

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND, NORTHERN DIVISION

PETER N. NGATIA,

Plaintiff,

v.

DEPARTMENT OF PUBLIC
SAFETY & CORRECTIONAL SERVICES,
et al.,

Defendants.

CIVIL NO.: WDQ-14-0899

* * * * *

MEMORANDUM OPINION

Peter N. Ngatia, *pro se*, sued the Department of Public Safety and Correctional services, the Jessup Correctional Institution (collectively, "the State Defendants), and the American Federation of State, County and Municipal Employees ("AFSCME")¹ for discrimination, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"),² and other claims. Pending are AFSCME's motion to dismiss, the Plaintiff's motion to amend the complaint, and the State Defendants' motion to dismiss, or, in the alternative, for summary judgment. No hearing is necessary. See Local Rule 105.6 (D. Md. 2011). For the following reasons, the motion to dismiss and the motion for

¹ AFSCME was the union that represented the Plaintiff through his disciplinary process.

² 42 U.S.C. §§ 2000e, *et seq.*

summary judgment will be granted; the Plaintiff's motion to amend will be denied.

I. Background³

The Plaintiff is a naturalized American citizen from Kenya. ECF No. 17 at 3. On December 6, 2010, the Plaintiff began working for the Maryland Department of Public Safety and Correctional Services ("DPSCS") as a corrections officer ("CO"). *Id.* In 2011, the Plaintiff was assigned to the Jessup Correctional Institution ("JCI").⁴ *Id.*

³ The facts are taken from the complaint, ECF No. 1; the first amended complaint, ECF No. 17; the proposed second amended complaint, ECF No. 39; the State Defendants' motion, ECF No. 31; the Plaintiff's opposition, ECF No. 38; and their supporting exhibits.

On a motion to dismiss, the well-pled allegations in the complaint are accepted as true. *Brockington v. Boykins*, 637 F.3d 503, 505 (4th Cir. 2011). The Court will consider the pleadings, matters of public record, and documents attached to the motions that are integral to the complaint and whose authenticity is not disputed. *See Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

In reviewing a motion for summary judgment, the nonmovant's evidence "is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

⁴ The Plaintiff is currently assigned to the Maryland Correctional Institution for Women. ECF No. 17 at 3.

A. September 19, 2011 Incident⁵

JCI contains six housing units (A through F). ECF No. 31-3 (Investigation Report) at 21. Housing Unit F has four tiers or "wings" (labeled A through D) which form an "X" with the control center and lobby in the middle. ECF No. 17 at 4. There is one CO assigned to each tier, a CO in the control center, and an officer in charge. See *id.*

On September 19, 2011, the Plaintiff was assigned to Tier A of the F Housing Unit. *Id.* Gregory Okeke was assigned to the B-wing; Boniface Karani was assigned to the C-wing; Olanyiyi Ojo⁶ was assigned to the D-wing; and Tomeka Hollis⁷ was assigned to the control center. ECF No. 17 at 4; ECF No. 31-3 at 17-18. Sergeant Alonzo Owens⁸ was the officer in charge. *Id.*

⁵ The Plaintiff's account of the September 19, 2011 incident differs greatly from the State Defendants' version of events. The Court has attempted to present only the uncontested facts; the parties differ in how they interpret the conclusions to be drawn from these facts.

⁶ Other than identifying the Plaintiff as having Kenyan national origin, the Plaintiff and the State Defendants refer to non-American born COs as "African." Okeke, Karani, and Ojo are male and African born. See ECF 39-1 at 12.

⁷ Hollis is an African-American female. See ECF 39-1 at 11-12.

⁸ Owens is an African-American male. See ECF 39-1 at 11-12.

At about 9:00 pm, inmate Jawon Ferguson attacked Sergeant Owens at the entrance of the D-wing. ECF No. 31-5 (COBR Hearing Transcript) at 48:20-54:3. The attack moved into the housing unit lobby where Ferguson grabbed a broom and began striking Sergeant Owens with it. *Id.* Several minutes after the fight began, the Plaintiff ran into the lobby.⁹ See ECF No. 17 at 8-10.

When the Plaintiff entered the lobby, he did not join the fight, issue commands, or secure dropped pepper spray or other possible weapons that were on the ground. See ECF No. 31-5 at 54:4-57:25. There was another inmate, Clinton Bradley, in the area. *Id.* The Plaintiff did not attempt to restrain Bradley when he entered the lobby. *Id.* "None of the officers assigned to the F Housing Unit gained control of the situation, or subdued any of the inmates." *Id.* at 46:8-10.

