D. Conn.
04-cv-387
Chatigny, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of August, two thousand nineteen.

Present:

Robert A. Katzmann,
Chief Judge,
Rosemary S. Pooler,
Peter W. Hall,
Circuit Judges.

Christopher Everson,

Plaintiff-Appellant,

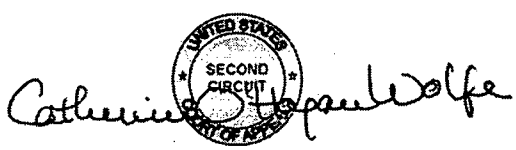
v. 19-882

Commissioner of Corrections, et al.,

Defendants-Appellees.

Appellees move to dismiss and for summary affirmance. Upon due consideration, it is hereby ORDERED that the motion is GRANTED. The appeal is DISMISSED because it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



APPENDIX A

03/25/2019	151	ORDER denying 146 Motion for Order. Plaintiff moves pursuant to Fed. R. Civ. P. 60(b)(6) to set aside the judgment dismissing this action challenging the termination of his employment. He asks the Court to re-enter the same judgment in order to give him another opportunity to appeal. Plaintiff's appeal from the judgment was dismissed for failure to pay the required fee. See Everson v. Comm'r of Corrections, Docket No. 09-0903-cv (2d Cir. 6/9/09). Two months later, he filed a motion to recall the mandate and proceed in forma pauperis, but that motion was denied because there was "[n]o showing of manifest injustice." See id., Docket Entry for 8/12/2009. In 2016, plaintiff filed a duplicative action challenging the termination of his employment. That action was dismissed on the ground that it was precluded by the prior action. Plaintiff unsuccessfully appealed. He then filed the present motion. Plaintiff argues that the interest served by providing him with a means to obtain appellate review of the dismissal of this action is a sufficient reason to justify granting relief from the judgment under Rule 60(b)(6). Defendants object principally on the ground that the motion is untimely. Given the passage of time, this objection has merit. Moreover, even if plaintiff has been reasonably diligent, as he contends, his motion under Rule 60(b)(6)is unavailing. In light of the Second Circuit's determination that the interests of justice did not justify recalling the mandate, the present motion may be barred by the law of the case. Even if that is not so, plaintiff has not shown that a new appeal would raise a substantial issue that should be considered by the Court of Appeals in the interests of justice. Accordingly, the motion is hereby denied. Signed by Judge Robert N. Chatigny on 3/25/19. (Chatigny, Robert) (Entered: 03/25/2019)
03/25/2019	152	ORDER finding as moot 147 Motion to consider evidence. Plaintiff asks the Court to consider evidence showing that he reasonably relied on an attorney to take action to obtain relief from the judgment. As explained in the order entered today denying the Rule 60(b)(6) motion, even if plaintiff can demonstrate that the Rule 60(b)(6) motion was filed within a reasonable time, the motion is nevertheless unavailing. Accordingly, the present motion is denied as moot. So ordered. Signed by Judge Robert N. Chatigny on 3/25/19. (Chatigny, Robert) (Entered: 03/25/2019)

APPendix B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of September, two thousand nineteen.

Christopher Everson,

Plaintiff - Appellant,

v.

Commissioner of Corrections, Theresa Lantz, John Armstrong, Nelvin Levester, Robert Carbone,

Defendants - Appellees.

ORDER

Docket No: 19-882

Appellant, Christopher Everson, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPendix C

~~Appendix B~~

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CHRISTOPHER EVERSON :

v. :

: CIVIL NO. 3:04CV387(RNC)

THERESA LANTZ, JOHN ARMSTRONG, NELVIN LEVESTER and ROBERT CARBONE :

JUDGMENT

This action having come on for consideration of the defendants' supplemental motion for summary judgment and the plaintiff's cross-motion for summary judgment before the Honorable Robert N. Chatigny, United States District Judge, and

The Court, having considered the full record of the case including applicable principles of law, and having issued a ruling and order granting the defendants' motion and denying plaintiff's motion; it is hereby

ORDERED, ADJUDGED and DECREED that judgment be and hereby is entered in favor of defendants.

Dated at Hartford, Connecticut, this 4th day of February, 2009.

ROBERTA D. TABORA, Clerk

By /S/ JW
Jo-Ann Walker
Deputy Clerk

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHRISTOPHER EVERSON Plaintiff, V. THERESA LANTZ, JOHN ARMSTRONG, NELVIN LEVESTER and ROBERT CARBONE, Defendants.	:	CASE NO. 3:04-CV-387 (RNC)

RULING AND ORDER

Pending for decision is a supplemental motion for summary judgment filed by the defendants seeking dismissal of plaintiff's claim under 42 U.S.C. § 1983 that his employment with the Connecticut Department of Correction ("DOC") was terminated because of his race in violation of the Equal Protection Clause of the Fourteenth Amendment. Plaintiff, an African American, alleges that he was disciplined more harshly for off-duty misconduct than similarly situated Caucasian and Hispanic employees. In a prior ruling, summary judgment was granted to the defendants on the other claims in the complaint. See Ruling and Order, September 30, 2006 (Doc. 48). Since then, defendants have supplemented the record with additional materials showing that plaintiff was not treated differently than similarly situated individuals outside his protected group. After careful review of the whole record, I conclude that plaintiff has failed to produce sufficient evidence to permit a jury to return a

Appendix E

verdict for him on the racial discrimination claim. Accordingly, the defendants' supplemental motion for summary judgment on this claim is granted.[1]

I. Facts

Plaintiff, while employed by the DOC as a corrections officer, was arrested on two occasions and charged with various off-duty offenses, including possession of marijuana and drug paraphernalia. He reported the arrests and the DOC commenced investigations. Plaintiff received accelerated rehabilitation on some of the charges, including the drug charges, which were dismissed after he successfully completed a period of probation. Other charges were nolled. Plaintiff failed to appear for a pre-disciplinary conference with the DOC, after which his employment was terminated. He grieved the termination but the grievance was denied. The matter then proceeded to arbitration. Plaintiff did not participate in the arbitration process. The arbitrator concluded that the termination of plaintiff's employment was supported by just cause. This suit followed.

