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

Enrique ORTIZ, Plaintiff,
v.
Anthony RUSSO, C.O. Gibb, C.O. D. Parkhurst, Correction Officer Prindle, Dir. D. Venettozzi, Defendants.

No. 13 CIV. 5317(ER).
|
Signed March 27, **2015**.

OPINION AND ORDER

RAMOS, District Judge.

***1** *Pro se* plaintiff Enrique Ortiz brings this suit pursuant to 42 U.S.C. § 1983 alleging that he was issued a misbehavior report ("Misbehavior Report") and held in the Segregated Housing Unit ("SHU") for ninety days while in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS") in violation of his constitutional rights. Defendants Russo, Gibb, Parkhurst, Prindle, and Venettozzi (collectively, "Defendants") bring the instant motion to dismiss Plaintiff's Amended Complaint ("Am.Compl.") under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) on the ground that Plaintiff has failed to state any plausible claims of entitlement to relief. Def.'s Mem. L. Support. Mot. Dismiss, Doc. 33. For the reasons set forth below, Defendants' motion is GRANTED.

I. Background

A. Factual Background

The Court accepts the following allegations as true for purposes of this motion. [1]

On May 21, 2010, Plaintiff was an inmate at the Eastern Correctional Facility when Corrections Officer ("C.O.") Prindle approached him in the prison yard and informed him that Sgt. Parkhurst wanted to see him in his office. Am. Compl., Doc. 28, ¶¶ 8–9. As C.O. Prindle escorted Plaintiff across the yard, he said to Plaintiff, "take a good look at this yard because it will be the last time you ever see it, or this facility, ever again ... because we don't allow gang members in our facility." *Id* . at ¶¶ 11–12. Plaintiff was escorted into an office occupied by Sergeant ("Sgt.") Parkhurst and Lieutenant ("Lt.") John Doe, who questioned Plaintiff regarding a departmental disbursement form he had used to access his inmate account. *Id.* at ¶ 14. On the disbursement form at issue, Plaintiff had written "33%" beside his signature. *Id.* The officers told Plaintiff that that the 33% symbol is a known "marking" of the Trinitarios Gang. *Id.* at ¶ 19. Plaintiff explained that there had been a "rash of identity theft" from other inmates' institutional accounts, and the 33% symbol was simply his way of protecting his account from theft. *Id.* at ¶ 15.

While Plaintiff was being detained by Sgt. Parkhurst and Lt. John Doe, C.O.s Prindle and Gibb searched his cell. *Id.* at ¶ 24–25. The search resulted in the discovery of "months and years" worth of Plaintiff's old processed disbursement receipts, all of which included the same "33%" symbol next to his signature. *Id.* at ¶ 26. The officers also recovered a newspaper article about the Jheri Curl gang. [2] *Id.* at ¶ 29.

Two days later, on May 23, 2010, Sgt. Parkhurst wrote and issued Plaintiff a Misbehavior Report for violating Rule 105.13 of the Standards of Inmate Behavior for New York. *Id.* at ¶¶ 33, 36. Rule 105.13 provides, "[a]n inmate shall not engage in or encourage others to engage in gang activities or meetings, or display, wear, possess, distribute or use gang insignia or materials including, but not limited to, printed or handwritten ... gang related material." N.Y. Comp.Codes R. & Regs. Tit. 7, § 270.2(B)(6)(iv) (May 28, 2008). The Misbehavior Report found that Plaintiff (1) used the 33% symbol next to his signature to signify gang involvement, and (2) possessed a prohibited newspaper article. Am. Compl. ¶¶ 21, 38.

***2** Plaintiff alleges that the Misbehavior Report was false and that Sgt. Parkhurst and Lt. John Doe issued it with the specific goal of harassing Plaintiff and depriving him of his liberty. *Id.* at ¶ 21. Specifically, Plaintiff alleges that all of the previous disbursement receipts had been approved, and no one had ever expressed to him the concern that the 33% symbol next to his signature was gang-related. *Id.* at ¶ 27. He also claims that he informed prison officials that a member of his family had sent him the article, which in turn was reviewed and provided to him by "the facility's

Media Review." Compl., Doc. 2–1, at ¶ 9. Plaintiff claims Sgt. Parkhurst was retaliating against him for the dismissal of a prior misbehavior report issued to him three years earlier by Sgt. Parkhurst, on May 18, 2007. Am. Compl. ¶ 28. Immediately after the Misbehavior Report was served on Plaintiff, he was removed from the general population and placed in the Special Housing Unit ("SHU"). *Id.* at ¶ 37.

On May 28, 2010, Captain ("Cpt.") Russo conducted a Tier III hearing regarding the allegations in the Misbehavior Report and found Plaintiff guilty of both charges. *Id.* at ¶ 39. Cpt. Russo explained that Plaintiff provided no documentary evidence that Media Review had permitted him to possess the article at issue, Doc. 2–1 at 18,[3] and that Plaintiff's explanation that he was using the 33% symbol to prevent forgery was "unreasonable." *Id.* Cpt. Russo imposed a penalty of ninety days in solitary confinement in the SHU and six months loss of good time. Am. Compl. ¶ 39. Plaintiff claims that Cpt. Russo prevented him from defending himself at the hearing by denying him a reasonable amount of time to review documents and preventing him from calling witnesses. *Id.* at ¶¶ 38, 47; Pl.'s Mem. L. Opp., Doc. 39 at 12–14.

Plaintiff's appeal of the Tier III hearing determination was affirmed by Director ("Dir.") Venettozzi on July 30, 2010. *Id.* at ¶ 40.

B. Procedural Background

Plaintiff filed an Article 78 petition in state court on November 23, 2010, naming the five Defendants herein as respondents, to review the determination that he had violated Prison Rule 105.13.[4] *See* Doc. 2–1 at 26. On January 5, 2012, the New York Supreme Court for Albany County confirmed the findings of the Tier III hearing. *See Ortiz v. Fischer,* 91 A.D.3d 1006, 935 N.Y.S.2d 914 (2012). The court stated, "[t]he [M]isbehavior [R]eport, together with the documentary evidence and testimony adduced at the hearing, including petitioner's admission to possessing the items in question and the testimony of the correction officials trained in identifying gang-related material, provide substantial evidence supporting the determination of guilt." *Id.* The court also determined that Plaintiff's "claim that he was denied adequate employee assistance because he was not provided copies of the disbursement forms and article [was] unavailing given that he was provided an opportunity to review these documents at the hearing, which he declined, and he ha[d] not demonstrated any prejudice." *Id.* Moreover, Plaintiff's "assertion that the symbols on the disbursement forms were his personal mark and that the [M]isbehavior [R]eport was retaliatory in nature presented a credibility issue for the Hearing Officer to resolve." *Id.* The court concluded that the Misbehavior Report itself contained "enough detailed and specific information to allow petitioner to prepare an adequate defense." *Id.*

***3** Plaintiff filed the instant action on July 30, 2013, followed by an Amended Complaint on February 7, 2014. Docs. 2, 28. Plaintiff alleges violations of his First Amendment rights against all Defendants under 42 U.S.C. § 1983. Am. Compl ¶¶ 43, 48, 54. Plaintiff also brings Fourteenth Amendment claims against Dir. Venettozzi and Cpt. Russo for violations of his due process rights.[5] *Id.* at ¶¶ 43, 47. Lastly, he claims that Sgt. Parkhurst, along with C.O.s Prindle and Gibb, violated his constitutional rights by harassing him. *Id.* at ¶ 54, 935 N.Y.S.2d 914. Plaintiff sues all Defendants in both their official and individual capacities. *Id.* at ¶¶ 4–5.

Defendants move to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction over Plaintiff's claims for monetary damages against Defendants in their official capacities, and pursuant to Rule 12(b) (6) for failure to state a claim.

II. Legal Standards

A. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) requires that an action be dismissed for lack of subject matter jurisdiction when the district court lacks the statutory or constitutional power to adjudicate the case. Fed.R.Civ.P. 12(b)(1). The party asserting subject matter jurisdiction carries the burden of establishing, by a preponderance of the evidence, that jurisdiction exists. *Morrison v. Nat'l Australia Bank Ltd.,* 547 F.3d 167, 170 (2d Cir.2008) (quoting *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir.2000)). On a Rule 12(b)(1) motion challenging the district court's subject matter jurisdiction, evidence outside of the pleadings, such as affidavits, may be considered by the court to resolve the disputed jurisdictional fact issues. *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi,* 215 F.3d 247, 253 (2d Cir.2000); see also Morrison, 547 F.3d at 170 (citing Makarova, 201 F.3d at 113). When evaluating a

motion to dismiss for lack of subject matter jurisdiction, the court accepts all material factual allegations in the complaint as true, but does not draw inferences from the complaint favorable to the plaintiff. *J.S. ex rel. N.S. v. Attica Cent. Sch.,* 386 F.3d 107, 110 (2d Cir.2004) (citing *Shipping Fin. Servs. Corp. v. Drakos,* 140 F.3d 129, 131 (2d Cir.1998)).

Where, as here, a party also seeks dismissal on Rule 12(b)(6) grounds, the court must consider the Rule 12(b)(1) motion first. *Baldessarre v. Monroe–Woodbury Cent. Sch. Dist.,* 820 F.Supp.2d 490, 499 (S.D.N.Y.**2011**), *aff'd sub nom. Baldessarre ex rel. Baldessarre v. Monroe–Woodbury Cent. Sch. Dist.,* 496 F. App'x 131 (2d Cir.2012).

B. Rule 12(b)(6)

When ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Nielsen v. Rabin,* 746 F.3d 58, 62 (2d Cir.2014). The court is not required to credit "mere conclusory statements" or "threadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)); *see also id.* at 681 (citing *Twombly,* 550 U.S. at 551). "To survive a motion to dismiss, a complaint must contain sufficient factual matter ... to 'state a claim to relief that is plausible on its face.' " *Id.* at 678 (quoting *Twombly,* 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly,* 550 U.S. at 556). More specifically, the plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* If the plaintiff has not "nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly,* 550 U.S. at 570; *Iqbal,* 556 U.S. at 680.

***4** The question in a Rule 12 motion to dismiss "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Sikhs for Justice v. Nath,* 893 F.Supp.2d 598, 615 (S.D.N.Y.2012) (quoting *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 278 (2d Cir.1995)) (internal quotation marks omitted). "[T]he purpose of Federal Rule of Civil Procedure 12(b)(6) 'is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits,' " and without regard for the weight of the evidence that might be offered in support of Plaintiff's claims. *Halebian v. Berv,* 644 F.3d 122, 130 (2d Cir.**2011**) (quoting *Global Network Commc'ns, Inc. v. City of New York,* 458 F.3d 150, 155 (2d Cir.2006)).

