2017 WL 4838322
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United States District Court, S.D. New York.

Raysun SMITH, Plaintiff,

v.

Correction Officer S. MILLER, individually and in his official capacity; Correction Officer L. Tabor, individually and in his official capacity; Correction Officer D. Kothari, individually and in his official capacity; Correction Officer Diaz, individually and in his official capacity; Correction Officer J. Rufino, individually and in his official capacity; Sergeant C. Llorens, individually and in his official capacity; Sergeant G. Heal, individually and in his official capacity; One John Doe Nurse, individually and in his official capacity; Sergeant Del Bianco, individually and in his official capacity; Correction Officer A. Riollano, individually and in his official capacity; M. O'Rafferty, individually and in his official capacity; Correction Officer Allen, individually and in his official capacity; Correction Officer F. Sioco, individually and in his official capacity; John Doe Correction Officer; Captain Harris, individually and in his official capacity., Defendants.

No. 15-CV-9561 (NSR)
|
Signed 10/23/2017

Attorneys and Law Firms

Raysun Smith, Brooklyn, NY, pro se.

Kristen Rose Vogel, New York Office of the Attorney General, New York, NY, for Defendants.

OPINION & ORDER

NELSON S. ROMÁN, United States District Judge

***1** Plaintiff Raysun Smith, proceeding *pro se* and *in forma pauperis*, brings this 42 U.S.C. § 1983 action against Defendants Correction Officer ("C.O.") Miller, C.O. Tabor, C.O. Rufino, C.O. Riollano, C.O. O'Rafferty, Sergeant Del Bianco, C.O. Sioco, C.O. Allen, C.O. Kothari, Sergeant Llorens, and Captain Harris, alleging that they violated his constitutional rights while he was in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"). Presently before the Court is a motion to dismiss portions of Plaintiff's Complaint submitted by Defendants Rufino, Riollano, O'Rafferty, Del Bianco, Sioco, Allen, and Harris.[1] Plaintiff has not submitted an opposition to this motion. For the following reasons, Defendants' partial motion to dismiss is GRANTED in part and DENIED in part.

BACKGROUND

I. Factual Allegations

The following facts are derived from the Complaint and are assumed to be true for the purposes of this motion.

a. Plaintiff's grievance and the January 5, 2015 incident

On December 17, 2014, while Plaintiff was incarcerated at Fishkill Correctional Facility ("Fishkill"), a corrections officer refused to take Plaintiff's picture and issue him a new identification card because Plaintiff's hair was styled in cornrow braids. (Compl. ¶ 23-27, ECF No. 2.) On December 30, 2014, Plaintiff filed a grievance with the Inmate Grievance Resolution Committee ("IGRC") at Fishkill, claiming that the officer's refusal to issue him an identification card was an act of discrimination. (*Id.* ¶ 28.) Plaintiff was interviewed by the acting IGRC supervisor, Defendant Del Bianco, about the incident on January 5, 2015. (*Id.* ¶ 29-30.) During the interview, Defendant Del Bianco became angry and threatened to place Plaintiff in the Secured Housing Unit ("SHU") if he did not take the cornrow braids out of his hair. (*Id.* ¶ 32.) Defendant Del Bianco further threatened that "he would come up to Plaintiff's housing unit and check to see if Plaintiff had complied and if not he would kick his ass" or send one of his officers to "handle it for him." (*Id.* ¶ 33.) Plaintiff thereafter left the grievance office and returned to his housing unit. (*Id.*)

Upon returning to his housing unit, fearing that he would be sent to the SHU, Plaintiff packed up all of his belongings as a precautionary measure. (*Id.* ¶ 35.) Plaintiff then left his housing unit to attend his daily assigned school program. (*Id.* ¶ 36.) When Plaintiff returned to his housing unit at about three in the afternoon, Defendant Miller confronted

Plaintiff and asked him why his property was packed up. (*Id.* ¶ 43.) Plaintiff informed Defendant Miller about Defendant Del Bianco's threat to send Plaintiff to the SHU, to which Defendant Miller responded, "[G]et the fuck out of here, get away from my desk." (*Id.* ¶ 44.) Later that afternoon as Defendant Miller was distributing inmate mail in Plaintiff's housing unit, Defendant Miller instructed Plaintiff to go back to his room and unpack his property. (*Id.* ¶ 47.) Plaintiff responded "O.K" while simultaneously laughing at a piece of mail he had just received. (*Id.*) Defendant Miller, believing that Plaintiff was laughing at him, began yelling at Plaintiff. (*Id.* ¶ 48.) Defendant Miller asked Plaintiff, "Did you just fucking laugh at me?" and instructed Plaintiff to "go to [his] fucking room, unpack [his] shit" and not to come out for the night. (*Id.*)Defendant Miller then escorted Plaintiff back to his room, and "in a threatening manner stood close to Plaintiff's face and stated 'You think this is a game? Do you know where you are at?' " and warned, "I'll be back." (*Id.* ¶ 49.)

***2** Shortly thereafter, Defendant Miller returned to Plaintiff's room with Defendant Tabor. (*Id.* ¶ 53.)While Defendant Tabor stood outside of Plaintiff's room door, Defendant Miller approached Plaintiff, stated "It's not so funny now," and punched Plaintiff in his left eye. (*Id.* ¶ 56-57.) Defendant Tabor then ran into the room and threw Plaintiff to the floor. (*Id.* ¶ 58.) Plaintiff was subsequently placed in handcuffs. (*Id.* ¶ 59.) Defendants Diaz and Kothari ran into Plaintiff's room and, along with Defendants Miller and Tabor, proceeded to kick and punch Plaintiff in the face, head, and body while he remained restrained on the floor. (*Id.* ¶ 60-61.)

After nearly three minutes, Defendant Sgt. Llorens arrived to Plaintiff's room. (*Id.* ¶ 62.) Defendant Llorens was present for part of the beating and did not intercede. (*Id.* ¶ 66.) Plaintiff was then raised to his feet and placed in a chokehold. (*Id.* ¶ 64.) While in this chokehold, Defendants began beating Plaintiff once again. (*Id.* ¶ 67.) Plaintiff attempted to inform Defendant Llorens that he could not breathe. (*Id.* ¶ 68.) Defendant Llorens replied, "Now you know how Eric Gardner felt," and laughed. (*Id.*)

Defendant Heal arrived while these events were unfolding and also failed to intercede. (*Id.* ¶ 69.) Defendant Heal and the other officers involved in the beating eventually escorted Plaintiff to the Regional Medical Unit ("RMU"). (*Id.* ¶ 70.) The officers continued to beat Plaintiff as they escorted him to the RMU. (*Id.* ¶ 71.)

Once at the RMU, Plaintiff was seen by a nurse—Defendant John Doe Nurse—who refused to document Plaintiff's injuries. (*Id.* ¶ 72-73.) The nurse told Plaintiff, "[T]he officers said nothing happened to you and that's what I'm going to write" and that "even if something did happen to you, you look like you deserved it, so I'll make sure there's no record of it because they did their job." (*Id.* ¶ 73-74.) Plaintiff did not receive medical treatment for his injuries. Plaintiff was thereafter taken to the SHU. (*Id.* ¶ 77.)

On January 8, 2015, Plaintiff was informed that the IGRC had denied the grievance Plaintiff filed regarding the alleged discrimination that took place on December 17, 2014. (*Id.* ¶ 78.) Plaintiff appealed the denial to the facility's superintendent on January 9, 2015. (*Id.* ¶ 79.) The superintendent denied Plaintiff's grievance appeal on January 13, 2015. (*Id.* ¶ 81.) Thereafter, Plaintiff filed an appeal of the superintendent's decision to the Inmate Grievance Program Central Office Review Committee ("CORC") on January 16, 2015. (*Id.* ¶ 82.) Plaintiff received a denial of his discrimination appeal from CORC on April 1, 2015, (*Id.* ¶ 111.)

On January 11, 2015, Plaintiff filed an additional grievance with the IGRC regarding the excessive use of force, discrimination, and denial of medical treatment that he experienced on January 5, 2015. (*Id.* ¶ 80.) Plaintiff's grievance was denied by the superintendent on February 5, 2015. Plaintiff filed a timely appeal with CORC. (*Id.* ¶ 90.) On April 29, 2015, Plaintiff received a denial of his excessive force appeal to CORC. (*Id.* ¶ 112.)

b. Acts of Retaliation

After Plaintiff filed his grievance for the events that took place on January 5, 2015, Plaintiff alleges that many Defendants retaliated against him. First, on February 3, 2015, Defendants Allen and the John Doe C.O. entered Plaintiff's cell to take a photograph of Plaintiff's cellmate, Troy Evans. (*Id.* ¶ 83.) Mr. Evans was asleep at the time, however, and the unnamed C.O. asked Plaintiff to wake him. (*Id.* ¶ 84.) Plaintiff responded that waking his cellmate was not his job. (*Id.* ¶ 85.) Defendant Allen, the other officer, and Plaintiff then got into a verbal dispute. (*Id.* ¶ 86.)

***3** The next day, during lunchtime, Defendant Allen opened the food slot in Plaintiff's cell door and intentionally threw two cups of liquid at Plaintiff. (*Id.* ¶ 88.) Defendant Allen then told Plaintiff, "[S]ee what happens when you piss officers off." (*Id.* ¶ 89.) Plaintiff alleges that Allen was clearly

referring to both the verbal altercation from the previous day and the January 5th incident. (*Id.* ¶ 90.) Fearing for his safety, Plaintiff filed an official grievance relating to this incident on February 4, 2015. (*Id.* ¶ 92.)

A second incident occurred on February 10, 2015, when Plaintiff alleges he was issued a retaliatory and false inmate misbehavior report by Defendant Rufino that was cosigned by Defendant Sioco. (*Id.* ¶ 94.) In the report, Defendant Rufino alleged that Plaintiff was yelling into the gallery and refused to stop, stating "[G]o ahead, give me a ticket, I don't care." (*Id.* ¶ 95.) At a disciplinary hearing held on February 18, 2015 regarding the hearing, Plaintiff's cellmate admitted both orally and in a written statement that he was the one yelling into the gallery and speaking to Defendant Rufino. (*Id.* ¶ 99-98.) Nonetheless, Plaintiff was found guilty of the allegations. (*Id.* ¶ 99.) Plaintiff subsequently filed an appeal to the superintendent to address the retaliatory ticket on February 8, 2015. Captain Harris denied the appeal and Plaintiff filed an appeal with DOCCS on February 27, 2015. (*Id.* ¶ 100.) Plaintiff's DOCCS appeal was denied on March 10, 2015. (*Id.* ¶ 102.)

On February 22, 2015, Plaintiff also filed a grievance stating that he was being fed his meals off of dirty trays in retaliation to the January 5, 2015 incident. (*Id.* ¶ 104.)

Finally on March 1, 2015, Defendants Riollano and Rufino searched Plaintiff's cell. (*Id.* ¶ 105.) Shortly thereafter, on March 7, 2015, Defendants O'Rafferty and Rufino again searched Plaintiff's cell. (*Id.* ¶ 106.) During this second search, Defendants O'Rafferty and Rufino placed their booted feet onto Plaintiff's pillow and left footprints on Plaintiff's bedding. (*Id.* ¶ 107.) Defendants O'Rafferty and Rufino also spit on Plaintiff's Muslim prayer rug during their search. (*Id.* ¶ 108.) Fearing for his safety and religious freedom, Plaintiff filed a grievance to address the retaliatory actions of Defendant O'Rafferty. (*Id.* ¶ 109.)

Plaintiff initiated this action pursuant to 42 U.S.C. § 1983 on December 07, 2015, alleging violations of his First and Eighth Amendment rights. Defendants filed the present motion to dismiss portions of Plaintiff's Complaint on October 25, 2016. The motions is unopposed.