II. Discussion

Summary judgment may be granted only if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). To

[1] Plaintiff's cross-motion for summary judgment is denied.

avoid summary judgment, plaintiff must point to evidence that would allow a reasonable jury to return a verdict in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); Graham v. Long Island R.R., 230 F.3d 34, 38 (2d Cir. 2000).

Plaintiff's equal protection claim under § 1983 is analyzed using the same framework applied in employment-discrimination cases brought under Title VII (i.e., the burden-shifting framework of McDonnell Douglas v. Green, 411 U.S. 792 (1973)). See Feingold v. New York, 366 F.3d 138, 159 (2d Cir. 2004). To present a prima facie case, plaintiff must produce evidence that his employment was terminated in circumstances giving rise to an inference of discrimination based on race. See Patterson v. County of Oneida, 375 F.3d 206, 221 (2d Cir. 2004). Plaintiff can satisfy this burden by showing that similarly situated employees outside his protected group who engaged in conduct of comparable seriousness were not terminated. See Graham, 230 F.3d at 39.[2] If he makes this showing, the burden shifts to the defendants to articulate a legitimate, nondiscriminatory reason for the termination. See id. Once such a reason is proffered, the burden shifts back to the plaintiff to demonstrate by

[2] Whether employees are similarly situated ordinarily is an issue of fact for a jury to resolve. Graham, 230 F.3d at 38. However, a court may properly grant summary judgment when no reasonable jury could find that employees were similarly situated. See Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 499 n. 2 (2d Cir. 2001).

competent evidence that the defendants' explanation is a pretext for discrimination, in other words, that the proffered explanation is not true and that he was terminated because of his race. Id.

Plaintiff has satisfied his burden of presenting a prima facie case. He points to more than fifty similarly situated corrections officers[3] who faced criminal charges but were not

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[3]These include, for example:

J.B., a white male corrections officer arrested and charged first with assault on a police officer, driving while intoxicated and criminal mischief and then again four months later with disorderly conduct and assault in the third degree. He was initially dismissed but then reinstated via stipulated agreement. (Def. Mem. S.J. Ex. 29 at 6.)

S.G., an Hispanic male corrections officer charged with sexual assault in the first degree and burglary in the first degree. There is no record of any disciplinary action against him. (Id. at 17.)

D.D., a white male corrections officer charged with assault on a police officer, interfering with a police officer, criminal mischief in the third degree, and driving under the influence. He was initially dismissed but then allowed to return via stipulated agreement. (Def. Mem. S.J. Ex. 31 at 22.)

Among those charged with drug offenses, plaintiff points to:

H.A., an Hispanic male corrections officer charged with driving while intoxicated, speeding, failure to obey a traffic signal, and possession of marijuana. He was placed on administrative leave but then reinstated after two months. (Def. Mem. S.J. Ex. 29 at 2.)

C.C., a white male corrections officer charged with larceny in the sixth degree, possession of marijuana, possession and use of drug paraphernalia, and criminal trespass in the third degree. He was placed on administrative leave while a DOC investigation progressed, but allowed to return to service thereafter. (Id. at 9.)

J.F., a white male corrections officer arrested and charged with disorderly conduct and possession of a controlled substance. There is no mention of any discipline taken against

(continued...)

terminated.[4] Defendants have satisfied their burden of articulating a nondiscriminatory reason for the termination. They state that plaintiff was terminated because he engaged in drug-related misconduct for which he received accelerated rehabilitation and failed to participate in the DOC's disciplinary process. Defendants' explanation is supported by admissible evidence sufficient to support a jury finding that these are the true reasons for the termination. Accordingly, to avoid summary judgment, plaintiff must offer proof that would permit a jury to find that the defendants' explanation is untrue and that his race played a role in the termination.

Plaintiff has not carried this burden. The DOC's policy of treating drug offenses harshly has been sustained by the State Board of Mediation and Arbitration, which has consistently found that a drug offense provides just cause for terminating a corrections officer. (See, e.g., Def. Supp. Mem. S.J. Ex. 5) ("This Arbitrator has found many times in the past that the

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[3](...continued)
him. (Id. at 16.)
J.M., an Hispanic male charged with driving under the influence and possession of marijuana. He was initially dismissed but allowed to return via a "last chance" stipulated agreement. (Id. at 29.)

[4]Defendants' objection that these comparators are not sufficiently similar is misplaced. At the prima facie stage, the plaintiff's burden of production is "minimal." James v. New York Racing Ass'n., 233 F.3d 149, 153 (2d Cir. 2000). The defendants' objections are better reserved for the nondiscriminatory-reason and pretext stages of the analysis.

corrections operation cannot be run by officers who are involved in any way in the sale or use of narcotics. To allow this would be to allow the inmate population, the corrections officers guarding the inmate population[,] and the public itself to be placed in harm's way."). The disciplinary records defendants have produced in this case show that the DOC has consistently taken a hard line against drug offenders. DOC arrest logs, appended as exhibit 29 to defendants' first motion for summary judgment, show that approximately 60% of DOC employees who were charged with a drug offense were terminated. (See id.) In addition, the arrest logs show that drug offenders of all races were terminated at approximately the same rate, 58.33% for African-Americans (seven out of twelve) compared to 58.14% for Caucasians and Hispanics (twenty-five out of forty-three). (See id.) Of those, like the plaintiff, with marijuana charges, one of two African-American officers was terminated (50%), compared with six of eleven Caucasian and Hispanic officers (55%). Of those, like the plaintiff, with a non-distribution drug charge as well as additional charges, three out of five African-Americans (60%) were terminated compared to eight of fourteen Caucasians and Hispanics (57.14%). (See id.)