The same standard applies to motions to dismiss *pro se* complaints. *See Zapolski v. Fed. Republic of Germany,* 425 F. App'x 5, 6 (2d Cir.**2011**). The Court remains obligated to construe a *pro se* complaint liberally, *Hill v. Curcione,* 657 F.3d 116, 122 (2d Cir.**2011**), and to interpret a *pro se* plaintiff's claims as raising the strongest arguments that they suggest. *Triestman v. Fed. Bureau of Prisons,* 470 F.3d 471, 474 (2d Cir.2006). The obligation to be lenient while reading a *pro se* plaintiff's pleadings "applies with particular force when the plaintiff's civil rights are at issue." *Jackson v. N.Y.S. Dep't of Labor,* 709 F.Supp.2d 218, 224 (S.D.N.Y.2010) (citing *McEachin v. McGuinnis,* 357 F.3d 197, 200 (2d Cir.2004)). "However, even *pro se* plaintiffs asserting civil rights claims cannot withstand a motion to dismiss unless their pleadings contain factual allegations sufficient to raise a right to relief above the speculative level." *Id.* (quoting *Twombly,* 550 U.S. at 555) (internal quotation marks omitted). A *pro se* plaintiff's pleadings still must contain "more than an unadorned, the defendant-unlawfully-harmed me accusation." *Iqbal,* 566 U.S. at 678. A complaint that "tenders naked assertion[s] devoid of further enhancement" will not suffice. *Id.* (quoting *Twombly,* 550 U.S. at 557) (internal quotation marks omitted); *see also Triestman,* 470 F.3d at 477 ("[*P*]*ro se* status 'does not exempt a party from compliance with relevant rules of procedural and substantive law.' ") (quoting *Traguth v. Zuck,* 710 F.2d 90, 95 (2d Cir.1983)). Additionally, as the Second Circuit recently held, "[a] district court deciding a motion to dismiss *may* consider factual allegations made by a *pro se* party in his papers opposing the motion." *Walker v. Schult,* 717 F.3d 119, 122 n. 1 (2d Cir.2013) (emphasis added).

A court may also take into account matters of which judicial notice can be taken. Although review is "generally limited to the facts and allegations that are contained in the complaint and in any documents that are either incorporated into the complaint by reference or attached to the complaint as exhibits ... we may also look to public records, including complaints filed in state court, in deciding a motion to dismiss." *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.,* 369 F.3d 212, 217 (2d Cir.2004) (internal citation and quotation marks omitted). It is routine for courts to take judicial notice of court documents, "not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Kramer v. Time Warner Inc.,* 937 F.2d 767, 774 (2d Cir.1991); *see, e.g., Kendall v. Cuomo,* No. 12 CIV. 3438(ALC), 2013 **WL** 5425780, at *6 (S.D.N.Y. Sept.27, 2013) (taking judicial notice of a valid court order Plaintiff claimed was "false, fake, and nonexistent").

***5** Defendants' collateral estoppel argument requires the Court to consider Plaintiff's Article 78 petition and the corresponding New York State Supreme Court decision, in which the court affirmed the outcome of his Tier III hearing. *See Ortiz,* 935 N.Y.S.2d at 914. Where a defendant's issue preclusion argument rests on another court's judgment, it is appropriate for the court to take judicial notice of the plaintiff's complaint filed in the previous action, along with the judgment itself, without converting the motion into one for summary judgment. *See Simpson v. Melton–Simpson,* No. 10 CIV. 6347(NRB), **2011** **WL** 4056915, at *2 (S.D.N.Y. Aug.29, **2011**). Thus, the Court takes judicial notice of Plaintiff's Article 78 petition, along with the state court's subsequent decision. [6]

III. Discussion

A. Subject Matter Jurisdiction

Defendants move to dismiss Plaintiff's claims for monetary damages due to lack of subject matter jurisdiction. Indeed, Defendants are entitled to Eleventh Amendment immunity and any claims brought against them in their official capacities must be dismissed. [7]

"It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). This bar "remains in effect when State officials are sued for damages in their official capacity." *Kentucky v. Graham,* 473 U.S. 159, 169, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Here, each of the Defendants are employees of DOCCS, a state entity, and are therefore entitled to Eleventh Amendment immunity from claims against them in their official capacity. *See Inside Connect, Inc. v. Fischer,* No. 13–CV–1138 (CS), 2014 **WL** 2933221, at *7 (S.D.N.Y. June 30, 2014) (finding the plaintiff's claims against current and former DOCCS employees to be barred the Eleventh Amendment). New York State has neither waived its sovereign immunity, nor has Congress abrogated the state's immunity through § 1983. *See Johnson v. New York,* No. 10 CIV. 9532(DLC), 2012 **WL** 335683, at *1 (S.D.N.Y. Feb.1, 2012) (citing *Santiago v. New York State Dep't of Corr. Servs.,* 945 F.2d 25, 31 (2d Cir.1991)). Hence, all of Plaintiff's claims against Defendants in their official capacities are barred and must be dismissed. [8]

B. Collateral Estoppel

Defendants argue that many of Plaintiff's claims are barred by the doctrine of collateral estoppel because they were already litigated and decided in the underlying Article 78 proceeding in state court. Defs.' Reply Mem., Doc. 42 at 4–7.

A party who had a full and fair opportunity to litigate an issue in a previous proceeding may, under of the doctrine of collateral estoppel, be barred from raising an identical issue in a later proceeding. *Curry v. City of Syracuse,* 316 F.3d 324, 331 (2d Cir.2003). Collateral estoppel, often referred to as issue preclusion, bars the "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *W & D Imports, Inc. v. Lia,* 563 F. App'x 19, 22 (2d Cir.2014) (quoting *New Hampshire v. Maine,* 532 U.S. 742, 748–49, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)).

***6** Under 28 U.S.C. § 1738, federal courts are required to give preclusive effect to state court judgments where the courts of the state would do so. *Ferris v. Cuevas,* 118 F.3d 122, 126 (2d Cir.1997) (citing *Allen v. McCurry,* 449 U.S. 90, 95–96, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)). Thus, New York law applies when determining what preclusive effect the prior judgment in an Article 78 proceeding has on a § 1983 action in federal court. *Blasi v. New York City Bd. of*

Educ., No. 00–CV–5320 (RRM)(MDG), 2012 WL 3307227, at *7 (E.D.N.Y. Mar. 12, 2012) *report and recommendation adopted,* No. 00–CV–5320, 2012 WL 3307346 (E.D.N.Y. Aug.12, 2012) *aff'd,* 544 F. App'x 10 (2d Cir.2013); *see also* *Giakoumelos v. Coughlin,* 88 F.3d 56, 59 (2d Cir.1996); *Bussa v. Educ. Alliance, Inc.,* No. 14–CV–449 GBD (JLC), 2014 WL 4744556, at *2 (S.D.N.Y. Sept.24, 2014).

In applying New York collateral estoppel rules, the Second Circuit has identified two essential elements. "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination." *Jenkins v. City of New York,* 478 F.3d 76, 85 (2d Cir.2007) (quoting *Juan C. v. Cortines,* 89 N.Y.2d 659, 657 N.Y.S.2d 581, 679 N.E.2d 1061, 1065 (N.Y.1997)). Under New York law, "[t]he party asserting issue preclusion bears the burden of showing that the identical issue was previously decided, while the party against whom the doctrine is asserted bears the burden of showing the absence of a full and fair opportunity to litigate in the prior proceeding." *Colon v. Coughlin,* 58 F.3d 865, 869 (2d Cir.1995).

Plaintiff's due process claim against Cpt. Russo raises issues identical to those already decided in his Article 78 proceeding. [9] Here, Plaintiff claims that Cpt. Russo violated his due process rights when he "denied him a reasonable amount of time to review the documents" that were the subject of the charges against him and the right to call witnesses. Doc. 39 at 12–14. Plaintiff also asserts that he was denied a fair and impartial hearing officer because Cpt. Russo was biased and unqualified to preside over the hearing. *Id.* at 15–16. Similarly, in his Article 78 petition, Plaintiff argued that Cpt. Russo failed "to afford petitioner adequate employee assistance" because the assistants assigned to Plaintiff told him he was not entitled to many of the documents and witnesses he wanted, and then "failed to meet back" with him to give him the documents he had requested. Compl., Doc. 2–1 at 28, 31–32, ¶¶ 10, 17. He also alleged that Cpt. Russo denied him "ample time to digest or review the documents" and the right to call witnesses. *Id.* at 30–31, ¶¶ 16–17. In addition, Plaintiff's Article 78 petition alleged that he was denied the right to have his "innocence or guilt determined by a fair and impartial hearing officer" in that Cpt. Russo was "arbitrary and capricious[.]" *Id.* at 30, ¶ 15. In sum, it is clear that Plaintiff raised identical issues in his Article 78 petition with respect to Cpt. Russo as he does in the instant litigation.

***7** Plaintiff has also failed to prove that he was not given a full and fair opportunity to litigate the claims in the prior proceeding. *Giakoumelos,* 88 F.3d at 59; *Ryan v. New York Tel. Co.,* 62 N.Y.2d 494, 478 N.Y.S.2d 823, 467 N.E.2d 487, 491 (1984) ("[T]he burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in prior action or proceeding."). Nowhere in Plaintiff's papers does he demonstrate that he did not have a full and fair opportunity to litigate all the issues related to the Misbehavior Report and Tier III proceeding in state court. Any assertion to the contrary by Plaintiff would be without merit, given that he submitted a petition supported by exhibits, as well as a reply to the respondents' opposition papers. *See Fortunatus v. Clinton Cnty., N.Y.,* 937 F.Supp.2d 320, 332 (N.D.N.Y.2013) ("[The plaintiff] cannot gainsay that he had a full and fair opportunity to litigate his claims of denial of equal protection and due process. In addition to his lengthy petition, [the Plaintiff] submitted sworn affidavits, exhibits, and a memorandum of law in support of his claims, all of which would substantiate a full opportunity to litigate."). Therefore, Plaintiff's Fourteenth Amendment due process claims against Cpt. Russo are barred by the doctrine of collateral estoppel.

In the instant case, Plaintiff also alleges a retaliation claim against Sgt. Parkhurst. Am. Compl. ¶ 54. Although Plaintiff did not directly state a retaliation claim in his Article 78 petition, he concedes that the state court addressed the issue after Plaintiff "made the attempt" to argue it. Doc. 39 at 11–12. Indeed, the state court held that Plaintiff's assertion "that the [M]isbehavior [R]eport was retaliatory in nature presented a credibility issue for the Hearing Officer to resolve[.]" *Ortiz,* 935 N.Y.S.2d at 916. Thus, because the issue was addressed by the Supreme Court, Plaintiff's retaliation claim against Sgt. Parkhurst is also precluded.