STANDARD ON A MOTION TO DISMISS

Under Rule 12(b)(6), the inquiry for motions to dismiss is whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *accord* *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010) (applying same standard to Rule 12(c) motions). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. The Court must take all material factual allegations as true and draw reasonable inferences in the non-moving party's favor, but the Court is " 'not bound to accept as true a legal conclusion couched as a factual allegation,' " or to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

***4** In determining whether a complaint states a plausible claim for relief, a district court must consider the context and "draw on its judicial experience and common sense." *Id.* at 679. A claim is facially plausible when the factual content pleaded allows a court "to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

"Where, as here, a plaintiff proceeds *pro se,* the court must 'construe [ ] [his] [complaint] liberally and interpret[ ] [it] to raise the strongest arguments that [it] suggest[s].' " *Askew v. Lindsey*, No. 15-CV-7496 (KMK), 2016 WL 499261, at *2 (S.D.N.Y. Sept. 16, 2016) (citing *Sykes v. Bank of Am.*, 723 F.3d 399, 403 (2d Cir. 2013)). Yet, "the liberal treatment afforded to *pro se* litigants does not exempt a *pro se* party from compliance with relevant rules of procedural and substantive law.' " *Id.* (citing *Bell v. Jendell*, 980 F. Supp. 2d 555, 559 (S.D.N.Y. 2013)).

DISCUSSION

Liberally construed, Plaintiff's Complaint alleges claims under the First and Eighth Amendments. Specifically, Plaintiff suggests First Amendment retaliation claims against Defendants Allen, Rufino, Sioco, O'Rafferty, Riollano, and Harris and free exercise claims against Defendants Rufino and O'Rafferty. Additionally, Plaintiff's Complaint implies an Eighth Amendment failure to protect claim against Defendant

Del Bianco. In the present motion, Defendants assert that (1) Plaintiff's claims should be dismissed for failure to exhaust administrative remedies, and (2) Plaintiff failed to state a claim for any constitutional violation. The Court will address each set of claims in turn.

I. Exhaustion

Defendants first contend that several of Plaintiff's claims should be dismissed for failure to exhaust administrative remedies, including (1) Plaintiff's claim against Defendant Allen for throwing two cups of liquid at him; (2) Plaintiff's claim that he was being fed his meals off dirty trays; (3) Plaintiff's claim regarding the search of his cell conducted on March 1, 2015; and (4) Plaintiff's claim regarding the search of cell conducted on March 7, 2015. (Defs.' Mot. at 9.) The Court finds that dismissal of Plaintiff's above claims for failure to exhaust is inappropriate at this time.

Under the Prison Litigation Reform Act of 1995 ("PLRA"), "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "The PLRA's exhaustion requirement 'applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.' " *Giano v. Goord*, 380 F.3d 670, 675 (2d Cir. 2004) (quoting *Porter v. Nussle*, 534 U.S. 516, 532, (2002)).

Exhausting all remedies " 'means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).' " *Washington v. Chaboty*, No. 09-CV-9199, 2015 WL 1439348, at *6 (S.D.N.Y. Mar. 30, 2015) (quoting *Hernandez v. Coffey,* 582 F.3d 303, 305 (2d Cir. 2009)). "[B]ecause 'it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion[,] ... [t]he exhaustion inquiry ... requires that [the court] look at the state prison procedures and the prisoner's grievance to determine whether the prisoner has complied with those procedures.' " *Espinal v. Goord*, 558 F.3d 119, 124 (2d Cir. 2009) (quoting *Jones v. Bock*, 549 U.S. 199, 218 (2007)).

***5** A person detained or incarcerated at a DOCCS facility must exhaust all steps of the Inmate Grievance Resolution ("IGR") Program ("IGRP"). *See Robinson v. Henschel*, No. 10-CV-6212, 2014 WL 1257287, at *10 (S.D.N.Y. Mar. 26, 2014). The IGRP provides a three-tiered process for adjudicating inmate complaints: (1) the prisoner files a grievance with the IGR committee ("IGRC"), (2) the prisoner may appeal an adverse decision by the IGRC to the superintendent of the facility, and (3) the prisoner then may appeal an adverse decision by the superintendent to the Central Office Review Committee ("CORC"). *See Espinal*, 558 F.3d at 125; *see also* 7 N.Y. Comp. Codes R. & Regs. § 701.5.

In the present case, Defendants argue that several of Plaintiff's retaliation claims should be dismissed because Plaintiff did not properly exhaust all available administrative remedies. In support of this argument, Defendants provide a declaration from the Assistant Director of the Inmate Grievance Program at DOCCS, Jeffrey Hale, along with two exhibits, purporting to demonstrate that Plaintiff never appealed to CORC his grievances relating to the above claims. (ECF No. 34.) Despite this action being at the motion to dismiss phase of litigation, Defendants assert that the Court may consider their external evidence. This Court, however, disagrees.

Courts typically "may not look beyond the four corners of the complaint in considering a motion to dismiss." *Mayo v. Federal Government*, 558 Fed.Appx. 55, 56 (2d Cir. 2014). "A complaint 'is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.' " *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 155 (2d Cir. 2002)). Where a document is not attached as an exhibit nor incorporated by reference, a court "may nevertheless consider it where the complaint 'relies heavily upon its terms and effect,' thereby rendering the document 'integral' to the complaint." *Id.* (quoting *DiFolco v. MSNBS Cable L.L.C.*, 662 F.3d 104, 111 (2d Cir. 2010)).

In the context of § 1983 claims, courts have taken notice of administrative records outside of the pleadings to determine whether a plaintiff's claims have been properly exhausted. As this Court has noted, however, "in those cases the complaint a) was the standard *pro se* form complaint that has a check-box regarding exhaustion, b) contained allegations clearly stating that the inmate had exhausted his administrative remedies, or

c) clearly pointed to the fact that the inmate had, in fact, not exhausted." *Colon v. New York State Dep't of Corr. & Cmty. Supervision*, No 15-CV-7432 (NSR), **2017** **WL** 4157372, at *5 (S.D.N. Y Sept. 15, **2017**). In such cases, the outside records could be considered by the court because they were relied on and/ or incorporated by plaintiff's explicit references to administrative exhaustion in the complaint. Where none of these conditions is satisfied, however, this Court has refused to look beyond the four corners of the complaint for the purposes of a motion to dismiss. *Id.*

In the case at hand, Plaintiff neither incorporated by reference nor relied on the administrative records that Defendants now ask this Court to consider. Although Plaintiff explicitly states that he "exhausted all of his administrative remedies trying to address this violent incident," Plaintiff's allegation of administrative exhaustion refers only to the January 5th incident. (*See* Compl. ¶ 113.) Plaintiff does *not* claim to have exhausted the administrative remedies for any of the claims at issue in Defendants' present motion. Neither does Plaintiff assert he appealed the grievances relating to these claims to the highest level—the superintendent of CORC.

***6** Moreover, Plaintiff was under no obligation to affirmatively plead or demonstrate administrative exhaustion in the Complaint. As the Second Circuit has recognized, "[f]ailure to exhaust administrative remedies is an affirmative defense under the PLRA, *not a pleading requirement.*" *Williams v. Priatno*, 829 F.3d 118, 122 (2d Cir. 2016) (emphasis added) (internal citations omitted); *see also* *Jones v. Bock*, 549 U.S. 199, 216 (2007)("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specifically plead or demonstrate exhaustion in their complaints"); *contra* *Smart v. Goord*, 441 F. Supp. 2d 631, 637 (S.D.N.Y. 2006) ("As exhaustion of administrative remedies is a prerequisite to bringing suit, an inmate plaintiff necessarily refers to and relies on documents exhibiting proof of exhaustion. Because the exhaustion issue is an integral part of the prisoner's claims, the Court may refer to materials outside of the complaint on a 12(b)(6) motion in determining whether a plaintiff exhausted."), *reconsidered*, No. 04-CV-8850 (RWS), 2008 **WL** 591230, at *2 (recognizing that the Court's previous opinion "[did] not faithfully capture the subtlety of exhaustion doctrine in the Second Circuit" and that the Court should have addressed non-exhaustion as an affirmative defense).

Therefore, Defendants' records regarding Plaintiff's CORC appeals were neither incorporated by reference nor relied upon by Plaintiff in the Complaint. As such, the Court will not consider Defendants' documentary evidence of non-exhaustion at this juncture.

While it is imperative to resolve the issue of exhaustion as early as possible, if "it is not clear from the face of the complaint whether the plaintiff exhausted, a Rule 12(b)(6) motion is not the proper vehicle." *McCoy v. Goord*, 255 F. Supp. 2d 233, 249 (S.D.N.Y. 2003). In the present case, it is not clear from the face of the complaint that Plaintiff has failed to exhaust his administrative remedies. Accordingly, dismissal of Plaintiff's claims for lack of exhaustion is improper at this time. The Court now addresses each of Plaintiff's claims individually.

II. First Amendment Retaliation Claims

The Second Circuit urges caution when addressing retaliation claims brought by prisoners because "claims by prisoners that particular administrative decisions have been made for retaliatory purposes are prone to abuse. Virtually every prisoner can assert such a claim as to every decision which he or she dislikes." *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983). Therefore, courts should "examine prisoners' claims of retaliation with skepticism and particular care." *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995). Accordingly, "a complaint which alleges retaliation in wholly conclusory terms may safely be dismissed on the pleadings alone." *Flaherty*, 713 F.2d at 13. To survive a motion to dismiss, a prisoner asserting a retaliation claim must "allege '(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.' " *Davis v. Goord*, 320 F.3d 346, 352 (2d Cir. 2003)(quoting *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir. 2001)).

Here, Plaintiff alleges that many of the Defendants engaged in acts of retaliation after he filed a grievance reporting Defendants Miller, Tabor, Diaz, Kothari, Heal, and Llorens for their alleged use of excessive force on January 5, 2015. [2] As the Second Circuit has recognized, the filing of prison grievances is a constitutionally protected activity. *Davis*, 320 F.3d at 352. Plaintiff, therefore, meets the first prong of

the test for retaliation claims. The Court now turns to whether Plaintiff's individual retaliation claims satisfy the remaining portions of the tripartite test.

a. Retaliation Claim Against Defendant Allen

***7** Plaintiff fails to raise a plausible claim of retaliation against Defendant Allen. In the Complaint, Plaintiff alleges that on February 4, 2015, Defendant Allen "intentionally threw two cups of liquid at Plaintiff," and stated, "see what happens when you piss officers off." (Compl. 83-89.)

Assuming, *arguendo*, that Defendant Allen's behavior constitutes an adverse action, Plaintiff nonetheless fails to allege a causal connection between his protected activity and Defendant Allen's conduct with sufficient specificity. The alleged causal connection "must be sufficient to support the inference that the speech played a substantial part in the [ ] adverse [ ] action." *Walker v. Schriro*, 2013 WL 1234930, at *8 (S.D.N. Y Mar. 26, 2013) (internal quotation marks omitted). Both direct and circumstantial evidence can support such an inference. However, "[e]ven at the motion to dismiss stage, the inmate must allege more than his personal belief that he is a victim of retaliation," *Id.* (internal quotations omitted). "Conclusory allegations of retaliation are not sufficient; the plaintiff must allege facts from which retaliation may plausibly be inferred." *Jabot v. MHU Counselor Roszel*, No. 14-CV-3951 (VB), 2016 WL 6996173, at *6 (S.D.N. Y Nov. 29, 2016).

Here, Plaintiff fails to state facts from which retaliation may be inferred. "Generally, alleged retaliation motivated by an action the prisoner took which did not personally involve the prison officials is insufficient for a retaliation claim." *Ortiz v. Russo*, No. 13-CV-5317 (ER), 2015 WL 1427247, at *11 (S.D.N. Y Mar. 27, 2015) (citing *Wright v. Goord*, 554 F.3d 255, 274 (2d Cir. 2009) (dismissing a *pro se* prisoner's retaliation claim against a corrections officer where the alleged basis for retaliation was a letter the prisoner wrote that neither named nor addressed the defendant)). Here, Plaintiff merely makes the conclusory assertion that Defendant Allen's statement, "see what happens when you piss officers off," referred to the January 5th incident and Plaintiff's subsequent grievance. [3] Defendant Allen, however, had no apparent involvement in the January 5th incident and Plaintiff fails to allege any facts that would support a finding that Defendant Allen was personally motivated by Plaintiff's grievance. While there may exist instances in which retaliation claims may be established against defendants who were not personally involved in the original incident, at a minimum, plaintiffs must allege that such defendants have personal knowledge of the protected activity that purportedly motivated the retaliatory conduct. In the present case, Plaintiff neither alleges that Defendant Allen was somehow personally involved in the January 5th incident, or even that Defendant Allen knew of the incident. Absent such allegations, Plaintiff fails to establish the necessary causal connection between Defendant Allen's adverse action and Plaintiff's protected conduct.

b. Retaliation claim Against Defendants Rufino, Sioco, and Harris—False Misbehavior Report

***8** Similarly, Plaintiff fails to establish the necessary causal connection between his protected activity—filing a grievance—and the alleged retaliatory conduct of Defendants Rufino, Sioco, and Harris. Plaintiff alleges that Defendant Rufino issued him a retaliatory and false inmate misbehavior report, signed by Defendant Sioco, accusing Plaintiff of yelling into the prison gallery and refusing orders to stop. (Compl. ¶ 94-95.) Despite written admission from Plaintiff's cellmate that it was he who was yelling into the gallery, Plaintiff was found guilty of the allegations at a hearing on February 18, 2015. (*Id.* ¶ 98-99.) Plaintiff claims he was found guilty of the false allegations in retaliation for his grievance relating to the January 5th incident. (*Id.*) Plaintiff appealed the retaliatory false ticket, but his appeal was denied by Captain Harris. (*Id.* ¶ 101.)