In addition, the record confirms that plaintiff's refusal to participate in the disciplinary process was a significant factor in the termination of his employment. The vast majority of the

comparators plaintiff points to participated in pre-disciplinary and arbitration proceedings. Of the four Hispanic or Caucasian individuals in the arrest logs who were not terminated despite being similarly situated to the plaintiff in that they faced non-distribution drug charges accompanied by other charges, all participated in the disciplinary process through pre-disciplinary hearings or arbitration proceedings or both.[5] This serves to

[5]These are:

H.A., an Hispanic male corrections officer charged with driving while intoxicated, speeding, failure to obey traffic signals and possession of marijuana. Defendants note that H.A. not only participated in the disciplinary process, but also had his charges nolled prior to returning to service, unlike plaintiff whose drug charges were only dismissed after a twenty-month period of probation under his accelerated-rehabilitation agreement. (Def. Mem. S.J. Ex. 29 at 2.)

C.C., a white male corrections officer arrested for sixth-degree larceny, possession of marijuana, possession of drug paraphernalia, and third-degree criminal trespass. He participated in the disciplinary process and was allowed to return to work pursuant to a stipulated agreement. Defendants note that the charges in this case were based on out-of-state conduct, making them more difficult to prove and that the officer participated in a Step Three hearing at the Office of Labor Relations. (Id. at 9.)

J.F., a white male corrections officer arrested for disorderly conduct and possession of a controlled substance. He availed himself of the negotiation process at arbitration and entered into a stipulated agreement. In addition, defendants note that he had his charges nolled prior to returning to work, whereas plaintiff's drug charges remained pending during his period of probation. (Id. at 16.)

J.M., an Hispanic male corrections officer arrested for driving under the influence and possession of marijuana. He was dismissed but then allowed to return to work on a "last chance" stipulated agreement. The defendants note that J.M. produced drug tests taken immediately after his arrest showing that he had no marijuana in his system, making it difficult for the state to prove its case during the disciplinary process. Needless to say,

(continued...)

explain why plaintiff was treated more harshly than other officers who were charged with off-duty drug offenses accompanied by other offenses and yet were not terminated.

In his response to the defendants' supplemental motion for summary judgment, plaintiff contends that he should be compared with all officers arrested for off-duty misconduct, not just drug offenders. But he offers no proof that the DOC's policy and practice of treating drug offenders more harshly than others is a pretext for racial discrimination. Plaintiff also contends that participation in the DOC's disciplinary process is irrelevant. He asserts that the DOC's process addresses whether there is good cause for a termination, not whether the constitutional standard of equal protection is satisfied. This argument misses the

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[5](...continued)
J.M.'s participation in this process was material to its favorable resolution in his case. (Id. at 29.)

Two other individuals had similar charges to the plaintiff and were not directly addressed by defendants. P.R., a white male teacher, charged with driving while intoxicated and possession of marijuana, resigned from state service after having the possession charge nolled. (Id. at 40.) Defendants have elsewhere noted that plaintiff never sought to resign from his position. In addition, there are conflicting records with regard to A.C., an Hispanic male corrections officer charged with possession of marijuana, driving while intoxicated, and failure to wear a seatbelt. The Department's arrest log shows that he was charged with these offense in 2005 and placed on administrative leave. (Id. at 11.) However, in the disciplinary log, there is no mention of these offenses; rather A.C. is cited only for tardiness and exhaustion of sick leave. (Def. Mem. S.J. Ex. 31 at 17.) The lack of information surrounding these two comparators is far from sufficient to establish that the defendants articulated non-discriminatory reasons for terminating plaintiff were merely a pretext for discrimination.

point. Defendants explain that plaintiff was terminated while a few other officers charged with similar off-duty misconduct were not because the others took advantage of the opportunity to defend themselves and in some cases negotiated stipulated agreements allowing them to return to state service. Plaintiff emphasizes that he was not notified of his opportunity to participate in a pre-disciplinary hearing until after the hearing was held. It is undisputed, however, that several attempts were made to contact him to schedule a pre-disciplinary conference and the conference was rescheduled twice when he failed to appear. (See Def. Mem. S.J. Exs. 9, 10, 15, 16, 17, 18.)[6]

IV. Conclusion

Accordingly, the defendants' supplemental motion for summary judgment (doc. # 114) is hereby granted. Plaintiff's cross-motion for summary judgment (doc. # 121) is denied. The Clerk may close the file.

So ordered this 3d day of February 2009.

/s/ RNC
Robert N. Chatigny
United States District Judge

[6] Because plaintiff has failed to present sufficient evidence to support a finding that his employment was terminated because of his race, it is unnecessary to consider defendants' argument that they are entitled to qualified immunity.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHRISTOPHER EVERSON, Plaintiff, V. THERESA LANTZ, COMMISSIONER OF CORRECTION; JOHN ARMSTRONG; NELVIN LEVESTER; ROBERT CARBONE, Defendants.	:	CASE NO. 3:04-CV-387 (RNC)

RULING AND ORDER

Plaintiff, a former employee of the Connecticut Department of Correction ("DOC"), brings this action pursuant to 42 U.S.C. § 1983 alleging that he was terminated in violation of his constitutional rights to procedural due process and equal protection. Defendants have moved for summary judgment, and plaintiff has filed a partial cross-motion for summary judgment. For the reasons that follow, summary judgment is granted for defendants on the due process and "class of one" equal protection claims but denied on the race-based equal protection claim.

I. Facts

Plaintiff, an African-American male, began working as a correction officer at DOC in 1984. (Defs.' L. R. 56(a)1 Statement ¶ 1.) At the time of the incidents that led to his termination, he was not working because of a back injury and was receiving workers' compensation benefits. (Pl.'s L. R. 56(a)1

Appendix F

Statement ¶ 8.) Defendant Levester was the warden at Webster Correctional Institution, where plaintiff was assigned to duty. (Pl.'s L. R. 56(a)1 Statement ¶¶ 4, 7.) Defendant Carbone was an administrative captain at Webster Correctional Institution. (Defs.' L. R. 56(a)1 Statement ¶ 6.) Defendant Armstrong was the commissioner of the Department of Correction. (Defs.' L. R. 56(a)1 Statement ¶ 3.) Defendant Lantz is the current commissioner and is sued in her official capacity only. (Defs.' L.R. 56(a)1 Statement ¶ 2.)