Finally, although the only reference to Dir. Venettozzi in the Article 78 petition is Plaintiff's statement that Dir. Venettozzi affirmed the Tier III hearing findings, Doc. 2–1 at 33, ¶ 20, Plaintiff does not appear to base the instant action on any other separate acts committed by him. *See* Am. Compl. ¶¶ 40, 43, 45. Therefore, to the extent Plaintiff is merely challenging Dir. Venettozzi's decision to uphold the results of the Tier III hearing, his claim is barred.

C. Adequacy of Pleadings

In order to state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: (1) defendants were state actors or were acting under color of state law at the time of the alleged wrongful action; and (2) the action deprived plaintiff of a right secured by the Constitution or federal law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 49–50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). "Section 1983 is only a grant of a right of action; the substantive right giving rise to the action must come from another source." *Singer v. Fulton Cnty. Sheriff,* 63 F.3d 110, 119 (2d Cir.1995) (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)). Thus, a civil rights action brought under § 1983 will stand only insofar as the plaintiff can prove an actual violation of his rights under the Constitution or federal law. *Id.*

i. Constitutionality of Rule 105.13

***8** Liberally construed, Plaintiff's complaint alleges a variety of First Amendment violations related to his possession of the article. Plaintiff alleges that C.O.s Prindle and Gibb violated his First Amendment rights by confiscating the newspaper article from his cell, that Sgt. Parkhurst violated his First Amendment rights by penalizing him for possessing the article, and that Cpt. Russo violated his rights by finding him guilty of the charge in the Tier III Hearing. Am. Compl. ¶¶ 24, 29, 38, 48. He also accuses Dir. Venettozzi of confining him "for exercising his first amendment [sic] right[.]" *Id.* In effect, Plaintiff is either claiming that Defendants violated his First Amendment rights in the manner in which they enforced Prison Rule 105.13 or the regulation itself is unconstitutional.

With respect to the prison regulation itself, although imprisonment does not automatically deprive a prisoner of his First Amendment rights, "the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere ." *Beard v. Banks,* 548 U.S. 521, 528, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006). In addition, courts owe "substantial deference to the professional judgment of prison administrators." *Id.* (quoting *Overton v. Bazzetta,* 539 U.S. 126, 132, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003)) (internal quotation marks omitted). Thus, challenges to prison regulations that allegedly inhibit First Amendment rights "must be analyzed in terms of the legitimate policies and goals of the corrections system." *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974).

Prison regulations impinging on inmates' constitutional rights are valid "if they are reasonably related to legitimate penological interests ... and are not an exaggerated response to such objectives." *Beard,* 548 U.S. at 528 (internal citation and quotation marks omitted). In *Turner v. Safley,* 482 U.S. 78, 89–90, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), the Supreme Court identified four factors to consider in determining the reasonableness of a prison regulation. First, "there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 482 U.S. at 89 (citing *Block v. Rutherford,* 468 U.S. 576, 586, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984)). Second, courts must assess "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. Third, courts should consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Finally, courts should consider any "ready alternatives" to the regulation in question for furthering the governmental interest. *Id.* "[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation," whereas "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable." *Id.*

The first *Turner* factor, requiring a valid and rational connection between the prison regulation and the legitimate government interest, is met in this case. The Supreme Court has recognized the prevalence of dangerous gang activity within prison walls and the importance of preventing it. *Wilkinson v. Austin,* 545 U.S. 209, 227, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005) ("Prison security, imperiled by the brutal reality of prison gangs, provides the backdrop of the State's interest [in determining placement in a supermax prison] ... gangs seek nothing less than to control prison life and to extend their power outside prison walls."); *Turner,* 482 U.S. at 91–92 ("the Missouri Division of Corrections had a growing problem with prison gangs, and ... restricting communications among gang members ... was an important element in combating this problem."). Here, the regulation seeks to minimize gang activity amongst inmates by limiting the amount of gang-related communication within a prison.

***9** As to the second *Turner* factor, the regulation provides for alternative means of exercising First Amendment rights. Specifically, Prison Rule 105.13 presumably allows inmates to possess published gang-related materials that are available through the library or approved through the Media Review process. [10] Regulations which limit, but do not eliminate, the availability of alternatives means of exercising a constitutional right may be permissible. *Beard,* 548 U.S. at 532. While the Court recognizes that Plaintiff alleges that he was issued the article by "the department's correspondence office," Am. Compl. ¶ 32, the transcript of the Tier III hearing indicates that Plaintiff was unable to provide any documentation establishing that Media Review had approved the article. Doc. 2–4 at 105–106. The New York Supreme Court subsequently affirmed the finding that Plaintiff was guilty of violating Rule 105.13. Regardless, the question for purposes of the second *Turner* factor is not whether prison authorities properly interpreted Rule 105.13; it is whether Rule 105.13 provides a reasonable alternative.

The third *Turner* factor evaluates the magnitude and nature of accommodating the asserted constitutional right. Allowing inmates to possess gang-related materials would likely cause a "ripple effect" on other inmates and prison staff; in such circumstances, "courts should be particularly deferential to the informed discretion of corrections officials." *See Turner,* 482 U.S. at 90. Thus, given the threat of gang activity within prisons, accommodating the purported right to possess gang-related materials would likely produce a negative result.

Consideration of the final *Turner* factor also supports the reasonableness of this regulation. "[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable[.]" *Id.* at 90. Thus, if an inmate can suggest an alternative that accommodates his constitutional rights at a minimal cost to valid penological interests, this may be evidence that a regulation does not satisfy the "reasonable relationship" standard. *Id.* at 91. Here, Plaintiff has not provided any alternatives to the current regulation, nor has he pleaded facts which suggest that obvious alternatives exist. As a result, the Court cannot say the prison regulation fails the "reasonable relationship" standard set forth in the final prong of the *Turner* test.

Finally, the Court notes that substantial deference must be given to prison administrators in matters affecting discipline and safety. *Overton,* 539 U.S. at 132 ("We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."). An analysis of the challeged regulation against the *Turner* factors in conjunction with the deference owed to prison officials compels the conclusion that the regulation in question does not unreasonably restrict Plaintiff's First Amendment rights.

***10** Therefore, to the extent that Plaintiff challenges the constitutionality of Prison Rule 105.13 itself, he fails to state a claim under the First Amendment.

ii. First Amendment Retaliation Claims

Insofar as Plaintiff challenges whether Defendants faithfully enforced Prison Rule 105.13 by penalizing him for possessing the article which he claims was approved through the Media Review process, the Court is required to follow the findings of the state court during Plaintiff's Article 78 proceeding, where it affirmed that Plaintiff was guilty of violating Rule 105.13. *See Ortiz,* 935 N.Y.S.2d at 916. However, the Court also construes the Amended Complaint as alleging First Amendment retaliation claims that were not previously raised against C.O.s Prindle and Gibb. [11] Am. Compl. ¶¶ 28, 54. Plaintiff alleges that C.O.s Gibb and Prindle "retaliated against him" by searching his cell and confiscating a news article containing gang-related material. Am. Compl. ¶ 54. C.O.s Prindle and Gibb were instructed by Sgt. Parkhurst to perform the cell search. *Id.* at ¶ 25.

"[I]t is well settled that a 'prison inmate has no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in the deprivation of a protected liberty interest.' " *Williams v. Dubray,* 557 F. App'x 84, 87 (2d Cir.2014) (quoting *Freeman v. Rideout,* 808 F.2d 949, 951 (2d Cir.1986)). Rather, "the inmate must show something more, such as that he was deprived of due process during the resulting disciplinary hearing, or that the misbehavior report was filed in retaliation for the inmate's exercise of his constitutional rights." *Id.* (citing *Boddie v. Schnieder,* 105 F.3d 857, 862 (2d Cir.1997)). A First Amendment retaliation claim under § 1983 requires that a prisoner establish three elements; "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and

(3) that there was a causal connection between the protected speech and the adverse action." *Gill v. Pidlypchak,* 389 F.3d 379, 380 (2d Cir.2004) (quoting *Dawes v. Walker,* 239 F.3d 489, 492 (2d Cir.2001), *overruled on other grounds, Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)).

Acknowledging "the ease with which claims of retaliation may be fabricated," courts "examine prisoners' claims of retaliation with skepticism and particular care." *Johnson v. Eggersdorf,* 8 F. App'x 140, 144 (2d Cir.2001) (quoting *Colon,* 58 F.3d at 872); *see also Flaherty v. Coughlin,* 713 F.2d 10, 13 (2d Cir.1983) (retaliation claims by prisoners are "prone to abuse"). Recognizing the possibilities for abuse in retaliation claims, "we have insisted on a higher level of detail in pleading them[.]" *Gill v. Mooney,* 824 F.2d 192, 194 (2d Cir.1987). Thus, a complaint "which alleges retaliation in wholly conclusory terms may safely be dismissed on the pleadings alone." *Id.* (citing *Flaherty,* 713 F.2d at 13).

***11** At the outset, Plaintiff fails to specifically identify the speech or conduct at issue which he purports to be protected. Plaintiff argues that Sgt. Parkhurst and C.O.s Prindle and Gibb retaliated against him because an earlier misbehavior report, issued against him by Sgt. Parkhurst in 2007, was overturned. Am. Compl. ¶¶ 20–21. In the prison context, free and inhibited access to seek redress of grievances against state officers is a protected right. *Franco v. Kelly,* 854 F.2d 584, 589 (2d Cir.1988). Plaintiff has not stated whether he took any constitutionally protected action against Sgt. Parkhurst regarding the 2007 report. Presumably, however, the 2007 report was dismissed after Plaintiff filed a grievance or complaint. Even if the Court accepts this as true, his retaliation claims still fails for the reasons stated below.

Plaintiff does not allege facts which establish that C.O.s Gibb and Prindle took an adverse action against him. Although the Second Circuit has not specifically addressed whether a cell search constitutes "adverse action" as required for a retaliation claim, many district courts in this circuit have held that it does not. *See Williams v. King,* No. 11–CV–1863 (SAS), 2014 WL 3925230, at *10 (S.D.N.Y. Aug.11, 2014) (collecting cases). Additionally, Plaintiff fails to allege any facts that would support a finding that C.O.s Prindle and Gibb were personally motivated by the dismissal of an earlier grievance they have no apparent connection with. Generally, alleged retaliation motivated by an action the prisoner took which did not personally involve the prison officials is insufficient for a retaliation claim. *Wright v. Goord,* 554 F.3d 255, 274 (2d Cir.2009) (dismissing a *pro se* prisoner's claim that he was assaulted by the defendant in retaliation for an earlier letter he wrote which did not name or address defendant); *Roseboro v. Gillespie,* 791 F.Supp.2d 353, 369 (S.D.N.Y.2011) (the plaintiff "failed to provide any basis to believe that [the defendant] retaliated for a grievance that she was not personally named in"); *Hare v. Hayden,* No. 09 CIV. 3135 RWS, 2011 WL 1453789, at *4 (S.D.N.Y. Apr.14, 2011) ("As a general matter, it is difficult to establish one defendant's retaliation for complaints against another defendant."); *Bryant v. Goord,* No. 99 CIV. 9442, 2002 WL 553556, at *2 (S.D.N.Y. Apr.12, 2002) ("The grievances that Plaintiff filed prior to the disciplinary proceedings at issue here did not involve any of these Defendants, therefore, there is no basis to assume that these Defendants ... retaliate[d] for his filing grievances against other corrections officers.").