Like his allegations against Defendant Allen, Plaintiff's allegations against Defendants Rufino, Sioco, and Harris lack facts from which a retaliatory motive may be inferred. In evaluating whether a causal connection exists between a protected activity and the filing of an allegedly retaliatory false misbehavior report, courts have considered a number of factors, "including: (i) the temporal proximity between the protected activity and the alleged retaliatory act; (ii) the inmate's prior good disciplinary record, (iii) vindication at a hearing on the matter; and (iv) statements by the defendant concerning his motivation." *Ortiz*, 2015 WL 1427247, at *11.

As to the first factor, Plaintiff filed his grievance relating to the January 5th incident on January 11, 2015. (Compl. ¶ 80.) The false misbehavior report was issued on February 10, 2015. (*Id.* ¶ 94.) While "[t]he Second Circuit has not

drawn a bright line defining the outer limits beyond which a temporal relationship is too attenuated to establish causation," "courts in this Circuit generally hold that a gap longer than two months severs the inferred causal relationship." *Graham v. Macy's Inc.*, No. 14-CV-3192 (PAE), 2016 WL 354897, at *9 (S.D.N. Y Jan. 28, 2016)(internal quotation marks and citations omitted), *aff'd.*, 675 Fed.Appx. 81 (2d Cir. 2017). In the present case, Plaintiff's grievance and the false misbehavior report were separated by only one month. The temporal proximity between Plaintiff's protected activity and the alleged retaliatory action could thus support an inference of retaliatory intent.

The remaining factors, however, do not support an inference of retaliation. The Complaint is silent regarding Plaintiff's previous disciplinary record, Plaintiff was found guilty at a subsequent hearing, and Plaintiff does not allege any statements by Defendants regarding their motivation. Moreover, Defendants Rufino, Sioco, and Harris do not appear to have been personally involved in the January 5th incident and Plaintiff fails to allege that Defendants Rufino, Sioco, and Harris even knew of the incident and Plaintiff's subsequent grievance. Plaintiff, therefore, fails to raise a retaliation claim against Defendants Rufino, Sioco, and Harris with regards to the false misbehavior report.

c. Retaliation claims against Rufino, Riollano, and O'Rafferty—Cell searches

Plaintiff next alleges that Defendants Rufino, Riollano, and O'Rafferty engaged in retaliation by searching his cell on two occasions—first on March 1, 2015 and again on March 7, 2015. (Compl. ¶ 105-07.) Plaintiff further alleges that in the course of the second search, Defendants Rufino and Riollano placed their booted feet on his pillow and blanket and spit on his Muslim prayer rug. *Id.* Plaintiff refers to these searches as "retaliatory actions" in the Complaint, but does not specify what protected conduct Defendants were retaliating against. Liberally construed, Plaintiff's claim appears to allege that Defendant Rufino, Riollano, and O'Rafferty retaliated against Plaintiff due to his appeal of the false misbehavior report issued by Defendant Rufino on February 10, 2015. [4]

***9** However, Plaintiff's allegations are insufficient to raise a retaliation claim against Defendants Rufino, Riollano, and O'Rafferty. Although appeals of misbehavior reports—like the filing of grievances—constitute protected conduct, *Wood v. Cty. of Sullivan*, No. 00-CV-4339 (DLC), 2002 WL 31158822, at *10 (S.D.N. Y Sept. 27, 2002), Plaintiff's allegations do not satisfy the remaining elements of a retaliation claim.

Specifically, the alleged conduct of Defendants Rufino, Riollano, and O'Rafferty does not amount to an adverse action. An adverse action is any action "that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." *Id.* at 353 (internal quotation marks omitted). Otherwise, the act is "*de minimis* and therefore outside the ambit of constitutional protection." *Id.* (internal quotation marks omitted). "In making this determination, the court's inquiry must be 'tailored to the different circumstances in which retaliation claims arise,' bearing in mind that '[p]risoners may be required to tolerate more ... than average citizens, before a [retaliatory] action taken against them is considered adverse." *Davis*, 320 F.3d at 353 (quoting *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001)).

Here, Plaintiff accuses Defendants Rufino, Riollano, and O'Rafferty of conducting retaliatory cell searches. "The Second Circuit has not addressed whether a cell search can constitute an adverse action for purposes of a First Amendment retaliation claim." *Mateo v. Alexander*, No. 10-CV-8427 (LAP) (DCF), 2012 WL 864805, at *4 (S.D.N. Y Mar. 14, 2012). However, numerous district courts in this circuit have recognized that while searches alone may not be actionable, prisoners "can assert a retaliation claim for [defendants'] conduct in conjunction with the cell search." *Rodriguez v. McClenning*, 399 F. Supp. 2d 228, 239 (S.D.N.Y. April 22, 2005); *see also Steward v. Richardson*, No. 15-CV-9034 (VB), 2016 WL 7441708, at *5 (S.D.N.Y. Dec. 27, 2016) ("Considered collectively, as they ought to be, plaintiff's allegations of retaliatory cell searches and destruction of his property are sufficient to state a claim.").

Plaintiff does not allege that Defendant Riollano engaged in any retaliatory action beyond the search of his cell. (*See* Compl. ¶ 105-07.) Because cell searches alone have not been found actionable as adverse actions in this Circuit, the retaliation claim against Defendant Riollano is dismissed.

Defendants Rufino and O'Rafferty, however, are alleged to have stepped on Plaintiff's bedding and spit on Plaintiff's Muslim prayer rug while conducting their search. (*Compl.* ¶ 107-8.) The Court, therefore, considers the cell search in conjunction with Defendants' other conduct. Even in conjunction, however, Defendants' acts do not constitute

an adverse action sufficient to support Plaintiff's retaliation claim. Courts in this circuit have typically only found cell searches to constitute adverse actions when they involve significant deprivations or destruction of property. *See, e.g., Smith v. City of New York*, No. 14-CV-5927, **2017 WL** 2172318, at *4 (S.D.N. Y May 16, **2017**)("[T]he confiscation or destruction of property taken at the time of searches may constitute an adverse action" (internal quotation marks omitted)); *Smith v. City of New York*, No. 03-CV-7576, 2005 **WL** 1026551, at *3 (S.D.N. Y May 3, 2005) ("[R]etaliatory destruction of a prisoner's personal property has previously been found substantial enough to qualify as an adverse action"). Absent such deprivations, courts have been reluctant deem cell searches adverse actions. *See Shannon v. Venettozzi*, No. 13-CV-4530 (KBF), 2015 **WL** 114179, at *6 (S.D.N.Y. Jan 8, 2015) (recognizing that "courts in this district have found that destruction of personal property is often an adverse action, but minor cases of withholding property are typically *de minimis*"), *aff'd in part, vacated in part*, 670 Fed.Appx. 29 (2d Cir. 2016); *Smith*, **2017 WL** 2172318, at *4 (ruling that Defendant's act of throwing out an inmate's food and bed linen was not a substantial enough injury to constitute an adverse action because it would not deter a similarly situated individual of ordinary firmness form exercising his or her constitutional rights); *Fann v. Arnold*, No. 14-CV-6187 (FGP), 2016 **WL** 2858927, at *2 (W.D.N.Y. May 16, 2016) (ruling that the plaintiff's allegation that "all of his property was thrown in the shower" was a *de minimis* act of retaliation").

***10** Here, the alleged retaliatory actions of Defendants Rufino and O'Rafferty during the cell search—while inappropriate and harassing—did not deprive Plaintiff of his property nor cause its destruction. Accordingly, their actions are *de minimis* and do not constitute an adverse action. Plaintiff's retaliation claims against Defendants Rufino and O'Rafferty are therefore dismissed.

d. Retaliation Claims Against Unnamed Defendants—Dirty Trays

For his final retaliation claim, Plaintiff alleges that he was being fed meals off of dirty trays "in retaliation for the incident of January 5, 2015." (Compl. ¶ 104.) Plaintiff fails, however, to identify the parties responsible for these retaliatory actions or even name a "John Doe" defendant. Without more specific factual allegations, no causal connection between Plaintiff's protected conduct and the retaliatory acts may be inferred. Plaintiff's retaliation claim regarding the dirty trays is therefore dismissed. *See Flynn v. Ward*, No. 15-CV-1028, 2016 **WL** 1357737, at *14 (N.D.N.Y. Apr. 5, 2016) (ruling that "Plaintiff's failure to identify the parties responsible for the [retaliatory] incidents requires the Court to dismiss these retaliation claims").

III. First Amendment Free Exercise Claim

Plaintiff's allegation that he feared for his religious freedom after Defendants Rufino and O'Rafferty spit on his Muslim prayer rug during the March 7, 2015 search of his cell fails to raise a First Amendment Free Exercise claim.

"The Free Exercise Clause of the First Amendment is an 'unflinching pledge to allow our citizenry to explore ... religious beliefs in accordance with the dictates of their conscience." *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984)). "Prisoners have long been understood to retain some measure of the constitutional protection afforded by the First Amendment's Free Exercise Clause." *Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir. 2003). However, the Second Circuit has acknowledged that, "although prisoners do not abandon their constitutional rights at the prison door, lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Saluhuddin v. Goord*, 467 F.3d 263, 274 (2d Cir. 2006) (internal citations and alterations omitted). Accordingly, the First Amendment protection afforded to inmates must be balanced with "the interests of prison official charged with complex duties arising from administration of the penal system." *Ford*, 352 F.3d at 588.

To establish a Free Exercise claim, a plaintiff must typically show that a sincerely held religious belief was substantially burdened by conduct that was not reasonably related to a legitimate penological interest. *Turner v. Sidorowicz*, No. 12-CV-7048 (NSR), 2016 **WL** 3938344, at *5 (S.D.N. Y July 18, 2016); *Holland v. Goord*, 758 F.3d 215, 220-23 (2d Cir. 2014). For the purposes of this analysis, a "substantial burden" exists when "the state put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs." *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (internal quotation marks omitted). However, the Second Circuit has questioned the vitality of the "substantial burden" test following the concern articulated by the Supreme Court in

Employment Division v. Smith, 494 U.S. 872 (1990), that application of the test "embroils courts in the unacceptable business of evaluating the relative merits of differing religious claims." *Holland*, 758 F.3d at 220 (internal quotation marks omitted).

***11** While this Court recognizes that "[i]t is not within the judicial ken to question the centrality of a particular beliefs or practice to a faith," such a concern does not apply to the present action. *See* *Smith*, 494 U.S. at 887 (quoting *Hernandez v. C.I.R.*, 490 U.S. 680, 686 (1989)). Here, Plaintiff has failed to allege *any* burden on his religious beliefs. In such cases—where the significance or centrality of a religious practice is not at issue—courts in this circuit have engaged in the "substantial burden" analysis. *See Colliton v. Bunt*, 15-CV-6580 (CS), 2016 WL 7443171, *11, n. 15 (S.D.N.Y. Dec. 27, 2016) (recognizing that the concerns articulated in *Holland* did not apply where the plaintiff failed to allege any burden on his religious beliefs), *appeal dismissed*, (Jan. 4, 2017); *Newdow v. Peterson*, 753 F.3d 105, 109-10 (2d Cir. 2014) (affirming the district court's dismissal of a Free Exercise claim where atheist plaintiffs failed to identify how the placement of "In God We Trust" on U.S. currency burdened their religious activity). Because Plaintiff makes no allegations regarding *how* Defendants' actions pressured him to modify his behavior or violate his beliefs, he fails to state a Free Exercise Claim against Defendants Rufino and O'Rafferty.

