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

Kevin Damion CRICHLOW, Plaintiff,
v.
Brian FISCHER, et al., Defendants.

9:17-cv-00194 (TJM/TWD)
|
Signed 09/05/2017

Attorneys and Law Firms

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REPORT-RECOMMENDATION AND ORDER

THÉRÈSE WILEY DANCKS, United States Magistrate Judge

***1** *Pro se* Plaintiff Kevin Damon Crichlow, an inmate in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), commenced this action by filing a complaint pursuant to 42 U.S.C. § 1983 in the Southern District of New York on October 16, 2012. (Dkt. No. 2.) Plaintiff filed an amended complaint, the operative pleading, on June 17, 2013, seeking relief against more than 100 defendants. (Dkt. No. 12.) Plaintiff alleges violations of the First, Eighth, and Fourteenth Amendments, Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* ("ADA"), and the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), while confined at Downstate Correctional Facility ("Downstate"), Eastern New York Correctional Facility ("Eastern"), Auburn Correctional Facility ("Auburn") and Wende Correctional Facility ("Wende"). On April 28, 2015, the action was transferred to the Western District of New York. (Dkt. No. 168.) Thereafter, on February 21, 2017, Plaintiff's claims arising from his incarceration at Auburn and Eastern were transferred to this District. (Dkt. No. 225.) The Honorable Thomas J. McAvoy, Senior United States District Judge, has referred the matter to this Court for Report and Recommendation pursuant to 28 U.S.C. § 636(b) and L.R. 72.3(c).

Presently before the Court is Defendants' motion for summary judgment in lieu of an answer pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Dkt. No. 177.) Plaintiff has opposed the motion. (Dkt. No. 209.) Also before the Court is Plaintiff's motion for substitution of a party pursuant to Rule 25(a) of the Federal Rules of Civil Procedure. (Dkt. No. 231.) For the reasons explained below, it is recommended that the District Court grant summary judgment to all Defendants, including those who have not been named and/or served, and that Plaintiff's Rule 25(a) motion be denied as moot.

I. PROCEDURAL HISTORY

Plaintiff's original complaint, comprising of 163 pages, was filed in the Southern District on October 16, 2012, against more than 100 defendants arising from his incarceration at four DOCCS facilities from 2008 through 2012. (Dkt. No. 2.) On March 19, 2013, Plaintiff was ordered to file an amended complaint that complied with Rules 8 and 10 of the Federal Rules of Civil Procedure. (Dkt. No. 6.) On June 17, 2013, Plaintiff filed an amended complaint seeking relief against 136 defendants, namely DOCCS employees and medical providers, arising from his confinement at Downstate, Auburn, Eastern, and Wende. (Dkt. No. 12.) On February 13, 2015, the Southern District Court *sua sponte* dismissed numerous defendants and ordered Plaintiff to show cause why the case should not be transferred to the Western District of New York. (Dkt. No. 164.) On April 28, 2015, the action was transferred to the Western District. (Dkt. No. 168.)

On November 20, 2015, Defendants filed a motion for summary judgment in lieu of an answer, arguing all claims were time-barred, unexhausted, vague, or due process claims that did not implicate a liberty interest. (Dkt. No. 177-5.) Plaintiff initially responded with an opposition totaling more than 900 pages with exhibits, and Defendants filed a reply. (Dkt Nos. 188 and 189.) Thereafter, Plaintiff was granted permission to file an amended opposition to Defendants' motion. (Dkt. Nos. 192 and 198.) Plaintiff filed his amended opposition, totaling more than 200 pages with exhibits. (Dkt. No. 209.) Defendants filed a reply to Plaintiff's amended opposition. (Dkt. No. 210.) Without obtaining permission from the Court, Plaintiff filed a sur-reply, along with numerous exhibits that it appears Plaintiff inadvertently failed to file with his amended opposition. (Dkt. No. 211.)

***2** On February 10, 2017, Western District Judge Elizabeth A. Wolford severed the action into three separate actions based upon the location where each claim allegedly arose, transferred those claims arising in the Southern and Northern Districts, and retained the claims arising in the Western District. (Dkt. No. 223. [1]) On February 21, 2017, Plaintiff's claims arising during his confinement at Auburn and Eastern were transferred to this District. (Dkt. No. 225.) On April 26, 2017, Senior Judge McAvoy severed and transferred all claims arising at Wende that were mistakenly transferred to this District back to the Western District, Case Number 6:15-CV-6252. (Dkt. No. 228.)

Remaining Defendants in this action are Corrections Officer ("C.O.") Daniel Bauer, C.O. Christopher Clarke, Dr. Mikhail Gusman, RN Denise Falzon, Nurse II Ellenjane Aversano, Dr. Ann L. Andola, Lieutenant ("Lt.") Karl Simmons, Senior Counselor Thomas Briggs, C.O. Donielle Allison, C.O. Kevin Rosa, Counselor Ariel Escobar, C.O. Jill Friedman, C.O. Kelly Jamil, Captain Anthony Russo, Acting Superintendent Rosemarie Wendland, C.O. Jeffrey Brewer, C.O. Merrill Conner, Sergeant ("Sgt.") Daniel Parkhurst, C.O. Scott Navitsky, Lt. Edward Madison, D.M.D. Marlon K. Moore, C.O. Nathan Vevone, Sgt. Berndt J. Leifeld, Nurse LaPenna, and Dr. Jeffrey Arliss. (Dkt. No. 227.)

II. BACKGROUND

A. Plaintiff's Allegations

At all times relevant to this action, Plaintiff was incarcerated at Auburn and Eastern. (Dkt. Nos. 12, 223, and 225. [2]) Generally, Plaintiff alleges violations of his constitutional and statutory rights under the First, Eighth, and Fourteenth Amendments, the ADA, and Rehabilitation Act while confined at Auburn and Eastern from November 16, 2010, through February 16, 2012. (*See generally* Dkt. No. 12.) For a complete statement of Plaintiff's claims related to Auburn and Eastern, reference is made to Plaintiff's amended complaint.

1. Auburn

On November 16, 2010, Plaintiff was transferred from Wende to Eastern. (Dkt. No. 12-1 at ¶ 71.) Plaintiff's transfer route stopped at Auburn for 72 hours. *Id.* While confined at Auburn, Plaintiff alleges he was verbally threatened and denied medical care. *Id.* Specifically, on November 19, 2010, at 8:00 a.m., while in the first floor transfer area Plaintiff was threatened by C.O. Clarke to "give up" his medical wrist brace "or get beat up." *Id.* C.O. Clark took Plaintiff's wrist brace, causing "more damages" to Plaintiff's wrist. *Id.* Plaintiff was without a wrist brace for approximately six weeks. *Id.*

2. Eastern

a. Medical Indifference Claims

Plaintiff alleges inadequate or nonexistent medical care, and claims he was treated "unprofessionally" because of his race, ethnicity, weakened immune system, and hearing disability. *Id.* at ¶¶ 75-76. Specifically, in December 2010, Plaintiff alleges he was denied dental care, pain medication, and batteries for his hearing aid. *Id.* at ¶¶ 76-77. On December 13, 2010, Plaintiff was denied pain medication and emergency dental treatment. *Id.* at ¶ 77. Although x-rays revealed Plaintiff has two cavities in February 2011, and he was in extreme pain, Plaintiff was denied emergency extraction and was forced to wait several months for dental extractions. *Id.* at ¶ 101, 105. Plaintiff was also denied a "soft food diet or Ensure" even though he had difficulty eating. *Id.* at ¶ 103.