⁹ In the complaint, the Plaintiff asserts that he came to the lobby after hearing sounds of a fight and hearing Ojo shout. ECF No. 17 at 9-10. In his initial report, the Plaintiff stated that he received an officer in need of assistance call from Hollis in the control center. See ECF No. 31-3 at 10-14. During his interrogation, the Plaintiff said that he was wrong in his report and he ran to the lobby because he heard sounds of distress. *Id.* at 14. The Plaintiff told the investigator, "The actions I performed on that day are different from what I actually transcribed on the matter of record." *Id.* at 14.

CO Francis Fruh¹⁰ ran into the F Housing Unit from another housing unit. *Id.* at 46:14-18; 57:1-58:58. Fruh immediately attempted to assist Sergeant Owens. *Id.* However, Bradley stepped forward and struck Fruh on the head.¹¹ *Id.* Fruh turned and struck Bradley who fell to the floor. *Id.*

Other "officers assigned to the E Housing Unit and to [the] JCI compound" entered the F Housing Unit, including Marcus Bazemore, Martin Simon-Ebughu, Adetokinbo Ayai, and Ayonkunle Ayodele.¹² ECF No. 31-2 at ¶ 12; ECF No. 31-5 at 46:14-18, 58:12-59:9. Bazemore grabbed Ferguson "around the waist and took him to the ground." ECF No. 31-5 at 58:25-59:12. Bazemore and the officers from outside the F Housing Unit then detained Ferguson. *Id.*

B. Investigation and Disciplinary Action

On September 23, 2011, an administrative committee including Assistant Warden Cherie Peay, Allen Gang, and Captain Gary Forman reviewed the video of the September 19th incident to determine if the use of force by the officers was proper. ECF

¹⁰ CO Fruh is identified as an "African" male. ECF No. 31-2 (Wolfe Aff.) at ¶ 12.

¹¹ Some time after this, Bradley approached the Plaintiff who used pepper spray on Bradley. See ECF No. 31-5 at 55:22-56:20.

¹² Simon-Ebughu, Ayai, and Ayodele are identified as "non-American born," "African" males. ECF No. 31-2 at ¶ 12.

NO. 31-3 at 1. "[I]t was determined that the level of force may [have] be[en] justified but disciplinary action [was to be] taken against [] staff for the lack of response in an emergency." *Id.*

On October 4, 2011, JCI's Investigative Supervisor, Captain Shalawnda Suggs, began an investigation of the incident. ECF No. 31-3 at 1. During her investigation, Captain Suggs read all of the written reports of the incident, "interrogated" all the officers involved, reviewed the video, and gathered 24 exhibits. *See id.* at 2-27. Captain Suggs interviewed the Plaintiff twice. *See id.* at 5-14. On both occasions, the Plaintiff was represented by AFSCME counsel. *Id.*

At the completion of her investigation, Captain Suggs determined:

After reviewing the video footage, recorded and written statements[,] Officer Ngatia's statement is not consistent. It is determined that he has intentionally provided misleading information. His verbal and written statements contradict the video footage. Officer Ngatia confirms that some of the facts submitted in his written report were false. He admits that he never overheard a radio transmission indicating an officer in need of assistance as stated in his Matter of Record and Use of Force documentation submitted on September 19, 2011. His lack of recalling events such as post orders and matter of records after provided the opportunity to review his written reports is questionable. His vague responses are also questionable. Therefore, it is determined

that Officer Peter Ngatia['s] statements are not credible.

Had Officer Ngatia applied [the] mechanical restraints that he [was] issued at the beginning of his tour of duty[] on inmate Clinton Bradley after gaining knowledge of a physical attack [on] Sergeant Owens, inmate Bradley would not have been able to strike Officer Francis Fruh upon his entrance to the Housing Unit to assist. He confirms that he was aware of potential danger and believed something was wrong in the lobby after hearing yelling and shouting coming from the lobby area. However, he failed to utilize his radio to notify a supervisor or call for assistance. He confirmed that his radio was operational when he requested [O]fficer Hollis to open the front door [to Wing A] and she immediately responded. Had he taken action, he could have prevented the assault of Officer Fruh

ECF No. 31-3 at 22-23 ("Findings."). Captain Suggs determined that all the F Housing Unit's wing officers responded inappropriately to the September 19th emergency. ECF No. 31-7 at 1. However, she found that Sergeant Owens and control center officer Hollis were not at fault. *Id.*

On December 16, 2011, Captain Suggs sent her investigative report to JCI Warden John Wolfe. ECF No. 31-2 at ¶ 3. That day, Wolfe issued a Notice of Disciplinary Charges against the Plaintiff. *Id.* at ¶ 5. The notice contained eight charges and recommended termination. See ECF No. 31-4. The Plaintiff filed an appeal of disciplinary charges and requested a hearing pursuant to the Correctional Officer's Bill of Rights ("COBR"). ECF No. 31-2 at ¶ 5.