IV. Eighth Amendment Claim

Plaintiff's Complaint, liberally construed, also suggests a possible Eighth Amendment claim against Defendant Del Bianco for inciting or encouraging the assault that transpired on January 5, 2015. Plaintiff alleges that on January 5, 2015, Defendant Del Bianco, the acting IGRC supervisor, "became angry and irate and began screaming and threatening him," saying that he was going to "kick his ass" and "if [he] could not make it up to Plaintiff's housing unit that day, then one of his officers would come up there and handle it for him." (Compl. ¶ 33.) Further, Plaintiff claims that shortly before he was assaulted in his cell, Defendant Miller—the same Defendant who is alleged to have initiated the assault on Plaintiff—stated he was going to call Defendant Del Bianco. (Compl. ¶ 41.)

To establish an Eighth Amendment claim, a prisoner must satisfy a two-part test, composed of an objective and subjective element. *See, e.g.*, *Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012). Objectively, the conduct at issue, evaluated "in light of contemporary standards of decency," *Wright v. Goord*, 554 F.3d 255, 268 (2d Cir. 2009) (internal quotation marks omitted), must be "sufficiently serious ... to reach constitutional dimensions," *Romano v. Howarth*, 998 F.2d 101, 105 (2d Cir. 1996) (internal quotation marks omitted). The subjective element requires the prison official accused of violating the Eighth Amendment to have possessed a "wanton state of mind" in carrying out the conduct at issue. *Branham v. Meachum*, 77 F.3d 626, 630 (2d Cir. 1996) (internal quotation marks omitted).

Further, courts have allowed Eighth Amendment claims against prison officials who have not directly inflicted physical injuries on prisoners, but whose "deliberate indifference" to a "substantial risk of serious harm" nonetheless contributed to such injury. *See, e.g.*, *Randle v. Alexander*, 960 F. Supp. 2d 457, 472 (S.D.N.Y. 2013) (finding allegations that a prison guard forced two inmates to fight each other sufficient to raise both excessive use of force and failure to protect Eighth Amendment claims against that guard); *Bouknight v. Shaw*, No. 08-CV-5187 (PKC), 2009 WL 969932, at *4 (S.D.N.Y. Apr. 6, 2009) (recognizing that "a prisoner can state a claim under the Eighth Amendment against a corrections officer who spreads malicious rumor about him if the rumors incited other inmates to assault [the plaintiff] ..., thereby placing him at grave risk of physical harm" (internal quotation marks omitted)); (*Quezada v. Fischer*, No. 9:13-CV-0086 (MAD) (TWD); 2016 WL 1118451, at *2 (N.D.N.Y. Mar. 22, 2016) (adopting Magistrate Judge's finding that a correction officer's "instigation and encouragement [of other correction officers] to physically assault [p]laintiff, coupled with the alleged occurrence of the ensuing beating on him, was sufficient to state an Eighth Amendment harassment claim").

***12** Here, Plaintiff suggests that Defendant Del Bianco intentionally incited and encouraged a violent attack on him by other prison guards. Such an allegation clearly satisfies the first—objective—prong of the Eighth Amendment inquiry; there is no question that instructing or encouraging other guards to attack an inmate poses an objectively serious risk of harm. Plaintiff's allegations also easily satisfy the second—subjective—portion of the test, as "[i]ntentionally exposing an inmate to the risk of harm ... with no penological purpose is indicative of deliberate indifference to the inmate's safety at best and manifests an intent to harm the inmate at worst."

Mirabella v. Correction Officer O'Keenan, No. 15-CV-142S, 2016 WL 4678980, at *4 (W.D.N.Y. Sept. 7, 2016) (internal quotation marks omitted); *see also* *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) ("While .. deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something *less* than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." (emphasis added)); *Randle*, 960 F. Supp. 2d at 474 (S.D.N.Y. 2013)(ruling that a forced fight between inmates "serve[d] no legitimate penological purpose and reflect[ed] indifference to inmate safety, if not malice toward those forced to engaged in the illicit violence"). Thus, Plaintiff has successfully raised an Eighth Amendment claim against Defendant Del Bianco and dismissal is inappropriate at this time.

CONCLUSION

For the foregoing reasons, Defendants' partial motion to dismiss is GRANTED in part and DENIED in part. The First Amendment retaliation claims against Defendants Allen, Sioco, Rufino, Riollano, O'Rafferty, and Harris are dismissed without prejudice. The First Amendment Free Exercise claims against Defendants Rufino and O'Rafferty are also dismissed without prejudice. Because no claims remain against Defendants Allen, Sioco, Rufino, Riollano, O'Rafferty, and Harris, they are dismissed from this action. Plaintiff's Eighth Amendment claims against Defendants Miller, Tabor, Diaz, Kothari, Heal, LLorens, and Del Bianco remain.

The remaining Defendants are directed to file their answer on or before November 13, 2017. The parties are further directed to appear for an in-person Initial Pretrial Conference scheduled for November 16, 2017 at 11:45 am before Judge Román and complete a Case Management Plan and Scheduling Order, which should be submitted to chambers prior to the conference. The Clerk of the Court is respectfully directed to terminate the motion at ECF No. 32.

SO ORDERED.

Attachment

CIVIL CASE DISCOVERY PLAN AND SCHEDULING ORDER

This Civil Case Discovery Plan and Scheduling Order is adopted, after consultation with counsel, pursuant to Fed. R. Civ. P. 16 and 26(f):

1. All parties [consent] [do not consent] to conducting all further proceedings before a Magistrate Judge, including motions and trial, pursuant to 28 U.S.C. § 636(c). The parties are free to withhold consent without adverse substantive consequences. (If all parties consent, the remaining paragraphs of this form need not be completed.)

2. This case [is] [is not] to be tried to a jury.

3. Joinder of additional parties must be accomplished by _____.

4. Amended pleadings may be filed until _____.

5. Interrogatories shall be served no later than _____, and responses thereto shall be served within thirty (30) days thereafter. The provisions of Local Civil Rule 33.3 [shall] [shall not] apply to this case.

6. First request for production of documents, if any, shall be served no later than _____.

7. Non-expert depositions shall be completed by _____.

   a. Unless counsel agree otherwise or the Court so orders, depositions shall not be held until all parties have responded to any first requests for production of documents.

   b. Depositions shall proceed concurrently.

   c. Whenever possible, unless counsel agree otherwise or the Court so orders, non-party depositions shall follow party depositions.

8. Any further interrogatories, including expert interrogatories, shall be served no later than _____.

***13** 9. Requests to Admit, if any, shall be served no later than _____.

10. Expert reports shall be served no later than _____.

11. Rebuttal expert reports shall be served no later than _____.

12. Expert depositions shall be completed by _____.

13. Additional provisions agreed upon by counsel are attached hereto and made a part hereof.

14. **ALL DISCOVERY SHALL BE COMPLETED BY** _____

15. Any motions shall be filed in accordance with the Court's Individual Practices.

16. This Civil Case Discovery Plan and Scheduling Order may not be changed without leave of Court (or the assigned Magistrate Judge acting under a specific order of reference).

17. The Magistrate Judge assigned to this case is the Hon. _____.

18. If, after entry of this Order, the parties consent to trial before a Magistrate Judge, the Magistrate Judge will schedule a date certain for trial and will, if necessary, amend this Order consistent therewith.

19. The next case management conference is scheduled for _____, at_____. (The Court will set this date at the initial conference.)

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 4838322

Footnotes

1 This motion does not address the claims against Defendants Diaz and Heal, who have yet to be served with the Complaint, or Defendants John Doe C.O and John Doe Nurse, who have yet to be properly added to this action. (Defs.' Mem. Supp. Mot Dismiss (Defs.' Mot."), at 1, n.2, ECF No. 32.) Additionally, the remaining defendants are not moving to dismiss Plaintiff's excessive force and failure to intercede claims against Defendants Miller, Tabor, Kothari, and Captain Harris regarding the incident January 05, 2015. (*Id.* at 1, n.3.)

2 Specifically, Plaintiff alleges that Defendants engaged in acts of retaliation based on "the incident of January 5, 2015." Construing *pro se* Plaintiff's Complaint liberally to raise the strongest argument it suggests, the Court reads the Complaint as alleging retaliation against Plaintiff's constitutionally-protected activity of filing a prison grievance regarding the events that transpired on January 5, 2015.

3 Plaintiff's claim that Defendant Allen was also retaliating against him due to a "verbal dispute" they had on the previous day also fails. While "case law in this Circuit indicates that a prisoner's oral complaints to a correction officer may serve as the basis for a First Amendment retaliation claim," *Tirado v. Shutt*, No. 13-CV-2848, 2015 WL 774982, at *9 (S.D.N. Y Feb 23, 2015), courts have distinguished between verbal complaints and mere confrontations. *See* *McIntosh v. United States*, No. 14-CV-7889 (KMK), 2016 WL 1274585, at *27 (S.D.N.Y. Mar. 31, 2016). Verbal confrontations—like the "verbal dispute" between Plaintiff and Defendant Allen, in which Plaintiff was not asserting nor protecting any discernible right—do not constitute protected activity and cannot act as the basis for a retaliation claim.

4 While the Court notes that the Complaint could also be read as alleging that Defendants Rufino, Riollano, and O'Rafferty were retaliating against Plaintiff's grievance regarding the January 5th incident, such a claim would fail. Defendants Rufino, Riollano, and O'Rafferty were not personally involved in the January 5th incident and Plaintiff fails to allege any other causal connection between their actions and that grievance. Defendant

Rufino, however, issued the false misbehavior report and participated in both searches, thus establishing a greater causal connection between his actions and Plaintiff's protected conduct.

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

Charles BROOKS, Plaintiff,
v.
Michael HOGAN, et al., Defendants.

9:14-CV-0477 (LEK/DJS)
|
Signed 03/15/2017
|
Filed 03/16/2017

Attorneys and Law Firms

Charles Brooks, Marcy, NY, pro se.

Justin L. Engel, New York State Attorney General, Albany, NY, for Defendants.

DECISION AND ORDER

Lawrence E. Kahn, U.S. District Judge

I. INTRODUCTION

***1** Presently before the Court is pro se Plaintiff Charles Brooks's Motion for Reconsideration of the Court's Decision and Order dated March 31, 2016. Dkt. Nos. 67 ("March Order"), 73 ("Motion"). Plaintiff also filed a supplemental memorandum in support of the Motion for Reconsideration, including several exhibits. Dkt. Nos. 77 ("Supplemental Memorandum"), 78 ("Supplemental Exhibits"). Defendants submitted a response to the Motion and the Supplemental Memorandum, Dkt. No. 79 ("Opposition"), and Brooks filed a reply, Dkt. No. 81 ("Reply"). For the following reasons, the Motion is denied.

II. BACKGROUND

The Court assumes the parties' familiarity with the facts and history of this case and recites only those facts necessary to the resolution of the pending Motion. Brooks is involuntarily confined at Central New York Psychiatric Center ("CNYPC"), and he commenced this action under 42 U.S.C. § 1983 alleging multiple constitutional violations arising out of his confinement. Compl. ¶ 38. Defendants filed three separate motions to dismiss, which addressed some, but not all, of Brooks's claims. Dkt. Nos. 42, 47, 60 ("Motions to Dismiss"). The March Order—which Brooks now asks the Court to reconsider—addressed two sets of claims: (1) Fourteenth Amendment due process claims against multiple defendants for unauthorized disclosure of Brooks's private medical records, and (2) First Amendment retaliation claims alleging that multiple defendants retaliated against Brooks after he filed a complaint under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").[1] March Order at 6, 9. The Court dismissed Brooks's Fourteenth Amendment due process claims against all defendants, and it dismissed his First Amendment retaliation claims against all but one defendant. Id. at 8, 10, 12.