***3** On April 18, 2011, Dr. Arliss operated on Plaintiff's wrist at Foxhall Ambulatory Surgery Center, which took much longer than planned. *Id.* at ¶ 124. Thereafter, on August 3, 2011, "a pin came out of the bottom" of Plaintiff's right wrist. *Id.* at ¶ 152. Although Plaintiff was taken to the facility's hospital, Plaintiff claims he should have been transported immediately to Dr. Arliss. *Id.* Plaintiff alleges he was in extreme pain for over thirty-one hours and received inadequate and negligent medical care at the facility's hospital before he was transported to an outside facility to have Dr. Arliss remove the broken pin. *Id.*

On October 21, 2011, Plaintiff was denied medical treatment after a use of force incident. *Id.* at ¶ 194.

b. Conditions of Confinement Claims

Plaintiff also brings conditions of confinement claims while confined to keeplock on the S.D.U. Block and in the Segregated Housing Unit ("SHU"). Plaintiff claims he was denied showers and recreation, laundry services and clean linen, special religious meals, personal hygiene products, fresh drinking and bathing water, commissary, and legal

supplies. Plaintiff alleges senior officials were all aware and tolerated these unconstitutional practices by subordinate employees. *Id.* at ¶ 91.

Specifically, Plaintiff claims from January 12, 2011, through January 31, 2011, and from February 3, 2011, through February 5, 2011, while on keeplock, he was denied medical care, batteries for his hearing aids, recreation, showers, medical sick calls, and religious meals in retaliation for filing grievances against C.O. Jamil, C.O. Friedman, and C.O. Brewer. *Id.* at ¶¶ 81-84, 90-91, 140. On January 14, 2012, C.O. Friedman denied Plaintiff toilet paper and soap. *Id.* at ¶ 84. On January 24, 2011, and January 25, 2011, C.O. Allison denied Plaintiff outside exercise and fresh air because it was "to [sic] cold." *Id.* at ¶ 87. C.O. Friedman and C.O. Jamil routinely denied Plaintiff recreation if he attended a "medical call out" in retaliation for filing grievances against them. *Id.* at ¶¶ 113, 114.

On March 6, 2011, Plaintiff claims he was discriminated against due to his disability and was subject to inhumane conditions of keeplock confinement for fifty-eight days. *Id.* at ¶ 106. While keeplocked, Plaintiff claims he was denied laundry and clean linens "at least once a week" in violation of DOCCS Directives. *Id.* Plaintiff also was denied a "commissary buy sheet." *Id.* Plaintiff claims he was denied soap, shampoo, deodorant, stationary supplies, adequate nutrition, clothing, shelter, sanitation, medical care, and personal safety. *Id.* at ¶ 107.

On March 3, 2011, C.O. Friedman told Plaintiff "if you go to a call out that would be considered your keeplock rec." *Id.* at ¶ 113. On March 7, 2011, C.O. Friedman refused to let Plaintiff wash his laundry or change his sheets on his "meds run." *Id.* at ¶ 108. On March 25, 2011, after attending a medical call out, C.O. Friedman denied Plaintiff recreation and told Plaintiff that his "medical call out" was his "keeplock rec." *Id.* at ¶ 114. Plaintiff claims he was denied recreation in retaliation for filing grievances. *Id.* Plaintiff also claims he was "always" denied outdoor exercise and fresh air. *Id.* at ¶ 113.

On April 14, 2011, Plaintiff claims Defendant C.O. Brewer threatened to extend his keeplock because he requested to speak to the block sergeant about his housing conditions. *Id.* at 123. Plaintiff claims he was denied packages on May 16, 2011. *Id.* at ¶¶ 133-34. On July 27, 2011, Plaintiff claims he was deprived of fresh drinking water. *Id.* at ¶ 141.

From July 28, 2011, through November 13, 2011, Plaintiff was subjected to excessive noise from other inmates yelling and "banging" in their cells. *Id.* at ¶ 147. Throughout September 2011, Plaintiff alleges he was exposed to "infectious diseases" and forced to live in unsanitary and unhygienic conditions with rusty brown water. *Id.* at 175. Due to a maintenance error, Plaintiff's cell flooded on October 6, 2011. *Id.* at ¶ 184.

***4** Regarding his food, Plaintiff alleges C.O. Jamil and C.O. Friedman "tampered" with his religious meals and deprived Plaintiff of adequate nutrition by failing to provide Plaintiff with the carton of milk included with his meals. *Id.* at ¶ 114. Further, while confined to keeplock, C.O. Friedman and C.O. Jamil would often delay his first meal by over two hours. *Id.* at ¶ 85. On May 24, 2011, C.O. Friedman and C.O. Jamil deprived Plaintiff of his "Jewish kosher breakfast." *Id.* at ¶ 131. That same day, Plaintiff was deprived commissary and was not provided with toothpaste, deodorant, soap, shampoo, and legal postage. *Id.* at ¶ 132. Throughout September and October of 2011, Plaintiff also claims he was given the "wrong food" on numerous occasions and therefore was deprived of his religious meals. *Id.* at ¶¶ 177, 178, 180. Plaintiff was denied Jewish food and commissary on October 4, 2011 and October 5, 2011. *Id.* at ¶ 183.

c. Excessive Force Claims

Plaintiff alleges he was subjected to excessive force on October 21, 2011. *Id.* at ¶¶ 188-91. At approximately 3:30 p.m., on the way to the evening "meds run," C.O. Navitsky asked Plaintiff for his identification care and medical card. *Id.* at ¶¶ 187-88. Plaintiff explained that he did not have a medical card because he had only been released from the SHU a few hours prior. *Id.* at ¶ 188. C.O. Navitsky instructed Plaintiff to "sit the fuck down." *Id.* Plaintiff waited for approximately fifteen minutes and then requested to return to his housing unit. *Id.* C.O. Navitsky stated in a very loud voice, "what are you fucking dumb or are you deaf too[?]" *Id.* Plaintiff sat back down. *Id.* Ten minutes later, Plaintiff told C.O. Navitsky he was going to miss evening chow. *Id.* C.O. Navitsky stated, "I'm going to fucking kill you." *Id.* at ¶ 189. C.O. Navitsky left the area and returned with a "black hammer mallet." *Id.* at ¶¶ 189-90. Thereafter, C.O. Navitsky struck Plaintiff with a "black hammer mallet" and C.O. Wilson punched Plaintiff on the right side of his head. *Id.* at ¶ 190; Dkt. No. 12 at ¶ 5. Plaintiff states he was hit on the right side of his head, body, hand, and hip. (Dkt. No. 12-1 at ¶ 190.)

After the assault, C.O. Navitsky and C.O. Wilson started screaming, ran into the control room, and pressed a button. *Id.* A response team arrived and Plaintiff was escorted to his cell, and approximately two hours later, to the SHU. *Id.* at ¶ 191. The next day, Plaintiff was issued an inmate misbehavior report, charging Plaintiff with violet conduct, harassment, refusing a direct order, threat, being out of place, and noncompliance. *Id.*

d. Due Process Claims

Plaintiff also raises Fourteenth Amendment due process claims. *Id.* at ¶¶ 77-80, 86, 89, 100, 117, 119, 120, 161-66, 193. Plaintiff claims his due process rights were violated when he was denied witnesses during disciplinary hearings and sentenced to keeplock and subjected inhumane conditions of confinement. *Id.* at ¶¶ 77-80. On January 12, 2011, Plaintiff alleges he was denied witnesses that would have proven his innocence. *Id.* at ¶ 86. On February 11, 2011, during a Tier II disciplinary hearing, Lt. Simmons sentenced Plaintiff to 60 days of keeplock for refusing his programs even though the maximum penalty was 30 days under DOCCS directive. *Id.* at ¶ 89.

