23)). The only actions that could have conceivably been in retaliation for grievances against defendant Kupiec herself would have been the May 17, 2011 incident involving the manilla envelope with court documents inside and the inadvertent tearing of plaintiff's test scores (which is not part of this action and apparently occurred in August of 2011, based on the August 22, 2011 memorandum of apology from defendant Kupiec). None of defendant Kupiec's other actions took place subsequent to the March or April grievance against her. (Pl.'s Ex. Z(19), Dkt. No. 205–3 at 256). Plaintiff filed a grievance about his test scores on September 1, 2011. (Pl.'s Ex. Z(18), Dkt. No. 205–3 at 254) (CORC decision dated January 18, 2012). At his deposition, plaintiff testified that he did not think he had filed any prior grievances against defendant Kupiec, and there are no documents in the record reflecting grievances prior to April 22, 2011. (DT at 111).

30 *Gill*, *supra*.

31 Contrary to plaintiff's assertion, this action by an employee in the package room does not prove that all packages go through defendant Kupiec. The legal mail was delivered to the package room in error, someone opened it, determined that it was ***not*** a "package," placed the documents in a plain manilla envelope with plaintiff's name and DIN number on it,





and sent it to the mail room where defendant Kupiec works. She determined that the documents were from a court, placed them back in the manilla envelope, together with writing the name of the court from which they came, and sent them through the proper channels for legal mail. (Pl.'s Exs. Z(36); Z(35), Dkt. No. 205–3 at 316, 318) (CORC Determination dated 10/15/11; Memorandum from defendant Kupiec to DSP Phillips). Although plaintiff claimed that his legal mail was "destroyed," that is clearly not true, only the envelope was missing, and defendant Kupiec had nothing to do with that. *See* Pl.'s Ex. Z(32), Dkt. No. 205–3 at 293).

32 Even if the court were considering the test score incident, the court would find no adverse action because in a letter, dated November 14, 2011, Acting Commissioner for Program Services Catherine M. Jacobsen wrote to plaintiff, explaining the facility's response to the test tearing incident. (Pl.'s Ex. Z(31)) (Dkt. No. 205–3 at 289). The facility informed Acting Commissioner Jacobsen that "the mail was taped and placed into an envelope with a note of apology explaining the error."(*Id.*)

33 Plaintiff claims that the withdrawal of his action constitutes the "actual injury" he needs to establish an access to courts claim.

34 It is not clear what "motion" would have been stricken.

35 CO Johnston is a former defendant who was dismissed from this action pursuant to Judge D'Agostino's September 27, 2011 Order. (Dkt. No. 19).

36 The September incident was only tangentially related to the exercise of plaintiff's religious rights. Plaintiff had attended a religious service in the morning of September 9, 2010, and because of the religious holiday, he was excused from all programming on that day. Plaintiff chose to attend the law library in the afternoon because he had been excused from his other program, based upon a memorandum written by DSP Phillips. Plaintiff was prevented from doing so, but the grievance was resolved in his favor. However, plaintiff did not miss a religious service, he was only prevented from spending his free afternoon, pursuing non-religious activities the way he wished.

37 In fact, plaintiff was convinced that no "corrective action" was taken. However, he has included a memorandum from Christopher Tapia (IGP Supervisor) to Julie Dennis, dated December 7, 2010, stating that, after receiving a telephone call from DSP Phillips, Director Tapia spoke with CO Johnson the day that Director Tapia received the plaintiff's complaint. (Pl.'s Ex. Z(42), Dkt. No. 205–3 at 341). Director Tapia explained the proper procedure and "clarified" the memo. "The corrective action was that the memo was clarified. All referenced staff are now aware and no other complaints received."(*Id.*) No "discipline" was involved, and there is no reference to defendant Ready in this memorandum and no reason that he would have been advised of the issue because he was not involved in the incident.

38 In fact, the only adverse action alleged in plaintiff's grievance (aside from the shorter service) was that the inmates were not allowed to wait in the chapel for the rabbi or rabbis to arrive. Clearly, this is not "adverse" within the meaning of a retaliation claim.

39 During his deposition, plaintiff testified that Ellis was "taking it out" on all the other Jewish inmates because of a grievance written by plaintiff against him. (Pl.'s Dep. at 54). Plaintiff's complaint was that 'Ellis won't even open the door until the last minute, so we all just hanging out outside the chapel because Ellis won't open the door."(*Id.* at 55). Failure to open a door before services are about to start can hardly be categorized as "adverse action." Once again, the court does not make any findings against defendant Ellis. The court is assuming the facts, hypothetically, for purposes of this particular discussion.

40 Plaintiff's interrogatory asks when defendant Boll became "aware" of plaintiff's September 9, 2010 grievance against defendant Ellis. (Dkt. No. 205–3 ¶ 7). However, none of the claims in this law suit relating to defendant Ellis occurred in September of 2010. Thus, any information in the September 9, 2010 grievance would not have even made defendant Boll aware of the claims in this action.

41 Clearly plaintiff received a copy of the letter as indicated in the response to the interrogatory. The letter is not supportive of plaintiff's claim, and it is disingenuous of plaintiff to omit the letter and cite only parts of defendant Boll's response to the interrogatories. Plaintiff's accusations that defendant is "lying" to the court are completely unfounded, and apparently plaintiff did not read the defendant's affidavit or see the letter that was attached. Plaintiff is constantly accusing others of nefarious conduct, while omitting important facts himself.

42 The court must point out that the incident with defendant Ready did not occur until December 7, 2010, and the incident with defendant Ellis did not occur until March of 2011, so the plaintiff's first letter and defendant Boll's December 2nd response could not have been related to an incident that had not yet occurred and could not have "created" any personal involvement in any event.

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United States District Court,
N.D. New York.

Gregory HARVEY, Plaintiff,
v.
David HARDER, et al., Defendants.

No. 9:09–CV–154 (TJM/ATB). | July 31, 2012.

**Attorneys and Law Firms**

Gregory Harvey, pro se.

Aaron Marcus, Asst. Broome County Atty., for Defendants.

**ORDER and REPORT–RECOMMENDATION**

ANDREW T. BAXTER, United States Magistrtate Judge.

*1 This matter has been referred to me for Report and Recommendation pursuant to 28 U.S.C. § 636(b) and LOCAL RULES N.D.N.Y. 72.3(c). In this civil rights amended complaint, plaintiff alleges that defendants violated his rights to due process and equal protection [1] when they kept him in "segregated housing" for approximately one month, without any disciplinary incident or hearing. (Am, Compl .; Dkt. No. 33). Plaintiff also alleges that defendant Shear improperly ordered plaintiff to be put in restraints whenever he left his cell. (*Id.*) Plaintiff seeks substantial monetary relief.

Presently before the court is defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56. (Dkt. No. 47). Plaintiff has responded in opposition to the motion. (Dkt. No. 50). For the following reasons, this court agrees with defendants and will recommend dismissal of the amended complaint.

**DISCUSSION**

**I. *Facts and Procedural History*** [2]

Plaintiff alleges that he was improperly placed in "segregated housing" at Broome County Correctional Facility ("BCCF") from January 12, 2007 until he was transferred out of the facility on February 13, 2007. Plaintiff claims that defendants violated his rights to due process and equal protection because they did not afford him a hearing prior to his confinement in the Special Housing Unit ("SHU"). Plaintiff's original complaint named only the Broome County Sheriff, David Harder. (Dkt. No. 1). In his amended complaint, plaintiff added the names of five more defendants, who plaintiff believes are responsible for his improper confinement: (1) Sergeant Robert E. Buholski; (2) Sergeant Jon C. Gillette; (3) Lieutenant Wesley C. Shear; (4) Corrections Officer ("CO") David B. Thompson; and (5) Lieutenant William Lillie. [3]

Plaintiff claims that on January 12, 2007, when plaintiff was transferred from Herkimer County Correctional Facility ("HCCF"), defendant Harder "ordered his staff to wrongfully imprison and put restraints upon plaintiff by housing him illegally in segregated [sic] housing without any record of a disciplinary incident report or any record of a disciplinary hearing."(Am. Compl. ¶ 6; Facts). Plaintiff also alleges that, beginning on January 17, 2007, "restraints were put on him," and that defendant Harder and his staff violated plaintiff's Eighth Amendment right to be free from cruel and unusual punishment with their "deliberate indifference." (Am. Compl. ¶ 6; CM/ECF pp. 6–7). Plaintiff states that he became paranoid "from the loss of liberty enjoyed by other prisoners."(*Id.* at p. 7) Plaintiff alleges that each of the five new defendants "signed an order" wrongfully housing plaintiff in SHU; defendant Thompson signed two orders; and defendant Shear also signed an order "to place Plaintiff in restraints whenever he left his cell."(Am. Compl. ¶ 7; Causes of Action; CM/ECF pp. 6–7).

There is no dispute in this case that plaintiff was housed in "segregated housing" for the entire time that he was incarcerated in BCCF. Defendants state that plaintiff was in Administrative Segregation ("Ad Seg"), rather than *disciplinary* segregation. In support of the motion for summary judgment, each defendant has submitted an affidavit, explaining the circumstances under which plaintiff was confined to Ad Seg for the period between January 12th and February 13t' of 2007. (Dkt.Nos.47–19–47–26). An affidavit was submitted by Sergeant Edward J. Cermak, who is not a defendant, but states that it was he, (not defendant Gillette), [4] who reviewed the Order placing plaintiff in Ad Seg in the facility's SHU (D–Pod). (Dkt. No. 47–20; Cermak Aff. ¶ 12; Gillette Aff. ¶ 11). Affidavits were also submitted by CO Franklin Sherman, the Classification Officer at BCCF; and Mark Smolinsky, the Jail Administrator at BCCF. (Dkt.Nos.47–24, 47–25).

*2 Defendants' affidavits all state that plaintiff was transferred from HCCF to BCCF on January 12, 2007. Prior to the transfer, defendants state that, on January 11, 2007, a " 'Custodial Transfer Information' sheet" was created at HCCF, evidencing plaintiff's transfer. (Buholski Aff. ¶ 2; Cermak Aff. ¶ 2; Gillette Aff. ¶ 2; Shear Aff. ¶ 2; Sherman Aff. ¶ 3; Smolinsky Aff. ¶ 5; Thompson Aff. ¶ 3). [5] This information, prepared by Lieutenant John Coddington at HCCF, indicated that plaintiff had known mental health problems, was on medication, had been assaultive toward staff and inmates at HCCF, and had poor adjustment to confinement. (*Id.* & Ex. F)

Accompanying the custodial transfer information, was a letter from HCCF Lieutenant Coddington, further explaining that plaintiff had an "extensive psychiatric history"; had been assaultive toward staff at HCCF; had very long fingernails, which he refused to cut and had threatened to use as weapons against the staff; had a long history of threat-related activity, including threats to the President of the United States; [6] had been housed in HCCF Ad Seg due to continued outbursts and threats toward staff; had not been housed in general population due to unstable behavior and continued to be housed "alone"; was very paranoid, and was subject to "drastic mood swings." (Smolinsky Aff. ¶ 6 & Ex. G). The court notes that while incarcerated in HCCF, on October 8, 2006, plaintiff was notified that his "classification level" was "Maximum." [7] (Def.s' Ex. D).

Plaintiff arrived at BCCF on Friday, January 12, 2007 at approximately 12:49 p.m. (*Id.* ¶ 7). He was screened by CO Joe Spaziano, who noted that the plaintiff had a "chronic psychiatric history with mental health treatment" and referred him to the forensic unit for evaluation. (*Id.*) Plaintiff was taken to the Ad Seg area of the forensic/medical unit at 5:29 p.m. on January 12. Until that time, plaintiff had been housed in cell number 5 of the "admissions unit," where all inmates are housed as part of the facility's admission procedures. [8] (*Id.* & Def.s' Ex.H; Housing History Sheet). The forensic referral sheet is Defendants' Exhibit I. On January 14, 2007, plaintiff was cleared by forensics, medical, and corrections to leave the medical unit, and he was then taken to A–Pod, another housing unit used for classification purposes. (*Id.* ¶ 15 & Def.s' Ex. H). CO Sherman is the facility's Classification Officer, and was charged with completing plaintiff's classification. (Sherman Aff. ¶ 2).

Prior to the completion of plaintiff's classification, on January 17, 2007, there was an incident in A–Pod, in which plaintiff allegedly directed threats toward the President of the United States as well as other individuals. (Smolinsky Aff. ¶ 16; Sherman Aff. ¶ 8). Because of this incident, plaintiff was returned to the medical unit at 2:00 p.m. on January 17th. (*Id.* & Def.s' Ex. H). Another Ad Seg order was drafted by CO Thompson, who noted that plaintiff was being admitted to Ad Seg as part of the facility admission procedure, but also noted that the staff perceived a serious threat to the inmate's safety, although he had not requested protection. (Shear Aff. ¶ 10 & Def.s' Ex. M). Sergeant Cermak reviewed the Order and directed plaintiff's placement in Ad Seg in SHU. (Shear Aff. ¶ 12). At the same time, defendant Shear states that he signed a "Restraint Order" which meant that plaintiff would have a "two officer escort" anytime that he was out of his cell. (Shear Aff. ¶ 13). Defendant Shear states that "[n]o physical restraints, e.g. handcuffs, shackles, etc., were made part of this Order, or placed on the plaintiff."(*Id.*). When plaintiff was released from the medical unit on January 18, 2007 he, was placed in Ad Seg in D–Pod, the SHU of BCCF to finish out his classification period. [9] (*Id.*) Defendant Shear states that he had no control over plaintiff's ultimate classification. (Shear Aff. ¶ 16).

*3 Plaintiff's classification was completed on Friday, January 19, 2007. He was determined to be a "maximum" security inmate, and his assignment to D–Pod was continued. (*Id.* ¶ 18). CO Sherman states that he conducted the classification pursuant to the facility's "Classification of Inmates" and the "Special Security Classification" policy. (Sherman Aff. ¶ 9). The "Special Security Classification" policy allows the facility to assign inmates to SHU if they have exhibited violent behavior during periods of incarceration. (Sherman Aff. ¶ 10). CO Sherman states that in making his classification determination, he considered the transfer papers sent by HCCF. In addition, he noted that plaintiff's current charges included Rape in the first and second degree, both violent felonies; he had exhibited assaultive behavior at HCCF; had an extensive psychiatric history; had a history of substance abuse; and had threatened the President of the United States. (Sherman Aff. ¶ 10). CO Sherman used a "Classification Point Scale" and determined that plaintiff was a "maximum" security inmate, not eligible for general population. (*Id.* ¶ 11). CO Sherman states that this classification was not made for punitive reasons, but for the safety and the security of the facility, its staff, and other inmates. (*Id.*) Plaintiff was notified of his classification on Monday, January 22, 2007. (Smolinsky Aff. ¶ 19).

Plaintiff was transferred out of BCCF on February 13, 2007. (Def .s' Ex. H). Defendants do not dispute that plaintiff was confined in "segregated housing" for his entire stay at BCCF.

**II. *Summary Judgment***

Summary judgment may be granted when the moving party carries its burden of showing the absence of a genuine issue of material fact. Fed.R.Civ.P. 56; *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir.1990)."Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude summary judgment."*Salahuddin v. Coughlin*, 674 F.Supp. 1048, 1052 (S.D.N.Y.1987) (citation omitted). A dispute about a genuine issue of material fact exists if the evidence is such that "a reasonable [fact finder] could return a verdict for the nonmoving party."*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In meeting its burden, the party moving for summary judgment bears the initial responsibility of informing the court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Fed.R.Civ.P. 56(c)(1)(A). If the moving party satisfies its burden, the nonmoving party must move forward with specific facts showing that there is a genuine issue for trial. *Salahuddin v. Goord*, 467 F.3d 263, 272–73 (2d Cir.2006). In determining whether there is a genuine issue of material fact, a court must resolve all ambiguities, and draw all inferences, against the movant. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). However, when the moving party has met its burden, the nonmoving party must do more than "simply show that there is some metaphysical doubt as to the material facts."*Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247–48.

**III. *Exhaustion of Administrative Remedies***

**A. Legal Standards**

***4** The Prison Litigation Reform Act, (PLRA), 42 U.S.C. § 1997e(a), requires an inmate to exhaust all available administrative remedies prior to bringing a federal civil rights action. This requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and regardless of the subject matter of the claim. *See Giano v. Goord*, 380 F.3d 670, 675–76 (2d Cir.2004) (citing *Porter v. Nussle*, 534 U.S. 516, 532 (2002) (exhaustion requirement applies, *inter alia*, to excessive force claims). Inmates must exhaust their administrative remedies even if they are seeking only money damages that are not available in prison administrative proceedings. *Id.* at 675.

The failure to exhaust is an affirmative defense that must be raised by the defendants. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Johnson v. Testman*, 380 F.3d 691, 695 (2d Cir.2004). As an affirmative defense, it is the defendants' burden to establish that plaintiff failed to meet the exhaustion requirements. *See, e.g, Key v. Toussaint*, 660 F.Supp.2d 518, 523 (S.D.N.Y.2009) (citations omitted).

In order to properly exhaust an inmate's administrative remedies, he must complete the administrative review process in accordance with the applicable state rules. *Jones v. Bock*, 549 U.S. at 218–19 (citing *Woodford v. Ngo*, 548 U.S. 81 (2006)). In *Woodford*, the Court held that "proper" exhaustion means that the inmate must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a prerequisite to bringing suit in federal court. 548 U.S. at 90–103.

Generally, exhaustion of administrative remedies involves utilizing the facility's grievance process, however, when an inmate's federal claims arise directly out of a disciplinary or administrative segregation hearing or confinement, he exhausts his administrative remedies by presenting his objections in the administrative appeals process. *Sweet v. Wende Correctional Facility*, 514 F.Supp.2d 411, 413 (W.D.N.Y.2007) (citing *Rosales v. Bennett*, 297 F.Supp.2d 637, 639 (W.D.N.Y.2004) (discussing the difference between the grievance process and the administrative appeals process for disciplinary or administrative segregation appeals).

The Second Circuit developed a "three part inquiry" to determine whether an inmate has fulfilled the PLRA exhaustion requirement. *See Brownell v. Krom*, 446 F.3d 305, 311–12 (2d Cir.2006) (citing *Hemphill v. State of New York*, 380 F.3d 680, 686 (2d Cir.2004)). The inquiry asks (1) whether the administrative remedies were available to the inmate; (2) whether defendants' own actions inhibiting exhaustion estops them from raising the defense; and (3) whether "special circumstances" justify the inmate's failure to comply with the exhaustion requirement. *Id.*

**B. Application**





Plaintiff in this case did not challenge his classification or the administrative segregation decision. In his response to the summary judgment motion, plaintiff argues that he asked a corrections officer about challenging the decision. (Pl.'s Br. at 14). The corrections officer told plaintiff that BCCF did not have a grievance committee, "you write a sergeant if that doesn't work you write a lieutenant."(*Id.*) Plaintiff claims that he wrote to both a sergeant and a lieutenant, who told plaintiff that he "is on administrative segregation and there is nothing anyone can do about it."(*Id.*) In support of his argument, plaintiff cites Jail Administrator Smolinsky's affidavit, which confirms that an administrative segregation decision is not "grievable." (*Id.* & Smolinsky Aff. ¶ 21).

***5** Plaintiff may be attempting to claim that the officers prevented him from challenging the decision by "misleading" him about the proper procedural vehicle for the challenge. The corrections officer who told plaintiff that the decision was not grievable was not misleading. While defendants agree that an administrative segregation decision is not subject to the "grievance" process, the defendants assert that the Ad Seg decision is subject to challenge by appealing to the Facility Administrator. (Def.s' Ex. P). Defendants' Exhibit P is a page from the Inmate Handbook, specifically referencing "Administrative Segregation/Protective Custody." The handbook states that "[y]ou have the option to appeal administrative segregation decisions to the Facility Administrator."(*Id.*)

Plaintiff in this case concedes that he did not appeal to the Facility Administrator when he states that he wrote to a sergeant and a lieutenant. There is no indication, and he does not allege, that he was not given an inmate handbook. The "corrections officer" was correct in telling plaintiff that an administrative segregation determination was not grievable because the proper method of appeal is through the Jail Administrator.

The court understands that plaintiff's incarceration at BCCF was quite short, and one of the exceptions noted above involves whether the administrative remedies were actually "available" to the plaintiff. The administrative segregation decision was ultimately made on January 19, 2007, and plaintiff was transferred to another facility on February 13, 2007. It is unclear how long it would have taken to challenge the classification. There may have been very little time to appeal the decision. It has been held that transfer to other custody does not eliminate the plaintiff's duty to exhaust his administrative remedies, "at least where an inmate has sufficient time to pursue administrative remedies in the facility where the incident complained of took place."*Flowers v. City of New York*, 668 F.Supp.2d 574, 578 (S.D.N.Y.2009). If there were insufficient time to appeal, an exception to the exhaustion requirement might be available to plaintiff. While, the court could recommend dismissal for failure to exhaust, because the case may also be dismissed on the merits, and there could be an argument that plaintiff did not have sufficient time to appeal the decision, I will not recommend dismissing the action based solely upon plaintiff's failure to exhaust administrative remedies.

**IV. *Due Process***

**A. Legal Standards**

In order to begin a due process analysis, the court determines whether plaintiff had a protected liberty interest in remaining free from the confinement that he challenges and then determines whether the defendants deprived plaintiff of that liberty interest without due process. *Giano v. Selsky*, 238 F.3d 223, 225 (2d Cir.2001); *Beckoya v. Coughlin*, 91 F.3d 349, 351 (2d Cir.1996). In *Sandin v. Conner*, the Supreme Court held that although states may still create liberty interests protected by due process, "these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force ..., nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."*Sandin v. Conner*, 515 U.S. 472, 483–84 (1995).

***6** The Second Circuit has explicitly avoided a bright line rule that a certain period of confinement in a segregated housing unit ("SHU") automatically gives rise to due process protection. *See Sims v. Artuz*, 230 F.3d 14, 23 (2d Cir.2000); *Colon v. Howard*, 215 F.3d 227, 234 (2d Cir.2000). Instead, cases in this circuit have created guidelines for use by district courts in determining whether a prisoner's liberty interest was infringed.*Palmer v. Richards*, 364 F.3d 60, 64–66 (2d Cir.2004). A confinement longer than an intermediate one, and under "normal SHU conditions" is "a sufficient departure from the ordinary incidents of prison life to require procedural due process protections under *Sandin*."*Colon v. Howard*, 215 F.3d at 231 (finding that a prisoner's liberty interest was infringed by 305–day confinement). Shorter confinements under normal SHU conditions may not implicate a prisoner's liberty interest.

"SHU confinements of fewer than 101 days could constitute atypical and significant hardships if the conditions were more severe than the normal SHU conditions ... or a more fully developed record showed that even relatively brief confinements under normal SHU conditions were, in fact, atypical." *Palmer v. Richards*, 364 F.3d at 65 (citations omitted). In the absence of a detailed factual record, cases in this Circuit typically affirm dismissal of due process claims where the period of time spent in SHU was short-*e.g.*, 30 days-and there was no indication that the plaintiff endured unusual SHU conditions. *Id.* at 65–66 (collecting cases). *See also Arce v. Walker*, 139 F.3d 329, 334–35 (2d Cir.1998) (the *Sandin* analysis is properly applied to determine whether non-punitive, administrative segregation implicates a state-created liberty interest).

**B. Application**

Plaintiff was in Ad Seg at BCCF from January 12, 2007 until February 13, 2007, a total of 32 days. The first eleven days,[10] however, were spent in Ad Seg due to the admissions/classification procedure at the facility. New York regulations governing county jails provide that the chief administrative officer of each facility shall "establish, implement and maintain a formal and objective system for the consistent classification of all inmates." N.Y. COMP. CODES R. & REGS. tit. 9, § 7013.1 (N.Y.CRR)). The regulations are quite detailed and provide specific requirements for such policies and procedures. *Id.* 9 NYCRR § § 7013.1–7013.9.

In accordance with these regulations, BCCF policy provides that, upon transfer into the facility, all inmates must go through initial screening and classification procedures. (Def.s' Ex. N; Broome County Sheriff's Correction Division Policy Statement). The policy statement provides that "[u]pon completion of the initial screening and risk assessment the inmate will be placed in Ad Seg for classification." (*Id.* ¶ 3). Classification may last up to five business days.[11] (*Id.*) If records are not available, the Jail Administrator may extend the classification time to ten business days.

*7 The policy statement also provides detailed factors that the classification officer must consider when determining how to classify an inmate for housing purposes. (*Id.* ¶ 6(a)–6(j)). Those factors include criminal history; propensity for victimization or violence; history of medical or mental illness; history of hostile relationships with other inmates; and any other information that "may affect the safety and welfare of the inmate or facility staff." (*Id.*) After the primary classification interview is completed, the interviewing officer recommends appropriate housing for the inmate. (*Id.* ¶ 10). This paragraph also provides a procedure for challenges to primary housing assignments, and any changes in primary housing relating to custody level will be discussed with the inmate by the classification officer and tour supervisor. (*Id.* ¶ 10(b), 10(c)). The classification officer competes a "Classification Sheet," containing a numerical value assigned to the various factors considered. (Def.s' Ex. O).

"The [Supreme] Court has counseled judicial restraint in the federal courts' review of prison policy and administration, noting that 'courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.' " *Giano v. Senkowski*, 54 F.3d 1050, 1053 (2d Cir.1995) (quoting *Turner v. Safely*, 482 U.S. 78, 84 (1987)). The overarching consideration is that a prison regulation infringing on an inmate's constitutional rights is valid so long as the regulation is "reasonably related to the legitimate penological interests." *Turner v. Safely*, 482 U.S. at 89. In *Turner*, the Supreme Court held that the court should determine whether the government objective is legitimate and neutral, and then whether there is a valid, rational connection between the prison regulation or the official action and the legitimate governmental interest that justifies that action. *Id.* Finally, the court determines whether there are alternative means for the inmate to exercise that constitutional right. *Id.* at 90.

In this case, the regulations cited above, together with the policy of allowing temporary segregation of inmates upon transfer into a facility are unquestionably related to the safety and security of the facility. Until an inmate is screened for prior violence; propensity for victimization; possible enemies; behavior; and adjustment, the facility administrators have no way of knowing where the best place to house the inmate will be. Thus, a short classification period in administrative segregation in order to complete this objective is a completely reasonable restriction on an inmate's liberty. The regulations provide for notice to the inmate and for a challenge to the classification. Thus, the regulations are valid under *Turner*, and no due process right is violated.[12]

As shown by the plaintiff's housing history report, he spent part of his classification time in the mental health area of the medical unit. (Def.'s Ex. H). Although he complains that the administrative segregation damaged his mental health and that defendants were deliberately indifferent to his mental condition, it appears that the defendants were very concerned





about his mental condition, and according to his housing record, placed him in the medical unit three times prior to his final classification.[13] Defendants could not ignore the transfer papers indicating that plaintiff was a safety risk.[14] They could not ignore plaintiff's unusual behavior and statements to the screening officer, and the progress notes written during his stay in the medical unit show that the concern for his mental health was justified.[15] (Def.s' Ex. L).

*8 In addition, plaintiff's relatively brief Ad Seg placement did not implicate a liberty interest under *Sandin*. Plaintiff's classification was completed on Friday January 19, 2007, and he was notified of his classification on Monday January 22, 2007, one business day after the determination was made.[16] He was entitled to a review of this classification, but did not take the opportunity to challenge it. Plaintiff spent the last 21 days of his stay at BCCF in Ad Seg. Based on *Sandin*, a period of 30 days segregation does not create a liberty interest, particularly when plaintiff has not made any assertion that the conditions of confinement (other than the separation from other inmates) was in any way atypical or significant. Even if the court were to count the entire time that plaintiff was in administrative segregation (32 days), he still would not have had a liberty interest that is protected by due process.[17]

Finally, even if plaintiff had a liberty interest, he received all the process he was due. It is clear that his confinement was administrative, not disciplinary. Plaintiff confuses the two types of confinement. He continues to argue that he was entitled to notice of "charges." There were no "charges" of which to receive notice. Instead, he got notice of the *classification determination* and an opportunity to challenge the determination as required by the regulations involving classification and housing assignments. The fact that he did not challenge the determination does not change the result. Thus, for all of the above procedural and substantive reasons, plaintiff's due process claim may be dismissed.

**V. *Conditions of Confinement***

Plaintiff hints that certain of his conditions of confinement were unconstitutional. Plaintiff states that defendants were deliberately indifferent to his mental health by keeping him in "isolation." Plaintiff also states that defendants issued a "restraint order," and he was placed in restraints whenever he left the cell.

**A. Medical Care**

**1. Legal Standards**

The defendants never actually mention the date of plaintiff's conviction. The reason the court mentions this is simply to clarify the standard under which conditions of confinement are analyzed. Allegations of mistreatment of pretrial detainees in state custody are brought under the Due Process Clause of the Fourteenth Amendment. *See Caiozzo v. Korman*, 581 F.3d 63, 69 (2d Cir.2009). It has been held that because a pretrial detainee has not been "convicted," the proper inquiry is whether the conditions of confinement amount to punishment under the Due Process Clause, not whether the "punishment" is cruel and unusual under the Eighth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535 n. 16 (1979) (contrasting sentenced prisoners with pretrial detainees). Sentenced prisoners are protected by the Eighth Amendment prohibition against cruel and unusual punishment. However, the same standard applies to claims of deliberate indifference to a serious threat to the health or safety of a person in custody, regardless of whether they are brought under the Eighth Amendment, relating to convicted prisoners, or under the Fourteenth Amendment for pretrial detainees.[18] *See Caiozzo v. Korman*, 581 F.3d at 72. Thus, the date of plaintiff's conviction is not relevant to any discussion because the standard would be the same whether plaintiff were still a pretrial detainee or whether he had been convicted of the charges.

*9 In order to state a claim based on constitutionally inadequate medical treatment, plaintiffs must allege "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. at 106. There are two elements to the deliberate indifference standard. *Smith v. Carpenter*, 316 F.3d 178, 183–84 (2d Cir.2003). The first element is objective and measures the severity of the deprivation, while the second element is subjective and ensures that the defendant acted with a sufficiently culpable state of mind. *Id.* at 184 (citing *inter alia Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir.1998)).

**2. Application**

Plaintiff in this case claims that the isolation made him depressed and harmed his mental health. However, plaintiff spent several days in the mental health unit, and was examined by Dr. Rahmon, according to the progress notes submitted by both plaintiff and defendants. (Def.s' Ex. L). Plaintiff was monitored and his medications were regulated. There is absolutely no indication that the defendants, none of whom are medical personnel, were deliberately indifferent

to plaintiff's medical needs, because it is clear that, when a concern arose regarding plaintiff's mental health, he was transferred to the medical unit for observation. Plaintiff's conclusory allegation that the "isolation" made his mental status worse is baseless.

**B. Restraints**

**1. Legal Standards**

In order to show that conditions of confinement violate the Eighth Amendment, the plaintiff must demonstrate that the conditions result in an "unquestioned and serious deprivation of basic human needs," and that defendants imposed those conditions with deliberate indifference. *Jolly v. Coughlin*, 76 F.3d 468, 480 (2d Cir.1996) (citing *Wilson v. Seiter*, 501 U.S. 294, 297 (1991); *Whitley v. Albers*, 475 U.S. 312, 319–20 (1986); *Anderson v. Coughlin*, 757 F.2d 33, 35 (2d Cir.1985)). The placement of restraints such as handcuffs on an inmate does not, by itself, amount to excessive force or cruel and unusual punishment. *See Bridgeforth v. County of Rensselaer*, No. 1:08–CV–779, 2012 WL 2873361, at *6 (N.D.N.Y. July 12, 2012) (absent some allegation beyond forceful cuffing, the claim against defendant was insufficient as a matter of law).

In this case, defendant Shear states that he did sign a "Restraint Order," but the order only called for plaintiff to have a two-officer escort or "double team" anytime that he left his cell. (Shear Aff. ¶ 13). Defendant Shear further states that "[n]o physical restraints" such as handcuffs or shackles were made a part of the order, "or placed on plaintiff." (*Id.*) Plaintiff himself submits the Order in question, and it supports defendant Shear's affirmation. (Pl.'s Ex. C; Dkt. No. 50–1 at 6). The order is signed by defendant Shear. Although the typewritten portion of the order states that, due to plaintiff's involvement in the January 17t' incident, he would be placed in "full restraints" when he left the housing unit for a period of seven days, above the typewritten material, is a handwritten note by defendant Shear that reads: "Double Team only." (*Id.*) The order was reviewed and continued on two occasions: "1/26/07 ... 2/2/07." (*Id.*)

*10 Plaintiff's own exhibits support defendant Shear's statement that no physical restraints were placed on plaintiff. (Pl.'s Ex. C, G). The "restraint" only involved assigning two officers to plaintiff when he left the housing unit. This order does not come anywhere near the level of a constitutional violation, particularly given plaintiff's behavior during the time in question. Thus, to the extent that plaintiff's amended complaint can be read as alleging an Eighth Amendment or Substantive Due Process claim regarding his conditions of confinement, it may be dismissed. [19]

**WHEREFORE,** based on the findings above, it is

**RECOMMENDED,** that defendants' motion for summary judgment (Dkt. No. 47) be **GRANTED,** and plaintiff's amended complaint be **DISMISSED IN ITS ENTIRETY AS AGAINST ALL DEFENDANTS,** and it is further

**ORDERED,** that plaintiff's request to amend the amended complaint to remove defendant Gillette and add defendant Cermak (Dkt. No. 50) is **DENIED AS MOOT.**

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 6(a), 6(e), 72.

**All Citations**

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Footnotes

1 The amended complaint refers only to "due process," however, the plaintiff's response to defendants' summary judgment motion mentions "equal protection." The court will consider both claims in this recommendation.

2 The court must note that plaintiff has filed eight cases in the Northern District of New York, only three of which are currently pending. *Harvey v. Farber, et al.*, 9:09–CV–152 (MAD/TWD); *Harvey v. Corrections Officers 1 through 6, et al.*, 9:09–CV–154 (LEK/TWD); and this case, *Harvey v. Harder*, 9:09–CV–154 (TJM/ATB). The cases that are closed are the following: *Harvey v. Grow, et al.*, 9:09–CV–518 (GTS/RFT); *Harvey v. Sawyer, et al.*, 9:09–CV–598 (FJS/DRH); *Harvey v. Luther, et al.*, 9:09–CV–599 (DNH/GJD); *Harvey v. City of Utica Police Officers, et al.*, 9:09–CV–644 (TJM/GHL); and *Harvey v. Law*, 9:10–CV–1468 (LEK/DEP). The court understands that at the time plaintiff filed his original complaint in this action, many of the above cases had not yet been filed; however, by the time plaintiff filed his amended complaint in March of 2011, *all* of the other cases had been filed, but plaintiff continued to list only one case on the amended complaint form. (Am.Compl.¶ 5).

3 Defendant Lillie has not been served in this case. After the first attempt at service was unsuccessful for various defendants, the court reissued summonses on March 31, 2011. (Dkt. No. 34). Service on four of the five new defendants was successful, and they all join in the motion for summary judgment. Another summons for defendant Lillie was reissued on October 14, 2011, but the summons was returned "unexecuted" on October 26, 2011. (Dkt.Nos.40, 42). The "Process Receipt" states that defendant Lillie is no longer employed at BCCF. Defendant Lillie has not been served in this action, and defense counsel requests dismissal of the case against defendant Lillie for lack of service under Fed.R.Civ.P. 4(m). (Dkt. No. 47–28; Def. s' Br. at 11) (page assigned by defense counsel to his brief, not the CM/ECF page). Because this court is recommending dismissal with prejudice, both procedurally and on the merits of this action, the court need not address lack of service, which would normally result in a dismissal without prejudice.

4 Based on this admission by Sergeant Cermak, plaintiff has requested in his response to the motion for summary judgment, that the court allow plaintiff to amend his amended complaint to remove defendant Gillette as a defendant and replace him with Sergeant Cermak. Generally, the court would allow such an amendment. However, because the court is recommending dismissal on the merits of this case, it would be futile to add Sergeant Cermak at this time. The court would still recommend dismissal notwithstanding the addition of Sergeant Cermak. The court will consider his affidavit.

5 Many of the affidavits contain similar paragraphs regarding the background of this case. The court will cite to the affidavit of Mark Smolinsky, Jail Administrator, for ease of citation, even though the same information is contained in other affidavits. Mr. Smolinsky is *not* a defendant in this case, and his affidavit contains additional information that is relevant to the motion. I will cite to other affidavits as noted for additional information that is not contained in Administrator Smolinsky's statement.

6 Defendants have also filed the June 6, 2006 letter of Timothy M. Kirk, Resident Agent in Charge of the Syracuse office of the United States Secret Service. (Def.s' Ex. B). The letter requests that the Secret Service be notified in the event the plaintiff was released from custody for any reason, due to plaintiff's long history of threat-related activity. (*Id.*) The reason for this request was so that, if plaintiff were released, the Secret Service could assess whether he posed a danger to "any of our protectees." (*Id.*)

7 Plaintiff was incarcerated in HCCF, pending his prosecution for First Degree Rape; Third Degree Assault; Second Degree Unlawful Imprisonment; and Criminal Mischief. (*See* Def. s' Ex. E; Herkimer County Court commitment, dated October 30, 2006—indicating no bail pending trial). Plaintiff was clearly incarcerated in HFFC prior to October 30th because his classification notice is dated October 8, 2006. (Def. s' Ex. D).

8 An Ad Seg Order was drafted on January 12, 2007 by defendant Thompson. (Def. s' Ex. J). There were three reasons marked with an "X" for why plaintiff was being placed in Ad Seg. The first reason was due to "facility admission procedures." The second and third reasons were that the staff perceived a serious threat to the inmate's safety (although no request for protection had been made) and the inmate was exhibiting unusual behavior and could threaten to, or cause injury to himself or others. (*Id.* & Buholski Aff. ¶ 8). Defendant Buholski reviewed the order and placed plaintiff in Ad Seg within the medical unit. (Buholski Aff. ¶ 10). The order was approved by defendant Lillie. (*Id.* & Def. s' Ex. J).

9 Defendant Shear states that inmates may be placed in D–Pod without a hearing for reasons other than disciplinary. (Shear Aff. ¶ 15).

10 January 12, 2007 until January 22, 2007 (counting the first day that he was brought to BCCF as "one" and the day the he was notified of his classification).

11 Although it appears that the defendants complied with state regulations, providing for particular time limits, the violation of a state law or regulation alone would not necessarily rise to the level of a constitutional violation. *Dixon v. Goord*, 224 F.Supp.2d 739, 744–45 (S.D.N.Y.2002). *See Russell v. Coughlin*, 910 F.2d 75, 78 n. 1 (2d Cir.1990)).

12 The court would also point out that the regulations do not violate equal protection because all inmates are subject to the same regulations governing classification. Plaintiff does not mention equal protection in his amended complaint, however, in his response the motion for summary judgment, he mentions equal protection for the first time. Even assuming that plaintiff could raise a new claim in his response, this claim has no merit. In order to state a claim for an equal protection violation, plaintiff would have to allege that other similarly situated inmates were treated differently that he was. *See Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir.1995) (citing *Clebume v. Clebume Living Ctr.*, 473 U.S. 432, 439 (1985) (the Equal Protection Clause provides that the government shall treat all similarly-situated people alike). Plaintiff in this case has not alleged that any other inmates, similarly situated to plaintiff, were treated differently regarding classification.

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13 Plaintiff's own exhibits show that on January 19, 2007, plaintiff was brought back to the medical unit for a physical problem, unrelated to his mental status. (Pl.'s Ex. F). The exhibit also shows that the progress note for January 18, 2007 states that the inmate was "seen and cleared by forensics today. [L]eft unit for general population."*Id.* Plaintiff argues that Dr. Rahmon "increased his medication and cleared him for general population on January 14th. (Pl.'s Br. at 7). Plaintiff cites his Exhibit B as support for this, however, Exhibit B only states that Dr. Rahmon increased plaintiff's medication. Exhibit D is the exhibit to which plaintiff may be referring, however, the note only states that plaintiff left the unit for general population on January 18th, not that plaintiff was "cleared" for general population. In any event, plaintiff was still in his classification period on January 14th and could not have gone back to general population because his classification was not completed until January 19.th

14 As part of plaintiff's "equal protection" claim, he argues that the defendants cannot "prove" that they ordered other inmates into Ad Seg, based upon letters from another county. The burden is on plaintiff to show that he was treated differently than other "similarly situated" inmates. He makes absolutely no claim that other inmates who had such a history of violence and threats were treated differently and makes no claim that other inmates were not placed in Ad Seg as part of the admission/classification procedures.

15 On January 14, 2007, the progress notes indicate that Dr. Rahmon was "in to see inmate." (Def.s' Ex. H). The note states that plaintiff's speech was "rushed," his thoughts were racing, he stated that he was a producer from Los Angeles, who spoke to a Fox news reporter about "the CIA issues," and "spoke to himself "most of the day." (*Id.*) On January 17, 2007, plaintiff was involved in an incident whereby plaintiff allegedly threatened the President of the United States, resulting in his second transfer to the mental health unit. Based upon plaintiff's history and behavior, he cannot seriously argue that defendants had no reason to be concerned about the security of the facility.

16 The New York Regulations provide for notice of the classification determination in "one business day" after the determination is made. 9 NYCRR § 7013.8(f).

17 *See, e.g., Brown v. Graham*, 9:07–CV–1353 (FJS/ATB), 2010 WL 6428251, at *9 (N.D.N.Y. Mar. 30, 2010) ("The federal district courts in New York, applying *Sandin*, have been consistent in holding that terms of SITU or "keeplock" of approximately 30 days or less do not implicate a liberty interest protected by the Due Process clause, even in the absence of detailed factual development regarding the conditions of confinement.") (Report–Recommendation), adopted, 2011 WL 1213482 (N.D.N.Y. Mar. 31, 2011); *Rivera v. Goord*, 9:05–CV–1379, 2008 WL 5378372 at *2–*3 (N.D.N.Y. Dec. 22, 2008) (granting summary judgment on the issue that 40 days in room confinement did not constitute a cognizable liberty deprivation under *Sandin* ); *Smith v. Taylor*, 149 F. App'x 12, 2005 WL 2019547 at *1 (2d Cir.2005) (affirming grant of summary judgment dismissing plaintiff's claims of defects in an administrative hearing that resulted in his disciplinary confinement for 45 days in the SITU; plaintiff did not offer evidence that his confinement was more onerous that those generally present in the SITU and thus did not have a protected liberty interest in avoiding the 45–day confinement).

18 Because the due process rights of pretrial detainees are "at least as great as the Eighth Amendment protections available to a convicted prisoner," and the same standard applies, cases cited that refer to the Eighth Amendment are thus applicable to the conditions of confinement claims of a pretrial detainee. *Revere v. Mass Gen. Hosp.*, 463 U.S. 239, 244 (1983).

19 Defendant Harder also argues that he had no contact with plaintiff and bore no personal responsibility for his housing assignment or any other problem that plaintiff might have had at BCCF. (Harder Aff. ¶ 2). Because the court is recommending dismissal on the merits and on procedural grounds, defendant Harder's involvement is not critical to the court's recommendation. The court would just note that personal involvement is required for the assessment of damages in a section 1983 action. *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994) (citation omitted); *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.2003). The same is true for defendant Jon Gillette who was mistakenly named by plaintiff instead of Edward J. Cermak.

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2010 WL 1235591

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2010 WL 1235591
Only the Westlaw citation is currently available.

**This decision was reviewed by West editorial staff and not assigned editorial enhancements.**

United States District Court,
N.D. New York.

James MURRAY, Plaintiff,
v.
R. PALMER; S. Griffin; M. Terry; F. Englese; Sergeant Edwards; K. Bump; and K.H. Smith, Defendants.

No. 9:03-CV-1010 (GTS/GHL). | March 31, 2010.

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Hon. Andrew M. Cuomo, Attorney General for the State of New York, Timothy Mulvey, Esq., James Seaman, Esq., Assistant Attorneys General, of Counsel, Albany, NY, for Defendants.

***DECISION and ORDER***

Hon. GLENN T. SUDDABY, District Judge.

*1 The trial in this prisoner civil rights action, filed *pro se* by James Murray ("Plaintiff") pursuant to 42 U.S.C. § 1983, began with an evidentiary hearing before the undersigned on March 1, 2010, regarding the affirmative defense of seven employees of the New York State Department of Correctional Services-R. Palmer, S. Griffin, M. Terry, F. Englese, Sergeant Edwards, K. Bump, and K.H. Smith ("Defendants")-that Plaintiff failed to exhaust his available administrative remedies, as required by the Prison Litigation Reform Act, before filing this action on August 14, 2003. At the hearing, documentary evidence was admitted, and testimony was taken of Plaintiff as well as Defendants' witnesses (Darin Williams, Sally Reams, and Jeffery Hale), whom Plaintiff was able to cross-examine through *pro bono* trial counsel. At the conclusion of the hearing, the undersigned indicated that a written decision would follow. This is that written decision. For the reasons stated below, Plaintiff's Second Amended Complaint is dismissed because of his failure to exhaust his available administrative remedies.

**I. RELEVANT LEGAL STANDARD**

The Prison Litigation Reform Act of 1995 ("PLRA") requires that prisoners who bring suit in federal court must first exhaust their available administrative remedies: "No action shall be brought with respect to prison conditions under § 1983... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."42 U .S.C. § 1997e. The PLRA was enacted "to reduce the quantity and improve the quality of prisoner suits" by "afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case."*Porter v. Nussle*, 534 U.S. 516, 524-25, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). In this regard, exhaustion serves two major purposes. First, it protects "administrative agency authority" by giving the agency "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of the agency's procedures."*Woodford v. Ngo*, 548 U.S. 81, 89, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006). Second, exhaustion promotes efficiency because (a) "[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court," and (b) "even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration."*Woodford*, 548 U .S. at 89."[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."*Porter*, 534 U.S. at 532.

In accordance with the PLRA, the New York State Department of Correctional Services ("DOCS") has made available a well-established inmate grievance program. 7 N.Y.C.R.R. § 701.7. Generally, the DOCS Inmate Grievance Program ("IGP") involves the following three-step procedure for the filing of grievances. 7 N.Y.C.R.R. §§ 701.5, 701.6(g), 701.7.[1] *First*, an inmate must file a complaint with the facility's IGP clerk within a certain number of days of the

alleged occurrence.[2] If a grievance complaint form is not readily available, a complaint may be submitted on plain paper. A representative of the facility's inmate grievance resolution committee ("IGRC") has a certain number of days from receipt of the grievance to informally resolve the issue. If there is no such informal resolution, then the full IGRC conducts a hearing within a certain number of days of receipt of the grievance, and issues a written decision within a certain number of days of the conclusion of the hearing. *Second*, a grievant may appeal the IGRC decision to the facility's superintendent within a certain number of days of receipt of the IGRC's written decision. The superintendent is to issue a written decision within a certain number of days of receipt of the grievant's appeal. *Third*, a grievant may appeal to the central office review committee ("CORC") within a certain number of days of receipt of the superintendent's written decision. CORC is to render a written decision within a certain number of days of receipt of the appeal.

***2** Moreover, there is an expedited process for the review of complaints of inmate harassment or other misconduct by corrections officers or prison employees. 7 N.Y.C.R.R. § 701.8. In the event the inmate seeks expedited review, he or she may report the misconduct to the employee's supervisor. The inmate then files a grievance under the normal procedures outlined above, but all grievances alleging employee misconduct are given a grievance number, and sent immediately to the superintendent for review. Under the regulations, the superintendent or his designee shall determine immediately whether the allegations, if true, would state a "bona fide" case of harassment, and if so, shall initiate an investigation of the complaint, either "in-house," by the Inspector General's Office, or by the New York State Police Bureau of Criminal Investigations. An appeal of the adverse decision of the superintendent may be taken to the CORC as in the regular grievance procedure. A similar "special" procedure is provided for claims of discrimination against an inmate. 7 N.Y.C.R.R. § 701.9.

It is important to note that these procedural requirements contain several safeguards. For example, if an inmate could not file such a complaint within the required time period after the alleged occurrence, he or she could apply to the facility's IGP Supervisor for an exception to the time limit based on mitigating circumstances. If that application was denied, the inmate could file a complaint complaining that the application was wrongfully denied.[3] Moreover, any failure by the IGRC or the superintendent to timely respond to a grievance or first-level appeal, respectively, can-and must-be appealed to the next level, including CORC, to complete the grievance process.[4] There appears to be a conflict in case law regarding whether the IGRC's nonresponse must be appealed to the superintendent where the plaintiff's grievance was never assigned a grievance number.[5] After carefully reviewing this case law, the Court finds that the weight of authority appears to answer this question in the affirmative.[6] The Court notes that, if the plaintiff adequately describes, in his appeal to the superintendent, the substance of his grievance (or if the plaintiff attaches, to his appeal, a copy of his grievance), it would appear that there is something for the superintendent to review.

It is also important to note that DOCS has a *separate and distinct* administrative appeal process for inmate misbehavior hearings:

A. For Tier III superintendent hearings, the appeal is to the Commissioner's designee, Donald Selsky, D.O.C.S. Director of Special Housing/Inmate Disciplinary Program, pursuant to 8 N.Y.C.R.R. § 254.8;

B. For Tier II disciplinary hearings, the appeal is to the facility superintendent pursuant to 7 N.Y.C.R.R. § 253.8; and

C. For Tier I violation hearings, the appeal is to the facility superintendent or a designee pursuant to 7 N.Y.C.R.R. § 252.6.

***3** "An individual decision or disposition of any current or subsequent program or procedure having a written appeal mechanism which extends review to outside the facility shall be considered nongrievable."7 N.Y.C.R.R. § 701.3(c)(1). Similarly, "an individual decision or disposition resulting from a disciplinary proceeding ... is not grievable."7 N.Y.C.R.R. § 701.3(c)(2). However, "[t]he policies, rules, and procedures of any program or procedure, including those above, are grievable."7 N.Y.C.R.R. § 701.3(c)(3); *see also* N.Y. Dep't Corr. Serv. Directive No. 4040 at III.E.

Generally, if a prisoner has failed to follow each of the required three steps of the above-described grievance procedure prior to commencing litigation, he has failed to exhaust his administrative remedies. *Ruggiero v. County of Orange*, 467 F.3d 170, 175 (2d Cir.2006) (citing *Porter*, 534 U.S. at 524). However, the Second Circuit has held that a three-part inquiry is appropriate where a defendant contends that a prisoner has failed to exhaust his available administrative remedies, as required by the PLRA. *Hemphill*





*v. State of New York*, 380 F.3d 680, 686, 691 (2d Cir.2004), *accord*, *Ruggiero*, 467 F.3d at 175.First, "the court must ask whether [the] administrative remedies [not pursued by the prisoner] were in fact 'available' to the prisoner."*Hemphill*, 380 F.3d at 686 (citation omitted). Second, if those remedies were available, "the court should ... inquire as to whether [some or all of] the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it ... or whether the defendants' own actions inhibiting the [prisoner's] exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense."*Id.* [citations omitted]. Third, if the remedies were available and some of the defendants did not forfeit, and were not estopped from raising, the non-exhaustion defense, "the Court should consider whether 'special circumstances' have been plausibly alleged that justify the prisoner's failure to comply with the administrative procedural requirements."*Id.* [citations and internal quotations omitted].

With regard to this third inquiry, the Court notes that, *under certain circumstances*, an inmate may exhaust his administrative remedies by raising his claim during a related *disciplinary proceeding*. *Giano v. Goord*, 380 F.3d 670, 678-79 (2d Cir.2004); *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir.2004).[7] However, in essence, the circumstances in question include instances in which (1) the inmate reasonably believed that his "only available remedy" was to raise his claim as part of a tier disciplinary hearing,[8] *and* (2) the inmate articulated and pursued his claim in the disciplinary proceeding in a manner that afforded prison officials the time and opportunity to thoroughly investigate that claim.[9] Some district courts have found the first requirement not present where (a) there was nothing objectively confusing about the DOCS regulations governing the grievability of his claim,[10] (b) the inmate was specifically informed that the claim in question was grievable,[11] (c) the inmate separately pursued the proper grievance process by filing a grievance with the IGRC,[12] (d) by initially alleging that he did appeal his claim to CORC (albeit without proof), the inmate has indicated that, during the time in question, he understood the correct procedure for exhaustion,[13] and/or (e) before and after the incident in question, the inmate pursued similar claims through filing a grievance with the IGRC.[14] Other district courts have found the second requirement not present where (a) the inmate's mention of his claim during the disciplinary hearing was so insubstantial that prison officials did not subsequently investigate that claim,[15] and/or (b) the inmate did not appeal his disciplinary hearing conviction.[16]

***4** Finally, two points bear mentioning regarding exhaustion. First, given that non-exhaustion is an affirmative defense, the defendant bears the burden of showing that a prisoner has failed to exhaust his available administrative remedies. *See, e.g., Sease v. Phillips*, 06-CV-3663, 2008 WL 2901966, *4 (S.D.N.Y. July 25, 2008). However, once a defendant has adduced reliable evidence that administrative remedies were available to Plaintiff and that Plaintiff nevertheless failed to exhaust those administrative remedies, Plaintiff must then "counter" Defendants' assertion by showing exhaustion, unavailability, estoppel, or "special circumstances."[17]

Second, the Court recognizes that there is case law from within the Second Circuit supporting the view that the exhaustion issue is one of fact, which should be determined by a jury, rather than by the Court.[18] However, there is also case law from within the Second Circuit supporting the view that the exhaustion issue is one of law, which should be determined by the Court, rather than by a jury.[19] After carefully reviewing the case law, the Court finds that the latter case law-which includes cases from the Second Circuit and this District-outweighs the former case law.[20] (The Court notes that the latter case law includes cases from the Second Circuit and this District.)[21] More importantly, the Court finds that the latter cases are better reasoned than are the former cases. In particular, the Court relies on the reasons articulated by the Second Circuit in 1999: "Where administrative remedies are created by statute or regulation affecting the governance of prisons, ... the answer depends on the meaning of the relevant statute or regulation."*Snider v. Melindez*, 199 F.3d 108, 113-14 (2d Cir.1999). The Court relies also on the several reasons articulated by Judge Richard A. Posner in a recent Seventh Circuit decision: most notably, the fact that the exhaustion-of-administrative-remedies inquiry does not address the merits of, or deadlines governing, the plaintiff's claim but an issue of "judicial traffic control" (i.e., what forum a dispute is to be resolved in), which is never an issue for a jury but always an issue for a judge. *See Pavey v. Conley*, 544 F.3d 739, 740-42 (7th Cir.2008) (en banc), *cert. denied*,--- U.S. ----, 129 S.Ct. 1620, 173 L.Ed.2d 995 (2009). The Court notes that the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits appear to agree with the ultimate conclusion of the Second and Seventh

Circuits that the exhaustion issue is properly decided by a judge, not a jury. [22]

**II. ANALYSIS**

As an initial matter, Plaintiff argues that he exhausted his administrative remedies regarding the claims at issue in this action, by filing a grievance regarding those claims, and then appealing the non-response to that grievance all the way to CORC. Because the Court rejects this argument based on the evidence adduced at the hearing, the Court proceeds to an analysis of the three-step exhaustion inquiry established by the Second Circuit.

**A. Availability of Administrative Remedies**

*5 New York prison inmates are subject to an Inmate Grievance Program established by DOCS and recognized as an "available" remedy for purposes of the PLRA. *See Mingues v. Nelson*, 96-CV-5396, 2004 WL 324898, at *4 (S.D.N.Y. Feb.20, 2004) (citing *Mojias v. Johnson*, 351 F.3d 606 (2d Cir.2003), and *Snider v. Melindez*, 199 F.3d 108, 112-13 [2d Cir.1999] ). There are different circumstances under which the grievance procedure is deemed not to have been available to an inmate plaintiff. *Hemphill*, 380 F.3d at 687-88.For example, courts have found unavailability "where plaintiff is unaware of the grievance procedures or did not understand it or where defendants' behavior prevents plaintiff from seeking administrative remedies." *Hargrove v. Riley*, 04-CV-4587, 2007 WL 389003, at *8 (E.D.N.Y. Jan.31, 2007) (internal citations omitted). When testing the availability of administrative remedies in the face of claims that undue influence from prison workers has caused a plaintiff inmate to forego the formal grievance process, courts employ an objective test, examining whether "a similarly situated individual of ordinary firmness [would] have deemed them available." *Hemphill*, 380F.3d at 688 (quotations and citations omitted); *see Hargrove*, 2007 WL 389003, at *8.

Here, after carefully considering the evidence submitted at the hearing in this action on March 1, 2010, the Court finds that administrative remedies were "available" to Plaintiff during the time in question. The Court makes this finding for the following four reasons.

First, in his sworn Complaint (which has the force and effect of an affidavit), Plaintiff stated, "Yes," in response to the question, "Is there a prisoner grievance procedure at this facility ."(Dkt. No. 1, ¶ 4.a.) [23] Second, both Darin Williams (the corrections officer in charge of the special housing unit during the relevant time period) and Sally Reams (the Inmate grievance program supervisor during the relevant time period) testified credibly, at the exhaustion hearing, that there was a working grievance program at Great Meadow Correctional Facility during the time in question. (Hearing Tr. at 10, 12, 14-21, 40-54.) Third, Plaintiff testified, at the exhaustion hearing that, during this approximate time period (the August to November of 2000), he filed at least three other grievances Great Meadow Correctional Facility, to which he received responses from the inmate grievance clerk, the Superintendent, and CORC. (*Id.* at 154, 157-58, 169-70;*see also* Hearing Exs. D-4, D-5, P-8, P-13, P-14.) [24] Fourth, the Court finds the relevant portions of Plaintiff's hearing testimony regarding the grievance at issue in this action to be incredible due to various omissions and inconsistencies in that testimony, and his demeanor during the hearing. (*Id.* at 127-34.) [25]

**B. Estoppel**

After carefully considering the evidence submitted at the hearing in this action on March 1, 2010, the Court finds that Defendants did not forfeit the affirmative defense of non-exhaustion by failing to raise or preserve it, or by taking actions that inhibited Plaintiff's exhaustion of remedies. For example, Defendants' Answer timely asserted this affirmative defense. (Dkt. No. 35, ¶ 17.) Moreover, Plaintiff failed to offer any credible evidence at the hearing that *Defendant* s in any way interfered with Plaintiff's ability to file grievances during the time in question. (Hearing Tr. at 127-34, 157-58, 169-70.) Generally, a defendant in an action may not be estopped from asserting the affirmative defense of failure to exhaust administrative remedies based on the actions (or inactions) of other individuals. [26]

**C. Special Circumstances**

*6 There are a variety of special circumstances that may excuse a prisoner's failure to exhaust his available administrative remedies, including (but not limited to) the following:

(1) The facility's "failure to provide grievance deposit boxes, denial of forms and writing materials, and a refusal to accept or forward plaintiff's appeals-which effectively rendered the grievance appeal process unavailable to him." *Sandlin v. Poole*, 575 F.Supp.2d 484, 488 (W.D.N.Y.2008) (noting that "[s]uch facts support a finding that defendants are estopped





from relying on the exhaustion defense, as well as "special circumstances" excusing plaintiff's failure to exhaust");

(2) Other individuals' "threats [to the plaintiff] of physical retaliation and reasonable misinterpretation of the statutory requirements of the appeals process." *Clarke v. Thornton*, 515 F.Supp.2d 435, 439 (S.D.N.Y.2007) (noting also that "[a] correctional facility's failure to make forms or administrative opinions "available" to the prisoner does not relieve the inmate from this burden."); and

(3) When plaintiff tries "to exhaust prison grievance procedures[, and] although each of his efforts, alone, may not have fully complied, together his efforts sufficiently informed prison officials of his grievance and led to a thorough investigation of the grievance." *Hairston v. LaMarche*, 05-CV-6642, 2006 WL 2309592, at *8 (S.D.N.Y. Aug.10, 2006).

After carefully considering the issue, the Court finds that there exists, in this action, no "special circumstances" justifying Plaintiff's failure to comply with the administrative procedural requirements. Construed with the utmost of special leniency, Plaintiff's hearing testimony, and his counsel's cross-examination of Defendants' witnesses, raise the specter of two excuses for not having exhausted his available administrative remedies before he (allegedly) mailed his Complaint in this action on August 14, 2003:(1) that exhaustion was not possible because of the administrative procedures that DOCS has implemented regarding inmate grievances; and/or (2) that an unspecified number of unidentified corrections officers (who are not Defendants in this action) somehow interfered with the delivery of his grievance and appeals. For example, Plaintiff testified at the exhaustion hearing that he handed his grievance and appeals to various corrections officers making rounds where he was being housed, and that, if his grievance and/or appeals were never received, it must have been because his letters were not properly delivered. (Hearing Tr. at 126-36.)

With regard to these excuses, the Court finds that, while these excuses could constitute special circumstances justifying an inmate's failure to exhaust his available administrative remedies in certain situations, [27] these excuses are not available to Plaintiff in the current action because, as stated in Part II.A. of this Decision and Order, the credible testimony before the Court indicates that Plaintiff did not hand his grievance and appeals to various corrections officers with regard to the claims in question. *See, supra*, Part II.A. of this Decision and Order. [28]

*7 For all these reasons, the Court finds that Plaintiff's proffered excuse does not constitute a special circumstance justifying his failure to exhaust his available administrative remedies before filing this action.

**ACCORDINGLY,** it is

**ORDERED** that Plaintiff's Second Amended Complaint (Dkt. No. 10) is ***DISMISSED*** **in its entirety without prejudice** for failure to exhaust his available administrative remedies before filing this action, pursuant to the PLRA; and it is further

**ORDERED** that the Clerk of the Court shall enter judgment for Defendants and close the file in this action.

**All Citations**

Not Reported in F.Supp.2d, 2010 WL 1235591

Footnotes

1 *See also White v. The State of New York*, 00-CV-3434, 2002 U . S. Dist. LEXIS 18791, at *6 (S.D.N.Y. Oct 3, 2002).
2 The Court uses the term "a certain number of days" rather than a particular time period because (1) since the three-step process was instituted, the time periods imposed by the process have changed, and (2) the time periods governing any particular grievance depend on the regulations and directives pending during the time in question.
3 *Groves v. Knight*, 05-CV-0183, Decision and Order at 3 (N.D.N.Y. filed Aug. 4, 2009) (Suddaby, J.).
4 7 N.Y.C.R.R. § 701.6(g) ("[M]atters not decided within the time limits may be appealed to the next step."); *Hemphill v. New York*, 198 F.Supp.2d 546, 549 (S.D.N.Y.2002), *vacated and remanded on other grounds*,380 F.3d 680 (2d Cir.2004); *see, e.g.*., DOCS Directive 4040 dated 8/22/03, ¶ VI.G. ("Absent [a time limit extension granted by the grievant], matters not decided within the time limits may be appealed to the next step."); *Pacheco v. Drown*, 06-CV-0020, 2010 WL 144400, at *19 & n. 21 (N.D.N.Y. Jan.11, 2010) (Suddaby, J.) ("It is important to note that any failure by the IGRC or the superintendent to timely respond to a grievance or first-level appeal, respectively, can be appealed to the next level, including CORC, to complete the grievance process."), *accord*, *Torres v. Caron*, 08-CV-0416, 2009 WL 5216956, at *5 & n. 28 (N.D.N.Y.

Dec.30, 2009) (Mordue, C.J.), *Benitez v. Hamm*, 04-CV-1159, 2009 WL 3486379, at *13 & n. 34 (N.D.N.Y. Oct.21, 2009) (Mordue, C.J.), *Ross v. Wood*, 05-CV-1112, 2009 WL 3199539, at *11 & n. 34 (N.D.N.Y. Sept.30, 2009) (Scullin, J.), *Sheils v. Brannen*, 05-CV-0135, 2008 WL 4371776, at *8 & n. 24 (N.D.N.Y. Sept.18, 2008) (Kahn, J.), *Murray v. Palmer*, 03-CV-1010, 2008 WL 2522324, at *15 & n. 46 (N.D.N.Y. June 20, 2008) (Hurd, J.), *McCloud v. Turegllo*, 07-CV-0650, 2008 WL 17772305, at *10 & n. 25 (N.D.N.Y. Apr. 15, 2008) (Mordue, C.J.), *Shaheen v. McIntyre*, 05-CV-0173, 2007 WL 3274835, at *14 & n. 114 (N.D.N.Y. Nov.5, 2007) (McAvoy, J.); *Nimmons v. Silver*, 03-CV-0671, Report-Recommendation, at 15-16 (N.D.N.Y. filed Aug. 29, 2006) (Lowe, M.J.) (recommending that the Court grant Defendants' motion for summary judgment, in part because plaintiff adduced no evidence that he appealed the lack of a timely decision by the facility's IGRC to the next level, namely to either the facility's superintendent or CORC), *adopted by* Decision and Order (N.D.N.Y. filed Oct. 17, 2006) (Hurd, J.); *Gill v. Frawley*, 02-CV-1380, 2006 WL 1742738, at *11 & n. 66 (N.D.N.Y. June 22, 2006) (McAvoy, J.) ("[A]n inmate's mere attempt to file a grievance (which is subsequently lost or destroyed by a prison official) is not, in and of itself, a reasonable effort to exhaust his administrative remedies since the inmate may still appeal the loss or destruction of that grievance."); *Walters v. Carpenter*, 02-CV-0664, 2004 WL 1403301, at *3 (S.D.N.Y. June 22, 2004) ("[M]atters not decided within the prescribed time limits must be appealed to the next level of review."); *Croswell v. McCoy*, 01-CV-0547, 2003 WL 962534, at *4 (N.D.N.Y. March 11, 2003) (Sharpe, M.J.) ("If a plaintiff receives no response to a grievance and then fails to appeal it to the next level, he has failed to exhaust his administrative remedies as required by the PLRA."); *Reyes v. Punzal*, 206 F.Supp.2d 431, 433 (W.D.N.Y.2002) ("Even assuming that plaintiff never received a response to his grievance, he had further administrative avenues of relief open to him.").

5 *Compare Johnson v. Tedford*, 04-CV-0932, 616 F.Supp.2d 321, 326 (N.D.N.Y.2007) (Sharpe, J.) ("[W]hen a prisoner asserts a grievance to which there is no response, *and it is not recorded or assigned a grievance number*, administrative remedies may be completely exhausted, as there is nothing on record for the next administrative level to review.") [emphasis in original, and citations omitted] *with Waters v. Schneider*, 01-CV-5217, 2002 WL 727025, at *2 (S.D.N.Y. Apr.23, 2002) (finding that, in order to exhaust his available administrative remedies, plaintiff had to file an appeal with the superintendent from the IGRC's non-response to his grievance, of which no record existed).

6 *See, e.g., Murray v. Palmer*, 03-CV-1010, 2008 WL 2522324, at *16, 18 (N.D.N.Y. June 20, 2008) (Hurd, J., adopting Report-Recommendation of Lowe, M.J.) (finding that, in order to exhaust his available administrative remedies with regard to his grievance of August 30, 2000, plaintiff had to file an appeal with the superintendent from the IGRC's non-response to that grievance, which included a failure to acknowledge the receipt of the grievance and assign it a number); *Midalgo v. Bass*, 03-CV-1128, 2006 WL 2795332, at *7 (N.D.N.Y. Sept.26, 2006) (Mordue, C.J., adopting Report-Recommendation of Treece, M.J.) (observing that plaintiff was "requir[ed]" to seek an appeal to the superintendent, even though he never received a response to his grievance of April 26, 2003, which was never assigned a grievance number); *Collins v. Cunningham*, 06-CV-0420, 2009 WL 2163214, at *3, 6 (W.D.N.Y. July 20, 2009) (rejecting plaintiff's argument that his administrative remedies were not available to him where his grievance of March 20, 2004, was not assigned a grievance number); *Veloz v. New York*, 339 F.Supp.2d 505, 515-16 (S.D.N.Y.2004) (rejecting inmate's argument that the prison's grievance procedure had been rendered unavailable to him by the practice of prison officials' losing or destroying his grievances, because, *inter alia*,"there was no evidence whatsoever that any of [plaintiff's] grievances were filed with a grievance clerk," and he should have "appeal[ed] these claims to the next level once it became clear to him that a response to his initial filing was not forthcoming"); *cf. Hernandez v. Coffey*, 582 F.3d 303, 305, 309, n. 3 (2d Cir.2009) ("Our ruling in no way suggests that we agree with Hernandez's arguments regarding exhaustion or justification for failure to exhaust [which included an argument that the Inmate Grievance Program was not available to him because, when he filed a grievance at the first stage of the Program, he received no response and his grievance was not assigned a grievance number].").

7 The Court recognizes that the Supreme Court's decision in *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006), may have changed the law regarding possible exceptions to the exhaustion requirement (and thus the possibility that exhaustion might occur through the disciplinary process). Specifically, in *Woodford*, the Supreme Court held that the PLRA required "proper" exhaustion as a prerequisite to filing a section 1983 action in federal court. *Woodford*, 548 U.S. at 93. "Proper" exhaustion means that the inmate must complete the administrative review process *in accordance with the applicable procedural rules*, as a prerequisite to bringing suit in federal court. *Id.* at 88-103 (emphasis added). It is unclear whether *Woodford* has overruled any decisions that recognize "exceptions" to the exhaustion requirement. Out of special solicitude to Plaintiff, the Court will assume that *Woodford* has not overruled the Second Circuit's *Giano-Testman* line of cases.

8 *Giano*, 380 F.3d at 678 ("[W]hile Giano was required to exhaust available administrative remedies before filing suit, his failure to do so was justified by his reasonable belief that DOCS regulations foreclosed such recourse."); *Testman*, 380





F.3d at 696-98 (remanding case so that district court could consider, *inter alia*, whether prisoner was justified in believing that his complaints in the disciplinary appeal procedurally exhausted his administrative remedies because the prison's remedial system was confusing).

9 *Testman*, 380 F.3d at 696-98 (remanding case so that district court could consider, *inter alia*, whether prisoner's submissions in the disciplinary appeals process exhausted his remedies "in a substantive sense" by "afford[ing] corrections officials time and opportunity to address complaints internally"); *Chavis v. Goord*, 00-CV-1418, 2007 WL 2903950, at *9 (N.D.N.Y. Oct.1, 2007) (Kahn, J.) ("[T]o be considered proper, exhaustion must occur in both a substantive sense, meaning that prison officials are somehow placed on notice of an inmate's complaint, and procedurally, in that it must be presented within the framework of some established procedure that would permit both investigation and, if appropriate, remediation.") [citation omitted]. The Court joins the above-described two requirements in the conjunctive because the Second Circuit has recognized that mere notice to prison officials through informal channels, without more, does not suffice to satisfy the PLRA procedural exhaustion requirement. *See Macias v. Zenk*, No. 04-6131, 495 F.3d 37, at *43-44 (2d Cir.2007) (recognizing that *Woodford v. Ngo*, 548 U.S. 81 [2006],overruled*Braham v. Casey*, 425 F.3d 177 [2d Cir.2005], to the extent that *Braham* held that "informal complaints" would suffice to exhaust a claim).

10 *See, e.g., Reynoso v. Swezey*, 423 F.Supp.2d 73, 75 (W.D.N.Y.2006), *aff'd*,238 F. App'x 660 (2d Cir.2007) (unpublished order), *cert. denied*,552 U.S. 1207, 128 S.Ct. 1278, 170 L.Ed.2d 109 (2008); *Holland v. James*, 05-CV-5346, 2009 WL 691946, at *3 (S.D.N.Y. March 6, 2009); *Winston v. Woodward*, 05-CV-3385, 2008 WL 2263191, at *10 (S.D.N.Y. May 30, 2008); *cf. Muniz v. Goord*, 04-CV-0479, 2007 WL 2027912, at *5 & n. 23 (N.D.N.Y. July 11, 2007) (McAvoy, J.) (reciting this point of law in context of failure to appeal grievance determination to CORC).

11 *See, e.g., Johnson v. Barney*, 04-CV-10204, 2007 WL 2597666, at *2 (S.D.N.Y. Aug.30, 2007); *Reynoso*, 423 F.Supp.2d at 75-76.

12 *See, e.g., Reynoso*, 423 F.Supp.2d at 75 ("There is no evidence that plaintiff was confused or misled about the proper method for raising his claims. In fact, the record shows exactly the opposite: plaintiff did file a grievance about the incident. He simply failed to appeal the denial of that grievance to CORC."); *Tapp v. Kitchen*, 02-CV-6658, 2004 WL 2403827, at *9 (W.D.N.Y. Oct.26, 2004) ("In the instant case, however, plaintiff does not and cannot claim to have believed that his only available remedy was to raise his complaint as part of his disciplinary hearing, since he also filed a grievance with the Inspector General, and also claims to have filed both an inmate grievance and a separate complaint with the facility superintendent."); *cf. Muniz*, 2007 WL 2027912, at *5 & n. 23 ("Plaintiff's Complaint alleges facts indicating that he believed it necessary to file a grievance with the Gouverneur C.F. IGRC and to appeal the denial of that grievance to the Gouverneur C.F. Superintendent. Why would he not also believe it necessary to take the next step in the exhaustion process and appeal the Superintendent's decision to CORC?").

13 *See, e.g., Petrusch v. Oliloushi*, 03-CV-6369, 2005 WL 2420352, at *5 (W.D.N.Y. Sept.30, 2005) ("[A]s to his grievance, which is the subject of this lawsuit, plaintiff does not appear to be contending that he believed the Superintendent's denial constituted exhaustion, since by initially claiming that he did appeal to CORC, albeit without proof, he has demonstrated his knowledge of the correct procedure for exhaustion.").

14 *See, e.g., Benjamin v. Comm'r N.Y. State DOCS*, 02-CV-1703, 2007 WL 2319126, at *14 (S.D.N.Y. Aug.10, 2007) ("Benjamin cannot claim that he believed that appealing his disciplinary proceeding was the only available remedy at his disposal in light of the numerous grievances he has filed during his incarceration at Green Haven [both before and after the incident in question]."), *vacated in part on other grounds*,No. 07-3845, 293 F. App'x 69 (2d Cir.2008).

15 *See, e.g., Chavis*, 2007 WL 2903950, at *9 ("The focus of a disciplinary hearing is upon the conduct of the inmate, and not that of prison officials.... While the mention of a constitutional claim during plaintiff's disciplinary hearing could potentially have satisfied his substantive exhaustion requirement by virtue of his having notified prison officials of the nature of his claims, he did not fulfill his procedural exhaustion requirement [under the circumstances due to his] ... mere utterance of his claims during the course of a disciplinary hearing .... [T]here is nothing in the record to suggest that when the issues of interference with plaintiff's religious free exercise rights or alleged retaliation for having voiced his concerns were in any way investigated by prison officials.") [citations omitted].

16 *See, e.g., Colon v. Furlani*, 07-CV-6022, 2008 WL 5000521, at *2 (W.D.N.Y. Nov.19, 2008) ("Colon was found guilty of harassment based on a letter that he wrote to defendant Bordinaro, concerning some of the events giving rise to his failure-to-protect claim, but it does not appear that he appealed that disposition.... While under some circumstances an inmate may be able to satisfy the exhaustion requirement by appealing from a disciplinary hearing decision ..., plaintiff did not do so here, and this claim is therefore barred under the PLRA.") [citations omitted]; *Cassano v. Powers*, 02-CV-6639, 2005 WL 1926013, at *5 (W.D.N.Y. Aug.10, 2005) ("[E]ven assuming plaintiff believed that his proper recourse was to raise [his] complaint at his disciplinary hearing, rather than using the Inmate Grievance Program, he did not exhaust that

process. That is, plaintiff has not provided any evidence that he appealed his Tier III hearing conviction. Since plaintiff did not pursue even the disciplinary appeal process, he can not have made submissions in the disciplinary process that were sufficient, in a substantive sense, to exhaust his remedies under § 1997e(a).") [internal quotation marks and citation omitted].

17 *See Hemphill*, 380 F.3d at 686 (describing the three-part inquiry appropriate in cases where a prisoner plaintiff plausibly seeks to "counter" defendants' contention that the prisoner failed to exhaust his available administrative remedies under the PLRA); *Verley v. Wright*, 02-CV-1182, 2007 WL 2822199, at *8 (S.D.N.Y. Sept.27, 2007) ("[P]laintiff has failed to demonstrate that the administrative remedies were not, in fact, 'actually available to him.' "); *Winston v. Woodward*, 05-CV-3385, 2008 WL 2263191, at *10 (S.D.N.Y. May 30, 2008) (finding that the plaintiff "failed to meet his burden under *Hemphill* of demonstrating 'special circumstances' "); *see also Ramirez v. Martinez*, 04-CV-1034, 2009 WL 2496647, at *4 (M.D.Pa. Aug.14, 2009) ("In order to effectively oppose defendants' exhaustion argument, the plaintiff has to make a showing in regard to each of his claims."); *Washington v. Proffitt*, 04-CV-0671, 2005 WL 1176587, at *1 (W.D.Va. May 17, 2005) ("[I]t is plaintiff's duty, at an evidentiary hearing, "to establish by a preponderance of the evidence that he had exhausted his administrative remedies or that any defendant had hindered or prevented him from doing so within the period fixed by the Jail's procedures for filing a grievance.").

18 *See, e.g., Lunney v. Brureton*, 04-CV-2438, 2007 WL 1544629, at *10 n. 4 (S.D.N.Y. May 29, 2007) ("There is certainly case law that supports the view that exhaustion should be determined by the Court rather than by a jury. As the Supreme Court has recently affirmed, however, exhaustion is an 'affirmative defense,' much like a statute of limitations defense. Where there are disputed factual questions regarding an affirmative defense such as a statute of limitations defense, the Second Circuit has stated that 'issues of fact as to the application of that defense must be submitted to a jury.'Thus, it is not clear that factual disputes regarding the exhaustion defense should ultimately be decided by the Court."); *Finch v. Servello*, 06-CV-1448, 2008 WL 4527758, at *8 n. 5 (N.D.N.Y. Sept.29, 2008) (McAvoy, J.) (citing *Lunney* and noting that "it is not clear that factual disputes regarding the exhaustion defense should ultimately be decided by the Court").

19 *See, e.g., Harrison v. Goord*, 07-CV-1806, 2009 WL 1605770, at *7 n. 7 (S.D.N.Y. June 9, 2009) (recognizing that "[t]here is authority ... for the position that where questions of fact exist as to whether a plaintiff has exhausted administrative remedies, such fact questions are for the Court, rather than a jury, to decide ...."); *Amador v. Superintend. of Dept. of Corr. Servs.*, 03-CV-0850, 2007 WL 4326747, at *5 n. 7 (S.D.N.Y. Dec.4, 2007) ("It is unclear whether factual disputes regarding the exhaustion defense should ultimately be decided by the court or by a jury.... [T]here is ... case law ... supporting the view that exhaustion should be determined by the court and not a jury."), *appeal pending*, No. 08-2079-pr (2d Cir. argued July 15, 2009).

20 *See, e.g., Mastroianni v. Reilly*, 602 F.Supp.2d 425, 438 (E.D.N.Y.2009) (noting that the magistrate judge held an evidentiary hearing "on the issue of exhaustion"); *Sease v. Phillips*, 06-CV-3663, 2008 WL 2901966, *3 n. 2 (S.D.N.Y. July 25, 2008) (finding that "the better approach is for the judge, and not the jury, to decide any contested issues of fact relating to the defense of failure to exhaust administrative remedies."); *Amador*, 2007 WL 4326747, at *5 n. 7 ("[T]here is ... case law, which in my view is more persuasive and on point, supporting the view that exhaustion should be determined by the court and not a jury. I find it proper that this issue be decided by the court."); *Enigwe v. Zenk*, 03-CV-0854, 2006 WL 2654985, at *4 (E.D.N.Y. Sept.15, 2006) (finding that, at the summary judgment "stage of the proceedings, a genuine question of fact exists with respect to whether [plaintiff] should be excused from exhausting his administrative remedies with regard to claims relating to his confinement at MDC Brooklyn," and therefore "direct[ing] that a hearing be held" before a judge, to resolve this issue); *Dukes v. S.H.U. C.O. John Doe # 1*, 03-CV-4639, 2006 WL 1628487, at *6 (S.D.N.Y. June 12, 2006) (ordering an "evidentiary hearing [before a judge] on the issue of whether prison officials failed to assign grievance numbers to [plaintiff]'s grievances and, if so, whether that rendered further administrative remedies unavailable, estopped the Defendants from asserting non-exhaustion, or justified [plaintiff]'s failure to appeal to the CORC"); *Mingues v. Nelson*, 96-CV-5396, 2004 WL 324898, at *4 (S.D.N.Y. Feb.20, 2004) ("The Court could have *sua sponte* dismiss[ed] this action as the record is unmistakeably clear that an appropriate administrative procedure was available to him, that he was required to exhaust his administrative remedies, and that he failed to do so as required by the PLRA.... In this case, plaintiff has been afforded notice and given an opportunity to respond to the exhaustion issue and his failure remains clear."); *Roland v. Murphy*, 289 F.Supp.2d 321, 323 (E.D.N.Y.2003)"[W]hether the plaintiff has exhausted his administrative remedies is a question for the Court to decide as a matter of law.") [internal quotation marks and citation omitted]; *Evans v. Jonathan*, 253 F.Supp.2d 505, 509 (W.D.N.Y.2003) ( "[W]hether the plaintiff has exhausted his administrative remedies is a question for the Court to decide as a matter of law.").

21 *See, e.g., Snider v. Melindez*, 199 F.3d 108, 113-14 (2d Cir.1999) ("Whether an administrative remedy was available to a prisoner in a particular prison or prison system, and whether such remedy was applicable to the grievance underlying





the prisoner's suit, are not questions of fact. They either are, or inevitably contain, questions of law. Where administrative remedies are created by statute or regulation affecting the governance of prisons, the existence of the administrative remedy is purely a question of law. The answer depends on the meaning of the relevant statute or regulation."), *accord, Mojias v. Johnson*, 351 F.3d 606, 608-11 (2d Cir.2003) (citing relevant language from *Snider v. Melindez*, and later stating that a district court could *sua sponte* dismiss a prisoner's civil rights complaint for failure to exhaust his available administrative remedies if it gave him notice and an opportunity to be heard); *DeBlasio v. Moriarty*, 05-CV-1143, Minute Entry (N.D.N.Y. filed Dec. 9, 2008) (McCurn, J.) (indicating that judge held pre-trial evidentiary hearing on whether plaintiff had exhausted administrative remedies before filing action); *Pierre v. County of Broome*, 05-CV-0332, 2007 WL 625978, at *1 n. 1 (N.D.N.Y. Feb.23, 2007) (McAvoy, J.) (noting that "[t]he court held an evidentiary hearing on October 25, 2006 concerning the issue of whether Plaintiff had exhausted administrative remedies"); *Hill v. Chanalor*, 419 F.Supp.2d 255, 257-59 (N.D.N.Y. March 8, 2006) (Kahn, J.) (*sua sponte* dismissing a prisoner's civil rights complaint, pretrial, for failure to exhaust his available administrative remedies after it gave him notice and an opportunity to be heard); *Raines v. Pickman*, 103 F.Supp.2d 552, 555 (N.D.N.Y.2000) (Mordue, J.) ("[I]n order for the Court to dismiss for failing to exhaust administrative remedies, the Court must be shown that such a remedy exists for an inmate beating in the grievance context. This is an issue of law for the Court to determine.").

22 *See Casanova v. Dubois*, 289 F.3d 142, 147 (1st Cir.2002); *Hill v. Smith*, 186 F. App'x 271, 273-74 (3d Cir.2006); *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir.2003); *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 682-83 (4th Cir.2005); *Dillon v. Rogers*, No. 08-30419, 2010 WL 378306, at *7 (5th Cir. Feb.4, 2010); *Taylor v. U.S.*, 161 F. App'x 483, 486 (6th Cir.2005); *Larkins v. Wilkinson*, 172 F.3d 48, at *1 (6th Cir.1998); *Husley v. Belken*, 57 F. App'x 281, 281 (6th Cir.2003); *Ponder v. Wackenhut Corr. Corp.*, 23 F. App'x 631, 631-32 (8th Cir.2002); *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir.2003), *cert. denied*,540 U.S. 810 (2003); *Freeman v. Watkins*, 479 F.3d 1257, 1260 (10th Cir.2007); *Alloway v. Ward*, 188 F. App'x 863, 866 (6th Cir.2006); *Bryant v. Rich*, 530 F.3d 1368, 1373-76 (11th Cir.), *cert. denied*,--- U.S. ----, 129 S.Ct. 733, 172 L.Ed.2d 734 (2008).

23 The Court notes that, in his Complaint, Plaintiff also swore that his "grievance was denied." (Dkt. No. 1, ¶ 4.b.ii.) However, during the exhaustion hearing, Plaintiff testified that he never received a response to his grievance from any member of DOCS.

24 In addition, the documentary evidence adduced at the hearing establishes that, in actuality, Plaintiff filed ten other grievances during this time period (and several appeals from the denials of those grievances). The first of these grievances (Grievance Number GM-30651-00), filed on August 25, 2000, regarded Plaintiff's request for medications. (Hearing Exs. D-4, D-5.) The second of these grievances (Grievance Number GM-30691-00), filed on September 1, 2000, regarded Plaintiff's request for copies. (Hearing Ex. D-4.) The third of these grievances (Grievance Number GM-30729-00), filed on September 11, 2000, regarded the use of full restrains against Plaintiff. (*Id.; see also* Hearing Ex. P-14.) The fourth of these grievances, filed on October 19, 2000 (Grievance Number GM-30901-00), regarded Plaintiff's request for the repair of his cell sink. (Hearing Exs. D-4, D-5.) The fifth of these grievances (Grievance Number GM-30901-00), also filed on October 19, 2000, regarded Plaintiff's request for the clean up of his cell. (Hearing Ex. D-4.) The sixth of these grievances (Grievance Number GM-31040-00), filed on November 17, 2000, regarded the review of records. (*Id.*) The seventh of these grievances (Grievance Number GM-31041-00), also filed on November 17, 2000, regarded Plaintiff's request for medical attention. (*Id.*; see also Hearing Ex. P-13) The eighth of these grievances (Grievance Number GM-31048-00), filed on November 20, 2000, regarded the rotation of books. (Hearing Ex. D-14) The ninth of these grievances (Grievance Number GM-31040-00), filed on November 27, 2000, regarded the review of records (and was consolidated with his earlier grievance on the same subject).(*Id.*) The tenth of these grievances (Grievance Number GM-31070-00), filed on November 27, 2000, regarded Plaintiff's eyeglasses. (*Id.*)

25 For example, Plaintiff was unable to identify the corrections officers to whom he handed his grievance and appeals for mailing. (*Id.* at 127-34.)Moreover, Plaintiff did not convincingly explain why the grievance and appeals at issue in this action did not make it through the mailing process, while his numerous other grievances and appeals did make it through the mailing process. (*Id.* at 154-171.)In addition, Plaintiff acknowledged that it was his belief, during this time period, that an inmate was not required to exhaust his administrative remedies in matters involving the use of excessive force; yet, according to Plaintiff, he decided to exhaust his administrative remedies on his excessive force claim anyway. (*Id.* at 148-49.)

26 *See Ruggiero v. County of Orange*, 467 F.3d 170, 178 (2d Cir.2006) (holding that defendants were not estopped from asserting the affirmative defense of non-exhaustion where the conduct plaintiff alleged kept him from filing a grievance-that he was not given the manual on how to grieve-was not attributable to the defendants and plaintiff "point[ed] to no affirmative act by prison officials that would have prevented him from pursuing administrative remedies"); *Murray v.*

*Palmer*, 03-CV-1010, 2008 WL 2522324, at *19 (N.D.N.Y. June 20, 2008) (Hurd, J., adopting Report-Recommendation of Lowe, M.J.) ("I have found no evidence sufficient to create a genuine issue of triable fact on the issue of whether Defendants, *through their own actions*, have inhibited Plaintiff exhaustion of remedies so as to estop one or more Defendants from raising Plaintiff's failure to exhaust as a defense.") [emphasis in original]; *Shaheen v. McIntyre*, 05-CV-0173, 2007 WL 3274835, at *16 (N.D.N.Y. Nov.5, 2007) (McAvoy, J. adopting Report-Recommendation of Lowe, M.J.) (finding defendants not estopped from raising Plaintiff's non-exhaustion as a defense based on plaintiff's allegation "that [he] was inhibited (through non-responsiveness) by [ ] unnamed officials at Coxsackie C.F.'s Inmate Grievance Program (or perhaps the Grievance Review Committee), and Coxsackie C.F. Deputy Superintendent of Security Graham" because plaintiff's complaint and "opposition papers ... fail to contain any evidence placing blame on Defendants for the (alleged) failure to address his grievances and complaint letters"); *Smith v. Woods*, 03-CV-0480, 2006 WL 1133247, at *18 (N.D.N.Y. Apr.24, 2006) (Hurd, J. adopting Report-Recommendation of Lowe, M.J.) (finding that defendants are not estopped from relying on the defense of non-exhaustion because "no evidence (or even an argument) exists that any Defendant ... inhibit[ed] Plaintiff's exhaustion of remedies; Plaintiff merely argues that a non-party to this action (the IGRC Supervisor) advised him that his allegedly defective bunk bed was not a grievable matter."); *cf. Warren v. Purcell*, 03-CV-8736, 2004 WL 1970642, at *6 (S.D.N.Y. Sept.3, 2004) (finding that conflicting statements [offered by a non-party]-that the prisoner needed to refile [his grievance] and that the prisoner should await the results of DOCS's investigation-estopped the defendants from relying on the defense on non-exhaustion, or "[a]lternatively, ... provided ... a 'special circumstance' under which the plaintiff's failure to pursue the appellate procedures specified in the IGP was amply justified."); *Brown v. Koenigsmann*, 01-CV-10013, 2005 WL 1925649, at *1-2 (S.D.N.Y. Aug.10, 2005) ("Plaintiff does not assert that Dr. Koenigsmann personally was responsible for [the failure of anyone from the Inmate Grievance Program to address plaintiff's appeal]. [However,] *Ziemba [v. Wezner*, 366 F.3d 161 (2d Cir.2004) ] does not require a showing that Dr. Koenigsmann is personally responsible for plaintiff's failure to complete exhaustion [in order for Dr. Koenigsmann to be estopped from asserting the affirmative defense of failure to exhaust administrative remedies], as long as someone employed by DOCS is. If that reading of Ziemba is incorrect, however, ... then the circumstances here must be regarded as special, and as justifying the incompleteness of exhaustion, since a decision by CORC is hardly something plaintiff could have accomplished on his own.").

27 *See, e.g., Sandlin v. Poole*, 575 F.Supp.2d 484, 488 (W.D.N.Y.2008) (noting that "refusal to accept or forward plaintiff's appeals ... effectively render[s] the grievance appeal process unavailable to him").

28 The Court notes that, even if Plaintiff did (as he testified) hand to a corrections officer for mailing a letter to the Superintendent on September 13, 2000, appealing from the IGRC's failure to decide his grievance of August 22, 2000, within nine working days (i.e., by September 5, 2000), it appears that such an appeal would have been filed two days too late under DOCS Directive 4040, which requires that appeal to be filed within four working days of the IGRC's failure to decide his grievance (i.e., by September 11, 2000). (*See* Hearing Tr. 127-34; Hearing Ex. P-1, at 5-7 [attaching ¶¶ V.A, V.B. of DOCS Directive 4040, dated 6/8/98].)

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United States District Court,
N.D. New York.

Jeff SMITH, Plaintiff,
v.
Robert K. WOODS, Deputy Superintendent; Joseph R. Belarge, Captain; G.J. O'Donnell, Sergeant; F.S.A. Antonelli; and Wayne Holt, Correction Officer, Defendants.

No. 9:03-CV-480. | April 24, 2006.

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**DECISION and ORDER**

DAVID N. HURD, District Judge.

*1 Plaintiff, Jeff Smith, brought this civil rights action pursuant to 42 U.S.C. § 1983. By Report-Recommendation dated March 17, 2006, the Honorable George H. Lowe, United States Magistrate Judge, recommended that defendants' motion for summary judgment be granted, and that plaintiff's motion for partial summary judgment be denied. (Docket No. 51). The plaintiff has filed objections to the Report-Recommendation. (Docket No. 53).

Based upon a de novo determination of the portions of the report and recommendations to which the plaintiff has objected, the Report-Recommendation is accepted and adopted in whole. *See*28 U .S.C. 636(b)(1). Accordingly, it is ORDERED that
1. Defendants' motion for summary judgment is GRANTED;

Plaintiff's motion for partial summary judgment is DENIED. and

The complaint is DISMISSED in its entirety.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

GEORGE H. LOWE, Magistrate Judge.

**REPORT-RECOMMENDATION**

This matter has been referred to me for Report and Recommendation by the Honorable David N. Hurd, United States District Judge, pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c) of the Rules of Practice for this Court. In this *pro se* civil rights action brought under 42 U.S.C. § 1983, Jeff Smith ("Plaintiff") alleges that five employees of Upstate Correctional Facility-Deputy Superintendent Robert K. Woods, Captain Joseph R. Belarge, Sergeant G.J. O'Donnel, Food Service Administrator Richard Antonelli, and Correction Officer Wayne Holt ("Defendants")-violated his rights under the First, Fourth, Eighth, and Fourteenth Amendments by (1) retaliating against him for having previously filed a complaint, (2) subjecting him to an unreasonable search and seizure, (3) subjecting him to a damaged bunk bed while he was housed in the Upstate Correctional Facility Special Housing Unit, and (4) taking away his "good time" credits without affording him due process. (Dkt. No. 5 [Plf.'s Am. Compl.].)[1]

Currently before the Court is Defendants' motion for summary judgment (Dkt. No. 37), and Plaintiff's motion for partial summary judgment (Dkt. No. 38), both brought pursuant to Rule 56 of the Federal Rules of Civil Procedure. Because both motions were filed on the same day (February 11, 2005), and neither was filed in response to the other, I construe each motion as a "motion" and neither motion as a "cross-motion." Both Plaintiff and Defendants have responded to each other's motion (Dkt.Nos.42, 45), and replied to the other's response (Dkt.Nos.47, 48).

Generally, Defendants' motion raises six issues: (1) whether Plaintiff has failed to establish (or even state) a First Amendment retaliation claim; (2) whether Plaintiff has failed to state a Fourth Amendment claim, (3) whether Plaintiff has failed to establish (or even state) an Eighth Amendment claim; (4) whether Plaintiff has failed to exhaust his available administrative remedies regarding his Eighth Amendment claim; (5) whether Plaintiff has failed to establish (or even state) a Fourteenth Amendment due process claim; (6)

whether Plaintiff has failed to establish (or properly state) a conspiracy claim; and (7) whether Defendants are protected by qualified immunity. (Dkt. No. 37, Part 25 [Defs.' Mem. of Law].)

*2 Generally, Plaintiff's motion raises three issues: (1) whether Plaintiff is entitled to judgment as a matter of law on his First Amendment retaliation claim; (2) whether Plaintiff is entitled to judgment as a matter of law on his Eighth Amendment claim; and (3) whether Plaintiff is entitled to judgment as a matter of law on his Fourteenth Amendment due process claim. (Dkt. No. 38, Part 3 [Plf.'s Mem. of Law].) Although I liberally construe Plaintiff's Amended Complaint as containing a Fourth Amendment claim, I do not liberally construe his motion as requesting judgment as a matter of law on his Fourth Amendment claim, especially given the burden on a movant under the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 7(b)(1) (requiring that movants "shall set forth the relief or order sought," and "shall state with particularity the grounds [for the relief requested]").

For the reasons discussed below, I answer each of the six questions posed in Defendants' motion in the affirmative, and I answer each of the three questions posed in Plaintiff's motion in the negative. As a result, I recommend that Defendants' motion for summary judgment be granted and that Plaintiff's motion for partial summary judgment be denied.

## I. SUMMARY JUDGMENT STANDARD

Under Rule 56(e) of the Federal Rules of Civil Procedure, summary judgment is warranted 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). In determining whether a genuine issue of material [2] fact exists, the Court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir.1997) (citation omitted); *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir.1990) (citation omitted).

However, when the moving party has met its initial burden of establishing the absence of any genuine issue of material fact, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). The nonmoving party must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 477 U.S. 574, 585-86 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "A dispute regarding a material fact is *genuine* if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Ross v. McGinnis*, 00-CV-0275, 2004 WL 1125177, at *8 (W.D.N.Y. March 29, 2004) [internal quotations omitted] [emphasis added].

Imposed over this general burden-shifting framework is the generous perspective with which the Court must view a *pro se* plaintiff's pleadings. "[I]n actions in which one of the parties appears *pro se*, this Court is faced with the ... responsibility of granting significant liberality in how *pro se* pleadings are construed." *Aziz Zarif Shabazz v. Pico*, 994 F.Supp. 460, 467 (S.D.N.Y.1998); *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) *(per curiam) (pro se* pleadings held "to less stringent standards than formal pleadings drafted by lawyers."); *Ortiz v. Cornetta*, 867 F.2d 146, 148 (2d Cir.1989). For example, where a plaintiff is proceeding *pro se*, and the defendant has filed a dispositive motion, the Court must construe the plaintiff's complaint and opposition papers liberally so as to raise the strongest arguments that they suggest. *See Weixel v. Bd. of Ed. of City of New York*, 287 F.3d 138, 146 (2d Cir.2002) (motion to dismiss in civil rights case); *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994) (motion for summary judgment in civil rights case); *Thomas v. Irving*, 981 F.Supp. 794, 799 (W.D.N.Y.1997) (motion for summary judgment in civil rights case).

*3 However, although "[t]he work product of *pro se* litigants should be generously and liberally construed, ... [a *pro se* litigant's] failure to allege either specific facts or particular laws that have been violated renders [an] attempt to oppose defendants' motion ineffectual." *Kadosh v. TRW, Inc.*, 91-CV-5080, 1994 WL 681763, at *5 (S.D.N.Y. Dec. 5, 1994). In other words, "[p]roceeding pro se does not otherwise relieve a [party] from the usual requirements to survive a motion for summary judgment ." *Bussa v. Aitalia Line Aeree Italiane S.p.A.*, 02-CV-10296, 2004 WL 1637014, at *4 (S.D.N.Y. July 21, 2004) (citations omitted), *accord, Durran v. Selsky*, 251 F.Supp.2d 1208, 1211 (W.D.N.Y.2003) (citations omitted).

## II. STATEMENT OF MATERIAL FACTS

The facts set forth in a defendant's Rule 7.1(a)(3) Statement of Material Facts will be taken as true to the extent those





facts are supported by the evidence in the record [3] and are not specifically controverted by the plaintiff. [4]

To "specifically controvert[ ]" each of the statements of material fact in a defendant's Rule 7.1(a)(3) Statement of Material Facts, a plaintiff must file a *response* to the Statement of Material Facts that "mirror[s] the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in matching numbered paragraphs" *and* that "set[s] forth a specific citation to the record where the factual issue arises." [5]

Portions of the record sufficient to create a "factual issue" include affidavits or verified complaints (which are treated as affidavits for purposes of summary judgment). [6] However, to be sufficient to create a "factual issue," such an affidavit or verified complaint must, among other things, be based "on personal knowledge." [7] An affidavit or verified complaint is not based on personal knowledge if, for example, it is based on mere "information and belief" or hearsay. [8]

Similarly, such an affidavit or verified complaint must not be conclusory. [9] Of course, an affidavit may be conclusory because its assertions are too general. [10] However, even where an affidavit's assertions are specific (e.g., with respect to time, place, persons, events, conversation, etc.), that affidavit may still be deemed conclusory if it is (1) "largely unsubstantiated by any other direct evidence" and (2) "so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in the complaint." [11] Indeed, it has long been the rule in the Second Circuit that "issues of credibility sufficient to defeat a motion for summary judgment are not created if the contradicting or impeaching evidence is too incredible to be believed by reasonable minds." *Price v. Worldvision Enterprises, Inc.*, 455 F.Supp. 252, 266, n. 25 (S.D.N.Y.1978), *aff'd without opinion*, 603 F.2d 214 (2d Cir.1979).

*4 Here, Defendants have a filed Rule 7.1 Statement of Material Facts, and supporting affidavits and exhibits. (Dkt. No. 37, Parts 2-25.) Plaintiff has filed a response to Defendants' Rule 7.1 Statement. (Dkt. No. 42, Part 1.) In addition, Plaintiff has filed (1) declarations and exhibits in opposition to the affidavits of Defendants Woods, Belarge, Holt, Antonelli, and Holden (Dkt. No. 42, Parts 1, 3), and (2) a verified Amended Complaint (Dkt. No. 5). Finally, because Plaintiff is proceeding *pro se* and this is a civil rights action, I will consider, in evaluating Plaintiff's response to Defendants' motion for summary judgment, Plaintiff's declaration and exhibits in support of his motion for partial summary judgment. (Dkt. No. 38, Parts 1, 4.)

I address Plaintiff's responsive documents in more detail below. However, a few general observations are appropriate here. Plaintiff's Rule 7.1 Response contains hardly any citations to the record, much less any citations to admissible evidence; rather, to the extent that Plaintiff's Rule 7.1 Response contains any citations at all, those citations are often to other portions of Plaintiff's Response or to his Amended Complaint (which are, themselves, conclusory), or to exhibits that do not support his denial of the fact asserted. Moreover, his Declarations and verified Amended Complaint are often argumentative in nature (in violation of Local Rule 7.1[a][2] ) and not based on personal knowledge (but only hearsay or pure speculation). Finally, his Declarations and verified Amended Complaint are often conclusory and replete with inconsistencies and improbabilities.

For example, he asserts that "[a]t no time did [he] possess[ ] [Inmate Alcivar's] legal materials other than [the times when he and Inmates Lipman and Robles approached Defendant Holt with such materials]." [12] However, his own letters and deposition testimony contain repeated representations that he was, at other times, in possession of such materials. [13]

Similarly, he asserts that the documents allegedly discovered by Defendant O'Donnell in Plaintiff's "cube" on August 31, 2002, were in fact "the exact same materials intercepted by Woods through the U.S. mail." [14] However, those documents contained copies of two letters-dated July 4, 2002, and July 16, 2002-from Plaintiff to Inmate Alcivar's two daughters. [15] Plaintiff offers no explanation as to why Inmate Alcivar's daughters would be returning copies of those letters to Plaintiff between August 19, 2006, and August 31, 2002-the time period during which Defendant Woods allegedly intercepted Plaintiff's mail. [16]

Generally, I find such assertions by Plaintiff to be too incredible to be believed by reasonable minds.

Accordingly, the following material facts, even when viewed most favorably to Plaintiff, are supported by evidence in the record, and are not specifically controverted by Plaintiff:

**Background**

1. From July of 2002 until November of 2002 (the time period relevant to the allegations contained in Plaintiff's Amended Complaint), Plaintiff was an inmate in the care and custody of the New York State Department of Correctional Services ("DOCS"), incarcerated at the Greene Correctional Facility ("Greene C.F."). [17]

*5 At all times relevant to this action, Defendant Robert K. Woods was the Deputy Superintendent for Security at Greene C.F.; Defendant Joseph R. Belange was a Captain at Greene C.F.; Defendant G.J. O'Donnel was a Sergeant at Greene C.F.; Defendant Richard Antonelli was a Food Services Administrator at Greene C.F.; and Defendant Wayne Holt was a Corrections Officer at Greene C.F. [18]

**Plaintiff's Legal Assistance to Inmate Peter Alcivar and Communications with Inmate Alcivar's Daughters**

3. At some point in 2001, Inmate Peter Alcivar filed a civil rights action against DOCS and employees of Greene C.F. and Woodbourne C.F. in the United States District Court for the Northern District of New York (civil action number 9:01-CV-1198). [19]

4. On or about May 7, 2002, Plaintiff provided legal assistance to Inmate Alcivar by answering a question regarding an affidavit. [20] At the time, Plaintiff was not an inmate law clerk. [21]

5. On or about May 10, 2002, Inmate Alcivar was admitted to Albany Medical Center to receive treatment for cancer. [22]

6. On or about July 4, 2002, Plaintiff wrote and sent a letter to Inmate Alcivar's two daughters about Inmate Alcivar's pending federal civil rights action. [23] In pertinent part, the letter stated,

I am writing to inform you of my assistance to Peter [Alcivar] in the above referenced matter [case number 9:01-CV-1198] where he has a Section 1983 of the U.S.C.A. Civil Rights complaint against the Department of Correctional Services now pending in the United States District Court for the Northern District of New York; that is if he (Peter) hasn't already told both of you that I am helping him with the filing of his motions, etc....
Getting right to the point for the purpose of writing you, and letting you know what is going on with Peter's case. There is [sic] two inmates that Peter trusted with his papers and other legal documents, that is one inmate that housed [sic] in the same dorm as him and myself....

I have already wrote [sic] to the court on June 24, 2002, informing said court as to Peter's current situation.... See copy of the *letter addressed to the court*... enclosed with this letter I am writing you....

Peter told me that you have copies of all his papers, those of which are the same as the papers I have here....

[I]f you wish ... you all could come to the facility to see me, I would then go over the case with all of you, tell all of you what I know from Peter, the research that I have done for him and the list of cases of authority that I have and would cite in his motions and use at trial; I also could give you all of his legal documents right there....

Both of you should ... let Peter know that he should not worry about the case, it is not going to be dismissed ... because I already wrote to the court for him. [24]

7. On or about July 6, 2002, Inmate Alcivar died at Albany Medical Center. [25]

*6 8. On or about July 16, 2002, Plaintiff wrote and sent a second letter to Alcivar's two daughters. [26] In pertinent part, the letter states: "The box containing the legal documents should be following this letter, I am going to hold a copy of the complaint so if you should find a lawyer he or she could visit me at the facility and go over the facts the claim is based on." [27] In addition, the last page of the letter states:

NOTE: Read the "TO/From" memo form note that I made up, get it notarize [sic] and sign it in front of the notary public. Make a copy for your files and send me the *original*.
It is an idea to have that note in my files so non [sic] of the officers and staff members would ask what I am doing with Mr. Alcivar [sic] legal documents if he is no longer here. By doing the above your [sic] are giving me consent to have said documents in my possession. [28]





9. On or about August 8, 2002, Plaintiff wrote and sent a third letter to Alcivar's two daughters. [29] In pertinent part, the letter states: "Please send me that 'To/From' note if you already have it notarized, I told you I need it for the copy of the complaint I told you that I would hold...."

**Plaintiff's Communications with Defendant Woods and the Search of Plaintiff's Prison Cell (or "Cube")**

10. On or about July 16, 2002, Plaintiff wrote and sent a note to Defendant Woods. [30] The note stated: "Please be advised that I need to talk to you in reference to the above subject inmate [i.e., Inmate Alcivar] which is a matter of importance. This must be in person at your earliest convenience. Thank you for your professional attention to this request." [31]

11. On or about July 21, 2002, Plaintiff wrote and sent a second note to Defendant Woods. [32] The note stated: "Please note that on the above subject date [i.e., July 16, 2002] I wrote to you requesting to see you. I must speak to you before July 23, 2002. This matter is very important. Thank you for your attention." [33]

12. Defendant Woods did not respond to Plaintiff's notes for two reasons: (1) Defendant Woods did not receive either of the two notes until after the date referenced by Plaintiff (i.e., July 23, 2002) had passed; and (2) Defendant Woods believed that Plaintiff's notes were "cryptic." [34]

13. On or about August 5, 2002, Plaintiff wrote and sent a third note to Deputy Superintendent Woods. [35] The note stated, in pertinent part:

Please take notice that since you have neglected to answer the above two (2) requests [i.e., dated July 16, 2002, and July 21, 2002] to meet with me about a very serious matter concerning a *<DEAD>* man's legal documents, in the future if anything should come of a matter of said documents being in my possession or the inmate's family should have any questions of same and I answer those questions according to law, you and the administration cannot take any action against the inmate's family nor myself. [36]

*7 14. On or about August 6, 2002, Defendant Woods sent a memorandum to Plaintiff. [37] That memorandum stated, in pertinent part:

Your August 5th letter ... makes reference to legal documents belonging to deceased Inmate Alcivar.... I have directed Law Library Officer Holt to speak to you and recover from you any legal documents of deceased Inmate Alcivar.... In fact, you should have turned over any such documents to Law Library Officer Holt immediately. [38]

15. On August 7, 2002, Plaintiff received Defendant Woods' memorandum. [39]

16. Meanwhile, on or about August 5, 2002, Defendant Holt asked Plaintiff for Inmate Alcivar's legal documents. [40] Plaintiff denied having such documents. [41]

17. As a result, at some point between August 5, 2002, and August 31, 2002, Defendant Woods directed Defendant Belarge to have Plaintiff's cell (or "cube") searched and to interview Plaintiff about his statements made in his August 5, 2002, note. [42]

18. At some point on August 31, 2002 (apparently between 8:30 a.m. and 11:00 a.m.), Defendant Belarge had Plaintiff's cell (or "cube") searched by Defendant O'Donnell (and apparently Defendant Holt and two other corrections officers). [43] At some point (apparently during this search), Defendant O'Donnell discovered Inmate Alcivar's legal documents (as well as various correspondence between Plaintiff and Inmate Alcivar's two daughters). [44]

19. At approximately 11:00 a.m. on August 31, 2002, Defendants Belarge and O'Donnell interviewed Plaintiff about his statements in his August 5, 2002, note to Defendant Woods. [45] At approximately 2:50 p.m. on August 31, 2002, Defendant O'Donnell stored Inmate Alcivar's legal documents (as well as various correspondence between Plaintiff and Inmate Alcivar's two daughters) in an evidence locker at Greene C.F. [46]

**Plaintiff's Misbehavior Report, Disciplinary Hearing, and Appeal**

20. Relying on the documents discovered and the subsequent interview conducted, Defendants Belarge and O'Donnell issued Plaintiff a misbehavior report on August 31, 2002.[47] The misbehavior report charged Plaintiff with three offenses: (1) providing legal assistance to Inmate Alcivar without prior authorization in violation of Inmate Rule 180.17; (2) exchanging legal materials with Inmate Alcivar without authorization in violation of Inmate Rule 113.15; and (3) soliciting materials from Inmate Alcivar's family members without authorization in violation of Inmate Rule 103.20.[48]

21. During the time period at issue (i.e., May through August of 2002), Rule 180.17 of DOCS' Standards of Inmate Behavior prohibited inmates from providing legal assistance to other inmates without prior approval from the Superintendent or his designee;[49] Rule 113.15 of DOCS' Standards of Inmate Behavior prohibited inmates from exchanging personal property (such as legal materials) with other inmates without authorization;[50] and Rule 103.20 of DOCS' Standards of Inmate Behavior prohibited inmates from requesting or soliciting goods or services from any person other than an immediate family member without the consent or approval of the Superintendent or his designee.[51]

*8 22. On September 6, 2002, Plaintiff received a disciplinary hearing, conducted by Defendant Antonelli.[52] Defendant Antonelli found Plaintiff guilty of all three charges, and imposed the following penalties: 90 days in S.H.U., 90 days loss of packages privileges, 90 days loss of commissary privileges, 90 days loss of telephone privileges, and three months loss of "good time" credits.[53] In reaching his finding of guilt, Defendant Antonelli relied on (1) the assertions by Defendants Belarge and O'Donnell in Plaintiff's misbehavior report that Plaintiff had made certain admissions to them during an interview, (2) Defendant Antonelli's belief that Plaintiff had made certain admissions in his correspondence to Inmate Alcivar's daughters, and (3) Defendant Antonelli's understanding that certain legal materials belonging to Inmate Alcivar had been found in Plaintiff's cell (or "cube").[54]

23. Also on September 6, 2002, Plaintiff appealed Defendant Antonelli's disciplinary decision to Donald Seksky, Director of DOCS' Special Housing/Inmate Disciplinary Program, who affirmed that decision on October 28, 2002.[55] Plaintiff's appeal did not complain about any lack or denial of witnesses at his disciplinary hearing; similarly, Mr. Selky's appellate decision did not address such a complaint.[56]

24. On October 24, 2002, Greene C.F. officials conducted a discretionary review of Plaintiff's SHU sentence.[57] Based upon this review, Plaintiff's SHU time was reduced from 90 days to 75 days.[58] However, Plaintiff's good time loss was unaffected by the discretionary review.[59]

**Meetings Between Defendants Woods, Belarge and O'Donnell**

25. At some point between August 5, 2002, and August 31, 2002, Defendant Woods met with Defendant Belarge to discuss Plaintiff.[60] Defendant Belarge then met with Defendant O'Donnell to discuss Plaintiff.[61]

26. Both meetings (which were held *prior* to the issuance of Plaintiff's misbehavior report on August 31, 2002) were held according to standard procedure at Greene C.F.[62] Specifically, the purpose of the meetings was to discuss how to investigate whether Plaintiff had violated prison rules.[63]

**Plaintiff's Bunk(s) in SHU**

27. As a result of his disciplinary conviction, Plaintiff was housed in Greene C.F.'s SHU from approximately September 6, 2002, to November 21, 2002.[64]

28. At no point (either during or after the above-described time period) did Plaintiff file any written grievances, or submit any letters of complaint, about an alleged defect in any of the bunk beds that he was assigned while in SHU.[65]

29. On February 8, 2005, Defendant Belarge had photographs taken of the bunk beds that Plaintiff was assigned while he was in SHU; and on April 22, 2005, Defendant Belarge had photographs taken of the other bunk beds that Plaintiff suggests he may have been assigned.[66] Those photographs are made part of the record at Exhibit A to the February 10, 2005, Affidavit of Defendant Belarge, and at Exhibits A and B to the April 29, 2005, Affidavit of Kenneth Scattergood.[67] Between September 6, 2002, and February 10, 2005, there was no record of any repairs made to any of the bunk beds that Plaintiff was assigned while in SHU; and between September 6, 2002, and April 22, 2005, there was no record of any repairs made to any of the other bunk beds that Plaintiff suggests he may have been assigned while in SHU.[68]





**III. ANALYSIS**

**A. Whether Plaintiff Has Failed to Establish (or Even State) a First Amendment Retaliation Claim**

*9 In their memorandum of law, Defendants argue that Plaintiff has failed to establish (or even state) a First Amendment retaliation claim against Defendant Antonelli because (1) he fails to establish that he had been engaging in speech or conduct that is protected by the First Amendment, and (2) in any event, he fails to establish a causal link between that protected activity and any adverse action against him by Defendant Antonelli. (Dkt. No. 37, Part 25 at 15-16 [Defs.' Mem. of Law].) Liberally construed, Plaintiff's response papers argue that (1) he had a constitutionally protected liberty right to make an oral and written complaint about Defendant Antonelli's management of the prison mess hall, and (2) as a result of Plaintiff's complaints (and an "encounter" between Plaintiff and Antonelli one week before Plaintiff's disciplinary hearing), Defendant Antonelli retaliated against Plaintiff during Plaintiff's disciplinary hearing by, among other things, depriving Plaintiff of his statutorily protected right to receive "good time" credits (which would have accelerated Plaintiff's release on parole). (Dkt. No. 42, Part 2 at 9 [Plf.'s Response].)

Claims of retaliation like those asserted by Plaintiff find their roots in the First Amendment. *See Gill v. Pidlypchak*, 389 F.3d 379, 380-81 (2d Cir.2004). Central to such claims is the notion that in a prison setting, corrections officials may not take actions which would have a chilling effect upon an inmate's exercise of First Amendment rights. *See Gill*, 389 F.3d at 381-383. Because of the relative ease with which claims of retaliation can be incanted, however, courts have scrutinized such retaliation claims with "skepticism and particular care." *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir.1995); *see also Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir.1983). As the Second Circuit has noted,

> [t]his is true for several reasons. First, claims of retaliation are difficult to dispose of on the pleadings because they involve questions of intent and are therefore easily fabricated. Second, prisoners' claims of retaliation pose a substantial risk of unwarranted judicial intrusion into matters of general prison administration. This is so because virtually any adverse action taken against a prisoner by a prison official-even those otherwise not rising to the level of a constitutional violation-can be characterized as a constitutionally proscribed retaliatory act.

*Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir.2001) (citations omitted), overruled on other grounds, *Swierkewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

To prevail on a First Amendment claim under 42 U.S.C. § 1983, a Plaintiff must prove by the preponderance of the evidence that: (1) the speech or conduct at issue was "protected", (2) the defendants took "adverse action" against the plaintiff-namely, action that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights; and (3) there was a causal connection between the protected speech and the adverse action-in other words, that the protected conduct was a "substantial or motivating factor" in the defendants' decision to take action against the plaintiff. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Gill*, 389 F.3d at 380 (citing *Dawes v. Walker*, 239 F.3d 489, 492 [2d. Cir.2001].) Under this analysis, adverse action taken for both proper and improper reasons may be upheld if the action would have been taken based on the proper reasons alone. *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir.1996) (citations omitted).

*10 Here, Plaintiff's claim fails for several reasons. I acknowledge that the First Amendment protects, not only the filing of written grievances and complaints, but, under some circumstances, the making of oral complaints to corrections officers.[69] However, even assuming Plaintiff had a constitutionally protected right to make both written and *oral* complaints about Defendant Antonelli, no evidence exists establishing (or even suggesting) that any complaints by Plaintiff against Defendant Antonelli impacted Defendant Antonelli's disciplinary decision.

For example, no evidence exists that Plaintiff submitted any grievances or complaints against Defendant Antonelli, only that he submitted a letter to Deputy Superintendent

Eldred complaining about "Mess Hall Dishwashing Machines" approximately three weeks before the disciplinary hearing.[70] Plaintiff's letter did not mention Defendant Antonelli.[71] In any event, no evidence exists indicating that Defendant Antonelli knew about any grievances against him by Plaintiff at the time of Plaintiff's disciplinary hearing.[72] Similarly, no evidence exists that he ever confronted Defendant Antonelli with an oral complaint about the mess hall-other than Plaintiff's vague and uncorroborated assertions that he "met" with, or had an "encounter" with, Defendant Antonelli about the mess hall before the disciplinary hearing.[73] Finally, the record evidence establishes that Defendant Antonelli could, and indeed would, have reached the same disciplinary hearing decision (and imposed the same penalties) despite any such complaints or grievances by Plaintiff (i.e., based upon the evidence as presented to him at Plaintiff's disciplinary hearing decision).[74]

As a result, I recommend that the Court dismiss Plaintiff's First Amendment retaliation claim.

**B. Whether Plaintiff Has Failed to State a Fourth Amendment Claim**

I do not construe Defendants' memorandum of law as expressly arguing that any Fourth Amendment claim asserted by Plaintiff should be dismissed for failure to state a claim under Rule 12(b)(1) of the Federal Rules of Civil Procedure, which permits motions to dismiss for "lack of jurisdiction over the subject matter" of a claim. However, I do construe that memorandum of law, as well as defense counsel's questions of Plaintiff during his deposition, as *suggesting* that Plaintiff has failed to assert a Fourth Amendment claim (regarding the search of his property by Defendants at Greene C.F.) over which federal courts have subject matter jurisdiction.[75]

Under Rule 12 of the Federal Rules of Civil Procedure, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."Fed.R.Civ.P. 12(h)(3). Thus, the Court has a duty to examine whether or not it has subject matter jurisdiction over Plaintiff's attempted Fourth Amendment claim.

Here, I find that the Court does not have subject matter jurisdiction (pursuant to 42 U.S.C. § 1983 or otherwise) over that claim, which is asserted in Paragraphs 44 and 15 of Plaintiff's Amended Complaint.[76] Specifically, the allegations contained in Paragraph 15 of his Amended Complaint are the sole *factual* basis for Plaintiff's Fourth Amendment claim.[77] In pertinent part, that paragraph alleges that on "August 31, 2002, 11:20 A.M., Belarge ... had plaintiff's personal property searched [for Alcivar's materials] by three officers, one of whom was Holt...."[78]

***11** The problem with Plaintiff's Fourth Amendment claim is that, even if the search occurred as Plaintiff alleged, that search was of a prisoner's cell (or "cube")."[T]he Fourth Amendment proscription against unreasonable searches does not apply within the confines of a prison cell."*Hudson v. Palmer*, 468 U.S. 517, 526 (1984).[79] Nor does the Fourth Amendment proscription apply within the confines of a prison "cube."[80] Indeed, Plaintiff appears to recognize this point of law.[81]

I note that I do not liberally construe Plaintiff's Amended Complaint as asserting a Fourth Amendment claim against Defendant Woods for (allegedly) unreasonably searching and seizing various pieces of Plaintiff's outgoing and incoming mail in August of 2002. However, even if I did so construe that Amended Complaint, I would conclude that this Court would not have subject matter jurisdiction over that claim. The only portion of Plaintiff's Amended Complaint that regards such a search and seizure by Defendant Woods of Plaintiff's mail is vague and conclusory.[82] Even taking as true Plaintiff's allegations, the mail in question consisted of clearly identifiable contraband (e.g., legal materials belonging to Inmate Alcivar in packages to, or from, persons bearing the last name of Alcivar).[83] I fail to see how any search and confiscation of such contraband would have violated the Fourth Amendment. Indeed, such a search and confiscation would appear to have been expressly authorized by DOCS Directive No. 4422 (which regards the Inmate Correspondence Program).[84]

As a result, I recommend that the Court dismiss Plaintiff's Fourth Amendment claim.

**C. Whether Plaintiff Has Failed to Establish (or Even State) an Eighth Amendment Claim**

In their memorandum of law, Defendants argue that Plaintiff has failed to establish (or even state) an Eighth Amendment





claim because (1) Plaintiff has not established (or even alleged) a deprivation that is "sufficiently serious" for purposes of the Eighth Amendment, and (2) he has not established that Defendants were *deliberately* indifferent to Plaintiff's health or safety. (Dkt. No. 37, Part 25 at 11, 13-14 [Defs.' Mem. of Law].) Liberally construed, Plaintiff's response papers argue that (1) he has established a deprivation that is "sufficiently serious" through his evidence that he experienced a back injury while in SHU as a result of his "twisted bunk," and (2) he has established such deliberate indifference through his testimony that he orally complained to Defendants Woods and Belarge (as well as others) of his back injury and the fact that they "ignored" his complaints. (Dkt. No. 42, Part 2 at 13-15 [Plf.'s Response].)

"[A] prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation must be, objectively, 'sufficiently serious'.... [Second,] a prison official must have a 'sufficiently culpable state of mind.' " *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). "In prison-conditions cases that state of mind is one of deliberate indifference to inmate health or safety...." *Farmer*, 511 U.S. at 834.

***12** With regard to the first element, "the plaintiff must demonstrate that the conditions of his confinement resulted in 'unquestioned and serious deprivations of basic human needs' or 'deprive inmates of the minimal civilized measures of life's necessities.' " *Davidson v. Murray*, 371 F.Supp.2d 361, 370 (W.D.N.Y.2005) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 [1981]). "As recognized by the Supreme Court in *Rhodes*, 'the Constitution does not mandate comfortable prisons,' ... and conditions that are 'restrictive and even harsh ... are part of the penalty that criminal offenders pay for their offenses against society.' " *Davidson*, 371 F.Supp.2d at 370 (quoting *Rhodes*, 452 U.S. at 347, 349).

With regard to the second element, "[i]n prison-conditions cases [the requisite] state of mind is one of deliberate indifference to inmate health or safety...."*Farmer*, 511 U.S. at 834. "[D]eliberate indifference describes a state of mind more blameworthy than negligence."*Id.* at 835."Deliberate indifference" exists if an official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."*Id.* at 837.

**1. Sufficiently Serious Deprivation**

Plaintiff alleges that he was diagnosed with "spondylolisthesis"[85] in September of 2002 as a result of sleeping on a defective bed.[86] As far as I can tell from available reported decisions, all federal courts faced with evidence of such an injury on a dispositive motion in a prisoner civil rights case explicitly or implicitly assume, for the sake of argument, that the injury constitutes a serious medical need.[87] I do not make such an assumption here because, unlike the prisoners in those other civil rights cases, Plaintiff does not allege that his Eighth Amendment deprivation consisted of his "spondylolisthesis" but his defective (or "twisted") bunk bed. In addition to being supported by the express language of Plaintiff's Amended Complaint,[88] this reading of Plaintiff's allegations is supported by his testimony in his deposition that he is not asserting a claim that the medical staff was deliberately indifferent to any serious medical need.[89]

This is apparently why Defendants, in their motions papers, do not challenge Plaintiff's allegation that he suffered from "spondylolisthesis," but do challenge his allegation that he was assigned a bunk bed that was in any way defective.[90] In support of that argument, Defendants submit evidence that none of the bunk beds to which Plaintiff was assigned while in SHU (1) showed any visible defects (much less the defect that Plaintiff alleges, i.e., being "twisted") at or after the time in question, and (2) were either complained about by other inmates or repaired at or after the time in question.[91]

***13** More convincing, however, is the temporal disconnect between the onset of Plaintiff's back injury and his assignment to the allegedly defective bunk bed in question. Although Defendants do not appear to argue that the onset of Plaintiff's injury pre-dated his assignment to the allegedly defective bunk bed,[92] there is evidence indicating that Plaintiff's back injury existed *before* he was assigned to the allegedly defective bunk bed (i.e., Bunk Number "OS-A1-20(b)") on September 23, 2002.[93] There is even evidence indicating that Plaintiff's back injury existed before he was admitted to SHU on September 6, 2002.[94]

Even if Plaintiff were alleging that his back injury existed before September 6, 2002, but that his injury was *exacerbated* by his various bunk beds while in SHU, I would reach the same conclusion. As I described above, the first element of the Eighth Amendment's two-part test is "objective," not "subjective." Simply stated, the Eighth Amendment does

not mandate "comfortable" bunk beds.[95] For these reasons, I find that Plaintiff has failed to establish a "sufficiently serious" deprivation for purposes of the Eighth Amendment.

**2. Deliberate Indifference**

Even if Plaintiff had established a "sufficiently serious" deprivation for purposes of the Eighth Amendment, I would find that he has not established that Defendants acted with deliberate indifference to Plaintiff's health or safety.

To the extent that Plaintiff alleges that any of the Defendants "knew" that Plaintiff would be assigned to an allegedly defective bunk (Bunk Number "OS-A1-20(b)" in Cell "A1-20") *before* Plaintiff began his incarceration in the Greene C.F. SHU on September 6, 2002, I find that those allegations are wholly conclusory and without any evidentiary support whatsoever in the record. (Dkt. No. 5, ¶¶ 3 5, 37, 39, 43 [Am. Compl.].)

However, Plaintiff also asserts (rather conclusorily) that Defendants knew about the allegedly defective bunk *after* Plaintiff was assigned to it.[96] More specifically, Plaintiff submits testimony that (1) he orally complained to Defendant Woods about the bunk in question on or about September 27, 2002, (2) Plaintiff orally complained to Defendant Belarge about the bunk in question on September 18, 2002, and (3) Plaintiff orally complained to other corrections officers about the bunk in question at various other times.[97] Setting aside the lack of any testimony (of which I am aware) that Plaintiff ever orally complained to Defendants O'Donnell, Antontelli or Holt, there is a fatal flaw with Plaintiff's reliance on this evidence.

The problem is that, even if this evidence is true, there is no evidence that Defendants or *anyone* "ignored" Plaintiff's oral complaints. Indeed, the evidence shows that Plaintiff was assigned to the allegedly defective bunk bed for only about two weeks (between September 23, 2002, and October 7, 2002), and that he was then moved in response to his oral complaints.[98] Any assertion by Plaintiff that Defendants Woods and Belarge, upon hearing Plaintiff orally complain about the bunk, told Plaintiff to "[t]ell the officer about it" or "tell it to the officer on the unit" does not indicate deliberate indifference by supervisors such as Defendants Woods or Belarge, especially given that Plaintiff was subsequently then purposely assigned to a different bunk.[99]

***14** In addition, the evidence shows that no one at Greene C.F. in any way interfered with the prompt and adequate medical care provided to Plaintiff regarding his back. Plaintiff acknowledges that his medical care at Greene C.F. included the following: (1) a CAT scan on October 17, 2002, and second CAT scan at some point between October 22, 2002, and December 11, 2002, (2) physical therapy on October 24, November 5, November 8, and November 18, 2002; (3) an MRI examination on January 10, 2003; and (4) being provided "pain killers" on September 13, 2002, five packets of Naproxen (500 mg. each) on December 11, 2002, and more "pain killers" on or after January 10, 2003, along with a back brace.[100]

Finally, I note that the evidence shows that, on October 24, 2002, Greene C.F. officials shortened Plaintiff's stay in SHU 15 days (reducing his sentence in SHU from 90 days to 15 days).[101] Under the circumstances, I find that no reasonable fact-finder could conclude, based on the record before me, that Defendants acted with deliberate indifference to Plaintiff's health or safety

As a result, I recommend that the Court dismiss Plaintiff's Eighth Amendment claim.

**D. Whether Plaintiff Has Failed to Exhaust His Available Administrative Remedies Regarding His Eighth Amendment Claim**

In their memorandum of law, Defendants argue Plaintiff has failed to established that he exhausted his available administrative remedies regarding his Eighth Amendment claim because he acknowledges that he did not file a written administrative grievance with respect to the alleged condition of his bunk bed. (Dkt. No. 37, Part 25 at 11-13 [Defs.' Mem. of Law].) Liberally construed, Plaintiff's response papers argue that (1) no administrative remedy was available because a complaint about a defective bunk bed is not a grievable matter, (2) even if a complaint about a bunk bed were a grievable matter, he was misled by the Supervisor of the Inmate

Grievance Resolution Committee ("IGRC") into believing that the matter was not grievable, and (3) in any event, although he did not file a written grievance regarding his bunk, he filed several oral complaints regarding the bunk (i.e., to Defendant Woods, Defendant Belarge, the IGRC Supervisor, and various other corrections officers and/or sergeants). (Dkt. No. 42, Part 2 at 13-15 [Plf.'s Response].)





The Prison Litigation Reform Act of 1995 ("PLRA") requires that prisoners who bring suit in federal court must first exhaust their available administrative remedies: "No action shall be brought with respect to prison conditions under § 1983... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."42 U.S.C. § 1997e. The Department of Correctional Services ("DOCS") has available a well-established three-step grievance program:

> First, an inmate is to file a complaint with the Grievance Clerk. An inmate grievance resolution committee ("IGRC") representative has seven working days to informally resolve the issue. If there is no resolution, then the full IGRC conducts a hearing and documents the decision. Second, a grievant may appeal the IGRC decision to the superintendent, whose decision is documented. Third, a grievant may appeal to the central office review committee ("CORC"), which must render a decision within twenty working days of receiving the appeal, and this decision is documented.

***15** *White v. The State of New York*, 00-CV-3434, 2002 U.S. Dist. LEXIS 18791, at *6 (S.D.N.Y. Oct 3, 2002) (citing N.Y. Comp.Codes R. & Regs. Tit. 7, § 701.7). Generally, if a prisoner has failed to follow each of these steps prior to commencing litigation, he has failed to exhaust his administrative remedies. *Rodriguez v. Hahn*, 209 F.Supp.2d 344, 347-48 (S.D.N.Y.2002); *Reyes v. Punzal*, 206 F.Supp.2d 431, 433 (W.D.N.Y.2002).

However, the Second Circuit has recently held that a three-part inquiry is appropriate where a defendant contends that a prisoner has failed to exhaust his available administrative remedies, as required by the PLRA. *See Hemphill v. State of New York*, 380 F.3d 680, 686, 691 (2d Cir.2004). First, "the court must ask whether [the] administrative remedies [not pursued by the prisoner] were in fact 'available' to the prisoner."*Hemphill*, 380 F.3d at 686 (citation omitted). Second, if those remedies were available, "the court should ... inquire as to whether [some or all of] the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it ... or whether the defendants' own actions inhibiting the [prisoner's] exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense."*Id.* (citations omitted). Third, if the remedies were available and some of the defendants did not forfeit, and were not estopped from raising, the non-exhaustion defense, "the Court should consider whether 'special circumstances' have been plausibly alleged that justify the prisoner's failure to comply with the administrative procedural requirements."*Id.* (citations and internal quotations omitted).

**1. Availability of Administrative Remedies**

Plaintiff admits (repeatedly) that he filed no written grievance about his bunk bed.[102] He argues, however, that no written grievance could have been filed, because a defective bunk bed is not a grievable matter. In support of this argument, he offers only conclusory assertions, testimony containing (at best) inadmissible hearsay, and documents that are completely immaterial to the fact in question.[103] Defendants, on the other hand, offer the affidavit of IGRC Supervisor Marilyn Berlin, who swears, *inter alia*, that "[c]omplaints about maintenance issues and cell conditions [such as defective bunk beds] are proper subjects of grievances."(Dkt. No. 48, Part 6, ¶ 3 [Berlin Aff.].) As a result, I must reject Plaintiff's unsupported assertion that a defective bunk bed is not grievable.

This does not end the inquiry, however, because "a remedy that prison officials prevent a prisoner from utilizing is not an 'available' remedy under [the Prison Litigation Reform Act]."*Miller v. Norris*, 247 F.3d 736, 740 (8th Cir.2001), *cited by Abney v. McGinnis*, 380 F.3d 663, 669 (2d Cir.2004) (holding that "[t]he defendants' failure to implement the multiple rulings in [plaintiff's] favor rendered administrative relief 'unavailable' under the PLRA."). More specifically, case law exists supporting the proposition that, assuming plaintiff was instructed by prison officials, contrary to prison regulations, that he could not file a grievance, *and plaintiff indeed did not initiate the grievance process by filing that grievance in reliance on that misrepresentation*,"the formal grievance proceeding required by [the prison grievance system] was never 'available' to [plaintiff] within the meaning of [the PLRA]."*See Brown v. Croak*, 312 F.3d 109, 112-113 (3d Cir.2002), *cited by Giano v. Goord*, 380 F.3d 670, 677 n. 6 (2d Cir.2004).

***16** Here, however, I can find absolutely no evidence in the record before me that IGRC Supervisor Berlin (or any prison official at Greene C.F.) at any time advised Plaintiff

that a defective bunk bed is not a grievable matter. Again, in support of his argument that the IGRC made such a remark to him, Plaintiff offers only vague testimony containing (at best) inadmissible hearsay, and documents that are immaterial to the fact in question.[104] Plaintiff's vague and conclusory argument is made even more incredible in light of IGRC Supervisor Berlin's sworn statement denying that Plaintiff ever orally complained to her about his (allegedly) defective bunk bed, or that she told him that the matter was not grievable.[105]

**2. Estoppel**

Defendants have preserved their affirmative defense of non-exhaustion by raising it in their Answer. (Dkt. No. 17, ¶ 29 [Defs.' Answer] ) Moreover, no evidence (or even an argument) exists that any *Defendant* is estopped from raising this defense because of his or her actions inhibiting Plaintiff's exhaustion of remedies; Plaintiff merely argues that a non-party to this action (the IGRC Supervisor) advised him that his allegedly defective bunk bed was not a grievable matter.

**3. "Special Circumstances" Justifying Failure to Exhaust**

Finally, Plaintiff provides no evidence that "special circumstances" exist justifying his failure to exhaust his available administrative remedies. Plaintiff alleges that, on several occasions during the relevant time period, he made oral complaints about his allegedly defective bunk bed to various employees of Greene C.F., including Defendants Woods and Belarge. For the sake of argument, I will set aside the vagueness of this allegation, its incredibility given numerous other inconsistencies and improbabilities in Plaintiff's papers, and its total lack of support by any corroborating evidence. The problem with Plaintiff's reliance on this allegation is that, even if it were true, it would not justify Plaintiff's failure to file a written grievance about his bunk bed.

Plaintiff was 51 years old at the time of this incident; he had been incarcerated in several New York State correctional facilities before the incident; and he had even attended a year of law school.[106] He admits that, at the time of the incident, he was familiar with the grievance process at Greene C.F.[107] Indeed, he had filed grievances immediately before and during this very time period.[108] Simply stated, it would have been unreasonable for Plaintiff to believe that he could fulfill the grievance requirement-which included a requirement that the IGRC's decision be appealed to the Greene C.F. Superintendent and then to CORC before exhaustion had occurred-by making some oral complaints to various passers by, whomever they might be.

As a result of Plaintiff's failure to exhaust his available administrative remedies, I recommend that his Eighth Amendment claim be dismissed.

**E. Whether Plaintiff Has Failed to Establish (or Even State) a Fourteenth Amendment Due Process Claim**

***17** In their memorandum of law, Defendants argue that Plaintiff's due process claim (which is based on the manner in which his disciplinary hearing was conducted, and which sought damages only and not injunctive relief) is not cognizable because a judgment in his favor would necessarily imply the invalidity of his disciplinary conviction (which resulted in a loss of good-time credits and thus affected the overall length of Plaintiff's confinement) and Plaintiff has not established that that conviction has been reversed, expunged, or invalidated. (Dkt. No. 37, Part 25 at 10-11 [Defs.' Mem. of Law, citing, *inter alia*, *Heck v. Humphrey*, 512 U .S. 477 (1994) and *Edwards v. Balisok*, 520 U.S. 641 (1997) ].) Liberally construed, Plaintiff's response papers argue (without any legal support) that, even though Plaintiff's loss of his good-time credits had not been invalidated on appeal, for Defendants to obtain summary judgment "they must prove their innocence beyond a shadow of a reasonable doubt," which (he argues) they have not done. (Dkt. No. 42, Part 2 at 10-13 [Plf.'s Response].)

I reject Plaintiff's argument, and specifically his proffered legal standard on this motion for summary judgment. Under the circumstances, Defendants have met their modest threshold burden with regard to this issue.[109] To avoid dismissal on summary judgment grounds, Plaintiff must introduce evidence raising a question of fact as to (1) whether or not his disciplinary conviction affected the overall length of Plaintiff's confinement by resulting in a loss of good-time credits or (2) whether or not his disciplinary conviction has been reversed, expunged, or invalidated.[110] He has not done so. Indeed, the evidence shows (and Plaintiff concedes) that (1) Plaintiff's disciplinary conviction affected the overall length of Plaintiff's confinement by resulting in a loss of good-time, and (2) his disciplinary conviction was not reversed, expunged, or invalidated.[111]





As a result, I recommend that Plaintiff's Fourteenth Amendment due process claim be dismissed.

**F. Whether Plaintiff Has Failed to Establish (or Even State) a Claim for Conspiracy**

In their memorandum of law, Defendants argue that Plaintiff has failed to establish (or even state) a claim for conspiracy because (1) such a claim falls not under 42 U.S.C. § 1983 but 42 U.S.C. § 1985, which applies specifically to conspiracies, (2) to succeed on a conspiracy claim under 42 U.S.C. § 1985, Plaintiff must allege and show "a meeting of the minds," and (3) Plaintiff has not alleged and shown such a meeting of the minds but has offered mere speculative and conclusory allegations of conspiracy, *see, e.g.*,Dkt. No. 5, ¶¶ 21-22 (Am.Compl.). (Dkt. No. 37, Part 25 at 8-9 [Defs.' Mem. of Law].) Liberally construed, Plaintiff's response argues that the evidence does establish such a meeting of the minds because (1) in their affidavits, Defendants Woods, Antonelli, and Belarge all swear that they met to plan a strategy regarding Plaintiff, and (2) that strategy clearly violated DOCS' policies and procedures, which never involve a group of high-ranking officials (such as a deputy superintendent, captain, and sergeant) meeting to plan a strategy regarding an inmate, but which involve merely letting a disciplinary charge be filed and decided by a hearing officer. (Dkt. No. 42, Part 2 at 7-8 [Plf.'s Response].)

***18** I agree with Defendants largely for the reasons stated, and based upon the cases cited, in their memorandum of law. (Dkt. No. 37, Part 25 at 8-9 [Defs.' Mem. of Law].) Plaintiff's attempted conspiracy claim, which is asserted under 42 U.S.C. § 1983, should actually be asserted under 42 U.S.C. § 1985. *See Webb v. Goord*, 340 F.3d 105, 110 (2d. Cir.2003) (construing Section 1983 claim styled as "Conspiracy to Violate Civil Rights" as Section 1985 claim). To maintain an action under Section 1985, a plaintiff "must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end."*Webb*, 340 F.3d at 110 [internal quotation marks and citations omitted]. Where a plaintiff does not provide such a factual basis, but only conclusory, vague or general allegations, such a conspiracy claim fails. *Id.* (dismissing conclusory allegation "that any such meeting of the minds occurred among any or all of the defendants"); *Boddie v. Schneider*, 105 F.3d 857, 862 (2d. Cir.1997) (dismissal of "conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights" is proper).

Here, Plaintiff's conspiracy claim is conclusory, vague and general. It is uncontroverted that, at some point between August 5, 2002, and August 31, 2002, a meeting took place between Defendant Woods and Defendant Belarge, and a meeting took place between Defendant Belarge and Defendant O'Donnell, and that the purpose of both meetings was to discuss Plaintiff. (*See, supra*, Statement of Fact Nos. 25-26.)The issue is whether the purpose of that meeting was "to achieve an unlawful end" or to simply investigate whether Plaintiff had violated prison rules.

Defendants offer evidence that the purpose of the meeting was to lawfully investigate Plaintiff, and Plaintiff has offered no *evidence* to the contrary. Plaintiff merely argues that DOCS' policies and procedures would *never* involve a group of high-ranking officials (such as a deputy superintendent, captain, and sergeant) meeting to discuss a Plaintiff. Even if Plaintiff had made this assertion in an affidavit or declaration rather than in a memorandum of law, I would have difficulty imagining how Plaintiff (despite his legal training and considerable experience as an inmate) could possibly have personal knowledge of such a fact. Furthermore, as a matter of common sense, it seems to me that where (as here) an inmate has made a mysterious representation to a deputy superintendent implying that he has possession of a deceased inmate's legal materials, it would be entirely conceivable (and appropriate) for the deputy superintendent to initiate an investigation of the matter, which investigation would involve lawful meetings with subordinates.

In any event, I need not base my recommendation on Plaintiff's lack of personal knowledge or on my common sense: the fact is that Plaintiff has adduced absolutely no evidence in support of his vague and conclusory allegation that Defendants Woods, Belarge and O'Donnell entered into an agreement to achieve an unlawful end. As a result, I recommend that the Court dismiss Plaintiff's conspiracy claim.

**G. Whether Defendants Are Protected by Qualified Immunity**

***19** In their memorandum of law, Defendants argue that they are entitled to qualified immunity because they could not have reasonably known that their conduct was in violation of a clearly established statutory or constitutional right. (Dkt. No. 37, Part 25 at 17 [Defs.' Mem. of Law].) Liberally construed, Plaintiff's response argues (without citing any evidence) that, under the circumstances, any reasonable person would have reasonably known their conduct was violating Plaintiff's

clearly established constitutional rights. (Dkt. No. 42, Part 2 at 15-17 [Plf.'s Response].)

Again, I must reject Plaintiff's conclusory argument. "Once qualified immunity is pleaded, plaintiff's complaint will be dismissed unless defendant's alleged conduct, when committed, violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Williams*, 781 F .2d at 322 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 815 [1982] ). Regarding the issue of whether a particular right was *clearly established*, courts in this circuit consider three factors:

> (1) whether the right in question was defined with 'reasonable specificity'; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

*Jermosen v. Smith*, 945 F.2d 547, 550 (2d Cir.1991) (citations omitted), cert. denied, 503 U.S. 962 (1992).[112] Regarding the issue of whether *a reasonable person would have known* he was violating such a clearly established right, this "objective reasonableness"[113] test is met if "officers of reasonable competence could disagree on [the legality of defendant's actions]."*Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Malsh v. Correctional Officer Austin*, 901 F.Supp. 757, 764 (S.D.N.Y.1995) (citing cases); *Ramirez v. Holmes*, 921 F.Supp. 204, 211 (S.D.N.Y.1996). As the Supreme Court explained,

> [T]he qualified immunity defense ... provides ample protection to all but the plainly incompetent or those who knowingly violate the law.... Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.

*Malley*, 475 U.S. at 341. Furthermore, courts in the Second Circuit recognize that "the use of an 'objective reasonableness' standard permits qualified immunity claims to be decided as a matter of law."*Malsh*, 901 F.Supp. at 764 (citing *Cartier v. Lussier*, 955 F.2d 841, 844 [2d Cir.1992] [citing Supreme Court cases] ).

Here, based on my liberal construction of all of Plaintiff's motion papers and response papers, I will assume, for the sake of argument, that Plaintiff is claiming he had, among others, the following rights: (1) a right to have Defendant Holt take control of Inmate Alcivar's legal materials when Plaintiff offered those materials to Defendant Holt, and to later acknowledge his failure to take control of those materials; (2) a right to have Defendant Woods personally visit Plaintiff in his "cube," and not launch a disciplinary investigation against him, following Plaintiff's notes to Defendant Woods; (3) a right to have Defendants Belarge and O'Donnell not open or read Plaintiff's correspondence to and from Inmate Alcivar's two daughters, following Plaintiff's notes to Defendant Woods; (4) a right to have Defendant Antonelli recuse himself based on the (alleged) fact that Plaintiff and Defendant Antonelli, one week before the disciplinary hearing, had had an "encounter" regarding the conditions of the equipment in the prison mess hall; and (5) a right to be either transferred to a new cell in SHU, or provided with a new bunk bed in SHU, *immediately* upon making an oral complaint about his bunk bed to Defendants Woods, Belarge, O'Donnell, Antonelli and/or Holt (or upon the observations of that bunk bed by those Defendants).

***20** As an initial matter, it is unclear to me that any of these rights were "clearly established" in the summer and fall of 2002 (or are clearly established now). In any event, even if these rights were clearly established, it appears entirely reasonable to me for Defendants to have concluded that their treatment of Plaintiff did not violate these rights (or any rights). Simply stated, I can find no *evidence* in the record that Defendants Holt, Woods, Belarge, O'Donnell or Antonelli did anything wrong. At the very least, officers of reasonable competence could have disagreed as to the lawfulness of Defendants' actions..

As a result, even if the Court does not dismiss all of Plaintiff's claims for the reasons stated earlier in this Report-Recommendation, I recommend that the Court dismiss all of Plaintiff's claims based on qualified immunity.

**H. Plaintiff's Motion for Partial Summary Judgment**

Based on the above reasons, I find that Plaintiff's motion for partial summary judgment-which (at best) contains arguments regarding the issues discussed above-is without merit. I reach this conclusion for the independent reason that Plaintiff's Rule 7.1 Statement of Material Facts (Dkt. No. 38, Part 2) generally does not contain any citations to the record, and, to the extent that Rule 7.1 Statement does





contain citations to the record, the record generally does not actually support the facts asserted. *See* N.D .N.Y. L.R. 7.1(a)(3) (*"Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion."*) [emphasis in original].

As a result, I recommend the denial of Plaintiff's motion for partial summary judgment.

**ACCORDINGLY,** it is

RECOMMENDED that Defendants' motion for summary judgment (Dkt. No. 37) be *GRANTED;* and it is further

RECOMMENDED that Plaintiff's motion for partial summary judgment (Dkt. No. 38) be *DENIED.*

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.***Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Sec'y of Health and Human Svcs.*, 892 F.2d 15 [2d Cir.1989] ); 28 U.S.C. § 636(b); Fed.R.Civ.P. 6(a), 6(e), 72.

**All Citations**

Not Reported in F.Supp.2d, 2006 WL 1133247

Footnotes

1 Given my duty to liberally construe a *pro se* plaintiff's civil rights complaint, I construe Plaintiff's Amended Complaint as including a claim that various Defendants violated Plaintiff's rights under the Fourth Amendment to be free from unreasonable searches and seizures. *See Phillips v. Girdich*, 408 F.3d 124, 130 (2d Cir.2005) ("We leave it for the district court to determine what other claims, if any, [the plaintiff] has raised. In so doing, the court's imagination should be limited only by [the plaintiff's] factual allegations, not by the legal claims set out in his pleadings.") [citations omitted] *(See also*Dkt. No. 5, ¶ 44 [Plf.'s Am. Compl., alleging that Defendants Woods and Holt "violat[ed] plaintiff's 4th ... Amendment[ ] rights"], ¶ 15 [alleging that Defendant Belarge "had plaintiff's personal property searched by three officers, one of whom was Holt"]; Dkt. No. 37, Part 23, Ex. A at 26-28 [Munkowitz Decl., attaching transcript of deposition of Plaintiff, in which he explains his claim under the Fourth Amendment based on the alleged unjustified search and seizure of his property].)

2 A fact is "material" only if it would have some effect on the outcome of the suit. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

3 *See Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir.2004) (citations omitted).

4 *See* Local Rule 7.1(a)(3) (*"Any facts set forth in the Statement of Material Facts shall be deemed admitted unless specifically controverted by the opposing party."*).

5 Local Rule 7.1(a)(3); *see, e.g., Jones v. Smithkline Beecham Corp.*, 309 F.Supp.2d 343, 346 (N.D.N.Y.2004) (McAvoy, J.) ("[W]here Plaintiff has failed to provide specific references to the record in support of her denials or has otherwise failed to completely deny Defendant's assertions of fact, those assertions will be taken as true."); *Lee v. Alfonso*, 97-CV-1741, 2004 U.S. Dist. LEXIS 20746, at *15 (N.D.N.Y. Feb. 10, 2004) (Scullin, C.J.) ("Plaintiff does not offer any facts to support his claims that would raise an issue of fact. Nor has he overcome his failure to respond to Defendants' Rule 7.1(a)(3) Statement. Therefore, Defendants' version of the facts remains uncontroverted."); *Margan v. Niles*, 250 F.Supp.2d 63, 67 (N.D.N.Y.2003) (Hurd, J.) ("Plaintiff's Rule 7.1(a)(3) statement, which contains numerous denials, does not contain a single citation to the record. Because plaintiff's response Rule 7.1(a)(3) statement does not comply with the local rules, it has not been considered."); *Mehlenbacher v. Slafrad*, 99-CV-2127, 2003 U.S. Dist. LEXIS 9248, at *4 (N.D.N.Y. June 4, 2003) (Sharpe, M.J.) ("Since [the plaintiff] has failed to respond to the defendant's statements of material fact, the facts as set forth in the defendants' Rule 7.1 Statement ... are accepted as true."); *Adams v. N.Y. State Thruway Auth.*, 97-CV-1909, 2001 U.S. Dist. LEXIS 3206, at *2, n. 1 (N.D.N.Y. March 22, 2001) (Mordue, J.) ("[T]o the extent plaintiff's responses violate Local Rule 7. 1, and are not properly admitted or denied, the Court will deem defendant's statement of fact admitted by plaintiff."); *see also Holtz v. Rockefeller*, 258 F.3d 62, 74 (2d Cir.2001) ("[A] Local Rule 56.1 statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record.").