On May 4, 2016, Brooks filed the present Motion for Reconsideration of the Court's March Order. Mot. Brooks does not specify the legal authority under which he moves for reconsideration, but under Federal Rule of Civil Procedure 54(b) federal district courts retain the right to reconsider an interlocutory order "at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b); see also Scott v. Chipotle Mexican Grill, Inc., 103 F. Supp. 3d 542, 545 (S.D.N.Y. 2015) ("The district court ... 'is vested with the power to revisit its decisions before the entry of final judgment....' " (quoting Transaero, Inc. v. La Fuerza Aerea Boliviana, 99 F.3d 538, 541 (2d Cir. 1996))). Because the March Order is interlocutory, Rule 54(b) is the only appropriate basis for reconsideration.

In this district, Local Rule 7.1(g) sets the deadline to file a motion for reconsideration of an interlocutory order: "[A] party may file and serve a motion for reconsideration or reargument no later than FOURTEEN DAYS after the entry of the challenged judgment, order, or decree." Here, Brooks's Motion was filed more than fourteen days after the March Order, and it is therefore untimely under Local Rule 7.1(g). Nevertheless, in light of Brooks's pro se status, the Court will consider the merits of the Motion.

III. LEGAL STANDARD

***2** The standard for granting a motion for reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the

court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). Thus, reconsideration "should not be granted where the moving party seeks solely to relitigate an issue already decided." Id. Accordingly, a court should generally refrain from revising its earlier decisions "unless there is 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice.' " Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003) (quoting Virgin Atl. Airways v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)).

IV. DISCUSSION

A. The Motion

In his Motion, Brooks advances three different arguments for reconsideration: (1) the Court "erred by wrongly interpreting the facts [and] absolv[ing] the defendants of their misconduct," (2) the Court mistakenly ignored and dismissed Brooks's First Amendment retaliation claims, and (3) the Court failed to acknowledge Brooks's due process claim. Mot. at 2, 7, 17.

Brooks's first argument refers to an incident on January 8, **2012**, in which he was allegedly physically assaulted by CNYPC staff members. Compl. ¶ 42. In a January 13, 2015 Report-Recommendation reviewing the Complaint under 28 U.S.C. § 1915(e), U.S. Magistrate Judge Randolph F. Treece recognized several potential claims arising out of the events that occurred on January 8, **2012**. Dkt. No. 17 ("Report-Recommendation") at 8–9. Specifically, Judge Treece found that the Complaint required a response to the following claims related to the January 8, **2012** incident[2]: excessive use of force as to defendants Allen, Kunz, Parrish, and Hollenbeck; failure to intervene and protect as to defendants Farnum and Creaser-Smith; retaliation against each of those defendants, as their actions may have been in response to Brooks's HIPAA complaint; and failure to train and supervise as to defendants Hogan, Nowicki, Gonzalez, and Sawyer (the "Supervisory Defendants"). Id. In the March Order, the Court dismissed all claims against the Supervisory Defendants and dismissed the retaliation claims against all Defendants, except for Allen. March Order at 12.

Brooks appears to misunderstand the result of the March Order. He argues at length that defendants Allen and Creaser-Smith should not be "absolved of their misconduct" on January 8, **2012**, Mot. at 4–7, but, as Defendants acknowledge in their Opposition, the majority of the claims against those defendants have not been dismissed, Opp'n at 2–3. In particular, excessive use of force claims as to defendants Allen, Kunz, Parrish, and Hollenbeck, and failure to intervene and protect claims as to defendants Farnum and Creaser-Smith, were not dismissed. To the extent that Brooks is arguing that the claims against the Supervisory Defendants should not have been dismissed, he provides no basis for reconsideration.

***3** Second, Brooks argues that the Court committed legal error by dismissing his First Amendment retaliation claims. Mot. at 17. Brooks describes four instances of retaliation at length: (1) an incident on August 18, 2010, in which Bell allegedly harassed and assaulted Brooks, and he was placed in a seclusion room for twenty-four hours; (2) unethical behavior on the part of defendant Velte, one of Brooks's psychologists, on March 14, 2011; (3) a phase demotion and transfer that Brooks received on March 31, 2011; and (4) the alleged assault and subsequent disciplinary measures on January 8, **2012**. Id. at 17–24.

As the Report-Recommendation made clear, any claims arising out of the incidents on August 18, 2011, and March 31, 2011, are barred by the statute of limitations. Rep.-Rec. at 6–8. The Court later found that Brooks's claims about the March 14, 2011 incident were equitably tolled because his grievance related to that incident was not resolved until May 4, 2011, less than three years before Brooks filed the Complaint in this case. Dkt. No. 65 ("Reconsideration Order") at 3–4. The statute of limitations for § 1983 claims is determined by the applicable state's "general or residual statute for personal injury actions," which is three years in New York. Pearl v. City of Long Beach, 296 F.3d 76, 79 (2d Cir. 2002); accord N.Y. C.P.L.R. § 214(5). Therefore, the retaliation claims arising out of the incidents on March 14, 2011, and January 8, **2012**, are timely.

"To prove a First Amendment retaliation claim, 'a prisoner must show "(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." ' " Roseboro v. Gillespie, 791 F. Supp. 2d 353, 366 (S.D.N.Y. 2011) (quoting Espinal v. Goord, 558 F.3d 119, 128 (2d Cir. 2009)).

In the Complaint, Brooks alleges that on March 14, 2011, Velte engaged in "unethical conduct" that "cannot be viewed as supportive." Compl. ¶ 39. But it is not clear from the Complaint what exactly Velte did, or how he may have committed a HIPAA violation. Furthermore, even if Velte had committed a HIPPA violation, there is no indication that he was aware of any protected speech that Brooks had engaged in, or that he was retaliating against Brooks for that speech. Therefore, there is no basis in the Complaint for a First Amendment retaliation claim against Velte, and the Court will not now recognize such a claim for the first time on a motion for reconsideration.

As for the January 8, **2012** incident, the Court dismissed Brooks's retaliation claims for that incident against all defendants but Allen.[3] March Order at 9–10. The Court pointed to several reasons why Brooks had not stated a claim of retaliation against the other defendants, including Brooks's failure to allege that those defendants were even aware of his HIPAA complaint. Id. at 9. Any defendants who were not aware of Brooks's protected speech could not have retaliated against him because of that speech. While Brooks now claims that all Defendants were aware of his complaint, he does not provide any evidence for that claim. Even if Brooks were to provide evidence at this stage, it would need to be evidence that was not previously available. Space Hunters, Inc. v. United States, 500 Fed.Appx. 76, 81 (2d Cir. **2012**); see also NEM Re Receivables, LLC v. Fortress Re, Inc., 187 F. Supp. 3d 390, 396 (S.D.N.Y. 2016) ("A motion to reconsider is not petitioner's opportunity to put forward evidence that he could have, but failed, to provide the Court when the Court initially considered the motion."). As Brooks has failed to provide any evidence—let alone newly discovered evidence—reconsideration is not warranted.

***4** Third, Brooks argues that the Court "erred by failing to acknowledge [his] due process claim." Mot. at 7. Brooks goes on to argue that the Court should have recognized—presumably in the Report-Recommendation on initial review—that his Complaint could be read to include due process claims in relation to at least three different events. Mot. at 9–11. But a motion for reconsideration is not the appropriate vehicle for such arguments. Under the Local Rules, any objection to the Report-Recommendation should have been made within fourteen days, L.R. 7.1(g), but Brooks did not include this particular argument in his timely filed objections, Dkt. No. 16 ("Objections"). Now—over two years after the Report-Recommendation was filed—is not the time for Brooks to raise new theories of his case. See Norton v. Town of Brookhaven, 47 F. Supp. 3d 152, 155 (E.D.N.Y. 2014) ("A party requesting reconsideration is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then use [reconsideration] to advance new facts and theories in response to the court's rulings."); City of New York v. Venkataram, No. 06-CV-6578, 2009 **WL** 3321278, at *1 (S.D.N.Y. Oct. 7, 2009) ("[I]t is not appropriate to use a motion for reconsideration as a vehicle to advance new theories a party failed to articulate in arguing the underlying motion.").

B. The Supplemental Memorandum

Twenty-two days after submitting his Motion for Reconsideration, Brooks filed the Supplemental Memorandum, which presented a new set of arguments for granting reconsideration of the March Order. Under the Local Rules, this was impermissible. Brooks did not ask for, or receive, the Court's permission to submit the Supplemental Memorandum. Nevertheless, in light of Brooks's pro se status, the Court will address the three arguments contained in the Supplemental Memorandum: (1) the Court erred in dismissing his Fourteenth Amendment due process claims regarding the disclosure of medical information, (2) the Court failed to recognize his stigma-plus and conditions of confinement claims, and (3) several defendants used excessive force against him during the January 8, **2012** altercation. Supplemental Mem. at 3, 5, 11, 13.

First, Brooks moves for reconsideration of the Court's dismissal of his Fourteenth Amendment due process claims about the unauthorized disclosure of his medical information in November 2009 and March 2011. Id. at 5. The Court dismissed those claims because it found that Brooks had failed to allege that the disclosed records "contained information of a sensitive nature." March Order at 7. Brooks insists that he specifically alleged that it was " 'highly sensitive' ... information of the most 'intimate kind.' " Supplemental Mem. at 5 (quoting Compl. ¶ 25). Therefore, Brooks argues, reconsideration is necessary to prevent clear error. Id.

"The Fourteenth Amendment's Due Process Clause protects an inmate from the unwanted disclosure of information pertaining to an inmate's health." Davidson v. Desai, 817 F. Supp. 2d 166, 191 (W.D.N.Y. 2011) (citing Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994)). This protection is based on the right to privacy, and it extends to prisoners

insofar as it does not interfere with legitimate penological objectives. Matson v. Bd. of Educ. of City Sch. Dist. of N.Y., 631 F.3d 57, 64–65 (2d Cir. 2011). But the protection against disclosure of medical records is not absolute; instead, it is considered on a case-by-case basis and depends on the medical condition at issue. Id. at 66–67.

"Privacy interests in medical information vary with the medical condition with certain 'unusual' conditions, including positive HIV status and transsexualism being 'likely to provoke both an intense desire to preserve one's medical confidentiality, as well as hostility and intolerance from others.' " Davidson, 817 F. Supp. 2d at 191–92 (quoting Powell v. Schriver, 175 F.3d 107, 111 (2d Cir. 1999)). Courts in this circuit have chosen not to extend Fourteenth Amendment protection to several other medical conditions. See Watson v. Wright, 08-CV-62, 2010 WL 55932, at *1 (N.D.N.Y. Jan. 5, 2010) ("This Court finds no basis in Powell and its progeny for holding that, in a prison setting, plaintiff's Hepatitis C condition is the type of condition that gives rise to constitutional protection."); Hamilton v. Smith, No. 06-CV-805, 2009 WL 3199531, at *15 & n.18 (N.D.N.Y. Jan. 13, 2009) (finding that a prisoner had no Fourteenth Amendment right to privacy regarding high blood pressure, high cholesterol, and Hepatitis A).

***5** While Brooks claims that the disclosed medical information was "highly sensitive" information of "the most intimate kind," Compl. ¶ 25, he fails to allege what medical condition, if any, this information related to. The only specific disclosures that Brooks alleges are: (1) his ex-girlfriend's name, address, and phone number; (2) his personal medication (though he does not say what the medication was); and (3) his sister's address. Dkt. No. 1-1 ("Exhibits") at 5. [4] As the Court stated in the March Order, Brooks does not have a sufficient confidentiality interest in that information to support a Fourteenth Amendment claim. March Order at 7. Without providing more information about what medical information the alleged disclosures were related to, Brooks cannot state a Fourteenth Amendment claim for disclosure of medical information. See Davidson, 817 F. Supp. 2d at 192 (dismissing a Fourteenth Amendment claim for disclosure of medical information where the plaintiff had "not specified which of his medical conditions ... was so 'unusual' that the disclosure ... arose to a Fourteenth Amendment violation"); Webb v. Goldstein, 117 F. Supp. 2d 289, 298 (E.D.N.Y. 2000) (finding a prisoner's allegation that disclosed records "contained mental health information" and "the fact that he was tested for HIV" insufficient to support a Fourteenth Amendment claim).