On February 24, 2011, Plaintiff was sentenced to "30 more days" without due process after being found guilty of "obstruction." *Id*. On April 1, 2011, Lt. Simmons denied Plaintiff an inmate witness, and sentenced Plaintiff to an additional 30 days of keeplock for contraband. *Id.* at ¶ 117. During the April 1, 2011, disciplinary hearing, Plaintiff told Lt. Simmons he was being denied packages and was "not getting" showers, commissary, and recreation. *Id*. On April 2, 2011, Lt. Simmons found Plaintiff guilty of refusing a direct order, and added 30 days of keeplock. *Id.* at ¶ 120. Lt. Simmons told Plaintiff that DOCCS was getting "rich" from all of the $5.00 surcharges related to Plaintiff's misbehavior reports. *Id.*

***5** On August 6, 2011, while housed in the medical clinic following his wrist surgery, Plaintiff was summoned to a disciplinary hearing even though he had not been issued an inmate misbehavior report twenty-four hours in advance. *Id.* at ¶ 161. At the hearing, Lt. Madison provided Plaintiff with a copy of a false July 27, 2011, inmate misbehavior report. *Id.* at ¶¶ 161-62. Lt. Madison threatened Plaintiff with physical harm for objecting to the late notice. *Id.* at ¶¶ 163-64. During the hearing, Plaintiff was denied a witnesses and was found guilty of DOCCS violation 102.10 (threats). *Id.* at ¶ 164. Plaintiff was sentenced to 120 days in the SHU with a corresponding loss of privileges. *Id.* at ¶ 165.

On November 12, 2011, at the disciplinary hearing related to the October 22, 2011, use of force incident, Plaintiff was found guilty of "being out of place." *Id.* at ¶ 193. Plaintiff alleges the involved parties conspired to cover up the use of force incident, thereby depriving Plaintiff of his due process rights. *Id.*

e. Access to Courts

Plaintiff also claims he was denied the opportunity to access the courts. On March 29, 2011, C.O. Vevone searched Plaintiff's cell for over three hours, while making sexual and derogatory comments to Plaintiff. *Id.* at ¶ 110. During this search, C.O. Vevone found a blueprint of Eastern, which was an exhibit to Plaintiff's *coram nobis* petition. *Id.* at ¶¶ 110-11. Plaintiff was charged with "contraband" and denied his exhibit. *Id.*

On or about November 10, 2011, while confined in the SHU, Plaintiff gave unknown officers legal mail to be sent to the Southern District, in Action No. 11 Civ. 833. *Id.* at ¶ 197. Instead of mailing Plaintiff's legal documents to the Southern District, DOCCS destroyed his amended pleading. *Id.* at ¶ 198.

f. Reasonable Accommodation Claims

Plaintiff argues Defendants failed to provide reasonable accommodations for his hearing disability. Plaintiff alleges on December 13, 2010, Nurse Aversano denied Plaintiff batteries for his hearing aids, thereby forcing Plaintiff to "get batteries from other inmates." *Id.* at ¶ 77. From April 18, 2011, through April 25, 2011, C.O. Jamil, C.O. Brewer, and C.O. Friedman refused to escort Plaintiff to the package room, thereby denying Plaintiff two packages containing reading material for his "reasonable accommodation" to learn sign language. *Id.* at ¶ 127. On August 8, 2011, Plaintiff was deprived of a typewriter, even though he was issued a permit. *Id.* at ¶ 135. Plaintiff also alleges he was denied his "shake awake" alarm and batteries for his hearing aid while he was recovering from his second wrist surgery. *Id.* at ¶ 159.

g. Retaliation and Conspiracy Claims

Plaintiff alleges all of the above conduct was in retaliation for filing grievances and lawsuits. *Id.* at ¶ 166. Plaintiff also alleges Defendants conspired to cover up evidence of the above conduct. *Id.* at ¶ 112. Lastly, Plaintiff alleges he was transferred from Eastern to Wende on February 16, 2012, in retaliation for filing grievances. *Id.* at ¶ 166.

B. Parties' Briefing on Defendants' Motion for Summary Judgment

In their pre-answer motion for summary judgment, Defendants maintain that Plaintiff failed to exhaust his administrative remedies. (Dkt. No. 177-5 at 4-6.[3]) In that regard, Defendants argue Plaintiff only exhausted a single grievance relevant to this action. *Id.* In that grievance, Plaintiff complained of the conditions of his keeplock confinement at Eastern, stating he was being denied laundry, soap, shampoo, deodorant, and writing papers. *Id.* at 6-7. Defendants contend such claims do not give rise to an Eighth Amendment conditions of confinement claim. *Id.* Defendants also contend Plaintiff's generalized allegations in that grievance, to the effect that he faced discrimination based on a disability, and was denied adequate nutrition, clothing, shelter, medical care, and security while keeplocked, failed to provide Defendants with enough information to rectify the problem at the administrative level, and therefore, is also unexhausted. *Id.* at 7.

***6** In his opposition to Defendants' motion, Plaintiff claims, among other things, that he exhausted his administrative remedies by filing over 300 grievances and by complaining to supervisory prison officials and Commissioner Fischer. (Dkt. Nos. 209-3 at 7 and 211 at 1.) Plaintiff further argues his grievances and appeals were lost, destroyed, or ignored by prison officials and DOCCS. *Id.* As to his conditions of confinement claim, Plaintiff explains he had been keeplocked for fifty-eight days and was deprived of his "basic human needs," such as showers and recreation. (Dkt. No. 209-2 at 21.)

III. LEGAL STANDARD

Pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." Fed. R. Civ. P. 56(b). "The standard for granting summary judgment is the same whether the motion is made in lieu of an answer or after discovery has occurred." *Crichlow v. Fischer*, No. 6:15-cv-06252 EAW, 2017 WL 920753, at *3 (W.D.N.Y. Mar. 7, 2017[4]) (citing *Anderson v. Rochester-Genesee Reg'l Transp. Auth.*, 337 F.3d 201, 206 (2d Cir. 2003)).

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; *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." *Liberty Lobby*, 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 273 (citations omitted). 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., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (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).

"To defeat summary judgment, ... nonmoving parties may not rely on conclusory allegations or unsubstantiated speculation." *Id.* (citation and internal quotation marks omitted). "[T]o satisfy Rule 56(e), affidavits must be based upon 'concrete particulars,' not conclusory allegations." *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997) (citation 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).

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). 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." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). However, "a *pro se* party's 'bald assertion,' unsupported by evidence, is not sufficient to overcome a motion for summary judgment." *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991).

IV. DISCUSSION

A. Exhaustion of Administrative Remedies

1. Legal Standard

***7** Under the Prison Litigation Reform Act of 1995 ("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). Exhaustion is required for "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). This rule applies to an inmate's constitutional claims, as well as claims under the ADA and Rehabilitation Act. *Carlson v. Parry*, No. 06-CV-6621P, 2012 WL 1067866, at *12 (W.D.N.Y. Mar. 29, 2012) (ADA and Rehabilitation Act claims "must be exhausted administratively prior to raising them in federal court"); *Carrasquillo v. City of N.Y.*, 324 F. Supp. 2d 428, 442 (S.D.N.Y. 2004) (ADA and Rehabilitation Act claims "fall within the rubric of 'any other federal law.' ").