Finally, Plaintiff's retaliation claims lack the necessary causal connection. In evaluating whether a causal connection exists, "a number of factors may be considered, including: (i) the temporal proximity between the protected activity and the alleged retaliatory act; (ii) the inmate's prior good disciplinary record; (iii) vindication at a [Tier III] hearing on the matter; and (iv) statements by the defendant concerning his motivation." *Jones v. Marshall,* No. 08 CIV. 0562, 2010 WL 234990, at *4 (S.D.N.Y. Jan.19, 2010) (quoting *Baskerville v. Blot,* 224 F.Supp.2d 723, 732 (S.D.N.Y.2002)) (internal quotation marks omitted).

***12** Here, Plaintiff argues Defendants retaliated against him in 2010 for an overturned misbehavior report issued more than three years earlier. Am. Compl. ¶ 28. Citing an incident which occurred three years prior is generally insufficient to satisfy the causal connection requirement for a retaliation claim. *Spavone v. Fischer,* No. 10 CIV. 9427(RJH)(THK), 2012 WL 360289, at *5 (S.D.N .Y. Feb. 3, 2012) (finding fifteen months inadequate to establish a causal connection through temporal proximity); *Crawford v. Braun,* No. 99 CIV 5851(RMB)(JCF), 2001 WL 127306, at *6 (S.D.N.Y. Feb. 9, 2001) (describing a lapse of seven months as too "attenuated" for purposes of temporal proximity). Plaintiff

also asserts that he "can, without a doubt, demonstrate proof of good behavior." Doc. 39 at 19. However, the attachments to Plaintiff's complaint reveal his disciplinary record is not as pristine as he represents. [12] As to the third factor, he admits that the Misbehavior Report was upheld by a Tier III hearing officer, Dir. Venettozzi, and a New York Supreme Court. *See* Am. Compl. ¶¶ 39, 40; *see also Ortiz,* 935 N.Y.S.2d at 914.

Plaintiff's claims against C.O.s Prindle and Gibb also allege retaliation in "wholly conclusory" terms. *Flaherty,* 713 F.2d at 13. Thus, the First Amendment retaliation claims against them must be dismissed.

iii. Harassment Claims

Although Plaintiff did not address any harassment claims in his papers opposing Defendants' motion to dismiss, his Amended Complaint alleges that the Defendants "retaliated against him by harassing him." Am. Compl. ¶ 54.

"Prisoners have no constitutional right to be free from harassment." *Greene v. Mazzuca,* 485 F.Supp.2d 447, 451 (S.D.N.Y.2007) (citing *Aziz Zarif Shabazz v. Pico,* 994 F.Supp. 460, 474 (S.D.N.Y.1998)). In order to qualify for constitutional protection, the alleged harassment "may be so drastic as to violate the Eighth Amendment's right to be free from cruel and usual punishment, but only in the harshest of circumstances." *Id.* It "must be objectively and sufficiently serious," and deny the inmate "the minimal civilized measure of life's necessities." *Id.*

Plaintiff states that, after learning that his 2007 misbehavior report had been dismissed, Sgt. Parkhurst "threatened plaintiff that he would get him at some later point." Doc. 39 at 17. In extremely broad terms, Plaintiff claims that Sgt. Parkhurst "used the disbursement forms and the newspapers articles for his purposes of harassing Plaintiff[.]" Am. Compl. ¶ 33. He also asserts that Sgt. Parkhurst conducted a 72–hour investigation, which Plaintiff alleges is "another form of harassment[,]"during which Plaintiff was "in confinement without charge." *Id.* at ¶ 34. Plaintiff claims that Sgt. Parkhurst, along with C.O.s Prindle and Gibb, used this 72–hour investigation to "finalize their set up on [sic] him." *Id.* at ¶¶ 34–35. Based on these allegations, the Court is unable to conclude that Defendants harassed Plaintiff to a level which amounts to an Eighth Amendment violation.

***13** Unless accompanied by a physical injury, verbal harassment alone "does not constitute the violation of *any* federally protected right and therefore is not actionable under 42 U.S.C. § 1983." *Aziz Zarif Shabazz,* 994 F.Supp. at 474 (emphasis added). Threats, verbal harassment, and similar behavior are not sufficient for a claim under 42 U.S.C. § 1983. *See Davis v. Goord,* 320 F.3d 346, 353 (2d Cir.2003) ("Insulting or disrespectful comments directed at an inmate generally do not rise to this level [of a constitutional violation]."); *Purcell v. Coughlin,* 790 F.2d 263, 265 (2d Cir.1986) (holding "name calling" by a prison official was not a constitutional violation); *Greene v. Mazzuca,* 485 F.Supp.2d 447, 451 (S.D.N.Y.2007) (being yelled at, spit at, and threatened with time in the SHU did not rise to the level of a § 1983 claim); *Montero v. Crusie,* 153 F.Supp.2d 368, 376 (S.D.N.Y.2001) ("Verbal threats or harassment, unless accompanied by physical force or the present ability to effectuate the threat, are not actionable under § 1983."). Thus, Sgt. Parkhurst's threat to "get him at some later point" does not constitute a constitutional violation.

D. Failure to Allege Personal Involvement of Dir. Venettozzi

It is the well settled law of this Circuit that a claim brought under § 1983 must allege the personal involvement of each defendant. *See, e.g., Grullon v. City of New Haven,* 720 F.3d 133, 138 (2d Cir.2013) (listing Second Circuit cases). "Conclusory accusations regarding a defendant's personal involvement in the alleged violation, standing alone, are not sufficient ... and supervisors cannot be held liable based solely on the alleged misconduct of their subordinates." *Kee v. Hasty,* No. 01 Civ. 2123(KMW)(DF), 2004 WL 807071, at *12 (S.D.N.Y. Apr. 14, 2004) (internal citations omitted).

Plaintiff alleges that Dir. Venettozzi deprived him of his Fourteenth Amendment rights when he wrongly affirmed the disposition of the hearing, thus penalizing and confining Plaintiff for exercising his First Amendment Rights. Am. Compl. ¶ 43. Courts within this Circuit are split as to whether a prison official who simply denies an inmate's administrative appeal from a disciplinary hearing can be held liable under § 1983. *Compare Jamison v. Fischer,* No. 11 CIV. 4697(RJS), 2012 WL 4767173, at *4 (S.D.N.Y. Sept.27, 2012) (holding that the administrative official who

affirmed the results of the plaintiff's disciplinary hearing was not personally involved because the alleged constitutional violation had ceased by the time that he was called upon to review the appeal), *with* *Thomas v. Calero,* 824 F.Supp.2d 488, 509 (S.D.N.Y.2011) (denying motion to dismiss because, by affirming the results of the plaintiff's disciplinary hearing, the defendant's actions were "sufficient to demonstrate personal involvement and could lead a trier of fact to impose liability"). This Court agrees with the line of decisions that hold that "an official reviewing an appeal of a prison disciplinary hearing can be held liable under § 1983 only if the constitutional violation complained of ... is itself ongoing." *Jamison,* WL 4767173, at *5 (citing *Odom v. Calero,* No. 06 CIV 15527(LAK)(GWG), 2008 WL 2735868, at *7 (S.D.N .Y. July 10, 2008)). As one court has noted, "allowing suits to proceed against all of the officers who reviewed an inmate's appeal in such a situation would improperly impose supervisory liability, conflicting with the clear mandate of *Iqbal* and many years of Second Circuit case law." *Id.*

***14** Since Dir. Venettozzi's involvement was distinct from the constitutional violations Plaintiff has alleged against the other Defendants, he cannot be held liable under § 1983 for violations that occurred prior to his review and were not ongoing. *See id.* Therefore, Plaintiff cannot sustain a claim against Dir. Venettozzi under § 1983.

E. Habeas Corpus

In the alternative, Plaintiff asks this Court to "convert this action" to a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. 39 at 11. However, a complaint alleging 42 U.S.C. § 1983 claims is not interchangeable with an application for a writ of habeas corpus. *Bodie v. Morgenthau,* 342 F.Supp.2d 193, 202 n. 5 (S.D.N.Y.2004) (refusing to *sua sponte* convert a § 1983 action into a petition to habeas corpus because doing so "may result in a disastrous deprivation of a future opportunity to have a well-justified grievance adjudicated.") (quoting *Adams v. United States,* 155 F.3d 582, 583 (2d Cir.1998)); *Garcia v. Aquavuva,* No. 13–CV–4360 SLT JMA, 2013 WL 6248524, at n. 2 (E.D.N.Y. Dec.3, 2013) (denying plaintiff's motion to convert his § 1983 action to a habeas petition). This Court will not transform Plaintiff's complaint into a petition for habeas corpus.

F. *Heck v. Humphrey*

Defendants argue that many of Plaintiff's claims are barred by *Heck v. Humphrey.* Doc. 33 at 12. In *Heck v. Humphrey,* the Supreme Court held that if "judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence[,]" the court must dismiss his complaint "unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. 477, 486–87, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

The Second Circuit clarified the application of the *Heck* rule to "mixed sanction" cases, where a prisoner is subject to a single disciplinary proceeding that results in sanctions that affect both the duration of his imprisonment and the conditions of his confinement. In "mixed sanction" cases, a prisoner

> can proceed separately, under § 1983, with a challenge to the sanctions affecting his conditions of confinement without satisfying the favorable termination rule, *but that he can only do so if he is willing to forgo once and for all any challenge to any* sanctions that affect the duration of his confinement. In other words, the prisoner must abandon, not just now, but also in any future proceeding, any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking in his current § 1983 suit.

Peralta v. Vasquez, 467 F.3d 98, 104 (2d Cir.2006) (emphasis in original).

Here, Plaintiff was sanctioned with ninety days in the SHU and six months loss of good time credits. Am. Compl. ¶ 39. If Plaintiff indeed lost good time credits, the rule from *Heck* bars Plaintiff from challenging the loss because he has not shown that it was invalidated. [13] *Peralta,*

467 F.3d at 100; *Paulino v. Fischer,* No. 9:12–CV–00076 (TJM), 2013 WL 5230264, at *6 (N.D.N.Y. Sept.16, 2013) ("The rule announced in *Heck* applies whenever a prisoner challenges the fact or length of his conviction or sentence, including being deprived of 'good time' credits in a prison disciplinary proceeding, where the deprivation impacts the duration his confinement."). To the extent Plaintiff challenges his confinement in the SHU as a result of the Misbehavior Report, his claims are barred by *Heck* because he has not indicated that he is willing to forgo any and all challenges to his loss of good time credits. *See* *Peralta,* 467 F.3d at 104.