On October 27, 2000, a state court judge ordered plaintiff to surrender all pistols and revolvers. (See Defs.' L. R. 56(a)1 Statement ¶ 7.) Hamden police officers subsequently executed a search warrant at plaintiff's home seeking pistols and revolvers that were known to be registered to him. (Defs.' L. R. 56(a)1 Statement ¶ 9.) According to the police report, plaintiff struck a police officer executing the warrant and resisted arrest, and the officers discovered 6.2 grams of marijuana, rolling papers, and four marijuana roaches in a closet. (See Defs.' Ex. 3.) Plaintiff was arrested for interfering with execution of the search warrant, disorderly conduct, assault on a police officer, possession of marijuana, and possession of drug paraphernalia. (Defs.' L. R. 56(a)1 Statement ¶ 11.) Assault on a police officer is a felony. See Conn. Gen. Stat. § 53a-167c. Plaintiff promptly reported the arrest to the DOC, and an investigation was

commenced. (Defs.' L. R. 56(a)1 Statement ¶¶ 15-19.) In May 2001, plaintiff was granted accelerated rehabilitation. In January 2003, the charges were dismissed following a period of probation. (Defs.' L. R. 56(a)1 Statement ¶ 47.)

On November 21, 2000, plaintiff was arrested on a warrant charging him with threatening, harassment, sexual assault, and criminal attempt to commit sexual assault. (Defs.' L. R. 56(a)1 Statement ¶ 21.) Plaintiff reported this arrest to the DOC, and an investigation was commenced. (Defs.' L. R. 56(a)1 Statement ¶¶ 22-24.) The charges were nolled in December 2001. (Defs.' L. R. 56(a)1 Statement ¶ 46.)

On January 10, 2001, defendant Carbone submitted to defendant Levester investigation reports covering the two arrests. (See Defs.' L. R. 56(a)1 Statement ¶¶ 25-26, 30-31.) In the course of his investigations, Carbone did not interview anyone other than the plaintiff. (Pl.'s L. R. 56(a)1 Statement ¶¶ 34-35.) He believed that the purpose of the investigations was to verify only the occurrence of the arrests, not the underlying conduct precipitating the arrests. (Def.'s L. R. 56(a)1 Statement ¶ 34.) He concluded that by virtue of plaintiff's arrests on warrants there existed probable cause that plaintiff had violated the Department's directive on employee conduct. (Defs.' L. R. 56(a)1 Statement ¶¶ 27, 32.) A letter was sent to plaintiff notifying him of a pre-disciplinary

conference. (Defs.' L. R. 56(a)1 Statement ¶ 35.) Plaintiff did not attend the conference. (Defs.' L. R. 56(a)1 Statement ¶ 36.) The conference was rescheduled twice. Plaintiff failed to appear both times despite numerous notifications by mail and phone. (Defs.' L. R. 56(a)1 Statement ¶¶ 37-38, 42-43.) Following the pre-disciplinary conference on March 8, 2001, plaintiff's employment was terminated for "just cause." (Defs.' L. R. 56(a)1 Statement ¶¶ 43-44.) Defendant Armstrong agreed with this decision. (Defs.' L. R. 56(a)1 Statement ¶ 40.)

Plaintiff grieved his dismissal in March 2001. (Defs.' L. R. 56(a)1 Statement ¶ 50.) The grievance was denied. (Defs.' L. R. 56(a)1 Statement ¶ 51.) The matter then proceeded to arbitration. On April 22, 2002, the arbitrator denied plaintiff's grievance and concluded that he had been terminated for just cause. (Defs.' L. R. 56(a)1 Statement ¶ 52.) Plaintiff commenced this action on March 5, 2004.

II. Discussion

Summary judgment may be granted only when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of showing that no genuine issue of material fact exists, and all reasonable inferences must be drawn in favor of the nonmoving party. Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc., 391 F.3d

77, 83 (2d Cir. 2004). Once the moving party has demonstrated the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and point to evidence in the record showing a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Plaintiff asserts both procedural due process and equal protection claims. He claims that defendants infringed his procedural due process rights by terminating him in violation of the Department's directives governing employee discipline and disciplinary investigations.[1] He also claims that he was treated more harshly than similarly situated Caucasian and Hispanic employees in that he was terminated because of off-duty arrests before conviction on the resulting charges. Defendants move for summary judgment on the ground that plaintiff has not adduced evidence to support these claims. In addition, they contend that they are entitled to summary judgment based on qualified immunity.

A. Procedural Due Process

[1] Plaintiff alleges a variety of irregularities in the investigation of his misconduct and his termination. For example, he alleges that defendant Carbone failed to interview relevant witnesses to the incidents, in violation of Directive 1.10 ¶ 5.b, and that he based his conclusion that plaintiff had engaged in misconduct solely on the fact of his arrests. He also alleges that defendants Levester and Armstrong did not consider whether the investigation was conducted fairly or whether substantial evidence supported plaintiff's guilt when they recommended termination, in violation of Directive 2.6 ¶ 13.

A procedural due process claim comprises two inquiries. First, the court must determine whether the plaintiff has a protected property or liberty interest. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 & n.3 (1985). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Id. at 538 (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)). The parties agree that plaintiff had a protected property interest in his continued employment because he could only be terminated for just cause. Second, the court must determine what process is due. Id. at 541. This inquiry is a matter of federal law and requires balancing the individual's interest, the government's interest, which involves its interest in avoiding administrative burdens, and the risk of erroneous deprivation. See id. at 541-43 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

In Loudermill, the Court defined what process is due before a state can deprive a public employee of a property interest in continued employment. After weighing the competing interests at stake, the Court concluded that a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. at 546. The pre-termination hearing need only be "a determination of whether there are

reasonable grounds to believe that the charges against the employee are true and support the proposed action" so long as the employee has recourse to a post-termination hearing. Id. at 545-46.