In order to properly exhaust administrative remedies under the PLRA, inmates are required to complete the administrative review process in accordance with the rules applicable to the particular institution to which they are confined. *Jones v. Bock*, 549 U.S. 199, 218 (2007) (citing *Woodford v. Ngo*, 548 U.S. 81, 88 (2006)); *see also* *Amador v. Andrews*, 655 F.3d 89, 96 (2d Cir. 2011) (exhaustion necessitates "using all steps that the [government] agency holds out, and doing so properly").

In New York state prisons, DOCCS has a well-established three-step Inmate Grievance Program ("IGP"). N.Y. Comp. Codes R. & Regs. ("N.Y.C.R.R.") tit. 7, § 701.5 (2013). Generally, the DOCCS IGP involves the following procedure for the filing of grievances. First, an inmate must file a complaint with the facility's IGP clerk within twenty-one calendar days of the alleged occurrence. *Id.* § 701.5(a). A representative of the facility's inmate grievance resolution committee ("IGRC") has sixteen calendar days from receipt of the grievance to informally resolve the issue. *Id.* § 701.5(b)(1). If there is no such informal resolution, then the full IGRC conducts a hearing within sixteen calendar days of receipt of the grievance, *id.* § 701.5(b)(2), and issues a written decision within two working days of the conclusion of the hearing. *Id.* § 701.5(b)(3).

Second, a grievant may appeal the IGRC decision to the facility's superintendent within seven calendar days of receipt of the IGRC's written decision. *Id.* § 701.5(c)(1). If the grievance involves an institutional issue (as opposed to a DOCCS-wide policy issue), the superintendent must issue a written decision within twenty calendar days of receipt of the grievant's appeal. *Id.* § 701.5(c)(3)(ii). Grievances regarding DOCCS-wide policy issues are forwarded directly to the central office review committee ("CORC") for a decision under the process applicable to the third step. *Id.* § 701.5(c)(3)(i).

Third, a grievant may appeal to CORC within seven working days of receipt of the superintendent's written decision. *Id.* § 701.5(d)(1)(i). CORC is to render a written decision within thirty calendar days of receipt of the appeal. *Id.* § 701.5(d)(3)(ii).

Grievances claiming employee harassment "are of particular concern to the administration of [DOCCS] facilities," and subject to an expedited procedure whereby the grievance goes directly to the facility superintendent.[5] *Id.* § 701.8. The superintendent is required to initiate an in-house investigation by higher ranking supervisory personnel; request an investigation by the inspector general's office; or request an investigation by the New York State Police Bureau of Investigation if the superintendent determines that criminal activity may be involved. *Id.* § 701.8(d). A grievance referred to the superintendent and determined to be an allegation of

harassment, may not be withdrawn and must be addressed by the superintendent. *Id.* § 701.8(d). The superintendent is required to render a decision on the grievance within twenty-five calendar days, and extensions may be granted only with the consent of the grievant. *Id.* § 701.8(f). If the superintendent fails to respond within the required twenty-five days, the grievant may appeal the grievance to CORC by "filing a notice of decision to appeal (form #2133) with the inmate grievance clerk." *Id.* § 701.8(g).

***8** If a prisoner has failed to properly follow each of the applicable steps, including receipt of a decision from CORC prior to commencing litigation, he has failed to exhaust his administrative remedies and is barred from commencing a federal lawsuit. *Woodford*, 548 U.S. at 93.

Because failure to exhaust is an affirmative defense, the defendant bears the burden of showing by a preponderance of the evidence that the plaintiff has failed to exhaust administrative remedies. *See* *Murray v. Palmer*, No. 9:03-CV-1010 (GTS/GHL), 2010 WL 1235591, at *4 (N.D.N.Y. Mar. 31, 2010); *Bailey v. Fortier*, No. 9:09-CV-0742 (GLS/DEP), 2012 WL 6935254, at *6 (N.D.N.Y. Oct. 4, 2012) (the party asserting failure to exhaust bears the burden of proving its elements by a preponderance of the evidence).

Whether a plaintiff has exhausted his administrative remedies is a question of law. *Snider v. Melindez*, 199 F.3d 108, 113-14 (2d Cir. 1999). Thus, an inmate's failure to exhaust administrative remedies is properly considered on a motion for summary judgment in lieu of an answer. *Crichlow v. Fischer*, No. 6:15-CV-06252 EAW, 2017 WL 920753, at *5 (W.D.N.Y. Mar. 7, 2017) (citing *Mckinney v. Prack*, 170 F. Supp. 3d 510, 514 (W.D.N.Y. 2016) (granting a motion for summary judgment made in lieu of an answer where inmate failed to exhaust administrative remedies)); *see also Crichlow v. Crowley*, No. 13-CV-6624 CJS, 2015 WL 1808626, at *6-7 (W.D.N.Y. Apr. 21, 2015) (same); *Crenshaw v. Syed*, 686 F. Supp. 2d 234, 236 (W.D.N.Y. 2010) (same).

2. Analysis

Defendants contend summary judgment should be granted because Plaintiff failed to comply with the administrative exhaustion requirement of the PLRA. (Dkt. No. 177-5 at 4-7.) In support of their motion, Defendants have submitted the declaration of Jeffery Hale, Assistant Director of DOCCS IGP. (Dkt. No. 177-3.) In that capacity, Hale is a custodian of the records maintained by CORC. *Id.* at ¶ 1. The CORC computer database contains records of all appeals received from the facility IGP offices and which were heard and decided by CORC since 1990. *Id.* at 2. These grievances are referred to as "exhausted." *Id.*

Hale declares that he has reviewed the records for all grievances appealed to CORC by Plaintiff from his incarceration in 2008, through commencement of this action in October 2012. *Id.* at ¶¶ 3-4. In total, Plaintiff exhausted twenty-seven grievances to CORC, only one of which is relevant to this action. *See id.* at 5-7.

On March 14, 2011, Plaintiff filed a six-page grievance dated March 6, 2011, assigned Grievance No. ECF-24381-11:

> I'VE BEEN ON KEEPLOCK FOR 58 DAYS I'M BEING DISCRIMINATED AGAINST CAUSE OF MY HARD HEARING HL20 HEARING LOSS DEPRIVED OF THE OPPORTUNTIY FOR LAUNDRY SERVICES ALSO TO PROVIDE CLEAN CHANGE OF CLOTHING OR SHEETS AT LEAST ONCE A WEEK IN ACCORDANCE WITH ITS OWN DOCS ALSO COMMISARY BUYSHEET FOR KEEP LOCK INMATES NO SOAP SHAMPOO OR DEODORANT OR LEGAL PAD OR PENS TO DO LAW WORK ALSO STAMPS, AND HAD INSUFFICIENT HEALTH & HYGIENE SUPPLIES, I CRICHLOW WAS DEPRIVED OF THESE BASIC HUMAN NECESSITIES. AND ITS EFFECTS INCLUDING INADQEUATE NUTRITION, CLOTHING, SHELTER, SANITATION, MEDICAL CARE, AND PERSONAL SAFETY, AND CAUSE GENUINE DEPRATION AND HARDSHIP OVER AN EXTENDED PERIORD OF TIME. FOR I, CRICHLOW, SUCH HARSH CONDITIONS & RESTRICTIONS ARE INCOMPATIBLE WITH CONTEMPROARY STANDARDS OF DECENCY, CAUSE WANTON AND UNNECESSARY INFLICTION OF PAIN, AND ARE NOT REASONABLY RELATED TO ANY LEGITIMATE PENOLOGICAL OBJECTIVES. AS A RESULT OF THE FORGOING, I, CRICHLOW OF B-3-32-25 S.D.U., WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT IN VIOALTION OF THE EIGHTH AMENDMENT AND FORTHEENTH AMDNENDMNT. ALSO IN VIOLATION OF THE F.R.A. 1973 & A.D.A. OF 1990.