6 *See Patterson v. County of Oneida*, 375 F.2d 206, 219 (2d. Cir.2004) ("[A] verified pleading ... has the effect of an affidavit and may be relied upon to oppose summary judgment."); *Fitzgerald v. Henderson*, 251 F.3d 345, 361 (2d Cir.2001) (holding that plaintiff "was entitled to rely on [his verified amended complaint] in opposing summary judgment"), *cert. denied*,536 U.S. 922 (2002); *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir.1993) ("A verified complaint is to be treated

as an affidavit for summary judgment purposes.") [citations omitted]; Fed.R.Civ.P. 56(c) ("The judgment sought shall be rendered forthwith if the ... affidavits ... show that there is no genuine issue as to any material fact....").

7 Fed.R.Civ.P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to the matters stated therein."); *see also U.S. v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1084 (2d Cir.1995) [citations omitted], *cert. denied sub nom, Ferrante v. U.S.*, 516 U.S. 806 (1995).

8 *See Patterson*, 375 F.3d at 219 ("[Rule 56(e)'s] requirement that affidavits be made on personal knowledge is not satisfied by assertions made 'on information and belief.'...[Furthermore, the Rule's] requirement that the affiant have personal knowledge and be competent to testify to the matters asserted in the affidavits also means that the affidavit's hearsay assertion that would not be admissible at trial if testified to by the affiant is insufficient to create a genuine issue for trial."); *Sellers v. M .C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir.1988) ("[Defendant's] affidavit states that it is based on personal knowledge or upon information and belief.... Because there is no way to ascertain which portions of [Defendant's] affidavit were based on personal knowledge, as opposed to information and belief, the affidavit is insufficient under Rule 56 to support the motion for summary judgment."); *Applegate v. Top Assoc., Inc.*, 425 F.2d 92, 97 (2d Cir.1970) (rejecting affidavit made on "suspicion ... rumor and hearsay"); *Spence v. Maryland Cas. Co.*, 803 F.Supp. 649, 664 (W.D.N.Y.1992) (rejecting affidavit made on "secondhand information and hearsay"), *aff'd*,995 F.2d 1147 (2d Cir.1993).

9 *See*Fed.R.Civ.P. 56(e) (requiring that non-movant "set forth specific facts showing that there is a genuine issue for trial"); *Patterson*, 375 F.3d at 219 (2d. Cir.2004) ("Nor is a genuine issue created merely by the presentation of assertions [in an affidavit] that are conclusory.") [citations omitted]; *Applegate*, 425 F.2d at 97 (stating that the purpose of Rule 56[e] is to "prevent the exchange of affidavits on a motion for summary judgment from degenerating into mere elaboration of conclusory pleadings").

10 *See, e.g., Bickerstaff v. Vassar Col*, 196 F.3d 435, 452 (2d Cir.1998) (McAvoy, C.J., sitting by designation) ("Statements [for example, those made in affidavits, deposition testimony or trial testimony] that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.") [citations omitted]; *West-Fair Elec. Contractors v. Aetna Cas. & Sur.*, 78 F.3d 61, 63 (2d Cir.1996) (rejecting affidavit's conclusory statements that, in essence, asserted merely that there was a dispute between the parties over the amount owed to the plaintiff under a contract); *Meiri v. Dacon*, 759 F.2d 989, 997 (2d Cir.1985) (plaintiff's allegation that she "heard disparaging remarks about Jews, but, of course, don't ask me to pinpoint people, times or places.... It's all around us" was conclusory and thus insufficient to satisfy the requirements of Rule 56[e] ), *cert. denied*,474 U.S. 829 (1985); *Applegate*, 425 F.2d at 97 ("[Plaintiff] has provided the court [through his affidavit] with the characters and plot line for a novel of intrigue rather than the concrete particulars which would entitle him to a trial.").

11 *See, e.g., Jeffreys v. City of New York*, 426 F.3d 549, 554-555 (2d Cir.2005) (affirming grant of summary judgment to defendants in part because plaintiff's testimony about an alleged assault by police officers was "largely unsubstantiated by any other direct evidence" and was "so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in the complaint") [citations and internal quotations omitted]; *Argus, Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 45 (2d Cir.1986) (affirming grant of summary judgment to defendants in part because plaintiffs' deposition testimony regarding an alleged defect in a camera product line was, although specific, "unsupported by documentary or other concrete evidence" and thus "simply not enough to create a genuine issue of fact in light of the evidence to the contrary"); *Allah v. Greiner*, 03-CV-3789, 2006 WL 357824, at *3-4 & n. 7, 14, 16, 21 (S.D.N.Y. Feb. 15, 2006) (prisoner's verified complaint, which recounted specific statements by defendants that they were violating his rights, was conclusory and discredited by the evidence, and therefore insufficient to create issue of fact with regard to all but one of prisoner's claims, although verified complaint was sufficient to create issue of fact with regard to prisoner's claim of retaliation against one defendant because retaliatory act occurred on same day as plaintiff's grievance against that defendant, whose testimony was internally inconsistent and in conflict with other evidence); *Olle v. Columbia Univ.*, 332 F.Supp.2d 599, 612 (S.D.N.Y.2004) (plaintiff's deposition testimony was insufficient evidence to oppose defendants' motion for summary judgment where that testimony recounted specific allegedly sexist remarks that "were either unsupported by admissible evidence or benign"), aff'd, 136 Fed. Appx. 383 (2d Cir.2005) (unreported decision).

12 (Dkt. No. 42, Part 1, ¶ 7 [Plf.'s Response to Woods Aff.].)

13 (*See, e.g.*,Dkt. No. 37, Part 22, Ex. A at 31 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, in which he testifies that, when Defendant Holt failed to take "control" of Inmate Alcivar's legal documents, Defendant Holt left Plaintiff ***"stuck with them*** as well as the other two inmates"], 31-32 [admitting that he did not return the documents to the law clerk's work station in the law library out of a fear that the document may fall into another inmate's hands], 32 [admitting





that he took the documents to "honor" Inmate Alcivar's "wishes"], 33 [admitting that he took the documents after Inmate Alcivar's death based on his belief that "they were not supposed to be in the law library after the inmate was deceased"]; Dkt. No. 37, Part 18, Ex. B at 6-9 [Antonelli Aff., attaching letter dated 7/4/02 from Plaintiff, in which he states, "There is [sic] two inmates that Peter trusted with his papers and other legal documents, that is one inmate that housed [sic] in the same dorm as him and myself.... Peter told me that you have copies of all his papers, those of which are the same as the papers ***I have here"];***Dkt. No. 37, Part 18, Ex. B at 10-12, 14 [Antonelli Aff., attaching 7/16/02 letter from Plaintiff, in which he states, "I am going to ***hold a copy of the complaint"*** in Inmate Alcivar's federal civil rights action]; Dkt. No. 37, Part 7 [Ex. C to Woods Aff., attaching Plaintiff's 8/5/02 letter, in which he states, "in the future if anything should come of a matter of said documents ***being in my possession ...*** you and the administration cannot take any action against the inmate's family nor myself"] [emphasis added].)

14 (Dkt. No. 42, Part 1, ¶ 5.B. [Plf.'s Response to Antonelli Aff.].)

15 (Dkt. No. 37, Part 18 at 6-8, 10-12 [Ex. B to Antonelli Aff., attaching contraband allegedly found in Plaintiff's "cube"].)

16 (Dkt. No. 5, ¶ 12 [Am. Compl.].)

17 (Dkt. No. 37, Part 2, ¶ 2 [Defs.' Rule 7.1 Statement]; Dkt. No. 42, Part 1, ¶ 2 [Plf.'s Rule 7.1 Response]; Dkt. No. 5, ¶ 4 [Am. Compl].)

18 (Dkt. No. 37, Part 2, ¶¶ 4-8 [Defs.' Rule 7.1 Statement]; Dkt. No. 42, Part 1, ¶¶ 4-8 [Plf.'s Rule 7.1 Response]; Dkt. No. 5, ¶ ¶ 3, 3(a), 3(b), 3(c) [Am. Compl.].)

19 (Dkt. No. 42, Part 1, ¶ 12 [Plf.'s Rule 7.1 Response]; Dkt. No. 5, "Facts of the Incident," ¶¶ 1-3 [Am. Compl.]; Dkt. No. 37, Part 18, Ex. B at 18-37 [Antonelli Aff., attaching pleading and motion from lawsuit].)

20 (Dkt. No. 37, Part 2, ¶ 12 [Defs.' Rule 7.1 Statement]; Dkt. No. 42, Part 1, ¶ 12 [Plf.'s Rule 7.1 Response, admitting that, on one occasion, Plaintiff answered a question posed by Inmate Alcivar regarding an affidavit, which question and answer were communicated with the help of Inmate Law Clerk George Robles]; Dkt. No. 5, "Facts of the Incident," ¶ 2 [Am. Compl.]; Dkt. No. 37, Part 18 [Ex. B. to Antonelli Aff.].)

21 (Dkt. No. 37, Part 2, ¶ 13 [Defs.' Rule 7.1 Statement]; Dkt. No. 42, Part 1, ¶ 13 [Plf.'s Rule 7.1 Response].)

22 (Dkt. No. 1, "Facts of the Incident," ¶ 1 [Am. Compl.]; Dkt. No. 42, Part 1, ¶ 6 [Plf.'s Response to Antonelli Aff., asserting that Inmate Alcivar was "admitted to Albany Medical Center Hospital three days after Robles asked plaintiff the question [about] an affidavit and its contents"].)

23 (Dkt. No. 37, Part 18, Ex. B at 6-9 [Antonelli Aff., attaching letter dated 7/4/02 from Plaintiff to Raida and Raisa Alcivar, and letter dated 6/24/02]; Dkt. No. 37, Part 23, Ex. A at 79-80 [Munkwitz Dec., attaching transcript of Plaintiff's deposition, in which Plaintiff admits having written and sent the letter dated 7/4/02].)

24 (Dkt. No. 37, Part 18, Ex. B at 6-9 [Antonelli Aff., attaching letter dated 7/4/02 from Plaintiff to Raida and Raisa Alcivar, and letter dated 6/24/02].)

25 (Dkt. No. 37, Part 2, ¶ 11 [Defs.' Rule 7.1 Statement]; Dkt. No. 42, Part 1, ¶ 11 [Plf.'s Rule 7.1 Response]; Dkt. No. 5, "Facts of the Incident," ¶ 3 [Am. Compl.].)

26 (Dkt. No. 37, Part 2, ¶ 18 [Defs.' Rule 7.1 Statement, asserting that Plaintiff wrote and sent the letter and memorandum]; Dkt. No. 42, Part 1, ¶ 18 [Plf.'s Rule 7.1 Response, not specifically denying that Plaintiff wrote and sent the letter and memorandum]; Dkt. No. 37, Part 16, ¶ 9 [Antonelli Aff.]; Dkt. No. 37, Part 18, Ex. B at 10-12, 14 [Antonelli Aff., attaching 7/16/02 letter, the last page of which refers to an attached "To/From" memorandum]; Dkt. No. 37, Part 23, Ex. A at 81-82 [Munkwitz Decl., attaching transcript of Plaintiff's deposition, in which he admitted writing and sending the letter and memorandum].)

27 (Dkt. No. 37, Part 18, Ex. B at 10 [Antonelli Aff., attaching 7/16/02 letter].)

28 (Dkt. No. 37, Part 18, Ex. B at 10-12, 14 [Antonelli Aff., attaching 7/16/02 letter, the last page of which refers to an attached "To/From" memorandum].)

29 (Dkt. No. 37, Part 16, ¶ 9 [Antonelli Aff.]; Dkt. No. 37, Part 18, Ex. B at 13 [Antonelli Aff., attaching 8/8/02 letter]; Dkt. No. 37, Part 23, Ex. A at 81-82 [Munkwitz Decl., attaching transcript of Plaintiff's deposition, in which he admitted writing and sending the letter].)

30 (Dkt. No. 37, Part 3, ¶ 3 [Woods Aff.]; Dkt. No. 37, Part 4, Ex A [Woods Aff.]; Dkt. No. 37, Part 2, ¶ 20 [Defs.' Rule 7.1 Statement, asserting fact]; Dkt. No. 42, Part 1, ¶ 20 [Plf.'s Rule 7.1 Response, admitting fact].)

31 (Dkt. No. 37, Part 4, Ex A [Woods Aff.].)

32 (Dkt. No. 37, Part 3, ¶ 3 [Woods Aff.]; Dkt. No. 37, Part 5 [Ex. B to Woods Aff.]; Dkt. No. 37, Part 2, ¶ 20 [Defs.' Rule 7.1 Statement, asserting fact]; Dkt. No. 42, Part 1, ¶ 20 [Plf.'s Rule 7.1 Response, admitting fact].)

33 (Dkt. No. 37, Part 5 [Ex. B to Woods Aff.].)

34 (Dkt. No. 37, Part 3, ¶¶ 4-5 [Woods Aff.]; Dkt. No. 37, Part 2, ¶ 21 [Defs.' Rule 7.1 Statement, asserting fact]; Dkt. No. 42, Part 1, ¶ 21 [Plf.'s Rule 7.1 Response, not specifically controverting either that Defendant Woods did not receive the notes until after July 23, 2003, or that Defendant Woods believed the notes to be "crypic"]; Dkt. No. 37, Part 8, Ex. D [Woods Aff., attaching Defendant Woods' 8/6/02 memorandum to Plaintiff stating that Plaintiff's two notes were "brief and very vague" and lacked "specifics"].)

35 (Dkt. No. 37, Part 3, ¶ 6 [Woods Aff.]; Dkt. No. 37, Part 7, Ex. C [Woods Aff., attaching note]; Dkt. No. 37, Part 2, ¶ 22 [Defs.' Rule 7.1 Statement, asserting that Plaintiff wrote and sent note]; Dkt. No. 42, Part 1, ¶ 22 [Plf.'s Rule 7.1 Response, not specifically controverting that Plaintiff wrote and sent note].)

36 (Dkt. No. 37, Part 7 [Ex. C to Woods Aff.].)

37 (Dkt. No. 37, Part 3, ¶ 6 [Woods Aff., asserting that he sent this memorandum]; Dkt. No. 42, Part 1, ¶ 6 [Plf.'s Response to Woods Aff., admitting that Defendant Woods sent Plaintiff this memorandum]; Dkt. No. 37, Part 8, Ex. D [Woods Aff., attaching the memorandum].)

38 (Dkt. No. 37, Part 7, Ex. D [Woods Aff., attaching the 8/6/02 memorandum].)

39 (Dkt. No. 5, "Facts of the Incident," ¶ 11 [Plf.'s Am. Compl.].)

40 (Dkt. No. 37, Part 2, ¶ 24 [Defs.' Rule 7.1 Statement, asserting fact]; Dkt. No. 42, Part 1, ¶ 24 [Plf.'s Rule 7.1 Response, not specifically controverting fact]; Dkt. No. 37, Part 29, ¶ 7 [Holt Aff.]; Dkt. No. 5, "Facts of the Incident," ¶ 10 [Plf.'s Am. Compl.].)

41 (Dkt. No. 37, Part 2, ¶ 24 [Defs.' Rule 7.1 Statement, asserting fact]; Dkt. No. 42, Part 1, ¶ 24 [Plf.'s Rule 7.1 Response, not specifically controverting that Plaintiff denied to Defendant Holt having Inmate Alcivar's legal documents, only citing to Paragraph 12 of Plaintiff's Rule 7.1 Response, which is not material to the asserted fact]; Dkt. No. 37, Part 29, ¶ 7 [Holt Aff.].)

42 (Dkt. No. 37, Part 3, ¶¶ 8, 9 [Woods Aff.]; Dkt. No. 37, Part 8, ¶ 3 [Belarge Aff.]; Dkt. No. 37, Part 2, ¶ 25 [Defs.' Rule 7.1 Statement, asserting that Defendant Woods directed Defendant Belarge to have Plaintiff's cell searched]; Dkt. No. 42, Part 1, ¶ 24 [Plf.'s Rule 7.1 Response, admitting that Defendant Woods directed Defendant Belarge to have Plaintiff's "cube" searched].)

43 (Dkt. No. 37, Part 8, ¶ 4 [Belarge Aff.]; Dkt. No. 37, Part 2, ¶¶ 25-26 [Defs.' Rule 7.1 Statement]; Dkt. No. 42, Part 1, ¶¶ 25-26 [Plf.'s Rule 7.1 Response]; Dkt. No. 37, Part 17, Ex. A [Antonelli Aff., attaching misbehavior report which suggests that Defendants Belarge and O'Donnell had in their possession Inmate Alcivar's legal documents as well as various correspondence between Plaintiff and Inmate Alcivar's two daughters, before those Defendants interviewed Plaintiff at 11:00 a.m. on August 31, 2002]; Dkt. No. 5, "Facts of the Incident," ¶¶ 13-14 [Plf.'s Am. Compl., stating that Defendant Belarge had in his possession a letter that Plaintiff had written to Raisa Alcivar by the time he interviewed Plaintiff at 10:57 a.m. on August 31, 2002].)

44 (Dkt. No. 37, Part 2, ¶ 26 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 26 [Plf.'s Rule 7.1 Response, not citing any admissible evidence in support of his denial of this fact]; Dkt. No. 37, Part 8, ¶ 4 [Belarge Aff.]; Dkt. No. 37, Part 3, ¶ 10 [Woods Aff.]; Dkt. No. 37, Part 16, ¶ 5 [Antonelli Aff.]; Dkt. No. 37, Part 18, Ex. B [Antonelli Aff., attaching documents discovered in Plaintiff's cell, and "Chain of Custody" Record indicating that Defendant O'Donnell was the one who found the documents]; Dkt. No. 38, Part 4 at 90 [exhibit to Plaintiff's motion for summary judgment, attaching Contraband Receipt issued by Defendant O'Donnell]; Dkt. No. 37, Part 22, Ex. A at 31-33 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, in which he admits numerous times that, after Defendant Holt failed to take "control" of Inmate Alcivar's legal documents, Plaintiff, along with two other inmates, retained possession of those documents, out of a fear that those documents would be stolen by another inmate, and out of a sense of duty to Inmate Alcivar]; Dkt. No. 37, Part 18, Ex. B at 10-12, 14 [Antonelli Aff., attaching 7/16/02 letter from Plaintiff, in which he states, "I am going to hold a copy of the complaint" in Inmate Alcivar's federal civil rights action]; Dkt. No. 37, Part 7 [Ex. C to Woods Aff., attaching Plaintiff's 8/5/02 letter, in which he states, 'in the future if anything should come of a matter of said documents being in my possession ... you and the administration cannot take any action against the inmate's family nor myself"]; *see also* Dkt. No. 37, Part 19, ¶ 3 [Holden Aff., testifying that at some point in the summer of 2002 Plaintiff told Holden that he was helping an inmate who had been taken to the hospital due to an illness]; Dkt. No. 45, Part 8, ¶¶ 4-5 [Belarge Reply Aff., swearing that evidence in question did not come from any interception of Plaintiff's mail, but from Plaintiff's personal belongings].)

45 (Dkt. No. 37, Part 2, ¶ 28 [Defs.' Rule 7.1 Statement, asserting that interview took place]; Dkt. No. 42, Part 1, ¶ 28 [Plf.'s Rule 7.1 Response, admitting that interview took place despite his blanket statement "Deny"]; Dkt. No. 37, Part 8, ¶ 5 [Belarge Aff.]; Dkt. No. 5, "Facts of the Incident," ¶¶ 13-15 [Plf.'s Am. Compl., stating that interview took place at 10:57 a.m. on 8/31/02]; Dkt. No. 37, Part 17, Ex. A [Antonelli Aff., attaching 8/31/02 misbehavior report, stating that the interview took place at 11:00 a.m. on 8/31/02].)





46 (Dkt. No. 37, Part 18, Ex. B [Antonelli Aff., attaching documents discovered in Plaintiff's cell, and "Chain of Custody" Record indicating that Defendant O'Donnell stored the documents in an evidence locker at 2:50 p.m. on 8/31/02]; Dkt. No. 37, Part 17, Ex. A at 2 [Antonelli Aff., attaching 8/31/02 misbehavior report, stating that Defendant O'Donnell stored the documents in an evidence locker on 8/31/02].)

47 (Dkt. No. 37, Part 8, ¶ 6 [Belarge Aff.]; Dkt. No. 37, Part 17, Ex. A [Antonelli Aff., attaching 8/31/02 misbehavior report].)

48 (Dkt. No. 37, Part 17, Ex. A [Antonelli Aff., attaching 8/31/02 misbehavior report]; Dkt. No. 37, Part 2, ¶ 29 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 29 [Plf.'s Response, admitting receipt of the misbehavior report, and not specifically denying that he was charged with the three offenses stated in Defendants' assertion of fact].)

49 (Dkt. No. 37, Part 16, ¶ 7 [Antonelli Aff.]; Dkt. No. 37, Part 2, ¶ 14 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 14 [Plf.'s Response, not denying this fact, only asserting that he received permission to assist Inmate Alicvar from Defendant Holt].) *See also* 7 N.Y.C.R.R. § 270.02[B][26][vii].

50 (Dkt. No. 37, Part 3, ¶ 7 [Woods Aff.]; Dkt. No. 37, Part 16, ¶ 8 [Antonelli Aff.]; Dkt. No. 37, Part 2, ¶ 10 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 10 [Plf.'s Response, admitting this fact].) *See also* 7 N.Y.C.R.R. § 270.02[B][14] [v].

51 (Dkt. No. 37, Part 16, ¶ 9 [Antonelli Aff.]; Dkt. No. 37, Part 2, ¶ 19 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 19 [Plf.'s Response, not specifically denying this fact, only denying that he indeed requested or solicited "goods or services" from Inmate Alcivar's daughters].) *See also* 7 N.Y.C.R.R. § 270.02[B][4][ii].

52 (Dkt. No. 37, Part 2, ¶ 30 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 30 [Plf.'s Response, admitting this fact].)

53 (Dkt. No. 37, Part 2, ¶ 31 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 31 [Plf.'s Response, admitting this fact].)

54 (Dkt. No. 37, Part 16, ¶¶ 4-6, 11 [Antonelli Aff., asserting this fact]; Dkt. No. 42, Part 1, ¶¶ 4-6, 11 [Plf.'s Response to Antonelli Aff., admitting part of this fact, not specifically controverting the rest of this fact, and, in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 38, Part 4 at 43-44 [exhibit to Plaintiff's motion for summary judgment, attaching Defendant Antonelli's written hearing decision]; Dkt. No. 5, ¶ 17 [Am. Compl., acknowledging that Defendant Antonelli had, in reaching his decision, relied on, among other things, Plaintiff's misbehavior report and various letters between Plaintiff and Inmate Alcivar's daughters].)

55 (Dkt. No. 37, Part 2, ¶ 32 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 32 [Plf.'s Response, admitting this fact]; Dkt. No. 42, Part 23 at 46-48 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, in which he discusses the appeal]; Dkt. No. 38, Part 3 at 46, 68 [exhibits to Plaintiff's motion for summary judgment, attaching his appeal and Mr. Selsky's affirmance].)

56 (Dkt. No. 42, Part 23 at 46-48 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, in which he discusses his one-page appeal and acknowledges that it did not complain about any lack or denial of witnesses]; Dkt. No. 38, Part 3 at 46, 68 [exhibits to Plaintiff's motion for summary judgment, attaching his appeal and Mr. Selsky's affirmance].)

57 (Dkt. No. 37, Part 2, ¶ 31 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 3 1 [Plf.'s Response, admitting part of this fact, not specifically controverting the rest of this fact, and, in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 37, Part 8, ¶ 8 [Belarge Aff.].)

58 *(Id.)*

59 *(Id.)*

60 (Dkt. No. 37, Part 2, ¶ 37 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 37 [Plf.'s Response, not specifically controverting this fact, and, in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 37, Part 3, ¶¶ 9, 13 [Wood Aff.]; Dkt. No. 37, Part 8, ¶¶ 3, 9 [Belarge Aff.]; Dkt. No. 42, Part 23 at 35-37 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, asserting that such a meeting took place between Defendants Woods and Belarge at some point].)

61 (Dkt. No. 37, Part 2, ¶ 3 8 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 3 8 [Plf.'s Response, admitting this fact]; Dkt. No. 37, Part 8, ¶ 9 [Belarge Aff.]; Dkt. No. 42, Part 22 at 35-37 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, asserting that such a meeting took place between Defendants Belarge and O'Donnell at some point].)

62 (Dkt. No. 37, Part 2, ¶ 39 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 39 [Plf.'s Response, not specifically controverting that the pre-misbehavior report meeting between Defendants Woods and Belarge, and the pre-misbehavior report meeting between Defendants Belarge and O'Donnell, were held according to standard procedure at Greene C.F., and, in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 37, Part 3,

¶ 13 [Wood Aff.]. Dkt. No. 37, Part 8, ¶ 9 [Belarge Aff.]; Dkt. No. 37, Part 19, ¶ 2 [Holden Aff., disclaiming any knowledge about an alleged unlawful meeting between Defendants Woods, Belarge, and O'Donnell concerning Plaintiff].)

63 (Dkt. No. 37, Part 2, ¶¶ 37-39 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶¶ 37-39 [Plf.'s Response, not specifically controverting this fact, and, in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 37, Part 3, ¶ 13 [Wood Aff.]; Dkt. No. 37, Part 8, ¶¶ 3, 9 [Belarge Aff.]; Dkt. No. 37, Part 19, ¶ 2 [Holden Aff., disclaiming any knowledge about an alleged unlawful meeting between Defendants Woods, Belarge, and O'Donnell concerning Plaintiff].)

64 (Dkt. No. 5, ¶¶ 26, 37 [Am. Comp.]; Dkt. No. 37, Part 23, Ex. A at 57-58 [Munkwitz Decl., attaching transcript of Plaintiff's deposition]; Dkt. No. 42, Part 1, ¶ 43 [Plf.'s Rule 7.1 Response, stating, "Plaintiff left S-Block November 21, 2002...."].)

65 (Dkt. No. 37, Part 2, ¶ 41 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 41 [Plf.'s Response, not specifically controverting this fact]; Dkt. No. 37, Part 23, Ex. A at 58-62 [Munkwitz Decl., attaching transcript of Plaintiff's deposition, in which he acknowledged this fact]; Dkt. No. 48, Part 6 [Belin Aff.].)

66 (Dkt. No. 37, Part 2, ¶ 42 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 42 [Plf.'s Rule 7.1 Response, not specifically controverting this fact, and in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 37, Part 8, ¶¶ 11-12 [Belarge Aff.]; Dkt. No. 37, Parts 9-12 [Ex. A to Belarge Aff., attaching photographs]; Dkt. No. 48, Parts 4, 8-17 [Defs.' reply affidavits and exhibits, attaching photographs].)

67 (Dkt. No. 37, Part 8, ¶¶ 11-12 [Belarge Aff.]; Dkt. No. 37, Parts 9-12 [Ex. A to Belarge Aff., attaching photographs]; Dkt. No. 48, Parts 4, 8-17 [Defs.' reply affidavits and exhibits, attaching photographs].)

68 (Dkt. No. 37, Part 2, ¶ 43 [Defs.' Rule 7.1 Statement, asserting this fact]; Dkt. No. 42, Part 1, ¶ 43 [Plf.'s Rule 7.1 Response, not specifically controverting this fact, and in any event not citing any admissible evidence in support of any denial of this fact]; Dkt. No. 37, Part 8, ¶¶ 13-14 [Belarge Aff.]; Dkt. No. 37, Parts 13-15, Ex. B [Belarge Aff., attaching work orders]; Dkt. No. 48, Parts 4-5 [Defs.' reply affidavit and exhibits, attaching work orders].)

69 *See Malik'El v. N.Y. State DOCS*, 96-CV-0669, 1998 U.S. Dist. LEXIS 5471, at *7 & n. 1 (N.D.N.Y. March 4, 1998) (Sharpe, M.J.) (under circumstances, plaintiff's oral complaint to corrections officer might state a First Amendment claim), *adopted by* 1998 U.S. Dist. 5465 (N.D.N.Y. Apr. 8, 1998) (Pooler, D.J.); *but see Rodriguez v. Phillips*, 66 F.3d 470, 479 (2d Cir.1995) ("In the context of the confrontation described in [the plaintiff's] own words, there was no clearly established First Amendment right to approach and speak to Officer Rubin.") (emphasis added); *Garrido v. Coughlin*, 716 F.Supp. 98, 101 (S.D.N.Y.1989) (plaintiff's "verbal confrontation" with corrections officer was not protected speech or conduct under the First Amendment).

70 (Dkt. No. 48, Parts 6-7, ¶ 6 [Berlin Aff., testifying that the only grievance on file from Plaintiff, from between August 2002 to December 2002 was a grievance dated 8/8/02 about the legal mail limit at Greene C.F., attaching that grievance at Exhibit A]; Dkt. No. 37, Part 24 [Munkowitz Decl., attaching Plaintiff's 8/16/02 letter of complaint to Deputy Superintendent Eldred regarding the "Mess Hall Dishwashing Machines"]; Dkt. No. 37, Part 23, Ex. A at 86-90 [Munkwitz Decl., attaching transcript of Plaintiff's deposition].)

71 (Dkt. No. 37, Part 24 [Munkowitz Decl., attaching Plaintiff's 8/16/02 letter of complaint to Deputy Superintendent Eldred regarding the mess hall dishwashing machines, not mentioning any specifics, much less the name or position of Defendant Antonelli]; Dkt. No. 37, Part 23, Ex. A at 86-90 [Munkwitz Decl., attaching transcript of Plaintiff's deposition, in which Plaintiff admits this fact].)

72 (Dkt. No. 37, Part 17, ¶ 13 [Antonelli Aff., testifying that "I ... understand that plaintiff alleges that I retaliated against him based upon a grievance that plaintiff made against me. I am not aware of any grievances filed by plaintiff against me"]; Dkt. No. 42, Part 1, ¶ 12 [Plf.'s Response to Antonelli Aff., containing no response to Paragraph 13 of Antonelli's affidavit, and asserting conclusorily that "[the tier office] had chosen Antonelli to preside over plaintiff's tier hearing on September 6, 2002 ... and that was due to Antonelli's encounter with plaintiff one week prior to holding said hearing," without providing any specifics about the alleged "encounter," without providing any assertion that it was Antonelli who was motivated by the alleged "encounter," and without providing reason to believe Plaintiff had personal knowledge of the Tier Office's motivation in assigning Antonelli as the hearing officer].)

73 (Dkt. No. 42, Part 1¶ 12 [Plf.'s Response to Antonelli Aff., asserting that, one week before the disciplinary hearing, Plaintiff had an "encounter" with Defendant Antonelli]; Dkt. No. 37, Part 23, Ex. A at 89 [Munkwitz Decl., attaching transcript of Plaintiff's deposition, in which Plaintiff states that, days before the disciplinary hearing, he "met" with Defendant Antonelli about the condition of the "utensils, dish washing machines, et cetera" in the mess hall].)

74 *(See, supra,* Statement of Fact Nos. 22-23 [stating evidence upon which Defendant Antonelli based his hearing decision, and fact that the decision was affirmed on appeal].)





75 (Dkt. No. 37, Part 25 at 8-9 [Defs.' Mem. of Law, addressing the conclusory nature of Plaintiff's claims about a "conspiracy" against him, the subject of which included the search of his property]; Dkt. No. 37, Part 22, Ex. A at 14 [Munkwitz Decl., attaching transcript of Plaintiff's deposition, in which defense counsel stated, "I don't see how the [F]ourth [A]mendment gives you a right to be free from harmful situations. So I would like you to explain that to me," and Plaintiff stated, "[T]he [F]ourth [A]mendment does not apply to the specific paragraph that you are referring to," i.e., Paragraph 43 of the Amended Complaint], 22 [in which defense counsel asked, "Is there anything else in your second cause of action ..." other than a due process claim, and Plaintiff answered, "Not at this point, ma'am" even though that cause of action cites the Fourth Amendment], 26 [in which defense counsel asked, "You have a constitutional right to be free from search and seizure as an inmate?" and Plaintiff answered, "As an inmate, no, ma'am"].) *See Clissuras v. CUNY*, 359 F.3d 79, 81 n. 3 (2d Cir.2004) (treating a "suggestion" to the court, in the form of a letter, that subject matter jurisdiction was lacking as a request for a dismissal order under Rule 12[h][3]).

76 *(See* Dkt. No. 5, ¶ 44 [Plf.'s Am. Compl., alleging that Defendants Woods and Holt "violat[ed] plaintiff's 4th ... Amendment [] rights"], ¶ 15 [alleging that Defendant Belarge "had plaintiff's personal property searched by three officers, one of whom was Holt"]; Dkt. No. 37, Part 23, Ex. A at 14-22, 26-28 [Munkowitz Decl., attaching transcript of deposition of Plaintiff, in which he explains his claim under the Fourth Amendment based on the alleged unjustified search and seizure of his property].)

77 (Dkt. No. 37, Part 22, Ex. A at 14 [Munkwitz Decl., attaching transcript of Plaintiff's deposition, in which Plaintiff stated, "[T]he [F]ourth [A]mendment does not apply to" Plaintiff's first cause of action], 22 [in which defense counsel asked, "Is there anything else in your second cause of action ..." other than a due process claim, and Plaintiff answered, "Not at this point, ma'am" even though the cause of action cites the Fourth Amendment], 28 [in which defense counsel asked, "Are you alleging that the facts in paragraph 15 give rise to a constitutional claim for search and seizure?" and Plaintiff answered, "Yes, ma'am"].)

78 (Dkt. No. 5, ¶ 14 [Am. Compl.].)

79 *See also Tinsley v. Greene*, 95-CV-1765, 1997 WL 160124, at *7 (N.D.N.Y. March 31, 1997) ("Plaintiff thus may assert no cause of action here based on an alleged violation of his Fourth Amendment rights."); *Demalo v. Mann*, 877 F.Supp. 89, 95 (N.D.N.Y.) ("Searches of prison cells, even arbitrary searches, implicate no protected constitutional rights."), *aff'd*,122 F.3d 1055 (2d Cir.1995).

80 *See Freeman v. Goord*, 02-CV-9033, 2005 U.S. Dist. LEXIS 32019, at *5 & n. 4 (S.D.N.Y. Dec. 7, 1995) (granting defendants' motion for summary judgment, in part because plaintiff had no reasonable expectation of privacy, under the Fourth Amendment, in his cell, which plaintiff referred to as his "cube"); *Rodriguez v. Coughlin*, 795 F.Supp. 609, 611, 613 (W.D.N.Y.1992) (granting defendants' motion for summary judgment, in part because prison officials have same need, and right, to search prisoner's "cell" as his "cubicle").

81 (Dkt. No. 37, Part 22, Ex. A at 26 [Munkwitz Decl., attaching transcript of Plaintiff's deposition, in which defense counsel asked, "You have a constitutional right to be free from search and seizure as an inmate?" and Plaintiff answered, "As an inmate, no, ma'am"].)

82 (Dkt. No. 5, ¶ 12 [Am. Compl.].)

83 I note that the alleged "interception" by Defendant Woods of these packages was preceded by a letter from Plaintiff to Woods referring to "documents [belonging to Inmate Alcivar] being in [Plaintiff's] possession" and referring to Inmate Alcivar's family members. Furthermore, I note that the alleged contents of these packages would have reasonably appeared (at the very least) to consist of contraband (i.e., allegedly being the same documents that later gave rise to three disciplinary charges against Plaintiff, which charges resulted in a conviction that was affirmed on appeal).

84 *See, e.g.,* DOCS Directive No. 4422, § III.B.17. ("Inmates shall not be permitted to use their correspondence privileges to solicit ... services, or goods."), § III.G.1. ("All incoming general correspondence will be opened and inspected for ... photocopied materials, or contraband.") (5/18/02).

85 "Spondylolisthesis" is defined as "forward movement of the body of one of the lower lumbar vertebrae on the vertebra below it, or upon the sacrum." *Rowland v. Hildreth*, 92-CV-6140, 1993 U.S. Dist. LEXIS 10233, at *35, n. 6 (S.D.N.Y. July 27, 1993) (citing *Stedman's Medical Dictionary* at 1456 [25th ed.1990].).

86 (Dkt. No. 5, ¶ 27 [Am. Compl.]; Dkt. No. 38, Part 4 at 58-62 [Plf.'s Motion for Summary Judgment, attaching medical records repeatedly stating "spondylolisthesis"]; Dkt. No. 37, Part 23 at 54-58 [Munkowitz Decl., attaching transcript of Plaintiff's deposition testimony, in which Plaintiff describes his injury generally].)

87 *See Villante v. N.Y. State DOCS*, 96-CV-1484, 2002 U.S. Dist. LEXIS 26279, at *4, 8-9 (N.D.N.Y. March 28, 2002) (Mordue, J.), *adopting report-recommendation*,2002 U.S. Dist. LEXIS, at *11-12 (N.D.N.Y. Oct. 26, 2001) (Homer, M.J.);

*Rowland*,1993 U.S. Dist. LEXIS 10233, at *13-16, 30; *Smith v. Umar*, 89-CV-6988, 1989 U.S. Dist. LEXIS 14170, at *4-6, 8-10 (E.D.Pa. Nov. 28, 1989).

88 (Dkt. No. 5, ¶¶ 35, 37, 38, 43 [Am. Compl., alleging that Defendants-who are non-medical personnel-violated Plaintiff's Eighth Amendment rights by placing him in, and keeping him in, SHU, despite knowing of the allegedly substandard conditions there, which included his allegedly defective bunk].)

89 (Dkt. No. 37, Part 23 at 42-43, 53, 58 [Munkowitz Decl., attaching transcript of Plaintiff's deposition testimony, in which Plaintiff testifies that he was not asserting any claim regarding the medical treatment that he received, or that the medical staff was deliberately indifferent to a serious medical need].)

90 (Dkt. No. 37, Part 25 at 14 [Defs.' Mem. of Law, arguing that "plaintiff cannot demonstrate that his bunk was 'damaged' in any manner," citing record evidence in an attempt to support that argument].)

91 (*See, supra,* Statement of Fact No. 29.)

92 (Dkt. No. 37, Part 25 at 11, 13-14 [Defs.' Mem. of Law].)

93 (*Compare*Dkt. No. 42, Part 1, ¶¶ 10(a), 11 [Plf.'s Response to Belarge Aff., swearing that he was assigned to the allegedly "dilapidated" bunk in question-Bunk Number "OS-A1-20(b)"-on **9/23/02,** after having been assigned to two different SHU cells, i.e., first in Cell "SH-0013" and then in Cell "B1-18"] *with*Dkt. No. 5, ¶¶ 26-27 [Plf.'s Am. Compl., containing a sworn allegation that the onset of his back injury was on or before **9/13/02,** and that the date of diagnosis was **9/20/02]***and* Dkt. No. 42, Part 1, ¶ 15 [Plf.'s Response to Belarge Aff., swearing that he orally complained to Belarge about the bunk on **9/18/02]***and* Dkt. No. 37, Part 23 at 58 [Munkowitz Decl., attaching transcript of Plaintiff's deposition testimony, in which Plaintiff testifies that he first requested sick call on **9/9/02,** or three days after his admission to SHU].)

94 (Dkt. No. 38, Part 4 at 58-62 [Plf.'s Motion for Summary Judgment, attaching medical record printed on **9/9/02** containing a typed notation, apparently entered on 8/23/02 stating, "Reason for Consultation: H/O sciatica type pain which has responded to PT **in the past.**I request a **repeat treatment** series for 6 weeks" and noting that Plaintiff was 51 years old at the time] [emphasis added].)

95 *See Faunce v. Gomez*, No. 97-16943, 1998 U.S.App. LEXIS. 22703, at *3 (9th Cir. Sept. 14, 1998) (affirming district court's grant of summary judgment to defendants in part because the plaintiff's Eighth Amendment claim was premised on his complaint that his mattress was uncomfortable and his bedding was insufficient); *Page v. Kirby*, 314 F.Supp.2d 619, 620 (N.D.W.Va.) (dismissing prisoner's Eighth Amendment claim premised on complaint that his mattress was uncomfortable); *Lewi v. District of Columbia*, 92-CV-2653, 1993 U.S. Dist. LEXIS 1948, at *5 (D.D.C. Feb. 24, 1993) dismissing prisoner's Eighth Amendment claim premised on complaint that his mattress was uncomfortable).

96 (Dkt. No. 5, ¶ 38 [Am. Compl.].)

97 (*See, e.g.*,Dkt. No. 42, Part 1, ¶ 15 [Plf.'s Response to Belarge Aff., swearing that he orally complained to Belarge about the bunk on September 18, 2002]; *compare*Dkt. No. 42, Part 1, ¶ 14 [Plf.'s Response to Woods Aff., swearing that his oral complaint to Woods was made on September 27, 2002] *with*Dkt. No. 42, Part 2 at 13 [Mem. of Law, arguing that his oral complaint to Woods was made on September 12, 2002].)

98 (Dkt. No. 37, Part 8, ¶ 11 [Belarge Aff., identifying second bunk Plaintiff was assigned while in "S-Block" as Bunk Number "OS-A1-20(b)"]; Dkt. No. 42, Part 1, ¶ 11 [Plf.'s Response to Belarge Aff., admitting that fact], ¶ 10(a) [swearing that he was assigned to the allegedly "dilapidated" bunk in question on 9/23/02], ¶ 10(b) [swearing that, at 9:45 p.m. on or about 10/7/02-fourteen days after 9/23/02-he was purposely moved to a cell "with a better bunk," i.e., Cell "B2-40".) Any assertions by Plaintiff to the contrary are purely conclusory, self-contradictory, and frankly too incredible to be believed by reasonable minds. (Dkt. No. 5, ¶ 26 [Am. Compl., alleging conclusorily that his verbal complaints about his bunk bed "went unsolved"]; *compare*Dkt. No. 37, Part 23 at 58 [Munkowitz Decl., attaching transcript of Plaintiff's deposition testimony, in which Plaintiff testifies that he was assigned to the same bunk bed during his entire stay in SHU] *with*Dkt. No. 42, Part 1, ¶ 11 [Plf.'s Response to Belarge Aff., admitting that he served his time in SHU in four different cells], ¶ 10(a) [swearing that he was not assigned to the allegedly "dilapidated" bunk in question until 9/23/02, despite his admission to SHU on 9/6/02, and that it was the *third* such bunk to which he had been assigned in SHU], ¶ 10(b) [swearing that, at 9:45 p.m. on or about 10/7/02-fourteen days after 9/23/02-he was purposely moved to a cell "with a better bunk," i.e., Cell "B2-40".])

99 (*Compare*Dkt. No. 42, Part 1, ¶ 14 [Plf.'s Response to Woods Aff.] *and* Dkt. No. 42, Part 1, ¶ 15 [Plf.'s Response to Belarge Aff.] *with*Dkt. No. 42, Part 1, ¶ 10(c) [Plf.'s Response to Belarge Aff.].)

100 (Dkt. No. 5, ¶¶ 26-33 [Am. Compl.].)

101 (*See, supra,* Statement of Fact No. 24.)

102 (Dkt. No. 37, Part 23 at 58, 61, 63, 65 [Munkowitz Decl., attaching transcript of Plaintiff's deposition].)

103 (*See, e.g.*,Dkt. No. 42, Part 2 at 13-15 [Plf.'s Response Mem. of Law, in which Plaintiff appears to argue-without any citation to evidence-that he orally complained about his bunk bed to an unidentified IGRC Supervisor, whom Plaintiff





alleges orally informed him that a defective bunk bed is not a grievable matter]; Dkt. No. 37, Part 23 at 60, 63, 65 [Munkowitz Decl., attaching transcript of Plaintiff's deposition, apparently alluding to the same hearsay remark by the IGRC Superintendent]; Dkt. No. 38, Part 4 at 50, 52, 54, 66 [Plf.'s Motion for Summary Judgment, attaching, as exhibits, documents regarding Plaintiff's grievance about the grounds for his disciplinary conviction and not his allegedly defective bunk bed].)

104 (*See, e.g.*,Dkt. No. 42, Part 2 at 13-15 [Plf.'s Response Mem. of Law]; Dkt. No. 37, Part 23 at 60, 63, 65 [Munkowitz Decl., attaching transcript of Plaintiff's deposition]; Dkt. No. 38, Part 4 at 50, 52, 54, 66 [Plf.'s Motion for Summary Judgment, attaching exhibits regarding a grievance about a different matter].)

105 (Dkt. No. 48, Part 6, ¶¶ 4-5, 8-11 [Berlin Aff.].)

106 (Dkt. No. 37, Part 23 at 6-11 [Munkowitz Decl., attaching transcript of Plaintiff's deposition]; Dkt. No. 38, Part 4 at 58 [Plf.'s Motion for Summary Judgment, attaching medical record showing his date of birth].)

107 (Dkt. No. 37, Part 23 at 59 [Munkowitz Decl., attaching transcript of Plaintiff's deposition].)

108 (Dkt. No. 38, Part 4 at 50 [Plf.'s Motion for Summary Judgment, attaching Plaintiff's grievance dated 9/18/02, about the grounds for his disciplinary conviction]; Dkt. No. 48, Part 7 [Defs. Reply, attaching grievance dated 8/7/02, about mail room, and appeal from decision regarding that grievance].)

109 *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986); *Ciaprazi v. Goord*, 02-CV-0915, 2005 WL 3531464, at *8 (N .D.N.Y. Dec. 22, 2005) (Sharpe, J.) (adopting Report-Recommendation by Peebles, M.J.) ("[D]efendants' decision to rely ... upon the lack of evidentiary support for plaintiff's retaliation claims ... is sufficient to cast the burden upon the plaintiff to come forward with evidence demonstrating the existence of genuinely disputed material issues of fact at trial with regard to those claims.") [citations omitted].

110 *See Griffin v. Selsky*, 326 F.Supp.2d 429, 430 (W.D.N.Y.2004); *McNair v. Jones*, 01-CV03253, 2003 U.S. Dist. LEXIS 15825, at *7-8 (S.D.N.Y.2003); *Dawes v. Dibiase*, 91-CV-0479, 1997 WL 376043, at *7-8 (N.D.N.Y. July 3, 1997) (McAvoy, J.).

111 (*See, e.g.*,Dkt. No. 5, ¶ 18 [Am. Compl., containing sworn allegation that Plaintiff was sentenced to three months loss of good-time credits]; Dkt. No. 42, Part 1 [Plf.'s Response to Belarge Aff., admitting Defendants' assertion that the discretionary review of Plaintiff's disciplinary sentence did not affect Plaintiff's loss of good-time credits]; Dkt. No. 38, Part 4 at 32 [Plf.'s Motion for Summary judgment, attaching disciplinary hearing decision, showing sentence imposed]; Dkt. No. 42, Part 2 at 13 [Plf.'s Response, arguing that "even though plaintiff's good time was not reversed, expunged, or declared invalid, that by itself does not make plaintiff's claims 'not cognizable'...."].)

112 *See also Calhoun v. N.Y.S. Div. of Parole*, 999 F.2d 647, 654 (2d Cir.1993); *Prue v. City of Syracuse*, 26 F.3d 14, 17-18 (2d Cir.1994).

113 *See Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987) ( "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective reasonableness of the action.' ") (quoting *Harlow*, 457 U.S. at 819); *Benitez v. Wolff*, 985 F.2d 662, 666 (2d Cir.1993) (qualified immunity protects defendants "even where the rights were clearly established, if it was objectively reasonable for defendants to believe that their acts did not violate those rights").

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United States District Court,
N.D. New York.

Timothy A. VAIL, Plaintiff,
v.
Amber LASHWAY, Nurse Practitioner, Clinton Corr. Facility; Vonda Johnson, M.D., Facility Health Servs. Dir., Clinton Corr. Facility; and Dr. Marco Berard, M.D., Surgeon Alice Hyde Med. Ctr., Defendants.

No. 9:12–CV–1245 (GTS/RFT). | Signed Sept. 15, 2014.

**Attorneys and Law Firms**

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Hon. Eric T. Schneiderman, Attorney General for the State of New York, Gregory J. Rodriquez, Esq., Assistant Attorney General, of Counsel, Albany, NY, for Defendants.

**Opinion**

GLENN T. SUDDABY, District Judge.

***1** Currently before the Court, in this *pro se* prisoner civil rights action filed by Timothy A. Vail ("Plaintiff") against the three above-captioned Defendants, are Defendants' motion for summary judgment and United States Magistrate Judge Randolph F. Treece's ReportRecommendation recommending that Defendants' motion be granted and that Plaintiff's Complaint be dismissed. (Dkt.Nos.37, 43, 51.) Plaintiff has not filed an Objection to the Report–Recommendation, and the deadline by which to do so has expired. (*See generally* Docket Sheet.) For the reasons set forth below, the Report–Recommendation is adopted in its entirety, Defendants' motion is granted, and Plaintiff's Complaint is dismissed.

Generally, in his Report–Recommendation, Magistrate Judge Treece rendered the following conclusions: (1) Plaintiff has failed to establish an Eighth Amendment medicalindifference claim against (a) Defendants Lashway, Johnson, and Berard for failing to administer pain medication, (b) Defendants Lashway and Johnson for failing to address Plaintiff's withdrawal symptoms after his Ultram prescription was discontinued, (c) Defendants Lashway and Johnson for failing to properly and timely treat Plaintiff's dislocated shoulder and knee injury, (d) Defendant Berard for failing to timely treat Plaintiff's shoulder injury, and (c) Defendants Lashway, Johnson and Berard with respect to a "handful" of missed appointments during Plaintiff's treatment period; (2) Plaintiff has failed to establish a First Amendment retaliation claim alleging that Defendants conspired to deny him medical care as a result of Plaintiff's filing grievances concerning his medical treatment; and (3) Plaintiff has failed to establish a supervisory-liability claim against Defendant Johnson with regard to any constitutional violations (allegedly) committed by Defendants Lashway and/or Berard. (Dkt. No. 51, at Parts II.B. to II.D.) Familiarity with the factual findings supporting these conclusions is assumed in this Decision and Order, which is intended primarily for review by the parties.

Where, as here, *no* objection is made to a portion of a report-recommendation, the Court subjects that portion of the report-recommendation to only a *clear error* review. Fed.R.Civ.P. 72(b), Advisory Committee Notes: 1983 Addition. When performing such a "clear error" review, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Id.*; *see also Batista v. Walker*, 94–CV–2826, 1995 WL 453299, at *1 (S.D.N.Y. July 31, 1995) (Sotomayor, J.) ("I am permitted to adopt those sections of [a magistrate judge's] report to which no specific objection is made, so long as those sections are not facially erroneous.") (internal quotation marks and citations omitted).

After carefully reviewing the relevant filings in this action, the Court can find no clear error in the Report–Recommendation: Magistrate Judge Treece employed the proper standards, accurately recited the facts, and reasonably applied the law to those facts. As a result, the Court accepts and adopts the Report–Recommendation for the reasons stated therein. (Dkt. No. 51.)

***2 ACCORDINGLY,** it is

**ORDERED** that Magistrate Judge Treece's Report–Recommendation (Dkt. No. 51) is ***ACCEPTED*** and ***ADOPTED*** in its entirety; and it is further

**ORDERED** that Plaintiff's Complaint (Dkt. No. 1) is ***DISMISSED.***





***REPORT–RECOMMENDATION and ORDER***

RANDOLPH F. TREECE, United States Magistrate Judge.

*Pro se* Plaintiff Timothy Vail brings this Complaint, pursuant to 42 U.S.C. § 1983, alleging that Defendants failed to provide him with constitutionally adequate medical care and retaliated against him for exercising his First Amendment right to file grievances. *See generally* Dkt. No. 1, Compl. Defendants now move, pursuant to Fed.R.Civ.P. 56, for summary judgment. Dkt. No. 37, Defs.' Summ. J. Mot. Plaintiff opposes the Motion. Dkt. No. 43. For the reasons that follow, we recommend that the Defendants' Motion be **GRANTED.**

**I. STANDARD OF REVIEW**

Pursuant to FED. R. CIV. P. 56(a), summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The moving party bears the burden to demonstrate through "pleadings, depositions, answers to interrogatories, and admissions on file, together with [ ] affidavits, if any," that there is no genuine issue of material fact. *F.D.I. C. v. Giammettei*, 34 F.3d 51, 54 (2d Cir.1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "When a party has moved for summary judgment on the basis of asserted facts supported as required by [FED. R. CIV. P. 56(e) ] and has, in accordance with local court rules, served a concise statement of the material facts as to which it contends there exist no genuine issues to be tried, those facts will be deemed admitted unless properly controverted by the nonmoving party." *Glazer v. Formica Corp.*, 964 F.2d 149, 154 (2d Cir.1992).

To defeat a motion for summary judgment, the non-movant must set out specific facts showing that there is a genuine issue for trial, and cannot rest merely on allegations or denials of the facts submitted by the movant. FED. R. CIV. P. 56(c); *see also Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir.2003) ( "Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment when the moving party has set out a documentary case."); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525–26 (2d Cir.1994). To that end, sworn statements are "more than mere conclusory allegations subject to disregard ... they are specific and detailed allegations of fact, made under penalty of perjury, and should be treated as evidence in deciding a summary judgment motion" and the credibility of such statements is better left to a trier of fact. *Scott v. Coughlin*, 344 F.3d at 289 (citing *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir.1983) and *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir.1995)).

When considering a motion for summary judgment, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. *Nora Beverages, Inc. v. Perrier Group of Am., Inc.*, 164 F.3d 736, 742 (2d Cir.1998). "[T]he trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir.1994). Furthermore, where a party is proceeding *pro se*, the court must "read [his or her] supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994), *accord, Soto v. Walker*, 44 F.3d 169, 173 (2d Cir.1995). Nonetheless, mere conclusory allegations, unsupported by the record, are insufficient to defeat a motion for summary judgment. *See Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir.1991).

**II. DISCUSSION**

**A. Background**

***3** Except where noted, the following facts are undisputed.

On July 6, 2003, while attempting to escape from Elmira Correctional Facility, Plaintiff fell thirty to forty feet off of an exterior wall, causing him to injure, *inter alia*, his left shoulder. Dkt. No. 37–1, Defs.' Statement of Material Facts Pursuant to Local Rule 7.1(a)(3) (hereinafter "Defs.' 7.1 Statement"), at Ex. 1, Elmira Escape R., dated Mar. 19, 2004; Compl. at ¶¶ 1 & 2.[1] Subsequently, while he was incarcerated at Clinton Correctional Facility ("CCF") where nurse practitioner Defendant Amber Lashway acted as Plaintiff's primary care provider ("PCP") from June of 2005 through May of 2010. Dkt. No. 37–5, Amber Lashway Decl., dated Dec. 19, 2013, at ¶¶ 3 & 6.

On December 15, 2006, in response to Plaintiff's complaints about shoulder pain, Defendant Berard, an orthopedic surgeon at Alice Hyde Medical Center ("AHMC"), ordered an x-ray, MRI, and other diagnostic tests. Dkt. No. 39, Portions of Pl.'s AHMC Med. R., at p. 000026; Dkt. No. 37–7, Marco R. Berard Decl., dated Dec. 23, 2013, at ¶¶ 2 & 5–6. On May 18, 2007, after reviewing the results of Plaintiff's diagnostic tests, Defendant Berard concluded that Plaintiff had a "partial thickness tear of the supraspinatus tendon." Defendant Berard recommended that Plaintiff receive physical therapy ("PT") for his left shoulder three times a week for two months. Berard Decl. at ¶ 7; AHMC Med. R. at p. 000028.

On May 22, 2007, Defendant Lashway prescribed Motrin for Plaintiff. On May 24, Plaintiff reported that he was unable to take the Motrin because it hurt his stomach, and Defendant Lashway prescribed Celebrex. On July 10, at Plaintiff's request, Defendant Lashway discontinued Plaintiff's Celebrex prescription and prescribed Tylenol. On August 9, Defendant Lashway prescribed Ultram, in crushed form, for treatment of Plaintiff's shoulder pain. Lashway Decl. at ¶¶ 9–12; Dkt. No. 38, Portions of Pl.'s CCF Med. R., at pp. 7–9.[2] On September 14, Defendant Berard recommended that Plaintiff undergo surgery on his left shoulder, and Plaintiff consented. Berard Decl. at ¶ 10; AHMC Med. R. at pp. 000029–30; Compl. at ¶ 13. In his report, Defendant Berard noted that Plaintiff's pain was a "6 to 7 out of 10" and that he was suffering from "daily pain." AHMC Med. R. at p. 000029. "Thereafter, Plaintiff ... participated in a number of ongoing sessions of physical therapy ... until ... October 31, 2008."Compl. at ¶ 15.

On September 20, 2007, Plaintiff was accused of hoarding a dose of Ultram. Nonetheless, on November 5, Defendant Lashway renewed Plaintiff's Ultram prescription. Lashway Decl. at ¶¶ 14–15; CCF Med. R. at pp. 5–6. On December 20, Defendant Berard performed surgery on Plaintiff's left shoulder; in his discharge directions, Dr. Berard recommended that Plaintiff receive Tylenol # 3[3] every four hours as needed for pain. Berard Decl. at ¶ 12; AHMC Med. R. at pp. 000031–35. On January 30, 2008, Defendant Lashway renewed Plaintiff's Ultram prescription. Lashway Decl. at ¶ 19; CCF Med. R. at p. 3.

*4 On August 14, 2008, Plaintiff complained to a nurse about right knee pain; it was noted that he was already taking Ultram. On August 22, Plaintiff's prescription for acetaminophen (the generic for Tylenol) was renewed to be taken every six hours as needed. On September 23, Plaintiff's prescription for Ultram was renewed. Lashway Decl. at ¶¶ 20–22; CCF Med. R. at pp. 92–94.

On October 2, 2008, Defendant Lashway requested a consultation with an orthopedic surgeon in response to Plaintiff's complaints of pain in his left shoulder. Lashway Decl. at ¶ 23; CCF Med. R. at p. 91. On January 30, 2009, Defendant Berard recommended surgery after examining Plaintiff's left shoulder and Plaintiff consented. Berard Decl. at ¶ 13; AHMC Med. R. at pp. 000035–38. Defendant Berard performed the surgery on March 10, 2009; in his discharge instructions Defendant Berard recommended that Plaintiff be given Tylenol # 3 every four hours as needed for pain. Berard Decl. at ¶ 14; AHMC Med. R. at pp. 000039–41. On March 11, Defendant Doctor Johnson, the Facility Health Services Director at CCF, examined Plaintiff and prescribed Ultram during the two weeks following the surgery. Dkt. No. 37–6, Vonda Johnson Decl., dated Dec. 18, 2013, at ¶¶ 2 & 8; CCF Med. R. at p. 89.

On March 3, 2009, an MRI of Plaintiff's right knee revealed a medial meniscus tear. Lashway Decl. at ¶ 24; CCF Med. R. at p. 90.

On April 10, 2009, Plaintiff was seen by Defendant Berard's colleague Dr. Macelaru,[4] who initially recommended that Plaintiff undergo a third surgery; however, Plaintiff was weary of more surgery and elected PT instead. Compl. at ¶ 17. Dr. Macelaru recommended that Plaintiff "start/continue physical therapy for shoulder instability and to follow up in two months for possible additional therapy if there was no improvement." Berard Decl. at ¶ 15; CCF Med. R. at p. 62. On April 7, Defendant Lashway renewed Plaintiff's Ultram prescription for thirty days. Lashway Decl. at ¶ 28; CCF Med. R. at p. 88. On April 14, Defendant Lashway submitted a request for PT for Plaintiff's left shoulder due to instability and pain. Lashway Decl. at ¶ 29; CCF Med. R. at pp. 62 & 64. On April 30, Plaintiff saw the physical therapist who recommended PT twice a week for six weeks. Lashway Decl. at ¶ 31; CCF Med. R. at p. 62; Compl. at ¶ 19.

On May 5, 2009, Plaintiff was caught hoarding a dose of Ultram. Compl. at ¶ ¶ 20–22; Lashway Decl. at ¶ 32; CCF Med. R. at p. 87. On May 7, Defendant Lashway ordered that Plaintiff's Ultram prescription be discontinued. Lashway Decl. at ¶ 32; CCF Med. R. at p. 87. Plaintiff received his last dose of Ultram on the evening of May 7. Compl. at ¶ 26. On the morning of May 8, 2009, Nurse Badger[5] came to Plaintiff's cell in the morning and explained that





his Ultram Prescription had been discontinued. Plaintiff told Nurse Badger that if he did not receive a dose of Ultram he would begin to go through withdrawal; Nurse Badger agreed to speak with Defendant Johnson regarding the situation. Compl. at ¶¶ 27–28.

*5 Plaintiff also submitted a sick call request on May 8, 2009, claiming that he was still in pain due to his shoulder, but making no mention of withdrawal symptoms. *Id.* at ¶ 28; Dkt. No. 1–1, Pl.'s Exs. to Compl. (hereinafter "Pl.'s Exs."), at p. 13.[6] Additionally, Plaintiff wrote a letter to Nurse Practitioner Lashway, in which he noted that his Ultram had been taken away and requested that it be reinstated; the letter did not mention withdrawal. Compl. at ¶ 29; Pl.'s Exs. at pp 14–1'. On the morning of May 9, Nurse Badger told Plaintiff that she had spoken to Defendant Johnson about "his situation," but that she would not be reinstating his Ultram and any concerns about medication should be made to Plaintiffs PCP; withdrawal was not mentioned. Compl. at ¶ 31.

On May 9, 2009, Plaintiff submitted another sick call request, which stated "Need to see FNP Ms. Lashway—Provider—To address Shoulder and Knee Issues."Compl. at ¶ 31; Pl.'s Exs. at p. 17. Plaintiff submitted an additional request on May 11, 2009, which stated: "Need to see FNP Ms. Lashway—Provider—cannot move due to pain in [sic] pressure on area with tear."Compl. at ¶ 32; Pl.'s Exs. at p. 18. Neither request mentioned withdrawal symptoms. Plaintiff alleges that Defendant Lashway wrote to Plaintiff on May 12 that his Ultram had been discontinued due to the fact that the drug was not medically necessary two months post-surgery, and because he had been caught hoarding the medication. Compl. at ¶ 33; Pl.'s Exs. at p. 19. Contrariwise, Defendant claims that she actually met with Plaintiff on May 12. Lashway Decl. at ¶ 34.[7] Defendant Lashway noted in Plaintiff's medical record that Plaintiff was two months post-surgery, had no future need for Ultram and had been caught hoarding the drug on May 5. She prescribed Motrin as needed for seven days. Lashway Decl. at ¶ 34; CCF Med. R. at p. 85.

On May 13, 2009, Plaintiff wrote a letter to Nurse Administrator B. Lecuyer[8] expressing his desire to reinstate his Ultram prescription. The letter mentions that Plaintiff was experiencing pain and discomfort, trouble sleeping, and that he was not weaned off of Ultram. Plaintiff also explained that his knee problem had not been addressed by anyone, and taking ibuprofen caused him to experience side effects, including "rapid heart beat, dizziness, [and] burning in [his] stomach, to name a few."Compl. at ¶ 37; Pl.'s Exs. at pp. 21–22. On May 14, Plaintiff filed a grievance, which noted that his Ultram prescription had been discontinued but does not mention that he was suffering from symptoms of withdrawal. Compl. at ¶ 38; Pl.'s Exs. at pp. 23–24.

On May 15, 2009, Plaintiff received a response from Nurse Administrator B. Lecuyer noting that his medical records revealed his Ultram prescription was discontinued due to the fact that he was caught "cheeking" his pill. Compl. at ¶ 39; Pl.'s Exs. at p. 25. Plaintiff also received a note from Defendant Lashway on May 15, noting that she had advised him on May 12 that his Ultram prescription had been discontinued, and that the Motrin she prescribed would be effective for his knee pain. Compl. at ¶ 39; Pl.'s Exs. at p. 26.

*6 On May 16, 2009, Plaintiff wrote a letter to a friend, Shireen Dunlop, asking her to intervene on his behalf by writing letters to "the head dept." and Dr. Lester Wright,[9] "the director of health services, central office."Compl. at ¶ 43; Pl.'s Exs. at pp. 28–29. Although Plaintiff relayed to Dunlop that he was in constant pain and experiencing side effects from the new medication, he failed to mention withdrawal at all. *Id.* On May 20, Mrs. Dunlop, wrote to Superintendent of CCF, Dale Artus,[10] and Dr. Wright, noting that Plaintiff should not have been taken off of his medication "abruptly ... due to the withdrawals." Compl. at ¶ 47; Pl.'s Exs. at p. 34; Pl.'s Exs. at pp. 85–89, Shireen M. Dunlop Aff., dated April 19, 2012, at ¶ 10. There is no evidence to suggest that this letter was ever seen by Defendants.

On May 18, 2009, Plaintiff submitted a sick call request, noting that his "meds" were discontinued on May 7, that he was experiencing difficulty sleeping, pain in his right knee and shoulder, and that he could not take the medicine that was provided due to side effects. Compl. at ¶ 44; Pl.'s Exs. at p. 30. This request did not mention symptoms of withdrawal. That same day, Plaintiff wrote to Superintendent Artus complaining about being taken off of his Ultram medication abruptly, the side effects he was experiencing from the Motrin and ibuprofen, the pain in his shoulder, and his inability to participate in PT; however, Plaintiff failed to mention any symptoms of withdrawal. Compl. at ¶ 45; CCF Med. R. at pp. 74–75. On May 19, Plaintiff's letter to the Superintendent was forwarded to First Deputy Superintendent Thomas LaValley,[11] for his review and action. Compl. at ¶ 46; CCF Med. R. at p. 73.

On May 22, 2009, Defendant Johnson responded to the letter Plaintiff wrote to Superintendent Artus, noting:

> You were found to be misusing/ abusing your prescribed medication, to which you admit. It was your provider's decision to discontinue that medicine because she is not obligated nor comfortable continuing to prescribe medication for you to misuse or abuse. If the ibuprofen is upsetting your stomach, you can try taking it with an acid reducer. You can discuss this with Ms. Lashway when you see her—you have been scheduled to see her next week. Until then I have prescribed acetaminophen for you to use ... for pain.

Compl. at ¶ 49; CCF Med. R. at pp. 72 & 78 (noting that T. LaValley forwarded Plaintiff's letter to Defendant Johnson).

Although Plaintiff reported to PT for his shoulder on April 30 and May 13, 2009, he refused to participate on May 15, 20, and 22. CCF Med. R. at pp. 58–62; Compl. at ¶¶ 19 & 42; Lashway Decl. at ¶ 37. On May 22, Plaintiff's physical therapist recommended that Plaintiff's PT be discontinued due to his consistent refusal to attend. Lashway Decl. at ¶ 37; CCF Med. R. at p. 58. Plaintiff's PT was discontinued on May 26. Lashway Decl. at ¶ 38; CCF Med. R. at p. 57. On May 27, Plaintiff requested an appointment with a specialist regarding his left shoulder. Compl. at ¶ 50; Pl.'s Exs. at p. 36.

*7 On May 28, 2009, Defendant Lashway saw Plaintiff. Defendant Lashway explained that Plaintiff was discharged from PT by the provider. Defendant Lashway further advised Plaintiff that she was aware of the results of the MRI on his right knee, and that Motrin was adequate for pain control. Plaintiff requested that his Ultram prescription be reinstated, and told Defendant Lashway that he could not take either Motrin or Tylenol. When Defendant Lashway asked why Plaintiff could not take either drug Plaintiff responded "you know, I just can't, I don't need to tell you."Lashway Decl. at ¶ 39; CCF Med. R. at p. 83. Contrariwise, Plaintiff argues that at this appointment he reminded Defendant Lashway of all the drugs she had prescribed in the past and his history of issues with those drugs. Compl. at ¶ 51. Nonetheless, it is uncontested that after this appointment, Defendant Lashway requested an orthopedic consultation for Plaintiff's right knee. Lashway Decl. at ¶ 39; Compl. at ¶ 51.

On May 28, 2009, after meeting with Defendant Lashway, Plaintiff wrote to Nurse Administrator B. Lecuyer, noting that he attempted to speak to Defendant Lashway about his shoulder but was informed that due to his failure to participate in PT his concerns with his shoulder would not be addressed, and Defendant Lashway would only address Plaintiff's concerns regarding his knee. Additionally, Plaintiff informed B. Lecuyer that "[he] was discontinued on all [his] pain medications by FNP Lashway without acknowledging any protocol procedures in weaning a person off the medication [he] was taking for more than 2yrs continuously [sic], thus [he] had to endure the suffering of withdraw [al.]" Compl. at ¶ 52; Pl.'s Exs. at pp. 38–39. That same day Plaintiff also wrote to Lester Wright, reiterating his concerns regarding his shoulder, his issues with taking Motrin and ibuprofen, and —without describing them—noting that after his Ultram was discontinued, he suffered "serious" symptoms of withdrawal. Compl. at ¶ 53; Pl.'s Exs. at pp. 40–42.

On May 29, 2009, Plaintiff requested an additional appointment with Defendant Lashway regarding his shoulder pain. Compl. at ¶ 55; Pl.'s Exs. at p. 43. On June 1, Nurse Administrator B. Lecuyer responded to Plaintiff's May 28 letter, noting that Nurse Lashway had already submitted a consultation request for a visit with an outside specialist. Compl. at ¶ 56; Pl.'s Exs. at p. 44. Plaintiff maintains that this referral was for treatment of his knee injury only. Compl. at ¶ 56.

On June 2, Plainiff submitted a grievance complaining that his shoulder issues were being ignored. Compl. at ¶ 57; Pl.'s Exs. at p. 45. That same day, Plaintiff requested an appointment with a specialist. Compl. at ¶ 58; Pl.'s Exs. at p. 46. On June 8, Plaintiff submitted a sick call request noting that he required attention for his shoulder and that he had not received any medication except for twelve to fourteen Tylenol per day. Compl. at ¶ 60; Pl.'s Exs. at p. 48; Lashway Decl. at ¶ 40; CCF Med. R. at pp. 81–82.

*8 On June 11, the Inmate Grievance Resolution Committee ("IGRC") denied Plaintiff's May 14 and June 2, 2009 grievances, noting that his medication had been discontinued due to misuse, and that Plaintiff had been seen by an orthopedic specialist who recommended PT, but that PT was discontinued due to Plaintiff's repeated refusals to attend. Compl. at ¶ 61; Pl.'s Exs. at pp. 49–50. On June 18, Plaintiff complained of his inability to receive care for his shoulder to Thomas LaValley. Compl. at ¶ 64. On June





19, the Superintendent's Office upheld the IGRC's findings with regard to Plaintiff's grievances, noting that Plaintiff had been seen for his left shoulder injury, had been prescribed PT, which was ultimately discontinued due to his failure to participate, and that he had been prescribed Motrin and Tylenol for pain management. Compl. at ¶ 65; Pl.'s Exs. at pp. 54–55.

On June 19, Plaintiff wrote to Nurse Administrator B. Lecuyer asking for additional care for his shoulder, and noting that "I have only [T]ylenol, which I have to take 10–12 for a couple hr. [sic] relief."Compl. at ¶ 67; Pl.'s Exs. at p. 57. On June 23, 2009, Nurse Administrator B. Lecuyer responded to Plaintiff's June 19 letter, noting that the nurse practitioner had advised that he had been prescribed PT, but that it was discontinued due to his own non-compliance. Compl. at ¶ 68; Pl.'s Exs. at p. 58.

On June 25, 2009, Plaintiff received a letter from Superintendent Artus informing him that the Superintendent had spoken to Defendant Johnson regarding his medication issues, and that Defendant Johnson assured him that after his upcoming orthopedic appointment, his need for PT and medication would be evaluated. Compl. at ¶ 70; Pl.'s Exs. at p. 60. On June 26, Defendant Johnson wrote to Plaintiff and informed him that "I believe Ms. Lashway has spoken to you recently re: plans to address your orthopedic issue. You will be seeing the orthopedist very soon and we will devise a plan from that point."Johnson Decl. at ¶ 15; CCF Med. R. at p. 71; Compl. at ¶ 71.

On July 3, 2009, Plaintiff was seen by Defendant Berard, who evaluated his right knee and recommended surgery, but refused to examine Plaintiff's shoulder. Compl. at ¶ 72; Pl.'s Exs. at p. 62; CCF Med. R. at pp. 40–42. On July 13, Plaintiff filed a grievance complaining that he had been told by Corrections Officer Martin [12] that he would be seen by his provider on June 9, but that callouts were cancelled due to an emergency, and that he was told he would be seen on July 13, but that no one came to get him. Compl. at ¶ 74; Pl.'s Exs. at p. 64. On July 29, Plaintiff was informed that "a call out with the Physical therapist to address shoulder issues has been scheduled in the near future. On 7/21/09 the Facility Nurse Practitioner ordered Tylenol medication to help the discomfort. A callout with the facility Nurse Practitioner to address the shoulder issue is scheduled in the very near future."Compl. at ¶ 76; Pl.'s Exs. at p. 67.

*9 On July 21, 2009, Defendant Lashway submitted a new request for PT for Plaintiff's left shoulder. Lashway Decl. at ¶ 41; CCF Med. R. at pp. 55–56. Under the section entitled "REASON FOR CONSULTATION," Defendant Lashway noted that "IN PAST HE REFUSED [PHYSICAL THERAPY] SERVICES ... HE HAS SINCE AGREED TO ATTEND PHYSICAL THERAPY SERVICES AND FOLLOW THEIR RECOMMENDATIONS."CCF Med. R. at p. 54. On July 30, 2009, Plaintiff met with a physical therapist, regarding his left shoulder, who recommended that Plaintiff undergo PT twice a week for six weeks. *Id.* Plaintiff received PT for his left shoulder on August 11, 14, 18, and 21. *Id.* at pp. 47 & 49–51; Lashway Decl. at ¶ 42.

On August 25, 2009, Dr. Berard performed surgery on Plaintiff's right knee. In his discharge instructions, Defendant Berard recommended that Plaintiff be given Tylenol # 3 post-operation for pain. Berard Decl. at ¶ 17; AHMC Med. R. at pp. 000044–47. Plaintiff received Tylenol # 3 every four hours, the day after the surgery. Thereafter, Plaintiff was provided with a thirty-day supply of ibuprofen for pain management. [13] Compl. at ¶¶ 81–84. On August 26, 2009, Plaintiff was referred for PT on his right knee. CCF Med. R. at p. 48. Thereafter, Plaintiff received PT on his left shoulder and/or right knee on September 1, 3, 8, 11, 15, 22, 24, and October 1, 2009. *Id.* at pp. 23–25, 27–30, 34, & 38; Lashway Decl. at ¶ 42. On October 8, all of Plaintiff's PT was discontinued by his therapist. Lashway Decl. at 44; CCF Med. R. at p. 22.

On January 7, 2010, Defendant Lashway referred Plaintiff for an orthopedic consultation for his left shoulder and an MRI for his right knee based on his complaints that he had fallen and reinjured his knee. Lashway Decl. at ¶ 46; CCF Med. R. at p. 21. On February 9, 2010, Plaintiff was referred for PT on his right knee. CCF Med. R. at p. 20. On February 18 and March 4, Plaintiff refused to participate in PT for his right knee. *Id.* at pp. 18–19. Nonetheless, Plaintiff was provided PT for his right knee on March 25. *Id.* at p. 16. On March 22, Plaintiff's physical therapist noted that Plaintiff had no new complaints, and that he was making "slow progress" and should continue PT twice a week. Pl.'s Exs. at p. 82. Per Defendant Lashway's January 7 consultation request, Defendant Berard met with Plaintiff regarding his left shoulder on March 26. Defendant Berard found no remaining instability in Plaintiff's shoulder and recommended that he receive PT twice a week for one more month and continue PT on his own thereafter. *Id.* at pp. 17 & 78; Berard Decl. at ¶ 18.

Plaintiff received PT on his right knee on April 6, 2010. CCF Med. R. at pp. 15. On April 9, 13, and 16, Plaintiff refused to participate in PT sessions for his left shoulder, prompting Plaintiff's physical therapist to request that his PT be discontinued on April 16. *Id.* at pp. 12–14.[14] On May 19, 2010, Plaintiff was transferred from CCF to Shawangunk Correctional Facility. *Id.* at p. 76; Compl. at ¶ 96.

**B. Deliberate Medical Indifference**

***10** To state an Eighth Amendment claim for denial of adequate medical care, a prisoner must demonstrate that prison officials acted with "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). "[T]he plaintiff must allege conduct that is 'repugnant to the conscience of mankind' or 'incompatible with the evolving standards of decency that mark the progress of a maturing society.' " *Ross v. Kelly*, 784 F.Supp. 35, 44 (W.D.N.Y.), *aff'd*,970 F.2d 896 (2d Cir.1992) (quoting *Estelle v. Gamble*, 429 U.S. at 102, 105–06). To state a claim for denial of medical care, a prisoner must demonstrate (1) a serious medical condition and (2) deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 834–35 (1994); *Hathaway v. Coughlin ("Hathaway I")*, 37 F.3d 63, 66 (2d Cir.1994).

The seriousness element is an objective test, to determine whether the deprivation of care is sufficiently serious "entails two inquiries." *Salahuddin v. Goord*, 467 F.3d 263, 279 (2d Cir.2006) (citations omitted). First, courts must determine "whether the prisoner was actually deprived of adequate medical care." *Id.* Medical care is "adequate" where the care provided is a "reasonable" response in light of the "health risk" the inmate faces. *Id.* at pp. 279–80. The second inquiry requires a determination of "whether the inadequacy in medical care is sufficiently serious." *Id.* at p. 280. In cases where medical care is denied, courts focus on the seriousness of the underlying medical condition. *Id.* (citing *Smith v. Carpenter*, 316 F.3d 178, 185–86 (2d Cir.2003). Some of the factors that determine whether a prisoner's medical condition is serious include: "1) whether a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment, 2) whether the medical condition significantly affects daily activities, and 3) the existence of chronic and substantial pain." *Brock v. Wright*, 315 F.3d 158, 162–63 (2d Cir.2003) (internal quotation marks and citations omitted) (noting that an inmate is not required to show "that he or she experiences pain that is at the limit of human ability to bear, nor [does the court] require a showing that his or her condition will degenerate into a life threatening one").

Whereas, the "seriousness inquiry is narrower" in cases where "the prisoner is receiving ongoing treatment and the offending conduct is an unreasonable delay or interruption in that treatment." *Salahuddin v. Goord*, 467 F.3d at 280 (citing *Smith v. Carpenter*, 316 F.3d at 185)). In such cases, courts "focus [ ] on the challenged delay or interruption in treatment rather than the prisoner's underlying medical condition alone." *Id.* The question becomes whether delaying treatment subjected Plaintiff to any serious risk of harm. To that end, the Second Circuit has instructed us that "the severity of the alleged denial of medical care should be analyzed with regard to all relevant facts and circumstances." *Smith v. Carpenter*, 316 F.3d at 187. In this regard, "the actual medical consequences that flow from the alleged denial of care will be highly relevant to the question of whether the denial of treatment subjected the prisoner to a significant risk of serious harm." *Id.* Determining whether the inadequacy/delay presents a sufficiently serious risk "requires the court to examine how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner." *Id.* (citing *Helling, v. McKinney*, 509 U.S. 25, 32–33 (1993)).

***11** The second element, deliberate indifference, is based on a subjective standard. To establish deliberate indifference a plaintiff must demonstrate that the defendant acted with a culpable mental state, similar to criminal recklessness. *Wilson v. Seiter*, 501 U.S. 294, 301–03 (1991); *Hathaway I*, 37 F.3d at 66. A plaintiff must demonstrate that the defendant acted with reckless disregard to a known substantial risk of harm. *Farmer v. Brennan*, 511 U.S. at 836. This requires "something more than mere negligence ... [but] something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id.* at 835; *see also Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir.1996) (citing *Farmer* ). Further, a showing of medical malpractice is insufficient to support an Eighth Amendment claim unless "the malpractice involves culpable recklessness, i.e., an act or a failure to act by the prison doctor that evinces 'a conscious disregard of a substantial risk of serious harm.' " *Chance v. Armstrong*, 143 F.3d at 702 (quoting *Hathaway v. Coughlin ("Hathaway II")*, 99 F.3d 550, 553 (2d Cir.1996)); *see also Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir.2003) (citations omitted). Although a delay in providing necessary medical care may in some cases constitute deliberate indifference, such a classification is reserved "for cases in





which, for example, officials deliberately delayed care as a form of punishment; ignored a lifethreatening and fast degenerating condition for three days; or delayed major surgery for over two years." *Freeman v. Stack*,2000 WL 1459782, at *6 (S.D.N.Y. Sep. 29, 2000).

Construed liberally, Plaintiff's Complaint alleges that Defendants provided constitutionally inadequate care for his shoulder, knee, and withdrawal symptoms.

***1. Denial of Care***

**a. Withdrawal**

Plaintiff alleges that Defendants Lashway and Johnson denied him treatment for the symptoms of withdrawal that he experienced after his Ultram medication was discontinued by Defendant Lashway on May 7, 2009. *See* Compl. at ¶¶ 26, 28, & 102–103. According to Plaintiff, for a week and a half to two weeks after the Ultram was discontinued he suffered from withdrawal symptoms, which included: stomach cramps, diarrhea, lack of sleep, aches all over his body, and a migraine headache that would not go away. Compl. at ¶ 35. However, as explained below, even if we accept, *arguendo*, that these injuries were sufficiently serious for purposes of the Eighth Amendment, there is no evidence to suggest that Defendants Lashway and Johnson were aware of Plaintiff's withdrawal symptoms until after they subsided.

As noted above, Plaintiff's Ultram medication was discontinued by Defendant Lashway on May 7, 2009, based on her belief that Plaintiff had been misusing/abusing the drug, and her medical belief that Ultram was no longer necessary to treat Plaintiff's pain two months after his surgery. On May 8, upon being notified that his Ultram prescription had been discontinued, Plaintiff informed Nurse Badger that he would begin to suffer from withdrawal if he did not get his pills; Nurse Badger agreed to speak with Defendant Johnson about Plaintiff's Ultram prescription. Compl. at ¶¶ 26–28. It is unclear whether Defendant Badger actually mentioned Plaintiff's fear of impending withdrawal to Defendant Johnson. However, even if Nurse Badger had told Defendant Johnson that Plaintiff believed he would start to experience symptoms of withdrawal if he did not receive more Ultram, Defendant Johnson cannot be found to have been deliberately indifferent toward a purely speculative condition. *See Alston v. Bendheim*, 672 F.Supp.2d 378, 386 (S.D.N.Y.2009). Even where the doctor allegedly knows that the medication contains addictive attributes and that the patient has been taking it for an extended period of time, the failure by the doctor to predict the patient's addiction and withdrawal amounts to nothing more than negligence or malpractice; tortious conduct which is not actionable under § 1983. *Id.*

***12** Moreover, although Plaintiff and Mrs. Dunlop wrote numerous letters and made multiple sick call requests between May 7 and May 21, 2009, these letters and requests either did not mention withdrawal or Plaintiff's symptoms, or, in the case of the letter written on Plaintiff's behalf by Mrs. Dunlop, were not addressed to Defendants. CCF Med. R. at pp. 74–75; Pl.'s Exs. at pp. 13–15, 17–18, 21–24, 28–30, 34, & 36. At the earliest, Defendants Johnson and Lashway received notice that Plaintiff was suffering severe symptoms of withdrawal on May 28, 2009. On that day, Plaintiff alleges that he met with Defendant Lashway and discussed his medication issues with her; furthermore, the record reflects that he also sent letters to Lester Wright and Nurse Administrator B. Lecuyer in which he mentioned that he had been forced to suffer "severe" symptoms of withdrawal. Lashway Decl. at ¶ 39; CCF Med. R. at p. 83; Compl. at ¶¶ 52–53; Pl.'s Exs. at pp. 38–39 & 40–42.

Crucially, by his own admission, Plaintiff's withdrawal symptoms only lasted between a week and a half and two weeks, and therefore, would have already subsided by May 28, 2009. Compl. at ¶ 35. Thus, it cannot be established that either Defendant Lashway or Johnson knew of, let alone consciously disregarded, Plaintiff's severe symptoms of withdrawal. *See Hathaway v. Coughlin*, 37 F.3d at 66 (to establish deliberate indifference, the defendant must "know[ ] of and disregard [ ] an excessive risk to inmate health or safety").

Accordingly, we recommend that Defendants' Motion be **GRANTED** with respect to Plaintiff's claims that Defendants Johnson and Lashway denied him treatment for his symptoms of withdrawal.

**b. Shoulder**

Plaintiff's shoulder injury caused him to suffer from severe pain on a daily basis and interfered with his ability to use his left arm. Moreover, as noted above, Plaintiff's shoulder injury was sufficiently serious enough to warrant, *inter alia*, an MRI and x-ray, visits with specialists, PT, pain killers, and

multiple surgeries. *See supra* Part II. A. Thus, Plaintiff has established that his shoulder injury is an objectively serious medical condition for purposes of the Eighth Amendment. *See Chance v. Armstrong*, 143 F.3d at 702.

Yet, as noted above, Defendants provided or recommended a host of treatments including: consultations with outside specialists, x-rays, MRIs, PT, three surgeries, and pain medications such as cortisone shots, Tylenol, Celebrex, Motrin, Ultram, and Tylenol # 3, *see supra* Part II.A. Documented evidence of such extensive, frequent, and appropriate treatments are in and of themselves sufficient to dispel any notion that these Defendants outright denied Plaintiff adequate medical care for the treatment of his shoulder. *Cf. Buffaloe v. Fein*, 2013 WL 5815371, *8 (S.D.N.Y. Oct. 24, 2013) (collecting cases in support of the proposition that "the high frequency of care could reasonably have assured Dr. Bernstein that there was no denial or delay of care"); *see also Harrington v. Mid–State Corr. Facility*, 2010 WL 3522520 (N.D.N.Y. May 21, 2010) (finding that defendant doctors' "actions of referring [plaintiff's] care to a specialist, more familiar with the intricacies of [plaintiff's] subjective symptoms, belies any claims of deliberate indifference. Referring for specialist care, explaining the specialist's findings, and referring for further diagnostic follow-up are all appropriate treatment actions.") (citing *Dean v. Coughlin*, 804 F.2d 207, 215 (2d Cir.1986)).

***13** Nonetheless, Plaintiff alleges that he was denied medical care for his shoulder: (i) by Defendants Johnson, [15] Lashway, and Berard for their failure to administer proper pain medication to Plaintiff; and (ii) when Defendant Berard refused to look at Plaintiff's left shoulder during a consultative examination of his right knee on July 3, 2009.

***i. Pain Medication***

Plaintiff's claims that he was denied adequate treatment for his knee and shoulder injuries because each of the Defendants failed to provide him with proper pain medication are unavailing. *See* Compl. at ¶¶ 102–106. Neither Defendant Lashway's decision to discontinue Plaintiff's Ultram prescription on May 7, 2009, nor her or Defendant Johnson's subsequent refusals to reinstate his Ultram prescription, constituted deliberate indifference. *See Wright v. Genovese*, 694 F.Supp.2d 137, 160 (N.D.N.Y.2010) ("Differences in opinion between a doctor and an inmate patient as to the appropriate pain medication clearly do not support a claim that the doctor was deliberately indifferent to the inmate's serious medical needs."). This is particularly true in the instant case where Defendants' decisions were supported by Defendant Lashway's medical judgment that Ultram was no longer medically necessary two months post-surgery, and the fact that Plaintiff had twice been disciplined for misusing the medication. *See, e.g.*, Lashway Decl. at ¶¶ 32 & 34; CCF Med. R. at pp. 72 & 87; Pl.'s Exs. at pp. 19, 25, 49, and 69; *see also Josey v. Rock*, 2013 WL 1500435, at *9 (N.D.N.Y. Mar. 19, 2013) (finding no deliberate indifference where doctors discontinued Ultram prescription based on their concerns that plaintiff was seeking Ultram for non-medical reasons and Ultram was not the best treatment for patient's pain); *see also Cole v. Pang Lay Kooi*, 2013 WL 4026842, at *5 (N.D.N.Y. Aug. 6, 2013) (finding a lack of deliberate indifference where prisoner's Ultram prescription was discontinued after he was caught hoarding doses of the drug); *Scott v. Perio*, 2005 WL 711884, at *6 (W.D.N.Y. Mar. 25, 2005) (finding that in the absence of evidence that stronger medication was withheld for non-medical reasons, "[i]t is not for the Court to second guess plaintiff's medical providers as to what medicine or what dosage should have been prescribed to treat the plaintiff.").

Likewise, Plaintiff's claim that Defendant Lashway was deliberately indifferent because she refused to prescribe any pain medication other than NSAID pain relievers, which she allegedly knew he could not tolerate, is patently untrue. Countless entries in the record establish that Plaintiff was continuously provided with Tylenol, a non-NSAID pain medication, that he had tolerated in the past and admits provided him some relief with regard to his present claims. *See, e.g.*, Lashway Decl. at ¶ 21; CCF Med. R. at pp. 53, 72, & 93; Pl.'s Exs. at pp. 48, 50, 55, 57, & 67. Thus, Plaintiff had access to pain medication other than NSAIDs. [16]

***14** Moreover, even if Defendants Lashway and/or Johnson had decided to prescribe Motrin or some other NSAID, the decision to choose one form of pain medication over another, even if the medication causes side effects, is not indicative of deliberate indifference. *See Rush v. Fischer*, 2011 WL 6747392, at *3 (S.D.N.Y. Dec. 23, 2011) ("The decision to prescribe one form of pain medication in place of another does not constitute deliberate indifference to a prisoner's serious medical needs.") (citing, *inter alia*, *Hill v. Curcione*, 657 F.3d 116, 123 (2d Cir.2011), & *Reyes v. Gardener*, 93 F. App'x 283, 285 (2d Cir.2004) (summary order)); *Perez v. Cnty. of Monroe*, 945 F.Supp.2d 413, 415 (W.D.N.Y.2013) (finding that, "at most" plaintiff's allegation that the medicine





prescribed by his doctor caused joint pain and arthritis as side effects was a " 'mere disagreement over [his] proper treatment,' which does not give rise to a constitutional violation") (quoting and citing *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir.1998)); *see also Idowu v. Middleton*, 2012 WL 6040742, at *6 (S.D.N.Y. Dec. 4, 2012) (finding no Eighth Amendment claim stated where nurse ignored plaintiff's complaints, on three separate occasions, that he was experiencing side effects from the medication he was prescribed which included: "stomach pains, vomiting, dizziness, insomnia and other conditions"). [17]

Furthermore, with respect to Plaintiff's allegations that Defendant Berard failed to provide adequate pain medication, *see* Compl. at ¶ 106, it is clear from the medical records that after each of Plaintiff's surgeries Defendant Berard provided pain medication to Plaintiff while he remained within the Defendant's care at AHMC. Berard Decl. at ¶¶ 12, 14, & 17; AHMC Med. R. at pp. 000031–34, 000034–38, & 000044–46. Additionally, it is undisputed that Defendant Berard was not Defendant Lashway's nor Defendant Johnson's supervisor, nor possessed the authority to prescribe pain medication to Plaintiff once he left AHMC and returned to CCF. Berard Decl. at ¶ 8, 7, & 19; *also cf.* Compl. at ¶ 72.

***ii. July 3, 2009***

Plaintiff maintains that he went to see Defendant Berard on July 3, 2009, for treatment of his right knee. At that appointment Plaintiff also requested that Defendant Berard examine his left shoulder. "Defendant Dr. Berard advised Plaintiff he was there to be seen about whether or not he would like to have his R-knee surgically repaired—he had not been told by anyone that he was supposed to examine Plaintiff's L-shoulder, and he said there was nothing written in the file he had for the consult."Compl. at ¶ 72. Dr. Berard's refusal to examine Plaintiff's left shoulder because it was outside of the scope of what care he was authorized to provide does not evince deliberate indifference. [18] Indeed, Plaintiff had been told prior to his July 3 appointment that his shoulder issues would be dealt with after his July 3 appointment for his knee issue. *See* Compl. at ¶¶ 70–71; Pl.'s Exs. at p. 60; CCF Med. R. at p. 71.

***15** Accordingly, we recommend that Defendants' Motion be **GRANTED** with respect to Plaintiff's claims that he was ever denied care for his left shoulder.

***2. Delay in Care***

At best, affording Plaintiff all of the special solicitude and liberality owed to a *pro se* Plaintiff, Plaintiff's remaining allegations are best interpreted as claims that care for his knee and shoulder was unconstitutionally delayed. Specifically, Plaintiff has alleged that: (i) his requests for sick call were not always timely followed; (ii) between May 26 and July 21, 2009, Defendant Lashway discontinued PT on his shoulder, refused his requests for an appointment with a specialist, and provided only pain medication for his shoulder injury; and (iii) that he was provided only pain medication for treatment of his right knee between March 22, 2009, when the injury was discovered, and August 25, 2009, when Dr. Berard performed surgery on his knee. *See generally* Compl.

***a. Sick Call***

According to Plaintiff, despite submitting sick call requests on May 8, 9, and 11, 2009, "on the callouts for May 14, 2009 he was not seen when Defendant FNP Lashway came to the SHU, nor did she make a round, as was normal protocol;" furthermore despite submitting a sick call request on May 18, Plaintiff was not seen until May 28, 2009. Compl. at ¶ 57. Plaintiff also alleges that "on July 13, 2009, Plaintiff was supposed to be seen by his provider, but he was not seen at that time[.]"*Id.* at ¶ 74.

Typically, delays that constitute deliberate indifference occur when " 'officials deliberately delayed care as a form of punishment, ignored a life threatening and fast-degenerating condition for three days, or delayed major surgery for over two years.' " *Washington v. Farooki*, 2013 WL 3328240, at *6 (N.D.N .Y. July 2, 2013) (quoting *Brunskill v. Cnty. of Suffolk*, 2012 WL 2921180, at *3 (E.D.N.Y. July 11, 2012)). As noted above, Plaintiff's shoulder injury was an objectively sufficiently serious injury. Contrariwise, with respect to Plaintiff's knee injury, courts within our Circuit have repeatedly held that a torn medial meniscus is not an objectively sufficiently serious condition for purposes of the Eight Amendment. *See Moody v. Pickles*, 2006 WL 2645124, at *6 (N.D.N.Y. Sept. 13, 2006) (surveying cases). However, even if both conditions constituted serious injuries, there is no evidence in the record before us to suggest that either injury was life threatening or fast degenerating, or that these appointments were deliberately delayed as a form of punishment. Moreover, it is clear from our discussion

of the facts above that Plaintiff received near constant care from Defendant Lashway during the several month period surrounding these incidents including, *inter alia*, pain medication, PT, appointments with specialists, and multiple surgeries. *See supra*, Part II.A.

Accordingly, we recommend that Defendants' Motion be **GRANTED** to the extent that Plaintiff alleges that a handful of missed appointments during a period in which he received near continuous care constituted an unconstitutional delay in treatment. *See Morrison v. Mamis*, 2008 WL 5451639, at *9 nn. 8 & 23 (S.D.N.Y. Dec. 18, 2008) (surveying cases in support of a similar conclusion).

**b. Delay in Shoulder Treatment**

***16** Plaintiff alleges that, after his physical therapist recommended that his PT for his leftshoulder be discontinued based on his consistent refusals to attend, Defendants Lashway and Johnson refused to permit him to see a specialist for his shoulder until and unless he completed the twelve sessions of PT which they had prescribed. *See, e.g.*, Pl.'s Opp'n at pp. 9–10 ("Prior to May 2009, Plaintiff had not been refused any requests by Defendants Lashway or Berard, and Johnson, too, on the one time she seen [sic] me after a surgery. After May 2009, Plaintiff could not get anything for his [shoulder] except the 12 [physical therapy] sessions Defendant Lashway and Johnson told Plaintiff he had to go to in order to receive any further treatment for his shoulder."); *see also* Compl. at ¶ 114 ("Defendants FNP Lashway and Dr. Johnson ... refused to see [him], and no longer would make available adequate treatment for [his] ongoing l-shoulder by discontinuing requests for followup care, then telling [him] that once he took Pt sessions, and seen the orthopedic Doctor, he would be considered for treatment and pain medication.").

Ironically, it was due to Plaintiff's own reluctance to accept a third surgery on April 10, 2009, that Plaintiff was prescribed the twelve PT sessions in the first place. Indeed, Plaintiff declined a third shoulder surgery and elected instead to continue with PT, noting that "he became hesitant because his shoulder seemed more of an experiment, than actual remedies to fix his problem." Compl. at ¶ 17. Accordingly, Dr. Macelaru recommended that Plaintiff undergo two months of PT and then be re-evaluated. Berard Decl. at ¶ 15; CCF Med. R. at p. 62. And, although Plaintiff initially reported for PT on April 30 and May 13, 2009, he failed to report on May 15, 20, and 22, at which time his therapist requested that PT be discontinued. CCF Med. R. at pp. 57–60 & 62. During the so called period of delay, Defendants Lashway and Johnson, as well as other prison officials repeatedly explained to Plaintiff that treatment for his left shoulder was denied during this period because of his own refusal to participate in the PT that had been prescribed for him. CCF Med. R. at pp. 57–60 & 62; Compl. at ¶¶ 61 & 68; Pl.'s Exs. at pp. 55 & 58. Crucially, the record reflects that once Plaintiff agreed to complete PT, PT was re-instated. *See* CCF Med. R. at p. 54.

Plaintiff's allegation that Defendants Lashway and Johnson refused to provide further treatment for his shoulder until he completed the two months of PT that was prescribed does not evince deliberate indifference. Rather, it reflects a reasonable response to Plaintiff's ongoing refusal to adhere to the course of treatment that they prescribed. Stated simply, Plaintiff cannot on the one hand refuse to participate in the treatments prescribed by his doctors, and on the other claim that the course of treatment was inadequate. *See Buffaloe v. Fein*, 2013 WL 5815371, at *9 (surveying cases for the proposition that in light of plaintiff's "ongoing medication treatment and his history of refusing physical therapy and medication," defendants denial of care did not constitute deliberate indifference); *see also Snyder v. Law*, 2010 WL 5572768, at *3 (N.D.N.Y. Dec. 21, 2010) (surveying cases for the proposition that the "*fait de compli*" in plaintiff's deliberate medical indifference case was his failure to adhere to the course of treatment prescribed by his doctors). Plaintiff's desire to see an orthopedic specialist before completing the course of PT prescribed by Defendants is nothing more than an in-actionable disagreement between a prisoner and his doctors as to the appropriate form of treatment. [19] *Demata v. New York State Corr. Dep't of Health Servs.*, 198 F.3d 233 (2d Cir.1999) (citing *Chance v. Armstrong*, 143 F.3d at 703, for the proposition that "strengthening exercises are in fact a form of medical care. Demata's mere disagreement with this form of treatment does not establish deliberate indifference.").

***17** Accordingly, we recommend that Defendants' Motion be **GRANTED** with respect to Plaintiff's claims that Defendants Lashway and Johnson unconstitutionally delayed his shoulder treatment.

**c. Delay in Knee Treatment**

On March 3, 2009, Plaintiff was diagnosed with a "medial miniscus tear" in his right knee. Lashway Decl. at ¶ 24; CCF Med. R. at p. 90. However, Plaintiff did not receive





surgery until August 25, 2009. Compl. at ¶ 39; Pl.'s Exs. at p. 26. Berard Decl. at ¶ 17; AHMC Med. R. at pp. 000044–46. Additionally, it is clear that Plaintiff was receiving pain medication during the interval between his diagnosis and surgery. At the time of his diagnosis, and up until the medication was discontinued by Defendant Lashway on May 7, Plaintiff was receiving Ultram for pain. Johnson Decl. at ¶ 2 & 8; Lashway Decl. at ¶ 24; CCF Med. R. at pp. 88–89. After the Ultram was discontinued, Plaintiff was informed that the pain medications he had been prescribed, including Tylenol and Motrin were sufficient to manage his knee pain. Compl. at ¶ 39; Pl.'s Exs. at p. 26; Lashway Decl. at ¶ 39. Where such ongoing treatment is evident, it has been held that delaying surgery for the same injury for as long as a year does not amount to deliberate indifference. *See Moody v. Pickles*, 2006 WL 2645124, at *6 (N.D .N.Y. Sept. 13, 2006) (citing *Culp v. Koenigsmann*, 2000 WL 995495, at *4, *9–*10 (S.D.N.Y. July 19, 2000) for the proposition that there was no "Eighth Amendment violation where plaintiff suffered from a torn medial meniscus and experienced a one-year delay from injury to surgery")).

Accordingly, because there are no genuine issues of material fact with respect to whether Defendants Lashway, Johnson, or Berard provided Plaintiff with constitutionally adequate medical care for his knee and shoulder we recommend that Defendants' Motion for Summary Judgment be **GRANTED** with regard to all of Plaintiff's deliberate medical indifference claims.

**C. Retaliation**

Plaintiff alleges that Defendants conspired with one another to deprive him of constitutionally adequate medical care in retaliation for grievances and complaints he filed regarding his medical treatment. *See* Compl. at ¶¶ 109–113.

The Second Circuit has made it clear that an inmate has a substantive due process right not to be subjected to retaliation for the exercise of a constitutional right, such as petitioning the government for redress of grievances. *Jones v. Coughlin*, 45 F.3d 677, 679–80 (2d Cir.1995); *Franco v. Kelly*, 854 F.2d 584, 589–90 (2d Cir.1988). Claims of retaliation, like those asserted by Plaintiff, find their roots in the First Amendment. Central to such claims is the notion that in a prison setting, corrections officials may not take actions which would have a chilling effect upon an inmate's exercise of First Amendment rights. *Gill v. Pidlypchak*, 389 F.3d 379, 381–83 (2d Cir.2004).

Because of the relative ease with which claims of retaliation can be invoked, courts should examine such claims "with skepticism and particular care." *Colon v. Coughlin*, 58 F.3d at 872 (citation omitted); *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir.2001), *overruled on other grounds, Swierkewicz v. Sorema N.A.*, 534 U.S. 506 (2002) ("[V]irtually any adverse action taken against a prisoner by a prison official-even those otherwise not rising to the level of a constitutional violation-can be characterized as a constitutionally proscribed retaliatory act."(citation omitted)); *see also Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir.1996).

***18** To state a First Amendment claim for retaliation, an inmate must demonstrate (1) he or she was engaged in constitutionally protected activity, (2) the defendant took adverse action against the plaintiff, and (3) there was a causal connection between the protected activity and the adverse action in that the alleged conduct was substantially motivated by the protected activity. *Gill v. Pidlypchak*, 389 F.3d at 380 (citing *Dawes v. Walker*, 239 F.3d at 492); *see also Morales v. Mackalm*, 278 F.3d 126, 131 (2d Cir.2002).

The plaintiff bears the initial burden in showing that the defendant's actions were improperly motivated. To satisfy the second prong, a prisoner must present evidence inferring that a defendant acted with an improper motive. Such evidence includes: (1) temporal proximity between the protected activity and the alleged retaliatory act; (2) plaintiff's prior good disciplinary record; (3) plaintiff's vindication at his disciplinary hearing; and (4) defendants' statements regarding their motive for the discipline. *See Colon v.. Coughlin*, 58 F.3d 865, 872–73 (2d Cir.1995). A plaintiff may meet this burden by presenting circumstantial evidence of a retaliatory motive, thus obviating the need for direct evidence. *Bennett v. Goord*, 343 F.3d 133, 139 (2d Cir.2003) (holding that plaintiff met his burden in proving retaliatory motive by presenting circumstantial evidence relating to, *inter alia*, the temporal proximity of allegedly false misbehavior reports and the subsequent reversal of the disciplinary charges on appeal as unfounded)."Only retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action for a claim of retaliation."*Davis v. Goord*, 320 F.3d 346, 353 (2d Cir.2003) (citing *Dawes v. Walker*, 239 F.3d at 493). Otherwise, the retaliatory act is "*de minimis* and therefore outside the ambit of constitutional protection."

*Dawes v. Walker*, 239 F.3d at 493. Furthermore, in satisfying the causal connection requirement, also known as temporal proximity, the allegations must be "sufficient to support the inference that the speech played a substantial part in the adverse action." *Id.* at 492 (internal quotation marks and citations omitted) (cited in *Davis*, 320 F.3d at 353).

In situations where the defendant's actions are the result of both retaliatory and legitimate reasons, the burden shifts to the defendants to show that they would have taken the same action absent the retaliatory motive. *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir.1996) (citing, *inter alia*, *Mount Healthy Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977)); *Lowrance v. Achtyl*, 20 F.3d 529, 535 (2d Cir.1994) (cited in *Carpio v. Walker*, 1997 WL 642543, at *6 (N.D.N.Y. Oct. 15,1997)); *see also Gayle v. Gonyea*, 313 F.3d at 682 (defendant may successfully meet this burden of justification with regard to a particular punishment by demonstrating that "plaintiff committed the most serious, if not all, of the prohibited conduct charged in the misbehavior report" (internal quotation marks and citations omitted)).

**19 There is no question that filing grievances is a protected activity. Likewise, "it is plausible that a denial of medical evaluation, treatment, and adequate pain medication would suffice to deter a similarly situated individual of ordinary firmness from filing a constitutionally protected grievance against a prison doctor." *Burton v. Lynch*, 664 F.Supp.2d 349, 367 (S.D.N.Y.2009); *Benitez v. Parmer*, 2013 WL 5310245, at *8 (N.D.N.Y. July 8, 2013) (GTS/DEP) (citing *Burton v. Lynch*). However, as noted above, here there is no evidence that Plaintiff was ever deprived of adequate medical care. *See infra* Part II.B. Indeed, between May 7, 2009 (when Plaintiff's Ultram prescription was discontinued and he began filing grievances and complaints about his treatment), and May 2010 (when Plaintiff was transferred to Shawangunk), Plaintiff received near continuous treatment, including: four visits with Defendant Lashway who made no less than six referrals for Plaintiff to see specialists, CCF Med. R. at pp. 10, 20, 64, 77–79 & 83; two visits and knee surgery with Defendant Berard, *id.* at p. 17, & AHMC Med. R. at pp. 000041–46; and, twenty-four scheduled appointments for PT for his knee and/or shoulder, CCF Med. R. at pp. 11–16, 18–19, 22–30, 34, 36, 47, 49–51, & 54. Our conclusion in this regard is, on its own, likely sufficient to grant summary judgment against Plaintiff's medical retaliation claims. *See Cole v. Levitt*, 2009 WL 4571828, at *10 (W.D.N.Y. Dec. 4, 2009) (citing *Goros v. Pearlman*, 2007 WL 1423718, *3 (N.D.N.Y.2007), for the proposition that no medical retaliation occurred where there was no evidence of medical deliberate indifference); *Tatta v. Wright*, 616 F.Supp.2d 308, 320 (N.D.N.Y.2007) (denying plaintiff's claim that he was denied adequate medical care in retaliation for filing grievances where plaintiff failed to establish the denial of adequate medical care).

However, here additional reasons for dismissal also exist. Construed liberally, Plaintiff alleges that Defendants took the following adverse actions: (1) they discontinued and/or refused to reinstate his Ultram prescription; (2) they prescribed ineffective pain medications; (3) refused to provide him with a follow-up appointment with a specialist after he refused to participate in PT; and (4) Defendant Lashway verbally threatened him. *See* Compl. at ¶¶ 109–113.

With respect to the first three alleged adverse actions, Defendants have clearly established that they had legitimate non-retaliatory reasons for taking such actions—*i.e.*, Plaintiff's lack of medical need for and history of abusing/misusing Ultram, and his refusal to participate in PT. *See Graham v. Henderson*, 89 F.3d at 79.

Additionally, Plaintiff alleges that "almost immediately after ... [he] filed grievances against the Defendant [Lashway,] Plaintiff was warned by the Defendant that if he continued with complaints and grievances they would only get worse for him concerning his treatment." Compl. at ¶ 109. In some cases, verbal threats have been held to constitute adverse action. *See Mateo v. Fischer*, 682 F.Supp.2d 423, 434 (S.D.N.Y.2010) (surveying cases in support of the proposition that "some verbal threats, even if not serious enough to implicate the Eighth Amendment, can constitute an adverse action"). However, Plaintiff's allegation is deficient in numerous ways. To begin with, Plaintiff does not identify when or where this allegation was made nor which grievance brought about the alleged threats. More importantly, the allegation is too non-specific and indirect to have a chilling effect on a prisoner of ordinary firmness. *See id.* (surveying cases for the proposition that "[t]he less direct and specific a threat, the less likely it will deter an inmate from exercising his First Amendment rights"); *Alicea v. Howell*, 387 F.Supp.2d 227, 237 (W.D.N.Y.2005) ("alleged statements to plaintiff about there being 'no secrets in prison' and that plaintiff would 'have to pay the consequences' for filing a grievance ... do not give rise to a First Amendment retaliation claim.").





**20 Accordingly, we recommend that Defendants' Motion be **GRANTED** with respect to Plaintiff's retaliation claims against Defendants. Likewise, because we have found no evidence of any constitutional violations, to the extent that Plaintiff alleges that the Defendants conspired with one another to deny him adequate medical care in retaliation for exercising his First Amendment rights, we recommend that such claim also be **DISMISSED.** *See Benitez v. Partner*, 2013 WL 5310245, at * 10 (surveying cases for the proposition that in the absence of any underlying constitutional violations, a plaintiff cannot sustain a § 1983 conspiracy claim).

### D. Supervisory Liability

To the extent that Plaintiff has argued that Defendant Johnson was liable in her supervisory capacity for the alleged underlying constitutional violations committed by Defendant Lashaway and/or Berard, we recommend that such claims be **DISMISSED** in light of the fact that we have found no evidence of any underlying constitutional violations. *See, e.g.*, Compl. at ¶ 105; *see also Elek v. Inc. Vill. of Monroe*, 815 F.Supp.2d 801, 808 (S.D.N.Y.2011) (collecting cases for the proposition that "because Plaintiff has not established any underlying constitutional violation, she cannot state a claim for § 1983 supervisor liability").

## III. CONCLUSION

For the reasons stated herein, it is hereby

**RECOMMENDED,** that Defendants' Motion for Summary Judgment (Dkt. No. 37) be **GRANTED,** and that the Complaint be **DISMISSED;** and it is further

**ORDERED,** that the Clerk of the Court serve a copy of this Report–Recommendation and Order upon the parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. ***FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN (14) DAYS WILL PRECLUDE APPELLATE REVIEW.*** *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15 (2d Cir.1989)); *see also* 28 U.S.C. § 636(b) (1); FED. R. CIV. P. 72 & 6(a).

Filed July 16, 2014.

**All Citations**

Slip Copy, 2014 WL 4626490

Footnotes

1 Plaintiff's Complaint is comprised of a *pro forma* § 1983 complaint and a handwritten section, both of which contain numbered paragraphs. When referencing the handwritten portion of Plaintiff's Complaint we refer to the paragraphs as numbered by Plaintiff; when referring to the *pro forma* portion of Plaintiff's Complaint we refer to the page numbers automatically assigned by the Court's Case Management Electronic Case Filing system.

2 Plaintiff's CCF Medical Record is comprised of documents from multiple non-sequentially numbered sources. Accordingly, we refer to the page numbers automatically assigned by the Court's Case Management Electronic Case Filing system.

3 Tylenol # 3 is a narcotic pain reliever which contains codeine, an opioid.

4 Dr. Macelaru is not a Defendant in this action.

5 Nurse Badger is not a Defendant in this action.

6 Although Plaintiff provided a detailed index of the Exhibits attached to his Complaint, he failed to label each individual Exhibit. Therefore, the Court refers to the page numbers automatically assigned by the Court's Case Management Electronic Case Filing system

7 Regardless of whether a visit occurred, neither party contends that Plaintiff complained of symptoms of withdrawal on May 12. *See* Compl. at ¶ 33; Lashway Decl. at ¶ 34; CCF Med. R. at p. 85.

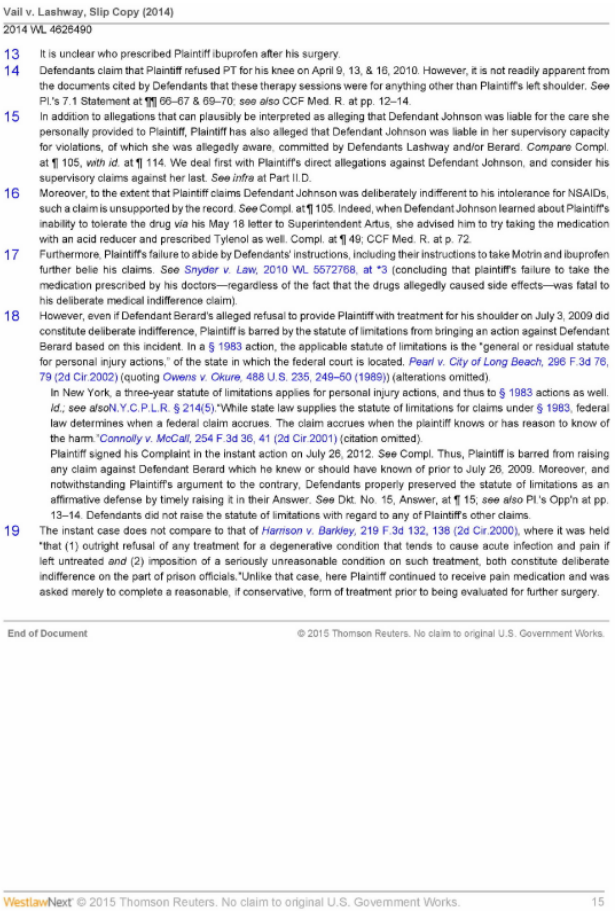
8 B. Lecuyer is not a Defendant in this action.

9 Dr. Wright is not a Defendant in this action.

10 Superintendent Artus is not a Defendant in this action.

11 Deputy Superintendent LaValley is not a Defendant in this action.

12 Officer Martin is not a Defendant in this action.



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13 It is unclear who prescribed Plaintiff ibuprofen after his surgery.

14 Defendants claim that Plaintiff refused PT for his knee on April 9, 13, & 16, 2010. However, it is not readily apparent from the documents cited by Defendants that these therapy sessions were for anything other than Plaintiff's left shoulder. *See* Pl.'s 7.1 Statement at ¶¶ 66–67 & 69–70; *see also* CCF Med. R. at pp. 12–14.

15 In addition to allegations that can plausibly be interpreted as alleging that Defendant Johnson was liable for the care she personally provided to Plaintiff, Plaintiff has also alleged that Defendant Johnson was liable in her supervisory capacity for violations, of which she was allegedly aware, committed by Defendants Lashway and/or Berard. *Compare* Compl. at ¶ 105, *with id.* at ¶ 114. We deal first with Plaintiff's direct allegations against Defendant Johnson, and consider his supervisory claims against her last. *See infra* at Part II.D.

16 Moreover, to the extent that Plaintiff claims Defendant Johnson was deliberately indifferent to his intolerance for NSAIDs, such a claim is unsupported by the record. *See* Compl. at ¶ 105. Indeed, when Defendant Johnson learned about Plaintiff's inability to tolerate the drug *via* his May 18 letter to Superintendent Artus, she advised him to try taking the medication with an acid reducer and prescribed Tylenol as well. Compl. at ¶ 49; CCF Med. R. at p. 72.

17 Furthermore, Plaintiff's failure to abide by Defendants' instructions, including their instructions to take Motrin and ibuprofen further belie his claims. *See Snyder v. Law*, 2010 WL 5572768, at *3 (concluding that plaintiff's failure to take the medication prescribed by his doctors—regardless of the fact that the drugs allegedly caused side effects—was fatal to his deliberate medical indifference claim).

18 However, even if Defendant Berard's alleged refusal to provide Plaintiff with treatment for his shoulder on July 3, 2009 did constitute deliberate indifference, Plaintiff is barred by the statute of limitations from bringing an action against Defendant Berard based on this incident. In a § 1983 action, the applicable statute of limitations is the "general or residual statute for personal injury actions," of the state in which the federal court is located. *Pearl v. City of Long Beach*, 296 F.3d 76, 79 (2d Cir.2002) (quoting *Owens v. Okure*, 488 U.S. 235, 249–50 (1989)) (alterations omitted).

In New York, a three-year statute of limitations applies for personal injury actions, and thus to § 1983 actions as well. *Id.; see also* N.Y.C.P.L.R. § 214(5). "While state law supplies the statute of limitations for claims under § 1983, federal law determines when a federal claim accrues. The claim accrues when the plaintiff knows or has reason to know of the harm." *Connolly v. McCall*, 254 F.3d 36, 41 (2d Cir.2001) (citation omitted).

Plaintiff signed his Complaint in the instant action on July 26, 2012. *See* Compl. Thus, Plaintiff is barred from raising any claim against Defendant Berard which he knew or should have known of prior to July 26, 2009. Moreover, and notwithstanding Plaintiff's argument to the contrary, Defendants properly preserved the statute of limitations as an affirmative defense by timely raising it in their Answer. *See* Dkt. No. 15, Answer, at ¶ 15; *see also* Pl.'s Opp'n at pp. 13–14. Defendants did not raise the statute of limitations with regard to any of Plaintiff's other claims.

19 The instant case does not compare to that of *Harrison v. Barkley*, 219 F.3d 132, 138 (2d Cir.2000), where it was held "that (1) outright refusal of any treatment for a degenerative condition that tends to cause acute infection and pain if left untreated *and* (2) imposition of a seriously unreasonable condition on such treatment, both constitute deliberate indifference on the part of prison officials." Unlike that case, here Plaintiff continued to receive pain medication and was asked merely to complete a reasonable, if conservative, form of treatment prior to being evaluated for further surgery.

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**All Citations**

Not Reported in Fed. Supp., 2015 WL 9809874

## Footnotes

1 Edward Saldano was also initially named as a Plaintiff in the action. (Dkt. No. 1.) However, Saldano was dismissed from the action without prejudice early on for failing to comply with an order regarding payment of the filing fee. (Dkt.Nos.9–10.)

2 Because the paragraphs in Plaintiff's complaint are not numbered consecutively throughout the pleading, and there are instances of the same number being used for more than one paragraph, references to the complaint herein are to the page number assigned by the Court's CM/ECF electronic docketing system.

3 Plaintiff's claim that Gagnon and DuFrane conducted the November 29, 2012, search on his cell in retaliation for grievances filed by Plaintiff was dismissed by Judge Suddaby on initial review. (Dkt. No. 10 at 34–35.)

4 Plaintiff claims that Keleher perjured himself at the hearing. (Dkt. No. 1 at 6.)

5 Plaintiff has submitted a copy of the December 19, 2012, grievance in opposition to Defendants' motion for summary judgment. (Dkt. No. 43–1 at 5–7.) The grievance is not on the printout of closed grievances filed by Plaintiff that was submitted by Defendants. (Dkt. No. 40–5 at 24.) It is unclear from the certification of Jeffrey Hale accompanying the list and Declaration of Melissa A. Latino, Defendants' counsel, whether the list purports to contain all of the grievances filed by Plaintiff. *Id.* at 1–2 and 23. It would appear that it may not since Grievance No. UST–51144–13, challenging the inclusion of the smuggling charge by the Review

Officer, which is annexed to the Declaration of Scott Woodward submitted by Defendants, is not on the closed grievances list. (Dkt. No. 40–7 at 6–9.)

6 Copies of all unpublished decisions cited herein will be provided to Plaintiff in accordance with *LeBron v. Sanders,* 557 F.3d 76 (2d Cir.2009) (per curiam).

7 L.R. 7.1(a)(3) provides that *"The Court shall deem admitted any properly supported facts set forth in the Statement of Material Facts that the opposing party does not specifically controvert."* However, *see Vermont Teddy Bear Co., Inc. v. 1–800 Beargram Co.,* 373 F.3d 241, 244 (2d. Cir.2004) ("[I]n determining whether the moving party has met his burden of showing the absence of a genuine issue for trial, the district court may not rely solely on the statement of undisputed facts in the moving party's [Statement of Material Facts]. It must be satisfied that the citation to evidence in the record supports the assertion.") (citations omitted).

8 Defendants have complied with L.R. 56.2 by providing Plaintiff with the requisite notice of the consequences of his failure to respond to their summary judgment motion. (Dkt. No. 40 at 4.)

9 28 U.S.C. § 1746 states that a statement of verification must be in "substantially" the same form as the statement set forth in § 1746(2), which reads "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct." Although Plaintiff's signature in his complaint is notarized, the complaint has not been verified under oath. (Dkt. No. 1 at 44.) A complaint cannot be considered as an affidavit where, although notarized, it was not verified under oath. *Inmates, Washington County Jail v. England,* 516 F.Supp. 132, 138 (E.D.Tenn.1980), *aff'd without opinion,* 659 F.2d 1081 (6th Cir.1981) (Table).

10 Under N.Y. Comp.Codes R. & Regs, tit 7., § 251–2.2, the review officer is required to review misbehavior reports, classify them as a Tier I, II, or III, and refer them to the appropriate disciplinary body for action. § 251–2.2(a)–(b). The review officer has the authority to dismiss any misbehavior report which fails to state a valid charge. § 251–2.2(c). In Grievance No. UST–51144–13, filed by Plaintiff on January 8, 2013, Plaintiff complained that the review officer should have dismissed the smuggling charge on the grounds that there was no basis for the charge in the Misbehavior Report issued by DuFrane. (Dkt. No. 40–7 at 6.) In the Grievance, Plaintiff placed responsibility for the erroneous Tier III designation of the Misbehavior Report issued by DuFrane on the reviewing officer's failure to dismiss the smuggling charge. *Id*. at 8.

11 Given the lack of evidence of causation, it is unnecessary for the Court to consider whether Haug's finding of guilt on the smuggling charge was reasonable based upon the evidence presented at the hearing.

12 Inasmuch as the Court is recommending that Haug be granted summary judgment, it finds it unnecessary to reach his qualified immunity argument.

13 Plaintiff also claims that Rock wrongfully denied his September 30, 2012, grievance against Sevey regarding his medical diet food tray. (Dkt. No. 1 at 21.) However, Plaintiff's medical diet claim against Sevey was dismissed on initial review. (Dkt. No. 10 at 19–20.)

14 Plaintiff has also claimed that Rock was deliberately indifferent to his complaints about the PIMS program but has provided no evidence of constitutional violation by any of the defendants with respect thereto.

15 The Second Circuit has expressly declined to determine whether *Iqbal* eliminated any of the *Colon* bases for liability. *See Grullon v. City of New Haven,* 720 F.3d 133, 139 (2d Cir.2013).

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2016 WL 204494
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Bruce HENSON, Plaintiff,
v.
GAGNON, Sergeant, Upstate Corr. Facility; E. DuFrane, Corr. Officer, Upstate Corr. Facility; D. Rock, Superintendent, Upstate Corr. Facility; and Houge, Civilian, Hearing Officer, Upstate Corr. Facility; Defendants.

9:13-CV-590 (GTS/TWD)
|
Signed 01/15/2016

**Attorneys and Law Firms**

Bruce Henson, 09-A-1436, Upstate Correctional Facility, P.O. Box 2001, Malone, New York 12953, pro se.

Hon. Eric T. Schneiderman, Attorney General for the State of New York, The Capitol, Melissa A. Latino, Esq., Assistant Attorney General, of Counsel, Albany, New York 12224, for Defendants.

**DECISION and ORDER**

GLENN T. SUDDABY, Chief United States District Judge

***1** Currently before the Court, in this *pro se* prisoner civil rights action filed by Bruce Henson ("Plaintiff") against the four above-captioned employees of the New York State Department of Corrections and Community Supervision ("Defendants") pursuant to 42 U.S.C. § 1983, are (1) Defendants' motion for summary judgment, and (2) United States Magistrate Judge Thérèse Wiley Dancks' Report-Recommendation recommending that Defendants' motion be granted. (Dkt. Nos. 40, 50.) None of the parties have filed objections to the Report-Recommendation, and the deadline by which to do so has expired. (*See generally* Docket Sheet.) After carefully reviewing the relevant papers herein, including Magistrate Judge Dancks' thorough Report-Recommendation, the Court can find no clear-error in the Report-Recommendation.[1] Magistrate Judge Dancks employed the proper standards, accurately recited the facts, and reasonably applied the law to those facts. As a result, the Report-Recommendation is accepted and adopted in its entirety for the reasons set forth therein, and Defendant's motion is granted. To those reasons, the Court would add only that Plaintiff was *twice* provided the requisite Local Rule 56.2 notice. (Dkt. No. 40 at 4; Dkt. No. 42, at 2.)

**ACCORDINGLY**, it is

**ORDERED** that Magistrate Judge Dancks' Report-Recommendation (Dkt. No. 50) is **ACCEPTED** and **ADOPTED** in its entirety; and it is further

**ORDERED** that Defendants' motion for summary judgment (Dkt. No. 40) is **GRANTED**; and it is further

**ORDERED** that, as the Court has adopted the Report-Recommendation, Plaintiff's supervisory claims against Defendant Rock are **DISMISSED**; and it is further

**ORDERED** that Plaintiff's Complaint (Dkt. NO. 1) is **DISMISSED** in its entirety and the Clerk of Court shall enter judgment for Defendants and close this action.

**All Citations**

Not Reported in Fed. Supp., 2016 WL 204494

## Footnotes

1 When no objection is made to a report-recommendation, the Court subjects that report-recommendation to only a clear error review. Fed. R. Civ. P. 72(b), Advisory Committee Notes: 1983 Addition. When performing such a "clear error" review, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Id.*; *see also Batista v. Walker*, 94-CV-2826, 1995 WL 453299, at *1 (S.D.N.Y. July 31, 1995) (Sotomayor, J.) ("I am permitted to adopt those sections of [a magistrate judge's]

report to which no specific objection is made, so long as those sections are not facially erroneous.") (internal quotation marks omitted).

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2023 WL 2382637
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Chamma K. BRANDON, Plaintiff,
v.
Suzanne KINTER, Lawrence Bedard, Robert Webb, Thomas Perry, Eric Blaise, Kevin Laurin, and Margaret Clancy, Defendants.

9:13-cv-00939 (BKS/ATB)
|
Signed March 6, 2023

**Attorneys and Law Firms**

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For Defendants: April J. Laws, Johnson & Laws, LLC, 646 Plank Road, Suite 205, Clifton Park, New York 12065.

**MEMORANDUM-DECISION AND ORDER**

Brenda K. Sannes, Chief United States District Judge:

## I. INTRODUCTION

***1** Plaintiff Chamma K. Brandon brings this action against the above-named Defendants, employees of Clinton County Jail ("CCJ"), under 42 U.S.C. § 1983, alleging that during his 2012 incarceration, he was served meals containing pork in violation of his Muslim diet and retaliated against for filing grievances regarding his religious and medical diets. (Dkt. No. 17). Plaintiff pressed two claims at trial: (1) that Defendants Corrections Lieutenant Kevin Laurin, Registered Nurse and Healthcare Coordinator Suzanne Kinter, Corrections Sergeant Margaret Clancy, Food Service Manager Lawrence Bedard, and Corrections Officers Robert Webb and Thomas Perry violated Plaintiff's right to the free exercise of religion under the First Amendment; and (2) that Defendants Lt. Laurin, Nurse Kinter, Sgt. Clancy, Bedard, and Corrections Officer Eric Blaise retaliated against Plaintiff for filing meal-related grievances in violation of the First Amendment. (*Id.*). The Court held a three-day bench trial at which Plaintiff and all Defendants, except Margaret Clancy, [1] testified.

After carefully considering the trial record, the credibility of the witnesses, and the submissions of the parties, [2] the Court finds Plaintiff proved by a preponderance of the evidence that: (1) Lt. Laurin violated Plaintiff's First Amendment right to the free exercise of religion; (2) Officers Webb and Perry are entitled to qualified immunity; (3) Lt. Laurin and Nurse Kinter retaliated against Plaintiff for engaging in conduct protected by the First Amendment; and (4) Plaintiff is entitled to compensatory damages, and punitive damages are warranted. The Court further finds that Plaintiff failed to prove by a preponderance of the evidence: (1) his free exercise claims against Nurse Kinter, Sgt. Clancy, and Bedard; and (2) his retaliation claims against Sgt. Clancy, Officer Blaise, and Bedard. The following constitutes the Court's findings of fact and conclusions of law.

## II. FINDINGS OF FACT

### A. The Individual Defendants

Lt. Laurin was a "Corrections Lieutenant at CCJ whose duties included supervising corrections sergeants and the day-to-day activities throughout CCJ, as well as overseeing the grievance program at CCJ." (Joint Pre-Trial Stipulation, ¶ 3(a)(vi)). Nurse Kinter, a registered nurse, "was the Jail Healthcare Coordinator whose duties included supervising Registered Nurses at CCJ and overseeing the medical treatment of inmates detained at CCJ." (*Id.* ¶ 3(a)(viii)). Sgt. Clancy "was a Corrections Sergeant at CCJ whose duties included supervising Corrections Officers [and] documenting reports," and assisting Lt. Laurin in overseeing the grievance program. (*Id.* ¶ 3(a)(vii); Trial Transcript, at 70 ("T. 70")). Bedard "was the Food Service Manager at CCJ whose duties included supervising the cooks in the kitchen to make sure food was provided in compliance with the menu, recipes, and special diets that the inmates have on file with the kitchen." (Joint Pre-Trial Stipulation, ¶ 3(a)(v)). Officers Webb, Perry, and Blaise were "Corrections Officer[s] whose duties included providing for the safety, security and order of the facility." (*Id.* ¶¶ 3(a)(ix–xi)).

### B. Religious and Medical Diets

***2** CCJ is a 300-bed facility that housed approximately 210 inmates in 2012, the time period relevant to this action. (T. 284). During the booking and intake process, the booking officer documented each inmate's religion, if any, for the purpose of ascertaining whether the inmate required a religious diet. (T. 293). If so, the booking officer would fill out a "Special Diet Notification" form for a religious

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diet and "physically bring that [form] to the kitchen." (Dkt. No. 250, ¶ 12; T. 293–94, 446). A CCJ lieutenant, sergeant, and grievance coordinator were also authorized to fill out a Special Diet Notification form documenting an inmate's need for a religious diet. (Pl.'s Ex. 8; Defs.' Ex. 21; T. 343).[3] CCJ medical staff and facility nurses were responsible for approving medical diets and for notifying the kitchen of an inmate's need for a medical diet by sending a Diet Notification form specifying the medical diet to the kitchen. (T. 448).[4]

### C. CCJ Kitchen and Meal Service

Inmates at CCJ received all their meals on trays that the kitchen staff delivered to them in their housing units, or "pods." (T. 296–97). Unless the kitchen had been notified of a medical or religious diet, each inmate received a "regular" or "general population" meal. (T. 455). In addition to the general population diet, the CCJ kitchen prepared "approximately ten" special diets, including diabetic, lactose free, low fat/low cholesterol, low sodium, gluten-free, and "no-pork" or religious diets. (*Id.*). Each day, to ensure each inmate received "the proper meal in [the] right area," Bedard, as food service manager, reviewed the menu and the inmate housing report and prepared a list with each inmate's name, special diet, if any, and the inmate's pod. (T. 441–42). Bedard maintained inmate files and would place all special diet slips—religious or medical—in the inmate's file. (T. 293, 461).

Bedard, several cooks, and up to seven inmates worked in the kitchen. (T. 449). The cooks were responsible for making the meal designated by the menu that day—"whatever soup it is for the day, whatever sandwiches for that day," for example. (T. 443). There was a "food line" in the kitchen, which Bedard described as "a conveyer-type line where the trays are placed on the conveyer from one end to the other end as the food is being served." (T. 443). The cooks were responsible for placing the "main course" and other food items on the trays. (T. 444, 451). Bedard was "not always on [the] food line," but he would, at times, work on the food line serving small items such as condiments, fruit, or a package of cookies. (T. 451). The inmate workers also served on the food line, and one inmate worker was "at the very end to put the trays into the cart" for delivery to the designated pod. (T. 443). Prior to each meal, "sticky note tabs" were prepared for each inmate receiving a special diet. (T. 444). The sticky notes listed the inmate's name and type of diet and were first placed above the food line and then onto the meal tray before the tray was placed onto the cart for delivery. (T. 444 (Bedard testifying that if the inmate had a religious diet, for example, that inmate's name and "no pork" would be on the tray's label)).

***3** Once the trays were placed onto the cart, a corrections officer and inmate worker would escort the cart to "particular pods." (T. 43). The corrections officer in the pod would alert the inmates that meals had arrived and divide the inmates into two lines—"regular gen pop" and "special diet persons"—to receive their trays. (T. 44). If an inmate complained that his meal did not comply with a special diet, the pod corrections officer could check the inmate's file, a copy of which was contained "at the podium" in the inmate's pod, to verify the diet. (T. 487–88). The corrections officer could also call the kitchen, or send the tray back to the kitchen where Bedard or a cook would inspect the tray and, if the tray was not right, replace the incorrect item or the entire meal. (T. 451, 487–88).

### D. Plaintiff

#### 1. Religious Background

Plaintiff, a born Muslim, grew up attending religious services with his father. (T. 35). The *Quran* prohibits Muslims from eating pork. (T. 38). Eating pork is "haram," "a sin," for which "you can be placed in hellfire." (T. 39); *see* *Brandon v. Kinter*, 938 F.3d 21, 36 (2d Cir. 2019) ("For Muslims who follow Islamic dietary laws, consuming pork is a sin at any time, regardless of whether the consumption occurs during a holiday or not" and "[t]he Quran expressly commands against it." (citing *Quran* 2:173)). The practice of Islam also prohibits the eating of pork products, or "anything associated" with pork. (T. 39). For this reason, not only is the handling of pork prohibited, but a plate of food containing pork and non-pork products is considered contaminated and inedible. (T. 39).

#### 2. Plaintiff Booked at CCJ - January 2012 and March 2012

Plaintiff was booked into CCJ twice during 2012. During all time periods relevant to this action, Plaintiff was a pretrial detainee. Plaintiff's first stay at CCJ was from January 14, 2012 until March 2, 2012. (Pl.'s Ex. 5; Defs.' Ex. 2; T. 42, 191). No religion is noted on Plaintiff's January 12 booking sheet. (Pl.'s Ex. 5; Defs.' Ex. 2). "On January 14, 2012, Plaintiff was issued a 'no shellfish diet' at CCJ." (Joint Pre-trial Stipulation, ¶ 3(a)(xii)). Plaintiff did not request religious, no-pork meals during this stay. (T. 41–42). If

Plaintiff received a meal with pork in it, he did not complain but he would not eat the meal, either. (T. 41–42). Some form of pork, i.e., sausage, ribs, salami, bologna, was featured on the menu for the general population diet two to four times each week. (T. 48–49, 72–73; Pl.'s Exs. 1, 2).

On March 2, 2012, Plaintiff was "released," though, for reasons that are not relevant here, he was never "physically" "released" from the facility, and he was, instead, arrested and booked into CCJ a second time. (T. 42, 191). Plaintiff's March 2 booking sheet lists his religion as Muslim. (Defs.' Ex. 3). However, the booking officer, who is a not a defendant in this case, did not bring a religious "no-pork" diet slip to the kitchen after Plaintiff's booking, or at any time thereafter. (T. 344, 371). Because Plaintiff identified as Muslim when he was rebooked on March 2, 2012, he should have had a religious diet slip forwarded to the kitchen as of March 2, 2012. (T. 370–71).

**3. Plaintiff's Requests for Muslim Diet – March to August 2012**

"On March 23, 2012, Plaintiff was issued a 'no tomato or tomato product diet,' " because he has severe acid reflux. (Joint Pre-Trial Stipulation, ¶ 3(a)(xiii); T. 46). "On May 21, 2012, Plaintiff was issued a 'low fat, low cholesterol' diet" because he had high cholesterol. (Joint Pre-Trial Stipulation, ¶ 3(a)(xiv); T. 46).

In March, April, and May 2012, Plaintiff received meals with pork two to four times each week. (T. 49, 76–77). If Plaintiff received a meal tray with pork, he did not eat it; he would either give it away, throw it away, or trade with another inmate. (T. 75). If Plaintiff could not consume a food tray because it contained pork, and if he had "commissary," he "would "eat commissary" though it "had nothing to really substitute" for a meal and "[i]t was just junk." (T. 75, 79). If he did not have commissary food, he "just wouldn't eat anything." (T. 75). As a result of missing meals, Plaintiff had headaches, fatigue, dizziness, and confusion, and was frustrated. (T. 79). Plaintiff experienced the "angst of knowing" that he was not going to eat. (*Id.*).

***4** In May 2012, Plaintiff began complaining to shift corrections officers, who knew he was Muslim and that he was "not supposed to get pork." (T. 78). One officer responded by suggesting that Plaintiff "write a medical," (*id.*), and told him that the medical ward "would address" his religious dietary needs. (T. 80). On May 28, Plaintiff filed a grievance stating:

> I was denied my meal. I'm on a special diet and the cooks [sic] refused to make the proper accommodations to my diet. The housing unit officer told the trustee to obtain the proper special diet meal and that was to no avail. The housing unit officer called the kitchen in a further attempt to obtain my special diet me[al] and resulted in the cook's absolute refusal.

(Pl.'s Ex. 10). [5] Although it is not referenced in the grievance, Defendants acknowledge that on May 28, Plaintiff stated in writing to CCJ that he was Muslim. (Dkt. No. 250, ¶ 77; T. 202–03).

On June 21, Plaintiff submitted a "Sick Call Request" inquiring about a knee brace and requesting that a "no pork order" be sent to the kitchen and placed in his folder, explaining that he did "not eat pork yet [was] still being served pork during meals." (Pl.'s Ex. 11). Medical staff responded: "given knee brace." (*Id.*). Plaintiff received no response regarding his request for a no-pork diet and continued to receive meals with pork. (T. 82).

On or about July 4, Plaintiff sent another Sick Call Request. (Pl.'s Ex. 12). In it, Plaintiff stated that his inmate folder reflects that he is to have "no fish or shellfish" due to "allergy" and requests that the "kitchen" be notified. (*Id.*). Although the remainder of the request is largely illegible, it appears to seek a no-pork product diet. (*Id.*). The response, from a nurse who is a not a defendant in this case, stated: "Done—for no fish/shellfish. Need to ask security staff to submit diet slip for pork. Medical does not do religious diets." (*Id.*). When Plaintiff received this response, he showed it to a security officer who said: "we don't do that. We don't do religious diets, that's a medical thing." (T. 83).

On July 6, Plaintiff submitted a third Sick Call Request. (Pl.'s Ex. 13). He wrote: "I've made several attempts to have my meals altered to a no pork or pork products diet. I'm a Muslim and do not consume anything associated with pork. I told the 'Security Staff' [illegible] they directed me to consult medical about this matter. Please make the proper adjustment

to my diet." (*Id.*). On July 9, Nurse Kinter responded: "You will have to speak with jail Sgt. or Lt." (*Id.*). Nurse Kinter explained at trial that she referred Plaintiff to the jail sergeant or lieutenant because she had always been told by "security ... all the way up to the major," that "nurses were not allowed to do religious diets." (T. 389). Plaintiff continued to receive meals with pork in July, August, and September 2012. (T. 86–87). [6]

**4. Plaintiff's Muslim Diet Grievances and Lt. Laurin's Involvement – September 2012**

***5** On September 15, 2012, Plaintiff filed a grievance complaining that he was being given trays with food he could not eat due to his medical conditions and that were inconsistent with his "various restrictive diets." (Pl.'s Ex. 14). He further stated that "this is one of several grievances I've made but to no avail." (*Id.*). Plaintiff sought a:

> complete overhaul of the kitchen staff. This is one of many complaints which seems to go unresponded. I've been here for more than 9 mths [sic] and at least 1 time per week there has been a problem with my meals. I've filed several grievances, made countless complaints to shift officers. Still this problem still reoccurs.

(*Id.*). The grievance's "Summary of facility staff attempts to resolve" stated: "Sent tray back to kitchen. Talked with kitchen staff." (*Id.*) The staff individual, who is not a defendant here "stated that everything on inmate Brandon's tray coinsided [sic] with inmate Brandon's diet. The tray was sent back down to D-Pod and Inmate Brandon took the tray and asked for a grievance." (*Id.*).

On September 24, Plaintiff filed a grievance stating that he "can not/do[es] not eat pork or any pork products nor tomatoes" but that he was served a BLT for lunch and that when he "instructed the server to produce another tray," the server later "returned with the same tray stating the kitchen will not accommodate." (Pl.'s Ex. 15). As to the "[a]ction requested," Plaintiff wrote that "stating some sort of action to be conducted seems useless" because he had been in CCJ "for 250+ days and continuously receive[d] food" he could not eat. (*Id.*). The grievance's "Summary of facility staff attempts to resolve" stated: "called the nurse to see what the inmate 'Brandon' couldn't eat and she stated he is on a low fat low sodium diet and that the inmate is allergic to tomatos [sic]." (*Id.*). Plaintiff did not receive a replacement for the September 24 lunch. (T. 93). Later that day, Plaintiff filed a second grievance: "Again, I'm being denied a dinner (meal). I do not/can not eat pork or pork products or tomatoes. For dinner I was served a salad which had tomatoes & bacon strips.... The officer instructed the server to make accommodations & the server returned with the same tray after picking out the tomatoes." (Pl.'s Ex. 16). Under "Action requested by the grievant," Plaintiff wrote: "I've made countless grievances to what seems to be a useless process. I've went many times without having a meal because of the kitchen's seemingly inability to make simple food accommodations." (Pl.'s Ex. 16). The grievance's "Summary of facility staff attempts to resolve" stated: "I called the nurse to see what the inmate can't have and she stated no tomatoes or low fat low salt items." (*Id.*).

On or about September 26, 2012, Sgt. Clancy, who had been handling Plaintiff's grievances, went to Lt. Laurin with a concern about the number of grievances Plaintiff had submitted about meals. (T. 302, 306–07 (Lt. Laurin testifying that he received Plaintiff's grievance on September 26 and that he began to investigate on September 26 or 27)). Sgt. Clancy "had tried to explain [to Plaintiff] that the meals that [Plaintiff] was receiving were his meals." (T. 302). When Lt. Laurin and Sgt. Clancy investigated, they found Plaintiff had a medical diet in place—low fat, low sodium, no fish, no shellfish, no tomatoes, and no tomato products. (*Id.*). Sgt. Clancy also told Lt. Laurin that Plaintiff was stating that "he wasn't getting his Muslim no pork, no pork products diet." (T. 303). Lt. Laurin "dismissed Sergeant Clancy from doing the grievances" and took them over himself because there was "a problem and [he] needed to find out where the problem was" and see if he "could cure it." (T. 304). On either September 26 or 27, 2012, Lt. Laurin "went down physically" to the kitchen and he and Bedard went through Plaintiff's file together. (T. 305–06). Lt. Laurin explained that "[t]he paper that normally has religious diets that are generated by security staff is a little bit smaller" and he "wanted to make sure that it wasn't being missed." (*Id.*). They "did not find a religious slip" in Plaintiff's file. (*Id.*).

***6** Lt. Laurin testified that on either September 9 or 27, he *verbally* notified the kitchen that Plaintiff was to be on a "no

pork or no products" diet. (T. 307, 333–34). The Court does not credit this testimony. Lt. Laurin could not recall who he told about Plaintiff's diet. (T. 307 (Lt. Laurin testifying that he "would have to go to Bedard" but that he did not "know exactly" who he talked to, only that he "talked to somebody down in the kitchen")). Nor could Lt. Laurin accurately state on what date he told the kitchen of Plaintiff's no pork diet, (*compare id.* (Lt. Laurin testifying that he notified the kitchen on September 26 or 27); *with* T. 333–34 (Lt. Laurin testifying that he verbally notified the kitchen on September 9)).[7] Indeed, Lt. Laurin's representations regarding when the kitchen was notified—verbally or in writing—of Plaintiff's religious diet have varied greatly in this case. For example, at trial, Lt. Laurin acknowledged that he previously filed an affidavit in this matter, in support of Defendants' motion for summary judgment, that stated: "due to plaintiff's March 2012 declaration that he was a Muslim, plaintiff did have a notification placed in his file that provided him a diet with no pork or no pork products." (T. 372 (citing Pl.'s Ex. 67 (marked for identification))); *see infra* Section II.D.6. Lt. Laurin further acknowledged that, in that affidavit, he referred to "Exhibit A," a copy of the Special Diet Notification form that the Court has found was not actually given to the kitchen until October 5, 2012. *See infra* Section II.D.6. The Special Diet Notification form that Lt. Laurin cited in his affidavit is in all respects identical to the Special Diet Notification form that was given to the kitchen on October 5, 2012 except that the date ("10/5/12") is missing.[8] (T. 374–75). Moreover, not only was Lt. Laurin's testimony regarding a verbal notification to the kitchen not credible, but Bedard[9] testified that no one at CCJ *told* him that Plaintiff should not be served pork or pork products, (T. 469), stated that it was *not* the general practice for anyone at CCJ to tell him orally about an inmate's medical or religious restrictions, (T. 468), and that he received Plaintiff's religious diet notification on a *form*, (T. 470).

***7** On or around September 27, Lt. Laurin went to Plaintiff's housing unit to discuss what was "going on, in terms of" Plaintiff's "religious diet." (T. 91, 97, 304). Lt. Laurin told Plaintiff he was aware Plaintiff is Muslim and that Plaintiff was receiving pork meals and acknowledged "it's wrong, but he said he's going to help." (T. 91). Lt. Laurin told Plaintiff he was "going to look into it and to address these matters." (T. 91–92).

On September 27, Lt. Laurin, as grievance coordinator, issued decisions regarding Plaintiff's September 15 and two September 24 grievances. (Pl.'s Exs. 14, 15, 16). As to the September 15 grievance, Lt. Laurin wrote: "Kitchen has been informed as of 9/27/2012 that you are low fat, low cholesterol, no tomatoes or tomatoe [sic] products, no fish or shellfish. They did not have that you were Muslim. You will get no pork or pork products." (Pl.'s Ex. 14). As to the first September 24 grievance, Lt. Laurin wrote: "As of 9/27/12 the kitchen was reviewed [sic] of your diet. Lowfat/ low cholesterol, no tomatoes or tomatoe [sic] products, no shellfish or fish and that you are Muslim. Kitchen stated that the bacon is veggie bacon. We will furnish you with a copy of the ingredients." (Pl.'s Ex. 15). As to the second September 24 grievance, Lt. Laurin wrote: "Kitchen is aware of your diet. Bacon is veggie bacon. A copy of the ingredients will be provided to you. I have advised the kitchen that if you get a wrong meal that the whole meal will be redone." (Pl.'s Ex. 16). Plaintiff never received a copy of ingredients listing "veggie bacon" and did not recall ever seeing "veggie bacon" on the menu at CCJ. (T. 94).

On September 29, after issuing the above-referenced decisions, Lt. Laurin further investigated Plaintiff's September 15 and 24 grievances. (Pl.'s Exs. 14, 15, 16 ("Grievance Investigation Form")). Lt. Laurin interviewed Plaintiff, Nurse Kinter, and Bedard. (Pl.'s Exs. 14, 15, 16). In his "Summary of findings," Lt. Laurin wrote: "Inmate Brandon's diets have been documented by medical and a copy of Brandon's special deit [sic] was given to the kitchen staff. Kitchen had not been notified he was Muslim. Kitchen staff has been advised to correct the diet." (Pl.'s Exs. 14, 15, 16). Under "List other relevant information/documentation," Lt. Laurin wrote: "A copy of special diets. Has been buying items in the commissary that he should not have with his diet." (Pl.'s Exs. 14, 15, 16).

**5. Plaintiff's Medical Diet Grievances – October 1–3, 2012**

Plaintiff filed two grievances on October 1, 2012. In the first, Plaintiff wrote that he was "served a sandwich which had tomatoes in it." (Pl.'s Ex. 26). He explained that because of his "medical conditions, he cannot consume any tomatoes/ tomatoes products." (*Id.*). In the second October 1 grievance, Plaintiff complained that he was "being denied a lunch tray" that complied with his medical special diet. (Pl.'s Ex. 27). Under "Summary of facility staff attempts to resolve" an officer wrote: "called kitchen – spoke with kitchen boss Bedard – new sandwich was being made ... brought down to inmate." (*Id.*). Lt. Laurin subsequently wrote: "Had a meeting

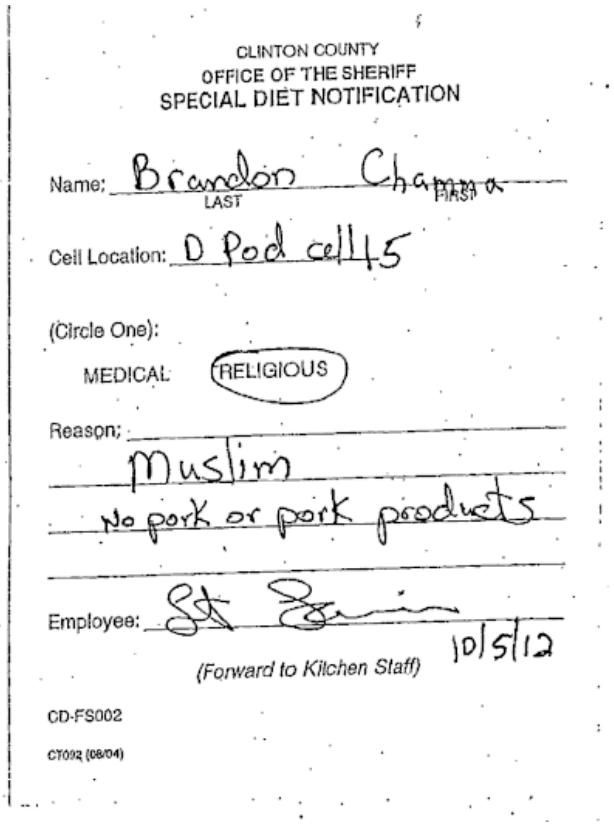
with the kitchen cook manager and explained no more mistakes if there are mistakes they are to be corrected." (*Id.*).

On October 3, Plaintiff filed a grievance stating that he "cannot eat/consume tomato or tomato products due to my medical conditions which was cleared by medical staff. I was served tomato soup in my lunch tray. Having been served tomato soup denies me a meal." (Pl.'s Ex. 28). The grievance's "Summary of facility staff attempts to resolve" stated that: "the tomato alternative soup was the 3 bean salad in a separate bowl on the meal tray. According to the kitchen all contents of tray was compliant to the diets prescribed to inmate Brandon by medical." (*Id.*). [10]

### 6. Special Diet Notification Form for Religious Diet Filed with Kitchen – October 5, 2012

***8** On October 5, 2012, Lt. Laurin "went down to booking, filled out the [religious meal] slip [him]self, put the date on it, brought it down to the kitchen and had them put it right directly in [Plaintiff's] file and mark him as a Muslim, no pork/no pork products." (T. 306; Pl.'s Ex. 8) Lt. Laurin circled the section of the form for a "Religious" diet and wrote "Muslim no pork or pork products"; he signed the from and dated it "10/5/12." (Pl.'s Ex. 8); *see* Figure 1.