On July 12 and 13, 2012, the COBR Hearing Board--composed of three independent corrections officers--heard evidence from the State Defendants and the Plaintiff about the September 19th incident. See ECF No. 31-5 (Hearing Transcript). The Plaintiff was represented by AFSCME counsel. *Id.* at 6:2-6. When the video of the incident was played, the Plaintiff's counsel did not object. *Id.* at 46:22-25. During his opening statement, counsel urged the Board to look at the video and stated that there would be "no better testimony than the video" *Id.* at 28:18-20.

After the State Defendants had the opportunity to present their case, the Plaintiff was allowed to respond. The Plaintiff gave his version of events. See ECF No. 31-6 at 13. Captain Martine Ice testified on the Plaintiff's behalf. *Id.* at 12. Captain Ice stated that the Plaintiff's response to the incident was "acceptable" although it "could have been better." *Id.* He attributed the Plaintiff's mistakes to his inexperience. *Id.*

At the end of the hearing, the Board determined that the Plaintiff was guilty of three of the eight charges: improper performance of a duty, insubordination, and breach of security. ECF No. 81-5 at 258:10-259:25. After hearing testimony on

punishment, the Board recommended that the Plaintiff be suspended for 14 days without pay. *Id.* at 283:18-23.

On August 14, 2012, before the Board had issued its written findings, Warden Wolfe issued a final disciplinary order suspending the Plaintiff for 14 days without pay beginning on August 16, 2012. ECF No. 31-7. On October 15, 2012, the Board issued its written decision. ECF No. 15-1 at 2. On October 23, 2012, Wolfe issued a second final disciplinary order. ECF No. 31-8. Wolfe asserts that he was merely confirming the prior order and was not imposing a new 14 day suspension. ECF No. 31-2 at ¶ 8. However, the Plaintiff and AFSCME counsel believed that the order was for a new suspension. See ECF No. 15-1 at 2-3. AFSCME, on behalf of the Plaintiff, petitioned the Circuit Court for Anne Arundel County for judicial review of the disciplinary order in accordance with the COBR.¹³ See ECF No. 15-1 at 3.

On September 24, 2012, the Plaintiff filed a Charge of Discrimination with the EEOC against JCI. See ECF No. 17 at 2-3; ECF No. 31-12. The Plaintiff alleged that he was punished

¹³ On appeal, the Plaintiff wanted AFSCME counsel to argue that the State Defendants had altered the evidence, and that the Plaintiff did not commit the infractions for which he was punished. See ECF No. 34-3 (email with counsel) at 1. Counsel refused to adopt this approach, and suggested a procedural appeal. *Id.*

although Sergeant Owens and Hollis were not punished, because of his race and national origin. ECF No. 31-12. On April 23, 2013, the Circuit Court for Anne Arundel County found that Wolfe's order violated the COBR, rescinded the suspension, and awarded the Plaintiff full back pay. ECF No. 15-4.

On May 31, 2013, the Plaintiff sent a letter to the Cleveland Field Office of the EEOC. ECF No. 28-5 at 3. The Plaintiff asserted that AFSCME had discriminated against him by not challenging the evidence substantively on appeal, and was working with JCI to conceal altered evidence. *Id.* at 4. The Plaintiff stated that he "wish[ed] [to] extend [his] charges to incorporate AFSCME for discriminat[ion]" *Id.* The Plaintiff ended the letter by stating, "Kindly send me an updated charge so that I [can] endorse it; if you consider the information sufficient enough." *Id.* The Plaintiff never received an updated charge; nor, is there any evidence that the EEOC ever received the letter. See ECF No. 21 at 2.

On December 25, 2013, the EEOC sent the Plaintiff a right to sue letter. ECF No. 31-13. The letter only discussed the

Plaintiff's claims against the State Defendants and did not mention AFSCME. See *id.*¹⁴

C. Procedural History

On March 31, 2014, the Plaintiff sued the State Defendants and AFSCME for race, sex, and national origin discrimination and retaliation. ECF No. 1. He also asserted that the investigation violated due process. *Id.* The Plaintiff's claims were based on his arguments that Sergeant Owens and CO Hollis committed multiple infractions during the September 19, 2011 incident, but were not punished. See, e.g., *id.* at 5-6. The Plaintiff alleged that the State Defendants had altered the video of the incident to protect Hollis, and that AFSCME was working with the State Defendants to conceal this fact.¹⁵ See *id.* at 16-17.