> ***9** ALSO TODAY OFFICER FREEMAN REFUSED TO LET ME WASH CLOTHING 3,7,2011 OR CHANGE MY SHEET THIS BEEN GOING ON FOR OVER 2 WEEKS BY OFFICERS WORKING 7 TO 3 TOUR IN S.D.U., THE EFFECT OF ALL ABOVE THESE DEPRIVATIONS WAS ONLY COMPOUNDED, BY THE UNSANITARY LIVING CONDITIONS ALSO VERY UNHEALTHY TO ME WITH MY FRAGILE HEALTH CONDITION.
>
> I KNOW NEXT 7 TO 3 FEMALE OFFICERS ARE GOING TO SAY I TRY TO BRUTAL ATTACKS THEM OR PUT A GUN IN MY CELL OR SET ME UP. ALSO MIGHT SAY I'LL THREATING HER SO I BE PUT IN S.H.U. ALSO ON 3,8,2011 I TALK TO DEPUTY ABOUT NOT GETTING NONE OF THE ABOVE TIME 10:00 AM ALSO ABOUT OFFICER FREEMAN.

(Dkt. No. 177-4 at 12-17 (original unaltered text).)

On April 8, 2011, the Superintendent found "no merit" to Plaintiff's grievance:

> Grievant alleges harassment by security staff regarding his clothing, laundry, medical, and toiletries. The involved staff have taken the appropriate steps to explain how keeplocked inmates receive services including recreation, medical, laundry, etc. The grievant has failed to follow staff direction. As a result, the grievant has misbehavior reports pending resolution. Grievant must follow staff direction. Staff direction should not be viewed as harassment. Grievance has no merit."

Id. at 18.

In his appeal statement to CORC, Plaintiff alleged: "OFFICER FREEMAN & OFFICER JAHMEL ARE NOT LET ME OUT FOR SHOWER OR RECREATION AND WHEN I GO TO MEDS RUN THEY SAYING THAT MY REC AND SHOWER." *Id.* (original unaltered text).

On June 15, 2011, CORC upheld the Superintendent's decision for the reasons stated. *Id.* at 9. In addition:

> CORC notes that that the facility administration has conducted a proper investigation, and that sufficient evidence has not been presented to substantiate that the grievant was denied appropriate hygiene items, medical treatment, meals, or laundry services. CORC notes that keeplock inmates are permitted to purchase soap, shampoo, deodorant and stamps from the commissary. Further, CO F ... indicates that she observed the grievant several times attempting to wash his clothing in the slop sink on the way to medication. CORC notes that in accordance with facility P&P 639 Section VI.B.1. laundry services for B/3 are conducted on Wednesday mornings. CORC advises him to follow facility P&P regarding laundry procedures in order to avoid future similar difficulties. ... With respect to the grievant's appeal, CORC asserts that all relevant information must be presented at the time of filing in order for a proper investigation to be conducted at the facility level.

Id.

As such, Defendants seek summary judgment on all claims that were not raised in Grievance No. ECF-24381-11. (Dkt. No. 177-5 at 4-6.)

In his opposition, Plaintiff claims he has filed over 300 grievances, and seems to suggest that this is sufficient to exhaust his administrative remedies. (Dkt. No. 209-3 at 8.) Plaintiff misunderstands the exhaustion requirement. The filing of a grievance is but the first step in exhausting administrative remedies. To exhaust DOCCS administrative remedies, a prisoner must appeal to CORC. *See* *Woodford*, 548 U.S. at 93. "Plaintiff's filing of 300 grievances, even if

true, is insufficient to exhaust his remedies under the PLRA." *See* *Crichlow v. Fischer*, 2017 WL 920753, at 5.

Plaintiff has also suggested alternative means to exhaust administrative remedies, all of which have been previously rejected by the Western District. *Crichlow v. Crowley*, 2015 WL 1808626, at *5-6 (granting summary judgment and dismissing Plaintiff's First, Eighth, and Fourteenth Amendment claims, and ADA and Rehabilitation Act claims without prejudice for failure to exhaust administrative remedies). For example, Plaintiff argues that his claims should be deemed exhausted when the Inspector General "takes over" and investigates a claim. (Dkt. No. 209-3 at 9.) Plaintiff also claims he exhausted his administrative remedies by "filing outside grievances" and complaining to Commissioner Fischer, wardens, and senior staff. *Id.* at 7. Lastly, Plaintiff contends inmates do not have to exhaust "favorable" determinations to CORC. *Id.* at 44. The Court also finds Plaintiff's contentions to be meritless.

***10** Indeed, "the law is clear that prisoners 'cannot satisfy the PLRA's exhaustion requirement solely by ... making informal complaints to prison staff.' " *Khudan v. Lee*, No. 12-cv-8147 (RJS), 2016 WL 4735364, at *5 (S.D.N.Y. Sept. 8, 2016) (quoting *Macias v. Zenk*, 495 F.3d 37, 44 (2d Cir. 2007)); *see also Rodriguez v. Cross*, No. 15-CV-1079 (GTS/CFH), 2017 WL 2791063, at *4 (N.D.N.Y. May 9, 2017) ("such correspondence does not satisfy exhaustion and falls outside of the grievance procedures."). Furthermore, contrary to Plaintiff's contention, an investigation conducted by the Inspector General regarding an inmate's claim does not exhaust nor excuse the inmate from exhausting his grievance to CORC. *See Dabney v. Pegano*, 604 Fed.Appx. 1, 4 (2d Cir. 2015) ("The [Inspector General's] of [the inmate's] claims does not constitute such a special circumstance [excusing exhaustion].").

Based upon the foregoing, the Court finds Defendants have adequately supported the affirmative defense of non-exhaustion as to all claims not addressed in Grievance No. ECF-24381-11. However, as recognized by the Supreme Court in *Ross v. Blake*, a finding of failure to exhaust does not end a court's exhaustion review because "the PLRA contains its own, textual exception to mandatory exhaustion." *Ross v. Blake*, 136 S. Ct. 1850, 1588 (2016). [6]

Under the PLRA, "the exhaustion requirement hinges on the 'availab[ility]' of administrative remedies: An inmate, that is, must exhaust available remedies, but need not exhaust unavailable ones." *Id.* Thus, courts are tasked with determining whether or not a prisoner's administrative remedies are, in fact, "available." The Supreme Court found the ordinary meaning of the word "available" to be " 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.' " *Id.* (quoting *Booth v. Churner*, 532 U.S. 731, 737-38 (2001)). "Accordingly, an inmate is required to exhaust those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the action complained of.' " *Id.* at 1859 (citation omitted).

To guide courts in this analysis, the Supreme Court identified "three kinds of circumstances" in which an administrative remedy, "although officially on the books," is not "available." [7] *Id.* at 1859. First, "an 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. *Id.* "Next, an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use." *Id.* To meet this high bar, the administrative remedy must be "essentially 'unknowable.' " *Id.* Finally, an administrative remedy is not available "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 1860.

***11** In response to Defendants' assertion that Plaintiff failed to exhaust his administrative remedies for all claims not addressed in Grievance No. ECF-24381-11, Plaintiff claims that DOCCS lost or destroyed his grievances. (Dkt. No. 209-3 at 19 (claiming that DOCCS destroyed meritorious grievances); *see also* Dkt. No. 211 at 1.) Western District Judge Wolford rejected this argument in Case No. 6:15-CV-06252, finding that "Plaintiff's wholly conclusory and unsupported allegation that grievances are tampered with at Wende do not create a material issue of fact in this case." *Crichlow v. Fischer*, 2017 WL 920753, at *6 (quoting *Mims v. Yehl*, Nos. 13-CV-6405-FPG, 14-CV-6304-FPG, 14-CV-6305-FPG, 2014 WL 4715883, at *4 (W.D.N.Y. Sept. 22, 2014)). This Court also finds that Plaintiff's general claim of grievance tampering at Eastern fails to create a material issue of fact in this action.