Figure 1: Defendants' Exhibit 21 – Dated Special Diet Notification Form


CLINTON COUNTY
OFFICE OF THE SHERIFF
SPECIAL DIET NOTIFICATION

Name: Brandon (LAST) Chapman (FIRST)

Cell Location: D Pod cell 45

(Circle One):

MEDICAL RELIGIOUS

Reason: Muslim
No pork or pork products

Employee: [signature] 10/5/12

(Forward to Kitchen Staff)

CD-FS002

CT092 (08/04)

Lt. Laurin testified that he did not know why he did not provide the "religious slip" earlier and instead waited until October 5. (T. 306). The Court finds that the kitchen was first notified about Plaintiff's religious diet on October 5, 2012, in this Special Diet Notification form. The Court further finds that from September 26 to October 5, Plaintiff continued to be served pork meals and received approximately six pork meals during that week-and-a-half time period. (Pl.'s Exs. 1, 2 (CCJ menus showing pork served two to four times weekly)).

### 7. Meal-Related Grievances – October 9–15, 2012

On October 9, 2012, Plaintiff filed a grievance regarding a meal he received in September:

> I've been served & have consume[d] food items I'm not suppose to consume due to religious beliefs. Through discussion on today's lunch trey [sic] with the shift officer "Coocher" about it containing a ham sandwich. The officer stated it is not ham it is turkey & continued to state, the only pork product served to inmates is the ham steak. He was told it contains pork from the kitchen staff. On September 9th, I was served ham steak for dinner. When I presented it to the shift officer he told me it was made of turkey and no pork/pork [products] ... were included in the ham steak. He continued to state the kitchen doesn't use any

pork products specifically because of the variety of inmates having religious constraints against pork/pork products.

I need someone to get to the bottom of this. 2 different officers making 2 contrary statements.

(Pl.'s Ex. 18). Under "Summary of facility staff attempts to resolve" is written:

> I talked to Michelle in the kitchen and she told me that until recently they had nothing stating that inmate Brandon was a no pork diet. So it is very likely that inmate Brandon recieved [sic] pork on Sept. 9. She also stated that inmate Brandon will no longer receive [sic] pork due to the fact that they now have documentation.

(*Id.*).

On October 10, at approximately 4:30 p.m., Plaintiff filed a grievance stating that he was "served a chef salad with strips of ham." (Pl.'s Ex. 20; Defs.' Ex. 9). The grievance's "Summary of facility staff attempts to resolve" states the corrections officer had the tray returned to the kitchen for replacement. (Pl.'s Ex. 20; Defs.' Ex. 9). Fifteen minutes later, at approximately 4:35 p.m., Plaintiff filed a second grievance stating that instead of replacing the tray in its entirety, the kitchen removed the strips of ham and sent back the same tray. (Pl.'s Ex. 19; Defs.' Ex. 8; Pl.'s Ex. 20; Defs.' Ex. 9). The second grievance's "Summary of facility staff attempts to resolve" states that "Sgt. Gregory" "went [to] the kitchen staff to discuss the tray and that no pork products were to be placed on or near the meal. The cook informed Sgt. Gregory the meat was turkey ham and a replacement tray would not be made." (Pl.'s Ex. 19; Defs.' Ex. 8). Lt. Laurin investigated these grievances and falsely responded: "You have not received pork or pork products from the kitchen for a meal since 9/9/2012." (Pl.'s Ex. 19; Defs.' Ex. 8). Lt. Laurin further stated that "the ham you receive is turkey ham sliced or cubed. Your Muslim diet is being served correct. I have included the ingredient label to you." (Pl.'s Ex. 19; Defs.' Ex. 8). Lt. Laurin made a copy of the turkey ham label to show Plaintiff "that it wasn't a pork product, even though it looks like pork." (T. 318; Defs.' Ex. 1).

***9** On October 11, Plaintiff filed a grievance seeking copies of his food grievances. [11] (Pl.'s Ex. 34). Lt. Laurin's response stated: "The foil request I have given you should give you the information you are requesting." (*Id.*). In a decision dated October 25, Lt. Laurin stated that it "has always been the practice of the facility to charge 25 cents for any requested copies" and that Plaintiff would receive a copy of his grievances "at no charge when the grievance is accepted or is appealed." (*Id.*).

On October 14, Plaintiff submitted a second grievance seeking copies of past food grievances. (Pl.'s Ex. 35). On October 15, Plaintiff filed two grievances. [12] (Pl.'s Exs. 36, 38). One of the grievances sought copies of past food grievances [13] and the other complained that the peanut butter that was served with his breakfast was "high on cholesterol" and asserted that he needed his "restrictive diets to be followed." (Pl.'s Exs. 36, 38).

**8. Medical Diets Revoked – October 15–16, 2012**

Lt. Laurin had noted during his September 29 investigation into Plaintiff's grievances that Plaintiff had "been buying items in commissary that he should not have with his diet." (Pl.'s Exs. 14, 15, 16). "[E]arly in October," after receiving "an awful lot of grievances from [Plaintiff] that just wouldn't even slow down," Lt. Laurin requested Plaintiff's commissary receipts. (T. 326–27 (explaining that the grievances "were just one right after another, so we have an issue"); *see also* Defs.' Ex. 22 (commissary receipts "reprinted on 10/02/2012")). Lt. Laurin testified that his purpose in requesting the receipts was "to look over the items [Plaintiff] was purchasing and to see if it was complying with his diet." (T. 327). Upon reviewing Plaintiff's commissary slips, Lt. Laurin noted that "[t]here was some items that [he] felt were contradictory to [Plaintiff's] low sodium/low fat diet," (*id.*), including "[r]amen [chili] soup," which contained tomato products; "squeeze cheese;" "mac and cheese;" and "nutty buddy bars." (T. 211, 327).

On October 15, Lt. Laurin went to Plaintiff's pod to speak with Plaintiff about his "various grievances" and commissary purchases. (T. 113–14, 328). Lt. Laurin "started ... yelling" and asked Plaintiff "to explain" his commissary purchases —Lt. Laurin asked Plaintiff what the "sense" was of Lt. Laurin and other CCJ officials "putting in all this effort" to respond to "all [Plaintiff's] grievances" if Plaintiff was

"turning around and purchasing" "oatmeal cream pies and nutty bars in commissary?" (T. 113–14, 328–29). Plaintiff responded that "sometimes I don't eat anything since I'm not fed anything, so I have to eat something." (T. 115). Lt. Laurin testified that he understood from their discussion of the commissary receipts that Plaintiff had "traded or bartered" commissary items; although Lt. Laurin acknowledged that Plaintiff did not expressly say so. (T. 328–29). Lt. Laurin testified that if Plaintiff had admitted this he would have been "written up" for violating CCJ rules. (*Id.*). Plaintiff had never been questioned about his commissary purchases before. (T. 115).

***10** After speaking with Plaintiff, Lt. Laurin went to Nurse Kinter to show her the commissary receipts. (T. 329). Lt. Laurin wanted Nurse Kinter "to be aware that [Plaintiff] was purchasing these items and they weren't compliant with his low fat/low sodium diet." (*Id.*). Lt. Laurin explained that his job was "just to make" Nurse Kinter "aware" of the items Plaintiff had been purchasing, and that he had "done this before in the past" with other inmates. (*Id.*). When asked for examples, Lt. Laurin responded: diabetics, individuals who they had "to put ... on a low sodium diet because they start retaining fluids," and "pregnant females," in an effort "to keep them on a good healthy diet." (T. 330). However, Lt. Laurin acknowledged on cross-examination that CCJ would not revoke a diabetic or pregnant inmate's medical diet based on a review of commissary purchases. (T. 357–58).

The following morning, October 16, Plaintiff "was called to go to sick call." (T. 115).[14] Plaintiff was escorted to the medical ward, where he was seen by Nurse Kinter and Dr. Glen Schroyer, who is not a defendant in this case. (T. 116–17). Nurse Kinter told Plaintiff that they were "taking [Plaintiff's] ... medical – – the dietary restrictions away" because Plaintiff was "not being compliant with [his] diet." (T. 118). Plaintiff "immediately" objected and began asking Dr. Schroyer why Nurse Kinter was "making these statements" and "how" he was "allowing this?" (*Id.*). Dr. Shroyer "didn't say anything" and "shrugged his shoulders." (*Id.*). Regarding the commissary purchases, Plaintiff told Nurse Kinter that "due to the past instances and continuous neglect of my dietary restrictions from the kitchen I never know whether or not I'll receive a meal let alone a meal I can eat." (Pl.'s Ex. 40). Plaintiff then said that if they removed his medical diets he was "not going to just eat anything" and that he could not eat a regular diet and that he was "going to write grievances." (T. 118–19).

Nurse Kinter testified that there were no medical concerns about removing Plaintiff's low fat/low cholesterol diet because "his labs had improved at the time when he was here at the jail" and as it "look[ed] like he wasn't being compliant with his meals ... we had no concern with Mr. Brandon's diet at that time." (T. 437). The "coronary risk evaluation" labs in the record, however, do not support this testimony. (Pl.'s Ex. 66). For example, Plaintiff's cholesterol was 255 (high) in May 2012, 259 (high) in August 2012, and 249 (high) on October 3, 2012. (*Id.*). The other lab results—HDL, LDL, and triglycerides—showed similarly minor fluctuations and all remained flagged as high or low. (*Id.*). Nurse Kinter was aware that patients with high levels of cholesterol are at increased risk of heart disease and that patients with acid reflux can become ill if they eat foods with high acidity, like tomatoes, but had "[n]o concerns" about that. (T. 419–20, 440). After reviewing Plaintiff's commissary purchases, and finding that he "was buying everything that was against his medical diet," Nurse Kinter "did a new diet slip to start the regular diet, no fish, no shellfish diet," and she "sent it back down to the kitchen, and then that notification went into the doctor's folder." (T. 393). The "Diet Notification" Nurse Kinter sent to the kitchen is dated October 16, and directed the kitchen to "Cancel all previous slips" and place Plaintiff on the "Reg Diet" but "No Shellfish." (Pl.'s Ex. 41).

The same day, October 16, Plaintiff filed a grievance regarding Nurse Kinter's removal of his medical diet. (Pl.'s Exs. 39, 40). Lt. Laurin denied the grievance. (Pl.'s Ex. 40).

On October 17, 2012, Plaintiff submitted two Sick Call Requests. (Pl.'s Ex. 42; Defs.' Ex. 20). The first stated: "I do not eat tomatoes. Tomatoes causes me extreme acid reflux ... yet I was served a dinner of pasta & tomato sauce. The restriction was taken out of my file." (Pl.'s Ex. 42). Plaintiff requested that the restriction be reinstated. (*Id.*). On October 18, Nurse Kinter responded: "This was discussed at visit with M.D. You decided not to follow doctor's recommendations!" (*Id.*). The second Sick Call Request stated that Plaintiff does not eat pork, he is Muslim, he has raised this issue on several occasions, and that his diet was "recently" changed under Nurse Kinter's "directive" and he "need[s] his religious diet reinstated." (Defs.' Ex. 20). Nurse Kinter investigated Plaintiff's request and on October 18, responded: "Your religious diet is still in effect. I checked with kitchen. I don't do anything with religion." (*Id.*; T. 414).

**9. Served Pork Meal – October 17, 2012**

***11** On October 17, Plaintiff received a pasta salad. (T. 136). It was labeled "meatless" or "vegetarian" but when Plaintiff "began to ... dig in," he discovered the salad had pork in it. (*Id.*). When Plaintiff compared his tray to that of another Muslim inmate he found his salad was different. (T. 137). When Plaintiff compared his tray to "the general population" trays, he found they were identical. (*Id.*). Plaintiff reported the tray to the officer on duty. (*Id.*). Plaintiff submitted a grievance on October 17 reporting that he had been served a "ham salad" despite having a Special Diet Notification in his inmate file. (Pl.'s Ex. 22). On the grievance, Sgt. Clancy wrote: "I replaced the meal and was given a non-pork meal. And as for the meal slip a new one was placed in file and kitchen was notified." [15] (*Id.*). Plaintiff checked the line next to "I do not accept this resolution and wish to file a formal grievance." (*Id.*). Under "Decision of the Grievance Coordinator," Sgt. Clancy wrote: "Spoke with kitchen @ 1835 [6:35 p.m.]. Was shown file that shows inmate Brandon no shellfish; No pork. Returned and spoke with inmate. Inmate Brandon refuses to accept @ 1844 [6:44 p.m.]." (*Id.*). The next day, Sgt. Clancy told Plaintiff she had investigated the matter and that "the staff chef had made a mistake," and had "put the pork meal on [Plaintiff's] tray instead of the non-pork meal." (T. 141–42; Pl.'s Ex. 22). When Plaintiff asked Sgt. Clancy if she would document that, Sgt. Clancy said "no," and that she was "going to leave it as she had it." (T. 143). Plaintiff testified that as Sgt. Clancy walked away from him, she said to Officer Blaise: "if he grieves another tray, she's going to lock" Plaintiff up. (*Id.*). [16] Lt. Laurin ultimately denied the grievance by attaching, without explanation, his October 12 investigation, which occurred five days before the incident at issue in the October 17 grievance. (Pl.'s Ex. 22).

**10. Medical Diet Grievances – October 19–27, 2012**

On October 19, 2012, Plaintiff submitted three grievances: the first stated that he had received a tray with "hot cereal & buttery toast," which did not comply with his "restrictive diet" for his "high cholesterol condition," (Pl.'s Ex. 43), the second stated that he was served tomato soup for lunch, which causes him "severe ...acid reflux," (Pl.'s Ex. 44), and the third stated that he had been served a salad with tomatoes for dinner, which causes him "severe ...acid reflux," (Pl.'s Ex. 45). Plaintiff filed similar grievances on October 20, 22, 24, 25, 27, 28, 29, 30, 31, and November 1. (Pl.'s Exs. 45–55). On November 2, after investigating, Lt. Laurin issued a decision denying Plaintiff's grievances, noting that "[t]he jails [sic] Health Coordinator and the Jail Physician has [sic] eliminated your diets consisting of low fat, low cholesterol, no fish and no tomatoes or tomato products" because the commissary items Plaintiff had purchased were not compliant "with the Physicians [sic] recommendations." (Pl.'s Ex. 56). Lt. Laurin noted that the "no shell fish" and "religious restrictions for Muslims" were intact. (*Id.*). Plaintiff filed additional grievances regarding his medical diet on November 2, 4, and 9. (Pl.'s Exs. 57, 58, 59).

By October 26, Lt. Laurin had received "several grievances" from Plaintiff, and he spoke with "medical and asked them if there was something we could do." (T. 335–36). Lt. Laurin's "focus was totally on answering his grievances and seeing if we couldn't get some kind of resolution." (T. 336). Lt. Laurin explained that resolving Plaintiff's grievances had "turned into a full-time job" and "was a little overwhelming." (*Id.*). Lt. Laurin estimated that Plaintiff had filed eighteen grievances. (*Id.*). Lt. Laurin also discussed with Nurse Kinter whether there was "something we could do to get [Plaintiff] back on his diet because we needed to come to a conclusion of all this"—meaning that they "needed to make all parties happy." (T. 336–37). [17]

**11. Served Pork Meal – Late October 2012**

The following week, in late October, Plaintiff received a meal with "a label of vegetarian bean soup" that appeared to be "compliant." (T. 152). However, as Plaintiff started to eat, he noticed "small bits of ham chunks swimming in" the soup. (*Id.*). Plaintiff looked around and noticed that the others who received "non-pork meal[s]," had different meals than Plaintiff but that his was the same as "the general population meals." (T. 152). Plaintiff reported the meal to the officer on duty. (*Id.*). The officer "did his own investigation" by comparing Plaintiff's meal to the meals of the other inmates and concluded, like Plaintiff, that although Plaintiff's soup was labeled "vegetarian soup" it was ham soup. (T. 153). The officer "contacted the kitchen." (*Id.*). The officer reported that "Chef Bedard said that he mistakenly used the same ladle spoon to serve [his] tray with another tray," so he "mixed" up the soup on Plaintiff's tray. (T. 153–54). Plaintiff received a replacement meal. (*Id.*). As a result, Plaintiff "started combing through" his meals. (*Id.*).

**12. Served Pork Meal – November 2012**

***12** In November 2012, Plaintiff received a meal with a pasta salad labeled "meatless salad" that contained pepperoni. (T. 155). Plaintiff "immediately" brought the pepperoni to the attention of Officer Webb, who was the corrections officer on duty. (T. 156). Plaintiff told Officer Webb that he did not eat pork and about "the last two instances when [he] received a meal that appeared to have a label that was compliant with [his] religious diet, but the meal itself wasn't," and said, "this happened again and this is pepperoni." (*Id.*). Officer Webb, without looking at the tray, immediately said "oh, that's turkey pepperoni." (*Id.*). Plaintiff explained that it was "pork pepperoni" and "went on to say" that even it if it was "turkey," not only would everyone have received it, but it was not "meatless" and the salad was labeled "meatless salad." (T. 155, 157). Plaintiff asked Officer Webb to "[c]ontact the kitchen and just confirm," "[i]f it's turkey, then its turkey. If it's not, then ... [he] would like a replacement of some sort." (T. 157). Officer Webb said he would call. (*Id.*).

After twenty minutes "went by," Plaintiff approached Officer Webb, who was on the phone." (*Id.*). Officer Webb said "oh, so its turkey—turkey pepperoni." (*Id.*). "And then he told [Plaintiff] that he spoke to somebody in the kitchen and he confirmed that it was turkey pepperoni." (*Id.*). When Plaintiff asked who Officer Webb spoke to, Officer Webb said something to the effect that he was not going to tell Plaintiff who it was. (T. 158). Plaintiff stated that he wanted a name because he wanted to submit a grievance. (*Id.*). Officer Webb replied that if Plaintiff grieved the meal, he would not get a replacement meal. (*Id.*). Plaintiff did not receive a replacement meal and there is no evidence that Plaintiff filed a grievance. (T. 159). Defendants did not present any evidence that the kitchen served turkey pepperoni. The Court finds that the pepperoni served to Plaintiff that day contained pork and, crediting Plaintiff's testimony, finds that Officer Webb did not call the kitchen to check whether the pepperoni in the salad was turkey pepperoni.

**13. Medical Diet Reinstated – November 15–21, 2012**

On November 15, Plaintiff submitted a "Sick Call Request" seeking to speak with Nurse Kinter about the removal of his restrictive diets "because of a non-compliance of my diet she said I committed through my commissary purchases." (Pl.'s Ex. 60). Plaintiff requested guidance regarding appropriate commissary purchases "that won't be deemed as non-compliant so" that his restrictive diets can be "reinstated." (*Id.*). Plaintiff asked if Nurse Kinter "could talk to him about his commissary purchases," and she did. (T. 394). Together, they "went through the commissary options to see what would be better options of what to buy." (T. 394–95). Nurse Kinter crossed off items from the commissary list "that were not recommended for him to purchase." (T. 401). On November 21, Nurse Kinter restored Plaintiff's diets and noted that Plaintiff could "purchase items from commissary that are highlighted." (Pl.'s Ex. 60).

**14. Assaulted by Another Inmate – November 17–18, 2012**

On or about November 17, Plaintiff saw Sgt. Clancy and Officer Blaise in an observation housing unit where Plaintiff was confined. (T. 145). They were "escorting" another inmate, "Tiny," "into the cell next to" Plaintiff. (*Id.*). Plaintiff knew Tiny "had a reputation ... for attacking other inmates," for throwing things at other inmates, including feces and urine, and for spitting. (T. 145–46). As Sgt. Clancy and Officer Blaise were moving Tiny into his cell, Plaintiff heard Tiny and Sgt. Clancy arguing and then heard Sgt. Clancy say, "let's see if he tries this shit on Brandon." (T. 146). Plaintiff testified that after Sgt. Clancy and Officer Blaise left, Tiny began making "racial remarks" to Plaintiff, and that the two of them argued during the night. (T. 147). When Officer Blaise returned the next day during mealtime, Officer Blaise asked Plaintiff to assist in carrying food trays (T. 148). Plaintiff agreed and began carrying trays. (T. 149). As Plaintiff stood up from his work in front of Tiny's cell, Tiny spit in his face. (*Id.*). Officer Blaise issued an incident report regarding Tiny's conduct. (Defs.' Ex. 23).

**15. Served Pork Meal – December 25, 2012**

***13** On December 25, there were two issues with Plaintiff's meals. (T. 494). At breakfast, Plaintiff told Officer Perry, the corrections officer on duty, that there was butter on his toast. (*Id.*). Officer Perry checked his file, which reflected a "low cal/low fat diet," and "called the kitchen and had his toast replaced." (*Id.*). At lunch, Plaintiff received a meal of barbeque ribs, which he immediately brought to Officer Perry's attention. (T. 161–62). Officer Perry "smirk[ed] and said, come on Brandon ... where's your holiday spirit." (T. 162). They "started arguing immediately." (*Id.*). Plaintiff

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"cursed at him" and "was combative" and "upset." (*Id.*). Plaintiff voiced his frustration of "an entire year of this nonstop" "like I'm a joke to these people." (T. 162–63). Plaintiff filed a grievance stating again that he is Muslim and that he was yet again served a meal with pork. (Pl.'s Ex. 25). Under "[s]ummary of facility staff attempts to resolve," the grievance states: "your meal was addressed and changed to address your needs." (*Id.*). On the grievance, Plaintiff checked the line next to "I do not accept this resolution and wish to file a formal grievance." (*Id.*). The grievance was never forwarded to the grievance coordinator and there is nothing in the record that suggests it proceeded beyond Officer Perry. Defendants provide no explanation for this. [18] Plaintiff testified that despite the statement on the grievance, his meal was not replaced. (T. 164). Having observed the testimony of Plaintiff and Officer Perry, and the credibility and demeanor of each witness on this issue, the Court credits Plaintiff's testimony that his meal was not replaced.

Plaintiff lost fifty pounds during the twelve months he was in the jail. (T. 166).

## III. CONCLUSIONS OF LAW

### A. Legal Standard

"The preponderance standard is no more than a tie-breaker dictating that when the evidence on an issue is evenly balanced, the party with the burden of proof loses." *United States v. Gigante*, 94 F.3d 53, 55 (2d Cir. 1996); *see Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 731 (2d Cir. 2001).

### B. First Amendment Free Exercise of Religion

Like prisoners, pretrial detainees "have 'long been understood to retain some measure of' their rights under the Free Exercise Clause." *Brandon*, 938 F.3d at 32 (quoting *Ford v. McGinnis (Ford II)*, 352 F.3d 582, 588 (2d Cir. 2003)). "These rights, however, must be balanced against the 'interests of prison officials charged with complex duties arising from administration of the penal system.' " *Id.* (quoting *Ford II*, 352 F.3d at 588). Thus, courts must "judge prisoners' free exercise claims 'under a "reasonableness" test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.' " *Id.* (quoting *Ford II*, 352 F.3d at 588). This test requires a prisoner or pretrial detainee to "show at the threshold that the disputed conduct substantially burdens his sincerely held religious beliefs." *Id.* (quoting *Holland v. Goord*, 758 F.3d 215, 220 (2d Cir. 2014)). If the prisoner or pretrial detainee "satisfies these threshold requirements, a defendant can still avoid liability by showing that his or her conduct is 'reasonably related to legitimate penological interests.' " *Id.* (quoting *Holland*, 758 F.3d at 222).

At trial, Plaintiff established by a preponderance of the evidence that he was entitled to receive a Muslim, no-pork, no pork products diet starting on March 2, 2012, the date he was re-booked into CCJ and listed his religion as Muslim. The importance of avoiding pork and pork products to the practice of Islam was undisputed at trial; the *Quran* prohibits the eating of pork and the eating of pork is considered "a high sin." (T. 38–39). It was also undisputed that Plaintiff's beliefs were sincerely held. (T. 55). Notwithstanding Plaintiff's entitlement to a religious diet, he was served pork meals two to four times weekly—between 62 and 124 pork meals—during the 31-week period from March 2, 2012 to October 5, 2012, the day a Special Diet Notification form directing the kitchen to provide a religious diet was placed in his inmate file. (T. 59–81; Pl.'s Ex. 1). Even after Lt. Laurin gave the kitchen written notice of Plaintiff's entitlement to a Muslim, no-pork, no pork products diet on October 5, Plaintiff was served pork meals at least four times thereafter: on October 17, (Pl.'s Ex. 22); in late October, (T. 152–54); once in November, (T. 155); and on December 25, (Pl.'s Ex. 25). The October meals were replaced, (*see* Pl.'s Ex. 22 T. 154), but the November meal with pepperoni, and the December 25 BBQ pork ribs meal were not replaced.

***14** Thus, Plaintiff has established that he was denied a religiously compliant diet from March 2 to October 5, 2012 and served a total of *at least* 66 pork meals from March 2 to December 25, 2012. The Court has no difficulty concluding that the denial of a religious diet for seven months and the service of at least 66 pork meals substantially burdened Plaintiff's sincerely held religious beliefs. *See Brandon*, 938 F.3d at 35–36 (observing that the Circuit previously found the denial "of a single [religious] feast constituted a substantial burden" and concluding that the denial of ten Muslim, no-pork meals "may constitute a substantial burden" (citing *Ford II*, 352 F.3d at 593)). Defendants presented no evidence at trial that the service of pork meals to Plaintiff was reasonably related to a legitimate penological interest. Accordingly, the Court finds Plaintiff's right to the free exercise of religion was violated.

**1. Personal Involvement [19] and Deliberate Indifference**

The Second Circuit has instructed:

> [A]fter *Iqbal*, there is no special rule for supervisory liability. Instead, a plaintiff must plead and prove "that each Government-official defendant, through the official's own individual actions, has violated the Constitution." [*Ashcroft v.*] *Iqbal*, 556 U.S. [662,] 676, 129 S.Ct. 1937, 173 L.Ed.2d 868 [(2009)]. "The factors necessary to establish a [§ 1983] violation will vary with the constitutional provision at issue" because the elements of different constitutional violations vary. *Id.* The violation must be established against the supervisory official directly.

*Tangreti v. Bachmann*, 983 F.3d 609, 618 (2d Cir. 2020). "The focus is on what the supervisor did or caused to be done, 'the resulting injury attributable to his conduct, and the *mens rea* required of him to be held liable, which can be no less than the *mens rea* required of anyone else.' " *Id.* (quoting *Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010) (Gorsuch, J.)).

In this case, to prove the individual Defendants liable under the First Amendment for the violation of his right to free exercise of religion, Plaintiff must also establish that they acted with deliberate indifference. [20] "The 'deliberate indifference standard embodies both an objective and a subjective prong.' " *Morgan v. Dzurenda*, 956 F.3d 84, 89 (2d Cir. 2020) (quoting *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994)). "First, the alleged deprivation must be, in objective terms, sufficiently serious." *Id.* (quoting *Hathaway*, 37 F.3d at 66). "Second, the charged official must act with a sufficiently culpable state of mind." *Id.* (quoting *Hathaway*, 37 F.3d at 66). "Deliberate indifference requires more than negligence, but less than conduct undertaken for the very purpose of causing harm." *Id.* (quoting *Hathaway*, 37 F.3d at 66). As to the second prong, "the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk" to the right to free exercise. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (explaining deliberate indifference in pretrial detainee context); *see also id.* (explaining that "[i]n other words, the 'subjective prong' (or '*mens rea* prong') of a deliberate indifference claim is defined objectively").

**a. Lt. Laurin**

***15** To establish a constitutional violation against Lt. Laurin, Plaintiff must show that Lt. Laurin, "through [his] own individual actions, has violated the Constitution." *Tangreti*, 983 F.3d at 618. Lt. Laurin was responsible for supervising the corrections sergeants and the day-to-day activities throughout CCJ, and for overseeing the grievance program at CCJ. (Joint Pre-Trial Stipulation, ¶ 3(a)(vi)). However, there is no evidence in the record indicating that Lt. Laurin had any knowledge regarding, or involvement with, Plaintiff's requests for a Muslim diet before September 26. And because Lt. Laurin's supervisory responsibilities alone are insufficient to subject him to liability, *see Tangreti*, 983 F.3d at 619 (explaining that a supervisor cannot be found liable alone "by reason of ... [his] supervision of others who committed the violation"), the Court finds Plaintiff has failed to prove Lt. Laurin's liability for the service of pork meals, in violation of Plaintiff's free exercise rights, from March 2 to September 26. However, this does not end the inquiry as to Lt. Laurin's liability for it is undisputed that Lt. Laurin became involved on September 26.

When Lt. Laurin began handling Plaintiff's grievances on September 26, he learned that Plaintiff was Muslim, (T. 91 (Plaintiff testifying that Lt. Laurin told him that he was aware Plaintiff was Muslim)), and that he had been receiving noncompliant meals for many months, (*see, e.g.*, Pl.'s Ex. 15 (Plaintiff stating in grievance "I've been here for 250+ days and continuously receive food ... which I can't eat")). When Lt. Laurin searched the kitchen's files, he found the kitchen did not have a religious diet form in Plaintiff's file. (T. 303, 306–07, 341). Lt. Laurin then went to Plaintiff and said he knew Plaintiff was Muslim, that Plaintiff was receiving pork meals, that it was "wrong" and that "he's going to help." (T. 91, 304). On September 29, when Lt. Laurin issued a decision on Plaintiff's grievances, he noted that the "kitchen had not been notified he was Muslim" but that "kitchen staff has been advised to correct the diet." (Pl.'s Ex. 15). This, of course, was untrue because Lt. Laurin had not yet filed a Special Diet Notification form for Plaintiff. Despite personally assuring Plaintiff on September 27 that he would no longer receive pork meals and representing that he had already "advised" the kitchen "to correct the diet," Lt. Laurin did not complete a Special Diet Notification form until October 5—ten days, and thirty meals, later. (Pl.'s Ex. 8). Lt. Laurin had no explanation for not filing the Special Diet Notification form until October 5, (T. 306, 351 (Lt. Laurin testifying that he did not "know

offhand" and speculating that he "probably got tied up in something")), and understood such forms were to be filed the same day as booking, or shortly thereafter. (T. 293–94 (Lt. Laurin testifying that "[o]nce that inmate was booked in," the booking officer "was supposed" to physically bring the religious diet notification slip "down to the kitchen")). Based on this evidence, the Court concludes that as of September 26, Lt. Laurin knew that Plaintiff was entitled to a Muslim diet, and that without a Special Diet Notification form in his kitchen inmate file, there was an excessive risk that Plaintiff would continue to receive pork meals in violation of his religion. And yet, Lt. Laurin inexplicably waited ten days to file the Special Diet Notification form. Therefore, the Court finds that Plaintiff has proven by a preponderance of the evidence that Lt. Laurin recklessly failed to act with reasonable care to mitigate the risk that remaining on a regular diet at CCJ posed to Plaintiff's right to free exercise of religion. *Darnell*, 849 F.3d at 35. Accordingly, Lt. Laurin is liable for the September 26 to October 5 violation of Plaintiff's right to the free exercise of religion. [21]

***16** Despite Lt. Laurin's filing of the Special Diet Notification form, Plaintiff was served four pork meals between October 5 and December 25. However, Plaintiff has not shown Lt. Laurin's "individual actions" with respect to these meals led to the violation of Plaintiff's First Amendment rights. Moreover, as the two pork meals Plaintiff was served in October were both replaced immediately, (Pl.'s Exs. 22; T. 154), the burden on Plaintiff's free exercise of religion may have been de minimis. *See Rutherford v. Westchester Cnty.*, No. 18-cv-4872, 2020 WL 433841, at *7, 2020 U.S. Dist. LEXIS 14113 (S.D.N.Y. Jan. 28, 2020) ("As Plaintiff alleges only a single incident of ham in his halal meal, and as he acknowledges that Defendants attempted to rectify (or at least ameliorate) the situation immediately, he has not alleged a constitutional violation."). But even assuming the service of two pork meals in October constituted a substantial burden, in both instances, the only evidence before the Court as to why Plaintiff was served pork meals suggests that it was due to a mistake in the kitchen. (T. 142, 153–54). While Lt. Laurin was responsible for the day-to-day supervision of the CCJ, and reviewed the grievance regarding the October 17 pork meal, (Pl.'s Ex. 22), there is no evidence connecting him to either meal. *See Tangreti*, 983 F.3d at 619 (explaining that a supervisor cannot be found liable alone "by reason of ... [his] supervision of others who committed the violation").

Plaintiff was also served a pasta salad with pepperoni in November, and barbeque pork ribs on December 25. (T. 155; Pl.'s Ex. 25). Neither meal was replaced. There is no evidence in the record indicating why Plaintiff received pork meals on these dates. The Court therefore has no basis for finding the service of pork on either date was an intentional act. Moreover, Plaintiff failed to present evidence showing that Lt. Laurin was personally involved in either meal. Therefore, the Court finds Plaintiff has not shown Lt. Laurin's liability for the four pork meals served to Plaintiff between October 17 and December 25.

Accordingly, the Court finds Lt. Laurin is liable for violating Plaintiff's First Amendment right to the free exercise of religion by failing to provide a Muslim diet from September 26 to October 5.

**b. Nurse Kinter**

There is evidence that Nurse Kinter knew of Plaintiff's efforts to obtain a religious diet as early as May 28. (*See, e.g.*, Pl.'s Exs. 9, 13). There is also evidence that Nurse Kinter directed Plaintiff to speak to a sergeant or lieutenant at CCJ and that she did not help Plaintiff obtain a religious diet. (Pl.'s Ex. 13). However, Plaintiff failed to prove by a preponderance of the evidence that Nurse Kinter had any authority to do more than direct Plaintiff's inquiries to those with authority to assist him and check to see what diets were on file with the kitchen. Nurse Kinter testified that the nurses at CCJ "were always told that the healthcare office, any of us nurses, were not allowed to do religious diets" and that she had never filled out a religious diet slip in the four years she had worked at CCJ. (T. 389; T. 468 (Bedard testifying that he did not recall a nurse or anyone from the medical facility ever providing him with a religious diet restriction)). The evidence showed that only a booking officer, sergeant or lieutenant, or grievance coordinator could authorize a religious diet. (T. 293, 468; Pl.'s Ex. 8'; Pl.'s Ex. 13). In *Tangreti*, for example, the Second Circuit noted that where the defendant prison official "was not responsible for procuring cameras or for [the correctional facility's] camera policy[,] [t]he district court correctly concluded that apart from discussing this problem with other officials, [the defendant] had no further responsibility to resolve it." 983 F.3d at 619 n.7. Thus, the Court finds that apart from directing Plaintiff to the individuals at CCJ who could authorize religious diets, Nurse Kinter had no additional authority or responsibility to assist Plaintiff in obtaining a religious diet. *Jackson v. Sheehan*, No. 16-cv-6710, 2021 WL 795313, at *7, 2021 U.S. Dist. LEXIS 38947 (W.D.N.Y. Mar. 2, 2021) ("Jansen and Haimes,

having performed their functions with respect to Plaintiff's complaint to the limits of their authority, 'had no further responsibility to resolve it.' " (quoting *Tangreti*, 983 F.3d at 619 n.7)). Accordingly, the Court finds Plaintiff failed to prove by a preponderance of the evidence Nurse Kinter's personal involvement in the violation of his right to the free exercise of religion.

**c. Bedard**

***17** Plaintiff also failed to prove Bedard acted with deliberate indifference or was personally involved in the deprivation of his right to the free exercise of religion. Plaintiff established that Bedard was responsible for ensuring that meals were prepared in compliance with religious diets, and was aware, as of October 5, of Plaintiff's religious diet. (T. 459–60, 469–70; Pl.'s Ex. 8). To the extent Plaintiff seeks to hold Bedard liable for the period before the Special Diet Notification was placed in his inmate folder—March 2 to October 5—Plaintiff has presented no evidence that Bedard knew he was entitled to a no-pork diet during that time period. The Court therefore finds Plaintiff has failed to establish Bedard's liability for the noncompliant meals served from March 2 to October 5. However, as the kitchen served pork meals to Plaintiff four times *after* being notified in writing on October 5 of Plaintiff's no-pork diet, the Court must consider whether Plaintiff has proven Bedard's deliberate indifference and personal involvement in connection with these meals. (See Pl.'s Ex. 22 (served pasta salad with ham on October 17); T. 152–54 (served vegetarian bean soup "with small bits of ham chunks" in late October); T. 155 (served pasta salad with pepperoni in November); Pl.'s Ex. 25 (served barbeque pork rib sandwich on December 25)).

The evidence at trial showed that Bedard acted in a supervisory role with respect to meal service, and although there is some evidence that Bedard was aware Plaintiff was claiming that mistakes were being made with respect to his religious meals, *see* Dkt. No. 22 ("Grievance Investigation Form" dated October 15 indicating that Lt. Laurin interviewed Bedard with respect to serving Plaintiff pork), there was little evidence connecting Bedard to the four pork meals Plaintiff received after the Special Diet Notification was filed with the kitchen. There was no evidence presented at trial that suggested Bedard was involved in preparing or serving Plaintiff's meal tray on October 17. Indeed, the evidence in record shows that Sgt. Clancy spoke with the "kitchen" about this incident and learned that a "staff chef had a made a mistake." (T. 141–42). The Court therefore finds no basis for holding Bedard liable for this incident. With respect to the soup with ham that Plaintiff was served in late October, Plaintiff testified that he was told that Bedard "mistakenly used the same ladle spoon to serve [Plaintiff's] tray with another tray" which resulted in Plaintiff receiving ham in his soup. (T. 153–54). However, even assuming Bedard mistakenly served Plaintiff ham soup instead of vegetarian bean soup,[22] the Court finds no basis for concluding Bedard acted with deliberate indifference. Indeed, the evidence that each time the kitchen was made aware of a mistake (on October 17 and again in late October), a replacement meal was sent undermines any suggestion of deliberate indifference to the violation of Plaintiff's right to the free exercise of religion. *See*, *e.g.*, *Rangolan v. County of Nassau*, 217 F.3d 77, 79 (2d Cir. 2000) (finding no deliberate indifference when "the County took steps to protect" a vulnerable inmate "but mistakenly failed to implement them"); *Vail v. City of New York*, 68 F. Supp. 3d 412, 425–26 (S.D.N.Y. 2014) (finding that the plaintiff failed to adequately allege the defendant acted with deliberate indifference because even if the defendant administered the incorrect medication, they "acted quickly after Plaintiff became symptomatic, and therefore they were not reckless"); *Ivey v. City of New York*, Nos. 12-cv-3580, 2013 WL 6838954, at *3, 2013 U.S. Dist. LEXIS 175884 (S.D.N.Y. Dec. 12, 2013) (granting a motion to dismiss where it was "[im]plausible that [the] defendants [had] acted with 'deliberate indifference' " because "they appeared to have taken immediate steps to provide treatment" "almost immediately" after the plaintiff "was diagnosed with a serious ... condition"). Finally, there is no evidence connecting Bedard, other than in a supervisory role as food service manager, to the third or fourth pork meals Plaintiff was served—pasta salad with pepperoni in November or the barbeque pork ribs on December 25. Accordingly, the Court finds Plaintiff has failed to prove, by a preponderance of the evidence, his free exercise of religion claim against Bedard.

**d. Sgt. Clancy**

***18** Plaintiff asserts Sgt. Clancy was "personally involved and deliberately indifferent to Plaintiff's Free Exercise rights" because she refused to "record" her finding that Plaintiff had been served pork on Plaintiff's October 17 religious dietary grievance and threatened to "lock" Plaintiff up if he filed another grievance. (Dkt. No. 247 (citing Pl.'s Ex. 22; T. 142–45)). Although Sgt. Clancy did not explicitly state

that Plaintiff received a pork meal on Plaintiff's October 17 grievance, Sgt. Clancy stated that she "replaced the meal" and that Plaintiff "was given a non-pork meal." (Pl.'s Ex. 22). Sgt. Clancy's statement implies that Plaintiff's original meal contained pork, and her efforts to have it replaced reflect Sgt. Clancy's acknowledgement that the original meal was improper and that Plaintiff was entitled to a no-pork meal. (*Id.*). The Court finds no deliberate indifference or personal involvement under these circumstances.

**e. Officers Webb and Perry**

Plaintiff's free exercise claim against Officer Perry arises from the pasta salad with pepperoni Plaintiff was served in November 2012. Plaintiff's free exercise claim against Officer Perry stems from Plaintiff's receipt of a meal of barbeque pork ribs on December 25. (T. 161–62). However, for the reasons discussed below, *see supra* Section III.B.2, because it was not "clearly established" in 2012 that the failure to replace a single meal would substantially burden a Muslim inmate's First Amendment rights, *Francis v. Fiacco*, 942 F.3d 126, 139 (2d Cir. 2019) (quoting *Ricciuti v. Gyzenis*, 834 F.3d 162, 167 (2d Cir. 2016)), the Court finds Officer Webb and Officer Perry are entitled to qualified immunity, and does not address the merits of Plaintiff's constitutional claims against them, *see id.* at 140 (observing that courts, in their discretion, may "proceed directly to step two of the [qualified immunity] analysis and, if they find that qualified immunity applies, avoid the '[u]nnecessary litigation of constitutional issues' at step one") (quoting *Pearson v. Callahan*, 555 U.S. 223, 237, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)).

**2. Qualified Immunity**

"Qualified immunity shields federal and state officials from money damages unless [the] plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Francis* 942 F.3d at 139 (quoting *Ricciuti*, 834 F.3d at 167). Thus, even after a prison officer has been found liable for a constitutional violation, "the doctrine of qualified immunity will shield that officer from liability for damages if his [or her] 'conduct d[id] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Outlaw v. City of Hartford*, 884 F.3d 351, 366 (2d Cir. 2018) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015)). A court may grant qualified immunity after a finding of liability "if an officer has made a reasonable mistake of law, i.e., if the constitutional violation he [or she] has committed was not a 'clearly established' violation." *Jackson v. Tellado*, 236 F. Supp. 3d 636, 662 (E.D.N.Y. 2017). "The qualified immunity standard is an objective standard, asking not whether the defendant officer acted in good faith or what he himself [or she herself] knew or believed, but rather what would have been known to or believed by a reasonable officer in the defendant's position." *Outlaw*, 884 F.3d at 367. Qualified immunity is an affirmative defense that a defendant bears the burden of proving. *Id.* "To the extent that a particular finding of fact [i]s essential to an affirmative defense, ... it [i]s incumbent on [the defendant] to request that the [factfinder] be asked the pertinent question." *Id.* (quoting *Kerman v. City of New York*, 374 F.3d 93, 120 (2d Cir. 2004)) (markings in original).

"To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Taylor v. Barkes*, 575 U.S. 822, 825, 135 S.Ct. 2042, 192 L.Ed.2d 78 (2015) (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012)). "In making this determination, [courts] consider Supreme Court and Second Circuit precedent as it existed at the time of the challenged conduct." *McGowan v. United States*, 825 F.3d 118, 124 (2d Cir. 2016) (citing *Garcia v. Does*, 779 F.3d 84, 92 (2d Cir. 2014)). However, "the absence of a decision by [the Second Circuit] or the Supreme Court directly addressing the right at issue will not preclude a finding that the law was clearly established so long as preexisting law clearly foreshadows a particular ruling on the issue." *Id.* (quoting *Garcia*, 779 F.3d at 92 (internal quotation marks, alterations, and citations omitted)).

**a. Lt. Laurin**

***19** "We ... have clearly established that a prisoner has a right to a diet consistent with his or her religious scruples." *Ford II*, 352 F.3d at 597 (citing *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975)). Lt. Laurin knew, as of September 26, that Plaintiff was entitled to a Muslim diet, that Plaintiff should have been receiving a Muslim diet since March 2, and that Plaintiff had been wrongfully denied a Muslim diet for approximately seven months. And yet, Lt. Laurin, inexplicably, left Plaintiff on a regular prison diet for ten more days before placing in Plaintiff's kitchen file a Special Diet

Notification form advising the kitchen to provide Plaintiff a non-pork diet. Even assuming, as discussed below, that the "law was not clearly established as to how many religiously compliant meals must be denied before the prisoner' religious beliefs are substantially burdened," *Brandon*, 938 F.3d at 39, the Court finds that no reasonable officer, who had no legitimate penological reason for withholding a religious diet, would have believed that allowing an inmate to remain on a regular diet for an additional ten days, during which time the inmate regularly received pork meals he could not eat, [23] was not a substantial burden. *See, e.g.*, *McEachin v. McGuinnis*, 357 F.3d 197, 201 (2d Cir. 2004) (explaining that the principle that denying "prison inmates the provision of food that satisfies the dictates of their faith does unconstitutionally burden their free exercise rights" was "established in our circuit at least as early as 1975" and that the district court improperly dismissed the plaintiff's claim that "the seven-day restrictive diet imposed upon him ... impinged upon his observance of Ramadan" (citing *Ford II*, 352 F.3d at 597)). Notably, Lt. Laurin does not argue otherwise. Accordingly, Lt. Laurin is not entitled to qualified immunity.

**b. Officers Webb and Perry**

Officers Webb and Perry were each only involved in one incident. The Court finds that, even crediting Plaintiff's allegations, Officers Webb and Perry are entitled to qualified immunity for these isolated incidents. A reasonable officer would not necessarily have known that the failure to replace a single noncompliant meal imposed a substantial burden under existing precedent. Though there need not be a case directly on point, "existing precedent must have placed the statutory or constitutional question beyond debate." *Taylor*, 575 U.S. at 825, 135 S.Ct. 2042 (internal quotation marks and citations omitted). It was not clearly established in 2012 that the denial of a single religious meal would substantially burden a plaintiff's First Amendment rights. *Compare Brandon*, 938 F.3d at 36 n.11 ("We express no opinion as to whether a single meal or a smaller number of meals spread out over a longer period of time might perhaps be considered isolated incidents, such that the burden they impose is de minimis."); *with Williams v. Does*, 639 F. App'x 55, 57 (2d Cir. 2016) ("The district court relied on non-binding case law when it determined that Williams's burden was *de minimis* because only a few of his meals were delivered prematurely; its reasoning is inconsistent with this Court's case law, which cautions against 'the danger that courts will make conclusory judgments about the unimportance of the religious practice to the adherent.' " (quoting *Ford II*, 352 F.3d at 593)); *see also Wiley v. Baker*, No. 20-cv-154, 2022 WL 3045042, at *6, 2022 U.S. Dist. LEXIS 138684 (D. Vt. June 10, 2022) (declining to dismiss at the pleading stage because, "given that the case law is not clear on precisely how many missed or untimely meals during Ramadan would constitute a 'substantial burden' to a Muslim inmate, dismissal on 'substantial burden' grounds is inappropriate at this stage of the case"), *report and recommendation adopted*, 2022 WL 3042140, 2022 U.S. Dist. LEXIS 136972 (D. Vt. Aug. 2, 2022); *Brown v. Graham*, No. 07-cv-1353, 2010 WL 6428251, at *15, 2010 U.S. Dist. LEXIS 144188 (N.D.N.Y. Mar. 30, 2010) (holding that even assuming that the "plaintiff was approved to receive a kosher meal throughout his confinement ... the withholding of a single noon meal constituted, at most, a de minimis burden on plaintiff's religious expression"), *report and recommendation adopted*, 2011 WL 1213482, 2011 U.S. Dist. LEXIS 34345 (N.D.N.Y. Mar. 31, 2011), *aff'd*, 470 F. App'x 11 (2d Cir. 2012) ("[T]here is nothing in this record that could support a reasonable jury conclusion that [the defendant's] failure to provide [Plaintiff] a kosher meal on a single occasion rose to the level of a substantial burden on [Plaintiff's] religious freedom."). Thus, Officers Webb and Perry are entitled to qualified immunity.

**C. First Amendment Retaliation**

***20** Plaintiff brings three First Amendment retaliation claims: (1) that Lt. Laurin and Nurse Kinter retaliated against him for filing grievances by removing his medical diets; (2) that Sgt. Clancy and Officer Blaise retaliated against him for filing a grievance on October 17 by exposing him to assault by another inmate; and (3) that Bedard retaliated against him for filing grievances by intentionally placing pork in his meals. Defendants argue that Plaintiff has failed to prove his claims by a preponderance of the evidence.

To prove First Amendment retaliation, Plaintiff must establish by a preponderance of the evidence: " '(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected [conduct] and the adverse action.' " *Hayes v. Dahlke*, 976 F.3d 259, 272 (2d Cir. 2020) (alteration in original) (quoting *Holland*, 758 F.3d at 225).

**1. Removal of Medical Diets**

Plaintiff filed his first meal-related grievance on May 28, (Pl.'s Ex. 10), and thirteen additional grievances from September 15 to October 15.[24] It is well settled that "retaliation against a prisoner for pursuing a grievance violates the right to petition government for the redress of grievances guaranteed by the First and Fourteenth Amendments and is actionable under § 1983." *Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996) (citing *Franco v. Kelly*, 854 F.2d 584 (2d Cir. 1988)); *see also Brandon*, 938 F.3d at 40 ("The filing of prison grievances is a protected activity.") (citing *Davis v. Goord*, 320 F.3d 346, 352–53 (2d Cir. 2003)). Thus, Plaintiff has proven the first element of his retaliation claims.

"An adverse action is defined as 'retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.' " *Id.* (quoting *Davis*, 320 F.3d at 353). "The test is objective, and the plaintiff is not required to show that he was actually deterred." *Id.* (citing *Gill v. Pidlypchak*, 389 F.3d 379, 381 (2d Cir. 2004)). Thus, a retaliation claim may proceed "even where a particular plaintiff was not himself subjectively deterred; that is, where he continued to file grievances." *Gill*, 389 F.3d at 381. Such a plaintiff may satisfy the adverse action element by showing that the conduct "would have deterred a similarly situated individual of ordinary firmness." *Brandon*, 938 F.3d at 40 (quoting *Gill*, 389 F.3d at 381).

***21** Next, the plaintiff must "establish a causal connection between the defendants' actions and the adverse action." *Id.* at 40. To do so, a plaintiff must show "that the speech played a substantial part in the adverse action," *id.* (quoting *Davis*, 320 F.3d at 354), "in response to which the defendant official can then show that the [adverse] action would have occurred regardless," *Hayes*, 976 F.3d at 272 (citing *Holland*, 758 F.3d at 226). "A plaintiff can establish a causal connection that suggests retaliation by showing that protected activity was close in time to the adverse action." *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009).

On October 16, Nurse Kinter issued a "Diet Notification" form to the CCJ kitchen regarding Plaintiff's "Medical" diet. (Pl.'s Ex. 41). The form, which is signed by Nurse Kinter, directed the "cancel[ation of] all previous slips" and placement of Plaintiff on a "Reg Diet"—"No Shellfish." (*Id.*). It canceled Plaintiff's low fat/low cholesterol, no tomato, no fish medical diet. The cancelation of Plaintiff's medical diet did not deter him from filing further grievances: he filed one the day his medical diet was canceled, (Pl.'s Exs. 39, 40), and seventeen grievances between October 17 and November 21, the day his medical diet was reinstated, (Pl.'s Exs. 22, 43, 44, 45, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59). However, applying the objective test, the Court finds Plaintiff has proved by a preponderance of the evidence that he suffered an adverse action. Dr. Schroyer issued a medical diet, including a "no shellfish diet" on January 14 to address Plaintiff's shellfish allergies, a "no tomato or tomato products diet" on March 23 to address Plaintiff's severe acid reflux, and a "low fat/low cholesterol diet" on May 21 to address Plaintiff's high cholesterol. (Joint Pre-Trial Stipulation, ¶ 3(a)(xii)–(xiv); T. 45–46). At the time Dr. Shroyer ordered Plaintiff's low fat/low cholesterol diet, Plaintiff's labs reflected high cholesterol levels, which, Plaintiff understood, placed his health at risk. (T. 129). Plaintiff also understood that the dietary restriction was important to reduce the risks to his health. (T. 129).[25] Because tomatoes caused Plaintiff severe acid reflux, their removal from his diet was necessary to avoid acid reflux. In this case, Plaintiff established that the removal of these diets had the impact of depriving Plaintiff of portions of many of his meals. (*See, e.g.*, Pl.'s Ex. 46 (Plaintiff grieving the removal of "restrictive status" and explaining that it directly exposed him "to foods I can't consume")). Indeed, the grievances Plaintiff filed show that as a result of the revocation of his medial diet, he was deprived of a full or partial meal at least fourteen times during a 21-day period (Pl.'s Exs. 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 55, 57, 58, 59 (Grievances filed between October 19 and November 9)). Thus, Plaintiff has established that the removal of his "low fat/low cholesterol" and "no tomato" diet was an adverse action. *See, e.g.*, *Quezada v. Roy*, No. 14-cv-4056, 2017 WL 6887793, at *10, 2017 U.S. Dist. LEXIS 210539 (S.D.N.Y. Dec. 14, 2017) (finding, at summary judgment, that "removing Plaintiff from his therapeutic diet plan constitutes an adverse action for purposes of a First Amendment retaliation claim"); *Davis*, 320 F.3d at 353 (finding, at pleading stage, that the plaintiff adequately alleged adverse action based on deprivation of "high fiber diet").

***22** In addition, Plaintiff has proven by a preponderance of the evidence that his filing of grievances "played a substantial part" in the adverse action. Lt. Laurin investigated "what [Plaintiff was] doing with commissary" as part of his investigation into Plaintiff's grievances about his medical and religious diets. (T. 326). On September 29, Lt. Laurin noted, in investigating Plaintiff's September 15 and 24 grievances, that Plaintiff was "buying items in the commissary that he should not be with his diet." (Pl.'s Exs. 14, 15, 16). On or about October 2, Lt. Laurin had Plaintiff's commissary receipts

printed. (Defs.' Ex. 22 (commissary receipts "reprinted on 10/02/2012")). Although he had that information on October 2, Lt. Laurin did nothing with it until October 15, when he angrily confronted Plaintiff, asking "[i]f we're getting all these grievances and you're turning around and purchasing these items," what is the "sense of us ... putting in all this effort." (T. 328). Between October 2 and October 15, Plaintiff had filed seven grievances, five of which concerned the food he was being served. (Pl.'s Exs. 18, 19, 20, 34, 35, 36, 38). Although Lt. Laurin understood that Plaintiff was not eating all of what he was buying and that Plaintiff had been regularly receiving pork meals, no part of which he could eat during a significant part of the time period reflected in the commissary receipts, (*see* Defs.' Ex. 22 (receipts from purchases for July, August, and September 2012)), after speaking with Plaintiff, he went directly to Nurse Kinter to inform her about the commissary receipts, (T. 329). Nurse Kinter removed Plaintiff's medical diet the next day. Given the temporal proximity between Plaintiff's grievances and Lt. Laurin's conduct, Lt. Laurin's direct reference to Plaintiff's grievances, and his angry tone, Plaintiff has established his filing of grievances played a substantial role in the removal of his medical diets. Lt. Laurin's comments to Plaintiff on October 15 directly implicated not only the fact that Plaintiff had engaged in protected speech—filing grievances—but also the content of that speech—seeking help ensuring he received meals consistent with his medical diet.

"The defendant official then bears the burden of establishing that the [adverse] action would have occurred 'even absent the retaliatory motivation.' " *Holland v. Goord*, 758 F.3d 215, 226 (2d Cir. 2014) (quoting *Gayle v. Gonyea,* 313 F.3d 677, 682 (2d Cir. 2002)). In *Lowrance v. Achtyl*, 20 F.3d 529, 535 (2d Cir. 1994), the Second Circuit held that a retaliation defendant satisfies this burden when it is "undisputed that [plaintiff] had in fact committed the prohibited conduct."

Defendants have failed to prove that Plaintiff's medical diets would have been revoked absent the retaliatory motivation. There is no dispute that Plaintiff made the commissary purchases at issue. However, as Lt. Laurin knew, Plaintiff did not eat all the commissary purchases himself. In addition, Plaintiff testified that with respect to the chili ramen, about which Lt. Laurin and Nurse Kinter were purportedly concerned because it contained tomato powder, although he did eat the "noodles several times," that he "couldn't handle" and did not "[u]tilize the [seasoning] packet." (T. 211–12). Moreover, the evidence at trial established that the practice at the jail, in the case of an inmate making unhealthy commissary purchases, was to procure the medical staff's help in *placing them on* a medical or healthier diet; the practice was never to remove a medical diet of an inmate whose health depended on it. Indeed, Lt. Laurin asserted at trial that "[w]e've done this before in the past" and that it was his "job ... to make" medical "aware" of the inmate's commissary purchases. (T. 329). He stated, for example he had "done this for" diabetics who were not paying "attention" and they have had "to put them on a low sodium diet because they start retaining fluids" and for "pregnant females," and explained that "we try to keep them on a good healthy diet." (T. 330). This testimony might support the unilateral placement of an inmate on a medial diet as it would *benefit* the diabetic or pregnant inmate's health, but it in no way supports the *removal* of a medical diet necessary to an inmate's health, which could only be harmful. Moreover, to the extent it was Lt. Laurin's job to make medical aware, the only inference from the above testimony is that he had a duty to make medical aware that the inmate was eating products harmful to his health—and procure intervention that would help, not harm, the inmate. Lt. Laurin has identified no other reason for the removal of Plaintiff's medical diet other than Plaintiff's purchase of commissary items that did not comply with the "low fat/low sodium" diet, a reason he reaffirmed in personally denying Plaintiff's fifteen subsequent grievances, most of which complained that he was served spaghetti sauce, tomato soup, and tomato slices, which caused him acid reflux, and buttered toast, which was bad for his cholesterol. (Pl.'s Ex. 56). Therefore, Lt. Laurin has not met his burden of establishing as a matter of law that Plaintiff's medical diet would have been removed in the absence of a retaliatory motive.

***23** Finally, to the extent Lt. Laurin argues he was not personally involved in this retaliatory act, because only medical staff could decide to remove a medical diet, the Court rejects that argument. (Dkt. No. 250, at 46). Lt. Laurin himself testified that he worked together with Nurse Kinter with respect to medical diets, (T. 329–30 (Lt. Laurin testifying that "[w]e've done this before in the past" and that "we have to put [diabetics] on a low sodium diet because they start retaining fluids" and "we try to keep [pregnant inmates] on a good healthy diet")), and that he brought the commissary receipts directly to Nurse Kinter for the purpose of showing Plaintiff's noncompliance with his medical diets, (T. 329 ("I wanted her to be aware that he was purchasing these items and they weren't compliant with his low fat/low sodium diet.")). In light of these facts, the Court finds it of little consequence that Lt. Laurin could not sign the form removing the medical

diet himself. Thus, for all these reasons, the Court finds that Lt. Laurin's "own individual actions," constitute First Amendment retaliation. *Tangreti*, 983 F.3d at 612 (quoting *Iqbal*, 556 U.S. at 676, 129 S.Ct. 1937).

Plaintiff likewise established Nurse Kinter's liability and personal involvement. Nurse Kinter was aware of Plaintiff's grievances because Lt. Laurin interviewed her on September 29 as part of his investigations into Plaintiff's complaints that he was not receiving meals that complied with his medical diets, (*see* Pl.'s Ex. 14 (September 15 grievance: "My food trays are constantly either missing something or stocked with items I'm not supposed to consume due to medical conditions."); Pl.'s Ex. 15 (September 24 grievance: "I cannot eat ... tomatoes."); Pl.'s Ex. 16 (September 24 grievance: "I was served a salad which had tomatoes."); *see also* Pl.'s Ex. 16 ("Grievance Investigation Form" for September 15 and 24 grievances noting that Nurse Kinter was interviewed as part of the investigation); T. 421 (Nurse Kinter testifying that she knew Plaintiff was grieving his meals)). On September 15, Lt. Laurin notified Nurse Kinter about Plaintiff's noncompliant commissary purchases. On September 16, Nurse Kinter summoned Plaintiff to the medical ward and informed him that his medical restrictions were being revoked due to his noncompliant commissary purchase. That same day, Nurse Kinter signed the "Diet Notification" form revoking Plaintiff's medical diets. (Pl.'s Ex. 41).

Nurse Kinter removed Plaintiff's medical diet less than three weeks after she was interviewed in connection with Plaintiff's medical diet related grievances. The close temporal proximity between Plaintiff's grievances and the revocation of Plaintiff's medical diets is circumstantial evidence of retaliatory intent and causal connection. *See Gayle v. Gonyea*, 313 F.3d 677, 683 (2d Cir. 2002) ("We have held that the temporal proximity of an allegedly retaliatory misbehavior report to a grievance may serve as circumstantial evidence of retaliation."). In addition, there is a direct correlation between the subject matter of the protected conduct, the grievances complaining that Plaintiff's medical diet was not being followed and the adverse action, the removal of the medical diet. Finally, Nurse Kinter's inexplicable placement of Plaintiff on a regular diet that would do nothing to help, and could only, as she knew, further harm his cholesterol level and cause Plaintiff severe acid reflux, is evidence of retaliatory intent. (*See* T. 419–20 (Nurse Kinter testifying that she was aware that patients with high levels of cholesterol are at increased risk of heart disease and that patients with acid reflux can get sick if they eat foods with high acidity)); *Burton v. Lynch*, 664 F. Supp. 2d 349, 368 (S.D.N.Y. 2009) (finding that, while the doctor's refusal to examine the plaintiff's elbow and comments that it "look[ed] fine" and that the plaintiff's "allergy to Motrin was Plaintiff's 'problem' " did not "explicitly state an intent to retaliate," they were "consistent with and imply a retaliatory motive," explaining that "[t]he facts corroborating the existence of Plaintiff's injuries and the failings of Dr. Supple's diagnosis and treatment, when taken in conjunction with Plaintiff's allegations of the brusque treatment he received from Dr. Supple, sufficiently allege a 'causal connection' between the filing of the grievance and the adverse action").

***24** Further, Nurse Kinter has failed to show that she would have taken the same action in the absence of Plaintiff's grievances. Nurse Kinter testified that Plaintiff had a history of problematic cholesterol and triglyceride levels, (T. 396 (Nurse Kinter testifying that Plaintiff's "ADL's, HDLs, LDLs were a little bit out of whack and we wanted to get them better" and "we needed to ... decrease his triglycerides and ... cholesterol")), that cholesterol can cause, among other health problems, a stroke, heart attack, and blocked artery, and "if somebody has a history of that, we kind of want to get that under control." (T. 396). Nurse Kinter testified that had she felt that removing the medical diet would "make that prisoner in worse condition, I would not have removed that diet" and that she had no concerns about removing Plaintiff medical diet because "his labs had improved." (T. 437). If true, this evidence might support a finding that Nurse Kinter would have removed the medical diets regardless of Plaintiff's grievance, but the evidence before the Court shows that Plaintiff's "labs" were largely the same at the time; they do not show improvement. In addition, as discussed above, there is no evidence that removal of a medical diet was ever used as a tactic for improving an inmate's health at CCJ. Accordingly, the Court finds Plaintiff has proven by a preponderance of the evidence that Nurse Kinter retaliated against him for engaging in conduct protected by the First Amendment.

**2. Exposing Plaintiff to Assault by Another Inmate**

Plaintiff claims that Sgt. Clancy and Officer Blaise retaliated against Plaintiff for filing his October 17 grievance regarding a pork meal, (Pl.'s Ex. 22), by "exposing him to assault by another inmate" on November 18.

Even crediting Plaintiff's testimony that on October 17, Sgt. Clancy commented to Officer Blaise that she would lock Plaintiff up if he filed another grievance and that on

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November 17, as she was bringing Tiny into Plaintiff's housing unit, she wondered if Tiny would "tr[y] this shit on Brandon," Plaintiff's retaliation claim against Sgt. Clancy and Officer Blaise fails. By Plaintiff's own admission, he argued with, yelled at, cursed, and called Tiny names, and made racially prejudicial remarks to Tiny "*all night*," the night before the November 18 assault. (T. 147). The Court therefore finds that it was more likely than not Plaintiff's own conduct toward Tiny—not any actions Sgt. Clancy or Officer Blaise may have taken in placing Plaintiff near Tiny—that exposed Plaintiff to Tiny's assault. Accordingly, as Plaintiff failed to prove by a preponderance of the evidence a causal connection between Plaintiff's October 17 protected conduct of filing a grievance, and Tiny's November 18 assault, his retaliation claims against Sgt. Clancy and Officer Blaise are dismissed.

**3. Intentional Introduction of Pork Into Meals**

Plaintiff claims CCJ Food Service Manager Bedard retaliated against Plaintiff for filing meal-related grievances "by introducing pork into meals otherwise labeled meatless." (Dkt. No. 247, at 61–62). Plaintiff filed twenty-nine grievances from May 28 to October 31, the majority of which were food-related. (Pl.'s Exs. 10, 14, 15, 16, 18, 19, 20, 22, 26, 27, 28, 34, 35, 36, 38, 39, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54). Bedard was only aware of Plaintiff's no-pork diet as of October 5, 2012. In his post-trial briefing regarding his retaliation claim against Bedard, Plaintiff specifically refers to the "meals otherwise labeled meatless" he received on October 17, (*see* Pl.'s Ex. 22 (ham salad)), "and on other *dates* in October 2012," (Dkt. No. 247, at 61 (emphasis added)). However, the evidence showed that Plaintiff was served a pork meal on only *one* other occasion in late October—a vegetarian or "meatless" soup containing ham in late October. (T. 152–54).

Even assuming Bedard was aware of Plaintiff's grievances, because there is no evidence that Bedard had any part in the preparation of Plaintiff's tray on October 17, the Court finds Plaintiff's claim of retaliation as to that incident fails for lack of personal involvement. *See supra*, Section III.B.1.c. Bedard was responsible for supervising the cooks in the kitchen to make sure food was provided in compliance with an inmate's special diet, but his supervisory role, without more, is insufficient. *Tangreti*, 983 F.3d at 618. Plaintiff has introduced some evidence that Bedard was responsible for placing the soup that contained pork on Plaintiff's tray in late October. Although temporal proximity between Plaintiff's filing of grievances in September and October 2012 and the late October service of soup with pork may be circumstantial evidence of retaliatory intent, there is no evidence that shows that the placement of the soup with pork on Plaintiff's tray was anything more than a mistake and the Court notes that this meal was immediately replaced. (T. 153–54). On this record, the Court finds that Plaintiff has failed to establish retaliatory intent. *See Lakram v. Coughlin*, 99 F.3d 402 (2d Cir. 1995) ("Although correctional officials now concede that Lakram's transfer was a mistake, a mistake is insufficient to support a claim of retaliation."). Thus, Plaintiff's First Amendment retaliation claim against Bedard is dismissed.

**4. Qualified Immunity**

***25** Lt. Laurin argues that he is entitled to qualified immunity on Plaintiff's First Amendment retaliation claim because he had no authority to rescind medical diets, Plaintiff's claim of retaliation is unfounded, and Lt. Laurin spent time and effort following the removal of Plaintiff's medical diet addressing Plaintiff's grievances on that issue. (Dkt. No. 250, at 55). Nurse Kinter argues that she is entitled to qualified immunity because it was "the jail physician—and not Defendant Kinter who had the final decision as to which medical special diets would be ... removed" and, in any event, one month later she recommended the reinstatement of Plaintiff's medical diet. (Dkt. No. 250, at 56).

These arguments principally concern the merits of Plaintiff's retaliation claim, which the Court has addressed above. The Court has found not only that Lt. Laurin had the authority to procure the revocation (or approval of) a medical diet, but that he procured the revocation of Plaintiff's medical diet in retaliation for Plaintiff's filing of multiple grievances complaining that his medical and religious diets were not being followed. The Court has also found that Nurse Kinter had the express authority to revoke a medical diet and that she revoked Plaintiff's medical diet with retaliatory intent. Nurse Kinter correctly notes that Plaintiff's medical diets were reinstated eventually—after Plaintiff asked for guidance on medically appropriate commissary purchases. But the eventual reinstatement of the medical diet does not undermine the Court's determination that the revocation of that diet was retaliatory. It appears that the medical diet was reinstated to quell the increase in Plaintiff's grievances. (T. 336–37 (Lt. Laurin testifying that he discussed with Nurse Kinter whether there was "something we could to do get [Plaintiff] back on this diet because we needed to come to a conclusion of all

this")). Although Defendants have not advanced any other arguments regarding their entitlement to qualified immunity, as the following analysis shows, qualified immunity is, in any event, inapplicable here.

First, the filing of grievances was clearly established as a constitutionally protected activity in 2012. *See Gill*, 389 F.3d at 384 (the "use of the prison grievance system" is a protected activity); *Franco*, 854 F.2d at 589 (holding that prisoner had constitutional right to petition government for redress of grievances, which included cooperating with state investigation of inmate abuse); *Graham*, 89 F.3d at 80 (filing of a grievance and attempt to find inmates to represent the grievants is constitutionally protected). Second, no reasonable prison official could have reasonably believed that it was not an adverse action to remove Plaintiff's medical diet which was in place to help get his cholesterol "under control" in order to reduce his risk of, among other things, heart attack and stroke, and without which he would experience "severe acid reflux." *See Davidson v. Chestnut*, 193 F.3d 144, 149 (2d Cir. 1999) (observing that denial of kosher diet is an adverse action that may support retaliation claim); *Davis*, 320 F.3d at 352–54 (holding inmate's claim that prison officials denied plaintiff his high fiber diet days after filing inmate grievances sufficiently alleged First Amendment retaliation claim); *Quezada*, 2017 WL 6887793, at *10, 2017 U.S. Dist. LEXIS 210539 ("[D]enial of a therapeutic diet is an adverse action sufficient to form the basis of a retaliation claim."). Finally, the Court has found that both Lt. Laurin and Nurse Kinter acted with retaliatory intent. "[W]here a more specific intent is actually an element of the plaintiff's claim as defined by clearly established law, it can never be objectively reasonable for a government official to act with the intent that is prohibited by law." *Locurto v. Safir*, 264 F.3d 154, 169 (2d Cir. 2001). [26]

***26** Accordingly, the Court finds that Lt. Laurin and Nurse Kinter are not entitled to qualified immunity.

**D. Compensatory Damages**

The Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(e), provides, in relevant part:

> (e) Limitation on recovery
>
> No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

42 U.S.C. § 1997e(e). The PLRA's limitation on recovery "is generally interpreted to preclude a prisoner complaining of mental and emotional injury during imprisonment, without a showing of physical injury, from receiving an award of compensatory damages." *Walker v. Schult*, 45 F.4th 598, 612 (2d Cir. 2022). [27] Here, Plaintiff alleges physical injury due to a fifty-pound weight loss, headaches, fatigue, hunger, and mental distress. (Dkt. No. 247, at 76). "[T]here is no statutory definition of 'physical injury' as used in section 1997e(e)." *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999). However, the physical injury required under § 1997e(e) must be more than de minimis. *Id.* (citing *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997)). "Physical afflictions that courts have found de minimis include contracting a fungal infection from exposure to sewage and waste, skin rashes, and itching, soreness and cracked skin." *Hong v. Liburd*, 18-cv-7201, 2020 U.S. Dist. LEXIS 139145, at *30 (S.D.N.Y. Aug. 3, 2020) (internal citations omitted) (citing cases). [28] Even assuming Plaintiff established physical injury, because Defendants are liable for only limited time periods, September 26 to October 5, and October 15 to November 21, and Plaintiff has not presented specific evidence concerning his physical condition during these time period, the Court finds no basis for awarding compensatory damages based on physical, mental, or emotional injury.

Nonetheless, Plaintiff is entitled to compensatory damages for the injury resulting from Defendants' violation of his First Amendment rights. *Toliver v. City of New York*, 530 F. App'x 90, 93 n.2 (2d Cir. 2013) ("[E]ven if Toliver is unable to establish that any of the injuries complained of in this action stemmed from an incident in which he suffered physical injuries, Toliver may still recover damages for injuries to his First Amendment rights, as well as nominal and punitive damages for any other constitutional violations.") (citing *Thompson v. Carter*, 284 F.3d 411, 416 (2d Cir. 2002)); *see also Ford v. McGinnis (Ford I)*, 198 F. Supp. 2d 363, 366 (S.D.N.Y. 2001) (explaining that the PLRA "does not bar a separate award of damages to compensate the plaintiff for the First Amendment violation in and of itself."). Where, as here, a plaintiff is "entitled to recover for the loss of intangible rights," although a jury, or, in this case, the Court, may "not ... award 'speculative damages,' " the amount of monetary damages awarded is "*necessarily arbitrary and unprovable.*" *Kerman v. City of New York*, 374 F.3d 93, 125 (2d Cir. 2004) (emphasis in original) (quoting *Raysor v. Port Auth. of New York & New Jersey*, 768 F.2d 34, 39 (2d Cir. 1985)). In *Kerman*, the plaintiff prevailed on his Fourth Amendment

unlawful seizure claim. 374 F.3d at 121. The Second Circuit held that the jury should have been instructed that the plaintiff was entitled to compensatory damages for his loss of liberty, and explained that: "The damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering; even absent such other injuries, an award of several thousand dollars may be appropriate simply for several hours' loss of liberty." 374 F.3d 93, 125–26 (2d Cir. 2004); *see also Ford I*, 198 F. Supp. 2d at 366 (holding that the "plaintiff may be awarded an amount to compensate him for the denial of his religious meal").

***27** In this case, Plaintiff has proven that he was wrongfully served six meals containing pork from September 26 to October 5, 2012, as a result of Lt. Laurin's failure to place a Special Diet Notification in Plaintiff's inmate folder. Thus, not only was he deprived of six meals in a ten-day period, but the service of each meal violated his First Amendment right to the free exercise of religion. The Court awards Plaintiff $500 per meal for the violation of his First Amendment right to the free exercises of religion, for a total of $3,000. *Cf., Drayton v. City of New York*, No. 17-cv-7091, 2022 WL 16948769, at *4–5, 2022 U.S. Dist. LEXIS 207165 (E.D.N.Y. Nov. 15, 2022) (offering the plaintiff choice of new trial or accepting reduced compensatory damages award of $10,000 for his loss of liberty during the "3 and 30 minutes" he was in wrongful custody, observing that New York cases uphold awards of up to $10,000, in loss of liberty cases, "even without proof of actual damages") (citing inter alia *Hallenbeck v. City of Albany*, 99 A.D.2d 639, 472 N.Y.S.2d 187 (3d Dep't 1984) ($10,000 for three hours); *Woodard v. City of Albany*, 81 A.D.2d 947, 439 N.Y.S.2d 701 (3d Dep't 1981) ($7,500 for five hours)); *King v. Zamiara*, 788 F.3d 207, 215–16 (6th Cir. 2015) (affirming award of compensatory damages in the amount of $1,475, equally $5 per day for First Amendment retaliatory transfer to "more restrictive facility").

Plaintiff has also proven that Lt. Laurin and Nurse Kinter retaliated against him for filing grievances by revoking his medical diets from October 16, 2012 to November 21, 2012. During that thirty-seven-day period, Plaintiff regularly received meals, parts of which he could not eat because they were harmful to his cholesterol levels or would cause severe acid reflux. Accordingly, the Court awards Plaintiff $200 per day for each day his medical diets were revoked, for a total of $7,400. *Cf., King*, 788 F.3d at 215–16.

**E. Punitive Damages**

"Punitive damages are available in a § 1983 action 'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.' " *Lee v. Edwards*, 101 F.3d 805, 808 (2d Cir. 1996) (quoting *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983)). "The terms 'malice' or 'reckless indifference' pertain to the [defendant's] knowledge that [he or she] may be acting in violation of federal law." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999). "To be entitled to an award of punitive damages, a claimant must show a 'positive element of conscious wrongdoing.' " *New Windsor Volunteer Ambulance Corps, Inc. v. Meyers*, 442 F.3d 101, 121 (2d Cir. 2006) (quoting *Kolstad*, 527 U.S. at 538, 119 S.Ct. 2118). Further, punitive damages are appropriate when the defendant's actions call for "deterrence and punishment over and above that provided by compensatory awards." *Wade*, 461 U.S. at 54, 103 S.Ct. 1625.

Here, Lt. Laurin acted recklessly and with callous indifference to Plaintiff's First Amendment right to the free exercise of religion when he waited ten days to implement a religious diet that he knew Plaintiff was entitled to and had been wrongfully denied for the past seven months. Lt. Laurin knew religious diet notification forms were to be filed with the kitchen on the same day as booking, but gave no explanation for waiting ten days after learning one had not been filed on Plaintiff's behalf to do so, speculating only that he may have gotten "tied up" in something. The Court further finds that an award of punitive damages will serve the purposes of deterrence and punishment.

The Court further finds that Lt. Laurin and Nurse Kinter acted recklessly and with an evil motive and intent toward Plaintiff when they removed his medical diets—a particularly vicious action given that they were well aware how concerned Plaintiff was about his health and diet and that he had used commissary purchases, to eat or barter, in order to help make up for the many meals he could not eat because they contained pork. Indeed, they removed his medical meals less than two weeks after Plaintiff began receiving proper religious meals, placing him back in the position of regularly receiving meals he could not eat. The Court further finds that an award of punitive damages will serve the purposes of deterrence and punishment.

***28** Accordingly, Plaintiff is entitled to punitive damages and the Court will hold a hearing to permit evidence regarding

the financial conditions of Defendants Laurin and Kinter, and argument concerning an appropriate punitive damages award.

**IV. CONCLUSION**

For these reasons, it is hereby

**ORDERED** that Plaintiff is entitled to judgment in his favor against Kevin Laurin on his First Amendment free exercise claim; and it is further

**ORDERED** that Plaintiff is entitled to judgment in his favor against Kevin Laurin and Suzanne Kinter on his First Amendment retaliation claim; and it is further

**ORDERED** that Suzanne Kinter, Lawrence Bedard, Margaret Clancy, Robert Webb, and Thomas Perry are entitled to judgment in their favor on Plaintiff's First Amendment free exercise claim; and it is further

**ORDERED** that Lawrence Bedard, Margaret Clancy, and Eric Blaise are entitled to judgment in their favor on Plaintiff's First Amendment retaliation claim; and it is further

**ORDERED** that Plaintiff is entitled to compensatory damages in the amount of $3,000 on his First Amendment free exercise claim; and it is further

**ORDERED** that Plaintiff is entitled to compensatory damages in the amount of $7,400 on his First Amendment retaliation claim; and it is further

**ORDERED** that Plaintiff is entitled to an award of punitive damages against Kevin Laurin and Suzanne Kinter in an amount to be determined following a hearing on April 18, 2023, at 10:00 a.m.

**IT IS SO ORDERED.**

**All Citations**

Not Reported in Fed. Supp., 2023 WL 2382637

## Footnotes

1 Prior to trial, the Court appointed Samantha Clancy, Margaret Clancy's daughter, as guardian ad litem for Margaret Clancy due to medical issues. (Dkt. No. 241).

2 In his Proposed Findings of Fact and Conclusions of Law, Plaintiff seeks an award of sanctions in connection with the Special Diet Notification form, one version of which is contained in Defendants' Exhibit 21,(Dkt. No. 247, at 72–75), and a second version is contained in Plaintiff's Exhibit 8, *see infra* Figure 1. The Court addresses this request in an Order to Show Cause that will be issued separately.

3 The CCJ 2012 "Inmate Handbook Rules/Regulations" stated: "There will be NO special diets unless ordered by the facility nurse or doctor, and ONLY for a legitimate medical or religious reason." (Defs.' Ex. 24). However, there was no evidence at trial showing that a facility nurse could order or remove a religious diet. Nurse Kinter testified that the nurses "were always told that the healthcare office, any of us nurses, were not allowed to do religious diets" and that she had never filled out a religious diet slip in the four years she had worked at CCJ. (T. 389; *see also* T. 468 (Bedard testifying that "I would only allow the booking officer to give me the religious diet or a nurse a medical diet")). At most, a facility nurse could check an inmate's kitchen file to ascertain whether that inmate had a religious diet on file. (Defs.' Ex. 20).

4 Information about an inmate's special diet was also contained in a file in the inmate's housing unit, or "pod." (T. 488).

5 Plaintiff did not pursue the grievance after filing; under "Summary of facility staff attempts to resolve," Plaintiff placed a check-mark next to "I accept this resolution." (Pl.'s Ex. 10). The "resolution" is not stated on the grievance form.

6 In 2012, the holy month of Ramadan was between July and August. (T. 87). During Ramadan, Plaintiff was required "to abstain from consuming food or beverage" from sunrise to sundown. (T. 88). In July, Plaintiff told a corrections officer that "Ramadan is coming up" and he was "supposed to fast" and asked who he should "speak to about getting the accommodation of fasting, of receiving a meal prior to the beginning of fast and then a meal after fast" (T. 88–89). Plaintiff testified that he was told that CCJ would not accommodate the fast. (T. 89). Plaintiff also testified that he filed "grievances" related to meals he received with pork during Ramadan. (*Id.*). However, none of this testimony is corroborated.

7 The September 9 date is repeated in a response Lt. Laurin provided to a Prisoner Request Form Plaintiff submitted on October 11 complaining that he was still being served pork and had not received a response to his grievances, (Pl.'s Ex. 21; Defs.' Ex. 16 (Lt. Laurin responding: "You have not received pork or pork products since 9/9/12")), and again in an October 15 response to Plaintiff's October 10 grievance regarding a chef salad with ham, (Pl.'s Ex. 19 (Lt. Laurin responding: "You have not received pork or pork products from the kitchen for a meal since 9/9/2012")). However, given Lt. Laurin's testimony that he did not become aware of Plaintiff's entitlement to Muslim meals until September 26, (T. 302, 306–07), Lt. Laurin's statements to Plaintiff in October that Plaintiff had not received pork since September 9 were false. Had this date appeared once, it might be explained as a typographical error, but Lt. Laurin used it in two separate documents, and again at trial, without explanation. However, as Plaintiff has not argued that Lt. Laurin had personal knowledge of Plaintiff's deprivation of a Muslim diet before September 26, the Court concludes Plaintiff implicitly acknowledges the September 9 date is inaccurate. (*See generally* Dkt. No. 247; *see also id.* at 64–65 (discussing Lt. Laurin's personal involvement and September 26 discovery "that Plaintiff had no religious diet slip on file with the kitchen")).

8 It was undisputed at trial that the *dated* form contained in Defendants' Exhibit 21 was the authentic form. (*See* Figure 1 *infra* Section II.D.6.). At trial, the Court took judicial notice (T. 375–76) that United States Magistrate Judge David E. Peebles issued a Report and Recommendation recommending granting Defendants' motion for summary judgment as to Plaintiff's First Amendment free exercise of religion and retaliation claims in which he noted that the "date of '10/5/12' " appeared to be written in "defendant Laurin's handwriting," and found "it plausible, that the version of this notice produced by defendants in support of their motion has been 'falsified ... by removing the date written on the notification.' " *Brandon v. Schroyer*, 13-cv-939, 2016 WL 1638242, at *4, 2016 U.S. Dist. LEXIS 25003 (N.D.N.Y. Feb. 26, 2016), *adopted by*, 2016 WL 1639904, 2016 U.S. Dist. LEXIS 54634 (N.D.N.Y. Apr. 25, 2016), *affirmed in part and reversed and remanded in part, sub nom., Brandon v. Kinter*, 938 F.3d 21 (2d Cir. 2019). The submission of the undated form to the Court is the subject of an Order to Show Cause that will be issued separately.

9 Bedard acknowledged at trial that he was asked in an interrogatory during discovery: "When was Bedard or anyone with the kitchen staff notified that plaintiff was issued a religious diet?" and that he provided the following sworn response: "the kitchen staff was notified of plaintiff's religious diet from the booking officer on or about March 2, 2012." (T. 464). At trial, Plaintiff argued that "[p]er Defendant Bedard's interrogatory response" the kitchen staff was notified about his religious diet on March 2. (T. 514). However, there was no credible evidence presented at trial that Bedard or anyone in the kitchen knew of Plaintiff's religious diet before October 5.

10 In addition, on October 3, Plaintiff also filed two Prisoner Request Forms, both seeking "a copy of all past food grievances." (Pl.'s Exs. 29, 30). To the first, Lt. Laurin responded: "Copies are 25 cents per page. You will be issued a copy of grievance if accepted or appealed to the CPCRC at no charge." (Pl.'s Ex. 29). To the second, Lt. Laurin responded: "Previously answered." (Pl.'s Ex. 30). Further, on October 5, Plaintiff filed

two Prisoner Request Forms. (Pl.'s Exs. 31, 32). One seeks the address for "Prisoner Legal Services," the "Attorney General Office of New York," and the "closest Legal Aid Society." (Pl.'s Ex. 31). The other seeks copies of "all" his food grievances. (Pl.'s Ex. 32). On October 9, Lt. Laurin responded with three addresses. (Pl.'s Ex. 31). Lt. Laurin's undated response to Plaintiff's request for all food grievances stated "[p]reviously answered." (Pl.'s Ex. 32).

11 On October 11, Plaintiff also filed a Prisoner Request Form stating that he was "still being served pork" and that he "need[ed] these issues addressed." (Pl.'s Ex. 21). Lt. Laurin again falsely responded: "You have not received pork or pork products since 9/9/12." (*Id.*). Because Plaintiff provided no testimony regarding the factual circumstances underlying this complaint, and the parties do not advance any arguments regarding this complaint, and given that Plaintiff submitted it the day after he filed his October 10 grievances, (Pl.'s Exs. 19, 20), to which Lt. Laurin had yet to respond, the Court concludes that Plaintiff was complaining about the meals he received on October 10 (rather than an additional pork meal).

12 On October 15, Plaintiff also filed a Prisoner Request Form seeking the address for the State Commission of Corrections. (Pl.'s Ex. 37).

13 In a decision dated October 25, regarding the October 14 grievance regarding the lack of response to his prior food grievances, Lt. Laurin stated that three of Plaintiff's grievances had been "mailed" for further appeal, that four were with "the Jail Administrator," and there "were 13 others not counting this one" and that none of Plaintiff's grievances were "being ignored." (Pl.'s Ex. 35). The same day, Lt. Laurin issued a decision regarding the October 15 grievance seeking copies. (Pl.'s Ex. 36 (referring to Pl.'s Ex. 34))

14 Plaintiff was "confused about" being called to go to sick call because typically, inmates were required to "fill out a form to go"—"they don't just call you." (T. 115–16).

15 There was no evidence of a "new" "meal slip" presented at trial.

16 Plaintiff testified that he thought he received a second pork meal later on that day but unlike his testimony about other pork meals, which detailed the type of pork and surrounding circumstances, his testimony was nonspecific and he seemed uncertain. (*See* T. 144 ("I think I received it later on that day -- or like, later on that day I believe I received another meal with pork")). The Court therefore declines to credit this testimony.

17 On October 27, 2012, Plaintiff filed a "Prisoner Request Form." (Pl.'s Ex. 24). The top portion of the form is unreadable. (*Id.*). The response states: "Medical does not do religious diet. See security." (*Id.*). The form is signed by Nurse Kinter and dated October 29. (*Id.*).

18 If an inmate checked the line next to "I do not accept this resolution and wish to file a formal grievance," it was deemed an appeal and sent to the grievance coordinator, who was required to respond to the grievance within five days. (T. 295). Once the grievance coordinator responded, the grievance was returned to the inmate, who then had two days to accept or appeal the response. (T. 295–96).

19 Plaintiff argues that because Defendants did not argue personal involvement on summary judgment, the mandate rule bars "its consideration here." (Dkt. No. 247, at 68). The Court disagrees. "[T]he so-called mandate rule bars re-litigation of issues already decided on direct appeal" and also "prevents re-litigation in the district court" of matters expressly decided or impliedly resolved by the appellate court. *Yick Man Mui v. United States*, 614 F.3d 50, 53 (2d Cir. 2010). In reversing the district court's entry of summary judgment, the Second Circuit did not expressly or impliedly resolve the issue of personal involvement. Moreover, "[t]he role of the appellee is to defend the decision of the lower court. This Court has not held that an appellee is required, upon pain of subsequent waiver, to raise every possible alternate ground upon which the lower court could have decided an issue." *Brown v. City of New York*, 862 F.3d 182, 188 (2d Cir. 2017).

20 The Second "Circuit has not stated whether a First Amendment free exercise claim requires more than negligence." *Brandon*, 938 F.3d at 38. The parties here assume that it does and advance arguments concerning whether Defendants acted with deliberate indifference in serving Plaintiff pork. (Dkt. No. 247, at 63–67; Dkt. No. 250, at 30–41).

21 Defendants do not dispute that that this ten-day deprivation of a religious diet constituted a substantial burden. *See Brandon*, 938 F.3d at 36 (observing that "when Muslim inmates are served meals containing pork, they are faced with the choice of disobeying the commands of their faith or not eating").

22 There was no corroboration of the report that Bedard mistakenly gave Plaintiff ham soup. Indeed, Bedard testified that it was the "cook's duty" on the food line to serve the main course, including the soup, (T. 444), that he was "not always on th[e] food line," but that when he was, he helped in small ways, such as placing condiments, crackers, or cookies on meal trays. (T. 451).

23 Plaintiff estimated, based on the menu, that he received two to four pork meals per week while on a regular diet. (T. 49).

24 (Pl.'s Ex. 14 (medical diet not followed, filed September 15); Pl.'s Ex. 15 (served pork and tomatoes in violation of religious and medical diets, filed September 24); Pl.'s Ex. 16 (served pork and tomatoes in violation of religious and medical diets, filed September 24); Pl.'s Ex. 26 (served tomatoes in violation of medical diet, filed October 1); Pl.'s Ex. 27 (served sandwich with tomatoes in violation of medical diet, filed October 1); Pl.'s Ex. 28 (served tomato soup in violation of medical diet and requests copies of food grievances, filed October 2); Pl.'s Ex. 18 (served ham or turkey ham for lunch on October 9 in violation of religious diet and received conflicting information about whether ham steak served on September 9 was turkey or ham, filed October 9); Pl.'s Ex. 19 (served chef salad with ham in violation of religious diet, filed October 10); Pl.'s Ex. 20 (served chef salad with ham in violation of religious diet, filed October 10); Pl.'s Ex. 34 (requests copies of food grievances, filed October 11); Pl.'s Ex. 35 (requests response to grievances about medical and religious diets, filed October 14); Pl.'s Ex. 36 (requests copies of food grievances and objects to charge for copies, filed October 15); Pl.'s Ex. 38 (served peanut butter in violation of medical diet, filed October 15)).

25 Nurse Kinter explained at trial that "cholesterol can cause a lot of different problems in your body," including a stroke, a heart attack, and blocked arteries. (T. 396).

26 Defendants make no arguments and cite no case law to the contrary.

27 Because Plaintiff was incarcerated at the time he commenced this action, (*see* Dkt. No. 1), this provision continues to apply. *Cf. Cano v. City of New York*, 44 F. Supp. 3d 324, 331 (E.D.N.Y. 2014) (explaining that "§ 1997e(e) does not bar Plaintiffs, who were *not incarcerated at the time they filed this action*, from seeking any category of damages"); *In re Nassau Cnty. Strip Search Cases*, No. 99-cv-2844, 2010 WL 3781563, at *5, 2010 U.S. Dist. LEXIS 99783 (E.D.N.Y. Sept. 22, 2010) ("PLRA's recovery limitation ... does not apply to plaintiffs not incarcerated at the time the action is brought").

28 No Westlaw cite available.

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Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

David ZAIRE, Plaintiff,
v.
John/Jane DOE, Deputy Commissioner/
Designee for NYS Department of Corrections;
and Thomas Welch, Corrections Counselor
at Clinton Correctional Facility, Defendants.

No. 9:03-CV-629(FJS/RFT).
|
July 13, 2006.

**Attorneys and Law Firms**

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Office of New York State, Attorney General, Maria Moran, AAG, Hon. Eliot Spitzer, Attorney General for the State of New York, of counsel, Syracuse, NY, for Defendant Welch.

**MEMORANDUM-DECISION AND ORDER**

SCULLIN, Senior Judge.

## I. INTRODUCTION

***1** Plaintiff brings this action pursuant to 42 U.S.C. § 1983 alleging violations of his First Amendment rights. Specifically, Plaintiff alleges that Defendant Welch violated his First Amendment rights when he changed and/or falsified [1] Plaintiff's Department of Correctional Services' ("DOCS") records with respect to a therapeutic program in retaliation for Plaintiff's pursuit of a previous federal civil rights action. [2] *See* Complaint at ¶ 19; Report-Recommendation and Order at 2.

Currently before the Court are Defendant Welch's objections to Magistrate Judge Treece's Report-Recommendation and Order. Defendant Welch objects to Magistrate Judge Treece's recommendation that this Court deny his motion for summary judgment on Plaintiff's First Amendment retaliation claim because Magistrate Judge Treece neglected to address the second element of Plaintiff's claim, i.e., whether Defendant's actions were adverse. *See* Defendant Welch's Objections at 1-2.

## II. BACKGROUND

Plaintiff previously filed *Zaire v. Muller,* 9:98-CV-1838, in this District. That case proceeded to trial, and the jury returned a verdict in Plaintiff's favor on June 21, 2002. Plaintiff then moved, in part, for and was granted declaratory and injunctive relief. [3] He then filed a motion to hold the defendants in that case in contempt for not complying with the district court's order; the court denied that motion. From May 10, 2001, until October 4, 2002, Plaintiff was incarcerated at Clinton Correctional Facility ("Clinton"). During his incarceration at Clinton, Plaintiff's Correction Counselor was Defendant Thomas Welch.

On July 8, 2002, Defendant met with Plaintiff regarding a Sexual Offenders Program consent form, a document signifying agreement to participate in that program. Defendant's signature is on the document, but Plaintiff's is not. Defendant also noted in Plaintiff's Quarterly Review for the period from May 4, 2002, through August 26, 2002, that Plaintiff refused to accept the Sexual Offenders Program on July 8, 2002, and August 27, 2002. Plaintiff's signature is not on the quarterly review.

## III. DISCUSSION

### A. Standard of Review

***1. Review ofReport-Recommendation and Order***

"When a district court evaluates the report and recommendation of a magistrate judge, the court may 'accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.' " *Wilds v. United Parcel Serv., Inc.,* 262 F.Supp.2d 163, 169 (S.D.N.Y.2003) (quoting 28 U.S.C. § 636(b)(1)). A party " 'may object to the findings or recommendations of the magistrate judge' " within ten days of being served with the report and recommendation. *Id.* (citations omitted). When neither party files objections, " 'a district court need only satisfy itself that there is no clear error on the face of the record' " to accept the report and recommendation. *Id.* (quoting *Nelson v. Smith, (S.D.N.Y.* 1985) 618 F.Supp. 1186, 1189). However, " '[w]hen an objection is raised, the court is required to conduct a *de*

*novo* review of the contested sections.' " *Id.* at 170 (quoting *Pizarro v. Bartlett* (S.D.N.Y.1991) 776 F.Supp. 815, 817).

*2. Summary Judgment*

***2** A court may grant summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure when " '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.' " *Dibble v. Fenimore,* slip copy, No. 1:97-CV-1256, 2006 WL 1373061, *3 (N.D.N.Y. May 15, 2006) (quotation and other citation omitted). The court must resolve all ambiguities and draw all rational inferences of fact in favor of the nonmoving party. *See id.* (citation omitted). "A dispute regarding a material fact is genuine 'if evidence is such that a reasonable jury could return a verdict for the non-moving party.' " *Young v. Corbin,* 889 F.Supp. 582, 584 (N.D.N.Y.1995) (quotation omitted). "Once the movant ... has established a prima facie case demonstrating the absence of a genuine issue of material fact, the non-moving party must come forward with enough evidence to lead a rational trier of fact to find for the non-moving party." *Id.* (citation omitted). Finally, "sworn statements are more than mere conclusory allegations subject to disregard ...; they are specific and detailed allegations of fact, made under penalty of perjury, and should be treated as evidence in deciding a summary judgment motion." *Scott v. Coughlin,* 344 F.3d 282, 289 (2d Cir.2003) (citing *Colon v. Coughlin,* 58 F.3d 865, 872 (2d Cir.1995)).

**B. Exhaustion of Administrative Remedies**

Magistrate Judge Treece recommended that the Court deny Defendant's motion for summary judgment to the extent that it was based upon the assertion that Plaintiff has failed to exhaust his administrative remedies. After stating the law pertaining to the Prisoner Litigation Reform Act, 42 U.S.C. § 1997(e)(a), and describing the New York State Department of Correctional Services' three-step process for exhausting all administrative remedies available to inmates, Magistrate Judge Treece examined the facts and evidence that both parties had presented. *See* Report-Recommendation and Order at 7-9. Magistrate Judge Treece noted that Plaintiff stated that he had grieved and appealed his claims of retaliation and false entries against Defendant in grievance BRL-5893-02 entitled "Wants Transfer to Downstate HUB," which is contrary to Defendant's assertion that Plaintiff failed to file a grievance regarding these incidents. *See id.* at 7-8 (citing Plaintiff's 7.1 Statement at ¶ 13; Affidavit of Thomas Egan, dated July 12, 2005 ("Egan Aff."), at ¶ 4 & Exhibit "A" at p. 4; Defendant's 7.1 Statement at ¶ 13). Furthermore, Magistrate Judge Treece found that the Court could not ascertain the contents of that grievance because neither party provided the Court with a copy of the grievance and its title did not indicate whether the grievance was against Defendant. *See id.* at 8. Therefore,, Magistrate Judge Treece found that the Court could "not deem Plaintiff's claim as unexhausted as the grievance complaint may very well have brought up the issues of retaliation and forgery." *See id.* at 8-9. Neither party objects to Magistrate Judge Treece's recommendation that the Court deny Defendant's motion for summary judgment on the issue of failure to exhaust administrative remedies.

***3** As Magistrate Judge Treece recognized, under the Prisoner Litigation Reform Act "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Furthermore,

[s]o long as the prisoner's grievance "present[s] the relevant factual circumstances giving rise to a potential claim ... sufficient under the circumstances to put the prison on notice of potential claims and to fulfill the basic purposes of the exhaustion requirement, ... [t]here does not appear to be any reason to require a prisoner to present fully developed legal and factual claims at the administrative level."

*Sulton v. Wright,* 265 F.Supp.2d 292, 298 (S.D.N.Y.2003) (quotation and other citation omitted). Additionally, New York only requires the grievance to include "the grievant's name, department identification number, housing unit, program assignment ... [and] a concise, specific description of the problem and the action requested...." N.Y. Comp.Codes R. & Reg. tit. 7, § 701.7(a)(i).

Based upon its review of the record, the Court finds that the conclusion and recommendation that Magistrate Judge Treece reached is not clearly erroneous. Without being able to ascertain the contents of grievance number BRL-5893-02, the Court cannot determine whether Plaintiff's claim is exhausted because, despite the title stating that the grievance is about a request for transfer, the Court cannot determine whether the grievance contained Plaintiff's claims of retaliation and forgery against Defendant, as he states it does. Accordingly, the Court adopts Magistrate Judge Treece's recommendation and denies Defendant's motion for summary judgement to the

extent that the motion rests upon Plaintiff's failure to exhaust administrative remedies.

**C. First Amendment Retaliation Claim** [4]

To maintain a claim for First Amendment retaliation, a plaintiff must demonstrate " '(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action.' " *Holmes v. Grant,* slip copy, No. 03 Civ. 3426, 2006 WL 851753, *15 (S.D.N.Y. Mar. 31, 2006) (quotation omitted). Once the plaintiff establishes a *prima facie* case of retaliation, "the burden shifts to the defendants 'to show that the plaintiff would have received the same punishment even absent the retaliatory motivation....' " *Bartley v. Collins,* No. 95 Civ. 10161, 2006 WL 1289256, *4 (S.D.N.Y. May 10, 2006) (quotation and other citation omitted). If the defendant demonstrates that the plaintiff would have received the same punishment absent retaliatory motive, the plaintiff's claim fails.

***1. Protected-Speech Prong***

With respect to the protected-speech prong of a retaliation claim, it is well established that "[p]risoners have a constitutional right to petition the government, and it is a violation of § 1983 for prison officials to retaliate against prisoners for the exercise of that right." *Id.* (citations omitted). Plaintiff's filing of the civil case *Zaire v. Muller* is protected conduct. *See Gill v. Pact Org.,* No. 95 Civ. 4510, 1997 WL 539948, *12 (S.D.N.Y. Aug. 28, 1997) (citation omitted). Accordingly, the Court adopts Magistrate Judge Treece's finding that Plaintiff satisfied the first prong of his retaliation claim.

***2. Adverse-Action Prong***

***4** To satisfy the adverse-action prong of a retaliation claim in the prison setting, an inmate must show that prison officials took adverse action against him. In this setting, the Second Circuit has "defined 'adverse action' *objectively,* as retaliatory conduct 'that would deter a similarly situated individual of ordinary firmness from exercising ... constitutional rights.' " *Gill v. Pidlypchack,* 389 F.3d 379, 381 (2d Cir.2004) (quotation omitted). However, to prove an adverse-action, a prisoner need not demonstrate an actual subjective chill, i.e., that the defendant's action dissuaded him from further exercising his own rights. *See id.* at 384.

Plaintiff asserts that Defendant retaliated against him for filing a civil action in federal court by changing or falsifying DOCS' records to reflect that Plaintiff refused to participate in the Sexual Offender Program ("SOP"). *See* Complaint at ¶ 19. Plaintiff asserts that Defendant's entries on July 8, 2002, and August 27, 2002, were false and harmed him because DOCS' officials used these entries as a pretext to assert that he was not eligible for the Close-to-Home transfer program, that they subjected him to confiscation of ten-years good behavior allowances, [5] and that they continued his imprisonment past his previous conditional release date of January 12, 2003. [6] *See* Complaint at ¶¶ 17-19.

Defendant argues that the entries he made were not an erroneous change of Plaintiff's position towards the SOP program because "the Sexual Offender Program was *not available,* which is quite different from a claim that records were changed to indicate a refusal of SOP if Plaintiff had previously indicated that he would take the program." *See* Defendant's Objections at 2. He further claims that Plaintiff provides no evidence to indicate that he was on a waiting list for the SOP as of July 8, 2002, [7] and that he refused to participate in SOP both before and after his meetings with Defendant. *See id.* Moreover, Defendant argues that his actions were not adverse because they did not deter Plaintiff from filing grievances after the incidents, that his actions were in no way threatening and would not have deterred any other inmate from filing subsequent grievances or lawsuits, and that his actions were simply *de minimus. See id.* at 2.

With respect to the circumstances surrounding the documentation of Plaintiff's refusal to participate in SOP, Defendant states that, pursuant to DOCS' policy, [8] he approached Plaintiff on July 8, 2002, and August 27, 2002, provided him with the opportunity to sign the SOP consent form, and informed him that refusing to sign the form was tantamount to refusing the program. *See* Affidavit of Thomas Welch, dated July 12, 2005 ("Welch Aff."), at ¶ 3. Defendant states that Plaintiff refused to sign the consent form and that he documented Plaintiff's actions on the form just like any other prison official would. *See id.* at ¶ 3, Exhibit "A." Contrary to Defendant's account, Plaintiff states that, on July 8, 2002, and August 27, 2002, Defendant did not approach him with an opportunity to sign the SOP consent form. *See* Plaintiff's 7.1 Statement at ¶ 6. Rather, Plaintiff states that Defendant insisted that he sign a declaration of refusal of the SOP; and, when he refused to comply, Defendant filled it out himself. *See id.* at ¶¶ 6-7. Although Defendant asserts that

he did not "change" the DOCS' records to reflect a refusal, Plaintiff's complaint and motion papers indicate that it was not necessarily a change, but a falsification of his refusal. *See* Complaint at ¶¶ 16-18; Plaintiff's Affirmation at p. 1; Plaintiff's 7.1 Statement at ¶ 6. Thus, an issue of fact exists as to whether Defendant's alleged action actually occurred.

***5** Assuming such action did occur, the question is whether a reasonable jury could find such action to be adverse. Contrary to Defendant's assertion, it is of no consequence whether Plaintiff was deterred from exercising his constitutional rights; rather, the question is whether a similarly-situated inmate would be deterred from exercising his constitutional rights. Defendant states that his action is not adverse because he was making an accurate and appropriate documentation of the facts. *See* Defendant's Memorandum of Law at 7. Defendant also claims his action was *de minimus* and that a similarly situated inmate would not have been deterred from exercising his constitutional rights because of Defendant's actions; however, Defendant offers no evidence to support his claims, except to say that his conduct was in no way threatening and that a similarly-situated inmate would not be deterred from exercising his constitutional rights; he simply concludes that such is the case. *See* Defendant's Objections at 2. However, if a reasonable jury concluded that Defendant's false entries resulted in officials denying Plaintiff participation in the Close-to-Home Transfer Program,[9] resulted in a loss of ten-years good behavior allowances, and continued imprisonment past his previous conditional release date, it could also conclude that such consequences would deter a similarly-situated inmate from filing a federal action.

Based upon the above-stated reasons, the Court finds that a reasonable jury could conclude that Defendant took some action against Plaintiff and that his action was adverse because it would deter a similarly-situated inmate of ordinary firmness from exercising his constitutional rights. Accordingly, the Court holds that issues of material fact exist with respect to the adverse-action prong of Plaintiff's retaliation claim.

***3. Causal-Connection Prong***

To satisfy the causal-connection prong of a retaliation claim, an inmate must show "that the protected conduct was a 'substantial or motivating factor' in the prison officials' decision to take action against the plaintiff." *Ciaprazi v. Goord,* No. 9:02 CV 00915, 2005 WL 3531464, *6 (N.D.N.Y. Dec. 22, 2005) (citations omitted). The court may consider a number of factors when determining whether a causal connection exists, including "(1) the temporal proximity between the protected activity and the alleged retaliatory act; (2) the inmate's prior good disciplinary record; (3) vindication at a hearing on the matter; and (4) statements by the defendant concerning his motivation." *Holmes,* 2006 WL 851753, at *15 (citation omitted).

Based upon the record, the Court concludes that a reasonable jury could find a causal connection between Plaintiff's federal civil action and Defendant's actions with respect to the SOP consent form. The temporal proximity between the favorable verdict in Plaintiff's lawsuit and Defendant's alleged retaliation is circumstantial evidence of such retaliation. *See Gayle v. Gonyea,* 313 F.3d 677, 683 (2d Cir.2002) (citation omitted). Plaintiff received a favorable verdict on June 21, 2002, and the first of Defendant's allegedly false notations that Plaintiff had refused to participate in the SOP occurred on July 8, 2002, a mere two weeks later. *See* Affirmation of Maria Moran, dated July 22, 2005 ("Moran Aff."), at Exhibit "1" at 1; Plaintiff's 7.1 Statement at ¶ 6. Furthermore, July 8, 2002, was the first time Defendant approached Plaintiff about SOP; previous entries on the quarterly review indicate that in February 2002 and May 2002 the program was not available. *See* Welch Aff. at Exhibit "B." In addition, although Defendant states that he was not aware of the outcome or substance of any legal actions that Plaintiff was pursuing while he was at Clinton, Plaintiff contradicts this statement, indicating that he and his attorney had three different telephone conversations about his federal civil action, *Zaire v. Muller,* and that Defendant was present on each occasion and remained inside the cubicle office where the conversations were held and sat three feet away from Plaintiff. *See* Plaintiff's Affirmation at p. 2. Additionally, Plaintiff states that his attorney had at least three conversations with Defendant regarding DOCS' policies relating to issues raised in *Zaire v. Muller. See id.* Moreover, Plaintiff claims that his attorney had a conversation with Defendant on July 8, 2002, regarding her need to speak to Plaintiff about post-trial motions. *See id.* Finally, Plaintiff contends that, when he questioned Defendant about the sudden need to have him sign an SOP consent form, Defendant replied " '[b]ecause you pushed the issue. Now you have to put up or shut up.' " *See id.* Viewing these facts in the light most favorable to Plaintiff, a reasonable jury could find that Plaintiff had established a causal connection between Defendant's alleged falsification of Plaintiff's DOCS' records and Plaintiff's successful federal action. Accordingly, the Court concludes that Plaintiff has raised material issues

of fact as to the existence of a causal connection between his federal civil rights action and Defendant's alleged retaliatory act of falsely noting on the SOP consent form that Plaintiff has refused the program.

***4. Defendant's Burden***

***6** Defendant states that "DOCS policy requires that convicted and incarcerated sex offenders, who are roughly two to three years away from their earliest release date, sign a Sexual Offender Program ... participation consent form to remain eligible for early release ... [and] because SOP is not offered at Clinton, inmates are requested to sign a consent form for SOP before transfer to a facility with the program will be submitted," and that refusal to sign is interpreted as a refusal to participate in the program. *See* Welch Aff. at ¶¶ 2-3. On the other hand, Plaintiff asserts that he was not aware of any such DOCS' policy and disputes that the form must be signed in order to receive a transfer because on two occasions, November 9, 2000, and September 17, 2002, he submitted transfer requests without signing the SOP consent form. *See* Plaintiff's 7.1 Statement at ¶¶ 4-5. Furthermore, Plaintiff states that he has been eligible for early release since November 1997, after his initial parole board hearing, and that he has appeared before the parole board for early release on three subsequent occasions. *See* Plaintiff's 7.1 Statement at ¶ 4.

Finally, Defendant asserts that part of the criteria for the SOP is that an inmate admit his sexual offense and that the demonstration of acceptance of responsibility is integral to the successful completion of SOP; and, therefore, an inmate's unwillingness to admit his sexual crimes is construed as a refusal of the SOP. *See* Welch Aff. at ¶ 5. However, Defendant does not cite to any DOCS' policy or provide the Court with copies of the policies to which he refers. Furthermore, Plaintiff states that, until his favorable verdict in *Zaire v. Muller,* Defendant acknowledged that the SOP was a moot issue by placing "program not available" entries on his quarterly evaluations in February 2002 and May 2002. Although Defendant has submitted documents indicating that Plaintiff had refused SOP when others had offered it to him [10] and that Defendant was not a party to Plaintiff's federal litigation, this does not demonstrate, as a matter of law, that Defendant would have taken the same action against Plaintiff regardless of the outcome of Plaintiff's litigation. Moreover, although Defendant argues that any prison official would document an inmate's refusal to participate in a program, there is an issue of fact with respect to whether Defendant offered Plaintiff the opportunity to participate in the program, Plaintiff refused the program and then refused to sign the refusal form, or whether Defendant demanded that Plaintiff sign a refusal to participate and, when Plaintiff would not comply, filled it out himself. Therefore, the Court finds that Defendant has not demonstrated, as a matter of law, that he would have taken the same action against Plaintiff despite the favorable verdict awarded to Plaintiff in his federal action.

Accordingly, as Plaintiff has created issues of fact regarding the second and third prongs of his First Amendment retaliation claim, the Court adopts Magistrate Judge Treece's recommendation and denies Defendant's motion for summary judgment.

## IV. CONCLUSION

***7** After carefully considering Magistrate Judge Treece's February 22, 2006 Report-Recommendation and Order, Defendant's objections thereto, the relevant parts of the record, and the applicable law, and for the reasons stated herein, the Court hereby

**ORDERS** that Magistrate Judge Treece's February 22, 2006 Report-Recommendation and Order is **ADOPTED** in its entirety; and the Court further

**ORDERS** that Defendant's motion for summary judgment is **DENIED** with respect to Plaintiff's claims against him in his individual capacity; and the Court further

**ORDERS** that Defendant's motion for summary judgment is **GRANTED** with respect to Plaintiff's claims against him in his official capacity; and the Court further

**ORDERS** that the parties contact Magistrate Judge Treece's chambers within **ten (10) days of the date of this Order** to schedule a final pre-trial conference.

**IT IS SO ORDERED**

RANDOLPH F. TREECE, Magistrate Judge.

***REPORT RECOMMENDATION and ORDER***

*Pro se* Plaintiff David Zaire brings a civil action pursuant to 42 U.S.C. § 1983, alleging that John/Jane Doe ("Doe")

violated his First Amendment rights when Doe "knowingly and vindictively retaliated" against Plaintiff and violated his Fifth Amendment rights when Doe "willfully, knowingly, and vindictively maintained the plaintiff at a hardship traveling distance" from his family in two prison transfers; Plaintiff also alleges that Thomas Welch violated his First Amendment rights when Plaintiff's records were changed in regards to a therapeutic program in retaliation for a previous federal civil rights claim brought by Plaintiff. Dkt. No. 1, Compl. at ¶ 19. Defendant Welch brings this Motion for Summary Judgment. Dkt. No. 22. For the reasons to follow, it is recommended that the Motion for Summary Judgment be **denied.**

## I. FACTS

Plaintiff previously filed a federal lawsuit, *David Zaire v. Muller,* 9:98-CV-1838, in the Northern District of New York. Def.'s 7.1 Statement at ¶ 14; *see also* 9:98-CV-1838, Dkt. Nos. 1, Compl. & 52, Am. Compl. After a jury trial, a verdict was returned in Plaintiff's favor on June 21, 2002. [1] Def.'s 7.1 Statement at ¶ 14, Maria Moran Affirm., Ex. 1, Mem. and Order, dated Nov. 18, 2002; *see also* 9:98-CV-1838, Dkt. Nos. 63, Jury Verdict & 64, Judgment. Upon the verdict, Plaintiff moved, in part, for declaratory and injunctive relief, which was granted. [2] Def.'s 7 .1 Statement at ¶ 14, Moran Affirm., Ex. 1, Mem. and Order at pp. 1-2; *see also* 9:98-CV-1838, Dkt. No. 72, Mem. and Order, dated Nov. 18, 2002.

Prior and subsequent to Plaintiff's previous lawsuit, Plaintiff was incarcerated at Clinton Correctional Facility ("Clinton") from May 10, 2001 until October 4, 2002. Def.'s 7.1 Statement at ¶ 2. During that period of time, Thomas Welch was Plaintiff's Correction Counselor. *Id.* Plaintiff's incarceration was a result of convictions which included rape in the first degree and sodomy in the first degree. *Id.* at ¶ 3.

***8** Sexual offenders are to participate in Sexual Offender Program ("SOP"). *Id.* at ¶ 4. SOP is not offered at Clinton. *Id.* at ¶ 5. On July 8, 2002, Welch met with Plaintiff regarding a SOP consent form, which is a document for the agreement to participate in the sex offender counseling program; the form was signed by Welch but Plaintiff's signature was not on the document. *Id.* at ¶ 6; Dkt. No. 22, Thomas Welch Aff., Ex. A, Clinton SOP Form. In Plaintiff's Quarterly Review for the period of May 4, 2002 to August 26, 2002, Welch noted on the document that Plaintiff refused to accept SOP on July 8, 2002 and August 27, 2002; Plaintiff did not sign the Quarterly Review. Def.'s 7.1 Statement at ¶ 7; Welch Aff, Ex. B, Inmate Review Worksheet, dated Aug. 27, 2002.

## II. DISCUSSION

### A. Summary Judgment Standard

Pursuant to FED.R.CIV.P. 56(c), summary judgment is appropriate only where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." The moving party bears the burden to demonstrate through "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," that there is no genuine issue of material fact. *F.D.I. C. v. Giammettei,* 34 F.3d 51, 54 (2d Cir.1994) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)). "When a party has moved for summary judgment on the basis of asserted facts supported as required by [Federal Rule of Civil Procedure 56(e) ] and has, in accordance with local court rules, served a concise statement of the material facts as to which it contends there exist no genuine issues to be tried, those facts will be deemed admitted unless properly controverted by the nonmoving party." *Glazer v. Formica Corp.,* 964 F.2d 149, 154 (2d Cir.1992).

To defeat a motion for summary judgment, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial," and cannot rest on "mere allegations or denials" of the facts submitted by the moving party. FED.R.CIV.P. 56(e); *see also Scott v. Coughlin,* 344 F.3d 282, 287 (2d Cir.2003) ("Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment when the moving party has set out a documentary case."); *Rexnord Holdings, Inc. v. Bidermann,* 21 F.3d 522, 525-26 (2d Cir.1994). To that end, sworn statements are "more than mere conclusory allegations subject to disregard ... they are specific and detailed allegations of fact, made under penalty of perjury, and should be treated as evidence in deciding a summary judgment motion" and the credibility of such statements is better left to a trier of fact. *Scott v. Coughlin,* 344 F.3d at 289 (citing *Colon v. Coughlin,* 58 F.3d 865, 872 (2d Cir.1995) and *Flaherty v. Coughlin,* 713 F.2d 10, 13 (2d Cir.1983)). Furthermore, "[a] dispute regarding a material fact is genuine 'if evidence is such that a reasonable jury could return a verdict for the non-moving party.' " *Young v. Corbin,* 889 F.Supp. 582, 584 (N.D.N.Y.1995) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)).

***9** When considering a motion for summary judgment, the court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. *Nora Beverages, Inc. v. Perrier Group of Am., Inc.,* 164 F.3d 736, 742 (2d Cir.1998). "[T]he trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." *Gallo v. Prudential Residential Servs., Ltd. P'ship,* 22 F.3d 1219, 1224 (2d Cir.1994).

**B. John/Jane Doe**

This Court previously stated to Plaintiff that "[i]n order to pursue his claim against 'John Doe' Defendants, Plaintiff must take reasonable and expeditious steps to ascertain their identities and then file a motion to amend seeking leave of the Court to bring such named individuals into this action." Dkt. No. 4, Order, dated May 29, 2003. The U.S. Marshals also noted they could not serve John/Jane Doe as they were not named. Dkt. No. 5. On January 16, 2004, the Honorable Frederick J. Scullin, Chief United States District Court Judge, issued an Order whereby it was noted that Plaintiff had provided an affidavit stating he had submitted a letter to Mr. Anthony Annucci, Deputy Commissioner and Counsel for the Department of Correctional Services, seeking the identities of the "John/Jane Doe" Defendant[s]. Dkt. No. 8, Order, dated Jan. 16, 2004; Dkt. No. 7, David Zaire Aff., dated Dec. 1, 2003, at ¶ 3. Plaintiff further stated that since he received no response to his inquiry, he sent a follow up letter, for which he also did not receive a response. Order, dated Jan. 16, 2004; Zaire Aff. ¶ 4. Judge Scullin ordered that "Plaintiff's request for assistance in ascertaining the identity or identities of the 'John/Jane Doe' Defendant(s) is **DENIED WITHOUT PREJUDICE TO RENEW** at a later time." Plaintiff made no further application to the Court.

However, Plaintiff, in his Response to the Motion for Summary Judgment, asks the Court not to dismiss the action as to the "John/Jane Doe" Defendants but Plaintiff also does not make a formal motion for court intervention. Dkt. No. 23, David Zaire Affirm. at p. 4. Plaintiff does submit three letters, dated August 28, 2002, July 14, 2003, and August 4, 2003, whereby he attempted to ascertain the identities of the "John/Jane Doe" Defendants. *Id.,* Ex. A. Nevertheless, the Court is unaware of any steps taken by Plaintiff subsequent to Judge Scullin's January 16, 2004 Order to identify the "John/Jane Doe" Defendants. To that extent, Plaintiff may file a motion for court intervention to aid in his identification of the "John/Jane Doe" Defendants. If Plaintiff chooses to file the motion, Plaintiff is to provide the Court with information as to his attempts to ascertain the identities after the issuance of the January 16, 2004 Order.

**C. Eleventh Amendment**

***10** Plaintiff brings suit against Defendant Welch in his official capacity and, although Plaintiff does not specifically state that he is suing Defendant in his individual capacity, it will be assumed as prisoners suing pursuant to § 1983 normally sue in both capacities. Compl. at ¶ 3. Plaintiff seeks punitive damages against Defendant Welch in his individual and official capacities. *Id.* at ¶ 21.

The Eleventh Amendment states "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Eleventh Amendment bars a suit against the state in federal court unless the state consents to being sued or Congress legislatively overrides a state's immunity. *Huang v. Johnson,* 251 F.3d 65, 69 (2d Cir.2000). The state's immunity extends to state officials "act[ing] on behalf of the state" when the state is the " 'real, substantial party in interest.' " *Id.* at 69-70 (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddie, Inc.,* 506 U.S. 139, 142-47 (1993) & quoting *Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89, 101-02 (1984)). Moreover, the Eleventh Amendment will bar recovery for money damages in a suit "against state officials in their official capacities." *Ford v. Reynolds,* 316 F.3d 351, 354 (2d Cir.2003).

Therefore, Defendant Welch cannot be sued in his official capacity in a claim for money damages. However, Zaire may seek damages from him in his individual capacity.

**D. Exhaustion of Remedies**

Plaintiff states that he exhausted his remedies in regards to his retaliatory and false entries claims against Welch. Pl.'s 7.1 Statement at ¶ 13. Defendants allege, however, that Plaintiff

did not file a grievance or appeal as to this claim for either the July or August 2002 incidents. Def.'s 7.1 Statement at ¶ 13.

The Prisoner Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997(e)(a), states that "[n]o action shall be brought with respect to prison conditions under [section 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." This exhaustion requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle,* 534 U.S. 516, 532 (2002); *see also Ziemba v. Wezner,* 366 F.3d 161, 163 (2d Cir.2004).

The New York State Department of Corrections has created a three-step process to exhaust all administrative remedies available to inmates. *See Abney v. McGinnis,* 380 F.3d 663, 668 (3d Cir.2004). First, the inmate must file a grievance complaint with the Grievance Clerk within fourteen (14) days of the incident. N.Y. COMP.CODES R. & REGS. tit. 7, § 701.7(a)(1). The complaint is then submitted to the IGRC to review the grievance. N.Y. COMP.CODES R. & REGS. tit. 7, § 701.7(a)(2)-(5). Second, if the inmate appeals the IGRC decision, then the inmate may appeal to the Superintendent. *See* N.Y. COMP.CODES R. & REGS. tit. 7, § 701 .7(b). Third, if the inmate appeals the Superintendent's determination, the CORC is to make a final administrative determination. N.Y. COMP.CODES R. & REGS. tit. 7, § 701.7(c). Upon the completion of all three steps, an inmate may "seek relief pursuant to 42 U.S.C. § 1983." *Colon v. Harvey,* 344 F.Supp.2d 896, 897 (W.D.N.Y.2004) (citing *Neal v. Goord* 267 F.3d 116, 122 (2d Cir.2001); *Santos v. Hauck,* 242 F.Supp.2d 257, 259 (W.D.N.Y.2003)).

***11** If a prisoner's grievance " 'presents the relevant factual circumstances giving rise to a potential claim ... sufficient under the circumstances to put the prison on notice of potential claims and to fulfill the basic purposes of the exhaustion requirement ... [then] there does not appear to be any reason to require a prisoner to present fully developed legal and factual claims at the administrative level. *Sulton v. Wright,* 265 F.Supp.2d 292, 298 (S.D.N.Y.2003) (quoting *Irvin v. Zamora,* 161 F.Supp.2d 1125, 1134-35 (S.D.Cal.2001) and further citing *Lewis v. Washington,* 197 F.R.D. 611, 614 (N.D.Ill.2000)); *see also Strong v. David,* 297 F.3d 646, 649-50 (7th Cir.2002) (citing *Booth v. Churner,* 532 U.S. 731 (2001) for the proposition that the PLRA requires prisoners to exhaust a *process* and not a *remedy)*. Indeed, New York State's regulations prescribing the content to be included in a prisoner grievance states that in addition to administrative information, such a grievant's name and housing unit, the grievance "must contain a concise, specific description of the problem and the action requested...." N.Y. COMP.CODES R. & REGS. tit. 7, § 701.7(a)(1)(I).

Here, Plaintiff states he did grieve and appeal his claim of retaliation and false entries against Welch in complaint BRL-5893-02, which is entitled "Wants Transfer to Downstate HUB." Pl.'s 7.1 Statement at ¶ 13; Dkt. No. 22, Thomas Eagen Aff., Ex. A at p. 4. This complaint was appealed to the CORC. Eagen Aff. at ¶ 4. However, this Court cannot ascertain the contents of the complaint as neither Plaintiff nor Defendant provided documentation of that complaint and the title does not provide any insight as to whether the complaint was against Welch. Furthermore, the Court cannot deem Plaintiff's claim as unexhausted as the grievance complaint may very well have brought up the issues of retaliation and forgery.

Therefore, it is recommended that the Motion for Summary Judgment on the issue of exhaustion be **denied.**

### D. First Amendment Claim

Plaintiff alleges that Welch violated his First Amendment rights when Welch "knowingly, vindictively and maliciously" changed his Department of Correctional Services ("DOCS") records to express a refusal to participate in SOP "in direct retaliation for ... exercising his right to pursue a federal civil rights claim." Compl. at ¶ 19.

In order to prevail on a retaliation claim, a plaintiff bears the burden to prove, "first, that he engaged in constitutionally protected conduct and, second, that the conduct was a substantial or motivating factor for the adverse actions taken by prison officials." *Bennett v. Goord,* 343 F.3d 133, 137 (2d Cir.2003). A plaintiff may meet the burden of proving an inappropriate retaliatory motive by presenting circumstantial evidence of a retaliatory motive, thus obviating the need for direct evidence. *Id.* at 139 (holding that plaintiff met his burden in proving retaliatory motive by presenting circumstantial evidence relating to, *inter alia,* the temporal proximity of allegedly false misbehavior reports and the subsequent reversal of the disciplinary charges on appeal as unfounded). If the plaintiff can carry that burden, the defendants will still be entitled to summary judgment if they

can show, by a preponderance of the evidence, that they would have taken the same action in the absence of the prisoner's First Amendment activity. *Davidson v. Chestnut,* 193 F.3d 144, 148-49 (2d Cir.1999); *see Hynes v. Squillace,* 143 F.3d 653, 657 (2d Cir .1998); *see also Lowrance v. Achtyl,* 20 F.3d 529, 535 (2d Cir.1994).

***12** Here, since Defendant Welch "does not dispute that an inmate may file a civil right lawsuit," the first element is not at issue. Dkt. No. 22, Def. Mem. of Law at p. 6. However, Welch does repugn the existence of a causal connection between the protected activity, the filing of a lawsuit, and the actions taken by Welch. *Id.; see also Bennett,* 343 F.3d at 137. Welch also disputes that he subjected Plaintiff to any adverse actions. Def. Mem. of Law at p. 6.

Defendant Welch states that DOCS policy requires inmates who are convicted as sex offenders to sign a SOP participation consent form to stay eligible for early release and that the form must be signed before there the prisoner can be transferred to a facility with the program. [3] Def.'s 7.1 Statement at ¶¶ 4 & 5; Welch Aff. at ¶ 2. Plaintiff states he not aware of any such DOCS policy and he disputes that the form must be signed in order to receive a transfer. Pl.'s 7.1 Statement at ¶¶ 4 & 5. Plaintiff notes that on two occasions, November 9, 2000 and September 17, 2002, transfer requests were made without signing the SOP consent form. *Id.* at ¶ 5.

On July 8, 2002, Welch submits that he approached Plaintiff with an opportunity to sign the SOP consent form but that Plaintiff had refused. Def.'s 7.1 Statement at ¶ 6; Welch Aff. at ¶ 3. Plaintiff, on the other hand, contends that Welch insisted that he "sign a declaration of refusal of the SOP" and then proceeded to "fill[ ] out the refusal on his own when Plaintiff would not comply with his demand." Pl.'s 7.1 Statement at ¶ 6. Plaintiff states that when he questioned Welch as to the need to sign an SOP refusal, Welch's response was "because you pushed the issue. Now you have to put up or shut up." Dkt. No. 23, David Zaire Affirm. at p. 2. Plaintiff claims that the timing of this statement "was obviously connected to Plaintiff's just-completed litigation." Zaire Affirm. at p. 2. The verdict had been returned on June 21, 2002. Moran Affirm., Ex. 1, Mem. and Order at p. 1. On August 27, 2002, Plaintiff met with Welch in regards to Plaintiff's Quarterly Review. Pl.'s 7.1 Statement at ¶ 7; Def.'s 7.1 Statement at ¶ 7; Welch Aff. at ¶ 4. At that time, the SOP consent form was discussed; however, Welch contends that while he provided Plaintiff with another opportunity to sign the form, Plaintiff refused to sign it. Def.'s 7.1 Statement at ¶ 7; Welch Aff. at ¶ 4. Notwithstanding, Plaintiff alleges that Welch was "attempting to obtain a signed refusal ... in order to nullify entries previously made in Plaintiff's records[.]" Pl.'s 7.1 Statement at ¶ 7.

Plaintiff claims that Welch's entries on July 8 and August 27, 2002, were false and in retaliation for Plaintiff's previously filed lawsuit, *David Zaire v. Muller.* Welch Aff. at ¶ 9; Zaire Affirm. at p. 2. Welch avers that he "was not aware of the outcome or substance of any legal actions [Plaintiff] was pursuing while he was at Clinton." Welch Aff. at ¶ 9. Plaintiff, on the other hand, purports that prior to trial on the *Muller* case, he participated in three telephone conversations with his attorney regarding the issues of the trial while at Clinton. Zaire Affirm. at p. 2. Furthermore, Welch "was present on each occasion and remained inside the small cubicle office where the conversations were held, sitting just three feet away[.]" *Id.*

***13** Plaintiff has met his initial burden of producing sufficient evidence to raise a question of material fact about whether retaliation was a substantial factor in the entries refusing to participate in SOP. The temporal proximity between the favorable verdict of his lawsuit and the alleged retaliation provides circumstantial evidence of retaliation. *See Gayle v. Gonyea,* 313 F.3d 677, 683 (2d Cir.2002). The verdict was rendered on June 21, 2002. The first attempt to obtain a signature on the SOP consent form occurred on July 8, 2002, only about two weeks after the verdict. Welch also attempted to obtain Plaintiff's signature on August 27, 2002 during the Quarterly Review. And despite the fact that the jury trial had ended, Plaintiff had an outstanding motion for attorney's fees, reimbursement costs, and declaratory and injunctive relief, which may have possibly influenced Welch. Moran Affirm., Ex. 1, Mem. and Order; Zaire Affirm. at p. 3.

As Plaintiff has met his burden, Defendant Welch may still be entitled to summary judgment if he can prove, by a preponderance of the evidence, that he would have taken the same action in the absence of Plaintiff's prior lawsuit. Welch provides an affidavit whereby he presents reasons for the need for an SOP consent form. Welch submits that it is standard DOCS policy to require convicted sexual offenders, "who are roughly two to three years away from their earliest release date, sign a Sexual Offender Program ... participation consent form to remain eligible for early release." Welch Aff. at ¶ 2. Welch further states that prisoners are requested to sign the consent form before a prisoner can be transferred to another facility to enroll in SOP. *Id.* Refusal to sign the consent form

is interpreted as a refusal to participate in the program. *Id.* at ¶ 3. Defendant Welch also states that one of the criteria to enter SOP is that the participant must accept his or her sexual offenses and that because Plaintiff maintains his innocence, "DOCS policy construes the plaintiff's unwillingness to admit his sexual crimes as a refusal of the program." *Id.* at ¶ 5. However, Welch points to no specific DOCS policies regarding SOP. Furthermore, Welch did not provide any copies of the DOCS policies to which he makes reference. Plaintiff states that up until his favorable verdict in *David Zaire v. Muller,* Welch "had been routinely acknowledging that the SOP was a moot issue" by placing Program Not Available ("PNA") entries on the quarterly evaluations for February 2002 and May 2002. Zaire Affirm. at p. 2; Welch Aff., Ex. B, Inmate Review Worksheet, dated Aug. 27, 2002. Defendant Welch has not met his burden of establishing as a matter of law that he would have taken the same action in the absence of Zaire's First Amendment activity.

Therefore, it is recommended that the Motion for Summary Judgment be **denied.**

### III. CONCLUSION

For the reasons stated herein, it is hereby

***14 RECOMMENDED,** that the Motion for Summary Judgment (Dkt. No. 22) be **DENIED;** and it is further

**ORDERED,** that Plaintiff may, if he chooses, file a motion for court intervention to aid in his identification of the John/Jane Doe Defendants; such motion shall be filed no later than April 7, 2006. Should Plaintiff fail to file such motion, the Clerk is directed to forward this matter to the undersigned for the issuance of a report-recommendation wherein the Court will recommend dismissal of the claim against the John/Jane Doe Defendants which will be deemed abandoned; and it is further

**ORDERED,** that the Clerk of the Court serve a copy of this Report-Recommendation and Order upon the parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have ten (10) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. ***FAILURE TO OBJECT TO THIS REPORT WITHIN TEN (10) DAYS WILL PRECLUDE APPELLATE REVIEW.*** *Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Sec'y of Health and Human Servs.,* 892 F.2d 15 (2d Cir.1989)); *see also* 28 U.S.C. § 636(b)(1); FED.R.CIV.P. 72, 6(a), & 6(e).

**All Citations**

Not Reported in F.Supp.2d, 2006 WL 1994848

## Footnotes

1 In his motion papers Plaintiff uses the term "changed;" however, in his complaint, he indicates that Defendant made false entries in his record. *See* Complaint at ¶¶ 16-18.

2 Plaintiff's complaint also names John/Jane Doe as Defendants. Two of Plaintiffs three causes of action pertain to John/Jane Doe. In his Report-Recommendation and Order, Magistrate Judge Treece ordered that "Plaintiff may, if he chooses, file a motion for court intervention to aid in his identification of John/Jane Doe Defendants...." *See* Report-Recommendation and Order at 13. Plaintiff did file a motion for court intervention and that motion is currently pending before Magistrate Judge Treece. *See* Dkt. No. 26.

3 Magistrate Judge Treece noted that, "[i]n Plaintiff's claim for declaratory and injunctive relief, he sought to participate in the Family Reunion Program ("FRP"); however, the Defendants' position in that case was that Plaintiff first needed to complete the Sexual Offender Program ("SOP") in order to qualify for FRP." *See* Report-Recommendation and Order at 2 n. 2.

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4 Magistrate Judge Treece found that, under the Eleventh Amendment, Plaintiff could not sue Defendant Welch in his official capacity. *See* Report-Recommendation and Order at 6. Defendant Welch states that he does not object to this finding and asks the Court to dismiss the claims against him in his official capacity. Plaintiff filed no objections. Accordingly, the Court adopts Magistrate Judge Treece's finding that Plaintiff cannot sue Defendant Welch in his official capacity.

5 Plaintiff states that the DOCS' Commissioner noted that Plaintiff "has refused to address assessed needs of the therapeutic program." *See* Complaint at ¶ 18.

6 Plaintiff's 7.1 Statement and his Complaint list the main harm that Defendant's retaliatory action caused as the denial of his participation in the Close-to-Home Transfer program. However, his complaint includes all of the above-listed injuries.

7 Plaintiff notes in his affirmation that he does not allege that he was on an "active waiting list" for SOP as of July 8, 2002. *See* Plaintiff's Affirmation at 2 n. 1.

8 Plaintiff and Defendant provide conflicting views of DOCS' policy regarding SOP consent forms and transfer submissions and the circumstances surrounding the documentation of Plaintiff's refusal to participate in the SOP. Defendant indicates that DOCS' policy states that, in order for Plaintiff to remain eligible for early release, within two or three years of the earliest date for release, Plaintiff must sign an SOP consent. Furthermore, Defendant states that in order to submit a transfer request to a facility with a SOP, the SOP consent form must be signed. *See* Welch Aff. at ¶¶ 2-3. Plaintiff, however, states that he is not aware of any such policies and that he previously has been transferred to facilities offering SOP without signing the form. *See* Plaintiff's 7.1 Statement at ¶¶ 4-5.

9 Plaintiff states that his wife has medical conditions and transfers out of "Shawangunk's lower Hudson Valley would impose hardship traveling distance upon his wife and possibly exacerbate her medical conditions." *See* Complaint at ¶ 7.

10 As part of his submissions, Defendant included affidavits from *Zaire v. Muller.* It appears that Defendant submitted these forms to show Plaintiff's continued refusal of SOP and to show that Plaintiff, therefore, refused SOP on the occasions at issue in this case. However, the Court cannot determine, as a matter of law, based upon Plaintiff's alleged prior and subsequent refusals that he necessarily refused an opportunity for SOP when Defendant offered it to him because there is an issue of fact concerning whether Defendant offered SOP to Plaintiff or just demanded that he sign a refusal. Furthermore, according to Plaintiff, one of these affidavits contains a forged signature, and another one has a note from Plaintiff stating that he had never refused SOP. *See* Plaintiff's Affirmation at p. 3 n. 1; Moran Aff., at Exhibit "3" at Exhibits "B" & "C."

1 Plaintiff was awarded "$1.00 in damages as to three of the four defendants." Def.'s 7.1 Statement, Maria Moran Affirm., Ex. 1, Mem. and Order, dated Nov. 18, 2002, at p. 1; *see also* 9:98-CV-1838, Dkt. No. 72, Mem. and Order, dated Nov. 18, 2002.

2 In Plaintiff's claim for declaratory and injunctive relief, he sought to participate in the Family Reunion Program ("FRP"); however, the Defendants' position in that case was that Plaintiff first needed to complete the Sexual Offender Program ("SOP") in order to qualify for FRP. Def.'s 7.1 Statement, Moran Affirm., Ex. 1, Mem. and Order at pp. 1-2; *see also* 9:98-CV-1838, Mem. and Order, dated Nov. 18, 2002.

3 A copy of the policy was not provided to the Court.


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Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Andrew HENDRICKS, Plaintiff,
v.
Shelley M. MALLOZZI, Director of the Inmate Grievance Program for DOCCS; Earl Bell, Superintendent, Clinton Correctional Facility; D. Holdridge, Deputy Superintendent for Security, Clinton Correctional Facility; and C. DeLutis, Captain of Security, Clinton Correctional Facility, Defendants.

9:20-CV-1035 (MAD/ML)
|
Signed 01/14/2022

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**REPORT and RECOMMENDATION**

MIROSLAV LOVRIC, United States Magistrate Judge

***1** Currently before the Court, in this civil rights action filed by Andrew Hendricks ("Plaintiff") against Shelley Mallozzi, Earl Bell, D. Holdridge, and C. DeLutis (collectively "Defendants"), is Defendants' motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. No. 17.) For the reasons set forth below, I recommend that Defendants' motion be granted in part and denied in part.

## I. RELEVANT BACKGROUND

### A. Procedural History

On September 3, 2020, Plaintiff commenced this action by the filing of a Complaint, accompanied by a motion for leave to proceed *in forma pauperis* ("IFP"). (Dkt. Nos. 1, 2.) On October 29, 2020, United States District Judge Mae A. D'Agostino granted Plaintiff's IFP application and dismissed the Complaint without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1). (Dkt. No. 5.)

On November 18, 2020, Plaintiff filed an Amended Complaint. (Dkt. No. 8.) On December 23, 2020, Judge D'Agostino reviewed Plaintiff's Amended Complaint and set forth the factual allegations therein. (Dkt. No. 9 at 2-4.) Judge D'Agostino ordered that (1) Plaintiff's Amended Complaint was accepted for filing with respect to a claim for retaliation pursuant to the First Amendment and 42 U.S.C. § 1983, against Defendants, and (2) any other causes of action in the Amended Complaint were dismissed. (*See generally* Dkt. No. 9.)

On March 1, 2021, in lieu of an answer, Defendants filed the pending motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. No. 17.)

### B. Parties' Briefing on Defendants' Motion to Dismiss

#### 1. Defendants' Memorandum of Law

Generally, in support of their motion to dismiss, Defendants assert the following two arguments: (1) Plaintiff's retaliation claim fails as a matter of law, and (2) Plaintiff failed to allege the personal involvement of Defendants Holdridge, Bell, and Mallozzi. (Dkt. No. 17, Attach. 1 at 6-16.)

More specifically, Defendants first argue that Plaintiff's retaliation claim fails as a matter of law because the Amended Complaint fails to allege facts plausibly suggesting that Defendants took an adverse action against Plaintiff or that a causal connection existed between his protected speech and the alleged adverse action. (*Id.* at 8-15.) Defendants argue that Plaintiff's claim against Defendant DeLutis—which is premised on grievance that Plaintiff filed against Correction Officer Ayotte (an unnamed party to this action)—fails because (a) Plaintiff's conclusory allegation (that Defendant DeLutis was "sympathetic" towards C.O. Ayotte for an unknown reason) is insufficient to overcome the heightened burden of establishing a causal connection of retaliation by one officer (Defendant DeLutis) on behalf of another officer (C.O. Ayotte), (b) inmates do not have any constitutional right to a particular prison job, (c) temporal proximity alone is insufficient to establish an inference of retaliation, and (d) Defendant DeLutis's actions were taken for legitimate, non-retaliatory reasons unrelated to Plaintiff's

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protected activity—namely, a security concern. (*Id.* at 8-11.) Defendants argue that Plaintiff's claim against Defendant Holdridge—which is premised on his alleged approval of Defendant DeLutis's decision to remove Plaintiff from his job, a lie that he reviewed confidential documents supporting Plaintiff's removal from his job, and failure to follow DOCCS policies and procedures when removing Plaintiff from his job—fails because (a) inmates do not have any constitutional right to a particular prison job, (b) temporal proximity alone is insufficient to establish an inference of retaliation, (c) Plaintiff's conclusory allegation (that Defendant Holdridge acted out of sympathy towards C.O. Ayotte for an unknown reason) is insufficient to overcome the heightened burden of establishing a causal connection of retaliation by one officer (Defendant Holdridge) on behalf of another officer (C.O. Ayotte), and (d) Defendant Holdridge's alleged lie (that he reviewed security documents that do not exist) and failure to follow DOCCS policy for removal of an inmate from his job, are not constitutional violations and thus do not give rise to liability pursuant to 42 U.S.C. § 1983. (*Id.* at 11-13.) Defendants argue that Plaintiff's claim against Defendants Bell and Mallozzi—which is premised on their denial of his grievance appeal, failure to properly investigate his claims, and assertion that Defendant Bell was "deceptive and misleading" about DOCCS policy—fails because (a) Plaintiff's conclusory allegation that Defendants Bell and Mallozzi retaliated against him for filing a grievance against C.O. Ayotte is insufficient to overcome the heightened burden of establishing a causal connection of retaliation by one officer (Defendant Bell or Defendant Mallozzi) on behalf of another officer (C.O. Ayotte), (b) prisoners do not have a due process right to a thorough investigation of grievances and thus, Defendants Bell and Mallozzi's alleged incomplete investigations are not adverse actions, (c) there is no temporal proximity between the filing of Plaintiff's grievance against C.O. Ayotte on October 12, 2017, and the affirmations of Plaintiff's grievance appeals by Defendants Bell and Mallozzi on January 18, 2018, and May 8, 2019, respectively. (*Id.* at 14-15.)

***2** Second, Defendants argue that based on the Second Circuit decision set forth in *Tangretti*, Plaintiff must allege facts plausibly suggesting that Defendants Holdridge, Bell, and Mallozzi violated his First Amendment rights with their own individual actions. (*Id.* at 15-17.) Defendants argue that the Amended Complaint fails to allege that Defendants Holdridge, Bell, and Mallozzi were (a) aware of Plaintiff's protected speech (i.e., the grievance he filed against C.O. Ayotte), (b) knew the extent of the investigation into the first grievance filed by Plaintiff, or (c) acted with retaliatory animus towards Plaintiff because of the grievance filed against C.O. Ayotte. (*Id.*) Further, Defendants argue that Plaintiff's allegations regarding Defendants Bell and Mallozzi—that they were involved in the affirmation of Plaintiff's grievance denial—are insufficient to allege personal involvement. (*Id.*)

**2. Plaintiff's Opposition**

Generally, in opposition to Defendants' motion, Plaintiff argues that (1) the Amended Complaint alleges facts plausibly suggesting a claim of retaliation; and (2) the Amended Complaint plausibly alleges the personal involvement of Defendants Holdridge, Bell, and Mallozzi. (Dkt. No. 22.)

First, Plaintiff argues that he plausibly alleged a claim of retaliation against (1) Defendant DeLutis because (a) he alleged that Defendant DeLutis e-mailed Ms. Hicks telling her to remove Plaintiff from the tailor shop for no reason other than to punish Plaintiff for filing a grievance, which was an adverse action, and (b) there is a causal connection between Plaintiff's grievance and his removal from the tailor shop which can be inferred from (i) the temporal proximity of the two incidents, (ii) Defendant DeLutis's removal of Plaintiff from the tailor shop before conducting an investigation into Plaintiff's grievance, and (iii) the fact that DOCCS' policies and procedures regarding removal of inmates from a program were not followed when removing Plaintiff from the tailor shop, (2) he alleged that Defendant Holdridge became personally involved in the constitutional violation (a) when he lied about reviewing confidential documents that did not exist, and (b) with his support of Defendant DeLutis's decision to remove Plaintiff from the tailor shop, which "showed gross negligence and demonstrated deliberate indifference," (3) he alleged that Defendants Bell and Mallozzi became personally involved in the constitutional violation when they chose "not to do what was right" and "remedy the wrong and in doing so[,] showed gross negligence and demonstrated deliberate indifference to [Plaintiff's] constitutional rights." (Dkt. No. 22 at 4-7.)

Second, Plaintiff argues that (1) as supervisors, Defendants Bell and Mallozzi were personally involved because they learned of the constitutional violation through Plaintiff's grievance appeal and failed to rectify the situation, and (2) Defendant Holdridge was personally involved because Plaintiff sent him a letter requesting information about

Plaintiff's removal from the tailor shop and Defendant Holdridge stated that he reviewed confidential documentation supporting Plaintiff's removal and that he supported Plaintiff's removal. (*Id.*)

## II. LEGAL STANDARD GOVERNING MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM

It has long been understood that a dismissal for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), can be based on one or both of two grounds: (1) a challenge to the "sufficiency of the pleading" under Fed. R. Civ. P. 8(a)(2); or (2) a challenge to the legal cognizability of the claim. *Jackson v. Onondaga Cnty.*, 549 F. Supp. 2d 204, 211, nn.15-16 (N.D.N.Y. 2008) (McAvoy, J., adopting Report-Recommendation on *de novo* review).

Because such dismissals are often based on the first ground, a few words regarding that ground are appropriate. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain "a *short and plain* statement of the claim *showing* that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). In the Court's view, this tension between permitting a "short and plain statement" and requiring that the statement "show[ ]" an entitlement to relief is often at the heart of misunderstandings that occur regarding the pleading standard established by Fed. R. Civ. P. 8(a)(2).

***3** On the one hand, the Supreme Court has long characterized the "short and plain" pleading standard under Fed. R. Civ. P. 8(a)(2) as "simplified" and "liberal." *Jackson*, 549 F. Supp. 2d at 212, n.20 (citing Supreme Court case). On the other hand, the Supreme Court has held that, by requiring the above-described "showing," the pleading standard under Fed. R. Civ. P. 8(a)(2) requires that the pleading contain a statement that "give[s] the defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests." *Jackson*, 549 F. Supp. 2d at 212, n.17 (citing Supreme Court cases) (emphasis added). [1]

The Supreme Court has explained that such *fair notice* has the important purpose of "enabl[ing] the adverse party to answer and prepare for trial" and "facilitat[ing] a proper decision on the merits" by the court. *Jackson*, 549 F. Supp. 2d at 212, n.18 (citing Supreme Court cases); *Rusyniak v. Gensini,* 629 F. Supp. 2d 203, 213 & n.32 (N.D.N.Y. 2009) (Suddaby, J.) (citing Second Circuit cases). For this reason, as one commentator has correctly observed, the "liberal" notice pleading standard "has its limits." 2 *Moore's Federal Practice* § 12.34[1][b] at 12-61 (3d ed. 2003). For example, numerous Supreme Court and Second Circuit decisions exist holding that a pleading has failed to meet the "liberal" notice pleading standard. *Rusyniak,* 629 F. Supp. 2d at 213, n.22 (citing Supreme Court and Second Circuit cases); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-52 (2009).

Most notably, in *Bell Atlantic Corp. v. Twombly*, the Supreme Court reversed an appellate decision holding that a complaint had stated an actionable antitrust claim under 15 U.S.C. § 1. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). In doing so, the Court "retire[d]" the famous statement by the Court in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly*, 127 S. Ct. at 1968-69. Rather than turn on the *conceivability* of an actionable claim, the Court clarified, the "fair notice" standard turns on the *plausibility* of an actionable claim. *Id.* at 1965-74. The Court explained that, while this does not mean that a pleading need "set out in detail the facts upon which [the claim is based]," it does mean that the pleading must contain at least "some factual allegation[s]." *Id.* at 1965. More specifically, the "[f]actual allegations must be enough to raise a right to relief above the speculative level [to a plausible level]," assuming (of course) that all the allegations in the complaint are true. *Id.*

As for the nature of what is "plausible," the Supreme Court explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "[D]etermining whether a complaint states a plausible claim for relief ... [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.... [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged–but it has not show[n]–that the pleader is entitled to relief." *Iqbal*, 129 S. Ct. at 1950 [internal quotation marks and citations omitted]. However, while the plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully," *id.*, it "does not impose a probability requirement." *Twombly*, 550 U.S. at 556.

***4** Because of this requirement of factual allegations plausibly suggesting an entitlement to relief, "the tenet that a court must accept as true all of the allegations contained

in the complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by merely conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. Similarly, a pleading that only "tenders naked assertions devoid of further factual enhancement" will not suffice. *Iqbal*, 129 S. Ct. at 1949 (internal citations and alterations omitted). Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citations omitted).

However, "in a *pro se* case, the court must view the submissions by a more lenient standard than that accorded to 'formal pleadings drafted by lawyers.' " *Govan v. Campbell*, 289 F. Supp. 2d 289, 295 (N.D.N.Y. 2007) (Sharpe, M.J.) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)) (other citations omitted). The Second Circuit has opined that the court is obligated to " 'make reasonable allowances to protect *pro se* litigants' " from inadvertently forfeiting legal rights merely because they lack a legal education. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006) (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)). As a result, *Twombly* and *Iqbal* notwithstanding, the court must continue to "construe [a complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggests." *Weixel v. Bd. of Educ.*, 287 F.3d 139, 146 (2d Cir. 2002).

## III. ANALYSIS

### A. Whether Plaintiff Sufficiently Alleged a First Amendment Retaliation Claim Against Defendant DeLutis

After carefully considering the matter, I answer this question in the affirmative for the reasons set forth below.

A cognizable claim of retaliation pursuant to 42 U.S.C. § 1983 lies when prison officials take an adverse action against an inmate that is motivated by the inmate's exercise of a constitutional right, including the free speech provisions of the First Amendment. *See Friedl v. City of N.Y.*, 210 F.3d 79, 85 (2d Cir. 2000) ("In general, a section 1983 claim will lie where the government takes negative action against an individual because of his exercise of rights guaranteed by the Constitution or federal laws."). As the Second Circuit has repeatedly cautioned, however, because such claims are easily incanted and inmates often attribute adverse action, including the issuance of misbehavior reports, to retaliatory animus, courts must approach such claims "with skepticism and particular care." *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir. 2001), *overruled on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *accord, Davis v. Goord*, 320 F.3d 346, 352 (2d Cir. 2003).

To state a *prima facie* claim pursuant to 42 U.S.C. § 1983 for retaliatory conduct, a plaintiff must advance non-conclusory allegations establishing that (1) the conduct at issue was protected, (2) the defendants took adverse action against the plaintiff, and (3) there was a causal connection between the protected activity and the adverse action–in other words, that the protected conduct was a "substantial or motivating factor" in the prison officials' decision to take action against the plaintiff. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Dillon v. Morano*, 497 F.3d 247, 251 (2d Cir. 2007); *Garrett v. Reynolds*, No. 99-CV-2065, 2003 WL 22299359, at *4 (N.D.N.Y. Oct. 3, 2003) (Sharpe, M.J.).