Second, Brooks argues that the Court erred in failing to recognize his conditions-of-confinement and stigma-plus claims. Supplemental Mem. at 2, 11. But, as the Court stated above in relation to the due process claims raised for the first time in Brooks's Motion, a motion for reconsideration is not the time to raise new claims in his case. It is well settled that a motion for reconsideration is "not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise 'taking a second bite at the apple.' " Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012) (quoting Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998)).

Third, Brooks argues that several defendants used excessive force against him during the January 8, 2012 altercation, and other defendants failed to intervene on his behalf. Supplemental Mem. at 13–24. On these points, Brooks again seems to misunderstand the result of the March Order. As Defendants state in the Opposition, they never moved to dismiss Brooks's excessive force claims or his failure to protect claims. Opp'n at 8. Therefore, Brooks's excessive force claims as to defendants Allen, Kunz, Parrish, and Hollenbeck, and his failure to protect claims as to defendants Farnum and Creaser-Smith, will go forward.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Plaintiff's Motion for Reconsideration (Dkt. No. 73) is **DENIED**; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 1025966

Footnotes

1 It is not clear where or when Brooks filed this complaint, but he sent copies to several of the CNYPC supervisors who were named as defendants in this action. Compl. ¶ 37.

2 The Report-Recommendation dismissed Brooks's claims about all other incidents alleged in the Complaint as barred by the statute of limitations. Rep.-Rec. at 6–8. Although the Report-Recommendation was later adopted in full, Dkt. No. 17, Brooks filed a motion for reconsideration, Dkt. No. 28, which was granted in part, Dkt. No. 65 ("Reconsideration Order") at 5. In the Reconsideration Order, the Court found that claims related to two different incidents were not necessarily untimely. Id. at 3–4.

3 On this point, Brooks again seems confused about the result of the March Order. Brooks argues at length that Allen must be held responsible for his retaliatory conduct, but he ignores the fact that his retaliation claim against Allen survived the Motions to Dismiss. March Order at 10.

4 The cited page numbers for the Exhibits correspond to those assigned by the Court's electronic filing system ("ECF").

2012 WL 3704996
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Michael L. WILSON, Plaintiff,
v.
Charles KELLY, Deputy Superintendent Security. Great Meadow Correctional Facility, in his individual and official capacity; Peter Besson, Lieutenant, Great Meadow Correctional Facility, in his individual and official capacity; Craig Goodman, Lieutenant, Great Meadow Correctional Facility, in his individual and official capacity; Paul Zarnetski, Lieutenant, Great Meadow Correctional Facility, in his individual and official capacity; Nicholas Deluca, Sergeant, Great Meadow Correctional Facility, in his individual and official capacity; Richard Vladyka, Sergeant, Great Meadow Correctional Facility, in his individual and official capacity; Deborah Black, Principal Store Clerk, Great Meadow Correctional Facility, in her individual and official capacity, Defendants.

No. 9:11–cv–00030 (MAD/RFT).
|
Aug. 27, 2012.

Attorneys and Law Firms

Michael L. Wilson, Comstock, NY, pro se.

Office of the New York, State Attorney General, Cathy Y. Sheehan, AAG, of Counsel, Albany, NY, for Defendants.

MEMORANDUM–DECISION AND ORDER

MAE A. D'AGOSTINO, District Judge.

I. INTRODUCTION

***1** On January 5, 2011, Plaintiff, a New York State prison inmate, commenced this civil rights action, pursuant to 42 U.S.C. § 1983. *See* Dkt. No. 1. Plaintiff claims that Defendants violated his rights under the First and Fourteenth Amendments to the United States Constitution. *See id.* Plaintiff seeks monetary damages, as well as declaratory and injunctive relief. *See id.* at ¶ 2.

On September 29, 2011, Defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* Dkt. No. 25. On June 22, 2012, Magistrate Judge Treece issued a Report–Recommendation and Order recommending that the Court grant-inpart and deny-in-part Defendants' motion to dismiss. *See* Dkt. No. 29.

Currently before the Court are Plaintiff's objections to Magistrate Judge Treece's ReportRecommendation and Order. *See* Dkt. No. 31.

II. BACKGROUND

A. Factual background

Plaintiff is presently in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS") at Great Meadow Correctional Facility ("Great Meadow"), which serves as the location of the events giving rise to this complaint. *See* Dkt. No. 1 at ¶¶ 5, 17. Plaintiff describes himself as "a devoted practicing Muslim, who attends religious services every Friday afternoon, including all religious classes." *See id.* at ¶ 15. Moreover, Plaintiff was an Inmate Liaison Representative for an unspecified period of time and currently works in Great Meadow's metal furniture shop. *See id.* at ¶¶ 15, 17.

On or about October 25, 2009, Plaintiff submitted a letter to Thomas LaValley, Superintendent of Great Meadow, concerning "harassment and discrimination against the Muslim faith" by staff members at Great Meadow. *See* Dkt. No. 1 at Exhibit "A." In this letter, Plaintiff recounts, among others, the following events: (1) an October 24, 2009 incident in which a sergeant, who is not a defendant in this action, stopped him while he was on his way to Arabic/Salat class and advised him that his pants were in violation of prison regulations because they were too short; (2) harassment and discrimination suffered by Muslim inmates; and (3) Lieutenant Sawyer's assault on Plaintiff in the sergeant room while Officer Green, who is not a defendant in this action, watched. *See id.* [1] In this letter to Superintendent LaValley, after informing him of the various problems he has with the staff at Great Meadow, Plaintiff states that "I would like for you to address this matter because I can start things also." *See id.* Plaintiff proceeds to state that "I really don't want to start anything but if I'm force[d] to I will." *See id.* Finally, in his

letter, Plaintiff makes the following request: "I ask that you respond back or speak with me whenever you can ... but once again, I ask that you clear this up because I really don't want to take this out [of] the facility without giving you the chance to correct the matter first." *See id.*

***2** On October 31, 2009, Plaintiff received a misbehavior report, authored by Defendant DeLuca, regarding the "threat" made in his letter and also for refusing a direct order when Plaintiff refused to be interviewed by Defendant DeLuca about his comment that he "can start things also." *See id.* at Exhibit "B." Plaintiff claims that he did not report to Defendant DeLuca because he feared for his safety because Defendant DeLuca "has a history of assaults on inmates." *See id.* at ¶ 24.

Defendant Zarnetski held a disciplinary hearing on the misbehavior report. *See id.* at ¶ 25. Plaintiff claims that Defendant Zarnetski was biased during the hearing and repeatedly referred to him as "nigger," stupid," and "asshole." *See id.* Plaintiff also objected to Defendant Goodman being present at the hearing as an observer because he was not a witness or a party to the misbehavior report. *See id.*

Defendant Zarnetski found Plaintiff guilty of issuing a threat but not guilty of refusing to obey a direct order. *See id.* at ¶ 27 and Exhibit "C." Initially, the misbehavior report determination was upheld by Defendant Kelly, the Deputy Superintendent for Security. *See id.* at Exhibit "C." On February 12, **2012**, however, Defendant Kelly reversed the hearing determination and expunged Plaintiff's record because the hearing was not completely recorded, per established procedure. *See id.* at Exhibit "E."

On February 5, 2010, Plaintiff was issued another misbehavior report, charging him with altering state property, giving false statements or information, and refusing a direct order. *See id.* at ¶ 33 and Exhibit "G." Defendant Black indicated on the misbehavior report, "per Hearing Lt. Goodman, this will be I/M Wilson's third time being cited for altered clothing. Also I/M has been given numerous direct orders from staff members not to wear hemmed pants that are hemmed incorrectly/illegally." *See Id.* at Exhibit "G." During the hearing on this misbehavior report, Plaintiff objected to Defendant DeLuca's testimony as biased. *See id.* at ¶ 35. Plaintiff was found guilty on all charges and sentenced to fifteen-days keeplock confinement. *See id.* at Exhibit "H." Thereafter, on February 23, 2010, Plaintiff's FOIL request for a copy of the tape of the hearing was denied because the tape was "expunged/not available." *See id.* at Exhibit "L." On February 24, 2010, Defendant Kelly reversed and expunged this hearing disposition from Plaintiff's record. *See id.* at Exhibit "K."

As a result of the hearing determinations and resulting forty-five days combined keeplock confinement, Plaintiff missed seven religious services. *See id.* at ¶ 15. Plaintiff also alleges that, for two years, he volunteered as an inmate cook during the Muslim Ramadan Id festival. *See Id.* at ¶ 18. Plaintiff had also worked in the kitchen and mess hall "as an assigned program without incident." *See id.* On or about July 30, 2010, Defendant Vladyka removed Plaintiff's name from the kitchen assignment list for the Ramadan festival. *See id.* at ¶ 20. Prior to this, Defendant Vladyka made comments about Plaintiff filing complaints and grievances against staff. *See id.* Defendant Vladyka claimed that Plaintiff was a security risk because of his behavior. *See id.* at ¶ 21.

B. Magistrate Judge Treece's June 22, 2012 Report–Recommendation and Order

***3** In his June 22, **2012** Report–Recommendation and Order, Magistrate Judge Treece recommended that the Court grant in part and deny in part Defendants' motion to dismiss. *See* Dkt. No. 29. Specifically, Magistrate Judge Treece recommended that the Court deny the motion as to Plaintiff's First Amendment retaliation claim against Defendant DeLuca, but grant the motion as to Plaintiff's First Amendment retaliation claims against the remaining Defendants. *See id.* at 9–12. Moreover, Magistrate Judge Treece recommended that the Court grant Defendants' motion to dismiss Plaintiff's First Amendment Free Exercise claims because Plaintiff failed to allege facts indicating that a substantial burden was placed on his religious beliefs and because Plaintiff failed to allege the personal involvement of any Defendant. *See id.* at 12–14. Magistrate Judge Treece also recommended that the Court dismiss Plaintiff's conspiracy claim against all Defendants because he failed to plausibly allege an agreement between two or more actors. *See id.* at 14–15.

Next, regarding Plaintiff's due process claims, Magistrate Judge Treece found that neither the fifteen nor the thirty day keeplock sentence imposed upon Plaintiff constituted a significant or atypical hardship. *See Id.* at 17–18. Further, he found that "Plaintiff's inability to attend seven Muslim religious services, loss of his honor block cell status and loss of wages, which all occurred because he was held in keeplock confinement, do not constitute deprivation of a liberty interest." *See id.* at 18. As such, Magistrate Judge

Treece recommended that the Court grant Defendants' motion to dismiss as to these claims. *See id.*

Finally, Magistrate Judge Treece found that Defendant DeLuca is entitled to Eleventh Amendment immunity as to Plaintiff's claim for money damages against him in his official capacity. *See id.* at 21. However, Plaintiff's claims against Defendant DeLuca in his official capacity for injunctive and declaratory relief may proceed. *See id.*

C. Plaintiff's objections to Magistrate Judge Treece's Report–Recommendation and Order

Plaintiff raises five numbered objections to the Report–Recommendation and Order. *See* Dkt. No. 31. First, Plaintiff argues that Defendant Kelly should not be dismissed from this action because when he initially upheld the disciplinary hearing's outcome relating to the October 31, 2009 misbehavior report, he inaccurately stated that "the hearing was held in accordance with departmental directive # 4932 and established procedure" because it was later determined that there was no tape of the hearing as required by the directive. *See id.* at ¶ 1. Further, Plaintiff contends that Defendant Kelly's decision to reverse his initial decision to uphold the disciplinary hearing's outcome and expunge his record was because Plaintiff requested that the Superintendent review the matter and this would allow Defendant Kelly to avoid "being censored by his supervisor." *See id.*

***4** Second, Plaintiff objects to the recommended dismissal of Defendant Black because her "verbal harassment of [his] religious choice, and her prohibiting [him] from having pants hemmed, and her initiating the disciplinary proceeding (which lead to 15 days of confinement & the miss[ing] of (3) obligatory religious services) ... violated [his] freedom of religion." *See id.* at ¶ 2. Plaintiff claims that in her misbehavior report, Defendant Black fails to provide the name of the official(s) who allegedly gave Plaintiff a direct order that was ignored or who had allegedly cited Plaintiff in the past for his behavior. *See id.*