Indeed, "[c]ourts in this Circuit have continuously held that mere contentions or speculation of grievances being misplaced by officers do not create a genuine issue of material

fact when there is no evidence to support the allegations." *Rodriguez v. Cross*, 2017 WL 2791063, at *7 (citing *Khudan*, 2016 WL 4735364, at *6 (citations omitted) (holding under *Ross*, mere "stand alone" accusations that prison officials routinely interfered with his attempts to file grievances are "insufficient" to withstand summary judgment)); *see also* *Veloz v. New York*, 339 F. Supp. 2d 505, 516 (S.D.N.Y. 2004) (granting summary judgment where the plaintiff claimed prison officers misplaced his grievances but offered no evidence to support his contention) (citing *Nunez v. Goord*, 172 F. Supp. 2d 417, 428 (S.D.N.Y. 2001) (inmate's unsupported claims that his grievances were lost or destroyed by officers thereby rendering his attempts to grieve futile, fails to excuse inmate from fully grieving remedies)); *Rosado v. Fessetto*, No. 9:09-cv-67 (DNH)(ATB), 2010 WL 3808813, at *7 (N.D.N.Y. Aug. 4, 2010) ("Courts have consistently held ... that an inmate's general claim that his grievance was lost or destroyed does not excuse the exhaustion requirement."), *adopted by* 2010 WL 3809991 (N.D.N.Y. Sept. 21, 2010).

In his sur-reply, Plaintiff claims in conclusory fashion that Captain Russo and Acting Superintendent Wendland "conspired" with other staff at Eastern to "destroy" Grievance Nos. ECF-242710-10, ECF-24275-10, ECF-24281-10, and ECF-24287-10, so as to "cover-up their own misconduct." (Dkt. No. 211 at 19.) Plaintiff speculates that because only one grievance was appealed to CORC while he was confined at Eastern (ECF-24381-11), all of his grievances must have been destroyed by DOCCS. However, as set forth above, "[c]onclusory allegations, conjecture and speculation ... are insufficient to create a genuine issue of fact." *Kerzer*, 156 F.3d at 400.

Plaintiff has also challenged the veracity of Hale's declaration. (Dkt. No. 209-3 at 8, 16-17.) Specifically, Plaintiff contends Hale's declaration is "inadequate" because several grievances are "missing" from CORC's records and thus omitted from Hale's declaration and attached exhibits, including Grievance Nos. ECF-24713-11, ECF-24515-11, ECF-24607-11, ECF-24622-11 and ECF-24782-11. (Dkt. No. 209-3 at 8.) However, as set forth in Hale's declaration, "[t]he CORC computer database contains records of all appeals received from the facility Inmate Grievance Program Officers *and* which were heard and decided by CORC since 1990. (Dkt. No. 177-3 at ¶ 2 (emphasis added).) The five grievances Plaintiff claims were omitted from Hale's declaration do not bear the Grievance Clerk's Signature. (*See* Dkt. No. 211-1 at 18, 27, 28, 29, 30.)

Lastly, to the extent Plaintiff relies on *Hemphill* and *Giano* to argue "special circumstances" justify and excuse his failure to comply with the exhaustion requirement (*see* Dkt. No. 211 at 4), "that avenue has been foreclosed." *Riles v. Buchanan*, 656 Fed.Appx. 577, 581 (2d Cir. 2016).

***12** Based upon the forgoing, the Court finds Plaintiff exhausted a single grievance before commencing this action. Therefore, the Court recommends granting Defendants' motion for summary judgment on all claims not addressed in ECF-24381-11 for failure to exhaust administrative remedies.

B. Grievance No. ECF-24381-11

Defendants also seek summary judgment on Plaintiff's claims addressed in ECF-2431-11, which pertain to the conditions of Plaintiff's keeplock confinement. (Dkt. No. 177-55 at 6-7.) As an initial matter, Defendants contend that Plaintiff's exhausted claims of being denied laundry, soap, shampoo, deodorant, and writing paper while in keeplock do not give rise to an Eighth Amendment claim. *Id.* Defendants further argue that Plaintiff's generalized allegations, to the effect that he faced discrimination based on a disability, and was denied adequate nutrition, clothing, shelter, medical care, and security, fails to provide Defendants with enough information to rectify the problem at the administrative level as to have exhausted those claims associated with Plaintiff's keeplock confinement. *Id.* In response to Defendants' motion, Plaintiff claims he was "deprived of basic human necessities." (Dkt. No. 210-2 at 21.)

1. Conditions of Confinement

The Eighth Amendment protects prisoners from "cruel and unusual punishment" in the form of "unnecessary and wanton infliction of pain" at the hands of prison officials. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The constitutional prohibition against cruel and unusual punishment includes the right to be free from conditions of confinement that impose an excessive risk to an inmate's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994). To establish an Eighth Amendment conditions of confinement claim, a plaintiff must establish that (1) he was incarcerated under conditions which posed

a substantial risk of serious harm, and (2) prison officials acted with deliberate indifference to his health or safety. *See* *Farmer*, 511 U.S. at 834.

The required culpable state of mind of the prison official is one of deliberate indifference. *Farmer*, 511 U.S. at 834; *Trammell v. Keane*, 338 F.3d 155, 162 (2d Cir. 2003). "Deliberate indifference" requires more than negligence, but less than conduct undertaken for the very purpose of causing harm. *Farmer*, 511 U.S. at 835. The prison official must know that the inmate faces "a substantial risk of serious harm and [must disregard] that risk by failing to take reasonable measures to abate it." *Bolton v. Goord*, 992 F. Supp. 604, 626 (S.D.N.Y. 1998) (quoting *Farmer*, 511 U.S. at 847).

The Supreme Court has held that the Eighth Amendment requires that inmates not be deprived of their "basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety." *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (internal citation and quotation omitted). However, "[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." *Blyden v. Mancusi*, 186 F.3d 252, 263 (2d Cir. 1999). "The conditions themselves must be evaluated in light of contemporary standards of decency." *Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012) (citation and internal quotation marks omitted).

2. Analysis

***13** Plaintiff alleges while keeplocked for fifty-eight days, he was subjected to conditions in violation of the Eighth Amendment. (Dkt. No. 12-1 at ¶ 106-07.[8]) Specifically, Plaintiff claims he was denied laundry, soap, shampoo, deodorant, and stationary supplies such as writing paper, and pens. *Id.* Such claims do not give rise to an Eighth Amendment claim. *See, e.g.*, *Chavis v. Kienert*, No. 9:03-CV-0039 (FJS/RFT), 2005 WL 2452150, at *21 (N.D.N.Y. Sept. 30, 2005) (denial of toiletries for a two month period did not rise to the level of deliberate indifference to the prisoner's health or safety); *Thomas v. Smith*, 559 F. Supp. 223, 224 (W.D.N.Y. 1983) (denial of basic hygiene items such as deodorant, soap, shampoo while confined in disciplinary segregation dismissed as frivolous); *see also* *Trammell v. Keane*, 338 F.3d at 165 (holding that "[d]eprivation of other toiletries for approximately two weeks—while perhaps uncomfortable—does not pose such an obvious risk to an inmate's health or safety to suggest that the defendants were 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and [that they also drew] the inference.' " (quoting *Farmer*, 511 U.S. at 837)); *Fernandez v. Armstrong*, No. 3:02-CV-2252, 2005 WL 733664, at *5 (D. Conn. Mar. 30, 2005) (denial of hygiene items including a toothbrush, toothpaste, soap, and shampoo for a period of sixteen days does not allege a violation of Eighth Amendment rights (citations omitted)). *McCorkle v. Walker*, 871 F. Supp. 555, 557 (N.D.N.Y. 1995) (no Eighth Amendment violation where plaintiff was not given a change of underwear for fifteen days); *Chavis v. Fairman*, No. 94-1503, 1995 WL 156599, at *5 (7th Cir. Apr. 6, 1995) (no Eighth Amendment violation where inmate was forced to wear same uniform for three weeks).