For purposes of this motion, it is undisputed that Plaintiff engaged in constitutionally protected speech by the filing of a grievance. (Dkt. No. 17, Attach. 1 at 8); *see Davis v. Goord*, 320 F.3d at 352-53 ("[T]he filing of prison grievances is a constitutionally protected activity."); *Flood v. Cappelli*, 18-CV-3897, 2019 WL 3778736, at *7 (S.D.N.Y. Aug. 2, 2019) (collecting cases) (holding that the filing of a grievance is protected speech).

***5** I reject Defendants' argument that the Amended Complaint fails to allege facts plausibly suggesting that they took an adverse action against Plaintiff. Although courts in the Second Circuit have held that "inmates in the DOC[C]S system do not have any constitutional, statutory, regulatory, or precedential right to a particular prison job," *Muhammad v. Warithu-Deen Umar*, 98 F. Supp. 2d 337, 345 (W.D.N.Y. 2000) (citing *Gill v. Mooney*, 824 F.2d 192, 194 (2d Cir. 1987)), courts have also held that terminating a prisoner's employment is an "adverse action" for purposes of a First Amendment retaliation claim. *Casey v. Pallito*, 12-CV-0284, 2016 WL 96157, at *7 (D. Vt. Jan. 7, 2016); *see Logan v. Graham*, 18-CV-0291, 2019 WL 8015209, at *13, n.19 (N.D.N.Y. Nov. 26, 2019) (Lovric, M.J.) (finding that the firing of the plaintiff from his job as a feed-up porter constituted an adverse action for purposes of a First Amendment retaliation claim); *Henderson v. Vanderwerff*, 13-CV-1537, 2016 WL 660921, at *4 (N.D.N.Y. Feb. 18, 2016) (D'Agostino, J.) (holding that the "[p]laintiff's complaint plausibly alleges that Officer Chuttey was involved in the adverse action of terminating [the p]laintiff from his prison job in retaliation for his filing of the grievance against Officer Richardson."); *Chavis v. Struebel*, 317 F. Supp. 2d 232,

238 (W.D.N.Y. 2004) (noting that "assigning the inmate [to] less desirable work assignments satisfies the adverse action requirement" for purposes of a prisoner's First Amendment retaliation claim); *Van Pelt v. Finn*, 92-CV-2977, 1993 WL 465297, at *4 (S.D.N.Y. Nov. 12, 1993) (holding that reassignment of an inmate to a less desirable job with lower pay constitutes an adverse action).

In considering whether there is a "causal connection between the protected speech and the adverse action, a court may consider a number of factors, including any statements made by the defendant concerning his motivation and the temporal proximity between the protected activity and the defendant's adverse action." *Roseboro v. Gillespie*, 719 F. Supp. 2d 353, 366 (S.D.N.Y. 2011). The Second Circuit has "held that temporal proximity between protected conduct and an adverse action constitutes circumstantial evidence of retaliation," but, at the summary judgment stage, has also "consistently required some further evidence of retaliatory animus before permitting a prisoner to proceed to trial on a retaliation claim." *Washington v. Afify*, 681 F. App'x 43, 46 (2d Cir. 2017); *see Ziemba v. Thomas*, 390 F. Supp. 2d 136, 157 (D. Conn. 2005) ("Temporal proximity alone is not sufficient for the plaintiff's claim to survive summary judgment.").

I also reject Defendants' argument that the Amended Complaint fails to allege facts plausibly suggesting a causal connection between Plaintiff's protected speech on October 12, 2017 (Dkt. No. 8 at ¶ 11), and Defendant DeLutis's alleged e-mail to Ms. Hicks on October 26, 2017, telling her to remove Plaintiff from his position in the tailor shop (Dkt. No. 8 at ¶ 27).

First, the Second Circuit has made clear that "temporal proximity of an allegedly retaliatory [action] to a grievance may serve as circumstantial evidence of retaliation." *Gayle v. Gonyea*, 313 F.3d 677, 683 (2d Cir. 2002) (citing *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995)); *see also Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 90 (2d Cir. 2015) (holding that, within the context of an employment discrimination claim, "[a] retaliatory purpose can be shown indirectly by timing: protected activity followed closely in time by adverse employment action."). Although there is significant case law to support the contention that temporal proximity alone is insufficient to survive a motion for summary judgment, *Washington v. Afify*, 681 F. App'x 43, 46 (2d Cir. 2017), the same is not true at the motion to dismiss stage. *See Roseboro v. Gillespie*, 791 F. Supp. 2d 353, 370 (S.D.N.Y. 2011) (collecting cases) ("To be sure, a 'plaintiff can establish a causal connection that suggests retaliation by showing that protected activity was close in time to the adverse action.' Such circumstantial evidence of retaliation, however, without more, is insufficient to survive summary judgment."). Defendants cite to *Thomas v. Waugh*, 13-CV-0321, 2015 WL 5750945, at *4 (N.D.N.Y. Sept. 30, 2015) (D'Agostino, J. adopting Report-Recommendation on *de novo* review) (citing *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001)), which held that "temporal proximity alone is insufficient to establish an inference of retaliation." However, the Second Circuit case relied on by the Court in *Thomas*, did not draw such a conclusion. *Slattery*, 248 F.3d at 95. Instead, the Second Circuit in *Slattery*, held that, in the context of an employment case, "[w]here timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff ever engaged in any protected activity, an inference of retaliation does not arise." *Slattery*, 248 F.3d at 95. Here, unlike the facts presented in *Slattery*, the Amended Complaint does not allege facts plausibly suggesting that gradual adverse job actions began before Plaintiff was removed from his position in the tailor shop. (*See generally* Dkt. No. 8.) As a result, I find that temporal proximity alone is sufficient to infer a causal connection at the motion to dismiss stage.

***6** Second, the Amended Complaint alleges more than mere temporal proximity from which, a causal connection could be inferred. As set forth by Plaintiff in his memorandum of law, a causal connection could also be inferred based on Defendants' alleged failure to follow "DOCCS's policies and procedures regarding requests for removal and removal of inmates from program." (Dkt. No. 22 at 4; *accord* Dkt. No. 8 at ¶ 34.) While Defendants' alleged failure to follow DOCCS' policies and procedures does not "explicitly state an intent to retaliate, [it] is consistent with and impl[ies] a retaliatory motive." *Burton v. Lynch*, 664 F. Supp. 2d 349, 368 (S.D.N.Y. 2009).

Third, although Plaintiff alleges that Defendant DeLutis took an adverse action against him on behalf of C.O. Ayotte and "it is difficult to establish one defendant's retaliation for complaints against another defendant," *Hare v. Hayden*, 09-CV-3135, 2011 WL 1453789, at *4 (S.D.N.Y. Apr. 14, 2011), I find that the Amended Complaint alleges facts plausibly suggesting a causal connection. More specifically, Plaintiff alleges that Defendant DeLutis was "in charge of the investigation" regarding the grievance that Plaintiff filed against C.O. Ayotte. (Dkt. No. 8 at ¶ 26.) In addition, the Amended Complaint alleges that (1) Plaintiff filed the

grievance on October 20, 2017,[2] (2) on October 26, 2017, Defendant DeLutis sent an e-mail to Ms. Hicks directing her to remove Plaintiff from the tailor shop for "security reasons," and (3) on October 27, 2017, Defendant DeLutis directed Sergeant Stuart to interview Plaintiff and C.O. Ayotte about Plaintiff's grievance. (Dkt. No. 8 at ¶¶ 26-27.) Thus, the Amended Complaint alleges that Defendant DeLutis was aware of Plaintiff's protected speech (the grievance against C.O. Ayotte) at the time he took the adverse action against Plaintiff (directing his removal from the tailor shop) and that those events occurred in close temporal proximity to each other. *See Young v. Shipman*, 18-CV-0782, 2020 WL 1329159, at *4-5 (N.D.N.Y. Mar. 23, 2020) (Sannes, J.) (finding that the plaintiff alleged facts plausibly suggesting a causal connection between the plaintiff's protected speech (a grievance that the plaintiff filed against Defendant Sawyer) and the adverse action (taken by Defendant Shipman) where Defendant Shipman was allegedly aware of the plaintiff's grievance against Defendant Sawyer and the events occurred in close temporal proximity).

As a result, I recommend that Defendants' motion to dismiss the Amended Complaint, arguing that Plaintiff's retaliation claim fails as a matter of law against Defendant DeLutis, be denied.[3]

**B. Whether Plaintiff Alleged Facts Plausibly Suggesting a Retaliation Claim Against Defendants Holdridge, Bell, and Mallozzi**

For the reasons stated in Defendants' memorandum of law, I recommend that Plaintiff's retaliation claim against Defendants Holdridge, Bell, and Mallozzi be dismissed for failure to state a claim upon which relief may be granted. The following is intended to supplement, but not supplant those reasons.

***7** "It is well settled in this Circuit that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.' " *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (quoting *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991)). In order to prevail on a section 1983 cause of action against an individual, a plaintiff must show "a tangible connection between the acts of a defendant and the injuries suffered." *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986). "[D]irect participation as a basis of liability in this context requires intentional participation in the conduct constituting a violation of the victim's rights by one who knew of the facts rendering it illegal." *Provost v. City of Newburgh*, 262 F.3d 146, 155 (2d Cir. 2001) (internal quotation marks omitted).

Courts in this circuit routinely hold that "the doctrine of respondeat superior cannot be applied to section 1983 actions to satisfy the prerequisite of personal involvement. Therefore, a prison official may not be found liable for a constitutional violation merely because of the acts of those under his control." *Kinch v. Artuz*, 97-CV-2419, 1997 WL 576038, at *2 (S.D.N.Y. Sept. 15, 1997) (citing *Colon v. Coughlin*, 58 F.3d 865, 874 (2d Cir. 1995); *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994)). Thus, supervisory officials may not be held liable for their subordinates' constitutional violations merely because they are in a position of authority. *See Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996); *see also Colon*, 58 F.3d at 874 (holding that the fact that the defendant occupied a high-ranking position in the New York prison hierarchy, without more, was insufficient to establish personal involvement). Before deciding *Ashcroft v. Iqbal*, 556 U.S. 62 (2009), the Second Circuit held that supervisory personnel could be considered "personally involved" if

> (1) the defendant participated directly in the alleged constitutional violation;
>
> (2) the defendant, after being informed of the violation through report or appeal, failed to remedy the wrong;
>
> (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom;
>
> (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts; or
>
> (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

*Colon*, 58 F.3d at 873 (citing *Wright*, 21 F.3d at 501 (additional citation omitted)).

In *Tangreti v. Bachmann*, 983 F.3d 609 (2d Cir. 2020), the Second Circuit addressed how the Supreme Court's decision in *Iqbal* affected the standards in *Colon* for establishing supervisory liability. Consistent with other circuits, the Second Circuit concluded that "there is no special rule for supervisory liability," and held that a "plaintiff must plead and prove 'that each Government-official defendant, through the official's own individual actions, had violated the Constitution.' " *Tangreti*, 983 F.3d at 618. The Second

Circuit explained that, " 'the factors necessary to establish a [§ 1983] violation will vary with the constitutional provision at issue' because the elements of different constitutional violations vary. The violation must be established against the supervisory official directly." *Id.* (quoting *Iqbal*, 556 U.S. at 676). "District courts discussing *Tangreti* agree that the decision invalidated the *Colon* test and mandates that a plaintiff must establish a violation against the supervisory official directly." *Fabrizio v. Smith*, 20-CV-0011, 2021 WL 2211206, at *10 (N.D.N.Y. Mar. 10, 2021) (Lovric, M.J.) (collecting cases), *report and recommendation adopted by* 2021 WL 2211023 (N.D.N.Y. June 1, 2021) (Suddaby, C.J.).

***8** "In light of *Tangreti,* [a] plaintiff cannot establish [a supervisor's] personal involvement based upon the denial of grievance and/or appeals because it does not plausibly suggest '[t]he factors necessary to establish' a First Amendment ... claim." *Bryant v. Miller*, 18-CV-0494, 2021 WL 5095284, at *20 (N.D.N.Y. July 22, 2021) (Hummel, M.J.), *report and recommendation adopted by* 2021 WL 4272396 (N.D.N.Y. Sept. 21, 2021) (Suddaby, C.J.); *see Fabrizio*, 2021 WL 2211206, at *10 (holding that the plaintiff's "attempt to plead personal involvement based upon the denial of a grievance and/or appeals, lacks merit because it does not plausibly suggest '[t]he factors necessary to establish' a First Amendment retaliation claim."); *Zielinski v. Annucci*, 17-CV-1087, 2019 WL 2479616, at *12 (N.D.N.Y. Jan. 8, 2019) (Hummel, M.J.), *report and recommendation adopted by* 2019 WL 1305826 (N.D.N.Y. Mar. 22, 2019) ("[I]t is well-established that the review, denial or affirmance of a denial of a grievance is insufficient to establish personal involvement."); *Gomez v. Sepiol*, 11-CV-1017SR, 2014 WL 1575872, at *10 (W.D.N.Y. Apr. 11, 2014) ("[T]he investigation of a grievance alone, is not sufficient to allege personal involvement in the underlying constitutional violation."); *Rosales v. Kikendall*, 677 F. Supp. 2d 643, 649 (W.D.N.Y. 2010) (holding that the plaintiff failed to establish the defendant's personal involvement based on allegations that the defendant investigated the plaintiff's grievance and concluded that there was no evidence that the other defendants had retaliated against the plaintiff).

Plaintiff's allegations against Defendants Holdridge, Bell, and Mallozzi, relate solely to their (a) denial of Plaintiff's grievance, (b) affirmation of Plaintiff's grievance denial, and/or (c) affirmation of Defendant DeLutis's removal of Plaintiff from the tailor shop. (*See generally* Dkt. Nos. 1, 22.) After the Second Circuit's ruling in *Tangreti*, these allegations are insufficient to plausibly suggest the personal involvement of Defendants Holdridge, Bell, and Mallozzi. As a result, I recommend that Defendants' motion to dismiss with respect to Defendants Holdridge, Bell, and Mallozzi, be granted.

**ACCORDINGLY**, it is hereby respectfully

**RECOMMENDED** that Plaintiff's Amended Complaint (Dkt. No. 8) be **DISMISSED** with respect to Defendants Holdridge, Bell, and Mallozzi for failure to state a claim upon which relief may be granted, pursuant to Fed. R. Civ. P. 12(b)(6); and it is further respectfully

**RECOMMENDED** that Defendants' motion to dismiss (Dkt. No. 17) be **GRANTED** to the extent that it sought dismissal of Defendants Holdridge, Bell, and Mallozzi because the Amended Complaint failed to state a claim upon which relief may be granted, and **DENIED** to the extent that it sought dismissal of the Amended Complaint with respect to Defendant DeLutis; and it is further

**ORDERED** that the Clerk of the Court shall file a copy of this Report-Recommendation on the docket of this case and serve a copy upon the parties in accordance with the local rules. [4]

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993) (citing *Small v. Sec. of Health & Human Servs.*, 892 F.2d 15 (2d Cir. 1989)); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72.

**All Citations**

Not Reported in Fed. Supp., 2022 WL 1129887

## Footnotes

1 *Accord, Flores v. Graphtex*, 189 F.R.D. 54, 54 (N.D.N.Y. 1999) (Munson, J.); *Hudson v. Artuz*, 95-CV-4768, 1998 WL 832708, at *1 (S.D.N.Y. Nov. 30, 1998); *Powell v. Marine Midland Bank*, 162 F.R.D. 15, 16 (N.D.N.Y. 1995) (McAvoy, C.J.).

2 Plaintiff also alleges that this grievance was filed on October 12, 2017. (*Compare* Dkt. No. 8 at ¶ 11, *with* Dkt. No. 8 at ¶ 26.) For purposes of this motion, the Court need not resolve whether Plaintiff's grievance was filed on October 12, 2017, or October 20, 2017.

3 To the extent that Defendants claim that they would have taken the same action against Plaintiff absent the protected conduct, at this stage of the litigation, the Court is unable, on a motion to dismiss, to resolve such factual disputes. *See Carl v. Dirie,* 09-CV-0724, 2010 WL 3338566, at *6 (N.D.N.Y. March 29, 2010) (Treece, M.J.) (denying the defendant's motion to dismiss retaliation claim due to factual issues surrounding whether the defendants would have taken the same actions in the absence of retaliatory motives).

4 The Clerk shall also provide Plaintiff with copies of all unreported decisions cited herein in accordance with *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).

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United States District Court, N.D. New York.

Andrew HENDRICKS, Plaintiff,
v.
Shelley M. MALLOZZI, Director of the Inmate Grievance Program for DOCCS; Earl Bell, Superintendent, Clinton Correctional Facility; D. Holdridge, Deputy Superintendent for Security, Clinton Correctional Facility; and C. Delutis, Captain of Security, Clinton Correctional Facility, Defendants.

9:20-CV-1035 (MAD/ML)
|
Signed 03/23/2022

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**MEMORANDUM-DECISION AND ORDER**

Mae A. D'Agostino, United States District Judge:

## I. INTRODUCTION

***1** Plaintiff commenced this civil rights action on September 3, 2020, alleging violations of his constitutional rights while he was incarcerated at Clinton Correctional Facility. *See* Dkt. No. 1. On October 29, 2020, this Court dismissed the complaint without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1). *See* Dkt. No. 5. Plaintiff filed a proposed amended complaint on November 18, 2020. *See* Dkt. No. 8. In his amended complaint, Plaintiff asserted that Defendants C. DeLutis, K. Hicks, D. Holdridge, Earl Bell, and Shelley M. Mallozzi violated his First and Fourteenth Amendment rights when they removed him from his prison job in retaliation for filing a grievance against a correctional officer. *See id.* at ¶¶ 24-57. On December 23, 2020, this Court accepted the amended complaint for filing only to the extent that it asserted First Amendment retaliation claims against Defendants DeLutis, Holdridge, Bell, and Mallozzi, and dismissed the remaining claims without prejudice. *See* Dkt. No. 9.

On March 1, 2021, in lieu of an answer, Defendants filed a motion to dismiss the amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* Dkt. No. 17. On January 14, 2022, Magistrate Judge Lovric issued a Report and Recommendation recommending that Defendants' motion to dismiss be granted with respect to Defendants Holdridge, Bell, and Mallozzi, and denied with respect to Defendant DeLutis. *See* Dkt. No. 28. On January 31, 2021, Plaintiff objected to the Report and Recommendation to the extent it recommended granting Defendants' motion to dismiss with respect to Defendants Holdridge, Bell, and Mallozzi. *See* Dkt. No. 29. Currently before the Court is Magistrate Judge Lovric's Report and Recommendation and Plaintiff's objection thereto.

## II. BACKGROUND

The amended complaint alleges that, on October 11, 2017, Plaintiff was given an "Inmate Counseling Notification" by a nonparty civilian employee of the tailor shop where Plaintiff worked. *See* Dkt. No. 8 at ¶ 10. Two days later, Plaintiff submitted a grievance to the Inmate Grievance Resolution Committee ("IGRC") alleging that nonparty Corrections Officer ("C.O.") Ayotte was harassing him in connection with the Inmate Counseling Notification. *See id.* at ¶ 11. Defendant DeLutis "was in charge of the investigation[ and] directed [a nonparty C.O.] to interview [Plaintiff] and C.O. Ayotte about the incident, which he did, separately, on 10/27/17." *Id.* at ¶ 26. On November 1, 2017, at the request of Defendant DeLutis, Plaintiff was removed from his position at the tailor shop for confidential "security reasons." *Id.* at ¶ 29.

On December 11, 2017, Plaintiff filed a second grievance complaining that his removal from his tailor shop job was done in retaliation for the prior grievance he had filed against C.O. Ayotte. *See id.* at ¶ 30. The IGRC denied the second grievance, stating that Plaintiff was removed from the tailor shop for legitimate security concerns. *See id.* at ¶ 47. The IGRC told Plaintiff he was not allowed to know what those security reasons were because "it might jeopardize the safety and security of the facility." *Id.*

***2** Plaintiff appealed the IGRC's decision to the Superintendent, Defendant Bell, on December 27, 2017. *Id.* Defendant Bell ultimately denied the appeal and found Plaintiff's retaliation claim to be "unsubstantiated" because Plaintiff was removed from the tailor shop for legitimate security concerns. *Id.* at ¶ 48. In rendering this decision, Defendant Bell allegedly quoted the "Policy, Procedures and Standards for Programing Inmates manual" and stated that "[a] change in program can be made at anytime, 'in person or in writing ....' " *Id.* at ¶ 49. The amended complaint claims that this quote was "nothing less than a shameless and unattractive attempt to be deceptive and misleading" because the manual "clearly does not say 'in person or in writing' in that particular section." *Id.*

Plaintiff appealed Defendant Bell's determination to the DOCCS Central Office Review Committee ("CORC"), where Defendant Mallozzi was serving as Director. *Id.* CORC upheld Defendant Bell's determination, finding that Plaintiff was removed from his position at the tailor shop for security reasons. *See id.* at ¶ 53.

Meanwhile, on November 27, 2017, Plaintiff sent a letter to Defendant Holdridge requesting information about his removal from the tailor shop. *See id.* at ¶ 43. Defendant Holdridge replied the same day, "stating that he had reviewed the 'confidential documentation supporting [Plaintiff's] removal' and that he ... also support[ed] the removal" because it was "in the best interest of the facility." *Id.* The complaint asserts that Defendant Holdridge's statement that he reviewed confidential documentation is a "deliberate and deceptive untruth" because Plaintiff "F.O.I.L. requested any and all documents" related to his removal and the only thing he received was a copy of an email from Defendant DeLutis requesting the removal. *Id.* at ¶¶ 44-45.

On March 1, 2021, Defendants DeLutis, Holdridge, Bell, and Mallozzi filed a motion to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). *See* Dkt. No. 17. On January 14, 2022, Magistrate Judge Lovric issued a Report and Recommendation recommending, as relevant here, that the motion to dismiss be granted as to Defendants Holdridge, Bell, and Mallozzi. *See* Dkt. No. 28. Magistrate Judge Lovric found that—after the Second Circuit's recent ruling in *Tangreti v. Bachmann*, 983 F.3d 609 (2d Cir. 2020)—a " 'plaintiff cannot establish [a supervisor's] personal involvement based upon the denial of grievance and/or appeals because it does not plausibly suggest "[t]he factors necessary to establish" a First Amendment ... claim.' " Dkt. No. 28 at 17 (quotation omitted). Noting that "Plaintiff's allegations against Defendants Holdridge, Bell, and Mallozzi, relate[d] solely to their (a) denial of Plaintiff's grievance, (b) affirmation of Plaintiff's grievance denial, and/or (c) affirmation of Defendant DeLutis's removal of Plaintiff from the tailor shop," Magistrate Judge Lovric concluded that Plaintiff's "allegations are insufficient to plausibly suggest the personal involvement of Defendants Holdridge, Bell, and Mallozi." *Id.*

Plaintiff's raises two objections to Magistrate Judge Lovric's Report and Recommendation. First, Plaintiff argues that the amended complaint alleged facts beyond the denial or affirmation of the denial of a grievance that plausibly support the personal involvement of Defendants Holdridge, Bell, and Mallozzi in Plaintiff's retaliation claim. *See* Dkt. No. 29 at ¶¶ 1-4. Second, Plaintiff argues that it was unfair for Magistrate Judge Lovric to rely on *Tangreti* in rejecting his retaliation claims because *Tangreti* was decided after Plaintiff filed his amended complaint. *See id.* at ¶¶ 5-7. Plaintiff also asks for permission to file a second amended complaint should the Court choose to adopt the Report and Recommendation. *See id.* at ¶ 7.

## III. DISCUSSION

### A. Standard of Review

***3** A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the party's claim for relief. *See Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007) (citation omitted). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Although a court's review of a motion to dismiss is generally limited to the facts presented in the pleading, the court may consider documents that are "integral" to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002)).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," *see* Fed. R. Civ. P. 8(a)

(2), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief.' " *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *id.* at 555 (citation omitted), and present claims that are "plausible on [their] face." *Id.* at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief." ' " *Id.* (quoting [*Twombly*, 550 U.S.] at 557). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly*, 550 U.S. at 558, or where a plaintiff has "not nudged [his] claims across the line from conceivable to plausible, the[ ] complaint must be dismissed." *Id.* at 570.

"[I]n a *pro se* case, the court must view the submissions by a more lenient standard than that accorded to 'formal pleadings drafted by lawyers.' " *Govan v. Campbell*, 289 F. Supp. 2d 289, 295 (N.D.N.Y. 2007) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)) (other citations omitted). The Second Circuit has opined that the court is obligated to "make reasonable allowances to protect *pro se* litigants" from inadvertently forfeiting legal rights merely because they lack a legal education. *Id.* (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)).

When a party files specific objections to a magistrate judge's report-recommendation, the district court makes a "de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). However, when a party files "[g]eneral or conclusory objections or objections which merely recite the same arguments [that he presented] to the magistrate judge," the court reviews those recommendations for clear error. *O'Diah v. Mawhir*, No. 9:08-CV-322, 2011 WL 933846, *1 (N.D.N.Y. Mar. 16, 2011) (citations and footnote omitted). After the appropriate review, "the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

**B. Plaintiff's Objections**

Plaintiff's first objection is that his amended complaint has alleged facts that plausibly suggest the personal involvement of Defendants Holdridge, Bell, and Mallozzi in the events that form the basis of his retaliation claim. *See* Dkt. No. 29 at ¶ 1. Specifically, Plaintiff asserts that the amended complaint states that Defendant Holdridge "took it upon himself to get personally involved" by responding to a letter written by Plaintiff and "stating that he [had] reviewed the confidential documentation supporting [Plaintiff's] removal from the Tailor Shop ... knowing full well that no such documentation even existed." *Id.* at ¶ 2 (citing Dkt. No. 8 at ¶¶ 42-45). Plaintiff also asserts that Defendant Bell did more than "merely deny [his] grievance on appeal"; claiming that he "reconfigur[ed] and manipulat[ed] the wording of DOCCS policy," showing "blatant disregard for and deliberate indifference to [Plaintiff's] First Amendment rights." *Id.* at ¶ 4 (citing Dkt. No. 8 at ¶¶ 46-51). Finally, Plaintiff argues that the amended complaint states that Defendant Mallozzi "just rubber stamped [D]efendant Bell's decision," making him "just as liable as [D]efendant Bell." *Id.*

***4** The Court finds that Defendants' motion to dismiss should be granted with respect to Defendants Holdridge, Bell, and Mallozzi. As Magistrate Judge Lovric found, "[i]t is well settled that affirming the outcome of a disciplinary hearing does not in itself constitute personal involvement in any potential due process violation," or other alleged underlying unconstitutional conduct. *Abdul-Halim v. Bruyere*, No. 9:19-CV-740, 2021 WL 3783087, *3 (N.D.N.Y. Aug. 26, 2021); *see also Smart v. Annucci*, No. 19-CV-7908, 2021 WL 260105, *5 (S.D.N.Y. Jan. 26, 2021) ("Failing to correct another officer's violation does not suffice"); *Gomez v. Sepiol*, No. 11-CV-1017, 2014 WL 1575872, *10 (W.D.N.Y. Apr. 11, 2014) ("[T]he investigation of a grievance alone, is not sufficient to allege personal involvement in the underlying constitutional violation"); *Rosales v. Kikendall*, 677 F. Supp. 2d 643, 649 (W.D.N.Y. 2010) (holding that the plaintiff failed to establish the defendant's personal involvement based on allegations that the defendant investigated the plaintiff's grievance and concluded that there was no evidence that the other defendants had retaliated against the plaintiff). Contrary to Plaintiff's argument, Defendant Holdridge's reliance on confidential documentation and Defendant Bell's alleged error when quoting DOCCS policy do not transform their review of his second grievance into personal involvement in the underlying constitutional violation (the allegedly retaliatory removal of Plaintiff from his job); nor do these alleged actions amount to separate constitutional violations.

Plaintiff next objects to the application of the Second Circuit's holding in *Tangreti v. Bachmann*, 983 F.3d 609 (2d Cir. 2020),[1] to this case. *See* Dkt. No. 29 at ¶¶ 5-7. Specifically,

Plaintiff notes that the amended complaint was filed before the decision in *Tangreti* was issued, and argues that it would be "unfair" for the Court to apply *Tangreti* where he "obviously had no knowledge that the [prior] test would soon be invalidated" at the time he wrote the amended complaint. *Id.* at ¶ 7. The Court finds that *Tangreti* is properly applied to this case. "[T]he general rule [is] that a court must apply the law as it exists at the time it renders its decision." *Walsche v. First Inv'rs Corp.*, 981 F.2d 649, 653 (2d Cir. 1992) (citations omitted); *see also Kremer v. Chem. Const. Corp.*, 623 F.2d 786, 788-89 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982) ("The general rule of long standing is that judicial precedents normally have retroactive as well as prospective effect"). The narrow exception to this general principle identified in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), does not apply here. [2]

Accordingly, the Court adopts Magistrate Judge Lovric's Report and Recommendation in its entirety.

**C. Leave to Amend**

Finally, Plaintiff requests leave to file a second amended complaint should the Court choose to adopt Magistrate Judge Lovric's Report and Recommendation. *See* Dkt. No. 29 at ¶ 7. In general, a court should not dismiss a *pro se* litigant's complaint without granting leave to amend at least once " 'when a liberal reading of the complaint gives any indication that a valid claim might be stated.' " *Shomo v. City of New York*, 579 F.3d 176, 183 (2d Cir. 2009) (quoting *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795 (2d Cir. 1999)). However, an opportunity to amend is not required where the plaintiff has previously been afforded such an opportunity. *See Coleman v. brokersXpress, LLC*, 375 Fed. Appx. 136, 137 (2d Cir. 2010); *see also Bivona v. McLean*, No. 9:19-CV-0303, 2019 WL 2250553, *5 (N.D.N.Y. May 24, 2019); *Abascal v. Hilton*, No. 04-CV-1401, 2008 WL 268366, *8 (N.D.N.Y. Jan. 13, 2008), *aff'd*, 357 Fed. Appx. 388 (2d Cir. 2009).

***5** Here, Plaintiff has already been afforded one opportunity to amend the complaint and has not made any specific showing as to how he would cure the defects that have persisted if given a second opportunity to amend. Accordingly, Plaintiff's request for leave to file a second amended complaint is denied.

## IV. CONCLUSION

After carefully reviewing the Report and Recommendation, the entire record in this matter, and the applicable law, the Court hereby

**ORDERS** that Magistrate Judge Lovric's Report and Recommendation (Dkt. No. 28) is **ADOPTED** in its entirety for the reasons set forth herein; and the Court further

**ORDERS** that Defendants' motion to dismiss (Dkt. No. 17) is **GRANTED in part** and **DENIED in part**; [3] and the Court further

**ORDERS** that Defendants Holdridge, Bell, and Mallozzi are terminated as Defendants in this action; and the Court further

**ORDERS** that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

**IT IS SO ORDERED.**

**All Citations**

Not Reported in Fed. Supp., 2022 WL 856885

## Footnotes

1 In *Tangreti*, the Second Circuit addressed how the Supreme Court's decision in *Iqbal* affected the standards for establishing supervisory liability. Ultimately, the Second Circuit held that, to establish a constitutional violation against a supervisor, a plaintiff "must plead and prove that [the supervisor-]defendant, through [his or her] own individual actions, has violated the constitution." *Tangreti*, 983 F.3d at 618 (internal quotation marks omitted).

2 "To qualify for purely prospective application, a decision 'must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed' " and "the court must then 'weigh' the issue of whether retroactive application would conflict with or further the purposes of the new rule and whether it would produce inequitable results." *Walsche*, 981 F.2d at 653 (quoting *Chevron Oil Co.*, 404 U.S. at 106-07).

3 Plaintiff's First Amendment retaliation claim remains against Defendant DeLutis.

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United States District Court, S.D. New York.

Jerome BARNETT, Plaintiff,
v.
The CITY OF YONKERS, Detective Sullivan; Karl A. Scully, Esq.; and Richard Logan, Esq., Defendants.

No. 15-CV-4013 (KMK)
|
Signed 09/28/2018

**Attorneys and Law Firms**

Jerome Barnett, Fishkill, NY, Pro Se Plaintiff.

Rory Carleton McCormick, Esq., Corporation Counsel, City of Yonkers, Yonkers, NY, Counsel for Defendants.

OPINION & ORDER

KENNETH M. KARAS, UNITED STATES DISTRICT JUDGE

***1** Pro se Plaintiff Jerome Barnett ("Plaintiff") brings this Action against the City Of Yonkers ("Yonkers"), Detective Sullivan ("Sullivan"); Karl A. Scully, Esq. ("Scully"); and Richard Logan, Esq. ("Logan," and collectively with others, "Defendants"), alleging Defendants violated his rights under the Fourth and Sixth Amendments to the United States Constitution and New York state law. (*See* Compl. (Dkt. No. 2).) Plaintiff bring thirteen claims: (1) federal claims under 42 U.S.C. § 1983 against Yonkers, pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); (2) federal claims under § 1983 against Yonkers and Sullivan for false arrest; (3) federal claims under § 1983 against Yonkers and Sullivan for false imprisonment; (4) federal claims under § 1983 against Yonkers, Sullivan, Scully, and Logan for malicious prosecution; (5) federal claims under § 1983 against Yonkers, Logan, and Sullivan for due process violations; (6) state law respondeat superior claims against Yonkers; (7) state law fabrication of evidence claims against Sullivan; (8) state law conversion claims against Sullivan; (9) federal claims under § 1983 against Sullivan for illegal search and seizure; (10) federal claims under § 1983 against Yonkers, Sullivan, Logan, and Scully for conspiracy; and (11) federal claims under § 1983 against Sullivan for retaliation. (*See* Compl.) Before the Court is a Motion for Summary Judgment on behalf of Defendants Yonkers and Sullivan (together, "Moving Defendants"). (Notice of Mot. for Summ. J. ("Notice of Mot.") (Dkt. No. 42).) For the following reasons, the Motion is granted.

I. Background

A. Factual Background

The following facts are taken from Defendants' statement pursuant to Local Civil Rule 56.1, (Defs.' Rule 56.1 Statement ("Defs.' 56.1") (Dkt. No. 45) ), the exhibits submitted by Defendants, (Decl. of Rory McCormick in Supp. of Mot. for Summ. J. (McCormick Decl.) ), as well as Plaintiff's deposition transcript, (Letter from Rory McCormick, Esq. to Court Ex. A ("Pl.'s Dep.") (Dkt. No. 48) ), and are recounted "in the light most favorable to" Plaintiff, the non-movant. *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 30 (2d Cir. 2018) (internal quotation marks omitted).[1] The facts as described below are not in dispute, except where indicated.

***2** On April 7, 2011 members of the Yonkers Police Department ("YPD"), including Sullivan, responded to 31 Cedar Street on a call from a tenant of the building witnessing a tall black male carrying numerous five-gallon containers of fuel into the basement. (Defs.' 56.1 ¶ 1; Decl. of Rory McCormick, Esq.) ("McCormick Decl.") Ex. A ("YPD Crime Investigation Report") (Dkt. No. 43); McCormick Decl. Ex. B ("YPD Supp. Report"); McCormick Decl. Ex. C ("YPD Radio").[2] The fuel was causing fumes throughout the building and the tenant feared for her safety. (Defs.' 56.1 ¶ 1; YPD Crime Investigation Report; YPD Supp. Report; YPD Radio). Upon arrival the officers found multiple trails of oil leading to the basement. (Defs.' 56.1 ¶ 1; YPD Crime Investigation Report; YPD Supp. Report; McCormick Decl. Ex. D ("Photos").) Sullivan detected a strong odor of fuel oil emanating from the basement. (Defs.' 56.1 ¶ 1; YPD Supp. Report.)

Sullivan then requested the presence of the Yonkers Fire Department ("YFD") as well as the YPD Emergency Services Unit ("ESU") so that entry could be gained in the basement. (Defs.' 56.1 ¶ 2; YPD Supp. Report.) After ESU officials arrived at the scene, they breached the basement door and left the door open to ventilate the basement. (Defs.' 56.1 ¶ 2; YPD Supp. Report.) Inside the basement, the officers discovered 38 five-gallon containers of diesel fuel. (Defs.' 56.1 ¶ 2; YPD Crime Investigation Report; YPD Supp. Report; Photos.)

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YFD tested a sample of the liquid in the containers and confirmed the liquid was diesel fuel. (Defs.' 56.1 ¶ 2; YPD Supp. Report.) YFD also took an air sample of the basement which revealed a dangerously high level of diesel in the air. (Defs.' 56.1 ¶ 2; YPD Supp. Report.)

Yonkers Department of Public Works was notified and removed the 38 containers from the building, and the Westchester County Police Bomb Squad stored them at the Westchester County Police Academy. (Defs.' 56.1 ¶ 2; YPD Crime Investigation Report; YPD Supp. Report; Photos.) A canvass of the building revealed that an unknown tenant photographed the male who was carting the fuel oil into the basement. (Defs.' 56.1 ¶ 3; YPD Supp. Report.) Sullivan contacted the owner of the building, Harout Tiratsuyan ("Tiratsuyan"), who viewed the photo and identified Plaintiff as the individual in the picture. (Defs.' 56.1 ¶ 3; YPD Supp. Report; McCormick Decl. Ex. E ("Tiratsuyan Written Statement").) Tiratsuyan indicated that he had no knowledge that containers of diesel fuel were stored in the basement and that no containers were present in the basement when he was at the building the previous day to meet with Con Edison personnel. (Defs.' 56.1 ¶ 3; YPD Supp. Report; Tiratsuyan Written Statement.) Tiratsuyan explained that Plaintiff was someone he employed to do small jobs at the building such as cleaning the hallways, backyard, and taking out the trash on pick-up day. (Defs.' 56.1 ¶ 4; Tiratsuyan Written Statement; Pl.'s Dep 5–6.)[3] Additionally, Tiratsuyan told Sullivan that Plaintiff had a key to the basement and periodically stayed in a back spare room in the basement. (Defs.' 56.1 ¶ 4; Tiratsuyan Written Statement; Pl.'s Dep. 5–6 (testifying Plaintiff used the basement to store "personal" stuff and he "sometime" stayed overnight there).) Tiratsuyan met with Sullivan at 31 Cedar Street and saw the 38 five-gallon containers of diesel fuel. (Defs.' 56.1 ¶ 5; Tiratsuyan Written Statement.) Tiratsuyan also provided a written statement to Sullivan at the Yonkers Detective Division at approximately 2:50 p.m. on April 7, 2011. (Defs.' 56.1 ¶ 5; Tiratsuyan Written Statement.) Tiratsuyan stated that he never gave Plaintiff permission to store anything in the basement including any type of fuel. (Defs.' 56.1 ¶ 5; Tiratsuyan Written Statement.)

***3** Sullivan arrested Plaintiff on April 7, 2011 at approximately 5:00 p.m. at his girlfriend's apartment on Linden Street. (Defs.' 56.1 ¶ 6; YPD Supp. Report; Pl.'s Dep. 8–9.) Plaintiff testified that "somebody knocked on the door and [he] looked through the peep hole and the person had his hand over the peep hole, so [he] stated, if you don't move your hand, I'm not the letting you in." (Pl.'s Dep. 9.) And, "when they moved their hand, [he] s[aw] a couple of badges." (*Id.*) Plaintiff opened the door, the officers asked for his name, and when he answered, the officer said they were "looking" for him. (*Id.*) Plaintiff asked if he was under arrest, and they said "yeah" and then handcuffed him and took him to the station. (*Id.*) Plaintiff testified "[t]hey had no warrant, no nothing. They just arrested me." (*Id.* 9–10; *see also id.* at 21 ("[T]hey never had no warrant to come to my girl's house to arrest me").) When he got to the police station, Plaintiff learned he was being arrested in "connection with some fuel." (*Id.* at 10.) Sometime during this period, Plaintiff's girlfriend went to clean up his room in the basement of 31 Cedar Street and "all [his] stuff was thrown in water." (*Id.* at 22.) Plaintiff also went back, and "most of [his] shit was missing," including "two gold rings, a chain, [and] all [his] IDs." (*Id.*) Plaintiff testified that he believes he was being retaliated against as a result of a lawsuit he filed in 2002 alleging Yonkers detention officers beat him while he was in their custody. (*Id.*) Plaintiff believes two Yonkers officers lost their jobs as a result of his lawsuit. (*Id.* at 23.) However, Plaintiff contends that the lawyer prosecuting that lawsuit on his behalf was disbarred and the case was dismissed for failure to prosecute. (*Id.* at 24.)

On April 8, 2011, Sullivan signed a Misdemeanor Information, Indictment Number 11-1938, charging Plaintiff with the misdemeanor offenses of reckless endangerment in the second degree; reckless endangerment of property; and disorderly conduct: creating a hazardous/offensive condition. (Defs.' 56.1 ¶ 6; McCormick Decl. Ex. F ("Misdemeanor Information").) Additionally, Plaintiff had an unrelated pending felony Complaint in the Yonkers City Court, Indictment Number 11-733, "dated April 8, 2011, charging criminal possession of stolen property in the third degree." (Defs.' 56.1 ¶ 7; McCormick Decl. Ex. G ("Scully Letter").)[4] Plaintiff proceeded to a jury trial on felony charges under Indictment Number 11-733. (Defs.' 56.1 ¶ 8; McCormick Decl. Ex. H ("Sergi Letter"); McCormick Decl. Ex. I ("RAP Sheet") 7–8.) On September 19, 2012, the jury convicted Plaintiff of burglary in the third degree, among other charges in Indictment Number 11-733, and found him not guilty on other charges. (Defs.' 56.1 ¶ 8; Sergi Letter; RAP Sheet 7–8.) On January 9, 2013, Plaintiff was sentenced to an indeterminate term of imprisonment of three and a half to seven years. (Defs.' 56.1 ¶ 8; Sergi Letter; RAP Sheet 7–8.) Plaintiff appealed, but the New York State Appellate Division affirmed the conviction. (Pl.'s Dep. 16.)

On January 14, 2013, the misdemeanor charges in Indictment Number 11-1938, which are the subject of this Action, "were

terminated by the People's indication to the City Court of Yonkers that those charges were satisfied by this Court's sentence under Indictment Number 11-0733, as any sentence on the addressed misdemeanors would merge with [the c]ourt's sentence upon those felony convictions." (Defs.' 56.1 ¶ 8; Sergi Letter; *see also* McCormick Decl. Ex. J ("Yonkers City Court Certificate of Disposition"); McCormick Decl. Ex. K ("Yonkers City Court Decision & Order"); McCormick Decl. Ex. L ("Yonkers City Court Transcript").) Based on Plaintiff's recollection, after appearing in Yonkers City Court following the sentencing in Indictment Number 11-733, "they ... convicted [him] without a trial." (Pl.'s Dep. 19–20.) Plaintiff testified that he wrote to the judge following the hearing, and "they sent [him] a disposition back, dismissing the [misdemeanor] charges." (*Id.* 20.)[5]

***4** Plaintiff testified that Scully, his lawyer for the misdemeanor charges in Indictment Number 11-1938, "kept putting [his] case off," and "kept waiving [Plaintiff's] case and kept leaving [him] in limbo." (Pl.'s Decl. 17.) Further, Plaintiff alleges Scully "kept going along with" Theodore Brundage, his lawyer in Indictment Number 11-733, and they "were working together and putting my cases off." (*Id.*) Scully told Plaintiff that Yonkers was "not going to take [him] to trial because they can't afford to take [him] to trial." (*Id.*) Plaintiff did not understand why he would "not get the right to go to trial." (*Id.*)

On April 10, 2015, Plaintiff served a Pro Se Notice of Claim on the City of Yonkers regarding the events that occurred on April 7, 2011, stating claims for "[f]alse arrest, [f]alse [i]mprisonment, [m]alicious [p]rosecution, [d]ue [p]rocess, [r]espondeat [s]uperior, *Monell Doctrine U.S. S.Ct.*, [n]egligent, [r]etention, [h]iring, [c]onversion of [p]ersonal [p]roperty, against the City of Yonkers and detective Sullivan, [f]abrication of [e]vidence, [c]onspiracy, [u]nlawful [s]earch and seizure, [w]arrantless entry, [r]etaliation." (McCormick Decl. Ex. P ("Notice of Claim") 3.)

B. Procedural History

Plaintiff filed the instant Complaint on May 14, 2015. (Compl.)[6] On August 26, 2015, Yonkers and Sullivan filed an Answer. (Dkt. No. 11.) On December 23, 2015, Plaintiff filed a letter requesting the Court appoint pro bono counsel. (Dkt. No. 17.) In an Order dated February 23, 2016, the Court denied Plaintiff's Motion for Assignment of Counsel without prejudice, (Dkt. No. 18), and a copy of the Order was mailed to Plaintiff, (see Dkt. (entry for Feb. 29, 2016) ). However, the Order was returned to the Court on March 18, 2016, (*see* Dkt. (entry for Mar. 18, 2016) ), so on September 1, 2016, the Court issued an Order directing Plaintiff to show cause, by no later than September 30, 2016, as to why this case should not be dismissed for failure to prosecute, (Order to Show Cause (Dkt. No. 19) ). A copy of the Order was mailed to Plaintiff, (*see* Dkt. (entry for Sept. 2, 2016) ), but the mail was returned to the Clerk of the Court, (*see* Dkt. (entry for Sept. 21, 2016) ). On October 14, 2016, the Court obtained an address for Plaintiff from the New Rochelle Area Parole Office, and mailed another Order directing Plaintiff to show cause, by no later than November 13, 2016, as to why this case should not be dismissed. (Dkt. No. 21.) Plaintiff did not respond, and the Court dismissed the case for failure to prosecute. (Dkt. No. 22.)

On January 4, 2017, Plaintiff filed a letter requesting the Court re-open his case, (Dkt. No. 23), and the Court granted the request and scheduled a conference on February 8, 2018, (Dkt. No. 24). Plaintiff failed to appear at the conference until after the time scheduled for the conference had concluded. (*See* Dkt. (minute entry for Feb. 8, 2017).)[7] On July 20, 2017, the Court held a conference and set a discovery schedule. (Dkt. No. 31, 34.)[8] The Court held another conference on January 9, 2018, and adopted a schedule for the instant Motion. (Dkt. No. 41.) In accordance with the scheduling order, Moving Defendants filed their Motions and accompanying papers on February 9, 2018. (Notice of Motion; Defs.' Mem. Law in Supp. of Mot. for Summary Judgment ("Defs.' Mem.") (Dkt. No. 44); McCormick Decl.; Defs.' 56.1.) Plaintiff did not file a timely opposition to the Motion, but notified the Court on July 5, 2018 of his updated address. (Dkt. No. 46.) On August 21, 2018, Plaintiff filed an opposition to the Motion and renewed his request for counsel. (Pl.'s Mem. Law in Opp. to Mot. for Summary Judgment ("Pl.'s Mem.") (Dkt. No. 47).) The Court denied Plaintiff's Motion for Assignment of Counsel. (Dkt. No. 49.)

II. Discussion

A. Standard of Review

***5** Summary judgment is appropriate where the movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 123–24 (2d Cir. 2014) (same). "In determining whether summary judgment is appropriate," a court must "construe the facts in the light most favorable to

the non-moving party and ... resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (internal quotation marks omitted); *see also Borough of Upper Saddle River v. Rockland Cty. Sewer Dist. No. 1*, 16 F. Supp. 3d 294, 314 (S.D.N.Y. 2014) (same). "It is the movant's burden to show that no genuine factual dispute exists." *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004); *see also Berry v. Marchinkowski*, 137 F. Supp. 3d 495, 521 (S.D.N.Y. 2015) (same).

"However, when the burden of proof at trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim," in which case "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *CILP Assocs., L.P. v. Pricewaterhouse Coopers LLP*, 735 F.3d 114, 123 (2d Cir. 2013) (alteration and internal quotation marks omitted). Further, "[t]o survive a [summary judgment] motion ..., [a nonmovant] need[s] to create more than a 'metaphysical' possibility that his allegations were correct; he need[s] to 'come forward with specific facts showing that there is a genuine issue for trial,' " *Wrobel v. County of Erie*, 692 F.3d 22, 30 (2d Cir. 2012) (emphasis omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) ), "and cannot rely on the mere allegations or denials contained in the pleadings," *Guardian Life Ins. Co. v. Gilmore*, 45 F. Supp. 3d 310, 322 (S.D.N.Y. 2014) (internal quotation marks omitted); *see also Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009) ("When a motion for summary judgment is properly supported by documents or other evidentiary materials, the party opposing summary judgment may not merely rest on the allegations or denials of his pleading...."). And, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

"On a motion for summary judgment, a fact is material if it might affect the outcome of the suit under the governing law." *Royal Crown Day Care LLC v. Dep't of Health & Mental Hygiene*, 746 F.3d 538, 544 (2d Cir. 2014) (internal quotation marks omitted). At this stage, "[t]he role of the court is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." *Brod*, 653 F.3d at 164 (internal quotation marks omitted). Thus, a court's goal should be "to isolate and dispose of factually unsupported claims." *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 495 (2d Cir. 2004) (internal quotation marks omitted) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986) ). However, a district court should consider only evidence that would be admissible at trial. *See Nora Beverages, Inc. v. Perrier Grp. of Am., Inc.*, 164 F.3d 736, 746 (2d Cir. 1998). "[W]here a party relies on affidavits ... to establish facts, the statements 'must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant ... is competent to testify on the matters stated.' " *DiStiso v. Cook*, 691 F.3d 226, 230 (2d Cir. 2012) (quoting Fed. R. Civ. P. 56(c)(4) ).

***6** Finally, the Second Circuit has instructed that when a court considers a motion for summary judgment, "special solicitude" should be afforded a pro se litigant, *see Graham v. Lewinski,* 848 F.2d 342, 344 (2d Cir. 1988); *accord Mercado v. Div. of N.Y. State Police,* No. 96-CV-235, 2001 WL 563741, at *7 (S.D.N.Y. May 24, 2001) (same), and a court should construe "the submissions of a pro se litigant ... liberally" and interpret them "to raise the strongest arguments that they suggest," *Triestman v. Fed. Bureau of Prisons,* 470 F.3d 471, 474 (2d Cir. 2006) (italics and internal quotation marks omitted). And, "the failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment." *Vermont Teddy Bear Co.*, 373 F.3d at 244; *see also Jackson v. Fed. Exp.*, 766 F.3d 189, 196 (2d Cir. 2014) (explaining that "an examination of the legal validity of an entry of summary judgment should ... be[ ] made in light of the opposing party's pro se status" (italics omitted) ). "Nonetheless, proceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment, and a pro se party's bald assertions unsupported by evidence ... are insufficient to overcome a motion for summary judgment." *Houston v. Teamsters Local 210, Affiliated Health & Ins. Fund-Vacation Fringe Ben. Fund,* 27 F. Supp. 3d 346, 351 (E.D.N.Y. 2014) (alterations, italics, and internal quotation marks omitted); *see also Flores v. City of New York*, No. 15-CV-2903, 2017 WL 3263147, at *2 (S.D.N.Y. July 31, 2017) (same).

B. Second Cause of Action for False Arrest and Third Cause of Action for False Imprisonment [9]

A "§ 1983 claim for false arrest derives from [the] Fourth Amendment right to remain free from unreasonable seizures, which includes the right to remain free from arrest absent

probable cause." *Jaegly v. Couch*, 439 F.3d 149, 151 (2d Cir. 2006); *see also Scalpi v. Town of E. Fishkill*, No. 14-CV-2126, 2016 WL 858944, at *10 (S.D.N.Y. Feb. 29, 2016) (same). "A [§] 1983 claim for false arrest is substantially the same as a claim for false arrest under New York law." *Simpson v. City of New York*, 793 F.3d 259, 265 (2d Cir. 2015) (internal quotation marks omitted). "To prevail, a plaintiff must prove four elements: (1) the defendant intended to confine [the plaintiff], (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not contest the confinement[,] and (4) the confinement was not otherwise privileged." *Crews v. Cty. of Nassau*, 996 F. Supp. 2d 186, 203 (E.D.N.Y. 2014) (internal quotation marks omitted). Probable cause is a complete defense to an action for false arrest, whether that action is brought under New York state law or under § 1983. *See Simpson*, 793 F.3d at 265. In general, probable cause exists where an arresting officer "has knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Id.* (internal quotation marks omitted). Probable cause is measured based on "those facts available to the officer at the time of arrest and immediately before it," *id.* (internal quotation marks omitted), and the existence of probable cause must be determined based on the "totality of the circumstances," *see Calamia v. City of New York*, 879 F.2d 1025, 1032 (2d Cir. 1989). A court assessing probable cause must "examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (internal quotation marks omitted).

***7** Defendants argue that there was probable cause to arrest Plaintiff based on two statutes: reckless endangerment in the second degree, N.Y. Penal Law § 120.20, and reckless endangerment of property, N.Y. Penal Law § 145.25. (Defs.' Mem. 4.) "A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person." N.Y. Penal Law § 120.20. "A person is guilty of reckless endangerment of property when he recklessly engages in conduct which creates a substantial risk of damage to the property of another person in an amount exceeding two hundred fifty dollars." N.Y. Penal Law § 145.25. A Fourth Amendment claim turns on whether probable cause existed to arrest Plaintiff for any crime, not whether probable cause existed with respect to each individual charge. *See Devenpeck v. Alford*, 543 U.S. 146, 153–56 (2004). Accordingly, Defendants will prevail if there was probable cause to arrest Plaintiff for any single offense. *See Marcavage v. City of New York*, 689 F.3d 98, 109–10 (2d Cir. 2012).

Plaintiff was arrested on April 7, 2011. (YPD Supp. Report.) The record contains evidence that on the date of the arrest, the YPD call center received a call from a panicked tenant who witnessed a tall black male carrying numerous five-gallon containers of fuel in to the basement of her building. (YPD Crime Investigation Report; YPD Supp. Report; YPD Radio.) The scent of fuel had seeped through the apartment building, prompting the tenant to call the police. (YPD Crime Investigation Report; YPD Supp. Report; YPD Radio.) Tests conducted by the YPD confirmed the substance inside the containers was diesel fuel and that there was a dangerous level of diesel in the air. (YPD Crime Investigation Report.) Additionally, the way the fuel was stored created a fire risk, and required the Westchester County Bomb Squad to escort the fuel off site. (YPD Crime Investigation Report; YPD Supp. Report.) After canvasing the building, an unknown tenant provided a photo the tenant took of the male who placed the fuel in the basement. (YPD Supp. Report.) The owner of the building, Tiratsuyan, subsequently identified the person in the photo as Plaintiff, and explained that Plaintiff was employed by Tiratsuyan to do various tasks in the building, and that he had a key to the basement. (YPD Supp. Report; Tiratsuyan Written Statement.)

Having obtained all this information prior to the arrest, the undisputed facts support the conclusion that YPD and Sullivan had both "knowledge and reasonably trustworthy information of facts and circumstances that [were] sufficient to warrant a person of reasonable caution" to believe Plaintiff acted recklessly in creating a substantial risk of serious physical injury to another person. *Simpson*, 793 F.3d at 265. [10] The fact that no one was injured does not change the analysis. "For probable cause to exist to arrest pursuant to New York Penal Law § 120.20, there need not be proof of actual serious physical injury to another person, only the substantial risk of such injury, recklessly created." *Higginbotham v. Sylvester*, 218 F. Supp. 3d 238, 242 (S.D.N.Y. 2016) (collecting cases), *aff'd sub nom.* 2018 WL 3559116 (2d Cir. July 25, 2018). Indeed, the undisputed facts surrounding Plaintiff's alleged storage of fuel in the basement at 31 Cedar Street demonstrate that a person of reasonable caution would infer that Plaintiff acted recklessly in creating a substantial risk of serious physical injury to another person by storing 38 five-gallon containers of diesel

fuel in the basement, which not only created a fire hazard, but also caused dangerous levels of fumes. Thus, the evidence is sufficient to support a finding of arguable probable cause to arrest Plaintiff pursuant to New York Penal Law § 120.20. That is to say, there is no genuine dispute of material fact that it was objectively reasonable for the arresting officers to believe that probable cause existed, or at the very least, for officers of reasonable competence to disagree on whether probable cause existed. *See United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 85 (2d Cir. 2002) ("[T]he determination of probable cause is an objective one, to be made without regard to the individual officer's subjective motives or belief as to the existence of probable cause."). Accordingly, Moving Defendants are entitled to summary judgment on the second and third causes of action for false arrest and false imprisonment.

C. Fourth Cause of Action for Malicious Prosecution

***8** The Fourth Amendment protects individuals from criminal prosecution based on the "perversion of proper legal procedures." *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 117 (2d Cir. 1995) (quoting *Broughton v. State*, 37 N.Y.2d 451, 457 (1975) ). Like false arrest claims, the elements of a malicious prosecution claim under [§] 1983 are "substantially the same as the elements under New York law." *Boyd v. City of New York*, 336 F.3d 72, 75 (2d Cir. 2003) (quotation marks omitted); *Brooks v. Panas*, No. 14-CV-4835, 2016 WL 614684, at *3 (E.D.N.Y. Feb. 16, 2016) (same). To prevail on a claim of malicious prosecution, a plaintiff must show four elements: (1) that the defendant commenced or continued a criminal proceeding against him; (2) that the proceeding was terminated in the plaintiff's favor; (3) that there was no probable cause for the proceeding; and (4) that the proceeding was instituted with malice. *See Kinzer v. Jackson*, 316 F.3d 139, 143 (2d Cir. 2003); *accord O'Brien v. Alexander*, 101 F.3d 1479, 1484 (2d Cir. 1996). As with the false arrest claim, "[t]he existence of probable cause will defeat a claim of malicious prosecution." *Fabrikant v. French*, 691 F.3d 193, 215 (2d Cir. 2012). However, if "the plaintiff can demonstrate mitigating facts to vitiate probable cause which were first uncovered after the arrest," the malicious prosecution claim will not be defeated by a finding of probable cause to arrest. *Drummond v. Castro*, 522 F. Supp. 2d 667, 678 (S.D.N.Y. 2007) (internal quotation marks omitted).

The Court already has found that the undisputed facts support the conclusion probable cause existed to arrest Plaintiff on April 7, 2011. *See supra* II.B. Further, Plaintiff failed to establish the existence of evidence uncovered after the arrest that successfully vitiates probable cause. Even if the fuel was not placed in the basement by Plaintiff, the overwhelming evidence available to Defendants at the time of the arrest sufficed to establish an objectively reasonable basis for a finding of probable cause to arrest and prosecute Plaintiff. Accordingly, the Court grants summary judgment in favor of Moving Defendants for the fourth claim of malicious prosecution. *See Tardif v. City of New York*, No. 13-CV-4056, 2017 WL 571016, at *10 (S.D.N.Y. Feb. 6, 2017), *adopted in part,* 2017 WL 1079979 (S.D.N.Y. Mar. 22, 2017), *on reconsideration in part,* 2017 WL 3634612 (S.D.N.Y. Aug. 23, 2017) (granting summary judgment in favor of the defendant on malicious prosecution claim after finding probable cause existed to arrest Plaintiff).

D. Fifth Cause of Action for Due Process Violation, Sixth Cause of Action for Illegal Search and Seizure, Tenth Cause of Action for Conspiracy, and Eleventh Cause of Action for Retaliation – Statute of Limitations [11]

Defendants argue that Plaintiff's fifth cause of action alleging due process violations, ninth cause of action for illegal search and seizure, tenth cause of action for conspiracy, and eleventh cause of action for retaliation are time-barred. (Defs.' Mem. 9–10.) The Supreme Court has held that the statute of limitations for federal claims under 42 U.S.C. § 1983 "is that which the State provides for personal-injury torts." *Wallace v. Kato*, 549 U.S. 384, 387 (2007). Accordingly, federal courts in New York apply a three-year statute of limitations for personal injury actions to § 1983 claims. *Shomo v. City of New York*, 579 F.3d 176, 181 (2d Cir. 2009). However, the question of when a § 1983 claim accrues is a "question of federal law." *Wallace,* 549 U.S. at 388. "[A]ccrual occurs when [a] plaintiff knows or has reason to know of the injury which is the basis of his action." *Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002) (internal quotation marks omitted). Put differently, accrual occurred when Plaintiff had "a complete and present cause of action, that is, when [P]laintiff [could] file suit and obtain relief." *Wallace*, 549 U.S. at 388 (citations and internal quotation marks omitted). It does not wait "until [Plaintiff] has received judicial verification that [D]efendants' acts were wrongful." *Veal v. Geraci*, 23 F.3d 722, 724 (2d Cir. 1994). Plaintiff filed his Complaint on May 14, 2015, (Compl.), thus, any claims accruing prior to May 14, 2012 are time barred.

1. Sixth Cause of Action for Illegal Search and Seizure

***9** To begin, any claim relating to the illegal search and seizure of Plaintiff's room at 31 Cedar Street accrued on the date of the search itself—April 7, 2011—and is thus time-barred. *See Wheeler v. Slanovec*, No. 16-CV-9065, 2018 WL 2768651, at *6 (S.D.N.Y. June 8, 2018) (holding claims relating to the illegal search of Plaintiff's home accrued on the date of the search); *Forbes v. City of New York*, No. 15-CV-3458, 2016 WL 6269602, at *3 (S.D.N.Y. Oct. 26, 2016) ("An unlawful search claim accrues at the time of the search." (internal quotation marks omitted) ); *Deraffele v. City of New Rochelle*, No. 15-CV-282, 2016 WL 1274590, at *10 (S.D.N.Y. Mar. 30, 2016) (holding that the plaintiff's Fourth Amendment claim accrued on "the date on which the allegedly illegal search and entry occurred" and collecting cases); *see also Williams v. Savory*, 87 F. Supp. 3d 437, 453 (S.D.N.Y. 2015) (rejecting as "incorrect" the plaintiff's argument that her § 1983 claim accrued on the date when she "came to know that her Constitutional protections were compromised" by an earlier warrantless seizure because her claim accrued when she know of the *harm* ). Accordingly, the Court grants summary judgment as to the ninth cause of action alleging illegal search and seizure.

2. Eleventh Cause of Action for Retaliation

Plaintiff's cause of action alleging retaliation under the First Amendment is similarly time barred. Plaintiff alleges "Sullivan took advantage of his position as a detective and retaliated against Plaintiff by trashing his room/apartment, and by causing Plaintiff to be arrested and prosecuted, when he was aware that evidence existed that Plaintiff was innocent of all criminal charges" as retaliation for "filing of a notice of claim upon the City of Yonkers in 2002," which caused a YPD Captain to be terminated for "assaulting Plaintiff, and making racist remarks during the assault." (Compl. ¶ 119; *see also* Pl.'s Dep. 22–25.) Important to the First Amendment retaliation claim, "the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known or predictable." *Wallace,* 549 U.S. at 391 (citation omitted).

"To plead a First Amendment retaliation claim a plaintiff must show: (1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by [the plaintiff's] exercise of that right; and (3) the defendant's actions caused him some injury." *Dorsett v. County of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013). Plaintiff's cause of action would have thus accrued at the time of the allegedly retaliatory search and arrest—April 7, 2011. As of that date, Plaintiff had engaged in protected speech by filing the notice of claim in 2002. Accordingly, as alleged, his cause of action for First Amendment retaliation accrued more than three years prior to the filing of the initial complaint on May 14, 2015. "That the full scope of [his] injury was not known at that time, including whether or not [he] would be convicted ... that [Sullivan] would continue harassment, does not alter the date that [his] cause of action accrued." *Smith v. Campbell*, 782 F.3d 93, 100–02 (2d Cir. 2015) (finding First Amendment retaliation claim accrued when allegedly retaliatory traffic tickets were delivered to the plaintiff, not after the date of the trial); *Deraffele*, 2016 WL 1274590, at *10 (finding First Amendment retaliation claim accrued when allegedly retaliatory citations were issued); *Turner v. Boyle*, 116 F. Supp. 3d 58, 83–84 (D. Conn. 2015) (noting that "a claim for ... First Amendment retaliation[ ] accrues at the time that the allegedly wrongful conduct took place"). [12] Accordingly, the Court grants summary judgment as to the eleventh cause of action alleging retaliation. [13]

3. Fifth Cause of Action for Due Process Violation and Tenth Cause of Action for Conspiracy

***10** Whether Plaintiff's fifth cause of action for violation of his right to due process and tenth cause of action for conspiracy is untimely is unclear from the record. Both Plaintiff's due process and conspiracy claim are related to the alleged denial of his speedy trial rights. (Compl. ¶ 103 (alleging Plaintiff was denied access to a trial within 90 days); *id.* ¶ 116 (alleging there was a conspiracy to deny him his right to a speedy trial for 21 months).) Moving Defendants argue these claims are time barred "because the events giving rise to this case occurred on April 7, 2011." (Defs.' Mem. 10.) However, Plaintiff alleges his denial of due process and the conspiracy continued for twenty-one months from Plaintiff's arrest on April 7, 2011—in other words, the alleged conduct continued until approximately May 2013. (Compl. ¶¶ 103, 116.) The record indicates Plaintiff's trial was in fact delayed due to the felony charges in Indictment Number 11-773. (Scully Letter; Sergi Letter; Yonkers City Court Decision & Order; Yonkers City Court Transcript.) The record does not support Defendants' argument that this cause of action accrued on April 7, 2011, because at that time, there had been no delay of Plaintiff's trial, and Plaintiff would not yet have had "a complete and present cause of action"

as to either claim at that time. *Wallace*, 549 U.S. at 388. Because Moving Defendants do not properly brief how the Court should calculate the statute of limitations as to these claims, and cite to no cases addressing the question, the Court declines to determine whether summary judgment should be granted based on the statute of limitations, and will proceed to the merits. *Bejaoui v. City of New York*, No. 13-CV-5667, 2015 WL 1529633, at *11 (E.D.N.Y. Mar. 31, 2015) (deciding speedy trial rights claim on the merits because, "[a]lthough [the d]efendants argue that [the p]laintiff's Sixth Amendment claim is barred by the statute of limitations, [the d]efendants offers no explanation for this contention").

E. Fifth Cause of Action for Due Process Violation

Regardless of whether it is timely, Plaintiff's due process claim nonetheless fails to survive summary judgment, as there is no dispute of material facts regarding Moving Defendant's lack of personal involvement in the alleged constitutional violation. Plaintiff alleges a federal claim under § 1983 for violation of his due process rights, because he was not tried within 90 days, as required by law. (Compl. ¶ 103.) The Court presumes Plaintiff is referencing New York Criminal Procedure Law § 30.30, which requires dismissal if the People are not ready for trial within ninety days of the commencement of a criminal action when a defendant is accused of at least one misdemeanor. N.Y. Crim. Pro. L. §§ 30.30(1)(b). Construing Plaintiff's Complaint liberally, the Court reads Plaintiff's allegations regarding the Due Process cause of action to be a claim for deprivation of Plaintiff's Sixth Amendment speedy trial rights. *Blount v. Moccia*, No. 16-CV-4505, 2017 WL 5634680, at *7 (S.D.N.Y. Nov. 21, 2017) (finding Plaintiff's allegation regarding a violation of N.Y. Crim. Pro. Law § 30.30 "may also be read to raise a claim under the Sixth Amendment"). "Violations of this constitutional right can be redressed through civil actions brought under [§] 1983." *Brooks*, 2016 WL 614684, at *4. [14]

"It is well settled that, in order to establish a defendant's individual liability in a suit brought under § 1983, a plaintiff must show ... the defendant's personal involvement in the alleged constitutional deprivation." *Grullon v. City of New Haven*, 720 F.3d 133, 138 (2d Cir. 2013). To establish personal involvement, a plaintiff must show that:

> (1) the defendant participated directly in the alleged constitutional violation[;] (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong[;] (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom[;] (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts[;] or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

***11** *Id.* at 139 (italics and internal quotation marks omitted). In other words, "[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676. Therefore, Plaintiff must present evidence of conduct by Sullivan that falls into one of the five categories identified above. *See Lebron v. Mrzyglod*, No. 14-CV-10290, 2017 WL 365493, at *4 (S.D.N.Y. Jan. 24, 2017) (holding that the five categories "still control[ ] with respect to claims that do not require a showing of discriminatory intent" post-*Iqbal* ).

The record references Sullivan only in the context of the events on April 7, 2011. (Pl.'s Dep. 9, 25.) There is no evidence that Sullivan participated directly or somehow permitted the delay of Plaintiff's trial, supervised anyone responsible or the delay, was informed or even knew about the delay and failed to remedy the wrong or act on information indicating that unconstitutional acts were occurring, or created a policy or custom that led to the delay. Plaintiff's opposition to the Motion discusses alleged conduct by Scully and Logan that deprived him of his right to a speedy trial, but makes no reference to Sullivan's involvement in the denial of his speedy trial rights. (*See generally* Pl.'s Opp.) "The absence of any facts [showing] a defendant's personal involvement in the violation of a plaintiff's Sixth Amendment right to a speedy trial, therefore, dooms any such claim." *Brooks*, 2016 WL 614684, at *4. *See also Davila v. Johnson*, No. 15-CV-2665, 2015 WL 8968357, at *10, (S.D.N.Y. Dec. 15, 2015) (dismissing § 1983 claim for violation of speedy trial rights where "[the p]etitioner [did] not allege that any of the remaining [r]espondents were personally involved in

the violation of his speedy trial rights"); *Davis v. Nassau Cty.*, No. 06-CV-4762, 2011 WL 5401663, at *7, (E.D.N.Y. Nov. 5, 2011) (granting summary judgment in favor of the defendants on the plaintiff's § 1983 speedy trial claim because the plaintiff failed to put forth sufficient evidence of the defendants' personal involvement in any deprivation of his speedy trial rights). The Court therefore grants summary judgment to Sullivan because Plaintiff has not created a dispute of material fact as to whether Sullivan was personally involved in the violation of Plaintiff's due process rights.

To the extent Plaintiff also is asserting a substantive due process claim, this also fails. "[W]here another provision of the Constitution 'provides an explicit textual source of constitutional protection,' a court must assess a plaintiff's claims under that explicit provision and 'not the more generalized notion of substantive due process.' " *Kia P. v. McIntyre*, 235 F.3d 749, 757–58 (2d Cir. 2000) (quoting *Conn v. Gabbert*, 526 U.S. 286, 293 (1999) ); *see also Velez v. Levy*, 401 F.3d 75, 94 (2d Cir. 2005) ("[W]here a specific constitutional provision prohibits government action, plaintiffs seeking redress for that prohibited conduct in a § 1983 suit cannot make reference to the broad notion of substantive due process."). This is so because, as the Supreme Court has observed, "the guideposts for responsible decisionmaking" in the "unchartered area" of substantive due process "are scarce and open-ended." *Albright v. Oliver*, 510 U.S. 266, 271–72 (1994) (plurality opinion). As a result, the Supreme Court has "always been reluctant to expand the concept of substantive due process" and has limited the availability of such claims to those which are not covered under other constitutional amendments. *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). The Court concludes, therefore, that, because all of Plaintiff's constitutional claims are covered under either Fourth or Sixth Amendment standards, he does not have an additional substantive due process cause of action under the Fourteenth Amendment. *See Velez*, 401 F.3d at 94 (holding that the "plaintiff's substantive due process claim is either subsumed in her more particularized allegations," raising First Amendment and Equal Protection Clause claims, "or must fail"); *Case v. City of New York*, 233 F. Supp. 3d 372, 395–96 (S.D.N.Y. 2017) (same).

F. Tenth Cause of Action for Conspiracy

***12** Defendants argue that, even assuming they are timely, Plaintiff's conspiracy allegations should be dismissed. (Defs.' Mem. 10.) "To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999); *see also Corsini v. Brodsky*, 2018 WL 1773501, at *19 (2d Cir. April 13, 2018) (same) (citing *Ciambriello v. Cty. of Nassau*, 292 F.3d 307, 324–25 (2d Cir. 2002) ). Plaintiff has failed to satisfy this standard, as he has presented no evidence that the YPD or Sullivan had any involvement in the decision to keep him in jail during that time period, let alone that they were involved in an agreement to do so or that there was a "meeting of the minds" with the other Defendants. That they were involved in his arrest has no bearing on his access to a speedy trial. Indeed, the record shows that the delay in Indictment Number 11-1938 was the result of the pending trial in his other felony matter, resulting in "the local court [being] relegated to tracking the felony case." (Scully Letter.) There are no facts in the record that YPD or Sullivan knew about, much less played any role in, that decision. *See Wheeler*, 2018 WL 2768651, at *10 (granting motion to dismiss where "[t]here is no allegation whatsoever that any [d]efendant was involved in these proceedings"); *McGee v. Dunn*, No. 09-CV-6098, 2015 WL 9077386, at *6 (S.D.N.Y. Dec. 16, 2015), *aff'd*, 672 F. App'x 115 (2d Cir. 2017) (granting summary judgment where "[t]he plaintiff provide[d] only conclusory allegations ... and "those allegations [were] easily disproved [by the record], and the plaintiff offer[ed] insufficient evidence, if any, to conclude otherwise or show a genuine issue of material fact" "); *Sylvester v. City of New York*, 385 F. Supp. 2d 431, 446 (S.D.N.Y. 2005) (granting summary judgment where "the plaintiffs have failed to present evidence regarding the existence of an agreement to violate their constitutional rights"). Thus, there is no genuine issue of material fact regarding whether YPD and Sullivan entered into an agreement to violate Plaintiff's constitutional rights. Summary judgment therefore should be granted in favor of Moving Defendants for the tenth cause of action.

G. First Cause of Action for *Monell* Claims Against City of Yonkers

Defendants argue that Plaintiff fails to plausibly state a *Monell* claim against the City of Middletown. (Defs.' Mem. 8–9.) "Congress did not intend municipalities to be held liable [under § 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978). Thus, "to prevail on a claim against a municipality under [§] 1983 based on acts of a public official, a plaintiff is required to prove: (1) actions taken under color of law; (2) deprivation of

a constitutional or statutory right; (3) causation; (4) damages; and (5) that an official policy of the municipality caused the constitutional injury." *Roe v. City of Waterbury*, 542 F.3d 31, 36 (2d Cir. 2008).

Because Plaintiff has failed to allege a deprivation of a constitutional right as to the false arrest, false imprisonment, malicious prosecution, due process violations, illegal search and seizure, conspiracy, and retaliation claims, there is no dispute as to material fact that Plaintiff was not deprived of a constitutional right and cannot satisfy the burden of proving Yonkers liable under *Monell*. *Roe*, 542 F.3d at 36 (listing "deprivation of a constitutional or statutory right" as element a plaintiff is required to prove to bring a claim of municipal liability). Accordingly, the Court grants Moving Defendant's summary judgment motion as to the City of Yonkers.

H. Sixth Cause of Action for Respondeat Superior Liability, Seventh Cause of Action for State Law Fabrication of Evidence, Eighth Cause of Action for State Law Conversion

There are certain procedural hurdles that a plaintiff must cross before he is able to sue employees of the City of Yonkers. Under New York law, an individual suing city employees must file a notice of claim. New York's General Municipal Law provides in pertinent part:

> No action ... shall be ... maintained against a city ... or of any officer, agent or employee thereof ... unless, (a) a notice of claim shall have been made and served upon the city ... in compliance with [§ 50-e] of this article[.]

N.Y. Gen. Mun. Law § 50–i(1). Section 50–e provides in pertinent part that for a "case founded upon tort," notice of the claim must be served "within ninety days after the claim arises." N.Y. Gen. Mun. Law § 50–e(1)(a). "A plaintiff's state law tort claims in a federal civil rights action against ... police officers employed by the city should be dismissed when plaintiff's notice of claim is filed more than 90 days after the claims arose." *Bender v. Alvarez,* 06–CV–3378, 2009 WL 112716, at *10 (E.D.N.Y. Jan. 16, 2009) (citing *Brogdon v. City of New Rochelle,* 200 F. Supp. 2d 411, 428 (S.D.N.Y. 2002) ) (internal quotation marks omitted).

***13** The incident giving rise to the state law claims suggested by Plaintiff's Complaint occurred on April 7, 2011, when Defendants searched Plaintiff's room and seized certain of his possessions and arrested him. The record indicates that Plaintiff did not file his notice of claim until April 10, 2015. (Notice of Claim.) Even assuming he was able to wait until the conclusion of his trial to file the Notice, the period of time between the disposition of his criminal case on January 14, 2014 and April 10, 2015 is longer than ninety days. As a result, Plaintiff's notice was untimely. Therefore, Defendants' motion for summary judgement is granted as to the state law claims. *Forney v. Forney*, 96 F. Supp. 3d 7, 14 (E.D.N.Y. 2015) (dismissing claims for failure to timely file a notice of claim).

III. Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment is granted. The Clerk of Court is respectfully directed to terminate the pending Motion, (Dkt. No. 42), enter judgment for Moving Defendants, and mail a copy of this Opinion to Plaintiff.

Additionally, the Court Orders counsel for Moving Defendants to provide additional identifying information on Defendant Logan so that the Court can proceed with serving him. It is generally Plaintiff's responsibility to ensure that service is made and, if necessary, to request an extension of time of service. *See Meilleur v. Strong*, 682 F.3d 56, 63 (2d Cir. 2012). However, when the action involves a pro se inmate, the process rules "are more lenient than for represented members of the general public." *Mahon v. Namani*, No. 15-CV-2032, 2016 WL 6820739, at *3 (S.D.N.Y. Nov. 10, 2016). When a plaintiff is proceeding in forma pauperis and relying on the U.S. Marshals, the responsibility for serving the complaint shifts from the plaintiff to the Court. *See Wright v. Lewis*, 76 F.3d 57, 59 (2d Cir. 1996); *see also Romandette v. Weetabix Co.*, 807 F.2d 309, 311 (2d Cir. 1986). Here, Plaintiff relied on U.S. Marshals to effect service on Defendant Logan through an Order of Service dated June 8, 2015. (Dkt. No. 7.) However, the U.S. Marshals were unable to serve Defendant Logan. (Dkt. No. 10.) Counsel for Defendants previously indicated Logan was no longer employed by the Westchester County District Attorney's Office and they were not aware of a more updated address. (Dkt. No. 20.) In order for the Court to ascertain the addresses where Defendant Logan may be served, the Court orders counsel for Moving Defendants

to provide the Court with *any* identifying information that may assist the Court in locating Defendant Logan. Counsel for Moving Defendants shall provide this information to the Court within 21 days of the date of this order. If Counsel for Defendants believes such information needs to be filed under seal, they may make such a request to the Court.

SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2018 WL 4680026

## Footnotes

1 Local Civil Rule 56.1(a) requires the moving party to submit a "short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." The nonmoving party, in turn, must submit "a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short[,] and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried." Local Civ. R. 56.1(b). "A pro se litigant is not excused from this rule," *Brandever v. Port Imperial Ferry Corp.*, No. 13-CV-2813, 2014 WL 1053774, at *3 (S.D.N.Y. Mar. 13, 2014) (italics omitted), and "[a] nonmoving party's failure to respond to a Rule 56.1 statement permits the [C]ourt to conclude that the facts asserted in the statement are uncontested and admissible," *T.Y. v. N.Y.C. Dep't of Educ.*, 584 F.3d 412, 418 (2d Cir. 2009); *see also Biberaj v. Pritchard Indus., Inc.*, 859 F. Supp. 2d 549, 553 n.3 (S.D.N.Y. 2012) (same). Here, Defendants filed and served their statement pursuant to Rule 56.1, (Dkt. No. 45), and filed and served a statement notifying Plaintiff of the potential consequences of not responding to the Motion, as required by Local Rule 56.2, (Notice of Mot.). Despite this notice, Plaintiff failed to submit a response to Defendant's 56.1 Statement of Facts. Accordingly, the Court may conclude that the facts in Defendant's 56.1 Statement are uncontested and admissible. *See Brandever,* 2014 WL 1053774, at *3 (concluding that because the pro se plaintiff did not submit a Rule 56.1 statement in response to the defendant's statement of facts, "there [were] no material issues of fact"); *Anand v. N.Y. State Div. of Hous. & Cmty. Renewal*, No. 11-CV-9616, 2013 WL 4757837, at *7 (S.D.N.Y. Aug. 29, 2013) (same).

Nevertheless, in light of the "special solicitude" afforded to pro se litigants "when confronted with motions for summary judgment," *Graham v. Lewinski*, 848 F.2d 342, 344 (2d Cir. 1988), the Court will "in its discretion opt to conduct an assiduous review of the record," including Plaintiff's deposition testimony, when deciding the instant Motion, *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 73 (2d Cir. 2001). *See also Houston v. Teamsters Local 210, Affiliated Health & Ins. Fund-Vacation Fringe Ben. Fund*, 27 F. Supp. 3d 346, 349 (E.D.N.Y. 2014) ("Although [the] plaintiffs did not file a Rule 56.1 statement, the Court has independently reviewed the record to ensure that there is uncontroverted evidence to support the paragraphs referenced in [the] defendants' Rule 56.1."); *Cherry v. Byram Hills Cent. Sch. Dist.*, No. 11-CV-3872, 2013 WL 2922483, at *1 (S.D.N.Y. June 14, 2013) (italics omitted) ("[W]here a pro se plaintiff fails to submit a proper ... Rule 56.1 statement in opposition to a summary judgment motion, the [c]ourt retains some discretion to consider the substance of the plaintiff's arguments, where actually supported by evidentiary submissions." (internal quotation marks omitted) ); *Pagan v. Corr. Med. Servs.*, No. 11-CV-1357, 2013 WL 5425587, at *2 (S.D.N.Y. Sept. 27, 2013) (explaining that "[t]he [c]ourt ha[d] considered the [motions for summary judgment] in light of the entirety of the record to afford [the pro se] [p]laintiff the special solicitude to which he [was] entitled" where the plaintiff failed to submit a Rule 56.1 response).

2 Plaintiff testified he, on occasion, used the five-gallon containers to remove water from the basement when it flooded by pumping water into the containers. (Pl.'s Dep. 8–9.)

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3 When citing to Plaintiff's deposition, the Court cites to the full version provided by Moving Defendants on August 29, 2018. (Pl.'s Dep.).

4 At his deposition, Plaintiff testified " 'they' used the misdemeanors to hold me in jail. I sat in there for a few months before I got indicted. I wasn't indicted right away." (Pl.'s Dep. 12; *see also id.* at 14 (Plaintiff "sat in the county jail [on the misdemeanor charge] while they build these cases and, again, they gave me a felony.").) Plaintiff had no recollection of being indicted in April of 2011 in Indictment Number 11-733. However, the record indicates that Indictment Number 11-733 was filed on April 8, 2011. (Scully Letter.)

5 The record indicates that on October 30, 2014, the Yonkers City Court adjudged that the charges in Indictment Number 11-1938 were "satisfied by Indictment # 11-733." (Yonkers City Court Certificate of Disposition.)

6 On June 8, 2018, the Court issued an Order of Service to allow Plaintiff to effect service on Defendants through the U.S. Marshals Service. (Dkt. No. 6.) Defendant Logan was never served, (Dkt. Nos. 9, 13), and counsel for Moving Defendants were unable to provide an address following Logan's departure from the Westchester County District Attorney's Office, (Dkt. No. 20).

7 Plaintiff sent a number of letters regarding alleged harassment and threats by YPD officers unrelated to the issues raised in the Complaint, and requested an injunction. (Dkt. Nos. 25, 29). The Court advised Plaintiff that should he seek relief in connection with the alleged events raised in his letters, he should continue with his pending proceeding in state court regarding these allegations or file a separate federal action. (Dkt. No. 30.)

8 Plaintiff requested the Court appoint counsel again on June 12, 2017, August 4, 2017, and November 14, 2017, (Dkt. Nos. 32, 35, 38), which the Court denied, (Dkt. Nos. 33, 36, 39).

9 "The common law tort of false arrest is a species of false imprisonment." *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995). Because under New York Law, the torts of false arrest and false imprisonment are "synonymous," *Jackson v. City of New York*, 939 F. Supp. 2d 235, 248 (E.D.N.Y. 2013) (quoting *Posr v. Doherty,* 944 F.2d 91, 96 (2d Cir. 1991) ), the Court analyzes the claims together. *See also Hulett v. City of Syracuse*, 253 F. Supp. 3d 462, 494 (N.D.N.Y. 2017).

10 Plaintiff alleged in his Complaint that the fuel in the basement was actually Tiratsuyan's. (Compl. ¶¶ 61, 67.) Even if Tiratsuyan lied to the police, there is no evidence in the record that an objectively reasonable officer should have known that at the time, and, considering the totality of the circumstances, there was an abundance of other evidence leading up to the arrest, including the tenant's description and the photograph of Plaintiff, to form a determination of probable cause to arrest Plaintiff. The police officers were not obligated to evaluate possible defenses Plaintiff may have been able to raise prior to arresting him. *See Panetta v. Crowley*, 460 F.3d 388, 396 (2d Cir. 2006) ("[O]nce officers possess facts sufficient to establish probable cause, they are neither required nor allowed to sit as prosecutor, judge or jury. Their function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the evidence." (internal quotation mark omitted).)

11 Moving Defendants argue Sullivan is entitled to qualified immunity on "the remaining [§] 1983 claims." (Defs.' Mem. 7.) However, Moving Defendants make no actual arguments about "the remaining [§] 1983 claims" and why they are entitled to qualified immunity. (*Id.*) "The Court therefore declines to consider this argument, because it is not sufficiently explained by [Moving] Defendants, who are represented by counsel and attempting to dismiss a pro se Complaint." *Whitley v. Bowden*, No. 17-CV-3564, 2018 WL 2170313, at *12 (S.D.N.Y. May 10, 2018).

12 The Court in *Smith* explicitly rejected the argument that a cause of action for First Amendment retaliation accrues after trial, noting, that in the "[Second] Circuit, First Amendment claims, even those arising out of the same series of events that give rise to Fourth Amendment claims, do not require a favorable termination in the

criminal action to be cognizable as a matter of law." *Smith v. Campbell*, 782 F.3d 93, 101 (2d Cir. 2015) (citing *Johnson v. Bax*, 63 F.3d 154, 159 (2d Cir. 1995) ) ("Unlike claims sounding in malicious prosecution ... the favorable termination of a criminal proceeding is not an essential element of an independent First Amendment claim."). In *Smith*, court analogized the temporal posture of a First Amendment retaliatory prosecution claim with unlawful arrest claim, which the Supreme Court's decision in *Wallace* held accrued prior to any conviction. *Id.* (citing *Wallace*, 549 U.S. at 394) ("If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed absent some other bar to suit.").

13 Even if not time barred, because the Court has already found there was no material dispute that there was probable cause to arrest Plaintiff on April 7, 2011, Plaintiff has failed to prove a protected interest. *Fabrikant v. French*, 691 F.3d 193, 215 (2d Cir. 2012) ("[P]robable cause will ... defeat a First Amendment claim that is premised on the allegation that [the] defendants prosecuted a plaintiff out of a retaliatory motive, in an attempt to silence her." (quotation marks and citations omitted) ); *Tardif v. City of New York*, No. 13-CV-4056, 2017 WL 571016, at *11 (S.D.N.Y. Feb. 6, 2017), *adopted in relevant part,* 2017 WL 1079979 (S.D.N.Y. Mar. 22, 2017), *on reconsideration in part,* 2017 WL 3634612 (S.D.N.Y. Aug. 23, 2017) (granting summary judgment because the "finding that probable cause existed to arrest the plaintiff ... defeat[ed] the plaintiff's First Amendment retaliation claims").

14 Because the limitations of N.Y. Crim. Pro. Law § 30.30 are a state statutory standard, "a violation of § 30.30 is not in itself a violation of the Constitution or federal law, an element of a § 1983 claim." *Fobbs v. City of New York*, No. 15-CV-6736, 2017 WL 2656207, at *3 (S.D.N.Y. June 19, 2017), *appeal dismissed sub nom.* 2018 WL 3617815 (2d Cir. May 22, 2018); *see also Jackson v. Marshall*, No. 04-CV-3915, 2008 WL 800745, at *4 (S.D.N.Y. Mar. 25, 2008) (because the limitations of § 30.30 are statutory, not constitutional, "a violation of § 30.30 cannot be the basis of a § 1983 claim"); *Gibriano v. Att'y Gen. of State of New York*, 965 F. Supp. 489, 491–92 (S.D.N.Y. 1997) (noting, in the context of a habeas corpus action, "[§] 30.30 is a statutory time in which the People of New York must be ready for trial; [§] 30.30 is not, as such, a statutory embodiment of the constitutional guarantee to a speedy trial." (internal quotation marks omitted) ).

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United States District Court, E.D. New York.

Eric JENKINS, Plaintiff,
v.
The CITY OF NEW YORK; Captain Deochan; Correction Officer O'Garra; Correction Officer Congilio, Defendant.

18-CV-7024 (LDH)(LB)
|
Signed 11/12/2020

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**MEMORANDUM AND ORDER**

LASHANN DEARCY HALL, United States District Judge:

***1** Plaintiff Eric Jenkins, proceeding pro se, asserts claims against Defendants City of New York, Captain Deochan, Correction Officer O'Garra, and Correction Officer Coniglio pursuant to 42 U.S.C. § 1983 for violations of his Fourth and Eighth Amendment rights guaranteed under the United States Constitution. [1] Defendants move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint in its entirety. In the alternative, Defendants move pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings.

**BACKGROUND** [2]

Plaintiff was arrested on July 17, 2017, and arraigned on July 18, 2017. (Compl. at 4, 17, ECF No. 1.) From the time he was arrested until July 23, 2017, Plaintiff remained in the intake receiving room, and did not receive hot food (alternatively referred to by Plaintiff as a "proper meal"), a shower, or a bed. (*Id.* at 4, 17.)

On September 10, 2017, while detained at Otis Bantum Correctional Center, [3] Plaintiff and multiple other inmates were strip searched inside of a bathroom by the Officer-Defendants. (Compl. at 3, 4.) Plaintiff's search was conducted: (1) in the absence of an immediate threat to the housing area; (2) in front of other inmates; (3) in view of correction officers of the opposite sex; (4) with demeaning comments made about his body; (5) without mats to stand on or any coverings for private body parts; and (6) in violation of the Department of Corrections' ("DOC") search policy. (*Id.*) The strip search caused him a "loss of dignity and self-respect ... [and] emotional stress." (*Id.*)

**STANDARD OF REVIEW**

***2** To withstand a Rule 12(b)(6) motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when the alleged facts allow the court to draw a "reasonable inference" of defendants' liability for the alleged misconduct. *Id.* While this standard requires more than a "sheer possibility" of defendants' liability, *id.*, "[i]t is not the Court's function to weigh the evidence that might be presented at trial" on a motion to dismiss. *Morris v. Northrop Grumman Corp.*, 37 F. Supp. 2d 556, 565 (E.D.N.Y. 1999). Instead, "the Court must merely determine whether the complaint itself is legally sufficient, and, in doing so, it is well settled that the Court must accept the factual allegations of the complaint as true." *Id.* (citations omitted).

Moreover, where, as here, a plaintiff is proceeding pro se, his pleadings "must be construed liberally and interpreted to raise the strongest arguments that they suggest." *Sykes v. Bank of Am.*, 723 F.3d 399, 403 (2d Cir. 2013) (quoting *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006)). A pro se complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Boykin v. KeyCorp*, 521 F.3d 202, 214 (2d Cir. 2008) (quoting *Erickson v. Pardus*, 55 U.S. 89, 94 (2007) (per curiam)). This rule is "particularly so when the pro se plaintiff alleges that [his] civil rights have been violated." *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 191 (2d Cir. 2008) (citing *McEachin v. McGuinnis*, 357 F.3d 197, 200

(2d Cir. 2004)). Still, "even pro se plaintiffs asserting civil right[s] claims cannot withstand a motion to dismiss unless their pleadings contain factual allegations sufficient to raise a 'right to relief above the speculative level.' " *Jackson v. NYS Dep't of Labor*, 709 F. Supp. 2d 218, 224 (S.D.N.Y. 2010) (quoting *Twombly*, 550 U.S. at 555).

## DISCUSSION

### I. Prison Litigation Reform Act

Pursuant to the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(e), "[n]o Federal civil action may be brought by a prisoner ... for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e); *see also Liner v. Goord*, 196 F.3d 132, 134 (2d Cir. 1999) ("[T]he PLRA restricts an inmate's right to file suit in federal court prior to exhausting administrative remedies and, with respect to emotional distress claims, without a prior showing of physical injury."). Plaintiff alleges that his injuries consisted of "loss of dignity and self respect [sic] as well as emotional stress due to comments made during [the] search." (Compl. at 4, 18.) As Plaintiff has alleged exclusively emotional injuries, Plaintiff's complaint is barred by the PLRA. However, even if his complaint were not barred, each of his claims fails on the merits.

### II. Strip Search

#### A. Fourth Amendment

There can be no question that "inmates [ ] retain a limited right to bodily privacy." *Harris v. Miller*, 818 F.3d 49, 57 (2d Cir. 2016). Courts assessing an inmate's claim that officers infringed upon his right to bodily privacy must undertake a two-part inquiry. *First*, the court must determine whether the inmate has exhibited an actual, subjective expectation of bodily privacy. *Id. Second*, the court must determine whether the prison officials had sufficient justification to intrude on the inmate's fourth amendment rights. *Id.* In considering the second question, where, as here, a plaintiff challenges an isolated strip search,[4] courts apply the standard set forth in *Bell v. Wolfish*, 441 U.S. 520 (1979), to determine whether the search was reasonable under the Fourth Amendment. In *Bell*, the Supreme Court held that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." 441 U.S. at 559. Rather, the Court must consider (1) "the scope of the particular intrusion," (2) "the manner in which it is conducted," (3) "the justification for initiating it," and (4) "the place in which it is conducted." *Id.* To survive a motion to dismiss, a plaintiff alleging an unconstitutional search must "plead facts sufficient to give rise to a plausible inference that the search was not reasonably related to legitimate penological interests." *Rebenstorf v. City of New York*, No. 15 CIV. 5784 (BMC), 2015 WL 6438765, at *4 (E.D.N.Y. Oct. 21, 2015) (citing *Simmons v. Cripps*, No. 12 Civ. 1061, 2013 WL 1290268, at *21 (E.D.N.Y. Feb. 15, 2013)). Defendants argue that Plaintiff's allegations regarding the search are insufficient to state a cognizable claim under the Fourth Amendment. (Defs.' Mem. L. Supp. Mot. Dismiss ("Defs.' Mem.") 5-12, ECF No. 54.) The Court agrees.

***3** *First,* strip searches conducted in view of other inmates or officers are not, in and of themselves, unreasonable. *See Rebenstorf*, 2015 WL 6438765, at *2, *4 (dismissing plaintiff's claim for unconstitutional strip search where the Corrections Officers yelled "obscenities and remarks" during the visual body cavity search, which took place in view of other inmates and officers); *Lopez v. Phipps*, No. 18-CV-3605 (MKB), 2019 WL 2504097, at *4-*5 (E.D.N.Y. June 17, 2019) (finding that a search that was conducted in view of three other inmates did not state a viable Fourth Amendment claim); *Miller v. Bailey*, No. 05-CV-5493 (CBA)(LB), 2008 WL 1787692, at *9 (E.D.N.Y. Apr. 17, 2008) (collecting cases for the proposition that "strip searches of prisoners in the presence of other inmates and staff is not constitutionally defective, especially in light of legitimate security concerns"). That female officers were present does not change the Court's conclusion. Where an officer of the opposite sex is involved in a strip search, district courts in this circuit have recognized that these cases involve a "heightened invasion of privacy." *Holland v. City of New York*, 197 F. Supp. 3d 529, 543 (S.D.N.Y. 2016) (collecting cases). However, those courts have distinguished between "regular and close viewing" and "incidental and brief viewing of a naked" inmate, with the latter being found constitutional. *Id.* (internal quotations omitted). Here, there are no allegations that the strip search involved anything more than an incidental or brief viewing of Plaintiff by officers of the opposite sex.

*Second,* allegations that officers made demeaning comment about Plaintiff's body during the search does not render the search unreasonable under law. *See Rebenstorf*, 2015 WL 6438765 at *4 (dismissing plaintiff's claim for unconstitutional strip search where the Corrections Officers yelled "obscenities and remarks" during the visual body cavity search, which took place in view of other inmates and officers). While "indefensible and unprofessional,"

allegations of verbal threats and verbal abuse are not sufficient to transform an otherwise lawful strip search into one proscribed by the Constitution. *Id.* at *4 (quoting *Jermosen v. Coughlin,* 878 F.Supp. 444, 449 (N.D.N.Y. 1995)); *see also Purcell v. Coughlin*, 790 F.2d 263, 265 (2d Cir. 1986) ("The claim that a prison guard called Purcell names also did not allege any appreciable injury and was properly dismissed.").

*Third,* Plaintiff's allegation that he lacked a mat to stand on during the search is likewise insufficient to state a claim. In this regard, Plaintiff's complaint is akin to *Mercedes v. City of New York,* 19-CV-04094(KAM)(LB), 2020 WL 2219186, at *1 (E.D.N.Y. May 6, 2020). In *Mercedes*, the district court found that the plaintiff had not sufficiently pleaded an unreasonable search where the plaintiff alleged, among other things, that he had to stand barefoot in urine and saliva during a strip search. [5] *Id.*

*Fourth,* the allegation that the strip search violated "search policy" does not rise to the level of a Fourth Amendment violation. (Compl. at 4.) To start, Plaintiff does not specify what policy was alleged violated. However, assuming Plaintiff is referring to a violation of a DOC policy or regulation, such a violation does not, in and of itself, constitute a cognizable constitutional claim. *See Rebenstorf*, 2015 WL 6438765, at *4 (finding no Fourth Amendment violation where violation of DOC regulation alleged); *Simmons v. Cripps,* No. 12-CIV-1061, 2013 WL 1290268, at *21 (S.D.N.Y. Feb. 15, 2013) ("As a general matter, violations of state or local prison regulations, do not, in themselves, constitute violations of federal rights."), *report and recommendation adopted*, No. 12-CIV.-1061, 2013 WL 1285417 (S.D.N.Y. Mar. 28, 2013).

*Fifth,* that there was no particularized suspicion of Plaintiff does not render the search unconstitutional. Indeed, "routine and random" searches divorced from any particularized suspicion have long been deemed constitutional. *See Covino v. Patrissi*, 967 F.2d 73, 75, 80 (2d Cir. 1992) (affirming district court's denial of a preliminary injunction seeking to enjoin prison officials from conducting "random visual body-cavity searches," as such searches "are reasonably related to its legitimate penological interests"); *Rebenstorf*, 2015 WL 6438765, at *3 (dismissing plaintiff's visual body cavity search claim for failing to state a claim under the Fourth Amendment because plaintiff failed to make any allegations that the search, which took place in front of other inmates and officers, was any different from "a routine, random strip search of inmates"); *Walker v. Ponte*, No. 14 CIV. 8507 (ER), 2016 WL 4411415, at *4 (S.D.N.Y. Aug. 18, 2016) (collecting cases for the proposition that "random strip searches may be conducted [ ] in detainees' housing units").

***4** Against this backdrop, the Court has considered each of the allegations related to the search and considered the scope, manner, justification, and place of the strip search at issue, as required by *Bell*. The scope of the search was a strip search, rather than a visual or manual body cavity search. While the search was conducted in view of other inmates and female correction officers, it was conducted in the bathroom rather than some place more public. Furthermore, there is a legitimate penological interests in conducting a random and routine strip search of a housing unit. [6] Accordingly, Plaintiff's Fourth Amendment claim is dismissed.

**B. Eighth Amendment** [7]

"The unnecessary and wanton infliction of pain on a prisoner constitutes cruel and unusual punishment in violation of the Eighth Amendment." *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997) (internal quotations omitted). Prison officials violate the Eighth Amendment when: (1) the alleged punishment is "objectively, sufficiently serious," and (2) the alleged perpetrator possesses a "sufficiently culpable state of mind." *Farmer v. Brennan,* 511 U.S. 825, 834 (1994) (internal quotations omitted). The Court construes Plaintiff's Eighth Amendment claim as a complaint that the strip search constituted sexual abuse. Certainly, "a single incident of sexual abuse, if sufficiently severe or serious, may violate an inmate's Eighth Amendment rights." *Crawford v. Cuomo*, 796 F.3d 252, 257 (2d Cir. 2015). Nonetheless, Defendants argue that, as alleged, Plaintiff has not stated a cognizable Eighth Amendment claim. (Def.'s Mem. 10.) The Court agrees.

Generally, a single strip search, without more, "reflect[s] a legitimate penological purpose, rather than the wanton infliction of an objectively serious deprivation." *Vaughn v. Strickland*, No. 12 CIV. 2696 (JPO), 2013 WL 3481413, at *3 (S.D.N.Y. July 11, 2013) (collecting cases). For example, in *Cole v. Suffolk Cty. Corr. Facility*, the inmate alleged that a prison official groped his penis and scrotum while frisking him. 2020 WL 2113205, at *4. There, the court found that this contact was "too similar to the type of incidental contact accompanying a run-of-the-mill pat down to reasonably infer any inappropriate touching or malicious intention." *Id.* A similar analysis is applicable here. Plaintiff has not alleged any inappropriate touching or malicious intention that would rise to the level of an Eighth Amendment violation.

Accordingly, Plaintiff's Eighth Amendment claim related to his strip search is dismissed. [8]

**III. Lack Of Hot Food, Shower, And Bed From July 17, 2017 To July 23, 2017**

***5** "It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Farid v. Ellen*, 593 F.3d 233, 249 (2d Cir. 2010). In Plaintiff's complaint, filed on December 3, 2018, he failed to identify any officer allegedly responsible for his denial of hot food, a shower, and a bed while he was in the intake room between July 17, 2017 and July 23, 2017 (the "July 17 to July 23 allegations"). (Compl. 4, 17) This need not be fatal. In *Valentin v. Dinkins*, the Second Circuit ruled that a pro se litigant is entitled to assistance from the district court in identifying a defendant. 121 F.3d at 76. However, the Second Circuit made clear that its ruling in *Valentin* was "not intended to preclude a finding by the district court, after further inquiry, that the information available is insufficient to identify the defendant with enough specificity to permit service of process, so that dismissal of the complaint is warranted." *Id.*

Here, Magistrate Judge Bloom issued a Valentin order against Defendant City of New York (the "City") in an effort to assist Plaintiff in identifying any DOC personnel who might be responsible for the July 17 to July 23 allegations. [9] (ECF No. 10.) The order required the City to locate Plaintiff's movement records during this time period. (*Id.*) After reviewing Plaintiff's movement records, the City determined that Plaintiff was only in intake for a period of approximately 28 hours—from 1:10 a.m. on July 19, 2017 through 5:35 a.m. on July 20, 2017—rather than the five days alleged in his complaint. (ECF No. 15.) In that 28-hour time period, the City determined that nearly 60 people had contact with Plaintiff. (ECF No. 26.) Plaintiff never provided counsel for the City with any identifying details which could assist in narrowing the individual(s) allegedly responsible for his deprivations. (ECF No. 26.) Counsel from the City met with three captains that were scheduled to supervise intake at OBCC during the time period Plaintiff was in intake, but none of these individuals recalled Plaintiff or the allegations. (*Id.*) Ultimately, Magistrate Judge Bloom determined that a 60-person list of potential Defendants was insufficient to identify the potential tortfeasor with enough specificity to permit service, as it would be unreasonable to name and serve 60 people as defendants in this matter. (ECF No. 27.) To-date, Plaintiff has not otherwise identified the alleged wrongdoers. On this basis alone, Plaintiff's claims related to the lack of food, shower and a bed are ripe for dismissal. [10]

**IV. Municipal Liability**

***6** Plaintiff failed to state a claim for violations of his constitutional rights with respect to the strip search, and accordingly, he cannot sustain a claim against the City pursuant to *Monell v. Department of Social Services,* 436 U.S. 658 (1978). *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (observing that *Monell* liability does not lie where a municipality's officer does not inflict constitutional harm); *Johnson v. City of New York*, 551 F. App'x 14, 15 (2d Cir. 2014) (summary order) (affirming district court's dismissal of *Monell* claim where plaintiff did not allege a valid underlying constitutional deprivation against the City). As to the July 17 to July 23 allegations, he has failed to allege that any deprivations he experienced were the result of a policy, custom, or practice by the City, as required by *Monell*. *See Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983) (recounting that to state a *Monell* claim against a municipality, a plaintiff must plead "(1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right").

* * *

Having dismissed all of Plaintiff's federal claims, and as the parties here are not diverse of citizenship, the Court declines to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3) over Plaintiff's other claims to the extent they arise under the state constitution or common law. *See Brzak v. United Nations*, 597 F.3d 107, 113–14 (2d Cir. 2010) ("[W]e have said that if a plaintiff's federal claims are dismissed before trial, the state claims should be dismissed as well." (internal quotations omitted)); *see also First Capital Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 182 (2d Cir. 2004) ("The exercise of supplemental jurisdiction is left to the discretion of the district court[.]"). These claims are therefore dismissed without prejudice for lack of subject-matter jurisdiction.

**CONCLUSION**

For the foregoing reasons, Defendants' 12(b)(6) motion is GRANTED, and the complaint is dismissed in its entirety.

Accordingly, the Court need not reach Defendants' 12(c) motion.

In light of his pro se status, Plaintiff is granted leave to file an amended complaint within 30 days from the entry of this memorandum and order. *Cruz v. Gomez*, 202 F.3d 593 (2d Cir. 2000). The amended complaint must be captioned "Amended Complaint" and bear the same docket number as this memorandum and order. Failure to file an amended complaint within 30 days, as directed by this memorandum and order, will result in dismissal of Plaintiff's case for failure to prosecute.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith and therefore *in forma pauperis* status is denied for the purpose of any appeal. *Coppedge v. United States*, 369 U.S. 438, 444–45 (1962).

SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2020 WL 6700087

## Footnotes

1 Neither the City of New York, nor the three officers named as Defendants were initially named in Plaintiff's complaint. (*See* Compl. at 1, ECF No. 1.) On December 17, 2018, Magistrate Judge Bloom ordered that the City replace the Department of Corrections as a substitute defendant, and issued an order pursuant to *Valentin v. Dinkins*, 121 F. 3d 72 (2d Cir. 1997) ("*Valentin* order"), for the City to assist Plaintiff in identifying the individual officers involved in his September 10, 2019 strip search. (ECF No. 5.) On June 17, 2019, the City identified the three officers present during the strip search; and, on June 20, 2019, amended summonses were issued identifying the Defendant-officers by name. (ECF Nos. 26, 28.) Lastly, as discussed in greater depth below, on June 18, 2019, Magistrate Judge Bloom granted the City's request to be relieved of any further obligation pursuant to the *Valentin* order to identify the officers who were responsible for the denial of food, a shower, and a bed from July 17, 2017 to July 23, 2017 as alleged by Plaintiff. (ECF No. 27.)

2 The following facts are taken from the complaint and the documents attached to the complaint, which are deemed incorporated into the complaint by reference, and are assumed to be true for the purpose of evaluating this instant motion. *See Beauvoir v. Israel*, 794 F.3d 244, 248 n.4 (2d Cir. 2015) ("It is well established that documents that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered." (internal quotations and modification omitted)).

3 Plaintiff refers to the location of this incident as OBCC, which is an acronym for Otis Bantum Correctional Center. (*See* Compl. at 8.); *see also* The New York City Department of Correction, Facilities Overview, *available at* https://www1.nyc.gov/site/doc/about/facilities.page (last visited Nov. 2, 2020).

4 A strip search is an "inspection of a naked individual, without any scrutiny of the subject body's cavities." *Harris*, 818 F.3d at 58. A strip search is distinguishable from a "visual body cavity search," which extends to visual inspection of the anal and genital areas, or a "manual body cavity search," which includes some degree of touching or probing of body cavities. *Id.*

5 *Mercedes* was analogous in several other respects. There, female officers watched while the search was conducted, multiple officers were laughing during the search, and there was no probable cause to search plaintiff as all inmates in an entire housing unit were subjected to strip searches. 2020 WL 2219186, at *1.

6 Were the Court to construe Plaintiff's complaint as alleging an unlawful strip search policy, the Court would find that Plaintiff has not alleged facts to even plausibly allege that the search policy was unrelated legitimate penological interests. *See Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 326

(2012) ("[A] regulation impinging on an inmate's constitutional rights must be upheld 'if it is reasonably related to legitimate penological interests.' " (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987))).

7 From Plaintiff's filings, it appears that the strip search occurred after an arrest, and not after a conviction. (*See* Pl.'s Opp. Defs.' Mot. Dismiss ("Pl.'s Opp.") 1, ECF No. 55. ("A person rights are not taken away for merely being arrested[.]"); *see also* Compl. at 4, 17 (alleging that Plaintiff was arrested on July 17, 2017 and arraigned July 18, 2017).) Generally, Eighth Amendment protection against cruel and unusual punishment applies only after conviction. *See Whitley v. Albers*, 475 U.S. 312, 318 (1986) ("The Clause applies only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." (internal quotations omitted)). However, courts in the Second Circuit " 'apply the established Eighth Amendment framework for claims of sexual abuse by prison officials' to pretrial detainees." *Cole v. Suffolk Cty. Corr. Facility*, No. 20-CV-1883, 2020 WL 2113205, at *3 (E.D.N.Y. May 4, 2020) (quoting *Harry v. Suarez*, No. 10-cv-6756, 2012 WL 2053533, at *2 n.3 (S.D.N.Y. June 4, 2012) (collecting cases)).

8 In his opposition, Plaintiff states—for the first time—the same strip search is also violative of the First Amendment as it violates his religion. (Pl.'s Opp 1) Plaintiff does not specify what religion he follows or allege any additional facts with respect to any First Amendment claim. In any event, his First Amendment claim fails. "Reasonable strip searches of prisoners, regardless of their religion, are generally acceptable under the First Amendment because they further the compelling governmental interest of penological safety." *Jean-Laurent v. Wilkerson*, 438 F. Supp. 2d 318, 324 (S.D.N.Y. 2006), *aff'd*, 461 F. App'x 18 (2d Cir. 2012). The Court has already found that the search, as pleaded, constituted a routine and random search and was thus justified by legitimate penological interests. And courts in this circuit that have examined whether "standard strip searches" of Muslim inmates—"whose religion might forbid them from being seen naked by other individuals"—violate the First Amendment have found that such searches are not unconstitutional. *Cook v. City of New York*, No. 1:19-CV-3858 (PKC) (JO), 2019 WL 3388909, at *2 (E.D.N.Y. July 26, 2019) (quoting *Pizarro v. Bd. of Corr.*, No. 16-CV-2418 (RJS), 2018 WL 3462512, at *5 (S.D.N.Y. July 17, 2018) (collecting cases)). Accordingly, any First Amendment claim is also dismissed.

9 In opposition to the motion to dismiss, Plaintiff requests a court order to assist him in gaining access to video footage from July which will show that he was held for 5 days without shower or a hot meal, and may presumably show who was interacting with Plaintiff during this time. (Pl's Opp. 4.) Defendants have already represented to Plaintiff and the Court that no such surveillance video exists and accordingly, this request is denied. (ECF No. 26.)

10 Even if Plaintiff were to identify these individuals, his claims would still fail on the merits. The denial of hot food for 28 hours does not constitute a constitutional violation. *See Brooks v. NYC DOC Comm'r,* No. 14-CV-6283 (RRM) (CLP), 2016 WL 4530456, at *4 (E.D.N.Y. Aug. 29, 2016) (collecting cases for the proposition that pretrial detainees' lack of access to hot food for up to two weeks is insufficient to state claim). Nor does a claim regarding unconstitutional conditions of confinement lie based on lack of showers for 28 hours. *See id.* at *5 (collecting cases for the proposition that lack of access to showers for up to thirteen days is insufficient to state claim for deprivation of rights). Lastly, the lack of a bed or mattress for 28 hours is not sufficient to state a cognizable constitutional claim. *See, e.g., Myers v. City of New York,* No. 11 CIV. 8525 (PAE), 2012 WL 3776707, at *6-7 (S.D.N.Y. Aug. 29, 2012) (collecting cases for the proposition that courts have found that a detainee who has been forced to sleep on the floor or on a "filthy" surface for "multiple days" does not have a cognizable claim for a constitutional violation).

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United States District Court, D. Connecticut.

Orlando VELEZ-SHADE, Jr., Plaintiff,
v.
POPULATION MANAGEMENT, et al., Defendants.

CIVIL CASE NO. 3:18cv1784(JCH)
|
Signed 09/25/2019

**Attorneys and Law Firms**

Orlando Velez-Shade, Jr., Suffield, CT, pro se.

**INITIAL REVIEW ORDER**

Janet C. Hall, United States District Judge

***1** The plaintiff, Orlando Velez-Shade, Jr. ("Velez-Shade"), is currently incarcerated at MacDougall-Walker Correctional Institution ("MacDougall-Walker"). He initiated this action by filing a civil rights complaint against Population Management, Director of Security Antonio Santiago, Security Risk Group ("SRG") Coordinator John Aldi, District Administrator Quiros, Warden Rodrigues, Captain Lizon, Lieutenant Alexander, Hearing Officer Prior, Correctional Officers Betances, Clark, Richards and Rodriguez and Mailroom Officer DeJesus.

Velez-Shade subsequently sought leave to amend his Complaint to add new allegations against Director Santiago. On February 5, 2019, the court granted Velez-Shade thirty days to file an amended complaint. Velez-Shade chose not to file an amended complaint within the time specified. For the reasons set forth below, the Complaint is dismissed in part.

## I. STANDARD OF REVIEW

Pursuant to section 1915A(b) of title 28 of the United States Code, the court must review prisoner civil complaints against governmental actors and dismiss any portion of a complaint that is "frivolous, malicious, or fails to state a claim upon which relief may be granted," or that "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b). This standard of review "appl[ies] to all civil complaints brought by prisoners against governmental officials or entities regardless of whether the prisoner has paid [a] filing fee." Shakur v. Selsky, 391 F.3d 106, 112 (2d Cir. 2004) (internal quotation marks and citation omitted).

Rule 8 of the Federal Rules of Civil Procedure requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although detailed allegations are not required, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted). A complaint that includes only " 'labels and conclusions,' 'a formulaic recitation of the elements of a cause of action' or 'naked assertion[s]' devoid of 'further factual enhancement,' " does not meet the facial plausibility standard. Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007)). Although courts still have an obligation to interpret "a pro se complaint liberally," a complaint must still include sufficient factual allegations to meet the standard of facial plausibility. See Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009) (citations omitted).

## II. FACTS

On June 16, 2018, Velez-Shade was housed in Building 4 at Carl Robinson Correctional Institution. See Complaint ("Compl.") (Doc. No. 1) at 6 ¶ 1. [1] As Velez-Shade walked to the dining hall, he became involved in a physical altercation with two other inmates. See id. at 13. Correctional Officer Richards was present during the altercation but waited almost two minutes to intervene. See id. at 6 ¶ 3. Other correctional officers arrived at the scene, detained Velez-Shade, and escorted him to the restrictive housing unit ("RHU"). See id. at 7 ¶ 4. Velez-Shade remained in the RHU until June 22, 2018. Id. at 7 ¶ 5. On that date, Velez-Shade completed serving his sanction of seven days of confinement in punitive segregation and received other sanctions. See id. at 7 ¶ 5.

***2** Before Velez-Shade was released from the RHU, Lieutenant Alexander issued him a disciplinary report for security risk group affiliation. See id. at 7 ¶ 6. The disciplinary report accused Velez-Shade of having been involved in a four-on-one altercation and included an unsupported allegation that the Department of Correction had "tracked [Velez-Shade] for an extended period of time ... as an active Crip member."

See id. at 13. Correctional Officers Clark and Betances investigated the disciplinary report. See id. at 7 ¶ 8.

On June 26, 2018, Velez-Shade appeared at a hearing with his advocate, Correctional Officer Rodriguez. See id. at 7 ¶ 9. Correctional Officers Clark and Betances were present at the hearing, and Officer Clark presented information pertaining to the investigation of the disciplinary charge. See id. at 7-8 ¶¶ 10-11. Lieutenant Prior refused to permit Velez-Shade to present his views either orally or in writing and would not let Velez-Shade review the source of information statement that was the basis of the issuance of the disciplinary report. See id. at 8 ¶¶ 12, 15-16. Lieutenant Prior stated that Velez-Shade was acting as a gang member because he had participated in the altercation with other inmates on June 16, 2018. See id. at 8 ¶ 17. Lieutenant Prior found Velez-Shade guilty of being affiliated with a security risk group and designated him as a security risk group member. See id. at 9 ¶ 21.

From June 16, 2018, to June 29, 2018, Velez-Shade was confined in the restrictive housing unit at Carl Robinson. See id. at 9 ¶ 23. He was not permitted to participate in outside recreation and his cell was illuminated by a bright light every day and night. See id. at 9 ¶¶ 23-25. He was unable to get enough sleep which caused him to experience "crucial symptoms of [his] P.T.S.D. as well as his bipolar one." See id. at 9 ¶ 25. He lost weight and muscle mass during his confinement in the restrictive housing unit because he could not exercise regularly. See id. at 9 ¶ 26.

On June 29, 2018, prison officials transferred Velez-Shade to Northern Correctional Institution ("Northern") to be placed in the security risk group program. See id. at 9 ¶ 27. Mental health officials did not clear Velez-Shade for placement at Northern, and the Security Risk Group Review Committee did not review him for phase placement prior to his transfer. See id. at 9-10 ¶ 27-29.

On July 1, 2018, Velez-Shade appealed Lieutenant Prior's finding of guilt as to charge of security risk group affiliation. See id. at 10 ¶ 32. On August 1, 2018, District Administrator Quiros denied the appeal and found no reason to modify the decision of the hearing officer. See id. at 10 ¶ 35.

On August 3, 2018, Director of Security Santiago informed Velez-Shade that there were no documents responsive to his Freedom of Information Act request pertaining to the decision to designate him as an affiliated security risk group member. See id. at 10 ¶ 38. On October 5, 2018, Director Santiago informed Velez-Shade that he would remain in the security risk group program. See id.

On August 8, 2018, Velez-Shade sent a letter to his aunt indicating that his due process rights had been violated and requested that she get him legal assistance. See id. at 11 ¶ 39. Officials at Northern censored Velez-Shade's outgoing mail without notification. See id. at 11 ¶ 40.

During his confinement at Northern, prison officials strip-searched Velez-Shade every time he left his cell and required him to wear handcuffs behind his back during recreation. See id. at 11 ¶ 1. Velez-Shade could not exercise in restraints and the restraints caused pain in his shoulders. See id. at 11 ¶¶ 2-3. Captain Lizon and Warden Rodrigues required Velez-Shade to exercise outdoors during inclement weather. See id. at 16. Velez-Shade was bitten by insects during recreation because he could not swat them away. See id. at 11 ¶ 6. When it was raining, Velez-Shade became soaking wet and caught a cold. See id. at 12 ¶ 7.

***3** Prison officials required Velez-Shade to wear handcuffs, leg irons, and a belly chain connecting the handcuffs and leg irons when he made telephone calls to his family members. See id. at 12 ¶ 9. The restraints forced him to crouch down in an uncomfortable and painful position during his thirty-minute telephone calls. See id. at 12 ¶¶ 10-12.

Between October 8 and 10, 2018, Velez-Shade was confined in a cell with a toilet that was backed up with urine and fecal matter from the cell next door. See id. at 12 ¶ 13. Captain Lizon and Warden Rodrigues required him to remain in the cell for forty hours before moving him to a new cell. See id. at 12 ¶¶ 13–14; id. at 16-17.

## III. DISCUSSION

Velez-Shade claims that the defendants violated his rights under the First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and his rights under Article First, sections '4, 5, 8, 9, and 20 of the Connecticut Constitution. He sues the defendants in both their individual and official capacities.

A. Population Management and SRG Coordinator Aldi

Velez-Shade has named "Population Management" and SRG Director Aldi as defendants, but asserts no factual allegations against either defendant. The State of Connecticut Department of Correction website describes "Offender

Classification and Population Management" as a "unit" that "coordinates overall offender classification efforts and is responsible for the assignment of offender movement throughout the entire infrastructure of the Department." See Connecticut State Department of Correction, Offender Classification and Population Management, available at https://portal.ct.gov/DOC/Org/Offender-Classification-and-Population-Management. Velez-Shade does not otherwise refer to the Offender Classification and Population Management unit other than in the caption and description of parties. Thus, he has not alleged that the Offender Classification and Population Management unit has violated his federally or constitutionally protected rights. Furthermore, a unit within the Department of Correction is not a person subject to liability under section 1983. See Torres v. UConn Health, No. 3:17-CV-00325 (SRU), 2017 WL 3737945, at *1 (D. Conn. Aug. 29, 2017) (dismissing claims against the Department of Correction Correctional Transportation Unit because such entities are not "persons" within the meaning of section 1983). All claims against Population Management are dismissed. See 28 U.S.C. § 1915A(b)(1).

Velez-Shade does not mention SRG Coordinator Aldi in the body of the Complaint. In the section of the Complaint describing his legal claims, Velez-Shade contends that "Aldi and Santiago used readymade langue and violated my rights by failing to correct the misconduct and encouraging the continuation of the misconduct of all defendants." Compl. at 16. Velez-Shade does not allege that he wrote to or otherwise contacted Aldi or that Aldi wrote to or spoke to him in connection with his placement in the security risk group program. Thus, although he contends that Aldi violated his due process rights in connection with his placement in the program, there are no facts alleged to support this contention. Accordingly, the claim against SRG Director Aldi is dismissed. See 28 U.S.C. § 1915A(b)(1).

B. Official Capacity Claims – Remaining Defendants

***4** Velez-Shade seeks compensatory and punitive damages and a declaration that the defendants violated his federal constitutional rights. The Eleventh Amendment to the United States Constitution bars claims for monetary damages against a state actor acting in his official capacity, unless there is a waiver of this immunity by statute or the state consents to suit. See Kentucky v. Graham, 473 U.S. 159, 169 (1985).

There are no allegations that the State of Connecticut has consented to be sued for claims brought against the defendants under section 1983. Furthermore, section 1983 was not intended to override a state's sovereign immunity. See Quern v. Jordan, 440 U.S. 332, 342 (1979) (holding that section 1983 does not override a state's Eleventh Amendment immunity). Thus, to the extent that Velez-Shade seeks punitive and compensatory damages from the defendants in their official capacities, such a request for relief is barred by the Eleventh Amendment. Accordingly, the claims for monetary damages against the defendants in their official capacities are dismissed. See 28 U.S.C. § 1915A(b)(2).

Velez-Shade seeks a declaration that the defendants violated his federal rights. Declaratory relief serves to "settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships." Colabella v. American Institute of Certified Public Accountants, No. 10-cv-2291(KAM)(ALC), 2011 WL 4532132, at *22 (E.D.N.Y. Sept. 28, 2011) (citing Beacon Const. Co., Inc. v. Matco Elec. Co., Inc., 521 F.2d 392, 397 (2d Cir. 1975)). Declaratory relief operates in a prospective manner to allow parties to resolve claims before either side suffers great harm. See In re Combustion Equip. Assoc. Inc., 838 F.2d 35, 37 (2d Cir. 1988).

A party may seek prospective injunctive and declaratory relief against state officials acting in violation of federal law. See Ex Parte Young, 209 U.S. 123, 155-56 (1908). The Eleventh Amendment, however, precludes requests for declaratory or injunctive relief for past violations of federal law. See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (holding that Eleventh Amendment "does not permit judgments against state officers declaring that they violated federal law in the past"); Green v. Mansour, 474 U.S. 64, 68 (1985) ("We have refused to extend the reasoning of Young, however, to claims for retrospective relief.") (citations omitted).

The allegations in the Complaint relate to the plaintiff's confinement at Carl Robinson from June 16, 2018 to June 29, 2018, and Northern from June 29, 2018 to October 10, 2018. Velez-Shade was incarcerated at MacDougall-Walker when he filed this action and remains at MacDougall-Walker. A request for a declaration that the defendants violated Velez-Shade's federal constitutional rights prior to October 11, 2018 cannot be properly characterized as "prospective" because Velez-Shade does not allege how such relief would remedy a future constitutional violation by the defendants. Thus, the request seeking declaratory relief for past constitutional violations is barred by the Eleventh Amendment. See Green,

474 U.S. at 71-73 (holding that Eleventh Amendment bars retrospective declaratory judgment that state actors violated federal law absent allegation of ongoing violation). The request seeking declaratory relief against the remaining defendants is dismissed. See 28 U.S.C. § 1915A(b)(1).

C. First Amendment – Mail Interference

***5** Velez-Shade alleges that, on one occasion in August 2018, he attempted to send a letter to his aunt describing how his "due process was violated" and also asking his aunt to secure legal assistance for him. Compl. at 11 ¶ 39. He claims that Mailroom Officer DeJesus censored his correspondence to his aunt. See id. at 11 ¶ 40. Velez-Shade did not receive a rejection notice or an explanation for the decision to censor the letter. See id.

The First Amendment protects an inmate's right of access to the courts and access to the free flow of incoming and outgoing mail. See Davis v. Goord, 320 F.3d 346, 351 (2d Cir. 2003) (citing Heimerle v. Attorney General, 753 F.2d 10, 12-13 (2d Cir. 1985)). Prison officials may regulate the right to receive and send non-legal mail if the restrictions they employ are "reasonably related to legitimate penological interests." Thornburgh v. Abbott, 490 U.S. 401, 409 (1989) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)). To state a First Amendment claim related to interference with incoming or outgoing non-legal mail, a prisoner must allege that officials engaged in "a pattern or practice of interference" without a "legitimate penological" justification. Thomas v. Washburn, No. 13-CV-303V(F), 2016 WL 6791125, at *2-3 (W.D.N.Y. Sept. 7, 2016) ("[T]hree interferences with Plaintiff's out-going mail as alleged by Plaintiff fails to establish an actionable pattern or practice sufficient to state a claim for a First Amendment mail violation."), report and recommendation adopted, No. 13-CV-303V(F), 2016 WL 6778794 (W.D.N.Y. Nov. 16, 2016).

There are no factual allegations to plausibly suggest that the censorship of the letter addressed to Velez-Shade's aunt was part of a pattern or practice of interference with mail. Rather, the interference with mail occurred on one day. Nor has Velez-Shade alleged that he suffered any injury due to the fact that his letter did not reach his aunt. He does not allege that he was unable to pursue a legal action or have access the courts. Nor does he allege that he could not reach his aunt by telephone. Approximately two months after attempting to send a letter to his aunt regarding alleged due process violations by prison officials, Velez-Shade filed this action. Accordingly, the First Amendment claim that Mailroom Officer DeJesus interfered with Velez-Shade's outgoing mail on one occasion fails to state a claim upon which relief may be granted and is dismissed. See 28 U.S.C. § 1915A(b)(1).

D. Eighth Amendment

Velez-Shade alleges that Officer Richards failed to protect him from harm and that Lieutenant Alexander, Captain Lizon, and Warden Rodrigues subjected him to restrictive or unconstitutional conditions of confinement. The court construes these claims as arising under the Eighth Amendment.

In the context of a prisoner's conditions of confinement, those conditions that are "restrictive or even harsh," but which "cannot be said to be cruel and unusual under contemporary standards" do not violate the Eighth Amendment because "they are part of the penalty that criminal offenders pay for their offenses against society." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Although the Constitution does not require "comfortable" prison conditions, it does not permit prison officials to maintain conditions which inflict "unnecessary and wanton pain" or which result in the "serious deprivation of basic human needs ... or the minimal civilized measure of life's necessities." Id. In addition, the Eighth Amendment requires prison officials to "take reasonable measures to guarantee the safety of inmates in their custody" and to protect prisoners from violence at the hands of other prisoners." Farmer v. Brennan, 511 U.S. 825, 832-33 (1994) (internal quotation marks and citations omitted).

***6** To state a claim of failure to protect or deliberate indifference to health or safety due to unconstitutional conditions of confinement, an inmate must demonstrate both an objective and a subjective element. To meet the objective element, the inmate must allege that he was incarcerated under a condition or a combination of conditions that resulted in a "sufficiently serious" deprivation of a life necessity or a "human need[ ]" or posed "a substantial risk of serious harm" to his health or safety. Farmer, 511 U.S. at 834; Rhodes, 452 U.S. at 347. The Supreme Court has identified the following basic human needs or life necessities of an inmate: food, clothing, shelter, medical care, warmth, safety, sanitary living conditions, and exercise. See Wilson v. Seiter, 501 U.S. 294, 304 (1991); DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989); Rhodes, 452 U.S. at 348. In Wilson, the Supreme Court observed that "some conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the

deprivation of a single, identifiable human need....” Wilson, 501 U.S. at 304 (emphasis and citations omitted).

To meet the subjective element, an inmate must plausibly allege that the defendants possessed culpable intent; that is, the officials knew that he faced a substantial risk to his health or safety and disregarded that risk by failing to take corrective action. See Farmer, 511 U.S. at 834, 837. Thus, an allegation of “mere negligen[t]” conduct is insufficient. Id. at 835. Rather, the subjective element requires that the inmate allege that defendants acted with “a mental state equivalent to subjective recklessness, as the term is used in criminal law.” Salahuddin v. Goord, 467 F.3d 263, 280 (2d Cir. 2006).

1. Failure to Protect

Velez-Shade claims that Officer Richards observed him fighting with two other inmates, but Officer Richards waited almost two minutes to try to stop the fight. The court concludes that Velez-Shade has alleged that he faced a substantial risk of serious injury because Officer Richards did not intervene immediately to stop the altercation. Thus, he has met the objective prong of the Eighth Amendment failure to protect standard.

With regard to the subjective prong, Velez-Shade has not plausibly alleged Officer Richards' decision to wait less than two minutes to act or intervene constituted deliberate indifference to his health or safety. The facts suggest that Officer Richards was alone when the altercation broke out involving Velez-Shade and two other inmates. See Compl. at 13. Velez-Shade has not alleged that Officer Richards could have safely intervened by himself to stop the altercation that involved three inmates. Thus, Velez-Shade has not plausibly alleged that Officer Richards was deliberately indifferent to Velez-Shade's safety by declining to immediately intervene in the altercation and waiting less than two minutes to take action. Compare Stubbs v. Dudley, 849 F.2d 83, 86–87 (2d Cir. 1988) (concluding that deliberate indifference is shown when an officer fails to act when there is no risk to himself or to the security of the prison), with Lawrence v. Rodak, No. 11-CV-6115-FPG, 2014 WL 4829418, at *3 (W.D.N.Y. Sept. 29, 2014) (“Rodak's delay in intervening until other officers arrived was not a failure to act.”); Blaylock v. Borden, 547 F.Supp.2d 305, 312 (S.D.N.Y. 2008) (awaiting assistance was reasonable when the officer was alone with two inmates); Williams v. Russo, 01–CV–6401, 2009 WL 185758 at *2 (W.D.N.Y. Jan. 26, 2009) (finding that it was unsafe for two officers to enter a room with six inmates to break up a fight between two of them). The court concludes that Velez-Shade has not stated a plausible Eighth Amendment failure to protect claim against Officer Richards and the claim is dismissed. See 28 U.S.C. § 1915A(b)(1).

2. Conditions of Confinement at Carl Robinson

Velez-Shade alleges that from June 16, 2018 to June 29, 2018, during his confinement in the restrictive housing unit at Carl Robinson, Lieutenant Alexander failed to permit him to participate in either outdoor or indoor recreation. In addition, every day and night, she permitted a bright light to illuminate his cell.

a. Recreation

***7** Velez-Shade alleges that he was unable to participate in outdoor or indoor recreation for thirteen days. He contends that he lost weight and muscle mass during the thirteen-day period because he was not exercising regularly.

It is well-established that exercise constitutes a basic human need that is protected under the Eighth Amendment. See Wilson, 501 U.S. at 304–05; Dumpson v. McGinnis, 348 F. App'x. 658, 659 (2d Cir. 2009); Williams v. Greifinger, 97 F.3d 699, 704 (2d Cir. 1996). The restriction on Velez-Shade's participation in recreation at Carl Robinson was only temporary and did not significantly affect his health. Furthermore, Velez-Shade does not allege that he could not perform exercises in his cell. Although a denial of all opportunities to exercise for an extended period of time might constitute a serious deprivation of a basic human need under the objective prong of the Eighth Amendment, courts have routinely held that a denial of the opportunity to exercise for a short period of time does not constitute a sufficiently serious deprivation. See, e.g., Branham v. Meachum, 77 F.3d 626, 630–31 (2d Cir. 1996) (holding that keeping plaintiff on full restraint status without outdoor recreation for 22 days does not state an Eighth Amendment claim); Torrez v. Semple, No. 3:17-CV-1232 (SRU), 2018 WL 2303018, at *6 (D. Conn. May 21, 2018) (denial of recreation for 10 days did not “state[ ] plausible Eighth Amendment claim”); Houston v. Goord, No. 9:03cv1412 (GTS/DEP), 2009 WL 890658, at *4 (N.D.N.Y. Mar. 31, 2009) (holding plaintiff's Eighth Amendment claim not cognizable because the denial of outdoor activity for less than two weeks was

de minimis); Shakur v. Sieminski, 3:07cv1239 (CFD), 2007 WL 2151174, at *5 (D. Conn. July 15, 2007) (stating that "[a]lthough the Second Circuit has approved one hour of outdoor recreation per day, it has not held that amount to be the constitutional minimum") (internal citations omitted); Davidson v. Coughlin, 968 F.Supp.121, 131 (S.D.N.Y. 1997) (holding that deprivation of exercise for 14 days did not violate the Eighth Amendment).

Because Velez-Shade has alleged that Lieutenant Alexander denied him the opportunity to participate in recreation for only thirteen days during his confinement at Carl Robinson, the court concludes that he has not stated a plausible claim of a serious deprivation of a basic human need. The denial of recreation claim against Lieutenant Alexander is dismissed. See 28 U.S.C. § 1915A(b)(1).

b. Illumination of Cell

Velez-Shade alleges that he lost countless hours of sleep because there was a bright light shining on him every day and night during his confinement in his cell in the restrictive housing unit at Carl Robinson. The lack of sleep caused him to experience "crucial symptoms of [his] P.T.S.D. as well as his bipolar one." Compl. at 9 ¶ 25.

The Second Circuit has observed that "sleep is critical to human existence, and conditions that prevent sleep have been held to violate the Eighth Amendment." Walker v. Schult, 717 F.3d 119, 126 (2d Cir. 2013) (collecting cases). Thus, "[r]equiring inmates to live in constant illumination can ... under certain circumstances, rise to the level of an Eighth Amendment violation." Jones v. Rock, No. 9:12–CV–447 (NAM/TWD), 2013 WL 4804500, *10 (N.D.N.Y. Sept. 6, 2013).

***8** Velez-Shade has plausibly alleged that the constant illumination of his cell in the restrictive housing unit for thirteen days caused him to lose sleep, a basic human need. Furthermore, the loss of sleep exacerbated his mental health conditions. Velez-Shade claims that Lieutenant Alexander either imposed the condition or permitted officers in the unit to deny Velez-Shade's requests to turn the light off. Thus, Velez has stated a plausible claim of deliberate indifference to his health against Lieutenant Alexander. See Abreu v. Farley, No. 6:11-CV-06251 EAW, 2019 WL 1230778, at *20 (W.D.N.Y. Mar. 15, 2019) (declining to grant summary judgment to defendants where plaintiff provided evidence that he "suffered periods of 24-hour illumination of his prison cell, which resulted in headaches, eye problems, depression, and the inability to sleep for close to two weeks").

3. Conditions of Confinement at Northern

Velez-Shade alleges that, during his confinement at Northern from June 29, 2018, until October 10, 2018, Warden Rodrigues and Captain Lizon required him to: (1) be strip-searched every time that he left his cell; (2) go outside to recreate in any kind of weather; (3) be handcuffed behind his back when exercising in the recreation yard; and (4) be handcuffed in the front, placed in leg shackles, and wear a tether chain when speaking to his family on the telephone. In addition, on one occasion in October 2018, Warden Rodrigues and Captain Lizon left Velez-Shade in a cell with a toilet that was backed up with urine and feces for more than forty hours.

a. Clogged Toilet

Velez-Shade states that, at some point on October 8, 2018, the toilet in the cell next to his cell backed up into his toilet. He was exposed to a toilet full of feces and urine for over forty hours. Furthermore, Velez-Shade has alleged that Warden Rodrigues and Captain Lizon were aware of the condition but did not move him from the cell for over forty hours.

The court concludes that this allegation of unsanitary living conditions was of sufficient duration to constitute a serious deprivation of basic human need. Thus, Velez has stated a plausible claim of deliberate indifference to a basic human need—sanitary living conditions—against Warden Rodrigues and Captain Lizon. See Wiley v. Kirkpatrick, 801 F.3d 51, 66–68 (2d Cir. 2015) (explaining that claims of allegedly unconstitutional unsanitary conditions of confinement must be analyzed based on their severity and duration); Walker, 717 F.3d at 127 ("Indeed, unsanitary conditions lasting for mere days may constitute an Eighth Amendment violation."). This Eighth Amendment claim of unsanitary living condition will proceed against Warden Rodrigues and Captain Lizon in their individual capacities.

b. Handcuffing – Telephone Use and Recreation

Velez-Shade claims that he was required to recreate in handcuffs behind his back in all kinds of weather and was

required to wear handcuffs, leg shackles, and a tether chain during his telephone calls with his family. He experienced shoulder, neck, and back pain from the restraints and became sick at times because he was forced to recreate outside in the rain. Because it was not uncommon for inmates to slip out of their handcuffs, Velez was exposed to a risk of assault by other inmates in the recreation yard. Velez-Shade alleges that he was confined at Northern for approximately four months from June 29, 2018, until October 10, 2018.

Given the allegations regarding the severity of the restraint requirements to which he was exposed, together with the duration of his exposure, the court concludes that Velez-Shade has stated a plausible claim of deliberate indifference to his health against Warden Rodrigues and Captain Lizon.

E. Fourth Amendment

Velez-Shade claims that Warden Rodrigues and Captain Lizon required him to submit to a strip search every time that he left his cell to go to another part of his housing unit or the prison facility. The strip search involved Velez-Shade having to squat and cough. The Second Circuit has recently "reiterate[d] that Inmates retain a limited right of bodily privacy under the Fourth Amendment." Harris v. Miller, 818 F.3d 49, 57 (2d Cir. 2016). In evaluating a claim of a violation of right of bodily privacy, a court is required to make two determinations: "(1) ... whether the inmate has 'exhibit[ed] an actual, subjective expectation of bodily privacy,' and (2) ... 'whether the prison officials had sufficient justification to intrude on [the inmate's]' " expectation of bodily privacy. See id. (quoting Covino v. Patrissi, 967 F.2d 73, 77-78 (2d Cir. 1992)).

***9** As to the first inquiry, there is no dispute that a visual body cavity search is a "serious invasion of privacy." Id. at 58 (quoting Florence v. Board of Chosen Freeholders, 566 U.S. 318, 344-45 (2012) (internal quotation marks omitted)). Thus, for purposes of this ruling only, the court will assume that Velez-Shade had a subjective expectation of privacy.

As to the second inquiry, "courts apply one of two separate but overlapping frameworks. If the inmate's Fourth Amendment claim challenges a prison regulation or policy, courts typically analyze the claim under Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987)." Harris, 818 F.3d at 57. Courts determine whether the regulation is "reasonably related to legitimate penological interests ... with reference to four factors discussed in Turner." Harris, 818 F.3d at 57-58. However, where the inmate challenges particular searches of his person, rather than an overarching policy, courts apply a four-factor test established in Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). See Harris, 818 F.3d at 58.

It is unclear, based on the allegations in the Complaint, whether Velez-Shade seeks to argue that there was a general policy in place which violated his Fourth Amendment rights, or whether he is alleging that Warden Rodrigues and Captain Lizon violated his rights in the context of isolated incidents. The Complaint contains neither allegations as to a generally applicable policy or regulation, nor facts detailing the nature of any particular strip searches. Rather, the Complaint contains only the general allegation that Velez-Shade was strip-searched "before leaving [his] cell and must squat down and cough." Compl. at 11 ¶ 1. Absent plausible factual allegations detailing either a policy which violated Velez-Shade's rights, or plausible allegations as to specific searches of his person, the Complaint fails to state a claim upon which relief may be granted. The Fourth Amendment claims against Warden Rodrigues and Captain Lizon are dismissed without prejudice. 28 U.S.C.A. § 1915A(b).

F. Fifth Amendment

Velez-Shade alleges that the defendants violated his right to due process under both the Fifth and the Fourteenth Amendments in connection with the disposition of the disciplinary report issued to him on June 22, 2018, and his placement in the security risk group program on June 29, 2018. The Fifth Amendment, however, applies to the federal government, not to the states. See Dusenbery v. United States, 534 U.S. 161, 167 (2002) (holding Fifth Amendment's Due Process Clause protects citizens against only federal government actors, not State officials); Mitchell v. Home, 377 F.Supp.2d 361, 372–73 (S.D.N.Y. 2005) (dismissing Fifth Amendment due process claim asserted against employee of the state of New York because "[a]ny due process rights [the] plaintiff enjoys as against state government officials ... arise solely from the Fourteenth Amendment due process clause") (citation omitted).

Velez-Shade has not raised any claim against a federal government actor. Thus, his Fifth Amendment due process claims are dismissed. See 28 U.S.C. § 1915A(b)(1).

G. Fourteenth Amendment

The Fourteenth Amendment's Due Process Clause "protects persons against deprivations of life, liberty, or property."

U.S Const. amend. XIV. "Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States." Hewitt v. Helms, 459 U.S. 460, 466 (1983). The standard analysis for a claim of a violation of procedural due process "proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (per curiam).

***10** In Sandin v. Conner, 515 U.S. 472 (1995), the Supreme Court recognized that "[s]tates may under certain circumstances create liberty interests which are protected by the Due Process Clause." Id. at 483-84. A prisoner has a protected liberty interest in not being confined only if the state created such an interest in a statute or regulation and the deprivation of that interest caused him to suffer an atypical and significant hardship. See Tellier v. Fields, 280 F.3d 69, 80-81 (2d Cir. 2000).

1. June 22, 2018 Disciplinary Report

Velez-Shade suggests that he received a disciplinary report in connection with the altercation that he was involved in on June 16, 2016, at Carl Robinson and that he received a sanction of seven days of punitive segregation in connection with the disposition of that disciplinary report. He states that, on June 22, 2018, he completed his seven-day period of confinement in the RHU. He does not challenge the process that he received in connection with the disciplinary report arising from the June 16, 2018 altercation.

He alleges that on June 22, 2018, before officials released him from the RHU, Lieutenant Alexander issued him a disciplinary report for security risk group affiliation. Correctional Officers Betances and Clark subsequently investigated the disciplinary charge and appeared at the hearing held on June 26, 2018. Lieutenant Prior presided over the hearing, and Correctional Officer Rodriguez appeared as Velez-Shade's advocate. Velez-Shade pleaded not guilty to the disciplinary charge, but Lieutenant Prior found him guilty of security risk group affiliation and designated him as a member of a security risk group. Velez-Shade does not allege that Lieutenant Prior imposed any sanctions against him in connection with the guilty finding. Velez-Shade remained in the RHU until prison officials transferred him to Northern on June 29, 2018 to begin the security risk group program.

The Second Circuit has held that "in determining whether [an inmate] endured an atypical and significant hardship" a district court should consider the duration of the inmate's confinement in segregation and "the extent to which the conditions [in] ... segregation differ from other routine prison conditions." Palmer v. Richards, 364 F.3d 60, 64 (2d Cir. 2004) (internal quotation marks and citation omitted). With regard to duration, the Second Circuit has resisted establishing a "bright line rule that a certain period of ... confinement [in a restrictive housing unit] automatically fails to implicate due process rights." Id.

As indicated above, Velez-Shade contends that he endured unconstitutional conditions of confinement including a denial of recreation and deprivation of sleep during the thirteen-day period that he was in the RHU before and after the disposition of the June 22, 2018 disciplinary report. In particular, Velez-Shade alleges that he was unable to sleep because of continuous illumination in his cell, and that the deprivation of sleep which resulted from the constant illumination triggered his PTSD symptoms.

The Second Circuit has noted that, "[i]n the absence of a detailed factual record, we have affirmed dismissal of due process claims only in cases where the period of time spent in [restrictive housing] was exceedingly short—less than the 30 days that the Sandin plaintiff spent in [restrictive housing]—and there was no indication that the plaintiff endured unusual [restrictive housing] conditions." Palmer, 364 F.3d at 65–66. Here, Velez-Shade was exposed to the conditions in the RHU less than 30 days. Furthermore, the Complaint does not allege that Velez-Shade's conditions of confinement were unusual relative to other inmates in general population, and although courts have an obligation to interpret a pro se complaint liberally, a complaint must still include sufficient factual allegations to meet the standard of facial plausibility. See Harris v. Mills, 572 F.3d at 72 (citations omitted). In this case, the Complaint fails to allege any facts as to Velez-Shade's conditions of confinement in the RHU relative to the normal conditions of confinement in the prison. See Welch v. Bartlett, 196 F.3d 389, 393 (2d Cir. 1999) ("Whether the conditions of Welch's confinement constitute an atypical and significant hardship requires that they be considered in comparison to the hardships endured by prisoners in general population, as well as prisoners in administrative and protective confinement, assuming such confinements are imposed in the ordinary course of prison administration.").

***11** The court concludes that, absent any facts plausibly alleging that Velez-Shade's conditions of confinement in the RHU were atypical in comparison to the norm, the Complaint fails to state a claim upon which relief may be granted. The Fourteenth Amendment due process claim against Lieutenants Alexander and Prior, Correctional Officers Betances and Clark, and District Administrator Quiros, in connection with the issuance and disposition of the June 22, 2018 disciplinary charge as well as the appeal of disposition of the disciplinary charge, is dismissed. See 28 U.S.C. § 1915A(b)(1).

The court further notes that the only allegation against Correctional Officer Rodriguez is that he or she appeared at the disciplinary hearing as Velez-Shade's advocate. Velez-Shade does not assert that Officer Rodriguez failed to provide him with assistance or otherwise deprived him of due process in connection with the disciplinary hearing. Thus, Velez-Shade has not alleged that Officer Rodriguez violated his federally or constitutionally protected rights. The Fourteenth Amendment due process claim against Officer Rodriguez is dismissed. See 28 U.S.C. § 1915A(b)(1).

2. Placement in Security Risk Group Program

Velez-Shade also challenges his placement in the security risk group program on June 29, 2018. He contends that he did not receive a hearing or any other separate proceeding or review before his transfer to Northern to begin the program.

The Second Circuit has held that "[a] state-created liberty interest 'arises when state statutes or regulations require, in language of an unmistakably mandatory character, that a prisoner not suffer a particular deprivation absent specified predicates.' " Vega v. Lantz, 596 F.3d 77, 83 (2d Cir. 2010) (quoting Welch, 196 F.3d at 392 (internal citations and quotation marks omitted)). In Connecticut, Administrative Directive 6.14 governs the procedures for security risk groups. See State of Connecticut Department of Correction, Administrative Directive 6.14 ("AD 6.14"). AD 6.14 establishes certain mandatory predicates for the designation of inmates as security risk group members. See id. § 6 (defining "Security Risk Group Member Designation Process."). Velez-Shade therefore had a liberty interest in avoiding designation as a security risk group member and the related placement in SRG. See id. § 6(B)–(C).

Velez-Shade must also demonstrate that he was subjected to "atypical and significant hardship ... in relation to the ordinary incidents of prison life." Sandin, 515 U.S. at 484. Velez-Shade alleges that he endured various restrictive conditions during his four-month confinement in the security risk group program, including strip searches every time he left his cell and recreation in handcuffs behind his back. Moreover, AD 6.14 requires, inter alia, that all Phase 1 SRG members "be handcuffed behind the back for all out of cell movement," and limits visitation to non-contact visits with immediate family. AD 6.14 § 11(N), (V). While the Complaint does not allege these limitations, the court takes judicial notice of the Administrative Directives. Velez-Shade's allegations, combined with the limitations mandated by AD 6.14, are sufficient to plausibly allege that he endured conditions of confinement in the security risk group program at Northern that were atypical and significant, when compared with the general prison population. See Welch, 196 F.3d at 392 ("[A]ctions under the Due Process Clause are reserved for prisoners enduring a hardship that is substantially more grave than hardships they would be likely to endure simply as a consequence of the ordinary administration of the prison.").

***12** Velez-Shade contends that he did not receive a separate hearing or review before his transfer to Northern and placement in the security risk group program. Absent a separate hearing or proceeding or notice that the disciplinary hearing was also a classification hearing to determine his placement in the security risk group program, it is apparent that Velez-Shade did not have an opportunity to defend against the change in his classification.

The court concludes that Velez-Shade has stated a plausible procedural due process claim with regard to his transfer to Northern and placement in the security risk group program on June 29, 2018. This Fourteenth Amendment procedural due process claim will proceed against Lieutenant Prior and Director of Security Santiago in their individual capacities.

H. Claims under the Connecticut Constitution

In addition to his federal constitutional claims, Velez-Shade contends that the defendants violated his rights under Article First §§ 4, 5, 8, 9, and 20 of the Connecticut Constitution. Article First, § 4 of the Connecticut Constitution provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Conn. Const. art. 1 § 4. Article First, section 5 provides: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press." Conn. Const. art. 1, § 5.

Article First, § 8 provides in pertinent part: "No person shall be ... deprived of life, liberty or property with due process of law...." Conn. Const. art. 1, § 8. Article First, § 9 provides: "No person shall be arrested, detained or punished, except in cases clearly warranted by law." Conn. Const. art. 1, § 9. Article First § 20 provides that "[n]o person shall be denied equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."

In Binnette v. Sabo, 244 Conn. 23, 41-47 (1998), the Connecticut Supreme Court relied on Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), to recognize a private cause of action for monetary damages against municipal police officers for violations of Article First, §§ 7 and 9 of the Connecticut Constitution that arose out of an alleged unreasonable search and seizure and unlawful arrest of the plaintiff. In reaching its decision, the Connecticut Supreme Court "emphasize[d] that [its] decision to recognize a Bivens-type remedy in this case does not mean that a constitutional cause of action exists for every violation of our state constitution." Id. at 47.

1. Article First, Sections 8 and 20

This court and the Connecticut Superior Court have routinely declined to recognize a private right of action under Article first §§ 8 and 20 of the Connecticut Constitution. See, e.g., Richard v. Strom, No. 3:18-CV-1451 (CSH), 2018 WL 6050898, at *8 (D. Conn. Nov. 19, 2018) ("There is no established private right of action under the religious discrimination, due process, or equal protection provisions (Article First §§ 3, 8, and 20 of the Connecticut Constitution.")); Minto v. Dep't of Mental Health & Addiction Servs., No. HHDCV176076730S, 2018 WL 710124, at *9 (Conn. Super. Ct. Jan. 11, 2018) ("Connecticut courts have unanimously declined to recognize a private cause of action under article first, § 20"); Doe v. Crowley v. Town of Enfield, No. 3:14 cv 01903 (MPS), 2015 WL 4162435, at *3 (D. Conn. July 9, 2015) (declining to recognize a private right of action under Article First, §§ 8 and 20); Gothberg v. Town of Plainville, 148 F. Supp. 3d 168, 187-88 (D. Conn. 2015) (declining to exercise supplemental jurisdiction over state constitutional claim under Article First, section 8 because decision to recognize private right of action under this section raises novel or complex issue of state law); Johnson v. State Dep't of Children & Families, No. 3:11cv996(WWE), 2012 WL 6049583, at *5 (D. Conn. Dec. 5, 2012) ("[T]he Court will join numerous courts that have declined to recognize a private right of action pursuant to Article First, § 20"); Silvera v. Connecticut Dep't of Corr., 726 F. Supp. 2d 183, 199 (D. Conn. 2010) (declining to recognize a private right of action under, inter alia, Article First § 20).