***15** "In mixed sanction actions, a *pro se* plaintiff should be given the option of waiving any challenge to conditions affecting the duration of his confinement so that he can proceed with his claims with respect to the conditions of his confinement." *Paulino,* 2013 WL 5230264, at *7. However, because all of Plaintiff's claims are dismissible on separate grounds, presenting Plaintiff with this option is unnecessary.

G. Qualified Immunity

Finally, Defendants contend that Plaintiff's claims should be dismissed under the doctrine of qualified immunity. Doc. 33 at 21. A government official sued in his individual capacity is entitled to qualified immunity (1) if the conduct attributed to him was not prohibited by federal law; or (2) where the conduct was so prohibited, if the plaintiff's right not to be subjected to such conduct by the defendant was not clearly established at the time it occurred; or (3) if the defendant's action was objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken. *Manganiello v. City of New York,* 612 F.3d 149, 164 (2d Cir.2010) (internal citations omitted).

At the very least, Defendants' qualified immunity argument succeeds on the third prong of the test, because the Defendants' actions were objectively reasonable in light of clearly established legal rules regarding circumstances present here. The substantial deference due to prison officials allows them to use their professional judgment to reach an experience-based conclusion that prison policies, such as Rule 105.13, work to further prison objectives. *Beard,* 548 U.S. at 533. Moreover, there is no authority establishing a First Amendment right to possess gang-related newspaper articles or publications. Taking into account both the objective reasonableness of the Defendants' actions and the absence of a clearly established right, Defendants are entitled to qualified immunity with respect to Plaintiff's First Amendment claims.

IV. Conclusion

For the reasons set forth above, Defendants' motion to dismiss is GRANTED. The Clerk of the Court is respectfully directed to terminate the motion, Doc. 31, to mail a copy of this Opinion and Order to Plaintiff, and to close the case.

Furthermore, the Court certifies, pursuant to 28 U.S.C. § 1915(a) (3), that any appeal from this Opinion and Order would not be taken in good faith; therefore, *in forma pauperis* status is denied for purposes of an appeal. *See* *Coppedge v. United States,* 369 U.S. 438, 444–45, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

It is SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1427247

Footnotes

1 Some of the allegations appear in documents attached to the original Complaint, which was partially amended by Plaintiff. "Courts have held that it may be appropriate to consider materials outside of the Complaint in the *pro se* context ... and, in particular, materials that a *pro se* plaintiff attaches to his opposition papers[.]" *Ceara v. Deacon,* No. 13–CV–6023 (KMK), 2014 WL 6674559, at *8 (S.D.N.Y. Nov.25, 2014) (internal citations omitted) (emphasis added); *see also Rodriguez v. McGinnis,* 1 F.Supp.2d 244, 246–47 (S.D.N.Y.1998) ("Although material outside a complaint generally is not to be taken into consideration on a motion to dismiss, the policy reasons favoring liberal construction of *pro se* complaints permit a court to

consider allegations of a *pro se* plaintiff in opposition papers on a motion where, as here, those allegations are consistent with the complaint.”).

2 According to the Misbehavior Report, the Jheri Curl gang is a Dominican gang from the New York City area. Am. Compl. at 19.

3 Given the numerous unnumbered attachments to the Complaint, the Court's citations to them refer to the page numbers reflected on ECF.

4 Plaintiff's Article 78 petition names “Correction Officer Pringle” as a respondent, presumably referring to C.O. Prindle, who is a Defendant in the instant action.

5 In his opposition papers, Plaintiff states that he is dropping his conspiracy and failure to protect claims. Doc. 39 at 29. In any event, Plaintiff failed to assert any such claims in any of his pleadings.

6 The Court can also consider the Article 78 petition on the independent basis that it was included as an exhibit to the original complaint. Compl., Doc. 2–1 at 26.

7 Furthermore, “state officials cannot be sued in their official capacity for damages because such officials are not ‘persons' under § 1983.” *A'Gard v. Perez,* 919 F.Supp.2d 394, 409 n. 13 (S.D.N.Y.2013), *reconsideration denied* (Feb. 11, 2013), *reconsideration denied* (Apr. 9, 2013), *appeal dismissed* (July 8, 2013) (citing *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)).

8 In his opposition papers, Plaintiff stated that he is “willing to forego all monetary damages in lieu of declaratory relief seeking to simply reverse the underlying decision.” Doc. 39 at 12. Regardless, where “the only available declaratory relief would be that Defendants' past policy or practice violated Plaintiff's rights ... such relief is barred under the Eleventh Amendment.” *Inside Connect, Inc.,* 2014 WL 2933221, at *7.

9 Defendants also argue that Plaintiff's claims against C.O.s Prindle and Gibb are barred. Doc. 42 at 4–7. However, these claims are not clearly precluded. Although Plaintiff's Article 78 petition asserted that C.O.s Prindle and Gibb searched his cell and recovered the article at issue, Doc. 2–1 at 27, ¶ 8, nowhere in his Article 78 petition did Plaintiff argue that their actions violated his First Amendment rights or were retaliatory in nature. Given these facts, it is not apparent that Plaintiff is raising identical issues to those in his Article 78 petition.

10 The language of Rule 105.13 “excludes published material that the inmate has obtained through the facility library or that has been approved for the inmate to possess through the media review process.” N.Y. Comp.Codes R. & Regs. Tit. 7, § 270.2(B)(6)(iv) (May 28, 2008).

11 Plaintiff also alleges retaliation claims against Sgt. Parkhurst. Am. Compl. ¶ 54. For the reasons set forth in Section III.B, Plaintiff's claim of retaliation against Sgt. Parkhurst must be dismissed because it was adjudicated by the State Supreme Court in its Article 78 proceeding. Even if the Court were to consider it on the merits, however, it would still fail due to the lack of temporal proximity between the dismissal of the 2007 misbehavior report and the conduct at issue here.

12 Plaintiff states that, with the exception of this Misbehavior Report, he has “never been charged with egregious [sic] misconduct to warrant a superintendent's hearing.” Doc. 39 at 19. He goes on to state that a “superintendent's hearing” or, Tier III hearing, “is reserved for the most serious alleged disciplinary infractions.” *Id.* at n. 9. However, Plaintiff's original complaint attached two misbehavior reports, one from 2010 and another dated **2011**, charging Plaintiff with multiple infractions including smuggling and the unauthorized exchange of personal items. Doc. 2–2 at 76, 79.

13 In his papers, Plaintiff claims that he could not lose good time credits because he was ineligible to receive them by virtue of the fact that he is serving an “indeterminate sentence of 25 years to life.” Doc. 39 at 9.

2011 WL 1453789
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Susan Lee HARE, Plaintiff,
v.
James HAYDEN et al., Defendants.

No. 09 Civ. 3135(RWS).
|
April 14, **2011**.

OPINION

SWEET, District Judge.

***1** Defendants Reverend Maria Lopez ("Lopez"), Deputy Superintendant James Hayden ("Hayden"), and Grievance Supervisor Kim Watson ("Watson") (collectively, "Defendants") have filed motions for summary judgment. For the reasons stated below, these motions are granted.

Prior Proceedings

Plaintiff Susan Lee Hare ("Hare" or "Plaintiff") filed her complaint on April 1, 2009, alleging misconduct by Superintendant Ada Perez, Superintendant Elizabeth Williams, Hayden, Lopez, and Watson. Defendants Perez, Williams, Hayden, and Watson answered on September 16, 2009. Defendant Lopez answered on August 31, 2010. On November 22, 2010, the Court signed off on the stipulated dismissal of Defendants Perez and Williams.

Defendant Lopez and Defendants Hayden and Watson filed separate motions for summary judgment on December 13, 2010 and December 14, 2010, respectively. These motions were heard on submission on January 19, **2011**.

Statement of Facta

In August 2008, Plaintiff was programmed as a Catholic clerk assisting Father O'Shea, the Catholic Chaplain at Bedford Hills Correctional Facility ("BHCF"). She was programmed for both the morning and afternoon shifts. *See* Deposition of Susan Hare, attached to Declaration of John Knudsen ("Knudsen Dec") as Exhibit A ("Hare Dep."), at 15. On August 14, 2008, a meeting occurred between Plaintiff, Father O'Shea, and Hayden. At that meeting, Father O'Shea recommended that Plaintiff remain the Catholic clerk after his retirement on August 15, and Hayden agreed that Plaintiff remain in the position. Affirmation of James Hayden ("Hayden Aff."), ¶ 3, attached to Knudsen Dec. as Exhibit C.

Plaintiff then sent a letter dated August 16, 2008 to Hayden in which she made several allegations against Reverend Lopez, including that Lopez met with Hare on August 15, that Lopez ordered the moving of a cabinet with Catholic items, and that Lopez ordered her clerks to pack up the Catholic items in the Sacristy into bags and put them out for the trash. *See* Hare Letter dated Aug. 18, 2008, attached to Knudsen Dec. at Exhibit B at Hare 27–31. The underlying theme of Plaintiff's letter appears to have been that Reverend Lopez was using her position to defile the Catholic religion. *See Id.* at 30 ("the Catholic (sic) have been defiled by this woman and her community.") In response to Plaintiff's letter and to address the allegations, Hayden set up a meeting on August 18, 2008 with Plaintiff, Lopez and two other inmates, Tuttle and Ramsey. Hayden Aff., ¶ 5.

The August 18 meeting between Plaintiff and Reverend Lopez was very contentious. Hayden Aff. ¶ 6. During the meeting, Hayden attempted to verify the allegations made in Plaintiff's August 16 letter. *See* Hare 110–11. He could not substantiate any of Plaintiff's allegations and determined that they were largely hearsay. *Id.;* Hayden Aff, ¶ 6. According to Hayden, Lopez did not attempt to attack Plaintiff during that meeting. Hayden Aff. ¶ 7; Affirmation of John Ruiz, ¶ 2, attached to Knudsen Dec as Exhibit D.

***2** Plaintiff contends that on August 18, Lopez verbally abused and physically threatened her in the chapel. Pl. Opp. Aff., at 4–7. Plaintiff claims that this interaction led to an investigation which prevented her from working as Catholic clerk. *Id.* at 4. It is unclear whether this interaction was separate from the August 18, 2008 meeting.