Plaintiff appears to concede that defendants provided him with the process due under Loudermill. (See Doc. #38 at 17.) He argues instead that constitutional due process protections require an agency to follow its own internal rules when terminating employees, citing a line of cases originating in Service v. Dulles, 354 U.S. 363 (1957). Plaintiff misconstrues these cases, which concern judicial review of federal agency action under principles of administrative law. See Bd. of Curators v. Horowitz, 435 U.S. 78, 92 n.8 (1978) (holding that Service "enunciate[d] principles of federal administrative law rather than of constitutional law binding upon the States"). Plaintiff cites no case holding that due process requires a state agency to follow its own internal procedures when terminating an employee. In fact, Loudermill held just the opposite: "The answer to [the] question [of how much process is due] is not to be found in the [state] statute." 470 U.S. at 541; see also McDarby v. Dinkins, 907 F.2d 1334, 1337-38 (2d Cir. 1990) ("When the minimal due process requirements of notice and hearing have been met, a claim that an agency's policies or regulations have not been adhered to does not sustain an action for redress of

procedural due process violations." (quoting Goodrich v. Newport News Sch. Bd., 743 F.2d 225, 227 (4th Cir. 1984))).[2]

The issue in a procedural due process claim is not whether the state decision was correct or complied with state procedural regulations. The Due Process Clause does not prohibit erroneous deprivations of property; it requires that a person being deprived of property receive due process. This Court's role is not to review the correctness of defendants' conclusion that just cause existed for plaintiff's termination under the directives; plaintiff already litigated this issue in arbitration. Because plaintiff has conceded that he received the process required

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[2] As one opinion cited by plaintiff stated:

> It is not every disregard of its regulations by a public agency that gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional processes of state institutions. . . .
>
> While courts have generally invalidated adjudicatory actions by federal agencies which violated their own regulations promulgated to give a party a procedural safeguard, we conclude that the basis for such reversals is not . . . the Due Process Clause, but rather a rule of administrative law.

Bates v. Sponberg, 547 F.2d 325, 329-30 (6th Cir. 1976) (footnote omitted). Plaintiff has not articulated how defendants' alleged failure to follow their internal rules resulted in a procedure that itself impinged his rights. Rather, he broadly (and incorrectly) asserts that a state employee's due process rights are automatically violated when his employer does not follow its internal rules.

under Loudermill, he has failed to state a claim under the Due Process Clause.[3]

B. Equal Protection

The crux of plaintiff's equal protection claim is that he was terminated before the criminal charges brought against him were resolved, whereas similarly situated Caucasian and Hispanic employees were not terminated until after they were convicted. Defendants argue that there is no issue of genuine fact regarding whether similarly situated employees were treated differently. I cannot agree.

"The Equal Protection Clause requires that the government treat all similarly situated people alike." Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 499 (2d Cir. 2001). A selective treatment claim under the Equal Protection Clause requires a showing that the plaintiff was treated differently from others similarly situated and that the selective treatment was based on impermissible considerations such as race. See Giordano v. City of N.Y., 274 F.3d 740, 750 (2d Cir. 2001). Alternatively, under a "class of one" theory, a plaintiff may

[3] Plaintiff argues that, because defendants allegedly terminated him for conduct that was not grounds for termination under the Department's directives, he lacked "notice" that he could be dismissed for such conduct. (See Doc. #38 at 10 n.9.) I do not understand plaintiff to be arguing that he lacked the notice required by Loudermill because plaintiff does not allege that he lacked notice of the charges against him in advance of his Loudermill hearing.

demonstrate that he was treated differently from others similarly situated and that there was no rational basis for the difference in treatment. See Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam).[4]

A plaintiff must demonstrate that an employee with whom he seeks to be compared is "similarly situated in all material respects." Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000) (quoting Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 64 (2d Cir. 1997)).[5] The plaintiff and comparison employee need not be identical, but they must be "subject to the same workplace standards," and the conduct for which they were sanctioned must e be "of comparable seriousness." Id. at 40. "The determination that two acts are of comparable seriousness requires - in addition to an examination of the acts - an examination of the context and surrounding circumstances in which those acts are evaluated." Id. Whether individuals are similarly situated is thus usually an issue of fact for the jury. See id. at 39; see also Harlen Assocs., 273 F.3d at 499 n.2 (whether individuals are similarly situated is generally an issue for the jury, but the

[4] The Second Circuit has not yet decided whether Olech requires a showing of malice or bad faith. See, e.g., Bizzarro v. Miranda, 394 F.3d 82, 88 (2d Cir. 2005); Giordano, 274 F.3d at 750-51.

[5] Graham is a Title VII case but the Second Circuit applies the same "similarly situated" test in equal protection cases. See, e.g., Harlen Assocs., 273 F.3d at 499 n.2.

issue can be decided on summary judgment "where it is clear that no reasonable jury could find the similarly situated prong met").

On the record before me, there are genuine issues of material fact regarding whether plaintiff was treated differently than similarly situated Caucasian and Hispanic employees. Defendants have submitted records allegedly showing that employees of all races were terminated both before and after conviction for felony and drug-related offenses. The records lack sufficient detail for me to conclude that these individuals were similarly situated to plaintiff. For example, many of the drug offenses resulting in termination involved possession of cocaine. As plaintiff argues, a rational jury could conclude that plaintiff was not similarly situated to employees arrested for cocaine possession because Connecticut law distinguishes between possession of narcotics such as cocaine and possession of less than four ounces of marijuana. See Conn. Gen. Stat. § 21a-279.[6] Similarly, it is debatable whether plaintiff should be

[6] Defendants have submitted various letters and other documents concerning disciplinary action taken against other officers to show that employees of all races have been terminated for felony and drug-related offenses before and after conviction. (See Defs.' Ex. 35.) My review of these documents revealed four explicit mentions of marijuana possession. An African-American, was terminated for off-duty possession of marijuana. (See Doc. #31 at 33.) Two Caucasians were terminated following marijuana-related offenses but were allowed to return to work pursuant to a stipulation. (See Doc. #31 at 13, 22.) A third Caucasian was terminated following an marijuana-related arrest but was subsequently allowed to resign in lieu of termination. (See Doc. #31 at 67.) A jury might or might not find these individuals

compared to individuals arrested for selling narcotics or possessing narcotics with intent to sell. Moreover, I cannot discern from the records submitted by the defendants whether some employees were terminated pre- or post-conviction.