***13** The court concludes that it would be inappropriate to exercise supplemental jurisdiction over potential claims under the Connecticut constitution that raise new and undeveloped issues under state law. See 28 U.S.C. § 1367(c)(1) ("The district courts may decline to exercise supplemental jurisdiction over a claim" that "raised a novel or complex issue of State Law...."). Accordingly, the court declines to exercise supplemental jurisdiction over the claims that the defendants violated Velez-Shade's rights under Article First, §§ 8 and 20 of the Connecticut Constitution.

2. Article First, Sections 4 and 5

Velez-Shade alleges that Mailroom Officer DeJesus violated his rights under two of Connecticut's constitutional provisions governing free speech, Articles First, §§ 4 and 5, by censoring a letter that he sought to mail to his aunt. An individual's right to freedom of speech under the Connecticut Constitution derives from Article First, § 4. The Connecticut Supreme Court has held that Article First, § 5 "literally applies only to the passage of laws restraining freedom of speech or press and does not by its terms afford protection provided by § 4 against restrictions the exercise of those rights which government officials may impose whether or not sanctioned by law." Cologne v. Westfarms Associates, 192 Conn. 48, 63 (1984).

Velez-Shade does not challenge a state statute as being violative of his right to free speech. Thus, Velez-Shade has failed to state a claim of a violation of Article First, § 5 and the claim is dismissed. See Niblack v. Brighthaupt, No. CV155035513, 2018 WL 1386211, at *5 (Conn. Super. Ct. Feb. 20, 2018) (dismissing inmate's claim that rejection and return of packages by mail room staff at prison facility violated his right to free speech under Article First, § 5 of the Connecticut Constitution because claim did not relate to the passage of a law restraining freedom of speech) (citing Cologne, 192 Conn. at 63).

In Lopez v. Smiley, 375 F. Supp. 2d 19 (D. Conn. 2005), the court acknowledged that the Connecticut Supreme Court had recognized a private right of action under Article First, §§ 4,

5, and 14 for declaratory or injunctive relief, but noted the absence of Connecticut state court cases recognizing a private right of action for money damages under Article First, § 4. See id. at 24 n.2 (collecting cases). Research has revealed no cases since Lopez that have recognized a claim for money damages under Article First, § 4.[2] See Williams v. Walter Ford, No. 3:14-CV-1181 (VAB), 2015 WL 8490910, at *9 (D. Conn. Dec. 10, 2015) (finding "no state cases recognizing a claim for money damages under this [free speech] provision" of the Connecticut Constitution) (citing Marshall v. Town of Middlefield, No. 3:10-cv-1009(JCH), 2012 WL 601783, at *9 (D. Conn. Feb. 23, 2012) ("The court finds no cases in which a Connecticut court has recognized a private right of action for money damages under either § four or twenty and multiple cases in which courts have expressly declined to recognize such claims.")). Accordingly, the court declines to exercise supplemental jurisdiction over the claim that the Mailroom Officer DeJesus violated Velez-Shade's rights under Article First, § 4 of the Connecticut Constitution.

3. Article First, Section 9

***14** It is unclear how Article First, § 9 is applicable to Velez-Shade's due process claims relating to the disposition of a disciplinary report and his placement in the security risk group program. See Compl. at 13-16. Velez-Shade also alleges that Lieutenant Alexander violated his rights under Article First, § 9 by subjecting him to restrictive or uncomfortable conditions of confinement for thirteen days at Carl Robinson. See id. at 15. The court cannot locate any cases in which a Connecticut state court has recognized a private right of action for money damages under Article First, § 9 of the Connecticut Constitution for a claim that prison officials subjected an inmate to unconstitutional conditions of confinement See Torres v. Armstrong, No. CV990427057S, 2001 WL 1178581, at *6 n.6 (Conn. Super. Ct. Sept. 6, 2001) (declining to recognize a damages action under Article First, § 9 of the Connecticut Constitution). Thus, Velez-Shade in effect is requesting that this court recognize a new state constitutional tort cause of action asserted by a state prisoner against Department of Correction employees.

The court declines to exercise supplemental jurisdiction over the claim seeking monetary damages for a violation of Article First, § 9 of the Connecticut Constitution because the recognition of a new state constitutional tort should be considered and determined by the Connecticut courts. See M.A. v. City of Torrington, No. 3:10CV1890 (JBA), 2012 WL 3985166, at *4 (D. Conn. Sept. 10, 2012) ("[T]he Court declines to exercise supplemental jurisdiction over Plaintiffs' constitutional claims, leaving any such recognition of new state constitutional torts to Connecticut courts, based on the case-by-case approach of Binette and on considerations of federal-state comity."); Lopez, 375 F. Supp. 2d at 26 ("In light of the Connecticut Supreme Court's explicit statement in Binette that the Supreme Court did not intend to create a cause of action for money damages for every alleged violation of the Connecticut state constitution, ... and the fact that federalism and comity concerns strongly suggest that recognition of new state constitutional torts should be determined on a case-by-case basis by Connecticut courts in the first instance, this Court will refrain from exercising supplemental jurisdiction over ... Mr. Lopez's Connecticut constitutional claims.").

## ORDERS

The court enters the following orders:

(1) The official capacity request for monetary damages is **DISMISSED** pursuant to pursuant to 28 U.S.C. § 1915A(b)(2). The following claims are **DISMISSED** pursuant to 28 U.S.C. § 1915A(b)(1): The official capacity request for declaratory relief; all claims against Population Management and SRG Coordinator Aldi; the Fifth Amendment due process claim; the First Amendment claim against Mailroom Officer DeJesus; the Eighth Amendment failure to protect claim against Correctional Officer Richards; the Eighth Amendment denial of recreation claim against Lieutenant Alexander; the Fourteenth Amendment procedural due process claim related to the disposition of the June 22, 2018 disciplinary report against Lieutenants Alexander and Prior, Correctional Officers Betances and Clark, and District Administrator Quiros; the Fourteenth Amendment due process claim against Correctional Officer Rodriguez; the Fourth Amendment claim against Warden Rodrigues and Captain Lizon related to strip searches performed on Velez-Shade during his confinement at Northern; and the claim that Mailroom Officer Richards violated Velez-Shade's rights under Article First, § 5 of the Connecticut Constitution. The court declines to exercise supplemental jurisdiction over the claims that the defendants violated Velez-Shade's rights under Article First, §§ 4, 8, 9, and 20 of the Connecticut Constitution.

The following claims will proceed against the defendants in their individual capacities: The Eighth Amendment

claim against Lieutenant Alexander related to the constant illumination of Velez-Shade's cell during his confinement at Carl Robinson; the Eighth Amendment claims against Warden Rodrigues and Captain Lizon related to handcuffing requirements during telephone calls and recreation, conditions in the recreation yard, and exposure to an unsanitary condition of confinement for over forty hours during Velez-Shade's confinement at Northern from January 29, 2018 to October 10, 2018; and the Fourteenth Amendment procedural due process claim related to the placement of Velez-Shade in the Security Risk Group Program at Northern on January 29, 2018, against Lieutenant Prior and Director of Security Santiago.

***15** (2) Within twenty-one (21) days of this Order, the Clerk shall verify the current work addresses of: Director of Security Antonio Santiago, Warden Rodrigues, Captain Lizon, Lieutenant Alexander, and Hearing Officer Prior, and mail a copy of the Complaint, this Order, and a waiver of service of process request packet to each defendant in his or her individual capacity at his or her confirmed address. On the thirty-fifth (35th) day after mailing, the Clerk shall report to the court on the status of each request. If any defendant fails to return the waiver request, the Clerk shall make arrangements for in-person service by the U.S. Marshals Service and that defendant shall be required to pay the costs of such service in accordance with Federal Rule of Civil Procedure 4(d).

(3) The defendants shall file their response to the Complaint, either an answer or motion to dismiss, within sixty (60) days from the date the notice of lawsuit and waiver of service of summons forms are mailed to them. If the defendants choose to file an answer, they shall admit or deny the allegations and respond to the cognizable claims recited above. They may also include any and all additional defenses permitted by the Federal Rules.

(4) Discovery, pursuant to Federal Rules of Civil Procedure 26 through 37, shall be completed within six months (180 days) from the date of this Order. Discovery requests need not be filed with the court.

(5) All motions for summary judgment shall be filed within seven months (210 days) from the date of this Order.

(6) The Clerk shall send a copy of the Complaint and this Order to the Connecticut Attorney General and to the Department of Correction Legal Affairs Unit.

**SO ORDERED.**

**All Citations**

Not Reported in Fed. Supp., 2019 WL 4674767

## Footnotes

1 In citing to the Complaint, the court references the page numbers imposed by the court's electronic filing system.

2 Furthermore, "Connecticut courts have rejected the argument that the free-speech provisions of the Connecticut Constitution are independently actionable apart from the cause of action that is prescribed under § 13-52q." Jennings v. Town of Stratford, 263 F. Supp. 3d 391, 409 (D. Conn. 2017) (citing Thibault v. Barkhamsted Fire Dist., No. CV136008093S, 2013 WL 6038259, at *5 (Conn. Super. Ct. Oct. 21, 2013); Blue v. Carbonaro, No. CV146015705S, 2015 WL 3555294, at *21 (Conn. Super. Ct. May 11, 2015)).

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2020 WL 5834219
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Darrell HARLOW, Plaintiff,
v.
Sergeant ST. ANDREWS, et al., Defendants.

9:18-CV-0648 (LEK/DJS)
|
Signed 10/01/2020

**Attorneys and Law Firms**

Darrell Harlow, Moravia, NY, pro se.

John E. Heisler, Jr., Yvette Velasco, Onondaga County Department of Law, Syracuse, NY, for Defendants.

**MEMORANDUM-DECISION AND ORDER**

Lawrence E. Kahn, U.S. District Judge

## I. INTRODUCTION

***1** Plaintiff Darrell Harlow, currently incarcerated at the Attica Correctional Facility, brings this pro se action against Sergeant Benjamin St. Andrew, [1] Sergeant Robert Feldman, Deputy Shedrick Williams, Sergeant Corey Moore, Deputy David Mazzoni, Deputy Michael McCarty, Deputy Jordan Dodge, Lieutenant Edward Salvagni, Sergeant Amy Burton, Deputy Marc Sarno, Deputy Kevin Koebler, Deputy Christopher Cornish, Deputy Patrick Picciotto, and Deputy Codee Phillips, alleging violations arising out of his confinement as a pretrial detainee at the Onondaga County Justice Center. See Docket. Plaintiff commenced this action on June 4, 2018, Dkt. No. 1 ("Complaint"), and filed his application to proceed in forma pauperis ("IFP") the same day, Dkt. No. 2. Plaintiff later submitted an amended complaint adding new defendants. Dkt. No. 9 ("Amended Complaint"). Plaintiff was subsequently granted IFP status. Dkt. No. 12. Plaintiff submitted a second amended complaint on December 17, 2018. Dkt. No. 19 ("Second Amended Complaint"). Following initial review under 28 U.S.C. §§ 1915(e) and 1915A, this case has proceeded with four distinct claims: (1) Fourteenth Amendment excessive force and failure to protect claims against numerous defendants arising out of an incident on March 10, 2016; (2) Fourth Amendment invasion of privacy claims against multiple defendants arising out of a separate March 10, 2016 incident; (3) Fourteenth Amendment conditions of confinement claims against Andrew and Williams arising out of the conditions of Cell 10 in the 5C pod; and (4) Fourteenth Amendment claims against Burton, Sarno, and Phillips arising out of the conditions of Pod 5C, Cell 42. Dkt. No. 70 ("Report-Recommendation").

On October 16, 2019, Defendants filed a motion for summary judgment. Dkt. Nos. 50 ("Motion"), 50-11 ("Statement of Material Facts"), 50-12 ("Defendants' Memorandum of Law"), 50-2 to -10 (Exhibits). On December 9, 2019, Plaintiff filed a response opposing the motion. Dkt. Nos. 62 ("Plaintiff's Memorandum of Law"), 62-1 ("Response to Statement of Material Facts"). On September 3, 2020, the Honorable Daniel J. Stewart, United States Magistrate Judge, recommended that Defendants' summary judgment motion be granted for Plaintiff's Fourth Amendment privacy claims and Fourteenth Amendment conditions of confinement claims against Burton, Sarno, Phillips, and Andrew and denied for all other claims. See generally R. & R. Plaintiff timely filed objections to the Report-Recommendation. Dkt. No. 71 ("Objections").

## II. BACKGROUND

### A. The Second Amended Complaint and the Report-Recommendation

The following facts are detailed in the Report-Recommendation, familiarity with which is assumed. See R. & R. at 2–3. For convenience, the Court summarizes them here.

***2** On March 10, 2016, Plaintiff was brought to the Onondaga County Justice Center to be booked on criminal charges. Id. at 2. During booking, Plaintiff alleges that he was assaulted by Defendants. Id. at 2; Pl.'s Mem. of Law at 14–17. Defendants claim that while force was used, it was necessary to stop a suicide attempt by Plaintiff. R. & R. at 2 (citing Defs.' Mem. of Law at 6–8). Later that day, Plaintiff was moved from his booking cell to a separate cell after being physically restrained while naked. Id. at 3. There is no dispute that Plaintiff was moved after being physically restrained while naked. Id.; Statement of Material Facts at 3; Resp. to Statement of Material Facts at 4–5.

Plaintiff was subsequently moved to different cells within the facility. R. & R. at 3. Plaintiff was placed in Pod 5C, Cell 10, which was covered in feces, vomit, blood, spoiled food, and

fruit flies for four days. Id.; Pl.'s Mem. of Law at 3–4. Plaintiff was later moved to Pod 5C, Cell 42 for three days, where the temperature was over 90 degrees. R. & R. at 3; Pl.'s Mem. of Law at 4. There is no dispute that Plaintiff was housed in these cells, or that Cell 42 exceeded 90 degrees for three days. R. & R. at 3; Statement of Material Facts at 3; Defs.' Mem. of Law at 10–11. Defendants do, however, contest the condition of Cell 10. Defs.' Mem. of Law at 9–10; Mot. Ex. G.

**B. The Report-Recommendation**

Judge Stewart first concluded that Plaintiff's constitutional claims were governed by a three-year statute of limitations and not a one-year-and-ninety-day statute of limitations governing tort claims against municipal defendants. R. & R. at 5. Thus, Plaintiff's claims were timely. Id.

Judge Stewart then recommended granting summary judgment to Defendants on Plaintiff's Fourth Amendment privacy claim because a single incident of being stripped naked and restrained briefly was not sufficient to state a bodily privacy claim. Id. at 15. Judge Stewart also recommended granting summary judgment on Plaintiff's conditions of confinement claim against Andrew because Andrew denied observing the feces, vomit, blood, spoiled food, and fruit flies in Cell 10 of Pod 5C and Plaintiff did not allege that Andrew himself observed the cell conditions. Id. at 12–13. Lastly, Judge Stewart recommended granting summary judgment on Plaintiff's conditions of confinement claims against Burton, Sarno, and Phillips for the extreme heat in Cell 42 for three days because Plaintiff was not exposed to the extreme heat for a "prolonged period." Id. at 14.

Judge Stewart recommended denying summary judgment for Plaintiff's excessive force claim because there was an insufficient record from Defendants to dismiss the claim and recommended denying summary judgment for Plaintiff's conditions of confinement claim against Williams because he did not deny observing feces, vomit, blood, spoiled food, and fruit flies in Cell 10. Id. at 8–11, 13.

**C. Objections**

Plaintiff objects to the grant of summary judgment as to his Fourth Amendment privacy claims and Fourteenth Amendment conditions of confinement claims. See generally Objs. For the privacy claim, Plaintiff argues that the distance between himself and female staff members should be considered, rather than just the amount of time he was naked while in transit to another cell. Objs. at 2–5. For the conditions of confinement claim against Andrew, Plaintiff argues that Andrew either knew or should have known that Cell 10 was covered in vomit, feces, and other filth. Objs. at 6.

For the conditions of confinement claims against Burton, Sarno, and Phillips in Cell 42, Plaintiff argues that his exposure to extreme heat for three days should be considered prolonged under applicable case law. Objs. at 5. In addition to the time exposed, Plaintiff suggests that the extremity of the conditions should be considered before granting summary judgment on his confinement claim. Id.

## III. STANDARD OF REVIEW

**A. Review of a Report-Recommendation**

***3** Within fourteen days after a party has been served with a copy of a magistrate judge's report-recommendation, the party "may serve and file specific, written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b); see also L.R. 72.1(c). A court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). To qualify as a specific objection, the objection must, "with particularity, identify [1] the portions of the proposed findings, recommendations, or report to which it has an objection and [2] the basis for the objection." See Garcia v. Duvall, No. 09-CV-884, 2012 WL 42270, at *1–2 (N.D.N.Y. Jan. 9, 2012) (internal quotation marks omitted).

If no objections are made, or if an objection is general, conclusory, perfunctory, or a mere reiteration of an argument made to the magistrate judge, a district court need review that aspect of a report-recommendation only for clear error. See Barnes v. Prack, No. 11-CV-857, 2013 WL 1121353, at *1 (N.D.N.Y. Mar. 18, 2013); see also Demuth v. Cutting, No. 18-CV-789, 2020 WL 950229, at *2 (N.D.N.Y. Feb. 27, 2020) (Kahn, J.). "A [district] judge ... may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." § 636(b).

**B. Summary Judgment**

For the portions of the Report-Recommendation that the Court reviews de novo, the Court will apply the same summary judgment standard as discussed in the Report-Recommendation. See R. & R. at 3–5. For convenience, the Court summarizes this standard here.

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden to demonstrate through "pleadings, depositions, answers to interrogatories, and admissions on file, together with [ ] affidavits, if any," that there is no genuine issue of material fact. F.D.I.C. v. Giammettei, 34 F.3d 51, 54 (2d Cir. 1994) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) (alteration in original).

To defeat a motion of summary judgment, the non-movant must set out specific facts showing that there is a genuine issue for trial, and cannot rest merely on allegations or denials of the facts submitted by the movant. Fed. R. Civ. P. 56(a). Sworn statements are "more than mere conclusory allegations subject to disregard ... they are specific and detailed allegations of fact, made under penalty of perjury, and should be treated as evidence in deciding a summary judgment motion." Scott v. Coughlin, 344 F.3d 282, 289 (2d Cir. 2003). The credibility of such statements is better left to a trier of fact. Id.

When considering a motion for summary judgment, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. Nora Beverages, Inc. v. Perrier Group of Am., Inc., 164 F.3d 736, 742 (2d Cir. 1998). Furthermore, when a party is proceeding pro se, the court must "read [his or her] supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest." Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). Summary judgment is only appropriate "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

## IV. DISCUSSION

### A. Statute of Limitations

No objections were filed to this portion of the Report-Recommendation. See generally Objs. Consequently, the court reviews the Report-Recommendation for clear error and finds none. Therefore, the Court adopts the Report-Recommendation finding that Plaintiff's claims are timely and not barred by the statute of limitations. R. & R. at 8.

### B. Plaintiff's Excessive Force and Failure to Protect Claims

***4** No objections were filed to this portion of the Report-Recommendation. See generally Objs. Consequently, the court reviews the Report-Recommendation for clear error and finds none. Therefore, the Court adopts the Report-Recommendation finding that Plaintiff's Fourteenth Amendment excessive force and failure to protect claims raise a genuine issue of material fact and cannot be resolved on summary judgment. R. & R. at 11.

### C. Plaintiff's Fourth Amendment Privacy Claims

Plaintiff objects to the dismissal of his Fourth Amendment privacy claims, asserting that "the invasion [of privacy] was more direct th[a]n indirect" and that Burton and other female inmates were very close to him while he was naked. Objs. at 2 (citing Urbano v. Murphy, 11-CV-806, 2013 WL 6842939, at *3 (D. Conn. Dec. 23, 2013)). Plaintiff adds that whether "a prison officer is searching for contraband is highly relevant to the inquiry ... when analyzing an inmates [sic] claim that prison officers infringed [his] 4th Amendment right to bodily privacy" and that "in this case searching for contraband was not the justification" because Plaintiff "had already been search[ed] for contraband prior to being placed in the holding cell." Objs. at 3.

Plaintiff's objection specifically identifies the portions of the Report-Recommendation to which he has an objection and his basis for objection and does not reiterate arguments made in his Second Amended Complaint. See Garcia, 2012 WL 42270, at *1–2. Thus, Plaintiff's objection is a specific objection and the Court will review Plaintiff's Fourth Amendment privacy claim de novo.

As the Report-Recommendation noted, "prisoners retain a right to bodily privacy, even if that right is limited by institutional and security concerns." R. & R. at 15 (citing Nicholas v. Goord, 430 F.3d 652, 658 (2d Cir. 2005)). "[W]hile all forced observations or inspections of the naked body implicate a privacy concern, it is generally considered a greater invasion to have one's naked body viewed by a member of the opposite sex." Harris v. Miller, 818 F.3d 49, 59 (2d Cir. 2016) (citing Byrd v. Maricopa Cty. Sheriff's Dep't, 629 F.3d 1135, 1141 (9th Cir. 2011) ("[T]he desire to shield one's unclothed figure from [the] view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.")). For this reason, "[c]ourts throughout the country have universally

frowned upon cross-gender strip searches in the absence of [ ] emergency or exigent circumstances." Harris, 818 F.3d at 59 (quoting Byrd, 629 F.3d at 1141). If an inmate's Fourth Amendment claim challenges an isolated search, courts typically apply the standards set forth in Bell v. Wolfish in assessing the reasonableness of the search by balancing the need for the particular search against the invasion of personal rights, considering: (1) the scope of the particular intrusion; (2) the manner in which the search was conducted; (3) the justification for initiating the search; and (4) the place the search was conducted. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

The Report-Recommendation did not consider the Bell factors when recommending the dismissal of Plaintiff's right to privacy claims. Because the Court finds this test paramount in evaluating these claims, the Court will apply each of the Bell factors to determine the reasonableness of Plaintiff's search and then determine whether summary judgment is appropriate.

*1. The Scope of the Intrusion*

***5** The first Bell factor, the scope of intrusion, concerns the type of search performed and whether the search involved an officer of the same gender as the inmate. See Harris, 818 F.3d at 58 ("A strip search ... refers to an inspection of a naked individual without any scrutiny of the subject's body cavities.") (internal quotation marks omitted). Here, the parties do not contest that Plaintiff was strip searched. Pl.'s Mem. of Law at 2–3, 9–10; Mot. Ex. D at 4, 11. Furthermore, Plaintiff's strip search involved Burton, who is a female. Id. Thus, the first Bell factor weighs against finding Plaintiff's search reasonable.

*2. The Manner in Which the Search was Conducted*

The second Bell factor, the manner in which the search was conducted, looks at whether the search was conducted in a reasonable manner. See Harris, 818 F.3d at 59–60 ("[a] strip search conducted in a professional manner is more reasonable than [ ] one that is not."). As Plaintiff notes, Bell states that "on occasion a security guard may conduct the search in an abusive fashion ... such abuse cannot be condoned." Objs. at 4 (quoting Bell, 441 U.S. at 560).

Plaintiff states that during his strip search he was thrown to the ground, Defendants applied pressure to his arms, legs, neck, and behind his ear, and Plaintiff was placed in "a strait jacket" leaving his genital area exposed. Pl.'s Mem. of Law at 3; Resp. to Statement of Material Facts at 4 ("Plaintiff was stripped naked and placed in an Emergency Response Belt (ERB) that bounded his upper torso and legs."). The forceful nature of Defendants' search on Plaintiff suggests that Plaintiff's search was not conducted in a reasonable manner. See e.g., Harris, 818 F.3d at 60 (citing Lee v. Downs, 641 F.2d 1117, 1120 (4th Cir. 1981) ("[I]t was wholly unnecessary for the male guards to remain in the room and to restrain the plaintiff while her underclothing was forcefully removed.")).

*3. The Justification for Initiating the Search*

Defendants contend that their actions were necessary to address a suicide attempt, but Plaintiff contests this. R. & R. at 15. Since Defendants do not offer any other justification, there is a genuine dispute of material fact as to whether this strip search was justified.

*4. The Place in Which the Search was Conducted*

For the last Bell factor, courts have arrived at different conclusions regarding what makes the place in which the search was conducted more or less reasonable. See Harris, 818 F.3d at 62 ("Some courts have found that searches conducted in the presence of other inmates are more reasonable because there is a reduced chance of abuse ... [o]ther courts have found that searches conducted outside the presence of other inmates are more reasonable."). This Circuit has found that searches conducted outside the presence of other inmates are more reasonable. Id. (stating that a strip search conducted in the presence of unnecessary spectators is less reasonable than one conducted in the presence of only those individuals needed to conduct the search.). The search and the movement of Plaintiff's naked body occurred in the presence of other inmates. See Objs. at 3; Mot. Ex. B. Thus, this factor also weighs against finding Plaintiff's search reasonable.

Being stripped by an officer of the opposite gender without justification and moved while naked in close proximity to guards and other inmates of the opposite sex may rise to a Fourth Amendment violation of Plaintiff's right to bodily

privacy. See e.g., Harris, 818 F.3d at 62–63 ("[I]f the inmate challenges an isolated search as infringing on his or her right of bodily privacy, courts should assess the claimed violation for reasonableness under the Bell factors.... We further note that cross-gender strip searches of inmates conducted in the absence of an emergency or other exigent circumstances are generally frowned upon.") (internal quotation marks omitted). Here, because none of the Bell factors seem to weigh in favor of Defendants, the Court determines that a reasonable jury could find for Plaintiff and thus denies Defendants' motion for summary judgment as to Plaintiff's right to privacy claims.

**D. Plaintiff's Fourteenth Amendment Conditions of Confinement Claims**

***6** Plaintiff objects to the portion of the Report-Recommendation granting Defendants' motion for summary judgment as to his Fourteenth Amendment conditions of confinement claim against Andrew, and argues that Andrew knew or should have known of the deplorable conditions in Cell 10 of Pod 5C. Objs. at 6. Plaintiff states that other staff knew and expressed concern about these conditions, specifically Erin Moore and "Toni." Pl.'s Mem. of Law at 4, 19; Objs. at 8.

Plaintiff also objects to the grant of summary judgment on his Fourteenth Amendment conditions of confinement claims against Burton, Sarno, and Phillips, asserting that his exposure to extremely hot temperatures in Cell 42 lasted for days and that under Ortiz v. Dep't of Corr. of City of New York, three days of exposure is sufficient to constitute a constitutional violation. Objs. at 5 (citing Ortiz, No. 08-CV-2195, 2011 WL 2638137, at *7 (S.D.N.Y. Apr. 29, 2011)).

Plaintiff's objections specifically identify the portions of the Report-Recommendation to which he has an objection and his basis for objecting. Plaintiff does not just reiterate arguments made in his Second Amended Complaint. See Garcia, 2012 WL 42270, at *1–2. Thus, Plaintiff's objection is a specific objection and his Fourteenth Amendment conditions of confinement claims will be reviewed de novo.

A pretrial detainee's claim of unconstitutional conditions of confinement are governed by the Due Process Clause of the Fourteenth Amendment. Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017).

> A pretrial detainee may establish a § 1983 claim for allegedly unconstitutional conditions of confinement by showing that the officers acted with deliberate indifference to the challenged conditions. This means that a pretrial detainee must satisfy two prongs to prove a claim, an "objective prong" showing that the challenged conditions were sufficiently serious to constitute objective deprivations of the right to due process, and a "subjective prong"—perhaps better classified as a "mens rea prong" or "mental element prong"—showing that the officer acted with at least deliberate indifference to the challenged conditions.

Pittman v. Billings, No. 20-CV-422, 2020 WL 2079440, at *5 (N.D.N.Y. Apr. 30, 2020) (internal citations omitted). The subjective prong can be defined either subjectively, i.e., what a person knew and disregarded, or objectively, i.e., what a reasonable person would have known and would not have disregarded. Id.

*1. Pod 5C, Cell 10*

As the Report-Recommendation noted, Plaintiff states that Andrew moved him to Cell 10 in Pod 5C, which had "feces, vomit, spoiled food, fruit flies[,] and blood on the walls and floor." R. & R. at 12 (quoting Sec. Am. Compl. at 8). Andrew's affidavit denies observing any of the conditions observed by Plaintiff. Mot. Ex. G.

For the objective prong, in Darnell, the Second Circuit found a material dispute of fact with respect to the objective prong of a conditions of confinement claim based on the plaintiffs' contention that they were housed in cells with urine, vomit, and feces present in 10- to 24-hour increments. Darnell, 849 F.3d at 24. Because the conditions in this cell are similar, and Plaintiff was there for at least 72 hours, there is a genuine dispute of material fact as to whether Plaintiff satisfies the objective prong of an unconstitutional condition of confinement.

For the subjective prong of an unconstitutional condition of confinement, the Report-Recommendation noted Andrew's denial of personally observing the conditions in which Plaintiff was confined. R. & R. at 12–13. However, this does not establish whether Andrew should have known that Plaintiff was confined in a cell with feces, vomit, and other filth. Darnell, 849 F.3d at 35 (stating that the subjective prong is satisfied when a reasonable defendant-official would have known of objective conditions and acted to mitigate the risk they posed to a pretrial detainee). Plaintiff claims that Andrew personally placed him in Cell 10 and that Plaintiff complained about the cell's condition through the cell door slot and later to mental health workers. Pl.'s Mem. of Law at 3–4, 19; Objs. at 7–8; Dkt. No. 62-1 at 8. Because the subjective prong does not require actual knowledge from Andrew, there is a genuine dispute of material fact as to whether Andrew should have known of the conditions in Cell 10 and thus as to whether Plaintiff satisfies the subjective prong of a Fourteenth Amendment conditions-of-confinement claim.

***7** Since Plaintiff's claim against Andrew raises a genuine dispute of material fact for both the objective and subjective prong for an unconstitutional condition of confinement, summary judgment should be denied as to this claim.

*2. Pod 5C, Cell 42*

Plaintiff also alleges that he was subjected to extreme heat, in excess of 90 degrees, when he was moved to a new cell for three days. Pl.'s Mem. of Law at 4, 19–20. Burton, Sarno, and Phillips had knowledge of this condition and failed to remedy it. Id. As the Report-Recommendation notes, Defendants offer no evidence refuting Plaintiff's allegations that the temperature in his cell exceeded 90 degrees. See R. & R. at 14.

Numerous courts, including those in the Second Circuit, have found that excessive hot or cold conditions may be unconstitutional. See Wingate v. Robert N. Davoren Center, No. 12-CV-5521, 2013 WL 4856573, at *3 (S.D.N.Y. Sept. 10, 2013). However, district courts in this Circuit have also found "allegations of exposure to extreme temperatures for short periods of time are insufficient to state an Eighth or Fourteenth Amendment claim." Id.

The Report-Recommendation concluded that three days' exposure to a condition was insufficient to state a conditions of confinement claim. See R. & R. at 14–15. However, the Report-Recommendation failed to consider the severity of conditions during the three day period in recommending dismissal for the conditions of confinement claim.

The conditions of Plaintiff's cell are nearly analogous to the conditions in Wingate, where the plaintiff was exposed to "90 plus degree" temperatures for seven days straight and the court found that this objectively posed a serious health risk. See Wingate, 2013 WL 4856573, at *3–4. Here, although Plaintiff was exposed to this extreme heat for less than half the time as in Wingate, the Wingate court noted that even being in these conditions for a few hours with poor ventilation could pose a grave risk to the occupant's health. Id. Plaintiff notes this when he says he "thought [he] was gonna die in the cell those days." Objs. at 5. Thus, there is a genuine dispute of material fact determinative of the objective prong of a conditions-of-confinement claim. Because Defendants do not dispute their subjective knowledge of these conditions, they have not carried their initial burden on summary judgment of establishing that no material questions of fact exist. See R. & R. at 13 (citing Callwood v. City of Kingston, No. 15-CV-1298, 2020 WL 2838602, at *6 (N.D.N.Y. June 1, 2020)).

For these reasons, the Court finds that summary judgment should be denied as to Plaintiff's Fourteenth Amendment conditions of confinement claims arising out of the time he spent in Cell 42.

**V. CONCLUSION**

Accordingly, it is hereby:

**ORDERED**, that the Report-Recommendation (Dkt. No. 70) is **APPROVED and ADOPTED** to the extent it recommends denial of Defendants' Motion for Summary Judgment (Dkt. No. 50) for Plaintiff's Fourteenth Amendment excessive force and failure to protect claims and Plaintiff's Fourteenth Amendment conditions of confinement claim against Williams and **REJECTED** to the extent it recommends that Defendants' Motion for Summary Judgment be granted as to Plaintiff's Fourth Amendment invasion of privacy claims and Plaintiff's other Fourteenth Amendment conditions of confinement claims; and it is further

***8 ORDERED**, that Defendants' Motion for Summary Judgment be **DENIED in its entirety**; and it is further

**ORDERED**, that the clerk serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

**IT IS SO ORDERED.**

**All Citations**

Not Reported in Fed. Supp., 2020 WL 5834219

## Footnotes

1 This defendant's last name is spelled alternatively as Andrews and Andrew throughout the docket. See Docket. This Court will refer to him as Andrew since that is how he spelled his name in his answer to the Amended Complaint. See Dkt. No. 21.

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KeyCite Overruling Risk - Negative Treatment
Overruling Risk Darnell v. Pineiro, 2nd Cir., February 21, 2017

2013 WL 4856573
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Chris WINGATE, Plaintiff,
v.
ROBERT N. DAVOREN CENTER, New York City Department of Corrections, City of New York, and John Does 1–3, Defendants.

No. 12 Civ. 5521(ALC).
|
Sept. 10, 2013.

***OPINION & ORDER***

ANDREW L. CARTER, JR., District Judge.

**I. Introduction**

***1** On July 13, 2012, *pro se* Plaintiff Chris Wingate, formerly in the custody of the New York City Department of Corrections, filed a Complaint pursuant to 42 U.S.C. § 1983, alleging violations of his Fourteenth Amendment rights by Defendants Robert N. Davoren Center ("RNDC"), New York City Department of Corrections, City of New York, and John Does 1–3 (collectively "Defendants"). Plaintiff challenges his conditions of confinement while at the RNDC, claiming he was subjected to excessive heat in his cell. On November 16, 2012, Defendants moved to dismiss the Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff submitted his opposition on July 26, 2013.

**II. Background**

From June 29, 2012 to July 5, 2012, Plaintiff alleges he was housed in 4 upper, Cell 16 of the RNDC at Rikers Island. (Compl.§§ II.A–C.) According to Plaintiff, the window in Cell 16 did not open. (*Id.* § II.D.) As a result of the inoperable window, Plaintiff alleges he was not "able to breath [sic][or] sleep due to the sweltering heat[.]" (*Id.*) Additionally, he had to "stand at the cell door to try to get the little air that the fan in the tier blew [his] way." (*Id.*)

Plaintiff also claims he repeatedly asked Defendants John Does 1–3 to fix the window or move him to one of the other cells, which Plaintiff claims were available. (*Id.*) Plaintiff states Defendants denied his requests, though "they put in a work order [to fix the window]." (*Id.*)

As a result of the excessive heat in his cell, Plaintiff allegedly suffered from dehydration, lack of sleep, heat exhaustion, fainting spells, dizzy spells, and profuse sweating. (*Id.* § III .)

**III. Discussion**

Defendants argue Plaintiff's Complaint should be dismissed on the following grounds: (1) Plaintiff failed to state a claim for deprivation of his Fourteenth Amendment rights; (2) Plaintiff failed to make any allegations of municipal liability; and (3) Plaintiff failed to allege personal involvement of the John Doe Defendants in the purported constitutional deprivation.

**A. Standard of Review**

Rule 12(b)(6) allows for dismissal if a party fails "to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). When deciding a motion to dismiss, the Court must accept as true all well-pled facts alleged in the complaint and must draw all reasonable inferences in a plaintiff's favor. *McCarthy v. Dun & Bradstreet Corp.,* 482 F.3d 184, 191 (2d Cir.2007). Claims should be dismissed when a plaintiff has not pled enough facts that "plausibly give rise to an entitlement for relief." *Ashcroft v. Iqbal,* 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. If the non-moving party has "not nudged [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

***2** "[T]o state a civil rights claim under § 1983, a complaint must contain specific allegations of fact which indicate a deprivation of constitutional rights; allegations which are nothing more than broad, simple, and conclusory statements are insufficient to state a claim under § 1983." *Alfaro Motors, Inc. v. Ward,* 814 F.2d 883, 887 (2d Cir.1987). Submissions of *pro se* plaintiffs, however, should be construed liberally by courts. *Triestman v. Fed. Bureau of Prisons,* 470 F.3d 471, 474–75 (2d Cir.2006). *Pro se* complaints will be read " 'to raise the strongest arguments that they suggest.' " *Fulton v.*

*Goord,* 591 F.3d 37, 43 (2d Cir.2009) (quoting *Green v. United States,* 260 F.3d 78, 83 (2d Cir.2001)).

**B. Plaintiff's Alleged Constitutional Deprivation**

The Due Process Clause of the Fourteenth Amendment requires that a "person detained prior to conviction receives protection against mistreatment at the hands of prison officials...." [1] *Caiozzo v. Koreman,* 581 F.3d 63, 69 (2d Cir.2009). To show an Eighth or Fourteenth Amendment violation, two requirements must be met: (1) "the deprivation alleged by the prisoner must be in objective terms 'sufficiently serious' such that the deprivation 'den[ied] the minimal civilized measure of life's necessities' "; and (2) "prison officials must have acted with deliberate indifference in that they 'kn[ew] of and disregard[ed] an excessive risk to inmate health or safety.' " *Branham v. Meachum,* 77 F.3d 626, 630–31 (2d Cir.1996) (citations omitted). The first prong is objective, and the second prong is subjective. *Id.* at 630.

To satisfy the objective prong, the alleged deprivation must be "sufficiently serious" so as to "violate[ ] contemporary standards of decency." *Helling v. McKinney,* 509 U.S. 25, 36, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). In other words, "States must not deprive prisoners of their 'basic human needs-*e.g.,* food, clothing, shelter, medical care, and reasonable safety.' Nor may prison officials expose prisoners to conditions that 'pose an unreasonable risk of serious damage to [their] future health.' " *Phelps v. Kapnolas,* 308 F.3d 180, 185 (2d Cir.2002) (internal citations omitted). "Because society does not expect or intend prison conditions to be comfortable, only extreme deprivations are sufficient to sustain a 'conditions-of-confinement' claim." *Blyden v. Mancusi,* 186 F.3d 252, 263 (2d Cir.1999).

With respect to the subjective prong, a plaintiff must show the charged official acted with deliberate indifference to his or her health or safety. *Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Deliberate indifference means at least subjective recklessness as understood in the criminal context and more than mere negligence. *Stevens,* 2011 WL 3251501, at *3 (citing *Farmer,* 511 U.S. at 835). The Supreme Court has previously explained,

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

***3** *Farmer,* 511 U.S. at 837. Whether the prison official had the requisite knowledge can be shown by inference through use of circumstantial evidence. *Phelps,* 308 F.3d at 185.

Many courts, including the Second Circuit, have held excessively hot or cold conditions may be a constitutional violation. *See e.g. Gaston v. Coughlin,* 249 F.3d 156, 164 (2d Cir.2001) (finding exposure to freezing cold temperatures for a five-month period during the winter can constitute an Eighth Amendment violation); *Corselli v. Coughlin,* 842 F.2d 23, 27 (2d Cir.1988) (noting deliberate exposure to "bitter cold" and subfreezing temperatures for three months may constitute cruel and unusual punishment); *Wright v. McMann,* 387 F.2d 519 (2d Cir.1967) (holding where prisoner was denuded and exposed to subfreezing temperatures for eleven days in a strip cell that was "fetid and reeking from the stench of the bodily wastes of previous occupants which ... covered the floor, the sink, and the toilet[,]" such treatment may constitute cruel and unusual punishment).; *Sleeper v. City of Richmond, Va.,* No. 3:12CV441–HEH, 2012 WL 3555412, at *5 (E.D.Va. Aug.16, 2012) (finding excessive heat, which caused the death of the prisoner, could amount to an Eighth Amendment violation); *Clark v. Bandy,* No. 2:10–CV–00169–RWS, 2011 WL 1346975, at *3 (N.D.Ga. Apr.8, 2011) (holding prisoner could state an Eighth Amendment claim where he complained to prison officials of excessive heat and trouble breathing for three months).

Conversely, district courts in this Circuit have also found allegations of exposure to extreme temperatures for short periods of time are insufficient to state an Eighth or Fourteenth Amendment claim. *See e.g. Stevens,* 2011 WL 3251501, at *3 (holding pre-trial detainee housed in a cell with a broken window covered by a garbage bag during cold and rainy weather for as many as four days did not allege a Fourteenth Amendment violation); *Borges v. McGinnis,* No. 03–CV–6375 CJS, 2007 WL 1232227, at *6 (W.D.N.Y. Apr.26, 2007) (finding inmate, wearing a paper gown and slippers, with no blanket, residing in a cell that was approximately 50 degrees for three days did not suffer

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a constitutional deprivation); *Grant v. Riley,* No. 89 Civ. 0359(MBM), 1993 WL 485600, at *4 (S.D.N.Y. Nov.24, 1993) (noting placement of inmate in a cell with a broken window incompletely covered by loose plastic and a cold wind blowing through for three days and denying him a coat, bedding, or blankets was not an Eighth Amendment violation).

Here, Plaintiff alleges he was exposed to "90 plus degree [temperatures] everyday" for seven days. (Compl.§§ II.C, V.) While it is unclear whether "90 plus degrees" is indicative of the temperature outdoors or the temperature inside the cell, the heat allegedly caused Plaintiff to endure fainting spells, dizzy spells, and trouble breathing. (*Id.* § III.) The heat compounded with the lack of ventilation due to the malfunctioning window supports a reasonable inference that Plaintiff's health could have been seriously endangered by the climate in his cell. Plaintiff's alleged injuries further support such an inference. As Plaintiff points out in his opposition, being trapped in a car with closed windows, for example, during extreme heat can pose a grave risk to the occupant's health after as little as a few hours. (Pl.'s Opp. 1.) There is no reason to doubt the same would be true for a prisoner confined to a cell.

***4** Construing the Complaint liberally, the Court reasonably infers from Plaintiff's allegations that the conditions of his confinement objectively posed a sufficiently serious health risk. In making this finding, the Court notes, at the instant posture, a liberal construction of the Complaint suggests Plaintiff's allegations warrant further development of the factual record. *See Nelson v. Plumley,* No. 9:12–CV–0422 (TJM/DEP), 2013 WL 1121362, at *10 (N.D.N.Y. Jan.24, 2013) ("[A significant number of cases] that dismiss the plaintiff's Eighth Amendment claim do so on a motion for summary judgment, at a point when the record is more fully developed. While the defendants in this action may have a rational explanation for the conditions plaintiff allegedly endured, or may deny those allegations, or the court may later determine, on a motion for summary judgment, that the ... exposure alleged is not sufficient to sustain an Eighth Amendment claim, at this procedural juncture, ... dismissal [is not appropriate.]").

To satisfy the subjective prong, Plaintiff claims he "constantly asked" Defendants John Does 1–3 to fix the window or move him to another cell. (Compl.§ II.D.) Further, "they [Defendants John Does 1–3] knew the window was inoperable." (*Id.*) Having alleged Defendants knew of the problems with the window and the repeated complaints about the temperature of the cell, Defendants' deliberate indifference to the serious risk of confining someone under those conditions may be reasonably inferred from the circumstances. *See Farmer,* 511 U.S. at 842 ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.")

Recognizing Plaintiff is entitled to all reasonable inferences and the facts he provides are deemed true on a motion to dismiss, in addition to the liberal construction of his *pro se* Complaint, the allegations sufficiently state a § 1983 claim for an unconstitutional deprivation of Plaintiff's Fourteenth Amendment rights. The Court is particularly mindful that "dismissal of a *pro se* claim as insufficiently pleaded is appropriate only in the most unsustainable of cases." *Boykin v. KeyCorp,* 521 F.3d 202, 216 (2d Cir.2008).

**C. Municipal Liability**

As set forth in *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), a municipality may be liable under § 1983 if the deprivation of a constitutional right is caused by a governmental custom, policy, or usage of the municipality. *See also Connick v. Thompson,* ––– U.S. ––––, ––––, 131 S.Ct. 1350, 1359, 179 L.Ed.2d 417 (2011) (finding municipalities can be held liable for "practices so persistent and widespread as to practically have the force of law"). "[T]o hold a city liable under § 1983 for the unconstitutional actions of its employees, a plaintiff is required to plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." *Wray v. City of N.Y.,* 490 F.3d 189, 195 (2d Cir.2007) (quoting *Batista v. Rodriguez,* 702 F.2d 393, 397 (2d Cir.1983)).

***5** According to Defendants, Plaintiff's claim for municipal liability should be dismissed because the Complaint does not identify particular City policies or practices resulting in Plaintiff's alleged injuries. The Court agrees. Plaintiff makes no allegations whatsoever regarding City policies related to his conditions of confinement. Nor does he make allegations that any other prisoner endured similar conditions in his or her cell. Defendant's Motion to Dismiss is GRANTED with respect to Defendant City of New York.

**D. Personal Involvement of Defendants John Does 1–3**

"It is well settled in this Circuit that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.' " *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994) (quoting *Moffitt v. Town of Brookfield,* 950 F.2d 880, 885 (2d Cir.1991)). "A defendant may be personally involved in a constitutional deprivation within the meaning of 42 U.S.C. § 1983 ... [if t]he defendant ... directly participated in the infraction." *Williams v. Smith,* 781 F.2d 319, 323 (2d Cir.1986).

Plaintiff alleges John Does 1–3 were personally aware of the inoperable window and the temperature of his cell. Plaintiff also alleges Defendants refused to make accommodations for him, including moving him to another cell, until the window was repaired. These allegations demonstrate a direct and tangible connection to the purported violation of Plaintiff's Fourteenth Amendment rights. As such, Plaintiff has satisfied the personal involvement element of a § 1983 claim.

**IV. Conclusion**

For the reasons set forth above, Defendant's Motion to Dismiss is **GRANTED in-part** and **DENIED in-part.** Defendant City of New York is **DISMISSED** from this case. Plaintiff's § 1983 claim against Defendants John Does 1–3 for allegedly violating his Fourteenth Amendment rights survives Defendants' Motion.

The Court notes, while not relied upon in deciding this Motion, Plaintiff offered additional facts in his opposition that were not included in the Complaint. For instance, Plaintiff argued the temperature was "well into the high 90's even 100[,]" "there was a work order for the inoperable window before [he] reached Rikers Island[,]" and he suffered "nose bleeds[.]" (Pl.'s Opp. 1.) The Court will hold a telephone status conference with the parties on **October 3, 2013 at 11:30 a.m.** to address amending the Complaint to include these facts and ascertaining the identities of the John Doe Defendants.

**SO ORDERED.**

**All Citations**

Not Reported in F.Supp.2d, 2013 WL 4856573

## Footnotes

1 Plaintiff does not state if he was a pre-trial detainee or a convicted prisoner in the Complaint. Defendants have proffered that Plaintiff was a pre-trial detainee while at the RNDC. (Def.'s Mem. 4 n. 1.) "A convicted prisoner is entitled to the protections of the Eighth Amendment's proscription against 'cruel and unusual punishment,' while a pre-trial detainee held in state custody is protected by the Due Process Clause of the Fourteenth Amendment." *Stevens v. City of N.Y.,* No. 10 Civ. 5455(PGG), 2011 WL 3251501, at *2 n.l (S.D.N.Y. July 22, 2011) (citing *Caiozzo,* 581 F.3d at 69). "Claims for deliberate indifference to a ... serious threat to the health or safety of a person in custody should be analyzed under the same standard irrespective of whether they are brought under the Eighth or Fourteenth Amendment[.]" *Caiozzo,* 581 F.3d at 72. Since the standard is the same, the Court treats Plaintiff's claim as an alleged violation of the Fourteenth Amendment.

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Distinguished by Young v. Tryon, W.D.N.Y., January 23, 2015

2012 WL 75430
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Antoine SCOTT, Plaintiff,
v.
Detective Roxanne LOPEZ, Detective R. Bookstein, Detective Halligan, Police Officer John Doe, Defendants.

No. 11 Civ. 809(WHP).
|
Jan. 5, 2012.

**Attorneys and Law Firms**

Antoine Verlenzo Scott, New City, NY, pro se.

Brian S. Sokoloff, Sokoloff Stern LLP, Westbury, NY, for Defendants.

*MEMORANDUM & ORDER*

WILLIAM H. PAULEY III, District Judge.

***1** Plaintiff *pro se* Antoine Scott ("Scott") brings this federal civil rights action against Detective Roxanne Lopez ("Lopez"), Detective R. Bookstein ("Bookstein"), Detective Halligan ("Halligan"), and an unnamed police officer ("Doe") (collectively, "Defendants"). Defendants move for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). For the following reasons, Defendants' motion is granted, and the Complaint is dismissed.

*BACKGROUND*

On December 16, 2010, officers of the Spring Valley Police Department ("SVPD") arrested Scott in connection with a home invasion. (Complaint, dated January 26, 2011 ("Compl."), II.D; Ex. A, at 4.) After Scott's arrest, Doe [1] brought him to a small room at the SVPD headquarters. (Compl.II.D.) Scott alleges that Doe placed him in handcuffs and took away his jacket and sneakers. (Compl.II.D.) The room was cold, and Scott asserts that he remained there shivering for three to four hours. (Compl.II.D.) No one responded to Scott's repeated requests for return of his jacket and sneakers. (Compl.II.D.) At some point. Scott was transferred to a holding cell. (Compl.II.D.)

The following day, Halligan and Brookstein escorted Scott from his holding cell to an interrogation room. (Compl.II.D.) In the interrogation room, Lopez advised Scott of his *Miranda* rights and attempted to question him. (Compl. II.D; Ex. A, at 4.) Scott declined to answer any questions and requested a lawyer. (Compl. II.D; Ex. A, at 4.) Lopez then ceased the interview and returned Scott to his cell. (Compl. II.D; Ex. A, at 4.) On December 20, 2010, three days later, a lawyer was appointed for Scott. (Compl. II .D.)

*DISCUSSION*

I. *Legal Standard*

This Court evaluates a motion for judgment on the pleadings under the same standard as a motion to dismiss for failure to state a claim. *See Bank of N.Y. v. First Millenium, Inc.,* 607 F.3d 905, 922 (2d Cir.2010). Accordingly, the Court must accept all factual allegations in the complaint as true and must draws all reasonable inferences in plaintiff's favor. *See Bank of N.Y.,* 607 F.3d at 922. However, legal conclusions and formulaic recitals of the elements of a cause of action are not entitled to the presumption of truth. *See Hayden v.* Paterson, 594 F.3d 150, 160–62 (2d Cir.2010). If, after accepting all factual allegations as true, the complaint fails to state a plausible claim for relief, then the complaint cannot survive a Rule 12(c) motion. *See Bank of N.Y.,* 607 F.3d at 92.

A *pro se* litigant's submissions are held to "less stringent standards than [those] drafted by lawyers." *Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Courts must "liberally construe pleadings and briefs submitted by *pro se* litigants, reading such submissions 'to raise the strongest arguments they suggest.' " *Berlin v. United States,* 478 F.3d 489, 491 (2d Cir.2007). Nevertheless, the Court need not accept as true "conclusions of law or unwarranted deductions of fact." *First Nationwide Bank v. Gelt Funding Corp.,* 27 F.3d 763, 771 (2d Cir.1994).

II. *Fourteenth Amendment*

***2** "A person detained prior to conviction receives protection against mistreatment at the hands of prison officials under ... the Due Process Clause of the Fourteenth

Amendment....” *Caiozzo v. Koreman,* 581 F.3d 63, 69 (2d Cir.2009). Courts analyze these claims under the same standard utilized in evaluating a prisoner's Eighth Amendment claims. *See Caiozzo,* 581 F.3d at 72. “First, the deprivation alleged must be, objectively, sufficiently serious.... [A] prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities.” *Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (internal citations and quotation marks omitted). Second, a plaintiff must prove that the defendants “imposed the conditions with deliberate indifference to a risk of harm of which they were subjectively aware.” *Felmine v. City of N.Y.,* No. 09 Civ. 3768(CBA)(JO), 2011 WL 4543268, at *21 (E.D.N.Y. Sept. 29, 2011) (citing *Caiozzo,* 581 F.3d at 72).

Scott failed to submit any opposition to Defendants' motion. But even reading his Complaint to raise the strongest arguments it suggests, several hours of confinement in a chilly room is not a constitutional violation. Scott's temporary deprivation was not sufficiently serious, and therefore does not satisfy the objective component of the inquiry. *See Gardner v. Mental Health Unit of Sullivan Corr. Facility,* No. 07 Civ. 5535(WHP), 2009 WL 1834382, at *3 (no constitutional violation where prisoner was “very cold” for no more than seven days); *see also Felmine,* 2011 WL 4543268, at *22 (no constitutional violation where pre-trial detainee was kept in cold cell overnight for 6–7 hours). And while the Second Circuit has recognized constitutional violations where prisoners were exposed to the cold, those cases are distinguishable because the prisoners were subject to extreme cold for months at a time. *See e.g., Gaston v. Coughlin,* 249 F.3d 156, 164 (2d Cir.2001) (prisoner exposed to sub-zero temperatures for several months); *Corselli v. Coughiln.* 842 F.2d 23, 27 (2d Cir.1988) (same).

III. *Fifth Amendment*

The Fifth Amendment entitles “a suspect to request the presence of an attorney during custodial interrogation, and require[s] police officers to scrupulously honor the underlying privilege against self-incrimination protected by that request.” *Wood v. Ecrole,* 644 F.3d 83, 86 n. 1 (2d Cir.2011) (internal quotation marks and alterations omitted). In other words, once a suspect requests an attorney, “the interrogation must cease until an attorney is present.” *Edwards v. Arizona,* 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

Defendants did not violate Scott's Fifth Amendment right to counsel because Scott alleges that the interrogation ceased as soon as he asked for a lawyer. (Compl. II.D; Ex. A, at 4.) He does not allege that Lopez continued to interrogate him in violation of his rights. While two days elapsed between the time he asked for a lawyer and the time one was appointed, Scott does not allege that any effort was made to question him during that interval. Moreover, this Court takes judicial notice of the fact that December 18–19, 2010—the intervening days—were a weekend. Because Scott does not allege a constitutional violation, the Court need not address Defendants' qualified immunity argument.

*CONCLUSION*

***3** For the foregoing reasons, Defendants' motion for judgment on the pleadings is granted in its entirety, and the Complaint is dismissed. The Clerk of the Court is directed to terminate the motion pending at ECF. No. 30 and mark this case closed.

SO ORDERED:

**All Citations**

Not Reported in F.Supp.2d, 2012 WL 75430

## Footnotes

1 Scott has not complied with this Court's Order dated June 17, 2011 (ECF. No. 21), directing him to file an Amended Complaint identifying the John Doe Defendant by August 1, 2011.

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2009 WL 1834382
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Phillip Jerome GARDNER, Plaintiff,
v.
MENTAL HEALTH UNIT OF, SULLIVAN CORRECTIONAL FACILITY et al., Defendants.

No. 07 Civ. 5535(WHP).
|
June 17, 2009.

**Attorneys and Law Firms**

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Kevin McCaffery, Esq., Assistant Attorney General, Office of the Attorney General, New York, NY, for Defendants.

*MEMORANDUM & ORDER*

WILLIAM H. PAULEY III, District Judge.

***1** *Pro se* Plaintiff Phillip Jerome Gardner ("Gardner"), brings this federal civil rights action for violation of his Fourth, Eighth and Fourteenth Amendment rights. Defendants the Mental Health Unit of Sullivan Correctional Facility, Dr. Banyon, Dr. Kahn, and Nurse Darbee (collectively "Defendants") move for judgment on the pleadings. For the following reasons, Defendants' motion is granted.

*BACKGROUND*

For purposes of this motion, the allegations in the Complaint are accepted as true. In August 2006, Gardner was an inmate at Sullivan Correctional Facility, under the care of the Office of Mental Health ("OMH"), as a result of diagnoses of schizoaffective and anti-social personality disorders. (Compl. at 1.) Gardner was prescribed Abilify, Zoloft, and Trazadone. (Compl. at 3) On August 9, 2006, Gardner refused a "finger stick" diabetes test and insulin to treat his diabetes. As a result, an unidentified male nurse sent him to the Mental Health Unit ("MHU"). (Compl. at 2.) Dr. Kahn interviewed Gardner and authorized his detention in an observation cell. [1] (Compl. at 2.) Gardner was then strip searched and remained in an observation cell for three to five days. (Compl. at 2.)

Gardner was also placed in the observation cell from October 4, 2006 to October 11, 2006 for refusing his insulin again. (Compl. at 7.) On this occasion, he was questioned by Dr. Kahn and Dr. Banyon, both of whom approved his placement in the observation cell and required him to receive medication via injection. (Compl. at 7.) Once again, Gardner was strip searched prior to his confinement in the observation cell.

On both occasions, while in the observation cells, Gardner was required to wear a hospital gown, not permitted to shower, required to request toilet paper, not provided utensils, adequate bedding or pen or paper and alleges he was cold. (Compl. at 6–7.) Gardner also alleges his confinement was improper because refusing medication is a medical issue, not a mental health issue, and as a result he should have been sent to the infirmary.

*DISCUSSION*

I. *Legal Standard*

A Rule 12(c) motion for judgment on the pleadings is decided under the same standard as a Rule 12(b)(6) motion. *Burnette v. Carothers,* 192 F.3d 52, 56 (2d Cir.1999). Courts accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiffs' favor. *Grandon v. Merrill Lynch & Co.,* 147 F.3d 184, 188 (2d Cir.1998). Courts should dismiss a complaint for failure to state a claim only if it fails to include "plausible grounds" for relief. *Bell Atl. Corp. v. Twombly,* 550 U.S. 554, 127 S.Ct. 1955, 1959 (2007) (requiring plaintiff to plead "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [his claim]") *see also Ashcroft v. Iqbal,* 556 U.S. ——, 129 S.Ct. 1937, 1953 (2009) (" Twombly expounded the pleading standard for all civil actions.") (internal quotation marks and citations omitted). Dismissal is proper where a plaintiff fails to plead the basic elements of a claim. *See Wright v. Giuliani,* No. 99 Civ. 10091(WHP), 2000 WL 777940, at *4 (S.D.N.Y. June 14, 2000).

***2** A *pro se* litigant's submissions are held to "less stringent standards than [those] drafted by lawyers." *Haines v. Kerner,* 404 U.S. 519. 520 (1972). Courts "must construe *pro se* complaints liberally" and read them to raise the strongest arguments that they suggest. *Lerman v. Bd. of Elections,* 232 F.3d 135, 140 (2d Cir.2000); *see also Taylor v. Dep't of Educ.,*

313 F.3d 768, 776 (2d Cir.2002); *Weixel v. Bd. of Educ. of N.Y.,* 287 F.3d 138, 146 (2d Cir.2002). Nevertheless, the Court does not have to accept as true "conclusions of law or unwarranted deductions of fact." *First Nationwide Bank v. Gelt Funding Corp.,* 27 F.3d 763, 771 (2d Cir.1994) (citations omitted).

II. *Eighth Amendment Claim*

"[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney,* 509 U.S. 25, 31 (1993). "To prove a violation of the Eighth Amendment, an inmate must show (1) that the deprivation alleged is 'objectively sufficiently serious' such that the plaintiff was denied 'the minimal civilized measure of life's necessities,' and (2) that the defendant official possessed a 'sufficiently culpable state of mind' associated with 'the unnecessary and wanton infliction of pain.' " *Trammell v. Keane,* 338 F.3d 155, 161 (2d Cir.2003) (quoting *Farmer v. Brennan,* 511 U.S. 825,834(1994)).

While "the Constitution does not mandate comfortable prisons", *Rhodes v. Chapman,* 452 U.S. 337, 349 (1981), the Eighth Amendment "imposes duties on [prison] officials ... [to] provide humane conditions of confinement ... [and] ensure that inmates receive adequate food, clothing, shelter, and medical care." *Farmer,* 511 U.S. at 832 (internal quotation omitted).

Gardner alleges his Eighth Amendment rights were violated because he was (1) provided inadequate clothing and bedding; (2) denied soap, toothpaste, utensils, pen, paper, and the opportunity to shower; (3) required to request toilet paper; and (4) placed in a cold observation cell.

First, Gardner was not actually deprived of clothing or bedding. Second, denying a prisoner the opportunity to shower for seven days and withholding toiletries, while uncomfortable, does not endanger an inmate's health and safety. *See, e.g., Farmer,* 511 U.S. at 837; *Ifill v. Goord,* No. 03–CV–355S (WMS), 2007 WL 2874413, at *5–6 (W.D.N.Y. Sept. 27, 2007) (depravation of access to toiletries insufficient to establish a constitutional violation); *Brown v. McElroy,* 160 F.Supp.2d 699, 706 (S.D.N.Y.2001) (allegation that plaintiff was kept in a room without toiletries insufficient to state a constitutional claim); *McCoy v. Goord,* 255 F.Supp.2d 233, 260 (S.D.N.Y.2003) ("A two-week suspension of shower privileges does not suffice as a denial of basic hygienic needs." (internal quotation omitted)). Third, while complete deprivation of toilet-paper may constitute a constitutional violation if it poses a risk to inmate health and safety, *see Keane,* 338 F.3d at 165, here Gardner was simply required to request toilet tissue. Fourth, while the deprivation of food may rise to constitutional levels under certain circumstances, *see Robles v. Coughlin,* 725 F.2d 12, 15 (2d Cir.1983), a lack of utensils does not present "an immediate danger to health or well-being." *Chapdelaine. v. Keller,* 95 Civ. 1126(RSP)(GLS), 1998 WL 357350, at *12 (N.D.N.Y. Apr. 16, 1998). Finally, the unavailability of a pen or paper, is not objectively serious. *See Purcell v. Coughlin,* 790 F.2d 263, 265 (2d Cir.1986).

***3** As for Gardner's claim that he was placed in a cold observation cell, "[a]n Eighth Amendment claim may be established by proof that the inmate was subjected for a prolonged period to bitter cold," *Gaston v. Coughlin,* 249 F.3d 156, 164 (2d Cir.2001), provided that the cell's conditions were "objectively, sufficiently serious that [the prisoner] was denied the minimal civilized measure of life's necessities." *Gaston,* 249 F.3d at 164; *see also Corselli v. Coughlin,* 842 F.2d 23, 27 (2d Cir.1988) (Prisoner "exposed to bitterly cold temperatures for approximately three months in the fall and winter of 1983–84 when the large window frames in his cell block were empty and correction officers made things worse by tearing down plastic sheeting partially covering the frames."); *Gaston,* 249 F.3d at 165 (Prisoner exposed to "freezing and sub-zero temperatures" in the winter months.); *Borges v. McGinnis,* 03 Civ. 6375(CJS), 2007 WL 1232227 at *5 (W.D.N.Y. Apr. 26, 2007) ("An inmate cannot establish an Eighth Amendment claim merely by establishing that he was uncomfortably cold for a short period.")). Gardner's allegation that he was "very cold" is not objectively serious enough to constitute an Eighth Amendment violation, particularly when it lasted no more than seven days during the months of August and October.

II. *Fourth Amendment Claim*

"The Fourth Amendment [ ] requires all searches conducted within a prison, including strip searches, to be reasonable." [2] *Jean–Laurent v. Wilkerson,* 438 F.Supp.2d 318, 323 (S.D.N.Y.2006) (citing *Hodges v. Stanley,* 712 F.2d 34, 35–36 (2d Cir.1983)). "The test of reasonableness under the Fourth Amendment ... requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish,* 441 U.S. 520, 559 (1979).

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Corrections staff have a legitimate penological interest in ensuring that inmates admitted to observation cells are not carrying contraband. That need for safety and security outweighs the personal intrusion. *See Gomez v. Coughlin,* 685 F.Supp. 1291, 1300 (S.D.N.Y.1988) (Strip search of an inmate required by DOCS regulations before the inmate was placed in administrative segregation "was prudent, reasonable and required."); *see also Iqbal v. Hasty,* 490 F.3d 143, 171 (2d Cir.2007) (noting it may be reasonable to search an inmate before he is placed in administrative segregation). Accordingly, Gardner's Fourth Amendment claim is dismissed.

III. *Fourteenth Amendment Claim*

To the extent that Gardner asserts a claim for a violation of his liberty interest when he refused to take his diabetes and mental health medication, it is dismissed. "[A] prison may compel a prisoner to submit to treatment despite his general right to refuse such treatment when prison officials, 'in the exercise of professional judgment, deem it necessary to carry out' legitimate penological objectives." *Pabon v. Wright,* 459 F.3d 241, 251 (2d Cir.2006) (quoting *White v. Napoleon,* 897 F.2d 103, 113 (3rd Cir.1990)).

*CONCLUSION*

***4** For the foregoing reasons, Defendants' motion for judgment on the pleadings is granted and this action is dismissed. The Clerk of the Court is directed to mark the case closed.

SO ORDERED.

**All Citations**

Not Reported in F.Supp.2d, 2009 WL 1834382

## Footnotes

1 Gardner's complaint refers to the observation cell as a "strip cell."

2 Although Gardner identifies the strip search as an Eighth Amendment violation, this Court properly considers it under the Fourth Amendment standard.

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KeyCite Overruling Risk - Negative Treatment
Overruling Risk Darnell v. Pineiro, 2nd Cir., February 21, 2017

2011 WL 4543268
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court,
E.D. New York.

Ian FELMINE, Plaintiff,
v.
The CITY OF NEW YORK, Detective Martin Ruane, Detective Julio Franco, Detective Thomas Markhardt, Sergeant Jose Borrero, "John Doe" and "Jane Doe", Defendants.

No. 09–CV–3768 (CBA)(JO).
|
Sept. 29, 2011.

**Attorneys and Law Firms**

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***MEMORANDUM & ORDER***

AMON, Chief Judge.

***1** Plaintiff Ian Felmine has filed suit pursuant to 42 U.S.C. § 1983 and § 1985 alleging various deprivations of constitutional rights, as well as various state law causes of action. The plaintiff's claims arise from his arrest and prosecution for the attempted murder of Max Mazile on October 30, 2006. The plaintiff was arrested following statements made by Mazile to the police, and was subsequently indicted for attempted murder on the grand jury testimony of Mazile and another witness. On June 10, 2009, however, the King's County District Attorney's Office voluntarily dismissed the case, citing the fact that Mazile was uncooperative and did not wish to proceed. This action followed. The defendants now move for summary judgment asserting various defenses, including that the plaintiff's claims fail as a matter of law, are time-barred, or that the defendants are entitled to qualified immunity.

The plaintiff also moves to amend his complaint, principally to assert claims against Assistant District Attorney Allana Alexander. For the reasons stated herein, the Court grants the defendants' summary judgment motion in part and denies it in part. The plaintiff's motion to amend his complaint is denied in full.

***THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT***

**I. SUMMARY AND BACKGROUND**

On October 30, 2006, a large fight broke out in the parking lot of the Brooklyn Museum involving students from nearby Clara Barton High School. During the incident, Max Mazile was stabbed to the left side of his upper chest. (Uzoh Decl., Ex. 10, at 155.) Mazile was admitted to the trauma unit of the King's County Hospital Center and was discharged on November 4, 2006.

On the night of the incident, police officers including Detectives Ruane, Markhardt and Franco went to the Kings County Hospital to interview Mazile. The parties dispute whether the officers conducted one or two interviews. Complaint Follow Up Informationals from the night of the incident, signed by Detective Ruane, indicate that the Ruane conducted two interviews that night. During the first interview, the reports indicate, Ruane learned that "a perp by the name of Ian stabbed the C/V in the chest believing the c/v was involved in the fight ... The C/V states that he heard that the fight was over a Haitian flag that this perp Ian spit on last week." (Kunz Decl., Ex. D, at 2.) The reports state that Detective Ruane then interviewed a school safety officer at Clara Barton High School, who stated that the person who spit on the Haitian flag was named Ian Felmine. (*Id.* at 3) According to the report, Detective Ruane then conducted a check in the precinct's photo manager, and procured a photograph of seventeen-year-old Ian Felmine from a previous arrest. (*Id.* at 4.) Another Complaint Follow Up indicates that Detective Ruane re-interviewed Mazile at roughly 11:00 p.m. and showed him the photograph, at which point, "the C/V positively identified the perp as the one who stabbed him." (*Id.* at 5.)

***2** Mazile testified at his deposition that only one interview with the police occurred on the night of the incident. During that interview, he states that he was shown a picture of Felmine and informed the officers that the individual in the photograph was in crowd that surged toward him before he was stabbed. (Uzoh Decl., Ex. 5, at 32, 93, 96–97.) He testified that he never told the officers that he was "stabbed in the chest by Ian," and that he wasn't aware that the fight was about a Haitian flag. (*Id.* at 33–34.) Mazile initially testified that he told the officers on the night of the incident that he saw the individual in the photograph with a slim, silver object. (*Id.* at 40, 93.) However, he later stated that he did not tell the officers about the object when they spoke that night. (*Id.* at 95.)

Later that same evening, at approximately 11:30 p.m., the four defendant officers went to Felmine's apartment. When they arrived, Felmine's mother, Estlyn Briggs, answered the door. Ms. Briggs told the police that Felmine lived in the house, and the police then asked to see him. In his deposition, Detective Ruane testified that Ms. Briggs then gave affirmative consent for the officers to enter. (Uzoh Decl., Ex. 6, at 101.) In her deposition, Ms. Briggs stated only that when the officers asked to see Felmine, she "turned [her] back, let go of [the] door" and walked to Felmine's room. (Uzoh Decl., Ex. 8, at 36.) Felmine was arrested at that time.

According to Felmine's version of the events, an unidentified civilian assaulted him with a two-by-four on October 30, 2006 sometime after 3:50pm, near the Brooklyn Museum. (Uzoh Decl., Ex. 4, at 118–24.) After the alleged assault, Felmine states he ran home and went to sleep. (*Id.* at 135–37.) He did not seek any medical treatment for his injuries at that time, and awoke when the officers arrived to arrest him. (*Id.* at 215, 137.) According to Felmine, in the course of arresting him the officers handcuffed him unnecessarily tightly and repeatedly shoved him, running him into the precinct wall and causing him to hit his head on the door to the police car. (*Id.* at 218–221.) He also argues that he requested medical treatment on the night of his arrest and was denied it. (Uzoh Decl., Ex. 4, at 183.) At his deposition, Detective Ruane testified that Felmine did not appear to have any injuries. (Uzoh Decl., Ex. 6, at 107.)

Detective Ruane interrogated Felmine during the early morning hours of October 31, 2006. It is undisputed that by this point the officers had received information that the fight at the museum may have arisen out of a dispute where Felmine spit on a Haitian flag. Felmine stated to the Detective that he was involved in an incident involving a Haitian flag earlier that week; though, he says he never mentioned anyone spitting on the flag. (*Id.* at 155–56.) According to Felmine, he told Ruane that he was at the Brooklyn Museum on the day of the incident, and that he was with an individual named Kareem Barrow. (*Id.* at 151, 179.) Barrow had been arrested at the scene of the incident in possession of a knife. According to a police report, an eyewitness identified Barrow as the attacker of a second victim who had been cut in the face during the altercation. (Kunz Decl., Ex. B.) [1]

***3** Later that day, Detective Ruane was interviewed by the Kings County District Attorney's Early Case Assessment Bureau and signed a felony complaint against Felmine, which charged him with attempted murder and other offenses. Felmine was taken to Central Booking, met with an attorney, and appeared for his initial arraignment where bail was set and a grand jury date was scheduled for a few days later. In the early morning hours of November 1, 2006, Felmine was taken to the emergency department of Long Island College Hospital, where he was diagnosed with a contusion to his right elbow and abrasions on his right forehead. (Uzoh Decl., Ex. 15, at 3–4.) He then was sent back to the precinct to sleep until a bus could transport him to Rikers Island.

Assistant District Attorney Allana Alexander spoke directly to the victim, Max Mazile, just days after the incident and took video testimony that she presented to the grand jury on November 3, 2006. Mazile testified at his deposition that the ADA did not prepare him for his testimony in any way, but simply came to the hospital, set up the video recorder, and asked Mazile questions about what happened. (Uzoh Decl., Ex. 5, at 17,48.) In Mazile's grand jury testimony he stated that he saw Felmine as part of a group that chased him, and that he saw Felmine swinging a slim, silver object at his back. (Uzoh Decl, Ex. 13, at 14–15.) The only other witness who testified against Felmine was a civilian witness named Wilguens Dorval. Dorval told the grand jury that he saw Felmine chasing Mazile with a screwdriver, and then join a group in kicking and punching Mazile. (Uzoh Decl, Ex. 21, at 16.) None of the defendant officers testified before the grand jury.

Prior to recording Mazile's grand jury testimony, ADA Alexander spoke with Dorval at the hospital and discovered that he had been an eyewitness to the fights at the museum. (Uzoh Decl., Ex. 7, at 29–39.) It is disputed exactly what was said between the two of them, but Dorval testified in his deposition that the ADA put pressure on him and his friends

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to give her information about Felmine by telling them that Felmine was dangerous and could hurt someone else. (Uzoh Decl., Ex. 9, at 39–40.) Dorval then agreed to testify the next day before the grand jury. He stated in his deposition that when he met to prepare with ADA Alexander immediately before giving his grand jury testimony, she told him to say he saw Felmine with a screwdriver, even though Dorval claims he only heard this fact secondhand from others at the hospital. (*Id.* at 53–55.) Dorval does not dispute that he was present at the incident and saw Felmine participating in the fighting.

On November 3, 2006, the Grand Jury indicted Felmine on charges including attempted murder, assault, and criminal possession of a weapon. (Uzoh Decl., Ex. 35.) On June 10, 2009, the Kings County District Attorney's Office moved to dismiss the charges against Felmine due to lack of cooperation on the part of the witnesses. (Uzoh Decl., Ex. 20.)

## II. STANDARD OF REVIEW

***4** Defendants move for summary judgment, seeking dismissal of the complaint in full. Summary judgment is appropriate 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 judgment as a matter of law. Fed.R.Civ.P. 56(c); *accord Celotex Corp. v. Catrett,* 477 U.S. 317, 322 23 (1986); *Belfi v. Prendergast,* 191 F.3d 129, 135 (2d Cir.1999). The Court's function is not to resolve disputed issues of fact but only to determine whether there is a genuine issue of fact to be tried. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not that of a judge." *Id.* at 255; *see also Fischl v. Armitage,* 128 F.3d 50,55 (2d Cir.1997) ( "[C]redibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment.").

The court is required to view the evidence in the light most favorable to the nonmoving party. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Nevertheless, the non-moving party cannot rest on mere allegations or denials but must instead set forth specific facts showing there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Nat'l Westminster Bank USA v. Ross,* 676 F.Supp. 48, 51 (S.D.N.Y.1987) ( "[S]peculation, conclusory allegations, and mere denials are not enough to raise genuine issues of fact.").

A motion for summary judgment requires the party bearing the burden of proof at trial "to make a showing sufficient to establish the existence of an element essential to that party's case ... since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex,* 477 U.S. at 322–23. No genuine issue exists unless there is sufficient evidence favoring the nonmoving party for a rational trier of fact to find for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson,* 477 U.S. at 249–50 (citations omitted).

In order to maintain an action pursuant to § 1983, a plaintiff must allege two essential elements. First, "the conduct complained of must have been committed by a person acting under color of state law." *Pitchell v. Callan,* 13 F.3d 545, 547 (2d Cir.1994). Second, "the conduct complained of must have deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States." *Id.* "Section 1983 itself creates no substantive rights, [but] ... only a procedure for redress for the deprivation of rights established elsewhere." *Sykes v. James,* 13 F.3d 515, 519 (2d Cir.1993) (citing *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 816, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985)).

## III. THE INDIVIDUAL DEFENDANTS

### A. The Statute of Limitations as to Defendants Markhardt and Borrero

***5** The defense argues that because the plaintiff failed to amend his complaint to name defendants Markhardt and Borrero before the expiration of the statute of limitations, claims against those defendants must be dismissed. The plaintiff does not dispute that the claims against these two defendants would be otherwise time-barred, but argues only that the defendants are equitably estopped from asserting a statute of limitation defense, because the defendants were aware of the officers' names and prevented the plaintiff from obtaining them in time to amend his complaint before the limitations period expired.

Claims under § 1983 are governed by the statute of limitations and tolling rules provided by the analogous state law. *Board of Regents v. Tomanio,* 446 U.S. 478, 483–92, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980). In New York, the applicable statute of limitations is three years. *Soto v. Brooklyn Corr. Facility,* 80 F.3d 34, 35 (2d Cir.1996); *see* N.Y. C.P.L.R. § 214(5). The statute of limitations accrues "when the plaintiff knows or has reason to know of the injury which is the

basis of the action." *Singleton v. City of New York,* 632 F.2d 185, 191 (2d Cir.1980). However, because the plaintiff was seventeen at the time of his arrest, the statute of limitations for claims accruing during that event was "tolled" until his eighteenth birthday on December 9, 2006. *See* N.Y. C.P.L.R. § 208. The limitations period for these claims therefore expired on December 9, 2009. The plaintiff's claim for malicious prosecution did not begin to accrue until the date of favorable termination of the criminal proceedings—June 10, 2009—and so the limitations period will not expire until June 10, 2012. *See Heck v. Humphrey,* 512 U.S. 477, 489–90, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The plaintiff's Second Amended Complaint was filed on January 18, 2010 and was the first pleading to add Markhardt and Borrero as defendants. (Uzoh Decl., Ex. 1.) The issue is thus whether equitable estoppel prevents defendants Markhardt and Borrero from raising the statute of limitations for all claims other than malicious prosecution.

A defendant may be equitably estopped from asserting the statute of limitations as a defense "in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused [the plaintiff] to delay in bringing his lawsuit." *Cerbone v. Int'l Ladies' Garment Workers' Union,* 768 F.2d 45, 50 (2d Cir.1985); *see also Keating v. Carey,* 706 F.2d 377, 382 (2d Cir.1983). "To invoke equitable estoppel, a plaintiff must show that: (1) the defendant made a definite misrepresentation of fact, and had reason to believe that the plaintiff would rely on it; and (2) the plaintiff reasonably relied on that misrepresentation to his detriment." *Buttry v. General Signal Corp.,* 68 F.3d 1488, 1493 (2d Cir.1995) (citing *Heckler v. Cmty. Health Servs.,* 467 U.S. 51, 59, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984)). A concealment of material facts is a sufficient "misrepresentation" to satisfy the first prong of the test. *Smith v. Smith,* 830 F.2d 11, 13 (2d Cir.1987).

***6** On September 24, 2009, Magistrate Judge Orenstein ordered the defendants to identify the police officers "involved in the arrest at issue in this litigation" no later than October 23, 2009. (Uzoh Decl., Ex. 46.) A letter from defense counsel to the plaintiff's counsel, dated October 2, 2009, contained only the name of Detective Ruane, and stated that the City was not able to identify any other individuals who had been involved in the arrest at that time. (Uzoh Decl., Ex. 48.) On October 8, 2009, the plaintiff's counsel notified defense counsel that his client knew that there were multiple officers involved in the arrest and was seeking the additional names. (Uzoh Decl., Ex. 49.) It is unclear whether defense counsel ever responded to this request. The plaintiff claims he received the police reports from his arrest on October 21, 2009. These reports revealed the involvement of Detective Franco, who was timely added to the complaint. [2] (Pl. 56.1 Stmt. at ¶ 164.) In an email dated December 17, 2009, the plaintiff's counsel again inquired for additional officers' names and was told by defense counsel that they would be produced as quickly as possible. (Uzoh Decl., Ex. 52.) This communication took place, of course, after the limitations period had already expired. Defense counsel produced the names of all four officers in a letter dated January 13, 2010. (Uzoh Decl., Ex. 53.) The defendants maintain that they failed to undertake efforts to produce the additional names earlier because the plaintiff's complaint only named one "John Doe" officer as a defendant, and the City was therefore under the impression that the plaintiff was only suing Detective Ruane.

On these facts, the plaintiff fails to make the requisite showing for equitable estoppel. In particular, the plaintiff makes no showing that he relied to his detriment, prior to the December 9, 2009 expiration date, on any statement or omission made by defense counsel. The above communications make clear that the plaintiff was long aware that multiple officers were involved in his arrest, and that he was never dissuaded from his belief that additional names needed to be produced. Thus, it does not appear that the plaintiff was deceived or misled in any way into failing to add the additional defendants. Once defense counsel failed to produce names beyond Detective Ruane's, the plaintiff at all times had the option of moving this Court to compel the disclosures and to address any misunderstandings between the parties regarding who the plaintiff was seeking to sue. By filing his action so close to the end of the limitations period, the plaintiff assumed the common risk of discovery delays, and should have taken more proactive measures to prevent his claims from lapsing. Instead, he did not revive the matter with the defendants until after the limitations period had expired.

For the reasons stated, the Court grants summary judgment to Detectives Markhardt and Borrero on the grounds of the statute of limitations for all claims other than malicious prosecution. [3]

**B. False Arrest**

***7** A § 1983 claim for false arrest or false imprisonment, based on an individual's right to be free from unreasonable seizures, is substantially the same as a claim for false arrest under New York law. *Boyd v. City of New York,* 336 F.3d 72, 75 (2d Cir.2003). Such a claim requires the plaintiff to

show (1) that the defendant intended to confine the plaintiff; (2) that the plaintiff was conscious of the confinement; (3) that the plaintiff did not consent to the confinement; and (4) that the confinement was not otherwise privileged. *Savino v. City of New York,* 331 F.3d 63, 75 (2d Cir.2003). Even where a plaintiff proves all of the required elements, the claim will nevertheless fail where there was probable cause for the arrest. *Jaegly v. Couch,* 439 F.3d 149, 152 (2d Cir.2006) ("[T]he existence of probable cause is an absolute defense to a false arrest claim."); *Caldarola v. Calabrese,* 298 F.3d 156, 161 (2d Cir.2002); *see also Singer v. Fulton County Sheriff,* 63 F.3d 110, 118 (2d Cir.1995) ("There can be no federal civil rights claim for false arrest where the arresting officer had probable cause."). Here, the defense argues that no claim for false arrest may lie against the arresting officers because the undisputed facts establish that there was probable cause.

Probable cause requires an officer to have "knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *Martinez v. Simonetti,* 202 F.3d 625, 634 (2d Cir.2000) (citation omitted). "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer *at the time of the arrest." Devenpeck v. Alford,* 543 U.S. 146, 152, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004) (emphasis added); *accord Ricciuti v. New York City Transit Authority,* 124 F.3d 123, 128 (2d Cir.1997). Probable cause is to be analyzed from an objective perspective, in light of the "totality of the circumstances." *Panetta v. Crowley,* 460 F.3d 388, 395 (2d Cir.2006). Therefore, the state of mind of the arresting officer is irrelevant to the probable cause determination; "[t]hat 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." *Devenpeck,* 543 U.S. at 153; *see Jaegly,* 439 F.3d at 153 (noting that the Supreme Court has "rejected the view that probable cause to arrest must be predicated upon the offense invoked by the arresting officer, or even upon an offense 'closely related' to the offense invoked by the arresting officer"). Thus, in the instant case, the plaintiff's claim of false arrest must fail if, at the time of the arrest, the defendant officers had probable cause to arrest the plaintiff for any crime.

The defendants argue that probable cause was established during the officers' interview with Max Mazile prior to the plaintiff's arrest. The defendants urge that that the undisputed facts to be taken from the interview, even if insufficient to create probable cause for attempted murder, would establish probable cause to arrest for several crimes under New York law, including N.Y.P.L. § 120.15 "Menacing in the third degree," N.Y.P.L. § 120.06 "Gang assault in the first degree," and N.Y.P.L. § 120.10 "Attempted assault."

***8** "[I]t is well-established that a law enforcement official has probable cause to arrest if he received his information from some person, normally the putative victim or eyewitness, unless the circumstances raise doubt as to the person's veracity." *Panetta,* 460 F.3d at 395 (citations and internal quotation marks omitted); *see also Singer,* 63 F.3d at 119 ("An arresting officer advised of a crime by a person who claims to be the victim ... has probable cause to effect an arrest absent circumstances that raise doubts as to the victim's veracity".). The veracity of those individuals "who are the victims of the very crime they report to the police is assumed." *Miloslavsky v. AES Engineering Soc., Inc.,* 808 F.Supp. 351, 355 (S.D.N.Y.1992), *aff'd,* 993 F.2d 1534 (2d Cir.1993); *see also Martinez,* 202 F.3d at 634; *Parisi v. Suffolk County,* 2009 WL 4405488, at *7 (E.D.N.Y.2009) ("[T]he probable cause standard does not require that the arresting officer affirmatively seek out reasons to doubt the victim or witness where none are apparent."). In addition, a photo identification of the suspect by an eye witness "is normally sufficient to establish probable cause." *Celestin v. City of New York,* 581 F.Supp.2d 420, 431 (E.D.N.Y.2008). However, in making that determination, a court will consider the reliability of the identification, including the corroborating circumstances and whether there was reason to question the veracity of the witness. *See Thompson v. City of New York,* 603 F.Supp.2d 650, 657 (S.D.N.Y.2009) (noting that circumstances may exist "where a victim's identification was so unreliable as to not establish probable cause"); *Oliveira v. Mayer,* 23 F.3d 642 (2d Cir.1994) ("[E]ven if bystander witnesses are considered presumptively reliable, a report of a crime alone will not necessarily establish probable cause.").

Reading the record in the light most favorable to the plaintiff, the Court finds that there remain many disputed issues of material fact as to the existence of probable cause to arrest. It seems that the only fact on which the parties agree is that Mazile identified to the police a picture of Felmine as a person who was present at the scene of the stabbing. In his deposition, Mazile's account of his conversation with the police contains a great degree of ambiguity and seeming contradiction. In many instances, it is unclear whether Mazile is recounting what he told police about the incident prior to the plaintiff's arrest, or whether he is stating what actually took place at the Brooklyn Museum, but that he might not have told police at the hospital.

Thus, at times, Mazile appears to testify that he told the officers that Felmine was in a crowd of individuals that came towards him, causing him to attempt to defend himself and then to run away. (Uzoh Decl., Ex. 5, at 68–71, 92–93.) Later, however, Mazile states that in his only conversation with the police, "[the officer] brought a picture and I told them I did see Ian there. That was it." (*Id.* at 96–97.) The Mazile deposition is also contradictory with respect to whether he told police that Felmine was carrying an object. Initially, Mazile testified that he told the officers he saw Felmine at the altercation with an object in his hand. (*Id.* 40–41.) Later in the same deposition, though, Mazile testified that while he did see Felmine with a silver object in his hand, he didn't think he told the defendants this information at the hospital because "it didn't come up." (*Id.* 93–97.)

***9** Detective Ruane's account of the evening is much different from Mazile's. Ruane, in both his deposition and his police reports, stated that Mazile told him at the hospital that he was stabbed by a person named Ian over a dispute involving a Haitian flag. (Uzoh Decl, Ex. 6, at 135–139; Kunz Decl., Exhibit E, No. 2.) However, Mazile testified that he never told police that he was *stabbed* by the person in the photograph, and that he can't remember if he gave the officers the name Ian. (Uzoh Decl., Ex. 5, at 32–33.) He also testified that he has never given the identity of the person who stabbed him because he does not know. (*Id.* at 42.) Additionally, he testified that he never told the officers at the hospital anything about a Haitian flag, and wasn't aware of such a dispute. (*Id.* at 34.)

Where there is a dispute as to the facts and events giving rise to probable cause, the question is properly left to the jury. *See Murphy v. Lynn,* 118 F.3d 938, 947 (2d Cir.1997) ("[W]here the question of whether an arresting officer had probable cause is predominantly factual in nature, as where there is dispute as to the pertinent events, the existence *vel non* of probable cause is to be decided by the jury."); *Moore v. Comesanas,* 32 F.3d 670, 673 (2d Cir.1994) (holding that since the issue of probable cause was predominantly factual in nature, it was properly presented to the jury.) On the record before the Court, it remains difficult to discern what information was told to the defendants prior to the plaintiff's arrest. If, according to the plaintiff's contention, Mazile only told police officers that Felmine was present at the incident, and nothing more, this would not have amounted to probable cause for any arrest. *See United States v. Almanzar,* 749 F.Supp. 538, 540 (S.D.N.Y.1990) ("[M]ere association with a known or suspected criminal or presence at the scene of a crime does not create probable cause.") (citing *United States v. Di Re,* 332 U.S. 581, 593, 68 S.Ct. 222, 92 L.Ed. 210 (1948)). Given Mazile's testimony that he did not tell the officers about any dispute involving a Haitian flag, thereby contradicting Detective Ruane's police reports, it is similarly difficult to discern how and when the officers obtained this information and used it to link Felmine to the stabbing incident. The conflicting accounts provided by Ruane and Mazile, as well as the seeming inconsistencies and confusion within Mazile's deposition itself, leave many disputed issues as to the reliability and credibility of anyone's account of the events. These issues are for a jury to decide. *See Anderson,* 477 U.S. at 255.

The defendants argue that even if probable cause was lacking, they should nonetheless be entitled to qualified immunity. Qualified immunity protects officials from civil damages liability where "(1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." *Holcomb v. Lykens,* 337 F.3d 217, 220 (2d Cir.2003) (quoting *Weyant v. Okst,* 101 F.3d 845, 857 (2d Cir.1996)). Because here, the right not to be arrested without probable cause was clearly established, the only question is whether it was objectively reasonable for the defendants to believe their conduct did not violate that right. A police officer has acted in an unreasonable manner where "no officer of reasonable competence could have made the same choice in similar circumstances." *Lee v. Sandberg,* 136 F.3d 94, 102 (2d Cir.1997). That is, officers are entitled to qualified immunity if "officers of reasonable competence could disagree" as to legality of their action. *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

***10** To that end, the doctrine of qualified immunity protects an officer from a § 1983 suit for false arrest where there was "arguable" probable cause for the arrest. *See Zellner v. Summerlin,* 494 F.3d 344, 369 (2d Cir.2007). "Arguable probable cause exists 'if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Escalera v. Lunn,* 361 F.3d 737, 743 (2d Cir.2004) (quoting *Golino v. City of New Haven,* 950 F.2d 864, 870 (2d Cir.1991)). However, while qualified immunity provides this broader protection from liability, " '[a]rguable' probable cause must not be misunderstood to mean 'almost' probable cause." *Zellner,* 494 F.3d at 370 (quotations omitted). Thus, the Second Circuit has explained, "[i]f officers of reasonable

competence would have to agree that the information possessed by the officer at the time of arrest did not add up to probable cause, the fact that it came close does not immunize the officer." *Jenkins v. City of New York,* 478 F.3d 76, 87 (2d Cir.2007).

A claim that it was objectively reasonable for an official to believe that his actions did not violate a clearly established right "has its principal focus on the particular facts of the case." *Hurlman v. Rice,* 927 F.2d 74, 78–79 (2d Cir.1991); *see Kerman v. City of New York,* 374 F.3d 93, 109 (2d Cir.2004). Summary judgment should therefore not be granted on the basis of qualified immunity unless the defendant can show that "no reasonable jury, viewing the evidence in the light most favorable to the Plaintiff, could conclude that the defendant's actions were objectively unreasonable in light of clearly established law." *Ford v. Moore,* 237 F.3d 156, 162 (2d Cir.2001). Where there is no dispute as to the material facts, the matter of whether the defendants' conduct was objectively reasonable in a question of law for the court. *Zellner,* 494 F.3d at 368. If there is such a factual dispute, however, "the factual questions must be resolved by the factfinder." *Kerman,* 374 F.3d at 109; *see also Thomas v. Roach,* 165 F.3d 137, 143 (2d Cir.1999) ( "Summary judgment on qualified immunity grounds is not appropriate where there are facts in dispute that are material to a determination of reasonableness."); *Lennon v. Miller,* 66 F.3d 416, 420 (2d Cir.1995).

In this case, most of the material facts leading up to the arrest are in dispute. It is impossible to discern an account that is sufficiently uncontroverted to establish as a matter of law that there was any degree of probable cause—"arguable" or otherwise. Felmine's version of the events is that the officers arrested him after receiving information that he was present at the chaotic scene of the fight, but no more. Officers of reasonable competence would have to agree that this did not amount to probable cause to arrest the plaintiff for a crime. Faced with so little in the way of undisputed facts, and reading the evidence in the light most favorable to the plaintiff, the Court cannot conclude as a matter of law that the defendants' actions were objectively reasonable under clearly established Fourth Amendment principles.

***11** Accordingly, as to defendants Ruane and Franco, summary judgment on the claim for false arrest is denied.

**C. Malicious Prosecution**

Like a claim of false arrest, the elements of a malicious prosecution claim pursuant to 42 U.S.C. § 1983 are drawn from state law. *Boyd v. City of New York,* 336 F.3d 72, 75 (2d Cir.2003); *Jocks v. Tavernier,* 316 F.3d 128, 134 (2d Cir.2003). Under New York law, to succeed on a claim of malicious prosecution, the plaintiff must prove four elements: (1) the defendant initiated or continued a criminal proceeding; (2) the proceeding terminated favorably to the plaintiff, (3) there was no probable cause for the criminal charge; and (4) the defendant acted maliciously. *Rothstein v. Carriere,* 373 F.3d 275, 282 (2d Cir.2004); *Savino v. City of New York,* 331 F.3d 63, 72 (2d Cir.2003). While the plaintiff has presented sufficient evidence that Detective Ruane meets the first element, the plaintiff fails to survive summary judgment on the third and fourth.

**1. Initiation of prosecution**

The defendants claim that the officers did not initiate a prosecution against the plaintiff. Rather, they argue, the officers did nothing more than disclose to the district attorney's office all material information within their knowledge, and the ADA made the decision to prosecute independent of any pressure from the officers.

To prevail on a malicious prosecution claim, a plaintiff must show that the defendant "played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act." *Manganiello,* 612 F.3d 149,163 (2d Cir.2010). Where the claim is directed at the police, "a malicious-prosecution claim cannot stand if the decision made by the prosecutor to bring criminal charges was independent of any pressure exerted by [the] police." *Hartman v. Moore,* 547 U.S. 250, 263, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006). However, in malicious prosecution claims brought against police officers, plaintiffs have succeeded in demonstrating that the officers initiated criminal proceedings by having the plaintiff arraigned, by filling out complaining and corroborating affidavits, or by signing felony complaints. *Llerando–Phipps v. City of New York,* 390 F.Supp.2d 372, 383 (S.D.N.Y.2005); *see Cameron v. City of New York,* 598 F.3d 50, 63 (2d Cir.2010) ("Under New York law, police officers can 'initiate' prosecution by filing charges or other accusatory instruments."); *Cox v. County of Suffolk,* 827 F.Supp. 935 935, 938 (E.D.N.Y.1993) (holding that in swearing to and signing the felony compliant, the officer was sufficiently involved in the initiation of the criminal proceeding for a malicious prosecution claim).

Here, it is undisputed that Detective Ruane was interviewed by the DA's Early Case Assessment Bureau and signed the sworn criminal court complaint. (Kunz Decl., Ex. G.) As to

Ruane, this fact is sufficient to survive summary judgment on this factor. However, the plaintiff does not point to any facts indicating that the other officers participated in the initiation of formal criminal proceedings. (Pl. 56.1 Stmt. at ¶¶ 111–24.) Ruane's deposition establishes that the other officers assisted to varying degrees in the investigation, witness interviews, and the arrest itself, but that Ruane was the only one "assigned" to the case and was the one responsible for providing documents and information to the DA's office. (Uzoh Decl., Ex. 6, at 110, 191–93.) Moreover, it is now undisputed that none of the defendant officers testified at the grand jury. (Defs. 56.1 Stmt. at ¶ 41.) The plaintiff has therefore not produced sufficient facts from which a jury could find that the defendants other than Ruane "played an active role in the prosecution" within the meaning of a malicious prosecution claim.

***12** For the above reasons, summary judgment is granted in favor of defendants Franco, Markhardt and Borrero on the malicious prosecution claim.

**2. Probable cause to prosecute**

As with a false arrest claim, the existence of probable cause is a complete defense to a claim of malicious prosecution. *Savino,* 331 F.3d at 72. Moreover, "[o]nce a suspect has been indicted ... the law holds that the Grand Jury action creates a presumption of probable cause." *Rothstein v. Carriere,* 373 F.3d 275, 282–83 (2d Cir.2004); *see Green v. Montgomery,* 219 F.3d 52, 60 (2d Cir.2000) (citing *Marshall v. Sullivan,* 105 F.3d 47, 50 (2d Cir.1996)). That presumption may only be rebutted "by evidence that *the indictment* was procured by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith." *Savino,* 331 F.3d at 72 (quotations omitted) (emphasis added). "[I]t is the plaintiff who bears the burden of proof in rebutting the presumption of probable cause that arises from the indictment." *Id.* at 73. This burden "requires the plaintiff to establish what occurred in the Grand Jury, and to further establish that those circumstances warrant a finding of misconduct sufficient to erode the premise that the Grand Jury acts judicially." *Rothstein,* 373 F.3d at 284. The plaintiff may not satisfy his burden "with mere 'conjecture' and 'surmise' that his indictment was procured as a result of conduct undertaken by the defendants in bad faith." *Savino,* 331 F.3d at 73.

The plaintiff argues that because the indictment was eventually dismissed, that dismissal negates the presumption of probable cause, citing *Cox v. County of Suffolk,* 827 F.Supp. 935, 939 (E.D.N.Y.1993). In *Cox,* however, the district court held only that "where a grand jury indictment is reviewed by a state judge and dismissed due to total lack of evidence ... the presumption of probable cause raised by that indictment will fail." *Id.* at 939. Here, the dismissal of the case against Felmine did not pertain to the evidence adduced at the grand jury, but rather resulted from the ADA's voluntary motion to dismiss due the difficulty of ascertaining trial testimony from the victim. (Uzoh Decl., Ex. 19.)

The plaintiff further argues that the presumption of probable cause may be overcome where, as here, a plaintiff alleges that the police provided false statements to the prosecutor. In his Rule 56.1 Statement, Felmine alleges that the false statements consisted of telling the ADA that Mazile and Felmine were fighting during the incident, and that Felmine had a "sharp shiny object and stabbed [Mazile] in the chest." (Pl. 56.1 Stmt. at ¶ 111.) There are similar statements contained in Ruane's criminal complaint. (Uzoh Decl., Ex. G.)

Where a prosecution follows from a grand jury indictment, however, the police officer accused of malicious prosecution typically must have engaged in some misconduct that had a material effect on that indictment. *See, e.g., Manganiello,* 612 F.3d at 162 (presumption of probable cause was rebutted where police officer defendant, inter alia, promoted a grand jury witness to the ADA despite knowing he had already lied about the plaintiff's involvement in the crime); *Savino,* 331 F.3d at 73 (in order to survive a motion for summary judgment on malicious prosecution claim against police officer defendants, "[the plaintiff] must have submitted evidence sufficient for a reasonable jury to find that his indictment was procured *as a result of police conduct* undertaken in bad faith" (emphasis added)). Conversely, where the grand jury indictment is procured without any involvement of the alleged falsehoods, those falsehoods cannot be considered a proximate cause of the resulting prosecution. *Richardson v. City of New York,* 2006 WL 2792768, at *7 & n. 4 (E.D.N.Y.2006) (noting that in a malicious prosecution claim "[t]he alleged fabrication must be both material, *i.e.,* 'likely to influence a jury's decision,' and 'the legally cognizable' cause of the post-arraignment deprivation of liberty.") (quoting *Ricciuti,* 124 F.3d at 130; *Zahrey v. Coffey,* 221 F.3d 342, 350 (2d Cir.2000)).

***13** Therefore, even taking as true Felmine's claim that Detective Ruane embellished what Mazile had told him about the stabbing, this allegation does not serve to rebut the presumption of probable cause created by the grand jury indictment, because there is no evidence that Detective Ruane

exerted any influence whatsoever over what took place before the grand jury. It is undisputed that the only two witnesses presented against Felmine were Mazile and Wilguens Dorval, both of whom the prosecutor interviewed on her own. ADA Alexander testified in her deposition that she could not remember speaking to the police prior to the indictment, and that after speaking with Mazile herself, she made "a determination that [she] didn't need the officers' testimony to present the evidence to the Grand Jury." (*Id.* at 50.)[4] None of Ruane's alleged misrepresentations were ever integrated into the prosecution's case.

The plaintiff seeks to show that the grand jury proceedings were corrupted by pointing to Wilguens Dorval's deposition, which contains testimony that can be read to indicate that ADA Alexander told him to testify to facts that he did not personally observe but had only heard from others who had also been present at the incident. (Uzoh Decl., Ex. 9, at 52–55.) A discussion of this evidence is taken up further as it relates to plaintiff's motion to add ADA Alexander as a defendant, *infra.* For current purposes, it must be observed that there is no claim that Detective Ruane had any involvement in the procuring of Dorval's testimony—to the contrary, it is undisputed that ADA Alexander was the only person who knew Dorval was a witness prior to the grand jury. (Uzoh Decl., Ex. 7, at 62.).

Furthermore, even setting aside Dorval's grand jury testimony, Max Mazile's undisputed account of the incident was alone sufficient to create probable cause for the ensuing indictment. *See Bakowski v. Kurimai,* 387 Fed. App'x 10, 12 (2d. Cir.2003) (rejecting malicious prosecution claim because "the evidence presented to the grand jury, independent of [the challenged] testimony ... was sufficient to establish probable cause to indict"). In Mazile's grand jury testimony, he stated that he saw Felmine as part of a group that chased him, and that Felmine was repeatedly swinging a long, slim silver object at his back. (Uzoh Decl, Ex. 13, at14–15.) He also stated that he fell and the pursuers began kicking him, shortly before he realized he had been stabbed. (*Id.* at 15–20.) He has never denied the truthfulness of this testimony. Rather, he confirmed in his deposition that his grand jury testimony was not "procured by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith." *Savino,* 331 F.3d at 72 (quotations omitted). Indeed, the most that can be said of the alleged defect in Dorval's testimony is that he did not reveal that *other* people claimed to have seen Felmine carrying a screwdriver, but he did not personally observe it. (Uzoh Decl., Ex. 9, at 53–55.) He does not dispute seeing Felmine in the group that was fighting and kicking the victim, and he never alleges that the ADA told him to embellish his version of those events. (*Id.* at 47–53; Ex. 21, at 13.) Even crediting the plaintiff's claims about Dorval's lack of personal knowledge as to the screwdriver, he has failed to present sufficient evidence that the grand jury proceedings were so "tainted" with false evidence that the resulting indictment lacked probable cause. *Rothstein,* 373 F.3d at 285.

***14** Finally, it is undisputed that immediately following his arrest, the plaintiff admitted to Detective Ruane during interrogation that he had been in a fight that day at the Brooklyn Museum, that he was with Kareem Barrow at the time, and that he had been involved in a dispute the prior week involving a Haitian flag. (Uzoh Decl., Ex. 4, at 151–55, 179.) By that point, Kareem Barrow had been arrested in possession of a knife and had been identified by an eyewitness as the perpetrator of a second assault. The police had also received information that the fights were motivated by the earlier dispute over the flag. In light of these admissions, coupled with Mazile's account of the events, no reasonable jury could conclude that the prosecution lacked probable cause.

**3. Malice**

Defendants further argue that there is no evidence in the record of actual malice. In the context of a malicious prosecution claim, malice consists of " 'a wrong or improper motive, something other than a desire to see the ends of justice served.' " *Lowth v. Town of Cheektowaga,* 82 F.3d 563, 573 (2d Cir.1996) (quoting *Nardelli v. Stamberg,* 44 N.Y.2d 500, 503, 406 N.Y.S.2d 443, 377 N.E.2d 975 (1978)). Furthermore, "while lack of probable cause to institute a criminal proceeding and proof of actual malice are independent and indispensable elements of a malicious prosecution action, the absence of probable cause does bear on the malice issue." *Blake v. Race,* 487 F.Supp.2d 187 (E.D.N.Y.2007) (quotations and citations omitted). To that end, even if a plaintiff makes no direct showing of malice, "lack of probable cause generally raises an inference of malice sufficient to withstand summary judgment." *Ricciuti,* 124 F.3d at 131.

The plaintiff's arguments regarding malice do nothing more than recite legal standards, and he points to no facts in the record indicating that Detective Ruane acted with an invidious motive. Moreover, since this Court has already found that there was probable cause for the prosecution, malice may not be inferred on that basis.

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For the foregoing reasons, summary judgment in favor of the defendants is granted with respect to the plaintiff's claim of malicious prosecution.

**D. Right to a Fair Trial**

The plaintiff also makes a claim that he was denied his right to a fair trial based on Detective Ruane's allegedly false assertions to the DA's office about what Mazile told him took place during the stabbing. Both parties concede that the plaintiff has a constitutional right not "to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigatory capacity, at least where the officer foresees that he himself will use the evidence with a resulting deprivation of liberty." *Zahrey,* 221 F.3d at 344. Stated another way, "when a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action for damages under 42 U.S.C. § 1983." *Ricciuti,* 124 F.3d at 130. This type of § 1983 claim bears many similarities to the plaintiff's claim for malicious prosecution, and thus a similar disposition is appropriate. *See Richardson,* 2006 WL 2792768, at *7 (noting that the difference between a malicious prosecution claim and "a free-standing claim for fabrication of evidence or denial of a fair trial, is a matter of some doctrinal ambiguity").

***15** As in the causal inquiry of a malicious prosecution claim, cases dealing with the alleged fabrication of evidence as a denial of the right to a fair trial have focused on the use or foreseeable use of the false information in the grand jury or at trial. *See Zahrey,* 221 F.3d at 345–46 (defendant alleged to have improperly influenced and coerced the grand jury testimony that resulted in indictment and trial); *Ricciuti,* 124 F.3d at 130 (jury could find that the defendants "violated the plaintiffs' clearly established constitutional rights by conspiring to fabricate and forward to prosecutors a known false confession almost certain to influence a jury's verdict"); *Wray v. City of New York,* 490 F.3d 189, 192–95 (2007) (officer-defendant not liable under § 1983 for violating right to a fair trial based on trial judge's decision to admit unduly suggestive show-up identification at trial). Allegedly false statements that played no part in the course of the prosecution cannot be said to have corrupted the fairness of the state's case against the accused.

Here, the plaintiff points to no evidence in the record indicating that any of the allegedly false conclusions concerning his involvement in the stabbing were to be used at trial; rather, the ADA has always maintained that the state's case proceeded on the basis of Mazile's firsthand account of the events. As discussed above, the indictment was also obtained independently from any representations made by the police. There is thus no factual basis from which a jury could infer that the defendants "misled or pressured the prosecution or trial judge" in any way that could have deprived the plaintiff of a fair trial. *Wray,* 490 F.3d at 193.

Summary judgment is thus granted to the defendants on the fair trial claim.

**E. Unlawful Entry**

The plaintiff claims that the defendants violated his Fourth Amendment rights by entering his residence without a warrant, and thus are liable under § 1983. The defendants argue that the plaintiff cannot maintain a claim for unlawful entry because Ms. Briggs, the plaintiff's mother, consented to the entry. The plaintiff contends that consent was not in fact given by Ms. Briggs.

A warrantless entry into a house is presumptively unconstitutional. *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). One well-established exception to this presumption exists where consent is given to the entry by a person who possesses common authority over the premises. *Illinois v. Rodriguez,* 497 U.S. 177, 181, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). "Consent can be found from an individual's words, acts or conduct." *Krause v. Penny,* 837 F.2d 595, 597 (2d Cir.1988). Because the Fourth Amendment only prohibits objectively unreasonable searches, in the context of a purported consent to search the "ultimate question" is whether, based on the totality of the circumstances, "the officer had a reasonable basis for believing that there had been consent to the search." *United States v. Garcia,* 56 F.3d 418, 423 (2d Cir.1995) (quoting *United States v. Sanchez,* 32 F.3d 1330, 1334–35 (8th Cir.1994) (collecting cases)). [5] "Consent must be a product of that individual's free and unconstrained choice, rather than a mere acquiescence in a show of authority." *United States v. Wilson,* 11 F.3d 346, 351 (2d Cir.1993) (quoting *Schneckloth,* 412 U.S. at 227) (internal citations omitted).

***16** The plaintiff does not claim that his mother lacked authority to consent to the entry, so the issue turns on whether consent was in fact given. In Detective Ruane's deposition, he testified that he asked Ms. Briggs for permission to enter the

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apartment and was given express, verbal consent (Uzoh Decl., Ex. 6, at 88). In Ms. Briggs' own deposition, she testified that:

> [The arresting officers] asked me if I have a son named Ian Felmine, and I said yes. They said, where is he? I said, he's inside. And they said they would like to see him. So I turned my back, let go of my door, walked into the room and they were behind me.

(Uzoh Decl., Ex. 8, at 36.) A sworn affidavit signed by Ms. Briggs, taken the month before her deposition, states "I told [the police] that I would check to find out whether he was at home, and then closed my door. As I closed the door and started walking towards my son's bedroom, I heard the door open and I saw the two gentleman ... following me." (Uzoh Decl., Ex. 14, at ¶¶ 5–6.)

The case law regarding when non-verbal actions constitute valid consent is murky. One Second Circuit case found consent where a defendant "advised the officers that his identification was inside the house and entered for the purpose of showing them his identification." *United States v. Deutsch,* 987 F.2d 878, 883 (2d Cir.1993). However, the district court's finding, upheld in *Deutsch,* was made following a full suppression hearing in a criminal case, and the court based its decision on far more testimony than the record contains here. *Id.* at 881–82. Other non-verbal consent cases appear to contain more affirmatively welcoming physical actions by the person giving consent than those presented in this case. *See United States v. Flores,* 48 F.3d 467, 468–69 (10th Cir.1995) (after giving valid consent to one search, the defendant re-consented to a second search of her car trunk when officer told her to re-open the trunk and she complied after a brief hesitation); *United States v. Wilson,* 895 F.2d 168, 172 (4th Cir.1990) (defendant consented to search of his person by shrugging his shoulders and extending his arms); *United States v. Zabala,* 52 F.Supp.2d 377, 385 (S.D.N.Y.1999) (defendant consented to search of her apartment when police asked her if "we can take a look inside" and defendant unlocked and opened her door); *United States v. Lee,* 1996 WL 391877, at *3–4 (S.D.N.Y.1996) (defendant consented to search of shopping bag where she verbally refused to consent but handed the bag to the agent).

The defendants argue that the entry should be upheld under *Takacs v. City of New York,* 2011 U.S. Dist. LEXIS 7055 (S.D.N.Y.2011) because it is undisputed that Ms. Briggs did not voice any lack of consent. There, however, the court addressed a different question. The court was determining whether an arresting officer's statement that he had consent to search a § 1983 plaintiff's apartment, when the plaintiff denied that he had consented, could establish sufficiently fraudulent circumstances as to overcome the presumption of probable cause created by a grand jury indictment. The court found that because the plaintiff did not allege that he voiced or otherwise manifested his lack of consent, plaintiff had not raised sufficient allegations to rebut the presumption. *Id.* at *13 n. 6. In contrast, the plaintiff here does not have to rebut any presumption in his unlawful entry claim, but needs only to raise a triable question of fact on the issue of consent.

***17** Ms. Briggs deposition states only that she turned her back and "let go" of her door. In some circumstances, this might have reasonably appeared to be a clear invitation for the officers to follow her. However, if the door were on a spring or otherwise closed when she let it go, it would be unreasonable to believe that she had in fact consented to the entry. Given that Ms. Briggs' affidavit characterizes her actions as "clos[ing]" the door, the Court must take this evidence in the light most favorable to the plaintiff and conclude that, at the least, there is a genuine question of fact on the issue of consent. Based on Ms. Briggs' statements in her deposition and affidavit, a reasonable jury could find that she attempted to close the door and fetch the plaintiff herself.

The defendants assert that even if consent was not in fact given, they are nonetheless entitled to qualified immunity on this claim. As noted above, it is clearly established that an officer must reasonably believe he has adequate consent prior to making a warrantless entry into a home in circumstances such as these. The only question is whether the defendants' actions here were objectively reasonable in light of these Fourth Amendment principles. Similar to the qualified immunity analysis for the false arrest claim, *supra,* the Court concludes that there are still facts in dispute that are material to determining whether the defendants reasonably believed that consent had been obtained. Since a jury could rationally conclude from the evidence presented that Ms. Briggs did not indicate any consent to the officers' entry, they could likewise conclude that the defendants were not objectively reasonable in concluding that the entry was lawful. *See Mangino v. Incorporated Village of Patchogue,* 739 F.Supp.2d 205, 243 n. 33 (E.D.N.Y.2010) (holding that

"there are still disputed issues of fact regarding whether [the defendant] did consent and, if so, whether the consent was voluntary, that preclude summary judgment on the unlawful entry claim, including on the issue of qualified immunity").

Summary judgment is thus denied on the unlawful entry claim as to defendants Ruane and Franco.

**F. Excessive Force**

The defendants argue first that any non-handcuffing-related allegations of excessive force were not raised in the complaint and thus are separate claims that are now time-barred. The defendants assert that the plaintiff did not make these additional allegations of force until his deposition. Second, they argue that, even including any non-handcuffing-related allegations, the plaintiff has failed to present adequate evidence of injury to withstand summary judgment.

As an initial matter, even assuming that handcuffing-related excessive force and other types of excessive force can be properly viewed as distinct "claims," this Court rejects the defendants' contention that any non-handcuffing-related allegations are time-barred. The complaint makes the clear factual allegation that the defendants "proceeded to arrest and detain plaintiff, and used excessive force to assault, detain, and imprison plaintiff." (2d Am.Compl.¶ 16.) Under the heading for the excessive force cause of action, the complaint again states that the defendants "physically assault[ed]" the plaintiff. (2d Am.Compl.¶ 39.) Coupled with what the defendants concede is a properly pleaded claim of excessively tight handcuffing, this is clearly sufficient to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); *see also* Fed.R.Civ.P. 8(a)(2). The defendants were on clear notice that the plaintiff was asserting a claim based on the amount of force used against his person during the arrest. The Court believes that for the purposes of the statute of limitations, the statements made in the plaintiff's deposition are properly viewed as factual development and elaboration of his initial claim.

***18** Civil rights claims under § 1983 for excessive use of force are governed by the "objective reasonableness" standard of the Fourth Amendment. *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Whether the force used in connection with the arrest is reasonable depends on a careful weighing of the totality of the circumstances in each particular case, including whether the suspect poses a threat, resists, or attempts to evade arrest, and the severity of the crime at issue. *Id.* at 396. "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers' violates the Fourth Amendment." *Id.* (quoting *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.1973)). Rather, a "de minimis use of force will rarely suffice to state a Constitutional claim." *Romano v. Howarth,* 998 F.2d 101, 105 (2d Cir.1991).

Plaintiff's deposition refers to the following incidents of force used during his arrest: he states that the defendants subjected him to excessively tight and painful handcuffing, over his request that the handcuffs be loosened (Uzoh Decl, Ex. 4, at 141); that the officers shoved him into the police car, causing his head to hit the door frame (*Id.* at 221–22); that he was slammed against the wall multiple times (*Id.* at 219, 224); and that at the police precinct, one of the defendants bent him over a table and tightened his handcuffs until he signed an unidentified piece of paper (*Id.* at 191–94).

In terms of injury, the plaintiff states that as a result of the tight handcuffing he had sore wrists, red marks for "a whole month," and some degree of bleeding. (*Id.* 225, 241.) He states that hitting his head on the car door "hurt[ ] ... Out of ten, nine," and that he began experiencing migraine headaches while incarcerated. (*Id.* 222, 96.) Finally, he states that he continues to experience pain in his wrists, though "only if [he] is playing sports." (*Id.* 225.)

As for documented medical evidence, the record contains the following: the prisoner medical treatment form completed on October 31, 2006 references a "complaint of arm pain" but makes no further diagnosis. (Uzoh Decl., Ex. O.) Medical records from Long Island College Hospital, made early in the morning of November 1, 2006, reference a "bruise to right arm", and state "17 y/o c/o pain to right arm and right side of forehead s/c assault on Thursday, pt hit in head and arm [by] 2x4 wood." (*Id.*) The "initial impression" of the hospital professional is listed as "contusions and abrasions" and on a later form, "soft tissue contusion to right arm, abrasions right forehead." However, based on the reference to the two-by-four, it is unclear whether some or all of these injuries may have arisen from the assault that the plaintiff alleges to have suffered by an unidentified individual prior to his arrest. He admits to never mentioning any wrist discomfort to the doctors, and nothing in the medical reports appears to reference any wrist injury. (Uzoh Decl., Ex. 4, at 240.) Plaintiff testified in his deposition, however, that he did

not complain to the examining doctors of other injuries on the night of his arrest because he remained scared of the police. (*Id.* at 248–49.) He also testified that he remained handcuffed while at the hospital, which prevented the doctors from examining his wrists. (*Id.* at 244.)

***19** The defendants argue that the plaintiff fails to present sufficient evidence of injury resulting from the arrest, and thus there is no question of fact that the force used was anything other than de minimis. The law of this circuit, however, does not appear to place a demanding requirement on excessive force plaintiffs to demonstrate injury. In *Robison v. Via,* 821 F.2d 913 (2d Cir.1987), the Second Circuit held that the plaintiff's claims that she was pushed against the inside of her car door, "yanked" out of her car by the police officer, and thrown up against the fender of her car were sufficient to survive summary judgment. *Id.* at 923–24. Though the plaintiff alleged only bruising, the court observed that

> [w]hile Robison did not seek medical treatment for her injuries, and this fact may ultimately weigh against her in the minds of the jury in assessing whether the force used was excessive, this failure is not fatal to her claim. If the force used was unreasonable and excessive, the plaintiff may recover even if the injuries inflicted were not permanent or severe.

*Id.* at 924; *see Maxwell v. City of New York,* 380 F.3d 106, 108 (2d Cir.2004) (citing *Robison* and noting that "we have permitted a plaintiff's claim to survive summary judgment on allegations that, during the course of arrest, a police officer twisted her arm, 'yanked' her, and threw her up against a car, causing only bruising"); *see also Hayes v. New York City Police Dep't,* 212 Fed. App'x 60, 62 (2d Cir.2007) ("We have permitted claims to survive summary judgment where the only injury alleged is bruising."). In *Maxwell,* the Second Circuit overturned the district court's grant of summary judgment to the defendants where the plaintiff alleged only that she scraped her head while being pushed inside the police vehicle. 380 F.3d at 109–110. There, however, the plaintiff did present medical documentation of post-concussive syndrome. *Id.* at 108. However, in *Yang Feng Zhao v. City of New York,* 656 F.Supp.2d 375, 389–91 (S.D.N.Y.2009), the district court refused to grant summary judgment where the plaintiff testified that the defendants pushed his face into a table causing him pain for about an hour, but he offered no record of medical treatment. The court reasoned that while some district courts have required documentation of injury, "they have not specified the precise extent of the required injury or even indicated why the use of completely unjustified force by the police that does not result in physical harm could not yield a constitutional claim for which the appropriate relief would be nominal damages." *Id.* at 390.

With respect to handcuffing-related uses of force, courts have analyzed the officers' conduct "in light of the minimal amount of force necessary to maintain custody of [the arrestee]." *Esmont v. City of New York,* 371 F.Supp.2d 202, 215 (E.D.N.Y.2005). In evaluating the reasonableness of police handcuffing, courts have looked at whether "1) the handcuffs were unreasonably tight; 2) the defendants ignored the arrestee's pleas that the handcuffs were too tight; and 3) the degree of injury to the wrists." *Id.* (citing *Burchett v. Kiefer,* 310 F.3d 937, 944–45 (6th Cir.2002) (additional citation omitted)). In *Castro v. County of Nassau,* 739 F.Supp.2d 153, 161 (E.D.N.Y.2010), the court found that the plaintiff's deposition testimony that the defendants ignored his requests to loosen the handcuffs, leaving his wrists "red and sore," satisfied the injury element cited above.

***20** In light of the facts and precedents, the Court concludes that summary judgment is inappropriate on this claim. Crediting the allegations in the plaintiff's deposition, and recognizing the ambiguity as to the source of the injuries documented in the medical records, the Court cannot conclude as a matter of law that no rational trier of fact could find that the defendants used an unreasonable amount of force—particularly in light of the defendant's status as a minor at the time of the arrest and the lack of any evidence that he resisted or posed any other threat at that time. A reasonable jury could credit the plaintiff's assertions that the defendants shoved him into the car door and the wall, intentionally tightened his handcuffs to cause him pain, and ignored his requests that the handcuffs be loosened. The jury could likewise conclude that these uses of force resulted in some compensable harm. The central inquiry for purposes of the Fourth Amendment is only whether the force used was *reasonable,* not whether it caused a particular degree of injury. Ambiguity in the evidence of injury, and its bearing on the reasonableness question, are considerations to be weighed by a jury.

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For similar reasons, the Court also concludes that qualified immunity is not properly decided at summary judgment for this claim. As noted previously, the qualified immunity inquiry turns on whether the defendants' actions were objectively reasonable under clearly established law; and the clearly established law of excessive force itself hinges on the reasonableness of the force used. *Stephenson v. Doe,* 332 F.3d 68, 77 (2d Cir.2003) ("It is well established that 'the use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness.' ") (quoting *Saucier v. Katz,* 533 U.S. 194, 201–02, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Since the degree and reasonableness of the officers' use of force against the plaintiff remains an issue of disputed fact, the Court likewise cannot conclude as a matter of law that the defendants' actions were reasonable for qualified immunity purposes.

For the foregoing reasons, summary judgment is denied as to the claim of excessive against defendants Ruane and Franco.

**G. Delayed Medical Treatment**

The plaintiff claims that the defendants' failure to send him to the emergency room on the night of his arrest violated his constitutional rights. Claims of delayed medical treatment made by a pre-trial detainee are decided under the rubric of the Due Process Clause, though the analysis is essentially identical to a prisoner's Eighth Amendment claim for deliberate indifference. *Caiozzo v. Koreman,* 581 F.3d 63, 69–71(2d Cir.2009); *Weyant v. Okst,* 101 F.3d 845, 856 (2d Cir.1996). A government custodian of a pretrial detainee "may be found liable for violating the detainee's due process rights if the official denied treatment needed to remedy a serious medical condition and did so because of his deliberate indifference to that need." *Id.* In order to succeed on such a claim, the plaintiff must satisfy both objective and subjective components: "Objectively, the alleged deprivation must be sufficiently serious, in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists. Subjectively, the charged official must act with a sufficiently culpable state of mind." *Hathaway v. Coughlin,* 99 F.3d 550, 553 (2d Cir.1996); *see also Cuoco v. Moritsugu,* 222 F.3d 99, 106 (2d Cir.2000) (applying two-pronged test to pre-trial detainee).

***21** In this case, the plaintiff cannot satisfy either prong. As to the first factor, his own admitted delay in seeking medical treatment for himself belies any claim of urgency or extreme pain. Felmine stated in his deposition that he was assaulted around 3:50 p.m. that afternoon. (Uzoh Decl., Ex. 4, at 122–25.) At the time of his arrest, at 11:30 p.m., he had made no attempt to seek medical attention. Moreover, as detailed earlier, the medical treatment form completed on October 31, 2006 notes only a complaint of arm pain. (Kunz Decl., Exhibit O.) No rational factfinder could conclude that he was presenting signs of urgent medical need in the preceding twenty-four hours that would satisfy the objective prong of a deliberate indifference claim. Moreover, Felmine admits that after being processed at Central Booking, the arresting officers drove him to the hospital in the early hours of November 1, 2006. (Uzoh Decl., Ex. 4, at 185–87.)

The plaintiff likewise fails to present any evidence regarding the subjective prong, which requires that the defendant actually "know[ ] of and disregard [ ] an excessive risk to .. health or safety." *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *see Caiozzo,* 581 F.3d at 71 (requiring that defendant be "actually aware of that immediate danger"). The uncontroverted facts reflect no excessive risk of which the defendants were aware, and further demonstrate that the defendants in fact provided medical treatment in a timely manner after the plaintiff's arrest was fully processed.

Summary judgment is therefore granted to the defendants on the claim of delayed medical treatment.

**H. Conditions of Confinement**

The plaintiff claims that he was subjected to unconstitutional conditions of confinement at the police precinct. Claims regarding inadequate conditions of confinement for pre-trial detainees are measured by "whether the conditions amount to 'punishment' without due process in violation of the Fourteenth Amendment." *Lareau v. Manson,* 651 F.2d 96, 102 (2d Cir.1981). As with claims of delayed medical treatment, these claims are analyzed under similar standards as Eighth Amendment claims brought by prisoners. *Caiozzo,* 581 F.3d at 70. Thus, the plaintiff must likewise establish both the objective and subjective components. First, the deprivation must, from an objective standpoint, be "sufficiently serious." *Farmer v. Brennan,* 511 U.S. 825, 34, 114 S.Ct. 1970, ——, 128 L.Ed.2d 811, —— (1994. A plaintiff must demonstrate that the conditions of confinement fell below the "minimal civilized measure of life's necessities." *Rhodes v. Chapman,* 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); *see also Phelps v. Kapnolas,* 308 F.3d 180, 185 (2d Cir.2002) ("Ultimately, to establish the objective element of an Eighth Amendment claim, a prisoner must prove that the conditions of his confinement violated contemporary standards of

decency."). The subjective test requires a plaintiff to show that the defendant officials imposed the conditions with deliberate indifference to a risk of harm of which they were subjectively aware. *Caiozzo,* 581 F.3d at 71.

***22** Here, Felmine claims that he was deprived of water for several "hours" at the station, and that he was kept overnight in a cold cell without a mattress for 6–7 hours. (Uzoh Decl., Ex. 4, at 229–235.) He also testified in his deposition that he did not eat until he got to Rikers Island, which appears to have been sometime on November 1, 2006—around a day and a half after his arrest. (*Id.* at 189.) During the preceding day, Felmine was taken to Central Booking, was arraigned, met with a lawyer, and was taken to the hospital. (*Id.* at 182–86.) Felmine testified that when he asked for food at the precinct, he was denied. (*Id.* at 230). He also testified, however, that he did not tell anyone at Central Booking that he was hungry. (*Id.*) While he was at the hospital, Felmine claims he was given water, but that the medical personnel stated they weren't allowed to give him food because they couldn't face liability for food poisoning. (*Id.* at 228–29.)

These allegations do not amount to punishment without due process. While the exact sequence of events is unclear, Felmine's testimony establishes that after arriving at the precinct late at night, he was shuttled between various places and custodians in order to process his arrest, have him arraigned, and provide him with legal assistance and medical care. Indeed, his testimony indicates that for much of this time he was not even in the custody of the individual defendants, but rather was being supervised by the Department of Corrections at Central Booking or medical personnel at the hospital. (*Id.* at 182–89.) Furthermore, his own account indicates that much of the time he spent at the precinct was during the late evening hours.

In *Rush v. Astacio,* 1998 WL 480751 (2d. Cir.1998), the Second Circuit held that, in the absence of evidence of an intent to punish, denying a pretrial detainee food for twelve hours and keeping him in a "very cold" room for six hours did not violate the plaintiff's due process rights. The court reasoned that "[n]either the degree of hardship nor the duration of the alleged constitutional violation were substantial." *Id.* at *2; *see also Benjamin v. Kooi,* 2010 WL 985844, at *10 (N.D.N.Y.2010) (denying plaintiff two to three meals and bedding for a full day did not violate Eighth Amendment). The court further observed that "there are legitimate governmental purposes that justify not feeding every detainee upon arrival at a police station and that justify not accommodating every detainee's climate-sensitivities." *Rush,* 1998 WL 480751, at *2; *see Webster v. City of New York,* 333 F.Supp.2d 184, 200 (S.D.N.Y.2004) ("There are legitimate governmental purposes that justify not feeding every detainee upon arrival at a police station, particularly those detainees who arrive at a police station in the early morning hours."). The circumstances in this case appear sufficiently analogous. In the initial bustle of processing and arraigning an arrestee, the government undoubtedly faces much higher difficulties in accommodating hunger and sleeping requests than in a static prison environment. Even crediting the plaintiff's testimony, the oversight alleged here is not sufficiently serious to amount to a constitutional violation, and does not demonstrate that the defendants consciously disregarded an "excessive risk to [the plaintiff's] health or safety." *Hathaway v. Coughlin,* 37 F.3d 63, 66 (2d Cir.1994).

***23** Summary judgment is thus granted to the defendants on this claim.

**I. Illegal Strip Searches**

The plaintiff's complaint cursorily alleges that he was strip searched repeatedly while incarcerated at Rikers. (2d Am.Compl.¶ 53–59.) He fails, however, to point to evidence anywhere in the record supporting this claim, or any evidence that the individual defendants conducted the alleged strip searches. Summary judgment in favor of the defendants is properly granted on any such claim.

**J. Substantive Due Process**

The plaintiff also appears to assert a catch-all substantive due process claim. However, he presents no facts or case law indicating that this claim should be analyzed separately from the more specific constitutional violations alleged above; indeed, the one case he cites dismissed a catch-all due process claim for precisely these reasons. *Zahrey v. City of New York,* 2009 WL 54495, at *25 (S.D.N.Y.2009). The Supreme Court has held that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *County of Sacramento v. Lewis,* 523 U.S. 833, 842, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (internal quotation marks omitted).

Accordingly, summary judgment is granted to the defendants on any residual due process claim.

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**K. Conspiracy under 42 U.S.C. § 1985**

Plaintiff also asserts a claim for conspiracy under 42 U.S.C. § 1985(3). For such a claim to survive, the plaintiff must present evidence of "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *Cine SK8, Inc. v. Town of Henrietta,* 507 F.3d 778, 790 (2d Cir.2007). In addition, the plaintiff must show that the alleged conspiracy was "motivated by some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." *Thomas v. Roach,* 165 F.3d 137, 146 (2d Cir.1999) (internal quotation marks omitted). Mere conclusory allegations that a conspiracy took place, without any factual basis evidencing a "meeting of the minds" between the defendants, will warrant dismissal of a § 1985 claim. *Webb v. Goord,* 340 F.3d 105, 110–11 (2d Cir.2003).

In this case, the plaintiff is unable to make out a claim of conspiracy that can withstand summary judgment. He presents no evidence of an agreement involving any of the defendants, and makes only conclusory and generalized allegations that the defendants conspired with a "Ms. Moke" and the safety officer at Clara Barton High School to "present false testimony" against the plaintiff. Who Ms. Moke is and her relation to the case are found nowhere in the record. As to the safety officer, a police report in the record indicates only that he was interviewed by the defendants and stated that Felmine was a part of an incident involving a Haitian flag, a fact that Felmine concedes. (Kunz Decl, Ex. D.) None of the defendants other than Ruane were deposed, and Ruane's deposition does not support the existence of any conspiracy to deprive the plaintiff of equal protection under the laws. Moreover, plaintiff's only evidence of discriminatory animus is the assertion in his brief that he is of West Indian descent.

***24** These sparse facts do not provide any credible basis for the finding of a § 1985 conspiracy. Summary judgment is thus properly granted to the defendants on this claim.

**IV. *MONELL* CLAIM AGAINST THE CITY OF NEW YORK**

The plaintiff's allegations against the City of New York fail to satisfy the requirements of *Monell v. New York City Dep't of Social Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In order to sustain a claim for relief under 42 U.S.C. § 1983 against a municipal defendant, a plaintiff must show the existence of an officially adopted policy or custom that caused injury, and a direct causal connection between that policy or custom and the deprivation of a constitutional right. *Bd. of County Comm'rs v. Brown,* 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell,* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which can be attributed to a municipal policymaker." *City of Oklahoma v. Turtle,* 471 U.S. 808, 823–24, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). Said another way, the plaintiff must demonstrate that the municipality was the "moving force" behind the alleged injury. *Brown,* 520 U.S. at 404.

In this case, the plaintiff makes only conclusory assertions of *Monell* liability based on the City's alleged failure to train Detective Ruane and ADA Alexander; an alleged city policy of arresting innocent persons in order to meet "productivity goals"; an alleged policy of unconstitutionally strip searching prisoners at Riker's island; and an alleged policy of filing statements of readiness for trial in cases where the prosecutor was informed by her witnesses that they did not want to be involved in the prosecution.

There is no evidence in the record supporting any of the plaintiff's policy allegations. As to Ruane's alleged lack of training, the plaintiff can point only to a vague question asked during Ruane's deposition on whether he was trained at the Police Academy "on the kind of questioning" to ask crime witnesses, to which he responded, "Not that I can recall." (Uzoh Decl., Ex. 6, at 82.) There is no evidence of the City's alleged failure to train ADA Alexander or of any policy of when statements of readiness are to be filed. As to any alleged policies of strip searching prisoners or making arrests to meet productivity goals, plaintiff cites only to his own complaint and to an unproduced statement by Deputy Commissioner Paul J. Browne from 2006. (Pl. 56.1 Stmt. ¶¶ 159–60.)

Summary judgment is thus granted to the City of New York on plaintiff's § 1983 claims.

**V. STATE LAW CLAIMS**

Plaintiff also alleges various claims against all the defendants under New York state law that can be disposed of summarily. [6]

In New York, the statute of limitations for tort actions against the city or its employees is one year and ninety days. N.Y. Gen. Mun. L. §§ 50–k, -i. As noted earlier, the limitations period was tolled due to plaintiff's infancy until December 9, 2006. Thus, any claims accruing during the plaintiff's initial arrest and detention expired on or around March 9, 2008—well before the original complaint was filed on August 31, 2009. The only claim for which the limitations period had not yet run, as the defendants concede, was the state law claim for malicious prosecution, which did not accrue until the favorable termination of proceedings on June 9, 2009. *See Nunez v. City of New York,* 307 A.D.2d 218, 219, 762 N.Y.S.2d 384 (1st Dep't, 2003). Similarly, since the plaintiff concedes that he did not file a notice of claim with the City until August 28, 2009, he failed to comply with New York's notice of claim requirement for all claims other than malicious prosecution. *See* N.Y. Gen. Mun. L. §§ 50–e, -i, -k(6) (requiring plaintiffs suing municipal defendants or police officers to file a notice of claim within 90 days following the incident).

***25** As previously noted, the requirements for a malicious prosecution claim under New York state law are essentially the same as those required under federal law. *Cornejo v. Bell,* 592 F.3d 121, 129 (2d Cir.2010) ("[S]ection 1983 ... adopts the law of the forum state so far as the elements of the claim for malicious prosecution are concerned."); *see also Broughton v. State,* 37 N.Y.2d 451, 457, 373 N.Y.S.2d 87, 335 N.E.2d 310 (N.Y.1975). Therefore, since the Court has already found summary judgment in favor of the defendants to be proper on the federal malicious prosecution claim, summary judgment on the state analogue is likewise granted here.

## VI. CONCLUSION

For the foregoing reasons, summary judgment on the claims against defendants Ruane and Franco for false arrest, unlawful entry, and excessive force is DENIED. As to all the remaining claims and defendants, the defendants' motion for summary judgment is GRANTED.

***THE PLAINTIFF'S MOTION TO AMEND THE COMPLAINT***

The plaintiff seeks to amend his complaint principally to add multiple claims against ADA Allana Alexander. These claims include (1) violation of the right to a fair trial; (2) violation of substantive due process rights; (3) selective enforcement; (4) conspiracy; and (5) malicious prosecution. The plaintiff now also asserts selective enforcement claims against the police officer defendants. The defendants argue that the amendment adding ADA Alexander should be disallowed because it is "futile," owing either to absolute or qualified immunity. They further argue that the selective enforcement claim fails as a matter of law. [7]

Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend a pleading "shall be freely given where justice so requires." However, where "there is no merit in the proposed amendments, leave to amend should be denied." *Health–Chem Corp. v. Baker,* 915 F.2d 805, 810 (2d Cir.1990); *see Ruffolo v. Oppenheimer & Co.,* 987 F.2d 129, 131 (2d Cir.1993) (per curiam) ("Where it appears that granting leave to amend is unlikely to be productive, however, it is not an abuse of discretion to deny leave to amend."). A proposed amendment is futile if it could not withstand a motion to dismiss. *Lucente v. Int'l Business Machine's Corp.,* 310 F.3d 243, 258 (2d. Cir.2003). [8]

As detailed below, the motion to amend the complaint is denied in full. The Court agrees that the claims against ADA Alexander are futile as a matter of law, because her actions were protected by either absolute or qualified immunity. Further, the Court finds that there are no facts in the proposed amended complaint or the record supporting a selective enforcement claim against any defendant, thus the selective enforcement claim against the remaining defendants is likewise disallowed.

## I. RELEVANT FACTS

All of the plaintiff's claims against ADA Alexander arise out of the following facts, which the Court recounts here in the light most favorable to the plaintiff. ADA Alexander did not get involved in the case against Ian Felmine until after he had been arrested and the felony complaint had been filed. [9] Her duties upon receiving the case were to prepare an indictment and present the case to the grand jury. (Uzoh Decl., Ex. 7, at 16–18.) Both parties agree that Alexander came to the hospital to take the video testimony of Max Mazile, and that while at the hospital she also spoke to some of Mazile's friends, concerning their knowledge of the stabbing incident. As a result of these conversations at the hospital, Alexander

asked Wilguens Dorval, a witness to the fights outside the Brooklyn Museum who had not previously been identified by the police, to testify before the grand jury. (*Id.* at 21, 31–33, 62.) Alexander testified in her deposition that she believes she interviewed Dorval prior to taking Mazile's video testimony. (*Id.* at 35.)

***26** According to Dorval's deposition, his encounter with ADA Alexander began when she came up to a group of Mazile's friends who were visiting the hospital and asked them if they had any information about what had taken place. (Uzoh Decl., Ex. 9, at 38–39.) Dorval testified that Alexander told the group that she needed evidence to "lock up" Felmine, who she told them had already been arrested. (*Id.* at 39.) In a sworn affidavit, Dorval elaborated that the ADA made "an emotional speech" stating that she was convinced Felmine was the perpetrator, and that he was violent and shouldn't be left on the streets. (Uzoh Decl., Ex. 34, at ¶ 12.) According to Dorval, she asked the group to imagine how they would feel if Felmine were released and ended up attacking them or their loved ones. (*Id.*)

During ADA Alexander's conversation with the group, Dorval testified that one or more people (not including himself) stated that they had seen Felmine with a screwdriver. (Uzoh Decl., Ex. 9, at 43, 52.) Dorval testified that Alexander then took him aside for a one-on-one conversation where she asked him if he would testify before the grand jury. (*Id.* at 43, 44.) According to Dorval, he told Alexander during that conversation that he did not know who stabbed Mazile. (*Id.* at 42.) He told her that he saw Felmine "fighting" in the group of people, and that Felmine had one hand inside his shirt, but that didn't see him holding any weapon. (*Id.* at 47–48.) Dorval testified that during this conversation, ADA Alexander did not tell him what he should say before the grand jury. (*Id.* at 49.)

Dorval testified that the next conversation he had with Alexander was at the courthouse, immediately prior to his grand jury testimony. (*Id.* at 51.) During this conversation, Dorval claims Alexander asked him again if he saw Felmine with a screwdriver, and Dorval told her "If people who were there said they saw Ian with a screwdriver, then maybe he had a screwdriver." (*Id.* at 53.) Dorval claims that Alexander's response was, "Then that is what you should use." (*Id.*) In Dorval's grand jury testimony, he testified unequivocally that he personally observed Felmine chase Mazile, pull out a screwdriver, swing it at Mazile, and then participate in kicking and punching Mazile. (Kunz Decl., Ex. N. at 12–13.) After hearing Dorval's testimony and the video of Mazile's testimony, the grand jury returned a true bill against Felmine for attempted murder and other counts. (Kunz Decl., Ex. H.)

## II. ADA ALEXANDER: ABSOLUTE AND QUALIFIED IMMUNITY

The law is well established that prosecutors are entitled to absolute immunity "from claims for damages arising out of prosecutor duties that are 'intimately associated with the judicial phase of the criminal process.' " *Parkinson v. Cozzolino,* 238 F.3d 145, (2001) (2d. Cir.2001) (quoting *Doe v. Phillips,* 81 F.3d 1204, 1209 (2d Cir.1996)). In determining whether a prosecutor is entitled to absolute immunity, courts employ a functional approach, which looks to the nature of the function that the prosecutor was performing at the time of the complained of actions. *Buckley v. Fitzsimmons,* 509 U.S. 259, 269, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). If counsel was acting in her role as an advocate, she is entitled to absolute immunity. *Imbler v. Pachtman,* 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Functions that serve "in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of [a prosecutor's] role as an advocate for the State" are unquestionably entitled to absolute immunity. *Buckley,* 509 U.S. at 273. On the other hand, if she was acting in an investigatory capacity, she is entitled only to the qualified immunity that is normally given to executive officials pursuing their duties. *Id.* (observing that qualified immunity is the norm for executive officers.) The government bears the burden of establishing absolute immunity, but once a court determines that the prosecutor was functioning in her capacity as an advocate, absolute immunity will shield her from liability "however erroneous the act may have been, and however injurious in its consequences it may have proved to be to the plaintiff." *Cleavinger v. Saxner,* 474 U.S. 193, 199–200, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985); *see DiBlasio v. Novello,* 344 F.3d 292, 297 (2d Cir.2003).

***27** Drawing the line between prosecutorial and investigative functions is rarely easy. Courts have often looked to "the timing of the conduct at issue." *DiBlasio,* 344 F.3d at 300–01. Thus, *Buckley* held that a prosecutor was not functioning as an advocate "before he had probable cause to have anyone arrested." *Buckley,* 509 U.S. at 273; *see Hill v. City of New York,* 45 F.3d 653, 661 (2d Cir.1995) ("Before any formal legal proceeding has begun and before there is probable cause to arrest ... a prosecutor receives only qualified immunity.") (citations omitted). The Supreme Court stated that the critical distinction lies "between the advocate's role in evaluating evidence and interviewing witnesses as he

prepares for trial" and "the detective's role in searching for the clues and corroboration that might give him probable cause." *Buckley,* 509 U.S. at 273. However, "[a]ll members of the Court [in *Buckley* ] recognized ... that a prosecutor's conduct even after probable cause exists might be investigative." *Zahrey v. Coffey,* 221 F.3d 342, 347 n.2 (2d Cir.2000).

In this case, the primary conduct complained of took place in the time period after the felony complaint had been filed, and led up to ADA Alexander's presentation to the grand jury. The plaintiff's central allegation against Alexander is that she "knowingly suborned perjury, and coerced and manipulated witnesses into providing false testimony against the plaintiff" at the grand jury. (3d Am. Compl. at ¶ 20.)

"There is widespread agreement among Courts of Appeals that prosecutors are absolutely immune from liability under § 1983 for their conduct before grand juries." *Burns v. Reed,* 500 U.S. 478, 490 n. 6, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). It has been squarely held that the act of "knowingly presenting false evidence to, while at the same time withholding exculpatory evidence from [the grand jury] ... lie[s] at the very core of a prosecutor's role as an advocate." *Bernard v. Cnty. of Suffolk,* 356 F.3d 495, 503 (2d. Cir.2004); *see Imbler,* 424 U.S. at 431 & n. 34 (holding prosecutor is absolutely immune from liability for initiating a prosecution and from claims that he willfully used perjured testimony). The prosecutor's absolute immunity applies "not just for presentation of testimony" but also to preparatory conduct "relating to their advocacy." *Dory v. Ryan,* 24 F.3d 81, 83 (2d Cir.1994) (holding prosecutor absolutely immune from claim of *conspiring* to present false evidence at a criminal trial). The Second Circuit has recognized, for example, that "out-of-court efforts to control a witness' grand jury testimony that are made subsequent to the decision to indict" are protected by absolute immunity. *Hill v. City of New York,* 45 F.3d 653, 662 (2d Cir.1995). It is critical to bear in mind, however, that once an indictment has issued, it is all too easy to classify every action taken by the prosecutor prior to that moment as an advocate's preparation. Nonetheless, where a prosecutor undertakes "investigative functions normally performed by a detective or a police officer," only qualified immunity will attach. *Buckley,* 509 U.S. at 273; *see Smith v. Garretto,* 147 F.3d 91, 94 (2d Cir.1998) ("[The defendant's] action in orchestrating a sting ... is decidedly on the investigation side of the line. In no sense was [he] preparing for the presentation of an existing case; he was doing police work in the hope that his target would succumb to temptation and thereby furnish evidence on which a prosecution could be based.")

***28** In light of the above, it seems clear that the actions taken by ADA Alexander in her courthouse meeting with Wilguens Dorval, immediately prior to his testimony before the grand jury, fell squarely within her role as an advocate. At this point, not only had the felony complaint been filed and the suspect arrested, but the decision to seek an indictment had already been decidedly made—indeed, the presentation to the grand jury was to take place in mere minutes. Alexander was preparing Dorval's testimony, and such conduct is properly characterized as part of an advocate's function of presenting evidence on behalf of the state. *See Buckley,* 509 U.S. at 273 (absolute immunity extends to "the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made"). Although, taking the plaintiff's version of the events as true, Alexander may have prepared a witness to testify to facts for which he lacked personal knowledge, this seems no less entitled to absolute immunity than the knowing presentation of false evidence that has been held in prior cases to fall within the prosecutorial function. *See Imbler,* 424 U.S. at 431 & n. 34; *Bernard,* 356 F.3d at 503. Once ADA Alexander arrived at the courthouse to prepare an already scheduled witness to testify before the grand jury, she was initiating a prosecution as an advocate for the state, and was therefore covered by absolute immunity.

In light of the foregoing conclusion, the only remaining question as to ADA Alexander is whether the plaintiff may properly amend claims arising out her conduct during her visit to the hospital. [10] In that setting, crediting the plaintiff's version of the facts, one could plausibly conclude that ADA Alexander was acting as an investigator rather than an advocate. First, as to the timing, it is true that the criminal court complaint had already been filed and a grand jury presentation had been scheduled. However, the complaint was filed only a few days previously, and a factfinder could conclude that ADA Alexander was still in the process of compiling evidence and determining whether an indictment could in fact be obtained on the available testimony. As for other functional considerations, Alexander admitted that the witnesses interviewed had not previously been identified by the police, and that she was the only person who discovered Wilguens Dorval. In speaking to the group of Mazile's friends, Alexander was not verifying information from a witness already interviewed by the police, but was in fact

investigating whether other eyewitnesses could corroborate and bolster Mazile's account of the events. It would be reasonable to conclude that this conduct was the sort of "investigative function[ ] normally performed by a detective or a police officer." *Buckley,* 509 U.S. at 273

Nonetheless, we need not decide the question for certain because any claims arising out of these events, if actionable at all, would be entitled to qualified immunity. As noted previously, "public officials are entitled to qualified immunity if (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." *Holcomb v. Lykens,* 337 F.3d 217, 220 (2d Cir.2003) (quoting *Weyant v. Okst,* 101 F.3d 845, 857 (2d Cir.1996)). The plaintiff argues repeatedly that Alexander's conduct at the hospital amounted to "solicit[ing], coerc[ing], and manipulate[ing]" Dorval into providing false testimony, as well as "conspir[ing] to fabricate" false evidence. (Pl. Br. at 21–22.) However, the only evidence in the record is that Alexander spoke to a group of Mazile's friends, told them Felmine had been arrested, and asked someone to step forward to testify. There is absolutely no indication that she threatened or coerced them. Even taking as true Dorval's affidavit, which contains the firmest allegations (though is not fully corroborated by Dorval's own deposition), ADA Alexander merely urged the group to help her put a violent offender in jail, and to imagine how they would feel if someone they knew were harmed by him in the future. Further, the affidavit states that when talking to Dorval's alone, Alexander informed him only that she "needed ... damaging testimony." (Uzoh Decl., Ex. 34, at ¶ 18.) Dorval stated in his deposition that at no time during her visit to the hospital did Alexander tell him how he should testify. Further, he admitted that when Alexander spoke to the whole group, she was provided with the information that Felmine was seen with a screwdriver, and that he himself told her that he saw Felmine participating in the fight at the Brooklyn Museum.

***29** None of these facts give rise to any credible inference of a constitutional violation. Appealing to a group's better instincts in order to encourage them to testify is not actionable conduct. Furthermore, Dorval's account of his private conversation with ADA Alexander demonstrates only that she told him she was seeking information, asked him questions, listened to his answers, and that he subsequently agreed to testify before the grand jury. There is no evidence that Alexander abused any investigatory function in order to secure particular testimony. For that reason, "[n]o reasonable jury, viewing the evidence in the light most favorable to the Plaintiff, could conclude that the defendant's actions were objectively unreasonable" under any claim or theory drawn from established law. *Ford v. Moore,* 237 F.3d 156, 162 (2d Cir.2001).

For the reasons stated, the Court concludes that the proposed amendment adding claims against ADA Alexander would be futile, because all of the conduct at issue was protected by either absolute or qualified immunity.

## III. SELECTIVE ENFORCEMENT

The plaintiff now seeks to add a claim of selective enforcement against all the defendants. This claim plainly could not survive a motion to dismiss. "In order to establish a violation of equal protection based on selective enforcement, the plaintiff must ordinarily show "(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Lisa's Party City, Inc. v. Town of Henrietta,* 185 F.3d 12, 16 (2d Cir.1999) (internal quotation marks omitted).

The proposed amended complaint offers no factual basis for this claim other than the fact that Felmine happens to be West Indian. (3d Am. Compl. at ¶ 31.) In his motion papers, the plaintiff's only supplemental argument is that he was the only person arrested for the stabbing of Mazile. Clearly, these conclusory statements do not state a valid claim for selective enforcement.

## IV. CONCLUSION

For the reasons stated, the plaintiff's motion to file a third amended complaint and to join ADA Allana Alexander as a defendant is DENIED in full, because any new claims would be futile.

SO ORDERED.

### All Citations

Not Reported in F.Supp.2d, 2011 WL 4543268

## Footnotes

1 On December 11, 2008, Assistant District Attorney Allana Alexander informed the Supreme Court, Kings County, that when tested for DNA analysis, the blood on the knife found on Kareem Barrow did not match that of the second victim. (Uzoh Decl., Ex. 16, at 2.)