Plaintiff filed a grievance alleging that Reverend Lopez verbally harassed her during the August 18 meeting. *See* Hare 104–105. Hayden notified the Superintendent's Office of his personal observations during that meeting, which were incorporated into the Superintendent's response. *See* Hare 103; Hayden Aff., ¶ 8. Following the August 18 meeting, Plaintiff did not appear for her program assignment as Catholic clerk for two weeks, after which time Reverend

Lopez forwarded a memorandum to counselor Greenfield on September 2, 2008, requesting that Plaintiff be removed from her position as Catholic clerk and noting that no new Catholic clerk should be named until a Catholic Priest had been hired. *See* Hare 42. Plaintiff contends that this report was false and that she showed up for work but was sent away. Pl. Opp. Aff. at 9. Counselor Greenfield contacted Hayden to discuss Lopez's request for Plaintiff's removal. Hayden Aff., ¶ 9. According to Hayden, Plaintiff was removed from her Catholic clerk position by him on September 8, 2008, at the latest. Hayden Aff., ¶ 11. Plaintiff contends that she was not removed until September 15, 2008. Pl. Opp. Aff. at 9.

Hayden claims to have removed Plaintiff from her position for multiple reasons. Initially, it was reported that plaintiff failed to report for two weeks for programming after Father O'Shea retired. Hayden Aff., ¶ 10; Hare 42. Also, Hayden determined that Plaintiff was being disruptive to the provision of Catholic services at Bedford Hills. Hayden Aff. ¶ 10. Hayden had investigated plaintiffs numerous allegations about Reverend Lopez and her alleged interference with the Catholic programs and could not substantiate any of them. *Id.* For example, Hayden states that Plaintiff was telling inmates and outside civilians in the Catholic community that Lopez had the cabinet with Catholic items in it moved, and had articles removed from the Sacristy. *Id.* Hayden had received a call from Deacon Lou Santore, a civilian volunteer, who had been told these claims by Plaintiff and was upset. Hayden investigated these claims and determined them to be inaccurate. *Id.* Instead, he determined that the cabinet was moved by a volunteer from the long-term inmate committee, and that Plaintiff appeared to be the only person with the combination to the Sacristy. *Id.;* Affirmation of Kowsillia Magoo, ¶ 4, attached to Knudsen Dec. as Exhibit E. As part of his responsibilities as Deputy Superintendent of Programs, Hayden states that he could not allow inmates to use their programming position to disrupt the inmate and civilian volunteer populations. *Id.*

***3** Additionally, Hayden discussed this issue with all the other chaplains at the facility, who agreed that Plaintiff should no longer remain as the Catholic clerk. Hayden Aff., ¶ 11. This included Sister MaryAnn Collins, who was a part-time employee at the facility and apparently effectively acted as head of the Catholic community there. *Id.* Finally, Hayden determined that Plaintiff and Reverend Lopez were not able to work together. *Id.* Plaintiff drafted a handwritten grievance complaint on September 4, 2008, in which she complained that Reverend Lopez was retaliating against her because of her prior grievance, and asked that she "stop being harassed and retaliated against by Rev. Lopez." Hare 40–41. Defendant Watson responded to that grievance, noting that Plaintiff no longer worked as a clerk and, thus, Reverend Lopez could no longer be harassing her. Hare 39. Watson states that this was an attempt by her to informally resolve Plaintiff's grievance. Affirmation of Kim Watson ("Watson Aff."), at ¶ 3, attached as Exhibit F to Knudsen Dec. Plaintiff did not request to have the grievance formally processed, but if she had, Watson claims she would have done so. *Id.* Plaintiff contends that she took Watson's response to mean that she could not file a grievance.

Summary Judgment Standard

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In considering a summary judgment motion, the Court must "view the evidence in the light most favorable to the non-moving party and draw all reasonable inference in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party." *Allen v. Coughlin,* 64 F.3d 77, 79 (2d Cir.1995) (internal citations and quotation marks omitted); *see also* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Affidavits submitted in opposition to summary judgment must be based on personal knowledge from a competent source, and "set forth such facts as would be admissible in evidence." *Patterson v. County of Oneida,* 375 F.3d 206, 219 (2d Cir.2004) (quoting Fed.R.Civ.P. 56(c)). Hearsay or other evidence that would be inadmissible at trial cannot be credited to defeat a summary judgment motion. *See* *Id.* at 219 ("an affidavit's hearsay assertion that would not be admissible at trial if testified to by the affiant is insufficient to create a genuine issue for trial.").

Plaintiff's Retaliation Claims are Dismissed

In order to state a valid retaliation claim, a plaintiff must allege that her actions were protected by the Constitution, and that such "conduct was a substantial or motivating factor for the adverse actions taken by prison officials." *Bennett v. Goord,* 343 F.3d 133, 137 (2d Cir.2003) (internal citations omitted). There must be a "causal connection between the protected [conduct] and the adverse action." *Gill*

v. Pidlypchak, 389 F.3d 379, 380 (2d Cir.2004) (internal citation and quotations omitted). "A plaintiff cannot state a retaliation claim in wholly conclusory terms, but rather, must provide a pleading that is 'supported by specific and detailed factual allegations.' " *Anderson v. Lapolt,* No. 07 Civ. 1184, 2009 WL 3232418, at *5 (N.D.N.Y. Oct. 1, 2009) (quoting *Friedl v. City of New York,* 210 F.3d 79, 85–86 (2d Cir.2000)); *see also Sawyer v. Jowers,* No. 08 Civ. 186, 2008 WL 4791557, at *6 (N.D.Tex. Oct. 31, 2008) ("To state a claim of retaliation, the inmate must allege more than his personal belief that he is the victim of retaliation. Conclusory allegations of retaliation are not sufficient; the plaintiff must produce direct evidence of motivation or allege a chronology of events from which retaliation may plausibly be inferred") (internal citations omitted); *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995) (if plaintiff's claim of retaliation had been based on circumstantial evidence alone, and not also supported by direct evidence of defendant's admission, Court would be inclined to grant summary judgment); *Bussey v. Phillips,* 419 F.Supp.2d 569, 585 (S.D.N.Y.2006) ("In order to survive summary judgment on a retaliation claim, a plaintiff bears the burden of showing two genuine issues of material fact: first, that the plaintiff engaged in constitutionally protected conduct, and, second, that the conduct was a substantial or motivating factor for the adverse actions taken by prison officials.").

***4** Even where a plaintiff meets her burden of establishing a prima facie retaliation claim, it is still subject to dismissal if sufficient other non-retaliatory reasons to take the adverse action were present. *See Bussey,* 419 F.Supp.2d at 585; *Gayle v. Gonyea,* 313 F.3d 677, 682 (2d Cir.2002). Furthermore, inmates have no right, constitutional or otherwise, to any particular job or assignment within a prison. *Gill v. Mooney,* 824 F.2d 192, 194 (2d Cir.1987); *Hodges v. Jones,* 873 F.Supp. 737, 745 (N.D.N.Y.1995) (citing *Lane v. Reid,* 575 F.Supp. 37, 39 (S.D.N.Y.1983). Inmates can be removed from prison assignments for virtually any reason, provided that such decisions are not based on the inmate's race or religion. *Bussey,* 419 F.Supp.2d at 589 (S.D.N.Y.2006).

It should be noted that "courts must approach prisoner claims of retaliation with skepticism and particular care," as such claims are "easily fabricated" and run the risk of "unwarranted judicial intrusion into matters of general prison administration." *Dawes v. Walker,* 239 F.3d 489, 491 (2d Cir.2001), overruled on other grounds in *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002). *See also Graham v. Henderson,* 89 F.3d 75, 79 (2d Cir.1996) (noting that prisoner retaliation claims are " 'prone to abuse' because prisoners can claim retaliation for every decision they dislike.") (quoting *Flaherty v. Coughlin,* 713 F.2d 10, 13 (2d Cir.1983)); *Colon,* 58 F.3d at 872 ("because we recognize both the near inevitability of decisions and actions by prison officials to which prisoners will take exception and the ease with which claims of retaliation may be fabricated, we examine prisoners' claims of retaliation with skepticism and particular care."); *Gill,* 824 F.2d at 194 (because of the potential for abuse, the Court of Appeals requires a "higher level of detail in pleading [retaliation claims]").

Plaintiff contends that she was removed from her position as Catholic clerk by Hayden in retaliation for her complaints against Lopez. [1] There is no dispute that Plaintiff's complaints against Lopez are protected speech and that her removal from her position as Catholic clerk was an adverse action; however, Plaintiff fails to establish the causal link between her complaints and her dismissal, particularly in light of legitimate non-discriminatory reasons for her dismissal given by Hayden.

As a general matter, it is difficult to establish one defendant's retaliation for complaints against another defendant. *See Wright v. Goord,* 554 F.3d 255, 274 (2d Cir.2009) (dismissing retaliation claim against a corrections officer when only alleged basis for retaliation was complaint about a prior incident by another corrections officer). Here, even giving Plaintiff every reasonable inference, Plaintiff fails to establish that Hayden had a motive to retaliate arising from her complaints against Lopez, and that Hayden's retaliatory motive formed the basis for her dismissal.

***5** To the extent Plaintiff contends that Hayden was incompetent or covering up Lopez's misconduct, the evidence before the Court indicates otherwise. Hayden investigated Plaintiff's claims against Reverend Lopez. The August 18, 2008 meeting between Plaintiff, Hayden and Lopez was called in order for Hayden to investigate Plaintiffs allegations in her August 16 letter, *see* Hayden Aff., ¶ 5, and at that meeting, Hayden questioned both Plaintiff and Lopez to determine the veracity of Plaintiff's allegations. *See* Hare 110–111; Hare Dep., at 73–74. Plaintiff's subsequent grievance on August 21 alleged that Lopez mistreated her during the August 18 meeting, a claim for which there was no need for

Hayden to investigate since he was present for the meeting and knew what had and had not occurred. *See* Hayden Aff., ¶ 8. Finally, there is no evidence to indicate that Hayden was "covering up" for Lopez, and the record indicates that Hayden reasonably found Plaintiff's complaints against Lopez to be meritless. Plaintiff's allegations of a cover up are conclusory and are insufficient to meet Plaintiff's burden for a retaliation claim at the summary judgment stage. *See* *Graham,* 89 F.3d at 79.

Even if the Court were persuaded that there was a causal connection between Plaintiff's complaints against Lopez and her dismissal for her position as Catholic clerk, Hayden had valid, non-discriminatory reasons for dismissing her. "A finding of sufficient permissible reasons to justify state action is 'readily drawn in the context of prison administration where ... prison officials have broad administrative and discretionary authority.' " *Graham,* 89 F.3d at 79 (quoting *Lowrance v. Achtyl,* 20 F.3d 529, 535 (2d Cir.1994)). Here, Hayden identified four legitimate reasons for Plaintiff's removal: (1) she failed to show up for work for 2 weeks[2]; (2) her behavior disrupted the overall provision of Catholic services at Bedford Hills; (3) her removal was recommended by all the other chaplains, including the part-time chaplain, Sister MaryAnn Collins; and (4) the inability of Plaintiff and Lopez to work together. Hayden Aff., ¶¶ 10–11.