On July 17, 2014, AFSCME moved to dismiss the complaint. ECF No. 15. On July 18, 2014, the Plaintiff filed a "Supplemental to the Complaint" in which he restated his previous charges and added a claim for race discrimination under

¹⁴ The Plaintiff has presented no evidence that he contacted the EEOC about the AFSCME omission, or attempted to amend his charge.

¹⁵ The Plaintiff does not allege who altered the video or what alterations were made.

the Civil Rights Act of 1991.¹⁶ ECF No. 17. All the Defendants have treated this "supplemental" as an amended complaint, and the Plaintiff has not objected.

On July 24, 2014, the Plaintiff filed a "motion to suppress."¹⁷ ECF No. 19. The court clerk correctly docketed the motion to suppress as the Plaintiff's response in opposition to AFSCME's motion to dismiss. On July 31, 2014, the Plaintiff filed a "Reconsideration Motion to Suppress." ECF No. 21. The Plaintiff was attempting to supplement his prior response in opposition; however, the clerk docketed the filing as a separate motion.¹⁸

On August 8, 2014, AFSCME moved to dismiss the amended complaint. ECF No. 22. On August 13, 2014, the Plaintiff filed another motion to suppress as his response.¹⁹ ECF No. 26. Also on August 13, 2014, AFSCME learned that it had not properly served the Plaintiff with its motion to dismiss the amended complaint. See ECF No. 28-1. On August 15, 2014, AFSCME

¹⁶ 42 U.S.C. § 1981.

¹⁷ The Plaintiff files his responses as "motions to suppress."

¹⁸ Accordingly, the Court will deny the motion to suppress and will consider ECF No. 21 as a supplement to ECF No. 19.

¹⁹ The Court will deny that motion to suppress and consider ECF No. 26 the Plaintiff's response in opposition.

refiled its motion to dismiss and properly served the Plaintiff.²⁰ ECF No. 28. On August 22, 2014, the State Defendants moved to dismiss the amended complaint or, in the alternative, for summary judgment. ECF No. 31.

On August 25, 2014, the Plaintiff filed two documents with the Court: a response to AFSCME's motion to dismiss and a motion to suppress AFSCME's motion to dismiss. ECF Nos. 33, 34. Although the motion to suppress was docketed as a separate motion, it was actually the Plaintiff's response in opposition.²¹ On September 11, 2014, AFSCME replied. ECF No. 37.

On September 19, 2014, the Plaintiff opposed the State Defendants' motion. ECF No. 38. On September 26, 2014, the Plaintiff filed a motion "for leave to state a claim." ECF No. 39. On October 2, 2014, the State Defendants filed their reply. ECF No. 40.

²⁰ Although AFSCME informed the clerk that it was refiling its motion to dismiss, both ECF No. 22 and ECF No. 28 remained active motions on the docket. The Court will strike ECF No. 22 and will consider ECF No. 28 and its responses.

²¹ In the motion to suppress and not the "response," the Plaintiff addresses AFSCME's arguments about dismissal. See ECF No. 34. Accordingly, the Court will deny the motion to suppress and consider ECF No. 33 and ECF No. 34 as the Plaintiff's response in opposition.

II. Analysis

A. Legal Standards

1. Amending a Complaint

Fed. R. Civ. P. 15(a)(1) allows a party to "amend its pleading once as a matter of course" within "21 days after serving it" or, "if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." All other amendments may be made "only with the opposing party's written consent or the court's leave." Rule 15(a)(2).

Federal Rule of Civil Procedure 15(a)(2) instructs that leave to amend should be freely given when justice requires. Leave should be denied only when amendment would unduly prejudice the opposing party, amount to futility, or reward the movant's bad faith. *Steinburg v. Chesterfield Cnty. Planning Comm'n*, 527 F.3d 377, 390 (4th Cir. 2008); *Equal Rights Ctr. v. Niles Bolton Associates*, 602 F.3d 597, 603 (4th Cir. 2010).

2. Lack of Subject Matter Jurisdiction

The plaintiff bears the burden of proving subject matter jurisdiction. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 523 F.3d 453, 459 (4th Cir. 2008). When considering a

motion to dismiss for lack of subject matter jurisdiction, "the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Velasco v. Government of Indonesia*, 370 F.3d 392, 398 (4th Cir.2004). However, courts "should apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir.1991).