2 While Detective Markhardt's name also appears in the police reports that plaintiff admits to have possessed by October 21, 2009, the report only states that Markhardt ran a background check on the victim Max Mazile, and does not indicate that he was involved in the plaintiff's arrest. (Uzoh Decl., Ex. 50)

3 Plaintiff does not argue that the addition of Markhardt and Borrero should "relate back" to the naming of a single "John Doe" in the original complaint, due to his lack of knowledge as to the officer's identities. Indeed, the plaintiff's Second Amended Complaint names Markhardt and Borrero but retains the "John Doe" defendant as well. It should be observed regardless that the Second Circuit has held that substituting individual officers for "John Doe" defendants after the expiration of the statute of limitations does not "relate back" under Rule 15(c) of the Federal Rules of Civil Procedure when the initial failure was due to lack of knowledge. *Barrow v. Wethersfield Police Dep't,* 66 F.3d 466, 470 (2d Cir.1996) ("Rule 15(c) does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities."). Though one district court in this circuit has allowed such an amendment when the plaintiff made diligent attempts to identify the individual within the limitations period but was denied the information by the defendants, *see Byrd v. Abate,* 964 F.Supp. 140, 145–46 (S.D.N.Y.2007), the plaintiff here would nonetheless face difficulties under this theory since he has only ever named *one* "John Doe," despite his personal knowledge of the facts giving rise to the claim and his counsel's own admission that he knew there were multiple officers involved in the arrest. (*See* Uzoh Decl., Ex. 49.) At any rate, the Court need not resolve these issues, as the plaintiff only raises the equitable estoppel argument.

4 The plaintiff cites to *Cameron v. City of New York,* 598 F.3d 50, 63–65 (2d Cir.2010), seemingly for the proposition that the subsequent acts of the prosecutor and grand jury have *no* bearing on the liability of a police officer who allegedly provides false information to the ADA. However, the criminal case at issue in *Cameron* was never presented to a grand jury, but rather was a misdemeanor tried only on the basis of the felony complaint sworn to by the defendant officer. *Id.* at 57 (describing the post-arrest events). Thus, the *Cameron* court did not confront the argument that a presumption of probable cause should be given to the indictment, and did not deal with a case where the alleged falsehoods were wholly independent from the direct witness testimony offered before the grand jury issuing that indictment.

5 Although in a criminal case, the government bears the burden of proving consent, *Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), "the law of this Circuit is not clear in assigning the burden of proof regarding consent in a § 1983 action." *Tirreno v. Mott,* 375 Fed. App'x 140, 142 (2d Cir.2010). This Court need not decide the burden issue here, as it finds that, regardless, there remains a genuine issue of material fact precluding the grant of summary judgment

6 Though the complaint is not entirely clear, the state law claims appear to be for false arrest, excessive force, and malicious prosecution; constitutional tort claims under the state constitution; claims for intentional and negligent infliction of emotional distress; and a claim against the City for negligent hiring.

7 Defendants, in their response, appear to have neglected to address the selective enforcement claim as to the police officer defendants specifically, but they do present an applicable argument that such a claim fails as a matter of law in their discussion of ADA Alexander.

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8 Though the standard for futility has been formulated based on a motion to dismiss, where the motion to amend is made after discovery, courts have looked to the record in assessing whether the proposed amendment is futile. *See, e.g., Lucente,* 310 F.3d at 259–60; *Lee v. Regal Cruises, Ltd.,* 916 F.Supp. 300, 304–05 (S.D.N.Y.1996). The Court is thus not limited to the pleadings in its assessment.

9 Different personnel at the DA's Early Case Assessment Bureau were responsible for the initial interview of Detective Ruane, the drafting of the felony complaint, and the first arraignment and bail hearing (where a date was set for the grand jury). After that point the case was assigned to ADA Alexander for presentation to the grand jury in order to secure the felony indictment. (Uzoh Decl., Ex. 7, at 13–17.)

10 To the extent that plaintiff attempts to attach any liability to ADA Alexander's filing of a statement of readiness for trial, (3d Am. Compl. at ¶ 26), it need only be noted briefly that such conduct falls clearly within a prosecutor's function as an advocate before the trial court.

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2009 WL 3317262
Only the Westlaw citation is currently available.

United States District Court,
S.D. Georgia,
Savannah Division.

Steven WILLIAMS, Plaintiff,
v.
Angela GRANT, Mental Health Director; Lieutenant Philisia Morales; and Four Unknown Prison Guards, Defendants. [1]

No. CV408–203.
|
Oct. 14, 2009.

***ORDER***

J. RANDAL HALL, District Judge.

***1** After a careful *de novo* review of the record in this case, the Court concurs with the Magistrate Judge's Report and Recommendation, to which objections have been filed. Accordingly, the Report and Recommendation of the Magistrate Judge is adopted as the opinion of the Court.

**SO ORDERED.**

***REPORT AND RECOMMENDATION***

G.R. SMITH, United States Magistrate Judge.

Plaintiff Steven Williams brought this 42 U.S.C. § 1983 civil rights action against Coastal State Prison personnel. Doc. 1. The Court previously screened his complaint under 28 U.S.C. § 1915A and concluded that he stated an Eighth Amendment claim. Doc. 8, *adopted,* doc. 12; *Williams v. Williams,* 2009 WL 1550857 at * 3 (S.D.Ga. June 1, 2009). It also twice denied his motion for appointment of counsel. *Williams v. Grant,* 639 F.Supp.2d 1377, 2009 WL 2390521 (S.D.Ga. July 6, 2009).

The allegations against both the named and "John Doe" defendants in this case are reasonably straightforward: prison officials recklessly prescribed delusion- and paranoia-inducing pharmaceuticals to Williams, then dragged him (while handcuffed and unable to walk) across 50 feet of asphalt instead of first fetching him a wheelchair. Additionally, Williams says one "officer tried to get me to talk by putting the flame of his cigarette lighter against my wrist. I screamed in pain. He then put his lighter flame against my forearm and made me scream again." Doc. 8 at 3–4.

These assertions, the Court previously concluded, were enough to sustain Williams's complaint against all but one defendant. *Id.* at 7. Williams also alleged that the defendants were deliberately indifferent to his serious medical needs. *Id.* at 5 ("recklessly prescribing delusion and paranoia inducing pharmaceuticals"). Given plaintiff's pro se status, the Court authorized the complaint to advance under 28 U.S.C. § 1915A, even though some of his allegations were not defendant-specific.

Contending that Williams has failed to exhaust his administrative remedies with regard to his deliberate-indifference claim, the two named defendants have filed a pre-answer, Fed.R.Civ.P. 12(b)(6) motion to dismiss [2] his deliberate indifference claims. Docs. 21 & 23. Alternatively they move to dismiss those claim on the merits (i.e., for failure to state a claim). Finally, they move to stay discovery and the case in general until their dismissal motion is reached. Doc. 20.

Williams's response is limited to the exhaustion issue and does not address the merits. Doc. 23. Local Rule 7.1 provides that a failure to respond to a motion indicates that it is unopposed, so the "merits" portion of defendants' Rule 12(b)(6) motion is not contested. Nevertheless, the Court will examine defendants' "merits" motion to ensure that it is legally supported. Because the Court is granting that motion, defendants' stay motion (doc. 20) is **DENIED** as moot.

On the merits, these two defendants have shown that all but one of Williams's *non*-excessive-force claims warrant dismissal. First, his "deliberate indifference" claims against defendant Angela Grant must be dismissed because, at bottom, he at best alleges a mere disagreement with medical treatment policy. [3] In his complaint he faults her for prescribing him two different drugs, doc. 1 at 5, 7, which (this Court previously noted) could pose interaction problems. Doc. 8 at 2 n. 2. As Grant points out, plaintiff fails to allege

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any facts showing that Grant was subjectively aware of this matter. *See supra* n. 3. This is a critical element of his claim:

> ***2** In order to show an objectively serious deprivation of medical care, the inmate must demonstrate: 1) an objectively serious medical need that, left unattended, poses a serious risk of harm; 2) that the response made by public officials to that need was poor enough to constitute an "unnecessary and wanton infliction of pain," and not merely accidental inadequacy, negligence in diagnosis or treatment, or even medical malpractice actionable under state law; and 3) an attitude of deliberate indifference, which shows that the defendants were *aware* of the facts from which a substantial risk of serious harm could be inferred, and that they actually *did* draw that inference. *Taylor v. Adams,* 221 F.3d 1254, 1258 (11 Cir.2002). *Pitts v. Poveda,* 2009 WL 347411 at * 3 (S.D.Fla. Feb.11, 2009) (unpublished) (emphasis added); *id.* at * 4 ("Liability may be imposed for deliberate indifference only if the plaintiff proves the defendant actually knew of an excessive risk to inmate health or safety and disregarded that risk.") (quotes and cite omitted).

Here, Williams alleges only that Grant and her staff were "deliberately indifferent when they prescribed to [him] the two drugs, Prozac and Ultrum [sic], which because [he took] them together ... made [him] delusional and paranoid." Doc. 1 at 7. Defendants argue that, to state a claim, plaintiff must allege that they "were *aware* of the facts from which a substantial risk of serious harm could be inferred, and that they actually *did* draw that inference." Yet, he has failed to do that.

The Court agrees. Using the phrase "deliberately indifferent" as a mere shibboleth is not enough; threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, no longer suffice under Fed.R.Civ.P. 8. *Ashcroft v. Iqbal,* —— U.S. ——, ——– – ——, 129 S.Ct. 1937, 1949–50, 173 L.Ed.2d 868 (2009). Thus, this claim must be dismissed.

Plaintiff also faults Grant for failing to establish "a working arrangement for [Mental Health (MH) ] counselors to promptly see MH prisoners in emergency situations concerning their mental health unless the situation involves attempted suicide." Doc. 1 at 7. Yet, here he at most complains of general medical protocols and prison policies, which does not suffice. Plus his allegations lack basic § 1983 claim elements such as subjective awareness and causation to the level of intending to punish him:

> to show the required subjective intent to punish, a plaintiff must demonstrate that the public official acted with an attitude of deliberate indifference, which is in turn defined as requiring two separate things: awareness of facts from which the inference could be drawn that a substantial risk of serious harm exists and drawing of the inference. Ultimately, there are thus four requirements: an objectively serious need, an objectively insufficient response to that need, subjective awareness of facts signaling the need, and an actual inference of required action from those facts.

***3** *Taylor,* 221 F.3d at 1258 (quotes, cites and alterations omitted); *cf. Shriner v. Rohlings,* 286 F. App'x 564, 566 (10th Cir.2008) (inmate's "allegation that he was denied a transfer for the evaluation of his mental block does not demonstrate 'deliberate indifference' to his 'sufficiently serious' medical needs.... And a mere disagreement with the treatment offered by medical staff is not enough to establish an Eighth Amendment violation.") (cites omitted); *Estelle,* 429 U.S. at 106 (a mere disagreement between a prisoner and prison officials as to diagnosis or treatment does not give rise to a constitutional violation). This claim, too, must be dismissed.

Next, Williams cites alleged deficiencies by Grant's mental health Staff in responding to his sick call. Doc. 1 at 7–8. But this, too, fails to state a § 1983 claim because it is not coupled with an allegation of direct participation. And respondeat superior liability, it has long been held, will not support a § 1983 action. *See, e.g., Bryant v. Jones,* 575 F.3d 1281, 1299 (11th Cir.2009) (liability in § 1983 cases cannot be premised solely upon a theory of respondeat superior; supervisory liability occurs either when a supervisor personally participates in alleged constitutional violation or when there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation).

Williams further complains that "an officer" tried to burn his arm with a cigarette lighter flame. Doc. 1 at 10. Defendants

Grant and Morales move to dismiss because they are not linked to this claim; indeed, the officer is not even named. The Court agrees, and thus to the extent he seeks to hold these two named defendants liable, this claim fails. Williams may amend his complaint to plead either or both of these defendants back into this claim if discovery reveals their participation (e.g., they authorized the attempted burn-torture, or knowingly failed to prevent it).

Finally, Williams complains that "Lt. Morales oversaw the officers take my clothing and underclothing. I was butt naked in a cold bare cell for several hours until they brought me a paper gown." Doc. 1 at 10. Morales argues that plaintiff fails to allege that he suffered any risk of harm or injury, and thus fails to state an Eighth Amendment claim. Doc. 21–2 at 15–17. It must be remembered that

> not all deficiencies and inadequacies in prison conditions amount to a violation of a prisoner's constitutional rights. *See generally Rhodes v. Chapman,* 452 U.S. 337, 349, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981) (noting that the Constitution "does not mandate comfortable prisons"). Instead, the Eighth Amendment "is violated only where an inmate is deprived of 'the minimal civilized measure of life's necessities.' " *Tillery v. Owens,* 907 F.2d 418, 426 (3d Cir.1990) (quoting *Rhodes,* 452 U.S. at 347, 101 S.Ct. 2392, 69 L.Ed.2d 59). Moreover, to be held liable for an Eighth Amendment violation, a defendant must possess a sufficiently culpable state of mind; he must be deliberately indifferent to the inmate's safety. *Wilson v. Setter,* 501 U.S. 294, 297–99, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).

***4** *Jetter v. Beard,* 183 F. App'x 178, 181 (3rd Cir.2006) (after prison psychiatrist was informed that prisoner had attempted to harm himself and to block view into his cell, psychiatrist's recommendation that correctional officers remove any items from prisoner's cell with which he could harm himself did not amount to Eighth Amendment violation against cruel and unusual punishment, despite prisoner's claims that, as a result, his cell was stripped and he was left naked in his cell for five days, where recommendation was made not to humiliate or harm prisoner, but to ensure his safety and further legitimate penal concerns).

Certainly no medical basis existed here for leaving Williams "butt naked" in his "cold bare cell for several hours." At this, the pleading stage, it is hard to believe that there was no cot with a blanket or other ways for Williams to keep warm until he was brought a paper gown. Still, the Court is required to accept plaintiff's allegations as true. Is subjecting him to three *hours* of shivering (construed liberally, that is what he fairly alleges) depriving him of the civilized measure of life's necessities? [4]

Courts answer that question by examining the circumstances of each case, and "atmosphere" cases turn on severity, duration, or a combination of both; all that must add up to "extreme" to be actionable. *See Chandler v. Crosby,* 379 F.3d 1278, 1294–95 (11th Cir.2004) (" 'extreme deprivations' " are required to make out a conditions-of-confinement claim under the Eighth Amendment; prisoner may state such a claim by alleging a deficiency as to either cooling or ventilation in isolation, or both in combination; however, "a prisoner's mere discomfort, without more, does not offend the Eighth Amendment); *Dixon v. Godinez,* 114 F.3d 640, 644 (7th Cir.1997) (in determining whether low temperatures in prison cell violate state prisoner's right to be free from cruel and unusual punishment, courts should examine several factors, such as severity of cold, its duration, whether prisoner has alternative means to protect himself from cold, adequacy of such alternatives, and whether prisoner must endure other uncomfortable conditions as well as cold); *Spencer v. Bouchard,* 449 F.3d 721, 728–29 (6th Cir.2006) (alleged conditions of confinement for pretrial detainee at county jail, including subjection to cold cell continuously for several months, especially when coupled with leaking ceiling in cell, constituted sufficiently serious deprivation to support detainee's § 1983 Fourteenth Amendment inadequate-shelter claim against county officials, even though there was some question as to how cold cell was); *Bell v. Caruso,* 2009 WL 654812 at * 1 (W.D. Mich. Mar 10, 2009) (unpublished).

Here, however, Williams has not alleged enough. Under *Iqbal,* he must supply more than conclusions and vague assertions like "cold bare cell" phraseology. *Iqbal,* 129 S.Ct. at 1949 (pleading that offers labels and conclusions or formulaic recitation of elements of cause of action will not do, nor does complaint suffice if it tenders naked assertions devoid of further factual enhancement). Accordingly, this claim fails, too.

***5** Accordingly, the named defendants' motion to stay (doc. 20) is **DENIED** as moot and their motion to dismiss (doc. 21) should be **GRANTED in part.** Hence, the Court should dismiss with prejudice plaintiff's claims against defendant Angela Grant, as well as all but his excessive-force claim against defendant Philisia Morales. Finally, plaintiff is directed to deploy his discovery rights to elicit the information that he needs to name the "John Doe" defendants

in this case; otherwise, he faces dismissal of them under Fed.R.Civ.P. 4(m), and may well suffer other legal (e.g., statute of limitation) consequences. *See, e.g.,* 6A FED. PRAC. & PROC. CIV.2D § 1498 (*Relation Back of Amendments Changing Parties—In General* ) (2009); *Ferreira v. City of Pawtucket,* 365 F.Supp.2d 215, 217 (D.R.I.2004).

**SO REPORTED AND RECOMMENDED** this *24th* day of September, 2009.

**All Citations**

Not Reported in F.Supp.2d, 2009 WL 3317262

## Footnotes

1 The Court has amended the caption to omit Thalrone Williams, who was previously dismissed from this case, doc. 8 at 7, and to reflect the first name of "Lieutenant Morales," who is now identified by her full name on doc. 21 at 1. All subsequent filings shall conform.

2 The Eleventh Circuit recently instructed that

> "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiffs obligation to provide the 'grounds' of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555, 127 S.Ct. at 1965 (citation omitted). At the pleading stage, Federal Rule of Civil Procedure 8(a)(2) requires that "the plain statement possess enough heft to show that the pleader is entitled to relief." *Id.* at 557, 127 S.Ct. at 1966 (internal quotations omitted).

*Williams v. Brown,* 2009 WL 2883496 at * 4 (11th Cir. Sept.10, 2009) (unpublished); *Godson v. Chatham County Sheriff Dep't,* 2009 WL 1288866 at * 1 (S.D.Ga. May 8, 2009) (unpublished) (applying dismissal standards to *pro se* complaints and reminding that, while complaint *language* may be construed liberally, the same pleading rules apply to pro se litigants as represented litigants, and judges may not advocate for them).

3 As the Eleventh Circuit explained in *Brown v. Johnson,* 387 F.3d 1344, 1351 (11th Cir.2004):

> It is well established that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' ... proscribed by the Eighth Amendment." *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976) (citation and footnotes omitted). A prisoner states a valid claim, under 42 U.S.C. section 1983, "whether the indifference is manifested by prison doctors in their response to the prisoner's needs ... or by prison guards in intentionally denying or delaying access to medical care ... or intentionally interfering with treatment once proscribed." *Id.* at 104–05, 97 S.Ct. at 291.
>
> "To show that a prison official acted with deliberate indifference to serious medical needs, a plaintiff must satisfy both an objective and a subjective inquiry." *Farrow v. West,* 320 F.3d 1235, 1243 (11th Cir.2003). First, the plaintiff must prove an objectively serious medical need. *Id.* Second, the plaintiff must prove that the prison official acted with deliberate indifference to that need. *Id.*

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> "A serious medical need is considered 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.' " *Id.* (citing *Hill v. Dekalb Reg'l Youth Det. Ctr.,* 40 F.3d 1176, 1187 (11th Cir.1994)). In either case, "the medical need must be one that, if left unattended, pos[es] a substantial risk of serious harm." *Id.* (citation and internal quotations marks omitted)....

To establish the second element, deliberate indifference to the serious medical need, the prisoner must prove three facts: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; and (3) by conduct that is more than mere negligence. *McElligott v. Foley,* 182 F.3d 1248, 1255 (11th Cir.1999).

4 Applying cases like *Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Hudson v. McMillian,* 503 U.S. 1, 8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992), and *Wilson v. Setter,* 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), one court summarized that under the Eighth Amendment an inmate must show that he is

> is incarcerated under conditions posing a substantial risk of serious harm. Within the context of claims that prison conditions constitute a deprivation sufficiently serious to meet the objective component of an Eighth Amendment claim, the Court's inquiry must focus on whether inmates are deprived of the minimal civilized measure of life's necessities. The Constitution does not mandate comfortable prisons. Rather, routine discomfort is part of the penalty that criminal offenders pay for their offenses against society.

*Davis v. Little,* 2009 WL 2849641 at *7 (W.D.Tenn. Sept.1, 2009) (unpublished).

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2024 WL 325385
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Abdul H. ABDULLAH, Plaintiff,
v.
NYPD 30TH PRECINCT; P.O. Randy Delgado; P.O. M. Ducasse; Sergeant Smith; Lieutenant Edwardo Chandradeo, Defendants.

24-CV-0137 (LTS)
|
Signed January 29, 2024

**Attorneys and Law Firms**

Abdul H. Abdullah, New York, NY, Pro Se.

ORDER TO AMEND

LAURA TAYLOR SWAIN, Chief United States District Judge:

***1** Plaintiff, who is appearing *pro se*, brings this action under 42 U.S.C. § 1983, alleging that Defendants violated his federal constitutional rights. He sues the 30th Precinct of the New York City Police Department ("NYPD"); NYPD Officers Randy Delgado, M. Ducasse; NYPD Sergeant Smith; and NYPD Lieutenant Edwardo Chandradeo. By order dated January 11, 2024, the Court granted Plaintiff's request to proceed *in forma pauperis* ("IFP"), that is, without prepayment of fees. For the reasons set forth below, the Court grants Plaintiff leave to file an amended complaint within 60 days of the date of this order.

## STANDARD OF REVIEW

The Court must dismiss an IFP complaint, or any portion of the complaint, that is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); *see Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998). The Court must also dismiss a complaint when the Court lacks subject matter jurisdiction of the claims raised. *See* Fed. R. Civ. P. 12(h)(3).

While the law mandates dismissal on any of these grounds, the Court is obliged to construe *pro se* pleadings liberally, *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), and interpret them to raise the "strongest [claims] that they *suggest*," *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (internal quotation marks and citations omitted) (emphasis in original). But the "special solicitude" in *pro se* cases, *id.* at 475 (citation omitted), has its limits – to state a claim, *pro se* pleadings still must comply with Rule 8 of the Federal Rules of Civil Procedure, which requires a complaint to make a short and plain statement showing that the pleader is entitled to relief.

Rule 8 requires a complaint to include enough facts to state a claim for relief "that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible if the plaintiff pleads enough factual detail to allow the Court to draw the inference that the defendant is liable for the alleged misconduct. In reviewing the complaint, the Court must accept all well-pleaded factual allegations as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). But it does not have to accept as true "[t]hreadbare recitals of the elements of a cause of action," which are essentially just legal conclusions. *Twombly*, 550 U.S. at 555. After separating legal conclusions from well-pleaded factual allegations, the Court must determine whether those facts make it plausible – not merely possible – that the pleader is entitled to relief. *Id.*

## BACKGROUND

Plaintiff states that the events giving rise to his claims occurred on November 30, 2023, at the intersection of 145th Street and Broadway in Manhattan. In his statement of facts, Plaintiff alleges, "An illegal seizure and search occurred kidnapping and falsely imprison me confiscating my automobile an[d] my personal property by Sergeant Smith[,] Officer Delgado, [and] M. Ducasse witness[ed] by my nephew Georgie." (ECF 1, at 4.) [1]

***2** Plaintiff further alleges that he suffered "[d]efamation of character"; he was "[d]eprived of water causing dehydra[ ]tion"; he was "subject to unsan[ ]itized condition in the bathroom," and he was "lock[ed] up in a cold prison cell without [a] sweater or jacket causing flu like symptoms" that caused him to "stay at home for two weeks." (*Id.* at 5.)

Plaintiff seeks money damages.

## DISCUSSION

Because Plaintiff alleges that his constitutional rights were violated by state officials and seeks money damages, his claims arise 42 U.S.C. § 1983. To state a claim under Section 1983, a plaintiff must allege both that: (1) a right secured by the Constitution or laws of the United States was violated, and (2) the right was violated by a person acting under the color of state law, or a "state actor." *West v. Atkins*, 487 U.S. 42, 48-49 (1988).

### A. NYPD 30th Precinct

Plaintiff's claims against the NYPD's 30th Precinct must be dismissed because an agency of the City of New York is not an entity that can be sued. N.Y. City Charter ch. 17, § 396 ("[A]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law."); *Jenkins v. City of New York*, 478 F.3d 76, 93 n.19 (2d Cir. 2007); *see also Emerson v. City of New York*, 740 F. Supp. 2d 385, 396 (S.D.N.Y. 2010) ("[A] plaintiff is generally prohibited from suing a municipal agency."). The Court therefore dismisses Plaintiff's claims against the NYPD's 30th Precinct. [2] *See* N.Y. City Charter ch. 17, § 396.

In light of Plaintiff's *pro se* status and likely intention to assert claims against the City of New York, however, the Court construes the complaint's claims against the 30th Precinct as asserting claims against the City of New York. When a plaintiff sues a municipality under Section 1983, it is not enough for the plaintiff to allege that one of the municipality's employees or agents engaged in some wrongdoing. The plaintiff must show that the municipality itself caused the violation of the plaintiff's rights. *See Connick v. Thompson*, 563 U.S. 51, 60 (2011) ("A municipality or other local government may be liable under this section [1983] if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation." (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692 (1978))); *Cash v. Cnty. of Erie*, 654 F.3d 324, 333 (2d Cir. 2011). In other words, to state a Section 1983 claim against a municipality, the plaintiff must allege facts showing (1) the existence of a municipal policy, custom, or practice, and (2) that the policy, custom, or practice caused the violation of the plaintiff's constitutional rights. *See Jones v. Town of East Haven*, 691 F.3d 72, 80 (2d Cir. 2012); *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997) (internal citations omitted).

***3** Here, Plaintiff alleges no facts suggesting that the City of New York has a policy, practice, or custom that has caused a violation of his constitutional right. Moreover, as discussed below, Plaintiff has not alleged facts suggesting an underlying constitutional violation. *See Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (absent an underlying constitutional violation, there can be no *Monell* liability). If Plaintiff names the City of New York as a defendant in his amended complaint, he must allege facts suggesting that the City has a policy, practice, or custom that caused a violation of his constitutional rights.

### B. False Arrest

Plaintiff's allegations that he was "kidnap[ed]" and "falsely imprison[ed]" suggest he may be attempting to assert a claim for false arrest. [3] The Court first looks to state law to establish the elements of a false arrest claim under Section 1983. *See Manuel v. City of Joliet, Ill.*, 580 U.S. 357, 378 (2017) (Alito, J, dissenting) ("[T]o flesh out the elements of this constitutional tort, we must look for 'tort analogies.' "); *see also Lanning v. City of Glens Falls*, 908 F.3d 19, 25 (2d Cir. 2018) (holding that common law principles are meant simply to guide rather than to control the definition of Section 1983 claims and courts should not "mechanically apply" the law of New York State), *abrogated on other grounds*, *Thompson v. Clark*, 596 U.S. 36 (2022).

Under New York law, to state a claim for false arrest, a plaintiff must show that: "(1) the defendant intended to confine [the plaintiff], (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged." *Liranzo v. United States*, 690 F.3d 78, 95 (2d Cir. 2012). An arrest is privileged if it is based on probable cause. *Jenkins v. City of New York*, 478 F.3d 76, 84 (2d Cir. 2007).

Officers have probable cause to arrest when they "have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Gonzalez v. City of Schenectady*, 728 F.3d 149, 155 (2d Cir. 2013) (emphasis and citation omitted). "Probable cause can exist even where it is based on mistaken information, so long as the arresting officer acted reasonably and in good faith in relying on

that information." *Bernard v. United States*, 25 F.3d 98, 102 (1994); *Curley v. Vill. of Suffern*, 268 F.3d 65, 70 (2d Cir. 2001) (holding that a police officer is "not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest.").

***4** Plaintiff does not provide any facts about the circumstances leading up to his arrest or alleged false imprisonment. His allegations therefore are not sufficient to state a claim for false arrest under Section 1983.

**C. Seizure of Property**

The Court construes Plaintiff's allegations that police officers confiscated his automobile and his "personal property" as attempting to assert a claim that he was deprived of his property in violation of the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment protects "against deprivations [of life, liberty, or property] without due process of law." *Rivera-Powell v. N.Y. City Bd. of Elections*, 470 F.3d 458, 464 (2d Cir. 2006) (internal quotation marks and citation omitted). "The fundamental requisite of due process of law is the opportunity to be heard ... at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (internal quotation marks and citations omitted). Determining whether the process provided is adequate requires a weighing of: (1) the private interest affected; (2) the risk of erroneous deprivation and the probable value of further safeguards; and (3) the governmental interest at issue. *See Rivera-Powell*, 470 F.3d at 466 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

A government official's random and unauthorized act does not violate a person's right to procedural due process if a meaningful postdeprivation remedy is available. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1986); *Parratt v. Taylor*, 451 U.S. 527, 540-43 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986); *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 880 (2d Cir. 1996). Thus, a claim under Section 1983 asserting that a government official has deprived a person of a property interest is not cognizable in a federal district court if state law provides an adequate remedy for the deprivation of that interest. *See Zinermon v. Burch*, 494 U.S. 113, 127-39 (1990); *Hudson*, 468 U.S. at 533. Accordingly, when a plaintiff asserts such a claim, "the federal court's initial inquiry must be whether the state has provided adequate remedies to redress such unlawful acts." *Vialez v. N.Y.C. Hous. Auth.*, 783 F. Supp. 109, 114 (S.D.N.Y. 1991).

Because the government cannot predict precisely when a government official's random and unauthorized deprivation of a person's property interest will occur, it would be impossible to provide meaningful due process before the deprivation of the property interest. *See, e.g.*, *Hudson*, 468 U.S. at 532-33. Accordingly, New York State law provides postdeprivation remedies to cure such deprivations. *See Jenkins v. McMickens*, 618 F. Supp. 1472, 1474 (S.D.N.Y. 1985) (state tort action available to compensate detainee for alleged loss of property by city jail officials); *Cook v. City of New York*, 607 F. Supp. 702, 704 (S.D.N.Y. 1985) (detainee had meaningful postdeprivation remedy for loss of book through state action for negligence, replevin, or conversion); *Moreno v. New York*, 69 N.Y.2d 432 (1987) (alternative state remedies to recover seized property discussed); *Boyle v. Kelley*, 42 N.Y.2d 88, 90-91 (1977) (property wrongfully seized by officials during a search recoverable by a state replevin action or a state proceeding brought under Article 78 of the New York Civil Practice Law and Rules).

***5** Here, Plaintiff alleges no facts showing that he has pursued any of these state remedies, nor any facts showing that these remedies are inadequate. Plaintiff therefore fails to state a claim under Section 1983 that Defendants deprived him of his property without due process.

**D. Conditions of Confinement**

Plaintiff alleges that he while he was detained in an unspecified facility, he was subjected to unconstitutional conditions of confinement. Because it appears that Plaintiff was a pretrial detainee during the events giving rise to his claims, the claims arise under the Due Process Clause of the Fourteenth Amendment, rather than under the Eighth Amendment's Cruel and Unusual Punishment Clause. *See Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). "[A] detainee's rights [under the Fourteenth Amendment] are at least as great as the Eighth Amendment protections available to a convicted prisoner." *Id.* (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)).

To state such a conditions-of-confinement claim, a plaintiff must satisfy two elements: (1) an "objective" element, which requires a showing that the challenged conditions are sufficiently serious to pose an unreasonable risk to his health or safety, and (2) a "mental" element, which requires a showing that a correction official acted with at least deliberate indifference to the challenged conditions. *Id.*

For the objective element, a pretrial detainee "must show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health" or safety, which "includes the risk of serious damage to 'physical and mental soundness.' " *Id.* at 30 (citing *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013), and quoting *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972)). "[P]rison officials violate the Constitution when they deprive an inmate of his basic human needs such as food, clothing, medical care, and safe and sanitary living conditions." *Walker*, 717 F.3d at 125 (internal quotation marks omitted).

For the subjective element, a pretrial detainee must allege "that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." *Darnell*, 849 F.3d at 35. The mere negligence of a correction official is not a proper basis for a claim of a federal constitutional violation under Section 1983. *See Daniels v. Williams*, 474 U.S. 327, 335-36 (1986); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986).

1. Dirty bathroom

Plaintiff alleges that he was subjected to an "unsan[ ]itized condition" in the bathroom of an unspecified facility (ECF 1, at 5), but he does not allege any facts describing the nature of the condition of the bathroom. Nor does Plaintiff allege any facts suggesting that the conditions in the bathroom posed an unreasonable risk of serious damage to his health or that any individual defendant acted deliberately to impose the condition or recklessly failed to mitigate the condition. Plaintiff therefore fails to state a conditions-of-confinement claim arising from the condition of the bathroom at the facility where he was held.

2. Deprivation of water

***6** To amount to a constitutional violation, a deprivation of food or nutrients must create a serious danger to the health of the inmate. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678, 683, 687 (1978) (holding in the context of the Eighth Amendment, a diet of fewer than 1,000 calories per day would be "intolerably cruel for weeks or months"); *Phelps v. Kapnolas*, 308 F.3d 180, 187 (2d Cir. 2002) (holding that placing plaintiff on a nutritionally inadequate restricted diet for fourteen days was likely to cause serious harm); *Dixon v. Fishkill Corr. Fac.*, No. 17-CV-1123 (NSR), 2019 WL 2866489, at *3 (S.D.N.Y. July 2, 2019) (plaintiff's allegations that he did not receive a meal for over 30 hours on three occasions during a single week and that the food he was served was nutritionally inadequate amounted to a substantial deprivation of food under the Eighth Amendment). [4]

Here, Plaintiff alleges that he "[d]eprived of water causing dehydra[ ]tion." (ECF 1, at 5.) He does not, however, allege facts describing the length of time for which he was deprived of water or the physical effects of such deprivation. Furthermore, Plaintiff does not allege facts suggesting that any individual defendant acted intentionally or recklessly in imposing or failing to alleviate the dangerous condition. Plaintiff therefore fails to state a claim that his alleged denial of water rises to the level of a constitutional violation.

3. Cold temperature

A prisoner's exposure to excessively hot or cold temperature may give rise to a constitutional violation. *See, e.g.*, *Gaston v. Coughlin*, 249 F.3d 156, 165 (2d Cir. 2001) (holding that a prisoner's exposure to "temperatures near or well below freezing for a five-month period" stated an Eighth Amendment claim); *Lopez v. Phipps*, No. 18-CV-3605, 2019 WL 2504097, at *7 (E.D.N.Y. June 17, 2019) ("[C]ourts in this Circuit have held that excessively hot or cold temperature may give rise to a constitutional violation."); *Wingate v. Robert N. Davoren Center*, No. 12-CV-5521 (ALC), 2013 WL 4856573, at *3 (S.D.N.Y. Sept. 10, 2013) ("Many courts, including the Second Circuit, have held excessively hot or cold conditions may be a constitutional violation." (citation omitted)). While there is no " 'bright-line durational or severity threshold' that a deprivation must meet," *Collins v. Fischer*, No. 15-CV-103 (KMK), 2018 WL 1626528, at *7 (S.D.N.Y. Mar. 30, 2018) (quoting *Darnell*, 849 F.3d at 32), courts have generally found that allegations of exposure to mildly cold temperatures, or where the exposure to cold was short term, did not support claims of a constitutional deprivation, *see Miller v. Netto*, No. 3:17-CV-0362 (KAD), 2019 WL 4646973, at *9 (D. Conn. Sept. 24, 2019) (no constitutional violation based on pre-trial detainee's "expos[ure] to cold temperatures for at most, nineteen hours"); *Brims v. Ramapo Police Dep't*, No. 11-CV-712 (VB), 2011 WL 7101233, at *5 (S.D.N.Y. Dec. 23, 2011) ("Cases where plaintiffs have succeeded on those claims ... involve allegations of exposure to freezing or near-freezing temperatures for a more prolonged period of time than eleven hours."); *Stevens v. City of New York*, No. 10-CV-5455 (PGG), 2011 WL 3251501, at *4 & n.2 (S.D.N.Y.

July 22, 2011) (no constitutional violation when plaintiff alleged that he "was housed in a cell with a broken window – which was 'somewhat' covered by a garbage bag" for up to four days in mid-May).

Here, Plaintiff alleges he was "lock[ed] up in a cold prison cell without [a] sweater or jacket causing flu like symptoms." (ECF 1, at 5.) He does not, however, allege facts describing how long he was held in the cold cell or the severity of the temperature of the cell. While he alleges that he experienced "flu like symptoms" as a result of being placed in a cold cell, he does not allege any facts suggesting that the symptoms he experienced constituted an unreasonable risk of serious damage to his health. Furthermore, Plaintiff does not allege facts suggesting that any individual defendant acted intentionally or recklessly in placing him in the cold cell.

## LEAVE TO AMEND

***7** Plaintiff proceeds in this matter without the benefit of an attorney. District courts generally should grant a self-represented plaintiff an opportunity to amend a complaint to cure its defects, unless amendment would be futile. *See Hill v. Curcione*, 657 F.3d 116, 123-24 (2d Cir. 2011); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Indeed, the Second Circuit has cautioned that district courts "should not dismiss [a *pro se* complaint] without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (quoting *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795 (2d Cir. 1999)). Because Plaintiff may be able to allege additional facts to state valid Section 1983 claims, the Court grants Plaintiff 60 days' leave to amend his complaint to detail his claims.

Plaintiff is granted leave to amend his complaint to provide more facts about his Section 1983 claims for false arrest, deprivation of property without due process, and unconstitutional conditions of confinement. In the "Statement of Claim" section of the amended complaint form, Plaintiff must provide a short and plain statement of the relevant facts supporting each claim against each defendant. If Plaintiff has an address for any named defendant, Plaintiff must provide it. Plaintiff should include all of the information in the amended complaint that Plaintiff wants the Court to consider in deciding whether the amended complaint states a claim for relief. That information should include:

a) the names and titles of all relevant people;

b) a description of all relevant events, including what each defendant did or failed to do, the approximate date and time of each event, and the general location where each event occurred;

c) a description of the injuries Plaintiff suffered; and

d) the relief Plaintiff seeks, such as money damages, injunctive relief, or declaratory relief.

Essentially, Plaintiff's amended complaint should tell the Court: who violated his federally protected rights and how; when and where such violations occurred; and why Plaintiff is entitled to relief.

Because Plaintiff's amended complaint will completely replace, not supplement, the original complaint, any facts or claims that Plaintiff wants to include from the original complaint must be repeated in the amended complaint.

## CONCLUSION

The Court dismisses Plaintiff's claims against the NYPD's 30th Precinct. *See* N.Y. City Charter ch. 17, § 396.

Plaintiff is granted leave to file an amended complaint that complies with the standards set forth above. Plaintiff must submit the amended complaint to this Court's Pro Se Intake Unit within 60 days of the date of this order, caption the document as an "Amended Complaint," and label the document with docket number 24-CV-0137 (LTS). An Amended Complaint form is attached to this order. No summons will issue at this time. If Plaintiff fails to comply within the time allowed, and he cannot show good cause to excuse such failure, the complaint will be dismissed for failure to state a claim upon which relief may be granted, and the Court will decline, under 28 U.S.C. § 1367(c)(3), to exercise supplemental jurisdiction of any state law claims Plaintiff may be asserting.

Plaintiff may receive court documents by email by completing the attached form, Consent to Electronic Service. [5]

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore IFP status is denied for the purpose of an appeal.

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*Cf.* *Coppedge v. United States*, 369 U.S. 438, 444-45 (1962) (holding that an appellant demonstrates good faith when he seeks review of a nonfrivolous issue).

***8** SO ORDERED.

Attachment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____
_____
_____

*(In the space above enter the full name(s) of the plaintiff(s).)*

-against-

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

*(In the space above enter the full name(s) of the defendant(s). If you cannot fit the names of all of the defendants in the space provided, please write "see attached" in the space above and attach an additional sheet of paper with the full list of names. The names listed in the above caption must be identical to those contained in Part I. Addresses should not be included here.)*

____ Civ. _____ (____)

**AMENDED COMPLAINT**

Jury Trial: ☐ Yes ☐ No
(check one)

**I. Parties in this complaint:**

A. List your name, address and telephone number. If you are presently in custody, include your identification number and the name and address of your current place of confinement. Do the same for any additional plaintiffs named. Attach additional sheets of paper as necessary.

Plaintiff Name _____
Street Address _____
County, City _____
State & Zip Code _____
Telephone Number _____

B. List all defendants. You should state the full name of the defendant, even if that defendant is a government agency, an organization, a corporation, or an individual. Include the address where each defendant may be served. Make sure that the defendant(s) listed below are identical to those contained in the above caption. Attach additional sheets of paper as necessary.

*Rev. 12/2009* 1

Defendant No. 1 Name _____
Street Address _____
County, City _____
State & Zip Code _____
Telephone Number _____

Defendant No. 2 Name _____
Street Address _____
County, City _____
State & Zip Code _____
Telephone Number _____

Defendant No. 3 Name _____
Street Address _____
County, City _____
State & Zip Code _____
Telephone Number _____

Defendant No. 4 Name _____
Street Address _____
County, City _____
State & Zip Code _____
Telephone Number _____

**II. Basis for Jurisdiction:**

Federal courts are courts of limited jurisdiction. Only two types of cases can be heard in federal court: cases involving a federal question and cases involving diversity of citizenship of the parties. Under 28 U.S.C. § 1331, a case involving the United States Constitution or federal laws or treaties is a federal question case. Under 28 U.S.C. § 1332, a case in which a citizen of one state sues a citizen of another state and the amount in damages is more than $75,000 is a diversity of citizenship case.

A. What is the basis for federal court jurisdiction? *(check all that apply)*

☐ Federal Questions ☐ Diversity of Citizenship

B. If the basis for jurisdiction is Federal Question, what federal Constitutional, statutory or treaty right is at issue? _____

C. If the basis for jurisdiction is Diversity of Citizenship, what is the state of citizenship of each party?

Plaintiff(s) state(s) of citizenship _____
Defendant(s) state(s) of citizenship _____

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**III. Statement of Claim:**

State as briefly as possible the facts of your case. Describe how each of the defendants named in the caption of this complaint is involved in this action, along with the dates and locations of all relevant events. You may wish to include further details such as the names of other persons involved in the events giving rise to your claims. Do not cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Attach additional sheets of paper as necessary.

A. Where did the events giving rise to your claim(s) occur? _____

B. What date and approximate time did the events giving rise to your claim(s) occur? _____

C. Facts: _____

What happened to you?

Who did what?

Was anyone else involved?

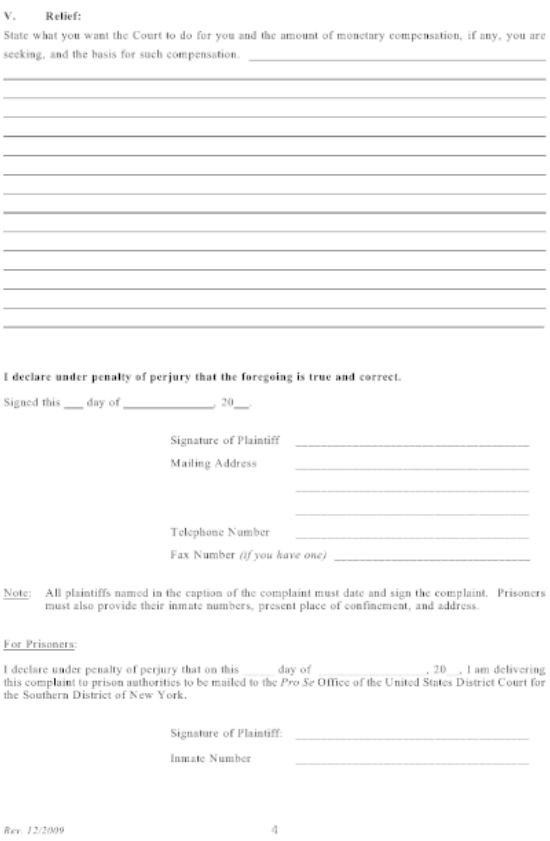
Who else saw what happened?

**IV. Injuries:**

If you sustained injuries related to the events alleged above, describe them and state what medical treatment, if any, you required and received. _____

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V. Relief:

State what you want the Court to do for you and the amount of monetary compensation, if any, you are seeking, and the basis for such compensation.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this ___ day of _____, 20__.

Signature of Plaintiff _____

Mailing Address _____

_____

_____

Telephone Number _____

Fax Number *(if you have one)* _____

Note: All plaintiffs named in the caption of the complaint must date and sign the complaint. Prisoners must also provide their inmate numbers, present place of confinement, and address.

For Prisoners:

I declare under penalty of perjury that on this ____ day of _____, 20__, I am delivering this complaint to prison authorities to be mailed to the *Pro Se* Office of the United States District Court for the Southern District of New York.

Signature of Plaintiff: _____

Inmate Number _____

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**All Citations**

Slip Copy, 2024 WL 325385

## Footnotes

1 Plaintiff writes using irregular capitalization. For readability, the Court uses standard capitalization when quoting from the complaint. All other spelling, grammar, and punctuation are as in the original unless otherwise indicated.

2 The NYPD's 30th Precinct is not a "person" within the meaning of Section 1983. *See DeJesus v. Squad*, No. 19-CV-6497, 2019 WL 3958404, at *2 (S.D.N.Y. Aug. 21, 2019) (holding "42nd Precinct Detective Squad" not a "person" under Section 1983) (citing, *inter alia*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989)); *see also Zuckerman v. App. Div., Second Dep't S. Ct.*, 421 F.2d 625, 626 (2d Cir. 1970) (court not a "person" within the meaning of 42 U.S.C. Section 1983).

3 Although Plaintiff characterizes his claim as one for false imprisonment, the "elements of a claim for false imprisonment made pursuant to Section 1983 are the same as those for false arrest," *Copeland v. New York City Police Dep't*, No. 97-CV-4224 (DLC), 1998 WL 799169, at *2 (S.D.N.Y. Nov. 13, 1998), and thus, "the claims are analyzed in identical fashion," *Mitchell v. Home*, 377 F. Supp. 2d 361, 371 (S.D.N.Y. 2005); *see also Leibovitz v. Barry*, No. 15-CV-1722 (KAM), 2016 WL 5107064, at *8 (E.D.N.Y. Sept. 20, 2016) (analyzing false arrest and false imprisonment claims under both Section 1983 and New York law as "essentially the same causes of action"); *Murry v. Williams*, No. 05-CV-9438 (NRB), 2007 WL 430419, at *5 (S.D.N.Y. Feb. 8, 2007) ("[W]e consider claims of false arrest and false imprisonment to be synonymous causes of action, as the elements of both claims under New York law are the same." (citing *Covington v. City of New York*, 171 F.3d 117, 125 (2d Cir. 1999))).

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4 The objective prong of the deliberate indifference standard is the same under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. *See* *Darnell*, 849 F.3d at 30.

5 If Plaintiff consents to receive documents by email, Plaintiff will no longer receive court documents by regular mail.

**End of Document**

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2020 WL 3893272
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Clarence DELANEY, Jr., Plaintiff,
v.
C.O. CANFIELD, et al., Defendants.

No. 19-CV-6729 (KMK)
|
Signed 07/10/2020

**Attorneys and Law Firms**

Clarence DeLaney, Jr., New York, NY, Pro se Plaintiff.

Janice Powers, Esq., Office of the Attorney General for the State of New York, White Plains, NY, Counsel for Defendants.

OPINION & ORDER

KENNETH M. KARAS, United States District Judge:

***1** Clarence DeLaney, Jr. ("Plaintiff"), proceeding pro se, brings this Complaint, pursuant to 42 U.S.C. § 1983 and state law, against Defendants, alleging that they violated his rights and caused him injury at Fishkill Correctional Facility ("Fishkill") when they prevented Plaintiff from using the bathroom while waiting for his medication, denied Plaintiff certain medical treatments and equipment, and destroyed some of Plaintiff's personal property. (*See* Compl. (Dkt. No. 2).)[1] Before the Court is Defendants' Motion To Dismiss the Complaint (the "Motion"), filed pursuant to Federal Rule of Civil Procedure 12(b)(6). (*See* Not. of Mot. (Dkt. No. 37).) For the following reasons, the Motion is granted.

## I. Background

### A. Factual Background

The following facts are drawn from Plaintiff's Complaint and any exhibits attached therein, and are assumed true for the purpose of resolving the instant Motion.

#### 1. Bathroom Use

Plaintiff alleges that, at Fishkill, he was part of "a group of close to [100] or more inmates who routinely every morning had to attend early chow and then walk together as a group ... to receive nurse administered medication." (Compl. 5.)[2] It took at least 30 minutes and sometimes "up to an hour or more" for every inmate to receive their medication. (*Id.*) The length of time it took for every inmate to receive his medication could depend on the nurse giving out medication that day or whether there was a "code red [or] blue going on." (*Id.*) Plaintiff alleges that all the inmates waiting to receive medication would have to wait until every inmate in line received their medication for the group to be escorted back to their housing units. (*Id.*) Plaintiff claims that, due to the wait time for medication, on many days, he "unnecessarily urinated or defecated on [him]self," which caused him emotional, mental, and physical distress. (*Id.*)

Plaintiff takes medication for high blood pressure and for digestive issues. (*See id.* at 6.) He claims to be disabled, as defined by the Americans with Disabilities Act (the "ADA"), and "medically unassigned" from prison labor duties. (*Id.* at 7.) Plaintiff allegedly experiences uncontrollable bladder and bowel movements, most often during breakfast and the morning medication run. (*See id.* at 6.) During the medication distribution, Plaintiff first has to receive medication from the "mental health" window before walking to the "other side" to wait in line for medication for his physical ailments. (*Id.*)

Plaintiff claims that, although there is an inmate restroom in the area where the medication distribution occurs, Defendant Canfield bans all inmates from using that restroom during "the entire medication run." (*Id.* at 7.) Canfield has allegedly said, "I don't care if you have to piss or shit in your pants, I am not letting you use the restroom." (*Id.*) Canfield would also threaten inmates with disciplinary infractions if they tried to use the restroom in question. (*Id.*) Plaintiff alleges that Canfield has behaved this way with him and with other inmates. (*See id.* at 7–8.) As a result, Plaintiff has defecated and urinated on himself on "several occasions." (*Id.* at 8.)

***2** Plaintiff claims that he has told many other members of the Fishkill staff about Canfield's behavior, including Defendants Cofield, Churns, Williams, Fields, Akinyombo, Annucci, and Thomas. (*Id.*) However, they have "allow[ed]" the practice to continue. (*Id.*) Plaintiff also claims that Thomas has refused to give him a special permit to use the restroom, despite his medical issues. (*Id.*)

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2. Medical Treatments

When Plaintiff first arrived at Fishkill, he was assigned to a "Dr. Davis," to whom Plaintiff explained the nature of his chronic medical ailments, which include high blood pressure, sleep apnea, orthopedic problems, and Type II diabetes. (*Id.* at 10.) Dr. Davis passed away in March or April 2019, and Plaintiff's medical file was subsequently passed on to Defendant Thomas. (*Id.*)

Plaintiff claims that Thomas rejected many of Plaintiff's medical requests, claiming that "Albany would reject paying for the cost of medical" expenses such as an MRI or a sleep apnea machine. (*Id.*) However, according to Plaintiff, he had been using a sleep apnea machine without issue at other correctional facilities. (*Id.*) Thomas then told Plaintiff that he would be required to sit for a sleep study in order to determine whether a sleep apnea machine would be provided to him. (*Id.*) Plaintiff claims the sleep study, conducted on May 23, 2019, was a "joke with equipment that you could buy in a toy store." (*Id.*) Thomas never contacted Plaintiff regarding the results of the sleep study. (*Id.*) When Plaintiff attempted to follow up with Defendant Akinyombo, he was told that he had not been approved for use of a sleep apnea machine. (*Id.*)

Plaintiff also claims that he was rejected from blood tests despite the fact that he had requested one from Thomas. (*Id.* at 11.) Plaintiff told Thomas that he needed a blood test because he had been diagnosed with Type II diabetes in the past and because he had a family history of the disease. (*Id.*) Thomas allegedly ignored the request, so Plaintiff instead "signed for sick call," claiming that he felt diabetes symptoms. (*Id.*) Subsequently, Thomas gave Plaintiff a urine analysis test instead of a blood test, which "did[ not] make any sense to ... Plaintiff." (*Id.*) Plaintiff claims that both Thomas and Akinyombo ignored his medical needs and, as a result, he continues to struggle with sleep. (*Id.*)

3. Personal Property and Subsequent Grievances

Plaintiff further alleges that Fishkill staff interfered with his personal property. Specifically, on May 23, 2019, he was ordered by Defendant Lee to get ready for a "medical trip," i.e., his overnight sleep study at Green Haven Correctional Facility ("Green Haven"). (*Id.* at 12.) Plaintiff left Fishkill at 8:00 p.m. the night of May 23 and returned at 9:30 a.m. on the morning of May 24. (*Id.*) When Plaintiff arrived at his housing unit in the morning, he was told by a non-party correction officer that his "personal and state property" had been "packed up and sent to another location of the prison." (*Id.*) The correction officer also informed Plaintiff that his "small locker" had been left in his "cube," so the correction officer had moved it to the "back room of the dorm so that it could be secured." (*Id.*) Plaintiff became angry because the move was "against rules, regulations, codes, and against" DOCCS policy. (*Id.*) [3]

***3** When Plaintiff retrieved his relocated property, he discovered that certain items that he had purchased from the commissary and "many legal documents" were missing. (*Id.* at 12–13.) Plaintiff "was advised" that Defendant Lee had packed up his belongings and that he had thrown away these items in the trash. (*Id.* at 13.) Plaintiff was also given other items by inmates who claimed that they had seen Defendant Lee throw them in the trash. (*Id.*)

Plaintiff claims that he never received an "I-64" form, an "inventory shee[t]" that is allegedly mandatory to use whenever an inmate's belongings are packed up and relocated. (*Id.*) Plaintiff filed a grievance regarding his property loss, and Plaintiff's attorney also contacted prison staff. (*Id.*) [4] Plaintiff was interviewed about his grievances, but Defendant Sablinski and other unnamed officers denied his claim. (*Id.* at 14.) Plaintiff claims that Sablinski's determination was "biased and predetermin[e]d" and therefore, makes him liable as a supervising officer for failing to correct Defendant Lee's purported violation. (*Id.*)

On June 26, 2019, Plaintiff was ordered to see Defendant Vines, presumably in connection to his grievances. (*Id.*) Plaintiff claims that, during the interview, Vines engaged in "intimidation" and "harassment." (*Id.*) Vines asked Plaintiff about sexual misconduct allegations, and Plaintiff responded that his grievance did not pertain to sexual misconduct. (*Id.* at 14–15.) Plaintiff claims that his grievance continued to be ignored and that Defendant Lee has since threatened him "on a few occasions." (*Id.* at 15.) Plaintiff believes that Lee was suspended as a result of Plaintiff's grievance. (*Id.*)

Plaintiff claims that Fishkill generally has a "bad reputation" regarding the handling of inmate property, filing false tickets against inmates, and not upholding DOCCS rules and regulations. (*Id.*)

4. Plaintiff's Claims

Plaintiff lists several causes of action in his Complaint. The Court construes them as follows. Plaintiff alleges that Canfield violated the Eighth Amendment's protections by denying Plaintiff's requests to use the bathroom during medicine distribution. (*Id.* at 16.) Also pursuant to the Eighth Amendment, Plaintiff claims that Thomas was deliberately indifferent to his medical needs when she ignored his requests for a sleep apnea machine, a blood test, and an MRI to address chronic pain in his "left middle finger." (*Id.* at 16, 23.)[5] Plaintiff also appears to allege Due Process violations based on his purportedly missing property and the failure to rectify the situation through his grievances. (*Id.* at 24.) Plaintiff further claims that a number of supervisory Defendants are liable because they were aware of Canfield's and Lee's actions and allowed them to continue. (*Id.* at 21–22.)

Plaintiff also appears to bring a number of additional claims under state law premised on the same factual allegations, including negligence, (*id.* at 18), pain and suffering, (*id.* at 20), infliction of mental and emotional distress, (*id.*), and various violations of state constitutional rights, such as "cruel and unusual punishment," the due process clause, and the equal protection clause, (*id.* at 18–19).

B. Procedural History

***4** Plaintiff filed his Complaint on July 18, 2019, (*see* Compl.), and Plaintiff's request to proceed in forma pauperis ("IFP") was granted on August 14, 2019, (*see* Dkt. No. 9). Initially, in a Pre-Motion Letter requesting leave to file the instant Motion, counsel for Defendants stated that she needed more information to accurately identify the individual named as "C.O. Lee" in Plaintiff's Complaint. (*See* Dkt. No. 30.) However, the Court set a briefing schedule for Defendants' proposed motion to dismiss, anyway. (*See* Dkt. No. 31.) On January 3, 2020, counsel for Defendants notified the Court that she had identified the correct "C.O. Lee" and accepted his request for representation. (Dkt. No. 40.)

Defendants filed their opening papers on December 30, 2019. (*See* Not. of Mot.; Defs.' Mem. of Law in Supp. of Mot. ("Defs.' Mem.") (Dkt. No. 38).) Plaintiff filed an Opposition on January 9, 2020. (*See* Pl.'s Mem. in Opp'n to Mot. ("Pl.'s Mem.") (Dkt. No. 41).) On January 17, 2020, Defendants wrote a Letter to the Court stating that they did not intend to file a reply and rested on their moving papers. (*See* Dkt. No. 46.)

II. Discussion

A. Standard of Review

The Supreme Court has held that although a complaint "does not need detailed factual allegations" to survive a motion to dismiss, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration and quotation marks omitted). Indeed, Rule 8 of the Federal Rules of Civil Procedure "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (alteration and quotation marks omitted). Rather, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Although "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *id.* at 563, and a plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face," *id.* at 570, if a plaintiff has not "nudged [his] claim[ ] across the line from conceivable to plausible, the[ ] complaint must be dismissed," *id.*; *see also Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' " (second alteration in original) (citation omitted) (quoting Fed. R. Civ. P. 8(a)(2))); *id.* at 678–79 ("Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

"[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam), and "draw[ ] all reasonable inferences in favor of the plaintiff," *Daniel v. T&M Prot. Res., Inc.*, 992 F. Supp. 2d 302, 304 n.1 (S.D.N.Y. 2014) (citing *Koch v. Christie's*

*Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012)). Additionally, "[i]n adjudicating a Rule 12(b)(6) motion, a district court must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Leonard F. v. Isr. Disc. Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999) (quotation marks omitted); *see also Wang v. Palmisano*, 157 F. Supp. 3d 306, 317 (S.D.N.Y. 2016) (same). Where, as here, a plaintiff proceeds pro se, the court must "construe[ ] [his] [complaint] liberally and interpret[ ] [it] to raise the strongest arguments that [it] suggest[s]." *Sykes v. Bank of Am.*, 723 F.3d 399, 403 (2d Cir. 2013) (quotation marks omitted). However, "the liberal treatment afforded to pro se litigants does not exempt a pro se party from compliance with relevant rules of procedural and substantive law." *Bell v. Jendell*, 980 F. Supp. 2d 555, 559 (S.D.N.Y. 2013) (quotation marks omitted); *see also Caidor v. Onondaga County*, 517 F.3d 601, 605 (2d Cir. 2008) ("[P]ro se litigants generally are required to inform themselves regarding procedural rules and to comply with them." (italics and quotation marks omitted)).

***5** Generally, "[i]n adjudicating a Rule 12(b)(6) motion, a district court must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Leonard F. v. Isr. Disc. Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999) (quotation marks and citation omitted). When a plaintiff proceeds pro se, however, the Court may consider "materials outside the complaint to the extent that they are consistent with the allegations in the complaint," *Alsaifullah v. Furco*, No. 12-CV-2907, 2013 WL 3972514, at *4 n.3 (S.D.N.Y. Aug. 2, 2013) (quotation marks omitted), including "documents that a pro se litigant attaches to his opposition papers," *Agu v. Rhea*, No. 09-CV-4732, 2010 WL 5186839, at *4 n.6 (E.D.N.Y. Dec. 15, 2010) (italics omitted).

B. Analysis

1. Eighth Amendment Claims

a. Conditions of Confinement

"The conditions of a prisoner's confinement can give rise to an Eighth Amendment violation." *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (per curiam) (citing, inter alia, *Farmer v. Brennan*, 511 U.S. 825, 828 (1994)). "Although the Constitution does not require 'comfortable' prison conditions, the conditions of confinement may not 'involve the wanton and unnecessary infliction of pain.' " *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). "In such cases, a prisoner may prevail only where he proves both an objective element—that the prison officials' transgression was 'sufficiently serious'—and a subjective element—that the officials acted, or omitted to act, with a 'sufficiently culpable state of mind,' i.e., with 'deliberate indifference to inmate health or safety.' " *Phelps*, 308 F.3d at 185 (quoting *Farmer*, 511 U.S. at 834 (italics omitted)); *see also Garcia v. Fischer*, No. 13-CV-8196, 2016 WL 297729, at *4 (S.D.N.Y. Jan. 22, 2016) (same). "To meet the objective element, the inmate must show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health." *Walker*, 717 F.3d at 125 (citations omitted); *see also Seymore v. Dep't of Corr. Servs.*, No. 11-CV-2254, 2014 WL 641428, at *3 (S.D.N.Y. Feb. 18, 2014) ("[T]he Second Circuit ... has explained that '[b]ecause society does not expect or intend prison conditions to be comfortable, only extreme deprivations are sufficient to sustain a "conditions-of-confinement claim.' " " (alteration in original) (citation omitted)). To meet the subjective element, a plaintiff must show that the defendant "acted with more than mere negligence," and instead knew of and disregarded an "excessive risk to inmate health or safety." *Walker*, 717 F.3d at 125 (citations and quotation marks omitted). Under the Eighth Amendment, officials may not "create inhumane prison conditions, deprive inmates of basic necessities, or fail to protect their health or safety." *Overton v. Bazzetta*, 539 U.S. 126, 137 (2003).

Plaintiff's allegations, even if true, fail to state a claim for a violation of Plaintiff's constitutional rights. "The Eighth Amendment is generally not violated where unsanitary conditions are temporary." *D'Attore v. New York City*, No. 10-CV-3102, 2015 WL 556778, at *11 (S.D.N.Y. Feb. 10, 2015) (citations, alteration, and quotation marks omitted), *appeal dismissed*, No. 15-636 (2d Cir. May 11, 2015). "The temporary deprivation of the right to use the toilet, in the absence of serious physical harm or a serious risk of contamination, does not rise to the level of an objective constitutional violation." *Mateo v. Alexander*, No. 10-CV-8427, 2012 WL 864805, at *5 (S.D.N.Y. Mar. 14, 2012) (citation omitted); *see also May v. DeJesus*, No. 06-CV-1888, 2010 WL 1286800, at *5 (D. Conn. Mar. 30, 2010) ("Courts in this and other circuits have consistently held that an occasional or temporary deprivation of toilet use, does not

constitute an extreme deprivation of a basic human need or necessity of life." (collecting cases)); *Whitted v. Lazerson*, No. 96-CV-2746, 1998 WL 259929, at *2 (S.D.N.Y. May 21, 1998) (holding that refusing the plaintiff the use of the bathroom, which resulted in the plaintiff urinating in his pants, was not a constitutional violation). Plaintiff alleges that, at most, he was restricted from using the bathroom for between 30 to 60 minutes five days a week while he waited for medication disbursements. (*See* Compl. 5–7.) Lengthier restrictions on bathroom usage have routinely been held not to constitute violations of inmates' constitutional rights. *See Jones v. Marshall*, No. 08-CV-562, 2010 WL 234990, at *3 (S.D.N.Y. Jan. 19, 2010) (90-minute bathroom restriction did not "establish the existence of an objective injury for purposes of eighth Amendment claim" (collecting cases)); *see also Walker v. Dep't of Corr. Serv.*, No. 11-CV-993, 2012 WL 527210, at *1–2 (S.D.N.Y. Feb. 14, 2012) (dismissing a 80-minute bathroom restriction); *Gill v. Riddick*, No. 03-CV-1456, 2005 WL 755745, at *16 (N.D.N.Y. Mar. 31, 2005) (70-minute bathroom restriction); *Bourdon v. Roney*, No. 99-CV-769, 2003 WL 21058177, at *10–11 (N.D.N.Y. Mar. 6, 2003) (three-hour bathroom restriction); *Odom v. Keane*, No. 95-CV-9941, 1997 WL 576088, at *5 (S.D.N.Y. Sept. 17, 1997) (holding that a claim that the plaintiff's toilet did not flush for 10 hours each day for a period of several months did not state a constitutional violation). Plaintiff has therefore failed to allege that the circumstances "pose[d] an unreasonable risk of serious damage to his health." *Walker*, 717 F.3d at 125 (citations omitted)

***6** Even if the injury were one that fulfilled the objective prong of the claim, the Complaint also fails to establish that Canfield acted with a "sufficiently culpable state of mind." *Phelps*, 308 F.3d at 185 (citation and quotation marks omitted). Plaintiff never alleges that he informed Canfield of how his medical ailments required him to use the bathroom even within the 30-to-60 minute window of medication distribution. Although Plaintiff alleges that he asked Defendant Thomas for a bathroom pass that he could use while in line, which he never received, (*see* Compl. 10), he never alleges that Canfield knew about his medical needs at all, (*see id.* at 7–10). Canfield's general statements to the inmate population, such as "I don't care if you have to piss or shit in your pants," (*id.* at 7), are also not by themselves indicative of a sufficiently culpable state of mind, *see Gill*, 2005 WL 755745, at *6, *16 (dismissing Eighth Amendment claims premised on bathroom restrictions where the defendant said, "I don't care if you shit on yourself" (record citation and quotation marks omitted)); *cf. Hart v. City of New York*, No. 11-CV-4678, 2013 WL 6139648, at *9 (S.D.N.Y. Nov. 18, 2013) (denying summary judgment because the plaintiff testified that he had "specifically informed" the defendant officer about his multiple sclerosis, which caused frequent urination and, therefore, a "reasonable juror could find that [the plaintiff] was denied a minimal civilized measure of life's necessities and that [the defendant] had a sufficiently culpable state of mind amounting to deliberate indifference"); *DeBlasio v. Rock*, No. 09-CV-1077, 2011 WL 4478515, at *16 (N.D.N.Y. Sept. 26, 2011) (denying summary judgment where the plaintiff alleged that he had been handcuffed for five hours while "pleading to be released in order to use the bathroom"). Indeed, most of Plaintiff's allegations pertain to how Canfield's restrictions affected *other* inmates who are not parties to this Action. (*See* Compl. 8–10.) Therefore, Plaintiff's conditions-of-confinement claim regarding bathroom access fails, and is dismissed. [6]

b. Deliberate Indifference to Medical Needs

Defendants argue that any deliberate indifference to medical needs claim against Defendants Thomas and Akinyombo also fails. (*See* Defs.' Mem. 10–12.) Similar to a conditions-of-confinement claim, a claim for deliberate indifference to medical needs requires a plaintiff to allege, first, that the "alleged deprivation of adequate medical care [is] sufficiently serious." *Spavone v. N.Y. State Dep't of Corr. Servs.*, 719 F.3d 127, 138 (2d Cir. 2013) (citation and quotation marks omitted). Analyzing this objective requirement involves two inquiries: "whether the prisoner was actually deprived of adequate medical care," and "whether the inadequacy in medical care is sufficiently serious," which in turn "requires the court to examine how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner." *Salahuddin v. Goord*, 467 F.3d 263, 279–80 (2d Cir. 2006) (citation omitted). "There is no settled, precise metric to guide a court in its estimation of the seriousness of a prisoner's medical condition." *Brock v. Wright*, 315 F.3d 158, 162 (2d Cir. 2003). Nevertheless, the Second Circuit has offered the following non-exhaustive list of factors to consider when evaluating an inmate's medical condition: "(1) whether a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment, (2) whether the medical condition significantly affects daily activities, and (3) the existence of chronic and substantial pain." *Id.* (citation and quotation marks omitted). And the second

element requires the plaintiff to show that prison officials were "subjectively reckless in their denial of medical care." *Spavone*, 719 F.3d at 138 (citation omitted). Importantly, neither "mere negligence" nor "mere disagreement over the proper treatment ... give[s] rise to an Eighth Amendment violation." *Bryant v. Capra*, No. 18-CV-10198, 2020 WL 508843, at *9 (S.D.N.Y. Jan. 31, 2020) (citations, alteration, and quotation marks omitted).

***7** Neither Thomas nor Akinyombo is alleged to have done anything that would give rise to a claim for deliberate indifference to Plaintiff's medical needs. Plaintiff's allegations suggest at most that he disagreed with Thomas's decision to implement a sleep study before deciding whether to provide Plaintiff with a CPAP machine for his sleep apnea, (*see* Compl. 10), Thomas's decision not to provide an MRI for an unspecified finger injury, (*see id.* at 23), and Thomas's decision to implement a urine analysis test instead of a blood test to monitor Plaintiff's diabetes symptoms, (*see id.* at 11). Plaintiff does not allege that Thomas ignored his medical complaints entirely; indeed, the Complaint itself shows that Thomas responded to Plaintiff's complaints of sleep apnea by ordering a sleep study, which ultimately revealed only a "mild" condition that did not require a CPAP machine. (Compl. 65; *see also id.* at 10–11, 32, 63.) Thomas's medical decisions are not indicative of deliberate indifference to any acute medical condition. "[A] medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment." *Estelle v. Gamble*, 429 U.S. 97, 107 (1976); *accord Riddick v. Mauer*, 730 F. App'x 34, 37–38 (2d Cir. 2018) (affirming denial of injunctive relief based on the inmate-plaintiff's claims concerning denials of MRIs, x-rays, and a new mattress because they constituted "mere disagreements over treatment"). "[T]he essential test is one of medical necessity and not one simply of desirability." *Hill v. Curcione*, 657 F.3d 116, 123 (2d Cir. 2011) (citation and quotation marks omitted). Here, Plaintiff alleges only that his medical preferences were not honored and does not even allege that he experienced any severe or chronic pain as a result of those choices. Accordingly, no constitutional violation occurred, and any claim for deliberate indifference to medical needs is dismissed. *See id.* (affirming dismissal of a complaint where the inmate plaintiff alleged that he was denied certain medication and a "nerve conduction study[,] leaving him to needlessly suffer" (quotation marks omitted)); *see also Fox v. Fischer*, 242 F. App'x 759, 760 (2d Cir. 2007) (affirming dismissal of deliberate indifference claim where, despite providing the plaintiff with different medication than the one he desired, there was "no allegation" that the chosen method "caused harm, if any, sufficiently serious to establish ... a deliberate indifference claim" (citation omitted)); *Santana v. Watson*, No. 13-CV-1549, 2014 WL 1803308, at *5 (S.D.N.Y. May 6, 2014) (explaining that even if sleep apnea were "sufficiently grave to be constitutionally cognizable," a claim for medical indifference would still fail because there was "no indication that [the plaintiff's] health declined during the time he was without a CPAP machine, or that the ... deprivation significantly affected his daily activities or caused him chronic and substantial pain" (footnotes omitted)); *Perez v. City of New York*, No. 13-CV-3328, 2013 WL 6182931, at *1, *3 (S.D.N.Y. Nov. 21, 2013) (dismissing deliberate indifference to medical needs claim where the plaintiff complained that his requests for "certain pain and diabetes medications" were ignored because the plaintiff did not "allege an urgent condition that may produce death, degeneration, or extreme pain" or that the defendant providers' medical choices "created such a condition" (citation, record citation, alteration, and quotation marks omitted)). [7] , [8]

2. Plaintiff's Personal Property

Plaintiff also appears to assert claims for loss of property without due process. (*See* Compl. 12–14.) However, "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of ... the Fourteenth Amendment if a meaningful post[-]deprivation remedy for the loss is available." *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *see also Acevedo v. Fischer*, No. 12-CV-6866, 2014 WL 5015470, at *13 (S.D.N.Y. Sept. 29, 2014) (same), *appeal dismissed*, No. 14-3839 (2d Cir. Jan. 8, 2015). In fact, "the state's action is not complete until and unless it provides or refuses to provide a suitable post[-]deprivation remedy." *Acevedo*, 2014 WL 5015470, at *13 (quoting *Hudson*, 468 U.S. at 533). In applying this doctrine, "the Second Circuit has determined that 'New York in fact affords an adequate post-deprivation remedy in the form of, inter alia, a Court of Claims action.' " *Id.* (italics omitted) (quoting *Jackson v. Burke*, 256 F.3d 93, 96 (2d Cir. 2001)); *see also Malik v. City of New York*, No. 11-CV-6062, 2012 WL 3345317, at *11 (S.D.N.Y. Aug. 15, 2012) ("New York provides such an adequate post-deprivation remedy in the form of state law causes of action for negligence, replevin, and conversion." (collecting cases)), *adopted by* 2012 WL 4475156 (S.D.N.Y. Sept. 28, 2012). District courts thus routinely dismiss claims by inmates who assert that they were deprived of property by corrections officers. *See, e.g.*,

*JCG v. Ercole*, No. 11-CV-6844, 2014 WL 1630815, at *32 (S.D.N.Y. Apr. 24, 2014) (dismissing an inmate's deprivation of property claim because "the existence of an adequate post-deprivation state remedy precludes a due process claim under § 1983" (citations omitted)), *adopted by* 2014 WL 2769120 (S.D.N.Y. June 18, 2014); *Green v. Niles*, No. 11-CV-1349, 2012 WL 987473, at *6 (S.D.N.Y. Mar. 23, 2012) (dismissing an inmate's claim because "a prison's loss of an inmate['s] property ... will not support a due process claim redressable under § 1983 if adequate state post-deprivation remedies are available" (citation and quotation marks omitted)).

***8** Here, the Complaint alleges that other inmates told Plaintiff that Defendant Lee threw away some of his materials while Plaintiff was away for a medical trip. (*See* Compl. 12–13.) The Complaint also attaches a letter from Defendant Sablinksi stating that the missing property consisted of items that were not secured in Plaintiff's locker when Plaintiff left for his trip and that Plaintiff did receive all the items that he had secured in his locker. (*See id.* at 41.) Plaintiff complains that he never received an "I-64" inventory sheet and that Lee's actions were unauthorized and outside of normal DOCCS practice. (*See id.* at 12–13.) Because the Complaint thus suggests the deprivation of property was "effected through random and unauthorized conduct of a state employee"—as opposed to "established state procedure"—Plaintiff has an adequate post-deprivation remedy under state tort law. *Hudson*, 468 U.S. at 532–33. Consequently, he cannot sustain a § 1983 claim based on the deprivation of his personal property. *See Franco v. Kelly*, 854 F.2d 584, 588 (2d Cir. 1988) (noting that the "mere deprivation of personal property would not rise to the level of a constitutional injury" (citation omitted)). Therefore, Plaintiff fails to state any claim under the Fourteenth Amendment (or any other provision) based on his purportedly missing property.

3. Supervisory Liability

Plaintiff also seeks to hold a number of named Defendants liable as supervisors for explicitly or implicitly approving of Canfield's bathroom restrictions and/or Lee's purported interference with Plaintiff's property. (*See* Compl. 21–22.) Such claims are not legally cognizable. It is well established that respondeat superior is not a basis for liability under § 1983. *See Blyden v. Mancusi*, 186 F.3d 252, 264 (2d Cir. 1999); *see also Jamison v. Fischer*, No. 11-CV-4697, 2012 WL 4767173, at *3 (S.D.N.Y. Sept. 27, 2012) (explaining that *Iqbal* "rejected the argument that a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution" (citation and quotation marks omitted)), *appeal not considered by* 617 F. App'x 25 (2d Cir. 2015). Instead, a plaintiff seeking to hold a supervisory defendant liable pursuant to § 1983 must allege personal involvement by the defendant, a requirement that may be satisfied by alleging that

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

*Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (citation omitted). Plaintiff has not offered any allegations that establish personal involvement based on application of these factors. In any event, because the Court has determined that Plaintiff has failed to allege any underlying constitutional violation based on the facts presented, no supervising Defendant may be held liable for being "grossly negligent in supervising subordinates who committed the wrongful acts." *Id.* (citation omitted). Therefore, any claims for "supervisory liability" are dismissed.

4. State Claims

To the extent any state claims remain, the Court also dismisses them. *See Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998) ("In general, where the federal claims are dismissed before trial, the state claims should be dismissed as well." (citations omitted)); *Thomas v. Grunberg 77 LLC*, No. 15-CV-1925, 2017 WL 3263141, at *1 (S.D.N.Y. July

28, 2017) (dismissing state claims where the federal claims had been mooted); *Torres v. City of New York*, 248 F. Supp. 2d 333, 334 (S.D.N.Y. 2003) ("Where the basis for pendent jurisdiction is dismissed, ordinarily so should the state law claims be dismissed." (citations omitted)). Should Plaintiff seek to file an amended complaint, Plaintiff may also reassert his claims under state law and cure any potential deficiencies raised by Defendants in their Motion.

## III. Conclusion

***9** For the foregoing reasons, the Court grants Defendants' Motion To Dismiss. In light of Plaintiff's pro se status, and because this is the first adjudication of Plaintiff's claims on the merits, Plaintiff's claims are dismissed without prejudice.[9] If Plaintiff wishes to file an amended complaint alleging additional facts and otherwise addressing the deficiencies identified above, Plaintiff must do so within 30 days of the date of this Opinion & Order. Failure to properly and timely amend will likely result in dismissal of the claims against Defendants with prejudice. Plaintiff is encouraged to focus specifically on articulating the factual predicates for the wrongs he *himself* has experienced and not to include generalized allegations regarding other inmates' rumored experiences with Defendants.

The Clerk of Court is respectfully directed to terminate the pending Motion, (Dkt. No. 37).

SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2020 WL 3893272

## Footnotes

1 "Defendants" refers to C.O. Canfield ("Canfield"), C.O. Lee ("Lee"), Sgt. Cofield ("Cofield"), Sgt. Vines ("Vines"), Captain Churns ("Churns"), Lt. Sablinksi ("Sablinski"), S. Urbanski ("Urbanski"), E. Williams ("Williams"), First Deputy Superintendent L. Fields ("Fields"), Superintendent A. Akinyombo ("Akinyombo"), Anthony Annucci ("Annucci"), and Nurse Practitioner Ms. Thomas ("Thomas"). (*See* Dkt.; Compl.)

2 The Court cites to the ECF page numbers stamped on the upper-right hand corner of the Complaint.

3 "DOCCS" refers to the New York State Department of Corrections and Community Supervision.

4 The Court assumes that Plaintiff refers to his criminal attorney, as the named counsel does not represent Plaintiff in this Action. (*See* Dkt.)

5 Plaintiff did not provide any other context for Thomas's purported denial of an MRI. He merely alleges that Thomas refused to provide either an MRI or physical therapy despite his complaints of "chronic pain" and a "degenerative joint disease," which is also not alleged or explained elsewhere in the Complaint. (Compl. 23.)

6 To the extent Plaintiff attempts to bring a "Due Process" or "Equal Protection" claim premised on the same facts, they fail. The Court finds no allegations to support such legal claims. To establish a Due Process claim, a plaintiff must show that "(1) he possessed a liberty interest and (2) that the defendant(s) deprived him of that interest as a result of insufficient process." *Thomas v. Calero*, 824 F. Supp. 2d 488, 500 (S.D.N.Y. 2011) (citations and quotation marks omitted). As discussed above, Plaintiff has not shown that any of the alleged facts created an "atypical and significant hardship on [him] in relation to the ordinary incidents of prison life." *Burroughs v. Mitchell*, 325 F. Supp. 3d 249, 276 (N.D.N.Y. 2018) (citations and quotation marks omitted).

The Equal Protection Clause "directs state actors to treat similarly situated people alike." *Heyliger v. Krygier*, 335 F. Supp. 3d 482, 494 (W.D.N.Y. 2018) (citation and quotation marks omitted). "To prove an equal protection violation, claimants must prove purposeful discrimination, directed at an identifiable or suspect

class." *Id.* (citation and quotation marks omitted). Although Plaintiff claims to be disabled as defined under the ADA, (Compl. 7), Plaintiff also alleges that Canfield universally restricted *all* inmates in the medication line from using the bathroom, (*see id.* at 7–10). Therefore, Plaintiff has not plausibly alleged that he was singled out due to any purported suspect class to which Plaintiff belongs.

7 The Complaint does not allege that Akinyombo made any actual medical decisions. (*See generally* Compl.) Instead, Plaintiff merely alleges that Akinyombo supervised and/or approved of Thomas's underlying decisions. (*See id.* at 11, 63, 65.) Because the Court has determined that Thomas committed no constitutional error, any derivative claim against Akinyombo for approving of Thomas's decisions is also dismissed.

8 Moreover, to the extent Plaintiff seeks to base a deliberate indifference claim on Thomas's purported denial of a bathroom pass, (*see* Compl. 9), such a claim would also fail because Plaintiff has not alleged that any such deprivation "caused him chronic and substantial pain," *Santana*, 2014 WL 1803308, at *4 (citing *Brock*, 315 F.3d at 162).

9 Because the Court has dismissed the underlying claims on their merits, the Court does not address Defendants' argument regarding failure to administratively exhaust. (*See* Defs.' Mem. 13–14.) Defendants may, of course, raise such an argument again against an amended pleading if it continues to be applicable.

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Amaury URENA, Plaintiff,
v.
CITY OF NEW YORK, Sean Turgut, Stephanie Pamphile and Tiffany Williams, Defendants.

22-CV-04758 (JLR) (KHP)
|
Signed July 10, 2024

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**REPORT AND RECOMMENDATION ON MOTION FOR SUMMARY JUDGMENT**

KATHARINE H. PARKER, United States Magistrate Judge

***1 TO: THE HONORABLE JUDGE JENNIFER L. ROCHON, United States District Judge**

Pro se Plaintiff Amaury Urena brings this action under 42 U.S.C. § 1983 against Defendants the City of New York, Sean Turgut, Stephanie Pamphile and Tiffany Williams (collectively, "Defendants") for actions that occurred while Plaintiff was a pretrial detainee. [1] Before the Court for report and recommendation is Defendants' motion for summary judgment (the "Motion") in which Defendants seek the dismissal of all claims and what the Court construes as Plaintiff's cross-motion for summary judgment (filed in opposition to Defendants' motion). (*See* ECF Nos. 79-82, 97-98, 101-02.) For the reasons that follow, I respectfully recommend that Defendants' motion be GRANTED and Plaintiff's motion be DENIED.

**BACKGROUND** [2]

On April 30, 2022, Plaintiff was housed in Quad Upper 10 at the Anna M. Kross Center ("AMKC") on Rikers Island pending criminal charges for, among other things, armed robbery in the first degree. (ECF No. 81, Defendants' Statement of Material Facts ("DSMF") at ¶ 1.) On that same date, Quad Upper 10 at AMKC was placed on lock down after several inmates were involved in a slashing. (*Id.* at ¶ 2.) Plaintiff received an infraction for his alleged involvement in the slashing incident. [3] (*Id.* at ¶ 3.)

On the night of April 30, 2022, Plaintiff was transferred to Quad Lower 12, an empty unit at AMKC, and was placed in a cell that contained a mattress, toilet, and sink. (*Id.* at ¶ 5.) Plaintiff received food while in Quad Lower 12 and remained there overnight until approximately 9:00 p.m. on May 1, 2022. [4] (*Id.* at ¶¶ 7-8.) At some point while Plaintiff was in this cell in Quad Lower 12, he flooded his cell by clogging the toilet and flushing the toilet. (ECF No. 101, Defendants' Responses to Plaintiff's Statement of Material Facts, ("DRF") at ¶ 4; Pl. Dep. 27:16-19.) Stephanie Pamphile and Tiffany Williams were assigned to Quad Lower 12 while plaintiff was incarcerated. (DSMF at ¶ 6.) At approximately 9:00 p.m., Plaintiff was handcuffed and placed on a bus to be transported from AMKC to the George R. Vierno Center ("GRVC") on Rikers Island with approximately eight other inmates. (*Id.* at ¶ 9.) Plaintiff does not recall who handcuffed him. (*Id.* at ¶ 10.) Correction officer Turgut was one of the officers assigned to work on the bus while Plaintiff was on it. (*Id.* at ¶ 11.) Neither Stephanie Pamphile nor Tiffany Williams was present on the bus. (*Id.* at ¶ 12.)

***2** The bus arrived at GRVC, but the inmates on the bus, including Plaintiff, were not permitted to enter the facility until approximately twelve hours later. (*Id.* at ¶¶ 13, 17.) For the duration of the twelve hours, Plaintiff was handcuffed on the bus. (*Id.* at ¶¶14-15, 17.) Plaintiff testified that while on the bus, he asked the correction officers to remove his handcuffs, to which they responded they could not do so. (*Id.* at ¶¶14-15; Pl. Dep. 39:13-40:23.) Plaintiff now disputes this and instead asserts he asked the officers to loosen his handcuffs, although he does not cite evidence for this assertion.

While on the bus, Plaintiff threatened to file a lawsuit against the correction officers, physically threatened one of them, and

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tried to kick the back door of the bus open. (*Id.* at ¶ 16.) After 12 hours, Plaintiff was released from the bus and placed inside a cell at GRVC, at which time his handcuffs were removed. (*Id.* at ¶ 18.) Plaintiff testified that upon arriving at GRVC, he informed correction officers that he needed to see "mental health" and "medical" and was told he would have to be secured in his cell first and then would be put on a medical list. (*See* ECF No. 98, Declaration of Amaury Urena, Pl. Dep. 58:12-17.) Plaintiff experienced pain in his shoulders and wrists because of the prolonged wearing of the handcuffs. (DSMF at ¶ 19; Pl. Dep. 72:23-73:3.) Plaintiff offers inconsistent statements in his Opposition and statement of facts regarding the duration of the shoulder and wrist pain, but he testified in his deposition that the pain continued for "a couple days." (Pl. Dep. 72:23-73:8.) After the night spent on the bus, Plaintiff first received medical treatment on May 9, 2022 when he saw a mental health clinician, but he did not mention any shoulder or wrist injury. (DSMF at ¶ 20.) On May 10, 2022, Plaintiff saw a doctor at GRVC and requested medication for a razor rash, but again did not mention injury to the shoulders or wrists. (*Id.* at ¶ 21.) Plaintiff did not receive any medical treatment for injury that resulted from the prolonged handcuffing on May 1, 2022. (*Id.* at ¶ 22.)

Plaintiff did not file a grievance about being detained in Quad Lower 12 or on the bus. (*Id.* at ¶ 23.) Plaintiff did, however, call 311 to report that he was placed in a cell in Quad Lower 12 and subsequently held overnight on a bus while handcuffed. (DRF at ¶ 13; Pl. Dep. 85:25-86:25.) Plaintiff did not follow up with 311 following his call. (DRF at ¶ 13; Pl. Dep. 87:18-21.)

## PROCEDURAL HISTORY

Plaintiff initiated this action on June 7, 2022 with the filing of the initial complaint. (ECF No. 2.) On February 9, 2023, Plaintiff filed the First Amended Complaint, which is the operative complaint (the "Complaint"). (ECF No. 34.)

On January 12, 2024, Defendants filed the instant Motion and supporting papers. (ECF No. 79.) Plaintiff opposed the Motion on April 16, 2024 (the "Opposition") (ECF No. 97), and Defendants replied on May 20, 2024 (the "Reply") (ECF No. 102.) In the Opposition, Plaintiff suggests that summary judgment should be granted in his favor. Although not brought as a formal motion, the Court construes Plaintiff's Opposition as both an opposition to Defendants' Motion and as a cross-motion for summary judgment. *See Davis v. City of Mount Vernon*, No. 17 CV 8029 (VB), 2020 WL 3430198, at *1 (S.D.N.Y. June 22, 2020) (construing pro se plaintiff's submission as both a response to defendants' motion for summary judgment and as a cross-motion for summary judgment).

## STANDARDS OF REVIEW

Under Rule 56 of the Federal Rules of Civil Procedure, a court may grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists," but "when the burden of proof at trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to" an absence of evidence "on an essential element of the nonmovant's claim." *Souza v. Exotic Island Enters., Inc.*, 68 F.4th 99, 108 (2d Cir. 2023) (citation and quotation marks omitted); *see also In re Whole Foods Mkt. Grp., Inc. Overcharging Litig.*, 397 F. Supp. 3d 406, 419-20 (S.D.N.Y. 2019) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), *aff'd sub nom. John v. Whole Foods Mkt. Grp., Inc.*, 823 F. App'x 46 (2d Cir. 2020). Once a movant has made that showing, "the nonmovant must set forth specific facts showing that there is a genuine issue for trial." *Souza*, 68 F.4th at 108 (citation and quotation marks omitted). "Conclusory allegations, conjecture, and speculation ... are insufficient to create a genuine issue of fact." *Shannon v. N.Y.C. Transit Auth.*, 332 F.3d 95, 99 (2d Cir. 2003) (citation and quotation marks omitted); *see also Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (citation omitted); *Herlihy v. City of New York*, 654 F. App'x 40, 43 (2d Cir. 2016).

***3** "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To receive consideration, the evidence in the record must be admissible at trial. *Santos v. Murdock*, 243 F.3d 681, 683 (2d Cir. 2001). The Court must "resolve any doubts and ambiguities and draw all reasonable inferences in favor of the nonmoving party." *Johnson v. L'Oréal USA*, 2023 WL 2637456, at *3 (2d Cir. March 27, 2023) (citation omitted). "Summary judgment is improper if the evidence is such that a reasonable jury could return a verdict for a nonmoving party." *Banks v. Gen. Motors, LLC*, 81 F.4th 242, 258 (2d Cir. 2023) (internal quotation marks and citations omitted).

Additionally, "[i]t is well-settled that *pro se* litigants generally are entitled to a liberal construction of their pleadings, which should be read to raise the strongest arguments that they suggest." *Green v. United States*, 260 F.3d 78, 83 (2d Cir. 2001) (internal quotations and citation omitted); *see also Hemphill v. New York*, 380 F.3d 680, 687 (2d Cir. 2004) ("It is well-established that 'when [a] plaintiff proceeds *pro se* ... a court is obliged to construe his pleadings liberally, particularly when they allege civil rights violations.' " (alteration in original) (internal citation omitted)), *overruled on other grounds by Ross v. Blake*, 578 U.S. 632 (2016). Nevertheless, "proceeding *pro se* does not otherwise relieve a litigant of the usual requirements of summary judgment, and a *pro se* party's bald assertions unsupported by Evidence[ ] are insufficient to overcome a motion for summary judgment." *Leon v. Dep't of Educ.*, No. 10CV2725WFKARL, 2017 WL 6729676, at *4 (E.D.N.Y. Sept. 29, 2017), *aff'd sub nom. Leon v. New York City Dep't of Educ.*, 740 F. App'x 759 (2d Cir. 2018) (internal citations omitted).

Under the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, parties to a summary judgment motion are required to each submit a statement of material facts. S.D.N.Y & E.D.N.Y Civ. R. 56.1(a) & (b). The nonmoving party is tasked with responding to each of the facts asserted by the moving party and each fact that is not specifically denied or controverted may be deemed admitted. *Id.* at 56.1(c). Pursuant to Local Rule 56.1(d), each statement of material fact and each statement denying or controverting a statement of material fact "must be followed by citation to evidence that would be admissible[.]" *Id.* at 56.1(d).

As a preliminary matter, Defendants ask the Court, for purposes of this motion, to deem all facts set forth in Defendants' Rule 56.1 Statement to be admitted because, despite having received notice of the requirements of the local rule, Plaintiff failed to adhere to those requirements in his opposing statement. Where a plaintiff proceeding *pro se* does not file a proper local 56.1 statement in opposition to a summary judgment motion, "the Court retains some discretion to consider the substance of the plaintiff's arguments, where actually supported by evidentiary submissions." *Cherry v. Byram Hills Cent. Sch. Dist.*, No. 11-CV-3872 ER, 2013 WL 2922483, at *1 (S.D.N.Y. June 14, 2013). Courts have held that, in light of the special solicitude afforded to *pro se* litigants, courts may "conduct an assiduous review of the record" for the purpose of deciding the summary judgment motion. *Brown v. City of New York*, No. 21CIV4632PGGSLC, 2023 WL 2908661 (S.D.N.Y. Jan. 30, 2023), *report and recommendation adopted*, No. 21CIV4632PGGSLC, 2023 WL 2496089, at *5 (S.D.N.Y. Mar. 14, 2023) (citing *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 73 (2d Cir. 2001), *abrogated in part on other grounds by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009)). Plaintiff's written opposition to the motion, while imperfect, does highlight for the Court those material facts that Plaintiff believes to be in dispute. Therefore, this Court considers the totality of the parties' submissions in identifying disputed material facts and construes those disputed facts in Plaintiff's favor as is appropriate on summary judgment. *See Vasquez v. Reilly*, No. 15-CV-9528 (KMK), 2018 WL 2768648, at *1 n.1 (S.D.N.Y. June 8, 2018) (collecting cases). However, where Plaintiff makes factual assertions in his opposition papers without citing to evidence, the Court disregards them. *See Berry v. Marchinkowski*, 137 F. Supp. 3d 495, at *520 (S.D.N.Y. 2015).

## DISCUSSION

***4** Plaintiff's Complaint raises four separate 42 U.S.C. § 1983 claims: (1) unconstitutional conditions of confinement by the individual defendants; (2) unreasonable seizure by the individual defendants; (3) excessive force by Defendant Turgut and Doe 1 [5]; and (4) municipal liability by the City of New York. Defendants argue that summary judgment should be granted because all of Plaintiff's claims fail as a matter of law, Plaintiff failed to exhaust administrative remedies, and the individual Defendants are entitled to qualified immunity.

### *1.* Exhaustion of Administrative Remedies

Defendants argue that summary judgment should be granted as to Plaintiff's claims of unconstitutional conditions of confinement and unreasonable seizure because Plaintiff failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act ("PLRA") prior to bringing the instant action. Pursuant to the PLRA, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA requires "proper exhaustion," which means "using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits)." *Woodford v. Ngo*, 548 U.S. 81, 90

(2006). However, the Supreme Court has identified three circumstances in which an administrative remedy is not capable of use and therefore exhaustion is not required: (1) where the administrative procedure "operates as a simple dead end – with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) where the process is "so opaque that it becomes, practically speaking, incapable of use"; and (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross v. Blake*, 578 U.S. 632, 633 (2016).

At Rikers Island, grievance procedures are governed by the Inmate Grievance Resolution Program ("IGRP"). [6] *Rodriguez v. City of New York*, No. 1:21-CV-1384-GHW, 2023 WL 2368985, at *3 (S.D.N.Y. Mar. 6, 2023). The December 10, 2018 version of the IGRP, which is the most recent, details the following procedure for processing and resolving inmate complaints: "(1) submission of a complaint to the Office of Constituent and Grievance Services; (2) an appeal to the facility's Commanding officer; (3) an appeal to the facility's Division Chief; and (4) an appeal to the Central Office Review Committee." *Kelly v. Carter*, No. 21-CV-8992 (ALC), 2023 WL 5334018, at *3 (S.D.N.Y. Aug. 18, 2023).

It is undisputed that Plaintiff did not file a grievance form regarding his detainment in Quad Lower 12 between April 30 and May 1, 2022 or his detainment on the bus between May 1 and May 2, 2022. (DSMF at ¶ 23.) Nevertheless, Plaintiff did call 311 to report his grievance regarding that incident, which is permitted under the IGRP. [7] Defendants maintain, however, that Plaintiff failed to exhaust his administrative remedies because he did not complete the remaining steps in the IGRP process, namely, the various appeals. Courts have held that failure to pursue an unanswered grievance constitutes a failure to exhaust administrative remedies. *See Rodriguez*, 2023 WL 2368985, at *4 (holding that Plaintiff failed to exhaust administrative remedies because he did not follow up after not receiving a response to his 311 call reporting a grievance); *Pizarro v. Ponte*, No. 17 CIV. 4412 (LGS), 2019 WL 568875, at *5 (S.D.N.Y. Feb. 11, 2019) (finding that Plaintiff failed to exhaust administrative remedies regarding his due process rehousing claim because he failed to pursue his grievance after not receiving a response).

***5** Here, Plaintiff testified that he did not follow up when he did not receive a response to his grievance. (Pl. Dep. 87:10-19.) When asked why he did not follow up, Plaintiff responded that he thought it was "the[ir] job to follow up with me." (*Id.* at 87:18-21.) Plaintiff also makes the conclusory assertion that any attempts to exhaust his administrative remedies would have been futile or unavailable. Conclusory assertions are insufficient to fall under an exception to the exhaustion rule. Because Plaintiff failed to pursue his grievance after not receiving a response, Plaintiff did not exhaust his administrative remedies. Regardless, even assuming Plaintiff had exhausted his administrative remedies, for the reasons set forth below, each of Plaintiff's claims also fails on the merits.

***2.* Section 1983 Claims**

Section 1983 provides, in relevant part, that: "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured[.]" 42 U.S.C. § 1983. Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); *see Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004). To state a claim under § 1983, a plaintiff must allege "(1) the challenged conduct was attributable to a person who was acting under color of state law and (2) the conduct deprived the plaintiff of a right guaranteed by the U.S. Constitution." *Castilla v. City of New York*, 2013 WL 1803896, at *2 (S.D.N.Y. Apr. 25, 2013); *see Cornejo v. Bell*, 592 F.3d 121, 127 (2d Cir. 2010). The conduct in this case implicates Plaintiff's rights under the Fourteenth Amendment because Plaintiff was a pretrial detainee at the time of the incidents. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017).

*a. Unconstitutional Conditions of Confinement*

Defendants argue that Plaintiff's unconstitutional conditions of confinement claim fails as a matter of law because the conduct at issue does not rise to the level of a constitutional violation. To prevail on an unconstitutional conditions of confinement claim, a pretrial detainee must satisfy two prongs: "(1) an objective prong showing that the challenged conditions were sufficiently serious to constitute objective deprivations of the right to due process; and (2) a 'mens rea prong' that shows that the officer acted with at least deliberate indifference to the challenged conditions." *House*

*v. City of New York*, No. 18CIV6693PAEKNF, 2020 WL 6891830, at *11 (S.D.N.Y. Nov. 24, 2020) (internal citations and quotations omitted). In order to meet the objective prong, a plaintiff must show "that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to [her] health." *Moore v. Cnty. of Nassau*, No. 18-CV-4786 (ST), 2023 WL 2477631, at *4 (E.D.N.Y. Mar. 13, 2023) (citing *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017)). While there is no static test to determine whether an objective deprivation was sufficiently serious, courts look to "contemporary standards of decency." *Darnell*, 849 F.3d at 30. Many courts have held that "unpleasant or unsanitary conditions only rise to the level of a Constitutional violation if they amount to an objectively and sufficiently serious denial of the minimal civilized measure of life's necessities." *Flores v. City of New York*, No. 21CV1680PGGKHP, 2022 WL 4705949, at *14 (S.D.N.Y. Aug. 8, 2022), *report and recommendation adopted*, No. 21CIV1680PGGKHP, 2022 WL 4592892 (S.D.N.Y. Sept. 30, 2022).

***6** Neither Plaintiff's confinement in a cell in Quad Lower 12, nor his confinement on the bus rise to the level of a constitutional violation. Plaintiff does not provide facts to suggest that either confinement posed an unreasonable risk of serious damage to his health. As to Plaintiff's claim regarding his confinement to the cell, Plaintiff testified in his deposition that the cell contained a mattress, toilet, and sink, and that he received food, albeit from other inmates. (DSMF at ¶ 5; Pl. Dep. at 26:4-18.) Although Plaintiff asserts in the Opposition that his cell was flooded, he testified that he himself flooded the cell. (DRF at ¶ 4; Pl. Dep. 27:16-19.) A 24-hour confinement to a cell with a mattress, toilet, and sink, that was flooded based on Plaintiff's own actions, does not rise to the level of a deprivation of constitutional rights, even if Plaintiff was forced to miss a meal, because there is no evidence that Plaintiff's health was at risk. *See Flores*, 2022 WL 4705949, at *15 (finding plaintiff's allegation that he was forced to sit among sewage and toilet water that flooded his cell for a day not enough to constitute a constitutional violation because plaintiff did not allege he suffered sickness or ill effects resulting from such exposure); *Mejia v. Carter*, No. 121CV09049ATSDA, 2022 WL 17653826, at *5 (S.D.N.Y. Nov. 2, 2022), *report and recommendation adopted*, No. 21CIV9049ATSDA, 2022 WL 17624254 (S.D.N.Y. Dec. 13, 2022) (holding that the deprivation of food and water for a seven to eight-hour period does not rise to the level of a constitutional violation); *Daniels v. Carter*, No. 21CIV8985ATSLC, 2022 WL 17979915, at *9 (S.D.N.Y. Nov. 22, 2022), *report and recommendation adopted*, No. 21CIV8985ATSLC, 2022 WL 17978908 (S.D.N.Y. Dec. 28, 2022) (finding that an eight-hour deprivation of food and water was objectively not sufficiently serious to give rise to a constitutional violation as a matter of law); *Genao v. City of New York*, No. 21CV00303ATVF, 2023 WL 4633486 (S.D.N.Y. June 20, 2023), *report and recommendation adopted*, No. 21CIV303ATVF, 2023 WL 4625522, at *14 (S.D.N.Y. July 19, 2023) (finding Plaintiff's allegations that he was denied access to his property, linens and blankets for one night, and breakfast to be insufficient to sustain a conditions of confinement claim). Therefore, Plaintiff has not satisfied the objective prong of his conditions of confinement claim regarding his confinement to a cell in Quad Lower 12.

Plaintiff's confinement on the bus for twelve hours while handcuffed also does not rise to the level of a constitutional violation because Plaintiff does not provide facts showing an unreasonable risk of serious damage to his health. *See Darnell*, 849 F.3d at 30 (quoting *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013)) (to state a claim for a violation of due process based on conditions of confinement, a plaintiff must show the challenged "conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health, which includes the risk of serious damage to physical and mental soundness."). In a similar case, *Livigni v. Ortega*, the Court held that leaving inmates on a bus overnight while handcuffed, without access to water or a restroom, did not rise to the level of a constitutional violation. No. 15-CV-9454 (CM), 2016 WL 6143351, at *4 (S.D.N.Y. Oct. 19, 2016). In contrast, the court in *Colson v. Mingo* held that the confinement conditions satisfied the objective prong where plaintiff was handcuffed on a bus for fifteen hours in close proximity to shattered glass, his own human waste, as well as vomit, feces and urine of other passengers with no access to a bathroom, water, or any hygienic materials. No. 18-CV-2765 (JGLC), 2024 WL 1018582, at *13 (S.D.N.Y. Mar. 8, 2024). This case is more similar to *Livigni* than *Colson* because Plaintiff asserts that he was confined to a bus overnight while handcuffed but provides no evidence that the situation posed an unreasonable risk of serious damage to his health. And, specifically, there is no allegation that there were dangerous or unsanitary conditions on the bus. Therefore, Plaintiff has not satisfied the objective prong of his conditions of confinement claim with respect to his detention on the bus.

Plaintiff relies on *Hope v. Pelzer*, in which the Supreme Court held the plaintiff's constitutional rights were violated when he was hitched to a post and was forced to remain there for seven hours shirtless while the sun burned his skin and

without access to water. 536 U.S. 730, 735-37 (2002). Sun exposure for seven hours without cover or water clearly poses a threat to one's health, but those factors do not exist here, where Plaintiff was not exposed to the hot sun. Plaintiff also cites *Palmer v. Johnson*, but that case is distinguishable. 193 F.3d 346 (5th Cir. 1999) (finding Plaintiff established the objective prong when he was confined outdoors on a cold and windy night with forty-nine other inmates for seventeen hours with no shelter, jacket, source of heat or access to bathroom facilities and was forced to relieve himself in the small, bounded area shared with the other inmates). This case is unlike *Palmer* because it does not involve allegations of exposure to the elements or human waste, both of which could pose a threat to an individual's health.

***7** Because Plaintiff does not satisfy the objective prong, I do not need to reach the subjective prong. *See Moore v. Cnty. of Nassau*, No. 18-CV-4786 (ST), 2023 WL 2477631, at *7 (E.D.N.Y. Mar. 13, 2023) (holding summary judgment is appropriate based on Plaintiff's failure to demonstrate that the objective prong has been satisfied). Accordingly, I respectfully recommend granting Defendants' motion for summary judgment as to Plaintiff's conditions of confinement claim and denying Plaintiff's cross-motion because Plaintiff has failed to raise any issues of material fact with regard to whether the conditions of confinement were sufficiently serious to constitute objective deprivations of the right to due process.

*b. Unreasonable Seizure Against Individual Defendants*

Defendants argue that Plaintiff's unreasonable seizure claim fails as a matter of law because, at the time of seizure, Plaintiff was already incarcerated. Plaintiff concedes in his Opposition that "an inmate cannot be illegally seized while he is lawfully incarcerated because the incarceration itself is the only relevant seizure for the purposes of the Fourth Amendment." (quoting *Garcia-Garcia v. City of New York*, No. 12 CIV. 1302, 2013 WL 3832730, at *4 (S.D.N.Y. July 22, 2013)).

Accordingly, I respectfully recommend granting Defendants' motion for summary judgment as to Plaintiff's unreasonable seizure claim and denying Plaintiff's cross-motion.[8] *See Garcia-Garcia*, 2013 WL 3832730, at *4-5 (granting motion to dismiss plaintiff's unlawful seizure claim because plaintiff was already in custody at the time of the alleged seizure); *Bristol v. Queens Cnty.*, No. CV095544JFBAKT, 2018 WL 5077166, at *11 (E.D.N.Y. Mar. 30, 2018) (same), *report and recommendation adopted*, No. 09CV5544JMAAKT, 2018 WL 4328828 (E.D.N.Y. Sept. 11, 2018).

*c. Excessive Force Against Defendants Turgut and Doe 1*

Defendants argue that Plaintiff's excessive force claim fails as a matter of law because handcuffing Plaintiff was objectively reasonable and Plaintiff cannot show injury from the handcuffing. To establish a claim of excessive force, "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable" given the facts and circumstances at the time. *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015).

When evaluating the reasonableness of handcuffing, courts consider evidence that "1) the handcuffs were unreasonably tight; 2) the defendants ignored the arrestee's pleas that the handcuffs were too tight; and 3) the degree of injury to the wrists." *McGarrell v. Arias*, No. 18CIV2273GBDHBP, 2019 WL 2528370, at *4 (S.D.N.Y. Mar. 1, 2019), *report and recommendation adopted*, No. 18CIV2273GBDHBP, 2019 WL 1254880 (S.D.N.Y. Mar. 19, 2019) (internal citations omitted). Here, Plaintiff asserts that he asked for his handcuffs to be loosened. While Plaintiff testified that he asked for the handcuffs to be removed rather than loosened, the Court notes that the officers could have offered to loosen Plaintiff's handcuffs in response to his pleas to have them removed, which neither party asserts the officers did. In any case, it is undisputed that while on the bus, Plaintiff threatened to file a lawsuit against the correction officers, physically threatened one of them, and tried to kick the back door of the bus open. (DSMF at ¶ 16.) Therefore, it was reasonable for the correction officers to believe that removing Plaintiff's handcuffs could pose a security threat.

***8** In addition, Plaintiff's alleged injury from the handcuffing was minor – pain in his shoulders and wrist.[9] When considering the severity of injury factor, "[t]here is a consensus among courts in this circuit that tight handcuffing does not constitute excessive force unless it causes some injury beyond temporary discomfort." *Ward v. Doe #3*, No. 22-CV-6497-FPG, 2023 WL 3025218, at *3 (W.D.N.Y. Apr. 20, 2023) (internal citations omitted). Here, Plaintiff testified that the pain in his shoulders and wrists lasted for a couple of days. (Pl. Dep. 72:23-73:3.) Courts have found more serious injuries than Plaintiff's to be *de minimis*. *See Johnson v. City of New York*, No. 18-CV-5623 (ALC), 2020 WL 3100197, at

*3 (S.D.N.Y. June 11, 2020) (dismissing plaintiff's excessive force claim where detective pulled plaintiff out of holding pen, causing plaintiff's head and body to hit the wall, and other officers grabbed plaintiff and shoved him against wall to handcuff him and plaintiff suffered a bump on his forehead, head pain, bruises on his left and right wrists, and numb wrists); *McGarrell*, 2019 WL 2528370, at *4 ("*De minimis* injuries from handcuffing such as numbness or inflammation are insufficient to sustain an excessive force claim."); *cf. Ali v. Ramos*, No. 1:16-CV-01994 (ALC), 2020 WL 5817009 (S.D.N.Y. Sept. 30, 2020) (denying summary judgment on excessive force claim where plaintiff suffered nerve damage from handcuffing that required surgery). Although Plaintiff testified that he requested medical treatment upon arriving at GRVC, the medical records attached to Defendants' Motion indicate that Plaintiff did not receive any medical treatment until May 9, 2024, at which point he did not mention any injury to his shoulders or wrists. (DSMF at ¶ 20.) Therefore, Plaintiff did not have any continuing injury from the night spent on the bus, which further supports dismissal. [10] *See Falls v. (Police Officer) Detective Michael Pitt*, No. 16-CV-8863 (KMK), 2021 WL 1164185, *14 (S.D.N.Y. Mar. 26, 2021) (holding that the fact that the tight handcuffing did not cause plaintiff continuing injury was fatal to his excessive force claim).

Accordingly, I recommend granting Defendants' summary judgment motion as to Plaintiff's excessive force claim and denying Plaintiff's cross-motion.

*d. Municipal Liability Claim*

Defendants argue that Plaintiff's municipal liability claim fails as a matter of law because Defendants did not violate Plaintiff's constitutional rights. A municipality can be held liable under 42 U.S.C. § 1983 if the deprivation of the plaintiff's rights under federal law is caused by a governmental custom, policy, or usage of the municipality. *Blanco v. Success Acad. Charter Sch., Inc.*, No. 23-CV-01652 (LJL), 2024 WL 965001, at *20 (S.D.N.Y. Mar. 6, 2024) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978)). However, failure to establish an underlying constitutional violation is fatal to a municipal liability claim under *Monell*. *See Askins v. Doe No. 1*, 727 F.3d 248, 253 (2d Cir. 2013) ("Unless a plaintiff shows that he has been the victim of a federal law tort committed by persons for whose conduct the municipality can be responsible, there is no basis for holding the municipality liable. *Monell* does not create a stand-alone cause of action[.]"); *Brown v. City of New York*, No. 21CIV4632PGGSLC, 2023 WL 2908661 (S.D.N.Y. Jan. 30, 2023) (holding summary judgment is appropriate for a municipal liability claim because plaintiff did not establish an underlying 42 U.S.C. § 1983 claim), *report and recommendation adopted*, No. 21CIV4632PGGSLC, 2023 WL 2496089 (S.D.N.Y. Mar. 14, 2023). Because Plaintiff's underlying 42 U.S.C. § 1983 claims fail as explained above, Plaintiff's municipal liability claim also fails.

***9** Accordingly, I recommend granting Defendants' summary judgment motion as to Plaintiff's municipal liability claim and denying Plaintiff's cross-motion. [11]

## CONCLUSION

For the foregoing reasons, I respectfully recommend that Defendants' motion for summary judgment be GRANTED in its entirety and that Plaintiff's cross-motion for summary judgement be DENIED in its entirety.

## NOTICE

**Plaintiff shall have seventeen days and Defendants shall have fourteen days from service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding three additional days only when service is made under Fed. R. Civ. P. 5(b)(2)(C)(mail), (D) (leaving with the clerk), or (F) (other means consented to by the parties)). A party may respond to another party's objections after being served with a copy. Fed. R. Civ. P.72(b)(2).**

**Plaintiff shall have seventeen days to serve and file any response. Defendant shall have fourteen days to serve and file any response. Any objections and any responses to such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Jennifer L. Rochon at the United States Courthouse, 500 Pearl St., New York, New York 10007, and served on the other parties. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Rochon. The failure to file timely objections shall result in a waiver of those objections for purposes of**

**appeal.** *See* **28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); *Thomas v. Arn*, 474 U.S. 140 (1985).**

**All Citations**

Slip Copy, 2024 WL 3607662

## Footnotes

1 Plaintiff also brought claims against Warden Caputo and Warden John Doe, but on June 29, 2022, the Honorable Judge Lorna G. Schofield dismissed those defendants. (ECF No. 6.)

2 The following facts are undisputed except where otherwise noted.

3 Plaintiff disputes that he was involved in the slashing incident but does not dispute he received an infraction.

4 Plaintiff testified that he received food from fellow inmates housed in a different housing area. Correction officers permitted these other inmates to bring Plaintiff food. (ECF No. 80, Declaration of Bailey Forcier, Exhibit A ("Pl. Dep."), 26:4-18.)

5 Defendant John Doe was terminated as a party on February 10, 2023.

6 Courts routinely take judicial notice of the applicable IGRP procedures. *See Hickman v. City of New York*, No. 20-CV-4699 (RA)(OTW), 2021 WL 3604786, at *3 (S.D.N.Y. Aug. 12, 2021).

7 *See* N.Y.C. Dep't of Corr., Directive 3376R-A, § V.H (December 10, 2018), https://www1.nyc.gov/assets/doc/downloads/directives/Directive_3376R-A.pdf ("An inmate may also call 311 to file their complaint.")

8 In the Opposition, Plaintiff purports to move to amend his Complaint to restore his first filed complaint as the operative complaint. This request is not properly raised in an opposition for summary judgment. In any event, the first filed complaint does not cure any of the deficiencies described herein.

9 To the extent Plaintiff attempts to raise a cruel and unusual punishment claim in the Opposition, it is improper. *See Espinoza v. New York City Dep't of Transportation*, 304 F. Supp. 3d 374, 384 (S.D.N.Y. 2018) (finding that it is "inappropriate to raise new claims for the first time in submissions in opposition to a summary judgment motion" because it fails to "give defendants fair notice of the nature of the plaintiff's claim.") (internal citations omitted). In any case, because Plaintiff was a pretrial detainee at the time of the relevant events, his claims are analyzed under the Due Process Clause of the Fourteenth Amendment, rather than the Cruel and Unusual Punishment Clause of the Eighth Amendment. *See Holland v. City of New York*, 197 F. Supp. 3d 529, 545 (S.D.N.Y. 2016).

10 Plaintiff cites *Lynch ex rel. Lynch v. City of Mount Vernon*, 567 F. Supp. 2d 459 (S.D.N.Y. 2008), but that case does not support his position. In *Lynch*, the court granted dismissal of the excessive force claim despite the fact that there was evidence that the handcuffs were too tight because there was no evidence that the tight handcuffing injured the plaintiff to any serious degree. *Id.* at 468-69.

11 Because I recommend dismissal based on the merits, I do not address Defendants' argument that Defendants are entitled to qualified immunity. *See Quintin v. Cnty. of Nassau*, No. 18-CV-5852 (JS)(ARL), 2022 WL 888950, at *5 (E.D.N.Y. Mar. 25, 2022).

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2024 WL 1018582
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Ronald E. COLSON, Plaintiff,

v.

Warden MINGO, Captain Williams, Captain Johnson, Captain C. Bell, Captain M. Daniels, Captain M. Gums-Francis, Captain W. Ross, C.O. K. Anderson, C.O. C. Carter, C.O. A. Henry, C.O. O. Hyppolite, C.O. T. Jackson, C.O. E. Lopera, C.O. D. Ortiz and The City of New York, Municipality, Defendants.

18-CV-2765 (JGLC)
|
Signed March 8, 2024

**Attorneys and Law Firms**

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Evan J. Gottstein, New York City Law Department, New York, NY, Samantha J. Pallini, Corporation Counsel of the City of New York, New York, NY, for Defendants Warden Mingo, Captain Williams, Captain Johnson, The City of New York, Captain W. Ross, C. O. T. Jackson, C.O. K. Anderson, Captain C. Bell, Captain M. Daniels, Captain M. Gums-Francis, C.O. C. Carter, C.O. D. Ortiz, C.O. E. Lopera, C.O. O. Hyppolite, C.O. A. Henry.

## OPINION AND ORDER

JESSICA G. L. CLARKE, United States District Judge:

***1** Incarcerated *pro se* Plaintiff Ronald E. Colson ("Plaintiff") brings this action for violation of his Eighth Amendment rights, pertaining to unsafe conditions of confinement and excessive use of force, against Defendants City of New York (the "City"), Warden Maxsolaine Mingo, Captain Michael Williams, Captain Timothy Johnson, Captain Michelle Gumbs-Francis, Captain Walter Ross, Captain Cheryl Bell, Captain Mark Daniels, Correction Officer ("C.O.") Kevin Anderson, C.O. Cedric Carter, C.O. Alason Henry, C.O. Oswald Hyppolite, C.O. Te-Art Jackson, C.O. Edwin Lopera and C.O. Daniel Ortiz (the individual defendants collectively the "Individual Defendants" and, together with the City, the "Defendants"). Pending before the Court is Defendants' motion for summary judgment against Plaintiff's claims. For the reasons stated herein, Defendants' motion is GRANTED in part and DENIED in part. Furthermore, the Court *sua sponte* orders the appointment of *pro bono* counsel to assist Plaintiff for the purposes of proceeding to trial.

## BACKGROUND

### A. Factual Background

On August 30, 2016, Plaintiff was detained at the Manhattan Detention Complex ("MDC"), in the custody of the New York City Department of Correction ("DOC") following criminal conviction. ECF No. 126 ("Statement of Materials Facts" or "SMF") ¶¶ 1–4; ECF No. 151. On that day Plaintiff was assigned for transfer to the Anna M. Kross Center ("AMKC"), a DOC facility located on Rikers Island. *Id.* ¶¶ 5–6. Plaintiff requested not to be transferred, based on his understanding of the dangerous conditions on Rikers Island, where Plaintiff had previously been incarcerated. ECF No. 131-6 at 58:24–60:1. Later that day, Plaintiff was placed on a bus with other incarcerated individuals to be transferred to Rikers Island. SMF ¶ 15.

Plaintiff had not taken his prescription blood pressure medication that morning because his last prescription had run out and had not yet been refilled. *Id.* ¶¶ 7–12. Plaintiff states that he informed multiple DOC personnel, including the officers on the bus, that he needed his prescription blood pressure medication, and that Captain Williams told Plaintiff that he would be provided his prescription medication if he got on the bus. ECF No. 131-6 at 40:15–44:10, 48:13–49:1. Plaintiff alleges that one of the officers under Captain Williams' supervision cursed at him for complaining about needing medical attention before getting on the bus. ECF No. 34 ("First Amended Complaint" or "FAC") ¶ 24. [1] Plaintiff did not eat breakfast earlier that day and only ate cucumbers for lunch because he found the other food provided to be "not really edible." ECF No. 131-6 at 55:10–56:15; SMF ¶¶ 13–14. Plaintiff testified that the next scheduled meal time at MDC was at 6:30 p.m., but that he and the other individuals being transferred were not given any food after approximately 11:30 a.m. on August 30, 2016 prior to being transferred. ECF No. 131-6 at 55:7–9, 56:10–15.

***2** At approximately 7:00 p.m., Plaintiff and a number of other incarcerated individuals boarded a DOC transport bus at MDC, which contained broken glass on the floor and some seats. SMF ¶¶ 15, 18; ECF No. 131-6 at 86:23–24. DOC employees made efforts to locate another transport, but ultimately ordered Plaintiff and other incarcerated individuals to board the bus notwithstanding their complaints about broken glass and the unsanitary condition of the bus, including leftover trash and food waste, which were not cleaned up. ECF No. 131-6 at 86:13–22; 87:17–23, 93:3–14; ECF No. 131-7 at 21:20–23:3.

C.O. Munish Chopra, a non-party to this case, drove the bus to Rikers Island, and another correction officer[2] was the escort officer on the bus. SMF ¶ 20. The transport bus arrived at AMKC on Rikers Island at approximately 7:45–7:50 p.m., but none of the passengers were permitted to enter AMKC at that time. *Id.* ¶¶ 22–23. C.O. Chopra then drove the bus to the George R. Vierno Center ("GRVC") on Rikers Island to transfer the individuals who were assigned to be transferred to that facility, but the GRVC staff did not accept anyone on the bus for transfer. *Id.* ¶ 24. Plaintiff states that Captain Williams gave the order for the bus to stay on Rikers Island overnight instead of going back to MDC. ECF No. 131-6 at 72:13–73:4. Non-party Assistant Deputy Warden Enjoli Murria testified that the tour commander at AMKC is responsible for handling this type of situation when the bus has already left MDC. ECF No. 131-10 at 24:24–25:15; ECF No. 148-2 at 1. C.O. Chopra and his partner[3] did not transfer any incarcerated individuals from the bus into any Rikers Island facilities that night, except for one passenger who was admitted to the Eric M. Taylor Center ("EMTC") around 11:00 p.m. or midnight. SMF ¶¶ 25–26; ECF No. 131-7 at 25:18–22. The officers on the bus indicated that Rikers Island does not accept admissions after 8:00 p.m, but that they also could not return to MDC. ECF No. 131-7 at 17:15–19, 27:23–28:10.

Plaintiff, along with other incarcerated passengers, was left to languish on the bus overnight, parked at Rikers Island, until the next morning. SMF ¶¶ 27–28. Plaintiff testified that he was suffering from nausea, dizziness, headache and overheating, and asked the officers on the bus for his prescription blood pressure medication or to take him to the medical facility, but was rebuffed in harsh terms. ECF No. 131-7 at 23:25–24:23; ECF No. 131-6 at 39:1–3, 40:15–18. While on the bus, Plaintiff did not have access to food, water or a bathroom. SMF ¶ 29. Without access to a bathroom, and at the indication of the officers on the bus, the incarcerated individuals on the bus were forced to use the back of the bus to urinate and defecate. SMF ¶¶ 29–31; ECF No. 131-7 at 30:20–31:4, 36:12–24. The passengers on the bus, including Plaintiff, vomited due to the odor of the buildup of urine and feces. SMF ¶ 32; ECF No. 131-7 at 35:14–24. They also repeatedly asked for food, water and access to a restroom, but none were provided. ECF No. 131-7 at 28:11–31:4.

Some of the incarcerated individuals (not Plaintiff) were placed in cages on the bus, and it appears there may have been a cage separating the officers on the bus from the passengers. SMF ¶ 56; ECF No. 131-6 at 82:21–22, 89:10–17; ECF No. 131-7 at 31:24–25, 41:12–14; ECF No. 131-8 at 17:21–25, 22:25–23:11; ECF No. 131-13 at 27:9, 36:5–21, 37:24–25. The officers on the bus repeatedly got off and on the bus in order to, it appears, talk to other officers, use the restroom and get food, but none of the remaining passengers were permitted to disembark. ECF No. 131-7 at 16:22–19:25, 21:1–25, 23:1–25:25, 27:1–28:25, 30:1–31:15. Several passengers (not Plaintiff) suffered cuts from the broken glass, which moved around while the bus was in motion. ECF No. 131-7 at 39:20–40:24; ECF No. 131–6 at 87:3–7. Plaintiff was in handcuffs (as were all the incarcerated passengers), which he says were excessively tight, for the entire time on the bus. ECF No. 131-6 at 68:6–13, 82:14–15, 85:18–22; ECF No. 131-7 at 31:10–17.

***3** At approximately 8:00 a.m. on August 31, 2016, C.O. Anderson and his partner[4] relieved C.O. Chopra and his partner from the transport bus while it was still parked at Rikers Island. SMF ¶¶ 33–34. Also that morning, personnel at AMKC were informed that passengers were refusing to get off of a bus that was parked outside their facility. *Id.* ¶¶ 35–37. Plaintiff maintains that he at no time refused to get off the bus, and that he told Warden Mingo that he wanted to get off the bus to use the bathroom. ECF No. 142 ("RSMF") ¶ 37; ECF No. 131-7 at 51:6–20. Several captains, including defendants Captain Johnson and Captain Gumbs-Francis, and AMKC Warden Mingo boarded the bus and spoke with the passengers at different times to try to convince or order them to get off the bus, and also notified the tour commander at AMKC of the situation.[5] SMF ¶¶ 39–40, 42; ECF No. 131-11 at 67:6–13, 69:13–24; ECF No. 131-12 at 40:3–10.

According to Plaintiff, Captain Johnson threatened to have "the Bloods" hurt the passengers once they were inside AMKC. ECF No. 131-7 at 45:10–51:5. Warden Mingo told the passengers that the Emergency Services Unit ("ESU") was going to be called, and that a chemical agent would be used to get the passengers off the bus, but none of the passengers

got up to exit the bus. SMF ¶ 42. The ESU team was called, presumably by Warden Mingo, to respond to the "hot bus," which refers to a DOC bus that requires ESU assistance. SMF ¶¶ 43–44; ECF No. 131-14 at 47:19–49:3; ECF No. 131-15 at 38:25–39:8.

At least five DOC personnel boarded the bus, including Captain Daniels, Captain Ross, C.O. Lopera, C.O. Ortiz and C.O. Henry, all of whom were present when a chemical agent, MK-9, [6] was deployed on the passengers of the bus. SMF ¶¶ 50–51, 57; ECF No. 131-13 at 37:8–38:15; ECF No. 131-15 at 49:8–10. Captain Daniels and Captain Ross tried to persuade or order the passengers to disembark before force was used, but no passengers got off the bus. SMF ¶ 51; ECF No. 131-13 at 27:14–15, 35:22–23. At least one passenger (not Plaintiff) threatened to cut C.O. Ortiz with broken glass if he opened the gate to the passenger cabin of the bus. SMF ¶ 52. One passenger (not Plaintiff) started to cut himself with broken glass. *Id.* ¶ 53.

C.O. Henry and C.O. Ortiz (wearing a mask) sprayed MK-9 on the passengers of the bus, which was ordered by Captain Daniels and possibly others. *Id.* ¶¶ 54–56; ECF No. 131-13 at 37:2–4; ECF No. 131-17; ECF No. 131-16. Plaintiff states that the first spray of MK-9 lasted longer than 30 seconds. ECF No. 131-8 at 22:2–21. Defendants Daniels, Ross and Ortiz noted only sprays of one to two seconds in duration in their use of force reports. ECF Nos. 131-16–131-18. The pepper spray affected all the passengers due to the small confines of the bus. ECF No. 131-13 at 36:24–37:1; ECF No. 131-20. After that first spray of the chemical agent, Plaintiff says he demanded to get off the bus, and then an officer told him to come up and sit towards the front of the bus, after which the officer sprayed Plaintiff with MK-9 for what felt like 30 seconds directly on Plaintiff's face, head, shoulders and upper body. SMF ¶ 63; ECF No. 131-8 at 22:22–23:4, 25:1–21. Plaintiff put his head down to try to avoid the effects of the pepper spray, as did all the passengers, but the chemical agent dripped down his head, neck, shoulders and back. ECF No. 131-16; ECF No. 131-8 at 25:14–21. Plaintiff alleges that one of the officers also hit him on the head with an MK-9 cannister. FAC ¶ 42.

***4** After being pepper sprayed, the passengers tried to get air through the windows of the bus, but ESU officers in riot gear and face masks sprayed MK-9 through the windows from outside the bus. ECF No. 131-8 at 16:2–17:25, 20:11–22:21. Captain Bell, C.O. Hyppolite and non-party C.O. Green were among the eleven ESU officers who were at the scene. ECF No. 131-14 at 43:9–25; ECF No. 131-15 at 43:18–20. Plaintiff testified that one of the officers on the bus made a video recording of the incident using a handheld camera. ECF No. 131-8 at 16:13–17:6.

Plaintiff states that he sustained physical injuries in the form of "burned and bruised skin upon his head, face and body, as well as migraine headaches, dizziness and blurred vision." FAC ¶ 47. Plaintiff was taken off the transport bus and into AMKC but was not given medication, topical ointments or bandages to treat the parts of his body exposed to the chemical agent. SMF ¶ 65; ECF No. 131-8 at 27:21–28:6. Plaintiff alleges that he was kept on the bus for over sixteen hours in total. FAC ¶ 66. Once inside the facility, Plaintiff was permitted to shower within approximately one hour, and was permitted to wash himself with soap and water sometime before showering. SMF ¶¶ 66–67. Plaintiff states that the water in the shower was hot, which activated the effects of the residual chemical agent. ECF No. 131-8 at 29:23–25.

At approximately 3:08 p.m., Plaintiff received medical attention for exposure to a chemical agent. SMF ¶ 68. Other passengers were seen at the clinic as well, and medical staff noted visible injuries such as skin redness on some, while noting other complaints such as dizziness, burning sensations, and headaches from the chemical agent. *Id.* ¶ 69. The doctor's notes from Plaintiff's medical visit deferred diagnosis and noted no sign of injury, but Plaintiff maintains that he complained of burning skin, dizziness and headaches stemming from exposure to MK-9. SMF ¶ 70; RSMF ¶ 70; ECF No. 131-21. Plaintiff also states that he was not asked any follow-up questions about his injuries. ECF No. 131-8 at 33:13–15.

Plaintiff filled out a grievance form about the conditions of the bus overnight and the use of MK-9. SMF ¶ 83; ECF No. 128 ("Def. Mem.") at 4. The form is dated September 8, 2016. SMF ¶ 83. His grievance requested "the video footage that the E.S.U. Captain recorded of the incident preserved for litigation hold" and for a "detailed list" of the officers involved to be provided to him. ECF No. 131-25. DOC's Inmate Grievance Resolution Committee ("IGRC") does not have a record of receiving his grievance. SMF ¶ 84.

DOC's grievance procedures provide that incarcerated individuals can complain about any "issue, condition, practice, or action relating to the inmate's confinement" by filling out a written grievance form and submitting it to an IGRC staff member, dropping it off in the Grievance Box or

bringing it the Grievance Officer. SMF ¶¶ 71–75. The DOC's grievance procedures, the Inmate Grievance Request Program ("IGRP"), provides a four-step process that is summarized in the Inmate Handbook. *Id.* The IGRP provides that IGRC staff will timestamp the grievance form upon receipt, issue the form a grievance/request reference number and provide the incarcerated individual with a copy of this time-stamped form as a record of receipt within two business days. *Id.* ¶ 76. If the incarcerated individual does not receive a response to their grievance within five business days, they can request a formal hearing, then appeal to the Warden, then appeal to the Central Office Review Committee ("CORC"), then appeal to the Board of Correction ("BOC"). *Id.* ¶¶ 77–81. Complaints of assault or use of force by a DOC staff person are not subject to this four-step IGRP grievance procedure; rather, incarcerated individuals can file a grievance about a use of force by DOC staff, and the IGRC will refer that grievance to the commanding officer for necessary action. *Id.* ¶ 82.

***5** Plaintiff did not avail himself of the subsequent steps of the IGRP process prior to his transfer back to state custody on September 28, 2016. *Id.* ¶¶ 85–89. Plaintiff claims he was transferred from Rikers so that his grievance would not be entered or heard. ECF No. 131-6 at 65:18–23. As of October 1, 2020, Plaintiff represented that he still had "a skin condition, headaches, migraines, eye problems and nose bleeds" from which he did not suffer prior to the complained-of incidents of August 30–31, 2016. ECF No. 148-1 at 5.

**B. Procedural History**

Plaintiff was incarcerated at Clinton Correctional Facility in Dannemora, New York, when he commenced this action on March 21, 2018.[7] ECF No. 2; SMF ¶ 89. Plaintiff seeks damages for "physical injuries including, burned and bruised skin upon his head, face and body, as well as migraine headaches, dizziness and blurred vision" and emotional distress, as well as punitive damages, attorney's fees, costs and injunctive relief in the form of an investigation into the DOC. FAC ¶¶ 44–47, 49–50, 55, 59, 67, 75–78.

On August 25, 2018, the Court ordered Corporation Counsel for the City to ascertain the identities and badge numbers of the John Does that Plaintiff sought to sue in his original complaint pursuant to *Valentin v. Dinkins*, 121 F.3d 72 (2d Cir. 1997). ECF No. 8. In response to the Court's *Valentin* order, Corporation Counsel identified C.O. Henry, C.O. Ortiz, C.O. Carter, C.O. Anderson, Captain Williams and Captain Johnson, all of whom Plaintiff named as defendants in his First Amended Complaint – the operative complaint – which he filed on December 6, 2018. ECF Nos. 15, 21, 32 and 34. On October 29, 2018, the Court also ordered Defendants to, *inter alia*, "state whether [ ] there is any existing video of the incident alleged by Plaintiff to have occurred on August 31, 2016," in response to which Defendants represented that "there is no existing video footage of the incident(s) alleged by Plaintiff to have occurred on either August 30, 2016 or August 31, 2016 ...." ECF Nos. 31, 32. Plaintiff was appointed limited *pro bono* counsel for the purposes of discovery, whose representation has since concluded upon the close of discovery. ECF Nos. 45, 60, 78, 117. Subsequently, Plaintiff moved for the appointment of new *pro bono* counsel, which was denied. ECF Nos. 118, 132. Plaintiff, not presently represented by counsel, filed a brief in opposition to Defendants' motion for summary judgment. ECF No. 141 ("Pl. Opp.").

Plaintiff states that he submitted a number of letters to BOC following up on his grievance after his transfer from AMKC, but counsel for Defendants indicated Plaintiff has not produced these letters in discovery.[8] Pl. Opp. at 3; ECF No. 148 ¶ 29; ECF No. 147 ("Def. R. Br.") at 4. At the court telephone conference held on March 14, 2019, Plaintiff reiterated his prior statement that an officer with a handheld camera recorded a video of the events on the bus occurring on August 31, 2016. ECF No. 148-3 at 3:6–14. Counsel for Defendants indicated, based on DOC policy and conversations with the officers involved, that "there was no video footage." *Id.* at 2:18–2:24; 3:7–3:22. Magistrate Judge Freeman observed that the parties' factual dispute could not be reconciled, in response to which counsel for Defendants offered to do "further digging" into the issue. *Id.* at 3:15–22. At the court conference on May 16, 2019, counsel for Defendants reiterated that, "according to the defendant officers, there was no handheld camera used during the incident" and counsel offered to follow-up with DOC again to confirm. ECF No. 52 at 4:3–24. Plaintiff states that he "submitted to Corporation Counsel all follow up letter[s] addressed to BOC" in regard to his grievance, in addition to multiple New York Freedom of Information Law ("FOIL") requests pertaining to the video of the August 31, 2016 incident that Plaintiff says was recorded by a DOC ESU officer. Pl. Opp. at 3.

***6** On March 30, 2023, Defendants filed the instant motion for summary judgment. ECF No. 125. On June 12, 2023, Plaintiff sought leave to file a second amended complaint; the Court instructed Plaintiff that he "should seek leave for any

amendment of the complaint in his opposition" to Defendants' summary judgment motion, which Plaintiff did. ECF Nos. 135–136; Pl. Opp. at 4, 8.

## LEGAL STANDARD

To prevail on a motion for summary judgment, the movant must "show[ ] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The movant bears the burden of demonstrating the absence of a question of material fact. *Celotex Corp.*, 477 U.S. at 322. If the movant meets her initial burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008) (internal citation omitted). "A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (internal citation omitted).

When the movant properly supports her motion with evidentiary materials, the opposing party must establish a genuine issue of fact by citing "particular parts of materials in the record" to survive the summary judgment motion. Fed. R. Civ. P. 56(c)(1)(A); *see also Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). "Only disputes over facts that might affect the outcome of the suit under the governing law" preclude a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there are genuine issues of material fact, a court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003) (quoting *Stern v. Trustees of Columbia Univ. in City of New York*, 131 F.3d 305, 312 (2d Cir. 1997)). "The function of the district court in considering [a] motion for summary judgment is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists." *Kee v. City of New York*, 12 F.4th 150, 166–67 (2d Cir. 2021) (internal quotation marks and citation omitted). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *S. Katzman Produce Inc. v. Yadid*, 999 F.3d 867, 877 (2d Cir. 2021) (internal citation omitted).

"Where, as here, the party opposing summary judgment is proceeding *pro se*, the Court must construe that party's submissions 'liberally and interpret them to raise the strongest arguments that they suggest.' " *Taylor v. Quayyum*, No. 16-CV-1143 (GHW), 2023 WL 5293383, at *5 (S.D.N.Y. Aug. 17, 2023) (quoting *Corcoran v. N.Y. Power Auth.*, 202 F.3d 530, 536 (2d Cir. 1999)). "It is well established that a court is ordinarily obligated to afford a special solicitude to *pro se* litigants," *Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010), "particularly where motions for summary judgment are concerned." *Jackson v. Fed. Express*, 766 F.3d 189, 195 (2d Cir. 2014). "It is through this lens of leniency towards *pro se* litigants that this Court must consider a defendant's motion for summary judgment against a *pro se* plaintiff." *Adams v. George*, No. 18-CV-02630, 2020 WL 5504472, at *5 (S.D.N.Y. Sept. 8, 2020).

## DISCUSSION

***7** First, the Court addresses the requirements of the Prison Litigation Reform Act (the "PLRA"), finding that Defendants are not entitled to summary judgment on the basis of failure to exhaust administrative remedies. Next, the Court construes Plaintiff's First Amended Complaint as raising Eighth Amendment claims against Individual Defendants, with respect to conditions of confinement and excessive use of force, and municipal liability claims against the City pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). The Court dismisses Plaintiff's due process clams because the events underlying this action occurred after Plaintiff was convicted. The Court then turns to Plaintiff's claims against Individual Defendants, finding that summary judgment is not appropriate at this time and that Plaintiff may file a second amended complaint. The Court is unable to determine at this juncture whether the City is entitled to summary judgment against Plaintiff's *Monell* claims and which Individual Defendants were not personally involved in the alleged constitutional violations, and thus denies without prejudice the motion in these respects. Finally, the Court *sua sponte* orders the appointment of *pro bono* counsel to assist Plaintiff for the purposes of proceeding to trial.

### I. Exhaustion of Administrative Remedies Under the PLRA

The Court sets forth the legal standard for exhaustion of administrative remedies under the PLRA, as well as the specific procedure for such exhaustion set out by the

DOC. Applying those standards here, the Court finds that Defendants are not entitled to summary judgment on their exhaustion of administrative remedies defense.

**A. Statutory Exhaustion Requirement**

The PLRA provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "Exhaustion is 'mandatory' and 'applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes,' " or allege excessive force, the denial of adequate medical care or some other wrong. *Hernandez v. Coffey*, 582 F.3d 303, 305 (2d Cir. 2009) (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)); *see also Ross v. Blake*, 578 U.S. 632, 635 (2016).

"The PLRA requires 'proper exhaustion' of administrative remedies, meaning exhaustion in 'compliance with an agency's deadlines and other critical procedural rules.' " *Lucente v. County of Suffolk*, 980 F.3d 284, 311 (2d Cir. 2020) (quoting *Woodford v. Ngo*, 548 U.S. 81, 90–91 (2006)). Proper exhaustion "means using all steps that the agency holds out, and doing so *properly* ...." *Woodford*, 548 U.S. at 90 (emphasis in original). To exhaust administrative remedies under the PLRA, an incarcerated individual must "complete the administrative review process in accordance with the applicable procedural rules – rules that are defined not by the PLRA, but by the prison grievance process itself." *Jones v. Bock*, 549 U.S. 199, 218 (2007) (quoting *Woodford*, 548 U.S. at 88).

However, incarcerated individuals need not comply with the exhaustion requirement when administrative remedies are "unavailable." *Ross v. Blake*, 578 U.S. 632, 642 (2016). An administrative procedure will be treated as unavailable for purposes of this exemption in at least three circumstances: (1) when "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) when it is "so opaque that it becomes, practically speaking, incapable of use"; or (3) when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Williams v. Priatno*, 829 F.3d 118, 123–24 (2d Cir. 2016) (quoting *Ross*, 578 U.S. at 633–34). The Second Circuit has since reasoned that "[t]he test for deciding whether the ordinary grievance procedures were available must be an objective one: that is, would a similarly situated individual of ordinary firmness have deemed them available." *Lucente*, 980 F.3d at 311–12 (quoting *Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004) (*abrogated on other grounds by Ross*, 578 U.S. at 635)).

**B. DOC's Administrative Procedures**

***8** Administrative grievance procedures at Rikers Island are governed by the IGRP. *Hickman v. City of New York*, No. 20-CV-4699 (RA), 2021 WL 3604786, at *3 (S.D.N.Y. Aug. 12, 2021). The Court takes judicial notice of the IGRP. *See Sanders v. City of New York*, No. 16-CV-7246 (PGG), 2018 WL 3117508, at *4 n.1 (S.D.N.Y. June 25, 2018) (cleaned up) ("It is a common practice in this District to take judicial notice of the version of the IGRP in effect at the time of the events giving rise to a prisoner's claim."). As DOC Directive 3376 ("IGRP Directive") was the version of the IGRP in effect in August 2016, it is the governing administrative grievance procedure in this action. *See* N.Y.C. Dep't of Corr., Directive 3376 (effective Sept. 10, 2012), available at https://www.nyc.gov/html/doc/downloads/pdf/Directive_3376_Inmate_Grievance_Request_Program.pdf (last visited Mar. 8, 2024).

The IGRP provides a four-step administrative review and appeals process for grievances from individuals incarcerated by the DOC:

> (1) file a complaint with the IGRP for informal resolution within ten [business] days of the alleged violation; (2) if unsatisfied with the disposition or a disposition has not been reached in a timely manner, request a hearing with the Inmate Grievance Resolution Committee ("IGRC") within five [business] days of the disposition; (3) appeal to the commanding officer of the facility, who must render a decision within five [business] days; and (4) if the inmate is still unsatisfied with the disposition, appeal to the DOC Central Office Review Committee ("CORC"), which must issue a recommendation within 15 [business] days.

*Groenow v. Williams*, No. 13-CV-3961 (PAC) (JLC), 2014 WL 941276, at *2 n.1 (S.D.N.Y. Mar. 11, 2014) (citing the IGRP Directive). An incarcerated individual "must take each of the four steps to exhaust the administrative grievance process" unless administrative remedies are "unavailable." *Sanders v. City of New York*, No. 16-CV-7426 (PGG), 2018 WL 3117508, at *4 n.2 (S.D.N.Y. June 25, 2018) (internal citation omitted). Some issues, including "complaints of assault or harassment by a staff person" and "allegations of staff-on-inmate use of force or harassment" are "non-grievable" and thus not subject to the four-step IGRP process. ECF No. 131-24 ("Inmate Handbook") at 21; IGRP Directive § IV(B)(2)(b)(ii). Where exhaustion of "the full suite of IGRP procedures [is] not required," an incarcerated person must still "file a formal grievance to exhaust all remedies." *House v. City of New York*, No. 18-CV-6693 (PAE), 2020 WL 6891830, at *9 (S.D.N.Y. Nov. 24, 2020). For grievances pertaining to "grievable" issues, "it is well established that, even if an inmate does not receive a response to his grievance, he fails to exhaust administrative remedies if he does not avail himself of the available appeals process." *Massey v. City of New York*, No. 20-CV-5665 (GBD) (DF), 2021 WL 4943564, at *7 (S.D.N.Y. Aug. 30, 2021) (cleaned up). "[I]t is also well settled that 'proper exhaustion' requires an inmate to not only file an initial grievance, but also to exhaust his claims through each level of the specified grievance process." *Id.*

**C. Defendants Are Not Entitled to Summary Judgment on Exhaustion of Administrative Remedies Defense**

Plaintiff maintains he filed a grievance by means of an Inmate Grievance and Request Program Statement Form on September 8, 2016, regarding the conditions of the bus and use of force to remove passengers from the bus. ECF No. 131-25 (the "Grievance"); SMF ¶ 83. DOC, however, maintains it never received it. SMF ¶ 84; Def. Mem. at 4, 8–9. Notwithstanding this factual dispute, Defendants move for summary judgment against Plaintiff's Eighth Amendment claims on the basis that Plaintiff did not exhaust administrative remedies by completing the IGRP appeals process. Def. Mem. at 7–10. Failure to exhaust administrative remedies under the PLRA is an affirmative defense. *See Johnson v. Rowley*, 569 F.3d 40, 45 (2d Cir. 2009). Because of the factual dispute and the other reasons detailed below, Defendants are not entitled to summary judgment on their exhaustion of administrative remedies defense. *See Garcia v. Heath*, 74 F.4th 44, 48-49 (2d Cir. 2023) (factual dispute as to whether plaintiff exhausted PRLA remedies precluded summary judgment where "the record reflects a plausible inference that the prison officials failed to log [plaintiff's] grievance").

***9** First, Plaintiff's excessive force claim is "non-grievable" under the IGRP. *See* IGRP Directive § IV(B)(2)(b)(ii); *Drew v. City of New York*, No. 16-CV-594 (AJP), 2016 WL 4533660, at *8 (S.D.N.Y. Aug. 29, 2016) (collecting cases finding that excessive force claims are non-grievable under the IGRP). Accordingly, Plaintiff was not required to exhaust "the full suite of IGRP procedures" other than the filing of a "formal grievance." *House*, 2020 WL 6891830, at *9. There is an issue of material fact as to whether Plaintiff filed a formal grievance and therefore exhausted administrative remedies with respect to this claim, which precludes summary judgment.

Plaintiff's conditions of confinement claims are "grievable" and thus "subject to the IGRP appeals process." *Taylor v. New York City Dep't of Corr.*, 849 F. App'x 5, 9 (2d Cir. 2021) ("Since the conditions-of-confinement ... claims were grievable, and therefore subject to the IGRP appeals process, [Plaintiff]'s failure to appeal the non-responses to these grievances constituted a failure to exhaust his administrative remedies."). After filing his grievance on September 8, 2016, Plaintiff did not avail himself of the subsequent steps of the IGRP process prior to his transfer back to state custody on September 28, 2016. SMF ¶¶ 85–88. "Courts in this Circuit have consistently held that the failure to take an available administrative appeal, even when the initial grievance receives no response, constitutes a failure to exhaust available administrative remedies." *Garvin v. Rivera*, No. 13-CV-7054 (RJS), 2015 WL 876464, at *4 (S.D.N.Y. Feb. 28, 2015); *see also Williams v. Correction Officer Priatno*, 829 F.3d 118, 126 n.6 (2d Cir. 2016) ("[M]any district courts have concluded that a 'nonresponse' to a grievance 'must be appealed' in order to exhaust administrative remedies under the PLRA.").

However, if "the regulatory scheme providing for [administrative] appeal is 'so opaque' and 'so confusing that ... no reasonable prisoner can use it,' " then the exhaustion requirement may be excused. *Priatno*, 829 F.3d at 124 (quoting *Ross*, 578 U.S. at 644). Here, the relevant administrative procedures provide that IGRP staff will provide an informal resolution within five business days after receiving a grievance. IGRP Directive § II(F). "The IGRP contemplates that prison officials might not always respond to inmates' grievances. It sets forth the procedure to follow in

such circumstances." *Taylor*, 849 F. App'x at 8. The procedure provides that "[i]n the event that the inmate does not receive a timely disposition at any stage of the IGRP process, the inmate may submit a request for an appeal (to proceed to the next step of the IGRP process)." IGRP Directive § IV(D)(10)(a). "Such an appeal shall be submitted no later than ten (10) business days following the date upon which a response was due from [DOC]." *Id.*

Because Plaintiff received no response to his grievance, the deadline for him to proceed to the next step of the IGRP process – filing an appeal to the warden or commanding officer of the facility – was September 29, 2016, fifteen business days after the date of his grievance. Plaintiff was transferred back to state custody on September 28, 2016, the day before his deadline for an administrative appeal elapsed. *See* SMF ¶ 88. DOC's administrative procedure provided that "[i]f appropriate, the grievance supervisor shall also forward the [final CORC decision] to the commanding officer of any facility to which the inmate has been transferred." IGRP Directive § IV(J)(5)(d). However, the procedure is silent as to what occurs in the event that the original facility takes no action in response to a grievance, and then the complainant is transferred to another carceral facility. Plaintiff still had time on the clock to appeal to the commanding officer of AMKC when he was transferred to Downstate Correctional Facility in Fishkill, New York on September 28, 2016. As Plaintiff correctly observes, DOC's grievance procedures provide "no policy guidance that indicates how a prisoner can further pursue a grievance in the event of a transfer to state prison" when that transfer occurs before any response to the grievance is received. RSMF ¶ 78. DOC's grievance procedures "simply do not contemplate the situation in which [Plaintiff] found himself, making it practically impossible for him to ascertain whether and how he could pursue his grievance" after his transfer. *Priatno*, 829 F.3d at 124.

***10** This is not a case in which Plaintiff "retained the ability to appeal his grievance to the central office review committee even after he was transferred," *Richardson v. N.Y. State Dep't of Corr.*, 633 Fed. App'x 816, 818 (2d Cir. 2016), because the next stage in the IGRP administrative process – which is facility-specific – was to appeal to the commanding officer of AMKC. Such appeal was rendered unavailable by Plaintiff's transfer to state custody. The IGRP procedures "plainly do not provide guidance on how a transferred inmate can appeal his grievance with the original facility without having received a response." *Priatno*, 829 F.3d at 126. As a result, whatever administrative remedies were available to Plaintiff after his transfer, if any, were "so opaque and confusing that they were, 'practically speaking, incapable of use.' " *Id.* (quoting *Ross*, 578 U.S. at 644). Accordingly, Defendants have not demonstrated that they are entitled to summary judgment on their exhaustion of administrative remedies defense.

**II. Plaintiff's Constitutional Claims Arise Under the Eighth Amendment**

Pursuant to 42 U.S.C. § 1983 ("Section 1983"), Plaintiff asserts causes of action for: (1) excessive force; (2) deprivation of basic human need; (3) violation of due process; (4) municipal liability for excessive force; (5) municipal liability for deprivation of basic human need; and (6) municipal liability for violation of due process. FAC ¶¶ 43–74.

Section 1983 provides "a species of tort liability in favor of persons deprived of federally secured rights." *Smith v. Wade*, 461 U.S. 30, 34 (1983) (cleaned up). A Section 1983 claim requires a plaintiff to show that "some person has deprived him of a federal right" and that such person "acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). It is undisputed that the Individual Defendants, as employees of DOC, were acting under color of state law during the relevant time period. Because Plaintiff asserts claims against several Individual Defendants and seeks monetary damages, he must also demonstrate that each officer was personally involved in depriving him of his constitutional rights. *Grullon v. City of New Haven*, 720 F.3d 133, 138 (2d Cir. 2013) (collecting cases); *see infra* section VI. Because the events underlying the First Amended Complaint occurred after Plaintiff was convicted, rather than before trial, *see* ECF No. 151, the Court construes his First Amended Complaint as alleging violations of the Eighth Amendment guarantee of freedom from "cruel and unusual punishment," rather than violations of his due process rights. *See Morrison v. United States*, No. 17-CV-6779 (WHP), 2019 WL 5295119, at *4 (S.D.N.Y. Oct. 18, 2019) (collecting cases) ("While the constitutional status of convicted, but not sentenced, defendants remains an unanswered question in [the Second Circuit], district courts apply the Eighth Amendment, not the Fifth or Fourteenth Amendments, to individuals in [Plaintiff's] circumstance."); *see also Colds v. Smyth*, No. 22-CV-2023 (CS), 2023 WL 6258544, at *5 (S.D.N.Y. Sept. 26, 2023) (same).