Third, Plaintiff objects to the recommended dismissal of Defendant Zarnetski because he violated his due process right to a fair hearing by creating a "hostile and intimidating hearing environment" and because he failed to record the hearing, thereby preventing Plaintiff from exercising his right to a meaningful appeal. *See id.* at ¶ 3. Plaintiff claims that Defendant Zarnetski purposely failed to record the disciplinary hearing in an effort to deprive him of his rights and to retaliate against him. *See Id.*

Fourth, Plaintiff objects to the recommended dismissal of Defendant Besson because Defendant Besson failed to provide him with a fair and adequate hearing. *See id.* at ¶ 4. Plaintiff claims that the evidence at the hearing was clearly contradictory and finding Plaintiff guilty of refusing a direct order but not guilty on the tampering with state property charge was inconsistent with the evidence. *See id.* As such, Plaintiff claims that Defendant Besson's "clear contradiction demonstrates pure vindictiveness." *See id.* Plaintiff asserts that Defendant Besson's vindictiveness is further demonstrated by the fact that his written disposition finding Plaintiff guilty was drafted and signed by Defendant Besson on February 17, 2010, one day prior to the conclusion of the hearing. *See id.*

Finally, Plaintiff objects to the recommended dismissal of Defendant Vladyka. *See id.* at ¶ 5. Plaintiff claims that he "provided sufficient information within the complaint for a reasonable jury to determine if defendant Vladyka ['s] actions w[ere] motivated by a retaliatory act, since defendant had refused to state or show his reasoning for declaring plaintiff a security concern and not allowing plaintiff to cook during the month of [R]amadan as [he] had done (2) consecutive years prior to filing of his grievances." *See id.* Plaintiff asserts that, before he began filing complaints against staff, there were no reports or rumors of security concerns from the staff at Great Meadow. *See id.*

III. DISCUSSION

A. Standard of review

1. Review of a report-recommendation and order

When a party files specific objections to a magistrate judge's report-recommendation, the district court makes a *"de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1) (2006). When a party, however, files "[g]eneral or conclusory objections or objections which merely recite the same arguments [that he presented] to the magistrate judge," the court reviews those recommendations for clear error. *O'Diah v. Mawhir,* No. 9:08–CV–322, 2011 WL 933846, *1 (N.D.N.Y. Mar. 16, 2011) (citations and footnote omitted). After the appropriate review, "the court may accept, reject, or modify, in whole or in part,

the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1) (2006).

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

2. Motion to dismiss standard

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the party's claim for relief. *See* *Patane v. Clark,* 508 F.3d 106, 111–12 (2d Cir.2007). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87, 98 (2d Cir.2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See* *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949–50 (2009) (citation omitted). Although a court's review of a motion to dismiss is generally limited to the facts presented in the pleading, the court may consider documents that are "integral" to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See* *Mangiafico v. Blumenthal,* 471 F.3d 391, 398 (2d Cir.2006) (quoting *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 152–53 (2d Cir.2002)).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," *see* Fed.R.Civ.P. 8(a) (2), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief[,]' " *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 557 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *See* *id.* at 555 (citation omitted), and present claims that are "plausible on [their] face," *id.* at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 129 S.Ct. at 1949 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief." ' " *Id.* (quoting [*Twombly,* 550 U.S.] at 557, 127 S.Ct.1955). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly,* 550 U.S. at 558, or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the [ ] complaint must be dismissed[,]" *id.* at 570.

***6** Despite this recent tightening of the standard for pleading a claim, complaints by *pro se* parties continue to be accorded more deference than those filed by attorneys. *See* *Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (quotation omitted). As such, *Twombly* and *Iqbal* notwithstanding, this Court must continue to " 'construe [a complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggests.' " *Weixel v. Bd. of Educ.,* 287 F.3d 138, 146 (2d Cir.2002) (quotation omitted).

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

3. 42 U.S.C. § 1983

Section 1983 imposes liability for "conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." *Rizzo v. Goode,* 423 U.S. 362, 370–71 (1976) (quoting 42 U.S.C. § 1983). Not only must the conduct deprive the plaintiff of rights and privileges secured by the Constitution, but the actions or omissions attributable to each defendant must be the proximate cause of the injuries and consequent damages that the plaintiff sustained. *See Brown v. Coughlin,* 758 F.Supp. 876, 881 (S.D.N.Y.1991) (citing *Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481, *reh. denied,* 445 U.S. 920, 100 S.Ct. 1285, 63 L.Ed.2d 606 (1980)). As such, for a plaintiff to recover in a section 1983 action, he must establish a causal connection between the acts or omissions of each defendant and any injury or damages he suffered as a result of those acts or omissions. *See id.* (citing *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979)) (other citation omitted).

" '[P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.' " *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994) (quotation and other citations omitted). " '[W]hen monetary damages are sought under § 1983, the general doctrine of *respondeat superior* does not suffice and a showing of some personal responsibility of the defendant is required.' " *Id.* (quoting *Johnson v. Glick,* 481 F.2d 1028, 1034 (2d Cir.)). There is a sufficient showing of personal involvement of a defendant if (1) the defendant directly participated in the alleged constitutional deprivation; (2) the defendant is a supervisory official who failed to correct the wrong after learning about it through a report or appeal; (3) the defendant is a supervisory official who created a policy or custom under which the constitutional deprivation occurred, or allowed such a policy or custom to continue; or (4) the defendant is a supervisory official that was grossly negligent in managing subordinates who caused the constitutional deprivation. *See id.* (quoting *Williams v. Smith,* 781 F.2d 319, 323–24 (2d Cir.1986)).

B. First Amendment retaliation

***7** "Courts properly approach prisoner retaliation claims 'with skepticism and particular care,' because 'virtually any adverse action taken against a prisoner by a prison official—even those otherwise not rising to the level of a constitutional violation—can be characterized as a constitutionally proscribed retaliatory act.' " *Davis v. Goord,* 320 F.3d 346, 352 (2d Cir.2003) (quotation and other citation omitted). "To prove a First Amendment retaliation claim under Section 1983, a prisoner must show ... '(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.' " *Espinal v. Goord,* 558 F.3d 119, 128 (2d Cir .2009) (quoting *Gill v. Pidlypchak,* 389 F.3d 379, 380 (2d Cir.2004)).

"Only retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action for a claim of retaliation." *Davis,* 320 F.3d at 353 (internal quotation marks and citation omitted). In making this determination, courts are to "bear in mind" that "prisoners may be required to tolerate more than average citizens, before a retaliatory action taken against them is considered adverse." *Dawes v. Walker,* 239 F.3d 489, 491 (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) (internal quotation marks and citations omitted). The "test is objective, not subjective, and must be so, since the very commencement of a lawsuit would otherwise be dispositive on the issue of chilling." *Davidson v. Bartholome,* 460 F.Supp.2d 436, 447 (S.D.N.Y.2006) (citations omitted).

1. Defendant Kelly

In his complaint, Plaintiff alleges that Defendant Kelly initially upheld the misbehavior report determination, but, on February 12, 2010, Defendant Kelly reversed the hearing determination and expunged Plaintiff's record because the hearing was not completely recorded, per established procedure. *See* Dkt. No. 1 at Exhibits "C" & "E." Similarly, Plaintiff alleges that Defendant Kelly reversed the second misbehavior report on February 21, 2010, again because of Defendant Besson's failure to record the disciplinary hearing. *See id.* at ¶¶ 36–37 and Exhibits "K"-"L." Plaintiff claims that Defendant Kelly's failure to reverse these determinations upon his first review of the matter demonstrates that Defendant Kelly retaliated against him and that he, "for the sole purpose of punitive retaliation[,] utilized and

manipulated the Tier appeal process to maximize and extract the full penalty of sanctions[.]" *See id.* at ¶ 52. [2]

Plaintiff's conclusory allegations against Defendant Kelly fail to allege a plausible claim of retaliation. Plaintiff does not allege any facts giving rise to an inference of retaliation and fails to allege a causal connection between his letter to Superintendent LaValley—the protected activity—and Defendant Kelly's decision to initially affirm the appeal. Moreover, upon review of Plaintiff's letter to Superintendent LaValley, it is clear that language was used that could reasonably be construed as threatening, thereby providing a reasonable basis for affirming the disciplinary hearing determination. Finally, courts in this circuit have held that the fact that a deputy superintendent affirms a disciplinary hearing determination on appeal is, without more, insufficient to establish the personal involvement of that official. *See* *Ramsey v. Goord,* No. 05–CV–47A, 2005 WL 2000144, *6 (W.D.N.Y. Aug. 13, 2005) (citations omitted).

***8** Based on the foregoing, the Court finds that Magistrate Judge Treece correctly determined that Plaintiff has failed to allege facts plausibly suggesting that Defendant Kelly retaliated against him in violation of his First Amendment rights.

2. Defendant Black

Plaintiff alleges that Defendant Black filed a misbehavior report against him in retaliation for filing a "grievance/complaint," as well as for his religious beliefs. *See* Dkt. No. 1 at ¶ 33. Plaintiff claims that Defendant Black did this "independently and/or at the behest of Goodman[.]" *See id.* at ¶ 55.

Again, Plaintiff's conclusory allegations are insufficient to state a plausible retaliation claim against Defendant Black. Although Plaintiff claims that he filed grievances/complaints against prison officials, he fails to allege when he filed these grievances or even who the grievances were filed against. Without such information or other non-conclusory allegations regarding Defendant Black's conduct, Plaintiff has failed to adequately plead that there was a causal connection between the protected speech and the adverse action. Further, even assuming that Plaintiff's October 25, 2009 letter to Superintendent LaValley is the "grievance/complaint" to which Plaintiff refers, Defendant Black is not discussed in the letter and Defendant Black did not file a misbehavior report against Plaintiff until February 5, 2010—more than three months after Plaintiff's protected activity. *See Allan v. Woods,* No. 9:05–CV–1280, 2008 WL 724240, *9 (N.D.N.Y. Mar. 17, 2008) (finding "no connection" when "almost three months" had elapsed from the filing of the grievance to the alleged retaliatory action). Had Plaintiff's "grievance/complaint" been filed against Defendant Black, Plaintiff's retaliation claim against her may have been plausible. *See* *Espinal v. Goord,* 558 F.3d 119, 129 (2d Cir .2009) (citations omitted). In the absence of such an allegation, however, Plaintiff has failed to allege a plausible retaliation claim against Defendant Black.

Based on the foregoing, the Court finds that Magistrate Judge Treece correctly determined that Plaintiff has failed to allege facts plausibly suggesting that Defendant Black retaliated against him in violation of his First Amendment rights.

c. Defendant Zarnetski

In his complaint, Plaintiff alleges that Defendant Zarnetski was biased during his disciplinary hearing on November 4, 2009, and that he repeatedly called Plaintiff a "Nigger", "Stupid," and "Asshole." *See* Dkt. No. 1 at ¶ 25. Further, Plaintiff claims that Defendant Zarnetski improperly allowed Defendant Goodman to be present at the hearing, because Defendant Goodman was a direct party to the misbehavior report. *See id.*

Again, Plaintiff has failed to allege any plausible connection between this alleged retaliatory action and any of Plaintiff's protected activities. There are no allegations in the complaint to suggest that Defendant Zarnetski, acting as a hearing officer, found Plaintiff guilty of issuing a threat in retaliation for Plaintiff having filed a grievance. *See Monroe v. Janes,* No. 9:06–CV–0859, 2008 WL 508905, *6 (N.D.N.Y. Feb. 21, 2008) (citation omitted). Moreover, as discussed above, a review of Plaintiff's October 25, 2009 letter to Superintendent LaValley can reasonably be read as containing several threats. [3]

***9** Based on the foregoing, the Court finds that Magistrate Judge Treece correctly determined that Plaintiff has failed to allege facts plausibly suggesting that Defendant Zarnetski retaliated against him in violation of his First Amendment rights.

d. Defendant Besson

According to the complaint, Defendant Besson conducted the February 7, 2010 disciplinary hearing on Plaintiff's misbehavior report dated February 5, 2010. *See* Dkt. No. 1 at ¶¶ 33–35. In his fourth claim, Plaintiff claims that "Defendant Besson violated [his] clearly established right to due process for the sole purpose of punitive retaliation by violating established procedure as outlined in 7 NYCRR V, by not conducting a fair and impartial hearing as alleged[.]" *See id.* at ¶ 51.

