

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: _____ DATE FILED: <u>March 31, 2009</u>
--

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
 :  
 JULIO ISLEY SMITH, :  
 :  
 :  
 Petitioner, :  
 :  
 - against - :  
 :  
 JANET MAYPES-RHYNDERS, et al., :  
 :  
 Respondent. :  
 :  
 -----X

07 Civ. 11241 (PAC) (MHD)  
ORDER ADOPTING R&R

HONORABLE PAUL A. CROTTY, United States District Judge:

Pro se Plaintiff Julio Isley Smith, an inmate in the New York State correctional system, brings this lawsuit under 42 U.S.C. § 1983 against nine corrections officers, sergeants, and the Deputy Superintendent of Green Haven Correctional Facility. He claims that the Defendants harassed and threatened him, destroyed or stole his property, and brought groundless disciplinary charges against him in retaliation for his having complained about alleged officer misconduct.

Plaintiff first filed a Complaint in this matter on September 7, 2007, which the Court dismissed, sua sponte, with leave to replead, on December 14, 2007. Plaintiff filed an Amended Complaint on February 25, 2008, and the Court referred the case to United States Magistrate Judge Michael H. Dolinger for general pretrial matters. On August 8, Defendants moved to dismiss the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Magistrate Judge Dolinger issued a Report and Recommendation (“R&R”) on March 11, 2009, recommending that the Defendants’ motion be granted as to some of the individual defendants and denied as to the others.

The R&R provided ten days for written objections, pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. The R&R specifically advised that “[f]ailure to file timely objections may constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals.” (R&R 22.) No objections have been filed.

### **DISCUSSION**

“To accept the report and recommendation of a magistrate, to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record.” Wilds v. United Parcel Serv., 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003). Upon review and analysis, the Court finds no clear error and agrees with Magistrate Judge Dolinger’s determinations that:

1) Plaintiff has stated a claim for retaliation against Officers Rapalee, MacIssaac, Fredricks, Lawfer, Melious, and Weckesser, and Deputy Superintendent Cunningham, because Plaintiff alleges that they took adverse action against him by filing false disciplinary charges and telling other inmates that he was a child molester.

2) Plaintiff has failed to state a claim against Officers Maypes-Rhynders and Sergeants Montegari and Hillman because Plaintiff fails to allege that they took adverse actions against him with the necessary retaliatory intent.

3) Plaintiff adequately pleads a deprivation of his due process rights by Defendants Melious, Lawfer, and Cunningham because Plaintiff alleges that Cunningham, the hearing officer at his disciplinary hearing, was biased, and that Melious and Lawfer filed the allegedly false charges.

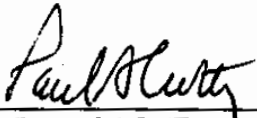
4) Plaintiff has properly alleged a claim against Defendants Melious and Lawfer for denial of access to the courts because he claims that they wrongfully took his legal papers, which allegedly resulted in Plaintiff losing a lawsuit.

5) A ruling on Defendants' immunity defense is premature based only on the pleadings.

Accordingly, the Court accepts and adopts the Report and Recommendation as its opinion. The Defendants' motion to dismiss is GRANTED with respect to Officer Maypes-Rhynders and Sergeant Montegari and Hillman, and DENIED with respect to all other Defendants. The order of reference to Magistrate Judge Dolinger is continual.

Dated: New York, New York  
March 31, 2009

SO ORDERED

  
\_\_\_\_\_  
PAUL A. CROTTY  
United States District Judge

Copies to:

Julio Isley Smith  
# 99-A-6505  
Attica Correctional Facility  
Exchange Street  
Attica, NY 14011-0149

Magistrate Judge Michael H. Dolinger  
Interoffice mail