3. Failure to State a Claim

Under Fed. R. Civ. P. 12(b)(6), an action may be dismissed for failure to state a claim upon which relief can be granted. Rule 12(b)(6) tests the legal sufficiency of a complaint, but does not "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006).

The Court bears in mind that Rule 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Migdal v. Rowe Price-Fleming Int'l Inc.*, 248 F.3d 321, 325-26 (4th Cir. 2001). Although Rule 8's

notice-pleading requirements are "not onerous," the plaintiff must allege facts that support each element of the claim advanced. *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 764-65 (4th Cir. 2003). These facts must be sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

This requires that the plaintiff do more than "plead[] facts that are 'merely consistent with a defendant's liability'"; the facts pled must "allow[] 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) (quoting *Twombly*, 550 U.S. at 557). The complaint must not only allege but also "show" that the plaintiff is entitled to relief. *Id.* at 679 (internal quotation marks omitted). "Whe[n] 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." *Id.* (internal quotation marks and alteration omitted).

4. Motion for Summary Judgment

The State Defendants' motion is captioned as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, for summary judgment under Rule 56. A motion

with this caption implicates the Court's discretion under Rule 12(d) of the Federal Rules of Civil Procedure. See *Kensington Vol. Fire Dept., Inc. v. Montgomery County*, 788 F. Supp. 2d 431, 436-37 (D. Md. 2011).

Ordinarily, a court "is not to consider matters outside the pleadings or resolve factual disputes when ruling on a motion to dismiss." *Bosiger v. U.S. Airways*, 510 F.3d 442, 450 (4th Cir. 2007). However, under Rule 12(d), a court, in its discretion, may consider matters outside the pleadings; if the court does so, "the motion must be treated as one for summary judgment under Rule 56," and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d).²² When the movant alternatively captions its motion as one for summary judgment, the parties are deemed to be on notice that conversion under Rule 12(d) may

²² A district judge has "complete discretion to determine whether or not to accept the submission of any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion and rely on it, thereby converting the motion, or to reject it or simply not consider it." 5 C Wright & Miller, *Federal Practice and Procedure* § 1366, at 159 (3d ed. 2004, 2011 Supp.). This discretion "should be exercised with great caution and attention to the parties' procedural rights." *Id.* at 149. In general, courts are guided by whether consideration of extraneous material "is likely to facilitate the disposition of the action," and "whether discovery prior to the utilization of the summary judgment procedure" is necessary. *Id.* at 165-67.

occur; the Court "does not have an obligation to notify parties of the obvious." *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 261 (4th Cir. 1998).

In accordance with *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975), the Plaintiff was informed of his right to file a response to the motion, and the opportunity to submit affidavits, declarations, and other documentary evidence. See ECF No. 35. As noted, the Plaintiff responded to the motion, and attached documentary evidence. ECF No. 38.²³

Ordinarily, summary judgment is inappropriate when "the parties have not had an opportunity for reasonable discovery." *E.I. de Nemours and Co. v. Kolon Industries, Inc.*, 637 F.3d 435, 448 (4th Cir. 2011). However, "the party opposing summary judgment 'cannot complain that summary judgment was granted without discovery unless that party has made an attempt to oppose the motion on the grounds that more time was needed for discovery.'" *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir.2002) (quoting *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir.1996)).

²³ The Plaintiff captioned his response as "Plaintiff's [] Response to Defendants' [] Motion to Dismiss, or For Summary Judgment." ECF No. 38 at 1. Through his captioning, and the filing of evidence, the Plaintiff demonstrated that he "had actual notice that the motion could be disposed of as one for summary judgment." *Laughlin*, 149 F.3d at 261.

Generally, to raise adequately the issue that discovery is needed, the party opposing the motion must file an affidavit or declaration pursuant to Rule 56(d) (formerly Rule 56(f)), explaining why, "for specified reasons, it cannot present facts essential to justify its opposition" without needed discovery. Fed. R. Civ. P. 56(d); see *Harrods*, 302 F.3d at 244-45 (discussing affidavit requirement of former Rule 56(f)). The Plaintiff has not filed a Rule 56(d) affidavit. It is therefore appropriate to address the Defendants' motion as one for summary judgment.

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a);²⁴ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A 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). However, the opposing party must produce

²⁴ Rule 56(a), which "carries forward the summary[] judgment standard expressed in former subdivision (c)," changed "genuine 'issue' [to] genuine 'dispute,'" and restored the word "'shall' . . . to express the direction to grant summary judgment." Fed. R. Civ. P. 56 advisory committee's note.

evidence upon which a reasonable fact finder could rely. *Celotex Corp.*, 477 U.S. at 322-23. The mere existence of a "scintilla" of evidence is insufficient to preclude summary judgment. *Anderson*, 477 U.S. at 252.