By contrast, plaintiff has identified several Caucasian and Hispanic employees whose employment was not terminated following a felony arrest. For example, a white male with two arrests, one for a felony offense of risk of injury to a minor, was placed on administrative leave but not terminated. (See Doc. #29 at 2.) A Hispanic male was placed on leave following arrests for sexual assault and burglary; however, he was not terminated and was allowed to return to work following a "not guilty" verdict. (See Doc. #29 at 17.) Similarly, employees with drug-related arrests, some more serious than plaintiff's, were not terminated pre-conviction. A white male arrested for possession and sale of a controlled substance was placed on leave and, pursuant to a stipulation, suspended for thirty days. (See Doc. #29 at 19; Doc. #31 at 33.) Another white male arrested for possession of marijuana was given a last chance stipulation. (See Doc. #29 at 10; Doc. #31 at 14.) It is conceivable that a reasonable jury could find these individuals similarly situated to plaintiff.

Because I find genuine issues of material fact going to

---

similarly situated to plaintiff, but the differences in treatment raise issues of fact to be decided by a jury.

whether plaintiff was treated differently than similarly situated individuals, summary judgment must be denied on plaintiff's race-based equal protection claim. However, I grant summary judgment on plaintiff's "class of one" claim. Plaintiff makes no attempt to argue in opposition to defendant's motion for summary judgment that there was no rational basis for the difference in treatment. In the absence of any such argument, this claim is deemed waived.

C. Qualified Immunity

In the alternative, defendants argue that their actions are protected by qualified immunity. In assessing a defense of qualified immunity, the relevant question is whether a reasonable officer in the defendant's position could have believed the defendant's actions lawful in light of clearly established law. See Anderson v. Creighton, 483 U.S. 635, 641 (1987). No reasonable officer would have believed it lawful, in light of clearly established law, to discipline African-American employees more severely than Caucasian or Hispanic employees. Because there are genuine issues of material fact going to whether defendants treated plaintiff differently than similarly situated Caucasian and Hispanic employees, I cannot determine at this stage whether defendants are entitled to qualified immunity.

III. Conclusion

For the foregoing reasons, defendants' motion for summary judgment [Doc. #30] is hereby granted in part and denied in part.

Plaintiff's motion for summary judgment [Doc. #37] is hereby denied. Count two ("class of one") and counts three and four (procedural due process) are dismissed.

So ordered.

Dated at Hartford, Connecticut this 30th day of September 2006.

/s/
Robert N. Chatigny
United States District Judge

Appendix A

DIST OF CONN. (N.H.)
09-CV-387
CHATIGNY

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 9th day of June, two thousand and nine,

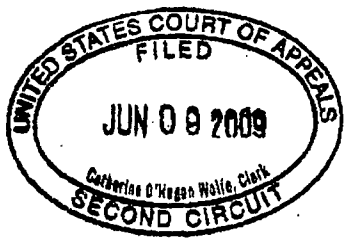
Christopher Everson,

Plaintiff-Appellant,

v.

Commissioner Of Corrections, Theresa Lantz, John Armstrong, Nelvin A. Levester, Robert Carbone,

Defendants-Appellees.



ORDER
Docket Number: 09-0903-cv

The *Civil Appeals Management Plan* of this court directs that within the (10) days after filing a Notice of Appeal, the appellant shall, inter alia, either pay docketing fee or move for leave to proceed *in forma pauperis*, and that in the event of default of this requirement the Clerk may dismiss the appeal without further notice.

The appellant herein not having so proceeded, upon consideration thereof, it is **ORDERED** that the appeal from the order of 2-4-09 from the United States District Court of Connecticut be) and it hereby is **DISMISSED**. Any motions pending prior to the entry of this order of dismissal are deemed **MOOT**.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By:
Jamie Kaufman, Deputy Clerk

APPENDIX G

Appendix A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

(Caption [use short title])
Docket Number(s): 09-0903-CV
Everson v. Commissioner of Corrections CT

Motion for: Recall Mandate and In forma Pauperis

Set forth below precise, complete statement of relief sought:

Relief of Recall mandate and for my case to be Reopened, Motion for In forma Pauperis to be Granted

MOVING PARTY: Everson
☑ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Commissioner of Correction CT.

MOVING ATTORNEY: PRO SE PARTY
(name of attorney, with firm, address, phone number and e-mail)
PRO SE PARTY
Christopher Everson
INMATE 359124 Cheshire CI
900 Highland Ave.
Cheshire, CT 06410

OPPOSING ATTORNEY (Name): Asst. Atty. Gen. Jane B Emons
(name of attorney, with firm, address, phone number and e-mail)
JANE B. Emons Asst. Atty. General
State of CT, 55 Elm St. P.O. Box 120
Hartford, CT. 06141

Court-Judge/Agency appealed from: U.S. District Court For CT, Judge Robert N. Chatigny

Please check appropriate boxes:

Has consent of opposing counsel:
A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☐ No

Is oral argument requested? ☐ Yes ☒ No
(request for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☒ No
If yes, enter date

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
Has request for relief been made below? ☐ Yes ☒ No

Has this relief been previously sought in this Court? ☐ Yes ☒ No

Requested return date and explanation of emergency:
0

Signature of Moving Attorney: PRO SE PARTY Christopher Everson Date: July 30, 2009

Has service been effected? ☐ Yes ☒ No
(Attach proof of service)

ORDER

Before: Jon O. Newman, *Circuit Judge*

IT IS HEREBY ORDERED that the motion to recall the mandate is DENIED. No showing of manifest injustice. See District Court opinion dismissing discrimination claim.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
by
Joy Fallek, Administrative Attorney

8-12-09
Date

Appendix H

16-3381
Everson v. Armstrong et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of September, two thousand seventeen.