Furthermore, to the extent Plaintiff relies on alleged violations of DOCCS regulations regarding laundry services and commissary buy sheets, "[a] violation of a state law or regulation, in and of itself, does not give rise to liability under 42 U.S.C. § 1983." *Cusamano v. Sobek*, 604 F. Supp. 2d 416, 482 (N.D.N.Y. 2009) (collecting cases).

In his opposition, Plaintiff claims he "was not getting commissary" at all. (Dkt. No. 209-3 at 11.) However, as Defendants correctly note, the record evidence demonstrates loss of commissary was part of Plaintiff's disciplinary sentences. (*See* Dkt. No. 177-4.)

Regarding Plaintiff's general allegation of being deprived of adequate nutrition, clothing, shelter, sanitation, medical care, and personal safety while keeplocked, Defendants challenge whether Grievance No. ECF-24381-11 is sufficient on its face to exhaust Plaintiff's administrative remedies. (Dkt. No. 177-5 at 6-7.)

Second Circuit case law is clear that the grievance standard is similar to notice pleading in that a grievance "must contain allegations sufficient to alert the defendants to the nature of the claim and to allow them to defend against it." *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 234 (2d Cir. 2004). Although it is appropriate to afford *pro se* inmates a liberal grievance pleading standard, the grievance may not be so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally.[9] *Brownell*

v. Krom, 446 F.3d 305, 310 (2d Cir. 2006). Thus, "a prisoner must allege facts sufficient to alert corrections officials 'to the nature of the claim,' and 'provide enough information about the conduct' at issue 'to allow prison officials to take appropriate responsive measures.' " *Singh v. Lynch*, 460 Fed.Appx. 45, 47 (2d Cir. 2012) (quoting *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004)).

***14** Furthermore, the plaintiff's claim and grievance must be predicated on the same injury. *Rentas v. Nason*, No. 09-cv-5528, 2010 WL 3734086, at *1 (S.D.N.Y. Sept. 22, 2010); *see Turner v. Goord*, 376 F. Supp. 2d 321, 324 (W.D.N.Y. 2005) ("[T]he mere fact that [the] plaintiff filed some grievance, and fully appealed all the decisions on that grievance, does not automatically mean that he can now sue anyone who was in any way connected with the events giving rise to that grievance.").

In this instance, Defendants contend Plaintiff's generalized allegations in Grievance No. ECF-24381-11, to the effect that Plaintiff faced discrimination based on a disability, and was denied adequate nutrition, clothing, shelter, medical care and security, fails to provide Defendants with enough information to rectify the problem at the administrative level as to have exhausted the claims associated with Plaintiff's keeplock confinement. (Dkt. No. 177-5 at 6-7.) Although the Court tends to agree with Defendants, the decisions issued by the Superintendent and CORC suggest Plaintiff's grievance provided enough information to investigate and conduct a proper investigation regarding "hygiene items, medical treatment, meals, or laundry services" while keeplocked. (Dkt. No. 177-3 at 9, 18.)

Regardless, upon a thorough review of Plaintiff's amended complaint and opposition papers, the Court finds Plaintiff's alleged deprivations of adequate nutrition, clothing, shelter, medical care, do not meet, neither singularly nor collectively, the objective standard of the Eighth Amendment. Simply put, "the Constitutional does not require comfortable prison conditions." *Walker*, 717 F.3d at 125.

As to his alleged denial of medical care, Plaintiff's allegations are belied by his claims. (*See* Dkt. No. 12-1 at ¶¶ 106-07.) Throughout his keeplock confinement, Plaintiff states he attended sick calls, received emergency dental services and pain medication, and had wrist surgery and follow-up care appointments. Specifically, the day after he was confined to keeplock, Plaintiff went to a medical call on January 12, 2011. *Id.* at ¶ 80. Thereafter, Plaintiff "went to emergency dental" on February 27, 2011, and claims to have been to "emergency dental" over "10 times" and "also emergency sick call over 8 times." *Id.* at ¶ 101. On March 1, 2011, Plaintiff again went to "emergency dental" and received antibiotics. *Id.* at ¶ 105. Plaintiff attended medical call out on March 7, 2011, March 24, 2011, March 25, 2011, April 9, 2011, and April 14, 2011. *Id.* at ¶¶ 108, 121, 128. Furthermore, on April 18, 2011, Plaintiff was transported to Foxhall Ambulatory Surgery Center for wrist surgery performed by Dr. Arliss. *Id.* at ¶ 124. Plaintiff received medical services on April 29, 2011, and follow-up care with Dr. Arliss on May 2, 2011. *Id.* at ¶ 129-30. Plaintiff received medication on May 24, 2011. *Id.* at ¶ 131.

Regarding inadequate nutrition, the "limited denial of food ... while on keeplock confinement does not rise to the level of cruel and inhuman punishment." *Barclay v. New York*, 477 F. Supp. 2d 546, 554 (N.D.N.Y. 2007) (being denied food for two or three days for a messhall violation did not constitutional a constitutional violation). At most, Plaintiff alleges meals were withheld on an isolated basis. "[S]uch conduct, though not necessarily to be condoned, does not typically rise to a level of constitutional significance." *Cruz v. Church*, No. 05-CV-1067, 2008 WL 4891165, at *12 (N.D.N.Y. Nov. 10, 2008). While Plaintiff complains on January 11, 2011, January 12, 2011, and January 14, 2011, that he was provided with "general population" food instead of his "special Jewish diet," Plaintiff has not alleged a total deprivation of food for an extended period of time. Further as discussed above, Plaintiff's claims regarding religious meals were not exhausted. *Id.* at ¶ 84.

***15** Plaintiff also maintains he was regularly denied recreation and showers while keeplocked.[10] Specifically, Plaintiff claims he was denied outdoor exercise and fresh air on January 24, 2011, and January 25, 2011, because C.O. Allison said it was "to [sic] cold" even though general population was permitted in the "yard." *Id.* at ¶ 87. On February 3, 4, and 5, 2011, Plaintiff claims he was denied recreation and shower. *Id.* at ¶ 91. Plaintiff claims he was denied recreation and showers on February 8, 9, 11, and 13, 2011. *Id.* at ¶ 92. Plaintiff claims he was denied recreation on March 7, 2011, March 24, 2011, March 25, 2011, April 9, 2011, and April 14, 2011, because he attended medical call out. *Id.* at ¶¶ 108, 121, 128.