B. The Plaintiff's Motion to Amend

The Plaintiff's proposed second amended complaint contains new claims for hostile work environment and retaliation under § 1981. See ECF No. 39-1 at 1. There are no new factual assertions. *Id.* The main change from the first amended complaint is in organization. See *id.*

Although leave to amend should be freely given when justice requires, for the reasons discussed *infra* the Plaintiff's amended complaint would be futile. Accordingly, the Court will deny the motion. See *Steinburg*, 527 F.3d at 390.

C. Failure to Exhaust Administrative Remedies

A Title VII plaintiff must first "exhaust [his] administrative remedies by bringing a charge with the EEOC." *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 247 (4th Cir.2000). "The scope of the plaintiff's right to file a federal lawsuit is determined by the charge's contents." *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 300 (4th Cir.2009). "Only those discrimination claims stated in the initial charge, those

reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit."

Id. (internal quotation marks omitted). "[A] failure by the plaintiff to exhaust administrative remedies . . . deprives the federal courts of subject matter jurisdiction over the claim."

Id.

AFSCME argues that the Court must dismiss all claims against the union because the Plaintiff failed to exhaust his administrative remedies. ECF No. 28-2 at 3. The Plaintiff cites his May 31, 2013 letter to the EEOC to show that he exhausted his administrative remedies. ECF No. 28-5 at 3.

Although the Plaintiff sent a letter to the EEOC, he has not shown that the letter was ever received. Further, the letter stated that the EEOC was to send him "an updated charge so that [he] [could] endorse it; if [the EEOC] consider[ed] the information sufficient enough." *Id.* The Plaintiff never received an updated charge; the right to sue letter from the EEOC only discussed the claims against the State Defendants; and the Plaintiff offers no evidence other than the May 31, 2013 letter that he amended his original complaint. See ECF No. 21 at 2; ECF No. 31-13. Because AFSCME had no notice of the

Plaintiff's claims, the Plaintiff has failed to exhaust his administrative remedies. See *Chacko v. Patuxent Inst.*, 429 F.3d 505, 510 (4th Cir.2005). Accordingly, the Court lacks subject matter jurisdiction over the Plaintiff's Title VII claims against AFSCME, and those claims will be dismissed.²⁵

The State Defendants argue that the Plaintiff's sex discrimination claim must be dismissed because his EEOC charge was only for race and national origin discrimination. ECF No. 31 at 18. The Plaintiff's sex discrimination claim is "reasonably related" to his EEOC complaint. In the EEOC complaint, the Plaintiff discusses CO Hollis and states that she was treated differently from him. ECF No. 31-12. Further, the sex discrimination claim arises out of the same set of facts as the race and national origin discrimination claims.

However, the Court does not have subject matter jurisdiction over the Plaintiff's Title VII retaliation claim. The Plaintiff claims that he was retaliated against because of

²⁵ Section 1981 does not have an administrative exhaustion requirement. See *Qualls v. Giant Food, Inc.*, 187 F. Supp. 2d 530, 533 (D. Md. 2002). Therefore, the Court has subject matter jurisdiction over the Plaintiff's race discrimination claim under § 1981. However, because the complaint states that other black individuals were not punished and were used by the Plaintiff as comparators, the complaint fails to state a claim for racial discrimination. This will be discussed in more detail *infra* when the Court addresses the State Defendants' motion for summary judgment.

his assertions that the State Defendants fabricated evidence. See ECF No. 17. Although this claim grew from the September 19, 2011 incident it is based on independent and specific facts not contained in the EEOC charge, and the Plaintiff did not check the "retaliation" box on his charge. See ECF No. 31-12. Therefore, the Court lacks subject matter jurisdiction. See *Jones v. Calvert Grp, Ltd.*, 551 F.3d 297, 301 (4th Cir. 2009) ("Indeed, she checked only the 'retaliation' box on her EEOC charge . . . The district court therefore properly determined that Jones failed to exhaust her administrative remedies"); *Sewell v. Strayer Univ.*, 956 F. Supp. 2d 658, 668-69 (D. Md. 2013) (checked only "retaliation" box); *Cohens v. Md. Dept. of Human Res.*, 933 F. Supp. 2d 735, 743 (D. Md. 2013) (failure to check "retaliation" box).