PRESENT:

BARRINGTON D. PARKER,
SUSAN L. CARNEY,
Circuit Judges.
TIMOTHY C. STANCEU,
*Chief Judge, U.S. Court of Int'l Trade.**

CHRISTOPHER EVERSON,

Plaintiff-Appellant,

v. No. 16-3381

JOHN ARMSTRONG, OFFICIAL AND INDIVIDUAL CAPACITY,
SCOTT SEMPLE, COMMISSIONER OF CORRECTION,
OFFICIAL AND INDIVIDUAL CAPACITY,

Defendants-Appellees.

FOR APPELLANT: Christopher Everson, *pro se*, Hamden, CT.

* Chief Judge Timothy C. Stanceu, of the United States Court of International Trade, sitting by designation.

APPENDIX I

AMICUS CURIAE: Carletha S.P. Texidor, Assistant Attorney General, Office of the Connecticut Attorney General, Hartford, CT.

Appeal from a judgment of the United States District Court for the District of Connecticut (Chatigny, *J.*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court entered on September 7, 2016, is **AFFIRMED.**

Appellant Christopher Everson appeals from a judgment entered after the district court *sua sponte* dismissed his suit pursuant to 28 U.S.C. § 1915(e)(2). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, to which we refer only as necessary to explain our decision to affirm.[1]

We review *de novo* a district court's *sua sponte* dismissal under § 1915(e)(2). *Giano v. Goord*, 250 F.3d 146, 149-50 (2d Cir. 2001). We conclude that the district court properly dismissed Everson's complaint on claim-preclusion grounds. *Monahan v. N.Y.C. Dept. of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000) (A claim is precluded when "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action."). First, Everson's 2004 action for damages under 42 U.S.C. § 1983 was resolved on the merits when the district court entered summary judgment for defendants in 2009. *Everson v. Comm'r of Corr.*, No. 04-cv-387 (Dkt. Nos. 48, 131); *see also Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991). Second, with the exception of Commissioner Scott Semple, now sued in his individual capacity, the 2004 action and the

[1] The named defendants were never served and, therefore, are not parties to this appeal. We directed the Connecticut Attorney General's Office to file a brief as amicus curiae in support of defendants' position.

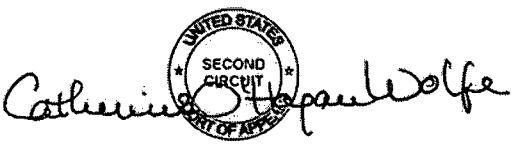
current action involve the same named parties or those in privity with them. Third, in both the 2004 action and the current action, Everson asserts claims under § 1983 based on his allegedly discriminatory firing in 2001. Therefore, the district court properly determined that the earlier dismissal of the 2004 action precludes Everson from pursuing the present claims against the same parties.

Dismissal of Everson's claim against Semple also was proper. The district court dismissed this claim on claim-preclusion grounds even though it could have been argued that Semple was not in privity with the plaintiffs in the 2004 action. We need not consider that issue because the claim, even were it not so precluded, would be time-barred. *See Lounsbury v. Jeffries*, 25 F.3d 131, 133-34 (2d Cir. 1994). Moreover, to the extent Everson seeks in the current action to hold Semple liable in his individual capacity as well as in his official capacity, he fails to allege any facts to support an inference that Semple was personally involved in the 2001 events giving rise to his claim. *See, e.g., K & A Radiologic Tech. Servs., Inc. v. Comm'r of Dep't of Health of State of N.Y.*, 189 F.3d 273, 278-79 (2d Cir. 1999) (stating that "[p]ersonal involvement of the defendant in the alleged deprivation is a prerequisite to recovery of damages under § 1983").

Finally, Everson invokes this Court's mandamus jurisdiction, seeking an order directing the district court to revisit its 2009 summary judgment ruling. We deny the requested relief. Everson has already had the opportunity to appeal the 2009 ruling, and mandamus "[may] not be used as a substitute for the regular appeals process." *See, e.g., Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004) (citation omitted).

We have considered Everson's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the district court's judgment.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT ~~ADDENDUM~~

DISTRICT OF CONNECTICUT ~~EXHIBIT~~ A-1

CHRISTOPHER EVERSON,	:	
Plaintiff,	:	**CASE NO. 3:16CV77 (RNC)**
V.	:	
SCOTT SEMPLE, ***Commissioner of Correction, Official and Individual Capacity,*** **and JOHN ARMSTRONG,** ***Official and Individual Capacity,***	:	
Defendants.	:	

JUDGMENT

This action having come on for consideration of the paintiff's motion for leave to proceed in forma pauperis dkt. # [2], and the plaintiff's motion for appointment of counsel dkt. # [3] before the Honorable Robert N. Chatigny, United States District Judge, and, District Judge Robert N. Chatigny referred the matter to the Honorable Judge Donna F. Martinez, United States Magistrate Judge and,

The Honorable Donna F. Martinez, US Magistrate Judge having considered the full record of the case including applicable principles of law, and having filed a recommended ruling dkt. # [10] granting the plaintiff's motion to proceed in forma pauperis, denying his motion for appointment of counsel and recommending that his complaint be dismissed without prejudice pursuant to 28 U.S.C. § 1915 (e) (2)(B). The Court having approved and adopted over objection; it is hereby

ORDERED, ADJUDGED AND DECREED that this case be dismissed.

Dated at Hartford, Connecticut, this 7th day of September, 2016.