Plaintiff's allegations that Lopez independently retaliated against her, by preventing her from returning to her program assignment, falsely reporting her absence from her job, and otherwise acting inappropriately toward her, are belied by Plaintiff's acknowledgement that Lopez never made any statement revealing that she engaged in any conduct with the intent to retaliate against Plaintiff for writing complaint letters or for any other act by Plaintiff. (Hare Dep. at 135). Plaintiff can only point to her conclusory assumptions of Lopez's motive and has failed to adequately substantiate her claims to survive this motion for summary judgment.

Furthermore, even if Plaintiff did establish that Lopez filed a false report in retaliation for her complaints, Plaintiff cannot establish that the adverse action of her dismissal from her position as Catholic clerk by Hayden arose from that allegedly false report. As discussed above, Hayden chose to dismiss Plaintiff for three other legitimate reasons and would have done so regardless of the report. Hayden Aff., ¶¶ 10–11. *See* *Graham,* 89 F.3d at 79 (quoting *Lowrance,* 20 F.3d at 535).

Plaintiff's Claim that Lopez Filed a False Misbehavior Report is Dismissed

***6** To the extent that Plaintiff claims Lopez falsely reported her absence from work for two weeks, this allegation does not support a claim. "The Second Circuit has held that the issuance of false misbehavior reports against an inmate by corrections officers is insufficient on its own to establish a denial of due process...."[3] *Faison v. Janicki,* No. 03 Civ. 6475, 2007 WL 529310, at *4 (W.D.N.Y. Feb. 14, 2007) (citing *Boddie v. Schnieder,* 105 F.3d 857, 862 (2d Cir.1997)). *See also* *Moore v. Casselbeny,* 584 F.Supp.2d 580, 582 (W.D.N.Y.2008) ("There is no basis for a constitutional claim alleging the mere filing of a false report"); *Flemings v. Kinney,* No. 02 Civ. 9989, 2004 WL 1672448, at *3 (S.D.N.Y. Jul. 27, 2004) ("[i]t is well settled that 'a prison inmate has no general constitutional right to be free from being falsely accused in a misbehavior report' ") (quoting *Boddie,* 105 F.3d at 862). Furthermore, the record does not support Plaintiff's assertion that Lopez's report was false. Officers Ruiz and Magoo both affirm that they were never instructed by Lopez not to allow Plaintiff to enter the chapel. Ruiz Aff., ¶ 3; Magoo Aff., ¶ 3. Lopez denies having falsified the report.

Plaintiff's Claim that She was Unable to File a Grievance is Dismissed

Plaintiff alleges that she was denied the right to file a grievance when Watson responded to Plaintiff's September 4, 2008 grievance, which requested that Lopez stop retaliating against her, by noting that Plaintiff no longer worked as a clerk and, thus, Reverend Lopez could not retaliate against her. *See* Hare 39–41. Watson claims to have sent this memorandum to Plaintiff in an attempt to informally resolve the grievance, which is part of Watson's responsibilities, Watson Aff. ¶ 3, but Plaintiff alleges she understood the memorandum to indicate that she was not allowed to file a grievance. Watson claims she would have formally filed the grievance if Plaintiff had contacted her and requested that it be formally filed. *Id.*

While there is a dispute of fact as to whether Plaintiff was allowed to file a grievance, Plaintiff has no constitutionally protected right to file a grievance, and thus does not have

a cognizable § 1983 claim. *See* *Shell v. Brzezniak,* 365 F.Supp.2d 362, 370 (W.D.N.Y.2005) ("[I]nmate grievance programs created by state law are not required by the Constitution and consequently allegations that prison officials violated those procedures does not give rise to a cognizable § 1983 claim") (citing *Cancel v. Goord,* No. 00 Civ.2042, 2001 WL 303713, *3 (S.D.N.Y. Mar. 29, 2001)); *Mastroianni v. Reilly,* 602 F.Supp.2d 425, 437 (E.D.N.Y.2009) ("[T]he grievance procedure or lack thereof cannot itself form the basis of a Section 1983 claim because there is no constitutional right to a grievance mechanism") (citing *Swift v. Tweddell,* 582 F.Supp.2d 437, 445–46 (W.D.N.Y.2008)). Notably, Defendants do not argue that Plaintiff has failed to exhaust her claim of retaliation because this grievance was not processed through the entire grievance system.

Plaintiff's Claims of Verbal Abuse are Dismissed

***7** Plaintiff accuses Lopez of approaching her on August 18, 2008 "in a menacing way, raising her hands toward plaintiff from behind in a motion as if to strangle plaintiff" (Pl. Opp. Aff. at 7) and asserts that Lopez "screamed" at her and called her a "liar" (Hare Dep. at 57) or otherwise spoke to her in an abusive manner. While Lopez denies Hare's allegations regarding her conduct, even when the evidence concerning them is viewed most favorably to Plaintiff, these allegations do not support an action pursuant to § 1983. The Eighth Amendment proscribes the " 'unnecessary and wanton infliction of pain' " on prisoners by prison officials. *Boddie,* 105 F.3d at 861 (quoting *Whitley v. Albers,* 475 U.S. 312, 319 (1986)). Hare does not claim that any actual physical harm was caused to her by Lopez, and she acknowledged in her deposition testimony that, on the occasion when she alleges Lopez approached her in a physically threatening manner, "[m]y back was to her" (Hare Dep. at 61), and "I didn't see her ...." (Hare Dep. at 58). According to Plaintiff, Officer Ruiz "stopped the whole incident" before any assault could take place. (Hare Dep. at 57).

It is undisputed that there was no actual assault, and Plaintiff's evidence, viewed most favorably to her, establishes nothing more than verbal abuse. As the Court held in *Aziz Zarif Shabazz v. Pico,* 994 F.Supp. 460, 474 (S.D.N.Y, 1998):

> [V]erbal harassment or profanity alone, "unaccompanied by any injury, no matter how inappropriate, unprofessional, or reprehensible it might seem," does not constitute the violation of any federally protected right and therefore is not actionable under 42 U.S.C. § 1983. *Del Carpio v. Walker,* No. 95 Civ. 1502(RSP) (GJD), 1997 WL 642543, at * 6 (N.D.N.Y. Oct. 15, 1997) (citing *Purcell v. Coughlin,* 790 F.2d 263, 265 (2d Cir.1986) (per curiam); *Brown v. Croce,* 967 F.Supp. 101, 104 (S.D.N.Y.1997)); *see Ramirez v. Holmes,* 921 F.Supp. 204, 210 (S.D.N.Y.1996); *Alnutt v. Cleary,* 913 F.Supp. 160, 165–66 (W.D.N.Y.1996); *Jermosen v. Coughlin,* 878 F.Supp. 444, 449 (N.D.N.Y.1995) ("Although indefensible and unprofessional, verbal threats or abuse are not sufficient to state a constitutional violation cognizable under § 1983."); *Beal v. City of New York,* No. 92 Civ. 0718(KMW), 1994 WL 163954, at *6 (S.D.N.Y. Apr. 22, 1994), *aff'd,* 89 F.3d 826, 1995 WL 722263 (2d Cir.1995); *Hurdle v. Ackerhalt,* No. 92–CV–1673, 1993 WL 71370, at *1–2 (N.D.N.Y. Mar. 8, 1993) (allegations of threats and harassment do not rise to the level of a Constitutional violation).

Plaintiff's claim fails because she does not allege that she suffered any physical injury. *See Bouknight v. Shaw,* No. 08 Civ. 5187, 2009 WL 969932, at *3 (S.D.N.Y. Apr. 6, 2009) ("Verbal harassment and name calling, absent physical injury, are not constitutional violations cognizable under § 1983.") (citing *Purcell,* 790 F.2d at 265). *See also* *Thompson v. Carter,* 284 F.3d 411, 418 (2d Cir.2002) ("We agree with the majority of our sister circuits that [42 U.S.C. §] 1997e(e) applies to claims in which a plaintiff alleges constitutional violations so that the plaintiff cannot recover damages for mental or emotional injury for a constitutional violation in the absence of a showing of actual physical injury.") Rather, Plaintiff contends that she suffered only "mental anguish" as a consequence of the Defendants' actions.

***8** "Under certain circumstances, the intentional infliction of psychological pain may constitute an Eighth Amendment violation, so long as the pain is not *de minimus.*" *Shabazz,* 994 F.Supp. at 475. Plaintiff stated in her deposition that she was affected by Lopez's conduct particularly because she was a domestic violence victim and because Lopez came from a position of trust. (Hare Dep. at 139). However, Plaintiff admitted during her deposition that, notwithstanding the availability of mental health services, she never sought such services, but attained sufficient relief from her distress

by speaking about it with a chaplain. (Hare Dep. at 139–40). Based on Plaintiff's allegations and record, Plaintiff's mental pain was *de minimus*. *See* *Shabazz,* 994 F.Supp. at 475 (mental anguish caused by repeated use of racial slurs was *de minimus*); *Jermosen v. Coughlin,* No. 87 Civ. 6267, 1993 WL 267357, at *6 (S.D.N.Y. July 9, 1993), *aff'd,* 41 F.3d 1501 (2d Cir.1994) (*de minimus* psychological harm when correctional officers "approached plaintiff with their nightsticks raised in a threatening position" before conducting a strip frisk).

Plaintiff's Claims for Infringement of Her Religious Rights are Dismissed

a. The Alleged Removal of Religious Objects from the Sacristy

Hare's complaint discusses at length the alleged removal of religious articles from the Catholic sacristy at BHCF, but she has acknowledges that she did not observe anyone removing those articles, and that she has no personal knowledge regarding who is responsible for any such conduct. (Hare Dep. at 137; Pl. Opp. Aff. at 7). Lopez, for her part, denies any involvement in or knowledge of this occurrence. (Lopez Aff., ¶¶ 14–15). It appears that Plaintiff's only basis for claiming that Lopez had any involvement in the alleged removal of the articles in question is her assertion that she was told by Officer Magoo and through a grapevine of other inmates that Lopez had authorized other inmates to take this action. (Hare Dep. at 37; Pl. Opp. Aff. at 9). This hearsay claim is not corroborated by Officer Magoo; in fact, he has affirmed that he did not make such a statement to Hare. (Magoo Aff., ¶ 4). Likewise, Inmate Rose Ramsey, who allegedly told Lucy Tuttle, who allegedly told Plaintiff, about Lopez's role in the removal of articles for the Catholic service has not provided an affidavit corroborating Plaintiff's contention. Thus, Hare does not present admissible evidence to support her allegation that Lopez caused the removal of items from the Catholic sacristy. *See* *Finnegan v. Board of Educ. of Enlarged City School Dist. of Troy,* 30 F.3d 273, 274 (2d Cir.1994) (hearsay that would not be admissible at trial cannot be relied upon in opposition to a motion for summary judgment). Without establishing Lopez's involvement in the alleged removal of Catholic items, Plaintiff has not established a claim. As the Court of Appeals has recognized, "[b]ecause Section 1983 imposes liability only upon those who actually cause a deprivation of rights, 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.' " *Blyden v. Mancusi,* 186 F.3d 252, 264 (2d Cir.1999) (quoting *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994)).