Considering the solicitude afforded *pro se* litigants, the Court construes Plaintiff's First Amended Complaint as setting forth four cognizable Section 1983 claims: (1) an Eighth

Amendment conditions of confinement claim based on the conditions on the bus; (2) an Eighth Amendment excessive force claim based on the use of the MK-9 pepper spray; (3) a municipal liability claim pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) regarding conditions of confinement; and (4) a municipal liability pursuant to *Monell* regarding excessive use of force. Because the events underlying the First Amended Complaint occurred after Plaintiff was convicted, rather than before trial, Plaintiff's due process claims are dismissed.

**III. Conditions of Confinement Claims**

Considering Plaintiff's *pro se* status, the Court construes his First Amended Complaint as raising Eighth Amendment conditions of confinement claims related to (1) unsanitary conditions and (2) deprivation of food and water. Defendants argue that Plaintiff's conditions of confinement claims fail on the merits and that the Individual Defendants against whom the claims are asserted are entitled to qualified immunity. The Court first sets forth the legal framework that governs Plaintiff's Eighth Amendment conditions of confinement claims and then addresses each of the challenged conditions and Defendants' qualified immunity defense. The Court denies Defendants' summary judgment motion with respect to both challenged conditions.

**A. Framework for Eighth Amendment Conditions of Confinement Claims**

***11** "The Eighth Amendment protects prisoners from cruel and unusual punishment by prison officials." *Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015) (citing *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)). "In prisons, inmates have the right to be free from conditions of confinement that impose an excessive risk to inmate health or safety." *Salgado v. DuBois*, No. 17-CV-6040 (NSR), 2019 WL 1409808, at *5 (S.D.N.Y. Mar. 28, 2019) (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). "The Eighth Amendment requires prison officials to take reasonable measures to guarantee the safety of inmates in their custody." *Hayes v. N.Y. City Dep't of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996) (citing *Farmer*, 511 U.S. at 832). "The Second Circuit, in addressing the needs protected by the Eighth Amendment, has stated that sentenced prisoners are entitled to 'adequate food, clothing, shelter, sanitation, medical care and personal safety.' " *Rasheen v. Adner*, 356 F. Supp. 3d 222, 240 (N.D.N.Y. 2019) (quoting *Wolfish v. Levi*, 573 F.2d 118, 125 (2d Cir. 1978), *rev'd on other grounds sub nom. Bell v. Wolfish*, 441 U.S. 520 (1979)).

"To demonstrate that the conditions of [one's] confinement constitute cruel and unusual punishment, the plaintiff must satisfy both an objective test and a subjective test." *Jolly v. Coughlin*, 76 F.3d 468, 480 (2d Cir. 1996) (internal citation omitted). The plaintiff "must allege that: (1) objectively, the deprivation the inmate suffered was 'sufficiently serious that he was denied the minimal civilized measure of life's necessities,' and (2) subjectively, the defendant official acted with 'a sufficiently culpable state of mind ..., such as deliberate indifference to inmate health or safety.' " *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013) (quoting *Gaston v. Coughlin*, 249 F.3d 156, 164 (2d Cir. 2001)). "To meet the objective element, the inmate must show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health." *Id.* (citation omitted). "There is no static test to determine whether a deprivation is sufficiently serious; instead, the conditions themselves must be evaluated in light of contemporary standards of decency." *Darnell v. Pineiro*, 849 F.3d 17, 30 (2d Cir. 2017) (cleaned up). "In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." *Helling v. McKinney*, 509 U.S. 25, 36 (1993). "To meet the subjective element, the plaintiff must show that the defendant acted with 'more than mere negligence.' " *Walker*, 717 F.3d at 125. (internal citation omitted). " '[T]he prison official must know of, and disregard, an excessive risk to inmate health or safety.' " *Id.* (internal citation omitted). "Evidence that a risk was 'obvious or otherwise must have been known to a defendant' may be sufficient for a fact finder to conclude that the defendant was actually aware of the risk." *Id.* (quoting *Brock v. Wright*, 315 F.3d 158, 164 (2d Cir. 2003)).

"Conditions of confinement may be aggregated to rise to the level of a constitutional violation, but 'only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise.' " *Darnell*, 849 F.3d at 30 (quoting *Walker*, 717 F.3d at 125). "[T]he proper lens through which to analyze allegedly unconstitutional unsanitary conditions of confinement is with reference to their severity and duration, not the detainee's resulting injury." *Id.* "Moreover, the conditions must be analyzed in combination, not in isolation, at least where one alleged deprivation has a bearing on another." *Id.* at 32. "An overcrowded cell, for example, may exacerbate the effect of unsanitary conditions. Similarly, poor ventilation may be particularly harmful when combined with an overflowing toilet. Inadequate nutrition may be compounded by infestation." *Id.* The Court must consider the effects of the alleged deprivations with respect to both

the "physical and mental soundness" of Plaintiff. *Willey v. Kirkpatrick*, 801 F.3d 51, 67 (2d Cir. 2015).

***12** The Court applies the foregoing framework, requiring "deliberate indifference" with respect to a "sufficiently serious" deprivation, to both of the challenged conditions of confinement. *See Darnell*, 849 F.3d at 31–32. "Each of these conditions must be measured by its severity and duration, not the resulting injury, and none of these conditions is subject to a bright-line durational or severity threshold." *Id.* at 32. Aside from contesting the "personal involvement" of certain Individual Defendants, which the Court addresses later (*see infra* section VI), Defendants contest only the objective prong, arguing that the deprivations Plaintiff suffered were not "sufficiently serious" to violate the Eighth Amendment. In the following subsections, the Court concludes that a reasonable jury could find that the deprivations Plaintiff suffered, if proven, were sufficiently serious to violate the Eighth Amendment and that there is sufficient evidence in the record suggesting that at least some of the Individual Defendants knew of and disregarded excessive risks to Plaintiff's health and safety. The Court analyzes both challenged conditions in turn.

**B. Unsanitary Conditions**

"Unsanitary conditions, especially when coupled with other mutually enforcing conditions, such as poor ventilation and lack of hygienic items (in particular, toilet paper), can rise to the level of an objective deprivation." *Id.* at 30. The Second Circuit has "reiterated that the proper lens through which to analyze allegedly unconstitutional unsanitary conditions of confinement is with reference to their severity and duration, not the detainee's resulting injury." *Id.* Defendants argue that Plaintiff's exposure to unsanitary conditions does not implicate the Eighth Amendment because it lasted fewer than fifteen hours. Def. Br. at 15–16. While acknowledging that "there are many exposures of inmates to unsanitary conditions that do not amount to a constitutional violation," the Second Circuit has rejected the concept of "any bright-line durational requirement for a viable unsanitary-conditions claim" or "some minimal level of grotesquerie required." *Darnell*, 849 F.3d at 30–31 (citing *Willey*, 801 F.3d at 68). Instead, the Circuit instructs that "whether exposure to human waste is cruel and unusual depends on both the duration and the severity of the exposure." *Willey*, 801 F.3d at 68. If the circumstances are sufficiently severe, "an exposure to human waste [lasting] merely ten minutes" may violate the Eighth Amendment. *Id.* "The severity of an exposure may be less quantifiable than its duration, but its qualitative offense to a prisoner's dignity should be given due consideration." *Id.* The Court must consider the effects of the exposure to unsanitary conditions with respect to both the "physical and mental soundness" of Plaintiff. *Id.* at 67.

Moreover, "[r]easonably adequate sanitation and the ability to dispose of one's bodily wastes without unreasonably risking contamination are basic identifiable human needs of a prisoner." *Hart v. City of New York*, No. 11-CV-4678 (RA), 2013 WL 6139648, at *8 (S.D.N.Y. Nov. 18, 2013) (quoting *Odom v. Keane*, No. 95-CV-9941 (SS), 1997 WL 576088, at *5 (S.D.N.Y. Sept. 15, 1997)). Temporary denial of access to the restroom for short periods of time, without more, does not itself give rise to an Eighth Amendment claim. *See Livingston v. Hoffnagle*, No. 19-CV-353 (GLS) (CFH), 2019 WL 7500501, at *9 (N.D.N.Y. Nov. 8, 2019) (collecting cases). However, courts have found that extended denial of bathroom access, especially when coupled with unsanitary conditions, may give rise to an Eighth Amendment violation. *See May v. DeJesus*, No. 06-CV-1888 (AWT), 2010 WL 1286800, at *5 (D. Conn. Mar. 30, 2010) ("[C]ourts have considered whether the deprivation of toilet use resulted in unsanitary conditions that posed a significant risk to the inmate's health."); *Hart*, 2013 WL 6139648, at *7–8 (denying summary judgment on Eighth Amendment claim where plaintiff alerted officers to preexisting condition of frequent urination but was denied access to bathroom for twelve hours, forcing plaintiff to "repeatedly soil himself and remain[ ] imprisoned in urine-soaked clothing."); *DeBlasio v. Rock*, No. 09-CV-1077 (TJM), 2011 WL 4478515, at *16 (N.D.N.Y. Sept. 26, 2011) (denying defendants' motion for summary judgment as to conditions of confinement claim where plaintiff alleged that defendant correction officers handcuffed him behind his back and refused to remove his handcuffs so that he could use the bathroom for five hours, ultimately forcing him to urinate and defecate on himself). The court in *DeBlasio* found that "a reasonable juror, if he or she credited Plaintiff's version of events, could find that being handcuffed for five hours while pleading to be released in order to use the bathroom is an extreme deprivation." *Id.*

***13** Here, it is undisputed that Plaintiff was handcuffed and denied access to the bathroom for at least fifteen hours. Without access to a bathroom, and at the indication of the officers on the bus, the incarcerated individuals on the bus were forced to use the back of the bus to urinate and defecate. SMF ¶¶ 29–31; ECF No. 131-7 at 30:20–31:4, 36:12–24. The passengers, including Plaintiff, vomited due to the odor of the buildup of urine and feces on the bus. SMF ¶ 32;

ECF No. 131-7 at 35:14–24. These unsanitary conditions were further exacerbated by the lack of access to toilet paper and other hygienic materials because the "[a]vailability of hygienic materials is particularly important in the context of otherwise unsanitary living conditions." *Walker*, 717 F.3d at 127 (collecting cases finding that "the failure to provide prisoners with toiletries and other hygienic materials may rise to the level of a constitutional violation").

Moreover, "conditions that would normally have nothing to do with sanitation (for example, poor air circulation or being kept naked) can exacerbate the harmful effects of unsanitary conditions." *Darnell*, 849 F.3d at 31. Courts have recognized the danger to incarcerated individuals posed by confinement in close proximity to broken glass, especially alongside other unsanitary conditions, and that such circumstances may constitute inhumane conditions of confinement under the Eighth Amendment. *See Nur v. Hyatte*, No. 23-CV-512 (JD), 2023 WL 6382582, at *2 (N.D. Ind. Sept. 29, 2023) (confinement in dark cell "containing broken glass and another inmate's feces ... trigger[ed] Eighth Amendment concerns"); *Walker-Abrams v. Baca*, No. 12-CV-21 (MMD) (CSD), 2022 WL 17494197, at *8–9 (D. Nev. Oct. 18, 2022), *report and recommendation adopted sub nom. Walker v. Baca*, No. 19-CV-21, 2022 WL 16744451 (D. Nev. Nov. 7, 2022) (finding that "a genuine dispute of material fact as to the existence of broken/cracked windows and associated shards of glass, whether they presented a safety hazard, and whether enough was being done to address this issue" precluded qualified immunity defense and summary judgment against Eighth Amendment conditions of confinement claim); *Nelson v. Macauley*, No. 20-CV-70 (PLM), 2020 WL 2519841, at *2, 5–6 (W.D. Mich. May 18, 2020) (confinement to dirty cell covered in feces and with broken glass on the floor sufficient to state Eighth Amendment conditions of confinement claim).

In this case, the severely unsanitary conditions on the bus were further exacerbated by the presence of broken glass on the seats and floor of several rows of the bus, which moved around while the bus was in motion, forcing the passengers into even closer proximity to each other and their own human waste. *See* SMF ¶ 18; ECF No. 131-6 at 86:23–88:23. DOC employees made efforts to locate another transport, but ultimately ordered Plaintiff and other incarcerated individuals to board the bus notwithstanding their complaints about broken glass and the unsanitary condition of the bus, including leftover trash and food waste, which were not cleaned up. ECF No. 131-6 at 87:17–23, 93:3–14; ECF No. 131-7 at 21:20–23:3. Several incarcerated individuals (not Plaintiff) suffered cuts from the broken glass, which moved around while the bus was in motion. ECF No. 131-7 at 39:20–40:24; ECF No. 131–6 at 87:3–7. While there is no evidence that Plaintiff was cut by broken glass, the Court analyzes the dangerousness of the conditions of confinement as "measured by its severity and duration, not the resulting injury ...." *Darnell*, 849 F.3d at 32. If proven, a Hobson's choice between confinement in close proximity to a safety hazard and the debasement of close exposure to human waste is too degrading to be permitted and not one that today's society may tolerate.

Considered in the aggregate, *see Darnell*, 849 F.3d at 30, the Court finds that the unsanitary conditions here satisfy the objective prong for the purposes of summary judgment. While handcuffed on the bus for at least fifteen hours, Plaintiff was forcibly exposed, in close confines and amidst shattered glass, to his own human waste, as well as the buildup of the vomit, feces and urine of other passengers, with no access to the bathroom, water or any hygienic materials. The Second Circuit has long established that "[c]ausing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted." *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972). Notwithstanding Defendants' argument that the facts here do not cross a certain durational threshold – a bright-line approach to conditions of confinement claims explicitly rejected by the Second Circuit – the Court rejects "as a matter of law the principle that it is not cruel and unusual punishment for prison officials knowingly" to keep incarcerated persons confined in close proximity to human waste overnight where mutually enforcing conditions exacerbate the severity of the risk to health and safety posed by those unsanitary conditions. *Gaston*, 249 F.3d at 166.

***14** As to the subjective prong, for at least a subset of the Individual Defendants, there are ample facts in the record such that a reasonable juror could conclude that they were aware that Plaintiff and other passengers were exposed to severely unsanitary conditions and acted with deliberate indifference with respect to such deprivation. The passengers on the bus, including Plaintiff, repeatedly asked for food, water and access to a restroom but none were provided. ECF No. 131-7 at 28:11–31:4. The officers on the bus repeatedly got off and on the bus in order to, it appears, talk to other officers, use the restroom and get food, but none of the remaining passengers were permitted to disembark. ECF No. 131-7 at 16:22–19:25, 21:1–25, 23:1–25:25, 27:1–28:25, 30:1–31:15. Without access to a bathroom, and at

the indication of the officers on the bus, the incarcerated individuals on the bus were forced to use the back of the bus to urinate and defecate, and the passengers on the bus, including Plaintiff, vomited due to the odor of the buildup of urine and feces. SMF ¶¶ 29–32; ECF No. 131-7 at 30:23–31:4, 35:14–24, 36:12–24.

Based on this record, a reasonable juror could conclude that at least some of the Individual Defendants were "aware of facts from which the inference could be drawn that a substantial risk of serious harm existed" with respect to the unsanitary conditions, and indeed drew such an inference, but disregarded this substantial risk. *Bradshaw v. Uhler*, No. 21-CV-901 (DNH) (ML), 2023 WL 5795937, at *24 (N.D.N.Y. July 20, 2023), *report and recommendation adopted*, No. 21-CV-901, 2023 WL 5367520 (N.D.N.Y. Aug. 22, 2023) (quoting *Farmer*, 511 U.S. at 837).

**C. Deprivation of Food and Water**

"[U]nder certain circumstances a substantial deprivation of food may well be recognized as being of constitutional dimension." *Robles v. Coughlin*, 725 F.2d 12, 15 (2d Cir. 1983); *see also Jackson v. Marks*, 722 F. App'x 106, 107 (2d Cir. 2018) (quoting *Robles*, 725 F.2d at 15) (" '[A] substantial deprivation of food' can cause serious physical harm sufficient to find cruel and unusual punishment in violation of the Eighth Amendment.").

Defendants argue that Plaintiff was not deprived of food and water for long enough to reach constitutional dimensions. Def. Br. at 13–14. Defendants characterize the time period Plaintiffs was confined on the bus as lasting no more than fifteen hours, while Plaintiff alleges that said confinement lasted over sixteen hours. Def. Br. at 13–16; FAC ¶ 66. Plaintiff testified that he was last provided food on August 30, 2016 at approximately 11:30 a.m. and that the next meal time at MDC was at 6:30 p.m. ECF No. 131-6 at 55:7–9, 56:10–15. The record does not reflect whether, and at what time, Plaintiff was ultimately provided access to food and drinking water after being admitted to AMKC on August 31, 2016. However, it is undisputed that Plaintiff was deprived of food and water for at least fifteen hours, and the Court cannot conclude as a matter of law that this deprivation did not rise to the level of a constitutional violation based on duration alone, as deprivations of similar length have been found to reach constitutional implications. *See Simmons v. Kelly*, No. 06-CV-6183 (RJS), 2009 WL 857410, at *8 (S.D.N.Y. Mar. 31, 2009) (citing *Tavarez-Guerrero v. Toledo-Davila*, 573 F. Supp. 2d 507, 512–13 (D. P.R. 2008)) ("[C]ourts have held that a deprivation of as little as seventeen hours has constitutional implications.").

This is particularly true because the Court must analyze the seriousness of Plaintiff's deprivation of food and water, coupled with mutually enforcing conditions, with respect to *both* severity and duration. *Darnell*, 849 F.3d at 30. As discussed in the previous subsection, the concurrent deprivations that Plaintiff experienced – including severely unsanitary conditions stemming from exposure to human waste and shattered glass in close quarters and the denial of access to the bathroom and hygienic materials – exacerbated the severity of the threat to his health posed by the extended denial of food and water.

The denial of access to medical care further exacerbated the health risk created by the denial of food and water. "Cruel and unusual punishment in violation of the Eighth Amendment can take many shapes," including "deliberate indifference ... to a prisoner's serious medical needs." *Walker v. Schult*, 45 F.4th 598, 610 (2d Cir. 2022); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (claims that prison officials intentionally disregarded an incarcerated individual's medical needs fall under the umbrella of protection from the imposition of cruel and unusual punishment afforded by the Eighth Amendment). The Eighth Amendment "imposes a duty upon prison officials to ensure that inmates receive adequate medical care." *Salahuddin v. Goord*, 467 F.3d 263, 279 (2d Cir. 2006) (citing *Farmer*, 511 U.S. at 832, 844).

***15** Generally, courts have found that missing a single dose of medication, without more, is not itself actionable. *See Constantino v. DiStefano*, No. 18-CV-5730 (BMC), 2020 WL 353094, at *5 (E.D.N.Y. Jan. 21, 2020) (collecting cases). However, it has also been recognized that "missing a single dose of [plaintiff's] hypertension medication" could, depending on the evidentiary record, lead to "a serious medical problem" for Eighth Amendment purposes. *Torres v. Trombly*, 421 F. Supp. 2d 527, 532–33 (D. Conn. 2006).

Here, Plaintiff testified that he was suffering from nausea, dizziness, headache and overheating – symptoms of hypertension – and asked the officers on the bus for his medication or to take him to a medical facility, but was rebuffed in harsh terms. ECF No. 131-7 at 23:25–24:23. The denial of blood pressure medication – while not on its own reaching constitutional dimensions – was a mutually reinforcing deprivation which "must be analyzed in combination, not in isolation" with the deprivation of food

and water. *Darnell*, 849 F.3d at 32. The Court finds that denial of prescription blood pressure medication and medical treatment exacerbated the threat to Plaintiff's health posed by deprivation of food and water. Considering the facts in the light most favorable to Plaintiff, a reasonable juror could find that the deprivation of food and water, exacerbated by the severely unsanitary conditions and deprivation of medication and medical care, was sufficiently serious to violate the Eighth Amendment.

As to the subjective prong, for at least a subset of the Individual Defendants, there are ample facts in the record such that a reasonable juror could conclude that they were aware of the deprivation of food and water (based on the facts recited in the previous subsection) – as well as Plaintiff's medical needs – and acted with deliberate indifference with respect to such deprivation. Regarding medical needs, Plaintiff testified that he informed multiple DOC personnel, including the officers on the bus, that he needed his prescription blood pressure medication, and that Captain Williams told Plaintiff that he would be provided his prescription medication if he got on the bus. ECF No. 131-6 at 40:15–44:10, 49:13–49:1. Plaintiff alleges that one of the officers under Captain Williams' supervision cursed at him for complaining about needing medical attention before getting on the bus. FAC ¶ 24. Another passenger was permitted to disembark the bus around 11:00 p.m. or midnight, but Plaintiff's request for medication or to be taken into the medical facility was rebuffed. SMF ¶¶ 25–26; ECF No. 131-7 at 23:25–24:23, 25:18–22.

Based on the factual record presented to the Court, a reasonable juror could conclude that at least some of the Individual Defendants knew of, and disregarded, an "obvious" and excessive risk to Plaintiff's health or safety posed by the denial food and water (as exacerbated by the severely unsanitary conditions and denial of medical care). *See Walker*, 717 F.3d at 125.

Thus, both challenged conditions – unsanitary conditions and deprivation of food and water – satisfy the objective prong for the purposes of summary judgment. And there is sufficient evidence in the record from which a reasonable juror could conclude that at least some of the Individual Defendants knew of and disregarded each of the excessive risks to Plaintiff's health and safety.

**D. Qualified Immunity**

***16** Defendants assert that they are entitled to qualified immunity with respect to Plaintiff's conditions of confinement claims because "plaintiff staying on a bus overnight" was not "clearly established as unconstitutional." Def. Br. at 16. The Court disagrees.

"Qualified immunity shields government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Walker*, 45 F.4th at 617 (internal citation and quotation marks omitted); *see also Smith v. Sullivan*, No. 20-CV-659 (DNH) (CFH), 2023 WL 3727447, at *18 (N.D.N.Y. May 3, 2023), *report and recommendation adopted*, No. 20-CV-659, 2023 WL 3722137 (N.D.N.Y. May 30, 2023) (internal citation omitted) (applying the qualified immunity standard to correction officers). Qualified immunity does not shield government officials from liability when "(1) the official violated a statutory or constitutional right, and (2) that right was clearly established at the time of the challenged conduct." *Matzell v. Annucci*, 64 F.4th 425, 434 (2d Cir. 2023) (internal citation omitted). "A right is clearly established when 'the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Id.*, 64 F.4th at 434 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

"In determining if a right is clearly established, this Court looks to whether (1) it was defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has confirmed the existence of the right, and (3) a reasonable defendant would have understood that his conduct was unlawful." *Doninger v. Niehoff*, 642 F.3d 334, 345 (2d Cir. 2011) (internal citation omitted). The Supreme Court has made clear that its precedent does not "require a case directly on point" but that "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Qualified immunity protects a government actor if it was "objectively reasonable for him to believe that his behavior did not violate the [plaintiff's] clearly established constitutional rights" at the time of the challenged act. *Lennon v. Miller*, 66 F.3d 416, 418 (2d Cir. 1995).

"A defendant is entitled to summary judgment on qualified immunity grounds when no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiffs, could conclude that it was objectively unreasonable for the defendant to believe that he was acting in a fashion that did not clearly

violate an established federally protected right." *Id.* at 420 (cleaned up). It is well settled in the Second Circuit that a defendant's ability to rely on qualified immunity from liability is a question of law for the court to decide on summary judgment only when "the factual record is not in serious dispute." *Id.*, 66 F.3d at 421.

In this case, Plaintiff's constitutional right to "humane conditions of confinement" and to be free from conditions of confinement which pose "an excessive risk to inmate health or safety" was clearly established at the time of the underlying incidents. *Farmer*, 511 U.S. at 837; *see also Helling v. McKinney*, 509 U.S. 25, 32 (1993) (incarcerated individuals are entitled to "basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety"). As discussed in the foregoing sections, Plaintiff's constitutional right to humane conditions of confinement – including, and specifically, to be free from severe (1) unsanitary conditions and (2) deprivation of food and water – was clearly established at the time of the underlying incidents. "[T]he challenged conditions in this case, such as inadequate nutrition, and unsanitary conditions ... are clearly covered by *Willey*." *Darnell*, 849 F.3d at 31 (citing *Willey*, 801 F.3d at 68–69). Moreover, *Willey* – decided by the Second Circuit in August 2015, well before the underlying incidents in this case in August 2016 – "was not breaking new ground, but rather reaffirming the law in this Circuit." *Id.* Accordingly, the rights Plaintiff seeks to vindicate through his conditions of confinement claims were clearly established at the time of the challenged conduct.

***17** The facts here do not support summary judgment on qualified immunity. The Second Circuit has long established that "[c]ausing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted." *LaReau*, 473 F.2d at 978. While handcuffed on the bus for at least fifteen hours, Plaintiff was forcibly exposed, in close confines and amidst shattered glass, to his own human waste, as well as the buildup of the vomit, feces and urine of other passengers, with no access to the bathroom, water or any hygienic materials. Unsanitary conditions of this severity – alongside the extended deprivation of food and water, which was exacerbated by the denial of medication or medical care – warrant denial of summary judgment on qualified immunity in light of the clearly established law of *Willey* on unconstitutional conditions of confinement.

There is sufficient evidence in the record that at least some of the Individual Defendants knew of and disregarded excessive risks to Plaintiff's health and safety. Viewing the evidence in the light most favorable to Plaintiff, and drawing all reasonable inferences in his favor, the Court concludes a rational jury could find that it was objectively unreasonable for at least some of the Individual Defendants to believe they were not violating Plaintiff's constitutional rights. With respect to the subjective prong of each challenged condition, the Court found that a reasonable juror could conclude that at least some of the Individual Defendants knew of, and disregarded, obvious and excessive risks to Plaintiff's health or safety which reached constitutional dimensions. This precludes summary judgment on qualified immunity. *See Roland v. City of New York*, No. 19-CV-2240 (PKC), 2023 WL 2599649, at *8 (E.D.N.Y. Mar. 22, 2023) ("[A] material factual dispute [ ] as to the subjective prong ... preclude[s] a finding of qualified immunity at [summary judgment].").

Defendants' assertion of qualified immunity relies heavily on the duration of the challenged conditions, notwithstanding the Second Circuit's rejection of a bright-line durational threshold for such claims. *See supra* sections III(A)–(B). This does not suffice to establish summary judgment on qualified immunity, where it is undisputed that Plaintiff was deprived of food and water for at least fifteen hours and Plaintiff was forcibly exposed, in close confines and amidst shattered glass, to his own human waste, as well as the buildup of the vomit, feces and urine of other passengers, with no access to the bathroom, water or any hygienic materials. *See Simmons*, 2009 WL 857410, at *8 (citing *Tavarez-Guerrero*, 573 F. Supp. 2d at 512–13) (because "courts have held that a deprivation of as little as seventeen hours has constitutional implications," the "length of Plaintiff's period of deprivation [of food and water] is an issue of material fact that will bear on whether Defendants are entitled to dismissal on qualified immunity grounds").

Whether all of the challenged conditions of confinement "combine to constitute an Eighth Amendment violation" and whether "Plaintiff's repeated complaints made Defendants aware of the substantial risk of harm, such that their failure to provide remedies amounted to deliberate indifference" – both of which find sufficient support in the record at this juncture – are ultimately "questions for a jury to decide." *Walker v. Schult*, No. 11-CV-287 (LEK), 2016 WL 4203536, at *14 (N.D.N.Y. Aug. 9, 2016) (denying summary judgment on qualified immunity). If Plaintiff's testimony is credited, he was denied food, water, prescription medication/medical

treatment and access to the bathroom – and was confined in close proximity to broken glass (from which several passengers sustained injuries) and his and others' human waste – for at least sixteen hours. Further, if Plaintiff's testimony is credited, he suffered these deprivations despite his repeated pleas and with the awareness of multiple DOC employees at MDC, Rikers Island and on the bus. A reasonable juror, drawing all inferences in favor of Plaintiff, could find that it was objectively unreasonable to believe that these circumstances would not violate Plaintiff's constitutional right to be free from conditions of confinement that impose "an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. Thus, the Court denies summary judgment with respect to qualified immunity. *See Portillo v. Webb*, No. 16-CV-4731 (VEC) (GWG), 2022 WL 2337380, at *15 (S.D.N.Y. June 29, 2022) (denying summary judgment because "if [Plaintiff]'s version of events is believed, qualified immunity is inappropriate"); *see also Roland v. City of New York*, No. 19-CV-2240 (PKC), 2023 WL 2599649, at *7 (E.D.N.Y. Mar. 22, 2023) ("A reasonable jury could credit Plaintiff's version of events; another could reject it as baseless. Conflicting versions of events, which find support in the record, require denial of summary judgment.").

***18** Accordingly, the court DENIES Defendants' motion with respect to Plaintiff's conditions of confinement claims on both the merits and on qualified immunity grounds.

**IV. Excessive Force**

Plaintiff also asserts an Eighth Amendment claim for excessive use of force related to the use of MK-9, a very powerful form of pepper spray, on the bus. To state an Eighth Amendment excessive force claim, an incarcerated individual must allege that: (1) "the conduct was objectively harmful enough or sufficiently serious to reach constitutional dimensions," and (2) "the defendant acted with a subjectively sufficiently culpable state of mind," which is "characterized by wantonness in light of the particular circumstances surrounding the challenged conduct." *Harris v. Miller*, 818 F.3d 49, 63–64 (2d Cir. 2016) (internal citations and quotation marks omitted). "The test of whether use of force in prison constitutes excessive force contrary to the Eighth Amendment is whether the force was used in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Scott v. Coughlin*, 344 F.3d 282, 291 (2d Cir. 2003). "To determine whether defendants acted maliciously or wantonly, a court must examine several factors including: the extent of the injury and the mental state of the defendant, as well as 'the need for the application of force; the correlation between that need and the amount of force used; the threat reasonably perceived by the defendants; and any efforts made by the defendants to temper the severity of a forceful response.' " *Id.* (quoting *Romano v. Howarth*, 998 F.2d 101, 105 (2d Cir. 1993)).

Regarding the objective prong, "when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated." *Harris*, 818 F.3d at 64 (quoting *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)). The objective prong "is satisfied in the excessive force context even if the victim does not suffer serious, or significant injury," *id.* (quoting *United States v. Walsh*, 194 F.3d 37, 50 (2d Cir. 1999)), although "a *de minimis* use of force will rarely suffice to state a constitutional claim." *Romano*, 998 F.2d at105. Thus, the "core judicial inquiry" into a claim of excessive force is "not whether a certain quantum of injury was sustained, but rather 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.' " *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (per curiam) (quoting *McMillian*, 503 U.S. at 7).

"It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Terebesi v. Torreso*, 764 F.3d 217, 243 (2d Cir. 2014) (quoting *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994)). "As such, an officer who fails to intervene where he or she observes or has reason to know that excessive force is being used or a constitutional violation has been committed by a fellow officer is liable for the preventable harm caused by that officer." *Portillo*, 2022 WL 2337380, at *11 (citing *Anderson*, 17 F.3d at 557). "To be found liable for excessive force, [a defendant] must have either used excessive force himself or failed to intervene, despite having a 'realistic opportunity' to do so, to prevent another officer from applying excessive force." *McGrier v. City of New York*, 849 F. App'x 268, 272 (2d Cir. 2021) (citing *Anderson*, 17 F.3d at 557); *see also Randolph v. Griffin*, 816 F. App'x 520, 525 (2d Cir. 2020) (finding genuine issue of material fact precluded summary judgment on failure to intervene claims predicated on Eighth Amendment excessive force claims); *United States v. Scott*, 833 F. App'x 884, 887–88 (2d Cir. 2020) (under the Eighth Amendment "[i]t is well-settled that an officer has a duty to intervene to protect an individual under the control and custody of the state from excessive force"). [9]

***19** "A correction officer's use of pepper spray may constitute an objectively serious, unnecessary, and wanton infliction of pain in violation of the Eighth Amendment." *Javier v. Russo*, No. 21-CV-7097 (VB), 2023 WL 5532468, at *7 (S.D.N.Y. Aug. 28, 2023); *see also Alston v. Daniels,* No. 15-CV-669 (CSH), 2015 WL 7257896, at *4 (D. Conn. Nov. 17, 2015) ("In the Second Circuit, a prison guard's use of a chemical agent ... on an inmate may, under certain circumstances, constitute unnecessary and wanton infliction of pain in violation of the Eighth Amendment."); *Tracy v. Freshwater*, 623 F.3d 90, 98–99 (2d Cir. 2010) (denying summary judgment on excessive force claim under Fourth Amendment because plaintiff was pepper sprayed when he "had already been handcuffed and was offering no physical resistance of police commands").

It is clearly established in the Second Circuit that law enforcement may not use "significant force," including pepper spray, against a restrained individual who is not resisting and poses no threat to officers. *Jones v. Treubig*, 963 F.3d 214, 225 (2d Cir. 2020) (citing cases); *see also Portillo*, 2022 WL 2337380, at *15. "In cases where a prison official uses a chemical spray against a compliant prisoner, the subjective element is satisfied when spraying the prisoner cannot be characterized as an attempt to maintain or restore discipline." *Baptiste v. Griffin*, No. 18-CV-7274 (NSR), 2022 WL 2316184, at *4 (S.D.N.Y. June 28, 2022) (internal citation and quotation marks omitted). As to the objective element, "there is a substantial body of case law" documenting that exposure to pepper spray "causes 'a variety of incapacitating and painful effects' " such that exposure to such chemical constitutes "more than a *de minimis* use of physical force." *Rodriguez v. City of New York*, No. 14-CV-8647 (PGG), 2016 WL 5476003, at *6, 9 (S.D.N.Y. Sept. 29, 2016) (quoting *Toliver v. New York City Dep't of Corr.*, No. 10-CV-5355 (RJS), 2016 WL 4705166, at *3 (S.D.N.Y. July 29, 2016)) (denying summary judgment on the merits and qualified immunity where "[d]efendants proceeded to use the chemical or pepper spray in what reasonably can be inferred to have been an indiscriminate manner"). Accordingly, correction officers may not use pepper spray "lightly or gratuitously" against unresisting individuals who do not post an immediate threat. *Id.* at 9 (quoting *Tracy*, 623 F.3d at 98).

Here, Plaintiff testified that the first spray of MK-9 lasted longer than 30 seconds. ECF No. 131-8 at 22:2–21. It is undisputed that the pepper spray affected all the passengers due to the small confines of the bus. ECF No. 131-13 at 36:24–37:1; ECF No. 131-20. After that first spray of the chemical agent, Plaintiff says he demanded to get off the bus, and then an officer told him to come up and sit towards the front of the bus, after which the officer sprayed Plaintiff with MK-9 for at least 30 seconds directly on Plaintiff's face, head, shoulders and upper body. SMF ¶ 63; ECF No. 131-8 at 22:22–23:4, 25:14–21. Plaintiff put his head down to try to avoid the effects of the pepper spray, as did all the passengers, but the chemical agent dripped down his head, neck, shoulders and back. ECF No. 131-16; ECF No. 131-8 at 25:14–21. Plaintiff alleges that one of the officers also hit him on the head with an MK-9 cannister. FAC ¶ 42. After being pepper sprayed, the passengers tried to get air through the windows of the bus, but ESU officers in riot gear and face masks sprayed MK-9 through the windows from outside the bus. ECF No. 131-8 at 16:2–17:25, 20:11–22:21.

Aside from contesting the "personal involvement" of certain defendants, on which issue the Court reserves judgment, *see infra* section VI, Defendants' argument with respect to the excessive force claim is that Plaintiff's testimony is so "farfetched and inconsistent" that no rational juror could credit it. Defendants argue that, even viewing the facts in the light most favorable to Plaintiff, it is implausible that Plaintiff was pepper sprayed on his face because he put his head down. Def. Br. at 19–20. Defendants also argue that it requires a "suspension of disbelief" to credit Plaintiff's testimony that he suffered injury as a result of being pepper sprayed because the doctor's notes from Plaintiff's medical visit on August 31, 2016 noted no sign of injury. *Id.* at 20. These arguments miss the mark on several fronts.

***20** First, Defendants improperly seek summary judgment based on facts that are in dispute. Plaintiff maintains that he complained of burning skin, dizziness and headaches stemming from exposure to MK-9 but was asked no follow-up questions about his injuries. SMF ¶ 70; RSMF ¶ 70; ECF No. 131-21; ECF No. 131-8 at 33:13–15. Defendants may argue to the jury that Plaintiff's version of events should not be believed, but this argument does not provide a basis for summary judgment. This argument goes to the credibility of Plaintiff's testimony, and "as a general rule, a district court may not discredit a witness's deposition testimony on a motion for summary judgment, because the assessment of a witness's credibility is a function reserved for the jury." *Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 725 (2d Cir. 2010).

Second, Defendants' argument that no rational juror could credit Plaintiff's version of events – namely, that Plaintiff

could not have been pepper sprayed on his face because he put his head down – misconstrues Plaintiff's deposition testimony and belies common sense. Def. Br. at 20. One can infer how Plaintiff, while handcuffed, could not protect parts of his face from being pepper sprayed, or how being pepper sprayed at close range on the head, shoulders and upper body – as Plaintiff testified he was – might result in chemical agent making contact with one's face. Moreover, Defendants' argument again improperly asks the Court to make credibility assessments that are the province of the jury. *See Baptiste*, 2022 WL 2316184, at *5 (denying summary judgment and qualified immunity in excessive force case regarding use of pepper spray where the credibility of plaintiff's "subjective self-serving statements" regarding what took place was an assessment reserved for the jury).

Third, Defendants argue for the first time in reply that "plaintiff cannot maintain an excessive force claim when he alleges to have suffered only incidental contact from and [sic] otherwise lawful use of chemical agent on other inmates." Def. R. Br. at 5. Defendants mischaracterize Plaintiff's testimony. Plaintiff testified that he was directly pepper sprayed on the face, head, shoulders and upper body. Moreover, this argument fails because there is no dispute that the use of pepper spray, which affected all the passengers due to the small confines of the bus, was intentional. *See Taylor v. Quayyum*, No. 16-CV-1143 (GHW), 2021 WL 6065743, at *5–6 (S.D.N.Y. Dec. 21, 2021) (plaintiff who was an "unintended victim of pepper spray targeted at another" adequately set forth an excessive force claim because the "use of force was intentional" and "objectively unreasonable"). The inquiry under the subjective prong of the excessive force analysis examines whether the use of force was intended, not whether the recipient was intended. *See Rodriguez*, 2016 WL 5476003, at *6, 8–9 (denying summary judgment and qualified immunity where the consequences plaintiff suffered from defendants' use of pepper spray against another individual in a confined space "would have been reasonably foreseeable" to defendant officers, regardless of whether plaintiff was an "unintended recipient of force"). And, in any event, if a jury credits Plaintiff's testimony that an officer walked him to the front of the bus and pepper sprayed him directly or that ESU officers indiscriminately sprayed MK-9 through the windows of the bus, then he was certainly an intended recipient of force.

Fourth, Defendants mischaracterize the law of excessive force. That Plaintiff may not have suffered lasting injuries stemming from his exposure to MK-9 does not preclude his excessive force claim as a matter of law. *See Hudson*, 503 U.S. at 9 (internal citation omitted) ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated ... whether or not significant injury is evident."); *Baptiste*, 2022 WL 2316184, at *4 (quoting *Robison v. Via*, 821 F.2d 913, 924 (2d Cir. 1987)) (rejecting defendant's argument that "Plaintiff suffered only temporary side effects as a result of the chemical agents" as a basis for summary judgment because "the Second Circuit has held that 'if the force used was unreasonable and excessive, the plaintiff may recover even if the injuries inflicted were not permanent or severe' "); *Jones v. Wagner*, No. 20-CV-00475 (VAB), 2022 WL 1525134, at *8 (D. Conn. May 13, 2022) (internal citation and quotation marks omitted) ("Although [the plaintiff's] medical records later show that his pain subsided, case law in this Circuit cautions wariness about granting summary judgment on this basis, on the ground that, if injuries of limited duration were enough to defeat an excessive force claim, police and corrections officers would essentially be able to utilize pepper spray and similar chemical agents with impunity."); *see also Flemming v. Kemp*, No. 09-CV-1185 (TJM) (DRH), 2012 WL 4094196, at *12 (N.D.N.Y. Aug. 30, 2012) ("A *de minimus* injury may still survive summary judgment if there was a malicious use of excessive force.").

***21** Finally, summary judgment against Plaintiff's excessive force claim is particularly inappropriate in light of Plaintiff's testimony that he asked to get off the bus, and was restrained and complying with orders, when an officer brought him to the front of the bus and pepper sprayed him directly. A reasonable jury could credit Plaintiff's testimony in this regard – or with respect to the indiscriminate deployment of MK-9 through the windows of the bus – and conclude that certain Individual Defendants caused, or failed to intervene to stop, Plaintiff from being pepper sprayed when he was already complying, and that further use of the chemical agent against him under those circumstances was malicious and sadistic – in other words, for the purpose of causing harm. *See Jones v. Falco*, No. 20-CV-3485 (VB), 2022 WL 3668358, at *6 (S.D.N.Y. Aug. 25, 2022) (quoting *Wright v. Goord*, 554 F.3d at 268). ("[A] reasonable jury could credit plaintiff's testimony and conclude [defendant] administered pepper spray to plaintiff when he was already complying with the officers' directions, and thus administered pepper spray 'to cause harm maliciously and sadistically.' "). If such testimony is credited, use of pepper spray against Plaintiff under such circumstances "would run counter to clearly established Second Circuit law requiring that such

substances 'not be used lightly or gratuitously' by police and corrections officers." *Rodriguez*, 2016 WL 5476003, at *9 (quoting *Tracy*, 623 F.3d at 98). If Plaintiff's testimony is credited, he did not threaten any corrections officers with harm, and in fact he asked to disembark the bus – both throughout the night and after the first burst of MK-9 – and was instead walked to the front of the bus and pepper sprayed directly and kept on the bus while MK-9 was sprayed through the windows. Under these circumstances, the Court cannot conclude as a matter of law that pepper spraying a handcuffed, unresisting individual in Plaintiff's position was not gratuitous (and therefore excessive) or that failing to intervene while a fellow officer did so was lawful. *See Edrei v. Maguire*, 892 F.3d 525, 543 (2d Cir. 2018) (cleaned up) ("[B]ecause gratuitous force is unreasonable and therefore excessive, we presume that no reasonable officer could have believed that he was entitled to use pepper spray gratuitously against a restrained and unresisting arrestee.").

Accordingly, the court DENIES Defendants' motion with respect to Plaintiff's excessive force claim.

**V. Spoliation**

In his opposition, Plaintiff requests "an adverse inference due to the missing video of the incident, which would quash any genuine dispute [of] material fact in regard[ ] to the force used against Plaintiff in this action." Pl. Opp. at 9. "An inference of spoliation can allow the nonmoving party to survive summary judgment 'in borderline cases' and 'in combination with some (not insubstantial) evidence' in the nonmoving party's favor." *Chloe v. DesignersImports.com USA, Inc.*, No. 07-CV-1791 (CS) (GAY), 2009 WL 1227927, at *9 (S.D.N.Y. Apr. 30, 2009) (quoting *Byrnie v. Town of Cromwell, Bd. Of Educ.*, 243 F.3d 93, 107 (2d Cir. 2001)). In this case, the Court has resolved the summary judgment motion without need to reach spoliation, and the existence of a video of the events of August 31, 2016 is not a material fact at this stage; thus, the Court reserves judgment regarding any inference of spoliation.

**VI. Personal Involvement Under Section 1983**

The Court first sets forth the legal standard for "personal involvement" under Section 1983, then grants Plaintiff leave to amend his First Amended Complaint in order to conform his pleading to this standard.

**A. Framework for Personal Involvement Under Section 1983**

Because Plaintiff seeks monetary damages against Individual Defendants pursuant to Section 1983 claims, he must demonstrate that each officer was personally involved in depriving him of his constitutional rights. *See Grullon v. City of New Haven*, 720 F.3d 133, 138–39 (2d Cir. 2013) (collecting cases). To establish such liability, Plaintiff must show that each "defendant, through the official's own individual actions, has violated the Constitution." *Tangreti v. Bachmann*, 983 F.3d 609, 618 (2d Cir. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)). A plaintiff may establish personal involvement by showing that: "(1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring." *Grullon*, 720 F.3d at 138 (2d Cir. 2013) (cleaned up). In the context of Section 1983 supervisory claims, a plaintiff "must demonstrate both that the defendant was 'aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and that the defendant also drew the inference.' " *Elting v. Lassiter*, No. 22-CV-8573 (PGG), 2023 WL 8699454, at *5 (S.D.N.Y. Dec. 14, 2023) (quoting *Tangreti*, 983 F.3d at 619) (cleaned up).

**B. Leave to Amend Complaint**

***22** Defendant seeks dismissal of this action with respect to all the Individual Defendants, except C.O. Ortiz and C.O. Henry, on the basis that they were not "personally involved" in the challenged conditions of confinement or use of force against Plaintiff. Def. Br. at 11–12, 18–19; Def. R. Br. at 1–2. Plaintiff seeks leave to amend his First Amended Complaint in order to name the "proper defendants" with respect to each cause of action. Pl. Opp. at 4, 8. Defendants' motion is DENIED and Plaintiff's application is GRANTED as specified below.

Based on the present record, which omits, *inter alia*, considerable portions of Plaintiff's and other deponents' testimony, the Court is unable to clearly ascertain which defendants were not personally involved in the previously discussed conditions of confinement and use of force against Plaintiff. Having found sufficient evidence to support the objective seriousness of the deprivations Plaintiff suffered

– which jeopardized Plaintiff's health and safety in ways that at least some individual DOC employees knowingly disregarded – the Court is mindful not to lightly extinguish the claims arising out of those deprivations based only on the need for an amended pleading, especially in light of Plaintiff's status as an incarcerated *pro se* litigant.

Moreover, the Court has concerns about the circumstances under which Defendants purport that *pro se* Plaintiff has "abandoned" almost all of his claims against the Individual Defendants. Def. R. Br. at 1–2. Defendants seek dismissal of Plaintiff's conditions of confinement claim against C.O. Carter for lack of personal involvement on the basis that C.O. Carter was not one of the bus drivers on August 30, 2016. Def. Br. at 12. However, Defendants previously confirmed in 2018 in their response to the Court's *Valentin* order – which provided the information Plaintiff used to amend his First Amended Complaint – that C.O. Carter was the other bus driver. ECF No. 32; ECF No. 131-9 at 35:13–24. On August 5, 2021 – thirty-two months after Plaintiff filed his First Amended Complaint, and twenty-four months after the three-year statute of limitations [10] for Plaintiff's Section 1983 claims elapsed – Defendants represented that "upon information and belief, defendants Carter and Anderson were not present on the bus overnight ...." ECF No. 82 at 2 n.1–2. Defendants concede that they produced "supplemental disclosures identifying additional non-parties whom they learned were also present during the incident at issue in this case" as late as November 22, 2021, thirty-five months (December 2018 to November 2021) after Plaintiff filed his First Amended Complaint and twenty-seven months (August 2019 to November 2021) after the Section 1983 statute of limitations elapsed. Def. R. Br. at 10. Plaintiff appears to have in good faith credited Defendants' potentially erroneous (at least in part) representation in the instant motion practice that he named the wrong defendants in his First Amended Complaint. Pl. Opp. at 4, 8. Defendants characterize Plaintiff as having "abandoned" his excessive force claims except as to C.O. Ortiz and C.O. Henry, *see* Def. R. at 1–2, when, in actuality, Plaintiff requested that the Court defer disposition pending his second amended complaint, which he requested leave to file in accordance with prior order of the Court. Pl. Opp. at 8; ECF No. 135; ECF No. 138. Under these circumstances, and considering Plaintiff's *pro se* status, the Court will not dismiss Plaintiff's conditions of confinement and excessive force claims as to any of the Individual Defendants at this juncture.

***23** Defendants contend that, to the extent Plaintiff wishes to add new defendants, any claims against such parties would be barred by the three-year statute of limitations for Section 1983 claims and would not "relate back" to the date of the original complaint. The Court reserves judgment [11] as to whether Plaintiff's claims, as amended, properly relate back to the date of the filing of the original complaint pursuant to Fed. R. Civ. P. 15(c)(1)(C) or New York Civil Practice Law and Rules Sections 203 or 1024 and whether the Individual Defendants named therein were personally involved in depriving Plaintiff of his constitutional rights. *See Burris v. Nassau Cnty. Dist. Att'y*, No. 14-CV-5540 (PKC), 2023 WL 6450398, at *13 (E.D.N.Y. Sept. 30, 2023) (internal citation omitted) ("Rule 15(c)(1)(A) directs courts to consider both federal and state law and apply whichever affords a 'more forgiving' principle of relation back.").

For the foregoing reasons, and in consideration of Plaintiff's *pro se* status, the Court GRANTS Plaintiff leave to file a second amended complaint to specify the proper defendants for each of his claims. To limit the scope of amendment at this late juncture, the Court only permits Plaintiff to assert each claim against those individuals who violated his constitutional rights, in the form of the challenged conditions of confinement on the bus or in pepper spraying him, by (1) directly causing, ordering or participating in such violation or (2) being made aware of the circumstances of such violation and failing to remedy it. The Court does not permit Plaintiff to amend to add any John Does or parties whose identities remain unknown. Plaintiff shall file his amended complaint no later than **June 6, 2024**.

**VII. Municipal Liability (*Monell*)**

Plaintiff brings municipal liability claims against the City, regarding conditions of confinement and excessive use of force, pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). A claim for municipal liability under Section 1983 requires a plaintiff to "plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." *Wray v. City of New York*, 490 F.3d 189, 195 (2d Cir. 2007) (quoting *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983)). A plaintiff may satisfy the "policy or custom" requirement by alleging one of the following:

> (1) [A] formal policy officially endorsed by the municipality; (2)

> actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation in question; (3) a practice so consistent and widespread that, although not expressly authorized, constitutes a custom or usage of which a supervising policy-maker must have been aware; or (4) a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees.

*Brandon v. City of New York*, 705 F. Supp. 2d 261, 276–77 (S.D.N.Y. 2010) (internal citations omitted); *Patterson v. County of Oneida*, 375 F.3d 206, 226–27 (2d Cir. 2004) (describing methods of establishing *Monell* liability). Moreover, a plaintiff must establish a causal link between the municipality's policy, custom or practice and the alleged constitutional injury. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 n.8 (1985) ("The fact that a municipal 'policy' might lead to 'police misconduct' is hardly sufficient to satisfy *Monell*'s requirement that the particular policy be the 'moving force' behind a *constitutional* violation. There must at least be an affirmative link between[, for example,] the training inadequacies alleged, and the particular constitutional violation at issue.").

***24** The Court found that a reasonable juror could conclude that Plaintiff suffered certain deprivations that are objectively harmful enough to reach constitutional dimensions and that Individual Defendants are not entitled to summary judgment against Plaintiff's conditions of confinement and excessive force claims. The City argues that Plaintiff fails to (1) identify a policy or practice of the City that led to the violation of his constitutional rights, and (2) that such policy was the "moving force" behind the constitutional violations. Def. Br. at 22–23.

Without the benefit of counsel, Plaintiff does not bring to the Court's attention evidence establishing a municipal policy or custom. However, the Court declines to extinguish Plaintiff's *Monell* claims at this juncture, which are at least plausible based on the present record, notwithstanding its omission of considerable portions of deposition testimony and possibly other information adduced in discovery which may be favorable to Plaintiff. It is not clear whether, or to what extent, discovery pursuant to Plaintiff's *Monell* claims has taken place. The Court declines to adjudicate this issue without a fuller picture of the factual record pertaining to Plaintiff's *Monell* claims, which Plaintiff would be better situated bring to the Court's attention with the benefit of *pro bono* counsel. *See infra* section VIII.

Based on the facts discussed in relation to Plaintiff's conditions of confinement and excessive force claims, Plaintiff's *Monell* claims may be meritorious. For instance, Defendants recite facts suggesting that the officers on the bus, per DOC policy, were unable to admit the passengers to any facilities on Rikers Island, let anyone off the bus, or return to MDC. SMF ¶¶ 22–28. If DOC has or had this practice – that when unable to admit transferees to Rikers Island that they cannot return to the transferring facility and may be confined to a transport overnight without access to food, water, lavatories or medical care – such practice may constitute the "moving force" behind any unconstitutional conditions of confinement here. Or, if DOC was aware of the repeated practice of the foregoing or similar, such that it knew similar conditions of confinement were likely to recur, and knowingly disregarded this risk by failing to adequately train its employees to discontinue this practice and adopt proper procedures to safeguard the health and safety of transferees, such failure may constitute the "moving force" behind the same.

Defendants also recite facts suggesting that the events of August 31, 2016, which culminated in officers pepper spraying Plaintiff and the other passengers, proceeded according to protocol for how to handle a "hot bus." SMF ¶¶ 42–46. If DOC has or had a consistent practice directing or permitting the indiscriminate or gratuitous use of MK-9 against all individuals on a "hot bus" – even individuals who are restrained, unresisting and pose no threat to officers – such practice may constitute the "moving force" behind any unconstitutional use of excessive force against Plaintiff here. Or, if DOC was aware of the repeated practice of the foregoing or similar, such that it knew similar use of force was likely to recur, and knowingly disregarded this risk by failing to adequately train its employees to discontinue this practice and adopt proper procedures to protect individuals in Plaintiff's position from being pepper sprayed in an indiscriminate or gratuitous manner, such failure may constitute the "moving force" behind the same. This is particularly true here where it appears DOC has long been on notice of a practice of

excessive use of chemical agents by corrections officers on Rikers Island against incarcerated individuals in violation of its own directives. *See* BOC Chemical Agent Report at 8–9 (providing an overview of the history of use of excessive force by DOC staff since well before the incident at issue here); *see also White v. City of New York*, No. 13-CV-7421 (KPF), 2015 WL 4601121, at *7, n.1 (S.D.N.Y. July 31, 2015) (considering Department of Justice findings letter which "detail[ed] the rampant use of excessive force at Rikers Island," including numerous instances of needless use of pepper spray). Because Plaintiff's *Monell* claims may be meritorious, and the Court cannot ascertain at this juncture whether there is evidence in the record to support them, or whether *Monell* discovery has even taken place, the Court is unable to determine whether the City is entitled to summary judgment against Plaintiff's *Monell* claims. Accordingly, the motion is DENIED without prejudice with respect to Plaintiff's *Monell* claims.

**VIII. Appointment of Pro Bono Counsel**

***25** Following the withdrawal of limited *pro bono* counsel, whose representation concluded at the close of discovery, Plaintiff moved for the appointment of new *pro bono* counsel, which was previously denied. ECF Nos. 45, 60, 78, 117, 118, 132. In determining whether to grant an application for counsel, the Court must consider "the merits of [the] plaintiff's case, the plaintiff's ability to pay for private counsel, his efforts to obtain a lawyer, the availability of counsel, and the plaintiff's ability to gather the facts and deal with the issues if unassisted by counsel." *Cooper v. A. Sargenti Co., Inc.*, 877 F.2d 170, 172 (2d Cir. 1989) (per curiam). Other factors to consider include (1) the plaintiff's ability to investigate the crucial facts; (2) whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact-finder; (3) the plaintiff's ability to present the case; (4) the complexity of the legal issues; and (5) any special reason in the case why appointment of counsel would be more likely to lead to a just determination. *See Hodge v. Police Officers*, 802 F.2d 58, 61–62 (2d Cir. 1986).

Having denied Defendants' summary judgment motion with respect to both the conditions of confinement and excessive force claims, and considering the factors set forth in *Cooper* and *Hodge*, the Court now finds it appropriate to appoint *pro bono* counsel to represent Plaintiff for the purposes of proceeding to trial, including the filing of a second amended complaint (*see supra* section V). As discussed in section VII, Plaintiff would also benefit from the assistance of *pro bono* counsel in bringing to the Court's attention any evidence establishing a municipal policy or custom with respect to his *Monell* claims. Plaintiff has not filed a new motion for the appointment of counsel, but the Court grants Plaintiff *pro bono* counsel *sua sponte*. *See Gunter v. Comm'r of Soc. Sec.*, 361 F. App'x 197, 200 (2d Cir. 2010).

The Clerk of Court is directed to attempt to locate *pro bono* counsel to represent Plaintiff for the purposes of proceeding to trial. The Court advises Plaintiff that there are no funds to retain counsel in civil cases and the Court relies on volunteers. Due to a scarcity of volunteer attorneys, a lengthy period of time may pass before counsel volunteers to represent Plaintiff. If an attorney volunteers, the attorney will contact Plaintiff directly. There is no guarantee, however, that a volunteer attorney will decide to take the case, and Plaintiff should be prepared to proceed with the case without an attorney. The Office of Pro Se Litigation is respectfully requested to provide the Court with an update by **April 8, 2024**, as to whether an attorney is willing to represent Mr. Colson.

**CONCLUSION**

For the reasons set forth herein, Defendants' motion for summary judgment is GRANTED in part and DENIED in part. For the reasons stated in Section II, Plaintiff's due process claims are DISMISSED. For the reasons stated in Sections III and IV, the motion is DENIED with respect to Plaintiff's conditions of confinement and excessive force claims. For the reasons stated in Section V, the Court reserves judgment on spoliation. For the reasons stated in Sections VI and VII, the motion is DENIED without prejudice with respect to Plaintiff's *Monell* claims and which Individual Defendants were not personally involved in the alleged constitutional violations.

Plaintiff's application for leave to file a second amended complaint, to specify the proper defendants for each of his claims, is GRANTED. As specified in section VIII, to limit the scope of amendment at this late juncture, the Court only permits Plaintiff to assert each claim against those individuals who violated his constitutional rights, in the form of the challenged conditions of confinement on the bus or in pepper spraying him, by (1) directly causing, ordering or participating in such violation or (2) being made aware of the circumstances of such violation and failing to remedy it. The Court does not permit Plaintiff to amend to add any John Does or parties whose identities remain unknown. The Court will also not reopen fact discovery absent good cause. Plaintiff shall file his amended complaint no later than **June 6, 2024**.

***26** For the reasons stated in section VIII, the Clerk of Court is directed to attempt to locate *pro bono* counsel to represent Plaintiff for the purposes of proceeding to trial. The Office *of Pro Se* Litigation is respectfully requested to provide the Court with an update by **April 8, 2024**, as to whether an attorney is willing to represent Mr. Colson.

**All Citations**

Slip Copy, 2024 WL 1018582

## Footnotes

1 The Court considers the FAC, which Plaintiff verified under penalty of perjury, as an affidavit for the purposes of summary judgment. *See* *Parker v. Fantasia*, 425 F. Supp. 3d 171, 176 n.1 (S.D.N.Y. 2019) (quoting *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995)) ("[W]here a plaintiff 'verifies his complaint by attesting under penalty of perjury that the statements in the complaint are true to the best of his knowledge,' the 'verified complaint is to be treated as an affidavit for summary judgment purposes.' ").

2 While Defendants now state that the identity of the other bus driver is unknown, Defendants previously confirmed in 2018 that C.O. Carter was the other bus driver. ECF No. 32 at 2; ECF No. 131-9 at 35:13–24.

3 C.O. Chopra testified that he cannot recall the name or gender of the other officer on the bus with him that night, but Defendants previously represented to the Court in 2018 that C.O. Carter was the other bus driver. ECF No. 32 at 2; ECF No. 131-9 at 35:13–24.

4 Defendants now state that C.O. Carter relieved an unknown officer on the bus at approximately August 31, 2016, but Defendants previously confirmed in 2018 that C.O. Carter was the other bus driver. SMF ¶ 33; ECF No. 32 at 2; ECF No. 131-9 at 35:13–24.

5 Captain Johnson and Captain Gumbs-Francis both testified that they could not recall the name of the AMKC tour commander at that time. ECF No. 131-11 at 69:21–24; ECF No. 131-12 at 28:11–13. Captain Gumbs-Francis also testified that she could not recall the names of the officers on the bus. ECF No. 131-11 at 48:16–21, 65:6–9.

6 New York City's Board of Corrections describes the chemical agent MK-9 as a "very powerful form of [pepper spray]" that "is prohibited [by DOC Directive 4510R-H, dated March 7, 2017] from being used against a single individual presenting passive resistance." See N.Y.C. Bd. Of Corr., AN ASSESSMENT OF THE USE OF CHEMICAL AGENTS IN NEW YORK CITY JAILS (Feb. 2024), available at https://www.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/An-Assessment-of-the-Use-of-Chemical-Agents-in-NYC-Jails-Final.pdf (last visited Mar. 8, 2024) (the "BOC Chemical Agent Report"); *see also* ECF No. 131-8 at 25:1–9; ECF No. 131-15 at 37:11–24. It also describes the anticipated effects of exposure to pepper spray, which include: "swelling of the mucous membranes; immediate involuntary closing of the eyes; uncontrollable coughing; gagging; gasping for breath; and the sensation of intense burning of the skin and mucous membranes inside the nose and the mouth." *Id.*

7 As of the date of this Order, Plaintiff is incarcerated at Green Haven Correctional Facility in Stormville, NY.

8 Plaintiff states that he lost his bag of legal paperwork containing documents relevant to this action. ECF No. 131-8 at 80:8–15.

9 District courts have relied on *Anderson* and its progeny in Eighth Amendment excessive force and failure to intervene cases involving corrections officers. *See*, *e.g.*, *Stephenson v. Davis*, No. 22-CV-644 (SVN), 2024

WL 50774, at *4 (D. Conn. Jan. 4, 2024); *see also* *Edrei v. Maguire*, 892 F.3d 525, 542 n.5 (2d Cir. 2018) (noting in the excessive force context that it is "the practice of the Supreme Court and this Circuit ... [to] cross-pollinate between Fourth, Eighth, and Fourteenth Amendment [case law].").

10 *See* *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 79 (2d Cir. 2015) ("Claims under § 1983 are governed by a three-year statute of limitations in New York.").

11 It would be premature for the Court to opine on relation back at this juncture. *See* *Young v. Lugo*, No. 18-CV-4216 (JS), 2023 WL 2624346, at *3 (E.D.N.Y. Mar. 24, 2023).

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Only the Westlaw citation is currently available.
United States District Court, D. Connecticut.

Master RASHID, Plaintiff,
v.
Kalican KURTULUS, et al., Defendants.

No. 3:23-cv-722 (VAB)
|
Signed September 1, 2023

**Attorneys and Law Firms**

Master Rashid, Cheshire, CT, Pro Se.

**INITIAL REVIEW ORDER**

Victor A. Bolden, United States District Judge

***1** Master Rashid ("Plaintiff"), currently confined at Cheshire Correctional Institution in Cheshire, Connecticut, has filed a 196-page Complaint *pro se* under 42 U.S.C. § 1983. Mr. Rashid names twenty-two defendants, Kurtulus Kalican, [1] Lieutenant Jerome Ffrench, Officer Briggs, Officer John Doe 1, Officer John Doe 2, Officer John Doe 3, Officer Doe 4, Officer Doe 5, Lieutenant Doe 6, Lieutenant Doe 7, Lieutenant Doe 8, Lieutenant/DHO Grimaldi, Officer/Investigator Reyes, Officer/Investigator Santaniello, Warden Doe, Deputy Warden Pierce, Captain Blackstock, Officer Schiender, Officer Bell, APRN Deborah Broadley, Dr. Richard Williams, and CHN/HSRC Debra Cruz.

The Prison Litigation Reform Act requires that federal courts review complaints brought by prisoners seeking relief against a government entity or officer or employee of a government entity. 28 U.S.C. § 1915A(a). Upon review, the Court must dismiss the complaint, or any portion of the complaint, that is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915(e)(2)(b), 1915A(b).

The Court has thoroughly reviewed all factual allegations in the Complaint and conducted an initial review of the allegations therein under 28 U.S.C. § 1915A.

Based on this initial review, the Court orders as follows.

All claims asserted in sub-complaints two through four are **SEVERED** under Federal Rule of Civil Procedure 21 and **DISMISSED** without prejudice to refiling in separate actions.

The Clerk of Court is directed to terminate defendants Pierce, Blackstock, Schiender, Bell, Broadley, Cruz, and Williams from this action.

All Fourteenth Amendment claims for denial of substantive and procedural due process and equal protection of the laws, all claims against inmate Kalican, all requests for declaratory and injunctive relief, and all requests for damages against the defendants in their official capacities are **DISMISSED** under 28 U.S.C. § 1915A(b)(1) and (2).

The Clerk of Court also is directed to terminate defendants Grimaldi, Reyes, Santaniello, and Warden Doe from this action.

The case will proceed on the Eighth Amendment claims relating to the use of force and failure to intervene against defendants Does 1-8, Ffrench, and Briggs in their individual capacities and the Eighth Amendment conditions of confinement claim regarding confinement in restraints and denial of access to a bathroom against defendants Does 1-8 and Ffrench in their individual capacities.

***2** Mr. Rashid's motion for preliminary injunction or temporary restraining order [**ECF No. 9**] is **DENIED**.

## I. Factual Background

The incidents underlying this action allegedly occurred while Mr. Rashid, a Virginia inmate confined in Connecticut under the Interstate Corrections Compact, was confined at MacDougall-Walker Correctional Institution.

On February 10, 2022, Mr. Rashid allegedly was lying on his bunk after receiving his evening medication, when an officer allegedly instructed Mr. Rashid to go to the officer's station. When he allegedly arrived, he allegedly was told that he was wanted in the main corridor. When Mr. Rashid allegedly opened the door to the main corridor, he allegedly saw fifteen officers standing in a dimly lit corner. The officers allegedly told Mr. Rashid to "step out" but he allegedly became fearful and ran back into the housing unit. *Id.* at 2, ¶ 1.

The officers allegedly followed Mr. Rashid who entered the housing unit with his fist raised in the air. The officers

allegedly repeatedly sprayed Mr. Rashid with a chemical agent, threw him to the floor, jumped on him, and kicked him. Lieutenant Ffrench allegedly sprayed Mr. Rashid with the first can of the chemical agent. Mr. Rashid allegedly assumed that the officers acted this way because he was a "new arrival transfer offender." *Id.* ¶ 2. Mr. Rashid alleges that he has a serious heart condition, for which he takes daily medication and has access to nitroglycerin, as well as multiple spinal issues, which preclude exposure to chemical agents. *Id.*

As Officer Doe allegedly took Mr. Rashid to the floor, Mr. Rashid allegedly yelled that he was unable to breathe because of the chemical agent, but officers allegedly continued to spray him. Other Officers Doe allegedly punched him in the face and one officer allegedly had him in a choke hold. Other Officers Doe allegedly yanked on his handcuffed arms, allegedly trying to break his arms. An Officer Doe allegedly picked Mr. Rashid off the floor and slammed his face into the wall. *Id.* at 3, ¶ 3.

Mr. Rashid allegedly had a mask over his face that became soaked with the chemical agent. He allegedly continued to yell that he was unable to breathe. Mr. Rashid also allegedly was blinded by the chemical agent and could not see anything. Mr. Rashid allegedly was dragged down the hall to restrictive housing where his clothes were removed and he was strip searched. Mr. Rashid allegedly was then dressed in a jumpsuit, shackled, and handcuffed. He allegedly complained that the handcuffs were too tight, but no one did anything. *Id.* ¶ 4.

A nurse allegedly came into the cell and poured saline solution over Mr. Rashid's head and face. When he allegedly complained that his skin was burning and he could not see, the nurse allegedly said, "this would have to do." *Id.* at 4, ¶ 4. Mr. Rashid allegedly was confined in the cell for hours. Officers allegedly refused his request to have the restraints removed so he could use the bathroom. As a result, Mr. Rashid allegedly soiled himself. *Id.*

Approximately 12:30 a.m. on February 11, 2022, several officers and lieutenants and a state trooper allegedly came to Mr. Rashid's cell. He allegedly was brought to a conference room where the state trooper charged him with assault. Mr. Rashid allegedly denied assaulting anyone. *Id.* ¶ 5.

***3** The officers allegedly told Mr. Rashid that inmate Kalican allegedly said that Mr. Rashid had punched him in the face. Mr. Rashid allegedly admitted that inmate Kalican had been his cellmate for a few weeks before Mr. Rashid contracted COVID-19, but allegedly claimed that inmate Kalican had been moved before Mr. Rashid returned to his cell. Mr. Rashid allegedly said that surveillance footage would show that he never touched inmate Kalican. *Id.* at 4-5, ¶ 6. The officers allegedly told Mr. Rashid that there was no surveillance footage of the assault and there were no witnesses. *Id.* at 5, ¶ 7. After he allegedly was charged, Mr. Rashid allegedly was taken to another cell where he was given clean underwear and the restraints were removed. *Id.* at 5-6, ¶ 10.

Lieutenant Ffrench allegedly issued a disciplinary report charging Mr. Rashid with assault on a correctional employee and a second identical report charging him with interfering with safety and security. *Id.* at 6, ¶ 11. Mr. Rashid also allegedly received a disciplinary report for assaulting inmate Kalican. The report allegedly did not state that Mr. Rashid was seen making physical contact with inmate Kalican or engaging in a heated conversation with him. *Id.* ¶ 12.

Officer Briggs allegedly filed a report stating that he witnessed a crowd of inmates in the vestibule between housing units H1 and H2 and saw an agitated Mr. Rashid backing away from the H2 door heading toward the main concourse. *Id.* ¶ 13. Officer Briggs allegedly stated that he then noticed inmate Kalican on the floor covered with blood. *Id.* ¶ 14.

Between February 11 and 14, 2022, Warden Doe allegedly made a security check in restrictive housing. Mr. Rashid allegedly told the warden that he did not do anything and that there was no proof that he assaulted inmate Kalican. Warden Doe allegedly told Mr. Rashid that he would be "ok" after the hearing and directed him to address his concerns with Investigator Reyes. *Id.* at 7, ¶ 15.

Investigator Reyes allegedly spoke with Mr. Rashid on February 14, 2022. Investigator Reyes allegedly told Mr. Rashid that the security footage did not show him assaulting inmate Kalican. He allegedly asked Mr. Rashid if he would plead guilty to the charge of assaulting staff. Mr. Rashid allegedly responded that he could not enter a plea when the security footage would show that he ran away and did not assault anyone. *Id.* at 7-8, ¶ 16. Investigator Reyes allegedly spoke to the warden. After allegedly reviewing the surveillance footage, the warden allegedly recommended that Mr. Rashid enter a plea to attempted assault and accept a sanction of nine days. Mr. Rashid allegedly refused. *Id.* at 8,

¶ 18. At the disciplinary hearing, after the charges were read, Disciplinary Hearing Officer Lieutenant Grimaldi allegedly told Mr. Rashid that he could get out of restrictive housing if he pleaded guilty to assaulting a correctional employee. Mr. Rashid allegedly said he could not plead guilty when the disciplinary report did not identify one staff member he allegedly assaulted. He allegedly pleaded guilty, however, to get out of restrictive housing. *Id.* at 8-9, ¶ 19.

When Lieutenant Grimaldi allegedly asked about the assault on inmate Kalican, Mr. Rashid allegedly denied doing anything and stated that if he had assaulted inmate Kalican he would have had blood on him. Mr. Rashid allegedly asked Lieutenant Grimaldi to review surveillance footage. *Id.* at 9, ¶ 20. Lieutenant Grimaldi allegedly found Mr. Rashid guilty of the assault. As evidence, he allegedly cited inmate Kalican's statement, the fact that the two inmates had issues before, a matter Mr. Rashid denies, and the fact that Mr. Rashid was nearby and appeared agitated. Mr. Rashid's appeal of the disciplinary finding allegedly was denied. *Id.* ¶ 21. Mr. Rashid allegedly was sanctioned with three days confinement in punitive segregation, thirty days loss of visits, and thirty days loss of mail. *Id.* at 40.

## II. Discussion

***4** Mr. Rashid asserts the following claims based on these allegations: (1) an Eighth Amendment claim that defendant Kalican falsely stated, without any proof, that Mr. Rashid assaulted him; (2) an Eighth Amendment claim that defendants Does 1-8, Ffrench, and Briggs used excessive force against Mr. Rashid or failed to intervene to prevent the use of force; (3) Eighth and Fourteenth Amendment claims that defendants Does 1-8 and Ffrench allowed Mr. Rashid to be restrained for hours without bathroom access; (4) a Fourteenth Amendment claim that defendants Grimaldi, Reyes, Santaniello, and Warden Doe permitted disciplinary action to be taken against Mr. Rashid for assaulting inmate Kalican without any evidence supporting the charge and with an inadequate written disposition; and (5) Fourteenth Amendment claims that defendants Ffrench, Does 1-8, and Briggs permitted false disciplinary and criminal action to be taken against Mr. Rashid.

As a preliminary matter before considering these substantive claims, the Court will address Mr. Rashid's rather lengthy Complaint.

### A. Joinder

Federal Rule of Civil Procedure 20 permits joinder of multiple defendants in one action only if "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). "What will constitute the same transaction or occurrence under the first prong of Rule 20(a) is approached on a case by case basis." *Dixon v. Scott Fetzer Co.*, 317 F.R.D. 329, 331 (D. Conn. 2016) (citation and quotation marks omitted). "The same transaction requirement means that there must be some allegation that the joined defendants conspired or acted jointly." *Arista Records LLC v. Does 1-4*, 589 F. Supp. 2d 151, 154 (D. Conn. 2008) (citation and quotation marks omitted).

As the Second Circuit has observed in the context of Rule 13 of the Federal Rules of Civil Procedure, whether a counterclaim arises out of the same transaction as the original claim depends upon the logical relationship between the claim and whether the "essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Harris v. Steinem*, 571 F.2d 119, 123 (2d Cir. 1978).

Mr. Rashid's Complaint consists of 196 pages and combines four separate sub-complaints.

The first sub-complaint, pages 2-64, asserts claims for use of excessive force, failure to protect, and denial of due process relating to the February 20, 2022 incidents and a subsequent disciplinary hearing. The Defendants identified in the first sub-complaint are Kalican, Does 1-8, Lieutenant Ffrench, Officer Briggs, Disciplinary Hearing Officer Lieutenant Grimaldi, Investigators/Officers Santaniello and Reyes, and Warden Doe.

The second sub-complaint, pages 65-73, asserts a conditions of confinement claim relating to the condition of the showers in September 2022. Defendants Blackstock and Pierce are named in the second sub-complaint.

The third sub-complaint, pages 74-81, asserts claims for unconstitutional conditions of confinement and denial of equal protection relating to an inoperable toilet and a cell flooded with sewage on October 6, 2022. Defendants Bell,

Schiender, and Blackstock are named in the third sub-complaint.

The fourth sub-complaint, pages 116-96, concerns medical treatment. Defendants Cruz, Broadley, and Williams are named in this claim. Pages 81-115 are exhibits in support of the claims in sub-complaints two and three.

The claims in the four sub-complaints are topically unrelated and involve different defendants. Indeed, Captain Blackstock is the only Defendant named in more than one sub-complaint. As the claims arise from different events, it is appropriate to sever the sub-complaints and have each sub-complaint proceed in a separate action. *See Costello v. Home Depot U.S.A., Inc.*, 888 F. Supp. 2d 258, 264 (D. Conn. 2012) (severance may be appropriate when claims "arise from different circumstances and would require separate analyses.").

***5** Accordingly, the claims in sub-complaints two through four are severed and dismissed without prejudice as improperly joined. If Mr. Rashid wishes to pursue these claims, he may do so in separate actions. *See* Fed. R. Civ. 21 ("The court may ... sever any claim against a party.").

The Court next will consider the claims in the first sub-complaint regarding the use of excessive force and the subsequent disciplinary hearing.

B. The Claims Against Another Inmate

Private citizens generally are not subject to liability under section 1983. *See American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999); *Ciambriello v. County of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002). For the actions of a private party to be imputed to the state, there must be facts alleged showing "a sufficiently close nexus between the State and the challenged action of [the private defendants] so that the action ... may fairly be treated as that of the State itself." *NCAA v. Tarkanian*, 488 U.S. 179, 192 n.12 (1988) (citations omitted); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (a private party may be held liable if it was "a willful participant in joint activity with the State or its agents").

In his first claim, Mr. Rashid alleges that Mr. Kalican violated his Eighth Amendment rights by providing correctional staff false information. To state a Section 1983 claim against Mr. Kalican, however, Mr. Rashid must allege facts showing that persons acting under color of state law deprived him of constitutional or federally protected rights.

But Mr. Rashid alleges only that inmate Kalican accused him of assault. Mr. Rashid alleges no facts suggesting that any defendant was involved in his doing so. Mr. Rashid also has not alleged facts suggesting that inmate Kalican's actions could be imputed to the state defendants. Thus, he fails to state a cognizable claim against inmate Kalican.

Accordingly, any claims against inmate Kalican are dismissed under 28 U.S.C. § 1915A(b)(1).

C. The Excessive Force Claims

When an inmate alleges that excessive force was used by a correctional officer, the issue is "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." *Hudson v. McMillian*, 503 U.S. 1, 6 (1992). A *de minimis* use of force will rarely be sufficient to satisfy the objective element unless that force also is "repugnant to the conscience of mankind." *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010) (quoting *Hudson*, 503 U.S. at 9-10 (internal quotation marks omitted)). Nor is the extent of the inmate's injuries as a result of the defendant's conduct the critical issue in determining the objective component. *See Wilkins*, 559 U.S. at 37 (the "core judicial inquiry" is "not whether a certain quantum of injury was sustained," but rather whether unreasonable force was applied given the circumstances); *Hudson*, 503 U.S. at 9 ("[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated" irrespective of whether significant injury was sustained).

The court considers several factors including "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." *Hudson*, 503 U.S. at 7 (internal quotation marks and citation omitted). Officers are liable not only when they use excessive force themselves, but also when they fail to intervene to prevent the use of excessive force by another officer when they are in a position to observe the conduct and have time to intervene. *See Sloley v. VanBramer*, 945 F.3d 30, 46-47 (2d Cir. 2019). "Liability attaches on the theory that the officer, by failing to intervene,

becomes a 'tacit collaborator' in the illegality." *Figueroa v. Mazza*, 825 F.3d 89, 106 (2d Cir. 2016).

***6** In his second claim, Mr. Rashid alleges that defendants Does 1-8, Ffrench, and Briggs used excessive force against Mr. Rashid or failed to intervene to prevent the use of force. He alleges that he had not assaulted anyone and, in fact, was running from officers he believed intended to assault him when he was excessively sprayed with a chemical agent and assaulted. Further development of the record is needed on this claim to determine whether the application of force was necessary, what threat was perceived by correctional officers to warrant use of force, what efforts, if any, were made to temper the severity of the response, and whether any defendant had an opportunity to intervene to prevent the use of excessive force.

Accordingly, for now, the Eighth Amendment excessive force and failure to intervene claims against defendants Does 1-8, Ffrench, and Briggs will proceed for further development of the record.

D. The Conditions of Confinement Claims

"When reviewing the use of restraints under the Eighth Amendment, the court must consider the individual circumstances surrounding the use of restraints, including the length of time restraints were imposed and the objective sought to be served." *Alston v. Butkiewicus*, No. 3:09-cv-207(CSH), 2012 WL 6093887, at *11 (D. Conn. Dec. 7, 2012). Because "[m]aintaining order and security in a prison is a legitimate penological objective ... the use of restraints that are reasonably related to maintaining prison order and security, without more, does not violate the Eighth Amendment." *Shehan v. Erfe*, No. 3:15-cv-1315(MPS), 2017 WL 53691, at *9 (D. Conn. Jan. 4, 2017); *see also Caballero v. Lantz*, No. 3:05-cv-140(CFD), 2008 WL 638397, at *3 (D. Conn. Mar. 5, 2008) ("The use of in-cell restraints in prisons is not prohibited by the Eighth Amendment and is certainly justified under many circumstances.").

In his third claim, Mr. Rashid alleges that defendants Does 1-8 and Ffrench permitted him to be restrained for hours without bathroom access. Mr. Rashid alleges that he was taken to restrictive housing and held in in-cell restraints from approximately 7:00 p.m. until 1:00 a.m. He alleges that the restraints were tight and he was not released from the restraints to use the bathroom during that time. Mr. Rashid alleges that these actions violated his Eighth and Fourteenth Amendment rights.

Mr. Rashid further alleges that he did not assault any correctional officer, but force was used against him. At this stage of the case, it is not clear whether the use of restraints was warranted. In addition, Mr. Rashid alleges that the restraints were tight but nothing was done when he complained. Nor was he permitted to use the bathroom during the eight hours he was restrained causing him to soil himself.

These allegations are sufficient to permit his Eighth Amendment claim to proceed against the Defendants alleged to be responsible for his placement, Does 1-8 and Ffrench. *See Davis v. Rinaldi*, No. 3:19-cv-504(CSH), 2019 WL 7879729, at *11 (D. Conn. Oct. 31, 2019) (permitting Eighth Amendment claim for placement in restraints to proceed where plaintiff alleged that he did not start altercation and did not fight back*); see also Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (noting that "deprivation of bathroom breaks" where prisoner was confined "created a risk of particular discomfort and humiliation" contributed to punishment being considered cruel and unusual and noting harm from being denied change of clothing after defecating on oneself).

But as to these actions also violating his Fourteenth Amendment rights to due process and equal protection of the laws, "where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claim under that explicit provision and not the more generalized notion of substantive due process." *Kia P. v. McIntyre*, 235 F.3d 749, 757-58 (2d Cir. 2000) (quoting *Conn v. Gabbert*, 526 U.S. 286, 293 (1999) (internal quotation marks omitted)). Because the Eighth Amendment addresses Mr. Rashid's confinement claims, any substantive due process claim, based on the same factual allegations, will be dismissed under 8 U.S.C. § 1915A(b)(1).

***7** To state an equal protection claim, Mr. Rashid must allege that: (1) he was treated differently from similarly situated individuals and (2) the difference in or discriminatory treatment was based on "impermissible considerations such as race, religion, intent to punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000) (quoting *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980)). As Mr. Rashid does not identify any similarly situated inmate who was treated differently, he cannot state a cognizable equal protection claim. Any equal

protection claim, therefore, will be dismissed under 28 U.S.C. § 1915A(b)(1).

Accordingly, as to Mr. Rashid's conditions of confinement claim, his Eighth Amendment claim will proceed, but his substantive due process and equal protections claims, ones arising out of the same factual allegations, will be dismissed.

E. Due Process Claim – Assault on Inmate Kalican

To state a claim for violation of his right to procedural due process, Mr. Rashid must allege facts showing that he had a protected liberty interest and that he was deprived of that interest without being afforded due process of law. *See Walker v. Fischer*, 523 F. App'x 43, 44 (2d Cir. 2013) (citing *Giano v. Selsky*, 238 F.3d 223, 225 (2d Cir. 2001)). The Due Process Clause, standing alone, generally does not create a protected liberty interest in conditions of confinement, as long as the conditions are "within the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum v. Fano*, 427 U.S. 215, 228 (1976) (finding no protected liberty interest in freedom from interstate prison transfer, even to a maximum security facility, because prison officials have discretion to transfer prisoners among correctional facilities "for whatever reason or for no reason at all"). There are circumstances under which a state statute, policy, or regulation, however, can create a protected liberty interest relating to conditions of confinement.

In *Sandin v. Conner*, 515 U.S. 472 (1995), the Supreme Court held that a liberty interest warranting due process protection "will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force ... nonetheless imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. Thus, to assess Mr. Rashid's claim, the Court must determine whether the sanctions imposed at the disciplinary hearing constitute an atypical and significant hardship.

In his fourth claim, Mr. Rashid contends that he was denied procedural due process in that defendants Grimaldi, Reyes, Santaniello, and Warden Doe permitted disciplinary action to be taken against him for assaulting inmate Kalican without any supporting evidence.

At the disciplinary hearing, Mr. Rashid received sanctions of three days confinement in punitive segregation, thirty days loss of mail, and thirty days loss of visits. *See* ECF No. 1 at 40. In *Sandin*, the Supreme Court held that confinement in the restrictive housing unit for thirty days for disciplinary reasons did not implicate a constitutionally protected liberty interest. 515 U.S. at 485-86 ("Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest."). Further, the Second Circuit has held that confinement in restrictive housing for less than 101 days does not constitute an atypical and significant hardship sufficient to state a claim under *Sandin*. *See Sealey v. Giltner*, 197 F.3d 578, 589 (2d Cir. 1999) (finding that 101-day confinement in restrictive housing, while "doubtless unpleasant," did not constitute atypical and significant hardship); *Lewis v. Sieminski*, No. 3:08-cv-728(JCH), 2010 WL3287991, at *6 (D. Conn. Sept. 22, 2010) (noting that "the decisions in the Second Circuit are unanimous that keeplock or [segregated housing unit] confinement of 20 days or less in New York prisons is not 'atypical or significant hardship' under *Sandin*").

***8** As the Second Circuit has held that a brief confinement in restrictive housing, such as three days, does not constitute an atypical and significant hardship, this sanction is insufficient to support a claim for denial of due process. The additional sanctions of thirty days loss of mail and thirty days loss of visits, imposed sequentially after Mr. Rashid's release from RHU, do not alter this determination. *See Baldwin v. Arnone*, No. 3:12-cv-243(JCH), 2013 WL 628660, at *3, 8 (D. Conn. Feb. 19, 2013) (holding that sanctions of fifteen days confinement in punitive segregation followed by thirty days loss of recreation and ninety days loss of telephone privileges are insufficient to demonstrate atypical and significant hardship to support a due process claim under *Sandin*) (citing cases).

As Mr. Rashid's disciplinary sanctions do not constitute an atypical and significant hardship, he fails to state a plausible due process claim based on the guilty finding at the disciplinary hearing.

Accordingly, Mr. Rashid's Fourteenth Amendment due process claim relating to the assault on inmate Kalican will be dismissed under 28 U.S.C. § 1915A(b)(1).

F. Due Process Claim – Assault on Staff

When a criminal defendant pleads guilty, he "admits his guilt and waives all non-jurisdictional challenges to his conviction." *Sosa v. Cleaver*, No. 3:03-cv-1707(DJS)(TPS), 2005 WL 1205119, at *7 (D. Conn. May 18, 2005) (citing *United States v. Sykes*, 697 F.2d 87, 89 (2d Cir. 1983)). Prisoners are afforded fewer rights in prison disciplinary proceedings than criminal defendants receive at trial. *See Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) ("Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply."). As a result, courts considering due process claims have rejected those claims where the prisoner has pleaded guilty to the disciplinary charge. *See Coleman v. Sutton,* 530 F. Supp. 2d 451, 453 (W.D.N.Y. 2008) (plaintiff's plea of guilty to the charges in disciplinary report "defeats any claim based on issuance of the report"), *aff'd*, 355 F. App'x 566 (2d Cir. 2009); *see also Rodriguez v. Cook*, No. 3:20-cv-1902(CSH), 2022 WL 4104100, at *6 n.4 (D. Conn. Sept. 8, 2022) (plaintiff waived any procedural due process challenge to disciplinary charges by entering guilty plea); *Sosa*, 2005 WL 1205119, at *7 (noting that "[r]esearch has revealed no cases permitting an inmate who has pled guilty to disciplinary charges to challenge the propriety of the issuance of the disciplinary report").

In his fifth, and final, claim, Mr. Rashid alleges that defendants Ffrench, Does, 1-8, and Briggs permitted false charges to proceed against him for assault on staff both in state court and prison disciplinary proceedings. But Mr. Rashid pleaded guilty to the disciplinary charge for assault on staff, allegedly to be released from restrictive housing. As a result, any due process challenge to the disciplinary report for assault on staff will be dismissed under 28 U.S.C. § 1915A(b)(1).

Mr. Rashid also challenges the allegedly false criminal charge asserted against him for assault on staff as a denial of due process. But, to state a cognizable due process claim, Mr. Rashid must allege facts showing that he was deprived of a protected liberty interest. Courts considering due process claims based on charges filed against incarcerated persons have held, however, that a prisoner has no due process claim where his period of incarceration was not lengthened as a result of the new charges. *See Parker v. City of New York*, No. 05 Civ. 1083(PKC)(GWG), 2008 WL 110904, at *9 (S.D.N.Y. Jan. 7, 2008) (plaintiff was not deprived of his liberty interest where the period of incarceration was not lengthened as a result of new charges brought against him while incarcerated); *Holmes v. Grant*, No. 03 Civ. 3426, 2006 WL 851753, at *14 (S.D.N.Y. Mar. 31, 2006) ("An inmate already incarcerated has not suffered any unconstitutional deprivation of liberty as a result of being charged with new criminal offenses ....").

***9** As Mr. Rashid was already incarcerated and does not allege that his sentence was lengthened, or even that he was convicted of the charge, he fails to state a plausible due process claim as a result of the state charges for assault on staff.

Accordingly, this due process claim will be dismissed under 28 U.S.C. § 1915A(b)(1).

G. Declaratory and Injunctive Relief

Declaratory relief serves to "settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationship." *Colabella v. American Inst. of Certified Pub. Accountants*, No. 10-cv-2291(KAM)(ALC), 2011 WL 4532132, at *22 (E.D.N.Y. Sept. 28, 2011) (citation omitted). As such, "[d]eclaratory relief operates prospectively to enable parties to adjudicate claims before either side suffers great damages." *Orr v. Waterbury Police Dep't*, No. 3:17-cv-788(VAB), 2018 WL 780218, at *7 (D. Conn. Feb. 8, 2018). In *Orr*, the court dismissed the request for declaratory judgment that the defendants had violated the plaintiff's Fourth Amendment rights during his arrest because the request "concern[ed] only past actions." *Id.*

Mr. Rashid seeks a declaration that the actions of the defendants violated his various constitutional rights. As Mr. Rashid's request for declaratory relief concerns past actions, any request for declaratory relief would not be cognizable.

Accordingly, the requests for declaratory relief will be dismissed.

Mr. Rashid's request for injunctive relief seeks expungement of the disciplinary finding and reduction of his classification which, presumably, was raised after the disciplinary proceedings. As the Court has dismissed all claims relating to the disciplinary proceedings, this request is dismissed as moot.

H. Official Capacity Claims

The Eleventh Amendment prohibits an award of damages against state officials in their official capacities unless the state has waived that immunity or Congress has abrogated it. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Section 1983 does not abrogate state sovereign immunity. *Quern v. Jordan*, 440 U.S. 332, 343 (1979).

Mr. Rashid does not indicate whether he names the defendants in their individual or official capacities. As he included requests for declaratory and injunctive relief, the Court assumes that he named all defendants in both individual and official capacities. However, the only remaining claims are for damages.

Nor does Mr. Rashid allege facts suggesting that the state has waived immunity in this case. Thus, as all defendants are state officials, Mr. Rashid cannot obtain damages from any defendant in his or her official capacity.

Accordingly, all claims for damages against the defendants in their official capacities will be dismissed under 28 U.S.C. § 1915A(b)(2).

I. Motion for Preliminary Injunction

Interim injunctive relief "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Grand River Enterprise Six Nations Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (citation omitted). To prevail on his claim for mandatory relief, Mr. Rashid must demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Glossip v. Gross*, 576 U.S. 863, 876 (2015) (internal quotation marks and citation omitted); *see also Hester ex rel. A.H. v. French*, 985 F.3d 165, 176 (2d Cir. 2021) (to obtain mandatory preliminary injunctive relief against a government actor, plaintiff must, *inter alia*, "make a strong showing of irreparable harm" absent injunctive relief and "demonstrate a clear or substantial likelihood of success on the merits"). The Second Circuit considers a showing of irreparable harm the most important requirement for an award of preliminary injunctive relief. *See Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009).

***10** The district court has wide discretion in determining whether to grant preliminary injunctive relief. *See Moore v. Consolidated Edison Co. of New York, Inc.*, 409 F.3d 506, 511 (2d Cir. 2005). "In the prison context, a request for injunctive relief must always be viewed with great caution so as not to immerse the federal judiciary in the management of state prisons." *Fisher v. Goord*, 981 F. Supp. 140, 167 (W.D.N.Y. 1997) (citing *Farmer v. Brennan*, 511 U.S. 825, 846-47 (1994)) (other citations omitted). The Supreme Court has repeatedly stated that "plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citations omitted). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* (citation omitted).

In addition, allegations of irreparable harm or claims of a likelihood of success on the merits must be substantiated with admissible evidence. *Torrez v. Semple*, No. 3:17-cv-1223(SRU), 2017 WL 6624009, at *1 (D. Conn. Dec. 28, 2017); *see also Cox v. Morley*, No. 9:20-cv-1235(GLS/CFH), 2020 WL 6781522, at *10 n.13 (N.D.N.Y. Nov. 18, 2020) ("any renewed request for injunctive relief must be supported by evidence, as opposed to mere allegations, showing that the alleged irreparable harm is imminent"); *Hancock v. Essential Res., Inc.*, 792 F. Supp. 924, 928 (S.D.N.Y. 1992) ("Preliminary injunctive relief cannot rest on mere hypotheticals.").

Mr. Rashid has filed a motion for preliminary injunction or temporary restraining order seeking orders that the Defendants (1) cease trying to intimidate him to hinder prosecution of this case; (2) provide him, and secure for trial, surveillance footage of the University of Connecticut hospital and loading dock and the Cheshire Correctional Institution AP room on the evening of May 22, 2023; (3) provide him the names of all John Doe defendants; and (4) protect his person, legal work, and books from harm by the defendants.

Mr. Rashid's motion appears to be based on speculation about possible future events.

Further, as one of the requirements for an award of preliminary injunctive relief is demonstration of a likelihood of success on the merits of his claims, Mr. Rashid's requests

for preliminary injunctive relief must relate to the claims in the operative complaint. *See, e.g., DeBeers Consol. Mines Ltd. v. United States*, 325 U.S. 212, 220 (1945) (preliminary injunction inappropriate where the injunction "deals with a matter lying wholly outside of the issues in the suit"); *McMillian v. Konecny*, No. 9:15-CV-0241(GTS/DJS), 2018 WL 813515, at *2 (N.D.N.Y. Feb. 9, 2018) (relief sought in motion for temporary restraining order or preliminary injunction must relate to claims in complaint); *Torres v. UConn Health*, No. 3:17-cv-325(SRU), 2017 WL 3713521, at *2 (D. Conn. Aug. 29, 2017) (preliminary injunctive relief not warranted because claim in motion was unrelated to underlying claims in complaint).

Mr. Rashid's claims in this case concern the use of excessive force and related disciplinary proceedings that occurred in February 2022, while Mr. Rashid was confined at MacDougall-Walker Correctional Institution. He is now confined at Cheshire Correctional Institution. And the requests in his motion do not concern the use of force incident or the disciplinary proceedings. Rather they deal with matters occurring at Cheshire Correctional Institution around May 2023, over a year later and involve persons who are not defendants in this case.

Finally, Mr. Rashid cannot obtain preliminary injunctive relief from persons who are not named as defendants. *See* Fed. R. Civ. P. 65(d)(2) (injunction binding only on parties); *Lapierre v. Lavalley*, No. 9:15-cv-1499(MAD/DJS), 2016 WL 4442799, at *3 (N.D.N.Y. Aug. 23, 2016) (plaintiff could not seek injunctive relief against correctional staff at prison to which he had been transferred as they were not defendants in the case and could not seek injunctive relief against staff at former facility because transfer mooted request for injunctive relief); *Oliphant v. Villano*, No. 3:09-cv-862(JBA), 2010 WL 5069879, at *2 (D. Conn. Dec. 3, 2010) (holding that the court lacks jurisdiction to enjoin conduct of prison mental health, medical, and correctional staff who are not defendants in the case).

***11** Accordingly, Mr. Rashid's motion for preliminary injunction or temporary restraining order will be denied. As for the information sought regarding the identities of the John Does currently in this lawsuit, an Initial Discovery Disclosure Order will be issued in conjunction with this order requiring the Defendants to provide the names of witnesses having relevant information, which presumably includes the Doe defendants, as they are alleged to have participated in the use of force.

**III. Conclusion**

All claims asserted in sub-complaints two through four are **SEVERED** under Federal Rule of Civil Procedure 21 and **DISMISSED** without prejudice to refiling in separate actions.

The Clerk of Court is directed to terminate defendants Pierce, Blackstock, Schiender, Bell, Broadley, Cruz, and Williams from this action.

All Fourteenth Amendment claims for denial of substantive and procedural due process and equal protection of the laws, all claims against inmate Kalican, all requests for declaratory and injunctive relief, and all requests for damages against the defendants in their official capacities are **DISMISSED** under 28 U.S.C. § 1915A(b)(1) and (2).

The Clerk of Court also is directed to terminate defendants Grimaldi, Reyes, Santaniello, and Warden Doe from this action.

The case will proceed on the Eighth Amendment claims relating to the use of force and failure to intervene against defendants Does 1-8, Ffrench, and Briggs in their individual capacities and the Eighth Amendment conditions of confinement claim regarding confinement in restraints and denial of access to a bathroom against defendants Does 1-8 and Ffrench in their individual capacities.

Mr. Rashid's motion for preliminary injunction or temporary restraining order [**ECF No. 9**] is **DENIED**.

The Court enters the following additional orders.

(1) **The Clerk of Court shall** contact the Department of Correction Office of Legal Affairs to ascertain current service addresses for defendants Ffrench and Briggs, mail a waiver of service of process request packet containing the Complaint and this Order to each defendant at the address provided by **September 29, 2023**, and report to the court on the status of the waiver request by **October 13, 2023**. If any Defendant fails to return the waiver request, the Clerk of Court shall arrange for in-person service by the U.S. Marshals Service on Defendant in his individual capacity and the defendant shall be required to pay the cost of such service.

(2) **The Clerk of Court shall** send Plaintiff a copy of this Order.

(3) **The Clerk of Court shall** send a courtesy copy of the Complaint and this Order to the Connecticut Attorney General and the Department of Correction Office of Legal Affairs.

(4) Defendants shall file their response to the complaint, either an Answer or Motion to Dismiss, by **December 15, 2023**. If they choose to file an Answer, they shall admit or deny the allegations and respond to the cognizable claim recited above. They also may include all additional defenses permitted by the Federal Rules.

(5) Discovery, under Federal Rules of Civil Procedure 26 through 37, shall be completed by **May 17, 2024**. Discovery requests need not be filed with the court.

(6) All motions for summary judgment shall be filed by **June 21, 2024**.

(7) Under Local Civil Rule 7(a), a nonmoving party must respond to a dispositive motion within twenty-one (21) days of the date the motion was filed. If no response is filed, or the response is not timely, the dispositive motion can be granted absent objection.

***12** (8) If Plaintiff changes his address at any time during the litigation of this case, Local Court Rule 83.1(c)2 provides that he MUST notify the court. Failure to do so can result in the dismissal of the case. Plaintiff must give notice of a new address even if he is incarcerated. Plaintiff should write PLEASE NOTE MY NEW ADDRESS on the notice. It is not enough to just put the new address on a letter without indicating that it is a new address. If Plaintiff has more than one pending case, he should indicate all the case numbers in the notification of change of address. Plaintiff should also notify Defendants or the attorney for Defendants of his new address.

(9) Plaintiff shall utilize the Prisoner Efiling Program when filing documents with the court. Plaintiff is advised that the Program may be used only to file documents with the court. As local court rules provide that discovery requests are not filed with the court, discovery requests must be served on Defendants' counsel by regular mail.

(10) The Clerk of Court shall immediately enter the District of Connecticut Standing Order Re: Initial Discovery Disclosures concerning cases initiated by self-represented inmates and shall send a copy to Plaintiff.

(11) The Court cannot effect service on defendants Doe 1-8 without their full names and current work or service addresses. Plaintiff is directed to obtain this information through discovery and file a notice containing the information. Once the notice has been filed, the Court will order service on defendants Doe 1-8.

SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2023 WL 5672589

## Footnotes

1 Mr. Rashid names this defendant, as Kalican Kurtulus in the case caption. Records available on the Department of Correction website, however, show that his name is Kurtulus Kalican. *See* www.ctinmateinfo.state.ct.us/detailsupv.asp?id_inmt_num=314840. The Court may take judicial notice of matters of public record. *See, e.g., Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006); *Kelley v. Quiros*, No. 3:22-cv-1425(KAD), 2023 WL 1818545, at *2 (D. Conn. Feb. 8, 2023) (taking judicial notice of state prison website inmate locator information). The Court uses the defendant's correct name in this order and requests the Clerk to correct the docket.


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United States District Court, S.D. New York.

Isreal VELEZ, Plaintiff,
v.
CITY OF NEW YORK, New York City Department of Correction, Captain Sewer, Shield #Unknown, Correction Officer FNU Brown, Shield #Unknown, Correction Officer FNU Mateo, Shield #9169, and Correction Officer FNU Jacob, Shield #18421, Defendants.

1:17-cv-9871-GHW
|
Signed 08/01/2019

**Attorneys and Law Firms**

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MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

***1** Plaintiff Isreal Velez ("Plaintiff" or "Velez") brought this action claiming that in October 2016, while he was a pretrial detainee housed at Rikers Island, he was the victim of a violent attack. Plaintiff asserts claims against Defendants Captain Robyn Sewer, Correction Officer FNU Brown, Correction Officer FNU Mateo, and Correction Officer FNU Jacob for failing to prevent the attack, failing to intervene in the attack, and conspiring to permit the attack and conceal their actions. He also asserts *Monell* claims against the City of New York as well as New York common law claims for negligent hiring, training, and retention. Defendants Sewer, Mateo, Jacob, and the City of New York have moved for summary judgment, arguing that Plaintiff has not put forth sufficient evidence for a jury to find in his favor on any of his claims and that, alternatively, Defendants Mateo, Jacob, and Sewer are entitled to qualified immunity. For the reasons discussed below, Defendants' motion is GRANTED. [1]

**I. BACKGROUND**

The Court views the facts in the light most favorable to the non-moving party. *See Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012). Unless otherwise indicated, the following facts are undisputed.

On October 5, 2016, Plaintiff, a pre-trial detainee, was transported from the George R. Vierno Center ("GRVC") on Rikers Island to the Manhattan Mental Health Court. Dkt. No. 45 ("56.1 Stmt.") at ¶¶ 1, 4. While waiting for his scheduled court appearance at the Manhattan Mental Health Court, Plaintiff was placed in a holding cell with other inmates. *Id.* at ¶ 6. One of the inmates placed in the cell with Plaintiff was Daniel Sparber ("Sparber"). *Id.* at ¶ 7. Although Sparber did not speak to Plaintiff or make any physical contact with Plaintiff, Sparber was "pacing up and down ... like he was plotting" which made Plaintiff feel like he had "problems in that cell." *Id.* at ¶ 8; Deposition of Isreal Velez, Dkt. No. 37-2 ("Velez Dep."), at 75:5-21. Plaintiff also testified that Sparber looked at him with a "menacing stare." Velez Dep. at 83:3-12. Plaintiff had never met Sparber prior to October 5, 2016. 56.1 Stmt. at ¶ 9.

After his court appearance, Plaintiff alerted Correction Officer Mateo to several concerns. At his deposition, Plaintiff testified that he told Officer Mateo that he was thirsty and he needed to use the restroom. Velez Dep. at 84:19-24. Plaintiff also testified that he told Officer Mateo that he felt like his "life [was] in danger in that jail cell," although he did not "get into details" and "didn't point anyone out." *Id.* at 84:22-23, 85:5-8. However, Plaintiff later testified that he did tell Officer Mateo about a particular inmate who was "pacing up and down," to which Officer Mateo responded, "[Y]es, he's a real bad ass." *Id.* at 89:3-8. Due to these concerns, Plaintiff requested that he be transferred to his own holding cell. *Id.* at 89:11-14. Officer Mateo declined Plaintiff's request and escorted Plaintiff back to his original holding cell. *Id.* at 85:11-4, 88:14-16.

***2** Once Plaintiff was back in his cell, Correction Officer Jacob arrived to provide water to Plaintiff and the other inmates. 56.1 Stmt. at ¶ 15. Plaintiff informed Officer Jacob that he was having problems in the cell and wished to be moved to another cell, gesturing at Sparber. *Id.* However, as Plaintiff went to reach for a cup of water, Sparber simultaneously reached for the same cup. 56.1 Stmt. at ¶ 18. Plaintiff looked at Sparber and asked, "You don't mind, do you?" to which Sparber responded, "Yeah, I mind." Velez Dep. at 101:4-7. Plaintiff put the cup of water up to his mouth.

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*Id.* at 101:8-9. Sparber then punched Plaintiff on the left side of his face, in front of Officer Jacob. 56.1 Stmt. at ¶ 19.

Plaintiff and Sparber wrestled with each other for fifteen minutes and Sparber eventually bit Plaintiff on the left side of his face. *Id.* at ¶ 20. Plaintiff struck Sparber in the chin and grabbed him by the throat. *Id.* at ¶ 21. As soon as the fight broke out, Officer Jacob repeatedly ordered Sparber to "get off him," but Sparber did not listen to her commands. *Id.* at ¶ 22. Plaintiff also testified that Defendants Brown and Mateo were present outside of the holding cell during the fight, but that he did not know what those officers were doing during the fight. Velez Dep. 106:13-18, 107:10-23. Captain Sewer, who supervised the correction officers at the Manhattan Mental Health Court, testified in her deposition that she ran to the cell once she heard the commotion and ordered the surrounding officers to break up the fight. Deposition of Robyn Sewer, Dkt. No. 42-1 ("Sewer Dep."), at 15:5-15, 24:25-25:12. Captain Sewer helped remove Sparber from the cell "because he was the more aggressive one." *Id.* at 30:4-9.

After the fighting ceased, Captain Sewer interviewed Plaintiff and escorted him to the medical clinic to treat his wounds. 56.1 Stmt. at ¶ 27. As a result of the altercation, Plaintiff suffered from bite marks to his face and scalp, injuries to his head and knees, and aggravation of a pre-existing toe injury. Velez Dep. at 128:10-12, 131:13-15, 136:10-139:8. Plaintiff also claims that he suffered from depression and other emotional injuries resulting from the attack. *Id.* at 141:17-19. Plaintiff waited for five hours after the fight ended before he received medical treatment. 56.1 Stmt. at ¶ 24.

## II. LEGAL STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("[S]ummary judgment is proper '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.' " (quoting former Fed. R. Civ. P. 56(c))). A genuine dispute exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," while a fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

The movant bears the initial burden of demonstrating "the absence of a genuine issue of material fact," and, if satisfied, the burden then shifts to the non-movant to present "evidence sufficient to satisfy every element of the claim." *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008) (citing *Celotex*, 477 U.S. at 323). To defeat a motion for summary judgment, the non-movant "must come forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting former Fed. R. Civ. P. 56(e)). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252. Moreover, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita*, 475 U.S. at 586 (citations omitted), and she "may not rely on conclusory allegations or unsubstantiated speculation," *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2001) (internal quotation marks and citation omitted).

***3** In determining whether there exists a genuine dispute as to a material fact, the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Johnson*, 680 F.3d at 236 (internal quotation marks and citation omitted). The Court's job is not to "weigh the evidence or resolve issues of fact." *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 254 (2d Cir. 2002) (citation omitted); *see also Hayes v. N.Y. City Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996) ("In applying th[e] [summary judgment] standard, the court should not weigh evidence or assess the credibility of witnesses."). "Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment." *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citation omitted).

## III. DISCUSSION

### A. The Individual Defendants are Entitled to Summary Judgment on Plaintiff's Failure to Protect Claims

In general, "prison officials have a duty to protect prisoners from violence at the hands of other prisoners." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)) (internal alteration omitted). However, "not ... every injury

suffered by one prisoner at the hands of another ... translates into constitutional liability for prison officials responsible for the victim's safety." *Id.* at 834. A claim that an officer failed to protect an inmate from attack or failed to intervene to stop an attack rises to the level of a constitutional violation where the officer acted with "deliberate indifference to a substantial risk of serious harm to an inmate.' " *Taylor v. City of New York*, No. 16 CIV. 7857 (NRB), 2018 WL 1737626, at *11 (S.D.N.Y. Mar. 27, 2018) (quoting *Farmer*, 511 U.S. at 828).

When such claims are made by pretrial detainees, they are evaluated under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment, as "pretrial detainees have not been convicted of a crime and thus may not be punished in any manner—nether cruelly and unusually nor otherwise." *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) (internal alteration and quotation omitted). "This means that a pretrial detainee must satisfy two prongs to prove a claim, an 'objective prong' showing that the challenged conditions were sufficiently serious to constitute objective deprivations of the right to due process, and a 'subjective prong'—perhaps better classified as a '*mens rea* prong' or 'mental element prong'—showing that the officer acted with at least deliberate indifference to the challenged conditions." *Id.* at 29. Following the Second Circuit's decision in *Darnell*, the second prong of a pre-trial detainee's claim is measured by an objective standard: "[T]he pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." *Taylor*, 2018 WL 1737626, at *11 (quoting *Darnell*, 849 F.3d at 35).

However, even if the pretrial detainee satisfies both prongs of his failure to protect claim, "the doctrine of qualified immunity will shield [a state officer] from liability for damages if his conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Outlaw v. City of Hartford*, 884 F.3d 351, 366 (2d Cir. 2018). "[T]he right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official.' " *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (internal quotations omitted). To determine whether a right is clearly established, courts must consider "whether (1) it was defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has confirmed the existence of the right, and (3) a reasonable defendant would have understood that his conduct was unlawful." *Doninger v. Niehoff*, 642 F.3d 334, 345 (2d Cir. 2011).

***4** Qualified immunity "may also be available when, even though plaintiff's federal rights and the official's permissible actions were clearly delineated at the time of the action complained of, it was nonetheless 'objectively reasonable' for the defendant official 'to believe that his acts did not violate those rights.' " *Rodriguez v. Phillips*, 66 F.3d 470, 475 (2d Cir. 1995). "Thus, if the court determines that the only conclusion a rational jury could reach is that reasonable officers would disagree about the legality of the defendant's conduct under the circumstances, summary judgment is appropriate." *Dublin v. New York City Law Dept.*, No. 10 Civ. 2971 (LAP), 2012 WL 4471306 at *6 (S.D.N.Y. Sept. 26, 2012). In evaluating a qualified immunity defense, courts are not required to begin "by deciding whether a constitutional right was violated," but are allowed to "exercise their sound discretion" in determining whether to first consider whether qualified immunity bars the claim even if a constitutional right was violated. *Lara-Grimaldi v. Cty. of Putnam*, No. 17-CV-622 (KMK), 2018 WL 1626348, at *9 (S.D.N.Y. Mar. 29, 2018) (quoting *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

With respect to Defendants Jacob and Sewer, Plaintiff has not put forth sufficient evidence for a jury to find that Defendants intentionally or recklessly failed to prevent the attack. To the contrary, it is clear from the evidence that neither Defendant had any opportunity to prevent the attack. Although Plaintiff argues in his briefing that Officer Jacob "blatantly ignored [his] plea for protection," Dkt. No. 44 at 14, that argument is belied by his own testimony, which clearly states that he was assaulted by Sparber *immediately* after he told Officer Jacob about his desire to be moved to a different holding cell. Velez Dep. at 87:15-20 ("I said look, I want to go to another cell, I got problems in the cell.... [a]nd that's when he attacked me right in front of her."). Since the assault happened immediately after Plaintiff's comment, Officer Jacob had no reasonable opportunity to intervene. *See, e.g.*, *Vincent v. Sitnewski*, 117 F. Supp. 3d 329, 336 (S.D.N.Y. 2015) ("[I]n the context of an altercation, an inmate must show that ... the officer had a realistic opportunity to intervene and prevent the harm."). Furthermore, the parties do not dispute that Officer Sewer was not present at the holding cell until after the fight had already begun. [2] Accordingly, no reasonable jury could find that Officer Jacob or Officer Sewer is liable for failing to prevent the attack.

Furthermore, the Court concludes that Defendant Mateo is entitled to qualified immunity with respect to any claim that he failed to prevent Sparber's attack. Plaintiff's vague and unsubstantiated concerns about his safety which he expressed to Officer Mateo were not sufficient to make clear to a reasonable officer that preventative action was constitutionally required. Indeed, a number of courts in this district have found that an inmate informing an officer about a nebulous or untethered fear does not put an officer on notice that the inmate is at risk of attack. *See e.g., Haughton v. Clinton*, No. 15-CV-1160 (JPO), 2015 WL 9244398 at *2 (S.D.N.Y. Dec. 17, 2015) (granting defendant's motion to dismiss failure to protect claim when plaintiff only told the correction officer that he "feared for [his] safety," because that statement was "too conclusory for [the officer] to have inferred the existence of such a substantial risk"); *Desulma v. City of New York*, No. 98CIV.2078(RMB)(RLE), 2001 WL 798002, at *7 (S.D.N.Y. July 6, 2001) (although prison official knew that the plaintiff feared certain inmates and had requested protective measures, "given the lack of prior history of violence between [plaintiff] and [his attackers,]" there was no reason for him "to infer the existence of a threat of harm"); *El-Shabazz v. Wangenstein*, No. 92 CIV. 7291 (LBS), 1995 WL 489686, at *9 (S.D.N.Y. Aug. 15, 1995) (dismissing failure to protect claim when "[a]ll plaintiff ever told DOCS officials was that he had a 'funny feeling' and that he '[felt] like something [was] going to happen' "); [3] *see also Rivera v. New York*, No. 96 Civ. 7697(RWS), 1999 WL 13240, at *9 (S.D.N.Y. Jan. 12, 1999) ("[C]ommunicating vague concerns of future assault by unknown individuals [is] not sufficient to impose liability on an officer who fails to protect an inmate."). Those cases which have found officers potentially liable for failing to prevent an attack involved clear and specific threats against an inmate. *See, e.g.*, *Rogers v. Salius*, No. 3:16-CV-1299 (JCH), 2017 WL 1370695, at *5 (D. Conn. Apr. 13, 2017) (denying motion to dismiss where plaintiff alleged that prison officials had "intercepted a note putting a hit on [plaintiff]"); *Henry v. Cty. of Nassau*, 13-cv-7427 (SJF)(ARL), 2015 WL 2337393 at *6 (E.D.N.Y. May 13, 2015) (denying motion to dismiss as to prison officials "alleged to have been personally involved" in the decision to place plaintiff in general population rather than protective custody after credible threats of gang retaliation were made against him).

***5** Here, a jury could find that Plaintiff informed Officer Mateo that there was an inmate pacing up and down in the holding cell and that Plaintiff was concerned for his safety, but there is no evidence that Plaintiff provided any details to Officer Mateo about why he felt unsafe—indeed, it is clear that Sparber did not actually make any specific threats towards Plaintiff. Even if Officer Mateo was aware that Sparber had some propensity towards violence—a proposition arguably supported by Officer Mateo's statement that Sparber was "a real bad ass"—there is no evidence in this record that Officer Mateo was aware or should have been aware of a specific risk to Plaintiff. *See Gilmore v. Rivera,* No. 13 Civ. 6955(RWS), 2014 WL 1998227 at *3 (S.D.N.Y. May 14, 2014) (holding that even though officers knew an inmate was a "serial feces thrower," there was nothing to suggest that the officers "would have known that plaintiff himself was at risk" of being hit). Given the state of the law in this Circuit, the Court concludes that reasonable officers would disagree about the legality of Officer Mateo's decision to return Plaintiff to the holding cell and, accordingly, that Defendant Mateo is entitled to qualified immunity.

To the extent that Plaintiff argues that Defendants are liable for failing to intervene during the attack—a claim which he included in his complaint, but did not address in his summary judgment briefing—Plaintiff has failed to adduce sufficient evidence to support this theory of liability. The only evidence in the record which would even begin to suggest that the officers acted unreasonably once the altercation began is the fact that the fight lasted for fifteen minutes before any officers physically entered the holding cell. But the law in this Circuit is clear that officers are under no obligation to put their own safety at risk by intervening in inmate fights. *See Brown v. Correction Officer Shon Chambers*, No. 92 CIV. 7622 (LAP), 1995 WL 234681, at *4 (S.D.N.Y. Apr. 20, 1995), *aff'd sub nom.*, 99 F.3d 402 (2d Cir. 1995) ("[Plaintiff's] argument that the correction officers should have intervened to stop the fight, for example, is not persuasive. Prison officials have no duty to put their own safety at risk to stop an altercation between inmates."); *see also Blaylock v. Borden*, 547 F. Supp. 2d 305, 312 (S.D.N.Y. 2008), *aff'd*, 363 F. App'x 786 (2d Cir. 2010) ("[T]he assertion that [defendant] acted improperly by calling for officer assistance instead of jumping into the fight himself is itself unreasonable."). Because Plaintiff has put forth no evidence that Defendants acted unreasonably after the attack began, Defendants are entitled to summary judgment on Plaintiff's failure to intervene claims.

**B. The Individual Defendants are Entitled to Summary Judgment on Plaintiff's Conspiracy Claim**

"To state a claim for conspiracy to commit a civil rights deprivation under 42 U.S.C. § 1985, a plaintiff must allege:

(1) a conspiracy; (2) to deprive directly or indirectly any person of equal protection of the laws, or of equal privileges and immunities; and (3) an act in furtherance of the conspiracy; (4) whereby his person or property is injured or he is deprived of any right of a U.S. citizen." *See Poulos v. City of New York*, No. 14CV3023-LTS-HBP, 2015 WL 5707496, at *7 (S.D.N.Y. Sept. 29, 2015) (quoting *Mian v. Donaldson, Lufkin & Sec. Corp.*, 7 F.3d 1085, 1087-88 (2d Cir. 1993). "In order to sustain such a claim, a plaintiff must 'provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end.' " *Id.* (citing *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003)).

Defendants argue that Plaintiff has put forth no evidence to support his conspiracy claim. The Court agrees. Although the record suggests that Defendants may have interacted with each other to some degree around the time of the attack, there is absolutely no evidence in the record which suggests that they entered into an agreement to deprive Plaintiff of his civil rights. Defendants' motion for summary judgment on Plaintiff's conspiracy claim is granted. [4]

**C. The City of New York is Entitled to Summary Judgment on Plaintiff's *Monell* Claims and State Law Claims for Negligent Hiring, Training, and Retention**

***6** Plaintiff also asserts *Monell* claims against the City of New York based on the City's failure to adequately train, discipline and supervise the correction officers and New York common law claims for negligent hiring, training, and retention. The Court agrees with Defendants that summary judgment on these claims is appropriate. [5]

To prevail on a *Monell* claim for failure to supervise, Plaintiff "must establish [the City's] deliberate indifference by showing that 'the need for more or better supervision to protect against constitutional violations was obvious,' but that [the City] made 'no meaningful attempt' to forestall or prevent the unconstitutional conduct." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 127 (2d Cir. 2004). For his *Monell* claims for inadequate training, Plaintiff must "establish not only that the officials' purported failure to train occurred under circumstances that could constitute deliberate indifference, but [must] also ... identify a specific deficiency in the city's training program and establish that deficiency is 'closely related to the ultimate injury,' such that it 'actually caused' the constitutional deprivation." *Id.* at 129. Plaintiff has made no attempt to adduce any evidence which would support a claim for *Monell* liability under either of these theories and thus summary judgment is appropriate.

With regard to Plaintiff's state law claims for negligent hiring, training, and retention, the parties agree that "[d]uring the events at issue, the individual defendants were acting in their capacity as agents, servants and employees of the City of New York and the DOC." 56.1 Stmt. at ¶ 29. That fact alone is sufficient to defeat Plaintiff's claim, because "New York law does not permit a claim for negligent hiring, training, retention or supervision where the defendants act in the scope of their employment." *Schoolcraft v. City of New York*, 103 F. Supp. 3d 465, 521 (S.D.N.Y.), *on reconsideration in part*, 133 F. Supp. 3d 563 (S.D.N.Y. 2015). Accordingly, the Court grants Defendants' motion for summary judgment on Plaintiff's municipal liability claims.

**IV. CONCLUSION**

For the reasons stated above, Defendants' motion for summary judgment is GRANTED. The Clerk of Court is directed to terminate the motion pending at Dkt. No. 36, to enter judgment for Defendants, and to close this case.

SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2019 WL 3495642

## Footnotes

1 The Court notes that, although this case was filed on December 18, 2017, Correction Officer Brown has not yet been served, nor has Plaintiff requested that a summons be issued for Defendant Brown. Plaintiff has not made any application to the Court for an extension of time to serve Defendant Brown and the period for

service expired approximately 16 months ago. Accordingly, the Court dismisses all claims against Defendant Brown without prejudice pursuant to Fed. R. Civ. P. 4(m).

2 In fact, Plaintiff's summary judgment briefing does not mention Defendant Sewer even once.

3 Although these cases were decided before the Second Circuit's decision in *Darnell*, their analysis survives that decision because the outcome of each case was not based on a conclusion that the officer was not subjectively aware of a risk to the inmate. Instead, in each case, the court had direct evidence of what the officer knew—*i.e.*, the concerns communicated to the officer by the inmate—and then addressed the issue of whether, based on that actual knowledge, the officer should have been aware of a substantial risk of serious harm to the inmate.

4 Defendants also argue that Plaintiff's claims are barred by the intra-corporate conspiracy doctrine. However, because the Court finds that Plaintiff has not put forth sufficient evidence to support his conspiracy claim, the Court need not address the parties' arguments regarding the applicability of the intra-corporate conspiracy doctrine in these circumstances.

5 The Court notes that Plaintiff's summary judgment briefing does not mention his municipal liability claims and that, as a result, Defendants have urged the Court to conclude that those claims are abandoned. However, Plaintiff's failure to oppose Defendants' motion on these claims does not in itself justify the granting of summary judgment. “[W]here the non-moving party ‘chooses the perilous path of failing to submit a response to a summary judgment motion, the district court may not grant the motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial.’ ” *Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004) (quoting *Amaker v. Foley*, 274 F.3d 677, 681 (2d Cir. 2001)).

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United States District Court, S.D. New York.

Curtis A. MCDANIEL, Plaintiff,
v.
The CITY OF NEW YORK, Shirlonda Golden, Shield No. 5890, Irwin DeLeon, Shield No. 1284, Captain Sonia Manzo, Shield No. 1360, Defendants.

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|
Signed 02/11/2022

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Danielle Yolanda Clayton, Jessica Claire Engle, Robert George Wennemer, Jr., Peter William Brocker, New York City Law Department, Special Federal Litigation Division, New York, NY, for Defendant Irwin DeLeon.

**OPINION AND ORDER ADOPTING REPORT AND RECOMMENDATION**

KATHERINE POLK FAILLA, District Judge:

***1** *Pro se* plaintiff Curtis McDaniel brings this action pursuant to 42 U.S.C. § 1983 alleging that while he was a pretrial detainee at Rikers Island, Defendants were deliberately indifferent to his safety and certain correction officers used excessive force against him, all in violation of his constitutional rights. Defendants have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Now pending before this Court is the January 21, 2022 Report and Recommendation issued by United States Magistrate Robert W. Lehrburger (the "Report" (Dkt. #86), copy attached), which recommends that Defendants' motion be granted in full.

The Court has examined the Report and notes that no party has objected within the fourteen-day period from its service, as provided by 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. For the reasons set forth below, the Court finds no error in the Report and adopts it in its entirety.

**BACKGROUND**

The Court incorporates by reference the recitation of the facts provided in the Report, to which no party objects. (*See* Report 2-3).

On September 20, 2019, Plaintiff filed the underlying complaint in this matter. (Dkt. #2). On November 22, 2019, this matter was referred to Judge Lehrburger for general pretrial supervision. (Dkt. #6, 9). On May 28, 2020, Plaintiff filed an Amended Complaint, which is the operative pleading in this matter. (Dkt. #29). Three of the Defendants, the City of New York, Shirlonda Golden, and Sonia Manzo, answered the Amended Complaint on July 24, 2020. (Dkt. #34). On December 14, 2020, Defendant Irwin DeLeon filed his answer to the Amended Complaint. (Dkt. #48). Fact discovery concluded on March 25, 2021. (Dkt. #58). Thereafter, on May 10, 2021 Defendants filed a motion for summary judgment (Dkt. #63-68), which motion the Court referred to Judge Lehrburger for a report and recommendation (Dkt. #69). Plaintiff filed an opposition to Defendant's motion on July 9, 2021. (Dkt. #73-76). Defendants filed their reply brief on August 28, 2021. (Dkt. #80).

On January 21, 2022, Judge Lehrburger issued the Report, recommending that the Court grant Defendants' motion for summary judgment. (Dkt. #86). The deadline for the parties to file objections to the report was February 4, 2022. (*See* Report 24-25). To date, no objections have been filed.

**DISCUSSION**

A court may accept, reject, or modify, in whole or in part, the findings or recommendations made by a magistrate judge. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Grassia v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989). A court may also accept those portions of a report to which no specific, written objection is made, as long as the factual and legal bases supporting the findings are not clearly erroneous. *See Ramirez v. United States*, 898 F. Supp. 2d 659, 663 (S.D.N.Y. 2012) (citation omitted). A magistrate judge's decision is clearly erroneous only if the district court is " 'left with the definite

and firm conviction that a mistake has been committed.' " *Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001) (quoting *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). "A party's failure to object to a report and recommendation, after receiving clear notice of the consequences of such a failure, operates as a waiver of the party's right both to object to the report and recommendation and to obtain appellate review." *Grady* v. *Conway,* No. 11 Civ. 7277 (KPF) (FM), 2015 WL 5008463, at *3 (S.D.N.Y. Aug. 24, 2015) (citing *Frank* v. *Johnson*, 968 F.2d 298, 300 (2d Cir. 1992)).

***2** As neither party has submitted objections to the Report, review for clear error is appropriate. *See Phillips* v. *Reed Grp., Ltd.*, 955 F. Supp. 2d 201, 211 (S.D.N.Y. 2013). The Court has reviewed the Report and finds that its reasoning is sound and that it is grounded in fact and law. More specifically, the Court agrees with the Report's conclusions that: (i) Plaintiff failed to provide any evidence in support of his claim for municipal liability (Report 11-13); (ii) neither Manzo nor Golden had personal involvement in the alleged deprivations of Plaintiff's constitutional rights, as necessary to give rise to liability under Section 1983 (*id.* at 13-15); (iii) Plaintiff failed to establish that the circumstances of his incarceration posed a substantial risk of serious harm or that Defendants were deliberately indifferent to such a risk, both of which are necessary elements for a claim for deliberate indifference to Plaintiff's safety (*id.* at 15-19); (iv) the record does not contain any evidence suggesting that Defendants applied excessive force to Plaintiff (*id.* at 19-22); and (v) Plaintiff's negligence claim fails because Defendants did not breach their duty to protect Plaintiff from impending harm (*id.* at 22-24). Having reviewed the record, the Court finds no clear error and adopts the Report in its entirety.

Furthermore, because the Report explicitly states that "[f]ailure to file timely objections will result in waiver of objections and preclude appellate review" (Report 25), both parties' failure to object operates as a waiver of appellate review, *see Caidor* v. *Onondaga Cnty.*, 517 F.3d 601, 604 (2d Cir. 2008) (citing *Small* v. *Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam)).

## CONCLUSION

The Court agrees completely with Judge Lehrburger's well-reasoned Report and hereby adopts its reasoning by reference. Accordingly, it is ordered that summary judgment be GRANTED in Defendants' favor in its entirety.

The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close this case. The Clerk of Court is further directed to mail a copy of this Opinion and Order to Plaintiff at his address of record.

SO ORDERED.

## REPORT AND RECOMMENDATION TO HON. KATHERINE P. FAILLA SUMMARY JUDGMENT

ROBERT W. LEHRBURGER, United States Magistrate Judge.

Plaintiff Curtis McDaniel ("McDaniel"), proceeding *pro se*, filed this lawsuit against the City of New York (the "City") and several Correction Officers: Captain Sonia Manzo ("Manzo") and Officers Shirlonda Golden ("Golden") and Irwin DeLeon ("DeLeon") (collectively, "Defendants") pursuant to 42 U.S.C. § 1983. McDaniel alleges that while he was incarcerated at Rikers Island, the Defendants were negligent and deliberately indifferent to his safety and that certain correction officers used excessive force against him. Defendants have moved for summary judgment pursuant to Rule 56 of the Federal Rules Of Civil Procedure. (Dkt. 63.) For the following reasons, I recommend that Defendants' motion be GRANTED and that judgment be entered in favor of Defendants and against McDaniel.

## FACTS [1]

At all relevant times, McDaniel was a pretrial detainee housed at the Anna M. Kross Correctional Facility ("AMKC") at Rikers Island operated by the New York City Department Of Correction. (SOF ¶¶ 1-2.) When he entered AMKC on March 9, 2019, McDaniel was initially housed in the W18LB housing unit. (SOF ¶ 2.) Two weeks later, McDaniel was transferred within AMKC to a housing unit called Dorm 2 Upper. (Compl. at 5; [2] SOF ¶ 8.)

***3** On March 30, 2019, McDaniel had a physical altercation with N.O., another pretrial detainee, while they were in an area where phone calls could be made. [3] N.O. demanded that McDaniel "sell" him his phone calls, which McDaniel refused to do. (Compl. at 5; SOF ¶¶ 17-18.) N.O. followed McDaniel from the calling area to McDaniel's bunk and continued to

"harass" and "threaten" him. (Compl. at 6; McDaniel Dep. at 91-92, 99.[4]) N.O. insisted that the two go to the bathroom to fight. (McDaniel Dep. at 91; SOF ¶ 19.) Initially McDaniel refused, but he ultimately went to the bathroom and engaged in some kind of altercation with N.O.[5] (Compl. at 6; SOF ¶¶ 19-25; McDaniel Dep. at 104.) McDaniel left the bathroom and walked into the dayroom followed by N.O., who "started screaming and yelling." (Compl. at 7; SOF ¶ 26; McDaniel Dep. at 104.)

Another unidentified correction officer intervened by physically placing himself between McDaniel and N.O.[6] The correction officer attempted to restrain N.O. but was unable to do so. N.O. lunged at McDaniel several times. Although McDaniel successfully pushed N.O. away, N.O. was able to grab McDaniel. The two began to fight, and N.O. held McDaniel in a headlock. (Compl. at 3; SOF ¶¶ 27-34; McDaniel Dep. at 104-05.) The unidentified correction officer requested back up, and another correction officer entered the area and attempted to break up the fight. The officer grabbed McDaniel and pulled him away from N.O.; however, when he realized that N.O. had McDaniel in headlock, he ordered N.O. to release McDaniel, and N.O. complied. (Compl. at 3; SOF ¶¶ 38-41; McDaniel Dep. at 106.) The two men were separated, and McDaniel was removed from the dayroom. (Compl. at 7; SOF ¶ 43; McDaniel Dep. at 106.)

McDaniel claims that as a result of the incident he suffered a pulled neck muscle and injuries to his arm, head, and tongue. (Compl. at 8; McDaniel Dep. at 165.)

## PROCEDURAL HISTORY

On September 20, 2019, McDaniel filed his original complaint. (Dkt. 2.) McDaniel filed the operative Amended Complaint on May 28, 2020, which additionally named Defendants Golden and DeLeon.[7] (Dkt. 29.)

The parties proceeded through discovery, which concluded on March 25, 2021. (Dkt. 58.) On May 10, 2021, Defendants filed the instant motion for summary judgment. (Dkt. 63.) Defendants filed a declaration and a memorandum in support of the motion as well as a statement of undisputed material facts pursuant to the Southern District of New York's Local Civil Rule 56.1. (Dkts. 64, 65, 67.) Along with the supporting Declaration of Peter Brocker, Defendants submitted several exhibits including: (1) the New York City Department of Correction Inmate Movement History regarding McDaniel's transfers within Rikers Island; (2) excerpts of McDaniel's deposition, dated March 24, 2021; (3) the New York City Department of Correction New Admission Screening Report for McDaniel; (4) the New York City Department of Correction Injury to Inmate Report for McDaniel, dated March 30, 2019; and (5) a Notice of Personal Injury Claim Form submitted by McDaniel on April 16, 2019.

***4** On May 12, 2021, the case was referred to me for report and recommendation on the Defendants' motion for summary judgment. (Dkt. 69.) McDaniel filed an opposition to Defendants' motion on July 9, 2021 (Dkt. 73),[8] and Defendants filed their reply on August 28, 2021. (Dkt. 80.) McDaniel did not submit a Rule 56.1 Statement of Undisputed Facts.

## LEGAL STANDARDS

The Court sets forth the relevant legal standards regarding summary judgment, review of *pro se* pleadings, and the requirements for deliberate indifference and excessive force claims under 42 U.S.C. § 1983.

### A. Summary Judgment

"[A] court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10 (1986). The Court's task is not to resolve contested issues of fact but rather to determine whether there exists any disputed issue of material fact. *Donahue v. Windsor Locks Board Of Fire Commissioners*, 834 F.2d 54, 58 (2d Cir. 1987); *Knight v. U.S. Fire Insurance Co.*, 804 F.2d 9, 11 (2d Cir. 1986). " 'A fact is material when it might affect the outcome of the suit under governing law.' " *Gorham-DiMaggio v. Countrywide Home Loans, Inc.*, 421 F. App'x 97, 101 (2d Cir. 2011) (summary order) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 202 (2d Cir. 2007)). A dispute "is 'genuine' ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510.

"The moving party bears the initial burden of demonstrating 'the absence of a genuine issue of material fact.' " *Federal*

*Deposit Insurance Corp. v. Great American Insurance Co.*, 607 F.3d 288, 292 (2d Cir. 2010) (quoting *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553). Once that burden is met, "the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." *Id.* (citing *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2510).

" 'All evidence submitted on the motion is to be construed in the manner most favorable to the nonmoving party.' " *Okin v. Village Of Cornwall-On-Hudson Police Department*, 577 F.3d 415, 427 (2d Cir. 2009) (quoting *Horvath v. Westport Library Association*, 362 F.3d 147, 151 (2d Cir. 2004)). However, "[t]o defeat a summary judgment motion, the non-moving party 'must do more than simply show that there is some metaphysical doubt as to the material facts,' and 'may not rely on conclusory allegations or unsubstantiated speculation.' " *Federal Deposit Insurance Corp.*, 607 F.3d at 292 (first quoting *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986), then quoting *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998)). While "disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment[,] [f]actual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248, 106 S. Ct. 2510; *see also Knight*, 804 F.2d at 11-12 (" 'the mere existence of factual issues – where those issues are not material to the claims before the court – will not suffice to defeat a motion for summary judgment' " (alteration omitted)) (quoting *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985) (per curium)).

***5** Where, as here, a plaintiff is *pro se*, district courts must read his or her pleadings "liberally and interpret them to raise the strongest arguments that they suggest." *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 50 (2d Cir. 2003) (internal quotation marks omitted). Courts "are less demanding of [pro se] litigants generally, particularly where motions for summary judgment are concerned." *Jackson v. Federal Express*, 766 F.3d 189, 195 (2d Cir. 2014). A pro se litigant thus is given "special solicitude" in responding to a motion for summary judgment. *Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010); *see also Knowles v. New York City Department Of Corrections*, 904 F. Supp. 217, 220 (S.D.N.Y. 1995) (same). This solicitude, however, "does not relieve [the pro se litigant] of his duty to meet the requirements necessary to defeat a motion for summary judgment." *Jorgensen*, 351 F.3d at 50 (internal quotation marks omitted).

**B. Consequences of McDaniel's Failure to Provide a Rule 56.1 Statement**

Pursuant to Rule 56(c) of the Federal Rules Of Civil Procedure, a party asserting that a fact cannot be, or is, genuinely disputed "must support the assertion by" either "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). The court need only consider the cited materials, although it may consider other materials in the record. Fed. R. Civ. P. 56(c)(3). The Southern District of New York's local rules require the parties to submit enumerated statements of undisputed and disputed material facts. Local Civil Rule 56.1(a)-(b). Consistent with Rule 56(c) of the Federal Rules of Civil Procedure, "[e]ach statement by the movant or opponent ... including each statement controverting any statement of material fact, must be followed by citation to evidence which would be admissible." Local Civil Rule 56.1(d).

"*Pro se* litigants ... are not excused from meeting the requirements of Local Civil Rule 56.1" when a party moving for summary judgment provides notice to a pro se party consistent with Local Civil Rule 56.2. *Wali v. One Source Co.*, 678 F. Supp. 2d 170, 178 (S.D.N.Y. 2009); *see also Berry v. Marchinkowski*, 137 F. Supp. 3d 495, 502 n.1 (S.D.N.Y. 2015) ("A pro se litigant is not excused from [Local Civil Rule 56.1]"). If the *pro se* party fails to file a Rule 56.1 statement, a court may deem all factual allegations of the moving party as true or, in the alternative, may "opt to conduct an assiduous review of the record." *Battle v. Day Care Council, Local 205, DC 1707 Welfare Fund*, No. 11-CV-4043, 2012 WL 3055574, at *1 n.1 (S.D.N.Y. July 26, 2012) (internal quotation marks and citation omitted); *see Brandever v. Port Imperial Ferry Corp.*, No. 13-CV-2813, 2014 WL 1053774, at *3 (S.D.N.Y. March 13, 2014) (concluding that because the pro se plaintiff did not submit a Rule 56.1 statement in response to the defendant's statement of facts, "there [were] no material issues of fact"); *see also Anand v. New York State Division of Housing and Community Renewal*, No. 11-CV-9616, 2013 WL 4757837, at *7 (S.D.N.Y. Aug. 29, 2013) (same).

While Defendants filed a Rule 56.1 statement, McDaniel did not. Nor did McDaniel directly object to Defendants' Rule 56.1 statement in whole or in part, despite the fact that Defendants served McDaniel with the requisite Notice To Pro Se Litigants. (Dkt. 66.) Instead, McDaniel submitted

only an opposition to Defendants' motion, addressing only two of Defendants' arguments and containing few factual contentions. The Court therefore accepts as true Defendants' factual assertions in its Rule 56.1 statement, but also credits, for purposes of this motion, McDaniel's factual assertions to the extent they are based on personal knowledge and not unduly speculative.

**C. Section 1983 Claims**

***6** To state a cause of action under 42 U.S.C. § 1983, " 'a plaintiff must allege that some person acting under color of state law deprived him of a federal right.' " *Ahlers v. Rabinowitz*, 684 F.3d 53, 60-61 (2d Cir. 2012) (quoting *Washington v. James*, 782 F.2d 1134, 1138 (2d Cir. 1986)). Because § 1983 does not provide its own substantive right, plaintiffs must identify the federally protected right that was allegedly violated. *See Gonzaga University v. Doe*, 536 U.S. 273, 285, 122 S. Ct. 2268, 2276 (2002) (plaintiffs cannot simply claim a violation of § 1983, because § 1983 " 'by itself does not protect anyone against anything' ") (quoting *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617, 99 S. Ct. 1905, 1916 (1979)). Accordingly, the plaintiff must show that (1) the defendant acted under color of state law and that (2) as a result of the defendant's actions, the plaintiff suffered a denial of federal statutory rights or constitutional rights or privileges. *Annis v. County Of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998). Additionally, "in all § 1983 cases, the plaintiff must prove that the defendant's action was a proximate cause of the plaintiff's injury." *Gierlinger v. Gleason*, 160 F.3d 858, 872 (2d Cir. 1998); *see also White v. City Of New York*, No. 16-CV-6183, 2017 WL 3575700, at *5 (S.D.N.Y. Aug. 17, 2017).

Read liberally, the Amended Complaint asserts claims for deliberate indifference to safety and excessive force. Because he was a pre-trial detainee at the time the incident in question occurred, McDaniel's 1983 claims arise under the Fourteenth Amendment. *See Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) ("A pretrial detainee's claims are evaluated under the Due Process Clause because[ ] [p]retrial detainees have not been convicted of a crime and thus may not be punished in any manner – neither cruelly and unusually nor otherwise") (internal quotation marks and citations omitted); *Barnes v. Harling*, 368 F. Supp. 3d 573, 596 (W.D.N.Y. 2019) ("Under current Second Circuit law, when a pretrial detainee plaintiff brings § 1983 claims alleging deliberate indifference, including claims alleging failure to protect or intervene," a district court analyzes these claims under the Fourteenth Amendment using the standard set forth in *Darnell*); *Graham v. Conner*, 490 U.S. 386, 395 n.10, 109 S. Ct. 1865, 1871 n.10 (1989) ("the Due Process Clause [of the Fourteenth Amendment] protects a pretrial detainee from the use of excessive force that amounts to punishment"); *Edrei v. Maguire*, 892 F.3d 525, 533 (2d Cir. 2018) ("pretrial detainees ... rely on the constitutional guarantee of 'due process' ").

**1. Deliberate Indifference To Prisoner Safety - Failure To Intervene**

To state a claim of deliberate indifference under the Due Process Clause of the Fourteenth Amendment, a plaintiff's allegations must satisfy a two-prong test comprised of both objective and subjective standards. "[T]o establish an objective deprivation, the inmate must show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health. ... There is no static test to determine whether a deprivation is sufficiently serious; instead, the conditions themselves must be evaluated in light of contemporary standards of decency." *Molina v. County of Westchester*, No. 16-CV-3421, 2017 WL 1609021, at *2 (S.D.N.Y. Apr. 28, 2017) (internal citations and quotation marks omitted). To satisfy the second, subjective prong, "[a] pretrial detainee must prove that the defendant-official acted intentionally ... or recklessly failed to act with reasonable care to mitigate the risk ... even though the defendant-official knew, or should have known, of the risk of harm." *Id.* at *3 (internal quotations marks omitted); *see also Darnell*, 849 F.3d at 35 (same and referring to this subjective prong as the "*mens rea* prong").

**2. Excessive Force**

***7** A claim of excessive force under the Fourteenth Amendment arises under the Due Process Clause. *See United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999). To prevail on a Fourteenth Amendment excessive force claim, a pretrial detainee must show that "the force purposely or knowingly used against him was objectively unreasonable." *Kingsley v. Hendrickson*, 576 U.S. 389, 396-97, 135 S. Ct. 2466, 2473 (2015). In contrast to both the subjective and objective elements of the deliberate indifference claim, an excessive force claim under the Fourteenth Amendment uses a wholly objective standard. *See id.* at 397, 135 S. Ct. at 2473.

**DISCUSSION**

As discussed below, McDaniel's claims should be dismissed on summary judgment. McDaniel's claims against the City should be dismissed as there is no evidence of municipal liability. The claims against officers Manzo and Golden should be dismissed because there is no evidence by which a reasonable juror could find Manzo and Golden were personally involved in any actionable conduct or absence of conduct. Further, there is no evidence to establish the objective element of either Section 1983 claim or the subjective element of the deliberate indifference claim.

**A. No Evidence Of Municipal Liability**

Municipalities cannot be vicariously liable under Section 1983 for their employees' acts. *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037 (1978). Municipalities are only liable under Section 1983 for constitutional deprivations resulting from a governmental policy or custom. *Id.*, 98 S. Ct. at 2037-8. A plaintiff may demonstrate that such a policy or custom exists by introducing evidence of one of the following: "(1) a formal policy officially endorsed by the municipality; (2) actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation in question; (3) a practice so consistent and widespread that, although not expressly authorized, constitutes a custom or usage of which a supervising policy-maker must have been aware; or (4) a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees." *Jones v. Westchester County*, 182 F.Supp.3d 134, 158 (S.D.N.Y. 2016) (quoting *Brandon v. City of New York*, 705 F.Supp.2d 261, 276–77 (S.D.N.Y. 2010)). To prevail on a *Monell* claim, a plaintiff must also show that "there is a direct causal link between [the] municipal policy or custom and the alleged constitutional deprivation" he suffered. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 1203 (1989).

The City is a municipality and therefore cannot be sued as a defendant absent a viable *Monell* claim. McDaniel has not provided any evidence, let alone particularized allegations, of any policies or widespread practices or customs related to the alleged action, or inaction, of the correction officers. Nor has McDaniel provided any evidence, or even claimed, that a need for better monitoring and training was otherwise obvious. Rather, the facts as alleged and for which proof has been presented concern a specific one-time incident involving a physical altercation between McDaniel and another inmate. Those allegations are not enough to indicate a customary practice or existence of a particular policy. *See City Of Oklahoma City v. Tuttle*, 471 U.S. 808, 841, 105 S. Ct. 2427, 2445 (1985) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which can be attributed to a municipal policymaker"). Despite naming the City as a defendant, the Amended Complaint does not even address the City and contains no allegations connecting policymaking officials with the alleged misconduct or alleging failure to train or supervise. Accordingly, the Complaint fails to state an actionable civil rights claim against the City. Similarly, the record is devoid of any evidence to support such a claim. Judgment should be granted in favor of the City.

**B. No Proof Of Personal Manzo Or Golden's Personal Involvement**

***8** "It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Johnson v. Newburgh Enlarged School District*, 239 F.3d 246, 254 (2d Cir. 2001); *see also Lloyd v. City of New York*, 43 F. Supp. 3d 254, 266 (S.D.N.Y. 2014) ("Personal involvement is a question of fact and must be satisfied as to each individual defendant"). Personal involvement can be established by showing that the individual "(1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated." *Rahman v. Fisher*, 607 F. Supp. 2d 580, 585 (S.D.N.Y. 2009) (quoting *Iqbal v. Hasty*, 490 F.3d 143, 152–153 (2d Cir. 2007)). McDaniel has not presented evidence by which a reasonable juror could find the requisite personal involvement of either Manzo or Golden.

McDaniel testified that Manzo was not present for the incident "until it was all over." (McDaniel Dep. at 98-99.) When asked whether Manzo had an opportunity to intervene and stop the fight between him and N.O., McDaniel stated that he was "not sure." (McDaniel Dep. at 191.)

Similarly, Defendant Golden was not directly involved in the altercation between McDaniel and N.O. Golden was stationed in the "bubble" – the housing area's command center, which is "[a]bout 25, 30 feet away" from where the incident occurred.

(McDaniel Dep. at 107.) McDaniel testified that he did not tell Golden that he was going to fight with N.O. and that Golden did not have an opportunity to stop the fight. (McDaniel Dep. at 109, 191). McDaniel also indicated that Golden could not "particularly see out of the bubble into the dorm per se." (McDaniel Dep. at 107.)

McDaniel has presented no evidence that either Defendant Golden or Manzo directly participated in the incident, failed to address a violation, developed or enforced a problematic policy related to the violation, failed to supervise the correction officers who allegedly committed the violation, or were in any other way deliberately indifferent to McDaniel's rights. McDaniel's conclusory allegations are not sustainable. *See Brown v. Doe*, No. 13-CV-8409, 2014 WL 5461815, at *8 (S.D.N.Y. Oct. 28, 2014) ("Conclusory accusations regarding a defendant's personal involvement in the alleged violation, standing alone, are not sufficient") (internal quotation marks omitted). Without more, the claims against Manzo and Golden cannot stand and should be dismissed.

**C. No Deliberate Indifference Claim**

"Prison officials have a duty ... to protect prisoners from violence at the hands of other prisoners." *Farmer v. Brennan,* 511 U.S. 825, 834, 114 S. Ct. 1970, 1976 (1994) (internal quotation marks omitted). Therefore, in certain circumstances, "[a]llowing an attack on an inmate to proceed without intervening is a constitutional violation." *Rosen v. City of New York*, 667 F. Supp. 2d 355, 360 (S.D.N.Y. 2009) (internal quotation marks omitted). However, "[n]ot every injury that a prisoner suffers at the hands of another results in constitutional liability for the officials responsible for that prisoner's safety." *Taylor v. City Of New York*, No. 16-CV-7857, 2018 WL 1737626, at *11 (S.D.N.Y. March 27, 2018) (citing *Farmer*, 511 U.S. at 834, 114 S. Ct. 1970, 1977). McDaniel's deliberate indifference claims requires him to demonstrate (1) that the alleged violation was "sufficiently serious" and (2) that the Defendants knowingly disregarded an excessive risk to his health or safety. Defendants argue that McDaniel cannot establish either the objective or subjective prong of his deliberate indifference claim. The Court agrees.

***9** As an initial matter, McDaniel concedes that an unidentified Correction Officer, and later Defendant DeLeon, ***did*** intervene during the altercation with N.O. (Compl. at 7.) Presumably, McDaniel alleges that a Correction Officer should have intervened earlier to prevent the fight. Defendants argue that they were not on notice of the incident prior to its occurrence and therefore could not have taken steps to intervene before the fight began.

**1. No Substantial Risk Of Serious Harm**

To meet the objective prong for a claim based on failure to protect, McDaniel must show that he was incarcerated under conditions that posed a substantial risk of serious harm. Although there is not litmus test for what is considered "sufficiently serious" the Second Circuit has explained that "prisoners may not be deprived of their basic human needs —*e.g.,* food, clothing, shelter, medical care, and reasonable safety—and they may not be exposed to conditions that pose an unreasonable risk of serious damage to their future health." *Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012) (internal brackets and quotation marks omitted). For a failure to protect claim in the context of violence between incarcerated individuals, "[a] substantial risk of serious harm can be demonstrated where there is evidence of a previous altercation between a plaintiff and an attacker, coupled with a complaint by plaintiff regarding the altercation or a request by plaintiff to be separated from the attacker." *Gilmore v. Rivera,* No. 13–CV–6955, 2014 WL 1998227, at *3 (S.D.N.Y. May 14, 2014).

McDaniel argues that moving him to the Dorm 2 Upper exposed him to serious risk, of which Defendants were or should have been aware. McDaniel alleges that Defendants knew that members of a certain gang were targeting him and that they purposely moved him to a housing unit in which many members of that gang were also housed. (Compl. at 5.) McDaniel provides no details to support these allegations and does not offer any evidence showing that on the day in question, he was at substantial risk of harm.

Upon his arrival to AMKC, McDaniel was asked if he knew of any reason why he would be at risk or need special protection. He indicated that he did not. (SOF ¶¶ 3-5; McDaniel Dep. at 77.) McDaniel asserts that in the moments leading up the altercation with N.O., he informed the Correction Officer posted near the phone that "N.O. was angry, and that he has some kind of psychological problem, and that he is stalking me and he's threatening me" and that he told N.O. in front of this officer that he did not want to engage in a fight. (McDaniel Dep. at 84.) McDaniel does not know which Correction Officer he spoke to because there were two officers on the floor – the unidentified Defendant Doe and Defendant DeLeon. (McDaniel Dep. at 85.) Without more, McDaniel's claim cannot survive.

At no point either before or after his transfer to the new housing unit did McDaniel report to Defendants that he was afraid of or targeted by N.O. (SOF ¶¶ 12-13; McDaniel Dep. at 85.) Moreover, McDaniel had interacted with N.O. a few times before the March 30, 2019 altercation without any threats of violence or cause for concern. (SOF ¶¶ 15-16; McDaniel Dep. at 90.)