D. The Plaintiff's Employment Discrimination Claims

1. Methods of Proving Discrimination

A plaintiff can prove his employer's discrimination through one of two methods. See *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004). These methods apply equally to substantive discrimination claims and Title VII retaliation claims. See *Kapel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1228 (4th Cir. 1998).

First, a plaintiff may use "any direct or indirect evidence relevant to and sufficiently probative of the issue," under "ordinary principles of proof." *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 731 (4th Cir. 1996) (internal quotation marks omitted). The plaintiff must produce "direct evidence of a stated purpose to discriminate and/or [indirect] evidence of sufficient probative force to reflect a genuine issue of material fact." *Rhoads v. FDIC*, 257 F.3d 373, 391 (4th Cir. 2001) (alteration in original) (internal quotation marks omitted).

Absent direct evidence of discrimination, the Court applies the burden-shifting approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, the plaintiff must first establish a *prima facie* case of discrimination. *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 294 (4th Cir. 2010). If he does, "a presumption of illegal discrimination" arises, and the burden of production shifts to the employer to articulate a nondiscriminatory reason for its adverse decision. *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 336 (4th Cir. 2011).

"If the defendant carries this burden of production, the presumption raised by the *prima facie* case is rebutted," *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981), and the *McDonnell Douglas* framework "drops out of the picture." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). The plaintiff must then prove by a preponderance of the evidence that "the proffered reason was not the true reason for the employment decision," and that the true reason was discrimination. *Burdine*, 450 U.S. at 256. He may do this directly or indirectly, by "persuading the court that a discriminatory reason more likely motivated the employer" or by showing that the employer's explanation is "unworthy of credence." *Id.*

2. AFSCME's Motion to Dismiss the § 1981 Race Discrimination Claim

The Plaintiff alleges in the complaint that AFSCME discriminated against the Plaintiff by refusing to argue that the video was tampered with and by pursuing a *successful* procedural appeal rather than arguing the Plaintiff's substantive innocence. ECF No. 17 at 6-8. The Plaintiff offers no facts to support his conclusion that AFSCME knew of, and was attempting to cover up the State Defendants' evidence tampering. He only offers his belief that there was a conspiracy.

A labor organization may incur liability under § 1981 if it "instigated or actively supported the discriminatory acts [of an employer]." *Anjelino v. New York Times Co.*, 200 F.3d 73, 95 (3d Cir. 1999). There are no facts in the complaint that can plausibly support such a claim. Accordingly, the Court will grant AFSCME's motion.

3. The § 1981 Retaliation Claim²⁶

To establish a *prima facie* case of retaliation, the Plaintiff must show 1) that he engaged in a protected activity; 2) his employer took an adverse employment action against him; and 3) there was a causal link between the protected activity and adverse action. *Navy Fed. Credit Union*, 424 F.3d at 406. There are two categories of protected activity -- opposition and participation. *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998). Participation includes "making a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing." *Betof v. Suburban Hosp.*, No. DKC-11-1452, 2012 WL 2564781, at *10 (D. Md. June 29, 2012). Opposition is a much broader category and includes

²⁶ Because no evidence outside the complaint was used in analyzing this claim, the Court will address AFSCME's motion to dismiss and the State Defendants' motion for summary judgment together.

"staging informal protests and voicing one's own opinions in order to bring attention to an employer's discriminatory activities,"²⁷ or "complain[ing] to [] superiors about suspected violations"²⁸

The Plaintiff argues that he was retaliated against because he stood up to the State Defendants and argued that they had falsified evidence. However, this is not a protected activity. Further, charges were referred against the Plaintiff before he made these allegations.²⁹ There is nothing to support this charge. Accordingly the Court will grant AFSCME's motion to dismiss and the State Defendants' motion for summary judgment.

4. Summary Judgment on the Substantive Discrimination Claims

The Plaintiff asserts that he was discriminated against because of his race, sex, and national origin. See ECF No. 17. Although each of these claims is distinct, they fail for the same reason. Assuming, for the sake of argument, that the Plaintiff has established a *prima facie* case of discrimination,

²⁷ *Laughlin*, 149 F.3d at 259.

²⁸ *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 543-44 (4th Cir. 2003).

²⁹ The first instance on the record in which the Plaintiff asserts that evidence was fabricated was his letter to his AFSCME appellate counsel. See ECF No. 34-3.

the State Defendants have offered a non-discriminatory reason for his suspension--his conduct during the September 19, 2011 incident. The Plaintiff has failed to cite any evidence that this reason is pretextual.