ROBIN D. TABORA, Clerk

By /s/ TG
Terri Glynn
Deputy Clerk

Appendix J

ADDENDUM Exhibit A-4

U.S. District Court

United States District Court for the District of Connecticut

Notice of Electronic Filing

The following transaction was entered on 9/6/2016 at 9:59 AM EDT and filed on 9/6/2016

Case Name: Everson v. Semple et al

Case Number: 3:16-cv-00077-RNC

Filer:

Document Number: 12(No document attached)

Docket Text:

ORDER Approving [10] Recommended Ruling. After review of the recommended ruling in light of the plaintiff's objection, the recommended ruling is hereby approved and adopted. Plaintiff contends that res judicata does not prevent him from relitigating the claims he raised in the prior action because the claims were not adjudicated on the merits. But the claims were dismissed on summary judgment, which constitutes an adjudication on the merits, and, accordingly, res judicata applies. Plaintiff also argues that in the prior action the court failed to consider a "vast amount" of evidence. But res judicata prevents relitigation even when the disappointed party believes that the court in the prior action failed to consider admissible evidence. Finally, plaintiff argues that a writ of mandamus should be issued because he has no other remedy. But a writ of mandamus may not be used to enable a party to relitigate claims when the claims are barred by res judicata. Accordingly, the action is hereby dismissed. The Clerk will close the file. So ordered. Signed by Judge Robert N. Chatigny on 9/6/16. (Chatigny, Robert)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHRISTOPHER EVERSON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CASE NO. 3:16cv77(RNC)
	:	
SCOTT SEMPLE, ET AL.	:	
	:	
Defendants.	:	

RECOMMENDED RULING

Plaintiff, Christopher Everson, brings this employment discrimination action against defendants Scott Semple and John Armstrong--the Commissioner and former Commissioner of the Department of Correction ("DOC"), respectively. Pending before the court is plaintiff's motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 (doc. #2) as well as his motion for appointment of counsel.[1] (Doc. #3.) Based on plaintiff's financial affidavit, the motion to proceed in forma pauperis is GRANTED. However, I recommend that his complaint be dismissed without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B). His motion for appointment of counsel is DENIED.

I. Legal Standard

The same statute that authorizes the court to grant in forma pauperis status to a plaintiff also contains a provision

[1]U.S. District Judge Robert N. Chatigny referred the pending motions to me on June 15, 2016. (Doc. #8.)

APPendix K

that protects against abuses of this privilege. Subsection (e) provides that the court "shall dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B); Neitzke v. Williams, 490 U.S. 319, 325 (1989).

II. Discussion

Plaintiff's complaint appears to challenge the court's February 4, 2009 judgment against him in an earlier lawsuit he filed in 2004. See Everson v. Comm'r of Correction, Docket No. 04-cv-387(RNC) (D. Conn. Feb. 4, 2009). Plaintiff pleads the same underlying facts as he did in the 2004 case. He was arrested in October and November 2000, but the charges later were dismissed. Immediately following both arrests, plaintiff alleges that his employer, the Department of Correction ("DOC"), "began its employee arrest procedure," with which plaintiff maintains he cooperated fully. Nonetheless, in March 2001, the DOC terminated plaintiff's employment. In April 2004, he filed a complaint with this court pursuant to 42 U.S.C. § 1983, alleging employment discrimination on the basis of his race. In February 2009, Judge Chatigny granted summary judgment in favor of defendants. Plaintiff appealed to the Second Circuit, which dismissed his appeal for failure to pay the filing fee. He

filed a motion to reopen the case, which was denied. Plaintiff filed a petition for a writ of certiorari, which the United States Supreme Court denied in November 2010.

"Under the doctrine of res judicata, or claim preclusion, [a] final adjudication on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." St. Pierre v. Dyer, 208 F.3d 394, 399 (2d Cir. 2000) (internal quotation marks omitted). "Once a final judgment has been entered on the merits of the case, that judgment will bar any subsequent litigation by the same parties or those in privity with them concerning the transactions out of which the first action arose . . . . The doctrine of res judicata mandates the sua sponte dismissal of the instant action." Wasser v. Battista, No. 12-CV-2455 (RRM)(LB), 2012 WL 1901957, at *2 (E.D.N.Y. May 23, 2012). Plaintiff's attempt to relitigate claims that already were decided by this court is barred by the doctrine of res judicata and thus, his complaint should be dismissed. Eze v. Scott, No. 10-CV-1017, 2011 WL 4383140, at *4 (W.D.N.Y. Sept. 14, 2011) ("[R]epetitious litigation of virtually identical causes of action is subject to dismissal under 28 U.S.C. § 1915[e].") (internal quotation marks omitted).

Turning to plaintiff's request for appointment of counsel, a plaintiff in a civil case is not entitled to appointment of a

free lawyer on request and the Second Circuit repeatedly has cautioned district courts against the routine appointment of counsel. See, e.g., Hendricks v. Coughlin, 114 F.3d 390, 393 (2d Cir. 1997); Cooper v. A. Sargenti Co., 877 F.2d 170, 172 (2d Cir. 1989). Because volunteer-lawyer time is in short supply, a plaintiff seeking appointment of a free lawyer must show first that he "sought counsel and has been unable to obtain it." McDonald v. Head Criminal Court Supervisor Officer, 850 F.2d 121, 123 (2d Cir. 1988). If the plaintiff has been unable to obtain counsel, he must then demonstrate that his complaint passes the test of "likely merit." Cooper at 173. This standard requires a plaintiff to show that the claims in the complaint have a sufficient basis to justify appointing a volunteer lawyer to pursue them. In light of my recommendation to dismiss plaintiff's complaint on res judicata grounds, plaintiff's motion for appointment of counsel is DENIED.

III. Conclusion

For these reasons, plaintiff's motion to proceed in forma pauperis (doc. #2) is GRANTED, but I recommend that his complaint be dismissed without prejudice. Plaintiff's motion for appointment of counsel (doc. #3) is DENIED.

Any party may seek the district court's review of this recommendation. See 28 U.S.C. § 636(b) (written objections to proposed findings and recommendations must be filed within

fourteen days after service of same); Fed. R. Civ. P. 6(a), 6(d) & 72; Thomas v. Arn, 474 U.S. 140, 155 (1985); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992) (failure to file timely objections to Magistrate Judge's recommended ruling waives further review of the ruling).

Dated this 3rd day of August, 2016 at Hartford, Connecticut.

/s/
Donna F. Martinez
United States Magistrate Judge