Magistrate Judge Treece correctly determined that, although Plaintiff has sufficiently alleged the first prong of his retaliation claim, Plaintiff has failed to allege that Defendant Besson knew of his constitutionally protected activity, *i.e.,* the October 25, 2009 letter to Superintendent LaValley or any other unidentified grievance Plaintiff may have filed. As such, Plaintiff has failed to plausibly allege that his protected activity was causally connected to any alleged adverse action taken by Defendant Besson.

Based on the foregoing, the Court finds that Magistrate Judge Treece correctly determined that Plaintiff has failed to allege facts plausibly suggesting that Defendant Besson retaliated against him in violation of his First Amendment rights.

e. Defendant Vladyka

Plaintiff claims that Defendant Vladyka retaliated against him by having his "name removed from the kitchen Ramadan list due to the above ... actions of filing grievances and complaints." *See* Dkt. No. 1 at ¶ 20. Plaintiff further alleges that Defendant Vladyka, before removing him from his kitchen assignment, made comments regarding the grievances and complaints that he has filed against correctional staff at Great Meadow. *See id.* at ¶¶ 20, 53.

Regarding Defendant Vladyka, Plaintiff has alleged that he filed grievances between October 2009 and August 2010, and that Defendant Vladyka commented on his grievance activities prior to unjustly removing him from his kitchen assignment on July 30, 2010. Although somewhat vague, Plaintiff has adequately pled a First Amendment retaliation claim against Defendant Vladyka. Unlike Plaintiff's allegations against the Defendants discussed above, here Plaintiff has alleged facts that can plausibly suggest that Defendant Vladyka's conduct—having Plaintiff removed from his kitchen assignment—was done in retaliation for Plaintiff filing grievances against corrections personnel. The fact that Defendant Vladyka made comments to Plaintiff regarding the grievances he filed, regardless of whether Defendant Vladyka was named as a party to any of the grievances, renders this claim not merely conceivable but plausible. *See* *Bibbs v. Early,* 541 F.3d 267, 274 (5th Cir.2008) (denying the defendants' motion for summary judgment as to the plaintiff's retaliation claim and holding that "the lapse of a month between the filing of his last grievance and the alleged retaliation does not foreclose a finding of a genuine issue of material fact on the causation question, particularly given the comments of the guards directly referring to inmates' filing of grievances"). Finally, as courts in this circuit have held, an inmates reassignment from a job or its termination can constitute adverse action necessary to support a claim of retaliation. *See Vega v. Lareau,* No. 9:04–CV–0750, 2010 WL 2682307, *8 (N.D.N.Y. Mar. 16, 2010) (citing cases).

***10** Based on the foregoing, the Court finds that Magistrate Judge Treece improperly determined that Plaintiff failed to state a First Amendment retaliation claim against Defendant Vladyka. As such, the Court rejects Magistrate Judge Treece's Report–Recommendation and Order insofar as it recommends the dismissal of Plaintiff's First Amendment retaliation claim against Defendant Vladyka.

C. Freedom to practice religion

The First Amendment to the United States Constitution guarantees the right to free exercise of religion. *See* U.S. Const. amend. I; *Cutter v. Wilkinson,* 544 U.S. 709, 719 (2005). As is true with regard to the First Amendment generally, the free exercise clause applies to prison inmates, subject to appropriate limiting factors. *See* *Ford v. McGinnis,* 352 F.3d 582, 588 (2d Cir.2003) (holding that "[p]risoners have long been understood to retain some measure of the constitutional protection afforded by the First Amendment's Free Exercise Clause" (citing *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800, 2804 (1974)). Thus, for example, under accepted free exercise jurisprudence, inmates are guaranteed the right to participate in congregate religious services under most circumstances. *See, e.g.,* *Salahuddin v. Coughlin,* 993 F.2d 306, 308 (2d Cir.1993) (citing cases).

The right of prison inmates to exercise their religious beliefs, however, is not absolute or unbridled, but instead is subject to valid penological concerns, including those relating to institutional security. *See* *O'Lone v. Estate of Shabazz,*

482 U.S. 342, 348 (1987); *Salahuddin,* 993 F.2d at 308. For example, a determination of whether an inmate's constitutional rights have been infringed by the refusal to permit his attendance at a religious service hinges upon the balancing of the inmate's First Amendment free exercise right against the institutional needs of officials tasked with the increasingly daunting task of operating prison facilities. This determination is "one of reasonableness, taking into account whether the particular [act] affecting [the] constitutional right ... is 'reasonably related to legitimate penological interests.' " *Benjamin v. Coughlin,* 905 F.2d 571, 574 (2d Cir.1990) (quoting *Turner v. Safley,* 482 U.S. 78, 89, 107 S.Ct. 2254, 2261 (1987)).

In the present matter, Plaintiff alleges the combined forty-five days that he spent under keeplock confinement caused him to be "restrained from Seven (7) combined religious services[.]" *See* Dkt. No. 1 at ¶¶ 15, 47. This allegation is insufficient to survive Defendants' motion to dismiss. Notably, Plaintiff does not assert any factual allegations indicating what "combined religious services" he was not able to attend during the time in question or that he was not provided with an alternative method of practicing his religion. *See* *Williams v. Weaver,* No. 9:03–CV–0912, 2006 WL 2794417, *5 (N.D.N.Y. Sept. 26, 2006) (citation omitted). Further, Plaintiff has not pled that his attendance at congregate religious services was "cental or important" to his religious beliefs. *See* *Washington v. Chaboty,* No. 09 Civ. 9199, 2011 WL 102714, *8 (S.D.N.Y. Jan. 10, 2011).

***11** Moreover, as Magistrate Judge Treece correctly found, Plaintiff has failed to allege that any of the Defendants were personally involved in causing him to miss the seven congregate religious services while he was sentenced to keeplock confinement. *See Hernandez v. Keane,* 341 F.3d 145 (2d Cir.2003) (citation omitted). Although Defendants Zarnetski and Besson rendered the keeplock confinement punishments that ultimately resulted in Plaintiff missing the seven religious services, Plaintiff has not alleged that any of the Defendants were responsible for the creation or implementation of a policy that caused him to miss religious services. Since personal involvement in the alleged unconstitutional conduct is a prerequisite to recovery under section 1983, Plaintiff's failure to allege the personal involvement of any of the Defendants in this alleged conduct requires the Court to grant Defendants' motion to dismiss Plaintiff's First Amendment Free Exercise claims. *See id.* (citation omitted).

Based on the foregoing, the Court finds that Magistrate Judge Treece correctly determined that Plaintiff has failed to allege facts plausibly suggesting that Defendants violated his First Amendment Free Exercise rights.

D. Due Process

Plaintiff asserts that Defendants Besson and Zarnetski violated his due right to due process by not conducting fair and impartial disciplinary hearings. *See* Dkt. No. 1 at ¶¶ 50–51. Plaintiff claims that Defendant Besson and Zarnetski violated 7 N.Y.C.R.R. §§ 250.2 and 253, and N.Y. Corrections Law § 138, which outline procedures for disciplinary hearings.

The Fourteenth Amendment to the Constitution provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "Although prison inmates necessarily have their liberty severely curtailed while incarcerated, they are nevertheless entitled to certain procedural protections when disciplinary actions subject them to further liberty deprivations such as loss of good-time credit or special confinement that imposes an atypical hardship." *Sira v. Morton,* 380 F.3d 57, 69 (2d Cir.2004) (citations omitted).

As a threshold matter, an inmate asserting a violation of his right to due process must first establish that he had a protected liberty interest in remaining free from the confinement that he challenges and, if so, that the defendant deprived the plaintiff of that liberty interest without due process. *See* *Giano v. Selsky,* 238 F.3d 223, 225 (2d Cir.2001); *Bedoya v. Coughlin,* 91 F.3d 349, 351 (2d Cir.1996). To establish a protected liberty interest, a prisoner must satisfy the standard set forth in *Sandin v. Conner,* 515 U.S. 472, 483–84 (1995). In *Sandin v. Conner,* the Supreme Court held that although states may still create liberty interests protected by due process, "these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force ..., nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner,* 515 U.S. 472, 483–84 (1995). Thus, to show that a

liberty interest is sufficient to invoke the protections of the Due Process Clause, a prisoner must establish both that his resulting confinement or restraint creates an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" and that the state has enacted a regulation or statute which grants inmates a protected liberty interest in remaining free from that confinement or restraint. *Id.* at 484; *see also* *Frazier v. Coughlin,* 81 F.3d 313, 317 (2d Cir.1996). When determining whether a plaintiff possesses a liberty interest, district courts must examine the specific circumstances of confinement, including analysis of both the length and conditions of confinement. *See Sealey,* 197 F.3d at 586; *Arce v. Walker,* 139 F.3d 329, 335–36 (2d Cir.1998).

***12** The fact that an inmate has been sentenced to serve forty-five days of keeplock confinement, without more, is insufficient to establish an atypical and significant deprivation. In the present matter, Plaintiff was sentenced on two separate occasions to thirty days of keeplock confinement and fifteen days of keeplock confinement. Plaintiff does not allege that his keeplock confinement was "atypical and significant" or that it affected the overall length of his criminal sentence. *See Jermosen v. Cahill,* 159 F.3d 1347 (2d Cir.1998) (citations omitted). Even if the keeplock sentences are aggregated for a total of forty-five days, Plaintiff has failed to allege a sufficient liberty interest. The Second Circuit has held that, "with respect to 'normal' SHU confinement, ... a 101–day confinement does not meet the *Sandin* standard of atypicality." *Ortiz v. McBride,* 380 F.3d 649, 654 (2d Cir.2004) (citation omitted). Plaintiff's complaint fails to allege that his forty-five days of keeplock confinement was an atypical and significant hardship; and, therefore, the Court finds that Magistrate Judge Treece correctly determined that the Court should grant Defendants' motion to dismiss as to this claim.

E. Plaintiff's remaining claims

In addition to the claims discussed above, Plaintiff's complaint also attempts to allege a section 1983 conspiracy claim against Defendants. *See* Dkt. No. 1 at ¶¶ 48, 55. In his response to Defendants' motion to dismiss, Plaintiff also asserts that Defendants Besson, Black, DeLuca, Goodman, Kelly, and Zarnetski all conspired to have him confined to his cell and removed from honor block. In his June 22, **2012** Report–Recommendation and Order, Magistrate Judge Treece recommended that the Court dismiss these claims because Plaintiff failed to failed to allege an agreement between the members of the alleged conspiracy to violate Plaintiff's rights. *See* Dkt. No. 29 at 15. Plaintiff did not object to this portion of Magistrate Judge Treece's ReportRecommendation and Order.

Having reviewed these claims and Magistrate Judge Treece's recommended disposition, the Court finds that Magistrate Judge Treece correctly determined that Plaintiff has failed to allege facts which plausibly suggest a conspiracy pursuant to section 1983. Therefore, the Court grants Defendants' motion to dismiss Plaintiff's conspiracy claims.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions, Magistrate Judge Treece's Report–Recommendation and Order and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Magistrate Judge Treece's June 22, **2012** Report–Recommendation and Order is **ADOPTED in part and REJECTED in part** for the reasons stated herein; and the Court further

ORDERS that Defendants' motion to dismiss is **GRANTED in part** and **DENIED in part;** and the Court further

ORDERS that Defendants DeLuca and Vladyka shall file an answer to Plaintiff's complaint in compliance with the Federal Rules of Civil Procedure; and the Court further

***13 ORDERS** that all further pretrial matters are referred to Magistrate Judge Treece; and the Court further

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

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 3704996

Footnotes

1 Plaintiff did not report this incident and later found out that “Lieutenant Sawyer” is actually Defendant Goodman.

2 Although Plaintiff states that this is a retaliation claim against Defendant Kelly, the Court believes that this claim is more appropriately viewed as alleging a denial of due process. In light of Plaintiff's *pro se* status, the Court will review the merits of this claim as both a First Amendment retaliation claim and a Fourteenth Amendment due process claim.

3 The Court believes that, although this claim has been treated as a First Amendment retaliation claim, it is more appropriately analyzed as a Fourteenth Amendment due process claim. In light of Plaintiff's *pro se* status, the Court will treat Plaintiff's allegations against Defendant Zarnetski as alleging claims under both the First and Fourteenth Amendments.