McDaniel has not established a previous altercation with N.O. or that he complained about N.O. or made a request to be separated from N.O. prior to the altercation. McDaniel thus cannot meet the objective standard of establishing that he was subject to a sufficiently serious risk of harm. *See e.g.*, *Ewers v. City Of New York*, No. 17-CV-1116, 2021 WL 2188128, at *6 (S.D.N.Y. May 28, 2021) (granting summary judgment to defendants on the first prong of plaintiff's failure to protect claims because "Plaintiff has not provided any evidence that he and [the other inmate] engaged in prior physical altercations that should have indicated to Officer Haywood that there was an unreasonable risk of serious harm to plaintiff, as is required for plaintiff to succeed on his failure to protect claim"); *Leckie v. City Of New York*, No. 18-CV-3917, 2021 WL 84234, at *5 (E.D.N.Y. Jan. 11, 2021) (granting defendants' summary judgment motion regarding claims of deliberate indifference because plaintiff "does not demonstrate that he was incarcerated in conditions that posed a substantial risk of harm, because prior to this attack he testified that he did not fear for his life or safety; further, [plaintiff] had not complained about his attackers, raised concerns about his safety in Housing Area 6B, or otherwise provided notice to [defendants] that he was at a substantial risk of harm"); *Gilmore*, 2014 WL 1998227 at *3 (dismissing claim as a matter of law where "nothing suggests that [the Department of Corrections] or the other Defendants would have known [prior to the incident] that Plaintiff himself was at risk"); *Stewart v. Schiro*, No. 13-CV-3613, 2015 WL 1854198, at *7 (E.D.N.Y. Apr. 22, 2015) (dismissing failure to protect claim where plaintiff had never been involved in an attack before and had no reason to suspect that he would be attacked on the day of the incident).

**2. No Deliberate Indifference**

***10** For the same, and additional reasons, McDaniel cannot establish the second requirement that Defendants were deliberately indifferent. To assess the deliberate indifference element, the question is whether an official "acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." *Darnell*, 849 F.3d at 35.

McDaniel has offered no evidence indicating that the Defendants either intentionally or recklessly failed to act to mitigate the risk. In the context of prisoner safety, a prison official's failure to intervene violates a pretrial detainee's Fourteenth Amendment rights only where the officer acted with "deliberate indifference to a substantial risk of serious harm" to the detainee. *Farmer,* 511 U.S. at 836, 114 S. Ct. at 1978 (internal quotation marks omitted). "In the context of a failure to intervene claim, an officer displays deliberate indifference when he has adequate time to assess a serious threat against an inmate and a fair opportunity to protect the inmate without risk to himself, yet fails to intervene." *Rosen*, 667 F. Supp. 2d at 360 (internal quotation marks omitted). Here, the undisputed facts show that Correction Officers responded to the altercation by directly intervening between McDaniel and N.O., attempting to restrain N.O., requesting back up assistance, and separating McDaniel from N.O. Nothing in the record indicates that the Defendants failed to intervene in the incident, let alone that they did so with deliberate indifference. Accordingly, the Defendants are entitled to summary judgment with respect to McDaniel's deliberate indifference claims.

**D. No Excessive Force Claim**

To make a successful excessive force claim under the Fourteenth Amendment, McDaniel must show that the used against him was objectively unreasonable. *Kingsley*, 576 U.S. at 396-97, 135 S. Ct. at 2472-73. Factors bearing on the objective reasonableness of the force include "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Edrei*, 892 F.3d at 534 (internal quotation marks omitted).

The record here is devoid of any evidence of unreasonable use of force. The parties agree that while McDaniel and N.O. were engaged in a physical altercation, a correction officer pulled McDaniel away from N.O.[9] Because N.O. had McDaniel in a headlock, the correction officer pulling on McDaniel gave N.O. a direct order to release McDaniel, which N.O. complied with, and then the officer separated the two men.

(Compl. at 7; SOF ¶¶ 38-41; McDaniel Dep. at 105-06.) Grabbing or pulling a detainee may constitute a significant use of force and in certain cases may form the basis of a constitutional violation. However, "if the force was applied in a good-faith effort to maintain or restore discipline, it is unlikely to be repugnant to the conscience of mankind, and will not amount to excessive force under Second Circuit law." *Quinones v. Rollison*, No. 18-CV-1170, 2020 WL 6420181, at *4 (S.D.N.Y. Nov. 1, 2020) (internal quotation marks omitted).

***11** McDaniel does not dispute that the sole purpose of the officer's use of force was to end the fight between the two detainees. In a prison setting, the use of force to restore order can be reasonable. *See e.g.*, *Quinones*, 2020 WL 6420181 at *4 (granting summary judgment to Correction Officer who used pepper spray to break up a fight between prisoners); *Dobbins v. Ponte*, No. 15-CV-3091, 2017 WL 3309726, at *5 (S.D.N.Y. Aug. 2, 2017) (granting summary judgment to the defendants as to the plaintiff's Fourteenth Amendment excessive use of force claim because the plaintiff "was indisputably acting in a belligerent and defiant manner"); *Barnes v. Harling*, 368 F. Supp. 3d 573, 593 (W.D.N.Y. 2019) (finding that a correction officer's use of force to break up a fight did not rise to the level of constitutional violation).

Defendants argue that given the circumstances, the officers' actions were reasonable and no reasonable juror could find otherwise. Noting the Court's duty to "take account of the legitimate interests in managing a jail" and deferring to "policies and practices needed to maintain order and institutional security is appropriate," the Court agrees that the minimal force used to separate McDaniel from N.O. was objectively reasonable. *Frost v. New York City Police Department*, 980 F.3d 231, 252 (2d Cir. 2020) (quoting *Kingsley*, 576 U.S. at 399-400, 135 S. Ct. at 2474).

Additionally, McDaniel has presented no evidence that his injury was incurred while an officer was separating him from N.O. as compared to when N.O. first put McDaniel in a headlock. But even if he had, the injury alleged by McDaniel is de minimis. McDaniel alleges that the officer's use of force led him to suffer a pulled neck muscle. The Second Circuit has clearly ruled, however, that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Boddie v. Schnieder*, 105 F.3d 857, 862 (2d Cir. 1997). Rather, plaintiffs must "show that the harm incurred was more than de minimis." *Berry v. City Of New York Department Of Corrections.*, No. 12-CV-7819, 2014 WL 2158518, at *5 (S.D.N.Y. May 22, 2014), *aff'd sub nom.*, 622 F. App'x 10 (2d Cir. 2015); *see also Lynch v. City Of New York*, 952 F.3d 67, 77 (2d Cir. 2020) ("there is a de minimis level of imposition with which the Constitution is not concerned") (internal quotation marks omitted); *Lewis v. Huebner*, No. 17-CV-8101, 2020 WL 1244254, at *5 (S.D.N.Y. Mar. 16, 2020) ("claims for excessive force under the Fourteenth Amendment must involve force that is either more than de minimis or repugnant to the conscience of mankind") (internal quotation marks omitted).

Based on the foregoing, a reasonable juror could not conclude that the officers used excessive force while intervening in the altercation between McDaniel and N.O. Consequently, McDaniel's excessive force claim cannot proceed.

**E. Qualified Immunity**

Defendants argue that if claims against Defendant DeLeon survive summary judgment, he is nonetheless entitled to qualified immunity. Defendants have established that there is insufficient evidence to establish either deliberate indifference or excessive force. They are entitled to summary judgment on that basis. Accordingly, the Court need not address the issue of qualified immunity.

**F. Negligence Claim**

In addition to the Section 1983 claims, McDaniel asserts a state law negligence claim; i.e., that Defendants neglected their duty to protect him from N.O. (Compl. at 8-9.) This claim too should be dismissed on the merits. [10]

***12** Under New York law, plaintiffs alleging negligence must establish "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof." *Sackin v. TransPerfect Global, Inc.*, 278 F. Supp. 3d 739, 747 (S.D.N.Y. 2017) (quoting *Caronia v. Philip Morris USA, Inc.*, 715 F.3d 417, 428 (2d Cir. 2013)). "[I]t is well-established in New York that when the State assumes physical custody of inmates or detainees, who cannot protect and defend themselves in the same way as those at liberty can, the State owes a duty of care to safeguard those individuals from harm." *Maldonado v. Town Of Greenburgh*, 460 F. Supp. 3d 382, 400 (S.D.N.Y. 2020). That duty extends to attacks from other incarcerated persons; however, it does not "render the State an insurer of inmate safety." *Sanchez v. State Of New York*, 99 N.Y.2d 247, 252 784 N.E.2d 675, 678(N.Y. 2002). Rather, "the scope of the

State's duty to protect inmates is limited to risks of harm that are reasonably foreseeable." *Id.*

As discussed above in the context of McDaniel's § 1983 claims, Defendants were not on notice of any specific threat or impending harm to McDaniel, and N.O.'s attack was not reasonably foreseeable. Defendants thus did not breach their duty with respect to McDaniel's safety, and Defendants are entitled to summary judgment.[11] *See Case v. Anderson*, No. 16-CV-983, 2017 WL 3701863, at *24 (S.D.N.Y. Aug. 25, 2017) ("Although a duty of care is owed by prison authorities with respect to the health and safety of their charges, the State's duty to prisoners does not mandate unremitting surveillance in all circumstances") (internal citation and quotation marks omitted). Courts in this district have dismissed negligence claims against prison staff in similar circumstances. *See, e.g.*, *House v. City Of New York*, No. 18-CV-6693, 2020 WL 6891830, at *21 (S.D.N.Y. Nov. 24, 2020) (granting summary judgment in favor of defendants and dismissing plaintiff's negligence claim where Plaintiff failed to establish that his risk of harm was reasonably foreseeable by prison staff); *Kovalchik v. City Of New York*, No. 09-CV-4546, 2014 WL 4652478, at *9 (S.D.N.Y. Sept. 18, 2014) (granting Defendant's summary judgment motion for section 1983 and negligence claims because "no jury could find that reasonable care required the City to ... provide greater supervision of [plaintiff]").

## CONCLUSION

For the foregoing reasons, I recommend that Defendants' motion for summary judgment be GRANTED in its entirety and that McDaniel's claims be dismissed in their entirety.

## DEADLINE FOR OBJECTIONS AND APPEAL

Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of Court, with extra copies delivered to the Chambers of the Honorable Katherine P. Failla, United States Courthouse, 40 Foley Square, New York, New York 10007, and to the Chambers of the undersigned, 500 Pearl Street, New York, New York 1007. **FAILURE TO FILE TIMELY OBJECTIONS WILL RESULT IN WAIVER OF OBJECTIONS AND PRECLUDE APPELLATE REVIEW.**

### All Citations

Not Reported in Fed. Supp., 2022 WL 421122

## Footnotes

1 Unless otherwise noted, the facts are drawn from Defendants' Statement Of Undisputed Facts Pursuant To Local Civil Rule 56.1 ("SOF") (Dkt. 67), to which McDaniel provided no counterstatement, Defendants' supporting exhibits attached to the Declaration of Peter W. Brocker (Dkt. 64), and the procedural docket. Additionally, mindful of the duty to extend special solicitude to *pro se* litigants, the Court has conducted a thorough review of the available record and considered McDaniel's admissible evidence. The Court draws all reasonable inferences and resolves all ambiguities in favor of McDaniel, the nonmoving party. The consequences of McDaniel's failure to file a Rule 56.1 statement are discussed further below.

2 "Compl." refers to Plaintiff's Amended Complaint at Dkt. 29.

3 McDaniel does not name this individual in his Complaint, and the Defendants refer to the individual by his initials.

4 "McDaniel Dep." refers to the transcript of the deposition of Curtis McDaniel conducted on March 24, 2021. (Dkt. 64, Ex. B.) The page numbers cited by the Court refer to the internal pagination on the transcript.

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5 In the Amended Complaint, McDaniel alleges that "as I went in the bathroom [N.O.] jumped in front of me and cut me on the arm with some sharp rock or something." (Compl. at 6.) During his deposition, McDaniel testified that N.O. "reached in his waistband as if he was going to grab a weapon or something, and I flinched at him, and I walked out of the bathroom because I didn't know what he had or what was going to happen." (McDaniel Dep. at 104.)

6 McDaniel identified this correction officer as Defendant DeLeon in the Amended Complaint but testified as his deposition that he did not know which officer intervened and ended the fight.

7 Correction Officer Gordon, previously named in the first complaint, was not named in the Amended Complaint. (Dkt. 29.)

8 McDaniel filed duplicate copies of his opposition at Dkts. 73 and 76.

9 It is unclear which Correction Officer allegedly used excessive force against McDaniel. The Amended Complaint states that Defendant DeLeon pulled McDaniel away from N.O., but at his deposition, McDaniel indicated that he was not sure if it was Defendant DeLeon or another officer. (Compl. at 7; McDaniel Dep. at 106.)

10 Where, as here, a federal court dismisses all federal claims, the court may exercise its discretion to decline supplemental jurisdiction and dismiss remaining state law claims without prejudice. *See* 28 U.S.C. § 1367(c)(3); *see also Blackrock Balanced Capital Portfolio v. HSBC Bank USA, National Association*, 95 F. Supp. 3d 703, 708-09 (S.D.N.Y. 2015) (district court "may decide to refuse to exercise supplemental jurisdiction if ... the district court has dismissed all other claims over which it had federal jurisdiction...."); *Rosario v. International Auto Mall & Leasing Center, Inc.*, No. 12-CV-4059, 2013 WL 1144893, at *4 (S.D.N.Y. March 19, 2013) (dismissing state claim where the court "has no independent basis for federal jurisdiction"). Conversely, the Court may exercise its discretion to resolve the state court claims. *See Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639, 129 S. Ct. 1862, 1866 (2009) ("A district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary"). Given the lack of merit to McDaniel's claims, and that the state law negligence claim can be disposed of for some of the same reasons as the § 1983 claims, the Court recommends resolving the state law claim as set forth above.

11 Defendants also contend that McDaniel's negligence claim is deficient for failure to comply with the strict requirements to file and plead a notice of claim against municipal entities or their employees. *See* N.Y. Gen. Mun. Law § 50-i(1), 50-e. McDaniel apparently did timely file a notice of claim and described the manner in which the claim arose and the injuries claimed. (*See* Dkt. 64, Ex. E.) Although McDaniel did not allege filing of the notice of claim in his complaint, the Court does not recommend granting summary judgment on that basis.

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United States District Court, S.D. New York.

Marquise D. WILLIAMS, Plaintiff,
v.
Officer SALVUCCI #531 and
Sergeant Cimorelli, Defendants.

No. 20-CV-5098 (CS)
|
Signed December 12, 2022

**Attorneys and Law Firms**

Kellie E. Lagitch, Chief Assistant County Attorney, Richard B. Golden, County Attorney for Orange County, Office of the Orange County Attorney, Goshen, New York, Counsel for Defendants.

**OPINION & ORDER**

Seibel, District Judge

***1** Before the Court is Defendants' unopposed motion for summary judgment. (ECF No. 42.) For the reasons set forth below, Defendants' motion is GRANTED.

## I. BACKGROUND

The following facts are based on Defendants' Local Civil Rule 56.1 Statement, (ECF No. 48 ("Ds' 56.1 Stmt.")), and supporting materials, and are undisputed unless otherwise noted. [1]

### A. Facts

Plaintiff brings this lawsuit in connection with an altercation that occurred on June 6, 2020, when he was a pretrial detainee at the Orange County Correctional Facility ("OCCF"). (Ds' 56.1 Stmt. ¶¶ 1-2, 5-29; IC at 3; AC at 4.) [2] He alleges failure-to-protect claims against Defendants Correction Officer Anthony Salvucci and Sergeant Joseph Cimorelli. (*See* AC at 4.)

On the date in question, Plaintiff was housed in OCCF's Delta 2, or "D2," housing unit in Cell 24 on the unit's top tier. (ECF No. 44 ("Cimorelli Aff.") ¶¶ 4, 7.) He had been transferred there the day before. (*Id.* ¶ 3.) Plaintiff alleges that that morning at approximately 8:30 a.m., he stopped Cimorelli near his cell and told him that he did not feel safe in the D2 unit because of the number of "no contact" or "keep separate" orders he had with regard to other inmates housed there, and requested to be moved. (AC at 4.) Cimorelli allegedly told Plaintiff that he could not be moved and "not to worry." (*Id.*) Cimorelli denies this, stating "had [this conversation] taken place I would have been required [to] lock him in his cell until his safety concerns could be evaluated and a determination made as to whether a move was warranted. I would never have simply told him 'you will be all right' as he claims." (Cimorelli Aff. ¶ 17.)

***2** One of the "keep separate" orders had been issued on March 15, 2020, and required that Plaintiff and inmate Arnold Melendez, who had been involved in an altercation in the prison yard, were to have no contact with each other. (Ds' 56.1 Stmt. ¶ 9; Cimorelli Aff. ¶ 5; IC at 3.) Melendez had been housed in the D2 unit since February 12, 2020. (Ds' 56.1 Stmt. ¶ 10; Cimorelli Aff. ¶ 5.)

On June 6, 2020, non-defendant Officer Gregory Bosch was the Delta Control Officer ("DCO"), responsible for locking inmates in and out of their cells in the D1 and D2 housing units. (Ds' 56.1 Stmt. ¶ 5; Cimorelli Aff. ¶ 7.) The DCO sits in a separate room – often referred to as "the bubble" – located between the two housing units, and is the only officer who can electronically open the doors in both units. (Ds' 56.1 Stmt. ¶ 6; Cimorelli Aff. ¶ 8.) Salvucci was the Delta 2 housing officer, and Cimorelli was the Delta Wing sergeant. (D's 56.1 Stmt. ¶¶ 7-8.)

At approximately 12:30 p.m. on June 6, 2020, according to Bosch, he verified with Defendant Salvucci that Plaintiff was due to be released from the unit for recreation, so he isolated the cells of the inmates with whom Plaintiff had "keep separate" orders and then "locked the unit out for recreation." (ECF No. 43-4 at 2; *see* ECF No. 43-7 at 3.) At about the same time, Melendez returned to the D2 housing unit, and Bosch unlocked the unit door to allow Melendez back in. (Ds' 56.1 Stmt. ¶ 11; *see* ECF No. 43-7 at 3.) Bosch "immediately realized [his] mistake," (ECF No. 43-4 at 2; ECF No. 43-7 at 3): he had allowed Plaintiff out of his cell before Melendez had been locked in, (Ds' 56.1 Stmt. ¶ 13). He then immediately alerted Salvucci by phone. (*Id.*)

Meanwhile, Plaintiff exited his cell facing right, but then looked over the railing, saw Melendez on the lower tier of

the housing unit, and turned to the left to go down the stairs. (Video 1 at 0:13-0:29; ECF No. 43-4 at 2.)[3] According to Plaintiff, as he walked down to the lower tier, "[w]e [saw] one another and again [e]ngae[d] in a fight." (IC at 3; *see* AC at 4 ("we start fighting").) Video of the incident, however, reveals that Melendez had started to go up the stairs, but when another inmate coming down blocked his way, he backed down the stairs and onto the lower tier. (Video 1 at 0:17-0:26.) Plaintiff continued down the stairs and punched Melendez, and Melendez began punching back at Plaintiff. (*Id.* at 0:26-0:38; ECF No. 43-5 at 4.)

Salvucci made a radio transmission that there was a fight. (Ds' 56.1 Stmt. ¶ 18; ECF No. 43-5 at 2; ECF No. 43-6 at 2.) Shortly after, inmate Donnell Murray joined the fight and began attacking Plaintiff, (Video 1 at 0:38-0:56; ECF No. 43-5 at 4)[4]; Plaintiff "[went] down," (AC at 4; *see* Video 1 at 0:57; IC at 3); and Melendez stabbed Plaintiff "with something sharp in the face area," (IC at 3; *see* AC at 4). Defendant Salvucci then sent a second radio transmission indicating that "the fight was now two inmates against one." (ECF No. 43-5 at 4; *see* ECF No. 43-4 at 4; ECF No. 43-6 at 5.) According to the video footage, Salvucci entered the camera's view after Plaintiff was on the ground, about thirty seconds after the altercation began, (Video 1 at 1:02), and first unlocked a cell to let an inmate near the fight into the cell, (*id.* at 1:04-1:09). He appears to be about to do the same for another nearby inmate, moving toward the inmates who are fighting, and appears to remove something from his back pocket as he does so. (*Id.* at 1:10-1:16).

***3** Defendant Salvucci reported that he gave the inmates several direct orders to stop fighting, which they ignored. (ECF No. 43-5 at 4.)[5] Sgt. Cimorelli entered the unit "less than a minute after the fight began" and states that he ordered the inmates to stop fighting. (Cimorelli Aff. ¶ 15; Video 1 at 1:15-1:17.)[6] Melendez and Murray complied and backed away from Plaintiff. (Cimorelli Aff. ¶ 15; ECF No. 43-6 at 5; Video 1 at 1:18-1:21.) Salvucci guided Melendez away and had his arm out to keep Melendez behind him. (Video 1 at 1:18-1:35.) Cimorelli "attempted to keep [Plaintiff] from advancing towards Inmate Murray and Inmate Melendez by using a body hold." (ECF No. 43-6 at 5; Video 1 at 1:20-1:23.) But Plaintiff broke free and advanced toward the two inmates, and the fight resumed. (ECF No. 43-6 at 5; Video 1 at 1:23-1:36.) While attempting to restrain Plaintiff, Cimorelli had dropped his can of oleoresin capsicum ("OC") spray. (Video 1 at 1:25). He retrieved the can, (*id.* at 1:28-1:33), approached all three inmates, and told them they would be sprayed if they did not separate, (Cimorelli Aff. ¶ 16). None of the inmates complied. (*Id.*) Cimorelli then deployed two one-second bursts of the OC spray to Plaintiff's and Murray's faces. (*Id.*; Video 1 at 1:36-1:38.) All three inmates then disengaged and separated. (Video 1 at 1:39-1:42.) Five additional officers, who were members of OCCF's emergency response team, then responded to the incident. (*Id.* at 1:41-1:59.)

As a result of the fight, Plaintiff allegedly lost consciousness; suffered a concussion, swollen jaw, and "split/busted lip"; and had to be transported to an outside hospital. (IC at 3-4; AC at 5.) He further alleges that the mouth area on the left side of his face had to be "glued" back together because, he was told, inmates are not allowed to get stitches. (IC at 3.)

On June 7, 2020, Plaintiff filed Grievance No. 20-0177 (the "Grievance") with Sgt. Torres through the OCCF's inmate grievance program ("IGP"), (ECF No. 43-13 at 7), alleging that Officer Salvucci and "[t]he officer working the (Bubble) at the time of the incident ... failed to follow protocol" because they failed to keep Plaintiff and Melendez separate per the "keep separate" order, (ECF No. 43-14 at 12). The Grievance was received the same day. (Ds' 56.1 Stmt. ¶ 41.) On June 12, 2022, the Grievance was accepted in part and denied in part by the Grievance Coordinator, as follows:

> The Officer that opened your cell when your No Contact was not Secured will be handled administratively. As for your Coming out of your cell when you knowingly engaged in an altercation with your No Contact ... [,] you could have closed your cell door. Your not closing your door Resulted in your injuries.

(ECF No. 43-14 at 12.)

On June 12, 2020, Sgt. DeEntremont delivered to Plaintiff copies of the decisions rendered by the Grievance Coordinator, Sgt. Kiszka, for the Grievance and two others Plaintiff had filed,[7] as well as copies of the New York State Commission on Correction ("NYSCC") Inmate Grievance Form Part II ("Part II Form") for each of the grievances.

(ECF No. 46 ("DeEntremont Aff.") ¶ 4.)[8] According to Sgt. DeEntremont, in his presence Plaintiff signed each of the Part II Forms indicating that he accepted the decision of the Grievance Coordinator. (*Id.* ¶ 5; *see* ECF No. 43-14 at 8, 11, 14; ECF No. 45 ("Kiszka Aff.") ¶¶ 19, 23.) But Plaintiff testified that he did not sign the Part II Form for the Grievance, and someone forged his signature thereon. (P's Depo. at 86:22-84:4; 84:23-85:8.) Plaintiff stated that he was given a copy of the Part II Form for the Grievance and recalls filling it out and saying he was appealing the decision. (*Id.* at 85:12-18.) He testified that someone delivered the Grievance decision and Part II Form to him and he filled out the form with help from another inmate, putting an X next to "I am appealing to the Chief Administrative Officer." (*Id.* at 86:11-87:11.) He testified that he gave his Part II Form back to "the same officer that [he] gave the original grievance to." (*Id.* at 85:21-24.) Plaintiff does not know who forged his signature on the Part II Form or why anyone would have been motivated to do so. (*Id.* at 97:15-18; 99:16-24.) He also does not recall any other instance where someone at OCCF forged his signature. (*Id.* at 99:25-100:5.)

***4** On June 17, 2020, Plaintiff told Sgt. Michael Schaffer that his signature had been forged on his grievance appeal paperwork and requested a grievance form. (ECF No. 43-14 at 3.) Sgt. Schaffer issued one, (*id.*), but Plaintiff never submitted it, (Kiszka Aff. ¶ 23).

### B. Procedural History

Plaintiff filed his IC on July 2, 2020, bringing claims under 42 U.S.C. § 1983 for failure to protect, in violation of the Fourteenth Amendment, against Salvucci, Cimorelli, Sheriff Carl DuBois, Undersheriff Kenneth T Jones, and Orange County Jail Colonel Mele. (IC at 1-5.) On July 7, 2020, the Court issued an Order of Service dismissing all claims against Dubois, Johnson and Mele, and ordering service on Salvucci and Cimorelli. (ECF No. 6.) The remaining Defendants submitted a pre-motion letter in anticipation of their motion to dismiss on October 5, 2020. (ECF No. 12.) The Court held a pre-motion conference on October 30, 2020, at which it granted Plaintiff leave to amend his complaint in response to the issues raised in Defendants' letter. (Minute Entry dated Oct. 30, 2020.) Plaintiff submitted his Amended Complaint on November 10, (AC), and Defendant's motion to dismiss followed on December 29, 2020, (ECF Nos. 18-20). Plaintiff never filed an opposition to the motion. On July 7, 2021, the Court denied the motion to dismiss. (Minute Entry dated July 7, 2021.)

On July 21, 2021, Salvucci and Cimorelli answered the Amended Complaint. (ECF No. 28.) After discovery, they filed a pre-motion letter in anticipation of their motion for summary judgment. (ECF No. 38.) On June 1, 2022, the Court held a pre-motion conference and set a briefing schedule. (Minute Entry dated June 1, 2022.) On August 8, 2022, Cimorelli and Salvucci filed the instant motion, (ECF Nos. 42-49), and Plaintiff once again failed to oppose.

## II. LEGAL STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he dispute about a material fact is 'genuine' ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law.... Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* On a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

The movant bears the initial burden of demonstrating "the absence of a genuine issue of material fact," and, if satisfied, the burden then shifts to the non-movant to "present evidence sufficient to satisfy every element of the claim." *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252. Moreover, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and "may not rely on conclusory allegations or unsubstantiated speculation," *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2001) (cleaned up).

***5** "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by ... citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ... admissions, interrogatory answers, or other materials...." Fed. R. Civ. P. 56(c)(1). Where a declaration is used to support or oppose the motion, it "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the ... declarant is

competent to testify on the matters stated." *Id.* at 56(c)(4); *see Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir. 2008). If "a party fails ... to properly address another party's assertion of fact as required by Rule 56(c), the court may ... consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." Fed. R. Civ. P. 56(e).

*Pro se* litigants must be afforded "special solicitude," *Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010), "particularly where motions for summary judgment are concerned," *Jackson v. Fed. Express*, 766 F.3d 189, 195 (2d Cir. 2014). Where, as here, the non-moving party fails to respond to the movant's summary judgment motion, "the district court may not grant the motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial." *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004) (cleaned up). "If the evidence submitted in support of the summary judgment motion does not meet the movant's burden of production, then summary judgment must be denied even if no opposing evidentiary matter is presented." *Id.* (cleaned up) (emphasis omitted).

## III. DISCUSSION

### A. Exhaustion Under the PLRA

The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion is required for "all inmate suits about prison life, whether they involve general circumstances or particular episodes." *Porter v. Nussle*, 534 U.S. 516, 532 (2002). The PLRA mandates that a plaintiff use "all steps that the agency holds out, and do[ ] so properly" – that is, in accordance with the applicable agency rules. *Amador v. Andrews*, 655 F.3d 89, 96 (2d Cir. 2011) (cleaned up). Exhaustion of available administrative remedies "must be complete prior to commencement of suit." *Chalif v. Spitzer*, No. 05-CV-1355, 2008 WL 1848650, at *13 (N.D.N.Y. Apr. 23, 2008) (cleaned up).

"Because failure to exhaust is an affirmative defense, defendants bear the initial burden of establishing, by pointing to legally sufficient sources such as statutes, regulations, or grievance procedures, that a grievance process exists and applies to the underlying dispute." *Hubbs v. Suffolk Cnty. Sheriff's Dep't*, 788 F.3d 54, 59 (2d Cir. 2015) (cleaned up). "If the defendants meet this initial burden, administrative remedies may nonetheless be deemed unavailable if the plaintiff can demonstrate that other factors ... rendered a nominally available procedure unavailable as a matter of fact." *Id.* "[A]n administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end – with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; is "so opaque that it becomes, practically speaking, incapable of use" or "so confusing that no reasonable prisoner can use" it; or "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Romano v. Ulrich*, 49 F.4th 148, 153 (2d Cir. 2022) (cleaned up).

***6** For inmates at OCCF, administrative exhaustion requires compliance with the Inmate Handbook, which sets forth OCCF's Grievance Procedure. (ECF No. 43-11); *see Falls v. Campbell*, No. 17-CV-35, 2022 WL 1004179, at *6 (S.D.N.Y. March 30, 2022). The Inmate Handbook states that OCCF's "Grievance Coordinator will administer the grievance process," and act as liaison between the inmate, the Chief Administrative Officer, and the NYSCC. (Inmate Handbook at 33.) Paragraph 2 of the Grievance Procedure provides instructions for filing grievances:

> b. ... [Y]ou may request and will receive a grievance form by the end of the shift, but no longer than eight (8) hours of your request
>
> c. Your grievance request must be submitted within five days of the incident.
>
> d. You may request and will receive assistance in filling out the form.
>
> e. The Chief Administrative Officer of his/her designee shall ensure that each grievance is investigated to the fullest extent necessary by an impartial person who was not personally involved in the circumstances giving rise to the grievance. A grievance that is too vague to understand or fails to set forth supporting evidence or information will be returned to the inmate. Failure to supply sufficient information or evidence within two (2) days shall be cause to deny the grievance.
>
> f. If you are not satisfied with the Grievance Coordinator's decision, you may appeal the determination to the

> Corrections Administrator within two business days of receiving the decision.
>
> g. You will receive a response within five (5) business days.

(*Id.* at 33-34.) The Grievance Procedure further states that grievances can be placed in a "Grievance Box", which is checked each business day in each housing unit. (*Id.* at 34.) Paragraph 4 outlines how an inmate can appeal to NYSCC:

> a. If the Corrections Administrator denies your grievance, you may appeal the decision within three business days to the State Commission on Corrections. The facility is responsible for mailing the appeal to the Commission. The Grievance Coordinator will issue a receipt indicating the date the appeal was submitted.
>
> b. You will receive a response from the Commission within forty-five business days of their receipt of the grievance. The Chief Administrative Officer and the Grievance Coordinator will also receive a copy of the findings. If it is found in favor of the grievant, as a matter of law, the Chief Administrative Officer will provide a remedy.

(*Id.*)

**B. Whether Plaintiff Failed to Exhaust His Administrative Remedies**

Defendants argue that Plaintiff failed to exhaust his administrative remedies prior to filing the instant lawsuit. (Ds' Mem. at 6-11). Specifically, they argue that at a minimum, Plaintiff failed to exhaust his claims against Defendant Cimorelli because the Grievance did not name him, generally refer to him, or mention facts relevant to the claim against him. (*Id.* at 10.) They further claim that Plaintiff failed to appeal the initial decision by the Grievance Coordinator. (*Id.* at 8-9.)

It is clear Plaintiff was aware of the available Grievance Procedure: he testified that he recalls receiving a copy of the Inmate Handbook, which included a description of the Grievance Procedure. (P's Depo. at 78:15-23.) He also testified that he was familiar with the process, (*id.* at 78:9-11), and indeed he made use of it frequently during his time at OCCF, including filing appeals, (Ds' 56.1 ¶¶ 36-40).

In Grievance No. 20-0177, Plaintiff wrote,

> On 6-6-20, I was [l]ocked out [of] my cell for Recreation at 12:30 noon. My (No Contact) [name redacted] wasn't suppose to be out nor in contact with me, we start fighting[,] another inmate jumps in and I start fighting both inmates. I got stabbed in my mouth with something sharp and end up with a concussion and get[ ] transported to the Hospital to get my lip sealed back together.

***7** (ECF No. 43-14 at 12.) He further stated, "The officer working the (Bubble) at the time of the incident and Officer Salvucci #531, failed to follow protocol and to keep us separate. If we w[ere] kept separate like we were supposed to[,] this altercation wouldn't have occurred and each officer should get written up." (*Id.*)

"The officer working the (Bubble)" was not Defendant Cimorelli but was Officer Bosch. (Ds' 56.1 Stmt. ¶ 5.) Plaintiff does not name or generally refer to Cimorelli in the Grievance. But "New York regulations relating to the filing of a grievance by a New York prison inmate do not require that an inmate identify every individual involved in the incident complained of in order to properly exhaust remedies as to those individuals." *Snyder v. Whittier*, 2009 WL 691940, at *8 (N.D.N.Y. Mar. 12, 2009). Although the Grievance Procedure says that "[a] grievance that is too vague to understand or fails to set forth supporting evidence or information will be returned to the inmate," (Inmate Handbook at 34), it contains no explicit requirement that the inmate list every responsible party. Nor does the grievance form itself instruct the inmate to name those responsible for the alleged misconduct. (*See, e.g.*, ECF No. 43-14 at 12); *see also Espinal v. Goord*, 558 F.3d 119, 126 (2d Cir. 2009) ("[T]he complaint form does not instruct the inmate to name the officials allegedly responsible for misconduct."). Therefore, a *pro se* inmate "cannot be expected to infer the existence of an identification requirement in the absence of a procedural rule stating that the grievance must include the names of the responsible parties." *Espinal*, 558 F.3d at 127.

But Defendants are nevertheless correct that Plaintiff failed to exhaust his claim as to Defendant Cimorelli. This is because Plaintiff's failure-to-protect claim against Cimorelli

is distinct from the claim against Salvucci and involves facts that were not outlined in the Grievance. Plaintiff does not allege that Cimorelli bears any responsibility for Plaintiff and Melendez being out of their cells at the same time. Rather, he alleges that he had a conversation with Cimorelli on the morning of June 6, 2020, in which Plaintiff said he did not feel safe in the D2 unit, but Cimorelli did nothing in response. (AC at 4.) Cimorelli's denial of this interaction, (Cimorelli Aff. ¶ 17), would create a fact issue, except the Grievance clearly did not detail or even refer to this alleged conversation, (*see* ECF No. 43-14 at 12).[9] The Grievance provided no notice that Plaintiff was alleging a claim of any kind against Cimorelli based on events hours before the fight. *See Percinthe v. Julien*, 2008 WL 4489777, at *2 (S.D.N.Y. Oct. 4, 2008) ("The question for this Court is whether the plaintiff's grievance sufficiently alerted prison officials that he was alleging some wrongdoing beyond that alleged against the person or persons specifically named in the grievance.") (cleaned up). Therefore, Plaintiff's claim as to Defendant Cimorelli was not properly exhausted.[10] *See Snyder*, 2009 WL 691940, at *8 ("[Plaintiff's] claim against Officer Funnye ... is distinct from that against defendant Whittier, in that it asserts that Officer Funnye failed to report the incident after it happened to proper authorities. Given this circumstance, [Plaintiff's] actions did not result in the proper exhaustion of his administrative remedies against defendant Funnye even if it is determined that he filed a proper grievance regarding the Whittier assault."). As such, the remaining analysis will focus on whether Plaintiff has properly exhausted his administrative remedies as to his claim against Defendant Salvucci.

***8** As outlined above, there is a dispute of fact as to whether Plaintiff signed the Part II Form accepting the Grievance Coordinator's decision, as Defendants contend, (DeEntremont Aff. ¶ 5; ECF No. 43-14 at 11; ECF No. 43-13 at 7), or if Plaintiff's signature on the Form is forged and Plaintiff actually sought to appeal, as Plaintiff contends, (P's Depo. at 86:11-87:11, 88:11-19), and as he reported to Sgt. Shaffer on June 17, 2020, (ECF No. 43-14 at 3). Assuming, as I must, that Plaintiff did not submit the form to which Defendants point and instead submitted a form that indicated he wanted to appeal, the record is unclear as to whether that appeal was timely. An appeal must be filed within three business days, (*see* Inmate Handbook at 34), but Plaintiff provides no facts showing he filed the appeal within this time frame.

Nevertheless, giving Plaintiff the benefit of the doubt, and "[b]earing in mind that defendants bear the burden of proof on th[e] issue" of failure to exhaust, *Livingston v. Piskor*, 215 F.R.D. 84, 86 (W.D.N.Y. 2003), fact issues remain as to whether Plaintiff failed to exhaust his administrative remedies as to his claim against Defendant Salvucci,[11] so I turn to the merits.

**C. Failure to Protect**

Because Plaintiff was a pretrial detainee at the time of the altercation, I analyze his failure-to-protect claims under the Due Process Clause of the Fourteenth Amendment, rather than under the Eighth Amendment. *See Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017).

The Due Process Clause imposes on jail officials "a duty to protect prisoners from violence at the hands of other prisoners." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (cleaned up). A prison official violates this requirement when (1) the inmate is incarcerated "under conditions posing a substantial risk of serious harm"; and (2) the prison official shows "deliberate indifference to inmate health or safety." *Id.* at 834 (cleaned up). "[A] prison official has sufficient culpable intent if he has knowledge that an inmate faces a substantial risk of serious harm and he disregards that risk by failing to take reasonable measures to abate the harm." *Hayes v. N.Y.C. Dep't of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996). "[M]ere negligence will not suffice." *Id.*; *accord Rembert v. Cheverko*, No. 12-CV-9196, 2014 WL 3384629, at *5 (S.D.N.Y. July 10, 2014).

A plaintiff may show that he is "incarcerated under conditions posing a substantial risk of serious harm," *Hayes*, 84 F.3d at 620, either from "a specific assailant or a more general risk of harm due to the conditions at the time of the attack," *Hurst v. Perez*, No. 15-CV-4703, 2017 WL 187532, at *2 (S.D.N.Y. Jan. 13, 2017), such as where "a substantial risk of inmate attacks was longstanding, pervasive, [or] well-documented," *Farmer*, 511 U.S. at 842. "Courts may find a substantial risk of serious harm where there is evidence of a previous altercation between a plaintiff and his attacker, coupled with a complaint by the plaintiff regarding the altercation or a request by the plaintiff to be separated from the attacker." *Mays v. Falu*, No. 18-CV-6145, 2019 WL 6619330, at *7 (S.D.N.Y. Dec. 5, 2019) (cleaned up).

"In the context of a failure to intervene claim, an officer displays deliberate indifference when he has adequate time to

assess a serious threat against an inmate and a fair opportunity to protect the inmate without risk to himself, yet fails to intervene." *Henry v. County of Nassau*, No. 13-CV-7427, 2015 WL 2337393, at *7 (E.D.N.Y. May 13, 2015) (cleaned up). "The law in this Circuit is clear that officers are under no obligation to put their own safety at risk by intervening in inmate fights." *Velez v. City of N.Y.*, No. 17-CV-9871, 2019 WL 3495642, at *5 (S.D.N.Y. Aug. 1, 2019). Where an inmate-on-inmate "fight was not of sufficient duration that an officer present as the scene would have had a reasonable opportunity to attempt to prevent the attack from continuing, the plaintiff cannot establish a Section 1983 failure to intervene claim." *Henry*, 2015 WL 2337393, at *7.

***9** Defendants argue that because Plaintiff was clearly the aggressor, he cannot establish that he faced a substantial risk of serious harm. (Ds' Mem. at 11-13.) The Court agrees. "While courts will look to the existence of 'no contact' orders (or lack thereof) to determine whether a substantial risk of harm existed," *Garcia v. Westchester Cnty.*, No. 19-CV-2167, 2021 WL 706413, at *4 (S.D.N.Y. Feb. 22, 2021), "the existence of a no-contact order is not necessarily dispositive as to whether a substantial risk of serious harm exists," *Mays*, 2019 WL 6619330, at *8 n.7. Here, although there was a "no contact" order between Plaintiff and Melendez, the harm that led to Plaintiff's injuries was brought on by Plaintiff's initiation of the altercation. "[A]n inmate's own violent tendencies are not the type of 'substantial risk of serious harm' protected by the Constitution." *Louis-Charles v. Courtwright*, No. 11-CV-147, 2014 WL 457951, at *6 (N.D.N.Y. Feb. 4, 2014) (collecting cases). Therefore, "a prisoner who is himself the aggressor in fights with other inmates cannot succeed on a failure to protect claim." *Id.*; *see Huger v. Anderson*, No. 12-CV-1242, 2015 WL 1525994, at *4 (M.D.N.C. Apr. 2, 2015) (Plaintiff's act of aggression against another inmate "represented a superseding cause" of Plaintiff's injuries, so officer's conduct was not proximate cause "as required to establish liability under § 1983").

Even if the existence of the "no contact" order were enough to demonstrate a risk of substantial harm to Plaintiff despite Plaintiff being the aggressor, he cannot establish that any official acted with the requisite deliberate indifference. To succeed on the second prong of a failure-to-protect claim, "a pretrial detainee must prove that the defendant-official acted intentionally or recklessly failed to act with reasonable care to mitigate the risk of harm even though the defendant-official knew, or should have known, of the risk." *Grant v. Hogue*, No. 17-CV-3609, 2019 WL 3066378, at *5-6 (S.D.N.Y. July 12, 2019) (cleaned up). "Thus, unlike the Eighth Amendment, the Fourteenth Amendment can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm." *Id.* (cleaned up). "In general, a defendant must have known of a prior altercation between the individuals in question or of specific threats that had been made against the plaintiff," in order to be held liable for inmate-on-inmate violence. *Garcia*, 2021 WL 706413, at *4.

Plaintiff alleges that on the day of the incident, he was let out of his cell "without knowing the where abouts" of Melendez, and Defendant Salvucci failed to inform him that Melendez was out of his cell and failed to keep him locked in until Melendez was returned to his cell. (AC at 4; *see* IC at 5.) He also alleges there was an "officer that stood there and did nothing at all to stop the two inmates from attacking him." (IC at 4.)

First, Plaintiff does not provide any facts showing the Defendant Salvucci specifically was aware of the "no contact" order between Plaintiff and Melendez, or of any prior altercation or threats against Plaintiff. But even if I were to assume such knowledge, Salvucci was not the officer responsible for letting Melendez and Plaintiff out at the same time; that was Officer Bosch, (Ds' 56.1 Stmt. ¶¶ 5, 11-13; Cimorelli Aff. ¶¶ 8-9), who is not named as a defendant.

Finally, Plaintiff's allegation that Salvucci "stood there and did nothing at all to stop the two inmates from attacking [him]" mischaracterizes Salvucci's actions. As soon as Plaintiff initiated the fight, (Video 1 at 0:31), Salvucci radioed for help, and did so again moments later when Murray joined in, (ECF No. 43-5 at 4). Salvucci then segregated other nearby inmates, (Video 1 at 1:02-1:15), before approaching the altercation and ordering those involved to stop fighting, which Melendez and Murray did moments later when Cimorelli approached, (*id.* at 1:18-1:20; ECF No. 43-5 at 4). Salvucci then attempted to isolate Melendez before Plaintiff attacked again. (Video 1 at 1:20-1:25.) A reasonable jury would have to conclude that Salvucci took reasonable measures to stop the fight. *See Blaylock v. Borden*, 547 F. Supp. 2d 305, 312 (S.D.N.Y. 2008) (officer "took reasonable measures" to stop altercation when "[h]e immediately ordered the men to cease fighting and promptly called for officer assistance.... Considering that [the officer's] actions – arriving promptly on the scene, calling for immediate assistance, and ordering the men to place their hands on the wall – are in line with the officers' safety protocol, plaintiff's contention that [the

officer] acted with deliberate indifference fails as a matter of law."), *aff'd* 363 F. App'x 786 (2d Cir. 2010) (summary order). That he did not physically intervene before the arrival of Cimorelli arrived does not show deliberate indifference. *See Rosario v. Nolan*, No. 16-CV-228, 2021 WL 2383769, at *3 (W.D.N.Y. Mar. 22, 2021) ("[I]t is well established that a failure to intervene in an inmate-on-inmate assault is not actionable if, in so doing, an officer would have subjected himself or others to harm."), *report and recommendation adopted*, 2021 WL 2380818 (W.D.N.Y. June 10, 2021); *Velez-Shade v. Population Mgmt.*, No. 18-CV-1784, 2019 WL 4674767, at *6 (D. Conn. Sept. 25, 2019) (granting motion to dismiss where lone officer waited two minutes, until backup arrived, to intervene in an altercation involving three inmates); *Blaylock*, 547 F. Supp. 2d at 312 (reasonable for officer who was "was alone with two inmates, one of who[m] had a weapon" to call for backup "instead of jumping into the fight himself").

***10** Therefore, Salvucci is entitled to summary judgment on Plaintiff's failure-to-protect claim. [12]

## IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED. The Clerk of Court is respectfully directed to terminate the pending motion, (ECF No. 42), enter judgment for Defendants, and close the case

**SO ORDERED.**

**All Citations**

Not Reported in Fed. Supp., 2022 WL 17586326

## Footnotes

1 Plaintiff did not file a responsive Rule 56.1 Statement or any papers in opposition to this motion. Local Civil Rule 56.1 requires that the party opposing a motion for summary judgment submit a counterstatement responding to the moving party's statement of material facts, indicating which facts are admitted and which the opposing party contends are in dispute and require trial. L.R. 56.1(b). Under the Local Rule, "[i]f the opposing party ... fails to controvert a fact so set forth in the moving party's Rule 56.1 statement, that fact will be deemed admitted." *Giannullo v. City of N.Y.*, 322 F.3d 139, 140 (2d Cir. 2003) (citing L.R. 56.1(c)). *Pro se* litigants are not excused from this requirement. *SEC v. Tecumseh Holdings Corp.*, 765 F. Supp. 2d 340, 344 n.4 (S.D.N.Y. 2011). As Defendants served Plaintiff with the requisite notice pursuant to Local Civil Rule 56.2, (*see* ECF No. 49), I have discretion to consider any properly supported facts in Defendants' Local Civil Rule 56.1 Statement admitted. *Vance v. Venettozzi*, No. 18-CV-748, 2021 WL 4145705, at *3 (N.D.N.Y. Sept. 13, 2021). (The Court will send Plaintiff copies of any unpublished decisions cited in this Opinion and Order.) But granting Plaintiff special solicitude, I have considered his statements in his complaint and amended complaint, (ECF No. 2 ("IC"); ECF No. 16 ("AC")), and his deposition testimony, (ECF No. 43-9 ("P's Depo.")). *See Holtz v. Rockefeller & Co.*, 258 F.3d 62, 73 (2d Cir. 2001) ("[W]hile a court is not required to consider what the parties fail to point out in their Local Rule 56.1 statements, it may in its discretion opt to conduct an assiduous review of the record even where one of the parties has failed to file such a statement.") (cleaned up).

2 Citations to Plaintiff's IC; AC; and ECF Nos. 43-4, 43-5, 43-6, 43-7, 43-8, 43-11, 43-13, 43-14, and 43-15 refer to the page numbers generated by the Court's electronic filing system.

3 "Video 1" refers to video footage of the June 6, 2020 incident submitted to the Court by Defendants in support of their motion. (*See* ECF No. 43 ¶ 20.)

4 There was no "keep separate" order in place between Plaintiff and Murray. (ECF No. 43-8 at 3; P's Depo. at 48:22-24.)

5 The video footage of the incident does not have any audio.

6 The video shows Cimorelli entering about 44 seconds after the fight began. (Video 1 at 1:15.)

7 On June 6, 2020, Plaintiff filed two additional grievances – Grievance No. 20-178 and Grievance No. 20-180 – with Sgts. Dellapia and Ehlers, respectively, (ECF No. 43-13 at 7-8), which were also received the same day, (Ds' 56.1 Stmt. ¶ 46). In Grievance No. 20-178, Plaintiff alleges that a Correction Officer named "Longhlin" used a racial slur against him, (ECF No. 43-14 at 15), and in Grievance No. 20-180, Plaintiff alleges that while at the hospital after the altercation, an unnamed officer went into his cell and took a magazine and gave it to another inmate, (ECF No. 43-14 at 9). Both grievances were denied on the merits by the Grievance Coordinator on June 12, 2020. (ECF No. 43-14 at 9, 15.)

8 Defendants' Rule 56.1 Statement states that this occurred on June 6, 2020, (Ds' 56.1 Stmt. ¶ 45), but the Inmate Grievance Form was signed on June 12, 2020 and Sgt. DeEntremont testified that that was the date as well. (ECF No. 43-14 at 12; DeEntremont Aff. ¶ 4.)

9 Plaintiff essentially concedes that he raised no grievance relating to the alleged inaction of Cimorelli. In the IC, in response to the question on the form, "Which claim(s) in this complaint did you grieve?" Plaintiff responded, "The officer that was there during the incident failed to keep me safe by letting my (no contact) out near me." (IC at 5.)

10 Further, there are no circumstances that would have made the administrative process unavailable to Plaintiff – as is obvious from the fact that he filed a grievance against Salvucci and Bosch.

11 The same dispute presents a fact issue as to whether jail personnel prevented Plaintiff from filing a grievance through "machination, misrepresentation, or intimidation."

12 The "traditional 'values of judicial economy, convenience, fairness, and comity' " weigh in favor of declining to exercise supplemental jurisdiction where all federal-law claims are eliminated before trial. *Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (citing 28 U.S.C. § 1367(c)(3)) (quoting *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). Having granted summary judgment on all claims over which this court has original jurisdiction, and having considered the factors set forth in *Cohill*, I decline to exercise supplemental jurisdiction over any state-law negligence claim Plaintiff may have intended to bring, and dismiss any such claim without prejudice.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Edwards by Edwards v. City of New York, S.D.N.Y., July 31, 2019

KeyCite Overruling Risk - Negative Treatment
Overruling Risk Darnell v. Pineiro, 2nd Cir., February 21, 2017

2016 WL 1241525
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Charles BLAKE, Plaintiff,
v.
ISRAEL SEXTON, SERGEANT, NEW YORK CITY POLICE DEPARTMENT, Defendants.

12 Civ. 7245 (ER)
|
Signed 03/24/2016

**Attorneys and Law Firms**

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**OPINION AND ORDER**

Ramos, D.J.

***1** Charles Blake ("Plaintiff"), appearing *pro se*, brings this action pursuant to 42 U.S.C. § 1983 ("Section 1983"), alleging that his constitutional rights were violated while he was held as a pretrial detainee in a detention holding facility in Brooklyn, New York. Specifically, Plaintiff alleges that Sergeant Israel Sexton ("Defendant" or "Sgt. Sexton") was deliberately indifferent to his health and safety in violation of the Fourteenth Amendment.

Defendant now moves for summary judgement. (Doc. 62). For the reasons discussed below, Defendant's motion for summary judgment is DENIED.

**I. Factual Background**

The following facts are undisputed except where otherwise noted.

On the morning of August 26, 2010, Plaintiff was held as a pretrial detainee at the Brooklyn County Court's Central Booking Detention Holding Facility in Brooklyn, New York. Defendant's Rule 56.1 Statement of Undisputed Facts ("Def.'s 56.1") (Doc. 63) ¶ 1. At some point that morning, Plaintiff sat down in an open seat in the holding cell. *Id.* at ¶ 6. Another detainee soon approached Plaintiff and requested that Plaintiff give him the seat. *Id.* at ¶ 7. At that point, according to Plaintiff, the other detainee, together with another individual, attacked Plaintiff. Plaintiff's Rule 56.1 Statement of Undisputed Facts ("Pl.'s 56.1") (Doc. 72) ¶ 9. Plaintiff and the other detainee had never met prior to this altercation. Def.'s 56.1 ¶ 19.

During the altercation, Sgt. Sexton approached the holding cell. Pl.'s 56.1 ¶ 9; Def.'s 56.1 ¶ 10. As Sgt. Sexton approached the cell, Plaintiff's attackers [1] placed Plaintiff out of Sgt. Sexton's line of sight and prevented Plaintiff from speaking. Def.'s 56.1 ¶ 1 1. Plaintiff claims that, at this point, Sgt. Sexton said "stop it in there," Pl.'s 56.1 ¶ 10, but Sgt. Sexton disputes claims he was aware of any altercation, Def.'s 56.1 ¶12. Sgt. Sexton then left the holding cell area, at which point the altercation resumed. Pl.'s 56.1 ¶ 12. The altercation caused other inmates in the holding cell to begin yelling. Def.'s 56.1 ¶ 14. According to Plaintiff, about ten to fifteen minutes later Sgt. Sexton and two other officers returned to the holding cell. Pl.'s 56.1 ¶ 15. The altercation stopped as soon as the officers inserted a key into the cell door. Def.'s 56.1 at ¶ 16. Plaintiff was removed from the cell, and Sgt. Sexton ordered another officer to call for an ambulance. Id. at ¶ 17. Within twenty minutes of the altercation, Plaintiff was seen by medical professionals and placed in an ambulance for transportation to a hospital for treatment of his injuries. Id. at ¶ 18.

According to medical records submitted with Plaintiff's Amended Complaint, Plaintiff suffered serious injuries, including closed dislocation of his right ankle, blunt trauma, and a right ankle fracture. Amended Complaint ("Am. Compl.") (Doc. 18), Ex. A. Plaintiff underwent two surgical operations on his right ankle, and was referred to physical therapy afterwards. *Id*. The records provided also indicate that Plaintiff may need additional surgeries in the future. *Id*. Defendant does not dispute these injuries or the need for medical treatment.

***2** The parties dispute whether or not Sgt. Sexton became aware of the altercation when he initially approached the holding cell. Sgt. Sexton claims he was initially unaware of

the altercation, Defendant's Memorandum of Law ("Def.'s Br.") (Doc. 66) at 2, while Plaintiff claims the Defendant knew "something was going on" when he initially approached the cell, Pl.'s 56.1 ¶ 10.

**II. Legal Standard on Motion for Summary Judgment**

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). "An issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Senno v. Elmsford Union Free Sch. Dist.*, 812 F. Supp. 2d 454, 467 (S.D.N.Y. 2011) (citing *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133, 137 (2d Cir. 2009)). A fact is "material" if it might affect the outcome of the litigation under the governing law. *Id*.

The party moving for summary judgment is first responsible for demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where, like here, "the burden of proof at trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 204 (2d Cir. 2009) (citing *Celotex*, 477 U.S. at 322 23). If the moving party meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008) (citing *Celotex*, 477 U.S. at 322 23).

In deciding a motion for summary judgment, the Court must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (quoting *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004)) (internal quotation marks omitted). However, in opposing a motion for summary judgment, the nonmoving party may not rely on unsupported assertions, conjecture, or surmise. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). The non-moving party must do more than show that there is "some metaphysical doubt as to the material facts." *McClellan v. Smith*, 439 F.3d 137, 144 (2d Cir. 2006) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)) (internal quotation mark omitted). To defeat a motion for summary judgment, "the non-moving party must set forth significant, probative evidence on which a reasonable fact-finder could decide in its favor." *Senno*, 812 F. Supp. 2d at 467–68 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256–57 (1986)).

The Second Circuit has made clear that "special solicitude should be afforded *pro se* litigants generally, when confronted with motions for summary judgment." *Graham v. Lewinski*, 848 F.2d 342, 344 (2d Cir. 1988) (citing *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988)). *Pro se* litigants' submissions are "held 'to less stringent standards than formal pleadings drafted by lawyers.'" *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (per curiam) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)); *see also Young v. N.Y.C. Dep't of Educ.*, No. 09 Civ. 6621, 2010 WL 2776835, at *5 (S.D.N.Y. July 13, 2010) (noting that the same principles apply to briefs and opposition papers filed by *pro se* litigants). Although "*pro se* status 'does not exempt a party from compliance with relevant rules of procedural and substantive law,'" *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 477 (2d Cir. 2006) (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)), courts read the pleadings and opposition papers submitted by *pro se* litigants "liberally and interpret them 'to raise the strongest arguments that they suggest.'" *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)). "However, a *pro se* party's 'bald assertion,' completely unsupported by evidence, is not sufficient to overcome a motion for summary judgment." *Lee v. Coughlin*, 902 F. Supp. 424, 429 (S.D.N.Y. 1995) (quoting *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991)).

**III. Discussion**

**A. Plaintiff's Deliberate Indifference Claim**

***3** The Eighth Amendment[2] requires that prison officials take "reasonable measure to guarantee the safety of inmates in their custody." *Hayes v. N.Y.C. Dep't of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996); *see also Gilmore v. Rivera*, No. 13 Civ. 6955 (RWS), 2014 WL 1998227, at *2 (S.D.N.Y. May 14, 2014) ("Prison officials may neither deprive a prisoner of 'basic human needs, *e.g.*, food, clothing, shelter, medical care, and reasonable safety,' nor expose an inmate to conditions that 'pose an unreasonable risk of serious damage to his future health.'") (citations omitted). Thus, a prison official's failure to protect a prisoner from harm may form the basis of a Section 1983 claim. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). "[P]rison officials have a duty to protect prisoners from violence at the hands of other prisoners." *Id*.

To prove an Eighth Amendment violation based on an attack by another inmate, "the plaintiff's burden consists of both objective and subjective elements—the plaintiff must demonstrate that the alleged deprivation is sufficiently serious under an objective standard and that the charged prison officials acted with a sufficiently culpable state of mind." *Knowles v. N.Y.C. Dep't of Corr.*, 904 F. Supp. 217, 221 (S.D.N.Y. 1995) (citing *Farmer*, 511 U.S. at 834).

First, under the objective prong, the alleged deprivation is "sufficiently serious" when a "prison official's act or omission ... result[s] in the denial of the 'minimal civilized measure of life's necessities.'" *Knowles v. N.Y.C. Dep't of Corr.*, 904 F. Supp. 217, 221 (S.D.N.Y. 1995) (citing *Farmer*, 511 U.S. at 834). A plaintiff need not show a serious physical injury, only the existence of a "substantial risk of serious harm." *Heisler v. Kralik*, 981 F. Supp. 830, 837 (S.D.N.Y. 1997) (quoting *Wilson*, 501 U.S. at 298), *aff'd*, 164 F.3d 618 (2d Cir. 1998). A substantial risk of serious harm "contemplates a condition of urgency, one that may produce death, degeneration, or extreme pain." *Colliton v. Gonzalez*, No. 07 Civ. 02125 (RJH) (MHD), 2011 WL 1118621, at *5 (S.D.N.Y. Mar. 23, 2011); *see also Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994).

Second, under the subjective prong, a plaintiff must demonstrate that the charged defendants acted with "deliberate indifference." *Wilson*, 501 U.S. at 303. Accordingly, a plaintiff must show that the defendant knew of and disregarded an excessive risk of inmate health and safety or that defendant was aware of facts from which it could reasonably be inferred that a substantial risk of serious harm existed. *See Farmer*, 511 U.S. at 837; *see also Walker*, 717 F.3d at 125 ("Evidence that a risk was 'obvious or otherwise must have been known to a defendant' may be sufficient for a fact finder to conclude that the defendant was actually aware of the risk.") (citation omitted). An officer displays deliberate indifference when he or she has adequate time to assess a serious threat against an inmate and a fair opportunity to protect the inmate with no risk to his or her self, yet fails to act. *Rosen v. The City of N.Y.*, 667 F. Supp. 2d 355, 360 (S.D.N.Y. 2009) (citing *Stubbs v. Dudley*, 849 F.2d 83, 86–87 (2d Cir. 1988)). A correctional officer's failure to intervene during an inmate attack can constitute deliberate indifference. *See Morales v. N.Y. State Dep't of Corr.*, 842 F.2d 27, 30 (2d Cir. 1988); *see also Stewart v. Schiro*, No. 13 Civ. 3613 (NGG) (VMS), 2015 WL 1854198, at *8–9 (E.D.N.Y. Apr. 22, 2015) (noting that an inmate-to-inmate altercation can "put a prison official on sufficient notice to render the prison official deliberately indifferent if he or she then fails to intervene in an appropriate manner"); *Candelaria v. Coughlin*, No. 91 Civ. 2978, 1996 WL 88555, at *9 (S.D.N.Y. Mar. 1, 1996) (same).

***4** To show deliberate indifference in a failure-to-intervene action, the plaintiff must first show defendant "observed or had reason to know" the plaintiff was involved in a physical altercation with another inmate. *Rosen*, 667 F. Supp. 2d at 360 (citing *Williams v. Russo*, No. 01 Civ. 6401 (CJS), 2009 WL 185758, at *4 (W.D.N.Y. Jan. 26, 2009). And second, plaintiff must show that the defendant had "an extended opportunity to stop the attack but failed to take any action to do so." *Rucco v. Howard*, No. 91 Civ. 6762 (RPP), 1993 WL 299296, at *4 (S.D.N.Y. Aug. 4, 1993) (citing *Williams*, 508 F.2d at 546); *see also Hayes v. N.Y.C. Dep't of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996) ("[A] prison official has sufficient culpable intent if he has knowledge that an inmate faces a substantial risk of serious harm and he disregards that risk by failing to take reasonable measures to abate the harm.") (citation omitted); *Russo*, 2009 WL 185758, at *4 (laying out the test for deliberate indifference in a failure to intervene claim.).

Here, regarding the objective prong, Plaintiff has submitted sufficient evidence to go to the trier of fact on whether he faced "a condition of urgency." *Colliton*, 2011 WL 1118621, at *5. According to Plaintiff, his alleged attackers punched and kicked him numerous times, and at least one punch to the back of the head was strong enough to knock Plaintiff to the ground. Declaration of Daniel G. Saavedra (Doc. 83), Ex. B ("Pl. Dep. Tr.") at 37:10 16, 38:1 25, 39:1 25. Moreover, documented injuries suffered by Plaintiff support the inference that conditions were urgent— *i.e.,* sufficiently serious—during the attack.[3] *See Knowles,* 904 F. Supp. at 221 (S.D.N.Y. 1995) (holding that the severity of plaintiff s injury, a cut to the face requiring sixteen stiches, clearly "constitute[d] a denial of the minimal civilized measure of life's necessities"); *see also Warren v. Goord,* 579 F. Supp. 2d 488, 496 (S.D.N.Y. 2008) (holding the objective prong satisfied based on a cut to plaintiffs face and noting that courts in this District have found the objective prong met based on plaintiffs' physical injuries), *aff'd,* 368 F. App'x 161 (2d Cir. 2010).

With respect to the subjective prong, Plaintiff first has provided sufficient evidence for a reasonable trier of fact to conclude that Defendant "observed or had reason to know" that Plaintiff was involved in a physical altercation with another inmate when Defendant initially approached the

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cell.[4] *Rosen,* 667 F. Supp. 2d at 360 (citing *Russo,* 2009 WL 185758, at *4). While Defendant relies heavily on Plaintiffs deposition testimony that Sgt. Sexton was not initially able to see the altercation when he first approached the cell, *see* Pl. Dep. Tr. at 41: 9 13 ("They just stopped because [Sgt. Sexton] couldn't look in. He couldn't see nothing."), there are other portions that, when construed in the light most favorable to Plaintiff, suggest Defendant did observe the altercation, *see* Pl. Dep. Tr. at 34:16 19 ("And Sergeant Sexton came to the gate with a street shirt on. He said, stop it in there and walked away. And they continued beating me."), 39:7 9 ("The dude is holding me on the side, like, choking me. And Sergeant Sexton just walked by and said, stop it in there."), 44:1822 ("When Sergeant Sexton walked by, [the inmate] started punching me.... [T]hat's when they started stomping me, kicking me, doing all that to me."). Putting aside the question of how Plaintiff could testify as to what *Defendant* saw, the portions of Plaintiff s deposition testimony that align with his allegation that Sgt. Sexton was aware of the attack when he first approached the cell must be credited because even where a party's deposition testimony may be internally inconsistent the Court "must 'draw all factual inferences in favor of the party against whom summary judgment is sought'." *DeAndrade v. K.J. Mountain Corp.,* No. 11 Civ. 00011 (ER), 2013 WL 6500233, at *7 (S.D.N.Y. Dec. 11, 2013) (quoting *Cronin v. Aetna Life Ins. Co.,* 46 F.3d 196, 202 (2d Cir.1995)); *see also Kass v. A.L.U.F. Plastics, Inc.,* No. 96 Civ. 1297 (MGC), 1999 WL 961780, at *1 n.1 (S.D.N.Y. Oct. 20, 1999) ("Although the inconsistency of the deposition testimony raises some questions, for purposes of [summary judgment], the portions to which [plaintiff] points must be assumed to be credible."). Accordingly, Plaintiff's deposition transcript raises a genuine issue of fact regarding whether or not Defendant knew or had reason to know of the altercation when he first approached the holding cell.

***5** Second, concerning whether or not Defendant had a reasonable opportunity to intervene, Defendant claims he responded "immediately" after he became aware of the altercation by returning to the cell with two other officers. Def's Br. at 3 (citing Pl. Dep. Tr. at 65:1 10). But that response *assumes* that Defendant did not have knowledge of the altercation until he heard the yelling. Since the parties agree that there was a ten to fifteen minute lapse between Defendant's first visit and his return to the cell, Pl.'s 56.1 ¶ 14 (citing Pl. Dep. Tr. at 34:18 22), the reasonableness of Defendant's response turns squarely on when Defendant actually learned of the altercation, a fact that is plainly in dispute. A reasonable jury could find that Defendant had a reasonable opportunity to attempt to prevent the attack from continuing but failed to seize it. *See Rosen,* 667 F. Supp. 2d at 360-61 (finding that the question of whether a prison supervisor had a reasonable opportunity to intervene was an issue of fact for the jury); *see also Brooks v. Brennan,* No. 912 Civ. 624 (NAM) (CFH), 2014 WL 6975370, at *11 (N.D.N.Y. Dec. 9, 2014) (denying defendants motion for summary judgment based on plaintiffs allegations that the defendants failed to intervene as they observed plaintiffs assault for a period of fifteen minutes.).

Defendant argues that he is entitled to summary judgment because Plaintiff offers no evidence that Defendant had prior knowledge of a previous altercation between Plaintiff and his alleged attackers. *See* Def's Br. at 6 ("[A] substantial risk of harm *can only* be demonstrated where there is evidence of a previous altercation between a plaintiff and their attacker, coupled with a complaint by plaintiff regarding the altercation or a request by plaintiff to be separated from the attacker.") (emphasis added) (citing *Hopkins v. Allard,* No. 08 Civ. 0001 (DNH) (DEP), 2010 U.S. Dist. LEXIS 114368, at *74 (N.D.N.Y. Aug. 23, 2010)). The cases relied on by Defendant, however, all stand for the proposition that there is no constitutional violation when prison officers fail to prevent purely surprise attacks.[5] But here, unlike in the cases cited by Defendant, Plaintiff's theory is that Defendant had *actual* knowledge of an ongoing attack when he first approached the cell, and that he then demonstrated deliberate indifference when he knowingly ignored the risk if substantial harm to Plaintiff for the next fifteen minutes while the attack continued. *See Stewart,* 2015 WL 1854198, at *8–9 ("[U]nder certain circumstances, the commencement of an inmate-to-inmate altercation could put a prison official on sufficient notice to render the prison official deliberately indifferent if he or she then fails to intervene in an appropriate manner."); *see also Candelaria v. Coughlin,* No. 91 Civ. 2978, 1996 WL 88555, at *9 (S.D.N.Y. Mar. 1, 1996) (inaction by a correction officer to intercede and halt an attack by a fellow prisoner is sufficient basis for deliberate indifference); *Heisler,* 981 F. Supp. at 837 (denying defendant's motion for summary judgment where the plaintiff alleged that another inmate, whom plaintiff had no alleged previous altercations with, attacked him while he was being held as a pretrial detainee, and that officers witnessed the assault but failed to intercede to stop it). Defendant, in other words, conflates the cases where defendants are alleged to have failed to prevent a surprise attack, and cases like the one before the Court where defendants are alleged to have failed to intervene to stop an attack they have actually witnessed. *See Desulma v. The City*

*of N.Y.*, No. 98 Civ. 2078 (RMB) (RLE), 2001 WL 798002, at *7 (S.D.N.Y. July 6, 2001) (noting that "a correctional officer's presence at an attack of an inmate, where he does nothing to stop an assault, may be sufficient to establish a [deliberate indifference] claim"). Accordingly, the cases Defendant relies on do not compel a different result here.

***6** Denial of summary judgment is proper on this record, even though the record consists only of Plaintiff s deposition testimony and medical records, and even though Defendant can cite to portions of that record that support his position. *See Knowles,* 904 F. Supp. at 222 ("[I]n light of the Court's heightened duty of scrutiny with regard to motions for summary judgment when a *pro se* litigant is involved, the Court finds that based on the current record there are indeed issues of fact suitable for trial.").

Accordingly, the Court finds that genuine issues of material fact remain as to Plaintiff's deliberate-indifference claim.

### B. Qualified Immunity

Defendant argues that, even if Plaintiff's rights were violated, he is nevertheless entitled to qualified immunity. *See* Def's Br. at 8 10. Defendants bear the burden of proof on this affirmative defense. *See Lore v. City of Syracuse,* 670 F.3d 127, 149 (2d Cir. 2012).

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). As the Second Circuit has described the doctrine:

> A government official sued in his individual capacity is entitled to qualified immunity (1) if the conduct attributed to him was not prohibited by federal law; or (2) where that conduct was so prohibited, if the plaintiffs right not to be subjected to such conduct by the defendant was not clearly established at the time it occurred; or (3) if the defendant's action was "objective[ly] legal[ly] reasonable[ ] ... in light of the legal rules that were clearly established at the time it was taken."

*Munafo v. Metropolitan Transportation Authority,* 285 F.3d 201, 210 (2d Cir. 2002) (alterations in original) (citations omitted) (quoting *Anderson v. Creighton,* 483 U.S. 635, 639 (1987)).

The Supreme Court recently explained that, "[t]o be clearly established, a right must be sufficiently clear 'that every reasonable official would [have understood] that what he is doing violates that right.'" *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (second alteration in original) (quoting *Anderson*, 483 U.S. at 640). Although a case directly on point is not required, "existing precedent must have placed the statutory or constitutional question beyond debate." *Fabrikant v. French*, 691 F.3d 193, 213 (2d Cir. 2012) (internal quotation mark omitted) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)). Moreover, "[e]ven if the right at issue was clearly established in certain respects ..., an officer is still entitled to qualified immunity if 'officers of reasonable competence could disagree' on the legality of the action at issue in its particular factual context." *Walczyk v. Rio*, 496 F.3d 139, 154 (2d Cir. 2007) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

When considering qualified immunity in the context of a Rule 56 motion, the Second Circuit has long held as follows:

> Summary judgment dismissing a claim on the basis of the defendants' qualified-immunity defense may thus be granted if the court finds that the asserted rights were not clearly established, or if the evidence is such that, even when it is viewed in the light most favorable to the plaintiffs and with all permissible inferences drawn in their favor, no rational jury could fail to conclude that it was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate a clearly established right.

***7** *In re State Police Litig.*, 88 F.3d 111, 123 (2d Cir. 1996).

"Correction officers have a clearly established duty to protect prisoners from violence at the hands of other prisoners." *Dennis v. Westchester Cty. Jail Corr. Dep't*, 485 Fed. App'x 478, 481 (2d Cir. 2012) (quoting *Farmer*, 511 U.S. at 833) (internal quotation marks omitted). Plaintiff claims Defendant

violated his clearly established constitutional right by acting with deliberate indifference to his safety in failing to protect him from harm from other inmates. The qualified immunity determination thus turns on the objective reasonableness of Defendant's conduct.

Defendant argues his actions were objectively reasonable because Plaintiff was involved in a surprise attack. Def.'s Br. at 9. However, as already discussed, the fact that the attack may have been a "surprise" may absolve the Defendant from failing to prevent it, but it does not permit him to do nothing when he is a witness to the attack and in a position to stop it. Whether he was a witness and in a position to stop it are disputed material facts. Because of that dispute, the Court is unable to conclude that Defendant's actions were objectively reasonable as a matter of law. *See Villante v. Vandyke,* No. 904 Civ. 759 (FJS) (DRH), 2008 WL 163596, at *6 (N.D.N. Y. Jan. 15, 2008) ("Since [p]laintiff has raised an issue of fact about whether [defendants] stood by and allowed other inmates to attack him ... [defendants are not entitled to qualified immunity"). Summary judgment on grounds of qualified immunity is thus inappropriate in this case.

**IV. Conclusion**

For the reasons set forth above, Defendants' motion for summary judgment is DENIED. The Court will hold a status conference on May 6, 2016 at 10:00 a.m. The clerk of the court is respectfully directed to terminate the motion. (Doc. 62).

It is SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2016 WL 1241525

## Footnotes

1 Defendant's Rule 56.1 Statement of Undisputed Facts refers to only one attacker. Plaintiff's account, however, consistently refers to at least two attackers. For the purposes of this motion, the Court will draw an inference in Plaintiff's favor that there were two attackers.

2 As opposed to deliberate indifference claims brought by post-conviction prisoners—which arise under the Eighth Amendment—claims for deliberate indifference brought by state pretrial detainees arise under the Fourteenth Amendment. *See Caiozzo v. Koreman*, 581 F.3d 63, 69–72 (2d Cir. 2009). However, the Second Circuit has stated that "[c]laims for deliberate indifference...should be analyzed under the same standard irrespective of whether they are brought under the Eighth or Fourteenth Amendment." *Id*. at 72; *see also Coronado v. Goord*, No. 99 Civ. 1674 (RWS), 2000 WL 1372834, at *7 (S.D.N.Y. Sept. 25, 2000) (stating that the standard for bringing a Fourteenth Amendment claim is the same as under the Eighth Amendment). Accordingly, the Eighth Amendment provides the applicable framework here. *Caiozzo*, 581 F.3d at 72.

3 Plaintiff's opposition brief also argues that the conditions in the holding cell created an objectively substantial risk of harm due to overcrowding and/or inadequate supervision by corrections officers. *See* Plaintiff's Memorandum of Law in Opposition ("Pl.'s Opp'n") (Doc. 73) 4. Plaintiff has not, however, submitted sufficient evidence to create a genuine issue of fact for trial on these particular conditions.

4 The court notes that the bulk of Plaintiff's opposition argues Defendant was negligent. *See, e.g.*, Pl.'s Opp'n at 5. Negligence is not sufficient to create liability in this context. *Farmer*, 511 U.S. at 834. The Court therefore only considers Plaintiff's deliberate-indifference claim, which "raise[s] the strongest arguments that [Plaintiff's papers] suggest." *McPherson*, 174 F.3d at 280.

5 *See Hopkins*, 2010 U.S. Dist. LEXIS 114368, at *74 (holding that without evidence of a previous altercation, no reasonable jury could find that defendants "*knew of* and disregarded a substantial risk of serious harm," in an action claiming failure to prevent a surprise attack)(emphasis added); *accord Desulma v. The City of N.Y.*,

No. 98 Civ. 2078 (RMB) (RLE), 2001 U.S. Dist. LEXIS 9678, at *21, 2001 WL 798002 (S.D.N.Y. Jul. 6, 2001); *Berry v. N.Y.C. Dep't of Corr., et al.*, No. l2 Civ. 7819 (RWS), 2014 U.S. Dist. LEXIS 71214, at *9 10, 2014 WL 2158518 (S.D.N.Y. May 22, 2014); *Fernandez v. N.Y.C. Dep't of Corr.*, No. 08 Civ. 4294 (KMW), 2010 U.S. Dist. LEXIS 29686, at *4, 2010 WL 1222017 (S.D.N.Y. Mar. 29, 2010); *Zimmerman v. Macomber*, No. 95 Civ. 882 (DAB), 2001 U.S. Dist. LEXIS 12499, at *5, 2001 WL 946383 (S.D.N.Y. Aug. 21, 2001); *Grant v. Burroushs*, g6 Civ,2753 (MGC), 2000 U.S. Dist. LEXIS 12917, at *9 (S.D.N.Y Sept. 8 2000).

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United States District Court, S.D. New York.

Dexter WASHINGTON, Plaintiff,
v.
Louis FALCO, Sheriff, and David Lowe, Sergeant, Defendants.

20 CV 3009 (VB)
|
Signed 03/01/2021

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## OPINION AND ORDER

Briccetti, United States District Judge:

***1** Plaintiff Dexter Washington, proceeding pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983 against defendants Sheriff Louis Falco and Sergeant ("Sgt.") David Lowe. Liberally construed, the complaint alleges violations of plaintiff's First, Fourth, and Fourteenth Amendment rights.

Now pending is defendants' motion to dismiss the complaint pursuant to Rule 12(b)(6). (Doc #17).

For the following reasons, the motion is GRANTED IN PART and DENIED IN PART.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

## BACKGROUND

For the purpose of ruling on the motion to dismiss, the Court accepts as true all well-pleaded factual allegations in the complaint and draws all reasonable inferences in plaintiff's favor, as summarized below. [1]

At all relevant times, plaintiff was a pretrial detainee at the Rockland County Correctional Center ("RCCC") in New City, New York.

According to plaintiff, a number of RCCC policies violated his constitutional right to be free from cruel and unusual punishment. Plaintiff alleges the RCCC's policy of having florescent lights on from 6:00 a.m. to 10:30 p.m. and switched on and off once "every half hour for the entire night, ... continuously disrupt[ed] and depriv[ed] plaintiff of a healthy and humane sleep pattern." (Doc. #2 ("Compl.") at ECF 5). [2] Plaintiff describes this practice as "light torture." (Id.).

Plaintiff also alleges Sheriff Falco and his administration implemented policies that "created and facilitated a dangerous environment," including a policy that required pretrial detainees to remain in their cells for sixteen hours a day and allowed them one- to three-hour periods outside their cells for recreation. (Compl. at ECF 7–8). He claims defendants perpetuated this "dangerous environment" by refusing to provide plaintiff and other pretrial detainees with "recreational equipment" such as playing cards and board games, to allow these items to be purchased through the commissary, or to be sent from friends and family. (Id.). Similarly, plaintiff alleges Falco and his administration refused to provide plaintiff and other pretrial detainees with reading material from a library or book cart. Finally, plaintiff claims the administration "waged a dietary war" against the pretrial detainees by refusing to provide or allowing them to purchase coffee or tea. (Id. at 9).

Next, plaintiff alleges Sheriff Falco replaced the traditional law library facility with two multi-purpose kiosk wall units. According to plaintiff, the machines are constantly in use by the RCCC's forty detainees for various activities, including, inter alia, text messaging, chaplain requests, medical requests, and commissary purchases.

***2** Plaintiff also alleges that under RCCC's strip search policy, officers are permitted to strip search pretrial detainees during cell searches, after pretrial detainees return from court, and after receiving visitors. Plaintiff alleges:

> During such searches plaintiff and other pretrial detainees are directed to strip naked, run their hands through their mouth (even in cases where plaintiff did not have an

> opportunity to wash his hands during the day, behind an[d] in their ears, for guys with hair, through their hair, under the arm pits, and then the officer directs you to reach between your legs an[d] life your testicles up for inspection, and in the case of an uncircumcised penis, you are directed to "skin it back until the raw head of the penis is exposed." Next you are made to lift both feet until the toes are fully inspected.

(Compl. at ECF 13). Plaintiff claims these searches occur in the early morning, the afternoon, and sometimes at 2:00 a.m. or 3:00 a.m., when the detainees are sleeping.

Plaintiff also claims Sheriff Falco and his administration have failed "to create a media review process to safeguard incoming and outgoing personal and legal mail." (Compl. at ECF 14). He claims that on various occasions, his mail was delivered to him opened and by an unknown officer. According to plaintiff, "[h]e along with many other pretrial detainees have repeatedly been the victim of allegedly lost personal and/or legal mail." (Id. at ECF 15).

Finally, plaintiff alleges he received a disciplinary infraction for allegedly having fruit in his cell in violation of facility rules. Plaintiff claims he was sentenced to a ten-day cell confinement in a segregated area specifically reserved for cell-confined pretrial detainees. According to plaintiff, his disciplinary time assessment form stated his release date went beyond ten days. Plaintiff claims that when he brought the excessive time to Sgt. Lowe's attention, Lowe responded that there was no error because it was his "personal policy to 'never' release a person on the day an[d] exact time of their release especially if that said release is in the early part of that said day." (Compl. at ECF 17). Plaintiff alleges he filed a grievance concerning the policy of "confining pretrial detainees beyond their 'agreed upon' disciplinary sanctions." (Id.). Plaintiff claims the grievance was denied by the grievance supervisor, who stated: "Sergeant Lowe's actions [were] not grievable." (Id.).

## DISCUSSION

I. Standard of Review

In deciding a Rule 12(b)(6) motion, the Court evaluates the sufficiency of the operative complaint under the "two-pronged approach" articulated by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). First, a plaintiff's legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. Id. at 678; Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010).[3] Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." Ashcroft v. Iqbal, 556 U.S. at 670.

***3** To survive a Rule 12(b)(6) motion, the allegations in the complaint must meet a standard of "plausibility." Ashcroft v. Iqbal, 556 U.S. at 678; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 556).

The Court must liberally construe submissions of pro se litigants and interpret them "to raise the strongest arguments that they suggest." Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam). Applying the pleading rules permissively is particularly appropriate when, as here, a pro se plaintiff alleges civil rights violations. See Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 191 (2d Cir. 2008). "Even in a pro se case, however, ... threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010). Nor may the Court "invent factual allegations" a plaintiff has not pleaded. Id.

II. Exhaustion

Defendants argue the complaint should be dismissed because plaintiff fails to allege that he fully exhausted his administrative remedies prior to filing this lawsuit.

The Court disagrees.

Under the Prison Litigation Reform Act ("PLRA"), "[n]o action shall be brought with respect to prison conditions under [Section 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The exhaustion requirement "applies to all inmate suits about prison life, whether they involve general

circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002).

"Failure to exhaust administrative remedies is an affirmative defense under the PLRA, not a pleading requirement." Williams v. Corr. Officer Priatno, 829 F.3d 118, 122 (2d Cir. 2016). "Accordingly, inmates are not required to specially plead or demonstrate exhaustion in their complaints." Id. Thus, when "a prisoner indicates that he has taken some steps toward exhaustion, district courts will normally not infer from his silence that he failed to take the remaining steps that full exhaustion would require." Huggins v. Schriro, 2015 WL 7345750, at *3 (S.D.N.Y. Nov. 19, 2015), report and recommendation adopted, 2016 WL 680822 (S.D.N.Y. Feb. 18, 2016).[4] "However, a district court still may dismiss a complaint for failure to exhaust administrative remedies if it is clear on the face of the complaint that the plaintiff did not satisfy the PLRA exhaustion requirement." Williams v. Corr. Officer Priatno, 829 F.3d at 122.

Construing all inferences in plaintiff's favor, it is not clear from the face of the operative complaint that plaintiff failed to fully exhaust his administrative remedies. To the contrary, plaintiff makes numerous statements in the complaint regarding his use of RCCC's grievance system.

***4** Accordingly, at this early stage of the proceedings, the Court will not dismiss plaintiff's claims for failure to exhaust his administrative remedies.

III. Due Process Claims

Liberally construed, the complaint presents two Fourteenth Amendment claims: first, challenging the conditions of plaintiff's confinement in violation of his right to substantive due process, and second, alleging Sgt. Lowe violated plaintiff's procedural due process rights by unilaterally increasing plaintiff's punishment for a disciplinary infraction without additional due process proceedings.[5]

A. Substantive Due Process

1. Legal Standard

A condition-of-confinement claim brought by a pretrial detainee is analyzed under the Due Process Clause of the Fourteenth Amendment, rather than under the Cruel and Unusual Punishments Clause of the Eighth Amendment, because "pretrial detainees have not been convicted of a crime and thus may not be punished in any manner—neither cruelly and unusually nor otherwise." Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017). Under the Fourteenth Amendment, "the proper inquiry is whether [the] conditions [of confinement] amount to punishment of the detainee." Bell v. Wolfish, 441 U.S. 520, 535 (1979). If the conditions are deemed not punitive, then the plaintiff's allegations are evaluated under a standard of deliberate indifference. Abreu v. Schriro, 2016 WL 3647958, at *4 (S.D.N.Y. July 1, 2016).

2. Restrictive and Punitive Conditions

Pretrial detainees retain a liberty interest in avoiding restrictions or conditions of confinement that "amount to punishment of the detainee." Bell v. Wolfish, 441 U.S. at 535. "[I]n assessing whether restrictions on pretrial detainees comport with substantive due process, 'a court must decide whether the restriction is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.' " Allah v. Milling, 876 F.3d 48, 55 (2d Cir. 2017) (quoting Bell v. Wolfish, 441 U.S. at 538). "Absent proof of intent to punish, 'that determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.' " Id. (quoting Bell v. Wolfish, 441 U.S. at 538).

It is well settled that "the government has a legitimate interest in the security of prisons, and that prison officials should be afforded deference in the adoption and execution of policies and practices ... needed to preserve internal order and discipline and to maintain institutional security." Allah v. Milling, 876 F.3d at 55. Additional objectives that could justify the imposition of restrictive conditions on pretrial detainees include "mak[ing] certain no weapons or illicit drugs reach detainees," "ensuring a detainee's presence at trial," and "manag[ing] the facility in which the individual is detained." Bell v. Wolfish, 441 U.S. at 540.

***5** Here, plaintiff fails plausibly to allege the challenged conditions of his confinement were punitive in nature. Specifically, plaintiff contends the following policies were restrictive and punitive: (i) RCCC's lighting policy; (ii) the policy confining detainees to their cells for sixteen hours a day and distributing the remaining eight hours for

recreation in one- to three-hour increments; (iii) RCCC's refusal to provide recreational equipment such as playing cards, board games, or reading material; and (iv) RCCC's refusal to provide or allow pretrial detainees to receive or purchase coffee or tea. Plaintiff does not, however, allege any facts suggesting defendants implemented these policies with punitive intent. Rather, he claims the RCCC's practices and policies were enforced against him and "hundreds of other pretrial detainees." (Compl. at ECF 7); see Abreu v. Schriro, 2016 WL 3647958, at *5 (finding no punitive intent alleged where "lockdowns did not target Plaintiff, but rather affected all inmates in the housing unit").

In addition, plaintiff fails plausibly to allege the challenged policies "are [not] rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose." Bell v. Wolfish, 441 U.S. at 561. Plaintiff's conclusory allegation that these policies were not imposed for any "viable penological goals or interest" (Compl. at ECF 1, 3), overlooks the RCCC's legitimate interest in maintaining security and order, ensuring no weapons or illicit drugs reach detainees, and managing the facility. See Bell v. Wolfish, 441 U.S. at 540, 554–55 (prohibiting personal packages did not deny pretrial detainees due process since detention center had legitimate interest in reducing risk of gambling, theft, inmate fights, and smuggling of contraband). Because the legitimate government interests as to the challenged policies are clear and the challenged conditions and restrictions are not so extreme that they "smack[ ] of punishment," the Court need not conduct a "factual inquiry into whether such ... restriction[s] [are] actually related to a legitimate governmental interest." Valdez v. City of N.Y., 2014 WL 2767201, at *2 (S.D.N.Y. June 17, 2014) (citing Covino v. Vermont Dept. of Corrections, 933 F.2d 128, 130 (2d Cir. 1991)).

Accordingly, plaintiff fails plausibly to allege the challenged conditions of his confinement were punitive in nature.

3. Deliberate Indifference to Conditions of Confinement

Plaintiff also fails plausibly to allege defendants were deliberately indifferent to the conditions of his confinement.

"A pretrial detainee may establish a § 1983 claim for allegedly unconstitutional conditions of confinement by showing that the officers acted with deliberate indifference to the challenged conditions." Darnell v. Pineiro, 849 F.3d at 29. To state such a claim, plaintiff's allegations must satisfy two prongs: an objective prong and a mens rea prong. Namely, plaintiff must plausibly allege "that the challenged conditions were sufficiently serious," and defendants "acted with at least deliberate indifference to the challenged conditions." Id.

To plead the objective prong, a pretrial detainee must plausibly allege the challenged conditions, "either alone or in combination, pose[d] an unreasonable risk of serious damage to his health." Darnell v. Pineiro, 849 F.3d at 30 (quoting Walker v. Schult, 717 F.3d 119, 125 (2d Cir. 2013)). There is no " 'static test' to determine whether a deprivation is sufficiently serious; instead, the 'conditions themselves must be evaluated in light of contemporary standards of decency.' " Id. (quoting Blissett v. Coughlin, 66 F.3d 531, 537 (2d Cir. 1995)). Although "the Constitution does not mandate comfortable prisons, prisoners are entitled to basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety." Randle v. Alexander, 960 F. Supp. 2d 457, 474–75 (S.D.N.Y. 2013). In addition, courts have held that "sleep is critical to human existence" and conditions which deprive a person of sleep may rise to the level of a constitutional violation. Walker v. Schult, 717 F.3d at 126.

***6** To plead the mens rea prong, a pretrial detainee must plausibly allege "that the defendant-official acted intentionally ..., or recklessly failed to act with reasonable care to mitigate the risk that the condition posed ... even though the defendant-official knew, or should have known," of the risk. Darnell v. Pineiro, 849 F.3d at 35. The Fourteenth Amendment's mens rea prong "is defined objectively" and "can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm." Id. Mere negligence by the prison official, however, does not satisfy the mens rea requirement. See id. at 36.

First, with respect to RCCC's lighting policy, plaintiff has sufficiently alleged the objective prong. At this early stage, plaintiff's allegation that the policy of turning on the lights for a brief period every half hour for the entire night caused him to suffer "continuous sleep deprivation" (Compl. at ECF 5), sufficiently alleges the policy posed an "unreasonable risk of serious damage" to his health. Darnell v. Pineiro, 849 F.3d at 30.

However, plaintiff's allegations that the lighting policy constituted torture and "deprived [him] of a healthy and humane sleep pattern" (Compl. at ECF 5) do not plausibly

plead the mens rea prong of the deliberate indifference analysis. Specifically, plaintiff pleads no facts to demonstrate defendants consciously or recklessly disregarded a serious risk of harm by implementing a lighting policy that switched lights on once every half hour, or that, even without any subjective awareness, that policy exposed plaintiff to a substantial risk of harm. Further, although plaintiff alleges "defendant Louis Falco, [was] grossly negligent" in "maintaining and causing [the RCCC's lighting policy] to be enforced upon plaintiff and hundreds of other pretrial detainees" (Doc. #7), as noted above, mere negligence is insufficient to establish the requisite mens rea to support a deliberate indifference claim.

Next, plaintiff's allegation that defendants were deliberately indifferent to the conditions of his confinement—by implementing policies that: (i) confined pretrial detainees to their cells for sixteen hours a day and distributed the remaining eight hours for recreation in one- to three-hour increments; (ii) deprived pretrial detainees of recreational equipment such as playing cards, board games, or reading material; and (iii) denied pretrial detainees coffee or tea—fails to satisfy the objective prong of the deliberate indifference analysis. [6] None of the alleged conditions deprived plaintiff of his "basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—[nor did] they ... expose[ ] him to conditions that pose[d] an unreasonable risk of serious damage to [plaintiff's] future health." Darnell v. Pineiro, 849 F.3d at 20. Because plaintiff has failed plausibly to allege these conditions of his confinement posed an unreasonable risk of serious damage to his health or safety, the Court need not reach the question of whether plaintiff's allegations regarding these conditions satisfy the mens rea prong of the analysis. [7]

***7** Accordingly, plaintiff's conditions of confinement claim must be dismissed.

B. Procedural Due Process Claim

Defendants argue plaintiff fails plausibly to allege he was denied procedural due process in violation of the Fourteenth Amendment.

The Court disagrees.

Procedural due process requires "that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." Chase Grp. Alliance LLC v. City of N.Y. Dep't of Fin., 620 F.3d 146, 150 (2d Cir. 2010). Thus, to establish a violation of due process rights, a plaintiff must show "(1) that he possessed a liberty interest and (2) that the defendant(s) deprived him of that interest as a result of insufficient process." Giano v. Selsky, 238 F.3d 223, 225 (2d Cir. 2001).

Pretrial detainees have a liberty interest in being free from punishment prior to conviction under the Due Process Clause. Bell v. Wolfish, 441 U.S. at 535. Thus, when a restriction is placed on a pretrial detainee for disciplinary reasons, "[p]rocedural due process requires that a pretrial detainee be given written notice, adequate time to prepare a defense, a written statement of the reasons for action taken, and a limited ability to present witnesses and evidence before being subjected to punitive as opposed to administrative measures." Allah v. Milling, 876 F.3d at 55 n.3. However, when a restriction is imposed for nonpunitive or administrative reasons, a pretrial detainee is entitled only to "receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to impose the restraint." Taylor v. Santana, 2007 WL 737485, at *4 (S.D.N.Y. 2007), aff'd sub nom. Taylor v. Comm'r of N.Y.C. Dept. of Corrs., 317 F. App'x 80 (2d Cir. 2009).

Here, plaintiff alleges he received a disciplinary infraction for having fruit in his cell in violation of facility rules. Plaintiff claims he was sentenced to a ten-day cell confinement in a segregated area specifically reserved for cell-confined pretrial detainees. But plaintiff does not allege he was denied due process with regard to that ten-day confinement. In fact, he acknowledges he "was provided with written notice of the alleged charges[,] the resulting time assessment attached thereto[,]" and suggests that he received a hearing which led to the ten-day time assessment. (Doc. #29 ("Pl. Sur-Reply") at ECF 3).

Rather, plaintiff alleges Sgt. Lowe violated plaintiff's procedural due process rights by unilaterally increasing his punishment for a disciplinary infraction "without further legitimate disciplinary proceedings." (Doc. #24 ("Pl. Opp.") at ECF 4). Specifically, plaintiff claims Sgt. Lowe extended plaintiff's disciplinary confinement "because it is [Lowe's] personal policy to 'never' release a person on the day an[d] exact time of their release especially if that said release is in the early part of that said day[.]" (Compl. at ECF 17). Plaintiff also alleges he informed Sgt. Lowe that Sgt. Lowe was "exceeding his authority," and Sgt. Lowe responded: "I could do as I please." (Pl. Opp. at ECF 5).

***8** Plaintiff has pleaded—albeit barely—a procedural due process claim against Sgt. Lowe for the additional time he spent in a housing unit "specifically reserved for cell-confine[d] pretrial detainee[s]" (Compl. at ECF 14) without additional due process. Plaintiff has adequately alleged both that his confinement was punitive and that he did not receive additional procedures prior to the increase in his disciplinary sentence. Defendants neither argue otherwise nor suggest the additional time plaintiff spent in the disciplinary segregation unit was "incident of some other legitimate governmental purpose." Bell v. Wolfish, 441 U.S. at 538.

Rather, defendants argue plaintiff was afforded the process he was due during the initial proceedings and characterize plaintiff's procedural due process allegation as "merely alleg[ing] that his ten-day cell confinement was slightly longer than the agreed upon ten (10) days." (Doc. #20 at ECF 37). Defendants miss the point and fail to address whether plaintiff's additional confinement was punitive or administrative, or whether plaintiff was afforded additional due process for his continued confinement.

Plaintiff has adequately alleged he was denied procedural due process with respect to the additional confinement. Nothing on the face of the complaint—which the Court accepts as true—suggests this additional confinement was for merely administrative reasons, and reading the complaint in the light most favorable to plaintiff the allegations are sufficient to plead a claim for a violation of procedural due process.

Accordingly, plaintiff's procedural due process claim against Sgt. Lowe may proceed.

IV. Denial of Access to the Courts Claim

Plaintiff's alleges Sheriff Falco's decision to replace the facility's law library with two multi-purpose kiosks denied plaintiff access to a law library. The Court liberally construes this allegation as a claim for denial of access to the courts. Defendants argue plaintiff fails to state such a claim. [8]

The Court agrees.

Although prisoners are guaranteed reasonable access to a law library as a part of their constitutional right of meaningful access to the courts, "the Constitution does not require unlimited and unrestricted access to a law library at the demand of a prisoner." Oliver v. Head Sherriff of Dep't & Div. of Corr. of Nassau Cnty., 2008 WL 238577, at *2 (E.D.N.Y. Jan. 28, 2008). Allegations of delays affecting research or communication with the courts do not violate this constitutional right. Jermosen v. Coughlin, 1995 WL 144155, at *5 (S.D.N.Y. Mar. 30, 1995). Furthermore, to state a claim, plaintiff must plausibly allege a defendant caused plaintiff to suffer "actual injury." Davis v. Goord, 320 F.3d 346, 352 (2d Cir. 2003). To establish actual injury, the denial must have hindered the plaintiff's efforts in pursuing a nonfrivolous legal claim. See Amaker v. Haponik, 1999 WL 76798, at *3 (S.D.N.Y. Feb. 17, 1999).

Here, plaintiff fails to allege an actual injury. Although plaintiff alleges the facility's switch from traditional law library services to kiosk units denied him his right to a law library because the new kiosk system was overcrowded and difficult to access, he fails to allege he suffered any actual injury during his pursuit of legal relief. For instance, plaintiff does not allege which specific, nonfrivolous legal challenges were affected by his inability to access the kiosks; which particular deadlines, if any, he missed due to such actions; or what specific documents, such as motions or pleadings, he was prevented from filing. Plaintiff does claim "many pretrial detainees into the hundreds, have been sentenced to many years and sometime life, in state prison simply because they didn't have the necessary legal tools to effectively represent themselves at the pretrial and trial stages of the said case." (Compl. at ECF 11). However, this conclusory allegation is insufficient to plead plaintiff, as distinguished from some other person, suffered an actual injury as a result of defendants' actions.

***9** Accordingly, plaintiff's denial of access to the courts claim must be dismissed.

V. Cavity Strip Search Claim

Liberally construed, plaintiff alleges RCCC's strip search policy—implemented by Sheriff Falco—of conducting routine strip searches of pretrial detainees during cell searches, upon pretrial detainees' return from court appearances, and after receiving visitors, violates his Fourth Amendment right to be free from unreasonable searches and seizures.

The Supreme Court has recognized a constitutional "right of personal privacy, or a guarantee of certain areas or zones of privacy." Roe v. Wade, 410 U.S. 113, 152 (1973). Inmates retain this constitutional guarantee, but only within limited circumstances. See Harris v. Miller, 818 F.3d 49, 57 (2d

Cir. 2016). "There is a long-established principle that the routine, random strip searches of inmates, including body cavity inspections, do not violate the Fourth Amendment." Vaughn v. Strickland, 2013 WL 3481413, at *4 (S.D.N.Y. July 11, 2013). Nevertheless, " 'the Fourth Amendment still requires all searches conducted within a prison, including strip searches, to be reasonable.' " Jean-Laurent v. Wilkerson, 438 F. Supp. 2d 318, 323 (S.D.N.Y. 2006), aff'd, 461 F. App'x 18 (2d Cir. 2012) (summary order).

The reasonableness of a strip search is determined by considering "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. at 559. "[S]trip searches performed with no legitimate penological purpose but merely to intimidate, harass, or punish are impermissible." George v. City of N.Y., 2013 WL 5943206, at *7 (S.D.N.Y. Nov. 6, 2013). A search justified by a legitimate penological interest may "become unreasonable where [it] is conducted in an abusive manner or in the presence of unnecessary spectators." Sankara v. Plaskett, 2017 WL 4444250, at *3 (S.D.N.Y. Oct. 4, 2017) (citing Bell v. Wolfish, 441 U.S. at 560). It is well established that "[t]he general practice of strip searching a detainee during housing searches and on the way to and from court appearances is not unconstitutional." Thompson v. City of N.Y., 2017 WL 1929552, at *2 (S.D.N.Y. May 9, 2017) (collecting cases).

Plaintiff fails plausibly to allege RCCC's strip search policy is unconstitutional. Plaintiff does not allege the strip search policy, or a particular strip search, was conducted with the intent to humiliate, harass, or abuse. Absent such allegations, the searches described by plaintiff are permissible because they serve RCCC's legitimate interest of preventing prisoners reentering the facility from bringing hidden contraband into and out of the facility or concealing contraband on their person. See George v. City of N.Y., 2013 WL 5943206, at *8.

Plaintiff's argument that the strip searches were unreasonable because "there is no rational or logical basis" (Pl. Sur-Reply at ECF 3) for having a female officer present is unavailing. As discussed above, a search may become unreasonable where it is conducted in the presence of unnecessary spectators. Sankara v. Plaskett, 2017 WL 4444250, at *3. However, the mere presence of a female officer during a strip search "does not alter th[e] determination" that a strip search is constitutional. Israel v. City of N.Y., 2012 WL 4762082, at *3 (S.D.N.Y. Oct. 5, 2012).

***10** Accordingly, plaintiff's Fourth Amendment claim for unreasonable search and seizure must be dismissed.

VI. Interference with Mail Claim

Defendants argue plaintiff fails to state a claim for interference with mail.

The Court agrees.

Allegations that a defendant has interfered with the free flow of mail are analyzed under the First Amendment. To state an interference with mail claim, plaintiff must adequately plead defendants "regularly and unjustifiably interfered" with his incoming mail. Davis v. Goord, 320 F.3d at 351. Prison officials may censor an inmate's mail only in furtherance of, and only to the extent "necessary or essential" to protect the government's interest in security, order, or rehabilitation. Washington v. James, 782 F.2d 1134, 1139 (2d Cir. 1986). Although one isolated instance of mail tampering does not amount to a constitutional violation, "as few as two [such] incidents ... could constitute an actionable violation," provided the incidents (i) "suggested an ongoing practice" of unwarranted censorship, or (ii) "unjustifiably chilled the prisoner's right of access to the courts or impaired the legal representation received." Davis v. Goord, 320 F.3d at 351. That said, "district courts have generally required specific allegations of invidious intent or of actual harm where the incidents of tampering are few and thus the implication of an actionable violation is not obvious on its face." Id.

Here, plaintiff does not plausibly allege either defendant tampered with plaintiff's mail with "invidious intent" or caused plaintiff to suffer "actual harm." Davis v. Goord, 320 F.3d at 351–52. Aside from noting Sheriff Falco and his administration "fail[ed] to create a media review process to safeguard incoming and outgoing personal and legal mail" (Compl. at ECF 14), the complaint contains no allegations suggesting either defendant withheld or tampered with plaintiff's mail—with invidious intent or otherwise.

Further, plaintiff identifies no specific injury suffered sufficient to survive a motion to dismiss. Indeed, plaintiff's conclusory allegation that "he along with many other pretrial detainees have repeatedly been the victim of allegedly lost personal and/or legal mail" (Compl. at ECF 15), lacks any factual support to state a viable mail-tampering claim. Plaintiff also asserts he "is injured every time his legal mail is opened" by a correction officer who is "at liberty to read its content and share it amongst themselves and even some

cases with, or in the presence of other inmates." (Doc. # 29 at ECF 3). Plaintiff does not allege any defendant did in fact read his legal mail; he alleges only that any correction officer is at liberty to do so. This allegation is nothing more than unsubstantiated speculation and is insufficient to allege a First Amendment mail-tampering claim.

Accordingly, plaintiff's First Amendment interference with mail claim must be dismissed.

## CONCLUSION

The motion to dismiss is GRANTED IN PART and DENIED IN PART.

Plaintiff's Fourteenth Amendment procedural due process claim against Sgt. David Lowe shall proceed. All other claims are dismissed.

***11** By March 15, 2021, defendant Lowe shall file an answer. By separate order, the Court will schedule an initial conference in this matter.

The Clerk is instructed to terminate Sheriff Louis Falco as a defendant in this action.

The Clerk is further instructed to terminate the motion. (Doc. #17).

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore in forma pauperis is denied for the purposes of any appeal. See Coppedge v. United States, 369 U.S. 438, 444–45 (1962).

SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2021 WL 797658

## Footnotes

1 Because plaintiff is proceeding pro se, "it is appropriate ... to consider factual allegations made in [his] opposition papers, so long as the allegations are consistent with the complaint." Kelley v. Universal Music Grp., 2016 WL 5720766, at *6 (S.D.N.Y. Sept. 29, 2016). Accordingly, the Court considers factual allegations made for the first time in plaintiff's opposition to the motion to dismiss and the exhibits annexed thereto. See Vlad-Berindan v. MTA N.Y.C. Transit, 2014 WL 6982929, at *6 (S.D.N.Y. Dec. 10, 2014).

2 "ECF ___" refers to page numbers automatically assigned by the Court's Electronic Case Filing System.

3 Unless otherwise indicated, case quotations omit all internal citations, quotations, footnotes, and alterations.

4 Because plaintiff is proceeding pro se, he will be provided with copies of all unpublished opinions cited in this decision. See Lebron v. Sanders, 557 F.3d 76, 79 (2d Cir. 2009).

5 The complaint is organized into six causes of action, alleging various RCCC policies and one personal policy of Sgt. Lowe's violated plaintiff's constitutional right not to be subjected to cruel and inhumane treatment. However, plaintiff's claims also implicate his First and Fourth Amendment rights. See infra Sections IV-VI.

6 Although plaintiff alleges RCCC's use of multi-purpose kiosk units in lieu of a traditional law library, strip search policy, and failure to safeguard incoming and outgoing personal and legal mail also violate his Fourteenth Amendment rights, such claims are more properly considered under the First and Fourth Amendments, as discussed infra sections IV-VI. To the extent plaintiff alleges such policies constituted cruel and inhuman treatment in violation of his Fourteenth Amendment rights, such claims fail because plaintiff pleads no facts suggesting such policies were punitive or deprived him of any basic human needs.

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7 Plaintiff also alleges Sheriff Falco misappropriated prison funds by failing to provide pretrial detainees basic recreational equipment or coffee and tea. This conclusory allegation is insufficient to state a claim upon which relief may be granted. That the prison did not spend money as plaintiff desired does not give rise to a cause of action under the Fourteenth Amendment.

8 The source of the constitutional right of access to the courts "has been variously located in the First Amendment right to petition for redress, the Privileges and Immunities Clause of Article IV, section 2, and the Due Process Clauses of the Fifth and Fourteenth Amendments." Crosby v. Petermann, 2020 WL 1434932, at *11 (S.D.N.Y. Mar. 24, 2020).

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Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Theodore HUDSON, Plaintiff,
v.
Christopher ARTUZ, Warden Philip Coombe, Commissioner Sergeant Ambrosino Doctor Manion Defendants.

No. 95 CIV. 4768(JSR).
|
Nov. 30, 1998.

**Attorneys and Law Firms**

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Alfred A. Delicata, Esq., Assistant Attorney General, New York.

MEMORANDUM AND ORDER

BUCHWALD, Magistrate J.

***1** Plaintiff Theodore Hudson filed this *pro se* action pursuant to 42 U.S.C. § 1983 on April 26, 1995. Plaintiff's complaint alleges defendants violated his constitutional rights while he was an inmate at Green Haven Correctional Facility. [1] Plaintiff's complaint was dismissed *sua sponte* by Judge Thomas P. Griesa on June 26, 1995 pursuant to 28 U.S.C. § 1915(d). On September 26, 1995, the Second Circuit Court of Appeals vacated the judgment and remanded the case to the district court for further proceedings.

The case was reassigned to Judge Barbara S. Jones on January 31, 1996. Defendants moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(c) on November 25, 1996. Thereafter, the case was reassigned to Judge Jed S. Rakoff on February 26, 1997. On February 26, 1998, Judge Rakoff granted defendants' motion to dismiss, but vacated the judgment on April 10, 1998 in response to plaintiff's motion for reconsideration in which plaintiff claimed that he never received defendants' motion to dismiss.

By Judge Rakoff's Order dated April 14, 1998, this case was referred to me for general pretrial purposes and for a Report and Recommendation on any dispositive motion. Presently pending is defendants' renewed motion to dismiss. Plaintiff filed a reply on July 6, 1998. For the reasons discussed below, plaintiff's complaint is dismissed without prejudice, and plaintiff is granted leave to replead within thirty (30) days of the date of the entry of this order.

FACTS

Plaintiff alleges that he was assaulted by four inmates in the Green Haven Correctional Facility mess hall on March 14, 1995. (Complaint at 4.) He alleges that he was struck with a pipe and a fork while in the "pop room" between 6:00 p.m. and 6:30 p.m. (Complaint at 4–5.) Plaintiff contends that the attack left him with 11 stitches in his head, chronic headaches, nightmares, and pain in his arm, shoulder, and back. (*Id.*) Plaintiff also states that Sergeant Ambrosino "failed to secure [the] area and separate" him from his attackers. (Reply at 5.) Plaintiff's claim against Warden Artuz is that he "fail [sic] to qualify as warden." (Complaint at 4.) Plaintiff names Commissioner Coombes as a defendant, alleging Coombes "fail [sic] to appoint a qualified warden over security." (Amended Complaint at 5.) Plaintiff further alleges that Dr. Manion refused to give him pain medication. (Complaint at 5.) Plaintiff seeks to "prevent violent crimes" and demands $6,000,000 in damages. (Amended Complaint at 5.)

Defendants moved to dismiss the complaint, arguing that: (1) the Eleventh Amendment bars suit against state defendants for money damages; (2) the plaintiff's allegations fail to state a claim for a constitutional violation; (3) the defendants are qualifiedly immune from damages; and (4) plaintiff must exhaust his administrative remedies before bringing this suit.

DISCUSSION

I find that plaintiff's complaint runs afoul of Rules 8 and 10 of the Federal Rules of Civil Procedure and dismiss the complaint without prejudice and with leave to amend. Federal Rule 8 requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The purpose of this Rule "is to give fair notice of the claim being asserted so as to permit the adverse party the opportunity to file a responsive answer [and] prepare an adequate defense." *Powell v. Marine Midland Bank,* 162 F.R.D. 15, 16 (N.D.N.Y.1995) (quoting *Brown v.*

*Califano,* 75 F.R.D. 497, 498 (D.D.C.1977)); *see Salahuddin v. Cuomo,* 861 F.2d 40, 42 (2d Cir.1988) (stating that the "principal function of pleadings under the Federal Rules is to give the adverse party fair notice of the claim asserted so as to enable him to answer and prepare for trial").

***2** Rule 10 of the Federal Rules of Civil Procedure requires, *inter alia,* that the allegations in a plaintiff's complaint be made in numbered paragraphs, each of which should recite, as far as practicable, only a single set of circumstances. *Moore's Federal Practice,* Vol. 2A, ¶ 10.03 (1996). Rule 10 also requires that each claim upon which plaintiff seeks relief be founded upon a separate transaction or occurrence. *Id.* [2] The purpose of Rule 10 is to "provide an easy mode of identification for referring to a particular paragraph in a prior pleading." *Sandler v. Capanna,* 92 Civ. 4838, 1992 WL 392597, *3 (E.D.Pa. Dec.17, 1992) (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure,* § 1323 at 735 (1990)).

A complaint that fails to comply with these pleading rules "presents far too heavy a burden in terms of defendants' duty to shape a comprehensive defense and provides no meaningful basis for the Court to assess the sufficiency of" a plaintiff's claims. *Gonzales v. Wing,* 167 F.R.D. 352, 355 (N.D.N.Y.1996). It may therefore be dismissed by the court. *Id.; see also Salahuddin v. Cuomo,* 861 F.2d at 42 ("When a complaint does not comply with the requirement that it be short and plain, the court has the power to, on its own initiative, ... dismiss the complaint"). Dismissal, however, is "usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." *Id.* In those cases in which the court dismisses a *pro se* complaint for failure to comply with Rule 8, it should give the plaintiff leave to amend when the complaint states a claim that is on its face nonfrivolous. *Simmons v. Abruzzo,* 49 F.3d 83, 87 (2d Cir.1995).

In determining whether a nonfrivolous claim is stated, the complaint's allegations are taken as true, and the "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v.. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The complaint of a *pro se* litigant is to be liberally construed in his favor when determining whether he has stated a meritorious claim. *See Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Even if it is difficult to determine the actual substance of the plaintiff's complaint, outright dismissal without leave to amend the complaint is generally disfavored as an abuse of discretion. *See Salahuddin,* 861 F.2d at 42–42; *see also Doe v. City of New York,* No. 97 Civ. 420, 1997 WL 124214, at *2 (E.D.N.Y. Mar.12, 1997).

Here, plaintiff's *pro se* complaint fails to satisfy the requirements of Federal Rules 8 and 10. The complaint is often illegible and largely incomprehensible, scattering what appear to be allegations specific to plaintiff within a forest of headnotes copied from prior opinions. Defendants have answered with a boilerplate brief, which is perhaps all a defendant can do when faced with such a complaint. The Court is left with an insurmountable burden in attempting to make a reasoned ruling on such muddled pleadings.

***3** Although plaintiff's complaint is substantially incomprehensible, it appears to plead at least some claims that cannot be termed frivolous on their face. For example, plaintiff clearly alleges that inmates assaulted him and that Dr. Manion refused to provide him medical attention. He also appears to assert that Sergeant Ambrosino failed to protect him from the attack or take steps to prevent future attacks. (Plaintiff's Reply at 5). It is well established that an inmate's constitutional rights are violated when prison officials act with deliberate indifference to his safety or with intent to cause him harm. *Hendricks v. Coughlin,* 942 F.2d 109 (2d Cir.1991). It is similarly well established that an inmate's constitutional rights are violated when a prison doctor denies his request for medical care with deliberate indifference to the inmate's serious medical needs. *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Hathaway v. Coughlin,* 37 F.3d 63 (2d Cir.1994), *cert. denied,* 513 U.S. 1154, 115 S.Ct. 1108, 130 L.Ed.2d 1074 (1995). Although plaintiff provides few facts to support his allegations, I disagree with defendants' assertion that outright dismissal is appropriate because it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Defendant's Memorandum at 5 (quoting *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

Because plaintiff's complaint does not comply with Rules 8 and 10, it is hereby dismissed without prejudice, and plaintiff is granted leave to replead within thirty (30) days of the date of the entry of this Order. In drafting his second amended complaint, plaintiff is directed to number each paragraph and order the paragraphs chronologically, so that each incident in

which he alleges a constitutional violation is described in the order that it occurred. Plaintiff is also directed to specifically describe the actions of each defendant that caused plaintiff harm, and to do so in separate paragraphs for each defendant. Plaintiff's complaint shall contain the facts specific to the incidents plaintiff alleges occurred, and not any facts relating to any case that has been decided previously by a court of law. Plaintiff's complaint shall also contain a clear statement of the relief he seeks in addition to monetary damages.

CONCLUSION

For the reasons set forth above, plaintiff's complaint is dismissed without prejudice, and plaintiff is granted leave to replead within thirty (30) days of the date of the entry of this Order.

IT IS SO ORDERED.

**All Citations**

Not Reported in F.Supp.2d, 1998 WL 832708

## Footnotes

1 Plaintiff is presently incarcerated at Sullivan Correctional Facility.

2 Rule 10 states:

> (b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

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2003 WL 21058177
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Ronald D. BOURDON, Plaintiff,
v.
Frank RONEY, New York State Trooper; Alfonso Ortega, New York State Trooper; William McEvoy, New York State Trooper; Dean Edwards, New York State Trooper; Anthony Larock, New York State Trooper; and Jeffrey Dorward, New York State Trooper; Defendants.

No. 9:99–CV–0769(LEK)GLS.
|
March 6, 2003.

**Attorneys and Law Firms**

Ronald Bourdon, Auburn Correctional Facility, Auburn, NY, Plaintiff, pro se.

Hon. Eliot Spitzer, Attorney General of the State of New York, Department of Law, The Capitol, Albany, New York, for the Defendants.

Roger W. Kinsey, Asst. Attorney General, of counsel.

*REPORT–RECOMMENDATION and ORDER*

SHARPE, Magistrate J.

***1** This matter was referred to the undersigned for Report–Recommendation by the Honorable Lawrence E. Kahn, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rules N.D.N.Y. 72.3(c).

Plaintiff, *pro se* Ronald Bourdon ("Bourdon") alleges in his amended complaint that the defendants conspired to fabricate false evidence against him for the purpose of obtaining an "unlawful search warrant," destroying exculpatory evidence, and conducting an illegal search of his property. Bourdon also claims that the defendants used excessive force against him in the course of his arrest and subsequent interrogation, all in violation of his constitutional rights (*Dkt. No. 9; Am. Compl.*). Bourdon seeks substantial monetary damages.

Presently before the court is the defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56 (*Dkt. No. 48* ). Bourdon filed a response (*Dkt. No. 72* ). For the following reasons, this court recommends that summary judgment be granted in part and denied in part.

I. *Summary Judgment Standard*

Summary judgment may be granted when the moving party carries its burden of showing the absence of a genuine issue of material fact. Fed.R.Civ.P. 56; *Thompson v. Gjivoje,* 896 F.2d 716, 720 (2d Cir.1990) (citations omitted). "Ambiguities or inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the summary judgment motion." *Id.* However, when the moving party has met its burden, the nonmoving party must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 585–86, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *see also, Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2502, 2510, 91 L.Ed.2d 202 (1986). At that point, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *Id.*

II. *Background*

Bourdon filed the present action on May 14, 1999. By Order filed August 11, 1999 ("August order"), District Judge Lawrence E. Kahn dismissed this action unless Bourdon filed an amended complaint within thirty days of the August order (*Dkt. No. 4* ). Bourdon did not file an amended complaint. Bourdon appealed the August order to the Second Circuit Court of Appeals (*Dkt. No. 6* ).

On May 17, 2000, the Second Circuit affirmed the dismissal of Bourdon's complaint as to "the judge, the prosecutors, the appointed attorneys, Broome County, and the government informer" (*Dkt. No. 8 at 3* ). The Circuit held, however, that Bourdon was entitled to assert excessive force claims against the New York State Trooper defendants named in his original complaint as well as claims arising out of the search of his home and the seizure of property from his residence. *Id.*

In accordance with the decision of the Second Circuit, on August 11, 2000, Bourdon filed an amended complaint (*Dkt. No. 9* ).

A. *Bourdon's Allegations*

***2** On June 14, 1996, defendants Frank Roney ("Roney") and Alfonso Ortega ("Ortega") drafted an application to search Bourdon's home (*Am.Compl., ¶ 1* ). The application was based on information obtained from an informant whom Roney and Ortega "knew to be false and unreliable." The informant "harbored ill will against the plaintiff." *Id.* at ¶ 2. Roney and Ortega presented the application to Broome County Judge Patrick Mathews in bad faith and "intentionally misled the court with false information." *Id.* at ¶ 3. The search warrant application submitted by Roney and Ortega lacked "probable cause." *Id.* at ¶ 4. Thereafter, Judge Mathews issued a search warrant, without probable cause, permitting the search of Bourdon's home. The search of Bourdon's home was "motivated by malice and an intent to arrest and seize evidence." *Id.* at ¶ 9.

On June 14, 1996, Bourdon's home was searched pursuant to the warrant and Bourdon and another resident of the dwelling, John Verge, were arrested. *Id.* at ¶ 10. When Bourdon was arrested, "his wrists were cuffed with his palms facing outward to insure added pain and discomfort, the cuffs were [then] squeezed painfully tight." *Id.* at ¶ 13. Bourdon was placed in the back of a squad car which was parked in the sun. The car windows were closed and the inside of the car felt "like a greenhouse." *Id.* at ¶ 13. He remained in the hot car, in handcuffs, for three hours without water or the use of a toilet. *Id.* at ¶ 14.

At one point, Roney opened the car door and said that if Bourdon told him where the guns were he could have some water, use the toilet, have his handcuffs loosened, and sit outside on a bench near the house. *Id.* at ¶ 15. Bourdon denied having guns. Roney got angry and told Bourdon that he "could suffer until he was ready to talk." *Id.* at ¶ 15. At that point, Bourdon's wrists were blue, his right leg was numb, he had wet his pants, and he had severe pain in his lower back.

Defendants seized items not included in the warrant such as Bourdon's books, his daughter's photographs and family albums, and his father's hunting license. *Id.* at ¶¶ 17–18. Defendants searched Bourdon's red van, his jeep, and the wooded area surrounding Bourdon's home, all places not listed in the warrant. *Id.* at ¶ 20. Bourdon claims that the only vehicle mentioned in the search warrant was his white van. Bourdon claims that the defendants removed a briefcase from his red van, moved it to the white van, and "staged a fraudulent photograph that depicted [the briefcase] as being originally found in the white van." Defendants also removed some items from the briefcase and placed them in Bourdon's home and then pretended that the items were originally found in the home. *Id.* at ¶ 20. Defendants later used the documents found in the briefcase to obtain an indictment against Bourdon. *Id.* The search ended at 9:35 p.m. Bourdon's home was left "in shambles." *Id.* at ¶ 21.

***3** During the search, defendants seized and improperly disposed of exculpatory evidence, specifically Bourdon's father's valid hunting license which was found in the same closet with the seized guns. The valid hunting license was never included in the inventory list of the items seized. *Id.* at ¶ 23.

After the search, Bourdon was taken to the state trooper barracks for interrogation. Bourdon's shoes were taken away and he was forced to stand barefoot on the cold cement floor "with one wrist painfully chained to a wall for another three hours." *Id.* at ¶ 22. Roney and Jeffrey Dorward ("Dorward") interrogated Bourdon, "inflicting pain and threats to obtain information." *Id* .

The defendants also "coerced" John Verge into providing information during an "unconstitutional interrogation." Based upon this information, the defendants returned to Bourdon's home three hours later and seized his father's guns from the rafters of the home. *Id.* at ¶ 24.

Bourdon claims that the defendants deliberately withheld evidence, conducted another illegal search of his home on the following day and seized more evidence, then "unlawfully combined all of the evidence as being seized on June 14, 1996." *Id.* at ¶ 25. Bourdon claims that the defendants violated his right to due process, to be free from unreasonable search and seizure and false arrest, and to be free from the use of excessive force in the course of an arrest.

B. *Defendants' Affidavits*

1. *Defendant Roney*

Roney states that on June 12, 1996, his barracks received a citizen's complaint against Bourdon that he had physically harassed two women and "brandished a handgun" (*Dkt. No. 49; Roney Aff. at ¶¶ 3–4* ). The complainants and Paul Mollis ("Mollis"), a friend of Bourdon's, each gave written statements to the state police. *Id.* at ¶ 5–6; *see also, Ex. A (copy of the Investigation Report), pp. 6–11 & 29–37*. Mollis told the state police that he had been to Bourdon's home several times

over the last year and had seen weapons there. Mollis stated that on June 13, 1996, he saw Bourdon near his white van with a pistol in his hand (*Roney Aff., Ex. A, pp. 13–16* ). On June 13, 1996, Roney went to Bourdon's home and Bourdon identified himself as "John Verge" (*Roney Aff., ¶ 11* ).

Based upon Roney's investigation and the statements given, Roney and Ortega prepared a search warrant application (*Roney Aff., ¶ 8; see also, Id., Ex. A, pp. 39–45* ). Judge Mathews determined that probable cause existed and issued a search warrant on June 14, 1996 (*Roney Aff., ¶ 9; Id., Ex. A, pp. 65–67* ).

On June 14, 1996, the defendants executed the search warrant at Bourdon's home. Bourdon again identified himself as "John Verge" and was thereafter arrested for second degree criminal impersonation. Defendant LaRock handcuffed Bourdon and placed him in a patrol car.

Roney states that at one point he asked Bourdon to tell him where the guns were located (*Roney Aff., ¶ 19* ). At some point, McEvoy took Bourdon to the woods, removed the handcuffs and allowed him to urinate. McEvoy then reapplied the cuffs and placed Bourdon in another patrol car. *Id.* at ¶¶ 19–21. The search stopped when it became too dark to work, and LaRock was assigned to guard the site for the night. *Id.* at ¶¶ 24–25.

***4** Bourdon was brought to the police barracks and secured to a "bull ring" which Roney describes as a ring secured in the wall. One of Bourdon's handcuffs was attached to the bull ring. Bourdon was brought from the holding area to Roney's office several times. Each time, his shoes were removed because Bourdon was considered an escape risk. *Id.* at ¶¶ 27–28.

During Verge's interrogation on June 14, 1996, he told Dorward about a "secret compartment" in Bourdon's home. *Id.* at ¶ 29; *see also, Ex. A, pp. 22, 49–50.* McEvoy returned to the secured search area, located the secret compartment and found a shotgun, a rifle, and a handgun (*Roney Aff., ¶ 37; Id., Ex. A, pp. 23–26* ). Bourdon was then arraigned on felony charges of criminal possession of a weapon and criminal possession of forged instruments (*Roney Aff., ¶ 38* ).

2. *Defendants Edwards and LaRock*

Edwards and LaRock stated that on the day the search warrant was executed, Bourdon falsely identified himself as John Verge. He was arrested for second degree criminal impersonation (*Dkt. No. 51; Edwards Aff., ¶¶ 3–7; Dkt. No. 52; LaRock Aff., ¶¶ 1–7* ). LaRock stated that after Bourdon's arrest, he handcuffed Bourdon and put him in a patrol car. LaRock was assigned to guard the search area overnight when it became too dark to continue. Later in the evening, McEvoy returned to the search site and located a secret compartment in Bourdon's home wherein he found a rifle, a shotgun, and a pistol (*LaRock Aff., at ¶¶ 15–17* ).

3. *Defendant McEvoy*

McEvoy stated that about two hours after the search began, he escorted Bourdon to the woods and allowed him to urinate (*Dkt. No. 53; McEvoy Aff., ¶¶ 3–5; see also, Id., Ex. B, Bourdon's Dep. at 79:13* ). McEvoy stated that after the search was stopped for the night, he returned to the site, located a secret compartment and found a shotgun, a rifle, and a pistol (*McEvoy Aff., ¶¶ 7–9* ).

4. *Defendant Dorward*

Dorward stated that after the search stopped for the night, he interrogated John Verge who told him that there was a "secret compartment" in Bourdon's home (*Dorward Aff., at ¶ 15; Dkt. No. 54* ). Verge signed, in Dorward's presence, a four page statement which included information about the secret compartment. *Id.* at ¶ 16; *see also, Id., Ex. A, pp. 22, 49–52.*

5. *Defendant Ortega*

Ortega stated that on June 14, 1996, he helped Roney prepare a search warrant application for Bourdon's home, vehicles and premises (*Dkt. No. 55; Ortega Aff., ¶ 3* ). Ortega stated that on that same day, he was present when Roney "affirmed" the application in the presence of Judge Mathews.

III. *Collateral Estoppel*

Under the full faith and credit statute, federal courts must give preclusive effect to state court judgments whenever the courts of the State in which the judgment was entered would do so. *Hickerson v. City of New York,* 146 F.3d 99, 103 (2d Cir.1998)(citing *inter alia Allen v. McCurry,* 449 U.S. 90, 96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980)). New York law provides that an issue may not be relitigated if the identical issue was "necessarily decided in a previous proceeding, provided that the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior action." *Id.* at 104 (citations omitted). The party opposing the application of collateral

estoppel has the burden of proving that he was denied the full and fair opportunity to litigate the issue or issues in question. *Id.* at 109 (citing *In re Sokol,* 113 F.3d 303, 306 (2d Cir.1997); *Kaufmann v. Eli Lilly & Co.,* 65 N.Y.2d 449, 456, 482 N.E.2d 63–67, 492 N.Y.S.2d 584, 588 (1985)).

***5** A determination of whether the party opposing collateral estoppel had a full and fair opportunity to litigate involves considering the "realities of the prior litigation," including circumstances which may have had the practical effect of discouraging a party from fully litigating an issue. *Id.* (citing *Ryan v. New York Telephone Co .,* 62 N.Y.2d 494, 501, 467 N.E.2d 487, 491, 478 N.Y.S.2d 823, 827 (1984). The factors to be considered include the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate, the actual extent of the litigation, and the competence and expertise of counsel. *Id.*

A. *The Search Warrant*

The Fourth Amendment forbids "unreasonable searches and seizures" of a person's "papers [ ] and effects" and requires that any search warrant be supported by "probable cause." U.S. Const. Amend. IV. The existence of probable cause is a complete defense to a claim that plaintiff's Fourth Amendment rights have been violated because the search warrant was obtained unlawfully. *DeFelice v. Ingrassia,* 210 F.Supp.2d 88, 92 (D.Conn.2002).

Bourdon claims that the search warrant was not based upon probable cause and therefore the warrant was unreasonable and constitutionally infirm. Specifically, Bourdon claims that the search warrant application prepared by Roney and Ortega was (a) based upon information obtained from an unreliable informant that they knew to "harbor[ ] ill will against the plaintiff (*Am. Compl .,* ¶ 2); and, (b) presented to the Broome County Court "in bad faith" because it contained intentionally misleading and false information. *Id.* at ¶ 3.

As stated above, the party seeking the benefit of collateral estoppel has the burden of showing the identity of the issues, and the party opposing the application of collateral estoppel has the burden of showing that he did not have a full and fair opportunity to litigate the claims in the prior action. *D'Andrea v. Hulton,* 81 F.Supp.2d 440, 443 (W.D.N.Y.), *adopted by* 1999 U.S. Dist. LEXIS 20701 (W.D.N.Y. Dec. 17, 1999) (citing *inter alia Khandhar v. Elfenbein,* 943 F.2d 244, 247 (2d Cir.1991)). In order to find identity of issues, the court must find that the issue to be decided in the second action was material to the first action and essential to the decision in the first action. *Id.* The court must also find that a different judgment in the second action would destroy or impair rights or interests established by the first action. *Id.* (citing *Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp. Inc.,* 250 N.Y. 304, 307, 165 N.E. 456 (1929)).

Defendants argue that the validity of the search warrant and, in particular, the presence of probable cause to issue the warrant, have already been litigated twice by Bourdon in state court. First, at a suppression hearing and again, upon appeal of Bourdon's conviction; therefore, he may not litigate the issues again.

***6** Bourdon previously argued in state court that "the warrant was not supported by probable cause in that it relied upon an application from which there were material omissions, and which contained false statements by Roney, and information supplied by an informant who was not reliable." *See People v. Bourdon,* 258 A.D .2d 810, 811 (3d Dep't 1999). The state court determined that probable cause did exist to issue the warrant and thus, the warrant was properly issued. *Id.* at 812. Bourdon's attempt to relitigate the very same issues in this court must fail.

Because the state court has already decided that there was probable cause to issue the search warrant and Bourdon had a full and fair opportunity to argue this issue in state court, this court recommends that the defendants' motion for summary judgment be granted as to Bourdon's claim that the warrant was illegally issued.

B. *Search and Seizure*

The Fourth Amendment requires that search warrants "particularly describ[e] the place to be searched, and the persons or things to be seized."

Bourdon claims that the search conducted in accordance with the warrant was unreasonable because it exceeded the scope of the warrant. Bourdon argues that the search was unreasonable because the defendants searched places not specifically identified in the search warrant. The warrant permitted the defendants to search Bourdon's person, his residence and any unattached structures, a white 1983 GMC van registered to him, any vehicle that he is found to be present in, and any person in Bourdon's residence or in any vehicle with Bourdon (*Dkt. No. 49 at 65–67* ). Bourdon claims that the defendants searched his "second van, his jeep, and property surrounding his home, and a trailer" and seized items not specifically listed in the search warrant.

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Defendants argue in conclusory fashion that the issues concerning the actual search and seizure have been fully litigated in state court. They offer no evidence to support this argument.

This court is unable to determine the reasonableness of the search and seizure or whether this claim is barred by collateral estoppel. Accordingly, without addressing the merits of this claim, the court recommends that the defendants' motion for summary judgment be denied, without prejudice, as to Bourdon's claim that the search and seizure was unconstitutionally executed. Defendants are granted permission to file a renewed motion for summary judgment on this issue which must be filed within forty-five days following a final decision by the District Judge on this motion for summary judgment. Any renewed summary judgment motion filed by the defendants must include a full presentation of the record of Bourdon's underlying state court proceedings including, but not limited to, any state court decision made at Bourdon's suppression hearing, a complete transcript of Bourdon's suppression hearing, and any briefs or other relevant papers filed by him on appeal.

C. *Fifth Amendment Claim*

***7** The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides in part that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. CONST. Amend. V. It guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence." *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489, 1493–94, 12 L.Ed.2d 653 (1964).

Bourdon claims that while subject to custodial interrogation, he was cuffed to the wall in a standing position for hours and forced to stand on a cold cement floor without shoes. Bourdon claims that he did not want to talk but the defendants continued to question him. At his deposition, he claimed that the defendants threatened him with "a long term incarceration" if he didn't reveal where his guns were. He also claimed that Dorward threatened that he "better cooperate with Roney, because Roney gets very upset" (*Dkt. No. 50, Dep. at 104* ). Bourdon asserts a claim for violation of the constitutional privilege against self-incrimination.

"Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding ... [t]o constitute a Fifth Amendment violation 'use of the [coerced] statement at trial is not required,' but that there must be some 'use or derivative use of a compelled statement at any criminal proceeding against the declarant." ' *Deshawn v. Safir,* 156 F.3d 340, 346–47 (2d Cir.1998) (internal citations omitted).

Since Bourdon admitted at his deposition that he made no statement to police during interrogation (*Dkt. No. 50, Dep. at 123* ), he cannot prove a necessary element of the Fifth Amendment violation, namely "use or derivative use of a compelled statement" against himself. Since Bourdon alleges no injury, this Court recommends the dismissal of Bourdon's Fifth Amendment claim.

IV. *False Arrest*

"The right to be free from arrest or prosecution in the absence of probable cause is a long established constitutional right." *Ricciuti v. N.Y.C. Transit Authority,* 124 F.3d 123, 128 (2d Cir.1997). In order to state a claim for false arrest under the federal constitution, plaintiff must show that he was arrested without probable cause. *Lowth v. Town of Cheektowaga,* 82 F.3d 563, 569 (2d Cir.1996) (citing *Broughton v. New York,* 37 N.Y.2d 451, 456, 335 N.E.2d 310, 313, 373 N.Y.S.2d 87, 93 (1975)). Probable cause exists when the arresting officer has "knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Weyant v. Okst,* 101 F.3d 845, 852 (2d Cir.1996). In assessing the existence of probable cause, the court must consider the facts available to the officer at the time of the arrest and immediately before it. *Lowth,* 82 F.3d at 569. The existence of probable cause is a complete defense to an action for false arrest, even if the plaintiff is subsequently acquitted of the charges, because probable cause constitutes justification for the arrest. *Weyant,* 101 F.3d at 852 (citing *Bernard v. United States,* 25 F.3d 98, 102 (2d Cir.1994)). In deciding whether probable cause to arrest exists, a police officer is entitled to rely on the victim's allegations that a crime has been committed. *Martinez v. Simonetti,* 202 F.3d 625, 634 (2d Cir.2000) (citing *Singer v. Fulton County Sheriff,* 63 F.3d 110, 119 (2d Cir.1995)). A police officer is also entitled to rely on the allegations of fellow police officers. *Martinez,* 202 F.3d at 634 (citing *Bernard v. U.S.,* 25 F.3d 98, 102–03 (2d Cir.1994)). The evidence needed to establish probable cause is less than that necessary to support a conviction. *Krause v. Bennett,* 887 F.2d 362, 370 (2d Cir.1989). Probable cause may be determined on the law on a motion for summary judgment if there is no

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dispute as to the pertinent events and the knowledge of the police officer. *Weyant,* 101 F.3d at 852.

***8** Bourdon contends that his arrest on the night of June 14, 1996, was without probable cause. Because this court finds that the defendants had probable cause to arrest Bourdon and that Bourdon was eventually convicted, the false arrest claim fails.

Roney states that on June 13, 1996, he went to Bourdon's home and spoke to a man who identified himself as John Verge (*Roney Aff.,* ¶ *11* ). Unbeknownst to Roney, the man was actually Bourdon. On June 14, 1996, the date of Bourdon's arrest and search of his home, Roney spoke to Bourdon who again identified himself as John Verge. Roney held out two photographs of Ronald Bourdon for Bourdon's inspection. Bourdon affirmed that the photos were of Ronald Bourdon but persisted in holding himself out to be John Verge. *Id.* at ¶¶ 12–14. Roney, knowing the man he was conversing with was actually Bourdon, arrested Bourdon for second degree criminal impersonation. *Id.* at ¶ 16; *see also, Edwards Aff.,* ¶¶ *4–7; LaRock Aff.,* ¶¶ *1–7; and Dorward Aff.,* ¶¶ *1–7* . In his own affidavit, Bourdon admits that when Roney spoke to him on June 13, 1996, Bourdon "lied and said that he [Bourdon] was not Mr. Bourdon, and that he [Mr. Bourdon] was not home" (*Dkt. No. 72; Bourdon Aff.,* ¶ *9* ). Bourdon admitted that when he was asked for identification, he produced "a New York State drivers license with his photo on the license, in the name of John Verge." *Id.* at ¶ 10. Bourdon further testified that "[d]efendants Roney and Dorward were unaware that they were being duped by him, and that he was really Mr. Bourdon and not John Verge." *Id.* at ¶ 11. Additionally, Bourdon testified at his deposition that (a) he possessed a driver's license in the name of John Verge which had his picture on it; and, (b) that on June 13, 1996, he falsely identified himself to Roney as John Verge and offered the false driver's license in support of his claim. *Dep. at 35–36 & 55–56.* Bourdon was arrested for second degree criminal impersonation following his second conversation with Roney.

New York Penal Law § 190.25(1) provides: "A person is guilty of criminal impersonation in the second degree when he [i]mpersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another." Conviction of this crime requires proof that the defendant impersonated a real person and not simply used some fictitious or assumed name. *People v. Sadiq,* 236 A.D.2d 638, 654 N.Y.S.2d 35 (N.Y.App.Div.), appeal denied sub nom., *People v. Sikandar,* 89 N.Y.2d 1100, 682 N.E.2d 995, 660 N.Y.S.2d 394 (1997). The "benefit" contemplated by the statute prohibiting criminal impersonation need not be monetary but may consist of the desire to avoid apprehension or prosecution. *People v. Sherman,* 116 Misc.2d 109, 455 N.Y.S.2d 528 (Rochester City Court, Monroe County 1982).

In light of Bourdon's own admission that on June 13, 1996, he willingly and knowingly identified himself as "John Verge", a real person, and produced a driver's license containing fraudulent information in support of this claim for the ostensible purpose of misleading the state police, it is absurd that he now argues that there was no probable cause to arrest him. Moreover, an officer is not required to make a full investigation of the surrounding circumstances prior to taking action. "Once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Ricciuti,* 124 F.3d at 128. Roney's version of the events is believable and his credibility is bolstered by the fact that Bourdon admitted to the very behavior for which he was arrested. Bourdon has not provided information or evidence to contest the defendants' allegations concerning probable cause. Under the circumstances, because probable cause is determined based upon the information available to the officer at the time of the arrest, the officers had a reasonable basis for believing there was probable cause to arrest Bourdon on June 14, 1996.

***9** In any event, Bourdon was ultimately convicted of second degree criminal impersonation. *See People v. Bourdon,* 258 A.D.2d 810 (3d Dep't 1999). The Second Circuit has held that a plaintiff's conviction prevents his recovery on a § 1983 claim for false arrest. *Cameron v. Fogarty,* 806 F.2d 380, 387 (2d Cir.1986). "Where the civil rights plaintiff has been convicted of the offense for which he was arrested, we have in effect accepted the fact of that conviction as conclusive evidence of good faith and reasonableness of the officer's belief in the lawfulness of the arrest." *Id.* at 388. Evidence of a conviction is a complete defense to a § 1983 action for false arrest. *Id.* at 388–89.

Since probable cause and Bourdon's conviction are each a defense to a false arrest claim, this court recommends the dismissal of Bourdon's false arrest claim.

V. *Excessive Force Claim*

The Supreme Court has made it clear that excessive force used by officers during an arrest violates the Fourth Amendment which guarantees citizens the right to be free

from unreasonable seizures of the person. *Graham v. Connor,* 490 U.S. 386, 394, 1098 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). "To establish a Fourth Amendment excessive force claim, a plaintiff must show that the force used by the officer was, in light of the facts and circumstances confronting him, 'objectively unreasonable' under Fourth Amendment standards." *Horton v. Town of Brookfield,* 98CV01834, 2001 WL 263299 (D.Conn.2001) (citing *Finnegan v. Fountain,* 915 F.2d 817, 823 (2d Cir.1990) (other citation omitted).

Bourdon complains that he was handcuffed for three hours while the search was conducted. He was also handcuffed, sometimes to a wall, at the police barracks for an additional two to three hours (*Dkt. No. 50; Dep. at 105–110* ). During his time in the patrol car, the defendants were actively involved in executing the search warrant and Bourdon was left alone in the car. The defendants admit that Bourdon was later cuffed to the wall at the police barracks. However, Roney explains that this is "the only holding area available in the Troop Barracks" (*Roney Aff. at 3* ). He also explains that this system, referred to as a bull ring, is commonly used at troopers' barracks throughout the state. *Id.* at 3.

Handcuffing has been found to give rise to a claim of excessive force where an individual suffers an injury as a result of being handcuffed. *Gonzales v. City of New York,* 98–CV–3084, 2000 WL 516682, at *4 (E.D.N.Y. March 7, 2000); *Simpson v. Saroff,* 741 F .Supp. 1073, 1078 (S.D.N.Y.1990). "Where the plaintiff does not allege that a prior injury existed or that an injury resulted from being handcuffed, however, courts have found that no constitutional violation exists and have dismissed the claims." *Horton,* 2001 WL 263299, at *7 (citing *Scott v. County of Nassau,* 94CV4291, 1998 WL 874840, at *5 (E.D.N.Y. Dec. 11, 1998) (granting summary judgment where there were no additional allegations of excessive force or allegations of prior injury); *Murphy v. Neuberger,* 94 Civ. 7421, 1996 WL 442797, at *8 (S.D.N.Y. Aug. 6, 1996) (granting motion to dismiss where plaintiff did not allege that he suffered any injury as a result of being handcuffed); *Foster v. Metropolitan Airports Comm'n,* 914 F.2d 1076, 1082 (8th Cir.1990) (affirming grant of summary judgment where plaintiff did not provide evidence of permanent injury).

***10** Bourdon has not alleged or provided any evidence of permanent injury as a result of being handcuffed. He does not claim to have had a pre-existing injury of which the officers were aware, or to have requested medical treatment while being handcuffed or immediately thereafter. The mere fact that Bourdon was uncomfortable for several hours is not enough to establish a constitutional violation. *See Miller v. Glanz,* 948 F.2d 1562, 1569–70 (10th Cir.1991) (plaintiff experienced only "momentary discomfort" when he was handcuffed in an "awkward position" for two hours). Thus, this court cannot find that handcuffing Bourdon, without more, constitutes a violation of his constitutional rights.

Bourdon also claims that he was subjected to physical and emotional abuse during his confinement at the police barracks. However, at his deposition, he admits that the defendants did not hit or strike him with anything (*Dep. at 105* ). He merely states that they threatened him with a lengthy incarceration. Bourdon further states that he was in pain and he was stiff after sitting in the car for three hours. Bourdon has alleged no injury and admits that there was no physical contact between himself and the defendants beyond the handcuffing. Bourdon has failed to allege any excessive force used at the police barracks. Accordingly, this court recommends that Bourdon's excessive force claim be denied.

VI. *Conditions of Confinement*

Pretrial detainees may not be subjected to conditions and restrictions that amount to "punishment" without due process of law. *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Weyant,* 101 F.3d at 856. [1] A detainee's Fourteenth Amendment due process rights concerning the conditions of his confinement are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *City of Revere v. Massachusetts General Hospital,* 463 U.S. 239, 244, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983) (citations omitted). The standard for analyzing a pretrial detainee's Fourteenth Amendment claim is the same as the Eighth Amendment standard. *See Weyant,* 101 F.3d at 856. Thus, a pretrial detainee's pleadings regarding the conditions of his confinement are sufficient if they meet both an objective and a subjective standard. To meet the objective standard, the claims must be "sufficiently serious"—the deprivation must deny minimal civilized measure of life's necessities. As to the subjective standard, plaintiff must allege that the defendants "had a sufficiently culpable state of mind amounting to at least deliberate indifference." *Dawes v. Walker,* 239 F.3d 489, 493–94 (2d Cir.2001) (citations omitted); *see also,* Weyant, 101 F.3d at 856.

Bourdon alleges that the manner in which he was detained after his arrest violated his constitutional rights. Bourdon claims that immediately after his arrest, he was placed in a hot,

unventilated car for three hours without water or bathroom privileges. Later at the barracks, he was required to stand, off and on, for three hours while handcuffed to a wall without shoes or socks.

***11** At his deposition, Bourdon admitted that he was allowed to urinate in the woods at about 9:30 p.m. Since the search began at approximately 6:30 p.m., Bourdon went, at most, three hours without bathroom privileges and water (*Roney Aff. at 2* ).

This court finds that Bourdon has failed to allege or substantiate both the objective and subjective components necessary to establish that the defendants acted with deliberate indifference in their methods of confinement. He has failed to adequately allege that he was denied minimal necessities of civilized life for a substantial period of time. *See Whitted v. Lazerson,* 96 Civ. 2746, 1998 WL 259929, at *3 (S.D.N.Y. May 21, 1998) ("temporary deprivation of the right to use the toilet, in the absence of serious physical harm or a serious risk of contamination, simply does not rise to the level of an Eighth Amendment violation"); *Warren v. Irvin,* 985 F.Supp. 350, 356 (W.D.N.Y.1997) (Depriving inmate of water for three days because he was using it to flood his cell did not amount to Eighth Amendment violation). In any event, because the defendants have stated a legitimate purpose in Bourdon's confinement – to secure Bourdon during the search and interrogation by the only means available – Bourdon has failed to establish that the defendants secured him in this manner merely as a form of punishment. Accordingly, this court recommends that the defendants' motion for summary judgment be granted as to Bourdon's conditions of confinement claim.

VII. Heck v. Humphrey

In *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), the Supreme Court held that a § 1983 action seeking damages is not cognizable if a decision in favor of the plaintiff would necessarily invalidate a criminal conviction unless the conviction or sentence had been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal habeas court. *Heck,* 512 U.S. at 486–87.

Bourdon's claims concerning the validity of the search warrant, the false arrest claim, and the Fifth Amendment violation have been recommended to be dismissed on the merits. Thus, this court need not analyze these claims under *Heck.*

Still remaining is Bourdon's claim that the defendants exceeded the scope of the search warrant. Because this court has determined that it cannot assess the validity of these claims without further development of the record by the defendants, this court also cannot consider at the present time whether *Heck* would invalidate these claims.

VIII. *Qualified Immunity*

As an alternative basis to grant dismissal, the defendants argue that they are entitled to qualified immunity. Qualified immunity protects government officials who perform discretionary functions in the course of their employment. It shields them from liability for money damages where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). It also protects officials from "the burdens of costly, but insubstantial, lawsuits." *Warren v. Keane,* 196 F.3d 330, 332 (2d Cir.1999)(quotation marks and internal citations omitted).

***12** The question of whether qualified immunity will protect a public official depends upon " 'the objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (citations omitted). Furthermore, the contours of the right violated must be sufficiently clear that a reasonable official might understand that his actions violate that right. *Id.* at 640, 107 S.Ct. at 3039; *Keane,* 196 F.3d at 332. The test for "evaluating whether a right was clearly established at the time a § 1983 defendant acted is: '(1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and, (3) whether under pre-existing law a reasonable defendant official would have understood that his or her acts were unlawful." ' *African Trade & Information Center, Inc., v. Abromaitis,* 294 F 3d. 355, 360 (2d Cir.2002); *see also, Charles W. v. Maul,* 214 F.3d 350, 360 (2d Cir.2000).

Additionally, the Second Circuit has held that a court may dismiss a claim based upon qualified immunity without first deciding the substantive claims therein. *See Horne v. Coughlin,* 191 F.3d 244 (2d Cir.1999). Also within this decision, the Second Circuit suggested that the qualified immunity issue should be addressed before the substance of

a claim. The court shall now consider the defendants' claim that they are entitled to qualified immunity.

In this case, it has been clearly established that persons have a right to be free from unreasonable search and seizure, false arrest, excessive force, inhumane conditions of confinement, and self-incrimination. However, this court finds that it was objectively reasonable for the defendants to believe that their conduct did not violate Bourdon's constitutional rights. The record reflects that the defendants could not have known that the statements provided in support of the search warrant were unreliable or that they lacked probable cause to arrest Bourdon. In fact, Bourdon admits to behavior which would amount to probable cause to arrest.

The record also reflects that Bourdon was handcuffed in a car for approximately three hours without water or the use of bathroom facilities. Bourdon makes no allegations that he told the defendants during this time that he was in pain or discomfort. Finally, the record reflects that while at the police barracks, Bourdon was handcuffed to a wall for approximately one and one-half hours on two separate occasions. Again, Bourdon does not allege that he complained of pain or discomfort to the defendants at this time. Bourdon also admits that he was never physically attacked by the defendants. Under these circumstances, it was reasonably objective to believe that Bourdon was not in pain or distress. Furthermore, this court finds that the defendants did not use excessive force upon Bourdon or confine him under inhumane conditions. Finally, since Bourdon made no statement during his interrogation, it was reasonably objective for the defendants to believe that they did not violate Bourdon's right to be free from self-incrimination.

***13** Accordingly, as an additional basis to grant summary judgment, this court recommends that the claims concerning the search warrant, false arrest, excessive force, unconstitutional conditions of confinement, and the Fifth Amendment be dismissed because the defendants are entitled to qualified immunity on these claims.

IX. *Stay of Discovery*

By Order of this court filed February 27, 2002, discovery in this action was stayed until a final decision was rendered on this motion for summary judgment. Because it is recommended that the defendants may file a renewed motion for summary judgment, the stay of discovery is continued until either (1) a decision by the District Judge on any renewed motion for summary judgment; or (2) absent any extensions of time granted by this court, the expiration of the time to file a renewed motion for summary judgment if no such motion has been filed.

WHEREFORE, based on the above, it is hereby

RECOMMENDED, that the defendants' motion be GRANTED (*Dkt. No. 48* ) to the extent that the following claims are dismissed on the merits as well as on the basis of qualified immunity:

a. Invalid search warrant;

b. False arrest;

c. Excessive force;

d. Illegal conditions of confinement; and

e. Fifth Amendment claim, and it is further

RECOMMENDED, that the defendants' motion be DENIED in all other respects, without prejudice, the defendants may file a renewed motion for summary judgment addressing Bourdon's claim involving the search and seizure issue. Any renewed motion must be filed within forty-five days following a decision by the District Judge on this summary judgment motion; and it is further

ORDERED, that the stay of discovery is continued until either: (1) a decision by the District Judge on any renewed motion for summary judgment; or (2) absent any extensions of time granted by this court, the expiration of the time to file a renewed motion for summary judgment if no such motion has been filed.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. *FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. Roldan v. Racette,* 984 F.2d 85 (2d Cir.1993)(citing *Small v. Secretary of Health and Human Services,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

**All Citations**

Not Reported in F.Supp.2d, 2003 WL 21058177

## Footnotes

1 Because plaintiff was a pre-trial detainee, his conditions of confinement is analyzed under the due process clause of the Fourteenth Amendment.

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