***9** Even if Plaintiff had established that Lopez bears responsibility for the removal of those articles from the sacristy, the conduct she alleges would not establish any violation of Hare's personal rights. She does not claim that any of the articles in question belonged to her, and, in the absence of specific criteria that Hare does not allege here, a plaintiff does not have standing to assert the constitutional rights of others. *Camacho v. Brandon,* 317 F.3d 153, 159 (2d Cir.2003) ("A plaintiff may assert the constitutional claims of a third party if the plaintiff can demonstrate: (1) injury to the plaintiff, (2) a close relationship between the plaintiff and the third party that would cause plaintiff to be an effective advocate for the third party's rights, and (3) 'some hindrance to the third party's ability to protect his or her own interests.' ") (quoting *Campbell v. Louisiana,* 523 U.S. 392, 397 (1998)). *Cf.* *Hudson v. Palmer,* 468 U.S. 517, 547 n. 13 (1984) (Stevens J., conc. in part and diss. in part) ("A prisoner's possession of ... personal property relating to religious observance, such as a Bible or a crucifix, is surely protected by the Free Exercise Clause of the First Amendment"). Thus, Hare's allegations regarding the alleged removal and desecration of objects from the Catholic sacristy does not give rise to any genuine dispute regarding facts that would be material to her § 1983 action against Lopez.

b. The Alleged Denial of Plaintiff's Right to Practice Her Religion

Plaintiff alleges that Lopez impermissibly infringed upon her right to practice religion. She does not allege any involvement in this deprivation by Hayden or Watson, so this claim is dismissed as to them.

In her complaint, Plaintiff asserts denial of "the right to practice Freedom of Religion," but she does not specify how this alleged violation of her civil rights occurred. In her affirmation opposing the summary judgment motions [4], Plaintiff contends that Lopez prevented Plaintiff from continuing her Catholic video group and curtailed "all Catholic programs, which precluded plaintiff from participating in them, as they no longer were running." Pl. Opp. Aff. at 8. Also, referring to Lopez's alleged verbal abuse of Plaintiff on August 8, **2011**, Plaintiff claims that "Lopez's actions effectively precluded any operations of

religious programs for Catholic inmates." Pl. Opp. Aff. at 6. These assertions are insufficient to place into issue facts that, if resolved in Plaintiff's favor, would entitle her to relief pursuant to Section § 1983.

To establish a free exercise claim under the First Amendment, a plaintiff must demonstrate that state action substantially burdened her observation of a "central religious belief" without a "compelling government interest" justifying the burden. *Skoros v. City of New York,* 437 F.3d 1, 39 (2d Cir.2006) (quoting *Jimmy Swaggart Ministries v. Bd. of Equalization,* 493 U.S. 378, 384–85 (1990)). An inmate's right to the free exercise of religion is "subject to limitations that arise both as a consequence of being incarcerated and from 'valid penological objectives.' " *Harris v. Lord,* 957 F.Supp. 471, 474 (S.D.N.Y.1997) (quoting *O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987)).

***10** With regard to the alleged curtailment of programs such as the "Praise Dance" or the video activities that she sought to organize, Plaintiff does not claim that these programs were "central or important" to the practice of her religion, an essential component of a claim that her religious beliefs were "substantially burdened." *Ford v. McGinness,* 352 F.3d 582, 593–94 (2d Cir.2003).

Hare's claims regarding the "suspension" of Catholic programs appear to be linked with her role in leading such programs. Plaintiff's papers and testimony recognize, however, the Catholic Chaplain, Father O'Shea, retired in August of 2008. The subsequent temporary suspension of programs that he had supervised cannot be deemed an unreasonable infringement on Plaintiff's practice of her religion, but simply a consequence of the institution's temporary lack of a Catholic Chaplain. Plaintiff's claim appears to be premised on her assumption that, even in Father O'Shea's absence, she should have been permitted to continue running these programs. (*See* Hare Dep. at 105 ("Even if I was not a clerk, I should have been allowed to run the program")). However, as discussed above, inmates have no right to any particular position or assignment at a correctional institution. *See* *Gill,* 824 F.2d at 194.

Plaintiff's claim that Lopez prevented her from attending Catholic Mass and other religious programming, to the extent that she asserts it, is not supported by the record and does not survive summary judgment even when all reasonable inferences are made in her favor. At her deposition she testified as follows:

> Q. In general, do you recall at any time when you were trying to go to Catholic mass where you were not allowed to go?
>
> A. If [Lopez] knew I was in there, then I was harassed. If she told the officer this Sunday she found out, she would tell that officer. If that officer was there, then I would be harrassed.
>
> Q. How were you harassed?
>
> A. Because I was told to leave, I'm not allowed to be there.
>
> Q. How many times, to the best of your recollection, were you told that you had to leave the Catholic mass?
>
> A. I would say a couple of times. Like I said, I got tired of being harassed, and I just stopped going.
>
> ...
>
> Q. What about programming, were you allowed to go to Catholic programming?
>
> A. No. Those were during the day. That's when she really got me. Then on Tuesday night she was there late. She was there until 8 o'clock at night. That was her late night. She made sure that the officer knew I was not supposed to be there.

(Hare Dep. at 106–07).

Plaintiff does not identify the officers involved or specify the dates on which she was allegedly told to leave the chapel. Plaintiff also provides no basis for her claim that, when they allegedly told her to leave, the officers were acting at the direction of Lopez, and does not claim to have observed Lopez giving any officer such instructions. Officers Ruiz and Magoo, who were stationed outside the 112 Chapel during the period in question, have affirmed that they never received any such instruction from Lopez. Ruiz Aff. ¶ 3; Magoo Aff. ¶ 3. Thus, Plaintiff has not presented any admissible evidence that would support her claim that Lopez prevented her from attending Mass or other religious services, and the record suggests that she was not denied entry to Mass.

***11** Moreover, it is unclear whether being told to leave the chapel "a couple of times" (Hare Dep. at 107)—even

when the evidence is viewed most favorably to Plaintiff—rises to the level of a "substantial burden" on Hare's religious freedom. It is undisputed that Hare's right to free exercise of religion includes the right to attend religious services. *O'Lone,* 482 U.S. 342, 348 (1987). However, that right is not unlimited or absolute, but is subject to limitations that arise both as a consequence of being incarcerated and from "valid penological objectives." *Id.* Because Plaintiff provides no particulars as to the dates and times when she was allegedly prevented from attending Mass, and does not identify the officers who allegedly prevented her from doing so, her claims are too vague to permit the Court to determine both that the alleged removal actually occurred and, if it did, whether it was justified by a compelling government interest. *See* *Skoros,* 437 F.3d at 39.

In view of all of these circumstances, the Court concludes that Hare's claim that her freedom of religion was infringed is not based on facts that would entitle her to relief pursuant to § 1983. *See* *Salahuddin v. Coughlin,* 781 F.2d 24, 29 (2d Cir.1986) (summary judgment stage is appropriate juncture for *pro se* plaintiffs to make clear the facts that they believe support their claims, and for a court to grant summary judgment where the underlying facts are insufficient).

Plaintiff's Reference to Additional Witnesses Does Not Merit a Denial of Summary Judgment

Plaintiff claims that Defendants' motions for summary judgment should be denied on the grounds that two witnesses have yet to file affidavits. Four months have passed since Defendants filed their motions for summary judgment, and Plaintiff has not attempted to submit these additional affidavits. Furthermore, Plaintiffs' description of what their witnesses will say demonstrates that they would not rescue her claims.

Plaintiff contends that Inmate Lucy Tuttle observed Lopez verbally abuse and physically threaten her in the chapel on August 18, 2008 and in the subsequent meeting on that same day (to the extent that these are separate instances). As was discussed above, Lopez's alleged verbal abuse does not support a § 1983 claim for cruel and unusual punishment, as Plaintiff alleges.

Plaintiff also contends that Lieutenant Collins was Sergeant Collins at BHCF at the time Lopez prevented Plaintiff from entering her work assignment as Catholic Chaplain's Clerk, again without specifying when this occurred. Lopez's alleged refusal to allow Plaintiff to work as Catholic clerk is insufficient to support § 1983 claim, as Lopez holds no right to her prison assignment. To the extent that Collins's affidavit would support Plaintiff's allegation that Lopez falsely reported her absent from work in retaliation for the Plaintiff's complaints, Plaintiff has not established that her complaints motivated the allegedly false reporting. Furthermore, Plaintiff cannot establish that the adverse action of her removal from her position as Catholic clerk was caused by the allegedly false reports, as Hayden cited other valid reasons for his decision to remove her.

Conclusion

***12** For the reasons stated above, Defendants' motions for summary judgment are granted.

It is so ordered.

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Footnotes

1 To the extent that Plaintiff's allegations of retaliation are not contained in her complaint, but come from her deposition testimony and other filings, they are dismissed on this independent ground. *Kearney v. County of Rockland,* 373 F.Supp.2d 434,440–41 (S.D.N.Y.2005) ("plaintiff must set forth facts that will allow each party to tailor its discovery to prepare an appropriate defense. Because a failure to assert a claim until the last minute will inevitably prejudice the defendant, courts in this District have consistently ruled that it is inappropriate to raise new claims for the first time in submissions in opposition to summary judgment.")

2 Plaintiff contends that she did show up for work but was sent away by Lopez. This claim against Lopez is addressed, infra. Hayden's reliance on Lopez's absence report was reasonable and was a legitimate basis for Hayden's decision to dismiss Plaintiff.

3 A plaintiff does have a claim "where the fabrication of evidence was motivated by a desire to retaliate for the inmate's exercise of his substantive constitutional rights." *Franco v. Kelly,* 854 F.2d 584, 588–89 (2d Cir.1988). However, as discussed above, Plaintiff, to the extent she makes such a claim, fails to establish that Lopez was motivated by Plaintiff's complaints when she filed the allegedly false report.

4 As with her retaliation claims, to the extent that Plaintiff's allegations of infringement on her rights to practice her religions are not contained in her complaint, but come from her deposition testimony and other filings, they are dismissed on this independent ground. Kearney, 373 F.Supp.2d at 440–41.

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