Even if these claims were exhausted, a conditions of confinement claim concerning the denial of showers rises to

the level of an Eighth Amendment violation only "when such a denial deprives the prisoner of basic human needs." *Dillon v. City of New York*, No. 12 Civ. 7112(LAP), 2013 WL 3776167, at *2 (S.D.N.Y. July 18, 2013) (citing *McCoy v. Goord*, 255 F. Supp. 2d 233, 260 (S.D.N.Y. 2003)). As such, "courts are reluctant to consider the temporary deprivation of showers a constitutional violation." *Id.*; *see, e.g.*, *Myers v. City of N.Y.*, No. 11 Civ. 8525(PAE), 2012 WL 3776707, at *8 (S.D.N.Y. Aug. 29, 2012) (temporary deprivations of personal hygiene do not deny plaintiff basic human needs and thus are not constitutional violations). Specifically, the denial of showers for as long as two weeks is not sufficiently serious to state a constitutional claim. *See* *McCoy*, 255 F. Supp. 2d at 260 (a two-week suspension of shower privileges does not rise to the level of an Eighth Amendment violation); *Cruz v. Jackson*, No. 94 Civ. 2600(RWS), 1997 WL 45348, at *6 (S.D.N.Y. Feb. 5, 1997) (same).

As to his alleged denial of outdoor exercise and recreation, such claims also fall short of the Eighth Amendment standard. *See, e.g., Barnes v. Craft*, No. 04-CV-1269, 2008 WL 3884369, at *9 (N.D.N.Y. Aug. 18, 2008) (denial of outdoor exercise "for six days [was] simply not sufficiently severe and prolonged to rise to the level of an Eighth Amendment violation."); *Gibson v. City of N.Y.*, 96 Civ. 3409, 1998 WL 146688, at *3 (S.D.N.Y. Mar. 25, 1998) (finding the "deprivation of the opportunity to participate in recreation for eight days in a sixty day period, even when coupled with the deprivation of an opportunity to exercise on two consecutive days," not sufficiently serious); *Davidson v. Coughlin*, 968 F. Supp. 121, 131 (S.D.N.Y. 1997) (deprivation of outdoor exercise for fourteen days did not violate Eighth Amendment). Indeed, "an occasional day without exercise when weather conditions preclude outdoor activities ... is not cruel and unusual punishment." *Anderson v. Coughlin*, 757 F.2d 32, 36 (2d Cir. 1985).

Even considering the totality of Plaintiff's alleged conditions while keeplocked, such claims still fall far short of the Eighth Amendment objective standards. *See, e.g.*, *McNatt v. Unit Manager Parker*, No. 99-CV-1397, 2000 WL 307000, at *4 (D. Conn. Jan. 18, 2000) (holding that the totality of conditions in restrictive housing unit, including stained, smelly mattresses, unclean cell, no bedding for six days, no cleaning supplies for six days, no toilet paper for one day, no toiletries or clothing for six days, no shower shoes, dirty showers, cold water that did not function properly; and smaller food portions, while not pleasant, did not rise to level of Eighth Amendment violation)).

***16** In light of the above, the Court finds Plaintiff has failed to raise a triable issue of fact as to the objective element of his Eighth Amendment claim. Even if Plaintiff had satisfied the objective element, Plaintiff offers no evidence and only his conclusory allegations of retaliatory animus and harassment to support the subjective element claim that Defendants acted with deliberate indifference to his health or safety. Indeed, Plaintiff cannot rely on conclusory allegations and speculation to defeat a motion for summary judgment. *Kerzer*, 156 F.3d at 400.

Based on the foregoing, the Court recommends granting summary judgment to Defendants on Plaintiff's Eighth Amendment conditions of confinement claim.

WHEREFORE, it is hereby

RECOMMENDED that Defendants' motion for summary judgment in lieu of an answer (Dkt. No. 177) be **GRANTED**; and is further

RECOMMENDED that Plaintiff's motion for substitution of a party (Dkt. No. 231) be **DENIED** as moot; 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 *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.[11] 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. Sec'y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989) (per curiam)); 28 U.S.C. § 636(b)(1) (Supp. 2013); Fed. R. Civ. P. 72, 6(a).

All Citations

Not Reported in Fed. Supp., 2017 WL 6466556

Footnotes

1 At the time of the severance and transfer, Judge Wolford noted that there were a number of pending motions, including Defendants' fully brief motion for summary judgment. (Dkt. No. 223 at 7-8.) Judge Wolford left the transferee courts in the Northern and Southern District to decide whether to grant the pending motions vis-à-vis those Defendants and claims transferred to each of them. *Id.*

2 Plaintiff's amended complaint spans 137 pages. (Dkt. No. 12.) Plaintiff's claims relating to Auburn and Eastern are set forth in Dkt. No. 12-1 at ¶¶ 71-147 and Dkt. No. 21-2 at ¶¶ 148-202.

3 Page references to documents identified by docket number are to the page assigned by the Court's electronic filing system.

4 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).

5 Section 701.8 has been found applicable to claims of excessive force. *See, e.g.*, *Torres v. Carry*, 691 F. Supp. 2d 366 (S.D.N.Y. 2009).

6 Not long after the parties filed their briefs, the Supreme Court rejected the "special circumstances" exception to mandatory exhaustion applied by many circuits and held that "[c]ourts may not engraft an unwritten 'special circumstance' onto the PLRA's exhaustion requirement." *Ross*, 136 S. Ct. 1850, 1862 ("mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion"); *see also* *Williams v. Priatno*, 829 F.3d 118, 123 (2d Cir. 2016) (*Hemphill v. New York*, 380 F.3d 680 (2d Cir. 2004) and *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004) have been abrogated by *Ross* to the extent those decisions established the "special circumstances" exception from the exhaustion of administrative remedies requirement in the PLRA). As the Second Circuit explained in *Williams*, "*Ross* largely supplants our *Hemphill* inquiry by framing the exception issue entirely within the context of whether administrative remedies were actually available to the aggrieved inmate." *Williams*, 829 F.3d at 123.

7 In a footnote in *Williams*, the Second Circuit noted that "the three circumstances discussed in *Ross* do not appear to be exhaustive, given the Court's focus on three kinds of circumstances that were 'relevant' to the facts of the case." 829 F.3d 118, 123 n.2. Because the same three circumstances were relevant to the PLRA exhaustion issue in *Williams*, the Second Circuit did not "opine on what other circumstances might render an otherwise available administrative remedy actually incapable of use." *Id.*

8 Defendants also argue that facility records show that on March 6, 2011, Plaintiff was a mere "three weeks into serving a 30-day keeplock sentence, which had begun on February 11, 2011." (Dkt. No. 177-5 at 6; *see* Dkt. No. 177-4 at 8.) In his opposition, Plaintiff explains that he had been keeplocked since January 11, 2011. (Dkt. No. 209-3 at 9-10.) In this instance, each position is supported by the record evidence. (*See* Dkt. No. 177-4 at 7.) Plaintiff's inmate disciplinary record indicates Plaintiff was keeplocked from January 11, 2011, through May 11, 2011, for various infractions. (Dkt. No. 177-4 at 8.) On March 6, 2011, Plaintiff was in the midst of serving a 30-day keeplock sentence, which he served from February 11, 2011 to March 13, 2011. *Id.*

9 New York regulations provide that "[i]n addition to the grievant's name, department identification number, housing unit, program assignment, etc., the grievance should contain a concise, specific description of the problem and the action requested and indicate what actions the grievant has taken to resolve the complaint, *i.e.*, specific persons/areas contacted and responses received." 7 N.Y.C.R.R. § 701.5(a)(2).

10 The Court finds that inasmuch as Plaintiff claimed he was deprived of recreation and showers for the first time in his appeal statement to CORC, such claims are also unexhausted. (Dkt. No. 177-3 at 12-18.)

11 If you are proceeding *pro se* and are served with this Order and Report-Recommendation by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the Order and Report-Recommendation 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).

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