The only evidence of discrimination alleged in the complaint (or any of the Plaintiff's responses) is disparate treatment. See ECF No. 17 at 17-32. However, the individuals the Plaintiff offers as comparators are also members of the protected classes to which he belongs. See *Allen v. Dorchester Cnty.*, No. ELH-11-01936, 2013 WL 5442415, at *15 (D. Md. Sept. 30, 2013) ("If plaintiff's comparators are from the same protected class, then any discrepancy in discipline is not attributable to plaintiff's membership in that class.").

CO Harris, Sergeant Owens, CO Fruh, and other officers who reported to the scene and were not punished were all black. Four of the officers who responded to the scene, including CO Fruh, are identified as "African" and were not born in the United States; these individuals were not punished and were cleared of any misconduct. Finally, the Plaintiff argues that he was discriminated against because of his sex because CO Hollis was treated differently; however, every other officer involved was male, and most received no discipline. The

Plaintiff cannot sustain a substantive discrimination claim. See *Booth v. Maryland*, 327 F.3d 377, 383 (4th Cir.2003) ("[It is] not possible to infer that any disparate discipline against Booth was motivated by racial discrimination because Booth's evidence demonstrated that both white and African-American employees were treated differently than Booth") (quotation marks and citation omitted).³⁰

"[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000). However, the plaintiff's "own assertions of discrimination" are not sufficient. *Adam v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 560 (4th Cir. 2011). Here, the Plaintiff's central argument is that he was punished while other officers who he

³⁰ See also *Delos Santos v. Potter*, 371 F. App'x 746, 748 (9th Cir.2010) (denying disparate treatment claim under ADEA and Title VII because comparators were members of the same protected class as plaintiff); *Jordan v. City of Gary, Ind.*, 396 F.3d 825, 833 (7th Cir.2005 ("[B]ecause [comparator] is a member of the same protected class as [the plaintiff], [the plaintiff] is precluded from successfully arguing that she was unfairly discriminated against"); *Floyd v. U.S. Dep't of Homeland Sec.*, No. RDB-09-0735, 2009 WL 3614830, at *8 (D. Md. Oct. 27, 2009) ("A plaintiff cannot establish a claim of disparate treatment by referencing a comparator of the same protected class.").

believes violated the rules were not. He asserts without any factual support that evidence was tampered with and offers no explanation about by whom or how this conspiracy was accomplished. At most the complaint establishes that the State Defendants ran a poor investigation.³¹ This Court does not "sit as a kind of super-personnel department weighing the prudence of [the State Defendants'] decisions." *DeJarnette v. Corning, Inc.*, 133 F. 3d 293,299 (4th Cir. 1998) (internal quotation marks omitted). No reasonable jury could conclude that the Plaintiff's race, sex, or national origin was a motivating factor in his discipline. Accordingly, the Court will grant summary judgment on these claims.

³¹ See *Bonds v. Leavitt*, 629 F.3d 369, 386 (4th Cir. 2011) ("Even if these investigations were improper or substandard, that does little to help her establish that the reasons given for her termination were not the actual reasons, and it certainly does not give rise to a reasonable inference that her race or gender was the real reason for her termination."); *Countess v. Maryland*, No. ELH-12-02252, 2014 U.S. Dist. LEXIS 5508, at *25 (D. Md. Jan. 16, 2014) ("[T]he employee's mere dissatisfaction with the thoroughness or speed of the employer's investigation does not give rise to liability under Title VII."); *Karpel*, 134 F.3d at 1227-29; see also *Hux v. City of Newport News*, 451 F.3d 311, 315 (4th Cir. 2006) ("Once an employer has provided a non-discriminatory explanation for its decision, the plaintiff cannot seek to expose that rationale as pretextual by focusing on minor discrepancies that do not cast doubt on the explanation's validity, or by raising points that are wholly irrelevant to it.").

D. The Plaintiff's Due Process Claim³²

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'" before such deprivation occurs. *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).


Here, the Plaintiff received a hearing before an independent board of corrections officers, and he successfully appealed the 14-day suspension to the Circuit Court for Anne Arundel County in full compliance with the COBR. Thus, the Plaintiff had an opportunity to be heard in a meaningful manner.

³² Because the Court only considers the public record of the Circuit Court for Anne Arundel County in analyzing the Plaintiff's Due Process claim, and public records may be considered on a motion to dismiss, the Court will discuss AFSCME's motion to dismiss and the State Defendants' motion for summary judgment together. *See Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

III. Conclusion

For the reasons stated above, AFSCME's motion to dismiss and the State Defendants' motion for summary judgment will be granted; the Plaintiff's motion to amend will be denied.

3/4/15
Date



William D. Quarles, Jr.
United States District Judge